IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 30.11.2017

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THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM

W.P.No.10767 of 2006 & W.P.M.P.No.12202 of 2006
and
W.P.No.10791 of 2006 & W.P.M.P.No.12233 of 2006

M/s.Sri Gowri & Co., rep. by
Mr.Balasubramaniam, Partner,
30, L.R.G.Layout, II Street,
Tirupur-7, Coimbatore District. ... Petitioner in both W.Ps.

Vs.

The Deputy Commercial Tax Officer,
Tirupur Central-I, C.T.Buildings.,
Kumaran Road, Tirupur-1,
Coimbatore District. ... Respondent in both W.Ps.

Petitions filed under Article 226 of the Constitution of India praying for issuance of Writ of Certiorarified Mandamus, to call for the records on the files of the respondent in TNGST : 2400490/2002-03 & 2003-04 respectively, dated 07.03.2006 and quash the same as being without authority of law, violative of principles of natural justice and invalid and illegal and direct the respondent to pass orders afresh in accordance with Section 55 of the Tamil Nadu General Sales Tax Act, 1959 and in accordance with law.

For Petitioner : Mr.V.Srikanth

For Respondent : Mrs.Narmadha Sampath,
Special Government Pleader

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COMMON ORDER

Heard Mr.V.Srikanth, learned counsel appearing for the petitioner and Mrs.Narmadha Sampath, learned Special Government Pleader appearing for the respondent.

2. The petitioner has filed these writ petitions challenging the orders passed by the respondent dated 07.03.2006, rejecting the petitioner's application for

rectification of the order of assessment passed by the respondent for the years 2002-03 and 2003-04.

3. The short issue, which falls for consideration is whether the respondent was justified in rejecting the application for rectification on the ground that there is no mistake, which is apparent on the face of the record warranting rectification under Section 55 of the Tamil Nadu General Sales Tax Act, 1959.

4. Before I examine the factual position, it would be relevant to know the legal position as to what would be an error, which is apparent on the face of the record.

5. In Mettur Chemical and Industrial Corporation Ltd., vs. Commissioner of Income-Tax, Madras-I reported in (1977) 110 ITR 822 (Mad), the Hon'ble Supreme Court held that the Income-tax officer was well within his jurisdiction in proceeding under Section 154 of the Income-tax Act, 1961 in order to rectify a mistake apparent from the record by adding back the wealth-tax, which he originally deducted, by correcting the mistake already committed by him.

6. In Assistant Commissioner, Income Tax, Rajkot, vs. Saurashtra Kutch Stock Exchange Ltd. reported in (2008) 230 ELT 385 (SC), the question, which fell for consideration was whether non- consideration of a decision of a Jurisdictional Court (High Court) or of the Supreme Court can be said to be a mistake apparent from the record and held that the Tribunal and the High Court were right in holding that such a mistake can be said to be a mistake apparent from the record, which could be rectified under Section 254(2) of the Income Tax Act. The relevant portion of the judgment is as follows:

> "40. The core issue, therefore, is whether non-consideration of a decision of Jurisdictional Court (in this case a decision of the High Court of Gujarat) or of the Supreme Court can be said to be a "mistake apparent from the record"? In our opinion, both - the Tribunal and the High Court - were right in holding that such a mistake can be said to be a "mistake apparent from the record" which could be rectified under Section 254(2).
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> 41. A similar question came up for consideration before the High Court of Gujarat in Suhrid Geigy Limited v. Commissioner of Surtax, Gujarat, (1999) 237 ITR 834 (Guj). It

> was held by the Division Bench of the High Court that if the point is covered by a decision of the Jurisdictional Court rendered prior or even subsequent to the order of rectification, it could be said to be "mistake apparent from the record" under Section 254(2) of the Act and could be corrected by the Tribunal.
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> 42. In our judgment, it is also well-settled that a judicial decision acts retrospectively. According to Blackstonian theory, it is not the function of the Court to pronounce a 'new rule' but to maintain and expound the 'old one'. In other words, Judges do not make law, they only discover or find the correct law. The law has always been the same. If a subsequent decision alters the earlier one, it (the later decision) does not make new law. It only discovers the correct principle of law which has to be applied retrospectively. To put it differently, even where an earlier decision of the Court operated for quite some time, the decision rendered later on would have retrospective effect clarifying the legal position which was earlier not correctly understood.
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> ....
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> 45. Rectification of an order stems from the fundamental principle that justice is above all. It is exercised to remove the error and to disturb the finality."

7. In V. Guard Industries Ltd., vs. Commercial Tax Officer and another reported in (2004) 136 STC 562 (Mad), the Court considered the similar question and pointed out as follows:

> "13. It is, therefore, clear that notwithstanding what may have been done by any other authority below the Supreme Court, when the Supreme Court pronouses on the true position of law any decision rendered by any other authority contrary to that is required to be regarded as an error which is apparent on the record. Rectification of such an error within the period permisssible under law and in accordance with the provisions of the statute is clearly required to be effected."

8. Thus, the legal position being that if the Supreme Court or the High Court pronounces the true position of law, any decision rendered by any other authority contrary to that is required to be regarded as an error which is apparent on the record.

9. Bearing the above legal principle in mind, if we examine the facts of the case, wherein the petitioner has contended that they have sold products to various parties and one such sale being mineral turpentine oil, which was sold against Form XVII declaration, it entitled the petitioner to claim concessional rate of tax.

10. By referring to the decision of the Hon'ble Division Bench of this Court in the case of State of Tamil Nadu vs. Madras Petro Chem Ltd., reported in (1993) 89 STC 438 (Mad), it was stated that if there is any mistake in the Form XVII declaration, the selling dealer is not made liable for the wrong declaration by the purchasing dealer. Therefore, the petitioner went before the assessing officer to state that because of the said decision there is an error, which is apparent on the face of the record and if at all, there is any mistake in the Form XVII declaration filed by the petitioner, they cannot be held responsible, as they were only selling dealer.

11. However, on facts, this Court finds that the assessing officer has recorded in the assessment order dated 01.03.2005, that the petitioner has sold the mineral turpentine oil to the dealer, who has used it for manufacturing process of textiles, which falls under Part-A of the III Schedule, which deals with general exemption and hence, the petitioner is not entitled for the benefit of the concessional rate of tax by referring upon Form XVII declaration.

12. The respondent further proceeds to state that the petitioner should be aware of the fact that he has been selling goods to a textile manufacturer and not entitled to transact business by obtaining Form XVII declaration. The petitioner's explanation is that the petitioner sells products to various such manufacturers and the presumption drawn by the assessing officer is incorrect.

13. In my considered view, this being a factual issue, ought to be agitated before the appellate authority and not before this Court in a writ petition. While there is no dispute to the legal position, as to what would be an error apparent on the face of the record, it has to be seen as to whether the

impugned order requires to be set aside for other reasons.

14. As pointed out earlier, the assessing officer has given certain reasons in the assessment order to state that as to how the petitioner is not entitled for sale against Form XVII declaration and it is not a case where defective Form XVII declaration has been filed. Therefore, the presumption, which was drawn against the petitioner should be discharged by the petitioner by producing necessary documents and records before the concerned authority and not before this Court.

15. Thus, for the above reasons, I find that there is no error in the impugned order warranting interference.

16. Learned counsel for the petitioner submitted that the petitioner had in fact filed an appeal before the appellate authority along with the application for waiver of pre-deposit, but, however, because of non-compliance of the pre-deposit within the time permited, the appeal was rejected and therefore, the petitioner went before the assessing officer for rectification.

17. Considering the fact that the factual issues have to be adjudicated, this Court is inclined to grant liberty to the petitioner to file an appeal before the appellate authority. Accordingly, while dismissing the writ petitions and confirming the orders passed by the respondent stating that there is no error to be rectified, liberty is granted to the petitioner to file an appeal before the appellate authority within a period of thirty days from the date of receipt of a copy of this order. If such appeal is filed, the appellate authority shall take on file the appeal without reference to limitation and proceed to decide the matter in accordance with law. This liberty has been granted taking into consideration the fact that the writ petitions have been pending since 2006 onwards. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

abr

To

The Deputy Commercial Tax Officer,
Tirupur Central-I, C.T.Buildings.,
Kumaran Road, Tirupur-1,
Coimbatore District.

+1cc to the Government Pleader, S.R.No. 85663

W.P.No.10767 of 2006 &
W.P.No.10791 of 2006

KAN(CO)

TR(27/12/2017)