

**Before the FOURTH BENCH of the
Maharashtra Sales Tax Tribunal
At Mumbai**

Vat Appeal NOS. 548 TO 549 of 2016

M / s . M a h a l a x m i T o b a c c o W o r k s **A p p l i c a n t**

V e r s u s

The State of Maharashtra **R e s p o n d e n t**

Coram : **M r . S . A . U p a d h y e , M e m b e r**
M r . D . B . K a p r a t w a r , M e m b e r

A p p e a r a n c e :

Shri. Pramod Surte, Sales Tax Practitioner, for the applicant.
Shri. Kadam, Deputy Commissioner of Sales Tax (Legal) for
the respondent.

Date: 02 / 12 / 2016

J U D G M E N T

(Per S.A. Upadhye, Member)

These appeals are directed against the order passed by the Joint Commissioner of Sales Tax (Appeals) RAI-F-001, Raigad Division, Belapur, Navi Mumbai for fixing part payment and granting interim stay on 25/08/2016. by this order Joint Commissioner of Sales Tax (Appeals) fixed part payment of Rs. 75,75,000/- of MVAT Act, 2002 and Rs. 81,900/- under CST Act (i.e. 50% of net tax dues) for the period 01/04/2011 to 31/03/2012.

The original assessment order is passed by the Deputy Commissioner of Sales Tax, (RAI-VAT-E-002) Large Tax Prayers Unit-1, Raigad Division Navi Mumbai, by which the claim of manufactured Tobacco which is exempted and as tax fee is not considered but held as deemed manufactured which is out of purview of entry 45(A) in Sch.A. Further, Deputy Commissioner of Sales Tax said that the appellant has misclassifieds to commodity knowingly therefore, penalty under section

29(3) MVAT Act, 2002, also imposed. Thus, the assessment resulted into the demand of Rs. 3,73,80,206/- under MVAT Act, 2002, and Rs. 2,02,157/- under C.S.T. Act, 1956 including interest and penalty.

Learned Shri. Pramod Surte, Sales Tax Practitioner on behalf of the appellant appeared and submitted that the appellant is the dealer dealing in resell of unmanufactured Tobacco which is covered under entry 45(A) in schedule A appended to the MVAT Act, 2002. However, he submitted that appellant has filed returns and completed audit as required under section 61 of MVAT Act, 2002. However, the Deputy Commissioner of Sales Tax made error in law and tax in assessing and taxing the goods under entry No. 12 of the schedule D impeded to MVAT Act, 2002 and taxed at the rate of 20% and also wrongly imposed the penalty under section 29(3). Further, therein first appellate authority without assigning any reasons directed the appellant to pay Rs. 75,75,000/- and of Rs. 81,900/- as part payment under MVAT Act, 2002, as well as C.S.T. Act, 1956, respectively. Further, he argued on the provisions of the law, according to him, the said goods are tax free till 31/03/2012, then the notification came from 1/4/2013 that unmanufactured goods i.e Tobacco sold under Brand name in sealed Packets are not covered under Sch.A, can not be considered as retrospective. He has cited the **judgment of Supreme Court in case of Cidco Forex International Drill v/s Commissioner of Income Tax and Greatship (India) Ltd. v/s Commissioner of Service Tax, Mumbai-1 as reported in (2015) 82 VST 1(Bom)** and requested to allow the appeals without insisting in any part payment.

Mr. Kadam learned Deputy Commissioner of Sales Tax (Legal) appearing for the revenue, submitted that the Deputy Commissioner of Sales Tax, Raigad Division Navi Mumbai has considered the facts as well as the law and the provision thereon at length, and supported the order which can not be now branded as not correct. However, he submitted that explanation to Entry A-45A clearly says that it does not cover unmanufactured tobacco sold in packets under brand name. Hence,

unable to tax under schedule D @ 20% . Accordingly appellant is properly assessed.

On considering their submissions from both sides, we have also perused the order of part payment passed by the appellate authority which is not the reasoned order. We have also gone through the facts of the present appellant's case in the light of the case laws cited by the appellant. Certainly, there is high debatable issued whether the said notification dated 31/3/2012, w.e.f. 1/4/2012 under entry 45A in schedule A can not be retrospective to mean applicable for previous. However, the Joint Commissioner of Sales Tax (Appeals) has not considered the said aspect in detail while passing the order of part payment. The order of part payment passed by the Joint Commissioner of Sales Tax (Appeals) Raigad Division, Belapur, Navi Mumbai is found to be only in operative part. The order of the part payment is not reasoned order and it is only in format prescribed by the appellate authority for grant of the interim stay and fixing part payment. The Joint Commissioner of Sales Tax (Appeals), should have passed the reasoned order in such case, where the appellant is facing financial difficulties. Hon'ble Bombay High Court has held in the case of **M /s. ICICI Bank Ltd v/s The State of Maharashtra 1048/2009 dated 3/7/2009** that the part payment order should be a reasoned order.

As per assessment order, appellant is dealing in sale of unmanufactured tobacco. It is covered under schedule A, Entry 45A. Further, manufactured tobacco is covered under schedule D Entry 12 liable to tax @ 20% . An explanation is added to Entry 45A of Schedule A stating that 'for removal of doubt' that unmanufactured tobacco sold in packet under brand name shall not be covered under entry 45A. This explanation is added on 31/03/2012 w.e.f. 01/04/2012. Returns were filed under the presumption that tax is not payable since 01/04/2007 i.e. from insertion of entry 45A. This prima facie shows that it is change in levy. In Sedco Case (cited supra) it is observed that 'it is settled law that assessment has to be made with reference to the law which is in

existence at that relevant time. In case of **Union of India Vs. Martin Lottery Agencies (2009) 24 VST SC**, the Apex Court held that merely by use of the words 'it is hereby declared that' or 'for removal of doubt' it can not be said that the amendment is clarificatory in nature. Period under consideration is 2011-12. Explanation added on 31/03/2012, then does it a good law for levy of indirect tax is highly debatable issue. We are dealing with inter locketary order, hence, without expressing any opinion on either side of appeal and after going through the above arguments it is felt that this is certainly a fit case for grant of stay without insisting on part payment. hence, we pass the following order:

O R D E R

1. Vat appeal No. 548 to 549 of 2016 are allowed.
2. The impugned order of fixation of part payment as condition in granting stay passed by the learned Joint Commissioner of Sales Tax (Appeals) RAI-F-001, Raigad Division, Belapur, Navi Mumbai is set aside and the recovery is stayed till the disposal of the first appeals.
3. The appeals are expedited and shall be decided within 6 months from the date of receipt of the present order.
4. Appeals are disposed. Proceedings is closed.
5. No order as to cost.

(D.B. Kapratwar)
Member

(S.A. Upadhye)
Member