
(1972) 12 DEL CK 0011
In the Delhi High Court
Case No : Suit Appeal No. 506 of 1967

Modi Industries	Vs	APPELLANT
Union of India		RESPONDENT

Date of Decision : 22-12-1972

Acts Referred:

Citation : (1973) ILR Delhi 886

Hon'ble Judges : B.C. Misra, J

Bench : Single Bench

Advocate : R. Dayal, Sharda, J.P. Chopra, G.S. Vohra and S.S. Shukla, for the Appellant;

Judgement

B.C. Misra, J.

(1) The plaintiff-company instituted the suit on 3rd May, 1964 in the subordinate Court which has since been transferred to this Court under the Delhi High Court Act for the recovery of the amount of terminal tax alleged to have been illegally collected by the Central Government. The plaintiff-manufacture Oxygen gas and brings them in gas Cylinders in the Union territory of Delhi and is required to pay terminal tax under the provisions of the Delhi Municipal Corporation Act 66 of 1957 (hereinafter referred to as the Act) and the rules framed there under. u/s 178(1) of the Act. the Central Government has been authorised to collect terminal tax through an organisation known as Terminal Tax Agency (hereinafter referred to as the Agency) and the Central Government has u/s 180 of the Act been further authorised to distribute the collected amount of tax to various local authorities operating in the Union territory of Delhi. Section 183 of the Act provides for making rules by the Central Government in relation to the levy, assessment and collection of terminal tax. Such rules have been framed and published under Notification dated 7th April, 1968 and a copy of them has been produced at the time of arguments. They are hereinafter referred to as the rules.

(2) In the plaint, the plaintiff has alleged that for the period from 1st August,

1961 to 3rd December, 1962. it imported Oxygen gas contained in iron cylinders into Delhi and the Agency charged it a sum of Rs. 52,454.93 on account of terminal tax levied under item 1 of clause V of the Tenth Schedule of the Act as per details given in Annexure "A" attached to the plaint. The rate of tax was originally 44 Paisa and was with effect from 1st April, 1961 raised to Rs. 1.60. The plaintiff has in this suit challenged the validity of section 178(1) of the Act imposing the tax and has contended that the same is unconstitutional and ultra vires as it infringes Articles 301 to 304 of the Constitution read with Article 265.

(3) The second plea preferred in the alternative is that the Oxygen gas of the plaintiff is not covered by item 1 of class V of the Tenth Schedule and the same is not a foreign medicine and the tax has been illegally collected. In this context the plaintiff has also alleged that in respect of one of the items, it took an appeal to the appellate authority under rule 36 of the rules and the authority by order dated 12th November, 1963 held that the Oxygen gas in dispute was not chargeable under item 1 of class V of the Schedule, but it did not record a finding as to what other item applied to it. The plaintiff made representations to the defendants for refund of the amount of terminal tax realised from it. The order of the appellate authority has been complied with in respect of the consignment covered by the said order, but in respect of previous recoveries, the defendants have failed to give relief to the plaintiff and so after serving a notice u/s 80 of the CPC as well as u/s 478 of the Act. it has filed this suit for refund of the amount of terminal tax as detailed in Annexure "B" attached to the plaint. In paragraph 14 of the plaint, the plaintiff has claimed recovery of Rs. 52,454.93 together with interest at 6 per cent per annum from the date of suit till realisation besides a permanent injunction against the first defendant restraining it from charging the terminal tax on the goods in dispute. In the alternative, the plaintiff has claimed a decree for Rs. 42,619.30 on the ground that if the goods in dispute are chargeable under the residuary article 31 of class Ix Miscellaneous of the Tenth Schedule, then only that amount is refundable. The plaintiff also claimed a permanent injunction restraining the first defendant from charging terminal tax on the goods in dispute under any other item except article 31 of class Ix Miscellaneous, but this relief was given up by the counsel for the plaintiff during the course of arguments in the circumstances of the case.

(4) The Union of India, the first defendant, has contested the suit and has contended that the suit is barred by limitation prescribed by sub-section (2) of section 478 of the Act and that it is barred for want of a valid notice and for misjoinder of causes of action. It is also contended that the jurisdiction of the civil Court to entertain the suit is barred and that the suit is not maintainable since the plaintiff has not exhausted its remedy of appeal provided by rule 36 of the rules. On the merits, it has been urged that the imposition of the tax in dispute is constitutionally valid and the amount has rightly been collected under item I of class V of the Tenth Schedule. It is also mentioned in the written statement that in respect of imports after 4th December, 62, the first defendant had instructed the Agency to refund the excess amount realised, but the dispute relating to the

previous period survives to be determined in the present suit- This is admitted to have been done and so the dispute in the suit relates to only the amount

(5) The Municipal Corporation, the second defendant has raised similar objections against the suit, namely, as being barred by time, not being maintainable for misguide of causes of action and being barred by section 478 of the Act and for not exhausting the remedy in appeal under rule 36. The jurisdiction of the civil Court has also been challenged. On the merits, the Corporation has raised similar pleas that the imposition of tax is constitutionally valid and it has properly been charged under item 1 of Class V.

(6) The plaintiff has filed replications reiterating its pleas contained in the plaint and controverting the contentions raised in the written statement of the defendants.

(7) By order dated 12th January, 1970, this Court noticed that a substantial question of law as to the interpretation of the Constitution had been raised and so a notice was issued to the Attorney General of India, being under Order 27-A of the Code of Civil Procedure. Mr. G.S. Vohra, Senior Advocate, has appeared in this suit to argue the matter on behalf of the Attorney General.

(8) On the pleadings of the parties, the following issues were framed on 2nd January, 1965:

"1. Was there any illegal levy of terminal tax on the goods of the plaintiff? If so, how much and to what effect? 2. Is the suit within time? 3. Is the suit not maintainable? 4. Is the suit barred for misguide of causes of action? 5. To what amount, if any, is the plaintiff entitled? 6. Were the notices served on the defendants invalid? 7. Has the Court no jurisdiction to try this suit? 8. Relief."

(9) Issue No. 1. At the initial stage of the suit, there was a dispute between the parties with regard to the total amount of the tax in dispute collected from the plaintiff. This was resolved by the statements of the parties dated 4th December, 1965 and the plaintiff as a result gave up its claim to the extent of Rs. 20.00. The result is that the plaintiff now claims a refund of Rs. 52,434.93 (beside interest from the first defendant in case the imposition of the tax is ultra vires): on the other hand, the plaintiff claims a sum of Rs. 42,599.30, but if the levy of the tax is constitutionally valid, but the charge has wrongly been made under item I of class V and ought to have been levied under the residuary item 31.

(10) Mr. Rameshwar Dial, learned counsel for the plaintiff has precisely and fairly placed before the court all the relevant authorities on the subject. He has not raised the question which was mentioned in clause (2) of paragraph 7-A of the plaint with regard to the legislative competence. He was right in doing so, since in the Union territory of Delhi, it is the Central Government which exercises powers and functions of the State and so it would not make any difference as to under which legislative entry the levy of the tax in dispute falls.

(11) The main contention of Mr. Rameshwar Dial is that the levy of the tax u/s

178 of the Act infringes the freedom guaranteed by Article 301 of the Constitution. The relevant provisions of the Municipal Act may now be reproduced :

"178.(1) On and from the date of the establishment of the Corporation u/s 3, there shall be levied on all goods carried by railway or road into the Union territory of Delhi from any place outside thereof, a terminal tax at the rates specified in the Tenth Schedule. (2) The Central Government may, by notification in the Official Gazette, vary from time to time, the rates specified in that Schedule, in relation to any goods or classes of goods so, however, that where the rates are increased, the increased rates shall not be more than treble the rates so specified. (3) The Central Government may by like notification declare that with effect from such date as may be specified in the notification, the terminal-tax levied in relation to any goods or class of goods shall, for reasons specified in the notification, cease to be levied 179. (1) The terminal tax levied under this Act shall be payable on demand and shall be collected by the Central Government in such manner and through such agency as may be specified by notification in the Official Gazette. (2) Such portion of the total proceeds of the terminal tax as the Central Government may determine shall be deducted to meet the cost of collection of the tax. 180. The proceeds of the terminal tax collected under this Act (which shall form part of the Consolidated Fund of India) reduced by the cost of collection as determined under sub-section (2) of section 179 shall, if Parliament by appropriation made by law in this behalf so provides, be paid by the Central Government to the Corporation and to other local authorities within the Union territory of Delhi in such proportion as may from time to time be determined by the Central Government. 183. The Central Government may make rules in relation to the levy, assessment and collection of terminal tax under this Act and may by such rules provide for the following among other matters, namely:- (a) the examination of goods liable to payment of terminal tax; (b) the inspection, weighing or otherwise examining the contents of any conveyance or package for the purpose of ascertaining whether it contains any goods in respect of which terminal tax is payable; (c) the seizure and confiscation of goods liable to terminal tax in case of refusal to pay such tax; (d) the measures to prevent evasion of terminal tax; (e) any other matter which is to be or may be prescribed for the levy, assessment or collection of the terminal tax."

(12) Article 301 of the Constitution on which the plaintiff relies reads as follows :

"301. Subject to the other provisions of this Part. trade, commerce and intercourse throughout the territory of India shall be free."

(13) This constitutional provision has been subjected to judicial scrutiny by the Supreme Court in a number of Cases. 1961 S.C. 232 1962 S.C. 1406 1968 S.C. 599 1969 S.C. 147. In view of the fact that the latest authority of the Supreme Court has noticed the earlier decisions, it is not necessary for me to refer to all of them. In *State of Madras vs. N.K. Nataraja Mudahar* AIR 1969 SC 147 the

majority of the Court observed as follows :

"THIS Article (Article 301) is couched in terms of the widest amplitude : trade, commerce and intercourse are thereby declared free and unhampered throughout the territory of India. The freedom of trade so declared is against the imposition of barriers or obstructions within the State as well as inter-State : all restrictions which directly and immediately affect the movement of trade are declared by Article 301 to be ineffective."

(14) After referring to the earlier authorities, the Court proceeded to observe :

"IT must, Therefore, be regarded as settled law that a tax may in certain cases directly and immediately restrict or hamper the flow of trade, but every imposition of tax does not do so."

(15) The Court, however, found the imposition of tax by the impugned statute as valid. In this judgment, Bachawat, J. agreed with the majority and observed that normally a law imposing tax on interstate sale does not offend Article 301 and the Central Sales Tax Act, 1956 was no exception to it and none of its directly impeded the movement of goods or the free flow of trade and that the Act had been saved by Article 302.

(16) K.S. Hegde, J. also agreed with the majority and observed that the Act in dispute was not a haphazard legislation: it was the product of deep thinking and clear analysis of the various aspects of the matter and that the Courts would be slow to hold such a measure as being either not in public interest or as vocative of Article 303. The Supreme Court in its earlier decision in *Firm A.T.B. Mehtab Majid and Co. Vs. State of Madras and Another*, observed that it was well settled that taxing laws could be restrictions on trade, commerce and intercourse and if they hamper the flow of trade and if they were not what could be termed to be compensatory taxes or regulatory measures.

(17) The question for determination in the suit, Therefore, is whether the tax in dispute directly and immediately hampers the free flow of trade or it is compensatory or regulatory.

(18) The terminal tax in Delhi is not a new tax. It had been imposed by the Delhi Municipal Committee and other bodies under the Punjab Municipal Act III of 1911 and had long been in force and was being collected by the various local authorities operating in Delhi in their respective territories except New Delhi, these various local authorities mentioned in the Second Schedule of the Act were taken over by the Municipal Corporation of Delhi under the Act. Provisions were, Therefore, made for collection of terminal tax by the Central Government and for its distribution among the other local authorities in accordance with the statutory provision. The distinction between a terminal tax and octroi duty. has been brought out in a decision of the Supreme Court in *Burmah Shell Oil Storage and Distributing Co. India Ltd. Vs. The Belgaum Borough Municipality*, , where Hidayatullah, J. (as he then was) speaking for the Court observed after

examining the various provisions of law and the history of the two taxes that octroi and terminal tax were different taxes though they resembled in one respect, namely that they were livable in respect of goods brought into a local area, while terminal taxes were livable on goods imported or exported from the municipal limits denoting thereby that they were connected with the traffic of goods, octrois were livable in respect of goods brought into a municipal area for consumption or use or sale. Under the Municipal Corporation Act there is no provision for levy of octroi duty and I understand that no such duty has been levied. The only tax imposed on the entry of the goods is terminal tax provided by section 178 of the Act and this has been levied on the goods carried by railway and by road in the Union territory of Delhi and apparently the tax is payable irrespective of whether the goods are consumed, used or sold in the territory or they otherwise leave the territory. This octroi duty or terminal tax was a major source of revenue to local authorities operating before the commencement of the Act, and under the Act the power to collect and regulate it has been conferred on the Central Government, but the same is exercised for the benefit of all the local authorities operating in the Union territory of Delhi, like the Corporation and the New Delhi Municipal Committee. Sections 42 and 43 of the Act make provisions for the mandatory and directory duties of the Corporation and empower it to spend its funds on the prescribed items. They include construction, maintenance and improvement of public streets as stated in clause 9 and maintenance and construction of municipal markets as mentioned in clause (k). Provision is also made for sanitation and other useful works and services. The funds for being spent on the said objects are necessary to be provided. The collections of the terminal tax made over to the Corporation are Therefore, in essence a compensation for the services rendered by the Corporation. No allegation has been made by the plaintiff that the terminal tax is discriminatory or has been imposed with intent to exclude the import of goods from any particular State. In my opinion, there is no doubt that the said tax is compensatory for the works and services rendered by the Corporation and it does not directly and immediately hamper the free flow of trade and it does not infringe the provision of Article 301 or any other article of the constitution. I must reject the first contention of the plaintiff and answer it against it.

(19) The other part of the issue covers the second contention of the plaintiff, item of class V (Drugs, spices and perfumes) of the Tenth Schedule of the Act reads as follows :--

"1. All foreign medicines including mineral waters syrups and medicinal tinctures, soda bicarb and caustic soda (imported in packages or boxes), sulphur in bottles and packets, iron sulphate, barium sulphate, haemorrhagic specticamia serum. dextrosol, castor oil in bottles, potash permanganate, glucose, oxygen gas, camphor oil. sugar of milk, medicated coloured and fragrant syrup."

Item 3 of class IX of the Tenth Schedule reads as follows :

"ALL other articles not chargeable under any other class."

(20) The tax in dispute has been levied under item I of class V. It deals with all foreign medicines. The word "foreign" in this context occurring in the Municipal Corporation Act. (which is an Act passed by the Parliament,) means territories outside India and it would have reference to imported drugs, spices and perfumes. There is nothing in this item to suggest that it applies to any Indian medicines or has reference to preparations according to Allopathic Pharmacopoeia. The gas cylinders in dispute produced by the plaintiff are not at all foreign .nor can they be called medicines. The Appellate Authority under the Terminal Tax Rules by order dated 12th November, 1963 has held that the goods in dispute, namely, oxygen gas cylinders manufactured by the plaintiff are not chargeable under item I of class V. This decision has been implemented by the defendants. I have, Therefore, no doubt that the levy of the tax on the goods of the plaintiff in dispute under item I of class V of the 10th Schedule was illegal.

(21) The question now arises under what other item should the levy fall. It has been argued that it is covered by item 3 of class IX, namely, Chemicals. Unfortunately, neither the plaintiff, nor the defendants have pleaded that the goods in dispute fall or do not fall under this item and no material whatsoever has been placed on the record to show whether the oxygen gas cylinders are either Chemicals or an item for industrial use. I understand there is a marked distinction in the quality and packing and price of the oxygen gas supplied and used for medical purposes as against the one supplied for industrial purposes like cutting and welding. In *Ramavatar Budhaiprasad Etc. Vs. Assistant Sales Tax Officer, Akola*, the Court referring to the word "vegetables" occurring under item No. 6 of the C.P. and Berar Sales Tax Act 21 of 1947, observed that the word had not been defined in the Act and so it must be construed not in any technical sense, nor from the botanical point of view, but as understood in common parlance and in its popular sense which people conversant with the subject-matter with which the statute was dealing, would attribute to it; it is to be understood in common language. The Supreme Court in another case (*Commissioner of Sales Tax, Madhya Pradesh Vs. Jaswant Singh Charan Singh*, , dealing with the word "charcoal" occurring in M.P. General Sales Tax Act 2 of 1959, observed that "coal" was technically understood as a mineral product and charcoal was manufactured by a human agency from products like wood or other things, but it was well settled that while interpreting an item in a statute like sales tax. resort should be had not to the scientific or technical meaning of such terms, but to their popular meaning or the meaning attached to them by those dealing in them, that is to say, to their commercial sense.

(22) *Cameron, J. in His Majesty the King vs. Planters Nut and Chocolate Company, Limited*. 1951 Can LR 122 observed that the particular words used by the Legislature in denomination of articles were to be understood according to the common commercial understanding of the terms used and not in their scientific or technical sense for the legislature does not suppose the merchants to be naturalists, or geologists, or botanists. * * * *. The Legislature was not enacting the taxing law to be applied to any particular science or art and the

words used were to be construed as understood in common language and, Therefore, they should be used in the popular sense, that is the sense which the people conversant with the subject-matter with which the statute is dealing would attribute to it: the statute affects the producer, the manufacturer, the importer, the wholesale retailer and the consumer and the legislature could not suppose an Act of this character that manufacturer, producers, importers, consumers and others who would be affected by the Act, would be botanists. * *

*. The object of the Excise Act is to raise revenue and for this purpose to classify substances according to the general usage and known denominations of trade and it is not the botanist's conception as to what constitutes a fruit or a vegetable which must govern the interpretation to be placed on the words, but rather what would ordinarily in matters of commerce in Canada be included therein. Botanically, oranges and lemons are berries, but otherwise no one would consider them as such. This observation was approved by the Supreme Court of Canada in (1952) 1 D.L.R. 385 and has been referred to with approval by our Supreme Court.

(23) A Case came up before a Full Bench of the High Court of Allahabad in Commissioner, Sales Tax, U.P., Lucknow Vs. Prayag Chemical Works, Naini, Allahabad, where the question for determination was whether the subject-matter in dispute was included in the item Chemicals of all kinds. The Full Bench to which S.N. Dwivedi J. (as he then was) and R.S. Pathak J. (as he then was) and R.L. Gulati J. were members, held that the scientific meaning of the word "Chemical or technical meaning to the effect that anything obtained or used in Chemistry was a chemical was not this correct test to apply. This test might afford a basis to the Chemists or scientists for the purpose of classifying a substance, but it would not be relevant in any activity where the primary actors, a dealer selling and a purchaser buying were principally interested in the article. The Court found that sodium silicate was popularly known and treated as a Chemical and so it was included in the item in dispute.

(24) The authorities mentioned above indicate that whether the oxygen gas in dispute is or is not a Chemical cannot be determined as an abstract question of law, either by reference to the books of Chemistry or the dictionaries. It must be decided according to the popular meaning or their commercial sense. This would necessitate an enquiry as to this kind of person who use it and the purpose for when it is used and also how they are ordinarily known and sold. In the absence of evidence, I would refrain from deciding this question and leave it open to the taxing authorities to determine it according to the material placed before them. No other item has been pressed before me as applicable to the goods in dispute. However, in view of the fact that I have held the imposition of the tax as constitutionally valid, it must be covered by one or the other items and in the absence of any other pleading or evidence, I would hold it liable to duty under item 31 of class IX which is the residuary item. The amount of tax in excess of the charge under item 31 will be refunded by the first defendant to the plaintiff. It will, however, be open to the taxing authorities to charge the goods in dispute

under any other item properly applicable, excepting item No. 1 of class V, if it is legally permissible to them still to do so. The issue is decided accordingly.

(25) Issue No. 2. The suit is for the recovery of the amount of taxes illegally levied. It is governed by Article 24 of the Schedule to the Limitation Act 36 of 1963 which corresponds to Article 62 of the previous Limitation Act : See The Municipal Committee, Amritsar Vs. Amar Dass, and The Municipal Council Dindigul vs. Bombay Company Limited A.L.R. 1929 Mad 409. This Article prescribes three years limitation from the date of payment. The first payment refund of which has been claimed, was made on 2nd August, 1961 and the last payment on 3rd December, 1962. The plaintiff is entitled to exclusion of the time spent in serving two months' notice on the first defendant u/s 80 of the CPC in view of section 15(2) of the Limitation Act. The suit is, Therefore, within limitation.

(26) This conclusion has not been seriously challenged by the defendants. What the defendants have contended is that the suit is barred by six months period prescribed by section 478(2) of the Municipal Corporation Act. This submission is not tenable. Section 478 deals with suits against the Corporation or against any municipal authority or officer or employee or any other person acting under the order or direction of the municipal authority or officer or employee. The present suit is directed against the Union of India, the first defendant for recovery of the terminal tax alleged to be illegally collected by them from the plaintiff. Section 478 of the Act has, Therefore, no application. The issue is decided in favor of the plaintiff.

(27) Issues Nos. 3 and 4. Nothing has been urged in answer to issues Nos. 3 and 4 and nothing has been shown as to why the suit is not maintainable or is bad for misguide of causes of action. The issues are answered against the defendants.

(28) Issue No. 5 Issue No. 5 will be decided along with issue No. 8.

(29) Issue No. 6 Nothing has been shown as to how notices are invalid. The issue is answered against the defendants.

(30) Issue No. 7 Mr. Chopra, counsel for the Union of India, has laid extremely great emphasis on this issue and has strenuously contended that the civil Courts have no jurisdiction. The limits of the exclusion of the jurisdiction of the civil Court have been carefully considered in a number of decisions and have finally been laid down authoritatively by the Supreme Court in two of its decisions, namely Dhulabhai and Others Vs. The State of Madhya Pradesh and Another, and Shree Raja Kandregula Srinivasa Jagannatha Rao Pantulu Bahadur Garu Vs. State of Andhra Pradesh, . In the later decision, the Court noticed and followed the observations of Hidayatullah, C.J., speaking for the Court made in the previous Du!abhai"s case. The following propositions of law, are, Therefore, well settled :

"(1)Where the statute gives a finality to the orders of the special tribunal the Civil courts, jurisdiction must be held to be excluded if there is adequate remedy

to do what the civil Courts would normally do in a suit. Such provision, however, does not exclude those cases where the provisions of the particular Act have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principle of judicial procedure. (2) Where there is an express bar of the jurisdiction of the court, an examination of the scheme of the particular Act to find the adequacy or the sufficiency of the remedies provided may be relevant but is not decisive to sustain the jurisdiction of the civil Court. Where there is no express exclusion the examination of the remedies and the scheme of the "particular Act" to find out the intendment becomes necessary and the result of the inquiry may be decisive. In the latter case it is necessary to see if the statute creates a special right or a liability and provides for the determination of the right or liability and further lays down that all questions about the said right and liability shall be determined by the tribunals so constituted, and whether remedies normally associated with actions in civil Courts are prescribed by the said statute or not. (3) Challenge to the provisions of the particular Act as ultra virus cannot be brought before Tribunals constituted under that Act. Even the High Court cannot go into that question on a revision or reference from the decision of the Tribunals. (4) When a provision is already declared unconstitutional or the constitutionality of any provision is to be challenged, a suit is open, A writ of certiorari may include a direction for refund if the claim is clearly within the time prescribed by the Limitation Act but it is not a compulsory remedy to replace a suit. (5) Where the particular Act contains no machinery for refund of tax collected in excess of constitutional limits or illegally collected a suit lies. (6) Questions of the correctness of the assessment apart from its constitutionality are for the decision of the authorities and civil suit does not lie if the orders of the authorities are declared to be final or there is an express prohibition in the particular Act. In either case the scheme of the particular Act must be examined because it is relevant enquiry. (7) An exclusion of the jurisdiction of the civil Court is not readily to be inferred unless the conditions above set down apply."

(31) In the present suit, the plaintiff has contended the illegality of the tax on two grounds, namely, that it violates Article 301 of the Constitution read with Article 265 and is unconstitutional and void. It has urged the legislative incompetence, but this point has been abandoned. The second ground claimed is that the levy of the tax under item 1 of class V is illegal and contrary to the provisions of the Act. So far as the first ground is concerned it clearly comes within rule 4 of the aforesaid dictum of the Supreme Court. Since the constitutionality of the relevant provision has been challenged, the jurisdiction of the civil Court would not be excluded.

(32) The learned counsel has urged that the term under which the tax was charged was a matter for final determination by the taxing authorities and the jurisdiction of the civil Court was expressly or impliedly barred. In furtherance of his argument, he has submitted that the plaintiff ought to have filed an appeal under rule 36 of the Terminal Tax Rules. This point requires consideration. It is

obvious that there is no provision in the Delhi Municipal Corporation Act which expressly excludes the jurisdiction of the civil Court in respect of terminal tax. Sections 168 and 171 of the Act admittedly do not deal with the terminal tax, but deals with other assessments of taxes like house-tax and etc., nor does section 343(5) deal with this situation. Therefore, no finality has expressly been given to the assessment of terminal tax and the departure of the Legislature in this respect appears to be deliberate. The reason obviously is that terminal tax is not levied by the Municipal Corporation, nor does it have a power to do so. The power u/s 178(2) of the Act is conferred upon the Central Government which is exercised through an organisation which is known as Terminal Tax Agency. Section 477 of the Act which excludes the entertainment of a suit is meant for the protection of the Municipal Corporation and municipal officers and employee; for anything done by them in good faith. This is a protection against tortuous acts but it does not have the effect of excluding the jurisdiction of the civil Court in determining the legality and validity of the tax. Mr. Chopra was unable to point out any provision of law expressly barring the jurisdiction of the civil Court. The question then arises as to whether any bar is to be implied by necessary intendment. In this connection, it would be interesting to notice that in the preceding Act punjab Municipal Act Iii of 1911, section 86 provided that no objection shall be taken to any valuation or assessment ,nor shall the liability of any person to be assessed or taxed be questioned in any other manner or any other authority than is provided I in this Act. Sub-section (2) further laid down that no refund of any tax shall be claimable by any person otherwise than in accordance with the provisions of this Act and the rules there under. We do not find any similar provision in Delhi Municipal Corporation Act. It would, Therefore, be safe to assume that the Parliament had made a 8 HCD/72-11 deliberate departure in this respect in enacting the present Act. Again, A there is nothing in the rules framed by the Central Government in the Terminal Tax Rules of 1958 to indicate the exclusion of the civil Court's jurisdiction either expressly or by necessary intendment. Mr. Rameshwar Dial has urged that even if the rules had made a provision for exclusion of such jurisdiction, it could be of no avail in the absence of an express provision to this effect contained in the Act itself. It is, however, not necessary for me to consider this submission of Mr. Rameshwar Dial as I do not find any provision in the rules themselves to exclude the jurisdiction of the civil Court. All that has been provided is an appeal under rule 36 which reads as follows:

"36. Any person dissatisfied with the assessment of terminal tax payable on his goods made under any of these rules may require that the matter shall be referred to the Terminal Tax Officer for a decision. In such a case the officer-in-charge of the barrier shall forward the goods to the head office under the escort of a peon, together with a brief report, of which he shall keep a copy in a memorandum book, for the decision of the Terminal Tax Officer. If such person is dissatisfied with the decision of the Terminal Tax Officer he shall pay the terminal tax, but may appeal against such decision to such superior officer as may be

determined by the Agency, provided that he lodges his appeal within fifteen days from the date of such payment."

(33) There is no finality attached to such appellate orders. Again this rule hardly suffices the requirements of determination of the question raised in the suit. There is no provision for summoning any oral or documentary evidence or issue of commission or examination of an expert or hearing the party. The provision for refund as contained in rule 34 is extremely limited to items like short deliveries, misdescription and miscalculations. In the nature of things, ordinarily, the charge of terminal tax is intended to be on the spot summary decision by the officer-in-charge of the terminal tax barrier and if a party is dissatisfied by his decision, provision is made to forward the goods to the head office with a brief report for the decision of the Terminal Tax Officer. He has again to decide the matter on the spot. If somebody feels dissatisfied with his decision, provision is made to file an appeal to such superior officer as may be determined by the Agency. This officer is known as Assessor & Collector and Terminal Tax Appellate Authority. This hierarchy of authorities and the procedure for appeals is not adequate for determination of complicated questions of law and fact. For example, whether the oxygen gas cylinders are Chemicals for industrial appliances or medicines. The Act and the rules do not contain any machinery for determination of such questions raised in the present suit. The suit would, Therefore, be covered by rule 5 laid down in the dicta of the Supreme Court in *Sree Srinivasa's* case (supra).

(34) Mr. Chopra has relied upon a Full Bench decision of the High Court of Punjab in *Kelash Nath and Others Vs. Municipal Committee, Batala*, . That case turned on the construction of the language in section 84 of the Punjab Municipal Act mentioned above, a provision corresponding to which is absent in the present Act. In this case itself the Court noticed an illustration given by Achhru Ram, J. in an earlier case reported as *Lal Singh Muktsar Municipality*. AIR 1949 EP 18. and observed that the illustration was thought-provoking and it would certainly be a glaring case if the levy was made like that, but it was not easy to conceive that the Assessing Authority would act in that arbitrary manner and so each case would have to be decided on its own facts. This authority Therefore, does not help Mr Chopra. The aforesaid Full Bench decision of the Punjab High Court , noticed in a Division Bench authority of the same High Court in *Union of India vs. Hindu Undivided Family Business Ram Lal Mansukh Rai* and another 1968 Pun LR 412 where S. B. Kapoor and R. S. Narula JJ. held that while in the Central Excise and Salt Act, there was a provision for appeal and revision, there was no express exclusion of jurisdiction of the civil Courts to question any assessment of duty, and so if the levy was outside the scops of the Act. and the rules and orders made there under, the jurisdiction of the civil Courts was not ousted. The Court, Therefore, considered the question whether the billets of kansi and brass rolled in uncut. circles did not lose their character as raw material for the manufacture of utensils. In this decision, the Court also noticed an authority of the Supreme Court in *Firm Seth Radha Kishan (Deceased) Represented by Hari Kishan and*

Others Vs. The Administrator, Municipal Committee, Ludhiana, . which has again turned on the provisions of sections 84 and 86 of the Punjab Municipal Act, the corresponding provisions of which do, as noticed above, not occur in the present Act.

(35) Again in this suit, I am factually not deciding under what item of the Schedule the goods in dispute will fall as that is the precise function of the taxing authorities. What I find is that the charge of terminal tax on the import of goods in dispute as foreign medicines covered by item 1 of class V is outside the jurisdiction of the taxing authorities and is an abuse of its power. As noticed above, the Terminal Tax Appellate Authority has already held that the goods in dispute are not covered under the said item and the defendant has given effect to the said decision in respect of subsequent imports, but it has failed to give relief to the plaintiff in respect of the previous imports. Those assessments are equally illegal and invalid and beyond the jurisdiction of the taxing authority. The civil Court would, Therefore, have jurisdiction to give relief to the plaintiff. Consequently I answer issue No. 7 against the defendants.

(36) Issues Nos. 5 & 8. Relief As a result of foregoing discussion, I hold that the plaintiff is entitled to refund of the amount of terminal tax paid in excess of what is livable as a residuary item under item 31 of Class Ix of the Tenth Schedule of the Act. In view of the fact that the plaintiff has given up its claim for a sum of Rs. 20 in respect of the total amount realised, I pass a decree in favor of the plaintiff against the first defendant Union of India for payment of Rs. 42.599.30 with proportionate amount of costs incurred on the court-fees on the plaint. The other costs of the suit would be borne by the respective parties. The first defendant Union of India is allowed three months" lime to pay the decretal amount and if it fails to do so, it would be liable to pay interest at the rate of 6 per cent per annum on the said amount from the date of the decree till realisation. Since the plaintiff has not claimed any relief against the second defendant as mentioned in paragraph 11 of the plaint, the suit against the second defendant is dismissed with no order as to costs.