RAJASTHAN TAX BOARD, AJMER

Rectification Application No. 27/2012/Bhilwara

M/s Anil Prakash Soni,
Bhilwara ... Appellant(in appeal respondent)
Versus
Commercial Taxes,
Works and Leasing Taxes,
Bhilwara. ... Respondent(in appeal appellant)

S.B.
Sunil Sharma, Member

Present

Shri N.S. Rathore
Dy. Govt. Advocate for the Revenue

Shri M.P. Sharma
Advocate for the Assessee

Date of Judgment :- 27-06-2014

JUDGEMENT

1. This rectification appeal has been filed by the assessee appellant before the Rajasthan Tax Board (hereinafter referred to as the "Board") against the impugned order dated 31-07-2012 of the Board in case of Commercial Taxes Officer, Works and Leasing Taxes, Bhilwara (hereinafter referred to as 'Assessing Officer') Vs M/s Anil Prakash Soni, passed u/s 84 of the Rajasthan Sales Tax (hereinafter referred to as 'Act') in appeal no. 1308/2008 on 31.07.2012 whereby, confirming and restoring levy of tax @ 12 % on the bitumen along with attendant surcharge and interest thereon in the assessment order dated 08.03.2007 for year 2004-2005 of the respondent (in present case appellant) assessee, pased under section 29 of the of the Act by the Assessing Officer, the Board set aside the appeal of assessee appellant, against which preferring the present rectification application on the ground that aforesaid works contract was not a twofold contact, one for works in question and other for supply(sale)of bitumen thereto,but a single indivisible contract the assessee appellant has presently sought that bitumen

utilized in the impugned works be considered -and rectified accordingly- in the impugned order of the Board dated 31.07.2012 not as sale towards execution of works contract but an integral part thereof, so that bitumen issue be part of exemption UNDERTAKING for the purposes of exemption fees chargeable @ 1.5% on both the works undertaken and bitumen supplied.

2. The brief facts of the case are that respondent assessee was awarded works contract relating to construction of road and CD works at Growth Centre, Hamirgarh Bhilwara by Rajasthan state Industrial Development & Investment Coropration Limited (for short "the RIICO") and construction of 33 KV S.S building with Boundary wall at Growth Centre, Hamirgarh by Ajmer Vidhyut Vitran Nigam Limited (for short "the AVVNL"), which entailed payment for works covered in UNDERTAKING at Rs 9,41,159/- and receipts of Rs 3,82,807/- against the sale of bitumen. The point in dispute in the present appeal is the levy of tax on bitumen (Daamar) by the Assessing Officer, discarding the claim of the respondent assessee that though payment for bitumen was received separately by it, yet bitumen was used in the works, for which UNDERTAKING was given. Therefore, it would not be chargeable to tax at the rate of 12% and would attract exemption fees as provided for aforesaid works contract under the UNDERTAKING.

3. The payment receipts of works executed as stated in the UNDERTAKING tendered by the respondent assessee, for exemption fees @ 1.5% of the total value of contract, aggregated to Rs 9,41,159/-, excluding the receipts against the "supply", or "arrangements", as per version of the assessee, of bitumen by the contractor amounted to Rs 8,77,449/- of which component of tax paid sales was at Rs 1,10,937/- and that of taxable sales was at Rs 2,71,870/-. As tax paid sales were exempted from tax, the Assessing Officer levied tax @12% and surcharge thereon, on the taxable purchases of bitumen at Rs 32,624/- and Rs 4,894/-, respectively,

4. On filing appeal before the Appellate Authority against the aforementioned assessment order, it decided that apart from the civil work undertaken by the respondent assessee towards construction works of road and building for RIICO Bhilwara, it was also agreed to between both the parties to the issue that respondent assessee would supply/arrange bitumen, for which he would be separately paid by the awarder. The assessee later on produced a letter from the RIICO in which the word, "supply of bitumen" was substituted for "arranged bitumen"; which reads as under:

"M/s. Anil Prakash Soni,
Contractor,
40-Behind Dak Bungalow,
Gandhinagar, Bhilwara,
Sub:- Work for construction of Road in remaining area of phase-I at Growth Center, Hamirgarh, Bhilwara

Please refer to your bid dated 17-10-2002/22-10-2002 vide which you have offered the rate 34,07% below for part (A) as per G-schedule based on P.W.D BSR 1998 (Integrated) amounting to Rs. 38,24,158.85 (Rupees Thirty eight lac twenty four thousand one hundred fifty eight and paisa eighty five) only, has been approved by the Management with the condition that the bitumen for the work shall be arranged by you at your own cost from the refinery to the site which shall be reimbursed as per original bills so oil companies i.e. HP, IOC and BP and other related document including all taxes and octroi etc. after verification by the site Engineer according to the consumption at the time of running/final payments. The transportation cost of bitumen shall also be reimbursed on production of the original bills at approved rates of the oil companies. You are requested to execute the work as per specifications and instructions of Asstt. Regional Manager, RIICO Ltd., Bhilwara. The stipulated dates of commencement and completion of the work will be as under:-

Date of Commencement - 01-01-2003
Date of Completion - 30-06-2003

You are also requested to attend this office for execution of contract agreement on non-judicial stamp of Rs 100/- at your cost within 7 days from the date of issue of this work order. "

5. Taking consideration of the above quoted letter, the Board did not buy Appellate Authority's thesis that the word 'supply' as appearing in the works order, and the schedule changed as "arranged by the contractor" in the letter; supply of bitumen thereafter be treated

as part of the indivisible work contract on the foundation of contractor having received payment separately towards arrangement of bitumen for the awarder, which could not be later covered in the exemption fees towards works contract under question. The upshot of all this was that the Assessing Officer rightly considered it as two separate contracts: one for civil work of construction of road, etc; and, other for supply (sales) of the bitumen. It, therefore, levied tax on sale of bitumen along with surcharge on it.

In the aforesaid appeal the Board agreed with the contention of Revenue that sale of bitumen was not part of the works contract as one awarded to the respondent assessee and decided that:

"on the basis of pure findings of the facts as enumerated above, this bench sums up that the supply (sale) of bitumen by the respondent assessee was rightly taxed 12% along with consequential surcharge and interest on it in the assessment order dated 08-03-2007 and agreed with the contention of Revenue that sale of bitumen was not part of the works contract as awarded to the respondent assessee.

As such, the order of the Appellate Authority disallowing tax on the sale of bitumen and imposition of consequential surcharge, is reversed ; and, the assessment order of the Assessing Officer dated 08/03/2007 as foresaid is confirmed and restored.

Opening up arguments in favour of assessee applicant, the counsel for the appellant (formerly respondent) said that the Assessing Officer arbitrarily misconstrued a simple fact that bitumen, after all, was being transferred in the execution of works contract under question and the assessee had not taken the supply of bitumen; it only carried out job of arranging bitumen, to be used in execution of works contract, against which payment was, of course, received by the contractor. He assailed that Assessing Officer had, in clear violation of law, broken up the single indivisible works contract into two separate parts. He submitted that the order of Appellate Authority, being right in eyes of law, was maintainable and confirmed to the extent of non taxability of bitumen in present case as it was based on the decision of the Hon'ble Supreme Court in case of Ganon Duncerlay & Co. (Madras) Lt. (1958) 9 STC page 353 treating it as single indivisible contract.

8. On the other hand, the learned counsel for the Revenue vehemently opposed the appellate order on the ground that this was a clear case of supply (sale) of bitumen to the awarder; which, in no way, was embedded in the scheme of works order as noted hereinabove. Therefore, no issue was involved of breaking it into singles or doubles. He assailed that the ploy used by the assessee that by changing words, "supply of bitumen" to the "arrangement of bitumen", nature of transaction would be changed and the Assessing Officer would veer round to his point of view that supply of bitumen was merely an arrangement for procurement of bitumen towards the execution of works under questions and it would pass under as part and parcel of the indivisible work contract for the purposes of exemption from full rate of tax and be eligible for concessional exemption rate of fees @ 1.5 %

9. Further elaborating his argument, the learned DGA for the Revenue put forth that there were two different distinguishable things in the present case: **one was award of works contracts, and second supply of bitumen.** The Appellate Authority wrongly clubbed together both the divergent things under the illusion that as both targeted the same end, they be conjointed under the umbrella of a single works contract.

10. He further contended that a bare perusal of the payment details would make things clear: the assessee received payments of Rs 7,67,389/- along with TDS at Rs 12,807/- against the details of works executed by it; and, total payment receipts obtained as per payment list, was Rs 11,50,196/- including the payment disbursed to the contractor separately towards its purchase of bitumen from outside the state, which, in actuality, did not exist as inalienable part of works order. The Appellate Authority drew the attention of the bench to the remark made in the payment list, against which has been written: **"Rs 3,82,807/- has been reimbursed against supply of cost of bitumen, sale tax, surcharge and transportation charge thereon."** The Appellate Authority contended that above remark left no doubt that the bitumen was supplied and separately reimbursed. It thus fell squarely in

the category of sale within the State ; and, the Assessing Officer was right in levying tax and surcharge on it. The Assessing Officer rightly concluded that on account of payment against supply (sale) of bitument being not part of works contract for "construction of road remaining area of growth center Hamirgarh I phase, Bhilwara", this amount was deducted from the payment receipts made not against the works contract order. He further argued that the respondent assessee tried to circumvent the debatable issue of sale of bitumen by substituting the word 'supply' of bitumen to 'arranged' bitumen, which did not change the nature of transaction: import from outside the state and sale of bitumen to the awarder was, exclusively, outside the scope of the works contracts' award to the respondent assessee. Therefore, there was no division of works contract awarded to it in the assessment order dated 03-03-2008 as mentioned above. He submitted that there was no ground for rectification of the impugned order of the Board dated 31.07.2012, because it thoroughly discussed the issue of the bitumen sale against which the assessee got payment separately.

11. After hearing both the parties to the issue, the bench is of the opinion that It would be imperative to look into the decision of the Apex Court in the case of ACTO v. M/s Makkad Plastic Agency reported in TUD, vol 29, p-253, which is a benchmark to decide scope and nature of rectification under section 37 of the Rajasthan Sales Tax Act 1994, akin to section 33 of the VAT Act, and 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.
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> " 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"

"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.

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

and quashed and the original order passed by the Assessing Officer is restored.

12. On premise of the aforesaid landmark judgment of the Apex Court, it becomes crystal clear that the scope of section 37 of the Rajasthan Sales Tax Act,1994 cannot be stretched to the farthest limit of altering the basic construction of the appeal order under rectification, primarily because section 37 of the RST Act in its complete domain is not purportedly created for basically changing an order already passed; for, it would then 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 break kernel of the impugned order so as not to vitiate its basic theme.

13. In terms of the aforesaid analysis of facts and law points involved, the rectification appeal of the appellant assessee is dismissed.

14. Order pronounced.

(SUNIL SHARMA)
MEMBER

राजस्थान कर बोर्ड, अजमेर

संशोधन प्रार्थना पत्र संख्या 28/2012/भीलवाडा

मैसर्स अनिल प्रकाश सोनी
भीलवाडा — अपीलार्थी

बनाम

वाणिज्यिक कर अधिकारी
वृत–बी,कोटा — प्रत्यर्थी

एकलपीठ
श्री सुनील शर्मा,सदस्य

उपस्थितः
श्री एम.पी. शर्मा
अभिभाषक — अपीलार्थी की ओर से
श्री एन.एस.राठौड
उप राजकीय अभिभाषक — प्रत्यर्थी की ओर से

निर्णय दिनांक 27.06.2014

निर्णय

यह संशोधन प्रार्थना पत्र राजस्थान कर बोर्ड द्वारा अपील संख्या 607/2011/भीलवाडा में पारित निर्णय 31.08.2012 में संशोधन हेतु प्रस्तुत किया गया है।

प्रकरण के तथ्य संक्षेप में इस प्रकार हैं कि अपीलार्थी कान्ट्रेक्टर है और ठेका में कार्य लेकर कार्य निष्पादित करता है। अपीलार्थी व्यवहारी का वर्ष 2003–04 का कर निर्धारण आदेश राजस्थान विक्रय कर अधिनियम,1994 (जिसे आगे अधिनियम कहा जायेगा) की धारा 29 के अन्तर्गत दिनांक 31.3.2006 को वाणिज्यिक कर अधिकारी, वर्क्स कान्ट्रेक्ट एण्ड लीजिंग टैक्स, भीलवाडा (जिसे आगे कर निर्धारण अधिकारी कहा जायेगा) द्वारा पारित किया। व्यवहारी द्वारा उप महाप्रबन्धक,रीको लिमिटैड, भीलवाडा द्वारा अवार्डड संविदा कार्य में कल्वर्ट, नाली आदि का निर्माण कार्य किया था, जिसके तहत अपीलार्थी को संविदा कार्य से प्राप्त कुल प्राप्ति राशि पर डेढ प्रतिशत की दर से मुक्ति शुल्क रू. 51,427/–निर्धारित किया गया। कान्ट्रेक्टर व्यवहारी से कर स्त्रोत पर अवार्डर उप महाप्रबन्धक,रीको लिमिटैड,भीलवाडा ने रू. 59,142/–जरिए एस टी 28 नम्बर 090136 वसूल की। इसके अतिरिक्त व्यवहारी अपीलार्थी ने मैसर्स रीको भीलवाड को बिटुमिन सप्लाई भी किया था, जिसके विरूद्ध प्राप्त भुगतान राशि पर उसने देय कर रू. 46,956/–एवं रू .76,430/–क्रमशः दिनांक 05.02.2004 एवं दिनांक 16.04. 2004 को राजकोष में जरिए चालान जमा करवाये। उक्त कार्य करने हेतु विभाग के समक्ष कर मुक्ति शुल्क का विकल्प लिया गया ,जिसके लिए व्यवहारी अपीलार्थी ने विभाग में नियमानुसार Undertaking प्रस्तुत की । अवार्डर ने भी Undertaking के आधार पर स्त्रोत पर मुक्ति शुल्क की कटौती की । कर निर्धारण अधिकारी ने राजस्थान बिक्री कर नियम 1995 (जिसे आगे नियम कहा जायेगा) के नियम 12(4) के तहत अण्डरटेकिंग के कार्यो में प्राप्त कुल राशि रू. 34,28,460/–पर डेढ प्रतिशत की दर से मुक्ति शुल्क एवं उस पर देय सरचार्ज आरोपित किया। व्यवहारी अपीलार्थी ने

आयात किये गये बिटुमिन की राशि में से रू. 8,77,449/–का बिटुमिन मैसर्स रीको लिमिटैड, भीलवाडा को विक्रय करना दर्शाया, जिस पर कर निर्धारण अधिकारी ने 12 प्रतिशत की दर से कर एवं उस पर 15 प्रतिशत से सरचार्ज, कुल रू. 1,21,088/–का करारोपण किया। कर निर्धारण अधिकारी द्वारा किये गये उक्त करारोपण से क्षुब्ध होकर अपीलार्थी व्यवहारी ने अपीलीय अधिकारी के समक्ष अपील पेश की, जिसमें उन्होंने निर्णय दिनांक 13.11.2007 पारित कर ठेकेदार द्वारा बिटुमिन सप्लाई पर चुकाये गये कर के सम्बन्ध में जांच कर पुनः निर्णय करने हेतु प्रतिप्रेषित किया। परन्तु उक्त कर निर्धारण आदेश में Undertaking के आधार पर सृजित मांग रू. 57,427/– एवं रू. 1,21,088/–को कायम रखा। उपरोक्त प्रतिप्रेषित आदेश की पालना में कर निर्धारण अधिकारी ने पुनः कर निर्धारण आदेश दिनांक 26.11.2009 पारित किया, जिसमें यह अवधारित किया कि नियम 12(ए)(बी) के अवलोकन से स्पष्ट है कि मुक्ति शुल्क का विकल्प लेने के बाद ठेकेदार का अन्डरटेकिंग के संविदा कार्यो से प्राप्त अपनी समस्त राशियों पर कर मुक्ति शुल्क जमा कराने का दायित्व है। अतः इस सन्दर्भ में व्यवहारी द्वारा राज्य के बाहर/राज्य के तहत से खरीदे गये संविदा कार्य से सम्बन्धित माल पर अण्डरटेकिंग के आधार पर जमा कराये गये मुक्ति शुल्क भुगतान में से तथा संविदा कार्यो में प्रयुक्त मजदूरी पर मुक्ति शुल्क से छूट प्राप्त करने का अधिकारी नहीं है। कर निर्धारण अधिकारी के उक्त आदेश से क्षुब्ध होकर अपीलार्थी व्यवहारी ने विद्वान अपीलीय अधिकारी के समक्ष पुनः अपील प्रस्तुत की। अपीलीय अधिकारी ने आदेश दिनांक 31.1.2011 पारित कर कर निर्धारण अधिकारी के आदेश से सहमति व्यक्त करते हुए अपीलार्थी व्यवहारी की अपील अस्वीकार कर दी, जिससे क्षुब्ध होकर अपीलार्थी व्यवहारी ने राजस्थान कर बोर्ड में अपील प्रस्तुत की गई,जिस पर उभय पक्ष की पक्ष बहस सुनी जाकर गुणावगुण पर विचार करने के पश्चात अपीलार्थी व्यवहारी की अपील अस्वीकार की गई है, जिसमें संशोधन हेतु प्रार्थना पत्र प्रस्तुत किया गया है।

अपीलार्थी की ओर से विद्वान अभिभाषक ने माननीय राजस्थान उच्च न्यायालय द्वारा सहायक आयुक्त, विशेष वृत,उदयपुर बनाम मैसर्स एच.ई.जी.लिमिटेड, रिषव टैक्सटाईल्स,रिषवदेव, उदयपुर 23 टैक्स अपडेट पेज 22 में प्रतिपादित सिद्धान्त को उद्धरित करते हुए कर बोर्ड द्वारा पारित निर्णय में संशोधन करने का निवेदन किया। उन्होंने राजस्थान बिक्री कर अधिनियम,1994(जिसे आगे अधिनियम कहा जायेगा) की धारा 15 का हवाला देते हुए कथन किया कि संविदा कार्य में निष्पादित माल को कर मुक्त किया गया है अतः संविदा कार्य में निष्पादित माल पर ही कर मुक्ति शुल्क निर्धारित की जा सकती है एवं संविदा कार्य में निष्पादित माल के अतिरिक्त मजदूरी व अन्य खर्चे,जिन पर अधिनियम में निहित प्रावधानों के अन्तर्गत कोई कर देयता नही करने के कारण अधिनियम की धारा 15 के अन्तर्गत कर मुक्ति शुल्क निर्धारित नहीं

किया जा सकता है। उन्होंने अपने उक्त कथन के समर्थन में माननीय कर्नाटक उच्च न्यायालय द्वारा (1999)114 एस टी सी 265 में प्रतिपादित सिद्धान्त को उद्धरित किया। उन्होंने बताया कि कि अधिनियम की धारा 2 (38) में "विक्रय" धारा 2(42) में कर योग्य आवर्त को परिभाषित किया गया है तथा विक्रय करा नियम,1995 के नियम 25 (2) के अन्तर्गत संविदा कार्य में कर योग्य आवर्त को निर्धारित करने के लिए संविदा कार्य में निष्पादन में मजदूरी की राशि को कुल आवर्त में कम किये जाने का प्रावधान है। उनका कथन है कि माननीय राजस्थान उच्च न्यायालय ने वाणिज्यिक कर अधिकारी बनाम ब्रिज कन्सट्रक्शन्स एवं इन्जीनियर्स (2010) 029 वी एस टी 062 में निर्णय देते हुए यह सिद्धान्त प्रतिपादित किया है कि राज्य के बाहर से आयात की जाकर डामर का निष्पादन संविदा कार्य में होने पर ऐसी डामर पर कर मुक्ति शुल्क ही निर्धारित किया जाना चाहिए न कि डामर की दर से। उन्होंने रीको लिमिटेड का उक्त संविदा कार्य ई.सी. के तहत हुआ है अतः रीको लिमिटेड से उक्त प्राप्त राशि पर माननीय राजसथान उच्च न्यायालय ने उक्त निर्णय के परिप्रेक्ष्य में कर मुक्ति शुल्क 1. 5 प्रतिशत से रू. 13268/–ही आरोपण योग्य होने का कथन के साथ ही साथ शेश राशि रू. 107820/–अपास्त करने का अनुरोध किया। विद्वान अभिभाषक ने उक्त कथन के आधार पर कर बोर्ड द्वारा पारित निर्णय दिनांक 31.08.2012 में संशोधन हेतु प्रस्तुत आधारों के आधार संशोधन करने का निवेदन किया।

प्रत्यर्थी की ओर से विद्वान उप राजकीय अभिभाषक ने कथन किया कि अधिनियम की धारा 37 के अन्तर्गत उन्हीं भूलों का संशोधन किया जा सकता है, जो रिकार्ड से परिलक्षित होती हों। उनका कथन है कि अपीलार्थी के विद्वान अभिभाषक ने ऐसी कोई भूल नहीं बतायी गई है, जो रिकार्ड से परिलक्षित होती हो। उनका यह भी कथन है कि सचेतन मस्तिष्क से पारित किये गये निर्णय में संशोधन हेतु वादविवाद नहीं किया जा सकता है। उन्होंने अपने कथन के समर्थन में माननीय उच्चतम न्यायालय द्वारा सहायक वाणिज्यिक कर अधिकारी बनाम मक्कड प्लास्टिक एजेन्सी (टैक्स अप डेट 29 पेज 353) को उद्धरित कर प्रस्तुत संशोधन प्रार्थना खारिज किये जाने का निवेदन किया।

उभय पक्षों की बहस सुनी गयी तथा उपलब्ध रिकार्ड का अवलोकन किया गया। अपीलीार्थी की ओर से उद्धृत किये गये न्यायिक दृष्टान्तों का ससम्मान अध्ययन किया गया। अपीलार्थी के विद्वान अभिभाषक द्वारा माननीय राजस्थान उच्च न्यायालय ने वाणिज्यिक कर अधिकारी बनाम ब्रिज कन्सट्रक्शन्स एवं इन्जीनियर्स (2010) 029 वी एस टी 062 को उद्धरित किया है,जिसमें माननीय उच्च न्यायालय द्वारा दिनांक 22.04.2009 को निर्णय पारित किया है,जिसका सारगर्भित अंश निम्न प्रकार है :–

"....Since the works contract in its entirely is covered by the exemption certificate issued by the the competent authority to the respondent-assessee, the assessing authority could not have obviously imposed tax under section 5A of the RST act treating

the same as the purchases from unregistered dealers made within the State of Rajasthan...."

कर बोर्ड की एकलपीठ द्वारा विधिक प्रावधानों एवं प्रकरण के तथ्यों को ध्यानमें रखते हुए संचेतन मस्तिष्क का प्रयोग करते हुए निम्न निर्णय दिया है :—

"अपीलार्थी व्यवहारी द्वारा राज्य के बाहर से आयातित बिटूमिन में से रू. 8,77,449/— का बिटूमिन उप महाप्रबन्धक,रीको लिमिटैड, भीलवाडा को विक्रय करना दर्शाया है, जिस पर अधिनियम के तहत 12 प्रतिशत से कर एवं सरचार्ज 15 प्रतिशत से आरोपित किया गया, जिसके पेटे व्यवहारी ने पूर्व में रू. नगद चालान रू. 1,23,296/—से राजकोष में जमा कराया है । और अवार्डर उप महाप्रबन्धक,रीको लिमिटैड, भीलवाडा की भुगतान सूची में (अन्डरटेकिंग के आधार पर रू. 34,88,460/—के संविदा कार्य के अतिरिक्त) नीचे पृथक से रू. 8,77,449/—का भुगतान बिटूमिन की कीमत का किया जाना दर्शाया है। अपीलार्थी व्यवहारी ने उक्त बिटूमिन की अवार्डर को की गई बिक्री पर कर नियमानुसार जरिए चालान राजकोष में जमा करा दिया है,जिसका समायोजन मूल कर निर्धारण आदेश दिनांक 31.07.2006 को दे भी दिया गया है। अपीलार्थी व्यवहारी के विद्वान अभिभाषक ने पुरजोर तर्क देते हुए उक्त बिटुमिन सप्लाई की भुगतान राशि पर डेढ प्रतिशत से रू. 13,268/— आरोपण योग्य होना बताया है तथा बिटुमिन सप्लाई पर शेष आरोपित कर राशि रू. 1,07,020/— को अपास्त करने की दलील दी । उक्त प्रकरण के समग्र तथ्यों की विवेचना एवं निहित विधिक बिन्दुओं के परिप्रेक्ष्य में बिटूमिन की बिक्री राशि पर मूल कर निर्धारण आदेश में 12 प्रतिशत से कर एवं 15 प्रतिशत से सरचार्ज आरोपण विधिसम्मत् है क्योंकि उक्त राशि बिटूमिन की खरीद के पेटे दी गयी थी, जो कि अण्डरटेकिंग में उल्लेखित संविदा कार्य से सम्बन्धित नहीं थी।

अपीलार्थी व्यवहारी ने अवार्डर को बिटूमिन की सप्लाई पर टी डी एस से कटौती नही की है, और ना ही इस सन्दर्भ में कोई एस टी 28 जारी किया है, जो यह प्रदर्शित करता है कि अवार्डर ने भी बिटूमिन की सप्लाई को संविदा कार्य नहीं माना है, क्योंकि उक्त बिटूमिन खरीद UNDERTAKING में वर्णित संविदा कार्य का हिस्सा नहीं है। **अतः अवार्डर को की गई बिटुमिन की पृथक सप्लाई को अण्डरटेकिंग की परिधि में लाकर मुक्ति शुल्क आरोपित किया जाना विधिसम्मत नहीं होगा । अतः इस बिन्दु पर व्यवहारी की अपील निरस्त की जाती है।"**

संशोधन प्रार्थना पत्र की सुनवाई के समय प्रस्तुत बहस प्रस्तुत किये गये न्यायिक दृष्टान्तों के परिप्रेक्ष्य में अधिनियम की धारा 37 के अन्तर्गत उन्हीं भूलों का संशोधन किया जा सकता है, जो रिकार्ड से परिलक्षित होती हों । उक्त तथ्यों के निर्वचन हेतु अधिनियम की धारा 37 को उद्धरित किया जाना समीचीन होगा :—

"37. Rectification of a mistake -(1) With a view to rectifying any mistake apparent from the record,any officer appointed or any auhtority constituted under the Act rectify suo motu or otherwise any order passed by him.

Explanation- A mistake apparent from the record shall inculde an order which was valid when it was made and is subsequenctly rendered in valid by anamendment of the law having retrospective operation or by a judgment of the Supreme Court, the Rajasthan High Court or the Rajasthan Tax Board.

उपरोक्त अधिनियम की धारा 37 के प्रावधानों से स्पष्ट है कि उक्त धारान्तर्गत उन्हीं भूल को संशोधित किया जा सकता है जो रिकार्ड से परिलक्षित होती हों । कर बोर्ड की एकलपील पारित द्वारा निर्णय दिनांक 31.08.3012 में रिकार्ड से कोई भूल परिलक्षित नही होती है।

प्रत्यर्थी की ओर से माननीय उच्चतम न्यायालय द्वारा सहायक वाणिज्यिक कर अधिकारी बनाम मक्कड प्लास्टिक एजेन्सी (टैक्स अप डेट 29 पेज 353) को उद्धरित कर कथन किया गया कि उक्त प्रकरण में मत प्रतिपादित किया गया है कि चेतन मस्तिष्क के पारित किये गये निर्णय में संशोधन किया जाना उचित नहीं है, जिसका सारगर्भित अंश उद्धरित किया जाना समीचीन है :–

"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:-

"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 enquiry 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. 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.

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. 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."

माननीय उच्चतम न्यायालय द्वारा प्रतिपादित उपरोक्त सिद्धान्त के आलोक में चैतन्य मस्तिष्क से पारित किये गये आदेश को इस स्तर पर विधिक रूप से संशोधित नही जा सकता है। कर बोर्ड की एकलपीठ द्वारा प्रकरण के तथ्यों का विस्तृत विवेचन करने के पश्चात संचतेन मस्तिष्क से निर्णय दिनांक 31.08.2012 पारित किया है,जिसमें उक्त निर्णय में प्रतिपादित सिद्धान्त के आधार पर संशोधन किये जाने का औचित्य नजर नही आती है।

उपरोक्त विवेचित तथ्यों के आधार पर अपीलार्थी की ओर से प्रस्तुत किया गया संशोधन प्रार्थना पत्र स्वीकार योग्य नहीं होने से अस्वीकार किया जाता है।

निर्णय सुनाया गया।

(सुनील शर्मा)
सदस्य