Before M.M. Kumar & Rajesh Bindal, JJ.

M/S TILAK RAJ, MADAN LAL,—*Petitioner*

versus

STATE OF PUNJAB AND ANOTHER,—*Respondents*

C.W.P. NO. 9937 OF 2005

2nd July, 2007

Constitution of India, 1950—Art. 226—Punjab General Sales Tax Act, 1948—S. 21—A(2) Item No. 65 of Schedule B—Punjab Value Added Tax Act, 2005—Purchase and sale of sugar in packed jute gunny bags (bardana)—Assessing authority holding gunny bags sold with sugar liable to tax—Ist Appellate Court dismissing appeal— Tribunal holding petitioner not liable to pay tax on sale of bardana— State filing rectification application—Tribunal modifying its earlier order while holding that there was an implied condition concerning sale of gunny bags—U/s 21—A(2) Tribunal may only rectify a 'mistake apparent from the record'—Tribunal has no jurisdiction to review its earlier order by entering into detailed analysis—Decision on a debatable point of law is not a mistake apparent from the record— Petition allowed, order allowing State's rectifiction application set aside.

Held, that the controversy was settled by the Tribunal on merit after considering various aspects. However, the Tribunal on 25th February, 2003 by entertaining a rectification application filed by the respondent State, set aside the order dated 30th August, 2000 and substituted the same by a new order dated 25th February, 2003 holding that there was an implied condition concerning sale of gunny bags (Bardana). Once such is the controversy then it cannot be concluded that there was a mistake apparent from the record within the meaning of Section 21-A of the 1948 Act. The Tribunal, in fact, by passing an order on the rectification application has reviewed its earlier order by entering into detailed analysis and has, thus, acted without jurisdiction. It is evident that the Tribunal has not corrected an obvious and patent mistake and, in fact, has entered into a long drawn process of reasoning on points on which there can easily be two opinions. Therefore, a decision on a debtable

point of law is not a mistake apparent from the record and the Tribunal could not have exercised jurisdiction by passing the order dated 25th February, 2003 and refusing to correct that mistake by dismissing the rectfication application of the petitioner,—*vide* order dated 22nd December, 2003.

(Para 15)

Futher held, that the respondent State has misused the process of law by moving rectification application only before the successor Presiding Officer rather than doing the same before the same Officer for the reason best known to it. It is well established that *'bench hunting'* is completely prohibited and no one can choose the Judge for decision of his case. Therefore, we do not appreciate the conduct of the respondent department in resorting to filing of rectification application in such manner.

(Para 15)

Kashmiri Lal Goyal, Advocate and Sandeep Goyal, Advocate, *for the petitioner.*

Amol Rattan Singh, Addl. A.G., Punjab, *for the respondents.*

JUDGEMENT

M.M. KUMAR, J.

(1) The short question raised in this petition filed under Article 226 of the Constitution is whether the Sales Tax Tribunal, Punjab, Chandigarh (for brevity, 'the Tribunal') could have validly exercise its jurisdiction while deciding the rectification application filed under Section 21-A (2) of the Punjab General Sales Tax Act, 1948 (for brevity, 'the 1948 Act'). The petitioner, which is a partnership firm and is engaged in the business of purchase and sale of sugar in packed jute gunny bags (Bardana), has raised the aforementioned issue by challening orders dated 25th February, 2003 (P-8) and 22nd December, 2003 (P-9), passed by the Tribunal. The Tribunal initially,—*vide* its order dated 30th August, 2000 (P-7) had granted relief to the petitioner. However, on rectification application filed by the respondent State, the order dated 30th August, 2000 (P-7) was rectified on 25th February, 2003 (P-8). The rectification application lateron filed by the petitioner was dismissed on 22nd December, 2003 (P-9).

(2) Facts in brief are that the petitioner was registered as a dealer under the provisions of the 1948 Act and has later on been registered under the Punjab Value Added Tax Act, 2005 (for brevity, 'the 2005 Act') after the repeal of 1948 Act. For the year 1989-90, the assessment was framed by the Assistant Excise and Taxation Commissioner-cum-Assessing Authority, Ludhiana-III and a finding was recorded that the gunny bags (bardana) sold with sugar were liable to tax by virtue of amendment in Item No. 65 of Schedule-B of the 1948 Act. The Assessing Authority had placed reliance on a judgment of Hon'ble the Supreme Court rendered in the case of **M/s Jamna Flour Mills (P) Ltd.** *versus* **State of Bihar (1),** wherein it was held that it is a question of fact as to whether an implied agreement to sell the packing material along with product existed in the facts and circumstances of the case. Accordingly, the Assessing Authority ordered addition on the value of gunny bags assessing the same at Rs. 1,51,410 by clarifying that the aforementioned amount is disallowed from the tax free claim of the dealer. The Assessing Authority also imposed penalty under Section 10(6) of the 1948 Act after recording the finding that the dealer had failed to furnish any plausible explanation for his failure to deposit the tax on the sale of gunny bags with sugar. Accordingly, a penalty of Rs. 1,000 under Section 10(6) of the 1948 Act was imposed and interest of Rs. 4,656.50 paise was also calculated.

(3) Feeling aggrieved, the petitioner went in appeal before the Deputy Excise and Taxation Commissioner (Appeals), Patiala Division, Patiala, by raising the plea that neither there is any contract for sale of gunny bags (Bardana) nor any consideration has passed on between the parties. The petitioner submitted that no implied sale could be inferred in the absence of any attending circumstances, especially when the petitioner had purchased sugar packed in jute gunny bags (Bardana) from sugar mills in the State of Punjab. It was argued that gunny bags were liable to be taxed at the first stage and tax, if any, was levy-able on the first seller i.e. sugar mills and the petitioner being the second seller of sugar was not liable to pay any tax. The petitioner had placed reliance on the sample bills dated 20th October, 1993 (P-2), 15th September, 1993 (P-3) and 28th March, 1990 (P-4), to show that no payment in lieu of the sale of gunny bags was made.

(1) (1987) 3 S.C.C. 404

However, the Deputy Excise and Taxation Commissioner (Appeals), Patiala Division, Patiala,—vide his order dated 18th February, 1994 (P-5) upheld the order passed by the Assessing Authority by holding that any dealer dealing exclusively in tax free goods can always claim that he does not fall within the ambit of Sales Tax Act. He further held that Bardana sold with tax free goods like sugar, is re-useable and the same cannot be called a mode of conveyance. As such, the contract for its sale with tax free goods was taken to be implied.

(4) The petitioner appealed to the Tribunal under Section 20 of the 1948 Act (P-6) and it succeeded in persuading the Presiding Officer of the Tribunal about the merit of its claim. The appeal was accepted and the Tribunal,—vide its order dated 30th August, 2000 (P-7) has held as under :—

> ".....The sole issue involved in this case is whether the sale by the appellant of bardana containing the sugar purchased by him from the Jagraon Cooperative Sugar Mills Ltd., Jagraon and the Budhewal Cooperative Sugar Mills Ltd., Budhewal (Ludhiana) (the bills of sales issued by them to the appellant are on this file), is taxable or not. Bardana is taxable only if a person exclusively deals in bardana. Also undisputedly, the sale of bardana is taxable at the first stage. Neither it is the case of respondent that the aforesaid sugar mills are the manufacturers of the bardana nor they are. Therefore, the appellant cannot be deemed to be the first purchaser from the manufacturer of the bardana nor is he liable to pay tax on the sale thereof. In so far as the contention of learned Assistant Advocate General regarding production of declarations in form ST XXII-A, it is not the appellant but the first purchaser(s) who had effected the purchases from the manufacturer(s), who could be required to produce such declarations. Singh the appellant is not liable to pay tax on the sale of bardana, this appeal is accepted and the impugned orders creating and upholding the additional demand are set aside."

(5) The respondent State of Punjab filed a rectification application, being Misc. (Rect) No. 129 of 2002-03, under Section 21-A of the 1948 Act for rectification of the order dated 30th August, 2000, whereby the appeal filed by the petitioner was allowed. The

Tribunal presided over by the different Presiding Officer, allowed the aforementioned rectification application,—*vide* order dated 25th February, 2003 (P-8), holding as under :—

> ".....Keeping in view the legal position enumerated by the counsel for the State, I am inclined to accept the submissions made in the Rectification Application by modifying the order of the Tribunal dated 30th August, 2000 to the extent that the bardana is taxable at the first stage as provided under section 5(1-A) of the Act ibid in the hands of each and every dealer who is liable to pay tax. It is also ordered that the order of the Tribunal that regarding the production of ST-XXII-A that the first purchaser who had effected the purchases from the manafacturer only could be required to produce the declarations stands modified....."

(6) The Tribunal further held that in case the petitioner wanted to obtain the benefit, it was required to furnish declaration in Form ST-XXII-A. However, it is significant to point out that the Tribunal did not take up any other issue raised by the petitioner despite the fact that on earlier occasion those issues were not adjudicated for the simple reason that the petitioner was given full relief. Thereafter, the petitioner made an application for rectification seeking rectification of the order dated 25th February, 2003 (P-8), raising the issue that there was no sale of Bardana, which has been the contention of the petitioner right from the first appellate authority and requesting the Tribunal to adjudicate the issue. It was further submitted that in view of the judgment of Hon'ble the Supreme Court in the case of **J.K. Synthetics Ltd.** *versus* **Commercial Tax Officer (2),** no penalty or interest was leviable. However, the application was dismissed by rejecting the argument raised by the petitioner concerning limitation of two years incorporated under Section 21-A of the 1948 Act and that there was no proof that the selling dealer had charged for the gunny bags (Bardana) separately in the invoices; and that burdern of proof was on the department to show that it was sale which has not been discharged. The other argument that the rectification application filed by the respondent State was signed by the Excise and Taxation Officer alone on behalf of the State of Punjab without any express authority of the State Government was also rejected.

(2) (1994) 94 S.T.C. 422 (S.C.)

(7) Mr. K.L. Goel, learned counsel for the petitioner has argued that the order dated 25th February, 2003, passed by the Tribunal on the rectification application filed by the respondent State is not sustainable in the eyes of law because the successor Presiding Officer of the Tribunal has not exercised the rectification jurisdiction but has entered into merit of the controversy by rehearing the matter and deciding the same afresh. According to the learned counsel the scope of Section 21-A of the 1948 Act cannot be extended to such an extent so as to permit the successor Presiding Officer to reopen the matter, express opinion on the question decided by presuming that it was a mistake apparent on record because if that procedure is permitted then in all the cases the power of the Appellate Tribunal or Revisional Authority would be exercised while deciding the rectification application. In support of his submission, learned counsel has placed reliance of judgments of Hon'ble the Supreme Court in the cases of **T.S. Balaram, L.T.O.** *versus* **Volkart Brothers (3)** and **C.I.T.** *versus* **Hero Cycles Pvt. Ltd., (4)**

(8) Another argument raised by the learned counsel is that whereas issues which were raised before the successor Presiding Officer in the rectification proceedings have not been decided on merit because the petitioner could have argued that no element of sale of gunny bags (Bardana) and the sale of sugar was present in the transaction. According to the learned counsel such a plea was available to the petitioner in view of the judgment of Hon'ble the Supreme Court in the cases of **Hyderabad Deccan Cigarette Factory** *versus* **State of Andhra Pradesh (5) Commissioner of Taxes, Assam** *versus* **Prabhat Marketing Co. Ltd. (6)** and **Raj Steel** *versus* **State of Andhra Pradesh (7).** Learned counsel has also cited Division Bench judgments of Kerala High Court in the cases of **Tushar Trading Co.** *versus* **State of Kerala (8)** and **Mookken Devassy Ouseph & Sons** *versus* **State of Kerala (9).**

(3) (1971) 82 I.T.R. 50
(4) (1997) 228 I.T.R. 463
(5) (1966) XVII S.T.C. 624
(6) (1967) XIX S.T.C. 84
(7) (1989) 3 S.C.C. 262
(8) (1971) XXVIII S.T.C. 214
(9) (1975) 36 S.T.C. 501

(9) Learned counsel has also submitted that if the value of the packing material is compared to the value of its contents it can be inferred that it was insignificant and, therefore, an agreement for sale packing material independently of the contents of the packet could not be implied under the general law. In support of his submission, learned counsel has placed reliance on a judgment of Hon'ble the Supreme Court in the case of **Razack & Co.** *versus* **State of Madras (10).** Mr. K.L. Goyal has emphasised, however, that he does not wish to challenge the order on merit and 'would be' content with the argument concerning jurisdiction of the Tribunal for amendment of the order.

(10) Mr. Amol Rattan Singh, learned State counsel has drawn our attention to Section 5(1-A) of the 1948 Act and argued that the order of the Tribunal on the rectification application filed by the respondent State was consistent with Section 5(1-A), inasmuch as, it has been provided that no sale of goods other than declared goods would be considered exempted from tax under 1948 Act unless the dealer effecting the sale at such subsequent sale furnishes to the Assessing Authority in the prescribed form and in the manner a certificate duly filled in and singed by the registered dealer from whom the goods were purchased. According to the learned State counsel it is for this reason that in the order dated 25th February, 2003 (P-8), the Tribunal has granted permission to the petitioner to submit Form XXII-A, which is the form prescribed. He has also drawn our attention to Rule 29(xi) to buttress his stand based on the proviso appended to Section 5(1-A). He emphasised that in the absence of any such declaration it has to be implied that there was sale of gunny bags (Bardana) as well. Learned counsel has also submitted that as to whether there is element of sale or not is necessarily a question of fact which has to be decided by keeping in view the nature of the transaction and various attending circumstances. According to him in the present case the gunny bags (Bardana) cannot be presumed to have lost its value after first use like any other packaging material, therefore, the element of sale can be implied. To support his contention, learned counsel has also placed reliance of Entry 65 read with Entry 105 of Schedule-B read with Section 6 of the 1948 Act. In support of his submission he has further

(10) (1967) XIX S.T.C. 135

placed reliance on the observations made in paras 7, 8 and 9 of the judgment of Hon'ble the Supreme Court in the case of Raj Steel (supra) and argued that if the packing material is an independent commodity and the packing material as well as the contents are sold independently then in such a situation the packing material is liable to tax on its own identity. Where the transaction of packing material is an independent transaction and if it is separately identified in the schedule and that there is no change chemical or physical in packing either at the time of packing or at the time of using the content, the packing capable of being resold after the contents have been consumed then the mere fact that consideration for the packing is merged with the consideration for the product would not constitute a basis for an argument that sale of packing has become an integral part of the sale of product. Therefore, he has submitted that gunny bags even after use, have to be regarded as an independent identity and it has to be implied that there was a contract for sale of gunny bags as well. In support of his submission, learned State counsel has also placed reliance on a judgment of Hon'ble the Supreme Court in the cases of **M/s Jamana Flour & Oil Mill (P) Ltd.** (supra) and **Associated Cement Companies Ltd.** *versus* **Government of Andhra Pradesh (11).**

(11) We have thoughtfully considered the submissions made by the learned counsel for the parties and minutely perused the impugned order of the Tribunal, dated 25th February, 2003 (P-8), passed on the rectification application filed by the respondent State under Section 21-A(2) of the 1948 Act alongwith other orders. In order to appreciate the controversy it would be profitable to advert to Section 21-A of the 1948 Act, which reads as under :—

"21-A. Rectification of mistakes.

(1) The Commissioner or the Officer on whom powers of the Commissioner under sub-section (1) of section 21 have been conferred by the State Government may, at any time within two years from the date of any order passed by him, of his own motion, rectify and mistake apparent from the record, and shall within a like period rectify and such mistake which has been brought to his notice by any person affected by such order.

(11) (2006) 1 S.C.C. 597

PROVIDED that no such rectification shall be made if it has the effect of enhancing the tax or reducing the amount of refund, unless the Commissioner or the Officer on whom powers of the Commissioner under sub-section (1) of section 21 have been conferred by the State Government has given notice in writing to such person of his intention to do so and has allowed such person a reasonable opportunity of being heard.

(2) The provisions of sub-section (1) shall apply to the rectification of a mistake by a Tribunal as they apply to the rectification of a mistake by the Commissioner.

(3) Whether any such rectification has the effect of reducing the amount of the tax or penalty, the Commissioner shall in the prescribed manner order the refund of the amount so due to such person.

(4) Where any such rectification has the effect of enhancing the amount of the tax or penalty or reducing the amount of the refund, the Commissioner shall order the recovery of the amount due from such person in the manner provided for the Section 11 and 11-B."

(12) A perusal of sub-section (2) of Section 21-A of the 1948 Act would show that the Tribunal on its own motion, at any time within two years from the date of any order passed by it, rectify a mistake apparent from the record and shall within a like period rectify any such mistake which has been brought to its notice by any person affected by such order. Similar provisions have been subject matter of consideration of Hon'ble the Supreme Court. For example Section 35-C(2) of the Central Excise Act, 1944 came up for consideration of their Lordships' in the cases of **Commissioner of Central Excise, Calcutta** *versus* **ASCU Ltd., Calcutta(12)** and **Commissioner of Central Excise, Vadodara** *versus* **Steelco Gujarat Ltd.,(13).** In both these cases it was held that "mistake apparent from the record" cannot be something which would have to be established by a long'drawn process of reasoning on points on which there may conceivably be two opinions. It was further held that a decision of a debatable point of law cannot be a mistake apparent on record. It appears to us that language of Section 35-C(2) is *pari materia* with the language of Section 21-A of the 1948

(12) (2003) 9 S.C.C. 230
(13) (2003) 12 S.C.C. 731

Act and, therefore, both the judgments of Hon'ble the Supreme Court would apply to the facts of the present case. Likewise, Hon'ble the Supreme Court was considering Section 154 of the Income-Tax Act, 1961, in the cases of T. S. Balaram *(supra)* and Hero Cycles Pvt. Ltd. *(supra)*. After detailed consideration in the case of T.S. Balaram, it has been held by their Lordship' as under :—

> "From what has been said above, it is clear that the question whether Section 17(1) of the Indian Income-Tax Act, 1922, was applicable to the case of the first respondent is not free from doubt. Therefore, the Income-tax Officer was not justified in thinking that on that question there can be no two opinions. It was not open to the Income-tax Officer to go into the true scope of the relevant provisons of the Act in a proceeding under Section 154 of the Income-tax Act, 1961. A mistake apparent on the record must be an obvious and patent mistake and not something which can be established by a long drawn process of reasoning on points on which there may conceivably be two opinions. As seen earlier, the High Court of Bombay opined that the original assessments were in accordance with law though in our opinion the High Court was not justified in going into that question. In **Satyanarayan Laxminarayan Hedge** *versus* **Mallikarjun Bhavanappa Tirumale** [1960] 1 S.C.R. 890, this court while spelling out the scope of the power of a High Court under Article 226 of the Constitution ruled that an error which has to be established by a long drawn process of reasoning on points where there may conceivably be two opinions cannot be said to be an error apparent on the face of the record. A decision on a debatable point of law is not a mistake apparent from the record — *see* **Sidhramappa Andannappa Manvi** *versus* **Commissioner of Income-Tax** [1952] 21 I.T.R. 333 (Bom.). The power of the officers mentioned in Section 154 of the Income-Tax Act, 1961, to correct "any mistake apparent from the record" is undoubtedly not more than that of the High Court to entertain a writ petition on the basis of an "error apparent on the face of the record"....."

(13) The aforementioned view was applied and followed by Hon'ble the Supreme Court in the case of Hero Cycles Pvt. Ltd. *(supra).*

(14) When the principles laid down by Hon'ble the Supreme Court in the aforementioned judgments are applied to the facts of the present case it becomes evident that the question of taxing gunny bags as packing material for packing sugar as against selling the same independently is an issue of debatable nature. In Raj Steel's case *(supra)* various tests have been laid down in order to ascertain whether a transaction for sale of packing material is an independent transaction or it is one package deal. Those factors are as under :—

"1. That packing material is a commodity having its own identity and is separately classified in the Schedule;

2. There is no change, chemical or physical in the packing either at the time of packing or at the time of using the content;

3. The packing is capable of being reused after the contents have been consumed;

4. The packing is used for convenience of transport and the quantity of the goods as such is not dependent on packing ;

5. The mere fact that the consideration for the packing is merged with the consideration for the product would not make the sale of packing an integrated part of the sale of the product.

In every case, the assessing authority is obliged to ascertain the true nature and character of the transaction upon a consideration of all the facts and circumstances pertaining to the transaction. The problem almost always required factual investigation into the nature of ingredients of the transaction."

(15) A perusal of the order passed by the Assessing Authority does not reveal the existence of any sale agreement or passing of consideration for the gunny bags (Bardana) nor it has ascertained the true nature and character of the transaction upon a consideration of

all the facts and circumstances pertaining to the transaction, whereas the assessee by attaching the bills dated 20th October, 1993, 15th September, 1993 and 28th March, 1990 (P-2, P-3 and P-4 respectively) has made an attempt to demonstrate that no consideration in respect of gunny bags (Bardana) was paid when it purchased sugar from various Co-operative Sugar Mills. The Deputy Excise and Taxation Commissioner (Appeals), Patiala Division, Patiala, has simply accepted the view expressed by the Assessing Authority stating that contract of sale in respect of gunny bags (Bardana) is implied. When the matter came before the Tribunal on 30th August, 2000 (P-7), it has expressed the view that gunny bags (Bardana) is taxable only if a person exclusively deals in the sale of gunny bags (Bardana), which is taxable at the first stage. On the reasoning that the respondent State has not developed its case that the Sugar Mills who have sold sugar to the petitioner were the manufacturers of gunny bags (Bardana), which, in fact, they were not and, therefore, the petitioner was not deemed to be the first purchaser from the manufacturer of gunny bags (Bardana) in order to fasten tax liability on him. The Tribunal had also considered the argument concerning declaration in Form ST XXII-A and rejected the same by stating that it is not the petitioner who has to do it and it was required to be done by the first purchaser who had effected the purchase from the manufacturer. Therefore, the controversy was settled on merit after considering various aspects. However, the Tribunal on 25th February, 2003 by entertaining a rectification application filed by the respondent State, set aside the order dated 30th August, 2000 (P-7) and substituted the same by a new order dated 25th February, 2003 (P-8) holding that there was an implied condition concerning sale of gunny bags (Bardana). Once such is the controversy then it cannot be concluded that there was a mistake apparent from the record within the meaning of Section 21-A of the 1948 Act. The Tribunal, in fact, by passing an order on the rectification applicaton has reviewed its earlier order by entering into detailed analysis and has, thus, acted without jurisdiction. It is evident that the Tribunal has not corrected an obvious and patent mistake and, in fact, has entered into a long drawn process of reasoning on points on which there can easily be two opinions. Therefore, a decision on a debatable point of law is not a mistake apparent from the record and the Tribunal could not have exercised jurisdiction by passing the order dated 25th February, 2003 (P-8) and refusing to correct that mistake by dismissing the rectification application of the petitioner,—

vide order dated 22nd December, 2003 (P-9). We are further of the view that the respondent State has mis-used the process of law by moving rectification application only before the successor Presiding Officer rather than doing the same before the same Officer for the reason best known to it. It is well established that *'bench hunting'* is completely prohibited and no one can choose the Judge for decision of his case. Therefore, we do not appreciate the conduct of the respondent department in resorting to filing of rectification application in such manner.

(16) For the reasons aforementioned, the writ petition succeeds. The order dated 25th February, 2003 (P-8) allowing the rectification application of the respondent State as well as the order dated 22nd December, 2003 (P-9) dismissing the rectification application of the petitioner are hereby set aside. We restore the order dated 30th August, 2000 (P-7).

(17) The writ petition stands disposed of in the above terms.

R.N.R.

Before Ashutosh Mohunta and R.S. Madan, JJ.

SHEO KUMAR SAHA,—*Petitioner*

versus

STATE OF HARYANA AND OTHERS,—*Respondents*

C.W.P. NO. 8533 OF 2006

16th March, 2007

Constitution of India, 1950—Art. 226—Punjab Civil Services Rules, Vol. I, Part-II, Appendix 20-Study Leave Rules—Rl. 10-Petitioner allowed study leave to get admission in M. Pharmacy Course of 2 years—Salary and allowances as per 1963 Rules granted—Respondents directing recovery of amount paid excess as daily allowance as petitioner entitled to only study leave allowance which is equivalent to half pay-Rl. 10(1) of 1963 Rules prescribe that half of full daily allowance to which Govt. employee would have been entitled under rules regulating his T.A. if he were on tour to the place of study-Interpretation-Petitioner entitled to daily allowance under Rl. 10-Ordres of recovery by department not tenable-Petition allowed.