IN THE HIGH COURT OF SINDH, KARACHI

Present: Mr. Justice Muhammad Junaid Ghaffar
Mr. Justice Jawad Akbar Sarwana

1.	I.T.R.A 121/2015	OCCIDENTAL PETROLEUM (PAKISTAN) INC V/S THE COMMISSIONER INLAND
2.	I.T.R.A 1237/2008	COMMISSIONER (LEGAL DIVISION) **VS** B.P PAKISTAN EXPLORATION.
3.	I.T.R.A 1239/2008	COMMISSIONER (LEGAL DIVISION) **VS** B.P PAKISTAN EXPLORATION
4.	I.T.R.A 10/2012	OCCIDENTAL PETROLEUM PAKISTAN. **VS** COMMISSIONER INLAND REVENUE.
5.	I.T.R.A 11/2012	OCCIDENTAL PETROLEUM PAKISTAN. **VS** COMMISSIONER INLAND REVENUE
6.	I.T.R.A 12/2012	OCCIDENTAL PETROLEUM PAKISTAN. **VS** COMMISSIONER INLAND REVENUE.
7.	I.T.R.A 13/2012	OCCIDENTAL OIL & GAS PAKISTAN LLNC **VS** COMMISSIONER INLAND REVENUE
8.	I.T.R.A 14/2012	COMMISSIONER INLAND REVENUE **VS** M/S ABBOT ASIA INVESTMENT
9.	I.T.R.A 15/2012	OCCIDENTAL OIL AND GAS PAKISTAN **VS** COMMISSIONER INLAND REVENUE.
10.	I.T.R.A 9/2012	OCCIDENTAL PETROLEUM PAKISTAN INC **VS** COMMISSIONER INLAND REVENUE
11.	I.T.R.A 84/2014	B.P PAKISTAN(BADIN)INC. **VS** THE COMMISSIONER INLAND REVENUE.
12.	I.T.R.A 120/2015	OCCIDENTAL PETROLEUM (PAKISTAN) INC. **VS** THE COMMISSIONER INLAND REVENUE
13.	I.T.R.A 158/2015	OCCIDENTAL OIL AND GAS PAKISTAN LLC **VS** THE COMMISSIONER INLAND REVENUE
14.	I.T.R.A 159/2015	OCCIDENTAL OIL AND GAS PAKISTAN LLC **VS** THE COMMISSIONER INLAND REVENUE
15.	I.T.R.A 160/2015	OCCIDENTAL OIL AND GAS PAKISTAN LLC **VS** THE COMMISSIONER INLAND REVENUE
16.	I.T.R.A 161/2015	OCCIDENTAL OIL AND GAS PAKISTAN LLC **VS** THE COMMISSIONER INLAND REVENUE
17.	I.T.R.A 82/2015	OCCIDENTAL PETROLEUM PAKISTAN INC **VS** THE COMMISSIONER INLAND REVENUE
18.	I.T.R.A 83/2015	OCCIDENTAL PETROLUM PAKISTAN INC **VS** THE COMMISSIONER INLAND REVENUE

19.	I.T.R.A 204/2016	M/S BP PAKISTAN (BADIN) INE **VS** THE COMMISSIONER INLAND REVENUE0
20.	I.T.R.A 328/2016	B.P PAKISTAN EXP & PROT- INC (BADIN) **VS** THE COMMISSIONER INLAND REVENUE
21.	I.T.R.A 329/2016	B.P PAKISTAN (BADIN) INC.... KHI **VS** THE COMMISSIONER INLAND REVENUE
22.	I.T.R.A 330/2016	B.P PAKISTAN EXP & PORT.... INC BADIN **VS** THE COMMISSIONER INLAND REVENUE
23.	I.T.R.A 331/2016	B.P PAKISTAN (BADIN) INC... KHI **VS** THE COMMISSIONER INLAND REVENUE
24.	I.T.R.A 332/2016	B.P PAKISTAN EXPLORATION & PRODUCTION INC (BADIN **VS** THE COMMISSIONER INLAND REVENUE
25.	I.T.R.A 333/2016	B.P PAKISTAN (BADIN....INC) KHI **VS** THE COMMISSIONER INLAND REVENUE
26.	I.T.R.A 135/2017	OCCIDENTAL PETROLEUM (PAKISTAN) INC: **VS** THE COMMISSION INLAND REVENUE
27.	I.T.R.A 169/2018	M/S KIRTHAR PAKISTAN B.V. **VS** THE COMMISSIONER INLAND REVENUE
28.	I.T.R.A 170/2018	M/S KIRTHAR PAKISTAN B.V. **VS** THE COMMISSIONER INLAND REVENUE
29.	I.T.R.A 171/2018	M/S KIRTHAR PAKISTAN B.V. **VS** THE COMMISSIONER INLAND REVENUE
30.	I.T.R.A 172/2018	M/S KIRTHAR PAKISTAN B.V. **VS** THE COMMISSIONER INLAND REVENUE
31.	I.T.R.A 173/2018	M/S KIRTHAR PAKISTAN B.V. **VS** THE COMMISSIONER INLAND REVENUE
32.	I.T.R.A 391/2018	PKP KADANWARI 2 LTD (NOW POPK LTD) **VS** COMMISSIONER INLAND REVENUE
33.	I.T.R.A 392/2018	PREMIER OIL PAKISTAN KADANWARI LTD. **VS** COMMISSIONER INLAND REVENUE
34.	I.T.R.A 393/2018	PREMIER OIL PAKISTAN KADANWARI LTD. **VS** COMMISSIONER INLAND REVENUE
35.	I.T.R.A 394/2018	PKP KIRTHAR 2 B.V. (POP, KIRTHAR B.V.) **VS** COMMISSIONER INLAND REVENUE
36.	I.T.R.A 395/2018	PREMIER OIL PAKISTAN KIRTHAR B.V **VS** COMMISSIONER INLAND REVENUE
37.	I.T.R.A 396/2018	PREMIER OIL PAKISTAN KIRTHAR B.V **VS** COMMISSIONER INLAND REVENUE
38.	I.T.R.A 76/2018	M/S OCCIDENTAL PETROLEUM (PAKISTAN) INC **VS** THE COMMISSIONER INLAND REVENUE
39.	I.T.R.A 302/2023	UNITED ENERGY PAKISTAN LIMITED **VS** COMMISSIONER INLAND REVENUE

40.	I.T.R.A 303/2023	UNITED ENERGY PAKISTAN LIMITED **VS** COMMISSIONER INLAND REVENUE
41.	I.T.R.A 304/2023	UNITED ENERGY PAKISTAN LIMITED **VS** COMMISSIONER INLAND REVENUE
42.	I.T.R.A 305/2023	UNITED ENERGY PAKISTAN LIMITED **VS** COMMISSIONER INLAND REVENUE
43.	I.T.R.A 306/2023	UNITED ENERGY PAKISTAN LIMITED **VS** COMMISSIONER INLAND REVENUE
44.	I.T.R.A 307/2023	UNITED ENERGY PAKISTAN LIMITED **VS** COMMISSIONER INLAND REVENUE

For the Applicants: M/s. Hussain Ali Almani, Ijaz Ahmed Zahid, Hashmatullah Aleem, Hamza Waheed, Sami-ur-Rehman Khan, Kohmeer Rind, Akbar Sohail, Barkat Ali Metlo, Waqar Ahmed, Advocates.

For the Respondents: M/s. Munawar Ali Memon, Ameer Bakhsh Metlo, Fayyaz Ali Metlo, Nazia Hinjarah, Syed Muhammad Khalid, Muhammad Khan for Shahid Ali Qureshi, Advocates.

Date of hearing: **20.01.2025**

Date of Judgment: **21.08.2025.**

JUDGMENT

Muhammad Junaid Ghaffar, Chief Justice: All these Reference Applications involve common Questions of law, notwithstanding that they have been filed by the Taxpayers / Oil Exploration Companies as well as Commissioner(s) Inland Revenue, against various orders of the Appellate Tribunal, Inland Revenue, Karachi, ("**Tribunal**"). Barring ITRA Nos. 1237 & 1239 of 2008 (*Commissioner Inland Revenue v. B.P. Pakistan Exploration*), rest of the orders of the Tribunal have been passed by placing reliance on a larger bench judgment of the Tribunal reported as **MND Exploration and Production**

Ltd[1]. Therefore, in essence, the Questions of law which are required to be dealt with and decided are arising from the Judgment in *MND Exploration* (Supra). Insofar as the case of *Commissioner Inland Revenue v. B.P. Pakistan Exploration* is concerned, the same was decided before the larger Bench Judgment in favor of the Taxpayers. The Applicants in all cases have proposed various Questions of law; however, primarily, there are only two Questions which are to be dealt with and decided by this Court which read as follows: -

1) **"Whether in calculating the depletion allowance under Rule 3 of Part-1 of the 5th Schedule to the Income Tax Ordinance, 2001, the amount of royalty is to be deducted from the well-head value?".**

2) **"Whether the Applicant / taxpayers are required to pay tax at the higher of *50%* of profits or gains *before* deduction of payments to the Government including royalty or *55%* of profits or gains *after* deduction of payments to the Government including royalty?**

2. Insofar as Question No. 1 as above is concerned, the same has now been settled by the Hon'ble Supreme Court in the case of ***Mari Gas Company Limited, Islamabad*** [2], whereby judgment of the learned Islamabad High Court in the case of ***Attock Oil Company Ltd***[3] has been maintained, wherein it was held that for the purposes of calculating depletion allowance under Rule 3 of Part-I of the 5th Schedule to the Income Tax Ordinance, 1979 ("**1979 Ordinance**"), the amount of royalty paid by a tax-payer to the Government is not to be deducted while computing the wellhead value. The Supreme Court has held that the amount of royalty paid by a taxpayer to the Government must be viewed as a separate component which is entirely independent on its own and is not

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[1] dated 13.06.2011 MND Exploration and Production Ltd. Vs. C.I.R., L.T.U., Islamabad (2012 PTD (Trib.) 581);

[2] vide judgment dated 29.11.2023 in Civil Petition No.2007 of 2022 Deputy Commissioner of Income Tax versus M/s Mari Gas Company Limited Islamabad,

[3] 2023 PTD 455 (Attock Oil Co. Ltd. v. Central Board of Revenue)

to be deducted while computing the well-head value. In view of such position no further deliberation or adjudication is warranted, nor the department's Counsel was able to dispute such fact; hence, the proposed Question No.1 is answered accordingly in favor of the taxpayers and against the department.

3. Coming to Question No. 2 as above it appears that earlier, the Tribunal vide its judgment dated 03.04.2008 in ITA No.129/KB of 2006 (impugned in ITRA Nos. 1237 & 1239 of 2008) had decided the issue in favor of the taxpayers by holding that they are liable to pay taxes as per the relevant clauses of their respective Petroleum Concession Agreements ("PCAs") read with Circular of CBR dated 14.05.1974. Such order of Tribunal was impugned before this Court and a Reference was pending, whereas, thereafter, the Tribunal constituted a larger Bench in respect of cases of other Exploration Companies for subsequent tax-years and in the case of ***MND Exploration*** (Supra) took a contrary view by deciding the issue in favor of the Department. The tax-payers Reference are against such orders, whereas the References of the department are in the matter of B.P Pakistan Exploration.

4. Mr. Ijaz Ahmed Advocate, learned Counsel appearing on behalf of the Applicant in ITRA Nos. 302 to 307 of 2023 has contended that the applicable tax rate is to be governed by the Taxation Article in "PCA" read with Section 26(b) further read with Rule 4(1) of the Fifth Schedule to the Income Tax Ordinance, 1979; which provides the maximum limit of 55% of profits and gains and so also the minimum limit of 50% profits and gains before deduction of payments to the Government (i.e. Royalty); that this rate of tax is in line with Circular No. 2 of 1974 issued by CBR and based on this working the amount of the minimum limit came out to be higher and as a result the E&P companies continued to pay this amount i.e. 50% profits

and gains before deduction of payments to the Government (i.e. Royalty) and department had never disputed this; that this issue had already been decided in BP Pakistan Exploration (Supra), whereas the larger bench of the Tribunal in MND Exploration and Production Limited (Supra) has erred in law by disagreeing with the decision in BP Pakistan Exploration (Supra), as the same does not provide any basis for reading the additional words “before deduction of payments to the Government (i.e Royalty)” in the language related to the maximum limit of 55% of the profits and gains; nor there is any basis for requiring the E&P companies (including Applicants) to pay the amount calculated at maximum limit of 55% of profits and gains; that the additional words before deduction of payments to the Government (i.e Royalty) cannot be read with the maximum limit of 55% of the profits and gains as provided in the PCAs; that neither the PCAs nor Rule 4(1) uses the words “before deduction of payments to the Government (i.e Royalty)” with the maximum limit of 55% of the profits and gains; that the words “before deduction of payments to the Government” have only been used in the proviso to the relevant clause of the Taxation Article which provides the minimum limit and similarly these words have only been used in the proviso to Rule 4(1) and have not been used in the main (enacting) part of Rule 4(1) which adopts the PCA clause for the purpose of the maximum limit; that Section 26 of the 1979 Ordinance provides special provisions regarding the Applicants business and shall have an overriding effect, and therefore, the applicable tax rate is required to be determined in accordance with Rule 4(1) of Part I of the Fifth Schedule to the 1979 Ordinance; that the view of the larger bench of Tribunal that The Regulation of Mines and Oil-Fields and Mineral Development (Government Control) Act, 1948 (“ 1948 Act”) shall prevail is not tenable as in terms of paragraph 1 of the Schedule to the 1948 Act, the provisions of the income tax law

with regard to computation of income and rate of tax are frozen on the effective date of the respective concession agreement and any amendment adverse to the interest of the party to whom such concession is granted will not apply to the extent of such concession agreement; that all the PCAs provide a maximum and a minimum limit of the liability of the Applicants for payments to the Government and taxes on income, wherein, the Maximum limit is prescribed by using the language “the sum of payments … to the Government and taxes on income, shall be limited to fifty five percent (55%) of profits or gains”, whereas the Minimum limit is prescribed by using the language “provided that the aggregate of the taxes on income and other payments shall not be less than 50% of the profits or gains …. before the deduction of the payments as provided for in the Ordinance.”; that the language prescribing the maximum limit does not include the words “before the deduction of the payments as provided for in the Ordinance”; that the minimum limit has been set out in a proviso to the main clause and the additional language used in the minimum limit proviso (i.e. before the deduction of the payments as provided for in the Ordinance) cannot be added to the main clause which describes the maximum limit of the liability; that “other payments to the Government” in this Rule is to be read based on the definition of the term “payments to the Government”, which is defined in Rule 6(5) of Part I of the Fifth Schedule of the 1979 Ordinance; that per settled law and principles of interpretation of statutes a proviso cannot increase the scope of the enacting part of the statute; that fixing the maximum and minimum limits is the function of the Federal Government under the 1948 Act and the Tribunal has no jurisdiction to read-in any additional language in the provisions of the PCAs; that since neither the PCAs nor the 1979 Ordinance, provides that the maximum limit is to be computed on profits and gains before deduction of other payments to the Government; hence, the conclusion drawn by

the Tribunal is flawed; that even otherwise the department and the Tribunal have attempted to deviate from continuous departmental practice, whereas it is a settled principle of law[4] that established departmental practice cannot be departed from; that wherever deemed appropriate, it has been agreed upon between the Exploration Companies and the Government, and relevant PCA has provided and catered to a situation, whereby certain higher rate of taxation is applicable as is the case of Tajjal PCA (Article 12.5)[5] and PCA of Adhi JVA (Article 6.4)[6]. While concluding his arguments he has prayed for an answer to the proposed questions in favor of the taxpayers.

5. Mr. Ali Almani, learned Counsel appearing for the Applicants in ITRA No.121 of 2015 and other connected matters has contended that Section 26(b) of the 1979 Ordinance, provides that tax payable by petroleum companies shall be computed in accordance with the 5th Schedule, whereas Rule 4(1) of Part 1 of the 5th Schedule provides that the aggregate of taxes on income and other payments to the Government shall not exceed the limits provided in a PCA, provided that the said aggregate shall not be less than 50% of the profits and gains "before the deduction of the payment to Government"; that in accordance with this rule, the upper limit of the aggregate of taxes on income and other payments to the Government has been prescribed in the PCA, while the lower

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[4] PLD 1970 Supreme Court 453; Nazir Ahmed vs. Pakistan; 1985 SCMR 1753 Asian Food Industries Limited vs. Pakistan; 2016 PTD 2910; Mohammad Amer Saeed vs. Model Customs Collectorate of Customs (East)

[5] "12.5 For the purposes of rule 4 in Part I of the Fifth Schedule to the Income Tax Ordinance 1979 (No. XXXI of 1979), the sum of payments by each of the Working Interest Owners to the Government and taxes on income, shall equal fifty five percent (55%) of its net profits or gains derived from the operations or part of the operations to which the provisions of the said Schedule apply before deduction of payments to the Government but after deducting depletion allowance for determining such profits or gains as allowed under rule 3 in the said Schedule."

[6] "For the purpose of rule 4 in Part I of the Fifth Schedule to the Income Tax Ordinance, 1979 (No. XXXI of 1979), and the Regulation of Mines & Oilfield & Mineral Development (Government Control) Act 1948 (No. XXIV of 1948) as amended and in force on the Effective Date of this Agreement, the sum of payments to the Government and taxes on income by each of the Working Interest Owners shall equal fifty five percent (55%) of the profits or gains derived from the operations / business or part of the operations / business to which the provisions of Part I of the said Schedule apply before deduction of payments to the Government but after deducting the depletion allowance for determining such profits or gains as allowed under rule 3 in Part I of the said Schedule and the regulations, provided that the said aggregate shall not in any case be less than 50% of the profits or gains from the said undertaking."

limit is 50% of profits and gains before deduction of payment to the Government; that the lower limit of the aggregate of taxes on income and royalty as provided in the 1979 Ordinance is 50% of the profits and gains before deduction of royalty and the Applicants can never pay less than this amount; that Rule 4(2) of Part I of the 5th Schedule then provides that where for any year, the aggregate of taxes on income and royalty is greater or less than the amount provided for in the PCA, an additional tax shall be payable or an abatement in tax shall be allowed so as to ensure that the aggregate of taxes on income and royalty is equal to the amount provided in the PCA; that resultantly, the upper limit is to be provided in PCA; and the lower limit is 50% of profits and gain before deduction of royalty; that in PCAs, the taxation clauses provide that the sum of taxes on income and royalty shall be limited to 55% of profits and gains; and the aggregate of taxes on income and royalty shall not be less than 50 % of profits and gains before deduction of royalty; that it is abundantly clear that the phrase "before deduction of payments" (i.e., deduction of royalty) is not used with or applicable to the upper limit of 55% of profits and gains and it only applies to the lower limit of 50% of profits and gains; that Royalty is an expense and to arrive at profits and gains, it must be deducted from the revenue of the company; hence, profits and gains, therefore, do not include royalty; that the consequence of this is that given the undisputed rate of royalty (12.5% of well head value), 55% of profits and gains is lower than 50% of profits and gains before deduction of royalty; that from the illustration[7] it can be easily inferred that the lower limit

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[7] Upper Limit

(i) Well head value (or revenue) = Rs. 100
(ii) Royalty = 12.5% of well-head value = Rs. 12.5
(iii) Profits and gains = Revenue – Royalty = 100 - 12.5 = Rs. 87.5
(iv) 55% of profit and gains = 55% of Rs. 87.5 = Rs. 48.125

Lower Limit
(v) Well head value (or revenue) = Rs. 100
(vi) Royalty = 12.5% of well-head value = Rs. 12.5
(vii) Profits and gains = Revenue – Royalty = 100 - 12.5 = Rs. 87.5

is, therefore, higher than the upper limit, and while this may seem counterintuitive, it is a direct consequence of the undisputed rate of royalty and the clear language of the taxation clauses in the PCAs; that this otherwise is in conformity with circular issued by FBR on 14.05.1974 illustrating how taxes on income are to be calculated read with Memorandum of Understanding entered into between Applicants and FBR on 26.03.2010 to resolve the disputes over depletion allowance and calculation of tax payable, in which the FBR agreed with Applicants calculation; that the stance of FBR that the phrase "before deduction of payments" used in the taxation clauses of the PCAs applies to both the upper limit of 55% of profits and gains and the lower limit of 50% of profits and gains is not based on proper appreciation of law and spirit of the mutual agreements and understanding between the Applicants and the Government; that 1948 only Act provides a range for the aggregate of taxes on income and royalty, wherein, the upper limit is 55% of profits and gains before deduction of royalty and the lower limit is 50% of profits and gains before deduction of royalty, and therefore, tax can be imposed anywhere between this range; that as against this the 1979 Ordinance also provides a range, whereby the upper limit is to be prescribed in the PCA and the lower limit is 50% of profits and gains before deduction of royalty; that based on this range and limits provided in the 1948 Act as well as the 1979 Ordinance, pursuant to relevant PCA's, it has been agreed that the upper limit is 55% of profits and gains and the lower limit is 50% of profits and gains before deduction of royalty; that as and when the parties have decided for any other rate or mode of taxation it has been so provided by specific and contrasting taxation clauses in other PCAs such as the Tajjal PCA, which specifically states that aggregate of taxes on income and royalty shall be 55% of profits and gains before deduction of

(viii) Profits and gains before deduction of royalty = 87.5 + 12.5 = Rs. 100
50% of profits and gains before deduction of royalty = 50% of Rs. 100 = Rs. 50.

royalty; that if the stance of FBR is accepted it will lead to an absurdity, as it is not possible either to calculate the tax payable nor the law and the rules in question can be reconciled. He has finally prayed for an answer to the proposed question in favor of the taxpayers.

6. On the other hand Mr. Fahim Memon, appearing in some of the cases on behalf of the Department / Inland Revenue has led the arguments and has contended that the Applicants have misinterpreted and have been misapplying the relevant provisions of the Acts and Rules so as to pay lesser amount of due tax to the Government; that the 1948 Act and the 5th Schedule to 1979 Ordinance, clearly mention that the tax rate shall be before deduction of royalty; hence, there is no question of determining the tax after deduction of the royalty, be it the lower limit of 50% or the upper limit of 55%; that the 1948 Act is the governing law which has to prevail by virtue of Section 4 ibid read with the Rules and if at all, there is any ambiguity viz a viz the PCA's as contended, the provisions of the 1948 Act will determine the rate of tax and its calculation and not the PCA alone; that the amendment in the year 1976, in the 1948 Act clearly sets out an upper cap @ 55% and floor at 50% of the profit or gains "before deduction of payments" to the Government; that para 2 of the Schedule to the 1948 Act, clearly indicates that both 55% and 50% limits should be computed on profits and gains before deduction of royalty; that CBR's circular of 1974 is not applicable as the applicable law i.e. the 1948 Act was amended in 1976; hence, is redundant for the present purposes; that the 1948 Act, as well as Rule 4 of the 5th Schedule to 1979 Ordinance, provide for tax rate before deduction of royalty, therefore, wherever, the PCA's provides otherwise, or are silent as to the words before or after deduction of royalty, the 1948 Act read with 1979 Ordinance, when harmoniously interpreted, would prevail; that the

Applicants are trying to read into the wordings of PCA's, which is not provided therein i.e. before deduction of payments to the Government; that the PCA's provide for tax rate but in each of it either provides "before deduction of royalty" or is silent; hence, the larger bench of the Tribunal has rightly concluded that the 1948 Act would prevail, therefore, the proposed question be answered in favor of the department.

7. Heard learned Counsel for the parties and perused the record. As already noted, for the present purposes we are only concerned with Question No.2 as above, as the other question of law already stands decided by the Supreme Court. Record reveals that all the Applicants are involved in the business of Oil and Gas Exploration and have been allotted various fields mostly in the Province of Sindh respectively for such purposes. They had filed their Annual Tax Returns (for various tax-years) by calculating their liability of tax in terms of the PCA's entered with the Government of Pakistan through the President by determining profits at the rate of 50% after deduction of payments of royalty to the Government of Pakistan. The department had thereafter issued different Show Cause Notices to the Applicants / Oil Exploration Companies whereby, in addition to various other issues, an objection was also raised as to the calculation of the applicable tax rate. We may reiterate that these cases are only in respect of the issue as noted hereinabove and confined to Question No.2. The taxpayers responded by raising various objections; however, Amended Assessment Orders were passed whereby, the determined liability to taxation was increased based on certain calculations in respect of deduction of royalty payments to the Government and the applicable tax rate. It may be noted that the facts of all the cases may not be identical, but it has very little bearing on the issue in hand as it is only a law point which is before us for determination. It appears that in all listed cases except (ITRA

No. 1237 & 1239 of 2008) the first Appellate authority, including the Tribunal, have decided the issue against the taxpayers, whereas in these two cases, the Tribunal has decided the matter in favor of the taxpayers which is also under challenge on behalf of the department. However, subsequently, to resolve the issue on a permanent basis, and apparently at the request of the department, a Larger Bench of the Tribunal was constituted which has been pleased to give its opinion against the taxpayers in *MND Exploration* (Supra). To have a better understanding of the issue in hand and the dispute so raised by the department, it would be advantageous to refer to the relevant provisions of the 1979 Ordinance the 1948 Act, and so also the relevant Article(s) of the PCA's between the Applicants and the President of Pakistan. They read as under:

Income Tax Ordinance, 1979
Section 26:

> **"26. Special provisions regarding business of insurance and production of oil and natural gas and exploration and extraction of other mineral deposits [3][etc.]:** Notwithstanding anything contained in this Ordinance--
>
> (a) the profits and gains of any business of insurance and the tax payable thereon shall be computed in accordance with the rules contained in the Fourth Schedule;
>
> (b) the profits and gains from the exploration and production of petroleum (including natural gas) ["and from refineries to be set up at Dhodak and Bobi fields; income of exploration and production companies from pipeline operations, and manufacture and sale of liquified petroleum gas or compressed natural gas"] and the tax payable thereon *shall be computed in accordance with the rules contained in Part I of the Fifth Schedule:"*

Fifth Schedule (Part-I)

> 4. **Limitation on payment to Government and taxes:** (1) The aggregate of the taxes on income and other payments to the Government in respect of the profits or gains derived from an undertaking to which this Part applies for any *assessment year shall not exceed the limits provided for in the agreement*:
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> [Provided that the said aggregate shall not be less than *fifty per cent of the profits or gains* derived by an onshore petroleum exploration and production undertaking and forty per cent of the profits on gains derived by an offshore petroleum exploration and production undertaking *before the deduction of the payment to the Government*.]

(2) If in respect of any year, the aggregate of the taxes on income and payments to the Government is greater or less than the amount provided for in the agreement, an additional tax shall be payable by the assessee or an abatement of tax shall be allowed to the assessee, as the case may be, so as to make the aggregate of the taxes on income and payments to the Government equal to the amount provided for in the agreement.

(3) If in respect of any year the payments to the Government exceed the amount provided for in the agreement, so much of the excess as consists of any tax or levy referred to in sub-clause (b) of clause (5) of rule 6 shall be carried forward and treated, for the purposes of this rule, as payments to the Government for the succeeding year:

Provided that the whole, of the payments to the Government exceeding the amount provided for in such agreement may be so carried forward if so provided for in any agreement with an assessee made before the first day of July, 1970."

"6. Definition: For the purpose of this Part,--

(1) "agreement" means an agreement entered into between the Government and an assessee for the exploration and production of petroleum in Pakistan;
(2) "commercial production" means production as determined by the Government;
(3) "Government" means the Government of Pakistan;
(4) "Part" means Part of this Schedule;
(5) "payments to the Government" means amounts payable to the Government or to any governmental authority in Pakistan--

(a) in respect of royalties as specified in the Pakistan Petroleum (Production) Rules, 1949; [or the Pakistan Petroleum (Exploration and Production) Rules, 1986;] and

(b) in respect of any tax or levy imposed in Pakistan peculiarly applicable to oil production or to extractive industries or any of them and not generally imposed upon all industrial and commercial activities;"

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The 1948 Act;

"**4. Effect of rules, etc., inconsistent with other enactments:**

Any rule made under this Act, and any order made under any such rule, shall have effect notwithstanding anything inconsistent therewith contained in any enactment or in any instrument having effect by virtue of any enactment other than this Act.

'[SCHEDULE]

(See Section 3 B)

1. Any provisions of the rules made under Section 2 or of any amendment in the [Income Tax Ordinance, 1979 (XXI of 1979)] hereinafter referred to as the [Ordinance] made after the effective date of an agreement for the grant of a licence or lease to explore prospect or mine petroleum which are inconsistent with the terms of the agreement, shall not apply to the

extent of such inconsistency to a company which is a party to the agreement.

2. Royalty shall be charged at a fixed rate of 12 1/2 percent of the Well-head value and shall form part of the sum of payments to the Federal Government *and taxes on income which shall neither be more than 55 percent nor less than 50 percent of the profits or gains before deduction of "payments to the Government" referred to in [clause (5) of rule 6 of part 1 of Fifth Schedule to the Ordinance,* hereinafter referred to as the said Schedule. "The limit of the sum of payments to the Federal Government and taxes on income shall be fixed at the time of grant of the permit or licence in accordance with the Petroleum Policy, of the Federal Government from the effective date of the permit or licence, as the case may be. Income from pipeline operations, the sale of LPG, CNG and from refined prod-ucts, where such refined products are produced from field due to their specific development needs (as approved by the Central Board of Revenue) shall be considered part of a licensee's or lessee's income under the said Schedule."

8. Before proceeding any further, it may be clarified that insofar as listed ITRA's are concerned, in all, the "PCAs" were entered in the year 1995 and notwithstanding the fact that the relevant tax years involved are of later years, for the purposes of taxation, they are to be governed and dealt with in terms of the 1979 Ordinance, and to that effect there is no dispute. The protection provided to this effect is a norm insofar as the taxability of Oil Exploration Companies is concerned. Despite promulgation of the Income Tax Ordinance, 2001, their tax returns are to be filed and governed in terms of the relevant date of the Concession Agreements. Coming to the above provisions, it appears that section 26 of the 1979 Ordinance provides that the tax payable shall be computed in accordance with the rules contained in Part-I of the 5th Schedule, whereas Rule 4 thereof provides that the aggregate of the taxes on income and other payments to the Government in respect of the profits or gains derived from an undertaking to which this Part applies for any assessment year, shall not exceed the *limits provided for in the Concession Agreement*. Proviso to Rule 4 ibid, further provides that the said aggregate shall not be less than *fifty per cent of the profits or gains derived by the Applicants before deduction of the payment to the Government*.

Sub-rule (2) to Rule 4, further provides that if the aggregate of the taxes on income and payments to the Government is greater or less than the amount provided for in the Concession Agreement, an additional tax shall be payable by the assessee or an abatement of tax shall be allowed, as the case may be, so as to make the aggregate of the taxes on income and payments to the Government equal to the amount provided for in the Concession Agreement. In essence, though the taxability of the Applicants has to be dealt with under the 1979 Ordinance; however, through a specialized mechanism in terms of Section 26(b) read with Part 1 of the Fifth Schedule to the 1979 Ordinance, while giving credibility and protection to the Concession Agreements, a mechanism has been evolved so as to secure the investors interest and their confidence in Oil Exploration business. Through Rule 4 of the 1979 Ordinance, a minimum benchmark has been provided whereby, the aggregate of the tax on income and other taxes to the Government shall not be less than fifty percent of the profits or gains *"before deduction of the payment to the Government"*. Similarly Rule 6(5) ibid defines payments to the Government which include *Royalties* as provided in the Pakistan Petroleum (Production) Rules, 1949 and so also any tax or levy imposed in Pakistan peculiarly applicable to oil production and related activities. The 1948 Act, by virtue of Section 4 thereof, provides an overriding effect as to other enactments. It states that any rule made under this Act, and any order made under any such rule, shall have effect notwithstanding anything inconsistent therewith contained in any other enactment or in any instrument having effect by virtue of any enactment other than this Act. In the Schedule to this Act Part-2 provides that royalty shall be charged at a fixed rate of 12.5% of the Well-head value and shall form part of the sum of payments to the Federal Government. To this effect there is no dispute between the parties and royalties are being paid at the rate of 12.5% of the

Well-head value and is accepted as part of the sum of the payment to the Government. The said Para-2 further provides that taxes on income shall neither be more than 55 percent; nor less than 50 percent of the profits or gains before deduction of **"payments to the Government"** as referred to in clause (5) of Rule 6 of Part 1 of the Fifth Schedule to the 1979 Ordinance. As noted earlier, in the 1979 Ordinance, cap of 50% of the profits or gains derived by the Applicants before deduction of the payments to the Government was provided, whereas, in the 1948 Act the minimum and maximum rates have been provided i.e. it should not be less then 50% and not more than 55% of the profits or gains before deduction of the payments to the Government. For us, in short, the issue is that as to how the said provisions are to be interpreted i.e. whether the condition of deductions of the payment to the Government shall also apply to the higher or upper limit of 55% as contended by the department or it is only to be read with or made applicable to the lower cap or limit of 50%. Insofar as PCAs in question are concerned, though there are various Agreements between the Applicants / Companies and the Government of Pakistan, but for the present purposes, it would be advantageous to examine any one of the said clauses in the PCAs to have a better understanding of the issue in hand. Clause 13.3 of the Agreement of the Applicant[8] reads as under: -

COMPARISON OF TAXATION CLAUSES IN EACH PCA

Sr.	PCA	APPLICABLE RULES	COMPANY	CLAUSE	TAX RATE
2.	BADIN I BADIN II BADIN III REVISED	Pakistan Petroleum Rules 1949 (Badin I) Pakistan Petroleum Rules 1986 (Badin II and II Revised)	B. P. Pakistan Exploration and Production Inc. & Occidental Petroleum (Pakistan)	13.3 In accordance with the provisions of Rule 4 of the said Schedule to the Ordinance, read with the Act, **the sum of payments** by each of the Working Interest Owners **to the Government and taxes on income shall be limited to fifty five percent (55%) of profits or gains** derived from the operations or part of the operations. Provided that the **aggregate of the taxes on income and other payments to the Government shall not be less than fifty percent**	Limited to 55% of profits and gains but not less than 50% of the profits and gains before deduction of payments to

[8] B.P. Pakistan Exploration and Production Inc & Occidental Petroleum (Pakistan) Inc.

			Inc.	**(50%) of the profits or gains** derived from the said operations **before the deduction of the payments to Government** but after making the depletion allowance for determining such profits and gains as allowed under Rule 3 in Part I of the said Schedule.	the government

9. The Agreements of the other Applicants / Companies are more or less the same whereas, dispute with the department is also identical. According to the Applicants / taxpayers this clause of the Agreement in question has an overriding effect and protects the rate of taxation pursuant to Rule 4 of Part 1 of the Fifth Schedule to the 1979 Ordinance, and further, it is not inconsistent with any of the provisions of the 1948 Act, hence, it must prevail. The above clause of the Agreement provides that in accordance with the Provision of Rule 4 of the Schedule to the 1979 Ordinance read with the 1948 Act, the sum of payments by each of the working interest owners to the Government and taxation on income shall be limited to 55% of profits or gains derived from the operation or part of the operations provided that the aggregate of the tax on income and other payments to the Government, shall not be less than 50% of the profits or gains derived from the said operations before deduction of the payments to the Government but after making the depletion allowance for determining such profits and gains as allowed under Rule 3 in Part I of the said Schedule. Simply put, the Applicant's case is that insofar as the minimum or lower cap of 50% is concerned, that can be arrived at before deduction of payments to the Government; however, when the sum of payments and tax is calculated on the basis of the upper limit i.e. 55% of profits and gains it has to be worked out after deduction of the payments to the Government. According to them, if this is not done, then absurdity would be created as to proper payable tax. Their further case is that if this interpretation of the department is accepted, then there was no need to put a higher cap as without deduction of payments to

the Government it will always be advantageous to the department to make working of the tax and payments based on a lower cap at the rate of 50%. To further understand the contention of the parties, it would be advantageous to work out the difference by way of an illustrated calculation which reads as under:-

		"As per taxpayer	**As per assessing officer**
Gross receipts		1000	1000
Less:			
Royalty		125	125
Operating Expenses, depreciation & other levies		375	375
Depletion allowance * 15% of Rs 1,000		150	150
		(650)	(650)
Profits / gains	**A**	350	350
		========	==========
Maximum Limit check			
Profits / gains		350	
Profits / gains before deduction of royalty			475 **G**
55% of profits / gains referred above	**B**	193	261
Less: Royalty already paid		(125)	(125)
Tax on income		68 **C**	136 **H**
Minimum Limit check			
Profits / gains before deduction of royalty - **D= A +royalty**		475	475
50% limit of above referred royalty- **E = D x50%**		238	238
Less: royalty already paid		(125)	(125)
Tax on income	**F**	113	113
Applicable sum of taxes and payments to Government		E (238), being higher than B (193)	B (261), being higher than E (238)"

10. From perusal of the aforesaid working of the illustration, it reflects that the Applicants have based their calculation on the basis of a higher rate or the maximum cap of 50% of profits and gains, but while doing so, they are deducting the payment of royalty while working out the tax on income. On the other hand, it is the case of the Respondent department that when the calculation is being made on the basis of maximum cap of 55%

or either on 52% as is the case in some of the Agreements, the payments made to the Government on account of royalty cannot be deducted as it is not provided so clearly in the Agreement and so also in the 1948 Act. The contention of the Respondent's Counsel, to a certain extent, regarding the language implied in the 1948 Act, appears to be correct, as it provides that tax on income shall neither be more than 55% nor less than 50% of the profits or gains before deduction of payments made to the Government. Here the words ***"deduction of payments to the Government"*** have been provided in both situations i.e. the maximum cap of 55% and the minimum limit of 50% as well. However, the Agreements in question do not provide the words before deduction of payments to the Government insofar as the upper cap or limit of 55% is concerned. It seems that while drafting the Agreements, an attempt has been made to incorporate which is not exactly provided for, either in the 1979 Ordinance: nor in the 1948 Act. The Agreement has been drafted in a manner so as to provide an edge to the taxpayer; however, the wording in the Agreement do not exactly corresponds to the language employed in the 1979 Ordinance or for that matter in the 1948 Act. In that case, Section 4 of the 1948 Act would come into force which provides an overriding effect vis-à-vis. anything contained in any other *enactment* or in any *instrument* therefore, the working arrived at by the Applicants do not appear to be in consonance with the 1948 Act. Insofar as the 1979 Ordinance is concerned, though it refers to the Agreement between the parties; however, the said limitation is in relation to the aggregate of the tax on income and other payments which shall not exceed the limits provided for in the Agreement. It does not, in any manner, entitles the Applicants to incorporate anything in the Agreements which is not consistent with the provisions of the 1948 Act. One needs to bifurcate the two payments which are being made to the Government i.e. *tax on*

income and *other payments*. The protection provided is in respect of the aggregate of both, which shall not be less than 50% of the profits or gains before deduction of the payments to the Government. The rate of royalty and the tax on income are clearly provided in Part 2 to the Schedule of the 1948 Act, according to which it shall not be more than 55% nor less than 50% of the profits and gains before deduction of payments to the Government. Therefore, as and when any calculation is being made for the purposes of calculating any tax on any income, [**be it @ 50% or 55%** or any other agreed rate] it must be arrived at before deduction of payments to the Government. The only protection on the basis of the PCA's available to the taxpayers / Applicants is in respect of the aggregate of the *tax on income and other payments* to the Government, whereas, in terms of Rule 4(2) of Part I of the Fifth Schedule to the 1979 Ordinance, it is also provided that if aggregate of the taxes on income and payments to the Government is greater, or less than the amount provided for in the Agreement, an automatic adjustment in the form of further payment or an abatement of tax can be availed of; therefore, the argument that accepting the contention of the Respondents would create an absurd situation is misconceived. At best, if at all an excess payment is made, it is subject to Rule 4(2) ibid.

11. One needs to appreciate that the 1979 Ordinance only provides for limits vide Rule 4 of the First Schedule (Part-I) in respect of the aggregates. With that it also provides for a minimum rate for that aggregate; however, it clearly states that it shall not be less than 50% of the profits or gains before deduction of the payment to the Government. Now if the PCA's in the listed cases provide for a range of minimum (50%) and a maximum of (55%), then why the words *"before deduction of the payment to the Government"* would not be applicable to the maximum limit. Despite best efforts the Applicants Counsel

have not been able to rebut this argument and have instead made their best possible efforts to rely upon the wordings in the PCA's and the protection so provided therein. However, this does not suffice at all. The protection in PCA is dependent on the applicable laws. If something has not been provided in it, then it couldn't have been incorporated in the PCA's, whereas even otherwise, then the wording of the 1948 Act would be the law and shall prevail which caters to this clearly. It provides for both the rates i.e. the maximum as well as the minimum rates and states that taxes on income shall neither be more than 55% nor less than 50% of the profits or gains before deduction of *"payments to the Government"* referred to in clause 5 of Rule 6 of Part-1 of the Fifth Schedule to the Ordinance. This clearly provides that in both the situations i.e. while fixing the rates either at 50% or at 55%, it must be before deduction of payments to the Government; hence, there is no ambiguity insofar as the applicable law is concerned. As stated, it is only in the PCAs that some wording has been incorporated leading to this anomaly that this condition of before deduction of payments to the Government shall only be applicable to the minimum rate of 50%. Besides this no other interpretation is possible as contended on behalf of the taxpayers.

12. Insofar as reliance on Circular of CBR is concerned, that has outlived and is of no consequence. As rightly pointed out, after the issuance of this Circular in the year 1974, the law has gone through various amendments, including the Income Tax Ordinance, therefore, the observations in the said circular are no longer relevant. Moreover, it is needless to state that any such directions / opinion of FBR are not binding *per se* on the officers of the FBR performing *quasi-judicial* functions, at least not on the Tribunal as an Appellate Forum. Thus, in all those cases in which an officer exercises a quasi-judicial function, it is not bound by the instructions and directions or orders of the

board which interfere with its judicial discretion[9]. In this view of the matter, any interpretation placed by the Central Board of Revenue, on a statutory provision cannot be treated as a pronouncement by a forum competent to adjudicate upon such a question judicially or quasi-judicially[10]. It is well settled proposition of law that the Central Board of Revenue, or for that matter even the Federal Government, cannot control or curtail judicial adjudication power in the forums provided under the relevant law by giving a particular interpretation to a particular provision of the relevant law[11].

13. In view of hereinabove facts and circumstances of these cases, it is held that all the rates provided in the PCA's (i.e. 50% to 55%) are applicable on profits and gains before deduction of royalty. The proposed Question No. 2 is answered accordingly in favor of the department and against the taxpayers. ITRA Nos. 1237 & 1239 of 2008 filed by the department are hereby ***allowed***, whereas all remaining Reference Applications filed by the taxpayers stand ***dismissed***. Let copy of this order be sent to Appellate Tribunal Inland Revenue (Pakistan) at Karachi, in terms of sub-section (5) of Section 133 of Income Tax Ordinance, 2001. Office to place copy of this order in connected Reference Applications.

Dated: 21.08.2025

CHIEF JUSTICE

J U D G E

Arshad

[9] Assistant Director Intelligence v B.R.Herman (PLD 1992 SC 485)
[10] Central Insurance Company v The Central Board of Revenue (1993 SCMR 1232)
[11] The Central Board of Revenue v Sheikh Spinning Mills Ltd. (1999 SCMR 1442)