WESTERN SAMOA NATIONAL PROVIDENT FUND BOARD

v

SAMOA HOLDINGS LTD

Supreme Court Apia
8 August; 2 November 1977
Nicholson CJ

CONSTITUTIONAL LAW (Fundamental rights) - Rights regarding property (No compulsory acquisition without compensation): Article 14(1) of the Constitution - Whether compulsory contributions by employer to employee benefit plan unconstitutional - Whether to be construed as affecting the general law for imposition and enforcement of a tax - Extensive review of decisions in other jurisdictions dealing with the attributes of a tax - Court concluding both employer and employee contributions amount to a tax - s 16(1) of the National Provident Fund Act 1972 to be construed as part of the general law relating to taxation within the meaning of Article 14(2)(a) of the Constitution:

Matthews v Chicory Marketing Board (1938) 60 CLR 263 followed: per Latham CJ at 276 (summarising the attributes of a tax referred to by Lord Thankerton in Lower Mainland Dairy Products Sales Adjustment Committee v Crystal Dairy Ltd [1933] AC 168 at 175) a tax is "a compulsory exaction of money by a public authority for public purposes, enforceable by law, and is not a payment for services rendered."

Heerwagen v Crosstown St Railway Co 86 NYS 218, 90 App Div 275; Schaffer v Oxford 117 SE 2nd 637, 102 Ga App 710; City of Halifax v Nova Scotia Car Works Ltd [1914] AC 992; Attorney-General v Elilts United Dairies (1921) 37 TLR 884; Anand Kumar Bindal v The Employees' State Insurance Corporation ILR [1958] 1 All 109 referred to.

Provided the revenue from a tax is in fact put to a public use and the legislation imposing the tax is a reasonable exercise of the taxing power for the purpose of providing such revenue as opposed to an arbitrary use of the power to effect some other purpose, the motive for imposing the tax is irrelevant: A Magnano Co v Hamilton 292 US 40; R v Barger (1908) 6 CLR 41 followed; Attorney-General Antigua v Antigua Times [1975] 3 All ER 81 referred to; Railroad Retirement Board v Alton Railway Co 295 US 330 distinguished.

Neither the fact that the burden of a tax is not uniform, nor that it does not result in uniform benefits for all taxpayers make it any the less a reasonable exertion of the taxing power: Carmichael v Southern Coal & Coke Corporation 301 US 494; Steward Machine Co v Davis 301 US 546 followed; US v Butler 56 S Ct 312 disapproved.

Whether or not the contributions in question are paid into a fund separate from general Government revenue does not affect the question of whether they amount to a tax: Leake v Commissioner of Taxes (1934) 36 WALR 66; Waterbury Savings Bank v Danaher 20 A 2nd 455 followed.

Other cases mentioned in judgment:
Attorney-General of Trinidad and Tobago v Mootoo [1976] 2 CLB 217.
Beeland Wholesale Co v Kaufman 174 Southern Reporter 516.
Brodhead v City of Milwaukee 19 Wis 652.
Decatur Tax Payers League v Adams 226 SE 2nd 69.

REFERENCE pursuant to Article 73(3) of the Constitution and preliminary objection by defendant heard together.
Preliminary objection by defence counsel rejected.
His Highness the Head of State humbly advised of the opinion of the Court.

Attorney-General Slade and Fuimaono for the State.
Enari for plaintiff.
Epati for defendant.

Cur adv vult

NICHOLSON CJ. This is a claim by the plaintiff against the defendant for $3,236.10, being contributions alleged to be due by the defendant as an employer in terms of Section 16(1) of the National Provident Fund Act 1972. The defendant, by way of a preliminary argument, submits that Section 16 of the Act contravenes Article 14 of the Constitution of Western Samoa which forbids the compulsory acquisition of property without compensation. The same question has been referred to the Supreme Court by His Highness the Head of State in terms of Article 73(3) of the Constitution, and at a composite hearing of these two sets of proceedings the Attorney-General appeared on the State's behalf. Written submissions by counsel were amplified at the hearing.

Article 14 of the Constitution in its relevant portions reads as follows:-

> 14. (1) No property shall be taken possession of compulsorily, and no right over or interest in any property shall be acquired compulsorily, except under the law which, of itself or when read with any other law -
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> (a) requires the payment within a reasonable time of adequate compensation therefor; and
> (b) gives to any person claiming that compensation a right of access, for the determination of his interest in the property and the amount of compensation, to the Supreme Court; and
> (c) gives to any party to proceedings in the Supreme Court relating to such a claim the same rights of appeal as are accorded generally to parties to civil proceedings in that Court sitting as a court of original jurisdiction.
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> (2) Nothing in this Article shall be construed as affecting any general law -
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> (a) for the imposition or enforcement of any tax, rate or duty; or
> (c) relating to leases, tenancies, mortgages, charges, bills of sale, or any other rights or obligations arising out of contracts; or
> (g) relating to trusts and trustees; or

The learned Attorney-General and Mr Enari for the plaintiff argue that the contributions required under the National Provident Fund Act 1972 amount to a tax in terms of Article 14(2)(a) or, alternatively, that they are moneys held on trust in terms of Article 14(2)(g) or, in the further alternative, that they form part of the rights and obligations of a contract between employer and employee in terms of Article 14(2)(c), and therefore fall within the exceptions to the provision against compulsory acquisition of property.

The National Provident Fund Act 1972 in its preamble purports to be "An Act for the establishment and administration of a Western Samoa National Provident Fund, for contributions to, investments by and the provisions and other benefits to members". The Fund was set up to provide a pensions and lump sum benefit scheme for employees on retirement, death or incapacity, and it is funded by contributions from employees of 5% of their wages and by employers' contributions of similar sums (Section 16). The contributions are compulsory for both employers and employees without significant exception. The Fund is administered by a Board, which includes two Government officials, two representatives of the Chamber of Commerce, two representatives of employees, and one representative of the Churches of Western Samoa. The Board in terms of Section 4 of the Act is a body corporate with perpetual succession, a common seal, with the capacity of suing and being sued, entering into contracts, and dealing with property. The Board is charged with the investment of its funds under certain conditions. The Fund is exempt from taxation (Section 54) and contributions by both employers and employees are deductible for income tax purposes (Sections 55 and 56). Employers receive no other direct benefit from the Fund.

Employees' credit with the Fund is protected from sequestration by Section 38 of the Act and from the consequences of bankruptcy by Section 40 of the Act. Sections 43 and 44 are penal provisions to enforce the requirements of the Act against employers and employees and in terms of Section 50 contributions are recoverable as civil debts.

The major argument was devoted to the question of whether or not the Act amounts to "any general law - (a) for the imposition or enforcement of any tax, rate or duty." Mr Epati for the defendant developed several arguments. He, first of all, attacked the suggestion that the National Provident Fund is a social welfare measure and therefore a public purpose with which Government should be properly concerned. He appeared to argue that because the scheme does not go beyond pension and death benefits, to the fields of medical benefits, maternity benefits, unemployment benefits and workers compensation, it is not a social welfare measure. He suggested that the real effect of the Act is to provide a source of funds for investment by the Board. Moreover, the limits of a minimum of $20,000 and 70% of value for any one investment, he submitted, places the potential investment benefits far beyond the resources of the average Western Samoan worker. Mr Epati acknowledged that adequate compensation in terms of the Constitution may be provided for employees in the form of the benefits payable to them under the scheme, although he doubted that the compensation could be regarded as paid within a reasonable time as required by Article 14(1)(a) of the Constitution. His argument is principally directed to the position of employers under the Act who appear to derive no benefit at all under the scheme. He opposed the argument that the contributions are a tax on the grounds that the Board is not a public authority, the purpose for which it was established is not a public one, the Fund does not form part of the public revenue, and the benefits of the Fund fall upon only a select section of the public, viz., employees and successful applicants for loans.

The question of what amounts to a tax, or to taxation, has been the subject of considerable judicial scrutiny throughout the English-speaking world. In particular in the United States of America, under the "due process" provisions of the Fourteenth Amendment to the Constitution, a substantial body of judicial comment on legislation providing for compulsory exactions of money has been built up. The American definitions of tax emphasise the aspects of public purposes, the compulsory nature of exactions, of legislative authority and of

enforceability of payment. In Heerwagen v. Crosstown St. Railway Co. 86 N.Y.S. 218, 225, 90 App. Div. 275 it was held that "the crucial attributes of a 'tax' are that it is a toll upon property without the consent of the owner, and the money secured is to be applied toward governmental expenses of the body politic for whose benefit the imposition is to be made." In Schaffer v. Oxford 117 S.E. 2nd 637, 640, 102 Ga. App. 710 a tax was defined as "an enforced contribution exacted pursuant to legislative authority for the purpose of raising revenue to be used for public or governmental purposes, and not as payment for a special privilege or a service rendered."

Latham C.J. in Matthews v. Chicory Marketing Board (1938) 60 C.L.R. 263, a decision of the High Court of Australia, at page 276 described a tax as, "a compulsory exaction of money by a public authority for public purposes, enforceable by law, and is not a payment for services rendered." In doing so, the learned Chief Justice was summarising the attributes of a tax referred to by Lord Thankerton in the Privy Council in the Canadian appeal of Lower Mainland Dairy Products Sales Adjustment Committee v. Crystal Dairy Ltd [1933] A.C. 168 at p. 175.

Lord Atkin in the English Court of Appeal in Attorney-General v. Elilts United Dairies (1921) 37 T.L.R. 884 reminded us in trenchant terms of the historical tradition for legislative authority to impose taxes. He said, "Though the attention of our ancestors was directed especially to abuses of the prerogative, there can be no doubt that this statute (the Bill of Rights) declares the law that no money shall be levied for or to the use of the Crown except by grant of Parliament. Again, the Privy Council in City of Halifax v. Nova Scotia Car Works Ltd [1914] A.C. 992 at 998 emphasised that compulsion is an essential feature of a tax.

The terms of the National Provident Fund Act 1972 provide the legislative authority to collect the contributions and make it clear that the contributions are compulsory and that their exaction can be enforced. In addition, I find that they are not for services rendered, an aspect with which many judicial definitions of tax seem preoccupied.

The remaining issues are whether it can be said that the National Provident Fund Board is a public authority in the sense intended by Latham C.J., and whether the contributions are exacted for public or governmental purposes.

In the Lower Mainland Dairy Products case, supra, a Committee, set up to exact levies from British Columbian fluid milk producers and to pay the levies out to producers of milk products as a market adjustment scheme, was held by the Privy Council to be a public authority.

In Matthews v. Chicory Marketing Board, supra, the High Court of Australia appeared to agree that the respondent Board was a public authority. It was one of a number of boards set up by statute to control the marketing of certain primary products and levies could be imposed on producers to meet the Board's expenses of administration research and the like.

In Anand Kumar Bindal v. The Employees' State Insurance Corporation I.L.R. [1958] 1 All. 109 at 118 an Indian Provincial Supreme Court was satisfied that a statutory corporation set up to provide sickness, maternity and unemployment injury benefits for employers and employees was a public authority for the purpose of levying these contributions.

In the light of these examples I find the National Provident Fund Board is a public authority for the purposes of this situation. I turn now to the question of whether its purposes are public purposes. Further scrutiny of Commonwealth and American decisions leads me to the firm conclusion that the purposes of the Fund are public.

In Attorney-General of Trinidad and Tobago v. Mootoo reported in digest form in Commonwealth Law Bulletin [1976] Vol. 2 Number 3 p. 217 the Court of Appeal of Trinidad and Tobago held that the imposition of a levy on taxpayers for the relief of unemployment and the training of the unemployed was for public purposes. In arriving at this conclusion the court approved a dictum of the Supreme Court of Wisconsin in an early decision Brodhead v. City of Milwaukee 19 Wis.652 that "to justify the

court in arresting the proceedings and in declaring the tax void, the absence of all public interest in the purposes for which the funds are raised must be clear and palpable."

In A. Magnano Co. v. Hamilton 292 US 40, a levy on sales of butter substitutes within the State of Washington motivated by a desire to protect the dairy industry, was nevertheless held a tax for a public purpose as the real test of a public purpose was the use to which the revenue was put, not the motive behind the legislation. This decision, delivered by Justice Sutherland, went on to say that the "due process" requirement of the United States Constitution only applies if the legislation is so arbitrary as to compel the conclusion that it does not involve the exertion of the taxing power, but in substance and effect the exertion of a different and forbidden power, such as the confiscation of property. In Railroad Retirement Board v. Alton Railway Co. 295 U.S. 330 the Supreme Court held a compulsory employee pension scheme was so arbitrary in its terms as to contravene the due process provisions of the Constitution, but this case is easily distinguishable from the general run of decisions on its facts. The High Court of Australia in R. v. Barger (1908) 6 C.L.R. 41 also held that the motives behind a measure were irrelevant if the measure was in exercise of an admitted power of legislation.

In the Attorney-General for Antigua v. Antigua Times [1975] 3 All E.R. 81 the Privy Council concluded that there was a presumption that the provisions of all Acts of Parliament of Antigua were reasonably required for the purpose of the Antiguan Constitution and that presumption had not been rebutted in the case of an Act prescribing an annual license fee of $600 for the right to publish a newspaper, for the amount of the license fee was not so manifestly excessive as to lead to the conclusion that the Act had been enacted for some purpose other than the raising of revenue. These authorities appear to spell out two further principles, viz., -

(1) that the motive behind the legislation imposing the charge is irrelevant providing the revenue raised is actually put to public purposes; and

(2) that the measure in itself must be shown to be a reasonable exercise of the taxing power and not an arbitrary exertion of power for some other purpose.

Applying the first of these principles to the defendant's argument that the real effect of the legislation is to provide a public investment fund, I find that if the defendant is in fact contending that that is the motive for the legislation, then the argument is irrelevant. The revenue raised is applied directly or indirectly for the purposes of pensions and benefits for employees. The business of government is traditionally concerned with relief from privation for the elderly and retired and for the dependants of deceased or disabled breadwinners. That the Fund does not provide an all-embracing social welfare scheme, as Mr Epati complains, is of no significance. It is open to Government to provide such other social welfare measures, in its discretion, as and when circumstances require or permit. I find that the contributions are being put to public purposes.

On the question of the second principle of reasonable exertion of the taxing power, Mr Epati argues that the legislation is so arbitrary in its incidence of burdens of contributions and its benefits that it goes beyond proper exercise of power to raise revenue. He emphasises that the employers pay into the Fund and apart from the right to deduct the amount of his contributions from his taxable income, they gain no benefits. Moreover the scheme is confined to only two classes of persons in the community, employers and employees,and makes no provision for other classes of the community.

In Carmichael v. Southern Coal & Coke Corporation 301 U.S. 494 the United States Supreme Court found that an Alabama state statute which imposed a levy on the payrolls of employers to be paid to a state unemployment compensation fund was an exercise of the taxing power, that freedom to select subjects of taxation and to grant exemptions is

inherent in the exercise of the power to tax and that due process does not impose upon a state a rigid rule of equality of taxations, and inequalities which result from the singling out of one particular class for taxation or exemption infringe no constitutional limitation. Similar sentiments were expressed by the Alabama Supreme Court in Beeland Wholesale Co. v. Kaufman 174 Southern Reporter 516, by the Privy Council in City of Halifax v. Nova Scotia Car Works Ltd, supra, and in Decatur Tax Payers League v. Adams 226 S.E. 2nd 69.

I note that Section 2 of the National Provident Fund Act 1972 in defining an employee excludes from the provisions of the Act any person or class of persons exempted or excluded by the Minister (of Finance) by notice published in the Gazette and the Savali. But in Steward Machine Co. v. Davis 301 U.S. 546 the Supreme Court expressly held that similar exemptions for employers were not so arbitrary as to render the tax imposed on employers immolative of the due process principle.

A contrary view was expressed by Roberts J. in U.S. v. Butler 56 S. Ct. 312 at 317 when he observed, "A tax in the general understanding of the term and as used in the Constitution signifies an exaction for the support of government. The word has never been thought to connote the expropriation of money from one group for the benefit of another." I do not accept this latter view and I adopt the reasoning contained in the line of cases I have mentioned. I hold that although the levies payable by employers do not impose a uniform tax nor bestow uniform benefits upon the whole body of taxpayers, it is nevertheless a proper and reasonable exertion of the taxing power and not the exercise of some arbitrary power.

I have given consideration to the point that the contributions are maintained in a fund separate from general revenue, but the authorities appear consistent in the view that the payment of contributions into a fund separate from general revenue accounts of government does not affect the question of whether the contributions amount to a tax. In Leake v. Commissioner of Taxes (1934) 36 W.A.L.R. 66 Dudyer J. held that the fact that a statute directs the particular application of a Hospital Fund, kept apart from general revenue, does not justify its being regarded as something different from a tax. In Waterbury Savings Bank v. Danaher 20 A. 2nd 455 the Supreme Court of Connecticut found that neither the fact that levies under an unemployment compensation act were called "contributions", nor that they were segregated in a separate fund for application for the purposes of the Act renders them any the less "taxes."

I conclude that the contributions required by both employers and employees under the National Provident Fund Act 1972 amount to a tax within the meaning of Article 14(2)(a) of the Constitution. I am therefore not called upon to consider other submissions that the contributions fall within other exceptions to the terms of Article 14(1). His Highness is humbly advised of this opinion upon the reference and the preliminary objection by defence counsel in the suit is rejected.