ORDER SHEET

IN THE HIGH COURT OF SINDH, KARACHI

Before: Muhammad Junaid Ghaffar &
Mohammad Abdur Rahman,JJ

C.P. No. D–470 of 2008
AND

Messrs Adamjee Insurance Company Limited

Vs.

Federation of Pakistan & others

C.P. No.D–512of 2008

M/s Habib Insurance Company Limited

Vs.

Federation of Pakistan & others

C.P. No.D–527of 2008

M/s Premier Insurance Company Limited

Vs.

Federation of Pakistan & others

C.P. No.D–569 of 2008

I.G.I Insurance Limited

Vs.

Federation of Pakistan & others

C.P. No.D–570 of 2008

Messrs Adamjee Insurance Company Limited

Vs.

Federation of Pakistan & others

C.P. No.D–470 of 2008

1. For hearing of Misc. No.1907/2008
2. For hearing of main case

C.P. No. 512 of 2008

1. For hearing of Misc. No.2184/2008
2. For hearing of main case

C.P. No.D–570 of 2008

1. For hearing of Misc. No.2471/2008
2. For hearing of main case

C.P. No.D–527 of 2008

1. For hearing of Misc. No.2238/2008
2. For hearing of main case

C.P. No.D–569 of 2008

1. For hearing of Misc. No.2468/2008
2. For hearing of main case

For the Petitioners in CP. No. D- 470 of 2008, CP No. D - 512 of 2008, CP No. D - 569 of 2008 and CP No. D - 570 of 2008	:	Mr. Hyder Ali Khan,
For the Petitioners in CP No. D-527/2008	:	Mr. Ahmed Siraj Memon & Mr. Munawar Ali Memon,
For the Respondents No.1 and 2 in all Petitions	:	Mr. Kashif Nazeer, Assistant Attorney General
For the Respondent No. 3 in all Petitions	:	Mr. Irfan Mir Halepota
Date of hearing	:	7 August 2024

O R D E R

MOHAMMAD ABDUR RAHMAN, J. This order will dispose of five Petitions, each maintained under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973, impugning notices that have each been issued to the Petitioners by the Additional Commissioner Taxation Officer-D, Large Taxpayer Unit (Audit

Division) each under Sub-Section (9) of Section 122 of the Income Tax Ordinance, 2001 (hereinafter referred to as the "ITO, 2001") to the effect that:

(i) exemptions that were granted to the Petitioner by the insertion of Rule 6 A into the Fourth Schedule of the ITO, 2001, which were interpreted by the Federal Board of Revenue (hereinafter referred to as the FBR) in paragraph 49 of Circular No. 1 of 2005 dated 5 July 2005 (hereinafter referred to as the "Circular"), were only available prospectively; and

(ii) that the Petitioners were obligated under Section 67 of the ITO, 2001 read with Rule 13 (2) of the Income Tax Rules, 2002 to apportion their expenses in respect of dividend income earned by them.

A. <u>The Petitions before the Court</u>

2. The pleadings in each of the Petitions are not disputed and are summarised as hereinunder:

(i) <u>C.P. No. D - 470 of 2008</u>

This Petition has been maintained by Adamjee Insurance Company Limited in respect of revised income tax returns filed by it for the Tax Years 2003, 2004 and 2005, each Tax Year ending on 31 December. The Petitioner received a notice under Sub-Section (9) of Section 122 of the ITO, 2001 from the Additional Commissioner Taxation Officer-D, Large Taxpayer Unit (Audit Division) on 24 December 2007 seeking to further amend the Assessment made under Sub-Section 5A of Section 122 of the ITO, 2001 inter alia on the basis of the clarification as contained in the Circular and thereby disallowing the exemption claimed by the Petitioner for the Tax year 2005. A reply was sent to the notice by the Petitioners tax advisers A.F. Ferguson & Co. on 18 January 2008 and which contended that the Circular misinterpreted the amendment made in clause 6A to the Fourth Schedule of the ITO, 2001. Certain correspondence was exchanged and a hearing was afforded to the Petitioner and whereafter two additional notices were issued by the Additional Commissioner Taxation Officer-D, Large Taxpayer Unit (Audit Division) to Adamjee Insurance Limited each under Sub-Section (9) of Section 122 of ITO, 2001 and each dated 10 March 2008 seeking to further amend the Assessment made under Sub-Section 5A of Section 122 of the ITO, 2001 for the Tax Years 2003 and 2004 and which was again premised on the interpretation cast in the Circular on the amendment made in clause 6A to the Fourth Schedule of the ITO, 2001. Adamjee Insurance

Company Limited impugns all three of the notices issued for the Tax Years 2003, 2004 and 2005 and also impugns the interpretation cast on the amendment made in clause 6A to the Fourth Schedule of the ITO, 2001 by the Circular issued by the FBR.

(ii) CP No. D - 512 of 2008

This Petition has been maintained by Habib Insurance Company Limited in respect of revised income tax returns filed by it for the Tax Year 2005, ending on 31 December. The Petitioner received a notice under Sub-Section (9) of Section 122 of the ITO, 2001 from the Additional Commissioner Taxation Officer-D, Large Taxpayer Unit (Audit Division) on 17 December 2007 seeking to further amend the Assessment made under Sub-Section 5A of Section 122 of the ITO, 2001 inter alia on the basis of the clarification as contained in the Circular and thereby disallowing the exemption claimed by the Petitioner for the Tax year 2005. A reply was sent to the notice on 27 February 2008 which contended that the Circular misinterpreted the amendment made in clause 6 A to the Fourth Schedule of the ITO, 2001. Thereafter and before the assessment was revised, Habib Insurance Company Limited has maintained this Petition impugning the notice dated 17 December 2007 issued for the Tax Years 2005 and also impugning the interpretation cast on the amendment made in clause 6A to the Fourth Schedule of the ITO, 2001 by the Circular issued by the FBR.

(iii) CP No. D - 527 of 2008

This Petition has been maintained by Premier Insurance Company Limited in respect of revised income tax returns filed by it for the Tax Years 2003, 2004 and 2005, each Tax Year ending on 31 December. The Petitioner initially received a notice under Sub-Section (9) of Section 122 of the ITO, 2001 from the Additional Commissioner Taxation Officer-D, Large Taxpayer Unit (Audit Division) on 17 December 2007 seeking to further amend the Assessment made under Sub-Section 5A of Section 122 of the ITO, 2001 on the basis of the clarification as contained in the Circular thereby disallowing the exemption claimed by the Petitioner for the Tax year 2005. Another notice dated 17 December 2007 was also issued under Sub-Section (9) of Section 122 of the ITO, 2001 from the Additional Commissioner Taxation Officer-D, Large Taxpayer Unit (Audit Division) seeking to further amend the Assessment made under Sub-Section 5A of Section 122 of the ITO, 2001 for the Tax Year 2006 and which related to proration of expenses in respect of dividend income under Section 67 of the ITO, 2001 read with Rule 13 (2) of the Income Tax Rules 2002.

Thereafter an additional two notices were issued by the Additional Commissioner Taxation Officer-D, Large Taxpayer Unit (Audit Division) each on 10 March 2008 and each under Sub-Section (9) of Section 122 of the ITO, 2001 seeking to further amend the Assessment made under Sub-Section 5A of Section 122 of the ITO, 2001 on the basis of the clarification as contained in the Circular thereby disallowing the exemption claimed by the Petitioner for the Tax years 2003 and 2004 and for proration of expenses in respect of dividend income under Section 67 of the ITO, 2001 read with Rule 13 (2) of the Income Tax Rules 2002. Thereafter and before the assessment was amended, Premier Insurance Company Limited has maintained this Petition impugning the notices dated 17 December 2007 issued for the Tax Years 2005 and 2006, the notices dated 10 March 2005 issued for the Tax Years 2003 and 2004 and also impugn the interpretation cast on the amendment made in clause 6A to the Fourth Schedule of the ITO, 2001 by the Circular issued by the Board of Revenue.

(iv) <u>CP No. D - 569 of 2008</u>

This Petition has been maintained by IGI Insurance Limited in respect of revised income tax returns filed by it for the Tax Years 2005 and 2006, each Tax Year ending on 31 December. The Petitioner received two notices each under Sub-Section (9) of Section 122 of the ITO, 2001 from the Additional Commissioner Taxation Officer-D, Large Taxpayer Unit (Audit Division) on 23 February 2008 seeking to further amend the Assessment made under Sub-Section 5A of Section 122 of the ITO, 2001 for the Tax years 2005 and for the Tax year 2006 inter alia on the basis of the clarification as contained in the Circular, thereby disallowing the exemption claimed by the Petitioner for each of those years and for proration of expenses in respect of dividend income under Section 67 of the ITO, 2001 read with Rule 13 (2) of the Income Tax Rules 2002. Thereafter and before the assessment was revised, IGI Insurance Limited has maintained this Petition impugning the notices dated 23 February 2008 issued for the Tax Years 2005 and 2006 and also impugning the interpretation cast on the amendment made in clause 6A to the Fourth Schedule of the ITO, 2001 by the Circular issued by the FBR.

(v) <u>CP No. D - 570 of 2008</u>

This Petition has been maintained by Adamjee Insurance Company Limited in respect of revised income tax returns filed by it for the Tax Years 2003, 2004 and 2005, each Tax Year ending on 31 December. The Petitioner received a notice under Sub-Section (9) of Section 122 of the ITO,2001 from

the Additional Commissioner Taxation Officer-D, Large Taxpayer Unit (Audit Division) on 24 December 2007 seeking to further amend the Assessment made under Sub-Section 5A of Section 122 of the ITO, 2001 on the basis of the clarification as contained in the Circular and thereby disallowing the exemption claimed by the Petitioner for the Tax year 2005 and also on the ground that Adamjee Insurance Company Limited had failed to apportion expenditure as against dividend income. CP No. D - 470 of 2008 had been maintained by Adamjee Insurance Company Limited and in which Adamjee Insurance Company Limited had challenged the clarification as contained in the Circular and thereby disallowing the exemption claimed by the Petitioner for the Tax Years 2003, 2004 and 2005 and in which the Petitioners had reserved their right to challenge the same notice in respect of the apportionment of expenditure as against the direction for proration of expenses in respect of dividend income under Section 67 of the ITO, 2001 read with Rule 13 (2) of the Income Tax Rules 2002 and now, exercising that right, they impugn that portion of the notice through this Petition.

B. <u>The Contentions of the Petitioners and the Respondents</u>

3. Mr. Hyder Ali Khan entered appearance on behalf of the Petitioners in CP. No. D- 470 of 2008, CP No. D - 512 of 2008, CP No. D - 569 of 2008 and CP No. D - 570 of 2008. He drew our attention to the provisions of Sub-Section (1) of Section 53 of the ITO, 2001 and which inter alia exempts certain incomes or classes of income from the payment of income tax and which reads as hereinunder:

> *" … **53. Exemptions and tax concessions in the Second Schedule.—***
>
> *(1) The income or classes of income, or persons or classes of persons specified in the Second Schedule shall be —*
>
> *(a) exempt from tax under this Ordinance, subject to any conditions and to the extent specified therein;*
>
> *(b) subject to tax under this Ordinance at such rates, which are less than the rates specified in the First Schedule, as are specified therein;*
>
> *(c) allowed a reduction in tax liability under this Ordinance, subject to any conditions and to the extent specified therein; or*
>
> *(d) exempted from the operation of any provision of this Ordinance, subject to any conditions and to the extent specified therein. …"*

He thereafter referred us to Paragraph 110 of Part I to the First Schedule of the ITO, 2001 (as originally promulgated) and which read as hereinunder:

> " … *Any income chargeable under the head "capital gains", being income from the sale of modaraba certificates or any instrument of redeemable capital as defined in the Companies Ordinance, 1984 (XLVII of 1984), listed on any stock exchange in Pakistan or shares of a public company (as defined in the First Schedule) and the Pakistan Telecommunications Corporation vouchers issued by the Government of Pakistan, derived by a taxpayer in respect of any assessment year ending on or before the thirtieth day of June 2005."*

He then referred us to Section 99 of the ITO, 2001 and clarified that having been given the status of a special industry, the profits and gains of each of the Petitioners being insurance companies, was to be computed in accordance with the rules as contained in the Fourth Schedule to the ITO, 2001. He submitted that as no such exemption, as contained in the Paragraph 110 of Part I to the First Schedule, was to be found in the Fourth Schedule to the ITO, 2001, it was considered that the exemption as contained in Paragraph 110 of Part I to the First Schedule of the ITO, 2001 was not available to insurance companies and who therefore protested against not being able to avail the same exemption as other "ordinary" industries. He contended that the Federal Government, conceding to this request, inserted Rule 6A into the Fourth Schedule of the ITO, 2001 through the Finance Act, 2005 and which granted such an exemption to the Petitioners in the following terms:

> " … *In Computing income under this Schedule, there shall not be included "capital gains" being income from the sale of modaraba certificates or any instrument of redeemable capital as defined in the Companies Ordinance, 1984 (XLVII of 1984), listed on any stock exchange in Pakistan or shares of a public company (as defined in sub-section (47) of section 2) and the Pakistan Telecommunications Corporation derived* ***upto to Tax year ending on the thirtieth day of June 2007****."*

He further contended that the Federal Board of Revenue, in their interpretation of this provision, as reflected in Paragraph 49 of the Circular, have interpreted this as a prospective amendment operative from the Tax Year 2006 onwards and which reads as hereinunder:

> " … *Under Clause (110) of Part I of Second Schedule exemption in capital gains on sale of shares etc. is available upto June 30, 2007, Since computation of income and tax in the case of insurance companies is governed by the Fourth Schedule therefore this exemption was not available to this sector. Insurance Companies have been complaining of discriminatory treatment since other sectors were enjoying this exemption. A similar exemption is being extended to the insurance companies as well and accordingly a new clause (6A) has been added in the fourth schedule for this purpose.* ***This exemption shall be available for tax year 2006 and onwards****.*

He referred us to section 26 of the Income Tax Ordinance, 1979 (hereinafter referred to as the "ITO, 1979") and Section 99 of the ITO, 2001, which both relate to the manner in which profits and gains of insurance businesses are to be calculated and which read as hereinunder:

Income Tax Ordinance, 1979	*Income Tax Ordinance, 2001*
26. ***Special provisions regarding business of insurance and production of oil and natural gas and exploration and extraction of other mineral deposits[, 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;*	***99. Special provisions relating to insurance business. –*** *The profits and gains of any insurance business shall be computed in accordance with the rules in the Fourth Schedule.*

Placing reliance on the omission of the words "***Notwithstanding anything contained in this Ordinance****"* from Section 99 of ITO, 2001 he contended that while under the ITO, 1979 only the provisions of the Fourth Schedule of that statute could be considered while determining the profits and gains of insurance businesses, the absence of such words from Section 99 of ITO, 2001 would allow the exemption as contained in Paragraph 110 of Part I to the First Schedule of the ITO, 2001 to be read in conjunction with the provisions of the Fourth Schedule of the ITO, 2001 to allow for the exemptions prior to the Tax Year 2006. He did not rely on any case law in support of these contentions. In respect of CP No. D - 570 of 2008 and the issue relating to proration of expenses as against dividend income by insurance companies Mr. Hyder Ali Khan contended that this issue has already been decided by a Division Bench of this Court reported as ***Commissioner (Legal) Inland Revenue vs. Messrs EFU General Insurance Ltd.***[1] and in which it was held that the Additional Commissioner Taxation Officer-D, Large Taxpayer Unit (Audit Division) could not rely on Section 67 of the ITO, 2001 to demand that the Petitioner apportion its common expenses in between different classes of income under Sub-Rule (2) of Rule 13 of the Income Tax Rules, 2002.

4. Mr. Arshad Siraj Memon who entered appearance for the Petitioner in, CP No. D - 527 of 2008 while supporting Mr. Hyder Ali Khan arguments in respect of proration of expenses in respect of dividend income by insurance companies presented an alternative interpretation to the provisions of Rule 6A to the Fourth Schedule of the ITO, 2001. Placing reliance on the decision of the Supreme Court of Pakistan reported as ***Dr Aftab Ahmed Khan vs. Mst. Zaibun Nisa***[2] he argued that the expression "*upto to Tax year ending on the thirtieth day of June 2007*" as used in the abovementioned rule should not be interpreted to be applicable prospectively from the date of its insertion into the ITO, 2001 but rather should be considered as being applicable from the date of the commencement of the ITO,

[1] 2011 PTD 2042
[2] 1998 SCMR 2085

2001 “upto” the Tax Year ending on the thirtieth day of June 2007. Premised on his interpretation he contended that interpretation that had been cast by the FBR on this insertion of Rule 6 A into the Fourth Schedule in the Circular applying the exemption prospectively from the Tax Year 2006 was incorrect and was liable to be set aside.

5. Mr. Irfan Mir Halepota who appeared on behalf of the Respondents contended that this Petition, in effect being maintained as against a notice under Sub-Section (9) of Section 122 of the ITO, 2001 from the Additional Commissioner Taxation Officer-D, Large Taxpayer Unit (Audit Division) on 24 December 2007 seeking to further amend the Assessment made under Sub-Section 5A of Section 122 of the ITO, 2001 was not maintainable. Supporting the interpretation cast in the Circular, he contended that as the insertion of Rule 6 A was made into the Fourth Schedule of the ITO, 2001 by the Finance Act, 2005, the exemption that was contained as such was prospective and could not be made applicable for any Tax Years prior to Tax Year 2006 as each tax year was a separate unit of account and taxation and the law had to be applied as it stood in the relevant tax year. In this regard he placed reliance on decision of the Supreme Court of Pakistan reported as ***Commissioner of Income Tax vs. Messrs Islamic Investment Bank Limited*** [3] to state that a vested right accrues in favour of the State to reassess an assessment where it is found that there was sufficient evidence to consider that the assessment made was prejudicial to the interests of the revenue. He also relied on the decision of the Supreme Court reported as ***Fawad Ahmad Mukhtar and others vs. Commissioner Inland Revenue (Zone-II), regional Tax Office, Multan and another***[4] wherein it was held that while an exemption created by statute would have a beneficial effect this would, on the principle that each tax year would be considered a separate unit of account and taxation this would not automatically mean that the exemption had a retrospective effect and which would have to be determined by the legislative intention as seen from the amendment. He said the intention of the amendment in Rule 6 A of the Fourth Schedule clearly does not lead to a suggestion that the amendment was to be made retrospectively and hence would only be applicable for the Tax Year 2006 onwards. He also relied on the decision reported as ***Controller of General Accounts, Government of Pakistan Islamabad and others vs. Abdul Waheed and others***[5] *and* ***Messrs Pakistan Telecommunication Company Ltd. vs. Collector of Customs, Karachi***[6] wherein it was held that where an amendment was made to a statue which is procedural in nature the same can be retrospective however if substantive rights are conferred through the amendment that it has to be seen as to whether

[3] 2016 SCMR 816
[4] 2022 SCMR 426
[5] 2023 SCMR 111
[6] 2023 SCMR 261

the legislative intent was to make the amendment effective retrospectively or prospectively.

6. We have heard Mr. Hyder Ali Khan, Mr. Arshad Siraj Memon and Mr. Irfan Mir Halepota and have perused the record.

C. <u>The Issues for Determination</u>

7. There are three issues that require determination in these Petitions and which are summarised as hereinunder:

(i) The first is as to whether these Petition are maintainable under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973, keeping in mind that at present only a notice under Sub-Section (9) of Section 122 of the ITO, 2001 has been issued to the Petitioners and consequentially no assessment has been made by the Additional Commissioner Taxation Officer-D, Large Taxpayer Unit (Audit Division) or in the alternative as to whether this Court has the jurisdiction to inquire into the validity of a Circular issued by the Federal Board of Revenue, which purportedly incorrectly interprets a provision of the ITO, 2001, and which if followed would curtail the discretion of the Additional Commissioner Taxation Officer-D, Large Taxpayer Unit (Audit Division) to adjudicate the notices issued to the Petitioners under Sub-Section (9) of Section 122 of the ITO, 2001;

On the assumption that this Court has the requisite jurisdiction to entertain these Petitions:

(ii) the second question would be as to whether the provisions of Fourth Schedule can be read in conjunction with clause 110 of Part I of the Second Schedule to allow for insurance companies to be exempted from the payment of capital gains tax in respect of the subject matter contained in that clause;

(ii) The third question would be as to whether the interpretation of the words "***<u>upto to Tax year ending on the thirtieth day of June 2007</u>"*** as contained in Rule 6A to the Fourth Schedule of the ITO, 2001, which was inserted into the ITO, 2001 through the Finance Act, 2005 is to be applied, as interpreted in the Circular, prospectively.

D. Jurisdiction under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973

8. The jurisdiction of this Court to entertain a Petition in respect of a Show Cause Notice, premised on the interpretation of a Circular of the FBR, was considered by the Supreme Court of Pakistan in the decision reported as ***Collector Of Customs, Customs House, Lahore and 3 Others Vs. Messrs S.M. Ahmad & Company (Pvt.) Limited, Islamabad***[7] and wherein it was held that:

> " … *9. As regards the maintainability of writ petition in the presence of alternate remedy, it is a settled proposition of law that it is no bar if such remedy is only illusory in nature, as observed in Gulistan Textile Mills Ltd. v. Pakistan (1983 CLC 1474). No useful purpose would have been served if the respondent had been required to avail of the remedy of the appeal or revision because the highest body i.e. the C.BA. had already expressed its opinion against the respondent. A reference may be made to Messrs Usmania Glass Sheet Factory Limited, Chittagong v. Sales Tax Officer, Chittagong (PLD 1971 SC 205) wherein it was observed that where a dispute arises between the parties in respect of fiscal right based on a statutory instrument, it can be determined in writ jurisdiction. After the decision given by the C.B.R. it would have been difficult for the Federal Government to take a contrary view about the assessment/evaluation of the wood imported by the respondent, and in these circumstances no exception could be taken to the respondent's invoking Constitutional jurisdiction of the High Court. Classification of goods is not always a pure question of fact and being a mixed question of fact and law, the High Court is possessed of jurisdiction to adjudicate upon such question in Constitutional jurisdiction in the light of dictum of the Supreme Court in M.Y. Khan v. M.M. Aslam and 2 others (1974 SCMR 196) and Messrs Delite House Ltd., v. Assistant Collector, Customs (1988 CLC 5)."*

On the basis of the above decision, it is clear that while this Court generally does not have the jurisdiction to entertain a petition under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 as against a notice under Sub-Section (9) of Section 122 of the ITO, 2001 as the appropriate course of action for the taxpayer is to let an assessment be made and thereafter to challenge such an adjudication through the statutory appellate forums that are provided for in the ITO, 2001, however where that appellate forum would be "illusory" then this Court's jurisdiction under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 can be availed. It would seem to us that the Petitioners understanding that the actions of the Additional Commissioner Taxation Officer-D, Large Taxpayer Unit (Audit Division) in issuing each of the notices under Sub-Section (9) of Section 122 of the ITO, 2001 were premised on the interpretation cast on Rule 6 A of the Fourth Schedule of the ITO, 2001 in the Circular and which on account of the provisions of Sub-Section (1) of Section 205 of the ITO, 2001 is binding on the Additional Commissioner Taxation Officer-D, Large Taxpayer Unit (Audit Division) are therefore challenging that interpretation to Rule 6 of the Fourth Schedule of the ITO, 2001 as incorrect and therefore impugn the interpretation cast by the FBR as contained in Paragraph 49 of the Circular on the basis of which the notices have been issued.

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[7] 1999 SCMR 138

9. The Supreme Court of Pakistan and various High Courts have on numerous occasions accepted such a *lis* as being within this Court's jurisdiction under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973.[8] In the decision reported as ***Messrs Central Insurance Co. and others vs. The Central Board of Revenue, Islamabad***[9] the Supreme Court of Pakistan has opined that:

> " … *26. … We have already pointed out hereinabove that the Central Board of Revenue does not figure in the hierarchy of the judicial forums provided for under the Ordinance and, therefore, the interpretation placed by it on the relevant provisions of the Ordinance in the Circular. at the most, can be treated as an administrative interpretation and not a judicial decision to qualify for treatment as a definite information. It is, being an administrative opinion, liable to be varied/modified and, therefore from its very nature, cannot be treated as a definite information. If we were to treat an administrative interpretation of a provision of law as a definite information, it will lead to uncertainty and will cause harassment to the assessees. The Central Board of Revenue may, at any time, place construction on a particular provision of the Ordinance, which may not be legally sustainable, but it will be treated by the Income Tax Officers as a definite information for the purposes of re-opening of the assessments which were competently framed long time back. We may observe that in the present case the construction placed by the Central Board of Revenue on the relevant provisions of the Ordinance seems to be correct, but that fact alone, will not change its character as to qualify it as a definite information to justify re opening of assessments. At this juncture, it may be pertinent to refer to the following observations as to the status of the Central Board of Revenue's interpretation of law, made by Cornelius, C.J. in the case of The Commissioner of Income-Tax, East Pakistan, Dacca v. Noor Hussain (PLD 1964 SC 657):*
>
> > *"In the view of my learned brother Fazle Akbar, the benefit in law cannot commence from any earlier date than that of the instrument by which the firm is constituted. He has at the same time observed that "the course pursued by the Board" as appearing from Circular No.8, "seems to be correct". In my view, if there is a departure from the law involved in the provision for relaxation contained in the Circular, then that Circular is to the extent of the deviation, invalid and ineffective, and power thereunder is illegally exercised The impression of such a departure conveyed by the following passage in the Circular, viz.---*
> >
> > *On a strict interpretation of the law, a firm can be registered only from the date on which the partnership deed has been executed. Since this would create hardship, the Board is disposed to agree to the benefit of registration being allowed for the full previous year, provided of course, the other conditions laid down for the registration of the firms under section 26-A are fulfilled.*
> >
> > *The Board's views as to the interpretation of law do not have the force of law, and the expectation would be, particularly where a fiscal statute is involved which should be implemented with strict impartiality, that references to inclination towards relaxation or otherwise would have been avoided."*

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[8] See ***Messrs Fazal Dina and Sons (Pvt.) Ltd. vs. Federal Board of Revenue, Islamabad and others*** 2009 SCMR 973; ***Meezan Islamic Fund and others vs. D.G. (WHT) FBR and others*** 2016 PTD 1204; ***An Industries (Pvt.) Ltd. through Director vs. Federation of Pakistan through Secretary and others*** 2017 PTD 665; ***Messrs Sky Overseas through Authorized Attorney vs. Federation of Pakistan through Secretary Revenue Division*** 2019 PTD 1964; ***Federal Board of Revenue vs. Messrs Wazir Ali & Company and others*** 2020 PTD 1140; ***Indus Motor Company Limited through Duly Authorized Officer vs. Federation of Pakistan through Secretary Ministry of Finance and 2 others***.2021 PTD 460; ***OBS Pakistan (Pvt.) Ltd. through Manager Legal vs. Federation of Pakistan through Secretary Revenue Ex Officio Chairman Federal Board of Revenue and 2 others*** 2022 PTD 290.

[9] 1993 SCMR 1232

As clarified by the Supreme Court of Pakistan, where a Circular is issued by the FBR which casts an incorrect interpretation of a section of a statute or for that matter of any delegated legislation, the Circular can be impugned in this Court's jurisdiction under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 as having to first avail the available appellate forums would in the words of the Supreme Court of Pakistan be "illusory" as the interpretation cast in the circular would clearly be binding on that appellate forum rendering the entire process nothing more than a formality. In such circumstances, we are of the opinion that this Court clearly has the requisite jurisdiction, under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 to consider the legality of a Circular issued by the FBR.

10. Having affirmed our jurisdiction to hear these Petitions, we are left to consider as to whether the Petitioners were obliged to prorate their expenses in respect of dividend income under Section 67 of the ITO, 2001 read with Sub-rule (2) of Rule 13 of the Income Tax Rules, 2002 or as to whether their profits and gains were solely computable under the provisions of the Fourth Schedule to the ITO, 2001 and additionally as to whether the interpretation that has been cast by the FBR on the insertion of Rule 6A in the Fourth Schedule of the ITO, 2001 being prospective is correct.

E. Whether Insurance Companies are Obliged to Prorate their Expenses in Respect Of Dividend Income under Section 67 of the ITO, 2001 Read With Sub-Rule (2) Of Rule 13 of The Income Tax Rules, 2002 or Whether Insurance Companies Profits and Gains are Solely Computable under the Provisions of the Fourth Schedule To The ITO, 2001

11. We believe, as correctly contended by Mr. Hyder Ali Khan and Mr. Arshad Siraj Memon, that this issue, as to whether or not the profits and gains of insurance companies can only be assessed in terms of the Fourth Schedule of the ITO, 2001 or in conjunction with other provisions of the ITO, 2001 has been decided by a Division Bench of this Court in the decision reported as ***Commissioner (Legal) Inland Revenue vs. Messrs EFU General Insurance Ltd.***[10] and wherein it was held that:

> " … *8. After perusal of the above law and the decisions relied upon by the learned counsel representing the respondent we are of the considered view that the taxability of the insurance business has been separated from the taxability of other business concerns that is why in the repealed Ordinance by virtue of section 26 of the Ordinance and in new Ordinance by virtue of section 99 of the Ordinance it has specifically been mentioned that taxability of the insurance business is to be dealt with by special provisions. Under section 26 of the repealed Ordinance it has specifically been mentioned that "Notwithstanding anything contained in this Ordinance (which was a non-obstante clause) the profits and gains of any business of insurance and the tax payable thereon shall be computed*

[10] 2011 PTD 2042

> *in accordance with the Fourth Schedule", meaning thereby that law makers were of the opinion that the tax of insurance business has to be separated from the taxability of the other businesses which were dealt with under the provisions of section 22 of the repealed Ordinance. Had the intention of the legislature was to treat these two business i.e. normal business and an insurance business to be of the like nature, section 26 would not have been part of the law depicting the intention of the legislature to give it separate treatment.*
>
> *9. In the repealed Ordinance also there was a specific Schedule, the Fourth Schedule, which deals with the manner and mode as to how the profits of an insurance business were to be computed, what adjustments were to be allowed, what were the exemptions in this regard and how far the said Schedule would apply to the Ordinance. In the newly introduced Ordinance also it is seen that section 99 specifically provides that a special mechanism has been prescribed with regard to determination of profits and gains of an insurance business which shall be computed in accordance ith the rules as given in the new Fourth Schedule. This Fourth Schedule also, just like the previous Schedule of the repealed Ordinance, talks about how profits of an insurance business are to be computed, what adjustments are to be allowed and what are the exemptions in this regard. It is observed that not only in the repealed Ordinance special provisions existed with regard to the taxability of insurance business but in the Income Tax Act, 1922 also. As per the provision of Section 10 (7) of the Act, which was parametria to section 26 of the repealed Ordinance and section 99 of the new Ordinance, it was specifically mentioned that the profits and gains of the insurance business will be computed as per the First Schedule of the Act which Schedule deals with the computation of profits and against in the case of an insurance company, therefore it appears to be an admitted position that since quite some time the lawmakers have treated this insurance business to be something different from normal business income and had treated its taxability to be different also, **hence it is established beyond doubt that ordinary rules for computation of profits and gain assessment cannot be applied in the case of an insurance business as the profits and gains of an insurance business has to be computed in accordance with the procedure laid down in the Fourth Schedule of the Ordinance**."*

A division bench of this Court having opined on this issue and wherein it was held that while calculating the profits and gains of an insurance business the assessment must be computed in accordance with the provisions of the Fourth Schedule and not under any other provisions of the ITO, 2001, and which decision aside from being binding on us we also find ourselves inclined to agree with, we are of the opinion that the issue raised in each of the notices issued under Sub-Section (9) of Section 122 of the ITO, 2001 to the extent of proration of expenses in respect of dividend income under Section 67 of the ITO, 2001 read with Sub-Rule (2) of Rule 13 of the Income Tax Rules, 2002 is an incorrect interpretation of the law and which cannot be sustained as the ordinary rules for calculation of profits and gain assessments cannot be applied in the case of an insurance company as the profits and gains of such a company has to be calculated only in accordance with the procedure laid down in the Fourth Schedule of the Ordinance and without resort to any other provision of the ITO, 2001.

ii. Retrospective Application of Rule 6A of the Fourth Schedule

12. The Supreme Court of Pakistan in the decision reported as ***Adnan Afzal vs. Capt.Sher Afzal***[11] has clarified the manner in which an amendment to a statute is to be construed either prospectively or retrospectively and has held that:

> " … *The general principle with regard to the interpretation of statutes as laid down in the well known case of the. Colonial Sugar Refining Company Limited v., Irving (1905 A C 369) is that "if the matter in question be a matter of procedure only", the provisions would be retrospective. "On the other hand, if it be more than a matter of procedure, if it touches a right in existence at the passing of the Act", then "in accordance with a long line of authorities extending from the time of Lord Coke to the present day", the legislation would not operate retrospectively, unless the Legislature had either "by express enactment or by necessary intendment given the legislation retroactive effect.*
>
> *To the same effect are the observations of Jessel, master of the Rolls, in the case of In re: Joseph Suche & Co. Limited ((1875) 1 Ch. D. 48), where it was observed that as "a general rule when the Legislature alters the rights of parties by taking away or conferring any right of action, its enactments, unless in express terms they apply to pending actions, do not affect them. It is said that there is on exception to that rule, namely, that these enactments merely affect procedure and do not extend to rights of action, they have been held to apply to existing rights."*
>
> *The question for consideration there was regarding the right of a secured creditor of a company to prove for the full amount of his debt without deducting the value of his securities in the course of the winding up. That was held to be, in substance, a right of action for the recovery of a debt and, therefore, section 10 of the English Judicature Act was held not to apply retrospectively.*
>
> *The principle has been admirably put by Crawford in his Book on Construction of Statutes, 1940 Edition, page 581, as follows:--*
>
> > *"As a general rule, legislation which relates solely to procedure or to legal remedies will not be subject to the rule that statutes should not be given retroactive operation. Similarly, the presumption against retrospective construction is inapplicable. In other words, such statutes constitute an exception to the rule pertaining to' statutes generally. Therefore, in the absence of a contrary legislative intention, statutes pertaining solely to procedure or legal remedy may affect a right of action no matter whether it came into existence prior to, or after the enactment of the statute. Similarly, they may be held applicable to proceedings pending or subsequently commenced. In any event, they will, at least, presumptively apply to accrued and pending as well as to future actions." …*
> >
> > *The next question, therefore, that arises for consideration is as to what are matters of procedure. It is obvious that matters relating to the remedy, the mode of trial, the manner of taking evidence and forms of action are all matters relating to procedure. Crawford too takes the view that questions relating to jurisdiction over a cause of action, venue, parties pleadings and rules of evidence also pertain to procedure, provided the burden of proof is not shifted. Thus a statute purporting to transfer jurisdiction over certain causes of action may operate retroactively. This is what is meant by saying that a change of forum by a law is retrospective being a matter of procedure only. Nevertheless, it must be pointed out that if in this process any existing rights are affected or the giving of retroactive operation causes inconvenience or injustice, then the Courts will not even in the case of a procedural statute, favour an interpretation giving retrospective effect to the statute. On the other hand, if the new procedural statute is of such a character that its retroactive application will tend to promote justice without any consequential embarrassment or detriment to any of the parties*

[11] PLD 1969 SC 187

> *concerned, the Courts would favorably incline towards giving effect to such procedural statutes retroactively."*

The principles for interpretation, that can be considered to be settled on the basis of the above quoted judgment, are that where a statute amends only procedural rights, as opposed to substantive rights, then such an amendment is to be treated as a curative amendment and to have a retrospective effect. Regarding a statute that amends substantive rights then generally such an amendment is not to be considered to have retrospective effect and should only be considered to be prospective when it can be seen "*by express enactment or by necessary intendment"* that the intention of the legislature was to give the amendment retrospective effect. Similar opinions have also been given by the Supreme Court of Pakistan in the decisions reported as ***Controller of General Accounts, Government of Pakistan Islamabad and others vs. Abdul Waheed and others***[12] *and* ***Messrs Pakistan Telecommunication Company Ltd. vs. Collector of Customs, Karachi***.[13]

13. In this context, we have examined the amendment made and are clear that the insertion of Rule 6 A into the Fourth Schedule of the ITO, 2001 is not a procedural amendment as it confers a benefit, in the form of an exemption from the payment of a tax, on the Petitioners. The amendment therefore conferring substantive rights on the Petitioners what needs to be considered is as to whether by express enactment or by necessary intendment it can be seen that the amendment was intended to be retrospective. In this regard, Mr. Arshad Siraj Memon had drawn our attention to the expression *"**upto to Tax year ending on the thirtieth day of June 2007**"* that is part of Rule 6A of the Fourth Schedule of the ITO, 2001 and referred us to the decision of the Supreme Court of Pakistan reported as ***Dr. Aftab Ahmed Khan vs. Mst. Zaibunnissa***[14] in which while hearing an appeal maintained as against an order of the Rent Controller an adjudication was required to be made on what the expression "up to" meant in the context of a rent order passed under Sub-Section (2) of Section 16 of the Sindh Rented Premises Ordinance, 1979 and in which it was held that:

> *" … from the quoted portion of the order of tentative deposit it is clear that such deposit was "up to September 1989". The words "up to" carrying the meaning "as far as", a particular level, number, amount etc. This in turn implies that when it is stated without anything more, that the deposits would be "upto September, 1989" such may or may not include the month of September itself* ***though the months proceedings September would definitely be included****. …"*

[12] 2023 SCMR 111
[13] 2023 SCMR 261
[14] 1998 SCMR 2085

A similar interpretation was cast on the same expression in a decision of the Court of Chancery reported as ***Gowers vs. Walker*** [15] wherein it was held that:

> " … *The expression "up to" is a well known one in accountancy and when books are said to be written up… and accounts to be vouched up to a particular date, no implication arises that any of the operations were completed before or even on the particular date, the true meaning being that the particular date is the one up to which the state of account has been ascertained. So here income tax assessed up to a particular date is not, in my opinion, confined to the actually assessed before that date,* ***but includes all assessed tax up to that date****, whether the assessment was made before or after that date. "*

The argument when developed to it's logical conclusion in the context of Rule 6 A of the Fourth Schedule of the ITO, 2001 would mean that the exemption conferred by the insertion of the rule would be applied to all tax years "up to" the tax year ending on 30 June 2007. While there is some merit in this argument we have thought it appropriate to consider other amendments made in the ITO, 2001 and have noted that whenever the legislature had "necessarily intended" for a provision of the ITO, 2001 to be retrospective a deeming clause has been used to give such an interpretation to the section. An example of this can be found in Section 21 of the Finance Act, 2022 which while "omitting" Section 100 F of the ITO, 2001, had clarified as hereinunder:

> " … *section 100F shall be omitted and shall be deemed to have been omitted with effect from 02nd March, 2022;"*

If the legislative intent was to make the insertion of Rule 6 A into the Fourth Schedule of the ITO, 2001 retrospective, a deeming provision could have been inserted into that statute. To the contrary the insertion made into the Income Tax Ordinance, 2001 of Rule 6 A into the Fourth Schedule of the ITO, 2001 by Sub-Section 48 of Section 8 of the Finance Act, 2005 is silent on its application and reads as hereinunder:

> " … *In the Fourth Schedule after clause (6) the following new clause shall be inserted, namely: -*
>
> *"(6A)****Exemption of Capital Gains from the sale of shares****.- In computing income under this Schedule, there shall not be included "capital gains", being income from the sale of modaraba certificates or any instrument of redeemable capital as defined in the Companies Ordinance, 1984 (XLVII of 1984), listed on any stock exchange in Pakistan or shares of a public company (as defined in sub-section (47) of section 2) and the Pakistan Telecommunications Corporation vouchers issued by the Government of Pakistan, derived up to tax year ending on the thirtieth day of June, 2007"*

The commencement of the insertion of Rule 6 A into the Fourth Schedule of the ITO, 2001 having not been prescribed in that provision, we note that Sub-Section (3) of Section 1 of the Finance Act, 2005 prescribed the manner in which the

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[15] [1930] 1 Ch 262 at 267

amendment made into the ITO, 2001 was to operate and which reads as hereinunder:

> *" … (3) It shall, **unless otherwise hereinafter provided**, come into force on the first day of July, 2005."*

The Finance Act, 2005 having specifically provided that the insertion of Rule 6 A into the Fourth Schedule of the ITO, 2001 shall be from 1 July 2005 ***"unless otherwise hereinafter provided"*** and there being no express provision made so as to allow the insertion of that Rule to apply or be deemed to apply retrospectively, we are of the opinion that the insertion of Rule 6 A therefore, in terms of Sub-Section (1) of Section 3 of the Finance Act, 2005, must be read to apply prospectively.

14. Our interpretation of such a provision is reinforced by the decision of the Supreme Court of Pakistan reported as ***Oxford University Press vs Commissioner of Income Tax, Companies Zone-I, Karachi***[16] wherein while considering the manner in which exemptions are to be interpreted it was held that:

> *" ... 9. The principles relating to the proper interpretation and application of exemption clauses in fiscal legislation are well established and require only a brief recapitulation. As correctly submitted by learned counsel for the appellant, as presently relevant these are as follows. Firstly, the onus lies on the taxpayer to show that his case comes within the exemption. **Secondly, if two reasonable interpretations are possible the one against the taxpayer will be adopted**. But, thirdly, if the taxpayer's case comes fairly within the scope of the exemption then he cannot be denied the benefit of the same on the basis of any supposed intention to the contrary of the legislature or authority granting it."*

As there are two reasonable interpretations that can be given to the manner in which Rule 6 A of the Fourth Schedule of the ITO, 2001 is to be interpreted and which relates to an exemption, the interpretation "against the taxpayer" is to be adopted. The provisions of Rule 6 A of the Fourth Schedule of the ITO, 2001 are therefore to apply prospectively from 1 July 2005 as correctly clarified by the FBR in the Circular.

F. Opinion of the Court

15. For the foregoing reasons we are of the opinion that:

(i) the issue of proration of dividend expenses by insurance companies under section 67 of the ITO, 2001 read with Sub-Rule (2) of Rule 13 of the Income Tax Rules, 2002 as maintained by the by the Additional Commissioner Taxation Officer-D, Large Taxpayer Unit (Audit

[16] 2019 SCMR 235

Division) cannot be sustained as the ordinary rules for calculation of profits and gains cannot be applied in the case of an insurance business as the profits and gains of an insurance business have to be computed only in accordance with the procedure laid down in the Fourth Schedule of the Ordinance and without resort to any other provision of the ITO, 2001 as held in ***Commissioner (Legal) Inland Revenue vs. Messrs EFU General Insurance Ltd.***[17]

(ii) the interpretation that has been given by the FBR to Rule 6A of the Fourth Schedule in the Circular is correct and the exemption contained in that Rule is applicable prospectively for the Tax Years 2006 until its omission from the ITO, 2001.

16. For the foregoing reasons, each of the Petitions are dismissed and consequentially the impugned notices in each of the Petitions, issued to the Petitioners by the Additional Commissioner Taxation Officer-D, Large Taxpayer Unit (Audit Division) under Sub-Section (9) of Section 122 of the ITO, 2001 seeking to further amend the Assessment made under Sub-Section 5A of Section 122 of the ITO, 2001, shall be adjudicated on their own merits keeping in mind the decision of this Court as reported in ***Commissioner (Legal) Inland Revenue vs. Messrs EFU General Insurance Ltd.***[18] There shall be no order as to costs.

JUDGE

JUDGE

Karachi dated 24 September 2024

[17] 2011 PTD 2042
[18] *Ibid*