

IN THE HIGH COURT OF SINDH, KARACHI

PRESENT:

MR. JUSTICE AQEEL AHMED ABBASI.
MR. JUSTICE MAHMOOD A. KHAN.

Constitutional Petition No. D – 1019 of 2019

Muhammad Ayaz Khan and others

Constitutional Petition No. D – 1046 of 2019

Ashfaq Muhammad Awan and another

Vs.

Federation of Pakistan & others

Petitioners: through Mr. Khalid Javed Khan and
Ms. Amber Lakhani, Advocates
Mr. Muhammad Ali Lakhani
a/w Syed Ali Zaidi, Advocates

Respondents: through Mr. Shahid Ali Qureshi and
Mr. Irfan Mir Halepota, Advocates

Federation: through Mr. Muhammad Ameenullah
Siddiqui, Assistant Attorney General

Date of Hearing: 07.07.2020.

Date of Judgment: 24.07.2020.

JUDGMENT

Aqeel Ahmed Abbasi, J.: In C.P.No.D-1019/2019, petitioners along with other Members of Establishment of Sindh High Court, including Private Secretaries, Personal Assistants and Court Associates etc. have expressed their grievance against deduction of income tax on the **Judicial Allowance** and **Special Judicial Allowance** from their salaries at source under Section 149 of the Income Tax Ordinance, 2001, by the respondent No.4 i.e. Accountant General Sindh. According to petitioners, such deduction of tax is illegal as both

these allowances are exempted from levy of income tax under Section 39 Part 1 to the Second Schedule to the Income Tax Ordinance, 2001. It has been prayed that collection of income tax against Judicial Allowance and Special Judicial Allowance from the petitioners' salary by the respondent No.4 may be declared to be illegal and without lawful authority. Whereas, in C.P.No.D-1046 of 2019 filed by the petitioners, and other Members of the Establishment sub-ordinate judiciary of Province of Sindh, similar grievance has been expressed by petitioners, who have prayed for the same relief accordingly. However, in this petition, a separate legal ground in addition to above legal ground of exemption has been agitated by the petitioners, according to which, **Judicial Allowance** and **Special Judicial Allowance** are excluded from the purview of imposition of income tax under Section 12(2)(c) of the Income Tax Ordinance, 2001, therefore, no tax deduction can be made from the salary of the petitioners in respect aforesaid allowances. In support of above submissions, reference to Entry 39 in Part 1 Schedule II to the Income Tax Ordinance, 2001, has also been made, according to which "Any special allowance or benefit (not being entertainment or conveyance allowance) or other perquisite within the meaning of Section 12 **specially granted to meet expenses wholly and necessarily incurred in the performance of duties of an office or employment of profit**", is exempted from income tax. Therefore, according to petitioners both these allowances are spent towards performance of duties of employment, hence, exempted from withholding of tax under Section 149 of the Income Tax Ordinance, 2001.

2. It has been argued by the learned counsel for the petitioners that from perusal of definition of the term salary given under Section 12 of the Income Tax Ordinance, 2001, and bare reading of Entry No.39 as referred to hereinabove, it is clear that exclusion provided under Section 12(2)(c) of the Income Tax Ordinance, 2001, reflects the clear intention of the legislature not to include the aforesaid Judicial Allowance and Special Judicial Allowance in the salary for the purposes of charging tax thereon, therefore, according to learned counsel for the petitioners, withholding of amount of income tax by treating the Judicial Allowance and Special Judicial Allowance as part of taxable salary income is illegal and without lawful authority. In support of their contention, learned counsel

for the petitioners have placed reliance in the recent judgments of Peshawar High Court in the case of **Muhammad Asif and others v. Federation of Pakistan and others (2018 PTD 806)** as well as judgment of the Lahore High Court in the case of **Syed Shabbir Shah v. Federation of Pakistan and others in W.P. No.243868/2018**, whereby, according to learned counsel for the petitioners, it has been held that deduction of income tax on the Judicial Allowance and Special Judicial Allowance from the salary of the Members of District Judiciary and Members of Establishment of Lahore High Court and Peshawar High Court, is illegal and without lawful authority.

3. Conversely, learned counsel for the respondent has opposed the above contention of the learned counsel for petitioners and submitted that every income is chargeable to tax unless exempted. According to learned counsel for the respondent, keeping in view the exhaustive definition of the term salary given under Section 12 of the Income Tax Ordinance, 2001, it is clear that all the benefits and the allowances are part of salary income, therefore, rightly subjected to withholding of income tax by Accountant General of Sindh. It has been further argued by learned counsel for the respondents that claim of exemption of both these allowances is not available under the 2nd Schedule to the Income Tax Ordinance, 2001, whereas, burden is upon petitioners to prove that such amount is exclusively used and spent for the performance of their duties.

4. We have heard the learned counsel for the parties, examined the record, relevant provisions of law, and have also gone through the judgments relied upon by the learned counsel for the parties in support of their contention. For resolution of dispute agitated in these petitions, we have to examine the relevant provisions of the Income Tax Ordinance, 2001 relating to chargeability of taxable salary income in terms of Section 12, as well as the provisions of Section 4, 9, 10 and 11 of the Income Tax Ordinance, 2001, which read as follows:-

4. Tax on taxable income.— (1) Subject to this Ordinance, income tax shall be imposed for each tax year, at the rate or rates specified in Division I, IB or II of Part I of the First Schedule, as the case may be, on every person who has **taxable income** for the year.

(2) The income tax payable by a taxpayer for a tax year shall be computed by applying the rate or rates of tax applicable to the taxpayer under this Ordinance to the **taxable income** of the taxpayer for the year,

and from the resulting amount shall be subtracted any tax credits allowed to the taxpayer for the year.

(3) Where a taxpayer is allowed more than one tax credit for a tax year, the credits shall be applied in the following order –

- (a) any foreign tax credit allowed under section 103; then
- (b) any tax credit allowed under Part X of Chapter III; and then
- (c) any tax credit allowed under sections ²[] 147 and 168.

(4) Certain classes of income (including the income of certain classes of persons) may be subject to –

- (a) separate taxation as provided in sections 5, 6 and 7; or
- (b) collection of tax under Division II of Part V of Chapter X or deduction of tax under Division III of Part V of Chapter X as a final tax on the income ³[of] the person.

(5) Income referred to in sub-section (4) shall be subject to tax as provided for in section 5, 6 or 7, or Part V of Chapter X, as the case may be, and shall not be included in the computation of taxable income in accordance with section 8 or 169, as the case may be.

(6) Where, by virtue of any provision of this Ordinance, income tax is to be deducted at source or collected or paid in advance, it shall, as the case may be, be so deducted, collected or paid, accordingly.

9. Taxable income.—The taxable income of a person for a tax year shall be the **total income** ¹[under clause (a) of section 10] of the person for the year reduced (but not below zero) by the total of any deductible allowances under Part IX of this Chapter of the person for the year.

10. Total Income.— The total income of a person for a tax year shall be the sum of the

- (a) person's income under all **heads of income** for the year; and
- (b) person's income exempt from tax under any of the provisions of this Ordinance.

11. Heads of income.— (1) For the purposes of the imposition of tax and the computation of total income, all income shall be classified under the following heads, namely: —

- (a) Salary;**
- (b) Income from Property;
- (c) Income from Business;
- (d) Capital Gains; and
- (e) Income from Other Sources.

(2) Subject to this Ordinance, the income of a person under a head of income for a tax year shall be the total of the amounts derived by the person in that year **that are chargeable to tax under the head** as reduced by the total deductions, if any, allowed under this Ordinance to the person for the year under that head.

(3) Subject to this Ordinance, where the total deductions allowed under this Ordinance to a person for a tax year under a head of income exceed the total of the amounts derived by the person in that year that are chargeable to tax under that head, the person shall be treated as sustaining a loss for that head for that year of an amount equal to the excess.

(4) A loss for a head of income for a tax year shall be dealt with in accordance with Part VIII of this Chapter.

(5) The income of a resident person under a head of income shall be computed by taking into account amounts that are Pakistan-source income and amounts that are foreign-source income.

(6) The income of a non-resident person under a head of income shall be computed by taking into account only amounts that are Pakistan-

source income

12. Salary.— (1) Any salary received by an employee in a tax year, other than salary that is exempt from tax under this Ordinance, shall be chargeable to tax in that year under the head —Salary.

(2) Salary means any amount received by an employee from any employment, whether of a revenue or capital nature, including —

- (a) any pay, wages or other remuneration provided to an employee, including leave pay, payment in lieu of leave, overtime payment, bonus, commission, fees, gratuity or work condition supplements (such as for unpleasant or dangerous working conditions)
- (b) any perquisite, whether convertible to money or not;
- (c) the amount of any allowance provided by an employer to an employee including a cost of living, subsistence, rent, utilities, education, entertainment or travel allowance, **but shall not include any allowance solely expended in the performance of the employee's duties of employment;**
- (d) the amount of any expenditure incurred by an employee that is paid or reimbursed by the employer, other than expenditure incurred on behalf of the employer in the performance of the employee's duties of employment;
- (e) the amount of any profits in lieu of, or in addition to, salary or wages, including any amount received —
 - (i) as consideration for a person's agreement to enter into an employment relationship;
 - (ii) as consideration for an employee's agreement to any conditions of employment or any changes to the employee's conditions of employment;
 - (iii) on termination of employment, whether paid voluntarily or under an agreement, including any compensation for redundancy or loss of employment and golden handshake payments;
 - (iv) from a provident or other fund, to the extent to which the amount is not a repayment of contributions made by the employee to the fund in respect of which the employee was not entitled to a deduction; and
 - (v) as consideration for an employee's agreement to a restrictive covenant in respect of any past, present or prospective employment;
- (f) any pension or annuity, or any supplement to a pension or annuity; and
- (g) any amount chargeable to tax as "Salary" under section 14.

(3) Where an employer agrees to pay the tax chargeable on an employee's salary, the amount of the employee's income chargeable under the head "Salary" shall be grossed up by the amount of tax payable by the employer.

(4) No deduction shall be allowed for any expenditure incurred by an employee in deriving amounts chargeable to tax under the head "Salary".

(5) For the purposes of this Ordinance, an amount or perquisite shall be treated as received by an employee from any employment regardless of whether the amount or perquisite is paid or provided —

- (a) by the employee's employer, an associate of the employer, or by a third party under an arrangement with the employer or an associate of the employer;
- (b) by a past employer or a prospective employer; or
- (c) to the employee or to an associate of the employee ¹[or to a third party under an agreement with the employee or an associate of the employee.]

(6) An employee who has received an amount referred to in sub-clause (iii) of clause (e) of sub-section (2) in a tax year may, by notice in writing to the Commissioner, elect for the amount to be taxed at the rate computed in accordance with the following formula, namely: —

A/B%

where —

A is the total tax paid or payable by the employee on the employee's total taxable income for the three preceding tax years; and

B is the employee's total taxable income for the three preceding tax years.

(7) Where —

- (a) any amount chargeable under the head "Salary" is paid to an employee in arrears; and
- (b) as a result the employee is chargeable at higher rates of tax than would have been applicable if the amount had been paid to the employee in the tax year in which the services were rendered,

the employee may, by notice in writing to the Commissioner, elect for the amount to be taxed at the rates of tax that would have been applicable if the salary had been paid to the employee in the tax year in which the services were rendered.

(8) An election under sub-section (6) or (7) shall be made by the due date for furnishing the employee's return of income or employer certificate, as the case may be, for the tax year in which the amount was received or by such later date as the Commissioner may allow.

5. There seems no dispute with regard to approval, sanction by the Competent Authority and disbursement of the amount of **judicial allowance** and **special judicial allowance** to the Members of the establishment of **Sindh High Court at Principal Seat, Bench at Sukkur and Circuit Courts at Hyderabad and Larkana**, as well as to the employees of the subordinate judiciary in the Province of Sindh by the Hon'ble Chief Justice Sindh High Court, and the Government of Sindh through Finance Department with the approval of the **worthy Chief Minister**, through various orders and office memorandums as

annexed with C.P.No.No.D-1019/2019 at Page: 13 to 25 as A/1 to A/3, B, C/1 and C/2 respectively, whereas, reference in this regard can also be made to case of *Amanullah Khan Yousufzai and others v. Federation of Pakistan and others* reported as **PLD 2011 Karachi 451**, wherein, a Divisional Bench of this Court has already dealt with the issue in the following terms:-

“64. And in view of the discussion made above, Constitution Petitions No. D-1930/09, C.P No. D-1465/09 and C.P D-2433/09 are disposed of in following terms:

1. The Government of Sindh is directed to pay Special Judicial Allowance equal to three times of the initial of their substantive pay scale (as allowed in Province of Punjab through notification dated 12-8-2008) with effect from 1-3-2010 when such allowances were extended to Servants and Employees of the High Court Establishment, (through Notification dated 2-4-2010 by the then honourable Chief Justice of High Court of Sindh) .to all the Judicial Officers of the District Judiciary including those working on ex-cadre posts, which shall include the District and Sessions Judges, Additional District and Sessions Judges, Senior Civil Judges, all Civil Judges and Judicial Magistrates working under the control, superintendence, and within the territorial jurisdiction of the High Court of Sindh per Article 203 of the Constitution, 1973.

2. Similarly, the employees and servants of establishment of Subordinate Judiciary/District Judiciary (Sindh Judicial Service) and that of Courts and Tribunal established under Federal or Provincial law, which are under the control, superintendence, of High Court of Sindh and functioning and discharging duties within the territorial jurisdiction of the High Court of Sindh per Article 203 of the Constitution, 1973 are also granted the same relief as is allowed through this order to the Judicial Officers referred to in para 1 above and in the same manner.

3. In view of financial constraints of the Provincial Government of Sindh, we would direct that the arrears to the Judicial officers of District Judiciary including Judicial Officers discharging judicial function/duty in Courts/Tribunal established under either Federal or Provincial law with effect from 1st March, 2010 to 30th June, 2011 shall be paid in monthly instalment together with and in addition with the monthly salary with effect from 1st January, 2012 till such time entire arrears with effect from 1-3-2010 are totally set off.

4. Government of Sindh and Government of Pakistan are also directed to take steps and initiate such legislative measures as may be necessary to empower High Court of Sindh and or the Chief Justice of High Court of Sindh to fix and determine the pay scale of

members of Sindh Judicial Service including judicial officers and servants and employees of Sindh Judicial Service in consonance with Article 203 and other enabling Articles of the Constitution of Pakistan and as per direction given in the case of Government of Balochistan v. Azizullah Memon, PLD 1993 SC 341 to fully secure financial independence and separation of judiciary from executive.

5. *Government of Sindh and Government of Pakistan are further directed to take such steps and legislative measures as may be necessary to empower High Court of Sindh and or the Chief Justice of High Court of Sindh to appoint, determine terms and conditions of employment, emolument, disciplinary proceedings removal from service and other incidental power and authority as regard Presiding Officers, servants and employees of Courts and Tribunals established under the Provincial and Federal laws in consonance with Article 203 and in implementation of Article 175(3) of the Constitution of Pakistan, which are under fly' control and superintendence, of High Court of Sindh and are functioning and discharging duties within the territorial jurisdiction of the High Court of Sindh as per Article 203 of the Constitution, 1973 and as per direction given in the case of Mehram Ali and others v. Federation of Pakistan and others, PLD 1998 SC 1445 and in case of Government of Balochistan v. Azizullah Memon, PLD 1993 SC 341.*

6. *Registrar High Court of Sindh is directed to intimate Government of Sindh and Government of Pakistan to take immediate steps for the implementation and compliance of above order/directive."*

6. However, the only grievance expressed in these petitions relates to deduction of income tax by the Accountant General of Sindh i.e. respondent No.4 from the salary of petitioners and other Members of the establishment of Sindh High Court as well as the Members of Subordinate Judiciary in Province of Sindh on the amounts paid towards **judicial allowance** and **special judicial allowance**, by treating the same as part of their taxable salary income, hence, chargeable to tax. It is settled legal position that while imposing any tax or levy upon its subject, the Legislature has to impose the same through clear and unambiguous language as per Constitutional mandate and Legislative competence. The Federation has the authority to impose Federal taxes under Article 73 of the Constitution of Islamic Republic of Pakistan, 1973 as per various Entries of the Federal Legislative List, provided under Fourth Schedule to the Constitution, however, by ensuring that such imposition of tax does not violate

the Fundamental Rights of citizens, and does not create any discrimination amongst the same class of person, upon whom such charge of tax has been created. It is also settled legal position that unless the charge of tax is created through clear and unambiguous language, there is no scope of any intendment or presumption about a tax, whereas, charging provisions are required to be strictly interpreted. Suffice to state that any income, person or class of persons, cannot be brought within the tax net by mere intendment, presumption or fiction of law, unless charge has been created through clear and unambiguous language reflecting intention of Legislature. A Divisional Bench of this Court in the case of **Collector of Sales Tax & Federal Excise v. Messrs Abbott Laboratories (Pakistan) Ltd.** reported as **2010 PTD 592**, while interpreting the charging and exemption provisions in a taxing Statute has been pleased to hold as under:-

“It is trite principle of interpretation of a taxing statute that charging provisions are required to be construed strictly. It is also a trite principle that in taxing statute, a tax on any person is to be levied by clear and unambiguous words and the expressions used in charging sections are not to be stretched by any process of interpretation, so as to bring a person within the tax net not falling under the clear and plain language of the statute. Similarly it is also a trite principle of interpretation of taxing statute that if there is any ambiguity the same has to be resolved in favour of subject. We are guided in this regard by al judgment of the Honourable Supreme Court reported as re: Province of Punjab v. Muhammad Aslam 2004 SCMR. 1649 in which it has been held as under:

"The provisions of the Act of 1958, being a taxing statute, are required to be construed strictly. There is no intendment or presumption about a tax. We have to go by the language clearly employed by the legislature in the fiscal statute."

Similarly, in another judgment reported as Commissioner of Income Tax Companies-II, Karachi v. Messrs Muhammad Usman Hajrabai Trust Imperial Courts, Karachi, Division Bench 2003 PTD 577 of this Court has held as under:

(a) "By now, it is a established principle of the interpretation of fiscal statutes that, a tax on any person is to be levied by clear and unambiguous words and the expressions-used in the charging sections are not to be stretched by any process of interpretation so as to bring a person within the tax net, not falling under the clear and plain language of the statute."

7. The charge of income tax is created under **Section 4** of the Income Tax Ordinance, 2001, according to which, subject to this Ordinance, **income tax shall be imposed** for the each tax year, **on every person**, who has **taxable income**, for which tax year at the rate and rates as specified in Division I, IB or II of Part I of the First Schedule as the case may be. The term **taxable income** has been defined under **Section 9** of the Income Tax Ordinance, 2001, according to which, the **taxable income** of a person for a tax year shall be the **total income [under clause (a) of section 10]** of the person for the year reduced (but not below zero) by the total of any deductible allowances under Part IX of this Chapter of the person for the year, whereas, the term **total income** has been defined under **Section 10** of the Income Tax Ordinance, 2001, according to which, the **total income of a person** for a tax year shall be the sum of the (a) person's income under **all heads of income** for the year; and (b) person's income **exempt from tax** under any of the provisions of this Ordinance. The terms **heads of income** under **Section 11** of the Income Tax Ordinance, 2001 has been defined, according to which, for the purposes of the imposition of tax and the computation of total income, all income shall be classified under the following heads, namely, (a) **Salary**; (b) Income from Property; (c) Income from Business; (d) Capital Gains; and € Income from other Sources. **Section 12** of the Income Tax Ordinance, 2001 defines the term salary. Whereas, for the purposes of the subject controversy agitated through instant petitions, we have to examine the provisions of sub-section (1) and sub-section (c) of sub-section (2) of Section 12 of the Income Tax Ordinance, 2001, in order to appreciate the chargeability of income of a person falling under the head **Salary**. According to sub-section (1) of Section 12, any amount of salary received by an employee in a tax year, other than salary that is exempt from tax under this Ordinance, shall be chargeable to tax to tax in that year under the head "Salary". In other words, whatever amount received by an employee from any employment as detailed in Section 12 is chargeable to tax, unless it is exempted from tax under the Ordinance 2001. However, it is pertinent to note that under Section 12 of the Income Tax Ordinance, 2001, the legislature, while bringing various type of amounts including pay, wages and other remuneration etc. provided to an employee, within the

definition of the term salary, under sub-section (c) of sub-section (2) of Section 12 of the Income Tax Ordinance, 2001, **any allowance solely expended in the performance of the employee's duties of employment**, has been excluded from the purview of definition of salary. In other words, whatever amount of remuneration, pay, wages, bonus, commission, fee, gratuity and allowances as detailed in Section 12 of the Income Tax Ordinance, 2001 by an employee are treated as part of Salary chargeable to tax, unless exempted from payment of tax as per Second Schedule to the Income Tax Ordinance, 2001. However, in the instant case, the issue does not relate to the claim of exemption from payment of tax under the Second Schedule to the Income Tax Ordinance, 2001, for the reason that according to petitioners, the amount of **judicial allowance** and **special judicial allowance** received by the petitioners towards performance of their judicial services and expended in the performance of duties of employment, **is not part of taxable income under the head salary in view of exclusion provided in terms of sub-section (c) of sub-section (2) of Section 12 of the Income Tax Ordinance, 2001**. Intention of the legislature, while providing exclusion of such allowances from the charge of taxation seems clear from the plain language of the law, whereas, an incentive has been given to the Members of the establishment of Sindh High Court as well as to the Members of the Establishment of sub-ordinate judiciary of the Province of Sindh, towards performance of their specialized judicial functions with complete sense of devotion and responsibility. Admittedly, similar treatment in respect of judicial allowance and special judicial allowance is already being given to the Members of the establishment of the Lahore High Court and the Peshawar High Court as well as Members of sub-ordinate judiciary in both the Provinces, which facts has not been disputed by the respondents.

8. It is pertinent to note that a Divisional bench of Peshawar High Court in the case of *Muhammad Asif & others v. The Federation of Pakistan and others* reported as **2018 PTD 806**, while examining the provisions of Section 12(2)(c) of the Income Tax Ordinance, 2001, has been pleased to hold as under:-

“8. Now moving on to the merits of the case; the terms 'salary' has been defined under section 12 (2) of the Ordinance, in terms that:-

"12. Salary.---(1) Any salary received by an employee in a tax year, other than salary that is exempt from tax under this Ordinance, shall be chargeable to tax in that year under the head "Salary".

(2) Salary means any amount received by an employee from any employment, whether of a revenue or capital nature, including--

(a)

(b)

(c) the amount of any allowance provided by an employer to an employee including a cost of living, subsistence, rent, utilities, education, entertainment or travel allowance, but shall not include any allowance solely expended in the performance of the employee's duties of employment."

9. The salary of a person, as defined in the Ordinance is clearly chargeable to Income Tax under subsection (1) of Section 12 of the Ordinance. However, the crucial issue to note is that the very definition of the salary expressly excludes from its purview and scope any allowance, which is solely "expended" in performance of the employee's duties of employment. The word expended has not been defined in the Ordinance, and so this Court following the cardinal principle of the interpretation of statutes, would render the said word its ordinary dictionary meanings. In doing so, it is noted that the word expended means;

"Spend or Use up"

(Concise Oxford English Dictionary).

To open up; UNFOLD,

To increase the extent, number, volume, or scope of; ENLARGE

To express at length or in greater detail;

To write out in full;

To subject to mathematical expansion;

To open out; SPREAD

To increase in extent, number, Volume, or scope.

To speak or write fully or in detail;

To feel generous or optimistic.

(Webster's New Explorer Encyclopedic Dictionary)

To use or spend.

(Chambers 21st-century Dictionary)

Spend or Use up

(The Australian Oxford Dictionary)

To use up time,

Energy,

Efforts, or

Some other resource.

(Encarta Dictionary (North America)

To spend;

To lay out;

To disburse;

To employ;

To waste

(Gem Practical Dictionary)

10. *On going through the above ordinary dictionary meaning of the word expend, one comes to the conclusion that it simply means to give or spend. Now, when we employ the said meaning to the word expended, the term 'salary', as explained in clause (c) of subsection (2) of section 12 of the Ordinance would not include any allowance, which is solely spent or given in furtherance of the performance of the employee's duties of employment.*

11. *In the present case, it is noted that the Special Judicial Allowance was allowed to the petitioners keeping in view the functions they were performing vide judgment of this Court dated 06.07.2010 in W.P.No.1098/2010 titled "Muhammad Sher Shah and others v. Government of Khyber Pakhtunkhwa and others". The relevant paras of the cited judgment, reads that:--*

"It is the constitutional obligation of the Government to provide speedy and inexpensive justice to the people. All the Judges, like the petitioners and their colleagues, and establishment / staff of the High Court are matchlessly confronting the phenomena without any let and lose, however, they are not paid the emoluments/salaries and allowances according to the cumbersome job done and according to their duration of working hours, as stated above, therefore, the inaction on the part of the Provincial Government for the last more than one year, not enhancing the judicial allowance, it has now agreed to enhance, was a grave omission on its part and the petitioners and others alike were grossly discriminated as the same were enhanced in the other two Provinces, much earlier without the intervention of the High Court. The Asian Development Bank has highlighted on its website that under the Access to Justice Program the Peshawar High Court and the District Judiciary of the Khyber Pakhtunkhwa has excellently achieved the target by deciding huge number of old cases. This message with commendable remarks alone was enough for the Provincial Government to have taken timely steps much prior to the other Provinces, providing the incentives for infusing new spirit in the Judicial Officers and the Staff of the High Court to do more. Such action would have produced more positive effects by compensating these devoted hard workers on one hand and thwarting anyone in the cadre to indulge in corruption. In our view, the Executive limb more particularly the Financial Managers of the Province were jealously thwarting the process and was putting a wrong picture before the democratically elected Government. Probably, it was, for this reason that the matter was delayed. This fact was more perceivable during the hearing of this petition at different occasion, as we closely watched them and their antecedents in this regard.

Despite of these omissions, we are constrained to appreciate the elected Government of Khyber Pakhtunkhwa for agreeing to the negotiated formula, without much reluctance, initially exhibited by the Administrative Secretaries and their Advisors. In our view, probably, the Chief Executive of the Province, the head of elected government, was

improperly briefed rather misguided by vested interest, however, when the ground realities were discovered, the agreed formula/settlement was thus materialized.

As the petitioners and others alike have worked hard day and night for more than two years for longer duration much beyond the office working hours required by the law, but they were not compensated, therefor, in the circumstances, it is highly justifiable to grant the petitioners and others alike, including the establishment / staff of the High Court one year arrears of the enhanced Special Judicial Allowance on the pattern and in the manner elaborately mentioned in our short order of the even date which shall be treated as part of this detailed judgment. The same is reproduced below for the sack of convenience:--

"For the detailed reasons to be recorded later, this petition is partially allowed. The respondents (Provincial Government of Khyber Pakhtunkhwa) is issued a writ, directing it to pay Special Judicial Allowance on the basis of one initial basic pay plus 50% of running basic pay with arrears of one initial pay but from 1st July, 2009 to all the Judicial Officers of the District Judiciary including those working on ex-cadre posts which shall include the District and Sessions Judges, Additional District and Sessions Judges, Senior Civil Judges/Special Magistrates and all Civil Judges/Magistrates working under the control and jurisdiction of the Peshawar High Court, Peshawar.

Similarly, the Establishment of the Peshawar High Court, Peshawar is also granted the same relief as is allowed through this order to the Judicial Officers referred to above and in the same manner/way.

Keeping in view the plea of financial constraints of the Provincial Government, we further direct that the arrears from 1st July, 2009 to 30th June, 2010 shall be paid in two installments, i.e. the 1st one shall be paid along with the monthly salary of August, 2010 in the first week of September, 2010 and the second half of the amount/installment be paid in the 1st week of January, 2011 with the monthly pay of December, 2010.

We further direct the respondents, particularly, the Establishment Department/Ministry, the Finance Department / Ministry, the Law Department/Ministry and the learned Advocate-General of Khyber Pakhtunkhwa to sit with the team of experts/Administrative Officers including the Registrar of the High Court to invent ways and means, to ascertain the areas where Court Fee on certain Petitions, Appeals, Revisions, Tax References, Review Petitions, Suits, Process Fee and on other alike matters can be reasonably levied and / or enhanced without burdening and taxing the poor litigants or the public-at-large. Further to raise the existing slab of Court Fee on different kind of cases/petitions to a reasonable extent not because the Province is suffering due to financial crises in view of the peculiar circumstances but also because that the local currency has constantly shown down trend due to depreciation and devaluation vis-a-vis foreign currency particularly, US \$, the main source

of exchange with it. No deviation from this order shall be made by the respondents in any manner whatsoever and on any pretext."

12. *The dicta of the above judgment clearly reflects that the Special Judicial Allowance granted to the petitioners was in appreciation of their performance of duties and thus would not fall within the scope of "Salary", and thereby not chargeable to Income Tax under the charging subsection (1) of section 12 of the Ordinance.*

13. *There is no cavil to the proposition that income chargeable to income tax can only be exempted from taxation if the same falls within the purview of the entries provided in the Second Schedule of the Ordinance. Much emphasis has been made by the worthy counsel for the Revenue that the Special Judicial Allowance does not fall within the Special Allowance or benefit provided under Item 39 of Part-I of the Second Schedule appended to the Ordinance, the same provides;-*

"Any special allowance or benefit (not being entertainment or conveyance allowance) or other perquisite within the meaning of section 12 specially granted to meet expenses wholly and necessarily incurred in the performance of the duties of an office or employment of profit."

14. *The bare reading of the aforementioned entry provides that the scope of allowances or benefit mentioned therein, supplements the clear exclusion provided under clause (c) of subsection (2) of Section 12 of the Ordinance. These are allowances, which are solely granted for the better performance of the duties of officers, as is in the case in hand.*

15. *In this view of the matter, the contention of the worthy counsel for the Revenue that the judicial allowances being not covered under Item 39 Part-I of the Second Schedule of the Ordinance would not be relevant to the case in hand. The issue of exemption would have been crucial and relevant, only if the Special Judicial Allowance granted to the petitioners was part of their salary, which is not the case in hand.*

16. *Accordingly, for the reasons stated hereinabove, this Court declares that Special Judicial Allowance granted to the Judicial Officers of the District Judiciary of Khyber Pakhtunkhwa, Officers of the Peshawar High Court, Peshawar and its employees are not liable to deduction of income tax at source within the contemplation of section 148 of the Ordinance. As far as the deductions already made from the petitioners, they may seek their appropriate remedy as provided under the enabling provisions of the Ordinance.*

This writ petition is disposed of, in the above terms."

9. The above judgment of the Divisional Bench of the Peshawar High Court is based on the earlier judgment dated 06.07.2010 of the Divisional Bench of the Peshawar High Court in the case of **Muhammad Sher Shah and others v.**

Government of Khyber Pakhtunkhwa and others in W.P.No.1098/2010, however, nothing has been brought on record to show as to whether the above cited judgment, has been challenged before the Hon'ble Supreme Court of Pakistan, on the contrary, it has been observed by the Divisional Bench of Lahore High Court in paragraph 8 of the judgment in **W.P.No.243868/2018 (Syed Shabbir Shah v. Federation of Pakistan)** that as per Legal Advisor of FBR such judgment has not been assailed before Hon'ble Supreme Court and has therefore, attained finality.

10. Learned counsel for the respondents has also not been able to assist this Court as to how the amount of judicial allowance and special judicial allowance does not fall within the category of the allowances covered within the exclusion of Section 12(2)(c) of the Income Tax Ordinance, 2001, nor could place on record any material to show that such amount is expended by the employees for a purpose other than performance of the employee's duties of employment. Learned counsel for respondents was specifically confronted to assist this Court as to whether both the **judicial and special judicial allowances, being recognized as allowances solely expended in the performance of the employee's duties of employment, by the Punjab and Khyderpakhtunkhaw Governments and the Federal Board of Revenue as well, as allowances not subject to charge of income tax, could be given different treatment by the Accountant General of Sindh or the Federal Board of Revenue in the case of Members of establishment of Sindh High Court and Subordinate Judiciary in the Province of Sindh, and as to whether such different treatment, would not amount to discrimination among same class of salaried persons**, however, no explanation could be given by the learned counsel for the respondents as well as the Assistant Attorney General in this regard.

11. In view of hereinabove facts and circumstances of the case, we are of the considered opinion that amount of **judicial allowance and special judicial allowance paid to the Members of establishment of Sindh High Court as well as to the Members of the establishment of sub-ordinate judiciary of**

Province of Sindh falls within the exclusion in terms of clause (c) of sub-section (2) of Section 12 of the Income Tax Ordinance, 2001, therefore, not part of their taxable salary income, hence, not chargeable to Tax or deduction under Section 149 of the Income Tax Ordinance, 2001. Accordingly, withholding of income tax on the aforesaid amounts is hereby declared to be illegal and without lawful authority. Consequently, both the constitutional petitions are allowed alongwith listed applications. Respondents are directed not to withhold any amount of income tax from **judicial allowance** and **special judicial allowance** of the Members of establishment of Sindh High Court as well as the Members of establishment of sub-ordinate judiciary in Province of Sindh. The amounts already deducted from the salary of the Members of establishment of Sindh High Court as well as to the sub-ordinate judiciary, shall be refunded by the FBR, on their filing refund applications in accordance with law, preferably, within a period of three months from the date of such claims.

Both the petitions stand allowed in the above terms along with listed application(s).

JUDGE

Dated: 24.07.2020.

JUDGE