# IN THE HIGH COURT OF SINDH AT KARACHI

**SUIT No. 2013 of 2015**

M/s. A.F. Ferguson & Co. & others----------Plaintiffs.

Versus

Pakistan & others ----------Defendants.

**SUIT No. 2014 of 2015**

KPMG Taseer Hadi & Co & others----------Plaintiffs.

Versus

Pakistan & others ----------Defendants.

**SUIT No. 2287/2014**

M/s. A.F. Ferguson & Co. & others----------Plaintiffs.

Versus

Pakistan & others ----------Defendants.

**SUIT No. 2344/2014**

Ernst & Young Ford Rhodes Sidat Hyder
& others----------Plaintiffs.

Versus

Pakistan & others ----------Defendants.

**SUIT No. 2345/2014**

KPMG Taseer Hadi & Co & others----------Plaintiffs.

Versus

Pakistan & others ----------Defendants.

**SUIT No. 2514/2016**

M/s. A.F. Ferguson & Co. & others----------Plaintiffs.

Versus

Pakistan & others ----------Defendants.

**SUIT No. 2515/2016**

KPMG Taseer Hadi & Co & others----------Plaintiffs.

Versus

Pakistan & others ----------Defendants.

**SUIT No. 2516/2016**

Ernst & Young Ford Rhodes Sidat Hyder
& others----------Plaintiffs.

Versus

Pakistan & others ----------Defendants.

**SUIT No. 2276/2017**

Ernst & Young Ford Rhodes Sidat Hyder
& others----------Plaintiffs.

Versus

Pakistan & others ----------Defendants.

**SUIT No. 2277/2017**

KPMG Taseer Hadi & Co & others----------Plaintiffs.

Versus

Pakistan & others ----------Defendants.

**SUIT No. 2278/2017**

M/s. A.F. Ferguson & Co. & others----------Plaintiffs.

Versus

Pakistan & others ----------Defendants.

**SUIT No. -2452/2018**

KPMG Taseer Hadi & Co & others----------Plaintiffs.

Versus

Federation of Pakistan & others ----------Defendants.

**SUIT No. -2453/2018**

M/s. A.F. Ferguson & Co. & others----------Plaintiffs.

Versus

Federation of Pakistan & others ----------Defendants.

**SUIT No. -2454/2018**

EY Ford Rhodes & others----------Plaintiffs.

Versus

Federation of Pakistan & others ----------Defendants.

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| **Dates of hearing:** | **01.03.2019, 28.03.2019, 24.04.2019, 15.05.2019 & 30.05.2019.** |
| **Date of Judgment:** | **09.08.2019** |
| **Plaintiffs in all Suits:** | **Through Mr. Khalid Jawed Khan, & Mr Umar Akhund Advocates.** |
| **Defendants in all Suits:** | **Through M/s. Muhammad Aqeel Qureshi, Dr. Shah Nawaz, Kashif Nazeer, and Shahid Ali Advocates.** |
| **Federation of Pakistan:** | **Through Mr. Osman A. Hadi, Assistant Attorney General.** |

# J U D G M E N T

***Muhammad Junaid Ghaffar, J.*** All these connected Suits involve a common legal question and have therefore been heard together and are being decided through this common Judgment. Plaintiff No.1 in all these Suits are an Association of Persons / Firms registered under the Partnership Act, 1932, whereas, the remaining Plaintiffs are the partners of the said Firms. Similarly, Plaintiff No.1 in all these Suits are also registered as a Firm of Chartered Accountants under the Institute of Chartered Accountants of Pakistan Ordinance, 1961, ("**1961 Ordinance**"), whereas, the remaining Plaintiffs are also qualified Chartered Accountants and members of the Institute of Chartered Accountants of Pakistan under the 1961 Ordinance.

2. The precise case, as set up on behalf of the Plaintiffs is to the effect that in terms of Section 92 of the Income Tax Ordinance, 2001, ("**Ordinance, 2001**") there is no compulsion or restriction that it is only the Firm which can file its return and pay taxes on the income, as at the same time the partners of the Firm are also eligible and or qualified to file their return and pay the income tax accordingly. And in that situation, the Firm is not liable to pay any tax on the income so earned on which the Partners have already

paid the tax. The first set of Suits was filed in the year 2014, wherein, certain ad-interim orders were passed, and subsequently for each year thereafter, fresh Suit(s) were filed for seeking similar orders in respect of each subsequent tax year.

3. Learned Counsel for the Plaintiffs has contended that this Court has to decide that whether there is any provision in the Income Tax Ordinance, 2001, which prohibits the Plaintiff partners of the Plaintiff No.1 firms from filing their individual Income Tax Returns for their total income including receipts by way of their respective shares from the firm and pay taxes thereon; and if the answer to be above question is in the negative, then no such prohibition could be implied in law as there is no question of any tax by implication. Per learned Counsel Lack of enabling machinery provision, if any, for filing such returns by the parties, could not have the effect of implying a prohibition in substantive law, which is otherwise not specifically provided by the legislature as the machinery provisions are to be construed liberally as they are there to facilitate enforcement of substantive law and not the other way round. According to him, the Plaintiffs case is that this Hon'ble Court may be pleased to read Section 92(1) of the Ordinance, 2001 plainly, and without adding or deleting any word into or from it. Per learned Counsel the effect of the departmental contention is that this Hon'ble Court should ignore the words **"**anywhere**"** purposefully used by the legislature in Section 92(1) and also read the section as prohibiting the partners of the firms from filing their tax returns and pay taxes on their receipts from the firm. He has further contented that the department has not contested the fact that although the firm and its partners are to be treated as distinct persons for the purposes of the Ordinance, 2001, but income in the hands of both has never been and cannot be taxed simultaneously. According to him historically income in the hands of firms was always exempt; while the partners were to pay the tax; and notwithstanding an amendment / deletion of certain provisions from 2003 to 2007, the Plaintiffs' case is that it still remains the same, and this Court must read Section 92(1) as providing for one contingency; namely where the firm pays the tax, the partners are exempt without prohibiting the other contingency

of vice versa i.e. where, as in past, the partners paid the tax, the same income in the hands of the firm was not to be taxed. According to him, the words **"**anywhere**"** used in Section 92(1) cannot be ignored or treated as redundant, as the only purpose of the same is to provide for consequence of the first contingency. He has further made an effort to read Section 92(1) by breaking it into two parts i.e. (i) 'an association of person shall be liable to tax separately from the members of the association hand; and (ii) anywhere the association of persons has paid the tax the amount received by a member of the association in the capacity as member out of the income of association shall be exempt from tax'. Per learned Counsel Section 92(1) lays down the principle of taxation of association of persons and provides that: (a) A.O.P./Firm shall be 'liable' to tax separately from its members; (b) Any amount received by a partner from the firm out of the income of the firm shall be exempted from tax in the hands of a partner. According to him, resultantly, firm and its members are to be treated as two separate and distinct persons for the purposes of the Ordinance, 2001 despite the fact that in law (Partnership Act, 1932) they are not separate and distinct persons; whereas, the common income in the hands of these two distinct persons i.e. the firm and the partners shall be taxed only once; and finally, where the firm has paid the tax, income in the hands of its partners shall be exempt. He has also read out the omitted provisions of Section 92(2) to (5) and Section 93 of the Ordinance, 2001, as existing before their repeal vide Finance Act, 2007, according to which Section 92(1) was made inapplicable to professional firms such as the Plaintiff No.1; with the consequence that though the firm was liable to furnish return of total income for each tax year; it was not liable to pay any tax; instead, its income was taxed in the hands of its respective partners as per Section 93. Per learned Counsel, thus, insofar the Plaintiffs are concerned, it is their case that the law was substantially the same until 2007, as it existed under the Ordinance, 1979. According to him, the Plaintiffs case is that the repeal of Sections 92(2) to (5) and 93, vide the Finance Act 2007, did not introduced any change in law necessarily compelling the firms to file its income tax return and pay the tax exempting the income from the firm in the hands of its respective partners, as it

can still be applied and operated vice versa. As to the objection of the Defendants that Plaintiff firms, having paid tax as per the departmental interpretation for few years since 2007, are barred from challenging that interpretation later on, he has contended that the same is misconceived as the taxpayer can challenge the law or its interpretation at any time as there is no estoppel against the law, whereas, even otherwise, in tax law, every tax year is a separate transaction and the preceding year is no binding precedent for the subsequent years. Per learned Counsel Section 92(1) even post 2007, merely provides the contingency where the firm decides to pay the tax, as there is no specific bar under the Ordinance, 2001 restricting the partners from filing return and paying tax on receipts from the firm, and once they have paid the tax, the same amount of income could not possibly be taxed against the firm, as the Ordinance, 2001 while treating the firm and its partners as distinct persons, taxes income only in the hands of one. According to him, the firm and its partners have to file independent tax returns; thus, Plaintiff partners are entitled to file their respective tax returns and pay the tax on receipts from the firm as well as other income, if any and in support he has relied upon the case reported as ***Muhammad Zafar Iqbal V. the Secretary Revenue Division, Islamabad (2017 P T D 1405).*** He has further argued that the nature of tax would not change due to machinery provisions by merely providing the manner and time of its collection and for this he has relied upon the cases of ***Messrs Al-Haj Industrial Corporation (Pvt.) Ltd. Peshawar V. Collector of Customs (appraisement), Customs House, Karachi (2004 P T D 801)*** and ***Messrs Hashwani Hotels Limited through Executive Director V. Government of Pakistan through Secretary Ministry of Finance, Islamabad and 5 others (2004 P T D 901).*** According to him the Court is to read and apply the plain language and letter of law as it is; as nothing is to be implied, read into or presumed, nor any words of the statute can be ignored or treated as redundant and the Court is not to fill in any gap or read restrictions into the statute which are otherwise not specifically provided therein and in support he has referred to the cases of ***Commissioner of Income Tax Legal Division, Lahore V. Khursheed Ahmed (P L D 2016 SC 545), Messrs Pakistan***

***Television Corporation Limited V. Commissioner Inland Revenue (Legal), LTU, Islamabad and others (2017 P T D 1372), Messrs Pakistan Television Corporation Limited V. Commissioner Inland Revenue (Legal), LTU, Islamabad and others (2017 S C M R 1136), Artistic Denim Mills Ltd. V. Federal Board of Revenue and others (2017 P T D 730) and Oxford University Press V. Commissioner of Income Tax, Companies Zone-I, Karachi and others (2019 S C M R 235).*** Per learned Counsel to bring a subject to charge and levy, the burden is upon the Revenue to establish that the said subject is chargeable to tax, and once such burden is discharged, only then the onus shifts to the taxpayers, whereas, on facts, the Revenue has failed to point out any provision prohibiting the partners from filing their returns and paying tax on receipts from the firm, and in support of this he has relied upon ***Collector of Sales Tax and Federal Excise v. Messrs Abbott Laboratories (Pakistan) Ltd. Karachi (2010 P T D 592).*** He has further argued that a fiscal statute has to be construed liberally in favour of the taxpayer and the interpretation which is beneficial to the taxpayer should be adopted and not the other way round as contended by the Department and in support he has referred to ***Messrs Mehran Associates Limited V. The Commissioner of Income Tax, Karachi (1993 S C M R 274 at 286), Commissioner of Income Tax V. Messrs Gilani Transport Company (2017 P T D 1540) and Messrs Pakistan Television Corporation Limited V. Commissioner Inland Revenue (Legal), LTU, Islamabad and others (2017 S C M R 1136 at 1146).*** Per learned Counsel once an income is received and taxed in the hands of either the partners or the firm; it cannot be taxed in the hands of the other and to support this proposition he has referred to the case of ***Pakistan Industrial Development Corporation V. Pakistan through the Secretary, Ministry of Finance (1992 S C M R 891), Joti Prasad Agarwal and others v. Income Tax Officer (B) Ward Mathura (A I R 1959 Allahabad 456 at 458) (Para 4), The Commissioner of Income Tax U.P. Lucknow V. The Kanpur Coal Syndicate, Kanpur (A I R 1965 SC 325 at 326) and The Commissioner of Income Tax Bombay, South Poona V. Murlidhar Jhawar and Purna Ginning and Pressing Factory,***

***Dharmabad (A I R SC 1536 at 1537).*** He has also argued that a taxpayer is entitled to arrange his tax affairs in a manner so as to reduce his tax burden, and in this context he has relied upon the case of ***Commissioner of Income Tax V. Omprakash Premchand & Co. (1999 P T D 1814).*** He has also contended that there is no estoppel against the law as held in the cases of ***Messrs X.E.N Shahpur Division (LJC) Quarry Sub-Division, Sargodha V. The Collector of Sales Tax (Appeals) Collectorate of Customs Federal Excise and Sales Tax Faisalabad and others (2016 S C M R 1030 at 1036) and Pakistan Industrial Development Corporation V. Pakistan through the Secretary, Ministry of Finance (1992 S C M R 891).*** Finally, through his written synopsis he has submitted, without prejudice to the foregoing, that in the event this Court is not convinced of the submissions of the Plaintiffs and not inclined to read the statute in the manner as advanced by the Plaintiffs, and instead inclined to agree with the departmental interpretation, then since under the orders of this Hon'ble Court, the Plaintiff partners had filed their respective income tax returns and paid taxes accordingly while the Plaintiff firms had only filed returns but not paid tax; therefore, this Court may be pleased to order that no adverse consequence, proceedings or inference may follow or be drawn against the Plaintiffs and any amount of tax found due, shall be paid by the Plaintiff firms.

4. Mr. Muhammad Aqeel Qureshi, Advocate appearing on behalf of some of the Defendants has contended that the contention of the Plaintiffs' Counsel is not tenable in law inasmuch as Section 92 (ibid) clearly provides that the tax, if any, has to be paid by the Firm and once this has been done; then the partners are not required to pay any further tax on such income of the Firm. According to him after amendment in the year 2007, the Plaintiffs have been filing Returns on behalf of the Firm and taxes were being paid also by the Firm but now an attempt has been made to avoid payment of super tax, which is applicable on the Firm from tax year 2014 onwards.

5. Mr. Shahid Ali, Advocate also appearing on behalf of the Defendants has referred to Section 80(2) of the Ordinance, 2001 and has argued that this being a Special law would override the Partnership Act as well as the 1961 Ordinance, whereas, from 2007 till 2014, the Plaintiffs had no issue and Returns were being filed by the Firm itself and tax was being paid accordingly. Per learned Counsel, the Plaintiffs have made an attempt to seek protection and a vested right under the repealed provisions of the Ordinance 2001, which is no more on the Statute; hence, no such claim can be maintained. He has also relied upon the case reported as ***JDW Sugar Mills Limited v Province of Punjab*** (**PLD 2007 Lahore 68**).

6. Dr. Shah Nawaz, Advocate also appearing for the Defendants has contended that it is the Firm in the terms of Section 80 of the Ordinance, 2001, which is liable to pay taxes and once it has been done, the partners are exempted from any tax on such income; but in any case, it cannot be done vice-versa, as contended by the Plaintiffs. According to him in law, there is no provision to apply the same conversely.

7. Mr. Kashif Nazeer also appearing for the Defendants has referred to Section 2(10) of the Ordinance 2001 and has contended that it is the Firm, which has to pay tax first and no other possibility arises out from a literal interpretation of the relevant provisions of the Ordinance 2001. Per learned Counsel, the earlier provisions stand repealed and are no more available to the Plaintiffs, whereas, a clear intention has been shown by the Legislature to do away with the earlier provisions; hence the Plaintiffs' case has no merits. He has further argued that the Plaintiffs had no issue from 2007 to 2014 during which the Plaintiff No.1 in all these Suits i.e. the Firm, was paying taxes, whereas, the partners were exempt from any tax on such income; but as soon as a new tax i.e. super tax was introduced from tax year 2015, the stance of the Plaintiffs has changed, and they have approached this Court to apply the law conversely, which is impermissible.

8. Learned Assistant Attorney General has read out the provisions of Section 2(26) and 32 read with Section 80 of the Ordinance 2001 and has contended that as against the 1979 Ordinance, the 2001 Ordinance has been expanded, whereas, it is settled law that the Special Law would prevail upon the General Law, and therefore, the Plaintiffs cannot draw any exception from the Provisions of 2001 Ordinance. He has further argued that the Plaintiffs in fact want this Court to legislate and apply the law as contended, which according to him is impermissible, whereas, according to him, it is the firm, which is receiving the money and income; hence, the liability to pay tax will also be on the Firm first and not the partners of the Firm. In support of his contention he has relied upon the cases of ***Income Tax Officer v. Akbar Gul*** reported as **2018 PTD 1664**, ***Gulistan Textile Mills Ltd. and another v. Soneri Bank Ltd. and another*** reported as **2018 CLD 203**, ***Askari bank Limited v. DCD Services Limited and 3 others*** reported as **2018 CLD 799**, ***Arshad Mahmood v. Secretary Education*** reported as **1992 PLC 1044**, ***Dr. Zahid Javed v. Dr. Tahir Riaz Chaudhry and others*** reported **PLD 2016 Supreme Court 637** and ***District Bar Association, Rawalpindi and others v. Federation of Pakistan and others*** reported as **PLD 2015 Supreme Court 401.**

9. I have heard all the learned Counsel and perused the record with their assistance. As stated Plaintiff No.1 in all Suits are partnership firms registered under the Partnership Act, 1932, and the 1961 Ordinance, while the remaining Plaintiffs are Chartered Accountants governed by the said Ordinance. It appears that pursuant to Section 23 of the 1961 Ordinance, no company, limiting the liability of its members, whether incorporated in Pakistan or elsewhere, shall practice as Chartered Accountants, with the result that it is only a Partnership status which can be availed by such a firm. The case of the Plaintiffs is that though in terms of s.92 ibid, it is the firm which has to file its return and pay the tax; however, at the same time there is no limitation or prohibition, if the partners after receiving the income from the firm, file their respective returns and pay the tax on such income received from the firm. According to them in each situation the

income has to be taxed once; either on the income of the firm or on the income of the partners. It further appears that after promulgation of the Ordinance, 2001 and till 2007, s.92 was more or less in that same position as that of s.68 of the 1979 Ordinance, (since repealed). Under this, sub-section (1) of s.92 was not applicable to an association of persons i.e. a professional firm (Plaintiffs No.1 and the likes) which were otherwise prohibited from incorporation under any law or the rules of the body regulating their profession. It was further provided that an association of persons shall not be liable to tax and the income of the association shall be taxed to the members on accordance with s.93 ibid. This taxation measure continued till 2007 and thereafter the law was amended as is under challenge now. It further appears that the Plaintiff No.1 in all Suits, during this period kept on filing their tax returns as per the amended provision of s.92; but in the year 2014 filed Suit before this Court claiming relief to the effect that the inverse of what has being provided in s.92 is also permissible and by way of interim relief in all these Suits, this Court restrained the Defendants from demanding or raising tax liability from Plaintiff No.1 / firms while their partners were permitted to file their returns and pay tax as required under the law. It was further ordered that they were to first file their returns electronically and in case the same was not accepted, they were allowed to file the same manually, whereas, this continued for the subsequent years as well. The precise case of the Plaintiffs is to the effect that it is their choice to pay tax either by the Firm or by the Partners and once it is paid by the partners, the Firm is not liable to pay any tax. Since only a legal controversy is involved, by consent, on 29.11.2018, the following legal Issues were settled for adjudication in terms of Order 14 Rule 2 CPC, and the same reads as under:-

i. Whether the Suit is maintainable?

ii. Whether Section 92 of the Income Tax Ordinance, 2001, providing for separate taxation of Association of Persons is inapplicable to firms/registered partnerships including the Plaintiff No.1?

iii. Whether the erstwhile Sub Section (2) of Section 92 of the Income Tax Ordinance, 2001, being in the nature of mere clarificatory provision, its omission vide Finance Act, 2007, was immaterial insofar as professional firms prohibited from incorporating under the law were concerned and such firms including the Plaintiff No.1 continued to be excluded from the

purview of Sub Section (1) of Section 92 of the Income Tax Ordinance, 2001?

iv. Whether a registered firm such as the Plaintiff No.1 could lawfully be included in the definition of or otherwise treated as "Association of Persons" for the purpose of levy and recovery of income tax under of the Income Tax Ordinance, 2001?

v. Whether the Plaintiff No.1 is a person within the ambit of Income Tax Ordinance, 2001 in terms of Section 80(2)(a) & (c)?

vi. Whether inclusion of "profession or vocation" in the definition of "business" under Section 2(10) of the Income Tax Ordinance, 2001 is lawful and constitutional and could lawfully result in levy of tax on profession or vocation under provisions where tax is leviable only on "business" under the relevant provisions of the Income Tax Ordinance, 2001?

vii. Whether the Plaintiff No.1 is liable to pay income tax under the provisions of the Income Tax Ordinance, 2001, when all its partners/Plaintiffs No.2 onwards are individually paying income tax respectively under the provisions of the Income Tax Ordinance, 2001?

viii. What should the decree be?

Since all the Issues are interlinked and require interpretation of Section 92 of the Ordinance 2001, therefore, they are being decided through this common judgment collectively.

10. To have a clear and better understanding of the controversy in hand, it would be advantageous to refer to the relevant provisions of Sections 80 which defines an association of persons and firm, s.92 as well as repealed provisions of s.92 of the Ordinance, 2001, which reads as under:-

**80. Person.--**(1) The following shall be treated as persons for the purposes of this Ordinance, namely:--

(a) An individual;

(b) a company or association of persons incorporated, formed, organized or established in Pakistan or elsewhere;

(c) the Federal Government, a foreign government, a political subdivision of a foreign government, or public international organization.

(2) For the purposes of this Ordinance—

(a) **"association of persons" includes a firm, a Hindu undivided family, any artificial juridical person and any body of persons formed under a foreign law, but does not include a company;**

(b) "Company" means—

(i) a company as defined in the Companies Ordinance, 1984 (XLVII of 1984);

(ii) a body corporate formed by or under any law in force in Pakistan;

(iii) a modarba;

(iv) a body incorporated by or under the law of a country outside Pakistan relating to incorporation of companies;

[(v) a co-operative society, a finance society or any other society;]

[(va) a non-profit organization;

(vb) a trust, an entity or a body of persons established or constituted by or under any law for the time being in force;] (vi) a foreign association, whether incorporated or not, which the 3[Board] has, by general or special order, declared to be a company for the purposes of this Ordinance;

(vii) a Provincial Government; 4[* * *1

(viii) a 1[Local Government I in Pakistan; 2[or]

3[(ix) a Small Company as defined in section 2;]

(c) **"firm" means the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all:**,

(d) "trust" means an obligation annexed to the ownership of property and arising out of the confidence reposed in and accepted by the owner, or declared and accepted by the owner for the benefit of another, or of another and the owner, and includes a unit trust; and

(e) "unit trust" means any trust under which beneficial interests are divided into units such that the entitlements of the beneficiaries to income or capital are determined by the number of units held.

**92. Principles of taxation of associations of persons.**--(1) 1[***] **an association of persons shall be liable to tax separately from the members of the association and any 2[where the association of persons has paid tax the] amount received by a member of the association in the capacity as member out of the income of the association shall be exempt from tax 3[:]**

4[Provided that if at least one member of the association of persons is a company, the share of such company or companies shall be excluded for the purpose of computing the total income of the association of persons and the company or the companies shall be taxed separately, at the rate applicable to the companies, according to their share.]

*5[***]*

**Repealed provisions of s.92**

*Sub-sections (2), (3), (4) and (5) omitted by the Finance Act, 2007 (1V of 2007) (Assented on: 30th June, 2007), reported as PTCL 2007 BS. 274. At the time of omission sub-sections (2), (3), (4) and (5) were as under—*

*"[1][(2) Sub-section (1) shall not apply to an association of persons that is a professional firm prohibited from incorporating by any law or the rules of the body regulating the profession]*

*(3) An association of persons to which subsection (2) applies shall not be liable to 'tax and the income of the association shall be taxed to the members in accordance with section 93.*

*(4) An association o persons referred to in sub-section (3) shall furnish a return of total income for each tax year.*

*(5) Sections 114, 118 and 119 shall apply to a return of total income required to be furnished under sub-section (4)."*

11. Perusal of Section 80 (2) (a) provides that for the purposes of this Ordinance association of persons includes a **firm**, a Hindu undivided family, any artificial juridical person and any Body of persons formed under a foreign law, but does not include a company. Whereas, Subsection 2(c) defines "**firm**" which means the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all. Section 92 of the Ordinance 2001 deals with the Principles of taxation of association of persons and provides that they shall be liable to tax separately from the from the members of the association and any [1][where the association of persons has paid tax the] amount received by a member of the association in the capacity as member out of the income of the association shall be exempt from tax. Subsections (2) to Subsection (5) of Section 92 of the Ordinance 2001, since omitted have already been discussed hereinabove.

12. The Plaintiffs' contention as reflected from the arguments of the learned Counsel appearing on their behalf is twofold. First, it is their case that Section 92 does not prohibits the partners from paying taxes on their income as against the same by the firm. According to him the inverse of what is provided in s.92 is also permissible as not being prohibited or restricted. In support of this he has placed much reliance on the use of the words "where the association of person has paid tax", and therefore, according to him, if the partners have paid the tax, the liability of the Firm does not remain in field. It has been further argued by him that per

[1] Inserted by Finance Act, 2003.

settled law, the income in this matter, if any, is to be taxed only once and not twice; hence, once the partners have paid the tax, the Firm is not required to pay any such tax. The second limb of his argument is to the effect that notwithstanding the repeal / omission of Subsection (2) to Subsection (5) of Section 92 of the Ordinance 2001, the same can still be applied to the case of the Plaintiffs, inasmuch as the Plaintiff No.1 i.e. the Firm in all these Suits is still prohibited from incorporation by law i.e. 1961 Ordinance, and therefore, till such time the prohibition continues in the 1961 Ordinance, their taxability could not be changed or altered and the procedure of payment of tax by the partners must continue. According to him, this restriction of Professional firms leaves them exposed to various liabilities (as they cannot become limited liability companies); hence, this benefit of taxing the partners on the share of income received from the firm has to continue. However, with utmost respect, I am of the view that this would defeat the intention of the legislature and would rather amount to do legislation in favour of the Plaintiffs. The law, as stands today, clearly provides as to in what manner, the principle of taxation would be applied on an association of persons. A specific provision is there in the Ordinance 2001, which deals with the taxability of an Association of persons i.e. the Plaintiff No.1 in all these Suits and it states that the Association of persons shall be liable to tax separately from the members of Association and then it goes on to say, that any [where the Association of persons has paid tax the] amount received by a Member of an Association in the capacity as member out of income of the Association shall be exempt from tax. A literal and plain reading of this provision clearly provides that it is the Firm, which shall be taxed first; and once this has been done and tax has been paid, the partners or the Members of the Association of persons would then not be liable to pay any tax on the said income or the amount received by them as members or the partners from the Firm. This has been spelt out in clear terms that it is the firm, which has to be taxed first. There is no provision for applying this principle of taxation as provided in Section 92 (ibid) conversely, as argued, that if tax has been paid first by the partners or members on the amount received by them as income from the Firm, then the liability of the Firm to pay tax goes away. It

is also noteworthy that from 2007 to 2014, admittedly, the Plaintiffs had no issue by the repeal / omission of Subsection (2) to Subsection (5) of Section 92(ibid) and it was never challenged. Why the need wasn't there?. To this an argument has been raised on behalf of the Plaintiff that this delay, if any, cannot deprive them from challenging the vires of law at any moment of time, as there is no Estoppel against the law. To this, it may be observed that there is no cavil to such a proposition; however, when the facts and circumstances of the case in hand are read and examined in juxta-position to the challenge now being made by the Plaintiffs, it appears that it is not a mere challenge to the provisions of Section 92 (ibid); but there is a reason for this delay in such challenge, inasmuch as from tax year 2015 onwards in terms of Section 4(B) of the Ordinance 2001, a new tax has been introduced known as "super tax" for rehabilitation of temporarily displaced persons at the rate specified in Division IIA of Part-I of the First Schedule to the Ordinance, and a person other than a Banking Company having income equal to or exceeding Rs.500 Million has to pay Super Tax. Apparently the income of Plaintiff No.1 in all these cases i.e. the Firm is now liable to such super tax. This delay in challenging the vires of s.92 and the conduct of the Plaintiffs in this matter appears to be, to avoid payment of super tax by Plaintiff No.1 as the total income of the Firm is liable to such super tax; but when the income of the Firm is divided / distributed amongst the remaining Plaintiffs i.e. the partners, the liability of paying super tax no more remains in field; hence for this reason the Plaintiffs have made an attempt to challenge the vires of law and seek an interpretation of Section 92 to be applied conversely. In these peculiar facts and circumstances of case, the conduct of the Plaintiffs does not support this argument and to say that there is no estoppel against the law. It is in fact the attempt to avoid the payment of super tax by the Firm which has given rise to filing of these Suits, and to seek an interpretation as prayed. If the challenge had been otherwise, i.e. without their being any implication and / or avoidance from any super tax liability; then perhaps, the argument that there is no estoppel against the law could have had any weightage, but not in the given facts and circumstances as noted hereinabove.

13. It is also a settled proposition of law that the Courts are to interpret the law as legislated by the Legislature. The Courts are not required to either legislate by themselves, or add any words to the Statute. The Legislature in its own wisdom has omitted the provisions of Subsection (2) to Subsection (5) of Section 92 in the year 2007, and has now required the Firm to pay the tax first, instead of the partners as provided earlier, and therefore, this Court cannot hold that the omission of Sub-Sections (2) to (5) of s.92 was merely clarificatory in nature, and such omission is immaterial, and further that despite such omission, insofar as Plaintiff No.1 or the like professional firms are concerned, they are still excluded from applicability of sub-section (1) of s.92 ibid. Further this Court cannot interpret the present provisions of Section 92 in a manner as is being contended by the Plaintiffs (i.e. it is also validly applicable inversely) as this would amount to defeat the very intent and the purpose of the amended legislation. Courts are only required to interpret the Statue and not to add and / or delete any provision in the Statute. It is a settled principle of interpretation that while interpreting a specific provision of a statute, the intent of the legislature and the language employed is determinative of the legislative intent and the Courts have to interpret the same while keeping such intention in mind. In interpreting a penal or taxing statute the Courts must look to the words of the statute and interpret them in the light of what is clearly expressed. It cannot imply anything which is not expressed; it cannot import provisions in the statute so as to support assumed deficiency[2]. A statute is an edict of the Legislature and the conventional way of interpreting or construing a statute is to seek the 'intention' of its maker. If a statutory provision is open to more than one interpretation the Court has to choose that interpretation which represents the true intention of the Legislature. It is settled law that the function of the Courts is only to expound and not to legislate.

[2] [Collector of Customs (Appraisement) v. Abdul Majeed Khan & Others *1977 SCMR 371*].

14. It may also be noted that the relationship between Plaintiff No.1 and other Plaintiffs, in all these Suits, is admittedly that of an association of persons. Section 2(6) of the Ordinance states that an association of persons means an association of persons as defined in Section 80, whereas, Section 80(2)(a) provides that for the purposes of this Ordinance "association of persons" includes a firm, whereas, Section (2)(c) states that "firm" means the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all and lastly Section 2(10) of the Ordinance defines "business", which includes any trade, commerce, manufacture, **profession**, vocation or adventure or concern in the nature of trade, commerce, manufacture, profession or vocation, but does not include employment. From an overall reading of above definition(s), it clearly emerges that for the purposes of taxation, the relationship between Plaintiff No.1 and the remaining Plaintiffs is that of an association of persons and for which the taxation principles or methodology has been expressly provided in Section 92. According to this Section, the association of persons shall be liable to tax separately from the members of the association and any [where the association of persons has paid the tax the] amount received by a member of an association in the capacity as member out of income of the association shall be exempt from the tax. Learned Counsel for the Plaintiff has made an attempt to take advantage of the "any-where" in sub-section (1) of s.92 and has contended that this use of the words makes it optional, either for the firm, or the partners to pay tax; and once it has been done, the vice-versa would be exempt from any further tax. Before this could be responded to, it must be taken note of that the words [**where the association of persons has paid tax the**] were inserted through Finance Act, 2003, and its intention appears to be that once a tax has been paid by the association of persons, the members and or partners are then not liable to pay any tax on the amount received as income from the firm. At the outset it must be noted that this insertion has no nexus with the repeal / omission of sub-section (2) to (5) of s.92 which was done in 2007 i.e. much later on. Before 2003, the sub-section (1) read as ["Subject to sub-section (2)] an association of persons shall be liable to tax separately from the members of the association and any amount received by a member of the association in the

capacity as member out of the income of the association shall be exempt from tax. In this un-amended provision, it was provided that the association of persons shall be liable to pay tax separately from the members and any amount received by a member from the association of persons shall be exempt from tax. However, it provided an exemption to a member without there being a requirement for the association of persons to pay tax on such income first. This anomaly was clarified that the exemption to the member or the partner is only available when the firm or the association of persons has first paid the tax on the total income of the firm out of which the member has received its share as income. Only then the member was exempt. It appears that the Plaintiffs' Counsel has tried to take advantage of the use of the words "***any-where***" by reading it together conjunctively. It is his case that if *anywhere* the tax has been paid, by either of the firm or the partners; the other remainder has no further liability. However I am of the view the words "***any***" and "***where***" are not to be read together, as contended by the learned Counsel for the Plaintiffs. It is to be read separately and disjunctively and may be, it is an error on the part of the draftsman while carrying out the amendment through Finance Act 2003 as apparently word "***any***" is redundant and superfluous after such amendment and was only relevant until the words ***[where the association of persons has paid tax the]*** were inserted; hence no advantage in this manner can be taken by the Plaintiffs. This presence of word "any" even after the amendment in 2003, whereby, the words (***where the association of persons has paid tax the)*** were inserted, has to be read keeping in consideration such insertion. It is not there to read it conjunctively as "*anywhere*" as the word "***any***" was even there on the statute before 2003. In no manner Sub-section (1) of Section 92 can be read or interpreted, so as to agree with the contention of the Plaintiffs' Counsel, whereby, he has argued that either the association of persons or the partners can pay their taxes, as firstly, there is no prohibition or restriction to that effect; and secondly and if it is so, then association of persons would not be liable to pay any further tax. This appears to be a far-fetched attempt on the part of the Plaintiffs' Counsel and this Court is unable to agree with such argument.

15. Lastly, learned Counsel for the Plaintiffs also made an attempt to argue that now pursuant to ad-interim orders of this Court, the Partners or members have filed their returns and paid the tax accordingly, and therefore, no liability accrues against the firm or Plaintiffs No.1 anymore. It is a matter of record that when Plaintiffs came before this Court, ex-parte ad-interim orders were passed, whereby, as an interim measure, the partners were permitted to file their returns and pay the tax accordingly, whereas, the Plaintiff No.1 in all Suits i.e. the association of persons were protected from any coercive measures, which may have been adopted by the department. While arguing the case, an attempt was also made by the learned Counsel for the Plaintiff that now partners have already paid the tax on the income so generated by Plaintiff No.1, in all Suits; hence, there would not be any further liability to pay tax on the firm. However, it needs to be appreciated that any order passed by this Court as an ad-interim measure, does not become final until it is so decided finally. The plaintiffs cannot under the garb of an ad-interim order given to them as prayed, seek any protection, nor the same can be used as a shield for protecting them from any final liability, which may arise as a consequence of final dismissal of the injunction applications. It is but natural that such ad-interim orders are subject to finality; hence this argument is also misconceived and is hereby repelled.

16. There is also another aspect of the matter that prior to Finance Act, 2019, un-amended Section 139 of the Ordinance, 2001 did not cater for any situation, if the association of persons had failed to pay any tax as against the members of the association. It only provided where any tax payable by a partner in respect of his share of the income of the firm cannot be recovered from him, the firm shall be liable for the tax so due. Subsection (4) of Section 139 of the Ordinance, prior to Finance Act, 2019, had provided as under:-

> "(4) Notwithstanding anything in any law, where any tax payable by a member of an association of persons in respect of the member's share of the income of the association in respect of any tax year cannot be recovered from the member, the association shall be liable for the tax due by the member."

17. Now through Finance Act, 2019, two new Sub-sections namely Sub-section (5) and Sub-section (6) to Section 139, have been inserted. The amendment brought through Finance Act 2019 now reads as under:-

> "(27) in section 139, sub-section (5) shall be re-numbered as sub-section (7) and after sub-section (4), the following new sub-section shall be inserted, namely:-
>
> "(5) Notwithstanding anything contained any other law, for the time being in force, where any tax payable by an association of persons in respect of any tax year cannot be recovered from the association of persons, every person who was, at any time in that tax year, a member of the association of persons, shall be jointly and severally liable for payment of the tax due by the association of persons.
>
> (6) Any member who pays tax under sub-section (5) shall be entitled to recover the tax paid from the association of persons or a share of the tax from any other member."

18. Perusal of the aforesaid amendment reflects that now where any tax payable by an association of persons in respect of any tax year cannot be recovered from the association of persons, every person who was, at any time in that tax year, a member of association of persons, shall be jointly and severally liable for the payment of tax due to the association of persons, whereas, in terms of Sub-section (6) of Section 139 any member who pays the tax under Sub-section (5) shall be entitled to recover the tax paid from the association of persons or a share of a tax from any other member. Though apparently their appears to be no direct nexus of this amendment with the controversy in hand; but nonetheless insofar as passing of ad-interim orders in this matter are concerned, it has some benefit to the partners of Plaintiff No.1, who have already paid the tax and if ultimately the liability is determined against Plaintiff No.1, the liability of the partners could be settled and or adjusted as they have already paid the tax on the income of the firm. In fact this amendment now creates a balance between the liability of the firm as well as the partners against each other. Moreover, in the written arguments the Plaintiffs' Counsel has undertaken that if the Court does not agree with their contention, the Plaintiff No.1 would pay the tax accordingly.

19. The upshot of the above discussion is that in terms of s.92 it is only the association of persons or the firm which has to file its return of total income and pay the tax accordingly, and not the partners individually in respect of the income received from the association of persons or the firm. Once the tax is paid by the firm, then the partners are not required to pay any tax on such part of the income on which tax has already been paid; however, they are required to file independent return and pay tax on the other income, if any. There is no other interpretation and or understanding of s.92 ibid which can be arrived at or inferred by this Court, including, the inverse of what has been provided therein. Accordingly the issues are answered in the following terms;

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| Issue No.(ii) | negative |
| Issue No.(iii) | negative |
| Issue No.(iv) | affirmative |
| Issue No.(v) | affirmative |
| Issue No.(vi) | affirmative |
| Issue No.(vii) | affirmative |
| Issue No.(viii) | Suit(s) dismissed. |

20. Insofar as issue No.1 regarding maintainability of these Suits is concerned, though after having come to the conclusion that on merits all these Suits are to be dismissed; but nonetheless, this issue is also to be answered, as Civil Suit before this Court can now only be maintained before this Court if 50% of the disputed amount is paid to the department as laid down by the Hon'ble Supreme Court in the case reported as ***Searle IV Solution (Pvt.) Limited v Federation of Pakistan*** (**2018 SCMR 1444**). After passing of the above judgment by the Hon'ble Supreme Court, in all these cases office had raised an objection to this effect and on 18.10.2018 the following order was passed by deferring such aspect of the case.

1) For hearing of CMA No. 15150/2015.
2) For orders on maintainability of this Suit (vide Hon'ble Court's order dated 29.10.2015.)

**18.10.2018.**
Mr. Khalid Javed Khan Advocate for Plaintiff.

Mr. Umar Zad Gul Kakar DAG.
Dr. Shah Nawaz Advocate for Defendant.
Mr. Kashif Nazeer Advocate for Defendant.
Mr. Shahid Ali Advocate holding brief for
Mr. Amjad Javed Hashmi Advocate for Defendant
in Suit No. 2345/2014.

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Counsel for Defendant in Suit No. 2278/2017 has filed a statement detailing out the alleged outstanding amount against the Plaintiff in all connected Suits fixed today. Such claim is vehemently disputed on behalf of the Plaintiff. On perusal of the record, it reflects that when these Suits were filed there is no calculated demand against the Plaintiff, whereas, there are numerous Plaintiffs in these cases and except the partnership firm those are filing their returns and paying tax therefore, in this view of the position, the question as to maintainability of Suit and the deposit of 50% amount would be taken up along with main Suit. Since a legal controversy is involved, all learned Counsel are directed to come prepared with proposed legal issues on the next date whereafter, the entire Suit would be heard and decided in terms of Order 14 Rule 2 CPC.

To come up on 15.11.2018 at 11:00 A.M. Interim order if any, to continue till the next date. Office is directed to place copy of this order in all above connected matters.

21. Now this Court has come to the conclusion that Plaintiff No.1 in all these Suits i.e. the firm was required to file its return and pay the tax accordingly; whereas, Plaintiff No.1 in these Suits have not deposited any such amount, and therefore, on this count also, these Suits and any further proceedings as well, are not maintainable in view of the aforesaid judgment of the Hon'ble Supreme Court. The issue is therefore, answered accordingly.

22. All Suit(s) stand dismissed with pending applications if any. Office to prepare decree accordingly.

Dated: 09.08.2019

**J U D G E**