

IN THE HIGH COURT OF SINDH, KARACHI

Income Tax Reference Applications No.368 to 371 of 2024

Present: *Mr. Justice Muhammad Junaid Ghaffar*
Mr. Justice Mohammad Abdur Rahman,

Applicant: Ahmed Jan
Through Mr. Muhammad
Aleem, Advocate.

Respondent: The Commissioner Inland
Revenue Through Ms. Tania
Alam, Advocate.

Date of hearing: 14.05.2025.

Date of Judgment: 14.05.2025.

J U D G M E N T

Muhammad Junaid Ghaffar, Acting Chief Justice: Through these Reference Applications, the Applicant has impugned Orders dated 22.05.2025 and 23.05.2025 for Tax Years-2017, 2018, 2019 & 2020 respectively, passed by Commissioner (Appeals) proposing various questions of law; however, on perusal of record, it reflects that these Reference Applications can be decided on Question No.“C”¹, which now stands answered by the Honourable Supreme Court in the case of *Millat Tractors Limited, Lahore*².

2. Heard learned Counsel for the parties and perused the record. The precise question relating to the present controversy in hand and before the Hon’ble Supreme Court in the above judgment was as under:-

“1. Whether the learned Appellate Tribunal has erred in law by deciding the additions made under Section 111 of the Ordinance while holding that a separate and specific notice is required for addition under Section 111 when there is no specific provision in the ordinance requiring separate notice under Section 111 of the Ordinance?”

¹ “C, Whether the learned CIRA was justified to confirm the addition made u/s 111(1)(b) which have been made without issuing an independent and separate notice u/s 111 of the Ordinance?”

² Commissioner Inland Revenue Lahore v. Messrs Millat Tractors Limited, Lahore and others (2024 SCMR 700).

3. The above question including the question regarding retrospective application of an explanation added in 2022 to section 111 of the Ordinance has been answered in favour of the taxpayer and against the department and relevant finding to this effect is contained in Paragraphs 11, 12, 13, 14, 15 & 16, which reads as under:-

“11. Therefore, to answer the first question, and as applicable to the matters at hand, before an assessment can be amended under Section 122 on the basis of Section 111, the proceedings under Section 111(1) are to be initiated, the taxpayer is to be confronted with the information and the grounds applicable under Section 111(1) through a separate notice under the said provision, and then the proceedings are to be culminated through an appropriate order in the shape of an opinion of the Commissioner. This then becomes definite information for the purposes of Section 122(5), provided the grounds mentioned in Section 122(5) are applicable. The taxpayer is then to be confronted with these grounds through a notice under Section 122(9) and only then can an assessment be amended under Section 122.⁹ This view has also been recently taken by this Court in *Bashir Ahmed*¹⁰ wherein it has also been held that a notice under Section 111 can be simultaneously issued with a notice under Section 122(9), however, proceedings under Section 111 have to be finalized first in terms of an opinion of the Commissioner so as to constitute definite information, as is required under Section 122(5) of the Ordinance.

12. We, however, underline and clarify that even where a notice under Section 111 is issued simultaneously with a notice to amend an assessment under Section 122(9) of the Ordinance, no proceedings can be undertaken under the latter until the proceedings under Section 111 are finalized and result in an opinion against the taxpayer. This is because, even if some basis for action under Section 111 is mentioned in a notice under Section 122(9), it cannot constitute definite information for the purposes of Section 122(5). The proceedings under the notice issued under Section 122(9) can only be formally initiated when the requirement of definite information is satisfied under Section 122(5) after finalization of the proceedings under Section 111 through an opinion of the Commissioner. Therefore, where no opinion is formed against the taxpayer under Section 111, the proceedings under both provisions i.e., Sections 111 and 122 would lapse, and the notice under Section 122(9) would be of no legal effect. Where, however, there is an opinion formed against the taxpayer as definite information for the purposes of Section 122(5), the proceedings on the notice issued under Section 122(9) can formally proceed and shall be deemed to have commenced. It must also be noted that where the opinion formed against the taxpayer under Section 111 is materially different from what has been confronted to the taxpayer through the notice already issued under Section 122(9), and the Commissioner is of the view that another or different ground under Section 122(5) is applicable, a fresh or supplementary show cause notice under Section 122(9) must be issued to the taxpayer by confronting such ground(s) to the taxpayer. This is in view of the right to be treated in accordance with the law, and the principles of fair trial and due process enshrined in Articles 4 and 10A of the Constitution¹¹, respectively, and in terms of settled law that once a show cause notice is issued, the original adjudication on the said show cause notice can only be based on the grounds and allegations levelled therein.¹²

13. Adverting to the second issue at hand as to the effect of the Explanation introduced in Section 111 of the Ordinance to the instant cases, the Explanation was added in Section 111 pursuant to the Finance Act, 2021 and is reproduced below for reference:

Explanation.---For the removal of doubt, a separate notice under this section is not required to be issued if the explanation regarding nature and sources of amount credited or the investment of money, valuable article, or the funds from which expenditure was made has been confronted to the taxpayer through a notice under subsection (9) of section 122 of this Ordinance.

The Explanation was further substituted through the Finance Act, 2022 as under:

Explanation.---For the removal of doubt, it is clarified that a separate notice under this section is not required to be issued if the explanation regarding nature and sources of;

- (i) any amount credited in a person's books of account; or
- (ii) any investment made or ownership of money or valuable article; or
- (iii) funds from which expenditure was made; or
- (iv) suppression of any production, sales, or any amount chargeable to tax; or
- (v) suppression of any item of receipt liable to tax in whole or in part has been confronted to the taxpayer through a notice under subsection (9) of section 122 of the Ordinance.

On a plain reading of the aforesaid Explanation, it appears that it is couched in clarificatory and declaratory terms for "removal of doubt". However, we note that the intention behind the Explanation and the effect of adding the Explanation is to take away the right to a separate notice and proceedings under Section 111 if the grounds under Section 111(1)(a) to (d) are confronted to the taxpayer through a notice under Section 122(9) of the Ordinance. Therefore, in essence, it abridges the right to a separate notice and proceedings under Section 111 of the Ordinance, which was the requirement of the law as noted above. As a consequence, the Explanation takes away a substantive right of separate proceedings of the taxpayer, which otherwise existed prior to the introduction of the Explanation in Section 111.

14. Before dilating upon the applicability of the Explanation to the matters at hand, it would be appropriate to understand the rationale behind introducing an Explanation in an enactment. The purpose of an Explanation is ordinarily to explain some concept or expression or phrase occurring in the main provision. It is not uncommon for the legislature to accord either an extended or restricted meaning to such concept or expression by inserting an appropriate Explanation.¹³ Such a clarificatory provision is to be interpreted according to its own terms having regard to its context and not as to widen the ambit of the provision.¹⁴ As a general rule, an explanation added to a statutory provision is not a substantive provision in any sense of the term but as the plain meaning of the word itself shows, it is merely meant to explain or clarify certain ambiguities which may have crept in the statutory provision.¹⁵ The object of adding an Explanation to a statutory provision is only to facilitate its proper interpretation and to remove confusion and misunderstanding as to its true nature. It is relied upon only as a useful guide or in aid to the construction of the main provision.¹⁶ It is in this view of its effect that courts have normally given retrospective effect to such clarificatory or declaratory provisions in the shape of an Explanation.¹⁷

15. However, where the effect of the Explanation warps out of its normal purpose explained above, and acts as a substantive enactment or deeming provision, or enlarges substantive provisions of law or creates new liabilities, such an Explanation cannot be given retrospective effect unless the express language of the Explanation warrants such an interpretation.¹⁸ It is settled law that a change in substantive law which divests and adversely affects vested rights of the parties shall always have prospective application unless by express word of the legislation and/or by necessary intendment/implication such law has been made applicable retrospectively.¹⁹ As a cardinal principle of interpretation of statutes, tax statutes operate prospectively and not retrospectively unless clearly indicated by the

legislature, therefore, retrospectivity cannot be presumed.²⁰ Where an insertion or deletion of any provision in the rules or the law is merely procedural in nature, the same would apply retrospectively but not if it affects substantive rights which already stood accrued at the time when the un-amended rule or provision was in vogue.²¹ A provision curtailing substantive rights does not have retroactive operation unless the legislature elects to give it retrospective effect.²² Thus, where existing rights are affected or giving retroactive operation causes inconvenience or injustice, the Court will not favour an interpretation giving retrospective effect even where the provision is procedural.²³ Applying this to the instant case, and having established that the Explanation added in Section 111 of the Ordinance divests and affects a substantive right of the taxpayer to a separate notice and proceedings under Section 111, the same would not have retrospective effect and would apply prospectively. Therefore, the Explanation would not be applicable to the matters at hand as they pertain to tax years before the Explanation was introduced in Section 111.

16. However, in order to clarify, even if the Explanation was applicable to the instant matters, the proceedings under Section 111 would still require to be taken up first and finalized before the proceedings under Section 122(5) can formally proceed. This is in line with the scheme of Section 111 and its effect on Section 122, as explained above. The effect of the Explanation, therefore, is only to dispense with the requirement of a separate notice under Section 111, however, it cannot subsume two different and distinguishable proceedings under Sections 111 and 122. As such, while the Explanation dispenses with the requirement of a separate notice under Section 111, it does not dispense with the requirement that in case proceedings are initiated under Section 122(5) on the basis of definite information to be provided through Section 111, the proceedings under Section 111 are to be concluded first in the manner provided under the law and till such time, the proceedings under Section 122(9) cannot be given effect to.”

4. This very issue came before us in the case of **Abdul Qadir**³, and it has been held by us “*that insofar as cases pertaining to the period prior to the insertion of explanation are concerned, they will be governed by the law as it stood before such insertion. The cases in hand are of Tax Years 2017, 2018, 2019 & 2020, whereas show cause notice was issued in 2021, therefore, the explanation inserted subsequently would not apply*”. In the instant matters, neither a separate notices were issued under Section 111 *ibid*; nor an independent or separate orders were passed; hence, the addition so made in terms of section 111 was not lawful.

5. In view of hereinabove facts and circumstances of this case, since the question proposed and reproduced hereinabove has already been answered by the Honourable Supreme Court in the terms so stated hereinabove, as well as by this Court in

³ Order dated 24.03.2025 in ITRA No.399 of 2023

Abdul Qadir (Supra), this question is answered in favour of the Applicant and against the department. As a consequence, thereof, these Reference Applications are **allowed**, and the impugned orders are **set-aside**. Let copy of this order be issued to Commissioner (Appeals). Office is directed to place a copy of this order in all connected Reference Applications.

ACTING CHIEF JUSTICE

J U D G E

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