IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:
MR. JUSTICE UMAR ATA BANDIAL
MR. JUSTICE MUNIB AKHTAR
MR. JUSTICE YAHYA AFRIDI

CIVIL APPEALS NO. 2444 TO 2449 OF 2016
(On appeal against the judgment/order dated 18.06.2016 of the Peshawar High Court, Peshawar passed in ITR No. 37-P, 38-P, 39-P, 48-P, 47-P, 45-P of 2014)

M/s Shahid Gul and Partners ...Appellant(s)
(in all cases)

versus

Deputy Commissioner of Income Tax, Audit-V, RTO, Peshawar ...Respondent(s)
(in all cases)

For the appellant(s): Mr. Muhammad Idris, ASC.

For Respondents 1-2: Mr. Rehmanullah, ASC.
Syed Rifaqat Hussain Shah, AOR,
Mr. Abdul Hameed Anjum, Chief Legal, F.B.R.

Date of Hearing: 14.02.2019

JUDGMENT

YAHYA AFRIDI, J- This Court had granted leave to appeal in the petitions moved by M/s Shahid Gul & Partners, the present appellants, against the judgment dated 18.06.2016 passed by the Peshawar High Court, Peshawar in Income Tax References No. 37-P, 38-P, 39-P, 45-P, 47-P and 48-P of 2014 in terms that:

> "Leave is granted, inter alia, to consider whether the cost of land is a capital expenditure or revenue expenditure when the petitioner is dealing with the sale/purchase of

immovable property after construction. In this context learned counsel for the petitioner has explained that capital expenditure means when intangible property is acquired for the use of a taxpayer either for residential or commercial purposes, while the revenue expenditure is that expenditure which is incurred upon acquisition of intangible property but for the purposes of earning a profit. In this regard it is mentioned that the case of the petitioner did not fall within the purview of Section 24 of the Income Tax Ordinance, 2001 rather was covered by Section 20 and this aspect of the case was totally ignored by the learned High Court."

2. The facts which led to the show cause notices being served upon the appellants by the Revenue have been aptly summarised in the impugned judgment of the learned High Court in terms that:

"Brief facts of the case are that M/s Shahid Gul and Partners is an Association of Persons and is deriving income from construction and selling of shops/offices. The Taxpayers on 05.03.1998 purchased a plot in the heart of Peshawar Cantt; measuring 64 Kanals in open public auction from Privatization Commission of Pakistan for Rs. 36,40,00,000/-. Site plan was admittedly approved in May 2000 for covered area of 1398070 square feet. The taxpayer filed returns for Tax year 2001 and 2002 under section 120. The Taxpayer for tax Years 2003, 2004 and 2005, filed return of income declaring loss of (Rs. 1,45,94,762/-), income of Rs. 1,08.17.350/- and Rs. 2,44,22,113/-, respectively. The return for all these three years have been selected by Commissioner Income Tax for tax audit under section 177(4) (d) of Income Tax Ordinance, 2001, after service of show cause notice under section 122(9).....

The above assessment was made after selection of cases for total audit under section 177(4)(d) of Income Tax Ordinance 2001 after service of show cause notices under section 122(9) Ibid. the Taxpayer in his returns of income has divided the total purchase sum of land Rs. 36,40,00,000/- into four years in which the time likely to be taken for completion of the project. The Taxpayer claimed amortization charges amounting to Rs. 9,10,00,000/- for the Tax Year 2001 and for Tax Year 2002 amortization expenses claimed were amounting to Rs. 61571,288/-, and Rs. 235,18,992/-, have been claimed, respectively."

3. In pursuance of the aforementioned show cause notices issued by the Revenue, the amortization of the cost of land by the present appellant was rejected by the Deputy Commissioner, essentially in terms that:

"However, in tax payer's reply dated 19/09/2009, taking shelter under the doctrine of "Commercial expediency", taxpayer is of the opinion that neither the land under consideration is unimproved land nor it is a capital asset, but has been acquired for resale after making superstructure thereon in the shape of shops and offices and has been treated as stock in trade and for the purpose of calculation of taxable income, a portion of cost thereof has been charged to direct

expenses each year. The amortization cost in the present case has not been used in the senses given in the Income Tax Ordinance, 2001, but it has been used as a nomenclature to adjustment of a part of the cost of the land over the Ownership of the land rests with M/s Shahid Gul & Co as per record of the Cantonment and till date no evidence has been provided by the taxpayer that can show that land has been transferred in the name of prospective buyers.

Non-saleable area constitutes 66% of the total area, whereas 34% is the saleable area in the form of sale of shops on ownership basis.

Amortization has not been claimed in the returns for Tax Year 2006 & 2007.

Thus, amortization of land claimed at Rs. 61,571,288/- is hereby disallowed and shall be added back to declared income."

4. The present appellants, aggrieved of the order of the Deputy Commissioner, challenged the same in appeals before the Commissioner (Appeals), which were partially accepted by setting aside the order of the Deputy Commissioner, and the matter was remanded back to the Assessing Officer in terms that:

"Descriptively speaking the appellant is engaged in the business of conversion of a piece of land into a constructed multi-storey building known as Dean Trade Centre and the selling of shops and halls etc therein. The land on which the trading centre is situated has been improved in process i.e. boundary wall has been made. Payment of road, concerting and titling etc. so the land has been converted into improved land which is in the eyes of law a depreciable asset under section 22(15) of the Income Tax Ordinance, 2001. The taxation officer has no grasped this reality and has disallowed amortization expenses. This is illegal and shows a lack of understanding of the issue of amortization, improved land and concept of expenditure incurred on business activities which are to be allowed under the relevant heads. He should have given an opportunity to the assessee to explain the same and after verification allowed the expense or depreciation claim permissible under the law.

In view of the forgoing, the treatment of the assessing officer is not justified, hence addition on account of amortization to the tune of Rs. 61,571,288/- is deleted. The taxation officer is, however, directed to correctly evaluate the claim of the assessee, in case it is related to depreciation of improved land under section 22(1) of the Income Tax Ordinance, 2001, the same should be allowed. In case some of it is related to the cost of sale of shops and flats then it should be allowed under section 20 and 21 of the Income Tax Ordinance, 2001 and under the relevant provisions of law. The amount of the claim i.e. Rs. 61,571,288/- has to be worked out it could be more. It could be less, the point is to allow the correct amount, after it has been decided to allow the claim principally speaking. As mentioned above, this treatment-is-line-with the decision given on this topic vide CIT Appeals order No. 70 dated 25-09-2009."

5. Both the appellants as well as the Revenue being aggrieved of the orders of the Commissioner (Appeal) challenged

the same in appeals before the Appellate Tribunal Inland Revenue ("Tribunal"), which was partially accepted by remanding the matter to the Commissioner (Appeal) in terms that:

> "The learned AR pleaded before this Tribunal that the said land was purchased from Privatization Commission of Pakistan for a consideration of Rs. 36,40,00,000/- and the said cost of land has been amortized for various years. Even if we accept the plea of the assessee the amortization be allowed as expenses as per accounting principles, even then the plea of the taxpayer stands on no legal as the property was purchased from Privatization commission for a consideration of Rs. 36,40,00,000/- and if the amortization is taken as per 34% of sale able land/building then it should be Rs. 12,37,60000/- out of which Rs. 9,1000,000/- was allocated during the period relevant to the assessment year 2001-02, the balance amount for amortization should stand at Rs. 3,27,60,000/- while for subsequent years 2001-2002, 2002-203 amortization has been claimed and allowed as allowable expense as the cost of land, however, it should be worked out to the extent of 34% of the land sold but for which the matter is remanded back to adjudicating authority to allow the balance cost of land at Rs. 3,27,60000/- to the subsequent years i.e. 2003, 2004 and 2005, however, while calculating the cost of land, allowed in previous years should also be taken into account."

6. Again, both the parties being aggrieved of the decision of the Tribunal challenged the same by filing References before the learned Peshawar High Court, Peshawar, seeking its opinion on the following questions of law:

Questions of law agitated by the appellants:

"i. Whether there existed any evidence before the learned Tribunal that the total saleable land was 34% of the total land, and if no, what is the effect of such findings.

ii. Whether under the facts and circumstances of the case, the unsold area in the shape of corridors, verandas, open spaces, car parking is not the ancillary requirement/easements for the sold Land and thus the tribunal has not erred by not giving the benefits of depreciation regarding that part of the land.

iii. Whether once the Tribunal has allowed to the petitioner's depreciation against the purchase price of the land, then was it legally justified to bifurcate the entire property in two categories i.e. sold and unsold land as essentially the cost is not recoverable from the unsold land.

iv. Whether without prejudice to the above and in addition thereto, the Tribunal was competent to direct for taking into consideration the accounts of the petitioner for the period preceding the disputed years of 2003, 2004 and 2005.

v. Whether after the selection of Tax Year 2005 for total audit under Section 177(4)(d) of the ITO 2001, could the Hon'ble

Commissioner (Audit) further select preceding Tax Years of 2003 and 2004 in terms of Section 177(7), whereby the Commissioner (Audit) can select cases of a Taxpayer for the next following years, provided there are reasonable grounds, but cannot select cases for previous/preceding Tax Years?

vi. Whether the Notice was not time-barred?

vii. Whether once the history of allowing Amortization expenses for the determination of taxable income in the preceding assessment/Tax Years (i.e. 2002-2003), could the same issue be disallowed in relation to subsequent Tax Years of 2003, 2004 and 2005?

viii. Whether it is possible for two types of orders which co-exist to be sustainable in law since the Income Tax Authority has not amended the orders of the preceding assessment/Tax Years (i.e. 2002-2003) in which the claim of amortization was accepted?

Question of law agitated by the Revenue:

"Whether the learned Tribunal was justified to remand the case back to the adjudicating authority with the directions that amortization to the extent of 34% of the land sold should be worked out and allowed for the balance cost of land at Rs. 3,27,60,000/- as allowable expense as per Standard Accounting Principles for the subsequent years i.e. 2003, 2004 and 2005 whereas as per provisions of Section 24(11) of the Income Tax Ordinance, 2001 amortization of land is not an allowable expenses and that the Ordinance ibid prevails over the Standard Accounting Principles and the Doctrine of Commercial Expediency?"

7. The High Court, while rendering its opinion on the questions of law raised by the parties, concluded that:

"Keeping in view the above facts, discussions perusal of record and relevant law it is concluded that M/S Shahid Gul and Partners, Deans Trade Centre, Peshawar Cantonment, are having possession and ownership of all the land purchased by them measuring 334472 square feet (64 Kanals) and the Amortization wrongly and illegally claimed by the Taxpayer has rightly been disallowed by Deputy Commissioner Audits, for all the three years which is based on facts and law.

All the questions of Taxpayer have been replied in the preceding paragraphs as the Taxpayer could not prove his case and questions raised by him. On the other hand, the Commissioner Inland Revenue has proved their case, as a result, the assessment orders of Deputy Commissioner Audit for Tax Year 2003-2004 and 2005 are valid and upheld. The learned Appellate Tribunal was not justified to allow 34% of the amortization for the Tax Years 2003, 2004 and 2005 as amortization of land is not an allowable expense in this case under the provision of section 24(11) of the Income Tax Ordinance, 2001."

8. The learned counsel for the appellant candidly restricted his submissions to the first two questions of law raised

in the References filed before the High Court, which concerned the cost of land on which the sold shops were constructed as expenditure, and depreciation on the improved land under the enabling provisions of the Income Tax Ordinance, 2001 **("Ordinance")**, and in this regard, he finally contended that the orders passed by the Commissioner (Appeals) correctly determined the controversy between the parties.

9. Learned counsel for the Revenue, on the other hand, contended that as the shops had not been transferred to the prospective buyers, the appellants could not claim the cost of land as an expenditure under Section 20 of the Ordinance.

10. We have heard the valuable arguments of the learned counsels for the parties and have also perused the record.

11. The High Court, in its impugned decision, has, in essence, rejected the entire claimed deduction urged by the present appellant on three legal premises. First, the present appellant had not transferred the shops to the prospective buyers, and thus, it cannot claim any deduction for the cost incurred for the same. Second, the appellant's claim of deduction of the cost of land is a *capital expenditure* which, being barred under clause (n) of Section 21 of the Ordinance, could not be accepted as a deductible expense under Section 20(1) *supra*. And finally, the amortization of the cost of land is not a deductible expense under Section 24(11) of the Ordinance.

12. Let us take the first ground which prevailed upon the High Court in rejecting the appellant's claim; that the same was premature, as the transfer of shops to the prospective buyers had not been registered with the Cantonment Board Peshawar. To our

mind, this finding is not correct. On the one hand, the High Court is accepting the sale receipts of shops it received from the buyers thereof as income of the appellant, and on the other hand, the deduction of expenses so incurred and claimed by the appellant is being rejected. Such a stark contradiction cannot be legally sustainable. More importantly, the Ordinance does not expressly require registration of sales of immovable properties for its cost to be accepted as a deductible expense. Even otherwise, apart from the adverse finding rendered by the Assessing Officer, the two appellate forums accepted the subject transactions of sale of shops by the appellant to its buyers as part of its income, and that too, as being final and complete. And interestingly, the Revenue never contested or agitated this issue before any of the forums below. It, for the first time, raised this issue before this Court. Thus, the High Court has erred in rejecting the claimed deductions of the appellants on the ground that the sale of shops was not complete.

13. The next ground taken by the High Court in rejecting the appellant's claim was that the cost of land is a *capital expenditure*, which is expressly excluded from being considered as a deduction under clause (n) of Section 21 of the Ordinance, and thus, the same could not be accepted as a deductible expense under Section 20(1) *supra*.

14. To understand the above findings in reference to the present case, let us commence with the admitted position. The appellant's income has been claimed and assessed under the prescribed heading of *income from business*, which has been dealt with in Part-IV of Chapter III of the Ordinance. Section 20 of the Ordinance clearly provides for a taxpayer to deduct expenses for

the purposes of computing his income chargeable to tax. The said provision reads:

> "20. **Deductions in computing income chargeable under the head "Income from Business"**
> (1) Subject to this Ordinance, in computing the income of a person chargeable to tax under the head "Income from Business" for a tax year, a deduction shall be allowed for any expenditure incurred by the person in the year [wholly and exclusively for the purposes of business].
> [(1A) subject to this Ordinance, where animals which have been used for the purposes of the business or profession otherwise than as stock-in-trade and have died or become permanently useless or such purposes, the difference between the actual cost to the taxpayer of the animals and the amount, if any, realized in respect of the carcasses or animals.]
> (2) Subject to this Ordinance, where the expenditure referred to in *subsection (1) is incurred in acquiring a depreciable asset or an intangible with a useful life of more than one year or is pre-commencement expenditure, the person must depreciate or amortise the expenditure in accordance with sections 22, 23, 24 and 25.*
> (3) Subject to this Ordinance, where any expenditure is incurred by an amalgamated company on legal and financial advisory services and other administrative cost relating to planning and implementation of amalgamation, a deduction shall be allowable for such expenditure.]"
>
> (*Emphasis provided*)

15. On careful reading of the above provision, it is interesting to note that the legislature, in its wisdom, has employed the word *"any"* before the word "*expenditure*", and thereby rendered the expenditure to be without any qualification. This has surely expanded the scope of deductible expenditure. At the same time, this right has, however, been made conditional on three essential factors. Firstly, that the said expenditure is not excluded under Section 21 of the Ordinance, which provides for all those expenditures which cannot be claimed deductible while computing the income of a taxpayer for the chargeability of tax for the said tax year. Secondly, the said expenditure has to be incurred by the taxpayer, wholly and exclusively, for the purpose of his business. And finally, that the said deductible expenditure was incurred by the taxpayer within the said tax year. It would be interesting to note that the legislature has also provided for future

adjustments: sub-section 2 of Section 20 of the Ordinance provides for other expenses which can be adjusted in the future; first, expenses on *depreciable asset* having a life span of more than one year under Section 22 *supra*, and second, expenses on *intangible assets* of the same life span that can be amortized and the deductions thereunder availed under Section 24 *supra*.

16. The intention of the legislature is clear. In the first place, a right has been vested in the taxpayer to claim deductible expenses for the purposes of computing his income. And the *onus* to dispute the said expense, so claimed by a taxpayer, has been cast upon the Revenue. Thus, it is for the Revenue to show that the expenditure so claimed by the taxpayer is not permissible, or is excluded from deduction under the Ordinance, and in particular, Section 21 *supra*.

17. The contention of the Revenue, duly accepted by the High Court in its impugned decision, was that the appellant was claiming *capital expenditure,* which was barred under clause (n) of Section 21 of the Ordinance. The said provision reads:

> "21. **Deductions not allowed.**
> Except as otherwise provided in this Ordinance, no deduction shall be allowed in computing the income of a person under the head "Income from Business" for...
>
> (n) except as provided in Division III of this Part, any expenditure paid or payable of a capital nature [;and]".

18. The High Court has, in the impugned decision, employed the term "*capital expenditure*" for the expenses incurred by the appellant as not being permissible under the Ordinance. We note that the term "*capital expenditure*" has not been defined in the Ordinance. However, the term "*capital asset*" has been defined in

Section 2(11), and explained in Section 37 of the Ordinance. The said provisions, as it stood during the relevant period, read:

> "[2(11)] "**capital asset**" means a capital asset as defined in section 37;"
>
> "**37. Capital gains.** (1) Subject to this Ordinance, a gain arising on the disposal of a capital asset by a person in a tax year, other than a gain that I exempt from tax under this Ordinance, shall be chargeable to tax in that year under the head "Capital Gains".....
>
> (5) In this section, "**capital asset**" means property of any kind held by a person, whether or not connected with a business, but does not include-
> [(a) any stock-in-trade [***] consumable stores or raw materials held for the purpose of business;]
> (b) any property with respect to which the person is entitled to a depreciable deduction under section 22 or amortisation deduction under section 24; [or]
> (c) any immovable property...."

19. The words *"in this section"*, in the above noted sub-section 5 of Section 37, restricts the definition of the term *capital asset* provided therein to the said section. However, the definition of the term *capital asset*, provided in subsection 11 of Section 2, has adopted the definition of the term provided in Section 37, and thereby, extended the said definition to be applicable to the entire Ordinance.

20. The definition of the term *capital asset,* provided in subsection 5 of Section 37, has expressly excluded from its scope three types of properties: firstly, *depreciable assets*, which can be depreciated under Section 22 of the Ordinance; secondly, those whose cost can be amortized under Section 24 *supra;* and finally, any immovable property.

21. Now, reverting to the exclusion clause (n) of Section 21 of the Ordinance, we note that the same expressly excluded the very expenditures provided in Division III and Part IV of the Ordinance. A careful review of the said provisions reveals that the

same is, in fact, expenditures made by a taxpayer on *depreciable assets,* as provided in Section 22 of the Ordinance. The said provision reads as under:

> **"22. Depreciation.**
>
> (1) Subject to this section, a person shall be allowed a deduction for the depreciation of the person's depreciable assets used in the person's business in the tax year.
> .....
> (15) In this section,
> .....
> **"depreciable asset"** means any tangible movable property, immovable property (other than unimproved land), or structural improvement to the immovable property, owned by a person that
>
> (a) has a normal useful life exceeding one year;
> (b) is likely to lose value as a result of normal wear and tear, or obsolescence; and
> (c) is used wholly or partly by the person in deriving income from business chargeable to tax,
>
> but shall not include any tangible movable property, immovable property, or structural improvement to immovable property in relation to which a deduction has been allowed under another section of this Ordinance for the entire cost of the property or improvement in the tax year in which the property is acquired or improvement made by the person; and
>
> **"structural improvement"** in relation to immovable property, includes any building, road, driveway, car park, railway line, pipeline, bridge, tunnel, airport runway, canal, dock, wharf, retaining wall, fence, power lines, water or sewerage pipes, drainage, landscaping or dam [:]
>
> [Provided that where a depreciable asset is jointly owned by a taxpayer and an Islamic financial institution licensed by the State Bank of Pakistan or Securities and Exchange Commission of Pakistan, as the case may be, pursuant to an arrangement of *Musharika* financing or diminishing *Musharika* financing, the depreciable asset shall be treated to be wholly owned by the taxpayer."

22. The rate of depreciation has further been specified in Part I of the Third Schedule of the Ordinance (**"Third Schedule"**), which, at the relevant period, read as under:

Depreciation rates specified for the purposes of section 22 shall be -

Class of asset.	**Description.**	**Rate per cent of the written down value.**
	BUILDINGS	
I	Building (not otherwise specified).	5 (General rate)
II	Factory, workshop, cinema, hotel, hospital.	10
III	Residential quarters for labour	10

23. A thorough reading of the aforementioned provisions provides that deduction is allowed for depreciation of the taxpayer's *depreciable assets* used in furtherance of his business in the said tax year. The term *"depreciable assets"*, as explained in sub-section 15 of Section 22 of the Ordinance, in essence, refers to any tangible moveable property, immovable property (other than unimproved land), and includes *"structural improvement"* made on the immovable property. The *"structural improvement"*, in relation to the immovable property, is to include the changes made on the unimproved or even the improved land, which transforms its existing shape and is used for any purpose in furtherance of taxpayer's business.

24. The term *"depreciable assets"* as provided in subsection 15 of Section 22 of the Ordinance, however, qualifies the said property to be restricted to those having the following four essential attributes: firstly, the property should have a normal useful life of more than one year. Secondly, it should most likely lose value as a result of normal wear and tear. Thirdly, the said property has to be partly or wholly utilised for the furtherance of the taxpayer's business. And finally, an express qualification has been imposed not to include those properties or *structural improvements,* in relation to which deduction has already been availed and allowed to the taxpayer under Section 20 or another enabling provision of the Ordinance.

25. In the present cases, while computing the depreciation on the unsold improved land of the appellant, two very critical questions would need to be addressed; firstly, whether the unsold improved land of the appellant would fall within the scope of

"building" as specified in the Third Schedule of the Ordinance; and secondly, whether the cost of land beneath the said *"building"* would be accounted for in determining the value of the *"building"* for the purposes of the rate of depreciation stated in the said Schedule.

26. As far as the first issue is concerned, all land owned by the appellant, which falls within the definition of *depreciable assets,* as provided under sub-section 15 of Section 22 of the Ordinance, and explained above, would qualify to be accounted for depreciation. Accordingly, the word *"building"*, provided in the Third Schedule, would include *structural improvements* made by the appellant on the unsold land fulfilling the attributes of a *depreciable asset,* as provided in Section 22, and explained hereinabove.

27. With regards to the other issue, the question that arises is whether the cost of land beneath the said *"building"* would be included in determining the value of the rate of depreciation specified in the Third Schedule.

28. The word *"building"* has been a matter of extensive judicial discourse. The landmark judgment in the English jurisdiction was rendered by the Privy Council in **Corporation of the City of Victoria v. Bishop of Vancouver Island ((1921) 2 A.C. 384)** wherein, while considering the exemption under a taxing statute, the land beneath the *building* was held to be part thereof, in terms that:

> "To hold that the ground upon which the cathedral stands is exempt from taxation though not by express words is only to do what to avoid gross absurdity must be done in the case of the buildings mentioned in sub-ss. 3, 6 and 7 of this very s. 197. In the case of a building set apart and solely used as a hospital, the land adjoining thereto and actually used therewith, not exceeding 20 acres in the case of a public hospital and 3 acres in the case of a

> private hospital, is expressly exempted from taxation, but the ground upon which the hospital stands is not expressly exempted, though it necessarily contributes more to the services of suffering mankind than does the adjoining land. The only rational explanation of that provision is that the latter lands are impliedly exempted, because the word "building." as used in ordinary language, comprises not only the fabric of the building but the land upon which it stands. ..... their Lordships are clearly of opinion that, if rationally and justly construed, the word "building" must receive the same meaning in sub-ss. 1,3, 6 and 7, that is its natural and ordinary meaning, including the fabric of which it is composed, the ground upon which its walls stand, and the ground embraced within those walls."

29. In the United States of America, it was settled in **Thomas v. Long (166 N.W. 287, 288, 182 Iowa, 859)** that where one speaks of exchanging for a "*building*", it may be assumed that he referred as well to the land on which it stood. Furthermore, the case of **State ex rel. Holbert v. Robinsons (59 S.E.2d 884, 888, 134 W.Va. 524)** clarified that "*building*" means a structure or edifice covering a space of land constructed and designed to exist permanently for use as a dwelling, storehouse, factory, shelter for beast or to serve some other useful purpose and, of utmost importance to the matter at hand, that it includes the land on which the building stands, as well as the adjacent land. This same idea was also adopted and elaborated upon in the case of **Wade v. Odle (54 S.W. 786, 788, 21 Tex.Civ.App. 656)**, wherein it was stated that the land upon which the walls of a stone or brick building rest, or, indeed, of any other kind of a building, which in law is considered as annexed to the soil, and which is not clearly severed therefrom by the terms of the deed itself, must be considered as part of the building and a sale of the building, therefrom, would carry the title to the land upon which it stands.

30. In the Indian jurisdiction, in the matter titled **Commissioner of Income-Tax, Punjab Jammu and Kashmir and Himachal Pradesh v. M/s Alps Theatre, Patiala ((1967) 65 ITR 377 (SC))** the pivotal question referred to the Court was:

> "whether the cost of land is entitled to depreciation under the schedule to the Income-Tax Act along with the cost of the building standing thereon".

The above question was answered in the negative, and against the assessee, while setting aside the judgment of the High Court. The High Court had held that the land and the superstructure built upon it shall be considered as a single unit for the purpose of depreciation. However, the Supreme Court observed that the rate of depreciation is fixed on the nature of the structure, and it would thus be difficult to appreciate why the depreciation of land would be dependent on the class of structures. It further explained that depreciation should reflect the real income of the business, and since land does not depreciate, giving the same a depreciating value would not be reflective of the true income of the business. It, therefore, concluded that depreciation should be computed while excluding the cost of land whereupon the building stands erect. However, in later judgments including **Commissioner of Income-Tax, Bombay City-IV, Bombay v. Teritex Knitting Industries Pvt. Ltd. (1978 114 ITR 634 Bom)** the Court, while interpreting the term *cost of building* stated in the *Explanation* to section 80J of the Income-Tax Act, 1961, held that:

> "As a conclusion, this Court preferred the popular meaning of the word "building", and did not see the need to use its narrower meaning in holding that "the cost of the building occurring in the *Explanation* to section 80J of the Act would not mean only the superstructure but would also include the cost of the land married to the superstructure on which the superstructure stands".

In another matter, the Supreme Court of India in **Commissioner of Income-tax, Bombay v. M/s. Gwalior Rayon Silk Manufacturing Co. Ltd.** (AIR 1992 SC 1782), wherein the matter of depreciation was discussed in detail did not disturb the *ratio* rendered in **C.I.T. v. Alps Theatre** ***(supra)*** in terms that:

> "The question emerges, therefore, whether roads and drains include *building* under Section 32 of the Act. Section 32 provides depreciation of capital assets in respect of *buildings*, machinery, plant or furniture ... The allowance towards depreciation is for the continuation of the use of the assets wholly or in part during the accounting year and its contribution to the earning of the *income*. The object is to determine net *income* liable to *tax*. In *C.I.T. v. Alps Theatre, (1967) 65 ITR 377* heavily relied on by the revenue, this Court considering Section 10(2) of the *Income Tax* Act, 1922 held that Section 10(2) provides that such profits or gains shall be computed after making certain allowances. The object of giving these allowances is to determine the assessable *income*. Therein the question was whether the *land* on which the theatre was constructed is a *building* within the meaning of Section 10(2) of the *Income Tax* Act, 1922. This Court held that *land* is not a *building* and, therefore, the depreciation allowance for *land* separately is not admissible. The ratio therein has no application but the principle laid would be considered in the light of the purpose of the Act. In *C.I.T. v. Taj Mahal Hotel, (1971) 82 ITR 44*, this Court adopting a purposive approach held that sanitary and pipeline fittings fell within the definition of plant. 1922 Act intended to give a wide meaning to the word "Plant". The rules are meant only to carry out the provisions of the Act and cannot take away what is conferred by the Act or whittle down its effect."

31. This Court appreciates how the judicial opinion has swayed away from the views expressed by the Supreme Court of India in **Alps Theatre's case** ***(supra)***. However, the meaning assigned to the term *"building"* in the said cases cannot be applied to the present case, in view of provisions provided in the Ordinance, and

in particular, clause (b) of subsection 13 of Section 22 of the Ordinance, which reads:

> "13. For the purposes of this section,
> (a) ...
> (b) the cost of immovable property or a structural improvement to immovable property shall not include the cost of the land;"

In view of the above, it is noted that the land beneath the *structural improvements* in the shape of corridors, pavements, roads and other such improvements that have been made would not qualify to be included as a cost of the land on which depreciation is sought. To our mind, the value of the *"building"* for the purposes of determining the rate of depreciation has to be restricted only to the cost/expenses incurred on the *"structural improvements"* on the land, and not the costs of land on which it is built upon.

32. As far as the finding of the learned High Court regarding amortization of the cost of land is concerned and, in particular, that the same is not permissible within the scope of Section 24(11) of the Ordinance, the present appellant has throughout the proceedings never contested the said pronounced proposition. In fact, the appellant has candidly admitted in writing before the lower fora, and before this Court at the leave-granting stage, that the he is not seeking amortization of the cost of land within the contemplation of Section 24 of the Ordinance. The claim of the appellant is that the expenditure on land, and improvements thereon, are permissible deductions within the purview of sub-section (1) of Section 20 of the Ordinance.

33. To sum up the above deliberations, it would be safe to conclude:

I. That while computing the income of the appellant from the sale of the shops so constructed on the purchased land, the cost so incurred from the purchase thereof can be deducted under sub-section 1 of Section 20 of the Ordinance.

II. That the appellant is also entitled to seek depreciation under Section 22 of the Ordinance on the expenditure incurred by him on structural improvements of unsold improved part of the land for the furtherance of his business. This factual determination should also be undertaken by the assessing officer.

III. That the cost/expenses incurred on the *structural improvements* on the unsold improved land owned by the appellant being utilized for the furtherance of his business would be included in the value of a *depreciable asset* of the appellant within the contemplation of Section 22 of the Ordinance.

IV. That the cost incurred by the appellant for purchasing the unsold land would not be included in the value of the *depreciable asset* for the purposes of depreciation, within the meaning of Section 22 read with the Third Schedule of the Ordinance.

V. That the High Court, in its impugned decision, erred in declaring the claimed deductions of the appellant to be premature, and barred under clause (n) of Section 21 of the Ordinance. This being so, the decision of the High Court warrants interference.

VI. That the decision of the Tribunal, having omitted to consider depreciation of *depreciable assets* of the appellants while remanding the cases to the Assessing Officer, has also not decided the matter by a correct appreciation of relevant facts and the applicable law.

VII. That the decision of the Commissioner (Appeals) appears to have taken into the account both the deduction and depreciation available to the appellants under Sections 20 and 22 of the Ordinance, respectively. Accordingly, this Court is in accord with the decision so rendered by the said authority.

34. It was for the above stated reasons that we disposed of the appeals *vide* the short order of even date, in terms that:

> "After having heard the learned counsel for the parties and having perused the record in the case, for detailed reasons to be recorded later, the impugned judgment of the learned High Court and that of the learned Appellate Tribunal are set aside and the judgment of the learned Commissioner Inland Revenue (Appeals) is restored.
>
> 2. These appeals are disposed of in the terms noted above."

Islamabad, the
14th of February 2019
Approved for Reporting

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:
MR. JUSTICE UMAR ATA BANDIAL
MR. JUSTICE MUNIB AKHTAR
MR. JUSTICE YAHYA AFRIDI

CIVIL APPEAL NOS. 2444-2449 OF 2016

Shahid Gul and Partners

...Appellant(s)

vs

Deputy Commissioner of Income Tax

...Respondent(s)

Munib Akhtar, J.— I have had the advantage of reading in draft the judgment proposed by my learned brother, Yahya Afridi J. I am in agreement with the same, but would like to reserve my position in relation to paras 27 to 30, which contains a valuable discussion as regards the legal meaning of "building" in relation to the land beneath any structure. In my view, as pointed out by my learned brother in para 31, the matter is clinched, insofar as the facts and circumstances of the present case are concerned, by s. 22(13) of the Ordinance. Therefore, in my respectful view, the discussion in the preceding paras (i.e., 27 to 30) is not, strictly speaking, necessary and the matter ought to be regarded as left open for future consideration in an appropriate case.