IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.3354 OF 2016
WITH
WRIT PETITION NO.3355 OF 2016

M/s. Sun Tan Trading Co. Limited .... Petitioners
Vs.
The State of Maharashtra & Others .... Respondents

Mr. V. Sridharan, Senior Counsel with Mr. Prakash Shah, Mr. Rahul Thakar, Mr. Puneeth Ganapathy & Mr. Girish Kalla i/by PDS Legal for the Petitioners.
Mr. V.A. Sonpal, Special Counsel for the Respondent Nos.1 to 4.

CORAM: S.C. DHARMADHIKARI &
DR. SHALINI PHANSALKAR-JOSHI, JJ.

**DATE : ** MAY 03, 2016

P.C:

1. By these petitions under Article 226 of the Constitution of India, the petitioners are challenging an interim order passed by the Tribunal on 12-2-2016.

2. Ordinarily, this Court is reluctant to interfere with an interim order of a Tribunal, particularly when the main Appeal

is pending before the Joint Commissioner of Sales Tax (Appeals), Mumbai City Division, Mumbai.

3. However, Mr. Sridharan, learned Senior Counsel appearing on behalf of the petitioners, submits that the Tribunal has correctly and faithfully recorded all the arguments and referring to three aspects. The first aspect in the controversy was about the Duty Paid Transactions. It was argued that the petitioners conduct business of import and trading of alcoholic beverages. During the relevant period, the petitioners imported and cleared certain goods after filing Bills of Entry for Warehousing under Section 46 of the Customs Act, 1962 (for short, “the Act”). The imported goods were stored in Customs Bonded Warehouses and thereafter were transacted in, what is styled as, firstly, Duty Paid Transactions; secondly, Bond-to-Bond Transactions, and thirdly, SFIS/DFCES transactions.

4. Mr. Sridharan submits that the nature of these transactions was duly explained and it is apparent from the Tribunal's order that, it has virtually reproduced every single

argument from the written note submitted by the petitioners' counsel.

5. However, while dealing with the said arguments, the Tribunal thought that the only aspect needs to be looked into at the interlocutory stage is that the petitioners/appellants had paid a sum of Rs.58.04 crores as customs duty on the goods imported during the period 2004 to 2009, as per the order of the Settlement Commission under Section 7(b) of the Act. The order was passed by that Commission on 9-2-2012 pursuant to which this amount was deposited. This was never recovered from the customers as a consideration of sale price. The argument was that the tax burden was entirely of the petitioners/appellants and that is how it reduced the profit. As this amount was never charged or collected from the customers as a consideration of sales, therefore, it should not be taxed under the Sales Tax Act.

6. The other two arguments based on the Bond-to-Bond transactions and SFIS transactions have not been considered by the Tribunal, is the complaint of the learned Senior Counsel.

7. Mr. Sonpal, appearing on behalf of the Revenue, invites our attention to the affidavit in-reply filed to this writ petition and the rejoinder to submit that even with regard to the first part, the Tribunal has found that the entire burden, as is claimed, has not been discharged and a sum of Rs.1,56,32,612/- has been paid under protest on the total amount of tax levied under the Customs Act and, therefore, the Tribunal has considered this payment against the quantum of part-payment, to be decided by the Tribunal. Then the Tribunal, according to Mr. Sonpal, has considered even the other two arguments and in that regard he invites our attention to paragraph 5 of the Tribunal's order and consideration of the issue by the Tribunal. He also relied on paragraph 18 of the same.

8. After having heard both counsel at some length and perusing with their assistance the order passed by the Tribunal and impugned in the present petitions, we are of the view that the Tribunal's order on the interim application, though elaborate, it has failed to express even any prima facie view on

all the contentions raised. It has gone ahead and fixed the part-payment in one Appeal (VAT Appeal No.941 of 2015) at Rs.1,30,40,938/- and in another Appeal (VAT Appeal No.942 of 2015) at Rs.2,16,12,410/-. How these amounts are arrived at and from rejection or acceptance of which arguments and in relation to which part of the controversy, has not been clarified at all. It may be that at a prima facie stage the Tribunal would not express itself conclusively and decisively. However, from the order it must be apparent that the Tribunal applied its mind to all the issues raised and based on which the assessment has been made. If they are debatable and arguable and therefore merit consideration, then whether the rights and equities can be balanced by some arrangement or whether a case is made out for complete waiver of the pre-condition should be indicated by the Tribunal. We have been impressing upon the Tribunal that its order, even at the prima facie stage, must indicate beyond noting the rival contentions, that the Tribunal appreciated what is the controversy, has grappled with it in such a way that the issues are present to its mind and which have been dealt with or decided in Appeal, either by the First Appellate Authority or by it. In the present case, beyond referring to what transpired before the Settlement Commission and making a sweeping observation that the petitioners/appellants had adopted a modus operandi of under invoicing, which was subsequently unearthed by the Directorate of Revenue Intelligence (DRI), that the Tribunal concludes that the quantum of customs duty which should have been part of the sale price of the goods imported and sold by the petitioners cannot be said to be inclusive of the quantum of customs duty evaded and subsequently unearthed by the DRI. We are at a loss and are left to guess as to which Section or provision of the Maharashtra Value Added Tax Act, 2002 the Tribunal had in mind. Is it the definition of the term "Sale Price" as referred by Mr. Sonpal or some other which would support the prima facie view in law, has not been explained at all. Yet, crores of rupees are determined as deposit at an interim stage. This, prima facie, is no discussion, much less even an answer to the contentions raised before the Tribunal. The conduct of the party is one thing and could be relevant, but how that is decisive at all times and on all occasions has not been clear to us at all. In matters after matters in which the Tribunal after referring to the contentions, setting them down seriatim must follow it by applying its mind to basic and fundamental issue at hand. In such circumstances, even this order does not meet the requirement and it is vitiated by failure to apply the mind and to consider the contentions raised at the prima facie stage. The Tribunal having noted them should have at least discussed them briefly. We do not expect it to render a final Judgment but that virtually appears to have been done and if one is required to refer to some paras, paras 20 and 21 of the impugned order would indicate the same. It is in these circumstances and once the DRI's investigation has influenced the Tribunal's finding to a great extent, then we cannot sustain the same.

9. The writ petitions are allowed and the impugned order is quashed and set aside. The VAT Appeals shall stand restored to the Tribunal's file for a decision afresh, in accordance with law. Though these VAT Appeals are restored to the file of the

Tribunal, we clarify that we have expressed no opinion on the rival contentions. Beyond emphasising them and for some better consideration by the Tribunal in the fresh round, we have done nothing in this matter. Once the parameters of writ jurisdiction permit us to interfere with the impugned order, that we have done so and hereafter it is for the Tribunal to decide the Appeals in accordance with law, uninfluenced by its own tentative and prima facie conclusions. All contentions of both sides are kept open.

(DR. SHALINI PHANSALKAR-JOSHI, J.) (S.C. DHARMADHIKARI, J.)