

IN THE SUPREME COURT OF PAKISTAN

(Appellate Jurisdiction)

Present

Mr. Justice Qazi Faez Isa

Mr. Justice Yahya Afridi

Mr. Justice Jamal Khan Mandokhail

Civil Appeal No. 317/2022

*(Against the judgment dated
01.12.2021 of the Peshawar High
Court, Abbottabad Bench passed in
ITR. No. 1-A/2019)*

Muhammad Tahir

... Appellant

Versus

*Commissioner Inland Revenue, Zone-II, Regional Tax
Office, Abbottabad and another*

... Respondents

For the Appellant:

Mr. Riaz Hussain Azam, ASC

For the Respondents:

Mr. Zahid Idris Mufti, ASC

Mr. Anis M. Shehzad, AOR

On Court's notice:

Mr. Ayaz Shoukat, DAG

Mr. Ayaz Swati, AAG Balochistan

Mian Shafaqat Jan, AAG KP

Date of Hearing:

31.10.2022

ORDER

Qazi Faez Isa, J. The learned counsel for the appellant states that the appellant was and remains a resident of a Provincially Administered Tribal Area adjoining *Mansehra* District (**'the said tribal area'**) in terms of the then Article 246(b)(i) of the Constitution of the Islamic Republic of Pakistan (**'the Constitution'**), and income tax was deducted from him with regard to tax years 2011, 2012 and 2013 which was not leviable on the appellant. Therefore, the appellant sought refund thereof by submitting an application under section 170 of the Income Tax Ordinance, 2001 (**'the Ordinance'**). He further states that no notification was issued pursuant to the then Article 247(3) of the Constitution applying the Ordinance to the said tribal area.

2. The learned Mr. Zahid Idris Mufti on behalf of the Commissioner Inland Revenue states that the argument put forward by the appellant is misplaced because the President of

Pakistan ('the President') had issued an order *vide* S.R.O. 118(I)/2011 on the 10 February 2011 published in the Gazette of Pakistan Extraordinary on 12 February 2011 which ordered that the said tribal area ('the order') has ceased to be a tribal area. The order is reproduced hereunder:

'S.R.O. 118(I)/2011.- In exercise of the powers conferred by clause (6) of Article 247 of the Constitution of Islamic Republic of Pakistan, the President, after ascertaining the views of the people of the Tribal Area adjoining the Mansehra District as represented in the Tribal *Jirga*, is pleased to direct that the aforesaid Tribal Area shall cease to be a Tribal Area with immediate effect.'

3. Notices were also issued to the learned Attorney-General for Pakistan and to the Advocate Generals of the two provinces where there were tribal areas, that is, Khyber Pakhtunkhwa and Balochistan.

4. We have heard the learned counsel for the parties. To better appreciate and understand the submissions which have been made, it will be appropriate to reproduce Article 247 of the Constitution as it existed at the relevant time, as under:

'Administration of Tribal Areas

247. (1) Subject to the Constitution, the executive authority of the Federation shall extend to the Federally Administered Tribal Areas, and the executive authority of a Province shall extend to the Provincially Administered Tribal Areas therein.

(2) The President may, from time to time, give such directions to the Governor of a Province relating to the whole or any part of a Tribal Area within the Province as he may deem necessary, and the Governor shall, in the exercise of his functions under this Article, comply with such directions.

(3) No Act of Majlis-e-Shoora (Parliament) shall apply to any Federally Administered Tribal Area or to any part thereof, unless the President so directs, and no Act of Majlis-e-Shoora (Parliament) or a Provincial Assembly shall apply to a Provincially Administered Tribal Area, or to any part thereof, unless the Governor of the Province in which the Tribal Area is situate, with the approval of the President, so directs; and in giving such a direction with respect to any law, the President or, as the case may be, the Governor, may direct that the law shall, in its application to a Tribal Area, or to a specified part thereof, have effect subject to such exceptions and modifications as may be specified in the direction.

(4) Notwithstanding anything contained in the Constitution, the President may, with respect to any matter within the legislative competence of Majlis-e-Shoora (Parliament), and the Governor of a Province, with the prior approval of the

President, may, with respect to any matter within the legislative competence of the Provincial Assembly make regulations for the peace and good government of a Provincially Administered Tribal Area or any part thereof, situated in the Province.

(5) Notwithstanding anything contained in the Constitution, the President may, with respect to any matter, make regulations for the peace and good government of a Federally Administered Tribal Area or any part thereof.

(6) The President may, at any time, by Order, direct that the whole or any part of a Tribal Area shall cease to be Tribal Area, and such Order may contain such incidental and consequential provisions as appear to the President to be necessary and proper:

Provided that before making any Order under this clause, the President shall ascertain, in such manner as he considers appropriate, the views of the people of the Tribal Area concerned, as represented in tribal jirga.

(7) Neither the Supreme Court nor a High Court shall exercise any jurisdiction under the Constitution in relation to a Tribal Area, unless Majlis-e-Shoora (Parliament) by law otherwise provides:

Provided that nothing in this clause shall affect the jurisdiction which the Supreme Court or a High Court exercised in relation to a Tribal Area immediately before the commencing day.'

5. The President had the constitutional power to issue the order and his order changed the status of the said tribal area and made it a non-tribal area. Admittedly, the said tribal area adjoins *Mansehra* District and the order of the President was of a date prior to the levy/deduction of income tax. Therefore, the refund claim submitted by the appellant was correctly rejected by the Deputy Commissioner. The appeal preferred against such rejection was dismissed, however, the Income Tax Appellate Tribunal (**'the Tribunal'**) allowed the appellant's appeal. Thereafter, the Commissioner Inland Revenue preferred an income tax reference before the Abbottabad Bench of the Peshawar High Court which was allowed and the judgment of the Tribunal was set aside and that of the lower forums restored, with which we are in agreement as they accord with the stated constitutional provisions.

6. As regards the learned counsel for the appellant's submission that, the Ordinance was not specifically enforced in the said tribal area pursuant to Article 247(3) of the Constitution, this submission is not relevant since in the instant case the President had exercised powers under Article 247(6) of the Constitution and

had ordered that the adjoining areas of *Mansehra* District are no longer to be tribal areas, that is, the said tribal area became a non-tribal area. There is a distinction between the power exercised by the President under Article 247(6) of the Constitution, which determines the status of an area, with that exercised under Article 247(3) which may be used to extend any particular law to a tribal area. The order passed by the President under Article 247(6) of the Constitution meant that the area lost its status as a tribal area. Consequently, once the President had passed the order, any tax levied/deducted in accordance with the Ordinance was leviable/payable, because the Ordinance automatically stood extended to the said area. And, the fact that the area was hitherto a tribal area wherein tax under the Ordinance could not be levied/deducted would be of no consequence. The Deputy Commissioner had correctly dismissed the refund application of the appellant and the Commissioner (Appeals) had maintained his order; and the learned Judges of the High Court had correctly restored these orders by setting aside the judgment of the Tribunal. Therefore, this appeal is dismissed but there shall be no order as to costs as the case was one of first impression and as the High Court had set aside the judgment of the Tribunal.

Judge

Judge

Judge

Islamabad,
31.10. 2022
Rizwan

"Approved for reporting"