

Supreme Court, Division Bench
Honorable Justice Dr. Ananda Mohan Bhattarai
Honorable Justice Hari Prasad Phyuul

Decision

078-WO-1105

Case: Certiorari/Mandamus

Petitioner: Lilamani Neupane, resident of Kathmandu District, Budanilkantha Municipality

Ward No. 10, Kapane

Vs.

Respondents: Citizen Investment Fund, Kathmandu

Ministry of Finance

Department of Inland Revenue, Lazimpat

The brief fact and order of the case presented pursuant to Article 133 (2) of the Constitution of Nepal, falling under the jurisdiction of this Court, are as follows:

The writ petition submitted on 2078/12/13 (corresponding 27 March, 2022) by the petitioner states as follows: I, the petitioner, had been in regular service at Investment and Finance Company Limited located at Dilli Bazaar, and was later appointed to the position of Chief Executive on a four-year contract basis. Upon the completion of the contract service, the company issued a letter Ref. No. 4077/078/79 dated 2078/08/23 (corresponding to 9 December, 2021) instructing that the payment of the pension fund (gratuity) due to the petitioner under the Citizen Investment Fund be released. Accordingly, the gratuity amount before 2058 B.S. was Rs. 4,660,323.29, and the amount after 2058 B.S. was Rs. 13,103,968.49, totaling Rs. 17,764,291.78 as recorded in the voucher. As per the letter, a 5% tax i.e., Rs. 655,198.42 was to be deducted from the post-2058 gratuity amount of Rs. 13,103,968.49, leaving a balance of Rs. 12,448,770.07. Adding the tax-exempt pre-2058 amount of Rs. 4,660,323.29, the total payable to the petitioner was Rs. 17,109,093.56. However, the respondent fund transferred only Rs. 15,798,696.51 to my savings account at Investment and Finance Company Limited, Dillibazar, on 2078/10/09 (corresponding to 23 January, 2022). Article 115(1) of the Constitution of Nepal, states that “no tax shall be imposed and collected except in accordance with law.” Similarly, the proviso under Section 88 (1) of the prevailing Income Tax Act, 2058, and the principle enunciated in the writ case 075-WO-0512 establishes that only a 5% tax should be deducted at the time of payment. Contrary to this, a 15% tax was deducted. Since the tax deduction by the Fund constitutes a direct violation of the constitutional provision and the prevailing law, and since no other effective alternative remedy exists, the petitioner, pursuant to Sub-article (2) of Article 133 of the Constitution, seeks the court to issue an order of certiorari to annul the directives, actions, and decisions of the respondents and also through an order of mandamus or any other appropriate order to release the remaining amount after deducting the legally mandated 5% tax.

An order had been set aside by this court on 2078/12/17 (corresponding to 31 March, 2022) with reads as follows: what has transpired in this matter? Why should the order as sought by the petitioner not be issued? Provided there exists’ any reason and grounds for not issuing the order, the respondents No. 2, 3 and 4 are hereby directed to submit their rejoinder through the Office of the Attorney General and respondent No. 1 to submit the rejoinder either in person or through a representative within 15 days excluding the period of travel. It is hereby ordered to provide a copy of the writ petition and to issue summon in the names of the

respondent with the case file to be submitted upon receipt of the rejoinder or upon the expiry of the prescribed limitation period. With regards to the interim order, the proviso under Section 88 (1) of the Income Tax Act, 2058 states that five percent tax is applicable and in Ved Bahadur vs. Rastriya Baniya Bank, Central Office et.al., writ petition no. 075-WO-0512 , this court had held that only five percent tax is to be deducted pursuant to the legal provision and since the 15 percent tax deduction made against the petitioner's gratuity does not comply with the law and the principles laid down by this court, an interim order pursuant to Rule 49 (2) (a) of the Supreme Court Regulations, 2074 , has been issued directing the respondents not to deposit the amount deducted as tax as revenue until the final hearing of the petition.

The writ petition submitted by Citizen Investment Fund on 2078/12/30 (corresponding to 13 April, 2022) states as follows: the Citizen Investment Fund is an institution established under the Citizen Investment Fund Act, 2047. While making payments from the retirement fund operated by this Fund, income tax has been deducted pursuant to Sub-section (b) of Section 65 (1) of the Income Tax Act, 2058. During the monitoring conducted on 2075/06/24 (corresponding to 13 April, 2022), the Large Taxpayer Office at Harihar Bhawan provided verbal instructions that, at the time of repayment of amounts upon employees' retirement or resignation, tax should be deducted at the rate of 5% under Section 65(b) of the Income Tax Act, 2058, for contribution-based funds, and at the rate of 15% under Sub-section (1) of Section 88 of the same Act if there is no employer contribution. Accordingly, income tax has been deducted while making payments under the retirement fund where there is no employer contribution. Since the tax deduction has been carried out in accordance with the prevailing law and the directives of the regulatory authority, no constitutional rights of the respondents have been violated by any actions of this Fund and therefore, the writ petition should be dismissed.

The rejoinder submitted by the Department of Inland Revenue on 2078/12/29 (corresponding to 12 April, 2022) reads as follows: Under the provisions relating to retirement benefits in the Income Tax Act, 2058, and the Income Tax Regulations, 2059, it is clearly provided that: when an individual receives contribution-based retirement benefits within the limits of their assessable income while calculating their annual tax, a 5% tax is to be deducted on the calculated benefit; whereas, if retirement benefits are paid directly from a fund contributed by the employer in the name of the employee without including it in the employee's assessable income, a 15% advance tax is to be deducted. Accordingly, while making retirement payments to employees, the retirement fund has been classified as per the type of fund—5% tax deducted on payments from contribution-based funds and 15% tax deducted on payments from funds without any employer contribution. This practice has been carried out in accordance with the prevailing legal provisions. Therefore, the respondents' claim in this regard is not supported by law, and the petitioner's writ petition should be quashed.

The rejoinder submitted by the Ministry of Finance on 2079/01/08 (corresponding to 21 April, 2022) states as follows: with regard to the matters raised by the petitioner in the writ petition, no decision has been made by this Ministry. According to Section 65 (1) (b) of the Income Tax Act, 2058, if payment is made in lump sum, the payment to set by subtracting fifty percent of the paid amount or five hundred thousand rupees, whichever is higher, from the amount so paid shall be deemed as the profit made by the person from the disposal of his non-business taxable assets. Regarding the amount mentioned by the writ petitioner, only amounts paid by the Government of Nepal and from contribution-based retirement benefits fall under the proviso (b) of Sub-section (1) of Section 88 of the Act. Since the amount received by the petitioner does not fall under either of these two situations, the deduction of 15% tax as per Sub-section (1) of Section 88 of the Act has been correctly applied. Therefore, the petitioner's claim is unfounded, and the writ petition should be dismissed.

The rejoinder submitted by the Large Taxpayer Office on 2079/1/16 (corresponding to 29 April, 2022) reads as follows: the Citizen Investment Fund was established under the Citizen Investment Fund Act, 2047, and is recognized as an approved retirement fund under Section 63 of the Income Tax Act, 2058. The Citizen Investment Fund operates various retirement fund schemes and provides retirement payments accordingly. Among these schemes, the Fund operates the Gratuity Fund Scheme and the Investor Account Scheme. Under these schemes, employers deposit contributions, medical allowances, treatment expenses, and accumulated leave amounts for their employees to secure their future. Based on the information provided by the employer institutions, these amounts are paid to employees upon their retirement. When making payments under the Gratuity Fund Scheme and the Investor Account Scheme, the Citizen Investment Fund deducts a 5% tax on the retirement payment after reducing either fifty percent of the payment amount or Rs. 500,000, whichever is higher. The amounts paid to retired employees under the gratuity, accumulated leave, and medical treatment components are contributions that the employer companies or institutions have deposited institutionally to secure the post-retirement life of their employees. Since there is no contribution from the employee, Section 65(2) of the Income Tax Act provides that payments made from a non-contributory fund to the beneficiary employee under an unapproved retirement fund are not considered as income derived from the fund. In the case of retirement payments from a fund contributed by a resident individual, Section 88 (1) of the Income Tax Act, 2058, provides for a 15% tax deduction. However, the taxpayer, Citizen Investment Fund, while making payments to retired employees under the Gratuity Fund Scheme and the Investor Account Scheme from the employer company or institution, has deducted only 5% tax on the payment after reducing either fifty percent of the payment amount or Rs. 500,000, whichever is higher, for gratuity, medical treatment, and accumulated leave components. Since the petitioner's claim does not appear to have substantial merit and the writ petition has been filed against this office without proper legal basis, the petition is found to be defective and should therefore be quashed.

Order

The present writ petition was listed for hearing in accordance with procedure, and learned Advocate Mr. Kopil Prasad Adhikari on behalf of the petitioner argued that the petitioner, having served as an Executive Chief for Investment and Finance Company Limited under a four-year contractual appointment following regular employment, and upon completion of the contractual term, had sought payment of the retirement fund (gratuity) amount due from the Citizen Investment Trust, totaling to NPR 177,642,91.78. It has been noted that, pursuant to the Income Tax Act, 2058 BS, only 5% tax is permissible on amounts accrued after the year 2058 BS. However, the Trust remitted a lesser sum, having deducted tax at the rate of 15% on the post-2058 portion, in addition to non-taxable amounts accrued prior to 2058 BS. Such deduction at 15% clearly contravenes the proviso under Section 88 (1) of the *Income Tax Act, 2058*, and is contrary to the principles established by this honorable court in writ petition 075-WO-0512 filed by Ved Bahadur Lawati against the Department of Internal Revenue. Accordingly, the petitioner seeks correction of the tax deduction and release of the full retirement fund as legally due. Since the petitioner's company is a finance company, it cannot operate without the approval of Nepal Rastra Bank. As the Citizen Investment Trust had deposited contributions deducted directly from the petitioner's salary into the approved retirement fund, any retirement benefits arising therefrom ought to have been subject to only a 5% tax deduction. However, the decision to deduct tax at the rate of 15% is unlawful. Therefore, it was further argued that such decision must be annulled, and a writ of mandamus be issued in the name of the respondents, directing them to release to the petitioner the withheld 10% portion beyond the permissible 5% that has been stayed by the interim order.

Learned Joint Government Attorneys Ms. Rama Devi Parajuli and Mr. Hari Shankar Gyawali on behalf of the respondent, the Department of Inland Revenue, submitted that this honorable court, in writ petition 067-WO-0026, had already held that retirement fund (grant) payments are subject to taxation at the rate of 15%.

They further argued that the *Income Tax Act, 2058*, provides definitions regarding retirement funds and retirement payments, and under Section 8(2) (f) of the Act, conditions exist where such retirement fund amounts are taxable at the rates of both 5% and 15%. If the amount deposited into the fund has been deducted directly from an individual's salary—meaning provided, there is a contribution from the beneficiary natural person, then, pursuant to the proviso under Clause (1) of Section 88(1) of the *Income Tax Act, 2058*, only 5% tax shall be applicable. Conversely, if the employer has deposited the amount into the retirement fund on its own behalf, without being based on the contribution of the beneficiary natural person, and since the employer does not pay tax immediately but merely makes a provisioning entry, then at the time when payment is made to the beneficiary out of the fund, such amount becomes taxable at the rate of 15%. Since the amount deposited into the fund by the employer is not based on the contribution of the employee, it cannot be argued that only 5% income tax is applicable. Furthermore, as the interpretation made by the Division Bench of this honorable court in writ petition 075-WO-0512 does not encompass this particular issue, the writ petition is liable to be dismissed.

Learned Advocate Mr. Suman Paudel on behalf of the respondent Citizen Investment Trust, argued that the Citizen Investment Trust is not an institution required to obtain approval under the proviso of Section 63 of the *Income Tax Act, 2058*. Pursuant to Section 32 of the Citizen Investment Trust Act, the Trust has been operating contribution-based funds. More than 300 institutions are currently affiliated under the retirement fund scheme operated by the Trust. Following the order issued by the Division Bench of this honorable court in writ petition 075-WO-0512, correspondence was made with the Department of Inland Revenue for necessary directives. In response, the Department clarified that the order applied only to the specific case in that writ petition, requiring deduction at the rate of 5% therein, while in all other cases, income tax must be deducted at the rate of 15%. Accordingly, deductions have since been made in line with that instruction. Except where otherwise directed by this honorable court, the Citizen Investment Trust has, to date, been deducting 15% income tax from retirement fund payments. Therefore, it was further argued that the present writ petition is liable to be dismissed.

Upon hearing the arguments presented by the learned advocates on behalf of the petitioner and the respondents, as well as the learned Joint Government Attorneys on behalf of the Government of Nepal, and upon perusal of the case records, the matter for determination arises as to whether, in respect of the retirement fund (gratuity) paid in the interest of the petitioner employee, income tax should be deducted at the rate of 15% or 5%, whether the deduction made by the respondent Citizen Investment Trust at the rate of 15% and payment made accordingly was proper, and whether an order as sought by petitioner should be issued.

The petitioner, having served in regular service for Investment and Finance Company Limited, was subsequently appointed as Executive Chief under a four-year contractual term. Upon completion of the contract, the company issued a letter dated 2078/08/23 (corresponding to 9 December, 2021) specifying Rs. 17,764,91.78 as retirement fund (gratuity) amount payable from the Citizen Investment Trust. According to the said letter, the retirement fund included Rs. 4,660,323.29 accrued prior to 2058 and Rs. 13,103,968.49 accrued post 2058 totaling the amount to Rs. 17,764,291.78. As per the breakdown in the letter, on the post-2058 amount of NPR 13,103,968.49, only 5% tax in other words Rs. 655,198) was deductible, leaving a balance of Rs. 12,448,770.07, which together with the pre-2058 non-taxable amount of Rs. 4,660,323.29, entitled the petitioner to a total of Rs. 17,109,093.56. However, the Trust transferred only Rs. 15,798,696.51 to the petitioner's savings account, thereby paying less than the amount lawfully due, and it was later clarified that this was because tax of Rs. 1,965,595.27 had been deducted at the rate of 15%. The applicant submits that, under the proviso to Section 88(1) of the *Income Tax Act, 2058*, the provident fund amount payable to the applicant after 2058 is liable to tax at a rate of only 5 percent. However, the respondents in contravention of the said provision and Article 115 (1) of the Constitution have erroneously deducted tax at a rate of 15 percent. The petitioner prays that the respondents' actions be quashed by an order of certiorari,

and further requests the court to issue an order of mandamus or any other appropriate order directing the respondents to release the remaining amount after deducting tax at the lawful rate of 5 percent, whereas Sub-section (1) of Section 88 of *Income Tax Act, 2058*, prescribes the following: “when making payment by a resident person interest, natural resource, rent, royalty, service charge, commission, sales bonus, retirement payment and any other consideration having source in Nepal and in making payment of amount of any retirement payment, the person shall withhold tax at the rate of fifteen percent of the total amount of payment. However, the proviso to the same Sub-section, Clause (1)(b), provides that in case of retirement payment from the Government of Nepal or contribution-based retirement payment from the approved retirement fund, at the rate of five percent in benefit shall be computed under tax shall be deducted at a rate of 5 percent on retirement benefits paid from contributions made by the Government of Nepal or an approved provident fund, calculated in accordance with the benefits determined under Clause (b) of Sub-section (1) of Section 65. The rejoinder submitted by the Ministry of Finance, Government of Nepal, the Department of Inland Revenue and the Large Taxpayer Office reflecting consistent positions stated that furthermore, under Clause 65 (1) (b) of the same Act, the proviso to Section 88 (1) (b), Clause (1) of the *Income Tax Act, 2058*, is applicable only when the retirement payment is made either from the government or from a contribution-based retirement fund. Since the amount received by the petitioner does not fall under either of these categories, the deduction of 15% tax in accordance with Section 88 (1) of the Act is legally valid and accordingly the writ petition should be quashed. It is further submitted that, while disbursing amounts from the retirement fund administered by the Trust, tax has been deducted in accordance with Section 65(1) (b) of the *Income Tax Act, 2058*. During monitoring conducted on 2075/06/24 (corresponding to 10 October, 2018) by the Large Taxpayer Office, Harihar Bhawan, it was orally instructed that when amounts are refunded to employees upon retirement or resignation, tax should be deducted as follows: 5%, in the case of contribution-based funds; 15%, where there is no employer contribution, in accordance with Subsection (1) of Section 88 of the Act. Accordingly, Citizen Investment Trust has been disbursing payments from retirement funds that do not involve employer contributions, with tax deducted at the rate of 15%, in compliance with the oral instructions and legal provisions.

2. Upon consideration of the aforesaid writ petition, submissions, and rejoinder, the principal question that arises is whether, upon completion of four years of contractual service as Chief Executive during his regular tenure at Shree Investment and Finance Company Limited, the said Company was required to deduct income tax at the rate of 15 percent or 5 percent on the retirement fund (gratuity) payable from the Citizen Investment Fund. Upon examination, although it is not evident that the petitioner’s employer, Shree Investment and Finance Company Limited, is a resident company approved by the Department of Inland Revenue for the operation of a retirement fund, it appears that the Company had deposited the retirement fund amount into the Citizen Investment Trust, and that the said Trust has been administering such fund. After the petitioner’s contractual service term ended, on 2078/08/23 (corresponding to 9 December, 2021), the Company wrote to the Citizen Investment Trust for the disbursement of the retirement fund, and from the amount deposited therein, 15 percent income tax was deducted and the balance was paid to the petitioner, leading to the filing of the present writ petition. The petitioner contends that on the retirement payable, the deduction should have been made at the rate of 5 percent and not 15 percent.
3. Before determining the applicable rate of tax deduction on the payment receivable by the petitioner, it becomes necessary to examine and analyze in depth the provisions relating to the retirement fund, its underlying concept, and the arrangements made under the Income Tax Act, 2058. In simple terms, a retirement fund may be understood as a fund established for the purpose of providing payments to an employee upon retirement from service. Section 2(d) of the *Income Tax Act, 2058*, defines “**Retirement Fund**” as an entity established with the sole objective to accept retirement contribution fund for making retirement payments from the funds to the entity’s beneficiary individual or their dependents, and invest such funds. The term ‘Retirement Payment’ has been defined in Section 2 (e) wherein “retirement

payment” shall mean mentioned in the said provision has been defined under Section 2(n) of the Income Tax Act, 2058, wherein ‘Retirement Payment’ shall mean: (1) the payment made to a natural person upon his or her retirement, or (2) the payment made to the dependents of a natural person in the event of his or her death. From this, it is to be understood that a retirement fund is a fund established for the purpose of making payments to a beneficiary natural person (in the present context, the employer or employee) upon his or her retirement, or to his or her dependents in the event of death prior to receiving such payment. From the said definition, it is also clear that a retirement payment is not a recurring monthly payment like salary or allowance, but rather a one-time final payment made to the beneficiary natural person upon retirement from service.

4. In Section 2(d) of the Income Tax Act, the terminology ‘retirement contribution amount’ has also been used. Since a retirement fund is established from retirement contributions, it is necessary, before proceeding further, to clarify the meaning of the term ‘retirement contribution amount’ as employed in the said Section. Clarifying this, Section 2(f) provides that ‘retirement contribution amount’ shall mean any payment made into a retirement fund for the provision of retirement payment or for future provisions thereof. From this, it is to be understood that such contributions are payments made into the fund either for immediate retirement of the beneficiary natural person or for the purpose of his or her future retirement.

5. Generally, although the payment received by a beneficiary natural person upon retirement from service at the end of employment may appear to be income arising from employment, since it is contributed during the course of employment and deposited into the fund, a question may arise as to whether it should be regarded as income derived from employment. Learned Deputy Attorneys General have also raised this contention during the course of their arguments. However, when interpreting Section 8 in a harmonious manner, it appears that although such payment is generated in the course of employment, it does not constitute or fall within the category of employment income. In Sub-section (2) of Section 8 of the *Income Tax Act, 2058*, from among the payments to be treated as remuneration to a natural person, Section 8 (2) (f) provides that ‘retirement payment and the retirement contribution, including the amount deposited by the employer for that employee in the retirement fund shall also be computed. Nevertheless, Sub-section (3) on behalf of the employee, shall also be included.’ Nevertheless, sub-section (3) states that ‘notwithstanding anything contained in Sub-section (2), the following matters need not be included in computing the remuneration earned by an individual from employment’ and in Clause (a) thereof, the terminology ‘payments subject to final withholding tax’ has been employed. Since Sub-section (3) is an overriding provision, the provisions of Sub-section (3) shall prevail, and as the amount in the retirement fund is subject to final withholding tax, it does not constitute income derived from employment. This interpretation is further supported by the provisions prescribed in Sub-section (2) and (3) of Section 63. Sub-section (2) provides that ‘an individual who is the beneficiary of the retirement fund may make a claim to have the retirement contributions made to the fund in any income ear deducted while computing his income whereas Sub-section (3) prescribes the amount claimed by any person for deduction in any income year shall not exceed the prescribed limit of retirement contribution. Both of these matters are within the discretion of the beneficiary natural person. Under Sub-section (2), it is the individual to decide whether to claim a deduction while computing taxable income, and if such a claim is made, Sub-section (3) provides that the amount within the prescribed limit shall not be included in income computation. However, the payment of the retirement fund and the determination of applicable tax thereon is a separate matter. As this concerns a final payment, it should not be linked or treated in conjunction with the computation of annual income. From the provisions of Sub-sections (2) and (3) of Section 63, it also follows that any contribution made by a beneficiary natural person to a retirement fund shall not be included in the computation of that person’s taxable income for that year. Therefore, the benefit received from the retirement fund cannot be treated as employment income. Since it is a payment received upon retirement and is not included in the employment income, it must be understood, in accordance with Section 8 (3) (a), to be deemed

as a ‘payment subject to final withholding. Section 92 (1) of the Act provides for payments subject to final withholding tax, and Clause (g) therein specifies that all types of retirement payments including that paid by the Government of Nepal, or approved retirement fund, or a non-approved retirement fund are included except for regularly paid pensions). From this, it is also evident that the amount in the retirement fund cannot be treated as employment income. In other words, when the provisions of Sections 8 (2), 8 (3) (a), 63 (2) and (3), and Section 92 (1) of the *Income Tax Act, 2058* are interpreted harmoniously, it follows that while tax is indeed payable on the retirement fund for income tax purposes, it is not to be included in employment income. Therefore, it cannot be regarded as remuneration for the purpose of computing tax on employment income, nor can the tax be calculated and withheld on that basis. That is, since the payment from the retirement fund is a one-time payment made to the beneficiary natural person upon termination of employment, it must be understood and treated as such for the purposes of tax deduction.

6. While discussing the retirement fund, another matter also needs to be considered. The Income Tax Act envisages two types of retirement funds: an approved retirement fund and an unapproved retirement fund - that is, a fund operated by an entity to make payments to a beneficiary natural person upon retirement without having obtained approval. Section 2(b) of the Income Tax Act defines an ‘approved retirement fund’ as a retirement fund that has received approval from the Department in accordance with Sub-section (1) of Section 63. Sub-section (1) of Section 63 provides for two types of retirement funds. The first is a retirement fund operated by a resident person with approval from the Department of Inland Revenue, and the second is a retirement fund that does not require approval, such as those operated under the *Citizen Investment Trust Act, 2047*, the *Social Security Fund Act, 2074*, the *Savings Fund Act, 2019*, and the *Pension Fund Act, 2075*. Both of these fall within the category of approved retirement funds. However, apart from these, Section 65 (2), 88 (2) and other Sections of the Income Tax Act also envisages other retirement funds that have not obtained approval (unapproved retirement funds)¹. While calculating retirement payments, the method of computation differs depending on whether the payment is being made from an approved or unapproved fund. For example, under the provisions of Sub-section (1) of Section 65 of the Act, any payment made to a natural person based on contributions in an approved retirement fund, or any retirement payment made by the Government of Nepal, shall be included in the person’s income for the purpose of income computation; however, in such calculation, fifty percent of the payment amount or five hundred thousand, whichever is higher, shall be exempt from tax. The payment after deducting this exempt amount is considered a benefit derived from non-business income of the natural person. However, while computing the benefit derived from an unapproved retirement fund, according to the provisions of Sub-section (2) of Section 65, the entire benefit must be calculated without any deduction. Furthermore, the clarification in the same Sub-section specifies that any payment from a fund in which the beneficiary has made no contribution (non-contributory fund) shall not be considered a benefit arising from an unapproved retirement fund². This implies that, in the case of an unapproved retirement fund, the contribution of the beneficiary is mandatory; otherwise, the payment from the fund cannot be computed in accordance with Sub-section (2) of Section 65.

¹ Under the main provision of Section 88 (2), it is provided that a ten percent tax shall be deducted on benefits received from an unapproved retirement fund. This provision was amended by the Fiscal Act, 2066, and the Fiscal Act, 2075, subsequently established that tax shall be deducted at the rate of five percent."

² Sub-section (2) defines computing the profit made by an individual from the interest in any retirement fund that has not obtained approval and in the Explanation section it further provides the following: "For the purposes of this Section, 'profit made from the interest in any retirement fund that has not obtained approval' means, if retirement payments made from a retirement fund which has not obtained approval to a beneficiary individual for his interest in the fund exceed the amounts of retirement contributions paid by that person to that fund for his interest in the fund, the amount to the extent of such excess. Provided that payment made from any non-contributory fund shall not be considered as benefit from interest held in the retirement fund not approved."

7. The principal dispute concerns the rate of tax deduction on the retirement fund payment. The petitioner contends that, in accordance with the proviso Clause under Section 88 (1) of the *Income Tax Act, 2058*, only five percent tax should have been levied on the post-2058 contributions, but in violation of this provision, tax was deducted at the rate of fifteen percent. The respondent, including the department of Inland Revenue in its rejoinder contends that the proviso Clause under Section 88 (1) (a) of the Act is applicable only in cases where the retirement payment is made from government funds or is based on contributions. The respondent further contend that the amount received by the writ petitioner falls does not fall under either of the two situations mentioned above, and therefore, the deduction of tax at the rate of fifteen percent pursuant to Section 88 (1) of the Act is lawful. As the contentions of both parties are based on Section 88, it is necessary to analyze this legal provision in order to reach a conclusion. The provisions of Sub-section (1) of Section 88 of the Income Tax Act, 2058, are as follows:
 - (i) When making payment by a resident person for interest, natural resource, rent, royalty, service charge, commission, sales bonus, retirement payment and other any consideration having source in Nepal, and in making payment of amount of any retirement payment, the person shall withhold tax at the rate of fifteen percent of the total amount of payment.
8. Among the various categories of payments provided under the said provision, the ‘payment from the retirement fund and any other benefits and retirement payments’ deems to be relevant to the present dispute. A preliminary study of the legal provision indicates that tax is to be deducted at the rate of fifteen percent on the total payment when such retirement payments and other benefits are made. However, this provision is not limited to this alone. The proviso Clause of the same Section further states, ‘but in respect of the following payments, tax shall be deducted at the rates specified hereunder,’ and Clause (1) provides the following:
 - (i) In case of retirement payment from the Government of Nepal or contribution-based retirement payment from the approved retirement fund, at the rate of five percent in benefit computed under clause (b) of sub-section (1) of Section 65.
9. An analysis of the proviso clause of this provision reveals two situations. First, retirement payments made by the Government of Nepal; that is, any retirement payment made by the Government of Nepal to a beneficiary natural person upon retirement, whether it is a gratuity, an amount from a savings fund, payment for accumulated leave, medical treatment expenses, insurance proceeds, or any other payment, shall be subject to tax deduction at the rate of five percent³. There appears to be no dispute or doubt regarding this. However, if such payment is made not by the Government of Nepal but from an approved retirement fund, the question arises whether tax should be deducted at the rate of five percent or fifteen percent. In this context, the meaning of the term ‘contribution-based retirement payment’ needs to be clarified. Questions also arise as to whose contribution it is, whether it is from the employee or the employer, and whether a payment made from the employer, as opposed to the Government of Nepal, can be classified as a contribution-based retirement payment. In this regard, it is also necessary to consider what the principle of equality and judicial precedents indicate.

³ The Income Tax Directive, 2066, provides examples of retirement payments as follows: ‘Generally, examples of retirement payments include payments made in respect of contributions to a retirement fund, gratuity, savings fund, payment for accumulated leave, medical treatment expenses, long service gratuity, payments from a welfare fund, or other similar types of payments received at the time of retirement.’”

10. In this context, Sections 2(d), 2(e), and 2(f) of the *Income Tax Act, 2058*, respectively provide definitions for ‘retirement fund,’ ‘retirement payment,’ and ‘retirement contribution amount,’ which has been mentioned hereinabove. Regarding the retirement contribution amount under Section 2(f), the use of the phrase ‘provisions for retirement or for future provisions thereof’ indicates that payments made into the fund upon the retirement of the beneficiary natural person can also be considered retirement contributions. Since the beneficiary natural person is about to retire at the time of such payment, it is neither practical nor realistic to expect the individual to contribute to the fund at that stage. Contributing at the time of retirement would be akin to taking with one hand while giving with the other. Therefore, the contribution made at the time of retirement is, in reality, made by the employer entity, and such contribution must also be regarded as a ‘retirement contribution amount,’ which is clearly intended by the definition.
11. Consistent with the above interpretation, the *Income Tax Directive, 2066*, has also provided guidance. Regarding the retirement contribution amount, page 10 of the Directive states that it ‘**refers to the amount contributed either by the natural person himself/herself or, in the case of the concerned person, by the employer to the fund.**’ In light of this interpretation in the Directive, it is evident that for an approved retirement fund, a contribution-based retirement payment may arise from contributions made either by the employee or the employer. Excluding the savings fund, this interpretation is also applicable to other payments from the retirement fund, such as gratuity, accumulated leave payments, or medical treatment expenses, because in these cases, the employer does not directly contribute under any specific heading. Rather, the employer contributes to the fund to attract employees to service and to ensure that the entire payment liability does not fall on the employer at the time of retirement.
12. The matter of contributions to the retirement fund must also be considered in light of the Constitution of Nepal, specifically the right to equality under Article 18 and the right to social security of workers under Article 34. In order to safeguard the old-age interests of citizens, Article 34 (2) provides for ‘contribution-based retirement payments.’ Accordingly, when paying benefits from the retirement fund, it appears just and equitable that the contributions made to the fund, whether by the employee, the employer, or both, be recognized, regardless of whether the employee works in the government sector or elsewhere. In the context of the rights guaranteed by the Constitution, interpreting the proviso Clause of Article 88 (1) in such a way as to impose unequal tax obligations on these two categories of employees does not appear to be consistent with the principle of equality. Provided, both the employee and the employer are required to contribute mandatorily, it is the responsibility of the tax administration to ensure such compliances. In this regard, the provisions of Rule 20 of the *Income Tax Rules, 2059*, and the *Income Tax Directive, 2068*, indicate that the taxpayers are accountable for ensuring this, and not the employee. It is also understood that the investment of the retirement fund cannot be independently invested by the fund’s manager in a sector of their choice; rather, in accordance with Rule 20 (2) of the *Income Tax Rules, 2059*, it must be invested in government-approved avenues⁴. This indicates that the retirement fund has been created, at least indirectly, by the government for investment in the country’s development. Therefore, even if the employee has not contributed to the fund, or individual contributions are not separately recorded, or the employer has made collective contributions to the retirement fund, it appears unjust that a five percent tax is applied on retirement payments made by the government to public-sector employees, while a fifteen percent tax is imposed on contributions made by a resident person (employer) to an approved retirement fund for the benefit of the beneficiary natural person (employee). Such differentiation does not seem equitable. Under Article 34 (2) of the Constitution of Nepal, workers are guaranteed the right to contribution-based social security. In this context, imposing a fifteen percent tax on contributions accumulated in an approved retirement fund,

⁴ This includes investments made through the Citizen Investment Trust, bonds, co-financing with banks, and investments made for the benefit of the beneficiary.

including amounts deducted from salaries prior to 2075/03/32 (corresponding to 16 July, 2018) deems to be contrary to the guaranteed right to social security.

13. A review of the development of the Income Tax Act also shows that the provisions regarding retirement payments under Section 88 (1) of the *Income Tax Act, 2058*, have been amended over time. In the original provision, the proviso Clause stated that ‘tax shall be deducted at the rate of six percent only on provident fund and gratuity payments made from an approved retirement fund.’ The *Fiscal Ordinance, 2059*, replaced the words ‘provident fund and gratuity’ with ‘payment.’ Similarly, in 2063, the term ‘retirement payment’ was used, and the *Fiscal Act, 2071*, employed the phrase ‘retirement payment made from an approved retirement fund.’ It was only in 2075 that the *Fiscal Act, 2075*, introduced the terminology ‘contribution-based retirement fund.’ Pursuant to the provisions of the *Income Tax Directive, 2068*, payments from the retirement fund apply only to gratuity, accumulated leave payments, medical treatment expenses, and similar items, and an approved retirement fund can be established and operated only under the conditions specified in Rule 20 of the *Income Tax Rules, 2059*. Therefore, pursuant to the principal provision of Section 88 (1), and given that the current Act uses the terminology ‘contribution-based retirement payment,’ it cannot be argued that tax should be deducted at the rate of fifteen percent on retirement payments from an approved retirement fund on the basis that the employee did not contribute.
14. The same issue had earlier arisen in writ petitions filed by Ved Bahadur Lawati against the Rastriya Banijya Bank (075-WO-0512) and by Rambriksha Mandal against the Agricultural Development Bank (075-WO-0613). In these cases, the Division Bench of this court observed that ‘essentially, the provisions of Sub-section (1) of Section 88 of the *Income Tax Act, 2058*, constitute the primary rule for tax deduction at source on income included in an individual’s income, whereas the proviso Clause contained in that Sub-section is an exception or special provision to that main rule. Sub-section (1) generally prescribes a tax rate of fifteen percent on payments in respect of income sourced in Nepal, including natural sources, rent, royalties, service fees, commissions, sales bonuses, retirement payments, and other benefits. The proviso Clause contained in the same Sub-section, however, specifies different tax rates for different types of payments mentioned in the main rule. This constitutes a special provision regarding the determination of the tax rate. An exceptional or special proviso in a law is considered the last intention of the makers. When a law contains both general and special provisions on the same subject, principles have been propounded stating that in such circumstances the special provision is regarded as valid and overriding, and it limits or suspends the application of the general provision. In the present writ petition, it was observed that ‘the tax rate applicable to the petitioners’ retirement payments under the proviso of Clause (1) of Sub-section (1) of Section 88 is fixed at five percent, and the main provision of Sub-section (1), which prescribes a fifteen percent tax rate, is not attracted in favor of the petitioners. Consequently, an order of certiorari had been issued setting aside the decision of the Retirement Fund Management Committee to collect excess tax from the petitioners and directed that, for the retirement payments to be received by the petitioners, no amount other than the five percent tax determined by law shall be deducted. Similarly, an order of mandamus had also been issued directing that the ten percent amount already deducted and held in the deposit account from the petitioners be refunded to them.
15. Following the decision of this Court on 2078/08/21 (corresponding to 7 December, 2021) in the said writ petition, several other writ petitions have been filed based on that decision. During the hearing of the present writ petition, it was observed that the various pending writ petitions were not of the same nature but of different kinds. While the determination of the nature of each writ petition and as to whether or not a writ should be issued is to be made in the respective petition, however, in light of the provisions of the Income Tax Act and the Rules, the following can be summarized:

- (a) Regarding writ petitions filed concerning retirement payments (including gratuity and other benefits received at the time of retirement) made by institutions that have not established an approved retirement fund or are not affiliated with the Citizen Investment Trust, it appears that, under Section 63 of the Income Tax Act, 2058, payments made from an approved retirement fund or from a fund established by an entity not requiring approval are exceptions. In cases outside these circumstances, tax is not to be deducted at the rate of five percent as mentioned in the prohibitory clause of Section 88(1), but rather at the rate of fifteen percent in accordance with the main provision of the same section. This obligation is further supported by the clear provision in the proviso clause of Section 65 (2), Sub-clause (b), which states that ‘payments made from any non-contributory fund shall not be considered as benefit from interest held in the retirement fund not approved,’ thereby clearly prescribing the tax liability. Unless this provision is amended or declared null, it cannot, on the basis of equity, be interpreted contrary to the clear statutory provision. Therefore, in the case of payments from an unapproved retirement fund, the proviso clause of Section 88(1) does not apply, and the main provision of sub-section (1) is applicable.
- (b) Similarly, the current provision of the proviso clause of Section 88 (1), as amended by the *Fiscal Act, 2075*, effective from 2075/03/32 (corresponding to 16 July, 2018), introduced the terminology ‘contribution-based retirement payment.’ Prior to this amendment, the Clause used the words ‘retirement payment made from an approved retirement fund,’ and the term ‘contribution-based retirement payment’ was not part of the provision. Therefore, for employees who retired before 2075/03/32 (corresponding to 16 July, 2018), the provisions in force at the time of their retirement apply, and the amended provision is not applicable. Accordingly, the present provisions are not relevant for those who retired before that date. Furthermore, for those petitioners who retired before 2075/03/32⁹ (corresponding to 16 July, 2018), the applicable procedure for receiving retirement payments and the corresponding tax deduction at source remained dormant for several years. Only after the decision made by the Division Bench of this court in the writ petitions filed by Ved Bahadur Lawati against Rastriya Banijya Bank (075-WO-0512) and Rambriksha Mandal against Agricultural Development Bank (075-WO-0613) on 2078/08/21 did it become clear that the tax on their retirement payments should be deducted at the rate of five percent. Subsequently, the petitioners submitted applications to the concerned authorities, and when their applications were rejected or they had directly approached the court through writ petitions. The issue of tax deduction had been settled long ago, and the decision of the Division Bench were promptly issued and applied in favor of the petitioners, and therefore, the principles of laches is applicable to writ petitions filed several years later.
- (c) Some writ petitions appear to relate to employees who separated from service under the Voluntary Retirement Scheme. In respect of persons retiring under the voluntary retirement scheme, questions regarding the applicable rate of tax deduction at source had arisen in various earlier writ petitions, and contradictory decisions had been issued by different Division Benches. However, in the writ petition filed by Chaturbhuj Bhatt and others, the Full Bench, after considering these issues, held that the tax deduction at source on additional benefit payments provided under the voluntary retirement scheme was in accordance with the law and consequently, on 2070/01/12 (corresponding to 25 April, 2013) the writ petition was quashed. During the course of the arguments, the principles laid down by this court were also discussed. Learned Joint District Attorney referred to the decision of the Division Bench in the writ petition of Bidur Ban and others (067-WO-0026)⁵, while other learned advocates highlighted the decision of the Full Bench in the writ petition of Chaturbhuj Bhatt⁶ and others and drew the court’s attention to the principles enunciated therein. It is to be

⁵ Bidur Ban et.al., vs. Nepal Insurance Company Ltd. et.al. Date of Decision 2070/7/24 (corresponding to 10 November, 2013)

⁶ Chaturbhuj Bhatta et.al. vs. Agriculture Supplies Company Ltd. et.al. Nepal Law Magazine 2070, Decision No. 8958

noted that both writ petitions relate to the Voluntary Retirement Scheme; in both cases, the issue concerned the applicable rate of tax deduction at source on payments made to employees retiring under the scheme. In both instances, the deduction of tax at the rate of fifteen percent was held to be in accordance with the law. In the writ petition of Chaturbhuj Bhatt, it was observed that, under the Voluntary Retirement Scheme, payments made to employees fell within the expression 'payment of retirement benefits' under Section 88 (1) of the Income Tax Act, 2058. Accordingly, it was held that tax should be deducted at the rate of fifteen percent on the total retirement payment (Paragraph 9), wherein the writ petition was dismissed. Although the payments received by employees under the voluntary retirement scheme relate to retirement benefits, they do not appear to constitute amounts payable from an approved retirement fund under Section 63; therefore, Section 63 is not applicable (Paragraph 7). The Full Bench concluded that payments made to persons retiring under the voluntary retirement scheme constitute additional benefits. Such payments fall within the definition and scope of 'retirement payments' under Section 88 (1) of the Income Tax Act, 2058. Consequently, the deduction of tax at the rate of fifteen percent on such payments to voluntary retirement scheme retirees was held by the Full Bench to be in accordance with law.

- (d) Tax liability is primarily personal. That is, each writ petitioner at the time of retirement should examine when they took retirement, and under which category and at what rate and how much tax should be deducted. Similarly, issues such as whether or not the retirement was under the voluntary retirement scheme and whether it occurred prior or after 2075/03/32 (corresponding 16 July, 2018) are questions that need to be considered. While writs concerning tax evasion that affect the State may be considered matters of public interest, the issues raised here pertain to individual petitioners and must be considered on a personal level. Therefore, such matters on the grounds of public interest or concern cannot be accepted as representative petitions.

16. Considering the petitions discussed above, and in reference to the relief sought by the petitioner in this writ petition, after analyzing the tax liability along with the issues regarding tax liability under the Income Tax Act, 2058, as raised in other writ petitions heard simultaneously, the question arises whether the order as per the petitioner's request should be issued or not. Upon reviewing the present petition, it is observed that the retirement fund of the petitioner's organization is managed under the Citizens Investment Trust. In such a case, as the petitioner retired after 2075/03/32 (corresponding to 16 July, 2018), the provision under the proviso to Section 88 (1), sub-clause (1) of the Income Tax Act, 2058 requires tax deduction at the rate of five percent. Therefore, the deduction at the rate of fifteen percent appears to be contrary to law. Therefore, through an order of certiorari, the decision and correspondence of the respondent Citizens Investment Fund regarding the tax deduction has been quashed. Now, once it is confirmed that the petitioner retired after 2075/03/32 (corresponding to 16 July, 2018), the petitioner is entitled to recover the excess tax deducted. Hence, an order of mandamus is hereby issued, directing the Citizen Investment Fund to refund the amount to the petitioner and provided the amount has been deposited in the government revenue, to ensure its refund to the petitioner. It is hereby directed to provide a copy of this order to the respondent offices through the Office of the Attorney General, and to upload the order and maintain the case file accordingly.

Justice

Concurring with the above Opinion

Justice

Bench Officer: Dipti Paudel/Umesh Prasad Pandaya

Computer Operator: Rekha Bhattarai/Padma Acharya

Date Year 2080 Month of Shrawan Date 32 Day 5

Corresponding to Year 2023 of the Month of August Date 17 Day 5