[(2023) 127 TAX 112 (H.C. Kar.)]

[IN THE SINDH HIGH COURT, KARACHI]

Present: Muhammad Junaid Ghaffar and Agha Faisal, JJ.

SHELL PAKISTAN LIMITED & others

Versus

FEDERATION OF PAKISTAN & others

CP D 5842 of 2022
decided on 22.12.2022

(And connected matters, particularized in the Schedule[1] hereto.)

INCOME TAX ORDINANCE, 2001 (XLIX OF 2001)

Sections: 4B & 4C - Constitution of Pakistan, 1973, Articles 23, 24 & 25 - Proviso to Division 11B of Part 1 of the First schedule - Super tax for rehabilitation of temporarily displaced persons - Constitutionality of section 4C of Income Tax Ord: 2001 introduced vide Finance Act, 2022 - Unlawfully vitiates vested rights accrued in past and closed transactions, discriminatory, confiscatory, demonstrably, devoid of any intelligible differentia having rational nexus with the object of classification and amounts to impermissible double taxation - Grievance of the petitioners - **Challenge to** -

FACTS

The Petitioners had challenged the constitutionality of section 4C of the Income Tax Ordinance 2001 ("4C"), and the appurtenant 1st proviso to Division IIB of Part I of the First Schedule to the Income Tax Ordinance 2001 ("Proviso"), introduced vide Finance Act 2022, inter alia, upon grounds that the same unlawfully vitiates vested rights accrued in past and closed transactions; is discriminatory; confiscatory; demonstrably devoid of any intelligible differentia having rational nexus with the object of classification; and amounts to impermissible double taxation.

ARGUMENTS

It was the petitioners' case that section 4C ought to be struck down, inter alia, as a charging section that could not be retrospective; rights crystallized in the past could not be unhinged; no fairness was apparent from the verbiage of 4C; and it amounted to manifest arbitrariness, hence, dissonant with fundamental rights. It was articulated that in any event the

1 The Schedule hereto shall be read as an integral constituent hereof.

differentiation sought to be undertaken vide the Proviso must be quashed; on account of being discriminatory and devoid of any intelligible differentia having rational nexus with the object of classification.

It was the Federal Board of Revenue's case that since the challenge to section 4B of the Ordinance has failed, hence, the same fate ought to befall the challenge to section 4C, being pari materia thereto. Mr. Ijaz Ahmed Zahid painstakingly catalogued the annual accounts of certain sectors, included in the Proviso to attract the higher incidence of taxation, and sought to demonstrate that no intelligible differentia having any rational nexus with section 4C could be deciphered therefrom and further that no material establishing any such intelligible differentia was placed on record with the comments of the respondents.

DECISION

(A.) Fundamental questions for determination - It is our considered view that a determination herein could be clinched by answering two fundamental questions framed herein below:

i. *Whether section 4C of the Ordinance unlawfully vitiates vested rights accrued in past and closed transactions.*

ii. *Whether the 1st proviso to Division IIB of Part I of the First Schedule to the Ordinance is discriminatory and demonstrably devoid of any intelligible differentia having rational nexus with the object of classification.*

[Page 119]A.

(B.) Court should not declare a statute unconstitutional unless it also violated the letter of the legislation - A Court should not declare a statute unconstitutional on the ground that it violated the spirit of the Constitution unless it also violated the letter of the Constitution; a Court was not concerned with the wisdom or prudence of the legislation but only with its constitutionality; a Court should not strike down statutes on principles of republican or democratic government unless those principles were placed beyond legislative encroachment by the Constitution; and mala fides should not be attributed to the legislature.

[Page 129]B.

(C.) Amendment becomes a part of the original statute and both ought to be construed together - The law accepts that an amendment becomes a part of the original statute and both ought to be construed together. In case of any inconsistency, harmonization may be employed so as to impede an irreconcilable conflict.

[Page 130]C.

(D.) Super tax, levied once again, vide section 4C could not be recovered during subsistence of the benefit/protection granted to the taxpayer vide section 4B of the Ordinance - The Courts have consistently maintained that the scope of a provision could not be extended by analogy or beneficent/equitable construction in order to prevent an anomaly and if a section of a taxing statute creates doubt or ambiguity then it ought not to be construed to extract a new added obligation, not formerly cast upon the taxpayer. In such circumstances we do hereby find that super tax, levied once again, vide section 4C could not be recovered during the subsistence of the benefit/protection granted to the tax payer vide section 4B of the Ordinance.

[Page 130]D.

(E.) Protection afforded vide section 4B of the Ordinance only extends till tax year 2022 - While we remain cognizant that the legislature cannot be bound by any representation provided to us on behalf of FBR, however, even in its present form the protection afforded vide section 4B of the Ordinance only extends till tax year 2022. Therefore, subject to the conclusion recorded in the preceding paragraph, section 4C of the Ordinance is reconciled to read that the levy contemplated therein shall be applicable from tax year 2023.

[Page 131]E.

(F&G.) Proviso could not survive the test of intelligible differential - Proviso to be prime facie discriminatory without lawful sanction - In the present facts we are constrained to observe that the Proviso could not survive the test of intelligible differentia, as it could not be demonstrated that imposition of a two hundred and fifty percent (250%) higher rate of super tax was based on any intelligible differentia, having nexus with the purpose of the law.

[Page 139]F.

It is seen from the plain verbiage of section 4C that super tax has been imposed upon every person and the rate of taxation applicable is incremental, per the appurtenant schedule. The classification determinant for the rate is the income threshold and the respondents' counsel have remained unable to demonstrate any reasonableness in so far as the sub classification undertaken vide the Proviso is concerned or any nexus with the object of the levy. Therefore, we are constrained to find the Proviso to be prima facie discriminatory, hence, respectfully remain unable to accord any lawful sanction thereto.

[Page 139]G.

(H.) Super tax levied once again vide section 4C of the Ordinance, could not be recovered during the subsistence of the benefit/protection granted to the taxpayer vide section 4B of the Ordinance - The deliberation undertaken supra led us to conclude that super tax, levied once again vide section 4C of the Ordinance, could not be recovered during the subsistence of the benefit/protection granted to the taxpayer vide section 4B of the Ordinance and the only avenue to save the conflicting provisions of the law was to harmonize the same.

[Page 139]H.

[Case-law referred.]

Messrs Khalid Jawed Khan, Ovais Ali Shah, Farogh Naseem, Salman Akram Raja, Ijaz Ahmed Zahid, Jahanzeb Awan, Tariq Masood, Abid H. Shaban, Mushtaq Hussain Qazi, Anwar Kashif Mumtaz, Naveed A. Andrabi, Arshad Hussain Shehzad, Abdul Rahim Lakhani, Qazi Umair, Naeem Suleman, Ahmed Hussain, Lubna Pervaiz, Shahab Imam, Ameen M. Bandukda, Uzair Qadir Shoro, Tasawur Ali Hashmi, Fahad Ali Hashmi, Khalid Mehmood Siddiqui, Mariam Riaz, Faiz Muhammad Durrani, Ghulam Muhammad, Hanif Faisal Alam, Inzimam Sharif, Basil Nabi Malik, Omer Memon, Sufiyan Zaman, Muneeb Qidwai, Aitzaz Manzoor Memon, Abdallah Azzam Naqvi, Ajeet Kumar, Muhammad Ajmal Khan, Nadir Hussain Abro, Saifullah Sachwani, Rashid Khan Mehar, Ahmed Ali Hussain, Mohammad Aizaz Ahmed, Darvesh K. Mandhan, Muhammad Adnan Motan, Waqar Ahmed, Atir Aqeel Ansari, Hamza Hashim, Muhammad Amayed Ashfaq Tola, Muhammad Asad Ashfaq Tola, Muneer Ahmed, Shahbakht Pirzada, Zahid Ali Sahito, Samay Shams, Muhammad Ilyas Ahmed, Shams Mohiuddin Ansari, Furqan Mohiuddin Ansari, Ali Nawaz Khuhawar, Fahad Khan, Hamza Waheed, Yousuf Makda, Munawar uz Zaman Juna, Mohsin Khan, K. Jehangir, Rashid Mureed, S. Hassam Abidi, Jawaid Farooqi, Ammar Athar Saeed, Usman Alam, Ghulam Rasool Korai, Muhammad Taimoor Ahmed, Imtiaz Ali Sahito, Naveeda Basharat, Saima Anjum, Anas Makhdoom, Ahmed Farhaj, Muhammad Salman Aziz, Adnan Ali, Syed Zeeshan Ali, Maaz Waheed, Muhammad Aleem, Kashan Bashir Memon, Tauqeer Randhava, Muhammad Ali Bhatti, Imran Iqbal Khan, Arif Ali, Kanwar Yousuf Ali Khan, Abdul Jabbar Mallah, Arshad M. Tayebaly, Atta Mohammad Qureshi, Shahzad Saeed, Aurangzeb, Mashooq Ali Soomro, Muhammad Aziz, Ghazala Rafiq, Ellahi Bakhsh Qureshi, Muneer Ahmed Sahito, Saifullah Khawaja, Farhad Khan, Abdul Rehman Adeed, Mariam Salahuddin, Arshad M. Tayebaly, Sameera Iqbal, M. Mohsin Khan, Jamal Nasir, Omrazia Nadeem, Ghulam Nabi Abbasi, Shazia Aziz Khan, Muhammad Syed, Muhammad Hassan Meerza,

Naveed Sultan, Faheem Bhayo, Raghib Ibrahim Junejo, Sagar Ladhani, Awais Farooqi, Umer Ilyas Khan, Kanwar Mujahid Ali Khan, S.M. Hassan, Subhan Tasleem, Meerajuddin, Advocates for the Petitioners.

Messrs Faisal Siddiqi, Shah Nawaz Memon, Ghazi Khan Khalil, Ameer Bakhsh Metlo, Ameer Nausherwan Adil Memon, S. Ahsan Ali Shah, Huma Sodher, Amna Usman, Shakoh Zulqarnain, Syed Mohsin Imam Wasti, Fozia M. Murad, Imran Ali Metlo, Fayyaz Ali Metlo, Muhammad Aqeel Qureshi, Bilal Memon, Imran Mithani, Mohsin Mithani, Hayat Muhammad Junejo, Abdul Hakeem Junejo, Abdul Razaque Panhwer, Shaheer Saleem Memon, Zain Mustafa Soomro, S. Mohsin Ali Shah, Asif Ali Siyal, Abid Ali, Abdul Sami, Zohib, Khan, Abdul Shakoor Mangi, Zubair Hashmi, Bushra Zia, Faheem Raza, Ali Tahir Soomro, Ayaz Sarwar Jamali, Mian Rafiq Ahmed Tunio, Arshad Ali Tunio, Sajjad Ali Solangi, Qaim Ali Memon, Syed Shafqat Ali Shah Masoomi, Muhammad Idrees, Mehmood Hussain, Advocates, Syed Yasir Ahmed Shah (Assistant Attorney General), Qazi Ayazuddin (Assistant Attorney General) & Abdul Wahid Shar (Additional Commissioner, Inland Revenue, LTO, Karachi) for the Respondents.

Dates of hearing: 23.11.2022 28.11.2022 05.12.2022 06.12.2022 07.12.2022 08.12.2022 12.12.2022 14.12.2022 15.12.2022 19.12.2022 20.12.2022 22.12.202201

J U D G M E N T

[The Judgment of the Court was delivered by Agha Faisal, J.] The Petitioners had challenged the constitutionality of Section 4C of the Income Tax Ordinance 2001 ("4C"), and the appurtenant 1st proviso to Division IIB of Part I of the First Schedule to the Income Tax Ordinance 2001 ("Proviso"), introduced vide Finance Act 2022, *inter alia*, upon grounds that the same unlawfully vitiates vested rights accrued in past and closed transactions; is discriminatory; confiscatory; demonstrably devoid of any intelligible differentia having rational nexus with the object of classification; and amounts to impermissible double taxation.

The present petitions were advocated with respect to the *vires*[1] and were allowed to the extent of our short order, announced in Court at the conclusion of the final hearing, on 22.12.2022. These are the reasons for our short order.

1 It merits mention that no other issue was placed / agitated before this Court, irrespective of the pleadings in the respective petitions.

Factual context

2. In contemporary times, super tax was imposed vide section 4B[1] of the Income Tax Ordinance 2001 ("Ordinance"), having been inserted in the Ordinance through Finance Act 2015, and the levy was upheld by the respective High Courts[2]. The edicts of the High Courts are pending appeal before the honorable Supreme Court.

3. Super tax was imposed once again, vide insertion of section 4C[3] in the Ordinance vide Finance Act 2022. While the charge was expressed to befall upon the income of every person on the rates specified in Division IIB of Part I of the First Schedule to the Ordinance, the Proviso[4] thereof raised the incidence of tax exponentially upon entities partly or wholly engaged in certain businesses cited therein. This *vires* of this levy/proviso is presently in challenge before us.

Respective arguments

4. It was the petitioners' case[5] that section 4C ought to be struck down, *inter alia*, as a charging section could not be retrospective; rights crystallized in the past could not be unhinged; no fairness was apparent from the verbiage of 4C; and it amounted to manifest arbitrariness, hence, dissonant with fundamental rights. It was espoused in the alternative that section 4C be read to become effective from tax year 2023, *inter alia*, as the legislative field was already occupied, in so far as tax year 2022 was concerned, vested rights created vide section 4B of the Ordinance had not been varied and irreconcilable conflict existed between Divisions IIA and IIB of Part I of the First Schedule to the

1 4B. Super tax for rehabilitation of temporarily displaced persons. (1) A super tax shall be imposed for rehabilitation of temporarily displaced persons, for tax years 2015 and onwards, at the rates specified in Division IIA of Part I of the First Schedule, on income of every person specified in the said Division…

2 HBL Stock Fund vs. AC IR reported as 2020 PTD 1742 (Division Bench Sindh High Court); DG Khan Cement vs. Pakistan reported as 2020 PTD 1186 (Division Bench Lahore High Court); Attock Cement vs. Pakistan reported as 2019 PTD 934 (Single Bench Islamabad High Court).

3 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…

4 Provided that for tax year 2022 for persons engaged, whether partly or wholly, in the business of airlines, automobiles, beverages, cement, chemicals, cigarette and tobacco, fertilizer, iron and steel, LNG terminal, oil marketing, oil refining, petroleum and gas exploration and production, pharmaceuticals, sugar and textiles the rate of tax shall be 10% where the income exceeds Rs. 300 million.

5 Articulated by Dr. Farogh Nasim, Mr. Khalid Jawed Khan, Mr. Salman Akram Raja, Mr. Ijaz Ahmed Zahid & Mr. Ovais Ali Shah in seriatim; complimented / adopted by the remaining learned counsel for the petitioners.

Ordinance[1]. It was articulated that in any event the differentiation sought to be undertaken vide the Proviso must be quashed; on account of being discriminatory and devoid of any intelligible differentia having rational nexus with the object of classification[2].

5. It was the Federal Board of Revenue's case[3] that since the challenge to section 4B of the Ordinance has failed, hence, the same fate ought to befall the challenge to section 4C, being *pari materia* thereto. In was submitted that no crystallization has taken place with respect to any right of the petitioners and that in any event there was no bar upon double and/or retrospective taxation, notwithstanding the absence of any express intendment. The learned counsel vociferously denounced the claim of discrimination and argued that perceived hardship could not be any grounds to strike down fiscal legislation. It was concluded that *national interest* ought to be the paramount consideration in determining these petitions and that the overlap between sections 4B and 4C of the Ordinance is being remedied in any event, with effect from the next tax year, as section 4B of the Ordinance shall be withdrawn/repealed[4].

Scope of determination

6. Heard and perused. The challenge to section 4B of the Ordinance could not be sustained by an earlier Division Bench of this Court[5] and the exposition of law expressed is binding upon us in view of the *Multiline*[6] principles. The said issue is presently pending in appeal before the Supreme Court. Therefore, this determination is rested upon the premise that section 4B of the Ordinance is valid law and due care is endeavored to determine the present *lis* in a manner that the findings with respect to section 4B of the Ordinance are not disturbed, either expressly or even by implication[7].

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1 Barrister Khalid Jawed Khan.

2 Barrister Ovais Ali Shah.

3 Articulated by Mr. Faisal Siddiqui, Advocate and complimented / adopted by the remaining learned counsel for the respondents and the learned Assistant Attorney General appearing on notice per Order XXVII-A CPC.

4 In addition to the oral arguments, this was provided, by FBR's lead counsel, to the Court in writing vide written arguments dated 12.12.2022.

5 HBL Stock Fund vs. AC IR reported as 2020 PTD 1742.

6 Multiline Associates vs. Ardeshir Cowasjee reported as 1995 SCMR 362.

7 Notwithstanding vociferous insistence to the contrary articulated by Dr. Farogh Nasim, while placing reliance inter alia upon Matiari Sugar Mills vs. Sindh reported as PLD 1999 Karachi 424 (per Sabihuddin Ahmed J). Mr. Ovais Ali Shah also complimented this submission and placed reliance upon paragraph 19 of Trustees Port of Karachi vs. Muhammad Saleem reported as 1994 SCMR 2213 (per Fazal Karim J).

7. It is settled law that courts ought to abstain from deciding larger questions, if a case could be decided on narrower grounds and that it was preferred for the courts to confine determinations to questions pivotal for the determination of a case[1]. It is our considered view that a determination herein could be clinched by answering two fundamental questions framed herein below:

i. *Whether section 4C of the Ordinance unlawfully vitiates vested rights accrued in past and closed transactions*.

ii. *Whether the 1st proviso to Division IIB of Part I of the First Schedule to the Ordinance is discriminatory and demonstrably devoid of any intelligible differentia having rational nexus with the object of classification*.

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Therefore, we proceed to consider these questions and deem it prudent to eschew deliberation upon the other arguments; which we leave for future consideration in an appropriate case/s[2].

Whether section 4C of the Ordinance unlawfully vitiates vested rights accrued in past and closed transactions.

Juxtaposition of sections 4B and 4C of the Ordinance

8. The learned counsel from both sides of the spectrum were unified in one respect that section 4C is the same *specie* of tax as that levied vide section 4B of the Ordinance. While the petitioners' counsel argued that such equivalence was fatal for section 4C in the present facts and circumstances, the respondents' counsel insisted to the contrary and averred that it was this very correlation that ought to befall the same fate on section 4C as befell section 4B of the Ordinance before this Court[3]. The FBR's lead counsel gratuitously submitted in writing[4] that the two levies were of the same specie, hence, section 4B of the Ordinance would be *discontinued* from the next tax year. Therefore, it is in this context that we had to examine whether any protected rights were created vide section 4B of the Ordinance, in the subsistence whereof section 4C could not be given effect.

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1 Per Saqib Nisar J as he then was) in LDA & Others vs. Imrana Tiwana & Others reported as 2015 SCMR 1739.

2 Per Munib Akhtar J in Shahid Gul & Partners vs. DCIT Peshawar reported as 2021 SCMR 27.

3 Having been upheld in HBL Stock Fund vs. AC IR reported as 2020 PTD 1742.

4 Written arguments dated 12.12.2022.

Pertinent law

9. We have been graciously assisted with a myriad of authority[1] demarcating the remit of rights, vested rights and past & closed transactions, however, we would be hard pressed to best the illumining description and distinction elucidated by an earlier Division Bench of this Court in *Shahnawaz*[2]:

> "11. The general principles applicable in relation to vested rights, and the extent to which they can be retrospectively affected, are well-settled and have been stated and reaffirmed many times. Thus, in Chief Land Commissioner, Sindh and others v. Ghulam Hyder Shah and others 1988 SCMR 715, it has been observed as follows:
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> "In this behalf the High Court proceeded a on a correct principle of interpretation that 'no rule of construction is more firmly established than this, that retrospective operation is not to be given to a statute so as to impair an existing right or obligation'. The main and primary rule is that every statute is deemed to be prospective, unless by express provision or necessary intendment it is to have retrospective effect. Also the rule that no statute shall be construed so as to have retrospective operation affecting vested rights to a greater extent than its language renders necessary is firmly established." (para 11)
>
> "There is another aspect of this matter which also fortifies the conclusion stated above. This Court in Province of East Pakistan v. Sharafatullah and others PLD 1970 SC 514, affirmed the established rule that a statute cannot be read in such a way as to change accrued rights the title to which consists in transactions past and closed or in facts which are events that have already occurred." (para 13)

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1 Nagina Silk Mills vs. ITO reported as PLD 1963 SC 322; East Pakistan vs. Sharafatullah reported as 1970 PLD SC 514; CIT vs. EFU Insurance reported as 1982 PLD SC 247; G H Shah vs. Chief Land Commissioner reported as 1983 CLC 1585; Al Samrez Enterprises vs. Pakistan reported as 1986 SCMR 1917; WAPDA vs. Capt. Nazir reported as 1986 SCMR 96; Chief Land Commissioner vs. G H Shah reported as 1988 SCMR 715; Molasses Trading & Export vs. Pakistan reported as 1993 SCMR 1905; Muhammad Hussain vs. Muhammad reported as 2000 SCMR 367; Shahnawaz vs. Pakistan reported as 2011 PTD 1558; Zila Council Jhelum vs. PTC reported as PLD 2016 SC 398; Al Tech Engineers vs. Pakistan reported as 2017 SCMR 673; Super Engineering vs. CIR reported as 2019 SCMR 1111; H M Extraction vs. FBR reported as 2019 SCMR 1081.

2 Per Munib Akhtar J in Shahnawaz vs. Pakistan reported as 2011 PTD 1558 ("Shahnawaz").

It will be seen that the Supreme Court spoke of both "vested rights" and "past and closed transactions". A detailed analysis of the distinction between the two need not detain us, and it suffices to note that while every past and closed transaction is normally based on, or comprises, a vested right, every vested right is not necessarily a past and closed transaction. Indeed, if rights were required to be placed in ascending order, the 'scale' could be said to comprise of a 'bare' right, a vested right and a past and closed transaction. Ordinarily, a right can be regarded as progressing from a 'bare' right to become a vested right and then perhaps even a past and closed transaction. Of course, some rights only become vested rights, and do not go beyond to become past and closed transactions. Others may vest immediately, as soon as they arise or accrue, and then may (or may not) become past and closed transactions. Some rights (though this would be a somewhat rare and unusual situation) may even become past and closed transactions once they accrue, i.e., progress to that category straight from being 'bare' rights.

12. As even this brief account shows, some care must be taken to properly analyze the nature of the right under consideration. This is all the more so because (especially in the realm of fiscal statutes) past and closed transactions appear to stand on a footing higher than vested rights. This is clearly established by the decision in Molasses Trading and Export (Pvt) Ltd. v. Federation of Pakistan and others 1993 SCMR 1905, a case relied on by learned counsel for the petitioners. The case was concerned with the grant of an exemption under the Customs Act, 1969. An exemption (which is granted by a notification issued under section 19 of the Act) can be regarded as a 'bare' right, one that can be availed of by the concerned importer. In the well-known case of Al-Samrez Enterprise v. Federation of Pakistan 1986 SCMR 1917, it was held that if the importer altered his position in reliance on the notification (e.g., by entering into a contract or opening a letter of credit), he acquired a vested right in the exemption, to which he remained entitled even if the exemption itself stood withdrawn by the time the goods arrived in Pakistan. The 'bare' right, in other words, had been transformed into a vested right. In order to undo the effect of this decision, section 31 A was added to the Customs Act (by the Finance Act, 1988), and it was deemed always to have been part of the said Act. Thus, its position was, as presently relevant, similar to that of section 214C of the 2001 Ordinance. The question before the

> Supreme Court in Molasses Trading was whether section 31A had retrospectively destroyed the vested rights recognized in Al Samrez (the goods in question having been imported before 1-7-1988). The Supreme Court unanimously held that the answer to this question was in the affirmative. However, by a majority, it was also held that those cases in which the bills of entry had been filed by or before 30-6-1988 (i.e., before the Finance Act, 1988 came into force) had become past and closed transactions, and section 31A did not apply to them, notwithstanding the absolute terms in which it had, ostensibly, been given retrospective effect. The reason why the rights in those cases had gone from being vested rights to become past and closed transactions was that, in respect of customs duties, the levy of the tax stood crystallized on the date on which the bill of entry was filed. It is well-settled (see, e.g., the Ghulam Hyder Shah's case (supra)) that retrospective statutes affecting vested rights and/or past and closed transactions are to be given the narrowest effect and interpretation that is reasonably possible. Section 31-A, being concerned with undoing the effect of the Al Samrez case, was directed towards vested rights, and could not therefore affect past and closed transactions. Molasses Trading thus nicely illustrates both how rights can move along the 'scale' referred to above, and the distinction that exists between vested rights and past and closed transactions. In relying on this case, the petitioners clearly claim that their rights in the present case should be regarded as past and closed transactions, and hence remain unaffected by section 214C. Section 177 (under which the rights are claimed) must therefore be carefully analyzed in order to ascertain whether there are at all any rights thereunder and if so, whether they can be regarded as vested rights and/or as past and closed transactions."

10. If a right is found to qualify on the anvil recognized by *Shahnawaz*, the next issue would be to determine the protection afforded thereto under the law and the judgment directly on point in such regard is *Anwar Yahya*[1]. The Court was seized of a matter where exemption with regard profits earned on account of shares purchased, given zero rating, was taken away by a subsequent amendment to the law. It was held that the tax payer had acquired a vested right and the attempt by the legislature to

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1 Per Munib Akhtar J in Anwar Yahya vs. Pakistan reported as 2017 PTD 1069 ("Anwar Yahya"); upheld by the Supreme Court in CIR vs. Pakistan (Civil Appeal 930 & 931 of 2017) judgment dated 21.09.2022 (authored by Qazi Faez Isa J).

vitiate that right was struck down. It is considered expedient to reproduce the pertinent discussion herein:

> "8. ... In our view, on a proper interpretation of section 37A the question of any rights, vested or otherwise, turns not on the state of the Table as on the date of acquisition of the shares but rather on the substantive provisions of the section itself. Here, the most crucial provision is the proviso that was omitted by the Finance Act, 2014. It will be recalled that this was in the following terms: "Provided that this section shall not apply if the securities are held for a period of more than a year". Thus, the proviso disapplied the section in its entirety in respect of shares held for more than one year. As learned counsel for the petitioners rightly submitted, section 37A is a charging provision in a fiscal statute. The proviso had therefore to be read and applied literally. In other words, it meant precisely what it said: if a given lot of shares were held for more than a year, the section simply did not apply. The question of whether there was anything to tax (i.e., whether there were any capital gains) became moot and, in effect, disappeared. It must be kept in mind that this situation is materially different from reading and applying the relevant rate from the Table. To apply the Table necessarily means (and meant) that there is something to tax and the rate of "zero" percent means only that the capital gains are being so taxed. The practical effect would of course be the same, but this should not obscure the fact that, on the legal plane, the proviso operated differently. It operated on its own footing, completely detached from and independently of the Table and, inasmuch as it disapplied the section itself, irrespective of whether there were any capital gains or not. Furthermore, the proviso had effect on a basis that could be ascertained objectively.
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> 9. For the reasons just stated, in our view it was the proviso that could, and did, create vested rights. As soon as any given lot of shares had been held for more than a year, the proviso created a right in the taxpayer that vested, the right being that section 37A did not apply in respect of those shares. And since this was a vested right, the usual rules of interpretation applicable to such rights would apply. (Those rules, being well known and established, require no elaboration and in particular the case law cited by learned counsel for the petitioners need not be considered in any detail.) In particular, the omission of the proviso could not affect the rights that had become vested in a taxpayer in respect of a lot of shares that had been held for more

> than one year. The omission of the proviso by the Finance Act, 2014 did not therefore affect rights that had vested by the time of the omission. It is to be noted that the omission did not even purport to be retrospective. Since the omission took effect from 01.07.2014, this meant that it was a vested right that section 37A would not apply in respect of any shares held for more than a year by a taxpayer, as on or before 30.06.2014. Any capital gains made on such shares, even if the disposal took place on or after 01.07.2014, could not therefore be brought to tax. Applying the foregoing analysis to the illustrative case (see para 4 above), as on 30.06.2014 the petitioner No. 3 had held the 430,000 shares in PTCL for more than a year (since the same were acquired on 28.06.2013). By reason of the proviso the petitioner had acquired a vested right in section 37A not applying to the said shares on 29.06.2014. The subsequent omission of the proviso was therefore irrelevant and any capital gains made by the petitioner on the disposal of the said shares could not be taxed in terms of section 37A regardless of the date on which they were disposed off."

In appeal[1], the Supreme Court recently upheld the judgment while unequivocally observing that they could not be persuaded to take a different view from that taken in *Anwar Yahya*.

Import of section 4B of the Ordinance

11. Section 4B was inserted in the Ordinance vide the Finance Act 2015 and originally it read as follows:

> "4B. Super tax for rehabilitation of temporarily displaced persons. (1) A super tax shall be imposed for rehabilitation of temporarily displaced persons, for tax year 2015, at the rates specified in Division IIA of Part I of the First Schedule, on income of every person specified in the said Division…"

The rate of tax of tax was provided in the relevant schedule as being 4% of the income for banking companies and 3% of the income for persons, other than a banking company, having income equal to or exceeding Five Hundred Million Rupees.

12. Through successive finance acts, section 4B was varied to include subsequent tax years and in the present form it applies in respect of "*tax years 2015 and onwards*". The relevant schedule was also subjected to

1 Per Qazi Faez Isa J in CIR vs. Pakistan (Civil Appeal 930 & 931 of 2017) judgment dated 21.09.2022.

statutory amendments from time to time and in 2019 the said provision stood modified as follows:

	Tax year 2018	Tax year 2019	Tax year 2020	Tax years 2021 2022
Banking Company	4%	4%	4%	4%
Person other than banking company having income equal to or exceeding Rs. 500 million	3%	2%	0%	0%

13. It is manifest that in the year 2019, vide the Finance Supplementary (Second Amendment) Act 2019 assented on 9th March 2019, the rate of super tax upon all persons, other than a banking company, having an income equal to or exceeding Rs. 500 million was to be zero percent (0%) for the tax years 2020,2021 and 2022. It merits unequivocal mention that this position remained unvaried vide Finance Act 2022 and subsists till date.

Creation of protected right

14. It appears that the legislature, while *levying* tax in the *specie* of super tax upon persons, other than banks, earning the qualifying quantum of income, absolved such persons from paying the said tax for the tax years 2020, 2021 and 2022. This was done in 2019 by reducing the rate from one percent (1%) to zero percent (0%), vide Finance Supplementary (Second Amendment) Act, 2019 assented on 9th March 2019, and the benefit with respect to tax years 2020 and 2021 has already been availed by the tax payer. So in summation persons earning less than Rs. 500 million were not subjected to the levy of super tax and persons earning equal or exceeding the said amount were given a respite from levy thereof for the period, including the tax year 2022 in scrutiny before us.

15. The Parliament has the right to levy, assess and recover tax and is equally empowered to confer any exemption or benefit in such regard[1]. Such a benefit/exemption is a statutorily conferred right, as valid during its subsistence as the levy from which it absolves a tax payer. In the said context the exemption from payment of super tax for the relevant tax periods, including tax year 2022, is a statutorily conferred protected right conferred upon the tax payer and nothing has been demonstrated before us to consider the same as anything but a vested right, as recognized in *Shahnawaz*[2].

1 H M Extraction vs. FBR reported as 2019 SCMR 1081.

2 Per Munib Akhtar J in Shahnawaz vs. Pakistan reported as 2011 PTD 1558 ("Shahnawaz").

Subsistence of the vested right

16. While the legislature had the right to confer a right, being a benefit in the present case, nothing was placed before us to consider any hindrance upon the legislature to expressly modify, vary and/or determine the same. It is apparent that the legislature has not made any effort to determine, in any manner whatsoever, the benefit extended to the tax payer from payment of super tax for the tax years 2020, 2021 and 2022. However, it was the respondents' case that the protected right created vide section 4B stood impliedly superseded, with retrospective effect, by insertion of section 4C.

17. Mr. Khalid Jawed Khan had drawn parallels with similar litigation in the past and demonstrated that in *Elahi Cotton*[1] the presence of a non-obstante clause was crucial to saving the levy and; in *PIDC*[2] the existence of the express phrase "*in addition to*" was considered crucial. He articulated that section 4C was devoid of any non-obstante provision, deeming provision, the phrase "*in addition thereto*" or even the phrase "*subject to this Ordinance*"[3], hence, could not be sustained *inter alia* as impermissible double taxation. While considering this argument in its entirety might imperil our conscious endeavor to eschew any deliberation that might have an implication on section 4B of the Ordinance, however, we see no cavil to circumscribing the consideration of this argument to the extent that without any overriding effect expressed in section 4C, could the same be permitted to vitiate the protected vested rights created vide section 4B of the Ordinance. The answer to this issue has already been illumined by a Division bench of this Court in *Anwar Yahya*[4].

18. In *Anwar Yahya* an exemption given by statute was subsequently rescinded by amendment of the said provision itself. This High Court found that since vested rights had been created in favor of the tax payer, therefore, the rescission undertaken was found to be impermissible. The judgment found favor with the Supreme Court and the appeals there against were recently dismissed[5]. It is our considered opinion that the petitioners' case before us stands on a much more advantageous footing since the protection granted/vested right created in favor of tax payers, with respect to super tax, vide section 4B of the Ordinance remains in the

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1 Per Ajmal Mian J in Elahi Cotton Mills vs. Pakistan reported as PLD 1997 SC 582.

2 Per Saleem Akhtar J in PIDC vs. Pakistan reported as 1992 SCMR 891.

3 As manifest inter alia in sections 4, 5AA, 6, 7, 7B, 7C, 7D and 8 of the Ordinance.

4 Per Munib Akhtar J in Anwar Yahya vs. Pakistan reported as 2017 PTD 1069 ("Anwar Yahya"); upheld by the Supreme Court in CIR vs. Pakistan (Civil Appeal 930 & 931 of 2017) judgment dated 21.09.2022 (authored by Qazi Faez Isa J).

5 Per Qazi Faez Isa J in CIR vs. Pakistan (Civil Appeal 930 & 931 of 2017) judgment dated 21.09.2022.

field and consequently it is now incumbent upon this Court to determine the effect, if any, to be given to section 4C.

Recourse to settled principles of interpretation of fiscal statutes

19. *Rowlatt* J observed in *Cape Brandy Syndicate*[1] more than a century ago that in a taxing Act one has to look merely at what is clearly said. There is no presumption as to tax and one ought to only look fairly at the language employed. Our jurisprudence[2] enshrines the legal principles that there is no intendment or equity about tax, especially with regard to a charging provision,[3] and the provisions of a taxing statute must be applied as they stand; a provision creating a tax liability must be interpreted strictly in favor of the taxpayer and against the revenue authorities; any doubts arising from the interpretation of a fiscal provision must be resolved in favor of the taxpayer; if two reasonable interpretations are possible, the one favoring the taxpayer must be adopted; when a tax is clearly imposed by a statutory provision any exemption from it must be clearly expressed in the statute or clearly implied from it; where the taxpayer claims the benefit of such express or implied exemption, the burden is on him to establish that his case is covered by the exemption; the terms of the exemption ought to be reasonably construed; and if a taxpayer is entitled to an exemption on a reasonable construction of the law it ought not to be denied to him by a strained, strict or convoluted interpretation of the law.

20. The view of the Indian Supreme Court had also been consistent with the aforesaid until the same was revisited[4] recently and it was held that while the benefit of any ambiguity in a fiscal statute, in so far as chargeability is concerned, may inure to the benefit of the assesse, however, an ambiguity with respect of an exemption clause must be resolved in favor of revenue. The five member bench, while overruling the earlier view conferring primacy upon the assesses even in exemption matters as enunciated *inter alia* by a three member bench in *Sun Exports*[5], held that an exemption may only be allowed to an entity that has demonstrated that its case fell squarely within the parameters enumerated

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1 Cape Brandy Syndicate vs. IR reported as [1921] 1 KB 64, 71, 12 TC 358, 366, approved by the House of Lords in Canadian Eagle Oil Co Limited vs. The King reported as 27 TC 205, 248.

2 Per Saqib Nisar J in Pakistan Television v. CIR, reported as 2019 SCMR 282; reiterating Pakistan Television v. CIR reported as 2017 SCMR 1136.

3 Per Munib Akhtar J in Citibank NA vs. Commissioner Inland Revenue reported as 2014 PTD 284; cited with approval by the honorable Supreme Court in Pakistan Television v. CIR, reported as 2019 SCMR 282.

4 Commissioner of Customs (Imports) vs. Dilip Kumar and Company reported as TS-421-SC-2018.

5 Sun Export Corporations vs. Collector of Customs reported as (1997) 6 SCC 564.

in the relevant instrument itself and that all conditions precedent had been duly satiated. It is pertinent to observe that in an apparent, subsequent in time, departure from the *PTV case*[1], our Supreme Court held in *Fitter Pakistan*[2] that even if an exemption provision was susceptible to two interpretations, the one in favor of the exchequer was to be preferred.

21. In the present facts and circumstances there is a clearly expressed statutorily protected right, in respect of super tax, created in favor of the tax payer and under no stroke of interpretation, even strained, strict or convoluted, did the benefit stand diminished before us. The tax payers have availed the benefit for two years so far and nothing has been demonstrated before us to consider them disentitled to the remaining period. This leads us to the legal effect that section 4C merits, in the scenario whereby the respondents claim that rights subsisting vide section 4B of the Ordinance have been vitiated vide section 4C, notwithstanding the manifest absence of any express legislative intent to such effect. *Viscount Simonds* had observed in *London Investment*[3] that "*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* ".

22. The Supreme Court has consistently maintained that the superior courts retain the jurisdiction to declare a legislative enactment as void or unconstitutional and the parameters in such regard were comprehensively summated in the *Imrana Tiwana*[4], wherein the following principles were required to be applied when considering the vires of a legislative enactment[5]: there was a presumption in favor of constitutionality and a

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1 Per Saqib Nisar J in Pakistan Television v. CIR, reported as 2019 SCMR 282.

2 Per Umar Atta Bandial J in Collector of Customs FBR vs. Fitter Pakistan (Pvt.) Ltd. reported as 2020 SCMR 1157.

3 London Investment & Mortgage Company Limited vs. Worthington reported as 38 TC 86, 115 (HL), [1959] 37 ITR 56,62.

4 Per Mian Saqib Nisar J. in Lahore Development Authority vs. Imrana Tiwana reported as 2015 SCMR 1739.

5 Reliance was placed upon Province of East Pakistan vs. Sirajul Haq Patwari reported as PLD 1966 SC 854; Mehreen Zaibun Nisa vs. Land Commissioner reported as PLD 1975 SC 397; Kaneez Fatima vs. Wali Muhammad reported as PLD 1993 SC 901; Multiline Associates vs. Ardeshir Cowasjee reported as 1995 SCMR 362; Ellahi Cotton Mills Limited vs. Federation of Pakistan reported as PLD 1997 SC 582; Dr. Tariq Nawaz vs. Government of Pakistan reported as 2000 SCMR 1956; Mian Asif Aslam vs. Mian Muhammad Asif reported as PLD 2001 SC 499; Pakistan Muslim League (Q) vs. Chief Executive of Pakistan reported as PLD 2002 SC 994; Pakistan Lawyers Forum vs. Federation of Pakistan reported as PLD 2005 SC 719; Messrs Master Foam (Pvt.) Ltd. vs. Government of Pakistan reported as 2005 PTD 1537; Watan Party vs. Federation of Pakistan reported as PLD 2006 SC 697; Federation of Pakistan vs. Haji Muhammad Sadiq reported as PLD 2007 SC 133; Dr. Mobashir Hassan and others vs. Federation of Pakistan & Others reported as PLD 2010 SC 265 & Iqbal Zafar Jhagra vs. Federation of Pakistan reported as 2013 SCMR 1337.

law must not be declared unconstitutional unless the statute was placed next to the Constitution and no way could be found in reconciling the two; where more than one interpretation was possible, one of which would make the law valid and the other void, the Court must prefer the interpretation which favored validity; a statute must never be declared unconstitutional unless its invalidity was beyond reasonable doubt. a reasonable doubt must be resolved in favor of the statute being valid; a Court should abstain from deciding a Constitutional question, if a case could be decided on other or narrower grounds; a Court should not decide a larger Constitutional question than was necessary for the determination of the case; a Court should not declare a statute unconstitutional on the ground that it violated the spirit of the Constitution unless it also violated the letter of the Constitution; a Court was not concerned with the wisdom or prudence of the legislation but only with its Constitutionality; a Court should not strike down statutes on principles of republican or democratic government unless those principles were placed beyond legislative encroachment by the Constitution; and mala fides should not be attributed to the Legislature. In summation, it is the duty of the Court to make every effort to save legislation. **B**

Reconciliation of the conflicting statutory provisions

23. *Lord Denning* had eloquently opined in *Seaford Court*[1] that it would certainly save the judges trouble if Acts of Parliament were drafted with divine prescience and perfect clarity. In the absence of it, when a defect appears a judge cannot simply fold his hands and blame the draftsman. A judge should ask himself the question as to how the makers of the Act would have straightened it out. A judge must not alter the material of which the Act is woven, but he can and should iron out the creases.

24. At the risk of repetition, in order to illustrate the conflict under consideration it is imperative to reproduce the prevailing text of section 4B of the Ordinance with underline added for emphasis:

> "4B. Super tax for rehabilitation of temporarily displaced persons. (1) ***A super tax*** *shall be* ***imposed*** for rehabilitation of temporarily displaced persons, *for* ***tax years 2015 and onwards, at the rates specified in Division IIA of Part I of the First Schedule****, on* ***income of every person*** *specified in the said Division …*"

25. It is *prima facie* apparent from the plain verbiage of the provision that super tax is to be recovered from *every person*, subject to qualifying

1 Seaford Court Estates Limited vs. Asher [1949] 2 All ER 155, 164 (CA)

quantum of income, on the basis delineated in the identified schedule. It is also an incontrovertible fact that the relevant schedule precludes recovery of super tax from *every person* for a period inclusive of tax year 2022, hence, there is a manifest inconsistency with section 4C, which seeks to recover super tax for the tax year 2022.

26. The law accepts that an amendment becomes a part of the original statute and both ought to be construed together. In case of any inconsistency, harmonization may be employed so as to impede an irreconcilable conflict. While an amendment, being considered as the last expression of the will of the legislature, generally prevails, however, such effect is prospective and would not be given any retroactive construction, overriding effect on prior rights, unless the verbiage of the provision makes such construction necessary[1]. **C**

27. The Supreme Court[2] has maintained that where on true construction of two provisions of same statute two views were possible, one resulting in an anomaly and the other in harmony, a Court must adopt the latter and endeavor to harmonize and reconcile the provisions, instead of making such provisions inconsistent or repugnant *inter se*. The Indian Supreme Court summarized the essence of the rule of harmonious construction in *Price Waterhouse*[3] and observed that the courts should avoid a head on clash between two provisions of a statute and construe the provisions harmoniously. It was categorically held that provisions of one section of a statute could not be used to defeat the other, unless, despite efforts, the Court finds impossible to effect reconciliation.

28. It is already established that section 4B of the Ordinance conferred protected rights upon a tax payer, qualifying as vested rights upon the anvil of *Shahnawaz*[4]. It is also our deliberated view that such rights could not be vitiated in the manner suggested by the respondents, in view of the binding precedent of *Anwar Yahya*[5]. The Courts have consistently maintained that the scope of a provision could not be extended by analogy or beneficent/equitable construction in order to prevent an anomaly[6] and if a section of a taxing statute creates doubt or ambiguity **D**

1 The Construction of Statutes by Earl T Crawford; page 622.

2 Per Muhammad Bashir Khan Jehangiri J in Bashir Ahmed vs. Member BOR Punjab reported as PLD 1997 SC 294.

3 ICAI vs. Price Waterhouse reported as 1997) 6 SCC 312. Reference is also made to Sri Venkatramana Thevaru vs. State of Mysore reported as AIR 1958 SC 255.

4 Per Munib Akhtar J in Shahnawaz vs. Pakistan reported as 2011 PTD 1558 ("Shahnawaz").

5 Per Munib Akhtar J in Anwar Yahya vs. Pakistan reported as 2017 PTD 1069 ("Anwar Yahya"); upheld by the Supreme Court in CIR vs. Pakistan (Civil Appeal 930 & 931 of 2017) judgment dated 21.09.2022 (authored by Qazi Faez Isa J).

6 Per Shadi Lal CJ in Jiwan Das vs. CIT reported as 4 ITC 40, 46 (FB).

then it ought not to be construed to extract a new added obligation, not formerly cast upon the tax payer[1]. In such circumstances we do hereby find that super tax, levied once again, vide section 4C could not be recovered during the subsistence of the benefit/protection granted to the tax payer vide section 4B of the Ordinance.

29. While we remain cognizant that the legislature cannot be bound by any representation provided to us on behalf of FBR[2], however, even in its present form the protection afforded vide section 4B of the Ordinance only extends till tax year 2022. Therefore, subject to the conclusion **E** recorded in the preceding paragraph, section 4C of the Ordinance is reconciled to read that the levy contemplated therein shall be applicable from tax year 2023.

Whether the 1st proviso to Division IIB of Part I of the First Schedule to the Ordinance is discriminatory and demonstrably devoid of any intelligible differentia having rational nexus with the object of classification.

30. The Proviso under scrutiny reads as follows:

> "Provided that for tax year 2022 for persons engaged, whether partly or wholly, in the business of airlines, automobiles, beverages, cement, chemicals, cigarette and tobacco, fertilizer, iron and steel, LNG terminal, oil marketing, oil refining, petroleum and gas exploration and production, pharmaceuticals, sugar and textiles the rate of tax shall be 10% where the income exceeds Rs. 300 million."

31. It is manifest from the Proviso that it was to be effective only for the tax year 2022 and we have already read section 4C of the Ordinance to be applicable from tax year 2023. However, Mr. Ovais Ali Shah convincingly articulated that the legality of the Proviso merits scrutiny by the Court as it is discriminatory and demonstrably devoid of any intelligible differentia having rational nexus with the object of classification. It was submitted that eschewing such deliberation presently would only encourage multiplicity of litigation in the event that the Proviso was given effect for the tax year 2023 (and/or onwards) or the legislature amended section 4B of the Ordinance, to reconsider the benefit granted therein with respect to tax year 2022, prior thereto.

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1 Per Lord Buckmaster in F L Smidth & Co vs. Greenwood reported as 8 TC 193, 206 (HL).

2 Reference is made to FBR's representation that section 4B of the Ordinance is to be rescinded and 4C would be the only surviving provision with respect to super tax.

Discrimination & intelligible differentia

32. Article 25[1] of the Constitution envisages equality between citizens, however it allows for differential treatment of persons not similarly placed under a reasonable classification. Provided that the reasonable classification has to be based upon intelligible differentia having a nexus with the object sought to be achieved. [2]

33. In a recent judgment of this bench in *Hakimsons*[3] the issue of discrimination, in the context of fiscal legislation, was discussed. It was held that it has to be established from the legislation that it has discriminated within the same class of persons and in order for the law to be struck down, on the touchstone of Article 25 of the Constitution, it must be demonstrated that the said law is not based on intelligible criteria, devoid of nexus with the purpose of the law[4]. *I A Sherwani*[5] was relied upon to observe that equal protection of law does not envisage that every citizen is to be treated alike in all circumstances, however, it does contemplate that persons similarly situated or similarly placed are to be treated alike. It was maintained that reasonable classification is permissible provided it is based on an intelligible differentia, which distinguishes persons or things that are grouped together from those who have been left out, and that the differentia must have rational nexus to the object sought to be achieved by such classification.

34. In a recent pronouncement *Azam Shah*[6], the august Supreme Court was pleased to sieve through a myriad of authority to illustrate the doctrine of intelligible differentia:

> "The catchphrase "intelligible differentia" connotes dissimilarity or disparity capable of being comprehended. The classification must be based on an intelligible differentia which should distinguish the persons that are grouped together from others left out of the group and the differentia or categorization/ cataloguing must have a logical and commonsensical nexus with the object sought to be achieved. The concept of reasonableness is rationally a fundamental component of equality or non-arbitrariness. In the case of Dr. Mobashir Hassan v. Federation

1 All citizens are equal before law and are entitled to equal protection of law…

2 Per Umar Atta Bandial J in Hadayatullah vs. Pakistan reported as 2022 SCMR 1691.

3 Per Muhammad Junaid Ghaffar J in Hakimsons Impex vs. Federation of Pakistan (CP D 4146 of 2022) and connected matter; yet to be reported judgment dated 28.10.2022.

4 Sheraz Kaka vs. Federation of Pakistan reported as 2018 PTD 336.

5 1991 SCMR 1041.

6 Per Muhammad Ali Mazhar J in Syed Azam Shah vs. Pakistan reported as 2022 SCMR 1691.

of Pakistan (PLD 2010 SC 265), this Court held that intelligible differentia distinguishes persons or things from the other persons or things, who have been left out. The definition of classification "intelligible differentia" means differentiating between two sets of the people or objects, all such differentiations should be easily understood and should not be artificial. Whereas in the case of Secretary Economic Affairs Division, Islamabad and others. v. Anwarul Haq Ahmed and others (2013 SCMR 1687), this Court held that by now it is well settled that equality clause does not prohibit classification for those differently circumstanced provided a rational standard is laid down. The protection of Article 25 of the Constitution can be denied in peculiar circumstances of the case on basis of reasonable classification founded on an intelligible differentia which must have rational nexus to the object sought to be achieved by such classification. Reference: I.A. Sharwani v. Government of Pakistan (1991 SCMR 1041) and Tariq Aziz-ud-Din and others (Human Rights cases Nos.8340 of 2009, etc.) (2010 SCMR 130). In the case of Muhammad Shabbir Ahmed Nasir v. Secretary, Finance Division, Islamabad and another (1997 SCMR 1026), the petitioner contended that the Government has meted out discriminatory treatment to the employees serving in BPS 17 to 22 and deprived them from Secretariat Allowance while Secretariat Allowance being paid to the employees serving in BPS 1 to 16 was kept intact. The Court held that the Secretariat Allowance was not payable to all the employees of the Federal Government but it was admissible to only those employees of Federal Government who were serving in the Federal Secretariat, attached departments and offices. The Court articulated the principles of reasonable classification: (i) that equal protection of law does not envisage that every citizen is to be treated alike in all circumstances, but it contemplates that person similarly situated or similarly placed are to be treated alike; (ii) that reasonable classification is permissible but it must be founded on reasonable distinction or reasonable basis; (iii) that different laws can validly be enacted for different sexes, persons in different age groups, persons having different financial standings, and persons accused of heinous crimes; (iv) that no standard of universal application to test reasonableness of a classification can be laid down as what may be reasonable classification in a particular set of circumstances, may be unreasonable in the other set of circumstances; (v) that a law applying to one person or one

> class of persons may be Constitutionally valid if there is sufficient basis or reason for it but a classification which is arbitrary and is not founded on any rational basis is no classification as to warrant its exclusion from the mischief of Article 25; (vi) that equal protection of law means that all persons equally placed be treated alike both in privileges conferred and liabilities imposed; (vii) that in order to make a classification reasonable, it should be based (a) on an intelligible differentia which distinguishes persons or things that are grouped together from those who have been left out; (b) that the differentia must have rational nexus to the object sought to be achieved by such classification."

35. In *Tariq Mahmood*[1] the Supreme Court considered the import of such principles in the context of fiscal laws and observed that while the courts considered fiscal legislation with greater latitude, in terms of selecting the persons liable to tax (or exemption), the objects of taxation, the methods employed and as to the rates of taxation, however, the latitude so granted was not infinitely elastic and it was not as though the courts regarded taxation to be wholly beyond the purview of Article 25[2].

Proviso on the anvil of the law

36. Section 4C of the Ordinance imposes super tax on persons[3] having qualifying income at rates specified in the pertinent schedule, being:

Income	Rate of tax
Where income does not exceed Rs. 150 million	0% of income
Rs. 150 million to Rs. 200 million	1% of income
Rs. 200 million to Rs. 250 million	2% of income
Rs. 250 million to Rs. 300 million	3% of income
Where income exceeds Rs. 300 million	4% of income

37. The verbiage of section 4C of Ordinance and the pertinent division in the schedule make it clear that the levy is on the income of *every person* and the differentiation in respect of the quantum of income is the determinant factor for application of the designate tax rate. A plain reading shows that the higher the level of income the higher is the incidence of taxation intended. Similar treatment was accorded under

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1 Per Umar Munib Akhter J in CIR Peshawar vs. Tariq Mehmood reported as 2021 SCMR 440.

2 Reference was made to Amin Soap Factory's case reported as PLD 1976 SC 277 & Elahi Cotton Mills vs. Pakistan reported as PLD 1997 SC 582.

3 Other than banking companies.

section 4B of the Ordinance as well and we have been assisted with no argument to consider such classification as anything but reasonable; and having a nexus with the objective of the levy.

38. However, the Proviso was added to Division IIB of Part I of the First Schedule to the Ordinance to create a further sub-classification:

> "Provided that for tax year 2022 for persons engaged, whether partly or wholly, in the business of airlines, automobiles, beverages, cement, chemicals, cigarette and tobacco, fertilizer, iron and steel, LNG terminal, oil marketing, oil refining, petroleum and gas exploration and production, pharmaceuticals, sugar and textiles the rate of tax shall be 10% where the income exceeds Rs. 300 million."

So as a consequence of the Proviso, a person subject to tax at the designated rate would automatically become liable to a tax rate two hundred and fifty percent (250%) higher simply because of being partly/wholly engaged in the businesses listed therein.

39. In order to consider whether the Proviso could be saved as *reasonable classification*, we were guided by the judgments in *Nasir Ali*[1] and *Lucky Cement*[2].

40. The facts in *Nasir Ali* were that an internally displaced persons tax had been imposed on salaried persons having income of Rs. 1 million and above at the rate of five percent (5%), however, vide a proviso the rate of the same tax payable on bonus of corporate employees was to be thirty percent (30%). A Division Bench of this Court held that the additional incidence of taxation on the bonus of corporate employees was discriminatory, hence, *void ab initio*. Per Dr. Farogh Nasim, *Nasir Ali* has been upheld by the Supreme Court recently, however, the order in such regard was awaited. Learned counsel for the respondents articulated no cavil in such regard.

41. In *Lucky Cement*, the Supreme Court was seized of a claim for discrimination in respect of different rates of property tax upon similarly placed cement manufacturers. The differentiation was struck down by the Supreme Court and the illumining observations are reproduced herein below:

> "6. Article 25 of the Constitution mandates equality before the law and Article 18 of the Constitution secures the right to

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1 Syed Nasir Ali vs. Pakistan reported as 2010 PTD 1924.

2 Per Qazi Faez Isa J in Lucky Cement vs. Khyber Pakhtunkhwa reported as 2022 SCMR 1994.

conduct any lawful trade or business. If both these Articles are read together and applied to the present case it means that the appellant cannot be made to face a more onerous tax regime than its competitors. It would be appropriate to reproduce applicable extracts from the five-member Bench decision of this Court in the case of I.A. Sharwani v. Government of Pakistan.

> '(i) that equal protection of law does not envisage that every citizen is to be treated alike in all circumstances, but it contemplates that persons similarly situated or similarly placed are to be treated alike;
>
> (ii) that reasonable classification is permissible but it must be founded on reasonable distinction or reasonable basis;'
>
> '(v) that a law applying to one person or one class of persons may be constitutionally valid if there is sufficient basis or reason for it, but a classification which is arbitrary and is not founded on any rational basis is no classification as to warrant its exclusion from the mischief of Article 25;
>
> (vi) that equal protection of law means that all persons equally placed be treated alike both in privileges conferred and liabilities imposed;
>
> (vii) that in order to make a classification reasonable, it should be based-
>
> (a) on an intelligible differentia which distinguishes persons or things that are grouped together from those who have been left out;
>
> (b) that the differentia must have rational nexus to the object sought to be achieved by such classification.'

The aforesaid principle was enunciated in a service matter but it is equally applicable in matters of taxation. In the case of Collector of Customs v. Flying Kraft Paper Mills (Pvt.) Ltd. it was held, by a three-Member Bench of this Court, that, 'while there is a power in the Legislature and other taxing authorities to classify persons or properties into categories and to subject them to different rates of taxes, there is none to target incidence of taxation in such a way that similarly placed persons are dealt with not only dissimilarly but discriminately.' Therefore, we have no hesitation in declaring that the treatment meted out to the appellant to the extent of imposing property tax on its

buildings at a higher rate than which was imposed on the buildings of other cement manufacturers was discriminatory and to such extent it is illegal and ultra vires.

7. The Legislature of the Province had granted to the Government of the Province the power under section 42(5) of the Act (reproduced above) which it is to exercise in appropriate cases, including when similarly placed persons/entities/buildings were being treated discriminatingly or one was given an unfair or unreasonable advantage over another similarly placed. However, the Government did not exercise the power that the Act had granted to it under section 42(5) of the Act. In the case of Abu Bakar Siddique v. Collector of Customs it was held that, 'It is settled law that discretion must not be exercised to curtail the purpose of law and offend the statute rather the discretion must be exercised to advance the cause of justice in just, fair and reasonable manner. The failure to exercise the discretionary power under the statute without any legal justification would amount to refusal to use such power in an arbitrary and capricious manner.'

8. When the Government was aware of, or had been informed, that discrimination was taking place and an unfair/ unreasonable benefit/advantage was given to the appellant's competitors for no discernible reason it was incumbent upon the Government to exercise its powers under section 42(5) of the Act and rationalize matters, and its failure to do so would mean that it was acting in an arbitrary and capricious manner, which was not permissible. The United Kingdom's House of Lords had 142 years ago in the case of Frederic Guilder Julius v. The Lord Bishop of Oxford, held that that, 'giving a power is prima facie merely enabling the donee to act, and so may not inaccurately be said to be equivalent to saying he may act, yet if the object of giving the power is to enable the donee to effectuate a right, then it is the duty of the donee of the powers to exercise the power when those who have the right call upon him to do so.' This principle of interpretation of statutes was approved and reiterated by the House of Lords in the 2012 in the case of M. v Scottish Ministers.

9. The only question now remaining for consideration is how to undo the effect of the stated discrimination and unfair treatment meted out to the appellant, and whether the property tax already paid by the appellant, which was in excess of the

rates imposed on identically placed buildings can be retained or it must be refunded/adjusted. In this regard the learned counsel representing the appellant referred to the decision (of a three-Member Bench of this Court) in the case of Pfizer Laboratories Ltd. v. Federation of Pakistan, wherein it was held 'that the money paid by a citizen to a public authority in the form of taxes or other levies paid pursuant to an ultra vires demand by the authority is prima facie recoverable by a citizen as of right.' In that decision this Court had referred to the House of Lords decision in the case of Tower Hamlets London Borough Council v. Chetnik Developments Ltd. where it was said 'that the retention of moneys known to have been paid under a mistake at law, although it is a course permitted to an ordinary litigant is not regarded by the Courts as a 'high-minded thing' to do but rather as a 'shabby thing' or a 'dirty trick'.'

10. Therefore, for the aforesaid reasons, this appeal is allowed by setting aside the impugned judgment. Consequently, we direct the respondents to treat the buildings of the appellant in like manner to those of other cement manufacturers in the Province for purposes of property tax. Needless to state that if an intelligible differentia or criterion regarding the imposition of property tax on the buildings of cement manufacturers is made in the future, and it is permissible with the applicable law and accords therewith, the taxing authority/Government may impose property tax in accordance therewith. As regards the property tax already paid by the appellant, which was at a rate higher than that which was imposed on the buildings of other cement manufacturers, the difference in such amount is to be repaid to the appellant or adjusted with regard to the appellant's future property tax liability, and this be done within two months."

42. Mr. Ijaz Ahmed Zahid painstakingly catalogued the annual accounts of certain sectors, included in the Proviso to attract the higher incidence of taxation, and sought to demonstrate that no intelligible differentia having any rational nexus with section 4C could be deciphered therefrom and further that no material establishing any such intelligible differentia was placed on record with the comments of the respondents. It was argued that the respondents' submissions did not even indicate, let alone establish, any qualifying intelligible differentia and that the entire justification advanced in support of the Proviso was *prima facie* predicated upon non-representative sampling. The learned counsel illustrated his submissions by adverting to the airline sector, having been included in the Proviso, and submitted that since by the respondents'

own submission the sectors were chosen on the information available from the publicly listed entities in the relevant sectors, how could the annual figures of Pakistan International Airlines[1] lead the respondents to conclude that any profits, let alone excessive profits, were being made in that sector[2].

43. The Constitution confers fundamental rights upon citizens with respect to property, per Articles 23[3] and 24[4] of the Constitution, and such rights could not be abridged by measures determined to be discriminatory.

In the present facts we are constrained to observe that the Proviso could not survive the test of intelligible differentia, as it could not be demonstrated that imposition of a two hundred and fifty percent (250%) higher rate of super tax was based on any intelligible differentia, having nexus with the purpose of the law. **F**

44. It is seen from the plain verbiage of section 4C that super tax has been imposed upon *every person* and the rate of taxation applicable is incremental, per the appurtenant schedule. The classification determinant for the rate is the income threshold and the respondents' counsel have remained unable to demonstrate any reasonableness in so far as the sub classification undertaken vide the Proviso is concerned or any nexus with the object of the levy. Therefore, we are constrained to find the Proviso to be *prima facie* discriminatory, hence, respectfully remain unable to accord any lawful sanction thereto. **G**

Conclusion

45. The deliberation undertaken supra led us to conclude that super tax, levied once again vide section 4C of the Ordinance, could not be recovered during the subsistence of the benefit/protection granted to the tax payer vide section 4B of the Ordinance and the only avenue to save the conflicting provisions of the law was to harmonize the same. In addition thereto, the 1st proviso to Division IIB of Part I of the First Schedule to the Ordinance was found to be *prima facie* discriminatory and the respondents' learned counsel remained unable to demonstrate any intelligible differentia therein, having rational nexus with the object of classification. **H**

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1 Stated to be the only publicly listed airline in Pakistan.

2 Considering that the said airline has been making consistent losses and running on State subsidies since time immemorial.

3 Every citizen shall have the right to acquire, hold and dispose of property in any part of Pakistan, subject to the Constitution and any reasonable restrictions imposed by law in the public interest.

4 No person shall be deprived of his property save in accordance with law…

46. In view hereof, these petitions were allowed, in Court at the conclusion of the final hearing, per our short order dated 22.12.2022, operative constituent whereof is reproduced herein below:

"For reasons to be recorded later and subject to what is set out therein by way of amplification or otherwise, these petitions are allowed in terms of and to the extent specificated herein below:

1. Sections 4C of the Income Tax Ordinance 2001 is read to reflect that the levy shall be applicable from the tax year 2023.
2. Notwithstanding the foregoing, the 1st proviso to Division IIB of Part I of the First Schedule to the Income Tax Ordinance 2001 is declared to be discriminatory, hence, ultra vires to the Constitution.

The operation of this judgment shall remain suspended for a period of sixty days from the date hereof; hence, the securities furnished pursuant to respective *ad interim* orders shall remain intact for the said period."

These are the reasons for our short order. The office is instructed to place a copy hereof in each of the connected petitions.

Order accordingly.

Schedule

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