Stereo.HCJDA 38.

JUDGMENT SHEET.

LAHORE HIGH COURT
RAWALPINDI BENCH, RAWALPINDI.
JUDICIAL DEPARTMENT

I.T.R No.10 of 2024

COMMISSIONER INLAND REVENUE.

Versus.

SAJID HUSSAIN GONDAL AND ANOTHER.

JUDGMENT.

Date of hearing:	***21.01.2026.***
Applicant by:	*Mr. Manzoor Hussain, Advocate.*
Respondent No.1 by:	*M/s Syed Muhammad Imran Haider and Imran-ul-Haq, Advocates.*

Mirza Viqas Rauf, J. *This reference application in terms of section 133 of the Income Tax Ordinance, 2001 (hereinafter referred to as "**Ordinance**") is before us against the order dated 28th November, 2023 passed by the Appellate Tribunal Inland Revenue, Headquarter Bench, Islamabad (hereinafter referred to as "**Tribunal**") on the appeal of respondent No.1/taxpayer (hereinafter referred to as "**respondent**") whereby his appeal was allowed and order dated 24th January, 2023 passed by the Commissioner (Appeal-III), Inland Revenue, Rawalpindi was set aside.*

2. *Facts in brief necessary for the purpose of determination of questions of law canvassed in this reference application are that the **respondent** is a taxpayer, who presented his income tax return for the year 2019, which was deemed assessment in terms of section 120(1) of the **Ordinance**. The Additional Commissioner Inland Revenue (Assessing Officer) observed that in the returns, the **respondent** declared gross revenue whereas as per tax deduction claim under section 236A of the **Ordinance** the **respondent** had made purchases of Rs.59,389,112/- and further claimed profit & loss expenses amounting to Rs.48,260,900/- which renders the deemed assessment as erroneous insofar as*

prejudicial to the interest of revenue. This followed the issuance of show cause notice under section 122(9)/111(1) read with section 122(5A) of the ***Ordinance*** *to amend the deemed assessment under section 122(5A) of the* ***Ordinance.*** *The* ***respondent****, in furtherance of the show cause notice, attended the proceedings and submitted relevant record alongwith the explanation. The Assessing Officer, being not convinced with the stance of the* ***respondent****, proceeded to amend the deemed assessment under section 122 (5A) of the* ***Ordinance*** *and thus made certain additions. Being aggrieved, the* ***respondent*** *preferred an appeal before the Commissioner (Appeal-III) Inland Revenue, Rawalpindi, which was disposed of by way of order dated 24th January, 2023. The order of the Commissioner was then assailed by the* ***respondent*** *through an appeal before the* ***Tribunal****. The appeal was, however, accepted by way of impugned order.*

3*. On the basis of questions of law canvassed in this reference application, we issued a notice to the* ***respondent****, who in return is now represented through the latter.*

4. *This reference application came up for hearing on various dates and ultimately on 12th May, 2025, a precise question was framed, which is related to interpretation of sections 122(5) and 122(5A) of the* ***Ordinance*** *and both the sides were directed to assist the Court.*

5. *We have heard learned counsel for the applicant department as well as learned counsel representing the* ***respondent*** *at considerable length and perused the record.*

6. *The matter in issue emanates from the issuance of show cause notice under section 122(9)/111(1) read with 122(5A) of the* ***Ordinance*** *by the applicant department to the* ***respondent****. The reason for issuance of show cause notice is that on examination of the income tax returns of the* ***respondent*** *filed for the tax year 2019 under section 114(1) of the* ***Ordinance,*** *which stands deemed assessment under section 120 of the*

Ordinance, *discrepancies mentioned in the show cause notice were revealed, rendering the return erroneous insofar as prejudicial to the interest of revenue in terms of section 122(5A) of the* ***Ordinance****.*

7. *In order to comprehend the core issue involved in the reference, it would be advantageous to reproduce the discrepancies made basis for issuance of show cause notice, which read as under: -*

1. During the examination of your income tax return for the tax year 2019 it has been observed that you have declared Gross revenue receipts amounting to Rs.59,389, 112/- whereas as per tax deduction claimed u/s 236A it has been observed that you made purchases amounting to Rs. 59,389,112/- and further you claimed P&L expenses amounting to Rs. 48,260,900/- in the return, which renders your return/deemed assessment order u/s 120 erroneous insofar as prejudicial to the interest of revenue thus warranting action u/s 122(5A) of the Income Tax Ordinance, 2001.

2. You have claimed Gross revenue of Rs. 59,389,112 and tax paid thereon of Rs.5,940,189 u/ s 236A. <u>However the data available on the web portal depicts deduction u/s 153(1)(a)</u> amounting to Rs. 631,800/- and u/s 153(1)(b) amounting to Rs. 1,019,000/- of The Income Tax Ordinance, 2001. Whereas, the same does not reconcile with the declared version and attracts the provision of section 111(1) of the Income Tax Ordinance, 2001. The detail of activity u/s 153 is as under:

CPR#	Section	Amount	Tax Deducted
IT2018100503411048722	153(1)(a)	631800	63180
IT2019050217591000003	153(1)(b)	328000	32800
IT2019050217591000003	153(1)(b)	328000	32800
IT2019070403411073046	153(1)(b)	363000	33000
Total		1,650,800	161,780

3. You have claimed P&L expenses under the single head amounting to Rs.48,260,900/- Whereas on the other hand it has been observed that you have not withheld the tax. <u>Therefore the same warrants verification under section 21(c) of the Income Tax Ordinance,</u> 2001 failing which the same will be disallowed and added in your taxable income.

4. You have declared capital amounting to Rs.800,000/- while the quantum of your business as confronted above in para 1, 2 and 3 dost not commensurate with each other.

> You are requested to explain these discrepancies along with concrete evidence in support of your declared claim in your return filed for the Tax year 2019 by the date mentioned above failing which it will be presumed that you have nothing to put forth in your defense and amendment of assessment shall be finalized in the manner stated above.

(underlining supplied for emphasis)

Though the respondent submitted his explanation in response to the show cause notice but remained unsuccessful and while declaring the reply unsatisfactory, the assessment was amended vide order dated 14th June, 2022. Feeling aggrieved, the ***respondent*** *preferred an appeal before the Commissioner Appeals under section 129 of the* ***Ordinance*** *but his appeal was dismissed vide order dated 24th January, 2023. This prompted the* ***respondent*** *to prefer an appeal before the* ***Tribunal****. The appeal was accepted by way of order dated 28th November, 2023 and the amendment for the assessment was declared illegal.*

8. *Chapter X of the* ***Ordinance*** *provides the "procedure" and its Part I is related to "returns" whereas Part II deals with the "Assessments". Where a return of income presented by a taxpayer is in accord with the provisions of subsection 2 of section 114 of the* ***Ordinance****, then in terms of section 120(1) of the* ***Ordinance****, it is to be termed as "complete" and taken to be an assessment made and order issued by the Commissioner though no assessment is made by him with conscious application of mind. Notwithstanding such deeming provision, section 120(1A) of the* ***Ordinance*** *bestows powers upon the Commissioner to conduct audit of income tax affairs of a person in the manner prescribed in section 177 of the* ***Ordinance****. Section 177 authorizes the Commissioner to call for inter alia record or documents including books of accounts from a taxpayer, so as to examine the same and make enquiry into the expenditure, assets and liabilities. If deems apt and necessary, the Commissioner may even order forensic audit to be conducted. The Commissioner is, thus, equipped with the power to gather necessary information or data for the purpose of investigation and audit. After completing the audit, if the Commissioner considers*

necessary, he may obtain taxpayer's explanation on all issues raised in the audit and issue an audit report containing audit observations and findings. After issuing the audit report, the Commissioner may, if considered necessary, amend the assessment under sub-section (1) or sub-section (4) of section 122, as the case may be, after providing an opportunity of being heard to the taxpayer under sub-section (9) of section 122 of the ***Ordinance****.*

9. *Section 122 of the* ***Ordinance*** *deals with the amendment of assessments in terms whereof, the Commissioner is authorized to amend the assessment order in certain eventualities. In the case before us, the assessment since has been amended by invoking sub-section (5A) read with sub-section (9) of section 122 of the* ***Ordinance****, so it would be apposite to first examine the scope o f the relevant provisions and for the said purpose, same is reproduced below: -*

> ***Section 122. Amendment of assessments.- (1)*** *Subject to this section, the Commissioner may amend an assessment order treated as issued under section 120 or issued under section 121, by making such alterations or additions as the Commissioner considers necessary.*
>
> ***(2)*** *---*
>
> ***(3)*** *---*
>
> ***(4)*** *---*
>
> ***(5)*** *An assessment order in respect of a tax year, or an assessment year, shall only be amended under sub-section (1) and an amended assessment for that year shall only be further amended under sub-section (4) where, on the basis of audit or on the basis of definite information the Commissioner is satisfied that-*
>
> > ***(i)*** *any income chargeable to tax has escaped assessment; or*
> >
> > ***(ii)*** *total income has been under-assessed, or assessed at too low a rate, or has been the subject of excessive relief or refund; or*

> ***(iii)*** *any amount under a head of income has been mis-classified.*
>
> ***(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.*
>
> ***(6)*** ***---***
>
> ***(7)*** ***---***
>
> ***(8)*** ***---***
>
> ***(9)*** *No assessment shall be amended, or further amended, under this section unless the taxpayer has been provided with an opportunity of being heard:*
>
> *Provided that order under this section shall be made within one year of issuance of show cause notice or within such extended period as the Commissioner may, for reasons to be recorded in writing, so however, such extended period shall in no case exceed ninety days. This proviso shall be applicable to a show cause notice issued on or after the first day of July, 2021:*
>
> *Provided further that any period during which the proceedings are adjourned on account of a stay order or Alternative Dispute Resolution proceedings or agreed assessment proceedings under section 122D or the time taken through adjournment by the taxpayer not exceeding sixty days shall be excluded from the computation of the period specified in the first proviso.*

From the bare reading of the above noted provisions of law, it is manifestly clear that a Commissioner can only amend the assessment order in terms of sub-section (5A) of section 122 of the ***Ordinance*** *if he considers that the assessment order is erroneous insofar it is prejudicial to the interest of revenue. Power vested upon the Commissioner in terms of sub-section (5A) of section 122 of the* ***Ordinance*** *is like and akin to revisional power and it is suo motu as well. For the exercise of such power, it is sine qua non that the Commissioner should satisfy himself that the order of the Assessing Officer sought to be revised is erroneous as well as prejudicial to the interest of revenue.*

10. *Needless to reiterate that sub-section (5A) of section 122 of the* ***Ordinance*** *can only be invoked by the Commissioner if both the conditions are existing simultaneously. Recourse to sub-section (5A) cannot be made to correct each and every type of mistake or error committed by the Assessing Officer. Phrase "prejudicial to the interest of revenue" has to be read in conjunction with "erroneous order" but not in isolation. The main object and theme of sub-section (5A) of section 122 of the* ***Ordinance*** *appears to be to vest the power upon the Commissioner to amend the assessment order, if in his opinion, the Assessing Officer committed some glaring mistake while making the assessment order, which also tends to be prejudicial to the interest of revenue.*

11. *In other words, we can safely infer from the bare language of sub-section (5A) of section 122 of the* ***Ordinance*** *that it is meant to correct the apparent error or mistake committed by the Assessing Officer in the process of evaluating the material placed before him by the taxpayer and as a result of his erroneous assessment, it resulted into being prejudicial to the interest of revenue.*

12. *We feel no cavil to observe that there is a marked distinction between powers vested upon the Commissioner by virtue of sub-sections (5) and (5A) of section 122 of the* ***Ordinance****. In case of former, an assessment can be amended by the Commissioner on the basis of audit or some definite information whereas for invoking the powers of amendment of the assessment order in terms of latter provision, there is no such requirement. Sub-section (5) of section 122 of the* ***Ordinance*** *would be attracted when the wrong assessment is resulted on the basis of some false information or withholding of material information by the taxpayer relevant for the purpose of assessment whereas sub-section (5A) would come into play when despite availability of necessary information for the proper assessment, the Assessing Officer commits an*

error resulting into passing of erroneous order, which is prejudicial to the interest of revenue.

13. *In the above background, we when examined the show cause notice issued to the* ***respondent****, it appears that it was issued on the ground that the* ***respondent*** *declared gross revenue receipts amounting to Rs.59,389,112/- whereas as per tax deduction claimed under section 236A of the* ***Ordinance****, he made purchases amounting to Rs.59,389,112/- and further claimed profit and loss expenses amounting to Rs.48,260,900/- in the return, which rendered the return/deemed assessment under section 120 of the* ***Ordinance*** *erroneous insofar as prejudicial to the interest of revenue. It was further made basis for the show cause notice that as per data available on the web portal, it depicts deduction under section 153(1)(a) of the* ***Ordinance*** *amounting to Rs.631,800/- and under section 153(1)(b) amounting to Rs.1,019,000/- of the* ***Ordinance*** *whereas the same does not reconcile with the declared version and attracts the provision of section 111(1) of the* ***Ordinance****.*

14. *After examining the discrepancies forming basis of the show cause notice issued by the Commissioner while exercising jurisdiction under sub-sections (5A) and (9) of section 122 of the* ***Ordinance****, we are of the considered view that in the circumstances, Commissioner was precluded to exercise his powers under sub-section (5A) of section 122 of the* ***Ordinance****. The Commissioner, at the most, should have resorted to sub-section (5) of section 122 of the* ***Ordinance****, if he intended to amend the assessment order of the Assessing Officer. Reference to this effect can be made to <u>The COMMISSIONER INLAND REVENUE, MULTAN ZONE v. MUHAMMAD IQBAL RIND & SONS D.G. KHAN</u>* ***(2022 PTD 1411)****. The relevant extract from the same is reproduced below: -*

> "7. The provision of subsection (5A) of Section 122 of the Ordinance, as it existed at the relevant time, is reproduced herein below:
>
> > "Subject to subsection (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."

From perusal of the above provision, it is abundantly clear that an amendment of assessment under the said provision can be made only in cases where twin conditions namely, (i) the Assessment Order is erroneous; and (ii) it is prejudicial to the interest of revenue, are satisfied. If one of these pre-requisites is absent i.e. if the Assessment Order is not erroneous but prejudicial to the revenue or if it is erroneous but not prejudicial to the revenue, recourse cannot be had to the said section. There can be no doubt that the provision cannot be invoked to correct each and every type of mistake or error in the Assessment Order. An incorrect assumption of facts or an incorrect application of law will satisfy the requirement of the order being 'erroneous'. The phrase 'prejudicial to the interest of revenue' has to be read in conjunction with an erroneous Assessment Order. Every loss of revenue as a consequence of an Assessment Order cannot be treated as prejudicial to the interest of revenue. For examples, when an Assessment Order is based on one of the courses permissible in law and it has resulted in a loss of revenue or where two views are possible and the view taken in the Assessment Order is the one with which the commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the interests of revenue unless the view taken in the Assessment Order is unsustainable in law. To the same effect the expression *'erroneous in so far it is prejudicial to the interest of revenue'* occurring in Section 66A of the Income Tax Ordinance, 1979 in relation to the exercise of revisional powers specified therein has been interpreted in the cases of Galaxo Laboratories Limited v. Inspecting Assistant Commissioner of Income Tax and others (1992 PTD 932) and Messrs S.N.H. Industries (Pvt.) Ltd. v. Income Tax Department and another (2004 PTD 330).

8. It is also well settled that the error and prejudice should be clearly manifest from the show-cause notice and there is no room for any roving inquiry or fishing expedition. Reliance in this regard is placed on judgments in the cases of Commissioner Inland Revenue, Zone-I, LTU v. MCB Bank Limited (2021 PTD 1367); Honda Atlas Cars (Pakistan) Limited v. Appellate Tribunal Customs, Excise and Sales Tax (2021 PTD 1806) and Caretex v. Collector of Sales Tax and Federal Excise (2013 PTD 1536).

9. From perusal of the show-cause notice reproduced in the Amended Assessment Order dated 27.07.2011, it is manifest that jurisdiction under Section 122(5A)&(9) of the Ordinance was assumed while treating the respondent's assessment under Section 120(1) of the Ordinance for the tax year 2010 to be erroneous in so for as prejudicial to the interest of revenue merely on the ground that the figure of total cash withdrawal amounted to Rs.67,55,000/- when worked back on the basis of tax deduction under Section 231A of the Ordinance, which was not commensurate with the declared net sales/gross profit of Rs.3,30,000/-. The assumption that such worked back figure reflected sales or gross profit of the respondent is nothing more than a conjecture and surmise based on an arithmetic calculation of the Taxation Officer and the same was rightly held in appeals as not sufficient for treating the Assessment Order under Section 120(1) of the Ordinance to be erroneous in so for as prejudicial to the interest of revenue.

10. Indeed the Additional Commissioner himself realized that the aforementioned calculation was not adequate to amend assessment of the

> respondent under Section 120(1) of the Ordinance, therefore, he obtained all bank statements of the taxpayer for the tax year 2010 while invoking provisions of Section 176 of the Ordinance and through order dated 27.07.2011 under Section 122(5A) of the Ordinance amended assessment of the respondent the while treating the total deposits made in the bank accounts of the respondent to be his total sales/receipts liable to tax under the Ordinance."

15. *In the light of above noted threadbare discussion, we are inclined to observe that the* ***Tribunal*** *was right in its approach to allow the appeal of the* ***respondent*** *through the impugned order, which is unexceptionable. Resultantly, this reference application is answered in* ***negative****. Office to transmit copy of this judgment to the* ***Tribunal*** *in terms of section 133(8) of the* ***Ordinance****.*

(Jawad Hassan) *JUDGE*

(Mirza Viqas Rauf) *JUDGE*

Dictated:
28.01.2026
Signed
03.02.2026.

Announced in open Court on 03.02.2026.

(Jawad Hassan) *JUDGE*

(Mirza Viqas Rauf) *JUDGE*

Approved for reporting.

JUDGE *JUDGE*

Zeeshan