Before *Mohammad Ather Saeed* and *Munib Akhtar, JJ.*

(Karachi)

I.T.C. No. 192 of 2001 decided on 6.12.2010

M/S. HUMAN RESOURCES SERVICES---Applicant

versus

COMMISSIONER OF INCOME TAX---Respondent

Zahid F. Ibrahim & Liaquat Hussain for applicant.

Javed Farooqui for respondent.

Date of hearing: 2.12.2010.

ORDER

MOHAMMAD ATHER SAEED, J.---This Income Tax Reference application has been filed under section 136(2) of the Income Tax Ordinance, 1979 against the order of the Tribunal dated 29.03.2001 in R.A. No. 158/KB/2000-2001 whereby the Tribunal had rejected the reference application filed before it under section 136(1) as being without merits of substance. The following questions said to have arisen from the order of the Tribunal in M.A. (Rect) No. 55/KB of 2000-2001, dated 7.10.2010, have been proposed for the opinion of this Court:--

(1) As to whether in the facts and circumstances of the case and as per law laid down by the learned I. T. Appellate Tribunal and the superior Courts, there is no mistake of law and of facts and as such the learned Tribunal was justified in rejecting the application moved u/s. 156 of IT. Ordinance, 1979?

(2) As to whether in the facts and circumstances of the case, in terms of contract for providing human recourses services to ANZ Grindlays the applicant assessee was providing service only?

(3) As to whether in the facts and circumstances of the case the learned Tribunal was justified to arrive at finding that in terms of contract with ANZ Grindlays Bank the applicant/assessee was engaged in the marketing of credit cards and thus was engaged in business entrepreneur ship?

(4) As to whether in the facts and circumstances of the case, in terms of contract for providing human

resources services to ANZ Grindlays Bank the provisions of section 80-C of I.T. Ord., 1979 were attracted?

2. Brief facts of the case are that the present Applicant had filed return of income for the assessment year 1998-99, which was assessed under section 59(1). Later on the Inspecting Additional Commissioner had reopened the assessment under section 66-A of the Income Tax Ordinance, 1979 and passed an order 03.07.1979 whereby he cancelled the assessment under section 59(1) and completed the reassessment as final discharge of tax liability under section 80-C of the Income Tax Ordinance, 1979. The applicant filed an appeal before the Tribunal and the Tribunal *vide* its order dated 1.5.2000 in ITA No. 616/KB of 1999-2000 upheld the action of the IAC under section 66-A and dismissed the appeal of the assessee by holding that the case fell under the provisions of section 80-C. The present applicant instead of approaching this Court, filed an application before the Tribunal for rectification of mistake under section 156 of the Income Tax Ordinance, 1979 submitting that the Tribunal had committed the mistake by assuming that the applicant was involved in the marketing of Credit Cards whereas the applicant had only provided human resource services and therefore is not covered under section 80-C(4) of the Income Tax Ordinance, 1979.

3. The Tribunal *vide* its order referred to above dismissed the rectification application holding that the Tribunal had given a conscious finding and therefore it was not the case of mistake apparent on record requiring rectification under

section 156 of the Income Tax Ordinance and if the applicant was aggrieved with the finding of the Tribunal, the remedy available to him was to file a reference application for referring that questions of law arising from the impugned order to the Tribunal. Hence this reference application. This case was admitted for regular hearing on 7.5.2002.

4. We have heard Mr. Zahid F. Ibrahim the learned counsel for applicant and Mr. Jawaid Farooqui learned counsel for the respondent.

5. The main contention of Mr. Zahid F. Ibrahim the learned counsel for the applicant is that the Tribunal while passing the order on the merits of the case, had committed a substantial mistake by holding that marketing is not a service and on the basis of its above finding upholding the order of the IAC under section 66-A by which it was held that the applicant was liable for final discharge of liability and fell under section 80-C(4) of the Income Tax Ordinance, 1979 and was not entitled to be assessed under normal law. In this connection he relied on a judgment of this Court in the case of *Commissioner (Legal Division) v. Paracha Textile Mills Ltd.*, reported in 2010 PTD 1016 whereby this Court had held that though the Tribunal has no power to review its own order, however, it is fully empowered to rectify any mistake in its order provided the mistake is apparent and patent on record. Such mistake may not only be arithmetical or clerical mistake but it could be substantive or a procedural mistake. In view of this authority the learned counsel argued that the Tribunal had committed a substantive mistake by giving a wrong finding and such mistake is apparent on record and therefore falls within the

ambit of section 156 and amendment or modification of the order can be made under section 156 of the Income Tax Ordinance to remove this mistake.

6. Mr. Javed Farooqui the learned counsel for Respondent opposed the arguments of the learned counsel for applicant and submitted that the Tribunal has passed an exhaustive order in which they had examined all aspects of the case and had given a conscious finding that the marketing activity does not fall within the definition of services but within the definition of a contract and this finding being a conscious finding even if it is incorrect cannot be assumed to be a mistake and the applicant should have sought the remedy against the original order of the Tribunal. He further submitted that the Tribunal has no power to review its own order and the applicant's application moved under section 156 of the Income Tax Ordinance, 1979 is basically an application for review of the order. In this connection he also relied on the observation of this Court in the case of Paracha Textile Mills quoted *supra* relied on by the learned counsel for the applicant that the Tribunal is not empowered to review its own order. He further submitted that the mistake, which can be rectified under section 156 of the Income Tax Ordinance, 1979, should be apparent from record and should be seen floating on the record, it should not require any further inquiry or investigation or to undertake any further exercise to determine whether the mistake was apparent from record or not. In this connection he relied on the following two judgments of the Hon'ble Supreme Court of Pakistan:

(1) *Commissioner of Income Tax, Companies II, Karachi v. National Food Laboratories*, reported in (1992) 65 Tax 257 (S.C. Pak).

(2) *The Commissioner of Income Tax v. Mr. Abdul Ghani* reported in SBLR 2007 SC 61.

7. He submitted that the order of the Tribunal, which was sought to be rectified by the applicant, is not covered in order which can be rectified as held by the Hon'ble Supreme Court in the two judgments relied on by him. He further submitted that only question No. 1 can be said to have arisen from the order of the Tribunal as the remaining questions are on the merits of the case and the Tribunal, in the order against which the reference application has been filed, has not given any finding on these questions which had been decided in the original orders sought to be rectified by the applicant.

8. We have examined, the questions proposed in the light of the arguments of the learned counsel and have carefully perused the records of the case including all orders of the Tribunal and the judgments relied on by the learned counsel.

9. It is a settled law that the Tribunal does not have the power to review its own order and can only rectify it if it is satisfied that there is a mistake apparent from record. The judgment of the Hon'ble Supreme Court in the case of National Food quoted *supra* is the leading authority on the point of ratification. In this judgment their lordships 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 *suo motu* or if it is brought to the notice by an assessee. 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 fact of it. Where an officer exercising power under section 35 enters in to consider additional evidence and on that basis interprets the provision of law and forms an opinion different from the order, then it will not amount to 'rectification' of the order. Any mistake which is not patent and obvious on the record, cannot be termed to be an order which can be corrected by exercising power under section 35. In this regard reference can be made to *Shaikh Muhammad Iftikharul Haq v. Income Tax Officer, Bahawalpur*, (1966) 13 Tax 203 (S.C Pak), PLD 1966 SC 524 and *Pakistan River Steamer Limited v. Commissioner of Income Tax*, (1971) 23 Tax 236 (H. C. Dacca), 1971 PTD 204. In the present case the mistake pointed out by the petitioner was not of a nature to attract Section 35 and, therefore, the High Court has correctly answered the first question in the negative."

10. In the case of Abdul Ghani quoted ***supra*** the Hon'ble apex Court held as under:

"Viewed in the background of above legal and factual position, it is observed that the Tribunal had

decided the above issue after application of mind, consciously and giving plausible and satisfactory reasons for the same. It, therefore, cannot be said to be a mistaken or inadvertent finding or an floating on the face of the judgment so as to be rectifiable under Section 156 of the Ordinance. Rectification under Section 156 of the Ordinance is permissible if the error is apparent, obvious and floating on the face of the judgment and can be rectified without long drawn arguments and proceedings for appreciating facts and interpretation of application of any provision of law.

11. We have very carefully perused the order of the Tribunal by which the appeal was disposed of on merits.

12. On a perusal of the above order we have seen that the Tribunal after thoroughly examining the issue had come to the conclusion that the job performed by the applicant is marketing and does not fall within the purview of services. This conclusion has been reached consciously and irrespective of whether such conclusion is in accordance with law or not. It is not a mistake apparent from record and will require long drawn arguments and further investigation and inquiry and therefore, in accordance with the judgment of the Hon'ble Supreme Court quoted *supra*, cannot be termed a mistake which can be rectified under section 156 of the Ordinance. The Tribunal had in the order. rejected the rectification application in the following manner:

> "We are not persuaded to agree with the submission that it is a case of mistake apparent on record

requiring rectification under section 156 of the Income Tax Ordinance. It appears that the assessee is aggrieved with the finding of this Tribunal. If it is so, the assessee may pursue remedy available in law but in any case it does not fall within the purview of mistake apparent on record. The reason being that a considered opinion cannot be termed as a mistake apparent on record merely because a party to the proceedings is aggrieved with the finding. The rectification application is in fact in the nature of review application and the power of review is not vested in the Tribunal. The rectification application stands dismissed accordingly.

13. We fully subscribe to the above observations of the Tribunal and therefore, are inclined to hold that the decision of the Tribunal is unexceptionable and no interference, is called for from this Court.

14. We are also inclined to agree with the learned counsel that only question No. 1 arises from the order of the Tribunal and questions Nos. 2, 3 and 4 do not arise from this order of the Tribunal but could be said to have arisen from ITA No. 616/KB of 1999-2000 dated 1.5.2000 against which no reference application has been filed before us. We therefore, answer question No. 1 in affirmative in favour of the respondent and against the applicant and refuse to answer questions Nos. 2, 4 as they do not arise from the order of the Tribunal.

15. The above are the reasons in support of our short order delivered in Court on 2.10.2010 after hearing the learned counsel by which we had dismissed the above reference application.