

JUDGMENT SHEET.

IN THE ISLAMABAD HIGH COURT,
ISLAMABAD.

Writ Petition No.213/2023

Waheed Ashraf

Versus

Federation of Pakistan, etc.

Petitioner(s) By : Hafiz Muhammad Idris, Syed Farid Ahmed Bukhari, Mr. Usman Kiyani, Mian Haseeb Ali Bhatti, Mr. Muhammad Aslam Hayat, Mr. Muhammad Naeem Siddique Bhatti, Mr. Asif Farid, Mr. Sajid Naseem, Mr. Usman Ahmed Ranjha, Ms. Sabila Daraz Khan, Syed Ali Murtaza Abbas, Mirza Saqib Siddique, Mr. Waqar Javed, Ms. Fatima, Ms. Aiema Asrar, Malik Nasir Abbas Awan, Mr. Asif Saeed Mughal, Mr. Muhammad Musawar Gill, Mr. Khalil ur Rehman, Mr. Faisal Rasheed Ghouri, Mr. Faisal Jaffar Khan, Mr. Imran Ul Haq, Ms. Shazia Nadeem Malik and Mr. Hamid Jalal, Advocates.
Mr. Ejaz Hussain Rathore, Petitioner in person.

Respondents By : Mr. Ghulam Qasim Bhatti, Syed Ishfaq Hussain Naqvi, Barrister Atif Rahim Burki and Barrister Sohail Nawaz, Advocates.
Syed Ahsan Raza Kazmi, Deputy Attorney General.

Assisted By : Ms. Maheen Zeeshan Law Clerk

Date of Hearing : 15.01.2024.

AAMER FAROOQ, C.J. – This judgment shall decide the captioned writ petition as well as writ petitions mentioned in the schedule, attached herewith, as common question of law is involved.

2. The Petitioners, in all the petitions, have challenged the provision of section 7E of the Income Tax Ordinance, 2001 (“**the Ordinance**”), inserted through the Finance Act, 2022, on the basis that it is *ultra vires*

the Constitution of Islamic Republic of Pakistan, 1973 (**"the Constitution"**) for being beyond the competence of the Federal Legislature, and for being discriminatory and confiscatory violating Constitutional rights, hence is liable to be struck down.

3. In order to avoid any overlap or conflict, and for the ease of reference, the submissions made by all the Petitioners in the captioned petition, and the scheduled connected petitions, are discussed jointly. Learned counsels for the Petitioners¹ submitted, *inter alia*, that through section 7E of the Ordinance (**"the impugned provision"**), tax has been levied on deemed income derived from immovable assets, as specified therein, equal to 5% of the fair market value of the assets at the rates specified in Division VIIIIC of Part-I of the First Schedule to the Ordinance. It was contended that the impugned provision is tantamount to levy of tax on immovable property, which is beyond the competence of the Parliament pursuant to the Eighteenth Amendment to the Constitution. In this behalf, it was contended that with respect to Entries No.47 & 50, as provided in the Fourth Schedule to the Constitution, the Parliament does have competence to impose income tax, however, it has no competence to levy any tax on immovable property, whereas, in essence, the impugned tax is on immovable property. Learned counsels further contended that while interpreting relevant Schedule entries and the tax levied, the pith and substance of the levy is to be examined and the same is not to be taken on its face value. It was further argued that since levy in question is on

¹Hafiz Muhammad Idris, Syed Farid Ahmed Bukhari, Mr. Usman Kiyani, Mian Haseeb Ali Bhatti, Mr. Muhammad Aslam Hayat, Mr. Muhammad Naeem Siddique Bhatti, Mr. Asif Farid, Mr. Sajid Naseem, Mr. Usman Ahmed Ranjha, Ms. Sabila Daraz Khan, Syed Ali Murtaza Abbas, Mirza Saqib Siddique, Mr. Waqar Javed, Ms. Fatima, Ms. Aiema Asrar, Malik Nasir Abbas Awan, Mr. Asif Saeed Mughal, Mr. Muhammad Musawar Gill, Mr. Khalil ur Rehman, Mr. Faisal Rasheed Ghouri, Mr. Faisal Jaffar Khan, Mr. Imran Ul Haq, Ms. Shazia Nadeem Malik and Mr. Hamid Jalal, Advocates.
Mr. Ejaz Hussain Rathore, Petitioner in person.

immovable property, it is beyond the competence of Federal Legislature, and it is, thus, *ultra vires* the Constitution. Learned counsels for the Petitioners contended that the tax in question is confiscatory in nature inasmuch as no income is actually generated through the immovable property specified therein, and payment of the same is to be made from the personal resources of the taxpayer rather than from any income generated from the assets. It was contended that, in light of the judgment of the Supreme Court of Pakistan reported as *M/s Elahi Cotton Mills Ltd. versus Federation of Pakistan (PLD 1997 SC 582)*, where tax is confiscatory in nature, it violates the fundamental rights guaranteed under the Constitution, hence it is liable to be struck down. It was added that under sub-section 2 of the impugned provision, certain exemptions have been granted for payment of tax and bare reading of the same shows that those exemptions are discriminatory in nature, and thus are in violation of Article 25 of the Constitution. It was also contended that the method of payment of the tax is unreasonable and vague as tax is to be paid on 5% of the fair market value of the capital assets as deemed income. It was also submitted that "capital asset" has been defined and explained in the impugned provision as immovable property; and that the impugned provision has been given retrospective effect. Learned counsels apprised the Court that petitions challenging vires of section 7E of the Ordinance were also filed before the Sindh High Court as well as the Lahore High Court and the Peshawar High Court. In this behalf, it may be noted that that the Sindh High Court upheld the impugned provision, whereas the Lahore High Court undertook the exercise of reading down and suggested certain modifications, while the Peshawar High Court struck down the impugned provision as being *ultra vires* the Constitution.

4. Learned counsel for the Respondents² contended, *inter alia*, that Entry No.47 to the Fourth Schedule to the Constitution empowers the Parliament to legislate and the Federal Government to levy tax on any income other than agricultural income. It was submitted that the basic definition of "income" is provided in clause 29 of section 2 of the Ordinance, which is inclusive, meaning it is not exhaustive. It was contended that in the landmark judgment of the Supreme Court of Pakistan in *M/s Elahi Cotton Mills Ltd. versus Federation of Pakistan (PLD 1997 SC 582)*, various principles have been laid down and tax on the capacity of any company was held to be *intra vires*. It was contended that in order to declare a statute *ultra vires*, the principles laid down in *Lahore Development Authority versus Ms. Imrana Tiwana (2015 SCMR 1739)* are to be followed, which provide that the law is to be saved rather than destroyed and that the provision under challenge ought to be retained in a way so as to save it rather than to destroy by striking it down. It was also contended that the law cannot be struck down simply for being confiscatory in nature as it does not amount to violation of the Constitution or fundamental rights. It was also submitted that the law can be made applicable retrospectively insofar as any vested rights are not taken away which is not the case. Reference was made to the following case law qua the submissions addressed: *Army Welfare Sugar Mills versus Federation of Pakistan (1992 SCMR 1652)*, *Muhammad Husain and others versus Muhammad and others (2000 SCMR 367)*, *Annoor Textile Mills Ltd. versus The Federation of Pakistan (PLD 1994 SC 568)*, *Haji Dossa Limited, Karachi versus Province of Punjab through Collector Sahiwal and others (1973*

²Mr. Ghulam Qasim Bhatti, Syed Ishfaq Hussain Naqvi, Barrister Atif Rahim Burki and Barrister Sohail Nawaz, Advocates.

SCMR 124), Zaman Cement Company (Pvt) Limited versus Central Board of Revenue and others (2002 SCMR 312), Zakaria H.A Sattar Bilwani versus Inspecting Additional Commissioner of Wealth Tax (2003 SCMR 271), Sardar Sher Bahadar Khan versus Election Commission of Pakistan (PLD 2018 SC 97), Mst. Sarwar Ja versus Mukhtar Ahmad (PLD 2012 SC 217), Zila Council Jehlum versus Messrs Pakistan Tobacco Company Ltd. (PLD 2016 SC 398), Government of Pakistan versus Messrs Mardan Industries and another (1988 SCMR 410), Ashraf Sugar Mills versus Federation of Pakistan (1996 PLC 145), Pakistan through Ministry of Finance versus Fecto Belarus Tractors Ltd. (PLD 2002 SC 208), Molasse Trading & Export versus Federation of Pakistan (1993 SCMR 1905), Province of East Pakistan versus Sharafatullah (PLD 1970 SC 514), Shell Pakistan Ltd. versus Federation of Pakistan (2023 PTD 607 Sindh), Muhammad Khalid Qureshi versus Province of Punjab (2017 PTD 805 Lahore), Province of Punjab versus National Industries Cooperative Credit Corporation (2000 SCMR 567), Education Services (Pvt) Ltd. versus Federation of Pakistan (PLD 2016 Islamabad 141), A.M. Khan Leghari versus Government of Pakistan (PLD 1967 Lahore 227), Nihayat Ullah versus Secretary Local Government (PLD 2004 Peshawar 54), Federation of Pakistan versus Haji Muhammad Sadiq (2007 PTD 67 (SC), Lahore Development Authority versus Ms. Imrana Tiwana (2015 SCMR 1739), Muhammad Ramzan Katiar versus Pakistan Refinery Limited (2013 CLD 233 Sindh), Muzaffar Khan versus Evacuee Trust Property (2002 CLC 1819 Lahore), M/s Dewan Textile Mills Ltd. versus Pakistan (1984 CLC 1740 Karachi), Amin Textile Mills versus Federation of Pakistan (2002 CLC 1714 Karachi), Syed Manzoor Hussain Bokhari versus SP City Lahore (1990 MLD 1807 Lahore), Call Tell versus Federation of Pakistan (2005 PTD 833

Karachi), Human Rights Commission of Pakistan versus Government of Pakistan (PLD 2009 SC 507), Shafique Ahmed versus Government of Pakistan (PLD 2004 SC 168), M/s Shappire Textile Mills versus Federation of Pakistan (PLD 2006 Karachi 554), M/s Pioneer Traders versus Province of Sindh (PLD 2006 Karachi 648), Imdad Hussain versus Province of Sindh (2007 Karachi 116), Sarfraz Ahmad Tarar versus Province of Punjab (PLD 2007 Lahore 57), District Magistrate Lahore Commissioner, Lahore Division versus Syed Raza kazim (PLD 1961 SC 178), State of M.P versus Rakesh Kohli (2013 SCMR 34), Jibendra Kishore Achharyya versus The Province of East Pakistan (Revenue Department) (PLD 1957 SC (Pak) 9), Mr. FazlulQuaderChowdhry versus Mr. Muhammad Abdul Haque (PLD 1963 SC 486), President Reference No.2 of 2005 (PLD 2005 SC 873), M/s Elahi Cotton Mills Ltd. versus Federation of Pakistan (PLD 1997 SC 582).

5. Submissions of the parties have been heard and the documents placed on record examined with their able assistance.

6. Before embarking upon appreciation of the submissions made by the parties, it is apt to reproduce the impugned provision and dissect the same. The impugned provision is as follows:-

"7E. Tax on deemed income.- (1) For tax year 2022 and onwards, a tax shall be imposed at the rates specified in Division VIIIC 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 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.

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

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

(4) In this section—

- (a) "capital asset" means property of any kind held by a person, whether or not connected with a business, but does not include –
 - (i) any stock-in-trade, consumable stores or raw materials held for the purpose of business;
 - (ii) any shares, stocks or securities;
 - (iii) any property with respect to which the person is entitled to a depreciation deduction under section 22 or amortization deduction under section 24; or
 - (iv) any movable asset not mentioned in clauses (i), (ii) or (iii);
- (b) "farmhouse" means a house constructed on a total minimum area of 2000 square yards with a minimum covered area of 5000 square feet used as a single dwelling unit with or without an annex:

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

Examination of section 7E *ibid* shows that tax has been imposed for the tax year 2022 and onward at the rates specified in Division VIIIIC of Part-I of the First Schedule to the Constitution on the income as specified therein. Sub-section (2) of the impugned provision is the charging section and it levies income tax on an amount equal to 5% of the fair market value of the capital assets (deemed income), situated in Pakistan held on the last date of the tax year. In this behalf, sub-section (2) *ibid* states that a resident person shall be treated to have derived as income 5% of the fair market value of the capital assets, hence derivation of the income is deemed and not actual. Certain exemptions have been created, which are provided from sub-section (2) (a) to (i). Under sub-section (3) of the impugned provision, the Federal Government has been empowered to include or exclude any person or property for the purposes of section 7E. Sub-section (4), which the definition clause, defines "capital asset" as property of any kind held by a person, whether or not connected with a business but does not include any stock-in-trade, consumable stores or raw materials held for the purpose of business; any shares, stocks or securities; any property with respect to which the person is entitled to a depreciation deduction under section 22 or amortization deduction under section 24; or any movable asset. The same also excludes farmhouses constructed on a 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.

7. Before delving into detailed examination of the relevant precedents, it is pertinent to note a few key characteristics of tax laws in general. The power of the State to impose tax upon its citizens is inherent in the power to govern and such power is limited only by constitutional provisions³. It is also a well settled principle that all taxes are confiscatory in nature, however the element of confiscation is to be justified by the public purpose for which a particular tax has been enforced. Constitutional rights and provisions act as the safeguard for citizens, and as a check on legislative authority, while enacting tax law. Where the public purpose is such that is in line with the spirit of the Constitution and the tax enacted is a proportional measure to achieve such purpose, the element of confiscation shall not render the particular tax to be illegal or *ultra vires* to the Constitution. Where, however, the element of confiscation is not so justified, the tax may be regarded as violating Constitutional rights and thus may be liable to be struck down. Where the constitutionality of a tax law is in issue, the nature of the tax, the measure of the tax and its incidence must be considered while determining its validity⁴. In the instant case, while deliberating on the constitutionality and vires of the impugned provision, this Court is faced with the following key issues: Legislative Competence, Confiscatory Nature, Discriminatory Nature.

Determination of Constitutionality and Vires

8. Since vires or the legality of the Federal Statute has been put to challenge, this Court, at this stage, deems it essential to examine the case law developed over a period of time for adjudicating vires of any statute and the principles evolving from the referred case law. The most recent and authoritative judgment on the question of principles for striking down

³II. Taxing Power, Limitations, and Constitutional Restrictions – Corpus Juris Secundum Vol. 84.

⁴II. Taxing Power, Limitations, and Constitutional Restrictions – Corpus Juris Secundum Vol. 84.

the law or upholding the same is Lahore Development Authority versus Ms. Imrana Tiwana (2015 SCMR 1739). In the referred judgment, the Supreme Court of Pakistan, after examining the law on the subject laid down principles on the touchstone of which vires of law can be examined. The principles are summarized in paragraph 65 of the judgment and are as follow:-

"I. There is a presumption in favour of constitutionality and a law must not be declared unconstitutional unless the statute is placed next to the Constitution and no way can be found in reconciling the two;

II. Where more than one interpretation is possible, one of which would make the law valid and the other void, the Court must prefer the interpretation which favours validity;

III. A statute must never be declared unconstitutional unless its invalidity is beyond reasonable doubt. A reasonable doubt must be resolved in favour of the statute being valid;

IV. If a case can be decided on other or narrower grounds, the Court will abstain from deciding the constitutional question;

V. The Court will not decide a larger constitutional question than is necessary for the determination of the case;

VI. The Court will not declare a statute unconstitutional on the ground that it violates the spirit of the Constitution unless it also violates the letter of the Constitution;

VII. The Court is not concerned with the wisdom or prudence of the legislation but only with its constitutionality;

VIII. The Court will not strike down statutes on principles of republican or democratic government unless those principles are placed beyond legislative encroachment by the Constitution;

IX. Mala fides will not be attributed to the Legislature."

In Amin Textile Mills versus Federation of Pakistan (2002 CLC 1714 Karachi), the Division Bench of the Sindh High Court held that while looking from the standpoint of interpretation of statutes or from the angle of interpretation of legislative entries in the Constitution, the ordinary, plain and grammatical meaning of the words will have to be seen. The Courts

have to look at whether in pith and substance the subject matter of levy in question comes within the ambit of the relevant entry in the Constitution. It was also observed that the Courts have to give a very liberal and stretched connotation to the Constitutional entries and in pith and substance, the ordinary, grammatical and literal meaning of the terms will have to be seen. In Shell Pakistan Ltd. versus Federation of Pakistan (2023 PTD 607 Sindh), the Sindh High Court held that scope of a provision cannot be extended by analogy or beneficent/equitable construction in order to prevent an anomaly and if a section of a taxing statute creates doubt or ambiguity then it should not to be construed to extract a new added obligation, not formerly cast upon the taxpayer. It was also observed that provision of Article 25 of the Constitution envisages equality between citizens, however, it allows for differential treatment of persons not similarly placed under a reasonable classification. In Province of Punjab versus National Industries Cooperative Credit Corporation (2000 SCMR 567), it was held that if it is found that the impugned legislation is in the nature of legislative judgment impinging on judicial power of judiciary, it would prime facie be ultra vires the Constitution. In Education Services (Pvt) Ltd. versus Federation of Pakistan (PLD 2016 Islamabad 141), this Court observed that a High Court under Article 199 of the Constitution has jurisdiction to examine the validity of any Act of the Parliament and/or delegated legislation including notification; in case any law/Act of the Parliament violates any provision of the Constitution including fundamental rights, the same can be struck down by a High Court in exercise of powers under Article 199 of the Constitution; the law can also be struck down if it provides unfettered powers/discretion to be exercised in a discriminatory manner. In A.M. Khan Leghari versus Government of Pakistan (PLD 1967

Lahore 227), the Larger Bench of the Lahore High Court observed that it is but a corollary to the general rule of literal construction that nothing is to be added to or to be taken from a statute, unless there are similar adequate grounds to justify the inference that the Legislature intended something which it omitted to express. It was also observed that it is a strong thing to read into an Act of Parliament words which are not there and in the absence of clear necessity, it is a wrong thing to do. The Court is not entitled to read the words into an Act of the Parliament unless clear reason for it is to be found within the four corners of the Act itself. In Federation of Pakistan versus Haji Muhammad Sadiq (2007 PTD 67 (SC)), the Supreme Court of Pakistan held that language used in fiscal statute would be interpreted in literal and ordinary meanings in favour of the taxpayer and that the law should be interpreted in such a manner that the same should be saved rather than destroyed. In Messrs Sui Southern Gas Company Ltd. versus Federation of Pakistan (2018 SCMR 802), the Supreme Court of Pakistan laid down principles for interpretation of entries in the legislative lists. It was observed as follows:-

- (1) *The entries in the Legislative Lists of the Constitution are not powers of legislation but only fields of legislative head.*
- (2) *In construing the words in an Entry conferring legislative power on a legislative authority, the most liberal construction should be put upon the words.*
- (3) *While interpreting an Entry in a Legislative List, it should be given widest possible meaning and should not be read in a narrow or restricted sense.*
- (4) *Each general word in an Entry should be considered to extend to all ancillary or subsidiary matters which can fairly and reasonably be said to be comprehended in it.*
- (5) *If there appears to be apparent overlapping in respect of the subject-matter of a legislation, an effort has to be made to reconcile the Entries to give proper and pertinent meaning to them.*
- (6) *A general power ought not to be so construed so as to make a particular power conferred by the same legislation and operating in the same field a nullity.*

- (7) *Legislation under attack must be scrutinized in its entirety to determine its true character in pith and substance.*
- (8) *After considering the legislation as a whole in pith and substance, it has to be seen as to with respect to which topic or category of legislation in the various fields, it deals substantially and directly and not whether it would in actual operation affect an item in the forbidden field in an indirect way."*

In *Messrs Aisha Spinning Mills Ltd. versus Federation of Pakistan (1995 PTD 493)*, the Division Bench of the Lahore High Court also considered the principles for construction of entries in the Legislative Lists as contained in the Schedule to the Constitution. It was observed that the entries in the Schedules to the Constitution are not to be given any circumscribed pedantic construction; instead they are to be examined in widest possible spectrum; entries are the fields in which the Legislature of the State are empowered to act and frame laws. In *Lahore Development Authority versus Ms. Imrana Tiwana (2015 SCMR 1739)*, the Supreme Court affirmed that Article 4 of the Constitution was not accepted as criterion to test the vires of legislation. In celebrated judgment of *M/s Elahi Cotton Mills Ltd. versus Federation of Pakistan PLD 1997 SC 582* (the said judgment will be discussed in detail subsequently), the Supreme Court of Pakistan reiterated that the law is to be saved rather than to be destroyed and in case of any anomaly or ambiguity, provisions of the Statute are to be read down to save the law. In *State of M.P versus Rakesh Kohli (2013 SCMR 34)*, the Indian Supreme Court held that legislative enactment could be struck down by Court only on two grounds, firstly where the appropriate Legislature did not have competency to make the law and secondly, where it (enactment) abridged any of the fundamental rights enumerated in the Constitution or any other constitutional provisions. It was furthered that no enactment can be struck down merely for the reason that it was arbitrary or unreasonable

or irrational but some constitutional infirmity had to be found and specified.

9. The principles emerging from the above case law are as follow:-
- (i) This Court, under Article 199 of the Constitution, has jurisdiction to examine the validity of an Act of the Parliament or Rules framed thereunder.
 - (ii) The constitutionality of any enactment can be examined on the touchstone of fundamental rights and/or any provision of the Constitution and if an enactment fails to pass the test of conformity or is derogatory to the fundamental rights or provisions of the Constitution, without a legitimate purpose to justify such derogation, it may be struck down.
 - (iii) Vires of an enactment can also be examined on the basis of competence of the Legislature.
 - (iv) The interpretation of the enactment under challenge should be done in such a way that the law should be endeavored to be saved rather than to be struck down.
 - (v) While interpreting an entry in the Legislative Lists of the Schedules to the Constitution, pith and substance of the entry is to be examined and they are to be given an expansive rather than narrow pedantic interpretation.
 - (vi) In order to save the legislation, it should be read down in such a way so as to harmonize the fundamental rights enshrined in the Constitution and/or other provisions of the statutes.
10. From the above, it follows that the first and foremost priority for the Court is to endeavor to save law instead of destroying it; and, while the

language of the provisions of Constitutional Rights may provide for derogation from such rights, such derogation is not the general rule, rather it is the exception to the general rule. Such derogation is allowed not only on the basis of a public purpose, but where the measure taken to achieve such purpose is proportional to the same. In light of the above enumerated principles and parameters of determination of constitutionality and/or vires of any legislation, this Court shall now adjudicate upon the aforementioned key issues with regard to the impugned provision.

Legislative Competence

In the assault made on the impugned provision on the basis of constitutionality and competence, much was said, on behalf of the Petitioners, about the competence of the Legislature on the basis that the charging provision or the provision levying tax on deemed income derived from capital assets is in actuality a tax on immoveable property. In this regard, reference was made to Entries No.47 and 50 in the Fourth Schedule to the Constitution. Under Article 70 sub-Article 4 of the Constitution, the "Federal Legislative List" means the Federal Legislative List in the Fourth Schedule. This List provides subjects on which the Parliament/Majlis-e-Shoora can legislate on a particular subject within its competence. The Entries relevant for the present purpose are Entries No.47 and 50, as reproduced below:-

"47. Taxes on income other than agricultural income.

.....

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

Examination of Entry No.47 shows that it provides for levy of tax on income other than agricultural income and Entry No.50 provides for taxes on capital value of assets, not including taxes on immoveable property.

11. The crux of the submissions made by the learned counsels for the Petitioners was that in essence, the charging section imposes tax on the immovable property, which is beyond the legislative competence of the Parliament and after the Eighteenth Amendment to the Constitution, it is the domain of the Provincial Legislature. In order to appreciate the said argument, at this juncture, it is pertinent to take guidance from the principles enunciated in a very authoritative pronouncement on various aspects of examining the vires of a statute, an entry in the Legislative Lists, and levy of tax on particular subject viz. Messrs Elahi Cotton Mills Ltd. versus Federation of Pakistan (PLD 1997 SC 582) supra. The Supreme Court of Pakistan in the said judgment after examining the power of the State to levy tax and also the various aspects thereof, summarized the principles in paragraphs-31 of the judgment, which are as follow:-

- (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";*
- (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.*
- (vii) *That the policy 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.*
- (viii) *That while interpreting Constitutional provisions Court should keep in mind, social setting of the country, growing requirements of the society/nation, burning problems of the day and the complex issues facing the people, which the Legislature in its wisdom through legislation seeks to solve. The judicial approach should be dynamic rather than static, pragmatic and not pedantic and elastic rather, than rigid.*
- (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.*
- (xiii) *That the question, whether a particular kind of receipt is income or not would depend for its answer on the peculiar facts and circumstances of the case. If the nature of the receipt and its source are not satisfactorily*

explained by an assessee, facts which are generally within his peculiar knowledge, the Income Tax Officer may legitimately presume that the amount in question is an income of the assessee from an undisclosed source.

- (xiv) That the expression "clothes make the man" would be more nearly right if it were "Income makes the man". Knowledge about the income of a person will reveal most about him. It is a barometer to evaluate about his habits and views.*
- (xv) In Haig's language income is "the increase or accretion in one's power to satisfy his wants in a given period in so far as that power consists of (a) money itself or (b) anything susceptible of valuation in terms of money, whereas Simons equates personal income with algebraic sum of consumption and change is net worth".*
- (xvi) That the process of income determination is often expressed as one of the matching costs and revenues. It involves the process of working out costs used in connection with the earning of the revenue in a particular accounting period.*
- (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.*
- (xviii) 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.*
- (xx) That the legal fictions are limited for a definite purpose, they cannot be extended beyond the purpose for which they are created.*
- (xxi) That income-tax is a tax on a person in relation to his income. It is a tax imposed upon a person (natural or artificial) in relation to his income.*
- (xxii) That any legislation whereby either the prices of marketable commodities are fixed in such a way as to bring them below the cost of production and thereby make it impossible for a citizen to carry on his business or tax is imposed to such a way so as to result in acquiring property of those on whom the incidence of taxation fell, then such legislation would be violative of the fundamental rights to carry on business and to hold property as guaranteed in the Constitution.*

- (xxiii) *That the taxing power is unlimited as long as it does not amount to confiscation and that the Legislature does not have the power to tax to the point of confiscation.*
- (xxiv) *That the word 'reasonable' is a relative generic term 'difficult of adequate definition. It inter alia connotes agreeable to reason; conformable to reason; having the faculty of reason; rational; thinking, speaking, or acting rationally; or according to the dictates of reason; of sensible; just; proper and equitable or to act within the Constitutional bounds.*
- (xxv) *That a direct tax is one which "is demanded front the very person, who it is intended or desired should pay it, whereas indirect taxes are those, which are demanded from tine person in the expectation and intention that lie shall indemnify himself at the expense of another, like custom duties, excise taxes and sales tax, which are borne by the consumers.*
- (xxvi) *That levy of building tax on the basis of the covered area without taking into consideration, the class to which a particular building belongs, the nature of construction, the purpose for which it is used, its situation and its capacity for profitable use and other relevant circumstances bearing on the matters of taxation is not sustainable in law for want of reasonable classification.*
- (xxvii) *That there is a clear distinction between the subject-matter of a tax and the standard by which the amount of tax is measured keeping iii view the practical difficulties, which are encountered by the Revenue to locate the persons and to collect the tax due in certain trades, if the Legislature in its wisdom thought that it would facilitate the collection of tax due from specified traders on a presumptive basis, the same is not violative of the Fundamental Right relating to equality.*
- (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.*
- (xxix) *That it is an accepted canon of taxation to levy tax- on the basis of ability to pay. The section 115-J and 115-JA incorporated in Indian Income Tax Act, 1961, were intended and designed to bring within the tax net the companies, which though making huge profits and also declaring substantial dividends, but have been managing their affairs in such a way by availing of tax concessions etc., as to avoid payment of income-tax.*
- (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.

(xxxii) 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.

(xxxiii) 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.

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

(xxxv) 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."

The upshot of the above principles is that the State is the sovereign and has competence to legislate on matters specified under the Legislative List within its domain. Further, the State as a sovereign is competent to impose tax in furtherance of economic activities and to generate the income in order to run the affairs of the government.

12. In light of this discussion, if the charging section of the impugned provision i.e. sub-section (2) is re-read, which provides for deemed income derived from the capital value of assets, defined as essentially immovable property, it shows that the same is not really a tax on the immovable property as by virtue of fiction, i.e. deeming clause, it is deemed that a capital asset is deriving income which it might not actually derive. In light of *Elahi Cotton Mills Ltd (supra)* there is no prohibition on the Legislature from creating legal fiction so long as the same is within the purpose of the basic legislation; likewise, there is no prohibition against taxation on such

deemed income, which in actuality may not be earned but is to be taxed. In view of the said interpretation, it cannot be said that this imposition of tax by fiction of law falls within Entry No.50 of the Fourth Schedule to the Constitution, rather falls within Entry No.47, which provides for imposition of tax on income other than agricultural income. In reaching this conclusion, this Court is fortified by all the principles on the subject which have been reiterated, and a deeming effect can be given to generation of income. In order to further elaborate the concept of a deeming provision in the context of a presumptive tax regime, it must be understood that such a deeming enactment is something which the Legislature taxes on presumption, regardless of whether it exists in reality, as is the case in the instant provision, and that any capital asset owned by a resident person which may not actually be generating any income but it has been presumed by Legislature that it is deriving income equal to 5% of the fair market value of the said asset. Such deeming provisions are never regarded as alien to the concept of the legislation provided that it falls within the basic purpose of that enactment. It is only when it fails the basic purpose that the Court shall presume to deem them or would declare such assumption to be repugnant or beyond the scope of Legislature.

13. I, therefore, do not agree with the Petitioners' submissions regarding sub-section (2) of the impugned provision being a tax on the immovable property of a resident person taking it beyond the legislative competence of the Parliament. Furthermore, it is re-capitulated that it is, in fact, a fiction of law which presumes generation of income from the capital asset which is then taxed. The tax in question is, therefore, levied on the deemed income and not on the immovable property. The question of competence of the legislature is therefore answered in the affirmative, and

the impugned provision is, therefore, well within legislative competence of the Parliament.

Elements of Discrimination

14. The concept of income is defined in the Ordinance in section 2(29) and is as follow:-

"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, 156A, 233, sub-section (5) of section 234, [section 236Z] [and] [any amount treated as income under any provision of this Ordinance] and any loss of income."

Bare reading of the definition shows that any amount may be treated as income under any provisions of the Ordinance. To fortify my understanding, I have referred to the detailed examination of all the various aspects of the concept of tax, more specifically tax on income and its nature, as provided in the *Corpus Juris Secundum*⁵. Tax is a revenue-raising exaction imposed through generally applicable rates to defray public expenses⁶. In the elaboration it is provided that the primary purpose of a tax is to raise money, and not to regulate; in other words, it represents the legislature's definition of the measure of every citizen's duty in support of public burden.⁷ The purpose of the theory of taxation is essentially to support and fund the functioning of the government in return for the general advantages and protection which the government affords to the taxpayer citizens and their properties. Taxes can be classified as being either direct or indirect⁸ and the character of a tax depends on the legislative intent as expressed in the statute imposing it⁹. The power of the State to levy taxes is inherent in the power to govern and, except as

⁵ *Corpus Juris Secundum* Vols. 84 and 85.

⁶ II. Taxing Power, Limitations, and Constitutional Restrictions – *Corpus Juris Secundum* Vol. 84.

⁷ II. Taxing Power, Limitations, and Constitutional Restrictions – *Corpus Juris Secundum* Vol. 84.

⁸ *Ibid.*

⁹ *Ibid.*

limited by constitutional provisions, is practically without limit, extending to all persons, property and business over which the sovereign power of the State extends¹⁰. In this behalf, elements of neither equality nor reasonableness are regarded in the exercise of the State's power to tax as unjust or oppressive. However, the constitutional provisions regarding equality and uniformity in terms of taxation are mandatory and constitute a limitation on the legislative power to tax, so that statute relating to taxation must comply therewith, and a tax law which violates the prescribed rule of equality and uniformity is invalid. These mandatory requirements cannot be frittered away by judicial construction¹¹. A tax law which violates the prescribed rule of equality and uniformity is, therefore, invalid. Any unreasonable discrimination between taxpayers on whom taxes have been levied and who are assessed on the same class of subjects constitutes a lack of equality and uniformity in violation of the constitutional provisions. Inequality will materialize where a taxing provision imposes upon one taxpayer payment of a heavier exaction than another merely because the former is assumed to be financially able to bear the exaction with less distress than the latter, and such inequality offends the constitutional principles of uniformity and equality¹².

Keeping in view the above principles and also those enunciated in the *Elahi Cotton Mills Ltd* case (supra), I am fortified in my view that the Legislature has the prerogative to decide the questions of quantum of tax, the conditions subject to which it is levied, and 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

¹⁰Ibid.

¹¹Ibid.

¹²II. Taxing Power, Limitations, and Constitutional Restrictions – Corpus Juris Secundum Vol. 84.

where it is confiscatory, the Court may strike down the impugned statute as being unconstitutional¹³.

Elements of Confiscation and Inequality

In a certain way, every tax is confiscatory inasmuch as through sanction of the Parliament/government, part of an income derived by persons is taken away. This concept of the confiscation or confiscatory nature, as defined in Oxford Dictionary, is 'to take or seize by the authority'. Words and Phrases defines the term 'confiscatory' with regards to taxation as a tax which not reasonably related to a substantial public purpose¹⁴. If the taxing statute is confiscatory *per se*, it might not be in grave violation of constitutional provisions, especially the fundamental rights, since derogation therefrom is provided for to a certain extent within the same provisions. However, where confiscation is to such an extent that it is not reasonable, or it is beyond the extent of derogation as provided for within the same constitutional provisions, the statute in question will then be a grave violation of the fundamental rights of a person, thus, its validity cannot be upheld.

In order to elaborate this observation further, it is essential to reproduce Articles 23 & 24 of the Constitution. Article 23 of the Constitution provides right for every citizen to acquire, hold and dispose of property in any part of Pakistan, subject to the Constitution and any reasonable restrictions imposed by law and Article 24 provides for protection of property rights.

The referred Articles are reproduced below:-

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

24. *(1) No person shall be deprived of his property save in accordance with law.*

¹³Ibid.

¹⁴ Words and Phrases Vol. 8A – p. 560, 561.

(2) No property shall be compulsorily acquired or taken possession of save for a public purpose, and save by the authority of law which provides for compensation therefore and either fixes the amount of compensation or specifies the principles on and the manner in which compensation is to be determined and given.

(3) Nothing in this Article shall affect the validity of—

- (a) any law permitting the compulsory acquisition or taking possession of any property for preventing danger to life, property or public health; or*
- (b) any law permitting the taking over of any property which has been acquired by, or come into the possession of, any person by any unfair means, or in any manner, contrary to law; or*
- (c) any law relating to the acquisition, administration or disposal of any property which is or is deemed to be enemy property or evacuee property under any law (not being property which has ceased to be evacuee property under any law); or*
- (d) any law providing for the taking over of the management of any property by the State for a limited period, either in the public interest or in order to secure the proper management of the property, or for the benefit of its owner; or*
- (e) any law providing for the acquisition of any class of property for the purpose of—*
 - (i) providing education and medical aid to all or any specified class of citizens; or*
 - (ii) providing housing and public facilities and services such as roads, water supply, sewerage, gas and electric power to all or any specified class of citizens; or*
 - (iii) providing maintenance to those who, on account of unemployment, sickness, infirmity or old age, are unable to maintain themselves; or*
- (f) any existing law or any law made in pursuance of Article 253.*

(4) The adequacy or otherwise of any compensation provided for by any such law as is referred to in this Article, or determined in pursuance thereof, shall not be called in question in any court."

Bare reading of Article 23 shows that every citizen has the right to acquire, hold and dispose of the property, provided there are no reasonable restrictions imposed by law in the public interest. As discussed above, taxation laws are confiscatory *per se*, but such confiscation is limited to the specific purpose in pursuance of which the law in question has been

enacted. Where a certain portion of a resident person's earning is being taken away as payment of tax, such exaction made as to certain percentage of a larger amount earned or derived might not be as such harmful to any statute since the tax is being paid, or the exaction is being made out of an amount actually earned and only a portion of such actual earning is being taken away, however, where no income is actually earned and nothing is coming in yet a resident taxpayer is asked to pay something out of nothing, it may be regarded as confiscatory in the very sense of the concept and such confiscation would be unreasonable. As discussed above, the legislature can create a legal fiction by way of a deeming provision, and as such income which is not actually earned may be deemed to be earned, however, where to a certain extent a tax liability is to be imposed which is to be paid from a capital asset not generating any income may be considered as derogatory to Article 23 of the Constitution. Inasmuch as the referred Article does provide for reasonable restriction to be imposed on holding of the property, however, if a resident person who is a taxpayer is not generating any income which would fall within the definition of income as provided in section 2(29) of the Ordinance, but only by virtue of the fact that said person owns a capital asset which may as well have been gifted to him/her is being asked to pay liability on the same by treating the said assets as generating income is unreasonably confiscatory because eventually the taxpayer might have to dispose of the assets in order to pay such liability.

14. In civilized society, the purpose of fundamental rights, as are provided in every legal system, is to provide basic protection to persons and though they are not absolute and do not exist in a vacuum, such rights can only be taken away or restricted in accordance with law. Fundamental

rights are to be given broader interpretation and also are to be interpreted in such a way that they fulfill the requirements of modern society. The Constitution is an organic document and stagnancy cannot be attributed, and expansive interpretation is to be given to the same. In stating the said principles, I derive the wisdom of the Supreme Court of Pakistan as laid down *Mian Muhammad Nawaz Sharif versus President of Pakistan (PLD 1993 SC 473)*; any curb on the fundamental rights is to be given a strictly restrictive interpretation. In the referred backdrop, the imposition of tax on 5% of the fair market value of the capital asset on the basis that any capital asset which a resident person might hold is treated to be deriving income is confiscatory in nature, hence is in violation or derogation of Article 23 of the Constitution. The Lahore High Court in *D.G. Khan Cement Company Ltd. versus Federation of Pakistan (PLD 2013 Lah 693)*, while striking down section 8(1)(ca) of the Sales Tax Act, 1990, founded its reasoning on the basis of the relevant provision being in derogation of Article 23 of the Constitution. The referred judgment was authored by the Hon'ble Mr. Justice Syed Mansoor Ali Shah, who, after referring to the said principle of reasonableness and while relying on the concept of the fundamental rights as contained in the United Nations Charter, held that the referred law was in violation of the Article 23 of the Constitution.

This brings us to the next aspect of the impugned provision, i.e. how the elements of discrimination and confiscation unjustifiably infringe constitutional rights, and examination of the same in light of the principles laid down in *Elahi Cotton Mills* case, where the taxing statute is discriminatory and/or does not provide adequate machinery for recovery and/or otherwise is vague or unreasonable may be struck down. Reading of the impugned provision reveals that the tax is levied on 5% of the fair

market value of a capital asset as defined therein, however there is no provision as to who shall determine the fair market value and the criteria thereof. Such determination of fair market value has been left upon the whims of the tax-master. Additionally, the language of the impugned provision is vague and does not provide for the machinery for recovery and, as already noted above, a resident person who is a taxpayer and is not generating income eventually might be forced to dispose of the property if the person is unable to pay such tax. This makes the provision not only simply confiscatory but also, since no machinery for recovery of the assessment and is provided, makes it vague.

There is no cavil to the position that the Courts must endeavor to save the law rather than destroy it and as such, Courts must interpret a statute in a manner which is harmonious to the spirit and provisions of the Constitution. Where the vires of a law has been challenged on the touchstone of its constitutionality, while engaging in the interpretive exercise, Courts may read down the statute in an attempt to harmonize it with the constitutional principles and provisions. Albeit that such an exercise is undertaken for the purpose of saving the law instead of striking it down, where the interpretive exercise of reading down either yields an absurd conclusion, or does not bring the law under challenge within the constitutional parameters, in such cases there is no other option but to strike it down. This approach, though avoided by the Courts, becomes essential in cases where the law cannot be interpreted or read down to achieve harmony, for the reason that the Constitution is supreme and shall always prevail.

15. The charging provision may also be regarded as discriminatory on the basis that there exists no criterion for the required exaction to be

made. The Legislature has provided certain inclusion and exclusion from the impugned charging provision but there does not seem to be any basis thereof. Though sub-section 4 does provide for inclusion and exclusion of the categories of persons who are to be taxed, there does not seem to be any cogent reason thereof. Article 25 of the Constitution prohibits discrimination and provides for equality of all citizens. It says that all citizens are equal before the law and are entitled to equal protection of law. By imposition of tax on the resident person, who only holds a capital asset and does not fall within the exemptions can be said to be discriminatory against such person. The interpretation rendered to Article 25 of the Constitution in the authoritative pronouncement reported as *I.A Sherwani and others versus Government of Pakistan (1991 SCMR 1041)* is that there can be reasonable classification and where intelligible differentia exists between the said classifications, there shall be no instance of discrimination. The term "intelligible" connotes that it must be intelligible, or understandable, to a person of ordinary intelligence¹⁵. If the principles enunciated in *I.A. Sherwani* case and the concept of a criteria being intelligible are applied to the exemptions provided under the impugned provision, there seems to be neither any basis for classification, nor is there an intelligible differentia to form the basis of such classification, and the Legislature has deemed it on its whims. The lack of classification in the charging section, coupled with the absence of any intelligible differentia between the said persons who are to be taxed or exempted there from results in a confiscation which, in effect, translates to inequality. A similar question was decided by the Supreme Court of India in a case¹⁶, which has also been relied upon by the Supreme Court of Pakistan in its judgment in

¹⁵ Words and Phrases Vol. 21B p. 495

¹⁶ *KunnathaThathunniMoopil Nair etc. v. State of Kerala and another* (AIR 1961 SC 552)

the case of *Elahi Cotton Mills* (supra), wherein a tax had been imposed requiring every person holding land to pay such tax at a prescribed flat rate, regardless of whether or not any income was being derived the said property or whether the said property was capable of yielding any income at all. The Court in this case explored the effect of such tax through a hypothetical scenario as follows:

"...Under the Act in question we shall take a hypothetical case of a number of persons owning and possessing the same area of land. One makes nothing out of the land, because it is arid desert. The one does not make any income, but could raise some crop after a disproportionately large investment of a labour and capital. A third one, in due course of husbandry, is making the land yield just enough to pay for the incidental expenses and labour charges besides land tax or revenue. The fourth is making large profits, because the land is very fertile and capable of yielding good crops. Under the Act, it is manifest that the fourth category, in our illustration, would easily be able to bear the burden of the tax. The third one may be able to bear the tax. The first and the second one will have to pay from their own pockets, if they could afford the tax. 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 clear, therefore, that inequality is writ large on the Act and is inherent in the very provisions of the taxing section. It is also clear that there is no attempt at classification in the provisions of the Act. Hence, no more need be said as to what could have been the basis for a valid classification. It is one of those cases where the lack of classification creates inequality. It is, therefore, clearly hit by the prohibition to deny equality before the law contained in Article 14 of the Constitution. Furthermore, section 7 of the Act, quoted above, particularly the latter part, which vests the Government with the power wholly or partially to exempt any land from the provisions of the Act, is

clearly discriminatory in its effect and, therefore, infringes Article 14 of the Constitution. The Act does not lay down any principle or policy for the guidance of the exercise of the discretion by the Government in respect of the selection contemplated by section 7."

On these basis, the Court declared the provisions to be ultra vires. Furthermore, in light of paragraph-31 (xxxi) of Elahi Cotton Mills case, if tax is levied in such a way that it operates in a discriminatory manner against any person, it can be struck down.

16. In lieu of the detailed discussion above regarding the different elements of a taxing provision, I will now deliberate upon the nature and purpose of section 7E and whether the same, in pith and substance, is in violation of the constitutional rights and provisions. At the cost of repetition, it is understood that tax laws are by nature confiscatory, and as such, do infringe constitutional rights. This confiscation is supposed to be justified by a reasonable purpose which is in the public interest, and the proportionality of the measure of tax in context of said purpose. Section 7E requires tax to be paid on income deemed to be derived from capital assets as defined therein; it however does not classify any categories of the capital assets. The tax is to be imposed, at the rates specified in the relevant Schedule to the Ordinance, on 5% of the fair market value of the capital asset. No mechanism for determination of such fair market value has been provided for, neither is there any clarity with regards to different classes of properties. A person owning a large commercial plot, for instance, may be in a better position to pay such tax, however an owner of a small residential plot, or otherwise a plot which may not even have the capacity to yield any income whatsoever, may not have the ability to fulfill this burden. Although hardship is not ground enough for declaring a taxing

statute unconstitutional, but the tax under challenge would force the taxpayer who cannot pay the same to dispose of the capital asset. It is a settled principle that ordinarily, a tax on land or on land revenue is assessed on the actual or the potential productivity of the land sought to be taxed¹⁷. Similarly, a tax on income deemed to be derived from land must be imposed according to the potential capacity of the said land to yield income, deemed or otherwise. Though the presumptive tax regime has been upheld by the Supreme Court through numerous judgments, including that of *Elahi Cotton Mills* case, such presumptive taxation must be based on a comprehensive structure and must fall within the parameters of the Act itself, as well as constitutional provisions. The impugned provision lacks any such comprehensive structure, parameters or guidelines, it does not specify any method of computation of the fair market value of the asset in question, neither does it provide any classification of assets nor any machinery for recovery. Furthermore, the exemptions provided within the impugned provisions create classification which is not justified by any intelligible differentia; and in its effect, the impugned tax would force a taxpayer to dispose of property upon failure to pay such tax. This imposition of tax is, therefore, arbitrary and the elements of inequality, discrimination and the extent of confiscation are not justifiable by any measure and are thus tantamount to an illegal derogation from constitutional rights and provisions.

17. It is pertinent to state that vires of the impugned provision was under challenge before the three other High Courts i.e. the Sindh High Court, the Lahore High Court and Peshawar High Court. The Hon'ble Sindh High Court upheld the vires of section 7E, whereas the learned Single

¹⁷ AIR 1961 SC 552 (ibid); PLD 1997 SC 582 (ibid)

Bench of the Lahore High Court, in its judgment, suggested changes and endeavored to read down the provision; this judgment was however set aside by the learned Division Bench. The Peshawar High Court has struck down the law for being ultra *vires*. The judgments of the referred High Courts are not binding on this Court, but I do have the benefit of their wisdoms, however, I fail to bring myself in agreement with their respective views and reasoning, even with that of the Hon'ble Peshawar High Court which has struck down the law, however, at this juncture, it is only appropriate to observe that every High Court has territorial jurisdiction and the matter falling within the territorial jurisdiction is brought to the Court and is accordingly decided and if any particular issue is decided by any of the High Courts, the judgment is *in personam* and the principles laid down therein are of general obligation and the same are not binding but a judgment handed down in a case such as this, where vires of the statute is under challenge and if declared to be ultra vires, the judgment cannot be said to be *in personam* but is *in rem* and the effect thereof is ultimately to be examined by the Supreme Court of Pakistan in an appropriate case. I am of the view that if one High Court strikes down a law, the judgment being *in rem*, the legal obligation thereunder disappears and it cannot be said that such disappearance is only to the extent of territorial area to which the jurisdiction of the said High Court extends. The concept of a judgment *in rem* was discussed in detail by the Supreme Court of Pakistan in *Pir Bakhsh and The Chairman, Allotment Committee and others (PLD 1987 SC 145)*. The concept was explained as follows:-

"The terms "in rem" and "in personam" are of Roman Law used in connection with actio, that is, actio in rem and actio in personam to denote the nature of actions, and with the disappearance of the Roman forms of procedure, each of the two terms "in rem" and "in personam" got tagged with the word judgments to denote the end-products of actions in rem and actions in personam.

Thus, according to the civil law an actio in which a claim of ownership was made against all other persons was an action in rem and the judgment pronounced in such action was a judgment in rem and binding upon all persons whom the Court was competent to bind, but if the claim was made against a particular person or persons, it was an action in personam and the decree was a decree in personam and binding only upon the particular person or persons against whom the claim was preferred or persons who were privies to them.

The point adjudicated upon in a judgment in rem is always as to the status of the res and is conclusive against the world as to that status, whereas in a judgment in personam the point, whatever it may be, which is adjudicated upon, it not being as to the status of the res, is conclusive only between parties or privies. A decision in rem not merely declares the status of the person or thing, but ipso facto renders it such as it is declared.

Section 41 of the Evidence Act, 1872 does not use the term "judgment in rem", but it incorporates the law on the subject of "judgments in rem" and makes them relevant not only against strangers but also conclusive of certain matters such as whether a person was entitled to a legal character or to any specific thing not as against any specified person but absolutely.

Judgments in rem are an exception to the rule of law that no man should be bound by the decision of a Court of justice unless he or those under whom he claims were parties to the proceeding in which it was given. This rule of law is referable to the maxims of Roman Law namely, "Res inter alios judicata nullum inter aliosprejudicium facit," or "Res inter aliosactaalteri nocere non dibet" Such exception of the judgment in rem in the Roman Law was the foundation of the exception in English Law. Section 41 of the Evidence Act is the foundation for the exception of judgment in rem in our corpus juris. The reason why a judgment should not be used to the prejudice of a stranger is that he is denied the fundamental right to make a defence, or to examine or cross-examine witnesses or to appeal from a judgment which aggrieves him. This is the requirement of most manifest justice and good sense."

This view was followed by this Court in *Bannu Woolen Mills Ltd. versus Federation of Pakistan (2015 PTD 1058 Islamabad)*.

17. Summing up the reasoning as stated hereinabove, sub-section 2 of the impugned provision is confiscatory in nature and also discriminatory in its effect, and thus constitutes a violation of Article 25 of the Constitution. It also violates Article 23 of the Constitution and goes beyond the ambit of reasonable restrictions as provided thereunder, hence, is liable to be struck

down. Moreover, the classes or exemptions provided from payment of the tax does not seem to have any proper basis and has been created at whims of the Legislature which cannot be regarded as reasonable classification or classification based on intelligible differentia, hence violates Article 25 of the Constitution. Neither the machinery for assuming the fair market value has been provided, nor the recovery mechanism, and on the touchstone of *Messrs Elahi Cotton Mills* (supra), such deficiencies may form the basis for striking down a statute.

18. For the above reasons, the instant petition as well as petitions mentioned in the schedule are **allowed** and sub-section 2 of the impugned provision i.e. Section 7E of the Ordinance, is declared to be *ultra vires* the Constitution, hence it is struck down and is declared to be *void ab initio*. Consequently, the notices issued by the department under section 7E *ibid* are also set aside for being without lawful authority.

Before parting, I would like to acknowledge the hard work put in by Ms. Maheen Zeeshan, Advocate (my law clerk). It was only her ceaseless efforts to research the material with respect to legal issues involved that made the above reasoning possible.

(CHIEF JUSTICE)

Announced in open Court this 19th day of February, 2024.

(CHIEF JUSTICE)

M.Shah/.

Approved for reporting.

SCHEDULE
LIST OF PETITIONS CONNECTED WITH W.P No.213/2023

S.No.	Case No.	Title
1.	W.P. No.4880/2022	Ejaz Hussain Rathore Versus Federation of Pakistan, etc.
2.	W.P. No.191/2023	Waseem ur Rehman Versus Federation of Pakistan, etc.
3.	W.P. No.192/2023	Sami ur Rehman Versus Federation of Pakistan, etc.
4.	W.P. No.247/2023	Muhammad Naeem Versus Federation of Pakistan, etc.
5.	W.P. No.343/2023	Mrs. Beena Riaz Malik Versus Federation of Pakistan, etc.
6.	W.P. No.344/2023	Syed Waqar Ali Bokhari Versus Federation of Pakistan, etc.
7.	W.P. No.345/2023	Syed Zulfiqar Ali Bokhari Versus Federation of Pakistan, etc.
8.	W.P. No.397/2023	Shah Khalid Versus Federation of Pakistan, etc.
9.	W.P. No.440/2023	Irfan ul Wahab Khan Versus Federation of Pakistan, etc.
10.	W.P. No.442/2023	Saeed Ashraf Versus Federation of Pakistan, etc.
11.	W.P. No.443/2023	Muzaffar Ahmad Virk Versus Federation of Pakistan, etc.
12.	W.P. No.478/2023	M/s Imex Associates Versus Federation of Pakistan, etc.
13.	W.P. No.541/2023	Muhammad Sabeeh Khawaja Versus Federation of Pakistan, etc.
14.	W.P. No.544/2023	Mrs. Razia Saeed Versus Federation of Pakistan, etc.
15.	W.P. No.545/2023	Naseer Ahmed Malik Versus Federation of Pakistan, etc.
16.	W.P. No.548/2023	Chaudhry Muhammad Tahir Versus Federation of Pakistan, etc.

17.	W.P. No.549/2023	Muhammad Kaleem Ullah Versus Federation of Pakistan, etc.
18.	W.P. No.579/2023	Muhammad Usman Rafi Versus Federation of Pakistan, etc.
19.	W.P. No.629/2023	Chaudhary Farrukh Raza Versus Federation of Pakistan, etc.
20.	W.P. No.680/2023	Dr. Kamran Masud Versus Federation of Pakistan, etc.
21.	W.P. No.695/2023	Chaudhry Tariq Mehmood Toor Versus Federation of Pakistan, etc.
22.	W.P. No.771/2023	Muhammad Tariq Versus Federation of Pakistan, etc.
23.	W.P. No.918/2023	Hashmat Iqbal Versus Federation of Pakistan, etc.
24.	W.P. No.958/2023	Tahir Idris Versus Federation of Pakistan, etc.
25.	W.P. No.1042/2023	Mst. Zill e Huma Versus Pakistan through Federal Secretary, M/o Finance, etc.
26.	W.P. No.1043/2023	Atif Ikram Versus Pakistan through Federal Secretary, M/o Finance, etc.
27.	W.P. No.1155/2023	Ch. Amir Mumtaz Versus Federation of Pakistan, etc.
28.	W.P. No.1248/2023	Mrs. Mona Akbar, etc. Versus Federation of Pakistan, etc.
29.	W.P. No.1520/2023	Muhammad Ali Versus Federation of Pakistan, etc.
30.	W.P. No.2106/2023	Chaudhary Mukhtar Ahmed Versus Federation of Pakistan, etc.
31.	W.P. No.2353/2023	Naveed Yousaf Versus Federation of Pakistan, etc.
32.	W.P. No.2361/2023	Zulfiqar Ali Versus Federation of Pakistan, etc.
33.	W.P. No.2521/2023	Muhammad Abid Versus Federation of Pakistan, etc.

34.	W.P. No.2522/2023	Muhammad Asad Versus Federation of Pakistan, etc.
35.	W.P. No.2563/2023	Muhammad Saeed Versus Finance Division, through Secretary, M/o Finance, etc.
36.	W.P. No.2588/2023	Muhammad Mudassar Versus Federation of Pakistan, etc.
37.	W.P. No.2589/2023	Noor-ul-Amin Versus Finance Division, through Secretary, M/o Finance, etc.
38.	W.P. No.2652/2023	Misbah ul Hassan Versus Finance Division, through Secretary, M/o Finance, etc.
39.	W.P. No.2675/2023	Hamayun Naseer, etc. Versus Federation of Pakistan, etc.
40.	W.P. No.3009/2023	Hafiz Mohsin Akhtar Versus Federation of Pakistan, etc.
41.	W.P. No.3011/2023	Shabbir Ahmad Versus Federation of Pakistan, etc.
42.	W.P. No.3083/2023	Daud Abid Versus Federation of Pakistan, etc.
43.	W.P. No.3232/2023	Maleeha Hammad Versus Federation of Pakistan, etc.
44.	W.P. No.3233/2023	Muhammad Shafique Malik Versus Federation of Pakistan, etc.
45.	W.P. No.3234/2023	Sabahat Talha Versus Federation of Pakistan, etc.
46.	W.P. No.3235/2023	Mahreen Binte Talha Versus Federation of Pakistan, etc.
47.	W.P. No.3370/2023	Muhammad Talha Mehmood Versus Federation of Pakistan, etc.
48.	W.P. No.3375/2023	Muhammad Shamroz Khan Aryan Versus Federation of Pakistan, etc.
49.	W.P. No.3463/2023	Muhammad Mustafa Bin Talha Versus Federation of Pakistan, etc.
50.	W.P. No.3464/2023	Muhammad Qasim Bin Talha Versus Federation of Pakistan, etc.

51.	W.P. No.3580/2023	Malik Muhammad Akmal Versus Federation of Pakistan, etc.
52.	W.P. No.3581/2023	Raza Abbas Rajput Versus Federation of Pakistan, etc.
53.	W.P. No.3735/2023	Mst. Robena Aryan Versus Federation of Pakistan, etc.
54.	W.P. No.3789/2023	Waheed Ashraf Versus Federation of Pakistan, etc.