

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE A.M.SHAFFIQUE

MONDAY, THE 27TH DAY OF JUNE 2016/6TH ASHADHA, 1938

WP(C).No. 18723 of 2016 (M)  
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PETITIONER(S):  
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KERALA STATE BEVERAGES (M&M) CORPORATION LIMITED,  
SASTHAMANGALAM, TRIVANDRUM-695 010,  
REPRESENTED BY MANAGING DIRECTOR.

BY ADVS.SRI.ANIL D. NAIR,  
SRI.R.SREEJITH,  
KUM.SOUMYA PRAKASH,  
KUM.MEKHALA M.BENNY.

RESPONDENT(S):  
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1. JOINT COMMISSIONER OF INCOME TAX,  
SPECIAL RANGE, TRIVANDRUM-695 001.
2. PRINCIPAL COMMISSIONER OF INCOME TAX,  
TRIVANDRUM-695 001.
3. THE COMMISSIONER OF INCOME TAX (APPEALS),  
TRIVANDRUM-695 001.

BY ADVS. SRI.K.M.V.PANDALAI, SC,  
SRI.CHRISTOPHER ABRAHAM, SC.

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD  
ON 20-06-2016, THE COURT ON 27/06/2016 DELIVERED THE  
FOLLOWING:

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APPENDIX

PETITIONER'S EXHIBITS:-

- P1 TRUE COPY OF THE ASSESSMENT ORDER DATED 30/01/2015 FOR THE ASSESSMENT YEAR 2012-13 ISSUED BY THE 1ST RESPONDENT.
- P2 TRUE COPY OF THE LETTER DATED 03/02/2015 ISSUED BY THE 1ST RESPONDENT
- P3 TRUE COPY OF THE APPEAL BEFORE THE 3RD RESPONDENT SUBMITTED BY THE PETITIONER.
- P4 TRUE COPY OF THE STAY PETITION BEFORE THE 3RD RESPONDENT SUBMITTED BY THE PETITIONER.
- P5 TRUE COPY OF THE STAY PETITION BEFORE THE 1ST RESPONDENT SUBMITTED BY THE PETITIONER.
- P6 TRUE COPY OF THE STAY PETITION BEFORE THE 2ND RESPONDENT SUBMITTED BY THE PETITIONER.
- P7 TRUE COPY OF THE ORDER DATED 26/08/2015 ISSUED BY THE 1ST RESPONDENT.
- P8 TRUE COPY OF THE ORDER DATED 06/01/2016 ISSUED BY THE 1ST RESPONDENT.
- P9 TRUE COPY OF THE LETTER DATED 20/02/2016 SUBMITTED BY THE PETITIONER.
- P10A TRUE COPY OF THE CONSEQUENTIAL ORDER NO.AAACK9431G/ CIR-1(1)/TVM/2007-08 DATED 06/02/2015.
- P10B TRUE COPY OF THE CONSEQUENTIAL ORDER NO.AAACK9431G/ CIR-1(1)/TVM/2008-09 DATED 06/02/2015.
- P10C TRUE COPY OF THE CONSEQUENTIAL ORDER NO.AAACK9431G/ CIR-1(1)/TVM/2009-10 DATED 06/02/2015.
- P10D TRUE COPY OF THE CONSEQUENTIAL ORDER NO.AAACK9431G/ CIR-1(1)/TVM/2010-11 DATED 06/02/2015.
- P10E TRUE COPY OF THE CONSEQUENTIAL ORDER NO.AAACK9431G/ CIR-1(1)/TVM/2011-12 DATED 06/02/2015.

RESPONDENT'S EXHIBITS:- NIL.

//TRUE COPY//

**A.M.SHAFFIQUE, J**

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W.P.C.No.18723 of 2016

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Dated this the 27<sup>th</sup> day of June 2016

**J U D G M E N T**

This writ petition is filed by the Kerala State Beverages (M & M) Corporation Ltd. challenging Ext.P7 and for a direction to the respondent to grant refund of the amount adjusted as per Ext.P2 letter.

2. The short facts involved in the writ petition would disclose that the petitioner, being an assessee before the 1<sup>st</sup> respondent under the Income Tax Act, 1961 (hereinafter referred to as 'the IT Act') filed returns for the assessment year 2012-13 admitting income of Rs.80,94,44,360/-. The assessing officer had accepted the return. However, the matter was taken for scrutiny and assessment was completed as per order dated 30/01/2015 under Section 143(3) of the IT Act. Ext.P1 is the said order. A letter dated 03/02/2015 was issued to the petitioner by which petitioner was informed that the refund for the assessment year 2007-08 to 2011-12 is proposed to be adjusted against the demand for Rs.340,93,85,170/- raised in the assessment year

2012-13. The total amount of refunds determined pertaining to the assessment years from 2007-08 to 2011-12 is Rs.223,57,34,050/-. The petitioner preferred an appeal against Ext.P1 order and a stay petition was also filed. The stay petition was disposed by Ext.P7 order by giving effect to the adjustment and staying the outstanding demand of Rs.105.79 Crores. Petitioner, by letter dated 20/02/2016, requested the Joint Commissioner of Income Tax to refund an amount of Rs.223.57 Crores due to them over a period of time. It is stated that they have no liability in view of the orders of the Commissioner of Income Tax (Appeals) and the Income Tax Appellate Tribunal. Since no action has been taken in the matter, this writ petition is filed.

3. Petitioner submits that the order Ext.P7 granting stay of recovery of tax after adjusting the refund is illegal. The amount payable in terms of Ext.P2 is liable to be paid to the petitioner. As per Finance Act, 2016, a provision has been incorporated by which it is open for the petitioner to move an application for stay of collection of tax on remitting 15% of the demand. The maximum that can be levied is only 15% and

therefore, when the petitioner had made a request for such adjustment, it ought to have been permitted.

4. A statement is filed by the learned Standing Counsel on behalf of the respondents inter alia stating that the outstanding demand of Rs.340.93 Crores arose on account of the disallowance of the petitioner's claim for deduction of surcharge on sales tax and turnover tax. The refunds in respect of the respective assessment years have arisen on account of deletion of similar disallowances for the earlier assessment years. It is stated that the order passed by the Appellate Tribunal have not become final and departmental appeals are pending before this Court. Further reference is made to Section 245 of the IT Act wherein power is available to the assessing officer to set off the amount to be refunded against any amount remaining payable under the Act. It is submitted that when such a power had been exercised, the petitioner cannot legally sustain a claim for payment of the amount.

5. Petitioner had filed a reply stating that, it was on receipt of Ext.P2 order by which the petitioner came to know about the refund orders. However, petitioner was served with

copies of the orders dated 06/02/2015 wherein the 1<sup>st</sup> respondent had suo motu adjusted the money refundable to the petitioner against the dues in Ext.P1. Ext.P10 series are the orders passed. It is contended that Ext.P2 cannot be said to be a notice for the purpose of setting off refund against dues.

6. Heard learned counsel for the petitioner and the learned counsel appearing for the respondents.

7. The main contention urged by the learned counsel for the petitioner is that before issuing Ext.P2, no orders had been served on the petitioner by which the refund had been adjusted. In fact, the main challenge in the writ petition is against Ext.P7, which is an order passed by the Joint Commissioner of Income Tax while considering an application for stay. Stay has been granted on condition of the adjustments already made. When the appellate authority had taken such a view in the matter, I do not think that there will be any justification on the part of this Court in setting aside the said order, as no infirmity can be pointed out to the said order.

8. Learned counsel for the petitioner, however, would submit that Ext.P10 series have never been served on the

petitioner and it was preceded by Ext.P2 notice dated 3/2/2015. It might be correct to say that Ext.P2 ought to have been issued after the order dated 06/02/2015, which is produced as Ext.P10 series. But the fact remains that once Ext.P10 series had been issued and the appellate authority had taken cognizance of the said fact while granting stay, a direction to refund the amount, as claimed, is not sustainable. As rightly pointed out by the learned counsel for the petitioner, under normal circumstances, stay could be obtained by remitting 15% of the amount demanded. But the said provision may not apply when a right to set off is available to the Department in terms of Section 245 of the Act which reads as under:

***“245. Set off of refunds against tax remaining payable.***

*Where under any of the provisions of this Act, a refund is found to be due to any person, the Assessing Officer, Deputy Commissioner (Appeals), Commissioner (Appeals) or Chief Commissioner or Commissioner, as the case may be, may, in lieu of payment of the refund, set off the amount to be refunded or any part of that amount, against the sum, if any, remaining*

*payable under this Act by the person to whom the refund is due, after giving an intimation in writing to such person of the action proposed to be taken under this section."*

9. True that, at the time when Ext.P1 order was passed on 30/01/2015, the refund order was not in existence and it came into effect only on 06/02/2015. However, merely for the reason that there is some irregularity in the procedure adopted by the Department, I do not think that any direction can be issued, as prayed for.

Writ petition is, hence, dismissed.

(sd/-)

**(A.M.SHAFFIQUE, JUDGE)**

jsr