CUSTOMS EXCISE & SERVICE TAX APPLELLATE TRIBUNAL
ALLAHABAD

Customs Miscellaneous Application (Rectification of Mistake) No. 70450 of 2019
(On behalf of the Appellant)
In
Customs Appeal No. 70351 of 2019

[Arising out of Order-in-Original No.28-30/COMMR./NOIDA-CUS/2018 dated 18.10.2018 passed by the Commissioner of Customs, Noida, UP]

Mukesh Mahesh Kumar Kothari **Appellant**
1302, 13th Floor, Kumar Sophronia, Ulster Road,
Byculla, Mumbai-400 027

Versus

The Commissioner of Customs,
Customs House, Noida **Respondent**
Concor Complex, P.O. Container Depot
Greater Noida,
Gautam Budh Nagar
Noida, UP

Appearance

Shri P D Shah and Nishant Mishra, Advocates for the Appellant
Shri Anupam Tiwari, Authorised Representative of the Department

Coram:
HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. P. ANJANI KUMAR, MEMBER (TECHNICAL)

Date of Hearing: December 11, 2020
Date of Decision: December 22, 2020

MISCELLANOUS ORDER NO. 70104 / 2020

JUSTICE DILIP GUPTA

1. An application has been filed by the appellant Mukesh Mahesh Kothari in Customs Appeal No. 70351 of 2019 that was disposed of on September 12, 2019 with nine other customs appeals. The prayer made in this application is to rectify/ correct the Final Order dated September 12, 2019 to the extent mentioned in paragraphs 11 and 12 of the application.

2. Paragraphs 11 and 12 referred to in the aforesaid prayer of the application are reproduced below;

> "11. In view of the aforesaid, it is submitted that the above referred to Final Order No. 71733-71742/2019 dated 12.09.2019 of this Hon'ble Appellate Tribunal requires to be rectified to the extent of the amount of penalty mentioned in paragraph 25 by correcting as Rs. 60,000/- instead of Rs. 60,00,000/-.
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> 12. Further, the appropriation of the Rs. 1,00,00,000/- deposited by the Applicant/ appellant during the investigation against the duty demanded from the importers be set aside."

3. In regard to the appropriation of Rs. 1,00,00,000/- deposited by the applicant during the investigation, the following facts have been stated in the paragraphs 8 and 9 of the application;

> "8. This Hon'ble Appellate Tribunal has allowed the appeal of the Applicant/ Appellant and penalty on the Applicant/ Appellant is set aside. However, no findings are recorded qua the appropriation of Rs. 1,00,00,000/- deposited by the Applicant/ Appellant during the investigation against the duty demand from the importers.
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> 9. It is submitted that the Applicant/ Appellant had disputed the appropriation of the said amount of Rs. 1,00,00,000/- both in the appeal and in the written submissions filed by the Applicant/ Appellant pursuant to the liberty granted by this Hon'ble Appellate Tribunal. The appropriation of said Rs. 1,00,00,000/- is ex-facie invalid and without jurisdiction. There is no duty demand against the Applicant/ Appellant. The duty on goods seized from the Applicant/ Appellant is deposited by the Applicant/ Appellant."

4. There is no dispute regarding the first prayer made in the application as it appears to be a typing mistake. Rs. 60 lakhs mentioned in the third line of paragraph 25 of the Final Order dated September 12, 2019 requires to be deleted and replaced by Rs. 60 thousand.

5. In regard to the prayer made in the context of appropriation of Rs. 1,00,00,000/- deposited by the applicant during investigation, it will be necessary to state the factual aspects relating to the filing of the appeal.

6. The appellant carries on business in the name and style of M/s Orbit Gold as sole proprietor. The case of the Department is that the appellant used to receive gold jewellery from one Bharat

Jagda, which jewellery had been removed by Ajit Singh without payment of duty. The premises of the applicant were searched on February 06, 2009 by the officers of the Directorate of Revenue Intelligence and assorted gold jewellery weighing 1912.500 grams valued at approximately Rs. 19,08,000/-, gold bars and coins weighing 5207 grams valued at approximately 73,50,000/- and Indian currency of Rs. 3,19,400/- were seized. During investigation, statement of the appellant was recorded on September 04, 2009 and January 14, 2010. The appellant claims that during the investigation he was "made to admit that his father received imported jewellery weighing 59 kgs from the said Mr. Bharat Jagda on which no duty was paid and which was sold through the appellant's firm" and that "he was also made to deposit Rs. 1,00,00,000/- towards alleged duty payable on the jewellery received by the appellant". According to the appellant 13 demand drafts aggregating the Rs. 1,00,00,000/- had been submitted by letters dated May 15, 2009 and May 18, 2009.

7. A show cause notice dated February 02, 2010 was issued calling upon the appellant to explain why the seized jewellery/ gold bars and Indian currency be not confiscated and duty of Rs. 2,54,100/- be not demanded and recovered under section 28 of

the Customs Act, 1962[1] and penalty be not imposed upon the appellant under sections 112/114A/114AA of the Customs Act. An order dated January 31, 2011 was passed by the Commissioner of Customs confiscating the seized goods with an option to the appellant to redeem the same on payment of fine of Rs. 92,58,000/- and duty of Rs. 2,54,100/- with interest. The Commissioner also seized Indian currency of Rs. 3,19,400/- under section 121 of the Act and imposed penalty of Rs. 92,58,000/- under section 114A on the propriety firm of the appellant and Rs. 92,58,000/- under section 112(b) of the Act on the appellant. The Commissioner also appropriated Rs. 4,89,554/- towards the demand.

8. Feeling aggrieved by the said order passed by the Commissioner, the appellant and the firm filed two appeals before the Customs, Excise and Service Tax Appellate Tribunal[2], being Customs Appeal No. 72 of 2011 and Customs Appeal No. 85 of 2011. These two customs appeals were finally decided by the Tribunal on April 27, 2016. The Tribunal held that since the entire duty was deposited with interest and 25 % of the duty towards penalty, the confiscation of goods and currency was not sustainable in law and was, accordingly, set aside.

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1. the Act
2 . the Tribunal

9. Pursuant to the aforesaid order dated April 27, 2016 passed by the Tribunal, the appellant by a letter dated February 01, 2017 claimed refund of Rs. 1,00,00,000/- deposited by the appellant during investigation and a further sum of Rs. 3,25,000/- deposited by the appellant as pre-deposit before the Tribunal on March 10, 2011.

10. It also needs to be noted that during the pendency of the aforesaid two customs appeals before the Tribunal, a show cause notice dated November 12, 2013 was also issued to the appellant calling upon the appellant to show cause as to why penalty should not be imposed upon him under section 112 of the Act and why the amount deposited by the appellant during investigation be not be appropriated against the duty payable on the duty free gold jewellery which was removed from the factory of M/s Ajit Exports. The appellant claims that this show cause notice was not served upon the appellant and an order dated October 18, 2018 was passed by the Commissioner imposing penalty of Rs. 60,000/- on the appellant under section 112 of the Act and Rs. 60,000/- on the propriety firm (M/s Orbit Gold) under section 112 of the Act and another Rs. 60,000/- under section 114 of the Act.

11. It is against this order dated October 18, 2018 passed by the Commissioner that the appellant preferred the present appeal before the Tribunal which was decided on September 12, 2019.

The order passed by the Tribunal, in so far as the appellant is concerned, is reproduced below**:**

> "25. The Challenge in the present appeal is to imposition of penalties imposed upon them to the extent of Rs.60 lakhs and Rs.9 lakhs respectively under Section 112 of the Customs Act, 1962. Apart from the fact that the entire case of the Revenue is based upon the statements which have not been cross-examined, we find that as per the allegations of the Revenue, Shri Mahesh Kumar Moolchand Kothari was sharing the carrying charges of jewellery with Shri Bharat Jamnadas Jagda. The said allegation is based upon the statement of Shri Mukesh Kumar son of Shri Mahesh Kumar Moolchand Kothari. As per the appellant the said statement was given by Shri Mukesh Kumar to avoid his and his father's arrest and there is virtually no evidence to indicate that the present two appellants were involved in the so called fraud committed by the SEZ units. Shri Mukesh Kumar Moolchand Kothari is proprietor of M/s Orbit Gold and jewellery recovered from his premises resulted in passing of a separate order which order was appealed against by M/s Orbit Gold before the Tribunal and Tribunal vide its Final Order No.C/A/51307-51315/2016-CU[DB] dated 27 April, 2016 has held that the duties having been deposited along with interest and 25% of penalties the imposition of balance penalties upon the said M/s Orbit Gold is not justified. Inasmuch as the proceedings have been held to be concluded in the earlier set of proceedings, the imposition of penalty vide the present impugned order cannot be upheld. The same are accordingly set aside and their appeals are allowed."

12. Shri P D Shah assisted by Shri Nishant Mishra learned counsel for the appellant made the following submissions in support of the application;

(i) Customs Appeal No. 70351 of 2019 was filed by Mukesh Mahesh Kumar Kothari to assail the order dated October 18, 2018 passed by the Commissioner. This order had not only imposed penalties upon the appellant and the firm but had also appropriated an amount of Rs. 1,00,00,000/- deposited by the appellant during investigation. Specific grounds, namely, O,P,Q and R had been taken in the appeal as to why this amount could not have been appropriated and the appellant was entitled to refund of the same, but there is no consideration of this submission in the order of the Tribunal;

(ii) During the course of hearing of the appeal submission dated July 23, 2019 was submitted by the appellant, wherein it was stated that appropriation of Rs. 1,00,00,000/- during investigation was wrongly appropriated against the duty liabilities of M/s Ajit Exports, Noida.

(iii) Thus, when the order dated October 18, 2018 passed by the Commissioner was assailed by the appellant in the appeal filed before the Tribunal, the challenge made by the appellant against the appropriation of Rs. 1,00,00,000/- under the aforesaid order, the issue was required to be addressed by the Tribunal, but the Tribunal failed to address this issue in the Final order dated September 12, 2019 and, therefore, this apparent mistake that had crept in the order should be rectified; and

(iv) The appellant had on February 12, 2017, pursuant to the order dated April 12, 2017 passed by the Tribunal in Customs Appeal No. 72 of 2011 and Customs Appeal No.

85 of 2011 filed by the Appellant even before the Final order dated September 12, 2019 was passed by the Tribunal, filed an application for refund of amount of Rs. 1,00,00,000/- that had been deposited by the appellant during investigation but the application is not being decided presumably for the reason that the amount had been appropriated against the dues of some other firm.

13. Shri Anupam Tiwari, learned authorised representative of the Department has, however, submitted that the application filed for alleged rectification of a mistake so far as it concerns the appropriation of Rs. 1,00,00,000/- deserves to be rejected since no relief was claimed by the appellant for setting aside the order passed by the Commissioner appropriating the amount deposited during investigation and the appellant should pursue the refund application that has been filed.

14. The submissions advanced by learned counsel for the appellant and the learned authorised representative of the Department have been considered.

15. In the present case, the mistake apparent from the record that has been pointed out is non-consideration of an important contention raised by the appellant in the Final Order regarding

legality of the order to the extent it appropriated the deposit of Rs. 1,00,00,000/- made by the appellant during investigation.

16. It is not in dispute that after the premises of the appellant were searched on February 06, 2009 by the officers of the Directorate of Revenue Intelligence and during the course of investigation, the appellant deposited Rs. One crore by letters dated May 15, 2009 and May 18, 2009. Pursuant to the show cause notice dated February 02, 2010 that was issued to the appellant, an order dated January 31, 2011 was passed by the Commissioner confiscating the goods with an option to redeem the goods on payment of fine. The Commissioner also seized the Indian currency and imposed penalties upon the appellant and the firm. The customs appeals filed by the appellant and the firm before the Tribunal to assail the aforesaid order dated January 31, 2011 passed by the Commissioner of Customs were finally decided on April 27, 2016. The confiscation of goods and Indian currency was held to be bad in law. It is as a consequence of this order passed by the Tribunal, that the appellant filed an application for refund of the amount of Rs. 1,00,00,000/- that was deposited during investigation and Rs. 3,25,000/- towards the pre-deposit for filing he appeals.

17. During pendency of these two customs appeals a show cause notice dated November 12, 2013 was issued to the

appellant to explain why the amount deposited by the appellant during investigation should not be appropriated against the duty payable on the gold jewellery removed from factory of M/s Ajit Exports. This show cause notice was adjudicated by the Commissioner order dated October 18, 2018 which order was assailed in the appeal filed by the appellant before the Tribunal out of which the present application rectification of mistake has been filed.

18. As noted above, the final order dated October, 18, 2018 appropriated an amount of Rs. 1,00,00,000/- deposited by the appellant during the investigation against the dues of M/s Ajit Exports. Specific grounds had been taken by the appellant in the appeal against the appropriation of the amount deposited by the appellant during investigation and even in the written submissions this ground was taken. The relief claimed in the appeal was for setting aside the order dated October 18, 2018 passed by the Commissioner in its entirety and since it is this order that appropriates the amount deposited by the appellant during investigation, it cannot be urged that the appellant had not made any prayer for setting aside the order of appropriation of the amount. In such circumstances the contention advanced by the learned authorized representative of the Department that no relief had been claimed by the appellant for setting aside the order appropriating the amount cannot be accepted and the

contention of the learned counsel for the appellant that the final order dated September 12, 2019 should have adjudicated upon this issue deserves acceptance.

19. Learned counsel for the appellant and learned authorised Representative of the Department have also made submissions regarding the correctness of the order passed by the Commissioner appropriating the amount deposited by the appellant during investigation against the dues of another firm.

20. It is well said that amount deposited during investigation cannot be appropriated towards the tax dues of some other firm. The Commissioner has, however, appropriated the amount deposited by the appellant during investigation towards the tax dues of some other firm. The issue is whether this relief can be granted in the application that has been filed for rectification of mistake

21. It would, therefore, be appropriate to reproduce Section 35C(2) of the Act which confers power on the Appellate Tribunal to rectify any mistake apparent from the record and the same is reproduced below :

> "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 Principal

> Commissioner of Customs or Commissioner of Customs or the other party to appeal. Provided that an amendment which has the effect of enhancing an assessment or reducing a refund or otherwise increasing the liability of the other party, shall not be made under this sub-section, unless the Appellate Tribunal has given notice to him of its intention to do so and has allowed him a reasonable opportunity of being heard."

22. A bare perusal of the aforesaid sub-section (2) of Section 35C(2) of the Act indicates that the Appellate Tribunal may, with a view to rectify any mistake apparent from the record, amend any order passed by it under sub-section (1). Sub-section (1) provides that the Appellate Tribunal may, after giving the parties to the appeal, an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or annulling the decision or order appealed against or may refer the case back to the authority which passed such decision for a fresh adjudication. What is, therefore, necessary for a mistake to be rectified is that it must be apparent from the record.

23. Both "mistake" and "apparent" have been explained by the Supreme Court in **Deva Metal Powders (P) Ltd. vs Commissioner, Trade Tax (UP)[3].** The Supreme Court pointed out that "mistake" means to take or understand wrongly or inaccurately or to make an error in interpreting and "apparent" means visible; capable of being seen; obvious; plain. It has, therefore, been observed by the Supreme Court that a mistake

3. 2008 (221) ELT 16 (SC).

which can be rectified is one which is patent, which is obvious and whose discovery is not dependent on argument or elaboration. The Supreme Court also pointed out that a mistake capable of being rectified is not confined to a clerical or arithmetical mistake as it has a different connotation in taxation laws and is mostly subjective. The dividing line is thin and indiscernible. It is something which a judiciously instructed mind can find out from the record in order to attract the power to rectify. However, a decision on a debatable point of law or fact which remains to be investigated cannot be corrected by rectification. Paragraph 11 of the judgment is reproduced below:

> 11. "Mistake" is an ordinary word but in taxation laws, it has a special significance. It is not an arithmetical error which, after a judicious probe into the record from which it is supposed to emanate is discerned. The word "mistake" is inherently indefinite in scope, as to what may be a mistake for one may not be one for another. It is mostly subjective and the dividing line in border areas is thin and indiscernible. It is something which a duly and judiciously instructed mind can find out from the record. In order to attract the power to rectify under Section 22, it is not sufficient if there is merely a mistake in the order sought to be rectified. The mistake to be rectified must be one apparent from the record. A decision on a debatable point of law or a disputed question of fact is not a mistake apparent from the record. The plain meaning of the word "apparent" is that it must be something which appears to be so ex facie and it is incapable of argument or debate. **It, therefore, follows that a decision on a debatable point of law or fact or failure to apply the law to a set of facts which remains**

to be investigated cannot be corrected by way of rectifications."

[emphasis supplied]

24. The issue, therefore, that arises for consideration is whether non-consideration of a submission relevant to the issue for determination which was placed before the Tribunal, can be said to be a mistake apparent from the record so as to be rectified under Section 35C(2) of the Act. This issue was examined by the Supreme Court in **Asstt. Commr., Income Tax, Rajkot vs Saurashtra Kutch Stock Exchange Ltd.,[4].** It was pointed out that the error apparent from the record should be so manifest and clear that no Court would permit it to remain on record. It should be pertinent and self-evident and not require any elaborate discussion of evidence or argument. It was also observed that rectification of an order stems from the fundamental principle that justice is above all and it is to be exercised to remove the error and to disturb the finality.

25. It would, therefore, be appropriate to rectify the error that is apparent on the record by setting aside that part of the order passed by the Commissioner that appropriates an amount of Rs. 1,00,00,000/- deposited by the Appellant during investigation towards the tax dues on M/s Ajit Exports.

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4. 2008 (230) ELT 385 (SC).

26. The application filed for rectification of mistakes in the final order dated September 12, 2019 is, accordingly, disposed of with the following directions;

(i) In the third line of paragraph 25 of the Final Order, Rs. 60 lakhs shall be deleted and shall be replaced by Rs. 60 thousand.

(ii) That part of the order dated October 18, 2018 that directs for appropriation of Rs. 1,00,00,000/- deposited by the appellant during investigation is set aside.

(Order pronounced on December 22, 2020)

Sd/-

(JUSTICE DILIP GUPTA)
PRESIDENT

Sd/-
(P. ANJANI KUMAR)
MEMBER (TECHNICAL)

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