JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

Writ Petition no.4027 of 2022
M/s Fauji Fertilizer Company Limited and another
versus
Federation of Pakistan and others

Petitioners by: M/s Salman Akram Raja, Asad Ladha, Ramsha Banuri, Sameen Qureshi and Malik Ghulam Sabir, Advocates in WPs 4027, 4028, 4359, 4899, 4901, 4915,/2022, 429, 430, 431/2023

Hafiz Muhammad Idris and Syed Farid Ahmed Bukhari, Advocates in WPs 4851, 4852, 4861, 4875, 4877, 4896/2022 and 36, 74, 157, 245, 246, 441, 689, 696/2023

Sardar Ahmad Jamal Sukhera, Advocate in WPs 4854, 4855/2022, 49, 202, 203, 872/2023

Mr. Adnan Haider Randhawa, Advocate in WPs 230 and 231/2023

Mr. Faisal Khursheed Awan, Advocate in WPs 577, 578, 580, 581, 582, 675/2023

Mr. Muhammad Abubakar, Advocate in WP 432/2023

M/s Waheed Alam, Muhammad Shahrukh Sheikh, Sardar Alam Shafqat and Barrister Haroon Dugal, Advocates in WPs 4454 and 4457/2022

Mr. Faraz Fazal Sheikh, Advocate in WP 622/2023

M/s Rashid Hafeez and Muhammad Usman Shaukat, Advocates in WPs 84, 85, 106, 320, 366, 367, 584, 681/2023

Ch. Imran ul Haq, Ch. Naeem ul Haq and Ch.Faheem ul Haq, Advocates in WPs 4653, 4857, 4876, 4897/2022, 35, 302/2023

Barrister SM Yawar, Advocate in WP 312/2023

M/s Shahbaz Butt and Khurram Shahbaz Butt, Advocates in WPs 139, 140, 141, 142, 143, 144, 145, 146/2023

Mr. Khalil ur Rehman, Advocate in WPs 4731, 4805, 4853, 4866/2022

Mr. Adnan Haider, Advocate in WP 230 and 231/2023

M/s Nasim Sikandar and Nudrat Sultana Alvi, Advocates in WPs 4765, 4766, 4767 and 4768/2022

Ch. Muhammad Nasir, Advocate in WP 58/2023

Mr. Khurram Mehmood Qureshi, Advocate in WP 300/2023

Mr. Khurram M. Hashmi and Noman A. Farooqi, Advocates in WPs 4904/2022

Mr. Waqar Javed, Advocate in WP 162/2023

Mirza Saqib Siddeeq, Advocate in WPs 162, 201, 923/2023

Mr. Mansoor Usman Awan, Ms. Zainab Janjua and Mr.Salar Khan, Advocates in WPs 188, 774/2023

Syed Tanseer Bukhari, Syed Tauqeer Bukhari and Syed Ali Murtaza Abbas, Advocates WPs 4924/2022 and WPs 283, 297/2023

Mr. Rahat Shaheen Khokhar, Advocate in WPs 4848 and 4849/2022

Barrister Yousaf Khosa, Abdullah Alam Qureshi and Malik Omair Saleem, Advocates in WP 4879/2022

M/s Shaheer Roshan Shaikh and Haider Ali Khan, Advocates in WP 4864/2022

Mr. Sabir Hussain, legal advisor in WPs 4028 and 4359/2022

Raja Shayan, Advocate in WP 4915/2022

Respondents by: Hafiz Ahmad Rasheed, learned AAG

M/s Asma Hamid, Sana Azhar, Noor Ahsan and Mr. Hammad Hussain, Advocates for Commissioner IR

Syed Mumtaz Mazhar and Mr. Riaz Hussain Azam Bopera, Advocates for FBR

Mr. Muhammad Akhtar Abbasi, Advocate for respondent no.7 and 8 in WP 534/2023

Barrister Atif Rahim Burki, Advocate in relevant petitions

Syed Ishfaq Hussain Naqvi and Muhammad Imtiaz Abbasi, Advocates in relevant petitions

Mr. Muhammad Faisal Mushtaq Dar, Commissioner IR (Legal) and Khan Faisal, Additional Commissioner IR, LTO.

Dates of Hearing: 27.10.2022, 23.11.2022, 09.12.2022, 15.12.2022, 23.12.2022, 10.01.2023, 11.01.2023, 12.01.2023, 13.01.2023, 17.01.2023, 18.01.2023, 23.01.2023, 24.01.2023, 25.01.2023, 30.01.2023, 31.01.2023, 02.02.2023, 03.02.2023, 07.02.2023, 08.02.2023, 09.02.2023, 10.02.2023, 13.02.2023, 14.02.2023, 20.02.2023, 21.02.2023, 24.02.2023, 27.02.2023, 28.02.2023, 01.03.2023, 07.03.2023, 09.03.2023, 20.03.2023, 27.03.2023, 31.03.2023, 03.04.2023, 04.04.2023, 05.04.2023, 06.04.2023, 12.04.2023, 13.04.2023 and 18.04.2023

Sardar Ejaz Ishaq Khan, J:

1 PREFACE

1.1 THE PETITIONS

1.1.1 The petitioners in the writ petitions listed in the Annex to this judgment are aggrieved by the levy of 'super tax' imposed under § 4C of the Income Tax Ordinance 2001 (the **Ordinance**), and some of them have also received and impugned notices from the Commissioner demanding super tax. There are grounds common to all petitioners, and there are grounds specific to some petitioners only.

1.1.2 I cannot think of a better summation of the mood that pervaded the submissions of the learned counsels for the petitioners, with its grim pall hung over the court room, than the following sentence from Palkhiwala[1]:

> …[A]s long there are absurd revenue targets, outrageous tax demands will continue.

The revenue would have none of that, its submissions rooted in and sustained throughout by the appeal to that mantra-absolute, the supreme will of the Parliament, to impose taxes on anything under the sun it wishes to categorise as income, and on the precedents of three High Courts affirming that principle in the (almost) identical super tax levied earlier under § 4B of the Ordinance.

1.1.3 There are but some differences between §4C and §4B, not just in the circumstances, but the Court was informed, also in the submissions that were being advanced before this Court that were not made in the cases heard under §4B, and this submission is borne out on a review of those 3 cases. This will become clear during the course of this judgment.

1.2 SECTION 4C

1.2.1 Section 4C, inserted vide Finance Act 2022, expressed to become effective on 01.07.2022, reads as follows:

> **4C. Super tax on high earning persons**.--(1) A super tax shall be imposed for tax year 2022 and onwards at the rates specified in Division IIB of Part I of the First Schedule, on income of every person:
>
> Provided that this section shall not apply to a banking company for tax year 2022.
>
> (2) For the purposes of this section, "income" shall be the sum of the following:--
>
> (i) profit on debt, dividend, capital gains, brokerage and commission;
>
> (ii) taxable income (other than brought forward depreciation and brought forward business losses) under section 9 of the Ordinance, excluding amounts specified in clause (i);
>
> (iii) imputable income as defined in clause (28A) of section 2 excluding amounts specified in clause (i); and

[1] Kanga & Palkhivala's The Law and Practice of Income Tax, Eleventh Edition

> (iv) income computed, other than brought forward depreciation, brought forward amortization and brought forward business losses under Fourth, Fifth and Seventh Schedules.
>
> (3) The tax payable under sub-section (1) shall be paid, collected and deposited on the date and in the manner as specified in sub-section (1) of section 137 and all provisions of Chapter X of the Ordinance shall apply.
>
> (4) Where the tax is not paid by a person liable to pay it, the Commissioner shall by an order in writing, determine the tax payable, and shall serve upon the person, a notice of demand specifying the tax payable and within the time specified under section 137 of the Ordinance.
>
> (5) Where the tax is not paid by a person liable to pay it, the Commissioner shall recover the tax payable under sub-section (1) and the provisions of Part IV, X, XI and XII of Chapter X and Part I of Chapter XI of the Ordinance shall, so far as may be, apply to the collection of tax as these apply to the collection of tax under the Ordinance.
>
> (6) The Board may, by notification in the official Gazette, make rules for carrying out the purposes of this section.

1.3 COMMON GROUNDS AND INDUSTRY SPECIFIC GROUNDS

1.3.1 This judgment deals separately with grounds common to all petitioners and with grounds specific to certain industries, interleaved with the heading of fundamental rights.

1.3.2 The submissions touching fundamental rights, though common to all, are not dealt with under the common grounds heading, but under a separate heading, due to the emphasis in counsels' submissions for these to be addressed so that they remain available explicitly for consideration by the Supreme Court in appeal. The question of fundamental rights would not have been gone into due to the principle that Constitutional questions are not to be gone into if the *lis* can be disposed of on other points[2], had it not been the case that some petitioners do not qualify for the industry specific additional grounds for the challenge to §4C. These grounds are therefore examined, and to the extent agreed with, their benefit cannot be withheld from the industry-specific petitioners who succeed on grounds specific to their industries. The need to write this judgment with chapters specific to certain industries arose due to the grounds of challenge specific to those industries and not common with the other petitioners.

2 COMMONS GROUNDS

2.1 RETROSPECTIVE LEGISLATION TAKING AWAY VESTED RIGHTS

2.1.1 Ms. Hamid, valiantly leading the respondents' case (though appearing for respondent no.3, the Commissioner Large Tax Payers' Unit), cited numerous judgments (the list it

[2] LDA vs Imrana Tiwana (2015 SCMR 1739)

seemed would never end) for her submission that the Parliament can legislate retroactively[3] to take away vested rights, a brief précis of which is given below:

> i. A statute is to be deemed to be retrospective, if it takes away or impairs any vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect of transactions or considerations already past and closed.[4]
>
> ii. It may be mentioned that by now, it is well-settled proposition of law obtaining in Pakistan that if an exemption from payment of excise duty or any other tax, has been granted for a specified period on certain conditions and if a person fulfills those conditions, he acquires a vested right … but he can be denied his vested right by a legislative provision, like section 31-A, which has been incorporated in the Customs Act in 1988. [5]
>
> iii. …It is agreed on all hands that the well settled principles of interpretation of statutes are that vested rights cannot be taken away save by express words or necessary intendment… Therefore, vested rights can be taken away by such a legislation and it cannot be struck down on that ground…[6]
>
> iv. No doubt the Legislature is competent to give retrospective effect to an Act and can take away the vested right of the parties… while construing a legislation which has been given retrospective effect and interferes with the vested rights of the parties, the words used therein must be construed strictly and no case should be allowed to fall within the letter and spirit of Act which is not covered by the plain language of the legislation…[7]

2.1.2 Paragraphs from several other judgments[8] were also cited out of context lifting sentences out of those paragraphs as if they were statutory provisions on retrospectivity, but those paragraphs cannot be read out of the factual context before the respective courts, for the context determined the observations on

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[3] We'd skip the finer distinction between retrospective and rectroactive legislation as it is not material for this judgment. The two expressions are used interchangeably here.

[4] Mehreen Zaibun Nisa versus Land Commissioner, Multan (PLD 1975 SC 397)

[5] Messrs Army Welfare Sugar Mills Limited and others versus Federation of Pakistan and others (1992 SCMR 1652)

[6] Molasses Trading and Export Private Limited versus Federation of Pakistan and others (1993 SCMR 1905)

[7] Muhammad Hussain and others versus Muhammad and others (2000 SCMR 367)

[8]
i. Messrs Haider Automobile Limited versus Pakistan (PLD 1969 SC 623);
ii. Zaman Cement Company Private Limited versus Central Board of Revenue and others (2002 SCMR 312);
iii. Pakistan through Ministry of Finance Economic Affairs and another versus Fecto Belarus Tractors Limited (PLD 2002 SC 208);
iv. Haji Dossa Limited Karachi versus Province of Punjab through Collector, Sahiwal and others (1973 SCMR 124);
v. Sardar Sher Bahadur Khan and others versus Election Commission of Pakistan through Secretary, Election Commission, Islamabad and others (PLD 2018 SC 97);
vi. Mst. Sarwar Jan and others versus Mukhtar Ahmad and others (PLD 2012 SC 217);
vii. Zila Council Jehlum through District Coordination Officer versus Messrs Pakistan Tobacco Company Limited and others (PLD 2016 SC 398);
viii. Government of Pakistan and another versus Messrs Mardan Industries Limited and another (1988 SCMR 410).

retrospectivity as applicable to those cases[9]. And several of those judgments related to laws other than taxation.

2.1.3 Parliament '*taking away vested rights by retrospective legislation*' implies that those rights vested in the first place by some legislative act, or by grant of an exemption (such as in *Molasses*[10]), or like legislative or executive act, by which non-existent rights were created and vested in the citizens. This principle has no application where a *natural* right existed, not dependent on any beneficence of the legislature or the executive, that could be taken away, if at all, retrospectively. The right of a citizen to earn and keep the fruits of its labour is an inherent natural and a fundamental right, that does not depend on any legislative or executive act. This right is only subject to such laws on taxation by which the citizen pays a part of his earnings to the State by way of tax. When that right is curtailed by any legislation, it can only be prospective and never retroactive *for not being a right vested by legislation* in the first place. This critical distinction was entirely lost while citing all the judgments on the competence of the legislature to pass retroactive legislation taking away vested rights.

2.2 PAST & CLOSED TRANSACTIONS

2.2.1 Ms Hamid citing a copious number of citations for the Parliament's unfettered power to impose retrospective legislation by clear language was really quite unnecessary. That rule was never in question by the petitioners as a primary premise to start with. But that rule exists in parallel with, and does so without dissonance, with two exceptions, namely, that retrospective (or any) legislation cannot override fundamental rights, nor can override rights acquired under transactions past and closed or, preferably, rights acquired under '*facts and events that have already occurred*'[11]. It is quite pointless to ask that the former rule alone be applied, and its exceptions ignored. The petitioners accept the rule, and rest their case on its exceptions. It is therefore not necessary to visit any further the citations by Ms. Hamid affirming the rule. Mr. Salman Akram Raja for the petitioners in several petitions summarized it well that the rule of past and closed transactions was unique to our jurisprudence, though Mr. Sukhera demonstrated later that it was not, and I add that this is a jurisprudential landmark to be proud of, and not, as Ms. Hamid would have us believe, to be apologetic about as if it were an inadvertent incongruity with the rule. This exception to the rule was consciously laid down by the Supreme Court and then followed consistently. Its coordinate principles in other jurisdictions are

[9] A case is only an authority for what it actually decides and cannot be quoted for a proposition that may seem to follow logically from it: Trustees of Port of Karachi vs Muhammad Saleem (1994 SCMR 2213)
[10] Molasses Trading and Export Private Limited versus Federation of Pakistan and others (1993 SCMR 1905)
[11] Province of East Pakistan vs Sharafatullah (PLD 1970 SC 514)

arbitrariness, unreasonableness, and unexpected liability[12]. It is a good exception. It must stay.

2.2.2 Mr. Salman Akram Raja led the submissions on this ground, and his submissions were adopted largely by most of the other counsels. Though Mr. Raja's submissions were confined to his clients' cases, who were allowed a special tax year under § 74 of the Ordinance ending on 31st December, other learned counsels for the petitioners following normal tax years urged that the same principles applied for their clients also. But given that Mr. Raja's petition for Fauji Foundation was the first one, and the rest followed suit, it is appropriate that his client's past and closed transactions be summarised to illustrate, for the other petitioners have argued closure of their respective tax affairs for their tax accounting years in similar fashion.

2.2.3 He began by recounting that Fauji Foundation closed its tax accounts on 31st December 2021. Super tax was levied on 01.07.2022 for the tax year 2022 and onwards, latching on to tax year 2022 for Fauji Foundation, which, for the purposes of chargeability of income to tax, closed on 31.12.2021. Between 31.12.2021 and 30.06.2022, several transactions were undertaken by his clients without super tax being visible on the horizon. He challenged super tax for being charged on 'events that had already occurred' or 'transactions past and closed', and relied on *Molasses* to urge that super tax could not be levied for the tax year 2022 in any event. He made these submissions without prejudice to his additional submissions that the levy of super tax was violative of the fundamental rights under Articles 18, 23 and 24 of the Constitution. While responding to Ms. Hamid's stance of the complete freedom of the Parliament to impose taxation retroactively, he asked rhetorically, but quite pertinently, what would the Courts of this country do if this freedom of the Parliament was translated into legislating that Fauji Foundation would pay another tax on their income, say, for the year 2000? He has a point.

2.2.4 The facts and events already occurred were readily identified by him with reference to the audited financials. He added that Fauji was under statutory obligations fastened by the Companies Act, 2017 to finalise its audited accounts and lay them for approval in an annual general meeting, which was duly done. He cited the following provisions of the Companies Act with reference to actions completed by Fauji:

> i) § 132 – the annual general meeting (AGM) was to be held no later than 30.04.2022;
>
> ii) § 134 – the audited accounts were to be laid before the AGM;
>
> iii) § 223, 225 – the financial statements were to be approved, with taxation to be expressly stated;

[12] See Blodgett vs Holden, infra

> iv) § 241 – as dividends could be paid only out of profits, the financial statements had to state the final profitability figure, which in turn depended materially on the post-tax profits and such reservations from profit for reinvestments that were finally locked in the audited financial statements approved in the AGM.

Based on the finalised audited accounts, the company declared and paid dividends at 46.5% of post-tax profits, in the sum of Rs. 5.9 billion. The payment of dividend and other financial commitments made these past and closed transactions. If Fauji had known super tax to be payable, its profitability would have been lower with post-tax profits, and dividends would either not have been paid or would have been in a lesser sum. He added that the taxation liability was a material item in Fauji's financial statements, with an immediate and direct impact on its share prices for being a listed company.

2.2.5 Ms. Hamid, replied both orally and in writing that restatement of audited accounts was a normal business incident, and it was customary for taxpayers to restate their accounts for a number of reasons, including as a result of revised assessments, either on the tax payer's own volition, or as a result of amended assessments by the tax department.

2.2.6 Mr. Raja responded by saying that para 7 of Ms. Hamid's reply resting on her submission noted above was based on a false analogy of reopening of assessments, for that entailed some error in arriving at the final tax liability, and never the question of chargeability to a new tax. The reopening of assessments could be the result of a computational dispute, a dispute on the allowable expenses, exemptions, or the like, but never on the very question whether a new tax, not existent at the time the accounts were finalised, was chargeable. He did not take issue with the broader proposition of Parliament's power to pass retrospective legislation, but only with its power to tax transactions past and closed.

2.2.7 Other petitioners with a special tax year complained in a similar vein. For instance, the trustees of Askari Bank Provident Fund approved and finalized their financial statements on 04.02.2022, disbursing circa Rs.508 million, and permanent withdrawals of circa Rs.82 million, with the remaining amounts credited to the accounts of 6330 employees of the bank. These transactions, per Mr. Adnan Haider for the petitioner funds, were irreversible transactions undertaken on the basis of the funds' tax liability for the special tax year ending on 31.12.2021, in reliance on the exemption from tax that was valid and subsisting by the end of its special tax year, and therefore a matter past and closed, which could not be disturbed by retrospective application of super tax imposed on 01.07.2022.

2.2.8 Mr. Sukhera appearing for other petitioners cited *Blodgett vs Holden*[13] to submit that the doctrine of past and closed transactions was not unique to Pakistan. In *Blodgett*, the United States Supreme Court declared §319 of the Revenue Act 1924 unconstitutional insofar as it levied a tax on transfer of property made prior to the date of enforcement of §319. The Revenue Act was passed on 2 June 1924 and levied a tax on gifts made 'during the calendar year 1924'. Blodgett challenged the exaction of tax on gifts made by him in January 1924. The US Supreme Court set the following question for it to answer: "*whether Congress had the power to impose a charge upon the donor because of gifts fully consummated before such provisions came before it*?" The law report records the per curiam opinion of 6 judges of the Court, with 5 concurring with the opinion of Mr. Justice Reynolds, who held as follows:

> As to the gifts which Blodgett made during January 1924, we think the challenged enactment is *arbitrary* and for that reason invalid. It seems *wholly unreasonable* that one who, in entire faith and without the slightest premonition of such consequence, makes absolute disposition of his property by gifts should thereafter be required to pay a charge for so doing. (emphasis supplied)

Mr. Justice Holmes added his additional note, which, in material part, reads as follows:

> …I think it tolerably plain that the Act should be read as referring only to transactions taking place after it was passed, when to disregard the rule would be to impose *unexpected liability* that if known might have induced those concerned to avoid it and use their money in other ways.

The US Supreme Court found retrospective taxation of consummated transactions 'arbitrary' and 'wholly unreasonable' for imposing an 'unexpected liability' retrospectively, and therefore invalid under the due process doctrine in the American constitution.

2.2.9 Before we find the answer to this controversy, we need to address the point in time when the <u>*liability to tax crystallises*</u>, for it is the pivotal question in terms of the doctrine of past and closed transactions for our purposes.

2.3 <u>MOMENT OF CRYSTALLISATION OF TAX LIABILITY</u>

2.3.1 The petitioners' case was that the liability to tax crystallises on the close of the last day of the financial year on which the accounts for the purposes of the relevant tax year close. Their case was that the 'taxable event' was the 'accrual of income', and all taxable events stood concluded on the close of the relevant tax accounting year. They cited *Commissioner of Income Tax, Peshawar vs*

[13] 275 US 142 (Supreme Court Reporter, 1927)

Islamic Investment Bank Ltd[14], where the Supreme Court held unequivocally that:

> [The] liability to pay income tax accrues on the taxpayer on the last day of the income year/accounting year, though the tax becomes payable after it is quantified in accordance with the procedures laid down in the Income Tax Law.

2.3.2 The petitioners also cited *Fawad Ahmad Mukhtar vs Commissioner Inland Revenue*[15], holding that:

> Each tax year is a separate unit of account, and the law has to be applied as it stood in respect of that year alone.

2.3.3 The liability to pay – chargeability – is the first stage of liability to tax; one can't proceed to the next until this first stage is crossed. His Lordship Mr. Justice Munib Akhtar summarised this as follows[16]:

> In Whitney v. IR Commissioners (1926) 10 TC 88, in a well-known passage that has stood the test of time, Lord Dunedin spelt out the three stages of a tax (at the broadest plane) in the following terms:
>
> > "Now, there are three stages in the imposition of a tax: there is the declaration of liability, that is the part of the statute which determines what persons in respect of what property are liable. Next, there is the assessment. Liability does not depend on assessment. That, ex hypothesi, has already been fixed. But assessment particularizes the exact sum which a person liable has to pay. Lastly, come the methods of recovery, if the person taxed does not voluntarily pay.
>
> For purposes of the question now before us, the three stages may be restated as follows: leviable (declaration of liability), payable (assessment) and recoverable.

2.3.4 Ms. Hamid's position remained that the liability to tax is ascertained on the date the returns of income are filed, which for all the petitioners is a date after 1st July 2022, when the Finance Act 2022 was promulgated. Her position therefore is that §4C was very much in force before the liability to tax was final for the tax payers, and cited *Shahnawaz*[17] for her submission, wherein a sentence reads that '…*income tax legislation, as applicable to a given tax year, is normally regarded as being the law as it stands on the first day succeeding the tax year*.' Apart from that *Shahnawaz* being a judgment of the High Court has to give way to *Islamic Investment Bank* for being a judgment of the Supreme Court, in my respectful view, that sentence in Shahnawaz reflects the position prevailing under the 1922 Act and the 1979 Ordinance, as well as the position in the United Kingdom, where under a formal assessment follows the filing of tax return, and not the position under the 2001 Ordinance where under self-assessed returns are

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[14] 2016 SCMR 816; paras 15 and 16 of the judgment.
[15] 2022 SCMR 426
[16] H.M. Extraction Ghee and Oil Industries (Pvt.) Ltd versus Federal Board of Revenue, 2019 SCMR 1081
[17] Shahnawaz (Pvt) Ltd. through Director Finance vs Pakistan through Secretary Ministry of Finance (2011 PTD 1558)

filed on the basis of the tax regime prevailing on the last day of a tax accounting year.

2.3.5 Her reliance on other citations[18] to claim that a special tax year was a concession and did not confer a preferential right on the taxpayer to avoid a tax liability fastened after the close of its tax accounting year, but before it filed its tax return, has no relevance because the taxpayers are not claiming any preferential treatment; they claim only that their liability cannot turn on any legislation passed after the date their tax accounting years closed.

2.3.6 I therefore follow *Islamic Investment Bank* to hold that the taxable events for the petitioner's respective tax years closed, and the leviability of any tax on the petitioners crystallised and fell to be determined, only on the basis of the law as it stood on the date of the close of the taxpayers' tax accounting year, regardless of whether they followed a special or a normal tax year.

2.3.7 With the aforesaid background, I find on the strength of *Molasses*, *Anwar Yahya*[19], and *Blodgett*, that super tax under §4C could not be levied for any period prior to 30.06.2022.

2.4 Section 4B Cases

2.4.1 Much emphasis was laid by Ms. Hamid on the point that three High Courts have rejected the challenge to §4B of the Ordinance, which was (almost) identical to §4C, and that therefore this alone should suffice to decide these petitions. The petitioners' counsels controverted stating that fresh grounds were urged in these petitions. Their submissions appear correct.

2.4.2 The judgments in *DG Khan Cement*[20] and *HBL Stock Fund*[21] cases do not depict that the submissions on fundamental rights, except under Article 25, were rejected after reasoning and analysis, for the law reports stop at citing paras from precedents on the point, without reasoning as to why fundamental rights to conduct business and hold property were not found impinged upon, and for that reason cannot be considered laying down binding precedent on the point for not being part of their ratios[22]. Much of the Courts' opinions remained occupied with the argument that super tax was not a tax for being imposed for a specific purpose, nor was a fee, and was therefore beyond legislative competence[23]. The challenge to retrospectivity of §4B was not argued, nor was the 'post-tax

[18] Lotte Pakistan PTA Ltd vs Federation of Pakistan (2011 PTD 2229)

[19] 2017 PTD 1069, holding that while vested rights can be disturbed by unequivocal statutory intendment, past and closed transactions cannot.

[20] In Intra Court appeal. DG Khan Cement Company Ltd vs The Federation, 2020 PTD 1186.

[21] HBL Stock Fund vs ACIR, 2020 PTD 1742

[22] See footnote 9, supra. Also see Palkhivala, Chapter I, section 1.49 (Ratio Decidendi, Obiter Dicta, and Casual Observations)

[23] This point was not argued before this Court.

income' point argued[24]. In particular, the exclusion of brought forward losses and depreciation allowances was not addressed[25].

2.4.3 In particular, *HBL Stock Fund* simply reproduced the concluding passage in *PIDC*[26] case without adverting to the crucial distinction that super tax under consideration in PIDC was that under the Income Tax Act of 1922 was pre-existent, of contemporaneous lineage as the rest of the Income Tax Act, making it obvious to each taxpayer at the start of each tax year that it was also exposed to super tax at all times, for §56 of the 1922 Act announced *ex-ante* that '…*the total income…shall…for the purposes of super tax be the total income as assessed for the purposes of income-tax*.' There was no uncertainty for any tax payer at the start of each tax year, and he could organize his financial affairs accordingly. The opening words in §55 "[I]n addition to income tax" made that quite clear. With respect, both *HBL Stock Fund* and *D.G. Cement* overlook this crucial distinguishing factor[27]. With much respect, again, D.G. Cement reads the words 'in addition to' into §4B by reliance on dictionary definitions of super tax, which are merely definitions, and do not confer a warrant to read words into a charging provision which by settled principles of interpretation is subject to strict interpretation, with nothing to be implied therein unless it is expressly stated.

2.4.4 *Pakistan Tobacco*[28] on §4B was largely about double taxation, which is a topic that is discussed in the next section.

2.5 IRRECONCILABLE CONFLICT OF THE NEW CATEGORY OF INCOME (NOT DOUBLE TAXATION)

2.5.1 Mr. Shahbaz Butt led this plank of the petitioners' submissions, and was joined in by other learned counsels by adoption and additional submissions. The argument was that the conflict between §4C and other extant provisions was irreconcilable and therefore §4C to the extent of that conflict had to yield to the extant provisions. He relied largely on the reasoning in this regard in *Shell Pakistan Limited vs Federation of Pakistan & Others*[29] on the question of *inter-se repugnancy of provisions in the same statute*. His submission are summarised as follows:

i) 'Income from Business' is one of the 5 heads of income that constitute 'taxable income'. In arriving at the taxable income, §§ 22 to 24

[24] See the section on fundamental rights, infra.
[25] The law report indicates that the amendment vide Finance Act 2016 excluding the brought forward losses was not considered, and only §4B pre-amendment was reproduced at para 10 of the law report in HBL Stock Fund.
[26] Pakistan Industrial Development Corporation vs Pakistan, 1992 SCMR 891.
[27] See HBL Stock Fund, para 15, that the Supreme Court examined the vires of super tax in PIDC case. That was not so. The vires of section 55 of the Income Tax Act 1922 creating super tax was not before the Supreme Court. The question there was whether imposition of super tax on free reserves of a company by the Finance Acts 1967 and 1968 was ultra vires.
[28] Pakistan Tobacco Company vs The Federation, 2022 PTD 1730
[29] CP D 5842 of 2022. Paras 27 et seq. Sindh High Court on §4C.

and §§ 56 to 59-A of the Ordinance allow depreciation and amortisation allowances and carry-forward of losses, feeding into the 'chargeability' of income to tax, such that the resultant 'profits and gains of any business' stand diminished by netting-off the losses carried forward and diminution of the taxable income as a consequence.

ii) The exclusion of carried-forward losses and allowances for the purposes of computing the income to be charged to super tax is in arbitrary disregard of the right granted under the Ordinance under the sections aforesaid, which vested in the taxpayers in prior years when these were carried forward for the next year.

iii) The 'taxable income' per clause (ii) of sub-section (2) of §4C is therefore no longer the 'taxable income' envisaged by the Ordinance, throwing up an *irreconcilable conflict* with the rest of the Ordinance dealing with the foundational definition and concept of 'taxable income'.

2.5.2 Much time was spent by Ms. Hamid answering these submissions by a fall back on the principle of permissibility of double taxation by express language of a statute. She submitted that super tax remained valid even though it may amount to double taxation. She cited numerous judgments, with the most succinct one on this point being that of this Court in *Pakistan Tobacco*, rendered with reference to the relevant case law which I therefore need not restate.

2.5.3 However, the subtle but important distinction in the submission brought to the fore in the hearing in this case, not apparent from the law report in *Pakistan Tobacco*, is that super tax is on *a new category of income*[30], conjured up by rehashing the existent classes of income – just as a stew made up of left overs is a new dish, even though one may taste the flavours of the left overs, it is a new meal, given a new name, cooked all over again, and therefore to be sampled in its own right. Super tax is on this new category of income, an inflated one at that (just as tiny bits of left overs can add up to a substantial stew), and therefore the argument of double taxation is neither valid nor is advanced by the petitioners. This is a new argument, not countenanced in the law reports of the decided cases on §4B. This argument has two facets.

2.5.4 The first one is that classes of income, tax on which is already declared to be the 'final tax' under, inter alia, §§ 4(4) and 8, and which crystallised in terms of 'leviability' at the end of the tax accounting year, cannot be taxed again by adding in the mix of classes of income that go into the bowl for this new category, for that will contradict the prior – and still intact – statutory command of taxes on such classes of income being the final tax. I tend to agree, for extant statutory provisions are as much in force as §4C is, and hold that, this being an irreconcilable conflict, the regime under §4C has to yield to the regime of the

[30] See further discussion on this point in paras 3.5.3 and 3.5.4.

extant vested rights to allow carry-forward of depreciation, amortisation and business losses where so permitted under the other pre-existing provisions of the Ordinance.

2.5.5 The expression 'double taxation' is not a term of art with a singular meaning. Its permitted categories do not encompass taxing that which by the statutory command under the Ordinance is already subjected to *final tax*, or that which remained *exempt*, for that would make nonsense of the extant provisions of the Ordinance. The PIDC case held that post-tax income in the hands of a taxpayer as free-reserves could no longer be taxed because it no longer was income; super tax there was held payable, but only because it was an ex-ante statutory obligation of the taxpayer on the same taxable income without exclusions the taxpayer was entitled to under the Ordinance. §8 of the Ordinance declares the separate taxation on profit on debt, dividends, and capital gains[31] as '*a final tax on the amount in respect of which the tax is imposed*'. Ms. Hamid cited *Pakistan Tobacco* to urge that double taxation was permissible, but the law report in *Pakistan Tobacco* is silent on the point of another round of taxation of the classes of income declared by the Ordinance to qualify for final tax regime. While *Pakistan Tobacco* deals with the argument of double taxation at a higher level, it does not at the granular level at which the submissions were heard in this case with reference to the Ordinance itself declaring that the taxation on certain classes of income will constitute final tax. Per § 8, the 'amount' of those classes of income is excluded from the 'taxable income', no deductions or allowances are admissible, no tax credits are admissible. Bringing them back into the fold of 'income chargeable to tax' under §4C is, with respect, a fraud on the statute, and by extension, on the taxpayer, whose consent to be taxed is subject to law alone – the law being the Ordinance – and extracting tax in breach of an extant statutory provision is nothing if not confiscatory in breach of Articles 23 and 24 of the Constitution.

2.5.6 To me this argument ties-back into the argument of 'irreconcilable conflict', and as the right to be taxed in accordance with law under Article 77 of the Constitution accrued and matured on the closing date of the tax accounting year qua final tax on such classes, §4C to the extent of taxing them again is a violation of Article 4 of the Constitution read with §§ 4 and 8 of the Ordinance stipulating taxation on such classes of income to be the final tax.

2.5.7 The doctrine of 'implied repeal' urged by Ms. Hamid to resolve this irreconcilable conflict is quite misplaced in this context[32]. I have never known a case that employs this doctrine in respect of provisions that are very much on the

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[31] There are some granular level exceptions varying with the nature or value of the transaction, or the identity of the tax payer, where treatment as final tax may vary, but these granular exceptions are not relevant, for the reasoning in this judgment applies to the extent the final tax treatment is extended by the Ordinance.

[32] Also see para 4.1.2

statute book and continue to be applied in their own right. Is the revenue's argument that § 4(4) of the Ordinance stands repealed and the tax payer is no longer required to pay tax on profit on debt and dividends? Obviously not. So I don't see how it can be urged that they are to be taken as impliedly repealed. They are very much in force, and when in opposition to a subsequent provision in the same statute whittling away their import, they are to prevail where the taxpayer has organised its affairs during the tax accounting year on the basis of their validity and enforceability.

2.6 LEGISLATIVE COMPETENCE TO REDEFINE EXTANT CATEGORIES OF INCOME

2.6.1 The second facet of this 'new category of income' is that, although it is mentioned that the definition of 'income' is for the purposes of §4C only, the key question is whether the Constitution confers the competence to *define income twice and in a different manner for the same income*. Entry 47 of Part I of the Fourth Schedule to the Constitution confers the competence to levy taxes on 'incomes', but not to redefine the same incomes under another name to be taxed again.

2.6.2 The word 'income' is not defined by the Constitution but is defined under section 2(29) of the Ordinance. Even though case law holds that the word 'income' is to be given the widest possible meaning, no case law has been cited to the effect that the same income can be redefined to yield up a new category of income. All classes of income under § 4C are already defined and covered under various heads of income chargeable to tax. No authority for defining a new category of income using other taxable classes of income was cited by the revenue. On this score too, I find the legislative competence to be lacking.

2.6.3 It is important to note that §4C appears in Chapter II of the Ordinance, which is the primary source for the 'charging sections' in the Ordinance. For that reason, it is to be read together with the rest of the sections in Chapter II. §4C finds its place in Chapter II for the very reason that it purports to be another charging section, finding company with the other charging sections, inviting application of the cardinal rule of reading the statute as a whole. Once read with the primary charging section, §4, there is no warrant for creating a new category of income using the existing categories, for none of the classes of income in Chapter II are repeated for charge to income tax under any other class except for this reprehensible innovation of §4C[33].

2.7 PRESUMPTIVE TAXATION

2.7.1 Mr. Sukhera submitted that the method of computation of a new category of income for the purposes of §4C is tantamount to 'presumptive taxation', which is permissible under Entry 52 of the Federal Legislative List, but it cannot then

[33] And its identical twin, §4B.

be taxed under Entry 47, or in any event, it cannot be taxed with disregard of the other provisions of the Ordinance. He is right in saying so.

2.7.2 Super tax is computed on a presumption – a new category of income is presumed to arise by stacking all the categories of income therein. The Supreme Court observed in *Elahi Cotton* as follows:

> 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.
>
> (emphasis supplied)

2.7.3 The insertion of §4C has left the Ordinance with another mutilation. The resultant appendage of super tax, instead of leaving 'flexibility at the joints'[34] for the Parliament in fiscal legislation, leaves the corpus a mutant, the exact identity of which has been the subject of an intense debate both in the §4B cases and before this Court. Is super tax *sui generis* and a complete code unto itself, or is it a specie of income tax that is dependent on its 'leviability, payability and recoverability' on the life support system of the rest of the Ordinance, and as §4C in its entirety conforms to the latter construct, then to what extent it can partake of the rest of the Ordinance without an impermissible denial of the benefits of those other provisions of the Ordinance, except by an appeal at the highest level to that will of the Parliament that the Court is asked to assume on the logical fallacy of *petitio principii* – begging the question – that because of the Parliament's supreme will, the very question whether such imposition is valid is to be answered in positive. I am afraid this logical fallacy must be dispelled – with apology to the reader if resultantly taxed – by a somewhat detailed analysis of the passages of *Elahi Cotton*[35], which also takes us to the next topic of fundamental rights.

3 FUNDAMENTAL RIGHTS

3.1 <u>PREFACE</u>

3.1.1 The essence of taxation being compulsory exaction[36], and the essence of the fundamental right to property being that no one shall be deprived of its property save in accordance with law, a levy is confiscatory and expropriatory if it fails the filter of conformance with fundamental rights.

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[34] Holmes J in Bain Peanut Co. v Pinson 282 U.S. 499,501 (1931): "we must remember that the machinery of Government would not work if it were not allowed a little play in its joints" – cited in LDA vs Imrana Tiwana (2015 SCMR 1739)
[35] Elahi Cotton Mills Ltd vs Federation of Pakistan, PLD 1997 SC 582
[36] Federation vs Durrani Ceramics, 2014 SCMR 1630

3.1.2 The following passage, cited with approval in DG Cement can be taken to be an accurate rendition of the principles under consideration:

> Courts cannot sit in judgment over the wisdom of the legislature, except on two grounds on which the law laid down by the legislature can be struck down by the Courts, namely, lack of legislative competence and violation of any of the fundamental rights guaranteed in the Constitution or of any other Constitutional provision. [37]

3.1.3 It also needs be said that the 'judicial self-restraint' in the utilities, tax and economic regulation cases cannot be equated with a command to judicial retreat. Messrs Hamid Khan and Waqar Rana make the valid point that a higher emphasis on civil and political rights than economic rights misses the point that poverty, insecurity, and instability breed abuses of human rights, while wealth creates security and stability[38].

3.1.4 The inscrutability by the judicial process of the objective of accretion to revenues by taxation is beyond debate, that being the absolute prerogative of the Parliament. But the supreme will of the Legislature, itself a creation of the Constitution, remains subject to the Constitution, and to such checks as have been applied by the Courts as co-pillars of the State. Leaving aside the scholarly parsing of the extent to which some of those checks originated in common law without a statement of the fundamental rights in a written constitution (ergo the relatively higher level of judicial deference for the former), a statement of the fundamental rights in a written Constitution necessitates an explicit treatment of unreasonable[39] and arbitrary[40] methods on the anvil of the fundamental rights when they are urged in earnest by eminent counsel and the Court does not find the submissions insubstantial.

3.2 THE CONTEXT FOR EVALUATION OF LEGISLATION

3.2.1 The fundamental rights, especially economic ones, do not provide a formulaic prescription for evaluating the validity of fiscal legislation on their anvil. The context of fiscal legislation, the exigencies which led to its promulgation, and their consequences, set the context.

3.2.2 Reference to the pre-legislative and other materials in setting the context for examining fiscal legislation is valid, and is liberally practised by our Courts. The budget speeches were examined in the judgments on §4B. The most obvious example is *Elahi Cotton*. Unlike the statements of objects and reasons for other legislation, annual Finance Acts are preceded by budget speeches and annual financial statements explaining the overwhelming role the proposed

[37] Para 24 – DG Cement

[38] Chapter 2, Comparative Constitutional Law, by Hamid Khan and M. Waqar Rana, Oxford University Press, 2022

[39] Unreasonableness can be a ground for examining fiscal legislation overstepping the fundamental right to practice any profession, or to carry on any occupation, trade or business under article 19(1)(g) of the Constitution of India: Section 6(b), Chapter I, Palkhiwala.

[40] Blodgett vs Holden, supra.

taxation measures are to play in the national economy, in much more detail than ordinary legislation does. This context is in answer to the argument that Parliament is not accountable at any time before the next elections, and that an examination of the *vires* of the legislation on the anvil of fundamental rights under a written Constitution must remain absolutely devoid of any context other than the treasury's desperation for more tax revenues. That would make the budget speeches quite meaningless in the judicial context also, for the Court would not have adequate points of reference when the taxpayer emphasises the context in which his fundamental rights are violated, for the context is as much an aid to show that they were as it is for that they were not.

3.2.3 The Supreme Court in *Elahi Cotton* did not reach its conclusions in that celebrated judgement solely by a mechanical process of application of precedent and rules of statutory interpretation, but applied those rules after laying a strong foundation in the fiscal context for the application of those rules, i.e., after being satisfied that minimum and presumptive taxes were a good thing. While examining the vires of the presumptive tax regime, the Supreme Court was made aware of the pervasive tax evasion in that out of 10,000 registered companies, less than 400 companies paid income tax. Further, the committee comprising representatives of the business community and the official representatives in its report on increasing exports had suggested presumptive income tax; that is, the presumptive tax had a buy-in from the representatives of the business community. The fact that these factors weighed in much for the Supreme Court in evaluating the validity of presumptive tax is obvious from the extensive treatment given to the report of the National Taxation Reforms Commission in para 17 of the law report. The NTRC comprised the representatives of the business community and frankly acknowledged that malpractices on the part of both the taxpayers and the taxman necessitated reform, which accorded with the scheme of the presumptive tax. At paragraph 19, the Supreme Court referred to yet another recommendation by the Federation of Pakistan Chambers of Commerce and Industry for devising taxation measures that entailed minimum involvement in the process of the income tax department. The Court went on to refer the budget speech preceding the relevant Finance Ordinance, and the relevant portion from the Kenyan budget of 1997, that tended to buttress the context which the Supreme Court was setting for its decision, namely, the reform of the taxation process by which deductions at source would attain the taxation policy objectives of reducing the formal assessment procedures and the concomitant alleged corruption by tax department, widening the tax base, and the resultant justifiable increase in the tax revenues. At paragraph 20, the Supreme Court referred to the quote from the book "Public Financing Theory and Practice" that advocated the concept of minimum tax, to another book "Tax Policy and Tax Reform", to yet another book "Federal Income Taxation", and other books, all of which advocated a minimum tax on presumptive basis. It is instructive to note that the Supreme Court cited all the above materials to lay the context in which the constitutionality of the presumptive tax was to be examined by the Supreme Court. The Supreme Court then summarised its take on the context in paragraphs 21 and 22 of the law report by finding it 'evident' that the presumptive tax regime challenged in Elahi Cotton was targeted at the taxation policy objective "to eliminate the malpractices obtaining in the taxation system", and that "the concept of presumptive tax and/or minimum tax is projected by the eminent authors…has been adopted in some other countries of the world…". To fortify this context, the Supreme Court found it fit to reproduce the relevant parts of the replies by department recording the increase in the number of firms and companies that had been brought within the tax frame through presumptive and minimum taxes. With this context laid, the stage was set for the 'judicial latitude' being plainly and widely extended in favour of the legislation, and the legal competence of the Legislature to enact the presumptive tax legislation on gross receipts was then examined.

3.3 THE CONTEXT FOR SUPER TAX AND ENCROACHMENT OF FUNDAMENTAL RIGHTS

3.3.1 The FBR's replies to the various petitions candidly concede that the rather extraordinary taxation measures were adopted at the instance of IMF and that 'Pakistan is in the IMF's Extended Fund Facility Program and the 7th review was in progress … in order to provide fiscal space to the government this year the FBR has agreed to collect PKR 7.470 billion which is PKR 2.15 billion more than the IMF's own estimate.'

3.3.2 But this is the inexorable consequence of the successive Governments' profligacy and inept management of public finances. This is borne out by the World Bank's 2023 Report titled "*Pakistan's Federal Public Expenditure Review – Reducing Pakistan's Persistent Fiscal Deficits – 2023*". This report, by far more comprehensive than anything coming out by the wise Parliament or its successive Governments, after giving numbers of public debt and deficit, records in the Executive Summary as follows:

> Accordingly, both the deficit and debt levels are *in breach of* the fiscal rules stipulated by the Fiscal Responsibility and Debt Limitation Act (FRDLA).
>
> … In addition, the Report discusses the realignment[41] of federal government spending *with its constitutional mandate*, which would reduce expenditures pertaining to the operating expenses of the civil government and development spending or PSDP[42]. *All of these issues are the core factors behind Pakistan's recurring fiscal imbalances*.

The report notes that (despite being broke) Pakistan's federal fiscal spending was higher than its regional peers:

[41] A polite substitute word for persistent disregard of the constitutional mandate.
[42] In a tongue-in-cheek rider buried in a footnote, that again gets buried in this footnote, the report notes that: 'This PER does not discuss in detail federal expenditures on Pensions and Defense.'

> In FY22, combined federal and provincial expenditure stood just above PKR 13 trillion, around 19.7 percent of GDP, with the federal government accounting for about two-thirds at 13.5 percent of GDP. While these levels are not high by international standards, the spending pattern is strikingly rigid, with almost 70 percent of total spending per year being allocated to pre-committed areas such as interest payments, transfers and subsidies, and payments to public sector staff (Figure ES.5). *These levels are higher than that of regional peers.*

Another indictment is the following:

> Realigning federal recurrent and development spending with *constitutional mandates* can decrease redundancies and duplication of tasks and costs. Despite the 18th amendment, the Federal Government maintains recurrent and development spending on areas that have been devolved to the provinces. The rationalization of overlaps between federal and provincial spending provides opportunities for fiscal savings…*Spending by federal ministries focused on devolved subject areas, such as those for health and education, amounted to PKR 328 billion or 0.5 percent of GDP in FY22.*

It goes on to read:

> Pakistan's Public and Publicly Guaranteed Debt (PPGD) stock is high and still growing. The public debt stock, including guaranteed debt, reached 78.0 percent of GDP at the end of FY22, increasing from 58.6 percent of GDP at end-FY10. *The debt levels breached Pakistan's Fiscal Responsibility and Debt Limitation Act (FRDLA) 2005,* which requires public debt to be at most 60 percent of GDP at the end of FY23. As a result of the large debt stock, interest payments at 4.7 percent of GDP account for over one-third of its total federal expenditure in FY22. When compared across the region for the past 10 years, the country's average public debt share was higher than the regional average…
>
> The lack of an integrated debt management function undermines sound debt management in Pakistan, leading to suboptimal borrowing choices… The Treasury Single Account can be immediately implemented and can improve cash management and render fiscal savings of up to PKR 404 billion (0.6 percent of FY22 GDP) annually…
>
> Federal SOEs impose a significant fiscal drain and pose a substantial fiscal risk on the Federal Government. *Federal commercial SOEs have been incurring losses since FY16, with annual losses averaging at 0.5 percent of GDP over FY16–FY20* (Figure ES.8). Pakistan's federal SOEs have been found to be the least profitable in the South Asia region. With the persistent losses, the accumulated SOE losses have become substantial, amounting to 3.1 percent of GDP in FY20…
>
> Critical corporate governance reforms, such as the implementation of the *SOE Governance and Operations Law (2023)*, finalization of the SOE Ownership Policy and the operationalization of the SOE Oversight Unit, *are still pending*… Currently, there is no policy framework to set objectives and principles for the state ownership of SOEs, which has perpetuated an ad hoc approach to the ownership and oversight functions. The Federal Government has embarked on the roadmap to improve the SOE performance by identifying reform pathway for the SOEs; *however, the reforms are still pending*. Due to these delays, *the lack of transparency and accountability is likely to*

> *continue and may result in further unanticipated fiscal risk from SOE operations…*
>
> [C]oncrete steps need to be taken by the Federal Government to implement the reform roadmap for the key loss-making SOEs that can potentially *reduce the annual fiscal outflows of approximately PKR 458 billion* or 0.8 percent of GDP and would significantly contain the fiscal risk to the Federal Government…

3.3.3 Who will answer the question as to why the hole sought to be filled by super tax had not been closed by the wise Parliament by ensuring over the past few decades that the Government recouped that sum by setting its own house in order, instead of expressing its wisdom in asking the taxpayer to come to the rescue, yet again?

3.3.4 I fail to see how the 'economic exigency' that Ms. Hamid boldly puts forth as the reason to extract the last blood from the industry is attributable to anything but the mismanagement of the economy by the successive Governments themselves. Is a Parliament that does not rein in its successive profligate Governments to abide by the Constitutional and statutory mandates entitled to expropriate the last drops of blood flowing in the veins of its ailing industry, and is it entitled to assert that its supreme will shall prevail notwithstanding a persistent breach by its progeny Governments of their Constitutional and statutory obligations? I am afraid not, for it is then that justifiable charges of confiscatory taxation become well-nigh impossible to ignore by that appeal to that unfettered power and unbounded wisdom of a Parliament functioning under the Constitution and the rule of law. The situation is quite akin to the Kings in medieval times giving free rein to their sheriffs to run amok in the counties to confiscate the produce of their subjects, even after they had paid the tithes, just to fund their extravagant exploits. Is it not a violation of the citizens' inalienable right under Article 4 to be treated in accordance with law, where the root cause for imposition of a tax is persistent violation by the Parliament and its progeny Governments of the commands of the Constitution, the FRDLA, and other sovereign commitments for reform?

3.3.5 The evil sought to be remedied by §4C is the emptiness of the treasury's coffers. This evil is not a 'supervening and unforeseen circumstance' beyond the control of the elected representatives and the Governments put in place by them, such as the rehabilitation of displaced persons which led to the passage of §4B, but is an evil brought about by the Government itself qua a progeny of the Parliament by its repeat mismanagement of its coffers and repeat violation of the Constitutional and statutory commands passed by the Parliament for the Government to follow. The exclusion of the brought forward losses, depreciation and amortisation allowances for creating a new category of income for the purposes of super tax to make up for the Parliament's and the Government's callous profligacy over decades is an encroachment of the citizen's fundamental rights to hold property and do business. It is common knowledge – fortified by the aforesaid World

Bank Report – that the economic mismanagement necessitating unsustainable commercial borrowings by the public sector has severely constrained the borrowing space for the private sector. They cannot be asked to cough-up their property to remedy the evil of their elected representatives' profligacy, for to do so would rest on an assumption that the vote was cast with the consent for the elected Governments to be wasteful with the national resources in disregard of the limitations imposed by the Constitution, the FRDLA, and other legislations, an assumption for which not only there is no warrant, but which ought to be repugnant to the ears of those who advance it.

3.3.6 I conclude this section by making a statement that might leave legal minds at askance, but not the ones steeped in the affairs of our political economy. The Courts cannot continue to remain impervious to the economic realities of the day, and pretend they are to render decisions by a pedantic observance of precedent alone, for that is an impermissible withdrawal into the sanctuary of the precedent, when precedent was meant to elucidate and create certainty, but was never meant to straitjacket the common law to prevent its evolution. The evolutionary principle is the following: when the Parliament's wisdom is failing to deliver owing to a knowing and wilful disobedience of the Constitutional and statutory mandates binding on the Government qua its progeny, it is no longer a wisdom that binds the Court when to do so results in the confiscation of the citizens' property they would not have had to yield up but for such disobedience.

3.4 <u>EX-ANTE CERTAINTY OF TAX</u>

3.4.1 Mr. Raja submitted that certainty of tax was cardinal to the fundamental right to do business under Article 18, as businesses cannot function with taxation uncertainty. This statement can be placed at par with 'Gospel truths'. A taxpayer is entitled to be told in advance with reasonably certainty its exposure to a compulsory exaction from the fruits of his enterprise for a given tax period, for this is a corollary to his fundamental right to engage in productive commerce. The point is not about the powers of the legislature to impose retrospective legislation, which is beyond question if imposed by express words which is the case for §4C, but the clash with the fundamental right to do business by retrospective snatching of his post-tax income which he toiled through the year in the belief that it would be his to enjoy. I agree. The following passage by Adam Smith in his seminal book "The Wealth of Nations" (1776) was cited by the Division Bench in *HBL Stock Fund*:

> …the tax which each individual is bound to pay ought to be certain, and not arbitrary. The time of payment, the manner of payment, the quantity to be paid, ought all to be clear and plain to the contributor, and to every other person. The uncertainty of taxation encourages the insolence and favours the corruption of an order of men who are naturally unpopular, even where they are neither insolent nor corrupt. The certainty of what each individual ought to pay is, in taxation, a matter of so great importance, that a very considerable

> degree of inequality, it appears, is not so great an evil as a very small degree of uncertainty.

3.4.2 The revenue's submission that the fundamental right to conduct business and trade is subject to law is answered by citing *Jibendra*[43], with a five member bench of the Supreme Court calling this argument an 'inartistic device'.

3.5 WINDFALL PROFITS OF HIGH EARNING PERSONS

3.5.1 The Petitioners have advanced several grounds to plead that the methods, expressed in the language of §4C, by which the objective to raise revenues is sought to be realized, are irreconcilable with the fundamental rights to conduct trade and business under Article 18, the right to hold property under Article 23, and the right against deprivation of property under Article 24, of the Constitution of Pakistan.

3.5.2 The revenue's submissions before this Court made much of the inequity of the windfall profits remaining with the taxed industries because of 'global developments' and not due to any industriousness on their part.[44] Its reliance on contextual materials, including the articles reporting IMF's critique of the 'poor subsidising the rich' was in aid of the argument that those making windfall profits must contribute a large share to the tax base on the principle of progressive taxation. The budget speech and the annual finance statements purport to tax windfall profits[45], but end-up taxing persons earning an 'annual income' of Rs. 150 million or more, irrespective of their profits. Income and profits are not synonymous. So the argument of windfall profits is quite wrong when viewed with the lens of §4B. Several of the companies for whom the written submissions supplied extracts of financial statements showed a loss from the previous year, let alone windfall profits. The argument of windfall profits is a false cause for §4C. We stop short of a finding that the Parliament was purposefully misled by the argument of windfall profits irrespective of such companies that were in post-tax loss for the previous year.

3.5.3 It is quite obvious that an exaggerated income for the purposes of super tax is arrived at by a sleight. It rests on a concept of accretion of various classes of tax-paid income to yield artificially a larger number. The so-called 'high income' of the high earners chargeable to super tax is not really due to their incomes being high (to the super tax threshold) in actual fact, but entirely due to a sleight comprising of (i) a re-taxing of certain classes of income already taxed as 'final tax' at the end of the relevant tax year, and (ii) the exclusion of brought-forward losses, depreciation and amortisation in computing taxable income, that remains the taxpayer's right under other, equally valid, provisions of the Ordinance.

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[43] Jibendra Kishore Accharya vs The Province of East Pakistan, PLD 1957 SC (Pak) 9. Fundamental rights expressed subject to law cannot be taken away by law with this inartistic device.
[44] Ms. Hamid's written submissions.
[45] "Taxing those who made exorbitant profits (windfall gain)" – para 61.3, Budget Speech, 2022-23

3.5.4 This creation of a new category of income for the purposes of §4C creates an artificially inflated fiscal value out of real financial streams of revenue by a destructive re-casting of the closely-knit method of antiquity of exclusion of losses, depreciation and amortisation, woven into the elaborate fabric of the Ordinance for computation of taxable income, and is repugnant to the fundamental rights to hold property and do business in accordance with law, for the reason inter alia that disallowance of brought forward losses to businesses is tantamount to disapplying the other applicable provisions of the Ordinance which remain as much in force to the benefit of the taxpayer.

3.5.5 The heading of a statutory provision is ordinarily to be ignored in its construction, but that is no longer possible when the rationale for the tax (including by the papers put forth for the respondent FBR) is expressed un-hesitantly before the Court in terms of that heading. The picture is painted that super tax is none other than a tax on 'windfall profits', and all this is done poker-faced while asking the Court to overlook the stark reality that the so-called windfall profits are the offspring of a computation trick that dissipates like the serpents of Pharaoh's magicians as soon as the staff of truth is hurled at it.

3.5.6 The tenor of this judgment on the encroachment of fundamental rights by §4C may incur the indictment of the Court venturing beyond its remit of confining itself to a backward journey into precedent. The charge may be justified only if the accuser rests its case on a command to the Court to ignore the decades-long profligacy of the Government – *qua* a Constitutional organ, and not *qua* a particular political composition in a given era. This inexorable bankruptcy was euphemistically termed by Ms. Hamid as 'economic exigency'. That profligacy is no longer dismissible by the condescending and logically fallacious epithet of 'airy economics' – the fallacy being 'ignoring inconvenient data'[46] or 'suppressing damning evidence'– but is an indisputable circumstance standing stark naked before the Court, of which judicial notice cannot but be taken unless the Court cloisters itself in an ivory tower with no consciousness of the deafening noise on the ground below; closing the windows of the ivory tower no longer keeps the noise out.

3.5.7 Ms. Hamid's submissions in reliance on Article 38 of the Constitution to advance the principle of policy of social and economic wellbeing of the people for equitable distribution of wealth carries scant appeal when the wealth already collected by the coercive power of the State is mercilessly squandered in a repetitive cycle of flouting Constitutional, legislative and sovereign commitment mandates binding on the Government as an institution entrusted with the public purse.

3.5.8 The claim to taxing only the wealthiest sectors of the economy rests entirely on analyses of the listed companies, and does not account for the companies that are

[46] https://iep.utm.edu/fallacy/#IgnoringInconvenientData

not listed. This was evident by the submissions of Mr. Duggal representing pharmaceutical companies, stating that there were more than 750 companies, most of which were making loses and only the ones listed were analyzed by the FBR in all its assessments forming the basis of its representations to the Government and also in these petitions. This was not denied by the respondents and is also evident from a review of the reply in writ petition no.4768/2022. Further, in her submissions for Spud Energy, Ms. Zainab Janjua submitted that the data of the oil companies provided to the Legislature was not representative of the entire industry, particularly since the data of only four major publicly listed companies was used[47]. She submitted that her client, Spud Energy, in contrast, was a private company with heavy losses on its books, and that a conclusion as to an entire industry on the basis of a few high earning companies was completely unwarranted. The FBR's case to the Parliament to legislate on the assumption of the entire industries being highly profitable extrapolates the data of a few companies over the entire industries on the assumption of 'capacity to pay', and on that basis falls foul of the reasoning in *Elahi Cotton* wherein the Supreme Court held that:

> "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.[48]
>
> If we were to construe Entry 52 of the Legislative List keeping in view the above meanings of the expression "in lieu of", it becomes evident that the Legislature has the option instead of invoking Entry 47 for imposing taxes on income, it can impose the same under Entry 52 on the basis of capacity to earn in lieu of Entry 47, **but it cannot adopt both the methods in respect of one particular tax**." (emphasis supplied)

3.5.9 But §4C adopts both the methods. Resting on the strawman fallacy, it portrays the taxed industries as high-earning ones (capacity to pay), which however is only achieved by the sleight of computation and deprivation of vested rights of carry forward of statutory allowances (the computational approach). The legislative competence stands compromised as a result.

3.6 <u>AMOUNT – REAL OR IMAGINARY?</u>

3.6.1 Another ground, overlapping and co-extensive with the discussion in the preceding section, is that the new category of income conceived for the purposes

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[47] Pakistan Petroleum Limited, Mari Petroleum Company Limited, Oil &Gas Development Company Limited, and Pakistan Oilfields Limited.

[48] Based on this, striking down section 7(E) of the Income Tax Ordinance introduced vide Finance Act 2022, the Lahore High Court observed that "Entry 47 does not admit the imposition of presumptive tax because the expression 'taxes on income' means working out of income based on computation under various provisions of the taxing statute." WP 52559 of 2022, Muhammad Osman Gull vs Federation of Pakistan

of super tax is an imaginary sum, a deception, a conjuring trick, and ought not be sanctified by a misapplication of the doctrine of the Parliament's supreme will.

3.6.2 The concept of 'income' though expansive[49], with the categories of income not closed, nonetheless necessitates in view of its definition under § 2(29) of the Ordinance deploying the word 'amount' that there must be a real and tangible property for it to be subject to income tax. In the fiscal context, the word 'amount' in § 2(29) is not synonymous with other expressions like 'figure' or 'calculation', that only represent the outcome of an arithmetical exercise. The word 'amount' is an abstract noun when used for objects that do not have a physical existence, *but do exist in reality* (such as 'courage', 'idea', or 'tax target'). It is a concrete noun when used for objects which have a physical existence (e.g. 'tax collected'). Illustrative sentences under its etymology convey a reality and not a hypothesised entity. The words 'any amount treated as income' in § 2(29) entail that there must be a real and existent 'amount' for it to be regarded as income under the Ordinance. I therefore find that for any 'income' to qualify as income for the purposes of the Ordinance, it must exist in its own right, as opposed to merely being a number yielded up by a computational trick of restacking of existing categories of income that are already taxed, and in some cases are subject to final tax, and any bits remaining is now the property of the taxpayer[50], free from the debt of income tax that was prevalent on or before the specific transaction which was taxable at the time the transaction occurred during the tax year, or became subject to tax up to the closing date of that tax year. When those 'taxed events' are restacked to conjure up an 'amount' that does not exist in reality (especially by excluding otherwise admissible losses), it loses legitimacy to be counted as an 'amount' for the purposes of §2(29), for it targets transactions that have, for the purposes of taxation, 'concluded', have yielded 'income', to which the charge of tax has attached if it is taxable income, and cease to live a financial life for the purposes of yielding another 'amount' in reality. To argue otherwise, respectfully, is an egregious deployment of the Parliament's sovereignty principle, utterly misplaced and utterly unwarranted, and for that reason is tantamount to being confiscatory and expropriatory.

3.7 DUE PROCESS

3.7.1 Mr. Sukhera urged the Court on the strength of *Blodgett vs Holden* (supra) to extend the due process doctrine under Article 10-A of our Constitution to this case too. I do not think that is necessary. To me, a combined reading of Articles 18, 23 and 24 of our Constitution leads to a compelling argument that taxing transactions consummated when super tax was nowhere in sight creates an 'unexpected liability', is therefore 'arbitrary' and 'wholly unreasonable', and is

[49] Mrs. Samina Shaukat Ayub Khan vs Commissioner Income Tax Rawalpindi, PLD 1981 SC 85
[50] See PIDC case.

therefore in violation of the fundamental rights to hold and dispose of property and to conduct business with certainty in accordance with the law existent at the time the transactions were made.

3.8 UNLAWFUL DISCRIMINATION

3.8.1 Following the reasoning in Shell Pakistan, with which I respectfully (and gratefully) agree, I too find that the proviso to Division IIB of Part I of the First Schedule to the Ordinance levying super tax at 10% on the industries listed therein is discriminatory and, therefore, violates Article 25 of the Constitution.

4 INDUSTRY SPECIFIC GROUNDS

4.1 BENEVOLENT[51] FUNDS

4.1.1 Amongst the petitioners were provident, pension, and gratuity funds, whose income was exempt from tax. They received notices for recovery of super tax. They filed petitions claiming that, during the subsistence of the exemptions, they could not be charged super tax. The submissions were led by Mr. Adnan Haider, representing the gratuity fund and the provident fund of Askari Bank Limited, which also as a special tax year commencing 1st January to 31st of December.

4.1.2 Section 53 of the Ordinance stipulates that "*The income…specified in the Second Schedule shall be – (a) exempt from tax under this Ordinance, subject to any conditions and to the extent specified therein…*". It is common ground that the income of the petitioner funds was exempt from tax under the Second Schedule and remains so to date. Ms. Hamid however contended that the exemption was impliedly taken away when § 4C was promulgated. Her submissions for obvious reasons had to take an arduous and painful route of implied repeal for her point to be made. I cannot think for a better answer than the famous quote of Viscount Simonds when he said "*I hesitate in any case to introduce by way of implication in a taxing statute a provision which cries aloud for express statement if it is intended*"[52]. There is no suggestion at the bar that the Parliament and its draftsmen had to pass the legislation in a critical emergency which left them no moment to add a provision doing away with the exemptions, leaving it to the ingenuity of FBR's counsel to seek to distil the abolition of the exemption.

4.1.3 Ms. Hamid's other argument was that the exemption applied to 'taxable income', and not to the income computed under and for the purposes of § 4C. This submission too does not stand to scrutiny in view of the plain provisions of the Ordinance. §53 referred above stipulates '*exempt[ion] from tax under this Ordinance*'. § 2(63) defines 'tax' to mean "*any tax imposed under Chapter II*". § 4C occurs in Chapter II. The words 'any tax' would obviously include super

[51] Used here as a compendious description for various kinds of funds, such as gratuity, pension, provident or similar funds.

[52] London Investment & Mortgage Co Ltd vs Worthington [1959] 37 ITR 56, 62

tax also. Drawing a distinction between income tax on taxable income under § 4 and super tax under § 4C in an endeavour to deny exemption in the latter case is a vain exercise when § 2(63) is read with § 53, read further with the opening language of Part I of the Second Schedule, which stipulates that "*incomes… enumerated below… shall be exempt from tax…*", read further with clause 57 thereof which extends the exemption to "*any income" of the pension, gratuity and provident funds who had been issued the certificates of exemption under the Ordinance.*"

4.1.4 I add here that Ms. Hamid's objections to the maintainability of the writ petitions against recovery and show cause notices instead of pursuing the remedy before the department and its appellate forums are answered by a long held view that the presence of an alternate remedy does not preclude challenge in the Constitutional jurisdiction. This rule exists for the Court to regulate its discretion, but is not an inflexible and absolute rule, especially where an important question of general application or interpretation of a provision of the Ordinance is raised, or where the impugned notices are patently illegal[53].

4.1.5 Resultantly, the case of the benevolent funds succeeds. The recovery notices and the show cause notices, etc. impugned in the petitions by the petitioner funds, who held or continue to hold valid certificates of exemption from tax under the Ordinance, were issued unlawfully and are therefore set aside.

4.2 PETROLEUM INDUSTRY

4.2.1 Petroleum sector-specific submissions against the imposition of super tax were led primarily by Messrs Nasim Sikandar, Jamal Sukhera, Mansoor Awan, and Ms Zainab Janjua, representing petroleum exploration and production companies, resting their case on the *Regulation of Mines and Oil-Fields and Mineral Development (Government Control) Act, 1948* (the **1948 Act**) and, in case of Spud Energy (Private) Limited, on § 100 of the Ordinance read with Part 1 of the Fifth Schedule.

4.2.2 Sections 3B and 4 of the 1948 Act in so far as material are reproduced below:

> 3B. Concessions to petroleum exploration companies.__
>
> (1) Notwithstanding anything contained in any other law for the time being in force, every company … to whom a licence or a lease to explore, prospect and mine petroleum is granted under this Act… shall be entitled to the concessions specified in the Schedule...
>
> 4. Effect of rules etc., inconsistent with other enactments.
>
> Any rule made under this Act, and any order made under any such rule, shall have effect notwithstanding anything inconsistent therewith contained in any enactment or in any instrument having effect by virtue of an enactment other than this Act.

[53] Gatron Industries Limited vs Government of Pakistan, 1999 SCMR 1072

4.2.3 Part I of the Schedule to the 1948 Act referred to in section 3B in material part reads as follows:

> … any amendment in the Income Tax Ordinance 1979… made after the effective date of an agreement for the grant of a licence or lease to explore, prospect or mine petroleum, which are inconsistent with the terms of the agreement, shall not apply to the extent of such inconsistency to a company which is a party to the agreement.

Clause 2 of the Schedule in material part reads as follows:

> …taxes on income shall be fixed at the time of grant of the permit or licence…

4.2.4 The contention therefore is that on the date a Petroleum Concession Agreement (**PCA**) is signed, the law on taxation including the rates of tax are frozen in respect of the income that may be derived by exploiting the concession which is the subject of that PCA. This pact between the President of Pakistan as the grantor of the concession and the concessionaire company is termed as 'the freezing clause', which is found in all PCAs. Mr. Sikandar referred to Article 12 titled "Taxation" of his client's PCA, calling it a standard provision in all PCAs, and this has not been denied by Ms. Hamid. Clauses 12.1, 12.4 and 12.7 of the PCA have the cumulative effect that the provisions of Income Tax Ordinance, 1979 in force on the date the PCA was signed were to apply for the taxation limiting the tax exposure to '… *fifty-five percent (55%) of profits or gains derived from the operations* …' but in case of a conflict between the provisions of the PCA '…*and the provisions now in effect of the Ordinance, and the Fifth Schedule thereof*…' the latter was to prevail. Clause 20.2 is the primary freezing clause and stipulates that the Income Tax Ordinance 1979 as in force on the date of PCA was to apply regardless of any subsequent amendments thereto.

4.2.5 The crux of the petitioners' arguments is that the taxation liability was frozen on the date the PCAs were signed and that it was on the basis of that certainty as to the exposure to taxation that the petroleum investors decided to come forward to sign the PCAs and commit their investment. Any taxation that exceeded that tax exposure violated the statutory command under sections 3B and 4 of the 1948 Act read with Clauses 1 and 2 of the Schedule thereto read with the freezing clause of the PCA. This argument is simple and forceful and prevails with me, but necessitates a discussion on the judgment of the Division Bench of this Court in *Ocean Pakistan*[54], which remained the mainstay of Ms. Hamid's submissions in reply. Mr. Mansoor Awan and Ms. Zainab Janjua for Spud Energy made additional submissions specific to their clients.

4.2.6 One provision of law cannot make the other redundant or nugatory without an express intention and expression to that end, which is to be spelt out, as is the convention in legislative drafting, by inserting a non-obstante clause, but which is conspicuous by its absence in § 4C. On the contrary, the non-obstante clause

[54] Ocean Pakistan Private Limited versus Additional Commissioner Inland Revenue (2018 PTD 996)

appears in section 3B of the 1948 Act, although it is conditioned by reference to any other law for the time being in force, and the Schedule to the 1948 Act by its language makes the concessions stipulated in a PCA on its effective date operative for the future as well by expressly excluding the application of '*any amendment in the Income Tax Ordinance, 1979*' after the effective date of the PCA to the extent such amendment is inconsistent with the terms of the PCA.

4.2.7 While repealing the ITO 1979, the Ordinance vide §100 stipulated the taxation of E&P companies in accordance with the Fifth Schedule of the Ordinance. Section 100 is the charging section for E&P companies. By virtue of §8 of the General Clauses Act, 1897, references in a legislation to another legislation are to be read as references to the successor legislation to that other legislation, and therefore the references to ITO 1979 in the 1948 Act are to be read as references to the Ordinance replacing the ITO 1979.

4.2.8 The submissions at the bar did not go into any depth in the differences between the Fifth Schedule to the Ordinance and the Fifth Schedule to the ITO 1979, and remained confined to a general statement that no tax could be imposed that did not exist at the time the PCA was signed. Clause 2(6) of the Fifth Schedule permits carry forward of deductions under Part IV of Chapter III. Rule 4 of the Fifth Schedule is directly in point for the argument under consideration and is reproduced in material part below:-

> 4. Limitation on Payment to Federal Government and Taxes
>
> (1) The aggregate of the taxes on income and other payments …on, or after, the first day of July 2001 to the Government in respect of the profits or gains derived from such undertaking for a tax year shall not exceed the limits provided for in the agreement, provided the said aggregate shall not be less than fifty per cent of the profits or gains derived by an onshore petroleum exploration and production undertaking and forty per cent of the profits or gains derived by an offshore petroleum exploration and production undertaking, before deduction of the payment to the Federal Government.
>
> …
>
> (3) If, in respect of any tax year, the aggregate of the taxes on income and payments to the Federal Government is greater or less than the amount provided for in the agreement, an additional amount of tax shall be payable by the taxpayer, or an abatement of tax shall be allowed to the taxpayer, as the case may be, so as to make the aggregate of the taxes on income and payments to the Federal Government equal to the amount provided for in the agreement.
>
> (4) If, in respect of any year, the payments to the Federal Government exceed the amount provided for in the agreement, so much of the excess as consists of any tax or levy referred to in sub-clause (b) of clause (3) of rule 6 shall be carried forward and treated, for the purposes of this rule, as payments to the Federal Government for the succeeding year, provided that the whole of the

> payments to the Federal Government exceeding the amount provided for in such agreement may be carried forward if so provided for in any agreement with a taxpayer made before the first day of 1970.
>
> (4A) Notwithstanding anything contained in this Schedule, a person, for tax year 2012 and onward, may opt to pay tax at the rate of forty per cent of the profits and gains, net of royalty, derived by a petroleum exploration and production undertaking.
>
> …
>
> 4AB. The provisions of section 4C shall apply to the taxpayers under this schedule and shall be taxed at the rates specified in Division IIB of Part I of the First Schedule from tax year 2022 onwards.

4.2.9 Rule 4(1) of the Fifth Schedule stipulated that the aggregate of the taxes on income and other payments were not to exceed the limits provided for in the PCAs, but were not to be less than 40% of the profits or gain of the onshore E&P company. The repeat references in all the sub-rules of Rule 4 to the taxation remaining at par with the amount stipulated in the PCA is an endorsement of § 3-B and 4 of the 1948 Act, in that the limitation on taxes is conditioned by the amount or the cap stipulated in the PCAs. Ms. Hamid's submission with reference to Rule 4(4) that any taxes imposed under the Ordinance leading to an excess over and above the cap provided in the PCA were to be carried forward and to be treated as payment of tax to the Federal Government for the next year is incorrect. In fact, this stipulation is only in respect of sub-clause (b) of clause 3 of Rule 6, which is confined to any tax "*…peculiarly applicable to oil production… and not generally imposed upon all industrial and commercial activities*". The intent is quite obvious, that a general taxation measure applicable to all companies was <u>not</u> to apply to petroleum companies for the reason of §§ 3B and 4 of the 1948 Act read with Rules 4(1),(2) and (3) freezing the taxation liability as of the date of the PCA, and it was only in respect of taxation specific to petroleum companies that a carry forward of excess tax was stipulated as a concession specific to petroleum sector specific taxation.

4.2.10 This brings us to insertion of Rule 4AB in the Fifth Schedule reproduced above. The Finance Act imposed a new tax, the super tax under § 4C, which to the extent of E&P petitioners was not catered for in their PCAs. However, it has not been pleaded before this Court whether the taxability to super tax increased their aggregate liability under taxes and other payments payable to the Federal Government above the caps stipulated in Rule 4 of the Fifth Schedule. That is a matter for computation to be carried out in respect of each E&P company and, to the extent the cap is exceeded, the super tax for such E&P companies cannot be charged by virtue of the protection conferred on them under the PCAs, read with §§ 3B and 4 of the 1948 Act.

4.2.11 Turning now to *Ocean Pakistan* case, the judgment therein stands suspended by the Supreme Court[55]. Further, to the extent it turned on the argument that the Ordinance was a special law and the 1948 Act was a general law, in my respectful view, it is actually the other way round. The 1948 Act was a special law in so far as it provided for taxation of a special subject, being the taxation of petroleum exploration companies. The Ordinance is a general law on income tax which applies to all persons liable to tax. But the special sub-class of taxpayers comprising the E&P companies is addressed under the 1948 Act, make the latter a special law on the subject. Further still, the relevant question of law in Ocean Pakistan was "*Whether the ACIR erred in applying the Income Tax Ordinance, 2001 instead of Income Tax Ordinance, 1979 as stipulated and guaranteed under the Petroleum Concession Agreement?*". In paragraph 15 of the judgement, the Court decided the said question by stating that "*In such an eventuality, the provisions of the Ordinance of 1979 or Article 29.6 of the PCA are neither relevant nor attracted.*" Having reached the aforesaid conclusion, the Court proceeded on an assumption to decide a larger question of whether section 54 of the 2001 Ordinance overrode section 3B of the 1948 Act. The said question was not referred to the Court and its observations from paragraph 16-23 were mere dicta.

5 CONCLUSION AND ORDERS

1 §4C, as it stands now, falls to be *ultra vires* the fundamental rights under Articles 18, 23 and 24, read with Article 4 of the Constitution. Using *Imrana Tiwana* phraseology[56], §4C is "*held to be against the scheme of the Constitution and should either be read down or declared ultra vires for the reasons given*" in this judgment. With the preference to save rather than destroy, §4C is to be read down in calculating the income taxable to super tax so as to:

(a) exclude all classes of income enumerated therein the tax on which is final under the other provisions of the Ordinance; and

(b) sever the exclusions of brought forward depreciation, brought forward business losses, and brought forward amortization allowances available to the taxpayers under the other extant provisions of the Ordinance;

2 §4C, as read down, will have prospective application only, and will not apply to any transactions or events past and closed on or before 30th June 2022;

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[55] Civil Appeal No.334 of 2018, wherein CMA No. 1643/2018 was allowed with order to maintain status quo

[56] Paragraph 94(iv) of the judgment. On reading down and severance, also see *Haroon-ur-Rashid versus Lahore Development Authority, 2016 SCMR 931* (citing Australian authors) holding that "Reading down means that where an Act is expressed in language of a generality which makes it capable, if read literally, of applying to matters beyond the relevant legislative power, the court will construe it in a more limited sense as to keep it within power … where reading down is not available, the court next decides where there is a case for severing the invalid parts from the valid ones, which standing alone remain operative."

3 §4C, as read down, will not apply to the benevolent funds holding exemptions from tax under the other provisions of the Ordinance;

4 §4C, as read down, will not apply to petroleum and exploration companies to the extent its application results in the taxation of such companies exceeding the thresholds stipulated in Rule 4 of the Fifth Schedule to the Ordinance; and

5 All notices of demand or recovery impugned in the petitions are set aside, without prejudice to the revenue's right to issue fresh notices not inconsistent with this judgment.

(Sardar Ejaz Ishaq Khan)
Judge

Imran

Announced in open Court on _______.

Judge

Approved for reporting.

Annex

1	Writ Petition no. 4027/2022	M/s Fauji Fertilizer Co. Limited Versus Federation of Pakistan and others
2	Writ Petition no. 4028/2022	M/s China Mobile Pakistan Limited Versus Federation of Pakistan and others
3	Writ Petition no. 4359/2022	M/s China Mobile Pakistan LDI Limited (CMPAK LDI Ltd) Versus M/s Federation of Pakistan and others
4	Writ Petition no. 4454/2022	M/s Ferozsons Laboratories Limited Versus Federation of Pakistan and others
5	Writ Petition no. 4457/2022	M/s BF Biosciences Limited Versus Federation of Pakistan and others
6	Writ Petition no. 4653/2022	M/s Islamabad Diagnostic Centre Versus Federation of Pakistan and others
7	Writ Petition no. 4731/2022	M/s Indus Sugar Mills Limited Versus Federation of Pakistan and others
8	Writ Petition no. 4765/2022	M/s Attock Petroleum Limited (APL) Versus Federation of Pakistan and others
9	Writ Petition no. 4766/2022	M/s Attock Refinery Limited Versus Federation of Pakistan and others
10	Writ Petition no. 4767/2022	M/s Pakistan Oilfields Limited Versus Federation of Pakistan and others
11	Writ Petition no. 4768/2022	The Attock oil Company Limited Versus Federation of Pakistan and others

12	Writ Petition no. 4805/2022	M/s Sheikhupura Textile Mills Limited etc. Versus Federation of Pakistan and others
13	Writ Petition no. 4848/2022	M/s Al-Raeeee Developers (regd) Versus Federation of Pakistan and others
14	Writ Petition no. 4849/2022	M/s Yousaf Jamal Butt Versus Federation of Pakistan and others
15	Writ Petition no. 4851/2022	M/s Murree Brewery Company Limited Versus Federation of Pakistan and others
16	Writ Petition no. 4852/2022	M/s Roots Millennium Schools Private Limited Versus Federation of Pakistan and others
17	Writ Petition no. 4853/2022	M/s Glamour Textile Mills Limited etc. Versus Federation of Pakistan and others
18	Writ Petition no. 4854/2022	M/s Haidri Beverages (Private) Limited Versus Federation of Pakistan and others
19	Writ Petition no. 4855/2022	M/s Beverage Plus (Private) Limited Versus Federation of Pakistan and others
20	Writ Petition no. 4857/2022	M/s Astral Constructions (Private) Limited Versus Federation of Pakistan and others
21	Writ Petition no. 4861/2022	M/s MAP Rice Mills (Private) Limited Versus Federation of Pakistan and others
22	Writ Petition no. 4864/2022	M/s Al-Haj Pakistan Exploration Limited Versus Federation of Pakistan and others
23	Writ Petition no. 4866/2022	C. M. RAFI Versus Federation of Pakistan and others

24	Writ Petition no. 4875/2022	M/s Fauji Cement Co. Limited Versus Federation of Pakistan and others
25	Writ Petition no. 4876/2022	M/s Khyber Grace (Private) Limited Versus Federation of Pakistan and others
26	Writ Petition no. 4877/2022	M/s Bestway Cement Limited Versus Federation of Pakistan and others
27	Writ Petition no. 4879/2022	M/s Pendekar Kabirwala Power Limited Versus Federation of Pakistan and others
28	Writ Petition no. 4896/2022	M/s National Radio & Telecommunication Corporation Versus Federation of Pakistan and others
29	Writ Petition no. 4897/2022	M/s Arshad Mehmood Islamabad Versus Federation of Pakistan and others
30	Writ Petition no. 4899/2022	M/s UCH Power (Private) Limited Versus Federation of Pakistan and others
31	Writ Petition no. 4901/2022	M/s UCH-II Power (Private) Limited Versus Federation of Pakistan and others
32	Writ Petition no. 4904/2022	M/s Attock Petroleum Limited Employee Welfare Trust Versus Federation of Pakistan and others
33	Writ Petition no. 4915/2022	M/s Mari Petroleum Company Limited Versus Federation of Pakistan and others
34	Writ Petition no. 4924/2022	M/s Bahawalpur Engineering Limited Versus Commissioner Inland Revenue, etc.
35	Writ Petition no. 35/2023	Muhammad Fiaz Haider Versus Federation of Pakistan and others

36	Writ Petition no. 36/2023	Pakistan Television Corporation PTV Versus Federation of Pakistan and others
37	Writ Petition no. 49/2023	M/s Fauji Fertilizer Bin Qasim Limited etc. Versus Federation of Pakistan and others
38	Writ Petition no. 58/2023	Sohail Khattak Versus Federation of Pakistan and others
39	Writ Petition no. 74/2023	M/s Jadeed Feeds Industries ((Private)) Limited Versus Federation of Pakistan and others
40	Writ Petition no. 84/2023	Abdul Wahab Abbasi Versus Federation of Pakistan and others
41	Writ Petition no. 85/2023	M/s Gabor Kocsis Versus Federation of Pakistan and others
42	Writ Petition no. 106/2023	Anjum Ashraf Versus Federation of Pakistan and others
43	Writ Petition no. 139/2023	M/s Kohat Textile Mills Limited Versus Federation of Pakistan and others
44	Writ Petition no. 140/2023	M/s Saif Textile Mills Limited Versus Federation of Pakistan and others
45	Writ Petition no. 141/2023	M/s Saif Healthcare Limited Versus Federation of Pakistan and others
46	Writ Petition no. 142/2023	Iqbal Saifullah Khan Versus Federation of Pakistan and others
47	Writ Petition no. 143/2023	Javed Saifullah khan Versus Federation of Pakistan and others

48	Writ Petition no. 144/2023	Salim Saifullah Khan Versus Federation of Pakistan and others
49	Writ Petition no. 145/2023	Humayun Saifullah Khan Versus Federation of Pakistan and others
50	Writ Petition no. 146/2023	Anwar Saifullah Khan Versus Federation of Pakistan and others
51	Writ Petition no. 157/2023	M/s Islamabad Feeds (Private) Limited Versus Federation of Pakistan and others
52	Writ Petition no. 162/2023	M/s H.A. Shah & Sons Versus Federation of Pakistan and others
53	Writ Petition no. 188/2023	M/s Spud Energy (Private) Limited Versus Federation of Pakistan and others
54	Writ Petition no. 201/2023	Malik Sagheer Ahmed Versus Federation of Pakistan and others
55	Writ Petition no. 202/2023	M/s Bow Energy Resources (PAK) Versus Federation of Pakistan and others
56	Writ Petition no. 203/2023	M/s UEP Beta GmbH Versus Federation of Pakistan and others
57	Writ Petition no. 230/2023	M/s Askari Bank Limited Employees Gratuity Fund Versus Federation of Pakistan and others
58	Writ Petition no. 231/2023	M/s Askari Bank Employees Provident Fund Versus Federation of Pakistan and others
59	Writ Petition no. 245/2023	M/s Emaar DHA Islamabad Limited Versus Federation of Pakistan and others

60	Writ Petition no. 246/2023	M/s Jadeed oil Extraction (Private) Limited Versus Federation of Pakistan and others
61	Writ Petition no. 283/2023	M/s ISE Tower REIT Management Co. Versus Federation of Pakistan and others
62	Writ Petition no. 297/2023	Faiz Muhammad Versus Federation of Pakistan and others
63	Writ Petition no. 300/2023	M/s OGDCL Versus Federation of Pakistan and others
64	Writ Petition no. 302/2023	M/s Eiffel Civil & EM (Private) Limited Versus Federation of Pakistan and others
65	Writ Petition no. 312/2023	Raza Ahmed Khan Versus Federation of Pakistan and others
66	Writ Petition no. 320/2023	Sagheer Mufti Versus Federation of Pakistan and others
67	Writ Petition no. 366/2023	M/s Pakistan Mobile Communications Limited Versus Federation of Pakistan and others
68	Writ Petition no. 367/2023	Linkdotnet Telecom Versus Federation of Pakistan and others
69	Writ Petition no. 429/2023	M/s UPLHC II Limited Versus Federation of Pakistan and others
70	Writ Petition no. 430/2023	M/s International Power UCH Holding B.V. Versus Federation of Pakistan and others
71	Writ Petition no. 431/2023	M/s UPLHC I Limited Versus Federation of Pakistan and others

72	Writ Petition no. 432/2023	M/s ZTBL General Provident Fund Versus Federation of Pakistan and others
73	Writ Petition no. 441/2023	M/s Zubair Feeds (Private) Limited Versus Federation of Pakistan and others
74	Writ Petition no. 534/2023	NTC Versus Federation of Pakistan and others
75	Writ Petition no. 577/2023	Muhammad Husnain Versus Federation of Pakistan and others
76	Writ Petition no. 578/2023	Hassan Akhtar Versus Federation of Pakistan and others
77	Writ Petition no. 580/2023	Hamraz Ali Versus Federation of Pakistan and others
78	Writ Petition no. 581/2023	Muhammad Usman Versus Federation of Pakistan and others
79	Writ Petition no. 582/2023	Asghar Ali Versus Federation of Pakistan and others
80	Writ Petition no. 584/2023	Khalid Shahzad Versus Federation of Pakistan and others
81	Writ Petition no. 622/2023	M/s HM Extraction Ghee & Oil Industries Versus Federation of Pakistan and others
82	Writ Petition no. 675/2023	Wajahat Ali Versus Federation of Pakistan and others
83	Writ Petition no. 681/2023	Coate & Company Private Limited Versus Federation of Pakistan and others

84	Writ Petition no. 689/2023	NHA Versus Federation of Pakistan and others
85	Writ Petition no. 696/2023	Jan Muhammad Javaid Versus Federation of Pakistan and others
86	Writ Petition no. 774/2023	Hassan Ayub Khan Versus Federation of Pakistan and others
87	Writ Petition no. 872/2023	Shuaib Anwar Malik Versus Federation of Pakistan and others
88	Writ Petition no. 923/2023	Hashmat Iqbal Versus Federation of Pakistan and others
89	Writ Petition no. 1253/2023	Ali Akhtar Shah Versus Federation of Pakistan and others