Read:- 1. Application dt. 25/10/2007 under the Bombay Sales Tax Act, 1959, from M/s. Northpoint Training & Research Pvt. Ltd.
2. This office letter dt. 30/11/2007 calling the applicant for hearing.

Heard:- Shri D. H. Joshi, Advocate attended the hearing on dt. 22/01/2008.

PROCEEDINGS

(Under section 62 of the Bombay Sales Tax Act, 1959)

No. DDQ-11-07/Rectification/Adm-3/51/B- 4 Mumbai, dt. 21.02.2008

An application is received from M/s. Northpoint Training & Research Pvt. Ltd., of Rustic Highlands, Old Khandala Road, Khandala 410 401 for rectification of the determination order No.DDQ-11/2003/Adm-5/18/B-3 Mumbai, dt. 14/09/2006 (hereinafter referred to as "the impugned determination order") passed under section 52(1) (a) of the Bombay Sales Tax Act, 1959 in their case.

02. FACTS OF THE CASE

M/s. Northpoint Training & Research Pvt. Ltd. had applied on dt. 28/03/2003 for determination of the following question : *"Whether the applicant company is a dealer under section 2(11) read with Exception –II to the definition of 'dealer' under the Bombay Sales Tax Act, 1959."* Accordingly, a determination order as mentioned above was passed in their case wherein it was held that that M/s. Northpoint Training & Research Pvt. Ltd. is a dealer carrying on the business of buying or selling goods liable for registration under the Bombay Sales Tax Act,1959. The prayer for prospective effect to the impugned determination order, in case if the applicant was held as a dealer, was rejected.

03. CONTENTION

The applicant in the present application has applied for rectification of the impugned determination order. The applicant is of the opinion that the points raised by them in support of their contention of not being a dealer and hence, not liable to pay tax were not considered while passing the impugned determination order. The points not considered as mentioned in the rectification application are reproduced as follows :-

1. DDQ application one each under the BST Act and Luxury Tax Act u/s. 52 and u/s. 33 have been filed with CST's office on 31.3.2003.
2. First Sale Invoice No. 01 dated 20.1.2003, for Rs. 3,30,777/- in the name of Lintas India Pvt. Ltd., is attached to the application. This transaction is common to both the applications.
3. There is no tax collection in the invoices.

4. The main objects of the Company as listed in Clause-III(A)(1) and (2) as per Memorandum of Association are to establish and carry on schools, colleges, universities and institutions where students may obtain education including management, advertising, communications, accountancy, etc.
5. Faculty was appointed.
6. SC Judgment dated 31.10.2002 in the case of T.M.A. Pai Foundation reported in J.T. 2002 (9) SC 1, was relied and copy of the judgment was also filed.
7. Prayer for giving prospective effect u/s. 52(2) and 33(2) is contained in the application.
8. The queries raised by your office were duly answered vide our letters dated 1.1.2005, 28.2.2005 and 14.3.2005. Judgments in Madras Port Trust and Sai Publication, both of Supreme Court, were relied upon in a detailed submission dated 1.1.2005 filed on 4.1.2005.
9. The 12 Lintas Private Trusts owning the properties, vide declaration dated 11.5.2004, declared that they have formed into themselves an Association of persons (AOP's), a status recognized in the tax laws, and the business of Northpoint was continued on commercial basis w.e.f. 1.4.2004. Accordingly, BST and Luxury tax RC's were obtained on 28.10.2004 and by paying compounding fees, the above RC's were given retrospective effect from 1.4.2004 by the Ld. DC (Adm), Nariman Point. As a result, returns were filed by the AOP effective from 1.4.2004 till date and taxes paid.
10. Hence, in the above circumstances, the liability, if any, is from 20.1.2003 to 31.3.2003 and from 1.4.2003 to 31.3.2004 i.e. for 14 months and 11 days, to be exact on the point.
11. Since the applicant bonafide pursued the above dispute without any delay on their part, if their say is not accepted, then, their prayer for grant of prospective effect being in accordance with law may please be granted.

The applicant has submitted that his replies in response to the queries raised by the Department were not considered at the time of passing the impugned determination order. It is also submitted that the judgment in the case of T.M.A. Pai Foundation (cited supra) was not properly appreciated. Since the above facts were not taken into account while determining whether the applicant is a dealer and also while considering the request for prospective effect, the applicant states that there is a mistake of facts as well as law which is apparent on the record. Hence, it is contended that the mistake needs to be rectified as per law by granting prospective effect to the impugned determination order passed in his case. It is also contended that that since the impugned determination order in their case was passed after about three and a half years, the applicant was entitled to a prospective effect due to the inordinate delay. In support of this argument, the applicant has cited the following cases wherein the Hon'ble Maharashtra Sales Tax Tribunal [MSTT]

has granted prospective effect due to inordinate delay in disposing the determination applications :-

1. Sharad Timber Mart (Appeal No, 140 of 1991 dt. 20.08.1994)
2. Galore Manufacturing (Appeal No, 21 of 1994 dt. 24.07.1998)

04. HEARING

The case was taken up for hearing on dt. 22/01/2008. Shri D. H. Joshi, Advocate attended the hearing. He argued that certain points were not considered while passing the impugned determination order. This non consideration being a mistake apparent on record, the applicant requests for a rectification of the impugned determination order. The following points were placed for consideration during hearing :-

- The applicant was running a five star educational institution at Khandala where management courses for the senior manager personnel were conducted. Hence, the applicant is covered by the *Exception –II* to the definition of 'dealer' under the Bombay Sales Tax Act, 1959.
- The applicant was of the opinion that they were an educational institution. It was submitted that the judgment of the of the Supreme Court judgment dated 31.10.2002 in the case of T.M.A. Pai Foundation reported in J.T. 2002 (9) SC 1 supported their view. However, the then Commissioner in the impugned determination order had observed that an educational institution should be Government recognized. It is argued that *Exception –II* to the definition of 'dealer' has not restricted an educational institution to be one which has been recognized by the Government. Further, it was submitted that the aforesaid facts were brought to notice in a written submission addressed to the then Commissioner. But the same remained to be considered while passing the impugned determination order. It is stated that in fact there is no need for the applicant to obtain any Government recognition as the applicant is recognized by people in the field of management.
- It is informed that the applicant has preferred an appeal with the Hon. Maharashtra Sales Tax Tribunal.
- The applicant submits that as per the decision in T.M.A. Pai Foundation (cited supra), the applicant is an educational institution and the then Commissioner in the impugned determination order did not consider this aspect of the matter. This being a mistake apparent from the record, the impugned determination order needs to be rectified.
- The applicant has submitted that since there was a delay in passing the impugned determination order, the said order should be made prospective in effect.

The applicant has submitted a written submission dt. 22.1.2008 in which he has raised the following further points :-

1) Exception-II attached to Section 2(11) is on the statute w.e.f. 16.8.1985. This exception no where qualifies legislatively that an educational institute u/s. 2(11) Exception-II should be 'government recognized'. The Ld. Commissioner

while passing the DDQ order lost sight of this legal position and held that an educational institute should be government recognized. It is in this context, we submit that this is a legal mistake apparent on record and can be rectified u/s. 62 of the BST Act, 1959.

2) In the course of DDQ hearing, inter-alia, the applicant relied upon the Apex Court Judgment (Constitutional Bench comprised of 11 Judges) in the case of T.M.A. Pai Foundation & Ors. V. State of Karnataka & Ors. reported in Judgments Today (JT) – 2002 (9) SC 1. A copy of this judgment was delivered to the Ld. Commissioner on 5.5.2004. In law, the Ld. Commissioner while taking cognizance of the said judgment observed at page 15 of the Order as under:-

*"It is in this regard that the applicant has cited the case of **T.M.A. Pai Foundation & Others vs. State of Karnataka And Others**. However, the case is not under the Sales Tax statute. Also, it deals primarily with the rights of the minority educational institutions."*

The above appreciation of the Judgment is against the ratio of the said judgment which, inter-alia, as per 'Majority View' has ruled as under (at page 9 of the Judgment):-

*"The expression "education" in the articles of the Constitution means and includes education at all levels from the primary school level upto the post graduate level. **It includes professional education**. The expression "educational institutions means institutions that impart education, where "education" is understood hereinabove.,*

The right to establish and administer educational institutions is guaranteed under the Constitution to all citizens under Articles 19(1)(g) and 26, and to minorities specifically under Article 30.,

All citizens have a right to establish and administer educational institutions under Articles 19(1)(g) and 26, but this right is subject to the provisions of Articles 19(6) and 26(a). However, minority institutions will have a right to admit students belonging to the minority group, in the manner as discussed in this judgment."

3) Thus, the judgment squarely applies to the facts of our case and the appreciation of the Ld. Commissioner that the judgment deals primarily with the rights of the minority educational institutions is incorrect. This mistake is thus apparent on record and needs to be rectified. Further, in the said judgment (at Para 364), the Hon'ble Court ruled that - "…..*Reasonable surplus to meet cost of expansion and augmentation of facilities does not, however amount to profiteering.*" The applicant - Company was formed with a sole objective to run an educational institute. Therefore, the conclusion reached by the Ld. Commissioner at page 18-19 of the order that "*From 11.5.2004, there was only a transformation as regards the constitution of the applicant, i.e. from a 'private ltd. co.' to an 'association of persons"'* is factually incorrect as much as the private ltd. co. was formed with an objective to run the educational centre on substance basis whereas an 'association of persons' formed separately was with the sole objective to earn profit on commercial lines. The Ld. Commissioner, it is regretted, did not appreciate this factual position. Hence, this mistake is required to be rectified.

4) Apart from the above position, the applicant genuinely believed that they are an 'educational institute' and not liable to pay tax as a dealer. However, as

a matter of abundant caution, they have applied for DDQ and prayed that in case their plea is not accepted, then the order may be made with prospective effect. The Ld. Commissioner inordinately delayed the passing of the order to almost 4 years as may be seen from the record. Therefore, on this ground alone, the order should have been made with a prospective effect. Here again, the Ld. Commissioner erred in law. In support of this proposition, we rely on the following two judgments of the Hon'ble Tribunal (one copy each attached for ready reference) wherein for inordinate delay in passing the order, the Commissioner was directed to extend the relief of prospective grant of order:- 1. Sharad Timber Mart (Appeal No, 140 of 1991 dt. 20.08.1994)
2. Galore Manufacturing (Appeal No, 21 of 1994 dt. 24.07.1998)

The applicant has given yet another written submission dt. 08.02.2008 after the hearing dt. 22.1.2008 in which he has sought to invite attention to the following further points :-

The applicant submits that during the course of hearing on dt. 22.1.2008, it was observed that the applicant was seeking a review of the impugned determination order. The applicant denies the aforesaid observation and maintains that the present application for rectification is in keeping with the provisions of the Act. In support of his argument the applicant has placed reliance on a recent decision of the Supreme Court in the matter of "rectification of mistakes" (Honda Siel Power Products Ltd. v. Commissioner of Income Tax (295 ITR 466)). The applicant has quoted the following observations of the apex court in the aforementioned case :-

"Held, reversing the decision of the High Court, that in allowing the rectification application the Tribunal gave a finding that the earlier decision of a co-ordinate Bench was cited before it but through oversight it had missed the judgment while dismissing the appeal filed by the assessee on the question of admissibility / allowability of the claim of the assessee for enhanced depreciation under section 43A. One of the important reasons for giving the power of rectification to the Tribunal under section 254(2) was to see that no prejudice was caused to either of the parties appearing before it. The rule of precedent was an important aspect of certainty in the rule of law, and prejudice had resulted to the assessee since the precedent had not been considered by the Tribunal. The Tribunal was justified in rectifying the mistake on record."

The following observations of the apex court in para 12 of the aforementioned case are also reproduced by the applicant in his written submission as they deal with the scope of the power of rectification :-

"…… The purpose behind the enactment of section 254(2) is based on the fundamental principle that no party appearing before the Tribunal, be it an assessee or the Department, should suffer on account of any mistake committed by the Tribunal. This fundamental principle has nothing to do with the inherent powers of the Tribual. In the present case, the Tribunal in its order dated September 10, 2003, allowing the rectification application has given a finding that Samtel Color

Ltd. (supra) was cited before it by the assessee but through oversight it had missed out the said judgment while dismissing the appeal filed by the assessee on the question of admissibility / allowability of the claim of the assessee for enhanced depreciation under section 43A. One of the important reasons for giving the power of rectification to the Tribunal is to see that no prejudice is caused to either of the parties appearing before it by its decision based on a mistake apparent from the record."

In view of the above decision of the Apex Court directly applicable to the facts of his case, the applicant has requested to consider the two Tribunal judgments relied upon for the purpose of grant of prospective effect to the impugned determination order.

05. OBSERVATIONS

I have gone through all the facts of the case. The issue before me pertains to rectification of the determination order No.DDQ-11/2003/Adm-5/18/B- 3 Mumbai, dt. 14/09/2006 passed in the applicant's case. The applicant contends that his arguments and submissions were not considered while passing the impugned determination order. Hence, he has applied for rectification of the same. The applicant has submitted that since his submissions were not considered while passing the impugned determination order, there is a mistake of facts as well as law. The applicant is of the opinion that these mistakes of facts as well as law being apparent on the record can be amended by passing a rectification order under section 62 of the Bombay Sales Tax Act, 1959. Before dealing with the issue, I would look at the section 62 under consideration in the present proceedings Hence, let me reproduce herein section 62 of the Bombay Sales Tax Act, 1959 as follows :-

62. Rectification of mistakes

(1) The Commissioner may at any time within two years from the date of any order passed by him, on his own motion, rectify any mistake apparent from the record, and shall within a like period rectify any such mistake which has been brought to his notice by any person affected by such order :

Provided that, no such rectification shall be made if it has the effect of enchancing the tax or reducing the amount of a refund, unless the Commissioner 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.

(1A) Where any dealer or person has recorded in his books of accounts or, as the case may be, has claimed in the returns that no tax is payable or that the tax is payable at a reduced rate on any transaction of sale on account of any declaration or certificate to be received from the purchasing dealer or person and he has not produced such certificate or declaration before the passing of the order of assessment for any reason whatsoever in which assessment order the claim is disallowed, then at any time within two years from the date of the service on him of the said order, he may apply to the Commissioner for rectification of the order on the round that he has received such declaration or certificate and is in a position to produce the same and

thereupon the Commissioner may hold such inquiry as he may deem fit and after hearing the applicant, rectify the assessment order where necessary :

Provided that, in respect of any assessment sought to be rectified under this sub-section only one application for rectification shall be entertained:

Provided further that, where the dealer has applied in accordance with sub-section (1) or (1A) within the said period of two years for rectification of the said order and has specified in his application, the quantum by which the amount payable as per the said order should be reduced and has attached the necessary evidence if required, alongwith the application, then the Commissioner shall, without prejudice to the other provisions of this Act including, levy of interest, stay, if requested, the recovery of such quantum till the disposal of the application for rectification.]

(2) The provisions of sub-section (1) shall apply to the rectification of a mistake by the Tribunal or an appellate authority under section 55 as they apply to the rectification of a mistake by the Commissioner.

(3) Where any such rectification has the effect of reducing the amount of the tax or penalty [2][bst2][or interest] or the amount of forfeiture, the Commissioner shall, in the prescribed manner, refund any amount due to such person.

(4) Where any such rectification has the effect of enhancing the amount of tax or penalty [3][bst3][or interest] or the amount of forfeiture or reducing the amount of the refund, the Commissioner shall recover the amount due from such person in the manner provided for in section 38.

From a plain reading of the above section, it can be inferred as follows :-

- Section 62 provides for rectification of ***mistakes***.
- The mistake as contemplated by the section is a mistake which is ***apparent from the record***.
- The word "***apparent***" herein from the plain reading would mean mistakes which are *clear, obvious, glaring, visible, perceptible, noticeable, evident and plainly seen from the record*.
- A mistake could be a ***mistake of fact or a mistake of law***.
- A ***mistake of fact*** should be *clear from the record*.
- A ***mistake of law*** *should be so apparent as to preclude any interpretation of the provision of law*.
- The only limiting factor in both ***mistake of fact or a mistake of law*** is that both the mistakes should be apparent from the record.

The interpretation of the expression ***"apparent from the record"*** occurring in the above section has engendered a large volume of judicial interpretation. The leading decision on the meaning of the expression "*mistake apparent from the record*" is the Supreme Court decision in the case of **M. K. Venkatachalam, Income-tax Officer v. Bombay Dyeing and Mfg. Co. Ltd. [1958] 34 ITR 143** wherein it was held that this expression was wider than the expression "*error apparent on the face of the record*". The one uniform

principle that runs through the catena of decisions is that "a mistake apparent on record" must be an *"obvious" and "apparent"* 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. The applicant has argued that the impugned determination order suffers from mistake of fact as well as mistake of law. Mistake of fact can be ascertained on perusal of the record. What then would comprise "record" for the purposes of this section? Also, what would be the parameters for ascertaining a mistake of law? Hence, I would proceed by first understanding the following issues :-

1. Scope and meaning of the words ***"mistake apparent from the record***".
2. Difference between ***mistake of fact and mistake of law***.
3. Scope and meaning of the word "***record***".

The following cases have dealt with the above issues at sr. no. 1 & 2 :-

- In the case of **M/s. Fine Dyestuff & Chemicals (India) Limited v. State of Maharashtra (32 MTJ 488)**, the MSTT observed as follows :-
  - It is settled position that the error which can be rectified under Section 62 must be an error which is so apparent on the very face of the record that it is a wonder how it had crept in as the saying goes.
  - It is the assumption of the section that if the concerned Authority had not nodded as it were, they could have avoided the mistake, even in the first place.
  - A mistake either of fact or of law, glaring and obvious from the record itself capable of identification, without a detailed investigation or inquiry or elaborate arguments, in regard to which there could reasonably be no two opinions is a "mistake apparent from the record".
  - ***A decision on a debatable point of law will not, however, be a mistake apparent from the record.***
  - A point of law on which there are divergent views of other High Courts, is a debatable point of law.
  - When a point is covered by a decision of the Supreme Court or the concerned High Court, either rendered prior to or subsequent to the order proposed to be rectified, then the point ceases to be a debatable point."
- In the case of **Commissioner of Sales Tax v. M/s. Dharampur Leather Cloth Co., 41 STC 275**, the Hon'ble Bombay High Court has observed and laid down as under :
  - Mistakes apparent from the record, which can be rectified, are both mistakes of law and facts, but in the case of mistake of law it must be a glaring and obvious mistake, such as the levy of tax under a statutory provision which is subsequently held by the Supreme Court to be inoperative and ineffective or

making an assessment which on the basis of later decision of a High Court or the Supreme Court is found to the erroneous or time-barred.

- Where, however, the matter is debatable or involves long and elaborate arguments, it cannot be said that it is a mistake apparent from the record within the meaning of Section 35 of the Bombay Sales Tax Act, 1953."

- In Commissioner of Income-tax v. Ramesh Electric and Trading Co. [1993] 203 ITR 497, it was held that, ***failure of the Tribunal to consider an argument advanced by either party for arriving at a conclusion is not an error*** *apparent on the record, although it may be an error of judgment.*
- In Commissioner of Sales Tax, Maharashtra State, Bombay V. Motwane Pvt. Ltd. (84 STC 377), the Bombay High Court observed that, *while failure to apply the correct law to a set of facts already on record will fall within the ambit of the expression "mistake apparent from the record",* ***failure to apply the correct law to a set of facts which remain to be investigated will not fall within the said expression****.*
- In the case of Baba Associates v. State of Karnataka, Decision dated 24.9.1993 reported in (1994) 92 STC 578 (Kar.), it is held that, ***not following the decision of higher court constitutes mistake apparent from record which is squarely covered by scope of rectification****.*

The above point of view was also followed in the cases of :-

1. **M/s. East India Hotels Ltd. And Another V. The Assessing Authority (Sales Tax) (142 STC 376)** wherein the observations of the Supreme Court in the case of **T. S. Balaram, Income-tax Officer, Company Circle IV, Bombay v. Volkart Brothers [1971] 82 ITR 50 (SC)** were reproduced.
2. **Govindaraju Chetty v. Commercial Tax Officer [1968] 22 STC 46**

The above cases have laid down the law that, "*where without any elaborate argument one could point to the error and say here is a substantial point of law which stares one in the face, and there could reasonably be no two opinions entertained about it, a clear case of error apparent on the face of the record would be made out".* What the above cases seek to establish in respect of the words ***mistake apparent from the record*** could be summarized thus,

- A mistake apparent on the record must be *an obvious and patent mistake and not something which can be established by a long process of reasoning on points on which there may be conflicting opinion.*
- A mistake *which can be proved by only referring to the records and on the facts already on the record* can be said to be a mistake apparent on the record.

- The expression, inter alia, ***covers all mistakes discoverable from a perusal of the whole evidence in the case as well as a mistake from an omission to apply certain provisions of the Act to the facts of the case***.
- In order to fall within the expression "*mistake apparent from the record*", it should be possible to gather the mistake from the record as it exists.
- A mistake which cannot be gathered from the record without requiring, for being shown to be a mistake, evidence extraneous to the record is not a mistake "*apparent from the record*" and cannot be corrected or rectified under such a provision.
- In other words, a mistake which ***appears to be ex facie and is incapable of argument or debate*** will be such a mistake.
- A rectification petition, it must be remembered, has a limited purpose and cannot be allowed to be an appeal in disguise. **(Parison Devi v. Sumitra Devi (1998) 1 CTC 25 (SC))**. It is also true that rectification is not a proceeding analogous to review or appeal.
- Not following the decision of higher court does constitute a mistake apparent from record.
- A*n erroneous decision on a point of law is not an apparent error*.
- *In exercise of the jurisdiction conferred on the authorities under the section for rectification, it is not permissible even for erroneous decision to be re-heard and corrected*.

Now, let me understand the meaning of the word ***"record"***. In the case of M/s. Champaklal Nanabhai V. Commissioner Of Sales Tax, Maharashtra State, Bombay (99 STC 190), the Mumbai High Court has laid down the following law in respect of the word "record":-

- 'Record' does not mean only the order which is sought to be rectified.
- It comprises all proceedings on which the order in question is based.
- The authority concerned for the purpose of exercising the power under this section may look into the entire evidence and documents on record to ascertain whether any mistake had been committed by him in passing the impugned order.
- ***He cannot, however, go beyond the records and look into fresh evidence or material which had not been on record at the time the order was passed.***

Having understood the meaning of the expression "***mistake apparent from the record***" as well as the word ***"record",*** I now proceed to apply the same in the context of the facts of the present proceedings. The basic question in the present case is whether there is a *mistake apparent from the record* so as to invoke power under section 62 of the BST Act. The applicant has submitted that the impugned determination order failed to consider his submissions and arguments. Before ascertaining the correctness of the applicant's claim, it has to be seen whether the points, which are claimed as being not considered in the

impugned determination order, are points which would constitute ***"record"*** or as the case may be ***on the record***. I have already reproduced the points which as claimed by the applicant were not considered while passing the impugned determination order. All the 11 points as reproduced in **para no. 03** of this order would form part of the ***"record"*** as understood by the word ***"record"*** in the expression "***mistake apparent from the record"*** used for the purposes of section 62 of the Bombay Sales Tax Act, 1959, **provided they were brought to notice as also on record, -**

- in the application for determination;
- submissions after making the application for determination;
- during hearing of the determination application;
- submissions before and after hearing;

Thus, all submissions before the passing of the impugned determination order would form ***"record"*** in the instant case.

A hand written submission dt. 25/08/2006 was given after the hearing dt. 07/02/2006 by the applicant. It is interesting to see that the points as raised in this submission are the same 11 points (reproduced in **para no. 03** of this order) for which the applicant has preferred this present application for rectification. Nevertheless, I proceed to ascertain if the points raised can be termed as "*mistakes apparent from the record*".

1. It is not understood as to how the first point about DDQ application under the BST Act and Luxury Tax Act could be termed as a "*mistake apparent from the record*". All the same, it is seen that determination orders under both the enactments have been passed in pursuance of the applications filed with this office by the applicant.

2. & 3. The second point is about first sale invoice no. 01 dated 20.1.2003, for Rs. 3,30,777/- in the name of Lintas India Pvt. Ltd. and the third point is about no tax collection in the invoices. Now a determination in case of a question requesting the rate of tax is always in respect of a transaction as on a particular date. In the present case, the applicant desired to know whether his activities would come under the scope of the definition of 'dealer' under the Bombay Sales Tax Act, 1959. The applicant had submitted copies of the following invoices :- **1.** Invoice No. 001 dt. 20/01/2003 **2.** Invoice No. 002 dt. 26/01/2003 **3.** Invoice No. 003 dt. 10/02/2003 **4.** Invoice No. 004 dt. 22/02/2003. The invoice at **sr. no. 1** was even reproduced in the impugned determination order. Hence, the applicant's argument that the invoice raised by the applicant as well as the non-collection

of the tax by him in the invoice was not considered is incorrect. In short, the second and third points will not fall in the category of "*mistake apparent from the record*".

4. The fourth point is about the main objects of the Company as listed in Clause-III(A)(1) and (2) of the Memorandum of Association which are to establish and carry on schools, colleges, universities and institutions where students may obtain education including management, advertising, communications, accountancy, etc. It is seen that the main objects of the company to be pursued by the company on its incorporation and the objects incidental or ancillary to the attainment of the main objects as per the Memorandum of Association were reproduced in **para no. 03** of the impugned determination order. Hence, it cannot be said that there was a mistake in not noticing the objects of the Company.

5. The fifth point is about the appointment of faculty. It is seen that the impugned determination order had reproduced a chart submitted by the applicant showing the educational courses conducted at the campus during the Financial Year 2003-04. The names of the faculty are also mentioned in the aforementioned chart. The activities of the applicant as well as the appointment of faculty were considered and thus, had not escaped from being considered. Hence, there is no mistake.

6. The sixth point is about the Supreme Court Judgment dated 31.10.2002 in the case of T.M.A. Pai Foundation reported in J.T. 2002 (9) SC 1. In his written submission dt. 22.1.2008, the applicant has raised the following further points :-

a. The then Commissioner in the impugned determination order had erroneously observed that an educational institution should be Government recognized inspite of the fact that no such restriction was prescribed by the *Exception –II* to the definition of 'dealer' under the Bombay Sales Tax Act, 1959.

b. The Ld. Commissioner did not appreciate the ratio of the aforesaid judgment while passing the impugned determination order. The Apex court therein had observed as follows :-

> *"The expression "education" in the articles of the Constitution means and includes education at all levels from the primary school level upto the post graduate level.* ***It includes professional education****. The expression "educational institutions means institutions that impart education, where "education" is understood hereinabove.,*

c. The applicant has argued that the appreciation of the Ld. Commissioner that the T.M.A. Pai Foundation (cited supra) judgment deals primarily with the rights of the minority educational institutions is incorrect and hence, a mistake apparent on record.

I have perused the impugned determination order. It is seen that the aforesaid judgment has been mentioned and considered in **para nos. 02, 04, 08 and 10** of the impugned determination order. The argument in respect of *Exception II* to the definition of dealer was contended by the applicant even in the impugned determination order and was accordingly dealt with in the said order. In fact, the then Commissioner had elaborately dealt with the issue stating therein the criteria to qualify for being termed as an "educational institution". Since, the argument was considered, there is no mistake and hence the question of rectification does not arise. Further, we have seen earlier that *not following the decision of higher court does constitute a mistake apparent from record*. However, we have also seen that conflicting decision on a point of law is not an apparent error. The then Commissioner has followed the law and has passed a just and fair order. He had observed that the decision in the case of T.M.A. Pai Foundation (cited supra) was not relevant in the context of the impugned determination order. Nevertheless even if the applicant claims that the decision of the Supreme Court has not been followed, then also conflicting decision on a point of law is not an apparent error. Further, the words *"educational institution"* as appearing in the *Exception –II* to the definition of 'dealer' under the Bombay Sales Tax Act, 1959 have not been defined under the said Act. Understanding the meaning of these words is a question of interpretation. As per the then Commissioner, the applicant does not qualify to be termed as an *"educational institution"* owing to reasons elaborately discussed in the impugned determination order. This applicant seems to have a divergent view on the issue. Such divergence of view is not *a mistake apparent from record*.

7. The seventh point is about the prayer for prospective effect. The applicant's request for prospective effect to the impugned determination order was elaborately dealt with by examining the circumstances of the case and the prevailing law. Hence, it cannot be said that a mistake has been committed by not considering the applicant's arguments in respect of prospective effect.

8. The eighth point is about the queries raised by this office which were answered by the applicant in his letters dt. 1.1.2005, 28.2.2005 and 14.3.2005. The applicant submits that judgments in Madras Port Trust and Sai Publication, both of Supreme Court, were relied upon in a detailed submission dated 1.1.2005 filed by him on 4.1.2005. It is seen that, at the start of the impugned determination order, in the part of the order pertaining

to **"READ",** the submissions of the applicant find a mention at **sr. no. 2** as follows:- 2. Letter dated 01/01/2005, 14/03/2005 and 28/12/2005. In the **para no. 04** of the impugned determination order pertaining to **CONTENTION OF THE APPLICANT,** all the arguments of the applicant as per the application for determination as well as his written submissions were reproduced. Also, the applicant's replies to the queries raised by this office were taken into account while passing the impugned determination order. Hence, the applicant does not succeed in his argument in the present application that the points as raised by him were not considered in the impugned determination order. The impugned determination order had dealt with the reliance of the applicant, in support of his contention of being a non-dealer, on the judgments in the cases of Madras Port Trust [1999 114 STC 520 SC] and Sai Publication [SC 126 STC 288]. The judgment in the case of Madras Port Trust (cited supra) was reproduced in **para no. 07** of the impugned determination order. The judgment in the case of Sai Publication (cited supra) was elaborately dealt with in **para no. 10** of the impugned determination order. Thus, the point being considered, there is no question of a *mistake apparent from record*. The applicant may not be satisfied with the reasoning/interpretation in the impugned determination order. But this does not mean that there is a mistake committed in the impugned determination order. I would invite herein the attention of the applicant to the observation of the Hon. MSTT in the case of M/s. Johnson & Johnson Limited [Rectification Application No. 71 of 1997 decided on 19/12/1998]. The MSTT observed that the scope of rectification is limited. The following observation is worth reproducing :

If the rectification changes the nature of the order and reasoning of the Tribunal in the body of the judgment, such rectification application cannot be allowed as it would amount to review the judgment.

The ratio of the above decision would squarely be applicable to the facts of the present case as the request of the applicant herein for rectification seems to me an application for review in disguise. Hence, this rectification application is liable to be dismissed.

9. The ninth point is about the 12 Lintas Private Trusts owning the properties, by a declaration dated 11.5.2004, declaring that they have formed into themselves an Association of persons (AOP's), a status recognized in the tax laws, and the business of Northpoint being continued on commercial basis w.e.f. 1.4.2004. The ninth

point further states that BST and Luxury Tax RC's were obtained on 28.10.2004 and by paying compounding fees, the above RC's were given retrospective effect from 1.4.2004 by the Ld. DC (Adm), Nariman Point. The point also states that returns are filed by the AOP effective from 1.4.2004 till date and taxes have been paid. Again, this point was mentioned and appreciated in **para nos. 03 and 10** of the impugned determination order. I have to say again that the applicant may not be contented with the manner in which the point has been considered in the impugned determination order. But this would not constitute a mistake eligible for rectification.

10. The tenth point is about the liability, if any, from 20.1.2003 to 31.3.2003 and from 1.4.2003 to 31.3.2004 i.e. for 14 months and 11 days. This point has been considered in the context of the discussion on **PROSPECTIVE EFFECT** in **para no. 10** of the impugned determination order.

11. The eleventh point is about the applicant's prayer that since the applicant bonafide pursued the above dispute without any delay on their part, if their say is not accepted, then their prayer for grant of prospective effect being in accordance with law may be granted. Again, I fail to understand how the applicant could term this point as a "rectifiable mistake" when it has been dealt with elaborately in a para, **para no. 10** to be specific, devoted to the discussion on **PROSPECTIVE EFFECT** in the impugned determination order.

In his written submission dt. 22.1.2008, the applicant has raised the following further point that the Ld. Commissioner inordinately delayed the passing of the order to almost 4 years and therefore, on this ground alone, the order should have been made with a prospective effect. This as per the applicant is a mistake. In support of his point, the applicant has relied on the following two judgments of the Hon'ble MSTT in the cases of Sharad Timber Mart (cited supra) and Galore Manufacturing (cited supra) wherein for inordinate delay in passing the order, the Commissioner was directed to extend the relief of prospective grant of order. I have already reproduced the scope and meaning of the words "*mistake apparent from record*". The point as regards inordinate delay in passing the impugned determination order was not raised in the proceedings prior to the passing of the impugned determination order. As per the decision in the case of M/s. Champaklal Nanabhai V. Commissioner Of Sales Tax, Maharashtra State, Bombay

(99 STC 190), the Mumbai High Court has laid down the law that the rectifying authority **cannot, however, go beyond the records and look into fresh evidence or material which had not been on record at the time the order was passed.** The applicant argues that prospective effect should have been given in his case as there were supporting judgments as mentioned above and hence a mistake of law has been committed. In this regard, I have to say that the plea for prospective effect has been discussed at length in the impugned determination order. I do not wish to comment on the same. The then Commissioner had given his decision in respect of the plea for prospective effect after careful consideration of the facts of the case. Hence, there is no question of a ***"mistake"*** as such. As regards the reliance of the applicant on the aforementioned cases, I need to observe that the cases were not cited in the impugned determination order. We have already seen earlier that the rectifying authority cannot go beyond the records and look into fresh evidence or material which had not been on record at the time the order sought to be rectified was passed. In spite of this, I may deal with the argument that due to the delay in passing the impugned determination order, the applicant should have been given prospective effect.

The applicant has stated that the queries raised by this office were duly answered by letters dated 1.1.2005, 28.2.2005 and 14.3.2005. It is thus seen that the file was being processed and during the study of the case, any doubt raised or confusion in understanding of the issue was resolved by asking the applicant to clarify the same. The applicant has submitted that there has been a delay in passing the impugned determination order. Such is not the case. In the first case, delay in processing a determination application cannot be made a gateway for requesting prospective effect to any determination order. An order to be eligible to get a prospective effect should primarily suffer from statutory misguidance and ambiguity of the law. Other incidental factors are to be weighed in the light of the circumstances and facts of each case. The criteria for determining the eligibility of granting prospective effect to any determination order solely depends on the facts and circumstances of the individual case and cannot be made a law as such. The applicant has relied on the decisions in the cases of Sharad Timber Mart and Galore Manufacturing (cited supra) in support of his request for rectification of the impugned determination order. The facts of these cases could be seen in brief as follows :-

In Sharad Timber Mart (cited supra), the Hon. MSTT had confirmed the determination order therein and had observed that the then Commissioner had rightly rejected the prayer of the appellant therein for prospective effect. However, it was observed that due to inordinate delay in passing the determination order, the Commissioner may in his wisdom consider if the case, on facts, calls for any administrative relief. Thus, in Sharad Timber Mart (cited supra), the Tribunal had left it to the discretion of the Commissioner to grant administrative relief in the light of the facts of that case. Thus, the Tribunal had not on its own given prospective effect but had ruled that the Commissioner should consider the possibility of administrative relief and this consideration would be based on the facts of the case. The Commissioner therefore has the discretion to reject the possibility for administrative relief if the facts of the case were incapable of chalking out a case in favour of the possibility for administrative relief. This ruling cannot be interpreted to mean that due to delay in disposal of the application for determination order, the appellant, *de jure* be given the benefit of prospective effect. Needless to say prospective effect and administrative relief have different connotations in the context of a taxing statute. The applicant, thus, does not succeed in driving home a point by citing this case.

In Galore Manufacturing (cited supra), the appeal was against the determination order passed therein under section 9 of the Works Contract (Re-enacted) Act, 1989 read with section 52 of the erstwhile Bombay Sales Tax Act, 1959. The Hon. MSTT while upholding the determination order had granted prospective effect to the determination order on the basis of certain facts such as the Works Contract law was uncertain and the legal provisions were amended frequently. It is true that the concept of works contract has evolved over a period of years with regard to a catena of decisions by the various Courts of law. This cannot be said to be true in respect of the Bombay Sales Tax Act, 1959. Hence, the applicant's reliance on the decision in Galore Manufacturing (cited supra) is misplaced. It was rightly observed in the impugned determination order that,

"The provisions of the Act were very clear and reflect the legislative intention appropriately. I need to observe here that there was no ambiguity involved in the language of the various provisions of the law. In these circumstances, the plea of the applicant cannot be entertained as there is no statutory misguidance in the matter. The applicant was content applying his own reasoning to his activities. I have already dealt in detail with each of the claims of the applicant and their inappropriateness.

The applicant, therefore, cannot be successful in his request for prospective effect since no statutory misguidance of any kind has been established. The activities of the applicant from the start were of a business nature only. There was no statutory misguidance of any kind. Hence, I am inclined to observe that the applicant has not made out a case in favour of prospective effect.

The applicant's request for prospective effect is, therefore, not acceptable."

I would like to cite herein the decision of the Hon. MSTT in the case of M/s. Captain Cook Enterprises v. State of Maharashtra (20 MTJ 572) decided on 27th July, 1999 which has been decided after Galore Manufacturing (cited supra). The appellant therein had pleaded for prospective effect to the determination order as the time gap between the date of application and the date of the determination order was long. The Tribunal therein observed thus,

"It is pertinent to note that the position regarding the liability of the Caterers was made clear as per the amendment to the definition of 'sale' with effect from 2.2.1983 whereby the supply of food and drinks as per any other service business are deemed as sale. Therefore there was no ambiguity regarding the taxability of supply of food by caterers. While pleading for giving prospective effect to the order of the Hon'ble Commissioner, the appellant has merely stated that time gap between the date of application and the date of order was long. No other convincing ground is given and thus the appellant has failed to make out the case for giving prospective effect to the order of the Commissioner."

The above case thus confirms my observation that a prayer for prospective effect is to be considered in the light of the facts of each case. It cannot be given as a law in all cases, irrespective of the facts. The facts herein as observed in the impugned determination order do not carve out a case for considering the prayer for prospective effect in favour of the applicant. Further, the then Commissioner has applied his mind while giving the decision and it is evident from the impugned determination order.

In his written submission dt. 08/02/2008, the applicant has cited the decision of the Supreme Court in the case of Honda Siel Power Products Ltd. v. Commissioner of Income Tax (295 ITR 466)). The applicant has argued that the decision of the Apex Court is directly applicable to the facts of his case. I have gone through the facts of the case. In that case, the Appellate Tribunal had inadvertently not considered a case cited before it. The Supreme Court observed that the rule of precedent was an important aspect of certainty in the rule of law and hence, the Tribunal was justified in rectifying the mistake on record as a precedent had not been considered by the Tribunal. What the applicant wants to convey by citing the aforementioned case is not put in clear terms in the submission dt. 08/02/2008. Nevertheless, I am of the opinion that, the applicant by citing this judgment

wants to contend that the decision in the case of T.M.A. Pai Foundation (cited supra) has not been followed while passing the impugned determination order and hence a case for rectification is made out as a precedent had not been considered. I have already discussed earlier that the then Commissioner had considered the judgment while passing the impugned determination order. There is no such situation of the judgment having escaped the attention of the then Commissioner while passing the impugned determination order and therefore no case for rectification is made out. The judgment has been appreciated by the then Commissioner, even though the interpretation of the judgment is not acceptable to the applicant. As regards the request for prospective effect and the reliance on the cases of Sharad Timber Mart (cited supra) and Galore Manufacturing (cited supra), I have to say that the facts and the ratio laid down in these cases and their non-applicability to the facts of the present case has been already discussed by me hereinearlier. Hence, the applicant does not score a point by citing the case of Honda Siel Power Products Ltd. (cited supra).

It is seen that all the points as made by the applicant in his application for determination as well as in his written submissions as also the points made during hearing have been given careful consideration in the impugned determination order. In the decision in the impugned determination order, all points were considered and the decision arrived at was well reasoned although the applicant may not be satisfied with the outcome. The present application for rectification has been preferred as the applicant is of the opinion that the non-consideration of the 11 points in the "right sense" has led to a "mistake". In other words, the applicant desires benefit of recognition as a "non-dealer". But the present application for rectification does not stand as there is no mistake apparent from record. This in turn would mean that the present application for rectification is liable to be rejected being non maintainable.

Having dealt with all the points of the applicant in respect of his application for rectification, I deem it necessary to invite attention of the applicant to the case of M/s. Amrutlal Chemaux Ltd. v. The State of Maharashtra (23 MTJ 679) wherein the Hon. MSTT has quoted the observation of the Supreme Court in Tel Utpadak Kendra v. Dy. Comm. of Sales Tax (48 STC 248). The Apex Court has observed that

- ***When the Appellate jurisdiction of a superior authority is invoked against an order and that authority is seized of the case it is not permissible for a subordinate authority to claim to exercise jurisdiction to revise that very order.***

The crux of the matter is that the inferior forum becomes powerless in the matter which is the subject matter of an appropriate proceeding before a competent superior forum. In the present case, it is seen that the applicant has filed an appeal with the Hon. MSTT and this precludes me from passing an order in rectification. However, the circumstances of the present proceedings are such that there aren't any mistakes apparent on the face of the record which could be rectified and hence, I preferred to deal with the application, though non-maintainable.

07. CONCLUSION

I have dealt with all the claims of the applicant in support of his plea for a rectification of the impugned determination order. As observed in the preceding paras, none of the applicant's arguments in support of his prayer for rectification are acceptable. The applicant, it appears, has unnecessarily confused himself between a ***"mistake apparent from the record"*** and ***"an application of mind, though appearing erroneous to the applicant"***. The impugned determination order needs no rectification and is passed on sound and fair understanding of the law. Further all the points raised by the application in the present application for rectification except the two cases of Sharad Timber Mart and Galore Manufacturing (cited supra) had been raised in the proceedings of the impugned determination order and were also accordingly dealt with in the said order. In this view of the matter, the present application becomes non maintainable.

In the circumstances, I pass an order as follows :-

ORDER

(Under section 62 of the Bombay Sales Tax Act, 1959)

No. DDQ-11-07/Rectification/Adm-3/51/B- 4 Mumbai, dt. 21.02.2008

The application for rectification of the determination order No.DDQ-11/2003/Adm-5/18/B-3 Mumbai, dt. 14/09/2006 passed under section 52(1) (a) of the Bombay Sales Tax Act, 1959 in the case of the applicant is for reasons discussed hereinabove rejected.

(SANJAY BHATIA)
Commissioner of Sales Tax,
Maharashtra State, Mumbai.