

SUPREME COURT OF INDIA

Assistant Commercial Taxes

Vs.

Makkad Plastic Agencies

C.A.No.2692 of 2011

(Mukundakam Sharma and Anil R.Dave,JJ.,)

29.03.2011

JUDGMENT

Dr. Mukundakam Sharma,J.,

SLP(Civil)No.33853 of 2010

1. Leave granted.

2. This appeal is directed against the judgment and order dated 03.05.2010 passed by the Rajasthan High Court, Jodhpur Bench, in S.B. Civil [Sales- Tax] Revision No. 74 of 2010, whereby the High Court dismissed the said Revision Petition preferred by the appellant herein and upheld the order dated 22.01.2009 passed by the Rajasthan Taxation Board, Ajmer, wherein the Taxation Board interfered and modified its earlier order dated 13.05.2008.

3. The assessment of the assessee-respondent for the Assessment Year 2001-02 was completed by the Assessing Officer under Section 29(7) of the Rajasthan Sales Tax Act, 1994 [for short "the Act of 1994"] holding that the tax on "thermo ware" and "vacuum ware", which were the articles sold by the assessee-respondent during the relevant assessment year, should be levied Sales Tax at 10 per cent instead of 8 per cent, treating them as separate articles from plastic goods/products. Consequently, the liability of difference of tax at 2 per cent along with surcharge, interest and penalty was also levied.

4. The aforesaid order of the Assessing Officer was challenged by the assessee-respondent before the Deputy Commissioner [Appeals], Commercial Tax Department, Bikaner under Section 84 of the Act of 1994, which was allowed by the Appellate Authority by order dated 29.03.2005 by setting aside the demand for difference of tax imposed at 2 per cent as also the penalty and interest.

5. Aggrieved by the aforesaid order dated 29.03.2005 of the Deputy Commissioner [Appeals], Bikaner the appellant herein preferred an appeal before the Rajasthan Taxation

Board, Ajmer, which was heard and disposed of by the Taxation Board by allowing the same vide its order dated 13.05.2008. The Taxation Board considered various documents placed on record including invoices and, thereafter, on appreciation thereof, it was held that "plastic goods" and "thermo ware" are two different articles as was indicated from the invoice itself. It was also held that the conclusion arrived at by the Tax Assessing Officer is well-considered and reasonable, whereas the order passed by the Deputy Commissioner [Appeals], Bikaner is contrary to facts and law. Having held thus, the Taxation Board allowed the appeal and order dated 29.03.2005 passed by the Deputy Commissioner [Appeals], Bikaner was set aside and order passed by the Tax Assessing Officer was restored.

6. The assessee-respondent thereafter filed a rectification/amendment application purportedly under Section 37 of the Act of 1994, which was decided by the Rajasthan Taxation Board, Ajmer by passing an order dated 22.01.2009. By the aforesaid order the Taxation Board modified its earlier order to the extent of holding that as the assessee-respondent had declared all his sales in the books of accounts, in that situation, in order to levy penalty, department has to also prove additionally, that there was a mala fide intention on the part of the assessee- respondent for tax evasion, which is not revealed in the present case. It was further held that as the mala fide intention of the assessee-respondent for tax evasion has not been proved and since no such evidence is available on record from which it could be established that the assessee-respondent had the mala fide intention behind recovering the tax at the rate of 8 per cent, the order of levying penalty is not justiciable. After recording the aforesaid findings, the Taxation Board passed an order dated 22.01.2009 to the extent of amending its previous order dated 13.05.2008 and set aside the order passed by the Deputy Commissioner [Appeals], Bikaner dated 29.03.2005 on the issue of tax evasion only, however, maintained the finding on the issue of penalty.

7. Being aggrieved by the aforesaid order passed by the Taxation Board a Revision Petition was preferred by the appellant before the High Court of Rajasthan, Jodhpur Bench under Section 86 of the Act of 1994. The High Court, however, held that no question of law arises out of the order passed by the Taxation Board for consideration and, consequently, the Revision Petition was dismissed. The present appeal, as stated hereinbefore, is directed against the aforesaid two orders passed by the High Court as also by the Taxation Board.

8. From the aforesaid narration of facts it is crystal clear that the earlier order dated 13.05.2008 passed by the Taxation Board was interfered with and modified by the Taxation Board itself under its order dated 22.01.2009. The said order dated 22.01.2009 is practically challenged in the present case on the ground that the said order was passed by the Taxation Board in excess of its jurisdiction. The said order dated 22.01.2009 was passed on the basis of an Amendment Application filed by the assessee-respondent under Section 37 of the Act of 1994. In the said order dated 22.01.2009, the Taxation Board proceeded on the ground that the said application was in the nature of Amendment Application praying for amendment of its judgment and order dated 13.05.2008.

9. Contention raised on behalf of the appellant is that the Taxation Board committed a jurisdictional error in amending and reviewing its earlier order dated 13.05.2008 while exercising the power of rectification of a mistake apparent on the face of the record.

10. It may be stated herein that despite service of notice, none appears for the assessee-respondent and, therefore, we proceed to dispose of this appeal on the basis of the submissions made by the counsel appearing for the appellant and also on the perusal of the records placed before us.

11. In order to appreciate the aforesaid contention, we are required to extract the relevant part of Section 37 of the Act of 1994, which was the power exercised by the Taxation Board for passing the order dated 22.01.2009: - "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 the Act may rectify suo motu or otherwise any order passed by him. Explanation: A mistake apparent from the record shall include an 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.

12. The Taxation Board by its order dated 13.05.2008 was disposing of an appeal filed against the order dated 29.03.2005 passed by the Deputy Commissioner [Appeals]. By the aforesaid order dated 13.05.2008 the Taxation Board upheld and accepted the contention of the appellant herein that "thermo ware" is not similar to "plastic product" and that rather they are two different products/articles, which in fact is also proved and established from the documents on record. It was, therefore, held that the conclusion arrived at by the Assessing Officer is well-considered and reasonable. It was also held that, although, in the appellate judgment, given by the Deputy Commissioner [Appeals], reference was made to the use of "plastic granules" and "powder" as raw material for manufacturing "thermo ware" for treating "thermo ware" as covered under the category of plastic goods/products, but neither any evidence nor any reasonable and justifiable ground was given in the said order for doing the same. After recording the aforesaid findings, the Taxation Board set aside the judgment of the Deputy Commissioner [Appeals] and restored the order of the Tax Assessing Officer, who had by his order, held that the assessee-respondent is liable to pay tax at the rate of 10 per cent, as the product "thermo ware" and "vacuum ware", which are the articles sold by the assessee-respondent, are assessable to tax at the rate of 10 per cent instead of 8 per cent to be levied on plastic wares.

13. The aforesaid well-reasoned order came to be interfered with by the Taxation Board itself while exercising the purported powers under Section 37 of the Act of 1994, which empowers the Board only to rectify a mistake apparent on the face of the record. The issue, therefore, is whether, while exercising such power vested under Section 37 of the Act of 1994, the Taxation Board could re-appreciate the evidence on record and review its earlier order by holding that there was no mens rea on the part of the assessee-respondent and, therefore, no penalty is leviable on them. The aforesaid exercise of power by the Taxation Board in the

present case by interfering with its earlier order was submitted to be a jurisdictional error and also purportedly to be an exercise of power in excess to what is provided in the statute.

14. The scope and ambit of the power which could be exercised under Section 37 of the Act of 1994 is circumscribed and restricted within the ambit of the power vested by the said Section. Such a power is neither a power of review nor is akin to the power of revision but is only a power to rectify a mistake apparent on the face of the record. Rectification implies the correction of an error or a removal of defects or imperfections. It implies an error, mistake or defect which after rectification is made right.

15. In the case of *Commissioner of Income Tax, Bhopal v. Ralson Industries Ltd.* reported in¹ a similar situation arose for the interpretation of this Court regarding the scope and ambit of Section 154 of the Income Tax Act vesting the power of rectification as against the power vested under Section 263 of the Income Tax Act, which is a power of revision. While examining the scope of the power of rectification under Section 154 as against the power of revision vested under Section 263 of the Income Tax Act, it was held by this Court as follows at Para 8: -

"8. The scope and ambit of a proceeding for rectification of an order under Section 154 and a proceeding for revision under Section 263 are distinct and different. Order of rectification can be passed in certain contingencies. It does not confer a power of review. If an order of assessment is rectified by the Assessing Officer in terms of Section 154 of the Act, the same itself may be a subject matter of a proceeding under Section 263 of the Act. The power of revision under Section 263 is exercised by a higher authority. It is a special provision. The revisional jurisdiction is vested in the Commissioner. An order thereunder can be passed if it is found that the order of assessment is prejudicial to the Revenue. In such a proceeding, he may not only pass an appropriate order in exercise of the said jurisdiction but in order to enable him to do it, he may make such inquiry as he deems necessary in this behalf."

In paragraph 12 of the said judgment it was also held that when different jurisdictions are conferred upon different authorities, to be exercised on different conditions, both may not be held to be overlapping with each other. While examining the scope and limitations of jurisdiction under Section 154 of the Income Tax Act, it was held that such a power of rectification could only be exercised when there is an error apparent on the face of the record and that it does not confer any power of review. It was further held that an order of assessment may or may not be rectified and if an order of rectification is passed by the Assessing Authority, the rectified order shall be given effect to.

16. We may also at this stage appropriately refer to yet another decision of this Court in *Commissioner of Trade Tax, U.P. v. Upper Doab Sugar Mills Ltd.* reported in (2000) 3 SCC 676, in which the power and scope of rectification was considered and pitted against the scope of review. The aforesaid decision was in the context of Section 39(2) of the U.P. Sales Tax (Amendment) Act, 1995 which provides the power of review. Section 22 of the said Act

provides for rectification of mistake. In the said decision, it was held that when two specific and independent powers have been conferred upon the authorities, both powers can be exercised alternatively, but, it cannot be said that while exercising power of rectification, the authority can simultaneously exercise the power of review.

17. 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 v. Hemant Vimalnath Narichania and Others reported in*².

18. 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.

19. Thus, the orders passed by the Taxation Board on 22.01.2009 as also the impugned order and judgment passed by the High Court upholding the said order of the Taxation Board are hereby set aside and quashed and the original order passed by the Assessing Officer is restored.

20. In terms of the aforesaid observations, the present appeal is allowed but without costs.

¹(2007) 2 SCC 0326

²(2010) 9 SCC 0437