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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of Decision: 08.11.2019

\+ W.P.(C) 11846/2019

KAMAL KUMAR KALIA & ORS. ..... Petitioners

Through: Mr. Saju Jakob, Ms. Lily Thomas, Ms. Nancy Shah and Mr. Ravinder Kumar Singh, Advs.

versus

UNION OF INDIA & ORS. ..... Respondents

Through: Mr. Zoheb Hossain, Sr. Standing counsel for Revenue with Mr. Deepak Anand, Jr. Standing counsel for R-2. Mr. Ravi Prakash, CGSC with Mr.Farman Ali and Mr. Prashant Rana,Advs. for R-1 and 3.

CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI
HON'BLE MR. JUSTICE SANJEEV NARULA

VIPIN SANGHI, J. (Oral):

1. The petitioner has preferred the present writ petition to seek the following reliefs:

> "*a) Issue a writ of Mandamus or a Writ of Certiorari and/or any other appropriate Writ, Order or direction in the nature thereof directing the Respondents to treat and declare the Petitioners, the retirees of PSUs as government employees so as to attract the provisions of Section 1 0(10 AA)(i) of IT Act, entitling them to full tax exemption on leave encashment after retirement/superannuation and not as non-government employees falling under Section 10 (10 AA) (ii) subjecting them to illegal and discriminatory treatment on taxation of leave encashment which is illegal, arbitrary, ultra vires and in gross violation of Art. 12, 13,14, 16, 19, 21 and 265 of our constitution.*

b) Issue a writ of Mandamus or a Writ of Certiorari and/or any other appropriate Writ, Order or direction in the nature thereof directing the Respondents to treat and declare the Petitioners, the retirees of PSUs as government employees so as to attract the provisions of Section 10(10AA)(i) of IT Act, entitling them to full tax exemption on leave encashment after retirement/ superannuation and not as non-government employees falling under Section 10 (10 AA) (ii) subjecting- them to illegal and discriminatory treatment on taxation of leave encashment which is illegal, arbitrary, ultravires and in gross violation of Art. 12, 13, 14, 16, 19, 21 and 265 of our constitution. Issue a writ of Mandamus or a Writ of Certiorari and/or any other .appropriate Writ, Order or direction in the nature thereof directing the Respondents to make suitable amendments and modifications in Section 10 (10 AA) and/ or to issue a notification in this respect so as to quash the current tax assessment and to refund the excess tax received from the Petitioners with interest of 10% immediately to the Petitioners and /or

c) To issue appropriate notifications (as was done in the past up to the year 2002) to update and enhance the upper limit of tax exemption on leave encashment for the Petitioners in Public Sector service, on parity with Central Government employees, having regard to the maximum amount receivable by Government employees and their tax exemption, considering "highest salary of the highest official" of our Government in the following manner:

> *a. Notification to raise exemption limit from 3 lacs to 9 lacs wef.1.1.2006.*
>
> *b. Notification to raise exemption limit of tax on leave encashment from 9 lacs to 25 lacs with effect from 1.1.2016.*

d) To effect the said enhancement of tax exemption with retrospective effect as mentioned in the prayer (b) and to direct

the Respondents and income tax authorities to refund excess tax received, with interest at 10% from the date of payment till date of refund:

e) To issue an order for making effect of such changes with immediate effect, till the Respondents make suitable modifications/ notifications/ amendments."

2. The case of the petitioner is that the petitioners are retired employees of various nationalised banks. The grievance of the petitioners is that in respect of the leave encashment amounts drawn by them upon their retirement, they are subject to payment of income tax except to the extent the same is exempted under Section 10 (10 AA) of the IT Act. Sub-section 10AA of Section 10 of the Income Tax reads as follows:

"(*10AA*) *(i) any payment received by an employee of the Central Government or a State Government as the cash equivalent of the leave salary in respect of the period of earned leave at his credit at the time of his retirement [whether] on superannuation or otherwise;*

(ii) any payment of the nature referred to in sub-clause (i) received by an employee, other than an employee of the Central Government or a State Government, in respect of so much of the period of earned leave at his credit at the time of his retirement [whether] on superannuation or otherwise as does not exceed [ten] months, calculated on the basis of the average salary drawn by the employee during the period of ten months immediately preceding his retirement [whether] on superannuation or otherwise, [subject to such limit as the Central Government may, by notification in the Official Gazette, specify in this behalf having regard to the limit applicable in this behalf to the employees of that Government]:

Provided *that where any such payments are received by an*

employee from more than one employer in the same previous year, the aggregate amount exempt from income-tax under this sub-clause [shall not exceed the limit so specified]:

Provided further *that where any such payment or payments was or were received in any one or more earlier previous years also and the whole or any part of the amount of such payment or payments was or were not included in the total income of the assessee of such previous year or years, the amount exempt from income-tax under this sub-clause [shall not exceed the limit so specified], as reduced by the amount or, as the case may be, the aggregate amount not included in the total income of any such previous year or years.*

Explanation.—For the purposes of sub-clause (ii),— the entitlement to earned leave of an employee shall not exceed thirty days for every year of actual service rendered by him as an employee of the employer from whose service he has retired;"

3. The submission of the petitioners is that the employees of the Public Sector Undertaking and Nationalised Banks are discriminated against vis a vis Central Government and State Government employees since the Central Government and State Government employees are granted complete exemption in respect of the cash equivalent of the leave salary for the period of earned leave standing to their credit at the time of their retirement - whether on superannuation or otherwise. However, all others, including the employees of the Public Sector Undertaking and Nationalised Banks are granted exemption only in respect of the amount of leave salary payable for a period of 10 months, subject to the limit prescribed. He submits that the government has issued a notification in terms of Clause (ii) of sub-section 10AA of Section 10 whereby the limit to which such income is exempted is

prescribed as Rs.3 lacs. The submission of the petitioner is that the last such notification was issued on 31.05.2002 which reads as follows:

> "*S.0.588 (E). – In exercise of the powers conferred by sub-clause (ii) of clause (10AA) of section 10 of the Income Tax Act, 1961 (43 of l961), the Central Government, having regards to the maximum amount receivable by its employees as cash equivalent of leave salary in respect of the period of earned leave at their credit at the time of their retirement, whether superannuation or otherwise, hereby specifies the amount of rupees 3,00,000(Rupees three lakhs only) as the limit in relation to employees mentioned in that sub-clause who retire, whether on superannuation or otherwise after the 1st day of April, 1998.*
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> *[Notification No.123/2002(F. No.200/23/98-ITA-I)]*
> *I.P.S BINDRA, Under Secy*."

4. The grievance of the petitioners is that on one hand, the retired employees from the Public Sector Undertaking and Nationalised Banks are discriminated against vis-a-vis the Central Government and State Government employees, on the other hand, the limit for exemption has remained static and has not been enhanced since 1998, even though, multiple Pay Commissions have come into force and have been implemented/adopted since then, even in respect of Public Sector Undertakings and Nationalised Banks.

5. So far as the challenge to provisions of Section 10 (10AA) of the Act on the ground of discrimination is concerned, we are of the view that there is no merit therein. This is for the reason that employees of the Central Government and State Government form a distinct class and the classification is reasonable having nexus with the object sought to be

achieved. The Central Government and State Government employees enjoy a 'status' and they are governed by different terms and conditions of the employment. Reference here may be made to the decision in ***Roshan Lal Tandon v Union of India*** AIR 1967 SC 1889, wherein it was held by the Supreme Court that the legal position of a Government servant is more one of status than of Contract. The relevant extract from the said judgment reads as under:

> *"6. We pass on to consider the next contention of the petitioner that there was a contractual right as regards the condition of service applicable to the petitioner at the time he entered Grade 'D' and the condition of service could not be altered to his disadvantage afterwards by the notification issued by the Railway Board. It was said that the order of the Railway Board dated January 25, 1958, Annexure 'B', laid down that promotion to Grade 'C' from Grade 'D' was to be based on seniority-cum-suitability and this condition of service was contractual and could not be altered thereafter to the prejudice of the petitioner. In our opinion, there is no warrant for this argument. It is true that the origin of Government service is contractual. There is an offer and acceptance in every case. But once appointed to his post or office the Government servant acquires a status and his rights and obligations are no longer determined by consent of both parties, but by statute or statutory rules which may be framed and altered unilaterally by the Government. In other words,* ***the legal position of a Government servant is more one of status than of contract****. The hallmark of status is the attachment to a legal relationship of rights and duties imposed by the public law and not by mere agreement of the parties. The emolument of the Government servant and his terms of service are governed by statute or statutory rules which may be unilaterally altered by the Government without the consent of the employee. It is true that Article 311 imposes constitutional restrictions upon the power of removal granted to the President and the Governor under Article 310.* ***But it is obvious that the relationship between the Government and its servant is not like***

an ordinary contract of service between a master and servant. The legal relationship is something entirely different, something in the nature of status. It is much more than a purely contractual relationship voluntarily entered into between the parties. The duties of status are fixed by the law and in the enforcement of these duties society has an interest. *In the language of jurisprudence status is a condition of membership of a group of which powers and duties are exclusively determined by law and not by agreement between the parties concerned. The matter is clearly stated by Salmond and Williams on Contracts as follows:*

> *"So we may find both contractual and status-obligations produced by the same transaction. The one transaction may result in the creation not only of obligations defined by the parties and so pertaining to the sphere of contract but also and concurrently of obligations defined by the law itself, and so pertaining to the sphere of status. A contract of service between employer and employee, while for the most part pertaining exclusively to the sphere of contract, pertains also to that of status so far as the law itself has seen fit to attach to this relation compulsory incidents, such as liability to pay compensation for accidents. The extent to which the law is content to leave matters within the domain of contract to be determined by the exercise of the autonomous authority of the parties themselves, or thinks fit to bring the matter within the sphere of status by authoritatively determining for itself the contents of the relationship, is a matter depending on considerations of public policy. In such contracts as those of service the tendency in modern times is to withdraw the matter more and more from the domain of contract into that of status."*
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> *(Salmond and Williams on Contracts, 2nd Edn. p. 12)."*
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> (Emphasis added)

Thus, government employees enjoy protection and privileges under the Constitution and other laws, which are not available to those who are not

employees of the Central Government and State Governments.

6. The submission of the counsel for the petitioner is that the employees of the Public Sector Undertaking and Nationalised Banks are also rendering services for the government, and such organisations are covered by Article 12 of the Constitution of India as 'State'.

7. We do not find any merit in this submission either. Merely because Public Sector Undertaking and Nationalised Banks are considered as 'State' under Article 12 of the Constitution of India for the purpose of entrainment of proceedings under Article 226 of the Constitution and for enforcement of fundamental right under the Constitution, it does not follow that the employees of such Public Sector Undertaking, Nationalised Banks or other institutions which are classified as 'State' assume the status of Central Government and State Government employees. It has been held in multiple decisions that employees of Public Sector Undertakings are not at par with government servants (*Ref*: ***Officers & Supervisors of I.D.P.L. v Chairman & M.D. I.D.P.L.*** AIR 2003 SC 2870). In the noted case of ***A.K.Bindal v Union of India*** (2003) 5 SCC 163, while considering the issue of revision of the pay scales of employees of government companies/PSUs at par with government employees, it was held that the employees of government companies cannot claim the same legal rights as government employees. The relevant extract from the said judgment reads as under:

> *"17. The legal position is that identity of the government company remains distinct from the Government. The government company is not identified with the Union but has been placed under a special system of control and conferred certain*

privileges by virtue of the provisions contained in Sections 619 and 620 of the Companies Act. Merely because the entire share holding is owned by the Central Government will not make the incorporated company as Central Government. ***It is also equally well settled that the employees of the government company are not civil servants and so are not entitled to the protection afforded by Article 311 of the Constitution*** *(Pyare Lal Sharma v. Managing Director (1989) 3 SCC 448).* ***Since employees of government companies are not government servants, they have absolutely no legal right*** *to claim that the Government should pay their salary or that the additional expenditure incurred on account of revision of their pay scale should be met by the Government. Being employees of the companies it is the responsibility of the companies to pay them salary and if the company is sustaining losses continuously over a period and does not have the financial capacity to revise or enhance the pay scale, the petitioners cannot claim any legal right to ask for a direction to the Central Government to meet the additional expenditure which may be incurred on account of revision of pay scales. It appears that prior to issuance of the office memorandum dated 12.4.1993 the Government had been providing the necessary funds for the management of public sector enterprises which had been incurring losses. After the change in economic policy introduced in the early nineties, the Government took a decision that the public sector undertakings will have to generate their own resources to meet the additional expenditure incurred on account of increase in wages and that the Government will not provide any funds for the same. Such of the public sector enterprises (government companies) which had become sick and had been referred to BIFR, were obviously running on huge losses and did not have their own resources to meet the financial liability which would have been incurred by revision of pay scales. By the office memorandum dated 19.7.1995 the Government merely reiterated its earlier stand and issued a caution that till a decision was taken to revive the undertakings, no revision in pay scale should be allowed. We, therefore, do not find any infirmity, legal or constitutional in the two office memorandums which have been challenged in the writ*

petitions."

(Emphasis supplied)

We therefore, reject the present petition, insofar as the petitioners' challenge to the provisions of Section 10 (10AA) is concerned.

8. We are however of the, prima facie, view that the grievances of the petitioner with regard to exemption limit under Clause (ii) of Section 10 (10AA) not being raised since 1998, appears to be justified. This is so because over the decades, the pay-scales admissible to government servants, and even employees of the Public Sector Undertaking and Nationalised Banks and all others have been upwardly revised, keeping in view, the financial growth in the country as well as on account of rising inflation. The last drawn salaries have increased manifold since time and notification issued under Clause (ii) of Section 10 (10AA) was lastly issued, as taken note of hereinabove, on 31.05.2002. We therefore, issue notice to the respondents limited to this aspect.

9. Issue notice. Learned counsel for the respondents accepts notice. Respondents should file counter affidavits be filed within six weeks. Rejoinder thereto, if any, be filed before the next date.

10. List on 04.05.2020.

VIPIN SANGHI, J

SANJEEV NARULA, J

NOVEMBER 08, 2019/*Pallavi*