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JUDGMENT SHEET

IN THE LAHORE HIGH COURT, LAHORE

JUDICIAL DEPARTMENT

Sales Tax Reference No.53 of 2017

Commissioner Inland Revenue Versus *M/s Mehran Business International (Pvt) Ltd.*

JUDGMENT

DATE OF HEARING **31.05.2023**

APPLICANT BY **M/s Sultan Mahmood and Shahzad Ahmed Cheema, Advocates**

RESPONDENT BY **Mr. Sumair Saeed Ahmed, Advocate**

RAHEEL KAMRAN, J. – In this reference application under Section 47 of the Sales Tax Act, 1990 ('Act'), the following questions of law were proposed for our opinion which are asserted to have arisen from the order dated 14.12.2016 passed by the Appellate Tribunal Inland Revenue, Lahore ('Tribunal') in Miscellaneous Application No. 373/LB of 2016 in STA No.1051/LB of 2015:-

i. "Whether on the facts and circumstances of the case, in the garb of rectification the learned Appellate Tribunal Inland Revenue has illegally assumed the power of review?

ii. Whether on the facts and in the circumstances of the case, the learned Appellate Tribunal Inland Revenue had the power to amend its order in the name of rectification by deleting the demand which was upheld by the Collector (Appeals)?"

2. Factual background of the case is that show cause notice dated 29.01.2015 was issued to the respondent wherein it was charged with contravention of Sections 3, 6, 7, 8B, 22 and 26 of the Act read with S.R.O. No.647(I)/2007, dated 27.06.2007 as amended. The respondent joined the adjudicating proceedings and the Deputy Commissioner passed the assessment order dated 02.04.2015 creating a demand to pay the sales tax amounting to Rs.12,970,064/- alongwith the default surcharge (to be

calculated at the time of deposit) under Section 34 of the Act alongwith penalty of Rs.6,48,503/- under Section 33(5) of the Act. The respondent preferred an appeal against the aforementioned assessment order, which was dismissed by the Commissioner Inland Revenue (Appeals), vide order in appeal dated 09.06.2015. The respondent, being aggrieved, preferred further appeal before the Tribunal, being STA No.1051/LB/2015, which was dismissed vide order dated 02.06.2016, however, on 30.08.2016 the respondent filed an application for rectification of order dated 02.06.2016 and the Tribunal reversed its order and accepted appeal of the respondent vide order dated 14.12.2016 impugned herein.

3. Learned counsel for the applicant submits that in the facts and circumstances of the case, the Tribunal unlawfully assumed jurisdiction of review in the garb of rectification under Section 57 of the Act and reversed the order dated 02.06.2016 while accepting appeal of the respondent vide impugned order dated 14.12.2016. He maintains that there is a marked distinction between rectification and review inasmuch as the former is confined to correction of any clerical or arithmetical error in the order of assessment or adjudication which is apparent from the face of record whereas review entails reconsideration of the matter on discovery of new facts or patent error of law occurring in the order or judgment sought to be reviewed.

4. Conversely, learned counsel for the respondent has supported the impugned order for the reasons stated therein.

5. We have heard learned counsel for the parties and perused the available record.

6. The subject matter of rectification recently came under consideration of this Court in the case of *Commissioner Inland Revenue vs. Messrs Lahore Rubber Store* **(2023 PTD 182)** wherein it was observed:-

> *"7....Mostly, the application for rectification is moved, after lapse of limitation to file Tax Reference. It is held that rectification jurisdiction cannot be a substitute of Tax Reference, therefore, the Tribunal must check the bona fide by seeking explanation for not filing rectification*

> *application soon after the date of receiving certified copy of the final order.*
>
> *The law intends rectification, of an identified mistake, within the existing final order and not another independent order for different reasons. The Appellate Tribunal must identify the mistake, of law or fact, in accordance with the stipulated guidelines given by the august Supreme Court in National Food Laboratories Case, supra. After recording reasons for the identified mistake, the mistake should be corrected in the original final order, sought to be rectified. On such correction or amendment, if result of the appeal demands change, reasons for changing the result should be recorded separately.*
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> *After exercising original jurisdiction, the Tribunal becomes functus-officio with a little window for rectification of a mistake which in our opinion is an equitable remedy because law favour justice, to ensure that, an apparent and floating mistake, causing injustice, is allowed to be rectified within limitation of five years. Normally, an appealable order attains finality on expiration of limitation for filing the appeal or other remedy. Such a finality, cannot be compromised by filing an application for rectification to manage rehearing or review of the matter. Any injustice, because of an identified mistake, is rectifiable, as envisages in Section 221 of Income Tax Ordinance, 2001 ("Ordinance of 2001"), Section 57 of Sales Tax Act, 1990 ("Act of 1990) and Section 70 of Federal Excise Act, 2005 ("Act of 2005")."*

7. To further explore the nature and scope of jurisdiction qua rectification under Section 57 of the Act in the light of submissions made by learned counsel for the applicant, it would be advantageous to refer to the text of provisions thereof, which are reproduced hereunder:-

> **"Rectification of mistake.**---(1) The officer of Inland Revenue, Commissioner, the Commissioner (Appeals) or the Appellate Tribunal may, by an order in writing, amend any order passed by him to rectify any mistake apparent from the record on his or its own motion or any mistake brought to his or its notice by a taxpayer or, in the case of the Commissioner (Appeals) or the Appellate Tribunal, the Commissioner.
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> (2) No order under sub-section (1) which has the effect of increasing an assessment, reducing a refund or otherwise applying adversely to the taxpayer shall be made unless the taxpayer has been given a reasonable opportunity of being heard.
>
> (3) Where a mistake apparent on the record is brought to the notice of the officer of Inland Revenue, Commissioner

> or Commissioner (Appeals), as the case may be, and no order been made under sub-section (1), before the expiration of the financial year next following the date on which the mistake was brought to their notice, the mistake shall be treated as rectified and all the provisions of this Act shall have effect accordingly.
>
> (4) No order under sub-section (1) shall be made after five years from the date of the order sought to be rectified."

8. Prior to its substitution by the Finance Act, 2013 (XXII of 2013), Section 57 of the Act reads as under:-

> "**Correction of clerical errors, etc.**—Clerical or arithmetical errors in any assessment, adjudication, order or decision may, at any time, be corrected by the officer of Inland Revenue who made the assessment or adjudication or passed such order or decision or by this successor in office.
>
> Provided that before such correction, a notice shall be given to the registered person or to a person affected by such correction."

9. A comparison of the text of provisions of Section 57 of the Act makes it abundantly clear that the scope of rectification, which was previously confined to correction of clerical or arithmetical errors in any assessment, adjudication, order or decision, has been enlarged to rectify any mistake in the order which is apparent from the record. Rectification of mistake in the order may be made by the officer of Inland Revenue, Commissioner, the Commissioner (Appeals) or the Tribunal on his or its own motion or when the same is brought to his or its notice by a taxpayer or, in the case of the Commissioner (Appeals) or the Appellate Tribunal, by the Commissioner. However, the essential condition for the exercise of such power is that the mistake should be apparent from the record i.e. the mistake which may be seen floating on the surface and does not require investigation or further evidence. Any mistake in the order which is not patent and obvious from the record cannot be termed to be rectifiable. Indeed, the power of rectification visualized under Section 57 ibid may not cover a full-fledged review of an order on discovery of new evidence or fresh legal ground becoming available after the decision sought to be corrected. However, the failure to adjudicate upon a substantial plea taken or controversy raised, when materially affects outcome of the case, in our

opinion, does constitute a mistake apparent from the record which is rectifiable under Section 57 of the Act subject to satisfaction of other conditions and limitations specified therein. Needless to observe that a mistake is not rectifiable when the decision sought to be rectified was already assailed in appeal or Tax Reference which merged into the final decision of that higher forum.

10. Adverting now to the facts and circumstances of the instant case, operative part of the order dated 02.06.2016 is to the following effect:-

> *"6…We have noted that according to section 8B(1) adjustment of input tax; a registered person shall not be allowed to adjust input tax in excess of ninety percent of the output tax for that tax period while there seems to be a willful default from the appellant's side and because of it the default surcharge and penalty u/s 34 and 33(5) was charged by the assessing officer. It is pertinent to mention here that the appellant-registered person had himself declared his status as "Distributor" in his monthly sales tax return and owing to this fact obviously has adjusted 10% excess output tax which otherwise he was likely to pay. Further observed that the appellant did not comply with the express provisions of section 8B of the Sales Tax Act. 1990 and in view of this position he could not satisfy the authorities below with his altogether material evidence. Also observed that the case law furnished by the learned counsel for the appellant during the court proceedings are not on all fours to the facts of the appellant's case and as such vividly ignoring the legality of the appellant's case."*

11. It is evident from perusal of Paragraph No.4 of the order dated 02.06.2016 passed by the Tribunal that the respondent raised a categorical plea that 10% unadjusted input tax was available for adjustment in the very next tax period which, being a substantive right of the taxpayer, could not be denied. This being a substantial plea materially affecting outcome of the case i.e. determination of tax liability of the respondent, was required to be adjudicated upon and failure to do so by the Tribunal constituted a mistake obvious and apparent from the record that was rectifiable, which prompted the respondent to file an application on 30.08.2016 for rectification of the order dated 02.06.2016 under section 57 of the Act. It is manifest from perusal of the impugned order dated 14.12.2016 that the rectification application of the respondent has been allowed while recording valid reasons, the operative part whereof is reproduced herein below:-

> *"7. We have perused the case law as well as the copies of the sales tax returns furnished by the appellant. It is clear from the perusal of the returns that even if 10% tax would have been paid, it would have become adjustable in the very next tax period and if, at all the input tax remained unadjusted, it was refundable at the end of the financial year in terms of section 8B of the Sales Tax Act, 1990. Rule 34 of the Sales Tax Rules, 2006 also allows refund of excess input tax paid as a consequence of application of provisions of section 8B of the Act.*
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> *8. Considering these facts, it is apparent that the case law referred by the appellant is on all fours applicable to the case at hand. Apparently, a mistake of fact was made by the Appellate Tribunal while rendering the judgment. It is, therefore, held that it is a case of apparent error and mistake which is floating on the surface. This makes the order rectifiable in nature.*
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> *9. Consequently, it is held that principal amount of tax cannot be recovered from the taxpayer as it will be a case of double taxation, not warranted under the law. The demand on this account is, therefore, annulled. Resultantly, the appeal filed by the taxpayer is accepted and the impugned order passed by the Commissioner Inland Revenue (Appeals-III) is hereby cancelled to the extent of principal amount of tax. However, in the light of the ratio already decided by the Tribunal in STA No.1108/LB/2014, it is held that the appellant is liable to pay default surcharge for the relevant tax period. The penalty is also reduced to Rs.10,000/- (Rupees ten thousand only) in terms of section 33(5) of the Act, being inevitable as the taxpayer has defaulted the provisions of section 8B of the Act."*

12. In the case of *Commissioner Inland Revenue, Multan Vs. Messrs Hafeez Ghee and General Mills (Pvt.) Ltd Multan* **(2020 PTD 2025)** a Division Bench of this Court held as under:-

> *"4.The Appellate Tribunal had reached the conclusion that by adjustment of 100% input tax against output, no loss has been caused to the revenue because the said amount could subsequently be adjusted by the respondent and the taxpayer cannot be deprived of its legitimate right to do so. Furthermore, explanation has been given by the respondent that in Form there are no separate columns for 90% adjustment and 100% adjustment. As major portion of input tax was 100% adjustable therefore, they had sought 100% adjustment of the sales tax. We do not find any illegality in the view taken by the Appellate Tribunal that the respondent was entitled for 100% adjustment. Although procedure prescribed in law has not been followed, at the*

> *most the department can claim penalty for the said lapse...”*

13. Learned counsel for the applicant could not point out any illegality or infirmity in the impugned order. Accordingly, the question No.(i) is answered in negative while question No.(ii) is answered in affirmative i.e. both in favour of the respondent and against the revenue authorities. This Reference Application is ***disposed of*** accordingly.

14. The office shall send a copy of this judgment under seal of the Court to the Appellate Tribunal in compliance with Section 47(5) of the Act.

(ABID AZIZ SHEIKH) ***(RAHEEL KAMRAN)***
JUDGE ***JUDGE***

Approved for reporting

JUDGE ***JUDGE***

****Z.A.Manzoor ****