2023 S C M R 50

[Supreme Court of Pakistan]

Present: Umar Ata Bandial, C.J., Qazi Faez Isa and Syed Mansoor Ali Shah, JJ

Civil Appeal No.630 of 2010

(Against the judgment of Peshawar High Court, Peshawar dated 03.3.2009, passed in Tax Ref. No.8/2008)

and

Civil Appeals Nos. 159 to 161 of 2013

(Against the judgment of Peshawar High Court, Peshawar dated 15.2.2012, passed in ITRs Nos. 92 to 94/2008)

and

Civil Appeals Nos. 162 and 163 of 2013

(Against the judgment of Peshawar High Court, Peshawar dated 07.4.2011, passed in ITRs Nos. 116 and 117/2010)

and

Civil Appeals Nos. 164 to 167 of 2013

(Against the judgment of Peshawar High Court, Peshawar dated 03.3.2011, passed in ITRs Nos. 86 to 89/2010)

and

Civil Appeals Nos. 168 to 175 of 2013

(Against the judgment of Peshawar High Court, Peshawar dated 30.6.2011, passed in ITRs Nos. 41 to 48/2011)

and

Civil Appeals Nos. 176 to 178 of 2013

(Against the judgment of Peshawar High Court, Peshawar dated 27.9.2011, passed in ITRs Nos. 127 to 129/2010)

and

Civil Appeals Nos. 300 to 306 of 2013

(Against the judgment of Peshawar High Court, Peshawar dated 26.10.2011, passed in ITRs Nos. 54 to 60/2011)

and

Civil Appeals Nos. 529 to 531 of 2013

(Against the judgment of Peshawar High Court, Peshawar dated 18.1.2012, passed in ITRs Nos. 83 to 85/2010)

and

Civil Appeals Nos. 1211 to 1214 of 2014

(Against the judgment of Peshawar High Court, Peshawar dated 28.5.2014, passed in ITRs Nos. 115, 111, 112 and 122/2010)

and

Civil Appeals Nos. 1414 to 1418 of 2014

(Against the judgment of Peshawar High Court, Peshawar 10.7.2014, passed in ITRs Nos. 113/2010, 05, 08, 09 and 10/2011)

and

Civil Petitions Nos. 1152 and 1153 of 2017

(Against the judgment of Peshawar High Court, Peshawar dated 24.1.2017, passed in ITRs Nos. 06/2011 and 39-P/2013)

COMMISSIONER OF INCOME TAX---Appellant/Petitioner

Versus

Messrs DYE CHEMICAL INDUSTRIES (PVT.) LTD. and others---Respondents

Civil Appeals Nos. 630 of 2010, 159 to 178, 300 to 306, 529 to 531 of 2013, 1211 to 1214, 1414 to 1418 of 2014 and Civil Petitions Nos. 1152, 1153 of 2017, decided on 6th September, 2022.

Income Tax Ordinance (XXXI of 1979) [since repealed]---

----S. 80D & Second Sched. Pt. I, Cl. 122C---Protection of Economic Reforms Act (XII of 1992), Ss. 2(b), 3 & 6---Exemption from payment of minimum tax---Whether the respondent taxpayers enjoyed exemption from the payment of minimum tax charged under section 80D of the repealed Income Tax Ordinance, 1979 ("Ordinance") by virtue of section 6 of the Protection of Economic Reforms Act, 1992 ("Act") read with clause 122C, Part-I of the Second Schedule to the Ordinance---Held, that section 80D of the Ordinance introduced in the year 1991, much after the insertion of Clause 122C, was a non obstante provision and therefore overrode the other provisions of the Ordinance including any tax exemption granted under the Ordinance prior to the introduction of section 80D---Additionally, the industrial undertakings in the present case were set up after 07.11.1990 which was after the timeframe provided in clause 122C---"Economic reforms" which were protected under the Act were the ones that were announced, promulgated or implemented by the Government on or after the 7th day of November, 1990---"Economic reforms" also included "fiscal incentives for industrialization"---Section 6 of the Act, simply protected the "economic reforms" already introduced for a specified term and mandated that they shall not be altered to the disadvantage of the taxpayer---Fiscal incentives (part of the "economic reforms") that were protected under section 6 were the fiscal incentives that were announced, promulgated and implemented by the Government on or after 07.11.1990---Thus, the two notifications mentioned in the Schedule to the Act were tax incentives announced in December 1990---Section 6 also protected other fiscal incentives notified under the statutes mentioned in section 3 of the Act but the condition precedent for the "economic reforms" (including the fiscal incentives) to enjoy the protection of the Act was that they must have been announced, promulgated or implemented by the Government on or before 07.11.1990---In the present case, the fiscal incentive under clause 122C of Part-I of the Second Schedule was promulgated in 1987---Argument of the counsel for the taxpayer that the industrial undertaking set up by the respondents was after 07.11.1990 was immaterial; it was the promulgation of the fiscal incentive by the Government that had to be on or before 07.11.1990 and not the actual setting up of the industrial undertaking---Even otherwise, if the industrial undertaking was setup after 07.11.1990 then clause 122C does not apply as it only applied to industrial undertaking setup between January 1987 to June, 1988---Appeals were allowed.

Elahi Cotton Mills Ltd v. Federation of Pakistan PLD 1997 SC 582 distinguished.

Ghulam Shoaib Jally, Advocate Supreme Court for Appellants/ Petitioners (in all cases except C.As. Nos. 529 - 531 of 2013).

Jamroz Khan Afridi, Advocate Supreme Court for Appellants/ Petitioners (in C.As. Nos. 529 - 531 of 2013).

Ch. Akhtar Ali, Advocate-on-Record for Appellants/Petitioners (in C.A. No. 630 of 2010).

Syed Rifaqat Hussain Shah, Advocate-on-Record for Appellants/ Petitioners (in C.As. Nos. 159 - 178 of 2013).

Bahadur Sher Afridi, Additional Commissioner FBR.

Amjad Hameed Ghori, Advocate Supreme Court for Respondents (in C.As. Nos. 161, 300-306 of 2013 and 1416-1418 of 2014).

Abdul Rauf Rohaila, Advocate Supreme Court (through video-link) (in C.As. Nos. 162 - 163 of 2013).

Aftab Alam Yasir, Advocate Supreme Court for Respondents (in C.As. Nos. 168 - 175 of 2013).

Sh. Mehmood Ahmed, Advocate-on-Record for Respondents (in C.As. Nos. 176 - 178 of 2013).

Date of hearing: 6th September, 2022.

JUDGMENT

SYED MANSOOR ALI SHAH, J.---The question of law before us is whether the respondent taxpayers enjoyed exemption from the payment of minimum tax charged under section 80D of the repealed Income Tax Ordinance, 1979 ("Ordinance") by virtue of section 6 of the Protection of Economic Reforms Act, 1992 ("Act") read with clause 122C, Part-I of the Second Schedule to the Ordinance.

2. Briefly the common facts are that the respondent taxpayers were assessed for minimum tax on income under section 80D of the Ordinance by the tax officer. The said assessment order was approved by the CIT (Appeals). However, upon appeal the Tribunal set aside the said assessment and deleted the amount of minimum tax on

income on the ground that the respondents enjoyed exemption from tax under section 6 of the Act read with clause 122C, Part-I of the Second Schedule to the Ordinance. The Department agitated the matter before the High Court by filing Tax References which were decided against the Department on different dates through separate orders on the ground that the industrial undertakings of the respondents having been setup after 07.11.1990 were entitled to the relief under section 6 of the Act. The listed civil appeals, with the leave of the court, challenge these orders of the High Court.

3. Learned counsel for the Department submits that the respondents are not entitled to exemption from minimum tax on income under section 80D of the Ordinance by virtue of section 6 of the Act as it does not grant cover to fiscal incentives under clause 122C of Part-I of the Second Schedule to the Ordinance. He adds that date of setting up of the plant by the taxpayer is not relevant but what is relevant is the date of the announcement, promulgation and implementation of the fiscal incentive by the Government. On the other hand, learned counsel for the respondent taxpayers relying on Elahi Cotton Mills[1] and Zaman Cotton Mills[2] submitted that the respondent taxpayers were entitled to the exemption from the levy of minimum tax on income under section 80D of the Ordinance by virtue of section 6 of the Act read with clause 122C of Part-I of the Second Schedule to the Ordinance.

4. We have heard the learned counsel for the parties at some length and have examined the case record and the law on the subject. Examining the relevant provisions of law in a chronological order helps understand the scheme of the law.

5. The Second Schedule to the Ordinance deals with "Exemptions from Total Income" under section 14(1) of the Ordinance. One such exemption was introduced under Clause 122C of the Second Schedule on 22.01.1987[3] which provided as under: -

(122C) Profits and gains derived by an assessee from an industrial undertaking set up between the first day of January, 1987 and the thirtieth day of June, 1988, both days inclusive, for a period of ten years beginning with the month in which the undertaking is set up for commercial production is commenced, whichever is later. (emphasis supplied)

Subsequently, section 80D (minimum tax on income) was introduced through Finance Ordinance, 1991 and is reproduced hereunder:

80D. Minimum tax on income of certain persons. (1) Not-withstanding anything contained in this Ordinance or any other law for the time being in force, where no tax is payable or paid by a company or a registered firm, an individual, an association of persons, an unregistered firm or a Hindu undivided family which, not being a company, does not qualify for assessment under the self assessment scheme under subsection (1) of section 59 resident in Pakistan or the tax payable or paid is less than on-half per cent of the amount representing its turnover from all sources, the aggregate of the declared turnover shall be deemed to be the income of the said company or a registered firm, an individual, an association of persons, an unregistered firm or a Hindu undivided family which, not being a company, does not qualify for assessment under the self assessment scheme under subsection (1) of section 59 and tax thereon shall be charged in the manner specified in subsection (2).

Explanation.- For the removal of doubt, it is declared that the expression "where no tax is payable or paid" and "or the tax payable or paid" apply to all cases where tax is not payable or paid for any reason whatsoever including any loss of income, profits or gains or set off of loss of earlier years, exemption from tax, credits or rebates in tax, and allowances and deductions (including depreciation) admissible under any provision of this Ordinance or any other law for the time being in forced.

...

...

(emphasis supplied)

Section 80D of the Ordinance introduced in the year 1991[4], much after the insertion of Clause 122C, is a non-obstante provision and therefore overrides the other provisions of the Ordinance including any tax exemption granted under the Ordinance prior to the introduction of section 80D[5]. Additionally, according to the learned counsel for the appellant the industrial undertakings were set up after 07.11.1990 which is after the timeframe provided in clause 122C.

6. Now let us see if the promulgation of the Protection of Economic Reforms Act, 1992[6] on 28.07.1992 provides any additional protection to clause 122C by diluting the effect of section 80D of the Ordinance. Sections 2(b), 3, 6 and the Schedule to the Act require examination and are, thus, reproduced hereunder:-

Section 2(b)

"economic reforms" means economic policies and programmes, laws and regulations announced, promulgated or implemented by the Government on and after the seventh day of November, 1990, relating to privatization of public sector enterprises, and nationalized banks, promotion of savings and investments, introduction of fiscal incentives for industrialization and deregulation of investment, banking, finance, exchange and payments systems, holding and transfer of currencies; and

Section 3

Act to override other laws.--This Act shall have effect notwithstanding anything contained in the Foreign Currency Accounts (Protection) Ordinance, 2001 (L of 2001).

Section 6

Protection of fiscal incentives for setting up of industries.---The fiscal incentives for investment provided by the Government through the statutory orders listed in the Schedule or otherwise notified shall continue in force for the term specified therein and shall not be altered to the disadvantage of the investors.

The Schedule (See section 6)

1. Notification No. SRO 1283(I)/90, dated the 13th December, 1990, issued under subsection (2) of section 14 of the Income Tax Ordinance, 1979 (XXXI of 1979)

2. Notification No. SRO 1284(I)/90, dated the 13th December, 1990, issued under section 19 of the Customs Act, 1969 (IV of 1969).

The purpose of the Act as per its preamble is to provide legal protection to economic reforms that have already been introduced and are in the process of being introduced in order to create confidence in the establishment and continuity of the liberal economic environment created by these economic reforms. Collective reading of the above re produced provisions show that "economic reforms" which are protected under the Act are the ones that were announced, promulgated or implemented by the Government on or after the 7th day of November, 1990. "Economic reforms" also include "fiscal incentives for industrialization"[7]. Section 6, simply protects the "economic reforms" already introduced for a specified term and mandates that they shall not be altered to the disadvantage of the taxpayer. The fiscal incentives (part of the "economic reforms") that are protected under section 6 are the fiscal incentives that were announced, promulgated and implemented by the Government on or after 07.11.1990. Therefore, the two notifications mentioned in the Schedule to the Act are tax incentives announced in December 1990. Section 6 also protects other fiscal incentives notified under the statutes mentioned in section 3 of the Act but the condition precedent for the "economic reforms" (including the fiscal incentives) to enjoy the protection of the Act is that they must have been announced, promulgated or implemented by the Government on or before 07.11.1990. In this case the fiscal incentive under clause 122C of Part-I of the Second Schedule was promulgated in 1987. The argument of the learned counsel for the taxpayer that the industrial undertaking set up by the respondents was after 07.11.1990 is immaterial. It is the promulgation of the fiscal incentive by the Government that has to be on or before 07.11.1990 and not the actual setting up of the industrial undertaking. Even otherwise, if the industrial undertaking was setup after 07.11.1990 then clause 122C does not apply as it only applied to industrial undertaking setup between January 1987 to June, 1988.

7. The reliance by the learned counsel for the respondents on Elahi Cotton and Zaman Cotton is also misconceived. The relevant finding of this Court in Elahi Cotton for the purpose of this case, which was simply followed by Zaman Cotton, is as follows:

54. In our view, since the provisions of Act XII of 1992 are subsequent in time and as they are contained in a special statute, they shall prevail over the provisions of section 80-D of the Ordinance, which was enacted through Finance Act, 1991, which was an earlier statute and which was part of general statute. In this view of the matter, assesses who fulfil the conditions of the notifications referred to in the Schedule to section 6 of Act XII of 1992, are entitled to the protection.

The above shows that protection of the Act was extended to the notification under the Schedule of the Act which was dated 13.12.1990 and therefore met the requirement of the relevant date i.e., 07.11.1990. There is no cavil with the law settled by Elahi Cotton that the Act protects fiscal incentives otherwise taken away by section 80D provided the fiscal incentives in question must have been announced, promulgated or implemented by the Government on or after 07.11.1990, which is not so in the present case.

8. For the above reasons, the impugned orders are set aside and these appeals are allowed. The connected civil petitions are also converted into appeals and allowed in the same terms.

MWA/C-22/SC Appeals allowed.