



IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 20TH DAY OF APRIL 2022

PRESENT

THE HON'BLE MR. JUSTICE ALOK ARADHE

AND

THE HON'BLE MR.JUSTICE S. VISHWAJITH SHETTY

W.A. No.119 OF 2022 (T-RES)
IN
W.P. No.52371 OF 2019 (T-RES)

BETWEEN:

M/S. V.S. PRODUCTS
A PROPRIETARY FIRM
REP. BY ITS PROPRIETOR
MR. MANOJ KUMAR SRIVASTAVA
S/O SITARAM SRIVASTAVA
AGED ABOUT 50 YEARS
R/O PLOT NO.21-P, 2ND PHASE
ANTHARASANAHALLI INDUSTRIAL AREA
TUMKUR-572 106, (KARNATAKA).

... APPELLANT

(BY MR. C.S. VAIDYANATHAN, SR. COUNSEL FOR
MR. GOUTHAM BHADRAJ A/W
MR. VINAY KUTTAPPA K.S.
MR. SUMANTH M.B. ADVS.,)

AND:

1. UNION OF INDIA
REP. BY JOINT SECRETARY
MINISTRY OF FINANCE
DEPARTMENT OF REVENUE
ROOM NO.46, NORTH BLOCK

NEW DELHI-110 001.

2. THE COMMISSIONER OF CENTRAL TAX
(EARLIER KNOWN AS
THE COMMISSIONER OF CENTRAL EXCISE)
BANGALORE-I COMMISSIONERATE
PB NO.5400, QUEENS ROAD
BANGALORE-560 001.

... RESPONDENTS

(BY MR. N. VENKATARAMAN, ASGI A/W
MR. JEEVAN J. NEERALGI, AGA FOR C/R1 & R2)

THIS WRIT APPEAL IS FILED U/S 4 OF THE KARNATAKA HIGH COURT ACT PRAYING TO SET ASIDE THE COMMON IMPUGNED JUDGMENT AND ORDER DATED 04.01.2022 PASSED IN W.P. NO.52371/2019 PASSED BY THE LEARNED SINGLE JUDGE OF THIS HON'BLE COURT AND CONSEQUENTLY GRANT THE RELIEFS SOUGHT FOR IN THE WRIT PETITION AND GRANT SUCH OTHER RELIEFS SOUGHT FOR IN THE WRIT PETITION AND GRANT SUCH OTHER RELIEFS AS THIS HON'BLE COURT MAY DEEM FIT TO GRANT IN THE CIRCUMSTANCES OF THE CASE.

THIS WRIT APPEAL HAVING BEEN HEARD AND RESERVED FOR JUDGMENT ON 04.04.2022, COMING ON FOR PRONOUNCEMENT OF JUDGMENT THIS DAY, **ALOK ARADHE J.**, DELIVERED THE FOLLOWING:

JUDGMENT

This intra court appeal arises out of an order dated 04.01.2022 passed in WP No.5237/2021 by which writ petition preferred by the Appellant questioning the levy of excise duty under the Central Excise Act, 1944 (hereinafter referred to as 'the 1944 Act') and levy and collection of National Calamity Contingency Duty (hereinafter referred to as 'NCCD' for short) on tobacco and tobacco products, has been dismissed.

FACTS

2. Facts giving rise to filing of this appeal in a nutshell are that the appellant is a proprietary firm engaged in the manufacture of tobacco and tobacco products. The appellant had got itself registered under Rule 9 of Central Excise Registration Rules, 2002. After coming into force of Goods and Service Tax regime, the

appellant got itself registered under Rule 10(1) of Central Rules Goods and Services Tax Rules, 2017. By a Notification bearing No.2/2019 issued in exercise of powers conferred by Section 5A(1) of the 1944 Act dated 06.07.2019, Central Excise Duty was levied on Tobacco and Tobacco products.

3. The appellant thereupon filed a writ petition in which challenge was made to the validity of the aforesaid Notification. The appellant also sought a declaration that repeal and saving provision as contained in Section 174 of the Central Goods and Services Tax Act, 2017 (hereinafter referred to as 'CGST Act' for short) in so far as it seeks to save the operation of 1944 Act qua the tobacco and tobacco products is unconstitutional and bad in law. The appellant also assailed the validity of Section 136 of the Finance Act, 2001 which provides for levy and collection of NCCD, as unconstitutional. Alternatively, the appellant

sought a declaration that Section 136 of the Finance Act, 2001, which provides for levy and collection of NCCD has been impliedly repealed with effect from 01.07.2017 viz., the date on which the CGST Act came into force. The appellant sought the refund of the amount of NCCD collected by Respondents with effect from 01.07.2017.

FINDINGS OF LEARNED SINGLE JUDGE

4. The learned Single Judge vide common judgment dated 04.01.2022 passed in WP No.52371/2019, filed by the appellant and other connected matters, inter alia held as under:

(i) The effect on introduction of Article 246A in the Constitution is conferment of power of simultaneous levy on Goods and Services in the nature of Goods and Services Tax and use of non obstante clause does not have the effect of abrogation of power available under Article 246.

(ii) The sources of power under Article 246 and 246A are in fact mutually exclusive and aforesaid powers could be simultaneously exercised.

(iii) A duty of exercise can be levied on tobacco and tobacco products under Article 246 read with Entry 84 of List I post introduction of Article 246A.

(iv) The subsumation of manufacture in the concept of supply even if accepted would at the most amount to double taxation i.e., taxing a taxable event on two occasions, which in the absence of any prohibition in the law, is not impermissible.

(v) The legal taxable event under CGST Act would be supply, while the excise duty is leviable on manufacture. 'Supply' and 'Manufacture' are two different legally recognized aspects and even if incidence is on a single subject, the different legal aspect would not lead to an overlapping and would

result in treating the levy of tax as on different aspects.

(vi) Surcharge is a methodology for raising additional revenue and has nothing to do with leviability of tax or assessee's liability to pay the tax.

(vii) The only bar under Article 271 is that the surcharge contemplated therein excludes surcharge as regards the Goods and Services tax under Article 246A. In this case, the surcharge is by way of duty of excise and cannot be construed to be surcharge as regards Goods and Services tax as contemplated under Article 246A.

(viii) Under Article 271, surcharge could be levied at any time to increase the duty and taxes and surcharge being imposed by way of Finance Act, has nothing to do with surcharge on Goods and Services tax that may still be levied.

(ix) NCCD is in the nature of duty of excise and may be construed to be an additional

duty, yet it is an independent levy and exemption granted on excise duty vide Notification No.11/2017 dated 06.07.2019 cannot prohibit imposition of other additional duty or levy.

(x) Levy of basic excise duty and NCCD on tobacco and tobacco products is not violative of Article 14 of the Constitution of India. The elements of caprice, irrationality, disproportionality or excessiveness coupled with lack of determining principle have not been made out in the pleading and therefore, the impugned levy does not suffer from manifest arbitrariness.

5. The writ petition preferred by the appellant was accordingly dismissed. During the pendency of the writ petition an interim order was granted on 17.12.2019 restraining respondents from levy and collection of either the excise duty or NCCD, from the appellant. However a show cause notice dated 24.12.2021 was issued to the

appellant by which it was required to show cause as to why a sum of Rs.98,75,995/- should not be levied as basic duty and a sum of Rs.47,73,53,435/- should not be levied as NCCD for a period from 24.12.2019 to 31.07.2021.

After dismissal of writ petition on 04.01.2022 officials visited the premises of appellant immediately on the next date i.e., 05.01.2022. The appellant therefore deposited a sum of Rs.48,67,36,347/- on 05.01.2022 under protest. The appellant thereafter filed this appeal on 07.02.2022.

SUBMISSIONS OF THE APPELLANT

6. Learned Senior Counsel for the Appellant while inviting the attention of this court to the objects of the Constitution 101st Amendment Act, 2016 submitted that the object of the Act was to replace several indirect taxes being levied by the Union and State Government and to remove the cascading effect of taxes and to provide for a common national market for goods and services. It is

further submitted that the object of the Amendment Act inter alia is to provide for subsuming various Central Indirect Taxes and levies such as Central Excise Duty, Additional Excise Duties etc., and Central surcharge and cesses, so far as they relate to supply of goods and services. It is also urged that from the perusal of the Statement of Objects and Reasons of four GST Acts, it is evident that a single tax subsumes various taxes which were levied on supply of goods at each stage of the supply chain starting from manufacture/import till last retail level. It is contended that the GST Regime was brought into force with the main object of subsuming various indirect taxes into single tax.

7. It is urged that purposive construction of interpretation in relation to various provisions of the Constitution and GST Act has to be adopted. It is further urged that GST laws are *sui generis* in nature and are

traceable to Article 246A of the Constitution which confer the power on the Parliament and the State Legislatures to legislate on the entirety of this aspect. It is also contended that power to legislate in relation to Goods and Services Tax is conferred by Article 246A of the Constitution without any corresponding entries in VIIth Schedule. It is argued that legislative powers under Article 246 and 246A are mutually exclusive and both the Articles cannot be invoked simultaneously by the Union Government in relation to tobacco and tobacco products. It is also urged that the non obstante clause in Article 246-A has an overriding effect on Article 246 of the Constitution.

8. It is contended that non obstante clause has to be construed as operating to set aside, as no longer valid anything contained in relevant existing laws which is inconsistent with the provisions contained therein. It is pointed out that after coming into force of 101st

Constitutional Amendment, Article 248 of the Constitution which deals with residuary powers of legislation was amended and was made subject to Article 246-A. It is therefore contended that Article 246-A is exhaustive of taxes on all aspects qua tobacco and tobacco products and overrides the taxing powers referable to Article 246 or Article 248. It is submitted that legislative authority to levy excise duty cannot be sought from a corresponding entry in List I viz., Entry 84(f) read with Article 246 when the exclusive power to levy GST is traceable to Article 246A and subsumes all other indirect taxes. It is further submitted that in GST regime two taxable events namely manufacture and sale have been merged and supply is made the taxable event which includes the erstwhile taxable event of manufacturing. It is urged that since the supply comprehends all aspects and facets and therefore, no indirect tax under the old regime (Basic Excise Duty or

NCCD) could be levied on any aspect of supply of tobacco or tobacco products.

9. It is argued that levy of Basic Excise Duty and NCCD on tobacco and tobacco products post GST Regime is unconstitutional. It is also urged that tobacco and tobacco products which have been singled out and are the only category of goods to be included in the IVth Schedule to the Excise Act, despite subject to various indirect taxes under the GST regime. It is therefore contended that the action of levy of excise duty on tobacco and tobacco products amounts to hostile discrimination and amounts to violation of Article 14 of the Constitution of India. It is urged that post 101st Constitutional Amendment, Article 271 specifically excludes the duties and taxes referred to in Article 246-A and therefore, there cannot be any duty or tax by way of surcharge under Article 271. In support of

aforesaid submissions reliance has been placed on the decisions in:

- *STATE (NCT OF DELHI) V. UNION OF INDIA (2018) 8 SCC 501*
- *SHAILESH DHAIRYAWAN VS MOHAN BALKRISHNA LULLA (2016) 3 SCC 619,*
- *STATE OF GUJURAT VS MIRZAPUR MOTI KURESHI (2005) 8 SCC 534,*
- *MANJULA BASHINI VS. AP WOMEN'S COOP. FINANCE CORPORATION LTD. (2009) 8 SCC 431,*
- *FORUM FOR PEOPLES COLLECTIVE EFFORTS S STATE OF WB 92021) 8 SCC 599,*
- *UNION OF INDIA AND OTHERS VS VKC FOORTSTEPS INDIA PVT. LTD 2021 SCC ONLINE SC 706*
- *UNION OF INDIA VS MOHIT MINERAL (P) LTD. (2019) 2 SCC 599,*

- *SKILL LOTTO SOLUTIONS PVT LTD. VS UNION OF INDIA 2020 SCC ONLINE SC 990,*
- *THE STATE OF MANIOURE AND ORS VS SURAJKUMAR OKRAM AND ORS. CIVIL APPEAL NO.823-827/2022,*
- *BIMOLANGSHU ROY(D) VS STATE OF ASSAM AND ANR (2018) 14 SCC 408,*
- *HOESCHST PHARMACEUTICALS LTD. VS STATE OF BIHAR (1983) 4 SCC 45,*
- *ASWINI KUMAR GHOSE VS ARABINDA BOSE, AIR 1952 SC 369,*
- *RAMDEV FOOD PRODUCTS (P) TD. VS ARVINDBHAI RAMBHAI PATEL (2006) 8 SCC 726,*
- *CENTRAL BANK OF INDIA VS STATE OF KERALA (2009) 4 SCC 94,*
- *RS RAGHUNATH VS STATE OF KARNATAKA (1992) 1 SCC 335,*
- *UNION OF INDIA VS GM KOKIL (1984) SUPP SCC 196,*

- *KESHVANANDA BHARATI VS STATE OF KERALA (1973) 4 SCC 225,*
- *MATERIAL RECYCLING ASSOCIATION OF INDIA VS UNION OF INDIA (2021) SCC ONLINE DEL 1988,*
- *RELIANCE INDUSTRIES AND OTHERS VS STATE OF GUJARAT AND OTHERS 2020 SCC ONLINE GUJ 694,*
- *VASU CLOTHING PRIVATE LIMITED VS UNION OF INDIA (2018) SCC ONLINE MP 1117,*
- *HERO MOTORCORP LTD. VS UNION OF INDIA (2020) 80 GST 111 (DELHI),*
- *SRI SRI SRI KC GAJAPATI NARAYAN DEO VS STATE OF ORISSA, 1954 SCR 1,*
- *FEDERATION OF HOTEL & RESTAURANT ASSN. OF INDIA VS UNION OF INDIA (1989) 3 SCC 634,*
- *N VENUGOPALA RAVI VARMA RAJESH VS UNION OF INDIA (1969) 1 SCCC 681,*

- *VENKATESHWARA THEATERS VS STATE OF AP (1993) 3 SCC 677, JOSEPH SINE VS UNION OF INDIA (2019) 3 SCC 39,*
- *DEPUTY COMMISSIONER OF INCOME TAX VS PEPSI FOODS 2021 SCC ONLINE SC 283*
- *UNICORN INDUSTRIES VS UNION OF INDIA (2020) 3 SCC 492*
- *SAI BHASKAR IRON LTD VS AP ELECTRICITY REGULATORY COMMISSION, (2016) 9 SCC 134.*

SUBMISSIONS OF THE RESPONDENT

10. Learned ASGI submitted that a provision imposing a levy in the form of tax can only be set aside if there is a constitutional bar to the levy, there is constitutional illegality or infirmity in the levy. It is submitted that there is no constitutional bar to the simultaneous levy of excise duty, NCCD and GST on tobacco and tobacco products. It is also submitted that

taxable event for levy of GST is supply, whereas taxable event for levy of excise duty is manufacture. It is contended that the provisions under Article 246 and Article 246-A are independent of each other and can co-exist. It is pointed out the Constitution (101st) Amendment Act, 2016 has been enacted by the Parliament in exercise of powers under Article 368(2) of the Constitution and its object is to promote co-operative federalism.

11. It is contended that levy of excise duty on tobacco and tobacco products is matter of public policy and the Court in exercise of writ jurisdiction would not interfere in policy decisions. It is further contended that the objects of tax and quantum of tax are matters of policy decision of the legislature. It is also contended that tobacco and tobacco products can be subjected to levy of GST as well as other duties such as NCCD and Central Excise duty as

there is plurality of aspects of levy. It is also contended as long as there is plurality to the concepts of levy such multiple levies can be imposed independently. It is contended that even assuming the instant case to be a case of double taxation, the same does not suffer from any infirmity as it is levied by way of a legislation and only an executive action imposing double taxation can render the levy unsustainable. It is argued that all levies such as GST, Excise Duty, NCCD and Cess are being levied under the authority of law and no interference is called for with the order of the learned Single Judge.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

12. Before proceeding further, it is apposite to take note of relevant constitutional and statutory provisions. The Constitution (101st) Amendment Act, 2016 (hereinafter referred to as the 'Amendment Act' for short)

was enacted with an object to replace a number of indirect taxes being levied by the Union and State Governments and to remove the cascading effect of taxes and to provide for a common national market for Goods and Services. The amendment inter alia provided for subsuming of various central indirect taxes and levies such as Central Excise Duty, Additional Excise Duty, Central Surcharge and Cesses, so far as they relate to supply of goods and services. The relevant extract of statement of Objects and Reasons of the Amendment Act reads as under:

1. The Constitution is proposed to be amended to introduce the goods and services tax for conferring concurrent taxing powers on the Union as well as the States including Union territory with Legislature to make laws for levying goods and services tax on every transaction of supply of goods or services or both. The goods and services tax shall replace a number of indirect taxes being

levied by the Union and the State Governments and is intended to remove cascading effect of taxes and provide for a common national market for goods and services. The proposed Central and State goods and services tax will be levied on all transactions involving supply of goods and services, except those which are kept out of the purview of the goods and services tax.

2. The proposed Bill, which seeks further to amend the Constitution, *inter alia*, provides for—

(a) subsuming of various Central indirect taxes and levies such as Central Excise Duty, Additional Excise Duties, Excise Duty levied under the Medicinal and Toilet Preparations (Excise Duties) Act, 1955, Service Tax, Additional Customs Duty commonly known as Countervailing Duty, Special Additional Duty of Customs, and Central Surcharges and Cesses so far as

they relate to the supply of goods and services;

(b) subsuming of State Value Added Tax/Sales Tax, Entertainment Tax (other than the tax levied by the local bodies), Central Sales Tax (levied by the Centre and collected by the States), Octroi and Entry tax, Purchase Tax, Luxury tax, Taxes on lottery, betting and gambling, and State Cesses and surcharges in so far as they relate to supply of goods and services;

(c) dispensing with the concept of 'declared goods of special importance' under the Constitution;

(d) levy of Integrated Goods and Service Tax on inter-State transactions of goods and services;

(e) levy of an additional tax on supply of goods, not exceeding one per cent. In the course of inter-State trade or commerce to be collected by the Government of India for a

period of two years, and assigned to the States from where the supply originates;

(f) conferring concurrent power upon Parliament and the State Legislatures to make laws governing goods and services tax;

(g) coverage of all goods and services, except alcoholic liquor for human consumption, for the levy of goods and services tax. In case of petroleum and petroleum products, it has been provided that these goods shall not be subject The Constitution (One Hundred and First Amendment) Act, 2016 BGM on GST Act(s) and Draft Rule(s), 2017 A.9 to the levy of Goods and Services Tax till a date notified on the recommendation of the Goods and Services Tax Council.

(h) compensation to the States for loss of revenue arising on account of implementation of the Goods and Services Tax for a period which may extend to five years;

13. By Section 2 of the aforesaid Amendment Act, Article 246A was incorporated in the Constitution of India. Article 246 and 246A read as under:

246. *Subject matter of laws made by Parliament and by the Legislatures of States:*

(1) Notwithstanding anything in clauses (2) and (3), Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule (in this Constitution referred to as the Union List)

(2) Notwithstanding anything in clause (3), Parliament, and, subject to clause (1), the Legislature of any State also, have power to make laws with respect to any of the matters enumerated in List III in the Seventh Schedule (in this Constitution referred to as the Concurrent List)

(4) Parliament has power to make laws with respect to any matter for any part of the

territory of India not included (in a State) notwithstanding that such matter is a matter enumerated in the State List

246A. Special provision with respect to goods and services tax:

(1) Notwithstanding anything contained in articles 246 and 254, Parliament, and, subject to clause (2), the Legislature of every State, have power to make laws with respect to goods and services tax imposed by the Union or by such State.

(2) Parliament has exclusive power to make laws with respect to goods and services tax where the supply of goods, or of services, or both takes place in the course of inter-State trade or commerce.

Explanation.—The provisions of this article, shall, in respect of goods and services tax referred to in clause (5) of article 279A, take effect from the date recommended by the Goods and Services Tax Council.

14. Article 248 of the Constitution of India prior to coming into force of the Amendment Act read as follows:

248. Residuary powers of legislation

(1) Parliament has exclusive power to make any law with respect to any matter not enumerated in the Concurrent List or State List.

(2) Such power shall include the power of making any law imposing a tax not mentioned in either of those Lists.

15. However, after the Amendment Act, Article 248 was also amended and now reads as under:

248. Residuary powers of legislation.

(1) Subject to Article 246A, Parliament has exclusive power to make any law with respect to any matter not enumerated in the Concurrent List or State List.

(2) Such power shall include the power of making any law imposing a tax not

mentioned in either of those Lists.

16. Article 269-A provides for levy and collection of Goods and Service Tax in the course of inter-state trade and commerce. The relevant extract of Article 269-A after coming into force of the Amendment Act reads as under:

269A. Levy and collection of goods and services tax in course of inter-State trade or commerce:

(1) Goods and services tax on supplies in the course of inter-State trade or commerce shall be levied and collected by the Government of India and such tax shall be apportioned between the Union and the States in the manner as may be provided by Parliament by law on the recommendations of the Goods and Services Tax Council.

Explanation.—For the purposes of this clause, supply of goods, or of services, or both in the course of import into the territory of India shall be deemed to be supply of

goods, or of services, or both in the course of inter-state trade or commerce.

(2) xxx...

17. Article 271 prior to coming into force of Amendment Act read as under:

271. *Surcharge on certain duties and taxes for purposes of the Union:-*

Notwithstanding anything in Article 269 and 270, Parliament may at any time increase any of the duties or taxes referred in those in those articles by a surcharge for purposes of the Union and the whole proceeds of any such surcharge shall form part of consolidated Fund of India.

18. However, after the Amendment Act came into force Article 271 of the Constitution of India reads as under:

271. Surcharge on certain duties and taxes for purposes of the Union:

Notwithstanding anything in articles 269 and 270, Parliament may at any time increase any of the duties or taxes referred to in those articles except the goods and services tax under Article 246A by a surcharge for purposes of the Union and the whole proceeds of any such surcharge shall form part of the Consolidated Fund of India.

19. Vide Section 12 of the Amendment Act, Article 279-A was inserted in the Constitution which provides for the Constitution of 'Goods and Services Tax Council' under Article 279-A(4)(a). The Council has to make recommendation to the Union and the States regarding the cesses and surcharges levied by the Union, the States and

the local bodies which may be subsumed in Goods and Service Tax. Article 279-A(4)(f) provides for council to make recommendation to the Union and the States, regarding any special rate or rates for a specified period, to raise additional resources during any natural calamity or disaster for the facility of reference Article 279-A (4)(a) and (f) are extracted below for the facility of reference:

279A. Goods and Services Tax Council:

(1) The President shall, within sixty days from the date of commencement of the Constitution (One Hundred and First Amendment) Act, 2016, by order, constitute a Council to be called the Goods and Services Tax Council.

(2) XXX

(4) The Goods and Services Tax Council shall make recommendations to the Union and the States on:

(a) the taxes, cesses and surcharges levied by the Union, the States and the local bodies which may be subsumed in the goods and services tax;

(b) xxx

.....

(f) any special rate or rates for a specified period, to raise additional resources during any natural calamity or disaster;

20. By the Amendment Act, Entry 84 of List I in the Seventh Schedule of the Constitution was also substituted, which reads as under:

84. Duties of excise on the following goods manufactured or produced in India, namely:

(a) petroleum crude;

(b) high speed diesel;

(c) motor spirit (commonly known as petrol);

(d) natural gas;

(e) aviation turbine fuel; and

(f) tobacco and tobacco products.

21. CGST Act, 2017 is an Act to make a provision for levy and collection of tax on intra state supply of goods or services or both by the Central Government and for the matters connected therewith or incidental thereto. In the statement of objects and reasons of the Act, it is stated that there is a multiplicity of taxes, which are being levied on the same supply chain and in view of the difficulties faced in the then tax system on goods and services, several taxes were proposed to be subsumed in a single tax called the goods and services tax, which is levied on supply of goods or services or both at each stage of supply chain starting from manufacture or import and till the retail level. Section 9 (1) of the CGST Act provides of levy of tax called Central Goods and Services Tax on all intra-state supply of Goods and Services or both at a rate as may be

notified by the Government on the recommendation of the Council and collected in such a manner as may be prescribed. Section 11(1) of the CGST Act empowers the Government, on the recommendation of the Council to exempt generally, either absolutely or subject to such conditions specified therein, goods or services or both of any specified description from the whole or any part of the taxes leviable thereon with effect from such date as may be specified in the Notification.

22. The Parliament in respect of inter-state supply of goods or services or both has enacted Integrated Goods and Services Tax Act, 2017 (hereinafter referred to as the 'IGST Act'). Under Section 5(1) of the IGST Act, integrated Goods and Services Tax is levied on inter-state supply of Goods or Services or both on the recommendations of the Council. Section 6(1) of the Act empowers the Government

to issue exemption Notifications on the recommendations of the Council.

23. Under Section 9 of the CGST Act and under Section 5 of IGST Act, the taxes are levied s per Schedule II and IV on the rates of GST and IGST on goods. In terms of the Notifications, tobacco products are subject to Goods and Services Tax at the rate of 24% under Schedule IV and tobacco leaves are subject to levy at the rate of 5% under Schedule II. Apart from the taxes, GST Compensation Cess at the rate of 160% is levied under Goods and Services Tax (Compensation to States) Act, 2017.

24. Section 3 of the 1944 Act was substituted by Taxation Laws (Amendment) Act 2017 which provides for levy and collection of Central Excise Duty in such manner as may be prescribed on all excisable goods which are produced and manufactured in India at the rates set forth in the fourth Schedule to 1944 Act. The Central

Government issued a Notification dated 30.06.2017 under Section 5-A (1) of the 1944 Act, under which all products falling under Chapter 24 were exempted from the levy of Central Excise Duty. The Central Government, however, vide Notification dated 06.07.2019 withdrew the aforesaid Notification dated 30.06.2017. Thereafter, by another notification, dated 06.07.2019 the Central Government in exercise of powers under Section 5-A of the 1944 Act levied Excise Duty on tobacco products. On 27.03.2020, the VII Schedule of Finance Act, 2001 was substituted with V Schedule specified in Finance Act, 2020. Under the aforesaid Schedule, NCCD was levied at the rate specified therein, only in respect goods mentioned in Chapter 24 and Chapter 27.

REASONS

25. We have considered the rival submissions made on both sides and have perused the record. It is pertinent

to note that: GST, Compensation Cess, Surcharge as NCCD and Central Excise Duty are levied on tobacco and tobacco products. The petitioner has only questioned the levy relating to Central Excise Duty and NCCD. The rival pleas urged before us mainly involve consideration of the following issues:

- i) Whether after coming into force of Constitutional 101st Amendment Act, w.e.f 01.07.2017, the levy of Basic Excise Duty and levy of NCCD which is a duty of excise on tobacco and tobacco products is constitutionally valid?*
- ii) Whether there can be a simultaneous levy of GST under Article 246-A and levy of basic excise duty and NCCD under Article 246 qua tobacco and tobacco products?*
- iii) Whether excise duty has been levied on a separate and distinct aspect namely manufacture of tobacco products?*

iv) Whether levy of NCCD as surcharge on tobacco products is bad in law?

v) Whether levy of excise duty on tobacco and tobacco products is violative of Article 14 of Constitution of India?

26. It is a well settled rule of statutory interpretation that a non-obstante clause is appended to provision in the beginning with a view to give the enacting part of the Section, in case of a conflict, an overriding effect over the provision or Act mentioned in the non-obstante clause. It is equivalent to saying that in spite of provision of Act mentioned in the non-obstante clause, the enactment, following it, shall have its full operation or that the provisions embraced in non-obstante clause will not be an impediment for operation of the enactment. (**SEE: M VENUGOPAL VS DIVISIONAL MANAGER, LIFE INSURANCE CORPORATION, AIR 1994 SC 1343, IRIDIUM INDIA TELECOM LTD. VS MOTOROLA (2005) 2**

SCC 690). Article 246 (1) and (2) as well as Article 246A (1) begins with non-obstante clause. In Article 246-A (1), the expression 'subject to' has also been used. The said expression means as one conveying a limitation/restriction on the exercise of power. The said expression neither circumscribes power nor enlarges the same. The Supreme Court in **UNION OF INDIA VS VKC FOOTSTEPS 2021 SCC Online SC 706** took note of 101st Constitutional Amendment to the Constitution of India and held as under:

32. The One Hundred and First Constitutional Amendment brought about a significant merger by contemplating a fiscal umbrella comprehending GST. Article 246A was adopted in terms of which, notwithstanding anything contained in Article 246 and Article 254, Parliament and (subject to Clause (2)), the State Legislature of every State have the power to make laws with respect to GST imposed by the Union

PART E 65 or by the State under clause (2) of Article 246A. Parliament has the exclusive power to make laws with respect to goods and services tax where the supply of goods or of services, or both takes place in the course of inter-State trade or commerce. With the enactment of the One Hundred and First Constitutional Amendment, Entry 84 of the Union List has been restructured to incorporate duties of excise on the following goods manufactured or produced in India, namely – (a) petroleum crude; (b) high speed diesel; (c) motor spirit (commonly known as petrol); (d) natural gas; (e) aviation turbine fuel; and (f) tobacco and tobacco products.

33. Entry 54 of the State List has been restructured to provide for taxes on the sale of petroleum crude, high speed diesel, motor spirit (commonly known as petrol), natural gas, aviation turbine fuel and alcoholic liquor for human consumption, other than in the course of inter-State trade or commerce.

34. Article 246A has brought about several changes in the constitutional scheme:

- (i) Firstly, Article 246A defines the source of power as well as the field of legislation (with respect to goods and services tax) obviating the need to travel to the Seventh Schedule;*
- (ii) Secondly, the provisions of Article 246A are available both to Parliament and the State legislatures, save and except for the exclusive power of Parliament to enact GST legislation where the supply of goods or services takes place in the course of inter-State trade or commerce; and*
- (iii) Thirdly, Article 246A embodies the constitutional principle of simultaneous levy as distinct from the principle of concurrence. Concurrence, which operated within the fold of the Concurrent List, was regulated by Article 254.*

27. Thus, it is evident that the power under Article 246-A is an independent power and can be exercised notwithstanding anything contained in Article 246 and Article 254. Article 246-A is unique as it contains the source of power as well as field of legislation and therefore, the Supreme Court in **VKC FOOTSTEPS SUPRA** has held the same to be simultaneous power of taxation. The power under Article 246-A embodies the principle of simultaneous levy. Article 246 and Article 246-A operate in different spheres and exercise of power under Article 246-A does not result in denudation of power under Article 246. Article 246 and 246-A do not overlap each other and co-exist in the constitutional scheme. Article 246-A neither overrides nor restricts the operation of Article 246 read with Entry 84 of List I of Schedule VII. In the instant case, the levy of excise duty on tobacco and tobacco products under Entry 84 List I read with Article 246 is independent and co-exists without being impacted by the levy of GST

on the same product under Article 246-A as both the Articles are mutually exclusive of each other and can co-exist. The Central Excise duty and GST are levied under different sources of power and fields of legislation and do not overlap each other in any manner. For the aforementioned reasons, the issue whether after coming into force of Constitutional 101st Amendment Act, w.e.f 01.07.2017, the levy of Basic Excise Duty and NCCD which is a duty of excise on tobacco and tobacco products is constitutionally valid, is answered in the affirmative.

28. Article 245 and 246 of the Constitution describe the source of power and classify the same into three categories. In contrast Article 246A does not envisage a sole power either to the Union or to the States. It has been held by the Supreme Court in **VKC FOOTSTEPS SUPRA** Article 246A is unique, as it contains the source of power and the field of legislation and the same has been held to

be simultaneous power of taxation. Therefore, the Central Excise Duty and GST have distinct sources of power and fields of legislation and therefore, do not overlap each other.

29. A Constitution Bench of the Supreme Court in

**FEDERATION OF HOTEL AND RESTAURANT
ASSOCIATION OF INDIA VS UNION OF INDIA (1989) 3**

SCC 634 while dealing with the issue of constitutional validity of Expenditure Tax Act, 1987, took note of 'aspect doctrine' and held as under:

30. In Lefroy's Canada's Federal System the learned Author referring to the "aspects of legislation" under Sections 91 and 92 of the Canadian Constitution i.e. British North America Act, 1867 observes that "one of the most interesting and important principles which have been evolved by judicial decisions in connection with the distribution of legislative power is that subjects which in

one aspect and for one purpose fall within the power of a particular legislature may in another aspect and for another purpose fall within another legislative power". Learned Author says:

"... that by 'aspect' must be understood the aspect or point of view of the legislator in legislating the object, purpose, and scope of the legislation that the word is used subjectively of the legislator, rather than objectively of the matter legislated upon."

In Union Colliery Co. of British Columbia v. Bryden [1899 AC 580, 587] Lord Haldane said:

"It is remarkable the way this Board has reconciled the provisions of Section 91 and Section 92, by recognising that the subjects which fall within Section 91 in one aspect, may, under another aspect, fall under Section 92."

31. Indeed, the law "with respect to" a subject might incidentally "affect" another

subject in some way; but that is not the same thing as the law being on the latter subject. There might be overlapping; but the overlapping must be in law. The same transaction may involve two or more taxable events in its different aspects. But the fact that there is an overlapping does not detract from the distinctiveness of the aspects. Lord Simonds in Governor General-in-Council *v. Province of Madras* [AIR 1945 PC 98 : 1945 FCR 179, 193] in the context of concepts of Duties of Excise and Tax on Sale of Goods said:

“... The two taxes, the one levied on a manufacturer in respect of his goods, the other on a vendor in respect of, his sales, may, as is there pointed out, in one sense overlap. But in law there is no overlapping. The taxes are separated and distinct imposts. If in fact they overlap, that may be because the taxing authority, imposing a duty of excise, finds it convenient to impose that duty at the moment when the excisable

article leaves the factory or workshop for the first time on the occasion of its sale....”

32. Referring to the “aspect” doctrine Laskin's Canadian Constitutional Law states:

“The ‘aspect’ doctrine bears some resemblance to those just noted but, unlike them, deals not with what the ‘matter’ is but with what it ‘comes within’.... (p. 115)

... it applies where some of the constitutive elements about whose combination the statute is concerned (that is, they are its ‘matter’), are a kind most often met with in connection with one class of subjects and others are of a kind mostly dealt with in connection with another. As in the case of a pocket gadget compactly assembling knife blade, screwdriver, fishscaler, nailfile, etc., a description of it must mention everything but in characterising it the particular use

proposed to be made of it determines what it is. (p. 116)

“... I pause to comment on certain correlations of operative incompatibility and the ‘aspect’ doctrine. Both grapple with the issues arising from the composite nature of a statute, one as regards the preclusive impact of federal law on provincial measures bearing on constituents of federally regulated conduct, the other to identify what parts of the whole making up a ‘matter’ bring it within a class of subjects....” (p. 117)

88. *In the light of the above entries and decisions, I think that the learned Attorney General is right in urging that, merely because the 1987 Act as well as the State Acts levy taxes which have ultimate impact on persons who enjoy certain luxuries, the pith and substance of both cannot be considered to be the same. The object of a tax on luxury is to impose a tax on the enjoyment of certain types of benefits,*

facilities and advantages on which the legislature wishes to impose a curb. The idea is to encourage society to cater better to the needs of those who cannot afford them. For instance, a luxury tax may, to cite a catchy example, encourage construction of "janata" hotels rather than five star hotels. Such a tax may be on the person offering the luxury or the person enjoying it. It may be levied on the basis of the amount received for providing, or the amount paid for or expended for enjoying, the luxury. Conceivably, it could be on different bases altogether. The object of an expenditure tax — and, that, conceptually, there can be an expenditure tax is borne out by Azam Jha case [(1971) 3 SCC 621 : (1972) 1 SCR 470] — is to discourage expenditure which the legislature considers lavish or ostentatious. The object of the first would be to discourage certain types of living or enjoyment while that of the second would be to discourage people from incurring expenditure in unproductive or undesirable

channels. If a general Expenditure Tax Act, like that of 1957, had been enacted, no challenge to its validity could have been raised because it incidentally levied the tax on expenditure incurred on luxuries. The fact that there will be some overlapping then or that here there is a good deal of such overlapping, because the States have chosen to tax only some types of luxuries and the Centre to tax, at least for the time being, only expenditure which results in such luxuries, should not be allowed to draw a curtain over the basic difference between the two categories of imposts. For instance, if the conflict alleged had been between the present State Acts and an Act of Parliament taxing expenditure incurred in the construction of theatres or the maintenance of race horse establishments or the like, there would have been no overlapping at all and the pith and substance of the central tax could well be described as "expenditure" and not "luxuries". This distinction is not

obliterated merely because of the circumstance that both legislatures have chosen to attack the same area of vulnerability, one with a view to keep a check on “luxuries” and the other with a view to curb undesirable “expenditure”.

30. Applying the aforesaid ratio, to the facts of the case, it is to be noted that excise duty under entry 84 List I has a source of power to tax under Article 246 of the Constitution of India and is levied on a distinct and separate aspect namely manufacture of tobacco products. It is dealt with under section 7 of CGST Act 2017. The levy of GST is traceable to a different source of power viz., Article 246A on a completely different aspect namely supply of tobacco and tobacco products, section indicates that definition of ‘supply’ does not subsume the activity of manufacture. The activities of manufacture and supply remain as two independent activities in goods chain.

31. The Supreme Court in **MOHIT MINERALS (P) LTD VS UNION OF INDIA (2019) 2 SCC 599**

has held that the expression 'cess' means a tax levied for some special purpose and can also be levied as an increment to an existing tax. It was further held that after Constitution Hundred and First Amendment Act, 2017, the Parliament can levy cess for specific purpose under a law made by it. It was further held that Article 270 empowers the parliament to levy any cess by law. Paragraph No.56, 61, 62, 64 to 67 of the aforesaid judgment are extracted below for the facility of reference:

56. The expression used in Article 246-A is “power to make laws with respect to goods and services tax”. The power to make law, thus, is not general power related to a general entry rather it specifically relates to goods and services tax. When express power is there to make law regarding goods and

services tax, we fail to comprehend that how such power shall not include power to levy cess on goods and services tax. True, that the Constitution (One Hundred and First Amendment) Act, 2016 was passed to subsume various taxes, surcharges and cesses into one tax but the constitutional provision does not indicate that henceforth no surcharge or cess shall be levied.

Issue 4 : Whether levy of Compensation to States Cess and GST on the same taxing event is permissible in law?

61. *The petitioner elaborating his contention submits that as per Section 8 of the impugned legislation there shall be levied a cess on intra-State supply of goods and services as provided in Section 9 of the CGST Act whereas CGST Act has been enacted to levy tax as provided under Article 246-A of the Constitution. This is also true in respect of the cesses imposed on inter-State supplies of goods and services covered by Section 5 of*

the IGST Act, 2017. Therefore, on the same very transaction there cannot be two levies, one under CGST Act and another under impugned legislation as it would amount to double taxation as levy is on the same taxable event and same subject. Thus, there is an overlapping on law which is not permissible. The petitioner contends that goods and services tax being already imposed by three enactments of 2017 as noticed above imposition of States Compensation Cess is levied on the same taxing event and has overlapping effect.

62. *The principle is well settled that two taxes/imposts which are separate and distinct imposts and on two different aspects of a transaction are permissible as “in law there is no overlapping”.*

64. *Krishna Iyer, J. in Avinder Singh v. State of Punjab [Avinder Singh v. State of Punjab, (1979) 1 SCC 137], laid down that if on the*

same subject-matter the legislature chooses to levy tax twice over there is no inherent invalidity in the fiscal adventure unless there are some other prohibitions. In the above case the Government of Punjab had issued a notification under Section 90(4) of the Punjab Municipal Corporation Act, 1976 imposing tax at the rate of Rupee 1 per bottle on Indian made foreign liquor within the Municipal Corporation of Ludhiana. One of the contentions raised was that tax imposed is on sale, hence, beyond the Government power. In para 4 following was laid down : (SCC p. 144)

“4. ... A feeble plea that the tax is bad because of the vice of double taxation and is unreasonable because there are heavy prior levies was also voiced. Some of these contentions hardly merit consideration, but have been mentioned out of courtesy to counsel. The last one, for instance, deserves the least attention. There is nothing in Article 265 of the Constitution from which one can

spin out the constitutional vice called double taxation. (Bad economics may be good law and vice versa). Dealing with a somewhat similar argument, the Bombay High Court gave short shrift to it in Western India Theatres [Cantonment Board, Poona v. Western India Theatres Ltd., 1953 SCC OnLine Bom 13 : AIR 1954 Bom 261]. Some undeserving contentions die hard, rather survive after death. The only epitaph we may inscribe is : Rest in peace and don't be reborn! If on the same subject-matter the legislature chooses to levy tax twice over there is no inherent invalidity in the fiscal adventure save where other prohibitions exist."

65. Goods and services tax imposed under the 2017 Acts as noticed above and levy of cess on such intra-State supply of goods and services or both as provided under Section 9 of the CGST Act and such supply of goods and services or both as part of Section 5 of the IGST Act is, thus, two separate imposts

in law and are not prohibited by any law so as to declare it invalid.

66. *We, thus, do not find any substance in the submission that levy of Compensation to States Cess on same taxable event is not permissible.*

67. *We, thus, answer Issue 4 in the following manner:*

Levy of Compensation to States Cess is an increment to goods and services tax which is permissible in law.

32. It is pertinent to note that Section 136 of the Finance Act, 2001 provides for the levy of NCCD which is reproduced below for the facility of reference:

(1) In case of goods specified in the Seventh Schedule, being goods manufactured or produced, there shall be levied and collected for the purpose of the Union, by surcharge, a duty of excise, to be called the National Calamity Contingent duty (hereinafter

referred to as the National Calamity duty), at rates specified in the said schedule.

(2) The National Calamity duty chargeable on the goods specified in the Seventh Schedule shall be in addition to any other duties of excise chargeable on such goods under the Central Excise Act, 1944 (1 of 1944) of any other law for the time being in force.

Levy of NCCD is prescribed under Article 271 which unambiguously provides for increase in duty or taxes by surcharge. Therefore, there can be simultaneous levy of GST and levy of basic Excise duty and NCCD on tobacco or tobacco products.

33. The petitioners have placed reliance on decision of the Supreme Court in **BAJAJ AUTO VS UNION OF INDIA, 2019 (19) SCC 801** and **SRD NUTRIENTS PRIVATE LIMITED V. COMMISSIONER OF CENTRAL EXCISE, GUWAHATI, (2018) 1 SCC 105** to contend that levy of NCCD as a surcharge on tobacco and tobacco

products is bad in law and for the period from 2017 to 2019, when excise duty was not levied on tobacco products, there cannot be any levy of NCCD. The Supreme Court in **SRD NUTRIENTS (P) LTD SUPRA** dealt with the issue as to when there is no excise duty, the education cess, the secondary and higher education cess could not have been demanded. The said issue was answered in the negative. In **BAJAJ AUTO SUPRA**, the Supreme Court dealt with the question of levy of NCCD, education cess and secondary and higher education cess on manufacturing establishments which is exempted from payment of Central Excise Duty. The aforesaid issue was answered by placing reliance on **SRD NUTRIENTS (P) LTD SUPRA** and by stating that once excise duty is exempted, the NCCD levied as an excise duty cannot partake a different character and thus would be entitled to the benefit of exemption notification. However, it is pertinent to note that aforesaid decisions were rendered by a two

judge Benches of the Supreme Court and did not take into account the decision rendered by a three judge Bench of the Supreme Court in **UNION OF INDIA VS. MODI RUBBER LIMITED, (1986) 4 SCC 66.**

34. In **MODI RUBBER LIMITED SUPRA**, a three judge Bench of the Supreme Court it was held that when the exemption is granted under a particular provision, it would not cover any other kind of duty of excise imposed under the separate Acts. The aforesaid decisions was noticed by the Supreme Court in **UNICORN INDUSTRIES VS UNION OF INDIA 2020 (3) SCC 492**, followed the decision rendered by a three judge bench in **MODI RUBBER SUPRA** and in Paragraph 51 held as under:

51. Thus, it is clear that before the Division Bench deciding SRD Nutrients (P) Ltd. [SRD Nutrients (P) Ltd. v. CCE, (2018) 1 SCC 105] and Bajaj Auto Ltd. [Bajaj Auto Ltd. v. Union of India, (2019) 19 SCC 801 : 2019 SCC

*OnLine SC 421] , the previous binding decisions of the three-Judge Bench in Modi Rubber Ltd. [Union of India v. Modi Rubber Ltd., (1986) 4 SCC 66 : 1986 SCC (Tax) 781] and Rita Textiles (P) Ltd. [Rita Textiles (P) Ltd. v. Union of India, 1986 Supp SCC 557 : 1987 SCC (Tax) 87] were not placed for consideration. Thus, the decisions in SRD Nutrients (P) Ltd. [SRD Nutrients (P) Ltd. v. CCE, (2018) 1 SCC 105] and Bajaj Auto Ltd. [Bajaj Auto Ltd. v. Union of India, (2019) 19 SCC 801 : 2019 SCC OnLine SC 421] are clearly *per incuriam*. The decisions in Modi Rubber Ltd. [Union of India v. Modi Rubber Ltd., (1986) 4 SCC 66 : 1986 SCC (Tax) 781] and Rita Textiles (P) Ltd. [Rita Textiles (P) Ltd. v. Union of India, 1986 Supp SCC 557 : 1987 SCC (Tax) 87] are binding on us being of coordinate Bench, and we respectfully follow them. We did not find any ground to take a different view.*

35. Therefore, the reliance placed by the appellant on **BAJAJ AUTO SUPRA** is of no assistance to it as the same has been held to be per incuriam by a three judge bench of the Supreme Court in **UNICORN INDUSTRIES SUPRA**.

In the instant case, an exemption to excise duty is expressly stated by way of a notification and to the contrary, there is no specific mention to the exemption to NCCD and an exemption of excise duty cannot be made applicable to NCCD unless the same is explicitly specified by way of Notification. Therefore, exemption from excise duty cannot automatically mean exemption from levy of

NCCD

For the aforementioned reasons, it is axiomatic that levy of NCCD as surcharge on tobacco products is not bad in law.

36. A levy imposing tax is not immune from attack on the ground that it violates Article 14 of the Constitution of

India. The Courts are not concerned with the policy underlying the taxing statute or whether a particular tax could not have been imposed in a different way or in a way the Court might think more just and reasonable. A Constitution Bench of the Supreme Court in

RAMAKRISHNA DALMIA VS JUSTICE SR TENDOLKAR

AIR 1958 SC 538 has dealt with the scope and ambit of Article 14 and has enumerated the circumstances in which a law may be held as violative of Article 14. In

KHANDIGE SHYAM BHAT VS AGRICULTURAL ITO AIR

1963 SC 591, another Constitution Bench of the Supreme Court held that the Courts must permit a larger discretion to the legislature in the matter of classification, in view of inherent complexity of fiscal adjustment of diverse elements. It has further been held that the power of legislature to classify is of wide range and flexibility so that it can adjust its system of taxation in all proper and reasonable ways.

37. Another Constitution Bench of the Supreme Court in **KHYERBARI TEA CO. LTD S STATE OF ASSAM AIR 1964 SC 925** again ruled that legislature which is competent to levy a tax must inevitably be given full freedom to determine which article should be taxed, in what manner and at what rate. It has further been held that in tax matter, the State is allowed to pick and choose districts, objects, persons, methods and even rates for taxation if it does so reasonably. In VKC Footsteps supra in para 76 it is held as under:-

Parliament engrafted a provision for refund Section 54(3). In enacting such provision, Parliament is entitled to make policy choices and adopt appropriate classifications, given the latitude which our constitutional jurisprudence allows it in matters involving tax legislation and to provide for exemptions, concessions and benefits on terms, as it considers

appropriate. The consistent line of precedent of this Court emphasises certain basic precepts which govern both judicial review and judicial interpretation of tax legislation. These precepts are:

i) **Selecting the objects to be taxed, determining the quantum of tax, legislating for the conditions for the levy and the socio-economic goals which a tax must achieve are matters of legislative policy.** Chief Justice M. Hidayatullah, speaking for the Constitution Bench in *Assistant Commissioner of Urban Land Tax vs. Buckingham and Carnatic Co. Ltd.* Held:

10. *The objects to be taxed, the quantum of tax to be levied, the conditions subject to which it is levied and the social and economic policies which a tax is designed to subserve are all matters of political character and these matters have been entrusted to the legislature and not to the courts. In applying the test of reasonableness, it is also essential to notice*

that the power of taxation is generally regarded as an essential attribute of sovereignty and constitutional provisions relating to the power of taxation are regarded not as grant of power but as limitation upon the power which would otherwise be practically without limit.

(ii) The same principle has been reiterated in *Federation of Hotel and restaurant Association of India versus Union of India*, Justice MN Venkatachaliah (as the learned chief Justice then was), speaking for the Constitution bench held:

It is now well settled that though taxing laws are not outside Article 14, however, having regard to the wide variety of diverse economic criteria that go into the population of a fiscal policy legislature enjoys a wide latitude in the matter of selection of persons, subject matter, events, etc., for taxation. The tests of the vice of discrimination in a taxing law are, accordingly, less rigorous. In examining the

allegations of a hostile, discriminatory treatment what is looked into is not its phraseology, but the real effect of its provisions. A legislature does not, as an old saying goes, have to tax everything in order to be able to tax something. If there is equality and uniformity within each group, the law would not be discriminatory. Decisions of this court on the matter had permitted the legislatures to exercise an extremely wide discretion in classifying items for tax purposes, so long as it refrains from clear and hostile discrimination against particular persons or classes.

But, with all this latitude certain irreducible desiderata of equality shall govern classifications for differential treatment and taxation laws as well. The classification must be rational and based on some qualities and characteristics which are to be found in all the persons grouped together and absent in the others left out of the class. But this alone is not sufficient. Differentia must have a rational nexus with the object sought to be achieved by the law. The State, in

the exercise of its governmental power, has, or necessity, to make laws operating differently in relation to different groups or classes of persons to attain certain ends and must, therefore, possess the power to distinguish and classify persons or things. It is also recognised that no precise or set formulae or doctrine tests or precise scientific principles of exclusion or inclusion are to be applied. The test could only be one of palpable arbitrariness applied in the context of the felt the needs of the times and societal exigencies informed by experience.

(iii) In matters of classification, involving fiscal legislature is permitted to larger permitted a larger discretion so long as there is no transgression of the fundamental principle underlying the doctrine of classification in Hiralal Rattan Lal (supra), Justice K.S. Hegde, speaking for a four judge bench observed;

*It must be noted that generally speaking the primary purpose of levy of all taxes is to raise funds for public good. **Which person should be***

taxed, or what goods should be taxed, depends upon social, economic and administrative considerations. In a democratic set up it is for the legislature to decide what economic or social policy it should pursue or what administrative considerations it should bear in mind. The classification between the processed or split pulses and un processed or unsplit pulses is a reasonable classification. It is based on the used to visit those goods can be put. Hence in our opinion, the impugned classification is not violate of Article 14.

(iv) More recently in *union of India versus NITDIP textile Pacha processors Private Limited*, to judge bench observed;

It has been laid down in a large number of decisions of this court that a taxation statute, for the reasons of functional expediency and even otherwise, can pick and choose to tax some. About to classify being extremely broad and based on

diverse considerations of executive pragmatism, the judicature cannot rush in where even the legislature of warily treads. All these operational restraints on judicial power must weigh more empathetically where the subject is taxation. Discrimination resulting from fortuitous circumstances arising out of particular situation, in which some of the tax payers find themselves, is not hit by Article 14 if the legislation, as such, is of general application and does not single them out for harsh treatment. Advantages or disadvantages to individual assessee are accidental and inevitable and are inherent in every taxing statute as it has to draw a line somewhere and some cases necessarily fall on the other side of the line

38. It is trite law that party invoking the protection of Article 14 has to make an averment with details to sustain such a plea and has to adduce material to establish its allegations and the burden is on the party to plead and

prove that its right under Article 14 has been infringed

[SEE: STATE OF UP VS KARTAR SINGH AIR 1964 SC

1135] and **DANTULURI RAM RAJU AND OTHERS VS**

STATE OF ANDHRA PRADESH', (1972) 1 SCC 421. It is

equally well settled that in the absence of any pleading,

the challenge to the constitutional validity is to be rejected

in limine. **[STATE OF HARYANA VS STATE OF PUNJAB**

2004 (12) SCC 673]

39. In view of aforementioned well settled legal principles, we have perused the grounds raised in the petition. It is pertinent to note that in the writ petition, there are no pleadings that action of levy of excise duty on tobacco and tobacco products amounts to hostile discrimination and is violative of Article 14. In the memorandum of appeal, it has been stated that tobacco and tobacco products are the only goods which have been singled out for hostile and discriminatory treatment

subjecting it to two regimes of indirect taxations and therefore, it is violative of Article 14. The learned Single Judge has therefore, rightly held that no grounds are made out for application of principle of manifest arbitrariness in the pleadings. Except for alcoholic liquor for human consumption, petroleum and petroleum products, stamp duty, tobacco and tobacco products and opium all other goods are liable only to GST under Article 246A. The tobacco or tobacco products are brought to GST and excise duty, whereas opium is brought to GST and is also subject to Value Added Tax. The object tax and quantum of tax are matters of policy decision of the legislature and the legislature enjoys wide latitude in selection of persons, subject matter, events etc., for Taxation. The levy of excise duty on tobacco and tobacco products is a matter of public policy and this Court in exercise of writ jurisdiction would not interfere with the same. The appellants have failed to demonstrate that levy

of excise duty either suffers from manifest arbitrariness or is discriminatory. Accordingly it is held that the levy of excise of duty of tobacco and tobacco products is not violative of Article 14 of Constitution of India.

In view of preceding analysis, we do not find any ground to interfere with the order of the learned Single Judge. In the result, the appeal fails and is hereby dismissed.

**Sd/-
JUDGE**

**Sd/-
JUDGE**

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