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IN THE HIGH COURT OF DELHI.

WP(C)No.11251 of 2004

Date of Decision:- November 05, 2004

Shanti Fragrances.....Petitioner

Through: Mr.C.Hari Shankar and
Mr.S.Sunil, Advocates.

Versus

Union of India and others.....Respondents

Through: Mr.Rajeev Mehra for respondent No.1
Mr.H.C.Bhatia for respondent No.2.

CORAM:

HON'BLE THE CHIEF JUSTICE
HON'BLE MR.JUSTICE BADAR DURREZ AHMED

i) Whether Reports of the local papers may be allowed to see the judgment?
ii) To be referred to the Reporter or not?
iii) Whether the judgment should be reported in Digest?

B.C.PATEL, C.J. (ORAL)

1. The petitioner, by filing this petition, has challenged the insertion of Entry No.46 "*Pan Masala and Gutka*" by notification dated 31.3.2000 in the First Schedule of the Delhi Sales Tax Act, 1975 (hereinafter referred to as "the Act").

2. The incidence and levy of sales tax is provided in

Chapter II of the Act. The rate of tax is provided in Section 4 of the Act and in view of Section 4(1)(a) of the Act, the tax can be levied in respect of the goods specified in the First Schedule, at the rate of twelve paise in a rupee. Tax free goods are specified in Section 7 of the Act. Sub-section (1) of Section 7 of the Act reads as under:-

> "(1) No tax shall be payable under this Act on the sale of goods specified in the Third Schedule subject to the conditions and exceptions, if any, set out therein."

Sub section (2) of Section 7 of the Act reads as under:-

> "(2) The Lieutenant Governor may, by notification in the Official Gazette, add to, or omit from, or otherwise amend, the Third Schedule either retrospectively or prospectively and thereupon the Third Schedule shall be deemed to be amended accordingly:
>
> Provided that no such amendment shall be made retrospectively affecting the interests of any dealer."

3. Thus, it is clear that the items referred to in the First Schedule shall be subject to Sales Tax while those referred to in the Third Schedule will be tax free. It is also clear that the Lt.Governor is authorised to change the entries,as indicated in Section 7, that is to say, from tax free

goods to taxed goods and vice versa.

4. The learned counsel for the petitioner submitted that Tobacco is mentioned in the Third Schedule at Sr. No.22 and the entry reads as under:-

> "Tobacco, as defined in the Central Excises and Salt Act, 1944."

5. Thus, for ascertaining what is meant by "tobacco", we will have to refer to the Central Excises and Salt Act, 1944 read with Chapter 24 of the Schedule to the Central Excise Tariff Act, 1985. Chapter Note 3 thereof reads as under:-

> "In this Chapter, "tobacco" means any form of tobacco, whether cured or uncured and whether manufactured or not, and includes the leaf, stalks and stems of the tobacco plant, but does not include any part of a tobacco plant while still attached to the earth."

6. Chapter Note 6 reads as under:-

> "In this Chapter, "Pan masala containing tobacco", commonly known as 'gutka' or by any other name, means any preparation containing betel nuts and tobacco and any one or more of the following ingredients, namely:-
>
> (i) lime; and
> (ii) kattha (catechu),
>
> whether or not containing any other ingredients,

such as cardamom, copra and menthol."

7. Chapter 24 includes heading No.2404.49, which reads as under:-

"Pan masala containing tobacco"

8. The learned counsel for the petitioner submitted that "gutka" is "tobacco" and has placed reliance on the decision of Apex Court in *Kothari Products Ltd. v. Government of A.P.: (2000) 9 S.C.C.263* for this purpose and also on *State of Orissa v. Radheshyam Gudakhu Factory:(1988) 68 STC 92*. In State of Orissa's case (supra), the expression "Tobacco" as defined in Section 2(c) of the Additional Duties of Excise (Goods of Special Importance) Act, 1957 has the meaning given to it in item 9 of the First Schedule to the Central Excises and Salt Act, 1944 which is in the following terms:-

> "'Tobacco' means any form of tobacco, whether cured or uncured and whether manufactured or not, and includes the leaf, stalks and stems of the tobacco polant, but does not include any part of a tobacco plant while still attached to the earth."

9. In that case the question was whether 'gudaku' was covered by the expression, 'tobacco' as defined above.

The Court held that "gudaku" is a form of smoking tobacco and is a product of tobacco in common parlance. Before the Court there was no dispute that "gutka" is not included in "tobacco". Thus, it is clear that "gutka" and "gudaku" are both covered by the expression "tobacco" as understood in Chapter Note 3 of the Central Excise Tariff Act, 1985. The learned counsel for the petitioner submitted that when 'gudaku' and 'gutka' are tobacco and fall within Entry No.22 of Schedule III of the Act, there is a bar to levy sales tax by introducing Entry No.46 by a notification and by including it in Schedule I. The petitioner has relied upon the decision of Apex Court in Kothari Products Ltd.'s case (supra). In that case the appellant manufactured and was dealing in 'gutka' under the brand name "Pan Parag" and the introduction of Entry 194 in the First Schedule to the A.P.General Sales Tax Act was in question. That entry sought to tax "*pan masala including gutka.....*".

10. In that case the contention on behalf of the petitioner was that it is not open to the State of Andhra Pradesh to tax gutka. Section 8 of the State Sales Tax Act

provides that a dealer who deals in the goods specified in the Fourth Schedule thereto shall be exempt from tax thereunder in respect of such goods. Entry 7 of the Fourth Schedule of the State Sales Tax Act refers to tobacco and the explanation in this behalf is that the goods mentioned in Entry 7

> "shall be goods included in the relevant heads and sub-heads of the First Schedule to the Additional Duties of Excise (Goods of Special Importance Act, 1957, but does not include goods where no additional duties of excise are levied under that Schedule."

11. The said item refers to tobacco. In para 4, the Court held as under:-

> "Clearly, therefore, gutka is a tobacco that is covered by an entry in the First Schedule to the said Additional Duties of Excise Act and the branded gutka that the appellants manufacture is liable to tax thereunder. Gutka,therefore, is 'goods' covered by the explanation to the Fourth Schedule to the State Sales Tax Act and, therefore, covered by the exemption contained in Section 8 thereof. The Schedule to the State Act could, therefore, not have been amended by including gutka as a kind of pan masala in Entry 194 of its First Schedule. It must, therefore, be held that the inclusion of gutka in the said Entry 194 in the manner in which it is done is bad in law and is struck down. The appellants will be entitled to all consequential benefits."

12. The learned counsel for the Revenue submitted that tobacco in Entry No.22 of the Third Schedule is a general entry. Chapter 24 of the Schedule to the Central Excise Tariff Act, 1985 refers to various items under six heads. The learned counsel for the Revenue submitted that it is always open for the State to levy tax in accordance with the Sales Tax Act. All we require to do is to test the legislative competence in levying the tax in the instant case. The learned counsel for the Revenue further submitted that Entry No.22 in Third Schedule is a general entry and Entry No.46, which is now in the First Schedule is a specific entry and further there is no question of entertaining this petition. The learned counsel drew our attention to the decision of the Apex Court in Commissioner of Sales Tax, U.P. v. Agra Belting Works (1987) 66 STC 1, wherein the Court pointed out as under:-

> "As has been pointed out above, section 3 is the charging provision; section 3A authorises variation of the rate of tax and section 4 provides for exemption from tax. All the three sections are parts of the taxing scheme incorporated in the Act and the power both under section 3A as also under section 4 is exercisable by the State Government only. When, after a notification under section 4

granting exemption from liability, a subsequent notification under section 3A prescribes the rate of tax, it is beyond doubt that the intention is to withdraw the exemption and make the sale liable to tax at the rate prescribed in the notification. As the power both for the grant of exemption and the variation of the rate of tax vests in the State Government and it is not the requirement of the statute that notification of recall of exemption is a condition precedent to imposing tax at any prescribed rate by a valid notification under section 3A, we see no force in the contention of the assessee which has been upheld by the High Court. In fact, the second notification can easily be treated as a combined notification - both for withdrawal of exemption and also for providing higher tax. When power for both the operations vests in the State and the intention to levy the tax is clear we see no justification for not giving effect to the second notification. We would like to point out that the exemption was in regard to a class of goods and while the exemption continues, a specific item has now been notified under section 3A of the Act.

13. The learned counsel for the Revenue relied on the decision of Apex Court in Salex Tax Officer, Sector IX, Kanpur v. Darling Dairy Products and another (1994) 94 STC 93. In that case the special leave petition was dismissed. However, it appears that the review petition was allowed following the ratio of the decision of the Apex Court in Agra Belting Works's case (supra). At page 94, it was held as under:-

"In Commissioner, Sales Tax v Agra Beling Works [1987] 66 STC 1; (1987) 3 SCC 140 a bench of this Court comprising R.S.Pathak, C.J., Rangnath Misra and B.C.Ray, JJ., held by a majority, that sections 3, 3-A and 4 of the U.P.Sales Tax Act are parts of the taxing scheme incorporated in the Act and, therefore, where a notification is issued under section 3-A prescribing a rate of tax for goods which may have been exempted from tax by an earlier notification under section 4, it must be held that the intention was to withdraw the exemption and make the sale leviable to tax at the rate prescribed in the notification. It was held that it is not necessary in such a case that a specific or separate notification withdrawing or revoking the exemption is issued. Following the said decision it must be held that the exemption granted to ice cream by notification dated 21st May, 1974, was undone by the notification dated 4th November, 1974 as well as by the Notification dated 30th May, 1975.

For the above reasons the review petition is allowed and the order of the High Court dated 12th December, 1986 (which was the subject matter of S.L.P.No.14648 of 1988) is set aside. For the same reasons, the order dated 9th January, 1989 in the aforesaid S.L.P.14648 of 1988 is also set aside and the order of the assessing authority holding the turnover relating to ice cream as taxable is restored.'

14. These decisions were again followed by the Apex Court in State of Bihar and another v. Krishna Kumar Kabra and another (1998) 108 STC 1. In para 5, the Court pointed out as under:-

> "Our attention has been drawn to two judgments of this Court that squarely cover the issue in favour of the appellant-State. They are the judgments in Commissioner, Sales Tax, U.P. v. Agra Belting Works [1987] 66 STC 1 and in Sales Tax Officer, Sector IX, Kanpur v. Darling Dairy Products [1994] 94 STC 93. In the earlier case it was held that sections 3A and 4 of the U.P.Sales Tax Act, 1948 were part of the taxing scheme incorporated in that Act and, therefore, where a notification was issued under section 3A prescribing the rate of tax on goods which had been exempted from tax by an earlier notification under section 4, it had to be held that the intention was to withdraw the exemption and make the sale leviable to tax at the rate prescribed in the later notification. It was not necessary that a specific or separate notification withdrawing or revoking the notification should be issued. The latter judgment of this court, on similar facts, followed the earlier judgment".

15. The learned counsel for the Revenue submitted that the Kerala High Court in Reliance Trading Company v. State of Kerala (2000) 119 STC 321 following the aforesaid decision in para 8 pointed out as under:-

> "If there are two entries, one general and the other specific, the ordinary rule of construction that a general entry must give way to a specific entry is to be followed. The authority is to see that if two entries are apparently in conflict with one another, an attempt must be made to construe them harmoniously and not to treat them repugnant each other. A commodity falling under the general entry as also a specific entry has to be taxed in terms of special entry as the same is to prevail over

the general entry. That itself is sufficient to reject the stand of the assessee."

16. The learned counsel for the Revenue, in view of these decisions, submitted that when it is competent for the State to levy tax and by general entry exemption is granted, it is always open to levy the tax for a specific item by naming the same. It is not in dispute before the Court that the Lt.Governor had the power to issue such notification under the Act.

17. The learned counsel for the petitioner submitted that when the later decision of the Apex Court in Kothari Products Ltd.'s case (supra) pointed out that gutka is a tobacco, then there is no question of levying the tax on the same as it is already exempted under Section 7 of the Act vide Entry No.22. Before the Apex Court the question was whether "pan masala"which includes "gutka" can be taxed or not? In the instamt case the entries are 'pan masala' and 'gutka'. Before the Apex Court in Kothari Products Ltd.'s case (supra) there was a question of inclusion of 'guthka' in 'pan masala' and, therefore, the Court pointed out that the manner in which it is done is bad in law and, therefore, the

Court struck down the said entry. In the instant case, both 'pan masala' and 'gutka' are separate and specifically mentioned. The learned counsel for the petitioner further submitted that in view of the later decision this Court should follow the later decision.

18. It was submitted by the learned counsel for the petitioner that the decision in case of Kothari Products Ltd (supra) should be followed. We have considered the decision of the Apex Court in Agra Belting Works and other cases. It is required to be noted that even if two judgments of the Apex Court appear to be inconsistent on common issues brought before it in two different cases, it is expected to follow both the verdicts and try as best as possible to resolve the seeming conflict, if any, between the two decisions of the Supreme Court. We have examined all the judgments and we are required to follow the principles laid down by the Courts. It is difficult for the Court to depart from the reasoning indicated by various judgments of the Supreme Court as indicated in Agra Belting Works case (supra) and more particularly when the later judgment in Kothari

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Products Limited (supra) the matter was on a different point.

19. In view of the above, we find no merits in the petition and the same is dismissed.

CHIEF JUSTICE

November 05,2004 BADAR DURREZ AHMED, J.
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