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Supreme Court of Pakistan

Civil Appeals Nos. 87 to 106 of 2024 in Civil Petitions Nos.2447-L, 2448-L, 2601-L to 2606-L, 2765-L, 2787-L, 2834-L,2901-L, 2915-L, 2928-L, 2944-L to 2946-L, 2992-L of 2022 And Civil Petitions No. 646-L & 647-L of 2023 decided on 1st February, 2024. (A

PRESENT: MR. JUSTICE SYED MANSOOR ALI SHAH, MR. JUSTICE AMIN-UD-DIN KHAN AND MR. JUSTICE JAMAL KHAN MANDOKHAIL.

For the appellant(s): Mr. Ahmad Pervaiz, ASC. Mr. Muhammad Yahya, ASC. Mr. Muhammad Shahzad Cheema, ASC. Muhammad Qasim, Addl. Commissioner. Mr. M. Saeed Tahir, ASC (through V.L. from Lahore) For the respondent(s): Mr. Imtiaz Rashid Siddiqui, ASC. (Thro

COMMISSIONER INLAND REVENUE, LAHORE VSM/S. MILLAT TRACTORS LIMITED, LAHORE AND OTHERS

Law: Income Tax Ordinance, 2001

Section: 111,111(1),111(1)(a),111(1)(b),111(1)(c) ,111(1)

(d),120,121,122,122(1),122(4),122 (5),122(5)(i),122(5)(ii),122(5)(iii),122 (8),122(9)

INCOME TAX ORDINANCE 2001 (XLIX OF 2001)----Section 111---Explanation added in Section 111 diverts and effects a substantive right of the taxpayers to a separate notice and proceeding under Section 111, the same would not have retrospective effect and would apply prospectively.- The High Court held that the Explanation added to Section 111 of the Ordinance through the Finance Act, 2021 to the effect that a separate notice under the said provision was not required, was to apply prospectively as it adversely affected vested rights of the parties.

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

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

any provision in the rules or the law is merely procedural in nature, the same would apply retrospectively but not if it affects substantive rights which already stood accrued at the time when the un-amended rule or provision was in vogue. A provision curtailing substantive rights does not have retroactive operation unless the legislature elects to give it retrospective effect. Thus, where existing rights are affected or giving retroactive operation causes inconvenience or injustice, the Court will not favour an interpretation giving retrospective effect even where the provision is procedural. Applying this to the instant case, and having established that the Explanation added in Section 111 of the Ordinance divests and affects a substantive right of the taxpayer to a separate notice and proceedings under Section 111, the same would not have retrospective effect and would apply prospectively.

Therefore, the Explanation would not be applicable to the matters at hand as they pertain to tax years before the Explanation was introduced in Section 111.

Sections 111 & 122

In Cases prior to Explanation in Section 111, a separate notice was required to be issued under Section 111, before proceeding can be initiated under Section 122.--- Following questions of law raised before the High Court:

1. Whether the learned Appellate Tribunal has erred in law by deleting the additions made under Section 111 of the Ordinance while holding that a separate and specific notice is required for addition under Section 111 when there is no specific provision in the Ordinance requiring separate notice under Section 111 of the Ordinance?
2. Whether the learned Appellate Tribunal IR has overlooked the scheme of law that Section 111 of the Ordinance cannot be read in isolation without making reference to Section 122(1), 122(5)(ii) and 122(9) of the Ordinance?

It is settled law that within the contemplation of Section 111(1), an explanation is to be called from a taxpayer by issuing a specific notice under Section 111 of the Ordinance, confronting the taxpayer with the information gathered by the department and specifying which of the grounds in Section 111(1) is applicable. [Commissioner Inland Revenue v. Bashir Ahmed, 2021 SCMR 1290; Commissioner Inland Revenue v. Faqir Hussain. PTC L 2019 CL. 444; Commissioner Inland Revenue v. Ranipur (AG Station. 2017 PTD 1839; Commissioner Inland Revenue v. Muhammad Shaftque, 2015 PTD 1823.] It is only after this that an appropriate order can be passed under this provision in the form of an opinion of the Commissioner, thus concluding the proceedings under Section 111.

It is in this sequence of proceedings that the initiation and culmination of proceedings under Section 111 of the Ordinance becomes necessary before action can be taken under Section 122 to amend assessments on the basis of proceedings undertaken under Section 111. As noted above, the information available with the department under Section 111(1) is mere information. It is only after the taxpayer is confronted with this information through a separate notice by calling for an explanation, and when no explanation is offered or the explanation is not satisfactory in the opinion of the Commissioner under Section 111(1), that it transforms or crystallizes into definite information for the purposes of action under Section 122(5) for amendment of assessment under Section 122. The taxpayer will then be confronted with the grounds applicable under Section 122(5) through a notice under Section 122(9) of the Ordinance. As such, where the Commissioner has formed an opinion against the taxpayer as to the fulfilment of one of the grounds mentioned in Section 111(1) (a) to (d) of the Ordinance, and is of the view that any of the grounds in Section 122(5) is

applicable, the process under Section 122 is to be initiated to amend assessments through a notice under Section 122(9). Thus, unless the proceedings under Section 111(1) are initiated and completed, Section 122(5) cannot be given effect to and no notice under Section 122(9) can be issued for the purposes of amending an assessment through an addition contemplated under Section 111. It is to be noted that the present cases are related to tax years up till 2020. After the amendment introduced in Section 122(5) of the Ordinance through the Finance Act, 2020, the words definite information acquired from an audit or otherwise have been substituted with audit or on the basis of definite information. Therefore, the interpretation rendered above as to the applicability of Section 122(5) may not be applicable to cases post 2020 and the effect of the substituted expression will have to be determined in an appropriate case in the future.

Therefore, to answer the first question, and as applicable to the matters at hand, before an assessment can be amended under Section 122 on the basis of Section 111, the proceedings under Section 111(1) are to be initiated, the taxpayer is to be confronted with the information and the grounds applicable under Section 111(1) through a separate notice under the said provision, and then the proceedings are to be culminated through an appropriate order in the shape of an opinion of the Commissioner. This then becomes definite information for the purposes of Section 122(5), provided the grounds mentioned in Section 122(5) are applicable. The taxpayer is then to be confronted with these grounds through a notice under Section 122(9) and only then can an assessment be amended under Section 122.

Therefore, as far as the cases prior to the Explanation are concerned, a separate notice is required to be issued under Section 111 before proceedings can be initiated under Section 122.

The initiation and culmination of proceedings under Section 111 becomes necessary before action can be taken under Section 122 to amend assessments.

When the Commissioner has formed an opinion against the taxpayers as to fulfillment of one of the grounds mentioned in Section 111(1)(a) to (d), and is of view that any of the grounds in Section 122(5) is applicable, the process under Section 122 is to be initiated to amend assessments through a notice under Section 122(9).

Unless the proceeding under Section 111(1) are initiated and completed, Section 122(5) cannot be given effect to and no notice under Section 122(9) can be issued for the purpose of amending an assessment through an addition contemplated under Section 111.

Scheme behind Section 111 and its effect on amendment of assessments under Section 122. Section 111(1) provides that where any of the grounds in Section 111(1)(a) to (d) are applicable, and the taxpayer offers no explanation or the explanation provided, in the opinion of the Commissioner, is not satisfactory, this unexplained income or value of asset(s) shall be included in the income of the person chargeable to tax.

Therefore, once the department has information resulting in an impression or understanding that the grounds in Section 111(1)(a) to (d) relating to unexplained income or asset are attracted, an explanation is called from the taxpayer. At this stage, the information available with the department is mere information. If, however, the taxpayer fails to render any explanation, or the explanation offered by the taxpayer is not satisfactory in the opinion of the Commissioner, the said liability becomes unexplained income and is to be added to the income of the taxpayer chargeable to tax. If the explanation offered is satisfactory, the said proceedings can be dropped and no action is then required. Therefore, through the

opportunity of an explanation, the taxpayer can contest the allegations put to the taxpayer with regards to any of the grounds mentioned in Section 111(1)(a) to (d), whereafter, an opinion is to be formed by the Commissioner based on the said explanation, if any. As such, the said provision is essentially of an inquisitorial nature where the taxpayer is confronted with the information available with the department and an explanation is sought, and the resulting opinion of the Commissioner is not an adverse order per se but can be used to pass an adverse order against the taxpayer by adding the unexplained income to the income of the taxpayer chargeable to tax. The other provisions of Section 111 also do not empower the Commissioner to pass an adverse order and only provide statutory instructions as to how the unexplained income or asset, provided an opinion under Section 111(1) is given by the Commissioner to this effect, is to be added to the income of the taxpayer chargeable to tax. Therefore, the essence of the proceedings under Section 111 lies within Section 111(1) of the Ordinance, wherein the taxpayer is confronted with the information available with the department, and the Commissioner forms an opinion as to the unexplained income or assets of the taxpayer or otherwise.

Where a notice under Section 111 is issued simultaneously with a notice to amend an assessment under Section 122(9), no proceedings can be undertaken under Section 122(9) until the proceedings under Section 111 are finalized and result in an opinion against the taxpayer.- This view has also been recently taken by this Court in [Commissioner Inland Revenue v. Bashir Ahmed, 2021 SCMR 1290.] wherein it has also been held that a notice under Section 111 can be simultaneously issued with a notice under Section 122(9), however, proceedings under Section 111 have to be finalized first in terms of an opinion of the Commissioner so as to constitute definite information, as is required under Section 122(5) of the Ordinance.

We, however, underline and clarify that even where a notice under Section 111 is issued simultaneously with a notice to amend an assessment under Section 122(9) of the Ordinance, no proceedings can be undertaken under the latter until the proceedings under Section 111 are finalized and result in an opinion against the taxpayer. This is because, even if some basis for action under Section 111 is mentioned in a notice under Section 122(9), it cannot constitute definite information for the purposes of Section 122(5). The proceedings under the notice issued under Section 122(9) can only be formally initiated when the requirement of definite information is satisfied under Section 122(5) after finalization of the proceedings under Section 111 through an opinion of the Commissioner. Therefore, where no opinion is formed against the taxpayer under Section 111, the proceedings under both provisions i.e., Sections 111 and 122 would lapse, and the notice under Section 122(9) would be of no legal effect. Where, however, there is an opinion formed against the taxpayer as definite information for the purposes of Section 122(5), the proceedings on the notice issued under Section 122(9) can formally proceed and shall be deemed to have commenced. It must also be noted that where the opinion formed against the taxpayer under Section 111 is materially different from what has been confronted to the taxpayer through the notice already issued under Section 122(9), and the Commissioner is of the view that another or different ground under Section 122(5) is applicable, a fresh or supplementary show cause notice under Section 122(9) must be issued to the taxpayer by confronting such ground(s) to the taxpayer. This is in view of the right to be treated in accordance with the law, and the principles of fair trial and due process enshrined in Articles 4 and 10A of the Constitution, respectively, and in terms of settled law that once a show cause notice is issued, the original adjudication on the said show cause notice can only be based on the grounds and allegations levelled therein. [Commissioner Inland Revenue v. RYK Mills, PTCL 2024 CL. 322; Collector Central Excise v. Rohm Din. 1987 SC MR 1840; Commissioner Inland Revenue v. Rose Food Industries, 2023 SCMR 2070]

The proceeding under the notice, issued under Section 122(9) can only be formally initiated when the requirement of definite information is satisfied under Section 122(5) after finalization of the proceedings under Section 111 through an opinion of the commissioner.

Where no opinion is formed against the taxpayer under Section 111, the proceedings under both provisions Le. Sections 111 and 122 would lapse, and the notice under Section 122(9) would be of no legal effect.

Where the opinion formed against the taxpayer under Section 111, is materially different, and the commissioner is of the view that another or different ground under Section 122(5) is applicable, a fresh or supplementary show cause notice under Section 122(9) must be issued.

Once a show cause notice is issued, the original adjudication on the said show cause notice can only be based on the grounds and allegations leveled therein.

After introduction of the explanation in Section 111 in the year of 2021, a notice encompasses both the grounds under Section 111(1) and Section 122(5) can be issued under section 122(9), however the proceedings under Section 111 still have to be concluded first and thereafter the remaining part of the notice under Section 122(9) can be given effect to.-- In order to clarify, even if the Explanation was applicable to the instant matters, the proceedings under Section 111 would still require to be taken up first and finalized before the proceedings under Section 122(5) can formally proceed. This is in line with the scheme of Section 111 and its effect on Section 122, as explained above. The effect of the Explanation, therefore, is only to dispense with the requirement of a separate notice under Section 111, however, it cannot subsume two different and distinguishable proceedings under Section 111 and 122. As such, while the Explanation dispenses with the requirement of a separate notice under Section 111, it does not dispense with the requirement that in case proceedings are initiated under Section 122(5) on the basis of definite information to be provided through Section 111, the proceedings under Section 111 are to be concluded first in the manner provided under the law and till such time, the proceedings under Section 122(9) cannot be given effect to.

Therefore, where one notice is issued under Section 122(9) which encompasses both the grounds of Section 111(1) and Section 122(5), the proceedings under Section 111 will be taken up first. The taxpayer, in response, is to provide an explanation, as envisaged under Section 111(1). If the response to the grounds under Section 111 is satisfactory, then the proceedings can be dropped. However, where the response is not satisfactory, the Commissioner will then form an opinion, as is required under Section 111, which can only be taken as definite information for the purposes of Section 122(5) for amendment of the assessment. In view of the scheme of Section 111 and its effect on Section 122, it is imperative that the taxpayer is confronted with this opinion, providing the taxpayer with an opportunity to fully and finally understand and respond to the allegations against the taxpayer with respect to the grounds the Commissioner understands are applicable under Section 122(5) based on this opinion. As held above, it is only after the opinion is given by the Commissioner under Section 111(1) that the proceedings under Section 122 can be formally taken up and proceeded with. The taxpayer can then file a response to the grounds alleged under Section 122(5) under the same show cause notice issued under Section 122(9), by filing a supplementary response to the show cause notice. It is after considering this response that an assessment can be amended under Section 122, provided the Commissioner is still satisfied that any of the grounds under Section 122(5) are still applicable. We are also cognizant of the fact that two provisos have been added after Section 122(9) which provide for a time period from the date of issuance a show cause

notice for making an order under Section 122. In view of what has been held above, the said time period is to be considered as commencing on the day that the taxpayer is confronted with the opinion formed by the Commissioner under Section 111(1), as it is only then that the proceedings under Section 122 are to be formally taken up. In our view, this reconciliation harmonizes Section 111, its Explanation and Section 122(5) of the Ordinance.

The simultaneity of notices issued under Section 111 and 122(9) is not of much consequence and the proceedings under Section 111 have to proceed first and be finalized before proceedings under Section 122 are formally taken up. After the introduction of the Explanation in Section 111 in the year 2021, a notice encompassing both the grounds under Section 111(1) and Section 122(5) can be issued under Section 122(9), however, the proceedings under Section 111 still have to be concluded first and thereafter the remaining part of the notice under Section 122(9) can be given effect to.

The effect of explanation is only to dispense with the requirement of a separate notice under Section 111, however, it cannot subsume two different and distinguishable proceedings under Section 111 and 122.

INTERPRETATION OF STATUTE

Rational, purpose and object of introducing and Explanation in an enactment.- The purpose of an Explanation is ordinarily to explain some concept or expression or phrase occurring in the main provision. It is not uncommon for the legislature to accord either an extended or restricted meaning to such concept or expression by inserting an appropriate Explanation. Such a clarificatory provision is to be interpreted according to its own terms having regard to its context and not as to widen the ambit of the provision. As a general rule, an explanation added to a statutory provision is not a substantive provision in any sense of the term but as the plain meaning of the word itself shows, it is merely meant to explain or clarify certain ambiguities which may have crept in the statutory provision. [Rehman Cotton Mills v. Federation of Pakistan 2016 PTD 1256.] The object of adding an Explanation to a statutory provision is only to facilitate its proper interpretation and to remove confusion and misunderstanding as to its true nature. It is relied upon only as a useful guide or in aid to the construction of the main provision.

[Hussain Patel v. Habib, PLD 1981 SC 1; Chief Administrator Auqaf v. Koura, PLD 1991 SC 596.] It is in this view of its effect that courts have normally given retrospective effect to such clarificatory or declaratory provisions in the shape of an Explanation. [Hamid Ashraf v. Commissioner Inland Revenue. PTCL 2020 CL.412; Commissioner of Income Tax v. Asbestos Cement Industries, 1993 SCMR 1276; Kohinoor Sugar Mills v. Federation of Pakistan, PTCL 2018 CL. 98]

A provision curtailing substantive right does not have retroactive operation unless the legislative elects to give it retrospective effect.

JUDGMENT:

SYED MANSOOR ALI SHAH, JUSTICE:---.---

These civil petitions for leave to appeal have been filed against a consolidated judgment of the Lahore High Court dated 09.06.2022 and two other orders dated 12.01.2023[1] (collectively referred to as the impugned judgment), whereby the Tax References filed by the petitioner department and Intra Court Appeals (ICAs) filed by the taxpayers were decided against the petitioner department. The matters pertained to different tax years[3] with the latest being 2020[3]. In the ICAs, the matters involved the question as to whether

a notice under Section 111 of the Income Tax Ordinance, 2001 (Ordinance) is to be issued prior or subsequent to a notice issued under Section 122(9) of the Ordinance. Similarly, in the Tax References, the following questions of law, substantially involving the same legal question, were raised before the High Court:

1. Whether the learned Appellate Tribunal has erred in law by deleting the additions made under Section 111 of the Ordinance while holding that a separate and specific notice is required for addition under Section 111 when there is no specific provision in the Ordinance requiring separate notice under Section 111 of the Ordinance?
2. Whether the learned Appellate Tribunal IR has overlooked the scheme of law that Section 111 of the Ordinance cannot be read in isolation without making reference to Section 122(1), 122(5)(ii) and 122(9) of the Ordinance?
3. Whether the learned Appellate Tribunal IR fell in error by failing to appreciate that in view of the insertion of the Explanation in section 111 of the Income Tax Ordinance, 2001 vide Finance Act, 2021 the issuance of a separate notice under section 111 was not required for amendment of an assessment under section 120 of the Ordinance?

To examine these questions, leave to appeal is granted in these petitions. The office is directed to assign numbers to the appeals arising out of these petitions. The appeals are being taken up today and being decided on the basis of available record.

2. The first two questions appear to be interconnected and were decided by the High Court against the appellant department by holding that a separate notice under Section 111 of the Ordinance was required before proceedings can be initiated through a notice under Section 122 for the purposes of amending the assessment. As to the third question, the High Court held that the Explanation added to Section 111 of the Ordinance through the Finance Act, 2021 to the effect that a separate notice under the said provision was not required, was to apply prospectively as it adversely affected vested rights of the parties. Consequently, this question was also decided against the appellant department.

3. The learned counsel for the appellant department argued that there is no requirement of a separate notice under Section 111 because a notice under Section 122(9) is sufficient and covers the matters that ought to be taken up under Section 111 of the Ordinance. However, referring to the jurisprudence evolved over the years on the subject, he candidly submitted that such jurisprudence does point out that a separate notice under Section 111 is required, nonetheless, he clarified that such jurisprudence does not discuss whether the said notice is subsumed in Section 122(9) and there is no point in having two separate proceedings when one notice under Section 122(9) itself can suffice. In support of this contention, the learned counsel placed reliance on Commissioner Inland Revenue, T.R.O. Faisalabad v. Faqir Hussain and another (2019 PTD 1828), Commissioner Inland Revenue, Multan Zone v. Falah ud Din Qureshi (2021 PTD 192), Commissioner Inland Revenue, Zone-I, Regional Tax Office, Sukkur v. Messrs Ranipur CNG Station, Ranipur (2017 PTD 1839) and Commissioner Inland Revenue Zone Bahawalpur, Regional Tax Office, Bahawalpur v. Messrs Bashir Ahmed (deceased) through LRs (2021 SCMR 1290). He further relied on the Explanation introduced in Section 111 in the year 2021, as further amended in the year 2022, which provides that a notice under Section 122(9) would be sufficient and no separate notice is required for the purposes of proceedings under Section 111.

4. On the other hand, the learned counsel for the respondent taxpayers submitted that the proceedings under Section 122(5) can only be initiated if there is definite information. The information provided under Section 111 is not definite information but mere information,

and unless it solidifies into definite information, Section 122(5) cannot be attracted. He referred to Section 111 to state that once the tax department takes action on any of the grounds mentioned in Section 111(1) (a) to (d), an explanation is called from the taxpayer and then an opinion is formed by the Commissioner. In case the taxpayer is unable to explain the said income, the same becomes taxable income of the taxpayer, but in case there is sufficient explanation rendered by the taxpayer, the said proceedings can be dropped. Therefore, till such time these proceedings are given effect to, it cannot be said that the grounds mentioned in Section 111 amount to definite information and Section 122(5) cannot be attracted. As to the effect of the Explanation added in Section 111, he contended that the jurisprudence so far has settled that an Explanation has prospective effect and will not affect the cases for the tax years prior to the year 2021. He then submitted that since the Explanation is not applicable to the matters at hand, therefore, its effect is best to be discussed in an appropriate case.

5. We have heard the learned counsel for the parties and have gone through the record of the cases. The questions requiring determination in the instant matters are two-fold and connected: (i) whether a separate notice is required under Section 111 of the Ordinance or whether a notice under Section 122(9) is enough to initiate proceedings for amendment of the assessment on the grounds mentioned in Section 111 of the Ordinance; and (ii) the effect of the Explanation introduced in Section 111 of the Ordinance to the matters at hand.

6. In order to answer the above questions, it is important to understand the scheme behind Section 111 and its effect on amendment of assessments under Section 122 of the Ordinance. Section 111(1) provides that where any of the grounds in Section 111(1)(a) to (d) are applicable, and the taxpayer offers no explanation or the explanation provided, in the opinion of the Commissioner, is not satisfactory, this unexplained income or value of asset(s) shall be included in the income of the person chargeable to tax. For ease of reference, Section 111(1) of the Ordinance is reproduced below[4]:

111. Unexplained income or assets. (1) Where

- (a) any amount is credited in a persons books of account;
- (b) a person has made any investment or is the owner of any money or valuable article;
- (c) a person has incurred any expenditure; or
- (d) any person has concealed income or furnished inaccurate particulars of income including
 - (i) the suppression of any production, sales or any amount chargeable to tax; or
 - (ii) the suppression of any item of receipt liable to tax in whole or in part,

and the person offers no explanation about the nature and source of the amount credited or the investment, money, valuable article, or funds from which the expenditure was made suppression of any production, sales, any amount chargeable to tax and of any item of receipt liable to tax or the explanation offered by the person is not, [in the Commissioners opinion, satisfactory, the amount credited, value of the investment, money, value of the article, or amount of expenditure suppressed amount of production, sales or any amount chargeable to tax or of any item of receipt liable to tax shall be included in the persons income chargeable to tax under head Income from Other Sources to the extent it is not adequately explained][5]:

Provided that where a taxpayer explains the nature and source of the amount credited or

the investment made, money or valuable article owned or funds from which the expenditure was made, by way of agricultural income, such explanation shall be accepted to the extent of agricultural income worked back on the basis of agricultural income tax paid under the relevant provincial law.

Therefore, once the department has information resulting in an impression or understanding that the grounds in Section 111(1) (a) to (d) relating to unexplained income or asset are attracted, an explanation is called from the taxpayer. At this stage, the information available with the department is mere information. If, however, the taxpayer fails to render any explanation, or the explanation offered by the taxpayer is not satisfactory in the opinion of the Commissioner, the said liability becomes unexplained income and is to be added to the income of the taxpayer chargeable to tax. If the explanation offered is satisfactory, the said proceedings can be dropped and no action is then required. Therefore, through the opportunity of an explanation, the taxpayer can contest the allegations put to the taxpayer with regards to any of the grounds mentioned in Section 111(1) (a) to (d), whereafter, an opinion is to be formed by the Commissioner based on the said explanation, if any. As such, the said provision is essentially of an inquisitorial nature where the taxpayer is confronted with the information available with the department and an explanation is sought, and the resulting opinion of the Commissioner is not an adverse order per se but can be used to pass an adverse order against the taxpayer by adding the unexplained income to the income of the taxpayer chargeable to tax. The other provisions of Section 111 also do not empower the Commissioner to pass an adverse order and only provide statutory instructions as to how the unexplained income or asset, provided an opinion under Section 111(1) is given by the Commissioner to this effect, is to be added to the income of the taxpayer chargeable to tax. Therefore, the essence of the proceedings under Section 111 lies within Section 111(1) of the Ordinance, wherein the taxpayer is confronted with the information available with the department, and the Commissioner forms an opinion as to the unexplained income or assets of the taxpayer or otherwise.

7. It is settled law that within the contemplation of Section 111(1), an explanation is to be called from a taxpayer by issuing a specific notice under Section 111 of the Ordinance, confronting the taxpayer with the information gathered by the department and specifying which of the grounds in Section 111(1) is applicable[6]. It is only after this that an appropriate order can be passed under this provision in the form of an opinion of the Commissioner, thus concluding the proceedings under Section 111.

8. On the other hand, Section 122 of the Ordinance provides for amendment of assessments. The provisions of Section 122 relevant to the matters at hand are reproduced below for reference[7]:

S. 122. Amendment of assessments.-

(1) Subject to this section, the Commissioner may amend an assessment order treated as issued under section 120 or issued under section 121, or, by making such alterations or additions as the Commissioner considers necessary.

(5) An assessment order in respect of a tax year, or an assessment year, shall only be amended under sub-section (1) and an amended assessment for that year shall only be further amended under sub-section (4) where, on the basis of [definite information acquired from an audit or otherwise][8], the Commissioner is satisfied that -

(i) any income chargeable to tax has escaped assessment; or

(ii) total income has been under-assessed, or assessed at too low a rate, or has been the subject of excessive relief or refund; or

(iii) any amount under a head of income has been mis-classified.

(8) For the purposes of this section, definite information includes information on sales or purchases of any goods made by the taxpayer, receipts of the taxpayer from services rendered or any other receipts that may be chargeable to tax under this Ordinance, and on the acquisition, possession or disposal of any money, asset, valuable article or investment made or expenditure incurred by the taxpayer.

(9) No assessment shall be amended, or further amended, under this section unless the taxpayer has been provided with an opportunity of being heard.

In view of the above, under Section 122(1) of the Ordinance, the Commissioner has been empowered to amend an assessment order treated as issued under Sections 120 or 121 by making such alterations or additions as the Commissioner considers necessary. However, under Section 122(5), an assessment order shall only be amended under Section 122(1) or an amended assessment can only be further amended under Section 122(4) where, on the basis of definite information acquired from an audit or otherwise, the Commissioner is satisfied that any of the grounds in the said provision are satisfied. Section 122(8) provides what constitutes definite information for the purposes of this provision. Finally, Section 122(9) stipulates that no assessment shall be amended, or further amended, under Section 122 unless the taxpayer has been provided with the opportunity of being heard.

9. Therefore, pursuant to Section 122(5) of the Ordinance, the terminus a quo for initiation of proceedings under Section 122 is when the Commissioner, on the basis of definite information acquired from an audit or otherwise, is of the opinion that any of the grounds mentioned in Section 122(5)(i), (ii) or (iii) is applicable. Thereafter, a notice under Section 122(9) of the Ordinance, specifying the above ground(s), is sent to the taxpayer. If the taxpayer satisfactorily responds to the notice sent under Section 122(9), the proceedings can be dropped. Where, however, the response is not satisfactory, and the Commissioner is satisfied that any of the grounds in Section 122(5) are applicable, the Commissioner can amend the assessment order under Section 122(1) or further amend an amended assessment under Section 122(4) read with Section 122(5). As such, for initiation of proceedings under Section 122, the Commissioner must assess if any of the grounds under Section 122(5) are applicable, and such an assessment is to be based on definite information acquired from an audit or otherwise, which is the prerequisite to attract the provisions of Section 122(5) of the Ordinance.

10. It is in this sequence of proceedings that the initiation and culmination of proceedings under Section 111 of the Ordinance becomes necessary before action can be taken under Section 122 to amend assessments on the basis of proceedings undertaken under Section 111. As noted above, the information available with the department under Section 111(1) is mere information. It is only after the taxpayer is confronted with this information through a separate notice by calling for an explanation, and when no explanation is offered or the explanation is not satisfactory in the opinion of the Commissioner under Section 111(1), that it transforms or crystallizes into definite information for the purposes of action under Section 122(5) for amendment of assessment under Section 122. The taxpayer will then be confronted with the grounds applicable under Section 122(5) through a notice under Section 122(9) of the Ordinance. As such, where the Commissioner has formed an opinion against the taxpayer as to the fulfilment of one of the grounds mentioned in Section 111(1) (a) to (d) of the Ordinance, and is of the view that any of the grounds in Section 122(5) is

applicable, the process under Section 122 is to be initiated to amend assessments through a notice under Section 122(9). Thus, unless the proceedings under Section 111(1) are initiated and completed, Section 122(5) cannot be given effect to and no notice under Section 122(9) can be issued for the purposes of amending an assessment through an addition contemplated under Section 111. It is to be noted that the present cases are related to tax years up till 2020. After the amendment introduced in Section 122(5) of the Ordinance through the Finance Act, 2020, the words definite information acquired from an audit or otherwise have been substituted with audit or on the basis of definite information. Therefore, the interpretation rendered above as to the applicability of Section 122(5) may not be applicable to cases post 2020 and the effect of the substituted expression will have to be determined in an appropriate case in the future.

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

12. We, however, underline and clarify that even where a notice under Section 111 is issued simultaneously with a notice to amend an assessment under Section 122(9) of the Ordinance, no proceedings can be undertaken under the latter until the proceedings under Section 111 are finalized and result in an opinion against the taxpayer. This is because, even if some basis for action under Section 111 is mentioned in a notice under Section 122(9), it cannot constitute definite information for the purposes of Section 122(5). The proceedings under the notice issued under Section 122(9) can only be formally initiated when the requirement of definite information is satisfied under Section 122(5) after finalization of the proceedings under Section 111 through an opinion of the Commissioner. Therefore, where no opinion is formed against the taxpayer under Section 111, the proceedings under both provisions i.e., Sections 111 and 122 would lapse, and the notice under Section 122(9) would be of no legal effect. Where, however, there is an opinion formed against the taxpayer as definite information for the purposes of Section 122(5), the proceedings on the notice issued under Section 122(9) can formally proceed and shall be deemed to have commenced. It must also be noted that where the opinion formed against the taxpayer under Section 111 is materially different from what has been confronted to the taxpayer through the notice already issued under Section 122(9), and the Commissioner is of the view that another or different ground under Section 122(5) is applicable, a fresh or supplementary show cause notice under Section 122(9) must be issued to the taxpayer by confronting such ground(s) to the taxpayer. This is in view of the right to be treated in accordance with the law, and the principles of fair trial and due process enshrined in Articles 4 and 10A of the Constitution[11], respectively, and in terms of settled law that once a show cause notice is issued, the original adjudication on the said show cause notice can only be based on the grounds and allegations levelled therein[12].

13. Adverting to the second issue at hand as to the effect of the Explanation introduced in

Section 111 of the Ordinance to the instant cases, the Explanation was added in Section 111 pursuant to the Finance Act, 2021 and is reproduced below for reference:

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

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

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

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

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

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

15. However, where the effect of the Explanation warps out of its normal purpose explained above, and acts as a substantive enactment or deeming provision, or enlarges substantive provisions of law or creates new liabilities, such an Explanation cannot be given retrospective effect unless the express language of the Explanation warrants such an

interpretation[18]. It is settled law that a change in substantive law which divests and adversely affects vested rights of the parties shall always have prospective application unless by express word of the legislation and/or by necessary intendment/implication such law has been made applicable retrospectively[19]. As a cardinal principle of interpretation of statutes, tax statutes operate prospectively and not retrospectively unless clearly indicated by the legislature, therefore, retrospectivity cannot be presumed[20]5. Where an insertion or deletion of any provision in the rules or the law is merely procedural in nature, the same would apply retrospectively but not if it affects substantive rights which already stood accrued at the time when the un-amended rule or provision was in vogue[21]. A provision curtailing substantive rights does not have retroactive operation unless the legislature elects to give it retrospective effect[22]. Thus, where existing rights are affected or giving retroactive operation causes inconvenience or injustice, the Court will not favour an interpretation giving retrospective effect even where the provision is procedural[23]. Applying this to the instant case, and having established that the Explanation added in Section 111 of the Ordinance divests and affects a substantive right of the taxpayer to a separate notice and proceedings under Section 111, the same would not have retrospective effect and would apply prospectively. Therefore, the Explanation would not be applicable to the matters at hand as they pertain to tax years before the Explanation was introduced in Section 111.

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

17. Therefore, where one notice is issued under Section 122(9) which encompasses both the grounds of Section 111(1) and Section 122(5), the proceedings under Section 111 will be taken up first. The taxpayer, in response, is to provide an explanation, as envisaged under Section 111(1). If the response to the grounds under Section 111 is satisfactory, then the proceedings can be dropped. However, where the response is not satisfactory, the Commissioner will then form an opinion, as is required under Section 111, which can only be taken as definite information for the purposes of Section 122(5) for amendment of the assessment. In view of the scheme of Section 111 and its effect on Section 122, it is imperative that the taxpayer is confronted with this opinion, providing the taxpayer with an opportunity to fully and finally understand and respond to the allegations against the taxpayer with respect to the grounds the Commissioner understands are applicable under Section 122(5) based on this opinion. As held above, it is only after the opinion is given by the Commissioner under Section 111(1) that the proceedings under Section 122 can be formally taken up and proceeded with. The taxpayer can then file a response to the grounds alleged under Section 122(5) under the same show cause notice issued under Section 122(9), by filing a supplementary response to the show cause notice. It is after considering this response that an assessment can be amended under Section 122, provided the Commissioner is still satisfied that any of the grounds under Section 122(5) are still applicable. We are also cognizant of the fact that two provisos[24] have been added after Section 122(9) which provide for a time period from the date of issuance a show cause

notice for making an order under Section 122. In view of what has been held above, the said time period is to be considered as commencing on the day that the taxpayer is confronted with the opinion formed by the Commissioner under Section 111(1), as it is only then that the proceedings under Section 122 are to be formally taken up. In our view, this reconciliation harmonizes Section 111, its Explanation and Section 122(5) of the Ordinance.

18. Our view that the process could only be lawfully undertaken in two steps is further fortified from Section 114(6A) of the Ordinance, which extends a right to the taxpayer that the taxpayer can voluntarily file a revised return and deposit the tax before the issuance of a notice under Section 122(9) of the Ordinance, and consequently avoid the penalty stipulated in Section 182[25] of the Ordinance vis-a-vis the provisions of Section 111 of the Ordinance. If it is held that both the proceedings under Section 111 and 122 are now subsumed, the taxpayer would be deprived of this right which can neither be the legislative intent and nor legally justified. Accordingly, this right, which the legislature has thoughtfully extended to the taxpayers, could only be protected and preserved if the proceedings under Section 111 of the Ordinance are initiated first and the taxpayer could opt to either revise his return with voluntary payment of tax without penalty or contest the proceedings and forego the said right.

19. Therefore, as far as the cases prior to the Explanation are concerned, a separate notice is required to be issued under Section 111 before proceedings can be initiated under Section 122. The simultaneity of notices issued under Section 111 and 122(9) is not of much consequence and the proceedings under Section 111 have to proceed first and be finalized before proceedings under Section 122 are formally taken up. After the introduction of the Explanation in Section 111 in the year 2021, a notice encompassing both the grounds under Section 111(1) and Section 122(5) can be issued under Section 122(9), however, the proceedings under Section 111 still have to be concluded first and thereafter the remaining part of the notice under Section 122(9) can be given effect to.

20. For the reasons given above, these appeals are hereby dismissed.

1-Passed on the basis of the judgment of the Lahore High Court in Commissioner Inland Revenue v. Faqir Hussain, 2019 PTD 1828 which had earlier decided the same issue in favour of the taxpayers as the consolidated judgment dated 09.06.2022 impugned herein.

2-The tax years in these cases range from 2007 to 2020, however, we have noted that no substantive change was made in the provisions relevant to these matters until 2020.

3-It is important to underline that these matters pertain to tax years prior to the amendments made in Section 122(5) of the Ordinance through the Finance Act, 2020 by substituting audit or on the basis of definite information for definite information acquired from an audit or otherwise

4-The provision as it stood prior to the amendments made through the Finance Act, 2020 has been reproduced. However, it is to be noted that the provision is to apply to the relevant tax years in accordance with how the provision stood at the relevant time.

5-Substituted through the Finance Act, 2020 by in the Commissioners opinion, satisfactory

(a) the amount credited, value of the investment, money, value of the article, or amount of expenditure shall be included in the persons income chargeable to tax under the head Income from Other Sources to the extent it is not adequately explained; and

(b) the suppressed amount of production, sales or any amount chargeable to tax or of any item of receipt liable to tax shall be included in the persons income chargeable to tax under the head Income from Business to the extent it is not adequately explained.

6-Commissioner Inland Revenue v. Bashir Ahmed, 2021 SCMR 1290; Commissioner Inland Revenue v. Faqir Hussain, 2019 PTD 1282; Commissioner Inland Revenue v. Ranipur CNG Station, 2017 PTD 1839; Commissioner Inland Revenue v. Muhammad Shafique, 2015 PTD 1823.

7-The provision as it stood prior to the amendments made through the Finance Act, 2020 has been reproduced. However, it is to be noted that the provision is to apply to the relevant tax years in accordance with how the provision stood at the relevant time.

8-Expressions audit or on the basis of definite information substituted through Finance Act, 2020 dated 30th June, 2020

9-Commissioner Inland Revenue v. Falah, 2021 PTD 192; Commissioner Inland Revenue v. Faqir Hussain, 2019 PTD 1828; Commissioner Inland Revenue v. Ranipur CNG Station, 2017 PTD 1839.

10-Commissioner Inland Revenue v. Bashir Ahmed, 2021 SCMR 1290.

11-The Constitution of the Islamic Republic of Pakistan, 1973.

12-Commissioner Inland Revenue v. RYK Mills, 2023 SCMR 1856; Collector Central Excise v. Rahm Din, 1987 SCMR 1840; Commissioner Inland Revenue v. Rose Food Industries, 2023 SCMR 2070.

13-M.N. Rao and Amita Dhanda in N S Bindras Interpretation of Statutes (12th Edition, 2016); Rehman Cotton Mills v. Federation of

Pakistan, 2016 PTD 1256.

14-M. P. Tandon Interpretation of Statutes (12th Edition, 2019).

15-Rehman Cotton Mills v. Federation of Pakistan 2016 PTD 1256.

16-Hussain Patel v. Habib, PLD 1981 SC 1; Chief Administrator Auqaf v. Koura, PLD 1991 SC 596

17-Hamid Ashraf v. Commissioner Inland Revenue, 2020 SCMR 843; Commissioner of Income Tax v. Asbestos Cement Industries, 1993 SCMR 1276; Kohinoor Sugar Mills v. Federation of Pakistan, 2018 PTD 821

18-Commissioner Inland Revenue v. Trillium Pakistan, 2019 SCMR 1643; Commissioner of Income Tax v. Nazir Ahmed and Sons, 2004 PTD 921.

19-Controller General of Accounts v. Abdul Waheed, 2023 SCMR 111; Tariq Badar v. National Bank of Pakistan, 2013 SCMR 314; Commissioner of Income Tax v. Eli Lilly Pakistan, 2009 SCMR 1279; Hassan v. Fancy Foundation, PLD 1975 SC 1; Province of East Pakistan v. Sharafatullah, PLD 1970 SC 514; Nagina Silk Mill v. Income Tax Officer, PLD 1963 SC 322.

20-Rajby Industries v. Federation of Pakistan, 2023 SCMR 1407; Member (Taxes) Board of Revenue v. Qaisar Abbas, 2019 SCMR 446; Zila Council Jhelum v. Pakistan Tobacco Company, PLD 2016 SC 398; Commissioner of Income Tax v. Eli Lilly Pakistan, 2009 SCMR 1279.

21-Controller General of Accounts v. Abdul Waheed, 2023 SCMR 111; Manzoor Ali v. United Bank, 2005 SCMR 1785; Malik Gul Hassan v. Allied Bank of Pakistan, 1996 SCMR 237; Adrian Afzal v. Sher Afzal, PLD 1969 SC 187.

22-Badshah Gul Wazir v. Government of Khyber Pakhtunkhwa, 2015 SCMR 43.

23-Adnan Afzan v. Capt. Sher Afzal, PLD 1969 SC 187; Gul Hasan v. Allied Bank of Pakistan, 1996 SCMR 237

24-The following two provisos were added after Section 122(9) through the Finance Act, 2021 and further amended through the Finance Act, 2022.

Provided that order under this section shall be made within one hundred and eighty days of issuance of show cause notice or within such extended period as the Commissioner may, for reasons to be recorded in writing, so however, such extended period shall in no case exceed ninety days. This proviso shall be applicable to a show cause notice issued on or after the first day of July, 2021.

Provided further that any period during which the proceedings are adjourned on account of a stay order or Alternative Dispute Resolution proceedings or agreed assessment proceedings under section 122D or the time taken through adjournment by the taxpayer not exceeding sixty days shall be excluded from the computation of the period specified in the first proviso.

25-Per Serial No.12 of the Table provided in Section 182 of the Ordinance, for an offence under Section 111, the penalty may amount to one hundred thousand rupees or an amount equal to the tax which the personsought to evade, whichever is higher.