

KTBA CASE LAW UPDATE

Committee Members

Mr. Shams Ansari (Convener)

0333-2298701

shamsansari01@gmail.com

Mr. Farhan Mohib

0321-2753467

farhan.mohib@pwc.com

Mr. Arshad Mahmood

0333-2001227

amehmood@yousufadil.com

Mr. Ehtisham Qadir

0334-2210909

ehtisham@aqadirnco.com

Mr. Faiq Raza Rizvi

0302-2744737

federalcorporation@hotmail.com

Mr. Hameer Arshad Siraj

0333-2251555

hameer.siraj@gmail.com

Mr. Imran Ahmed Khan

0300-9273852

iakjci@yahoo.com

Mr. Razi Ahsan

0300-0446892

razi.lawconsultancy@gmail.com

Mr. Shabbar Moraj

0321-8920972

shabbar.muraj@pk.ey.com

Mr. Shiraz Khan

0333-2108546

shiraz@taxmanco.com

Dear Members,

A brief update on a recent judgement on “7E of the Income Tax Ordinance, 2001” by Lahore High Court is being shared with you for your knowledge.

This update is in line with the efforts undertaken by our “CASE LAW UPDATE COMMITTEE” with the larger goal to assist and apprise our Bar members with latest court decisions.

You are equally encouraged to share any important case law, which you feel that should be disseminated for the good of all.

You may contact the Committee Convener Mr. Shams Ansari or at the Bar’s numbers 021-99212222, 99211792 or email at info@karachitaxbar.com & ktba01@gmail.com

(Zafar Ahmed)
President

(M. Mehmood Bikiya)
Hon. General Secretary

KTBA CASE LAW UPDATE (Update # 2 of 2023 dated April 11, 2023)

1% INCOME TAX ON UNRENTED PROPERTIES HELD ILLEGAL IN THE PROVINCE OF PUNJAB

Appellate Authority: Lahore High Court

Appellant: Muhammad Osman Gull

Section: 7E of the Income Tax Ordinance, 2001

Detailed judgment was issued on April, 6 2023 [W.P. No. 52559 of 2022]

Background: 1% income tax on values of local unrented Properties (Capital Assets) was introduced in June 2022. The vires of the law were challenged in the Lahore High Court, which has given it much awaited decision last week after nine (09) months. The Lahore High Court decision carries greater significance especially once after the Sindh High Court decided the case earlier against the taxpayer and held the same intra vires of the constitution. The Lahore High Court has declared the 1% tax as ultra vires to the provisions of the Constitution, hence illegal.

Decision of the Court:

First Ruling of the Court: Legislative Incompetence. The Court dilated upon the primary line of defense taken by the Federation, in support of Section 7E i.e. Ellahi Cotton case, which is considered as the barometer for deeming incomes for taxation. The court tested the provisions of Section 7E on the principles laid down in the above famous case of Ellahi Cotton and observed that if fair market value under Section 7E, which is only notional and not actually received, the following is an inescapable conclusion:

- (i) it lacks the procedural machinery and levy of the tax;
- (ii) it is not capable of rationally considered as income of a citizen;
- (iii) neither it can be deemed as received, being hypothetical, nor it can be deemed to have been accrued; and
- (iv) being speculative it cannot be deemed as gain or profit.

The court further discussed the definition of income given under section 2(29) of the Ordinance, which uses expression “and any amount treated as income” and held that to confer power of presuming income, the word, “amount” is significant. In other words only an amount or receipt can be presumed as income and not a notional fair market value.

Therefore, it held that Federal Legislature is not competent, under Entry 47, to treat market value of an immoveable property as income.

Second Ruling of the Court: Principal of Reading Down a provision of law; The intended provision can be rescued if it amended as Capital Value Tax (CVT) instead of Income Tax.

Once after the Section 7E failed the test of ‘deemed’ income, the court re-examined it on the touchstone of the principle of interpretation i.e. ‘reading down’ and held that though Federation is capable of imposing CVT under entry 50 of the Federal Legislative List (FLL), the same could not be done unless suitable amendments are made by replacing the word ‘income’ with the phrase ‘capital asset’ and levy tax on such capital assets, instead of the deemed income, so as to bring it within the permissible framework of entry 50 of the FLL.

Third Ruling of the Court: The Manner of 1% income tax imposed is Discriminatory and Confiscatory.

Various clauses of Section 7E, which provide exclusions to certain properties and certain individuals from the mischief of Section 7E, are held to be discriminatory, as person inter se who have been excluded are not similarly placed. Yet, in few instances the persons excluded were of the same category as those who were not excluded, like original allottees of capital asset (ex or serving personnel of armed forces or ex-employees or serving personnel of Federal and provincial governments), as compared to persons acquiring property through inheritance. Hence, Section 7E was held to be discriminatory and confiscatory.

Conclusion: The judgment has been given at full length on all the grounds taken by the petitioners and defended by the defendants and has tendered a comprehensive opinion of a court on a case in point, which is applicable in rem. The same, however, remains binding under Article 201 only to extent of its provincial jurisdiction i.e. the province of Punjab.

A jurisdictional question arises in the end as to whether the taxing right of the FBR would remain intact for a person assessed in Sindh but has properties in Punjab? In case of Yes, the properties in Sindh of a taxpayer assessed in Punjab will be exempted after this decision.

NOTE: Members are requested to read the complete order attached herewith.

This update has been prepared for KTBA members and carries a brief narrative on a detailed Judgement and does not contain an opinion of the Bar, in any manner or sort. It is therefore, suggested that the judgment alone should be relied upon. Any reliance on the summary in any proceedings or project would not be binding on KTBA.