IN THE HIGH COURT OF SINDH, KARACHI
ITRA No. 190 of 2012

Date Order with signature of Judge

Present: **Munib Akhtar & Zulfiqar Ahmad Khan, JJ.**

For hearing of main case
Dates of hearing: 10, 11, 12, 13 and 17.11.2015 and
25.01 and 08.02.2016

Advocates for the Department:
Mr. Muhammad Siddique Mirza
Mr. Kafeel Ahmed Abbasi
Mr. Jawaid Farooqui
Mr. Amjad Javed Hashmi
Mr. Atif Awan

Advocates for the taxpayers:
Mr. Arshad Siraj
Mr. Iqbal Salman Pasha
Ms. Lubna Parvez
Mr. Abdul Sattar Pirzada
Mr. Anwar Kashif a/w Mr. Usman Alam
Mr. Akhtar Ali Mahmud

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Munib Akhtar, J.: By this common judgment we intend disposing off the Income Tax References and constitutional petitions listed in para 33 below. The tax references have all been filed by the tax authorities and in those, the taxpayers are the respondents. In the constitutional petitions, the position is of course reversed. It will be convenient to refer to the respective parties collectively, i.e., to the tax authorities as the "Department" and to the taxpayers as the "Taxpayers".

2. The issues that arise for determination can be stated in the form of the questions of law proposed by the Department in the tax references. These questions, as taken from ITRA 190/2012, are as follows:

> "(1) Whether on the facts and circumstances of the case the learned Appellate Tribunal Inland Revenue was justified to annul the order passed u/s 66A of the repealed Income Tax Ordinance, 1979 without considering the protection given in the case of *Commissioner of Income Tax v. Eli Lilly Pakistan (Pvt) Ltd* (2009) 100 Tax 81 (SC) [2009 SCMR 1279] against the lacunae hindering enforcement of the repealed Income Tax Ordinance, 1979?
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> (2) Whether on the facts and circumstances of the case the learned Appellate Tribunal Inland Revenue was justified holding that the order passed u/s 66A is barred by time without considering the exclusion of time elapsed between the decisions of the High Court of Sindh in *Honda Shahra-e-Faisal Shahrah-e-Faisal v Commissioner Income Tax*

2005 PTD 1316 and that of the Supreme Court in *Commissioner of Income Tax v Eli Lilly Pakistan (Pvt) Limited* (2009) 100 Tax 81?"

3. The questions arise in the following circumstances. The Income Tax Ordinance, 2001 ("2001 Ordinance"), which replaced the Income Tax Ordinance, 1979 ("1979 Ordinance") came into effect from 01.07.2002. This meant (in general and as here relevant), and subject to what is further stated below, that the 2001 Ordinance applied in relation to income earned in years on or after 01.07.2002. For income earned in years up to 30.06.2002 (again in general and as here relevant, and subject to what is further stated below), the 1979 Ordinance was applicable. To put the matter formally, the 1979 Ordinance applied up to the income year 2001-2002 (which would have corresponded to an assessment year 2002-2003). The 2001 Ordinance applied from the tax year 2003 onwards.

4. Section 66A of the 1979 Ordinance allowed for the reopening of an assessment if the assessment framed was "erroneous in so far as it is prejudicial to the interest of the revenue". A similar provision was inserted early on as subsection (5A) of s. 122 of the 2001 Ordinance, by the Finance Act, 2003. It will be convenient to set out these provisions at the outset. Section 66A, as it stood at the time of the repeal of the 1979 Ordinance, provided as follows:

> "66A. **Powers of Inspecting Additional Commissioner to revise Deputy Commissioner's order**.- (1) The Inspecting Additional Commissioner may call for and examine the record of any proceedings under this Ordinance, and if he considers that any order passed therein by the Deputy Commissioner is erroneous in so far as it is prejudicial to the interests of revenue, he may, after giving the assessee an opportunity of being heard and after making, or causing to be made, such enquiry as he deems necessary, pass such order thereon as the circumstances of the case justify, including an order enhancing or modifying the assessment, or cancelling the assessment and directing a fresh assessment to be made.
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> (1A) The provisions of sub-section (1) shall, in like manner, apply,-
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> (a) where an appeal has been filed under sections 129, 134 and 137, or an appeal has been filed under section 136, against an order passed by the Deputy Commissioner; and
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> (b) where an appeal referred to in clause (a) has been decided, in respect of any point or issue which was not the subject matter of such appeal.
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> (2) No order under sub-section (1) shall be made after the expiry of four years from the date of the order sought to be revised.
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> *Explanation*.- For the purpose of this section, an order prejudicial to the interests of revenue shall include an order passed without lawful jurisdiction."

Subsection (5A) and certain other subsections of s.122, as they stood on 01.07.2003, were as follows:

> "**122. Amendment of assessments.-** …
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> (2) An assessment order shall only be amended under subsection (1) within five years after the Commissioner has issued or is treated as having issued the assessment order on the taxpayer.
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> …
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> (4) Where an assessment order (hereinafter referred to as the "original assessment") has been amended under sub-section (1) or (3), the Commissioner may further amend, as many times as may be necessary, the original assessment within the later of –
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> (a) five years after the Commissioner has issued or is treated as having issued the original assessment order to the taxpayer; or
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> (b) one year after the Commissioner has issued or is treated as having issued the amended assessment order to the taxpayer.
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> …
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> (5A) Subject to sub-section (9), the Commissioner may amend, or further amend, an assessment order, if he considers that the assessment order is erroneous in so far it is prejudicial to the interest of revenue.
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> (5B) Any amended assessment order under sub-section (5A) may be passed within the time-limit specified in sub-section (2) or sub-section (4), as the case may be.
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> …
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> (9) No assessment shall be amended, or further amended, under this section unless the taxpayer has been provided with an opportunity of being heard."

5. After the 2001 Ordinance came into effect, the Department started issuing notices to taxpayers under s. 122(5A) in respect of assessments made under the 1979 Ordinance, in relation to matters that would have fallen within the scope of s.66A had the latter statute continued to remain in the field. These notices were challenged by the taxpayers in this Court by way of constitutional petitions on the ground that an attempt was being made to give retrospective effect to the 2001 Ordinance (and in particular, s.122(5A)). By a common judgment dated 02.03.2005 reported as *Honda Shahra-e-Faisal Shahrah-e-Faisal Association of Persons and others v. Regional Commissioner of Income Tax and others* 2005 PTD 1316 (herein after "*Honda Shahra-e-Faisal*"), a learned Division Bench was pleased to allow the petitions. The operative part of the judgment (para 14) stated as follows (emphasis supplied):

> "14. The facts and circumstances in the present petitions being squarely similar, we are persuaded to agree with the contention of Mr. Mansoorul Arfin, learned Counsel for the Petitioners that the provision contained in subsection (5-A) of section 122 of the Income Tax Ordinance, 2001, inserted with effect from 01.7.2003, is not retrospective in operation. Consequently, the assessments finalized before 01.7.2003 cannot be reopened/revised/amended in exercise of jurisdiction under the above provisions. *Admittedly, all the notices impugned in these petitions are in respect of the assessments finalized before 01.7.2003*, and consequently all the impugned notices are without jurisdiction, illegal and void ab initio. All the notices impunged in these petitions are therefore, hereby quashed along with proceedings in pursuance thereof. The petitions are allowed accordingly."

6. It appears that the decision in *Honda Shahra-e-Faisal* was followed by other High Courts as well. The Department preferred appeals to the Supreme Court, where *Honda Shahrah-e-Faisal* was the lead case. The Supreme Court, by a common judgment dated 22.06.2009 and reported as *Commissioner of Income Tax v. Eli Lilly Pakistan (Pvt) Ltd.* 2009 SCMR 1279, 2009 PTD 1392, (2009) 100 Tax 81 (herein after "*Eli Lilly*") upheld the decision in *Honda Shahrah-e-Faisal* but subject to certain observations, which are crucial for present purposes. It suffices to set out paras 54, 57 and 64 (to the extent presently material) from *Eli Lilly* (emphasis supplied):

> "54. A perusal of section 65 of the repealed Ordinance shows that a period of five years was provided for issuing notice to an assessee to initiate proceedings for additional assessment in the cases of escapement of income from assessment, etc. Time-limit of five years, with certain changes is also envisaged under subsections (2) & (4) of section 122 of the Ordinance within which power to amend an assessment may be exercised. Keeping the former and the present states of law in view, the irresistible conclusion appears to be that the assessments completed under the repealed Ordinance ought to be governed by the old law while the assessments of the post-enforcement period of the Ordinance are to be governed by the new law. This treatment of the two sets of assessments would also avert the anomaly that would be created if the assessments of the period up to 30th June, 2003 were excluded from the operation of the previous law on account of its repeal, and not included in the new law on account of its being prospective in application. It appears that the Respondents have been trying to take advantage of the technicalities, but we are afraid, they must fail. If there cases do not fall within the ambit of provisions of section 122 on account of the same being prospective, they cannot exclude their assessments from the purview of section 65 of the repealed Ordinance merely because of the lapse of the draftsman who omitted subsection (1) of section 239 at the amendment stage. Had the provisions of subsection (1) of section 239 of the Ordinance continued on the statute book, there would have been no ambiguity and no difficulty at all. In that eventuality, the assessments up to the period ending on 30th June 2002 would be governed by the relevant provisions of the repealed Ordinance as if the Ordinance had not come into force.
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> 57. In the light of the above discussion, we uphold view of the Sindh High Court taken in Honda Shahra-e-Faisal and followed by the other High Courts as also the Income Tax authorities that the provisions of

> section 122 of the Ordinance are prospective in their application and do not apply to the assessment of a year ending on or before 30th June, 2002. On that account the appeals are bound to fail and the impugned judgments would be upheld. *However, the learned High Courts have not adverted to the question of treatment of assessments of the period preceding the enforcement of the Ordinance*. As already noted, section 65 of the repealed Ordinance provided a period of five years for additional assessment and such assessments were to be dealt with under the said provision in accordance with original section 239(1) of the Ordinance. The learned High Courts failed to take into consideration this aspect of the matter and did not direct that the assessments completed under the repealed Ordinance would be subject to the provisions of the said Ordinance, as originally provided in unamended section 239(1), but not clearly and properly provided in the Ordinance at the amendment stage. We fill this lacuna in the impugned judgments and direct that *the assessment of any year ending on or before 30th June, 2002 would be governed by the repealed Ordinance and shall be dealt with as if the Ordinance had not come into force*….
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> 64. In the result, the titled appeals and petitions will be governed by the following orders:-
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> (1) Civil Appeals Nos.1617, 1622-1624, 2673 & 2675-2678 of 2006, and Civil Appeals Nos.497, 498, 911, 916, 1002, 1003 and 2282-2292 of 2008 are dismissed as withdrawn *with the observation that the assessment of any income year ending on or before 30th June 2002 shall be governed by the repealed Ordinance as if the Ordinance had not come into force as held in Para. 54 above*…."

7. After the judgment of the Supreme Court the Department issued notices under s.66A in respect of assessments framed under the 1979 Ordinance. These notices were challenged by the taxpayers on the ground that they were beyond limitation, i.e., beyond the four year period set out in subsection (2) of s.66A. (Other objections were also taken, but they are not relevant for present purposes, save in one case which will be dealt with below.) The Appellate Tribunal upheld the objection as to limitation. Different orders were made, against which the Department has filed the Income Tax References that are before us. It suffices to refer only to the order of the Tribunal challenged in ITRA 212/2011, since it sets out fully the reasoning that found favor with it. The learned Tribunal held as follows:

> "5. We have considered the contentions made from both the sides and have also perused provisions of relevant Section 66A and the decision of the Hon'ble Supreme Court of Pakistan. We have found that the said section has specifically provided time limits of four years for amending the order passed by assessing officer considered to be erroneous in so far as prejudicial to the interest of revenue by using the word "shall" making limitation mandatory. Even otherwise while perusal of the above referred order of the Hon'ble Supreme Court of Pakistan, we have no where found that the Hon'ble Supreme Court has condoned the limitation period in any of the matter nor discussion is regarding the provisions of Section 66A of the Ordinance, which are totally different from Section 65 of the repealed Ordinance, 1979. We have found that only in para 53 while referring the arguments of the representative of the department the Section 66A has been referred

> only for the purposes of distinguishing the application of Section 122(5A) of the Ordinance, 2001. We have no where found in this judgment of the Hon'ble Supreme Court of Pakistan holding that any provisions of law can be invoked outside the time limit provided under the law. In para 54 of the judgment while referring various cases the Section 66A has been referred but the reference in this regard in no way helps the department as neither any direction in this regard has been given nor any observation is regarding the condonation of the time limitation provided under the law. In this case admittedly the original order under Section 62 of the repealed Ordinance 1979 have been passed by the DCIT on 28th June, 2005. While the order under Section 66A mentioned at the title of the order under Section 66A of the Income Tax Ordinance, 2001 and also in the concluding para mentioning the order being amended under Section 122(5A) of the Ordinance, 2001, has been passed on 21.9.2010. While under subsection (2) of section 66A of the repealed Ordinance, 1979 invocation of the said Section 66A have become barred by time on 28.6.2009 and the notice under Section 66A has been issued on 22.6.2010 despite the facts that the above referred decision of the Hon'ble Supreme Court of Pakistan on the basis of which the order under Section 66A by the Additional Commissioner has been passed with the observation that this order is being passed in appreciation of the verdict of the Hon'ble Supreme Court of Pakistan and the date of the order has also been mentioned in next para as 22.6.2009. We therefore find force in the contention made by the learned Counsel for the Appellant that the order being passed after the time period provided under the mandatory provisions of law is without any jurisdiction and is therefore cancelled. The appeal filed by the assessee is allowed."

It was in these circumstances that the Income Tax References came to be filed. The constitutional petitions were filed directly in some of the cases to challenge the notices.

8. The matters were heard over several days and judgment reserved on 17.11.2015. Thereafter (and indeed, while judgment was under preparation) a decision of the Supreme Court came to our attention, being judgment dated 16.12.2015 in C.A. 1086/2009, titled *Commissioner of Income Tax Peshawar v. Islamic Investment Bank* (subsequently reported at 2016 SCMR 816). The judgment was made available on the website of the Supreme Court and that is how it came to our attention. It appeared to us that this judgment had a material bearing on the issues before us. We therefore felt it necessary to have the assistance of learned counsel in relation thereto. The matters that had been reserved were directed to be fixed for rehearing on 25.01.2016 and we apprised learned counsel of the judgment. (Some of the learned counsel were not yet aware of the same.) Learned counsel were heard on 08.02.2016 as to the scope and effect of the later judgment in relation to the issues raised in these matters, and judgment again reserved. We allowed learned counsel to file written submissions (limited to the scope and effect of the later judgment) and some of the learned counsel did so.

9. In view of the foregoing, the submissions by learned counsel are noted here in two parts: firstly, in relation to what learned counsel had to say as regards the issues raised, up to 17.11.2015, and secondly, what they had to submit as regards the scope and effect of the later judgment.

10. Mr. Siddique Mirza, learned counsel for the Department in some cases, read the questions of law raised by the Department and referred to the decision of this Court in *Honda Shahra-e-Faisal* and that of the Supreme Court in *Eli Lilly*. Learned counsel submitted that, at least in the tax references in which he appeared, the learned Appellate Tribunal had not recorded its own finding as to why the notices issued under s.66A of the 1979 Ordinance were time barred. Reference was made to ss. 66 and 160 of the 1979 Ordinance. Learned counsel also referred to *Eli Lilly*, especially at paras 54 and 57, and also to s. 239 of the 2001 Ordinance, both as originally enacted and then as substituted in 2002. Mr. Kafil Abbasi, learned counsel for the Department in ITRA 212/2011, submitted that in this case the assessment order was made on 28.06.2005 and the notice under s. 66A was issued on 22.06.2010. Learned counsel referred to the decision in *Honda Shahra-e-Faisal* (reading paras 10 and 11 thereof) and the judgment in *Eli Lilly* and submitted that the Supreme Court had saved s.66A of the 1979 Ordinance in terms of, and under, s. 239 of the 2001 Ordinance. Learned counsel submitted that after the decision of this Court in *Honda Shahra-e-Faisal* (which was announced on 02.03.2005), the Department stopped issuing notices under s. 122(5A) of the 2001 Ordinance. The judgment of the Supreme Court in *Eli Lilly* was announced on 22.06.2009. Learned counsel submitted that for purposes of determining limitation, the period between 02.03.2005 and 22.06.2009 was to be excluded. Thus, in the tax reference in which he appeared, the period of four years mandated by s. 66A(2) would have ordinarily expired on 27.06.2009, but if the excluded period was taken into consideration, the notice dated 22.08.2010 was within time. Learned counsel emphasized that no action had been taken in terms of s. 122(5A) of the 2001 Ordinance. Reliance was also placed on s. 160(b) of the 1979 Ordinance. Reference was also made to s. 62BB, inserted into the 1979 Ordinance in 2002.

11. Mr. Jawaid Faruqui, learned counsel who appeared for the Department in ITRA 51/2012 submitted that in this case, the return was for the assessment year 2001-2002 on self-assessment basis under s. 59(1) of the 1979 Ordinance. The assessment order was made on 30.06.2002 and the notice under s. 122(5A) issued on 08.05.2003. This notice was challenged in constitutional petition, which was allowed and the Department went in appeal to the Supreme Court. The subsequent (i.e., post *Eli Lilly*) notice under s. 66A was issued on 30.06.2010. Learned counsel submitted that while ordinarily the

four year period contemplated by s. 66A would start from 30.06.2002, the decision in *Eli Lilly* gave the Department a fresh cause of action and hence notices could be issued up to four years from 22.06.2009. On such basis, the notice was within time. Learned counsel also relied on the doctrine of merger and referred to certain case law in this regard. Other learned counsel appearing for the Department adopted the submissions by learned counsel as noted above.

12. Mr. Amjad Javed Hashmi, learned counsel appearing for the Department submitted that in *Eli Lilly*, the Supreme Court took note of a lacuna in the law, and it was to rectify the situation thereby created that para 57 of the judgment was directed. Learned counsel submitted that the notices earlier issued under s. 122(5A) should therefore, in the post *Eli Lilly* scenario, be deemed to be notices that had been issued under s. 66A of the 1979 Ordinance. It was on such basis that the periods of limitation ought to be considered. Thus, those notices under s. 122(5A), deemed to be notices under s. 66A, as were within the four year period ought to be regarded as validly issued and "saved" accordingly. Thus, in this petition, the assessment order was dated 24.0.2001 while the notice under s. 122(5A) was issued on 12.04.2004. This notice, post *Eli Lilly*, ought to be regarded as a notice under s. 66A and hence was within time on that basis.

13. For the Taxpayers, the case was opened by Mr. Arshad Siraj and Mr. Abdul Sattar Pirzada, who appeared in ITRA 190/2012. Learned counsel submitted that the assessment order was made on 29.05.2002, with the result that the four year period for issuing a notice under s. 66A expired on 28.05.2006. Learned counsel submitted that after the decision in *Eli Lilly* an attempt was made by the Department to use s. 66 as a "gateway" to justify the notice under s. 66A, which, as issued, would otherwise be patently beyond time. However, learned counsel submitted that s. 66 had nothing to do with s. 66A and on the face of it applied only to other provisions of the 1979 Ordinance. Learned counsel submitted that the first notice under s. 122(5A) of the 2001 Ordinance was issued on 30.12.2004. This was withdrawn and substituted by a subsequent notice dated 22.05.2007. Against the latter notice, a constitutional petition was filed (in this Court), which was allowed in terms of the decision in *Honda Shahra-e-Faisal*. Against this decision, the Department appealed to the Supreme Court, which disposed off the same in terms of its decision in *Eli Lilly*. Finally, the notice under s. 66A was issued on 20.06.2011. Learned counsel submitted that this narration made clear that the notice was hopelessly time barred. It was emphasized that if at all, the Department ought to have issued notices under s. 66A immediately after the decision in *Honda Shahra-e-Faisal*. It did not do so, but persisted in pursuing

its case under s. 122(5A). It was also submitted that in *Eli Lilly*, the Supreme Court did not at all extend the period of limitation. Learned counsel also relied on a decision of the Lahore High Court. As regards the point raised by Mr. Amjad Javed Hashmi and Mr. Akhtar Ali Mahmud, learned counsel submitted that this Court in *Honda Shahra-e-Faisal* had quashed the notices issued under s. 122(5A), and they had not at all been revived by the Supreme Court in *Eli Lilly*. Therefore, no question arose of considering them as having been issued under s. 66A (and "saved" on that basis) in light of the judgment of the Supreme Court.

14. Mr. Salman Pasha, learned counsel appearing in ITRA 195-197/2011 submitted that the notices were purportedly issued under s. 66A on 30.06.2010. However, learned counsel submitted, in addition to relying on *Eli Lilly*, that in fact the notices were never received by the assessee. Learned counsel submitted that this point had been accepted by the learned Appellate Tribunal. It was therefore contended that quite apart from the other grounds taken by the Taxpayers, in the foregoing tax references, there was an additional ground, of a complete failure and denial of the requirements of natural justice.

15. Ms. Lubna Parvez, learned counsel appearing in ITRA 212/2011 and other tax references, submitted that in that reference for the first time notice under s. 66A was issued after *Eli Lilly*, i.e., there had been no prior notice under s. 122(5A). Thus, it was contended, the four year period under s. 66A applied squarely and hence the notice was patently time barred. As regards the other tax references, learned counsel submitted that the judgment in *Eli Lilly* did not at all extend the period of limitation and in each of those cases, the notices were beyond time.

16. Mr. Kashif Mumtaz appeared for the petitioner (taxpayer) in C.P. D-2165/2010. The assessment order was made on 27.06.2001 and thus the four year period expired on 26.06.2005. The initial notice under s. 122(5A) was issued on 04.05.2004, whereas the notice under s. 66A after *Eli Lilly* was issued on 30.06.2010. Learned counsel submitted that the notices were beyond time.

17. Mr. Siddiq Mirza on behalf of the Department, and M/s Arshad Siraj, Salman Pasha and Anwar Kashif on behalf of the Taxpayers exercised the right of reply.

18. As regards the scope and effect of the later judgment of the Supreme Court, *Commissioner of Income Tax Peshawar v. Islamic Investment Bank*

2016 SCMR 816 (herein after referred to as "*Islamic Investment Bank*"), learned counsel for the Department referred to paras 10 to 13 thereof. Mr. Siddiq Mirza submitted that it was only the decision of this Court in *Honda Shahra-e-Faisal* that was declared to be *per incuraim*. It was submitted that the decision of the Supreme Court in *Eli Lilly* was not found to be *per incuriam*. However, Mr. Jawaid Faruqui submitted that the judgment in *Eli Lilly* had also been held to be *per incuriam*. This was because *Eli Lilly* had affirmed the decision in *Honda Shahra-e-Faisal* where it had been held that s. 122(5A) of the 2001 Ordinance did not have retrospective effect. However, a contrary view was taken by the Supreme Court in *Islamic Investment Bank*. Mr. Amjad Javed Hashmi was also of the view that the judgment had found *Eli Lilly* to be *per incuriam*. Reference was made to paras 13, 14 and 21 of the judgment in *Islamic Investment Bank*. Mr. Kafil Abbasi was of the view that the judgment later in time would prevail and submitted that the latter judgment had overruled the principle of prospective applicability of s. 122(5A) as had been accepted in *Eli Lilly*. For the Taxpayers, Mr. Salman Pasha and Mr. Anwar Kashif were of the view that the judgment in *Eli Lilly* had been found to be *per incuriam*. However, Ms. Lubna Parvez was of the view that it was only the decision of this Court in *Honda Shahra-e-Faisal* that had been found to be *per incuriam*. Mr. Arshad Siraj submitted that the notices presently in issue (under s. 66A) were issued after *Eli Lilly*. According to learned counsel, *Islamic Investment Bank* applied only to such notices as had been issued under s. 122(5A) (for assessments under the 1979 Ordinance) and were still "alive". Learned counsel referred to paras 13 and 21 of the judgment in *Islamic Investment Bank*.

19. We have heard learned counsel as above, considered the record and examined the case law. The issues before us, encapsulated in the questions of law noted at the beginning of this judgment, arise principally in terms of the tax references filed by the Department. We propose to proceed in this judgment as follows. We will first consider the questions on the basis of *Eli Lilly* alone, i.e., on the basis on which judgment was reserved on 17.11.2015. If we conclude that the questions ought to be answered against the Department and in favor of the Taxpayers, we will then proceed further to consider the effect of the subsequent judgment in *Islamic Investment Bank* and whether, in light of that decision, a different result ought to obtain.

20. In order to view *Eli Lilly* from the correct perspective, it is important to keep in mind that it was expressly noted in this Court in *Honda Shahra-e-Faisal* that in all the petitions before the Court the assessments had been finalized before 01.07.2003 (see para 14 of the judgment in *Honda Shahra-e-Faisal*, reproduced herein above in para 5). Since s.122(5A) had been added

to the 2001 Ordinance by the Finance Act, 2003 it was held by the learned Division Bench that the provision did not have retrospective effect, i.e., did not operate in relation to assessments finalized under the 1979 Ordinance up to 30.06.2003. It is pertinent to note that although s. 239 of the 2001 Ordinance was referred to by the petitioners during the course of their submissions this provision was not considered directly by the learned Division Bench itself in the judgment. In the Supreme Court, in *Eli Lilly*, in the crucial para 57 (reproduced herein above in para 6) the decision of this Court was upheld and it was expressly stated that "the provisions of section 122 of the Ordinance are prospective in their application and do not apply to the assessment of a year ending on or before 30th June, 2002". However, in the same para, the Supreme Court also filled in a certain lacuna that it found had been created as a result of amendments made in s. 239 of the 2001 Ordinance. It was directed that "the assessment of any year ending on or before 30th June, 2002 would be governed by the repealed Ordinance and shall be dealt with as if the [2001] Ordinance had not come into force". In our view, a reading of this para, along with the other relevant paras from the judgment in *Eli Lilly*, leave little doubt that in relation to any income year ending on or before 30.06.2002 no notice under s. 122(5A) of the 2001 Ordinance could have been issued. While a notice under s. 66A of the 1979 Ordinance could have been issued, it remained subject to the time limit imposed by subsection (2) thereof, i.e., had to be issued within "four years from the date of the order sought to be revised". In our view, learned counsel for the Taxpayers are correct in submitting that the judgment in *Eli Lilly* did not extend that period of limitation. It therefore follows that, with respect, the submission to the contrary by learned counsel for the Department cannot be accepted. In particular, it cannot be accepted that the period between the judgment of this Court in *Honda Shahra-e-Faisal* and of the Supreme Court in *Eli Lilly* is to be excluded, nor can it be accepted that notices under s. 66A could be issued for a period of four years counting from the date of the judgment in the Supreme Court. The conclusions arrived at by the learned Appellate Tribunal correctly set out the position in terms of the judgment in *Eli Lilly*. On this basis, we are of the view that the questions raised by the Department in the tax references would have to be answered against it and in favor of the Taxpayers, and the constitutional petitions would be disposed off accordingly.

21. Since we have reached the foregoing conclusion, it becomes necessary to consider the effect of the later judgment of the Supreme Court, i.e., *Islamic Investment Bank*. Before proceeding to do so, it will be convenient to set out s. 239 (in its first three subsections), firstly as originally enacted and then as substituted by the Finance Ordinance, 2002, with effect from 01.07.2002. It will be recalled that the 2001 Ordinance was enforced with effect from

01.07.2002. Section 239, as originally enacted, had stated in material part as follows:

> "**239. Savings.**-(1) The repealed Ordinance shall continue to apply to the assessment year ending on the 30th day of June 2003.
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> (2) In making any assessment in respect of any income year ending on or before the 30th day of June 2002, the provisions of the repealed Ordinance relating to the computation of total income and the tax payable thereon shall apply as if this Ordinance has not come into force.
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> (3) Where any return of income has been furnished by a person for any assessment year ending on or before the 30th day of June 2003, proceedings for the assessment of the person for that year shall be taken and continued as if this Ordinance has not come into force."

As substituted by the Finance Ordinance, 2002, the subsections read as follows:

> "**239. Savings.-** (1) Subject to sub-section (2), in making any assessment in respect of any income year ending on or before the 30th day of June, 2002, the provisions of the repealed Ordinance in so far as these relate to computation of total income and tax payable thereon shall apply as if this Ordinance had not come into force.
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> (2) The assessment, referred to in sub-section (1), shall be made by an income tax authority which is competent under this Ordinance to make an assessment in respect of a tax year ending on any date after the 30th day of June, 2002, and in accordance with the procedure specified in section 59 or 59A or 62 or 63, as the case may be, of the repealed Ordinance.
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> (3) The provisions of sub-section (1) and (2) shall apply, in like manner, to the imposition or charge of any penalty, additional tax or any other amount, under the repealed Ordinance, as these apply to the assessment, so however that procedure for such imposition or charge shall be in accordance with the corresponding provisions of this Ordinance."

(We may note for completeness that subsections (2) and (3) were subsequently amended by the Finance Acts of 2003, 2005 and 2010. However, those changes are not relevant for present purposes.)

22. The relevant facts in *Islamic Investment Bank* were as follows. The concerned income period was the income year 2000-2001, corresponding to the assessment year 2001-2002. The respondent's assessment was framed by order dated 14.05.2003, made in terms of the 1979 Ordinance. Thereafter, a notice dated 23.08.2004 was issued by the concerned officer under s. 122(5A) of the 2001 Ordinance, and on the basis thereof the assessment was amended. The respondent appealed to the Commissioner (Appeals) who set aside the notice on the basis of *Honda Shahra-e-Faisal*. The Department preferred an appeal to the Appellate Tribunal, which failed. Thereupon the Department filed a tax reference before the Peshawar High Court, which by order dated

29.01.2009 dismissed the same. At all levels, the view taken in *Honda Shahra-e-Faisal* was accepted and applied, namely that s. 122(5A), having been inserted with effect from 01.07.2003, did not have retrospective effect and hence could not be used to revisit an assessment made (as here) on or before 30.06.2003. The Department petitioned the Supreme Court for leave to appeal and leave was granted. The appeal was heard on 16.12.2015 and allowed by a short order, with detailed reasons following in the judgment.

23. We have carefully read the judgment in *Islamic Investment Bank* and, as noted above, when it came to our attention, we felt that it would be appropriate also to hear submissions by learned counsel. It was for this reason and purpose that the matter was fixed for rehearing. In our respectful view, the judgment can be regarded as having two distinct aspects. One is in relation to s. 122(5A) of the 2001 Ordinance: did it only have prospective effect, as held by this Court in *Honda Shahra-e-Faisal*, a decision that was affirmed by the Supreme Court in *Eli Lilly*? The second aspect is as to the effect of s. 239(1) of the 2001 Ordinance, which, as a saving clause, sought to give continued effect (for certain purposes) to the 1979 Ordinance. These two aspects also, in our respectful view, lead to a third aspect: the interaction between the two aspects.

24. As to the first aspect, the Supreme Court held as follows:

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

Thus, there can be no doubt that it has been held that *Honda Shahra-e-Faisal* was wrongly decided. However, that decision was affirmed by the Supreme Court in *Eli Lilly*. The Supreme Court in *Islamic Investment Bank* (in para 12) reproduced the crucial para 57 from the earlier judgment, and then observed (emphasis supplied):

> "13. In *Eli Lilly* case referred to above this Court held that the assessment order under the repealed Income Tax Ordinance, 1979, could have been reopened only under the provisions of Section 239(1) which were originally incorporated but as the same were substituted through amendment on 01.07.2003, the amended provision being prospective in its application cannot be applied to income years ending on or before 30.06.2002 thus concurred with the decision of the Sindh

> High Court in the case of *Honda Shahra-e-Faisal. In* *Honda Shahra-e-Faisal* *case, procedural provisions of Section 122(5A) of Income Tax Ordinance, 2001, were interpreted to be prospective in their application, such determination is contrary to the plethora of decisions of this Court wherein it has been held that where procedural provisions are incorporated through amendment then the same have retrospective application. We therefore treat such finding as* *per incuriam*. In the case of *Application by Abdul Rehman Farooq Pirzada and Begum Nusrat Ali Gonda Vs. Federation of Pakistan* (PLD 2013 SC 829) the legal term *per incuriam* was extensively discussed in its paragraph 4 and applied to an earlier decision of this Court in the case of *Accountant General Sindh Vs. Ahmed Ali U. Qureshi* (PLD 2008 SC 522)."

25. As will be readily appreciated, from the perspective of a High Court (and, indeed, any other forum or authority) it is of importance to properly ascertain what is intended by the observation: "We therefore treat such finding as *per incuriam.*" The reason is that the observation in *Honda Shahra-e-Faisal* noted in the immediately preceding sentence was expressly affirmed by the Supreme Court in *Eli Lilly*, where, in the opening sentence of para 57, it was observed: "In the light of the above discussion, we uphold view of the Sindh High Court taken in Honda Shahra-e-Faisal and followed by the other High Courts as also the Income Tax authorities that the provisions of section 122 of the Ordinance are prospective in their application and do not apply to the assessment of a year ending on or before 30th June, 2002." It will be recalled (see para 18 herein above) that even the learned counsel who appeared at the rehearing were not able to reach a consensus: some were of the view that the observation as regards the "finding" being *per incuriam* related only to the decision of this Court in *Honda Shahra-e-Faisal*, while others were of the view that it related to the decision of the Supreme Court in *Eli Lilly* (and of course, also obviously to the decision of this Court).

26. We have carefully considered this point. In our respectful view, the observation in para 13 of *Islamic Investment Bank* cannot be regarded as limited only to the decision of this Court in *Honda Shahra-e-Faisal*. This is so because that decision has been expressly affirmed in *Eli Lilly*. The reason why the decision in *Honda Shahra-e-Faisal* was held to be *per incuriam* was that it was contrary to a "plethora of decisions of this Court wherein it has been held that where procedural provisions are incorporated through amendment then the same have retrospective application". In our respectful view, it necessarily follows that in affirming *Honda Shahra-e-Faisal* the judgment in *Eli Lilly* would also have to be contrary to such case law and hence *per incuriam*. The matter can also be viewed from another perspective. If the observation in para 13 of *Islamic Investment Bank* were limited only to the decision of this Court in *Honda Shahra-e-Faisal*, that would leave the observation made in *Eli Lilly* in para 57 intact. But, that judgment was a decision of a three-member Bench,

as is the judgment in *Islamic Investment Bank*. Ordinarily, therefore, the former would bind the latter. But in *Islamic Investment Bank* the Supreme Court has held that s. 122(5A) had retrospective effect. This result could only come about if the observation in *Eli Lilly* were held to be *per incuriam*. Therefore, in our respectful view, the observation in para 13 of the judgment in *Islamic Investment Bank* is relatable both to the decision of this Court in *Honda Shahra-e-Faisal*, and that of the Supreme Court in *Eli Lilly*. Thus, as to the first aspect of the judgment in *Islamic Investment Bank* (see para 23 herein above), it is clear that s. 122(5A) of the 2001 Ordinance did have retrospective effect.

27. We turn to the second aspect, the scope and effect of s. 239(1), as substituted/amended. In para 8 of the judgment in *Islamic Investment Bank*, it was observed as follows (emphasis by way of underlining supplied; other in original):

> "8. Section 239 of the Income Tax Ordinance, 2001, by its very nature, being a saving clause, was intended to preserve certain powers and procedures contained in the repealed Income Tax Ordinance, 1979. Several procedures for the correct assessment of income and determination of tax liability were devised in the repealed Income Tax Ordinance, 1979. These procedures are applied at various stages so that no income may escape from taxation on account of non-disclosure or miscalculation. When the amended Section 239 (1) of the Income Tax Ordinance, 2001, states "*the provisions of the repealed Ordinance, in so far as these relates to computation of total income and tax payable thereon shall apply as if this Ordinance had not come into force"*, it in fact saves the entire set of procedures prescribed under the repealed law through which the exercise of reaching at the correct calculation of total income and the tax payable thereon can be undertaken with regard to the periods covered under the repealed Income Tax Ordinance, 1979. Section 2(7) of the Income Tax Ordinance, 1979, describes the term assessment thus *"assessment" includes re-assessment and additional assessment and the cognate expressions shall be construed accordingly*". Thus Section 239 (1) encompasses within its ambit all types of assessments that can be made to a tax return. In simple terms, assessment is relatable to all stages of assessments that could be made to a tax return under the provisions of the repealed Income Tax Ordinance, 1979. The replacement of old law with a new one was never intended to affect the right of the department to revise an assessment order that had been made under the provisions of the repealed Income Tax Ordinance, 1979, but was intended only to devise a new method and mechanism to determine income and the tax payable for the post repeal era. Hence, the whole purpose of incorporating Section 239 was to preserve certain powers and procedures laid down in the repealed Income Tax Ordinance, 1979, so that it can be subsequently enforced in the post repeal era only in matters that relate to the period covered under the repealed Income Tax Ordinance, 1979. Thus the provisions of Section 239 are purely procedural in nature. When a provision is incorporated in any statute through an amendment that is procedural in nature then the retrospective rule of construction is to be applied to such provision. Such a provision has to be construed as if it was incorporated on the date when the main enactment reached the statute book. … By virtue

> of the amended Section 239(1), the powers or inchoate rights relating to income years covered under repealed Income Tax Ordinance, 1979, to the extent mentioned in Section 239 of the Income Tax Ordinance, 2001, were to continue to be exercised/enforced on the basis of the procedures prescribed in the repealed law as if the repealed Ordinance, 1979 is still in operation. We are, therefore, of the opinion that the provisions of Income Tax Ordinance, 2001, cannot be interpreted in a manner so as to take away the powers of the Taxing Authority to revise, within the prescribed period of time, any assessment order that was passed under the provisions of the repealed Income Tax Ordinance, 1979."

28. In our respectful view, in *Islamic Investment Bank* the Supreme Court has held that the amended s. 239 contained within its saving provisions all the elements of the 1979 Ordinance as related to the making of an assessment in respect of income years ending on or before 30.06.2002. This would include the power under s.66A to revise an assessment order. In *Eli Lilly*, it will be recalled that the Supreme Court, in para 57, had concluded that the amended s. 239 had created a lacuna, which was duly filled in by the Court, such that it was directed that "the assessment of any year ending on or before 30th June, 2002 would be governed by the repealed Ordinance and shall be dealt with as if the [2001] Ordinance had not come into force". In our respectful view, although there is a difference of approach in the two judgments as regards s. 239, the conclusion is the same. Indeed, this is expressly noted in *Islamic Investment Bank* where, in para 14, it is observed as follows (emphasis supplied):

> "14. We may also point out here that it was also observed in *Eli Lilly* case that *Honda Shahra-e-Faisal Shahrah-e-Faisal* case has failed to address the question as to how the assessments relating to periods prior to Income Tax Ordinance, 2001, can be enforced. After observing so, it took the view that there was a lacuna which needed to be filled and this was done by holding that all assessments relating to the periods prior to Income Tax Ordinance, 2001, coming into force are to be undertaken in accordance with original provision of Section 239(1) of the Income Tax Ordinance, 2001. *Thus this Court in Eli Lilly case reached at the same conclusion, which we have reached in this case, albeit on a different set of reasoning*."

29. In our respectful view, as regards the second aspect (see para 23 herein above) both the judgments of the Supreme Court are in accord and lead to the same conclusion, notwithstanding the difference in the approach taken. This leads us to the third aspect, the interaction between a provision such as s. 122(5A) and a saving clause such as s. 239. For this reference will have to be made to para 21 of the judgment in *Islamic Investment Bank* (emphasis supplied):

> "21. In view of what has been discussed above, we are of the considered opinion that it was never intended by the lawmakers, even

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

30. In our respectful view, it is pertinent to note that the Supreme Court directed the notice that had led to the proceedings that ultimately culminated before it, being a notice under s. 122(5A) of the 2001 Ordinance, be treated as a notice under s. 66A of the 1979 Ordinance. It will be recalled that that notice had been issued on 23.08.2004 whereas the assessment had been framed on 14.05.2003. Now, keeping in mind the first aspect of the judgment, namely that a provision like s. 122(5A) itself had retrospective effect, the Supreme Court could, we would respectfully suggest, have let the notice stand as it did. However, it did not do so, but rather applied what we have respectfully described as the second aspect of the judgment, namely the effect of s. 239. This, in our respectful view, leads to the following conclusion as regards the third aspect. If a statute has a provision such as s. 122(5A) as well as a saving clause such as s. 239, then any case that comes within the ambit of the latter will be so treated and dealt with on the basis of the saving clause, rather than the former being invoked. Of course, the Supreme Court referred to s. 6 of the General Clauses Act, which could also have applied as held in the judgment. But, given the specific saving clause as contained in s. 239 perhaps no

occasion arose of invoking and applying s. 6 in the facts and circumstances of the case before the Supreme Court.

31. We turn to the cases before us in light of the foregoing discussion and analysis. In our respectful view, each of the tax references and petitions will have to be seen in light of the foregoing principles, which will have to be applied, in each case, to the notice that led to the proceedings that culminated in this Court. When the tax references are examined, it is found that the notices issued under s. 66A were all issued more than four years after the date of the relevant order. Therefore, in these cases the action was barred by limitation, whether examined in the light of the *Eli Lilly* decision or the judgment in *Islamic Investment Bank*. In addition, as noted above, in three of the tax references (ITRA Nos. 195-197/2011) there is an additional point that, as per the taxpayer, the notices were not served on it (the three references relating to different years of the same taxpayer). This contention was upheld by the learned Appellate Tribunal and was essentially a finding of fact. In any case, no question of law in relation thereto has been proposed by the Department in the tax references. For all of the foregoing reasons therefore, in our view the questions raised by the Department must be answered against it and in favor of the Taxpayers, with the result that the tax references fail and must be dismissed.

32. Turning to the constitutional petitions, we find that each of the notices (under s. 66A) that led to the filing of the relevant petition was issued more than four years after the date of the relevant assessment order. Therefore, in these cases also the impugned action was barred by limitation.

33. This judgment disposes off the following matters: ITRA Nos. 195/2011, 196/2011, 197/2011, 212/2011, 51/2012, 190/2012, 56/2013, 117/2013, 118/2013, 119/2013, 120/2013 and 162/2013, and constitutional petitions CP Nos. D-2087/2010, 2088/2010, 2165/2010, 2302/2011 and 2348/2011. There will be no order as to costs.

34. In view of the foregoing, it is ordered as follows:

a. In each of the tax references referred to above, the questions of law raised by the Department are answered against it and in favor of the respondent taxpayer, with the result that the tax references stand dismissed.

b. Each of the petitions referred to above is allowed with the result that the impugned notice in each is quashed

and set aside. In each case the petitioner is entitled to suitable injunctive relief.

JUDGE

JUDGE