IN THE HIGH COURT OF DELHI AT NEW DELHI

CW Nos.17214/06, 17513/06, 17616/06

KUBER TOBACCO PRODUCTS (P) LTD. ...Petitioner
through Mr. Bhagwati Prasad, Adv.

Versus

COMMISSIONER OF VALUE ADDED TAX ...Respondent
through Mr. R. K. Batra, Adv.

Date of Decision : 27th November, 2006

CORAM:
HON'BLE MR. JUSTICE VIKRAMAJIT SEN
HON'BLE DR. JUSTICE S. MURALIDHAR

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

JUDGMENT

1. These three Writ Petitions under Article 226 of the Constitution of India have been filed by the Petitioner in respect of Assessment Years 2001-02 and 2002-03. The Petitioner, who is engaged in the business of manufacture and sale of Pan Masala including Gutka, had been assessed under the Delhi Sales Tax Act, 1975 (`DST Act') and the Central Sales Tax Act for these years. Subsequently the Joint Commissioner, in exercise of his

powers under Section 46 of the DST Act had *suo motu* revised the Assessment Orders and taxed the turnover of the Petitioner at the rate of 12 per cent under Section 4(1)(a) read with Entry-46 of the First Schedule of the DST Act.

2. This Order was assailed before the Appellate Tribunal Value Added Tax, New Delhi, (`Appellate Tribunal') which, by its Order dated 30.5.2006, had directed the Petitioner to deposit the following amounts as a pre-condition to entertaining the Appeals:-

Year	**Act**	**Amount in figures(Rs.)**	**Amount in words (Rs.)**
2001-02	Local	17,00,000/-	Seventeen Lakhs
	Central	85,00,000/-	Eighty-Five Lakhs
2002-03	Local	1,40,000/-	One Lakh Forty Thousand
	Central	50,00,000/-	Fifty Lakhs

The total liability for these years, in respect of which the impugned Pre-deposit Order had been passed, is discernible from the following table:

Year	**Act**	**Tax(Rs.)**	**Interest (Rs.)**	**Total(Rs.)**
2001-02	Local	26,95,744/-	5,09,969/-	32,05,713/-
	Central	1,07,96,594/-	19,43,385/-	1,27,39,979/-

Year	Act	Tax(Rs.)	Interest (Rs.)	Total(Rs.)
2002-03	Local	2,01,846/-	33,149/-	2,34,995/-
	Central	61,77,494/-	11,13,389/-	72,90,883/-

3. It is evident that the focal and primary grievance of the Petitioner is the Appellate Tribunal's directions pertaining to pre-deposit. However, the assault to the vires of Section 43(5) of the DST Act in the context of Article 265 of the Constitution of India and of the vires of the Notification dated 31.3.2000 in the context of Articles 283(3) read with Section 15 of the Central Sales Tax Act and Article 239AA of the Constitution of India have also been ventilated.

4. The first ground that has been raised is that whilst Section 46 of the DST Act avowedly reposes on the Authority powers of Revision, the Delhi Value Added Tax Act (for brevity 'Delhi VAT Act), which repealed the DST Act with effect from 1.4.2005 does not contain similar provisions. The contention is that the intent of the legislature is unambiguously clear, i.e. that the powers of Revision no longer vests with the concerned Authority. This argument, however, is clearly misplaced since Section 106(2) of the Delhi VAT Act, 2004 contains the *non-obstante* clause to the

effect that repeal of the DST Act, 1975 shall not affect the previous operation of the said Acts or any right, title, entitlement, obligation or liability already acquired, accrued or incorporated thereunder. A Show Cause Notice was issued to the Petitioner on 15.3.2005, i.e. before the repeal of the DST Act. Those proceedings, therefore, shall continue unaffected by the repeal of the Act. This argument is, therefore, devoid of merit.

5. It has also been contended that the Petitioner has an untrammelled and undilutable right of appeal which emanates out of Article 265 of the Constitution of India. The requirement of making a pre-deposit of even a portion of the assessed tax clouds or clogs that right. Accordingly, it is submitted that Section 43(5) of the DST Act, which precludes the Appellate Tribunal from entertaining an appeal without pre-deposit of all or some portion of the disputed tax, is ultra vires the Constitution.

6. Learned counsel for the Petitioner brings in Article 265 on the premise that the word 'levy' takes within its sweep not only the powers to charge tax but also the machinery by which the assessed tax is to be collected. Reliance was sought to be placed by learned counsel on ***Assistant Collector of Central Excise,***

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Calcutta -vs - National Tobacco Co. of India Ltd., [1978] E.L.T. (J 416), which we do not find to be relevant. Our attention has also been drawn to the Judgment of a Single Bench in ***Baba Rice and General Mills -vs- The State of Haryana,*** [1988] 71 STC 266 and of the Division Bench in **CIT(Central), Madras -vs- Indian Express(Madurai) Pvt. Ltd.,** [1983] 140 ITR705 which again are of no assistance, in our view, to the Petitioner.

7. The principle that an Appeal is itself a creature of a statute is by now a firmly entrenched principle in our jurisprudence. The statute which bestows a right of an appeal can circumscribe and qualify the circumstances in which that right can be exercised. The decision of the Apex Court in ***Shyam Kishore -vs- Municipal Corporation of Delhi,*** AIR 1992 SC 2279 rightly comes to mind. An identical argument had been raised, but repelled in that case; it had been contended that if the deposit of the disputed tax was to be a pre-condition for the hearing of the appeal, this prerequisite may be so onerous as to make the remedy of an appeal wholly illusory. Their Lordships held that an appeal is not a matter of right and, therefore, the Court hearing the appeal did not possess the power to dispense with the pre-deposit and that the Appellate Court could do so to keep the

appeal pending for a reasonable period in order to enable the appellant to make the deposit by installments. Their Lordships had also deprecated the exercise of the extraordinary powers under Article 226 of the Constitution of India which were invoked by the Assessee in order to circumvent the making of the pre-deposit. We do not propose to multiply the authorities on this principle merely mentioning the decisions in ***State of Bombay -vs - Supreme General Films Exchange Ltd.***, AIR 1960 SC 980 and ***Anant Mills Co. Ltd. -vs- State of Gujarat***, AIR 1975 SC 1234. This has been reiterated in a decision of this Court in ***Vijay Power Generators Ltd. vs. CST,*** (2000) 120 STC 377. In this view of the matter, the challenge to the vires of Section 43(5) DST Act must fail.

8. The challenge to the vires of the Notification dated 31.3.2000 was laid before the Division Bench of this Court in ***M.R. Tobacco Pvt. Ltd. -vs- Union of India***, [2006] Vol. 145 211. The decision in ***Kothari Products Ltd. -vs- Government of Andhra Pradesh***, [2000] 119 STC 553 affirmed by the Supreme Court was distinguished by my learned Brothers because of the difference in the language employed in DST Act, 1975 and the Andhra Pradesh General Sales Tax Act, 1957. My

learned Brothers had also referred back to the decision of another Division Bench in ***M/s. Shanti Fragrances -vs- Union of India,*** [2006] 144 STC 529(Delhi). We find no reason whatsoever to enter upon a fresh consideration of the assault on the validity of the Notification dated 31.3.2000 in the light of these two decision of Co-ordinate Benches.

9. So far as quantum of pre-deposit is concerned, learned counsel for the Petitioner has contended that the Petitioner has not collected tax from the consumers. This factor may not be relevant since what is required of the Appellant is to plead and disclose financial hardship. However, this exercise has not been embarked upon by the Petitioner. It would have had to produce its Balance Sheets for the previous years to show that it was incapable of making the pre-deposit, or that its liquidity would have been stringently affected. In this regard, as against a liability for the year 2001-02 under the Local Act aggregating to Rs.32,05,713/- a sum of Rs.17,00,000/-, and for the year 2002-03 aggregating to Rs.2,34,995/- a sum of Rs.1,40,000/- has been ordered. Similarly, in respect of the Central Sales Tax Act, as against a liability for the year 2001-02 aggregating to Rs.1,27,39,979/- a sum of Rs.85,00,000/-, and for the year 2002-

03 as against a liability aggregating to Rs.72,90,883/-, Rs.50,00,000/- has been ordered. The Tribunal has obviously exercised its mind before arriving at its conclusion.

10. The Petitions are devoid of merit and are dismissed.

(VIKRAMAJIT SEN)
JUDGE

(S. MURALIDHAR)
JUDGE

November 27, 2006
`tp'

-fresh CM - 25/07 (for hearing)