IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED : 26.2.2021

CORAM

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM
and
THE HONOURABLE MS.JUSTICE R.N.MANJULA
Writ Petition No.16786 of 2004

M/s.Penta Media Graphics Ltd.,
rep.by Chairman & CEO, Chennai ...Petitioner

Vs

1.The Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai-6.

2.Commissioner of Central Excise-III, Chennai-34. ...Respondents

PETITION under Article 226 of The Constitution of India praying for the issuance of a Writ of Certiorarified Mandamus to call for the records of the case in Miscellaneous Order No.100/2004 dated 05.3.2004 passed by the first respondent, quash the same and consequently direct the first respondent to recall its original final order No.152/2003 dated 11.3.2003 passed in Appeal No.E/1670/98 and hear the appeal afresh.

For Petitioner : Mr.T.Ramesh
For Respondent-2 : Mrs.R.Hemalatha, SSC

Order of the Court was made by T.S.SIVAGNANAM,J

We have heard Mr.T.Ramesh, learned counsel for the petitioner and Mrs.R.Hemalatha, learned Senior Standing Counsel appearing for the second respondent.

2. This writ petition has been filed by the petitioner – assessee challenging the order passed by the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai (for brevity, the Tribunal) in a miscellaneous petition filed by the petitioner in Mis. Order No.100/2004 dated 05.3.2004.

3. The petitioner is a public limited company, which had established 100% export oriented unit in an electronic software

technology park for manufacture of several products including compact disc read only memory (CDROMs). The issue before the Tribunal was as to whether the product manufactured by the petitioner would be a computer software.

4. The Tribunal, by order dated 11.3.2003, referred to the technical opinion given by the senior professors from the Indian Institute of Technology, Madras and other institutions and in paragraph 7 of its order, the Tribunal held that the issue is highly technical matter and that just reading over the expert opinion at the time of personal hearing could not be taken to be giving an effective opportunity to the petitioner to explain their stand in the facts and circumstances of the case. Therefore, the Tribunal held that the matter should be reconsidered by the Adjudicating Authority in de novo proceedings. Having concluded so in paragraph 7 of the order dated 11.3.2003, the Tribunal proceeded to render a finding that the product manufactured by the petitioner was not a computer software and that therefore, the petitioner could not claim the benefit of the relevant notification.

5. Being aggrieved by the observation made by the Tribunal dated 11.3.2003 in spite of remanding the matter for de novo consideration, the petitioner filed a miscellaneous petition before the Tribunal and requested the Tribunal to invoke the powers under Section 129B(2) of the Customs Act, 1962. This miscellaneous petition appears to have been dealt with by the Tribunal in a more elaborate fashion than dealing with the correctness of the order passed by the Adjudicating Authority. In our considered view, such an exercise is totally uncalled for.

6. All that the Tribunal is required to see is as to whether there is any mistake apparent from the records. If the Tribunal comes to the conclusion that that there is a mistake apparent from the records, it is entitled to amend any order passed under Sub-Section (2) of Section 129B of the Act. The Judicial Member of the Tribunal held that there had been a mistake apparent from the records and that if the mistake was not rectified, the very purpose of remanding the matter to the Authority would be lost and if the observations were allowed to stand, it would be fatal to the order of assessment. The Technical Member proceeded on the technicalities of the matter and held that the observations contained in the original order of the Tribunal were justified. On account of the difference in the opinion, the matter stood referred to a third party, who concurred with the Technical Member and ultimately, the miscellaneous petition stood rejected. This order is impugned in this writ petition.

7. We have elaborately heard Mr.T.Ramesh, learned counsel for the petitioner and Mrs.R.Hemalatha, learned Senior Standing Counsel appearing for the second respondent.

8. The short question to be decided is as to whether the Tribunal should have exercised its power under Section 129B(2) of the Act and as to whether there was a mistake apparent on the face of the record for the Tribunal to exercise such power.

9. The learned Senior Standing Counsel appearing for the second respondent has referred to the decision of the Hon'ble Division Bench of the Delhi High Court in the case of Krishan Madan Vs. Department of Customs [(2001) 59 DRJ 476] wherein the Court elaborately discussed the power of the Tribunal under Section 129B of the Act and it was held that amendment of an order did not mean obliteration of the order originally passed and for its substitution by another, there should be existence of mistake and it should be apparent from the record and therefore, substitution of the order was not permissible.

10. In the said decision, the Court took note of the following decisions and it would be beneficial to refer to paragraph 6 of the said judgment :

> “6. A bare look at the language of Section 129B(2) makes it clear that a mistake apparent from the record is rectifiable. In order to attract the application of the provision, the mistake must exist and the same must be apparent from the record. The power to rectify the mistake however does not cover cases where a revision or review of the order is intended. "Mistake" means to take or understand wrongly or inaccurately; to make an error in interpreting; it is an error; a fault, a misunderstanding, a misconception. "Apparent' means visible; capable of being seen; easily seen; obvious; plain. A mistake which can be rectified under Section 129B (2) is one which is patent, which is obvious and whose discovery is not dependent on argument or elaboration. The language used in the provision makes it clear that only amendment to the order passed under Section 129B(1) is permissible where it is brought to the notice of the Tribunal that there is a mistake apparent from the record. In our view amendment of an order does not mean obliteration of the order originally passed and its substitution by a new order. What

the petitioner intends to do in the present case is precisely the substitution of the order, which according to us is not permissible under the provisions of Section 129B(2) of the Act and therefore, the Tribunal was justified in holding that there was no mistake apparent from the record. Where an error is far from being self-evident, it ceases to be an apparent error. It is no doubt true that a mistake capable of being rectified under Section 129B(2) is not confined to clerical or arithmetical mistakes. But, at the same time, it does not cover any mistake, which may be discovered by a complicated process of investigation, argument or proof. As observed by the Apex Court in Master Construction Co (P) Ltd. v. State of Orissa (1996) 17 STC 360, an error which is apparent on the record should be one which is not an error which depends for its discovery on elaborate arguments on questions of fact or law. Similar view was also expressed in Satyanarayan Laxminarayan Hedge v. Mallikarjun Bhavanapa Tirumale (AIR 1960 SC 137). It is to be noted that the language used in Order XLVII, Rule 1 of the Code of Civil Procedure, 1908 (in short "CPC" is different from the language used in Section 129B(2) of the Act. Power is given to various authorities to rectify any mistake "apparent from record". In the CPC, the words are "an error apparent on the face of the records". The two provisions do not mean the same thing. The power of Tribunals under Section 129B(2) to rectify "any mistake apparent from the record" is undoubtedly not more than that of the High Court to entertain a writ petition on the basis of "an error apparent on the face of the record". (see T.S.Balaram, ITO v. Volkart Brothers [(1971) 82 ITR 50 (SC)]. Mistake is an ordinary word, but in taxation laws, it has a specific and special significance. It is not an arithmetical or clerical error alone that comes within its purview. It comprehends errors which, after a judicious probe into the record from which it is supposed to emanate, are discerned. The word "mistake" is inherently indefinite in scope, as 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 129B(2) 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 the debatable point of law or disputed question of fact is not a mistake apparent from the record. The plain meaning of the word "apparent" in fact 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 rectification."

11. The concept of mistake, which is capable of being rectified under Section 129B(2) of the Act has been explained to mean that it is not confined to clerical or arithmetical mistakes alone. At the same time, the mistake to be rectified must be one apparent from the record and it should not be a mistake, which can be discovered by long drawn reasoning. While analyzing the legal principle for exercise of power under Section 129B of the Act in the said decision, the Court also noted the power given under the Civil Procedure Code where the words are "an error apparent on the face of the records". It was pointed out that the power of Tribunals under Section 129B(2) of the Act to rectify "any mistake apparent from the record" is undoubtedly not more than that of the High Court to entertain a writ petition on the basis of "an error apparent on the face of the record". Further, it was pointed out that mistake is an ordinary word, but in taxation laws, it has a specific and special significance, that it is not an arithmetical or clerical error alone that comes within its purview and that it comprehends errors which,after a judicious probe into the record from which it is supposed to emanate, are discerned. It was also held that in order to attract the power to rectify under Section 129B(2) of the Act, it is not sufficient if there is merely a mistake in the order sought to be rectified; and the mistake to be rectified must be one apparent from the record.

12. The learned Senior Standing Counsel appearing for the second respondent has also made a reference to the decision of the Hon'ble Supreme Court in the case of Mahendra Mills Ltd.

Vs. P.B.Desai [reported in 1975 (4) SCC 93] wherein Section 35 of the Income Tax Act, 1961 was dealt with and the relevant portions read thus :

> “20. Lastly, Shri Desai urged that we should not lose sight of the startling results which might flow from a liberal interpretation of Section 35. It is apprehended that if the phrase "record of the appeal" is widely interpreted so as to cover the records of all collateral proceedings and subsequent events, it would leave the door wide open to endless harassment of assessees; the income-tax authorities would under the guise of correcting mistakes, lightly reopen assessments long past and closed, and thus introduce an element of disconcerting instability in the administration of the Act.
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> 21. In our opinion, there is no room for any such apprehension. It must be remembered that a decision is a precedent on its own facts. Each case presents its own features. The income-tax authorities and Tribunals are supposed to apply the ratio of a decision, to the facts of particular cases with due care and discernment, bearing in mind the restricted scope of their jurisdiction under Section 35 and the object for which it is conferred.”

13. Bearing the above legal principles in mind, if we examine the impugned order, we are of the view that the reasons assigned by the Judicial Member at the first instance to allow the miscellaneous petition was the correct approach. We say so because the Tribunal, in the earlier part of the order, held that the issue to be decided is highly technical in nature. Certain materials were placed when the Tribunal was hearing the matter for the first time and therefore, the Tribunal opined that adequate opportunity was not granted to the assessee and thought fit to remand the matter for de novo consideration. Having arrived at such a conclusion, the Tribunal ought not to have ventured to give a finding on the very same issue, which the Tribunal though fit to remand to the Adjudicating Authority for a fresh consideration. Therefore, the Judicial Member, who agreed with the petitioner, rightly held that if the observations made in the other portion of the impugned order were not eschewed, it would be fatal to the case of the petitioner. Furthermore, the mistake is clearly visible from the records and it does not require any long drawn reasoning for a

prudent man to come to a conclusion that there is a mistake. Hence, we are of the opinion that the Tribunal ought to have exercised its power under Section 129B(2) of the Act and deleted the conclusive observations made by the Tribunal on the issue, which it thought fit to remand for de novo consideration because the issue is an open issue. Had the Tribunal done so, it would not be a case of re-writing the order, but only rectifying a mistake, which is apparent from the records.

14. For all the above reasons, the writ petition is allowed and the impugned order rejecting the miscellaneous petition is set aside. The findings rendered by the Judicial Member stating that the miscellaneous petition is maintainable and that the mistake should be rectified are upheld. Consequently, the observations made by the Tribunal in the final order dated 11.3.2003 in paragraph 7(b) are deleted and the matter is remanded to the Adjudicating Authority to take a decision on merits and in accordance with law in terms of the observations made by the Tribunal in paragraph 7(a) of the order dated 11.3.2003. Since the writ petition has been pending from 2004, the Adjudicating Authority is requested to complete the de novo proceedings at the earliest preferably within a period of three months from the date, on which, the web copy of the order is received by the Department at the instance of either the petitioner or the learned Senior Standing Counsel for the Revenue. No costs.

Sd/-
Assistant Registrar(CS VII)

//True Copy//

Sub Assistant Registrar

To
1.The Customs, Excise and Service Tax Appellate Tribunal, South Zonal
Bench, Sheshathri Bhavan,
26,Haddows Road, Chennai-6.

2.Commissioner of Central Excise-III,
121,Nungambakkam High Road,
Chennai-34.
+1cc to Mr.R.Heamalatha, Advocate SR.No. 11853

W.P.No.16786 of 2004

A.SK(12.03.2021)