A THE K.C.P. LTD.

v.

COMMISSIONER OF INCOME TAX, BANGALORE

AUGUST 9, 2000

B [S.P. BHARUCHA, R.C. LAHOTI AND N. SANTOSH HEGDE, JJ.]

Income Tax Act, 1961—Ss.2(24), 10 and 37—Trading Receipts—Price of sugar realised in excess of levy price—In the ordinary manner of assessee's business activities—Plea that the excess amount was retained in a separate C *account and liable to be paid to the purchaser, hence cannot be treated as trading receipt—Held, merely maintaining a separate account under a heading given by the assessee would not alter the nature of the receipt if it actually be a trading receipt—Transfer of the amount to Sugar Equalisation Fund of Government in 1997 does not have any bearing on the taxability of the amount which was a trading receipt in the assessment year 1972-73.*

D

For the assessment year 1972-73, vide a notification order appointing ceiling on levy price of sugar was passed. The appellant-assessee manufacturer of sugar, challenged the order by filing a writ petition in the High Court. By the interim order of the writ petition, the appellant was permitted to sell the sugar at the rate prior to the notification, till further orders.

E

Protected by the interim order appellant continued to sell at the old price and thus during that assessment year collected an amount of Rs. 14,96,130 in excess of levy price of sugar fixed. Income tax officer treated that amount as part of the trading receipts of the company for that year.

F

Appellant preferred appeal before the Commissioner of Income Tax, who held that the amount could not be brought to tax. The appeal to appellate tribunal was dismissed, but the tribunal referred the question of law to High Court under Section 256(1) of Income Tax Act, at the instance of the Revenue. High Court answered the question in the negative against G **the appellant-assessee.**

The writ petition filed by the appellant was subsequently dismissed. No liability was cast on the appellant to refund the excess amount to the purchasers either in the interim order or in the final order.

H **Thereafter, The Levy Sugar Price Equalisation Fund Act, 1976 came**

into force which provided that the amounts representing all excess realisations which were made before or after the commencement of the Act, shall be credited to a fund known as Sugar Price Equalisation Fund. Appellant filed writ petition before High Court challenging the vires of the Act, which was dismissed. The appeal against the same filed before this Court is pending.

In appeal to this Court, against the order of the High Court in Reference under Article 256(1) of Income Tax Act, 1961, appellant contended that it had collected the excess amount under interim orders of the Court; that the amount though received by the appellant, could not have been appropriate by it as its own; that the excess realisation did not accrue to the assessee and the same was liable to be refunded to the purchasers of the sugar in the event of the writ petition filed by the appellant company being dismissed by the High Court and thus it was a liability of the appellant company; and that the excess amount has been erroneously treated as trading receipt of the company. The appellant also contended that the appellant has transferred the amount to Sugar Equalisation Fund in 1974. Revenue contended that since the excess amount was realised by the appellant as price of the sugar sold by it during the course of its trading activities, therefore it has been rightly held to be a trading receipt of the appellant.

Dismissing the appeal, this Court

HELD : 1. The excess amount of Rs. 14,96,130 was realised by the appellant-assessee in the ordinary manner of its business activities and as the price of sugar sold by it. The amount was retained by the assessee as price of the sugar sold by it though its right to realise the amount was subject of dispute. The interim order of the High Court, looking to the phraseology employed therein would not make any difference in the nature of receipts by the assessee. Though the excess amount was retained in a separate account, that would also not make any difference. Firstly, merely maintaining a separate account under a heading given by the assessee would not alter the nature of the receipt if it actually be a trading receipt. Secondly, nothing is available on record to find out how and in what manner the separate account was maintained by the assessee. [308-C-D]

Chowringhee Sales Bureau P. Ltd. v *Commissioner of Income-Tax, West Bengal,* (1973) 87 ITR 542; *Sinclair Murray and Co. P. Ltd.* v. *Commissioner of Income Tax, Calcutta,* (1974) 97 ITR 615; *Commissioner of Income-Tax, U.P. - II* v. *Bazpur Co-operative Sugar Factory Ltd.,* (1988) 172 ITR 321;

A *Punjab Distilling Industries Ltd.* **v.** *Commissioner of Income-Tax, Simla,* **(1959) 35 ITR 519;** *Jonnalla Narashimharao and Co. and Ors.* **v.** *Commissioner of Income Tax,* **(1993) 200 ITR 588, referred to.**

Commissioner of Income-Tax **v.** *Mysore Sugar Co. Ltd.,* **(1990) 183 ITR 113 (Kant);** *Commissioner of Income-Tax* **v.** *Seksaria Biswan Sugar Factory*
B *Pvt Ltd.,* **(1992) 195 ITR 778 (Bom.) and** *Commissioner of Income-Tax, A.P.-I* **v.** *Chodavaram Co-operative Sugar Ltd.,* **(1987) 163 ITR 420 (A.P.), distinguished.**

Commissioner of Income-Tax, West Bengal-II **v.** *Hindustan Housing and Land Development Trust Ltd.,* **(1986) 161 ITR 524, relied on.**
C

2. The transfer of the amount to the Sugar Equalisation Fund in the year 1997 does not have any bearing on the taxability of the amount, which was a trading receipt in the assessment year 1972-1973. [308-E]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7652 of 1996.
D

From the Judgment and Order dated 29.12.94 of the Andhra Pradesh High Court in R.C. No. 12 of 1987.

R.F. Nariman, T.A. Ramachandran, Ms. Janaki Ramachandran, K. Ram Kumar and Ms. L. Roopa for the Appellant.

E Dr. Gauri Shankar, Ranbir Chandra, S. Rajappa and Ms. Sushma Suri for the Respondent.

The Judgment of the Court was delivered by

R.C. LAHOTI, J. By the impugned order of the High Court the follow-
F ing question of law referred by the Income-tax Appellate Tribunal to the High Court under Section 256(1) of the Income-tax Act, 1961 has been answered in the negative, i.e., in favour of the Revenue and against the assessee:-

> "Whether on the facts and in the circumstances of the case, the Appellate Tribunal is right in law in upholding the order of the Com-
G missioner of Income Tax deleting Rs.14,96,130 being the excess realisation over and above the authorised price on sale of sugar?"

The aggrieved assessee has come up in appeal.

The appellant company manufactures sugar and other items. It follows
H mercantile system of accounting. In the assessment year 1972-1973 levy price

of sugar was fixed at Rs.120.30 paise per quintal. The appellant challenged the order appointing ceiling on the price of the sugar by filing a writ petition in the High Court. On 31.3.1970 the High Court of Andhra Pradesh passed an interim order which *inter alia* read as under:-

> ".....the operation of notification issued by the respondent herein namely the Union of India, Ministry of Food and Agriculture, Community Development and Co-operation, New Delhi d/20.2.70 and 1.3.70 in so far as it relates to Zone No.2 BE AND HEREBY is suspended pending further orders on this petition and IT IS FURTHER ORDERED that the petitioners BE AND HEREBY are permitted to sell sugar at the rate prevailing prior to the SAID NOTIFICATION, i.e. at Rs.131.01 plus excise duty pending further orders on this petition."

Protected by the interim order the appellant continued to sell sugar at the rate of Rs.131 per quintal. During the assessment year 1972-1973 the appellant company collected an amount of Rs.14,96,130 in excess of levy price of sugar fixed by the Government for that year. The Income-tax Officer treated the amount of Rs.14,96,130 as part of the trading receipts of the company for that year. In an appeal preferred by the company the Commissioner of Income-tax held that the said amount could not be brought to tax. The Revenue preferred an appeal before the Appellate Tribunal which was dismissed. However, the abovesaid question of law was referred by the Tribunal for the opinion of the High Court at the instance of the Revenue. The High Court answered the question in the negative as already stated.

The writ petition preferred by the appellant before the High Court of Andhra Pradesh came to be dismissed on 18.2.1971. With the dismissal of the writ petition the interim order passed by the High Court came to be vacated automatically. It is pertinent to note that neither the interim order of the High Court had specifically cast a liability on the appellant company to refund the amount to the purchasers of the sugar from whom the excess amount was realised in the event of the petition being dismissed nor did the final order of the High Court direct the appellant to refund the amount. All that the interim order meant was that upon the dismissal of the writ petition, the appellant could no longer charge the price of Rs.131 plus excise duty. The fact remains, as was admitted at the Bar that the amount continued to remain with the appellant company and was not refunded to the purchasers.

Then came into force, with effect from 1.4.1976, The Levy Sugar Price

A Equalisation Fund Act, 1976. It provided *inter alia* that the amounts representing all excess realisations made by producers irrespective of whether such excess realisations were made before or after the commencement of this Act shall be credited to a fund known as Levy Sugar Price Equalisation Fund established under Section 3 of the Act. It is not disputed that the amount of
B Rs.14,96,310 was liable to be transferred by the appellant company to the said fund. However, the vires of this Act were also subjected to a challenge by the appellant filing a writ petition which was ultimately dismissed. The matter was brought in appeal before the Supreme Court and that appeal is still pending.

According to Shri R.F. Nariman, the learned senior counsel for the
C appellant company, the excess amount was collected by the appellant under interim orders of the Court. The amount though received by the appellant, could not have been appropriated by it as its own. The excess realisation did not accrue to the assessee. It was liable to be refunded to the purchasers of the sugar in the event of the writ petition filed by the appellant company being dismissed by the High Court and therefore it was a liability of the appellant
D company. The Income-tax Officer and the High Court have erred in treating the excess amount as trading receipt of the company. Dr. Gauri Shankar, the learned senior counsel for the Revenue has on the other hand submitted that the excess amount was realised by the appellant company as price of the sugar sold by it during the course of its trading activities and therefore it has been
E rightly held by the High Court to be a trading receipt of the appellant company.

We will refer to the law laid down in a few cases by this Court. In *Chowringhee Sales Bureau P. Ltd.* v. *Commissioner of Income-Tax, West Bengal,* (1973) 87 ITR 542, the appellant as an auctioneer effected sales of furniture and realised from the buyers in addition to the commission Rs.32,986
F as sales tax. The appellant neither paid this amount to the actual owner of the goods on whose behalf the goods were auctioned nor deposited the same in the State exchequer upon the plea that the statutory provision creating that liability upon it was not valid. The amount was also not refunded to the persons from whom it had been collected. This Court held the amount of Rs.32,986 to be the
G trading or business receipts of the auctioneer (appellant).

To the same effect are the decisions of this Court in *Sinclair Murray and Co. P. Ltd.* v. *Commissioner of Income-Tax, Calcutta,* (1974) 97 ITR 615 and *Commissioner of Income-Tax, U.P.-II* v. *Bazpur Co-operative Sugar Factory Ltd.*, (1988) 172 ITR 321. In these cases it has been the consistent view of this
H Court that if a receipt is a trading receipt the fact that it is not so shown in the

account books of the assessee would not prevent the assessing authority from treating it as a trading receipt. It is the true nature and quality of the receipt and not the head under which it is entered in the account books which is decisive. This Court has further observed that eventually if the amount so collected is passed on to the State Government or refunded to the purchasers the assessee would be entitled to claim deduction of the sum when so paid or refunded.

In *Punjab Distilling Industries Ltd.* v. *Commissioner of Income-Tax, Simla,* (1959) 35 ITR 519 the assessee carried on business as a distiller of country liquor and sold the produce to licensed wholesaler. The Government devised a scheme entitling the distillers to charge the wholesalers a price for the bottles in which the liquor was supplied, at the rates fixed by the Government which price was bound to be repaid on return of the bottles. The distiller collected from the wholesalers certain amount as security deposits though not authorised by the Government scheme. This security deposit was also returned as and when the bottles were returned. This additional sum was entered by the assessee under the heading "empty bottles return deposit account". A question arose whether the assessee could be assessed to tax on the balance of the amounts of these additional sums left with the assessee after the refunds were made. This Court held that in realising the additional amount described as security deposit the assessee was really charging an extra price for the bottles. The additional amounts taken were an integral part of the commercial transaction of the sale of liquor and bottles and when they were realised they were the moneys of the assessee and remained thereafter the moneys of the assessee. They were the assessee's trading receipts and therefore the balance of these additional sums left in the hands of the assessee after the refunds were assessable to tax. This Court further held that it did not make any difference that the additional amount was entered in a separate ledger under the head "empty bottles return deposit account" as the assessee's style of writing up the account books in a particular manner could not alter the real nature of the receipts.

In *Jonnalla Narashimharao and Co. and Ors.* v. *Commissioner of Income Tax,* (1993) 200 ITR 588 the appellant a commission agent collected in the assessment year 1968-1969 certain amounts by way of sales-tax under the name "Rusum" inasmuch as it disputed its liability to pay sales tax by filing various legal proceedings. The accounts were maintained on the mercantile system. In 1970, there was a retrospective amendment in the relevant sales tax

A law as a result of which the appellant's liability was upheld by the courts. The tax (i.e. the amount of "rusum") was remitted to the State later on and consequent upon the said amendment. This Court held that insofar as the assessment year 1968-1969 was concerned the amounts collected in the name of "Rusum" constituted business receipts of the appellant.

B In the case at hand the excess amount of Rs.14,96,130 was realised by the appellant company in the ordinary manner of its business activities and as the price of sugar sold by it. The amount was retained by the assessee as price of the sugar sold by it though the right of the appellate company to realise the amount was subject of dispute. The interim order of the High Court, looking C to the phraseology employed therein, would not make any difference in the nature of receipts by the assessee. Though the learned senior counsel for the appellant submitted that the excess amount was retained in a separate account, that would also not make any difference in our opinion. Firstly, the consistent view of this Court, as noticed hereinabove, is that merely maintaining a separate account under a heading given by the assessee would not alter the nature D of the receipt if it actually be a trading receipt. Secondly, nothing is available on record to find out how and in what manner the separate account was maintained by the assessee.

It was lastly submitted by the learned senior counsel for the appellant that E in the year 1997 the appellant has transferred the amount to Sugar Equalisation Fund of the Government. Suffice it to say that such transfer in the year 1997 does not have any bearing on the taxability of the amount which was a trading receipt in the assessment year 1972-1973.

The learned senior counsel for the assessee-appellant relied on three F decisions by different High Courts and submitted that in identical facts and circumstances the price of sugar realised in excess of the levy price was held not to be a trading receipt of the assessee and hence not liable to tax. The decisions so relied on are :- *Commissioner of Income-Tax* v. *Mysore Sugar Co. Ltd.* (1990) 183 ITR 113 (Kant), *Commissioner of Income-Tax* v. *Seksaria Biswan Sugar Factory Pvt. Ltd.*, (1992) 195 ITR 778 (Bom) and *Commissioner* G *of Income-Tax, A.P.-I* v. *Chodavaram Co- operative Sugar Ltd.*, (1987) 163 ITR 420 (A.P.). We have carefully perused the decisions. It is clear from the facts stated by the High Courts that in each of the cases the assessee's right to realise the excess price was subject matter of dispute pending in the High Court and the High Courts had passed different interim orders pursuant to which the H respective assessees were collecting the excess price. Though the interim

orders of the High Courts are differently worded in the three cases, one common feature of all the orders is that the realisation of the excess price by the respective assessees was hedged by several conditions one of which was that the assessee shall refund the amount received in excess of the price fixed in the event of the pending dispute being decided adversely to the assessee by the court. Thus the receipt of the amount by the assessee was clearly associated with a liability to refund the amount, which liability was ascertainable and quantified. Such is not the case at hand. The High Court of Karnataka and Bombay have in their decisions referred to and applied the decision of this court in *Commissioner of Income-Tax, West Bengal-II* v. *Hindustan Housing and Land Development Trust Ltd.*, (1986) 161 ITR 524. The facts of the case before the Supreme Court were that certain lands belonging to the assessee company were first requisitioned and then compulsorily acquired by the State Government. On an appeal preferred by the respondent company, the arbitrator made an award directing compensation to be paid for requisition and acquisition. The arbitrator's award was promptly challenged by the State Government before the High Court. Pending the appeal the State Government deposited the amount in the court which the assessee company was permitted to withdraw on furnishing a security bond for refunding the amount in the event of the appeal preferred by the State Government being decided in its favour. This court found that the entire amount was in dispute in the appeal filed by the State Government; that the dispute was 'real and substantial'; and that the amount deposited by the State Government was permitted to be withdrawn by the assessee subject to security bond for refunding the amount in the event of the appeal being allowed. On these facts, this court held that there was no absolute right to receive the enhanced amount at that stage and if the appeal was allowed and in its entirety the right to payment of enhanced amount would have fallen altogether. The principle of law laid down by this court in the case of *Hindustan Housing & Land Development Trust Limited* is to be read in the light of the facts of that case. Thus none of the decisions relied on by the learned senior counsel for the appellant is of any assistance to him.

For the foregoing reasons, we find ourselves in agreement with the view taken by the High Court. The appeal is devoid of any merit. It is dismissed with costs.

K.K.T. Appeal dismissed.