

ORDER SHEET

**IN THE HIGH COURT OF SINDH, KARACHI**

**Income Tax Reference Application (“ITRA”) No. 503 of 2009**

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Date

Order with signature of Judge

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For Hearing of case

1. For orders on CMA No. 544 of 2009
2. For hearing of main case.

**31.01.2023**

Mr. Khalil Dogar Advocate holding brief for Mr. Mohsin Imam Advocate for the Applicant Department.

Mr. Khalil Dogar Advocate submits that Mr. Mohsin Imam is unwell, therefore, matter be adjourned. However, this being an old case of 2009 cannot be adjourned, whereas, on perusal of the record it reflects that the issue in hand, during pendency of this Reference Application, stands decided by the Hon’ble Supreme Court, therefore, no useful purpose would be served by adjourning the matter. Since no one had appeared before the Tribunal as well, therefore, no notice is required to be issued to the Respondent.

It appears that the Applicant has impugned order dated 31.01.2009 passed by the Income Tax Appellate Tribunal (Pakistan) Karachi in I.T.A. No.505/KB/2007 (Tax year 2001-02), proposing only one question of law which reads as under: -

*“Whether on the facts and in the circumstances of the case, the learned Income Tax Appellate Tribunal was justified in holding that Section 122(5A) of the Income Tax Ordinance, 2001 brought into statute through Finance Act 2004 is not applicable to the assessments completed before the promulgation of the Income Tax Ordinance, 2001, whereas the amendment brought in, through Finance Ordinance 2002 in sub-section (1) of section 122 extends the applicability of section 122 to the assessments completed under the provision of the Income Tax Ordinance, 2001 as well?”*

From perusal of the order of the Commissioner (Appeals) it appears that the appeal was decided in favour of the assessee pursuant to judgment reported as *Honda Shahrah-e-Faisal Association of Persons Karachi and others vs. Regional Commissioner of Income Tax Karachi and 2 others* (**2005 PTD 1316**) by holding that since provision contained in sub-section (5A) of Section 122 of the Income Tax Ordinance, 2001 inserted w.e.f. 01.07.2003 is not retrospective in operation and therefore, following the decision of the Hon’ble High Court of

Sindh, the amended assessment framed under Section 122(5A) seeking amendment of the original order passed under Section 59(A) dated 15.5.2000 is hereby annulled. The learned Tribunal has also dismissed the appeal of the department by observing that since the order of the CIT is based on the judgment of this Court, no exception can be drawn.

However, subsequently in the case of **Commissioner of Income Tax v Islamic Investment Bank Limited**<sup>1</sup>, the Hon'ble Supreme Court was pleased to hold that the decision in the case of *Honda Shahrah-e-Faisal*<sup>2</sup> considered to be an authoritative judgment as to limitation period in amending deemed assessment orders under the Ordinance and apparently approved in the case of *Eli Lilly*<sup>3</sup> was erroneous as it had 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. The precise issue before the Hon'ble Supreme Court was whether the Commissioner Income Tax was justified in revising an assessment order relating to the period covered under the repealed Income Tax Ordinance, 1979, by invoking the provisions of Section 122 (5A) of the Income Tax Ordinance, 2001, that was inserted on 01.07.2003 i.e. one year after the Income Tax Ordinance, 2001, came into operation. As per *Honda Shahrah-e-Faisal*, the department could not have revised the assessment order in question by invoking section 122(5A) of Income Tax Ordinance, 2001, that was inserted on 01.07.2003 and being prospective in nature, cannot be given retrospective application; and provisions of section 66A of the repealed Income Tax Ordinance, 1979, were also not saved under the Saving Clause i.e. section 239 of the Income Tax Ordinance, 2001, the same also could not be applied to reopen the assessment order in question. The Hon'ble Supreme Court was dealing with the question whether section 239(1) as amended on 1.7.2003 on the basis of which notice under section 122(5A) was issued is prospective in its application or has retrospective application. The decision in *Honda Shahra-e-Faisal* was not approved in the case of *Islamic Investment Bank* by the Hon'ble Supreme Court. The Hon'ble Supreme Court also attended to the argument that since *Honda Shahra-e-Faisal* was already approved in *Eli Lilly*; therefore, no

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<sup>1</sup> 2016 SCMR 816

<sup>2</sup> 2005 PTD 1316

<sup>3</sup> 2009 SCMR 1279

further deliberation was warranted. It was dealt with in the following terms by the Hon'ble Supreme Court in the *Islamic Investment Bank* case.

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 v. 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 v. Ahmed Ali U. Qureshi* (PLD 2008 SC 522).

The Hon'ble Supreme Court in this case went further to hold that upon filing of a tax return a vested right is created in favor of the State at the end of each accounting year, though the exercise of making an assessment and revising it, takes place at a later stage and these procedural exercises are undertaken with the object of reaching to the correct calculations of yearly income.

In view of the above facts and circumstances of this case, the proposed question is answered in *negative*; in favour of the Applicant and against the Respondent. The Reference Application stands allowed, the impugned order dated 31.01.2009 passed by the Tribunal and order dated 31.3.2007 passed by Commissioner (Appeals) stands set aside.

Let copy of this order be issued to the Appellate Tribunal, Inland Revenue, Karachi in terms of section 133(5) of the Income Tax Ordinance, 2001.

J U D G E

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