

**IN THE HIGH COURT OF SINDH AT KARACHI**  
(Constitutional Jurisdiction)

C.P. Nos. D-1901 to 1905, D-1931 to 1941, D-1971 to 1973,  
D-1980 to 1983, D-2062 & 2063, D-2104 & 2136, D-2146,  
2147, 2168 & 2169, D-2244, 2268, 2278 & 2282 to 2285, D-2342, 2392,  
2570, 2631, 2632, 2728, 2903 all of 2009, D-41/2010, D-167/2010 & D-180/2010

Present:

Mr. Justice Gulzar Ahmed, and  
Mr. Justice Irfan Saadat Khan.

C.P. Nos. D-1901 to 1905/09:  
Dr. Muhammad Farogh Nasim, advocate for the petitioners.

C.P. No. D-2104/09:  
Mr. Sajid Bashir, advocate for the petitioner.

C.P. No. D-2136/09:  
Mr. Hasan Akbar, advocate for the petitioner.

C.P. Nos. D-2278/09 & 180/2010:  
Mr. Mazharul Hassan, advocate for the petitioner.

C.P. No. D-2392/2009:  
Mr. Asim Iqbal Advocate for the petitioner.

C.P. Nos. D-2611/09 & 2632/09:  
Mr. Amaluddin Ansari, advocate for the petitioner.

C.P. No. D-2728/2009:  
Mr. Rehman Hassan Naqvi and Miss. Lubna Pervez, advocates for the petitioner.

C.P. Nos. D-2803/09 & D-167/2010:  
Mr. Obaid-ur-Rehman, advocate for the petitioner.

Mr. Ashiq Raza, Deputy Attorney General for the Federation, Respondent No. 1.

Mr. Chaman Lal Oad, advocate for the respondents No. 2 and 3.

Mr. Abdul Ghaffar Khan, advocate for the private respondents in C.P. D-1902/09.

Mr. Muhammad Izhar, advocate for the private respondents in C.P. No. 1938/09 and 1971/09.

Mr. Atif Awan, advocate for the private respondents in C.P. No. D-2392/09.

Dates of hearing: 20.1.2010, 22.1.2010, 25.1.2010, 27.1.2010, 1.2.2010, 2.2.2010,  
3.2.2010, and 8.2.2010.

**JUDGMENT**

**IRFAN SAADAT KHAN, J:** These petitions call into question the imposition of Internally Displaced Persons Tax ("IDPT") imposed vide section 5(51)(a)(i)(b) of the Finance Act, 2009 on persons having taxable income of Rs. One Million or more at the rate of 5% on the income tax payable on their income and imposition of IDPT at the rate of 30% on the bonus paid or payable to the corporate employees only.

2. Dr. Muhammad Farogh Nasim, learned lead counsel for the petitioners submitted that vide Finance Act 2009 a number of amendments were made in the Income Tax Ordinance 2001 ("the Ordinance"). He submitted that through section 5(51)(a)(i)(b) of the said Act, third proviso to paragraph (1-A) to Division-1 of Part I of the First Schedule of the Ordinance was added which reads as under:

*"Provided further that Internally Displaced Persons Tax (IDPT), treated as income tax on the tax payable on the taxable income of one million rupees or more shall be levied at the rate of 5% of such tax, for tax year 2009."*

3. As per the learned counsel, this IDPT is to be treated as income tax and is to be levied at the rate of 5% of the tax leviable on salaried employees whose income is Rs. One Million or more. The learned counsel further submitted that this is a one-time levy and applicable to the tax year 2009 only. The learned counsel further submitted that through the said Finance Act, 2009 another proviso was added to section 12(2)(a) of the Ordinance, which reads as under:

*"Provided that any bonus paid or payable to corporate employees receiving salary income of one million rupees or more (excluding bonus) in the year, shall be chargeable to tax at the rate provided in paragraph (2) of Division I, Part I of First Schedule;"*

4. Learned counsel submits that vide the same Finance Act, following paragraph (2) was added to Part I of Division I, to the First Schedule of the Ordinance:

*"(2) The rate of tax payable on bonus as IDPT as income tax shall be @ 30 per cent for the tax year 2010"*

5. According to the learned counsel for the petitioners, the accumulated reading of the amendments in the Ordinance, quoted supra, would show that all corporate employees to whom bonus is being paid or payable shall pay tax at the rate of 30% on the bonus as IDPT.

6. While elaborating his arguments the learned counsel submitted that Entry 47 of the Fourth Schedule deals with "tax on income other than agricultural income" meaning thereby that the government has the authority under the law to tax on income, however, the government has no authority to impose a tax on tax and that IDPT is, in fact, a tax on tax and, and this power does not vests in the federal government to impose such tax on tax. The learned counsel, referring to the famous decision in the case of Elahi Cotton Mills v. Federation of Pakistan and others (PLD 1997 SC 582), admitted that the apex Court has allowed the legislature to widen the scope of the term "income" through a deeming clause, however, he submitted that it is a settled law that though the entries in the Constitution are to be given a liberal connotation but the same cannot be stretched beyond the pith and substance. The learned counsel submits that his case is not that of imposition of tax on income rather the present petitions challenge the authority of the Federal Government to impose a "tax on tax" which is wholly illegal and unconstitutional. He submitted that it is a trite law that no law is to be stretched beyond its reasonable limits. Hence, as per the learned counsel, Entry 47 cannot be interpreted in a way to include a tax on tax on the income as any interpretation by which a tax on tax on income would fall under Entry 47 would be against the mandate of the said Entry as the same would amount to unnecessary stretching of the said entry beyond its mandate and beyond its limits. The learned counsel further submitted that while imposing a tax incidence rationality is always to be considered as the parameter of the imposition of tax and that the rationality has to be with regard to the incident which could not be something not capable of being considered as income. As per the learned counsel in tax imposition rationality has to be given an important place and nothing which could not be considered as rational could not be termed as income and cannot be taxed. The learned counsel further submitted that the First Schedule to the Ordinance talks about the rates only and is not a

charging provision because it deals with rates of tax only and could not be considered to be something through which a tax could be imposed or through which any new levy is to be introduced. As per the learned counsel the various sections contained in the Ordinance deal with charging of tax and the imposition of IDPT by an amendment in the First Schedule at the very outset is ultra vires and abinitio void as the law makers cannot introduce a new levy or impose a tax by making certain amendments in the Schedule to the Ordinance, which deals with rates of taxes only. He further submitted that this method of imposition of a new levy by making amendment to the First Schedule and by not making suitable amendments in the charging sections of the Ordinance is uncalled for and ultra vires and is liable to be struck-down. He further submitted that charge always comes from the main section and not from a schedule to a statute. In this regard he invited our attention to sections 11 and 12 of the Ordinance. As per the learned counsel the IDPT is not only unconstitutional but is also a discriminatory provision of the law as the bonus paid or payable only to the employees in the corporate sector has been made taxable in the hands of corporate employees only leaving out all other employees working in other sectors. The learned counsel submits that IDPT is triple tax as a person will have to pay three different taxes, namely, (i) the income tax, (ii) IDPT on income tax and (iii) IDPT on bonus. In support of his contentions and submissions the learned counsel has submitted as many as eight paper books wherein he has elaborately explained the terms "income, income tax, tax, tax on tax, nature of Finance Act, proviso; nature and character, conflict between main provision and schedule, and Article 25 discrimination. The case law relied upon by the learned counsel for the petitioners will be considered at relevant place.

7. Mr. Obaidur Rehman, advocate for the petitioner in C.P. No. D-2803/09, while adopting the arguments advanced by Dr. Farogh Nasim, also explained how a proviso is to be interpreted and what is the real import of a proviso and relied upon PLD 1992 Kar. 183, 2007 CLC 1687 and PLD 2006 Lah. 240.

8. Mr. Sajid Bashir, learned counsel for the petitioner in C.P. No. D-2104/09 also adopted the arguments of Dr. Farogh Nasim, and submitted that bonus is always to be treated as part of the salary and same rate of tax has to be applied on bonus as that applied to the salaries. He submitted that this tax being discriminatory is liable to be struck-down. The learned counsel submitted that even otherwise the rate of IDPT on bonus is too high. All the other learned counsel have adopted the arguments of Dr. Farogh Nasim, advocate.

9. Mr. Chaman Lal Oad, learned counsel appearing for respondent No.2, 3(a) and 3(b) submitted that Parliament has the legislative competence to enact law with reference to certain taxes hence all the above petitions are liable to be dismissed in limine. He submitted that a proviso being a substantive law could be treated as a charging section. The learned counsel further submitted that as per provisions of section 12 of the Ordinance, bonus is included in salary of an employee and hence no double tax has been imposed by the said amendment. He further submitted that through an amendment in the Schedule a charge could be levied on a person. Learned counsel further submitted that while interpreting the taxation laws form and manner has to be kept in view. Learned counsel also submitted that no discrimination is being made as the legislature is empowered to levy tax through reasonable classification and in the present petitions no discrimination has been made. To support his

arguments the learned counsel relied upon a number of decisions of the superior courts and has also filed written synopsis which will be dealt with at appropriate place of this Judgment.

10. Mr. Ashiq Raza, learned DAG, while adopting the arguments of Mr. Chaman Lal, advocate, submitted that this is a one-time levy and only those persons have been burdened whose income is one million rupees or above meaning thereby that this tax has been imposed on that particular section of the persons who are earning a substantial amount and no discrimination has been made in this regard. He further submitted that taxation laws have to be applied in a liberal manner and, as per the learned DAG, the cases under discussion are squarely covered by the decision in the case of Elahi Cotton Mills (supra). The learned counsel further submitted that no discrimination has been made as this is not a case of pick and choose rather IDPT has been imposed across the board on every salaried individual whose income is one million rupees or more and in case of bonus also the same criteria has been applied by taxing corporate employees as a class. According to the learned DAG this tax has been imposed on the persons who have the capacity to pay the tax and that while interpreting the tax laws the same is to be viewed in a broad spectrum and not in a narrow or pedantic manner.

11. Mr. Abdul Ghaffar Khan, advocate, Mr. Izhar Muhammad, advocate, and Mr. Atif Awan, advocate appeared for the private respondents and supported the case of the petitioners and stated that they have no objection if the petitions are allowed as prayed.

12. Dr. Muhammad Farogh Nasim, while making his rebuttal, submitted that none of the judgments cited by Mr. Chaman Lal Oad is relevant to the present petitions. He submitted that the case laws relied upon by the learned counsel for the respondents are on different point and in those cases totally different aspects have been examined and discussed. He further submitted that as per section-13(2) of the General Clauses Act all plurals include singular and singular includes plural and hence the word tax used in Entry 47 could be used in singular. The learned counsel thereafter rebutted the decisions relied upon by the learned DAG and Mr. Chaman Lal and submitted that the cited cases may be ignored while considering the merits of these petitions.

13. We have heard all the learned counsel at considerable length and before proceeding any further would like to appreciate the efforts and the labour put in by all the learned counsel in assisting the Court in reaching to a final conclusion.

14. Brief facts of the case are that thousands of people were displaced from Swat and Wana areas of the Country on account of action taken against the terrorists. The displacement issue has arisen as a result of war and terror which started in 2007 due to which approximately three million persons were displaced from the areas of Swat, Wana, Malakand Division and other areas. The government of Pakistan has to provide these IDPs clothes, feed, health care, shelter etc. IDPs are the persons who are forced to flee their homes who unlike refugees remain within their country's borders. The Government harnessed all its resources to come to the rescue of such displaced persons. One of the steps taken by the Government to alleviate the sufferings of the people of the calamity-hit areas was to impose a tax called Internally Displaced Persons Tax on certain persons in order to obtain resources for helping out these persons. The precise words of the Finance Minister who delivered the Budget Speech are as under:

" 81. To help the internally displaced persons, it is proposed to levy for a single year:

- a nominal tax of 5% on the tax payable by every individual deriving income above rupees one million.
- It is further proposed to levy a flat rate of 10% on bonuses earned by individuals in the corporate sector drawing salary exceeding Rupees one million."

It is the imposition of such IDPT on tax on salary as well as on the bonus paid or payable to such employees which have been challenged in these petitions.

15. In these petitions mainly two questions have cropped up for determination of this Court, firstly, whether IDPT was rightly imposed on tax payable by employees earning one million rupees or more as salary income and, secondly, whether the Legislature was justified in levying 30% tax on the bonus paid or payable by corporate employees only receiving salary income of one million rupees or more.

16. Taking up the first question with regard to imposition of IDPT, the arguments of the learned counsel for the petitioners were: that the Legislature has no authority or power to impose a tax on tax and that the tax paid by the employees on their salary income cannot be treated as income by any stretch of imagination. According to Article-142 of the Constitution the Federal Legislature has the exclusive power to make laws in respect of any matter mentioned in the Federal Legislative List. Entry 47 in the Fourth Schedule to the Constitution deals with "tax on income other than agricultural income" and not with a tax on tax and as IDPT is a tax on tax, therefore, it is unconstitutional. As per the learned counsel the entries in the Constitution can be given liberal connotation but the same cannot be stretched beyond the pith and substance doctrine; and that IDPT is a triple tax as a person paying IDPT will have to pay (i) income tax on his salary, (ii) a tax on income tax paid by him on his salary, and (iii) tax on bonus. The learned counsel reiterated that he was mindful of the decision of the Hon'ble Apex Court given in the case of Elahi Cotton Mills, argued that even if it is assumed that the law-makers have the authority to impose the IDPT, as entries in the Fourth Schedule have to be given widest possible meaning; even then the method of introducing such tax is wholly illegal and uncalled for.

17. Entry 47 deals with "tax on income other than agricultural income". This entry talks about tax only and not about tax on tax, whereas the bare reading of the proviso added to the First Schedule reveals that it is a tax on tax. According to the learned counsel, though the law makers have the authority to impose tax on the income of any person but they have no authority to impose tax on tax as that would be against the mandate given under the Constitution and the whole scheme of the tax would become unconstitutional. As per the learned counsel while interpreting the constitutional provisions pith and substance of the matter has to be considered as that is the essence of bringing something to tax. No doubt, Pakistan being a welfare state has to take care of its citizen but on the other hand it is equally important that no one is to be unnecessarily burdened nor any discrimination is created against any person. Learned counsel thereafter invited our attention to the following decisions:

1. AIR 1981 S.C. 1922
2. 1992 SCMR 891
3. PLD 1994 Lah. 347

18. According to the learned counsel income cannot be stretched beyond the settled law and has to be interpreted in a rational manner. Entry 47 which deals only with tax cannot be stretched to mean a tax on tax. As per the learned counsel while interpreting a provision of law the Legislature has to put prime importance as to whether the term "tax" would in a rational sense include tax on tax or not and as per the learned counsel a tax on tax cannot take place of a tax in a rational manner.

19. Learned counsel for the Department/State on the other hand submitted that the issue whether Entry 47 has to be interpreted in narrow manner or has to be given wide interpretation has already been addressed by the Hon'ble Supreme Court in the case of Elahi Cotton Mills (Supra). The learned counsel also relied upon the decision reported as PTCL 1987-CL 233 wherein flood relief surcharge was introduced as an additional duty or burden on the taxpayers and it was held that the said flood relief surcharge merges with excise duty or duty leviable on production capacity basis.

20. Before proceeding any further it would be convenient if relevant portion of the decision reported as Elahi Cotton Mills (supra) is quoted, which reads as under:

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

21. A perusal of the above quoted portion of the decision would reveal that though no doubt no tax shall be levied or collected except by an authority of law but it is a well settled principle of law that all the entries in the Legislative List should be given the widest possible and most liberal construction. A bare perusal of Entry 47 would show that the constitutional sanction to impose income tax is derivable by the Federal Legislature from the words contained in the said Entry 47. The said Entry 47 and its comparable Entry No.43 of the 3<sup>rd</sup> Schedule to the erstwhile Constitution of Pakistan, 1962 has been the subject matter of interpretation by our own Supreme Court. In the case of PIDC v. Pakistan 1992 SCMR 891 a learned full bench of the Hon'ble Supreme Court of Pakistan was pleased to endorse the dicta of the Federal Court so also the Supreme Court of India in the cases of United Provinces v. Mst. Atiqa Begum and others AIR 1941 FC 16, Navinchandra Mafatlal v. CIT (1954) 26 ITR 758 and K.P. Varghese v. ITO AIR 1981 SC 1922, according to which words in constitutional entries must be given the most liberal construction in their widest amplitude; and also that the words in constitutional entries conferring the power of taxation should not be interpreted

in any restricted or pedantic manner and that each general word should be extended to include all ancillary or subsidiary matters which can fairly and reasonably be comprehended. In this context, the Supreme Court in the PIDC case has cited with approval an excerpt from Volume 85 of Corpus Juris Secundum page 731 which reads as follows:-

*"Income for any given period of time is the amount of gain so derived during the designated period. That which is not income cannot be made taxable by calling it income."*

The PIDC case decided by the Supreme Court has been cited with approval in Elahi Cotton Mills case. In the case of Commissioner of Sales Tax Vs. Hunza Central Asia Textile & Woolen Mills Ltd. (1999 SCMR 526) also this view of Elahi Cotton Mills was reiterated by holding that "any entry in legislative list is that the same should be given widest possible meaning". The word "income" used in the said Entry should be construed in a very wide manner and the power to legislate will take in all incidental and ancillary matters. Power to levy tax is a *sin qua non* for a state. State is run on the financial resources and for achieving its cherished goals taxes are imposed/levied. In the present case the rationale, as is evident from the speech of the Finance Minister, appears to be to help the poor and needy persons of Swat and Wana, who have been displaced from their homes, which, in our view, is a noble cause and Pakistan being a welfare state has to accommodate its citizens whenever those persons are found in distress or are found to be in need of help of the government. We fully agree with the observations made in the above judgment that Legislature enjoys plenary powers to impose taxes within the frame work of the Constitution and it has the power to tax whom it chooses and power to exempt whom it chooses, so long they do not exceed the mandate of the Constitution. Entries in the Legislative List of the Constitution are not powers of the Legislation but only fields of legislative heads.

Here we would like to reproduce the term "tax" used in the Ordinance:

2(63). "tax" means any tax imposed under Chapter II, and includes any penalty, fee, or other charge or any sum or amount leviable or payable under this Ordinance."

22. A perusal of the above definition of the term "tax" would reveal that this is an exhaustive definition which clearly states that tax includes any penalty, fee or other charges or sum or amount leviable or payable under the Ordinance. In our view, this definition is wide enough to cover a tax on tax also as the legislative entries have to be given widest possible meaning. Hence, in our opinion, imposition of tax on tax is within the legislative competence of the law makers under Entry 47 as the word tax is wide enough to embrace in it any sum or amount leviable or payable under the Ordinance. Moreover, our view is further strengthened in the light of the decisions reported as Sohail Jute Mills Ltd. (PLD 1991 SC 329) wherein the petitioner challenged the levy of surcharge/igra surcharge which was in addition to the custom duty and the Hon'ble Supreme Court of Pakistan upheld the same on the ground that it was nothing but an additional customs duty. In the case of PTCL 1987 CL 233 also on 15.09.1973 vide Finance Supplementary Ordinance 1971, flood relief surcharge was introduced which duty was made payable in addition to the normal excise duty. It was held by the Hon'ble Court that said flood relief surcharge would be considered not as an additional duty but the same imposed with the excise duty on the duty leviable on production

capacity basis. In the instant petitions also in our opinion the tax on tax has merged into the tax and could not be considered to be something beyond the legislative competence.

23. The learned counsel appearing on behalf of the petitioners have also admitted that the apex Court in the above referred case has opined that the term "income" has to be given widest possible meaning and have further admitted that the Entries in the Constitution are to be given a liberal connotation.

24. Hence, in view of what has been stated above, and in view of the explicit findings given by the apex Court in the judgment quoted supra, we are of the view that the Legislature is competent to impose and levy IDPT in its judicial competence as Entry 47 is wide enough not only to include tax but also a tax on tax. Hence so far as this argument of learned counsel for petitioners that Federation has no power to impose a tax on tax on income is concerned, we do not find any merit in this argument, which is hereby repelled. As we have given the decision on the legislative authority with regard to Entry 47 hence any discussion on definition of income, income tax, tax, tax on tax, nature of Finance Act, and pith and substance would only become academic.

25. The learned counsel for the petitioners thereafter submitted that the IDPT has been introduced by way of adding a proviso in the First Schedule to the Ordinance which deals with rates of taxes and no specific and reciprocal amendment has been made in the main Ordinance itself. He further submitted that Schedule adds the law and has no independent value. He added that the decision given in the case of *J. J. (Cotton Mills)* (supra) is clearly distinguishable as in that case provisions of sections 100, 101 and 102 were incorporated in the Ordinance itself as charging sections and were rightly upheld by the Hon'ble Supreme Court. However, in the present petitions, the case is totally different as in this case only a proviso is added to the First Schedule, without touching the Ordinance and without making suitable amendments in the charging sections but only a proviso has been added in the First Schedule which deals with the rates of taxes only and has no independent application. As per the learned counsel this is a bald substitution in the Ordinance wherein without touching the charging sections of the Ordinance a new charge/levy has been introduced by way of adding a proviso in the Schedule which deals with the rates of taxes only and cannot be applied in isolation without having a proper support and aid of the main Ordinance. In support of his contentions the learned counsel has relied on the following case laws:

1. *Mst. Nawab Bibi and 3 others v. Ch. Allah Ditta and others* (1998 SCMR 2381)
2. *Haji Altafuddin Kazi v. The Province of East Pakistan and others* (PLD 1963 Dacca 472)
3. *Syed Arif Raza Rizvi v. Messrs Pakistan International Airlines* (PLD 2001 Supreme Court 182)
4. *Shah Jahan v. Dr. Adnan and another* (1996 MLD 934)
5. *N.D.F.C. vs. Anwar Zaib White Cement Ltd.* (1999 MLD 1888)
6. *K.E.S.C. Progressive Workers' Union & others v. K.E.S.C. Labour Union and others* (1991 SCMR 888)



7. *Muhammad Nawaz Khan v. Pir Salahuddin, Kollaha, Campbellpur and another* (PLD 1967 Peshawar 99)
8. *Life Insurance Corporation of India v. United Commercial Bank & others* (PLD 1962 (W.P.) Karachi 837)
9. *Hakim Aziz Ahmad v. Ijazul Mulk* (PLD 1971 Lahore 305)
10. *Khan Bahadur Mian Feroz Shah (represented by 10 heirs) v. The Commissioner of Income-Tax, North Zone, (West Pakistan), Lahore* (PLD 1970 Peshawar 83)
11. *Messrs Shahi Bottlers Limited, Lahore v. The C.I.T., Central Zone, Lahore* (1999 PTD 3518)
12. *The State v. Ghulam Rasool and others* (1991 MLD 1923)
13. *Bibojee Services Ltd. v. Interasia Lines Ltd. and another* (1986 MLD 38)
14. *Messrs East and West Steamship Company v. (1) Pakistan & others* (PLD 1958 Supreme Court (Pak.) 41),
15. *Haji Muhammad Idrees and 17 others v. Inayat and 2 others* (PLD 2006 Lahore 240),
16. *Messrs Muzaffar Poultry Farm v. Pakistan Poultry Association, Sindh Zone, Karachi and 2 others* (PLD 1992 Karachi 181), and
17. *Nelofer Sameera Jamshaid Qureshi v. Board of Intermediate and Secondary Education, Lahore, through Chairman and another* (2007 CLC 1687) it has been held as under:

In the case of *Mst. Nawab Bibi and 3 others v. Ch. Allah Ditta and others* (1998 SCMR 2381) the Hon'ble Supreme Court has held as under:

*"While section of an Act dealt with particular field proviso would except or take or carry out from the field specific portion, therefore, before proviso could have any application, section itself must apply."*

In the case of *Haji Altafuddin Kazi v. The Province of East Pakistan and others* (PLD 1963 Dacca 472) it has been held as under:

*"Power given by way of Exception does not do away with general provisions. In exercise of a power provided for by way of Exception, the general provision in a statute cannot be done away with or completely given a go-by."*

In the case of *Syed Arif Raza Rizvi v. Messrs Pakistan International Airlines* (PLD 2001 Supreme Court 182) the Hon'ble Supreme Court has held as under:

*"Proviso to a section cuts down the meaning of that section as a proviso to a group of sections cuts down the meaning of that group. Provisos are not generally intended to do more than the same."*

In the case of *Shah Jahan v. Dr. Adnan and another* (1996 MLD 934) it has been held as under:

In PLD 1958 SC (Pak.) 41 the function of proviso was interpreted as under:--

*"A proviso is to be regarded as something which excepts a particular case from a general principle. The effect of a proviso is to except something out of the preceding"*

portion of the enactment or to qualify something enacted therein which but for the proviso would be within it. The words of a proviso are to be construed strictly and confined to the special case which its words enact; it would be wrong to construe those words as being co-extensive with those used in the purview, particularly where the effect might be of bringing about a repeal of the purview."

In the case of *N.D.F.C. vs. Anwar Zaib White Cement Ltd. (1999 MLD 1888)* it has been held as under:

"Proviso has always to be construed in juxtaposition with main provision. Object of proviso is to provide explanation or exception to main provision."

In the case of *K.E.S.C. Progressive Workers' Union through its Chairman and others v. K.E.S.C. Labour Union through its General Secretary and others (1991 SCMR 888)* the Hon'ble Supreme Court has held as under:

A proviso is of great importance when the Court has to consider what cases come within the enacting part of a section and it is always to be construed with reference to the preceding parts of the clause to which it is appended.

It will, however, generally be found that inconsistencies can be avoided by applying the general rule that the words of a proviso are not to be taken "absolutely in their strict literal sense," but that a proviso is "of necessity.....limited in its operation to the ambit of the section which it qualifies.

A proviso must be considered with relation to the principal matter to which it stands as a proviso. To treat the proviso as if were an independent enacting clause instead of being dependent on the main enactment is to sin against the fundamental rule of construction. Proviso and sub-clauses should be governed by the operative portion of the section.

Courts were not to be led astray by arguments such as which depend solely on taking words absolutely in their strict literal sense, disregarding the fundamental consideration that they appear in the proviso.

As a general rule, however, the operation of a proviso should be confined to that clause or portion of the statute which directly precedes it in the statute.

In the case of precision drafting, the proviso is to be taken as limited in its operation to the section or other provision it qualifies.

Indeed it cannot be disputed, that a proviso must be construed and treated as if it were, not a parallel positive enactment, but a limitation on a proposition which is direct and objective.

The proviso must of necessity be limited in its operation to the ambit of the section which it qualifies.

One of the plainest rules of statutory interpretation is that a proviso is to be regarded as something which excepts particular case from a general principle. The effect of a proviso is to except something out of the preceding portion of the enactment or to qualify something enacted therein which but for the proviso would be within it.

In the case of *Muhammad Nawaz Khan v. Pir Salahuddin, Collector, Campbellpur and another (PLD 1967 Peshawar 99)* it has been held as under:

"Exception to substantive provision, to be construed in light of main provision of section."

In the case of *Life Insurance Corporation of India v. United Commercial Bank, Karachi and others* (PLD 1962 (W.P.) Karachi 837) it has been held as under:

"Proviso, to be construed as subordinate to main clause should not be given greater effect than necessary.

A proviso should not be interpreted so as to have greater effect than strict construction of the proviso rendered it necessary. Ordinarily the proviso is something subordinate to the main clause, and generally what is contained in the proviso is not to be imported by implication into the clause."

In the case of *Hakim Aziz Ahmad v. Ijazul Mulk* (PLD 1971 Lahore 305) it has been held as under:

"Proviso subordinate to main provision words of proviso cannot be imported, by implication, wholesale into body of main enactment."

In the case of *Khan Bahadur Mian Feroz Shoh (represented by 10 heirs) v. The Commissioner of Income-Tax, North Zone, (West Pakistan), Lahore* (PLD 1970 Peshawar 83) it has been held as under:

The application of proviso has been dealt with in "The Interpretation of Statutes" by N.S. Bindra, 4<sup>th</sup> Edition, 1965, at pages 48 and 49. The Commentator comments:

"Proviso. - The proper function of a proviso is to except and deal with a case which would otherwise fall within the general language of the main enactment, and its effect is confined to that case. There is no magic in the words of a proviso. The proper way to regard a proviso is as a limitation upon the effect of the principal enactment. A proviso, which is in fact and in substance a proviso, can only operate to deal with a case which but for it would have fallen within the ambit of the section to which the proviso is a proviso. The section deals with a particular field and the proviso excepts or takes out or carries out from the field a particular portion, and therefore it is perfectly true that before a proviso can have any application the section itself apply. It is equally true that the proviso cannot deal with any other field than the field which the section itself deals with.

In the case of *Messrs Shahi Bottlers Limited, Lahore v. The C.I.T., Central Zone, Lahore* (1999 PTD 3518) it has been held as under:

"Proviso excepts and deals with a case which otherwise would have fallen within the language of main enactment; that for the purpose of its construction the whole of the Act is to be taken into consideration and a strict construction is to be accorded to proviso which should keep it within the ambit of substantive provisions."

In the case of *The State v. Ghulam Rasool and others* (1991 MLD 1923) it has been held as under:

"Proviso to a section excepts and deals with a case which otherwise would have fallen within the language of main enactment. For the purpose of construction of a proviso whole of the Act has to be taken into consideration and a strict construction is to be accorded to proviso which should keep it within the ambit of substantive provisions."

In the case of *Bidajee Services Ltd. v. Interasia Lines Ltd. and another* (1986 MLD 38) it has been held as under:

"Proviso added to main section, held, could not be considered in isolation but alongwith principal provision. Proviso, could not travel beyond scope of main enactment."

In the case of *Messrs East and West Steamship Company v. Secretary to Government of Pakistan, Ministry of Commerce, Karachi and others* (PLD 1958 Supreme Court (Pak.) 41) the Hon'ble Supreme Court has held as under:

"A proviso is to be regarded as something which excepts a particular case from a general principle. The effect of a proviso is to except something out of the preceding portion of the enactment or to qualify something enacted therein which but for the proviso would be within it.

The words of a proviso are to be construed strictly and confined to the special case which its words enact; it would be wrong to construe those words as being co-extensive with those used in the purview, particularly where the effect might be of bringing about a repeal of the purview."

In the case of *Haji Muhammad Idrees and 17 others v. Inayat and 2 others* (PLD 2006 Lahore 240) it has been held as under:

"Proviso only creates an exception to the main provision, but cannot override the section to which it forms part."

In the case of *Messrs Muzaffar Poultry Farm v. Pakistan Poultry Association, Sindh Zone, Karachi and 2 others* (PLD 1992 Karachi 181) it has been held as under:

"Proviso of a section has to be construed strictly and in the context of provision to which it is a proviso."

In the case of *Nelofer Sameera Jamshaid Qureshi v. Board of Intermediate and Secondary Education, Lahore, through Chairman and another* (2007 CLC 1687) it has been held as under:

"Proviso is subordinate to main clause and cannot travel beyond the scope of main enactment, nor it can be imported by implication in the main enactment."

In the case of *Excise and Taxation Officer, Karachi and another v. Durrah Shell Storage and Distribution Company of Pakistan Ltd. and 4 others* (1991 SCMR 118) the Hon'ble Supreme Court has held as under:

"Irreconcilable inconsistency between a charging section and the Schedule, Schedule is to yield to the Act."

In the case of *International Power Global Developments Ltd. v. Commissioner Income Tax* (2009 PTD 50) it has been held as under:

"Conflict between main statute and Schedule of the statute, provisions of main statute to prevail."

26. The consensus of the above cited cases, as summed up in PLD 1958 SC (Pak) 41, is as under:

1. A proviso is to be regarded as something which excepts a particular case from a general principle. The effect of a proviso is to except something out of the

preceding portion of the enactment or to qualify something enacted therein which but for the proviso would be within it.

2. The words of a proviso are to be construed strictly and confined to the special case which its words enact; it would be wrong to construe those words as being co-extensive with those used in the purview particularly where the effect might be of bringing about a repeal of the purview

27. Learned counsel appearing on behalf of the concerned respondents, on the other hand, submitted that no doubt no amendment has been made in the Ordinance or in the charging sections but as the amendment has been made in the Schedule hence the Schedule itself has become the charging provision. In support of his contention the learned counsel relied upon the decision reported as Commissioner of Income-Tax v. Messrs Phillips Holzman A.G. Ameerjee Valeejee & Sons, Karachi (PLD 1968 Karachi 95) wherein it was held that a proviso may be construed as a substantive law." The learned counsel further submitted that a proviso can be a substantive law under given facts and circumstances and in support thereof relied upon 66 ITR 664 and 50 ITR 798. The learned counsel also submitted that a Schedule is as much part of the statute and is as much an enactment as any other part and in support thereof relied upon PLD 1963 Dacca 238.

28. It is a trite law that in case of inconsistency between the charging section and the Schedule the Schedule is to yield to the Act. It is a binding rule of construction that before taxing a person it must be shown that he falls under the charging section as no tax could be imposed by way of implication simpliciter. If a person has to be brought within the ambit of a tax the same has to be specifically mentioned that the said person falls within the ambit of the charging section by clear words otherwise he cannot be taxed at all. It is also a trite law that Schedules are an aid to the charging sections and cannot be applied in derogation of the main section. It is further a trite law that in case of any conflict between the main provision and the schedule the main provision shall always prevail and has to be given preference over the Schedule. The Schedule helps to determine the ambit of the charging section since they both constitute an integrated code. The charging section deals with chargeability of something and the schedule deals with the rate of such chargeability meaning thereby that they both come hand in hand together.

29. In the Ordinance the chargeability comes from Section-4 of the Ordinance which reads as under:

**4. Tax on taxable income.-** (1) Subject to this Ordinance, income tax shall be imposed for each tax year, at the rate or rates specified in Division I or II of Part I of the First Schedule, as the case may be, on every person who has taxable income for the year.

(2) The income tax payable by a taxpayer for a tax year shall be computed by applying the rate or rates of tax applicable to the taxpayer under this Ordinance to the taxable income of the taxpayer for the year, and from the resulting amount shall be subtracted any tax credits allowed to the taxpayer for the year.

(3) Where a taxpayer is allowed more than one tax credit for a tax year, the credits shall be applied in the following order—

- (a) any foreign tax credit allowed under section 103; then
- (b) any tax credit allowed under Part X of Chapter III; and then
- (c) any tax credit allowed under sections 147 and 168.

(4) Certain classes of income, (including the income of certain classes of persons) may be subject to —

(a) separate taxation as provided in sections 5, 6 and 7; or

(b) collection of tax under Division II of Part V of Chapter X or deduction of tax under Division III of Part V of Chapter X as a final tax on the income or the person.

(5) Income referred to in sub-section (4) shall be subject to tax as provided for in section 5, 6 or 7, or Part V of Chapter X, as the case may be, and shall not be included in the computation of taxable income in accordance with section 8 or 169, as the case may be.

(6) Where, by virtue of any provision of this Ordinance, income tax is to be deducted at source or collected or paid in advance, it shall, as the case may be, be so deducted, collected or paid, accordingly.

30. A perusal of the above section reveals that income tax shall be imposed at the rates specified in the First Schedule. We have already come to the conclusion that the legislature has the legislative competence under Entry 47 of the Constitution to declare a levy as a tax on certain persons. We have also reproduced the definition of tax and pointed out in earlier part of this judgment that this definition is very exhaustive and may bring charge of any kind including tax on tax within its ambit. The imposition of IDPT by way of bringing the same by adding either a proviso or otherwise would therefore become secondary so long as the same is within the legislative competence to enact it and falls within the definition of tax. Thus in our opinion a valid charge has been created and in view of the explicit decision given by the Apex Court in Sohail Jute Mill case and by this Court in the case of Fauji Foundation the introduction of IDPT has become a part and parcel of the normal tax hence the same does not suffer from any legal infirmity. Furthermore, a perusal of the said proviso would reveal that the intention of the Legislature is to treat the IDPT as "income tax". Hence, if section 4 of the Ordinance is read in conjunction with the newly added proviso, there would be no ambiguity so far as the introduction of IDPT by way of adding a proviso is concerned. Therefore, we are of the opinion, that imposition of IDPT is a valid piece of legislation and does not require any interference of this Court.

31. The learned counsel for the petitioner thereafter submitted that so far as the imposition of tax on bonus is concerned, by way of adding a proviso in section 12 of the Ordinance is discriminatory as by adding the said proviso the law makers have targeted to tax only corporate employees and have not touched those employees working in other sectors and earning salary income of rupees one million or more. While elaborating his arguments the learned counsel submitted that section 12 of the Ordinance deals with the head "Salary" and there is no discrimination in the section with regard to the salary paid to an individual whether working in the corporate sector or elsewhere. Any individual working in any organization and drawing a salary which crosses a certain threshold is liable to pay tax on his income through salary at a particular rate. In the said section it is categorically mentioned that salary received by an employee shall be chargeable under this head as salary. The term "bonus" is included in the definition of term "salary" meaning thereby that the bonus paid by an employer to his employee also forms part of his salary and chargeable to tax under section 12 of the Ordinance. However, as per the learned counsel, by adding the said proviso to section 12 of the Ordinance the law makers have separated the bonus paid or payable to the corporate employees from that being paid to employees of other sectors. In support of his arguments, the learned counsel relied on the following decisions of the superior courts:

1. *I.A. Sherwani and others v. Government of Pakistan and others* (1991 SCMR 1041).
2. *Inamur Rehman v. Federation of Pakistan and others* (1992 SCMR 563).
3. *Central Board of Revenue and others v. Seven-up Bottling Company (Pvt) Ltd.* (1996 SCMR 700).
4. *Zaman Cement Company Limited v. Central Board of Revenue and others* (2002 SCMR 312).
5. *Commissioner of Income Tax v. Eli-Lilly Pakistan (Pvt) Ltd* (2009 SCMR 1279).
6. *C.P. Nos. 10 to 40 of 2007 and 59 of 2009 and 1100 Nos. 14128 P to 14331-P and 1508-P of 2009, and*
7. *Kunnathat Thathumi Noopil Nair vs. The State of Kerala and another* (1961 3 SCR 77).

In the case of *Central Board of Revenue and 3 others v. Seven-Up Bottling Company (Pvt.) Ltd.* (1996 S C M R 700) the Hon'ble Supreme Court has held as under:

"Rule 7, proviso of Excise Duty on Production Capacity (Aerated Water) Rules, 1990 having created a subclass out of a well defined and intelligible classification of manufacturers of foreign brand of aerated water, on the basis of payment of excise duty by them on actual production of goods in the preceding year and determination of their tax liability on that basis which procedure had no nexus to the object of classification envisaged by S. 3 (4) of the Central Excises and Salt Act, 1944 amounted to discrimination within a well defined category of manufacturers—Rule 7, Excise Duty of Production Capacity (Aerated Water) Rules 1990 was discriminatory and liable to be struck down on the ground of inequality under Art. 25 of the Constitution of Pakistan (1973)—Rule 7, Excise Duty on Production Capacity (Aerated Water) Rules, 1990 having been framed under S. 3 (4), Central Excises and Salt Act, 1994 was therefore enacted beyond the mandate of said section and for that reason it was invalid."

In the aforesaid judgment it has further been held as under:

"Declaring the rule as discriminatory and striking it down on the ground of inequality under Article 25 of the Constitution, therefore, was justified."

In the aforesaid judgment it has further been held as under:

"Art. 25—Article 25, Constitution of Pakistan (1973), guarantees for equality of all citizens before law and their entitlement to get equal protection of law—Article 25 also casts a duty on the Government to ensure enactment of laws which should provide equal protection to all citizens—Such rights of citizens cannot be defeated on the ground of waiver."

In the case of *Commissioner of Income Tax v. Messrs Eli Lilly Pakistan (Pvt.) Ltd.* (2009 SCMR 1279) the Hon'ble Supreme Court has held as under:

Per Ch. Jiaz Ahmed, J. agreeing with Ifikhar Muhammad Chaudhry, C.J.—

(q) *Constitution of Pakistan (1973)—*

*Framing of taxing laws in such a manner that people themselves voluntarily pay the taxes encouragingly and honestly—Obligation of the State to provide atmosphere*

based on honesty by providing equal protection of law---Every citizen must be treated equally, dignity of human being life should be maintained, and liberty of life and honour must be guaranteed as envisaged in the Articles 9, 14 / 25 of the Constitution. Supreme Court desired that law making body shall frame the laws after deliberations which is an additional duty cast upon the law making body in terms of Art. 2 - A of the Constitution which is in accordance with the Injunctions of Islam and doctrine of expectation of consultations.

In the judgment passed in *Constitution Petition Nos. 76 to 80 of 2007 & 59/2009 and Civil Appeal No. 1094 of 2009 and HRC Nos. 14328-P to 14331-P & 15082-P of 2009*, at page-76, the Hon'ble Supreme Court has held as under:

"58. It is important to note that as per the command of Article 4 of the Constitution all the citizens without any discrimination shall be dealt with in accordance with law, so enforcement of the law leaves no room for creating any distinction between the citizens, except a particular class, on the basis of intelligible differentia. The principle challenge to the NRO, 2007, is of its being discriminatory in nature. It is the case of the petitioners' that the NRO, 2007, being violative of Article 25 of the Constitution, deserves to be declared void ab initio, non est, thus never took birth".

At page-89 of the aforesaid judgment the Hon'ble Supreme Court has held as under:

"64. The amendment in Section 494 Cr.P.C. has not only undermined the independence of judiciary by substituting the Court, before whom the trial of an accused was pending, with the Review Board, but, at the same time, had also created a discrimination with the accused, who were facing trial prior to 1<sup>st</sup> January, 1986 or had been charged for the offence after 12<sup>th</sup> October, 1999".

At pages-181 to 184 of the aforesaid judgment the Hon'ble Supreme Court has observed as under:

113. Besides above, the principle of equality (Musawat), as enshrined in Article 25 of the Constitution, has its origin in the Islamic teachings. Reference in this behalf may be made to *Muhammad (PBUH) Encyclopedia of Seerah (Sunnah, Da'wah and Islam)*, 1<sup>st</sup> Edn. 1986, Vol. IV (p. 147-148). Relevant portion there from on the subject of "Equality" is reproduced herein below for convenience:-

#### **"Equality**

Equality is an essential requisite of justice, because when there is discrimination and partiality between people, there is no justice. The Code of Allah demands absolute equality of rights between all people without any discrimination or favouritism between man and man and between man and woman on any count.

The Qur'an declares, "O mankind! Behold, we have created you all out of a male and a female, and have made you into nations and tribes, so that you may know each other. Surely, the noblest of you in the sight of Allah is the one who is most pious." (49: 13)

This verse clearly establishes equality of all men and women on the basis of common parentage, and as such discounts all claims of superiority or discrimination for any person or group of persons. There is no rational or logical ground for such claims, and therefore, it is unreal and unnatural to demand discrimination between man and man or between man and woman on any count.

Besides all human beings are servants (ibid) of Allah and therefore equal.

They are all created by Allah and all are His servants alone. As such they are all equal and enjoy equal rights in all areas of life. In His service and obedience, all humans are equal and stand on the same level without any discrimination till as one race and one people before Him, no one claiming any special privileges and honours.



In Surah al-A'raf we have these words: "When you Lord drew forth from the children of Adam from their loins their descendants, and made them testify concerning themselves, saying: 'Am I not your Lord?' They said: Yes we do testify." (7:172). An then we find these words: "Surely, this Brotherhood of yours is single Brotherhood, and I am your Lord: therefore serve and obey Me (and no other)." (21:92 and 23:52))

This concept of equality bestows equal rights upon all members of the human race and leaves no room for any discrimination of any kind, whether by colour, creed, race or sex. If there is any discrimination anywhere, it is man made, not divinely ordained, and therefore, must be denounced, condemned and discarded.

Any such discrimination is unnatural and artificial and goes against the basic Doctrine of Tawhid. As such it will endanger the right balance and stability of human social life.

If there is any discrimination for any man or woman in Islam, it is on merit and on merit alone. Those who develop their personal relationship with Allah fear Allah, attain degrees of piety and taqwa of Allah, and reach higher stations of excellence in the Sight of Allah.

However, even they stand equal with others in the enjoyment of rights in society, and can claim no superiority or ~~knowingness~~ over others so far as social rights are concerned.

This basic doctrine also demands equality of all men and women before the law and negates any kind of discrimination between them. This is the essential requirement of the Rule of Law in Islam that all men and women are equal in the eyes of the Law and must be treated as such. Respect for human dignity, upon which the Prophet of Islam laid so much emphasis, also demands equality for all men and women in all fields of human activity. (For details see under "Basic Human Rights" in Volume III of this work)

**Equality of Rights**

It is implicit in the Doctrine of Tawhid and is also an essential ingredient of justice and equality that all people must enjoy equal rights without discrimination on any count in all fields and departments of life. In the enjoyment of social, political, and religious rights, there must not be any discrimination between ruler and ruled, employer and employee, rich and poor and man and woman: all should enjoy these rights freely, equally and without any check or restriction. Denial of any of these rights to any member would, in fact be a denial of the Doctrine of Tawhid.

**Equal Treatment**

The logical consequences of the above principle in practice demands absolutely equal treatment of all citizens, without any reservation, in all areas of life. It also requires: (a) equality of opportunity of education, training, employment and promotion in all services for all citizens, irrespective of their social or political status and influence; (b) equal treatment in all departments, without discrimination of any kind between rich and poor, big and small or workers and employers; (c) the right to a livelihood of every member of the Muslim state. It is the birthright of every person to have a guaranteed decent living and decent wage from the state. This calls indirectly for equitable distribution of wealth between all the members of the state on the principle of maximum circulation of the total wealth of the nation, discouraging, as far as possible, the concentration of wealth among a few people (59:7); and (d) it is also implicit in the above principle that for the political and social stability of society and state, matters of national interest must be decided through a process of consultation with the people, and all state affairs on all levels must be decided on the basis of the concept of consultation in its true sense, as envisaged by the Quro'n (42:38) and practiced by the Prophet Muhammad (PBUH).

117. Now turning towards the question under consideration in respect of insertion of Section 33F in the NAO, 1999 by means of Section 7 of the NRO, 2007, on the basis of which either the proceedings have been terminated or the cases have been withdrawn, as far as the withdrawal of proceedings under Section 494 Cr.P.C. is concerned, it has already been discussed hereinabove. While examining the implications of Section 2 of the NRO, 2007 wherein it was held that no withdrawal without the consent of the Court, seized with the case, is possible and this provision itself being discriminatory has been found in derogation to the fundamental rights enshrined in Article 25 of the Constitution.

At page-210 of the aforesaid judgment the Hon'ble Supreme Court has observed as under:

138. As it has been discussed hereinabove, by making reference to a book titled as "Muhammad (PBUH) Encyclopedia of Szerah", that principle of equality in Islam is an essential requisite of justice because when there is discrimination and partiality between the people, there is no justice. A code of Allah demands absolutely equality of rights between the people without any discrimination or favouritism between man and man, and man and woman, on any count. Therefore, without any fear of doubt, it can be held that Article 25 of the Constitution, namely, all citizens are equal before the law and are entitled to equal protection of law and there shall be no discrimination on the basis of sex alone, has its origin in Quranic injunctions.

At page-213 of the aforesaid judgment the Hon'ble Supreme Court has observed as under:

Thus for this reason as well, all the 'holders of public office' against whom cases have been initiated before 6<sup>th</sup> November 1990 and after 12 October 1999 are also entitled for equal protection of law because they are similarly placed. Therefore, on the basis of intelligible differentia, no distinction can be drawn between both the groups, as such the above sub-classification within the class of 'holder of public office' is not based on an intelligible differentia, having no rational nexus to the object, sought to be achieved by the relevant classification under the NRO, 2007 as such, it, being a discriminatory law, deserves to be declared void ab initio [I.A. Sherwani's case (1991 SCMR 1041)]

At page-249 of the aforesaid judgment the Hon'ble Supreme Court has observed as under:

171. We have examined the respective contentions of the learned counsel for the parties as well as the vires of the NRO, 2007 on the touchstone of various Articles of the Constitution, and have come to the conclusion that the BRO, 2007 as a whole, particularly its Sections 2, 6 and 7, is declared void ab initio being ultra vires and violative of Articles 4, 8, 12, 13, 25.

At page-261 of the aforesaid judgment the Hon'ble Supreme Court has observed as under:

9. It is settled principle of law that where a statute is ex facie discriminatory but is also capable of being administered in a discriminatory manner and it appears that it has actually being administered to the detriments of a particular class in particular, unjust and oppressive manner then it has been void ab initio since its inception. See *Woris Mehi's case* (PLD 1957 SC (Pak) 157), *Benazir's case* (PLD 1988 SC 416) and *I.A. Sherwani's case* (1991 SCMR 1041) and *Azizullah Memon's case* (PLD 1993 SC 341 at 358).

(v) ..... but a classification which is arbitrary and is not founded on any rational basis is no classification as to warrant its exclusion from the mischief of Article 25.

At page-285 of the aforesaid judgment the Hon'ble Supreme Court has observed as under:

9. The executive and legislative limbs of the State are also constitutionally obliged to apply the powers and resources at their command, in enforcing the Constitution and the rule of law without discrimination or undue favour to any person or class.

In the case of *Kunnathil Thathuni Moopil Nair v. The State of Kerala and another* (1961 J SCR 77) it has been held as under:

"The Travancore-Cochin Land Tax Act, 1955, was passed by the legislature of the State of Travancore-Cochin and was amended by Act 10 of 1957, by the State of Kerala. By s. 4 of the Act all lands in the State of whatever description and held under whatever tenure were to be charged and levied a uniform rate of tax to be called the basic tax....."

"The petitioners who owned forest in the State challenged the constitutional validity of the Act on the grounds that the provisions of the Act contravened Arts. 14, 19(D)(f) and 31(1) of the Constitution of India inasmuch as (1) the Act did not have any regard to the quality of the land or its productive capacity and the levy of a tax at a flat rate of Rs.2 per acre imposed very unreasonable restrictions on the right to hold property, (2) the Act did not lay down any provision calling for a return from the assessee for an enquiry or investigation of facts before the provisional assessment was made or any right of appeal to any higher authority and, in fact, did not make any provision for hearing the assessee at any stage, (3) s. 7 gave arbitrary power to the Government to pick and choose in the matter of grant of total or partial exemption from the provisions of the Act....."

"Held, (Sarkar, J., dissenting), that the Travancore-Cochin Land Tax Act, 1955, infringed the provisions of Art. 14 of the Constitution of India.

The Act obliged every person who held land to pay the tax at the flat rate prescribed, whether or not he made any income out of the property, or whether or not the property was capable of yielding any income. Consequently, there was no attempt at classification in the provisions of the Act and it was one of those cases where the lack of classification created inequality. It was therefore hit by the prohibition to deny equality before the law contained in Art. 14."

32. The learned counsel representing the Department on the other hand relied upon the decision reported as 178 ITR 97 wherein it was held that a reasonable classification is one which includes all who are similarly situated and none who are not. The learned counsel also relied upon the decision reported as 183 ITR 401 wherein it was held that "it is for the legislature or the taxing authority to determine the question of need, the policy and to select the goods or services for taxation".

33. We have considered the above-cited decisions of the superior courts and the arguments advanced by counsel for both the contesting parties. Article 25 of the Constitution of Islamic Republic of Pakistan ("the Constitution") deals with equality of citizens, which reads as under:

"25. Equality of citizens. (1) All citizens are equal before law and are entitled to equal protection of law.

(2) There shall be no discrimination on the basis of sex.

(3) Nothing in this Article shall prevent the State from making any special provision for the protection of women and children."

34. Under this Article all citizens are equal before the law and are entitled to equal protection of law. This article enshrines the basic concept of the religion of Islam also. As per this Article, the persons placed in similar situations are to be given similar treatment. There is no cavil to the proposition that all citizens are equal before the law and are entitled to equal protection, however, it is also a well settled proposition of law that the State is not precluded to treat its citizens on the basis of reasonable classification and that reasonable classification depends upon reasonable distinction on reasonable basis. No doubt that no standard or universal application to this reasonableness of classification can be laid down, however, it may be borne in mind that reasonable classification should be founded on

reasonable distinction. A law applicable to one person or one class of persons may be constitutionally valid if there is sufficient basis or reason for it, but a classification which is arbitrary and is not founded on any rational basis is not a reasonable classification and is clearly hit by Article 25 of the Constitution. Equal protection of law means that all persons equally placed be treated alike both in privileges and liabilities. In order to make a classification reasonable it should be based on intelligible differentia which distinguishes persons or things that are grouped together from those which have been left out and that differentia must have rational nexus to the object sought to be achieved by such classification.

35. In the present cases the basic idea to introduce IDPT was to accommodate the displaced persons who were dislocated from their homes and as Pakistan is a welfare state it is incumbent upon the government functionaries to take care of its citizens and to help them, if they are in distress.

36. In the above paragraphs we have held that the law makers have ample power to bring into the tax net by virtue of Entry 47 of the Fourth Schedule to the Constitution which otherwise could not be termed and treated as "income" and a detailed discussion in this regard has already been made in the case of Elahi Cotton Mills (supra). However, the question arises as to whether imposition of 30% tax on the bonus paid or payable to corporate employees receiving salary of one million rupees or more (excluding the bonus) can be termed as discriminatory and, therefore, hit by the provisions of Article 25 of the Constitution or the same can be termed as a reasonable classification.

37. It would be advantageous if section 12 of the Ordinance is quoted:

*12. Salary.- (1) Any salary received by an employee in a tax year, other than salary that is exempt from tax under this Ordinance, shall be chargeable to tax in that year under the head "Salary".*

*(2) Salary means any amount received by an employee from any employment, whether of a revenue or capital nature, including*

*(a) any pay, wages or other remuneration provided to an employee, including leave pay, payment in lieu of leave, overtime payment, bonus, commission, fees, gratuity or work condition supplements (such as for unpleasant or dangerous working conditions);*

*Provided that any bonus paid or payable to corporate employees receiving salary income of one million rupees or more (excluding bonus) in tax year 2010, shall be chargeable to tax at the rate provided in paragraph (2) of Division I of Part I of the First Schedule "*

38. A careful perusal of clause (a) of sub-section (2) of section 12 of the Ordinance reveals that bonus has been included in the salary and is liable to tax as per Table given under para (1A) to First Schedule. However, by inserting the above proviso by the Finance Act 2009, the bonus paid or payable to corporate employees receiving salary income of one million rupees or more has been taxed at the rate of 30%. But, employees of other sectors falling in the same category, i.e. receiving salary income of one million or more have been left out.

39. In the case of I.A. Sherwani and others v. Government of Pakistan and others, the Hon'ble Supreme Court has laid down the following principles with regard to equal protection of law and reasonableness of classification:

"(i) that equal protection of law does not envisage that every citizen is to be treated alike in all circumstances, but it contemplates that persons similarly situated or similarly placed are to be treated alike;

(ii) that reasonable classification is permissible but it must be founded on reasonable distinction or reasonable basis;

(iii) that different laws can validly be enacted for different sexes, persons in different age groups, persons having different financial standings, and persons accused of heinous crimes;

(iv) that no standard of universal application to test reasonableness of a classification can be laid down as what may be reasonable classification in a particular set of circumstances may be unreasonable in the other set of circumstances;

(v) that a law applying to one person or one class of persons may be constitutionally valid if there is sufficient basis or reason for it, but a classification which is arbitrary and is not founded on any rational basis is no classification as to warrant its exclusion from the mischief of Article 25;

(vi) that equal protection of law means that all persons equally placed be treated alike both in privileges conferred and liabilities imposed;

(vii) that in order to make a classification reasonable, it should be based--

(a) on an intelligible differentia which distinguishes persons or things that are grouped together from those who have been left out;

(b) that the differentia must have rational nexus to the object sought to be achieved by such classification."

If principles mentioned at (ii), (vi) and (vii)(a) and (b), quoted above, are read in juxtaposition it would transpire that:

- (a) Though reasonable classification is permitted but it must be founded on reasonable distinction or reasonable basis;
- (b) All persons equally placed be treated alike both in privileges conferred and liabilities imposed;
- (c) A reasonable classification is one which is made on intelligible differentia which distinguishes persons or things that are grouped together from those who have been left out and the differentia must have rational nexus to the object sought to be achieved by such classification.

In the case of *Inamur Rehman v. Federation of Pakistan and others* (1992 SCMR 563) the Hon'ble Supreme Court has held as under:

"There can be no cavil against this proposition as it is a well-recognized rule of Constitutional interpretation that there is a presumption in favour of the Constitutionality of a legislative enactment but if there is on the face of a statute no classification at all and no visible differentia, with reference to the object of the enactment as regards the person or persons subjected to its provisions, then the presumption is displaced. We cannot be asked to presume that there must be some undisclosed or unknown reasons for subjecting certain individuals to discriminatory treatment, for, in that case we will be making a travesty of the fundamental right of equality before law enshrined in the Constitution."

In the case of *Zaman Cement Company (Pvt) Ltd. v. Central Board of Revenue and others* (2002 SCMR 312) the Hon'ble Supreme Court has held as under:

"Additionally, while there is a power in the Legislature and other taxing authorities to classify persons or properties into categories and to subject them to different rates of taxes, there is none to target incidence of taxation in such a way that

*similarly placed persons are dealt with not only dissimilarly but discriminately. (See Elahi Cotton Mills Ltd. - v. Federation of Pakistan (PLD 1997 SC 582).*

40. In the above cited judgments the Hon'ble Supreme Court has clearly held that though the Legislature and other taxing authorities have the power to classify persons or properties into categories and to subject them to different rates of taxes, however, that incidence should be based in a way that similarly placed persons should not be dealt with dissimilarly or discriminately. In the present case only the corporate employees, who are receiving salary income of one million rupees or more, have been charged with this tax on bonus which does not appear to be a rational and reasonable classification as employees working in other sectors and drawing salary income in the same slab have been left out. The term "employee" has also been defined in the Ordinance as per section 2(20) of the Ordinance according to which "employee" means any individual engaged in employment. Perusal of section 12 of the Ordinance would reveal that this section deals with employees meaning thereby that there is no discrimination or distinction between the employees working in the corporate sector and the employees working in any other sector.

41. It is a trite law that tax laws should be imposed on the similarly placed persons as the Hon'ble Supreme Court in the case of I.A. Sharwani and others v. Government of Pakistan and others (1991 SCMR 1041) has specifically held that "persons equally placed be treated alike not only in privileges conferred but also with regard to the liabilities imposed." However, in this case, the liabilities imposed on corporate employees has been enhanced as compared to the similarly placed employees in other organizations. It is also a trite law that while interpreting fiscal statutes the Courts have the authority to strike down those laws which are violative of Article 25 of the Constitution which are not found to be established on any reasonable distinction and classification and which are discriminatory in nature. Reference in this regard may be made to PLD 2005 Karachi 55.


42. Equality has to be between persons who are placed in the same state of circumstances. There is no distinction as regard to taxability of employees and all the employees working for any type of employer are charged and taxed as per the provisions of section 12 of the Ordinance. Hence the discrimination created by adding the said proviso in the said sub-section of the Ordinance whereby only those employees who work for the corporate sector have been singled out for levy of tax at the rate of 30 of the bonus paid or payable to such employees while leaving out other employees working in other sectors, is discriminatory and violative of Article 25 of the Constitution as it is not based on any reasonable classification or distinction.

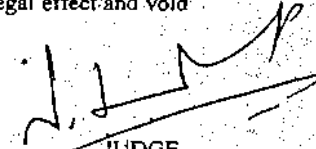
43. While imposing tax on the on the bonus paid or payable to corporate employees in the above manner and leaving out all other employees working in other walks of life to be absolved of this levy/tax does not appear to be a reasonable classification. A classification of persons or things would be rational and reasonable only if it is based on an intelligible differentia or distinction. The only ground urged before us by the learned counsel for the contesting respondents was that, firstly, the Legislature has the authority to tax a subject in the manner it deems fit and, secondly, that the corporate employees, who are receiving salary

income of rupees one million or more and to whom bonus is paid or is payable, are a group of persons who have the capacity to bear the same and hence they have been charged with this tax. The learned counsel also submitted that neither there was any pick and choose nor any discrimination occurred resulting in violation of Article 25 of the Constitution. However, no convincing argument was put forward nor was it controverted by them as to why only corporate employees have been burdened with this tax leaving out all the other employees drawing such salary and bonus in other sectors. For the purposes of income taxation a corporate employee earning a sum more than Rs. One million stands on the same footing as any other individual or employee earning the same sum, who is not a salaried employee of a company. The noted and declared objective of the impugned legislation as found in the parawise comments of the Respondents and also argued before us is that this is a contribution to meet the expenditure of re-settling internally displaced persons. Why only the corporate employees have been made to bear the brunt of such expenditure has not been explained at all. In fact, to our mind this is nothing but adverse, arbitrary and hostile discrimination clearly militating Article 25 of the Constitution as persons earning similar incomes (i.e. Rs. One million and more) have been discriminated without any (rationality) or intelligible differentia i.e. one set of persons being corporate employees earning Rs. One million or more are made to pay the impugned tax whereas other persons who are not corporate employees but who are also earning Rs. One million or more are not subjected thereto. And there is no attempt by the Respondents to explain at all why such a discriminatory tax has been levied.

44. In view of the above discussion and in the light of the authoritative pronouncements made by the Hon'ble Supreme Court in the above quoted decisions, we are of the opinion that imposition of tax at the rate of 30% on the bonus paid or payable to corporate employees only who are receiving salary income of one million rupees or more, leaving out all other persons who are also receiving same salary income and bonus but not working in corporate sector, is a discriminatory act and is violative of the provisions of Article 25 of the Constitution.

45. The upshot of the above discussion is that we dismiss these petitions so far as the imposition of IDPT is concerned, however, the imposition of tax on bonus, being discriminatory and in violation of Article 25 of the Constitution, the petitions are allowed to the extent that the imposition of tax on bonus paid or payable to the corporate employees drawing salary of one million rupees or more is held to be illegal, of no legal effect and void ab initio. However, there shall be no order as to costs.

  
JUDGE

  
JUDGE

Karachi.

Announced today

Dated: 16/7/2010.

