IN THE SUPREME COURT OF PAKISTAN
(APPELLATE JURISDICTION)

PRESENT:
MR. JUSTICE EJAZ AFZAL KHAN
MR. JUSTICE SARDAR TARIQ MASOOD
MR. JUSTICE FAISAL ARAB

CIVIL APPEAL NO. 1086 OF 2009
(On appeal against the order dated 29.1.2009 passed by the Peshawar High Court, Peshawar in T.R. No. 48/2007)

Commissioner of Income Tax, Peshawar ... Appellant

VERSUS

M/s Islamic Investment Bank Ltd ... Respondent

For the Appellant: Mr. Ghulam Shoaib Jalley, ASC

For the Respondent: Syed Mudassar Ameen, ASC

Date of Hearing: 16.12.2015

JUDGMENT

FAISAL ARAB, J.- The controversy in this appeal relates to the income tax return that was filed by the respondent for the income year that ended on 30.6.2001. Corresponding to such income year, the assessment year was 2001-02. The assessment on the tax return was finalized by the taxation officer on 14.05.2003 under the provisions of Section 62 of the repealed Income Tax Ordinance, 1979, on the strength of Section 239(1) of the Income Tax Ordinance, 2001, which states "*in making any assessment in respect of any income year ending on or before the 30th day of June, 2002, the provisions of the repealed Ordinance ....shall apply as if this Ordinance had not come into force.*" We may mention here that the Income Tax Ordinance, 1979 was repealed with effect from 30.06.2002 and replaced by Income Tax Ordinance, 2001 which came into operation on 01.07.2002.

2. When the Additional Commissioner, Income Tax, Range II, Companies Zone, Peshawar considered the assessment order in question to be prejudicial to the interest of the revenue, so he, in order to amend it, served a notice dated 23.08.2004 on the respondent under Section 122(5A) of the Income Tax Ordinance, 2001. After hearing the respondent, the original assessment order was amended vide order dated 08.04.2005 whereby the income earned by the respondent from the sale of membership card of Islamabad Stock Exchange was enhanced by two million rupees. The respondent preferred appeal against such order which was dismissed on 30.10.2006 by the Commissioner, Income Tax (Appeals), Peshawar. He held that notice under Section 122(5A) of the Income Tax Ordinance, 2001, was illegal and vacated the same on the ground that the original assessment was finalized on 14.05.2003 i.e. at a time when Section 122 (5A) had not been inserted in the Income Tax Ordinance, 2001, therefore, it cannot be applied retrospectively. While reaching at such decision, the Commissioner (Appeals) placed reliance on the case of *Honda Shahrah-e-Faisal Association of Persons, Karachi Vs. Regional Commissioner of Income Tax, Karachi* (2005 PTD 1316). In the said case, the Division bench of the Sindh High Court had held as follows:-

> *"the provisions contained in sub section (5-A) of Section 122 of the Income Tax Ordinance, 2001, inserted with effect from 1.7.2003, is not retrospective in operation. Consequently, the assessments finalized before*

> *1.7.2003 cannot be reopened/revised/amended in exercise of jurisdiction under the above provisions. Admittedly, all the notices impugned in these petitions are in respect of the assessments finalized before 1.7.2003, and consequently all the impugned notices are without jurisdiction, illegal, therefore, hereby quashed along with proceedings in pursuance thereof. The petitions are allowed accordingly."*

3. The order of the Commissioner Income Tax (Appeals) was challenged by the department through the Commissioner Income Tax before the Income Tax Appellate Tribunal, Peshawar. The tribunal also concurred with the decision of the Commissioner Income Tax (Appeals) and dismissed the appeal vide order dated 08.02.2007. In doing so it also placed reliance on the case of *Honda Shahrah-e-Faisal.* The concerned Commissioner, Income Tax then filed Tax Reference No. 48 of 2007 before the Peshawar High Court, which too was dismissed vide impugned order dated 29.01.2009. The Peshawar High Court also placed reliance on the case of *Honda Shahrah-e-Faisal* apart from placing reliance on judgments of the Lahore High Court reported in PTD 2008 Lahore 1420 and of the Peshawar High Court rendered on 22.10.2008 in Tax Reference No. 61/2007. The tax department being aggrieved by the impugned decision of the Peshawar High Court dated 29.01.2009 filed CPLA No. 432/2009 before this Court, following which leave was granted on 05.01.2009 and the petition was converted into present appeal. While granting leave, this Court observed that where the Commissioner has been given the power to amend an assessment order, in case he considers the same to be erroneous to the extent

that it was prejudicial to the interest of the revenue, then how could such a provision be held to be only prospective in nature?

4. Learned counsel for the appellant argued that the assessment order was rightly amended by the Additional Commissioner Income Tax Range-II, Company Zone, Peshawar, on the basis of Section 239 (1) of the Ordinance of 2001, however on appeal filed by the respondent, the very notice issued under the provisions of Section 122(5A) of the Income Tax Ordinance, 2001, was considered to be unlawful and this decision was maintained up to the Peshawar High Court. He contended that the main reason for rejection of appellant's notice was the decision of the Sindh High Court rendered in *Honda Shahrah-e-Faisal's* case, a decision which has also been affirmed by this Court in the case of *Commissioner of Income Tax Vs. Eli Lilly Pakistan (Pvt) Ltd* (2009 SCMR 1279). Appellant's counsel next contended that as Section 239(1) of the Income Tax Ordinance, 2001, provides that for the purpose of assessing any income year ending on or before the 30.6.2002, the provisions of the repealed Income Tax Ordinance, 1979, shall apply as if the Income Tax Ordinance, 2001, had not come into force, therefore, even if the issuance of notice dated 23.8.2004 under the provisions of Section 122(5A) of the Income Tax Ordinance, 2001, is regarded as not maintainable, such notice, on the strength of Section 239(1) of Income Tax Ordinance, 2001, ought to have been treated as notice under Section 66A of the repealed Income Tax Ordinance, 1979, instead of its outright rejection. Based on this argument, he submitted that this Court may treat the notice in question as notice under Section 66A of the Income Tax Ordinance,

1979, and remand the matter back to the Commissioner (Appeal) for his decision on merits.

5. In rebuttal, learned counsel for the respondent contended that the issuance of notice under Section 122(5A) of the Income Tax Ordinance, 2001, was rightly declared as illegal as Section 122(5A) was incorporated in the Income Tax Ordinance, 2001 on 01.07.2003 whereas the assessment of the tax return of the respondent was finalized on 14.05.2003, hence the provisions of Section 122(5A) were not even part of the Statute at the relevant time and thus could not have been invoked for any matter relating to a date prior to 01.07.2003. In addition to this argument, counsel for the respondent also contended that the respondent Company has gone into liquidation and in terms of Section 316 of the Companies Ordinance, 1984, before initiating any legal proceedings, permission ought to have been obtained from the Company Judge that is seized of the winding up proceedings. He submitted that this appeal may be dismissed.

6. When a Statute repeals an earlier Statute and it is an unqualified repeal, then the effect of such repeal is that the earlier Statue gets repealed in its entirety. However, where the Legislature intends to preserve any power or inchoate right in relation to the repealed Statute, then a saving clause is incorporated in the repealing Statute whereby certain provisions are preserved from getting repealed to the extent and with regard to the subject mentioned in the saving clause. The provisions of the repealed law that are so preserved are to be regarded as if the repealed Statute

was still in operation. Now the Income Tax Ordinance, 1979, stood repealed with effect from 30.06.2002 and was replaced by the Income Tax Ordinance, 2001, which came into operation immediately thereafter i.e. with effect from 01.07.2002. Section 239 (1) of the Income Tax Ordinance, 2001, provides that any assessment that was to be made for the income years ending on or before 30.06.2002, the same had to be made under the provisions of the repealed Income Tax Ordinance, 1979, as if Income Tax Ordinance, 2001, has not come into force. The question that arose before the forum below was whether the Commission Income Tax was justified in revising an assessment order relating the period covered under the repealed Income Tax Ordinance, 1979, by invoking the provisions of Section 122 (5A) of the Income Tax Ordinance, 2001, that was inserted on 01.07.2003 i.e. one year after the Income Tax Ordinance, 2001, came into operation. As per the interpretation put on Section 122 (5A) by the Sindh High Court in the case of *Honda Shahrah-e-Faisal,* the department could not have revised the assessment order in question by invoking Section 122 (5A) of Income Tax Ordinance, 2001, that was inserted on 01.07.2003 and being prospective in nature cannot be given retrospective application. In *Honda Shahrah-e-Faisal* case it was further held that as the provisions of Section 66A of the repealed Income Tax Ordinance, 1979, were also not saved under the Saving Clause i.e. Section 239 of the Income Tax Ordinance, 2001, the same also could not be applied to reopen the assessment order in question.

7. When the Income Tax Ordinance, 2001, came into operation on 01.07.2002, Section 239(1) read as "***239. Savings- (1) The repealed Ordinance shall continue to apply to the assessment year ending on the 30th day of June 2003".*** On 01.07.2003, Section 239 (1) was substituted by the Finance Act of 2002. It then onwards read "***239. Savings- (1) Subject to sub-section (2), in making any assessment in respect of any income year ending on or before the 30th day of June, 2002, the provisions of the repealed Ordinance, in so far as these relate to computation of total income and tax payable thereon shall apply as if this Ordinance had not come into force***. A bare reading of the original provisions of Section 239(1) would show that it was confined to only one assessment year that ended on 30.6.2003, which corresponds to the income year that ended on 30.6.2002. On the other hand the expression "*any income year*" in the amended Section 239(1) covers more than one income year that had ended on or before 30.06.2002. In other words, the amended Section 239(1) covered all assessment years ending on or before 30.6.2003 instead of just one assessment year ending on 30.6.2003 as provided in the original provisions of Section 239 (1). The expression *"any income year"* in the amended Section 239(1) clearly covers all assessment years that fall within the ambit of the repealed Income Tax Ordinance, 1979, which was not the case under the original provisions of Section 239(1) as under the original provisions the income tax department was not empowered to reopen any income year for scrutiny that fell prior to the income year that ended on 30.06.2002. As the lawmakers were not satisfied with this limited application of the original provision of Section 239 (1), hence they took corrective measure and altered it to the extent mentioned in the amended Section 239(1) whereby its scope, as discussed

above, was made much larger than the original provisions of Section 239(1). We shall now proceed to examine whether Section 239(1) as amended on 01.07.2003 on the basis of which notice under Section 122 (5A) was issued is prospective in its application or has retrospective application.

8. Section 239 of the Income Tax Ordinance, 2001, by its very nature, being a saving clause, was intended to preserve certain powers and procedures contained in the repealed Income Tax Ordinance, 1979. Several procedures for the correct assessment of income and determination of tax liability were devised in the repealed Income Tax Ordinance, 1979. These procedures are applied at various stages so that no income may escape from taxation on account of non-disclosure or miscalculation. When the amended Section 239 (1) of the Income Tax Ordinance, 2001, states "*the provisions of the repealed Ordinance, in so far as these relates to computation of total income and tax payable thereon shall apply as if this Ordinance had not come into force*", it in fact saves the entire set of procedures prescribed under the repealed law through which the exercise of reaching at the correct calculation of total income and the tax payable thereon can be undertaken with regard to the periods covered under the repealed Income Tax Ordinance, 1979. Section 2(7) of the Income Tax Ordinance, 1979, describes the term assessment thus *"assessment" includes re-assessment and additional assessment and the cognate expressions shall be construed accordingly*". Thus Section 239 (1) encompasses within its ambit all types of assessments that can be made to a tax return. In simple terms, assessment is relatable to all stages of assessments

that could be made to a tax return under the provisions of the repealed Income Tax Ordinance, 1979. The replacement of old law with a new one was never intended to affect the right of the department to revise an assessment order that had been made under the provisions of the repealed Income Tax Ordinance, 1979, but was intended only to devise a new method and mechanism to determine income and the tax payable for the post repeal era. Hence, the whole purpose of incorporating Section 239 was to preserve certain powers and procedures laid down in the repealed Income Tax Ordinance, 1979, so that it can be subsequently enforced in the post repeal era only in matters that relate to the period covered under the repealed Income Tax Ordinance, 1979. Thus the provisions of Section 239 are purely procedural in nature. When a provision is incorporated in any statute through an amendment that is procedural in nature then the retrospective rule of construction is to be applied to such provision. Such a provision has to be construed as if it was incorporated on the date when the main enactment reached the statute book. Merely because the amended Section 239(1) was inserted in the Income Tax Ordinance, 2001, on 01.07.2003 instead of 01.07.2002 when the parent statute came in operation, it cannot be said that a vacuum was created in giving effect to it from the date when the main enactment came into operation. By virtue of the amended Section 239(1), the powers or inchoate rights relating to income years covered under repealed Income Tax Ordinance, 1979, to the extent mentioned in Section 239 of the Income Tax Ordinance, 2001, were to continue to be exercised/enforced on the basis of the procedures prescribed in the repealed law as if the repealed Ordinance, 1979 is still in operation.

We are, therefore, of the opinion that the provisions of Income Tax Ordinance, 2001, cannot be interpreted in a manner so as to take away the powers of the Taxing Authority to revise, within the prescribed period of time, any assessment order that was passed under the provisions of the repealed Income Tax Ordinance, 1979. This intention of the legislature was not given primacy by the Sindh High Court while deciding the case of *Honda Shahrah-e-Faisal.* The learned Judges were simply swayed by the reasoning contained in CBR's Circular No.1 (48) IT-I/79, dated 17.02.1981 and thus failed to apply the provisions of amended Section 239(1) retrospectively.

9. In the case of *Commissioner of Income Tax vs. Asbestos Cement Industries Ltd* (1993 SCMR 1276) which was delivered in a tax matter almost in similar circumstances, this Court in paragraph 8 stated as follows:-

> *"8. A further aid to interpretation is available in the form of Explanation to section 136(1) of the Ordinance. That was added on 1-7-1985 by Finance Act I of 1985. It (the Explanation) reads as hereunder:----*
>
> > *"The period of ninety days within which an application is to be made shall apply notwithstanding that the application relates to an assessment year prior to the assessment year beginning on the first day of July, 1979, if such application is made on or after the first day of July, 1979."*
>
> *This Explanation is not a substantive enactment but declaratory. A declaratory legislation has always a retrospective effect. In Balaji Singh v. Chakka Gangamma and another AIR 1927 Mad. 85 the following principle was, enunciated on good authority for construing such Acts:---*
>
> > *"In Attorney-General v. Bugett (2 Price 381 = 146 Eng. Rep. 130), it was held that an Act of Parliament made to correct an error by omission in a former statute of the same session, has relation back to the time when the first Act was passed. Even when mistakes in legislative*

> *enactments are corrected by a later amending Act, the amending Act should be read as part of the Act which it was intended to correct. Though the Act is not called a declaratory or explanatory Act, if from the words used in the Act the Court can come to the conclusion that it is a declaratory or an explanatory Act, retrospective effect will be given to such Act."*

This Court in the case of *Commissioner of Income Tax vs. Asbestos Cement Industries Ltd* (1993 SCMR 1276) has also held that the provisions of law which are procedural in nature are retrospective in their application. A passage from the said judgment of this Court is reproduced as under:-

> *"4. The first legal proposition not open to question is that the law of limitation is by and large and substantially a procedural law. It was so held in S.M. Junaid v. President of Pakistan PLD 1981 SC 12. The other principle equally well established is that a procedural law has a retrospective application and is attracted forthwith to the pending proceedings.*

The Supreme Court of Azad Jammu & Kashmir also in the case of *Fazal dad Vs. Mst. Sakina Bibi and another* (1997 MLD 2861) retrospectively applied procedural law after holding as follows:-

> *"5. We have given our due consideration to the arguments raised at the Bar. There is no quarrel with the proposition that the law of limitation is a procedural law and generally it is given retrospective effect even if it is not so provided by the statute itself. However, there is one exception to it; if such retrospectively takes away, destroys or nullifies the vested rights of a litigant, the old law of limitation would govern the matter and new statute or provision of law introduced by an amendment or otherwise, would not affect the vested rights of a litigant. Even, the authorities relied upon by the learned counsel for the appellant support the aforesaid view. A*

reference may also be made to a case reported as Joshi Maganlal Kunverji v. Thacker Mulji Budha (AIR 1951 Kutch 15). While dealing with the proposition, it has been observed as under:--

> *"(4) ..... In the present case the plaintiff had a vested right under the repealed Limitation Act to bring his suit when the new Limitation Act was applied. The effect of the new Limitation Act was to destroy it outright. In such circumstances unless the Legislature has stated in unequivocal terms that the new enhancement should destroy the vested right it cannot be applied retrospectively so as to prevent the plaintiff from exercising his right to bring a suit which he had under the repealed Act. "*

10. There is no denying the fact that had the Income Tax Ordinance, 2001, not come into existence, the assessment in question could have been revised under the repealed Income Tax Ordinance, 1979, within five years of its finalisation i.e. within five years from 14.5.2003, when the initial assessment order in the present case was passed. This right to revise the assessment in question could be exercised under the provisions of the repealed Income Tax Ordinance, 1979, uptill 13.05.2008 which right was never given up under any provision of the Income Tax Ordinance, 2001. It does not appeal to reason that the Legislature would intend to let go persons whose incomes for any reason have escaped taxation under the repealed Income Tax Ordinance, 1979, but would still pursue the persons who are liable to file tax returns under the Income Tax Ordinance, 2001, so that they may not escape the correct tax liability. As already discussed, the Income Tax Ordinance, 2001, has preserved the powers of the tax authorities to revise assessments orders pertaining to the period falling under the repealed Income Tax Ordinance, 1979, and for

such purpose Section 239(1) was incorporated in the Income Tax Ordinance, 2001. In the present case, on the strength of Section 239(1), the machinery provided under Section 122 (5A) the Income Tax Ordinance, 2001, was brought into play for the assessment year in question. This, in our view, was only a technical mistake because in terms of Section 239 (1) of the Income Tax Ordinance, 2001, notice for reopening the assessment in question could have been issued under Section 66A of the repealed Income Tax Ordinance, 1979.

11. From the above discussion it thus appears that the decision in the case of *Honda Shahrah-e-Faisal* was erroneous as it proceeded on the assumption that the right to revise an assessment made under the repealed law stands extinguished merely for the reason that the provisions of Section 122 (5A) of Income Tax Ordinance, 2001, were inserted with effect from 01.07.2003 and being prospective in nature cannot be applied retrospectively. This resulted in destroying the department's right to revise, or amend or reopen an assessment order made under the repealed Income Tax Ordinance, 1979, irrespective of the fact that the time to revise such assessment under the repealed law had not even expired.

12. At the time of seeking leave before this Court, the appellant's counsel had referred to the case of *Commissioner of Income Tax Vs. Eli Lilly Pakistan (Pvt) Ltd* (2009 SCMR 1279) in order to point out that it has upheld the decision given in the case of *Honda Shahra-e-Faisal*. We therefore feel inclined to discuss the *Eli*

Lilly case in some detail. This Court in paragraph 57 of the *Eli Lilly* case had held as follows:-

> *"57. In the light of the above discussion, we uphold view of the Sindh High Court taken in Honda Shahra-e-Faisal and followed by the other High Courts as also the Income Tax authorities that the provisions of section 122 of the Ordinance are prospective in their application and do not apply to the assessment of a year ending on or before 30th June, 2002. On that account the appeals are bound to fail and the impugned judgments would be upheld. However, the learned High Courts have not adverted to the question of treatment of assessments of the period preceding the enforcement of the Ordinance. As already noted, section 65 of the repealed Ordinance provided a period of five years for additional assessment and such assessments were to be dealt with under the said provision in accordance with original section 239(1) of the Ordinance. The learned High Courts failed to take into consideration this aspect of the matter and did not direct that the assessments completed under the repealed Ordinance would be subject to the provisions of the said Ordinance, as originally provided in un-amended section 239(1), but not clearly and properly provided in the Ordinance at the amendment stage. We fill this lacuna in the impugned judgments and direct that the assessment of any year ending on or before 30th June, 2002 would be governed by the repealed Ordinance and shall be dealt with as if the Ordinance had not come into force. In taking this view, we are fortified by a passage from the Maxwell on Interpretation of Statutes, 10th Edition (1953), p. 228, which reads as under:-*
>
> > *"Where rights and procedure are dealt with together, the intention of the legislature may well be that the old rights are to be determined by the old procedure, and that only the new rights under the substituted section are to be dealt with by the new procedure."*

13. In *Eli Lilly* case referred to above this Court held that the assessment order under the repealed Income Tax Ordinance, 1979, could have been reopened only under the provisions of Section 239(1) which were originally incorporated but as the same were substituted through amendment on 01.07.2003, the amended provision being prospective in its application cannot be applied to income years ending on or before 30.06.2002 thus concurred with the decision of the Sindh High Court in the case of *Honda Shahra-e-Faisal.* In *Honda Shahra-e-Faisal* case, procedural provisions of Section 122(5A) of Income Tax Ordinance, 2001, were interpreted to be prospective in their application, such determination is contrary to the plethora of decisions of this Court wherein it has been held that where procedural provisions are incorporated through amendment then the same have retrospective application. We therefore treat such finding as *per incuriam.* In the case of *Application by Abdul Rehman Farooq Pirzada and Begum Nusrat Ali Gonda Vs. Federation of Pakistan* (PLD 2013 SC 829) the legal term *per incuriam* was extensively discussed in its paragraph 4 and applied to an earlier decision of this Court in the case of *Accountant General Sindh Vs. Ahmed Ali U. Qureshi* (PLD 2008 SC 522).

14. We may also point out here that it was also observed in *Eli Lilly* case that *Honda Shahrah-e-Faisal* case has failed to address the question as to how the assessments relating to periods prior to Income Tax Ordinance, 2001, can be enforced. After observing so, it took the view that there was a lacuna which needed to be filled and this was done by holding that all assessments relating to the

periods prior to Income Tax Ordinance, 2001, coming into force are to be undertaken in accordance with original provision of Section 239(1) of the Income Tax Ordinance, 2001. Thus this Court in *Eli Lilly* case reached at the same conclusion, which we have reached in this case, albeit on a different set of reasoning.

15. Apart from holding that provisions of Section 239(1) of the Income Tax Ordinance, 2001, have retrospective application, the controversy in the present case can also be looked at from distinct prospective. The tax laws are a body of rules and regulations under which the State has a claim on the taxpayers so that they may pay to the State a part of their incomes at the specified rates. This liability to pay income tax accrues on the taxpayer on the last day of the income year/accounting year, though the tax becomes payable after it is quantified in accordance with the procedures laid down in the Income Tax law. Thus a charge in favour of the State is created at the end of each accounting year, though the exercise of (i) making an assessment on the basis of ascertainable data of income and expenditure, or (ii) revising an assessment order where it is found that there is sufficient material to hold that the original assessment was prejudicial to the interest of the revenue, takes place at some later stage. These procedural exercises are undertaken only with the object of reaching at the correct calculation of yearly income but the real liability to pay tax had already accrued on the last day of the income year i.e. on the last day of the accounting year thereby creating a charge in favour of the State. It may be understood as an expense that has already accrued but is payable later. Reference can also be made to Section 9 of the Income Tax Ordinance, 1979,

with regard to the creation of the charge on the basis of income year. Thus seeking revision of a tax return at any subsequent stage has nothing to so with the creation of charge on the tax-payer that has become absolute on completion of the income year/accounting year.

16. In this regard reference can also be made to cases from Indian jurisdiction. In the case of *Chatturam Vs. Commissioner of Income Tax* (AIR 1947 FC 32) and in the case of *Williams Vs Henry Williams Ltd* it was held that the liability of Income Tax was definitely and finally created by the charging section and the provisions of assessment etc. were machinery provisions only for the purpose of quantifying the liability. In the case of *Wallace Brothers & Co. Ltd. Vs Commissioner of Income Tax* (AIR 1948 PC 118) also it was held *"…. the rate of tax for the year of assessment may be fixed after the close of the previous year and the assessment will necessarily be made after the close of that year. But the liability to tax arises by virtue of the charging section alone, and it arises not later than the close of the previous year, though quantification of the amount payable is postponed."* The Indian Supreme Court in the case of *Kalwa Devadattam v. Union of India* (AIR 1964 SC 880) also held the same in these words- "*Under the Indian Income-tax Act liability to pay income-tax arises on the accrual of the income, and not from the computation made by the taxing authorities in the course of assessment proceedings; it arises at a point of time not later than the close of the year of account."*

17. In light of the discussion undertaken in the preceding paragraph, it is clear that charge is created on the last date of accounting year which under the repealed Income Tax Ordinance, 1979, was created up till 30.06.2002. The power to recover tax cannot be taken away, even if there had been no saving clause in the Income Tax Ordinance, 2001. Such power gets automatically protected under the provisions of the general law i.e. Section 6 of the General Clauses Act, 1897. This claim on the basis of the charge already created could have been taken away if a specific provision to that effect had been incorporated in the Ordinance, 2001 but that is not the case in the present matter. Thus irrespective of any accounting discrepancy that is sorted out on the basis of the procedural provisions of the income tax law at any subsequent stage, the charge of income tax on the taxpayer stands established on the last day of the income year/accounting year. In the present case, the last day of the last income year covered under the repealed Income Tax Ordinance, 1979, was 30.6.2002, therefore, on all income years that ended on or before 30.6.2002 the charge to recover tax had already been created on or before such date. In the case of *Muhammad Arif Vs. State* (1993 SCMR 1589) it was held as follows:-

> *"From the above cited cases, it is evident that there is judicial consensus that where a law is repealed, it will not inter alia affect any investigations, legal proceedings or remedy in respect of any right, privilege, obligation, liability, penalty, forfeiture or punishment, and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be*

imposed as if the law had not been repealed. This is so, inter alia, because of section 6 of the General Clauses Act, 1897 (which corresponds to section 4 of the West Pakistan General Clauses Act, 1956), in the absence of any contrary intention manifested in the relevant statute."

18. Following passages from Indian jurisdiction in the case of *State of Punjab Vs. Mohar Singh Pratap Singh* (AIR 1955 Supreme Court 84) can also be referred with considerable advantage:-

"Whenever there is a repeal of an enactment, the consequences laid down in section 6 of the General Clauses Act will follow unless, as the section itself says, a different intention appears. In the case of a simple repeal there is scarcely any room for expression of a contrary opinion. But when the repeal is followed by fresh legislation on the same subject we would undoubtedly have to look to the provisions of the new Act, but only for the purpose of determining whether they indicate a different intention.

The line of enquiry would be, not whether the new Act expressly keeps alive old rights and liabilities but whether it manifests an intention to destroy them. We cannot therefore subscribe to the broad proposition that section 6 of the General Clauses Act is ruled out when there is repeal of an enactment followed by a fresh legislation. Section 6 would be applicable in such cases also unless the new legislation manifests an intention incompatible with or contrary to the provisions of the section. Such incompatibility would have to be ascertained from a consideration of all the relevant provisions of the new law and the mere absence of a saving clause is by itself not material."

19. Thus the charge on the income of an assessee that accrues on the last date of an income year is also protected independently under the provisions of general law i.e. Section 6 of the General Clauses Act and no dependence on saving clause was required.

20. In so far as the contention of the counsel for the respondent that leave was not obtained from the Court which is seized of the winding up proceedings, suffice is to state that Section 316 of the Companies Ordinance, 1984, is attracted when winding up order is passed or provisional manager is appointed. In the present case, it has not been demonstrated that such an order has been passed. Mere filing of winding up proceedings does not attract the provision of Section 316. Even otherwise, we have decided the question of jurisdiction and propose to remand the case back to the Commissioner Income Tax (Appeals), Peshawar, for adjudication of the respondent's appeal on merits. Hence, at this stage no useful purpose would be served to go into the question of whether the leave of the court that is seized of the winding up proceedings was to be sought first before proceeding further in the matter.

21. In view of what has been discussed above, we are of the considered opinion that it was never intended by the lawmakers, even at the time of promulgating the Income Tax Ordinance, 2001, to destroy the charge on incomes that accrued under the provisions of repealed Income Tax Ordinance, 1979, in so far as such charge related to correct computation of total income and the tax payable

thereon. Such a claim arising under the repealed law, which had not extinguished by afflux of time, was specifically made enforceable through legal fiction created in Section 239(1) as if the Income Tax Ordinance, 1979, had not been repealed. This was the sole object of incorporating Saving Clause in the form of Section 239(1) in the Income Tax Ordinance, 2001. Therefore, it cannot be said that the income years which relate to the period covered under the repealed Income Tax Ordinance, 1979, cannot be brought under scrutiny under its provisions after 30.06.2002 on the strength of Section 239 (1) of the Income Tax Ordinance, 2001. Additionally, this could be done even on the strength of the provisions of Section 6 of the General Clauses Act as the charge of tax stood created on or before 30.06.2002. As to the validity of the notice sent to the respondent under the label Section 122 (5A) of the Income Tax Ordinance, 2001, suffice is to state that merely because the notice was so labelled instead of Section 66A of the Income Tax Ordinance, 1979, it does not follow that it was invalid under the law. By virtue of Section 6 of the General Clauses Act as well as under Section 239(1) of the Income Tax Ordinance, 2001, powers under Section 66A could have been exercised to take same action as was contemplated in the notice in question. We therefore, treat the notice dated 23.8.2004 issued under Section 122(5A) to be notice issued under Section 66A of the Income Tax Ordinance, 1979. For the foregoing reasons, the impugned order is set-aside. Resultantly, the appeal of the respondent filed before the Commissioner, Income Tax (Appeals), Peshawar stands revived. Let the Commissioner, Income Tax (Appeals), Peshawar after issuing due

notice of hearing to the parties decide respondent's appeal afresh on merits. Needless to mention that his decision shall be governed by this decision with regard to the retrospective application of Section 239(1) of the Income Tax Ordinance, 2001. Let a copy of this judgment also be dispatched to the Chairman, Federal Board of Revenue for its implementation in cases involving similar controversy.

22. The above are the detailed reasons of our short order dated 16.12.2015.

JUDGE

JUDGE

Islamabad, the JUDGE
16th of December, 2015

Approved For Reporting
Khurram