**Law and the super tax: Part - II**

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Friday, Aug 18, 2023

The second point in the judgment authored by the Honourable Justice Sardar Ejaz Ishaq Khan in the case titled ‘M/s Fauji Fertilizer Company Limited & another v Federation of Pakistan & others’ was germane to Past & Closed Transactions.

The petitioners rested their case on the ground that retrospective legislation could not override rights acquired under transactions past and closed or, preferably, rights acquired under ‘facts and events that have already occurred’. The petitioner, Fauji Foundation, urged that under Section 74 of the ordinance, it was granted a special tax year, ending on December 31, whereas the super tax was levied on July 1, 2022 for the tax year 2022 and onwards, latching on to tax year 2022 for the petitioner, which for purposes of chargeability of income to tax closed on December 31, 2021.

It was contended by the petitioner that between December 31, 2021 and June 30, 2022, several transactions were undertaken by them, without a super tax visible on the horizon. The petitioner further challenged the super tax for being charged on ‘events that had already occurred’, by supplementing their annual audited financials which were laid in their Annual General Meeting. Contingent upon these finalized audited accounts, Fauji Foundation declared and paid dividends at 46.5 per cent of post-tax profits, in the sum of Rs5.9 billion. The payment of dividend and other financial commitments made these past and closed transactions.

Other petitioners, such as M/s Askari Bank Employees Provident Fund, also complained in a similar vein, contending that the trustees of the provident fund approved and finalized their financial statements on February 4, 2022, disbursing circa Rs508 million and permanent withdrawals of circa Rs82 million, with the remaining amounts credited to the accounts of 6330 employees of the bank. These transactions were also held to be irreversible transactions, undertaken on the basis of the funds tax liability for the special tax year ending on December 31, 2021.

Reliance, in this regard, was placed upon Blodgett v Holden, wherein the United States Supreme Court declared Section 319 of the Revenue Act, 1924 unconstitutional as it levied a tax on the transfer of property made prior to the date of enforcement of Section 319, by successively declaring retrospective taxation of consummated transactions as ‘arbitrary’ and ‘wholly unreasonable’.

The third point deliberated upon was that the new category of income, as envisaged under 4C (2), excluded, depreciation, amortization allowances and carried-forward losses, the applicability of which was provided for under Section(s) 22 to 24, and 56 to 59-A of the ordinance, thereby conflicting with the extant provisions along-with encroaching upon the rights secured by taxpayers, allowing them to carry-forward their losses under the ordinance.

The question of the aforesaid extant provisions of the ordinance yielding to 4C was one which was framed for the court to answer. Furthermore, the taxable income, as per clause (ii) of 4C (2), was in irreconcilable conflict with the ‘taxable income’ envisaged by the ordinance.

Reliance in this regard on the question of inter-se repugnancy of provisions in the same statute was placed upon the reasoning in ‘Shell Pakistan Limited v Federation of Pakistan & Others’. It was held that the right to be taxed in accordance with law, as stipulated under Article 77 of the constitution, accrued and matured on the closing date of the tax accounting year qua final tax on such classes, and 4C to the extent of taxing them again was deemed to be a violation of Article 4 of the constitution, read with Section 4 & 8 of the ordinance, stipulating taxes on such classes of income to be the final tax.

The FBR’s replies to the various petitions candidly conceded that the rather extraordinary taxation measures were adopted at the instance of the International Monetary Fund, and that: “Pakistan is in the IMF’s Extended Fund Facility Program and the 7th review was in progress; in order to provide fiscal space to the government this year the FBR has agreed to collect PKR 7.470 billion which is PKR 2.15 billion more than the IMF’s own estimate”.

The judgment provided a comprehensive answer to the above, by way of posing a question of its own in the following tone: “Who will answer the question as to why the hole sought to be filled by super tax had not been closed by the wise parliament by ensuring over the past few decades that the government recouped that sum by setting its own house in order, instead of expressing its wisdom in asking the taxpayer to come to the rescue, yet again?”

The industry-specific grounds contained two underlying notions: (i) concerned with the petitioners were provident, pensions and gratuity funds, whose income was exempt from tax under the Second Schedule of the Ordinance; and (ii) the petroleum industry. With regard to the former, the FBR contended that the exemptions were taken away when 4C was promulgated. Resultantly, the recovery notices and show-cause notices issued to benevolent funds were set aside and declared to be issued unlawfully.

The contention with regard to the petroleum industry was that on the date a Petroleum Concession Agreement (PCA) was signed, the law on taxation including the rates of tax, were held to be frozen in respect of the income that may be derived by exploiting the concession, which was the subject of the PCA. The pact between the president of Pakistan (the grantor of the concession) and the concessionaire company is termed as the ‘freezing clause’, found in all PCAs.

The crux of the petitioners’ argument was that taxation liability froze on the date the PCAs were signed and it was on the basis of that certainty, as to the exposure to taxation that the petroleum investors decided to come forward to sign the PCAs. Thereby committing their taxation, and therefore any taxation which exceeded the tax exposure, violated the statutory command. The court, therefore, held that super tax for such exploration and production companies, could not be charged by virtue of the protection conferred on them under the PCAs.

Consequentially, 4C was held to be read down (with a preference to save, rather than destroy), having prospective application only, and not to be applied to benevolent funds (holding exemptions from tax), petroleum and exploration companies and transactions or events past and closed on or before June 30, 2022.

Conclusively; it can be stated, with the utmost honesty, that the judgment rendered by the Honourable Justice Sardar Ejaz Ishaq Khan, in declaring 4C to be unconstitutional, is an ode to his intellectual dexterity, which shines brilliantly through his judicious interpretation of convoluted tax codes and his ability to distill intricate financial concepts into a coherent and justifiable judgment, a testament to his exceptional legal acuity in the realm of taxation.

Concluded

The writer is a lawyer.