IN THE SUPREME COURT OF PAKISTAN
(APPELLATE JURISDICTION)

Present
MR. JUSTICE UMAR ATA BANDIAL
MR. JUSTICE MUNIB AKHTAR
MR. JUSTICE YAHYA AFRIDI

Civil Appeal No. 545-K of 2010
(On appeal from the order dated 7.4.2009 passed by the Peshawar High Court, Peshawar in TR No;43 of 2008)

The Commissioner of Income Tax Peshawar **…Appellant (s)**

vs

Director General, NWFP Employees Social Security Institution, Peshawar and another **…Respondent (s)**

For the Appellant (s)	:	Mr. Rehmanullah, ASC. Mr. Farhat Nawaz Lodhi, ASC. Syed Rifaqat Shah, AOR.
For the Respondent (s)	:	Malik Akhtar Hussain, Awan, ASC.
On Court notice		Mr. Waqar Ahmad, Addl. A.G. KPK.
Date of hearing	:	09.01.2019

ORDER

Munib Akhtar, J.- This appeal, filed by the Department, impugns the judgment of the learned High Court whereby a tax reference filed by the respondent was allowed. The respondent is a statutory body set up under the (KPK) Provincial Employees' Social Security Ordinance, 1965 ("1965 Ordinance"). As provided in the statute, the respondent-authority has been created to provide various benefits to certain categories of employees in the event of sickness, maternity, employment injury or death. The outlays made by the respondent for such purposes come from various sources as identified, inter alia, in s. 28, the principal one being the contributions that employers are required to make in respect of their employees under s. 20. The Department sought to levy tax on the respondent, on the basis that

it had income within the meaning of the Income Tax Ordinance, 1979 ("1979 Ordinance") and did not enjoy any exemption there under. The respondent resisted this claim on two grounds. Firstly, it was contended that the receipts (and especially the contributions under s.20) did not constitute "income" within the meaning of the 1979 Ordinance. Thus, no question arose of there being any income that could be brought to tax. Secondly, and in the alternative, it was contended that even if the said receipts amounted to "income" the respondent was entitled to the exemption contained in clause (62) of Part I of the Second Schedule to the 1979 Ordinance ("Clause 62"). Both grounds were rejected by the tax authorities and the respondent's appeal before the learned Appellate Tribunal also failed. This resulted in the filing of a tax reference before the learned High Court, where the respondent met with success. Leave was granted here to the Department vide order dated 12.07.2010, inter-alia, to consider whether the amounts, and in particular the contributions, received by the respondent were "income" within the meaning of s. 2(24) of the 1979 Ordinance.

2. Before us, learned counsel for the appellant-Department submitted that the learned High Court had erred in concluding that the respondent had no income within the meaning of law as could be subjected to tax. Referring to the definition of "income" given in s. 2(24), learned counsel submitted that it was well settled that this term had a wide connotation and broad application. Thus, it was contended, the receipts of the respondent came within the scope of "income", and the first ground taken by the authority ought to have failed. As regards the second ground, learned counsel drew our attention to the language of Clause 62 and submitted that it applied (as presently relevant) only in relation to "voluntary contributions". It was submitted that the contributions received by the respondent under the 1965 Ordinance were statutory in nature and mandatory, and could not therefore be regarded as voluntary. Thus, the respondent's case did not come within the scope of the exemption. Learned counsel also submitted that the incomes of equivalent authorities in other Provinces, being in particular those established in Punjab and Sindh, which were operating under identical statutes had been brought to tax by the Department, and they were paying the same. It was submitted that this aspect had been noted by the learned Appellate Tribunal in the present case. Therefore, it was contended, the non-taxing of the respondent's income would be anomalous, and the learned High Court had erred materially in allowing the tax reference. It was prayed accordingly.

3. The learned AAG, as also learned counsel for the respondent, strongly opposed the appeal. It was submitted that the contributions received by the respondent were expended wholly on, and for, the welfare of the employees. The respondent acted only as a sort of intermediary between employers and employees, and facilitator of the welfare activities being carried on. Thus, the contributions did not at all come within the scope of the term "income" as used in the 1979 Ordinance. The bulk of the amounts received by the respondent was, and is, in the shape of contributions under s. 20. The learned AAG fairly, and in our view quite properly, accepted that there could be certain amounts (e.g., profits obtained on investment of surplus funds) that perhaps came within the scope of the 1979 Ordinance. However, those amounts were relatively small and the principal question remained as raised. Without prejudice to the first ground, and in the alternative, it was submitted as a second ground that if the amounts received by the respondent did come within the scope of "income" then Clause 62 was applicable. On such basis, it was submitted, the respondent's income was exempt from tax. The learned AAG further contended that even if this were not so, the respondent was entitled to the benefit of clause (142) of Part I of the Second Schedule ("Clause 142") to the Income Tax Ordinance, 2001 ("2001 Ordinance"), which was inserted therein by the Finance Act, 2015. Explaining his position, the learned AAG submitted that Clause 142 granted exemption to the contributions received by the provincial social security institutions, and the respondent was in fact expressly identified therein. The clause was obviously beneficial in nature and therefore, it was contended, it could be given retrospective effect even to the extent of applying in relation to the assessment years in question here, all of which fell under the 1979 Ordinance (being 1999-2000 to 2002-2003). On such basis it was contended that the learned High Court had reached the correct conclusion and the appeal ought therefore to be dismissed.

4. After having heard learned counsel as above and considered the submissions and record we were, with respect, unable to agree with the view that found favor with the learned High Court, and therefore allowed the appeal by a short order announced in Court. As regards the first ground, namely that the amounts received by the respondent, including in particular the contributions, were not "income" at all within the meaning of 1979 Ordinance, we inclined to agree with the submissions made by learned counsel for the Department. A bare perusal of s. 2(24) of the 1979 Ordinance shows that the definition of "income" is inclusive

and not exhaustive. Furthermore, the case law on what is meant by "income" under the statute, which extends over a period approaching a century (and indeed emanated under the Income Tax Act, 1922) has established as a bedrock principle that this term is of the widest connotation, amplitude and application. Thus, to take but a few examples, in *Kamakshya Narain Singh v. Commissioner of Income Tax* (1943) 11 ITR 513 the Privy Council observed that "[i]ncome … is a word difficult and perhaps impossible to define in any precise general formula" and "is a word of the broadest connotation" (pg. 521), and that "[t]he multiplicity of forms which 'income' may assume is beyond enumeration" (pg. 523). In *Gopal Saran Narain Singh v. Commissioner of Income Tax* (1935) 3 ITR 237, the Privy Council had earlier also ruled that "[a]nything which can properly be described as income, is taxable under the Act unless expressly exempted" (pg. 242). And, finally, in what is without doubt the leading treatise on the subject the principal principle derived from the authorities has been distilled in the following terms: "The categories of income are never closed" (*Kanga and Palkhivala's The Law and Practice of Income Tax*, 8th ed. (1990), pg. 119). In view of this long and unbroken chain of authority it was impossible to accept the submission made on behalf of the respondent that the amounts received by it, including the contributions under s. 20, were not "income" within the meaning of the statute. The first ground accordingly failed. We pause only to note that the learned AAG, no doubt keeping in mind the well-established position at law, fairly and properly, did not strongly press this ground.

5. We turn to the second ground, to consider whether Clause 62 was applicable in the facts and circumstances of the case. Obviously, in considering this ground the respondent's receipts are accepted as coming within the scope of the statute, the question now being whether its income was entitled to the benefit of the exemption. It is not necessary to set out Clause 62. It comprised of three sub-clauses, the substantive exemption being set out in the first one. For present purposes, it suffices to note that the first sub-clause may be regarded as having two components. The first component dealt with the question as to whose income was entitled to the exemption. This had to be answered with reference to sub-clauses (2) and (3). The second component was as to what income came within the scope of the exemption. The various categories in this regard were set out in sub-clause (1) itself and the one relevant for present purposes was "voluntary contributions". If either of the two components was found not to apply the exemption was not

available. Before us, the focus of attention was the second component, i.e., the "voluntary contributions". Having considered Clause 62 as well as the 1965 Ordinance we were of the view that, with respect, the submissions made by the learned AAG and learned counsel for the respondent could not be accepted. The contributions to be made by employers under s. 20 are clearly both statutory and mandatory. Failure to make timely payment exposes the delinquent employer to the consequences laid down in s. 23, which provides that if there is non-payment of any amount due under s. 20, then what is payable stands increased by such percentage or amount as may be prescribed. Section 23 further provides that any unpaid amount can be recovered as arrears of land revenue. Thus, contributions under s. 20 were, and are, not voluntary. They therefore did not come within the scope of the second component of sub-clause (1). While this was sufficient to preclude application of the Clause 62 to the facts and circumstances of the case at hand we may note that in our view, at least for the assessment years in question and from the record as available, it appears that the first ground was also unavailable to the respondent. Thus, Clause 62 had no application.

6. As regards the submissions made by the learned AAG for the application of Clause 142 we are, with respect, unable to agree. The rule of retrospective application of a beneficial provision has been developed in the context of subordinate legislation, and in respect of notifications which purported to operate from a date prior to the date of issuance. This rule stands, as it were, in counterpoise to the earlier developed rule that a notification having the effect of taking away, curtailing or otherwise interfering with a vested right cannot have retrospective application. Furthermore, the principles that apply to exemptions in the realm of fiscal legislation are well established. They require no rehearsal here and it suffices to note that they do not, with respect, apply in the manner as contended for by the learned AAG. Finally, to give retrospective effect to Clause 142 would be not merely to extend its reach over a huge period of time but also to cut across two different statutes. This is so because, after all, Clause 142 finds place in the 2001 Ordinance whereas the issue at hand arises under the 1979 Ordinance, which was repealed by the former. Clause 142 has no retrospective effect as contended for. Accordingly, the second ground also failed.

7. We may note that leave had been granted subject to the issue of limitation, since it appears that the Department's leave petition had been barred by one day. In the circumstances, the delay is condoned.

8. For the foregoing reasons the appeal was allowed, with the result that the impugned judgment was set aside and it was declared that the respondent's income in the relevant income/assessment years could be brought to tax under the 1979 Ordinance in accordance with the provisions thereof and the short order. The short order was to the following effect:

> "For reasons to be recorded later, this appeal is allowed. It is noted that the tax assessed upon the income of the respondent-Employees Social Security Institution **("ESSI")** does not include any surcharge of penalties. The disputed demand for tax by the appellant on the contributions collected by respondent-ESSI is for period, namely, 1999-2002 and 2002-2003. Subsequently, these contributions have been exempted as of financial year 2015. Whilst we hold that the contributions received by the respondent-ESSI are taxable as its income, we allow the respondent, which is a welfare organization, to approach the Federal Government forthwith for appropriate relief, if any, that may be granted in respect of the tax due.
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> 2. Be that as it may, the demand for tax raised by the appellant for the afore-noted assessment years is upheld in the terms noted above. The recovery of such dues, when resorted by the appellant, shall be effected through installments that can be easily met by the respondents."

Judge

Judge

Judge

Islamabad,
January, 9, 2019
Saeed Aslam/-

Approved for reporting