

Taxhelpline Case No. 113 of 2001

APPELLATE TRIBUNAL INLAND REVENUE

I. T. As. Nos. 110/IB, 111/IB. of 1997 98, 1143/IB, 523/113 and 1356/113 of 1999 2000, decided on 3rd October, 2000. Date of hearing: 9th September, 2000.

Before Syed Masood ul Hassan Shah, Judicial Member, and Jameel Ahmed Bhutto, Accountant Member

Mansoor Ahmed, D.A. G./L.A. and Riaz Hussain Shah, D.R. for Appellant (in I.T.As. Nos. 523/IB and 1356/113 of 1999 2000).

(a) Income Tax Ordinance (XXXI of 1979)---S.2(16)(bb) (32) & First Sched., Part I, para. (A)---Company --- Trust--Army Welfare Trust--Status---Army Welfare Trust was, previously carrying name of Army Welfare Projects Fund which was registered under the Societies Registration Act, 1860 and later on the name was changed as Army Welfare Trust and the new nomenclature stood entered with the Registrar, Joint Stock Companies---Nomenclature given that of a Trust was just a name adopted by the assessee which could not be included in the definition of "company" as defined in S.2(16)(bb) of the Income Tax Ordinance, 1979, and could be termed as having status of an association of persons to be taxed in accordance with the rate of income-tax given in para. (A) of Part I of the First Sched. to the Income Tax Ordinance, 1979.

1998 PTD (Trib.) 2017 rel.

(b) Income Tax Ordinance (XXXI of 1979)---

---Second Sched., Part I, Cl.(62)---Income of welfare trust for ex servicemen--Exemption--Income/profits/gains of the Army Welfare Trust actually spent on designed welfare activities would attract exemption provisions under CL (62) of Part I of the Second Sched. to the Income Tax Ordinance, 1979.

(c) Income-tax---

---Diversion of income at source through overriding title---Concept---Not recognized in Pakistan.

C.I.T. v. Shoorji Valle Bhdas (1962) 46 ITR 114 (SC); L. Hans Raj Gupta v. C.I.T. (1969) 73 ITR 765 (Delhi); (1933) 1 ITR 135 (PC); (1996) 73 Tax 197 (H.C. India); (1970) 76 ITR 194 (All.); (1974) 93 ITR 27 (All.); (1979) 116 ITR 56 (Guj.) (1976) 102 ITR 557 (All.); (1977) 107 ITR 776 (SC Ind.); (1995) 211 ITR 393 (Guj.) (1995) 216 ITR .291 (Bom.); Black's Law Dictionary; (1960) 39 ITR 706; (1962) 46 ITR 144 (SC India); (1981) 131 ITR 497; (1990) 61 Tax 149 (Kar.); C.I.T., Bombay City v. Sitaldas Tirathdas (1961) 41 ITR 367; (1996) 219 ITR 330; Messrs Elahi Cotton Mills' case PLD 1977 SC 532; (1972) 84 ITR 466; AIR 1946 Bom. (HC) 516; (1976) 105 ITR 320 (All.) and PLD 1990 SC 612 ref.

---Welfare trust---Income---Diversion of income---Income derived by the project of Welfare Trust would not qualify the definition of "diversion of income".

(e) Income Tax Ordinance (XXXI of 1979) ---

---Second Sched., Part I, Cl. (62)---Societies Registration Act (XXI of 1860)---Exemption---Income of welfare society registered under Societies Registration Act, 1860 would be exempt to the extent as allowed in cl.(62) of Part I of the Second Sched. of the Income Tax Ordinance, 1979.

(f) Income Tax Ordinance (XXXI of 1979) ---

---Second Sched., Part I, Cl. (62r --C.B.R. Circular No. 11 of 1993, dated 7-7-1993---Word "expended" used in Cl. (62) of Part I of the Second Sched. of the Income Tax Ordinance, 1979---Interpretation---Term "expended" could be regarded as having been actually spent for the purpose of carrying out designated welfare activities and onus of proof would lie on the assessee to prove the same---On submission of proof, the same would be exempt to .such extent and the remaining income would be subject to tax.

1998 PTD (Trib.) 2017 rel.

(g) Income Tax Ordinance (XXXI of 1979) ---

---Ss. 22 & 30---Income from business or profession---Income from other sources---Interest income---Interest income earned from Bank deposits etc. was to be regarded income from business or profession as per provision of S.22 of the Income Tax Ordinance, 1979 and likewise the proportionate financial expenses were also to be allowed which had been incurred in earning the said interest income.

I.T.As. Nos. 548 to 553/IB of 1998-99 rel.

(h) Income Tax Ordinance (XXXI of 1979) ---

---Second Sched., Part I, Cl. (62) & S.23(1)---Words "expended" and "any expenditure laid out or expended"--
-Meanings---Word "expended" means actually spent by the assessee for the purposes of carrying out welfare activities and had narrow meaning as compared to the words "any expenditure laid out or expended" as used in Cis. (xii), (xiii), (xiv), (xv) & (xviii) of S.23(1) of the Income Tax Ordinance, 1979 which provide for allowances and deductions admissible under, the head "income from business or profession"---Word "expended" mentioned in Cl. (62) of the Second Sched. of the Income Tax Ordinance, 1979 did not have any larger scope and meaning and was restricted only to the extent of actual spending of the business income by the assessee for the purpose of carrying out welfare activities.

(i) Income Tax Ordinance (XXXI of 1979) ---

---Second Sched., Part I, Cl. (62), Part II, Cl. (9) ---Word "expended"---. Connotation.

(j) Income Tax Ordinance (XXXI of 1979) ---

---S.23 (1) ---Expression "any expenditure laid out or expended" as used in cis. (xii) to (xv) & (xviii) of S.23(1) of the Income Tax Ordinance, 1979--Meanings.

Imtiaz Rasheed Siddiqui, Anjum Sheikh, F.C.A. and M. Nasir Khurshid, F.C.A. for Appellant (in I.T.As. Nos. 110/IB, 111/IB of 1997-98 and 1143/113 of 1999-2000).

**THIS ORDER PASSED BY:
SYED MASOOD-UL-HASSAN SHAH (JUDICIAL MEMBER), ---**

This order is intended to dispose of above income-tax appeals in accordance with the directions given by the Honourable Lahore High Court, Rawalpindi Bench, Rawalpindi through order, dated 15-12-1999 passed in Income-tax (Appeals) Nos.29 and 30 of 1999. For the convenience of reference, the relevant part of the order of the Honourable Lahore High Court, Rawalpindi Bench, containing contentions of the parties alongwith observations and directions, is reproduced hereunder: ---

"3. Learned counsel for the appellant contended that sole question regarding the overriding title to the income of the appellant incorporated in the appeal was dealt with in a slipshod manner with following observations:---

We may like to make it clear that the concept of overriding title to income does not arise in this case."

He argued that the Income-tax Appellate Tribunal has also not properly attended the following important questions of law involved in the present case: ---

- (i) Whether the income derived by the projects of AWT qualifies the definition of diversion of income?
- (ii) What is the effect of overriding title created to divert the income of assessee and whether concept of 'Real Income' is to be applied or not, in the case of Diversion of Income?
- (iii) Whether a Welfare Society registered under law is taxable and what is the interpretation of word expended as mentioned in clause (62) of Schedule II?

The learned counsel, however, without dilating much on the issues before us submitted that the main issue involved in the present appeal being at par to that of the issue involved in the Income-tax (Appeals) of Fauji Foundation bearing No. 16 of 1999, decided by this Court through judgment, dated 27-10-1999 and that if this appeal is disposed of in terms thereof he will be satisfied. In Fauji Foundation case in an identical situation we allowed the tax appeal and referred case back to the Appellate Tribunal for decision of the mixed question of law and fact raised therein without expressing ourselves in the matter. Since in the present case the Appellate Tribunal has not given any finding on the issues being raised, we, therefore, with a view not to put any party in disadvantage position consider it necessary the Tribunal should record finding on the issues in question.

4. Learned counsel representing the department submitted that the Commissioner Income-tax, Islamabad, has also filed a cross-appeal in the matter under section 136 of the Income Tax Ordinance, 1979, before this Court raising the following questions of law for decision:---

- (i) Whether or not the learned ITAT was justified to hold that the nomenclature given to the assessee of that of a trust was just a name of the assessee (Army Welfare Trust) which cannot be included in the definition of company as given in section 2(16) of the Income Tax Ordinance, 1979?
- (ii) Whether or not the ITAT was justified to hold that the assessee being registered under the Societies Act, 1860, cannot be considered as assigned the status of the company under section 2(16)(bb) of the Income Tax Ordinance, 1979 despite the fact that it contains all the ingredients of trust and is duly registered with the Registrar, Joint Stock Companies?

Learned counsel submits that if the appeal of the Commissioner Income-tax, which has not yet been registered, is also disposed of for the decision of questions raised therein by the Appellate Tribunal, he will not oppose the disposal of abovesaid appeals in terms of remand to the Appellate Tribunal enable the Tribunal to give a fresh decision of all questions being raised by the parties.

5. Since more than one mix questions of law and facts raised by the parties have not been considered by the departmental authorities as well as by the Income-tax Appellate Tribunal. Therefore, we in the light of the request of the learned counsel for the parties deem it proper to refer the matter back to the Income-tax Appellate Tribunal for fresh decision of all issues involved in the present appeals as well as in the cross-appeal preferred by the Commissioner Income-tax after providing a reasonable opportunity of hearing to the parties within two months. The respondent/department during the pendency of the appeals before the Tribunal will not proceed against the appellant coercively for recovery of the disputed amount of tax, relating to the assessment years 1994-95 and 1995-96. The appellant may on the strength of this order request the concerned authority for interim relief in the appeal relating to the assessment year 1996-97, which is still pending before the Commissioner Income-tax for decision. These Income-tax (Appeals) bearing Nos. 29 and 30 of 1999 along with the appeal filed by the Commissioner Income-tax against the Army Welfare Trust, which is not yet registered are accordingly disposed of with no order as to costs."

2. Now we proceed to decide the appeals in compliance to the above order of the Honourable Lahore High Court, Rawalpindi Bench, Rawalpindi.

3. Present. Mr. Imtiaz Rasheed Siddiqui, Advocate, Mr. Anjum Sheikh, F.C.A. and Mr. M. Nasir Khurshid, F.C.A. for the assessee and Mr. Mansoor Ahmed, D.A.G/L.A. and Mr. Riaz Hussain Shah, D.R. for the department.

4. The learned representatives of the parties have been heard.

5. Briefly the facts of the case are that the Army Welfare Trust (AWT) was carrying on different projects/industrial undertakings deriving income also from agricultural farms filed return of income for the assessment years 1993-94 and 1994-95 but did not declare any income in Part I of the return by claiming in Part II of the return that the total income was exempt from income-tax under clause (62) of the Second Schedule to the Income Tax Ordinance, 1979 because the same was entirely spent on welfare activities. The said returns were accompanied by statement of sales from different projects and copies of payment challans of tax under section 80-D and' the proof of tax deduction under section 50 of the said Ordinance. The Assessing Officer . processed the assessment by issuing statutory notices under sections 61 and 62 of the Ordinance time and again and the assessee filed certain details of documents in response to the said notices which were examined and then the Assessing Officer finally served the assessee with notices under section 62, dated 14-4-1996 stating therein that the replies/letters provided by the assessee and its A.R. were not explaining the nature of welfare activities and as to whether the said amounts were actually expended on welfare activities. Accordingly, the assessee was called upon to furnish the details and nature of income from agricultural farms and also explain the nature of activities being carried out in respect of each farm separately with further to produce evidence of filing of statements under sections 139, 140, 141, 142 and 144 and to furnish full details and documents regarding head office expenses. In response thereto, the A.R. of the assessee attended the office and submitted written explanation vide letter 6-5-1.996 by mainly contending that A.W.T. was a trust created solely for the welfare and benefit of ex-servicemen and serving personnel in the Army and their dependents and that AWT included various manufacturing and service providing activities which generate income in its structure and the entire

income from various activities was being placed at the disposal of the Ward, (Welfare and Rehabilitation Directorate) which in turn was utilizing the said resources on appropriate welfare activities. It was further stated in the said reply that all income/profits though reported in the accounts of AWT were diverted at source by an overriding title and AWT never became the beneficiary of income/profits at the time when it accrued. Reference was also made to get support in that respect in the said reply of the assessee on the case-laws from Indian jurisdiction as under:--

- (i) CIT v. Shoorji Valle Bhdas (1962) 46 ITR 114 (SC); and
- (ii) L. Hans Raj Gupta v. CIT (1969) 73 ITR 765 (Delhi), Delhi High Court.

The above contentions and explanation of the assessee did not find favour with the Assessing Officer and he after discussing the case with the A.R. of the assessee, assessed the income of the assessee as under:---

Assessment year 1993-1994

"Net income as per accounts: Rs. 120,468,640

Less:

- (1) Agricultural income specifically exempt: Rs. 14,607,996
- (2) Rental income exempt specifically under clause (62): Rs. 663,730
- (3) Amount expended by Ward as per accounts produced: Rs. 22,838,000 Net taxable income: Rs. 82,358,914

The assessee has calculated tax under section 80-D at Rs. 4,375,195. However, as per accounts produced, total turnover for the year under consideration is at Rs. 1,265,134,387 and tax under section 80-D @ 0.5% comes to Rs. 6,325,672. The assessee paid short tax for Rs. 2,038,788 for which additional tax under section 88 is being charged separately vide a separate order."

Assessment year 1994-95

"Net income as per accounts: Rs. 90,663,530

Less:

- (1) Agricultural income specifically exempt: Rs. 14,311,646
- (2) Rental income exempt specifically under clause (62): Rs. 690,930
- (3) Amount expended by Ward as per accounts produced: Rs. 2,100,000

Net taxable income: Rs. 73,560,954

Tax under section 80-D

The assessee has calculated tax under section 80-D at Rs. 5,310,105. However, as per accounts produced, total turnover for the year under consideration is at Rs. 1,401, 829,015 and tax under section 80-D- @ 0.5 % comes to Rs. 7,009,145. The assessee paid short tax for Rs. 2,425,269 for which additional tax under section 88 is being charged separately vide a separate order."

6. Feeling dissatisfied with the above treatment, the assessee preferred appeals and the learned Appeal Commissioner vide impugned appellate order confirmed the status of a 'company' assigned to the assessee by the Assessing Officer and also upheld the action of imposition of Workers' Welfare Fund (WWF) but set aside the issue of credit for tax at Rs. 88,210 in 1993-94 and at Rs. 1,904,083 in 1994-95 for de novo consideration while upholding the action of chargeability of tax under section 80-D with further setting aside the issue, of Air Ticketing for verification.

7. The assessee again feeling aggrieved with the above action of the learned Appeal Commissioner preferred these appeals before this Tribunal on the following common grounds for the assessment years 1993-94 and 1994-95:--

1. That the impugned order was bad in law, and on facts with regard, to the circumstances of the case;

2. that the learned CIT(A) has erred in not accepting the factual position that the entire income, profits or gains collected by the Army Welfare Trust was on behalf of the Welfare and Rehabilitation Directorate (Ward) of Pakistan Army for the purpose of incurring on designated welfare activities and as such were diverted at source by overriding title and thus, no part of such amount was taxable in the hands of Army Welfare Trust;

3. that the learned CIT(A) has erred in giving his appellate order without distinguishing the following cases cited in the written arguments:--

(i) CIT v. Shoorji Vallabhdas & Co.

(ii) L. Hans Raj Gupta v. CIT.

(iii) Poona Electric Supply Co. Ltd. v. CIT, Bombay City-I.

(iv) H.M. Kashiparkh & Co. Ltd. v. CIT.

(v) Raja Bejoy Singh Dudhuria v. CIT, Bengal

(vi) Usher's Wiltshire Brewery Ltd. v. Bruce.

(vii) CIT v. Chudgar Ranchudlal Jethalal.

(viii) Saldhana Vas CIT and Hotz Trust v. CIT.

4. that the learned CIT(A) has incorrectly stated that the case of Humdard Dawakhana was relied upon in the written arguments submitted at the time of hearing. In fact this case was never cited in the written arguments submitted under cover of Letter No. T-268/97/955, dated April 2, 1997; '

5. that without prejudice to the grounds of Appeals Nos. 2 and 3, the learned CIT(A) has erred in not accepting the claim of exemption based on the fact that the entire amount transferred or set apart for transfer to the Welfare and Rehabilitation Directorate related to amounts which were expended in the period in which they arose or in future periods on the qualified welfare activities and as such no part of such income, profit or gains was taxable in the hands of Army. Welfare Trust; and

6. that without prejudice to grounds of Appeals Nos. 2, 3 and 5 above:--

(i) that the learned CIT(A) has erred in not directing for proper computation of "income from business or profession" of the Army Welfare Trust;

(ii) that the learned CIT(A) has erred in considering Army Welfare Trust as "Company trust" (i.e. public company) instead of its actual legal status of Association of Persons (AOP);

(iii) that the learned CIT(A) has erred in confirming the charge of the Workers' Welfare Fund on profits and gains from certain projects of Army Welfare Trust which were not industrial undertakings; and

(iv) that the learned CIT(A) has erred in charging Minimum tax under section 80D of the Income Tax Ordinance, 1979 on the alleged turnover of the Army. Welfare Trust, by overlooking the fact that it was a case of an AOP and not that of a Company or a registered firm which would attract the provisions of section 80D of the Ordinance.

8. The above appeals were earlier decided by this Tribunal vide order, dated 2-3-1999 whereby the Tribunal vacated the orders of the learned forums below and set aside the assessment for de novo consideration in the light of the directions given in the said order.

9. Thereafter, the matter was assailed through appeals before the Honourable Lahore High Court, Rawalpindi Bench, and the Honourable Lahore High Court, Rawalpindi Bench, was pleased to refer the matter back to this Tribunal for fresh decision of all issues involved in the present appeals as well as in the cross-appeals preferred by the CIT/department after providing a reasonable opportunity of hearing to the parties.

10. In the meanwhile cross-appeals in respect of assessment year 1996-97, were also filed by the assessee and the department against the order of the learned Appeal Commissioner, dated 15-1-2000.

11. The department have also filed appeal in respect of assessment year 1995-96 against the order, dated 29-5-1999 passed by the learned Appeal Commissioner.

12. The assessee assailed the order, dated 15-1-2000 passed by the learned Appeal Commissioner for assessment year 1996-97 on the following grounds:--

(1) That the appellate order of the learned CIT(A) was bad in law and contrary to the facts and circumstances of the case;

(2) that the learned CIT(A) has erred in not adjudicating on the issue of diversion of income at source by overriding title as the surplus with AWT belonged to Welfare and Rehabilitation Directorate (Ward) of General Headquarters (GHQ) and that the Assessing officer had treated the surplus as income of AWT without

appreciating the law and the facts and that in the previous assessment years the learned CIT(A) had set aside the issue for de novo consideration;

(3) without prejudice to ground No. 2, the learned CIT(A) has erred in holding interest income of Rs. 397,946,772 under section 30 of the Ordinance as income from other sources ignoring the concept of commercial expediency which provides that where as assessee has an inherent right w transact any business under the objects allowed by the memorandum; that income should have been assessed under the head "income from Business and Profession" and not as "Income from other sources";

(4) without prejudice to ground. No. 2 and, the learned CIT(A) inadvertently omitted to give clear cut finding regarding allowability of the proportionate, financial expenses amounting to Rs. 242,493,203 under section 31 of the Ordinance and that the same was admitted by Assessing Officer in his order to be allowable under the heads 'Income from Business and Profession' and 'Interest Income' proportionately;

(5) that the learned CIT(A) has erred in setting aside the disallowance of the following expenses claimed in the profit and loss account without appreciating the facts and the law:--

Particulars Expenses (Amount in Rupees)

Claimed Disallowed % Age

Workers participation fund 4,531,000 2,032,567 45

Prior year adjustments 6,957,370 6,957,370 100

Rent expenses 4,088,912 4,088,912 100

(6) that the learned CIT(A) erred in ignoring in respect of exchange gains of Rs. 2,600,000 without any basis and justification and that the Assessing Officer has taxed the exchange gain on foreign currency account balances arbitrarily and without assigning any reason.

13. Hence the above appeal with the prayer for grant of whole relief admissible under the law.

14. The department have contested the order dated 15-1-2000 passed by the learned Appeal Commissioner for assessment year, 1996-97 on the following grounds:--

(1) That the order of the learned CIT(A) was bad in law and contrary to the facts of the case;

(2) that the learned CIT(A) was not justified to allow status of AOP as the assessee was rightly treated as company being trust under section 2(16) (bb) of the Ordinance; and

(3) that the learned CIT(A) was not justified to set aside the order with respect to additions under the head WPPF expenses and prior years adjustment as the said disallowances were made by the Assessing Officer in view of facts of case and law.

15. Hence the above appeal with the prayer for vacation of .the appellate order and restoration of that of the Assessing Officer.

16. The department have also disputed the order, dated 29-5-1999 passed by the learned Appeal Commissioner for the assessment year 1995-96 on the following grounds:

(1) That the order of the learned CIT(A) was bad in law and contrary to the facts of the case;

(2) that the learned CIT(A) was not justified to allow status of AOP as the assessee was rightly treated as company being trust under section 2(16) (bb) of the Ordinance; and

(3) that the learned CIT(A) was not justified to set aside the case on the issues of claims of exemption on the basis of diversion of income at source by overriding title and under the provisions of clause (62) of Part I of the Second Schedule to the Ordinance.

17. Hence the above appeal with the prayer. for the vacation of the appellate order and restoration of that of the Assessing Officer.

18. The learned D.R. have filed copies of cross-appeals filed by the department before the Honourable Lahore High Court, Rawalpindi Bench, for assessment years 1993-94 and 1994-95 for which the direction has been .given by the. Honourable Lahore High Court, Rawalpindi Bench for disposal alongwith the appeals filed by the assessee for assessment years 1993-94 and 1994-95 in the order as referred to above.

19. First of all we will try to adjudicate upon the issues in respect of assessment years 1993-94 and 1994-95. The learned A.R. of the assessee while giving the history of setting up of AWT stated that firstly the General Headquarters of Pakistan Army through A. G.'s Branch established the WARD for the welfare and rehabilitation services to the retired and, serving servicemen and civilian employees of the Armed Forces and their dependents. He stated that AWT was set up through registration under the Societies Registration Act, 1860, in 1971 carrying the original name of the "Army Welfare Project Fund" and then the name of this entity was changed to "Army Welfare Trust" in October, 1974 and was entered with the Registrar, Joint Stock Companies. He contended that AWT was in fact an organization set up with the specific objectives to provide for the welfare of the serving as well as retired personnel/employees of Pakistan Army and their dependents including civilian employees of the Armed Forces and their dependents. He then referred to Article .III of the Memorandum of Association laying down the objects of the AWT. He then stated that the AWT was being managed through a Committee of Administration which was the decision-making committee for all purposes having a full time Chairman. He stated that in fact that structure of A.W.T. was that of an extension of WARD of the A. G. Branch of Pakistan Army controlled through its A.-G. Branch and AWT undertake activities which contribute towards the welfare of the serving and retired personnel of the Army.

20. While explaining the financing of the welfare activities, the learned A.R. of the assessee stated that various projects were undertaken by the AWT for which capital was provided by the Welfare Directorate of the Army and the funds generated 'by the AWT were being used by the Welfare Directorate for financing its welfare activities including financing of hospitals, schools, medical treatment, scholarships etc. He then stated that initially the Welfare Director, used the funds generated by AWT by directing it to expend such funds directly as and when required for welfare activities but it was subsequently decided that entire funds generated by AWT

would be placed at the disposal of Welfare Directorate of the Army and these instructions were issued keeping in view the object clause of Memorandum of Association of AWT wherein it was given that the funds will be spent on the welfare activities- exclusively through WARD. In that consequence, he referred to the Adjutant-General's Letter No. 7791/776/AWT/WR-3, dated May 2, 1992. He stressed on the point that all earnings of AWT when accrued were to be immediately placed at the disposal of Welfare Directorate of Pakistan Army of which ANT essentially was an extension only. He further stated that the directive issued by the Pakistan Army clearly endorsed the fact that the beneficiary of all the revenue generating activities of AWT was WARD and all the activities were undertaken by the AWT were only on behalf of the WARD. He then while explaining the aspect of treatment in the accounts stated that the AWT was in fact an apparatus or tool for generating revenue for the WARD and the resulting gains or losses in each transaction were attributable to the WARD. He further stated that all the profits or gains for presentation purposes were transferred to WARD account in the financial statements prepared by the Committee of Administration.

21. With regard to aspect of taxation of AWT, the learned A.R. of the assessee stated that income derived by the trust or any other welfare institution from donations, voluntary contributions, subscription, house property, investments in Securities of Federal Government and so much of business income as was expended in Pakistan for the purposes of carrying out welfare activities was exempt from taxation under clause (62) of Part I of the Second Schedule to the Ordinance. He then referred clause (9) of Part II of the Second Schedule that any of the business income of Army Welfare Trust and Fauji Foundation not exempted from tax would be chargeable to tax at the reduced rate of 20 % of such income. He stated that the above requirement of taxation was introduced through amendments brought about by the Finance Act, 1992 which introduced clause (62) of the Part I of the Second Schedule in its present form and the Finance Act, 1993 which introduced clause (9) of Part II in its present form and as such the question of taxing. the income of AWT arose for the first time in respect of assessment year 1993; 94 onwards.

22. While explaining further the relationship between WARD and AWT, the learned A.R. of the assessee stated that GHQ of the Pakistan Army through Adjutant-General Branch established AWT for generating revenues and funds to be made available for utilization by the WARD for welfare activities. He stressed on the point that the very objective of establishing AWT was aimed at the sole purpose of generating revenue for utilization exclusively through WARD for welfare activities and all -the transactions undertaken by the AWT were at tributable to WARD and this factum was obvious from the Memorandum of Association to -the effect that all the profits and gains by AWT were attributable to WARD. He further explained that the carrying out business would tantamount to ultra vires of the Memorandum of Association if the utilization of such funds and gains generated by AWT was made for the purposes other than the stipulated purposes. He summed up his contentions in the context of above relationship while saying that the AWT though generated income in its name yet, was not the beneficiary of such income. He further explained that every sum of money accruing from the projects etc. became the proprietorship of WARD before it attained the character of income of AWT.

23. The learned A.R. of the assessee then argued in respect of three questions of law which he also pointed out before Honourable High Court as well which were as under:--

(i). Whether the income derived by the projects of AWT qualifies the definition of diversion of income?

(ii) What is the effect of overriding title created to divert the income of assessee and whether concept of 'Real income' is to be applied or not, in the case of diversion of income?

(iii) Whether a Welfare Society registered under law is taxable and what is the interpretation of word 'expended' as mentioned in clause (62) of Schedule II.

24. With regard to question No.(i), he, repeated that AWT was registered with the sole object to provide and generate revenue for the welfare of the beneficiaries through WARD who formed AWT for that very purpose and the funds generated from all the sources of AWT accrued to WARD at the very time of their origination and the WARD in lieu of its overriding title to the funds so generated was having an absolute authority to spend the same for the welfare activities on its own desire and no part was left to the AWT in that respect and neither the AWT was having any domain or authority or control over such funds.

25. He then again repeated about the aspect of structure of AWT to be an extension of WARD of Pakistan Army being controlled through its A.G. Branch and the funds generated by AWT as being spent by WARD towards welfare purposes as per clause III (i) of the Memorandum of Association of the AWT. He further laid stress that AWT was not at all holding any beneficial right on income/profits at the time of their accrual :one that in fact was only providing the source and skill to generate such income which was taken over by the WARD when generated. He then stated it was a settled principle of law that no tax should be levied on the income of an assessee who is just collecting that income on behalf of someone else. He further stated that the title of such income shall stand overridden by one for whose behalf the income was earned and this was the phenomenon of diversion of income by overriding title. In support of his above contention, he referred the concept of 'Agency' where agent receives income on behalf of his principal and only the principal was obliged and responsible for the payment of tax on such income and not the agent and the agent was only liable for the commission paid to him by the principal. He on the concept of diversion of income by overriding title further explained that such a concept was applicable where a person has to part with a part or whole of the receipt because of the existence of overriding title by another person through a legal obligation or an agreement and he in fact would part with the income because of a pre-existing title although he had received the money but he had no right to use or having ownership over the same. He further stated that the assessee may undertake or be bound by an obligation of an overriding nature to others which might compel him to make payments to earn the profits but if as a result of such an overriding obligation the profits earned in the books are to be shared with the other party then the notional income earned could not be formed the basis of taxation. He then while referring to the order of the Assessing Officer and of the learned first appellate forum contended that the above fact was totally misconceived by them in their orders and was also not discussed in the earlier order of the Tribunal. Thereafter, he while referring to certain observations of the Assessing officer in respect of question of diversion of income at source by overriding title and also the observations of the CIT(A) stated that they have not recorded any specific findings in that respect and also the observations of the Tribunal in its earlier order as having no solid reasons to have been recorded in these orders for rejecting the arguments raised on behalf of the assessee on that issue.

26. In respect of principles forming the basis for establishing as to whether the income has been diverted at source or not, the learned A.R. described the same as under:--

(i) For any income to be treated as diverted at source, it should have been made under some legal obligation or any agreement.

(ii) This obligation must be attached to the source of income.

(iii) The assessee has no right over the income so earned according to the obligation but not according to his/her discretion.

He, then in order to coincide AWT with the above principles, explained that the creation of AWT entailed in itself the obligation that this organization shall generate resources and provide funds to the WARD for the welfare of the beneficiaries and their families of the Armed Forces and this fact was contained at the inception of the objects given in Clause-III of Memorandum and Articles of AWT. He further stated that the Committee of Administration was comprising persons nominated by the A.G. Branch of GHQ and the Adjutant-General, A.G. Branch, GHQ who was also the Chairman of Committee of Administration vide Letter No. 7791/776/AWT/WR-3 has confirmed that all the revenues generated by AWT shall be at the disposal of WARD. He then further stated that AWT was in fact acting as a vehicle for generating resources in order to earn revenue for WARD as contained in clause (1) of the object clause of Memorandum of Association and further that WARD was holding lawful title on all the sources created by AWT and as such the WARD was holding lawful title on all the sources of AWT and another earned by AWT was capable of being used by itself at its will and all of such income has to be surrendered to the WARD and AWT was having no control over the income in question and this fact was established by the directions issued by A.-G. Branch of GHQ vide Letter No. 7791/776/AWT/WR-3, dated, 2-5-1992. He then referred the relevant extract of the letter, as under:--

"...The Directorate will spend this amount on such welfare activities as the Directorate may decide from time to time.

Funds required by Army Welfare Trust for carrying out welfare activities like expansion of its existing projects for setting up new projects and for carrying out other welfare activities on its own/in m 27. Then the learned A.R. of the assessee stated that the test to be applied in such cases is whether the withholding merely represented the payments of a personal debt or liability of an assessee i.e. a diversion of his income or represents a share in the income itself to which the assessee has only residual claim after the prior claims have been made. He explained that in the former case the withheld income would belong to the assessee and was taxable while in the later case it was not. He stated that in other words the test would be as to whether there was an effective alienation of the income at source before the assessee could claim the same. He then on the basis of above principles argued that the income of AWT could not be assessed in the hands of the AWT as it was generated for WARD of Pakistan Army GHQ and AWT was actually acting as a vehicle to reach the ultimate objective for WARD to provide welfare facilities for the aforementioned beneficiaries. He further stated that the Welfare Directorate of the Army provided the whole of the capital to AWT for starting its operational activities and the earnings by AWT which were in fact the ownership of the WARD continued to be used by the Army for financing of its various welfare activities. He then stated that initially the Welfare Directorate used the funds generated by AWT by directing them to directly finance the welfare activities but later on it was decided that entire funds generated by AWT would be merged in the pool which was used to finance the welfare activities undertaken by the Army. He then again referred the letter, dated 2-5-1992 of the Adjutant-General directing for surrendering of funds to the WARD by the AWT for meeting welfare costs which was as follows:---

"(1) In the past; Army Welfare Trust was called upon by General Headquarters to remit funds for welfare activities on need basis.

(2) It has now been decided by the General Headquarters that the entire net income/profit of Army Welfare Trust with effect from financial year ending 30th September, 1991 be transferred to the Welfare Directorate of General

Headquarters. The Directorate will spend this amount on such welfare activities as the Directorate may decide from time to time.

(3) Funds required by Army Welfare Trust for carrying out welfare activities like expansion of its existing projects, for setting up new projects and for carrying out other welfare activities on its own/in consultation with General Headquarters will be made available to Army Welfare Trust as and when required by Army Welfare Trust."

28. The learned A.R. of the assessee then fortified his stance by stating that there existed a strong case of a diversion of income by overriding title in the case of the assessee. In respect of concept of diversion of income by overriding title, he traced the history by referring a case cited as (1935) 1 ITR 135 (PC), wherein the Privy Council has also affirmed the principle of real profit and the concept of diversion of income.

29. Thereafter, the learned A.R. of the assessee gathered support to his above contention by referring case-laws reported as (1996) 73 Tax 197 (H.C. India) of Calcutta High Court and (1970) 76 ITR 194 , (Allahabad High Court).

30. The learned A.R. of the assessee then stated that the decisions made in these cases were also followed in the case-laws reported as (1974) 9U ITR 27 (Allahabad High Court); (1979) 116 ITR 56 (Gujarat High Court); (1976) 102 ITR 55: (Allahabad High Court) and (1977) 107 ITR 776 (S.C. Ind.)

31. The learned A.R. of the assessee further referred case-laws reported as (1995) 211 ITR 393 (Gujarat High Court); (1995) 216 ITR 291 (Bombay High Court) to support his plea in that respect that an assessee was not liable to tax on an income which was not his own but was collected on behalf of somebody else on the basis of diversion of income by overriding tile

32. With regard to concept of real income, the learned A.R. ,of the assessee contended that it is always the real income only which would get charged as income under the Ordinance and the important point would be as to whether the assessee received income or not. In that respect he referred definition of income as given in section 2(24) of the Ordinance and section 11 of the Ordinance with respect of scope of total income. He also referred the word 'income' defined in the Black's Lave Dictionary as under:--

"The money or other form of payment that one receives, periodically, from employment, business, investments, royalties, gifts and the like."

33. In light of above provisions and definitions of income, the learned A.R. of the assessee argued that it was clearly significant therefrom that the income must be received or deemed to accrue or arise to the person through himself or on his behalf and then that person/assessee would be subjected to tax. He then stated that the deeming provisions presuppose accrual of income to the assessee by fiction of law shifted the 'locale of accrual of the income'. He explained that a deeming clause makes a thing to be as provided by the statute though in reality it is not so and in other words the deeming provision relates to the concept of artificial income or fictional income. He then while referring material words given in section 11 of the Ordinance with respect to "receive, accrue or arise" contended that the greater emphasis was on the word "receive" in the above provision of law and the dictionary meaning of the word 'receive' means to accept or to acknowledge something. In this behalf he referred a case from Indian jurisdiction with the citation as (1960) 39 ITR 706 and stated that it was held therein that in

examining any transaction and situation of this nature the Court would have more regard to the reality and speciality of the situation rather than the purely theoretical or doctrinaire aspect of it.

34. Then the learned A.R. of the assessee referred a citation of case of Supreme Court of India stated to be reported as (1962) 46 ITR 144 (SC India) wherein it was held and quoted by him as under:--

"...Accounting entry cannot become income unless income has actually resulted. Income-tax is a levy on income. No doubt, the Income-tax Act takes into account two points of time at which the liability to tax is attracted, viz, the accrual of income or its receipts, but the substance of the matter is the income. If income does not result at all, there cannot be a tax even though in book-keeping, an entry is made about a 'hypothetical income', which does not materialize. Where income has, in fact, been remains the income of the 'recipient, even though given up, the tax may be payable. However, the income can be said not to have resulted at all, there is obviously neither accrual nor receipt of income, even though an entry to that effect might, in certain circumstances, have been made in the books of account..."

35. In the context of above case-laws from Indian jurisdiction, the learned A.R. of the assessee stated that the charge of tax was only on the real income and not on the notional income and that the income in the case of assessee as explained above was diverted by overriding title to the WARD and the obvious result was that the part of income or income so diverted did not become income of the assessee/AWT at all. He then stated that the return filed by the assessee declaring Nil income was not in any way demonstrative of the fact that the income of the AWT was liable to tax and there were many organizations which were exempt from levy of income-tax even they file return by declaring Nil income and for that he gave examples of Pakistan Telecommunication Company Limited and Small Business Finance Corporation..

36. For further explaining the concept of diversion of income by overriding title, the learned A.R. of the assessee stated that it was the nature of the obligation which was decisive factor and there was a difference between an amount which a person was obliged to apply out of his income and an amount which by the nature of the obligation cannot be said to be a part of income of the assessee and whereby an income by an obligation was diverted before it reached the assessee then would be deductible but where the income was required to be applied to discharge an obligation after such income reached the assessee then the same consequence in law did not follow. He stated that it was the first kind of payment which could truly be excused and not the second and the second payment was merely an obligation to pay another a portion of one's income which has been received and was since applied. He further explained that first was the case where income never reached the assessee who even if were to collect the same was doing as such not as a part of his income but for and on behalf of the person to whom it was payable. Finally in that respect, he stated that it has been established beyond any doubt that the income of AWT was not liable to tax and that the whole of the income of AWT stood diverted at source by overriding title to WARD. '

37. The learned A.R. of the assessee then explained the organizational structure of AWT and stated that Adjutant-General of Pakistan Army was the Chairman of the Trust and that the Committee of Administration of the WARD of GHQ was consisting of the following:--

Adjutant-General Pakistan Army Chairman

Chief of General Staff Pakistan Army Member

Quarter Master General Pakistan Army Member

Master General Ordnance Pakistan Army Member

Secretary

38. The learned A.R. of the assessee then stated that the projects undertaken by the AWT were being controlled through the Board of Directors consisting of Adjutant-General, Managing Director, Directors of Project Fund and Secretary. He then further stated that the Adjutant-General of Pakistan Army was having enough powers and discretion in the capacity of Chairman of AWT to decide that the income of AWT will be diverted to WARD as such the whole of the income generated by the AWT will be spent on the designated welfare activities by WARD because the sole objective of the formation of the trust was to provide welfare facilities to the servicemen and ex-servicemen of Pakistan Army. He finally concluded that the above arguments fully take care of the first two questions as referred to above.

39. The learned A.R. of the assessee, then, while dealing with the third question as to whether a welfare society was taxable in any manner whatsoever and what was the interpretation of word "expended" mentioned in clause (62) of the Second Schedule to the Ordinance contended that it was a settled principle of law that every word in a statute should be construed in the context in which it occurred to discover its appropriate meaning and such word is known by the Company it keeps. He further explained that the words in a statute should be construed with reference to the objects of the Act and that the statute in the event of the absence of any definition in that respect should be read as a whole to avoid absurd results. He then on the principle of beneficial interpretation stated that this principle would arise in a case whereby two views are reasonably possible in the opinion of the Court deciding the point at issues and. the Court in such a case should tilt in favour of the assessee and there should be a liberal construction with regard to exemption provisions. He then stated that it was clearly signified and specified that the main objective of the Trust as per clause III (i) of Memorandum of Association was to provide for welfare of the beneficiaries and hence the income of AWT was exempt from tax under clause 62(2) of Part I of the Second Schedule which was prescribing for the exemptions from tax either wholly or some part of the income.

40. While explaining the interpretation of word "expended" used in the context of clause (62), the learned A.R. of the assessee stated that entire income of AWT was being expended by the WARD on the welfare activities and he then referred clause---it was ~--" and clause VI of the Memorandum of Association as specifying that (i) the objects of the Trust shall not extend beyond the territories' of Pakistan and (ii) that whole of the income of the trust shall be applied towards the promotion of the objects set forth in the Memorandum. He then stated that now it is to be seen as to whether the income was being applied in a particular manner under a statutory or contractual obligation or under the provisions of a company memorandum or article of association and this will qualify for exemption as given in clause (62) of Part I of the Second Schedule to the Ordinance. He explained that if a person alienated or assigned the source of his income so that it was no longer his own then he may not be taxed upon the income arising after the assignment of source. He in that context referred a case-law from Indian jurisdiction with the citation as (1981) 131 ITR 497 of the Andhra Pradesh

41. Then in respect of method of accounting, the, learned A.R. of the assessee stated 'that AWT followed mercantile method of accounting and having pasted the operating results to the WARD account ceased to hold any right to enjoy its benefits. He stated that this account was being operated as a custodian of the WARD and AWT was just a vehicle for achieving the goals of the WARD and it always lost right over the amount, thus, transferred to WARD and the payments from WARD were made on the directions issued by'the A.-G. office and

that AWT was having no discretion whatsoever in that respect. To support his contention, he referred a case law from local jurisdiction reported as 1990 PTD 248 which was with regard to issue of bonus which was not actually paid. He then stated that the word "expended" used in clause (62) was of the same meanings as that of set apart for the purposes of welfare activities. He stated that it was sufficient that the trusts or other welfare institutions provide of set apart the funds for a charitable purpose during the relevant income year and it was not necessary, chat the whole of the amount of income which was earned during the period must be spent in the assessment year under consideration. He then stated that the interpretation of the word "expended" as made by the Assessing Officer was clearly misdirected and not sustainable under the law. He then stated that amount transferred to WARD account was an expenditure and not the disbursements from cash and this concept will find support from the fact that money could not be expended until it was received and, therefore, there was always a time lag between the earning of money and the expending thereof. He then stated that if the understanding of tax authorities was accepted for the sake of illustration purpose then it would mean that in year 1 huge profits are earned arid taxed without allowing any exemption under clause (62) because the profits arising during the period were not realized and no payment was made for welfare activities as such and whereas in year 2, say, there is no business income but huge amounts are expended on welfare activates because the revenues generated in year 1 are realized in that year and, therefore, the assessee paid taxes on business income which ultimately expended on welfare activates. He then stated that it is a settled principle of law that the subject cannot be taxed unless it comes within the letter of law and the argument that it will fall within the spirits of law cannot avail the dominion. He further stated that nevertheless, the tax laws have to be interpreted reasonably and in consonance with justice and where literal construction would defeat the obvious intention of the legislative and produce wholly unreasonable results then the Court must do something to achieve the obvious intention and produce the rational construction. He further explained that if the interpretation of law was opened to doubt then the construction most beneficial to the subject should be adopted. He further stated that a provision for exemption or relief should be construed liberally and in favour of the assessee and if a case appeared to be governed by either of two provisions then it was clearly the right of the assessee to claim that he should be assessed under that one which will leave him with a lighter burden.

42. On the other hand, Mr. Mansoor Ahmed, the learned Legal Advisor/D.A.G. on behalf of the department vehemently repelled the contentions as raised by the learned A.R. of the assessee. He stated that the arguments on behalf of learned A.R. of the assessee regarding concept of diversion of income/profits/gains of AWT at source by overriding title to the WARD were having no legal nexus. He contended that the relevant law in Pakistan was not having any concept of diversion of income on the basis of principle of overriding title and neither it has been specifically provided for in the said law. He explained that this concept cannot be allowed to the case in hand because in fact the income/profits/gains were in fact accruing to A.W.T. and mere simple directions through a letter of the Adjutant-General Branch of G.H.Q: of Pakistan Army could not be regarded to be sufficient to that effect for making a factual change with regard to the diversion of the said amount to the WARD. For explaining the concept of doctrine of diversion of income on the basis of overriding titles, he stated that there must be an established fact that somebody has the overriding title and the income was to be diverted on the dictates of that title and it stood diverted before it reached the assessee. He further explained that if such income does reach to the assessee then it would become the income of the assessee and if the assessee itself diverts such income then it would not be regarded as diversion of income by an overriding title. In order to support his contention he relied upon a case-law from Indian jurisdiction cited as (1961) 41 ITR 367 (C.I.T. Bombay City v. Sitaldas Tirathdas) and also referred the following part of the judgment regarding the said rule of diversion of income:---

"In our opinion, the true test is whether the amount sought to be deducted, in. truth, never reached the assessee

as his income. Obligations, no doubt, there are in every case, but it is the nature of the obligation which is the decisive fact. There is a difference between an amount which a person is obliged to apply out of his income and an amount which by the nature of the obligation cannot be said to be a part of the income of the assessee. Whereby the obligation income is diverted before it reaches the assess, it is deductible; but where the income is required to be applied to discharge an obligation after such income reaches the assessee, the same consequence, in law, does not follow. It is the first kind of payment which can truly be excused and not the second. The second payment is merely an obligation to pay another a portion of one's own income, which has been received and is since applied "

43. The learned Legal Advisor in the light of above dictum contended that diversion of income by overriding title was in the form of obligation and the very nature of obligation was the decisive factor to see that the person is obliged to divert the income of that part then that is not treated as its income and it may not be applied by him. He while drawing a comparison of the admissible deductions and inadmissible deductions as provided in sections 23 and 24 of the Ordinance with that of the similar provisions of the Indian Income Tax Act stated that allowable deductions under the Indian Income Tax Act were having wider aspect than that of our law. He then referred section 9 of the Ordinance and contended that whenever the income arises or accrues then section 9 is applied. In order to explain and elaborate as to what is an income in the law, he referred a case from Indian jurisdiction cited as (1996) 219 ITR 330 and also a case from our own jurisdiction of M/s. Elahi Cotton Mills reported as PLD 1977 SC 532 and another case from Indian jurisdiction reported as (1972) 84 ITR 466. He stated that the word "income" as has been interpreted in a case reported as 219 ITR 330 by the Supreme Court of India as under:---

"The word 'income' occurring in Entry 82 in List 1 of the Seventh Schedule to the Constitution should be construed liberally and in a very wide manner and the power to legislate will take in all incidental and ancillary matters including the authorization to make provisions to prevent evasion of tax, in any suitable manner. "

In the other case from Indian jurisdiction reported as (1972) 84 ITR 466 of the Supreme Court of India with regard to a case of income of a family, the learned Legal Advisor referred the para as under:---

"That the income was the income of the family and it was merely applied to discharge the obligation of the family, namely, the obligation to maintain its junior members. It reached the hands of the family as soon as it reached the hands of any of the members of the family who were entitled to receive it on behalf of the family. The members of the family received that income on behalf of the family and applied the same in discharge of the obligation of the family. There was, therefore, no diversion of the income of the family before it became its income. "

44. On the basis of above case-laws, the learned Legal Advisor stated that in fact income reached AWT and then applied and it was later on diverted and therefore, the case in hand, was not at all covered by any such factual position of diversion of income by overriding title to WARD. He further stated that it was to be seen very seriously and through material evidence to establish as to what was the relationship between AWT and WARD with regard to the change or transfer of income from one to other. He, then while taking up the letter of Adjutant-General Branch in that respect and also as referred to above, stated that whether such a letter of Adjutant General Branch of G.H.Q. was enough to establish the case with regard to concept of diversion of income by an overriding title from AWT to WARD. He then stated that the G.H.Q. was established under the Army Act, and

it was not within the charter and mandate of the law to establish such an institution and the WARD was not a part of the G.H.Q.

45. On a question by the Bench, as to whether WARD was not created by the G.H.Q., the learned Legal Advisor stated that the officers of G.H.Q. act in the ex officio capacity and moreover not a single rule or provision of law has been shown by the AWT with regard to the creation of Army Welfare Directorate. He while appreciating the cause of the AWT to be noble cause stated that AWT was nothing but a brain child of WARD and the WARD itself has no legal status in G.H.Q. He while referring to the Memorandum of Association stated that the objects of the Trust (A.W.T.) were to be decided by a Committee of Administration and the channel was of WARD. He stated that in fact the situation is reverse in that WARD was an agent of AWT for channelling the funds. He then referred other clauses of Memorandum of Association and stated that there were the names of the members alongwith their, designations and they signed as trustees in their ex officio capacity. He then stated that it has been established that it was a voluntary organization by officers to create a trust for the welfare of common lot of Pakistan Army. He then stated that rule 4 in the Rules and Regulations provided that Committee of Administration was earlier empowered in every respect and it did not admit of any alien therein.

46. While discussing about the legal status of AWT, the learned Legal Advisor stated that AWT was having the legal status of that of a society registered under the Societies Registration Act. He then referred to the preamble of the Societies Registration Act providing for the promotion of literate Science Fine Art or for charitable purposes and then referred to section 55 with regard to investing of property providing that the property movable or immovable if not vested in the trust shall be deemed to be invested in the governing body of the society. He then referred section 6 of the Act to explain that the society registered as such would legally be a juridical person. He then referred AIR 1946 Born. (H.C.) 516 and contended that the society registered under the Societies Registration Act is regarded as legal entity and nobody has right to deal with the property of the society in any manner except the society itself. He then again with regard to aspect of diversion of income stated that it is to be established that income never reached the assessee and it should be established that income never-reached the assessee and it should be established that there was an obligation whereby the income could not reach the assessee. He then referred a case from Indian jurisdiction reported as (1976) 105 ITR 320 (Allahabad High Court) and stated that in such cases then source is charged with an overriding title which diverts the income and a mere obligation to pay another is an application of income as held in that case. The learned Legal Advisor in the context of above case-law, contended that of course, obligation of the AWT to pay to the WARD, every income or profits or gains can be regarded as an obligation of an income and not the diversion of the income from. AWT to WARD: He then stated that argument of the assessee was that the assessee was not an independent entity but was in the position of subservient to the WARD and was bound to the command of WARD and it diverts its income in the interest of WARD. He then stated that when we lift up the veil of corporate body then behind it would appear a Directorate of WARD. He stated that in 1972, the WARD was not in existence. He further stated that when we lift the veil, nothing will appear but merely an intention of four officers of the Army to enter into a commercial and 'business activities and there was nothing to the documents of creation of trust that the trust was created as subservient to the WARD. He finally in that context stated that had it been a situation then they would have not stated the facts in the Balance-sheet like words "profits available for appropriation".

47. The learned Legal Advisor then further explained that overriding title is regarded as title better than the owner and the Memorandum of Association and Rules and Regulations thereunder cannot be just set aside by a letter of the Adjutant-General of Pakistan Army (who is one of the trustees) for giving effect to the concept of diversion of the income and of course such type of letter could not .in any way tantamount to create an overriding title. He then referred clause (62) of the Second Schedule to the Ordinance which was later on substituted vide

Finance Act, 1993 and contended that clause (62) only applies to the exemption of the income which is expended for the purpose of carrying out welfare activities and the income which is not expended on welfare activities shall become taxable. He then stated that activities of AWT have been designated in the Memorandum of Association and there was nothing like the concept of diversion of income at source to the WARD through overriding title. He then stated that there was no denial of the fact that the assessee was a body corporate and a legal entity created under the Societies Registration Act, 1860. He then referred a case of the Honourable Supreme Court of Pakistan reported as PLD 1990 SC 612 dealing with interpretation of corporations, associations, companies, cooperative societies, or trusts in Pakistan. In that respect he referred page 617 of the said case-law wherein it was observed as under:---

"If we trace the history of inception of the Corporations, we find that the Corporations originated with the Romans and Greeks and later were introduced into Britain and America. Greeks as early as the time of Solon (638-558 B.C.) permitted the incorporation of associations inter alia for business subject to the condition that their purposes should not be contrary to the general- law of the land. The Romans at an earlier date recognized Corporations which were introduced by Numa Pompilius, the second legendary King of Rome (715-672 B.C.). In Britain after its conquest, the Romans established Corporations and subsequently such bodies were established and recognized by English Law for various purposes, municipal, charitable and purely private on principles adopted basically from the Roman or civil law. In the American colonies various Corporations, both public and-private, were also created by English Kings or Parliament. After the independence of the United States the Corporations have been created only, under legislative enactment of the States or of the United States. "

48. The learned Legal Advisor further referred section 2(16)(bb) to state that a trust formed by or under any law for the time being in force included in the definition of company and AWT was a company for all intents and purposes. He further stated that the AWT was a trust registered under the Act and; therefore, it was a company.

49. The learned Legal Advisor in respect of part of income of the interest on the deposits in the banks contended that it was to be taxed as income from other sources under section 30 because it was obviously included in the definition of income from other sources and the deductions, if any, were allowable as per provisions of section 31 of the Ordinance.

50. We have considered the respective contentions of the parties in respect of above issues with regard to the concept of diversion of income through overriding title and the issue of exemption of income in the context of clause (62) of Part I of the Second Schedule of the Ordinance.

51. Before we dilate upon the issues raised by the parties we would like to reproduce here the relevant provisions of laws in that respect

INCOME TAX ORDINANCE 1979

Section 2(16). "Company" means---

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

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

(bb) a trust 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

(cc) a Modaraba as defined in the Modaraba Companies and Modarabas (Floatation and Control) Ordinance, 1980 (XXXI of 1980);

(d) the Government of a Province;

(e) a foreign association, whether incorporated or not, which the Central Board of Revenue may, be general or special order, declare to be a 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.

Section 2(24). "Income" includes---

(a) any income, profit or gains, from whatever source derived, chargeable to tax under any provision of this Ordinance under any head specified in section 15;

(b) any loss of such income, profit or gains; an

(c) any sum deemed to be income, or income accruing or arising or received in Pakistan under any provision of this Ordinance, company to its shareholders with a view to increasing its paid-up share capital.

Section 2 (32):

"person" includes individual, a firm, an association of persons, a Hindu undivided family, company, a local authority and very other artificial juridical person.

Section 2(41):

"return of total income" means the return of total income in the prescribed form, setting forth such particulars and accompanied by such statements, certificates and other documents and verified in such manner, as may be prescribed.

Section 2(43):

"tax" means income-tax, super-tax surcharge and additional tax chargeable or payable under this Ordinance, and includes any penalty; fee or other charge or any sum or amount leviable or payable under this Ordinance

Section 2(44):\

"total income" means the total amount of income referred to in section 11 computed in the manner laid down in this Ordinance; and includes any income which, under any provisions of this Ordinance, is to be included in the total income of an assessee.

Section 80-D:

Minimum tax on income of certain Companies and registered firms. ---Notwithstanding anything contained in

this Ordinance or any other law for the time being in force, where no tax is payable or paid by a company or registered firm resident in Pakistan or the tax payable or paid is less than one-half percent of the amount representing its turnover from all sources, the aggregated of the declared turnover from all sources, the aggregate of this declared turnover shall be deemed to be the income of the said company or a registered firm and tax thereon shall be charged in the manner specified in subsection (2).

Explanation.---For the removal of doubt, it is declared that the 'expression where no tax is payable or paid and or the tax payable or paid apply to all cases where tax is not payable or paid for any reason whatsoever including any loss of income, profits or gains or set off of loss of earlier years, exemption from tax, credits or rebates in tax and allowances. and deductions (including depreciation) admissible under any provision of this Ordinance or any other law for the time being in force.

(2) The company or a registered firm referred to in subsection (1) shall pay at income-tax—

(a) an amount where no tax is payable or paid equal to one-half percent of the said turnover; and

(b) an amount, where tax payable or paid is less than one-half percent of the said turnover equal to the difference between the tax payable or paid and the amount calculated in accordance with clause (a).

Explanation.---For the removal of doubt it is declared that "turnover" means the gross receipts, exclusive of trade discount shown on invoices or bills, derived from sale of goods or from rendering, giving or supplying services or benefits or from execution of contracts;

Clause (62) of Part I of Second Schedule to the Income Tax Ordinance, 1979 is also reproduced below:---
(Original clause (62) stood substituted by Finance Act, 1992 ,w.e.f. assessment year 1993-94).

(62)(1) Any income of a trust or welfare institution specified in sub-clauses (2) and (3) from donations, voluntary contributions, subscriptions, house property, investments in the securities of the Federal Government and so much of the income chargeable under the head Income from business or profession as is expended in Pakistan for the purposes of carrying out welfare activities:

Provided that in the case of income under the head "income from business or profession", the exemption in respect of income under the said head shall not exceed an amount which bears to the income under the said head the same proportion as the said amount bears to the aggregate of the incomes from the aforesaid sources of income.

(2) A trust administered under a scheme approved by the Federal Government in this behalf and established in Pakistan exclusively for the purposes of carrying out such activities as are for the benefit and welfare of--

(i) ex-servicemen and serving personnel, including civilian employees of the Armed Forces; and their dependents; or

(ii) ex-employees of serving personnel of the Federal Government or a Provincial Government and their dependents, where the said trust is administered by a committee nominated by the Federal Government or as the case may be a Provincial Government.

(3) A trust or welfare institution approved by the Central Board of Revenue for the purpose of this sub-clause;

The Companies Ordinance, 1984

Section 2(4):

"body corporate" or "corporation" includes a company incorporated outside Pakistan, but do not include--

(a) a corporation sole; or

(b) a cooperative society registered under the law as defined in this Ordinance, which the Federal Government may, by notification in the official Gazette, specify in this behalf.

Section 2(7):

"Company" means a company formed and registered under this Ordinance or an existing company.

52. Now we would like to give here the relevant parts of the judgments of the case-laws referred by the parties except the relevant parts already reproduced during the narration of arguments and contentions of the parties above.

53. In the case referred as (1933) 1 ITR 135 (PC) the relevant part of the judgment as, quoted by the learned A.R. of the assessee in his written brief is as under:---

"(i) that the assessee's liability under the decree did not fall within any of the exemptions or allowances conceded in sections 7 to 12 of the Indian Income Tax Act; (ii) but the sums paid by the assessee to his step-mother were not 'income' of the assessee at all. The decree of the Court by charging the appellant's whole resources with a specific payment to his step-mother had to that extent diverted his income from him and had directed it to his step-mother; to that extent what he received for her was not his income. "

54. In the case reported as (1996) 73 Tax 197 (H.C. India) as quoted by the learned A.R. of the assessee in his written brief, is as under:---

"The Tribunal was correct in taking the view that it was not a case where the assessee could be said to have received the entire rent as its income before it parted with it in favour of the lessee so as to constitute application of income. It cannot be said that the interpretation of the agreement, dated June 15, 1971 by the Tribunal was erroneous or improper. The Tribunal was, therefore, justified in holding that the said sum of Rs. 72,000 did not form part of the assessee's income.

We, therefore; answer the question in the affirmative and in favour of the assessee and against the revenue."

55. In the other case-law from Indian jurisdiction reported as (1970) 76 ITR 194 (Allahabad H.C.) as quoted by the learned A.R. of the assessee in his written brief, is as under:---

"We do not think that the Tribunal was correct in taking that view. The amounts realized by the assessee on

account of Dharmada were never treated as trading receipts or as surcharge on the sale price. This is evident from the fact that such realizations were never credited to the trading account not shown in, the profit and loss statement for the year. "

56. In the case-law reported as (1997) 107 ITR 776 (SC India) as referred by the learned A.R. of the assessee in his written brief wherein the Supreme Court of India stated to be held as under:-

"In our opinion the true test is whether the amount sought to be deducted, in truth, never reached the assessee as is income. Obligations, no doubt, there are in every case, but it is the nature of the obligation which is the decisive fact. There is a difference between an amount which a person is obliged to apply out of his income and an amount which by the nature of obligation cannot be said to be a part of the income of the assessee. Where by the obligation the income is diverted before it reaches the assessee, it is deductible; but where the income is required to be applied, to discharge an obligation after such income reaches the assessee, the same consequence, in law, does not follow. It is the first kind of payment which can truly be excused and not the second. The second payment is merely an obligation to pay another a portion of one's own income, which has been received since applied. The first is a case in which the income never reaches the assessee, who even if he were to collect it, does so, not as part of his income. But for and on behalf of a person whom it is payable.

In our opinion the present case is in which the wife and children of the assessee who continued to be the members of the family received the portion of the income of the assessee after the assessee had received the income as his own. The case is one of application of portion of income in discharge and obligation and not a case in which by an overriding charge the assessee became only a collector of another's income.

It is clear on the application of this test that, in the present case, the surcharge being impressed with an obligation in the nature of trust for being applied to local charities was by this obligation diverted before it reached in the hands of the assessee and at no stage, it became apart of the income of the assessee. When the assessee received the amounts on account of surcharge, they were impressed with a legal obligation to be applied for the benefit of local charities and they never reached the assessee as part of its income."

(The Supreme Court of India concluded the appeal with the following remarks):---

"We must accordingly at the High Court was right in answering the question referred to it in favour of the assessee and, in this view, the appeal must stand dismissed with costs. "

57. Now we take up the discussion on the issues in the context of contentions of the parties with respect to assessment years 1993-94 and 1994-95.

58. As there remains nothing to dispute that the AWT which was previously Army Welfare Fund Project registered under the Societies Registration Act, 1860. and later on changed its name to Army Welfare Trust having been duly entered as such through the Registrar of Joint Stock Companies and attained the status of a body registered, under the Societies Registration Act, 1860. In order to determine whether the assessee/AWT was falling within the definition of a company under section 2(16) of the Ordinance, we may like to first refer here a recent decision of the Income Tax Appellate Tribunal (Headquarters Karachi) reported as 1998 PTD (Trib.) 2017 wherein all the aspects of status of a society/body corporate registered under the Societies Registration Act, 1860 and a company as defined under section 2(16) alongwith definition of 'person' given in section 2(32) of the Ordinance have been dealt with exhaustively and elaborately.

59. In order to have a clear view of the observations and findings of the Tribunal in the above reported case, we may like to reproduce here the relevant parts of the said order as given in para. 35 at page 2044 and paras. 50 and 51 at page 2053 respectively:---

"35. In view of detailed discussion above we are not persuaded to follow the view held by Supreme Court of India that a society registered under the Societies Registration Act, 1860 is an unincorporated society and that it may have some of the characteristic of a corporation. We are of the considered opinion that a society registered under the Societies Registration Act, 1860, is a body corporate for all intents and purposes and is incorporated as understood in the legal parlance.

"50. From the above discussion, we are of the considered opinion that whenever the Legislature has used the words, formed, established, or created by or under the law it refers to the body corporate formed, established or created directly by the Legislature under the law enacted by it and, therefore, such expression shall not include a body corporate owing its existence to any instrument such as memorandum and articles of association and the registration thereof. In the case of societies registered under the Societies Registration Act, they are formed under section 1 of the said Act with a memorandum of association and filing the same with the Registrar of Joint Stock Companies and the registration thereof under section 3 of the said Act. It is, therefore, held that though a society registered under the Societies Registration Act is a body corporate but it is not a company as defined under section 2(16)(b) because such society is not formed by or under any law for the time being in force but is a body corporate which is constituted under an instrument and is registered in pursuance of the provisions contained in the Societies Registration-Act, 1860."

"51. Before concluding our finding on the issue relating to status of appellant, we would like to observe that in the title of assessment order the status of society/body corporate has been assigned to the appellant which is hereby maintained. However, while working out the tax liability the tax has been calculated at the rate of 52% which is applicable to companies. This treatment is not upheld, and is hereby vacated. The tax liability if any, is to be calculated in accordance with Para. A in Part. I of the First Schedule which prescribes rate of income-tax in the case of every individual, unregistered firm, association of persons, Hindu family/and artificial juridical person referred to in clause (32) of section 2 of the Income Tax Ordinance, 1979. "

60. As in the case in hand it was admitted fact that the AWT which was previously carrying name of Army Welfare Projects Fund was registered under the Societies Registration Act, 1860 in October, 1971 and later on the name was changed as Army Welfare Trust in October, 1974 and the new nomenclature stood duly entered with the Registrar, Joint Stock Companies. Therefore, the nomenclature given to the assessee that of a trust was just a name of the assessee which could not be outrightly included in the definition of company as defined in section 2(16)(bb) of the Ordinance for taxation purposes. On the strength of above-referred reported case of the Tribunal, we do not want to enter into any further discussion on the issue because the case referred was fully applicable to the instant case in that respect. Accordingly, for the case in hand, the tax liability or rate of income-tax was to be applied in accordance with para. (A) of Part I of the First Schedule as 'applicable in the case of every individual, unregistered firm, association of persons, Hindu the Ordinance. Accordingly, we would agree with the plea of the learned A.R. of the assessee that the assessee/AWT cannot be considered with the status of a company as defined in section 2(16) and it can at best be termed- as having status of an AOP to be taxed in accordance with the rate of income-tax given in para. (A) of Part I of the First Schedule to the Ordinance.

61. Now we have to deal with the main pivotal question with respect to the concept of diversion of income/profits at source through overriding title from that of AWT to the WARD.

62. In this very situation which we are dealing with, the only piece of evidence which has been produced on behalf of the assessee was a letter, dated 2-5-1992 A. G. Branch, GHQ issued by WARD wherein it was directed that the entire net income/profit of AWT with effect from financial year, ending 30-9-1991 be transferred to the Welfare Directorate of General Headquarters and the Directorate will spend this amount on such welfare activities as Directorate may decide from time to time.

63. In view of the very nature of the purpose for the creation of AWT as also discussed in the contentions of the parties above, we have no second opinion to the factual position as stood ascertained that the purpose and object of creation of AWT was to establish a trust for carrying out welfare activities for the beneficiaries as detailed earlier. Therefore, we have no doubt in our mind in viewing that the income/profits/gains of the AWT as have been actually spent on designed welfare activities would attract exemption provisions under clause (62) of Part I of the Second Schedule to the Ordinance. Therefore, a direction issued through a letter of the Adjutant-General Branch of GHQ as referred to above would not be a sufficient evidence and proof for drawing the conclusion that the entire net income/profits of AWT stood automatically diverted at source in the WARD through the concept of diversion of income through overriding title until it was practically and legally proved as such as to leaving not an iota of doubt with regard to actual happening of diversion of income of AWT though overriding title before .it accrued or fell to the AWT to be taken as not becoming the income of the assessee/AWT.

64. Now as regards the various case-laws as referred to by the learned A.R. of the assessee which have also been reproduced in context of relevant parts of the dictums given in the said case-laws; suffice it would be to state here that almost all the case-laws referred on the issue in question, were from foreign jurisdiction/ Indian jurisdiction and nothing was brought to the notice of this Tribunal from the relevant provisions of foreign law to totally equate and make the same as being analogous to the relevant provisions of the local law so as to avail to persuasive effect of the said case-laws to the proposition in hand. Moreover, the evidence produced by the assessee for establishing the factum of diversion of entire income of AWT to that of the WARD through the concept of overriding title was not at all sufficient enough to be regarded as cogent documentary evidence for proving the plea as taken on behalf of the assessee. Although, the learned A.R. of the assessee tried to convince us that the income/profits were not falling in the command of AWT to constitute an accrual of income to the AWT but yet this very fact if for the sake of arguments to be taken as such, would not take away the characteristic of a legal entity of the assessee created under the Societies Registration Act; 1980 and as held to be taxable as per rates of income-tax given in para. (A) of Part I of the First Schedule to the Ordinance. Obviously, we cannot allow a legal entity to be absolved from tax liability arising to it under the relevant provisions of law merely by an administrative instruction issued by another office through a letter to that effect.

65. The case-laws of the superior Courts from Indian jurisdiction as referred- to by the learned A.R. of-the assessee and as mentioned earlier have not persuaded us to acknowledge the concept of diversion of income at source through overriding title in the case in hand because our income-tax law was not that much similar to the Indian law wherein there was a wider concept vis-a-vis the concept of diversion of income through overriding title as acknowledged by their superior Courts and as such we cannot recognize the same for the proposition of the case before us.

66. Now we would consider the points in issue raised and referred by the parties and reflected in the order passed

by the Honourable Lahore High Court, Rawalpindi Bench, Rawalpindi for remitting the matter back to us for fresh decision of the issues involved in the case.

67. The learned counsel for the assessee has referred the following questions of law in his arguments before the Honourable Lahore High Court, Rawalpindi Bench, Rawalpindi:--

- (i) Whether the income derived by the projects of AWT qualifies the definition of diversion of income?
- (ii) What is the effect of overriding title created to divert the income of assessee and whether concept of "Real Income" is to be applied or not in the case of Diversion of Income?
- (iii) Whether a Welfare Society registered under law is taxable and what is the interpretation of Word 'expended' as mentioned in clause (62) of Schedule II?

68. On the other hand, the learned counsel representing the department before the Honourable Lahore High Court, Rawalpindi Bench, Rawalpindi with reference to cross-appeals filed by the department before the Honourable High Court, stated to have raised the following questions of law for decision as reflected in the order of the Honourable Lahore High Court, Rawalpindi Bench, Rawalpindi:--

- (i) Whether or not the learned ITAT was justified to hold that the nomenclature given to the assessee of that of a trust was just a name of the assessee (Army Welfare Trust) which cannot be included in the definition of company as given in section 2(16) of the Income Tax Ordinance, 1979?
- (ii) Whether or not the ITAT was justified to hold that the assessee being registered under the Societies Act, 1860, cannot be considered and assigned the status of the company under section 2(16)(bb) of the Income Tax Ordinance, 1979 despite the fact that it contains all the ingredients of trust and is duly registered with the Registrar, Joint Stock Companies?

69. If we first see to the question as reflected in the order of Honourable Lahore High Court, Rawalpindi Bench, Rawalpindi as stated to be raised by the learned counsel representing the department, suffice it would be to mention here that we have already given our findings above that the nomenclature given to the assessee of that of a trust was just a name of the assessee which cannot be included in the definition of company as given in section 2(16)(bb) of the Ordinance and it was in fact an AOP and to be taxed accordingly as per provisions of para. (A) of Part I of the First Schedule to the Ordinance while relying on the case-law reported as 1998 PTD (Trib.) 2017. As such the above questions as raised by the learned counsel on behalf of the department as reflected in the order of the Honourable Lahore High Court, Rawalpindi Bench, Rawalpindi shall stand answered accordingly that the assessee cannot be assigned the status of a company under section 2(16)(bb) of the Ordinance.

70. Now regarding the question No.(i) as reflected in the order of the Honourable Lahore High Court, Rawalpindi Bench, Rawalpindi raised by the learned counsel for the assessee while his arguing the case before the Honourable Lahore High Court, Rawalpindi Bench, Rawalpindi, we have already discussed above in detail with respect to the proposition involved in the said question in the context of contentions of learned A.R. and also about the applicability of the concept as expounded in the case-laws from Indian jurisdiction and we have not given recognition to the said concept as to have been available or applicable to our law. Therefore, on that basis we would like to answer the question of law at Serial No.(i) above in negative and would reaffirm that the income

derived by the projects of AWT did not qualify the definition of diversion of income.

71. Now with regard to question No-00 as to 'what is the effect of overriding title created to divert the income of the assessee and whether concept of "real income" is to be applied or not, in the case of Diversion of Income?' we would again answer this question in the light of our findings above in this manner that as we have not acknowledged the concept of diversion of Income through overriding title in the case of the assessee, therefore, we need not dilate upon the issue any further and as to whether any subsequent question with regard to concept of Real Income for the case of Diversion of Income was arising at all to be applied in the case before us. We do not think that any subsequent question as referred to above would arise in the case before us.

72. As regard the third question as to, "whether a Welfare Society registered under law is taxable and what is the interpretation of word expended as mentioned in clause (62) of IInd Schedule?" we have no doubt t in our mind that the income of the assessee which is a welfare society registered under the Societies Registration Act, 1860, would be exempt to the extent as allowed in clause (62). Undoubtedly, the assessee was having the status of an AOP on the ratio of the case-law cited as 1998 PTT (Trib.) 2017 as referred to above and now it would be for the assessee to establish that the income from business earned by the assessee was expended or spent for the designated welfare activities in the context of clause (62) of Part I of the Second Schedule to the Ordinance. The term "expended" can bitterly be regarded as having been spent for the purpose of carrying out welfare activities.. If any organization claims that it has spent its income or profits or gains for welfare activities in line with its charter or Memorandum of Association in its demanding, then what would be the measurement with the other side challenging this aspect that the amount was not expended or spent on such welfare activities until the claimant or assessee himself proves in that respect and it would require cogent evidence to establish that whole of the amount was actually spent or expended for the welfare activities. We can see to this very issue from another situation, where there is an organization carrying out welfare activities and indulged in several projects in order to generate resources for earning income for the welfare activities and also is making deposits in the banks for earning interest income in order to meet the expenditure of multifarious welfare activities, then, of course, entire income from business so earned and shown to have been spent on welfare activities will have to be proved to have been actually expended or spent on welfare activities and then if there is any part of such income which has not been proved as spent on welfare activities then the same will have to be chargeable to tax. The onus of proof in respect of claim of exemption would lie on the assessee to prove the same. In a recent case iii respect of another similar organization named as M/s. Fauji Foundation, we have given a very exhaustive judgment on the issues raised therein and we will also rely upon and follow the ratio of the said case decided by us vide order, dated 30-6-2000 passed in. I.T.As. Nos. 548 to 553/113 of 1998-99 in respects of the similar issues and points of both the cases. Therefore, third; question as indicated above shall stand answered accordingly as indicated above.

73. As a result of above, the questions of law and issues involved in the case of assessment years 1993-94 and 1994-95 as per directions of the Honourable Lahore High Court, Rawalpindi Bench, Rawalpindi: stand answered and resolved by us as our findings above.

74. Now as regards the appeal filed in respect of assessment year 199697 by the assessee, we would again refer our earlier decision of M/s. Fauji Foundation where the question of interest income earned from Bank deposits to be regarded as an income from business or profession or as an income from other sources to be assessable under section 22 or 30 respectively has been resolved in respect of an organization established for welfare purposes and the interest income has been regarded as income from business or profession and not as income from other sources. As, nothing has been established on behalf of the department to show that the income generated from the bank profits or interest income was a separate adventure than that of the business activity of

the assessee, therefore, we, without going into details and while relying on our earlier decided case of M/s. Fauji Foundation referred to above, would view and answer the issue in question in the same manner that the interest income earned by the AWT would be regarded as income from business or profession under section 22 of the Ordinance because the assessee was allowed by the Memorandum of Association in its clause (xviii) of para. III to invest money and property in any business or to carry on any trade for increasing the assets of the Trust for the objects of Memorandum of Association for the purpose of welfare activities. As there can be no second opinion to the already concluded resolution of the proposition with respect to question of treatment of interest income with specific reference to the welfare institution in case of M/s. Fauji Foundation, referred to above, therefore, we have to follow the ratio of the said case of which there was no difference in the manner of operation of both the welfare organizations and there was no any obvious dissimilarity between the two. It was for the department to establish specifically that the investment in the bank deposits was made just to create extra income for the purpose other than meeting the objects of welfare activities and was as such being actually spent on the purposes other than the welfare purposes. Of course, if the surplus funds or amounts are deposited in the Banks for earning profits then that deposit cannot be named something alien to the business activities and it was includible in the income from business or profession as per provisions of section 22 of the Ordinance. In that eventuality, obviously then we will have to allow proportionate financial expenses incurred by the assessee for earning such profits or interest income which have been actually spent in earning that income and as already a detailed discussion has been made on that question in the case of M/s. Fauji Foundation in the order of the Tribunal, dated 30-6-2000 referred to above. We do not want to stretch the same any further and rely on the same and accordingly conclude that the interest income of the assessee earned from bank deposits etc. was to be regarded income from business or profession and was assessable as such and likewise the proportionate financial expenses are also to be allowed to the assessee which have been incurred in earning said interest income. The other main question raised by the assessee in the appeal relating to assessment year 1996-97 in respect of diversion of income has already been answered and resolved by us in our findings given above for the assessment years 1993-94 and 1994-95 and hence the same shall stand answered accordingly.

75. Therefore, the appeal of the assessee with regard to assessment year 1996-97 shall stand disposed of accordingly as per discussion and findings given above.

76. Now we take up the cross-appeals filed by the department in respect of assessment year 1996-97. We do not find that any further discussion was required. If we see to ground No. 2 of cross-appeal filed by the department in respect of assessment year 1996-97, the answer to the same would be simple that we have already adjudged the status of the assessee of an AOP for the assessment years 1993-94 and 1994-95 and the same would be applied for the year under consideration. Therefore, the findings of learned Appeal Commissioner in the order, dated 15-1-2000 for the assessment year 1996-97 are affirmed on that score and the departmental plea is rejected.

77. With regard to the order of the learned Appeal Commissioner of setting aside the matter with respect to additions under the WPPF expenses and prior years adjustments and the ground No. 3 as raised by the department, we do not see any infirmity in the order, dated 15-1-2000 of the learned Appeal Commissioner and maintain the same to that extent. Accordingly, we find that the ground No. 3 of the departmental appeal for the assessment year 1996-97 being devoid of any merit is not sustainable and hence is rejected.

78. Resultantly, the departmental appeal for assessment year 1996-97 shall stand rejected.

79. With regard to departmental appeal for the assessment year 1995-96, the answer to the ground No. 2 as raised by the department has already been given in our findings in the appeals for the assessment years 1993-94 and

1994-95 with regard to assigning of status of AOP to the assessee/AWT. Therefore, the findings of learned Appeal Commissioner in the order, dated 29-5-1999 shall stand affirmed in the extent of assigning of status of AOP to the assessee. Consequently, the ground No. 2 as raised by the department in the appeal for assessment year 1995-96 shall stand rejected. With respect to ground No. 3 as raised in the said appeal for assessment year 1995-96 relating to the action of the learned Appeal Commissioner of setting 'aside the case on the issue of claims of exemption on the basis of diversion of income at source by overriding title and under the provisions of clause (62) of Part I of the Second Schedule to the Ordinance, suffices it would be to say that we have discussed at length the issue of diversion of income at source through overriding title and have already given our clear cut findings on that issue while taking up the case relating to assessment years 1993-94 and 1994-95 and as such we need not think it necessary to repeat said discussion and our findings and, therefore, would like to answer the ground No. 3 of the departmental appeal for assessment year 1995-96 accordingly for the treatment of the income of the assessee in the same manner as already settled by us above for the assessment years 1993-94 and 1994-95.

80. Therefore, the departmental appeal for assessment year 1995-96 stands disposed of accordingly.

81. Consequently, all the above appeals shall stand disposed of in the manner indicated above.

(Sd.)

(Syed Masood ul Hassan Shah),

Judicial Member.

82. JAMEEL AHMEDI BHUTTO (ACCOUNTANT MEMBER).---I have gone through the order proposed to be delivered by my learned brother, the Judicial Member, and agree with the findings given therein. However, in support of the findings recorded in para. 72 of the order, I would like to add my views hereafter.

82.1. Except for the persons specified in various clauses of the Second Schedule to the Ordinance to whom specific exemption has been granted under section 14 of the Ordinance, the income of all other assesseees, including the societies registered under the Societies Registration Act, 1860, is taxable. This interpretation is based on the most acknowledged principle of income tax law that every income is taxable unless expressly exempted under the provisions of the Ordinance. The status of the assessee is that of an AOP, as held on the ratio of the case-law cited as 1998 PTD (Trib.) 2017, and referred to in para. 72 of this order. Since AWT falls within the ambit of clause (62) of Part I of the Second Schedule to the Ordinance and is entitled to the reduced rate of tax at 20% of such business income as is not exempt under clause (62), the provisions of clause (9) of Part II of the Second Schedule to the Ordinance would be applicable to the case. The said clause (9) specifically applies to the cases of Fauji Foundation and Army Welfare Trust as named therein.

82.2. As regards the interpretation of the word "expended" mentioned in clause (62), the onus of proof would lie on the assessee to explain and produce evidence before the Assessing Officer that the amount of income chargeable under the head "income from business or profession" was actually spent on designated welfare activities and, on, submission of such proof, the same would be exempt to the extent provided under clause (62) of Part I of the Second Schedule to the Ordinance and the remaining income from business would be subject to tax in accordance with the principles and findings as given in the case reported as 1998 PTD (Trib.) 2017. For better understanding of this interpretation, it would be pertinent to reproduce the said clause (62) to show the

extent to which the income from business expended in Pakistan on welfare activities is eligible for exemption, subject to the conditions specified therein. This clause, (with emphasis added) reads as under:

"62(1) Any income of a trust or welfare institution specified in sub-clauses (2) and (3) from donations, voluntary contributions, subscriptions, house property, investments in the securities of the Federal Government and so much of the income chargeable under the head 'Income from business or profession' as is expended in Pakistan for the purposes of carrying out welfare activities:

Provided that in the case of income under the head 'Income from business or profession', the exemption in respect of income under the said head shall not exceed an amount which bears to the income under the said head the same proportion as the said amount bears to the aggregate of the incomes from the aforesaid sources of income.

(2) A trust administered under a scheme approved by the Federal Government in this behalf and established in Pakistan exclusively for the purposes of carrying out such activities as are for the benefit and welfare of--

(i) ex-servicemen and serving personnel, including civilian employees of the Armed Forces, and their dependents; or

(ii) ex-employees and serving personnel of the Federal Government or a Provincial Government and their dependents, where the said trust is administered by a committee nominated by the Federal Government or, as the cases may be, a Provincial Government.

(3) A trust or welfare institution approved by the Central Board of Revenue for purposes of this sub-clause."

82.3. In the context of abovementioned conditional exemption under clause (62), I would like to add that while explaining the effect of the amendment made in clause (62) in 1993, the Central Board of Revenue in its Circular No. 11 of 1993, dated July 7, 1993, also clarified that the exemption would be available to the extent that the business income is actually spent on welfare activities the relevant paragraph of the said C.B.R. Circular reads as under:---

"At present, business income of religious or charitable trusts/institutions is taxable. However, in the case of Welfare-Trusts for ex-servicemen, civil or military, business income as is actually spent on welfare activities is exempt. Clause (62) has been amended to provide that business income of such institutions/trusts as are approved by the Board for this purpose shall also be exempt to the extent it is actually spent on welfare activities on the lines of trusts for Government employees."

82.4 Considering the history of clause (62) of Part I and clause (9) of Part II of the Second Schedule to the Ordinance, I have no doubt in my mind that the word "expended" means actually spent by the assessee for the purposes of carrying out welfare activities. This word has narrow meaning as compared to the words "any expenditure laid out or expended" as used in clauses (xii) (xiii), (xiv), (xv) and (xviii) of subsection (1) of section 23 of the Ordinance, which provides for allowances and deductions admissible under the head "income from business or profession". It, therefore, follows that the word "expended" mentioned in clause (62) of the Second Schedule does not have any larger scope and meaning and is restricted only to the extent of actual spending of the business income by the assessee for the purpose of carrying out welfare activities. Had the intention of such exemption provided under section 14 of the Ordinance been different and wider in scope for the trusts and welfare institutions covered under clause (62), the Federal Government would have allowed exemption in the

same manner as granted to the religious and charitable trusts etc. As an example, it would be seen from clause (93) of Part I of the Second Schedule that it allows exemption not only to the income actually applied but also to the income finally set apart for application to religious or charitable purposes with the condition that such income is expended within Pakistan. Clause (93) reads as under:--

"(93) Any income which is derived from investments in securities of the Federal Government and house property held under trust or other legal obligations wholly, or in part only, for religious or charitable purposes and is actually applied or finally set apart for application thereto:

Provided that nothing in this clause shall apply to so much of the income as is not expended within Pakistan:

Provided further that if any sum out of the amount so set apart is expended outside Pakistan, it shall be included in the total income of the income year to which it is so expended or of the year in which it was set apart, whichever is the greater, and the provisions of subsection (3) of section 65 shall not apply to any assessment made or to be made in pursuance of this proviso."

82.5. In the case reported as 2000 PTD (Trib.) 2401 the Division Bench of this Tribunal has also decided the issue relating to the interpretation of the word "expended" appearing in clause (62) and held in its order, dated 1-6-1999 that the word refers to actual expenditure. The relevant paragraphs of the learned Tribunal's order are reproduced as under:---

"8. The learned A.R. of the assessee contends that as the assessee's trust fulfils all the requirements of clause (62)(2)(ii), therefore, its business income expended in Pakistan for the purpose of carrying on welfare activities is also exempt for assessment years 1993-94 and 1994-95 under the above-referred sub-clause (1) of clause (62) of the Second Schedule to the Ordinance. In order to substantiate his arguments the learned A.R. has laid much stress upon the meaning of the word "expended". It is submitted that the word "expended" has not been defined in Ordinance. Therefore, according to well-settled principle of interpretation the word used in the statute but not defined by the statute itself is to be interpreted according to its ordinary dictionary meaning. According to Black's Law Dictionary, Sixth Edition the word 'expend' means to 'pay out', 'lay out' 'consume' 'use up' 'normally implying receiving something in return'. In Chamber's Twentieth Century Dictionary "expend" means to 'layout', to employ or consume in any way, to spend. The word 'expend' according to the Oxford English Dictionary Volume III, means to 'pay out', 'to lay out', 'spend (money)', 'to spend', 'make away with', 'consume in outlay'."

9. It is contended by the learned A.R. that the word "expend" according to dictionary meaning represents not only the actual expenditure of money but also includes the amount or money which was laid -out for spending or to be consumed in future or retained for the projects. In this way, the learned A.R. tried to convince us that so much of the business income which the assessee had shown to be spent or to be used in future for welfare activities, is also exempt from the levy of tax under clause (62) of the Ordinance. We are afraid, that we do not subscribe to the interpretation as laid down by the learned A.R. for the reason that if the meaning of word "expend" is accepted as interpreted by the learned A.R. then the business income of a charitable trust formed in conformity with the above clause would never be brought to tax net and the provisions of clause (62) will become redundant and superfluous and secondly, it would never be the intention of the Legislature while enacting the above provisions of law. The words "so much of the income" are very important to ascertain the legislative intent. It means that amount from the income earned by the trust from business which has been actually spent on the welfare activities is only exempt from the levy of tax and not the amount which has not been actually spent on these projects. The general principle is that the claim of, an exemption from levy of a tax must be established

in clear and unequivocal terms. In regard to interpretation of a provision involving exemption, the Supreme Court of Pakistan in 1992 SCMR 1652 observed as under:--

"There are two basic principles of constructing a provision of statute involving exemption from payment of tax, namely, the first rule is that the burden of proof is on the person who claims exemption. The second rule is that a provision relating to grant to tax exemption is to be construed strictly against the person asserting and in favour of taxing officer."

Applying the above criteria we are very clear in our mind that the word 'expend' refers to actual expenditure and the so much of the business income as is actually expended on welfare projects is only exempt under clause (62). We hold that so much of the business income of the assessee which has been actually spent on the welfare activities of the trust is exempt from the levy of income-tax, we, therefore, modify the order of the learned CIT(A) by directing that so much of the income from business as has been actually spent on the welfare activities, being exempt shall be deleted from the assessments made for the assessment years 1992-93, 1994-95 and 1995-96."

82.6. In view of the foregoing, I also hold that word "expended" used in clause (62) of Part I of the Second Schedule to the Ordinance has restricted meaning and only that portion of the assessee's income from business chargeable under section 22 of the Ordinance would be allowed exemption under clause (62) as is actually spent by the assessee in Pakistan for the purposes of carrying out welfare activities. The burden of proof will naturally lie on the assessee claiming exemption under clause (62) because it is the Assessing Officer who has to be satisfied regarding the conditions required to be fulfilled for claiming such exemption, and it is he who has to determine that the exemption in respect of such income does not exceed an amount which bears to the income under the head 'income from business or profession the same proportion as the said amount bears to the aggregate incomes from all sources of income specified in sub-clause (1) of clause (62).

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