

Technical Release 3/2026

Comments

Short order of the

Federal Constitutional Court

On the matter of

Super Tax under Section 4C of the Income Tax Ordinance, 2001



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General

These notes provide a short summary on the decision of the Federal Constitutional Court (FCC) dated January 27, 2001 on the validity of Section 4C of the Income Tax Ordinance, 2001.

This order is the result of numerous appeals filed against the orders of Islamabad, Sindh and Lahore High Courts.

All appeals on this matter were merged, therefore, this order is applicable on all the cases on this subject. It has been stated in the order that:

For detailed reasons to be recorded separately, and subject to such amplification and/or explanation therein as is considered appropriate, all the titled cases are decided in the following terms:

This means that there will be a detailed order on this subject. Accordingly, in paragraphs 1 to 9 of the Order FCC has not given the basis of the decision. Nevertheless, the conclusions drawn, which is the decision, have been given in clear terms. These matters are discussed in the following paragraphs:

Questions raised before FCC

Following questions were before the FCC:

- (1) whether section 4C is intra vires the Constitution;
- (2) whether section 4C applies retroactively on income arising in tax year 2022;
- (3) whether the computation of "income" as defined in section 4C is constitutionally valid when it disallows brought forward losses, depreciation and amortization and includes heads of income liable to separate taxation;
- (4) whether the classification in the First Proviso to Division IIB, Part I, First

Schedule of the Income Tax Ordinance 2001 (hereinafter "the First Proviso") of 15 sectors subjected to a higher rate of super tax under section 4C (at the rate of 10%) for tax year 2022 where the "income" exceeded PKR 300 million is constitutionally impermissible?

(5) whether banking companies' are liable to pay super tax under section 4C for tax year 2023 and onwards in light of the Proviso to section 4C and the Second Proviso to Division IIB, and in light of the Seventh Schedule of the Ordinance 2001; and

(6) whether income from capital gains on securities assessed under the Eighth Schedule of the Income Tax Ordinance, 2001 is liable to be taxed under section 4C.

No Deemed to be Retrospective Application

The FCC has held that Super Tax under Section 4C which was introduced by way of insertion of this section in the Income Tax Ordinance, 2001 by the Finance Act 2022 is applicable for the year 2022. The court has considered that this is not a legislation with retroactive application. There was a different view on this subject by the High Court. The FCC has observed:

iii. Section 4C is held to be intra vires the Constitution and shall apply as enacted for tax year 2022 and onwards at the rates prescribed in Division IIB, Part I, First Schedule, Income Tax Ordinance, 2001. It is established law that the legislature has the plenary power to enact laws with retrospective and prospective effect subject to such laws not effecting past and closed transactions. There is no provision in the Ordinance

2001 whereby the closing of accounts of a tax year qualifies as an event which precludes the imposition of a fresh charge where none existed before, particularly when returns of income for tax year 2022 were yet to be filed. The impugned Judgments of the Division Benches of the learned Sindh, Islamabad iv. and Lahore High Courts to the extent they hold section 4C not to apply retroactively to tax year 2022 are set aside;

This means that Section 4C is treated to be applicable for the Tax Year 2022 and the concept of closure of books of accounts has not been accepted, except in the case of banking companies where there was a different legislation.

For banking companies the Super Tax will be applicable for the tax year 2023 in accordance with the provisions laid down in the Finance Act, 2022

Extent of definition of Income

FCC has decided that Section 4C is an independent section which is not governed by Section 4 of the Ordinance and the legislature has the right to impose a tax under this section. This decision is the answer to the undermentioned question framed by the FCC in their order:

(3) whether the computation of "income" as defined in section 4C is constitutionally valid when it disallows brought forward losses, depreciation and amortization and includes heads of income liable to separate taxation:

This means that the term 'income' as defined in this section will not be governed by the provisions of other sections of the Ordinance. FCC has been held that:

v. It is held that the definition of "income" for purposes of section 4C in so far as it includes income from all sources is validly enacted. The impugned judgments dated 20.07.2023 and 15.03.2024 of the Islamabad High Court to the extent they read down section 4C are set aside;

vi The direction issued by the learned Islamabad High Court, in the Pakistan Oilfields Judgment dated 15.03.2024, to the Federal Board of Revenue (FBR) to issue circular to implement the aforesaid judgment across Pakistan is beyond its jurisdiction and is set aside;

vii Super tax is a tax on income independent of the tax levied under section 4 of the Income Tax Ordinance, 2001. Entry 47, of Part I of the Fourth Schedule of the Constitution, Parliament is competent to levy "taxes on income". Therefore, section 4C is a self-contained provision insofar as this levy is concerned and is thus, a standalone tax on income. As such, section 4C as applies to capital gains under section 37A and Rules of the Eighth Schedule, Income Tax Ordinance, 2001 is held to be applicable thereto, being within the ambit of section 4C(2)(i) and (iv), Income Tax Ordinance 2001;

FCC has stated that 'super tax is a tax on income independent of the tax levied under section 4 of the Income Tax Ordinance, 2001'. However the judgement does not specifically and fully deal 'with heads of income liable to separate taxation'. There the matter is not the chargability but the finality of the rate.

There are certain amounts included in the definition of income under sub-section 2 of Section 4C however the same are governed by the different or final tax regime. Sub-section (2) of Section 4C states as under:

(2) For the purposes of this section, "income" shall be the sum of the following:—

(i) profit on debt, dividend, capital gains, brokerage and commission;

(ii) taxable income (other than brought forward depreciation and brought forward business losses) under section 9 of the Ordinance, excluding amounts specified in clause (i)

(iii) imputable income as defined in clause (28A) of section 2 excluding amounts specified in clause (i); and

(iv) income computed, other than brought forward depreciation, brought forward amortization and brought forward business losses under Fourth, Fifth, Seventh and Eighth Schedules.

There is no reference in the short order that the final rate prescribed on those regimes will also be overridden by the provisions of Section 4C of the Ordinance. Though it has been held that:

v. It is held that the definition of "income" for purposes of section 4C in so far as it includes income from all sources is validly enacted.

It has been held in paragraph 9(vi) that super tax under this Section can be levied on all sources of income. However it does not necessarily mean that it has been levied and held valid by the FCC where there is finality of rate for special reasons.

Furthermore the particular reference of capital gains and Income under the Eighth Schedule with specific reference to clauses of sub-section (2) of Section 4C clearly indicates that there is a valid case that FCC has not

confirmed the levy of super tax on income which are subject to tax under a particular regime such as 'dividend' under Section 5 of the Ordinance and levy of tax under the Final Tax Regime which are outside the provisions of Section 4 of the Ordinance. A particular means would necessarily required to be given to the following statement of the FCC:

As such, section 4C as applies to capital gains under section 37A and Rules of the Eighth Schedule, Income Tax Ordinance, 2001 is held to be applicable thereto, being within the ambit of section 4C(2)(i) and (iv), Income Tax Ordinance 2001;

Capital gain is only one of the items covered under section 4C(2)(i) of the Ordinance. There appears to be a case that this decision does not apply on such income and the order has not decided that subject as yet. It is expected that this matter will be clarified positively in detailed order. Furthermore, since FCC has validated the case of freeze rate in the case of E&P companies therefore there is no basis for not doing so in other cases such as the final tax regime.

Super Tax on E&P Companies

E&P Companies are subject to tax at the rate prescribed in the concession agreement. It has been held that super tax will be deemed to be included within that rate prescribed. It has been held that:

The legislative intent underlying Rule 4 is to provide a sector-specific framework recognizing the unique nature, risks, and investment requirements of the petroleum and exploration industry. Imposing a super tax beyond the prescribed threshold would effectively override this legislative safeguard, impose an excessive and disproportionate burden, and frustrate the purpose for which the special provisions were enacted. In the absence of a clear and express intention of the Legislature to

abrogate or modify these sectoral thresholds, section 4C cannot be construed so as to operate in a manner inconsistent with Rule 4 of the Fifth Schedule;

No Super Tax on Income of the Retirement Benefit Funds

Since it has been decided that super tax is a separate tax therefore by way of a specific decision, subject to certain conditions super tax will not be payable retirement funds.

Recovery of Tax

The recovery of tax as per decision can be made in accordance with the provisions of the income tax ordinance as laid down in Sub-section 3A of Section 138 of the Ordinance:

(3A) Notwithstanding anything contained in this Ordinance or any other law or any rule, any decision or judgment of any court, forum or authority, the tax payable under any

provision of this Ordinance or any assessment order shall become immediately payable subject to the following conditions —

(a) that the case has been decided in the favor of the department at three appellate forums including the High Court;

(b) that the recovery under this section shall only be made to the extent of lowest amount of demand which has been confirmed by any of the three appellate forums; and

(c) that the tax payable exceeds rupees two hundred million, and the Commissioner shall proceed to recover the said amount irrespective of the time provided under any other provision or the said decision or judgment.]

Annexure

SHORT ORDER

AMIN-UD-DIN KHAN, CJ:- For detailed reasons to be recorded separately, and subject to such amplification and/or explanation therein as is considered appropriate, all the titled cases are decided in the following terms:

1. The matters before this Court involve, inter alia, vires of super tax imposed under section 4B read with Division IIA, Part I, First Schedule, Income Tax Ordinance, 2001 (hereinafter "section 4B"). A tax for raising revenue for Internally Displaced Persons for tax year 2015 and onwards, inserted in the Income Tax Ordinance 2001 (hereinafter "the Ordinance 2001") vide Finance Act, 2015. The hearing of the aforesaid matter was immediately followed by the cases involving, inter alia, vires of section 4C read with Division IIB, Part I, First Schedule (hereinafter "section 4C") of the Income Tax Ordinance, 2001 imposed on High Earning Persons, enacted through Finance Act 2022. Common to both of the aforesaid provisions, this judgment also decides the challenges raised against the application of the said provisions to income arising to oil exploration and petroleum companies (hereinafter "E&P companies"), which income is assessed for tax under the relevant laws applicable as per their respective Petroleum Concession Agreements (hereinafter "PCAs").

2. In respect of section 4C, the additional questions requiring adjudication are framed as follows: (1) whether section 4C is intra vires the Constitution, (2) whether section 4C applies retroactively on income arising in tax year 2022, (3) whether the computation of "income" as defined in section 4C is constitutionally valid when it disallows brought forward losses, depreciation and amortization and includes heads of income liable to separate taxation, (4) whether the classification in the First Proviso to Division IIB, Part I, First Schedule of the Income Tax Ordinance 2001 (hereinafter "the First Proviso") of 15 sectors subjected to a higher rate of super tax under section 4C (at the rate of 10%) for tax year 2022 if their "income" exceeded PKR 300 million is constitutionally impermissible?, (5) whether banking companies' are liable to pay super tax under section 4C for tax year 2023 and onwards in light of the Proviso to section 4C and the Second Proviso to Division IIB, and in light of the Seventh Schedule of the Ordinance 2001, (6) whether income from capital gains on securities assessed under the Eighth Schedule, Income Tax Ordinance, 2001 is liable to be taxed under section 4C.

3. In respect of section 4B, the Sindh, Lahore and Islamabad High Courts, through their decisions, have upheld its vires, including finding that super tax under section 4B qualified as a "tax" and not a "fee" as contended by taxpayers. The cases of E&P companies were separated in the Islamabad High Court. The Single Bench of the learned Islamabad High Court decided the issue in favour of the Department, holding section 4B to be applicable to income arising from Fifth Schedule businesses notwithstanding the application of the Regulation of Mines & Minerals (Control & Production) Act, 19482. All appeals in respect of section 4B were filed in the Supreme Court under Article 185(3) of the Constitution by the taxpayers.

4. As concerns section 4C, the Sindh High Court declared the provision as intra vires but held section 4C inapplicable to tax year 2022 on the ground that super tax under section 4B was charged at 0% for tax year 2022 and relying on this representation, another super tax under section 4C was not chargeable for tax year 2022, hence declared section 4C applicable for tax year 2023 onwards. The Division Bench of the Lahore High Court, in reversing the decision of the learned Single Judge, ultimately declared section 4C applicable for tax year 2023 onwards and not applicable to tax year 2022 on the ground that liability of income arising in tax year 2022 crystallised on the last day of the tax year, i.e. 30.06.2022 and therefore could not be subjected to tax that was enacted through a

Finance Act that became effective on 01.07.2022 as the language of section 4C, in the opinion of the Bench, was not express or clear enough to apply to tax year 2022. The Single Judge of the learned Islamabad High Court decided petitions pertaining to both tax years 2022 (Fauji Fertilizer Judgment dated 20.07.2023), and for the tax year 2023 (Pakistan Oilfields Judgment dated 15.03.2024). In the former, the learned Single Judge declared section 4C to be inapplicable to tax year 2022 on the ground that the income arising therein was a past and closed transaction and read down section 4C to apply it in a limited scope. The judgments of the Islamabad High Court also set aside all impugned notices. All three High Courts held the First Proviso as discriminatory and ultra vires on the touchstone of Article 25 of the Constitution.

5. The Single Bench of the learned Islamabad High Court, vide the Fauji Fertilizer Judgment dated 20.07.2023, also adjudicated on the application of section 4C on E&P companies. It held section 4C not to apply thereto to the extent its application offended Rule 4 of the Fifth Schedule. The Judgment also held that the provident funds before it held exemption certificates in their favour and were thus exempt from the levy of section 4C.

6. It bears mention that for tax year 2023, taxpayers registered for tax in Sindh and Punjab filed their petitions challenging the amended rates (vide Finance Act 2023) in Division IIB at which section 4C was to be imposed for tax year 2023 onwards in the learned Islamabad High Court. The learned Single Judge decided the fate of these petitions in identical terms as its earlier judgment for tax year 2022, i.e., Fauji Fertilizer Judgment dated 20.07.2023. This Court has also observed that the transfer cases also included writ petitions filed in the years 2023, 2024 and 2025 pertaining to successive tax years through which taxpayers continued to assail the vires of section 4C.

7. Given the complexity of issues arising as a result of disparate judgments and the huge volume of cases pending in various High Courts and the Supreme Court pertaining to section 4B and section 4C for multiple tax years, the Supreme Court, vide order dated 12.03.2025, passed a direction in exercise of jurisdiction vested under the erstwhile Article 186A of the Constitution, directing that all cases (including writ petitions and intra-court appeals) be sent to the Supreme Court and clubbed with the pending appeals in the Supreme Court, for final adjudication.

8. Hearings in the matter proceeded apace, however, with the passage of the Twenty-Seventh Amendment to the Constitution, all the above cases were transferred to this Court by virtue of Article 175F of the Constitution. In the proceedings before us, the additional questions framed for this Court's consideration included preliminary objections regarding the locus standi of the Commissioner Inland Revenue and Federal Board of Revenue to institute appeals against the judgments of the various Benches of the High Courts, and whether the appeals ought not to have been filed by the Federation of Pakistan.

9. We have heard the parties and considered their submissions at length. Two members of this Bench also heard the matters extensively between March – December 2025 as members of the Bench of the Supreme Court. By this short order, the details of which will be further elucidated and recorded later, we decide the matters pertaining to both section 4B and section 4C, Income Tax Ordinance, as follows:

i. Section 4B is upheld as intra vires the Constitution and will apply as enacted for tax year 2015 and onwards at the rates prescribed in Division IIA, Part I, First Schedule, Income Tax Ordinance, 2001; the decisions of the learned High Courts in section 4B cases are declared to expound the correct position in law holding section 4B to be validly enacted as a "tax"; The provisions of section 4B are found neither discriminatory nor do they create any unreasonable or hostile classification among persons forming the same class upon whom the

charge is imposed. The classification introduced thereunder is income-based, rests on an intelligible differentia, and bears a rational nexus with the object sought to be achieved. The provision does not suffer from any inherent lack of legislative competence, nor does it, on its face, transgress any fundamental right in a manner sufficient to warrant its invalidation. Any perceived inequities or hardships arising from the operation of section 4B fall primarily within the legislative domain and do not, by themselves, justify judicial interference in fiscal matters. The provision squarely falls within Entry 47 of the Fourth Schedule, Legislative List, Part I of the Constitution, namely, 'taxes on income'. The legislature, therefore, was fully competent to impose, abolish, remit, alter, or regulate such tax through a Finance Act, as part of a Money Bill under Article 73(2)(a) of the Constitution of the Islamic Republic of Pakistan, 1973 ('the Constitution'). Consequently, section 4B is declared to be intra vires the Constitution;

ii. The preliminary objection raised by the taxpayers regarding the maintainability of the appeals in section 4C cases for not having been filed by the Federation is hereby rejected. This Court has the inherent power to transpose a party, should it be necessary for just and proper adjudication of a matter before it. Federation of Pakistan is a party in the appeals as a Respondent. Therefore, it can be transposed as an Appellant. It is so done. Record also reflects that of the pending cases, several appeals involving common questions of law including vires of the law, challenged show-cause notices, circulars and actions of the FBR/CIR, are filed by the Federation in addition to the CIR/FBR, therefore the appeals are held to be maintainable on this count too;

iii. Section 4C is held to be intra vires the Constitution and shall apply as enacted for tax year 2022 and onwards at the rates prescribed in Division IIB, Part I, First Schedule, Income Tax Ordinance, 2001. It is established law that the legislature has the plenary power to enact laws with retrospective and prospective effect subject to such laws not affecting past and closed transactions. There is no provision in the Ordinance 2001 whereby the closing of accounts of a tax year qualifies as an event which precludes the imposition of a fresh charge where none existed before, particularly when returns of income for tax year 2022 were yet to be filed. The impugned Judgments of the Division Benches of the learned Sindh, Islamabad iv. and Lahore High Courts to the extent they hold section 4C not to apply retroactively to tax year 2022 are set aside;

iv For the same reasons as above, the rates in Division IIB, Part I, First Schedule, Income Tax Ordinance amended through Finance Act 2023 shall apply for tax year 2023. The impugned Pakistan Oilfields Judgment dated 15.03.2024 of the Islamabad High Court to the extent it holds the rates in amended Division IIB not to apply retroactively to tax year 2023 is set aside;

v. It is held that the definition of "income" for purposes of section 4C in so far as it includes income from all sources is validly enacted. The impugned judgments dated 20.07.2023 and 15.03.2024 of the Islamabad High Court to the extent they read down section 4C are set aside;

vi The direction issued by the learned Islamabad High Court, in the Pakistan Oilfields Judgment dated 15.03.2024, to the Federal Board of Revenue (FBR) to issue circular to implement the aforesaid judgment across Pakistan is beyond its jurisdiction and is set aside;

vii Super tax is a tax on income independent of the tax levied under section 4 of the Income Tax Ordinance, 2001. Entry 47, of Part I of the Fourth Schedule of the Constitution, Parliament is competent to levy "taxes on income". Therefore, section 4C is a self-contained provision insofar as this levy is concerned and is thus, a standalone tax on income. As such, section 4C

as applies to capital gains under section 37A and Rules of the Eighth Schedule, Income Tax Ordinance, 2001 is held to be applicable thereto, being within the ambit of section 4C(2)(i) and (iv), Income Tax Ordinance 2001;

viii Section 4B and section 4C, by virtue of Rules 4AA and 4AB of the Fifth Schedule, Income Tax Ordinance 2001 will only apply to the income arising to E&P companies if it does not result in exceeding the aggregate rate of taxes provided in the aforesaid Schedule and their respective PCAs. In respect of section 4C, the concluding paragraph 5(4) of the impugned Pakistan Oilfields Judgment dated 15.03.2024 passed by the learned Islamabad High Court is modified to the extent that the departmental determination/assessment of each PCA shall be undertaken by placing the respective terms and conditions in juxtaposition with the Regulation of Mines & Minerals (Government Control) Act, 1948 and applicable taxing law governing their respective PCAs, be it the Income Tax Act 1922, Income Tax Ordinance 1979 or Income Tax Ordinance 2001. This finding will be deemed restricted to the application of section 4B and section 4C to such income as arises under Rule 1, Fifth Schedule to the Income Tax Ordinance 2001 and corresponding pari materia provisions in the applicable tax laws in relation to individual PCAs. Section 4C will otherwise apply to other income of E&P companies from all other sources which fall under sub-sections (i), (ii) and (iii) of sub-section (2) of section 4C. In this respect, the respective Commissioner Inland Revenue shall first make the determination of the E&P companies' liability, keeping in view the foregoing, and issue a fresh notice affording them an opportunity of hearing before taking any measures for recovery.

Moreover, section 4C shall not apply to E&P companies to the extent that its application would result in taxation exceeding the threshold stipulated in Rule 4 of the Fifth Schedule to Ordinance. The legislative intent underlying Rule 4 is to provide a sector-specific framework recognizing the unique nature, risks, and investment requirements of the petroleum and exploration industry. Imposing a super tax beyond the prescribed threshold would effectively override this legislative safeguard, impose an excessive and disproportionate burden, and frustrate the purpose for which the special provisions were enacted. In the absence of a clear and express intention of the Legislature to abrogate or modify these sectoral thresholds, section 4C cannot be construed so as to operate in a manner inconsistent with Rule 4 of the Fifth Schedule;

ix In the case of banking companies, it is held that section 4C shall apply as enacted vide Finance Act, 2022 to banking companies for Tax year 2023 and onwards and at rates applicable to tax year 2023 as amended by Finance Act 2023;

x Without prejudice to the foregoing declaration, section 4C shall not apply to the income, particularly to the benevolent funds enjoying exemption from tax under section 53, read with the Second Schedule to the Ordinance. Such funds constitute a distinct class expressly exempted by the Legislature in furtherance of recognized charitable and welfare objectives. Subjecting them to a super tax would defeat the very purpose of the statutory exemption and would be inconsistent with the legislative scheme of the Ordinance. In the absence of a clear and specific legislative intent to withdraw or curtail the said exemption, section 4C cannot be construed so as to override the exemption granted to benevolent funds. In the case of provident and benevolent funds before this Court, considering the Commissioner's/FBR's statement made before this Court during the course of proceedings, such funds which hold valid exemption certificates under the Ninth Schedule read with the relevant entries in the Second Schedule are not liable to pay super tax under section 4C. The said funds shall furnish their exemption certificates issued for the relevant tax years to the concerned Commissioners

Inland Revenue within fifteen days of this order. Upon receipt, the concerned Commissioners Inland Revenue, within seven days, shall pass written orders absolving such funds of their liability to pay super tax under section 4C; and

xi. The classification of sectors through inclusion in the First Proviso to Division IIB and taxable under section 4C at the rate of 10% for the tax year 2022 is declared to be reasonable, the differentia being intelligible and is thus permissible under Article 25 of the Constitution. The judgments of the learned Sindh, Lahore and Islamabad High Courts to the extent they declare the contents of the First Proviso to be discriminatory, are therefore set aside. All the appeals, petitions and transfer cases are disposed of accordingly.

CHIEF JUSTICE
JUDGE
JUDGE

Islamabad, 27.01.2026