Amendment of Assessments

Section 122
Of the I.T.Ord. **2001**
Section **66-A** Of the I.T.Ord. **1979**
Section **65** Of the I.T.Ord. **1979**

Of the Income Tax Ordinance,2001
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READ AT THE PAPER
S E M I N A R
Held By
Karachi Tax Bar Association
On
MONDAY THE 31ST. MARCH, 2003
At
CONFERENCE ROOM, Income Tax Building
Karachi

Amendment of Assessments U/S. 122 OF THE INCOME TAX ORDINANCE, 2001

Under The Income Tax Laws Of All The Countries, There Are Provisions For The Assessment Of The Income Declared By The Assessee. These Provisions were reflected In The Income Tax Ordinance, 1979 In Form Of Sections 59, 62 And 63 Under Which Sections The Income Was Originally Assessed.

The Income Tax Ordinance, 2001 is based on the concept "voluntarily compliance backed by strong audit'. Under the provisions of this Ordinance, all returns of income filed under section 114(1) shall be taken to be assessment orders for all purposes of this Ordinance issued to the taxpayer by the Commissioner on the day the returns were furnished. This means that the return of income without even being examined by the Commissioner to determine whether it has been prepared and the income and tax computed in accordance with the provisions of the Ordinance is taken be an assessment order.

Even in cases, where an assessment is finalized after detailed examination by the assessing officer, there is inherent danger that the income assessed may not include certain incomes which may have escaped assessment due to concealment of such income by the assessee or due to submission of inaccurate particulars or may have been assessed at too low a rate or the order of the assessing officer may be erroneous in so far as it is prejudicial to the interest of the revenue or there may be mistakes apparent from record. Remedies for all these eventualities are provided in the Income Tax Laws of almost all the countries. The sections in Income Tax Ordinance, 1979, which provided the remedies were sections 65, 66A and 156 where subject to certain conditions the departmental officers had been empowered to reopen assessments to retrieve the revenue loss due to concealed income or erroneous assessments.

Looking at the peculiar nature of the finalization of the assessment under the Income Tax Ordinance, 2001, it is all the more important that there is a section for retrieving loss of revenue which may arise from unconditional acceptance of the returns of income.

In the Income Tax Ordinance, 2001, the section which has been incorporated to deal with retrieval of loss of reve

nue is section 122 which has been titled 'Amendment of Assessments', whereas, the section parameteria to section 156 of the Repealed Ordinance which will deal with the 'Rectification of Mistakes' in Section 221. In my submissions before this august house today, I will try to highlight the similarities and the differences between section 122 and sections 65 and 66A of the Repealed Ordinance, which sections are the sections, which the lawmakers in their infinite wisdom intend to replace with the new section 122.

However, before I start my submissions on these lines, I would like to submit that the superior courts have levied great stress on the finality of assessments. Here I would like to quote extracts from the judgement of Mr. Justice H.R. Khanna of Indian Supreme Court who in the case of Parashuram Pottery Works Company Ltd. V/s. ITO, (1977 106 ITR Page-1) has made certain observations:

"At the same time, we have to bear in mind that the policy of law is that there must be a point of finality in legal proceedings, the stale issues should not be reactivated beyond a particular stage and that lapse of time must, induce repose in and set at rest judicial and quasi-judicial controversies as it must in other spheres of human activity".

From the time, the new Income Tax Ordinance has come into force my office and the offices of my other professional colleagues have been flooded with show cause notices for amending the assessment under section 122, such notices are being issued at the drop of a pin without properly examining whether the case falls within the parameters of section 122 or not. When confronted, the Taxation

Officers who issued these notices expressed their helplessness because they have been set targets to issue as many notices under section 122 as possible. It has also been heard that senior officers are encouraging Taxation Officers to amend assessments and are reluctant to restrict them from issuing notices under section 122 as according to them, it will nib their creativity in the bud. I would like to stress very strongly that the indiscriminate issuance of notices

under section 122 will undermine the real purpose of the promulgation of the new Ordinance, 2001 which as pointed out earlier was voluntarily compliance backed by strong audit. If every case has to be amended under section 122 then no useful purpose, can be served by accepting the declared result and then amending it, at the slightest pretext. Although, I do not hold any brief for tax-evaders, I would like to submit that section 122 should be applied only in those cases which fall within its four corners and should not be used as a tool for harassment and arbitrary revenue collection.

Before I start to analyse the provisions of section 122, it will be worthwhile reproducing the relevant sections, section 65 and 66A of the Repealed Ordinance and Section 122 of the Income Tax Ordinance, 2001

SECTION 65 & 66A **Of the Income Tax Ordinance, 1979**	**SECTION 122** **Of the Income Tax Ordinance, 2001**
SECTION 65 65. Additional assessment.--- (1) if, in 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 and the tax payable by him has been assessed or determined under sub-section (1) of section 59 or section 59A or deemed to have been so assessed or determined under	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 122 or issued under section 59, 59A, 62, 63 or 65 of the repealed Ordinance, by making such alterations or additions as the Commissioner considers necessary to ensure that the taxpayer is liable for the correct amount of tax for the tax year to which the assessment order relates. (2) An assessment order shall only be amended under subsection (1) within five years after the Commissioner has issued or is treated as having

sub-section (1) or section 59 or section 59A.	issued the assessment order on the taxpayer. (3) Where a taxpayer furnishes a revised return under sub-section (6) of section 114.
the Deputy Commissioner 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 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 sub-section (1) shall be initiated unless definite information has come into the possession of the Deputy Commissioner and he has obtained the previous approval of the Inspecting Additional Commissioner of Income Tax in writing to do so. Explanation.---As used in this sub-section, "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	(a) the Commissioner shall be treated as having made an amended assessment of the taxable income and tax payable thereon as set out in the revised return; and (b) the taxpayer's revised return shall be taken for all purposes of this Ordinance to be an amended assessment order issued to the taxpayer by the Commissioner on the day on which the revised return was furnished. (4) Where an assessment order (hereinafter referred to as the "original assessment") has been amended under sub-section (1) or (3), the Commissioner may further amend, as many times as may be necessary, the original assessment within the later of- (a) five years after the Commissioner has issued or is treated as having issued the original assessment order to the taxpayer; or (b) one year after the Commissioner has issued or is treated as having issued the amended assessment order to the tapayer. (4A) an amended assessment shall only be made within six years of the

any money, asset or valuable article, or any investment made or expenditure incurred by him. (3) Notice under sub-section (1), in respect of any income year, may be issued within ten years from the end of the assessment year in which the total income of the said income year was first assessable. Provided that, where the said notice is issued on or after the first day of July, 1987, this sub-section shall have effect as if for the words "ten years" the words "five year" were substituted.	date of original assessment. (5) An assessment order shall only be amended under sub-section (1) and an amended assessment shall only be amended under subsection (4) where the Commissioner-
(3A) Where a notice under sub-section (1) is issued on or after the first day of July, 1982, no order under the said sub-section shall be made after the expiration of one year from the end of the financial year in which such notice was served. (4) xxxxxxxxxxx SECTION 66-A 66A. Powers of Inspecting Additional Commissioner to revise Deputy Commissioner's order.---- (1) The Inspecting Additional Commissioner may call for and examine the record of any proceedings under this Ordinance, and if he considers that any order passed therein by the Deputy Commissioner is erroneous insofar as it is prejudicial to the interest of	(a) is of the view that this Ordinance or the repealed Ordinance has been incorrectly applied in making the assessment (including the misclassification of an amount under a head of income, incorrect payment of tax with the return of income, an incorrect claim for tax relief or rebate, an incorrect claim for exemption of any amount or an incorrect claim for a refund; or (b) has definite information acquired from an audit or otherwise that the income has been concealed or inaccurate particulars of income have been furnished or the assessment is otherwise incorrect. (5A) Where a person does not produce accounts and records, or details of expenditure, assets and

revenue, he may, after giving the assessee an opportunity of being heard and after making, or causing to be made, such enquiry as he deems necessary, pass such order thereon as the circumstances of the case justify, including an order enhancing or modifying the assessment, or canceling the assessment and directing a fresh assessment to be made. (1A) The provisions of sub-section (1) shall, in like manner, apply; (a) where an appeal has been filed under sections 129, 134 and 137, or an appeal has filed under section 136, against an order passed by the Deputy Commissioner; and (b) where an appeal referred to in clause (a) has been decided, in respect of any point or issue which was not the subject-matter of such appeal. (2) No order under sub-section (1) shall be made after the expiry of four years from the date of the order sought to be revised. Explanation.--- For the purposes of this section, an order prejudicial to the interests of revenue shall include an order passed without lawful jurisdiction.	liabilities or any other information required for the purposes of audit under section 177, or does not file wealth statement under section 116, the Commissioner may, based on any available information and to the best of Commissioner's judgement, make an amended assessment. (6) As soon as possible after making an amended assessment under sub-section (1) or (4), the Commissioner shall issue an amended assessment order to the taxpayer stating- (a) the amended taxable income of the taxpayer (b) the amended amount off tax due; (c) the amount of tax paid, if any; and (d) the time, place, and manner of appealing the amended assessment. (7) An amended assessment order shall be treated in all respects as an assessment order for the purposes of this Ordinance, other than for the purposes of sub-section (1).
	(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.

From a perusal of the comparative sections, you will see that the section 122 has been incorporated in the new Ordinance to cater to the cases falling under both sections 65 and 66A of the Income Tax Ordinance, 1979. In my submissions today, I will first compare provisions of section 65 with the relevant provisions of section 122 and then compare the provisions of section 66A with the relevant provisions of section 122.

SECTION 122
VIS-A-VIS
SECTION 65 OF REPEALED ORDINANCE

The conditions, which have been made mandatory for application of section 122, have been outlined in sub-section (5) of this section. Clause (b) of sub-section (5) deals with the cases which would have fallen under section 65 of the Repealed Ordinance. The mandatory condition prescribed is that the Commissioner is in possession of 'definite information' acquired from an audit or otherwise that the income has been concealed or inaccurate particulars of income have been furnished or the assessment is otherwise incorrect. 'Definite information' has been defined in sub-section (8) of this section and is almost the same as 'definite information' defined in section 65 of the Repealed Ordinance except that the information on the receipts of taxpayer from services rendered or any other receipts that may be chargeable to tax under the new Ordinance has been included in this definition and therefore the definition of the 'definite information' in the new Ordinance is more broader then the definition of the 'definite information' in the Repealed Ordinance. The major difference between the two statutes is that there is no requirement for requisitioning a return of income under the provisions of section 122 as was necessary under

the provisions of section 65. Another important distinction is that the Commissioner is not required to obtain approval from any of his senior officers for taking action under section 122 as was a mandatory requirement under section 65.

Since, section 65 was almost parameteria with section 34 of the Income Tax Act. 1922 a plethora of case laws had emerged over the years on all aspects of section 34 of the Income Tax Act., 1922 and section 65 of the Income Tax Ordinance, 1979.

In my submissions, I will scrutinize various case laws and try to analyse them to see whether they shall also apply to the interpretation of the provisions of section 122. The possession or otherwise of definite information has been the subject matter of a number of decisions of Supreme Courts and High Courts of Pakistan and India and in the light of these judgements, a consensus interpretation has been reached.

It is well settled law that facts already on record, that is the facts which were available before the assessing officer at the time of original assessment do not constitute definite information and cases cannot be reopened on that basis. From these case laws, the analogy has developed that information should come in the possession of the Assessing Officer subsequent to the assessment.

Another analogy which has arisen from the orders of the Superior Courts and is connected with the case law on definite information, are the case laws on reopening of cases on mere change of opinion. It has been held in a number of cases, that where complete facts have been disclosed and ITO has consciously formed an opinion and framed the assessment on the basis of that opinion, he cannot in presence of the same facts change his opinion and reopen the assessment.

To elaborate this point, I would like to quote extracts from two trend setting judgements of Supreme Court of Pakistan, which had radically changed the application of section 65.

In Eduljee Dinshaw Ltd. V/s. ITO reported in (1990) 61 TAX 105 their Lordships of the Supreme Court of Pakistan after analysing the numerous decisions of the Superior Courts of India and Pakistan made the following observations.

"Where all the facts have been fully disclosed by the assessee and considered by the Income Tax Authorities and the assessment has been framed consciously and no new facts have been discovered the assessment could not be reopened under section 65 of the Income Tax Ordinance, 1979"

In Arafat Woolen Mills Ltd. V/s. ITO reported in (1990) 61TAX46. His Lordship Mr. Justice Abdul Qadir Sheikh adjudicated as under"

"After having gone through the records of the case, we find that no exception can be taken with the above view that prevailed with the assessing officer. No other information or material, except what was already in possession of the assessing 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 the Ordinance had escaped assessment. In the counter affidavit filed by the Income Tax Officer in the High Court, it is categorically stated "the then assessing officer by mistake and oversight as regards the points of facts and law made an assessment" (on the basis of capital gains). It is however stated further in the counter affidavit that "certain items of taxable income escaped assessment which came to light at a later stage", but we do not put confidence into these items at all. It is the uncontroverted position that the assessing officer as well as the Inspecting Assistant Commissioner who gave the previous approval for initiating proceedings under section 65 of the Ordinance acted on the same material that was produced and made available to the previous assessing officer who had passed the assessment order which is sought to be reopened the case cannot be reopened under section 65".

The above obita-dictum has also been the obita-dictum of many judgements of the Indian Courts. In the case of Commissioner of Income Tax Delhi V/s. M.K.S. Pratap Kumari of Alwar, Reported in (1982) 45 TAX 116, it was held by the Delhi High Court, while quashing a notice for reopening an assessment as under:

"This is a simple case where on a reappraisal of the very same material, which he had earlier obtained, the assessing officer thought of taking a different view and initiated the proceedings. The action of the assessing officer was clearly without legal warrant inview of the well settled position regarding action under section 147(b).

In the case of Wyeth (India) Pvt. Ltd. V/s. N.D. Bhatt, Inspecting Assistant Commissioner of Income Tax and another (1982) Vol. 137 I.T.R. 20). The Bombay High Court quashed a notice under Section 147 and 148 for reopening an assessment on the ground that the assessee had already disclosed all the relevant material regarding the rent and compensation received by it and the previous assessing officer had completed the assessment after perusing the relevant material".

In two recent judgements one by Honorable Supreme Court of Pakistan and one by the Honorable Tribunal, certain informations have been excluded from the definition of definite information.

In M/s. Central Insurance Co. V/s. C.B.R. reported in 1993 PTD 766. My lord Justice Ajmal Mian, judge of the Supreme Court as he then was held that

interpretation of C.B.R. does not tantamount to definite information. He writes and I quote.

"The expression "definite information" will include factual information as well as information about the existence of a binding judgement 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 definite information. If one treats an administrative interpretation of a provision of law as a definite information, it will lead to uncertainty and will cause harassment to the assessee. 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 Officer as a definite information for the purposes of reopening 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.

In a landmark decision by Honorable Tribunal reported in (1995 71 Tax 193 (Trib.) it was held that Inspector's report cannot be treated as definite information and case cannot be reopened on the basis of Inspector's report.

I have highlighted extracts from the above judgements in order to comprehensively explain the fact that reopening of cases on the basis of same facts and due to mere change of opinion is beyond the jurisdiction of the assessing officer.

However, in some cases, the honorable courts have held that assessments framed without conscious application of mind can be reopened under section 65, this is the ratio decendi ermerging from the following judgements:

1. H.M. ABDULLAH V/S. I.T.O. KARACHI
63 TAX 113 (H.C.K)

In this case My Lord Mr. Justice Saleem Akhtar Judge of the Sindh High Court as he then was held as under:

"It is well-settled that on the basis of change of opinion action under section 65 cannot be initiated. However, in case where assessment order has been passed without investigation into the correctness of the return filed by the assessee without applying mind and the assessment order is not a conscious order passed by him, the question of change of opinion will not arise. The change of opinion arises only when there exists an opinion expressed by the assessing officer in regard to the controversy or matter under consideration. If no opinion has been expressed earlier, the question of change of opinion will not arise".This ratio decendi has also been upheld in a number of other cases a couple of them are cited below:

1. QUDDUS AHMED V/S. A.C.I.T.
74 TAX 24 (L.H.C)
2. NATIONAL BEAVERAGES V/S. C.I.T.
(2000) 83 TAX 359 (H.C.) Karachi.

It is an admitted fact that assessments under section 120 of the Income Tax Ordinance, 2001 are finalised without any application of mind or scrutiny / examination of the documents furnished as the declared return filed mandatory, it becomes an assessment order under section 120. The question is, whether, the judgements of the Superior Courts in which it has been held that the facts already on record at the time of framing of the assessment order do not constitute 'definite information' and / or the contradictory orders of the Superior Courts that if the assessments have not been consciously completed, they can be reopened under section 65 will apply to the orders deemed to be issued under section 120 of the new Ordinance. To resolve this dilemma, one has to once again review, the mandatory condition for amending an assessment under section 122 outlined in clause (b) of sub-section (5). On a plain-reading of this clause, it becomes clear that the 'definite information' for taking action under section 122 must have been acquired by the Commissioner from an audit or otherwise and must lead to conclusion that the income has been concealed or inaccurate particulars of income have been furnished or the assessment is otherwise, incorrect. It is my humble opinion that for amending an assessment, the 'definite information' cannot be acquired from the documents enclosed with the return, but must have come into the possession of the Commissioner from the proceedings of the audit, if the Commissioner has selected the case for audit under section 177 of the Income Tax Ordinance, 2001 or must have been acquired by him from any other source after the assessment has been deemed to have been finalised. It is therefore my humble opinion that the judgements of the Honorable Supreme Court of Pakistan in M/s. Edjuljee Dinshaw and Arafat Woolen Mills will still hold ground and it will only be possible to amend the assessments, if the 'definite information' is acquired by the Commissioner after the deemed finalisation of the assessment order.In the light of my above submissions, I would like to examine the jurisdiction of the Commissioner to further amend an order, which has already been amended under section 122(1) of the Income Tax Ordinance, 2001. Since, I have already opined that the

judgments of the Honorable Supreme Court of Pakistan in M/s. Eduljee Dinshaw and Arafaat Woolen Mills will also apply to cases under section 122, my conclusion is that the 'definite information' on the basis of which, the amended order, is sought to be further amended should have come into the possession of the Commissioner or acquired by him subsequent to the passing of the amended assessment and should not have been in his possession at the time of passing of the last amended assessment.

Vide Finance Ordinance, 2002, sub-section (1) of section 122 has been amended and the Commissioner has been empowered to amend the orders issued under section 59, 59(A), 62, 63 or 65 of the Repealed Ordinance. The questions which have to be examined are, (i) whether this amendment made by the Finance Ordinance, 2002 without corresponding amendment in other sections, can qualify for bringing in the ambit of section 122, the assessment completed and finalised under the provisions of the Repealed Ordinance?, (ii) whether the assessments which had become final before promulgation of the new Ordinance as the period of limitation for reopening of such assessments under section 65 / 66A had passed and no action had been taken, can be brought within the ambit of section 122 and subjected to the enhanced period of limitation. After studying the effect of repeal and section 239(5) of the Income Tax Ordinance, 2001 which clarifies that, if the prescribed period for filing any appeal, reference or revision under the Repealed Ordinance has expired on or before commencement of the new Ordinance, nothing in this Ordinance shall be construed to extend the limitation, just for the reason that a longer period is specified in the new Ordinance. While discussing effect of repeal, it has been stressed that, if the period of limitation for taking adverse action has expired before the repeal and the promulgation of the new enactment, a vested right has been acquired, which can only be taken away by specific intendment, and since, such intendment is missing in section 122, I am of the opinion, that those assessments in which action under section 65 and 66A had become time-barred before the repeal of the old Ordinance and coming enforce of the new Ordinance, cannot be brought within the ambit of section 122 and no action for amending the assessments can be taken in those cases.

Coming back to the first question raised by me, I would like to draw the attention of this august house to clause (c)(ii) of sub-section (2) of section 166 of the Income Tax Ordinance, 1979 which was titled Repeal and Savings, this section is being reproduced as under:

166. Repeal and Savings:- (1) The income-tax Act, 1922 (XI of 1922) is hereby repealed.

(2) Notwithstanding the repeal of the Income-tax Act, 1922 (XI of 1922) and without prejudice to the provisions of section 6 or section 24 of the General Clauses Act, 1897 (X of 1897).

(c) Where in respect of any assessment year,--

(ii) any income chargeable to tax had escaped assessment, or had been under assessed or assessed at too low a rate, or had been the subject of excessive relief or refund or the total income or the total world income and the tax payable had been determined under sub-section (1) of section 23 of the repealed Act and no proceedings under section 34 of the said Act in respect of any such income are pending at the commencement of this Ordinance a notice under section 65 may be issued in respect of that assessment year and all the provisions of this Ordinance shall apply accordingly;I would also draw your attention to the fact that such a saving is completely missing from section 239, which is the saving section of the Income Tax Ordinance, 2001. The effect of absence of such a saving clause in section 239 would be that the legislature considers that the assessments completed under the repealed law are passed and closed transactions and do not fall within the ambit of section 122 and this can also be gauged from the fact that when the Income Tax Ordinance, 2001 was promulgated, section 122 did not contain reference to the orders issued under section 59, 59A, 62, and 63 of the Repealed Ordinance and they were incorporated in this section by an amendment made through Finance Ordinance, 2002.

It is a cardinal principle of law that in absence of a clear provision to the contrary, a statute must not be construed as disturbing existing rights and orders that have become final. If we apply this principle to the subject in hand, the conclusion can be drawn that the Commissioner cannot reopen the case under section 122 that had attained finality under the Repealed Ordinance as sections 239 does not save the provisions of section 65 of the Repealed Ordinance as section 166(2)(c)(ii) of the Repealed Ordinance specifically provided that action under section 65 could be taken in cases falling under section 34 and as pointed out earlier, there is no such provision in the Income Tax Ordinance, 2001.

If we read section 122 as a whole, it will become apparent that this section basically deals with the assessment orders falling under the provisions of this Ordinance and even, the concept of acquiring 'definite information' from audit, relates to the audits, conducted under section 177 of this Ordinance. However, by including the assessment orders passed under the various sections of the Repealed Ordinance in the category of the assessment orders, which can be amended by the Commissioner, the legislature has revealed its intention that they would like to bring these assessment orders within the ambit of section 122 and legislative intent is an important source of interpretation. However, my view is that, section 122 is very poorly drafted and while amending section 122 vide Finance Ordinance, 2002, the legislature has not made consequential amendments in section 122 itself and other sections specially the non-addition of a specific clause in saving section 239 of the Income Tax Ordinance, 2001 to specifically provide for the orders passed under the Repealed Ordinance to fall

within the ambit of section 122 and I'm of the opinion, that this is a grey area and will only be properly interpreted when the Appellate Proceedings reach the Judicial Forum and this particular aspect of section 122 is interpreted by the courts. My personal advise to all my colleagues is that whenever, you receive a notice under section 122, seeking to amend an assessment order issued under the provisions of Repealed Ordinance, be sure to challenge the jurisdiction of the Commissioner and point out to him that, he has no power under section 122 to take action in respect of these assessments.

During my research on development of section 65 through the case laws, I came across a couple of cases dealing with the jurisdiction of section 65. These case laws are:

1. IMTIAZ RAFIQ BUTT V/S. I.T.O.
67 TAX 133

2. MIAN LIAQUAT ALI V/S. A.C.I.T.
81 TAX 309

In both these cases, the Honorable Lahore High Court has held that, if the jurisdiction of the assessing officer is challenged as a preliminary step, the concerned officer will attend to the same and decide the preliminary step before proceeding on merits or making any assessment and the assessee will be able to avail the remedy in the hierarchy of jurisdiction under the Ordinance. On the basis of these judgements my advice to my colleagues is that if they are challenging the jurisdiction of Commissioner, they should request him to first pass a preliminary order on the jurisdiction before proceedings with the merits of the case and challenge the same in appeal as soon as such order is received.

Section 177 of the Income Tax Ordinance, 2001 empowers the Commissioner to select any case of any assessee for audit on the basis of guidelines provided under this section, but this audit is different from the audit under the provisions of Repealed Ordinance. Under the old law, selection of case for audit meant that the case will be scrutinized and the assessment will be completed on the basis of such audit. However, the selection of case for audit under the new law means that a detailed audit of the tax affairs of the tax payers will be conducted and only, if 'definite information" is acquired from this audit, that the tax payers has concealed his income or furnished inaccurate particulars thereof or an incorrect assessment has been made only then can the Commissioner pass an amended assessment. However, if no 'definite information' concerning the above eventualities is acquired from the audit, the proceedings will be filed and no amended assessment can be made on the basis of the mere assumption, presumption, conjectures or the past history of the case under section 122 on the basis of such audit.

However, I would advise my colleagues to comply with all the requirement of the audit and supply all documents requisitioned by the Commissioner and which are mandatorily, required to be filed under various provisions of this Ordinance because failure to comply with or file any such document will empower the Commissioner to finalise an amended assessment under sub-section (5A) of section 122 based on any available information to the best of the judgement and there is no requirement of any 'definite information' to make such an amended assessment.

Before I consider the implications of section 122 vis-à-vis section 66A of the Repealed Ordinance, I would like to comment on one aspect of section 122 of the Income Tax Ordinance, 2001 which will be applicable to both sections 65 and 66A. On an examination of the notices received by my office and offices of other professional colleagues, it has been revealed that all these notices have been issued by the Taxation Officers. In most of these cases, the taxation officers have not cared to explain as to how he has acquired the jurisdiction to issue such notices. As far as my knowledge goes, it is mandatory upon an officer who is taking some action on the basis of delegated authority to intimate the basis of his delegated jurisdiction at the initiation of the proceedings.

Without prejudice to the above, it is my presumption that the Commissioners may have delegated powers to perform such functions in respect of such persons or class of persons or such areas as they in their discretion think fit. This delegation must have been made under section 210 of the Income Tax Ordinance, 2001. This section is reproduced below:

210. Delegation.--- (1) The Commissioner may, by an order in writing, delegate to any taxation officer all or any of the powers or functions conferred upon or assigned to the Commissioner under this Ordinance, other than the power of delegation.

(2) An order under sub-section (1) may be in respect of all or any of the persons, classes of persons or areas falling in the jurisdiction of the Commissioner.

(3) The Commissioner shall have the power to cancel, modify, alter or amend an order under sub-section (1).

From an examination of sub-section (1) and subsection (5) of section 122, it transpires that the word "considers" has been used with reference to Commissioner in sub-section (1) and the word "view" has been used in sub-clause (a) of sub-section (5) of section 122. Late Mr. Farahat Ali Khan the then Chairman of Income Tax Appellate Tribunal sitting singly in a case reported in (1991) 63 TAX 431 (Trib.) considered the provisions of section 66A of the Repealed Ordinance and analysed the impact of the above two words. I am quoting exhaustively from his above judgement as under:

"Now, if we turn to the second ingredient of section 66A it appears that learned CIT is required to consider that any order passed therein by the ITO is erroneous in so far as it is prejudicial to the interest of the revenue. It is important to note that the legislature has used here the word "consider." However, from perusal of various statutes we find that the words like "thinking", "consider", "satisfy" and "in his opinion" are used frequently and invariably by the legislature. Since they are not synonyms of each other, they could not be taken to convey the same meaning. I would therefore like to point out the difference between these expression in the light of the meaning which is ascribed to them by Dictionaries or which they connote in common parlance.

In my view, when a fact is brought from my sub-conscious part to the conscious part of the mind it is said that I "think" about it. However, if fantasy is added to my thinking it would be said that I am "Imagining". But, if I add reasoning faculty to my thinking, it is said that I am "considering". On the other hand, if after considering I arrive at some conclusion and express it. It is said to be my "opinion". However, when my opinion reaches the stage of my personal conviction, it is said that "I am satisfied". Let me mention here that the word "opinion" also carried technical meaning. The judgement of a member of House of Lords is called an opinion. Similarly, a document prepared by a counsel reflecting his understanding of law or fact is also called an opinion. The Sindh High Court has elaborately, dealt with the concept of opinion in case reported as (1976) 30 TAX 27. However, as I have pointed out earlier, it difers from the word "consider." According to Black's Law Dictionary, the word "consider" means and implies "to fix the mind on with a view to careful examination to examine, to inspect, to deliberate about and pender other, any entertainment or give heat to".

Thus, from this discussion, it is clear that the word "consider" has been used in section 66A to mean something more than mere thinking but something lesser than the opinion or satisfaction of IAC or CIT as the case may be. However, in any case, the IAC or CIT, as the case may be is required to apply his mind with a view to carefully examining all the facts and circumstances of the case which come to his notice from the record of any proceedings.

"View" has also been defined in Stroud's Judicial Dictionary 3rd Edition, Volume 4 Page 3221 as under:

"It is true that "view" is of great use in the common law and it is to be done and performed in person……."

From a perusal of section 122, it is apparent that the Commissioner has been vested with the jurisdiction to take action under section 122 on the basis of his personal consideration and personal view and if we examine these two words in the light of the above case law and definition, it prima-facie seems apparent that the view and consideration should be personally those of the Commissioner

and he cannot delegate his jurisdiction under section 122 to any other Junior Officer despite the provisions of section 210. Without prejudice to my above contention, I would like to submit that even, otherwise, the order of delegation delegating to a Taxation Officer, the functions in the case of a particular person or area will not vest him with jurisdiction to take action under section 66A and a specific delegation of the powers to take action under section 122 will have to be made by the Commissioner to entitle him to take action under this section.

I will therefore again advise my colleagues to challenge the jurisdiction as a preliminary step in cases where, the show notices under section 122 are issued by Taxation Officer.

SECTION 122
VIS-A-VIS
SECTION 66A OF REPEALED ORDINANCE

Before I start my submissions on the comparison of the provisions of section 122 with the provisions of section 66-A of the Income Tax Ordinance, 1979, I would like to reproduce SRO 633/(i)/02 dated 14th September, 2002.

Part II
Statutory Notifications (S.R.O.)
GOVERNMENT OF PAKISTAN

REVENUE DIVISION
(Central Board of Revenue)
NOTIFICATION
Islamabad, the 14th September, 2002

INCOME TAX

S.R.O. 633 (I)/2002.----In exercise of the powers conferred by section 240 of the Income Tax Ordinance, 2001 (XLIX of 2001), the Federal Government is pleased to direct that in making any assessment for the year beginning on the first day of July, 2002 or making any deduction or collection of tax for the year beginning on the first day of July, 2002, the said Ordinance shall have effect as if,---

(1) in section 114.---

(a) in sub-section (3), clause (b), were omitted; and

(b) in sub-section (5), for the words "only in respect of the" the words "in respect of one or more" were substituted.

(2) in section 121,---

(a) in sub-section (1), for the words and comma "under this Ordinance or the repealed Ordinance" the words "by the Commissioner through a notice" were substituted; and

(b) in sub-section (3), the words "and shall be an alternate to the application of in sub-section (4) of section 114" were omitted.

(3) in section 122,---

(a) after sub-section (4), the following new sub-section were inserted, namely :---

(4A) An amended assessment shall only be made within six years of the date of original assessment."';

(b) in sub-section (5), in clause (a), after the word "Ordinance", the words "or the repealed Ordinance" were inserted;

(c) in sub-section (5) in clause (b), the words "assessment is incorrect" the words "income has been concealed or inaccurate particulars of income have been furnished or the assessment is otherwise incorrect" were substituted; and

(d) after sub-section (5), the following new sub-section were inserted, namely :--

(5A) where a person does not produce accounts and records, or details of expenditure, assets and liabilities or any other information required for the purposes of audit under section 177, or does not file wealth statement under section 116, the Commissioner may, based on any available information and to the best of Commissioner's judgement, make an amended assessment.(4) in section 137,---

(a) in sub-section (1), after the word "taxpayer" occurring for the second time, the words "including tax payable under section 113" were inserted; and

(b) in sub-section (3) after the brackets and figure "(2) the word, brackets and figure "or (4) were inserted.

(5) in section 147, in sub-section (11), after the brackets, letter and comma "(b)" the brackets, letter and comma "(ba))" were inserted.

(6) in section 161, in sub-section (1),---

(a) in clause (a), after the figure "XII", the words and figure or as required under section 50 of the repealed Ordinance" were inserted; and

(b) in clause (b), after the figure and comma "160," the words, figures, brackets and comma "or having collected tax under section 50 of the repealed Ordinance pay to the credit of the Federal Government as required under sub-section (8) of section 50 of the repealed Ordinance," were inserted.

(7) in section 221, after sub-section (1), the following new sub-section was inserted, namely:---

(1A) The Commissioner may amend by an order in writing, any order passed under the repealed Ordinance by the DCIT, or an Income Tax Panel, as defined in section 2 of the repealed Ordinance,".

(8) in section 239,---
(a) in sub-section (2), after the figure and letter "59A" the word and figure "or 61" were inserted; and

(b) sub-section (18) was omitted.

VAKIL AHMED KHAN
Member (Direct Taxes)/Additional Secretary

From a perusal of the above SRO, you will see that the same is applicable in making any assessment for the year beginning on the 1st. day of July, 2002 and making any deduction or collection of tax for the year beginning on the 1st. day of July, 2002 and in my opinion, the year beginning on the 1st. day of July, 2002 will correspond with tax-year 2003. Vide this SRO, clause (a) of sub-section (5) is proposed to be amended to incorporate the words "or the Repealed Ordinance" after the word "Ordinance" in line one of clause (a) of section 122. This amendment therefore empowers the Commissioner to take action under section 122 where he is of the view that this Ordinance or the Repealed Ordinance has been incorrectly applied, but the simple fact is that only assessments upto the assessment year 2002-2003 are to be assessed under the provisions of the Repealed Ordinance and therefore, the provisions of Repealed Ordinance can only be incorrectly applied in making assessments upto the assessment year 2002-2003 and these have been specifically excluded from the amendment made vide SRO 633 quoted above. It is therefore my considered view that despite the incorrect application of the provisions of the Repealed Ordinance, the assessments finalized under the provisions of Repealed Ordinance up to the assessment year 2002-2003 cannot be amended under the provisions of Section 122.

The main feature of section 66A was that for an IAC to exercise jurisdiction under this section, the order should have been erroneous in so far as it was

prejudicial to the interest of the revenue and it was held by the superior courts that both these conditions, should co-exist and only then the IAC can assume jurisdiction under section 66A. It was also held by the Courts that section 66A covered both legal and factual errors. However, clause (a) of sub-section (5) of section 122 of the Income Tax Ordinance, 2001, which seeks to amend the assessments falling within the ambit of section 66A of the Repealed Ordinance, is very different from the provisions of section 66A. This section as it stood before the promulgation of SRO 633 provided that the Commissioner may amend an assessment order, if he is of the view

that this Ordinance has been incorrectly applied in making the assessment (including the misclassification of an amount under a head of income, incorrect payment of tax with the return of income, an incorrect claim for tax relief or rebate, an incorrect claim of exemption of any amount or an incorrect claim for a refund).

From a perusal of the above, it is apparent there is only one condition for amending the assessment under section 122 and if the above condition is fulfilled, action can be taken under section 122 irrespective of the fact, whether the original order was prejudicial to the interest of the revenue or not? It is my view that section 122 is applicable to cases which are erroneous to the extent that the provisions of the Ordinance has been incorrectly applied that is only errors of law and will not apply to cases, where there are factual errors, which may fall under the provisions of section 221, but this is a debatable point and I would request the Session Chairman Mr. Rehan Hasan Naqvi to enrich us on this point during his closing remarks.

Section 66A had been governed by the Merger Theory. As you all know the Merger Theory stipulates that the order of ITO merges with the order of the Appellate Authority and becomes the order of the Appellate Authority. This theory was first highlighted by the judgement of the Lahore High Court in the case of CIT Rawalpindi V/s. Begum Mumtaz Jamal (11976) 33 TAX 288. In this case the penalty levied before the finalisation of Appellate Order was deleted because fictionally speaking, due to merger of the Appellate Order with the assessment order there was no demand outstanding at that point of time.

In cases U/s. 66A the merger theory has played an important role and courts have held that since the order of the learned assessing officer has merged with the order of appellate authority, the IAC does not have the powers to revise the order of the Appellate Authority U/s. 66A. To counter these judgements, the legislature amended 66A vide Finance Ordinance, 1991 and incorporated sub-section (1A) which reads as under:

(1A) The provisions of sub-section (1) shall, in like manner, apply.

(a) where an appeal has been filed under sections 129 134 and 137, or a reference has been made under section 136, against an order passed by the (Deputy Commissioner); and

(b) where an appeal or reference referred to in clause (a) has been decided, in respect of any point or issue which was not the subject matter of such appeal reference.

Apparently the effect of this amendment was to take action where the point on which the orders were considered erroneous had not been the subject matter of appeal. There are a number of case laws on this point but I will only discuss two case laws at the moment.

The latest and the most important judgement is the judgement of the Supreme Court of Pakistan in the case of Glaxo Laboratories Ltd V/s. IAC and Others reported in (1992) 66 TAX 74 (S.C.). In this case justice Saleem Akhtar as he then was thoroughly discussed the provisions of section 66A in the light of the merger theory. To start with I would like to reproduce the Headnotes of this case.

Income Tax Ordinance, 1979 (XXXI of 1979) - Section 66A - Notice - Powers of I.A.C. - Doctrine of merger - assessee a non-resident company - assessment for the assessment year 1987-88 was completed - assessee filed an appeal before C.I.T. (A) which was partly allowed - assessee and the department both filed appeal against the order of the C.I.T.(A) - Department withdrew its appeal which was consequently dismissed - After dismissal of appeal department issued notice

under section 65 and framed assessment - Tribunal cancelled the assessment and held that proceeding initiated under section 65 were illegal and without jurisdiction - I.A.C. issued notice to revise income tax officer's order - whether I.A.C. had the jurisdiction or powers to initiate action in respect of the orders passed by the appellate authorities or the Tribunal - Held no - whether Income Tax Officer's order merged in the order of the Tribunal - Held yes.

While concluding the discussion, elaborating the reasons for the decision the Honorable Judge wrote and I quote.

The result is that the order of the Income Tax Officer merged into the order of the Tribunal and, therefore, the IAC did not have the jurisdiction to initiate action under section 66-A of the Income Tax Ordinance for reopening the matter. In this case principles of res judicata will not apply as it governed by the provisions of section 66-A which lays down the boundaries and parameters for exercise of jurisdiction under it. The fact that in 1991 sub-section (1-A) was added authorizing IAC to initiate action under section 66A even if appellate and revisional order has been passed, supports the contention that such a power

did'not exist earlier. The question whether it is applicable to the present case is kept open and we refrain from expressing any opinion at this stage. We therefore, allow the appeal and set aside the impugned judgement and consequently notice issued under section 66A of the Income Tax Ordinance is declared as without jurisdiction and of no legal effect.

Since, there are no sub-sections in section 122 which are parameteria which sub-section (1)(a) of section 66A of the Repealed Ordinance, it is my humble view, that the merger theory will restrict the powers of the Commissioner to amend the assessments under section 122 in those cases where appeals have been decided by Commissioner of Income Tax (Appeals) in case of any assessment or amended assessment irrespective of the fact that the point on which the amendment is sought to be made was the subject matter of Appellate Order or not. Without prejudice to my above contention, I would like to submit that as far as amending the assessment order on the basis of the incorrect application of the Ordinance is concerned, the powers given to the Commissioner to amend

the assessment order as many times as he considers necessary is a bonus for his inefficiency and ineptitude and he is given additional lease of life to correct his errors. In my opinion, the Commissioner should be asked to examine an assessment order thoroughly to find out which provisions of the Ordinance have been incorrectly applied and should be asked to amend the assessment to correct all such incorrect applications once and for all and should not be given another opportunity to amend the assessment to correct any further incorrect application of the Ordinance. I would therefore strongly recommend that as far as clause (a) of sub-section (5) of section 122 is concerned, the Commissioner may be allowed to amend the assessment order only once and should not be empowered to amend the assessment order as many time as he considers necessary.

Orders under section 66A were appealable before the Honorable Income Tax Appellate Tribunal and therefore another major change is that orders under section 122 are appealable before the Commissioner of Income Tax (Appeals) and no direct appeal has been prescribed before the Tribunal.

In accordance with the original concept of this Ordinance i.e. voluntary compliance backed by strong audit, it has provided in sub-section (3) that where the tax payer furnishes a revised return under sub-section (6) of section 114, the Commissioner shall be treated as having made an amended assessment and tax payers' revised return shall be taken to be an amended assessment for all purposes of this Ordinance.

To meet the ends of justice and in accordance as with the maxim 'Audi Altarem Paltaram', it has been provided under sub-section (9) that no assessment shall

be amended or further amended without providing the taxpayer an opportunity of being heard.

Sub-section (6) states the requirements of the stating certain information in the amended assessment order and bounds the Commissioner to issue the amended assessment as soon as possible.

There are number of points, which may still require clarification but I have tried my best to cover all major implications of section 122. The last point on which, I wish to dilate on is the period of limitation prescribed under section 122.

The subsections which provide for fixing the limitation period are subsection (2), (4) and (4A). Subsection (2) provides that the time period for amending an assessment order is within five years from the date, the Commissioner has issued or is treated as having issued the assessment order to the taxpayer. Subsection (4) extends the period of limitation to later of five years from the date of the original assessment or one year after the Commissioner has issued or is treated as having issued an amended assessment order, this could have extended the period of limitation to infinity and therefore, subsection (4A) has been incorporated to restrict the period of limitation to six years from the date of original assessment order in respect of the original amended order and all subsequent amended orders.

The period of limitation is therefore five years from the date of original order, if the original order has not been amended after the last date of fourth year and if it has been amended in the fourth year and subsequent amendment is made in the fifth year, it can be again amended within one year of such amendment subject to a maximum period of limitation of six years.

I would like to thank all of you for attending this seminar today and bearing me beyond the period of limitation of your patience.

May God-Bless all of you.

A L L A H H A F I Z

PREFACE

MR. REHAN HASAN NAQVI
Session Chairman

MR. IQBAL SALMAN PASHA
President Karachi Tax Bar Association

MR. NAJAM IRSHAD KHAN
Chairman Of C.P.E. Committee

Members of the Managing Committee,
Past Presidents,
Distinguished Members, Ladies & Gentlemen

I am grateful to the C.P.E. Committee of theKarachi Tax Bar Association for giving me the Honor of presenting this paper on section 122 of the Income Tax Ordinance 2001.

Section 122 is a part of Income Tax Ordinance, 2001 which has very recently been promulgated and has so far not been tested at Judicial Forums and therefore my submissions are based on my interpretation of the provisions of this section in the light of the case laws on sections 65 and 66A. It is indeed a matter of great relief for me that this session is being chaired by Mr. Rehan Hasan Naqvi, who will undoubtly dot the 'i's and cross the T's which I have left undotted and uncrossed. I am also sure that a stimulating discussion will take place in this august house which will clear a lot of confusion and doubts, which are still existing in my mind.

I would like to thank Mr. Rehan Hasan Naqvi for his guidance on this subject. This paper is a result of the brain storming session, I had with Mr. Ali Rahim and my junior colleagues Anwar Kashif Mumtaz and Asma Tasleem. This session and their suggestions clarified many points and I would like to thank them for their assistance.

Nadeem Ghaffar has efficiently converted my thoughts into print and he deserves accolades for effective performance.

I hope this presentation with all its inadequacies may be of some assistance to my professional colleagues.

Before presenting my submissions, I will only say:

IS BAR NE TAJURBAAT AUR KNOWLEDGE KI SHAKAL MAY
JO KUCH MUJHE DIYA, YOH LOTAY RAHA HOON MEIN