IN THE SUPREME COURT OF PAKISTAN
(APPELLATE JURISDICTION)

PRESENT: MR. JUSTICE MIAN SAQIB NISAR, HCJ
MR. JUSTICE UMAR ATA BANDIAL
MR. JUSTICE FAISAL ARAB

CIVIL APPEALS NO.622 & 623/2008 AND 1403 & 1404/2009
(Against the judgment dated 24.10.2007/8.5.2009 of the High Court of Sindh, Karachi passed in ITA Nos.1114 & 1115/1999, 485 & 486/2000)

1. M/s Squibb Pakistan Pvt. Ltd. **Vs.** Commissioner of Income Tax — In C.As.622 & 623/2008

2. Commissioner Income Tax (Legal Division) Large Tax Payer Unit Karachi **Vs.** M/s Syngenta Pakistan Ltd. — In C.As.1403 & 1404/2009

For the appellant(s): Dr. Muhammad Farough Naseem, ASC
(In CAs No.622 & 623/2008)

Dr. Farhat Zafar, ASC
(In CAs No.1403 & 1404/2009)

For the respondent(s): Mr. Muhammad Siddique Mirza, ASC
(In CAs No.622 & 623/2008)

Mr. Makhdoom Ali Khan, Sr. ASC
(In CAs No.1403 & 1404/2009)

Date of hearing: 08.02.2017

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JUDGMENT

MIAN SAQIB NISAR, CJ.- The key issue before us is the scope of Section 79 of the Income Tax Ordinance, 1979 *(as it stood prior to the Finance Act, 1992, hereinafter referred to as the Ordinance, 1979)* and whether it was applicable to the taxpayers in the instant matters.

2. The factual background is that Squibb Pakistan (Pvt.) Ltd. *(appellant in Civil Appeals No.622 and 623 of 2008, hereinafter referred to as "Squibb Pakistan")* and Syngenta Pakistan Ltd. *(respondent in Civil Appeals No.1403 and 1404 of 2009, hereinafter referred to as "Syngenta Pakistan")* were resident companies *(registered in Pakistan)* engaged in the import, manufacture and sale of pharmaceutical products. They imported pharmaceutical raw material from their parent companies *(foreign companies)*, namely M/s Bristol-Myers Squibb

International, USA *("Squibb International")* and M/s Ciba Geigy, Basel, Switzerland *("Ciba Geigy")* respectively. Their assessments *(assessment years of 1989-90 and 1990-91 for Squibb Pakistan and 1990-91 and 1991-92 for Syngenta Pakistan)* were finalized by making additions under Section 79 of the Ordinance, 1979 on account of the difference between the price of raw material imported by the companies from their parent companies and that imported by some other companies from other sources.

In Civil Appeal Nos.622 and 623 of 2008, the Commissioner of Income Tax (Appeals) *[CIT(A)]* upheld the addition followed by the deletion thereof by the learned Income Tax Appellate Tribunal *(Tribunal)*. The respondent's income tax appeal was allowed by the learned High Court *vide* impugned judgment and the addition was upheld by relying upon **Messrs Cynamid (Pakistan) Ltd., Karachi Vs. Commissioner of Income Tax, Companies-II, Karachi (2007 PTD 1946)**. Leave was granted on 10.7.2008 to consider the *"applicability of Section 79 of the Ordinance"*.

As regards Civil Appeal Nos.1403 and 1404 of 2009, upon the respondent's appeal before the CIT(A), the additions were deleted for decision afresh, and the learned Tribunal upheld the deletion. In the department's appeal before the learned High Court, the deletion of the addition was upheld, but the Court incorrectly relied upon its earlier order passed in ITA Nos.1114 and 1115 of 1999 *(ITAs in Civil Appeals No.622 and 623 of 2008)* which were decided in favour of the department. Leave was granted on 3.12.2009 on the basis of the aforementioned leave granting order dated 10.7.2008.

3. The submissions of the learned counsel for the appellant *(in Civil Appeals No.622 and 623 of 2008)* were to the effect that as per the assessment order, Squibb Pakistan imported two pharmaceutical raw materials, i.e. cephradine and amoxicillin trihydrate, for use in its final pharmaceutical product(s) from its parent company at a higher value than that paid for

the same products by other companies, warranting addition under Section 79 of the Ordinance, 1979; however, in order for the Assessing Officer to rely on these comparisons such cases had to be proved to be parallel in nature and complete details thereof should have been provided. Comparison between two persons/entities in dissimilar situations would be violative of Article 25 of the Constitution of the Islamic Republic of Pakistan, 1973 *(the Constitution)*. The disparity in the prices of the raw material was due to the superior nature and quality of the raw material of the parent company as it incurred huge expenditure on account of research and development to ensure the efficacy and safety of the products; there was no manipulation and arranged dealing between the resident and non-resident companies as required by Section 79 of the Ordinance, 1979, and nor was there a reduction, depletion or extinction of profits in the business as the pharmaceutical products were eventually sold at a price higher than similar products of other companies; and that the learned High Court had erred in relying upon the **Cynamid** case *(supra)* which was not the correct law. In support of his arguments, learned counsel relied upon the cases reported as **Commissioner of Income-Tax Vs. Pfizer Laboratories Ltd. (1989 PTD 612)**, **Commissioner of Income-Tax, Central Zone 'A', Karachi Vs. Glaxo Laboratories (Pakistan) Limited, Karachi (1991 PTD 393)** and the judgment dated 21.4.1992 passed in Civil Appeal No.237-K of 1991 titled **Glaxo Laboratories (Pakistan) Limited Vs. Commissioner of Income-Tax**.

Learned counsel for the respondent *(in Civil Appeals No.1403 and 1404 of 2009)* adopted the aforesaid arguments stating that undoubtedly the fate of his cases depended upon that of Civil Appeal Nos.622 and 623 of 2008.

4. The collective arguments of the learned counsel for the department *(in all the cases)* were that by purchasing raw material from their non-resident parent companies at a price higher than charged by other

sources for similar products, the resident companies were liable to have profits added to their assessment order(s) in terms of Section 79 of the Ordinance, 1979.

5. Heard. A perusal of **Cynamid**'s case *(supra)* relied upon by the learned High Court in the impugned judgments reveals that in paragraph No.5 of the aforementioned judgment, the learned High Court extracted eight principles while relying upon five judgments, three of the Appellate Tribunal ***{[1988 PTD (Trib) 447], Smith Kline and French of Pakistan Ltd. Vs. IAC Range-I, Companies-II, Karachi [ITA No.2202/KB of 1987-88]*** *and* ***Messrs Bayer Pharma (Pvt.) Ltd [ITA No.1796/KB of 1993-94, dated 14-9-1994]}*** and the judgments of the learned High Court of Sindh and this Court in the case of **Glaxo Laboratories** *(supra)*. Suffice it to say that first, the judgments of the Tribunal are not binding on the learned High Court, which should have provided reasons for its findings based on proper application of mind. Furthermore, both **Glaxo Laboratories** cases *(supra)* by the learned High Court and this Court do not in any manner lay down the eight principles extracted by the learned High Court in **Cynamid**'s case *(supra)* which to our mind is not good law. Besides, this Court's order in **Glaxo Laboratories** case *(supra)* is a leave refusing order which is not the law enunciated by this Court.

6. In consequence of the weaknesses noted in the case of **Cynamid** *(supra)*, the impugned judgments are devoid of an analytical discussion of the questions that arose for determination by the learned High Court in the references of these cases before it. We have already noted that questions of law arising in these cases involve, *inter alia,* the interpretation of statutes and ascertaining the evidentiary requisites for a finding recorded under Section 79 of the Ordinance, 1979. The different aspects of these matters are not clearly identified in the judgments of the lower *fora*. In the circumstances a further preliminary question arises for our consideration, i.e. whether new questions not urged or examined by

the lower *fora* can be raised in a reference filed under Section 136 *ibid*? In other words what is the scope of a tax reference?

7. The learned counsel for the parties made oral submissions in this context and provided case law to the Court. The judgments cited by the learned counsel are as follows, some of which are also quoted in our opinion. The judgments cited by Dr. Farogh Naseem include:- **Iram Ghee Mills Ltd. Vs. Income Tax Appellate Tribunal (1998 PTD 3835)**, **The Lungla (Sylhet) Tea Co. Ltd., Sylhetah Vs. Commissioner of Income-Tax, Dacca Circle, Dacca (1970 SCMR 872)**, **Commissioner of Income-Tax Vs. Pakistan Beverage Company, Karachi (1967 PTD 265)**, **Mathuraprasad Motilal and Co. Vs. Commissioner of Income Tax, Madhya Pradesh [(1956) 30 ITR 695 (Nag)]**, **Commissioner of Income-Tax, Punjab, Himachal Pradesh and Jammu & Kashmir Vs. Chander Bhan Harbhajan Lal [(1966) 60 ITR 188 (SC)]**, **Mountain States Mineral Enterprises Inc. Vs. Commissioner of Income Tax (Appeals) Zone-3, Karachi (2008 PTD 1087)**, **Liquidator of Mahmoodabad Properties (P.) Ltd. Vs. Commissioner of Income Tax, West Bengal-II [(1980) 124 ITR 31 (SC)**, **Commissioner of Income Tax, West Bengal Vs. Calcutta Agency Limited [(1951) 19 ITR 191 (SC)]**, **Commissioner of Income-Tax, Bombay Vs. Scindia Steam Navigation Co. Ltd. [AIR 1961 SC 1633 = (1961) 42 ITR 589 (SC)]**, **Messrs Pak Saudi Fertilizers Limited Vs. Commissioner of Income-Tax and others (2005 PTD 1607)**, **Commissioner (Legal Division) Large Taxpayers Unit, Karachi Vs. Bawany Metals Ltd. Karachi (2006 PTD 2256)**, **K. S. Venkataraman and Co. (P.) Ltd. Vs. State of Madras [(1966) 60 ITR 112 (SC)]**, **C. T. Senthilnathan Chettiar Vs. State of Madras [(1968) 67 ITR 102 (SC)]**, **Bhanji Bahwandas Vs. Commissioner of Income-Tax, Madras [(1968) 67 ITR 18 (SC)]**, **Jamunadas Mannalal Vs Commissioner of Income Tax, Bihar [(1985) 152 ITR 261 (Pat)]**, **Mohatta Brothers Vs.**

Commissioner of Income Tax, Gujarat, Ahmedabad [(1985) 153 ITR 247 (Guj)], **Estate of Late H. H. Rajkuerba, Dowager Maharani Saheb of Gondal Vs. Commissioner of Income-Tax, Karnataka [(1982) 135 ITR 393 (Kar.)]**, **Mahamaya Dassi Vs. Commissioner of Income-Tax, West Bengal-III [(1980) 126 ITR 748 (Cal)]**, **Addl Commissioner of Income Tax, M.P., Bhopal Vs. MP Rungta [(1979) 116 ITR 245 (MP)]**, **Amarchand Jalan Vs. Commissioner of Income-Tax, Central, Bombay [(1964) 54 ITR 18 (Bom)]**, **Commissioner of Wealth Tax Vs. Mahadeo Jalan & Mahabir Prasad Jalan [(1972) 86 ITR 621 (SC)]**, **Jetha Bhai Harji Vs. Commissioner of Income Tax, Gujarat, Bombay City [(1949) 17 ITR 533 (Bom)]**, **Commissioner of Income-Tax, Central Zone "A", Karachi Vs. Messrs Karachi Electric Supply Corporation Ltd. (1991 PTD 869)**, **The Commissioner of Income-Tax, Karachi (Central Zone) Vs. Messrs Pakistan Refinery Ltd., Karachi (1984 PTD 337)**, **Messrs Coronet Paints & Chemicals Ltd. Vs. The Commissioner of Income-Tax (Central), Karachi (1984 PTD 355)**, **Commissioner of Income Tax Companies No. 1, Karachi Vs. M/s. Hassan Associates (Pvt.) Ltd., Karachi (1994 SCMR 1321)**, **Mrs. Yasmeen Lari Vs. Registrar, Income Tax Appellate Tribunal (1990 PTD 967)**, **Commissioner of Income-Tax Vs. National Refinery Ltd. (2003 PTD 2020)**, **Messrs Urooj (Pvt.) Ltd., Karachi through Chief Executive Vs. Deputy Commissioner of Income-Tax, Circle-6, Companies IV, Karachi and 2 others (2004 PTD 295)**, **Karachi Properties Investment Company (Pvt.) Limited, Karachi Vs. Income-Tax Appellate Tribunal, Karachi and another (2004 PTD 948)**, **Messrs G. I. M. Gregory & Co. In re. [(1937) 5 ITR 12 (Cal)]**, **Commissioner of Income-Tax, Bombay City II Vs. Jadavji Narsidas & Co. [(1963) 48 ITR 41 (SC)]**, **Praise & Co. (Private) Ltd. Vs. Commissioner of Income-Tax, West Bengal [(1966) 60 ITR 566 (Cal)]**, **Humayun Properties Ltd. Vs. Commissioner of Income-Tax, Calcutta**

[(1962) 44 ITR 73 (Cal)], **Valivetti Sriramulu Vs. Commissioner of Income-Tax, A.P.** **[(1970) 76 ITR 551 (AP)]**, **Patny & Co. Vs. Commissioner of Income Tax, Bihar and Orissa, Patna** **[(1955) 28 ITR 414 (Oris)]**, **Commissioner of Income-Tax, Bombay South, Bombay Vs. Messrs Ogale Glass Works Limited, Ogale Wadi** **[AIR 1954 SC 429 = (1954) 25 ITR 529 (SC)]** and **Jesrajah Jiwanram Vs. Commissioner of Income-Tax, Assam** **[(1953) 24 ITR 245 (Assam)]**.

The judgments referred to by Mr. Makhdoom Ali Khan are:- **The Commissioner of Income-Tax, Lahore Zone, Lahore Vs. Messrs Shaikh Muhammad Ismail & Co. Ltd.** **(1986 SCMR 968)**, **Commissioner of Income Tax, Central Zone, Lahore Vs. Capt. (Retd.) Gohar Ayub Khan (1995 PTD 1074)**, **The Commissioner of Income-Tax, Lahore Vs. Messrs Immion International, Lahore** **(2001 PTD 900)**, **Messrs Nafees Cotton Mills Ltd., Lahore Vs. Income-Tax Appellate Tribunal, Lahore and 2 others** **(2001 PTD 1380)**, **Ghulam Mustafa Jatoi, Karachi Vs. Commissioner of Income Tax, Central Zone-B, Karachi** **(2006 PTD 1647)**, **Messrs. Superior Steel, Karachi Vs. Commissioner of Income-Tax, Zone-D, Karachi and another** **(2007 PTD 1577)**, **Mountain States Mineral Enterprises** *(supra)*, **Commissioner Inland Revenue, Legal Division, Bahawalpur Vs. Zulfiqar Ali** **(2012 PTD 964)**, **Commissioner of Income-Tax/Wealth Tax, Multan Vs. Messrs Move (Pvt.) Ltd., Multan** **(2013 PTD 2040)**, **Commissioner Inland Revenue Vs. Messrs Pak Arab Pipe Line Company Ltd.** **(2014 PTD 982)**, **Commissioner of Income-Tax/Wealth Tax Companies Zone Vs. Ms. Fahmida Hamid (2015 YLR 1167)**, **Commissioner (Legal) Inland Revenue, Large Taxpayer Unit Vs. Messrs Shield Corporation Ltd.** **(2015 PTD 2275)**, **Commissioner Inland Revenue, Zone-II, Regional Tax Office-II Vs. Messrs Sony Traders Wine Shop** **(2015 PTD 2287)**, **Commissioner Inland Revenue, Multan Vs. Messrs Bank Al-Habib Ltd.** **(2016 PTD**

2548), **Central Exchange Bank Ltd., Lahore Vs. The Commissioner of Income Tax, Lahore (PLD 1954 Lah 439)**, **Messrs Muhammad Idrees Barry & Co. Vs. The Commissioner of Income-Tax, Punjab and NWFP (PLD 1959 SC 202)**, **Abdul Ghani & Co. Vs. Commissioner of Income-Tax (PLD 1962 Kar 635)**, **Messrs Odeon Cinema, Lahore Vs. The Commissioner of Income-Tax, Lahore Zone, Lahore (1971 PTD 212)**, **Ahmad Karachi Halva Merchants & Ahmad Food Products Vs. CIT, Karachi (1982 SCMR 489)**, **The Commissioner of Income-Tax (Central), Karachi Vs. Messrs Haji Moulabux & Sons (1987 PTD 492)**, **The Commissioner of Income-Tax, Rawalpindi Vs. Sh. Ghulam Hussain (2001 PTD 1419)**, **Commissioner of Income-Tax, Rawalpindi Vs. Haji Mukhtar & Company (1980 PTD 415)**, **Haji Ibrahim Ishaq Johri Vs. The Commissioner of Income Tax (West), Karachi (1993 PTD 114)**, **Messrs Irum Ghee Mills Limited Vs. Income-Tax Appellate Tribunal and others (2000 SCMR 1871)**, **Commissioner Inland Revenue Vs. Messrs Macca CNG Gas Enterprises and others (2015 PTD 515)**, **Hassan Associates** *(supra)*, **Commissioner of Income-Tax, Rawalpindi Vs. Messrs Rural Food Products, Rawalpindi (2001 PTD 2306)**, **Commissioner of Income-Tax Companies, Lahore Vs. Crescent Art Fabric Limited, Lahore (2001 PTD 2553)**, **Dr. Mukhtar Hassan Randhawa Vs. Commissioner of Income-Tax, Coys Zone-I, Lahore (2001 PTD 2593)**, **Commissioner of Income-Tax, Companies-I, Karachi Vs. Messrs National Investment Trust Ltd., Karachi (2003 PTD 589)**, **Commissioner of Income-Tax, Rawalpindi Vs. Mst. Shakeela Bano (2002 PTD 1209)**, **Messrs Hong Kong Chinese Restaurant, Main Boulevard Gulberg, Lahore Vs. Assistant Commission of Income Tax, Circle 6, Lahore and another (2002 PTD 1878)**, **Commissioner of Income-Tax, Companies Zone-II, Karachi Vs. Messrs Sindh Engineering (Pvt.) Limited, Karachi (2002 SCMR 527)**, **National**

Refinery Ltd. *(supra)*, **Messrs Qadri Cloth House, Lahore Vs. Income Tax Appellate Tribunal, Lahore and 2 others (2005 PTD 2430)**, **Messrs F. M. Y. Industries Limited Vs. Deputy Commissioner Income Tax and another (2014 SCMR 907)** and **Punjab Mineral Development Corporation Ltd. Vs. Commissioner of Income Tax (2015 PTD 2522)**.

The issue of whether new questions can be raised before the High Court in a reference has been the subject of substantial debate ever since a provision for reference to the High Court on questions of law was introduced in the sub-continent in the early 20th century. Over the years, judicial opinions have been inconsistent and there has been considerable divergence, both, in the Pakistani as well as Indian jurisdictions. In India, the issue was strongly contested and numerous conflicting judgments were delivered from time to time. The Indian Supreme Court came down in the **Scindia Steam** case *(supra)* in favour of a restrictive view but the legislature intervened and the law was amended in 1998 to provide for direct 'appeals' to the High Court in place of 'references' on questions of law, the scope of the former being much wider. In Pakistan, however, as explained *infra,* the issue can still be said to be open as there is no authoritative pronouncement of the Supreme Court in relation to the scope of Section 133 of the Income Tax Ordinance, 2001 *(the Ordinance, 2001)* as it stands today.

8. In order to appreciate the scope of a reference under Section 133 of the Ordinance, 2001, it is necessary to firstly examine the history and background of the provision and how it, and its predecessor provisions, have been interpreted by the Courts. A provision for a reference to the High Court in income tax matters has been in existence in the sub-continent since at least 1918. Section 51 of the Indian Income Tax Act, 1918 *(the Act, 1918)* provided for a statement of case by the Chief Revenue Authority to the High Court. It read as under:

> *(1) If, in the course of any assessment under this Act or any proceeding in connection therewith other than a proceeding under Chapter VII, a question has arisen with reference to the interpretation of any of the provisions of this Act or of any rule thereunder, the Chief Revenue-authority may, either on its own motion or on reference from any Revenue-officer subordinate to it, draw up a statement of the case, and refer it, with its own opinion thereon, to the High Court, and shall so refer any such question on the application of the assessee, unless it is satisfied that the application is frivolous or that a reference is unnecessary.*
>
> *(2) If the High Court is not satisfied that the statements contained in the case are sufficient to enable it to determine the questions raised thereby, the Court may refer the case back to the Revenue-authority by which it was stated, to make such additions thereto, or alterations therein, as the Court may direct in that behalf.*
>
> *(3) The High Court upon hearing of any such case shall decide the questions raised thereby, and shall deliver its judgment thereon containing the grounds on which such decision is founded, and shall send to the Revenue-authority by which the case was stated, a copy of such judgment under the seal of the Court and the signature of the Registrar, and the Revenue-authority shall dispose of the case accordingly, or, if the case arose on reference from any Revenue-officer subordinate to it, shall forward a copy of such judgment to such officer who shall dispose of the case conformably to such judgment.*
>
> *(4) Where a reference is made to the High Court on the application of an assessee, costs shall be in the discretion of the Court.*

Under Section 51 of the Act, 1918, in brief, if in the course of assessment or any connected proceedings, a question of interpretation of any

provision of the Act or rule made thereunder arose, the Chief Revenue Authority was empowered, on its own motion or on reference from any subordinate officer or on the application of an assessee, unless the application to its satisfaction was frivolous, to draw up a statement of the case including its own opinion and refer it to the High Court. The High Court, if dissatisfied with the statement of the case to the extent that it did not enable it to answer the questions referred, could refer the matter back to the Authority to make such additions and alterations as desired by the High Court. Upon hearing the case, the High Court was bound to answer the questions referred and deliver its judgment thereon containing the grounds for the decision, and send it to the Revenue Authority to dispose of the matter accordingly. Thus the dispositive power remained with the Revenue Authority, although only in accordance with the opinion of the High Court.

9. Under the Act, 1918, the jurisdiction of the High Court in income tax matters was very restrictive. There was no right of any kind, either by way of appeal or revision or review or reference, to challenge before the High Court any order passed by the revenue authorities. The legal remedy which was made available related to the stage prior to passing of an order. A power was conferred on the Chief Revenue Authority either on his own or on the request of the assessee to refer any questions of interpretation of the Act or the Rules to the High Court and the High Court simply gave its legal opinion, which was applied by the Revenue Authority in the course of assessment or related proceedings. As observed earlier, this power was to be exercised **prior** to the passing of an order.

10. The scope of the High Court jurisdiction in a reference under Section 51 of the Act, 1918 came under consideration before the Privy Council in the case of **Tata Iron and Steel Company Ltd. Vs. The Chief**

Revenue Authority of Bombay (AIR 1923 PC 148). In this case, the High Court had passed a judgment in a reference under Section 51 of the Act, 1918 against which an appeal was filed before the Privy Council with the leave of the High Court of Bombay. A preliminary objection was raised by the respondent to the effect that no appeal lay against the judgment under Section 51 *ibid* as the same was merely advisory in nature. The Privy Council observed that there was no express right of appeal provided anywhere against a judgment under Section 51 *ibid* but a general right of appeal existed under Clause 39 of the Letters Patent of the High Court of Bombay to challenge any "final" judgment, decree or order passed by the High Court in exercise of its original jurisdiction. The Privy Council then went on to examine whether a judgment passed under Section 51 *ibid* qualified as a "final" judgment. The Privy Council held that the judgment under Section 51 *ibid* was not a judgment as understood by Clause 39 of the Letter Patent as it was not a decision obtained in an "action". The Privy Council observed that the judgment under Section 51 *ibid* could at best be an order and went on to examine whether it could be said to be a "final" order or only advisory. Certain observations of the Privy Council and its finding in this regard are reproduced below:

> *"One must therefore ask oneself what is the nature and character of the acts which Section 51 of the Income Tax Act authorises and empowers the High Court to do…The opinion of the Revenue Authority thus dominates and conditions the right of the assessee.*
>
> *Again it is the duty of the Revenue Officer to make the assessment, and it is in the "course" of making it the question which may be referred must arise…*
>
> *This last provision merely means that the Revenue Officer, in proceeding with the work in the course of which he was*

engaged when the question referred arose, shall be guided by the decision given, and shall make his assessment accordingly - the ultimate result being that he assesses the taxpayer at an amount which in his instructed opinion he judges to be right. No suit can be brought to set-aside or modify the assessment when so made. The amount of the taxpayers' liability is thus definitely fixed, but nothing more is done. The decision of the High Court does not in any way enforce the discharge of that liability. It would appear clear to their Lordships that the word "judgment" is not here used in its strict legal and proper sense.

It is not an executive document directing something to be done or not to be done, but is merely the expression of the opinions of the majority of the judges who heard the case, together with a statement of the grounds upon which those opinions are based…

It does not appear to their Lordships that the fact that the functionary who states a special case for the opinion of the Court is or is not bound to act upon it necessarily determines whether the order and decision of the Court is or is not merely advisory. In order to determine whether an order made by a Court on a case stated is final or merely advisory it is necessary to examine closely the language of the enactment, whether statute, rule or order, giving the power to state a case.

When a case is stated for the "opinion" of the Court, that word would serve prima facie to indicate that the order made by the Court was only advisory. Where the case is referred for the "decision" or "determination" of a question, there is a prima facie difficulty in holding that the order embodying this determination or decision is advisory, but the use of these words or one of them is not decisive…

It would appear to their Lordships that having regard to the authorities cited, and for the reasons already stated the decision, judgment or order made by the Court under

> *Section 51 of the Income Tax Act in this case, was merely advisory, and not in the proper and legal sense of the term final, and thus so far as these considerations are concerned that the appeal is incompetent.*"

11. From the above reproduced extracts, it is clear that the structure of the reference provision as it stood at the time was the determinative factor in the case. The Privy Council found support for its finding that the jurisdiction was "advisory" from the fact that questions which were to be referred under Section 51 *ibid* were those which arose in the "course" of assessment or related proceedings and the High Court merely gave its opinion which the Revenue Officer simply relied upon to finalize the assessment or related proceedings. A careful perusal of the Privy Council's judgment shows that the underlying reasoning behind its findings was that since the questions were not arising from an operative order but at a prior stage, the opinion thereon was not a final order in the nature of being determinative of the rights and liabilities of the parties. The reasons behind the Privy Council's decision thus only have a limited relevance today as the subsequent evolution of the law makes clear.

12. The provision for a reference to the High Court underwent substantial changes with the passing of the Indian Income Tax Act, 1922 *(the Act, 1922)*. Section 51 of the Act, 1918 was succeeded by Section 66 of the Act, 1922, which is reproduced below:-

> *(1) If, in the course of any assessment under this Act or any proceeding in connection therewith other than a proceeding under Chapter VIII, a question of law arises, the Commissioner may, either on his own motion or on reference from any Income-tax authority subordinate to him, draw up a statement of the case and refer it with his own opinion thereon to the High Court.*

(2) Within one month of the passing of an order under section 31 or section 32, the assessee in respect of whom the order was passed may, by application accompanied by a fee of one hundred rupees or such lesser sum as may be prescribed, require the Commissioner to refer to the High Court any question of law arising out of such order, and the Commissioner shall, within one month of the receipt of such application, draw up a statement of the case and refer it with his own opinion thereon to the High Court:

Provided that, if, in exercise of his power of review under section 33, the Commissioner decides the question, the assessee may withdraw his application, and if he does so, the fee paid shall be refunded.

(3) If, on any application being made under sub-section (2), the Commissioner refuses to state the case on the ground that no question of law arises, the assessee may apply to the High Court, and the High Court if it is not satisfied of the correctness of the Commissioner's decision, may require the Commissioner to state the case and to refer it, and, on receipt of any such requisition, the Commissioner shall state and refer the case accordingly.

(4) If the High Court is not satisfied that the statements in a case referred under this section are sufficient to enable it to determine the question raised thereby, the Court may refer the case back to the Commissioner by whom it was stated to make such additions thereto or alterations therein as the Court may direct in that behalf.

(5) The High Court upon the hearing of any such case shall decide the questions of law raised thereby, and shall deliver its judgment thereon containing the grounds on which such decision is founded, and shall send to the Commissioner by whom the case was stated a copy of such judgment under the seal of the Court and the signature of the Registrar, and the Commissioner shall dispose of the case accordingly, or, if the case arose on a reference from

> *any Income-tax authority subordinate to him, shall forward a copy of such judgment to such authority who shall dispose of the case conformably to such judgment.*
>
> *(6) Where a reference is made to the High Court on the application of an assessee, the costs shall be in the discretion of the Court.*
>
> *(7) Notwithstanding that a reference has been made under this section to the High Court, income-tax shall be payable in accordance with the assessment made in the case:*
>
> *Provided that, if the amount of an assessment is reduced as a result of such reference, the amount overpaid shall be refunded with such interest as the Commissioner may allow.*

Section 66 *ibid* retained the power of the Authority, now the Commissioner, to refer, on his own motion or on a reference from a subordinate officer, any question which arose in the course of an assessment or related proceedings to the High Court through a statement of the case with his opinion thereon. However, the remedy available to an assessee was widened decisively in terms of sub-section (2) whereby assessees were given the right to require the Commissioner to refer to the High Court, any questions of law arising out of the appellate orders passed by the revenue authorities. Thus, in addition to seeking advice prior to passing an order, the decision could itself be challenged. However, the assessee was limited to questions arising out of the order of the Revenue Authority, which meant that it could only refer those questions which were apparent from the record of the case and the facts as stated in the order of the Authority. In case the Commissioner refused to refer the case to the High Court, assessees could apply to the High Court and the High

Court, if dissatisfied with the Commissioner's decision, could require the Commissioner to draw up a statement of the case and refer it to the High Court. There was a clear widening of the power of the High Court and the remedies available to assessees in relation to income tax disputes under Section 66 of the Act, 1922 as compared to its predecessor provision.

13. Following the decision of the Privy Council in the case of **Tata Iron and Steel Co.** *(supra)*, it is clear that the jurisdiction exercised by the High Court in a reference under sub-section (1) of Section 66 *ibid* was considered "advisory", although that word does not appear in the law. However, it is clear that the same reasoning cannot be extended to references made to the High Court under sub-section (2). It will be noted that the scope of the reference under sub-section (1) was fundamentally different from the scope of a reference under sub-section (2). Under sub-section (1), the reference was made by the Commissioner, of his own volition or on a reference from a subordinate officer, in relation to questions arising during the course of assessment which had not yet been decided whereas under sub-section (2) the reference was made by the Commissioner at the behest of an assessee on questions arising out of a final order passed under Sections 31 or 32 of the Act, 1922 by the Department. In substance, a right was conferred on the assessee to challenge the final orders passed by the Department, albeit to the extent of legal issues arising out of such orders. This was akin to a second appeal. Under sub-section (5), the High Court upon hearing a case under sub-sections (1) or (2) was obligated to answer the questions referred supported by a judgment containing the grounds of the decision and forward the same to the Revenue Authority for disposing of the case accordingly. In so far as references under sub-section (1) were concerned, sub-section (5) applied appropriately as the matter remained pending with the Revenue Authority which then finalized it in accordance with the

decision of the High Court. However, to the extent of references under sub-section (2), since they arose against final orders, there were no proceedings as such pending before the Revenue Authority which could be finalized. The Revenue Authority was simply bound to apply the High Court's decision by way of implementing its orders subject to the modifications necessitated by the High Court's decision. This made a critical difference.

14. There was also a practical difference between the two different kinds of references, i.e. under sub-sections (1) and (2), which shows the difference in the nature of the jurisdictions. Under sub-section (1), the reference was prepared by the Commissioner who presumably either framed the questions himself or adopted questions framed by a subordinate officer. By contrast, the reference application under sub-section (2) was essentially prepared by the assessees who also framed and proposed the questions for the Commissioner to refer to the High Court. The procedure of filing the application under sub-section (2), in a similar manner as one under sub-section (1) through the Commissioner seems to have been retained as a matter of convenience and convention and appears not to have a great deal of significance, especially in view of the fact that the Commissioner's refusal to forward a reference to the High Court could be challenged directly by the assessee before the High Court under sub-section (3). The same issues as identified in the application under sub-section (2) were argued in applications under sub-section (3) and if the High Court saw a *prima facie* case, the matter was entertained by way of directing the Commissioner to make the reference as a matter of sheer formality. The assessee was thus allowed a full and proper remedy against final orders passed by the Revenue Authority to the extent of legal issues. It thus seems clear that whether or not the jurisdiction of the High Court is termed advisory is a matter of nominal terminology, there being

little doubt that the jurisdiction exercised under sub-section (2) read with sub-section (3) was basically appellate/final in nature, though limited only to questions of law, and not interim/advisory.

15. Since this point was never brought before the courts, it is therefore not surprising that it was ignored and thus the significance of this development remained unexplored, with a consequential failure to draw a distinction between the two obviously different kinds of domain. The High Courts imposed the same restrictive interpretation on applications under sub-section (2) as applications under sub-section (1). The seemingly unfounded self-imposed limitations placed by the Courts on their jurisdiction shaped the narrow scope of the reference jurisdiction of the High Courts in the years to come. The restrictive interpretation of the High Courts was also later on supported by the Privy Council, without any analysis or discussion, in the case of **Raja Bahadur Sir Rajendra narain Bhanj Deo Vs. Commissioner of Income-Tax, Bihar and Orissa (AIR 1940 PC 158)**. While refusing to answer a purely academic question, the Privy Council observed as under:-

> *"The function of the High Court in cases referred to it under S. 66 of the Act is advisory only, and is confined to considering and answering the actual question referred to it…"*

16. Notwithstanding the generally restrictive approach developed by the Courts towards reference applications of any kind, there was clearly an abridgement of the absolute powers of the tax department when Section 66 of the Act, 1922 replaced Section 51 of the Act, 1918. The broadening of the remedies available to the assessee continued in the years to come through various amendments, one of the major ones being through the Indian Income Tax (Amendment) Act, 1939 (Act VII of 1939),

which effected major changes in the law. By way of this amendment, the Income Tax Appellate Tribunal was formed, to which assessees were provided a direct right to appeal against orders passed by the Revenue Authority. Essentially a further forum was provided to assessees between the Revenue Authority and the High Court. Chief Justice Muhammad Munir was the architect of this amendment and went on to become the first President of the Tribunal in the year 1940. This was a clear broadening of the remedies available to assessees as it provided for a full time arbiter for legal disputes between the department and assessees. Section 66 of the Act, 1922 after the 1939 amendment read as under:-

> *"**66. Statement of case by Appellate Tribunal to High Court.-** [(1) Within sixty days of the date upon which he is served with notice of an order under sub-section (4) of section 33, the assessee or the Commissioner may, by application in the prescribed form, accompanied where application is made by the assessee by a fee of one hundred rupees, require the Appellate Tribunal to refer to the High Court any question of law arising out of such order, and the Appellate Tribunal shall within ninety days of the receipt of such application draw up a statement of the case and refer it to the High Court:*
>
> *Provided that, if, in the exercise of its powers under sub-section (2), the Appellate Tribunal refuses to state a case which it has been required by the assessee to state, the assessee may, within thirty days from the date on which he receives notice of the refusal to state the case, withdraw his application and, if he does so, the fee paid shall be refunded.*
>
> *(2) If on any application being made under sub-section (1) the Appellate Tribunal refuses to state the case on the ground that no question of law arises, the assessee or the Commissioner, as the case may be, may, within six months*

from the date on which he is served with notice of the refusal, apply to the High Court, and the High Court may, if it is not satisfied of the correctness of the decision of the Appellate Tribunal, require the Appellate Tribunal to state the case and to refer it, and on receipt of any such requisition the Appellate Tribunal shall state the case and refer it accordingly.

(3) If on any application being made under sub-section (1) the Appellate Tribunal rejects it on the ground that it is time-barred, the assessee or the Commissioner, as the case may be, may, within two months from the date on which he is served with notice of the rejection, apply to the High Court, and the High Court, if it is not satisfied of the correctness of the Appellate Tribunal's decision, may require the Appellate Tribunal to treat the application as made within the time allowed under sub-section (1).

(4) If the High Court is not satisfied that the statements in a case referred under this section are sufficient to enable it to determine the question raised thereby, the Court may refer the case back to the Appellate Tribunal to make such additions thereto or alterations therein as the Court may direct in that behalf.

(5) The High Court upon the hearing of any such case shall decide the questions of law raised thereby and shall deliver its judgment thereon containing the grounds on which such decision is founded and shall send a copy of such judgment under the seal of the Court and the signature of the Registrar to the Appellate Tribunal which shall pass such orders as are necessary to dispose of the case conformably to such judgment.[1]]

(6) Where a reference is made to the High Court […[2]] the costs shall be in the discretion of the Court.

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[1] Inserted in place of the old sub-sections (1) – (5) by Section 92 of the Indian Income Tax (Amendment) Act, 1939 (Act VII of 1939).
[2] The words "on the application of an assessee" were omitted by Section 92 of the Act *ibid.*

> *(7) Notwithstanding that a reference has been made under this section to the High Court, income-tax shall be payable in accordance with the assessment made in the case:*
>
> *Provided that, if the amount of an assessment is reduced as a result of such reference, the amount overpaid shall be refunded with such interest as the Commissioner may allow [unless the High Court, on intimation given by the Commissioner within thirty days of the receipt of the result of such reference that he intends to ask for leave to appeal to his Majesty in Council, makes an order authorising the Commissioner to postpone payment of such refund until the disposal of the appeal to His Majesty in Council.[3]]*
>
> *[(7A) Section 5 of the Indian Limitation Act, 1908 (IX of 1908), shall apply to an application to the High Court by an assessee [under sub-section (2) or sub-section (3)[4]].[5]]*
>
> *(8) For the purposes of this section "the High Court" means—*
>
> *(a) in relation to [……[6]] British Baluchistan, the High Court of Judicature at Lahore;*
> *(b) in relation to the province of Ajmer-Merwara, the High Court of Judicature at Allahabad; and*
> *(c) in relation to the province of Coorg, the High Court of Judicature at Madras."*

17. Under the amended Section 66 of the Act, 1922, both the department and the assessee were given the right to require the Tribunal to draw up a statement of the case and refer any questions of law arising out of the order of the Tribunal to the High Court and in case the Tribunal refused to do so, both sides had the opportunity to challenge the

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[3] Inserted by Section 82 of the Act *ibid.*
[4] Inserted in place of the words "under sub-section (3) or sub-section (3A)" by Section 92 of the Act *ibid.*
[5] Section 7A inserted by Section 28 of the Income Tax (Second Amendment) Act 1933 (Act XVIII of 1933).
[6] The words "the North West Frontier Province" were omitted by Section 82 of Act VII *supra.*

Tribunal's refusal before the High Court, which could then require the Tribunal to refer questions of law arising out of its order to the High Court. This procedure was basically the same as the procedure under the unamended Section 66(2) and (3) of the Act, 1922 with the difference that instead of the Commissioner, references were to be made through the Tribunal as it was the Tribunal's orders which could now be challenged in a reference. The rights of assessees increased as they were given an additional appellate forum, which could be termed quasi-independent and could determine legal-cum-factual disputes between the department and the assessee. The High Courts continued to hold a restrictive view of their jurisdiction under the amended Section 66 of the Act, 1922 since, in so far as the Courts were concerned, the only difference was that the application was now being made through the Tribunal rather than the Commissioner. It will however be noted that the discussion in the preceding paragraphs in support of a wider reading of the jurisdiction under Section 66(2) of the Act, 1922 prior to the 1939 amendment applies equally to Section 66 thereof as amended in 1939 since the basic features of the High Court's jurisdiction remained the same. The only notable difference is that the true advisory jurisdiction under Section 66(1) of the Act, 1922 was altogether done away with and instead the department was given a similar right as the assessee to challenge any order passed by the Tribunal. In so far as Pakistan is concerned, the law remained almost the same till at least 1971, when, as explained later, a crucial amendment was brought about in Section 66 *supra*.

18. Before examining the change in the law in 1971, it may be pertinent to examine some of the leading cases prior to the said change, which have been relied upon in later pronouncements of the High Courts and the Supreme Court. Although Courts were settled on the possibly incorrect position that the nature of the jurisdiction under Section 66

supra was advisory, there was a great deal of debate in relation to the exact scope of the reference jurisdiction and conflicting judgments started coming in, in relation to different issues. In most of the leading judgments of the High Court and the Privy Council from the pre-partition era, the issues involved were either:- (1) whether questions not agitated in the application to the Tribunal to refer the case, and hence not so referred, could be raised in the High Court either at the time of challenging the Tribunal's refusal to refer the case or at the time of arguments in a reference and/or (2) whether the High Court could itself formulate new questions of law which were not referred to it.

19. There were conflicting judgments from different High Courts on these issues but by and large, most agreed, rightly or wrongly, that questions not raised by the assessee in the application to the Tribunal to refer the case *(even if they could be said to have arisen out of the order of the Tribunal)* and hence not referred to the High Court, could not be raised in a reference by the assessee or by the High Court of its own motion. It also came to be settled, again, rightly or wrongly, that the High Court could not frame new questions on its own and was restricted to the questions referred to it but it could reformulate existing questions if necessary. Reference in this regard may be made to the following:-

(i) **Ishar Das Dharamchand – In the matter of (AIR 1926 Lah 168)**, in which it was held that the Commissioner is not obligated to refer questions not pressed/agitated by the assessee.

(ii) **In the matter of P. Thiruvengada Mudaliar (AIR 1928 Madras 889)** in which it was held that if a point is not raised before the Commissioner within the time prescribed for making an application under Section 66(2) of the Act, 1922 to require the Commissioner to state the case, he cannot be later

required, by the High Court or the assessee, to refer that point to the High Court.

(iii) **A.K.A.C.T.V. Chettyar Firm Vs. Commissioner of Income-Tax, Burma (AIR 1928 Rangoon 281)** in which the Rangoon High Court refused to consider two questions of law raised by the assessee in the application under Section 66(2) of the Act, 1922 against the Commissioner's refusal to state the case since those questions were not raised in the preceding application to the Commissioner requiring him to state the case.

(iv) **S.A. Subbiah Iyer Vs. Commissioner of Income-Tax, Madras (AIR 1930 Mad 449)**, in which a five member bench of the Madras High Court, while approving the cases of **P. Thiruvengada Mudaliar** and **ACACTV Chettyar Farm** *(discussed above)* held that questions not proposed before the Commissioner for referring to the High Court within the time prescribed by Section 66(2) *ibid* cannot be subsequently raised before the High Court.

(v) **Commissioner of Income-Tax, Burma Vs. P.K.N.P.R. Chettyar Firm (AIR 1930 Rangoon 78)**, in which it was held that the High Court cannot consider questions which the assessee did not require the Commissioner to state to the High Court under Section 66(2) *ibid*.

(vi) **Gurmukh Singh Vs. Commissioner of Income-Tax, Lahore [AIR 1944 Lah 353 (2)]** in which, after considering conflicting judgments, the Lahore High Court held that the High Court is only bound to refer those questions arising out of the order which are referred to it at the behest of the assessee and the High Court is bound by those questions and cannot formulate new questions not referred to it. The High Court, however, can reformulate existing questions.

20. It will be noted that the above judgments deal with the issue of whether questions not agitated by the assessee in the application made under Section 66(2) *ibid* requiring the Commissioner to state the case can

be raised subsequently before the High Court. There is nothing specifically in these judgments on the issue of whether questions of law arising out of the order under challenge, but not expressly raised before the lower forums, can be required by the assessee to be referred to the High Court. The distinction between these two categories is significant. Keeping aside the issue of the scope of the questions which may be proposed for reference by the assessee, it is clear that the courts had developed the view *(which was perhaps not as well-founded as it was considered to be)* that the powers of the High Courts in references were strictly limited.

21. In the case of **The Commissioner of Income-Tax, Bihar and Orissa Vs. Maharajadhiraja Kameshwar Singh of Barbhanga ([1933] 1 ITR 94)** before the Privy Council, the Commissioner, while stating a case, failed to formulate an apparent question arising out of a particular transaction. The High Court formulated the question itself in the reference and proceeded to answer it. The Privy Council, sitting in appeal against the judgment of the High Court noted this act of the High Court and criticized the departure from the regular procedure. However, in the circumstances of the case, the Privy Council did go on to express its view on the question. It may be noted that although this case supports the view developed by the courts at the time that the High Court's powers in references are limited, it clearly shows that the limits were not as absolute as they had been made to seem. The Privy Council may not have approved of the practice, but it did not hold it to be illegal and in fact did entertain the question itself as well.

22. Another decision of the Privy Council which has been relied upon extensively in later decisions of the High Courts is the case of **National Mutual Life Association of Australasia, Ltd. Vs. Commissioner of Income-Tax, Bombay Presidency and Aden (AIR 1936 PC 55)** wherein the High Court had decided a particular point

against the assessee solely on the basis of an argument presented by the Advocate-General for the first time during the hearing of the case. The Privy Council while noting this observed that the argument presented by the Advocate-General was irrelevant as it was beyond the scope of the letter of reference. This case again leaned towards a restrictive reading of the High Court's powers.

23. It can be seen from the pre-partition judgments discussed hereinabove that the Courts had developed the view that the High Courts' jurisdiction and powers in references were restricted. However, as has been discussed above, the foundations of this view are quite shaky. This generally restrictive interpretation of the reference jurisdiction, from the very beginning, played a significant role in the Courts' determination of the issue of whether assessees are entitled to raise questions in references which were not raised before the lower forums. This issue became more controversial post partition and before we examine the law as it developed in Pakistan in this regard, it may be pertinent to review the position in India after partition.

24. In India, the issue of the scope of the questions which may be proposed to the Tribunal for referring to the High Court became controversial very quickly and there came a time when there were multiple conflicting judgments in the field. The right conferred under Section 66 of the Act, 1922 on the assessee or the Commissioner was to require the Tribunal to refer any questions of law arising out of its order. The issue was whether the words "questions arising out of the order" included a question which was not argued before the Tribunal and/or dealt with by it in its order even though it be one of law and arising from the facts contained in the order.

25. The Madras High Court in the cases of **Messrs A. Abboy Chetty & others Vs. Commissioner of Income-Tax, Madras (AIR 1948**

Mad 181) and **Commissioner of Income-Tax, Excess Profits Tax, Madras Vs. Modern Theatres Ltd. (AIR 1952 Mad 255)** took the view that a question of law not raised before the Tribunal and not dealt with in its order could not be said to be arising out of the order even if on the facts stated that question fairly arises. The same view was taken by the Calcutta High Court in the cases of **Commissioner of Excess Profits Tax, West Bengal Vs. Jewanlal Ltd., Calcutta ([1951] 20 ITR 39)** and **Chainrup Sampatram Vs. Commissioner of Income Tax, West Bengal [(1951) 20 ITR 484]** and by the Patna High Court in the cases of **Maharaj Kumar Kamal Singh Vs. Commissioner of Income-Tax ([1954] 26 ITR 79)** and **Commissioner of Income-Tax, B and O. Vs. Ranchi Electric Supply Co. Ltd., Ranchi (AIR 1955 Pat 151)**. At the same time the Bombay High Court in the case of **Madanlal Dharnidharka Vs. The Commissioner of Income-Tax, Bombay City (AIR 1949 Bom 24)** held that questions not dealt with by the Tribunal could arise out of its order if the necessary facts were recorded. Chagla, CJ persuasively argued that:-

> *"…Now, looking at the plain language of the section apart from any authority, I should have stated that a question of law arose out of the order of the Tribunal if such a question was apparent on the order itself or it could be raised on the facts found by the Tribunal and which were stated in the order.* ***I see no reason to confine the jurisdiction of this Court to such questions of law as have been argued before the Tribunal or are dealt with by the Tribunal. The section does not say so and there is no reason why we should construe the expression 'arising out of such order' in a manner unwarranted by the ordinary grammatical construction of that expression****."*
>
> *[Emphasis supplied]*

26. It will be noted that the view of the Bombay High Court was on the plane of legal interpretation of the words used and was unfettered by the restraints imposed by importing the phrase "advisory jurisdiction" which does not appear in the law at all. This view found favour with the Punjab High Court in the case of **Commissioner of Income Tax, Delhi Vs. Punjab National Bank, Ltd., Delhi ([1952] 21 ITR 526)** and the Nagpur High Court in the case of **Mohanlal Harilal Vs. Commissioner of Income-Tax, C. P. and Berar, Nagpur ([1952] 22 ITR 448**). The Supreme Court of India left the issue open in the case of **Ogale Glass Works** *(supra)* but then went on to tilt in the opposite direction in the **Scindia Steam** case *(supra)* in which it *(the Supreme Court of India)* concluded as follows *(at page 1645)*:-

> *"31. The result of the above discussion may thus be summed up:*
>
> *(1) When a question is raised before the Tribunal and is dealt with by it, it is clearly one arising out of its order.*
>
> *(2) When a question of law is raised before the Tribunal but the Tribunal fails to deal with it, it must be deemed to have been dealt with by it, and is therefore one arising out of its order.*
>
> *(3) When a question is not raised before the Tribunal but the Tribunal deals with it, that will also be a question arising out of its order.*
>
> *(4) When a question of law is neither raised before the Tribunal nor considered by it, it will not be a question arising out of its order notwithstanding that it may arise on the findings given by it.*

> *Stating the position compendiously, it is only a question that has been raised before or decided by the Tribunal that could be held to arise out of its order."*

With regard to proposition (4) reproduced above, certain observations of the India Supreme Court *(at pages 1643-1644)*, as will be seen later, are critical. It was expressly conceded by the Supreme Court of India:-

> *"26.* ***But the main contention still remains that the language of S. 66(1) is wide enough to admit of questions of law which arise on the facts found by the Tribunal and that there is no justification for cutting down its amplitude by importing in effect words into it which are not there. There is considerable force in this argument****."*
>
> *[Emphasis supplied]*

The Indian Supreme Court however then proceeded to argue as follows:-

> *"But then there are certain features, which distinguish the jurisdiction under S. 66, and they have to be taken into consideration in ascertaining the true import of the words, "any question of law arising out of such order." The jurisdiction of a court in a reference under S. 66 is a special one, different from its ordinary jurisdiction as a civil court. The High Court, hearing a reference under that section, does not exercise any appellate or revisional or supervisory jurisdiction over the Tribunal. It acts purely in an advisory capacity, on a reference which properly comes before it under S. 66(1) and (2).* ***It gives the Tribunals advice, but ultimately it is for them to give effect to that advice.*** *It is of the essence of such a jurisdiction that the court can decide only questions which are referred to it and not any other question…If the true scope of the jurisdiction of the High Court is to give advice* ***when it is sought by the Tribunal****, it stands to reason that the Tribunal should have had an occasion to consider the question so that it may*

> *decide whether it should refer it for the decision of the court. How can it be said that the Tribunal should seek for advice on a question which it was not called upon to consider and in respect of which it had no opportunity of deciding whether the decision of the court should be sought?"*
>
> *[Emphasis supplied]*

27. It will be seen from the above reproduced extracts that although the Supreme Court of India agreed that the scope of the words "arising out of such order" was wide enough to include questions of law which had not been argued before the Tribunal, it held that they must be construed narrowly by reason of the "special" nature of the jurisdiction of the High Court and because firstly, it was for the Tribunal "to give effect to the advice" and secondly because the advice was being "sought by the Tribunal". In this manner the Supreme Court narrowly construed the words "arising out of the order" on the basis of the unnecessarily restrictive view of the reference jurisdiction developed by the courts over the years. On the face of it these reasons are not persuasive since the Tribunal was not seeking advice voluntarily, or on a *suo motu* basis, **but because it was obligated to do so under the law at the behest of an aggrieved party, which is the essence of a judicial process before a court of law.** Furthermore, it was also **not** within the discretion of the tribunal to give effect, or not give effect, to the advice. **It was binding on it and the mandate of the law required it to give effect to it.** Unfortunately, this judgment, although clearly flawed, has had an enormous effect on the subsequent case law both in India as well as in Pakistan. The question of the difference between an advisory jurisdiction and an appellate one, briefly discussed earlier, is one that we will revert to below.

28. In Pakistan, in the case of **R. S. Munshi Gulab Singh and Sons Vs. Commissioner of Income-Tax, Punjab (PLD 1950 Lah 476)** the assessee initially proposed two questions on 12.05.1945 which the Tribunal referred to the High Court. The High Court delivered a verdict on 19.10.1945 against the assessee whereafter on 28.02.1946 the assessee made a fresh application to the Tribunal to refer a completely different question. The Tribunal's refusal to do so was challenged before the Lahore High Court. The matter could very simply have been decided solely on the basis of the fact that the second application filed by the assessee was hopelessly time-barred. The Division Bench did in fact hold as much in this case. However, it went further in its judgment by finding as under:

> *"There can be no doubt that in the course of assessment proceedings for the year 1942-43 the assessee never raised the question which he now requires the Appellate Tribunal to state. In fact the position taken up by him was wholly inconsistent with the position that he has now adopted after the decision of the High Court…The Tribunal were, therefore, right in refusing to state the case. The law is clear on the point that it is only a question raised before the Appellate Tribunal that can be referred to the High Court under section 66."*

29. The Lahore High Court then went on to rely on, *inter alia*, the judgment of the Madras High Court in the case of **A. Abboy Chetty** *(supra)* which was approved by the Supreme Court of India in the following year in **Scindia Steam**'s case *(supra)*. Perhaps its inclination to discuss the assessee's contradictory positions, which led it into the domain of the issue whether new questions could be raised, can be attributed to the fact that the assessee in this case was blatantly trying to evade tax and kept taking conflicting positions. In any event, the Lahore High Court adopted the same restrictive approach post partition as was prevalent prior to it.

30. In the case of **The Scindia Steam Navigation Co. Ltd. Vs. The Commissioner of Income-Tax (PLD 1959 Kar 527)** a Division Bench of the High Court of Sindh held that although new questions could not be raised before the High Court, there was no restriction on new arguments being canvassed in support of the stated questions. This is an interesting case as it, while adopting the prevalent restrictive interpretation of the High Court's powers in reference, expanded the scope for assessees by finding that new submissions, as long as in the form of arguments in support of existing questions and not new questions themselves, could be raised before the High Court in a reference.

31. Around the same time as the Sindh High Court judgment discussed above, Section 66 came under consideration before a four member bench of the Supreme Court in the case of **M. Idrees Barry** *(supra)*. The Supreme Court in this case took a restrictive view of the High Court's jurisdiction under Section 66 of the Act, 1922. The facts of the case were that a dispute arose as to whether the assessee was properly served notices in the case. The Tribunal held that the service of notice was valid which led the assessee to propose a question for reference to the High Court. The department opposed the reference but the Tribunal accepted it and referred the question, the form of which was approved by the assessee. The High Court held that although the question as framed would go against the department, the "real" question involved would lead to a decision against the assessee. It then proceeded to 'reformulate' the question and answer it against the assessee. The Supreme Court pointed out that the question referred to the High Court was whether service of notice was "valid" while the High Court reframed the question to make it as to whether service of notice on the assessee was "effective". The Supreme Court went on to hold that the substance of the question

referred was not preserved by the High Court and therefore the reformulation was not valid. It further held that:-

> "*Further what is provided for in S. 66(1) is not a reference of any question arising on the facts of the case but only a reference of a question or questions which arise out of the order of the Appellate Tribunal. This is clear from the language of the section as well as from the decisions on which the learned Judges have relied. The extract from the above-mentioned Full Bench judgment incorporated in the judgment under appeal is to the effect that the Tribunal cannot travel beyond the question originally indicated by the assessee and the High Court cannot raise any question suo motu which is not covered by the reference. The learned Judges recognised this limitation…*"

The Supreme Court then went on to examine the judgment of the High Court which had decided the matter on the basis of the conduct of the assessee after finding that it was one of the issues referred to in the Tribunal's order. The Supreme Court disagreed with this observation and after examining the Tribunal's order found that the conduct of the assessee was never challenged by the department before the lower forums. The Supreme Court observed that the only point raised was whether the service was valid, as the person who received the notice was empowered by the assessee and the High Court's finding on effectiveness of service was not valid. The Supreme Court went on to discuss the Privy Council decision in **National Mutual Life Association**'s case *(supra)* in which the High Court had decided a point on the basis of a new argument raised before it but the Privy Council observed that the argument was outside the scope of the reference. The Supreme Court finally went on to conclude as follows:-

> *"It may well be that when the question referred is considered some point may emerge with regard to the assessee's liability which should have been raised before the Tribunal and dealt by it, but as long as that matter is not covered by the reference, the High Court cannot formulate a new question and deal with it, for, as pointed out by their Lordships of the Privy Council in Raja Bahadur Sir Rajendra Narayan Bhanj Deo v. Commissioner of Income-Tax, Bihar and Orissa [AIR 1940 PC 158 at 159] "the function of the High Court in cases referred to it under S. 66 of the Act is advisory only and is confined to considering and answering the actual question referred to it". The learned Judge should therefore have answered the question referred by the Income-tax Appellate Tribunal instead of formulating a different question and answering it."*

It is obvious from a perusal of the above judgment that the Supreme Court of Pakistan adopted a restrictive view of the High Court's jurisdiction and powers under Section 66 of the Act, 1922 on the basis of decisions of the Privy Council and other courts, which are based on certain fundamental misconceptions discussed earlier. Although the Supreme Court in **M. Idrees Barry** *(supra)* indicated that new issues cannot be raised in a reference, the point it actually decided was only that the High Court did not have any *suo motu* powers to frame new questions and answer them. The Supreme Court stated that only questions arising out of the order could be referred but did **not** expressly deal with the scope of the significant phrase "arising out of the order" or the issue of whether the assessee has the right to propose new questions while making a reference which are apparent from the facts as recorded in the Tribunal's order and fall within the ambit of that phrase.

32. The view of the Lahore High Court in the **R. S. Munshi Gulab Singh**'s case *(supra)* was followed by the Sindh High Court in the case of

Abdul Ghani & Co. Vs. Commissioner of Income-Tax (PLD 1962 Kar 635) wherein it was held that only questions raised before and dealt with by the Tribunal could be referred to the High Court at the behest of the assessee. However, subsequently in 1965, a five member bench of the Supreme Court of Pakistan showed a strong inclination to depart from the narrow construction of the reference jurisdiction of the High Court in one case and then went on to assign a more liberal construction to the same in another case. In the case of **Pakistan, through the Commissioner of Income-Tax, Karachi Vs. Messrs Majestic Cinema, Karachi (PLD 1965 SC 379)** the Supreme Court of Pakistan observed as under:-

> *"The second observation which we have to make is of a general nature. It is that consideration should be given to the question whether the procedure of ascertainment of the proper law applying to cases arising out of imposition of the income-tax, by the method of reference under section 66 of that Act is, in actual practice, entirely apt for the resolution of the questions of law arising,* ***owing to the danger which appears in a fairly considerable number of cases, of there being produced through this process a distortion of the case both as to facts and law in its presentation to the High Court****. It is in our view a matter for serious consideration whether a truer interpretation of the legal provisions could not be achieved by a process of direct appeal to the High Court from the decisions of the Tribunal, so limited however, that the determination of questions of fact is left within the exclusive responsibility of the Tribunal, subject to directions by the High Court, as to error of law or material error of procedure in such determination. We observe that in nearly all cases the question referred is prefaced by the expression "in the facts and circumstances of the case", and on occasions, these words seem to convey a request for a final ascertainment of the 'facts and circumstances'. Cases are not infrequent where the presentation of 'facts and circumstances' in the*

> *'statement of facts' appears in the course of the argument before the High Court and the Supreme Court, not to be entirely consistent from those appearing on the record. The Courts are then faced with a difficulty in formulating an answer to the question of law which would not operate a distortion in the imposition of the tax.*
>
> *In the present case, the facts are certainly clear, and the indefiniteness appeared in the question as referred to the High Court, but that is without effect on the observation that a direct appeal from the decisions of the Income-tax Tribunal in the two appeals before it, might have led to a more consistent decision in the present case, on the basis of the settled facts as they appeared. The procedure of reference is cumbersome and experience shows increasingly that it lends itself to possibilities of distortion not only in the presentation of facts relevant to the question of law referred, but even to distortion of the question of law itself. We think it is a matter for serious consideration by the authorities concerned whether the present procedure should not be replaced by a direct appeal, limited as to facts, to a Superior Court. A further clear advantage from a direct appeal would be a considerable saving of time in the finalisation of taxation matters."*
>
> *[Emphasis supplied]*

The point is well taken. What is the object of the entire exercise? Is it to provide a discourse on the technical competence of the counsel appearing before the Tribunal in relation to the points actually raised or which ought to have been raised, or is it to answer the substantive issues in relation to the levy of fiscal law?

33. Only a few months after the passing of the above judgment, the same five member bench of the Supreme Court of Pakistan was once again faced with a difficult question in relation to the scope of references. In the case of **Messrs Sutlej Cotton Mills Ltd., Okara Vs. The Commissioner of Income-Tax, North Zone (West Pakistan), Lahore**

(PLD 1965 SC 443) during the course of the hearing a question was raised as to the period of limitation which had not been properly raised or considered in the lower forums, although a generalized objection had been raised. In this regard, the Supreme Court held as under:-

> *"The question of violation of natural justice, as has been seen, was raised in bar of the jurisdiction of the Income-tax Officer to make the order of re-assessment which he made, and a point of jurisdiction is one which is not barred even at the ultimate stage before this Court…**It is open to a Court before which a point of jurisdiction is raised, to deal with it at the very last stage, even if the point was not raised at any earlier stage**, provided that all the evidence necessary for the determination of the point is available on the record so that no further evidence is required for reaching a satisfactory conclusion."*
>
> *[Emphasis supplied]*

The Supreme Court carved out this exception but went on to state in its conclusion that:-

> *"…in arriving at this conclusion, it has not been necessary in any way, to go outside the four corners of the question referred, or subject it to modification in any sense. The "facts and circumstances" have been accepted as they appear on the record, for the examination of the question."*

Put differently, the Supreme Court construed the question before it so widely, as to allow the jurisdictional point to be decided although it was neither raised, nor discussed, earlier. This was an original approach and the ends of justice were therefore served.

34. That despite a move towards a liberal interpretation of the reference jurisdiction of the High Courts, the Lahore High Court in the case of **Odeon Cinema** *(supra)* reverted to the earlier view relying on, *inter*

alia, the Sindh High Court judgment in the **Scindia Steam** case *(supra)* and the Supreme Court judgment in the **M. Idrees Barry** case *(supra),* and went on to hold that questions not raised before the Tribunal could not be agitated before the High Court in a reference. It may be noted that the Lahore High Court did not refer to the Supreme Court's latest judgment in the **Sutlej Cotton Mills** case *(supra)* and relied on the **M. Idrees Barry** judgment *(supra)*, without analysis of its exact scope.

35. Up until 1971, the position in Pakistan was that the Courts were supportive of the view that the reference jurisdiction of the High Court was limited to answering the questions referred to it and it could not enlarge this scope. The Supreme Court in the **Majestic Cinema** case *(supra)* recognized the need for an enlargement of the High Court's jurisdiction by providing a direct appeal on the questions of law and urged for a reconsideration of the law in this regard. Whilst dealing with the issue of whether questions not raised before or dealt with by the Tribunal, the High Courts had held that such questions could not be raised in a reference but in this regard a comprehensive and authoritative pronouncement of the Supreme Court of Pakistan was lacking. The High Courts found support from the case of **M. Idrees Barry** *(supra)*, but a close analysis of that decision shows that the Supreme Court while obviously taking a very restrictive view of the overall jurisdiction and powers of the High Courts in references did not expressly deal with the issue of whether new questions falling within the ambit of the phrase "arising out of the order" could be referred by assessees in reference applications. The Supreme Court of Pakistan in **Sutlej Cotton Mills** case *(supra)* noted that, if the relevant facts were on the record, a question of jurisdiction could be raised at any time before the Courts in tax matters, regardless of whether it was raised before the lower forums, but it did not say whether questions of law, other than jurisdictional questions, could also be raised at any

time in a similar manner. However, to the extent of jurisdictional issues, the Supreme Court can be said to have carved out an exception to the general rule laid down in the decisions of the High Courts.

36. Section 66 of the Act, 1922 was significantly amended by way of the Finance Ordinance, 1971 (Ordinance XIV of 1971). For the first time since the introduction of the provision for references in the tax laws of the sub-continent, litigants were given the right to directly refer questions of law arising out of the Tribunal's order to the High Court. This was an extremely important change, although its importance was not fully grasped at the time. It is vitally important to note that the argument for a restricted interpretation of the law, in as much as it was based on the view that since the High Court only gave its opinion to the Tribunal which was responsible for finalizing proceedings, the jurisdiction of the High Court was limited, was now being fatally undercut. A direct right had now been conferred on an assessee to invoke the jurisdiction of the High Court. The Tribunal itself did not need to seek any advice. It was not authorised to seek any advice. How then could the operative order of the High Court be termed as advice? The procedural formality of the past, which was given far more significance by the Courts than it deserved, was now removed thereby rendering the remedy available to the assessees more clearly appellate in nature. Thus, both the legal entitlement of the assessee and the jurisdiction of the High Court were enlarged. In practice also, the view of the Indian Supreme Court in the **Scindia Steam** case *(supra)* was now no longer applicable in any view of the matter. This change in the law may perhaps have been prompted by the Supreme Court's plea in the **Majestic Cinema** case *(supra)*. As amended in 1971, Section 66 of the Act, 1922 read as under:-

(1) Within sixty days of the date upon which he is served with notice of an order under sub-section (4) of section 33 the assessee or the Commissioner may, by application in the prescribed form, accompanied where application is made by the assessee by a fee of one hundred rupees, [refer to the High Court any question of law arising out of such order[7]].

[……[8]]

[(2) An application under sub-section (1) shall be in triplicate and shall be accompanied by the following documents, and where any such document is in any language other than English, also by translation thereof in English, namely :--

(a) Certified Copy, in triplicate, of the order of the Appellate Tribunal out of which the question of law has arisen;

(b) Certified Copy, in triplicate, of the order of the Income-tax Officer or the Inspecting Assistant Commissioner, as the case may be, which was the subject-matter of appeal before the Appellate Tribunal; and

(c) Certified Copy, in triplicate, of any other document the contents of which are relevant to the question of law formulated in the application and which was produced before the Income-tax Officer, the Inspecting Assistant Commissioner or the Appellate Tribunal, as the case may be, in the course of any proceedings relating to any order referred to in clause (a) or clause (b).

(3) Where the assessee is the applicant, the Commissioner shall be made a respondent; and where the

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[7] Inserted for the words "require the Appellate Tribunal to refer to the High Court any question of law arising out of such order, and the Appellate Tribunal shall within ninety days of the receipt of such application draw up a statement of the case and refer it to the High Court" by Section 4 of the Finance Ordinance, 1971 (Ordinance XIV of 1971).

[8] Proviso omitted by Section 4 of the Ordinance *ibid.*

Commissioner is the applicant the assessee shall be made a respondent:

Provided that where an assessee dies or is adjudicated insolvent or is succeeded by another person or is a company which is being wound up, the application shall not abate and may, if the assessee was the applicant, be continued by, and if he was the respondent, be continued against, the executor, administrator or successor or other legal representative of the assessee, or by or against the liquidator or receiver, as the case may be.

(4) In respect of cases referred to in sub-section (5) of section 5 where the Inspecting Assistant Commissioner performs the functions of an Income-tax Officer, reference in this section to Commissioner shall be construed as reference to the Central Board of Revenue.

(4-A) On receipt of the notice of the date of hearing of the application, the respondent shall, at least seven days before the date of hearing, submit in writing a reply to the application; and he shall therein specifically admit or deny whether the question of law formulated by the applicant arises out of the order of the Appellate Tribunal. If the question formulated by the applicant is, in the opinion of the respondent, defective, the reply shall state in what particular the question is defective and what is the exact question of law, if any, which arises out of the said order; and the reply shall be in triplicate and be accompanied by any documents (alongwith a translation in English of those of such documents as are not in English) which are relevant to the question of law formulated in the application and which were produced before the Income-tax Officer, the Inspecting Assistant Commissioner or the Appellate Tribunal, as the case may be, in the course of any proceedings relating to any order referred to in clause (a) or clause (b) of sub-section (1).[9]*]*

[9] Sub-sections (2), (3), (4) & (4A) inserted in place of sub-sections (2), (3), (3-A) & (4) by Section 4 of the Ordinance *ibid.*

(5) The High Court upon the hearing of any [such application[10]] shall decide the questions of law raised thereby and shall deliver its judgment thereon containing the grounds on which such decision is founded and shall send a copy of such judgment under the seal of the Court and the signature of the Registrar to the Appellate Tribunal which shall pass such orders as are necessary to dispose of the case conformably to such judgment.

(6) Where a reference is made to the High Court the costs shall be in the discretion of the Court.

(7) Notwithstanding that a reference has been made under this section to the High Court, income-tax shall be payable in accordance with the assessment made in the case:

Provided that, if the amount of an assessment is reduced as a result of such reference, the amount overpaid shall be refunded with such interest as the Commissioner may allow unless the High Court, on intimation given by the Commissioner within thirty days of the receipt of the result of such reference that he intends to ask for leave to appeal to the Supreme Court, makes an order authorising the Commissioner to postpone payment of such refund until the disposal of the appeal to the Supreme Court.

(7A) Section 5 of the Limitation Act, 1908 (IX of 1908), shall apply to an application under sub-section (1)

[…..[11]].

[(8) Any application made to the Appellate Tribunal or any question of law referred to the High Court by the Appellate Tribunal before the first day of July 1971, shall be disposed of by the Appellate Tribunal or the High Court,

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[10] Inserted in place of the words "such case" by Section 4 of the Ordinance *ibid.*
[11] The words "or sub-section (2) or sub-section (3)" omitted by Section 4 of the Ordinance *ibid.*

as the case may be, as if the Finance Ordinance, 1971, had not come into force.[12]*]*

37. This enlightened and progressive change in the law did not, however, last for long as the law reverted back to its original position with the passing of the Finance Act, 1974 (Act XL of 1974) *(it may be noted in passing that this somewhat erratic behaviour of the Finance Ministry in proposing and getting amendments passed without any proper application of mind is hardly commendable for the reason that Finance Acts do not travel to the Senate for debate and discussion and they are often passed by the National Assembly in routine without rigorous debate. This adds to the responsibility of the Finance Division to ensure a proper application of mind prior to proposing an amendment. The will of the legislature is certainly to be respected but the rapidly changing whims of the draftsmen of the Federal Board of Revenue are not to be encouraged. Perhaps the conclusion is that a greater vigilance is required by the superior courts in interpreting fiscal laws)*. However, the interpretation of Section 66 of the Act, 1922 as it stood between 1971 and 1974 is extremely important for the purposes of the present discussion since the current state of the law is materially similar. Although there is no authoritative pronouncement of the Supreme Court of Pakistan on the law from this period, there is a judgment of the Lahore High Court which sheds considerable light on the interpretation of Section 66 *ibid* as it stood after the 1971 amendment. In the case of **Messrs Hunza Asian Textile and Woolen Mills Ltd. Vs. Commissioner of Sales Tax, Rawalpindi Zone, Rawalpindi (1973 PTD 544 = [1974] 29 Taxation 1)** while examining the jurisdiction of the High Court under Section 17 of the Sales Tax Act, 1951, in order to answer questions apparent from the face of the record in a reference even though the questions were not urged before the Tribunal, the Lahore High Court had the occasion to examine the similar Section 66 of the Act, 1922. The Lahore High Court examined the conflicting case law on the scope of Section 66 *ibid* and relied on the

[12] Inserted by Section 4 of the Ordinance *ibid.*

Supreme Court judgment in the **Sutlej Cotton Mills** case *(supra)* to rightly note that there was a move towards a broadening of the jurisdiction of the High Courts in references even prior to the 1971 amendment. It then went on to hold *(at page 15)* as under:-

> *"15. On a careful consideration of the law we find that these amendments introduced in section 66 of the Income-tax Act and section 17 of the Sales Tax Act are fundamental in character and go to the very root of this jurisdiction exercised by the High Court under the law. There is no gainsaying that essentially this jurisdiction, vested in the High Court, is advisory only. But then under these two amended sections a right is conferred on the assessee or the Commissioner by an application to directly refer to the High Court any question of law "arising out" of the appellate order passed by the Appellate Tribunal.* ***As a matter of strict interpretation, on the language of the section, the word "arising" out of the order of the Tribunal in the context has a wider import and connotation than the word "raised" before the Tribunal. A question of law may still "arise" out of the order of the Tribunal although it was not actually raised before it.*** *In this connection it would be pertinent to reiterate the observations made by the Supreme Court of India in the Commissioner of Income-tax, Bombay v. Scindia Steam Navigation Co. Ltd. In interpreting the old section 66(1) of the Act the Court remarked that the language of section was wide enough to admit of questions of law on the facts found by the Tribunal and that there was no justification for ousting down its amplitude. We find that these remarks are all the more pertinent now after these amendments introduced in section 66(1) of the Act in this country by the Finance Ordinance, 1971. In these circumstances it calls for a more liberal interpretation to be placed on the amended provision for a direct reference of a question of law arising out of the appellate order passed by the Tribunal.* ***Indeed it seems to us that the power of High***

> ***Court on reference after these amendments is now more akin and similar to that vested in it in a second appeal.***
>
> …
>
> *17. …there is nothing inherent in the nature of this jurisdiction to debar the Court, in a proper case, from entertaining a new question of law patent on the face of the reference made to it by the Tribunal.*
>
> …
>
> *19. To sum up our above discussion we find that the jurisdiction vested in the High Court is a controlled one. It must act upon a reference by the assessee or the Commissioner and not without it. It is not a Court of facts but will decide questions of law only.* ***In this connection under the amended law the processing of the reference application through the Appellate Tribunal was dispensed with. The idea behind this amendment was to liberalize this procedure and to free it from the old process, shackles and hurdles. The dialogue now is between the assessee or the Commissioner and the Court directly.*** *On principle we cannot but hold that the Court is competent to entertain a pure question of law floating on the surface, patent on the face of the record, and going to the root of the case, merely because it escaped the notice of the party and was not raised before the Tribunal in appeal in the first instance.* ***The progress in the law has been to march forward from procedure to substance and to break down the rigours and formalities of the past in the larger interest of justice****…"*
>
> *[Emphasis supplied]*

38. The Lahore High Court essentially held that the jurisdiction under Section 66 *ibid* was essentially now appellate in nature, although restricted to only questions of law i.e. similar to a second appeal. On this view, it held that the phrase "arising out of the order" must now be assigned its natural meaning to include any questions which are apparent from the order. The Lahore High Court drew support from the decision of the Supreme Court of India in **Scindia Steam** *(supra)* wherein the court,

while agreeing that the natural meaning of the words "arising out of the order" could include new questions if they are apparent from the order, had gone on to adopt a narrow interpretation only because it felt constrained by the restrictive advisory jurisdiction of the High Court. The Lahore High Court correctly held that since that restrictive aspect of the law had been done away with and the jurisdiction was now practically appellate in nature, there was no reason why the words "arising out of the order" could not be assigned their natural meaning to include any questions which are apparent from the face of the record, regardless of whether they were raised before the Tribunal or not. There is an obvious distinction between "arising out of" and "argued before". The Lahore High Court correctly noted that if the questions to be referred were to be restricted to the questions dealt with by the Tribunal, the language of the law would have been "refer questions of law 'raised' before the Tribunal" and not "arising" out of its order. This clearly is a powerful argument.

39. The view of the Lahore High Court is good authority for the scope of a reference under Section 133 of the Ordinance, 2001 as it stands today, due to the similarity in the law. However, some later judgments of the superior courts have made matters slightly more complicated than that. As noted earlier, the law reverted back to the pre-1971 position with an amendment in Section 66 *ibid* by way of the Finance Act, 1974. Subsequently, Section 66 *supra* was replaced by Section 136 of the Ordinance, 1979, which also retained the formal procedure of referring questions through the Tribunal and read as under:-

> ***136. Reference to High Court.-*** *(1) Within ninety days of the date upon which he is served with notice of an order under section 135, the assessee or the Commissioner may, by application in such form and accompanied by such documents as may be prescribed, require the Appellate*

Tribunal to refer to the High Court any question of law arising out of such order, and the Appellate Tribunal shall, within ninety days of the receipt of such application, draw up a statement of the case and refer it to the High Court.

(2) If, on an application made under sub-section (1), the Appellate Tribunal refuses to state the case on the ground that no question of law arises, the assessee or the Commissioner, as the case may be, may within one hundred and twenty days from the date on which he is served with notice of the refusal, apply to the High Court, and the High Court may, if it is not satisfied with the correctness of the decision of the Appellate Tribunal, frame a question of law and the provisions of sub-sections (4), (5), (6) and (7) shall so far as may be, apply as they apply to a reference made under subsection (1).

(3) If the High Court is not satisfied that the statement in a case referred under sub-section (1) is sufficient to enable it to determine the question raised thereby, the Court may refer the case back to the Appellate Tribunal to make such modifications therein as the Court may direct.

(4) When any case has been referred to the High Court under this section, it shall be heard by a Bench of not less than two Judges of the High Court, and in respect of such case the provision of section 98 of the Code of Civil Procedure, 1908 (V of 1908) shall, so far [as] may be, apply notwithstanding anything contained in the Letters Patent applicable to any High Court or in any other law for the time being in force.

(5) The High Court upon the hearing of any such case, shall decide the questions of law raised thereby and shall deliver its judgment thereon containing the grounds on which such decision is founded and shall send a copy of such judgment under the seal of the Court and the signature of the Registrar to the Appellate Tribunal, which

> *shall pass such orders as are necessary to dispose of the case conformably to such judgment.*
>
> *(6) Where a reference is made to the High Court under this section, the costs shall be in the discretion of the Court.*
>
> *(7) Notwithstanding that a reference has been made under this section to the High Court, tax shall, unless the recovery thereof has been stayed by the High Court, be payable in accordance with the assessment made in the case.*
>
> *(8) Section 5 of the Limitation Act, 1908 (IX of 1908), shall apply to an application under subsection (1) or subsection (2).*
>
> *(9) When an application is made under subsection (1) by the assessee, it shall be accompanied by a fee of one hundred rupees.*

40. In the case of **Ahmad Karachi Halva** *(supra)*, a three member bench of the Supreme Court was called upon to decide the question whether a question of law raised in the memorandum of appeal but not argued before the Tribunal can be said to be arising out of the order of the Tribunal. The counsel for the appellant relied on the case of **Hunza Asian Textile and Woollen Mills** *(supra)* and **Walayat Flour Mills, Lyallpur Vs. Commissioner of Income-Tax, Rawalpindi ([1974] 29 Taxation 31)**. The Supreme Court first examined the judgment in **Hunza Asian Textile and Woollen Mills** *(supra)* and noted the discussion in relation to the decision of the Indian Supreme Court in **Scindia Steam** *(supra)* therein. It then went on to find in paragraph 8, as under:-

> *"The Division Bench, however, went further and held that a liberal meaning should be given to the expression "arising*

> *out of the order of such Court" in agreement with the minority opinion in that case. Accordingly, it was of the opinion that a new plea could be allowed to be raised if it was implicit in or covered by the question of law referred to it for its opinion and no additional facts were necessary for its disposal."*

The Supreme Court then went on to examine the judgment in the case of **Walayat Flour Mills** *(supra)* and while noting that the Division Bench relied on the minority view in the Indian Supreme Court judgment of **Scindia Steam** *(supra)*, the Supreme Court observed that the Lahore High Court had failed to rely on the cases of **Abdul Ghani,** *(supra)* **Odeon Cinema** *(supra)* and **M. Idrees Barry** *(supra)*. Thereafter the Supreme Court made a passing reference to some decisions from the Indian jurisdiction post the **Scindia Steam** case *(supra)* and went on to hold as under:-

> *"11. There is, therefore, a preponderance of view as held by the High Court in favour of the proposition that expression "arising out of such order" in section 66(1) of the Income-tax Act does not include within its concept a question of law which was not raised, argued or decided by the Tribunal. This Court in PLD 1959 SC (Pak.) 202 has not given any wider import to the expression and has confined it to a question of law which is dealt with by the Tribunal. This in our view would not include a question of law which was neither raised nor dealt with by the Tribunal.*
>
> *12. Concluding thus, we are not inclined to agree with the opinion of the Division Bench in (1974) 29 Taxation 31 which has followed the minority view of the Supreme Court of India in the case of Scindia Steam Navigation Co. Ltd. which itself did not find favour in the subsequent cases decided by the Supreme Court of India…"*

41. It may be noted that there are multiple aspects of the Supreme Court's decision which require a closer examination. Firstly, it will be noted that although in **Walayat Flour Mills** case *(supra)* express reliance was placed on the minority view in the Indian **Scindia Steam** case *(supra)*, the same is not true for the case of **Hunza Asian Textile and Woollen Mills** *(supra)*. The **Hunza Asian Textile and Woollen Mills** case *(supra)* did not rely on the minority view in the Indian **Scindia Steam** case *(supra).* What it did was to refer to the majority view in the Indian **Scindia Steam** case *(supra)* but read with the change in the law, which was the significant and determinative factor. Furthermore, it should be noted that the Lahore High Court had not advocated a liberal/wide reading of the phrase "arising out of such order" but instead had simply assigned the natural meaning of the words to the said phrase. Thus the essential point was the change in the law on which the case of **Hunza Asian Textile and Woollen Mills** *(supra)* rests. The case related to the tax year 1957-1958 and a reference was filed in 1964. The matter was decided by the Supreme Court in 1981. At all these material times, the law was different from the law interpreted by the Lahore High Court in the case of **Hunza Asian Textile and Woollen Mills** *(supra)*. Finally, in so far as the subsequent cases of the Indian Courts are concerned, they are hardly relevant since they were bound by the majority view in the Indian **Scindia Steam** case *(supra)* and obviously could not follow the minority view.

42. Essentially, the Supreme Court followed the majority view of the Indian Supreme Court decision in the **Scindia Steam** case *(supra)* because the intervening change in the law in Pakistan was not brought to its notice. If it had, perhaps the verdict may not have been the same. We have already pointed out the flaws in the reasoning in that case, and the earlier cases on which it relied. The Indian Supreme Court had proceeded on the unfounded assumption that the jurisdiction was advisory in the

narrow sense. On the contrary, the Tribunal was bound by the law to refer the matter to the High Court at the insistence of an aggrieved party and the Tribunal had no discretion to disregard the High Court's "advice". There is a clear cut conceptual distinction between binding and non-binding advice, especially when emanating from a court of law. An illustration of advisory jurisdiction is provided by Article 186 of the Constitution in terms of which the President, **of his own volition**, seeks the advice of the Supreme Court. The mere fact that a judicially binding verdict is given in the format of a question and answer does not change or alter its judicial character, especially when it is given in relation to a final order passed by a lower forum. It is a judicial verdict in every sense of the word and the Court exercises its normal judicial powers for this purpose. To conclude, the law does not use the phrase "advisory jurisdiction" and the use of this nomenclature cannot alter the plain meaning of the words used in the statute.

43. The view of the Courts of Pakistan has subsequently been coloured by the observations in the **Ahmad Karachi Halva** case *(supra)*. A major change to Section 136 of the Ordinance, 1979 came in 1997 when it was amended to provide for an "appeal" to the High Court instead of a "reference". Thus the earlier suggestion of the Supreme Court was belatedly acted upon by the legislature. Unfortunately, there was another reversion through the Finance Ordinance, 2000. Although the intention of the 1997 amendment was manifestly to broaden the jurisdiction of the High Court by explicitly making it an appellate jurisdiction, the High Court surprisingly failed to pick up this obvious point. In the case of **Hong Kong Chinese Restaurant** *(supra)*, the Lahore High Court held that since the jurisdiction was still limited to questions of law arising out of the order of the Tribunal, there was no difference between the scope of the

jurisdiction prior to and post the 1997 Amendment. This was a clear misreading of the law.

44. Thereafter followed yet another zig zag in the law. Section 136 of the Ordinance, 1979 was succeeded by Section 133 of the Ordinance, 2001, which, as amended up to the year 2004, read as under:-

> *(1) Where the Appellate Tribunal has made an order on an appeal under section 132, the [taxpayer[13]] or Commissioner may, by application in such form and accompanied by such documents as may be prescribed, require the Appellate Tribunal to refer any question of law arising out of such order to the High Court.*
>
> *(2) An application under sub-section (1) shall be made within ninety days of the date on which the [taxpayer[14]] or Commissioner, as the case may be, was served [……[15]] with the Appellate Tribunal's order.*
>
> *(3) Where, on an application under sub-section (1), the Appellate Tribunal is satisfied that a question of law arises out of its order, it shall, within ninety days of receipt of the application, draw up a statement of the case and refer it to the High Court.*
>
> *(4) Where, on an application under sub-section (1), the Appellate Tribunal refuses to state the case on the ground that no question of law arises, the [taxpayer[16]] or the Commissioner, as the case may be, may apply to the High Court and the High Court may, if it is not satisfied with the correctness of the decision of the Appellate Tribunal, frame a question of law for its consideration.*
>
> *(5) An application under sub-section (4) shall be made within one-hundred and twenty days from the date on*

[13] Inserted in place of the word "appellant" by the Finance Ordinance, 2002.
[14] Inserted in place of the word "appellant" by the Finance Ordinance, 2002.
[15] The words "notice of" omitted by the Finance Act, 2003.
[16] Inserted in place of the word "appellant" by the Finance Ordinance, 2002.

which the [taxpayer[17]] or Commissioner, as the case may be, was served with [order[18]] of the refusal.

(6) Sub-sections (10) through (14) shall apply to a question of law framed by the High Court in the same manner as they apply to a reference made under sub-section (1).

(7) If, on an application under sub-section (1), the Appellate Tribunal rejects the application on the ground that it is time-barred, the [taxpayer[19]] or Commissioner may apply to the High Court and, if the High Court is not satisfied with the correctness of the Appellate Tribunal's decision, the Court may require the Appellate Tribunal to treat the application as made within the time allowed under sub-section [(2)[20]].

(8) An application under sub-section (7) shall be made within [ninety days[21]] from the date on which the [taxpayer[22]] or Commissioner, as the case may be, was served with [order[23]] of the rejection.

(9) If the High Court is not satisfied that the statement in a case referred under sub-section (3) is sufficient to enable it to determine the question raised thereby, the Court may refer the case back to the Appellate Tribunal to make such modification therein as the Court may direct.

(10) A reference to the High Court under this section shall be heard by a Bench of not less than two Judges of the High Court and, in respect of the reference, the provisions of section 98 of the Code of Civil Procedure, 1908 (V of 1908) shall apply, so far as may be, notwithstanding anything contained in any other law for the time being in force.

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[17] Inserted in place of the word "appellant" by the Finance Ordinance, 2002.
[18] Inserted in place of the word "notice" by the Finance Act, 2003.
[19] Inserted in place of the word "appellant" by the Finance Ordinance, 2002.
[20] Inserted in place of the brackets and figure "(1)" by the Finance Act, 2003.
[21] Inserted in place of the words "three months" by the Finance Ordinance, 2002.
[22] Inserted in place of the word "appellant" by the Finance Ordinance, 2002.
[23] Inserted in place of the word "notice" by the Finance Act, 2003.

> *(11) The High Court upon hearing a reference under this section shall decide the questions of law raised by the reference and deliver judgment thereon containing the grounds on which such decision is founded.*
>
> *(12) A copy of the judgment of the High Court shall be sent under the seal of the Court and the signature of the Registrar to the Appellate Tribunal which shall pass such orders as are necessary to dispose of the case conformably to such judgment.*
>
> *(13) The costs of a reference to the High Court under this section shall be at the discretion of the Court.*
>
> *(14) Where a reference relates to an assessment, the tax due under the assessment shall be payable in accordance with the assessment, unless recovery of the tax has been stayed by the High Court.*
>
> *(15) Section 5 of the Limitation Act, 1908 (IX of 1908) shall apply to an application under sub-section (1).*
>
> *(16) An application under sub-section (1) by a person other than the Commissioner shall be accompanied by a fee of one hundred rupees.*

The provisions of Section 133 of the Ordinance, 2001, being similar to Section 136 of the Ordinance, 1979 were also interpreted by the Courts in a similar restrictive manner. Even the provisions for a reference under the Sales Tax Act, 1990 *(the Act, 1990)* and the Customs Act, 1969 were interpreted in an identical restrictive manner *[reference may be made to* ***Collector of Customs E & S. T. and Sales Tax Vs. Pakistan State Oil Company Ltd.*** *(2005 SCMR 1636) and* ***Towellers Ltd. through Chief Operating Officer Vs. Government of Pakistan Represented by Member Sales Tax Central Board of Revenue, Islamabad and another*** *(2006 PTD 310)]*.

45. Thereafter followed yet another major alteration in the law. Section 133 of the Ordinance, 2001 underwent two crucial changes in the year 2005 when it was amended once again, firstly, to provide the right to litigants to directly refer questions of law arising out of the Tribunal's order to the High Court, and, secondly, what is even more important, to explicitly state that the effect of the opinion of the High Court would automatically translate into a modification of the Tribunal's order. In brief, the High Court's judgment had now become self-executory. **The concept of "advice" being given to the Tribunal to alter its erroneous views has now totally disappeared, beyond any doubt.** The order of the Tribunal is altered by the opinion of the High Court, by operation of law. In other words the legal right and entitlement of the Tribunal to refer questions of law to the High Court for "advice" was taken away. This obviously makes an enormous difference. The earlier limitation which was supposedly because the reference was being made by the Tribunal and the answer was being given to the Tribunal has now disappeared. The litigant has been conferred a direct right to take his grievance to the High Court. **The Tribunal's views or formulations are no longer necessary or relevant. They are besides the point.** Section 133 of the Ordinance, 2001 as amended by the Finance Act, 2005 reads as under:-

> *[**133. Reference to High Court.**- (1) Within ninety days of the communication of the order of the Appellate Tribunal under sub-section (7) of section 132, the aggrieved person or the Commissioner may prefer an application, in the prescribed form along with a statement of the case, to the High Court, stating any question of law arising out of such order.*
>
> *(2) The statement to the High Court referred to in sub-section (1), shall set out the facts, the determination of the*

Appellate Tribunal and the question of law which arises out of its order.

(3) Where, on an application made under sub-section (1), the High Court is satisfied that a question of law arises out of the order referred to in sub-section (1), it may proceed to hear the case.

(4) A reference to the High Court under this section shall be heard by a Bench of not less than two judges of the High Court and, in respect of the reference, the provisions of section 98 of the Code of Civil Procedure, 1908 (Act V of 1908), shall apply, so far as may be, notwithstanding anything contained in any other law for the time being in force.

(5) The High Court upon hearing a reference under this section shall decide the question of law raised by the reference and pass judgment thereon specifying the grounds on which such judgment is based and the Tribunal's order shall stand modified accordingly. The Court shall send a copy of the judgment under the seal of the Court to the Appellate Tribunal.

(6) Notwithstanding that a reference has been made to the High Court, the tax shall be payable in accordance with the order of the Appellate Tribunal:

Provided that, if the amount of tax is reduced as a result of the judgment in the reference by the High Court and the amount of tax found refundable, the High Court may, on application by the Commissioner within thirty days of the receipt of the judgment of the High Court that he wants to prefer petition for leave to appeal to the Supreme Court, make an order authorizing the Commissioner to postpone the refund until the disposal of the appeal by the Supreme Court.

> *(7) Where recovery of tax has been stayed by the High Court by an order, such order shall cease to have effect on the expiration of a period of six months following the day on which it was made unless the appeal is decided or such order is withdrawn by the High Court earlier.*
>
> *(8) Section 5 of the Limitation Act, 1908 (IX of 1908), shall apply to an application made to the High Court under sub-section (1).*
>
> *(9) An application under sub-section (1) by a person other than the Commissioner shall be accompanied by a fee of one hundred rupees.*[24]*]*

46. Despite the legislature's clear intention to liberalize the law by way of the 2005 amendment, the High Courts have unfortunately continued to interpret the scope of the reference jurisdiction in the same restrictive manner as before. Reference in this regard may be made to the case of **Haseeb Waqas Sugar Mills Ltd. Vs. Government of Pakistan and others (2015 PTD 1665)**, wherein the Lahore High Court while interpreting the scope of Section 47 of the Act, 1990 *(which is similar to Section 133 of the Ordinance, 2001)* held that new questions could not be raised in a reference if they had not been urged before the lower forums. In reaching this conclusion, the Lahore High Court relied on, *inter alia*, the judgment in the **Ahmad Karachi Halva** case *(supra)* without realizing that in the intervening period the law had undergone a radical change. Other judgments also superficially followed cases decided under the old regime of law *[for example **Director, Intelligence and Investigation (Customs and Excise), Faisalabad and another Vs. Bagh Ali** **(2010 PTD 1024)** and **Mountain States Mineral Enterprises** (supra)]*. The case of **Ghulam Mustafa Jatoi** *(supra)*, wherein the Sindh High Court, after examining a large number of cases, set out the principles governing

[24] Inserted in place of sub-sections (1) to (16) by the Finance Act, 2005.

references under Section 133 of the Ordinance, 2001, suffers from the same flawed analysis. The problem with all the above decisions is that they fail to appreciate the significance of the amendments in the law in 2005 and thus failed to draw any distinction on that basis. The principles laid down in these cases may, at best, have been valid for the period prior to 2005. However, thereafter, the position of the law is different and warrants an independent examination. Judgments such as **Ahmad Karachi Halva** *(supra)*, **Abdul Ghani** *(supra)*, **Odeon Cinema** *(supra)* relied upon in these cases are also distinguishable as they relate to a period when the legal provision was different. Some other judgments relied upon do not expressly lay down the principle that new questions cannot be referred by the assessee if they were not taken up before the lower forums. The generally restrictive view adopted in these judgments is also open to the objection, as discussed earlier, that the language of Section 66 since its enactment, and the language of its successor provisions, is wide and confers broad powers, jurisdiction and rights upon the parties and the High Court, which the courts have not appreciated.

47. There is also a recent judgment of the Supreme Court in the case of **F. M. Y. Industries Limited** *(supra)* which also adopted the same restrictive view of the High Court's jurisdiction. However, the provision under consideration was Section 136 of the Ordinance, 1979 and not Section 133 of the Ordinance, 2001 as it stands today. Thus this decision is distinguishable. Furthermore, it is obviously not applicable for the purposes of interpreting the current provision of law as the same is significantly different. In a recent judgment reported as **Army Welfare Trust (Nizampur Cement Project), Rawalpindi and another Vs. Collector of Sales Tax (Now Commissioner Inland Revenue), Peshawar (2017 SCMR 9)**, this Court relied upon the case of **F. M. Y. Industries**

Limited *(supra)* however that was in the context of Section 47 of the Act, 1990 therefore this decision is also distinguishable.

48. To recapitulate, the problem all along has been the unfortunate legacy of the Act, 1918. This provided a true illustration of advisory jurisdiction, since advice was to be rendered to the Revenue Authority prior to its having passed an order. In 1922, this advisory jurisdiction was retained under Section 66(1) of the Act, 1922 which was similarly framed. However, this sub-section had, in sum and substance, lost its importance because of sub-section (2), which conferred the right to challenge the decision of the Tribunal on questions of law. It was this remedy which was followed thereafter. Section 66(1) *ibid* thereafter became redundant for all practical purposes and was eventually deleted through a subsequent amendment in 1939 and the same position continued under the Ordinance, 1979 and succeeding law. Thereafter, no advisory jurisdiction remained in any shape or form. But since the significance of the change was not appreciated, the concept of advisory jurisdiction continued to confuse the courts – the corpus had disappeared, but the shadow remained. The law as it stands after the 2005 amendment is now clear beyond any conceptual doubt. There is no question of advisory jurisdiction *(which phrase was never used in the law at any stage)* and the plain words of the section must now be given their ordinary meaning. No hyper-technicalities now stand as barriers in the way of substantive justice.

49. An independent interpretation of Section 133 of the Ordinance, 2001, as it stands today, on the plain language of the law, liberated from the burden or benefit of earlier judgments, would make the position very clear. Sub-section (1) confers a right on any person or the Commissioner aggrieved by a final order of the Appellate Tribunal to file an application before the High Court along with a statement of the case stating any questions of law arising out of the Tribunal's order. There is a

direct right to approach the High Court in a similar manner as in appeals, revisions, reviews etc. The order being challenged is the final order but the challenge is limited to questions of law only. The statement must set out the facts, the Tribunal's determination and the questions of law which arise out of its order in terms of sub-section (3). The questions of law which may be referred are only those which "arise" out of the order of the Tribunal. On the plain language of the law, this would include any question which can be made out from the order of the Tribunal. There is nothing in the scheme of the section to impute any extraordinary limitations on the type of questions which may be posed. The facts as stated in the Tribunal's order have to be taken as recorded and any question which can be made out from those facts may be raised in an application under Section 133 *ibid*, regardless of whether it was previously urged or not. There is absolutely no reason for confining the questions which may be referred to only those which were argued before the Tribunal on the hypothesis that this is an advisory jurisdiction as that is not what the language of the law contemplates. The law, as it stands, allows all questions **"arising" out of the order** to be referred and not just questions "argued" or "raised" **before the Tribunal.**

50. Section 133 *ibid* clearly states that upon hearing a case, the High Court is obligated to decide the question of law raised by the reference and pass judgment thereon and the Tribunal's order automatically stands modified by the order of the High Court. This is an extremely significant aspect as it is the essence of an appellate order that it ***per se*** modifies the order of the lower forum, or, in other words, merges into it. As pointed out above, this particular aspect of Section 133 *ibid* was introduced for the first time by way of the 2005 amendment and was not present in Section 66 of the Act, 1922 during the brief period between 1971 and 1974 when the law was similar to the present one. It is therefore

clear beyond any doubt that the remedy under Section 133 *ibid* is appellate in nature and must be construed and applied as such. The language of the law must be given effect to, rather than unnecessarily restricting the scope of the jurisdiction on the basis of judgments from an era when the law and circumstances were completely different. The civilized world, including our own country, has been moving towards greater rights for citizens over the last century to the extent that the privilege of a fair trial has now become a constitutional right. In these circumstances, it is not appropriate to restrict the scope of a legal remedy available to citizens on the basis of old decision, especially when the language of the law is clearly pointing in the opposite direction.

51. Before parting with the subject, a brief reference to the law in England may also be useful for purposes of comparison. A provision for statement of a case for the opinion of the High Court in tax matters has been in existence in English law since at least 1890. Section 59 of the Taxes Management Act, 1880 *(the Act, 1880)*, on which Section 66 of the Act, 1922 was presumably based, read as under:-

> "***59. Commissioners may be required to state a case for opinion of High Court.***
>
> *(1.) Immediately upon the determination of any appeal under the Income Tax Acts by the General Commissioners, or by the Special Commissioners, or any appeal under the Acts relating to the inhabited house duties by the General Commissioners, the appellant or the surveyor may, if dissatisfied with the determination as being erroneous in point of law, declare his dissatisfaction to the Commissioners who heard the appeal, and having so done may, within twenty-one days after the determination, require the Commissioners, by notice in writing addressed to their clerk, to state and sign a case for the opinion of the High Court thereon. The case shall set forth the facts and*

the determination, and the party requiring the same shall transmit the case, when so stated and signed, to the High Court within seven days after receiving the same, and shall previously to or at the same time give notice in writing of the fact of the case having been stated on his application, together with a copy of the case to the other party, being the surveyor, or the appellant, as the case may be.

(2.) In relation to cases to be so stated, and the hearing thereof, the following provisions shall have effect:

(a.) The party requiring the case shall, before he shall be entitled to have the case stated, pay to the clerk to the Commissioners a fee of twenty shillings for and in respect of the case:

(b.) The High Court shall hear and determine the question 'or questions of law arising on a case transmitted under this Act, and shall thereupon reverse, affirm, or amend the determination in respect of which the case has been stated, or remit the matter to the Commissioners with the opinion of the High Court thereon, or may make such other order in relation to the matter, and may make such order as to costs as to the High Court may seem fit, and all such orders shall be final and conclusive on all parties :

(c.) The High Court shall have power, if they think fit, to cause the case to be sent back for amendment, and thereupon the same shall be amended accordingly, and judgment shall be delivered after it shall have been amended:

(d.) The authority and jurisdiction hereby vested in the High Court shall and may (subject to any rules and orders of the High Court in relation thereto) be exercised by a judge of the High Court sitting in chambers, and as well in vacation as in term time:

> *(e.) The High Court may from time to time, and as often as they shall see occasion, make and alter rules and orders to regulate the practice and proceedings in reference to cases stated under this Act.*
>
> *(3.) An appeal shall lie from the decision of the High Court, or of any judge thereof, upon any case stated under the above provisions to Her Majesty's Court of Appeal, and from thence to the House of Lords, and from the decision of the Court of Session, as the Court of Exchequer in Scotland, upon any case so stated to the House of Lords.*
>
> *(4.) The fact that a case so stated is pending before the High Court therein referred to shall not in any way interfere with the payment of the income tax or inhabited house duty according to the assessment of the Commissioners by whom the case was stated, but the income tax or inhabited house duty shall be paid according to such assessment, as if the case had not been required to be stated, and in the event of the amount of assessment being altered by the order or judgment of the High Court the difference in amount, if too much has been paid, shall be repaid with such interest (if any) as the High Court may allow, and if too little, shall be deemed to be arrears (except so far as any penalty is incurred on account of arrears), and shall be paid and recovered accordingly."*

As stated earlier, Section 59 of the Act, 1880 was similar, but not identical, to Section 66 of the Act, 1922. One of the obvious differences was that under Section 59 *supra*, the statement of the case for the opinion of the High Court was not just limited to questions of law but covered any questions arising out of the determination. A provision similar to Section 59 of the Act, 1880 remained in the English Statute books till 01.04.2009 when Section 707 of the Income Tax Act, 2007 *(statement of case by Tribunal for opinion of High Court or Court of Session)* was repealed to provide for a direct appeal to an upper tier tribunal.

52. The position in England was settled very early in the case of **Attorney General Vs. Avelino Aramayo and Company ([1925] 1 KB 86)** wherein Lord Atkin held at pages 108-109 as under:-

> *"…..As I read the statutory procedure, which at that time depended on s. 59 of the Taxes Management Act, 1880, the Court is not limited to particular questions raised by the Commissioners in the form of questions on the case. All that the section provides is that if the appellant is dissatisfied with the determination as being erroneous in point of law he may require the Commissioners to state and sign a case, and the case shall set forth the facts and the determination, and upon that being done the Court has to decide whether or not the determination was or was not erroneous in point of law, and any point of law that can be raised properly upon the facts found by the Commissioners the Court can decide. No doubt there may be a point of law in respect of which the facts have not been sufficiently found, and if that point of law was not raised below at all and cannot be raised without further facts on either side, the Court may very well refuse to give effect to it, and Either (sic) party may have precluded themselves by their conduct from raising in the Court of Appeal the point of law which they deliberately refrained from raising down below. Those questions, of course, have to be considered. But apart from that, if the point of law or the erroneous nature of the determination of the point of law is apparent upon the case as stated, and there are no further facts to be found, the Court can give effect to the law."*

The Judgment of the Court of Appeals was upheld by the House of Lords in **Aramayo Francke Mines, Limited Vs. Eccott ([1925] A.C. 634)** and was consistently followed by the Courts in England. The proposition is that if a question arose from the facts as stated and no new facts were necessary for determination of the same, there is no reason why it should

not be entertained by the High Court regardless of whether it was raised before the lower forum.

53. The above is a brief conspectus of the law as it originally stood, as it has evolved over the years and as it stands today.

54. We now advert to an analysis of Section 79 of the Ordinance, 1979 which read as under:-

> *79.* ***Income from transactions with non-residents****.- Where business is carried on between a resident and a non-resident and it appears to the Income-tax Officer that, owing to the close connection between them, the course of business is so arranged that the business transacted between them produces to the resident either no profits or less than the ordinary profits which might be expected to arise in that business, the Income-tax Officer shall determine the amount of profits which may reasonably be deemed to have accrued to the resident and include such amount in the total income of the resident.*

Section 79 *ibid* pertained to the concept of transfer pricing which is the pricing of a transaction between related parties. While transfer pricing in itself is not illegal or unlawful, transfer mispricing, also known as abusive transfer pricing or transfer pricing manipulation **is**. When two unrelated companies transact with each other, the transaction generates a market price based on the forces of demand and supply. This is called arm's length trading. However, when two related companies enter into a transaction with each other, the price in such transaction may be distorted due to various factors. Sometimes the prices are distorted in order to minimize the overall tax bill of the corporate group. For example, one company *(in a jurisdiction with higher tax rates)* may pay a higher price for a good from its associated company *(in a jurisdiction with zero/low tax rates)* so that most of the profit of the corporate group is recorded in the country with

zero/low tax rates. In such situations, companies are not dealing with each other at arm's length. This principle entails that transfer prices must be comparable to the prices that unrelated parties would have charged in the same or similar circumstances. It requires a comparability analysis, whereby transactions between unrelated parties are identified which may be compared to the transactions between related parties in order to determine whether transfer mispricing has taken place. For this exercise, transfer pricing documentation is required which is the information and documents relied upon by taxpayers while determining the transfer price of their transaction.

55. This is the menace that Section 79 of the Ordinance, 1979 was meant to curb. According to Section 79 *ibid*, the Income Tax Officer was to determine the amount of profits which may reasonably be deemed to have accrued to the resident and include such amount in the total income of the resident if the following elements were present in a transaction:-

i. There was a resident and a non-resident;

ii. There was a close connection between them;

iii. Business was carried on between them; and

iv. The course of business was so arranged that the business transacted between them produced to the resident either:-

(a) no profits; or

(b) less than the ordinary profits which might be expected to arise in that business.

For the Income Tax Officer to exercise powers under Section 79 of the Ordinance, 1979, all the above elements were required to be present. The absence of any one of them rendered the section inapplicable to a case. As

regards the first element, "resident" was defined in Section 2(40) of the Ordinance, 1979 as follows:-

> *(40) "resident", in relation to any income year, means-*
>
> *(a) an individual, who-*
>
> *(i) is in Pakistan in that year for a period of, or for periods amounting in all to, one hundred and eighty two days or more; or*
>
> *(ii) is in Pakistan for a period of, or periods amounting in all to, ninety days or more in that year and who, within the four years preceding that year, has been in Pakistan for a period of, or periods amounting in all to, three hundred and sixty-five days or more; or*
>
> *(b) a Hindu undivided family, firm or other association of persons, the control and management of whose affairs is situated wholly or partly in Pakistan in that year; or*
>
> *(c) a Pakistani company or any other company, the control and management of whose affairs is situated wholly in Pakistan in that year;*

Section 2(30) of the Ordinance, 1979 defined "non-resident" as *"a person who is not resident"*, i.e. a person who did not fall within the definition of resident given in Section 2(40) *supra.* The second element, "close connection" was not defined in the Ordinance, 1979 and has to be understood in the context of the concept of transfer pricing. Residents and non-residents could be related or closely connected in various ways:- (i) the resident could be directly or indirectly controlled by the non-resident, for example, the resident may be a subsidiary and the non-resident the parent/holding company; (ii) the non-resident may be directly or indirectly controlled by

the resident, for example, the non-resident may be a subsidiary and the resident the parent/holding company; or (iii) the resident and non-resident were directly or indirectly controlled by a common person, for example, the resident and non-resident were both subsidiaries while the common person was the parent/holding company. Coming to the third element, "business" was defined in Section 2(11) of the Ordinance, 1979 thus *"includes any trade, commerce or manufacture, or any adventure or concern in the nature of trade, commerce or manufacture."* The use of the word "trade" was wide enough to cover any buying and selling of goods and services. Since certain facts are undisputed and therefore the first three elements stand proved, we deem it expedient to discuss the same before moving onto the fourth element which is contentious. First, Squibb Pakistan and Syngenta Pakistan fall within Section 2(40)(c) of the Ordinance, 1979 and are/were therefore residents. This fact is recorded in their respective assessment orders, which they do not dispute. It is also undisputed that Squibb International and Ciba Geigy are non-residents. Secondly, there is a close connection between each resident and non-resident; Squibb International and Ciba Geigy are the parent companies of Squibb Pakistan and Syngenta Pakistan respectively. This fact was mentioned in the assessment orders and not controverted by the assessees. The resident assessees also accept that they purchased various pharmaceutical raw materials from the non-residents for a certain amount of consideration which constitutes "trade" and therefore fell within the definition of "business", ergo business was carried on between the residents and non-residents. Thus the sole issue that remains is whether the course of business was so arranged that the business transacted between the resident and non-resident produced to the resident less than the ordinary profits which might be expected to arise in that business *(note:- the issue of no*

profits does not arise in these cases as it is undisputed that the resident companies did earn profits for the assessment years in question).

56. It is this fourth element that clinches the issue of transfer pricing. Where the pricing of transactions between closely connected parties is not at arm's length, this may result in reduced *(or no)* profit for the resident taxpayer, thus the tax authorities are empowered under Section 79 of the Ordinance, 1979 to adjust the profit upwards and impose tax accordingly. Section 79 *ibid* provides "*Where business is carried on between a resident and a non-resident and it* ***appears*** *to the Income-tax Officer that..." [emphasis supplied]*. In other words, in order to invoke Section 79 *ibid*, the Income Tax Officer had to see whether *prima facie*, the course of business was so arranged between the closely connected resident and non-resident that the business transacted between them produced to the resident less than the ordinary profits which might be expected to arise in that business. For this purpose the Income Tax Officer needs to base such *prima facie* opinion upon evidence gathered in a reasonable investigation showing that his proposed method of pricing was the most appropriate for determining the arm's length transfer price. The burden would then shift to the taxpayer to establish that the transfer price of the transaction with its closely connected non-resident was indeed at arm's length based upon another pricing method which was more appropriate in the facts and circumstances of the case. This is to be proven from *inter alia* the transfer pricing documentation.

57. Coming to the facts of the cases; the Income Tax Officers relied upon the accounts provided by the resident companies compared to their previous years and the details of import(s) of ingredients for its pharmaceuticals from the non-resident associate concerns as furnished by the assessees compared with the prices of imports of parallel companies from other sources, duly certified by the Assistant Drugs

Controller, and concluded that the raw material ingredient was imported by Squibb Pakistan and Syngenta Pakistan at a higher price, thereby reducing the profits that would have otherwise accrued to them and have adjusted the tax payable accordingly. What the Income Tax Officer(s) failed to show was that the **course of business was so arranged** between the closely connected resident and non-resident that the business transacted between them produced to the resident less than the ordinary profits which might have been expected to arise in that business. The Officer(s) merely tabulated the differences in the import prices without giving any precise details regarding the parallel cases upon which he placed reliance nor did he provide any *prima facie* justification that the pricing method adopted *(if any)* by him was the most apt in the peculiar facts and circumstances of the case. The reason cited by the Income Tax Officer that the raw materials imported by parallel companies from other sources fulfill the requirements, as laid down in the Drugs Act, 1976 and cleared by the Assistant Drugs Controller, is not to our mind sufficient to establish *prima facie* transfer mispricing. Various factors affect the price of a good and mere approval of some authority may mean that it *(the good)* has met the minimum specifications for the ingredient laid down in law but does not necessarily mean that the said goods can be treated at par with the goods imported by the resident companies for the purposes of pricing. Therefore we do not find that the Income Tax Officer had conducted a reasonable investigation or offered *prima facie* evidence based on an appropriate pricing method adopted by him, thereby showing transfer mispricing and resultant depletion in profits of the resident companies. Hence the burden never shifted to the resident taxpayers to prove that the pricing method adopted by the Income Tax Officer was not appropriate in the circumstances and that they *(the residents)* had duly conducted a comparability analysis of the pharmaceutical ingredients in question in

the light of which their transfer price was at arm's length. Therefore the Income Tax Officer erred in invoking Section 79 of the Ordinance, 1979 and adjusting the profit of the resident companies.

58. In light of the above, we find that Section 79 of the Ordinance, 1979 was not attracted to the case of Squibb Pakistan and Syngenta Pakistan, therefore, Civil Appeal Nos.622 and 623 of 2008 are allowed and the impugned judgements are set aside while Civil Appeal Nos.1403 and 1404 of 2009 are dismissed.

CHIEF JUSTICE

JUDGE

JUDGE

Announced in open court

on **26.4.2017** at **Islamabad**
Approved For Reporting
Waqas Naseer/*