

JUDGMENT
HUB POWER CO. LIMITED
Versus
COMMISSIONER INLAND REVENUE, ISLAMABAD
I.T.R.A. No. 46 of 2014

ATHAR MINALLAH, J.---Through this consolidated order we shall decide the instant Income Tax Reference, along with tax references listed in Annexure-A hereto. The questions of law raised in all the references for our consideration are the same and they have been filed by the same applicant.

2. The facts, in brief, are that the applicant is incorporated under the Companies Ordinance, 1984 as a public limited company and is listed on all the stock exchanges of Pakistan. It is engaged in the business of sale of electrical power to WAPDA and NTDC. The applicant submitted its respective tax returns for the relevant tax years and the same were treated as assessment orders under section 120(1) of the Income Tax Ordinance, 2001 (hereinafter referred to as the "Ordinance of 2001"). Notices were served by the Additional Commissioner Inland Revenue under section 122(5a) read with subsection (9) calling upon the applicant to explain as to why the Assessment Orders for the respective tax years may not be amended on the grounds mentioned therein. The first ground was in respect of liability of payment of the Workers Welfare Fund, while the second ground related to the profit in the context of term/call deposits not being covered for the purposes of exemption under clause 74 of Part 1 of the Second Schedule of the Ordinance of 2001. The applicant filed a detailed written reply. The Additional Commissioner Inland Revenue did not accept the explanation and, therefore, amended the Assessment Orders. The applicant challenged the amended Assessment Orders before the Commissioner Inland Revenue (Appeals) (hereinafter referred to as "CIRA"). The CIR(A) upheld the Assessment Orders and the applicant assailed the same before the Appellate Tribunal Inland Revenue (hereinafter referred to as the "Tribunal"). The learned Tribunal, vide respective orders, upheld the interpretation of clause 74 of Part 1 of the Second Schedule of the Ordinance of 2001 in the context of the term/call deposits. However, in the case of the impugned order passed by the learned Tribunal in I.T.R.A. No. 48 of 2014, the latter held that the Worker Welfare Fund was not recoverable on the basis of the judgment rendered by the Lahore High Court, Lahore, in the case titled "East Pakistan Chrome Tannery (Pvt.) Limited v. Federation of Pakistan, whereby the amendments made in the Worker Welfare Fund Ordinance, 1971 through the Finance Act, 2006 and 2008 have been struck down as being in violation of the Constitution.

3. The learned counsel for the applicant has not pressed the questions of law proposed at serial Nos. (a) and (b) of the application. The questions of law argued at length by the learned counsel firstly related to the interpretation of clause 74 of Part 1 of the 2nd Schedule of the Ordinance of 2001 and, secondly, the liability of the applicant in respect of the Worker Welfare Fund.

4. The learned counsel appearing on behalf of the applicant has argued that; the applicant is not claiming exemption from tax on any profit derived from any account kept with the financial institutions; a plain reading of clause 74 exempts the applicant from tax on profit derived from money kept in bank deposits; the word 'or' used in clause 74 is to be read as disjunctive; the 'bank deposits' or 'accounts' are to be read disjunctively rather than conjunctively; there is no justification to read 'or' as 'and' since it would lead to absurdity; the words are to be given their plain and ordinary meaning; extrinsic aids to construction, including legislative history, are to be taken recourse to only when the meaning is not plain; reliance has been placed on the cases titled "The Australian Alliance Assurance Company v. The Attorney General for Queensland" [AIR 1918 Privy Council 352], "Mt. Ramanandi Kuer v. Mt. Kalawati Kuer" [AIR 1928 Privy Council 2], "Nagendra Nath Dey v. Suresh Chandra Dey" [AIR 1932 Privy Council 165] and "Pakala Narayana Swami v. Emperor" [AIR 1939 Privy Council 47]; the second part of clause 74 relates to financial institutions and is not attracted in the instant case; the exemption provisions are to be construed, and only if the assessee falls outside these exemptions is the benefit to be denied; the legislature has used the exemption 'bank deposits'

and has not made any distinction between the different kinds of 'bank deposits'; the legislature cannot be presumed to be ignorant of the fact that 'bank deposits' are of many kinds which, inter alia, includes term 'bank deposits'; the term 'deposits' related to funds received by the applicant as a result of financial transactions relating to the project operations; the manner in which the learned Tribunal has interpreted clause 74 has been achieved by straining the language of the law and thus is contrary to the plain language; the learned Tribunal has read words into the statute not provided therein; reliance has been placed on "Excise and Taxation Officer v. Burmah Shell Storage and Distribution Company of Pakistan" [1993 SCMR 338], "Mian Muhammad Nawaz Sharif v. President of Pakistan" [PLD 1993 SC 473] and "Malik Asad Ali v. Federation of Pakistan" [PLD 1998 SC 161]. It is settled law that when interpreting a taxing statute the Court has to merely examine the language of the law and give it a plain meaning; there is no room for any intendment nor is there equity about a tax; the learned Tribunal accepted I.T.R.A. No. 37 of 2014 and has taken the view that the applicant is liable to pay the Worker Welfare Fund at the rates prior to the exemption made in the Finance Act, 2006 and 2008; in the matter relating to I.T.R.A. No. 37 of 2014, the learned Tribunal has decided not to follow the judgment of the Lahore High Court, Lahore and, therefore, has taken the view that the exemptions made in the Finance Act, 2006 and 2008 are effective.

5. The learned counsel appearing on behalf of the respondent / Department, on the other hand, has contended that; the learned CIR(A) and the learned Tribunal have correctly interpreted clause 74; the term 'deposits' is one of the many forms of 'bank deposits'; the term 'deposits' is that form of a 'bank deposit' which is for a fixed term and encashment prior to the maturity entails some kind of a penalty and the loss of interest; the language of clause 74 is obvious; the legislature did not intend to extend exemption to such deposits which were not related to financial transactions relating to the project operations; the word 'or' used in clause 74 is to be read as 'and'; the Sindh High Court in the judgment reported as [2010 PTD 1924] and [2013 PTD 969], after exhaustively examining the law, adjudged the Worker Welfare Fund levy to be a tax and, therefore; validated the introduction and enactment thereof through a Money Bill; the latter judgment of the Sindh High Court has been delivered by a Full Bench of the Court; the liability, therefore, to pay Worker Welfare Fund would be according to the amended rates.

6. The learned counsel have been heard and the record perused with their able assistance.

7. We will first consider and answer the questions of law formulated regarding the interpretation of clause 74 Part 1 of the 2nd Schedule of the Ordinance of 2001. It is not denied that the said exemption clause specifically relates to the applicant. The said clause is reproduced as follows:-

Any profit on debt derived by Hub Power Company Limited on or after the first day of July, 1991, on its bank deposits or accounts with [financial institutions] directly connected with financial transactions relating to the project operations."

8. It would also be pertinent to examine the legislative history of the said exemption clause. Initially the exemption clause which was inserted vide Item No. 76-A, Part-I of the Second Schedule of the repealed Income Tax Ordinance, 1979 (hereinafter referred to as the "Repealed Ordinance") was as follows:--

"Any interest or profit derived by Hub Power Company Limited on its deposits directly connected with financial transactions relating to the project operations."

9. It may be noted that the clause referred to deposits, provided it had a direct nexus with 'financial transactions relating to the project operations'. It may be further noted that such deposits were not expressly declared as having been made or maintained in bank deposits or accounts in a financial institution. This clause was amended vide SRO No. 13(I)/95 dated 04.01.1995 and the same is reproduced as follows:

"Any profit on debt derived by Hub Power Company Limited on or after the first day of July, 1991, on its bank deposits or accounts with financial institutions directly connected with financial transactions relating to the project operations."

10. It is obvious that clause 74, as it stands today, is the same which was amended and inserted as clause 76-A in Part 1 of the 2nd Schedule of the Repealed Ordinance vide SRO

No.13(I)/95 dated 04.01.1995. Clause 76-A, before the amendment, was couched in language which gave expansive scope to the exemption. The amendment, vide SRO No. 13(I)/95 dated 04.01.1995, restricted the deposits to 'bank deposits' or 'accounts' with 'financial institutions' and that too if the financial transactions were directly connected to the project operations. A plain reading of clause 74 of Part 1 of the 2nd Schedule of the Ordinance of 2001 shows that it has three ingredients or pre-conditions for the purposes of claiming exemption by the applicant i.e. firstly, any profit on a debt derived by the applicant on or after the first day of July 1991, secondly, such profit on a debt has to be on its 'bank deposits' or 'accounts' with financial institutions and, lastly, the 'bank deposits' or 'accounts' with financial institutions are to be directly connected with the financial transactions relating to the project operations. We are afraid that there is no force in the argument of the learned counsel appearing on behalf of the applicant that the 'bank deposits' includes 'term deposits' and that 'or' used in the clause will be read disjunctively. In order to further elaborate the distinction it would be essential to look at the meaning of 'bank deposits' and 'term deposits' and then interpret the clause in the light of the settled rules of interpretation relating to exemption clauses.

The expression 'deposits' is defined in the Eighth Edition Black's Law Dictionary is as follows:-

"deposit, n. 1. The act of giving money or other property to another who promises to preserve it or to use it and return it in kind; esp., the act of placing money in a bank for safety and convenience. [Cases: Banks and Banking 119-155. C.J.S. Banks and Banking 193, 246, 248, 266-314, 316, 320-322, 326-381, 383-384, 393, 396, 397, 399, 401-402, 404, 415-423, 425, 444, 455.] 2. The money or property so given.

demand deposit. A bank deposit that the depositor may withdraw at any time without prior notice to the bank.

direct deposit. The payment of wages by transferring the payment directly into the employee's bank account, usu. by electronic transfer.

frozen deposit. A bank deposit that cannot be withdrawn, as when the financial institution is insolvent.

general deposit, 1. A bank deposit of money that is commingled with other depositors' money. 2. A bank deposit that is to the depositor's credit, thus giving the depositor a right to the money and creating a debtor-creditor relationship between the bank and the depositor. * A bank is not required to return the actual money deposited as a general deposit, as it must with a special deposit; the bank need return only an equivalent sum. [Cases: Banks and Banking 75-80, 119. C.J.S. Banks and Banking 161, 172, 175-196, 246, 248, 269-271, 274, 276, 279, 284.]

special deposit. A bank deposit that is made for a specific purpose, that is kept separately and that is to be returned to the deposit. * The bank serves as a bailee or trustee for a special deposit. --- Also termed specific deposit. [Cases: Banks and Banking 153. C.J.S. Banks and Banking 283-287, 290.]

time deposit. A bank deposit that is to remain for a specified period or on which notice must be given to the bank before withdrawal."

11. The expression 'bank deposits' has not been defined in the Ordinance of 2001. Moreover, the prefix 'Bank' essentially has reference to a financial institution. The expression 'bank deposits', therefore, covers all types of deposits i.e. the putting of money into a bank account. 'Term deposit' is only one of a distinct category of several types of 'bank deposits' which involves entering into a contractual relationship with the Bank to park the money for a fixed period and in return the depositor receives interest or profit. The intention, therefore, in the case of a term deposit is to keep the money for the specified fixed term and to earn interest or profit later. A term deposit, therefore, cannot be construed as one of the categories of 'bank deposits' with a financial institution which is directly connected with financial transactions relating to the project operations. This is also not disputed in the instant case. It is also pertinent to mention that there are many types of deposits and accounts which are offered by the financial institutions. All the various types of 'accounts' also fall within the ambit of 'bank deposits' as is evident from the definition of the expression 'deposits'. However, there may be a distinction between the accounts which are directly connected with the financial transactions relating to

the project operations of an entity, or those which may not have such a connection. 'Bank deposits' is, therefore, a general term used for all kinds of deposits and includes 'term deposit' as one of a distinct category. As a corollary, all deposits made, whether they are in the form of a term deposit or keeping money in any type of account would fall within the ambit of the expression 'bank deposits'. The legislature, therefore, by using the expression 'bank deposits' and 'accounts' could not have intended to use them disjunctively since the former does not relate to or indentify any specific type of deposit. The legislative intent is also obvious from the history of the exemption clause contemplated in clause 74 of Part 1 of the 2nd Schedule of the Ordinance of 2001. Initially the expression 'deposit' was used but was circumscribed by being directly connected with the financial transactions relating to the project operations. Thus, all types of deposits were included for the purposes of claiming exemption provided that the applicant could show that they were directly connected with financial transactions relating to the project operations. The subsequent amendments made vide SRO No. 13(I)/95 dated 04.01.1995, merely elaborated the nature of the exemption and further clarified or emphasized that only such deposits, whether in the form of an account or any other Bank deposits would be covered under the exemption clause which were maintained with a financial institution and directly connected with the financial transactions relating to the project operations. The legislature obviously indented to extend the exemption only to such Bank deposits which were directly connected to 'financial transactions in relation to the project operations'. The, argument that the expressions 'bank deposits' and 'accounts' are to be read disjunctively and not conjunctively due to the use of the word 'or' is misconceived. At the expense of repetition it is reiterated that the expression 'bank deposits' includes all types of deposits and accounts offered and maintained by a financial institution. It would give rise to absurdity if the expression 'bank deposits' and 'accounts' are to be read disjunctively and would render the portion after the word 'or' as redundant. It would lead to an interpretation to the effect that all the categories of deposits, including the various accounts, regardless of their connection with financial transactions relating to project operations would be entitled to exemption, and thus render the latter part of the clause after the word 'or' as redundant. It is settled law that neither redundancy nor absurdity can be attributed to the legislature. It would also have the effect of assuming that the legislature had treated the expression 'bank deposits' as a distinct and separate category from 'accounts with financial institutions'. In doing so it would be presuming that the legislature was not aware of the ordinary meaning of the expression 'bank deposits'.

12. It is settled law that the words 'and' and 'or' are interchangeable and the word 'and' can be construed as 'or' and vice versa if the change is necessary to effectuate the obvious intention of the law-maker or the statutory rules framer as has been held by the august Supreme Court in the case reported as [PLD 1990 SC 632] "Khadim Hussain and another v. The Additional District Judge, Faisalabad and others". Reliance is also placed on [PLD 1995 Karachi 347] "Saifi Development Corporation Ltd. v. Workers' Union" and [PLD 1966 Lahore 128] "Muhammad Hussain v. The Additional District judge, Lahore and others". An obvious intention of the legislative intent from a plain reading of clause 74 of Part 1 of the 2nd Schedule of the Ordinance of 2001 was to extend exemption in the case of the applicant on any profit on a debt derived on deposits with financial institutions, which were directly connected with financial transactions relating to the project operations. If the argument of the learned counsel for the applicant that the expression 'bank deposits' is distinct from 'accounts' offered or maintained with financial institutions is to be accepted, and if both are read disjunctively, then on the basis of the ordinary meaning of the former expression any type of deposit would be covered there under, thus rendering the second limb i.e. accounts with financial institutions as redundant. The legislature can obviously not be presumed to have been ignorant of the wide meaning of the expression 'bank deposits' or to have used such language having the effect of rendering one part redundant. The expressions 'bank deposits' and 'accounts' with financial institutions are, therefore, held to be read conjunctively i.e. 'or' is to be read as 'and'.

13. The august Supreme Court in the case titled "A and B Food Industries Limited v. Commissioner of Income Tax/Sales, Karachi" [1992 SCMR 663], has succinctly explained the basic principles for interpretation of a statute in the context of clauses or provisions involving exemption from payment of a Lax. The relevant portion is reproduced as follows:--

"We may also observe that there are two basic principles of interpretation of a provision of a statute involving exemption from payment of a tax, namely; the first rule is that the burden of proof of exemption is on the person who claims the same. In this regard, reference may be made to the case of Madras Provincial Co-operative Bank, Ltd. v. Commissioner of Income Tax, Madras (AIR 1933 Madras 489) and the case of

Commissioner of Income-tax, Madras v. S.L. Mathias (AIR 1939 PC 1); and the second rule, is, that a provision relating to grant of tax exemption is to be construed strictly against the person asserting and in favour of taxing officer. In this regard, reference may be made to the case of Muhammad Steamship Co. Ltd. v. The Commissioner of Income-tax (Central), Karachi (PLD 1966 SC 828) and the case of Messrs Bisvil Spinners Ltd. v. Superintendent, Central Excise and Land Customs, Circle, Sheikhpura and another (PLD 1988 SC 370), and also the following treaties on the construction of the statutes:-

- (i) Sutherland on Statutory Construction, Vol.3, Edition 3 at page 296;
- (ii) Craies on Statute Law, Seventh Edition, page 431;
- (iii) Crawford on Statutory Construction, page. 506;
- (iv) N.S. Bindra on the Interpretation of Statutes, Third Edition, page 488.

14. In the light of the above, we hold that a 'term deposit' would, therefore, not fall within the ambit of clause 74 of Part-1 of 2nd Schedule of the Ordinance of 2001 for the purposes of claiming exemption since the word 'or' is to be read as having being used conjunctively.

15. The next question is relating to the Worker Welfare Fund. It is noted that three High Courts have already considered and delivered exhaustive judgments on the question of the vires of the amendments made through the Finance Act, 2006 and 2008. The Sindh High Court in Messrs Mutual Funds case 2010 PTD 1924 also reported as 2010 PTD 1924 and in Messrs Shahbaz's case PLD 2013 Sindh 449 = 2013 PTD 969 also reported as 2013 PTD 969, after exhaustively examining the law, adjudged the impugned levy to be a tax and, therefore, validated the introduction and enactment thereof through a Money Bill. The latter judgment of the Sindh High Court has been delivered by a Full Bench of the Court. The Lahore High Court, on the other hand, in Pakistan Chrome Tannery's case 2011 PTD 2643 also reported as 2011 PTD 2643 and Messrs Azgards case PLD 2013 Lah. 282 = 2013 PTD 1030 also reported as "Messrs Azgard Nine Ltd. v. Pakistan through Secretary and others" PLD 2013 Lahore 282, has declared the impugned levy, made through the amendments in the Ordinance of 1971 vide the Finance Act, 2006 and 2008 as a fee and not a tax, and thus struck down the legislation as being ultra virus. The Peshawar High Court, through judgment dated 29-05-2011 in Associated Industries Limited, Amangarh Industrial Area, Nowshera and others v. Federation of Pakistan in W.P. No.1425/2010, after discussing in detail the judgments of the Sindh High Court and the Lahore High Court and other precedent law, declared the amendments made through Money Bills as ultra vires.

16. We have gone through the eloquently authored judgments by the three High Courts. We concur with the reasoning and the conclusions elucidated in the judgment rendered by the Lahore High Court, Lahore and the Peshawar High Court, Peshawar. As a consequence we hold that the exemption made in the Worker Welfare Fund Ordinance, 1971 through the Finance Act, 2006 and 2008 were ultra vires the Constitution and, therefore, the charge would be in accordance with the rates as were prescribed prior to such amendments.

17. As a sequel to the above discussion the questions listed at Serial Nos. (e), (f), (g), (h) and (i) are answered in the negative, while the question at Serial No. (d) in the affirmative. The questions at Serial Nos. (a) to (c) were not pressed by the learned counsel for the applicant and, therefore, we are not required to answer the same.

18. The office is directed to send a copy of this judgment under the seal of the Court to the learned Appellate Tribunal.

Annexure-A

Sr. No.	ITRA No.	Title of the case.
1.	37/2014	Hub Power Co. Ltd. v. Commissioner Inland Revenue.
2.	47/2014	Hub Power Co. Ltd. v. Commissioner Inland Revenue.
3.	48/2014	Hub Power Co. Ltd. v. Commissioner Inland Revenue.
4.	49/2014	Hub Power Co. Ltd. v. Commissioner Inland Revenue.
5.	50/2014	Hub Power Co. Ltd. v. Commissioner Inland Revenue.

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