- *Collector of Customs, Port Muhammad Bin Qasim, Karachi v. Messrs Kaghan Ghee Mills (Pvt.) Ltd.* [2008 S.C.M.R. 1538]
- *Collector of Customs (Appraisement) v. Messrs Shahbaz International* [2007 P.T.D. 202]
- *Pakistan State Oil Company Ltd. v. Collector of Customs, E&ST (Adjudication-II) and others* [2006 S.C.M.R. 425]
- *Collector of Customs, Port Muhammad Bin Qasim, Karachi v. Messrs Kaghan Ghee Mills (Pvt.) Ltd.* [2006 P.T.D. 541]
- *Messrs Zarghoon Zarai Corporation v. Collector of Customs and another* [2006 P.T.D. 534]
- *Collector of Customs and others v. Tahir Dawood and others* [2005 P.T.D.1988]

7. After perusal of the record and the impugned judgment, we are of the view that no question of law arises from the impugned order passed by the Tribunal, nor question of law was pleaded and argued, before any of the forums below. We, are, therefore, of the view that the impugned order does not require any interference by this Court in its reference jurisdiction.

8. In the light of the above discussion, we do not find any merits in the instant reference application which is, therefore, accordingly *dismissed*.

Reference application dismissed.

(Jawaid Masood Tahir Bhatti, Chairman.)

2014 P.C.T.L.R. 699

[Appellate Tribunal Inland Revenue, Lahore Bench Lahore]

Present: **JAWAID MASOOD TAHIR BHATTI, CHAIRMAN and HAROOM M.K. TAREEN, ACCOUNTANT MEMBER**

Zia-ur-Rehman Prop. Salamat Enterprises, Kot Addu

Versus

CIR, RTO, Multan

I.T.A. No. 513/LB of 2013, decided on 14th May, 2013.

(a) Taxation---

---Certain acts should be done by a specified person and their performance by any other is impliedly prohibited---Principle of law.

(Para 7)

AMENDMENT OF ASSESSMENT --- (Point of jurisdiction)

(b) Income Tax Ordinance (XLIX of 2001)---

---Ss. 122(5AA), 120---(i) Whether the deemed assessment under Section 120 of the ITO could be erroneous and prejudicial to the interest of Revenue and as to whether turn over of appellant was liable to minimum tax under Section 113 of the said Ordinance?---(ii) Whether after introduction of sub-section (5AA) of Section 122 the powers under Section 122(5AA) fully vested with the Commissioner on the basis of personal examination and consideration of the facts of case by himself?---Difference of opinion---Resolution of said questions by Reference Member---Deemed amount under Section 120 of the Ordinance was neither erroneous nor prejudicial to the interest of Revenue---Tax payer was a distributor of *M/s.* Uniliver Pakistan (Ltd.) and used to sell the products of the principal company under an agreement on fixed margin allowed by said principal company in fixed/assigned territorial jurisdiction under the terms and

conditions laid down in the agreement---Tax payer had rightly declared Margin of profits/receipts in his return---Keeping in view the nature of business as well as declared version of tax payer in the previous year, tax payer, under circumstances, was required to pay turn over tax on its margin of profit under Section 113 of the Ordinance---Jurisdiction to exercise the powers under sub-section (5A) of Section 122 of the Ordinance for amendment of assessment vested to the Commissioner Inland Revenue and the same powes were not delegatable under Section 210 of the Ordinance to any subordinate authority---**Held:** Additional Commissioner Inland Revenue while passing order under sub-section (5A) of Section 122 of the Ordinance acted beyond his jurisdiction and amendment of assessment framed by time was illegal, void *ab initio* and not tenable in eye of law---Appeal of tax payer succeeded.

(Paras 13, 15, 16)

(c) Income Tax Ordinance (XLIX of 2001)---

---S. 113---'Turn over', word of---Meaning.

(Para 16)

زیر دفعہ 122(5)انکم ٹیکس آرڈیننس کارروائی عمل میں لاتے ہوئے ایڈیشنل کمشنر ان لینڈ ریونیو کو مذکورہ تشخیص میں ترمیم کیلئے اختیارسماعت حاصل نہ تھا۔ ٹریبونل میں اپیل منظور ہوئی۔

[Additional Commissioner Inland Revenue while acting under Section 122(5) had no jurisdiction to amend assessment. Tribunal allowed appeal].

For the Appellant: **Niaz Ahmad Khan, Advocate.**

For the Respondent: **Abid Raza Bodla, D.R.**

Date of hearing: **14th May, 2013.**

ORDER

JAWAID MASOOD TAHIR BHATTI, J. --- Titled appeal has been filed at the instance of the taxpayer calling

in question the impugned order dated 09.01.2013 passed by the learned CIR(A) Multan on the following grounds:---

(1) That the learned CIR(A) was not justified to confirm the Order under Section 122(5A) as the introducing the sub-section (5A) of the Income Tax Ordinance, 2001, the powers vested with the CIR(Audit) as the original order is neither erroneous nor prejudicial to the interest of revenue. Order is illegal, void *ab initio*, against law and facts of the case.

(2) That the learned CIR(Appeals) was not justified to confirm the order under Section 122(5A) as the introducing the sub-section (5AA) of the Income Tax Ordinance, 2001, the powers vested with the CIR with retrospective effect. Order under appeal is illegal, void, *ab initio* against the facts of the case

(3) That the learned CIR(Appeals) was not justified to ignore the history of the case as the appellant which was assessed in previous years on the basis of discount and no sales had ever been declared being case of distributor (Selling agent of the Principal company). Discarding the history of the case and without confrontation and even violation of Section 32 of the Income Tax Ordinance, 2001.

(4) That the order under appeal is not maintainable at all as the Sales for Turnover tax is to be taken excluding Sales Tax but in the instant case Sales including Sales Tax has been adopted and confirmed by CIR(Appeals) Multan. Order is illegal on this score.

(5) That the powers vested with CIR under Section 122(5A) are neither delegateable, nor delegated as provided under Section 210.

therefore, order passed by the learned Additional CIR is illegal on this score.

(6) That the learned Additional CIR was not justified to alter the history of the appellant which was assessed in previous years on the basis of discount and no sales have ever been declared being the case of distributor (selling agent of the company). Deviating the history without any confrontation is illegal, void *ab initio*, against law and facts of the case.

(7) That the learned Additional CIR was not justified to assess the sales at Rs. 136,165,612/- against the declared discount at Rs. 5,758,275/- which is highly excessive, harsh arbitrary, against law, against the history of the case and without any cogent reasons.

(8) That the learned Additional CIR was not justified to charge tax @ 0.2% under Section 113 at Rs. 266,182/- & Surcharge thereon which is not applicable, highly excessive, arbitrary, harsh and not tenable in the eye of law.

(9) That the learned Additional CIR was unjustified to assess sales without application of G.P. rate and allowing business expenses. The order is arbitrary and not according to the provisions of the Income Tax Ordinance, 2001.

2. Facts in brief are that the taxpayer is an individual, deriving income from business under the name and style of *M/s.* Salamat Enterprises. Return of income for the year under consideration was filed declaring income as under:---

Other Revenue/Commission.	Rs. 5,758,275/-
Profit & Loss Expenses.	Rs. 5,476,375/-
Net profit	Rs. 281,900/-
Supply of Goods.	Rs. 3,074,647/-

During the course of examination of record, the ACIR found that the tax chargeable had been worked out at Nil while the taxpayer had declared his turnover amounting to Rs. 136,165,612/- in the sales tax returns for the period relevant to tax year 2011. The ACIR further observed that the declaration of "receipts/commission" instead of trading results in his income tax return rendered the assessment order finalized under Section 120 "erroneous". He further observed that as per the provisions of Section 113 of Income Tax Ordinance, 2011 (hereinafter called the Ordinance), a taxpayer having Turnover above Rs. 50 (Million) is liable to pay minimum tax on turnover in which the taxpayer has failed to discharge his liability, hence the assessment finalized under Section 120 of the Ordinance is also "prejudicial to the interest of revenue". After issuing statutory notices and confronting the appellant the ACIR held that the assessment already finalized under Section 120 of the Ordinance was erroneous as far as prejudicial to the interest of revenue. Accordingly the assessment was amended under Section 122(5A) of the Ordinance by charging tax @ 0.2% under Section 113 being distributor at Rs. 266,182/- and surcharge @ 15% at Rs. 11,645/-. Being aggrieved with the said treatment the taxpayer approached the learned first appellate authority who *vide* an order dated 09.01.2013 rejected the appeal of the taxpayer, hence the instant appeal by the taxpayer.

3. Both the parties have been heard and relevant orders perused. The learned counsel of the taxpayer contended that learned CIR(A) was not justified to confirm the order passed under Section 122(5A) of the Ordinance because the original order under Section 120 is neither (*sic*) that the order passed by the learned Additional Commissioner Inland Revenue (Audit) under Section 122(5A) of the Ordinance is without any jurisdiction because

after the introduction of sub-section (5AA) of Section 122 of the Ordinance powers vested with the learned CIR with retrospective effect. Further argued that the powers vested with the CIR under Section 122(5A) are not delegateable as provided in Section 210 of the Ordinance. The learned counsel of the taxpayer has also drawn the attention the Court towards the fact that the learned ACIR has alter the history of the taxpayer. It was submitted that in the previous years the taxpayer was assessed on the basis of discount and no sales have ever been declared being the case of distributor (selling agent of the company). It was argued that discarding the history without any confrontation is illegal void *ab-initio* and against the law and facts of the case because as Section 32(4) of the Ordinance, it is the taxpayer who can change the method of accounting by applying in writing before the Commissioner. For the sake of convenience, Section 32(4) of the Ordinance is reproduced as under:---

> "32(4). A person may apply, in writing for a change in the person's method of accounting and the Commissioner may, by [order] in writing, approve such an application but only if satisfied that the change is necessary to clearly reflect the person's income chargeable to tax under the head "income from Business".

4. The learned D.R. on the other hand opposed the arguments advanced by the learned counsel of the taxpayer and supported the orders of the authorities below.

5. Both the parties have been heard and relevant record available perused alongwith case-law cited at the bar. As far as jurisdiction of the Additional Commissioner Inland Revenue to invoke provisions of Section 122(5A) is concerned, the law on this issue very clear that after the introduction of sub-section (5AA) of Section 122 of the Ordinance powers vested with the learned CIR with retrospective effect. Even otherwise in a reported judgment cited as 2012 PTD (Trib.) 1739 this has been discussed in

detail. The relevant extract from the reported judgment is reproduced as under:---

> "7. We find the argument put forth by the learned counsel to be quite weighty. Bare reading of Section 122(5A) clearly envisages that the Commissioner is under legal obligation to consider and apply his conscious mind that the assessment order passed under Section 120 of the Ordinance was erroneous and that was also prejudicial to the interest of revenue. After having (*sic*) ACIR, under Section 210(1) of the Ordinance, to amend the already completed assessment. It needs hardly be emphasized that, before the powers under Section 122(5A) is exercised or delegated, the Commissioner must be satisfied on the materials on record that the order being erroneous has caused prejudice to the interest of revenue is likely to cause such a prejudice. So, the powers under Section 122(5A) fully vest with the Commissioner of Inland Revenue on the basis of his personal examination and consideration of the facts of the case by himself. Actually, the powers of ACIR to invoke the provisions of Section 122(5A) of the Ordinance are wholly, solely and exclusively revolve around the objective consideration made by the Commissioner. There is no cavil to this proposition that the proceedings to be initiated under Section 122(5A) are revisional in its character and it is a cardinal principle of law that revisional jurisdiction cannot be exercised by the same person let alone by subordinate authorities. Where a statute directs that certain acts shall be done by a specified person and their performance by any other person is impliedly prohibited. Any authority vested with the powers of discretion is duty bound to exercise the same by himself by applying his independent mind and not influenced by extraneous consideration. In the case

referred to *in re:* 2011 PTD (Trib.) 705, it has been held as under:---

> "As regards the second legal objection that the Commissioner did not apply his independent mind, we are, in agreement with AR that assessment cannot be amended under Section 122(5A) without conscious application of mind by Commissioner himself. This is a legal obligation impose a personal obligation on an authority then the same authority is required to discharge that legal obligation. The obligation cannot be passed on anybody else."

8. Support in this regard was also sought from the case-law cited as 2005 PTD (Trib.) 344, 2007 PTD (Trib.) 1226, 2009 SCMR 1279, 2001 PTD 1467 (Lhr. H.C.) and 1997 SCMR 641. Evidently, the Commissioner, in the present case, has not applied his independent consideration at any point of proceedings in order to hold that the original order was erroneous and prejudicial to the interest of revenue. We, therefore, of the considered view that initiation of proceedings by the ACIR in terms of Section 122(5A) of the Ordinance for the tax years under reference were *ab initio* illegal void."

6. Coming to the objection with regard to the history of the case, we are also in agreement with the assertions made by the learned counsel of the taxpayer that discarding the history without confrontation to the taxpayer is illegal. In the instant case the taxpayer is distributor of Uniliver Pakistan and furnishing his returns of income since the assessment year 2000-2001 and declaring commission receipts under the head other revenue receipts/commission from the principal company. The learned counsel of the taxpayer produced before the Court a chart showing detail of tax period, purchases. Sales tax on purchases, supplies and sales tax to supplies. Perusal of the chart reveals that

amounts of sales and purchases are same, meaning thereby that the taxpayer only earns fixed commission and nothing else. In a unreported judgment passed *vide* ITA No. 968/LB/2012, it was held by the Tribunal that:---

> "Learned counsel representing the taxpayer has placed before this Bench the order of the Tribunal reported as (2002) 86 Tax 235 (Trib.) wherein it has been held that where an assessee is a distributor of items, which pertain to its principal, the rates of the items are fixed by the principal company and the assessee does not have any role to play in it. He does not make payments on purchase of the items as he is not selling it to a third party on his own behalf. In another case referred by the learned counsel of the taxpayer reported as (2006) 93 Tax 369 (Trib.) wherein it has been held that in the case where the assessee was a distributor of products of Lever Brothers (Pvt.) Ltd. and Pakistan Tobacco Company that turnover tax under Section 80-D of the repealed Ordinance, 1979 is to be charged on the commission earned by the agent/distributor ..... In another case referred by learned counsel of the taxpayer in the matter of Mehmood and Company in ITA No. 7/69 *vide* order dated 8.12.1999 the Hon'able High Court has held that if the assessee was a mere selling agent and was deriving income only from sale of goods for his principal then it is only his commission receipts which could be taken as his turnover."

While deciding a reference filed by the department, the Hon'able Lahore High Court, Multan Bench, Multan has also answered the question on the issue in hand in negative. The relevant extract from the *supra* judgment is as under:---

> "5. Admittedly, the assessee is distributor of Lexon Tobacco Company and he can be charged to tax under Section 80-D, on commission receipts and not the turnover, Identical questions were raised in ITA

No. 7 of 1999 in the case of "*C.I.T. v. Mahmood and Company (Pvt.) Ltd.*" and it was held by a learned Division Bench of this Court as under:---

> "Even otherwise, we agree that the Assessing Officer failed to record a finding of fact as to the exact nature of the business of the assessee. If he was a trader on his own account then his total sales or gross receipts could be taken as turnover as explained in explanation to Section 80-D of the Ordinance. However, if the applicant was mere selling agent and was deriving income only from sale of goods for his principals then it is only his commission receipts which could be taken as his turnover."

7. Keeping in view the above facts and circumstances as well case-law cited at bar, we are of the considered view that the contentions raised by the taxpayer are correct firstly for the reason that after the introduction of sub-section (5AA) of Section 122 the powers under Section 122(5A) fully vest with the Commissioner of Inland Revenue on the basis of his personal examination and consideration of the facts of the case by himself. It is trite law that certain acts shall be done by a specified person and their performance by any other is impliedly prohibited. In this case the ACIR has acted beyond his powers. There is also no mention of delegation of power in writing by the Commissioner of Inland Revenue in the order of the learned ACIR which also makes the order illegal. Secondly, as per Section 32(4) of the Ordinance, it was the taxpayer who may apply in writing for change of method of accounting and the Commissioner may, by an order in writing approve such an application. However, the learned ACIR on the basis of presumptions acted beyond his jurisdiction while changing the history of the taxpayer. The case-law cited *supra* are on all fours to the case of the taxpayer, hence the order passed

by the learned CIR(A) is vacated and the amended assessment order under Section 122(5A) is hereby annulled.

8. Appeal of the taxpayer succeeds.

HAROON MUHAMMAD KHAN TAREEN, ACCOUNTANT MEMBER --- 9. I have carefully gone through the order passed by my learned brother the Chairman Appellate Tribunal Inland Revenue but I do not find myself in agreement with him. The precise questions requiring answers are as to whether the deemed assessment under Section 120 of the Income Tax Ordinance, 2001 can be erroneous and prejudicial to the interest of revenue and as to whether turnover of the appellant is liable to minimum tax under Section 113 of the aforesaid Ordinance? After going through the facts of the case answer to both these questions would be in affirmative. Admittedly the appellant is a "distributor" of *M/s.* Uniliver Pakistan Limited and his turnover is squarely liable to minimum tax under Section 113 as the tax paid by the appellant on the taxable income fell short of the minimum tax therefore, the additional CIR was legally bound to invoke provisions of sub-section (5A) of Section 122 by treating the deemed assessment under Section 120 as erroneous and prejudicial to the interest of revenue.

10. It will not be out of place to mention here that provisions of Section 113, being non-obstante in nature, shall prevail over other provisions of the Income Tax Ordinance, 2001, *inter alia* Section 120. Regarding the plea of the learned A.R. that the Additional Commissioner Inland Revenue was not justified to discard the history of the case, the same is misplaced. The turnover of the appellant has been simply subjected to minimum tax and no other aspect of the assessment has been touched by the Additional Commissioner Inland Revenue. The issue of lack of jurisdiction under Section 122(5A) has adequately been dealt with by the CIR(A) as the Additional CIR did enjoy such

power delegated to him by the concerned CIR under Section 210 of the Income Tax Ordinance, 2001.

11. As a result orders passed by both the authorities below *i.e.* Commissioner Inland Revenue (Appeals) and Additional Commissioner Inland Revenue are maintained and appeal is hereby dismissed.

As difference of opinion has occurred therefore, following questions are framed for referee member to resolve the difference:---

"(i) Whether the deemed assessment under Section 120 of the Income Tax Ordinance, 2001 can be erroneous and prejudicial to the interest of revenue and as to whether turnover of the appellant is liable to minimum tax under Section 113 of the aforesaid Ordnance?

(ii) Whether after the introduction of sub-section (5AA) of Section 122 the powers under Section 122(5A) fully vest with the Commissioner of Inland Revenue on the basis of his personal examination and consideration of the facts of the case by himself?

AS PER MR. MUHAMMAD WASEEM CHAUDHARY, JUDICIAL MEMBER IN THE CASE OF MR. ZIA-UR-REHMAN, PROP. SALAMAT ENTERPRISES, KOT ADDU.

12. The matter has been entrusted to me by the Honourable Chairman for resolving the difference of opinion by my two learned brothers which has arisen while deciding the above-titled appeal. The questions raised by my learned brother, Accountant Member are as under:---

(i) Whether the deemed assessment under Section 120 of the Income Tax Ordinance, 2001 can be erroneous and prejudicial to the interest of revenue and as to whether turnover of the appellant is liable to minimum tax under Section 113 of the aforesaid Ordinance?

(ii) Whether after the introduction of sub-section (5AA) of Section 122 the powers under Section 122(5AA) fully vest with the Commissioner of Inland Revenue on the basis of his personal examination and consideration of the facts of the case by himself?

13. The first part of question No. 1, *supra* relates with the assessment "Whether erroneous and prejudicial to the interest of Revenue" and second part of question is "Whether turnover of the appellant is liable to minimum tax under Section 113 of the Income Tax Ordinance, 2001. After examination of record and considering the arguments, I observe that deemed assessment framed under Section 120 of the Income Tax Ordinance, 2001 (hereinafter referred as the Ordinance) is neither erroneous nor prejudicial to the interest of revenue. It is an admitted fact that the taxpayer is a distributor of *M/s.* Uniliver Pakistan (Pvt.) Limited and sells the products of the principal company under an agreement on fixed margin allowed by the said principal company in fixed/assigned territorial jurisdiction under the terms and conditions laid down in the agreement. The taxpayer has rightly declared Margin of Profit/Receipts in the return.

14. It was contention of the learned Additional Commissioner Inland Revenue, while issuing the notice under sub-section (9) of Section 122 of the Income Tax Ordinance, 2001 that the taxpayer himself declared sales in the returns of sales tax. It is an established fact that the provisions of Sales Tax Act, 1990 are different from the provisions of Income Tax Ordinance, 2001 being two different Laws covering the different aspects of the transactions connected with the business of the taxpayer. Admittedly, the sales declared by the taxpayer are covered under the 3rd Schedule of the Sales Tax Act, 1990, meaning thereby Sales Tax upto the retail price has been charged by the principal company and no further sales tax makes sufficient that the taxpayer's sales are on behalf of its

principal company being selling agent and its margin of profit/receipts are the turnover of the taxpayer/appellant.

15. Keeping in view the nature of business as well declared version of the taxpayer in the previous years, the taxpayer, under the circumstances, is required to pay turnover tax on its margin of profit/receipts under Section 113 if applicable. The "TURNOVER" is defined in sub-section (3) of Section 113 of the Income Tax Ordinance, 2001 which reads as under:---

Section 113(1).....

(3) TURNOVER MEANS.--

(a) the gross sales or **Gross Receipts**, exclusive of Sales Tax and Federal Excise duty or any trade discounts shown on invoices; or bills, derived from the sale of goods, and also excluding any amount taken as deemed income and is assessed as final discharge of the tax liability for which tax is already paid or payable;

16. Taking into consideration, the above definition of turnover which includes **"RECEIPTS"** where applicable, liable to turnover tax if exceeds the required threshold limit. So I consider that deemed assessment framed under Section 120 of the Income Tax Ordinance, 2001 is not prejudicial to the interest of Revenue as the provisions of Section 113 of the Income Tax Ordinance, 2001 are not attracted in the present case. It is clear from the definition of turnover; the receipts are not subjected to Turnover Tax being distributor of the Principal Company. In support there-to the learned authorized representative relied upon two decisions of the honourable Lahore High Court in Tax Reference No. ITA 7/1999 in the case of *CIT v. M/s. Mehmood & Company* and Tax Reference No. 22/2007, dated 02.04.2008 in the case of *M/s.* Abul Wafa & Sons wherein the Honourable High Court decided the matter in favour of the taxpayer.

17. As far as the second question is concerned I again fully agreed with the observations of my learned brother the Chairman Mr. Jawaid Masood Tahir Bhatti as Section 122(5AA) was inserted through Finance Act, 2010, in the statute, which is reproduced as under:---

Section 122(5AA)

In respect of any subject-matter which was not in dispute in an appeal the Commissioner shall have and shall be deemed always to have had the powers to amend or further amend an assessment order under sub-section (5A).

18. By the reading of sub-section (5AA) of Section 122 of the Income Tax Ordinance, 2001 clearly indicates that the jurisdiction to exercise the powers under sub-section (5A) of Section 122 of the Income Tax Ordinance, 2001 for amendment of assessment vested to the Commissioner Inland Revenue and the same powers are not delegateable under Section 210 of the Income Tax Ordinance, 2001 to any subordinate authority. The intention of the legislation is clear that whenever amendment of assessment is required to be made sub-section (5AA) of Section 122 of the Income Tax Ordinance, 2001, the Commissioner Inland Revenue has had jurisdiction to amend the assessment after consciously application of mind and with examination of available record. My learned brother the Chairman Mr. Jawaid Masood Tahir Bhatti also cited judgments of this Tribunal which are fully give strength to the above point of view. Therefore, I am not hesitate to hold that the Additional Commissioner Inland Revenue while passing the order under sub-section (5A) of Section 122 of the Income Tax Ordinance, 2001 by exercising powers under Section 122(5AA) of the Income Tax Ordinance, 2001 acted beyond his jurisdiction and amendment of assessment framed by him is illegal, void *ab initio* and not tenable in the eye of law. With the above observation I fully agreed with the view-point of my learned brother the Chairman and answer the question

No. 1 in negative and question No. 2 in affirmative both in favour of the taxpayer/appellant. Therefore, the findings given by my learned brother the Chairman in the shape of judgment authored by learned Chairman is fully endorsed which are well-reasoned and as per facts of the case.

19. As a result the appeal of the taxpayer succeeds.

Appeal accepted.

2014 P.C.T.L.R. 714

[Lahore]

Present: **SYED MANSOOR ALI SHAH, J.**

Sui Northern Gas Pipelines

Versus

Deputy Commissioner Inland Revenue, etc.

Writ Petition No. 14832 of 2014, decided on 24th June, 2014.

(a) Unjust enrichment, doctrine of---

---Unjust enrichment, is rendention of a benefit by a person that is unjust or inequitable.

(Para 14)

ADVANCE TAX --- (Concept)

(b) Constitution of Pakistan (1973)---

---Arts. 199, 4, 10A---Income Tax Ordinance, 2001, Ss. 161, 152, 21, 147---Impugned show-cause notice and Assessment Order---Concept of advance tax---Co-relation between advance tax and deduction of tax at source, scope and meaning of S. 161(1B) of the Ordinance and, in particular, whether advance tax paid for a quarter amounts to be paid in the meanwhile for the purpose of S. 161(1B)---

Question for determination---Analysis---Tax that was to be deducted from payment to payee/deductee and was in the meanwhile paid by that person (payee/deductee, no recovery shall be made from SNGPL (deductor-assessee) who failed to collect tax---Deduction shall, however, be liable to pay default surcharge at the rate of 18% per annum from the date he failed to copied a deduction the tax to the date of tax was paid---Tax payer (payee/deductee) whose tax has to be deducted at source avails the benefit of the said deduction at time of payment of advance tax under Section 147---Jurisprudence evolved over the years regarding the liability of a deductor-assessee in default in case of non-deduction is in accordance with said provision---Once the payment has been made by the payee, the amount of tax that SNGPL failed to deduct could not be recovered from SNGPL, except the imposition of default surcharge penalizing the factum to deduct---Reasoning of impugned show-cause notice and subsequent assessment order was based on assumption that payment of advance tax, *per se*, was an estimate and, therefore, it could not with certainty and exactness reflect amount of tax to be deduced at source---Quantum of advance tax assessed and paid under the formula is final for the purpose of a particular quarter and constitutes payment for purpose of S. 161(1B)---Said variables, therefore, had no bearing on sanctity or quantification of advance tax paid in earlier quarters---Concept of estimation attached to advance tax had no bearing on quarterly payments of advance tax, which on their own were final payments circulated on basis of a statutory formula---Impugned recovery made from a payee or deductor-assessee, inspite of advance tax having been paid, without deducting allowable tax credit, in a particular question, amounts to depriving the tax payer (payee) or deductor (withholding agent) of property for a year without any plausible justification---Deprivation results in unjustly enriching and benefiting the department---An opportunity