

## BRIEF NOTE ON SECTION 4C

### 1. INTRODUCTION OF SUPER TAX 4C:

Section 4C of the Income Tax Ordinance, 2001 (“ITO”) was introduced vide the Finance Act, 2022. Section 4C was applicable retrospectively i.e. applicable from tax year 2022 and onwards, on the income of every person, except for banking companies for the tax year 2022 at rates specified in Division IIB of Part I of the First Schedule on incomes exceeding Rs 150 million. The said Section was amended vide Finance Act 2023 (“FA 23”), through which the applicable super tax rates were increased

### 2. PETITIONS FILED BY THE TAXPAYERS BEFORE THE HON’BLE ISLAMABAD HIGH COURT (“IHC”):

Pursuant to the amendments made vide FA 23, taxpayers challenged the vires of Section 4C for the Tax Year 2023, before the Hon’ble Islamabad High Court (“IHC”). It is pertinent to note that even those taxpayers that are not assessed to tax in Islamabad have approached the Hon’ble IHC in its writ jurisdiction. Further, the Hon’ble IHC was pleased to grant interim relief wherein the Hon’ble IHC directed that the maximum rate of super tax that can be charged is 4% (the tax rate applicable before the amendment made vide FA 23) and that no demand inconsistent with the judgment titled Fauji Fertilizer Company Limited and another vs Federation of Pakistan and others (W.P. 4027 of 2022) (“Fauji Fertilizer judgment”), shall be raised by the FBR. As such, one of the key principles, inter-alia, emanating from the judicial pronouncement of the Hon’ble IHC in the Fauji Fertilizer judgment is that income falling under the Final Tax Regime shall not be taken into account for the purposes of computing super tax.

The relevant excerpt of the Fauji Fertilizer judgment is reproduced hereinbelow for the purposes of ready reference:

#### Quote

1 §4C, as it stands now, falls to be ultra vires the fundamental rights under Articles 18, 23 and 24, read with Article 4 of the Constitution. Using Imrana Tiwana phraseology<sup>56</sup>, §4C is “held to be against the scheme of the Constitution and should either be read down or

declared ultra vires for the reasons given” in this judgment. With the preference to save rather than destroy, §4C is to be read down in calculating the income taxable to super tax so as to:

(a) exclude all classes of income enumerated therein the tax on which is final under the other provisions of the Ordinance; and

(b) sever the exclusions of brought forward depreciation, brought forward business losses, and brought forward amortization allowances available to the taxpayers under the other extant provisions of the Ordinance;

2 §4C, as read down, will have prospective application only, and will not apply to any transactions or events past and closed on or before 30th June 2022;

#### Unquote

### 3. APPLICATION FOR RETURN OF PETITION FILED BY THE FBR:

The FBR had filed an application before the Hon’ble IHC requesting for the return of the petition of the petitioners on grounds that since the taxpayer Petitioners were assessed to tax in a different jurisdiction, i.e. the province of Sindh, therefore, the Hon’ble IHC lacked territorial jurisdiction to entertain the said Writ Petitions. Arguments were made at length by both parties and the Hon’ble IHC dismissed the above captioned application vide Short Order dated 08/12/2023 and held as under:

#### Quote

“Ms. Hamid, Barrister Munawar Iqbal Duggle, Mr. Farogh Naseem and Mr. Khalid Jawed Khan concluded their arguments on the point of jurisdiction today. For the reasons to be recorded in the final judgement, this Court finds that it would proceed to hear the case on merits on 26.01.2024. No other case should be listed on that date.”

#### Unquote

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### 4. CIVIL PETITIONS FOR LEAVE TO APPEAL FILED BY THE FBR AGAINST THE AFORESAID TWO INTERIM ORDERS BEFORE THE HON'BLE SUPREME COURT ("SC"):

The FBR filed several CPLAs challenging the aforesaid two interim Orders issued by the Hon'ble IHC. After hearing both parties, the Hon'ble SC vide Order dated 27th February 2024, allowed the CPLAs and set-aside the two interim Orders issued by the Hon'ble IHC.

Further, the Hon'ble SCP directed that the Hon'ble IHC must issue detailed reasons on the FBR's application for return of petition first, and thereafter take-up the interim stay applications of the taxpayer Petitioners.

Excerpts of the Hon'ble SC's Order reproduced below:

#### Quote

6. We have noted that no reason has yet been given by the High Court for passing the said interim orders and the detailed reasons are still awaited. At this juncture, the parties have arrived at a consensus that the Islamabad High Court be directed first to decide the question of maintainability through a speaking order and then take up the matter of interim relief. Hence, the application for interim relief filed by the respondent taxpayers shall be deemed to be pending before the said High Courts and in this background both the interim orders be set aside. Order accordingly.

7. We are sanguine that the question of maintainability as well as interim relief will be decided by the Islamabad High Court not later than one month from today. These petitions are converted into appeals and allowed in the above terms.

#### Unquote

### 5. HON'BLE IHC ORDER DATED 5TH MARCH 2024:

Thereafter, the Hon'ble IHC, upon fresh miscellaneous applications filed by counsel representing various taxpayers, was pleased to grant an interim relief to all petitioners before the Hon'ble IHC and granted stay to the taxpayer Petitioners through Order dated 5th March 2024. The same has been reproduced below:

Moreover, the Hon'ble IHC has also directed the FBR to issue instructions to the Chief Commissioner to refrain from coercive recovery measures in Karachi whilst coercive measures for recovery were restricted. The relevant portion of the Order of the Hon'ble IHC is reproduced hereinbelow for ease of reference:

#### Quote

3. However, by the same token, the respondents are directed not to undertake any coercive measures for recovery, including by any forcible recovery from the accounts of all the petitioners, in view of the judgement of this Court in Pakistan LNG Limited v. Federation of Pakistan (2022 PTD 1763).

...

6. It needs to be remembered that the Chief Commissioner acts not in his own right, but as an official of the FBR subordinate to the Board under section 207 of the Income Tax Ordinance, 2001, tasked to collect revenue for the Federal Government, and it would be downright absurd - reductio ad absurdum - to take the view that, while the Board and the Federal Government stand precluded from coercive recovery premised on the amendments to section 4C under challenge in these petitions, the Chief Commissioner Karachi can go on a limb of his own to collect revenue by implementing those amendments as they stand and remit the revenue to the Federal Government and FBR who for now stand precluded from receiving that revenue in their accounts in the first place! For the avoidance of doubt, and to put the question of territorial jurisdiction to rest, the Board is directed in the interim to issue instructions under section 214(1) of the Ordinance to the Chief Commissioner, Karachi, to refrain from adopting any measures for coercive recovery.

#### Unquote

The effect of the aforesaid order is that the FBR has been restrained from any recovery proceedings for the taxpayers and the main case has been fixed for hearing on the 14<sup>th</sup> March 2024.

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