

PESHAWAR HIGH COURT, PESHAWAR
(JUDICIAL DEPARTMENT)

WP No. 5327-P/2022

Latif Hakeem

.....Petitioner.

V/s

Federation of Pakistan
Through its Secretary Finance,
Islamabad and 02 others

.....Respondents.

For the Petitioner (s):

M/s Asim Khan, Asad Yousaf,
Najmuddin, Najamul Saleheen,
Muhammad Tariq, Nadia Gul &
Shahid Jan, Advocates.

For the Respondents:

M/s Sanaullah Deputy Attorney
General, Ghulam Shoaib Jally,
Ishtiaq Ahmad (Junior), Barrister
Sarwar Muzafar Shah,
Advocates along with Asad Bilal
Jehangir Additional
Commissioner Inland Revenue
& Siraj Muhammad Assistant
Commissioner Inland Revenue.

M/s Shumail Ahmad Butt &
Barrister Syed Mudassir Ameer,
Advocates/Amicus Curie.

Date of hearing:

23.11.2023

JUDGMENT

SYED ARSHAD ALI, J:- Latif Hakeem, the petitioner in the instant petition and the other petitioners in the connected petitions (particulars of the petitions are provided in Annexure 'A' to this judgment) are aggrieved of the insertion of section 7E through Finance Act, 2022 to the Income Tax Ordinance, 2001 ("**Ordinance**") which provides that for the tax year, 2022 and onward, a resident person shall be treated to have derived as income chargeable to tax, an amount equal to 5% of the fair market value of the capital assets situated in Pakistan, chargeable to tax @ 20% under Division-VIII C of Part-I of

the First Schedule to the Ordinance. The vires of the impugned legislation has been challenged mainly on three grounds; firstly, legislative incompetence of Parliament; secondly, the said levy is discriminatory and thirdly; being confiscatory.

2. The learned counsel for the petitioners after referring to the impugned provision has argued that right to hold property is the fundamental right of every citizen of Pakistan and the impugned legislation has directly affected the said right of the petitioners by making the non-income producing property owned by the petitioners subject to incidence of taxation where the Parliament has no power under Entry No. 47 of the Fourth Schedule to the Constitution of Islamic Republic of Pakistan, 1973 (“**Constitution**”) to legislate on the subject. The learned counsel, while referring to the judgment of the Hon’ble Lahore High Court passed in Constitutional Petition No. 52559/2022 dated 06.04.2023, has argued that after 18th amendment in the Constitution, the Parliament has no jurisdiction to tax immovable property in any form. The learned counsel has also maintained that no tax can be levied through a deeming provision in a Statute unless there is an event of taxation in terms of income as provided under the Ordinance. Since through the impugned levy, the property has been taxed, therefore, the same is not only ultra vires the Constitution but cannot be taxed in absence of realization of income from the said property.

3. The worthy Deputy Attorney General assisted by the learned counsel for the Revenue have argued that no doubt an immovable property cannot be taxed by the Parliament after 18th amendment in the Constitution but the capital value of Asset, though it may have not realized any income, can still be taxed by the Parliament through a deeming clause in terms of Entry No. 47 in the Fourth Schedule of Constitution. In support of their arguments, they have placed reliance upon the

judgment of the Apex Court in the case of *Messrs Elahi Cotton Mills Ltd*¹ and the judgment passed by the Hon'ble Sindh High Court in the case of *Hakim sons (Impex) (Pvt) Ltd*.²

4. M/s Shumail Ahmad Butt Advocate & Barrister Syed Mudassir Ameer were appointed as *Amicus Curie* to assist this Court in the matter.

5. Mr. Shumail Ahmad Butt, Advocate/the learned Amicus Curie, while arguing the case, has read Entry No. 47 as well as Entry No. 50 as it stands after 18th amendment in the Constitution and has submitted that immovable property has completely been ousted from Federal Legislative competence to tax. He has further maintained that after 18th amendment in the Constitution, in terms of Entry No. 50 *ibid*, it is only the Province which has the authority to legislate on the subject. The learned counsel, while referring to Article 142 of the Constitution, has argued that there is marked distinction between the power of Federation to regulate a subject and power to tax the same; as power to regulate a subject does not mean that it has the jurisdiction to even tax the subject. In this regard, he has referred to Article 253 of the Constitution and has stated that though the limits relating to immovable property through legislation can be determined by the Parliament, however, this does not mean that the Parliament has the power to tax the immovable property in view of the clear ouster as provided through Entry No. 50 *ibid*. The learned counsel has also referred to the legislative debate by the Federal Minister of Law before the impugned amendment and has stated that the aim was to tax immovable property on the basis of its rental value despite that it has no potential to

¹ *Messrs Elahi Cotton Mills Ltd and others vs. Federation of Pakistan through Secretary M/o Finance, Islamabad and 6 others* (PLD 1997 SC 582)

² *Hakim sons (Impex) (Pvt) Ltd and others vs. Federation of Pakistan* (C.P. D-4614/2022 etc decided on 28.10.2022).

generate any income in certain cases, hence, it is beyond the authority of the Parliament to levy the impugned tax in view of the clear bar enumerated in Entry No. 50 *ibid*. He, while bolstering his arguments, put reliance on the Parliamentary debate, and the law laid down by the Apex Court in the case of *Ghulam Hussain*.³ The learned counsel has also maintained that since the tax can be imposed on income and when the immovable property does not generate any income, it cannot be subject to impost of income tax through a deeming clause, as the same would not only be a violation of the basic purpose of direct taxation but would also be confiscatory. In support of his arguments, he has placed reliance on *Shaukat Ali Mian's case*.⁴ Regarding the competence of Parliament as well as State Legislature, the learned counsel has referred to the case of *Kesoram Industries Limited*.⁵ He has also produced the Khyber Pakhtunkhwa Finance Act, 2010 whereby capital value of immovable property has been taxed by the Province which clearly shows that after 18th amendment in the Constitution, it is the Province alone which can tax the capital value of the immovable property.

6. Barrister Syed Mudasir Ameer, the learned *Amicus Curie* has read various provisions of the Ordinance and has also referred to the case of *Messrs Elahi Cotton Mills Ltd (supra)* and argued that in order to trigger the provision of Income Tax Laws it has to be established that the subject can be taxed to income only when there is actual income and what is not income under the Income Tax Laws it cannot be termed as income through a deeming clause. He next contended that, while interpreting an Entry in a Legislative List, it should be

³ *Ghulam Hussain vs. Chairman, P.O.F. Board, Wah Cantt and another* (2002 SCMR 1691).

⁴ *Federation of Pakistan and others vs. Shaukat Ali Mian and others* (PLD 1999 SC 1026)

⁵ *The State of West Bengal vs. Kesoram Industries Limited* (2004) 10 SCC 201.

given the widest possible meaning. This, however, would not mean that the Parliament can choose to tax as income which in no rational sense can be regarded as a citizen's income. The learned counsel has laid much emphasis on Entry No. 50 and argued that once the immoveable property has been excluded from taxation by Parliament then it cannot be taxed in any other form. The learned counsel has referred to the law laid down by the Apex Court in the case of *Haji Muhammad Shafi*.⁶ The learned counsel further states that prior to 18th amendment in the Constitution, immoveable property could be taxed, with the exception of capital gain from immoveable property. However, with the 18th amendment Entry No. 50 was reworded whereby the subject capital gain was swapped with immoveable property and now it is only a capital gain relating to immoveable property which can be taxed by the Parliament whereas immovable property now falls within the jurisdiction of the Province even for the purpose of taxation.

7. We have given anxious consideration to the submissions of learned counsels for the parties as well as the learned *Amicus Curie* and have also perused the record.

8. It is envisaged by Article 77 of the Constitution that no tax shall be levied for the purposes of Federation except by or under the authority of Act of Majlis-e-Shoora (Parliament). Pakistan encompasses of the Federation as well as the federating Units i.e. the Provinces and distribution of legislative powers of Federation as well as the Provinces have been provided in Chapter-I of Part-V of the Constitution. Under Article 142(a), the Parliament alone has the jurisdiction to make laws with respect to any matter in the Federal Legislative List and in terms of sub-clause (c) of Article 142 Parliament has been restrained to make laws with respect to

⁶ *Haji Muhammad Shafi and others vs. Wealth Tax Officer and others (1992 PTD 726).*

any matter not enumerated in the Federal Legislative List and it is the Province alone which has the jurisdiction on all residual matters not enumerated in the Federal Legislative List as provided in the Fourth Schedule to the Constitution in terms of Article 70. Under the constitutional scheme relating to distribution of legislative competence, it is well settled that taxation is considered to be a distinct matter for legislative competence viz-a-viz the general subject of legislation. The general subjects of legislation are dealt with in one group of entries and power of taxation in a separate group. The power to tax cannot be deduced from a general legislative entry as an ancillary power. (*Kesoram Industries Limited's case (supra)*)

9. The following entries in Part-1, Fourth Schedule to the Constitution determines the legislative competence of the Parliament relating to taxation

FOURTH SCHEDULE
[Article 70(4)]
LEGISLATIVE LISTS
Federal Legislative List

43. *Duties of customs, including export duties.*
44. *Duties of excise, including duties on salt, but not including duties on alcoholic liquors, opium and other narcotics.*
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47. *Taxes on income other than agricultural income.*
48. *Taxes on corporations.*
49. *Taxes on the sales and purchases of goods imported, exported, produced, manufactured or consumed, except sales tax on services.*
50. *Taxes on the capital value of the assets, not including taxes on immoveable property.*
51. *Taxes on mineral oil, natural gas and minerals for use in generation of nuclear energy.*
52. *Taxes and duties on the production capacity of any plant, machinery, undertaking, establishment or installation in lieu of the taxes and duties specified in entries 44, 47, 48 and 49 or in lieu of any one or more of them.*
53. *Terminal taxes on goods, or passengers carried by railway, sea or air; taxes on their fares and freights.*

10. Since the issue at hand relates to imposition of tax on deeming income relating to an immovable property, therefore, germane to the controversy are Entry No. 47 and Entry No. 50. It is the case of Revenue that the genesis of the impugned legislation (section 7E) is from Entry No. 47 which is a tax on income and the exclusion through Entry No. 50 after 18th amendment is only to the extent of taxation of immovable property and not imposition of taxes on the capital value of Assets.

11. In order to proceed further, we have to comprehend the terms 'income' as it appears in Entry No. 47, 'capital value of the assets/capital gain' as it appears in Entry No. 50 and the essential question of the extent of exclusion of immovable property from the jurisdiction of Parliament.

Definition of 'Income' in the Ordinance

2(29) "income" includes any amount chargeable to tax under this Ordinance, any amount subject to collection 2[or deduction] of tax under section 148, 150, 152(1), 153, 154, 156, 156A, 233, sub-section (5) of section 234 and any amount treated as income under any provision of this Ordinance and any loss of income;

9. Taxable income.—The taxable income of a person for a tax year shall be the total income under clause (a) of section 10 of the person for the year reduced (but not below zero) by the total of any deductible allowances under Part IX of this Chapter of the person for the year.

12. The concept of income relating to it being subject to impost of Income Tax Act was very elaborately explained by the Apex Court in the case of *Samina Shaukat*⁷ in the following manner:-

"It will be seen that the term 'income' as used in the Income Tax Act is, indeed, a term of wide significance and generally and ordinarily it connotes a periodical monetary return, coming in with some sort of regularity or expected regularity, from a definite source; but, as observed by the Privy Council, the multiplicity of forms which income may

⁷ *Samina Shaukat vs. Commissioner of Income Tax (PLD 1981 SC 85)*

assume is beyond enumeration; and income need not necessarily be the recurrent return from a definite source; though it is generally of that character. It may consist of a series of separate receipts, as for instance happens in the case of professional earnings. In the last analysis, the question whether a particular kind of receipt is income or not would depend for its answer on the peculiar facts and circumstances of the case. If the nature of the receipt and its source are not satisfactorily explained by the assessee, facts which are generally within his peculiar knowledge, the Income-tax Officer may legitimately presume that the amount in question is an income of the assessee from an undisclosed source.

Once a finding is recorded that the amount in question could be treated as income within the meaning of the charging section, section 3 of the Income Tax Act, the burden of proving that the income qualified for exemption under any of the clauses of section 4 of the Act was on the assessee. Subsection (1) of section 4 of the Act provides that 'subject to the provisions of the Act, the total income of any previous year of any person includes all incomes, profits and gains from whatever source derived'. Subsection (3) of the same section then enumerates exemptions, and the operative words are 'any income, profits or gains falling within the following -classes shall not be included in the total income of the person receiving them ---' It was for the appellant to show that she was covered by the exemption granted by clause (vii) of subsection (3). This she clearly failed to do, for the reason that she could not satisfactorily explain the source of the entire amount of cash found in her hands, nor of the total accretions thereto in subsequent years.

It does not need much reasoning to see that if the source of income is not disclosed or satisfactorily explained, then it is not possible to hold that the income was not from business or from the exercise of a profession, vocation or occupation;".

13. The aforesaid explanation of the income for the purpose of impost of income tax was affirmed subsequently in the cases of *M/s Haji Maula Bux Corporation and Pakistan Industrial Development Corporation*.⁸

14. The definition of 'income' as provided under the Ordinance has the following three attributes:

- (i) *An amount chargeable to tax under the Ordinance;*

⁸ Commissioner of Income Tax, Rawalpindi vs. M/s Haji Maula Bux Corporation, Sargodha (PLD 1990 SC 990) and Pakistan Industrial Development Corporation vs. Pakistan through the Secretary, Ministry of Finance (1992 SCMR 891).

- (ii) *an amount subject to collection or deduction of tax; and*
- (iii) *An amount treated as income under any provision of this Ordinance and loss of income.*

15. The aforesaid third attribute refers to the deeming income; thus, if any income is received, arises or accrues or is deemed to receive, arise or accrue from the assessee, it would be subject to tax. It was observed by the Apex Court in *Pakistan Industrial Development Corporation's case (supra)* that the deeming provision presupposes accrual of income to the assessee but by fiction of law shifts the 'locale of accrual of the income'; a deeming clause makes a thing to be as provided by statute though in reality, it is not so. The said judgment refers to the law laid down by the Privy Council in *Bombay Trust Corporation's case*⁹ wherein the deeming income has been explained as:

"Thus, the phrase 'deemed to accrue or arise to him in India during such year' and the corresponding phrase with reference to receipt in this section, involve four possible concepts; (a) artificial accrual or receipt, (b) artificial place of accrual or receipt, (c) artificial chargeability of a person other than the actual owner of the income and (d) artificial year of taxability".

16. However, what would be the scope of the said deeming income has been very elaborately explained by the Apex Court in *Messrs Elahi Cotton Mills's case (supra)* while dealing with the vires of legislation i.e. section 80C & 80D of the erstwhile Income Tax Ordinance, 1979 whereby the income tax was imposed on the presumptive tax on the gross revenue/ value of export as deemed income of an assessee. The said levy was upheld by the Apex Court in the following manner:-

34.

In our view, sections 80-C and 80-CC of the Ordinance fall within the category of presumptive tax as under the same the persons covered by them

⁹ *CIT vs. Bombay Trust Corporation 4 I.T.C. 312*

pay a pre-determined amount of presumptive tax in full and final discharge of their liability in respect of the transactions on which the above tax is levied. Whereas section 80-D of the Ordinance is founded on the theory of minimum tax which has been elaborately dealt with in the treatises, the relevant portions of which have been quoted in extenso hereinabove. If we were to read Entry 47 in isolation without referring to Entry 52, one can urge that Entry 47 does not admit the imposition of presumptive tax as the expression "taxes on income" employed therein should be understood as to mean the working out of the same on the basis of computation as provided in the various provisions of the Ordinance. We are inclined to hold that presumptive tax is in fact akin to capacity tax i.e., capacity to earn. In this view of the matter, we will have to read Entry 47 in conjunction with Entry 52 which provides taxes and duties on production capacity of any plant, machinery, undertaking, establishment or installation in lieu of the taxes or duties specified in Entries 44, 47, 48 and 49 or in lieu of any one or more of them. Since under Entry 52, tax on capacity in lieu of taxes mentioned in Entry 47 can be imposed, the presumptive tax levied under sections 80-C and 80-CC of the Ordinance is in consonance with the above two entries if read in conjunction.

17. Similarly, in para-31 (xii) of the said judgment, it was observed by the Apex Court that what is not 'income' under the Income Tax Act, can be made 'income' by a Finance Act. An exemption granted by the Income Tax Act can be withdrawn by the Finance Act or the efficacy of that exemption may be reduced by the imposition of a new charge, of course, subject to Constitutional limitations.

The scope of taxing event in the legislation (starting with the Income Tax Act, 1922) as developed in judicial decision given at the highest level, was regarded as confined to revenue as opposed to capital. This distinction was regarded as fundamental to income tax law: revenue received could be brought to tax but capital received could not; similarly

expenditure that went to revenue account could be claimed as deduction but capital expenditure could not.¹⁰

18. The ratio in *Messrs Elahi Cotton Mills' case (supra)* for upholding the presumptive tax (minimum tax) was not in terms of Entry No. 47 but it was in view of Entry No. 52 which authorises the Parliament to tax the production capacity of a plant, machinery or undertaking in lieu of taxes and duties specified in Entries No. 44, 47, 48 and 49 *ibid*. On the other hand, immovable property lying idle has no capacity to generate income, therefore, it cannot be taxed on the basis of presumptive fair market value. In our humble view, this is the precise ratio of *Messrs Elahi Cotton Mills' case*. However, the owner is subject to impost of tax on the gain arising out of transaction of the immovable property under the Ordinance. This aspect has been vary aptly explained by the Lahore High Court in the case of *Muhammad Osman Gul*¹¹. That capital gain tax has always been and is part of the income tax, competence of which is Entry No.47, and reasons for placing it in Entry No. 50 was to exclude the immovable property from the definition of Capital Assets, only for the purpose of capital gain.

Capital value of Asset

19. The word/phrase capital value of asset or capital value viz-a-viz the asset are undefined words/phrases. The word "Assets" appears to be synonymous with the definition of property as provided under Article 260 of the Constitution as "Property includes any right, title or interest in property, moveable or immoveable and any means and instruments of production. The term 'value of asset' came under

¹⁰ Pakistan International Freight of Forwarders Association through General Secretary vs. Province of Sindh (2017 PTD 1).

¹¹ Muhammad Osman Gul Vs. Federation of Pakistan etc (W.P No. 52559 of 2022) decided on 06.04.2023.

consideration before the Apex Court as it stood under section 2(1) (o) of Monopolies and Restrictive Trade Practice (Control & Prevention) Ordinance (V of 1970). It was held by the Apex Court in *Sanaullah Woollen Mills's case*¹² that the word 'asset' is generally used in collective plural, and in commercial law it denotes the aggregate of available property, stock in trade, cash etc belonging to a merchant or mercantile company. It is also used to signify the means which a person or bank or a corporation has as compared with/his/its liabilities, that is its identity is separate and is not inclusive of debts or liabilities but is only comparable to them. It is in this sense that the word 'asset' has been used to denote a 'complete whole' of property. Any other meaning given to it will be against the verbal expression of the legislature, and would defeat the very purpose of the legislation.

20. The phrase capital value of asset also examined by the Apex Court in *Messrs I.C.C. Textile Ltd's case*.¹³ The issue for determination before the Apex Court in the aforesaid case was imposition of corporate asset tax imposed vide section 12 of the Finance Act, 1990 by the Federal Legislature chargeable on the basis of gross value of assets inclusive of liabilities in terms of Entry No. 50 of the Fourth Schedule of Constitution. The Apex Court while relying upon *Sanaullah Woollen Mills Ltd's case (supra)*, has explained the meaning of asset in para-12 of the judgment in the following manner:-

12. Reference at this stage may also be made to the case of Sanaullah Woollen Mills Ltd. (PLD 1987 SC 202) which was also relied upon by this Court in Haji Muhammad Shafi's case. In Sanaullah Woollen Mills's case the expression "value of assets" as defined in the Monopolies and Restrictive Trade Practices (Control and Prevention) Ordinance, 1970 came under consideration and this Court

¹² *Sanaullah Woollen Mills Ltd and another vs. Monopoly Control Authority (PLD 1987 SC 202)*

¹³ *Messrs I.C.C. Textile Ltd and others vs. Federation of Pakistan and others (2001 PTD 1557)*

while interpreting the expression "value of assets" held; the word "means" has no other significance but that, that the word "assets" has to be given its ordinary meaning and not to be understood as having any extended meaning which the word "includes" conveys. The word "assets" is generally used in collective plural, and in commercial law it denotes the aggregate of available property, stock in trade, cash etc., belonging to a merchant or mercantile company. (Black's Law Dictionary Revised Fourth Edition, page 151). It is also used to signify the means which a person or bank or a corporation has as compared with his/its liabilities that is, its identity is separate and is not inclusive of debts or liabilities but is only comparable to them. It is in this sense that the word "assets" has been used to denote whole of the property. Any other meaning given to it will be against the verbal expression of the legislature, and would defeat the very purpose of the legislation. After having read the ratio decidendi of both these judgments referred to herein above we feel that there should not be any doubt that the Corporate Assets Tax is tax on the capital value of the assets as per Item No-50 of the Legislative List and merely in view of the manner prescribed under section 12(12)(d) of the Act for calculating and imposing tax it cannot be held contrary to this entry or unconstitutional nor its constitutionality can be objected to for such reason. It is thus held that legislature had power to promulgate section 12 of the Act under Article 142 of the Constitution to levy Corporate Assets Tax on the value of the assets held by a company on a specified date, therefore, the gross assets of the Company as per section 12(12)(d) of the Act are liable to tax inclusive of the liabilities of the company as per Entry No.50 of the Federal Legislative List Part 1 Fourth Schedule of Constitution and there is absolutely no ambiguity of whatsoever nature in imposing the Corporate Assets Tax. As such the judgment relied upon by Mr. Ziaullah Kiani ASC and Mian Ashiq Hussain ASC in the case of B.P. Biscuits Factory (Supra) has no application on instant case, thus the contention raised in this behalf is also repelled.

Similarly, the phrase capital value of asset was also explained by the Indian Supreme Court in the case of *Harbhajan Singh Dhillon*.¹⁴ The Supreme Court of India has somewhat explained the expression capital value of asset in the manner, "it will, therefore, not be improper to interpret the

¹⁴ Union of India vs. Harbhajan Singh Dhillon (AIR 1972 SC 1061).

expression 'capital value of assets' as meaning the aggregate value of assets which a willing purchaser would offer a willing seller for the property in its condition at the time of transaction".

21. In view of Entry No. 47 and 50, taxes on income other than agriculture income as well as taxes on capital value of the asset, not including taxes on immoveable property is the field of legislation where Parliament is competent to legislate. A very drastic change was made in Entry No. 50 by the Parliament through 18th amendment in the Constitution. Before 18th amendment in the Constitution, Entry No. 50 read as taxes on the capital value of the asset, not including taxes on capital gains on immoveable property; whereas through 18th amendment in the Constitution, the word 'capital gain' was omitted and thus it reads as "taxes on capital value of the asset, not including taxes on immoveable property".

22. The essential question for interpretation is whether when admittedly, immoveable property is a component of an asset though is beyond the competence of Parliament to be taxed, however, whether being essential component of asset; its capital value can be taxed. The question further arises as to whether the exclusion of immoveable property from the legislative competence of Federation, as far as its taxation is concerned, would also exclude the immoveable property from meaning of capital asset.

23. The essential principle of interpretation is that the scope of an entry in Federal Legislative List should be given expanded and wider meaning. It is well settled that widest amplitude should be given to the language of entries occurring in the Legislative List. However, where there appears to be an overlap or a conflict between entries then it is the duty of the Court to find out its true intent and purpose and

to examine a particular legislation in its pith and substance to determine whether it fits in one list or the other.¹⁵

24. It is well settled that a tax has two elements: firstly, the person, things or activity on which the tax is imposed and secondly the amount of tax. The amount may be measured in many ways; but a distinction between the subject-matter of a tax and the standard by which the amount of tax is measured must not be lost sight of. These are described respectively as the subject of a tax and the measure of a tax. It is true that the standard adopted as a measure of the levy may be indicative of the nature of the tax, but it does not necessarily determine it. The nature of the mechanism by which the tax is to be assessed is not decisive of the essential characteristic of the particular tax charge, though it may throw light on the general character of the tax. (*Kesoram Industries Limited's case (supra)*).

25. Entry No. 50 as it stood before the 18th amendment in the Constitution did include the power of Federation to tax immovable property in any form but the exclusion was capital gains on immovable property. The said area was available to the Federation in the same fashion in the Constitution of Islamic Republic of Pakistan, 1962 in form of entry No. 42(e) which reads "taxes on capital value of asset, not including taxes on capital gains on immovable property". After the promulgation of Constitution of Islamic Republic of Pakistan, 1962, Wealth Tax Act, 1963 was promulgated by the Parliament. Section 3 of the Wealth Tax Act, 1963 envisaged that there shall be charged for every financial year commencing a tax in respect of the net wealth on the

¹⁵ The India Cement Ltd, etc. vs. State of Tamil Nadu etc (AIR 1990 SC 85), H.R. Banthia v. Union of India (AIR 1970 SC 1453). Union of India vs. H.S. Dhillon (AIR 1972 SC 1061). D.C. Rataria v. Bhuwalka Brothers Ltd (AIR 1955 SC 182) and Messrs Elahi Cotton Mills Ltd and others vs. Federation of Pakistan through Secretary M/o Finance, Islamabad and 6 others (PLD 1997 SC 582).

corresponding valuation date of every individual association etc whether incorporated or not at the rate specified in the Schedule. Net wealth under the same Act was defined under section 2(m) to mean the amount by which aggregate value computed in accordance with the provision of the Act of all assets where ever located belonging to the assessee on the valuation date including assets required to be included in his net wealth as on that date under the Act, is in excess of the aggregate value of all debts owed by the assessee on the valuation date etc. The vires of the Wealth Tax Act, 1963 was examined by the Apex Court in *Haji Muhammad Shafi's case (supra)*. The point of contest was that Wealth Tax Act 1963 was beyond the legislative competence of the Parliament as under Entry No. 50 of the Fourth Schedule of the Constitution tax can be levied on capital value of asset whereas under section 3 of the Wealth Tax Act, 1963 tax has been charged on net value of the asset. The contention was repelled by the Apex Court in the following words:-

4. We are in full agreement with the observation made by the learned Judges of the High Court. Item 50 of the Fourth Schedule provides for tax on capital value of the assets not including taxes on capital gain on immovable property. Therefore, tax on capital value of assets can be levied which is not disputed at all. Wealth Tax is one of those taxes which intends to subject the assets to taxation. It is nobody's case that the Wealth Tax Act does not charge the assets. The Act has provided a mechanism for imposing and calculating the tax on capital assets. The provision for calculating such tax is provided by the Act. Section 3 denotes which part of the capital value shall be taken into consideration for the purposes of charging wealth tax. It is nobody's case that the net value of assets is not a part of the capital value. The capital value of the assets includes the net value of the assets. The definition of the net wealth under section 2(m) clearly provides that first the aggregate value of all the assets belonging to the assessee has to be taken into consideration. This is the basis for charging the tax. Now, in order to calculate the tax the aggregate value of liabilities and debts are to be deducted from the aggregate value of assets and the excess so calculated has been

termed as 'net wealth' on which tax is calculated at the speed rate. This process of calculating the tax does not exclude the capital value of assets from wealth tax charged under section 3.

26. In order to further effectively comprehend this issue, we may refer to the law developed by the Indian Courts on the subject. However, before referring to the judgment of the Indian jurisdiction, we have to explain the essential distinction between the federal character of Indian Constitution from our own Constitution. In the Constitution of India, Articles 245, 246 & 248 invest the Parliament and the State Legislature with the power of legislation and defines their affairs of legislation. Article 245 defines the extent of territorial jurisdiction of the Parliament and the State Legislature respectively. The Legislature of the State is authorized to make laws for the whole or any part of the State and the Parliament can make laws for the whole or any part of the territory of India. The Seventh Schedule to the Constitution of India enumerates three Lists; List-1 enumerates various entries where the Union/Parliament has the exclusive power to legislate on matter enumerated in List-I. Similarly, in List-II defines the area where the State has the exclusive power to legislate whereas List-III is the concurrent list where both Union as well as State can legislate. However, in terms of Article 248 of the Constitution of India, the Parliament has exclusive power to make any law with respect to any matter which is not enumerated in the concurrent or State list. Thus, unlike our Constitution, the residual power to legislate is with the Parliament. In order to effectively comprehend the judgments which are rendered by the Indian Courts, we would like to refer to certain entries of the various lists relevant to the present controversy.

<i>List-I (Union List)</i>	<p><u>Entry No. 86.</u> Taxes on capital value of the assets, exclusive of agricultural land, of individuals and companies; taxes on the capital of companies.</p> <p><u>Entry No. 87.</u> Estate duty in respect of property other than agricultural land.</p> <p><u>Entry No. 97.</u> Any other matter not enumerated in List-II or List-III including any tax not mentioned in either of those Lists.</p>
<i>List-II (State List).</i>	<u>Entry No. 49.</u> Taxes on lands and buildings.

26.1 In *Ajoy Kumar Mukherjee's case*¹⁶, the issue was the imposition of tax/license fee under the Assam Local Self-Government Act, 1953 ("Act"). Under section 62(1) of the Act the local board may order that no land shall be used as a market otherwise than under a license to be granted by the Board. It was further provided under section 62(1) that the Board at a meeting may grant within the local remits of its jurisdiction a license for the use of any land as a market and impose an annual tax thereon and such condition as prescribed by rules. The appellant in the case was a land holder in the district of Kamrup and had established a market known as Kharma hat. The Board had asked the appellant to take out a license and pay Rs.600 for the year 1953-54 as license-fee for holding the market. The question before the Apex Court of India was that in view of Entry 49 which falls within State List i.e. taxes on land and building whether the provincial legislature was competent to demand the impugned levy. The Apex Court of India framed the following question for determination i.e. **the question which falls for consideration, therefore, is whether the impost in the present case as a tax on land within the meaning of Entry 49 of List II of the Seventh Schedule to the Constitution.**

Opinion of the Court

¹⁶ *Ajoy Kumar Mukherjee v. Local Board of Barpeta* (AIR 1965 Supreme Court 1561)

"This will again show that the tax provided by S. 62 (2) is a tax for the use of the land and it is not a tax on the market as such, for the income from the market in the shape of tolls, rents and other dues is not liable to tax under S. 62 and is different from such tax. The scheme of S. 62, therefore, shows that whenever any land is used for the purpose of holding a market, the owner, occupier or farmer of that land has to pay a certain tax for its use as such. But there is no tax on any transaction that may take place within the market. Further the amount of tax depends upon the area of the land on which market is held and the importance of the market subject to a maximum fixed by the State Government. We have, therefore, no hesitation in coming to the conclusion on a consideration of the scheme of S. 62 of the Act that the tax provided therein is a tax on land, though its incidence depends upon the use of the land as a market. Further as we have already indicated S. 62 (2) which uses the words "impose an annual tax thereon" clearly shows that the word "thereon" refers to any land for which a license is issued for use as a market and not to the word "market". Thus the tax in the present case being on land would clearly be within the competence of the State legislature. The contention of the appellant that the State legislature was not competent to impose this tax because there is no provision in List II of the Seventh Schedule for imposing a tax on markets as such must therefore fail."

26.2. In *Ralla Ram's case*¹⁷, the question before the Apex Court was whether the provisions of the Punjab Urban Immovable Property Tax Act, 1970 were beyond the powers of Provincial Legislature which enacted it. The relevant law relating to division of Federal Legislature and Provincial Legislature was the Government of India Act, 1935. According to Entry 54 in the Government of India Act, 1935, the taxes on income other than agricultural income were the domain of Federal Legislature listed in List I whereas in List II i.e. the power of Provincial Legislature there was Entry 42 which authorized the Provincial Legislature to impose taxes on lands and buildings.

The appellant in the case was owner of a shop in the town of Amritsar and under the Punjab Urban Immovable

¹⁷ *Ralla Ram v. The Province of East Punjab, the Province of Bombay – Intervener.* (AIR 1949 Federal Court 81)

Property Tax Act he was called upon to pay a particular sum as property tax. One of the objections on the said levy was that the Punjab Legislature was not competent to levy the said tax which is a tax on the owner and secondly, it was urged that the impugned tax is in substance a tax on income and as such falls under item 54 of List I and not under item 42 of List II. Section 3 of the Punjab Urban Immovable Property Tax Act at the relevant time read as under:-

“3. (1) There shall be charged, levied and paid an annual tax on buildings and lands situated in the rating areas shown in the schedule to this Act at such rate, not exceeding twenty per centum of the annual value of such buildings and lands, as the Provincial Government may by notification in the official Gazette direct in respect of each such rating area;”

Opinion of the Court

17. *Our own conclusion may be summed up very briefly. In the first place, we have to look into the charging section of the statute, because as was pointed out in Provincial Treasurer of Alberta and another v. C.E. Kerr and another, 1933 A.C. 710: (102 L.J.P.C. 137) “the identification of the subject-matter of the tax is only to be found in that section.” The charging section in the present case is S.3, which in clear terms levies not a tax on income but a tax on buildings and lands. It is true that we must look not to the mere form but to the substance of the levy, and the tax must be held to be invalid, if in the guise of a property tax it is really a tax on income. There is, however, nothing in the impugned Act to show that there was any intention on the part of the Legislature to get at or tax the income of the owner from the building. It is true that the annual value was used as the basis, but it was very different from the annual value which may be used for getting at the true profits or income. The annual value, as has been pointed out, is at best only notional or hypothetical income and not the actual income. It is only a standard used in the Income Tax Act for getting at income, but that is not enough to bar the use of the same standard for assessing a provincial tax. If a tax is to be levied on property, it will not be irrational to correlate it to the value of the property and to make some kind of annual value the basis of the tax, without intending to tax income.*

26.3. In *D.G. Gouse's case*¹⁸, the challenge before the Supreme Court of India was certain provisions of the Kerala Buildings Tax Act, 1975 ("Act") which imposed a tax on buildings. The vires of the Act was challenged on the touchstone of the competency of the State Legislature to enact the law. It was argued that the subject matter of the Act being a tax on building, it is a tax on the capital value of the assets of an individual or company and thus falls within the scope of Entry 86 of List I of the Seventh Schedule of the Constitution (Taxes on capital value of assets, exclusive of agricultural land, of individual and companies; taxes on the capital of the companies) which was within the competence of Union and not under Entry 49 of List II "taxes on lands and buildings" being the scope of State Legislature.

Opinion of the Court

"9. It has to be appreciated that in almost all cases, a tax has two elements which have been precisely stated by Seervai in his "Constitutional Law of India", second edition, volume 2, as follows, at page 1258,___

"Another principle for reconciling apparently conflicting tax entries follows from the fact that a tax has two elements: the person, thing or activity on which the tax is imposed, and the amount of the tax. The amount may be measured in many ways; but decided cases established a clear distinction between the subject-matter of a tax and the standard by which the amount of tax is measured. These two elements are described as the subject of a tax and the measure of a tax."

It may well be that one's building may imperceptibly be the subject-matter of tax, say wealth tax, as a component of his assets, under entry 86 (List I); and it may also be subjected to tax, say a direct tax under entry 46 (49) (List II), but as the two taxes are separate and distinct imposts, they cannot be said to over-lap each other, and would be within the competence of the Legislature concerned.

11. The decision in *Sudhir Chandra's case* was followed by this Court in *Asst. Commr. Of Urban Land Tax v. Buckingham and Carnatic Co. Ltd.*, (1970) 1 SCR 268 where the vires of the Madras Urban Land Tax Act, 1966, was challenged with reference to entry 86 of List I

¹⁸ *D.G. Gouse and Co. (Agents) Pvt. Ltd. v. State of Kerala and others* (AIR 1980 Supreme Court 271)

of the Seventh Schedule. The legal position on that aspect of the controversy was reiterated as follows,___

“But in a normal case a tax on capital value of assets bears no definable relation to lands and buildings which may or may not form a component of the total assets of the assessee. But entry 49 of the List II, contemplates a levy of tax on lands and buildings or both as units. It is not concerned with the division of interest or ownership in the units of lands or buildings which are brought to tax. Tax on lands and buildings is directly imposed on lands and buildings, and bears a definite relation to it. Tax on the capital value of assets bears no definable relation to lands and buildings which may form a component of the total assets of the assessee.”

12. *There is therefore no force in the argument that the State Legislature was not competent to impose the tax on buildings under entry 49 of List II of the Seventh Schedule of the Constitution.*

26.4. In *Buckingham and Carnatic Co. Ltd's case*¹⁹, the issue before the Apex Court of India was whether the Madras Urban Land Tax Act, 1966 (“Act”) (is Constitutionally Valid). According to the Act, a levy/tax was imposed on urban land on the basis of the market value of the land at the rate of 0.4 percent on such market value. Section 3 of the Act envisaged that there shall be levied and collected for every *fasli* year commencing from the date of the commencement of the Act, a tax on urban land from every owner of urban land at the rate of 0.4 percent of the average market value of the urban land in a sub-zone as determined under the Act.

Opinion of the Court

“5. We see no reason, therefore, for holding that the Entries 86 and 87 of List I preclude the State Legislature from taxing capital value of lands and buildings under Entry 49 of List II. In our opinion there is no conflict between Entry 86 of List I and Entry 49 of List II. The basis of taxation under the two entries is quite distinct. As regards Entry 86 of List I the basis of the taxation is the capital value of the asset. It is not a tax directly on the capital value of assets of individuals and companies on the valuation date. The tax is not imposed on the components of the assets of the assessee. The tax under

¹⁹ Assistant Commissioner of Urban Land Tax Madras and others etc.v. Buckingham and Carnatic Co. Ltd. etc.(AIR 1970 Supreme Court 169)

Entry 86 proceeds on the principle of aggregation and is imposed on totality of the value of all the assets. It is imposed on the total assets which the assessee owns and in determining the net wealth not only the encumbrances specifically charged against any item of asset, but the general liability of the assessee to pay his debts and to discharge his lawful obligations have to be taken into account”.

26.5. In *the State of Punjab's case*²⁰, the challenge before the Full Bench of the High Court was an amendment in the Wealth-tax Act 1957 which was passed by the Indian Parliament imposing tax on the net wealth on the corresponding valuation date of every individual, Hindu undivided family and company. Section 2 of the Act define 'net wealth' means the amount by which the aggregate value computed in accordance with the provisions of the Act on all the assets, wherever located, belonging to the assessee. Whereas the asset was defined under section 2(e) of the Act to include property of every description, movable or immovable, but does not include agricultural land and growing crops, grass or standing trees on such land. This definition clause was amended by section 24 of the Finance Act, 1969 thereby the exclusion of agricultural land was omitted. Therefore, the effect of the said amendment was that the assets for the purpose of computing the net wealth after the aforesaid amendment came to include agricultural land as well. The vires of the said legislation was challenged before the Punjab & Haryana High Court mainly on the ground that the Parliament had no competence to have taxed agricultural land.

27. In the Indian Constitution there are 3 lists i.e. Union List, State List and Concurrent List. Entry 86 of the Union List reads "taxes on the capital value of the assets, exclusive of agricultural land of individual and companies; taxes on the

²⁰ *The State of Punjab v. The Union of India through the Secretary to Government Finance Department, Government of India New Delhi. (AIR 1971 Punjab & Haryana 155).*

capital of the companies whereas Entry 49 of List II (when State is competent to legislate) reads "taxes on lands and buildings". The Court had allowed the petition by majority and expressed its opinion, relevant paragraphs are reproduced as under:-

"20. Under Entry 86 of List I the Constituent Assembly clearly withdrew the power from the Parliament to impose wealth-tax on agricultural land. The idea could be to give this power to the States and include it in List II. As already discussed, though a general power to tax agricultural land is given to the States, this power of imposing wealth-tax on agricultural land has not been given. The other intention could have been to include this tax in the Concurrent List, but that also has not been done. The only other intention could have been to keep it out altogether. No other intention could reasonably be attributed to the Constituent Assembly. It would certainly not have been the idea behind this exclusion in Entry 86 of List I, that the same power which has been excluded in Entry 86, be given back to the same authority, i.e. the Parliament itself, in that very List I in which from an earlier entry the power had been taken out. That would be telling the Parliament that the Constituent Assembly would not allow the Parliament to impose its tax under Entry 86 and consequently provided for a specific exclusion, but they had no objection to the Parliament imposing that very tax, so excluded, by exercise of its power under Entry 97, List I. From whatever point one may look at the matter, it is impossible to accept the contention of the Union Government that a tax which is specifically prohibited from being imposed by the Parliament, can be imposed by it in exercise of powers conferred on it under Article 248 read with Entry 97.

22. The effect of the impugned legislation in its 'pith and substance' is to impose a tax on the capital value of the assets, including agricultural land. Thus in effect the words of prohibition in Entry 86, namely, "excluding agricultural land" have been treated as nonexistent. In doing so, the Parliament has altogether gone beyond the limitations within which it has competence to legislate."

The aforesaid judgment of Punjab & Haryana High Court was challenged before the Supreme Court of India. The seven Member Bench of Supreme Court of India in the case of *Harbhajan Singh Dhillon (supra)* by majority has set aside the judgment of the Punjab & Haryana High Court and has upheld the aforesaid amendment in the Wealth Tax Act. Regarding the legislative competence, the Apex Court has held that the

inclusion of agricultural land under the purview of Wealth Tax Act was not in terms of entry No. 86 of List-I, however, the same falls within entry No. 97 of List-I. It is pertinent to note that entry No. 97, as mentioned above, are the residual power of Union to legislate on any matter which has not been provided in List-II or List-III.

It was also held in the said judgment that since taxing capital value of agricultural land is not provided under any entry in the State List (List-II) which only provides for taxation on land and buildings in terms of entry No. 49 of the State List, therefore, the same falls under entry No. 97 of List-I.

28. The crux of the aforesaid discussion is that:-

- (i) *The power of taxation on income as provided under entry No. 47 of the Parliament is altogether different from the power of Parliament to tax capital value of assets as provided under entry No. 50; both are different area of legislation.*
- (ii) *The word Assets is generally used in collective plural and in commercial law it denotes the aggregate of the available property, stock in trade, cash etc. Therefore, tax under Entry No. 50 (capital value of Assets) proceeds on the principles of aggregation and is imposed on totality of the value of all the Assets.²¹*
- (iii) *Tax on lands and buildings is directly imposed on lands and buildings, and bears a definite relation to it. Whereas tax on capital value of Asset bears no definable relation to land and building which may form a component of total assets of the assessee.²²*
- (iv) *If a tax is to be levied on property, it will not be irrational to co-relate it to the value of the property*

²¹ Sanaullah Woollen Mills Ltd and another vs. Monopoly Control Authority (PLD 1987 SC 202)

²² D.G. Gouse and Co. (Agents) Pvt. Ltd. v. State of Kerala and others (AIR 1980 Supreme Court 271)

*and to make some kind of annual value the basis of the tax, without intending to tax income.*²³

29. Having discussed the constitutional scheme, we would now revert to the impugned legislation.

30. Through Finance Act, 2022, amendments were made in the Ordinance and through a deeming clause, the capital assets (immovable property) of the resident person were taxed by inserting section 7E in the Ordinance, which reads as under:-

7E. Tax on deemed income.- (1) *For tax year 2022 and onwards, a tax shall be imposed at the rates specified in Division VIII C of Part-I of the First Schedule on the income specified in this section.*

(2) *A resident person shall be treated to have derived, as income chargeable to tax under this section, an amount equal to five percent of the fair market value of capital assets situated in Pakistan held on the last day of tax year excluding the following, namely:-*

(a) *one capital asset owned by the resident person;*

(b) *self-owned business premises from where the business is carried out by the persons appearing on the active taxpayers' list at any time during the year;*

(c) *self-owned agriculture land where agriculture activity is carried out by person excluding farmhouse and land annexed thereto;*

(d) *capital asset allotted to -*

(i) *a Shaheed or dependants of a shaheed belonging to Pakistan Armed Forces;*

(ii) *a person or dependants of the person who dies while in the service of Pakistan armed forces or Federal or provincial government;*

(iii) *a war wounded person while in service of Pakistan armed forces or Federal or provincial government; and*

(iv) *an ex-serviceman and serving personal of armed forces or ex-employees or serving personnel of Federal and provincial governments, being original allottees of the capital asset duly certified by the allotment authority;*

(e) *any property from which income is chargeable to tax under the Ordinance and tax leviable is paid thereon;*

²³ Ralla Ram v. The Province of East Punjab, the Province of Bombay – Intervener. (AIR 1949 Federal Court 81)

(f) capital asset in the first tax year of acquisition where tax under section 236K has been paid;

(g) where the fair market value of the capital assets in aggregate excluding the capital assets mentioned in clauses (a), (b), (c), (d), (e) and (f) does not exceed Rupees twenty-five million;

(h) capital assets owned by a provincial government or a local government; or

(i) capital assets owned by a local authority, a development authority, builders and developers for land development and construction, subject to the condition that such persons are registered with Directorate General of Designated Non-Financial Businesses and Professions:

Provided that the exclusions mentioned at clauses (a), (e), (f) and (g) of this sub-section shall not apply in case of a person not appearing in the active taxpayers' list, other than persons covered in rule 2 of the Tenth Schedule.

(3) The Federal Government may include or exclude any person or property for the purpose of this section.

(4) In this section—

(a) "capital asset" means property of any kind held by a person, whether or not connected with a business, but does not include

(i) any stock-in-trade, consumable stores or raw materials held for the purpose of business;

(ii) any shares, stocks or securities;

(iii) any property with respect to which the person is entitled to a depreciation deduction under section 22 or amortization deduction under section 24; or

(iv) any movable asset not mentioned in clauses (i), (ii) or (iii);

(b) "farmhouse" means a house constructed on a total minimum area of 2000 square yards with a minimum covered area of 5000 square feet used as a single dwelling unit with or without an annex:

Provided that where there are more than one dwelling units in a compound and the average area of the compound is more than 2000 square yards for a dwelling unit, each one of such dwelling units shall be treated as a separate farmhouse.

31. No doubt, the verbiage of section 7E would show that a tax through a deeming clause has been imposed on a resident

person, who possesses capital asset based on its fair market value. However, one of the similar asset is deductible of the value of more than Rs. 25 million. A close perusal of the entire section would show that the tax imposed through section 7E is only on immovable property i.e. an amount equal to 1% of the fair market value situated in Pakistan.

32. Taxing immovable property and taxing income arising from immovable property are two different concepts. The former is the burden on immovable property whereas the later is the burden on the owner of the property. Section 11 of the Ordinance provides various heads of income and income from property (section 11-B) as well as capital gain (section 11-D) are two separate heads of income.

33. The head income from immovable property has been further illustrated in Part-III of Chapter-III of the Ordinance which includes rental income (section 15), advance tax on sale of immovable property (section 236C), advance tax on purchase or transfer of immovable property (section 236K). Similarly, after 18th amendment, capital gain is also taxable on immovable property under section 37(1) of the Ordinance as admittedly tax on capital gain is not a tax on property but is a tax on receipt or gain by person on transfer or sale of property and not the property itself.

34. It is by now settled that the Constitutional Court can refer to the parliamentary debates, more particularly the speech made by the mover of the bill, to ascertain the purpose for which the legislation was enacted^{23-A}. Unfortunately, we do not have any parliamentary debates available on the website of the National Assembly regarding amendment in

^{23-A} Para-33 authored by Syed Mansoor Ali Shah, J in the case of Hidayatullah vs. Federation of Pakistan (2022 SCMR 1691); Mubeen-Us-Salam v. Federation (PLD 2006 SC 602); Benazir Bhutto v. Federation (PLD 1988 SC 416 per Nasim Hassan Shah, J); Pepper v. Hart (UKHL) 1993 SCMR 1019; and K.P. Varghese v. ITO Ernakulam (AIR 1981 SC 1922).

Entry No. 50 *ibid*, however, the parliamentary debate in respect of insertion/enactment of section 7E is available, which can be referred to as follows:

Tax on deemed rental income

Mr. Speaker,

The major part of the wealth of rich people is parked in the real estate sector in Pakistan. This is a double-faceted menace. It leads to the accumulation of unproductive assets and raises the prices of housing for the poor and lower-income groups. We intend to correct this imbalance. Therefore, all persons who have more than one immovable property exceeding Rs. 25 million situated in Pakistan shall be deemed to have received rent equal to 5% of the fair market value of the immovable property and shall pay tax at the rate of 1% of the fair market value of the said property. However, one house of each individual will be excluded.

Tax on transactions of immoveable properties

The current challenging times in Pakistan warrant huge sacrifices from the rich and affluent. It is about time that the privileged and affluent sections of society must come forward to play their pivotal role in the socio-economic development of Pakistan. We intend to provide a taxation structure where all classes of assets are taxed in an equitable manner. Unfortunately, our present taxation regime provides incentives for unproductive investments and taxes heavily the productive sectors. In order to correct this, capital gain of all classes of assets is now proposed to be taxed at 15% in case, the holding period of such property is one year or less. The capital gain payable on such assets will reduce to zero after a holding period of 6 years, reducing tax liability by 2.5% with each subsequent year.

Furthermore, the advance tax rate on the purchase and sale of property for filers is proposed to be enhanced to 2% from the current 1%. Moreover, in order to discourage the undocumented economy, the advance tax rate for buyers of immovable property who are non-filers is proposed to be enhanced to 5%.

35. The parliamentary debate clearly mentions that the object was to tax the unrealized income of the immoveable property through a deeming clause which shall be determined on the basis of its fair market value.

36. The term 'fair market value' is defined in section 68 of the Ordinance. The object of legislation behind insertion of section 7E was to tax the unrealized income of the

immoveable property possessed by a resident person through a deeming clause which is not permissible in view of the law laid down by the Apex Court in the case of *Messrs Elahi Cotton Mills* and the judgment of the Indian Supreme Court in the case of *Harbhajan Singh Dhillon*. Similarly, the impugned levy does not qualify the test to tax the capital value of asset as the asset means the entire wealth of a person and targeting the immovable property alone from the asset would, thus, be obviously beyond the competence of Parliament.

37. The Sindh High Court, with profound respect, though has elaborately dealt with each and every aspect of the case and has upheld the impugned legislation keeping in view the law laid down by the Apex Court in the case of *Elahi Cotton Mills (supra)* and Entry No. 47, however, we do not agree with the said reasoning on the grounds stated above.

38. Similarly, the Hon'ble Lahore High Court has though held that the unrealized income of the immoveable property cannot be taxed through the impugned legislation in terms of Entry No. 47 however it has passed a curative judgment reading down the impugned legislation. We concur with the finding of the Hon'ble Lahore High Court, but we do not deem it appropriate to read down the impugned legislation in the manner because it is for the Parliament to re-enact the law as suggested by the Hon'ble Lahore High Court.

39. In view of what has been stated above, we hold & declare that:

- i. *In view of the clear bar as provided under Entry No. 50 of the Fourth Schedule to the Constitution, the Parliament has no jurisdiction to impose income tax on immoveable property;*
- ii. *The Parliament has the jurisdiction to tax Capital Value of Assets in terms of Entry No. 50 of the Fourth Schedule to the Constitution;*

iii. *Capital Value of Assets means an inseparable complete whole of the property (both moveable and immoveable);*

iv. *The impugned legislation (section 7E introduced through Finance Act, 2022 to the Ordinance), which imposes taxes on immoveable property through a deeming clause does not qualify the test of Capital Value of Assets, therefore, is beyond the legislative competence of the Parliament; hence, the same is hereby struck down.*

40. All the writ petitions are allowed in the above terms.


Judge


Judge

Date of hearing & announcement
Of judgment.....23.11.2023

Date of preparation & signing
Of judgment.....02.01.2024

Annexure "A"

S. No.	Case Title
1.	<i>WP No. 5327-P/2022 "Latif Hakeem vs. Federation of Pakistan through Secretary Finance and others".</i>
2.	<i>WP No. 4806-P/2022 "Ahmad Kundi vs. Federation of Pakistan and others".</i>
3.	<i>WP No. 487-P/2023 "Mrs. Zeb Saifullah Khan vs. The Federation of Pakistan and others".</i>
4.	<i>WP No. 529-P/2023 "Nisar Khan vs. The Federation of Pakistan and others".</i>
5.	<i>WP No. 756-P/2023 "Fazal Qader vs. Pakistan through Federal Secretary and others".</i>
6.	<i>WP No. 757-P/2023 "Abbas Khan vs. Federation of Pakistan and others".</i>
7.	<i>WP No. 758-P/2023 "Azam Khan vs. Federation of Pakistan and others".</i>
8.	<i>WP No. 836-P/2023 "Abid Pervez Malik vs. Federation of Pakistan and others".</i>
9.	<i>WP No. 846-P/2023 "Atif Khan Khattak vs. Federation of Pakistan and others".</i>
10.	<i>WP No. 1598-P/2023 "Saleem Shahzad and others vs. Federation of Pakistan and others".</i>
11.	<i>WP No. 1917-P/2023 "Muhammad Pervez vs. Federation of Pakistan and others".</i>
12.	<i>WP No. 1994-P/2023 "Matiullah and others vs. Federation of Pakistan and others".</i>
13.	<i>WP No. 3595-P/2023 "Arbab Khalid Aziz and others vs. Federal Government and others".</i>
14.	<i>WP No. 4808-P/2023 "Daud Afridi vs. The Federation of Pakistan and others".</i>
15.	<i>WP No. 4809-P/2023 "Abdul Rehman vs. The Federation of Pakistan and others".</i>
16.	<i>WP No. 4810-P/2023 "Pir Saifullah vs. The Federation of Pakistan and others".</i>
17.	<i>WP No. 4811-P/2023 "Musa Afridi vs. The Federation of Pakistan and others".</i>
18.	<i>WP No. 4812-P/2023 "Waqif vs. The Federation of Pakistan and others".</i>
19.	<i>WP No. 4813-P/2023 "Saifur Rehman vs. The Federation of Pakistan and others".</i>
20.	<i>WP No. 4814-P/2023 "Muneebur Rehman vs. The Federation of Pakistan and others".</i>
21.	<i>WP No. 4815-P/2023 "Salman Ahmad vs. The Federation of Pakistan and others".</i>
22.	<i>WP No. 4816-P/2023 "Habibur Rehman vs. The Federation of Pakistan and others".</i>
23.	<i>WP No. 4817-P/2023 "Shoukat vs. The Federation of Pakistan and others".</i>
24.	<i>WP No. 4818-P/2023 "Taimoor Khan vs. The Federation of Pakistan and others".</i>
25.	<i>WP No. 4819-P/2023 "Irfanullah vs. The Federation of</i>

	<i>Pakistan and others</i> ".
26.	<i>WP No. 4820-P/2023 "Ziaur Rahman vs. The Federation of Pakistan and others"</i> .
27.	<i>WP No. 4821-P/2023 "Iqbal ur Rehman vs. The Federation of Pakistan and others"</i> .
28.	<i>WP No. 4822-P/2023 "Waqas Afridi vs. The Federation of Pakistan and others"</i> .
29.	<i>WP No. 5103-P/2023 "Yasir Khan vs. The Federation of Pakistan and others"</i> .
30.	<i>WP No. 5248-P/2023 "Shahab ud Din vs. Federation of Pakistan etc"</i> .

S..