

**PESHAWAR HIGH COURT, PESHAWAR**  
(JUDICIAL DEPARTMENT)

**WP No. 5842-P/2023 with IR**

**Bank of Khyber Peshawar.**

.....Petitioner

**Versus**

**Pakistan, through the Secretary, Ministry of Finance,  
Islamabad and others.**

.....Respondents

<b>Petitioners (by):</b>	M/S Hassan Ali & Ansab Abdullah Advocates
<b>Respondents (by):</b>	M/S Sanaullah, Additional Attorney General for the Federation and Ghulam Shoaib Jally, Advocate for respondents No. 2 to 5 alongwith Muhammad Yasir Nabi, Deputy Commissioner-IR, Siraj Muhammad, Assistant Commissioner-IR, Rahat Gul, Head Financial Controller and Ahmad Durrani, Incharge Tax.
<b>Date of hearing:</b>	12.06.2025
<b>Assistance:</b>	Mr. Mazhar Ali Khan, Research & Reference Officer

**J U D G M E N T**

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**SYED ARSHAD ALI, J.-** The Bank of Khyber (“**Petitioner-Bank**”), established under the Bank of Khyber Act, 1991, has questioned the vires of Section 99D of the Income Tax Ordinance, 2001 (“**Ordinance**”), inserted by Section 7(9) of the Finance Act, 2023, read with Rule 7CB of the Seventh Schedule and SRO 1588(I)/2023 dated 21.11.2023. The provision envisages an additional levy on the so-called windfall gains of banks arising from foreign currency fluctuations, and by virtue of the impugned SRO,

purports to operate retrospectively over the preceding three years.

2. Learned counsel for the Petitioner-Bank submits that the majority shares of the Petitioner-Bank are owned by the Provincial Government, and it has opted for a special tax year in terms of Section 74 of the Ordinance, commencing on 1st January and concluding on 31st December of each calendar year. For the tax year 2022, pertaining to the accounting period 1st January to 31st December 2021, and for the tax year 2023, pertaining to the accounting period 1st January to 31st December 2022, the Petitioner-Bank had already completed and finalized its accounts. By the closing dates of 31st December 2021 and 31st December 2022, respectively, the incidence of income tax for those years had crystallized in accordance with the law then in force. Consequently, any subsequent imposition of tax, particularly under Section 99D of the Ordinance, would be inapplicable to these years, which constitute past and closed transactions. It is urged that the Petitioner had structured its financial commitments, including investments and dividend disbursements to shareholders, on the basis of the settled legal position, and thus the impugned provision impermissibly unsettles vested rights. It is further argued that the income now sought to be subjected to levy under Section 99D had already borne tax at the rates of 35% and 39%, respectively, and that any additional charge thereon would amount to impermissible double taxation, rendering the measure confiscatory in nature.

3. Conversely, learned counsel for the respondents contends that the rationale underlying the windfall tax is to capture the extraordinary profits reaped by the banking

sector owing to abrupt fluctuations in the foreign currency market. It is urged that such windfall gains, being abnormal and unanticipated in nature, legitimately warranted the imposition of tax through Section 99D of the Ordinance. Counsel further submits that, by its very design, the levy is intended to operate retrospectively, and that the legislature is fully competent to enact fiscal measures with retrospective effect. In support of this contention, reliance was placed upon the judgment of the Hon'ble Sindh High Court in National Bank of Pakistan v. Federation of Pakistan and others (C.P.D. No. 713 of 2024, decided on 20.02.2025).

4. Heard the arguments and perused the record.
5. Before embarking upon the questions raised in this petition, it is considered appropriate to first reproduce the text of the impugned statutory provision along with the impugned SRO.

**99D. Additional tax on certain income, profits and gains.-** (1) Notwithstanding anything contained in this Ordinance or any other law for the time being in force, for any of the last three tax years preceding the tax year 2023 and onwards, in addition to any tax charged or chargeable, paid or payable under any of the provisions of this Ordinance, an additional tax shall be imposed on every person being a company who has any income, profit or gains that have arisen due to any economic factor or factors that resulted in windfall income, profits or gains.

(2) The Federal Government may, by notification in the official gazette,-

- (a) specify sector or sectors, for which this section applies;
- (b) determine windfall income, profits or gains and economic factor or factors including but not limited to international price fluctuation having bearing on any commodity price in Pakistan or any sector of the economy or difference in income, profit or gains on account of foreign currency fluctuation;

(c) provide the rate not exceeding fifty percent of such income, profits or gains;

(d) provide for the scope, time and payment of tax payable under this section in such manner and with such conditions as may be specified in the notification; and

(e) exempt any person or classes of persons, any income or classes of income from the application of this section, subject to any conditions as may be specified in the notification.

(3) The Federal Government shall place before the National Assembly the notification issued under this section within ninety days of the issuance of such notification or by the 30th day of June of the financial year, whichever is earlier.

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**Government of Pakistan**  
**Revenue Division**  
**Federal Board of Revenue**  
Islamabad, the 21 November, 2023.

**Notification**

**S.R.O.1588 (1)/2023.-** In exercise of the powers conferred by sub-section (2) of section 99D of the Income Tax Ordinance, 2001 (XLIX of 2001), the Federal Government is pleased to-

(a) specify the banking companies to be the sector for the purpose of the section 99D;

(b) determine that the method by which the windfall income, profits and gains are required to be computed shall be in accordance with the provisions of paragraph 2 below;

(c) specify that the rate of tax for the purpose of the said section 99D shall be forty percent;

(d) specify that the scope of windfall income, profits and gains shall be as computed in paragraph 2 for the calendar years 2021 and 2022 corresponding to tax years 2022 and 2023 respectively, for the purpose of the section 99D,

(e) appoint the 30th day of November, 2023 to be the date by which the payment of the additional tax for the purpose of the section 99D shall be made, or within such extended period not exceeding fifteen days, as the Commissioner, for reasons to be recorded in writing may allow, on an application in writing for extension of date by the taxpayer; and

(f) specify that payment of the additional tax shall be made in the federal treasury through a prescribed challan or computerized payment receipt.

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6. The impugned SRO, though issued and published in the official Gazette on 21.11.2023, was laid before Parliament only on 16.02.2024, as the Parliament remained non-functional during the intervening period.

7. A plain reading of Section 99D of the Ordinance reveals that it introduces the concept of an additional tax on windfall income, profits, or gains of companies. The statute, however, does not itself delineate the relevant sector or the economic factor attracting such levy, leaving the matter to the discretion of the Federal Government, while capping the rate of tax at a ceiling of 50% of the windfall income, profits, or gains derived from an identified economic factor during any of the three years preceding the tax year 2023 and onwards. The criteria for, and determination of, windfall income have been prescribed by the Federal Government through the impugned SRO, which sets out two distinct formulas for computation of such income for the calendar years 2021 and 2022, corresponding to the tax years 2022 and 2023.

8. Having referred to the impugned legislation, let us examine its legality. The expression “tax on income” is defined in Article 20 of the Constitution of the Islamic Republic of Pakistan, 1973 (**“the Constitution”**) to encompass, inter alia, a tax in the nature of an excess profits tax or a business profits tax. Correspondingly, “income” is defined in Section 2(29) of the Ordinance to include any amount chargeable to tax under the Ordinance, any sum subject to collection or deduction of tax under Sections 148,

150, 152(1), 153, 154, 156, 156A, 233, 234(5), as well as any amount treated as income under any provision of the Ordinance, including any income by way of loss. Chapter II of the Ordinance contains the charging provisions, while Section 11 prescribes the various heads of income. Section 99D is housed in Chapter VI of the Ordinance, which provides special taxation regimes for certain specified industries or trades.

**9.** Section 99D, as noted earlier, commences with a non obstante clause and constitutes a charging provision in its own right, imposing an additional tax upon a person whose income, profits, or gains arise from any economic factor or factors that yield windfall income. Though the Ordinance does not define the expression windfall income or windfall profits, the language of Section 99D leaves little doubt that what is sought to be taxed is an additional income of companies arising from unusual economic circumstances. By virtue of Entry No. 47 of the Fourth Schedule, read with Articles 142 and 165A of the Constitution, Parliament is empowered to legislate on the subject. This proposition, in fact, has not been seriously disputed by the Petitioner and already stands affirmed by the Hon'ble Sindh High Court in the case of *National Bank of Pakistan (supra)*.

**10.** The next limb of the Petitioner's argument is that income once subjected to taxation under the normal regime cannot be subjected again to the impost under Section 99D. However, counsel has not been able to point to any constitutional or statutory provision that prohibits the legislature from taxing the same income more than once. On the contrary, the Hon'ble Supreme Court in the case of

*Pakistan Industrial Development Corporation*<sup>1</sup> has recognized that the legislature possesses the competence to tax the same income twice, provided the intention to do so is clearly manifested in the language of the charging section.

**11.** Moving on to the strenuously contested arguments by the learned counsel for the Petitioner-Bank regarding the imposition of the impugned levy with retrospective effect. It is the contention of the learned counsel for the Petitioner-Bank that the legislation has unreasonably given effect to the impugned legislation for the past three years prior to the Finance Act, 2023, therefore, the same is illegal and without lawful authority. We need not to detain ourselves in lengthy discussion relating to the authority of the Parliament to impose tax with retrospective effect as the matter has already been settled by the apex Court in the case of *Mekotex (Pvt.) Limited*<sup>2</sup>. The apex Court, after undertaking an exhaustive survey of case law, lucidly held that there exists no constitutional limitation on the legislative competence conferred by Article 142 of the Constitution upon Parliament and the Provincial Assemblies to enact laws with retrospective effect, save that such power must always remain subject to the Constitution itself. Justice Syed Mansoor Ali Shah, in para 8 of the said judgment, has succinctly explained this principle, which is reproduced below for ready reference:

“8. Give the above constitutional position, which imposes no restriction on enacting civil laws either prospectively or retrospectively within constitutional limits, the settled principles of law regarding the legislature’s to enact civil laws with retrospective effect are as follows. The legislature’s power to legislate

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1. *Pakistan Industrial Development Corporation v. Pakistan through Secretary, Ministry of Finance* (1992 SCMR 891)
  2. *Commissioner Inland Revenue and others v. Mekotex (Pvt.) Limited and others* (PLD 2024 SC 1168).

includes the power to legislate with retrospective effect. A legislature that is competent to make a law on a particular subject also has the power to legislate such a law with retrospective effect and can, by legislative fiat, even take away vested rights or affect past and closed transactions. Therefore, when a legislature gives retrospective effect to a law, either by express provision or by necessary implication, no protection can be afforded to vested rights contrary to that law. Similarly, when a legislature enacts a law with retrospective effect, the person affected cannot plead the imposition of a previously non-existent civil obligation as a ground for declaring the law invalid. The Constitution only bars retrospective legislation concerning criminal liabilities, not civil rights and obligations. There is no such rule that even if a legislature has sought to take away a vested right, the courts must hold that such legislation is ineffective or strike down the legislation on the ground that it has retrospectively taken away a vested right.”

Therefore, the impugned legislation, which in express words authorizes exaction of the tax for the years prior to 2023, is intra vires the Constitution.

**12.** Next question before us is more crucial for determination of this Court; whether the impugned legislation impairs/unsettle the transactions which are past and closed before its insertion. There is a slight distinction between the vested rights and past and closed transactions. Not every vested right qualifies as a past and closed transaction, yet in fiscal statutes the doctrine of past and closed transactions enjoys a stronger footing and higher protection.<sup>3</sup>

**13.** In *Molasses Trading*, the Supreme Court had examined the retrospective insertion of Section 31A of the Customs Act, 1969, which sought to neutralize the principle laid down in *Al-Samrez* regarding crystallization of rights at

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3. *Shahnawaz (Pvt) Ltd. through Director Finance v. Pakistan through Secretary Ministry of Finance* (2011 PTD 1558).



the time of contract and opening of letters of credit. While upholding the plenary authority of the legislature to enact retrospective fiscal laws, the Court nevertheless noted that past and closed transactions cannot be unsettled unless the legislature clearly intends such reopening. It was held that once liability is crystallized such as on presentation of the bill of entry, subsequent retrospective amendments cannot disturb the settled position. Justice Munib Akhtar, synthesizing these precedents in *Shahnawaz*'s case (supra), concluded that while retrospective taxation is permissible, the doctrine of past and closed transactions remains a constitutional safeguard protecting rights and liabilities that have already attained finality.

**14.** This position has also been acknowledged in foreign jurisdictions. In a famous English case<sup>4</sup>, Lord Woolf, LCJ (as he then was), observed at para-27 that legislation is generally presumed not to alter substantive rights with respect to events that occurred before its commencement. Similarly, in a notable Canadian case<sup>5</sup>, Dickson J. at pp. 279–280 reaffirmed the general rule that statutes are not to be construed as retrospective unless such intention is expressed or arises by necessary implication. He explained that while an enactment may be deemed to come into force from an earlier date or may expressly apply to past transactions, absent such language it cannot be taken to alter rights as they existed at an earlier point in time. The repeal in that case, though affecting past transactions, was held not to operate retrospectively, as it merely curtailed a right for the future without disturbing rights already crystallized.

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4. *Wainwright v. Home Office* ([2002] QB 1334, 1345).

5. *Gustavson Drilling (1964) Ltd. v. Minister of National Revenue* [1977] (1 SCR 271).

15. Likewise, in a famous Australian case<sup>6</sup>, at paras 6–9, Dixon C.J. of the High Court of Australia emphasized the common law principle that repeal of a statute renders it as though it had never existed, but this rule is subject to the important exception of ‘past and closed transactions.’ In such cases, rights and liabilities already fixed by reference to past events remain unaffected, and the repeal cannot be taken to reopen or unsettle them. In the like manner, in the case of *Gajraj Singh*<sup>7</sup>, at para 22, the Supreme Court of India reiterated the principle that upon repeal, a statute is deemed to have never existed, save in respect of ‘transactions past and closed.’

16. In **Blodgett vs. Holden, 275 U.S. 142 (Supreme Court Reporter 1927)**, the U.S. Supreme Court was dealing with the matter where Blodgett challenged the exaction of tax on gifts made by him in January 1924, whereas the Revenue Act was on 2<sup>nd</sup> June 1924, which had taxed all the gifts made during the entire calendar year 1924. Mr. Justice Reynolds speaking for the majority had observed “As to the gifts which Blodgett made during January 1924, we think the challenged enactment is arbitrary and for that reason invalid. It seems wholly unreasonable that one who, in entire faith and without the slightest premonition of such consequence, makes absolute disposition of his property by gifts should thereafter be required to pay a charge for so doing.”

17. In the case of *Anwar Zaib White Cement Ltd.*<sup>8</sup>, a similar complex issue was raised before the Hon’ble Sindh High Court relating to interpretation of Section 22 of the Banking Companies (Recovery of Loans, Advances, Credits

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6. *Maxwell v. Murphy* [1957] HCA 7.

7. *Gajraj Singh and Others v. State Transport Appellate Tribunal and Others* (1997) 1 SCC 650.

8. *N.D.F.C. vs. Anwar Zaib White Cement Ltd.*” (1999 MLD 1888)

and Finances) Act, 1997 (“**Act of 1997**”). Section 22 of the Act of 1997 deals with the application of the Limitation Act, 1908. A proviso was inserted into Section 22, stating: “Provided that in relation to past transactions a fresh cause of action will be deemed to arise, for purposes of limitation only, on the date on which this Act comes into force”. It was argued before the Court that, by virtue of the said proviso, even a time barred suit for recovery can be instituted bank before the Banking Court. The Hon’ble Sindh High Court, while repelling the said arguments, has held that:

"The only reasonable and justifiable effect of the proviso would be that extended period of limitation has been provided in relation to the 'past' transactions, distinct from the 'closed' transactions involving barred or extinguished remedies. The result, therefore; would be two-fold. In regard to all the mark-up-based transactions disbursed prior to enforcement of Act XV of 1997, three years' period of limitation has been prescribed from the enactment of the Act and in relation to the interest-based transactions which were enforceable and the period of limitation, on the date of promulgation of Act XV of 1997, was still alive, an extended and additional period of limitation has been prescribed "

**18.** The said opinion of the Hon’ble Sindh Court was also upheld by the apex Court in the case of *Khalid Qureshi*<sup>9</sup> in the following manner:

“In the light of what has been discussed hereinabove it can be said with certainty that the right extinguished due to bar of limitation could not be revived by virtue of the provisions as contained in section22(1) of the Act as no retrospective effect has been given to it.”

**19.** The jurisprudence developed in our jurisdiction clearly postulates that retrospective legislation lies within the prerogative of the legislature, its reach does not

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9. *Khalid Qureshi and 5 others vs. United Bank Limited I.I. Chundrigar Road, Karachi*” (2001 SCMR 103)

ordinarily extend to past and closed transactions. Rights and liabilities that have already crystallized under the law as it stood at the relevant time remain immune from subsequent alteration, unless the legislature in clear and express terms provides otherwise. This principle, deeply rooted in the rules of statutory interpretation, preserves the certainty of legal and financial arrangements and safeguards vested rights from being unsettled by retroactive measures.

**20.** Against this backdrop, it becomes necessary to examine whether Section 99D of the Ordinance manifests such clear intention. Sub-section (1) may itself be read in two parts. The first part introduces the charging mechanism by imposing an additional tax on the windfall income, profits, or gains of companies, which on its plain terms operates prospectively as a fresh fiscal impost. The second part extends the reach of this charge to “*any of the last three tax years preceding the tax year 2023 and onwards,*” thereby conferring a retrospective sweep. Nevertheless, it unsettles the past and closed transactions.

**21.** The Petitioner is a banking company as well as a listed company. Section 34 of the Banking Companies Ordinance, 1962 (**“Ordinance of 1962”**), requires every banking company incorporated in Pakistan to prepare with reference to that year a balance-sheet and profit and loss account as on the last working day of the year in the forms set out in the Second Schedule to the Ordinance of 1962. Similarly, under Section 225 of the Companies Act, 2017, the classified companies are also required to maintain the financial statements which shall give a true and fair view of the state of affairs of the company, comply with the financial reporting standards notified by the Commission and shall be

prepared in accordance with the requirements contained in the Third Schedule to the Act for different class or classes of the companies.

**22.** The format of the financial statement for banks and DIFs is being issued periodically by the State Bank of Pakistan, keeping in view changes in law, regulations and rules. However, the Second Schedule to the Ordinance of 1962 also provides specimens/guidelines for making financial statements of the financial position of a banking company, which should, inter alia, include assets, liabilities, net assets, interest earned, non-markup interest expenses, profit/loss before taxation, and profit/loss after taxation in the like matters. The financial statements should clearly provide for assets/total assets on one hand as well as liabilities, equities, share capital, retained earnings, and total liabilities on the other hand to balance the account of a banking company.

**23.** It is important to note that a banking company or listed company is not obligated to issue dividends against retained earnings. The decision regarding the utilization of such earnings rests with the Board of Directors, who must act in the best interest of the company. If the banking company elects to distribute dividends—whether through a payout ratio to shareholders or by issuing bonus shares—it may do so. Alternatively, it retains the discretion to reinvest the retained earnings or profits without issuing dividends. Once reinvested, the amount forms part of the company's assets. However, if dividends are issued against the said earnings or profits, either by way of cash payout or bonus shares, the bonus shares shall contribute to the company's equity.

**24.** Every company/person is required to file income tax returns in the manner as provided under Chapter X of the Ordinance, which is deemed an assessment order under Section 120 of the Ordinance. The banking companies are required to file returns in the manner as provided under the Ordinance. The annual financial statement of a banking company is translated into the tax returns. There are three stages in the imposition of a tax: there is the declaration of liability, that is the part of the statute which determines what persons in respect of what property are liable. Next, there is the assessment. Liability does not depend on assessment. That, *ex hypothesi*, has already been fixed. But assessment particularize the exact sum which a person liable has to pay. Lastly, come the methods of recovery, if the person taxed does not voluntarily pay.<sup>10</sup> Under the scheme of the Ordinance, liability to pay income tax accrues to the taxpayer on the last day of the income year/accounting year, though the tax became payable after it was quantified in accordance with the procedure laid down in the Income Tax law.<sup>11</sup> Subject to the enabling provision of the Ordinance for reopening of assessment, on filing the tax returns, the income tax affairs of a company are thus closed.

**25.** The payment of dividends is a distinct taxing event. Section 150 of the Ordinance envisages that every resident company paying a dividend shall deduct tax from the gross amount of the dividend paid at the rate specified in Division I of Part III of the First Schedule. Similarly, Section 5 of the

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10. H.M. Extraction Ghee and Oil Industries (Pvt.) Ltd. and another v. Federal Board of Revenue and another (2019 SCMR 1081).

11. Commissioner of Income Tax Peshawar vs. Messrs Islamic Investment Bank Limited (2016 SCMR 816).

Ordinance envisages that a tax shall be imposed, at the rate specified in Division III of Part I of the First Schedule, on every person who receives a dividend from a company. Section 5 speaks of the dividend being “received” by a person from a company, while Section 150 speaks of the dividends being “paid” by the latter. The former is a general expression, bringing to tax all that is received by way of dividend, while the latter is limited to the requirement of Section 150, i.e., requiring a deduction to be made on the dividend paid.<sup>12</sup> It is in this view of the matter, at the end of each tax year when the dividends are paid to the shareholders it is subject to the impost of taxing event, and once the share money goes in the hands of shareholders, it becomes past and closed transactions. If the legislature intends to unsettle these past and closed transactions, it must have been in specific words.

**26.** The language of Section 99D of the Ordinance does not explicitly impair/unsettle these past and closed transactions. However, in our humble view, it charges an additional tax on the earnings, profits, gains, if it remains with the company (as reflected in the financial statements) in any form, including in the form of investments and thus, in that event, it would be subject to the imposition of tax under Section 99D of the Ordinance. However, as far as the said profit which is out of the hands of the company and paid to the shareholder, either in cash or through issuance of bonus shares, it becomes a closed transaction for that tax/financial year, and Section 99D of the Ordinance does

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12. Fawad Ahmad Mukhtar v. Commissioner Inland Revenue (Zone-II), Regional Tax Office, Multan and another (2022 SCMR 426).

not give any impression to charge the income of the shareholders of a banking company.

**27.** In light of the foregoing discussion, we dispose of this petition and hold that:-

- i. Section 99D of the Ordinance constitutes a valid charging provision and may, by its terms, operate with retrospective effect.
- ii. Section 99D of the Ordinance and SRO 1588(I)/2023 dated 21.11.2023, in no manner, unsettle the portion of income, profit, and gains accrued to the Petitioner-banking company for a tax period prior to 2023, which had already been passed on to the shareholder before the promulgation of the SRO ibid, being past and closed transactions.
- iii. As a corollary of the above, respondent No.4 shall re-determine the liability of the Petitioner-Bank.

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Date of hearing: 12.06.2025

Date of announcement: 10.10.2025

(D.B) Hon'ble Mr. Justice Syed Arshad Ali & Hon'ble Mr. Justice Wiqar Ahmad

Mahmood Shah, SSS