

IN THE HIGH COURT OF SINDH AT KARACHI.

Before: Mr. Justice Muhammad Junaid Ghaffar
Mr. Justice Muhammad Karim Khan Agha.

I.T.R.A. No.227/2006

Commissioner (Legal Division)
Versus
Atlas Investment Bank Limited

I.T.R.A. No.531/2006

Commissioner (Legal Division)
Versus
Al Faysal Investment Bank Limited

I.T.R.A. No.564/2009

Commissioner (Legal Division)
Versus
Atlas Investment Bank Limited

Date of hearing	12.01.2016
Date of Judgment	23.02.2016
Appellant:	Through Mr. Javed Farooqui, Advocate
Respondent	Through Mr. Dr. Ikram ul Haq, Advocate

JUDGMENT

Muhammad Karim Khan Agha, J. These three Income Tax Reference Applications (ITRA's) being ITRA 227/06 Commissioner of Income Tax V Atlas Investment Bank Limited, ITRA 531/06, The Commissioner of Income Tax V Faysal Investment Bank Limited and ITRA 564/09 Commissioner of Income Tax V Atlas Investment Bank Limited were all filed against the respective orders of the Income Tax Appellate Tribunal (Pakistan) Karachi (ITAT) by the Commissioner of Income Tax under S.133 and 136 of the Income Tax Ordinance 1979 and 2001 (the 1979 or 2001 Ordinance as the case may be) and involve a common question of law arising out of the respective orders of the ITAT so will all be disposed of by this common Judgment.

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2. As per the lead ITRA 227/06 the common question of law is, "Whether under the facts and in the circumstances of this case, the learned ITAT was justified to hold that investment banks are public limited companies and not the banking company within the purview of S.2 (10) of the Income Tax Ordinance 1979 read with section 5(b) and (c) Banking Companies Ordinance 1962" which in effect is almost identical to the question raised in the other two ITRA's although worded slightly differently however significantly the definition of a banking company in the 1979 Ordinance at S.2(10) as discussed later is different from the definition of a banking company in the 2001 Ordinance at S.2(7)

3. Both the Assesseees are investment banks (Atlas and Faysal).

4. The brief facts of the case as per ITRA 227/06 are that on 31-3-2000 the Deputy Commissioner of Income/Wealth Tax (DCIT) Circle 11 companies zone 1 Lahore after hearing the respondent (the Assessee) passed an assessment order (Assessment Order) for the year 1999-2000 under S.62 Income Tax Ordinance 1979 on the basis that the respondent was a banking company as opposed to an investment finance company as contended by the respondent and that the respondents assessment to tax was on the basis of it being a banking company which was at a higher rate than that of an investment finance company.

5. The respondent appealed this particular finding in the Assessment Order to the Commissioner of Income Tax/Wealth Tax (Appeals) Zone I Karachi who by Order dated 13-1-2003 reversed the finding in the Assessment Order regarding the applicant being a banking company and found it to be an investment finance company in the following terms of its Appellate Order (CIT (A)) at Para 3 (1) which is set out as under for ease of reference:

- i) Regarding treatment of appellant as an investment finance company instead of a banking company, I find considerable force in the arguments of the AR of the appellant. The very fact that appellant has been granted licence under SRO 585 (1) 86 dated 13 July 1987 by the Government of Pakistan and not a licence by State Bank of Pakistan under the Banking Companies Ordinance, 1962, makes the two institutions distinctly different. In case the plea of the revenue is accepted, then the above SRO become redundant and

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redundancy cannot be attributed to a taxing statute [(1998) PTD 1250]. Furthermore, appellant is specifically debarred from doing the business of banking and no violation has been found by SBP during regular periodical audit of the appellant company the explanation proposed by the revenue through Finance Bill 1998, with a view to bring investment banks within the definition of banking companies, was also turned down by the legislature last year. Lastly, the full bench of the Income Tax Appellate Tribunal ITA No. 3027 & 3028/LB of 1996 (assessment year 1991-92 & 1992-93) dated 19 April 1999 has finally clinched the issue in favour of the appellant. Respectfully following the said full bench judgment, which I am otherwise required to follow as held by Honourable Tribunal in (1996) 73 Tax 132 (Trib), I hold that the appellant being an investment finance company is therefore chargeable to tax at standard rate of listed public companies.

- ii) "Regarding inter-corporate rate of tax on dividend income from listed companies, the learned DCIT misdirected himself in law by relying upon a judgment of the Honourable Tribunal reported in (1979) 48 Tax-57 (Trib.) because the said judgment relates to the assessment under the Repealed Income Tax Act of 1992. It is an admitted fact that the provisions of Income Tax Ordinance, 1979 are entirely directly different in so far as chargeability of income from dividend is concerned. The findings given by the honourable Tribunal in the case of Bank of Punjab are also of no help to the revenue, because it has already been held that, unlike Bank of Punjab, appellant is not doing the business of banking, in the case of EFU Insurance Company Ltd. and other Vs. Federation of Pakistan reported in (1997) 76 Tax 21 (S.C. Pak) it has been held that even the companies doing the business of general insurance, income from dividend is chargeable at the inter-corporate rate of tax at 5%. For all these reasons, I hold that income from dividend in the case of appellant is chargeable to inter-corporate rate of tax at 5%. I am guided, in this behalf, by a judgment of the Karachi High Court in the case of Nishat Talkies Vs. C.I.T. (A) reported in (1989) 60 Tax 45 wherein it has been laid down that it is the duty of every Court and Tribunal in the country to follow the judgments of Supreme Court because under Article 189 of the constitution any judgment of the Supreme Court which decides a question of law is binding on all courts in Pakistan."

6. The Income Tax Department being aggrieved by the CIT (A) Order filed an appeal before the ITAT against the same and in particular its finding that the applicant was to be treated as an investment finance

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company instead of a banking company for tax purposes and that the rate of tax applicable would be that applicable to public listed companies rather than a banking company.

7. The ITAT by Order dated 19-7-2005 (ITAT Order) dismissed the Income Tax Departments Appeal as being without merit after hearing the concerned parties and up held the CIT (A) Order.

8. The Income Tax Department since it did not agree with the ITAT Order filed Reference Application under S.133 of the 2001 Ordinance and raised the question of law as alluded to above i.e.

“Whether under the facts and in the circumstances of this case, the learned ITAT was justified to hold that investment banks are public limited companies and not the banking company within the purview of S.2(10) of the Income Tax Ordinance 1979 read with section 5(b) and (c) Banking Companies Ordinance 1962”

9. Learned Counsel for the Income Tax Department drew the Courts attention to S.2 (7) of the 2001 Ordinance which defined a banking company as under:

“banking company” means a banking company as defined in the Banking Companies Ordinance 1962 (LVII 1962) and includes any body corporate which transacts the business of banking in Pakistan.

10. At this stage it is relevant to note that in the 1979 Ordinance (under which ITRA 227/06 which is the lead reference which is now under consideration) at S.2 (10) a banking company was defined as having, “the same meaning as in the Banking Companies Ordinance 1962 (LVII of 1962) and includes any body corporate formed by , or under, any law for the time being in force which transacts the business of banking in Pakistan” (Interestingly ITRA 531/06 does not mention the relevant section of any Income Tax Ordinance whilst ITRA 564/09 mentions S.2(7) of the 2001 Ordinance).

11. As can be seen in the 2001 Ordinance definition of a Banking Company at S.2(7) differed from the 1979 Ordinance definition at S.10(2) in so far as it omitted the words, “formed by, or under, any law for the time being in force” (bold added)

12. Perhaps this omission by Parliament was to add greater clarity to the section and make it absolutely clear that 2001 Ordinance was only to apply to companies carrying out the business of banking however so formed.

13. Learned Counsel for the Department then referred to S.5 (b) and (c) of the Banking Companies Ordinance 1962 (BCO) and submitted that when all 3 definitions were read together i.e. S.2(7) of the 2001 Ordinance and S.5(b) and (c) of the BCO it was evident that an investment bank was carrying out the business of banking especially as it was taking huge deposits from the public for investment purposes and later on returning the same and as such under S.2(7) of the Ordinance an investment bank was encompassed as a banking company and should be treated accordingly for taxation purposes as opposed to an investment finance company.

14. He also stressed that investment banks were licensed by the State Bank of Pakistan (SBP) which was the supervisory and regulatory body for banks in Pakistan and since investment banks were required to be licensed by the SBP it followed that they were banking companies.

15. He further placed reliance on **1999 80 Tax 98 (Trib) before the Income Tax Appellate Tribunal (Lahore Bench) Lahore** to stress that the use of the word "otherwise" as used in S.5 (b) of the BCO brought an Investment Bank on account of its functions within the ambit of conducting the business of banking and thus being a banking company for the purposes of S.2 (7) of the Ordinance.

16. On the other hand learned Counsel for the investment banks argued that investment banks were not banks which fell within the definition of S.2(7) of the 2001 Ordinance and instead were to be regarded as Financial Institutions as per S.24 of the 2001 Ordinance where they had been separately defined.

17. S.24 of the 2001 Ordinance reads as under:

"Financial Institution means an Institution [as defined]
by the Companies Ordinance [1984 XLVII of 1984]"

18. He further contended that investment banks did not carry out the business of banking. Such submission was largely based on the doctrine of the interpretation of Statutes. According to him when interpretation of

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technical words was required in a Statute such as business of banking as used in the BCO the technical definition of business of banking was applicable as opposed to its ordinary dictionary meaning. In this connection he placed reliance on **Noon Sugar Mills Ltd V CIT Rawalpindi 1990-62-Tax 74 (SC Pak)**, **Hirjana & Co.(Pakistan) Limited V Commissioner of sales Tax 1971 SCMR 128**, **Abdul Hammeed V Secretary Government of Balochistan PLD 1996 Quetta 21**.

19. He also argued that when the language of a statute was clear and unambiguous there was no room for intendment and in this case the definition of Banking Company as per S.2(7) of the 2001 Ordinance the language was clear and unambiguous and did not require any discussion about what the legislature actually intended.

20. In his submission the definition clause of a banking company under S.2(10) of the 1979 Ordinance broke into two limbs both of which contained unambiguous language which provided that,

- a) Banking Company has the same meaning as defined in Banking Company Ordinance, 1962.
- b) Only those bodies corporate that **are formed by or under any law and** transact the business of banking in Pakistan.

21. At this point it would seem apparent that the learned counsel for the respondents through the use of the words, **"are formed by or under any law and"** was basing his arguments on the definition of a Banking Company provided in S.2 (10) of the 1979 Ordinance as opposed to the 2001 Ordinance especially as he had provided the Court with written submissions to this effect on which he based his arguments which were in respect of ITRA 227/06 which reference was currently under consideration.

22. He further emphasized that banking is a licensed business in Pakistan and without the permission of State Bank of Pakistan no person can indulge in this business. The investment banks were given license to carry out activities other than banking business as per Para 5 (xx) of SRO No.585(1)/87 dated 13.7.1987.

23. He also submitted that the intention of the legislature was clear and unambiguous as was evident from the following provisions contained in the

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1979 Ordinance and the later promulgated 2001 Ordinance, wherein the terms banking companies and financial institution have been used in contradistinction to show them as independent and separate entities:

Income Tax Ordinance, 1979

1. Section 12(8)
2. Section 23(1)(via)
3. Section 50(2A)
4. Clause (79A) Part-I of the Second Schedule
5. Clause (3) of Part-IV of the Second Schedule
6. Rule (1) of the Third Schedule
7. Rule 5(1) of the Third Schedule
8. 2nd Proviso Rule 8(5) of the Third Schedule

Income Tax Ordinance, 2001

1. Section 2(1A)
2. Section 28(1)(b)
3. Section 29 (1)(a)(ii)
4. Section 39(3)
5. Section 77(4)
6. Section 106(1)
7. Section 151 (1)(b)
8. Section 151 (1)(b)
9. Section 153(5)(c)
10. Clause 81 Part-I of the Second Schedule

24. With regard to the words **body corporate by and under any law**, learned counsel argued that investment banks were not statutory bodies formed by or under any law. They are ordinary companies registered under the Companies Ordinance, 1984 and were given the status of Investment Finance Companies under SRO 585(1)/87 dated 13.7.1987 issued under sub-section (4) and (4A) of section 3 of the Capital Issues (Continuance of Control) Act, 1947 (XXIX of 1947).

25. He placed reliance in this respect on **CIT v Lahore Cantt, Cooperative Housing Society, Lhr. 2009 SCMR 715, CIT v. Engineering Corporative Housing Society, Lhr. 2000-82-Tax-52 (H.C.Lah.), CIT v. Spring Field Secondary School, Kyc 2003 PTD 1264 (Karachi High Court), Padamprashad Ratan Chand V. CIT (1954)-25-ITR-335, Queen v. Registrar of Joint Stock Companies (1891) 2QB 594, Elve v. Baylan (1891) 1 CH 501, Smith Davidson v. Mayrtle (1896 CH 590), United Dairies Lond Ltd. V. Beekemham Corporation (1963 1 QB 434) and the learned Income Tax Appellate Tribunal in its judgment reported as (1998) 78 Tax 71 (Trib.).**

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26. Finally he drew the Courts attention to a letter dated 8-12-2005 from the CBR through its Commissioner Legal Division, Large Tax Payers Unit Lahore to its counsel requesting him to withdraw the Appeals before the Hon'ble Lahore High Court whereby the CBR had raised the same question of law as in these ITRA's. His contention was that the CBR had already conceded through its withdrawal of the Appeals in Lahore that investment finance companies were not banking companies.

27. We have heard this case at length and carefully considered the documents on file (including written submissions), the relevant law and oral submissions by learned counsel and the case law cited by them at the bar.

28. As the ITRA being considered was subject to the 1979 Ordinance and the proceedings thereunder were saved by S.239 of the 2001 Ordinance we shall initially proceed by considering S.2 (10) of the 1979 Ordinance which seems to have defined a banking company in wider terms than S.2 (7) of the 2001 Ordinance and thereafter consider S.2 (7) if still considered necessary.

29. The hub of the issue seems to us whether an investment bank comes within the meaning of a banking company which carries on the business of banking so as to be treated as a banking company as defined in the 1979 Ordinance so as to bring it within the ambit of that Ordinance and be taxed as a banking company as opposed to a financial investment company.

30. The starting point therefore is S. 2(10) of the 1979 Ordinance which reads as under:

"10. "banking company" has the same meaning as in the Banking Companies Ordinance, 1962 (LVII of 1962) and includes any body corporate **formed by, or under, any law for the time being in force** which transacts the business of banking in Pakistan." (as mentioned earlier these bolded words have since been omitted from the 2001 Ordinance)

31. A banking company under the BCO is defined under S.5 (c) as under:

(c) "banking company" means any company which **transacts the business of banking** in Pakistan; [and includes their branches and subsidiaries functioning

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outside Pakistan of banking companies incorporated in Pakistan].”(bold added)

32. This leads to the crucial question of what is the business of banking. In this regard S.5 (b) gives us a strong indication by providing that:

S.5 (b) “banking” means the accepting, for the purpose of lending or investment, of deposits of money from the public, repayable on demand or **otherwise**, and withdrawable by cheque, draft, order or **otherwise** ;(bold added)

33. In terms of statutory interpretation plain words are to be given there ordinary meaning and if they are clear and unambiguous are to be applied as such. In such cases there is no need to interpret the same in order to discover the intent of the legislature.

34. In this respect reliance is placed on the case of **Justice Khurshid Anwar Bhinder V Federation of Pakistan (PLD 2010 SC 483)** which a larger Bench of the Hon’ble Supreme Court found as under at P.531 in respect of the interpretation of statutes.

“A fundamental principle of constitutional construction has always been to give effect to the intent of the framers of the organic law and of the people adopting it. As has been aptly observed **The pole star in the construction of a Constitution is the intention of its makers and adopters.** When the language of the statute is not only plain but admits of but one meaning, the task of interpretation can hardly be said to arise. It is not allowable to interpret what has no need of interpretation. Such language best declares, without more, the intention of the lawgivers, and is decisive of it. The rule of construction is “to intend the Legislature to have meant what they have actually expressed”. It matters not, in such a case, what the consequences may be. Therefore, if the meaning of the language used in the statute is unambiguous and is in accord with justice and convenience, the courts cannot busy themselves with supposed intentions, however admirable the same may be, because, in that event they would be traveling beyond their province and legislating for themselves. But if the context of the provision itself shows that the meaning intended was somewhat less than the words plainly seem to mean then the court must interpret that language in accordance with the indication of the intention of the Legislature so plainly given. **The first and primary rule of construction is that the intention of the Legislature must be found in the words used by the Legislature itself.**

If the words used are capable of one construction only then it would not be open to the courts to adopt any other hypothetical construction on the ground that such hypothetical construction is more consistent with the alleged object and policy of the Act. The judicial consensus seems to be that the essence of law lies in its spirit, not in its letter, for the letter is significant only as being the external manifestation of the intention that underlies it. Nevertheless in all ordinary cases the courts must be content to accept the *litera legis* as the exclusive and conclusive evidence of the *sententia legis*. They must, in general, take it absolutely for granted that the Legislature has said what it meant, and meant what it has said. Its scriptum est is the first principle of interpretation. Judges are not a liberty to add to or take from or modify the letter of the law simply because they have reason to believe that the true *sententia legis* is not completely or correctly expressed by it. That is to say, in all ordinary cases grammatical interpretation is the sole form allowable." (bold added)

35. Apart from the word "otherwise" it would appear that the rest of the language in S.5 (b) is clear and unambiguous and does not require interpretation.

36. If the word or "otherwise" had not been used it would appear prima facie that if we were to take S.5 (b) BCO as the business of banking this would be relatively clear and unambiguous. However the word "otherwise" tends to create a degree of uncertainty as "otherwise" could potentially mean anything connected with the words that followed and as such some interpretation of the word "otherwise" is required especially as learned Counsel for the Department stressed that it was this word that brought an investment bank within the purview of a banking company for the purposes of the 2001 Ordinance.

37. Further clarification on what actually is the business of banking through use of the word "otherwise" could be sought from S.7 BCO which sets out the forms of business which a bank may engage in. It may therefore follow that if a company carries out forms of business which are not covered by S.7 it may not be conducting the business of banking and would not fall within the definition of a banking company or if considered to be a banking company was acting in violation of S.7.

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BUSINESS OF BANKING COMPANIES

7. Forms of business in which banking companies may engage. (1) In addition to the business of banking, a banking company may engage in any one or more of the following forms of business, namely:--(bold added)

- (a) the borrowing, raising or taking up of money; the lending or advancing of money either upon or without security; the drawing making accepting, discounting, buying, selling, collecting and dealing in bills of exchange, hundis, promissory notes, coupons, drafts, bills of lading, railway receipts, warrants, debentures, certificates, scrips [participation term certificate, term finance certificates, musharika certificates, modaraba certificates and such other instruments as may be approved by the State Bank] and other instruments. And securities whether transferable negotiable or not; the granting and issuing of letters of credit, traveler's cheques and circular notes; the buying, selling and dealing in bullion and species; the buying and selling of foreign exchange including foreign bank notes; the acquiring, holding, issuing on commission, underwriting and dealing in stock, funds, shares, debentures, debenture stock, bonds, obligations, securities, [participation term certificates, term finance certificates, musharika certificates, modaraba certificates and such other instruments as may be approved by the State Bank] and investments of all kinds; the purchasing and selling of bonds, scrips or other forms of securities [participation term certificates, term finance certificates, musharika certificates, modaraba certificates and such other instruments as may be approved by the State Bank] on behalf of constituents or others, the negotiating of loans and advances; the receiving of all kinds of bonds, scrips or valuables on deposit or for safe custody or otherwise; the providing of safe deposit vaults; the collecting and transmitting of money and securities;
- (aa) the providing of finance as defined in the Banking Tribunals Ordinance, 1984;]
- (b) acting as agents for any Government or local authority or any other person or persons; the carrying on of agency, business of any description including the clearing and forwarding of goods, giving of receipts and discharges and otherwise acting as an attorney on behalf of customers, but excluding the business of a managing agent or treasurer of a company;
- (bb) acting as "modaraba company" under the provisions of the Modaraba Companies and Modaraba (Floatation and Control) Ordinance, 1980 (XXXI of 1980);]
- (c) contracting for public and private loans and negotiating and issuing the same;

- (d) the effecting, insuring, guaranteeing, underwriting, participating in managing and carrying out of any issue, public, Government, municipal or other loans or of shares, stock, debentures, [debenture stock or other securities] or debenture stock of any company, corporation or association and the lending of money for the purpose of any such issue;
- (f) carrying on and transacting every kind of guarantee and indemnity business;
- (ee) purchase or acquisition in the normal course of its banking business of any property, including commodities, patents, designs, trade marks and copyrights, with or without buy-back arrangements by the sellers or for sale in the form of hire-purchase or on deferred payment basis with mark-up or for leasing or licensing or for re-sharing or for any other mode of financing];
- (f) managing, selling and realizing any property which may come into the possession of the company in satisfaction or part satisfaction of any of its claims;
- (g) acquiring and holding and generally dealing with any property or any right, title or interest in any such property which may form the security or part of the security for any loans or advances or which may be connected with any such security;
- (h) undertaking and executing trusts;
- (i) undertaking the administration of estates as executor, trustee or otherwise;
- (j) establishing and supporting or aiding in the establishment and support of associations, institutions, funds, trusts and conveniences calculated to benefit employees or ex-employees of the company or the dependents or connections of such persons, granting pensions and allowances and making payments towards insurance; subscribing to or guaranteeing moneys for charitable or benevolent object or for any exhibition or for any public, general or useful objection;
- (k) the acquisition, construction, maintenance and alteration of any building or works necessary or convenient for the purposes of the company;
- (l) selling, improving, managing, developing, exchanging, leasing, mortgaging, disposing of or turning into account or otherwise dealing with all or any part of the property and rights of the company;

- (m) acquiring and undertaking the whole or any part of the business of any person or company, when such business is of a nature enumerated or described in this sub-section;
- (n) doing all such other things as are incidental or conducive to the promotion or advancement of the business of the company;
- (o) any other form of business which the [State Bank by circular] specify as a form of business in which it is lawful for a banking company to engage.

(2) **No banking company shall engage in any form of business other than those referred to in sub-section (1).** (bold added)

39. The difficulty however in using S.7 as a yardstick to interpret the word "otherwise" is that S.7 clearly uses the word **in addition** i.e. (1) **In addition** to the business of banking, a banking company may engage in any one or more of the following forms of business, namely the.....

40. This would tend to suggest that those **other forms** of business which a bank **may** engage in are **in addition** to the business of banking and do not amount to the core business of banking which is limited to S.5 (b). The up shot would therefore seem to be that a banking company would have to fulfill the pre-conditions set out in S.5 (b) in order to become a banking company for the purposes of that section and could only then carry out the additional businesses as in S.7 BCO as mentioned above

41. We are still left therefore to interpret what the word "otherwise" means within the context of S.5 (b) BCO, the BCO when read as a whole and the 1979 Ordinance when read as a whole.

42. In this respect in terms of statutory interpretation of a fiscal Statute we must consider the settled law as for example set out by the Hon'ble Supreme Court in the case of **Yousuf Re-Rolling Mill V Collector of customs (PLD SC 1989 232 Relevant P.241)** where it was held that "the rule of interpretation while construing taxing statutes is that the language used is not to be either stretched in favor of the state or narrowed in favour of the tax payer".

43. This principle and other well settled principles of law in respect of interpretation of fiscal statutes, which we endorse, was followed and is well set out by a **Full Bench of the Income Tax Appellate Tribunal (Lahore**

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Bench) Lahore (which was dealing with this precise issue of whether an investment bank could be considered as a banking company for the purposes of the 1979 Ordinance) 1999 80 Tax 98 (Trib) Relevant P.128 at Para 22 which found as under:

“22. There is another important principle of law pertaining to the imposition of fiscal burden or charging of tax, that it should be imposed by unequivocal and unambiguous language. Taxing statutes must state with the utmost clearness what and whom and in what manners they are taxing. Likewise the extent of fiscal burden should also be in clear words and without any ambiguity. **In any taxing provision if there are two possible constructions of the words of the statute then the effect is to be given to the one which is in favour of the citizen and not the one that enhances a burden or increased burden on him.** Neither any tax nor any higher rate of tax can be imposed by any interpretive process. No provision in fiscal statute can be extended on analogy and, therefore, the Court would never be justified in straining the language in order to hold a subject liable to tax or to a higher rate of tax than by looking at the clear words used by the legislature.” (bold added)

44. Under the above settled law since the definition of banking under S.2 (10) of the 1979 Ordinance and indeed 2001 Ordinance is by reference to S.5 (b) BCO this would indicate that the word “otherwise” as used in that section cannot be interpreted so widely as to bring further tax payers into the net or increase their tax liability when a narrow interpretation of the word “otherwise” would have avoided the same or if two reasonable conclusions can be reached on the issue the benefit must go to the tax payer.

45. The above cited Full Bench judgment of the Income Tax Appellate Tribunal Lahore is of significance in that it not only concerned the exact issue in hand but was a Full Bench decision which settled conflicting issues on this point by other ITAT's in a detailed, well reasoned and elaborate judgment.

46. The concise Oxford English Dictionary (OED) 12th Ed defines the word “otherwise” in the following terms:

“otherwise” adv 1 in different circumstances; or else.2 in other respects.3 in a different way. Alternatively adj in a different state or situation.

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PHRASES (or and otherwise indicating the opposite of something stated")

47. In our view however, this definition appears to be of little help for interpreting the word "otherwise" from a legal perspective and the better and more appropriate assistance from the legal perspective can be found by invoking the ejusdem generis rule of statutory interpretation/construction which is described in Blacks law dictionary 6th Ed. as under:

"Ejusdem generis /iyjesdem jeneres/. Of the same kind, class, or nature. In the construction of laws, wills, and other instruments, the "ejusdem generis rule" is, that where general words follow an enumeration of persons or things, by words of a particular and specific meaning, such general words are not to be construed in their widest extent, **but are to be held as applying only to persons or things of the same general kind or class as those specifically mentioned.** U.S. v. LaBrecque, D.C. N.J., 419 F.Supp. 430, 432. The rule, however, does not necessarily require that the general provision be limited in its scope to the identical things specifically named. Nor does it apply when the context manifests a contrary intention.

Under "ejusdem generis" canon of statutory construction, where general words follow the enumeration of particular classes of things, the general words will be construed as applying only to things of the same general class as those enumerated. Campbell v. Board of Dental Examiners, 53 Cal.App.3d 283, 125 Cal.Rptr. 694, 696.(bold added)

48. The ejusdem generis rule of interpretation /construction is further described in Judicial Dictionary (13) Ed. by KJ Airyar as under:

"Ejusdem generis. **If a general word is added to specific words, the general words take colour from the specific word,** and obviously when there are no specific words of ejusdem generis will not be applicable, [Pinters House Pvt Ltd v Misri Lal Dalip Singh AIR 1970 P&H 1 (7) (FB)].

When the legislature has indicated certain Acts and thereafter the words 'any law', is used, then the use of the word 'any other law' has to have nexus with the foregoing Acts. [V J A Flym v S S Chouhan (1996) 2 Chand CrCas 321 at 330 (Del)].

Rule explained. When a statute, particular classes are mentioned by name and then are followed by general words, the general words are sometimes construed ejusdem generis i.e. limited to the same category or genus comprehended by the particular words. But it is not necessary that this rule must always apply. The nature of the

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special words and the general words must be construed before the rule is applied. It follows, therefore, that interpretation ejusdem generis or noscitur a sociis need not always be made when words showing particular classes are followed by general words. Before the general words can be interpreted, there must be a genus constituted or a category disclosed with reference to which the general words can and are intended to be restricted. [Jagdish Chandra Gupta v Kajaria Traders (India) Ltd [1964] 8 SCR 50, (1964) 1 SCWR 675, 66 BLR 709, 1964 ALJ 971, (1965) 1 SCJ 249, 1965 MPLJ 34, 1963 LJ 45, AIR 1964 SC 1882]. (bold added)

49. As such if we apply the ejusdem generis rule for the purposes of interpretation it would tend to suggest that the word "otherwise" was limited to repaying public money otherwise than on demand for instance by allowing some grace period and enabling the public to withdraw money by cheque, draft, order or other means.
50. The word "otherwise" can therefore be seen as integrally linked to the time of repayment of money and the manner of repayment and nothing else. The core business of banking would therefore seem to be accepting money from the public for investment purposes which is repayable on demand or within such other time period by means of cheque, draft, order or through some other means such as cash or something equivalent in money terms.
51. As such all the other business's which a bank could enter into would be **in addition** to its core function as mentioned above as seems to be spelt out in S.7 BCO and that it would be a pre requisite for a company to satisfy the core functions as set out in S.5 (b) BCO before it could be considered as a banking company.
52. Therefore a plain reading of S.5(b) BCO coupled with the use of the ejusdem generis rule in interpreting the word "otherwise" in our view would tend to indicate that the core business or function of a bank in order for it to qualify as a banking company, in that it carries out the business of banking, is that it must perform **at least** all of the 4 functions mentioned below (the so called core functions) and that these core functions must be its **primary functions** when its operations are taken as a whole as opposed to any ancillary function:

1. Accepting of deposits of money from the public
2. The acceptance must be for the purpose of lending or investment
3. Such deposits must be repayable on demand or otherwise e.g. within a grace period and
4. Such deposits must be withdrawable by the public by cheque, draft, order or otherwise e.g. by cash;

53. We are fortified in our view of what amounts to core banking for the purpose of defining business of banking as per S.5 (b) BCO by the following case law:

A.I.R. 1954 TRAV. C. 50 and 51 (Vol. 41, C. N. 19).

"Mr. Narayana Pillal invited my attention to the definition of the term 'banking' in the Banking Companies Act, 10 of 1949 which has been made applicable to the State by subsequent legislation Section 5, Cl. 1 (1) gives the definition of 'banking' as follows,

"Banking means the accepting for the purpose of lending or investment of deposits of money from the public, repayable on demand or otherwise and **withdrawable** by cheque, draft or otherwise." (bold added)

(3) **It is clear from the definition that acceptance of deposit is sine qua non to constitute banking business.** There is no evidence in the case to show that the Samajam was either formed for accepting deposits or was actually accepting deposits at any time.....(bold added)

A 'Samajam' even though consisting of 15 members, which carries on money lending business will not be a banking company compulsorily registrable under the Companies Act, if there is no evidence to show that it was formed for accepting deposits or was actually accepting deposits at any time."

54. As can be seen under the Indian legal definition the term 'banking' in the Banking Companies Act, 10 of 1949 is almost identical to that contained in S.5 (b) of the BCO bar the addition of the word, "order" in the Pakistani law which in spirit is similar to the word before it and was later added to the Indian definition of a banking company.

A.I.R. 1957 MADRAS 745 (V 44 C 239 NOV.)

No person or body corporate or otherwise, can be a banker who does not (1) take deposit accounts, (2) take current accounts, (3) issue and pay cheques and (4) collect cheques crossed and uncrossed, for his customers. One claiming to be a banker must profess himself to be one, and the public must accept him as such, his main business must be

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that of banking from which generally, he should be able to earn his living."

AIR 1961 CALCUTTA 666 (V 48 C 129)

The definition of 'banking' given in S. 5 (1)(b) of the Banking Companies Act, 1940, makes it clear that receiving money on deposit from customers and honouring their cheques is the essential characteristic of banking. The essence of banking is the relationship which is brought into existence at the time of the deposit; *that is the core of banking*. Under S. 6 of the Act a banking company may, in addition to the business of banking, engage in any one or more of the different kinds of business specified in the various sub-clauses of sub-section (1) of that section. Thus, the business of banking covers every possible phase or combination of deposit, custody, investment, loan, exchange, issue and transmission of money, creation and transfer of credit and other kindred activities. *But if the essential characteristic of banking, namely, the power to receive deposits from the public which are repayable in the manner indicated in section 5 (1) (b) of the Act is absent and merely the power of granting loans is related and exercised that does not make the company a banking company. Lending of money may be one phase of banking business but it is not the main phase or the distinguishing phase.*" (bold added)

55. In the Pakistani case of **Overseas Pak Credit and Investment Corporation (Pvt) Limited V Governor State Bank of Pakistan (CLC 1988 P.1438)** a Divisional Bench of this Court when alluding to the meaning of Banking in S.5 (b) held as under at P.1441:

"The words "banking" and "banking company" have been defined by section 5(b) and (c) as follows:-

- "(b) 'Banking' means the accepting, for the purpose of lending or investment, of deposits of money from public, repayable on demand or otherwise, and withdrawable by cheque, draft, order or otherwise;
- (c) 'Banking Company' means any company which transacts the business of banking in Pakistan;

Explanation : Any company which is engaged in the manufacture of goods or carries on any trade and which accepts deposits of money from the public merely for the purpose of financing its business as such manufacturer or trader shall not be deemed to transact the business of banking within the meaning of this clause;"

The word 'Banking' as defined in section 5 (b) *contemplates a business where money or deposits are accepted from public for investment or lending them and*

further that such amount received from public is repayable on demand or by any other mode and can be withdrawn by cheque, draft or in any other manner".(bold added)

56. In the 1982 Pakistani case of **Shams Textile Mills Limited V Federation of Pakistan** (PLD 1982 Kar and Quetta P.513) the following observations were made:

P.519. Whereas the definition of a banking company given in the Ordinance, includes a bank as defined in the Banks (Nationalisation) Act, 1974 and includes a banking company incorporated outside Pakistan and transacting banking business in Pakistan and a financial institution which the Federal Government may by notification in the official Gazette declare to be a banking company for the purpose of Ordinance, but does not include the State Bank of Pakistan. It may be noticed that the definition of the banking company given in the Ordinance is wide in its scope as compared to the definition given in the Banks (Nationalisation) Act, 1974, or in the Banking Companies Ordinance, 1962, in as much as that a banking company incorporated outside Pakistan is also included. **Furthermore, a financial institution can be declared as a banking company for the purposes of the Ordinance by a Notification in the official Gazette by the Federal Government.**(bold added)

(In the reference under consideration no such notice has been received by the assessee in this respect from any body e.g Federal Government, SBP etc.As will be seen later the position is the contrary)

4. (a) (i) With reference to the case reported in P L D 1948 P C 107, it may be observed that the question before the privy Council was, as to whether the appellant-Company was liable to be assessed for income-tax under the Income-tax Ordinance of Ceylon in respect of the income and profit of its Ceylon branch, which had an office in Colombo and further question was, whether in computing the amount of said income and profit a deduction should be allowed in respect of a sum of Rs.53,226 debited to the Ceylon branch by way of interest on the balance due to the Head Office during the year ending 31.03.1940. While considering the above question Lord Morton of Henryton observed that the word "banking and banker" may bear different shades of meaning at different periods of history, and their meaning may not be uniform today in countries of different habits of life and of different degree of civilization: **It was further observed that for the purpose of deciding, as to whether appellant's Ceylon branch carried on business of banking at the material time, what is to be seen is whether the branch at the time could be described as "a company which carried on as its principal business the accepting of deposits of money on current account or others, subject to withdrawal by cheque, draft or order."** (bold added)

P.520 (iv) Reverting to the Law of Banking by Lord Chorley, it may be advantageous to reproduce herein below the description of the commercial banks given in the above book, which reads as follows :

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“Commercial Banks.---Commercial banks may be divided into banks of deposit and merchant banks. The object of a bank of deposit, of which the well known joint-stock banks called the ‘Big Five’ are examples, is to collect large aggregations or deposits of money by borrowing from the mercantile and general community, and to lend it out again at interest for short periods of those requiring money for finance of their business, whether in commerce, industry, or agriculture. The merchant banker, on the other hand, uses his own and borrowed money for the purposes of financing business of a type with which he makes himself especially familiar, such as overseas commerce, loans to foreign municipalities the issue of industrial securities, etc. The business of the merchant banker merges into that of the issue houses, and indeed it is hardly possible to give an exclusive description of it. It overlaps to some extent with that of the deposit banks, but they may be distinguished in that the merchant banks do not open account for any member of the public who choose to apply, and do not ordinarily issue cheque books to their customers. It is with the legal aspects of the business of the deposit banks that this volume is concerned, though something of what we have to say will apply also to the merchant banks in so far as they are concerned with the same type of business.....

57. In discussing banks and the business of banking the following was noted in Tannan’s Banking law and Practice in India (23 Ed.2010)

“P.198. 12. “Banking” and “Banking Company”

It is has been held by the Supreme Court in Rustom Cowasji Cooper v. Union of India, that the expression “Banking” does not include other commercial activities of a banking institution. The essential characteristic being its ability to receive money as deposits from customers and its ability to honour their cheques and without this mere power to grant loans would not of itself render an institution a Banking Company.” (AIR 1979 SC 564 :

“P. 199. 14. Essential Characteristics of Banking Company

Though banks have been allowed under Section 6 of the Banking Regulation Act, 1949 Section 5 of erstwhile Banking Companies Act, 1949, but if the

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essential characteristics of banking, that is, the power to receive deposits from the public which are repayable or refundable in the manner indicated in Section 5(1) (b) of the Banking Regulation Act, 1949 (10 of 1949) is absent and merely the power of granting loans is retained, that does not make the company a banking company." (Mahaluxmi Bank Ltd. V. Registrar of Companies, (1961) 31 Com Cases 287 (Cal) : AIR 1961 Cal 666, Section 6, Banking Regulation Act [Section 5, Banking Companies Act].(bold added)

"P. 762. 3. Major functions of banks

This shows that the major functions of banks are : (1) to mobilise the **deposits from the public** and (2) to utilise the deposits for the purpose of lending or investment or both. In the process of this activity, the banks make profits for themselves."(bold added)

58. The next question to be considered is what are the primary functions of an investment bank and whether the core functions of an investment bank bring it within the definition of the business of banking in terms of the core functions of the business of banking as identified earlier at Para 52.

59. The word "Bank" as per the concise Oxford English Dictionary (OED) 12th Ed is defined as:

"Bank n 1.a financial establishment that uses money deposited by customers for investment, pays it out when required, makes loans at interest and exchanges currency"

60. As can be seen this definition is quite similar to the definition of banking under S.5 (b) BCO and seems to contain a number of the core requirements as would constitute the business of banking.

61. On the other hand, "Investment Bank" as per the concise Oxford English Dictionary (OED) 12th Ed is defined as:

"Investment Bank" n. a bank that purchases large holdings of newly issued shares and sells them on to investors"

62. The point to note here is that if all banks carried on the business of banking why was there a need for two definitions of a bank and an investment Bank. This would indicate that to some extent at least the business of a bank and an investment bank are distinct. And perhaps for this reason, the legislature has prescribed different rates of taxation, as

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otherwise the banking company could itself venture into the business of "investment banking" instead of forming a separate investment bank

63. Furthermore, from the above definition it would seem that an investment bank does not in essence perform all the 4 core functions as identified earlier as to bring its activities within the core definition of the business of banking. It would appear that the main function of an investment bank is the acquisition of shares and later sale of such shares in order to make profits for large organizations as opposed to the public.

64. "A Dictionary on Accounting," published by Oxford University Press 2010 Ed. also provides 3 separate definitions of a commercial bank, investment bank and merchant bank as under:

"commercial bank". A privately owned bank that provides a wide range of financial services, both to the general public and to firms. **The principal activities** are operating cheque current accounts, receiving deposits, taking in and paying out notes and coin, and making loans. **Additional services** include trustee and executor facilities, the supply of foreign currency, the purchase and sale of securities, insurance, a credit-card system, and personal pensions. They also compete with the finance houses and merchant banks by providing venture capital and with building societies by providing mortgages. (bold added)

"investment bank". A US bank that fulfils many of the functions of a UK merchant bank. It is usually one that advises on mergers and acquisitions and provides finance for industrial corporations by buying shares in a company and selling them in relatively small lots to investors. Capital provided to companies is usually long-term and based on fixed assets. In the USA, commercial banks were excluded from selling securities for many years but the law was relaxed in the late 1980s and most of the remaining restrictions were removed in 1999. The financial crisis of 2008 saw the demise of several leading investment banks, notably Lehman Brothers, Bear Sterns, and Merrill Lynch.

"merchant bank". A bank that formerly specialized in financing foreign trade, an activity that often grew out of its own merchanting business. This led them into accepting bills of exchange and functioning as accepting houses. More recently they have tended to diversify into the field of hire-purchase finance, the granting of long-term loan (especially to companies), providing venture capital, advising companies on flotation's and takeover bids, underwriting new issues, and managing investment portfolios and unit trusts. Many of them are old-established and some offer a **limited banking service**. Their knowledge of International trade makes them specialists in dealing with the large multinational companies. Merchant

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banking has a long history in Europe. Several UK merchant banks were taken over in the 1990s either by the commercial banks or by large overseas banks. (bold added) .

65. As is evident from the above accounting definitions it would appear that investment banks do not provide all, if any of the services, so as to bring them within the core functions of the business of banking. For example, operating bank accounts for the public and taking deposits from the public. On the Contrary investment banks tend to perform specialized forms of investment on behalf of large corporate entities mainly in terms of the acquisition and sale of shares.

66. This is further illustrated by an Article by Rob Renaud entitled, "What is the difference between investment banks and merchant banks" (http://www.investopedia.com/ask/answers/05/investmentbank_vs_merchatbank.asp).

Merchant banks and investment banks, in their purest forms, are different kinds of financial institutions that perform different services. In practice, the fine lines that separate the functions of merchant banks and investment banks tend to blur. Traditional merchant banks often expand into the field of securities underwriting, while many investment banks participate in trade financing activities. In theory, investment banks and merchant banks perform different functions.

Pure investment banks raise funds for businesses and some governments by registering and issuing debut or equity and selling it on a market. Traditionally, investment banks only participated in underwriting and selling securities in large blocks. **Investment banks facilitate mergers and acquisitions through share sales and provide research and financial consulting to companies. Traditionally, investment banks did not deal with the general public.**

Traditionally merchant banks primarily perform international financing activities such as foreign corporate investing, foreign real estate investment, trade finance and international transaction facilitation. Some of the activities that a pure merchant bank is involved in may include issuing letters of credit, transferring funds internationally, trade consulting and co-investment in project involving trade of one form or another.

The current offerings of investment banks and merchant banks varies by the institution offering the services, but there are a few characteristics that most

companies that offer both investment and merchant banking share.

As a general rule, investment banks focus on initial public offerings (IPOs) and large public and private share offerings. Merchant banks tend to operate on small-scale companies and offer creative equity financing, bridge financing, mezzanine financing and a number of corporate credit products. While investment banks tend to focus on larger companies, merchant banks offer their services to companies that are too big for venture capital firms to serve properly, but are still too small to make a compelling public share offering on a large exchange. In order to bridge the gap between venture capital and a public offering, large merchant banks tend to privately place equity with other financial institutions, often taking on large portions of ownership in companies that are believed to have strong growth potential.

Merchant banks still offer trade financing products to their clients. Investment banks rarely offer trade financing because most investment banking clients have already outgrown the need for trade financing and the various credit products linked to it.” (bold added)

67. A further Article entitled “Difference between investment and merchant Banking” also sheds light on the difference in core functions/operation between a so called “ordinary bank” performing the business of banking and an investment and merchant Bank (http://www.investopedia.com/ask/answers/05/investment_ank_vs_merchant_bank.asp)

68. For ease of reference the Article is set out below:

Investment vs Merchant Banking.

Bank is an organization that provides a range of financial and some non financial services to its customers. The main source of income, that makes the bank survive is the interest charged from those to whom the bank has given loan. A bank accepts deposits from its customers and pay interest to that deposited money, while it lends money to those who need finance and charge interest from them. The interest rate chargeable from the borrowers is higher than the interest rate payable to depositors. This is how a bank, which is traditionally known to normal people, earns revenue. Banks can be broadly categorized as retail banks and investment banks. The above mentioned revenue generating procedure is more applicable to a retail bank. The revenue models of investment and merchant banks are different which we will discuss in this article.

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Investment Banking

An investment bank is a financial institution that engages in the issuance of securities on behalf of its client. Investment banks are the banks, which facilitate both the investor, who is in search for good investment opportunity and the investee, who is searching for capital to invest in viable projects. *Unlike other types of banks, investment banks are not accepting deposits from customers; that is, investment banks do not provide regular banking services to the general public.* The main Investment banking activities are issuance of securities, underwriting of securities, providing financial related consultancy services to companies, assisting companies in the acquisition and mergers, and similar services.

JP Morgan. Bank of America, Merrill Lynch. Goldman Sachs. Morgan Stanley, and Credit Suisse are some of the world renown investment banks.(bold added)

Merchant Banking

Merchant bank is a bank that mainly deals with international financial activities such as foreign real estate investment and long term company loans. *Merchant banks do not provide regular banking services to the general public.* Nowadays, merchant banks provide underwriting services and consultancy services for wealthy institutions, as well as individuals, issuance of letter of credit, international fund transfer, foreign corporate investment and foreign corporate investment and foreign real estate investment are some examples of services offered by a merchant bank. Merchant banks offer capital in exchange for share ownership. The main sources of income of merchant bank are fee for the consultancy that they provided and interest for the capital provided. Some of the financial institutions mentioned above (e.g: JP Morgan) have begun as merchant banks.(bold added)

69. Furthermore, the Full Bench of the Income Tax Appellate Tribunal Lahore cited above, which in this respect we endorse, was also of the view that investment banks did not carry out one of the 4 core functions of a banking company as defined in S.5 (b) in terms of withdrawal by cheque in the following terms at P.150:

38. The word 'withdrawable' has not been defined in the Banking Companies Ordinance, 1962 or any other law which has been referred to us. However, the principle that the words acquire the meaning and colour from the context in which they are used is very much attracted here. A perusal of para-5 of SRO 585 under which the investment finance companies are granted licence to carry on the investment finance business shows that the investment

finance companies receive deposits by issuance of short-term paper of its own or certificate of deposits or investment of not less than 30 days maturity and issuance of long-term certificate of deposits or investment. The proforma of certificate of deposits/certificate of investment has been produced before us to show that the amount of investment is payable to the registered holder on surrender of the certificate of the office of issue. It has been further stated before us that if the certificate of deposit/investment is surrendered after maturity the profit thereon is paid. However, if the certificate is surrendered prior to maturity no profit is paid thereon. **Be that as it may, the fact which has not been controverted is that the investment/deposits is payable on surrender of certificate and not otherwise.** Mr. Iqbal Naeem Pasha has produced copy of letter from State Bank of Pakistan dated 30th September 1993 according to which the State Bank of Pakistan in pursuance of control which it has on the non-banking financial institution (as nomenclature is given by the State Bank of Pakistan to the financial institutions) are permitted to give premature encashment of the certificate of investment subject to the condition that no profit will be paid on the certificate so encashed. **It shows that the repayment of the deposits with the financial institution/finance investment companies is on surrender and encashment of the certificate, meaning thereby that withdrawal of the part, investment/deposits is not permissible in the case of investment finance companies. In these circumstances the word 'withdrawable' by cheque, draft, order or otherwise gains importance.** According to Chambers Dictionary, (1993 Edition) the word withdrawal' means; an act of gradual process of withdrawing and the removal of money from a bank account. Thus when the expression withdrawable has been used in section 5(b) of the Banking Companies Ordinance, 1962 it envisaged, first, an account current or saving and secondly, the right of the account holder to take out or remove the money gradually, though having the right of withdrawing the amount in one transaction as well. **In the case of investment finance companies neither there is any account of depositor opened with the finance company in the nature of current or saving account nor there is any way for gradual or piece meal withdrawal of deposit at the option of depositor. The entire deposit is encashed on surrender of certificate of investment/deposit on maturity of certificate or prior to maturity but the repayment is in the form of total dis-investment of the entire investment/deposits.** Now in this back-ground when we examine the provisions contained in section 87 of the Banking Companies Ordinance, 1962 we find that the words "withdrawable by cheque, draft, order or otherwise' are not without significance. It is provided in section 87 of the Banking Companies Ordinance, 1962 **that no person other than a banking company, the State Bank of Pakistan, the National Bank of Pakistan or any other banking institution notified by the Federal Government in this behalf shall accept from the public deposits money withdrawable, by cheque.** Here we would like to refer

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even at the cost of repetition that the provision contained in Para-5(xx) of SRO 586(1)/87 specifically states that the investment finance company is not allowed to do banking business and in this connection they will neither issue cheque books nor accept deposits. So far as the acceptance of deposits, lending the same for investment and repayment of deposits are concerned the banking companies and investment finance companies both are engaged on the above activities *but one of the main point of distinction drawing a broad line of demarcation and not a thin line as held in the Division Bench Judgment of this Tribunal reported as (1997) 75 Tax 83 (Trib.) = 1997-PTD (Trib.) 786 is of receiving deposits withdrawable by cheque. It appears that the provisions contained in section 87 of banking Co. Ord. 1962 were not brought to the notice of learned Division Bench which decided the case cited above.(bold added)*

70. From the above discussion it therefore seems extremely unlikely that an investment bank undertakes the 4 core functions which are necessary to amount to the business of banking so as to qualify it as a banking company under S.5 (b) BCO and thereby bring it within the ambit of the definition of banking company as set out in the 1979 Ordinance i.e. S.2 (10).

71. It seems apparent that the 1979 Ordinance itself distinguishes between a "banking company" which it defines at S.2 (10) and a "company" which it defines at S.2 (16) as they are both defined separately under the 1979 Ordinance.

72. Under the S.2 (16) of the 1979 Ordinance, "Company" means:

2.[(16)] "company" means---

(a) company as defined in the Companies Act, 1913 (VII of 1913); or

(b) a body corporate formed by or under any law for the time being in force; or

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

(d) the Government of a Province ;

(e) a foreign association, whether incorporated or not, which the Central Board of Revenue may, by general or special order, declare to be company for the purposes of this ordinance for such assessment year or years (whether commencing before, on or after the first day of July, 1979) as may be specified in the said order.]

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73. Further support for the proposition that an investment bank being a financial institution distinct from a banking company can be found in the case of the **Full Bench of the Income Appellate Tribunal Lahore** which we endorse in this respect (which was dealing with this precise issue of whether an investment Bank could be considered as a banking company for the purposes of the 1979 Ordinance) 1999 80 Tax 67 (Trib) P.98 Relevant P.136 which found as under:.

"I have examined the Income Tax Ordinance closely to ascertain if the legislature has referred to financial institution as a separate and distinct entity other than bank or not, so that other principle that legislature does not waste the word and that when different, distinct and specific words/terms/expressions have been used by the legislature, they convey different connotation, and I have found that the legislature has used the terms financial institution in contradistinction to banking company in the following provisions of the Income Tax Ordinance.

- Section 12(18) of the Income-tax Ord. 1979.
- Section 23(1) (via) of the Income-tax Ord., 1979.....
- Section 50(2A) of the Income Tax Ord., 1979.....
- Clause (79A) Part-I of the Second Schedule to the Income-tax Ordinance 1979.....
- Clause (3) Part-IV of the second Schedule to the Income-Tax Ordinance, 1979.....
- Rule 1(1) of the Third Schedule to the Income-Tax Ordinance, 1979....
- Rule 5(1) of the Third Schedule to the Income-tax Ordinance, 1979"...

.....30. For the time being it will suffice to observe that in spite of incorporating the definition of banking contained in section 5(b) of the Banking Companies Ordinance, 1962 in the Income-tax Ordinance, 1979 by virtue of definition in section 2(10) of the Income-tax Ordinance, 1979, the legislature has separately mentioned banking company and the financial institution. If the intention of legislature would have been to include the financial institution in the definition of banking company, then there was no necessity of separately mentioning financial institution in various provisions of the Income-tax Ordinance, 1979. It is also a cardinal principle of the interpretation of statute that no oblivion can be attributed to the legislature and if it is held that the financial institution is a banking company for the purpose of Income-tax Ordinance, 1979-it can not be done without doing violence to the provisions

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contained in the Income-tax Ordinance, 1979 referred to above and without violating various principles of interpretation of statute (bold added)

74. Although the word financial institution finds no mention in the definition section of the 1979 Ordinance, in our view this loses relevance when, as above, it can be shown that a financial institution was recognized and treated as an independent entity from a banking company in the 1979 Ordinance and in fact may have been a motivating factor in a definition of "financial institution" being added to the 2001 Ordinance in S.2 (7) of its definition section.

75. Indeed as found by the **Full Bench of the Income Appellate Tribunal (Pakistan) Karachi** cited above the idea of an investment bank was not a new concept distinct from a banking company prior to the 1979 Ordinance where at P.148 it was stated as under:

"We will only give a passing remark that every banking company is in essence an investment finance institution as well but every investment finance institution is not a banking company. At present we are dealing with the developments in the field of investment and finance of which the legislature has taken notice. Section 15AA was inserted in the Income Tax Act, 1922 in the year 1953. It was amended from time to time and by Finance Act, 1965 the expression investment companies was included. On promulgation of Income-tax Ordinance, 1979 which repealed the Income-tax Act, 1922, the expression Pakistani investment companies was used in section 41(D). Again in section 43 sub-section (2) the expression investment company was used. It was provided in sub-section (3) of section 43 that the CBR may make rules regulating procedure for the grant of approval under section 43 and in pursuance thereof rule 38 was framed." In rule 38 the expression investment company was used and in sub-section (2) investment company was defined as follows:-

"Investment Company" means a company engaged principally or wholly, in buying and selling securities of other companies and includes a company, not being a holding company, the investment of which in the share capital of other companies at any one time is of an amount equivalent to 80% of the aggregate of its own paid up capital and free reserve but does not include a bank or an insurance company or a corporation which is a member of stock Exchange."(bold added)

76. As such although it is accepted that the banking industry is not static and as required moves with the needs of the prevailing times and the

demands of society as it evolves which have led to many innovations in recent times in the banking sector in terms, amongst other things, in the manner which banks are organized and operated and the different products which they offer it is also accepted that it is for the legislature to also respond to the needs of the times in both banking and taxation matters.

77. As is well known the law of Taxation is in a constant state of flux and is often amended in certain respects on an annual basis through the Finance Act with such amendments aiming to meet the needs of the time in terms of taxing both individuals and entities. As such the legislature has been cognizant of the concept of an investment bank being different from a banking company. If the legislature intended an investment bank or investment financial institution to be included in the definition of banking in the various Income Tax Ordinances it could have done so by making such amendments to the 1979 and 2001 Ordinance and even to the definitional section 5 (b) and (c) of the BCO. However the fact that the legislature has failed to make such amendments to specifically include a investment company or investment institution as a banking company for taxation purposes is a clear indication that at least for taxation purposes an investment bank is to be treated differently from a banking company.

78. As per the discussion above and based on the actual functions of the Assessee in our view it is extremely unlikely that the Assessee is a banking company as it fails to perform some of the core functions of a banking company as identified earlier. Therefore the next question which arises is whether it is an investment finance company as it alleges or some other kind of company for taxation purposes.

79. In this respect the Capital Issues (Continuance of Control) Act 1947 (Act XXIX of 1947) (the 1947 Act) and the Notification issued under it being SRO 585(1)/87 dated 13th July 1987 (the SRO) are of significance.

80. As is obvious from its name the 1947 Act aims to control the issue of capital. S.2 (a) defines the Issue of capital whilst S.2 (b) defines Securities as is referred to in S.2 (a). For ease of reference both these definitional sections are set out below:

2. Definitions: In this Act.

(a) 'Issue of capital' means the **issuing of any securities** whether for cash or otherwise ;(bold added)

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(b) 'Securities' means any of the following instruments issued or to be issued, by or for the benefit of a company whether incorporated in Pakistan or not, namely:

(i) shares, stocks, [Modaraba Certificates, Mutual Fund Certificates & trust Union];

(ii) debentures, [Lands and Participation Term Certificates];

(iii) other instruments creating a charge or lien on the assets of the company;

(iv) instruments acknowledging loan to or indebtedness of the company and guaranteed by a third party or entered into jointly with a third party and

v) any other instruments, specified by the Federal Government, by Notification in the official Gazette to be a security for the purpose of this Act,

81. Under S.3 of the 1947 Act which concerned the control of issue of capital S.4 and 4(A) provided as under:

(4) Notwithstanding anything contained in the Companies Act, 1913 (VII of 1913), or in any other law for the time being force, or in any contract or the articles or memorandum of association of any Company, any consent or recognition accorded under sub-section (2) or under sub-section (3), whether before or after the commencement of this sub-section, **shall be subject to such conditions as the Federal Government may if it is of opinion that it is necessary so to do in the public interest or in the interest of the company, impose from time to time. (bold added)**

(4-A) In particular and without prejudice to the generally of the foregoing power, **such conditions may relate to the nature, valuation and manner of disposal of securities,** issue of prospectus, brokerage and underwriting commission, listing of securities, quorum of meetings, qualification of directors, management expense or managerial remuneration, valuation of assets including depreciation, and distribution of cash and stock dividend. (bold added).

82. It is apparent from the above that the 1947 Act is mainly dealing with securities, shares and other instruments some of which do not form part of the core banking functions of a banking company as defined in S.5 (b) and (c) BCO as noted earlier.

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83. Under S.12 of the 1947 Act the Federal Government had the power to make Rules by notification in the Official Gazette for the purposes of carrying out the 1947 Act.

84. The aforementioned SRO was passed pursuant to the powers given to the Federal Government under S.4 and 4(A) of the 1947 Act whereby the Federal Government through the SRO stipulated that all consents and recognitions **in respect of investment finance companies** for issue of capital for making a public offer or for taking any other action under Sub section 2 or 3 of the said section would be subject to certain conditions (bold added).

85. Under S.1 (g) an investment finance company was defined as a company **registered and granted license under this Notification** to undertake and carry on the business of an investment finance company.

86. Certain pre conditions had to be met before a company could be registered as an investment finance company under S.2 of the SRO. Having met those requirements (for example being a public listed company with the objects and functions as listed in S.5 of the SRO and being registered on the stock exchanges of Pakistan) the Assessee was registered and issued a license under S.2 of the SRO which enabled it to commence operations as an investment finance company.

87. S.5 set out the objects and functions of the investment finance companies which related to (a) money market activities, (b) capital market activities (c) project financing activities and corporate financial services.

88. As is evident from the above none of the objects and functions of the investment finance companies related to the core functions of the business of banking as mentioned earlier.

89. Even otherwise the Investment finance companies were specifically excluded from carrying on the business of banking under S.5 (e) general which stated as under:

*(xx) Carrying on any other investment finance business specifically allowed by the Controller with the **exception** of banking business and insurance business as defined in the Banking Companies Ordinance, 1962 (LVII of 1962), and the Insurance Act, 1938 (IV of 1938), respectively, and in this*

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connection they will neither issue cheque-books nor accept deposit.

90. Such a provision is not exceptional and a similar provision can be found in the National Development Finance Corporation Act 1973 which at S.25 provided as under:

“S.25. Corporation not to be banking company. The Corporation shall not be deemed to be a banking company for the purposes of the banking Companies Ordinance 1962 or any other law for the time being in force relating to Banking companies”.

91. Thus the National Development Finance Corporation is not a banking company for the purposes of the BCO and can be treated as a non banking Financial Institution.

92. Essentially it seems that the Assessee derives its income from the business of investment in securities as regulated by the Security and Exchange Commission of Pakistan (SECP) under the Securities and Exchange Ordinance 1969 (as amended) and the SRO as opposed to the business of banking under the BCO

93. Notably the Assessee has been granted a license by the Federal Government under the SRO to carry on its investment business and is not required to be licensed by the SBP under S.27 (1) BCO as with banking companies who meet the definition under S.5 (b) of the BCO. Never the less during audit and Inspection by the SBP the Assessee was not found to have engaged in the business of banking which it was strictly prohibited to do under the SRO.

94. It is however pertinent to note, as mentioned earlier, that under the 1979 Ordinance “financial Institution” was not specifically defined in its definition section although it was used, as noted earlier, in the 1979 Ordinance in addition to the term banking company which was defined. Financial Institution however was defined in the 2001 Ordinance at S.24 as meaning an institution as defined under the Companies Ordinance 1984.

95. Under S.15 (A) of the Companies Ordinance 1984 “financial institution” was defined to include:

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- (a) a company or an institution whether established under any special enactment and operating within or outside Pakistan which transacts the business of banking or any associated or ancillary business through its branches;
- (b) a modaraba, leasing company, **investment bank**, venture capital company, financing company, housing finance company, a non-banking finance company, and
- (c) such other institution or companies authorized by law to undertake any similar business, as the Federal Government may, by notification in the official Gazette, specify for the purpose;]

96. Under S.2 (a) of the Financial Institutions (Recovery of Finances) Ordinance 2001 which was promulgated largely to expedite the recovery of loans a financial institution is defined as;

(a) "financial institution" means and includes---

- (i) any company whether incorporated within or outside Pakistan which transacts the business of banking or any associated or ancillary business in Pakistan through its branches within or outside Pakistan and includes a Government savings bank, but excludes the State Bank of Pakistan;
- (ii) a modaraba or modaraba management company, leasing company, **investment bank**, venture capital company, financing company, unit trust or mutual fund of any kind and credit or **investment institution**, corporation or company; and (bold added)
- (iii) any company authorized by law to carry on any similar business, as the Federal Government may by notification in the official Gazette, specify;

97. This definition may have given hope to the Department that the Assessee was a banking company since it appeared to fall within the definition of financial Institution.

98. However when considering this issue in the case of **Messrs Sindh Small Industries Corporation V Shahzad Khan (CLD 2006 (3) 1548.Relevant P.1551** it was held by a Divisional Bench of this Hon'ble Court as under:

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"Banking Company has been defined in section 5 (c) of the Banking Companies Ordinance, 1962 in the following terms:-

"Banking Company, means any company which transact the business of banking in Pakistan."

Whereas 'Banking' has been defined in section 5 (b) of the Banking Companies Ordinance, 1962 as under:-

"Banking means the accepting, for the purposes of lending or investment, of deposits of money from the public, repayable on demand or otherwise and withdrawable by cheque, draft, order or otherwise."

It is further important to mention that no company can carry the business of banking unless it holds a licence from the State Bank of Pakistan as provided in subsection (1) of section 27 of the Banking Companies Ordinance, 1962 which is reproduced herein below for the sake of convenience:-

"Licensing of banking companies.--- (1) No individual or association or body of individuals, not being a company, shall carry on banking business in Pakistan and, save as hereinafter provided, no company shall carry on banking business in Pakistan unless it holds a licence issued in that behalf by the State Bank; and any such licence may be issued subject to such conditions as the State Bank may think fit to impose."

On the other hand, Financial Institution has been defined in section 2(a) of the Financial Institution (Recovery of Finance) Ordinance, 2001 to the following effect:-

"2. Definitions.---In this Ordinance, unless there is anything repugnant in the subject or context.

(a) "financial institution" means and includes---

(i) any company whether incorporated within or outside Pakistan which transacts the business of banking or any associated or ancillary business in Pakistan through its branches within or outside Pakistan and includes a Government savings bank, but excludes the State Bank of Pakistan;

(ii) Modaraba or modaraba management company, leasing company, **investment bank**, venture capital company, financing company, unit trust or mutual fund of any kind and credit or **investment institution**, corporation or company; and (bold added)

(iii) any company authorised by law to carry on any similar business, as the Federal Government may by notification in the official Gazette, specify;

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A perusal of the aforesaid provision reflects that a company whether incorporated within or outside Pakistan which transacts business of banking or any associated or ancillary business in Pakistan through its branches within or outside Pakistan including Government Saving Bank or a modaraba or its management company, leasing company, **Investment Bank**, Venture Capital Company, Financing Company, Unit trust or mutual fund of any kind and credit or **investment institution**, Corporation or Company, or a Company authorized by law to carry on any similar business through a notification in the Official Gazette, falls within the ambit of Financial Institution. (bold added)

In view of the legal position as emerges on record, learned counsel for the appellant was not in a position to place anything on record to demonstrate that the appellant can be termed as a banking company as admittedly it does not accept deposits of money from the public for the purposes of lending or investment as envisaged in section 5(b) of the Banking Companies Ordinance, 1962 nor was in a position to show that the appellant can be termed as financial institution as defined in section 2(a) of the Financial Institutions (Recovery of Finance) Ordinance, 2001 as it does not carry out the **business of banking**. The learned counsel has further frankly conceded that the appellant has not been notified by the Federal Government to carry on any similar business, as envisaged in clause (iii), of section 2(a) of the Financial Institutions (Recovery of Finance) Ordinance, 2001, in order to attract the jurisdiction of the Banking Court."(bold added)

99. As regards the difference in wording of the definition of a banking company under S.2(10) of 1979 Ordinance and S.2(7) of the 2001 Ordinance in terms of the 1979 definition including the bolded words as mentioned below we find this of relatively minor significance and having no bearing on the out come of the ITRA's since we have found that an investment bank for Taxation purposes is extremely unlikely to carry out the business of banking in Pakistan since it lacks some of the 4 core functions to bring it within the purview of a banking company as discussed above and even otherwise its legitimacy as an investment bank (as opposed to a banking company) has been established through the SRO.

- (1) "banking company" has the same meaning as in the Banking Companies Ordinance, 1962 (LVII of 1962) and includes any body corporate **formed by, or under, any law for the time being in force** which transacts the business of banking in Pakistan;
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100. In our view therefore based on the above discussion the Assessee is not a banking company for the purposes of the 1979 and 2001 Ordinance because it is extremely unlikely that it carries out all the 4 core functions of a bank to bring it within the ambit of carrying out the business of banking as defined in S.5 (b) and (c) BCO, is not registered as a banking company as required by S.27 BCO to enable it to carry out the business of banking and has been licensed and registered under the SRO to carry out the objects of that SRO which **specifically exclude the business of banking** and as such is found to be a investment finance company as opposed to a banking company and should be taxed accordingly as per law.

101. In view of the hereinabove discussion and the facts and circumstances of the case the question proposed at Para 8 of this Judgment is rephrased as under and answered in the affirmative in favour of the respondents/assesses and against the applicant Department. The Office is directed that a certified copy of this Judgment be sent to the Appellant Tribunal Inland Revenue in terms of S.133 (5) of the Income Tax Ordinance 2001.

“That under the facts and in the circumstances of this case, the learned ITAT was justified to hold that investment banks are public limited companies and not the banking company within the purview of S.2 (10) of the Income Tax Ordinance 1979 (or S.2 (7) of the Income Tax Ordinance 2001) read with section 5(b) and (c) Banking Companies Ordinance 1962.”

Dated: 23-02-2016.