Reportable

RAJSASTHAN TAX BOARD, AJMER

1.Rectification No. 35/2012/Jaipur
2.Rectification No. 36/2012/Jaipur
3.Rectification No. 37/2012/Jaipur
4.Rectification No. 38/2012/Jaipur
5.Rectification No. 39/2012/Jaipur
6.Rectification No. 40/2012/Jaipur

Commercial Taxes Officer,
Anti Evasion, Zone-I, Jaipur .....Appellant
VERSUS
M/s Rajasthan State Road Transport Corporation
JAIPUR .....Respondent

D.B.
SUNIL SHARMA, MEMBER
AMAR SINGH, MEMBER

Present:

Shri, Vaibhav Kasliwal,Deputy Govt.for the Appellant
Shri, Vlvek Singhal,Advocate for the Respondent

Date. 22.05.2014

JUDGEMENT

1. These six rectification appeals have been filed by the Commercial Taxes Officer, Anti Evasion, Zone-I, Jaipur against the common orders dated March 16,2011 passed by the Division Bench of the Rajasthan Tax Board (for short, "the Board"), whereby all six orders dated 26.11.2008 of the Deputy Commissioner, Appeals, (Appeal II), Jaipur (for short, "the Appellate Authority) and the assessment orders dated 01.07.2008 passed by the Commercial Taxes Officer, Anti Evasion, Jaipur (for short, " the Assessing Authority)") levying differential tax and penalty along with imposition of interest against the appellant company under sections 25(1), 55 and 61 of the Rajasthan Value Added Tax (for short, " the Act") were set aside. The details of the assessment orders are as follows:

dz-la-	Appeal no.	Date of order and section under which order was madeS	Assessment period	Tax assessed	Interest	Penalty	Total
1	3/2009/Jaipur	01-07-2008 , section 25(1),61&55	01-04-2006 to s 30-06-2006	`29,88,729	`7,17,295	`59,77,458	`96,83,482
2	4/2009/Jaipur	01-07-2008 Section 25(1),61&55	01-07-2006 s to 30-09-2006	`24,31,805	`5,10,679	`48,63,610	`78,06,094
3	5/2009/jaipur	01-07-2008 Section 25(1),61&55	01-10-2006 s To 31-12-2006	`20,97,931	`3,77,628	`41,95,862	`66,71,421
4	6/2009/jaipur	01-07-2008 Section 25(1),61&55	01-01-2007 s To 31-03-2007	`20,98,653	`3,14,798	`41,97,306	`66,10,757
5	7/2009/jaipur	01-07-2008 Section 25(1),61&55	01-04-2007 s 30-06-2007	`22,97,817	`2,75,738	`45,95,630	
6	8/2009/jaipur	01-07-2008 Section 25(1),61&55 t	01-07-2007 s 30-09-2007	`4441513	`2,19,736	`48,83,026	`95,44,275

2. In the impugned case, the basic issue was related to the applicability of rate of tax on resale of the High Speed Diesel Oil (for short "HSD") purchased under the concessional notification dated 15.04.2006 by the RSRTC, and had for facts that the respondent corporation was entitled to purchase diesel at the concessional rate of 13 % against prevalent tax rate of 20% on the impugned commodity under the aforesaid notification subject to condition stipulated therein, inter alia, that such purchase would mean only for "official use". Making out a case against the respondent RSRTC for committing violation of the conditional "official use" clause no.3 of the aforesaid notification by reselling HSD so purchased to the owners of contracted vehicles, the Assessing Authority levied differential tax, interest and penalty against the assessee respondent in the assessment orders dated 01.07.2008 passed for the relevant periods. The Appellate Authority confirming the impugned orders of the Assessing

Authority rejected the appeals filed by the RSTRC, which were assailed before the Board. Accepting them, it concurred with the RSTRC that in the wake of enabling provisions to tax impugned transactions *non est* in the statute and the relevant notifications, the levy of differential tax , penalty and interest on such resale of HSD by the RSRTC to the owners of contracted vehicles in violation of condition no.3 of the aforesaid notification dated 15.04.2006 was not sustainable in eyes of law. It, therefore, set aside the levy of differential tax, penalty and interest on the aforesaid HSD sales in the relevant assessment orders made by the Assessing Authority which were upheld by orders dated 28.11.2008 of the Appellate Authority. The Board specifically observed in the impugned order dated 16.03.2011 that respondent was free to take lawful action.

3. In the instant matter the rectification applications have been filed under section 33 of the Act by the appellant department against the impugned order of the Board dated 16.03.2011 on the ground that it was a proved case of violation of otherwise use of goods purchased at concessional rate of tax than the one declaration was made for; and, that the Appellate Authority was right in upholding the aforesaid assessment orders wherein the Assessing Authority was within law in levying differential tax, penalty and interest. He argued that notification no.F12(28)FD/Tax/2007/147 dated 09.03.2007 was not considered by the Board, either.

4. Opening up arguments, the learned Deputy Government Advocate, Shri NK Vaid said that the RSRTC was a registered dealer under the provisions of the Act and the goods under consideration, HSD, were ones other than in the category of the exempted goods. Therefore, no tax under Sub-section (1) of Section 4 of the Act was payable as the goods under consideration were HSD notified under Sub rule 1 of Rule 11 of the Rajasthan Value Added Tax Rules, 2006 (for short " RVAT Rules") making it first point taxable. He pointed out that Rule 11 of the RVAT Rules described point of tax and sub rule (1) thereof laid down that the first point in series of sale would be

qualified by the first sale made by a registered dealer in the State or such point in the series of sales as could be notified by the State Government. He argued that diesel was notified under sub Rule (1) of Rule 11 of RVAT Rules and this made it taxable at first point of sale. Therefore, here circumstances existed where no tax was payable under sub-Section (1) of Section 4 of the Act. He raised the point that the condition that the goods were disposed off for the purpose other than those specified in Clause (a) to (g) of sub-Section (1) of Section 18 was also not applicable in the present case as the goods involved in the present case were HSD which were first point taxable and quoted notification no.F12(28)FD/Tax/2007/147 dated 09.03.2007 in this regard which in his view escaped consideration by the Board. It is reproduced as herein below:

(1) "In exercise of the powers conferred by Clause (e) of sub-section (1) of section 18 of the Rajasthan Value Added Tax Act, 2003 (Rajasthan Act no. 4 of 2003), the state Government being of the opinion that it is expedient in the public interest so to do, hereby notifies high and light Speed Diesel oil for the purpose of the said section."

5. He averred that the commodity diesel was placed in Schedule V of the Act and the Board committed a mistake apparent on the face of the record in interpreting sub-section 4(2) of the Act.

6. The learned counsel of the appellant Revenue brought to the notice of the Bench an observation made in the in operative para 6 at page 5 of the Board's impugned order dated 16.03.2011 that the Assessing Authority was free to take lawful action for violation of otherwise use of goods purchased than declaration made for under the provisions of the Act. In this case the goods diesel was notified goods under the rules and was first point taxable in series of sales. The respondent RSRTC committed violation of the declaration in as much as it disposed off a certain quantity of diesel other than for official use to the owners of vehicles under contact, receiving consideration in lieu thereof inclusive of amount of tax @20%. He averred that the Board

did not take into consideration Notification dated 09.03.2007 quoted hereinabove, which made it a fit case for taxability to be sustained @ 20 % in present case. It was a mistake apparent on the face of record and deserved rectification by sustenance of taxability @ 20% .

7. Arguing the case, the learned counsel to the respondent corporation, Shri Vivek Singhal opposed the very ground of the rectification application that notification dated 09.03.2007 was not taken into consideration by the Board. He was vociferous that when the Board categorically held in the impugned orders that the appellasnt Revenue was barred from extending its scope of operation for taxing resale of the HSD by the RSRTC to the owners of vehicles hired under contract in the given circumstances as laid down under the relevant notification in absence of any enabling provisions of the Act or RVAT Rules to this effect, now no further issues might be raised and no new notifications be flaunted to undermine the vital issue of taxability on the resale of HSD settled by the Board in the aforesaid impugned orders. He was vociferous that the Assessing Authority disregarded the statutory binding that the tax on the HSD, a first point taxable commodity, once having been borne by the respondent RSRTC, rendered the commodity out of purview of further taxation thereon and that the burden of tax could not have been further enhanced by imposition of differential tax under the garb of provisions of aforesaid conditional notification dated 15. 04. 2006 being flawed.

8. Assailing the defense of the Appellant Revenue that aforesaid notification dated 09.03.2007 was not taken note of by the Board, Shri Vivek Singhal, the learned counsel to the respondent Corporation, contended that the taxable turnover defined under section 2(40) of the Act of the Act did not vouchsafe the incidence of taxation on purchase turnover and, save deductions permissible under Rule 22 of the RVAT Rules, it could be arrived at accordingly for the purpose of levy of tax at the notified rate. However, such levy of tax under section 4(2) of the Act could be effected only in case the

goods purchased had not suffered tax under section 4(1) of the Act and were disposed off for the purposes other than those specified in clause (a) to (g) of section 18 of the Act. On the contrary, in the instant case tax ,tax on the first point of purchase of HSD having been suffered by the respondent Corporation, the Assessing Authority had no *locus standi* to levy any differential tax on the assessee appellant , in excess of what had already been paid by virtue of aforesaid concessional notification dated to the extent to which it had been granted concession from tax i.e., @ 7% ; besides, charging section of tax being section 4(2) of the Act, the turnover under consideration could not have been subjected to tax under section 25(1) of the Act as done by the Assessing Authority. At the backdrop of the arguments advanced, he stated that the rectification application filed by the appellant department being devoid of merit had no legal force and deserved dismissal.

9. After hearing both the parties to the issue on the subject under dispute in the impugned order dated16.03.2011, we now proceed to decide the core issue of rectification as sought by the appellant department. At the outset, it would be imperative to go through the notification,F12 (63) FD/TAX/2005-173 dated 32.03.2006 (as amended from time to time) which is the fulcrum of case on hand and is as follows:

10. In pursuance of rule 11 of the Rajasthan Value Added Tax Rules, 2006, read with sub section (1) of section 4 of the Rajasthan Value Added Tax Act, 2003, the State Government hereby directs that tax under section 4 of the Act, on the sales of Aviation Spirit, High and Light Speed diesel Oil, and Petrol, shall be payable by the dealers registered in the name and style as M/s Indian oil Corporation Ltd, M/s Bharat Petroleum Corporation Ltd,, M/s Hindustan oil Corporation Ltd and M/s Indo-Burma Petroleum Corporation Ltd, at the point when such dealers make sales of the sales goods to a dealer other than the aforesaid dealers for the first time in the State of Rajasthan.

This shall have effect from April 1, 2006

Rescinded by Notification dated 25-06-2008.

11. In a separate notification no.F12 (63) FD/TAX/2005-11 dated15.04.2006 (as amended from time to time), the Government prescribed the sale to or purchase of HSD to the RSRTC on a certain rate of tax, which reads as under:

12. In exercise of the powers conferred by sub-section (3) of section 8 of the Rajasthan Value Added Tax, 2003(Rajasthan Act No. 4 of 2003), the State Government being of the opinion that it is expedient in the public interest so to do, hereby exempts from tax the sale to or purchase by Rajasthan State Road Transport Corporation of High Speed Diesel to the extent to which the rate of tax in respect thereof exceeds 13% on the following conditions; namely:

(1). that the Rajasthan State Road Transport Corporation shall not purchase high speed diesel from out of the State except with the written permission from the Commissioner, Commercial Taxes, Rajasthan, in this behalf;

(2). that the Rajasthan State Road Transport Corporation shall submit monthly information of purchases within the State and from out of the Rajasthan State to the Assistant Commissioner/Commercial Taxes Officer, Special Circle, Rajasthan, Jaipur, within ten days from the close of the month; 2(a), This notification shall be deemed to have come into force with effect from 01-04-2006 ,(b)That the tax collected on such sales to Rajasthan State Road Transport Corporation, if any, shall be paid to the State Government; and (c), That the tax already paid on such purchase by Rajasthan State Road Transport Corporation, if any, shall not be refunded

(3) ,that the officer duly authorized by the Rajasthan State Road Transport Corporation for such purchases on its behalf furnishes to the selling dealer a certificate in Form appended here to

FORM

I.....(Name).....(Designation) of Rajasthan State Transport Corporation do here by certify that (High Speed Diesel) purchased from M/s..... of .....holder R.C.No..... on behalf of the Rajathan State Road Transport Corporation are for official use only and not for the purpose of resale for use in the manufacture of goods.

Place..... Seal of the duly Authorized Officer

Date:..... Signature .....

Designation of Authorized Officer

13. In the background of foregoing account, a bare reading of section 4(1) of the Act reveals that subject to the other provisions of Act and the provisions of the Central Sales Tax Act,1956 (Central Act No. 74 of the 1956), the tax payable by a dealer under the Act, **shall be at such point or points, as may be prescribed in the series of sales by successive dealers and shall be levied on the taxable turnover of sale of goods specified in Schedule III to Schedule VI at the rate mentioned against each of such goods in the said schedules.**

14. Whereas the relevant provision for taxing a commodity as laid down under section 4(2) of the Act says that every dealer who in the course of his business purchases any good other than exempted goods in the circumstances in which no tax under sub-section(1) is payable on the sale price of such goods and the goods are disposed off for the purpose other than those specified in clause (a) to (g) of sub-section (1) of section 18, shall be liable to pay tax on the purchase price of such goods at the rate mentioned against each of such goods in Schedule III to Schedule VI of the Act.

15. It would be appropriate to go through the scheme of Rule 22 (as amended from time to time) of the RVAT Rules that envisages the procedure for determination of taxable turnover as given below:

(1) For the purpose of determining the taxable turnover for levying tax under sub-section (1) of section 4 of the Act, the following amounts shall be deducted from the turnover,

(a) on which no tax is leviable under the Act,

(b) which has been exempted from tax,

(c) the sale price of the goods returned to the dealer by the purchases within a period of six months form the date of VAT invoice thereof.

where was sell is coverable Form VAT-35, VAT-36 and VAT 36 A]

(2) In case of a works contract while determining the taxable turnover apart from the deductions provided under sub-rule (1), the amount of labour shall also be deducted from the total value of the contract.

Explanation:-.....

16. Now, as regards sale of HSD, the Government notification no.F12 (63) FD/TAX/2005-172 dated 31.03.2006(as amended from time to time) says that In pursuance of rule 11 of the Rajasthan Value Added Tax Rules, 2006, read with sub-section(1)of section(4)of the Rajasthan Value Added Tax Act,2003, the State Government hereby directs that tax under section 4 of the Act, in respect of sales of Aviation Spirit (High and light speed diesel oil, Petrol) **shall be payable at the first point** in the series of sales by a registered dealer in the State of Rajasthan subject to the following conditions, namely:-

(i) that the selling dealer shall issue invoice and not VAT invoice, and

(ii) that the purchasing dealer shall not claim input tax credit in respect of such purchases). This shall have effect from April 1, 2006.

17. Coming to the plea for rectification on the basis of notification dated 09.03.2007, we find the above notifications dated 31.03,2006 made effective since 01.04.2006 were dealt with by the Board with a categorical conclusion that the HSD had been notified to be taxable at first point of sale and the notified oil companies, apart from sale thereof *inter se*, were invested with tax liability at first point of sale of HSD to other registered dealers. The Board was unequivocal on the point of alleged violation of condition no.3 of the declaration Form that HSD purchased was " for official use only and not for the purpose of resale for use in the manufacture of goods" that the lapse did not warrant levy of differential tax on further points of sales for want of enabling provisions on the statute to this effect in the relevant period. It also ruled out otherwise inclusion of purchase turnover for further taxation purposes in given circumstances, in absence of any enabling provisions in the Act, RVAT Rules, and for that matter even in the aforesaid notification dated 15.04.2006 to this effect. It, *inter alia*, observed that certain specific provisions existed in the erstwhile Rajasthan Sales Tax Act 1994 to provide for levy of tax and penalty, also interest, in such

cases, and also to deal with otherwise use of the goods purchased on declaration than for stated purpose, but they are conspicuous by absence in the present Act; which caused the Board to quash the levy of differential tax, penalty and interest in the assessment orders dated 01.07.2008 and set aside the appeal order dated 28.11.2008 accordingly. The issue that the aforesaid notification dated was not addressed by the Board while giving decision in the instant case loses significance in the wake of the Board's decision that the Assessing Authority exceeded his jurisdiction going beyond law in charging tax, penalty and interest against the respondent Company despite lack of enabling provisions in the statute to execute his fiat. The entire exercise of the assessee appellant to seek relief from the Board on issue of full taxation on the resale of HSD by way of rectification is no more than a balderdash when seen in the light of clear finding that there was no legal instrument or enactment to tax an already tax suffered commodity like HSD.

18. However, the Board left option open to the appellant to take up whatever legal remedy it contemplated, to address the issue on hand within legal framework of the Act and Rules.

19. On the issue of rectification, it would be imperative to look into the benchmark decision of the Hon'ble Apex Court in case of ACTO v. M/s Makkad Plastic Agency reported in TUD, vol 29, p-253, wherein the scope and nature of rectification under section 37 of the Rajasthan Sales Tax Act 1994, akin to section 33 of the Act, was exhaustively elaborated upon. An excerpt of which is as follows:

"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.

In the case of Commissioner of Income Tax, Bhopal v. Ralson Industries Ltd. reported in (2007) 2 SCC 326 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

.The scope and ambit of a proceeding for rectification 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 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 thagt such a power of rectification could onlybe 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.

20. 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 contexst 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.

21. 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 a 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. Hemand Vimalnath Naruichania and Others reported in (2010) 9SCC 437.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 tob rectify an obvious mistake which is apparent on the face of the records and for which a reappreciation 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 scrutinized 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.

22. Thus, the orders passed by the Taxation Board on 22-01-2009 as also impunged 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.

23. On premise of the aforesaid landmark judgment of the Apex Court, it becomes crystal clear that the scope of section 33 of the

Act cannot be stretched to the ludicrous extent of altering the basic construction of the appeal order under rectification, primarily because section 33 of the Act in its complete domain was not purportedly created for basically changing an order already passed; for, it would tantamount to passing a new order afresh imbued with changed nuances of law with a new interpretation of facts. At most, it is to rectify the peripherals of an order and not to disturb its kernel ,so as not to vitiate its basic theme.

24. In terms of the aforesaid analysis of facts and law points involved, the rectification appeals of the appellant Revenue filed under section 33 of the Act are dismissed.

25. Order pronounced.

22-5-14

(Amar Singh)
Member

(Sunil Sharma)
Member