JUDGMENT SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD

ITR NO. 90/2009

Commissioner of Income Tax (Legal) RTO, Office, Rawalpindi.

VS

Income Tax Apellate Tribunal, ETC

Applicant by : **Dr. G.M Choudhary, Advocate.**

Respondents by : **Syed Hasnain Ibrahim Kazmi, Advocate.**

Date of hearing : **13.02.2020**

LUBNA SALEEM PERVEZ, J. Through this judgment we intend to dispose of Income Tax Reference filed by the applicant Department, under section 133(1) of the Income Tax Ordinance, 2001 (herein after referred to as the "***Ordinance of 2001***") against order passed by the Income Tax Appellate Tribunal (herein after referred to as the "***ITAT***") in MA No. 145(IB) of 2008 (Tax Year 2005), dated 25.02.2009, and proposed following question(s) claiming to be questions of law arising out of the said order:

i. Whether on the facts and in the circumstances of the case, the learned ITAT was justified in rectifying its order dated 17.06.2008, where there was no mistake apparent from the said order.

ii. Whether on the facts and in the circumstances of the case the learned ITAT was justified in vacating the Taxation Officer's order passed under section 170 where the tax payer had failed to discharge onus vested upon him to prove that the supplies made were out of import and not from the local purchase.

iii. Whether or not learned ITAT was justified in directing to issue refund to the taxpayer when the taxpayer failed to discharge his legal obligations to prove on record that the supplies in question were made from the imports only.

2. Necessary facts of the case are that M/s Pak Micro Biological Associates, Rawalpindi (herein after referred to as the "***Respondent No. 2***"), derived income from import and supply of Diagnostic and Radiological Kits filed statement under section 115(4) of Ordinance of 2001, for the tax year 2005 declaring imports of Rs.15,155,639/- and claimed tax deduction of Rs. 909,338/-at import stage as final discharge of tax liability. It also claimed supplies of Rs. 18,154,947/- and declared tax deduction at Rs. 645,931/-

thereon. Besides Respondent No.2 also claimed refund of Rs. 20,150/- as tax paid on electricity bills and Rs. 57,379/- on mobile and telephone bills. Thus claimed unhold refund total of Rs. 640,949/- under section 170 of the Ordinance of 2001. The learned DCIT/Taxation Officer rejected the claim of refund on the ground that the Respondent No. 2 could not prove that the supplies were made out of goods imported by them, however, allowed refund on electricity and telephone bills, vide order dated 27.07.2007 u/s 170 of the Ordinance, 2001 (herein after referred to as the "***DCIT's Order***") of the Ordinance of 2001. Aggrieved with the said order, Respondent No. 2 filed appeal before Commissioner IT/WT (Appeals) who, vide order No. 341/2007 in appeal No. 341 dated 31.08.2007 (herein after referred to as the "***CIT(A)'s Order***"), allowed the appeal by accepting the contention of Respondent No.2 that they are importers of diagnostic and radiological kits which they supplied to the Hospitals and directed the Applicant to issue refund accordingly. Against the CIT(A)'s order dated 31.08.2007, the Applicant Department preferred appeal before ITAT who, vide order dated 17.06.2008, passed in ITA No. 517/IB/07(Tax Year 2005), vacated the CIT(A)'s Order dated 31.08.2007, and restored the DCIT's Order dated 27.07.2007. Whereafter, Respondent No. 2 filed Misc. application for rectification of order dated 17.06.2008, passed by the ITAT on the ground that the learned Member ITAT while deciding appeal, erroneously treated Respondent No. 2 as 'importer as well as a local dealer having mixed local purchases and supplies' for rejecting the refund claimed by the Respondent No. 2 for the tax year 2005 and contended that they are only the importers of Diagnostic and Radiological Kits and supply thereof, which are not locally manufactured. It is only in the event of emergencies that a negligible quantity of locally manufactured kits have been purchased and supplied to hospitals and clinics. As per application, the Respondent No. 2 also filed an affidavit that no refund has been claimed on the local purchases and supplies. The learned ITAT allowed the misc. application for rectification filed under section 221 of the Ordinance of 2001, considering it to be a mistake of fact floating on the surface of the order dated 17.06.2008. The learned ITAT while giving its findings also relied on SRO 97(I)/2002, dated 12.02.2002, according to which "taxpayers are not liable for withholding tax on the supplies made out of imported items" and allowed the miscellaneous application for rectification vide order dated 25.02.2009, passed in MA No. 145(IB) of 2008. Hence present Income Tax Reference by the applicant Department.

3. The learned Counsel of the Applicant Department argued that the ITAT has erred in law while allowing the application for rectification filed under

Section 221 of the Ordinance of 2001 as no mistake was floating on the surface of the order dated 17.06.2008. Learned Counsel contended that only an error in calculation or a typographical mistake is factual mistake which is permitted to be rectified under the provisions of section 221 of the Ordinance of 2001. Learned Counsel while supporting the order passed by the ITAT submitted that same was passed after proper application of mind and claim of refund made by the Respondent No.2 was rightly rejected for the reasons that the Respondent No. 2 also deals in local purchases and supplies. Thus, no mistake was apparent on the record of order, dated 17.08.2008, requiring rectification under section 221 of the Ordinance of 2001. Learned counsel argued that the ITAT has reviewed its order under the garb of rectification, which is not permissible under the law. Thus, learned Counsel contended that the impugned order dated 25.02.2009 is not legally sustainable and is liable to be set aside.

4. Learned Counsel for Respondent No. 2 vehemently contested the arguments advanced by the learned counsel for Applicant Department and submitted that the ITAT has incorrectly considered the Respondent No. 2 as supplier of imported as well as local goods without examining the previous record relating to its business, thus the ITAT has arrived at an erroneous conclusion, which necessitated rectification under section 221 to rectify the factual error floating on the surface of record. He further contended that no question of law arises out of the order dated 25.02.2009, passed by the learned ITAT requiring opinion of this Hon'ble Court. Moreover, no substantial question of law has been framed in this reference application requiring consideration of this Court, hence, prayed for dismissal of the present application filed by the Applicant Department. Learned Counsel for Respondent No.2 in support of his contentions, relied on case law reported as ***Commissioner of Income-Tax, Companies-I, Karachi Vs National Investment Trust Ltd., Karachi (2003 PTD 589 (HC Kar), Japan Storage Battery Ltd. Vs Commissioner Of Income-Tax, Companies Zone-I, Karachi (2003 PTD 2849 (HC Kar) and M. Ilyas & Sons Vs Commissioner of Income-Tax, Lahore Cone (PLD 1982 SC 259)***.

5. Arguments of the learned counsel for the parties have been heard and relevant record has also been perused with their able assistance.

6. Main grievance of the Applicant Department from the decision of learned ITAT is that the application for rectification filed under Section 221 of the Ordinance of 2001 has wrongly been entertained as no mistake was floating on the surface of the order dated 17.06.2008, whereas, according to learned Counsel for Respondent No. 2 learned ITAT arrived at an erroneous conclusion

while earlier observing that Respondent No. 2 is a supplier of imported as well as local goods which was a factual error apparent from the record necessitating rectification under Section 221. To resolve the controversy it is necessary to go through the contents of Section 221 of the Ordinance of 2001 which for ready reference is reproduced hereunder:-

> *"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."*

Perusal of the provision reveals that the authorities under the Income Tax Ordinance, 2001 are empowered to amend any order to rectify its mistake apparent on the record. This includes all the error of facts of any nature found floating on the surface of record requiring necessary correction of record without any probe, investigation, inquiry or evidence for its correction. It has by now well settled by the superior Courts that the mistakes obvious and apparent from record which are not required to be established through process of reasoning or reinvestigation on the issue or probe into controversies are rectifiable mistakes under the provisions of section 221 of the Ordinance of 2001. We are, therefore, not convinced with the arguments of the learned Counsel for the Applicant Department that section 221 of the Ordinance of 2001 is only meant for rectification of those mistakes which relates to calculations of tax or typographical errors. Reliance in this regard is placed on the judgment of Hon'ble Supreme Court of Pakistan passed in case of ***"M/s National Foods Vs. CIT" [1992 SCMR 687]***, whereby while defining the scope of the rectification of mistake under section 35 of Act, 1922 (*pari-materia* to section 221 of the Ordinance of 2001), it has been held as under:

> *"Section 35 of the repealed Income Tax Act, 1922 (hereinafter referred to as 'The Act') confers a power to rectify any mistake in the order which is apparent from the record. Such power can be exercised SuoMotu or if it is brought to the notice by an accessee. Therefore, essential condition for exercise of such power is that the mistake should be apparent on the face of record; mistake which may be seen floating on the surface and does not require investigation or further evidence. The mistake should be so obvious that on mere reading the order it may immediately strike on the face of it: Where an officer exercising powers under section 35 enter into a controversy, investigates into the matter, reassess the evidence, or takes into consideration additional evidence and on that basis interprets the provisions of law and forms an opinion different from order, then it will not amount to 'rectification' of the order. Any mistake which is not patent and obvious on record cannot be termed to be an order corrected by exercising powers under section 35."*

7. Keeping in mind the above observation of the Hon'ble Supreme Court in context of the present reference, we are of the view that a mistake of fact regarding nature of business of Respondent No. 2 was pointed out in the order

dated 17.06.2008, through rectification application which was rightly entertained through impugned order passed in MA 145(IB) of 2009 dated 25.02.2009, as business activity of taxpayer recorded in order of ITAT was a factual mistake, the taxpayer being an importer and supplier as per income tax record thus, it was a factual mistake floating on the surface of record which did not require investigation or probe in the issue, as such, a mistake rectifiable within the meaning of section 221 of the Ordinance of 2001.

8. The argument of the learned Counsel for Respondent No. 2 that the questions referred by the Applicant Department in the present reference are not the substantial questions desiring opinion of this Court have force. In this regard reliance can safely be made to the case law referred by the learned Counsel for Respondent No.2 i.e ***Commissioner of Income-Tax, Companies-I, Karachi Vs National Investment Trust Ltd., Karachi (2003 PTD 589 (H.C Kar)*** wherein it has been held that "*every question of law should not be referred to the High Court for its opinion; only substantial question of law should be referred to the High Court; if the law is very clear and no ambiguity is to be resolved or no interpretation required such question of law should not be referred to the High Court.*"

9. For the foregoing reasons, we are of the considered view that the questions proposed by the Applicant Department are not the substantial questions and primarily based on findings of fact and are thus answered in affirmative, against the Applicant Department and in favour of Respondent No. 2. Titled Income Tax Reference stands dismissed.

10. Copy of this order be sent to Registrar, Appellate Tribunal (Inland) Revenue.

(MOHSIN AKHTAR KAYANI)
JUDGE

(LUBNA SALEEM PERVEZ)
JUDGE

SHERAZI.