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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO. 472 OF 2010

1 M/s. S.R.Drugs Pvt. Ltd. and Anr.
Having its Corporate Office at
257 Sahid Bhagat Singh Road
Welcome House, Near G.P.O
Fort, Mumbai 400 001

2 Mr. Ruknuddin Ebrahim Tambe
Aged 66 years, an Indian
Inhabitant Managing Director of
M/s. S.R.Drugs Pvt. Ltd. and Anr.
Having its Corporate Office at
257 Sahid Bhagat Singh Road
Welcome House, Near G.P.O
Fort, Mumbai 400 001 …. Petitioners

Vs .

1 Commissioner of Sales Tax
having his office at
8th Floor, Vikrikar Bhavan,
Nesbeit Road, Mazgaon,
Mumbai 400 010

2 Maharashtra Sales Tax Tribunal
having his office at
8th Floor, Vikrikar Bhavan,
Nesbeit Road, Mazgaon,
Mumbai 400 010 …. Respondents

Mr Nawaz Haindaday with Ms Gazala Parveen Shaikh i/b. Judicare Law Associates for the Petitioners.

Ms Jyoti Chavan, Assistant Government Pleader with Mr Himanshu Takke, Assistant Government Pleader for the Respondents.

CORAM : NITIN JAMDAR AND
GAURI GODSE, JJ.
DATE : 22 NOVEMBER 2022

Oral Judgment: (Per: Nitin Jamdar J)

By this Petition, the Petitioner challenges the judgment and order dated 21 December 2009 passed by the Maharashtra Sales Tax Tribunal, Mumbai allowing the Rectification Applications filed by the Respondent No. 1-Commissioner of Sales Tax.

2. The State of Maharashtra had formulated a Policy for tax incentives to encourage industrialization of backward areas in the State. The Petitioner S.R.Drugs Private Limited had established a manufacturing unit in a backward area at Lote Parsuram, in Taluka Khed, District Ratnagiri. The Petitioner applied for the necessary certificate of eligibility from the appropriate implementing agency under the Schemes of 1983, 1988 and 1993. Under the 1983 Scheme for the original pilot plant, the Petitioner was granted an eligibility/entitlement certificate for the period from 14 March 1986 to 13 March 1993. According to the Petitioner, for expansion of the

plant under the 1988 Scheme eligibility/entitlement certificate was granted for the period 16 April 1996 to 15 April 2004 and for expansion under the 1993 Scheme, it was for the period between 1 February 1999 to 31 March 2011. The Appellant was assessed for the period mentioned above up to 31 March 2000 under the Bombay Sales Tax Act, 1959, and Central Sales Tax Act, 1956. The Petitioner requested the Assessing Authority not to apply the *pro-rata* method for determining tax liability as, according to the Petitioner, there was no expansion in respect of the entitlement certificate granted for the period from 16 April 1996 to 15 April 2004. The Respondent treated the unit post-period 1993 as an expansion unit. The contention of the Petitioner not to apply the pro-rata basis was rejected.

3. Being aggrieved by the action of the Respondents denying full exemption in respect of tax determination and consequently levying interest and penalty, the Petitioner filed five appeals before the Maharashtra Sales Tax Tribunal, i.e. Second Appeal Nos. 297 to 302 of 2005. The Sales Tax Tribunal, by order dated 18 April 2009 (Referred to as the "First Order"), allowed the appeals relying on the decision of the Division Bench of this court in the case of *Commissioner of Sales Tax, Mumbai vs. Pee Vee Textiles Ltd.*[1] According to the Tribunal since the Petitioner was covered by both 1988 Scheme and 1993 Scheme and in the absence of any Rules contemplated under Section 41BB of the Bombay Sales Tax

1 (2009) 26 VST 281 (Bom)

Act, 1959, the pro-rata basis in respect of the tax benefit admissible cannot be applied. The Tribunal also discussed the other aspects of the case and held that the Petitioner is entitled to full tax exemption in respect of the tax assessed under the provision of the Bombay Sales Tax Act and the Central Sales Tax Act. The application of the pro-rata basis made by the Respondent was not legal and proper. The matter was remanded to the Assessing Authority to re-compute tax liability and pass a fresh order.

4. Thereafter, on 14 September 2009, Respondent No. 1-Commissioner of Sales Tax, filed six Rectification Applications in respect of judgment and orders passed by the Tribunal dated 18 April 2009. The Rectification Applications were filed invoking the power of the Tribunal under Section 62 of the Bombay Sales Tax Act. By the impugned judgment and orders, the Tribunal allowed the Rectification Applications and set aside the judgment and orders passed on 18 April 2009 in the Second Appeals and restored the matters to the record of the Tribunal for being heard and decided afresh by the order dated 21 December 2009 (Referred to as the "Rectification Order").

5. Thereupon, the Petitioner has filed the present Petition challenging the six orders allowing the Rectification Orders. The Petitioner had filed five Second Appeals. Then five Rectification Applications were filed. Though one order has disposed of these, they were independent proceedings, and thus separate Writ

Petitions should have been filed. However, now that the Petition of the year 2010 has reached for hearing, we proceed consider the challenge in petition since the learned counsel for the Petitioners undertakes to pay the requisite court fees for the challenge to five the impugned orders.

6. By order dated 26 March 2010, while issuing Rule, the Tribunal was directed not to proceed further in respect of remanded proceedings.

7. We have heard Mr Nawaz Haindaday, learned counsel for the Petitioner and Ms Jyoti Chavan, learned Assistant Government Pleader for the Respondents.

8. Learned counsel for the Petitioner contended as follows. The exercise of power by the Tribunal under Section 62 of the Act is entirely incorrect as the said provision is only for the rectification of mistakes apparent on record and not to be exercised as a full-fledged review or as a substitute for an appeal. The foundation of the rectification application that the decision of the Co-ordinate Bench of the tribunal and the judgment of the this court has been incorrectly applied are grounds to be urged in the Appeal and not in an application under Section 62 of the Act. Learned counsel for the Petitioner relied upon decisions of the Honorable Supreme Court in the case of *Honda Siel Power Products Ltd. Vs. Commissioner of Income Tax*[2] and *Commissioner of Central*

2 (2007) 295 ITR 466 (SC)

Excise, Belapur, Mumbai Vs. RDC Concrete (India) Private Limited[3]. The learned counsel for the Petitioner submitted that the impugned order being passed in excess of jurisdiction be quashed and set aside.

9. Ms Jyoti Chavan, learned Assistant Government Pleader submitted that the power of Rectification is correctly exercised. The decision in the case of *Pee Vee Textiles* was in case of Scheme of 1993 and not 1998 and this essential factual distinction was entirely missed by the Tribunal when it passed the First Order, and this error which is on the face of the record, has been corrected by the Tribunal under Section 62 of the Act. That there was no bar for pro-rata calculation as far as the Package Scheme of Incentives for 1988 was concerned, is categorically laid in the case of *M/s. Balkrishna Industries Limited Vs. The State of Maharashtra*[4]. This judgement was also not considered by the Tribunal when the First Order was passed. Therefore there is no error in the Rectification order.

10. Having considered the rival contentions, the only aspect that we have to look into is- whether the Tribunal was right in exercising power under Section 62 of the Act and analyses the facts only in this context and not for adjudicating the dispute. Section 62 of the Bombay Sales Tax Act, 1959 reads thus:

3 (2011) 12 SCC 166
4 Second Appeal No. 203 of 2007 dated 25.01.2008

> *“62. **Rectification of mistakes** :- (1) The Commissioner may at any time within two years from the date of any order passed by him, on his own motion, rectify any mistake apparent from the record, and shall within a like period rectify any such mistake which has been brought to this notice by any person affected by such order.”*
>
> *Provided that, no such rectification shall be made if it has the effect of enhancing the tax or reducing the amount of a refund, unless the Commissioner has given notice in writing to such person of his intention to do so and has allowed such person a reasonable opportunity of being heard.*
>
> *(2) The provision of sub-section (1) shall apply to the rectification of a mistake by the Tribunal or an Appellate Authority under Section 55 as they apply to the rectification of a mistake by the commissioner.”*

The language of the section would indicate that what can be rectified is ‘mistake apparent from the record’. What is the exact ambit of the phrase ‘mistake apparent from the record’ that has fallen for consideration of the Honorable Supreme Court in various cases. In the case of *Commissioner of Central Excise, Belapur* after taking review of the earlier decisions on the subject, the Honorable Supreme Court observed thus:

> *21. This Court has decided in several cases that a mistake apparent on the record must be an obvious and patent mistake and the mistake should not be such which can be established by a long-drawn process of*

reasoning. In T.S. Balaram v Volkart Bros.[5] *this Court has already decided that power to rectify a mistake should be exercised when the mistake is a patent one and should be quite obvious. As stated hereinabove, the mistake cannot be such which can be ascertained by a long-drawn process of reasoning. Similarly, this Court has decided in ITO v. Asok Textiles Ltd.*[6] *that while rectifying a mistake, an erroneous view of law or a debatable point cannot be decided. Moreover, incorrect application of law can also not be corrected."*

Thus, the 'mistake apparent from the record' has to be obvious and patent mistake and not the one that needs to be established by long drawn process of reasoning.

11. In the decision of *Honda Siel* the Honorable Supreme Court has analysed the scope of power of rectification under Section 254(2) of the Income Tax Act which is *pari materia* provision in respect of Section 62 of the Act of 1959. The Honorable Supreme Court observed thus :

"12. As stated above, in this case we are concerned with the application under Section 254(2) of the 1961 Act. As stated above, the expression "rectification of mistake from the record" occurs in Section 154. It also find place in Section 254(2). The purpose behind enactment of Section 254(2) is based on the fundamental principle that no party appearing before the Tribunal, be it an assessee or the Department, should suffer on account of any mistake committed by the Tribunal. This fundamental principle has nothing to do with the inherent powers

5 (1971) 2 SCC 526
6 AIR 1961 SC 699

of the Tribunal. In the present case, the Tribunal in its order dated 10-9-2003 allowing the rectification application has given a finding that Samtel Color Ltd. was cited before it by the assessee but through oversight it had missed out the said judgment while dismissing the appeal filed by the assessee on the question of admissibility/allowability of the claim of the assessee for enhanced depreciation under Section 43-A. <u>One of the important reasons for giving the power of rectification to the Tribunal is to see that no prejudice is caused to either of the parties appearing before it by its decision based on a mistake apparent from the record.</u>

13. "Rule of precedent" is an important aspect of legal certainty in the rule of law. That principle is not obliterated by Section 254(2) of the Income Tax Act, 1961. When prejudice results from an order attributable to the Tribunal's mistake, error or omission, then it is the duty of the Tribunal to set it right. Atonement to the wronged party by the the court or Tribunal for the wrong committed by it has nothing to do with the concept of inherent power to review. <u>In the present case, the Tribunal was justified in exercising its powers under Section 254(2) when it was pointed out to the Tribunal that the judgment of the coordinate Bench was placed before the Tribunal when the original order came to be passed but it had committed a mistake in not considering the material which was already on record.</u> In our view, the High Court was not justified in interfering with the said order. We are not going by the doctrine or concept of inherent power. <u>We are simply proceeding on the basis that if prejudice has resulted to the party, which prejudice is attributable to the Tribunal's mistake, error or omission and which error is a manifest error then the Tribunal would be justified in rectifying its</u>

mistake, which had been done in the present case."

(emphasis supplied)

12. Keeping this scope of Section 62 in mind we now turn to the observation made by the Tribunal when it disposed of the Appeals by the First Order. The Tribunal referred to the factual aspects, arguments of both sides and thereafter referred to the decision of *Pee Vee Textiles.* In paragraph 22 and 23 of the First Order the Tribunal reproduced the observation of this Court in *Pee Vee Textiles* and held as under:

> *"25. It is pertinent to note that these observations made were not only with reference to 1993 scheme but it was applicable to incentives by different classes of dealers under different schemes and which included 1988 scheme also. It is an admitted fact that the government has not prescribed any rules under the provisions of section 41BB as on today as confirmed by the representative for Revenue. Considering this aspect it is required to be held that in absence of any rules providing pro-rata admissibility of sales tax incentives the appellant is entitled for full sales tax benefit in respect of 1988 scheme of expansion and 1993 scheme as argued by the appellant. Trade circulars issued by learned Commissioner of Sales Tax can not override the provisions of law u/s. 41BB which are now explained by the Hon'ble Bombay High Court. We are legally bound by the law as explained by the Hon'ble Bombay High Court."*
>
> (emphasis supplied)

The Tribunal, therefore, in its opinion, held that the decision in *Pee Vee Textiles* laid down a general proposition of law which applied to both 1993 and 1988 Schemes in absence of Rules.

13. Before proceeding further to analyze the impugned Rectification order, the case of the Respondent in the Rectification Application will have to be noted. The ground for rectification is stated in paragraph 04 of the Application which reads thus :

> *"04. The Tribunal has in the decision dated 25.01.2008 given in Second Appeal No. 203/2007 in the case of M/s. Balkrishna Industries Limited, categorically held that, there is no bar for Pro-rata calculation as far as Package Scheme of Incentives 1988 is concerned and the decision in the case of M/s. Pee Vee Textiles Limited (S.A. No. 48 of 2000, dt. 17.03.2001) pertaining to Package Scheme of 1993 is not applicable to 1988 PSI. The decision of the Bombay High Court in M/s. Pee Vee Textile's case was on the issue of applicability of Pro-rata method in the matter of availment of Incentives in respect of 1993 Package Scheme of Incentives. The issue before the Hon'ble Court was not in respect of any issue under 1988 Scheme. The Tribunal was required to follow its own judgment dated 25.01.2001 referred to above on the issue of applicability of Pro-rata method for availment of Incentives under 1988 Scheme. The Tribunal in not having followed its own judgment dated 25.01.2001 on the issue of Pro-rata method for availment of Sales Tax Incentives had committed a mistake which is apparent from the record of the order dated 18.04.2009 passed by the Tribunal in the present respondent's case."*

(emphasis supplied)

Therefore the case of the Respondent No.1-Commissioner for rectification was twofold. First, the decision in the case of *Balkrishna Industries Limited* was not considered, and there was a failure to consider the decision of the Co-ordinate Bench. Second, the Tribunal has not considered the factual aspects of the decision of the Division Bench of this Court in *Pee Vee Textiles Limited* before applying the law to the case of the Petitioner. Apart from there two grounds, no other ground was raised.

14. As to the first ground in the Rectification application that the the Tribunal did not consider the decision in the case of *Balkrishna Industries Ltd.,* nowhere in the application nor in the reply filed in this petition the Respondent has categorically asserted that the decision of *Balkrishna Industries Ltd.* was placed before the Tribunal when the First Order was passed. According to the Petitioner, the decision of *Balkrishna Industries Ltd.*, even otherwise, arises from different factual situations relating to the differential method of taxation and is not applicable. It is not necessary for us to comment as to the implication of the decision in *Balkrishna Industries Ltd.* as we will have to proceed that this decision was not placed before the Tribunal, and therefore it cannot be considered that there was a mistake committed by the Tribunal on this count for which parties should not suffer.

15. As regards the second ground in the rectification application based on the decision of *Pee Vee Textiles*, the learned Assistant Government Pleader contended that the decision in the case of *Pee Vee Textiles* contains an elaborate discussion of facts and various factual distinctions made between the two schemes, i.e. of 1993 and

1988 have been omitted from consideration and reading of *Pee Vee Textiles* would clearly show that there is no legal proposition sought to be culled out by the Tribunal in the First Order as emerges from the decision of *Pee Vee Textiles* in respect of the 1988 Package Scheme of Incentives.

16. We have to keep in mind the distinction between a challenge to a order on merits and its rectification under Section 62 of the Act. The Tribunal, in the First Order, has sought to apply the general proposition of law, which according to it, flows from the decision of *Pee Vee Textiles.* Reading of the Tribunal decision indicates that it proceeded on the basis that the Division Bench of this court in *Pee Vee Textiles* has laid down the general proposition of law in respect of the effect of the absence of Rules on the application of Section 43 BB of the Act of 1959. It was held that this proposition of law would apply even under the 1988 scheme since no rules were framed. In no manner can it be said that the Tribunal, while passing the First Order, has omitted the decision of *Pee Vee Textiles* from consideration or has overlooked the factual distinction. Therefore there was a conscious decision by the Tribunal in the First Order, whereby according to the Tribunal, this was the general proposition of law is irrespective of the factual position. If aggrieved by this conclusion, the corrective course of action for the Respondents was to challenge the First Order. We thus find merit in the contention of the Petitioner that the impugned Rectification orders are beyond the ambit of the power conferred under 62 of the Act.

17. The learned Assistant Government Pleader states that if Respondent No. 1 intends to take steps to challenge the order passed by the Tribunal on 18 April 2009 ,the issue of limitation may arise. However, this aspect will have to be decided by the court where such proceedings are presented. The concerned court will no doubt consider that it was not necessary for the Respondents to file any proceedings to challenge the First Order to date because the Respondent had succeeded in the Rectification proceedings.

18. In view of this discussion, the Writ Petition is allowed. Impugned orders dated 21 December 2009 passed in Rectification Applications by the Sales Tax Tribunal are quashed and set aside.

19. Rule is made absolute in the above terms. No orders as to costs.

20. We clarify that our observations are only in the context of the exercise of power under Section 62 of the Act.

21. Deficit Court fees, if any, shall be paid by the Petitioner within six weeks from today. Registry to examine.

(GAURI GODSE, J.) **(NITIN JAMDAR, J.)**