

(2016) 08 KAR CK 0089

In the Karnataka High Court

Case No : Sales Tax Revision Petition No. 77 of 2016 and Sales Tax Revision
Petition Nos. 90-100 of 2016

M/s. Hema Engineering

APPELLANT

Vs

The State of Karnataka

RESPONDENT

Date of Decision : 24-08-2016

Acts Referred:

Karnataka Value Added Tax Act, 2003 — Section 69

Citation : (2016) 4 KCCR 394

Hon'ble Judges : Jayant Patel and S.N. Satyanarayana, JJ.

Bench : Division Bench

Advocate : Sri T.K. Vedamurthy, Additional Government Advocate, for the
Respondent; Sri Keshava Murthy T.N, Advocate, for the Petitioner

Final Decision : Allowed

Judgement

The present petitions are directed against the order dated 30th December 2015 passed by the Tribunal whereby, the Tribunal, for the reasons recorded in the order has partly allowed the appeal by directing the matter to be considered in light of the observations made in the order of the Tribunal for the assessment of tax.

2. The petitioner-assessee has raised several questions of law. In our view, only substantial law which arises for consideration is:

"Whether the re-assessment was permissible under the head of "Rectification of the order in purported exercise of the power under Section 69 of Karnataka Value Added Tax Act, 2003 (hereinafter referred to as "the Act") on the basis of a clarification issued by the Commissioner which itself is after the order of re-assessment dated 28.6.2010."

3. In order to appreciate the question, some reference of the facts may be required:

"The assessee who is dealing in fabrication of iron and steel gates and windows etc. as per Entry Sl. No. 4 of the Sixth Schedule paid duty at the rate of 4% prevailing then. Thereafter, the returns were filed and the re-assessment was also made vide order dated 28.6.2010. On 21.2.2012, the Commissioner of Commercial Taxes issued clarification in purported exercise of his power whereby, he observed that, for the fabrication and erection of gates and windows etc., duty at the rate of 14% under Entry Sl. No. 23 of Sixth Schedule shall be payable. Based on the aforesaid clarification, on 18.2.2013, the notice was issued by the Assessing Authority in purported exercise of power under Section 69(2) of the Act for rectification of the reassessment order. On 22.2.2013, the petitioner filed the objections and on 15.3.2014, the assessing authority did not accept the objection and maintained the order for levying of tax at the rate of 12.5% with the penalty and the interest. On 20.10.2014, petitioner preferred appeal against the aforesaid order on 20.10.2014. The said appeal was dismissed by the first appellate authority. On 26.3.2015, the Commissioner of Commercial Taxes once again issued another clarification has observed that for MS fabrication windows and gates etc., the taxable rate will be 5.5% as per Entry No. 4 of Sixth Schedule. The petitioner challenged the order of the first appellate Authority dated 20.10.2014 before the Tribunal and the Tribunal ultimately vide order dated 30.12.2015 allowed the appeal partly and remanded the matter to the Assessing Authority as per the observations made to find out as to whether the raw material of the fabrication work is MS or other iron and steel and further directed for collection of tax as per the observations made. Under the circumstances, the present petitions before this Court."

4. We have heard Mr. Keshavamurthy T.N., the learned counsel appearing for the petitioner and Mr. T.K. Vedamurthy, AGA appearing for the respondent.

5. Section 69 of the KVAT Act which would be relevant deserves to be reproduced and the same reads as under:

"69. Rectification of mistakes:

(1) With a view to rectifying any mistake apparent from the record, the prescribed authority, appellate authority or revising authority, may, at any time within five years from the date of an order passed by it, amend such order.

(2) Any amendment which has the effect of enhancing an assessment or otherwise increasing the liability of the person concerned shall not be made unless the prescribed authority, appellate authority or revising authority, as the case may be, has given notice to the person concerned of its intention to do so and has allowed the person concerned the opportunity of showing cause in writing against such amendment.

[(2-A) xxxxx]

(3). Where an order has been considered and decided in any proceedings by way of appeal or revision relating to an order referred to in sub-section (1), the

authority passing such order may, notwithstanding anything contained in any law for the time being in force, amend the order under that subsection in relation to any matter other than the matter which has been so considered and decided.

(4) An order passed under Sub-section (1), shall be deemed to be an order passed under the same provision of law under which the original order, the mistake in which was rectified, has been passed."

6. The aforesaid shows that with a view to rectify the mistake apparent on the record, the power may be exercised within a period of five years from the date of passing of the order for amendment and that too after giving opportunity to the party concerned. What is relevant is, "mistake apparent from record". Therefore, neither the record which did not exist at the time when the order of assessment was passed earlier nor any fact in law or material which came into existence after the order could be considered. It is undisputed position that in the present case, the basis of the rectification order is, the clarification of the Commissioner of Commercial taxes dated 21.2.2012. The re-assessment order was already passed in case of the petitioners on 28.6.2010. Therefore, the basis for exercise of the power for rectification under Section 69 which is the clarification of the Commissioner dated 21.2.2012 did not exist at all when the re-assessment order was passed on 28.6.2010. If any material which has come into existence after the order of re-assessment, apart from the aspects that the same was not the part of the record, even otherwise also could not be considered since the material has come into existence on 21.02.2012 after the order of re-assessment dated 28.06.2010 and if considered, the same in our view can be said to be on the extraneous ground beyond the scope of power of rectification. The other issues of subsequent clarification dated 26.3.2015 providing for 5.5.% duty for the fabrication of the material of M.S. (Mild Steel) in our view also can also be said as extraneous so far as exercise of power under Section 69 of the Act itself. It is true that in view of the aforesaid subsequent clarification dated 26.3.2015, the doubt may arise about the chargeability whether as per Entry No. 4 of the Sixth Schedule or Entry No. 23 of Sixth Schedule but, we do not propose to make any observation since as per the observations made by us herein above, the exercise of power for rectification under Section 69 was unwarranted. At this stage, we may refer to the decision of this Court in case of Mysore Cements Limited v. Deputy Commissioner of Commercial Taxes (Assessment-V), City Division-II, Bangalore reported at 1994 STC 464 (Vol. 93), this Court for the scope and ambit of power of rectification observed at paras. 26 and 27 it was observed thus:

"26. Therefore in the final analysis, what is a "mistake apparent from the record", capable of being rectified? A mistake, either of fact or of law, glaring and obvious from the record itself, capable of identification, without a detailed investigation or enquiry or elaborate arguments, in regard to which there could reasonably be no two opinions is a "mistake apparent from the record". If it relates to a fact, it should be possible to say "this is obviously a mistake". A

decision on a debatable point of law will not however be a mistake apparent from the record. A point on which there is no decision of the Supreme Court or of the concerned High Court, and in regard to which two or more views are possible, is a debatable point of law. A point of law on which there is divergent views of other High Courts, is a debatable point of law. Hence there cannot be a rectification of an order, merely on the ground that a contrary decision was rendered on the point involved by a High Court other than the High Court of the concerned State. It is needless to point out that when a point is covered by a decision of the Supreme Court or concerned High Court, either rendered prior to or subsequent to the order proposed to be rectified, then the point ceases to be a debatable point; it also ceases to be a point requiring elaborate arguments or detailed investigation/enquiry. To encapsulate, the following will be "mistakes apparent from the record" relating to a question of law:

(a) An order made, ignoring or overlooking: (i) a binding decision of the Supreme Court or the concerned High Court rendered prior to the date of such order; and/or (ii) a relevant provision of existing law;

(b) An order, found to be erroneous: (i) by applying a subsequent enactment given retrospective effect; and/or (ii) by applying a subsequent decision of the Supreme Court or concerned High Court.

27. It should however be borne in mind that orders which have become final, cannot be rectified. This is not because a mistake apparent on the record ceases to be so in regard to an order which has become final, but because the time/limitation prescribed for appeal, revision, review or rectification, had expired. In other words, so long as the time prescribed for rectification or other remedy under the relevant statute has not expired, the order cannot be said to have become final, for purpose of rectification."

7. In the decision of the Apex Court in case of Deva Metal Powders Private Limited, v. Commissioner, Trade Tax, Uttar Pradesh reported at 2008(64) KAR L.J. 195 (SC), the Apex Court while considering the scope and ambit of jurisdiction for rectification observed at para. 11 which reads as under:

"Mistake" is an ordinary word but in taxation laws, it has a special significance. It is not an arithmetical error which, after a judicious probe into the record from which it is supposed to emanate is discerned. The word "mistake" is inherently indefinite in scope, as to what may be a mistake for one may not be one for another. It is mostly subjective and the dividing line in border areas is thin and indiscernible. It is something which a duly and judiciously instructed mind can find out from the record. In order to attract the power to rectify under Section 22, it is not sufficient if there is merely a mistake in the order sought to be rectified. The mistake to be rectified must be one apparent from the record. A decision on a debatable point of law or a disputed question of fact is not a mistake apparent from the record. The plain meaning of the word "apparent" is that it must be something which appears to be so ex facie and it is incapable of

argument or debate. It, therefore, follows that a decision on a debatable point of law or fact or failure to apply the law to a set of facts which remains to be investigated cannot be corrected by way of rectifications."

8. In our view, in any case, the material which did not exist at all at the time of order of re-assessment was passed on 28.6.2010 would not form basis for rectification of the re-assessment order. When it is undisputed position that the basis of the exercise of power for rectification is the clarification order dated 21.2.2012 issued by the Commissioner which in any case has come into existence after the order of reassessment, the power of rectification was unavailable. Further, it is not the case of respondent-revenue that any other clarification like 21.2.2012 was already in existence prior to 28.6.2010 i.e. date on which the order of re-assessment was passed.

9. In view of the aforesaid observation and discussion, the original order for exercise of power under Section 69(2) can be said as beyond the scope and ambit of Section 69 of the Act. Resultantly, the appeal arising therefrom before first appellate authority and the further appeal arising from the order of the first appellate authority before the Tribunal shall fall to ground and cannot be sustained. Hence, the above referred question is answered in a manner that the no material which has come into existence after the order/re-assessment is passed can be made as the basis for exercise of power under Section 69 of the Act and accordingly, question is answered in favour of the petitioner-assessee against the revenue.

10. Resultantly, impugned order of the first authority-assessing authority under Section 69 dated 20.10.2014 (Annexure-B) as well as order passed by the first appellate authority dated 15.3.2014 (Annexure-C) and the order of the Tribunal 30.12.2015 (Annexure-A) shall stand set aside. The petitions are allowed accordingly.

No order as to costs.