

(1999) 10 MP CK 0027

In the Madhya Pradesh High Court

Case No : Miscellaneous Petition No. 1130 of 1992

Prakashchand Basant Kumar

APPELLANT

Vs

Additional Commissioner of Sales Tax and Others

RESPONDENT

Date of Decision : 27-10-1999

Acts Referred:

Madhya Pradesh General Sales Tax Act, 1958 — Section 39(1), 39(5), 45

Citation : (2000) 118 STC 52

Hon'ble Judges : A.K. Gohil, J

Bench : Single Bench

Advocate : C.R. Pancholiya, for the Appellant; S. Mukati, Deputy Govt. Advocate, for the Respondent

Final Decision : Allowed

Judgement

A.K. Gohil, J.—By this petition under Article 226 of the Constitution of India, the petitioner is praying for quashing the impugned review order dated March 3, 1992 (annexure F) and also the notice of demand dated May 1, 1992 (annexure G) and also praying for restoration of the order dated October 25, 1991 (annexure C) which was passed by the Additional Commissioner of Sales Tax, M.P., Indore, following the decision of Board of Revenue dated August 27, 1990 (annexure D).

2. In short the case of the petitioner in this petition is that the petitioner has set up an oil mill at Bhikangaon which was a new industrial unit, The petitioner was exempted from payment of entry tax for the period of 5 years from the date of first purchase of oil-seeds and other raw materials for consumption in the manufacture of oil and oil-cake. The Assistant Commissioner of Sales Tax, Khargone (respondent No. 2) passed an assessment order under the Madhya Pradesh General Sales Tax Act, 1958 (for short "the State Sales Tax Act") on July 9, 1991 for the period from October 23, 1987 to November 9, 1988 (annexure B). The petitioner had claimed a set-off of tax at the rate of 2.5 per cent u/s 8(1) (a) of the State Sales Tax Act under Notification No. A-3-47-86-ST-V(2) dated

January 8, 1990 on fully tax paid purchases of cotton-seeds, but the Assistant Commissioner (respondent No. 2) allowed the set-off at the rate of 2 per cent only. Being aggrieved by the said order of assessment, the petitioner filed a revision application u/s 39(1) of the State Sales Tax Act before the Additional Commissioner of Sales Tax, M.P., Indore, and order was passed on October 25, 1991 in the said revision (annexure C). The revisional authority following the decision dated August 27, 1990 of the division Bench of the Board of Revenue, Madhya Pradesh, passed in Appeal No. 134-I/ 89 in the case of *Atmaram and Brothers v. Commissioner of Sales Tax*, held that the petitioner was entitled to set-off of tax at the rate of 2.5 per cent and difference of 0.5 per cent was allowed.

The case of the petitioner is that thereafter the petitioner received a notice dated January 10, 1992 issued by the Additional Commissioner of Sales Tax (respondent No. 1) purported to have been issued u/s 45 of the State Sales Tax Act and by this notice it was proposed to rectify the allowance of set-off of tax at 2.5 per cent instead of 2 per cent. The reply to this notice was filed on behalf of the petitioner on February 14, 1992 and in this reply it was pleaded that respondent No. 1 had no power or authority under any of the provisions of State Sales Tax Act to review his own order particularly when the order dated October 25, 1991 was passed following the decision of the Board of Revenue on the point of the rate of set-off allowable to the petitioner. It was further contended that the notice does not state any reasons for which the order dated October 25, 1991 suffered from any mistake apparent from the record. The Additional Commissioner of Sales Tax by order dated March 3, 1992 reviewed/ revised his order dated October 25, 1991 holding that the petitioner was not entitled to set-off of tax at the rate of 2.5 per cent which was allowed to him by order dated October 25, 1991. The petitioner has filed this petition challenging the aforesaid order dated March 3, 1992 which has been passed u/s 45(1)(i) of the State Sales Tax Act.

3. In return the contention of the respondents is that the order which was passed on October 25, 1991 was against the provisions of law and on the face of record it was liable to be rectified u/s 45 of the State Sales Tax Act and in case of *K.K. Industries, Itarsi v. Commissioner of Sales Tax, M.P. (1990) 23 VKN 290* by order dated January 2, 1990 the Board of Revenue has decided that set-off in the similar case shall be allowable at the rate of 2 per cent only and the case of *Atmaram's* was not applicable in the petitioner's case. On the basis of decisions of the Board of Revenue in case of *National Metal Industries, Indore and Steel Febro Industries, Indore v. Commissioner of Sales Tax (1991) 12 CTJ 338* and *Metalman Pipe Mfg. Co. Pvt. Ltd., Indore v. Commissioner of Sales Tax (1991) 24 VKN 498*, the Additional Commissioner rectified his order while exercising powers u/s 45 of the State Sales Tax Act as he was empowered to rectify his order whenever there seems to be any mistake apparent from the record.

4. I have heard the learned counsel for the parties and perused the record.

5. The sole question in this case for consideration before me is that whether respondent No. 1 had any jurisdiction and power u/s 45(1) of the M.P. General Sales Tax Act, 1958 to review and/or revive the order passed by him on October 25, 1991 ?

6. The submission of the learned counsel for the petitioner is that Section 45 of the State Sales Tax Act only envisaged the rectification of mistake apparent from the record. The parameters of Section 45 are well-defined by a series of judicial decisions and the said section permits the correction of only such mistakes which are apparent from the record and a mere change of opinion does not amount to a mistake much less a mistake apparent from the record within the meaning of Section 45 of the State Sales Tax Act. While allowing the review application, the reviewing authority cannot take a different view under the garb of Section 45 and the impugned order is without jurisdiction and liable to be set aside. The learned counsel relied on the decision of the Supreme Court in the case of Master Construction Co. (P.) Ltd. v. State of Orissa [1966] 17 STC 360, in which it has been held as Under :

"Held, on a construction of the rule, that Rule 83 provides a summary remedy within a narrow compass. The jurisdiction of the Commissioner under this rule is limited and is confined only to the correction of mistakes or omissions mentioned therein. An arithmetical mistake is a mistake of calculation ; a clerical mistake is a mistake in writing or typing. An error arising out of or occurring from an accidental slip or omission is an error due to a careless mistake or omission unintentionally made. The error should not be an error which depends for its discovery, elaborate arguments on questions of fact or law. The accidental slip or omission is an accidental slip or omission made by the court. However wide the expressions in the rule are construed, they cannot countenance a re-argument on merits on questions of fact or law, or permit a party to raise new arguments which he has not advanced at the first instance.

..... Held, that both the question of limitation as well as the question of construction of the appellate orders and the impact of those orders on the amounts paid towards tax before the assessments were arguable questions of fact and law. The wrong conclusion, if any, arrived at by the Commissioner in his earlier order was because the points were not raised and considered and they could not be said to be errors apparent on the face of the record arising or occurring from an accidental slip or omission, The action of the Commissioner amounted to a rehearing of the revision which was not permissible Under Rule 83."

7. In another case of Shree Bhagwati Roller Flour Mills v. Commissioner of Sales (Trade) Tax [1998] 108 STC 157, the Supreme Court has held as under :

".....The High Court rightly held that unless there was an error apparent on record, the Tribunal could not exercise its power of rectification. There was no error apparent on the face of the record of this case. The view taken by the

Commercial Tax Officer, the first appellate authority as well as the Tribunal was reversed by the rectification order. The Tribunal in effect revised its order altogether on a highly disputed question of law. The High Court, therefore, rightly held that the power of rectification was wrongly exercised and the rectification order dated February 9, 1994 should be quashed. We are in agreement with the view expressed by the High Court."

8. Learned counsel for the petitioner further relied on the decision of *Indian Iron & Steel Co. Ltd, v. Sales Tax Officer, Sector 4, Kanpur* [1973] 32 STC 95 in which it has been held by the Allahabad High Court as under :

"Section 22 of the U.P. Sales Tax Act, 1948, has a limited scope. It cannot be used to rectify every type of mistake. The jurisdiction of the assessing authority under that section is confined to the rectification of mistakes apparent on the face of the record of the assessment and it does not envisage the rectification of an error of judgment."

9. Learned counsel also relied on the decision of *Jainson Hosiery Industries v. Assessing Authority* [1991] 83 STC 26, in which it has been held by the Punjab and Haryana High Court as under :

"Held, allowing the petition, that u/s 21A of the Punjab General Sales Tax Act, a mistake which can be rectified should be clear from the record without the need for elaborate arguments. The Presiding Officer in the present case had merely substituted his own view for that of his predecessor, and no apparent mistake having been pointed out from the record the condition precedent for assuming jurisdiction u/s 21A had not been satisfied. The order of rectification was liable to be quashed."

10. The next submission of the learned counsel for the petitioner is that u/s 39(5) of the State Sales Tax Act remedy was available to the Commissioner where he considers that any order passed under Sub-section (1) by his predecessor or any Additional Commissioner of Sales Tax is erroneous in so far as it is prejudicial to the interests of revenue, he was entitled to file an appeal against such erroneous order before the Tribunal within two years from the date of such order. For ready reference the provisions of Sub-section (5) of Section 39 of the State Sales Tax Act are being reproduced below :

"39. Power of revision by Commissioner:--

(1).....

(2) to (4).....

(5) Where the Commissioner considers that any order passed under Sub-section (1) by his predecessor or any Additional Commissioner of Sales Tax is erroneous in so far as it is prejudicial to the interests of Revenue, he may file an appeal against such order before the Tribunal within two years from the date of such order. The provisions of Section 38 shall mutatis mutandis apply to the appeals

filed under this sub-section."

11. In reply, learned Deputy Government Advocate for the respondents has relied on the authority mentioned in the return, in the case of State of Uttar Pradesh v. Modi Industries Limited [1977] 40 STC 73, and it was submitted that according to the above decision of the Supreme Court, the revisional authority was empowered to rectify the error u/s 31(2) of the U.P. Sales Tax Act, 1948. It has been held by the Supreme Court in this case as under :

"Held, (i) that the amendment made by Section 31 was retroactive and applied to assessments pending or closed as if the amending Act had been in force at the material times ;

(ii) that it could not be said that the revising authority erred in not passing an order for giving effect to the judgment of the High Court dated July 24, 1961, which had become unenforceable by Section 31. Even if the revising authority had passed an order u/s 11(6) as directed by the High Court, that would have been of no consequence and would have been inoperative because of the specific provisions of Section 31(2)."

12. After going through the judgments cited by the parties, I am of the view that the recent decision of the Supreme Court in case of Shree Bhagwati Roller Flour Mills [1998] 108 STC 157, is relevant on the point of rectification of error where the apex Court has held that the Tribunal had no jurisdiction to revise the order on disputed question of law. The decision in case of Modi Industries Limited [1977] 40 STC 73 (SC), is mainly on the point of operation of the amending Act.

13. I have also gone through the review/revised order (annexure F) passed by respondent No. 1 on March 3, 1992 and in his judgment the decision was reviewed for not correcting any error apparent on the face of record but on the basis of the decisions of Board of Revenue referred to in this order on the question of grant of set-off, which was purely a point of law. The earlier order was reviewed on merits and a set-off which was granted at 2.5 per cent was withdrawn and set-off at 2 per cent was allowed. On the basis of the aforesaid decisions of the apex Court, in case of Shree Bhagwati Roller Flour Mills [1998] 108 STC 157 the respondent No. 1, Additional Commissioner, could not exercise its power of rectification u/s 45 and cannot reverse his decision on merits. The conclusion, arrived at by the Additional Commissioner in his earlier order was on the basis of the division Bench decision of the Board of Revenue and the same could not be said to be "an error apparent on the face of record" arising or occurring from an accidental slip or omission. The action of the Additional Commissioner amounted to a rehearing of the revision which according to me is not permissible u/s 45 of the State Sales Tax Act.

14. Section 45 of the State Sales Tax Act provides for rectification of mistakes and that is clearly when the mistake is apparent from the face of the record and not a mistake on merit. Under the garb of this provision, the decision on merits cannot be reviewed. In view of the specific provision in Sub-section (5) of

Section 39 of the State Sales Tax Act that the Commissioner may file an appeal before the Tribunal within a period of two years from the date of such order, it cannot be said that the Additional Commissioner had no remedy except to review his order. Remedy u/s 39(5) was available to the Commissioner to file an appeal before the Tribunal against the order of Additional Commissioner and that too within a period of two years from the date of such order. Admittedly in this case the mistake has come to the notice of the Additional Commissioner on January 10, 1992 within a period of 90 days of the passing of the order on October 25, 1991. In view of the aforesaid factual and legal position under the specific provision in Section 39(5) the impugned order dated March 3, 1992 is held to be without jurisdiction and accordingly it is liable to be quashed.

15. In the result, the petition is allowed and the impugned order dated March 3, 1992 (annexure F) is hereby quashed with no order as to costs. Security amount, if any, shall be refunded to the petitioner after due verification.