

ORDER

[Islamabad High Court]

Before Athar Minallah and Miangul Hassan Aurangzeb, JJ

OCEAN PAKISTAN LIMITED through Chief Executive Officer, Islamabad

Versus

ADDITIONAL COMMISSIONER INLAND REVENUE, (AUDIT-I), ISLAMABAD and 2 others

I.T.R. 1 of 2013, decided on 15th January, 2018.

ATHAR MINALLAH, J.---Through this Tax Reference, filed under section 133 of the Income Tax Ordinance, 2001 (hereinafter referred to as the "Ordinance of 2001"), Ocean Pakistan Limited (hereinafter referred to as the "applicant Company") has proposed for our consideration questions of law arising out of the judgment, dated 09-01-2013, rendered by the learned Appellate Tribunal Inland Revenue, Islamabad Bench, Islamabad (hereinafter referred to as the "Tribunal") in Income Tax Appeal No.521/IB/2012.

2. The facts, in brief, are that the applicant Company is a judicial person and has been incorporated under the laws of the Cayman Islands. The applicant Company is, inter alia, engaged in the business of petroleum exploration, prospecting, development, production, trade and sale thereof. The applicant Company and another incorporated entity were granted undivided rights and concessions pursuant to two separate Concession Agreements (hereinafter referred to as the "PCAs"). The said two separate PCAs i.e. Mirpur Khas Petroleum Concession Agreement and Khipro Petroleum Concession Agreement were executed on 29-12-1999. At the time of execution of the PCAs, licenses were also issued under the Pakistan Petroleum (Exploration and Production) Rules, 1986 (hereinafter referred to as the "Petroleum Rules, 1986"). The Petroleum Rules, 1986 have been made by the Federal Government pursuant to powers conferred under section 2 of the Regulation of Mines and Oilfields and Mineral Development (Government Control) Act, 1948 (hereinafter referred to as the "Act of 1948"). A Joint Operating Agreement (hereinafter referred to as the "JOA"), which is annexed with each PCA, was also duly executed by the entities granted undivided rights and concessions. The Government of Pakistan, vide letter dated 14.10.2004, approved the commercial discovery and development plan and pursuant thereto the applicant Company and other juridical persons were jointly granted Development and Production leases over the fields described in the letter of approval. The said leases were executed under the Petroleum Rules, 1986 on 26-09-2006. The expression 'Working Interest' has been defined in clause 1.40 under Article-I titled as Definitions in the PCAs as follows:--

"Working Interest" means all or any undivided interest in the entirety of the Petroleum concessions, rights and obligations and liabilities imposed by this Agreement, the Licence and any Lease(s) granted pursuant to the Rules and this Agreement, including the enjoyment of the exclusive right to explore and prospect for, develop, produce, sell and

otherwise dispose of Petroleum from the Area which interest is chargeable with and currently obligated to bear and pay its proportionate share of all costs and Expenditures (including royalties on production and rentals) incurred by Working Interest Owners, is exploring and prospecting for, drilling, developing, producing, selling and otherwise disposing of Petroleum from the Area."

3. Likewise, the 'Working Interest Owner' is defined in clause 1.41 as meaning an owner of a Working Interest. Neither were the licenses nor the leases granted exclusively in favour of the applicant Company, nor was the latter given possession of any specific land or property. The parties, which were jointly granted licenses and leases and their respective shares are described therein. The Working Interest of the applicant Company in the license or the lease was to the extent of its share explicitly mentioned therein. In case of the lease, dated 14.10.2004, granted by the Government of Pakistan for the Mirpur Khas Block, the applicant Company was one of the lessees having 51.31% share of the undivided interest or the 'Working Interest'. The applicant Company is, therefore one of the Working Interest Owners. It has been explicitly mentioned in the respective lease granted in favour of the Working Interest Owner that it gives the latter the exclusive right to perform activities in connection, with exploration for and exploitation of petroleum within the lease area. Also, the PCAs have not been executed exclusively with the applicant Company and the share of the latter as one of the Working Interest Owners has also been expressly mentioned therein. The expressions 'Lease' and 'Licence' are defined in clauses 1.23 and 1.24 respectively in the PCAs. Article-II of the PCAs titled 'Rights and Liabilities' unambiguously guarantees to the applicant Company and other Working Interest Owners the petroleum concessions and other rights which have been described in the PCAs. Clause 2.5 provides that the PCA does not create a partnership or any taxable entity but is solely a joint operating arrangement among the Working Interest Owners. The PCAs were executed with all the Working Interest Owners, including the applicant Company. Likewise, the applicant Company was one of the licensees and lessees in the licenses and leases, as the case may be, granted under the Petroleum Rules, 1986.

4. The applicant Company assigned/sold its entire share of Working Interest to and in favour of BP Pakistan Exploration and Production Inc (hereinafter referred to as "BP Pakistan"). The latter is a juridical person incorporated under the laws of the State of Delaware, United States of America. Pursuant to the assignment of the Working Interest, a novation Agreement, dated 21-03-2009, was executed between all the parties. As a consequence the PCAs, licenses and leases were accordingly amended. The Additional Commissioner Inland Revenue issued a show-cause notice, dated 2.10.2011 under section 122(9) read with section 122 (5A) of the Ordinance of 2001. It was alleged that the assessment made in respect of the tax year 2010 under the deeming provision of section 120 of the Ordinance of 2001 was found erroneous and prejudicial to the interest of revenue. It was asserted that the Working Interest of the applicant Company had been assigned or sold to Messrs BP Pakistan for a consideration of Rs.15,013,099,485/-. It was alleged that on account of the said assignment the applicant Company had received gain amounting to Rs.11,589,280,000/- and that the said gain had not been offered for tax. The applicant Company responded to the show-cause notice by filing a written reply. After affording an opportunity of hearing to the applicant Company, the Additional Commissioner passed an order, dated 29-05-2012 (hereinafter referred to as the "Order-in-Original"). The applicant Company preferred an appeal before the learned Commissioner Inland Revenue (Appeals-II), Islamabad (hereinafter referred to as the "CIR (A)"). The latter dismissed the appeal vide order dated 25-06-2012. The applicant Company preferred an appeal before the learned Tribunal and the same was also

dismissed vide judgment dated 09-01-2013. Hence, the questions of law arising out of the said judgment have been proposed for our consideration through the instant Tax Reference.

5. The learned counsel appearing on behalf of the applicant Company has contended that; the letter had sold its interest in an immovable property to BP Pakistan; Working Interest constitutes an interest in land i.e. immovable property and, therefore, it is to be treated as an interest in immovable property in the context of subsections (9) and (10) of section 101 of the Ordinance of 2001; the Working Interest if not a capital receipt at best may be treated as capital gains; the Federal Government is not empowered to levy tax on account of the transfer of an interest in immovable property; the applicant Company had transferred its interest in the immovable property which was leased out to the applicant; the provisions of section 24(11) of the Ordinance of 2001 are not attracted; the Taxation Officer had taken an erroneous view regarding the definition of intangible provided under section 24(11); the applicant Company was guaranteed a freeze in relation to the applicable laws through Article 29.6 of the PCA; the latter clause draws its sanction from section 3B and clause (1) of the Schedule of the Act of 1948; the applicant Company was afforded full protection against any law or adverse consequences; the Additional Commissioner Inland Revenue was not vested with jurisdiction under section 122(9) read with section 122(5A) to exercise the powers and, therefore, the show-cause notice and all subsequent orders passed are without lawful authority and jurisdiction; the powers vested under section 122(5A) are required to be interpreted in the light of section 34-A of the Income Tax Act, 1922 (hereinafter referred to as the "Act of 1922") and section 66-A of the Income Tax Ordinance, 1979 (hereinafter referred to as the "Ordinance of 1979"); the insertion of subsection (1-A) in section 210 is of vital importance; the powers vested in the Commissioner under sub-section (5A) is in the nature of revisional jurisdiction; there is a distinction between subsection (1-A) and subsection (2) of section 210 in as much as subsection (1-A) is attracted in respect of an assessment, which the Commissioner had earlier considered; under subsection (5A) of section 122 it is mandatory for the Commissioner to apply his or her mind before reaching a conclusion that the assessment already considered and deemed as final was prejudicial to the interest of the revenue, before proceeding to delegate the powers under subsection (1A) of section 210 of the Ordinance; the factum of considering whether the assessment was prejudicial to the interests of the revenue is within the exclusive realm of the Commissioner and it cannot be delegated; a delegatee cannot amend an assessment order under subsection (5A) of section 122; the applicant Company is entitled to avail the benefits under the Ordinance of 1979 by virtue of the freezing clause explicitly inserted in the PCAs i.e. clause 29.6; Article 29.6 of the PCAs read with section 3B and clause (1) of the Schedule of the Act of 1948 protects the applicant Company; it is settled law that where the statute affects a substantive right, it operates prospectively, unless by express enactment or necessary intendment a retrospective operation has been given; reliance is placed on 'Malik Gul Hasan and Co. and 5 others v. Allied Bank of Pakistan', 1996 SCMR 237 and 'Muhammad Arif v. The State' 1993 SCMR 1589; the language of Article 29.6 mandates that the expression 'revised' would include repeal or re-enactment and, therefore, the repeal of the Ordinance of 1979 was also covered; the scope of the concession areas in the context of the PCAs, licenses and leases are clearly outlined therein; the leasehold rights, granted after commercial discovery in the lease area, tantamount to granting rights in immovable property; the transfer of a Working Interest by the applicant Company to Messrs BP Pakistan with respect to immovable property described in the respective leases is not an intangible right; lease is an integral part of the definition of Working Interest and the PCAs; the definition of the expression 'intangible' in section 24 of the Ordinance of 2001 is relevant in a different context; the learned Adjudicating Officer, the learned CIR (A) and the learned Tribunal had failed to

appreciate the distinction between a lease and a license.

6. The learned counsel who has appeared on behalf of the Department has argued that; the sale of a Working Interest to a third party for a substantial consideration was an income liable to be taxed under the Ordinance of 2001; the sale of the Working Interest led to gain from disposal of 'intangible' arising out of contractual rights; sections 4 and 9 read together clearly show that the income arising out of the sale of a Working Interest was liable to be taxed; the lease granted under the Petroleum Rules, 1986 is in fact in the nature of a license; Working Interest as defined in the PCA refers to rights described therein; the Additional Commissioner, who had passed the Order-in-Original, was empowered and competent in terms of section 122(5A).

7. The learned counsel have been heard and the record perused with their able assistance.

8. The questions of law which have been proposed for our consideration are; firstly, the nature of the Working Interest, secondly, whether the leases granted under the respective PCAs create a 'benefit in an immovable property' and thus is excluded from the scope of income tax under the Ordinance of 2001, thirdly, the effect of relevant clauses of the respective PCAs relating to the applicability of the Ordinance of 1979 and, lastly, the jurisdiction of the Additional Commissioner who had issued the show-cause notice and adjudicated the same under section 122(5A) of the Ordinance, 2001. In a nut shell, it is the case of the applicant Company that the sale or assignment of a Working Interest does not create tax liability under the Ordinance of 2001. The admitted facts are that the applicant Company was one of the Working Interest Owners in the context of the respective PCAs. Neither the licenses nor the leases were exclusively granted in favour of the applicant Company. The expression 'Working Interest' has been explicitly defined in the respective PCAs as meaning the 'undivided interest in the entirety of the Petroleum concessions, rights, obligations and liabilities' imposed there under and the licenses and leases issued and executed pursuant thereto. The applicant Company had assigned or sold the Working Interest to the extent of its share in the PCAs, licenses or leases to BP Pakistan out the gain derived there from was not offered for tax in the relevant tax year. In order to answer the questions proposed for our consideration in the instant Tax Reference, it is essential to examine the nature of the transaction relating to the sale or assignment of a 'Working Interest' and the provisions of the relevant statutes i.e. the Ordinance of 2001, the Act of 1948 and the rules made there under, particularly the Petroleum Rules, 1986.

9. The Act of 1948 was enacted having the object and purpose to provide for matters relating to mines, oilfields and mineral development under the Government control. The Act of 1948 was amended through the Regulation of Mines and Oilfields and Mineral Development (Government Control) Amendment Act, 1996. Section 2 of the Act of 1948 empowers the Government to make Rules to provide for all or any of the matters described in clauses (a) to (h) thereof. Section 3A provides that, notwithstanding anything contained in any other law, or rules for the time being in force, the President may enter into an agreement with any company for the grant of a license or lease to explore, prospect and mine petroleum on the basis of a Production Sharing Agreement and on such terms and conditions as may be agreed between the Federal Government and the company. Section 3B further provides that every company shall be entitled to the concessions specified in the Schedule in addition to any concessions which may be admissible to it under any other law or the rules made under the Act of 1948. The Pakistan Petroleum (Production) Rules, 1949 were repealed by the Petroleum Rules, 1986. Clause (1) of Rule 2 defines petroleum rights as including

a permit, license and lease issued under the Petroleum Rules, 1986. Rule 8 explicitly provides that petroleum rights or any participating share therein shall not be assigned without the previous consent in writing of the Government. Rule 10 further provides that subject to Rules 21, 22 and 27, the grant of a petroleum right or renewal thereof is always at the discretion of the Government and that there is no obligation on the part of the latter to give any reason for the grant of or refusal to grant a Petroleum right. Rule 17 empowers the Government to grant an exclusive petroleum exploration license over any area and on such conditions as may be specified therein. Rules 18 and 19 describes the size and shape of the area for the purposes of rights granted under a license. Rule 20 describes the rights and obligations of a license holder. Rule 27 specifies the power of the Government to grant a development and production lease and provides that such a grant of lease shall be in respect of any discovery area within the licensed area already granted to the applicant under the Petroleum Rules of 1986. Rule 28 explicitly provides that the lease gives the holder an exclusive right to perform activities in connection with the development and production of petroleum in the area covered by the lease. Rules 29 and 30 are regarding the size and shape of a development area. The definition of the expression Working Interest has been reproduced above. The rights are in relation to exploring, developing, producing, selling and otherwise disposing of petroleum from the specified area. As already noted the applicant Company is one of the Working Interest Owners. Likewise, the PCAs, or the licenses and leases granted pursuant to the execution thereof under the Act of 1948 read with the Petroleum Rules, 1986 are not granted exclusively in favour of the applicant Company and the latter has an undivided interest in the entirety of the Petroleum rights to the extent of its share. The shape and size of the area covered under the PCAs, licenses and leases is described therein. Neither the title nor the exact description of the land included or covered within such area has been specified or mentioned. The possession of the land covered within ambit of the size and shape of the area described in the PCAs, licenses or leases is also not transferred or handed over exclusively to the Working Interest Owners. The ownership of such lands which fall within the scope of the size and shape described in the PCAs may vest in different persons or Governments.

10. A plain reading of the respective PCAs, licenses and leases executed and granted under the Act of 1948, read with the Petroleum Rules, 1986, clearly shows that the rights are restricted to interests in petroleum concessions, rights, obligations and liabilities which are specified therein. It is also obvious that neither is an interest intended to be created in the title of the lands covered within the area specified for the purposes of the PCAs, licenses or leases nor is the possession thereof exclusively transferred or in any other manner given to the Working Interest Owners. Likewise, when the PCA is read in its entirety it is further affirmed that the petroleum rights are only to the extent of the Petroleum concessions and such rights which are explicitly described therein. The respective PCAs executed with the Working Interest Owners and the licenses or leases granted under the Act of 1948 read with the Petroleum Rules of 1986 by no stretch of the imagination vest a right in respect of exclusive possession of the land(s), which is included in the area specified in such instruments. The PCAs, licenses and leases, when read together, explicitly shows that none of the Working Interest Owners can claim a right with respect to the immovable property or properties included in the specified area.

11. The learned counsel for the applicant Company has laid stress on the grant of 'lease' and has thus strenuously attempted to build a case that, as a consequence, an interest in immovable property is created and, therefore, any income derived or accrued there from will be outside the scope of nor can be treated as income under the various heads specified under the Ordinance of

2001. He has also extensively referred to various clauses in the PCA in support of this argument. It is, therefore, relevant to ascertain the nature of the 'lease' granted under the Act of 1948 read with the Petroleum Rules of 1986 i.e. to what extent does it create an interest in an immovable property. The expression 'lease' is defined under section 105 of the Transfer of Property Act, 1882, while 'license' is defined under section 52 of the Easement Act, 1882. The august Supreme Court in the case titled 'Abdul Razzaq and 8 others v. Shah Jehan and 5 others', 1995 SCMR 1489, has observed and held that in order to determine the true nature of a document the Court is required to read the same as a whole and its nature is to be determined by looking at the substance and not the form of its title. The difference, therefore, between a lease and license would depend on the substance of the document and the terms and conditions stipulated therein. The Sindh High Court in the case titled 'Sajid Ali Khan v. Muhammad Ahmed Farooqui' PLD 1959 (W.P.) Karachi 24, has observed and held that the test of exclusive possession is very important in determining whether a person is a lessee of property or a mere licensee. Likewise, in "Azim Khan v. State of Pakistan and another", PLD 1957 (W.P.) Karachi 892, it has been observed that the essential feature which distinguishes a lease from a license is the presence of exclusive possession in the case of a lease and its absence in the case of a license. The distinction between a lease and a license has been discussed in great detail by the august Supreme Court in the case titled 'Abdullah Bhai and others v. Ahmad Din', PLD 1964 SC 106. The intention of the parties to an agreement is the pivotal factor in determining whether an agreement is to be treated as a lease or a license. If it is gathered from the terms or substance of the document that the parties had intended to create an interest in the property then it would tantamount to a lease otherwise it will be in the nature of a license though it may be titled as a 'lease'.

12. In the instant case, the respective PCAs, licenses and leases executed and granted under the Act of 1948. Read with the Petroleum Rules, 1986, unambiguously shows that no right is created in favour of the Working Interest Owners or any one of them in any specific immovable property. All these instruments grant undivided interests in favour of the Working Interest Owners in respect of Petroleum concessions and rights expressly described therein. This is further highlighted by a combined reading of the Act of 1948 and the Petroleum Rules, 1986. Rules 10, 22, 27, 28, 62A, 63, 64, 65, 68 and 69, when read with the provisions of the respective PCAs, licenses or leases granted under the Petroleum Rules, 1986 unambiguously establishes that no right is created in favour of the Working Interest Owners, jointly or severally, to claim an interest or right in relation to the title or exclusive possession of any identified immovable property covered within the area specified in such instruments. The lease granted under the Petroleum Rules, 1986, therefore, is in the nature of a license and it is not a lease as defined under section 105 of The Transfer of Property Act, 1882. The very premise of the argument advanced by the learned counsel for the applicant Company is, therefore, misconceived and falls to the ground in the context of the applicability of the charging provisions of the Ordinance of 2001.

13. Having discussed the nature of a lease granted under the Petroleum Rules, 1986 it is essential for the adjudication of the instant Tax Reference to advert to the relevant provisions of the Ordinance of 2001. The Ordinance of 2001 was enacted to consolidate and amend the law relating to income tax and provides for matters ancillary thereto or connected therewith. The expressions 'capital asset', 'disposal', 'income', 'intangible', 'tax', 'taxable income', 'taxpayer' and 'total income' are respectively defined in clauses 11, 18, 29, 30, 63, 64, 66 and 69 of section 2. Section 4 is the charging section and provides that, subject to the Ordinance of 2001, income tax shall be imposed for each tax year at the rate or rates specified in Division I, IB or II of Part I of

the First Schedule on every person who has taxable income for that particular year. The scope of 'Taxable income' has been described in section 9 as the total income of a person under clause (a) of section 10 for the year, reduced but not below zero by the total of any deductible allowances under Part IX of Chapter III of the Ordinance of 2001. Clause (a) of section 10 provides that the total income of a person for a tax year shall be the sum of the latter's income under all heads of income for that particular year. Section 11 enumerates in clauses (a) to (e) of subsection (1) the different categories or heads of income. Income from business has been described in section 18 while income from property under section 15. Section 20 is in respect of the deductions which a taxpayer can make under the head income from business, while section 21 specifies such deductions which are not allowed. Section 22 provides that a person shall be allowed a deduction for depreciation of depreciable assets used in the business in the relevant tax year. Section 24 provides that a person shall be allowed an amortisation deduction for the cost of taxpayers 'intangibles' and the latter expression is defined under subsection (11) *ibid*. Section 39 provides that income of every kind received by a person in the relevant tax year, if it is not included in any other head, shall be chargeable to tax in that year under the head 'Income from Other Sources'. Some categories of income falling under this head have been specified in clauses (a) to (m) of subsection (1) of section 39. However, it is explicit from a plain reading of section 39 that the categories mentioned therein are not exhaustive. The scheme of the Ordinance of 2001 mandates that the total income of a taxpayer i.e. sum of the income under the heads of income specified in clauses (a) to (e) of section 11(1) during the relevant tax year attracts the imposition of income tax under section 4 of the Ordinance of 2001. In case of income falling under one of the heads of income specified under section 11, the income tax is charged and required to be paid by a tax payer in the prescribed manner, having regard, *inter alia*, to the permissible deductions, concessions or allowances provided under various provisions of the Ordinance of 2001 unless exempted under section 53 read with section 54 *ibid*.

14. It is obvious from the above survey of the provisions of the Act of 1948, read with the Petroleum Rules, 1986 and the Ordinance of 2001, that the gain accrued to the applicant Company from the consideration received for the sale or assignment of its share of Working Interest was definitely taxable income. It was indeed not the sale of an asset or leasehold rights in respect of an immovable property. The nature of the transaction did not attract the provisions of the Ordinance of 2001 relating to immovable property. It was an income which would either fall under clause (c) or clause (d) of section 11(1). The learned counsel, despite his able assistance, could not show that the income received from the sale or assignment of the Working Interest could be treated as a 'capital asset' in the context of section 37 of the Ordinance of 2001. The learned counsel for the Department also could not make out a case that the sale or disposition of the share in the Working Interest was income relating to profit and gain of business carried out by the applicant Company so that it could be treated as 'income from business' for the purposes of section 18 of the Ordinance of 2001. It was, therefore, an income which was not included in any of the heads of income specified in clauses (a) to (d) of section 11(1) and consequently fell under clause (e) i.e. income from other sources and thus chargeable to income tax under section 39 read with section 4 of the Ordinance of 2001. The applicant Company had also classified the said income in its relevant return showing it as 'income from other sources' and yet it was not offered for tax. It is also an admitted position that the income derived from the sale, dispossession or assignment of a Working Interest and falling under the heads of 'income from business' or 'income from other sources' is not exempt under sections 53 and 54 of the Ordinance of 2001. The applicant Company was, therefore, liable to pay income tax on the income received from the sale or assignment of its share of the

Working Interest under the head income from other sources having regard, inter alia, to the deductible allowances prescribed in Part IX of Chapter III of the Ordinance of 2001.

15. We shall next answer the question relating to the applicability of the provisions of the Income Tax Ordinance, 2001 (hereinafter referred to as the "Ordinance of 2001") in the context of section 3B of the Act of 1948, read with clause 29.6 of the PCA. The learned counsel for the applicant Company has laid great stress on clause 29.6 of the PCA in support of his contention that the provisions of the Ordinance of 1979, particularly the Fifth schedule, thereto, is attracted and not the Ordinance of 2001. The relevant provisions of the PCA and section 3-B of the Act of 1948 have already been discussed above. It is the case of the applicant Company that under Article 29.6 of the PCA it is entitled to the concessions which were guaranteed under the Ordinance of 1979, particularly section 26 thereof read with Part 1 of the Fifth Schedule thereto. A plain reading of section 26 and the Fifth Schedule reflects that its scope was strictly restricted to gains from 'exploration and production of petroleum'. Its applicability was restricted to 'income from business or profession'. The applicant Company itself acknowledges and admits that the sale or assignment of its share in the Working Interest does not fall within the ambit of 'profits or gains from the exploration and production of petroleum'. This indeed is the correct status regarding the sale of the Working Interest to BP Pakistan. In such an eventuality, the provisions of the Ordinance of 1979 or Article 29.6 of the PCA are neither relevant nor attracted.

16. Without prejudice to the aforementioned conclusion regarding Article 29.6 of the PCA, and assuming that the matter had a nexus with profits and gains from the exploration and production of petroleum, the effect of section 54 of the Ordinance of 2001 cannot be excluded from consideration. The said provision is couched in negative language and it explicitly provides that no provision in any other law providing for an exception, reduction in the rate or reduction in tax liability or exemption from operation of any provision of the Ordinance of 2001 shall have legal effect unless also provided for in the Ordinance of 2001. The proviso to section 54 was omitted through the Finance Act, 2008. Section 238 of the Ordinance of 2001 has repealed the Ordinance of 1979 while the savings specified under section 39 are not attracted in the facts and circumstances of the instant case. The question, therefore, arises whether the explicit language used in section 54 of the Ordinance of 2001 shows a legislative intent having the effect of implied repeal in the context of the exemptions or concessions under the Act of 1948 or the Ordinance of 1979. It would, therefore, be beneficial to examine the principles of interpretation in this context.

17. It is the exclusive domain of the legislature to make laws or to repeal, amend and revise existing statutory enactments. The repeal of an existing law may be amended through express intendment or it may be implied from statute(s) enacted later in time and which contain provisions that are contrary to the provisions of an earlier Act of the Parliament. In the celebrated treatise titled "The Construction of Statutes" by Earl T. Crawford, the test for the purposes of determining whether repeal may be implied has been eloquently explained as follows:--

"Of course, where a repeal is effected through implication, the later enactment thus affecting pre-existing law must be subjected to close scrutiny in the light of its own provisions and those of the law apparently abrogated in whole or in part. The construction of the new law becomes an important consideration, since its meaning and scope will determine whether a repeal takes place, and if so, its extent. And usually one of two questions will arise: (1) whether the new law is intended as a substitute for the old; or (2)

whether the new is irreconcilably inconsistent with the old, so that the former is thereby terminated. In brief, the problem will be simply to determine what is the legislative intention---whether the old law shall cease or 'whether it shall be supplemented'.

18. The above principles have been succinctly articulated by his Lordship Hamoodur Rehman, Judge as he then was, in the judgment of the august Supreme Court titled "Saiyyid Abdul A'la Maudoodi, etc. v. The Government of West Pakistan, etc." [PLD 1964 SC 673] and the relevant portions are reproduced as follows:--

"It is the later statute that must prevail, particularly, if it is a special statute dealing specifically with the subject in respect of which the inconsistency has occurred. To the extent of the inconsistency the earlier statute must yield and be deemed to have been impliedly repealed by the subsequent statute if the latter has been enacted by the same Legislature or by a Legislature whose laws prevail over the laws of the other Legislatures in the country in the case of inconsistency.

A great deal of argument has been advanced as to the tests to be employed for determining in what circumstances a repeal by implication takes place. One of the tests suggested is that such repeal can only be implied where it is clearly not possible for both laws to be obeyed. This may be a good test in most cases, but it does not, in my view, apply in all cases. It may be possible in some cases for both laws to be obeyed and yet there may be such repugnancy between the two as would entitle the Courts to hold that there has been an implied repeal. If the inconsistency covers the whole field of legislation, the test suggested may well be sufficient, for, the mere existence of two sets of contrary provisions would naturally exclude one. But where the inconsistency does not cover the whole field as in the present case, it may be necessary to examine and contrast the provisions of the two statutes in more detail in order to discover, as was pointed out by Issacs, J. in the case of "Clyde Engineering Company Limited v. Cowburn (1), 'if one enactment makes or acts upon as lawful that which the other makes unlawful, or if one enactment makes unlawful that which the other makes or acts upon as lawful.' If so the two must be held to that extent to be inconsistent even though 'it may be quite possible to obey both simply by not doing what is declared by either to be unlawful.'

No doubt the Courts should not be too astute in discovering such inconsistency, for, such inconsistency is not to be readily inferred; but where the co-existence of the two sets of provisions would palpably be destructive of the object for which the later statute was passed, the earlier must be deemed to have been impliedly repealed to the extent of the inconsistency. Repeal by implication is merely the consequence of contradictory or inconsistent legislation to which the Courts must give effect if the inconsistency cannot reasonably be reconciled."

19. The above principles were reaffirmed by the august Supreme Court in the case titled "Maj. Mehtab Khan v. The Rehabilitation Authority and another" [PLD 1973 SC 451] as follows:--

"It is an accepted principle of interpretation of the statutes that subsequent legislation on the same subject would, by necessary implication, repeal the earlier law to the extent of their mutual inconsistency or repugnancy. As observed in Goodwin v. Phillips (2), 'the

latest expression of the will of Parliament must always prevail'. The Court naturally leans against implying a repeal, and unless the two Acts are so plainly repugnant to each other that effect cannot be given to both at the same time, a repeal will not be implied (see *Kutner v. Phillips* (3).) The prior statute would be repealed by implication if its provisions were wholly incompatible with a subsequent one, or if the two statutes together would lead to wholly absurd consequences; or if the entire subject matter were taken away by the subsequent statute."

20. The maxim '*Leges posteriores priores contraries abrogant*' was elaborated by the august Supreme Court in the case titled "*Messrs Tank Steel and Re-Rolling Mills (Pvt.) Ltd. Dera Ismail Khan and others v. FOP and others*" [PLD 1996 SC 77]. The august Supreme Court has observed and held that where provisions of the later statute are so inconsistent with or repugnant to those of an earlier enactment that the two could not stand together, the earlier would be deemed to have been impliedly repealed by the later in point of time.

21. In the case titled "*Mumtaz Ali Khan Rajban and another v. FOP and others*" [PLD 2001 SC 169] the august Supreme Court has held that repeal cannot be implied unless there is an express repeal of an earlier statute by the later, or it is established that the two enactments cannot stand together. The apex Court has further held that the repeal by implication is possible and in this regard has quoted with approval from the treatise titled '*Interpretation of Statutes*' 8th Edition by N.S. Bindra.

22. In the case titled "*Tanveer Hussain v. Divisional Superintendent, Pakistan Railways and 02 others*" [PLD 2006 SC 249] the august Supreme Court has held and observed as follows:-

"The necessary conditions of implied repeal of an earlier statute or a provision thereof by a later statute are that; firstly, the two statutes cannot stand or co-exist together; secondly, to stand side by side, they will lead to absurd consequences; and thirdly, when the entire subject matter of the earlier statute or a provision thereof is taken away by the later statute."

23. The language of section 54 of the Ordinance of 2001 is unambiguous and free from any doubt. The provisions of the Act of 1948, read with section 26 of the Ordinance of 1979, and section 54 of the Ordinance of 2001 cannot stand or co exist together. They are repugnant to each other to such an extent that effect cannot be given to both. The provisions of section 54 of the Ordinance of 2001 is irreconcilably inconsistent with section 3B of the Act of 1948 or the Ordinance of 1979. From the explicit language used in section 54 of the Ordinance of 2001 it is obvious that the legislature intended to substitute and impliedly repeal section 3B of the Act of 1948.

24. Lastly, we shall advert to the question whether the Additional Commissioner Inland Revenue was empowered to adjudicate the matter under subsection (5A) of section 122 of the Ordinance of 2001. It has been argued by the learned counsel for the applicant Company that the power of the Commissioner to amend an order passed under sub-section (5A) is distinct and that it is in the nature of exercising revisional jurisdiction. According to the argument advanced by the learned counsel, the act whereby the Commissioner has to 'consider' whether or not to revise a deemed assessment precedes the delegation of power under sub-section (1A) of section 210 of the Ordinance of 2001. It has, therefore, been argued that subsection (1A) of section 210 is attracted

in respect of an assessment which the Commissioner has already considered to be erroneous and prejudicial to the interest of revenue. The learned counsel has emphasized that the act of 'considering' whether or not an assessment order under section 122 is erroneous and prejudicial to the interest of revenue has to be by the Commissioner himself or a delegate who has been expressly delegated powers in this regard. The learned counsel has tried to draw a distinction between the act of considering whether an assessment order is erroneous and prejudicial to the interest of revenue and its adjudication thereafter. We are afraid that this argument is fallacious and an attempt to read into the statute something not provided therein. If this argument is accepted then the Commissioner, while exercising powers under section 210 of the Ordinance of 2001, will have to explicitly and separately delegate powers vested in him under subsection (5A) of the Ordinance of 2001, not only for the purposes of adjudication but also for the consideration of whether or not the assessment order is erroneous and prejudicial to the interest of the revenue. Section 210 of the Ordinance of 2001 explicitly empowers the Commissioner to delegate to any officer of the Inland Revenue all or any of the powers or functions conferred upon or assigned to the latter under the Ordinance of 2001. The only two exceptions are that the Commissioner cannot delegate the power of delegation vested in him or her and that the power of amendment of assessment under subsection (5A) of section 122 cannot be delegated to an officer of the Inland Revenue below the rank of Additional Commissioner. Sub-section (5A) of section 122 provides that, subject to subsection (9), the Commissioner may, after making or causing to be made, such enquiries as he deems necessary, amend or further amend an assessment order if he considers that the assessment order is erroneous in so far that it is prejudicial to the interest of revenue. The distinction which the learned counsel has attempted to draw is not supported by the plain language used by the legislature, nor is such an intent obvious from a plain reading of subsection (1A) of section 210 or subsection (5A) of section 122 of the Ordinance of 2001.

25. The Ordinance is a fiscal statute. It is settled law that while interpreting fiscal statutes the Court looks at what is clearly said; there is no room for any intendment; nor is there any equity about a tax; there is no presumption as to tax; nothing was to be read in or implied and one could only look fairly at the language used. These principles were stated by Rowlett J regarding the interpretation of fiscal statutes in the case of 'Cape Brandy Syndicate v. Inland Revenue Commissioner' (1921) 1 KB 64. The taxing statute has to be interpreted strictly and, as a corollary, any defect or omission cannot be inferred. Moreover, it is settled law that the parameters provided in a taxing statute determine the chargeability and levying of a tax. Moreover, the law ought to be interpreted in the case of fiscal statutes by looking at the language in its literal and ordinary meaning. A fiscal statute cannot be declared ultra vires on the touchstone of reasonableness or otherwise, as the same has been declared by the august Supreme Court to be a matter of legislative policy and not for the Court to adjudicate upon. Reliance is placed on the cases of 'Federation of Pakistan through Secretary Ministry of Finance and others v. Haji Muhammad Sadiq and others' [PLD 2007 SC 133], 'Aslam Industries Ltd., Khanpur v. Pakistan Edible Corporation of Pakistan and others' [1993 SCMR 683], 'Collector of Customs (Appraisement), Karachi and others v. Messrs Abdul Majeed Khan and others' [1977 SCMR 371], and 'Messrs Hirjina & Co. (Pakistan). Ltd., Karachi v. Commissioner of Sales Tax Central Karachi' [1971 SCMR 128]. The power vested in the Commissioner under section 122(5A) were delegated by the latter to the Additional Commissioner Inland Revenue pursuant to jurisdiction vested under section 210(1A) of the Ordinance of 2001. The show-cause notice issued and the subsequent order in original was passed by the Additional Commissioner Inland Revenue who was vested with jurisdiction under section 122(5A) read with section 210(1A) of the Ordinance of 2001.

26. We, therefore, answer the questions at serial numbers 2, 3 and 4 in the negative and question No. 1 in the affirmative. The question at serial number 5 is relevant to the extent of claiming the allowance of amortization deduction under section 24 and, therefore, stands answered in the light of the above discussion. The income arising from the sale or assignment of the share in the Working Interest attracts the levy and charge of income tax and it ought to have been offered for tax in the relevant tax year.

27. A copy of this judgment shall be sent to the learned Tribunal under the seal of this Court.

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