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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

W.P.(C) 4002/2005

Date of Decision. April 05 ,2006

M/S.SOM ZARDA PRODUCTS (P) LTD. Petitioner
Through : **Mr. Dhruv Agrawal with Mr. Nalin Talwar, Advs.**

versus

GOVT. OF NCT OF DELHI & ORS ... Respondents
Through . **Mr. Raj K.Batra & Mr.Saleem Ahmed, Advs.**

CORAM:
HON'BLE MR. JUSTICE T.S. THAKUR
HON'BLE MR. JUSTICE B.N. CHATURVEDI

1. Whether reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not?
3. Whether the judgment should be reported in the Digest?

: **T.S. THAKUR, J.**

For orders see W P.(C) No 2925/2005.

T.S. THAKUR, J

B.N. CHATURVEDI, J

April 05, 2006
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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of Decision: April 05 ,2006

1. **W.P.(C) 2925/2005**

M/S.TRIMURTI FRAGRANCES (P) LTD. ..... Petitioner

versus

GOVT. OF NCT OF DELHI & ORS. ..... Respondents

2. **W.P.(C) 517/2006**

M/S.SOM FLAVOURS (P) LTD. ..... Petitioner

versus

GOVT. OF NCT OF DELHI & ORS. ..... Respondents

3. **W.P.(C) 4002/2005**

M/S.SOM ZARDA PRODUCTS (P) LTD. .... Petitioner

versus

GOVT. OF NCT OF DELHI & ORS. ..... Respondents

4. **W.P.(C) 9837/2005**

M/S.SUNRISE FOOD PRODUCTS .... Petitioner

versus

GOVT. OF NCT OF DELHI & ORS. ..... Respondents

5. W.P.(C) 23698/2005

M/S.KUBER TOBACCO (P) LTD. .... Petitioner

versus

GOVT. OF NCT OF DELHI & ORS. ..... Respondents

CORAM:
HON'BLE MR. JUSTICE T.S. THAKUR
HON'BLE MR. JUSTICE B.N. CHATURVEDI

Advocates who appeared in these case:

For the petitioners	**:**	**Mr. Dhruv Agrawal with Mr. Nalin Talwar, Advs.**
For the respondents	**:**	**Mr. Raj K.Batra & Mr.Saleem Ahmed, Adv.**

1. Whether reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not?
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: T.S. THAKUR, J.

In these writ petitions, the petitioners have challenged the legality of a notification dated 31st March, 2000,

issued by the Govt. of NCT of Delhi to the extent the same introduces Gutka as one of the items in Schedule-I to the Delhi Sales Tax Act, 1975 and thereby makes sale and purchase of that commodity taxable at the rate of 12%. The petitions arise in the following circumstances:

2. The petitioners are engaged in the manufacture and sale of Gutka/Pan Masala containing tobacco under different brands names. By the impugned notification, issued by the Government of NCT Delhi, Pan Masala and Gutka were inserted in Schedule-I to the Delhi Sales Tax Act at Entry No.46 retrospectively with effect from 1.4.2000. As a result of the said insertion, sale and purchase of Pan Masala and Gutka became taxable under the Delhi Sales Tax Act at the rate of 12%. The Petitioners assail the said insertion and the liability arising from the same, primarily on the ground that since Pan Masala and Gutka manufactured by them contain tobacco which is a declared commodity under Section 14 of the Central Sales Tax Act, 1956, any legislative measure adopted by the State could not levy a tax on the sale of the said commodity at a rate in excess of 4% stipulated under Section 15 of the Central Sales Tax Act. To the extent the impugned notification violates the said restriction validly prescribed by the Parliament in terms of Article 286 of the

Constitution, the same is, according to the petitioners, *ultra vires,* hence liable to be quashed.

3. We have heard, learned counsel for the parties at some length.

4. Article 286 of the Constitution of India, *inter alia,* provides that any law of a State shall, in so far as it imposes or authorizes the imposition of a tax on the sale or purchase of goods declared by the Parliament by law to be of special importance in the Inter State Trade or Commerce, be subject to such restrictions and conditions in regard to the systems of levy, rates and other incidents of the tax as the Parliament may by law specify. The Parliament has, in Section 15 of the Central Sales Tax Act, 1956, placed restrictions and conditions in regard to tax on sale or purchase of declared goods within a State. One of the restrictions contained in Section 15 is that tax payable in respect of any sale or purchase of declared goods inside the State shall not exceed 4% of the sale or purchase price thereof and such tax shall not be levied by more than one State.

5. In Godfrey Philips India Ltd. & Anr. Vs. State of U.P. & Ors., **2005 (1) Scale 465**, the Supreme Court held that if any declared goods referred to in Section 14 of the Central Sales Tax Act, 1956 are involved in such transfer, supply or delivery,

referred to in Clause 29-A of Article 366, the sales tax enactment of a State which provides for levy of sales tax thereon shall have to abide by the restriction mentioned in Section 15 of the Central Sales Tax Act, 1956.

6. In M.R. Tobacco Pvt. Ltd. Vs. Union of India & Ors. **[W.P.(C). No. 22726/2005]** disposed of by our order dated 17th January, 2006, the petitioner company had challenged the legislative competence of the State to levy Sales Tax on Gutka by insertion of an Entry in Schedule-I of the Delhi Sales Tax in terms of the impugned notification. A two-fold contention was urged on behalf of the petitioners in that petition. Firstly it was contended on the authority of the decision of the Supreme Court in Kothari Products Ltd. Vs. Government of A.P. **(2000) 9 SCC 263** that since Gutka and tobacco were covered under the Additional Duties of Excise (Goods of Special Importance) Act, 1957, the same were exempt from payment of any sales tax. Secondly, it was argued that additional excise duty payable under the Act afore-mentioned being in lieu of sales tax, the levy of sales tax by the inclusion of Gutka in Schedule-I of the Act was unconstitutional in as much as the same was contrary to the spirit underlying the Constitution (Eightieth Amendment) Act, 1999 apart from exposing the petitioner to double taxation which

was legally impermissible. Both these contentions were repelled by this Court. This Court noticed that the impugned notifications had been upheld in Shanti Fragrances Vs. Union of India & Ors., **[W.P.(C). No.11251/2004]**, disposed of on 5th November, 2004 and that it was open to the State to withdraw a general exemption by inclusion of an entry in the Schedule enumerating the goods, the sale whereof would attract a tax. The decision of the Supreme Court in Kothari Product's case was held to be inapplicable as the Supreme Court had, in that case, interpreted the provisions of Andhra Pradesh General Sales Tax Act, 1957 and the Schedules attached to the same. The scheme of the Delhi Act was, however, different from that of the Andhra Pradesh General Sales Tax Act, 1957. The ratio of the decision in Kothari Product's case had, therefore, no application. The Court also held that the State Legislatures were competent to levy taxes on the sale or purchase of the commodities exigible to additional excise duty. All that the levy of any such sales tax would mean is that the additional excise duty levied on such commodities by the Central Government will not be distributed among such of the States as had chosen to levy a tax on the sale thereof. Reliance was placed by this Court upon the decision of the Supreme Court in Mahalakshmi Oil Mills Vs. State of Andhra Pradesh, **(1989) 1**

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SCC 164, where their Lordships have observed:

> "In short, the object of the Act was to substitute additional duties of excise in place of sales tax so far as these goods were concerned. Since the State legislatures were at liberty, if they wished, to levy taxes on the sale or purchase of these commodities, the Act provided that the additional excise duties will be distributed only among such States as did not levy a tax on the sale or purchase of these commodities. Also, by including these goods in the category of goods declared to be of special importance in inter-State trade or commerce, the legislation ensured that, if any State levied sales tax in respect of these commodities, such levy was subject to the restrictions contained in the Central Sales Tax Act, 1956."

7. To the same effect is the decision of the Supreme Court in State of Kerela Vs. Attesse, **(1989) 72 STC 1**, where the Court has held as under:

> "By levying sales tax on an item covered by the Schedule to the 1957 Act, the State will have to forego its share on distribution of proceeds of the additional duty levied. Whether it should impose sales tax on an item of declared goods limited by the restrictions in section 15 of the Central Sales Tax Act, 1956 and at the risk of losing a share in the additional excise duty levied in respect of this very item is for the State to determine."

8. Reference may also be made to the decision of the Apex Court in State of Bihar Vs. Bihar Chamber of Commerce, **(1996) 103 STC 1,** where the Court has observed:

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> "By enacting the Additional Duties of Excise (Goods of Special Importance) Act Parliament levies additional duties of excise and distributes a part of the proceeds among the States provided the States do not levy taxes on sale or purchase of the schedule commodities. Parliament has also provided the consequence that follows if any State levies tax on sale or purchase of schedule commodities; all that happens is that the State will be deprived of its share in the proceeds of additional duties of excise for that financial year. Even this is subject to the power of the Central Government to direct otherwise, and Parliament could not, and did not, prohibit any State from making any law levying any tax which a State can levy by virtue of the entries in List II."

9. In the light of the above pronouncements of the Supreme Court, there is no gainsaying that the levy of additional excise duties in the category of goods declared to be of special importance in inter-State trade or commerce, did not prevent the State Legislatures from levying a tax on the sale of the such commodities, subject to the restrictions contained in the Central Sales Tax Act. All that the levy of any such sales tax would mean is that the additional excise duty levied on such commodities by the Central Government will not be distributed among such of the States as had levied such a sales tax. That, however, is a matter concerning distribution of the proceeds of additional duties, which has nothing to do with the legislative competence of the State Legislatures to levy a tax on the sale of such goods.

10. We have, in the circumstances, no hesitation in reiterating the view expressed by us in M.R.Tobacco Pvt. Ltd. Vs. Union of India & Ors. that the insertion of Gutka/Pan Masala in Schedule-I to the Delhi Sales Tax Act does not suffer from any vice of unconstitutionality or legislative incompetence.

11. In fairness to Mr.Agarwal, learned counsel for the petitioner, we must mention that the only ground which he pressed into service in support of the petitions was that since tobacco and manufactured tobacco substitutes which, according to the petitioner, includes Pan Masala and Gutka were goods declared to be of special importance, the restriction placed by the provisions of Section 15 of the Central Sales Tax Act and as the rate of tax which can be levied on the sale or purchase of any such commodity could in no case exceed 4%. To the extent the levy in the instant case was 12% by inclusion of the commodity in the First Schedule to the Act, the same, according to the learned counsel, violated the restriction placed upon the competence of the State Legislatures by Section 15 of the Central Sales Tax Act read with Article 286 of the Constitution.

12. On behalf of the respondents, it was, argued by Mr.Batra that if Gutka/Pan Masala was indeed a declared item, the rate of tax under the Delhi Sales Tax Act, 1975 on the sale of

Gutka could not exceed 4%. Mr. Batra, however, argued that Gutka was not a declared item under Section 14 of the Central Sales Tax Act, 1956 so as to restrict the powers of the State to levy a sales tax @ 12% on the sale thereof.

13. The question that falls for determination is whether Gutka is indeed a declared commodity so as to attract the restriction regarding the rate of tax leviable on the sale thereof.

14. Section 2 of the Central Sales Tax Act,1956 define "declared goods" thus:

> **"2. Definitions**.-In this Act, unless the context otherwise requires,-
>
> (a) XXX XXX
>
> (b) XXX XXX
>
> (c) "declared goods" means goods declared under section 14 to be of special importance in inter-State trade or commerce;

15. Section 14, Clause (ix) reliance whereupon is placed by the petitioner may also be extracted at this stage:

> **"14. Certain goods to be of special importance in the inter-State trade or commerce.-** It is hereby declared that the following goods are of special importance in inter-State trade or commerce:-
>
> (ix) **unmanufactured tobacco and tobacco refuse** covered under sub-heading No.2401.00, cigars and cheroots of tobacco covered under heading No.24.02, cigarettes and cigarillos of tobacco covered under sub-

heading Nos.2403.11, and 2403.21 and other manufactured tobacco covered under sub-heading Nos.2404.11, 2404.12, 2404.13, 2404.19, 2404.21, 2404.29, 2404.31, 2404.39, 2404.41, [2404.50 and 2404.60] of the Schedule of the Central Excise Tariff Act, 1985 (5 of 1986)."

16. Chapter 24 of Central Excise Tariff Act, 1985 deals with tobacco and manufactured tobacco substitutes. Note 6 to the said Chapter refers to pan masala containing tobacco and defines the said expression thus:

> "6. 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."

17. Pan masala containing tobacco is, under Chapter 24, shown at sub-heading No.2404.49, attracting a duty of 16% and an additional duty of 18% on the same. Pan masala containing tobacco manufactured by the petitioners in the present petitions does not constitute a declared commodity under section 14(ix) of the Central Sales Tax Act read with Central Excise Tariff Act, 1985. That is because sub-heading 2404.49 under Chapter 24 and the

Schedule to the Act earlier mentioned is not one of the sub-headings included in section 14(ix) of the Central Sales Tax Act.

18. On behalf of the petitioners, however, it was contended that section 14(ix) of the Act has reference to the provisions of the Central Excise Tariff Act, 1985 as the latter Act existed at the time of incorporation of the said provision in May, 1988. Subsequent amendments to the Central Excise Tariff Act or the Schedule thereto were, according to Mr.Agarwal, wholly irrelevant. Reliance was in support of that contention placed upon the decision of the Supreme Court in Nagpur Improvement Trust Vs. Vasantrao & Ors., **(2002) 7 SCC 657**.

19. Mr. Batra, on the other hand, argued that section 14(ix) in its present form was inserted with effect from 13th May, 1988 vide section 85 of the Finance Act, 1988. He submitted that even if the legal position was seen by reference to the said date, Pan masala containing tobacco commonly known as 'Gutka' was assessable under Chapter 21 of the Central Excise Tariff Act, 1985 and not under Chapter 24. We find merit in that submission. Chapter 21 of the Central Excise Tariff Act, 1985, as it existed at the time of incorporation of Clause (ix) to section 14 of the Central Sales Tax Act, define Pan masala as under:

> "In this Chapter, 'Pan Masala' means any preparation containing betel nuts and any

one or more of other ingredients such as lime, katha (*catechu)* cardamom, copra, menthol and tobacco."

20. That item figured at sub-heading 21.06 of Chapter 21 which reads as under:

> "**21.06 PAN MASALA**
> - Containing lime or katha (*catechu)* or both, whether or not containing tobacco:"

21. Chapter 24 of the Central Excise Tariff Act as on the date of introduction of Clause (ix) to section 14 of the Central Sales Tax Act did not deal with the Pan masala containing tobacco commonly known as 'Gutka' although it referred to other chewing tobacco preparations under heading No.24.04 and sub-headings 2404.41 and 2404.49, which may be gainfully extracted at this stage:

Heading No.	**Sub-heading No.**	**Description of goods**	**Rate of Duty**	
24.04		Chewing tobacco, including preparations commonly known as "Khara Masala", 'Kimam', 'Dokta', 'Zarda', Sukha' and 'Surti'	**Basic**	**Additional**
	2404.41	Bearing a brand name	20%	10%
	2404.49	Others	Nil	Nil

22. From whatever angle the question may be viewed, the result is obvious. Pan masala is not, in terms of the Central Excise

Tariff Act as it stands today, a declared item nor was it a declared item on the date, section 14(ix) of the Central Sales Tax Act was introduced in the form in which it today exists in the Statute Book. It is in the light of the above unnecessary for us to examine whether the legislation in the present case was by incorporation or by reference. We may all the same gainfully extract the following passage from the decision in *Nagpur Improvement Trust's case (supra)* which lucidly explains the distinction between and the consequences of the two methods of legislation:

> "When an earlier Act or certain of its provisions are incorporated by reference into a later Act, the provisions so incorporated become part and parcel of the later Act as if they had been bodily transposed into it. The incorporation of an earlier Act into a later Act is a legislative device adopted for the sake of convenience in order to avoid verbatim reproduction of the provisions of the earlier Act into the later. But this must be distinguished from a referential legislation which merely contains a reference or citation of the provisions of an earlier statute. In a case where a statute is incorporated, by reference, into a second statute, the repeal of the first statute by a third does not affect the second. The later Act along with the incorporated provisions of the earlier Act constitutes an independent legislation which is not modified or repealed by a modification or repeal of the earlier Act. However, where in a later Act there is a mere reference to an earlier Act, the modification, repeal or amendment of the statute that is referred, will also have an effect on the statute in which it is referred. It is equally

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> well settled that the question whether a former statute is merely referred to or cited in a later statute, or whether it is wholly or partially incorporated therein, is a question of construction."

23. What is evident in the present case is whether the legislation is taken to be one by incorporation as suggested by the petitioners or by reference/citation as argued by counsel for the respondents, the result remains the same. Pan masala is in either situation not a declared commodity as per the provisions of the two enactments as noticed above.

24. In the result, these writ petitions fail and are hereby dismissed but in the circumstances without any order as to costs.

T.S. THAKUR, J

B.N. CHATURVEDI, J

April 05, 2006
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