

**(1997) 06 KL CK 0041**  
**In the High Court Of Kerala**  
**Case No : O.P. No. 14944 of 1996**

Babu P. Thomas and Others

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

**Date of Decision :** 11-06-1997

**Acts Referred:**

Kerala Abkari Act, 1077 — Section 17(c), 17(g), 18

**Citation :** (1998) 1 KLJ 307

**Hon'ble Judges :** J.B. Koshy, J

**Bench :** Single Bench

**Advocate :** K. Sudhakaran, M. Pathrose Mathai, A.N. Rajan Babu, C.C. Thomas, George Poonthottam, Ananthakrishnan, K.P. Satheesan, T.G. Rajendran and N. Manoj Kumar, for the Appellant; M.K. Damodaran (Advocate General), V.V. Asokan (Special Govt. Pleader - Taxes) and N. Raghuraj (Govt. Pleader), for the Respondent

**Final Decision :** Allowed

## Judgement

J.B. Koshy, J.—Petitioners are the licencees u/s 18A of the Kerala Abkari Act. Petitioners get their licences in every year in accordance with the conditions applicable to the respective period. Sections 17 and 18 deals with levy of excise duty. Section 18 deals with rate of duty. The maximum rate fixed as Rs. 20/- per proof litre was changed to Rs. 200/- per proof litre or an amount equal to 200 per cent of the value of the liquor by Ext.P1 order dated 14.2.1996. The Government of Kerala by an Ordinance No. 2/96 namely the Abkari (Amendment) Ordinance 1996 amended Section 18 of the Abkari Act and thereby inserted the following: 3. Amendment of Section 18 - In Sub-section (3) of Section 18 of the Principal Act-

(1) In Clause (I) under the heading "Maximum Rates" against item (i) for the words and figures Rs. 20 per proof litre of Rs. 90.92 per proof gallon" the following words and figures shall be substituted namely:-

Rs.200 per proof litre or an amount equal to 200 per cent of the value of the

liquor.

(2) In the proviso for the words "country liquor" the words "Indian made foreign liquor" shall be substituted.

(3) After the proviso the following explanation shall be added, namely:-

"Explanation - Where any liquor is chargeable with duty at a rate depending on the value of the liquor, such value shall be the value at which the Kerala State Beverages Corporation purchases such liquor from Suppliers.

According to the said amendment the rate of duty payable on liquor has been increased to 200 per cent of the value of the liquor. The increase in duty was brought into force from 1.4.1996 onwards. The increased rate of duty of excise was sought to be imposed on the stock of liquor as on 1.4.1996 with the petitioners licencees. This demand of increased rate of duty from 1.4.1996 on the stock of duty paid liquor with the licencees which was purchased before 31.3.1996 is challenged in these original petitions.

The Government justified the above levy on the basis of the proviso to Section 18 which reads as follows: Provided that where there is a difference of duty of excise or luxury tax as between two licence periods, such difference may be collected in respect of all stocks of country liquor or intoxicating drugs held by licencees at the close of the former period.

According to the petitioners, the above proviso is not applicable in the instant case and if it is applicable that proviso is ultrawires of the Constitution and charging section and is liable to be set aside.

2. For analysing the nature of duty charged I may examine the nature of excise duty charged by the State. Entry 51 of list II in 7th Schedule of the Constitution gives power on the State to charge excise duty which reads as follows:

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) opium, Indian hemp and other narcotic drugs and narcotics;

but not including medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (b) of this entry.

This is similar to entry 84 of List I which authorises the Union Government to charge duties of excise on tobacco and other goods manufactured or produced in India except alcoholic liquors for human consumption which is given to the State as per List II entry 51. In view of this entry only the State is competent to levy excise duty on liquor manufactured or produced in the State. The word "manufacture" is defined u/s 3(19) of the Kerala Abkari Act (hereinafter referred to as the Act). It is as follows:

"Manufacture" includes every process, whether natural or artificial, by which any fermented, spirituous, or intoxicating liquor or intoxicating drug is produced, (prepared or blended) and also reinstallation and every process for the rectification of liquor.

3. A combined reading of the entry 8 List I of 7th Schedule of the Constitution of India which grants legislative competence to charge excise duty by the State on alcoholic liquors as well as the provisions of the Act will show that the excise duty is a duty on manufacture or production of alcoholic liquors and countervailing duty charged is a tax imposed on such excisable articles brought into the State from other parts of the country. It is different from sales tax charged on sale of goods. This has been explained by the Supreme Court clearly in *Bimal Chandra Banerjee Vs. State of Madhya Pradesh etc.*, . At paragraph 8, the imposition of excise duty by various abkari laws were considered and explained. While considering the provisions of Madhya Pradesh Excise Act at paragraph 8 the Apex Court held that the scheme of the Act is similar to the scheme of other excise Acts in this country. Thereafter it referred to entry 51 of list II in the Seventh Schedule to the Constitution of India and finally at paragraph 11 it was held as follows:

The excise duty is a duty on manufacture or production and countervailing duty is a tax imposed on excisable articles brought into the State from other parts of the country.

The charging section under the Kerala Abkari Act is Section 17 which reads as follows:

17. Duty on liquor or intoxicating drugs:-A duty of excise or luxury tax or both shall, if the Government so direct, be levied on all liquor and intoxicating drugs.

- (a) permitted to be imported u/s 6; or
- (b) permitted to be exported u/s 7; or
- (c) permitted u/s 11 to be transported; or
- (d) manufactured under any licence granted u/s 12; or
- (e) manufactured at any distillery, brewery, winery or other manufactory established u/s 14; or
- (f) issued from a distillery, brewery, winery or other manufactory or warehouse licensed or established u/s 12 or section 14; or
- (g) sold in any part of the State.

Provided that the duty on denatured spirit or beer manufactured in the State shall, unless the Government otherwise directs be equal to the duty to which denatured spirit or beer respectively imported into the State is liable under the law for the time being in force relating to the duties of customs on goods imported into the State.

The duty or tax which is authorised to the State to collect as per entry 51 of List II can be levied u/s 17 by the above seven methods mentioned in Section 17.

4. In *Premier Breweries Ltd. v. State of Kerala and others* (1980) KLT 547) this Court held that duty has to be levied according to Section 17 read with Section 18. Clauses (a) to (g) u/s 17 are alternative and mutually exclusive modes of levying. Government are empowered to adopt any one of these methods but Government cannot make a demand otherwise than under the same method. This Court held as follows:

Duty has to be levied in terms of S. 17 read with S. 18. Clauses (d) and (f) of S. 17 provide for alternative modes of levy which are mutually exclusive. These modes are restated in S. 18. The Government are empowered under the Act to adopt any one of these methods. By Ext.P1 the method under clause (f) was adopted by the Government, and it was acted upon by the petitioner. Having adopted the mode under clause (f) in preference to clause (d) - these two provisions being, in my view, mutually exclusive and alternative methods - the petitioner's counsel is perfectly justified in contending that the Government are precluded from making a demand otherwise than under clause (f) for the period prior to the order No. XA5-3349/72 dated 9.10.1975 under which the new mode of levy was prescribed. (As regards election and waiver, see the principles discussed by the House of Lords in *China Trade Corporation v. Evlogia Co.* (1979) 1 WLR.1018, 1024, 1034, 1035).

5. It is not disputed that Government has adopted the method mentioned in Section 17(f) for 1995-96 and 1996-97. Therefore duty can be charged and collected when it is issued from a distillery, brewery, winery or other manufactory or warehouse licensed or established u/s 12 or Section 14. In Kerala the sole wholesale distribution is done by the Kerala Beverages Corporation and duty has to be paid at the time when liquors issued from the licenced warehouse of the Kerala Beverages Corporation. The Government is free to adopt any method in clauses (a) to (g). But having decided to collect duty under clause (f) Government cannot collect the duty in any other method and once duty was collected by the Government, it cannot demand further duty or any difference of duty under any other method. This is very clear from the decision reported in 1980 KLT 547. The rate of duty to be collected is the rate when it is issued from the warehouse of the Kerala Beverages Corporation. If the duty of excise is increased when the goods were kept in the warehouse, the increased rate of duty should be paid when it is removed from the warehouse and it cannot be contended that only rate that is prevalent at the time of manufacture can be collected. Section 18 mainly deals rate of duty and manner of collection. Proviso to Section 18 relied on by the Government has no application when Government has fixed point of levy u/s 17(f). If proviso has got application in such cases, the nature of charge itself will become different, and the question whether the proviso is ultrawires of the Constitution, legislative competence and charging section etc. will have to be considered. But I am of the opinion that proviso to

Sec. 18 is applicable only if Government has fixed the levying event of duty as mentioned in clause (g) of Section 17. Here the Government has fixed Section 17(f) as taxable point, hence question whether the above proviso is ultravires of the Constitution need not be considered.

6. In *The State of Bombay Vs. S.S. Miranda Limited*, it was held by the Supreme Court that once the duty had been paid the liquor could be transported free from any further imposition. Apex Court clearly held that there is no power to the State Government to impose duty at every movement during the course of the trade. Eventhough there is power in the legislature to levy duty at every stage of movement of liquor, so long as it has not exercised that power, it cannot levy duty at a later stage after the duty was once collected.

7. Arguments were made by the petitioners on the basis of the Supreme Court decision in *M/s. Ponds India Ltd. Vs. Collector of Central Excise, Madras*, and in *Collector of Central Excise, Hyderabad etc. etc. Vs. M/s. Vazir Sultan Tobacco Company Limited, Hyderabad Etc. Etc.*, that excise duty being a tax on manufacture it cannot be charged if the increase is after the date of manufacture. I agree with the learned Advocate General that the above decisions are not laying down such a proposition. If the above cases when the goods were manufactured there was no special excise duty. It was held that such fresh excise duties cannot be charged on goods which were manufactured before the imposition of the fresh levy as excise duty is a tax on manufacture. But Apex Court also held that the date of manufacture is the date upon the levy attaches to goods eventhough the date of payment is different from the date of clearance as per Rule 9 and if duty is payable on the date of manufacture effective rate is the rate prevalent at the date of clearance. Therefore even if the rate of duty is increased after the date of manufacture, such increased duty can be collected if the increase came into effect before clearance of goods, the date of event fixed for the collection of duty under Rule 9. However, at no stretch of imagination difference in duty can not be demanded due to increase in duty after the goods are cleared under Rule 9. Here the present increase in duty was after its removal from the warehouse, the event of taxation fixed u/s 17(f) of the Act. Therefore that increased duty cannot be charged from the licencees who are also customers of goods from the Beverages Corporation on payment of cum duty price.

8. The Government is collecting duty from the Beverages Corporation. When liquor is sold, only on payment of duty after discharging the obligation u/s 17(f) Corporation issued liquor to the licencees. Thereafter there is no scope of charging further duty. The increased duty cannot be collected from the licencees or customers who purchased the duty paid liquor and kept stock in their licensed premises or houses. Section 18 proviso cannot held the Government so long as the Government has not decided to collect the duty u/s 17(g) but have decided to collect u/s 17(f) Indian made foreign liquor which has already subjected full levy of duty in the hands of Beverages Corporation when they issued and sold

the same to the licencees cannot be again subjected to further duty. The increased rates are applicable only to the liquor to which the charging section is applicable and not to the liquor which has already been subjected to charge of full duty of excise u/s 17. Therefore demand of duty of excise on the liquor which has subjected full duty of excise before 31.3.1996 cannot be made on the stock remaining unused in the licensed premises. One contention raised by the State is that there is no loss to the petitioners as they could have well collected it from their customers. This argument is attractive prima facie. First of all there is no evidence that these licencees have actually collected it. When the demand was made some petitioners obtained stay from this Court. Further there is no rule fixing prices to be charged by the licencees from the customers. Different bars charged at different rates depending upon the ability of their customers, services rendered in the bar etc. Because of the sudden step increase in the price, it is submitted that many bar owners were not able to increase the prices suddenly. In any event that is not a reason for sustain an illegal levy on the duty paid stock. Perhaps question of undue enrichment etc. can be pleaded by the State as a shield of any body applies for refund of the duty after payment if there is evidence that this duty was collected from customers and there are statutory provisions for that like Section 11 B of the Central Excise and Sald Act. But the above argument cannot support or save a demand of further levy of excise duty on the stock of goods which suffered full excise duty at the effective rate as existed at the time of its purchase. It was also pointed out by the petitioners that on 1.4.1997 excise duty of 200% was reduced to 100% and difference in excise duty on the stock was not refunded and they had to sell the duty paid stock at the higher rate on a lower price and these are all business profits or risks. I have already held that event of duty collection on alcoholic liquor is opted by the Government as prescribed u/s 17(f). Therefore on alcoholic liquor which is cleared after paying full effective rate of duty at the point prescribed u/s 17(f), no further duty can be demanded and the present duty demand on the duty paid stock is illegal.

In view of the above discussions, the Original Petitions are allowed and impugned demands are set aside.