

JUDGMENT SHEET.

IN THE ISLAMABAD HIGH COURT, ISLAMABAD.
JUDICIAL DEPARTMENT.

Writ Petition No. 67 of 2016.

M/s Bestway Cement Limited
Vs.
Additional Commissioner Inland Revenue, etc.

Petitioner's by. ***M/s Hafiz Muhammad Idrees,
Muhammad Mohsin Nazir, Mian
Tauqeer Aslam, Usman Shaukat, Ch.
Naeem Ul Haq and Mazhar Ul Haq
Hashmi, Advocates in their respective
petitions.***

Respondent's by. ***Hafiz Munawar Iqbal, Babar Bilal and
Riaz Hussain Azam Bopara, Advocates.***

Date of hearing. ***07.11.2017.***

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AAMER FAROOQ, J.- This judgment shall decide the instant petition as well as petitions mentioned in the schedule "A" attached herewith as common questions of law and facts are involved.

02. The petitioners, in all the petitions, are the Income Tax assesses. In this behalf they are aggrieved of notices issued by the respondent department under section 122(9) read with section 122(5A) of the Income Tax, Ordinance, 2001, whereby information has been sought alongwith record and documents with respect to the tax returns for year 2010-11-12.

03. Learned counsel for the petitioners, inter alia, contended that the notices have been issued under section 122(5A) of Income Tax Ordinance, 2001 and certain information has been sought with

respect to the tax returns for various years (Tax years 2010,2011 & 2012). In this behalf it was contended that amendment was made in Section 122(5A) *ibid* in the year 2012, through Finance Act, 2012 whereby, the assessment could be modified or changed after making inquiries as necessary; that prior to the said amendment Commissioner could only modify the assessment on the basis of available record if it appeared that the assessment is erroneous or prejudicial to the interest of revenue. It was further contended that retrospective effect cannot be given to the amendment made regarding conducting of inquiry. Reliance was placed on cases reported as ***"The Commissioner of Income tax v. M/s Eli Lilly Pakistan (Pvt.) Ltd."*** (Civil appeal No. 778 of 2005), ***"Messrs Allied Engineering Services Ltd v. Commissioner of Income tax "*** (2015 PTD 2562) and ***"The Commissioner Inland Revenue v. Maj.Gen (R) Dr. C.M. Anwar etc "*** (PTCL 2014 CL. 608).

3. Learned Counsel for the respondent department, *inter alia*, contended that the amendment made is procedural in nature therefore, shall operate retrospectively. Reliance was placed on cases reported as ***"Commissioner of Income Tax, Companies-II and another v. Hamdard Dawakhana (Waqf) Karachi "*** (PLD 1992 SC 847), ***" S.M Junaid v. President of Pakistan "*** (PLD 1981 Supreme Court 12), ***"Commissioner of Income Tax v. Olympia "*** (1988) 57 Tax 46 (H.C. Kar).

4. The petitioners are aggrieved of notices issued u/s 122 (5A) of Income Tax Ordinance, 2001 to the extent that they are seeking information and record to examine whether the returns filed and assessment orders passed are erroneous and / or prejudicial to revenue. Section 122 (5A) in its original form did not provide the Competent Authority with any power to make inquiries or call for information but could only examine the returns and the assessment order to determine if the same is erroneous or prejudicial to the interest of revenue. In 2012 amendment was

made and the Competent Authority was provided with power to make inquiries as deemed necessary. In its present form section 122(5A) *ibid* reads as follows:

"[(5A) Subject to sub-section (9), the Commissioner may after making, or causing to be made, such enquiries as he deems necessary,]amend, or further amend, an assessment order, if he considers that the assessment order is erroneous in so far it is prejudicial to the interest of revenue.]

5. The sole question for determination before this Court is whether the amendment made in said section in 2012 through Finance Act, 2012 regarding making of inquiries shall operate prospectively or retrospectively. The amendment incorporated in Section 122(5A) *ibid* is procedural in nature as it provides power to the Competent Authority to make inquiries as it deems necessary, however, it affects the substantive rights of the assessee regarding the modification or change in the assessment order. In such like cases where any amendment impacts the substantive rights it is an established principle that the amendment/ law operates prospectively. The Hon'ble Lahore high court in case reported as ***"The Commissioner Inland Revenue v. Maj.Gen (R) Dr. C.M. Anwar etc "*** (PTCL 2014 CL. 608) held that it is a trite law that even procedural law cannot take away vested rights by applying it retrospectively unless such intention of legislature is expressed in unequivocal terms; similarly the Hon'ble Sindh High Court in case titled as ***" Messrs Allied Engineering Services Ltd v. Commissioner of Income tax "*** (2015 PTD 2562) while examining the operation/ applicability of section 122(5A) *ibid*, held that the same operates prospectively and not retrospectively. In case reported as ***"The Commissioner of Income tax v. M/s Eli Lilly Pakistan (Pvt.) Ltd "*** (2009 SCMR 1279), it was held that section 122 operates prospectively, while reaching the conclusion the august Apex Court relied upon passage from Maxwell on Interpretation of Statutes 10th edition 1953, in which it was provided that where rights and procedure are dealt with together; the intention of the

legislature may well be that old rights are to be determined by the old procedure and that only new rights under the constituted section are to be dealt with by the new procedure. Similarly in case reported as ***“Zakaria H.A. Sattar Bilwani v. I.A.C of Wealth Tax, Karachi (2003) 87 Tax 113 (S.C Pak)*** it was observed that where any statute affects substantive rights it would operate prospectively unless by expressed enactment or necessary intendment retrospective operation has been given. Similar view was expressed in cases reported as ***“ Board of Revenue, Islamabad v. New Ammur Industries, Lahore” (2010) 101 Tax 193 (S.C Pak), “Caltex Oil (Pak) Ltd v. Commissioner of Income Tax, Companies-II Karachi” (2007) 95 Tax 41 (H.C Kar.).*** Reliance is also placed on case reported as ***“Monnoo Industries Ltd v. Commissioner of Income Tax, Lahore” (2001) 84 Tax 86 (H.C Lah.).*** In case reported as ***“Dr. Habib ur Rehman v. Quaid-e-Azam University” (2012 CLC 533),*** it was observed as follows:-

“In fact, the regulations operate retrospectively unless there is specific bar against it. The only exception to the retrospective operation of a procedural law is that if by giving it a retrospective operation, the vested right of a party is impaired then to that extent it operates prospectively. It has repeatedly been held that the courts while interpreting a law do not legislate or create a new law or amend the existing law. The Courts through interpretation only declare the two meanings of law which already existed”.

6. Similar view was expressed by the Division Bench of Hon’ble Sindh in case reported as ***“Niaz Muhammad v. Federation of Pakistan” (2008 PTD 1517)*** and it was observed that in certain cases if procedural law affects vested right it operates prospectively and not retrospectively. In case reported as ***“Hakim Ali Zardari v. The State” (PLD 1998 SC 1)*** the august apex Court observed that procedural statute operates retrospectively unless

the same affects an existing right on the date of promulgation or causes prejudice to a substantive right. It was also observed that a vested right is to be protected in all situations. The Hon'ble Supreme Court of Pakistan in case reported as "**Adnan Afzal v. Capt. Sher Afzal**" (PLD 1969 SC 187) observed as follows:-

"The general principle with regard to the interpretation of statutes as laid down in the well known case of the Colonial Sugar Refining Company Limited v. Irving 1901 A C 369 is that "if the matter in question be a matter of procedure only", the provisions would be retrospective. "On the other hand, if it be more than a matter of procedure, if it touches a right in existence at the passing of the Act", then "in accordance with a long line of authorities extending from the time of Lord Coke to the present day", the legislation would not operate retrospectively, unless the Legislature had either "by express enactment or by necessary intendment" given the legislation retroactive effect. To the same effect are the observations of Jessel, Master of the Rolls, in the case of In re : Joseph Suche & Co. Limited (1875) 1 Ch. D. 48 where it was observed that as "a general rule when the Legislature alters the rights of parties by taking away or conferring any right of action, its enactments, unless in express terms they apply to pending actions, do not affect them. It is said that there is one exception to that rule, namely, that, these enactments merely affect procedure and do not extend to rights of action, they have been held to apply to existing rights." The next question, therefore, that arises for consideration is as to what are matters of procedure. It is obvious that matters relating to the remedy, the mode of trial, the manner of taking evidence and forms of action are all matters relating to procedure. Crawford too takes the view that questions relating to jurisdiction over a cause of action, venue, parties, pleadings and rules of evidence also pertain to procedure, provided the burden of proof is not shifted. Thus a statute purporting to transfer jurisdiction over certain causes of action may operate retroactively. This is what is meant by saying that a change of forum by a law is retrospective being a matter of procedure only. Nevertheless, it must be pointed out that if in this process any existing rights are affected or the giving of retroactive operation cause inconvenience or injustice, then the Courts will not even in the case of a procedural statute, favour an interpretation giving retrospective effect to the statute. On the other hand, if the new procedural statute is of such a character that its retroactive application will tend to promote justice without any consequential embarrassment or detriment to any

of the parties concerned, the Courts would favorably incline towards giving effect to such procedural statutes retroactively”.

7. In view of the above case law it is clear that any amendment even though procedural in nature which affects the vested rights of any person operates prospectively and not retrospectively. The amendment made in section 122(5A) *ibid* provides power to the Commissioner to make inquiries as he deems fit. The consequence of these inquiries is that assessment order can be revised/modified which is a substantive right of an assessee. Prior to amendment in 2012 the assessment could only be revised only if the same appeared to be erroneous or prejudicial to the revenue and no information could be sought to determine the same. The new procedure which allows Commissioner to make inquiries directly affects the existing right of an assessee regarding modification or revision in assessment, hence it shall operate prospectively.

8. In view of the above, the instant petition as well as the petitions mentioned in the Schedule “A” are allowed and the impugned notices are set-aside however, it is observed that respondent authority may proceed against the petitioners under section 122 (5A) in accordance with the procedure as it existed prior to the amendment made in 2012.

(AAMER FAROOQ)
JUDGE

Announced in open Court on the 26th day of December, 2017.

JUDGE

Shakeel Afzal

Approved For Reporting