APPELLATE TRIBUNAL INLAND REVENUE (PAKISTAN)
KARACHI BENCH, KARACHI

Present: MR. MUHAMMAD JAWED ZAKARIA, J.M.
MR. FAHEEMUL HAQ KHAN, A.M

M.A (Rect) No. 138/KB/2016
In: STA No. 50/KB/2014
(For the Tax Period February- 2013 to October-2013)
U/s. 221

The Commissioner Inland Revenue,
Zone-II, LTU, Karachi.....Applicant

Versus

M/s. Dewan Sugar Mills Ltd,
Karachi. .....Respondent

Represented by:

Applicant : **Mr. Zafar Rafiq, DR.**
Respondent : **Mr. Muhammad Faheem Bhayo, Advocate.**

Date of Hearing : **18.08.2016**
Date of Order : **05.09.2016**

O R D E R

This Miscellaneous Application has been filed by the applicant/department seeking rectification in the order of this Tribunal passed vide **STA No. 50/KB/2014 dated 20.02.2016** on the facts and grounds as set forth in the memo of miscellaneous application.

2. On the date of hearing, **Mr. Zafar Rafiq, D.R** appeared on behalf of the applicant/department while **Mr. Muhammad Faheem Bhayo, Advocate** appeared on

behalf of the taxpayer. The contents of the M.A. for Rectification are reproduced as under:-

> *"1. It is respectfully submitted that plain reading of para 8(4) on page-20 of the Hon'ble Tribunal's order depicts that following grounds of issues remained unanswered in the finding part:*
>
> *2. The Sugar Mills claimed benefit of reduced rate against exports made through land routes of Afghanistan and Central Asian republics in violation of condition (d) of SRO No. 77 (I)/2013.*
>
> *3. The Sugar Mills claimed benefit of reduced rate against exports beyond three succeeding tax periods, which is not permissible under SRO No. 77 (I)/2013."*

3. Being dissatisfied with the order of this Tribunal quoted above, the applicant/department has sought rectification in the said order. During proceedings before this Tribunal, learned D.R reiterated the arguments put forth in the memo of application quoted supra, and finally prayed for re-calling the original order of this Tribunal quoted supra,

4. On the other hand, **Mr. Muhammad Faheem Bhayo, Advocate** appeared on behalf of the taxpayer vehemently opposed the contentions submitted by the learned D.R and supported the impugned Order as well as the order passed by this Tribunal. He submitted that issues in the original appeal have attained finality. Any rectification

would tantamount to change of opinion. The learned A.R of the taxpayer was also of the view that department has unnecessarily embarked upon "rectification" to yield the desired outcome. He further went on to stress that the supra M.A. Rectification is nothing but application of **"Review", "Re-hearing"** and/or **"Re-arguing afresh",** under the grab of rectification application.

5. We have heard learned representatives of both the sides and have perused the record of the case and we have also perused the order of the Tribunal.

6. From careful perusal of the Order of the Tribunal, we have found that the learned Division bench of this Tribunal has rendered its categorical findings at para 10 regarding "export to Central Asian Republics and Afghanistan through land routes was not a subject matter of the main appeal as the taxpayer did not export through land routes to above countries otherwise restricted in the S.R.O. Regarding applicability of SRO,. The Tribunal has passed a fairly elaborated and speaking reasoned order taking into account the relevant provisions of law and facts of the case and no grievance left un-decided. Thus, it is manifest that the Tribunal as rendered its finding vide para 9 to 18 in main

order of the Learned Tribunal, quoted blow for easy reference, the same runs as under :-

> *"……..*
> *9. We have given due consideration to the representatives of both sides besides perusing the available records and above reply of the department. Our findings in respect of core areas reveal that as per order a sum of Rs. 38,810,184/- is recoverable. This means concession claimed by the taxpayer on (38,810,184 ÷ Rs.7.50) = 5174692 kgs of export of sugar from 31-01-2012 to January 2013, precisely a period of twelve months. We also find that export policy announced by ECC had only two variables i.e. aggregate quantity to be exported (without fixation of any individual quota) and 1st date of permission 31-01-2012 without any cut off date to end such exports. Similarly, the concession was also quantity based for all the stakeholders.*
>
> ***10. The export of sugar to CAS and Afghanistan through land routes is not a subject matter of instant appeal neither relevant in the context as the taxpayer did not export though land routes to above countries otherwise restricted in the S.R.O. The revenue has no objection on concession claimed on exports after February 2013.***
>
> *11. As far as empowerment of ECC is concerned, there can no two opinion that ECC is a highly powerful executive body having the constitutional recognition and FBR by all means is subordinate to the decisions of ECC. On the contrary, the provisions of section 53(2) of the Income Tax Ordinance, 2001 can be referred and express description of status of ECC and status of its instructions over FBR as incorporated recently.*
>
> *12. The decision taken by ECC and directing FBR to allow concession to exporters has legal cover under Rule 16(1)(d) of the Federal Government Rules of Business 1973 read with articles 90 and 99 of the Constitution of Pakistan 1973 therefore, the same cannot be brushed aside.*
>
> *13. It is an admitted fact that the government had accorded such concession on levy of FED on local supply of white crystalline sugar to provide a bail out package keeping in view of stock position or economic exigencies of the stakeholders. The FBR cannot impose any restriction which may oppose the whole object of the scheme approved by authorities who have Constitutional Sanction. The very purpose*

of concession would be defeated if the viewpoint of officer is accepted. Since the concession granted have nexus with export quota allocated in previous meetings of ECC which covers 1.2 million matric tons then the officer cannot restrict the appellant from taking benefit of concession retrospectively. It is also observed that if concession is restricted to prospective operation of SRO then it would create great injustice to those sugar manufacturers who exported their sugar prior to issuance of concessional SRO. It is also on record that almost all the approved quota of 1.2 million matric tons was exported with prior approval of Government of Pakistan.

14. We are of the opinion that it is a trite principle of law that interpretation beneficial to subject would be adopted in criminal and taxation matters. Thus we find no room for ourselves to deviate from this settled principle of law. However, in the instant matter, it is subordinate operational regulation which had generated the controversy, otherwise the will of policy makers is quite obvious. The entire of a fiscal statute has to be read as a whole and not in piecemeal to deviate the intent of authority. So we find it is better to validate a thing than to invalidate it or it is better the law to prevail than perish. In the instant matter, the intentions of Executive Authority are not only clear but ***repetitive****, whereas on the contrary the "machinery-part" of SRO / statutory directions had created ambiguities. So the S.R.O has to be considered in the light of its origin, entirety and decision of ECC leading to issuance of S.R.O.*

15. On the factual plane, the sugar mills were allowed export based on their individual capacity/stock and as such no quota was fixed on individual or entity basis. All the sugar manufacturers were treated at par and were allowed the activity on first-come first-serve basis with an aggregate ceiling which was periodically enhanced by the E.C.C with its last enhancement on 11.12.2012 and fixation of limit at an aggregate of 1.2 matric tonnes; Other three ministries/institutions of Government of Pakistan were also monitoring the implementation of the decisions E.C.C i.e the Ministry of Commerce, State Bank of Pakistan and Ministry of Industries in the process of export.

16. We find the unequivocal decision of E.C.C on the subject matter on two occasions i.e on 10-01-2011 and 6 to 8 March, 2013 where concession has been granted upto 1.2 matric tonnes. Following are the extract of decisions of E.C.C;

Item No.1

Case No. 89/05/2013 *Dated: 13-03-2013*	*CONFIRMATION OF THE DECISIONS TAKEN BY THE ECONOMIC COORDINATION COMMITTEE (ECC) OF THE CABINET IN ITS MEETINGS HELD ON 6TH AND 8TH MARCH 2013*
Presented by: *Cabinet Division*	

MINUTES

The decisions taken by the Economic Coordination Committee (ECC) of the Cabinet in its meetings held on 6th and 8th March 2013, were submitted to the Cabinet for information and confirmation.

DECISION

The Cabinet considered the decisions taken by the Economic Coordination Committee (ECC) of the Cabinet, in its meetings held on 6th and 8th March 2013 and confirmed the same with the observations that the minutes have been recorded correctly. However, there were certain quotas raised pertaining to cases No. ECC-56/06/2013 and No. ECC-80/06/2013 which were clarified and decisions taken are reproduced here as under;

(i) Cases No. 56/06/2013, dated 6th March 2013 – GRANT OF INLAND FREIGHT SUBSIDY OF RS. 1.75 PER KILOGRAM FOR 1.2 MILLION MT OF SUGAR ALLOWED FOR EXPORT BY THE E.C.C:

After consulting the members of ECC, as present in the Cabinet meeting, it was decided that the reduced rate of excise duty @ 0.5% was applicable on local supply of sugar equivalent to the whole quota of 1.2 million tonnes of sugar allowed by ECC in its different meetings.

17. Subsequent to the re-confirmation of the decisions of E.C.C, F.B.R further issued administrative instructions. Following is the extract of administrative directions issued by F.B.R on 15-03-2013 to all its field formations;

15-03-2013, Circular of F.B.R.

Subject: ***LOWER RATE OF FEDERAL EXCISE DUTY ON SUGAR***

I am directed to refer to the Notification No. S.RO 77(I)/2013, dated 07-02-2013 and to enclose a copy of decisions of the Federal Cabinet in its meeting held on 13.03.2013 in Case No. ECC-58/06/2013, dated 6.3.2013 for information and compliance.

(Dr. Ashfaq Ahmed Tunio)
Chief (ST&FE)

18. That we have come to the conclusion that passing the affect of reduction @ Rs. 7.50 kg of indirect tax to end-consumers is not the question or purpose behind the levy as the said

> *concession has already been granted to the taxpayer by the DCIR in the later period without any objection. So we are of the opinion that the DCIR in terms of Section 42 was required to follow the instructions of F.B.R which he failed to do. Given the circumstances, we hold that taxpayer will be entitled to concession in the light of decisions of E.C.C to his quantum of export w.e.f 31-1-2012 and accordingly vacate the findings of the two authorities below."*

7. The perusal of the above, it is manifest that the Tribunal has recorded its findings regarding benefit available to Sugar Mills claimed reduced rate against exports made through land routes of Afghanistan and Central Asian has duly been considered by the Tribunal, and the Learned Tribunal has also held that **"The appellant taxpayer did not export through land routes to above countries otherwise restricted in the S.R.O."** therefore, the assertion of the department that the Tribunal has not answered on this issue is based on misconception and non-reading or mis-reading of the Tribunal's order. It is also observed by this court that the department has filed Reference Application before the Hon'ble High Court of Sindh against the main order of the Tribunal (Supra), therefore, we are of the considered opinion that when an issue is pending adjudication before the Honourable High Court on the subject matter, no rectification is required to be moved by either party before this Tribunal, which is just nothing but waste of time. Therefore, the instant rectification application

is not permissible and requires to be treated as misconceived and not maintainable on these matters. Let the issues should be decided by the Hon'ble High Court. Accordingly, there was no apparent and patent mistake flouting on the surface of the order of the Tribunal relating to the finding on the issue. For exercising jurisdiction under section 221 of the Income Tax Ordinance, 2001, **it was the mandatory condition that such mistake should be *wide, apparent, manifest and patent and not something which involved serious circumstances of dispute or question of facts or law to be established by a long drawn process and reasoning on the point to be rectified. Only a patent and glaring mistake or an evident error which apparently flouting on surface of the order of Tribunal, that did not require an elaborate discussion of evidence or arguments to establish, would be an, error/mistake apparent on the face of the record*** and, if flouting on the surface, could be rectified under the ambit of section 221 of the Income Tax Ordinance, 2001. It is also well settled that **section 221 of the Income Tax Ordinance, 2001 did not confer power on the**

Tribunal to REVIEW its earlier order. Thus, the Tribunal had no power to **review/revision or re-hear** its order passed on merit under the grab of rectification of mistake, no order could be passed under section 221 of the Income Tax Ordinance, 2001 which amounted to reversal of the order passed after discussing all the facts and statutory provisions in detail.

8. The contents of the Miscellaneous Application, further prove that the Department had taken a chance of re-arguing the appeal already decided. The power under section 221 ibid is confined to a rectification of a mistake apparent on record. The Tribunal must confine itself within those parameters. Section 221 is not a *carte blanche* for the Tribunal to change its own view by substituting a view which it believes should have been taken in the first instance. Section 221 is not a mandate to unsettle decisions taken after due reflection. The provision empowers the Tribunal to correct mistakes, apparent on the face. The section is not an avenue to revive a proceeding by recourse to a disingenuous argument nor does it contemplate a fresh look at a decision recorded on merits, howsoever, appealing an alternate view may seem. Unless a sense of restraint is observed, judicial discipline would be the casualty. That is not what the legislature envisaged.

9. The submissions of the department that the impugned order may be recalled, cannot be accepted as the **section 221 of the Income Tax Ordinance, 2001 is only to amend the order to rectify any mistake apparent from record and the original order should not be recalled for rehearing the matter de-novo. The Hon'ble High Court, in the case of [*CIT vs. McDowell & Co. Ltd.*, (2004) 269 ITR 451(Kar],** held that:

> *"9. We have given our anxious consideration to the issue. Section 35(1)(e) provides that with a view to rectifying any mistake apparent from the record, the Tribunal may amend any order passed by it under section 24. Sub-section (5) of section 35 provides that where an amendment is made under section 35, an order shall be passed in writing by the Tribunal.* ***The power vested in the Tribunal, by section 35***,[Paralled to section 221 of the Income Tax Ordinance, 2001] ***is only to amend the order, to rectify any mistake apparent from the record and not to review its order. Section 35 also clearly states the mistake should be rectified by amending the original order. Therefore, rectification presupposes the continued existence of the original order. When an amendment is made to the original order, the amendment merges with the***

original order. The original order is read with the amendment thereto. If the power to rectify the original order by way of amendment to that order is to be interpreted as permitting recalling of the original order, then the original order ceases to exist and a fresh original order is made. Recalling the original order involves rehearing of the matter which is not the purpose and intention of the provision for rectification. When the wording of the statutory provision are clear and unambiguous and can be given effect without any difficulty, it is not permissible to give an extending meaning to the provision. The words "amended the original order to rectify any mistake apparent from the record" does not mean recall the original order, rehear the matter and replace the original order by a fresh order. The purpose can be achieved by continuing the original order and passing an amendment order stating whatever is necessary to rectify the mistake apparent from the record. Whether the issue involved is one or more makes no difference, as what is contemplated and provided for is an amendment to the original order and not an order in substitution of the original order."

10. As observed by us in paragraphs supra, the department miserably failed to point out the mistakes committed by this Tribunal in passing the order. Therefore, we are not able to appreciate the proposition canvassed by the learned D.R. that this Tribunal should allow the present Miscellaneous Application by invoking the inherent power to correct its own mistakes. The department had filed the present Miscellaneous with the intention of re-arguing the matters which were concluded by this Tribunal. It is obvious that this approach of the department is clearly against the principles of *res judicata*.

11. It is obvious that such a legislative adventure by the present applicant/ revenue is clearly against the principles of *Res Judicata* as well as principles of Constructive *Res Judicata* and principle analogous thereto.

12. The principles of *Res Judicata* are of universal application as it is based on two age old principles, namely, **"*interest reipublicae ut sit finis litium*" which means <u>that it is in the interest of the State that there should be an end to litigation</u>** and the other principle is ***"nemo debet his ve ari, si constet curiae quod sit pro un aet eademn***

cause" meaning thereby **that no one ought to be vexed twice in a litigation if it appears to the Court that it is for one and the same cause.** This doctrine of *Res Judicata* is common to all civilized system of jurisprudence to the extent that a judgment after a proper trial by a Court of competent jurisdiction should be regarded as final and conclusive determination of the questions litigated and should forever set, the controversy, at rest.

13. That principle of finality of litigation is based on high principle of public policy. In the absence of such a principle great oppression might result under the colour and pretence of law in as much as there will be no end of litigation and a rich and malicious litigant will succeed in infinitely vexing his opponent by repetitive suits and actions. This may compel the weaker party to relinquish his right. The doctrine of *Res Judicata* has been evolved to prevent such an anarchy. That is why it is perceived that the plea of *Res Judicata* is not a technical doctrine but a fundamental principle which sustains the Rule of Law in ensuring finality in litigation. This principle seeks to promote honesty and a fair administration of justice and to prevent abuse in the

matter of accessing Court for agitating on issues which have become final between the parties.

14. Therefore, any proceeding which has been initiated in breach of the principle of *Res Judicata* is prima-facie a proceeding which has been initiated in abuse of the process of Court. One important consideration of public policy is that the decisions pronounced by courts of competent jurisdiction should be final, unless they are modified or reversed by appellate authorities; and the other principle is that no one should be made to face the same kind of litigation twice over, because such a process would be contrary to considerations of fair play and justice.

15. Therefore, it cannot be said that there are any mistakes apparent and flouting on the surface from record, which are capable of being rectified, exercising the power vested under section 221 of the Income Tax Ordinance, 2001.

16. Before leaving with this judgment, we must place on record that the applicant had not approached this Tribunal in the Miscellaneous Application with clean hand, as stated supra. A litigant who approaches the court of law with unclean hands does not deserve any relief. Even on this

score, this Miscellaneous Application is liable to be dismissed.

17. In view of above discussion and case, we have no hesitation to hold that the **Tribunal has no power to correct error of Judgment and review of its own decision. The "error of judgment" is not synonymous of "mistake in judgment". These are two different lexicology.** Thus, instant Rectification Applications filed by the applicant/department is beyond the scope of provisions of Section 221 of the Income Tax Ordinance, 2001. Further, from perusal of the contents of the Application, it is evident that the applicant in the garb of rectification is asking this Tribunal to re-examine and re-adjudicate the issues and to arrive at different conclusion as has been arrived at by this Tribunal in its order sought to be rectified. In this regard, reliance can be placed on the ratio of reported case of Hon'ble Supreme Court of Pakistan in the case of National Foods Laboratories reported as (1992) 65 Tax 257(S.C) wherein it has been held:-

> "*i)* ***The mistake should be apparent on the face of record; mistake which may be seen floating on the surface and does not require***

investigation or further evidence. The mistake should be so obvious that on mere reading of the order it may immediately strike on the face of it.

ii) *The Hon'ble Supreme Court of Pakistan in an other case of M/s. Shadman Cotton Mills Limited, Karachi reported as 2008 PTD 253 has held as under:-*

> ***".....The mistake must be of the nature, which is floating on the surface of record and must not involve, an elaborate discussion or detailed probe or process of determination".***

18. **Hon'ble Judge Mr. Justice Aqeel Ahmed Abbasi, of High Court of sindh,** in a classical judgment reported as **CIR V/s. ENI Pakistan Ltd [(2013) 107 TAX 297 (H.C. Kar)** their lordships was further affirmed the judgments referred to supra in clear and express words as observed that:

> " ***We may further observed that the scope of rectification is limited to the extent of rectification of an "error" apparent from record" hence the said provision cannot be invoked as an alternate or `substitute of an appeal, revision of review."***

19. Following the above dictum laid down by the Hon'ble Superior Courts we do not find any merit in this rectification Application which is beyond the scope of

rectification as provided under section 221 of the Income Tax Ordinance, 2001 is not tenable in law and hereby dismissed.

20. Revenue's M.A. (Rect.) stands dismissed being devoid of merit.

_____S/d_____
(MUHAMMAD JAWED ZAKARIA)
JUDICIAL MEMBER

_____S/d_____
(FAHEEMUL HAQ KHAN)
ACCOUNTANT MEMBER

*Arsalan Pathan APS**