

*Form No: HCJD/C-121.*  
JUDGEMENT SHEET  
IN THE ISLAMABAD HIGH COURT, ISLAMABAD  
JUDICIAL DEPARTMENT

Writ Petition No. 114 of 2016

M/s Pakistan Tobacco Company Ltd.

Vs

Federation of Pakistan through the Secretary, M/o Finance, etc.

PETITIONER BY: Mr. Hassan Kamran Bashir and Mr. Arif Humayun Advocates for the petitioner in W.P No. 114/2016.  
Mr. Muhammad Raheel Kamran Sheikh, Advocate for petitioners in Writ Petitions No. 647 & 649 of 2016.  
M/s Jawad Hassan and Barrister Omer Azad Malik, Advocates for the petitioner in W.P No. 186/2016.

RESPONDENTS BY: Mr. Farrukh Shahzad Dall, Assistant Attorney General.  
Syed Ishfaq Hussain Naqvi, Advocate for respondents in W.P No. 114/2016.  
Mr. Babar Bilal, Advocate for respondents in W.P No. 114/2016 and W.P No. 186/2016.  
Dr. Farhat Zafar and Sheikh Anwar ul Haq, Advocates for respondent No. 4 in Writ Petitions Nos. 647 and 649 of 2016.  
Mr. Saeed Ahmed Zaidi, Advocate for FBR in Writ Petitions No. 647 and 649 of 2016.

DATE OF HEARING: 12.07.2021.

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**BABAR SATTAR, J.-** Through this judgment this Court seeks to decide the instant petition as well as ***W.P No. 186/2016*** (*Mari Petroleum Company Ltd. Vs. Federation of Pakistan, etc*), ***W.P No. 647/2016*** (*Premier Oil Pakistan Kirthar*

*B.V. Vs. Federation of Pakistan, etc.*) and **W.P No. 649 of 2016** (*Premier Oil Pakistan Kirthar B.V. Vs. Federation of Pakistan, etc.*) as all of them involve similar questions of law and impugn the vires of section 4B and Division IIA of Part-I to the First Schedule of Income Tax Ordinance, 2001 (**"Ordinance of 2001"**) pursuant to which 'supertax' has been levied.

2. The legal question before this Court was raised and addressed by the learned Lahore High Court in **D.G. Khan Cement Company Limited Vs. Federal Board of Revenue and others (2018 PTD 287)** wherein the learned Judge-in-Chambers declared section 4B of the Ordinance of 2001 to be *intra vires* the Constitution. The said judgment was challenged before a Division Bench of the learned Lahore High Court, which upheld the judgment of the single bench by the judgment reported as **D.G. Khan Cement Company Limited through Chief Financial Officer and another Vs. Federation of Pakistan through Secretary Revenue and 3 others (2020 PTD 1186)**. The vires to section 4B of the Ordinance of 2001 was also challenged before the learned Sindh High Court in **HBL Stock Fund Vs Additional Commissioner Inland Revenue (2020 PTD 1742)** which too found that no ground was made out to declare the levy and imposition of supertax unconstitutional. The vires of section 4B of the Ordinance of 2001 was also challenge before this Court in **Messrs the Attock Oil Co. Ltd. Vs. Federation of Pakistan (2019 PTD 934)** which too dismissed the challenge to the legality of section 4B of the Ordinance of 2001 and found that it was validly promulgated

by the National Assembly through Finance Bill, 2015, and further declared that it did not suffer from any illegality and was did not violate any constitutional provision.

3. As arguments challenging the legality of section 4B of the Ordinance of 2001 as well as arguments in defence of the legality of the such provision have been dealt with in detail in the aforementioned judgments rendered by the learned Lahore High Court, learned Sindh High Court as well as this Court, in this judgment only summary of the arguments presented by the petitioner and the respondents is being provided followed by the reasoning of the learned High Courts that have already considered such arguments and rendered their opinion.

4. The challenge to constitutionality of section 4B of the Ordinance of 2001, as raised by the learned counsels for the petitioners, was three-pronged. The first was a challenge to the process through which section 4B was promulgated. The crux of the arguments was that as supertax, which was levied through section 4B of the Ordinance of 2001, is for a specific purpose (i.e. for the benefit of rehabilitation of temporarily displaced persons), the levy was not meant to contribute of the Federation and could therefore not to be deemed a tax. And that as it was not a tax, the said levy could not have been enacted by introducing a provision in the Finance Act as in view of Article 73(2) and (3) of the Constitution, it could only have been promulgated by Parliament through ordinary legislation and not by the National Assembly alone through a Finance Bill. The

second argument of the learned counsels for the petitioners was that section 4B amounted to imposing an additional tax on income which constituted imputable income, and imposition of double tax on income that had already been taxed was not permissible. It was further contended that a tax statute could only include one charging section and that as section 4 of the Ordinance of 2001 was a charging section, a second charging section in the form of section 4B was not permissible. The third argument of the learned counsels for the petitioners was that supertax pursuant to section 4B had been imposed on a narrow category of taxpayers which made it discriminatory and it was liable to be held *ultra vires* Article 25 of the Constitution.

5. Learned counsel for the respondents submitted that section 4B of the Ordinance of 2001 was a tax and not a fee or a cess and was rightly introduced as part of a Money Bill. That Section 4B amounted to imposition of a tax and squarely fell within the scope of Article 73(2)(a) of the Constitution. It was further contended that the Constitution did not prohibit the Federation from imposing a tax for a specific purpose and mere declaration of a specific purpose while imposing a tax did not transform it into fee or cess. It was argued that there is no mandatory requirement of law that a fiscal law can only have one charging section just as there was no requirement imposed by the Constitution that the income of a taxpayer cannot be subjected to tax twice over. It was also contended that pursuant to ratio in **Lahore Development Authority Versus Ms. Imrana Tiwana (2015 SCMR 1739)** a law must not be

declared unconstitutional unless a court can find no way to reconcile the provision of the statute with the Constitution. It was lastly contended that section 4B of the Ordinance of 2001 had already been adjudged as being *intra vires* the Constitution by the learned Sindh High Court, learned Lahore High Court as well as this Court and that the decision of the Judge-in-Chambers of this Court was binding in terms of the laid down in **Multiline Associates Vs. Ardeshir Cowasjee (1995 PLD SC 423)**.

6. Before rendering the opinion of this Court, let us consider how the legal challenge to section 4B of the Ordinance of 2001 has been treated by three High Courts that have found the said provision to be lawful. It was held by the learned Lahore High Court in **D.G. Khan Cement Company Limited Vs. Federal Board of Revenue and others (2018 PTD 287)** that rule against double taxation was a judge made rule without any constitutional basis and the High Court was not vested with any authority to exercise its judicial review powers to declare a statutory provision imposing tax unconstitutional on the basis of such rule. Relying on the law laid down in **Pakistan Industrial Development Corporation Vs. Pakistan through Secretary, Ministry of Finance (1992 SCMR 891)**, the learned Lahore High Court reiterated that "*double taxation can be imposed by a clear and specific language.*" It was explained that the rule against double taxation was a rule of statutory interpretation. The Court would ordinarily not construe a taxing statute such that it resulted in taxation of the same property twice. However,

if double taxation was imposed through clear words and there was no room for interpretation, the court would accord ordinary meaning to the words used in the taxing provision and if the result was introduction of a second incident of taxing the same property, so be it. The learned Lahore High Court further held that in view of the definition of tax as used in Article 260 of the Constitution as well as Entry 47 of the Federal Legislative List the Constitution explicitly contemplated imposition of special taxes for specific purposes and the use of words "taxes on income" in Entry 47 of the Federal Legislative List empowered the State to subject the same income to more than one tax. Relevant findings of the learned Lahore High Court are reproduced below:

*19. The simple rule propounded by the Supreme Court of Pakistan was that in the absence of any prohibition or limitation by the Constitution or law, the legislature could impose tax twice over on the same amount or income. It was further held that super tax had been levied in addition to the income tax by a clear and independent provision and for whose charge assessment and recovery procedure had been provided. On the touchstone of the same principle it can be gleaned that super tax in this case as well has been imposed by a clear and independent provision bringing forth the intention of the legislature to tax twice over the same income of a certain category of taxpayers. Simply because the legislature intends to tax the same income twice over does not detract from the constitutionality of the levy as there is nothing in the Constitution which prohibits the legislature from doing so. This Court in the exercise of its constitutional powers can only place the provisions of an enactment under challenge and square it with any provisions of the Constitution in order to hold that it is ultra vires or not. No provision of the Constitution has been cited or referred to in*

*the instant case by the learned counsel for the petitioners which will compel this Court to hold that super tax was unconstitutional. Clearly, super tax has been levied in addition to the income tax which has to be paid by the assessee although the category of assesses is different and the mode of determination for the purpose of super tax is also distinct from the one prescribed in respect of income tax. To my mind, the intent of the legislature is very clear and doubtless the legislature had consciously imposed a super tax in addition to the income tax already imposed by virtue of section 4B of the Income Tax Ordinance, 2001.*

*33. Taxation which has a nexus with the powers to impose tax under Article 77 includes the imposition of any tax or duty whether general, local or special, and tax shall be construed accordingly. Therefore, the legislature has vast powers to impose tax or duty which can be special in nature. This clearly means that tax can be imposed for special purpose and which will include a specific purpose as sought to be canvassed by the learned counsel for the petitioners. This is a complete answer to the argument of the learned counsel for the petitioners with regard to the mention of a purpose in Section 4B of the Ordinance, 2001. It is not difficult to construe that Section 4B is a special tax and has been imposed for a special purpose and by virtue of the definition of taxation given in Article 260 the Parliament was well within its powers to impose such a tax. We will also take a glance at Entry 47 of the Fourth Schedule to the Constitution which reads as follows:-*

*"47. Taxes on income other than agricultural income".*

*34. It has been settled by respectable authorities that Entries in the Legislative List of the Constitution indicate the subject on which a particular legislature is competent to enact but they do not provide any restriction as to the power of the legislature concerned. It is also well settled that a Legislative List cannot be construed narrowly but has to be given a liberal construction. It will be noticed that Entry 47 uses the term 'taxes on income'. This in my opinion is quite significant as it empowers the legislature to impose more than one tax*

*on the income of a person. Once again, the term 'tax on income' used in Entry 47 effectively nullifies the arguments with regard to double taxation. Therefore, not only that the legislature does not impose a prohibition on double taxation but in fact permits the levy of more than one tax on income.*

7. The judgment rendered by the learned Judge-in-Chambers in **D.G. Khan Cement** was appealed before the Division Bench of the learned Lahore High Court, which reaffirmed the judgment of the single bench and dismissed the appeal in **D.G. Khan Cement Company Limited through Chief Financial Officer and another Vs. Federation of Pakistan and others (2020 PTD 1186)**. The Division Bench of the learned Lahore High Court distinguished the law laid down by the august Supreme Court in **Federation of Pakistan Vs. Durrani Ceramics and others (2014 SCMR 1630)** and **Workers' Welfare Funds, Ministry of Human Resources Development, Islamabad and others v. East Pakistan Chrome Tannery (Pvt.) Ltd. (PLD 2017 SC 28)**. The opinion of the learned Division Bench was expressed in the following manner:

*18. So far as arguments of learned counsel for appellants regarding imputable income and double taxation are concerned, suffice it to say that, in absence of any constitutional/statutory prohibition or restriction on Legislature to again impose tax on the same subject matter, the same cannot be declared void or outside the powers of the Legislature. It is pertinent to mention here that the Legislature can impose more than one tax on income under Entry 47 of the Fourth Schedule to the Constitution which reads as follows:*

*"47. Taxes on income other than agricultural income".*



*19. It is a well-settled proposition of law that an entry in a legislative list cannot be construed narrowly or in a pedantic manner but it is to be given liberal construction. Reliance is placed on Elahi Cotton Mills supra and ICC Textile Ltd. and others v. Federation of Pakistan and others (2001 PTD 1557). The term "taxes on income" used in Entry 47 nullifies the argument of the appellants with regard to double taxation. Even otherwise, impugned levy has been imposed through a clear and independent provision, having its separate charge assessment and recovery mechanism. Intention of the Legislature in imposing super tax, besides the income tax already imposed, by way of Section 4B of the Ordinance of 2001, is very much clear. There is nothing on record which may suggest that impugned levy is unconstitutional.*

8. The challenge to legality of section 4B of the Ordinance of 2001 was dispelled by a Division Bench of the learned Sindh High Court in **HBL Stock Fund Vs Additional Commissioner Inland Revenue (2020 PTD 1742)**. The learned Sindh High Court while reiterating principles for judicial review of fiscal enactments found that imposition of special tax was permissible in view of Article 260 of the Constitution and that supertax imposed through section 4B of the Ordinance of 2001 did not amount to fee in terms of the law laid down by the august Supreme Court in **Durrani Ceramics** as there was no question of quid pro quo or benefit payable to the taxpayers liable to pay supertax. The learned Sindh High Court while rejecting the challenge to section 4B of the Ordinance of 2001 held the following:

*17. Accordingly, the above petitions and the suits, challenging the vires of Section 4B of the Income Tax*

*Ordinance, 2001 through Finance Act, 2015 are disposed of in the following terms along with listed applications:*

*(a) The Super Tax imposed under Section 4B of the Income Tax Ordinance, 2001 through Finance Act 2015 along with Money Bill possesses the characteristics of a tax, for being a compulsory exaction of money by public authority for the purposes of general revenue, whereas, the amount of tax so charged goes to Federal Consolidated Fund, therefore, has been rightly introduced under Article 73(2)(a) of the Constitution of the Islamic Republic of Pakistan, 1973, hence intra-vires to the Constitution;*

*(b) The Super Tax imposed under Section 4B of the Income Tax Ordinance 2001, through Finance Act, 2015, along with Money Bill is an additional tax on income covered under Entry 47 of the IV Schedule to the Constitution "taxes on income", and does not amount to double taxation, therefore, falls within the legislative competence of the National Assembly to impose, abolish, remit, alter or regulate a tax, through Finance Act along with Money Bill under Article 73(2)(a) of the Constitution of the Islamic Republic of Pakistan, 1973, hence intra vires to the Constitution;*

*(c) The Super Tax imposed under Section 4B of the Income Tax Ordinance, 2001 through Finance Act, 2001 along with Money Bill is not violative of Article 25 of the Constitution of the Islamic Republic of Pakistan, 1973 as it is neither discriminatory nor creates any unreasonable classification amongst the same class of persons upon whom its charge has been created, while applying the common burden through uniform rate of tax upon Banking Companies@ 4% of the income, and person other than Banking Company, having income equal to or exceeding Rs.500 Million @ 3% of the income.*

*(d) The Super Tax imposed under Section 4B of the Income Tax Ordinance, 2001 through Finance Act, 2015*

*along with Money Bill, is not a fee as there is no element of quid pro quo, nor the amount of Super Tax is charged as consideration for rendering any services to its payer in any manner.*

9. In the judgment rendered by this Court in **Messrs the Attock Oil Co. Ltd. Vs. Federation of Pakistan (2019 PTD 934)**

the following was held:

*9. A cumulative reading of the above provisions shows that the expression "tax" has a wide scope in the context of the Ordinance of 2001. The legislature in its wisdom and through insertion of section 4B intended the levy of super tax for rehabilitation of displaced persons. The mere incorporation of said levy in the Ordinance of 2001 leaves no doubt that the legislature had intended to treat it as a tax and not a fee. The judgments rendered by the august Supreme Court in cases titled "Federation of Pakistan through Secretary M/o Petroleum and Natural Resources and another v. Durrani Ceramics and others" [2014 SCMR 1630] and "Worker's Welfare Funds v. East Pakistan Chrome Tannery (Pvt.) Ltd." [PLD 2017 SC 28] are in respect of statutes other than the Ordinance of 2001. The distinguishing feature is the definition of tax given in the Ordinance of 2001 which, inter alia, includes fee. Section 4B and the levy there-under is covered under the definition of "tax" provided under subsection (63) of section 2 of the Ordinance of 2001. The judgments are, therefore, distinguishable and moreover, the mandatory ingredients for treating a levy as a fee are also not fulfilled in the instant case.*

10. This Court agrees with the conclusion drawn by the learned Judge-in-Chambers in **Messrs Attock Oil** that section 4B of the Ordinance of 2001 is *intra vires* the Constitution and is also not in breach of any fundamental right of citizens guaranteed by the Constitution, including right to equality guaranteed under Article 25 of the Constitution. As this Court has had the benefit

of at least four opinions rendered by single and division benches, respectively, of three High Courts, this Court adopts the reasoning of the learned Lahore High Court in the judgment rendered by the Judge-in-Chambers in **DG Khan Cement**. This Court agrees that the Constitution in view of language used in Article 260 contemplates the imposition of special tax and the mere declaration of special purpose of a tax levied does not in of itself transform such levy into fee or cess thereby taking it out of the scope of the tax for purposes of Article 73(2) of the Constitution. This Court further agrees with the judgment rendered by the Judge-in-Chambers of the learned Lahore High Court that in view of the law laid down by the august Supreme Court in **Pakistan Industrial Development Corporation Vs. Pakistan through Secretary, Ministry of Finance (1992 SCMR 891)** and Entry 47 of the Federal Legislative List, there cannot be read into the Constitution the intent of framers of the Constitution to place an embargo on creation of a second incidence of taxation in relation to the same income or property and consequently the levy of any tax cannot be declared unconstitutional on the basis that it amounts to double taxation as explained above. The rule against double taxation is a rule of statutory interpretation whereby a court assumes in relation to a fiscal statute that the legislature cannot be deemed to have intended to subject a taxpayer to double taxation unless it does so through clear and unequivocal words. It is settled law that only such person is to be subjected to the charging section of a taxing statute who falls within the scope of

such charging section in view of the clear words used in the statute. Thus, double taxation cannot be presumed as a matter of statutory interpretation and the presumption is always against double taxation where the language of the statute is open to interpretation. However, where the statute imposes double taxation through clear words, there is no room for interpretation and consequently the clear words used by the legislature making legislative intent plain must be given effect by the courts. This understanding of the law is backed by the dicta of the apex Court in **Sohail Jute Mills Ltd. Versus Federation of Pakistan (PLD 1991 SC 329)** wherein Iqra Surcharge was upheld by the august Supreme Court as an additional customs duty. In adopting the reasoning of the learned Judge-in-Chambers in **DG Khan Cement** this Court is guided by the law laid down by the august Supreme Court in **Messrs Elahi Cotton Mills Ltd. Vs Federation of Pakistan (PLD 1997 SC 582)**. The principles of interpretation in relation to fiscal statutes were enumerated in **Elahi Cotton Mills** and at least two among them are relevant for our present purposes. The first is that a court must lean in favour of the constitutionality of a legislation (which principle was more recently reiterated by the august Supreme Court in **Imrana Tiwana**). The second is 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.*" It was

emphasized that in relation to challenges to the legality of fiscal statutes, judicial review powers are exercised on deferential basis. And that courts exercise judicial restraint when it comes to the fiscal policy of the State and questions about its rationality and reasonability, in view of the doctrine of separation of powers that forms a foundational basis of our Constitution. It was held in **Elahi Cotton Mills** that where taxes are not expropriatory and confiscatory and *"the court finds that a fiscal statute does not suffer from any Constitutional infirmity, it is not supposed to entangle itself with the technical questions as to the scope and modality of its working etc."* **Elahi Cotton Mills** further clarifies that *"different laws can be validly enacted for different sexes, persons in different age groups, persons having different financial standings and that no standard of universal application to test reasonableness of a classification can be laid down as what may be reasonable classification in a particular set of circumstances, may be unreasonable in the other set of circumstances. The requirement of reasonable classification is fulfilled if in a taxing statute the Legislature has classified persons or properties into different categories which are subject to different rates of taxation with reference to income or property and such classification would not be open to attack on the ground of inequality or for the reason that the total burden resulting from such a classification is unequal."*

11. In view of the law laid down by the august Supreme Court in **Elahi Cotton Mills** and **Government of N.W.F.P Versus I.A. Sherwani (PLD 1994 SC 72)** this Court

agrees with the reasoning of the learned Judge-in-Chambers of the learned Lahore High Court in **DG Khan Cement** that section 4B of the Ordinance of 2001 cannot be held *ultra vires* the Constitution on the basis that it is discriminatory.

12. For the aforesaid reasons this Court finds that section 4B of the Ordinance of 2001, having been enacted through a Finance Act, falls within the scope of Article 73(2) of the Constitution, and while the supertax levied does amount to double taxation but such double taxation is not *ultra vires* the Constitution. Further there is no prohibition in the Constitution that prevents the legislature from introducing a second charging section within a taxing statute and the impugned section of the Ordinance of 2001 cannot be declared unconstitutional on such basis. The petitioners have also failed to make out a case that section 4B of the Ordinance of 2001 is inconsistent with the fundamental rights guaranteed by the Constitution and is consequently liable to be declared void in view of Article 8 of the Constitution. The petitions are consequently without merit and are **dismissed**.

(BABAR SATTAR)  
JUDGE

Announced in the open Court on **08.11.2021**.

JUDGE