A COMMISSIONER OF CENTRAL EXCISE, BELAPUR, MUMBAI

v.

RDC CONCRETE (INDIA) P. LTD.

(Civil Appeal No. 4409 of 201)

B AUGUST 9, 2011

[DR. MUKUNDAKAM SHARMA AND ANIL R. DAVE, JJ.]

C *Central Excise Act, 1944 – s. 35C(2) – Application under – For rectification of mistake – Power of appellate tribunal – Held: Re-appreciation of evidence on a debatable point cannot be said to be rectification of mistake apparent on record – Mistake apparent on record must be an obvious and* D *patent mistake – It cannot be something which can be established by a long drawn process of reasoning on points on which there may conceivably be two opinions – Decision on a debatable point of law cannot be a mistake apparent from the record – On facts, the appellate Tribunal exceeded* E *the powers given to it u/s. 35C(2) of the Act, and tried to re-appreciate the evidence and reconsider its legal view taken earlier in pursuance of a rectification application, which it could not have done so – Thus, the order passed in pursuance of the rectification application is bad in law and, is* F *quashed and set aside.*

Respondent-Company is engaged in the manufacturing of pavers. According to appellant-Revenue Department, the respondent sold its excisable goods to a related person or an inter-connected G **undertaking at a particular price and immediately thereafter, the inter-connected company had sold the very same goods at much higher price to another company, for the purpose of evasion of excise duty. A Cost Accountant was appointed to ascertain value of the**

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goods manufactured by the respondent. Thereafter, the Department raised demand for excise duty together with interest and equivalent amount of penalty. The respondent challenged the same. In the appeal filed by the respondent, the CESTAT upheld the demand of duty with interest and penalty. However, certain amount of penalty was set aside. The respondent filed an application for rectification of the said order under Section 35C(2) of the Central Excise Act, 1944. CESTAT modified the original final order to such an extent that the entire demand of duty was quashed and set aside as also the penalty imposed upon the respondent-Company and the Directors of the Company was set aside. CESTAT also accepted the submission raised by the respondent that an employee of the Department who was not in practice as a Cost Accountant, could not have been appointed to ascertain the value of the goods manufactured by the respondent (which was raised in the appeal but was not accepted by the CESTAT earlier) and did not accept the valuation arrived at by the Cost Accountant and the order was modified. Therefore, the appellant-Revenue Department filed the instant appeal.

Allowing the appeal, the Court

HELD: 1.1 A mistake apparent on record must be an obvious and patent mistake. A "mistake apparent from the record" cannot be something which can be established by a long drawn process of reasoning on points on which there may conceivably be two opinions. A decision on a debatable point of law cannot be a mistake apparent from the record. [Paras 16 and 21] [992-D-E; 999-G-H; 995-A-B]

T.S. Balram v. M/s.Volkart Brothers 82 ITR 50; *ITO v. Ashok Textiles* 41 ITR 732 – referred to.

1.2 If one looks at the subsequent order passed by

A the CESTAT in pursuance of the rectification application, it is very clear that the CESTAT re-appreciated the evidence and came to a different conclusion than the earlier one. At an earlier point of time, the CESTAT came to a conclusion that the company to which the B respondent-assessee sold its goods was an inter-connected company. In the circumstances, according to the CESTAT, the decision of the department to appoint a Cost Accountant to ascertain value of the goods manufactured by the asessee was considered to be just C and proper. However, after considering the submissions made in pursuance of the rectification application, the CESTAT came to a different conclusion to the effect that the asessee company and the buyer of the goods were not inter-connected companies. Different conclusions D were arrived at by the CESTAT because it re-appreciated the evidence in relation to common directors among the companies and *inter se* holding of shares by the companies. Re-appreciation of evidence on a debatable point cannot be said to be rectification of mistake E apparent on record. [Para 16] [992-D-H; 993-A]

1.3 In pursuance of the rectifying application, the CESTAT came to the conclusion that an officer of the department, who was working as Assistant Director (Cost) and was also a Member of an Institute of Cost and F Works Accountants was not competent as a Cost Accountant to ascertain value of the goods. It is strange as to why the CESTAT came to the conclusion that it was necessary that the person appointed as a Cost Accountant should be in practice. There is no reason as G to how the CESTAT came to the conclusion that the Cost Accountant, whose services were availed by the department should not have been engaged because he was an employee of the department and he was not in practice. The said facts clearly show that the CESTAT

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took a different view in pursuance of the rectification application. The submissions which were made before the CESTAT by the respondent while arguing the rectification application were also advanced before the CESTAT when the appeal was heard at an earlier stage. The arguments not accepted at an earlier point of time were accepted by the CESTAT after hearing the rectification application. It is strange as to how a particular decision taken by the CESTAT after considering all the relevant facts and submissions made on behalf of the parties was changed by the CESTAT. There was no mistake apparent on record when the CESTAT did not accept a submission of the respondent to the effect that the officer appointed to value the goods manufactured by asessee should not have been engaged as a Cost Accountant. [Para 17] [993-B-G]

Saci Allied Products Ltd. v. Commissioner of C. Ex., Meerut **2005(183) E.L.T 225 (S.C.);** *Commissioner of Central Excise,Mumbai v. Bharat Bijlee Limited* **2006 (198) ELT 489;** *Honda Siel Power Products Ltd. v. Commissioner of Income Tax, Delhi* **2008(221) E.L.T 11 (S.C.) – referred to.**

1.4 Upon perusal of both the orders viz. earlier order dated 4th November, 2008 and order dated 23rd November, 2009 passed in pursuance of the rectification application, the CESTAT exceeded its powers given to it under the provisions of Section 35C(2) of the Central Excise Act, 1944 and it tried to re-appreciate the evidence and it reconsidered its legal view taken earlier in pursuance of a rectification application. The CESTAT could not have done so while exercising its powers under Section 35C(2) of the Act, and, therefore, the impugned order passed in pursuance of the rectification application is bad in law and, therefore, the said order is quashed and set aside. [Paras 16, 22] [992-C; 995-C]

Commissioner of Central Excise, Calcutta v. Ascu Ltd.

A *Calcutta* **2003 (9) SCC 230;** *Commissioner of Central Excise, Vadodara v. Steelco Gujarat Ltd.* **2003(12) SCC 731;** *Deva Metal Powders Pvt. Ltd. v. Commissioner, Trade Tax,* ***U.P.*** **2008 (221) E.L.T 16;** *Mepco Industries Limited, Madurai v. Commissioner of Income Tax and Anr.* **2010 (1) SCC 434:**
B **2009 (15) SCR 1026 – cited.**

Case Law Reference:

2003 (9) SCC 230	**Cited**	**Para 13**
2003(12) SCC 731	**Cited**	**Para 13**
2008 (221) E.L.T 16	**Cited**	**Para 13**
2009 (15) SCR 1026	**Cited**	**Para 13**
82 ITR 50	**Referred to**	**Para 16, 21**
2005(183) E.L.T 225 (S.C.)	**Referred to**	**Para 18**
2006 (198) ELT 489	**Referred to**	**Para 19**
2008(221) E.L.T 11 (S.C.)	**Referred to**	**Para 20**
41 ITR 732	**Referred to**	**Para 21**

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CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4409 of 2010.

F From the Judgment and Order dated 23.11.2009 of the Customs, Excise & Service Tax Appellate Tribunal, West Zonal Bench at Mumbai in Appeal No. E/2032/06.

B. Bhattacharya, ASG, Harish Chandra, B. Tamta, Ajay Singh, Judy James, Nimisha Swarup and B. Krishna Prasad G for the Appellant.

Arshad Hidayatullah, Shailaja Kher, P.K. Ram, P.N. Srivastava and Rajesh Kumar for the Respondent.

The Judgment of the Court was delivered by

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ANIL R. DAVE, J. 1. Being aggrieved by the Order dated 23rd November, 2009, passed in Appeal No.E/2032/06-Mum. by the Customs, Excise & Service Tax Appellate Tribunal (CESTAT), West Zonal Bench at Mumbai, this appeal has been filed by the Revenue – Commissioner of Central Excise, Belapur, Mumbai.

2. By virtue of the impugned order, the CESTAT has rectified its Order dated 4th November, 2008 passed in Appeal No.E-2032-2033/06 in pursuance of an application for rectification filed by the present respondent-assessee under Section 35C(2) of the Central Excise Act, 1944 (hereinafter referred to as 'the Act').

It is the case of the appellant that the aforestated final order dated 4th November, 2008 passed by the CESTAT has been rectified in pursuance of the application filed by the respondent herein. The case of the appellant, in this appeal, is that under the garb of rectification, the CESTAT has modified its order dated 4th November, 2008 in such a way as if the respondent asessee had filed an appeal against the said order and the CESTAT has virtually allowed the appeal against its own order.

3. Mr. B. Bhattacharya, learned Additional Solicitor General, appearing for the Revenue submitted that the CESTAT has limited power to rectify its mistake under the provision of Section 35C(2) of the Act. The relevant portion of the said section reads as under:

> "35C(2) - The Appellate Tribunal may, at any time within six months from the date of the order, with a view to rectifying any mistake apparent from the record, amend any order passed by it under sub-section (1) and shall make such amendments if the mistake is brought to its notice by the Commissioner of Central Excise or the other party to the appeal....."

The learned counsel submitted that as per the language of the

A aforestated sub-section, it is clear that the Appellate Tribunal, i.e. the CESTAT has power to rectify any mistake which is apparent from the record of any order passed by it under Section 35C(1) of the Act. The learned counsel submitted that the CESTAT had passed final order dated 4th November, 2008 B in an appeal filed before it by the respondent. By virtue of the final order passed in the said appeal filed by the respondent, the CESTAT had upheld the demand of duty of Rs.90,89,480.56 together with interest and equivalent penalty of Rs.90,89,480.56 but the order imposing penalty of C Rs.25,00,000/- had been set aside. Moreover, the penalty imposed upon Shri Sanjay Bahadur had been reduced to Rs.1,00,000/-.

4. In pursuance of the application submitted by the respondent for rectification, the CESTAT modified the original D final order to such an extent that the entire demand of duty has been quashed and set aside and as a consequence thereof the penalty imposed upon the respondent company and upon the Directors of the company has also been set aside.

E 5. The learned counsel appearing for the Revenue submitted that in pursuance of the rectification application, the CESTAT has not only substantially changed its order but has also changed its legal view on the subject. According to him, while rectifying any order, the CESTAT can rectify any mistake F which is apparent from the record. Under the guise of rectification, the CESTAT cannot altogether take a different view in law and it cannot reappreciate evidence which had been led before it.

6. He further submitted that the CESTAT has practically G reviewed its order though it has no power to review its order and, therefore, it was not open to the CESTAT to review the decision rendered by it on 4th November, 2008. He further submitted that no judicial or quasi judicial authority has power to review its order unless the statute gives such a power.

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7. Coming to details, as to how the CESTAT exceeded its jurisdiction, the learned counsel narrated the facts in a nutshell. He submitted that the respondent-company is a manufacturer of 'Unipaved Interlocking Concrete Blocks' (pavers), being excisable goods falling under chapter 68 of the First Schedule to the Central Excise Tariff Act, 1985. In pursuance of specific information received by the Department of Central Excise with regard to evasion of duty by the respondent, officers of the Head Quarters (Preventive) Wing had given a surprise visit to the factory premises of the respondent on 13th February, 2002 and had checked the company's record and recorded statements of its officers. In pursuance of investigation, it was found that the pavers manufactured by the respondent were valued by the respondent at Rs.250/- per sq. mtr. and accordingly excise duty was paid thereon. The said pavers were sold by the respondent to a related person or its inter-connected company – M/s. Unitech Ltd. (UTL) for Rs.531/- per sq. mtr. and thereafter UTL was selling the same for Rs.826.50 per sq. mtr. to Senorita Builders Pvt. Ltd. Thus, according to the learned counsel, the goods manufactured by the respondent were shown at a substantially low value only for the purpose of evasion of excise duty.

8. In the aforestated circumstances, a Cost Accountant was appointed to ascertain value of the goods manufactured by the respondent. The Assistant Director (Cost) of the Excise Department, who was a Cost Accountant, was appointed, though he was in service of the Department. An objection was raised by the respondent before the CESTAT at the time of hearing of the appeal referred to hereinabove that an employee of the Department, who was not in practice as a Cost Accountant, could not have been appointed to ascertain value of the goods manufactured by the respondent.

9. The aforestated objection raised by the respondent was duly considered by the CESTAT and was rejected for the reason that the Act or Rules made thereunder nowhere provides

A that only a Cost Accountant, who is in practice should be appointed to ascertain value of the goods, when the Revenue feels that the value of the goods shown by the concerned manufacturer is required to be ascertained. In pursuance of the rectification application, the CESTAT had heard the matter B again and a similar objection was raised by the respondent in the rectification application. Once again it was submitted before the CESTAT that an officer of the department, though a Member of the Institute of Cost and Works Accountants of India, could not have been entrusted with the work of ascertaining the value C of the goods because the person so appointed was in service of the department and was not in practice. The learned counsel submitted that after hearing the rectification application, the CESTAT accepted the aforesaid submission (which had not been accepted by the CESTAT earlier) and the valuation D arrived at by the Cost Accountant was not accepted by the CESTAT and accordingly the order was modified.

10. The learned counsel for the Revenue submitted that the CESTAT could not have changed its view as stated above because what was permissible to the CESTAT was only E rectification of a mistake, if found apparent from the record. The interpretation with regard to the provision relating to the appointment of the Cost Accountant, which the CESTAT had accepted at an earlier point of time could not have been changed by the CESTAT while deciding the rectification F application because by changing the legal view, the CESTAT was not rectifying any mistake apparent from the record but the CESTAT was changing its view altogether, which is not permissible under the provision of Section 35C (2) of the Act.

G 11. Similarly, the learned counsel further submitted that the CESTAT had earlier arrived at a finding that the respondent company had sold its excisable goods to a related person or an inter-connected undertaking at a particular price and immediately thereafter the inter-connected company had sold the very same goods at much higher price to another company. H

The CESTAT had earlier come to a conclusion that it was nothing but an attempt to evade duty and subsequently, in pursuance of the rectification application, the CESTAT took altogether a different view whereby it came to the conclusion that the company with which the respondent-assessee had dealings, was in no way inter-connected. Thus, the facts which had been ascertained at an earlier point of time were found to be incorrect or the CESTAT had reappreciated evidence while deciding the rectifying application.

12. According to the learned counsel, the CESTAT should not have re-appreciated the evidence so as to come to a different conclusion while exercising its power under Section 35C(2) of the Act.

13. The learned counsel relied upon judgments of this Court in *Commissioner of Central Excise, Calcutta v. Ascu Ltd., Calcutta* 2003(9) SCC 230, *Commissioner of Central Excise, Vadodara v. Steelco Gujarat Ltd.* 2003(12) SCC 731, *Deva Metal Powders Pvt. Ltd. v. Commissioner, Trade Tax, U.P.* 2008(221) E.L.T 16 and *Mepco Industries Limited, Madurai v. Commissioner of Income Tax and Another* 2010(1) SCC 434.

14. On the other hand, the learned counsel for the respondent-assessee submitted that it was open to the CESTAT to change its view because it apparently noted its mistakes which had been committed while passing its earlier order dated 4th November, 2008. The counsel further submitted that the view expressed by this Court in the judgments referred to by the learned counsel appearing for the appellant had been subsequently changed in the judgments delivered in cases of *Commissioner of Central Excise, Mumbai v. Bharat Bijlee Limited,* 2006 (198) ELT 489, *Honda Siel Power Products Ltd. vs. Commissioner of Income Tax,* Delhi , 2008(221) ELT 11 and of *Saci Allied Products Ltd. v. Commissioner of C. Ex., Meerut,* 2005 (183) ELT 225. Thus, the learned counsel submitted that the CESTAT did not exceed its power and rightly

A rectified the mistakes which were apparent on the record while deciding the rectification application.

15. We heard the learned counsel at length and also considered the judgments cited by them and the orders passed by the CESTAT.

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16. Upon perusal of both the orders viz. earlier order dated 4th November, 2008 and order dated 23rd November, 2009 passed in pursuance of the rectification application, we are of the view that the CESTAT exceeded its powers given to it under C the provisions of Section 35C(2) of the Act. This Court has already laid down law in the case of T.S. Balram v. M/s.Volkart Brothers, 82 ITR 50 to the effect that a "mistake apparent from the record" cannot be something which can be established by a long drawn process of reasoning on points on which there D may conceivably be two opinions. It has been also held that a decision on a debatable point of law cannot be a mistake apparent from the record. If one looks at the subsequent order passed by the CESTAT in pursuance of the rectification application, it is very clear that the CESTAT re-appreciated the E evidence and came to a different conclusion than the earlier one.

At an earlier point of time, the CESTAT came to a conclusion that the company to which the respondent-assessee sold its goods was an inter-connected company. F In the circumstances, according to the CESTAT, the decision of the department to appoint a Cost Accountant to ascertain value of the goods manufactured by the asessee was considered to be just and proper. However, after considering the submissions made in pursuance of G the rectification application, the CESTAT came to a different conclusion to the effect that the asessee company and the buyer of the goods were not inter-connected companies. Different conclusions were arrived at by the CESTAT because it reappreciated the evidence in relation H to common directors among the companies and inter se

holding of shares by the companies. Re-appreciation of evidence on a debatable point cannot be said to be rectification of mistake apparent on record. A

17. Similarly, in pursuance of the rectifying application, the CESTAT came to the conclusion that an officer of the department, who was working as Assistant Director (Cost) and who was also a Member of an Institute of Cost and Works Accountants was not competent as a Cost Accountant to ascertain value of the goods. It is strange as to why the CESTAT came to the conclusion that it was necessary that the person appointed as a Cost Accountant should be in practice. We do not see any reason as to how the CESTAT came to the conclusion that the Cost Accountant, whose services were availed by the department should not have been engaged because he was an employee of the department and he was not in practice. The aforestated facts clearly show that the CESTAT took a different view in pursuance of the rectification application. The submissions which were made before the CESTAT by the respondent-assessee while arguing the rectification application were also advanced before the CESTAT when the appeal was heard at an earlier stage. The arguments not accepted at an earlier point of time were accepted by the CESTAT after hearing the rectification application. It is strange as to how a particular decision taken by the CESTAT after considering all the relevant facts and submissions made on behalf of the parties was changed by the CESTAT. There was no mistake apparent on record when the CESTAT did not accept a submission of the respondent-assessee to the effect that the officer appointed to value the goods manufactured by asessee should not have been engaged as a cost accountant. B C D E F G

18. We are not impressed by the judgments cited by the learned counsel for the respondent. So far as the judgment delivered in the matter of *Saci Allied Products Ltd. v. Commissioner of C. Ex., Meerut,* 2005(183) E.L.T 225 (S.C.) H

A is concerned, it pertains to sale of goods by an asessee to an independent and unrelated dealers and its effect on valuation. The said judgment pertains to a transaction with a related person in the State of U.P., at lower price and as such deals with the facts of that particular case. In our opinion, the said B judgment would not help the respondent so far as the matter pertaining to rectification is concerned.

19. So far as the judgment delivered in *Commissioner of Central Excise, Mumbai v. Bharat Bijlee Limited,* (supra) is C concerned, this Court held therein that when the Tribunal had totally failed to take into consideration something which was on record, the Tribunal had committed a mistake apparent on the face of the record. In the instant case, the evidence which was on record was duly appreciated by the Tribunal at the first instance but the Tribunal made an effort to re-appreciate the D evidence and re-appreciation can never be considered as rectification of a mistake. We are, therefore, of the view that the aforementioned judgment would not help the respondent-assessee.

E 20. So far as judgment delivered in the case of *Honda Siel Power Products Ltd. v. Commissioner of Income Tax, Delhi,* 2008(221) E.L.T 11 (S.C.), is concerned, there also the Tribunal had not considered certain material which was very much on record and thereby it committed a mistake which was F subsequently rectified by considering and appreciating the evidence which had not been considered earlier. As stated hereinabove, in the instant case, the position is absolutely different.

21. This Court has decided in several cases that a mistake G apparent on 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 the case of *T.S. Balram v. M/s. Volkart Brothers* (supra), this Court has already decided that power to rectify a mistake should be exercised when the H 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. Ashok Textiles,* 41 ITR 732 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.

22. For the aforestated reasons, we are of the view that the CESTAT exceeded its powers and it tried to re-appreciate the evidence and it reconsidered its legal view taken earlier in pursuance of a rectification application. In our opinion, the CESTAT could not have done so while exercising its powers under Section 35C(2) of the Act, and, therefore, the impugned order passed in pursuance of the rectification application is bad in law and, therefore, the said order is hereby quashed and set aside. The appeal is allowed with no order as to costs.

N.J. Appeal allowed.