Citation 1993 SCMR 1232
Law: Constitution of Pakistan, 1973
Sections: 185 (3)
Law: Income Tax Ordinance (XXXI OF 1979)
Sections: 3, 4, 5, 8, 29, 134, 136 , 137, 14, 17, 26, Second Sched , Fourth Sched., 65,

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1993 SCMR 1232

Civil Appeals Nos.605-K, 606-K, 624-K, 625-K, 626-K and 628-K of 1990 and 12-K of 1991, decided on 4th April, 1993. Dates of hearing: 24th and 25th January, 1993. (On appeal from the common judgment, dated 20-7-1989 of the High Court of Sindh, Karachi, passed in Constitution Petitions Nos. 641/88, 642/88, 348/89, 736/88, 539/88, 494/88 and 488/88 respectively).

Supreme Court of Pakistan

Present: Nasim Hasan Shah, Ajmal Mian and Muhammad Afzal Lone, JJ

Nasim A. Farooqui, Advocate Supreme Court for Appellants (in CAs. Nos.605-K, 606-K of 1990 anti 12-K of 1991).

Fazal Ghani Khan, Advocate Supreme Court for Appellants (in C.As. Nos. 624-K and 625-K of 1990).

Mansoor Ahmad Khan, Senior Advocate Supreme Court and M.G. Hasan, Advocate for Appellants (in C.As. Nos.626-K and 628-K of 1990).

Shaikh Haider, Advocate Supreme Court instructed by S.M. Abbas, Advocate-on-Record for Respondents (in all the Cases).

Messrs CENTRAL INSURANCE CO. and others--Appellants
Vs
THE CENTRAL BOARD OF REVENUE, ISLAMABAD and others---Respondents

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(a) Constitution of Pakistan (1973)---

----Art.l85(3)---Leave to appeal was granted for the reasons that the contentions advanced raised substantial questions of law which might affect a large number of cases and also appeared to be of first impression.

(b) Income Tax Ordinance (XXXI of 1979)---

----Ss.14, 17, 26, Second Sched., item No.(72) & Fourth Sched., R.5--Interpretation, scope and application of the provisions.

A perusal of section 14 indicates that it provides that notwithstanding anything contained in the Ordinance, the incomes or classes of income, or persons or classes of persons specified in the Second Schedule, shall be exempt from tax under the Ordinance subject to the conditions and to the extent specified therein, or liable to tax at such rates which are less than the rates specified in the First Schedule as are specified therein. or the above Second Schedule may provide reduction in tax liability subject to the conditions and to extent

specified therein, or it may exempt from the operation of any provision of the Ordinance subject to the conditions and to the extent specified therein. By virtue of subsection! (2) of section 14, the Federal Government has been empowered by notification in the official Gazette, to make such amendment in the Second Schedule in terms of its clauses (a), (b) and (c). Item (72) of the Second Schedule, in terms of above section 14 of the Ordinance, exempted the yield of National Saving Certificates or Defence Saving Certificates issued under the National Saving Scheme. Section 17 of the Ordinance provides that the incomes shall be chargeable under the head "Interest on securities" from the items mentioned in clauses (a) and (b) thereof. It may also be pointed out that subsection (2) of section 17 lays down that notwithstanding anything contained in subsection (1), where any security of Federal Government is issued with the condition that the interest shall not be liable to tax, the interest receivable on such security shall be exempt from tax in accordance with such condition. Clause (b) of subsection (2) contemplates that tax payable on the interest receivable on arty security of a Provincial Government issued with the same condition as aforesaid shall be payable by that Provincial Government. Section 26 provides inter alia, that notwithstanding anything contained in the Ordinance, the profits and gains of any business of insurance and the taxpayable thereon shall be computed in accordance with rules contained in the Fourth Schedule. Clauses (b) and (c) of the above section are not relevant for the purpose of the present controversy and, therefore, need not to be dealt with. Rule 5 of the Fourth Schedule lays down that the profits and gains of any business of insurance other than life insurance shall be taken to be the balance of the profits disclosed by the annual accounts required under the Insurance Act, 1938, to be furnished to the Controller of Insurance subject to the adjustment of the items mentioned in clauses (a) and (b) thereof.

(c) Income Tax Ordinance (XXXI of 1979)---

----Ss.14, 17, 26, Second Sched., item No.(72) & Fourth Sched., R.5---Interest earned by insurance company on Khas Deposit Certificates/Defence Savings Certificates being part of profits and gains could be subject to tax.

In the present case, it is an admitted position that the assessees while submitting their accounts to the Controller of Insurance in Form B in terms of the Insurance Act, 1938, had shown the interest earned by them on Khas Deposit Certificates/Defence Saving Certificates during the assessment years in question and, therefore, it was part of profits and gains and, therefore, could be subject to tax. It is true that section 14 as well as section 26 contained non obstante clause, but section 26, being a provision subsequent to section 14 and also being a special provision inter alia dealing with the working out of profits and gains of any business of insurance and the tax payable thereon read with Fourth Schedule, shall prevail.

Reference to clause (a) of subsection (2) of section 17 of the ordinance is not relevant as the assessees has not been able to demonstrate that Khas Deposit Certificates or Defence Saving Certificates were issued by the Federal Government with the condition that the interest thereon shall not be liable to tax. On the contrary, the assessees had relied on item (72) of the Second Schedule read with section 14 of the Ordinance.

The Commissioner of Income Tax v. R.G. Chapman PLD 1985 SC 329; Life Insurance Corporation of India v. Commissioner of Income-tax, Delhi and Rajasthan (1964) 51 ITR 773; Assessee v. Department (1964) 10 Taxation 95; Pandyan Insurance Co. v. Commissioner of Income-tax, Madras 1965 PTD 475; Lakshami Insurance Co. Ltd. v. Commissioner of Income-tax, New Delhi 1972 PTD 233; Commissioner of Income-tax, Bombay City II, Bombay v. New India Assurance Co. Ltd. 1972 PTD 458; Commissioner of Income-tax, Bombay City Il, Bombay v. New India Assurance Co. Ltd. (1969) 71 ITR 761; Lakshmi Insurance Co. Ltd. v. Commissioner of Income-Tax, New Delhi (1969) 72 ITR 474; Lakshmi Insurance Co. Ltd., Lahore v. Commissioner of Income-tax, Punjab, Delhi and N.-W.F.P. Provinces, Lahore AIR 1950 Lah. 234; Commissioner of Income-tax v. National Insurance Co. Ltd. (1986) 159 ITR 314; Commissioner of Income-tax, Central, Karachi v. Messrs Alpha

Insurance Co. Ltd. and another PLD 1981 SC 293; Messrs Habib Insurance Co. Ltd. v. Commissioner of Income-tax (Central), Karachi PLD 1985 SC 109; Commissioner of Income-tax (Central) Zone `A', Karachi v. Phoenix Assurance Co. Ltd. (1991) 64 Taxation 173 and Commissioner of Income-tax, Karachi v. Messrs Queensland Insurance Co. Ltd., Karachi 1992 SCMR 539 ref.

Nazir Ahmad v. Pakistan and 11 others PLD 1970 SC 453 and Asian Food Industries Ltd. and others v. Pakistan and others 1985 SCMR 1753 distinguished.

(d) Income-tax---

----Practice of the Department cannot negate the provisions of relevant statute.

(e) Income Tax Ordinance (XXXI of 1979)--S 65---C.B.R. Circular No. 4 of 1988, dated 19-4-1988--- Interpretation, scope and application of S. 65---Expression "definite information"--Connotation---If an assessee discloses all the material facts without any concealment and the assessment has been consciously completed by the Income Tax Officer, in such a case in the absence of discovery of any new fact, which can be treated as "definite information", there cannot be any scope for re-opening of the assessment under S. 65 on the grounds referred to in S.65(1)(a)(b)---Any change of opinion on the basis of the same material by the Income Tax Officer will not warrant pressing into service S.65(1)---Circular from Board of Revenue, interpreting the provision of S. 65 not a "definite information"---Re-opening of assessment by Income Tax Officer on the basis of Circular No. 4 of 1988 by C.B.R. was not justified.

The words "definite information" employed in subsection (2) of section 65 of the Ordinance are the key words for the purposes of justifying invoking of subsection (1) of section 65. The above words have not been defined in the Ordinance and, therefore, they will carry their literary meanings.

The word "information" has wide connotation and it is also used in relation of an accusation of the commission of an offence. Whereas, the word "definite" carries inter alia meaning, defined, having distinct limits, fixed, exact, clear precise, bounded etc. Since the word "information" has been prefixed. by the word "definite" in subsection (2) of section 65 of the Ordinance, it controls the generality of the word "information". Every information cannot be treated as the basis for re-opening of the assessment, but the information should be of the nature which should qualify as a definite information. In other words, mere guess, gossip or rumour cannot be treated as definite information. However, the expression "definite information" cannot be given a universal meaning, but it will have to be construed in the context of the circumstances of each case.

The expression "definite information" will include factual information as well as information about the existence of a binding judgment of a competent Court of law/forum for the purposes of section 65 of the Ordinance, but any interpretation of a provision of law by a functionary which has not been entrusted with the functions to interpret' such provision judicially, cannot be treated as a "definite information". The Central Board of Revenue does not figure in the hierarchy of the judicial forums provided for under the Ordinance and, therefore, the interpretation placed by it on the relevant provisions of the Ordinance in the circular, at the most, can be treated as an administrative interpretation and not a judicial decision to qualify for treatment as a definite information. It is, being an administrative opinion, liable to be varied, modified and, therefore, from its very nature, cannot be treated as a definite information. If one treats an administratively interpretation of a provision of law as a definite information, it will lead to uncertainty and will cause harassment to the assessees. The Central Board of Revenue may, at any time, place construction on a particular provision of the Ordinance, which may not be legally sustainable, but it will be treated by the

Income-tax Officers as a definite information for the purposes of re-opening of the assessments which were competently framed long time back. In the present case the construction placed by the Central Board of Revenue on the relevant provisions of the Ordinance seemed to be correct, but that fact alone would not change its character as to qualify it as a definite information to justify reopening of assessments.

A perusal of subsection (1) of section 65 shows that it provides for additional assessment, if in any year for any reason--

(a) any income chargeable to tax under the Ordinance has escaped assessment; or

(b) the total income of an assessee has been under-assessed or assessed at too low a rate or has been the subject of excessive relief or refund under the Ordinance.

In the above eventualities and if the total income of an assessee or the tax payable by him has been assessed or determined under subsection (1) of section 59 and no order of assessment has subsequently been made under section 65 or any other provision of the Ordinance, the Income Tax Officer may, at any time subject to the provisions of subsections (2), (3) and (4), issue a notice to the assessee containing all or any of the requirements of a notice under section 56 of the Ordinance and may proceed to assessee or determine by an order in writing the total income of the assessee or the tax payable by him, as the case may be, and all the provisions of the Ordinance in such case, shall so far as may be applied subject to the proviso that tax shall be charged at the rate or rates applicable to the assessment year for which the assessment is made.

Subsection (2) of section 65 places clog on the above power of the Income Tax Officer by providing that no proceedings under subsection (1) shall be initiated unless definite information has come into the possession of the Income Tax Officer and he has obtained the previous approval of the Inspecting Assistant Commissioner of Income Tax in writing to do so. The word "and" was substituted by Finance Act (VI of 1987) in place of the word "or" which appeared between the words "unless definite information has come into possession of the Income Tax Officer" and "he has obtained the previous approval". Prior to the amendment, it could be urged that in order to press into service subsection (1) of section 65, the requirement was that either the Income Tax Officer had come into possession of definite information or he had obtained previous approval of the Inspecting Assistant Commissioner of Income Tax in writing to do so but after the amendment, both the above requirements are mandatory. Where notices under section 65 were issued to the assessees after the above amendment, both the above requirements were necessary. Explanation to subsection (2) of section 65 explains the term "definite information" by. providing that it includes information in respect of sales and purchases made by the assessee, of any goods, of any information regarding acquisition, possession or transfer, by the assessee, of any money, assets or valuable articles or any investment made or expenditure incurred by him. Since the word "includes" has been employed, it means that the above definition or explanation is not exhaustive and, therefore, any definite information, which has direct nexus with the reasons mentioned in above clauses (a) and (b) of subsection (1) of section 65 referred to hereinabove, will be covered by above subsection (2).

If an assessee discloses all the material facts without any concealment and the assessment has been consciously completed by th8 Income Tax Officer, in such a case in the absence of discovery of any new fact which can be treated as a definite information, there cannot be any scope for re-opening of the assessment under the provisions of section 65 of the Ordinance on the grounds referred to in clause (a) or (b) of subsection (1) of section 65. In other words, any change of opinion on the basis of the same material by the Income Tax Officer will not warrant pressing into service section 65 (1) of the Ordinance. In the present cases, it is an admitted position that the assessees had not concealed any facts. On the contrary, they disclosed the interest earned by them on the Khas Deposits Certificates/Defence Saving Certificates in their balance-sheets and claimed exemption under Item (72) of the Second

Schedule read with section 14 of the Ordinance. No fresh facts have been discovered by Income Tax Officer except that the Income Tax Department had received the Circular from the Central Board of Revenue.

Edulji Dinshaw Limited v. Income Tax Officer 1990 PTD 155; Messrs Arafat Woollen Mills Limited v. The Income Tax Officer, Companies Circle C-1, Karachi 1990 PTD 338; Chambers 20th Century Dictionary, New Edition; The Concise Oxford Dictionary, Seventh Edn.; New Webster's Dictionary of the English Language; Black's Law Dictionary, Fifth Edn.; Commissioner of Wealth-Tax, West Bengal v. Imperial Tobacco Co. of India Ltd. (1966) 61 ITR 461; V. Jaganmohan Rao and others v. Commissioner of Income-tax anal Excess Profits Tax, Andhra Pradesh (1970) 75 ITR 373; Commissioner of Income-tax v. West Coast Industrial Company Limited (1987) 168 ITR 72; Philips Electrical Company of Pakistan (Pvt.) Limited v. Income-tax Officer, Companies Circle/B-3, Karachi and another 1990 PTD 389 and Republic Motors Ltd. v. Income-tax Officer and others 1990 PTD 889 ref.

(f) Income Tax Ordinance (XXXI of 1979)---

----Ss. 3, 4, 5, 8, 29, 134, 136 & 137---Scope and application of the provisions.

(g) Income-tax Ordinance (XXXI of 1979)---

----S. 3(a)---Central Board of Revenue---Powers of---Locus standi of Central Board of Revenue to interpret the provisions of the 'Ordinance---Status of Central Board of Revenue's interpretation of law.

Though the Central Board of Revenue has administrative control over the functionaries discharging their function under the Ordinance, but it does not figure in the hierarchy of the forums provided for adjudication of assessee's liability as to the tax. Any interpretation placed by the Central Board of Revenue, on a statutory provision cannot be treated as a pronouncement by a forum competent to adjudicate upon such a question judicially or quasi-judicially. The Central Board of Revenue cannot issue any administrative direction of the nature which may interfere with the judicial or quasi-judicial functions entrusted to the various functionaries under a statute. The instructions and directions of the Central Board of Revenue are binding on the functionaries discharging their functions under the Ordinance in view of section 8 so long as they are confined to the administrative matters. The interpretation of any provision of the Ordinance can be rendered judicially by the hierarchy of the forums provided for under the above provisions of the Ordinance, namely, the Income-tax Officer, Appellate Assistant Commissioner, Appellate Tribunal, the High Court and the Supreme Court and not by the Central Board of Revenue. In this view of the matter, the interpretation placed by the Central Board of Revenue on the relevant provisions of the Ordinance in the Circular, can be treated as administrative interpretation and not judicial interpretation.

If there is a departure for the law involved in the provision for relaxation contained in the Circular, then that Circular is to the extent of the deviation, invalid and ineffective, and power thereunder is illegally exercised.

The Board's views as to the interpretation of law do not have the force of law, and the expectation would be, particularly where a fiscal statute is involved which should be implemented with strict impartiality, that references to inclination towards relaxation or otherwise would have been avoided.

The Commissioner of Income-tax, East Pakistan, Dacca v. Noor Hussain PLD 1964 SC 657 ref.

(h) Income Tax Ordinance (XXX-I of 1979)---

----Ss. 65, 14, 17, 26, Second Sched., item No. 72 & Fourth Sched., R. 5--C.B.R. Circular No. 4 of 1988, dated 19-4-1988---Civil Procedure Code (V of 1908), O.XLVII, R.1---Re-opening of assessment--- Definite information—What constitutes---Principles---Principle that a subsequent binding decision after the disposal of the case cannot be said to be discovery of a "new important matter" or of a mistake or an error apparent on the face of record and that mere conflict or divergence of opinion cannot amount to be an error apparent on the face of record in terms of O.XLVII, R.1, C.P.C. will be applicable in case of S.65, Income-Tax Ordinance, 1979---If the Income-Tax Officer failed to take into consideration a decision of a superior Court which was binding on him at the time of framing of an assessment order, discovery of such authority subsequent to the framing of assessment may constitute a "definite information" in terms of S. 65, Income Tax Ordinance, 1979---Change in law cannot justify re-opening of a past and closed transaction in absence of express provision providing retroactive effect---Central Board of Revenue's circular interpreting S. 65 of the Ordinance, therefore, did not constitute "definite information" warranting re-opening of assessment under S. 65.

The Courts while construing the provisions of Order XLVII, C.P.C. which relates to the review of judgments, orders, have held that a subsequent binding decision after the disposal of the case cannot be said to be discovery of a new important matter or of a mistake or an error apparent on the face of record and that mere conflict or divergence of opinion cannot amount to an error apparent on the face of record in terms of Rule 1 of Order XLVII, C.P.C.

Though Order XLVII, Rule 1, C.P.C. cannot be equated with section 65 of the Ordinance on account of difference in language and scope of the respective provisions, but the above principle will be applicable even in case of section 65 of the Ordinance. However, if the Income-tax Officer failed to take into consideration a decision of a superior Court which was binding on him at the time of framing of an assessment order, discovery of the above authority subsequent to the framing of issue may constitute a "definite information" in terms of section 65 of the Ordinance. Even change in law cannot justify re-opening of a past and closed transaction in the absence of express provision providing retroactive effect.

Where the rights of the parties have been judicially determined with reference to the terms of a law in force at the time of the adjudication, the finality of such a judgment will not be affected merely because the law on the basis of which that decision was rendered had subsequently been altered unless a provision was expressly made in the changed or modified law destroying the finality of the aforesaid judgment.

In the present case at the time of framing of the assessment orders for the assessment years in issue except for C.B.R. Circular No.4 of 1988 interpreting the provisions of section 65 there was no decision of a superior Court which could be binding on the Income Tax Officer holding that section 26(b) read with Rule 5 of the Fourth Schedule to the Ordinance shall prevail on Item (72) of the Second Schedule read with section 14 of the Ordinance in order to deny the benefit of tax-free income. On the contrary, the department for a long period, had been consistently construing the above provisions in the manner as to extend the benefit of the tax-free income in the form of interest earned on the Khas Deposit Certificates/Defence Saving Certificates.

There being no definite information in terms of section 65(2) of the Ordinance available before the Income Tax Officer warranting issuance of the notices under section 65 of the Ordinance, Supreme Court declared the impugned notices and the proceedings/orders passed pursuant thereof as being without lawful authority and of no legal effect.

Lachhmi Narain Balu v. Ghisa Bihari and another AIR 1960 Pb. 43; Board of Revenue and another v. Syed Akbar Sahib AIR 1973 Ker. 285; Gyan Chandra Dwivedi v. 2nd Additional District Judge, Kanpur and others AIR 1987 All. 40 and Sardar Ali and others v. Muhammad Ali and others PLD.1988 SC 287 ref.

JUDGMENT

AJMAL MIAN, J.---By this common judgment, we intend to dispose of the above seven appeals, which have been filed with the leave of this Court and are directed against a common judgment dated 20-7-1989 passed, by a Division Bench of the High Court of Sindh in Constitution Petitions, filed by the appellants against the issuance of notices under section 65 of the Income Tax Ordinance, 1979, hereinafter referred to as the Ordinance, dismissing the same, except that in Civil Appeal No.12-K of 1991, there is a separate judgment of another Division Bench of the above High Court passed in Constitution Petition No.D-348 of 1989 following the above earlier decision of the Division Bench. Leave to appeal was granted for the reasons that the contentions advanced by the learned counsel for the appellants raised substantial questions of law which might affect a large number of cases and also appeared to be a first impression.

2.The brief facts are that the appellants are Insurance Companies and are carrying on the business of general insurance. Their income-tax assessments were finalized by the Income Tax Officer concerned in accordance with Section 26 read with Rule 5 of the Fourth Schedule to the Ordinance. It appears that the Central Board of Revenue issued Circular No.4 of 1988 dated 19-4-1988, whereby inter alia the following interpretation was placed on the provisions of the Ordinance:---

"It is thus evident that special provision has been made in the Ordinance for the computation of the profits and gains of insurance business. This means that whatever may be constituents of the receipts of an insurance company, the balance disclosed in the annual accounts constitutes insurance income. Thus in the case of insurance company all the receipts whether from property, business, interest on securities, capital gains on sale of stocks and shares, dividends, yield of National Saving or Defence Certificates, etc. will constitute insurance income and will be liable to tax. In such cases provisions of the Second Schedule to Income Tax Ordinance, 1979, will not be applicable to the individual receipts credited to the accounts."

Upon receipt of the above circular, the Income Tax Officer concerned issued above notices under section 65 of the Ordinance, proposing to re-open the appellants' income-tax assessments for the assessment years mentioned therein on the ground that the income earned by them from Khas Deposit/Defence Savings Certificates had escaped assessment in the relevant assessment years. Thereupon, inter alia the above appellants filed above Constitution Petitions.

3. Before the High Court, it was urged by the appellants that the income arising from Khas Deposit' Certificates was specifically exempted from the payment of. income-tax thereon by virtue of section 14 read with Item No.(72) of the Second Schedule to the Ordinance and thus the impugned notices were wholly without jurisdiction and mala fide. It was also urged by them that the income-tax assessment of the appellants having been finalized in accordance with law and exemption having been granted by the Income Tax Officer concerned after conscious application of mind, the subsequent change of opinion could not be a valid ground for re-opening of the assessment, as there was no definite information received by the I.T.O. after the finalization of the assessment and re-opening of the assessment was sought on tie material already on record.

4. However, the learned Judges of the Division Bench, through the judgment under appeal, dismissed 12 Constitution petitions filed by various Insurance Companies, which included the Constitution petitions filed by the present appellants, except that appellant's Constitution petition in Civil Appeal No.12-K of 1991 was disposed of by a separate judgment by another Division Bench of the same High Court. After that, the appellants filed petitions for leave to appeal, which were granted for the above reasons.

5. We have heard Messrs Fazle Ghani Khan, Nasim A. Farooqui, Mansoor Ahmad Khan and M.G. Hasan, learned counsel for the appellants, and Mr. Shaikh Haider, learned counsel for the respondent-department. We have also heard Sardar Sikandar Hayat, Advocate, as amicus curiae who appeared with the special permission of this Court.

6. Before proceeding with the contentions of the learned counsel for the parties, it may be advantageous to refer to the relevant provisions of the Ordinance, namely, sections 14, 17, Item No.(72) of the Second Schedule, section 26 and Rule 5 of the Fourth Schedule to the Ordinance, which are pertinent for the purpose of deciding the question, whether the interest earned by the appellants on Khas Deposit Certificates/Defence Saving Certificates was exempted from payment of income-tax or not.

Section 14 of the Ordinance:

"14. Exemptions.---(1) Notwithstanding anything contained in this Ordinance, the incomes or classes of incomes, or persons or classes of persons specified in the Second Schedule shall be---

(a) exempt from tax under this Ordinance, subject to the conditions and to the extent specified therein; or

(b) liable to tax at such rates, which are less than the rates specified in the First Schedule, as are specified therein; or

(c) allowed a reduction in tax liability, subject to the conditions and to the extent specified therein; or

(d) exempt from the operation of any provision of this Ordinance, subject to the conditions and to the extent specified therein.

(2) The Federal Government may, from time to time, by notification in the official Gazette, make such amendment in the Second Schedule by--

(a) adding any clause or condition therein;

(b) deleting any clause or condition therein; or

(c) making any change in any clause or condition therein,

as it may think fit, and all such amendments shall have effect in respect of any assessment year, as may be specified in this behalf, including any such year beginning on any date before or after the commencement of the financial year in which the said notification is issued."

Section 17 of the Ordinance:

17. Interest on securities.--(1) The following incomes shall be chargeable under the head "Interest on securities", namely:---

(a) interest on any securities of the Federal Government or a Provincial Government receivable by an assessee in any income year; and

(b) interest on debentures or other securities for money issued by or on behalf of a local authority or a Pakistani company receivable by an assessee in any income year.

(2) Notwithstanding anything contained in subsection (1),---

(a) where any security of the Federal Government is issued with the condition that the interest thereon shall not be liable to tax, the interest receivable on such security shall be ' exempt from tax in accordance with such condition; and

(b) tax payable on the interest receivable on any security of a Provincial Government issued with the same condition as aforesaid shall be payable by that Provincial Government.

Item (72)of the Second Schedule to the Ordinance:

(72) The yield of National Savings or Deposit Certificate including Defence Savings Certificate, issued under the National Saving Schemes:

Provided that exemption under this clause shall not apply in respect of any profit received on the reinvestment of Khas Deposit Certificates made under the National Saving Scheme on or after the tenth day of November, 1991:'

Section 26 of the Ordinance:

26. Special provisions regarding business of insurance and production of oil and natural gas and exploration and extraction of other mineral deposits.--Notwithstanding anything contained in this Ordinance,---

(a) the profits and gains of any business of insurance and the tax payable thereon shall be computed in accordance with the rules contained in the Fourth Schedule;

(b) the profits and gains from the exploration and production of petroleum (including natural gas) and the tax payable thereon shall. be computed in accordance with the rules contained in Part I of the Fifth Schedule:

Provided that nothing in this clause shall apply to the profits and gains attributable to the production of petroleum (including natural gas) which was discovered before the twenty-fourth day of September, 1954; and

(c) the profits and gains of any business which consists of, or includes, the exploration and extraction of such mineral deposits of a wasting nature (not being petroleum and natural gas) as may be specified in this behalf by the Federal Government carried on by an assessee in Pakistan shall be computed in accordance with the rules contained in Part II of the Fifth Schedule."

Rule 5 of the Fourth Schedule to the Ordinance:

"5. General Insurance.--The profits and gains of any business of insurance other than life insurance shall be taken to be the balance of the profits disclosed by the annual accounts required under the Insurance Act, 1938 (IV of 1938) to be furnished to the Controller of Insurance, subject to the following adjustments namely:---

(a) any expenditure or allowance or any reserve or provision for any expenditure or the amount of any tax deducted at source from any dividends or interest received which is not deductible in computing the income chargeable under the head "Income from business or

profession" shall be excluded;

(b) any amount either written off or taken reserve to meet depreciation or loss on the realisation, of investments shall be allowed as a deduction, and any sums taken credit for in the accounts on account of appreciation, or gains on the realisation, of investments shall be treated as part of the profits and gains:

Provided that the Income Tax Officer is satisfied about the reasonableness of the amount written off or taken to reserve in the accounts to meet depreciation, or loss - on the realisation, of investments, as the case may be."

7. A perusal of above-quoted section 14 indicates that it provides that notwithstanding anything contained in the Ordinance, the incomes or classes of incomes, or persons or classes of persons specified in the Second Schedule, shall be exempt from tax under the Ordinance subject to the conditions and to the extent specified therein, or liable to tax at such rates which are less than the rates specified in the First Schedule as are specified therein, or the above Second Schedule may provide reduction in tax liability subject to the conditions and to extent specified therein, or it may exempt from the operation of any provision of the Ordinance subject to the conditions and to the extent specified therein. It may further be noticed that by virtue of subsection (2) of section 14, the Federal Government has been empowered by notification in the official Gazette, to make such amendment in the Second Schedule in terms of clauses (a), (b) and (c) quoted hereinabove.

It may be pertinent at this juncture to point out that above-quoted Item (72) of the Second Schedule, in terms of above section 14 of the Ordinance, exempted 'the yield of National Saving Certificates or Defence Saving Certificates issued under the National Saving Scheme. The proviso which was added by SRO No.1135(1)/91.dated 7-11-1991, is not pertinent for the case in hand, as it was added after the assessment years in issue.

It may also be noticed that section 17 of the Ordinance provides that the incomes shall be chargeable under the head "Interest on securities" from the items mentioned in clauses. (a) and (b) thereof. It may also be pointed out that subsection (2) of section,. 17 lays down that notwithstanding anything contained in, subsection (1), where any security of Federal Government is issued with the condition that the interest shall not be liable to tax, the interest receivable on such security shall be exempt from tax in accordance with such condition. It may further be pointed out that clause (b) of subsection (2) contemplates that tax payable on the interest receivable on any security of a Provincial Government issued with the same condition as aforesaid shall be payable by that Provincial Government.

It may be noticed that section 26 provides inter alia, that notwithstanding anything contained in the Ordinance, the profits and gains of any business of insurance and the tax payable thereon shall be computed in accordance with rules contained, in the Fourth Schedule. Clauses (b) and (c) of the above section are not relevant for the purpose of the present controversy and, therefore, need not to be dealt with.

It may be pointed out that Rule 5 of the Fourth Schedule quoted hereinabove lays down that the profits and gains of any business of insurance other than life insurance shall be taken to be the balance of the profits disclosed by the annual accounts required under the Insurance Act, 1938, to be furnished to the Controller of Insurance subject to the adjustment of the items mentioned in clauses (a) and (b) thereof.

8. The learned Judges of the Division Bench of the High Court, after referring and quoting the extracts in extenso from the judgments in the case of The Commissioner of Income Tax v. R.G. Chapman PLD 1985 SC 329, the case of Life Insurance Corporation of India v. Commissioner of Income-tax, Delhi and Rajasthan (1964) 51 I.T.R. 773, the case of Assessee v. Department (1964) 10 Taxation 95, the case of Pandyan Insurance Co. v. Commissioner of Income-tax, Madras 1965 PTD 475, the case of Lakshami Insurance Co. Ltd. v. Commissioner

of Income-tax, New Delhi 1972 PTD 233 and the case of Commissioner of Income-tax, Bombay City II, Bombay v. New India Assurance Co. Ltd. 1972 PTD 458, have concluded as follows:---

"From the above discussion it clearly emerges that in determining the profits and gains of an insurance business and the tax payable thereon under the Ordinance only section 26 and the rules contained in the Fourth Schedule ibid are applicable and other provisions of the Ordinance do not apply. It, therefore, follows that the balance of profit declared by an insurance company in its annual account which is submitted to Controller of Insurance under the Insurance Act, 1938, is to be accepted by the Income Tax Officer as the profits arid gains of insurance business for the relevant year without any further probe or enquiry, except to the extent permitted by sub-clauses (a) and (b) of Rule 5 ibid. Accordingly, the interest income on securities derived by an insurance company which is included in the balance of profit declared by it in it's annual account submitted to Controller of Insurance under the Insurance Act, 1938, loses its character as `interest' income on securities and become part of profits and gains of insurance business, and as such is liable to charge of the tax under the Ordinance accordingly. In our view as soon as the profits and gains of insurance business are computed in accordance with the provision of section 26 read with rule 6 of the IV Schedule ibid, it becomes one unit of income which is not capable of being bifurcated for the purposes of charging to tax into different heads of income categorised in section 15 of the Ordinance:'

9. In support' of the above appeals, the learned counsel for the appellants, have vehemently urged that there is no conflict between the provisions of sections 14 and 26 and Item (72) of the Second Schedule and Rule 5 of the Fourth Schedule to the Ordinance and, therefore, the appellants were entitled to the benefit granted by item (72) of the Second Schedule pursuant to section 14 of the Ordinance on the amount of interest received by them on the Khas Deposit Certificates/Defence Saving Certificates. Reliance was placed particularly by them on the following judgments:---

(i) Commissioner of Income-tax, Bombay City 11, Bombay v. New India Assurance Co. Ltd. (1969) 71 I.T.R. 761;

in which a Division Bench of the Bombay High Court held that in computing the profits and gains of any insurance business and the tax payable thereon, Rule 6 of the Schedule to the Indian Income-tax Act, 1922, would govern -and prevail over sections mentioned in the non obstante clause in section 10(7) of the Act, but it could not be taken to mean that the exemption under sections 15B and 15C and under the Notification No.39 issued under section 60 or the deductions under section 4(1), could not be allowed or were, in any way, excluded from operation. In the above case, the Income Tax Officer denied the exemption of the following items:---

(a) donations for charitable purposes under section 15B;

(b) dividends from new companies under section 15C(4);

(c) interest on loans of the Mysore Government which were exempted by the Central Government under Notification No.39 dated July 5, 1954, under section 60, and

(d) exclusion of income to the extent of Rs.4,5(?0 under the third proviso to section 4(1) in respect of its business in foreign countries.

However, the Tribunal allowed the assessee's claim in respect of three items but rejected the claim, pertaining to the fourth item. Upon references filed by the assessee as well as by the Commissioner of Income Tax, the High Court held that the assessee was entitled to all the exemptions claimed by him.

(ii) Lakshmi Insurance Co. Ltd. v. Commissioner of Income-Tax, New Delhi, (1969) 72 I.T.R. 474;

In the above case, the facts were that Finance Department, through Notification No.878-F Income-tax dated 21-3-1922 issued under section 60 of the Indian Income-tax Act, 1922, exempted certain classes of income specified therein from the tax payable under the Act and provided that they shall not be taken into account in determining the total income or the salary of an assessee for the purposes of the Act. It may be stated that item (27) in the Notification was interest on Mysore Durbar securities. The question arose, whether interest on securities issued by the Mysore Durbar received by the assessee, a company which was carrying on the business of life insurance and whose income had to be computed under section 10(7) of the Act read with the Schedule, was exempt from taxation in its hands. It was held by a Division Bench of the Delhi High Court that exemption under section 60 was an overall exemption from the levy of the tax under the Act itself governing all other provisions in the Act including the provisions in the Rules in the Schedule and, consequently, the provisions of rule 2(b) of the Schedule did not come into operation at all, inasmuch as excluding the amount exempted under section 60. from taxable surplus, the Income Tax Officer could not be said to alter or change in any manner the actuarial valuation. It was further held that the amount of interest of Mysore Durbar securities received by the assessee insurance company was exempt from tax under the Act and could not be included in computing the taxable surplus.

(iii) Lakshmi Insurance Co. Ltd., Lahore v. Commissioner of Income-tax, Punjab, Delhi and N.-W.F.P. Provinces, Lahore AIR 1950 Lah. 234;

in which a Division Bench of the Lahore High Court comprising Munir, C.J. and Muhammad Sharif, J. (as their Lordships then were) held that in computing the total income of an assessee, whether it be a company carrying on insurance business or not, the interest received on any security of the Central Government which is income-tax free must be included and since under section 55 of the Income-tax Act, super-tax had to be levied on the total income, it was obvious that interest on securities of the Central Government which were free from income-tax were subject to the incidence of super-tax.

(iv) Commissioner of Income-tax v. National Insurance Co. Ltd. (1986) 159 I.T.R. 314;

In the above case, a Division Bench of the Calcutta High Court held that even though in the case of an insurance company, the different classes and categories of income, namely, income from house property, capital gains or income from other sources were not separately computed in accordance with the computation sections for the respective heads of the income in view of section 44 of the Income Tax Act, 1961. The different classes or categories of income which were shown in Form No.F of the Third Schedule to the Insurance Act, 1938, did not lose their character or quality and that an assessee, who carried on business in general insurance and was assessable under section 44 of the above Act, was entitled to the special deduction under section 80M.

10. There is no doubt that the above three judgments of the Indian jurisdiction directly support the appellants' claim and the fourth judgment of the Lahore High Court, also to some extent, lends support as it proceeded on the assumption that the interest on the Government securities was free of income-tax. However, the view found favour with the learned Judges of the Division Bench in the judgment under appeal, is also sustainable because of the following judgments of this Court, though the controversy in issue was not directly the subject-matter, of any of the above judgments.

(i) Commissioner of Income-tax, Central, Karachi v. Messrs. Alpha Insurance Co. Ltd. and

another PLD 1981 SC 293;

in which this Court, while construing the provisions of section 10(7) of the late Income-tax Act, 1922, read with Rule 6 contained in the First Schedule to the Act, which correspond to section 26(a) read with Rule 5 of the Fourth Schedule to the Ordinance, concluded as under:---

"14. Our conclusions therefore are that: (i) the rules contained in the First Schedule to the Income Tax Act completely, exhaustively and to the exclusion of every other provision not expressly incorporated, govern the computation of the Profits and Gains of insurance business, .

(ii) the power of the Assessing Authority under rule 6 of the First Schedule to the Income Tax Act does not like rule 2 of the same Schedule, or on' the strength of section 40-C of the Insurance Act or rule 40 of the Insurance Rules, extend to disallowance of the excess management expense.

(iii) the power of the Assessing Authority under first part of rule 6 (ibid) to readjust the balance of the profits disclosed by the annual accounts required to be furnished under the Insurance Act, 1938 is restricted to "exclude from it any expenditure, other than expenditure" which may under the provisions of section 10 of the Income-tax Act be allowed for in computing the profits and gains of a business. The Assessing Authority has to apply an independent mind uncontrolled by Insurance Act to arrive at such a re-adjustment.

(iv) the expense of management incurred in excess of the limit prescribed under section 40-C of the Insurance Act and rule 40 of the Insurance Rules are not in the nature of penalty, fine or forfeiture for the purposes of their admissibility for deduction as business expenses under section 10 of the Income-tax Act."

(ii) Messrs Habib Insurance Co. Ltd. v. Commissioner of Income-tax (Central), Karachi PLD 1985 SC 109;

In the above case, this Court, while construing the above section 10(7) and the First Schedule to the late Act, held as follows:---

"It, therefore, follows that the assets, incomes, gains of the appellant Company which is doing no other business except that of Insurance are all relatable to Business of Insurance and consequently on the strength of subsection (7) of section 10 of the Income-tax Act, the computation of tax has to take place in accordance with First Schedule. Provisions of First Schedule are self-contained and complete. It is true as contended by the learned counsel for the appellant that in Revenue cases one must look at the substance of the thing and not at the manner in which the account is stated. Rule 6 is in three parts. The first part provides as follows:---

"The profits and gains of any business of insurance other than life insurance shall be taken to be the balance of the profits disclosed by the annual accounts, copies of which are required to be furnished to the Controller of Insurance."

The second part provides and actually defines the limits of the powers of the Taxing authorities to---

"adjusting such balance so as to exclude from it any expenditure other than expenditure which may under the provisions of section 10 of this Act be allowed for in computing the profits and gains of business."

The third part which has a direct relevance to the case of the appellant provides:---

"Profits and losses on the realisation of investments, and depreciation and appreciation of the value of investments shall be dealt with as provided in rule 3 for the business of life insurance."

The relevant portion of rule. 3 so made applicable provides:---

"Any sums taken credit for in the accounts or actuarial valuation balance-sheet on account of appreciation of or gains on the realisation of the securities or other assets shall be included in the surplus."

It is not the contention of the appellant that the Tax Officer has misapplied these rules to its case. The case of the appellant is that the appellant twice showed these appreciation and gains which the appellant may not have shown at all and the Tax Officer should do what the appellant could do but did not do. This is something quite different from reaching at substance of the thing ignoring the manner in which the account is stated. It would amount to unsettling a statutory return.

The completeness and the importance of the accounts prescribed under Insurance Act for a company carrying on business of Insurance, even for purposes of income-tax will be apparent from a close examination of its provisions. Section 11 of the Act enjoins an insurer to prepare at the expiration of each calendar year a balance-sheet, a profit and loss account, and a relevant account in the prescribed form to be authenticated in the manner indicated.

After having concluded as above, it was held that the above statement of accounts in terms of the Insurance Act, 1938, was the basis for the Income Tax Officer for the purposes of computing profits and gains and the income-tax payable, and the Income Tax Officer was not competent to exclude any item shown in terms of the above provisions of the Insurance Act, 1938.

(iii) Commissioner of Income-tax (Central) Zone `A`, Karachi v. Phoenix Assurance Co. Ltd. (1991) 64 Taxation 173;

in which the above provisions of the late Act were in issue while considering inter alia the question, whether on the facts and circumstances of the case, the High Court was justified in holding that the reserve for taxation was not expenditure and, therefore, Rule 6 of the First Schedule to the late Act was not applicable to the case. After referring inter alia the above cases of the Commissioner of Income Tax, Central, Karachi v. Messrs Alpha Insurance Co. Ltd. and another and Messrs Habib Insurance Co. Ltd. v. Commissioner of Income Tax (Central), Karachi (supra), and the cases of foreign jurisdiction, concluded as under:---

"From the authoritative pronouncements of this Court, the law seems to be settled that finality attaches to the accounts submitted by the assessee insurance company under the Insurance Act to the Controller of Insurance, and the limited jurisdiction vesting in the Income Tax Officer is only to exclude expenditure from the balance of profits in such accounts which is not permissible under section 10 of the Act. Under subsection (7) of section 10 of the Act the profits and gains of any business of Insurance and the tax payable thereon, is required to be computed in accordance with the rules contained in the First Schedule to the Act. However, it is important to note, that the enacting part of this subsection is subjected to the non obstante clause excluding the application of section 8, 9, 10, 12 or 18 of the Act. Therefore, it is quite apparent that the main provisions with regard to computation of profits and gains in the Act have been excluded including section 10. It is only by virtue of Rule 6 of the First Schedule that section 10 has been brought back for the limited purpose of adding back expenditure not permissible under that section. Therefore, the Income Tax Officer, in the face of these statutory provisions, is not competent to upset

the integrity of the accounts submitted by the assessee under the Insurance Act, by applying the ordinary rules for computation of profits and gains and for assessment of tax thereon, in the light of provision of the Income Tax Act in respect of the income in regard to the head 'business'. The contention of the learned counsel, therefore, that the return filed by the assessee was not in accordance with Regulation I of Part 1 of the Second Schedule to the Insurance Act is untenable. Similarly his submission that `reserve' cannot become expenditure even though it may be mentioned on the debit side, because the money is not paid out irretrievably, is also irrelevant. On the contrary if the item in question did not in substance and essence constitute expenditure, it would be out of the power of the Income Tax Officer to apply the provisions of Rule 6 to exclude and addback the same to the balance of profits in order to bring it within the tax net."

(iv) Commissioner of Income-tax, Karachi v. Messrs Queensland Insurance Co. Ltd., Karachi 1992 SCMR 539;

In the above case, this Court, while dismissing an appeal filed by the Commissioner of Income-tax, Karachi, against the judgment of the High Court of Sindh passed in an Income Tax Reference, inter alia held that so far as life insurance was concerned, the ordinary method of computing profits and gains had been done away with by section 10(7) of the late Act and the special rules framed for that purpose contained in the First Schedule. It was further held that profits and gains of any such company shall be taken to be the balance of the profits disclosed in the annual accounts f4rnished to the Controller of Insurance by the company and that the Income Tax Officer could not reject the above accounts unless they were found to be fraudulent.

11. The ratio of the above judgments of this Court seems to be that profit and loss accounts submitted by an insurance company under the Insurance Act, 1938, to the Controller of Insurance, are to be accepted and to be made basis for the purposes of computing profits and gains of insurance business and the amount of tax payable thereon in terms of section 10(7) read with Rule 6 of the First Schedule to the late Act. The above provisions have been treated as complete, self-contained and exhaustive to the exclusion of every other provision not expressly incorporated, and therefore, the other provisions relating to the working out of profits and gains and the amount of tax payable contained inter alia in section 8, 9, 10, 12 or 18 of the late Act, are not applicable in case of an insurance company except that by virtue of above rule 6, section 10 of the above Act has been brought back for limited purpose of adding back expenditure not permissible under the above section. The Income Tax Officer, in face of the above statutory provisions, is not competent to undermine the authenticity/finality of the accounts submitted by the assessee under the Insurance Act by ordinary rules for computation of profits and gains and for assessment of tax thereon in the light of other provisions of the late Act. But, his jurisdiction is limited to addback items of expenditure not admissible as above.

12. It may be stated that section 26(a) and Rule 5 of the Fourth Schedule to the Ordinance correspond with above section 10(7) and Rule 6 of the First Schedule to the late Act as stated above and, therefore, the ratio of the above cases can be pressed into service while construing the above provisions of the Ordinance. In the present case, it is an admitted position that the appellants, while submitting their accounts to the Controller of Insurance in Form B in terms of the Insurance Act, 1938, had shown the interest earned by them on Khas Deposit Certificates/Defence Saving Certificates during the assessment years in question and, therefore, it was part of profits and gains and, therefore, could be subject to tax. It is true that section 14 as well as section 26 contained non obstante clause, but section 26, being a provision subsequent to section 14 and also being a special provision inter alia dealing with the working out of profits and gains of any business of insurance and the tax payable thereof read with Fourth Schedule; shall prevail.

13. We may observe that reference to clause (a) of subsection (2) of section 17 of the Ordinance by Mr. Mansoor Ahmad Khan, learned counsel for some of the appellants, is not

relevant as the appellants have not been able to demonstrate that Khas Deposit Certificates or Defence Saving Certificates were issued by the Federal Government with the condition that the interest thereon shall not be liable to tax. On the contrary, the appellants had relied upon before the High Court on item (72) of the Second Schedule read with section 14 of the Ordinance.

14. We may also observe that Mr. Fazle Ghani Khan has also pressed into service the Income Tax Department's practice obtaining during the last more than four decades, during which period the amounts of interest earned by the insurance companies of Khas Deposit Certificates/Defence Saving Certificates, were treated as tax free for the purposes of income-tax. Reliance was placed by him on the case of Nazir Ahmad v. Pakistan and 11 others PLD 1970 SC 453 and the case of Asian Food Industries Ltd. and others v. Pakistan and others 1985 SCMR 1753. Suffice it to observe that any alleged practice cannot negate the provisions of the Ordinance. However, this may be relevant for the purposes of consideration, whether re-opening of the assessments under section 65 of the Ordinance was warranted.

15. We may now advert to the second question, as to whether the Income Tax Officer was justified in pressing into service section 65 of the Ordinance on the basis of the above Circular, hereinafter referred to as the Circular reproduced in.para. 2 above, whereby the Central Board of Revenue purported to interpret the provisions of the Second Schedule to the Ordinance and concluded that special provision has been made in the Ordinance for computation of the profits and gains of insurance business and that whatever may be the constituents of the receipts of an insurance company, the balance disclosed in the annual accounts constitutes insurance income for the purpose of the above Schedule. The High Court has relied upon the judgment of the Allahabad High Court in the case of Rai Kumar Shrewan Kumar v. Central Board of Direct Taxes and another (1977) 107 I.T.R. 570, in which it was held that a Circular sent by the Board of Direct Taxes constituted `information' in terms of section 147(b) of the Income Tax Act, 1961. The Allahabad High Court, while concluding as above, inter alia relied upon the judgment of the Indian Supreme Court in the case of Kilyanji Mavji & Co. v. Commissioner of Income Tax (1976) 102 I.T.R. 287 rendered by two learned Judges. In this regard, it may be pertinent to point out that the Indian Supreme Court in a subsequent judgment in the case of Indian and Eastern Newspaper Society v: Commissioner of Income-tax, New Delhi (1979) 119 I.T.R. 996, given by three learned Judges, disapproved the case of Kilyanji Mavji & Co. (supra). The question involved in the latter case was, whether the opinion of an internal audit party of the Income Tax Department on a point of law can be regarded as `information' within the meaning of section 147(b) of the Indian Income Tax, 1961, for the purposes of reopening of an assessment. The Indian Supreme Court in the negative answered the above question. It may be advantageous to reproduce the following observations from the above judgment, wherein the case of Kilyanji Mavji & Co., (supra) has been commented upon and has been disapproved:---

"Now, in the case before us, the I.T.O. had, when he made the original assessment, considered the provisions of sections 9 and 10. Any different view taken by him afterwards on the application of those provisions would amount to a change of opinion on material already considered by him. The revenue contends that it is open to him to do so, and on that basis to reopen the assessment under section 147(b). Reliance is placed on Kalyanji Mavji & Co. v. CIT (1976) 102 I.T.R. 287 (SC), where a Bench of two learned Judges of this Court observed that a case where income had escaped assessment due to the `oversight, inadvertence or mistake' of the I.T.O. must fall within section 34(1)(b) of the Indian I.T. Act, 1922. It appears to us, with respect, that the proposition is stated too widely and travels farther than the statute warrants in so far as it can be said to lay down that if, on re-appraising the material considered by him during the original assessment, the I.T.O. discovers that he has committed an error in consequence of which income has escaped assessment, it is open to him to reopen the assessment. In our opinion, an error discovered on a reconsideration of the same material (and no more) does not give him that power. That was the view taken by this Court in Maharaj Kumar Kamal Singh v. CIT (1959) 35 ITR 1

(SC), CIT v. A. Raman & Co. (1968) 67 ITR 11 (SC) and Bankipur Club Ltd. v. CIT (1971) 82 ITR 831 (SC) and we do not believe that the law has since taken a different course. Any observation in Kalyanji Mavji & Co. v. CIT (1976) 102 ITR 287 (SC) suggesting the contrary do not, we say with respect, lay down the correct law.

A further submission raised by the revenue on section 147(b) of the Act may be considered at this stage. It is urged that the expression `information' in section 147(b) refers to the realisation by the I.T.O. that he has committed an error when making the original assessment. It is said that, when upon receipt of the audit note the I.T.O. discovers or realizes that a mistake has been committed in the original assessment, the discovery of the mistake would be `information' within the meaning of section 147(b). The submission appears to us inconsistent with the terms of section 147(b). Plainly, the statutory provision envisages that the I.T.O must first have information in his possession, and then in consequence of such information he must have reason to believe that income has escaped assessment. The realisation that income has escaped assessment is covered by the words `reason to believe', and it follows from the `information' received by the I.T.O. The information is not the realisation, the information gives birth to the realisation:'

16. We may now refer to subsections (1) and (2) of section 65 of the Ordinance, which read as follows:---

"65. Additional assessment.--(1) If, in any year, for any reason--- .

(a) any income chargeable to tax under this Ordinance has escaped assessment; or

(b) the total income of an, assessee has been under-assessed, or assessed at too low a rate, or has been the subject of excessive relief or refund under this Ordinance; or

(c) the total income of an assessee or the tax payable by him has been assessed or determined under subsection (1) of section 59 and no order of assessment has subsequently been made under this section or any other provision of this Ordinance.

The Income Tax Officer may, at any time, subject to the provisions of the subsections (2), (3) and (4) issue a notice to the assessee containing all or any of the requirements of a notice under section 56 and may proceed to assess or determine, by an order in writing, the total income of the assessee or the tax payable by him, as the case may be, and all the provisions of this Ordinance shall, so far as may be, apply accordingly:

Provided that the tax shall be charged at the rate or rates applicable to the assessment year for which the assessment is made.

(2) No proceedings under subsection (1) shall be initiated unless definite information has come into the possession of the Income Tax Officer and he has obtained the previous approval of the Inspecting Assistant Commissioner of Income Tax in writing to do so.

Explanation.---As used in this subsection, `definite information' includes information in respect of sales and purchases, made by the assessee, of any goods and any information regarding acquisition, possession or transfer, by the assessee, of any money, asset or valuable article, or any investment made or expenditure incurred by him" and...

(3) ... ...

(4) ... ...

17. A persual of the above-quoted subsection (1) of section 65 shows that f it provides for additional assessment, if in any year for any reason:--

(a) any income chargeable to tax under the Ordinance has escaped assessment; or

(b) the total income of an assessee has been under-assessed or assessed at too low a rate or has been the subject of excessive relief or refund under the Ordinance.

In the above eventualities and if the total income of an assessee or the tax payable by him has been assessed or determined under subsection (1) of section 59 and no order of assessment has subsequently been made under above section 65 or any other provision of the Ordinance, the Income Tax Officer may, at any time subject to the provisions of subsections (2), (3) and (4) issue a notice to the assessee containing all or any of the requirements of a notice under section 56 'of the Ordinance and may proceed to assessce or determine by an order in writing the total income of the assessee or the tax payable by him, as the case may be, and all the provisions of the Ordinance in such case, shall so far as may be applied subject to the proviso that tax shall be charged at the rate or rates applicable to the assessment year for which the assessment is made.

It may also be noticed that subsection (2) of section 65 places clog on the above power of the Income Tax Officer by providing that no proceedings under subsection (1) shall be initiated unless definite information has come into the possession of the Income Tax Officer and he has obtained the previous approval of the Inspecting Assistant Commissioner of Income Tax in writing to do so. It may be pointed out that the word "and" was substituted by Finance Act (VI of 1987) in place of the word "or" which appeared between the words "unless definite information has come into possession of the Income Tax Officer" and "he has obtained the previous approval". Prior to the: amendment, it could be urged that in order to press into service subsection (1) of section 65, the requirement was that either the Income Tax Officer had come into possession of definite information or he had obtained previous approval of the Inspecting Assistant Commissioner of Income Tax in writing to do so but after the amendment, both the above requirements are mandatory. Since in the case in hand notices under section 65 were issued to the appellants after the above amendment, both the above requirements were necessary.

18. It may further be noticed that Explanation to subsection (2) of section 65 explains the term "definite information" by providing that it includes information in respect of sales and purchases made by the assessee, of any goods, of any information regarding acquisition, possession or transfer, by the assessee, of any money, assets or valuable articles or any investment made or expenditure incurred by him. Since the word "includes" has been employed, it means that the above definition or explanation is not exhaustive and, therefore,. any definite information, which has direct nexus with the reasons mentioned in above clauses (a) and (b) of subsection (1) of section 65 referred to I hereinabove, will be covered by above subsection (2).

19. Before referring to the case-law of the foreign jurisdiction, we may refer to two recent judgments of this Court on the interpretation of above subsections (1) and (2) of section 65 of the Ordinance, namely, the case of Edulji Dinshaw Limited v. Income Tax Officer (1990 PTD 155) and the case of Messrs Arafat Woollen Mills Limited v. The Income Tax Officer, Companies Circle C-1, Karachi (1990 PTD 338).

In the above first case, the assessee had filed a Constitution petition to challenge the notice issued by the Income Tax Officer under section 65 of the Ordinance for reopening of the assessment for the years 1971-72 to 1980-81 on the ground that they had concealed their sale/purchase of properties specified therein. The High Court declined the above Constitution petition, but upon appeal with the leave of this Court, the same was allowed, and while allowing the appeal, this Court concluded as under:---

"Once all the facts have been fully disclosed by the assessee and considered by the Income-tax Authorities and the assessments have been consciously completed, and no new

fact has been discovered there can be no scope for interference with these concluded transactions under the provisions of section 65 of the Ordinance on the ground that the income chargeable to tax under the Ordinance has escaped assessment or has been under-assessed, etc., in the meaning of clause (a) or (b) of subsection (1) of section 65 of the Ordinance."

In the second case, the Income Tax Officer also issued a notice under section 65 for re-opening of the assessment for the year 1981-82 on the ground that the excess amount received by the assessee from the sale proceeds of plots and machinery was wrongly claimed by it as capital gains, instead of showing the same as revenue income. The above notice was impugned by the assessee through a Constitution petition, which was declined by the High Court, but upon appeal filed with the leave of this Court, the same was allowed and the following observations were made:---

"After having gone through the record of the case we find that no exception can be taken with the above view that prevailed with the Income-tax Officer. No other information or material, except what was already in possession of the Income-tax Officer who passed the assessment order, came within the knowledge or possession of the Income-tax Officer, who issued the impugned notice under section 65 as to justify the reason that any income received by the appellant company and chargeable to tax under Ordinance had escaped assessment."

20. The ratio of the above cases seems to be that if an assessee discloses all the material facts without any concealment and the assessment has beef' consciously completed by the Income Tax Officer, in such a case in the absence of discovery of any new fact which can be treated as a definite information, there cannot be any scope for re-opening of the assessment under the provisions of section 65 of the Ordinance on the grounds referred to in clause (a) or (b) of subsection (1) of section 65. In other words, any change of opinion on the basis of the same material by the Income Tax Officer will not warrant pressing into service section 65 (1) of the Ordinance. In the instant cases, it is an admitted position that the appellants had not concealed any fact. On the contrary, they disclosed the interest earned by them. on the Khas Deposits Certificates/Defence Saving Certificates in their balance-sheets and claimed exemption under Item (72) of the Second Schedule read with section 14 of the Ordinance. No fresh facts have been discovered by Income Tax Officer except that the Income Tax Department had received the Circular from the Central Board of Revenue, referred to hereinabove in para.2. The question, therefore, arises, whether the Circular can be treated as a definite information in terms of subsection (2) of section 65 of the Ordinance.

21. In order to appreciate the above controversy in its proper perspective, it may be pertinent to refer certain provisions of the Ordinance in order to examine as to the locus standi of the Central Board of Revenue to interpret the provisions of the Ordinance. In this regard, it may be stated that section 3(1) provides that there shall be the following classes of Income Tax Authorities for the purposes of the Ordinance, namely,

(a) Central Board of Revenue;

(aa) Regional Commissioners of Income Tax;

(b) Director of Survey, Vigilance, Inspection and Audit;

(c) Commissioner of Income Tax;

(d) Assistant Commissioners of Income Tax, who may be either Appellate Assistant Commissioners of Income. Tax or Inspecting Assistant Commissioners of Income Tax;

(e) Income Tax Officers; and

(f) Inspectors of Income Tax.

The other subsections of section 3 deal with the question, who would be the Incharge of the various functionaries mentioned in the above section. It is not necessary to dilate upon the same. It will suffice to mention that under subsection (1) of section 3, the Central Board of Revenue has been shown at the apex of the functionaries of the Income Tax Department.

It may further be observed that section 4 empowers the Central Board of Revenue to appoint Regional Commissioners of Income Tax, Directors of Survey, Vigilance, Inspection and Audit, Commissioners of Income Tax, Appellate and Inspecting Assistant Commissioners of Income Tax, Income Tax Officers and other executive or ministerial officers and staff as may be necessary.

Section 5 deals with the jurisdiction of the Income Tax Authorities from the level of Regional Commissioner down to the level of the Inspectors of Income Tax. It inter alia empowers the Central Board of Revenue by a general or special order in writing to direct that the jurisdiction of the Commissioner exercising powers of Appellate Assistant Commissioners and Inspecting Assistant Commissioners shall be determined by the Revisional Commissioners.

It may further be stated that section 8 lays down that all officers and persons employed in the execution of the Ordinance, shall observe and follow the orders, instructions and directions of the Central Board of Revenue. However, the proviso to the above section provides that no such orders, instructions or directions shall be given so as to interfere with the discretion of the Appellate Assistant Commissioner in the exercise of his appellate functions or any valuer in the exercise of his functions under the Ordinance.

We may also observe that section 129 provides an appeal from an order of Income Tax Officer to the Appellate Assistant Commissioner, whereas section 134 gives the right of appeal before the Income Tax Appellate Tribunal. It may further be observed that section 136 provides for reference to the High Court for soliciting the opinion of the High Court or any legal question. Whereas section 137 provides for an appeal to this Court.

22. It is evident from the above provisions that though the Central Board of Revenue has administrative control over the functionaries discharging their functions under the Ordinance, but it does not figure in the hierarchy of the forums provided for adjudication of assessee's liability as to the tax. In this view of the matter, any interpretation placed by the Central Board of Revenue, on a statutory provision cannot be treated as a pronouncement by a forum competent to adjudicate upon such a question judicially or quasi-judicially. We may point out that the Central Board of Revenue cannot issue any administrative direction of the nature which may interfere with the judicial or quasi-judicial functions entrusted to the various functionaries under a statute. The instructions and directions of the Central Board of Revenue are binding on the functionaries discharging their functions under the Ordinance in view of section 8 so long as they arc confined to the administrative matters. The interpretation of any provision of the Ordinance can be rendered judicially by the hierarchy of the forums provided for under the above provisions of the Ordinance, namely, the Income Tax Officer, Appellate Assistant Commissioner, Appellate Tribunal, the High Court and this Court and not by the Central Board of Revenue. In this view of the matter, the interpretation placed by the Central Board of Revenue on the relevant provisions of the Ordinance in the Circular, can be treated as administrative interpretation and not judicial interpretation.

23. We may point out that the words "definite information" employed in subsection (2) of section 65 of the Ordinance are the key words for the purposes of justifying invoking of subsection (1) of section 65. The above words have not been defined in the Ordinance and, therefore, they will carry their literary meanings. In this regard, it may be pertinent to refer to the following Dictionaries, wherein the word "definite" and the word "information" have

been defined as under:---

"Chambers 20th Century Dictionary New Edition.---"Definite" defined, having distinct limits, fixed, exact, clear, sympodial or cymose (bot) referring to a particular person of thing." "information" intelligence given, knowledge, an accusation given to a Magistrate or Court."

The Concise Oxford Dictionary Seventh Edition:--"Definite" having exact limits, determinate, distinct, precise, not vague:'

"information" informing, telling, thing told, knowledge, items of knowledge, news, charge or complaint lodged with Court or Magistrate."

New Webster's Dictionary of the English Language.-----"Definite" clearly defined or determined; not vague or general; fixed; precise; exact,; having fixed limits; of persons, clear or specific in thought or statement;"

"information" News or intelligence communicated by word or in writing; facts or data; knowledge derived from reading or instruction, or gathered in any way; law, an accusation of a criminal offence, presented by a public officer rather, than a grand jury. A quantity which measures the possible numerical uncertainty in the outcome of a particular experiment."

Black's Law Dictionary Fifth Edition:---"Definite" fixed, determined, defined, bounded."

"information" an accusation exhibited against a person for some criminal- offence, without an indictment. An accusation in the nature of an indictment, from which it differs only in being presented by a competent public officer on his oath of office, instead of a grand jury on their oath. A written accusation made by a public prosecutor, without the intervention of a grand jury. Salvail v. Sharkey, 108 R.I. 63, 271 A.2d 814, 817. In most states the information may be used in place of a grand jury indictment to bring a person to trial. As regards federal crimes, see Fed. R.Crim. P.7. See also Arraignment Indictment. As to joinder of informations, see Joinder."

24. From the above-quoted definitions of the word "information" it is apparent that it has wide connotation and it is also used in relation of an accusation of the commission of an offence. Whereas, the word "definite" carries inter alia meaning, defined, having distinct limits, fixed, exact, clear precise, bounded etc. Since the word "information" has been prefixed by the word "definite" in above subsection (2) of section 65 of the Ordinance, it controls the generality of the word "information". Every information cannot be treated as the basis for reopening of the assessment, but the information should be of the nature which should qualify as a definite information. In other words, mere guess, gossip or rumour cannot be treated as definite information. However, we may observe that the expression "definite information" cannot be given a universal meaning, but it will have to be construed in the context of the circumstances of each case.

25. We may now revert to some decisions besides the judgment in the case of Indian and Eastern Newspaper Society (supra), in which the legal opinion of the audit party was not considered as `information' in terms of section 147(b) of the Indian Income Tax Act, 1961. We may point out here that in the above provision of the Indian Income Tax Act, the word "definite" has been omitted and, therefore, the word "information" has not been prefixed by the word "definite". The effect of the above omission seems to be that the scope of above section 147(b) of the Indian Income Tax Act, 1961, is wider as compared to subsection (2) of section 65 of the Ordinance. In spite of the above difference, the Indian Supreme Court did not accept the legal opinion of the audit party as an information.

(i) Commissioner of Wealth Tax, West Bengal v. Imperial Tobacco Co. of India Ltd. (1966) 61 ITR 461;

in which the Indian Supreme Court, after referring its judgment in the case of Maharajkumar Kamal Singh's case (1959) 35 ITR 1 (SC), held that the expression "information" would cover information as to the true and correct state of law contained in the relevant judicial decisions for the purposes of section 34(1)(b) of the late Income-tax Act,. 1922.

(ii) V. Jaganmohan Rao and others v. Commissioner of Income Tax and Excess Profits Tax, Andhra Pradesh (1970) 75 ITR 373;

In the above case, the decision of the Privy Council covering the subject-matter of the case, was treated as the "information" to justify pressing into service section 34(1)(b) of the late Income-tax Act, 1922.

(iii) Commissioner of Income Tax v. West Coast Industrial Company Limited (1987) 168 ITR 72;

in which a Division Bench of the Kerala High Court considered the question, whether a circular issued by the Board of Revenue, can be treated as an `information' and held as follows:---

"We have carefully considered the circular. Although an opinion is mentioned in a certain portion of the circular, the principal object of the circular is to convey the information that the Supreme Court has in V.S.S. v. Meenakshi Achi CIT (1966) 60 ITR 253, held that rubber replantation subsidy is income in the hands of the recipient, and is, therefore, assessable as such. This is the judicial pronouncement on the point by the highest Court of the land and the object of the Board's circular is to convey that information. It is not the object of the circular to express an opinion, for no such opinion was called for. Once the Supreme Court has pronounced upon the matter, the question is, in the absence of subsequent overriding legislation, concluded and the opinion of any other person is of no relevance. Whatever opinion may have been expressed in the circular, whether it is the opinion of the Board or any other agency, such opinion is of no consequence or relevance, apart from a mere reference to the authoritative pronouncement on the matter by the Supreme Court. The object of the circular is, therefore, merely conveyance of the information regarding that pronouncement by the highest Court of the land. We do not, therefore, see any inconsistency between the decision of the Income-tax Officer to reopen the assessment and the principle stated by the Supreme Court in Indian and Eastern Newspaper Society v. C.I.T. (1979) 119 ITR 996. The principle is that while the Income-tax Officer should not be influenced by the opinion of the Board or the audit party, he can take note of the information communicated to him. He acts in a quasi-judicial capacity and must, therefore, act independently and on the strength of the information available to him. The mere fact that a circular contains, apart from the information, the opinion of the writer, would not by itself make the information invalid or unacceptable, provided it is separable from the opinion. While the officer must eschew the opinion, he is entitled to act on the information communicated."

(iv) Philips Electrical Company of Pakistan (Pvt.) Limited v. Income Tax Officer, Companies Circle/B-3, Karachi and another 1990 PTD 389;

In the above case, a Division Bench of the Sindh High Court to which Saleem Akhtar, J. (as his Lordship then was) was a party and who was the author of the judgment, while construing the above expression "definite information", held that change of opinion or different interpretation of a provision of law or deriving a different conclusion from a given sets of facts will not amount to a definite information. It may be advantageous to reproduce the relevant observations, which read as follows:---

"A bare perusal of this notice will show that it recited facts and allegations for reopening the assessment under section 65 of the Ordinance. The notice refers to the claim of bad debts allowed by the Tribunal and goes on to recite that as these debts do not relate to the

business income they could not be allowed. This objection to the grant of claim for bad debts is based on perusal of details filed by the petitioner alongwith the return of income. Therefore on respondent's own showing the objections are based on the return of income and documents filed by the petitioner which were available before the Income-tax Officer, Commissioner of Income-tax and the Income-tax Appellate Tribunal. At least it can be said that the points enumerated and raised in the notice dated 26-2-1987 which are the basis for reopening assessment under section 65 did not strike the aforestated authorities nor the department at any stage challenged that the debts did not relate to business income. The respondents are however of the opinion that the debts do not relate to the business income. This is merely a change of opinion based on application of facts which were available to the assessing officer and cannot amount to a definite information which may have come to the possession of the respondent. The term "definite information" conveys a meaning which is not the same as change of opinion. A different interpretation of any provision of law or deriving a different conclusion from a given set of facts will not amount to a definite information. It will be a change of opinion. Therefore the basis for reopening the assessment was a change of opinion of the respondent. The respondent therefore could not have taken any action under section 65 of the Income-tax Ordinance as it was not based on any definite information, but on change of opinion."

(v) Republic Motors Ltd. v. Income-tax Officer and others (1990 PTD 889);

in which also a Division Bench of the Sindh High Court, while construing the words "definite information", has held that receiving or obtaining by an Income Tax Officer certain interpretation of a particular provision of law from 'any department, be it a Ministry of Law or Central Board of Revenue or any Legal Advisor or from his own knowledge and reading law books, would not constitute "information' in terms of section 65. Incidentally, the author of the above judgment also happened to be Saleem Akhtar, J. It may be instructive to reproduce the relevant extract from the above judgment, which reads as follows:---

"It is, therefore, well-settled that receiving or obtaining certain interpretations of a particular provision of law from an v department, be it Ministry of Law or C.B.R. or any Legal Advisor or from his own knowledge and reading of the Law books would not constitute information as required by section 65. Bhagwati, C.J. (as he then was) has pointed out to the dangerous results which may follow from a liberal interpretation of the word "information" as sought by the Department as it will give unrestricted discretion in the hands of the Assessing Officer who may on their own interpretation of law set at naught the settled and final assessments."

26. The views found favour in the above cases seems to be in consonance with law, particularly the view taken in the two judgments of the Sindh High Court relied upon by Mr. Nasim A. Farooqui, Advocate. We are inclined to hold that the expression "definite information" will include factual information as well as information about the existence of a binding judgment of a competent Court of law/forum for the purposes of section 65 of the Ordinance, but any interpretation of a provision of law by a functionary which has not been entrusted with the functions to interpret such provision judicially, cannot be treated as a "definite information". We have already pointed out hereinabove that the Central Board of Revenue does not figure in the hierarchy of the judicial forums provided for under the Ordinance and, therefore, the interpretation placed by it on the relevant provisions of the Ordinance in the Circular. at the most, can be treated as an administrative interpretation and not a judicial decision to qualify for treatment as a definite information. It is, being an administrative opinion, liable to be varied/modified and, therefore from its very nature, cannot be treated as a definite information. If we were to treat an administrative interpretation of a provision of law as a definite information, it will lead to uncertainty and will cause harassment to the assessees. The Central Board of Revenue may, at any time, place construction on a particular provision of the Ordinance, which may not be legally sustainable, but it will be treated by the Income Tax Officers as a definite information for the purposes of re-opening of the assessments which were competently framed long time back.

We may observe that in the present case the construction placed by the Central Board of Revenue on the relevant provisions of the Ordinance seems to be correct, but that fact alone, will not change its character as to qualify it as a definite information to justify reopening of assessments. At this juncture, it may be pertinent to refer to the following observations as to the status of the Central Board of Revenue's interpretation of law, made by Cornelius, C.J. in the case of The Commissioner of Income-Tax, East Pakistan, Dacca v. Noor Hussain (PLD 1964 SC 657):

"In the view of my learned brother Fazle Akbar, the benefit in law cannot commence from any earlier date than that of the instrument by which the firm is constituted. He has at the same time observed that "the course pursued by the Board" as appearing from Circular No.8, "seems to be correct". In my view, if there is a departure from the law involved in the provision for relaxation contained in the Circular, then that Circular is to the extent of the deviation, invalid and ineffective, and power thereunder is illegally exercised. The impression of such a departure conveyed by the following passage in the Circular, viz.---

On a strict interpretation of the law, a firm can be registered only from the date on which the partnership deed has been executed. Since this would create hardship, the Board is disposed to agree to the benefit of registration being allowed for the full previous year, provided of course, the other conditions laid down for the registration of the firms under section 26-A are fulfilled.

The Board's views as to the interpretation of law do not have the force of law, and the expectation would be, particularly where a fiscal statute is involved which should be implemented with strict impartiality, that references to inclination towards relaxation or otherwise would have been avoided."

27. We may point out that the Courts while construing the provisions of Order XLVII, C.P.C. which relates to the review of judgments orders, have held that a subsequent binding decision after the disposal of the case cannot be said to be discovery of a new important matter or of a mistake or an error apparent on the face of record and that mere conflict or divergence of opinion cannot amount to an error apparent on the face of record in terms of Rule 1 of Order XLVII, C.P.C. In this behalf, reference may be made to the case of Lachhmi Narain Balu v. Ghisa Bihari and another (AIR 1960 Punjab 43), the case of Board of Revenue and another v. Syed Akbar Sahib (AIR 1973 Kerala 285) and the case of Gyan Chandra Dwivedi v. 2nd Additional District Judge, Kanpur and others AIR 1987 All. 40. Though Order XLVII, Rule 1, C.P.C. cannot be equated with section 65 of the Ordinance on account of difference in language and scope of the respective provisions, but the above principle will be applicable even in case of section 65 of the Ordinance. However, if the Income-Tax Officer failed to take into consideration a decision of a superior Court which was binding on him at the time of framing of an assessment order, discovery of the above authority subsequent to the framing of issue may constitute a "definite information" in terms of section 65 of the Ordinance. We may also observe that even change in law cannot justify re-opening of a past and closed transaction in the absence of express provision providing retroactive effect. In this behalf, reference may be made to a judgment of this Court in the case of Sardar Ali and others v. Muhammad Ali and others (PLD 1988 SC 287) wherein this Court has held as follows:---

"The law is well settled that where the rights of the parties have been judicially determined with reference to the terms of a law in force at the time of the adjudication, the finality of such a judgment will not be affected merely because the law on the basis of which that decision was rendered has subsequently been altered unless a provision is expressly made in the changed or modified law destroying the finality of the aforesaid judgment. This rule was clearly enunciated by the Privy Council in John Lemm v. Thomas Alexander Mitchell (L.R. 1912 Appeal Cases 400) which related an action for criminal conversion but was dismissed on May 5, 1908 as incompetent. On December 11, 1908, however an Ordinance (Hong Kong Ordinance 20/1908) was promulgated which gave a right to the respondent to bring such an

action. It was held that although the enactment purported to have retroactive effect, a subsisting judgment which was founded on the then existing law could not be annulled without explicit words to that effect. This rule has been adhered to by this Court and it has, in a recent judgment in the case of Pir Baksh and others v. The Chairman, Allotment Committee and others PLD 1987 SC 145, reiterated it and cited with approval the following observations made by this Court in the earlier case of Income-tax Officer v. Cement Agencies Ltd. (PLD 1969 SC 322):---

"The view that I have taken receives support from the decision of this Court in Civil Miscellaneous Petition No.K-21 of 1968 (Works Cooperative Housing Society and another v. The Karachi Development Authority) decided on the 20th January, 1969. In this case, my Lord the Chief Justice, in his judgment, referred to the decision of the Privy Council in the case of Lemm v. Mitchel, LR 1912 A.C. 400. The Privy Council observed that even a legislative measure like an Ordinance expressly given retroactive effect could not operate so as to annul a valid and existing judgment as between parties whose rights had been duly determined and according to the law which existed before the new Ordinance was passed. To the same effect is the decision in the case of Eyre v. Wynn Mackenzie (1986) 1 Ch. D 135."

28. In the present cases at the time of framing of the assessment orders for the assessment years in issue there Was no decision of a superior Court which could be binding on the Income Tax Officer holding that section 26(b) read with Rule 5 of the Fourth Schedule to the Ordinance shall prevail on Item (72) of the Second Schedule read with section 14 of the Ordinance in order to deny the benefit of tax-free income. On the contrary, the department for along period, had been consistently construing the above provisions in the manner as to extend the benefit of the tax-free income in the form of interest earned on the Khas Deposit Certificates/Defence Saving Certificates. The judgments of this Court referred to hereinabove, though have laid down that the provisions of the First Schedule relating to Insurance Companies on account of section 10(7) of the late Income Tax Act, were to prevail over the -other provisions except to the extent which have been expressly incorporated by virtue of 'the above relevant provisions of the First Schedule, but they have not touched upon the question, whether the tax free earnings by virtue of Item (72) of the Second Schedule read with section 14 of the Ordinance can be denied to the Insurance Companies by virtue of section 26(a) read with the Fourth Schedule to the Ordinance. There seems to be divergence of views on the above question in the Courts of Indian jurisdiction as reflected in the cases relied upon by the learned Judges of the Division Bench in the judgment under appeal and the cases cited by the learned counsel for the appellants at the Bar. The view taken by the department in the present cases cannot be; said to be perverse or such, which could not have been taken.

29. We are, therefore, of the view that there was no definite information in terms of section 65(2) of the Ordinance available before the Income Tax Officer warranting issuance of the impugned notices under section 65 of the Ordinance. We would, therefore, allow the above appeals and declare the impugned notices and the proceedings/orders passed pursuant thereof as being without lawful authority and of no legal effect. However, there will be no order as to costs.

30. Before parting with the above discussion, we would like to record our appreciation for the valuable assistance rendered by Sardar Sikandar Hayat, Advocate, who on our request has appeared as amicus curiae on the question, as to the legal effect of the Circular issued by the Central Board of Revenue.

Order accordingly.