

(2005) 11 KAR CK 0028
In the Karnataka High Court

Case No : Writ Petition Nos. 22098 of 2002 (T-TAX) and 54156 of 2003 (T-KST)

Brindavan Alcohol and Allied Chemicals Private Limited,
Mysore

APPELLANT

Vs

The Commissioner of Commercial Taxes, Bangalore and
Another

RESPONDENT

Date of Decision : 29-11-2005

Acts Referred:

Constitution of India, 1950 — Article 245
Industries (Development and Regulation) Act, 1951 — Section 18C
Karnataka Sales Tax Act, 1957 — Section 5(3)(A)

Citation : (2006) 60 KarLJ 92

Hon'ble Judges : D. V. Shylendra Kumar, J

Judgement

The Court, made the following:

At the request of the learned Counsel for the petitioners, arguments have been heard on both of these petitions together and matters are disposed of by this common order.

2. In the field of taxation, unending tussle between the revenue and the assessee is that while the revenue wants to collect as much tax as possible, the assessee wants to pay as less tax as possible. It is this competition that has given rise to voluminous litigation and all the law journals are filled with good number of judgments of the Courts on taxation matters. More decisions can also give room for inconsistency, variations and disagreements. Human ingenuity being such that, new frontiers are continuously explored, new horizons sought to be occupied, innovations attempted and all such efforts by the assessee is to get over the tax liability and equally resisted by the revenue to ensure that the tax payer does not wriggle out of the net of taxation.

3. The present writ petitions are no exception to this phenomenon. Petitioner is an industry manufacturing products using alcohol and alcoholic products and is said to be manufacturer of acidic acid and allied products. Also happens to be a

dealer registered under the provisions of the Karnataka Sales Tax Act, 1957 (for short, "the Act").

4. The petitioner in the course of its manufacturing activity uses "rectified spirit" which can be characterised even as a raw material for its end products and has to buy such "rectified spirit" from persons who sell the same, who are limited in numbers and who for such purpose also have to be licensed. While so buying the "rectified spirit", the petitioner has to bear the brunt of sales tax levied on the sale of "rectified spirit" by the selling dealer who collects the tax from the buyers i.e., persons like the petitioner and pass it on to the State. The rate at which these products/goods are subjected to tax has varied from time to time and as mentioned in Entry 12(ii) and (iii) of Part "S" of Second Schedule, which reads as under:

"12. Spirits and alcohol, that is to say:-

(ii) Rectified spirit 1-4-1988 to 31-3-1992 1-4-1992 to 31-3-1994 1-4-1994 to 31-3-1996 1-4-1996 to 31-3-1997 From 1-4-1997 Thirteen per cent Fifteen per cent Twenty per cent Twelve per cent Twenty per cent

(iii) Ethyl alcohol 1-4-1988 to 31-3-1992 1-4-1992 to 31-3-1996 1-4-1996 to 31-3-1998 From 1-4-1998 Ten per cent Fifteen per cent Twelve per cent Ten per cent"

5. As can be noticed, the levy of tax has been gradually on the rise and the rate being 25% on the sale of "rectified spirit". Petitioner as a buyer of this product has paid sales tax and it is later that the petitioner has become wise about the same and feeling particularly aggrieved that under the very next sub-entry, "ethyl alcohol" which is also basically a form of industrial alcohol is subjected to tax though at varying rates but as of now at 10% and the difference in the rate of tax as between the "rectified spirit" and "ethyl alcohol" having to a great extent irked the petitioner who has obviously felt discriminated in subjecting the product purchased by it to be taxed at a much higher rate than "ethyl alcohol" which is taxed at a lower rate, has questioned the legality of the provisions subjecting to sales tax these two commodities, namely, "rectified spirit" and "ethyl alcohol" at varying rates though it is contended that basically the chemical composition of both these commodities is one and the same.

6. More importantly, the petitioner is not very happy with the very levy itself, i.e., subjecting the sale of "rectified spirit" which is one form of industrial alcohol or non-portable alcohol to sales tax by the State Legislature and with a view to avoid any such levy of sales tax in total has also questioned the competence of the State Legislature itself in levying the sales tax on the sale of "rectified spirit" under the provisions of the Act on the premise that the State Legislature lacks legislative competence to make any law, to subject the "rectified spirit" to tax as it is contended that the "rectified spirit" being a version of industrial alcohol, it is not within the competence of the State Legislature to levy any tax at all on this product, inasmuch as, the Central Government, nay, the Parliament by enacting

the provisions of the Industries (Development and Regulation) Act, 1951 for the enactment of which power of the Parliament is referable to Entry 52 of List I i.e., Union List of Seventh Schedule of the Constitution and having indicated that fermentation Industries i.e., industries engaged in manufacturing alcohol and other products of fermentation industries being one of the industries which the Union Government wishes to take under its control for the development and regulation of the particular industry in terms of Entry 26 in the First Schedule to this Act read with Sections 2 and 3(i) of this Act and the "rectified spirit" being a product manufactured by such an industry, the development and regulation of which is now controlled and regulated by this Act of Parliament, the State Legislature is denuded of its power to enact any law including a law to levy any tax imposed on a product of such an industry and therefore the levy of tax on the sale of "rectified spirit" under the provisions of the Act is an Act without legislative competence and accordingly the levy should be declared as void, without legislative competence, tax if any collected whether by way of sales tax or otherwise on the sale of "rectified spirit" is to be refunded and it is for such a declaration and relief, the present writ petitions are filed.

7. The relief sought for in Writ Petition No. 22098 of 2002 reads as under:

"(a) declaring that the respondent has no authority to collect tax more than 10% on the purchaser of Ethyl Alcohol of 95% v/v with chemical formula C_2H_5OH as Ethyl Alcohol and rectified spirit are one and the same;

(aa) declare that the entries made by the second respondent in Second Schedule of Part "S", Entry 12(ii) for rectified spirit and Entry 12(iii) for Ethyl Alcohol under the Karnataka Sales Tax Act, 1957 as unconstitutional, illegal and violative of Article 14 of the Constitution of India and strike down the same;

(ab) declaring that the Entry 12 of Part "S" of Second Schedule under Section 5(3)(a) of the Karnataka Sales Tax Act introduced by Act 15 of 1988 with effect from 1-4-1988 as unconstitutional and ultra vires the powers of the State Legislature and strike down the same so far as petitioner is concerned;

(b) directing the respondent to refund the excess tax of 10% collected on purchase of Ethyl Alcohol for industrial purpose made by the petitioner from various dealers as per the Statement under the originals of Annexures-A and G from the year 1997-98 up-to-date;

(c) issue a direction directing the respondent to pay interest on the said 10% dues from the respective dates of payment at the rate of 24% per annum;

(d) And pass such other orders as this Hon"ble Court might deem meet in the interests of justice".

8. The relief sought for in Writ Petition No. 54156 of 2003 reads as under:

"(a) declaring that the Entry 12 of Part "S" of Second Schedule under Section 5(3)(a) of the Karnataka Sales Tax Act introduced by Act 15 of 1988 with effect

from 1-4-1988 as unconstitutional and ultra vires the powers of the State Legislature and strike down the same so far as petitioner is concerned;

(b) Issue a writ of mandamus to the Government of Karnataka and its concerned Departments, the respondents herein, to refund all taxes collected by the respondents from the petitioner from the date of its manufacturing activity in the year 1997 as detailed in Annexure-B with interest at 24% per annum and pass such other orders as this Hon"ble Court might deem meet in the interests of justice".

9. This writ petition was admitted on 28-8-2002 and respondents have entered appearance through Sri Vedamurthy, learned Government Pleader.

10. Writ petition was amended and additional prayers in terms of additional prayers in terms of (aa) and (ab) have been sought for. Respondents have filed their statement of objections and after amendment have filed additional statement of objections.

11. While it is asserted in the Statement of Objections that the State Legislature has legislative competence to levy sales tax on "rectified spirit", it is also asserted that subjecting this transaction of sale of "rectified spirit" and "ethyl alcohol" at different rates is also justified; that the two products of alcohol i.e., the two presentations in which alcohol is sold in commercial parlance are identified and recognised as two different items; that it has been so classified for not merely identifying the product but also based on the end user of these products; that while the "rectified spirit" is exclusively utilised as raw material by persons engaged in the activity of manufacturing potable liquor, "ethyl alcohol" is one form of alcohol which is utilised for preparing industrial solvent in various non-potable industries and also used as a raw material in the manufacture of pharmaceutical products. In substance, the contention is that there is a clear distinction between these two products, namely, "rectified spirit" and "ethyl alcohol" and subjecting them to different rates of sales tax is an intended, permitted legislative exercise and therefore the petition has no substance or merit and is required to be dismissed.

12. The main contention in the writ petitions is that the levy of sales tax on "rectified spirit", a product of alcohol industry, an industry which is a notified industry for the purposes of Industries (Development and Regulation) Act, 1951, is an Act which while not within the competence of the State Legislature, is an intrusion or encroachment on the power of the Parliament to make laws with reference to Entry 52 of List I of the Union List of Seventh Schedule and therefore it is contended that the levy of sales tax on "rectified spirit" is bad.

13. The other contention is on the ground of discrimination that "rectified spirit" and "ethyl alcohol" though are two versions of alcohol are nevertheless subjected to varying rates of taxes.

14. The principal contentions urged on behalf of the petitioners by Sri

Vijayashankar, learned Senior Counsel are: That rectified spirit, which is sub-entry (ii) of Entry 12 in Part "S" of Second Schedule to the Act and Ethyl Alcohol, which is figuring as sub-entry (iii) in the same entry, are in substance and material, one and the same; that even the chemical composition of these two products is also one and the same; that there is absolutely no reason to classify them as two products and two different entries and furthermore subjecting them to tax at varying rates; that it amounts to an act of discrimination, particularly against the persons like the petitioner who have to buy rectified spirit as consumable product in the manufacture of another product namely acidic acid and allied products; that rectified spirit being taxed at 20 to 25% rate is higher than the rate fixed for ethyl alcohol, which is taxed at 10%, is a clear case of discrimination vis-a-vis the persons who buy these products in the market; that there is absolutely no reason for subjecting these products to different rates of taxation and therefore the provisions are violative of Article 14 of the Constitution of India and as such to be declared as bad.

15. To drive home this submission, reliance is also placed by Sri Vijaya Shankar, learned Senior Counsel on the notification dated 18-5-1991, a copy of which is produced at Annexure-B to W.P. No. 22098 of 2002, issued under clause (19-A) of Section 2 of the Karnataka Excise Act, 1965, wherein it is indicated that ethyl alcohol also known as rectified spirit, silent spirit, natural spirit and such other substance, having a chemical formula C_2H_5OH to be a material for the purpose of the said Act, and wherein the State Government itself understood that ethyl alcohol and rectified spirit are one and the same product, having same chemical formula C_2H_5OH . Reliance is also placed on the notification issued under the Ethyl Alcohol (Price Control) Order, 1971, particularly the table appended to Clause 2, which reads as under:

"1. Absolute alcohol conforming to ISI standard No. 321-1952, naked, for equivalent volume at 100 per cent v/v strength Rupees nine hundred sixty and paise seventy per kilo litre

2. Rectified spirit conforming to ISI standard No. 323-1959 naked, for equivalent volume at 100 per cent v/v strength Rupees eight hundred seventy-three and paise thirty-seven per kilo litre

3. Rectified spirit conforming to ISI standard No. 323-1959 naked, for equivalent volume at 94.68 per cent v/v strength Rupees eight hundred twenty-six and paise ninety per kilo litre"

and submits that the chemical contents of both rectified spirit and ethyl alcohol being one and the same, no distinction could have been made as between these two products for the purpose of subjecting them to different rates of tax under the Act.

16. One another facet of argument is that irrespective of the validity or otherwise that can be attributed to the entry as such, Entry 12(ii) i.e., rectified spirit. It is settled principle of taxation that whenever two different goods are subjected to

tax under a particular provision and if there are two ways of interpreting the provision, the interpretation which helps the citizen or the assessee and which is in fact to some extent can reduce the burden of tax, has to be preferred and in the light of such submission, learned Senior Counsel urges that as rectified spirit and ethyl alcohol are chemically the same substance, rate of tax which is applicable to ethyl alcohol should also be held to be applicable to rectified spirit also, in the sense, they should not be subjected to two different rates of taxation and at any rate the lower rate of tax should be adopted for both the products. Learned Senior Counsel appearing for the petitioners has also placed reliance on several authorities in support of this proposition and strong reliance is placed on the decision of the Supreme Court in the case of *Union of India v Onkar S. Kanwar*, AIR 2002 SC 3563.

17. It is also urged on behalf of the petitioners that if the levy is held to be bad, the amount of tax that has been paid by the petitioners and which is collected by the State through the dealers, should be refunded to them and in support of such contention, reliance is placed on the following decisions:

(a) *Bharat Textiles and Proofing Industries v State of Karnataka*, 1996(41) Kar. L.J. 615 (HC);

(b) *Hindusthan Photo Film Manufacturing Company Limited, Bangalore v State of Karnataka*, ILR 2003 Kar. 1815 (DB);

(c) *Bhadrachalam Paperboards Limited v Government of Andhra Pradesh*, (2004)5 SCST 5209;

(d) *M/s. United Trading Agency v Additional Commissioner of Commercial Taxes, Zone II, Bangalore*, 1996(41) Kar. L.J. 348 (HC) (DB).

18. The more important contention urged on behalf of the petitioners is with regard to the competence of the State Legislature to levy sales tax itself in respect of the item, as it is a product of an industry regulated and controlled by the Central Government under the Industries (Development and Regulation) Act, 1951. It is in support of this proposition, considerable reliance is placed by Sri Vijaya Shankar, learned Senior Counsel appearing for the petitioners on the decision of the Supreme Court in the case of *Synthetics and Chemicals Limited v State of Uttar Pradesh*, AIR 1990 SC 1927, a decision of a Bench of seven-Judges of the Supreme Court, which was considering the competence of the State Legislature for levying of excise duty on production of alcohol-potable or non-potable particularly that was in place of production of industrial alcohol and wherein the Supreme Court had occasion to hold that it was only the Central Government which was competent to levy any duty or tax on the industrial alcohol with reference to Entry 84 of List I of Seventh Schedule and it was held that the State Legislature was not competent to levy such tax on manufacturers producing industrial alcohol, referring to Entry 51 of List II of Seventh Schedule of the Constitution. Though the Supreme Court was examining the competence of the State Legislatures to enact the respective enactments for levying of tax or

vend fee and the answers were in the context of such questions, learned Senior Counsel appearing for the petitioners has placed considerable reliance on the observations of the Supreme Court made in this case and as discussed in paras 82, 83 and 84 and as summed up in para 85 of this judgment, which reads thus:

"85. The position with regard to the control of alcohol industry has undergone material and significant change after the amendment of 1956 to the IDR Act. After the amendment, the State is left with only the following powers to legislate in respect of alcohol:

(a) it may pass any legislation in the nature of prohibition of potable liquor referable to Entry 6 of List II and regulating powers;

(b) it may lay down regulations to ensure that non-potable alcohol is not diverted and misused as a substitute for potable alcohol;

(c) the State may charge excise duty on potable alcohol and sales tax cannot be charged on industrial alcohol in the present case, because under the Ethyl Alcohol (Price Control) Order, sales tax cannot be charged by the State on industrial alcohol;

(d) however, in case State is rendering any service, as distinct from its claim of so-called grant of privilege, it may charge fees based on quid pro quo. See in this connection, the observations of *India Mica and Micanite Industries Limited v State of Bihar*, AIR 1971 SC 1182: (1971)2 SCC 236".

It is placing reliance on the observations as at para 85(c), extracted above, the argument is advanced on behalf of the petitioners to contend that sales tax cannot be levied on industrial alcohol inasmuch as under Ethyl Alcohol (Price Control) Order, 1971, State tax cannot be charged on the industrial alcohol. Submission of the learned Senior Counsel is that the position is not different as of now and therefore there cannot be any levy of sales tax on ethyl alcohol even now and tax collected from the petitioners by the State through the medium of sale and dealers is one without competence in law and in violation of Article 265 of the Constitution of India and therefore such levy and collection should be declared as unconstitutional, not authorised in law and for issue of the consequential mandamus for directing the State to refund the tax collected.

19. It is also the submission of Sri Vijaya Shankar, learned Senior Counsel appearing for the petitioners, that the legal position as indicated in this decision particularly at para 85(d) is a law that has been declared by a Constitutional Bench of the Supreme Court and is a law that is binding on all Courts in terms of Article 141 of the Constitution and this ruling of the Supreme Court having been followed in a number of subsequent decisions of the Supreme Court, one such being in the case of *State of Uttar Pradesh v Modi Distillery*, (1995)5 SCC 753, as also in the case of *State of Uttar Pradesh v Vam Organic Chemicals Limited*, AIR 2003 SC 4650, and that the ratio of this case has to be applied for the decision in the present writ petitions and the writ petitions are to be allowed.

20. It is also urged on behalf of the petitioners that though there is another decision of the Supreme Court with a composition of two learned Judges in the case of *State of Uttar Pradesh v Synthetics and Chemicals Limited*, (2004)2 SCST 2011 (2005 Edition), wherein the Supreme Court had itself described that its earlier decision in the case of *Synthetics and Chemicals Limited*, on this aspect of the matter viz., competence of the State Legislature to levy sales tax on alcohol and alcoholic products, as per incuriam and had reversed the decision of the Allahabad High Court, which had in fact applied the law as declared by the Supreme Court in the case of *Synthetics and Chemicals Limited*, and had upheld the contention of the State, to set aside the judgment of the High Court by holding that the earlier decision was per incuriam; that it is not a decision which can be considered as law laid down within the meaning of Article 141 of the Constitution of India, particularly as it was not within the competence of the latter Bench with the composition of two learned Judges to have either described the earlier judgment rendered by a seven-Judges Bench of the Supreme Court, as per incuriam or in any way to have indicated that the law as enunciated therein was not good law and therefore submits that notwithstanding such a latter decision of the Supreme Court, the law as had been declared in the case of *Synthetics and Chemicals Limited*, should nevertheless be applied and consequential relief be granted in favour of the petitioners. In support of this submission, learned Senior Counsel has placed reliance on the decision of the Supreme Court in the case of *Central Board of Dawoodi Bohra Community v State of Maharashtra*, AIR 2005 SC 752, paras 12 to 14, and submits that in the ratio laid down in this case, it should be understood that the decision of a two-Judges Bench in the case of *Synthetics and Chemicals Limited*, has to be taken to be a judgment of no consequence in the light of the earlier decision of the Supreme Court with the composition of seven-Judges Bench in the case of *Synthetics and Chemicals Limited*, and in this view of the matter, it may not be helpful or in any way productive for the State to contend that in the light of the decision of a two-Judges Bench, the respondents can contend that the State has legislative competence to levy sales tax on ethyl alcohol.

21. One another contention urged on behalf of the petitioners by drawing the reference to Article 246 of the Constitution of India, is that the constitutional scheme is rather emphatic with regard to the Parliamentary supremacy in the matter of legislation; that the Parliament has exclusive power to enact laws in respect of any matters enunciated in List I; that the Entry 51 in List I is an entry which confers exclusive powers in favour of Union Parliament to legislate or to make laws governing such industries, control of which is to be regulated by the Union by law declared by Parliament be extended in public interest and such law having been made by the Parliament in the form of Industries (Development and Regulation) Act, 1951 and industries involved in the production of alcohol being an industry notified for such purpose, submitted that all activities relating to such industry is a subject-matter within the exclusive province of the Parliament and no aspect of this subject can be in any way legislated upon or made subject-

matter of any tax or to impose any levy of any State Legislature and in this view of the matter also, it is submitted that insofar as the levy of any tax either by way of sales tax or otherwise, on a product of this nature of which the regulation and control is taken over by the Union by way of Central Act, the State Legislature cannot levy any tax even by reference to any of the entries either in List III or List II. It is for this reason, it is submitted that any reference to Entry 4 in List II by the respondents as a source of power to levy sales tax on sale of ethyl alcohol cannot be sustained or as not tenable. In this context, the learned Senior Counsel has also drawn my attention to Entry 33 of List III of the Concurrent List or Entry 51 of List II.

22. Per contra, it is contended by Sri T.K. Vedamurthy, learned Government Pleader appearing for the respondents that the State Legislature has legislative competence to levy sales tax in respect of all goods other than newspaper, whether it is ethyl alcohol or rectified spirit, it is nevertheless goods within the meaning of this entry and it is within the exclusive competence of the State Legislature to levy sales tax in respect of the transaction in the nature of a sale of such goods also, except to the extent which is provided otherwise in terms of Entry 92-A of List I. Submission of Sri Vedamurthy is that the entries in Lists I and II are mutually exclusive of one another; that insofar as the topics and subjects enunciated in List II, even in terms of Article 246 of the Constitution, in respect of topics or items not covered by either topics or entries in List I or List III, exclusive competence of the State Legislature is on such aspects; that it is now well-settled that the entries which are topics of legislation are general in nature, there are entries conferred power to levy tax; that whenever there is a specific entry conferring power on the State Legislature to levy tax, such power should be attributed to that entry and not one which is governed by entry in respect of even the very subject which is general in nature in the sense that it is for that Legislature in general to levy tax; that such an understanding and interpretation of the entries in Seventh Schedule of the Constitution has now been well-settled and therefore it is urged that the State Legislature has the competence to levy tax on ethyl alcohol.

23. However, learned Government Pleader would directly place great reliance on the decision of the Supreme Court in the case of State of Uttar Pradesh, and would submit that in the light of the law laid down by the Supreme Court in this decision, it is not open to contend that the State Legislature has no competence to levy sales tax on a produce like alcohol, whether produced for potable purpose or non-potable purpose. It is submitted by the learned Government Pleader that the question directly arose in the case of State of Uttar Pradesh, and has been squarely and directly answered by the Supreme Court, inasmuch as having characterised its earlier decision in the case of Synthetics and Chemicals Limited, as a decision rendered per incuriam vis-a-vis the provisions of Entry 54 of List II of Seventh Schedule of the Constitution, and as the State is placing reliance only on Entry 54 of List II, the discussion and the ruling rendered by the Supreme Court in the context of competence of State Legislature to levy any tax or what

was known as vend fee, placing reliance or drawing sustenance by reference to Entry 51 of List II was of no consequence; that whereas in the earlier case the debate was in the context of scope of legislation by the reference for withdrawal. In the light of Entry 52 and Entry 84 of List I vis-a-vis the competence of the State Legislature to levy such a duty of reference to Entry 51 of List II, in the present case, there is no such competition as between the Legislatures of the Union and the State; that the provisions of the Act is a rope referable to Entry 54 of List II, the validity of this law having been upheld and having stood the test of time including a levy of sales tax on alcohol and alcoholic products under this enactment, it is not at all open to the petitioners to contend that the State Legislature lacks legislative competence to levy sales tax on the sale of ethyl alcohol. It is for such purpose great reliance is placed on the decision of the Supreme Court in the case of State of Uttar Pradesh.

24. With regard to other contentions urged on behalf of the petitioners that the provisions is bad being discriminatory, Sri Vedomurthy, learned Government Pleader, vehemently submits that the provisions is a valid provision; that the Legislature has clearly understood and identified rectified spirit and ethyl alcohol as two different marketable commodities; that they are identified as two different products even in commercial parlance; that while ethyl alcohol is used as solvent in other industries and as raw material in pharmaceutical industry and contents that alcohol to the extent of 99%, in the sense it is highly saturated with alcohol and is a product not fit for human consumption and that rectified spirit is exclusively used as a raw material in the production of alcoholic drinks; that the contents of alcohol in rectified spirit is not more than 40 to 45% and at any rate in the commercial parlance, if the two products have different applications and are identified as two different commercial products, the submission is that the Legislature has thought it fit to keep a distinction between ethyl alcohol and rectified spirit and has in its wisdom subjected these two products different rates of taxation and having regard to the end user had thought it fit to subject rectified spirit to a higher rate of taxation, which is well-within the domain of the Legislature and urges that mere fact that the chemical combination of two products is one and the same will not make much difference.

25. Learned Government Pleader submits that it matters very little as to the chemical combination of a product or as to how a product is understood in scientific terms, when it comes to the question of levying tax in the context of commercial activities like sale for the purpose of identifying the product for levy of sales tax by the State Government and the State Government wants to subject different products to different rates of tax, which is well-within the domain of the State Legislature and in such an exercise if the Legislature has laid stress on commercial nature of the product rather than chemical contents or scientific classification of the product, the petitioners could not have any grievance in the matter. In support of this submission, learned Government Pleader relies on the decision of the Supreme Court in the case of Ramavatar Budhaiprasad v Assistant Sales Tax Officer, Akola, (1961)12 STC 286 (SC).

26. Learned Government Pleader alternatively submits that in the matter of selection of goods for levying of tax, State enjoys a very wide leeway or frame and it is open to the State to subject to tax only such persons and commodities, as it chooses and also to levy tax at different rates and so long as the persons grouped for similar or identical terms form a class by themselves and are similarly situated or located. It is in this context, learned Government Pleader submits that ethyl alcohol and rectified spirit are not exactly similarly situated having regard to their user persons making use of them and as two products commercially known in the market parlance, if the State Legislature deems to fit to levy different rates of tax on these two different products, there is no question of comparing the rates for invoking the vice of discrimination. Learned Government Pleader submits that the classification is not only reasonable but a classification well-intended and within the competence of the State Legislature and as the definite purpose of subjecting to tax, a product which is mainly used in the manufacture of potable alcohol at higher rate and even in the scheme of the Act it is quite obvious that the State has been levying sales tax at higher rate on such products which are in any form used in the manufacture of alcoholic drinks, including the sale of very alcoholic drinks. Submission of Sri Vedamurthy is that such distinction in the rate of tax on these products fits into the scheme of subjecting to tax alcohol and alcoholic products meant for human consumption at higher rate of tax. In support of this submission, reliance is placed on the decision of the Supreme Court in the case of *Khadi and Village Soap Industries Association v State of Haryana*, (1994)95 STC 355 (SC).

27. It is also the submission of Sri Vedamurthy that reliance placed on the notification at Annexure-B to the writ petition, issued for the purpose of Karnataka Excise Act and in the context of clause (19-A) of Section 2 has no relevance on the scheme of levy of tax under the Act; that the two enactment are being legislated for different purposes and operate differently; that the notification issued for the purpose of Excise Act cannot be called in aid for understanding or interpreting a provision of the Karnataka Sales Tax Act and therefore the argument, placing reliance on this notification, has no avail.

28. Likewise, learned Government Pleader submits that reliance placed on the provisions of Ethyl Alcohol (Price Control) Order has also no consequence, inasmuch as the table appended to Clause 2 of this order is for the purpose of identifying the products which are subjected to tax even at varying rates is of no consequence or has any effect on the provisions of the Act, particularly, the rates of tax as indicated in the schedule in respect of different items.

29. The controversy that has arisen for consideration, in my view, lies in a narrow compass. In matters of taxation, liability for payment of tax arises in the context of statutory provisions and determination of such liability as under the statute governing levy, quantification (assessment) and collection of the tax. A dispute in such liability can be essentially raised by a person who has to remit the tax and sale tax being a tax collected through the medium of dealers who are

primarily liable/responsible to collect tax and remit it to the State. Though a dealer may ultimately pass on the burden of tax that he has to pay to the State to consumers and may also work the tax into his pricing scheme of the product, the Act at the best positively permits under certain circumstances as sales tax payable to the State. A dealer whether collects or otherwise such tax from a purchaser, is nevertheless liable to remit the tax. The State primarily looks up to a dealer for payment of such tax. Such liability can be questioned, correctness of it is challenged only in the manner provided under the statute itself i.e., by the hierarchy of appeals and revisions. In the context of sales tax liability, a purchaser like the petitioner seldom comes into picture nor has an occasion to question either the legality or correctness of such levies. However, in the instant case, it may so happen that the petitioners are large consumers of the product - rectified spirit -and might have been paying large quantity of sales tax through dealers. Though persons like petitioners cannot indirectly question the correctness of an assessment order passed on a dealer who perhaps might have collected the tax from persons like the petitioners who are purchasers, if the dealer himself had not so questioned the legality of such a levy or correctness of such levy. This question could have significance for altering or relieving of a liability of any person and with the extent of the dealer who has sold the product if has already paid the tax, the question would have been academic and could have even held that it is not open to the persons like the petitioners to question the legality or otherwise of such levy. Though this is the settled legal/constitutional principle, for the limited purpose of examining the constitutional validity of the levy of sales tax under Entry 12(ii) of Part "S" of Second Schedule to the Act, I proceed on the premise that the petitioners have sufficient locus to maintain the writ petitions for the purpose of only challenging the constitutional validity of this provision and examine the contention urged by the learned Counsel for the parties on either side.

30. An examination of this nature while if the petitioners succeed would result in such levies being not legally possible any further, it cannot be worked backwards as tax that has already been collected pursuant to the assessment orders passed under the Act on the dealers and when such orders have attained finality could not have been compelled to be parted with, by the State at this point of time, when such levies themselves had not been questioned by challenging the assessment orders quantifying the levy. Moreover, in the absence of any other material or record to indicate such assessment orders and the payment of tax, even otherwise such question would not have arisen. However, as I am of the view that notwithstanding such legal position, the petitioners being tax payers and having been subjected to levy of sales tax on a product which they purchase and in large quantities and therefore creates considerable tax liability which has to be paid, and a declaration invalidating the provisions of levy, such tax being beneficiary in the event of success of the petitioners, examination is taken up for such purpose.

31. With regard to the first and the main contention viz., want of legislative

competence, on perusal of the rival pleadings and the submissions urged at the Bar, I am of the considered view that in the light of the decision of the Supreme Court in the case of State of Uttar Pradesh, wherein the Supreme Court had occasion to examine its earlier decision in the case of Synthetics and Chemicals Limited, and while answering the direct question as to the competence of a State Legislature levying sales tax on alcohol, even on industrial alcohol, and having answered this question directly and squarely in favour of the State and by reversing the decision of a Division Bench of Allahabad High Court, which had only placed reliance on the earlier decision of the very Supreme Court in the case of State of Uttar Pradesh. And further more having accepted the contention of the learned Advocate General urged on behalf of the State of Uttar Pradesh in that case to the effect that the earlier decision should be considered as a decision rendered per incuriam for the examination of the question of competence of a State Legislature to levy sales tax on a product like alcohol manufactured by an industry which is regulated and controlled by the Central Government under the provisions of the Industries (Development and Regulation) Act, and having characterised the earlier decision as per incuriam, the provisions of Entry 54 in List II of Seventh Schedule to the Constitution, the argument addressed by the learned Senior Counsel on behalf of the petitioner to hold that the State Legislature lacks legislative competence to levy tax on this product cannot be accepted. I am of the view that this question is squarely and directly covered by the decision of the Supreme Court in the case of State of Uttar Pradesh. In the light of the emphatic and clear ruling given by the Supreme Court, which decision is also the law declared by the Supreme Court within the meaning of Article 141 of the Constitution of India, it is the bounden duty of this Court to apply the law as declared by the Supreme Court in this regard and to proceed on this premise. In this regard it is apposite to refer to the summing-up observation made by the Supreme Court, which reads as under:

"The High Court, in our view, was clearly in error in striking down the impugned provision which undoubtedly falls within the legislative competence of the State, being referable to Entry 54 of List II. We are firmly of the view that the decision of this Court in Synthetics case is not an authority for the proposition canvassed by the assessee in challenging the provision. This Court has not, and could not have, intended to say that the Price Control Order made by the Central Government under the IDR Act imposed a fetter on the legislative power of the State under Entry 54 of List II to levy taxes on the sale or purchase of goods. The reference to sales tax in paragraph 86 (at page 315 of STC) of that judgment was merely accidental and has, therefore, no effect on the impugned levy".

The discussion, proceeding to this summing-up, clearly indicates that the Supreme Court had occasion to examine the scope of levy of tax under the taxing Entries 51 and 54 of List II vis-a-vis the non-taxing Entry 52 in List I as also the general Entry 8 of List II. The Supreme Court had also occasion to examine the scope of the legislation even in the context of Entry 33 of List III of

the Concurrent List and it is after a thorough and detailed examination of the scope of such entries and topics of legislation, the Court opined that insofar as the legislation of levy of sales tax under the provisions of the Act, like the Karnataka Sales Tax Act, is concerned, the source of power is referable only to Entry 54 of List II, subject to the limitation contained in the very Entry itself and is within the exclusive province of the State Legislature. It is in this view of the matter, the Supreme Court characterised that the earlier observations of the very Court in the case of Synthetics and Chemicals Limited, to the effect that its finding/ruling as per incuriam.

32. Though it is vehemently contended by the learned Senior Counsel appearing for the petitioners that the latter decision of the two-Judges Bench of the Supreme Court in the case of State of Uttar Pradesh, cannot be construed to be a law declared by the Supreme Court within the meaning of Article 141 of the Constitution of India and in support of such proposition, reliance is sought to be placed on the decision of the Supreme Court in the case of Central Board of Dawoodi Bohra Community, and it is also urged that it was not open or competent to a subsequent two-Judges Bench to characterise or describe an earlier judgment of a Constitutional Bench or Bench comprising seven-Judges to be per incuriam etc. I am afraid it is not open for this Court to entertain such a submission or examine the same. When once the Supreme Court itself being aware of an earlier decision of the very Court, describes that the earlier decision of the Court, for a particular proposition, to be per incuriam a constitutional provision, it is imperative on the part of this Court and in consonance with the judicial decorum and propriety to apply such ruling by the Supreme Court which in fact is a law declared in terms of Article 141 of the Constitution of India and this Court cannot entertain an examination of the validity of the impugned law on the touchstone of want of legislative competence in the light of such ratio. It is for this reason, the contention that the State Legislature lacks legislative competence to levy sales tax on the sale of rectified spirit is hereby rejected and it is held that the State Legislature has the competence to levy such tax in the light of the law laid down by the Supreme Court in the case of State of Uttar Pradesh.

33. That takes me to the second question i.e., levy of tax at different rates on rectified spirit and ethyl alcohol is discriminatory and also to another facet of this argument that chemical combination of these two products being one and the same, even otherwise, it should be declared that the product should be taxed at the rate which is lower of the two rates as indicated in the schedule.

34. The argument of discrimination is a naive argument to be accepted as one bringing about a classification which makes or causes discrimination. I say this for more than one reason. In the first instance, the Legislature itself has made a distinction of the two items namely, rectified spirit and ethyl alcohol. It is beyond doubt or question that a classification can be adopted and the State can choose a product for levy of tax and it is also well-within the domain of the State to fix a

rate. While so doing, it can subject different persons to different rates of tax so also different items. In what manner a person or a product is subjected to levy of tax or impost under other enactments is also of no consequence for such levy under this enactment, as the very existence of different enactment for levying different types of taxes by itself indicates that it is possible and permitted for the State to do so and what result follows under one enactment need not necessarily follow in the other enactment. A person may be taxed at a lower rate in one enactment and may be subjected to tax at a higher rate in another enactment. It is for this reason that what has transpired under the provisions of the Karnataka Excise Act cannot have any bearing to levy a tax under the Karnataka Sales Tax Act.

35. Insofar as the argument of discrimination is concerned, the argument can arise only when the two similar or identical persons are treated in a dissimilar fashion. The basis of the argument of discrimination is that the chemical combination of rectified spirit and ethyl alcohol is one and the same, for which reliance is placed not only on the notification issued under the Excise Act, but also on the provisions of the Ethyl Alcohol (Price Control) Order. As noticed above, placing reliance on the provisions of one enactment and notification issued for the purpose of such Act does not have any bearing in the context or interpreting the provisions of this Act.

36. The fallacy of the argument that the chemical combination of the two products is one and the same can be well-demonstrated by a simple example. As indicated by the Supreme Court in the case of Ramavatar, that it is not the scientific name or chemical combination that matters much, when levy is in the context of sales tax enactment, where the transaction is commercial in nature. The example can be that of sale of two products namely diamond and charcoal. If the argument addressed on behalf of the petitioners is to be accepted, it amounts that diamond and charcoal are to be treated alike, as they have the same chemical combination - carbon - which is an argument too naive to be accepted by applying any legal principles either in taxation or constitutional principle for making good the argument that it is discriminatory to treat rectified spirit and ethyl alcohol differently, only because their chemical combination is one and the same.

37. In the matter of levy of tax under the sales tax enactment what matters more, is how the product is understood in the market or commercial parlance. Here again such interpretation can arise only when the same product is sought to be differently taxed but when the same element gets different name in the market and two different products are sold, though in reality the chemical combination may be the same, the comparison does not lead to an act of discrimination. The description given by the Legislature in the very enactment being different in respect of the two products, the argument of this nature does not and cannot be accepted for making good the ground of discrimination.

38. Insofar as the argument that the rate that is more beneficial to the assessee

should be adopted in a given situation of this nature is concerned, I am of the opinion that the question does not arise in the present case, inasmuch as the Legislature has not left this aspect for a matter of interpretation as the two products are differently identified and subjected to tax at the rate as indicated against the particular product. Further, the question of interpretation does not arise in a situation of this nature and it is therefore that while rectified spirit suffers tax at a higher rate, ethyl alcohol may suffer tax at a lower rate. Different products will have different rates of taxes, which does not amount to any discrimination and this principle of levying tax at different rates on different products in taxation matters is well-settled for being examined at any greater length. It is for this reason the second contention urged on behalf of the petitioners to declare that the levy of tax at two different rates is discriminatory and therefore one levy of tax at only one rate is permissible or that it should be so interpreted as to levy tax at the rate lower on both the products on the premise that the chemical combination is the same, is rejected.

39. As both the contentions urged on behalf of the petitioners fail, it is not necessary for this Court to consider the further arguments advanced on behalf of the petitioners.

40. In the result, these writ petitions are dismissed. Rule discharged.