IN THE HIGH COURT OF DELHI AT NEW DELHI

EXTRAORDINARY CIVIL WRIT JURISDICTION

WP (C) NO. 3087 OF 2020

IN THE MATTER OF:

Praveen Gulati ...Petitioner

Versus

Government of Delhi & Ors. ...Respondents

INDEX

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IN THE HIGH COURT OF DELHI AT NEW DELHI
EXTRAORDINARY WRIT JURISDICTION
WRIT PETITION (C) NO. 3087 OF 2020
(and other connected petitions)

IN THE MATTER OF:

Praveen Gulati &Ors. .... Petitioners

Versus

GNCTD & Anr. ... Respondents

Most Respectfully Showeth:

COUNTER AFFIDAVIT ON BEHALF OF RESPONDENTS

working as Assistant Commissioner, do hereby solemnly affirm and state as under:

1. That, I am working in the aforesaid capacity with the answering Respondent and as such I am well conversant with the facts of the case and competent to swear this affidavit.

2. At the outset it is most respectfully submitted that the present batch of writ petitions, which invoke the extraordinary jurisdiction of this Hon'ble Court under Article 226 of the Constitution of India ("CoI"), raise a common issue for the consideration of this Hon'ble Court. While some of the petitions assert a private / personal interest, others have been projected as espousing a public interest, in the consumption of liquor.

3. In essence all the petitions seek to challenge the vires of the notification bearing no. F 3(2)/Fin (Rev-I)/2020-21/Ds-VI/150, dated 4.5.2020 (***"Impugned Notification"***), issued by the Government of the National

Capital Territory of Delhi ("***GNCTD***"). While asserting virtually an untrammeled and absolute right to consume liquor, the petitioners allege that the GNCTD lacks the legislative competence or the power under the Delhi Excise Act, 2009 (hereinafter referred to as the "Act") to issue the impugned notification.

4. Accordingly, the answering respondent, for the present, is filing a common affidavit, dealing with the aforesaid challenge to legislative competence/ power and other related issues and craves liberty to file a further and more detailed affidavit in reply to individual petitions, if the need so arises.

5. **Preliminary Submissions:**

5.1 That, at the very outset it is submitted that the present set of petitions have been founded upon a clear misconception of law, namely, that the taxing jurisprudence as applicable qua any fiscal levy is wholly applicable even to the fiscal levy viz a viz liquor; when the settled position in law is that the diverse principles applicable to fiscal levy in general is not necessarily applicable in case of liquor.

5.2 To begin with, the very object of a State Excise Levy is liquor, which unlike objects under other fiscal statutes, is dangerous and injurious to health and is therefore an article which is *res extra commercium*. A citizen therefore, has no fundamental right to do trade or business in liquor or for that matter also to consume liquor. On the other hand, State has the authority and jurisdiction to regulate (including prohibit-totally or partially) such trade and commerce as well as to regulate the sale, purchase and consumption of liquor.

5.3 In other words, there is an element of privilege viz a viz sale/ dealing in liquor or for that matter consumption of liquor; which the State is free to accord and/or regulate under the State Excise law.

5.4 Accordingly, State is also free to impose and recover a price for grant of such privilege;

5.5 Moreover, such imposition need not be either a tax or a fee yet less excise duty; or for that matter form part of Excise Revenue;

5.6 That apart, cost of regulation and supervision in form of regulatory and supervisory fee can also be charged under State Excise law for regulating and/ or supervising the various facets of sale, purchase, possession, etc. of liquor;

5.7 Insofar as such regulatory and supervisory fee is concerned, the law does not require and/ or oblige a justification of the same on the touchstone of quid pro quo;

5.8 It is also a well settled legal position that the aforesaid grant of privilege or for that matter the restrictions/ regulations/ supervisions can also be affected through subordinate legislations and/ or administrative orders;

6. And the present impugned levy is nothing but a combination of price of such privilege and cost of such regulation and supervision.

Background Fact:

7. Before proceeding to deal with the contentions raised by the petitioners, it is respectfully submitted that it is necessary to bear in mind, the immediate background in which the impugned notification came to be issued.

8. It is common knowledge that a tidal wave of gargantuan proportions has swept across the world wreaking havoc on the social and economic fabric of countries across the world and imperiling the health and life of millions of people.Infact the World Health Organisation(WHO) on 30th January 2020, in the second meeting of the Health Committee, constituted under the International Health Regulations 2005 (IHR), declared that the outbreak of COVID-19, constitutes a Public Health Emergency of International Concern ("PHEIC Declaration").

9. The Government of India in order to take all necessary steps to contain and restrict the spread of the virus, imposed a national lockdown with effect from 24th March 2020, which has been extended from time to time and is currently in operation till 31st May 2020.

10. Pertinently, the Central Government while extending the aforesaid National Lock Down vide the Order of 1st May 2020, had permitted the opening of liquor shops, subject to certain restrictions. A true copy of the order dated 1st May 2020 issued by the Central Government is annexed herewith and marked as **Annexure R-1**.

11. Pursuant thereto, the GNCTD in compliance of the said Order issued their directives vide order dated 3rd May 2020 prescribing the safeguards subject to which liquor vends would be permitted to operate. A true copy of the order dated 3rd May 2020 issued by GNCTD is annexed herewith and marked as **Annexure R-2**.

12. On the very same day, the answering State Excise Department issued an Order, controlling the number of vends which could open in the existing unprecedented / extraordinary circumstances by permitting only 181

vends and that too confined to L-6 and L-8 licensee (Government Corporations) out of total number of about 800 existing vends.

13. It is pertinent to note that under the aforesaid Order, several regulatory /supervisory measures were prescribed; some of them being;

i) To check and ensure that only those L-6 and L-8 vends which satisfy the criteria set out in clause 7 (ii) (d) of the aforesaid Central Government Guidelines dated 1.5.2020 are operating ;

ii) To check and ensure that only such L-6 and L-8 licensees, as opposed to the entire lot of 800 odd licensees, are selling liquor;

iii) To check and ensure that the prescribed timing (i.e. 9am to 6.30pm) is being adhered to;

iv) To check and ensure that social distancing is being maintained at the said vends which would inter alia include taking measures to control the number of patrons visiting the vends through inter alia regulating the demand to some extent;

v) To check and ensure that only bonded warehouses (L-1 and L-1F) are functioning;

vi) To ensure that the prescribed timing (ie 7am to 6.30am) is being adhered to by such warehouses;

vii) To check and ensure that such warehouses are functioning at only 33% strength of their employees;

viii) Deploy teams for site inspections of vends;

ix) Deploy bond inspectors for site inspections of warehouses ;

x) To deploy team and that too on daily basis at all L-6 and L-8 vends to ensure that the aforesaid restriction/ regulation is being complied with and that the operations are smooth;

xi) To deploy teams to ensure that no warehouse/ retail vend is open and / or functioning in containment zones

14. It was only pursuant to the aforesaid directives of the Central Government; State Government and that of the Excise Department of GNCTD that the impugned notification dated 04.05.2020 has been issued. Annexed herewith and marked as **Annexure R-3** is the copy of the said impugned notification dated 04.05.2020.

15. On the very same day a directive by the Commissioner was issued directing such vends to ensure collection of the Corona Fee levied under the aforesaid impugned notification. Hereto annexed and marked as **Annexure R-4** is the copy of the said directive by the Commissioner to the vends.

16. It is also submitted that owing to the clamp down on all economic activity, the revenue of the GNCTD(which primarily came from VAT/GST collection; State Excise and Stamp Duty) , has shrunk by almost 90% in the month of April 2020 and the total collections dwindled to a mere Rs.300 crores as opposed to approximately Rs.4000 crores in the corresponding month in the preceding year.

17. Pertinently, between 4.5.2020 and 25.5.2020 the total sale (turnover) of the operational L-6/L-7/L-8 vends has been Rs. 187 Crore which is way

too less as compared to the sale figures of May 2019, as the number of vends operational in May 2019 were around 800 and as of now, only 40 percent of the vends are operational due to various restrictions imposed by the Government in view of Corona virus outbreak.

18. That apart, the total Excise Revenue (including the impugned Corona Fee) collected by the State during the aforesaid period between 4.5.2020 to 25.5.2020 has been to the tune of Rs. 227.44 Crore (Inclusive of Rs 127 Crore of Special Corona Fee), against the total revenue collection of Rs. 425.24 Crore in May, 2019.

Legal Submissions:

19. Legislative Competence:

19.1 **Constitution of India:**Under List II, Schedule VII of the CoI, States are empowered to enact legislations pertaining to all aspects of intoxicating liquor, including its purchase and sale.

Entry 8:

> "Intoxicating liquors, that is to say, the production, manufacture, possession, transport, purchase and sale of intoxicating liquors."

Entry 51:

> "Duties of excise on the following goods manufactured or produced in the State and countervailing duties at the same or lower rates on similar goods manufactured or produced elsewhere in India:-
>
> (a) Alcoholic liquors for human consumption;
> (b) ****
>
> **** "

Entry 54:

> "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, but not including sale in the course of interstate trade or commerce, or sale in the course of international trade and commerce of such goods".

Entry 66:

"Fees in respect of any of the matters in this List, but not including the fees taken in any Court"

19.2 **Delhi Excise Act, 2009**: The relevant provisions of the Act are being set out for ready reference:

19.2.1"An Act to consolidate, amend and update the Excise Laws relating to manufacture, import, export, transport, possession, purchase, sale, etc., of liquor and other intoxicants, in the National Capital Territory of Delhi and for matters connected therewith or incidental thereto."

19.2.22. **Definitions-**

"(23) "duty" means the excise duty or the countervailing duty as mentioned in Entry 51 of List II of Seventh Schedule of the Constitution, or, as the case may be, special duty;"

"(27) "excise revenue" means revenue derived or derivable from any payment, duty, fee, tax, confiscation or fine, imposed or ordered under the provisions of this Act, or of any other law for the time being in force relating to intoxicants but does not include fine imposed by a court of law;"

"(52) "MRP" means the maximum price at which the liquor may be sold to the ultimate consumer and shall include all taxes, freight, transport charges, commission or trade margin payable to dealers, and all charges towards marketing, delivery, packing, forwarding and the like, as the case may be;"

"(63) "retail price" means the price fixed by the Excise Commissioner for the sale of intoxicant at which the licensee is bound to sell the intoxicants;"

19.2.3"4. **Powers and functions of Excise Commissioner**—The powers and functions of the Excise Commissioner shall be—

(a) to regulate, control and monitor manufacture, possession, import, export, transport, **sale and consumption of liquor** and other intoxicants;"

(b) ***

(c) to protect excise revenue and ensure prompt recovery;

***"

19.2.4"**11. Prohibition of import, export, transport, manufacture, possession, sale, etc. of intoxicant.**—(1) No person shall construct or establish any manufactory or warehouse, bottle, import, export, transport, transit, manufacture, collect, possess, **sell or purchase** any intoxicant or use, keep or have in his possession any material whatsoever, still, utensil, implement, apparatus, label, cork, capsule or seal for manufacture of any intoxicant except under the authority and in accordance with the terms and conditions of a licence or letter of intent or permit granted under this Act and the rules framed thereunder.

(2) ****"

19.2.5"**12. Grant of Letter of Intent / Licence or Permit.** - Every letter of intent/ licence or permit under this Act shall be granted for such period as subject to such restriction, conditions and in such form and contains such particulars, as may be prescribed".

19.2.6 "**26. Nature and components of excise revenue**—Excise revenue shall be levied and recovered under the following heads namely:—

(a) duty;

(b) licence fee;

(c) label registration fee;

(d) import or export fee".

"**27. Excise duty. countervailing duty and special duty**—(1) There shall be levied and collected duty on all intoxicants which are produced, manufactured, transported or imported into Delhi at such rates as may be prescribed not exceeding the rates set forth in the Schedule.

(2) There shall be levied and collected fees for terms and conditions and form of and duration of licence, permit and pass.

(3) In computing the retail price notwithstanding anything contained in sub-section (1) of section 27 the duty shall be so increased and computed that the retail price is rounded off up to the next higher multiple of ten rupees as notified by the Government and such increased duty shall be collected by the Government in the manner prescribed".

"**28. Power of Government to vary duty**—(1) Where in respect of any intoxicant, the Government is satisfied that the duty leviable thereon under section 27 of this Act should be increased or decreased and that circumstances exist which render it necessary to take immediate action, the Government may by notification in the Official Gazette direct an amendment of the Schedule to be made so as to substitute for the rate of duty specified in the Schedule in respect of such intoxicant.

(2) Every notification under sub-section (1) shall be laid before the Legislative Assembly if it is sitting as soon as may be after the issue of the notification, and, if it is not sitting within seven days of its re-assembly. and the Government shall seek the approval of the Legislative Assembly to the notification by a resolution moved within a period of fifteen days beginning with the day on which the notification is so laid before the Legislative Assembly. If the Legislative Assembly makes any modification in the notification or directs that the notification should cease to have effect the notification shall thereafter have effect only in such modified form or be of no effect. as the case may be but without prejudice to the validity of anything previously done thereunder."

19.2.7"**77. Power of Government to regulate drinking and to enforce prohibition.**—The Government may issue such order and take such measures as may be deemed appropriate to regulate drinking or to enforce prohibition in whole or in any part of Delhi."

19.2.8"**81. Power of Government to make rules.**—(1) The Government may by notification make rules not inconsistent with the provisions of this Act to carry out the purposes of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:—

****

(*f*) regulating the wholesale or retail sale of intoxicants;

(*g*) regulating the time, place, rate and manner of payment of duty or fee and the taking of security for its due payment;

****"

19.3 **<u>Delhi Excise Rules, 2010</u>**

19.3.1"**34.Grant of Wholesale and Retail Sale** - 1. Wholesale and Retail Licences of liquor shall be granted by the Deputy Commissioner in accordance with the terms and conditions, approved by the Government each year".

19.3.2 "**154. Rates of fee**.-The following shall be the rates of licence fee, label registration fee and other fees leviable in respect of excisable articles for the various categories of licences- ………………. …………………… ……………"

20. In view of the foregoing it is thus submitted that the Delhi Excise Act, 2009 and the Rules framed thereunder, also empowers the State to, inter alia, accord the privilege of a peculiar nature and also to regulate / supervise the sale, purchase and consumption of liquor in the National Capital Territory of Delhi during the currency of the Covid 19 pandemic; particularly in view of the aforesaid lockdown measures/ directives announced by the Central Government/ GNCTD/ the Excise Department of GNCTD.

21. It is further submitted that also in exercise of the power vested under Section 4, Section 11 (1) and Section 77 read with Section 81(1) and/or Section 81(2)(f)/(g), that Rule 154 (4) of the Rules has been amended and the impugned levy has been imposed; which is nothing but a combination of price towards grant of privilege and the cost of regulation / supervision . Moreover the directives issued by the Excise Commissioner dated

04.04.2020 to all the concerned vends, also in effect, modifies the terms and condition of such licensee in terms of Section 11 of the Act and Rule 34 of the Rules.

22. Pertinently, 10 States other than Delhi, namely, Assam, Meghalaya, Karnataka, Andhra Pradesh, Telangana, U.P, Haryana, Rajasthan, Tamilnadu, West-Bengal have imposed similar levy.

23. Without prejudice to the above, it is submitted that Sections 26 to 28 of the Act ex-facie have no application qua the present case and do not in any way prohibit the levy of the Special Corona Fee. It is submitted that the levy is imposed for the limited purpose as highlighted above during the currency of the pandemic.

24. It is further submitted that the Maximum Retail Price of liquor is not being raised and the same is only being used as the basis for calculating the amount of the present special levy.

25. In light of the submissions made hereinabove it is most respectfully submitted that the challenge raised by the petitioners is without any merit and may therefore kindly be dismissed.

DEPONENT

Asstt. Commissioner
O/o Commissioner Excise, Entt. & Luxury Tax
Govt. of NCT of Delhi
Vikas Bhawan, New Delhi-2

VERIFICATION

Verified at New Delhi on this 27 day of May, 2020 that the contents of the above affidavit are true and correct to the best of my knowledge and no part is false and nothing material has been concealed.

DEPONENT

Asstt. Commissioner
O/o Commissioner Excise, Entt. & Luxury Tax
Govt. of NCT of Delhi
Vikas Bhawan, New Delhi-2