

(2015) 04 RAJ CK 0073

In the Rajasthan High Court

Case No : Sales Tax Revision Petition No. 136 of 2011

Assistant Commissioner Works Contract and Leasing Tax

APPELLANT

Vs

P.N.C. Construction

RESPONDENT

Date of Decision : 24-04-2015

Acts Referred:

Citation : (2015) 82 VST 335

Hon'ble Judges : J.K. Ranka, J

Bench : Single Bench

Advocate : Archit Bohra on behalf of R.B. Mathur, for the Appellant

Judgement

J.K. Ranka, J.—This instant Sales Tax Revision Petition is directed against order dt.27/01/2009 passed by the Rajasthan Tax Board. It relates to the assessment year 2001-02.

2. This instant petition was admitted on the following question of law:-

"1. whether in the facts and circumstances of the case of Rajasthan Tax Board was justified in law and has not acted illegally and perversely in allowing the rectification application of respondent and changing the entire order despite of debatable issue involved in the same.

2. whether in the facts and circumstances of the case Rajasthan Tax Board was justified in law and has not acted illegally and perversely in allowing the rectification application u/s 37 of the Act despite of the facts that there was no mistake apparent from the face of record. "

3. The brief facts of the case are that the respondent-assessee, is a contractor and claimed that it, being from outside the state, was not aware of the notification dt.29/03/2001 and therefore, could not file the option within time, however, the Assessing officer was not satisfied with the explanation so offered and levied turnover tax and surcharge on the assessee which was challenged before the DC (A).

4. The DC (A) also upheld the finding of the Assessing officer and came to the conclusion that the option given by the assessee, was almost after two years, being opted on 11/03/2004 whereas the assessment pertains to the year ended on 31/03/2002 and accordingly rejected the contention of the assessee. However, the DC (A) held that benefit to the extent of 30 lakhs is to be granted in view of the notification and beyond 30 Lakhs the turnover tax and surcharge was upheld.

5. The assessee carried the matter in further appeal before the Tax Board who vide order dt.8/05/2007 rejected the contention of the assessee and upheld the claim of the revenue and order of Id. DC (A).

6. The assessee moved an application for rectification of the order dt.08/05/2007 passed in appeal No. 2836/2005 where the Tax Board reversed the order and upheld the claim of the assessee by holding that there was a mistake apparent on the face of record under section 37 and accordingly reversed its own order, set aside the order of the Assessing Officer as well as the Id. DC (A).

7. Id. counsel for the revenue contended that all the three authorities in unison had come to the conclusion including the Tax Board that the assessee is not entitled to the benefit of exemption on the basis of notification dt.29/03/2001 and once the order was passed by the Tax Board, it is much later that an application for rectification was moved and it was contended by Mr. Archit Bohra that entirely different view has been expressed by the Tax Board in the order impugned by not only considering the matter afresh when review in the garb of rectification is not permissible. He contended that the Tax Board has considered the issue afresh which cannot come within the definition of section 37 . He relied upon the judgment of the Apex Court in the case of Assistant Commercial Taxes Officer Vs. Makkad Plastic Agencies, (2011) 185 ECR 116 : (2011) 4 JT 203 : (2011) 4 SCALE 27 : (2011) 4 SCC 750 : (2011) 2 UJ 1509 : (2011) 42 VST 1 .

8. No-one has put in appearance on behalf of respondent despite service.

9. Having heard the counsel for the revenue and having perused the material on record including the order passed by the Tax Board dt.08/05/2007 and the impugned order dt.27/01/2009, in my view, the Tax Board was not justified in passing the impugned order by holding that a mistake apparent on the face of record, was committed by the Tax Board in order dt.08/05/2007 and has corrected the earlier order of the Tax Board dt.08/05/2007.

10. I have perused the impugned order and notice that the Tax Board in the impugned order has considered what was not before the Tax Board who decided the appeal vide order dt.08/05/2007. In my view, only a mistake apparent on the face of record can be rectified but I notice in the present order that the Tax Board has reviewed its own order which is impermissible in law.

11. It is also noticed that in the impugned order new facts have been considered by the Tax Board while coming to the conclusion that the turnover tax and

surcharge was not leviable.

12. It would be appropriate to quote section 37 of the RST Act:-

"Section 37 - Rectification of a mistake

(1) With a view to rectifying any mistake apparent from the record, any officer appointed or any authority constituted under this Act may rectify suo motu or otherwise any order passed by him.

Explanation. - A mistake apparent from the record shall include order which was valid when it was made and is subsequently rendered invalid by an amendment of the law having retrospective operation or by a judgment of the Supreme Court, the Rajasthan High court or the Rajasthan Tax Board.

(2) No application for rectification shall be filed under sub-section (1) after the expiry of a period of three years from the date of the order sought to be rectified.

(3) where an application under sub-section (1) is presented to the assessing authority, appellate authority and receipt thereof is obtained, it shall be disposed of within a period of one year from the date of presentation and where such application is not disposed of within the said period; the same shall be deemed to have been accepted.

(4) No rectification under this section shall be made after the expiry of four years from the date of the order sought to be rectified.

(5) An order of rectification which has the effect of increasing the liability of a dealer in any way, shall not be made without affording him an opportunity of being heard."

13. On perusal of the above Section, it is quite clear that the scope of rectification, in my view, is limited and the matter though can be rectified on a mistake apparent, obvious and glaring but every mistake cannot be corrected/rectified by the Tax Board. Even re-appreciation of same material is not permissible. The Hon'ble Apex Court, in the case of Assistant Commercial Taxes Officer vs. Makkad Plastic Agencies (supra), observed as under:-

"Both the aforesaid two decisions which were rendered while considering taxation laws are squarely applicable to the facts of the present case. It is also now an established proposition of law that review is a creature of the statute and such an order of review could be passed only when an express power of review is provided in the statute. In the absence of any statutory provision for review, exercise of power of review under the garb of clarification/modification/correction is not permissible. In coming to the said conclusion we are fortified by the decision of this Court in Kalabharati Advertising Vs. Hemant Vimalnath Narichania and Others, AIR 2010 SC 3745 : (2010) 9 JT 382 : (2011) 1 RCR(Civil) 216 : (2010) 9 SCC 437 : (2010) 10 SCR 971 .

Section 37 of the Act of 1994 provides for a power to rectify any mistake

apparent on the record. Such power is vested on the authority to rectify an obvious mistake which is apparent on the face of the records and for which a re-appreciation of the entire records is neither possible nor called for. When the subsequent order dated 22.01.2009 passed by the Taxation Board is analysed and scrutinised it would be clear/apparent that the Taxation Board while passing that order exceeded its jurisdiction by re-appreciating the evidence on record and holding that there was no mala fide intention on the part of Assessee-Respondent for tax evasion. Such re-appreciation of the evidence to come to a contrary finding was not available under section 37 of the Act of 1994 while exercising the power of rectification of error apparent on the face of the records."

14. The Hon'ble Apex Court in the case of Commissioner of Cental Excise, Belapur, Mumbai Vs. RDC Concrete (India) P. Ltd., (2011) 187 ECR 1 : (2011) 9 JT 114 : (2011) 8 SCALE 314 : (2011) 32 STT 426 has after considering the earlier judgments rendered by the Hon'ble Apex Court has held that the submissions which were made before the CESTAT by the respondent-assessee while arguing the rectification application were also advanced before CESTAT when the appeal was heard at an earlier stage. The arguments not accepted at an earner point of time were accepted by CESTAT after hearing the rectification application. It is strange as to how a particular decision taken by CESTAT after considering all the relevant facts and submissions made on behalf of the parties was changed by CESTAT. There was no mistake apparent on record when CESTAT did not accept a submission of the respondent assessee to the effect that the officer appointed to value the goods manufactured by the assessee should not have been engaged as a cost accountant.

14.1 After noticing the aforesaid fact the Apex Court in above judgment after taking into consideration several cases held that a mistake apparent on record must be an obvious and patent mistake and the mistake should not be such which can be established by a long-drawn process of reasoning. It further observed that in T.S. Balaram vs. Volkart Bros. the Apex court opined that power to rectify a mistake should be exercised when the mistake is a patent one and should be quite obvious. The mistake cannot be such which can be ascertained by a long-drawn process of reasoning. The Apex Court in The Income Tax Officer, Alwaye Vs. The Asok Textiles Ltd., Alwaye, AIR 1961 SC 699 : (1961) 41 ITR 732 : (1961) 3 SCR 236 held that while rectifying a mistake, an erroneous view of law or a debatable point cannot be decided. Moreover, incorrect application of law can also not be corrected.

14.2 The Hon'ble Apex Court further held in aforesaid judgment that for the aforestated reasons, they were of the opinion that CESTAT exceeded its powers and it tried to reappreciate the evidence and it reconsidered its legal view taken earlier in pursuance of a rectification application and in their opinion, CESTAT could not have done so while exercising its power under Section 35-C(2) of the Act, and, therefore, the impugned order passed in pursuance of the rectification application is bad in law and therefore, the said order is hereby quashed and set

aside.

15. Under the Act Review is impermissible or coming to a totally different conclusion what was reached earlier. Earlier view cannot be changed in the garb of rectification unless there is a glaring and obvious mistake apparent on the face of record. The Hon"ble Apex Court in the case of T.S. Balam, Income Tax Officer, Company Circle IV, Bombay Vs. Volkart Brothers, Bombay, AIR 1971 SC 2204 : (1971) 82 ITR 50 : (1971) 2 SCC 526 : (1972) 1 SCR 30 held as under:-

"A mistake apparent on the record must be an obvious and patent mistake and not something which can be established by a long drawn process of reasoning on points on which there may conceivably be two opinions."

16. The Hon"ble Apex Court in the case of Satyanarayan Laxminarayan Hegde and Others Vs. Millikarjun Bhavanappa Tirumale, AIR 1960 SC 137 : (1960) 1 SCR 890 ruled that an error which has to be established by a long drawn process of reasoning on points where there may conceivably be two opinions cannot be said to be an error apparent on the face of record.

17. The Hon"ble Apex Court in the case of Master Construction Co. (P) Ltd. Vs. State of Orissa and Another, AIR 1966 SC 1047 : (1966) 3 SCR 99 : (1966) 17 STC 360 held as under:-

"The wrong conclusion, if any, arrived at by the Commissioner in his earlier order, because of the fact that the said two arguments were not advanced before him, cannot be said to be errors apparent on the face of the record arising or occurring from an accidental slip or omission. The errors, if any, arose because the Department did not raise those points before the Commissioner. They were also errors not apparent on the face of the record for the decision depends upon consideration of arguable questions of limitation and construction of documents. Indeed the Commissioner re-heard arguments and came to a conclusion different from that which he arrived on the earlier occasion. This is not permissible under rule 83 of the Rules. "

18. In my view, rectification implies the correction of an error or removal of defects or imperfections and could not be used to appreciate the evidence on new facts which were not placed earlier. Rectification implies an error, mistake or defect which after rectification is made right.

19. In view of what has been observed herein above, the order of the Tax Board, by which the order has been rectified, certainly appears to be reviewing its own order and coming to a different conclusion than what was reached by the Tax Board earlier on 08/05/2007.

20. Consequently, the instant Sales Tax Revision Petition stands allowed. The question of law is decided in favour of the revenue by holding that the Tax Board was unjustified in reviewing the order in the garb of rectification, accordingly order dt.27/01/2009 is quashed and set aside. No costs.