IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:
Mr. Justice Umar Ata Bandial
Mr. Justice Sajjad Ali Shah
Mr. Justice Munib Akhtar

Civil Appeals No. 26 to 29 of 2015
(On appeal from the judgment/order dated 26.04.2014 of the Peshawar High Court, Peshawar passed in TR No. 5-P-8-P/2013)

Civil Appeal No. 16 of 2016
(On appeal from the judgment/order dated 17.09.2015 of the Peshawar High Court, Peshawar passed in TR No. 25-P/2015)

Civil Appeals 1550 to 1554 of 2016
(On appeal from the judgment/order dated 28.01.2016 of the Peshawar High Court, Peshawar passed in TR No. 01-P to 04-P/2015,85-P/2014)

Civil Appeal No. 1931 of 2019
(On appeal from the judgment/order dated 21.05.2019 of the Peshawar High Court, Peshawar passed in TR No. 20-P/2015)

The Commissioner Inland Revenue, Peshawar
(in all cases)

...Appellant(s)

Vs

Tariq Mehmood
(in C.A.26-29/15)

Muhammad Jamil Khan Alizai
(in C.A.16/2016)

M/s Z-FAST (Pvt.) Ltd. Peshawar
(in C.A.1550-1554/2016)

Muhammad Sajjad
(in C.A.1931/2019)

...Respondent(s)

For the Appellant(s): Mr. Ghulam Shoaib Jally, ASC
(in C.A. 26-29/15, 16/16, 1931/19)

Mr. Rehmanullah, ASC
(in C.A. 1550-1554/16)
Mr. Naeem Hassan, Sec. Lit. FBR

For the Respondent(s): Mr. Isaac Ali Qazi, ASC
(in C.A. 26-29/15)

In-person
(in C.A. 1931/19)

Ex parte
(in C.A. 16/16, 1553-1554/16)

On Court's Notice Mr. Ayaz Shaukat, DAG

Date of Hearing: 11.01.2021

ORDER

Munib Akhtar, J.: At the conclusion of the hearing, these appeals were dismissed by means of a short order. The following are our reasons for having done so.

2. The appeals arise under the Income Tax Ordinance, 2001 ("Ordinance") and raise the same question: whether in the facts and circumstances of the case, the respondent tax payers had a right of appeal to the Commissioner (Appeals) under s. 127? The learned Appellate Tribunal gave an answer in the affirmative and, on tax references filed by the department, the learned High Court agreed. Although different tax payers and various decisions of the High Court are involved, the lead case (which has been followed in the other matters) is in CA 26/2015, being the judgment of the High Court dated 26.04.2014. Leave was granted vide order dated 07.01.2015 to consider, in light of the various amendments made to ss. 122C (since omitted) and 127, whether the question had been correctly answered by the forums below. Notice was also issued to the learned Attorney General since, as noted in the leave granting order, a question in relation to fundamental rights could also be involved.

3. For reasons that will become clear, the appeals can be divided in two sets. One set comprises four appeals, CA 26-29/2015 (herein after the "first set"). The second set comprises the remaining (seven) appeals, herein after referred to as the "second set".

4. Since the question raised is almost exclusively relatable to statutory interpretation, and (as will be seen) to the application (or otherwise) of Article 25 of the Constitution, we straightaway go to the relevant provisions. Section 121 of the Ordinance allows the Commissioner to make what is termed a "best judgment" assessment. This power (which was also to be found in the predecessor legislation: see s. 63 thereof) allowed the Commissioner (up to the Finance Act, 2010) to take action if (as presently relevant) a person liable to pay income tax failed, despite notice, to file a return. In such a situation, the Commissioner was enabled to make an assessment "based on any available information or material and to the best of his judgement". Section

127 granted the person against whom such an order was made a right of appeal to the Commissioner (Appeals). For convenience, these two sections, as they stood up to the Finance Act, 2010, are reproduced below (as presently relevant) (emphasis supplied):

Section 121	Section 127
Best judgement assessment.—(1) Where a person fails to — (a) furnish a return of income as required by a notice under sub-section (3) or sub-section (4) of section 114; ... the Commissioner may, based on any available information or material and to the best of his judgement, make an assessment of the taxable income of the person and the tax due thereon. (2) As soon as possible after making an assessment under this section, the Commissioner shall issue the assessment order to the taxpayer....	**Appeal to the Commissioner (Appeals)**.—(1) Any person dissatisfied with any order passed by a Commissioner or a taxation officer under section 121, 122, ... or an order under sub-section (1) of section 161 holding a person to be personally liable to pay an amount of tax, or an order under clause (f) of sub-section (3) of section 172 declaring a person to be the representative of a non-resident person or an order giving effect to any finding or directions in any order made under this Part by the Commissioner (Appeals), Appellate Tribunal, High Court or Supreme Court, or an order under section 221 refusing to rectify the mistake, either in full or in part, as claimed by the taxpayer or an order having the effect of enhancing the assessment or reducing a refund or otherwise increasing the liability of the person may prefer an appeal to the Commissioner (Appeals) against the order.

Subsection (4) of s. 114 empowers the Commissioner to issue a notice to any person who (in his opinion) is required to file a return but has failed to do so, to furnish such return within the stipulated period. A failure to comply brought s. 121(1)(a) into operation, with attendant consequences.

5. By the Finance Act, 2010 ("FA 2010"), certain significant changes were made. In s. 121(1), clause (a) was omitted and in its stead a new provision, s. 122C, was inserted into the Ordinance. However, no changes were made to s. 127(1) as would be relevant for present purposes. The newly added s. 122C provided as follows:

> "**122C. Provisional assessment**.—(1) Where in response to a notice under sub-section (3) or sub-section (4) of section 114 a person fails to furnish return of income for any tax year, the Commissioner may, based on any available information or material and to the best of his judgment, make a provisional assessment of the taxable income of the person and issue a provisional assessment order specifying the taxable income assessed and the tax due thereon.
>
> (2) Notwithstanding anything contained in this Ordinance, the provisional assessment completed under sub-section (1) shall be treated as the final assessment after the expiry of sixty days from the date of service of order of provisional assessment and the provisions of this Ordinance shall apply accordingly:
>
> Provided that the provisions of sub-section (2) shall not apply if return of income along with wealth statement, wealth reconciliation statement and other documents required under sub-section (2A) of section 116 are filed by the person for the relevant tax year during the said period of sixty days."

When subsection (1) is examined it will be seen that, subject to one important change, it was identical in effect to what had earlier been contained in s. 121(1)(a). As earlier provided, it enabled the Commissioner to make a best judgment assessment if the relevant person failed to comply with a notice under subsections (3) or (4) of s. 114. However, unlike the position under s. 121, such an assessment was now "provisional" and the order made was a "provisional assessment order". Subsection (2) opened with a *non obstante* clause, and provided that the provisional assessment order would be treated as (i.e., deemed to be) the "final assessment" once 60 days had elapsed, subject to the proviso that if the person affected filed a return within that period, then the subsection would not apply. Although it was not expressly so stated, it can be concluded that in such an eventuality the return so filed would be dealt with as otherwise provided in the Ordinance.

6. The Finance Act, 2011 ("FA 2011") made no changes to s. 122C but did alter s. 127 in a manner relevant for present purposes. In subsection (1), after the words "liability of the person" (emphasized in the table above) the following words were added: "except a provisional assessment order under section 122C".

7. The next financial year brought further changes. The Finance Act, 2012 ("FA 2012") made certain changes to s. 122C but these are not relevant for our purposes. However, a change was made in s. 127(1) which is of direct and crucial importance. The insertion made in FA 2011, noted in the last preceding para, was amended, so that it now read as follows: "except an assessment order under section 122C".

8. The subsequent Finance Acts (occasionally) made changes to ss. 122C and 127, but these are not relevant for present purposes, till we come to the Finance Act, 2017 ("FA 2017"). By this Act, s. 122C was omitted altogether. In consequence, the insertion made in s. 127(1) was also omitted. Finally, what had been clause (a) of s. 121(1) was restored thereto, albeit in the shape of a new (though almost identically worded) clause (ab). Thus, the effect of FA 2017 was that (as presently relevant) the position as had prevailed prior to FA 2010 stood restored.

9. With this conspectus we turn to the factual aspect of the matter, which need be dealt with only lightly. In all the appeals, provisional assessment orders were made against the respondents under s. 122C(1). In the first set of appeals those orders were made in 2011, and these attained finality (in terms of subsection (2)) after FA 2011. Thereafter, the respondents filed their appeals before the Commissioner (Appeals) under s. 127. In the second set, the provisional assessment orders were made in 2013, attained finality on respective dates in that year and thereafter the respondents filed their appeals. It will be seen that, as regards s. 127(1), the appeals in the first set were filed after the change made by FA 2011 but before that brought about by FA 2012. In the second set, the appeals were filed after the change made by the latter. As already noted, the learned High Court held that there was a right of appeal in all cases.

10. During the course of submissions, on a query from the Court learned counsel for the department accepted, in our view correctly, that if no changes had at all been made to s. 127(1), an appeal would have lain against either a provisional assessment order or the (deemed) final assessment. The learned DAG who appeared on behalf of the Attorney General (on Court notice) submitted that the language of s. 127(1) wholly precluded any

such right of appeal (i.e., even without the changes made by FA 2011 or 2012). With respect, we are unable to agree, if for no reason other than that that would render the changes made wholly redundant. Obviously, the legislature itself believed that there would have been a right of appeal without the changes. That conclusion is correct. The crucial question is how that right was curtailed by the changes made in 2011 and 2012, and how that impacts on the facts and circumstances of the two sets of respondents.

11. In our view, the position can be regarding as falling in five periods. Prior to FA 2010 (period A), when s. 121 alone was in the field, there was a right of appeal against a best judgment assessment. Between FA 2010 and FA 2011 (period B), when s. 122C was brought in but s. 127 remained untouched, the right of appeal remained unaffected. There was a right against either the provisional assessment order or the (deemed) final assessment. The effect of FA 2011 (period C) was to take away the right of appeal against the provisional assessment order, but the right against the (deemed) final assessment remained unaffected. The purported effect of FA 2012 (period D) was to take away altogether the right of appeal against any order/assessment made under s. 122C. Finally, FA 2017 (period E) restored the position to what it had been prior to FA 2010.

12. When the first set of appeals is examined, it will be seen that the appeals were filed against the (deemed) final assessments and the matters lay within period C. There was then undoubtedly a right of appeal under s. 127. Even though it was of a curtailed nature, it sufficed in the facts and circumstances of the case. Therefore, as regards the first set, the question before us had to be answered in the affirmative, i.e., in favor of the respondents and against the department. These four appeals therefore stood dismissed.

13. As regards the second set of appeals, they all related to 2013 and thus lay in period D, when by virtue of the change made by FA 2012 the right of appeal stood wholly precluded. Now, it is well established that a right of appeal is a substantive right, which has to be conferred by statute. If the matter were limited to statutory interpretation alone then the question before us would

have to be answered in the negative. However, it will be recalled that the leave granting order had raised the possibility of a fundamental right being engaged, and possibly infringed. Although reference was made to Article 10-A of the Constitution, in our view (with respect) the point had greater traction (if at all any) in terms of Article 25, i.e., discrimination. It is to consider this aspect that we now turn.

14. The proper approach to Article 25 is well settled and reference need only be made to one of the leading cases, *I. A. Sharwani and others v. Government of Pakistan and others* 1991 SCMR 1041. The relevant principles are set out in para 26 of the judgment. Article 25 allows for reasonable classification, which is one that is based on intelligible differentia, which must have a rational nexus with the object sought to be achieved. The question is whether the respondents in the second set of appeals have been discriminated against by denying them a right of appeal under s. 127. The first task is to determine the overall class from which the said respondents have been "differentiated". Obviously, that is not all of the taxpayers under the Ordinance; it is only a specific segment thereof that would be relevant. In our view, the proper segment comprises those taxpayers against whom a best judgment assessment was made (whether under s. 121 or s. 122C) on their failure to properly respond to a notice under s. 114(4). Now, all the taxpayers in this segment had a right of appeal under s. 127 up to FA 2010 (the period A identified in para 11 *supra*), and from FA 2017 onwards (period E)). In between they also had a right of appeal between FA 2010 and FA 2011 (period B) and a curtailed right between FA 2011 and FA 2012 (period C). Between FA 2012 and FA 2017 (period D), within which the respondents now under consideration fell, there was no right of appeal at all. The question therefore is whether period D constitutes an intelligible differentia and if so, does it have a rational nexus with the object sought to be achieved, to constitute reasonable classification? If the answer is in the affirmative, then there was no discrimination. The respondents were lawfully denied a right of appeal and the second set of appeals must be allowed. However, if the answer is in the negative, then there was discrimination within the scope of Article 25, and the change made by FA 2012 in s. 127 was in violation of the Constitution.

15. It is of course well established that, in the context of Article 25, the courts give a relatively greater latitude to the State in fiscal legislation in terms of selecting the persons liable to tax (or exemption), the objects of taxation, the methods employed and as to the rates of taxation. Reference may be made to *Amin Soap Factory v.* PLD 1976 SC 277 (at pp. 283-4 in the context of exemptions) and, more generally, *Elahi Cotton Mills and others v. Federation of Pakistan and others* PLD 1997 SC 582, at para 31 (pg. 675 *et. seq.*), where the various principles deducible from the case law are elaborately set out. However, as the cases also make clear the latitude so granted is not infinitely elastic and it is not as though the courts regard taxation to be wholly beyond the purview of Article 25. In the present matters we are in any case concerned with a right of appeal and not, as such, with taxation itself. This Court has also stressed the importance, in the context of the fundamental right of access to justice, of the law granting at least one right of appeal to any person whose rights are substantively affected. Clearly, a best judgment assessment falls in this category. Having carefully considered the matter, in our view there were no intelligible differentiae that distinguished, insofar as the right of appeal under s. 127 was concerned, taxpayers who fell in period D from the taxpayers who came in the other periods. Furthermore, the differentiation created as a result of FA 2012 did not have any rational nexus with the object sought to be achieved by s. 122C.

16. Learned counsel for the department submitted that although the respondents in the second set of appeals were denied the right of appeal, they were not wholly bereft of remedy and relied on ss. 122A and 122B which confer powers of revision on the Commissioner and the Chief Commissioner respectively. In our view, this submission is, with respect, misconceived. The power of revision is different and distinct, both in its concept and application and effect, from the right of appeal. For one thing it moves within a narrow (and usually much narrower) locus than the right of appeal. Secondly, it is ultimately at the discretion of the authority exercising such power, whereas an appeal under s. 127 is as of right. Furthermore, an order by the Commissioner (Appeals) is appealable to the Appellate Tribunal and from there the matter can be taken to the High Court by way of a tax reference. These avenues appear not to be available against an

order in revision made under the sections relied upon. Therefore, there can, in the present context, be no equation with the right of appeal under s. 127 and any powers of revision conferred by ss. 122A or 122B.

17. In our view, the change made to s. 127(1) by FA 2012 was discriminatory within the meaning of Article 25 and being in violation of the fundamental right so conferred liable to be struck down. It is so declared. (More precisely, subsection (25) of s. 15 of FA 2012 is declared to have been *ultra vires* the Constitution.) The result is that at all times material for present purposes the right of appeal under s. 127(1) had the form that it took as a result of FA 2011, which meant that like the respondents in the first set of appeals, those in the second set also had such right. The question posed at the beginning of this judgment must therefore likewise be answered in the affirmative, in their favor and against the department. As a result, the second set of appeals also failed and stood dismissed.

18. The foregoing are the reasons for our short order dismissing the appeals.

Judge

Judge

Judge

Islamabad, the
11th January, 2021
Nisar/*
Approved for reporting