IN THE SUPREME COURT OF PAKISTAN
(APPELLATE JURISDICTION)

PRESENT

MR. JUSTICE IFTIKHAR MUHAMMAD CHAUDHRY, HCJ
MR. JUSTICE RAJA FAYYAZ AHMED
MR. JUSTICE CH. IJAZ AHMED

Civil Appeal No.778 of 2005

(On appeal from the judgment dated 30.3.2005 passed by the High Court of Sindh, Karachi in C.P. No. D-652/ 2004)

The Commissioner of Income Tax .... Appellant

Versus

M/s Eli Lilly Pakistan (Pvt.) Ltd. .... Respondent

CAs No. 876-879 of 2005

(On appeal from the judgment dated 2.3.05 passed by High Court of Sindh, Karachi in CPs 643-646/04)

The Commissioner of Income Tax …Appellant

Versus

M/s Honda Shahra-e-Faisal (AOP) Resp.in CA 876/05
Sh. Muhammad Amjad Maqbool in CA 877/05
Sh. Muhammad Mubashir in CA 878/05
Sh. Muhammad Afzal Maqbool in CA 879/05

CAs No. 1601-1625 of 2006

(On appeal from the judgment dated 5.10.06, 24.1.06, 26.1.06, 16.3.06, 24.3.06, 12.4.06, 29.3.6, 30.3.06, 21.4.06, 7.4.06, 28.3.06, 9.5.06, 10.8.06, passed by High Court of Sindh, Karachi in CP No.379/05, CP No. D 378/05, 1707/5, ITRA No.245-247/06, 169/06, ITR No.177-179/06, ITRA No.196-196 A/06, 197-198/06, 256/06, 203/06, 26/06, 225/06, 224/06, 235/06, 239/06, 230-231/06, 264/06, D-652/04, CP 643/04)

The Commissioner of Income Tax …Appellant

Versus

M/s Aero Asia International (Pvt.) Ltd. Res. in CA 1601/06

M/s Fauji Oil terminal & Distribution Co. Ltd. in CA 1602/06
M/s Gul Ahmed Energy Ltd. in CA 1603/06
M/s Nippon Safety Glass Pak (Pvt.) Ltd. in CA 1604-06/06
M/s G.T.N. Fabrics (Pvt) Ltd. in CA 1607/06
M/s N.C.R. Corporation in CAs 1608-10/06
M/s Amin Textile Mills Ltd. in CAs 1611-14/06
M/s Jehangir Siddiqui & Co Ltd. in CA 1615/06
M/s Khayaban-e-Iqbal (pvt) Ltd. in CA 1616/06
M/s Packages Ltd. in CA 1617/06
M/s SAF Textile Mills Ltd. in CA 1618-19/06
M/s Fahad Security Service Ltd. in CA 1620/06
M/s Al-Rehman Security Services Ltd. in CA 1621/06
M/s Al-Fatah Security Services Ltd. in CA 1622-24/06
M/s Sui Southern Gas Ltd. in CA 1625/06

CAs No. 2670-2687 of 2006

(On appeal from the judgment dated 22.8.06, 31.5.06, 15,9.06, 26.9.06, 22.9.06, 28.9.06 passed by High Court of Sindh, Karachi in ITR Nos. 404-406, 492/06, 272/06, 436-439/06, 450-452/06, 512-513/06, 263/06, 298/06, 307-308/06)

The Commissioner of Income Tax …Appellant

Versus

M/s B.P. Industries Ltd. Resp.in CA 2670-72/06
M/s Pakistan Refinery Ltd. in CA 2673/06
M/s Haji Muhammad Suleman in CA 2674/06
M/s Oxyplast (Pvt) Ltd. in CAs2675-78/06
M/s Maroof Security Services (Pvt) Ltd. in CAs 2679-81/06
M/s Zever Chemical Ltd. in CAs 2682-83/06
M/s Sui Southern Gas Ltd. in CA 2684/06
M/s Hashoo Holding (Pvt) Ltd. in CA 2685/06
M/s Rupali Bank Ltd. in CA 2686-87/06

CAs No. 585-595 of 2007

(On appeal from the judgment dated 19.10.06, 28.11.06, 14.11.06, 14.11.06, 13.10.06, 26.9.06, 10.10.06, 17.10.06, 17.11.06, passed by High Court of Sindh at Karachi in ITRA No.490/06, 49/06, 555/06, 559/06, 539/06, 510-511/06, 536-537/06, 541/06, 558/06)

The Commissioner of Income Tax …Appellant

Versus

M/s Evian Fats and Oil (Pvt) Ltd. Res. in CAs 585-586/07
M/s Dawlance (Pvt) Ltd. in CA 587/07
M/s Baba Farid Sugar Mills Ltd. in CA 588/07
M/s Model Homes in CA 589/07
M/s Zever Chemical Ltd. in CAs 590-91/07
M/s Mehran Sugar Mills Ltd. in CAs 592-93/07
M/s Irfan Iqbal Puri in CA 594/07
M/s Zed Pak Cement Factory Ltd. in CA 595/07

CAs No. 706-707 of 2007

(On appeal from the judgment dated 21.11.06 and 24.01.07, passed by High Court of Sindh, Karachi in ITRA No.472-473/06)

The Commissioner of Income Tax …Appellant

Versus

Daud Ahmed Res. in both cases

CAs No. 1369-1404 of 2007

(On appeal from the judgment dated 24.1.07, 11.1.07, 20.2.07, 21.5.07, 24.1.07, 6.2.07, 12.9.07, 18.5.07, 26.4.07, 22.10.07, passed by High Court of Sindh, Karachi in ITRA No.603/06, 590/06, 23-24/07, 613-614/06, 5-7/07, 604/06, 211/06, 73/07, 92-115/07)

The Commissioner of Income Tax …Appellant

Versus

M/s Waken Hut (Pvt) Ltd. Res. in CA 1369/07
M/s S.R.S Industrial Corp. (Pvt.) Ltd. in CA 1370/07
M/s Kashmir Corporation (Pvt) Ltd. in CAs 1371-72/07
M/s Ahmed Ibrahim Agency (Pvt) Ltd. in CAs 1373-74/07
M/s Condor Security Services (Pvt) Ltd. in CAs 1375-77/07
M/s Nadeem Brothers in CA 1378/07
M/s Al Fatah Security Services (Pvt.) Ltd. in CA 1379/07
M/s Haseeb Spinning Mills Ltd. in CA 1380/07
M/s Muhammad Saeed Transporters in CA 1381-83/07
M/s Dost Muhammad Transporters in CA 1384-86/07
M/s Abdul Rashid Transporters in CA 1387-89/07
M/s Arshad Hussain Transporters in CA 1390-92/07
M/s Muhammad Imran Transporters in CA 1393-95/07
M/s Ali Agencies Distributors Medicine in CA 1396/07
M/s Muhammad Saleem Transporters in CA 1397-99/07
M/s Muhammad Jawaid Transporters in CA 1400-01/07
M/s Muhammad Ramzan Transporters in CA 1402-04/07

CAs No. 459-501 of 2008

(On appeal from the judgment dated 22.10.07, 30.11.06, 26.10.07, 31.10.07, 17.12.07, passed by High Court of Sindh, Karachi in ITR No.233 - 265/07, 576-577/06, 578/06, 197/07, 230 - 232/07, 380-382/07)

The Commissioner of Income Tax …Appellant

Versus

M/s S.C. Jhonson and sons (pvt) Ltd. Resp. in CA 459/08
M/s Pak. Security Services Ltd. in CA 460-465/08
M/s Global Security Pakistan Ltd. in CA 466/2008
M/s Shahzad Security Services (pvt) Ltd. in CA 467-70/08
M/s Bawany Air Products Ltd. in CA 471-474/08

M/s Naurus (Pvt) Ltd. in CA 475-477/08
M/s Security & Management Services Ltd. in CA 478-80/08
M/s Rhone Poulene (Pvt) Ltd. in CA 481-83/08
M/s Industrial Chemicals (Pvt) Ltd. in CA 484/08
M/s Gama Silk Mills Ltd. in CA 485/08
M/s Pakistan Emerging Ventures Ltd. in CA 486/08
M/s Aluminum Company of Pakistan Ltd. in CA 487/08
M/s Continental Furnishing Co. Ltd. in CA 488/08
M/s Mass Advertising (Pvt) Ltd. in CA 489/08
M/s Superior Security Guards Ltd. in CA 490-91/08
M/s Sibaro Agencies (pvt) Ltd. in CA 292-494/08
M/s Pak. Hi Oils (Pvt) Ltd. in CA 495/08
M/s General Trading Establishment in CA 496/08
M/s Tin Box in CAs 497-498/08
M/s Blitz Security Services (Pvt) Ltd. in CAs 499-501/08

CAs No. 783-791 of 2008

(On appeal from the judgment dated 3.4.08, 2.4.08, passed by Islamabad High Court, Islamabad in RA No. 50-52, 56-58/07, 62/07, 63/07)

The Commissioner of Income Tax …Appellant

Versus

M/s National Highway Authority Resp. in CAs 783-788/08
M/s Security Investment Bank Ltd. in CAs 789-791/08

CAs No. 803-1039 of 2008

(On appeal from the judgment dated 3.4.08, 2.4.08, 7.4.08, 14..4.08, 10.4.08, passed by Lahore High Court, Multan Bench in PTR Nos. 10/07, 10/06, 27/06, 35/06, 04/07, 64/07, 11-12/07, 23-25/07, 30-33/07, 47-52/07, 61/07, 63/07, 16/08, 19/08, 42/08, 09/07, 17/07, 18/07, 54-56/07, 76/07, 59/07, 26-27/08, 30/08, 386/06, 372/07, 405-406/07, 531/07, 533/07, 550-51/07, 612-14/07, 661-63/07, 674/07, 698/07, 849/07, 880-81/07, 532/07, 534/07, 540/07, 1-3/08, 513/07, 629/07, 635/07, 707-10/07, 816/07, 821/07, 469-471/07, 630-33/07, 773/07, 777-780/07, 805-808/07, 830-831/07, 886-888/07, 334-339/07, 511-12/07, 625-26/07, 636-39/07, 715/07, 123/07, 202/07, 206/07, 221-22/07, 241-42/06, 251-52/07, 355/06, 360/06, 374-375/07, 413/06, 464/07, 505-507/07, 580-584/07, 593-596/07, 679/07, 841/07, 882-885/07, 208/06, 356/06, 592/07, 172-173/07, 289-290/07, 347-348/07, 359/07, 415/07, 418-421/07, 459/07, 461/06, 465/07, 446/07, 467-468/07, 495-499/07, 519-520/07, 640/07, 642-644/07, 684/07, 793/07, 823-824/07, 837-838/08, 842-844/07, 852-864/07, 37/07, 78/08, 114/07, 151-154/07, 166-171/07, 174/07, 248-250/07, 262-263/05, 118/06, 23-24/07, 34-

36/07, 102/07, 177-179/07, 183-184/07, 189/07, 244/07, 294/07, 358/07, 391-92/07, 462-63/07, 734/07, 4/08)

The Commissioner of Income Tax …Appellant

Versus

Khalid Javed	Resp. in CA 803/08
Intizar Ali Prop. M/s Bismillah	in CA 804/08
Munazza Iqbal	in CAs 805-06/08
M/s Circle 'M' Co. (Pvt) Ltd.	in CA 807/08
Rana Shahid Hussain,	in CA 808/08
Khalid Javed, Prop. Laureates Public School	in CAs 809-10/08
M/s Jalandhar Autos Workshop Multan	in CAs811-813/08
Allah Diya Sh.	in CA 814/08
Muhammad Khalid	in CA 815/08
M/s Chaudhry Electronics Distt. Pakpattan	in CA 816/08
M/s Pakistan Poultry Enterprises	in CA 817/08
Muhammad Amin	in CA 818/08
Mistry Ilam Din Repair Works	in CA 819/08
M/s Karam Pansar Store, Pakpattan	in CA 820, 22, 23/08
M/s Javed Iron Store	in CA 821/08
Ch. Abdul Rehman	in CA 824/08
Zia ur Rehman	in CA 825/08
Three Star Paper Cone, Industries	in CA 826/08
M/s Sh. Muhammad Abbas	in CA 827/08
Mudassar Hussain	in CA 828/08
Zia ul Hassan Siddiqui	in CA 829/08
M/s Shafique Building Material Store	in CA 830/08
M/s Safdar Naeem	in CA 831/08
M/s Lucky Steel	in CAs 832-34/08
Nishat Merzia Khanum	in CA 835/08
Akhtar Ali Ansari	in CA 836/08
M/s Honda Breeze Multan	in CA 837-839/08
M/s Phalia Sugar Mills	in CA 840/08
M/s Ibrahim Fibers Ltd.	in CA 841/08
M/s Imperial Electrical Company ltd.	in CAs 842-43/08
M/s Hybrid Techniques (Pvt) Ltd, Lahore	in CA 844/08
M/s Crescent Steel & Allied Products Ltd	in CA 846/08
M/s Shams Textile Mills Ltd.	in CA 847/08
M/s Fine Gas Co. (Pvt) Ltd.	in CAs 848-50/08
M/s Hajra Textile Mills Ltd.	in CAs 851-53/08
M/s Resham Textile Mills Ltd.	in CA 854/08
M/s Sarfraz Yaqoob Textile Mills Ltd	in CA 855/08
M/s Sui Northern Gas Pipelines Ltd	in CA 856-58/08
M/s Hybrid Techniques (Pvt) Ltd, Lahore	in CA 859/08
M/s Rupail Ltd, Lahore	in CA 860/08
Prime Commercial Bank, Ltd	in CA 861/08
M/s Security Solutions (Pvt) Ltd.	in CA 862-64/8
M/s Airsys ATM Ltd.	in CA 865/08
M/s Idrees Cloth House	in CA 866/08
M/s Sh. Shahid Rashid	in CA 867/08
M/s Malik Manzoor Hussain & Co.	in CA 868-71/08
Mian Muhammad Zahoor	in CA 872/08
Tariq Garments, Lahore	in CA 873/08

M/s Ammar Medical Complex Ltd.	in CA 874/08
M/s Ammar Medical Complex Ltd	in CAs 875-76/08
Kh. Khawar Rashid	in CAs 877-80/08
Shahzad A. Mumtaz	in CA 881/08
Siddiqui Brothers (Pvt) Ltd.	in CAs 882-85/08
M/s Reem Rice Mills (Pvt) Ltd	in CAs 886-89/08
M/s Muhammad Saeed	in CA 890/08
M/s Punjab Oil Mills Ltd	in CA 891/08
M/s Ravi Spinning Mills Ltd	in CAs 892-94/08
M/s Thal Industries Ltd.	in CAs 895-900/08
M/s Airsys ATM Ltd	in CAs 901-02/08
M/s Kh. Mahboob Elahi	in CAs 903-06/08
M/s Kh. Shahid Rashid	in CAs 907-10/08
M/s Four Star (Pvt) Ltd	in CA 911/08
M/s Moto Travel (Pvt) Ltd	in CA 912/08
M/s Indus Fruit Products Ltd	in CA 913/08
M/s Taiwan Chinese Restaurant (Pvt) Ltd	in CA 914/08
M/s Asim Siddique Associates	in CA 915/08
M/s Micko Industrial Chemicals (Pvt) Ltd	in CA 916/08
M/s Lipa Security Services (Pvt) Ltd	in CA 917-18/08
M/s Hafeez Shafi Tanneries (Pvt) Ltd	in CAs 919-20/08
M/s Asif Paint Industries	in CA 921/08
M/s Riasat Ali	in CA 922/08
M/s Honda Fort (Pvt) Ltd	in CAs 923-24/08
M/s Mohammad Sarwar	in CA 925/08
M/s Newage Plastic (Pvt) Ltd	in CA 926/08
M/s Ahad Fibers (Pvt) Ltd	in CAs 927-29/08
M/s Tayyab Textile Mills (Pvt) Ltd	in CA 930/08
M/s Sahil Ltd.	in CA 931/08
M/s Hermes on Line (Pvt) Ltd	in CAs 932-34/08
M/s Anjum Atta Sheikh	in CAs 935-38/08
M/s Akaasul Musaffa (Pvt) Ltd	in CA 939/08
M/s Muhammad Hafeez Khan	in CA 940/08
M/s Best Foods USA (Non resident)	in CAs 941-44/08
M/s Premier Rice Mills Gujrat	in CA 945/08
Ch. Riasat Ali	in CA 946/08
Mian Pervaiz Akhtar	in CA 947/08
M/s Amin Sajjad Heera	in CAs 948-49/08
M/s Pak. Pipe Steel Industries	in CA 950/08
M/s International Currency Exchange	in CA 951/08
M/s Allah Walay Jewelers	in CA 952/08
Muhammad Yousaf	in CA 953/08
Faisal Metal Works	in CA 954/08
M/s PCA Cargo (Pvt) Ltd.	in CA 955/08
Imran Shafi Curtain Point	in CA 956/08
M/s Muhammad Farooq Prop. Jinnah Autos	in CAs 957-59/08
M/s Feed Industries (Pvt) Ltd	in CA 960/08
M/s Ch. Engineering Co.	in CA 961/08
M/s Honda Homes	in CA 962/08
M/s Muhammad Asif Prop. Honda Palace	in CAs 963-65/08
M/s Aslam Flour Mills (Pvt) Ltd	in CAs 966-968/08
M/s Sonex Metal Industries (Pvt) Ltd	in CAs 969-70/08
M/s Gojra Tannery	in CAs 971-972/08

M/s K.K. Chicks	in CA 973/08
M/s Sonica Plastic Industries	in CA 974/08
M/s Butt Traders Commission Agent	in CAs 975-76/08
M/s Mahboob Elahi & Sons	in CA 977/08
M/s Khyzer Hayat	in CA 978/08
M/s Gujranwala Gas	in CAs 979-80/08
M/s Nasir Pervaiz Hardware Store	in CA 981/08
M/s Nasim Impex Cloth House	in CA 982/08
M/s Mahmood Ali	in CA 983/08
M/s Ch. Rice Mills	in CA 984/08
M/s Muhammad Latif Kunda Maker	in CA 985/08
M/s Zaka Ullah, Saif Ullah PEPSI Agency	in CA 986/08
M/s Mahboob Elahi & Sons (Pvt) Ltd	in CAs 987-88/08
M/s Shahid Hardware Store	in CAs 989-91/08
Ejaz-ul-Haq	in CAs 992-94/08
Javed Iqbal	in CA 995/08
Gondal Traders	in CA 996/08
Madina Traders	in CA 997/08
M/s Abdul Rauf & Brothers	in CA 998/08
M/s ICARO (Pvt) Ltd.	in CA 999/08
M/s Kohinoor Smith (Pvt) Ltd	in CA 1000/08
M/s Ravi Security Guard (Pvt) ltd	in CA 1001/08
M/s Kh. Electronics (Pvt) Ltd	in CAs 1002-3/08
Mrs. Saleh Ahmed	in CAs 1004-5/08
Mst. Mumtaz Begum	in CA 1006-7/08
M/s Siza International (Pvt) Ltd	in CAs 1008-11/08
M/s International Manpower Lahore Cantt.	in CA 1012/08
M/s Taq International Cargo Services (Pvt)	in CAs 1013-15/08
M/s Bright Career School	in CAs 1016-17/08
M/s Nafees Legler Denim Mills Ltd	in CA 1018/08
M/s Dawchem (Pvt) Ltd	in CA 1019-20/08
M/s ICARO (Pvt) Ltd.	in CA 1021-23/08
M/s Essena Foundation (Pvt) Ltd	in CA 1024/08
M/s Ghulam Rasool Co. (Pvt) Ltd	in CAs 1025-27/08
Mrs. Sobia Haroon	in CA 1028/08
M/s Shera Films Corp. Lahore	in CA 1029/08
M/s Buro Interiart (Pvt)	in CA 1030/08
M/s Ghousia Embroidery Lahore	in CA 1031/08
M/s Sargodha Textile Mills Ltd	in CA 1032/08
M/s Misto Industries (Pvt) Ltd	in CA 1033/08
M/s H. H. Associates, Lahore	in CAs 1034-35/08
M/s A. R. Tannery, Kasur	in CA 1036/08
M/s Salamat School System, Lahore	in CA 1037/08
M/s Popular Medical Service, Lahore	in CA 1038/08
M/s Security Solutions (Pvt) Ltd.	in CA 1039/08

CAs No.1148-1150 of 2008

(On appeal from the judgment dated 12.3.2008 passed by Lahore High Court, Rawalpindi Bench in TR Nos. 60/07, 100-101/06)

The Commissioner of Income Tax …Appellant

Versus

Qamar-uz-Zaman (in all cases) …Respondent

CIVIL PETITION No.1245 OF 2008

(On appeal from the judgment dated 13.3.08 passed by Lahore High Court, Rawalpindi Bench in TR No.110/06)

The Commissioner of Income Tax …Petitioner

Versus

M/s Attock Refinery Ltd, Morgah, Rwp. …Respondent

CAs No.1492-1509 of 2008

(On appeal from the judgment dated 10.4.2008 passed by Lahore High Court, Lahore in PTR Nos. 460-61/06, 453/06, 500/07, 617-18/07, 817-818/07, 832-833/07, 868-70/07, 889-93/07)

The Commissioner of Income Tax …Appellant

Versus

M/s Jhelum Valley Coal (Pvt) Ltd	Resp..in CAs 1492-93/08
Mian Maqsood Ahmed C/o Mumtaz Foundry	in CA 1494/08
Mst. Ghazala Roohi C/o Ittefaq Co.	in CA 1495/08
M/s M.E.C. Engineering Works (Pvt) Ltd	in CAs1496-97/08
Sami Ullah Sheikh	in CAs1498-99
M/s Millat Enterprises (Pvt) Ltd	in CA 1500/08
Muhammad Aslam Rahi	in CA 1501/08
M/s Aized Beverage Industries (Pvt) Ltd	in CA 1502/08
M/s Mohsan Rashid (Pvt) Ltd.	in CAs 1503-4/08
M/s Faisalabad Education Foundation	in CAs 1505-13/08

CAs No. 1847-1849 of 2008

(On appeal from the judgment dated 17.9.2008 passed by Lahore High Court, Lahore in ITRA Nos. 230-32/07)

Commissioner (Legal Division) …Appellant

Versus

Cherat Electric Ltd. Karachi …Res. in all cases

CAs No. 2257-2281, 2283-2311 of 2008

(On appeal from the judgment dated 23.9.2008 passed by Lahore High Court, Lahore in PTR Nos. 35-36/08, 106-108/08, 207/08, 316-18/08, 338-39/08, 438/08, 47/08, 63-67/08, 98-99/08, 133-36/08, 163/08, 165-

74/08, 253/08, 274/08, 348/08, 409/08, 432-33/08, 25/08, 175-76/08, 250/08, 252/08, 320/08, 323/08, 325/08, 327/08, 330-31/08, 333/08, 335/08)

The Commissioner of Income Tax …Appellant

Versus

Zameer Parvez Shah	Resp. in CA 2257-58/08
Ali Raza Ayub	in CA 2259/08
Muhammad Saleem Akhtar	in CA 2260/08
M/s Faisal Hospital	in CA 2261/08
M/s Masood Textile Pvt. Ltd.	in CA 2262/08
M/s Asghar & Son (Pvt) Ltd.	in CA 2263/08
Muhammad Saleem	in CA 2264/08
M/s Jawad Traders	in CA 2265/08
Misbahuddin Zaighum	in CA 2266/08
Saifuddin Moazzam	in CA 2267/08
Muhammad Iqbal	in CA 2268/08
M/s Highland Travel (Pvt) Ltd.	in CA 2269/08
Muhammad Faheem Qureshi	in CA 2270/08
M/s Muhammad Amin	in CA 2271-74/08
Rashid Ahmad	in CA 2275-76/08
Abid Hassan Minto	in CA 2277-78/08
Suleman Zafar Siddiqui	in CA 2289/08
Masood Ali Khan	in CA 2280/08
M/s N.B. Modaraba Management Co. Ltd.	in CA 2281-92/08
Sultan Hussain Batalvi	in CA 2293/08
M/s Ansari Variety Store	in CA 2294/08
M/s Time & Tune Lahore	in CA 2295/08
M/s Rehman A Fitting & Pipe Ind.	In CA 2296/08
M/s Nadeem Zoki, Photographer	in CAs 2297-98/08
M/s Pak Forest Industries (Pvt) Ltd.	in CA 2299/08
Sikandar Gulzar	in CA 2300-01/08
Shahid Hussain	in CA 2302/08
Salman Hussain Batalvi	in CA 2303/08
M/s Empire Developers	in CA 2304/08
M/s Mian Aftab Ahmad	in CA 2305/08
M/s S.B. Tools	in CA 2306/08
M/s Pak. Pink Carpets (Pvt) Ltd.	in CA 2307/08
M/s Mechanized Construction of Pakistan	in CA 2308/08
M/s Fine Steel Mills	in CA 2309/08
M/s Punjab Surgical Sale Centre	in CA 2310/08
M/s Continental Banking (Pvt) Ltd.	in CA 2311/08

CA No. 1322 of 2007

(On appeal from the judgment passed by Lahore High Court, Lahore in W.P. No. 3474/03)

C.B.R. thru. Its Chairman and others Appellants

Versus

M/s Siara Industries Respondent

CAs No. 115-118 of 2008

(On appeal from the judgment dated 24.9.07 passed by Peshawar High Court, Peshawar in TR Nos. 32-35/07)

The Commissioner of Income Tax …Appellant

Versus

M/s Muhammad Alam Fertilizers Respondent in all

CA No. 1491 of 2008

(On appeal from the judgment dated 10.4.08 passed by Lahore High Court, Lahore in PTR No.147/05)

The Commissioner of Income Tax …Appellant

Versus

M/s Sultan Trading Company …Respondent

CAs No.7-9 2008

(On appeal from the judgment dated 22.10.08 passed by Peshawar High Court in TRs No.61-63/07)

The Commissioner of Income Tax …Appellant

Versus

M/s Frontier Sugar Mills Respondents in all

CAs No. 1984- 2046 of 2007

(On appeal from the judgment dated 18.5.07 passed by High Court of Sindh at Karachi in ITRA Nos. 42-70/07, 126-128/07, 129-140/07, 142-147/07, 170-171/07,187-195/07, 120-121/07)

The Commissioner of Income Tax …Appellant

Versus

A.C.B. (Pvt) Ltd. Resp. in CA 1984/07
M/s B.M.A Capital Management in CA 1985-86/07
M/s Invest Capital & Security (Pvt) Ltd. in CA 1987-88/07
M/s Al-Khalid Security Services, Ltd. in CA 1989-91/07
M/s Hyder Security Services (Pvt) Ltd. in CA 1992-95/07
M/s Defender Security Services in CA 1996-98/07
M/s Zim's Security (Pvt) Ltd. in CA 1999-2000/07
M/s Modaraba Al-Tijarah in CA 2001-03/07
M/s Beep Guard (Pvt) Ltd. in CA 2004-06/07
M/s Mars Security Services (Pvt) Ltd. in CA 2007-10/07
M/s Plastiko Industries (Pvt) Ltd. in CA 2011-12/07
M/s Ahmed Estate (Pvt.) Ltd. in CA 2013/07
M/s Ibrahim Agencies (Pvt) Ltd. in CA 2014-15/07
M/s National Institutional Facilitation in CA 2016-18/07
M/s Shamsher Security Guards (Pvt) Ltd. in CA 2019-22/07

M/s Safety & Security (Pvt) Ltd. in CA 2023-26/07
M/s Farid Construction in CA 2027-32/07
M/s Noor Muhammad Shahzada & Co. in CA 2033/07
M/s Steelex (Pvt) Ltd. in CA 2034/07
M/s Shafique Textile Mills (Pvt) Ltd. in CA 2035/07
M/s Security Two Thousand (Pvt) Ltd. in CA2036-39/07
Agha Irshad Ahmad Khan in CA 2040/07
Nobel Security Operation (Pvt) Ltd. in CA 2041-42/07
Riaz Ahmad Tata in CA 2043/07
M/s Butt Sons Fisheries in CA 2044-45/07
M/s Ibrar Shoes Industries in CA 2046/07

CAs No. 291-292 of 2008

(On appeal from the judgment dated 31.10.2007 passed by High Court of Sindh, Karachi in ITRA No.149-150)

The Commissioner of Income Tax …Appellant

Versus

M/s Islam Oil Mills Resp. in CA 291-92/08

CAs No. 1099-1101 of 2008

(On appeal from the judgments dated 10.4.2008 passed by Lahore High Court, Multan Bench in PTR No.9-11/08

The Commissioner of Income Tax …Appellant

Versus

Mst. Nusrat Sultana Respondents in all

Civil Petitions No.12-13 of 2009

(On appeal from the judgment dated 23.9.08 passed by Peshawar High Court, Peshawar In TR Nos. 33-34/08)

The Commissioner of Income Tax … Appellant

Versus

Hakim Abdul Waheed Afghani Dawakhana … Respondent in all

CAs No. 30-32 of 2009

(On appeal from the judgment dated 31.10.2008 .passed by High Court of Sindh, Karachi in IRTA Nos. 985-86/08 and 397/07)

The Commissioner of Income Tax …Appellant

Versus

M/s Lahmayar International Resp. in CA 30-31/09
M/s Meezan Bank (Pvt) Ltd. in CA 32/09

CAs No. 33-57 of 2009

(On appeal from the judgment dated 23.9.2008 passed by Lahore High Court, Lahore in PTR Nos.17-19/08, 31/08, 77-78/08, 147-150, 206/09, 226-31/08, 264-68/08, 384/08, 399-400/08)

The Commissioner of Income Tax …Appellant

Versus

M/s Ali Bricks Company in CA 33-34/09
M/s Saleemi Brothers Khad Dealer in CA 35/09
M/s Tatrapack Pakistan Ltd. in CA 36/09
M/s Iftikhar Ahmad printers in CA 37/09
M/s Haji Corporation in CA 38/09
M/s Master Traders Khad Dealers in CA 39/09
M/s Haroon Textile Industries in CA 40/09
M/s Zafar Iqbal Printers in CA 41/09
M/s Amjad Autos in CA 42/09
M/s Mughal Industries in CA 43/09
M/s Pattoki Sugar Mills in CA 44-49/09
M/s Umar Fabrics in CA 50-54/09
M/s Madina Autos in CA 55/09
M/s Rana Faisal Rauf in CA 56/09
M/s Sarfraz & Co. in CA 57/09

CAs No. 112-113 of 2009

(On appeal from the judgment dated 4.11.08 passed by Peshawar High Court, Peshawar in TR No.108-109/07)

The Commissioner of Income Tax …Appellant

Versus

Jack & Jell Public School Respondent in all

CAs No. 122-123 of 2009

(On appeal from the judgment dated 6.11.2008, passed by Peshawar High Court, Peshawar in TR No.84, 98/06)

The Commissioner of Income Tax …Appellant

Versus

Haji Muhammad Amin Resp. in CA 122/09
Nisar Ahmad in CA 123/09

CAs No. 163-164 of 2009

(On appeal from the judgment dated 9.4.2008 passed by Islamabad High Court, in ITR Nos.842-843/08)

The Commissioner of Income Tax …Appellant

Versus

M/s Agriculture Development Bank Resp. in CA 163/09
M/s Sun Gas (Pvt) Ltd. in CA 164/09

CAs No.281-283 of 2009

(On appeal from the judgment dated 1.12.2008 & 19.11.08 passed by Peshawar High Court, Peshawar in TR No.21/07, 74-75/07)

The Commissioner of Income Tax …Appellant

Versus

M/s Allied Pak Industries (Pvt) Ltd. Resp. in CA 281/09
M/s Abasin Auto Store in CA 282-83/09

CAs No.1102-1110 of 2008

(On appeal from judgment dated 10.4.08, passed by Lahore High Court, Multan Bench in PTR Nos. 12/08, 1/08, 14-16/08, 25/07, 127/07, 175-176/07, 9-10/08, 11/07)

Commissioner of Income Tax …Appellant

Versus

Sheikh Asghar Mehmood Resp. in CA 1102/08
M/s Umar Khalid & Co. in CA 1103/08
M/s Punjab Printing Mills (Pvt) Ltd. in CA 1104-06/08
M/s Dawchem (Pvt) Ltd. in CA 1107/08
Muhammad Umar in CA 1108/08
M/s International Manpower Lahore in CA 1109-10/08

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Ch. Akhtar Ali, AOR.
(C.As. No. 163-164/2009)

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(C.As. No.291-292, 1149 & 1150/2008)

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(in CA 876-79/05, 1602/06, 1617-1619/06, 587-593/07, 1381-1395/07)

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Mr. Shahid Jameel, ASC
(in CA 707/07, 33-57/09, CPs 12-13/09,

Mr. M.S. Khattak, AOR.
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Mr. Muhammad Farid, ASC
(C.As. No. 1620-1624/2006)

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Nemo.
(in the remaining cases)

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(CA 1611-15/06, 587/07)

Mr. Badar Villani, ASC
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Mr. Umar Mehmood Kasuri, ASC
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(CAs 50-54/09)

Mr. Sirajuddin Khalid, ASC
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Dr. Farough Naseem, ASC
(CA 1602/06)

Mr. Muhammad Rashid Qamar, ASC
(CA 163/09)

Mr. Noor Muhammad Chandio, ASC
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Mr. Irfan Ahmad Sheikh, ASC
(CA 923-924/2008)

Mr. Iqbal Suleman Pasha, ASC
(CA 1625,2684/06 & 592-93, 1369, 2007-2010, 2016-18/07 & 1847-1849/08)

Mr. Shahbaz Butt, ASC
(CAs 841, 856-858, 891,911,916,971, 972, 1002, 1003, 1099, 1100, 1502, 1505-1512, 2281, 2292, 2114-2115/2008, 36/09 & CP 12/09)

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Mr. Faizur Rehman, AOR
(CAs 825,854, 1008-1010, 1013-15, 1111, 1491, 1500, 1501, 2264, 2304/08)

Ms. Edwina Williams (in person)
(CAs 112-113/09)

Nemo
(in the remaining cases)

Dates of hearing: 15th, 16th, 17th, 21st, 22nd and 28th April & 4th, 5th, 11th & 19th May, 2009

JUDGMENT

IFTIKHAR MUHAMMAD CHAUDHRY, C.J. – In Civil Appeals No. 876 to 879/2005, leave to appeal was granted, *inter alia*, to examine whether the provision contained in subsection (5A) of section 122 of the Income Tax Ordinance, 2001, (hereinafter referred to as the Ordinance) inserted w.e.f. 1st July 2003 was procedural in nature and was retrospective in operation or otherwise.

2. The above four appeals arise out of a judgment of the Sindh High Court passed in Constitution Petitions No. D-643 to D-646 of 2004.

The respondent M/S Honda Shahra-e-Faisal, an association of persons, namely, Shaikh Afzal Maqbool, Shaikh Mubashir Maqbool and Shaikh Amjad Maqbool, respondents in Civil Appeals No. 877, 878 & 879 of 2005 derived income from sale of spare parts and workshop receipts. The assessments in respect of the aforesaid respondents pertaining to the assessment year 2002-2003 were finalized on 20.05.2003 under section 59(1) of the Income Tax Ordinance, 1979 (hereinafter referred to as the repealed Ordinance). The Additional Commissioner of Income Tax, Range-II, Companies Zone-I, Karachi initiated proceedings under section 122 (5A) of the Ordinance calling upon the respondents to show cause as to why the above finalized assessments be not amended. Aggrieved thereof, the respondents filed Constitution Petitions before the High Court of Sindh taking the plea that since subsection (5A) of section 122 was inserted by the Finance Act, 2003 dated 17.06.2003, effective from 01.07.2003, therefore, the same could not be given retrospective effect and consequently it would not be applicable to the assessments finalized before 01.07.2003. The learned High Court, vide its judgment dated 02.03.2005 (hereinafter to be referred to as the *Honda Shahra-e-Faisal*) allowed the petitions and held that the provision contained in subsection (5A) of section 122 of the Ordinance, inserted with effect from 01.07.2003 was not retrospective in operation. It was held that the assessments finalized before the said date could not be reopened/revised/ amended in exercise of the jurisdiction conferred upon the income tax authorities under the above provision. Thus, the impugned notices were declared to be without jurisdiction, illegal and void *ab initio* and were quashed along with the relevant proceedings, hence the above appeals by the department by leave of this Court.

3. The Constitution Petitions, which are the subject-matter of C.As. No. 1601 to 1603 of 2006 were also filed in the High Court of Sindh against the issuance of show cause notices in more or less similar circumstances and were decided on the basis of *Honda Shahra-e-Faisal*.

4. Civil Appeals No. 1604 to 1625, 2670 to 2683, & 2685 to 2687 of 2006; 585 to 595, 706, 707, 1369 to 1404, & 1984 to 2046 of 2007; 291, 292, 459 to 499, 870 & 1847 to 1849 of 2008, 30 to 32 of 2009 also arise out of judgments of the High Court of Sindh passed in the tax references filed by the appellants. Here too, the judgment in *Honda Shahra-e-Faisal* was followed.

5. Civil Appeals No. 803 to 839 of 2008 arise out of judgments of the Lahore High Court, Multan Bench delivered in the tax references filed before it on the following question of law: -

> "Whether on the facts and circumstances of the case, the learned ITAT was justified in holding that section 122(5) of the Income Tax Ordinance, 2001 brought into statute through Finance Act, 2003 is not applicable to the assessments completed before the promulgation of the Income Tax Ordinance, 2001, whereas the amendment brought in through Finance Ordinance, 2002 in subsection (1) of section 122 extends the applicability of section 122 to the assessments completed under the provisions of the Income Tax Ordinance, 1979 as well."

6. Vide judgment dated 2.4.2008, a learned Division Bench of the Lahore High Court at Multan, following the law laid down in *Honda Shahra-e-Faisal* answered the aforesaid question in the affirmative and held that section 122(5A) did not have retrospective effect *qua* the assessments finalized before 1.7.2002, and as such could not be reopened/revised or amended in the exercise of jurisdiction under section 122(5A) of the Ordinance. Resultantly, the tax references were rejected.

7. Civil Appeals No. 840 to 1039, 1104 to 1127, 1491 to 1513, 2257 to 2311 of 2008, 7 to 9, 33 to 57 of 2009 arise out of judgments of the Lahore High Court, Lahore delivered in the tax references filed before it wherein it was held that the assessment orders framed by the Deputy Commissioner of Income Tax could not be amended or modified under any of the two subsections, namely (5) and (5A) of section 122 of the Ordinance. It was further held that the language of section 122 applied only to assessment orders finalized by the Commissioner in respect of the taxpayers for the tax year and not to the assessment orders made by the DCIT for the assessment years 2002-2003 and earlier. All the tax references were rejected.

8. Civil Appeal No. 1322 of 2007 arises out of judgment of the Lahore High Court, Lahore passed in Writ Petition filed against the show cause notice issued to the respondent. In this case, the Lahore High Court held that the impugned show cause notice, which was issued under the Ordinance as amended by SRO No.633(I)/2002 dated 14.9.2002 was not sustainable in law after the above SRO was declared *ultra vires* the Ordinance by this Court in the case of *Commissioner of Income Tax v. Kashmir Edible Oils Ltd* (2006 SCMR 109). It was also held that the subsequent insertion of these amendments through the Finance Act, 2003 also did not cure the illegality of the amendments made in the Ordinance through the said SRO. It was noted that the impugned show cause notice could not be issued under the Ordinance as it existed at the time of its enforcement, i.e., prior to any amendments whether made under the SRO or the Finance Act, 2003. As such, the impugned show cause notice was declared to be illegal and of no legal effect.

9. Civil Appeals No. 1148 to 1150 and 1245 of 2008 arise out judgments of the Lahore High Court, Rawalpindi Bench delivered in the tax references filed before it wherein it was held that the Ordinance applied to the tax year commencing from 1.7.2002. The provisions of section 122(5) as on that date neither covered the assessments finalized under the repealed Ordinance nor the operation of law was made retrospective in various corresponding provisions. The new law was more favourable to the taxpayers as against the revenue department terms, which was apparent from the terms, such as 'taxpayer' vis-à-vis 'assessee'.

10. Civil Appeals No. 500, 501 & 783 to 791 of 2008, and 163 and 164 of 2009 arise out of judgments of the Islamabad High Court, delivered in the tax references filed before it. The learned Islamabad High Court disposed of the tax references in the light of the law laid down in *Honda Shahra-e-Faisal*.

11. Civil Appeals No. 115 to 118 of 2008, 112, 113, 122, 123 & 281 to 283 of 2009 and Civil Petitions No. 12 & 13 of 2009 arise out of judgments of the Peshawar High Court, delivered in the tax references filed before it. The learned Peshawar High Court adhered to the exposition of law made by the Sindh and the Lahore High Courts and held that subsection (5A) of section 122 of the Ordinance inserted with effect from 1.7.2003 was not applicable to the assessments finalized before 1.7.2003 because subsection (5A) had no retrospective effect and, therefore, the assessments finalized before 1.7.2003 could not be reopened/revised/amended in exercise of jurisdiction under section 122 (5A) of the Ordinance.

12. In the appeals arising out of the judgments of the High Courts (Lahore High Court, Lahore, Multan, Rawalpindi & Bahawalpur Benches,

Islamabad High Court and the Peshawar High Court) leave was granted by this Court to examine, *inter alia*, the scope, effect and validity of subsections (1), (5), (5A) of section 122 of the Ordinance inserted w.e.f. 1.7.2003 by the Finance Act, 2003.

13. To illustrate the factual mattress upon which the tax references were founded, we narrate here the facts of one case from the Multan Bench. The assessments in respect of Khalid Javaid, respondent in C.A. No. 803/2008 relating to years 1998-1999, 1999-2000 & 2002-2003, completed on 30.10.2000, 29.9.1999 and 15.1.2003 respectively, were framed and finalized under section 62 of the repealed Ordinance before 1.7.2002, i.e. the date on which the Ordinance was enforced. The IAC concerned issued show cause notice dated 19.6.2004 to the respondent for imposition of correct amount of tax for the aforesaid years under section 122(5) of the Ordinance. The respondent challenged the show cause notice in appeal before the Commissioner of Income Tax (Appeals), Multan. In his order dated 29.3.2005, the Commissioner, placed reliance on the judgment of the High Court of Sindh in *Honda Shahra-e-Faisal*, allowed the appeal of the respondent and cancelled the amended assessment orders passed under section 122 of the Ordinance. Thus, the original assessment orders finalized under section 59 of the repealed Ordinance were restored. The Commissioner decided the issue on the legal plane and gave no finding on other grounds of appeal. The CIT Multan Zone then agitated the matter before the Income Tax Appellate Tribunal, Lahore Bench, but without any success and the order of the Commissioner was upheld. The CIT Multan Zone thereafter filed tax reference (TR No. 10/2007) before the Lahore High Court, Multan Bench with the following question of law for determination by the said Court: -

> "Whether on the facts and circumstances of the case, the learned ITAT was justified in holding that section 122(5) of the Income Tax Ordinance, 2001 brought into statute through Finance Act, 2003 is not applicable to the assessments completed before the promulgation of the Income Tax Ordinance, 2001, whereas the amendment brought in through Finance Ordinance, 2002 in subsection (1) of section 122 extends the applicability of section 122 to the assessments completed under the provisions of the Income Tax Ordinance, 1979 as well."

14. Vide judgment dated 2.4.2008, a learned Division Bench of the Lahore High Court, Multan Bench, following the law laid down in *Honda Shahra-e-Faisal* answered the aforesaid question in the affirmative and held that section 122(5A) had no retrospective effect *qua* the assessments finalized before 1.7.2002 and as such could not be reopened/revised or amended in the exercise of jurisdiction under section 122(5A) of the Ordinance. Resultantly, the tax references were rejected. It is noteworthy that all the cases were decided on the legal issue and not a single case was decided on merits.

15. The moot point in these appeals is the retrospective application or otherwise of the provisions of section 122(1), (5) & (5A) of the Ordinance. A common contention of the learned counsel for the appellants was that the High Courts were not right in holding that the said provisions had no retrospective effect. According to the learned counsel, the said provisions were procedural in nature, they did not create any charge or levy any tax and merely dealt with the machinery of assessment, therefore, as held in *Commissioner of Income Tax v. Mahaliram Ramjidas* (AIR 1940 Privy Council 124), in interpreting provisions of this kind the rule was that such construction should be preferred which made the machinery workable.

16. Mr. M. Ilyas Khan, learned counsel for the appellants in C.A. No. 803/2008 contended that section 122(1) as amended by the Finance Ordinance, 2002 was part of the Ordinance from the very date of enforcement, i.e. 1.7.2002. He submitted that subsection (1) was an enabling provision and the power of amendment conferred therein was to be exercised subject to other provisions of section 122 while subsections (5) & 5A) were procedural in nature and non-charging provisions but were to be read in conjunction with subsection (1), which explicitly provided for the amendment of assessment already finalized under the repealed Ordinance. He submitted that reference to various sections of the repealed Ordinance in subsection (1) of section 122 of the Ordinance clearly showed the intention of the legislature to apply the provision relating to amendment of assessment retrospectively with the rider that an assessment could be amended subject to time-limits provided in subsections (2) & (4A). Subsection (5A) of section 122 would be attracted on fulfillment of the twin conditions, namely, the erroneousness of the assessment and its being prejudicial to the interest of revenue to the assessments relating to the income year ending on or before 30.6.2002 finalized before 1.7.2003 under the repealed Ordinance, the date of insertion of the above subsection. On the other hand, if the applicability of subsection (5A) were restricted to the orders treated to be issued under the Ordinance alone, it would render the words '*erroneous in so far it is prejudicial to the interest of revenue*' a surplusage against the legislative intent. Subsections (5) and (5A) were procedural provisions as the same fell in Chapter X of the Ordinance, which related to procedure. It was well-settled principle of interpretation of fiscal statutes that only charging provisions would not be given retrospective effect but the procedural

provisions could well be applied retrospectively. The retrospectivity of a statute was either expressly conferred or could be inferred by necessary implication therein. The charging provisions were to be construed strictly, whereas the procedural provisions were to be interpreted liberally. He also pressed into service other principles of interpretation of statutes, namely, *every word in a statute to be given a meaning, a statute to be read as a whole, words to be construed in accordance with the intention, a law should be interpreted in such a manner that it should be saved rather than destroyed, the courts lean in favour of upholding constitutionality of legislation and would be extremely reluctant to strike down laws as unconstitutional, enactments dealing with procedure are always retrospective in the sense that they apply to the pending proceedings, the rule that fiscal statutes should be construed strictly was applicable only to a charging provision or a provision imposing penalty, scheme of the law is to be examined in its totality in order to arrive at a correct conclusion, no provision is to be considered in isolation, court may modify language of statute to give effect to manifest and undoubted intention of the legislature, procedural matters would not operate retrospectively if they touch a right in existence at the time of passing of the legislation, where retrospective effect to a statute is not given expressly, one must, apart from the language employed, look to the general scope and purview of the statute and at the remedy sought to be applied and consider what was the former state of the law, and what was that the legislature contemplated,* etc. He referred to Halsbury's Laws of England, vol. 36, 3rd edition, p. 423, Craies on Statute Law, fifth edition, p. 370, 371, Maxwell's Interpretation of Statutes, p. 228, *Hakim Khan v. Government of Pakistan* (PLD 1992 SC 595), etc. He further argued that with the repeal of the Ordinance (of

1979), no right was accrued to or conferred upon the assessees nor had they acquired any right inasmuch as section 122(1) clearly provided that the assessments made or deemed to have been made were open to amendment within a specified time-limit. Erroneous assessment prejudicial to the interest of revenue could not be termed a past and closed transaction. He submitted that the Commissioner was the authority empowered to amend or further amend an assessment, and though he was empowered to delegate his powers or functions under section 210, but by virtue of amendment made in the said section by insertion of subsection (1A), he was debarred from delegating his powers of amendment of assessment contained in subsection (5A) of section 122 to a taxation officer below the rank of Additional Commissioner of Income Tax. He further submitted that the power of amendment envisaged under subsection (5) was original in nature while the one under subsection (5A) was revisional in nature. He adopted the reasoning of a learned Single Judge of the High Court of Sindh in the case of *Fauji Oil Terminal and Distribution Co. Ltd. Karachi v. Additional Commissioner/Taxation Officer* (2006 PTD 734) that once an assessment order was treated as issued under section 120 or was actually issued under section 121, then the same could be amended or further amended on fulfillment of conditions specified in subsection (5) only and on no other ground, and that subsections (1), (3) and (5) were to be read together and not in isolation. He lastly submitted that the assessees or the taxpayers were not fair in disclosing their true incomes. There were countless cases of concealed income, etc. The assessees were not prepared to face the realities and instead of approaching the department, they filed writ petitions in the High

Courts against the law laid down in *Pak Arab Fertilizers (Pvt.) Ltd. v. Deputy Commissioner Income Tax* (2000 PTD 263).

17. Mr. Akhtar Ali Mehmood, ASC, learned counsel for the appellant in C.A. No. 876/2005 submitted that retrospectivity of the provisions of the Ordinance was evident from the actions being taken according to the scheme of the said Ordinance. In support of his submission, the learned counsel placed reliance on an order of the Commissioner of Income Tax whereby he delegated powers to the Taxation Officers (Additional Commissioner, etc.) passed after the enforcement of the Ordinance. He further referred to the case of *Commissioner of Income Tax, Multan v. Munazza Iqbal*, the subject-matter of C.As. No. 805 & 806 of 2008 in which relief was allowed to the respondent, though the case was not covered by SRO No. 633(I)/2002 dated 14.9.2002. He also placed on record a copy of the order dated 13.1.2009 passed by this Court in the case of *Commissioner (Legal Division), Large Taxpayer Unit v. M/S Shaheen Air International* (C.Ps. No. 511-K to 513-K of 2008 decided on 13.01.2009). This case related to rectification of assessment orders under section 221 of the Ordinance, passed on 25.10.1999 in respect of assessment years 1997-98 and 1998-99 as well as the assessment order dated 25.5.2000, in respect of assessment year 1999-00. In this case, the appellate authority as well as the Income Tax Appellate Tribunal had taken the view that the provisions of section 221 were applicable to assessments made after the enforcement of the Ordinance and therefore the power of rectification could only be exercised within the time-limit of four years laid down in section 156 of the repealed Ordinance.

18. Mr. Shahid Jamil Khan, ASC, learned counsel for the appellant submitted that under sections 65 and 66A of the repealed Ordinance read with section 6 of the General Clauses, 1897 an assessment could be amended, revised or reassessed subject to the provisions of law where it was found that the exact or proper tax, levied under the charging section, was not assessed, and no sanctity was attached to the assessment orders. The taxpayer did not have any vested right in a case of escaped income, or an erroneous assessment, etc. The power of the State to levy tax was protected by virtue of section 6 of the General Clauses Act, 1897. Section 122 provided machinery for the enforcement of charging provisions, therefore, the same were not debarred from being applied retrospectively. He relied upon the case of *Nawabzada Muhammad Amir Khan* (PLD 1961 SC 119) to emphasize that it was the duty of the Court to protect the right of the State by having recourse to the principles of harmonious construction and reconciling the conflicting provisions, or by curing the flaws in the language employed by the lawmaker. He referred to *Salmon v. Duncombe* (11 AC 634) where it was held that the machinery sections were to be liberally construed and if the incidence of tax was clear, the machinery sections should be so construed as to make the realization of the proper tax possible. He submitted that the defects in the language of the law could not be made a basis to defeat the intention of the legislature or to prevent the realization of tax that was in fact due.

19. Mr. M. Bilal, Sr. ASC for the appellants in C.A. No. 163-164/2009 and Raja Abdul Ghafoor, ASC/AOR for the petitioner in C.P. No. 1245/2008 & and appellants in C.As. No. 1322/2007, & 115-118 & 1491-

1513/2008 adopted the arguments advanced by M/S M. Ilyas Khan and Akhtar Ali Mehmood, ASCs.

20. Syed Naveed Andrabi, ASC for the respondent in C.A. No. 778 of 2005 made the following submissions: -

(1) At the time of promulgation of the Ordinance, about 1000 amendments were made to make the new law in line with the repealed Ordinance. The entire complexion of the law was changed

(2) Subsection 1 of section 122 of the Ordinance was an independent provision which had no nexus with subsection (5-A);

(3) The pending proceedings initiated under the provisions of the repealed Ordinance were saved under subsection (4) of section 239 of the Ordinance; and

(4) Vested rights had accrued to the assessees before the enforcement of the Ordinance, 2001, hence, the income tax authorities, under the Ordinance, 2001 did not have any lawful authority to reopen the assessment orders passed in favour of the assessees by the authorities under the repealed Ordinance. Reference was made to the cases of *Kashmir Edible Oil Ltd v. Federation of Pakistan* [2005 (91) Tax 480 Lahore] = 2005 PTD 1621 and *United Builders Corporation, Mirpur v. Commissioner Income-tax, Govt. of Azad J & K* (1984 PTD 137) = 49 (tax) 34.

21. Mr. Mansoorul Arifin, ASC, learned counsel for the respondent in C.A. No. 876 to 879 of 2005, supporting the impugned judgment of the High Court of Sindh in *Honda Shahra-e-Faisal*, made the following submissions: -

(1) The Ordinance, as originally promulgated, brought about change in its approach towards and treatment of the taxpayers by introducing a liberal tax regime, e.g., under section 120 of the Ordinance, where a taxpayer furnished a return of income,

the Commissioner shall be taken to have made an assessment of the taxable income. This changed approach lay at the foundation of the Ordinance and was the touchstone to judge the validity of the subsequent actions;

(2) The provisions of section 122 clearly showed that the legislature, through a conscious application of mind, kept outside the ambit of the provisions of the Ordinance the assessments of the period ending on 30.6.2002. It was only through an arbitrary amendment process, undertaken through the Finance Ordinance, 2002, the SRO dated 14.9.2002 and the Finance Act, 2003 that the assessments of the period preceding the enforcement of the Ordinance were brought within its pale;

(3) Subsection (5A) was applicable to the tax year 2003 and onward because the Ordinance was operative from 1.7.2002, therefore, the same could not be applied to the assessments of the period preceding its enforcement unless the law specifically so provided. Reference was made to the cases of *Calcutta Discount Co. v. Income-Tax Officer* [(1952) 21 ITR 579 (Calcutta)], *Niranjanlal Ramballabh v. Commissioner of Income-Tax, Madhya Pradesh* [(1953) 23 131)], *Commissioner of Income-Tax v. Maharaja Pratap Singh Bahadur* [(1956) 30 ITR 484 (Patna)], *Chairman, Central Board of Direct Taxes v. V.S. Malhotra* [(1981) 129 ITR 543 (Delhi)] and N.S. Bindra's Interpretation of Statutes, Eighth Edition 1997, p. 628;

(4) The Commissioner was empowered to amend an assessment by insertion of subsection (5) by means of SRO No. 633(I)/2002 dated 14.9.2002, but the same ceased to have effect after the said SRO was rescinded by SRO No. 608(I)/2003 dated 24.6.2003 in pursuance of the judgment of this Court in the case of *Kashmir Edible Oils Ltd* (supra);

(5) There was nothing in section 239, which indicated that the legislature intended to revive section 66A of the repealed Ordinance, hence the subsequent amendments introduced in section 122 with a view to achieving the same object were of

no legal effect, hence proceedings initiated under section 122(5A) in respect of the assessments completed under the repealed Ordinance were unlawful, which were also hit by the principle of past and closed transactions; and

(6) Subsection (5) was not a mere procedural provision, which could be applied retrospectively. Rather, the said provision, if applied retrospectively, would affect the accrued rights of the assessees, hence the same would be prospective in its operation. Reference was made to an order passed by this Court in an unreported case titled *Inspecting Additional Commissioner of Income Tax v. Zakaria H.A. Sattar Bilwani, Karachi* (C.P. No. 643-K to 647 of 2007 decided on 15.7.2008) wherein it was held that vested rights accruing to an assessee in respect of assessments for the years 1988-89 and 1989-90 finalized on 29.6.1989 and the assessments of 1990-91 and 1991-92 finalized before 30.6.1992 could not be taken away in exercise of powers conferred by an amending provision, namely, section 17B of the Wealth Tax Act, 1963 effective from 30.6.1992.

22. Dr. Farough Naseem, learned counsel for the respondent in C.A. No. 1602/2006 raised the following contentions: -

(1) The substantive laws would always be prospective while the procedural matters would be retrospective, but where the procedural laws affected past and closed transactions or existing, accrued, concluded, vested or substantive rights, the same would not be retrospective unless and until the statute expressly provided for retrospective application of the law. Thus, the power to revise or reopen any concluded assessment envisaged in subsections (5) or (5A) of section 122 of the Ordinance could not be applied retrospectively. He referred to a number of judgments of the superior Courts of Pakistan and India, including *Adnan Afzal v. Capt. Sher Afzal* (PLD 1969 SC 187), *Mushtaq Ahmed v. District Manager, Govt. Transport Service* (1982 SCMR 965), *WAPDA v. Capt.*

Nazir Hussain (1986 SCMR 96), *Glaxo Laboratories Ltd. V. Inspecting Assistant Commissioner of Income Tax* (PLD 1992 SC 549), *Mrs. Anjuman Shaheen v. Inspecting Assistant Commissioner of Income Tax* (1993 PTD 1113 & 1232), *Monnoo Industries Ltd v. C.I.T.* (2001 PTD 1525), *Delhi Cloth and General Mills Ltd v. Income Tax Commissioner,* Delhi (AIR 1927 PC 242), etc;

(2) Reopening/ revision/amendment of assessments was penal in nature as the process would expose the taxpayers to penal consequences, hence the issue fell within the domain of substantive law and was not a matter of mere procedure. On that account, the principles governing interpretation of penal provisions would be applicable in the matter of amendment, reopening or revision of concluded assessments;

(3) It was well-settled that if there was any doubt about prospectivity or retrospectivity of a particular provision, the Court would resolve it in terms of prospectivity;

(4) The provision of section 34 of the Income Tax Act, 1922 was not *pari materia* with section 122(5A). The case of *Mahaliram Ramjidas* (supra) was incorrectly relied upon by the appellants as the Privy Council did not decide the issue of retrospectivity of section 34 of the Income Tax Act, 1922;

(5) A bare reading of the entire section 122 would show that sub-section (4) of section 122 pertained to the amendment under subsection (1) or subsection (3), while in subsection (5) reference was only made to the amendment under subsection (1) or the further amendment under sub-section (4). Again in subsection (6), the legislature had consciously made a distinction between amended orders passed under subsection (1), subsection (4) or subsection (5-A), clearly establishing that the intention of the legislature was to create distinct categories. Hence the inescapable conclusion was that sub-section (1) was independent from subsection 122 (5-A). This was further endorsed from a reading of subsection (5-B), which specified a time-limit for the action under subsection (5-A). Time-limit under subsection (1) was not made applicable to

subsection (5-A). This would thus again endorse the contention that sub-section (5-A) was a category completely distinct from subsection (1). This was also established from the fact that the provision of sub-section (5-A) only was made subject to the provision of sub-section (9) and not subsection (1).

23. Mr. Shafqat Mehmood Chohan, ASC, learned counsel for the respondents in C.A. No. 669/2008 etc., made the following submissions: -

(1) It is necessary to see the scheme of law regarding assessment year and the assessee. This law was enforced on 1st July, 2002. According to subsection (3) of section 1 of the Ordinance, the Ordinance of 1979 was to be repealed on the date the former came into force as envisaged by section 238;

(2) The Ordinance was applicable to the activities of the assessment year commencing from 1.7.2002 and not to the activities of the period preceding its enforcement when the previous law was holding the field;

(3) Under section 122, only the Commissioner was the competent authority to amend an assessment or to further amend an amended assessment whereas the impugned notices were issued by officers of the income-tax department below the rank of the Commissioner, therefore, the notices were not issued competently;

(4) This section imposed additional liability, hence, it was a penal section creating charge itself because it was different from the previous section i.e. section 66A according to which taxpayer meant any representative of a person who derived an amount chargeable to tax under the repealed Ordinance;

(5) Every assessment order could not be amended, so while touching the rights of the taxpayer or assessee, there were two conditions, so these conditions itself spoke about the rights of an assessee; and

(6) Section 5-A was *pari materia* with section 66A and the limitation under the repealed Ordinance for section 66A was four years from the date of the order sought to be revised.

24. Mr. M. Iqbal Hashmi, ASC, learned counsel for the respondents in C.A. No. 825/2008 etc., argued as under: -

(1) Section 122(1) authorized the Commissioner to amend assessment orders passed under sections 59, 59A, 62, 63 and 65 of the repealed Ordinance;

(2) The amendment of assessment involved computation of taxable income, which, in respect of period ending on or before 30.6.2002 was to be done under the repealed Ordinance by virtue of subsection (1) of section 239 of the Ordinance. Thus, in case of any conflict between an earlier and a later provision, more specifically between section 122(1) and section 239(1), the subsequent provision would prevail;

(3) By virtue of section 122(8), section 122(5) would be applicable to income chargeable under the Ordinance as the definition of 'definite information' did not include the income chargeable under the repealed Ordinance in it; and

(4) The alternative submission of the learned counsel was that the appeals be remanded to the Income Tax Appellate Tribunal, as the same were decided, not on merits, but on the legal issue, viz., the prospective applicability of section 122(1), (5) or (5A).

25. Mr. Sirajuddin Khalid, ASC, learned counsel for the respondents in C.A. No. 826/2008 etc., filed copies of notices issued by the Inspecting Additional Commissioner of Income Tax under section 122 of the Ordinance in respect of assessment years 1995-96, 1996-97, 2000-01. He made the following arguments: -

(1) Amendment of assessment or reassessment was alien to the provisions of section 122 of the Ordinance up to the assessment year 2002-03;

(2) The words 'tax', 'taxable income', and 'taxpayer' used in subsection (6), as defined in section 2(63), 2(64) & (266) of the Ordinance did not include the period of assessment occupied by the repealed Ordinance. Thus, the assessments of the period up to the repeal of the Ordinance of 1979 did not fall within the scope of section 122 of the Ordinance;

(3) By virtue of section 239(1), the provisions of the repealed Ordinance relating to computation of total income and tax payable thereon shall apply as if the Ordinance had not come into force. Therefore, the power to amend an assessment envisaged in section 122(1), (5) or (5A) of the Ordinance would not be available in respect of the assessment orders passed under the repealed Ordinance;

(4) Section 122(1) would be invoked only if an assessment order was issued or treated as issued;

(5) The assessment order treated as issued under section 120 or issued under section 121 sought to be amended must be an order of the Commissioner, but if such order merged into an appellate or revisional order, then it would not be amenable to the provisions of section 122(5A); and

(6) The orders passed in appeal, revision or reference would be outside the purview of section 122(5A) as the Ordinance did not contain any provision parallel to subsection (1A) of section 66A of the repealed Ordinance.

26. Mr. Shahbaz Butt, ASC, learned counsel for the respondents in C.A. No. 841/2008 etc., filed written submissions along with a comparative chart of different provisions of the income tax laws, i.e. The Income Tax Act, 1922, the repealed Ordinance and the Ordinance, the Ordinance as per its original text when it was enforced, the amendments made through the Finance Ordinance, 2002, the amendments made through SRO No. 633(1)/2001 dated 14.09.2002, the amendments made

through the Finance Ordinance, 2002 and the Finance Act, 2003. He made the following arguments: -

(1) Notwithstanding the amendment made in subsection (1) of section 122, or the addition of subsection (5) or subsection (5A), the provisions of section 122 could not be invoked in respect of income year ending on 30th June, 2002;

(2) Subsections (1), (2) and (3) of section 239, as originally enacted, specifically related to the income year ending on 30th June, 2002 while subsection (4) thereof related specifically to pending proceedings;

(3) Subsection (2) of section 239 laid down that in making assessment in respect of any income year ending on or before the 30th day of June 2002, the provisions of the repealed Ordinance relating to the computation of total income and the tax payable thereon shall apply as if this Ordinance had not come into force;

(4) The key word 'assessment' was defined in both the Ordinances, i.e. the repealed Ordinance as well as the Ordinance (of 2001). The word 'assessment' as substituted by the Finance Ordinance, 2002, included 're-assessment' and 'amended assessment', which being the cognate expressions, were to be construed accordingly. If the above definition was read with section 239(1), it would indicate that an amended assessment would also fall within the connotations of assessment and shall apply accordingly;

(5) The words "*to ensure that the taxpayer is liable for the correct amount of tax for the tax year to which the assessment order relates*" occurring in section 122(1) of the Ordinance were omitted by means of the Finance Act, 2003. The said words referred to the charging provision as contained in the Ordinance where a charge was created on the basis of tax year as compared to assessment year used in the repealed Ordinance;

(6) Section 239 (1), (2) and (3) created charge in accordance with the provisions of the repealed Ordinance. Subsection (1) of

section 239 specifically stated that the computation of total income and tax payable thereon shall be that of the repealed Ordinance. Therefore, any charge thus created would be dealt with under the provisions of the repealed Ordinance and not under the Ordinance (of 2001);

(7) The power of amendment given in subsection (1) of section 122 was not an independent power for the reason that the provisions of this section were controlled by its opening words "*subject to this section*". Further, this section, as it existed till the tax year ending on 30th June 2003, was addressed to the taxpayer, which was alien to the income tax proceedings under the repealed Ordinance, and when it created charge, it addressed to the tax year, which was an alien connotation to the income tax proceedings under the repealed Ordinance. Thus, in this background, the charge created through amendment in respect of a tax year, was missing in respect of an assessment year;

(8) Keeping in view the original text of subsection (5), as it stood at the time of enforcement of the Ordinance, the assessments completed under any of sections 59, 59A, 62, 63 or 65 of the repealed Ordinance were not covered by it;

(9) Though such assessments were brought within the scope of subsection (5) by means of SRO No. 633(I)/2002 dated 14.9.2002, yet after its rescission by SRO No. 608(I)/2003 dated 24.6.2003, the same fell out of the scope of subsection (5); and

(10) Given the definition of 'taxpayer' in section 2(66) of the Ordinance, an assessee as defined in section 2(6) of the repealed Ordinance was alien to the provisions of section 122, hence the same did not apply to an assessee within the contemplation of the repealed Ordinance, particularly so when the two terms, 'taxpayer' and 'assessee' were not interchangeable. Thus, the relevant provisions did not have retrospective effect.

27. Mr. Muhammad Shoaib Abbasi, ASC for the respondents in C.A. 115-118/2008 submitted that his case was covered by section 122(5A) and the relevant provisions could not be given retrospective effect. He adopted the arguments of Mr. Shahbaz Butt.

28. Mr. Izharul Haq Siddiqui, ASC for the respondents in C.A. No.475-477/2008 adopted the arguments advanced on behalf of the respondents.

29. Mr. Hamid Shabbir Azar, ASC for the respondent in C.A. No.846/2008 submitted that his case was covered by section 122(5A). He adopted the arguments of the learned counsel for the respondents.

30. Mr. Irfan Ahmed Sheikh, ASC for the respondent in C.A. No. 923-924/2008 submitted that the definition of assessment included re-assessment under section 2(5) read with section 239(1) & (2) and its application could not be attracted to the cases in which assessments had already been finalized.

31. Mr. Hakam Qureshi, ASC learned counsel for the respondent in C.A. No. 1149/2008 adopted the arguments of Mr. Muhammad Iqbal Hashmi. He stated that when there were two or more interpretations, then in fiscal laws, the Court would adopt the interpretation favouring the taxpayer.

32. The learned Attorney General for Pakistan appeared on behalf of the Federal Government and filed concise statement. He stated that there would be no governance system at all in the country if the incomes were not properly assessed and the taxes not collected, causing prejudice to the public revenues. He argued as under: -

(1) No vested rights had accrued to the assessees in the matter of reopening, revising or amending of their assessments of the

pre-2001 Ordinance period as nobody could be allowed to gain premium on his *mala fide* acts, such as incorrect or collusive assessments, concealed income, etc;

(2) The impugned provisions were meant to modify the charge of tax offered by a taxpayer/assessee to actual tax chargeable and payable and to crystallize the correct charge as per the charging sections where there was mistake or error, or evasion, mis-declaration, tax fraud, or wrong application of law resulting in inaccurate charge of tax made, in the return of income;

(3) It was not a new concept, but was there in the Income Tax Act 1922 (sections 34 & 34A) as well as in the repealed Ordinance (sections 65 & 66A) and was now on the statute book in the form of section 122 of the Ordinance;

(4) Correction of assessment in favour of the taxpayer through rectification, appeal or revision was provided in sections 221, 127, 122A of the Ordinance. However, as no right of appeal was provided to the revenue department against an erroneous order of the tax authority, though the taxpayer had such right, errors of judgment operating against the revenue department would continue without remedy if provision like section 122 were not introduced;

(5) Subsections (5), (5A) and (9) laid down the parameters within which such powers would be exercised. Subsections (2), (4), (4A) and (5B) provided time limits and subsection (8) restricted the meaning of “definite information”, as used in sub-section (5) *ibid*. Thus, the legislature did not cast any additional burden, any new charge or duty on the subject, it merely clarified that amendment could be made on fulfillment of twin conditions of erroneousness and prejudice to the revenue;

(6) Similar provisions on amending the duty and taxes assessment were also available in the Customs Act (S.32) and the Sales Tax Act 1990 (Section 36). If a “person” paid tax with the return of income based on proper computation of total income, and proper application of tax rate; there is then no

issue as no appeal, no amendment, and no correction will be needed, as it would be accurate charge of tax;

(7) Subsections (5) and (5A) of section 122 were non-charging sections and were procedural in nature, therefore, the same were retrospective in operation;

(8) These provisions were also to be read in conjunction with section 122(1) which provided explicitly amendment of assessment already finalized under the repealed Ordinance; and

(9) The provisions of subsections (5) or (5A) were not *pari materia* to sections 65 or 66A of the repealed Ordinance, though certain conditions were transported into the said subsections. But, in any case, the two sets of provisions were different, inasmuch as the IAC could cancel or annul an assessment under section 66A, but the Commissioner could not pass such an order under subsection (5A);

(10) The application of the tax rate was protected under section 239(1) of the Ordinance, and same tax rate was applicable in respect of the assessments amended under the provisions of section 122;

(11) The case law on the issue of retrospectivity referred to by the learned counsel for the respondents was not relevant.

33. We have heard the learned Attorney General for Pakistan and the learned counsel for the parties and have gone through the relevant case law cited by them at the bar.

34. It may be observed that the Ordinance is the third major enactment governing the taxation laws. It was preceded by the Income Tax Ordinance, 1979, repealed on the enforcement of the Ordinance on 1.7.2002, and the Income Tax Act, 1922, one of laws adapted under the Indian Independence Act, 1947 on the eve of creation of Pakistan, which in turn was repealed by the Ordinance of 1979. The Preamble to the Ordinance states that it is expedient to consolidate and amend the law

relating to income tax and to provide for matters ancillary thereto or connected therewith. The decision of these appeals turns mainly on the true construction of section 122 of the Ordinance. We, therefore, undertake a brief survey of the legislative process, through which the provisions of this section have passed in taking their present shape and form, insofar the same is relevant for the purposes of adjudication of the controversy raised in these appeals. Section 122, as incorporated in the Income Tax Ordinance, 2001 (Ordinance No. XLIX of 2001) provided as under: -

> "**122. Amendment of assessments.-** (1) Subject to this section, the Commissioner may amend an assessment order treated as issued under section 120 or issued under section 121 by making such alterations or additions as the Commissioner considers necessary to ensure that the taxpayer is liable for the correct amount of tax for the tax year to which the assessment order relates.
>
> (2) An assessment order shall only be amended under subsection (1) within five years after the Commissioner has issued or is treated as having issued the assessment order on the taxpayer.
>
> (3) Where a taxpayer furnishes a revised return under subsection (6) of section 114 -
>
> (a) the Commissioner shall be treated as having made an amended assessment of the taxable income and tax payable thereon as set out in the revised return; and
>
> (b) the taxpayer's revised return shall be taken for all purposes of this Ordinance to be an amended assessment order issued to the taxpayer by the Commissioner on the day on which the revised return was furnished.
>
> (4) Where an assessment order (hereinafter referred to as the "original assessment") has been amended under subsection (1) or (3), the Commissioner may further amend, the original assessment within the later of –
>
> (a) five years after the Commissioner has issued or is treated as having issued the original assessment order to the taxpayer; or
>
> (b) one year after the Commissioner has issued or is treated as having issued the amended assessment order to the taxpayer.

(5) An assessment order shall only be amended under subsection (1) and an amended assessment for that year shall only be further amended under subsection (4) where the Commissioner –

(a) is of the view that this Ordinance has been incorrectly applied in making the assessment (including the misclassification of an amount under a head of income to claim tax relief, an incorrect claim for exemption of any amount or an incorrect claim for a refund; or

(b) has definite information acquired from an audit or otherwise that the assessment is incorrect.

(6) As soon as possible after making an amended assessment under subsection (1) or (4), the Commissioner shall issue an amended assessment order to the taxpayer stating –

(a) the amended taxable income of the taxpayer;
(b) the amended amount of tax due;
(c) the amount of tax paid, if any; and
(d) the time, place, and manner of appealing the amended assessment.

(7) An amended assessment order shall be treated in all respects as an assessment order for the purposes of this Ordinance, other than for the purposes of subsection (1).

(8) For the purposes of this section, “definite information” includes information on sales or purchases of any goods made by the taxpayer, and on the acquisition, possession or disposal of any money, asset, valuable article or investment made or expenditure incurred by the taxpayer.

In pursuance of section 1(3) of the Ordinance, it came into force w.e.f. 1.7.2002. By the Finance Ordinance[1], 2002, enacted simultaneously with effect from the same date, i.e. the date of enforcement of the Ordinance, the following amendments[2] were made in section 122: -

In subsection (1), the words and figures “or issued under section 59, 59A, 62, 63 or 65 of the repealed Ordinance, were inserted.

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[1] Printed as “Act” in the Income Tax Manual published by the Federal Board of Revenue. The National Assembly was not in existence at the relevant time, so no Act could be passed.

[2] Large scale amendments were made in the Ordinance overall.

[The Commissioner's power to amend an assessment was also made applicable to the assessments orders passed under certain sections of the repealed Ordinance.]

Words "as many times as may be necessary" were inserted in subsection (4)

[The scope of power of amendment of assessments made under subsection (1) or (3) was enlarged.]

35. By SRO No.633(I) /2002 dated 14.9.2002, the following new subsection (4A) was inserted into section 122: -

"An amended assessment shall only be made within six years of the date of original assessment.

[Six years' time-limit from the date of the original assessment was provided for an amended assessment, by which expression it appears that the original assessment could be amended by the Commissioner within a period of six years]

In subsection (5), in clause (a), after the word "Ordinance", the words "or the repealed Ordinance" were inserted.

[Thus, the assessments of pre-2001 Ordinance period were included.]

In subsection (5), in clause (b), for the words "assessment is incorrect" the words "income has been concealed or inaccurate particulars of income have been furnished or the assessment is otherwise incorrect" were substituted.

[The scope of amendment of assessment was stated.]

After subsection (5), new subsection (5A) was also inserted into section 122: -

"5(A) Where a person does not produce accounts and records, or details of expenditure, assets and liabilities or any other information required for the purposes of audit under section 177, or does not file wealth statement under section 116, the Commissioner may, based on any available information and to the best of Commissioner's judgment; make an amended assessment."

[Certain eventualities were provided where the Commissioner may pass an amended assessment order.]

In pursuance of the judgment of this Court in the case of *Kashmir Edible Oils Ltd*[3] (supra), the aforesaid SRO was rescinded by SRO No.608 (I) /2003 dated 24.6.2003 with which the amendments made in the Ordinance stood withdrawn.

36. The Ordinance was next amended by the Finance Act, 2003.The amendments introduced in section 122 are as under: -

> The words "to ensure that the taxpayer is liable for correct amount of tax for the tax year to which the assessment order relates" were omitted from subsection (1).

New subsection (4A) was inserted as under: -

> "(4A) In respect of an assessment made under the repealed Ordinance, nothing contained in subsection (2) or, as the case may be, subsection (4) shall be so construed as to have extended or curtailed the time-limit specified in section 65 of the aforesaid Ordinance in respect of an assessment order passed under that section and the time-limit specified in that section shall apply accordingly.
>
> [The time-limit already provided in section 65 of the repealed Ordinance was incorporated into the statute with respect to the assessment orders passed under that section. In fact, the amendment earlier brought about by the SRO dated 14.9.2002 was reincorporated with a change in the time-limit]

Subsection (5) was substituted as follows: -

> "(5) An assessment order in respect of tax year, or an assessment year, shall only be amended under sub-section (1) and an amended assessment for that year shall only be further amended under sub-section (4) where, on the basis of definite information acquired from an audit or otherwise, the Commissioner is satisfied that –

[3] Discussed in later part of the judgment to see its effect on the issues involved in these appeals.

(i) any income chargeable to tax has escaped assessment; or
(ii) total income has been under-assessed, or assessed at too low a rate, or has been the subject of excessive relief or refund; or
(iii) any amount under a head of income has been misclassified."

[A part of the provisions of section 65 of the repealed Ordinance, earlier not included in the Ordinance, was brought on the statute book in the form of this subsection, that is to say, the grounds for additional assessment given in that section, were enacted here. To this extent, the provisions of section 65 and subsection (5) are *pari materia*.]

New subsection (5A) was inserted as under: -

"(5A) Subject to sub-section (9), the Commissioner may amend, or further amend, an assessment order, if he considers that the assessment order is erroneous in so far it is prejudicial to the interest of revenue."

[The Commissioner was empowered to amend or further amend an assessment on two other considerations, namely, the erroneousness of an assessment, or its being prejudicial to the interest of revenue. An assessment earlier amended under section 65 of the repealed Ordinance was also made liable to be amended or further amended under this subsection. While exercising power under this subsection, taxpayer was to be provided with an opportunity of hearing as provided in subsection (9) To the extent of the grounds provided under this subsection for amending or further amending an assessment, this subsection is *pari materia* with section 66A of the repealed Ordinance.]

New subsection (5B) was inserted as under: -

"(5B) Any amended assessment order under sub-section (5A) may be passed within the time-limit specified in sub-section (2) or sub-section (4), as the case may be."

[Time-limits provided earlier were made applicable to amendment of assessments to be made under subsection (5A).]

Words and figures “subsection (1), subsection (4) or subsection (5A)” were added in subsection (6).

> [The amended assessment order in terms of subsection (6) was to be issued in three categories, namely, amended assessment order passed under subsections (1), (4), or (5A). *Amended assessments orders passed under subsection (3) would not be required to be issued in terms of subsection (6)*]

In subsection (8), the words, “*receipts of the taxpayer from services rendered or any other receipts that may be chargeable to tax under this Ordinance*” were added. Thus, the phrase “definite information” was further elaborated.

37. A perusal of the overall provisions of section 122, as amended from time to time, shows that the Commissioner is empowered to amend an assessment order by making such alterations or additions as he considers necessary. The power of amendment is to be exercised in the manner provided in section 122, which stipulates certain restrictions on the exercise of such power. The power of amendment can be exercised in respect of an assessment order treated as issued under section 120 or issued under section 121, or issued under section 59, 59A, 62, 63 or 65 of the repealed Ordinance. The assessment order can be amended within five years after the Commissioner has issued or is treated as having issued the assessment order on the taxpayer while an amended assessment order can be amended or further amended within a period of one year after the Commissioner has issued or is treated as having issued the amended assessment order to the taxpayer. The time limit provided in section 65 of the repealed Ordinance would be available in respect of an assessment order passed under that section. Under subsection (5), an

assessment shall only be amended, or an amended assessment shall only be further amended on the basis of definite information acquired from an audit or otherwise, where the Commissioner is satisfied that any income chargeable to tax has escaped assessment, or total income has been under-assessed, or assessed at too low a rate, or has been the subject of excessive relief or refund, or any amount under a head of income has been misclassified. So, there has to be definite information with the Commissioner, e.g. information on sales or purchases of any goods made by the taxpayer, receipts of the taxpayer from services rendered or any other receipts that may be chargeable to tax under the Ordinance and on the acquisition, possession or disposal of any money, asset, valuable article or investment made or expenditure incurred by the taxpayer. Such information must have been received from a certain source. Such information must stipulate a case of escaped assessment, under-assessment, assessment at too low a rate, excessive relief or refund, or misclassification of a head of income. Subsection (5A) also empowers the Commissioner to amend, or further amend an assessment order if he considers that the assessment order is erroneous in so far it is prejudicial to the interest of revenue, but before doing that, he shall provide the taxpayer with an opportunity of being heard. Power to amend or further amend an assessment order is also subject to the time-limit of five years or one year.

38. At this stage, it is necessary to have a glance at the provisions of section 239, the savings clause of the Ordinance because in the context of transition to a new phase of law, particularly where an existing law is repealed, the savings clause is always of pivotal nature, inasmuch as it

serves as a bridge to make the transition smooth. Subsections (1), (2) and (3) of section 239, as originally enacted, provided as under: -

> "(1) The repealed Ordinance 1979 shall continue to apply to the assessment year ending on the 30th day of June 2003.
>
> (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 relating to the computation of total income and the tax payable thereon shall apply as if this Ordinance had not come into force.
>
> (3) Where any return of income has been furnished by a person for any assessment year ending on or before the 30th day of June 2003, proceedings for the assessment of the person for that year shall be taken and continued as if this Ordinance has not come into force. "

The above subsections were amended by the Finance Ordinance, 2002 as under:-

> "(1) Subject to subsection (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.
>
> (2) The assessment, referred to in subsection (1), shall be made by an income tax authority which is competent under this Ordinance to make an assessment in respect of a tax year ending on any date after the 30th day of June, 2002, and in accordance with the procedure specified in section 59 or 59A or 61 or 62 or 63, as the case may be, of the repealed Ordinance.
>
> (3) The provisions of subsections (1) and (2) shall apply, in like manner, to the imposition or charge of any penalty, additional tax or any other amount, under the repealed Ordinance, as these apply to the assessment, so however that procedure for such imposition or charge shall be in accordance with the corresponding provisions of this Ordinance."

Thus, as per original subsection (1) of section 239 –

(i) The repealed Ordinance was applicable to assessment year ending on 30th June, 2003;

(ii) The repealed Ordinance governed the computation of total income and the tax payable thereon in respect of any income year ending on or before the 30th day of June 2002; and

(iii) The repealed Ordinance was applicable to proceedings in respect of assessment for the year ending on or before the 30th day of June 2003.

After the aforesaid amendment brought about by the Finance Ordinance, 2002, the authority competent to make an assessment in respect of a tax year ending on or before the 30th day of June, 2002 under the Ordinance was empowered to make an assessment in respect of a tax year ending on any date after the 30th day of June, 2002, in accordance with the procedure specified in sections 59, 59A, 61, 62 or 63 of the repealed Ordinance. The imposition or charge of any penalty, additional tax or any other amount, under the repealed Ordinance would also be governed by the aforesaid provisions. In subsection (2) of section 239, assessments under sections 59, 59A, 62 or 63 were referred to [whereas in subsection (1) of section 122, apart from the assessments under sections 59, 59A, 62 or 63, assessment under section **65** of the repealed Ordinance was also included.]

39. According to the learned counsel for the respondents, the previous laws envisaged additional assessment where any income chargeable to tax had escaped assessment, or was under assessed, or assessed at too low a rate, or was the subject of excessive relief (section 34 of the Income Tax Act, 1922 and section 65 of the repealed Ordinance). It was contended that the provisions of subsection (5) of section 122 in

particular were *pari materia* with the provisions of section 65 of the repealed Ordinance to that extent, and the legislature being aware of the previous state of the law, consciously did not enact a similar provision in section 122(1) as originally enacted and also omitted to save section 65. Therefore, subsequent reference to that section, or for that matter, the other sections of the repealed Ordinance, in section 122(1) was of little significance. They vehemently contended that section 65 having not been saved, the provisions of section 122(1), and particularly the provisions of subsections (5) and (5A) could not be applied retrospectively so as to reopen, revise or amend the assessments finalized under the repealed Ordinance. On the other hand, the learned counsel for the appellants stated that lacuna, if any, in the savings clause stood cured with the amendment of subsection (1) of section 122 and introduction of subsection (5).

40. We have given our anxious consideration to this aspect of the matter. To facilitate an easy analysis, the three provisions are juxtaposed with the help of the following comparative chart: -

COMPARATIVE CHART OF CORRESPONDING PROVISIONS		
Income Tax Act, 1922 Section 34	**Income Tax Ordinance, 1979 Section 65**	**Income Tax Ordinance 2001 Section 122**
34. Income escaping assessment: If for any reason income, profits or gains chargeable to income-tax have escaped assessment in any year or have been assessed at too low a rate, or have been	**65. Additional assessment.-** (1) If, in any year, for any reason,- (a) any income chargeable to tax under this Ordinance has escaped assessment; or (b) the total income of an assessee has been under assessed, or assessed at too low a rate, or has been the	**122. Amendment of assessments.-** (1) Subject to this section, the Commissioner may amend an assessment order treated as issued under section 120 or issued under section 121, or issued under section 59, 59A, 62, 63 or 65 of the repealed Ordinance, by making such alterations or additions as the Commissioner considers necessary. (2) An assessment order shall only be amended under subsection (1) within five years after the Commissioner has issued or is treated as having issued the assessment order on the taxpayer.

the subject of excessive relief or refund under this Act, the Income-tax Officer may, at any time within one year of the end of that year, serve on the person liable to pay tax on such income, profits, or gains, or in the case of a company, on the principal officer thereof, a notice containing all or any of the requirements which may be included in a notice under sub-section (2) of section 22 and may proceed to assess or reassess such income, profits or gains, and the provisions of this Act, shall, so far as may be, apply accordingly as if the notice were a notice issued under that sub-section: Provided that the tax shall be charged at the rate at which it would have been charged had the income, profits or gains not escaped assessment or full assessment, as the case may be: Provided further that	subject of excessive relief or refund under this ordinance; or (c) the total income of an assessee and the tax payable by him has been assessed or determined under sub-section (1) of section 59 or section 59A or deemed to have been so assessed or determined under sub-section (1) of section 59 or section 59A, the Deputy Commissioner may, at any time, subject to the provisions of sub-sections(2), (3) and (4), issue a notice to the assessee containing all or any of the requirements of a notice under section 56 and may proceed to assess or determine, by an order in writing, the total income of the assessee or the tax payable by him, as the case may be, and all the provisions of this Ordinance shall, so far as may be, apply accordingly: Provided that the tax shall be charged at the rate or rates applicable to the assessment year for which the assessment is made. (2) No proceedings under sub-section (1) shall be initiated unless definite information has come into the possession of the Deputy Commissioner and he has obtained the previous approval of the Inspecting Additional Commissioner of Income Tax in writing to do so. Explanation.- As used in this sub-section, "definite information"	(3) Where a taxpayer furnishes a revised return under sub-section (6) of section 114 - (a) the Commissioner shall be treated as having made an amended assessment of the taxable income and tax payable thereon as set out in the revised return; and (b) the taxpayer's revised return shall be taken for all purposes of this Ordinance to be an amended assessment order issued to the taxpayer by the Commissioner on the day on which the revised return was furnished. (4) Where an assessment order (hereinafter referred to as the "original assessment") has been amended under sub-section (1) or (3), the Commissioner may further amend,1[as many times as may be necessary, the original assessment within the later of – (a) five years after the Commissioner has issued or is treated as having issued the original assessment order to the taxpayer; or (b) one year after the Commissioner has issued or is treated as having issued the amended assessment order to the taxpayer. (4A) In respect of an assessment made under the repealed Ordinance, nothing contained in sub-section (2) or, as the case may be, sub-section (4) shall be so construed as to have extended or curtailed the time limit specified in section 65 of the aforesaid Ordinance in respect of an assessment order passed under that section and the time-limit specified in that section shall apply accordingly. (5) An assessment order in respect of tax year, or an assessment year, shall only be amended under sub-section (1) and an amended assessment for that year shall only be further amended under sub-section (4) where, on the basis of definite information acquired from an audit or otherwise, the Commissioner is satisfied that– (i) any income chargeable to tax has escaped assessment; or (ii) total income has been under-assessed, or assessed at too low a rate, or has been the subject of excessive relief or refund; or (iii) any amount under a head of income has been misclassified.] (5A) Subject to sub-section (9), the Commissioner may amend, or further amend, an assessment order, if he considers that the assessment order is erroneous in so far it is prejudicial to the interest of revenue.

where the assessment made or to be made is an assessment made or to be made on a person deemed to be the agent of a non-resident person under section 43, no notice under this subsection shall be issued after the expiry of one year of the end of that year. Provided further that unless definite information has come into his possession, the Income-tax Officer shall not initiate proceedings under this subsection without obtaining the previous approval of the Inspecting Assistant Commissioner of Income-tax in writing.	includes information in respect of sales and purchases, made by the assessee, of any goods, and any information regarding acquisition, possession or transfer, by the assessee, of any money, asset or valuable article, or any investment made or expenditure incurred by him. (3) Notice under sub-section (1), in respect of any income year, may be issued within ten years from the end of the assessment year in which the total income of the said income year was first assessable: Provided that, where the said notice is issued on or after the first day of July, 1987, this sub-section shall have effect as if for the words "ten years" the words "five years" were substituted. (3A) Where a notice under sub-section (1) is issued on or after the first day of July, 1982, no order under the said sub-section shall be made after the expiration of one year from the end of the financial year in which such notice was served.	(5B) Any amended assessment order under sub-section (5A) may be passed within the time-limit specified in sub-section (2) or sub-section (4), as the case may be. (6) As soon as possible after making an amended assessment under sub-section (1), sub-section (4) or sub-section (5A), the Commissioner shall issue an amended assessment order to the taxpayer stating – (a) the amended taxable income of the taxpayer; (b) the amended amount of tax due; (c) the amount of tax paid, if any; and (d) the time, place, and manner of appealing the amended assessment. (7) An amended assessment order shall be treated in all respects as an assessment order for the purposes of this Ordinance, other than for the purposes of sub-section (1). (8) For the purposes of this section, “definite information” includes information on sales or purchases of any goods made by the taxpayer, receipts of the taxpayer from services rendered or any other receipts that may be chargeable to tax under this Ordinance,] and on the acquisition, possession or disposal of any money, asset, valuable article or investment made or expenditure incurred by the taxpayer. (9) No assessment shall be amended, or further amended, under this section unless the taxpayer has been provided with an opportunity of being heard.”

41. There is force in the contention of the learned counsel for the respondents that the concept of additional assessment on the ground of escaped income, etc., as prevalent under the repealed Ordinance, or previously under the Income Tax Act, 1922, and also available in other jurisdictions (e.g. section 147 of the Indian Income Tax Act, 1961), was not legislated under the Ordinance as originally framed and promulgated. It

appears that the Ordinance was drafted in *post haste* and the draftsman omitted to incorporate this important provision. This observation is supported from the fact that the Ordinance was subjected to speedy, successive and large scale amendments, particularly at its very inception. It may be seen that section 238 provided that the Ordinance shall come into force on a date to be appointed by the Federal Government by notification in the official gazette. Accordingly, vide notification (SRO No. 381(I)/2002) dated 16.6.2002, the Ordinance came into force with effect from the first day of July 2002, *but with more or less 1000 amendments inserted by the Finance Ordinance, 2002*, as calculated by the learned counsel for the respondents. Soon thereafter, the Federal Government, in the purported exercise of power under section 240, a provision meant for removal of difficulties, came up with SRO No. 633(I)/2002 dated 14.9.2002, whereby amendments of substantive nature were made in different provisions of the Ordinance, e.g. sections 114, 121, 122, 137, 141, 161, 221 & 239, which changed the entire complexion of the law. The SRO also provided that for making any assessment for the year beginning on the first day of July, 2002, or making any deduction or collection of tax for the year beginning on the last day of July, 2002, the Ordinance would have effect accordingly.

42. The validity of the aforesaid SRO was called in question in various writ petitions filed before the Lahore High Court. A learned Single Judge of that Court allowed the writ petitions and declared the SRO in question *ultra vires* the Ordinance. The matter came up for consideration before this Court in the *case of Kashmir Edible Oils Ltd* (supra). This Court held that merely because the Federal Government was vested with the power to remove the difficulties in giving effect to any of the provisions of

the Ordinance did not empower the Government to go ahead with making amendments or repealing the provisions of the Ordinance. It was held that section 240 of the Ordinance had placed an embargo that the order passed by the Federal Government for removal of difficulties would not be inconsistent with the provisions of the Ordinance. Therefore, the Federal Government exceeded its powers of delegated legislation as contemplated by section 240 of the Ordinance and thus the said SRO could not co-exist with the original provisions of the Ordinance, many of which were sought to be amended thereby. However, it was observed that since the question of validity and effect of amendment in section 122 of the Ordinance by the Finance Act No. 1 of 2003 was not directly involved, therefore, the same was not examined in those proceedings.[4] It is noteworthy that retrospectivity or otherwise of the provisions of section 122 remained undetermined by this Court in *Kashmir Edible Oils Ltd.* (*supra*). The effect of the above decision of this Court on the cases pending either before this Court, or before any other authority or Court would be that the proceedings initiated in pursuance of the amendments of the SRO period, i.e. 14.9.2002 to 30.6.2003 would abate, inasmuch the very provisions of the Ordinance under which the proceedings were initiated were declared *ultra vires* and rendered null and *void ab initio*. However, the proceedings initiated on the basis of the provisions of the Ordinance, as amended from time to time, *minus the provisions of the SRO period*, would be in the field and subject to the decision of these appeals. This consideration in view, the learned counsel for the appellants frankly conceded that the appeals relating to the SRO period were not competent. They, therefore, requested that C.As. No. 1617, 1622-1624, 2673 & 2675-2678 of 2006, and C.As. No. 497, 498,

[4] Emphasis supplied.

911, 916, 1002, 1003, & 2282–2292 of 2008 may be allowed to be withdrawn. Accordingly, these appeals are dismissed as withdrawn.

43. At this juncture, we advert to the questions whether section 122 of the Ordinance is a procedural or substantive provision, whether it is to be applied prospectively or retrospectively, and whether assessees or taxpayers have acquired any right that their assessments finalized under the repealed Ordinance, being past and closed transactions, shall not be opened or amended under this provision? The learned counsel for the parties hotly contested the issue, the learned Attorney General for Pakistan on behalf of the Federal Government supporting the stance of the appellants that the provisions of the section were machinery provisions and not substantive as no tax or charge was levied thereby, therefore, the same were retrospective in operation and being procedural in nature applied to the assessments orders passed under the repealed Ordinance, moreso as the assessees had no vested right in the matter of reopening of the previous assessments. To resolve these issues, we revert to the case-law cited at the bar, but would suffice to refer to only some of them in the paragraphs next following.

44. In the case of *Adnan Afzal v. Capt. Sher Afzal* (PLD 1969 SC 187) the issue before this Court was the applicability of the West Pakistan Family Courts Act, 1964 to the proceedings commenced before the Act came into force. In holding that the Act brought about only procedural changes and did not affect any substantive right, therefore, according to the general rule of interpretation, that a procedural statute was to be given retroactive effect unless the law contained a contrary indication, Hamoodur Rehman, C.J., speaking for the Court, dilated upon the issue as under: -

> "The general principle with regard to the interpretation of statutes as laid down in the well known case of the *Colonial Sugar Refining Company Limited v. Irving* (1905 A C 369) is that "if the matter in question be a matter of procedure only", the provisions would be retrospective. "On the other hand, if it be more than a matter of procedure, if it touches a right in existence at the passing of the Act", then "in accordance with a long line of authorities extending from the time of Lord Coke to the present day", the legislation would not operate retrospectively, unless the Legislature had either "by express enactment or by necessary intendment" given the legislation retroactive effect.
>
> To the same effect are the observations of Jessel, master of the Rolls, in the *case of In re: Joseph Suche & Co. Limited* ((1875) 1 Ch. D. 48), where it was observed that as "a general rule when the Legislature alters the rights of parties by taking away or conferring any right of action, its enactments, unless in express terms they apply to pending actions, do not affect them. It is said that there is on exception to that rule, namely, that these enactments merely affect procedure and do not extend to rights of action, they have been held to apply to existing rights."
>
> The question for consideration there was regarding the right of a secured creditor of a company to prove for the full amount of his debt without deducting the value of his securities in the course of the winding up. That was held to be, in substance, a right of action for the recovery of a debt and, therefore, section 10 of the English Judicature Act was held not to apply retrospectively.
>
> The principle has been admirably put by Crawford in his Book on Construction of Statutes, 1940 Edition, page 581, as follows :-
>
> > "As a general rule, legislation which relates solely to procedure or to legal remedies will not be subject to the rule that statutes should not be given retroactive operation. Similarly, the presumption against retrospective construction is inapplicable. In other words, such statutes constitute an exception to the rule pertaining to statutes generally. Therefore, in the absence of a contrary legislative intention, statutes pertaining solely to procedure or legal remedy may affect a right of action no matter whether it came into existence prior to, or after the enactment of the statute. Similarly, they may be held applicable to proceedings pending or subsequently commenced. In any event, they will, at least, presumptively apply to accrued and pending as well as to future actions."

In this judgment, the Court also considered the question as to what were matters of procedure and held as under: -

> "The next question, therefore, that arises for consideration is as to what are matters of procedure. It is obvious that matters relating to the remedy, the mode of trial, the manner of taking evidence and forms of action are all matters relating to procedure. Crawford too takes the view that questions relating to jurisdiction over a cause of action, venue, parties pleadings and rules of evidence also pertain to procedure, provided the burden of proof is not shifted. Thus a statute purporting to transfer jurisdiction over certain causes of action may operate retroactively. This is what is meant by saying

that a change of forum by a law is retrospective being a matter of procedure only. Nevertheless, it must be pointed out that if in this process any existing rights are affected or the giving of retroactive operation causes inconvenience or injustice, then the Courts will not even in the case of a procedural statute, favour an interpretation giving retrospective effect to the statute. On the other hand, if the new procedural statute is of such a character that its retroactive application will tend to promote justice without any consequential embarrassment or detriment to any of the parties concerned, the Courts would favorably incline towards giving effect to such procedural statutes retroactively."

45. In a subsequent judgment of this Court reported as *Nabi Ahmed v. Home Secretary* (PLD 1969 SC 599) where the case of *Adnan Afzal* (supra) was also relied upon, the issue of retrospectivity was examined at still greater length. It is pertinent to refer to the following paragraphs from the said judgment:-

"21. In England, the basic sentiment of revulsion against injustice is strengthened by the jealousy of Courts to preserve their jurisdiction uncontaminated by extra-judicial considerations. They regard all considerations, whether political, administrative or even legislative, if they are not embodied in the law itself, as subordinate, if not entirely extraneous, to the judicial outlook. In the United States of America, emphasis on the constitutional separation of power is added. In the words of the American Jurisprudence, 16th Volume, page 771, Art. 429:

> "The position has been taken, however, in some jurisdictions that when an action is once commenced, jurisdiction is purely a judicial question, and it is unconstitutional, under the doctrine of the separation of the powers of Government, for the Legislature to attempt to usurp the judicial function by interfering legislation to oust the jurisdiction of the Court."

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22. One more consideration which appeals to me is that law abiding members of society regulate their lives according to the law as it exists at the time of their actions, and they expect the law to be steadfast and reliable See *Hughes and others v. Lumley and others* ((1854) 4 E & B 358). They assess and weigh the consequences according to the demands of existing law, including the requirements implicit in the existing system of law, and are entitled to feel, cheated if the law later lets them down by taking away or reducing their rights, or increasing their burdens. As pointed out by Willes, J. in *Phillips v. Eyre* (22 L T 869) at p. 876

> "Retrospective laws are no doubt *prima facie* of questionable policy, and contrary to the general principle that legislation by

> which the conduct of mankind is to be regulated ought, when introduced for the first time, to deal with future acts, and ought not to change the character of past transactions carried on upon the faith of the then existing law."

Further:

> "Blackstone, J., 1 Com. 46, describes laws *ex post facto* of this objectionable class as those by which after an action indifferent in itself is committed, the Legislature then for the first time declares it to have been a crime, and inflicts a punishment upon the person who has committed it. Here it is impossible that the party could foresee that an action, innocent when it was done, should be afterwards converted to guilt by a subsequent law; he had, therefore, no cause to abstain from it, and all punishment for not abstaining must of consequence be cruel and unjust'."

23. Justice Holmes of America has emphasized that law should be reliably ascertainable-this is important for law abiding persons, so that they may arrange their lives accordingly, but it is equally, if not more, important for wrong-doers in order to know their chances in law. The learned Judge has said in his address delivered in 1897 that-

> " . . if we take the view of our friend the bad man, we shall find that he does not care two straws for the axioms of deductions, but that he does want to know what the Massachusetts or English Courts are likely to do in fact. I am much of his mind. The prophecies of what the Courts will do in fact, and nothing more pretentious, are what I mean by the law."

What the Courts will do tomorrow depends a great deal on the answer to the question: To whom the appeal lies. This is why, to my mind, the Privy Council held in Colonial Sugar Co., that there was no difference between changing the forum of an appeal and altogether abolishing it. A past and closed transaction must be taken to have been concluded according to the law in force at that time, and the ultimate legal consequences of a legal duty or a legal right arising there from must, according to Justice Holmes, mean to the parties to it, "a prophecy". Civilization is in justice bound to respect that ‘prophecy', because the need for such prophecy is a creation of a civilized society.

24. People do not mind changes in law, if only the procedure is altered without altering the substance of the law. True, it is not easy to draw a line between substantive and procedural law, but the task is not impossible if the essential difference is kept in mind. According to Salmond’s Jurisprudence, 12th Edition of 1966 at page 128-

> "The law of procedure may be defined as that branch of the law which governs the process of litigation . . . . . All the residue is substantive law, and relates, not to the process of litigation, but to its purposes and subject-matter."

Thus:

> " .. a right of appeal, a right to give evidence on one's own behalf, a right to interrogate the other party,' 'rules defining the remedy . . . . as those which define the right itself,' that part of criminal law which deals, not with crimes alone, but with punishments also, as the measure of liability and many rules of procedure which, in their practical operation, are wholly or substantially equivalent to rules of substantive law,"

and, as such must be treated as falling within the classification of substantive law. In this category has been included by this Court the change of forum-

> "If in the process any existing rights are affected or the giving of retroactive operation causes inconvenience or injustice."

The rule regarding retrospectivity of statutes, as stated in Halsbury's Laws of England, Vol. 36, 3rd Edition, at pp. 423 & 426 runs as under: -

> "The general rule is that all statutes, other than those which are merely declaratory, or which relate only to matters of procedure or of evidence, are *prima facie*, prospective, and retrospective effect is not to be given to them unless, by express words or necessary implication, it appears that this was the intention of the Legislature."

> "The presumption against retrospection does not apply to legislation concerned merely with matters of procedure or of evidence; on the contrary, provisions of that nature are to be construed as retrospective unless there is a clear indication that such was not the intention of the Parliament.

> "It is presumed, moreover, that procedural statutes are intended to be fully retrospective in their operation, that is to say, are intended to apply not merely to future actions in respect of existing causes, but equally to proceedings instituted before their commencement. Thus, provisions regulating, or empowering the court to regulate, the course of proceedings, affect proceedings pending at their commencement, unless an intention to the contrary is clearly shown."

> "…. the Courts regard as retrospective any statute which operates on cases or facts coming into existence before its commencement."

In the instant case, the learned counsel for the parties were on common ground on the above exposition of the law, inasmuch as every one agreed that the substantive laws apply prospectively unless the statute expressly or implied provided that it would be applied retrospectively, the procedural laws are generally retrospective and apply to the pending proceedings with

the rider that if they affect the existing or accrued right, they would not apply retrospectively, unless of course the legislature intended to do so by express words or necessary implication. However, the learned counsel were at variance on the issue whether after the repeal of the Ordinance of 1979, the respondents had acquired any vested right, or a right had accrued to them on account of the repeal of the Ordinance of 1979, so as not to touch the assessment orders passed under the repealed Ordinance, particularly when section 65 of the repealed Ordinance, though stood saved under the original Ordinance, was not saved while introducing amendments in the Ordinance. In a somewhat similar context, in the case of *Inspecting Additional Commissioner of Income Tax v. Zakaria H.A. Sattar Bilwani, Karachi* (C.P. No. 643-K to 647 of 2007 decided on 15.7.2008), this Court noted that section 17-B introduced in the Wealth Tax Act, 1963 by means of Finance Act, 1992 was enacted to initiate proceedings *in the interest of revenue*. It was held that the amendment brought about by insertion of section 17-B was not merely procedural but also conferred powers to recall cases to the extent that was not available earlier which, by its very nature, was substantive in nature, therefore, it did not operate retrospectively. In this case, the case of *Commissioner of Income Tax v. Eastern Federal Insurance Company* [(1982) 46 Tax 6 (SC. Pak)] was also noted wherein the amendment brought about by the Finance Act, 1975 extended the period for re-opening of a case from four to six years. It was held that the amendment would not be applicable to the cases in which the period of four years had already expired on the ground that the vested right of the party after expiry of four years could not be taken away and therefore the amendment was not attracted to the case of

the assessee. The following portion of the judgment was quoted with approval: -

> "15. Keeping these principles in view, we are of the opinion that, even though the amending provisions in question, were a part of the procedural laws, they cannot be given retrospective effect, in the facts of the present case. There is no dispute between the parties that, but for the amendments, the business profits for the chargeable accounting period in question, were not liable to be assessed on 31.1.1958. On the expiry of the period of four years under section 14, the assessee had, therefore, clearly acquired a right and the assessment for the said period became a past and closed transaction. This right could not, therefore, be taken away by giving retrospective operation to the amended statutory provisions extending the period for assessment. The contentions advanced on behalf of the appellant are without substance. We, accordingly, agree with the judgment under appeal."

The introduction of time-limit within which an assessment can be amended in both the Ordinances (section 65 of the repealed Ordinance and section 122 of the Ordinance) is a statutory recognition of the protection against arbitrary power of reopening or amending an assessment after the expiry of the prescribed period. Therefore, it could not be said that in reopening the assessments already completed no right of the assessee/taxpayer was involved.

46. It was contended by Mr. Mansoorul Arifin that the provisions of section 122 of the Ordinance relating to amendment of assessment were *pari materia* with those of section 166A of the repealed Ordinance. He submitted that with the promulgation of the repealed Ordinance and repeal of the Income Tax Act, 1922 with effect from 1.7.1979, the provision akin to section 66A, viz., section 34A of the Act of 1922 was not saved by section 166 of the repealed Ordinance nor such a provision was enacted in the later enactment. Section 66A was inserted into the repealed Ordinance by the Finance Ordinance, 1980 with effect from 1.7.1980. The erstwhile

Central Board of Revenue,[5] vide Circular No. I(48)/II/1/79, dated 17.2.1981 stated that section 66A of the repealed Ordinance had no retrospective application. The said provisions were considered by a learned Division Bench of the Lahore High Court in the case of *Monnoo Industries Ltd v. C.I.T.* (2001 PTD 1525). It was held that section 66A of the repealed Ordinance was not procedural in nature and, therefore, it could not have retrospective effect to touch the assessments completed before its incorporation into the statute book, particularly in view of the fact that revisional provisions were not saved by the savings clause contained in section 166 of the repealed Ordinance providing for repeal and savings of the late Income Tax Act, 1922. Thus, the assessments pending at the time of enforcement of the repealed Ordinance had to be dealt with as if the repealed Ordinance had not come into force and the assessments finalized before 1.7.1980 could not be reopened under section 66A of the repealed Ordinance. It may be observed that section 66A of the repealed Ordinance provided for revision of the assessment orders, hence generally speaking it was *pari materia*, not with section 122 but with section 122A of the Ordinance, which provided for revision of the proceedings under the Ordinance. Subsection (5) is *pari materia* with section 65 of the repealed Ordinance inasmuch as the grounds earlier provided for additional assessment were made the grounds for amendment or further amendment under that subsection while section 66A of the repealed Ordinance qua grounds for revision is *pari materia* with subsection (5A). In any event, the High Court in the above case held that section 66A of the repealed Ordinance was not procedural in nature and, therefore, it could not have

[5] Renamed as Federal Board of Revenue.

retrospective effect to touch the assessments completed even though it was not saved under section 166 of the repealed Ordinance.

47. As put by the Privy Council in the *case of Mahaliram Ramjidas* (supra), and also reiterated by this Court in the cases of *Khan Bahadur Amiruddin v. West Punjab Province* (PLD 1956 FC 220) and *Muhammad Amir Khan v. Controller of Estate Duty* (PLD 1961 SC 119), there is a distinction between provisions which impose taxes and those which provide for the machinery by which tax is assessed and realized. The provisions relating to imposition of tax are to be strictly construed in favour of the subject so that if there be any substantial doubt, it has to be resolved in his favour. But the machinery sections are to be liberally construed. If the incidence of tax be clear, the machinery sections should be so construed as to make the realization of the proper tax possible. They should not be so construed as to defeat the intention of the legislature and to prevent the realization of the tax that is in fact due. However, in our view, the provision is impregnated with an essential attribute, which affects an accrued right of an assessee or a taxpayer that after efflux of a certain period of time, his assessment will not be opened or amended. Therefore, the section cannot be applied retrospectively unless the legislature has by express words or necessary implication intended to give it retrospective effect. Our burden, therefore, in the light of the contentions of the learned counsel for the parties is to find from the provisions of the Ordinance whether the legislature intended to apply provisions of section 122 retrospectively, either by express words, or by necessary implication, and what treatment the Ordinance envisaged to be given to the proceedings pending under the repealed Ordinance, including additional assessment

under section 65, which, to an extent, is *pari materia*, with the provisions of subsection (5) of section 122.

48. The learned counsel for the appellants vehemently contended that there was clear distinction between the charging sections (in this case sections 4 to 8 of the Ordinance) and the procedural or machinery provisions, section 122 being one of them. While the former sections were to be construed strictly, liberal approach was required to be adopted in the interpretation of the procedural or machinery provisions, so as to make the machinery workable and the realization of the tax possible. On the other hand, the learned counsel for the respondents took the position that an element of addition of liability was woven into the overall provisions of the Ordinance, particularly into the machinery sections, including section 122, therefore, the same could not be given retrospective effect. Having anxiously considered the matter, the view we are inclined to take is that the provision is impregnated with the potential of adding to the liability of the taxpayer, therefore, the same is not a mere matter of procedure. It has already been held that the taxpayers/assessees have a right that their assessments will not be reopened after the expiry of the statutory period of five years.

49. As to the non-incorporation into the original Ordinance of the concept of "*additional assessment on the grounds of escapement of income, etc.*" in the former laws, (later introduced into the Ordinance under subsection (5), or for that matter various other provisions of the repealed Ordinance, the legislature realizing the flaws in the law, immediately took in hand the work of filling the lacunae and supplying the omissions on successive reviews of the law in its present state. Thus, on the very day of

the enforcement of the Ordinance, i.e. 1.7.2002, the words and figures, “or issued under sections 59, 59A, 62, 63 or 65 of the repealed Ordinance” were inserted in subsection (1) of section 122 along side many other amendments and the assessment orders passed under those sections were brought within the pale of the amendment power. Likewise, on insertion of subsection (5) by the Finance Act, 2003, the *pari materia* provisions of section 65 (escapement of income from assessment, etc.) were brought on the statute book. These omissions were, however, earlier curable with the unamended provision of subsection (1) of section 239 on the statute book, which provided that the repealed Ordinance shall continue to apply to the assessment year ending on the 30th day of June, 2003, but became incurable with the substitution of that provision with subsections (1), (2) and (3) of section 239 by the Finance Ordinance, 2002 and the Finance Act, 2003, which omitted the *en block* applicability of the repealed Ordinance to the relevant assessments. Had the unamended provision of subsection (1) of section 239 continued on the statute book, no difficulty would have arisen regarding the treatment of assessment orders passed in respect of the assessment year ending on 30th June 2003. In such eventuality, the assessments up to the said period would have been governed under the repealed Ordinance, while the assessments of the post enforcement period of the Ordinance of 2001 would be governed under the latter Ordinance.

50. M/S Sirajuddin Khalid and M. Iqbal Hashmi, ASCs argued that the terms ‘tax’, ‘taxable income’ and ‘taxpayer’ as defined in section 2(63), (64) & (66) respectively were restricted to the Ordinance as they did not contain any reference to the corresponding or *pari materia* provisions in the repealed Ordinance, hence the provisions of the Ordinance could not

be applied to the assessments completed under the repealed Ordinance. The relevant provisions are reproduced below: -

> "2(63) "Tax" means any tax imposed under Chapter II, and includes any penalty, fee or other charge or any sum or amount leviable or payable under this Ordinance."
>
> (64) "Taxable income" means taxable income as defined in section 9."
>
> (66) "Taxpayer" means any person who derives an amount chargeable to tax under this Ordinance and includes --."

A bare perusal of the above provisions shows that here too the draftsman failed to create any link between these provisions and the relevant provisions of the repealed Ordinance.

51. This brings us to the question how this Court can come to the rescue of the draftsman who has left so much to be desired in the Ordinance. To find an answer, reference is made to the case of *Muhammad Amir Khan v. Controller of Estate Duty* (PLD 1961 SC 119) where this Court considered the question whether the Finance Act of 1956 was not *ultra vires* the Central Legislature and, in any case, even if the Finance Act of 1956 was ignored the proper duty calculated on the basis of determination by the Controller could be realised in spite of the defective wording of section 57 as it stood before its amendment by the Finance Act of 1956. Another question considered in this case was whether this Court could modify section 57 so as to bring it in accord with the rest of the Act and the intention of the Legislature. The Court dealt with the above questions in the following manner: -

> "We are satisfied that this is a case where the Court can modify the language of an enactment. It will be observed that there cannot be the slightest doubt in the present case as to the intention of the Legislature. In fact, it is admitted on behalf of the appellants that the failure to make a consequential amendment in section 57 could only be due to a slip. After providing the Controller could determine value subject to an appeal to the Appellate Tribunal the Legislature could

not possibly have intended that duty should be paid only on the account which was filed by the accounting party itself. All that has happened is that the draftsman failed to refer in section 57 to the provisions relating to determination in accordance with the amended Act. That we can modify the language of an Act to give effect to the manifest and undoubted intention of the legislature is a proposition which is well supported by authority and well justified in reason. As stated in Crawford on Statutory Construction (section 201 p. 348):

> "If the true meaning of the legislature appears from the entire enactment, errors, mistakes, omissions and misprints may be corrected by the Court, so that the legislative will may not be defeated. As a result, spelling, grammar, numbers and even words, may be corrected. This, as already stated, is simply making the strict letter of a statute yield to the obvious intent of the Legislators. But it must clearly, or at least with reasonable certainty, appear that the error is in fact one before the Court will be justified in making the proper correction or amendment or the Court will invade the province of the legislature and exercise legislative power. But when satisfied of the error, the Court may make the necessary correction. In accord with this principle, an erroneous description may be made to describe the thing actually intended or a misnomer made to name the thing really meant."

In Maxwell's Interpretation of Statutes the rule is thus stated on p. 229, 1953 Edition:

> "Where the language of the statute, in its ordinary meaning and grammatical constructions, leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship or injustice, presumably not intended, a construction may be put upon it which modifies the meaning of the words, and even the structure of the sentence."

In Salmon v. Duncombe and others (11 A C 634), their Lordships of the Privy Council said

> "It is, however, a very serious matter to hold that when the main object of a statute is clear, it shall be reduced to a nullity by the draftsman's unskilfulness or ignorance of law. It may be necessary for a Court of Justice to come to such a conclusion, but their Lordships hold that nothing can justify it except necessity or the absolute intractability of the language used. And they have set themselves to consider, first, whether any substantial doubt can be suggested as to the main object of the legislature, and, secondly, whether the last nine words of section 1 are so cogent and so limit the rest of the statute as to nullify its effect either entirely or in a very important particular."

There being no doubt in the present case that the duty which the legislature intended to be realized was that which was to be

determined in accordance with the provisions of the Act. We find we have jurisdiction to modify section 57 so as to rectify the draftsman's mistake and to read in it references to the Controller and the Appellate Tribunal, etc., and we would hold that the proper duty could be realized in spite of the defective wording of section 57.

Stress was laid during argument on the rule that statutes imposing taxes should be strictly construed. Any effort to invoke the aid of this rule in the present case is misconceived. There is a distinction between provisions which impose taxes and those which provide for the machinery by which tax is assessed and realized. The provisions relating to imposition of tax are to be strictly construed in favour of the subject so that if there be any substantial doubt it has to be resolved in his favour. But the machinery sections are to be liberally construed. If the incidence of tax be clear the machinery sections should be so construed as to make the realization of the proper tax possible. They should not be so construed as to defeat the intention of the legislature and to prevent the realization of the tax that is in fact due. The distinction stated above was recognised by the Federal Court of Pakistan in *Khan Bahadur Amiruddin and others v. West Punjab Province* (P L D1956 FC 120), where the learned Judges while dealing with a case under the Punjab Immovable Property Tax Act said:

> "The Act in question is no doubt a Taxing Act and unless the liability to be taxed is clear the interpretation should be in favour of the subject. But no question of interpretation arises regarding section 3, which, in unambiguous terms, determines the liability of the lands to be taxed. The provisions that have to be interpreted are those relating to the machinery of the assessment and in respect of such provisions of a taxing Act the Privy Council in Income-tax Commissioner v. Mahabi Ramjidas AIR 1940 P C 124, observed that that construction should be preferred which makes the machinery workable."

We also agree with the contention of the learned Attorney-General that in spite of the defective wording of section 57 duty could be realized on account of section 58-D. This section empowers the Controller to issue a notice of demand when duty has been determined in consequence or in pursuance of an order passed under the Act. In accordance with this section therefore once the Controller determines the value of the property and the duty that is due, he would have authority to issue a notice of demand. It has been urged on behalf of the appellants that this empowers only the issue of notice and does not contain any specific provision as to the realization of the duty. It appears to us to be involved in the authority to issue notice that the amount mentioned in the notice can be realized.

We may mention before concluding the contention pressed before us by Mr. Suhrawardy that the Controller and the Government were only taking advantage of a technicality inasmuch as the High Court may very well have allowed Writ Petition No. 39/55 and may have granted a writ forbidding the Controller from taking further steps. We

> may point out that it is only the appellants who have been trying to take advantage of a technicality and they have failed. The liability of payment of estate duty arose in the year 1952 when Sir Muhammad Akbar Khan died and in accordance with the Estate Duty Act the value of the estate of Sir Muhammad Akbar Khan was to be assessed by the Controller. The amendment of 1953 had come into force before the year allowed to the Central Board of Revenue for reference to the High Court expired. The Controller admittedly had on account of the amendment the power to determine value. The appellants had objected to the exercise of jurisdiction on the ground of a drafting error. This objection though conceded in a limited form by the Advocate-General of Pakistan in 1955 had no force and is now being overruled. The effect of the judgment is that proceedings before the Controller shall have their ordinary and natural course."

Thus, in the course of interpretation of statutes, this Court while ascertaining the manifest, undoubted and true will and intent of the legislation, is fully competent and empowered not only to fill the lacuna or supply the omissions, but also to point to the deficiencies or the excesses that have crept into the legislation due to the unskilfulness of the draftsman against the legislative will.

52. In the instant appeals, as noted earlier, leave to appeal was granted to examine the scope, effect and validity of section 122. The learned counsel for the respondents had to devote considerable time in arguing excessive and repetitive power to amend vested in the Commissioner at the cost of arbitrariness. The learned counsel vehemently contended that arbitrary powers were given to the Commissioner to amend an assessment and the draftsman failed to properly depict the legislative intent in this regard, which was to confer the power of amendment of assessment on the Commissioner simpliciter. Though, in response the learned counsel for the appellants contended that subsection (1) of section 122 was an enabling provision and the power of amendment was to be exercised subject to the constraints and restrictions imposed on it in the remaining parts of the section, but the fact remains that the power presents

a draconian façade to a taxpayer. To begin with, subsection (1) invests the Commissioner with the power to amend an assessment order by making such alterations or additions as he considers necessary. Next, subsection (3) says that the Commissioner shall be treated as having made an amended assessment of the taxable income and tax payable thereon as set out in the revised return furnished by a taxpayer in terms of subsection (6) of section 114. Under subsection (4), where an assessment order has been amended under subsection (1) or (3), the Commissioner may ***further amend it as many times as may be necessary*** over a period of five years after the issuance of the assessment order, or a period of one year after the issuance of amended assessment order. Ambiguity abounds in the subsection. Under this subsection, the Commissioner may further amend an assessment 100 times or 1000 times within the five years time-limit. The order passed under subsection (1) will be an amended assessment order. The revised return filed under subsection (3) shall also be treated as an amended assessment. One is left wondering from which assessment order the period of five years, or one year will be computed, from the date of the revised return, which in itself is an amended assessment order under subsection (3)(a), or an order amending assessment for the first time, or the hundredth time under subsection (4). Subsection (4A) is another patch work done for the limited purpose of saving the time-limit prescribed in section 65 of the repealed Ordinance for dealing with the assessments made under that provision. Again, this would not have been required had the unamended provision of section 239(1) of the Ordinance continued on the statute book. No doubt, subsection (5) stipulates the conditions under which the power to amend an assessment is to be exercised, but its placement in the section suggests, though

incorrectly, as if it is an independent power of amendment. If the grounds for amendment or further amendment were provided in subsection (1) itself, or the same were suffixed immediately after it, it would be easily comprehended. The absurdity, inconvenience and hardship are manifest. Then is subsection (5A), which provides that the Commissioner may amend, or further amend an assessment order, if he considers that the assessment order is erroneous in so far it is prejudicial to the interest of revenue. Indeed, it is an independent power, apart from the power of amendment contained in subsections (1), (3) & (4). That is why, the draftsman provided in subsection (5B) the time-limit within which this power was to be exercised. In this subsection, separate reference to subsection (9) – affording of opportunity of hearing to the taxpayer, is made. From the language of subsection (9), the provision appears to be applicable to the section as a whole and would be attracted to innumerable amendments or further amendments of assessments envisaged therein. The reference does not depict the legislative intent.

53. It was conceded by the learned counsel for the appellants that subsection (5A) provided an independent power of amendment or further amendment of assessment. Mr. M. Ilyas Khan stated that the power under subsection (5) was original in nature while that under subsection (5A) was revisional in nature. In fact, the grounds for amendment or further amendment provided in this subsection were the grounds for revision under section 66A of the repealed Ordinance. Now, the assessment orders are subject to a double revision. One is by the Commissioner under section 122A where no specific ground for revision is provided, but is to be made on an inquiry conducted in the matter. The other is by the Regional Commissioner under section 122B in a matter relating to issuance of an

exemption or lower rate certificate with regard to collection or deduction of tax at source under the Ordinance. Here too, an impression of excessive powers surfaces. Then, the Ordinance provides in section 221 for rectification of mistakes, *inter alia,* by the Commissioner. Subsection (1A) specifically empowers the Commissioner to amend any order passed under the repealed Ordinance by the Deputy Commissioner, etc. There is a need to review the language, content and scope of the power to amend and further amend an assessment, the power to revise an assessment and the power to rectify mistakes envisaged in these sections so as to make it in line with the legislative intent of consolidating the law relating to income tax so as to make it easily comprehensible to the convenience of the taxpayers.

54. A perusal of section 65 of the repealed Ordinance shows that a period of five years was provided for issuing notice to an assessee to initiate proceedings for additional assessment in the cases of escapement of income from assessment, etc. Time-limit of five years, with certain changes is also envisaged under subsections (2) & (4) of section 122 of the Ordinance within which power to amend an assessment may be exercised. Keeping the former and the present states of law in view, the irresistible conclusion appears to be that the assessments completed under the repealed Ordinance ought to be governed by the old law while the assessments of the post-enforcement period of the Ordinance are to be governed by the new law. This treatment of the two sets of assessments would also avert the anomaly that would be created if the assessments of the period up to 30th June, 2003 were excluded from the operation of the previous law on account of its repeal, and not included in the new law on account of its being prospective in application. It appears

that the respondents have been trying to take advantage of the technicalities, but we are afraid, they must fail. If their cases do not fall within the ambit of provisions of section 122 on account of the same being prospective, they cannot exclude their assessments from the purview of section 65 of the repealed Ordinance merely because of the lapse of the draftsman who omitted subsection (1) of section 239 at the amendment stage. Had the provisions of subsection (1) of section 239 of the Ordinance continued on the statute book, there would have been no ambiguity and no difficulty at all. In that eventuality, the assessments up to the period ending on 30th June 2002 would be governed by the relevant provisions of the repealed Ordinance as if the Ordinance had not come into force.

55. At this stage, we may take up another contention of the learned counsel for the appellants that in some of the cases, the writ petitions were filed in the High Court against the issuance of show cause notices by the taxation officers though appropriate remedies were available to them under the law in the form of appeal/revision before the concerned Income Tax authorities. It was contended that instead of availing the aforesaid remedies, the assessees/taxpayers directly filed the writ petitions and the High Courts also incorrectly entertained the same, though the same were not maintainable. On the other hand, the learned counsel for the respondents submitted that the writ petitions were filed against the issuance of show cause notices on the ground of lack of authority and jurisdiction in the Income Tax authorities under the Ordinance. It was also submitted that the contention of the learned counsel for the appellants was of no significance particularly when the High Courts in a large number of tax references also reached the same conclusion that the provisions of

section 122 of the Ordinance were prospective in operation and the relevant assessments could not be reopened under those provisions.

56. In *Commissioner of Income Tax v. Hamdard Dawakhana* (Waqf) (PLD 1992 SC 847) this Court quoted with approval the observation in an earlier case[6] that the tendency to bypass the remedy provided in the relevant statute and to press into service constitutional jurisdiction of the High Court was to be discouraged, *though in certain cases invoking of such jurisdiction instead of availing the statutory remedy was justified*, e.g. when the impugned order/action was palpably without jurisdiction and/or *mala fide*. It was further held that to force an aggrieved person in such a case to approach the forum provided under the relevant statute may not be just and proper. In the said case, the appellant had opted to avail of the hierarchy of the forums provided for under the repealed Ordinance up to the stage of filing of appeal before the Tribunal, but then instead of making a reference to the High Court, filed a Constitution Petition in the High Court. It was observed that once a party opted to invoke the remedies provided for under the relevant statute, he could not at his sweet will switch over to constitutional jurisdiction of the High Court in the mid of the proceedings in the absence of any compelling and justifiable reason. Incidentally, that is not the position in the instant cases where some of the respondents directly filed writ petitions in the High Courts and challenged the competence and validity of the show cause notices issued to them. Here, the *ratio* of the judgment of this Court in *Murree Brewery Co. Ltd v. Pakistan* (PLD 1972 SC 279) is more pertinently attracted. In this case, the appellant challenged the very jurisdiction of the Capital Development Authority acting under the Capital Development Authority Ordinance, 1960

[6] C.A. No. 79-K of 1991

to make the impugned acquisition under the Ordinance. It was held that if the appellant succeeded in establishing that the impugned acquisition was *ultra vires* the Ordinance, its appeal under section 36 would be an exercise in futility. It was further held that the rule that the High Court would not entertain a writ petition when other appropriate remedy was yet available was not a rule of law barring jurisdiction, but a rule by which the Court regulated its jurisdiction. It was noted that one of the well recognized exceptions to the general rule was a case where an order was attacked on the ground that it was wholly without authority. Where a statutory functionary acted *mala fide* or in a partial, unjust and oppressive manner, the High Court in the exercise of its writ jurisdiction had power to grant relief to the aggrieved party. It was also observed that the appeal under section 36 was limited to a matter which was within the jurisdiction of the authority concerned and the scope of the Ordinance. It was concluded that the question of jurisdiction was a matter for review, which was based not on the merits but on the legality of the lower authority's proceedings. In the instant cases too, the jurisdiction of the Income Tax authorities to issue the impugned show cause notices was successfully brought under challenge before the High Courts and it was found that the notices were not competently issued in view of the prospective application of the provisions of section 122 of the Ordinance. The case of *Pak Arab Fertilizers (Pvt.) Ltd* relied upon by Mr. M. Ilyas Khan was not relevant, as no factual controversies were involved in the writ petitions filed by the respondents in these matters. The objection of the learned counsel, in the light of the above well-settled law, is overruled.

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 unamended 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."

58. Mr. Shahid Jameel Khan, learned counsel for the appellants in C.A. No. 44 to 49 of 2009 stated that the issue for adjudication in these appeals before the High Court related to section 12(18) of the Ordinance in

respect of assessment years 1999-2000 to 2002-2003, which was not touched upon by the learned Judges in the impugned judgments. He, therefore, submitted that the proceedings, which were the subject-matter of the said appeals were required to be remanded to the High Court for decision in accordance with law. He further submitted that the assessments relating to 1994-1995 and 1999-2000 were to be governed under section 122 of the Ordinance. Therefore, to that extent, the appeals would be dealt with in the light of the decision of this Court in other appeals.

59. As to Civil Appeals No. 50 & 51 of 2009, Mr. Shahid Jameel Khan, learned counsel for the appellants stated that the issue for adjudication before the High Court related to section 221 of the Ordinance, i.e. rectification of assessments of the year 1998-1999, but the same was not touched upon by the learned Judges in the impugned judgments. Likewise, in respect of assessments 2000-2001, 2001-2002 and 2002-2003 the issue for adjudication before the High Court related to disallowance of interest expense, which too was not touched upon by the learned Judges in the impugned judgments. Only one assessment year, i.e. 1998-1999 related to section 122. He, therefore, submitted that the appeals to the extent of section 221 and disallowance of interest expense may be remanded to the learned High Court for decision according to law.

60. There is force in the submissions of the learned counsel. Accordingly, the appeals are partly allowed and the impugned judgments set aside to the above extent. The proceedings are remanded to the learned High Court for decision in accordance with law. As to section 122, the appeals will follow the decision of this Court in other appeals.

61. The learned counsel next submitted that C.A. No. 1099 to 1101 of 2008 were inadvertently clubbed in the High Court with section 122 cases, though these appeals related to rectification of assessment orders under section 221 of the Ordinance. We have examined the case files and have gone through the grounds of PTR No. 9, 10 & 11 of 2008 filed before the High Court. The assessments in these cases were rectified under section 221 and refunds of different sums of money were created. Subsequently, the assessments were reopened under section 122(5A) on the ground of being erroneous and prejudicial to the interest of revenue. The order was upheld in appeal before the Commissioner. However, the Appellate Tribunal allowed the appeal of the assessee. Consequently, the statements filed by her under sections 115(4) and 143B in respect of assessment year 2002-2003 were accepted and the rectification made under section 221 was revived. The precise contention of the learned counsel for the appellant was that the learned High Court decided these cases along with the connected cases on the issue of prospectivity or retrospectivity of section 122, and did not go into the actual controversy raised in these cases, i.e. the rectification of the relevant assessments, therefore, the appeals were required to be remanded to the High Court for decision in accordance with law. We uphold the contention of the learned counsel. Thus, the appeals are partly allowed and the cases remanded to the learned High Court for decision in accordance with law. Obviously, if any question pertaining to the application of section 122 be raised, the same would be governed by this judgment.

62. Mr. M. Ilyas Khan, Sr. ASC, learned counsel for the appellants in C.A. No.826 & 1102 of 2008 submitted that these appeals may be delinked as a different question of law was involved in it. Mr. Sirajuddin Khalid, ASC, learned counsel for the respondent in C.A. No.826/2008 subscribed to the submission of the learned counsel for the appellant. Order accordingly.

63. Mr. Shahid Jameel Khan, ASC further submitted that C.A. No.113/2009 was required to be delinked as a different question of law was involved therein. We have examined the case file and have found that the said appeal involves the common question of law relating to prospectivity or retrospectivity of section 122 of the Ordinance. Therefore, the same cannot be delinked and will be governed by this judgment.

64. In the result, the titled appeals and petitions will be governed by the following orders: -

(1) Civil Appeals No. 1617, 1622-1624, 2673 & 2675-2678 of 2006, and Civil Appeals No. 497, 498, 911, 916, 1002, 1003, & 2282–2292 of 2008 are dismissed as withdrawn with the observation that the assessment of any income year ending on or before 30th June 2002 shall be governed by the repealed Ordinance as if the Ordinance had not come into force as held in Para 54 above.

(2) Civil Appeals No. 1099 to 1101 of 2008 and Civil Appeals No. 44 to 51 of 2009 are partly allowed, the judgments of the High Court are set aside and the matters remanded to the concerned High Court for decision according to law.

(3) Civil Appeals No. 826 & 1102 of 2008 are delinked and adjourned to a date in office.

(4) All the remaining civil appeals and civil petitions are dismissed with no order as to costs.

CHIEF JUSTICE

JUDGE

JUDGE

Islamabad
Announced on _____.

CHIEF JUSTICE

APPROVED FOR REPORTING