



TLQC2550= Section 7E at SCP (re SHC order) fixed but adjourned

1 message

Asif Siddiq Kasbati <asif.s.kasbati@professional-excellence.com> Sat, Nov 25, 2023 at 12:30 PM
To: "Amsal@786tax.com" <amsal@786tax.com>, Asif Siddiq Kasbati <asif.s.kasbati@professional-excellence.com>
Bcc: kc-staff123@googlegroups.com

456+ Taxes & Levies Quick Commentary (TLQC) 2550

Dear Learned Professional

A. BACKGROUND

This refers to several TLQCs (in trail, blue, italic and after double line) about Section 7E Deemed Income relating to Property and Tax thereon, especially the following relating to this TLQC:

- (a) 2375 of 19.6.23 about Section 7E - Taxpayers to pay 50% - SCP Interim order against SHC order.
- (b) 2293 & 2305 of 6.4.23 & 14.4.23 being Short & Comprehensive Commentary respectively and Way Forward due to Section 7E LHC SB order in Taxpayers' favour.
- (c) **SHC order against taxpayers (TLQC 2041 of 2.11.22 & 2102 of 6.12.22 refer) declaring IT Section 7E intra vires, SHC Detailed order's Comprehensive Commentary**, with several other LHC & IHC TLQCs.

B. UPDATED STATUS

Further to TLQC 2375 about the SCP **Interim relief order dated 22.3.23 (Attachment 2375.1)**, as per reliable sources, the cases were fixed for hearing before the SCP for the Main hearing last week, however, adjourned sine die as date in office. Hence, a Fresh Notice for hearing will be issued.

We will keep you posted of any update as soon as possible, keeping your and our time constraints.

Should you require any clarification or explanations in respect of the above or otherwise, please feel free to email us.

Best regards for Here & Hereafter
Asif S Kasbati (FCA, FCMA & LLB)

Managing Partner

Kasbati & Co (1155+ Tax, Levies, Companies, Economy, Inflation, HR, Banking, Finance, etc

Quick Commentary Service Provider and High Level 440+ Tax & Levies Laws Consultants)

Head of Tax & Professional Excellence Services (Symbols of High Quality Practical Tax, Levies & Corporate Training for Beginners to High Levels' Professionals) **PTCL:** 92-21-34329108 **Mobile:** 0334 322

3161 **Website:** kasbati.co **Facebook:** <https://www.facebook.com/taxexcellence/>

Google Map link: Tax Excellence **YouTube Channel** Tax Excellence

=====

From: **Asif Siddiq Kasbati** <asif.s.kasbati@professional-excellence.com>
Date: Mon, Jun 19, 2023 at 3:52 PM
Subject: TLQC2375= Section 7E - Taxpayers to pay 50% - SCP Interim order

Dear Learned Professional

A. BACKGROUND

This refers to several TLQCs (in trail, blue, italic and after double line) about Section 7E Deemed Income relating to Property and Tax thereon, especially the following relating to this TLQC:

(a) 2293 & 2305 of 6.4.23 & 14.4.23 being Short & Comprehensive Commentary respectively and Way Forward due to Section 7E LHC SB order in Taxpayers' favour

(b) SHC order against taxpayers (TLQC 2041 of 2.11.22 & 2102 of 6.12.22 refer) declaring IT Section 7E intra vires, SHC Detailed order's Comprehensive Commentary, with several other LHC & IHC TLQCs

(c) 2057 of 10.11.22 and reiterated through other TLQCs that although the SHC order is against the taxpayers, however, we predicted based on the Court Proceedings and somehow our Sixth Sense indicates that the LHC order is likely to be in the taxpayers' favour.

B. EXECUTIVE SUMMARY

*The SCP vide order dated 22.3.23 (Attachment 2375.1 - not on SCP web but found from reliable sources 2 - 3 days ago and sent vide KQU 2270 of 17.6.23) in CP 1442-K/2022 in case of Sher Muhammad Mughari, etc Vs FoP, etc gave verdict on the matter that the impugned SHC judgment dated 28.10.2022 (TLQC 2102 refers) upheld the levy of Income Tax under Section 7E of the IT Ordinance on Deemed Income arising from Capital Assets, subject to certain exceptions listed in Section 7E(2). The Petitioner / Taxpayers challenged the impugned Tax, inter alia, on the basis that it is beyond the legislative competence of the Federal Legislature. It was their contention that Entry 50 of the Federal Legislative. **The SCP held that the Petitioner / Taxpayers also ought not to be saddled with 100% Liability pending adjudication of these Petitions but rather with 50% thereof.***

D. DETAILS

1. Brief Facts

1.1 The impugned SHC judgment dated 28.10.2022 (TLQC 2102 refers) upheld the levy of Income Tax under Section 7E of the IT Ordinance on Deemed Income arising from Capital Assets, subject to certain exceptions listed in Section 7E(2). The Petitioner / Taxpayers challenged the impugned Tax, inter alia, on the basis that it is beyond the legislative competence of the Federal Legislature. It was their contention that Entry 50 of the Federal Legislative List allows taxation as follows:

Taxes on the capital value of the assets, not including taxes on immovable property.

(emphasis supplied)

1.2 In the present case, the main assets on which the impugned tax is levied are immovable properties. As a result, according to them the Federation is incompetent to impose the impugned tax. They next

contended that the impugned tax is discriminatory and in this respect they have highlighted the provisions of Section 7E(2)(d) which are as follows:

7E. Tax on deemed income.

.....

.....

(d) capital asset allotted to-

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

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

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

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

1.3 Thirdly, they alleged that the impugned Tax is payable on the Statement of Assets filed on 30.6.2022 and so in this sense is retrospective. Further that it is confiscatory for being levied without having regard for the paying capacity of the Taxpayers.

2. SCP Deliberation

2.1 The foregoing Contentions have been dealt with in the impugned judgment on the basis of the law laid down by the SCP in Elahi Cotton Mills Ltd. Vs FoP (PLD 1997 SC 582 - Attachment 2375.2) and as a result the levy of impugned Tax on Deemed Income has been held valid. Accordingly, the amount of Tax can now be recovered from the Petitioner / Taxpayers who are presently seeking an order restraining such recovery by way of interim relief.

2.2 The SCP also considered the argument advanced by the Learned Additional Attorney General that a law promulgated by the competent legislature cannot be suspended pending final adjudication. He has relied on the judgment of the SCP reported as FoP Vs Aitzaz Ahsan (PLD 1989 SC 61 - Attachment 2375.3) which lays down the said rule that has not been modified since. He further submits that the SHC ought not to have prevented the recovery of the amount at the time of hearing the petitions. Presently, the SCP is in the same position because on the contentions raised by the Petitioners a final adjudication is yet to be made. The Learned Counsel for the Petitioner / Taxpayers have responded to this plea by submitting that the SCP has followed a consistent policy in cases where the vires of Tax Legislation have been assailed. He has referred to the judgment of the SCP dated 26.11.20 passed in CP 1529 of 2020 etc. titled DG Khan Cement Co. Ltd. Vs FoP wherein, whilst adjudicating the vires of Section 4B, interim relief was granted to the Petitioner / Taxpayers against coercive measures by the Tax Authorities on deposit of 50% of the assessed against them.

3. SCP Decision

The SCP held that the Petitioner / Taxpayers also ought not to be saddled with 100% Liability pending adjudication of these Petitions but rather with 50% thereof.

CP 212-213 of 2023: The SCP noticed that these Petitions pertain to the vires of Section 8(2)(b) of the Finance Act, 2022 and not to the levy imposed under Section 7E. Let these Petitions be listed for hearing separately.

Should you require any clarification or explanations in respect of the above or otherwise, please feel free to email us.

*Best regards for Here & Hereafter
Asif S Kasbati (FCA, FCMA & LLB)*

From: Asif Siddiq Kasbati <asif.s.kasbati@professional-excellence.com>

Date: Fri, Apr 14, 2023 at 3:24 PM

Subject: TLQC 2305= Comprehensive Commentary & Way Forward due to Section 7E LHC SB order in Taxpayers' favour

Dear Learned Professional

A BACKGROUND

This refers to several TLQCs (in trail, blue, italics and after double line) about Section 7E Deemed income relating to Property and tax thereon, especially the following relating to this TLQC:

*(a) 2293 of 6.4.23 being a **Short Commentary** on Section 7E LHC SB decided on 6.4.23 in Taxpayers favour, as we predicted 5 months ago in November 2022*

*(b) 2057 of 10.11.22 and reiterated through other TLQCs that although the SHC order is against the taxpayers, however, **we predicted based on the Court Proceedings and somehow our Sixth Sense indicates that the LHC order is likely to be in the taxpayers' favour.***

(c) Several TLQC about LHC day to day proceedings

Also refer to the SHC order against taxpayers (TLQC 2041 & 2102 refer) declaring IT Section 7E intra vires, SHC Detailed order's Comprehensive Commentary and several other LHC & IHC TLQCs

B COMPREHENSIVE COMMENTARY - EXECUTIVE SUMMARY

Federal Legislation Competence & Scope

*The LHC vide Single Bench (SB) order dated 6.4.23 (click on the link and treat as **Attachment 2305.1**) in WP 52559 of 2022 in case of Muhammad Osman Gull Vs FoP, etc & 1,057 others gave verdict on the matter that this judgment examines Federal Legislature's competence to levy income tax on immoveable property, invoking **fiction of law** by using phrase "**A person shall be treated to have derived, as income chargeable to tax**", on capital assets owned by resident person. This presumption is enforced by inserting Section 7E in Chapter II, captioned "Charge of Tax", of Income Tax Ordinance, 2001 ("Ordinance of 2001") through Finance Act, 2022. The LHC held as follows:*

(i) To treat the market value of immovable property as income under Entry 47 is beyond the competence of Federal Legislator, hence is declared ultra vires.

(ii) The provisions of Section 7E are read down to save the taxation on Capital Value of Assets, which is within the competence of Federal Legislature under Entry 50.

(iii) The Entry 50 for taxing Capital Value of Assets requires that the assets should be valued as a whole and taxed inseparably. Curative legislation is expected to bring the provisions of Section 7E, within the spirit of taxing Capital Value of Assets, and to harmonize it with other provisions of the Ordinance of 2001.

(iv) Exclusion of persons under clauses (i), (iii) and (iv) of Section 7E(2)(d), is discriminatory, offending the Article 25, therefore, are declared ultra vires.

However, the legislature is expected to remove the pointed out expropriatory and confiscatory aspects in the provisions of Section 7E.

C COMPREHENSIVE COMMENTARY - DETAILS

1. Brief Facts

Petitioners, being taxpayers, have claimed the taxation under Section 7E as ultra vires of Federal Legislature's field of competence, listed in Entries 50 (post eighteenth amendment) and 47 of Fourth Schedule to the Constitution.

2. Learned Counsel for Petitioner Submissions

a. Federal Legislative List

2.1 Immoveable Property has completely been ousted from Federal Legislature's competence to tax, therefore, taxation of income envisaged in Entry 47, cannot be deemed for immovable property. Explained that all aspects of taxing immoveable property have been entrusted to Provincial Legislatures after the 18th Amendment in the Constitution. His emphasis was that excluding phrase in Entry 50 is not of the taxes on immovable property, which are already in provincial legislature's competence, but is of immovable property as component of capital assets. Contended that the legal fiction is employed, by inserting Section 7E, to overcome the impediment in the Constitution, which is not permissible. Argued that the power to invoke legal fiction is not unfettered and read following paragraph from the judgment in Messrs Elahi Cotton Mills Ltd., etc Vs FoP, etc (PLD 1997 Supreme Court 582 = 1997 PTD 1555 - click on the link and treat as **Attachment 2305.2**):

31. From the above case-law and the treatises, inter alia the following principles of law are deducible:

.... ..

(xxxii) That the rule of interpretation that while interpreting an entry in a Legislative List it should be given widest possible meaning does not mean that Parliament can choose to tax as income as item which in no rational sense can be regarded as a citizen's income. The item taxed should rationally be capable of being considered as the income of a citizen.

(emphasis supplied)

2.2 The change in scheme of the Constitution, after the 18th Amendment, cannot be frustrated by employing the principle of giving the widest possible meaning. Emphasized that pith and substance doctrine, needs to be invoked to foil the attempt of charging immoveable property to tax by Federal Legislature. Also placed reliance on Pak Leather Crafts Limited, etc Vs Al-Barka Bank Pakistan Limited (2022 SCMR 1868 - **Attachment 2305.3**) and Muhammad Mubeen-us-Salam, etc Vs FoP, etc (PLD 2006 Supreme Court 602 - click on the link and treat as **Attachment 2305.4**).

Discriminatory & Article 25

2.3 Referring to the prayer clause in WP 59457 of 2022 and its grounds, he has challenged exclusion of persons, in Section 7E(2)(d), by claiming it to be discriminatory, offending Article 25 of the Constitution. Reliance was placed on *FoP, etc Vs Hazrat Hussain, etc (2018 SCMR 939 - click on the link and treat as Attachment 2305.5)* and *Lucky Cement Limited, etc Vs Khyber Pakhtunkhwa, etc (2022 SCMR 1994 - Attachment 2305.6)*.

b. Wealth Tax & FLL Entry 50

2.4 Federal Legislator cannot target Immovable Property alone, while Taxing Capital Value of Assets under the Constitution, which allows taxation on the value of assets of every description. Reference was made to judgment reported as *Haji Muhammad Shafi, etc Vs Wealth Tax Officer, etc (1992 PTD 726 - Attachment 2305.7)* to submit that repealed Wealth Tax Act (promulgated before the Constitution), was held within competence of the Federal Legislature List (FLL) under Entry 50 despite been validated by Article 268 of the Constitution. Referring to the definition of “assets” in Section 2(1)(5) of the Wealth Tax Act, which used the phrase “property of every description moveable or immovable”, he read charging provisions of its Section 3, to emphasize that levy was on the value (annual letting value) of “net wealth” or “assets”.

c. Capital Value Tax

2.5 Tracing the history of taxing Capital Value of Assets, he submitted that the tax under the Wealth Tax Act was suspended by inserting proviso in Section 3 through Finance Act 2000, however, the Act was repealed through Finance Act, 2003. One time tax on capital value of assets was also levied through Section 7 of the Finance Act, 1989 and Corporate Assets Tax was introduced through Section 12 of the Finance Act, 1991. By introducing Section 8 through Finance Act, 2022 value of foreign assets are also brought to taxation, which **CVT is held intra vires by another learned Single Bench of the LHC.**

d. Fiction of Law

2.6 A receipt or a benefit received can only be deemed as income for the purpose of taxation under the Entry 47. He read definition of income under Section 2(29) to submit that it can be divided into three types; first is the **conventional form of income chargeable** to tax under different heads of income; second is the withholding or deduction of tax on the transactions under the Sections mentioned therein and third type is “any amount treated as income”. The definition is reproduced:

2. Definitions. —....

(29) “income” includes any amount chargeable to tax under this Ordinance, any amount subject to collection or deduction of tax under sections 148, 150, 152(1), 153, 154, 156, 156A, 233, subsection (5) of section 234 and any amount treated as income under any provision of this Ordinance and any loss of income.

(emphasis supplied)

2.7 Section 7E is placed under Section 4(4)(a) as separate taxation, whereby immovable property is taxed, invoking **fiction of treating 5% of the market value as income of the property for every tax year.** The fiction, he submitted, is against the settled principles of taxing income. He explained that value of acquiring an immovable property is accepted as declared and on its sale the difference between cost of acquisition and sale is taxed as capital gain, which is tax on person not property. **He continued that fair market value is determined under Section 68 based on DC rates, meant for one time levy at the time of a transaction of immovable property.** Fair market value is the expected saleable price at a relevant point of time, which being uncertain is speculative gain (not actually received), therefore, cannot be a yardstick to deem it as income and tax. The saleable price could be relevant for determining the value of an immovable property as a capital asset, like under the Wealth Tax Act annual rented value of an immovable property was the yardstick for taxation.

e. SHC order for CVT VS SCP order for Elahi Cotton for FTR

2.8 He read the judgment dated 28.10.22 by SHC (in CP D-4614 of 2022 - TLQC 2102 refers), whereby the impugned Section 7E is held *intra vires*. Submitted that the judgment is based on *Elahi Cotton Mills Case (supra)*, but relevant part of the judgment (in paragraph No. 34) was neither reproduced nor discussed. It is argued that tax under Sections 80C & 80CC was held *intra vires*, by invoking Entry 52 to tax capacity in lieu of income. **Contended that in this case the speculative value cannot be termed as capacity of an immovable property.**

f. Asset is synonymous to Property

2.9 “Capital Assets” is recognized by the statutes taxing income in the Subcontinent, starting from Income Tax Act 1922 till the Ordinance of 2001 and Indian Income Tax Act 1961. In the Ordinance of 2001, it is defined under Section 37(5), while charging tax on “capital gain”. Placing reliance on *Messrs Julian Hoshang Dinshaw Trust, etc Vs Income Tax Officer, etc (1992 PTD 1 - Attachment 2305.8)*, he argued that capital gain on immovable property cannot be taxed by the Federal Legislature under Entry 50, after the 18th Amendment. Submitted that word “assets” is synonymous to word “property” which is defined under Article 260 as under:

Property includes any right, title or interest in property, **moveable or immovable**, and any means and instruments of production;

g. Immovable Property cannot be in FLL post 18th Amendment

2.10 Under Section 75(7) business assets and personal assets are treated differently for the purpose of value. Valuation of personal assets is provided under Section 76 to determine cost for the purpose of statement under Section 116, which can be redetermined by the Commissioner Inland Revenue under Section 111 read with Section 122. He concluded that an immovable property cannot be taxed by the Federal Legislature in any form.

2.11 Mian Ashiq Hussain, Advocate presented a comparative chart of Entries, allowing taxation on Capital Value of Assets, to show the changes from Government of India Act 1935 till 18th Amendment in the Constitution of 1973. **His emphasis is that the 18th Amendment has taken away the power of imposing all taxes on immovable property including capital gain tax.**

3. Learned Counsel for Respondent Submissions

a. Section 7E as per Entry 47

3.1 Provisions of Section 7E derives legislative competence from the Entry 47; the word “income” used in the Entry is to be given widest possible meaning; a legislature having competence to tax can impose it in any legislative instrument, be it Finance Act or the IT Ordinance and that income includes deeming income as is defined under Section 2(29) of the IT Ordinance.

3.2 The arguments were elaborated by referring to different provisions of laws and various judgments from Pakistani and Indian jurisdiction. The emphasis, mainly, was on **Elahi Cotton Mills judgment to argue that anything can be deemed as income by invoking the fiction of law**. He read from page 624 of the cited judgment to argue that an interpretation intending to narrow down the meaning of word “income” in the Entry 47 should be avoided. Reading the judgment from page No. 638, he submitted that reasonableness cannot be a ground to declare a legislation as *ultra vires* and that taxing the immovable property, being policy matter, is legislative prerogative. He cited *The Madurai District Central Co-operative Bank Ltd. Vs The Third Income Tax Officer, Madurai (AIR 1975 Supreme Court 2016)* and referred page No. 656 to support the argument that a tax, within competence, can be charged through legislation in parent statute or separately through a Finance Act. Relied upon judgments in *Muhammad Khalid Qureshi v. Province of Punjab (2017 PTD 805 - click on the link and treat as Attachment 2305.9)*, *MP Vs Rakesh Kohli, etc (2013 SCMR 34 - click on the link and treat as Attachment 2305.10)* and *Lahore Development Authority, etc Vs Ms. Imrana Tiwana, etc (2015 SCMR 1739 - click on the link and treat as Attachment 2305.11)* to highlight the guidelines for Courts, while dealing with constitutional validity of a taxing statute. He placed reliance on *Hari Krishna Bhargav Vs Union of India,*

*etc (1966 AIR 619) to submit that competence can be gathered from various Legislative Entries, different nature of taxes can be imposed in one statute. He read paragraphs No. 23 and 24 from DG Khan Cement Company Limited, etc Vs FoP, etc (2020 PTD 1186 - **Attachment 2305.12**) and paragraph No.5 from judgment in FoP, etc Vs Saleem Raza (PLD 2020 Supreme Court 320 - **Attachment 2305.13**). Relied upon judgment in Bhagwan Dass Jain Vs Union of India, etc (AIR 1981 Supreme Court 907), M/s Chelmsford Club Vs Commissioner of Income Tax (AIR 2000 Supreme Court 1092) and Sakarlal Balabhai Vs Income Tax Officer, Special [(1975) 100 ITR 97 Guj] - click on the link and treat as **Attachment 2305.14**].*

b. Non-Discriminatory

He opposed the arguments on discrimination by Mr. Salman Akram Raja, Advocate and submitted that exclusion of persons from chargeability of tax is based on intelligible differentia and placed reliance on Elahi Cotton Mills's Case.

c. Discourages accumulation of wealth, so OK

*3.3 Ms. Asma Hamid, Advocate after adopting arguments by Mr. Khalid Ishaq Advocate, added that the object of taxing immovable property is to discourage accumulation of wealth, for encouraging investment in industry and other productive economic activities. She relied upon judgments in Commissioner of Income Tax Peshawar v. Director General, NWFP Employees Social Security Institution, Peshawar and another (2019 SCMR 439 - **Attachment 2305.15**) and Aisha Spinning Mills Ltd. Vs FoP, etc (1995 PTD 493 - click on the link and treat as **Attachment 2305.16**).*

d. FLL Entry 50 is competent for Section 7E

3.4 Mirza Nasar Ahmad, Additional Attorney General representing Federation and responding to the notice under Order XXVII CPC, advanced different arguments, without prejudice to the arguments already made from respondents' side submitted that incidence of tax, under the impugned Section 7E, is the value of immovable property, even if we ignore the deeming phrase used in Section 7E of the Ordinance of 2001 the tax is at 5% of fair market value of the Capital Asset, he emphasized. Reiterated that competence to legislate can be gathered from two different Entries and different taxes can be imposed in one statute. Relying on the principle that courts should strive hard to save a legislation, he submitted that the impugned provisions can be read down to harmonize it with the competence available under Entry 50, which allows taxation on Capital Value of Assets and the term assets includes immovable property. He read Entry 50 in comparison with Entry 47 and submitted that exclusion of agriculture income is from the income, being its component, whereas in Entry 50 the exclusion is of taxes on immovable property and not of immovable property as component of capital assets.

4. LHC Deliberation

a. Summing up the Arguments - Legal Fiction, Sustainability of Section 7E & Discriminatory aspects

4.1 The arguments can be summed up in following legal propositions, which need to be resolved for determining the lis in this case.

*4.2 **First** is, the extent of legal fiction for treating anything as "income tax", under Entry 47, and if impugned tax fails the test of legal fiction, **Second** is, whether the provisions of Section 7E can be saved to tax capital value of immovable property, under Entry 50, and **Third** is, sustainability of the provisions of impugned Section 7E, on being examined in light of the referred judgments and constitutional mandate along with discriminatory aspects.*

b. Philosophical Interpretation of Taxation

4.3 The legal questions raised and argued are complex to answer without understanding the spirit and nature of different types and kinds of taxes. The task is well explained in the words of great physicists of all time Albert Einstein, who influenced the philosophy of science,

The hardest thing in the world to understand is the income tax.

Taxation is the basic attribute of sovereign authority, a state cannot be run without imposition and collection of taxes as is concisely expressed by founding father and framer of the United States constitution, Benjamin Franklin, who said

Our new Constitution is now established, everything seems to promise it will be durable; but, in this world, nothing is certain except death and taxes.

Montesquieu (the French Political Philosopher) in "Spirit of Law" explained the purpose of taxation in following words,

what are taxes but the revenue collected from people for objects in which they are interested; the contribution of the people for things useful and conclusive to their welfare

Taxation is compulsory exaction or enforced contribution, collected by state, under its sovereign authority, to carry into effect its mandates and for performance of manifold functions by the governments at Federal, Provincial or Local Government level. Mukherjee J., opined in Hindu Religious Endowments v. Sri Lakshmindra (AIR 1954 SC 282);

A neat definition of what tax means has been given by Latham C.L. of the High Court of Australia in – Matthews v. Chicory Marketing Board. A „tax according to learned Chief Justice, is a compulsory exaction of money by public authority for public purposes enforceable by law and is not payment for services rendered.... It is said that the essence of taxation is compulsion, that is to say, it is imposed under statutory power without the taxpayers consent and the payment is enforced by law. The second characteristic of tax is that it is an imposition made for the public purpose without reference to any special benefit to be conferred on the payer of the tax.... Another feature of taxation is that as it is a part of the common burden, the quantum of imposition upon the taxpayer depends generally upon his capacity to pay.

c. Bifurcation of Taxation into Direct & Indirect

4.4 Taxes are mainly classified as direct and indirect. Direct tax is one, the burden of which cannot be shifted to someone else, but for indirect tax, it can be to the end consumer. Direct taxes are primarily taxes on a natural person's net income or net worth. Taxes on net income are based on the taxpayer's ability to pay and taxes on net worth are levied on the total value of his assets owned, minus liabilities. Indirect taxes are levied on the production or consumption of goods and services or on transactions, including imports and exports. The chief reason for resorting to indirect taxes is that this method enables the government, in the words of the French economist Anne Robert Jacques Turgot, "to pluck the goose without making it cry out" because those who are paying it would not perceive that what they are paying as price is really a tax. Montesquieu (the French Political Philosopher) exemplified the indirect taxation in following words;

There are two states in Europe imposts are very heavy on liquors; in one the brewer alone pays the duty, in the other it is levied indiscriminately upon all the consumers; in the first, nobody feels the rigor of the impost, in the second, it is looked upon as a grievance. In the former, the subject is sensible only of the liberty he has of not paying, in the latter, he feels only the necessity that compels him to pay.

4.5 In American Taxation system taxes are divided in three basic categories; (i) tax on what you earn, (ii) tax on what you buy and (iii) tax on what you own. Taxes on earnings include income tax on individuals and corporations, payroll tax (paid on the wages and salaries of employees to finance social securities) and capital gain tax. Taxes on buying include sales tax, value added tax and excise tax, which are also called tax on transaction. Taxes on what you own include property tax, estate, inheritance and gift tax, wealth tax or tax on value of assets.

4.6 The event or incidence of all kinds of taxation, direct or indirect, is to be decided by the legislature through enactment, influenced by political, economic, and social factors, as well as international agreements and treaties. The incidence of taxation also determines whether the tax is on a person,

property or a transaction. Taxes on a person or property are generally direct taxes, and tax on transaction is indirect for it goes with the transaction and falls where the transaction terminates.

4.7 The state's power to tax is the incident of sovereignty, exercised through legislative discretion, which cannot be curtailed on grounds of being harsh or unreasonable. Nothing but express constitutional limitation upon legislative authority can exclude anything from the grasp of taxing power. The judiciary cannot redress oppressive taxation, being a policy decision, unless the taxation exceeds legislative power or competence under the Constitution and if it offends the fundamental rights guaranteed by the Constitution.

4.8 The Constitution of Pakistan recognizes the power of taxation, as basic characteristic of sovereignty, under its Article 7, with only condition that the state should be „empowered by law to impose any tax or cess;

7. In this Part, unless the context otherwise requires, “the State” means the Federal Government, Majlis-e-Shoora (Parliament), a Provincial Government, a Provincial Assembly, and such local or other authorities in Pakistan as are by law empowered to impose any tax or cess.

(emphasis supplied)

4.9 The condition is reiterated in Article 77 as is reflected in its caption “Tax to be levied by law only”. Article 142 bestows legislative competence upon the Federation and the Provinces. The Federation has exclusive power to impose tax, through legislation, with respect to the kinds and nature of taxes mentioned in the Federal Legislative List [means Federal Legislative List in Fourth Schedule as defined in Article 70(4)] (“FLL”) and the taxes not listed therein can only be imposed by the Provinces. Following Entries in Part I, Fourth Schedule are determining the fields or areas (the kinds and types of taxation), within Federation's power of taxation.

43. Duties of customs, including export duties.

44. Duties of excise, including duties on salt, but not including duties on alcoholic liquors, opium and other narcotics.

47. Taxes on income other than agricultural income.

48. Taxes on corporations,

49. Taxes on the sales and purchases of goods imported, exported, produced, manufactured or consumed, except sales tax on services.

50. Taxes on the capital value of the assets, not including taxes on immoveable property.

4 The words “on capital gains” omitted *ibid*.

51. Taxes on mineral oil, natural gas and minerals for use in generation of nuclear energy.

52. Taxes and duties on the production capacity of any plant, machinery, undertaking, establishment or installation in lieu of the taxes and duties specified in entries 44, 47, 48 and 49 or in lieu of any one or more of them.

53. Terminal taxes on goods, or passengers carried by railway, sea or air; taxes on their fares and freights.

(emphasis supplied)

d. Constitutional History of Taxation about Entries 47 & 52 and related Entries

4.10 Entries 47 and 50 are the subject of the queries to be answered, for which phrases Capital Value of Assets, „taxes on immovable property, and „income other than agriculture income need to be understood by exploring legislative history of the Entries, spreading in different Constitutions of Pakistan, since Government of India Act 1935;

Government of India Act, 1935.

54. Taxes on income other than agricultural income.

55. Taxes on the capital value of the assets, exclusive of agricultural land, of individuals and companies; taxes on the capital of companies.

Constitution of 1956

26. Duties of customs (including export duties); duties of excise (including duties on salt, but excluding alcoholic liquor; opium and other narcotics), corporation taxes and **taxes on income other than agricultural income**; estate and succession duties in respect of property other than agricultural land; taxes on the capital value of assets exclusive of agricultural land; taxes on sales and purchases; terminal taxes on goods or passengers carried by sea or air; taxes on their fares and freights; taxes on mineral oil and natural gas.

4.11 In both, the Government of India Act 1935 and Constitution of 1956, exclusion of agriculture land implies itself that immovable property was part of the Capital Assets. As a State policy, agriculture income and agriculture land were excluded or left out of the Centre's legislative competence to tax. Same is the position in the Constitution of India till date;

The Constitution of India.

82. Taxes on income other than agricultural income.

86. Taxes on the **capital value of the assets, exclusive of agricultural land**, of individuals and companies; taxes on the capital of companies.”

The proposition, or existing confusion, stems from the Constitution of 1962 whereby “capital gains on immovable property” was excluded in the Entry 42(e), determining taxation on “Capital Value of Assets” as a field of legislation, which is reproduced:

Constitution of 1962

42. Duties and taxes, as follows:-

(c) corporation taxes and taxes on income other than agricultural income;

(e) taxes on the capital value of assets, not including taxes on capital gains on immovable property;

4.12 The intention was to save the gain from sale or transfer of immovable property from taxation as a limb of income tax. The Exclusion of „capital gain on immovable property in the Entry 42(e) had adverse effects as investments in immovable property became more profitable and secure than in industry and trade, particularly in politically turbulent times. On the socio-economic side, gap between rich and the poor classes widened due to accumulation of wealth. One of the chief purposes of direct taxes is redistribution of wealth; taxing those who can afford more and compensating those who earn less or not. Philosophy behind direct taxes is the same as is embedded in Zakat, a religious obligation, which ensures redistribution of wealth to support the deserving groups of society and on the religious side it cleanse and purifies the soul and wealth of the rich. Materially, it restricts accumulation of wealth and eliminates social inequalities. Some religious scholars believe and preach that direct taxes paid to the State is discharge of the religious obligation. In Indonesia, to avoid double burden of Zakat and tax, Zakat paid to the designated institutions is deducted from profits and taxable residual income.

4.13 The Constitution of 1973, as existing today, confers fundamental right of acquiring, holding and disposing of property in Pakistan under Article 23, however, an exception, inter alia, is under Article 24(3)(f), which empowers Federation to enact laws under Article 253 to “prescribe the maximum limits as to property or any class thereof”. Though the primary purpose of taxation is collection of revenue, taxation is also used as a tool to implement State policies, like imposition of extra taxes on the assets or wealth beyond prescribed maximum limit. Taxation on „Capital Value of Assets as a field of legislation is consistently within competence of Federation or Centre and if read with Article 253 of existing Constitution of 1973, would confer an exhaustive competence to fix a maximum limit of possessing or controlling property or to levy tax for achieving this purpose. The word Property, synonymous to word Assets, as used in the Constitution is defined under Article 260 as, “Property” includes any right, title or interest in property, moveable or immovable, and any means and instruments of production;”. It is universally accepted that Assets include property of every kind, moveable or immovable, tangible or intangible.

4.14 Since the Federal Legislature is competent to fix a maximum limit of possessing or controlling property and can levy tax, deriving competence from Entry 50, to achieve this goal, it has implicit power to control and curb ill-gotten assets as well. Accumulation of wealth through unfair means can be checked and criminalized through taxing provisions alongwith amendments in corresponding provisions of other relevant laws. Obligation to declare assets, under the Section 116, should be mandatory for all public office holders including in judiciary and armed forces, indiscriminately. The declaration from the date of assuming office should be compared with the declaration on the retiring date. If increase does not commensurate with the capacity to earn during service, the public office holder should be obliged to discharge the burden of proving that the increase was from legitimate source and that the source was not achieved through or under the influence of office he kept. The consequence should be confiscation and criminal prosecution. Further inquiry is required to understand the concepts of „Capital Gain Tax, „Capital Assets and „Property as components of capital assets.

4.15 The exclusion, by Entry 42(e) of 1962 Constitution, of taxation „on capital gain from immovable property reflected in Income Tax Act 1922 (“ITA 1922”), which was the taxing statute under Government India Act 1935. It imposed direct tax on income, including tax on capital gain and continued under the successive Constitutions of Pakistan until Income Tax Ordinance 1979 (“ITO 1979”) was promulgated. Capital Gain was always a component of income tax in the subcontinent since ITA 1922. It was taxed under its Section 12B, as a head of income [Section 6(vi)], on profits and gains arising from the sale, exchange or transfer of a capital asset. Definition of „Capital Asset was given in Section 2(4A), which read;

(4A) “capital asset” means property of any kind other than agriculture land held by an assessee, whether or not connected with his business, profession or vocation, but does not include ___

4.16 The exclusion from capital assets were stock in trade, consumable store, raw material etc. along with personal effects, described as moveable property in personal use like jewellery and furniture etc. The phrase “other than agriculture land” was omitted in 1948 and clause (iii) was inserted, “any land from which the income derived by the assessee is agriculture income”, which confirmed the intention of the framers of Constitutions that agricultural income and the land from which agriculture income is derived, was out of Federations competence in Pakistan and of the Union in India. However, after the change in Entry 42(e) of 1962 Constitution, subclause (iv) was inserted in ITA 1922 by the Act XI of 1966; “..., but does not include, (iv) for the purpose of capital gains, any immovable property”, which means for other purposes the immovable property was part of capital assets. Such exclusion was not part of ITA 1922 adopted by India, for obvious reason that the corresponding Entry 86 in First List, Seventh Schedule of Indian Constitution was unchanged. In ITO 1979, capital gain was again a head of income under Section 15(e) and was taxed under Section 27. The term „Capital Assets was defined in Section 2(11) as „property of any kind held by assessee having similar exclusions including the land, income derived from which by the assessee was agriculture income. The subsection (2)(a)(ii) of the Section 27, excluded immovable property, for the purpose of charging capital gain tax, from the definition of capital assets.

4.17 Both the taxing statute confirm that capital gain was always a head of income tax because the tax is imposed on an amount received on sale or transfer, in excess of the cost of acquisition and not the property itself. However, such receipt on sale or transfer of an immovable property was excluded from the Entry 50, not otherwise as the excluding phrase, used in the Section 27, is itself showing i.e., „for the purpose of capital gain tax. The same was the interpretation of Entry 50 before 18th Amendment, therefore, the legislature under 1962 Constitution, itself promulgated Wealth Tax Act 1963, which taxed Capital Value of all Assets, by redefining it as Net Wealth. The Supreme Court of Pakistan confirmed this interpretation in *Haji Muhammad Shafi and others v. Wealth Tax Officer and others* (**Attachment 2305.7**) when competence to levy Wealth Tax under the Entry 50 was challenged. The Wealth Tax Act 1963 continued in force under Article 268 and as tax under Article 279 of 1973 Constitution. Wealth Tax Act 1963 was pleaded to be ultra vires of the Constitution of 1973, besides challenging double taxation, one by Federation and the other by Province through West Pakistan Urban Immovable Property Tax Act, 1958. Division Bench of the Sindh High Court dismissed the petition on both grounds and so was the fate of appeal before the August Supreme Court. Relevant portion of the judgment is reproduced.

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

(emphasis supplied)

e. Definition of Net Wealth

4.18 Net wealth, in its definition, was aggregate value of all assets including immovable property, however it was argued that Entry 50 allowed taxation of Value of Assets whereas Section 3 of Wealth Tax Act 1963 was charging net value of the assets. While answering this plea, value of assets as defined in *Sanaullah Woollen Mills Limited and another v. Monopoly Control Authority* (PLD 1987 SC 202 - **Attachment 2305.17**) was referred, in which it was held, "It is in this sense that the word 'assets' has been used to denote a 'complete whole' of the property.". The challenge was inspired by a judgment from Indian jurisdiction in *Union of India v. Harbhajan Singh Dhillon* [(1972) 83 I.T.R. 582].

4.19 The Entry 50, before 18th Amendment, was again examined by the Honble Supreme Court of Pakistan in *Messrs I.C.C. Textile Ltd. v. Federation of Pakistan* (2001 PTD 1557 - **Attachment 2305.18**). "Corporate Assets Tax" inclusive of liabilities, imposed under Section 12 of the Finance Act 1991 by the Federal Legislature, was assailed. Judgment in *Haji Muhammad Shafi* case (**Attachment 2305.7**) was endorsed and objection of relying upon the definition in *Sanaullah Woollen Mills* case (**Attachment 2305.17**) was explained, while holding that Federal legislature is competent to tax corporations under Entry 48, relevant excerpt is reproduced:-

11. In above concluding para most important principle laid down is that under Item 50 of the Legislative List Part I appended with the Fourth Schedule and the Wealth Tax Act both provide levying of tax on the assets notwithstanding the fact whether it is net value of the tax or not and only the difference is that under section 3 of the Wealth Tax Act a mechanism has been

provided for calculating and imposing the tax on the assets, therefore, for such reasons it cannot be considered that the net value of assets is not part of the capital value.

12. It is thus held that legislature had power to promulgate section 12 of the Act under Article 142 of the Constitution to levy Corporate Assets Tax on the value of the assets held by a company on a specified date, therefore, the gross assets of the Company as per section 12(12)(d) of the Act are liable to tax inclusive of the liabilities of the company as per Entry No.50 of the Federal Legislative List Part 1 Fourth Schedule of Constitution and there is absolutely no ambiguity of whatsoever nature in imposing the Corporate Assets Tax.

(emphasis supplied)

4.20 The judgments, *ibid*, confirm that the ouster of immovable property from the Entry 50, before 18th Amendment, was only for the purpose of capital gain tax, otherwise immovable property was an essential part of the Assets, giving competence to tax Capital Value of Assets.

4.21 Therefore, it is concluded and held that, before the 1962 Constitution, tax on agriculture income and agricultural land was out of Federation or Centres competence. After the 1962 Constitution till 18th Amendment, immovable property was always an essential component of Assets, bestowing competence to tax Capital Value of Assets to Federation. The exclusion of immovable property was only for the purpose of charging Capital Gain Tax. The Capital Gain Tax always was and is a part of income tax, competence of which is under Entry 47, and reason for placing it in Entry 50 was to exclude the immovable property from the definition of Capital Assets, only for the purpose of capital gain.

4.22 After change in Entry 50 through 18th Amendment, the effect of omitting the phrase, “on capital gains” is that now capital gain is taxable on immovable property, under Section 37(1) of the Ordinance of 2001, because capital gain is not a tax on property but a limb of income tax, on the receipt or gain by a person on transfer or sale of property and not on the property.

f. Extent of Tax on Immovable Property considering Entries 47, 50 & 52

4.23 Now exclusion of “taxes on immovable property”, in the Entry 50, and its extent is to be examined. There is a difference between taxes on immovable property and tax on income arising from immovable property. Burden of income tax, including capital gain tax is on the person who receives the income. Whereas the burden of taxes on immovable property is on the property and goes with the property if not taxed before the sale or transfer. Like Estate Tax paid by the estate itself, before assets are distributed to heirs and inheritance taxes are paid by those who inherit property. Gift tax is levied so that the inheritance and estate tax cannot be avoided by transferring property prior to death. In Pakistan, estate tax was charged under Estate Duty Act 1950, which was repealed in 1979, without any debate or deliberation. It was within the competence of Federation under Entry 46 „Estate Duty on property along with Entry 45 „Duties in respect of succession to property. Both the entries, imposing tax on immovable property, are repealed by 18th Amendment alongwith the amendment in Entry 50, where after the phrase “taxes on immovable property” is excluding “taxes” on immovable property and not the immovable property itself from capital assets, value of which is to be taxed under Entry 50. Omission of Entries 46 & 45 alongwith amendment in Entry 50, collectively shows that all taxes, burden of which is on the immovable property are excluded from competence of the Federation.

4.24 Punjab Urban Immovable Property Tax Act 1958 is also a tax on immovable property. Luxury House Tax was imposed through Section 8 of the Punjab Finance Act, 2014 on residential houses measuring two Kanals and above. Provinces competence to tax was assailed on touchstone of the Entry 50. Division Bench of this Court in Muhammad Khalid Qureshi v. Province of Punjab through Secretary, Excise and Taxation Department, Lahore and other (**Attachment 2305.9**), interpreted the Entry 50 and held that Luxury House Tax is tax on property and not on value of property, therefore, within competence of the Provincial Legislature. Relevant part of the judgment is reproduced:

20. Article 142 gives Provincial Legislature exclusive powers of legislation on the subjects which are not included in the Federal Legislative List. The language of Entry No.50 of the List gives the Parliament power to levy taxes on the capital value of the assets, and specifically excludes the

Parliament to levy taxes on immovable property. It means Provincial Assembly is vested with exclusive power to levy taxes on immovable property. A combined study of Entry No.50 with clause (c) of Article 142 shows that Federal Legislature can tax only capital value of assets. However, a Provincial Legislature is made competent to tax remaining all aspects of immovable property as discussed supra. The tax in question is on residential houses comprising land and superstructure thereon as specified in the First Schedule. Language of Section 8 read with First Schedule of PFA, 2014 does not suggest that capital value of residential houses is being taxed. The argument of learned counsel in this regard is self-contradictory when compared with their argument that properties of different value are being taxed similarly. Later part of Entry No.50 excludes taxation from immovable property from the ambit of Federal Legislature. The use of phrase in clause (c) of Article 142 i.e. "and Majlis-e-Shura/Parliament shall not" puts a clog on Federal legislative power to tax the matters, not enumerated in Federal Legislative List, including immovable property. The clause (c) of Article 142, read with latter portion of Entry No. 50 would show an emphasis regarding exclusion of Parliament's power to tax immovable property i.e., "not including taxes on immovable property". Since the tax in question is not being charged on value of residential houses, therefore, we have no doubt in our mind that only Provincial Legislature is competent, particularly after the 18th Amendment, to tax the residential houses consisting of more than specified land and superstructure thereon. It is emphasised that subsection (1) of the impugned Section 8 is levying tax on land and superstructure thereon and not the value thereof.

(emphasis supplied)

4.25 The judgment neither held nor observed that the value of immovable property cannot be taxed by the Federation. To understand the nature of impugned tax, levied under impugned Section 7E, post 18th Amendment changes in the Ordinance of 2001 are examined. Capital Gain is again a head of income under Section 11(1)(d) of the Ordinance of 2001, which defines „capital asset in Section 37(5), read with Section 2(11). Immoveable property was completely excluded from the definition, unlike the 1979 Ordinance where immoveable property was excluded for the purpose of capital gain tax, or a land used for agriculture income. It is important to note that the complete exclusion of immovable property was by the legislature and not by Entry 50 of the Constitution of 1973. This exclusion remained till Finance Act 2022, whereby Clause (c), “any immoveable property; or”, was omitted to give effect of 18th Amendment in the Entry 50. After omitting the Clause (c), immoveable property is included in the definition of capital assets and is taxable under Section 37(1) on capital gain. However, out of abundant caution, it appears, subsection (1A) is substituted through Finance Act 2022, which reads,

(1A) Notwithstanding anything contained in sub-section (1), gain arising on disposal of immovable property situated in Pakistan, to a person in a tax year shall be chargeable to tax under the head capital gains at the rates specified in Division VIII of Part I of the First Schedule.

(emphasis supplied)

4.26 The subsection (1A) and impugned Section 7E are inserted through Finance Act 2022, simultaneously. Agriculture land is now part of assets, for the purpose of capital gain tax. Self-owned agricultural land where agriculture activity is carried out is, however, excluded under Section 7E(2)(c), from chargeability of impugned tax. In impugned Section 7E, capital asset is separately defined under subsection (4)(a), which “means property of any kind held by a person, whether or not connected with a business”. However, by subclause (iv) to the subsection (4)(a), all moveable assets are excluded from the definition of asset. Interestingly, the levy under Section 7E has targeted only immoveable property by excluding all moveable assets from the definition of capital assets. An amount equal to fair market value of the immoveable property, situated in Pakistan, is treated to have been derived as income by the resident person. The levy is excluded on one capital asset, self-owned business premises and self-owned agriculture land where agriculture activity is carried on. Amongst others, twenty-five millions of fair market value, in aggregate, is excluded.

4.27 Though Capital Value of Assets, including immovable property can be taxed by Federation, however, it needs to be examined whether fair market value can be treated as income. If answer is in

negative, whether taxation under the impugned Section 7E can be saved by reading down the phrase, "treated to have derived, as income".

4.28 The respondent side relied, mainly upon the judgment in *Elahi Cotton Mills Case*. Federations competence, to impose Presumptive Tax under Sections 80C, 80CC and Minimum Tax under Section 80D of the repealed ITO 1979, was challenged. In the Section 80C, tax of contractors and importers deductible under various clauses of Section 50 were deemed to be income and tax was charged accordingly. In Section 80CC, the amount received by the exporter under Section 50(5A) & (5AA) was treated as income and tax was charged. August Supreme Court, in the elaborated judgment, read Entries 52 and 47 together to hold that in lieu of tax on income, capacity to earn income could be charged to tax, relevant part is reproduced:

34. In our view, sections 80-C and 80-CC of the Ordinance fall within the category of presumptive tax as under the same the persons covered by them pay a pre-determined amount of presumptive tax in full and final discharge of their liability in respect of the transactions on which the above tax is levied. Whereas section 80-D of the Ordinance is founded on the theory of minimum tax which has been elaborately dealt with in the treatises, the relevant portions of which have been quoted in extenso hereinabove. **If we were to read Entry 47 in isolation without referring to Entry 52, one can urge that Entry 47 does not admit the imposition of presumptive tax as the expression "taxes on income" employed therein should be understood as to mean the working out of the same on the basis of computation as provided in the various provisions of the Ordinance.** We are inclined to hold that **presumptive tax is in fact akin to capacity tax** i.e., capacity to earn. In this view of the matter, we will have to read Entry 47 in conjunction with Entry 52 which provides taxes and duties on production capacity of any plant, machinery, undertaking, establishment or installation in lieu of the taxes or duties specified in Entries 44, 47, 48 and 49 or in lieu of any one or more of them. Since under Entry 52, tax on capacity in lieu of taxes mentioned in Entry 47 can be imposed, the presumptive tax levied under sections 80-C and 80-CC of the Ordinance is in consonance with the above two entries if read in conjunction. However, we may point out that in Entry 52, the key words used are "in lieu of taxes and duties specified in entries 44, 47, 48 and 49 or in lieu of any one or more, of them". In order to understand the real import of the above portion of Entry 52, we **will** have to refer to the meaning of the words "in lieu of". In this regard, reference may be made to *Black's Law Dictionary*, Sixth Edition, *Ballentine's Law Dictionary*, Third Edition; and the *Legal Thesaurus* by Steven C. De Costa, which read as follows----

Black's Law Dictionary, page 787

"In lieu of": Instead of; in place of; in substitution of. It does not mean "in addition to".

Ballentine's Law Dictionary, page 628

"in lieu of" In substitution for or in place of Ordinarily implying the existence of something to be replaced.

Legal Thesaurus, page 266

"In lieu of": Proposition as a substitute for; as an alternative, by proxy, or, in place of, instead of, on behalf of, rather than, representing.

35. A perusal of the above quoted meanings of the above expression "in lieu of" indicates that the same connote, instead of, in place of, in substitution of, but it does not mean, in addition to.

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.** Since under sections 80-C and 80-CC the imposition of presumptive tax is in substitution of the normal method of levy and recovery of the income-tax, the same is in consonance with Entry 52.

(emphasis supplied)

It is important to note that presumptive tax was purely based on or akin to Entry 52 and it is observed, in particular, 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.

4.29 However, with complete reverence and understanding the binding command under Article 189 of the judgment by August Court, it is observed that the capacity tax changed the nature of the taxation from direct to indirect tax, because burden of the tax, being on transactions, in practice, is shifted on the end consumer by calculating it into cost along with other indirect taxes. The purpose and spirit of direct tax under Entry 47 is to lay burden on the person whose income is taxed, which is not achieved for absence of consequential legislation or regulation to ensure that this tax is not calculated into cost of the transaction, i.e., import, supply or service. This aspect, however, was never argued or considered in the judgment, therefore, it is noted with hope that it might be taken up and considered in an appropriate case by Honble Supreme Court.

4.30 Minimum tax under Section 80D was imposed where no tax was payable or paid or it was less than one-half percent of the total turnover from all sources of income, the declared turnover was deemed to be income and tax was charged. Unlike Presumptive Tax, minimum tax was charged after the statutory computation of arriving at net income, when no tax was chargeable or was below the threshold of one-half percent. The rationale was to contribute some tax (minimum) towards the cost of Government, without disturbing the right of carrying forward the losses, which is negative income. Relevant excerpt from the judgment is reproduced:

40. Adverting to the impugned newly-added section 80-D, it may be stated that we have already pointed out hereinabove that sections 80-C and 80-CC cannot be equated with section 80-D as the same is founded on different basis. It may again be observed that section 80-D is based on the theory of minimum tax. It envisages that every individual should pay a minimum tax towards the cost of the Government. The object of the minimum tax is to ensure that the tax-payers, who receive substantial amounts from exempt sources, pay at least some tax on their economic incomes of the year. This is achieved by reducing or disallowing certain itemised deductions. We may again observe that a large number of assesseees though generally earn profits but on account of various tax concessions including tax holidays, depreciation allowance etc., under Schedule II and deductions allowed under the various provisions of the Ordinance, show loss instead of any net profit, with the result that they do not contribute any income tax towards the public exchequer. The levy of minimum tax has been adopted in some other countries of the world including U.S.A., Israel, France, Columbia and Thailand besides India. In United States, under section 56(a) a tax equal to 15% of the amount, by which sum of the items of tax preference exceeds the greater of (i) \$ 100,000 (b)..... (c)... etc., is levied. In India above-quoted section 115-JA has been incorporated in 'the Indian Income Tax Act containing a detailed mechanism for computing, the total income of a company for the purpose of levy of minimum tax. In Thailand, above-quoted section 48 has been enacted in the relevant statute to levy minimum tax.”

(emphasis supplied)

4.31 The purpose of presuming the tax, deducted, withheld or received on the transactions under the Sections 80C & 80CC, was to avoid conventional statutory method of calculating net income, by construing it as taxpayers capacity to earn income under Entry 52. The August Court, noted the aspect of avoiding conventional method of calculating income in the following paragraph:

32. We have summarised hereinabove in para. 31 the ratio decidendi of the above discussed cases and certain pertinent observations made therein. A perusal of above sub-paras. (i) to (xxx) of para. 31 indicates that the 'same do not advance the case of the appellants. On the contrary, they reinforce the principle of law that the Legislature, particularly in economic activities, enjoys a wide latitude in the matter of selection of persons, subject-matters, events etc., for taxation. The presumption is in favour of the validity of the legislation. The burden to prove that the same is invalid is on the person who alleges it.

However, one can urge that the general observations contained in subparas. (xxxi) to (xxxiv) of para. 31 lend support to some extent to the appellants' case. However, it should not be overlooked that in none of the cases from the judgments of which the above observations have been lifted the question, as to whether there can be presumptive tax or the minimum tax, in view of entries 47 and 52 of the Legislative List, was in issue. **In this view of the matter, it would be inappropriate to apply the tests traditionally prescribed by the Income Tax Act and/or any other statute.**

(emphasis supplied)

4.32 The paragraph 32, *ibid*, clarifies that paragraph 31 only summarised the ratio decidendi of the discussed cases and did not apply the observations, completely, on merits of the case in particular subparas (xxxi) to (xxxvi). However, lawyers generally rely on paragraph 31, indiscriminately, in cases where tax issues are involved, without understanding its spirit explained in paragraph 32. The case in hand is not an exception, counsel from both sides have relied on different parts of paragraph No. 31 of the judgment, where it favours them.

4.33 The strict test of construing or presuming anything as income was not applied to merits of the case, as noted in the paragraph 32, because the levy of tax was declared under Entry 52. Whereas, in this case fair market value, being notional and speculative cannot be a tax on capacity of an immovable property and is treated as income under Entry 47, therefore, sub-paras (xxxi) to (xxxiv) of paragraph 31 shall apply, hence are reproduced:

31.

(xxxi) That though the Legislature has the prerogative to decide the questions of quantum of tax, the conditions subject to which it is levied, the manner in which it is sought to be recovered, but **if a taxing statute is plainly discriminatory or provides no procedural machinery for assessment and levy of the tax or that is confiscatory, the Court may strike down the impugned statute as unconstitutional.**

(xxxii) That the rule of interpretation that while interpreting an entry in a Legislative List it should be given widest possible meaning **does not mean that Parliament can choose to tax as income as item which in no rational sense can be regarded as a citizen's income. The item taxed should rationally be capable of being considered as the income of a citizen.**

(xxxiii) That before charging tax, **an assessee must be shown to have received income or the same has arisen and accrued or deemed to be so under the statute.** Any amount which cannot be treated as above is not an income and; therefore, cannot be subject to tax.

(xxxiv) **That there is a marked distinction between a tax on gross revenue and a tax on income, which for taxation purposes, means gains and profits: There may be considerable gross revenues, but no income taxable by an income-tax in the accepted sense.**

(emphasis supplied)

4.34 The principles, *ibid*, of presuming anything as income, are deduced, with approval, from the judgments discussed, therefore, have binding force without further probe into the relied upon judgments. If fair market value in Section 7E, being notional and not actually received, is tested on the touchstone of these principles, the inescapable conclusion is that (i) **it lacks any procedural machinery and levy of the tax,** (ii) **it is not capable of rationally considered as income of a citizen,** (iii) **neither it can be deemed as received, being hypothetical, nor it can be deemed to have accrued,** and (iv) **being speculative it cannot be deemed as gain or profit.**

g. Fair Market Value

4.35 The Fair Market Value, before introducing it in Section 7E, is defined in Section 29(3) of the ITO 1979 for the purpose of determining the cost of acquisition to tax Capital Gain under Section 27, where profit and gain from transfer of a capital asset is deemed as income of the year in which transfer took

place. Under Section 29(1) & (2), the fair market value is related to the date on which it become property of the assessee or the date of transfer and presumption here is for redetermination of the received profit and gain. Under Section 12(12) certain transactions of assets, like lease or purchase are deemed as income accrued or arise in Pakistan. The Commissioner is given power to determine the cost of acquisition, considering the sale or lease as per market value. The deeming under Section 12(12) is of a consideration of sale, purchase or lease, whereas under Section 7E there is no profit or gain or transfer of the asset, in particular of the immovable property. Section 29 of the ITO 1979 is reproduced:

29. Cost of acquisition, and consideration for transfer, how determined.- (1) Where the capital asset became the property of the assessee-

- (a) under a gift, bequest or will; or
- (b) by succession, inheritance or devolution; or
- (c) on any distribution of assets on the dissolution of a firm or other association of persons or the partition of a Hindu undivided family; or
- (d) on any distribution of assets on the liquidation of a company; or
- (e) under a transfer to a revocable or an irrevocable trust,

the fair market value of the asset, as on the date on which it became the property of the assessee, shall, for the purposes of sub-section (1) of section 28, be deemed to be the cost of acquisition.

(2) Where the person who acquires a capital asset from an assessee is directly or indirectly connected with him and the Deputy Commissioner has reason to believe that the transfer was effected with the object of avoiding or reducing the liability of the assessee, the fair market value of the capital asset, as on the date of the transfer, shall be deemed to be the consideration received by the assessee for its transfer.

(3) For the purposes of sub-section (1) and (2) and subsection (12) of section 12, "fair market value" means-

(a) the price which the capital asset would ordinarily fetch on sale in the open market on the relevant date; and

(b) where the price referred to in clause (a) is not ascertainable, such price as may be determined by the Deputy Commissioner after obtaining the approval of the Inspecting Additional Commissioner in writing.

(emphasis supplied)

4.36 Perusal of Section 29 shows that fair market value is determined, by invoking the deeming clause, where a property or asset changes hands with or without consideration. Even on change of hand without consideration, a conceivable benefit is received, which is translated into fair market value, whereas no conceivable benefit from an immovable property is discernible under Section 7E. Income is defined under Section 2(29) of the Ordinance of 2001, which uses expression "**and any amount treated as income**" to confer power of presuming income, but the word, "**amount**" has significance of receiving something, in other words only an amount or receipt can be presumed as income and not a notional fair market value. The Subsection (29) of Section 2 is reproduced:

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

(emphasis supplied)

4.37 Since the phrase, "treated to have derived, as income", used in the impugned Section 7E, fails the test of the principles and the provisions, *ibid*, to presume anything as income, therefore, it is held that

Federal Legislature was not competent, under Entry 47, to treat fair market value of an immoveable property as income. However, to save the legislation, within competence under Entry 50, the principle of reading down is applied and held that the phrase, *ibid*, shall not be read in subsection (2) as part of Section 7E. Strength for this interpretation is drawn from following sub-paras of paragraph 31 from *Elahi Cotton Mills Case*;

(xxviii) That denial of reliefs provided by sections 28 to 43-C of the Indian Income Tax Act to the particular business or trades covered by section 44-AC thereof without showing some basis fair and rational and without having nexus to the object sought to be achieved by the Legislature, held unfair, arbitrary, disproportionate to the prevalent evil and constitutes denial of equal treatment. Consequently, the Indian Supreme Court did not press into service non obstante clause of section 44-AC by applying theory of reading down as a rule of interpretation.

(xxx) That the theory of reading down is a rule of interpretation which is resorted to by the Courts when they find a provision read literally, seems to offend a fundamental right or falls outside the competence of the particular Legislature.

(emphasis supplied)

4.38 The theory of reading down was explained in the judgment by quoting following paragraph of Indian Supreme Courts judgment:

We may mention that the theory of reading down is a rule of interpretation resorted to by Courts where a provision, read literally, seems to offend a fundamental right or falls outside the competence of the particular Legislature. This was resorted to as far back -as 1941 in *In re: Hindu Women's Rights to Property Act*, AIR 1941 FC 72. The expression "property" was capable of taking in agricultural lands as well, in which case it would trench upon the field reserved for Provincial Legislatures exclusively (List II). The Court referred to the presumption that a Legislature must be presumed to be aware of its limitations and must also be attributed with an intention not to overstep its limits, and did not in fact apply to agricultural lands. In *All Saints' High School v. Government of A.P.*, AIR 1980 SC 1042, certain provisions of the AP Recognised Private Educational Institutions Control Act, 1975, were challenged as violating Article 30.

4.39 The next, consequential question is whether provisions of Section 7E, are sustainable, for taxing the Capital Value of Assets and in particular the immoveable property. Section 7E, after been read down (*sic*), is reproduced:

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

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

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

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

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

(d) capital asset allotted to –

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

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

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

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

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

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

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

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

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

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

(4) In this section—

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

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

(ii) any shares, stocks or securities;

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

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

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

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

(emphasis supplied)

4.40 If the phrase, “treated to have derived, as income” is not read in the subsection (2), then to construe it as tax on Capital Value of Assets under Entry 50, word “**income**” in subsection (1) has to be read as “**capital asset**”. As already held tax can be levied on Capital Value of Assets including immovable property, therefore, taxing five percent of fair market value of capital asset or immovable property under Section 7E, after reading it down in the manner above, is held *intra vires* of Federation’s legislative competence under Entry 50.

4.41 However, suitable amendments, with or without retrospective effect, can be made by the legislature, to bring the levy in harmony with other provisions of the Ordinance of 2001, like assets declared under Section 116 can be tax based on the declared value and with power to replace the value with fair market value, after notice under Section 122.

4.42 The spirit of the judgments in Haji Muhammad Shafi's case (**Attachment 2305.7**) and ICC Textile's case (**Attachment 2305.18**), is that Capital Assets for the purpose of tax under Entry 50 is an inseparable whole of all assets. The Indian Supreme Court while interpreting Entry 86 of Indian Constitution, *pari materia* to the Entry 50, held in *D. C. Gouse and Co. etc. Vs State of Kerala & ANR etc.* [1980 SCC (2) 410], "...that entry would not authorise a tax imposed on any of the components of assets of the assessee". In another judgment in *Sudhir Chandra Nawn v. Wealth Tax Officer, Calcutta and others* ([1969] 1 SCR 108), it is held, "the tax is not imposed on the components of the assets of the assessee; it is imposed on total assets which the assessee owns".

4.43 Section 7E, after reading down, brings within its fold the capital asset, defined therein, which include moveable property, but moveable assets are excluded in clause (4)(a)(iv). Being afraid of entering into the legislative domain and observing judicial deference, a suitable amendment is left for the legislature to bring the taxation within the mandate of Entry 50. The principle of judicial restraint couched in following sub paras of paragraph No.31 are observed for avoiding to give a legislative judgment:-

(i) That in view of wide variety of diverse economic criteria, which are to be considered for the formulation of a fiscal policy, Legislature enjoys a wide latitude in the matter of selection of persons, subject-matter, events, etc. for taxation. But with all this latitude certain irreducible desiderata of equality shall govern classification for differential treatment in taxation law as well.

(ii) That Courts while interpreting laws relating to economic activities view the same with greater latitude than the laws relating to civil rights such as freedom of speech, religion etc., keeping in view the complexity of economic problems which do not admit of solution through any **doctrinaire or straitjacket formula** as pointed out by Holmes, J. in one of his judgments.

iii) That Frankfurter J., in *Morey v. Doud* (1957) U.S. 457 has remarked that "in the utilities, tax and economic regulation cases, there are good reasons for judicial self-restraint if not judicial deference to the legislative judgment"

(emphasis supplied)

h. Exclusions of Persons from Tax on Immovable Property

4.44 Now comes the challenge to exclusions of persons from chargeability of tax as argued by Mr. Salman Akram Raja, Advocate. In this Courts opinion the exclusion of persons, in subsection (2)(d) (i) to (iv), does not create an intelligible differentia and the classification being unreasonable is discriminatory. The touchstone for testing discriminate taxation, unreasonableness is in following principles deduced in paragraph 31 of Elahi Cotton Mills judgment:-

(iv) That the Legislature is competent to classify persons or properties into different categories subject to different rates of tax. But if the same class of property similarly situated is subject to an incidence of taxation, which results in inequality amongst holders of the same kind of property, it is liable to be struck down on account of infringement of the fundamental right relating to equality.

(v) That "a State does not have to tax everything in order to tax something. It is allowed to pick and choose districts, objects, persons, methods and even rates for taxation if it does so reasonably". (Willi's Constitutional Law).

(vi) That the tests of **the vice of discrimination in a taxing law are less rigorous. If there is equality and uniformity within each group founded on intelligible differentia having a rational**

nexus with the object sought to be achieved by the law, the Constitutional mandate that a law should not be discriminatory is fulfilled.

(emphasis supplied)

These principles, in detail, are discussed in following paragraph of the judgment:-

29.

In the fifth case the question in case before this Court was, as to whether the pensioners who had retired prior to certain date/dates could be treated differently than the other pensioners who had retired subsequently to the target date/dates? One of us (Ajmal Mian, J.), after referring to the case-law, deduced the following principles of law:---

(i) that equal to 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;

(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.

(emphasis supplied)

4.45 In a recent judgment in *Lucky Cement Limited through General Manager, Peshawar v. Khyber Pakhtunkhwa through Secretary Local Government and Rural Development, Peshawar and others (Attachment 2305.6)*, the Apex Court has reiterated the principles. The persons excluded in clauses (i) to (iv) of Section 7E (2)(d) are now tested on the principles, laid down ante;

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

Shaheed and dependents of police and other forces are left out in this clause, which are similarly placed, hence this clause is discriminatory.

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

This class encompasses the whole class of person who dies in service, hence is not discriminatory.

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

There is remote possibility of person in Federal or Provincial service to be wounded in a war, therefore is discriminatory unless it is included for them to be wounded during discharge of their duties. Likewise, if a labourer is compensated for a wound or being disabled and purchases an asset is also discriminated if the asset is subjected to tax.

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

This clause is highly discriminatory for those who purchase property from their savings, but were never allotted any asset including immovable property during their service. Equality clause in Article 25, envisages, in light of the judgments, that similarly placed persons or a class should bear, equal burden of a particular taxation; otherwise the persons who are left out and taxed shall bear extra burden of the tax, of those who are excluded from taxation.

4.46 It is, therefore, held that clauses (i), (iii) and (iv) offend fundamental rights guaranteed under Article 25 of the Constitution, hence being discriminatory is declared ultra vires. While excluding persons, discussed above, the legislature has ignored the persons, who have inherited the immovable property but are not capable of paying Capital Value Tax, particularly when the tax is on person and not the property. This omission makes the levy 'expropriatory and confiscatory', for those who might have to sell the asset to be taxed, for paying the tax. Following extract from the judgment in Elahi Cotton Mills Case, supports the pointed out confiscatory and expropriatory aspect.

*44. Adverting to the above first reason, it may be observed that it is true that the power to tax cannot be used to embarrass and destroy the business/occupations which are sine qua non for the propriety of the people and the country. The object of the levy and recovery of taxes as pointed out hereinabove is to run the State and to make efforts for creation of an egalitarian society. If the rates of taxes are so high and disproportionate to the actual earnings or earning capacities that they destroy the taxpayers, the very object of their levy and recovery is defeated. It has, therefore, been held by the superior Courts of the foreign jurisdiction as well as of Pakistani jurisdiction including this Court that **the taxes should not be expropriatory and confiscatory in nature and that the same should not be imposed in such a way so as to result in acquiring properties of those to whom the incidence of taxation fell and if that is so, then such legislation would be violative of fundamental rights to carry on business or to hold properties as guaranteed by the Constitution.** The learned counsel for the appellants have heavily relied upon the judgment of this Court in the case of **Government of Pakistan v. Muhammad Ashraf** (supra), in which **this Court accepted the above legal proposition that a tax, which is confiscatory in its nature, would be violative of the fundamental rights relating to carrying on business and holding properties, but remanded the case to the High Court to examine the question, as to whether the rate of regulatory duty on Soyabean Oil imposed was of confiscatory nature.***

(emphasis supplied)

4.47 For avoiding the discriminatory and confiscatory aspect in the charging provision, the orthodox way is that it should be levied indiscriminately to all subjects falling within the mischief of charging provision. However, the exclusion be placed under the exempting provisions, which presuppose the taxation, but exempt whom they choose, for extending benefit to a class or persons, to alleviate hardship and confiscatory aspect and for achieving any policy or administrative goal. Such exemption, if granted through subordinate legislation is placed before the Parliament for approval. It is salutary rule of interpretation that exemption is not a right and in case of two interpretations, one favouring the chargeability is to be adopted by Courts.

5. LHC Decision

The LHC held as follows:

(i) To treat the market value of immovable property as income under Entry 47 is beyond the competence of Federal Legislator, hence is declared ultra vires.

(ii) The provisions of Section 7E are read down to save the taxation on Capital Value of Assets, which is within competence of Federal Legislature under Entry 50.

(iii) The Entry 50 for taxing Capital Value of Assets requires that the assets should be valued as a whole and taxed inseparably. Curative legislation is expected to bring the provisions, of Section 7E, within the spirit of taxing Capital Value of Assets, and to harmonies it with other provisions of the Ordinance of 2001.

(iv) Exclusion of persons under clauses (i), (iii) and (iv) of Section 7E(2)(d), is discriminatory, offending the Article 25, therefore, are declared ultra vires.

However, the legislature is expected to remove the pointed out expropriatory and confiscatory aspects in the provisions of Section 7E.

D. DIFFERENCE BETWEEN SHC AND LHC ORDER

It is worthwhile to note that the LHC SB order is in favour of taxpayers while SHC order was against the taxpayers. Hence, taxpayers have filed appeals before the SCP. The SCP has granted 50% stay verbally (TLQC 2270 refers) while written order is awaited. SCP is yet to hear the Petition.

E. WAY FORWARD

We expect the Inter-Court Appeal (ICA) is likely to be filed in LHC against the above LHC SB order by the Department OR the Department may expedite the hearing in Supreme Court, where the Taxpayers' Petition is pending for hearing against the SHC order. The Sindh taxpayers will also be interested in the early SCP hearing. Hence, stay in touch with you Legal Counsel and well refer to below.

F. FUTURE PROGRESS

*We will keep our **Valuable Subscriber** posted on the day to day progress at the Supreme Court, IHC, BHC, etc & Tax Department action, as soon as the progress comes to our knowledge, considering the other side and our time constraints.*

F. MULTIPLICATION

Although all the Commentaries are for our Subscribers only, however, your Goodself is allowed to share this TLQC with trail, so that maximum people can reap timely benefits and may subscribe too at a Nominal Ramzan Discounted Price for the first period, in order to know the Value of the Premium Service.

Should you require any clarification or explanations in respect of the above or otherwise, please feel free to email us.

Best regards for Here & Hereafter

Asif S Kasbati (FCA, FCMA & LLB)

From: **Asif Siddiq Kasbati** <kasbati.commentaries@gmail.com>

Date: Thu, Apr 6, 2023 at 11:06 PM

Subject: TLQC2293= Section 7E - LHC SB today decided in Taxpayers favour, as we predicted 5 months ago

Dear Professionals

A. Background

This refers to several TLQCs (in trail in blue & italics, after double line) about Section 7E Deemed income relating to Property and tax thereon, especially the following relating to this TLQC

(a) TLQC 2057 of 10.11.22 and reiterated through other TLQCs that although the SHC order is against the taxpayers, however, we predict based on the Court Proceedings and somehow our Sixth Sense indicates that the LHC order is likely to be in the taxpayers' favour.

(b) Several TLQC about LHC day to day proceedings

Also refer to the SHC order against taxpayers (TLQC 2041 & 2102 refer) declaring IT Section 7E intra vires, SHC Detailed order's Comprehensive Commentary and several other LHC & IHC TLQCs

A. Latest Status LHC SB order

Alhamdulillah, we are pleased to inform your Goodself that our prediction came true after about 5 months and today the LHC Single Bench (**SB**) vide order of 6.4.23 (Attachment 2293.1) in case of Muhammad Usman Gull VS FoP, etc **decided the case in taxpayers favour.** The reasons for the favourable order are summarised as follows:

(i) To treat the market value of immovable property (considering Valuation SRO) as income under Entry 47 is beyond the competence of Federal Legislator, hence is declared ultra vires.

(ii) The provisions of Section 7E are read down to save the taxation on Capital Value of Assets (CVA), which is within competence of Federal Legislature under Entry 50.

(iii) The Entry 50 for taxing CVA requires that the assets should be valued as a whole and taxed inseparably. Curative legislation is expected to bring the provisions, of Section 7E, within the spirit of taxing Capital Value of Assets, and to harmonize it with other provisions of the Income Tax Ordinance, 2001.

(iv) Exclusion of persons under clauses (i), (iii) and (iv) of Section 7E(2)(d), is discriminatory, offending the Article 25, therefore, are declared ultra vires.

However, the legislature is expected to remove the pointed out expropriatory and confiscatory aspects in the provisions of Section 7E.

C. Difference between SHC earlier Orders & LHC SB today order

It is worthwhile to note that the LHC SB order is in favour of taxpayers while SHC order was against the taxpayers. Hence, taxpayers have filed appeals before the SCP. The SCP has granted 50% stay verbally (TLQC 2270 refers) while written order is awaited. SCP is yet to hear the Petition.

D. Way Forward

We expect the Inter-Court Appeal (ICA) is likely to be filed in LHC against the above LHC SB order by the Department OR the Department may expedite the hearing in Supreme Court, where the Taxpayers' Petition is pending for hearing against the SHC order. The Sindh taxpayers will also be interested in the early SCP hearing. Hence, stay in touch with you Legal Counsel and well refer to below.

E. Future Progress

We will keep our **Valuable Subscriber** posted on the day to day progress at the Supreme Court, IHC, BHC, etc & Tax Department action, as soon as the progress comes to our knowledge, considering the other side and our time constraints.

F. Multiplication

Although all the Commentaries are for our Subscribers only, however, your Goodself is allowed to share this TLQC with trail, so that maximum people can reap timely benefits and may subscribe too at a Nominal Ramzan Discounted Price.

Should your Goodself require any clarification or explanations, please feel free to contact us.

Best regards for Here & Hereafter

Asif S Kasbati (FCA, FCMA & LLB)

From: **Asif Siddiq Kasbati** <asif.s.kasbati@professional-excellence.com>

Date: Tue, Dec 6, 2022 at 1:10 PM

Subject: TLQC2102=IT Section 7E intra vires, SHC Detailed order's Comprehensive Commentary

Dear Learned Professionals

A. BACKGROUND

1. This refers to TLQC 2083 dated 26.11.22 (in trail, in blue, in italic and after double line) whereby we sent our **Short Commentary** about Section 7E issue's SHC Detailed order against Taxpayers.
2. Moreover, we refer to 20 TLQCs (in trail) sent about different stages at LHC & SHC and related matters.
3. Although, the SHC order is against Taxpayers, it is worthwhile to note that the LHC had summoned FBR Chairman and Secretary Federal, Minister of Law to appear for response to the interesting questions raised by the LHC including those of 1989 CVT omission, introducing Section 7E with hardship, Constitutional issues, etc (TLQC 2073 in trail refers). Hence, KC reiterates (earlier in TLQC 2057 in trail) its prediction based on the LHC Court Proceedings and somehow our Sixth Sense constantly indicates that the LHC order is likely to be in the Taxpayers' favour.
4. As per reliable sources, the certain Taxpayers are considering filing Petitions before the Supreme Court and other taxpayers may be part of the same especially material amount is involved. Details will be discussed in the upcoming **Free Seminar**. **Please click here for Flyer or call any of the Tax Excellence/Kasbati & Co Representatives at 021 3729 6771 & 83 OR 0334 322 3163. Click Register Now to fill the Registration Form. We will share the Zoom Link shortly.**

B. UPDATED STATUS REFERENCE

You may have seen our KQU 1933 dated 26.11.22 whereby we shared the link of the "IT Order u/s 7E of the ITO, 2001 in the case of Hakimsons (Impex) (Pvt) Ltd, etc Vs FoP, etc - CP D-4614/2022, etc - SHC"

alongwith several other updates and now covering in our **Commentary** being an **Important** matter as your Goodself may have missed out the same owing to likely busy schedule.

C. COMMENTARY

EXECUTIVE SUMMARY

The SHC vide order dated 28.10.22 (click on the link and treat it as **Attachment 2102.1**) in CP D-4614 of 2022 & 207 other Petitions in the cases of Hakimsons (Impex) (Pvt) Ltd & 207 other Petitioners gave its verdict on the matter that all these Petitions involve a common legal question and, therefore, were decided through the common Judgment.

The SHC held that based on the perusal of the case laws referred as well as the dicta laid down by the SCP in the case of Elahi Cotton (*infra*), no exception can be drawn to the competence of the Federal Legislature while introducing Section 7E through FA 22, in the Ordinance, whereas, the impugned levy is neither *ultra vires* to the Constitution; nor it is confiscatory or discriminatory. Hence, the Federal Legislature is fully competent to impose Tax on deemed income pursuant to Section 7E, and therefore, by means of a short order dated 28.10.22 all listed Petitions were dismissed and these are the reasons thereof in ensuing paragraphs.

DETAILS

1. BRIEF FACTS

The Petitioners have challenged the provisions of Section 7E of the IT Ordinance (reproduced in para 5.3 *infra*) introduced through the FA 22, on the ground that it is *ultra vires* to the Constitution and so also discriminatory and confiscatory. Hence, void, *ab-initio* and liable to be struck down.

2. LEARNED COUNSEL FOR PETITIONER SUBMISSIONS

2.1 Section 7E imposes tax on property which is not within the competence of the Federal Legislature pursuant to Entry 50 of the Federal Legislative List provided in the Fourth Schedule to the Constitution. It is only the Provincial Legislature who can tax an immovable property. Section 7E *ibid* within itself is discriminatory as it provides certain exceptions and exclusions without providing any rationale to such exclusions and or exemptions.

2.2 Notwithstanding the validity of the concept of deemed income, while imposing tax under Section 7E of the Ordinance no transaction has been outlined on the basis of which any deemed income can accrue. tax can only be imposed on the income from property, whereas, under Section 7E *ibid* even properties which cannot be let out or generate any income, have also been included. It is also in violation of the concept of income received or income receivable.

2.3 There is no concept of any fictional income as it is alien to the IT Ordinance. In pith and substance it is a tax on immovable property which cannot be levied by the Federal Legislature. It is an attempt or a colourable exercise of powers under the Constitution so as to impose a tax for which the Constitution does not confer any authority upon the Federation. It has also failed to take or provide basis and

differentiation in the nature of property; its location, and the earning potential, if at all a tax has to be sustained. even such properties have been taxed for which there is no permission to raise any construction. there is also an anomaly in the holding period of the property in question per settled law what cannot be done directly, cannot be permitted to be done indirectly as and when deemed income has been held to be valid and legal, it has always had nexus with respect to generation of income or a transaction which can lead to an income.

2.4 The concept of deemed income was introduced to avoid benefits being claimed through losses, whereas, in the instant matter it is not present. the speech of the Finance Minister while introducing this levy by way of Finance Bill is very relevant inasmuch as the intent and object of the said levy as disclosed is to discourage holding the properties which does not fall within the domain of the Federal Legislature. It amounts to violate the fundamental rights as enshrined in Article 23 read with Article 253 of the Constitution. If at all, the impugned levy is to be sustained vis--vis. the speech of the Finance Minister; it ought to have been levied through an Act of Parliament by following the procedure as contemplated under Article 70 of the Constitution.

2.5 In fact it is an attempt to control ownership of immovable properties. Hence, by way of a Finance Bill or a Money Bill introduced through Article 73 of the Constitution, no valid legislation can be made. Tax can only be levied when there is an earning potential, which admittedly, in the present facts and circumstances, is lacking. It fails to pass the twin test regarding discrimination as settled by the SCP and Supreme Court of India. In essence it imposes tax on property and in pitch and substance it is not a tax on income or deemed income. Even otherwise, it has been imposed retrospectively for the current tax / financial year; whereas, it could only have been levied, if at all, from the next tax year.

2.6 It is confiscatory in nature inasmuch as there are instances wherein, the taxpayer, notwithstanding holding of various properties, is not generating any income so as to pay the tax on its deemed income. When the Finance Bill was sent to the Senate of Pakistan, a resolution was passed against this very levy and the advice of the Senate must not be ignored. All deemed income have some nexus with a business activity which in the instant matter is lacking. It amounts to double taxation as property tax is already levied by the Provinces. It fails to meet the settled principles regarding discrimination i.e. intelligible differentia.

2.7 The exclusion and exemption provided to various persons within Section 7E ibid must have nexus with some policy objectives of the Government which in the present facts and circumstances is completely lacking. an idle property is being taxed under the garb of deemed income. When the levy itself offends or goes against the competence of the Federal Legislature, no concept of deemed income can be invoked. The levy amounts to crossing the legislative boundaries which cannot be sustained. The tax levied through Section 7E ibid lacks a triggering event i.e. receiving of income or money.

2.8 Mere holding of immovable property cannot lead to any tax by way of a fictional income, and therefore, they have prayed that the provision in question is liable to be declared as ultra vires to the Constitution by placing reliance on the following cases:

- (a) *Baz Muhammad Kakar, etc Vs FoP, etc (PLD 2012 SC 923 - click on the link a and treat it as **Attachment 2102.2**);*
- (b) *Sohail Jute Mills Ltd Vs FoP (PLD 1991 SC 329 - **Attachment 2102.3**);*
- (c) *Attorney General of British Columbia Vs Macdonald Murphy Lumber Company (1930 AC 357);*
- (d) *Attorney General for Ontario Vs. Reciprocal Insurers and Others (1924 AC Privy Council 328);*
- (e) *Pakistan International Freight of Forwarders Association Vs Province of Sindh, etc (2017 PTD 1 - click on the link and treat it as **Attachment 2102.4**);*
- (f) *Elahi Cotton Mills Ltd, etc Vs. FoP, etc (PLD 1997 SC 582 - click on the link and treat it as **Attachment 2102.5**);*
- (g) *IA Sharwani Vs Government of Pakistan (1991 SCMR 1041);*
- (h) *Tariq Aziz ud Din (Human Rights Case) (2010 SCMR 130);*
- (i) *Molasses Trading & Export Vs FoP, etc (1993 SCMR 905);*
- (j) *Pakistan Industrial Development Corporation (PIDC) Vs Pakistan, etc (1992 SCMR 891 - **Attachment 2102.6**);*
- (k) *PSO Ltd. Vs CIT (2018 SCMR 894 - **Attachment 2102.7**);*
- (l) *State Vs Aziz ur Rehman (PLD 1973 SC 49);*
- (m) *PTV Vs CIR, etc (2017 PTD 1372 - **Attachment 2102.8**);*
- (n) *DS Nakara, etc Vs Union of India (AIR 1983 SC 130);*
- (o) *Jibendra Kishore Achharyya Chowdhury, etc Vs The Province of East Pakistan and Secretary, Finance and Revenue (Revenue) Department, Government of East Pakistan (PLD 1957 SC Pak 9);*
- (p) *Abid Hussain Sherazi Vs Secretary MWO Industries and Production, Government of Pakistan, Islamabad (2005 SCMR 1742 - **Attachment 2102.9**);*
- (q) *Pakcom Limited & Others V/s. Federation of Pakistan and Others (PLD 2011 SC 44 -click on the link and treat it as **Attachment 2102.10**);*
- (r) *FoP, etc Vs Shaukat Ali Mian, etc (PLD 1999 SC 1026 - **Attachment 2102.11**);*
- (s) *Yaqoob Ahmed, etc Vs FoP, etc (2020 PTD 1407 - click on the link and treat it as **Attachment 2102.12**);*
- (t) *Syed Nasir Ali, etc Vs Pakistan, etc (2010 PTD 1924 - click on the link and treat it as **Attachment 2102.13**); and*
- (u) *Dr. Mobashir Hassan, etc Vs FoP, etc (PLD 2010 SC 265 - click on the link and treat it as **Attachment 2102.14**).*

3. LEARNED COUNSEL FOR RESPONDENT SUBMISSIONS

3.1 *The concept of deemed income is not alien to the Income Tax Law, whereas, it has been validated in a number of cases by the superior courts. It is a tax on income and not on property. Hence, is within the*

competence of the Federal Legislature under Entry 47 to the Fourth Schedule of the Constitution. Is a conscious policy decision of the Federation and therefore, per settled law Courts must show restraint while interfering in the legislative competence of the Government.

3.2 It is not a case of exercising any powers under Entry 50 of the Fourth Schedule to the Constitution inasmuch as it is not a tax on the very property in question. But on the deemed income from the said property. Hence, permissible. In terms of Section 15, tax from rental income is already in field and is being paid by the taxpayers. Various other taxes are also leviable on properties under various provisions of the IT Ordinance. There is no discrimination within Section 7E as the exceptions which have been provided are in respect of different classes of persons which are otherwise enjoying various exemptions and exceptions.

3.3 The levy itself is a tax, hence, within the competence of the Federal Legislature to introduce the same under Article 70 of the Constitution by way of a Money Bill. Any hardship or inability to pay a tax is not a ground to declare the same as ultra vires. There is no concept of retrospectivity in the levy. The levy is not in violation of any of the fundamental rights as provided in the Constitution including Articles 23 and 253 to the Constitution. No property is being acquired forcibly, whereas, reasonable exceptions and exemptions have also been provided to the petitioners / taxpayers within Section 7E.

3.4 It is neither confiscatory nor discriminatory, whereas, the tax has been levied to fulfil various obligations and functions of the State which requires immediate taxation measures. under the concept of deemed income there is no requirement of a particular transaction to generate income. It is a case of reasonable classification within 7E, hence, cannot be declared ultra vires on this ground. It is the prerogative of the legislature to choose a class of persons on whom the tax may be imposed or not. A tax on income is not by itself a tax on property. Income can be deemed without any transaction.

3.5 Presumptive income or presumptive tax are provided in the IT Ordinance in various Sections and it is not necessary that there must be an actual income for taxation purposes. Re-characterisation of income is permissible under the Ordinance. The tax on such income has been levied reasonably vis-a-vis. values of the properties. various tax payers had availed the benefits of Foreign Assets Declaration Act, 2018 followed by an Ordinance of 2019. Hence, when benefits of the said legislation on property was availed, then subsequently, the competence to levy tax on income on the same property cannot be challenged.

3.6 The rental income of property has been taxed from the very inception of Income Tax Act, 1922 and such tax is covered by Entry 47 ibid. Hence, cannot be declared ultra vires to the Constitution and they have prayed for dismissal of these petitions, by placing reliance on the following cases:

*(a) Shah Nawaz (Pvt) Ltd, etc Vs Pakistan, etc (2011 PTD 1558 - click on the link and treat it as **Attachment 2102.15**);*

(b) Bhuwalka Steel Industries Ltd, etc Vs Union of India, etc & Others (Civil Appeal No 7823/2014);

*(c) Muhammad Khalid Qureshi Vs Province of Punjab, etc (2017 PTD 805 - click on the link and treat it as **Attachment 2102.16**);*

*(d) ICC Textile Ltd, etc Vs FoP, etc (2001 PTD 1557 - **Attachment 2102.17**)*

4. LEARNED ASSISTANT ATTORNEY GENERAL SUBMISSIONS

It is within the competence of the Federal Legislature to tax any income from property and the provision in question is not a tax by itself on such property. Income in this matter is being generated through the property. It falls within the competence of the Federal Legislature under Entry 47 of the Fourth Schedule to the Constitution. Per settled law the Courts must endeavour to save the legislation as far as possible. Hence, he sought dismissal of these Petitions by placing reliance on following the cases:

- (a) Mohtarma Benazir Bhutto, etc Vs President of Pakistan, etc [PLD 1998 SC 388 (670)];*
- (b) Lahore Improvement Trust, etc Vs The Custodian, Evacuee Property, West Pakistan, etc (PLD 1971 SC 811 - click on the link and treat it as **Attachment 2102.18**);*
- (c) Government of Sindh, etc Vs Khalil Ahmed, etc (1994 SCMR 782 - **Attachment 2102.19**);*
- (d) Dr. Tariq Nawaz, etc Vs Government of Pakistan, etc (2000 SCMR 1956 - **Attachment 2102.20**).*

5. SHC DELIBERATION

5.1 The Petitioners are resident taxpayers under various categories and since these Petitions are only premised on a legal challenge, independent facts and status of each petitioner need not be discussed. Their primary challenge is that Section 7E introduced through Finance Act, 2022 is ultra vires to the Constitution as firstly, it is beyond the competence of the Federal Legislature in terms of Entry 50 of the Fourth Schedule to the Constitution. Secondly, notwithstanding the issue regarding competency of the Federal Legislature, even otherwise, the levy by itself is confiscatory, discriminatory and is an attempt of a colourable exercise of power, as in pith and substance the levy in question is a tax on property, and not on its income, which in terms of Entry 50 ibid cannot be imposed by the Federal Legislature. This is the entire gist of their case for seeking a declaration that it is Ultra vires to the Constitution.

*5.2 On the other hand, the case of the Respondent / Federation is that it is not a tax per se on any immovable property but is a tax on deemed income of the property and falls within the competence of the Federal Legislature under Entry 47 of the Fourth Schedule to the Constitution. It is their further case that the concept of deemed income has been held to be valid in various cases including the celebrated case of Elahi Cotton (**Attachment 2102.5**) pronounced by the SCP and therefore, the impugned levy cannot be declared as ultra vires as contended on behalf of the Petitioners.*

5.3 For a better understanding of the controversy in hand, it would be advantageous to refer to Entry 47 and 50 of the Fourth Schedule to the Constitution enacted pursuant to Articles 70(4) and 142(a) of the Constitution. The same reads as under:

47. Taxes on income other than agricultural income.

50. Taxes on the capital value of the assets, not including taxes on immoveable property.

From perusal of the aforesaid Entry 47, it appears that the Federal Legislature can impose taxes on income other than agricultural income. A plain reading of this entry makes it clear that insofar as any income is concerned, a tax can be validly levied by the Federal Legislature. Perhaps, to this effect, there is no dispute and Petitioners Counsel have not raised any objection, that if it is a case of any income, tax

can be levied by the Federation. Insofar as Entry 50 as above is concerned, again it permits the Federal Legislature to impose taxes on the capital value of the assets, not including taxes on immoveable property. The case of the Petitioners before us is to the effect that the impugned levy under Section 7E is not a tax on income but a tax on immoveable property, which in terms of Entry 50 *ibid* is not within the competence of the Federal Legislature. To proceed further, it would be advantageous to refer to the relevant provisions of the impugned levy introduced by way of Section 7E, through Finance Act, 2022 which reads as under with our emphasis in **bold**:

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

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

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

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

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

(d) capital asset allotted to

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

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

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

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

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

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

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

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

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

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

(4) In this section:

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

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

(ii) any shares, stocks or securities;

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

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

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

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

5.4 From perusal of the aforesaid provision, it appears that for tax year 2022 and thereafter, a tax has been imposed at the rates specified in Division VIIC of Part I of the First Schedule on the income specified in this section. Section 7E(2) ibid has further provided that a resident person shall be treated to have derived, as income on the amount equal to 5% of the Fair Market Value (FMV) of capital assets situated in Pakistan held on the last day of the tax year, excluding the following:

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

(b) self-owned business premises from where the business is carried out;

(c) self-owned agriculture land where agriculture activity is carried out by such person and the capital asset allotted to a Shaheed or dependents of a Shaheed belonging to Pakistan Armed Forces;

(d) a person or dependents of the person who dies while in the service of Pakistan armed forces or Federal or provincial government;

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

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

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

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

(i) where the FMV of the capital assets in aggregate excluding the capital assets mentioned in clauses (a), (b), (c), (d), (e) and (f) does not exceed Rs 25M.

5.5 Similarly, capital assets have been defined in Section 7E(4)(a) *ibid*, and means property of any kind held by a person, whether or not connected with a business, but does not include the following:

(a) any stock-in-trade, consumable stores or raw materials, any shares, stocks or securities;

(b) any property to which a person is entitled to a depreciation deduction under Section 22 or amortization under Section 24; and

(c) any moveable asset not mentioned in clauses (i) (ii) or (iii) *ibid*.

THREE MAJOR MATTERS

The arguments of the petitioners Counsel as noted hereinabove are three-fold (a) the impugned levy is discriminatory (b) it is confiscatory, and (c) beyond the legislative competence of the Federal Legislature.

(I) DISCRIMINATION OR NOT ?

5.6 As to the argument regarding meting out discrimination to the petitioners as against the exceptions provided in Section 7E(2) *ibid*, it can be safely held that that this argument is not only misconceived but even has no force or legs to stand. Time and again, it has been held by the SCP as well as various High Courts of the country that the legislature has the competence to levy tax on different classes of persons and merely for the fact that someone is exempted from the levy of such tax, it cannot, always be pleaded that it is discriminatory in nature and is liable to be struck down in terms of Article 25 of the Constitution. It has to be clearly established from bare perusal of the impugned legislation that the levy has discriminated against the same class of persons. In order that a law 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; does not have a nexus with the purpose of law (*Sheraz Zaka Vs FoP - 2018 PTD 336 - Attachment 2102.21*). Per settled law the legislature is competent to classify persons or properties into different categories subject to different rates of tax".

5.7 The test of vice of discrimination in a taxing law are less rigorous and if there is equality and uniformity within each group founded on intelligible differentia having a rational nexus with the object sought to be achieved by the law, the Constitutional mandate that a law should not be discriminatory is fulfilled". When the impugned provision of Section 7E *ibid* is looked into keeping in mind the above dicta laid down by the SCP, it clearly reflects that the classes of persons who have been exempted from such levy are within the competence of the legislature as being classified separately, whereas, it is not the case of the Petitioners that they fall within the same class of those persons who have been exempted from the levy of tax in question. Much stress was laid on Section 7E(2)(d)(iv) *ibid* as to why certain exemption has been provided to a category of persons specified therein and to this, it may be observed that the very exemption is also further clarified and is not generic in nature.

5.8 It only extends to persons specified in Section 7E2(d)(iv) to the original allottees of the capital assets and that also being duly certified by the allotment authority. It may be observed that such a category of

person is allotted various properties which fall within their terms and condition of service from time to time either as an incentive or on their promotions, whereas, the exception provided is only to the extent of such original allotment and not thereafter. Though it is settled law that the guarantee of equal protection of laws also extend to taxing statutes; however, if the taxation, generally speaking, imposes a similar burden on every one with reference to that particular kind and extent of property, on the same basis of taxation, the law shall not be open to attack on the ground of inequality, even though the result of the taxation may be that the total burden on different persons may be unequal'.

5.9 If the Legislature has classified persons or properties into different categories, which are subjected to different rates of taxation with reference to income or property, such a classification would not be open to the attack of inequality on the ground that the total burden resulting from such a classification is unequal'. In deciding whether a taxation law is discriminatory or not it is necessary to bear in mind that the State has a wide discretion in selecting the persons or objects it will tax, and that a statute is not open to attack on the ground that it taxes some persons or objects and not others". In the celebrated case of IA Sherwani (1991 SCMR 1041) while deliberating on the question of equal protection in law the SCP has been pleased to hold that 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; 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; and finally 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; and (b) that the differentia must have rational nexus to the object sought to be achieved by such classification.

5.10 The SCP has deduced the principle of law 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. It has been further held 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. It may further be pointed out that different laws can be validly enacted for different sexes, persons in different age-groups, persons having different financial standings and 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.

5.11 Going further it has been observed that the question, as to whether a particular classification is valid or not, cannot be decided on the basis of advantages and disadvantages to individual assesseees which are accidental and inevitable and are inherent in every taxing statute as it has to draw a line somewhere and some cases necessarily may fall on the other side of the line.

5.12 Therefore, in essence no discrimination can be pleaded on this ground alone. Moreover, in terms of Section 7E(2)(g) a reasonable exemption has also been provided to all taxpayers in respect of properties owned by them having a value of up to Rs. 25M, and therefore, the Petitioners are estopped

by pleading discrimination when they themselves have been provided a benefit thereon. Resultantly, the argument that the impugned the levy is discriminatory, is per-se devoid of any merits; hence, not tenable.

(II) CONFISCATORY NATURE OR NOT ?

5.12 *It has been vehemently argued on behalf of the Petitioners that the levy in question is confiscatory in nature inasmuch as the properties in question are idle and not generating any income, therefore, there may be a case that the taxpayer does not have any money to pay any such tax or it does not have any further source of income; but is merely holding such property as assets or which have devolved upon and owned as legal heir(s). However, again there is no concept of invalidating a levy or tax merely on this ground that the taxpayer does not have any such capacity to pay the tax. Much stress was laid on the case of PSO (**Attachment 2102.7**), wherein, in its peculiar facts and circumstances the SCP had provided an exception to levy tax on PSO who was not generating any income to that extent which could sustain the levy of a presumptive tax on deemed income.*

5.13 *Firstly, it may be of relevance to observe that the facts as discussed in PSO (**Attachment 2102.7**) were materially different and not available to the present Petitioners. Secondly, with utmost respect and humility at the SCP's command, the SCP might have observed that case of PSO was decided by a three-member bench of the SCP, whereas, the SCP in Elahi Cotton case (**Attachment 2102.5**) decided by a five-member bench has been pleased to hold that levy of a tax, in its operation, may result in hardships or advantages or disadvantages to individual assesseees which are accidental and inevitable. Simipliciter this fact will not constitute violation of any of the fundamental rights. It has been further held that the taxing power is unlimited as long as it does not amount to confiscation. Similarly, a levy or imposition of tax cannot be struck down merely because of the reason that the taxpayer does not has the capacity or the amount of income on which tax has been levied. Hence, it may be rightly remarked that the Act obliges every person who holds land to pay the tax at the flat rate prescribed whether or not he makes any income out of the property, or whether or not the property is capable of yielding any income'.*

5.14 *If they cannot afford the tax, the property is liable to be sold, in due process of law, for realization of the public demand'. It is but natural that while paying taxes, there is always an element of hardship for a taxpayer in discharging his or her liability so created by the taxing statute; but this is inevitable in every taxation law, and this within itself is no ground to struck down a taxing law. The quantum of tax, levied by the taxing statute, the conditions subject to which it is levied, the manner in which it is sought to be recovered, are all matters within the competence of the Legislature, and in dealing with the contention raised by a citizen that the taxing statute contravenes any Article of the Constitution, Courts would naturally be circumspect and cautious. Again in Elahi Cotton (**Attachment 2102.5**), the SCP has dealt with the argument also raised herein on behalf of the Petitioners that the impugned levy is confiscatory in nature as it is demanding tax beyond the capacity of a taxpayer inasmuch as there is no corresponding income of the tax-payer to pay such a tax.*

5.15 *Over there the argument was that losses were being suffered continuously by various tax-payers, whereas, the levy of presumptive tax or minimum tax under Sections 80C, 80CC and 80D of*

*the repealed IT Ordinance, was confiscatory and it was observed by the SCP that **Since there is a presumption in favour of legislative competence as held in a number of judgments referred to hereinabove, the burden to show that the impugned taxes are confiscatory or expropriatory, was on the appellants. In our view, they have failed to bring on record any reliable material on the basis of which it can be concluded that the same are confiscatory or expropriatory.***

*5.16 It was further held that **The question, as to whether a particular tax is confiscatory or expropriatory, is to be determined with reference to the actual earning or earning capacity of an average prudent successful entrepreneur in a particular trade or business. The fact that a particular assessee has suffered loss/losses during certain assessment years, is not germane to the above question.***

*5.17 **Therefore, in our considered view, the present levy cannot be declared as ultra vires to the Constitution merely on the ground that it is confiscatory in nature.***

(III) LEGISLATIVE COMPETENCE OR NOT ?

*5.17 Lastly, coming to the issue regarding competency of the Federal Legislature, the case of the Petitioners is primarily based on the ground that the Federal Legislature has no jurisdiction or authority or competence to levy any tax on immovable property in terms of Entry 50 as above. According to them, post 18th amendment, this authority now vests exclusively in the Provincial Legislature, whereas, in essence, the impugned levy is in fact a tax on property and not a tax on any income generated by the Petitioners. On the other hand, the case of the Respondent / Federation is that it is not a tax falling within Entry 50 *ibid* but it is a case of deemed income on a resident taxpayer falling within the competence of the Federal Legislature under Entry 47 of the Fourth Schedule to the Constitution. From perusal of Section 7E *ibid*, it appears that firstly, it is a provision which has been incorporated in the IT Ordinance by way of Finance Act, 2022, and provides that resident person shall be treated to have derived as income chargeable to tax under this section, an amount equal to 5% of the FMV of capital assets situated in Pakistan held on the last day of tax year.*

*5.18 It is not denied that a tax on income can be levied by the Federal Legislature under Entry 47 *ibid*. Now what is to be seen is that whether an income could be deemed to have arisen to a resident taxpayer so as to levy a tax on such income. The concept of deemed income is not alien to the taxation laws in the country including the IT Act, the repealed IT Ordinance and the current IT Ordinance and this concept of deemed income has been accepted and approved, whereby, the Courts have upheld such deemed income for the purposes of levy of tax as being tax on income.*

*5.19 In the Indian Constitution of 1949, there exists Entry 82" of List I of the Seventh Schedule which is identical to our Entry 47 *ibid*, whereas, Entry 49 of List II of the Seventh Schedule to their Constitution is more or less similar to our Entry 50 *ibid*. In the case reported as *Bhaqwan Dass Jain y Union of India (AIR 1981 SC907)*, the issue for consideration before the Supreme Court of India was whether it is open to the Income Tax Officer while computing the liability of an assessee to tax under the Income Tax Act, 1961 to include in the income of the assessee any amount calculated in accordance with Section*

23(2) of the Income Tax Act, 1961 in respect of a house in the occupation of the assessee for the purposes of his own residence.

5.20 It was contended that inclusion of any amount under Section 23(2) of the Income Tax Act, 1961 in his income was unconstitutional as there could be no income at all in such a case accruing to him in the true sense of that term, the liability that was sought to be imposed under the Act in respect of his residential house was therefore, in its pith and substance a tax on building falling under Entry 49 of List II of the Seventh Schedule to the Constitution and hence Parliament could not impose the said liability under a law made in exercise of its legislative power under Entry 82 of List I of the Seventh Schedule to the Constitution which authorized it only to levy taxes on income other than agricultural income.

5.21 The Indian Supreme Court didn't agree with this proposition and held that the tax levied was on the income (though computed in an artificial way) from house property and not on house property; hence, Entry 49 of List II of the Seventh Schedule was not attracted. Similar is the situation in the instant matter, as apparently, the tax is on the deemed income and not on the immovable property as contended. The relevant finding of the Indian Supreme Court is as under:

13. There is one other circumstance which persuades us to take the view that computation of income for purposes of levy of income tax in accordance with Section 23(2) of the Act is justifiable under Entry 82 of List I of the Seventh Schedule to the Constitution. It is to be borne in mind that the Government of India Act, 1935 was enacted when the Indian Income-tax Act, 1922 was in force. Section 9 of the Indian Income-tax Act, 1922 provided for levy of income tax on the basis of the bona fide annual value of the property even when it was in the occupation of the assessee for the purposes of his own residence. While enacting entry 54 of list I of the Seventh Schedule to the Government of India Act, 1935, the British Parliament must have had in its view the Indian Income-tax Act, 1922 which was probably the only law relating to tax on incomes in force in British India then. Similarly, the Constituent Assembly while enacting Entry 82 of List I of the Seventh Schedule to the Constitution must have understood that the word 'income' used in that Entry would in any event include within its scope all items which came within the definition of income and were subjected to charge in the Indian Income-tax Act, 1922 which was in force at the time the Constitution was adopted. That the Constitution makers had the Indian Income-tax Act, 1922 in their view is borne out from Article 270(1) of the Constitution which provides for collection of taxes on income by the Government of India and distribution thereof between the Union and the States, Article 366(1) which defines 'agricultural income' as agricultural income as defined for the purposes of the enactments relating to Indian Income-tax and Article 366(29) which defines 'tax on income' as including a tax in the nature of an excess profits tax. In the circumstances it would not be wrong to construe the word 'income' in Entry 82 as including all items which were taxable under the contemporaneous law relating to tax on incomes which was in force at the time when the Constitution was enacted when as observed by this Court in the case of Navinchandra Mafatlal (supra) the word 'income' in Entry 82 is capable of a wider meaning than what was given to it in the Indian Income-tax Act, 1922 or the English Act of 1918.

Even in its ordinary economic sense, the expression 'income' includes not merely what is received or what comes in by exploiting the use of a property but also what one saves by using it oneself. That which can be converted into income can be reasonably regarded as giving rise to income. The tax levied under the Act is on the income (though computed in an artificial way) from house property in the above sense and not on house property. Entry 49 of List II of the Seventh Schedule to the Constitution is not,

therefore, attracted. The levy in question squarely falls under Entry 82 of List I of the Seventh Schedule to the Constitution.

5.22. Insofar as concept of deemed income under our tax laws is concerned, it would be of relevance to note that it was introduced through insertion of Sections 80C, 80D and 80DD which was impugned by the taxpayers in the High Courts of the country and eventually, it was decided by the SCP in the case of Elahi Cotton (Attachment 2102.5). As a matter of fact, the levy was sustained by the SHC as well as the LHC and thereafter, on appeal it was also upheld by the SCP. It may also be of relevance to observe that time and again the judgment in Elahi Cotton is cited and in fact, in this matter it was relied upon by both the sides and by making an argument in support of their contention respectively. However, we may say that this is least impressive and does not assist the SCP in any manner.

5.23 What has been overlooked by respective Counsels is that firstly, what was the proposition of law before the SCP and secondly, what had been finally decided therein. The question was whether there could be any concept of deemed income when it had not been received in actual and whether there could be any minimum tax or presumptive tax on income. This was, in a simple and plain language, the gist of the issue involved and nothing beyond that. It may further be observed that the SCP after a thread bare examination of the arguments and the case law relied upon by the respective parties enunciated certain principles of law; however, at the same time while dismissing the Appeals it was observed that they do not support the case of the Appellant / taxpayers and ultimately the levy was upheld in the following manner.

32. We have summarized hereinabove in para. 31 the ratio decidendi of the above discussed cases and certain pertinent observations made therein. A perusal of above sub- paras. (i) to (xxx) of para. 31 indicates that the 'same do not advance the case of the appellants. On the contrary, they reinforce the principle of law that the Legislature, particularly in economic activities, enjoys a wide latitude in the matter of selection of persons, subject-matters, events etc., for taxation. the presumption is in favour of the validity of the legislation. The burden to prove that the same is invalid is on the person who alleges it.

However, one can urge that the general observations contained in sub paras (xxi) to (xxxiv) of para. 31 lend support to some extent to the appellants' case. However, it should not be overlooked that in none of the cases from the judgments of which the above observations have been lifted the question, as to whether there can be presumptive tax or the minimum tax, in view of entries 47 and 52 of the Legislative List, was in issue. In this view of the matter, it would be inappropriate to apply the tests traditionally prescribed by the Income Tax Act and/or any other statute.

The Indian Supreme Court in the three cases falling in the first category mentioned in para. 25(i) hereinabove upheld the levy of tax on expenditure, hotel receipts and luxuries for the reasons already discussed hereinabove in para.26. In the cases falling in the second category referred to hereinabove in para.25(ii) which consists of six cases, the vires of newly added sections 44-AC and 206-C of the Indian Income Tax Act were in issue. The matter eventually was taken up by the Indian Supreme Court in the case of Sanyasi Rao (supra), which has been dealt with in detail with reference to the contentions of the learned counsel for the appellants herein below in para. 44. The cases falling under the above category do not advance the case of the appellants.

As regards the cases covered by the third category and which comprise 14 cases mentioned hereinabove in para. 25(iii), it may be stated that the learned counsel for the appellants have heavily relied upon the two cases, namely, the case of Kunnathat Thuni

Moopil Nair etc. (supra) and the case of State of Kerala v. Haji K. Kutty Nalia and others (supra) mentioned in para. 28(ii) and (vii) respectively', which have again been dealt with herein below in para 46 with reference to the submissions made by the learned counsel for the appellants. The remaining cases of the above category do not support the case of the appellants.

It may further be stated that the three cases of the Privy Council referred to hereinabove in para. 28 and also herein below in para. 42 need no further discussion. However, in one of the above three cases, namely, in the case of King v. Canedonis Collieries (supra), observations contained in above sub para. (xxxiv) of para. 31 were made namely, that 'there is a marked distinction between a tax on gross revenue and a tax on income, which for taxation purposes means gains and profits and that there may be considerable gross revenues but no income taxable by an income-tax in the accepted sense'. The above observations are to be viewed with reference to the above context in which they were made, namely, the legislative power inter se between the Dominion and the Provinces. The question, whether there can be presumptive tax and/or minimum tax was not in issue which. are comparatively modern concepts. The Indian Supreme Court in the Elal Hotel & Investment Ltd. (supra) held that the tax on chargeable receipts under the Hotel Receipts Tax Act, 1980, was valid.

As regards cases of Pakistani origin referred to hereinabove in para. 29, it may be observed that the learned counsel for the appellants heavily relied upon the case of Government of Pakistan and others v. Muhammad. Ashraf and others (supra) mentioned in sub-para. (vii) of para. 29 hereinabove, the same has been again dealt with herein below in para. 44. Reliance was also placed by the learned counsel for the appellants on certain observations in the case of Pakistan Industrial Development Corporation v Pakistan (supra) mentioned at para.29(vii) hereinabove, particularly on the general observation that "thus the deeming provision in section 4 of the Act By this provision anything which is not income cannot be treated as income Before charging tax an assessee must be shown to have received income or it has arisen and accrued or deemed to be so', (which has been referred to hereinabove in sub para. (xxxiii) of para. 31)

The above observations no doubt seemingly support the learned counsel for the appellants, but the same are to be viewed with reference to the context in which they were made, namely, whether the definition of income as extended by newly-added section 2(6C) of the late Act, whereby even free reserves exceeding paid-up ordinary share capital of the company as on the last day of the previous year, was included in the income. The above provisions were not declared ultra vires by this Court in the above report Furthermore, the above general observation founded on traditional approach cannot be pressed into service to examine the Constitutional validity of the above three impugned sections.

33. We may point out that in most of the above-cited cases the Court had upheld the validity of the impugned legislation levying taxes. In the first category which consists of three cases of the Indian Jurisdiction mentioned in para. 25(i) hereinabove, the Indian Supreme Court upheld the levy of tax on expenditure, hotel receipts, and luxuries for the reasons already discussed in para. 26 hereinabove.

It may further be observed that the cases falling under the second category referred to in para. 25(ii) have already been dealt with hereinabove in para. 27. The case of Sanyasi Rao (supra) decided by the Indian Supreme Court; which has some relevance to the controversy in issue, has again been dealt with herein below in para. 44 and, therefore, need no further discussion.

It may be stated that the third category of cases of Indian Jurisdiction referred to in para. 25(ii) hereinabove comprises 14 cases, the detail of which is given in para.28 hereinabove. It is not necessary to deal with each of them as they have already been dealt with hereinabove in the above para. However, we may again refer to some of the above cases heavily relied upon by the learned counsel for the appellants.

34. Keeping in view the above case-law and the treatises and the aforesaid legal inferences drawn therefrom, we may now revert to the question of vires of impugned sections. It may again be observed that the power to levy taxes is a sine qua non for a State. In fact, it is an attribute of sovereignty of a State. It is mandatory requirement of a State as it generates financial resources which are needed for running a State and for achieving the cherished goal, namely, to establish a welfare State. In this view of the matter, the Legislature enjoys plenary power to impose taxes within the framework of the Constitution. It has prima facie power to tax whom it chooses, power to exempt whom it chooses, power to impose such conditions as to liability or as to exemption as it chooses, so long as they do not exceed the mandate of the Constitution. It is also apparent that the entries in the Legislative List of the Constitution are not powers of legislation but only fields of legislative heads. The allocation of the subjects to the lists is not by way of scientific or logical definition but by way of mere simple enumeration of broad catalogue. A single tax may derive its sanction from one or more entries and many taxes may emanate from one single entry. It is needless to reiterate that it is a well-settled proposition of law that an entry in the Legislative List must be given a very wide and liberal interpretation. The word 'income' is susceptible as to include not only what is in ordinary parlance it conveys or it is understood, but what is deemed to have arisen or accrued. It is also manifest that income-tax is not only levied in the conventional manner i.e., by working out the net income after adjusting admissible expenses and other items, but the same may also be levied on the basis of gross receipts, expenditure etc. There are new species of income-tax, namely, presumptive tax and minimum tax.

5.24 From the above observations and the conclusion, it clearly reflects that any reliance by the Petitioners Counsel on Para 31 and its sub-paras in support of their respective contention is not in accordance with what has been finally held by the SCP. On the other hand, in fact, it is the inverse and supports the case of Respondents as to validity of the impugned levy. The following observations of the SCP while upholding the said levy which are relevant for the present purposes reads as under:

(ix) That the law should be saved rather than be destroyed and the Court must lean in favour of upholding the constitutionality of a legislation keeping in view that the rule of Constitutional interpretation is that there is a presumption in favour of the constitutionality of the legislative enactments unless ex facie it is violative of a Constitutional provision.

(x) That as per dictionary the word 'income' means 'a thing that comes in'. Its natural meaning embraces any profit or gain which is actually received. However, while construing the above word used in an entry in a legislative list, the above restricted meaning cannot be applied keeping in view that the allocation of the subjects to the lists is not by way of scientific or logical definition but by way of mere simplex enumeration of broad categories.

(xi) That the expression 'income' includes not merely what is received or what comes in by exploiting the use of a property but also what one saves by using it oneself. For example, use of a house by its owner.

(xii) That what is not 'income' under the Income Tax Act can be made 'income' by a Finance Act. An exemption granted by the Income Tax Act can be withdrawn by the Finance Act or the efficacy of that exemption may be reduced by the imposition of a new charge, of course, subject to Constitutional limitations.

(xvii) That generally the effect of a deeming provision in a taxing statute is that it brings within the tax net an amount which ordinarily would not have been treated as an income. In other words, it brings within the net of chargeability income not actually accrued but which supposedly to have accrued notionally.

(xii) That when a statute enacts that something shall be deemed to have been done which in fact and in truth was not done, the Court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to.

(xix) That where a person is deemed to be something the only meaning possible is that whereas he is not in reality that something, the Act required him to be treated as he were with all inevitable corollaries of that state of affairs.

Therefore, insofar as the concept of deemed income is concerned, it is not in dispute that it is an approved concept of taxation and is not dependent on the actual amount of money or income being received by a taxpayer. The best example which has been dealt with in respect of a deemed income in India as well as Pakistan, is in respect of the annual rental income from a property whether it has been rented out by a taxpayer or otherwise. Time and again disputes had arisen as to the actual income received or receivable as well as concealment by the taxpayer in respect of rent from the property and therefore, the legislature introduced a concept of deemed income, whereby, tax was levied on a fixed amount of income, whether or not the property was being let out; or the taxpayer was actually receiving such income.

*5.25 Insofar as the present levy is concerned, from perusal of Section 7E *ibid*, it clearly reflects that it is not a tax on property *per-se* but a tax on deemed income for holding of a capital asset as defined in Section 7E *ibid*, along with the exceptions and or exemptions as are also applicable to the Petitioners. In essence, it is a tax on the income being deemed from such immoveable properties and in that case, it would clearly fall within Entry 47 of the Federal Legislative List as provided under the Fourth Schedule to the Constitution. The argument that it is a tax on property; hence, will fall under Entry 50 *ibid*; and then it can only be levied by the Provincial Legislature, if at all, is misconceived and not tenable inasmuch as no tax is being levied on the property itself; rather it is a tax on deemed income of the property.*

*5.26 As to the argument that a tax has been levied without there being any transaction not resulting in any income, it would suffice that again the same does not appear to be a correct approach as apparently holding of property beyond the threshold as provided in Section 7E(2)(g) is by itself a transaction which has been deemed to be an income within the ambit of Section 7E *ibid*. Similarly, the argument that a transaction only occurs when an actual amount of income has been received is also misconceived as apparently a deemed income concept has been upheld by the SCP in Elahi Cotton case (**Attachment 2102.5**) and without going any further to elaborate the said concept of deemed income which apparently is an income, notwithstanding that it is being received in terms of money or otherwise. It is a fictional income concept, and if at all, it is to be relatable to an actual transaction or an attempt to generate an income, as contended, it would then not be an income deemed to have arisen.*

5.27 Deemed Income of a taxpayer is always not an actual income; hence, if the conditions of an enactment are satisfied, it is deemed income, irrespective of the actual transaction. This is what the concept of a deemed income is. Any other interpretation and meaning would not be a deemed income but an actual income. A fictional income is- not needed to create a situation which already exists in reality. It is an income which is deemed to have arisen and that is all. Once it is so, then any other relative happenings are materially irrelevant. The definition of income is an inclusive definition; it enlarges the

meaning of income. An income from property which has been made liable to tax is not its actual income in money but an artificial or statutory income as explained in the impugned section 7E.

5.28 In fact, by way of insertion of this Section another head of income has been created; though fictionally. Therefore, the fact that the owner of the property receives no income in fact or even that there is no possibility of his receiving an income is irrelevant for the consideration of the question as to what the artificial or statutory income of an assessee is from property. Fictions always conflict with reality, whereas presumptions may prove to be true. Legal fictions create an artificial state of affairs by a mandate of the legislature. They compel everybody concerned including the courts to believe the existence of an artificial state of facts contrary to the real state of facts. When a fiction is created by law, it is not open to anybody to plead or argue that the artificial state of facts created by law is not true, barring the only possible course if at all available is to question the constitutionality of the fiction.

5.29 One of the petitioners Counsel had vehemently relied upon the case of PIDC (Attachment 2102.6) in support of the contention that the concept of deemed income has not been approved by the SCP. However, this contention is misconceived in as much as the case of Elahi Cotton (Attachment 2102.5) is later in time. Moreover, in Elahi Cotton (Attachment 2102.5) the case of PIDC (Attachment 2102.6) has been discussed and it is observed that while dismissing the above appeal it was held that the controversy, whether amount of free reserves could be treated as income, was not involved as the levy challenged by the appellant was not income-tax but was a super tax charged under section 55 of the late Act. Here this question is not before us; hence, any passing remarks in the case of PIDC (Attachment 2102.6) will not be relevant for the present purposes and are of no help to the case of the petitioner before us. It was further observed in PIDC (Attachment 2102.6) at Para 9: It is only if the income is received arises or accrues or is deemed to receive, arise or accrue when an assessee is subjected to tax. The deeming provision presupposes accrual of income to the assessee but by fiction of law shifts the 'locale of accrual of the income'. A deeming clause makes a thing to be as provided by Statute though in reality it is not so. According to Privy Council in CIT. v. Bombay Trust Corporation 4 ITC 312, the term "deemed to receive or accrue" conveys the meaning that in reality it is not so but the Statute treats it as if it were". By placing reliance on Kanga and Palkhiwala on Income Tax, Volume I, VIIth Edition, it was further observed that "Thus, the phrase deemed to accrue or arise to him in India during such year' and the corresponding phrase with reference to receipt in this section, involve our possible concepts; (a) artificial accrual or receipt, (b) artificial place of accrual or receipt, (c) artificial chargeability of a person other than the actual owner of the income, and (d) artificial year of taxability." The Hon'ble Supreme Court in Elahi Cotton (Supra) has dealt with this particular finding by observing that (already reproduced hereinabove), "The above observations no doubt seemingly support the learned Counsel for the appellants, but the same are to be viewed with reference to the context in which they were made, namely, whether the definition of income as extended by newly added section 2(6-C) of the late Act, whereby even free reserves exceeding paid-up ordinary share capital of the company as on the last day of the previous year, was included in the income. The above provisions were not declared ultra vires by this Court in the above report. Furthermore, the above general observation founded on traditional approach cannot be pressed into service to examine the Constitutional validity of the above three impugned sections".

5.30 Therefore, reliance placed on the case of PIDC (Supra) is of no help to the case of the Petitioners. It is settled law that Income-tax is a tax on a person in relation to his income. The tax is not imposed on income generally; it is imposed on the income of a person, natural or artificial, whereas, the assessment has to be made against a person, and the tax has to be collected from the assessee; the tax is not made a charge on the income upon which it is levied, and broadly speaking, it is accurate to say that income-tax is a tax imposed upon a person in relation to his income.

5.31 Lastly an argument was also made as to the inability of FBR to make arrangements to collect the impugned levy as no modalities have been made public, it would suffice to observe that per settled law once the Court finds that a fiscal statute does not suffer from any Constitutional infirmity, it is not supposed to entangle itself with the technical questions as to the scope and modality of its working etc. The above questions pre-eminently deserve to be decided by the Government which possesses experts' services and the relevant information which necessitated imposition of the tax involved unless the same suffers from any legal infirmity which may warrant interference by the Court. Additionally, while examining a fiscal statute the Court should not be carried away with the fact that the same may be disadvantageous to some of the tax-payers. If such a fiscal statute is beneficial to the country on the whole, the individuals' interest should yield to the nationals' interest.

6. SHC Decision

The SHC held that based on the perusal of the case laws referred as well as the dicta laid down by the SCP in the case of Elahi Cotton (infra), no exception can be drawn to the competence of the Federal Legislature while introducing Section 7E through Finance Act, 2022, in the Ordinance, whereas, the impugned levy is (a) neither ultra vires to the Constitution; (b) nor it is confiscatory or discriminatory. Hence, the Federal Legislature is fully competent to impose Tax on deemed income pursuant to Section 7E, and therefore, by means of a short order dated 28.10.22 (TLQC 2083 refers) all listed Petitions were dismissed and these are the reasons thereof.

D. WAY FORWARD

As per reliable sources, the certain Taxpayers are considering filing Petitions before the Supreme Court and other taxpayers may be part of the same especially material amount is involved. Details will be discussed in the upcoming **Free Seminar. Please click here for Flyer or call any of the Tax Excellence/Kasbati & Co Representatives at 021 3729 6771 & 83 OR 0334 322 3163. Click Register Now to fill the Registration Form. We will share the Zoom Link shortly.**

Should you require any clarification or explanations in respect of the above or otherwise, please feel free to email us

Best regards for Here & Hereafter

Asif S Kasbati (FCA, FCMA & LLB)

From: **Asif Siddiq Asif S Kasbati** <asif.s.kasbati@professional-excellence.com>

Date: Thu, Nov 10, 2022 at 11:04 PM

Subject: TLQC2057= Section 7E LHC 10.11.22 (today) hearing status

Dear Learned Professionals

This refers to TLQCs 2054 (in trail in blue & italics, after double line) about Section 7E LHC Cases' hearing before the Learned Justice Shahid Jamil on 8.11.22, when the FBR Representative were partly heard against the Petitioners Legal Counsels' arguments. The cases were then fixed for final hearing on 10.11.22.

On 10.11.22 (today), owing to the absence of the AAG / FBR Representative, further arguments from him will be heard on 11.11.22. We will keep your Goodself posted of the update, as soon as it comes to our knowledge.

Although the SHC short order is against the taxpayers (TLQC 2041 refers), however, we predict based on the Court Proceedings and somehow our Sixth Sense indicates that the LHC order is likely to be in the taxpayers' favour.

For the detailed Background about SHC & LHC hearings against Section 7E matters and related matters, please refer to TLQC 2041 and 13 Other TLQCs in trail at the different stages.

Should you require any clarification or explanations in respect of the above or otherwise, please feel free to email us.

Best regards for Here & Hereafter

Asif S Kasbati (FCA, FCMA & LLB)

From: Asif Siddiq Kasbati <kasbati.commentaries@gmail.com>

Date: Wed, 2 Nov 2022 at 14:49

Subject: TLQC2041= IT Section 7E SHC short dismissal order

Dear Learned Professionals

A. WORKSHOP

We will discuss the below matter in detail in the upcoming Workshop. Click [here](#) for Flyer; send details as per Flyer for Direct Registration OR click [Register Now](#) for Tentative Registration. Call Mr Nivyan at 0323 327 4584 OR Mr Amsal 0342 222 8757 or 0213 432 9108 for more details.

B. COMMENTARY

*Considering Background para C(a) and Updates para D, the SHC vide order dated 28.10.22 (**Attachment 2041.1**) in CP D-4614 of 2022 & 207 other cases held that after hearing Learned Counsels for the parties including Assistant Attorney General & for reasons to be recorded later, all the Petitions mentioned in **Attachment 2021.1** have been dismissed.*

We will share the Detailed SHC order as soon as found.

C. BACKGROUND

This refers to the following TLQCs (in trail, blue, italic & after double line) about IT Section 7E matter:

(a) 2033 dated 28.10.22 SHC dismissing Section 7E appeals (when dismissal order was not available).

(b) 2032 dated 28.10.22 about LHC Section 7E Special Bench hearing on 1.11.22.

(c) 2014 dated 17.10.22 about SRO 1891 dated 13.10.22 whereby the Form for Deemed Income u/s 7E was added in the IT Rules.

(d) 2000 dated 30.9.22 about LHC Interim order dated 27.9.22 re IT Section 7E and adjournment to 18.10.22.

(e) 1995 dated 27.9.22 about LHC granting interim relief.

(f) 1983 dated 17.9.22 about IT Section 7E - LHC Interim relief order 2 in WP 52559/2022 and next hearing on 19.9.22.

(g) 1970 dated 7.9.22 about LHC Interim order dated 19.7.22 in which LHC gave details regarding the Petition WP 44604/2022.

(h) 1968 dated 5.9.22 about details of Petitions in SHC against IT Section 7E and Interim Relief order.

D. UPDATED STATUS

You may have seen KQU 1893 dated 2.11.22 whereby we shared the link of the “Order sheet - In the High Court of Sindh - C.P. No. D-4614 of 2022” alongwith several other updates and covered in our **Commentary** above, being an **Important** matter as your Goodself may have missed out the same owing to likely busy schedule.

Should you require any clarification or explanations in respect of the above or otherwise, please feel free to email us.

Best regards for Here & Hereafter

Asif S Kasbati (FCA, FCMA & LLB)

--

You received this message because you are subscribed to the Google Groups "KC Staff" group.

To unsubscribe from this group and stop receiving emails from it, send an email to kc-staff123+unsubscribe@googlegroups.com.

To view this discussion on the web visit <https://groups.google.com/d/msgid/kc-staff123/CALmgTOa-hQUus8gqWQUghgvXNM4G6S%2BapJL9iDorKFIPHbjQ%40mail.gmail.com>.



2375.3-PLD 1989 SC 61.pdf
86K