

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 32 OF 1999

Maharashtra Retail Liquor Dealers'
Association, an Association of retail
liquor Vendors duly registered under
the Companies Act, 1956 and having
its Registered Office at Shop No.1.,
Maitri Park, Sion Trombay Road,
Chembur, Mumbai 400 071

1 to 38

.... Petitioner

vs

1 The Commissioner, State Excise,
having his office at 2nd floor, Old Custom
House, Mumbai.

2 The State of Maharashtra,
Mantralaya, Mumbai
State Excise.

3 The Commissioner of Sales Tax,
Mazagaon, Mumbai

.... Respondents

Adv. Veena A. Thadhani for the petitioner.

Adv Abhay L. Patki, Addl. G.P. for Respondents/State.

**CORAM: ANOOP V. MOHTA AND
M. S. KARNIK, JJ.**

DATE : May 31, 2017

ORAL JUDGMENT (Per Anoop V. Mohta, J.):

Called out from final hearing board specifically listed in summer vacation.

2 The Petitioner Association (“the retailers”) is a registered body comprising of licensees, holding FL-II Licence under the provisions of the Bombay Prohibition Act, 1949 (the Prohibition Act) and the Rules made thereunder, for selling foreign and country liquor in retail. They have filed the present Petition on 23.12.1998 and prayed as under:

(a) that this Hon’ble Court be pleased to issue a Writ of Certiorari or a Writ in the nature of Certiorari or any other appropriate writ, order or direction of this Hon’ble Court calling for the papers and proceedings relating to the impugned Circular dated 9th December, 1998 (Ex. “E”) and the impugned Notifications dated 8th December, 1998 (Ex. “C”) and 9th December, 1998 (Ex. “D”) and after inquiring into the validity and/or legality thereof to quash and set aside to the same.

(b) that without prejudice to and in the alternative to the above, the Petitioner prays for a Writ of Mandamus or a Writ in the nature of Mandamus or any other appropriate Writ, Order or direction of this Hon’ble Court restraining the Respondents from levying or collecting Sales Tax on goods manufactured before 9th December, 1998.

(c) that pending the hearing and final disposal of the Petition, the Respondents be restrained from levying or collecting 8% Sales Tax on stock which has labels of “Maximum Retail Price Rs./- inclusive of all taxes and duties” and which has been manufactured prior to 9th December, 1998.”

All members of the Association are treated as Petitioners.

3 Pursuant to the order passed by this Court dated 21st September 2010, which is reproduced below, the individual retailer's (list of members is placed on record), have paid the court fee accordingly. We have considered their challenge based upon the submission and averments so made at the time of final hearing of the matter.

“As held by the Division Bench of this Court (Nagpur Bench) in judgment dated 29th June, 1976 delivered in Special Civil Application No. 1259/1975 (Govindrao Atmaramji Warjekar I The State of Maharashtra) and in Judgment dated 12th August, 1976 delivered in Civil Revision Application No. 343/1976 in Special Civil Application No.3337/1976 (Md. Usman Abdul Jabbar v. Union of India) (both unreported), whenever there is a petition by the association or any registered or unregistered organisation claiming reliefs in favour of their members, petitioner/s is/are required to pay court fees qua member of the association. The petitioners are, therefore, directed to disclose the names of the members of the petitioner-association and pay Court Fees qua each member of the Association within two weeks from today.

S.O. after two weeks.”

4 The background events are reproduced as under :

In 1964, the Petitioners state that various licences in Form FL II were first granted in 1964 and Sales Tax was initially collected from liquor Vendors holding FL II licences at the rate of 45% on mild liquor and 35% on hard liquor. Thereafter the Sales Tax levied was brought down to 35% on mild liquor and 25% on hard liquor which was again payable by the Vendors holding FL II licences.

5 In 1979, subsequently, 2nd Respondent (the State of Maharashtra) decided to abolish the separate levy of Sales Tax on liquor Vendors and merge sales tax with excise duty into a single levy which was collected at source i.e. in advance at the manufacturing level. Excise duty was therefore hiked and exemption was granted under Section 41 of the Bombay Sales Tax Act (the Sales Tax Act) to liquor Vendors holding FL II licences.

6 In 1996, a new duty structure was introduced for

collecting Excise Duty. By the new duty structure, excise duty including all taxes, octroi, transport, packaging etc was fixed at double the cost of production in the case of Indian Made Foreign Liquor and 33.33% of maximum retail price in case of Beer, Wine and Country liquor. Hence, by the new duty structure, excise duty was collected on the basis of the maximum retail sale which was required to be printed on the labels.

7 After 1st January, 1997, each bottle has a label bearing the slogan of “Maximum Retail Price Rs./- (inclusive of all taxes and duties)”. The Petitioners being retail dealers, had in their possession, at relevant time, a large quantity of stock with the said labels having M.R.P. Printed on them.

8 By Circular dated 9th December, 1998, the Petitioners were informed that by Government Notification dated 8th December, 1998, the Maharashtra Potable Liquor (Retail sale fixation of maximum retail price) Rules, 1996 had been amended and that the slogan mentioned on the label also was amended. By the Circular it was further mentioned that all goods manufactured before

9th December, 1998 would be subjected to payment of sales tax which would be collected and payable by the FL II Licensees. Hence by means of the Circular, the Petitioners have been directed to collect Sales tax at the rate of 8% from the customers over and above the Maximum Retail Price (inclusive of all taxes) printed on the labels.

The restricted submission.

9 The stock held by the Petitioners as stated, had already been subjected to levy of excise duty which was inclusive of all taxes including Sales Tax since Sales Tax was merged with Excise duty on 12th October, 1979 and thereafter no sales tax had been payable by the Petitioners. The Petitioners' counsel contended that by the Notification dated 8th December, 1998 and 9th December, 1998, the Petitioners are being subjected to double taxation since the initial levy of sales tax which was levied on liquor had not been withdrawn. It is also submitted that the Sales Tax, if not collected, by the retailers in view of the reasonable doubt and the confusion, apart from due notice to the consumers, now cannot be taxed and recovered, after so many years.

10 This Court, on 8th February 1999, after hearing the parties, while admitting the writ petition, observed as under:

“Heard.

Rule Returnable after six weeks.

Respondent waives service.

Heard the learned counsel for the petitioner on the prayer for the interim relief. Considering the nature of the levy and that the fact that pursuant to the assurance given to this Court, the respondents have issued advertisement in important daily newspapers that the vendors are allowed to collect sales tax in addition to the maximum retail price mentioned on the label, we are not inclined to stay the recovery of sales tax pursuant to the impugned notification.

We, however, direct that for the period upto 3rd February, 1999 when the advertisement appeared in English daily, the respondent shall not insist on deposit of tax from vendors (FL II Licence vendors) who have not collected the same. This is by way of interim order subject to the outcome of the writ petition.

Liberty to apply for expeditious hearing.”

11 All the parties have acted accordingly. No sales tax was collected at least till the date of advertisement dated 3rd February 1999, is the case. The retailers have been collecting the sales tax after 3rd February, 1999.

The Taxing Statutes and the binding circulars.

12 The Prohibition Act and the various Rules made thereunder including the Rules called “The Maharashtra Distillation of Spirit and Manufacture of Potable Liquor (Amendment), Rules 1966 (the Potable Liquor Rules) and the Maharashtra Potable Liquor (The Fixation of Maximum Retail Prices) Rules, 1996 (The Fixation of Retail Prices Rules) govern the issues revolving around the facts and circumstances of this case. So also, the Sales Tax Act and the Rules made thereunder.

13 The impugned circular dated 9.12.1998 issued by the Finance Department as sales tax is payable by FL II Licencees with effect from 9.12.1998, at the rate of 8% are also required to be collected by such licensees from customers. It is made clear through this circular that

“(01) Stock of beer and Indian Made Foreign Liquor manufactured prior to 9/12/98 may be sold without amending the label. However, this stock will be subject to payment of sales tax when sold in retain by FL II licensees.

(02) Stock manufactured after 9/12/98 will have to be stamped with the words (Excluding sales tax). This facility of stamping the labels will be available to manufacturers and licensees holding Form “K” licences

only till the stock of existing labels is exhausted or 28/2/99, whichever become applicable earlier. Thereafter i.e. from 1/3/99 instead of stamping labels, the words "Excluding Sales Tax" will have to necessarily be printed on the label. Necessary action for granting permission for using labels without these words will be taken by the concerned Superintendents in the State and the Commissioner's Office will grant the necessary permission for use of the labels to licensees holding "K" licensees."

14 The circular dated 8.12.1998 issued by the Finance Department under the Bombay Sales Tax Act in exercising powers conferred by subsection (1) of Section 41 of the Bombay Sales Tax Act, whereby inserted the impugned subject entry "b" which is as under:

"(b) after sub-entry (b), the following sub-entry shall be added, namely:-

(b) Sales by a Registered dealer holding Vendor licence in Form FL II under Bombay Foreign Liquor Rules, 1953 of foreign liquor as defined in Rule 3(6)(1) of the said Rules."	In excess of of eight percent	Nil
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15 Another notification dated 9.12.1998 issued under subsection (3A) of Section 12A of the Sales Tax Act, with immediate effect, by amending the schedule appended to the notification which

is reproduced as under :

“In the SCHEDULE appended to the said notification, after Serial No.4, the following shall be added, namely:-

“5. Dealers holding a vendor licence in Form FL-II under the Bombay Foreign Liquor Rules, 1953”.”

16 The additional factor in the present matter is that the State by notification dated 22.01.1999 under the Prohibition Act and Fixation Rules referring to subsection (3) of Section 143, in fact gazetted the explanation as under :

“Explanation II. - Sales tax on potable liquor excluding country liquor sold through FL II Vendor's licence issued under Rule 25 of Bombay Foreign Liquor Rules, 1953 levied vide Government Notification, Finance Department, No. STA.1097/CR-1/Taxation-2, dated the 8th December 1998 is also recoverable over and above Maximum Retail Price on such potable liquor manufactured prior to the 9th December 1998 and sold on or after the 9th December 1998.”

17 By another notification dated 22.1.1999 it is explained as under :

“2 In rule 11 of the Maharashtra Manufacture of Beer and Wine Rules, 1966, in sub-rule (2), after clause (a), the following Explanation shall be inserted, namely:-

“Explanation. - Sales tax on beer or wine sold through FL-II Vendor's licence issued under rule 25 of the

Bombay Foreign Liquor Rules, 1953, levied under Government Notification, Finance Department, No. STA-1097/CR-1/Taxation-2, dated the 8th December 1998 is also recoverable over and above Maximum Retail Price on such beer and wine manufactured prior to the 9th December 1998 and sold on or after the 9th December, 1998.”

18 Both these Acts are constitutionally valid and so also the Rules and the Circulars made thereunder. It is also settled that unless contra material and/or averments and/or case is made out, the presumption is always in favour of validity of such Act and Circulars, and Notifications, so issued by the State. The power of State and its authority under these Acts and so also the right of licensees, if any, need to be tested, based upon the averments and the case, so made out. It is also clear that such licensees are always governed by the provisions of these Acts, and the Rules made thereunder including the Notification and Circulars, as the privilege/permit is granted by the State to do such business of selling such liquor/products, which falls within the ambit of the Statutes. The power of State and/or statutory authority to impose such tax and/or collect the sales tax within the frame work of law, unless case is made out, need to be respected by all the concern.

The challenge to sales tax demand by the retailers/vendors and not by the consumers, is unsustainable .

19 The consumers are required to pay the valid sales tax. The vendors are required to collect it, at the time of sale of products itself. The presumption, as already recorded of validity including the respective power of such authority to bring in and/or impose sales tax on such transaction, is always in favour of the authority and the State. The vendors/retailers challenge even otherwise is unsustainable, in reference to the challenge so specifically raised, stating it to be double taxation, as ultimately the consumers bound to pay the sales tax and the vendors/retailer's obligation to collect such tax and pay to the department, in accordance with law.

20 There is no issue that such licensees are collecting the sales tax based upon the impugned provisions/circulars/notifications from the date of advertisement dated 3.2.1999 as recorded in order dated 8.2.1999. The challenge, though raised through the grounds contending that imposing of such sales tax is amounting to double taxation, but the fact that since the date of notification/circular, the members have been collecting the sales tax from the consumers

regularly. Non-collection, even if any, as agitated for want of clarification and/or prevailing confusion that also clarified by issuing the specific advertisement dated 3.2.1999 whereby; it is made known to the vendor as well as to the consumers/customers to collect the tax and/or to pay the sales tax in addition to the maximum retail price mentioned on the label. This issue, therefore, need no further discussion, as rested in view of the fact that all have been acting upon it since 3.2.1999.

The sales tax collected or not by the retailers.

21 The statement is made by the learned counsel for the Respondent that the Respondent/Department has already issued individual demand notices to the members/vendors/retailers pending this writ petition, after interim order dated 8.2.1999. Even otherwise, it is necessary for the concerned Departments to collect the factual and material data, to verify and/or enquire whether such retailers/licensees have actually collected the sales tax under the provisions in question and/or not, at the relevant time. The basic liability to collect the sales tax and make the payment to the Department in view of the valid provisions need no debate. All the

concerned are bound to collect and deposit the amount in accordance with law. The concerned members, if able to show and demonstrate that they have not actually collected and/or unable to collect for want of clarity and/or confusion, basically between the period from the date of issuance of notification/circular dated 8th December/9th December 1998 till the date 3rd February 1999. The State/Department, apart from the notification and circular even had advertise and give publicity about the said sales tax demand, for the concerned vendors and the consumers, in addition to the maximum retail price already mentioned on the label. The Department, therefore, would deal with the individual cases, based upon the reply and/or defences so raised, if any and may pass appropriate order.

No case for main reliefs so prayed.

22 The background events and the valid provisions and as no specific case is made out and even considering the settled provisions of Taxing Statute, by the Petitioner/Association to grant the relief of quashing and setting aside those Notifications/circulars, as prayed. No case is also made out to declare and/or grant any restraintment order from levying and/or collecting sales tax on goods manufactured

before 9th December, 1998. This is also for the reason that apart from the clear provisions of law and the notification, the State, in fact, has granted the respective and/or concerned vendors permission to collect the sales tax as reflected in Circular dated 9th December 1998, even the products manufactured prior to 9th December 1998 without amending the labels. It was made clear that the stocks would be subject to payment of sales tax when sold in retail by FL II licence. It is also made clear that the stock manufactured after 9th December 1998 would have to be stamped with the words “excluding the sales tax”. The facility of stamping was also extended only till the stock of existing labels available and/or exhausted till 28th February 1999. By this, it is also made clear that from 1st March 1999 the words “excluding sales tax” would have to be necessarily printed on the labels. Therefore, in totality, the position was made very clear to all the concerns that with effect from 9th December 1998, the sales tax at the rate of 8% is required to be collected by FL II Licencees from the customers and the sales tax would be payable by the concerned vendors.

23 The circular/notification of January 1999 further clarify

the position so recorded above. As noted, thereafter, even the vendors and concerned retailers/dealers have started collected the same. It is important to note ultimately the vendors/retailers are entitled to collect the sales tax in addition to the maximum retail price mentioned on the label. The State/Department has permitted to sell the product by amending the labels, thereby permitting such vendors/licensees to collect the sales tax from the consumers. Therefore, the vendors are under obligation to collect and pay the sales tax accordingly. Ultimately, the consumers who are required to make the payment of the sales tax so imposed and not the vendors directly from their profit. The Petition, as recorded above, is not by the consumers. The challenge is only by the vendors in the background so referred above.

The collected sales tax, required to be deposited by the vendors/retailers.

24 Therefore, in a case, where vendors have already collected the sales tax pursuant to these notifications/circulars, there remain no doubt that they have to make the payment of sales tax to the Department in accordance with law. We also find no illegality and/or

any irregularity in imposing such sales tax. It is well within the frame work of law and the record. The Government, as recorded above, even has taken care of the provisions of the Prohibition Act and the Rules made thereunder and permitted even to amend the labels and/or permitted them to put the additional stamp to avoid confusion in the market while selling the product and/or while collecting the sales tax from the consumers, inspite of fixation of maximum retail price mentioned on the label. The vendors, even otherwise, as recorded, bound to follow the Rules, Regulations and conditions so imposed while permitting them to sell such products. This includes the liability to collect the sales tax and make the payment accordingly to the Department.

The special circumstances of non-collection of sales tax.

25 In the present case, as noted above, there was reasonable doubt and the confusion that resulted into even putting advertisement dated 3.2.1999, by the Department for the concerned vendors and the consumers, about their liability to pay/collect the sales tax in addition to the price mentioned on the label. All have acted after the advertisement. This Court on 8 February 1999, by the interim order

not stayed the recovery of sales tax pursuant to impugned notification, but directed the Respondent not to insist on deposit of sales tax from vendors (FL II licence vendors) who have not collected the same. This is a facet which the Department needs to consider while dealing with the individual matters/the demand so raised and to pass appropriate order keeping in mind non-recovery of sales tax in view of the interim order passed by this Court dated 8 February 1999, which has been in force till today of passing this judgment i.e. practically for 18 years. The order passed by this Court on 8 February 1999, therefore need to be respected in so far as the vendors who have not actually collected the sales tax because of prevailing confusion till the date of advertisement dated 3rd February 1999.

The conclusion in the circumstances.

26 However, it is made clear that in case the retailers/vendors who have actually not collected the sales tax in view of the circumstances so referred above and still, if any adverse orders passed by the Department overlooking the above provisions and/or by recording the other finding on facts, those adverse orders should not be given effect to for a period of four weeks, from the date of

communication of adverse order, if any.

27 Therefore, the following order :

ORDER

- (a) The writ petition and the prayers are rejected/dismissed, however, with above observations.
- (b) Rule stands discharged accordingly.
- (c) No costs.

(M.S. KARNIK, J.)

(ANOOP V. MOHTA, J.)