

# **IN THE HIGH COURT OF SINDH, KARACHI**

I.T.R.A. No.20 of 2013

Present

Mr. Justice Aqeel Ahmed Abbasi  
Mr. Justice Muhammad Junaid Ghaffar

Date of hearing : 29.05.2015  
Date of order : 29.05.2015  
Applicant : The Commissioner Inland Revenue  
(Zone-III), LTU, Karachi,  
through Mr. Muhammad Siddiq Mirza,  
advocate.  
Respondent : M/s Pakistan Re Insurance Co. Ltd,  
through Ms. Lubna Pervez, advocate.

## **ORDER**

Aqeel Ahmed Abbasi, J Through instant reference application, applicant department has proposed the following two questions, which according to the learned counsel for the applicant, are questions of law arising from the impugned order dated 15.10.2012 passed by the Appellate Tribunal Inland Revenue of Pakistan, Karachi, in MA (Rect.) No.308/KB/2011 (Tax Year 2004) under Section 122 (5A) in ITA No.381/KB/2011:-

- “1) *Whether on the facts, and under the circumstances of the case the learned Appellate Tribunal Inland Revenue was justified to hold that submission of the order of delegation u/s 210 is a fresh evidence despite the fact that order of delegation was part of the assessment record since inception and being many years old could not be traced and produced instantaneously during the original proceedings before learned Appellate Tribunal Inland Revenue?*
- 2) *“Whether on the facts, and circumstances of the case the learned Appellate Tribunal Inland Revenue was justified in holding that there was no mistake floating on its order despite the fact that order of delegation of powers u/s 210 had been produced before the learned Tribunal which showed that its earlier observation that the Additional Commissioner had not been delegated powers to initiate proceedings u/s 122(5A) was contrary to the facts?”*

2. Learned counsel for the applicant after having readout the impugned order passed by the Appellate Tribunal Inland Revenue, as referred to hereinabove, submits that Appellate Tribunal Inland Revenue, has erred in law and fact by dismissing the rectification application filed by the applicant, whereby, rectification of an error relating to delegation of authority vide letter No.CIT(A) Jurisdiction Vo II Jud/35, August 29, 2005, was brought to the notice of the Appellate Tribunal, however, per learned counsel, instead of taking cognizance of such letter of jurisdiction and rectifying its order dated 01.06.2012, the Appellate Tribunal has dismissed the rectification application by observing that since such letter was not produced before the Commissioner (Appeals) or the Appellate Tribunal at the time of hearing appeal, therefore, the same cannot be allowed to be produced at the later stage through rectification application under Section 221 of the Income Tax Ordinance, 2001. Learned counsel submits that the impugned order may be set-aside and the questions proposed may be answered in favour of the applicant. In support of his contention, learned counsel for the applicant has placed reliance in the case of **Commissioner of Income Tax v. Messrs Pakistan Petroleum Limited and 2 others (2012 SCMR 371)**.

3. Conversely, learned counsel for the respondent has vehemently opposed the maintainability of instant reference application, as according to learned counsel, no reference lie against an order passed on rectification application, whereby, the rectification sought by the applicant has been declined. Learned counsel further submits that through rectification application filed by the applicant department in respect of an order dated 01.06.2012 passed by the Appellate Tribunal in ITA No.381/KB/2011 after hearing both the parties on merits, whereby, the order passed by the Additional Commissioner was declared to be without lawful authority as the Additional Commissioner was not delegated the

powers of Commissioner under Section 210 of the Income Tax Ordinance, 2001, to pass an amended assessment order in respect of the assessment for the Tax Year 2004. Per learned counsel, the applicant department did not produce any Notification of delegation of authority under Section 210 of the Income Tax Ordinance, 2001, either before the Commissioner (Appeals) or even before the Income Tax Appellate Tribunal, inspite of the fact that both the appellate authorities have recorded specific finding of fact with regard to non-delegation of authority by the Commissioner in terms of Section 210 of the Income Tax Ordinance, 2001, to the Additional Commissioner, Inland Revenue, therefore, the impugned order was set-aside. Per learned counsel, the order passed by the Appellate Tribunal on 01.06.2012 in ITA No.381/KB/2011 did not suffer from any illegality nor there was any error or mistake apparent from the record which could justify filing of a rectification application by referring to a document at a subsequent stage and after final disposal of the case on merits, therefore, the Appellate Tribunal Inland Revenue under above circumstances, was justified to dismiss the rectification application filed by the applicant. While, placing reliance in the case of **Commissioner of Income Tax v. Ateed Riaz (2002 PTD 570), Messrs Hong Kong Chinese Restaurant, Main Boulevard Gulberg, Lahore v. Assistant Commissioner of Income Tax, Circle 6, Lahore and another (2002 PTD 1878)** and an unreported judgment of this Court dated 24.04.2014 passed in ITRA No.219 of 2011 (**Commissioner Inland Revenue v. M/s. Kirther Pakistan B.V**), learned counsel for the respondent submits that it is settled legal position that a reference can be filed against an order passed under Section 132 of the Income Tax Ordinance, 2001 by the Appellate Tribunal Inland Revenue in respect of question(s) of law arising from such order and not from an order of rectification whereby the application of rectification is dismissed by the Appellate Tribunal. Per learned counsel, in ITA No.381/KB/2011, whereby, the appeal filed by the applicant department

was dismissed by the Appellate Tribunal on merits, by holding that the Additional Commissioner Inland Revenue while issuing Notice under Section 122(5A) on 24.10.2005 in the instant case was not delegated with the authority by the Commissioner in terms of Section 210 of the Income Tax Ordinance, 2001, whereas, it was further held that inspite of specific query by the Commissioner (Appeals) and the Appellate Tribunal with regard to such delegation of authority, while issuing a Show Cause Notice to the respondent in terms of Section 122 (5A), the applicant department could not place on record such Notification or letter regarding delegation of powers by the Commissioner in terms of Section 210 of the Income Tax Ordinance, 2001. While confronted with such factual position as stated by learned counsel for the respondent, the learned counsel for the applicant has also candidly conceded such factual position, however, contended that once such Notification was referred and brought to the notice of the Appellate Tribunal, the same would have been considered by the Appellate Tribunal and rectification would have been allowed. We are not persuaded to approve such contention of the learned counsel for the reason that, the scope of rectification in terms of provisions of Section 221 of the Income Tax Ordinance, 2001, does not extend to such error or mistakes, which are not apparent from the record, or have been brought on record at a subsequent stage, after final disposal of the case on merits, by the Appellate Tribunal Inland Revenue, after hearing the respective parties on the subject controversy, as it will violate the principle of finality attached to all judicial, quasi-judicial or administrative orders passed under law. It will be advantageous to reproduce the provision of Section 221 of the Income Tax Ordinance, 2001, to examine the scope of rectification as provided under the law:

*221. **Rectification of mistakes:-** (1) The Commissioner, the Commissioner (Appeals) or the Appellate Tribunal may, by an order in writing, amend any order passed by [him] to rectify any mistake apparent from the record on [his or its] own motion or any mistake brought to [his or its] notice by a taxpayer or, in the case of the*

*Commissioner (Appeals) or the Appellate Tribunal, the Commissioner.*

[(1A)] -----  
 (2) -----  
 (3) -----  
 (4) -----

4. From bare perusal of above provisions, it is clear that the Commissioner, the Commissioner (Appeals) or the Appellate Tribunal may amend any order passed by him/it to rectify any mistake **apparent from the record** on his or its on motion or any mistake brought to his or its notice by a taxpayer or, in the case of the Commissioner (Appeals) or the Appellate Tribunal, the Commissioner. In the instant case, admittedly, the so-called Notification of delegation of authority as referred to hereinabove by the learned counsel for the applicant was neither available on record when the orders were passed by the Commissioner (Appeals) or the Appellate Tribunal Inland Revenue, nor the same could be produced by the applicant department inspite of specific objections and opportunity provided for such purpose. Therefore, it cannot be presumed that such Notification regarding delegation was part of the record, and similarly, the decisions of the two appellate authorities could not be treated for having contained any mistake or error **apparent from the record**, which is a pre-condition while invoking the provision of Section 221 of the Income Tax Ordinance, 2001, relating to rectification of a mistake. The scope of rectification under the Income Tax law and filing of reference application against an order of rectification has been decided in various judgments of this Court as well as by the Honourable Supreme Court, whereas, reference in this regard can be made to the case of **CIT v. National Food Laboratories 1992 SCMR 687**, and judgment of this Court in the case of **Commissioner of Income-Tax v. Ateed Riaz 2002 PTD 570** and **The Commissioner (Legal) Inland Revenue v. M/s. ENI (AEP) Ltd. reported as 2013 PTD 508**, whereby, it has been held that only such orders can be

rectified where mistake or error is apparent from the record and may not involve re-appraisal of the evidence or a decision on legal points already decided, through detailed scrutiny and re-examination of the subject controversy. It has also been held that a reference can be filed against an order passed by the Appellate Tribunal under Section 132 of the Income Tax Ordinance, 2001, in respect of questions of law arising from such order, whereas, the period of filing a reference application against such order cannot be allowed to be extended by filing a rectification application. If a rectification application is dismissed then the only question which may arise from such order would be that as to whether such dismissal of rectification was in accordance with law or not. A controversy which has already been decided by the Appellate Tribunal while passing an order under Section 132 of the Income Tax Ordinance, 2001, cannot be re-agitated through rectification application, whereas, dismissal of rectification application does not give rise to question of law which has already been decided by the Appellate Tribunal in the main appeal. However, in cases, where, after disposal of an appeal by the Appellate Tribunal under Section 132 of the Income Tax Ordinance, 2001, a rectification application filed in terms of Section 221 of the Income Tax Ordinance, 2001, is allowed by the Appellate Tribunal and the main order is rectified in such a manner, which may give rise to a question of law, the same can be referred to this Court under Section 133 of the Income Tax Ordinance, 2001, as the order passed on rectification would merge with the main order passed by the Appellate Tribunal on main appeal under Section 132 of the Income Tax Ordinance, 2001.

5. Keeping in view hereinabove facts and circumstances of this case and by respectfully following decisions of the Hon'ble Supreme Court as well as the orders passed by this Court on the subject controversy as referred to hereinabove, we are of the opinion that instant reference application filed by the applicant against an order passed by the Appellate

Tribunal, whereby, a rectification application filed by the applicant was dismissed, is not maintainable, whereas, the questions proposed through instant reference application cannot be entertained and answered by this Court while exercising its reference jurisdiction in terms of Section 133 of the Income Tax Ordinance, 2001. It is pertinent to mention that when the learned counsel was inquired as to whether, such Notification has been filed along with instant reference application, or as to whether, he can produce such Notification pursuant to which applicant department filed rectification application before the Appellate Tribunal, the learned counsel for the applicant candidly conceded that such Notification has neither been placed on record through instant reference application nor he can produce the same for appraisal by this Court. Accordingly, we do not find any substance in the instant reference application which being devoid of any merits is hereby dismissed in limine.

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