
(2003) 09 RAJ CK 0012

In the Rajasthan High Court

Case No : IT Appeal No. 79 of 2002 & IT Appeal No. 8 of 2002

Commissioner of Income Tax

APPELLANT

Vs

Udaipur Distillery Co. Ltd.

RESPONDENT

Date of Decision : 03-09-2003

Acts Referred:

Income Tax Act, 1961 — Section 10(1), 35(1), 37(1), 43B, 43B(1)

Income Tax Rules, 1962 — Rule 7

Rajasthan Excise Rules, 1956 — Rule 69

Citation : (2004) 186 CTR 1 : (2004) 268 ITR 305

Hon'ble Judges : Sunil Kumar Garg, J; Rajesh Balia, J

Bench : Division Bench

Advocate : K.K. Bissa, for the Appellant; N.M. Ranka, Rajkumar, K.N. Joshi and Rajesh Joshi, for the Respondent

Final Decision : Partly Allowed

Judgement

1. We have heard the learned counsel for the parties.

2. In this appeal against the judgment of Tribunal, Jodhpur Bench Jodhpur dt. 27th June, 2001, following two questions were framed as substantial questions of law involved in the appeal vide order dt. 24th May, 2002 :

"(1) Whether, on the facts and in the circumstances of the case, the Tribunal was justified in deleting the addition of Rs. 5,61,462 by holding that unpaid amount of bottling fee has, on furnishing of bank guarantee, to be treated as actual payment and accordingly, the deduction in respect of the same cannot be denied u/s 43B of the IT Act, 1961 ?

(2) Whether, on the facts and in the circumstances of the case, the Tribunal was justified in deleting the addition of Rs. 61,412 made by the AO on account of disallowance of landscaping expenses not covered u/s 35(1)(iv) of the IT Act by wrongly relying on the decision in ITA No. 1546/Jp/95 dt. 30th March, 2001 ? "

By order dt. 26th Aug., 2003, while hearing of the appeal was going on, we have

framed following question No. 3 also as substantial question of law involved in the present appeal:

"(3) Whether, in the facts and circumstances of the case, bottling fees chargeable from the assessee under the Rules framed under the Rajasthan Excise Act, 1950 and interest chargeable on late payment of bottling fees, amounts to tax, duty, cess or fees within the meaning of Section 43B of IT Act, 1961, so as to attract the said provisions while considering allowability of deduction of such expenses."

3. The question No. 3 dwells on the claim of assessee-respondent for deduction of amount of bottling fee payable under the Rajasthan Excise Act, 1950 (hereinafter referred to as the Act of 1950) and relevant Rules framed thereunder. The question No. 2 is independent of questions No. 1 and 3. In the circumstances, we first take up question No. 2.

4. As the question suggests, it relates to disallowance of claim of assessee for deduction of landscaping expenses as R&D expenses allowable u/s 35 of the IT Act, 1961 (for short the Act). The amount of Rs. 61,412 claimed under the head of R&D expenses consists of two separate expenses. Rs. 53,862 relates to landscaping expenses and Rs. 7,550 to be the expenses incurred on transportation.

5. This appeal relates to the asst. yr. 1988-89. The AO placing reliance on his earlier order passed in the year 1987-88 has disallowed the expenses without discussing the reasons in assessment order for the year 1988-89. The assessee's appeal on this score also failed before the CIT(A) for the same reason.

6. The Tribunal considering the assessee's claim of allowance of aforesaid deduction after noting the contention of assessee passed the following order:

"Considering the rival contentions as also the facts and circumstances of the case we find the issue squarely covered by the decision of this Bench in ITA No. 1561/Jp/95 for asst. yr. 1992-93 (passed in common with ITA No. 1546/Jp/95 and 2072/Jp/92) given on 30th March, 2001, wherein vide para 10 on pp. 7 and 8 of that order, we have held the R & D asset to be constituting part of the "block of assets" and having neither been discarded away nor closed as yet, and accordingly, deleted the disallowance of depreciation thereon. We respectfully follow the aforesaid decision and accordingly delete this disallowance of expenses on R&D."

7. The Tribunal's order falls back upon its previous order relating to the asst. yr. 1992-93. In previous year relevant to asst. yr. 1992-93, it was found that fast food business of assessee has been closed in relation to which the expenses in question for the year 1992-93 has been claimed.

8. From the perusal of aforesaid order, it appears that the order for asst. yr. 1992-93, passed by the Tribunal related to the claim of the assessee for depreciation in respect of the assets of R & D employed in its fast food business which has since been closed. Moreover, we are neither concerned with the

expenses related to a closed business nor with the claim to depreciation. We are concerned here with asst. yr. 1988-89 and the claim for deductions of certain expenses incurred for landscaping and transportation of business of assessee. There is no dispute about the fact also that during asst. yr. 1988-89, fast food business of the assessee was continuing business. In fact relevant order would have been the order passed in case of asst. yr. 1987-88 immediately preceding the assessment year in question in which proceedings the assessing authority as well as CIT(A) have relied upon. In view thereof, we required the learned counsel for the respondents to place on record the order relating to the asst. yr. 1987-88 in respect of landscaping expenses which has been disallowed for earlier year by the Tribunal also.

9. Our attention was invited to the Judgment of the Tribunal in ITA No. 461/P/1990 decided on 10th Sept., 1998, as reported in *Udaipur Distillery Co. Ltd. v. Dy. CIT* 21 Tax World 85. As clearly stated in the aforesaid order for the year 1987-88, the Tribunal held that, "landscaping expenses incurred on uneven piece of land and making it fit for business use or cultivation of products to be used in fast food division. Levelling of land for making it usable for business purposes either for cultivation of vegetables or otherwise is definitely before putting the land for commercial use and was not allowable as revenue expenditure. The claim of the assessee regarding research and development expenses was negated by the Tribunal also by holding that the expenses so incurred by the appellant could not have been treated as having any bearing to the scientific research and development expenses."

10. Undoubtedly, the provisions of Section 35(1) of the IT Act could not have been attracted if the expenses did not relate to research and development. The requirement of Section 35 is that revenue expenses and capital expenses incurred in respect of the research carried out by the assessee are allowed as a deduction only where the research work relates to the business of assessee.

The finding of the Tribunal for earlier years has been specific that amount spent for development of land for making it fit for business was in the nature of capital expenses and was not allowable as revenue expenses.

11. However, learned counsel for the assessee urged that notwithstanding looking to amount involved the assessee has not pursued the matter thereafter, proceeding for each assessment year is an independent proceeding and principle of res judicata does not apply. He urged firstly that landscaping expenses in the present case are on findings recorded in earlier year also does not relate to construction of building for business of assessee but for making the land fit for cultivation of vegetables- Thus, expenses are directly related to the business activity of cultivation operations for growing vegetables and fruits, and not for creation of any asset of enduring nature. It cannot be termed as capital expenditure in any sense. Therefore, it ought to have been allowed as deduction u/s 37(1) as expenses wholly and exclusively incurred for carrying on business of the assessee. For the same reason the expenses also become deductible u/s

35(1)(i) as it is permissible to claim revenue expenditure too as R&D expenses u/s 35(1), He contended that the research and development activities related to cultivating and growing more and better quality of fruits and vegetables which are integrally related to business of assessee. About the nature of one of the assessee's business as fast food, there is no dispute, Alternatively, he contends that even if for any reason the landscaping expenses for levelling and making fit the land cultivable for growth of fruits and vegetables is held to be capital expenses, still it is allowable u/s 35(1)(iv) of the Act. An error has crept in considering the landscape expenses as relating to land development for construction. In the context of assessee's business expenses incurred in making land cultivable cannot be considered unrelated to business of assessee.

12. It was also contended that transportation expenses in noway can be considered as capital expenditure. It is a revenue expenses for the purpose of assessee's business. It is allowable both u/s 37(1) and 35(1) for the same reason as are urged in support of claim to deduction of landscaping business as revenue expenditure.

13. The position in regard to landscaping during the relevant year also remains the same. There is no alternation in that position.

14. Landscape in its ordinary sense means planning of parks or gardens to form an attractive scenic background often in association with the design of buildings, roads etc. So also "landscape gardening" means the art of laying out grounds so as to produce the effect of natural scenery. In fact the word "landscape has multiple meanings, one meaning refers to art of painting. A picture representing natural inland scenery as distinguished from a sea picture or a portrait, etc. is called as landscape painting. In contrast when it concerns in context of landscaping of a particular land or plant, it refers to laying out a ground so as to produce the effect of natural scenery. However, the term is not used for making the land. Therefore, the expenses described as landscaping expenses ordinarily refers to expenses incurred for laying grounds to give effect of natural scenery. It is ordinarily capital in nature resulting in improvement of the land value and also do not connect it any sense with research and development activity relating to business of the assessee.

15. The assessee's contention that landscaping expenses represent making the uneven land fit for cultivation of vegetables and fruits has been accepted by the assessing authority as well as the Tribunal in earlier years.

16. Accepting the finding of the Tribunal as it is, expenses were laid for making uneven land fit for cultivation. Thus, it was an expenses not in regular course of cultivation activity, but relates to making permanent improvement of uneven land to level it for future cultivation for assessee's purposes.

17. Even otherwise, treating it to be regular process of cultivation and not amounting to capital expenditure, expenses incurred on agriculture or cultivation activities are not allowable as such. As per the case of the petitioner, fruits and

vegetables cultivated by him on the land in question are used by itself for its business relating to fast food and preserved food and the vegetables and fruits are not sold in the market. Under such circumstances, the expenses relating to agriculture activities as such are not allowable as deduction from the income of the assessee, but the income being composite partly agriculture and partly from business, it has to be dealt with in terms of Rule 7 of the IT Rules, 1962 which prescribes computation of income which is partly from agriculture and partly from business. If on the other hand, fruits and vegetables grown on the land are sold in market, income being agriculture and exempted from tax u/s 10(1), no expenses relating thereto either revenue or capital become allowable as deduction from the income from the business. We have referred to these alternatives only because necessary facts about these are not on record.

18. Viewed from any angle, the amount spent on landscaping, in our opinion was rightly disallowed by the assessing authority and Tribunal has erred by allowing said expenses as deduction on wholly non-existing premises.

19. Second part of the expenses amounting to Rs. 7,550 refers to transportation expenses. Apparently, transportation expenses if they have been incurred in connection with business of the assessee amount to revenue expenditure unless it can be shown that the transportation charges were incurred for procuring an asset of enduring nature. There being no such material to show that transportation expenses amounting to Rs. 7,550, even if they are not related to research and development why the same may not be treated as revenue expenditure, when it is not the case of Revenue either that these expenses were not incurred for business purposes. Therefore, disallowance of Rs. 7,550 merely by saying that they do not relate to research and development of the assessee does not become disallowable. The claim of the assessee to claim deduction on account of transportation charges deserves to be allowed, as revenue expenses laid out wholly and exclusively for business.

20. So far as question No. 1 is concerned, it need not detain us much. The Tribunal has decided this question in favour of the assessee by holding that furnishing of bank guarantee in the facts and circumstances of the case is equal to actual payment and fulfils the condition required u/s 43B and has allowed the appeal of the assessee by directing that the expenses incurred by way of bottling fee may be allowed as deduction while computing the income for the assessment year in question as deemed to be actually paid during previous year. It has not gone into the question whether liability for payment of bottling fee which arises under the Rajasthan Excise Act and Rajasthan Excise Rules, 1952, framed thereunder, at all attracts the provisions of Section 43B of the IT Act, though it was specifically realised and urged before the Tribunal, in view of its finding on the aspect of actual payment, It is in the aforesaid circumstances that during the course of hearing third question was framed by us vide our order dt. 26th Aug., 2003, finding that this question was raised before the Tribunal and goes to the root of the matter. It also does not require any investigation into question of

facts.

21. Requirement of Section 43B of the Act is actual payment and not deemed payment as condition precedent for laying down the claim to the deduction in respect of any of the expenses incurred by the assessee during the relevant previous year specified in Section 43B, Furnishing bank guarantee cannot be equated with actual payment. Actual payment requires that money must flow from the assessee to the public exchequer as such as specified in Section 43B. In our opinion, there cannot be two opinion on the requirements of Section 43B.

22. The Division Bench of this Court in the case of Commissioner of Income Tax Vs. Rajasthan Patrika Ltd., has said that by no stretch of imagination can it be said that furnishing of bank guarantee is actual payment of tax or duty in cash ? A bank guarantee is only a guarantee for payment on some happening and that cannot be actual payment as required u/s 43B of the IT Act, 1961, for allowance as deduction in the computation of profits.

23. We are in agreement with the aforesaid ratio laid down in Rajasthan Patrika's case (supra). The statute does not confer power on authority or Tribunal constituted under the Act to legislate a legal fiction by denying something to exist while such thing really does not exist.

24. We may notice here that Rajasthan Patrika's case (supra) related to the deduction allowed in respect of customs duty paid by it, Question about it being not a tax or duty was not raised and perhaps there could not have been any such contention in respect of customs duty which undoubtedly falls within one of the specie of the broad purview of word "tax". This brings us to examine the Question No. 3.

25. The learned counsel for the assessee submitted that the expression used in Section 43B(a) after its amendment w.e.f. 1st April, 1989, refers to any sum payable by assessee by way of tax, duty, cess or fee by whatever name called, under any law for the time being in force. He contends that in order to attract provisions of Section 43B(a), the amount payable must be by way of tax, duty, cess or fee under any law for the time being in force. The expression cess or fees takes their colour from preceding expression tax and duty. Applying the principle of ejusdem generis, amount payable by way of fee must be an impost like a tax in order to attract Section 43B. Every payment due, even if called by name fee, does not become fee in technical sense as a kind of tax. Fees payable as consideration for services rendered, like an auditor's fee or an advocate's fee does not attract Section 43B notwithstanding they are called fee or even such charges are determined under any statutes. The learned counsel further contends that the State has exclusive right to deal in potable liquor and no citizen or person has any right much less fundamental right to do trade or business in intoxicants. The bottling fee for acquiring right of bottling Indian made foreign liquor, which is determined under Rajasthan Excise Act, 1950, and Rule 69 of the Rajasthan Excise Rules, 1962, is payable by the respondent-

assessee as consideration for acquiring this exclusive privilege. It is neither fee nor tax, but is the consideration for grant of privilege by the Government as term of contract in exercise of its right to enter contract in exercise of its exclusive right to deal and trade in potable liquor in all its manifestations.

26. In this connection, the learned counsel draws our attention to the decisions of Hon'ble Supreme Court in the case of Har Shankar and Others Vs. The Dy. Excise and Taxation Commr. and Others, Panna Lal v. State of Rajasthan : [1976]1SCR219 , State of Hayana v. Jage Ram AIR 1990 SC 2018 and State of U.P. v. Sheopat Rai AIR 1994 SC 813 . Our attention was also invited to a recent decision of Calcutta High Court in the case of Commissioner of Income Tax Vs. Varas International (P.) Ltd., The Calcutta High Court has held that bottling fee chargeable under the West Bengal Excise Act, 1909 r/w Rules 2 and 6 of the West Bengal (Manufacture of Country Spirit in Labelled and Capsuled Bottles) Rules, 1979 could not be construed as fee or duty or cess or tax and deduction can be claimed by an assessee without paying the licence fee to the State Government.

27. On the other hand it was contended by the learned counsel for the Revenue that in the context of Section 43B wherein any sum becomes payable as fee under any provision of statute, it is not for the AO as to what is the nature of such levy. He alleged that in the assessee's own case the Division Bench of this Court held that there exists quid pro quo to characterize bottling fee as fee which is leviable in exercise of legislative power to State under Entry 8 of Second List and Entry 33 of the Concurrent List. In view of decision in assessee's own case it cannot be alleged that bottling fee payable by it is not fee, but consideration for parting with exclusive privilege of State. In this connection, he had placed reliance on assessee's own case in Udaipur Distillery Co. Ltd v. State of Rajasthan 1996(2) WLC 413.

28. At this juncture it is apposite to notice the provision itself as it stood on 1st April, 1989 :

"Section 43B. Certain deductions to be only on actual payment--Notwithstanding anything contained in any other provision of this Act, a deduction otherwise allowable under this Act in respect of --

(a) any sum payable by the assessee by way of tax, duty, cess or fee, by whatever name called, under any law for the time being in force, or

(b) any sum payable by the assessee as an employer by way of contribution to any provident fund or superannuation fund or gratuity fund or any other fund for the welfare of employees, or

(c) any sum referred to in Clause (ii) of Sub-section (1) of Section 36; or

(d) any sum payable by the assessee as interest on any loan or borrowing from any public financial institution or a State Financial Corporation or a State Industrial Investment Corporation, in accordance with the terms and conditions

of the agreement governing such loan or borrowing, or

(e) any sum payable by the assessee as interest on any term loan from a scheduled bank in accordance with the terms and conditions of the agreement governing such loan or advances, or

(f) any sum payable by the assessee as an employer in lieu of any leave at the credit of his employee,

shall be allowed irrespective of the previous year in which the liability to pay such sum was incurred by the assessee according to the method of accounting regularly employed by him only in computing the income referred to in Section 28 of that previous year in which such sum is actually paid by him :

Provided that nothing contained in this section shall apply in relation to any sum referred to in Clause (a) or Clause (c) or Clause (d) or Clause (e) or Clause (f) which is actually paid by the assessee on or before the due date applicable in his case for furnishing the return of income under Sub-section (1) of Section 139 in respect of the previous year in which the liability to pay such sum was incurred as aforesaid and the evidence of such payment is furnished by the assessee along with such return."

29. It would be pertinent to note that the expression now used in Section 43B(a) is "tax, duty, cess or fee or by whatever name called". It denotes that items enumerated constitute species of the same genus and the expression "by whatever name called" which follows preceding words "tax", "duty", "cess" or "fee" has been used ejusdem generis to confine the application of the provisions not on the basis of mere nomenclatures, but notwithstanding name, they must fall within the genus "taxation" to which expression "tax", "duty", "cess" or "fee" as a group of its specie belong viz. compulsory exaction in the exercise of State's power of taxation where levy and collection is duly authorised by law as distinct from amount chargeable on principle as consideration payable under contract.

30. The principle of statutory interpretation is well known and well settled that when particular words pertaining to a class, category or genus are followed by general words, the general words are construed as limited to things of the same kind as those specified. This rule is known as the rule of ejusdem generis. It applies when

- (1) the statute contains an enumeration of specific words;
- (2) the subjects of enumeration constitute a class or category;
- (3) that class or category is not exhausted by the enumeration;
- (4) the general terms follow the enumeration; and
- (5) there is no indication of a different legislative intent.

Reference in this connection may be made to *Amar Chandra Chakraborty Vs. The*

Collector of Excise, Government of Tripura and Others, and Housing Board of Haryana Vs. Haryana Housing Board Employees Union and others,

31. The "tax", "duty", "cess" or "fee" constituting a class denotes to various kinds of imposts by State in its sovereign power of taxation to raise revenue for the State. Within the expression of each specie each expression denotes different kind of impost depending on the purpose for which they are levied. This power can be exercised in any of its manifestation only under any law authorising levy and collection of tax as envisaged under Article 265 which uses only expression that no "tax" shall be levied and collected except authorised by law.

32. It in its elementary meaning conveys that to support a tax legislative action is essential, it cannot be levied and collected in the absence of any legislative sanction by exercise of executive power of State under Article 73 by the Union or Article 162 by the State. Under Article 366(28) "taxation" has been defined to include the imposition of any tax or impost whether general or local or special and tax shall be construed accordingly. "Impost" means compulsory levy.

33. The well known and well settled characteristic of "tax" in its wider sense includes all imposts. Imposts in the context have following characteristics :

- (i) The power to tax is an incident of sovereignty.
- (ii) "Law" in the context of Article 265 means an Act of legislature and cannot comprise an executive order or rule without express statutory authority.
- (iii) The term "tax" under Article 265 r/w Article 366(28) includes imposts of every kind viz., tax, duty, cess or fees.
- (iv) As an incident of sovereignty and in the nature of compulsory exaction, a liability founded on principle of contract cannot be a "tax" in its technical sense as an impost, general, local or special.

34. At the outset, we must refer to the controversy with reference to which decision was rendered by this Court in the assessee's own case in *Udaipur Distillery Co. Ltd. v. State of Rajasthan* (supra). The assessee which was petitioner in the said decision is manufacturer and vendor of Indian made foreign liquor which is an excisable article within the meaning of Rajasthan Excise Act, 1950, and it has been issued licence to manufacture and vend Indian made foreign liquor. Indian made foreign liquor is potable liquor meant for human consumption. The assessee was also given a licence for bottling IMFL manufactured by it. The assessee has challenged the levy of bottling fee as violative of Constitution inter alia on the ground that the Industries (Development Regulation) Act, 1951 has been enacted by the Parliament and by the Amendment Act No. 71 of 1956, "fermentation industries" were included in item No. 26 in the Schedule appended to that Act and the control of which has been vested exclusively in the Union. On that premises, it was contended that the State legislature has no power to control such industry. Fermentation industry will necessarily include the entire industry in regard to potable alcohol

also including establishment of distilleries, manufacture of potable alcohol etc. Therefore, the State legislature does not have any power to make laws of levy of fees in respect of manufacture of potable alcohol or bottling thereof, after the said amendment of 1956. For this contention reliance was placed on entry 7 of the Union List and entry 24 of the State legislature, the industries which were governing entries 7 and 52 of List I. The petition was filed somewhere in the year 1984. It was also contended that such fee is also not sustainable as there is no quid pro quo to sustain bottling fee as fee for regulating business.

35. Against the aforesaid contention of the assessee, the primary contention of the State had been that keeping in view the provisions of the Rajasthan Excise Act, 1950 and Rule 69 of the Rajasthan Excise Rules levy of bottling fee is neither tax nor fee for rendering service, but it is consideration for parting with exclusive privilege of State to manufacture, transportation, distribution and sale of the liquor. Apart from relying upon entry No. 84 of List 1 of Schedule VII of the Constitution and entries No. 8, 51 and 66 of List II of Schedule VII of the Constitution, the levy was justified as fee to supervise and check at every stage the manufacturing and bottling process of liquor and, therefore, the levy of bottling fee was not violative of Article 19(1)(g) of the Constitution of India. It was also urged by the State that even if it is considered to be fee, there was quid pro quo.

36. However, the Division Bench of this Court did not go into the question of nature of levy viz., whether it is a fee or it is consideration for parting with the right of exclusive privilege to deal in liquor for human consumption which vests in the State. The Court examined the question of legislative competence of the State legislature and existence of quid pro quo to sustain it as a regulatory fee. Having come to the conclusion that under entry 8 of List-II of VIII Schedule and entry 33 of the Concurrent List, and State legislature has necessary legislative competence. The Court further reached the conclusion that there exists quid pro quo also to sustain the bottling fee as fees.

37. The Division Bench decision of this Court in the case of Udaipur Distillery Co. Ltd v. State of Rajasthan (supra) has not considered the question that has been raised before us as to the nature of liability which arises under the provisions of Excise Act and the Rules, whether it is an impost, in the nature of fees or consideration for parting with exclusive privilege as a part of contractual obligation arising out of trade activity of the State. It is apparent that no discussion finds place on the nature of bottling fee chargeable under the Rajasthan Excise Act and the Rules. The question whether the real nature of bottling fee is consideration for parting with exclusive privilege was left undecided having sustained the charge on one of the grounds raised by the parties. Merely because the levy of bottling fee can also be sustained as fee in its technical sense does not shut the enquiry into real nature of fee chargeable under State excise laws.

38. Right from the decision of Hon"ble Supreme Court in the case of the State of

Bombay v. F.N. Balsara AIR 1951 SC 318 a number of Constitution Benches of apex Court had occasion to consider this aspect of the matter as and when the question about the validity of levy of licence fee under different State Excise Acts has been raised. The consistent answer which the Hon"ble Supreme Court has given is that the expression "fee" is not used in the State excise laws or the Rules in the technical sense of the expression. By "licence fee" or "fixed fee" under the State excise laws relating to potable liquors/intoxicant is meant the price or consideration which the Government charges to the licensees for parting with its exclusive privileges and granting them to the licensees. It has also been held that there is no fundamental right to do trade or business in intoxicants, The State, under its regulatory powers has the right to prohibit absolutely every form of activity in relation to intoxicants; its manufacture, storage, export, import, sale and possession, in all their manifestations, these rights are vested in the State.

39. The Court approved the principle stated in "American Jurisprudence" Vol. 30, that while engaging in liquor traffic is not inherently unlawful, nevertheless it is a privilege and not a right, subject to governmental control. This power to control shall be right to self-protection and it rests upon the right of the State to care for the health, morals and welfare of the people. Liquor traffic is a source of pauperism and crime.

However, the Court did not accept the American doctrine that it is part of police power of the State to maintain law and order.

It was also found to commensurate with the directive principle of State policy. Article 47 states that the State shall endeavour to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health.

40. The aforesaid principle had been culled out by the Hon"ble Supreme Court in its various decisions. We shall refer to some of them which state the ratio relevant for the present purpose.

41. First case which we shall refer to is the decision of Hon"ble Supreme Court in the case of Har Shankar v. Dy. Excise and Taxation Commissioner (supra).

This case arose under the Punjab Excise Act, 1914. Number of issues were raised in respect of licence fee fixed under the Punjab Excise Act imposed by the excise and taxation commissioner and the authority to grant vending licence by public auction. For our purpose, two relevant contentions which were before the Court can be noticed.

First contention was that State Government alone was competent to impose a tax or an excise duty under the Act and that power could not be delegated to the Financial Commissioner or any other officer.

The argument on this question was that Section 34 of the Act which empowered the Financial Commissioner to levy fee was not a charging section, but if it is

construed as containing a delegation to him of the power of the State to levy taxes, no guidelines were laid down and thus, the delegation was excessive.

Secondly the fee which could be imposed by the Financial Commissioner u/s 34 of the Act could only be justified if it had a reasonable relation to the services rendered to the licensees. If it was imposed solely or mainly for the purpose of collecting revenue, it was outside the ambit of Item 66 of List II of the Seventh Schedule of the Constitution. The amounts realised in the auctions in the guise of licence fees were so exorbitant that they could not possibly be justified as free under Item 66.

42. It may be noticed that two questions were the same as has been raised by the challenger before this Court in *Udaipur Distillery Co. Ltd. v. State of Rajasthan* (supra) viz. that as a tax, levy of fee was beyond the legislative competence of the State legislature and as a fee, it lacked quid pro quo. The apex Court negatived both and held to be part of executive power of the State to trade.

The Court's conclusion were as under :

(i) The State under its regulatory powers, has the right to prohibit absolutely every form of activity in relation to intoxicants; its manufacture, storage, export, import, sale and possession. In all their manifestations, these rights are vested in the State.

(ii) Since rights in regard to intoxicants belong to the State, it is open to the Government to part with those rights for a consideration. By Article 298 of the Constitution, the executive power of the State extends to the carrying on of any trade or business and to the making of contracts for any purpose.

(iii) Citizens cannot have any fundamental right to trade or carry on business in the properties or rights belonging to the Government nor can thereby any infringement of Article 14, if the Government tries to get the best available price for its valuable rights.

(iv) The power of the State Government to charge a price for parting with its right and not the mode of fixing that price is what constitutes the essence of the matter.

(v) Nor indeed does the label affixed to the price determine either the true nature of the charge levied by the Government or its right to levy the same.

(vi) The amount charged to the licensees in the instant case are evidently neither in the nature, of a tax nor of excise duty. But then the licence fee which the State Government charged to the licensees through the medium of auctions or the "fixed fee" which it charged to the vendors of foreign liquor holding licences in Forms L-3, L-4 and LO-5 need bear no quid pro quo to the services rendered to the licensees. (vii) The word "fee" is not used in the Act or the Rules in the technical, sense of the expression. By "licence fee" or "fixed fee" is meant the

price, or consideration which the Government charges to the licensees for parting with its privilege and granting them to the licensees. As the State can carry on a trade or business, such a charge is the normal incident of a trading or business transaction.

(viii) Lastly no statute forbids the Government from trading in its own rights or privileges and the statute under consideration, far from doing so, expressly empowers it by Sections 27 and 34 to grant leases of its rights and to issue the requisite licences, permits or passes on payment of such fees as may be prescribed by the Financial Commissioner.

43. We may notice here that notwithstanding holding that trading in potable liquor is not fundamental right and it is the exclusive privilege which vests in the State, on the question of charges which are charged by the State Government for parting with its exclusive privilege, two different notes have been struck earlier thereto which have been considered in Har Shankar's case (supra). First different note was struck by Hon'ble apex Court in the case of Cooverjee B. Bharucha Vs. The Excise Commissioner and the Chief Commissioner, Ajmer and Others, in which Mahajan, C.J. speaking for the Court said that the fee imposed on the licensee was merely in the nature of tax than a licence fee.

44. Referring to this judgment, the Court in Har Shankar's case (supra) said that in Cooverjee's case (supra), the impugned power having been exercised in respect of a centrally administered area, the power was not fettered by the legislative lists loses its relevance in the view we are taking. It is true that in that case, it was permissible to the Court to find, as in fact it did, that the fee imposed on the licensee was merely in the nature of a tax than a licence fee. As the authority which levied the fee had the power to exact a tax, the levy could be upheld as a tax even if it could not be justified as a "fee", in the constitutional sense of that term. But the "licence fee" or fixed fee in the instant case does not have to conform to the requirement that it must bear a reasonable relationship with the services rendered to the licensees. The amount charged to the licensees is not a fee properly so-called nor indeed a tax but is in the nature of the price of a privilege, which the purchaser has to pay in any trading business transaction.

45. This also explains and supports the view which we had expressed above in respect of the decision of this Court in the case of Udaipur Distillery (supra) that merely because the bottling fee can also be sustained as fee because the authority imposing it has also power to impose fees in given case, it does not change the real nature of charge from being a consideration for parting with any part of exclusive privilege in any of its manifestations as normal incidence of carry on trade or business which belongs to State exclusively, to an impost, by whatever, name called.

46. The second different note was struck in W Krishna Kumar Narula etc. Vs. The State of Jammu and Kashmir and Others, wherein it has been held that dealing in liquor is business and a citizen has a right to do business in that commodity,

but the State can make a law imposing reasonable restrictions on the said right in public interest. Thus, in Krishna Kumar's case (supra) the Court has accepted dealing in liquor as part of fundamental right of freedom to trade subject to reasonable restriction that can be imposed by the State by making law for regulating such activity.

47. Referring to this judgment, the Court in Har Shankar's case (supra) said that it was unnecessary in Krishna Kumar's case (supra) to examine the question from this broader point of view as the only contention bearing on the constitutional validity of the provision impugned therein was not permitted to be raised as it was not argued in the High Court. The decision of the question whether a citizen has a fundamental right, to do trade or business in liquor proceeded in that case, avowedly, from a desire to clear that confusion arising from the "different views" expressed by the two Judges of the High Court. This may explain why the Court restricted its final conclusion by holding that dealing in liquor is business and the citizen has a right to do business in that commodity. The Court did not say, though such an implication may arise from its conclusion, that the citizen has a fundamental right to do trade or business in liquor.

48. The judgment in Krishna Kumar's case (supra) does not negate the right of the State to prohibit absolutely all forms of activities in relation to intoxicants. The wider right to prohibit absolutely would include the narrower right to permit dealings in intoxicants on such terms of general application as the State deems expedient.

49. From the aforesaid judgment it is clear that licence fee under State excise statutes are charged for parting with exclusive privilege of State to deal in liquor which includes manufacture, storage, export, import, sale and possession. In all their manifestations, these rights are vested in the State and are related to exercise of right to charge consideration as part of its exclusive right to deal with and trade in potable liquor. Merely because such charges made as part of contract can also be sustained as tax or fee, it cannot be termed as tax or fee in its technical sense.

50. The Synthetics and Chemicals Ltd. and Others Vs. State of U.P. and Others, case arose as a result of licence fee levied on industrial alcohol under different names under the U.P. Excise Act and the Court drew distinction between potable liquor and non-potable liquor. The conclusion of the Court in Synthetics and Chemicals Ltd. (supra) has been summarized as under:

"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 under entry 52 of List II. However, sales-tax cannot be charged on industrial alcohol in the present case, because under the Ethyl Alcohol (Price Control) Orders, 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."

51. The aforesaid summarisation also shows that while holding that State legislature has no general power to legislate in respect of industrial alcohol, as the field is exclusively occupied by Central legislature, the power of State legislature to levy regulatory fee on industrial alcohol or non-potable liquors was conceded on the basis of quid pro quo only, as distinct from grant of consideration for exclusive privilege, which exist only in respect of potable liquor.

52. Before parting with the discussions of Synthetics and Chemicals Ltd. case (supra), we may notice that the Court has referred to the decision in the case of State of Bombay v. F.N. Balsara AIR 1951 SC 318. In the said case, the Supreme Court had said that "intoxicating liquor" in entry .8 of State List includes all kinds of liquor including non-potable liquor and held it to be also part of exclusive privilege. To the extent the Supreme Court held that entry 8 in State List extends to include industrial or non-potable liquor also was not approved and that power was also held to refer to potable liquors only as held by Bombay High Court. However, no deviation, was made from the view expressed by Supreme Court that Entry 8 of Second List cannot support a tax, such power must exist independent of it.

53. After aforesaid two decisions another landmark judgment was delivered by the Hon"ble Supreme Court in the case of State of U.P. v. Sheopat Rai (supra). The case of Sheopat Rai arose as a result of dispute having arisen under the U.P. Excise Act, 1910. After referring to the various provisions of U.P. Excise Act, the Court said that the terms "licence fee" or the term "fixed fee" in the context of the U.P. Excise Act, the Ordinance with its preamble and the Excise (Amendment) Rules connotes the idea of payment of a sum by a person to the grantor of a licence as consideration for conferring upon such person by the grant of shop licence, the exclusive privilege or right to carry on certain activities in respect of country liquor or foreign liquor or intoxicating liquor within any local area of U.P. State, the carrying of which would have been otherwise the exclusive privilege or right of the grantor. The term "licence fee" or "fixed fee" used in the context of the U.P. Excise Act, the Ordinance read with the preamble and the Excise (Amendment) Rules is the amount of consideration receivable by the State Government for parting with its exclusive privilege or right in dealing with liquor or drugs including the exclusive privilege of vending foreign liquor in favour of a private party under a licence. The Court said :

"The term "licence fee" and the term "fixed fee", being the consideration which the Government receives from a private party to part in latter's favour its exclusive privilege or right to vend foreign liquor in specified shops of any locality in U.P. State under a contract by way of shop licence cannot be "fee" at all as held in Har Shankar's case. If that be so, the "licence fee" or "fixed fee" cannot partake the character of either "regulatory fee" or "compensatory fee" so as to regard it as fee. Thus, neither the "licence fee" nor the "fixed fee" realisable from a private party for granting the privilege or right to sell or vend foreign liquor to such party can fall within the ambit of the subject "fee" in the entry to List II of the Seventh Schedule to the Constitution. (Entry 66 relating to fees in List II). Then, the "licence fee" or the "fixed fee" cannot be regarded as tax since the characteristics of tax, namely, its levy being compulsive in nature, its burden being common, it being payable according to the varying abilities of the person to be charge are wholly absent, in both of the. As "duty" or "cess" stand on the same footing as "tax", the "licence fee" or "fixed fee" under consideration cannot be regarded either as "duty" or "cess".

The Court further found that the term "licence fee" or "fixed fee" used in the context of the U.P. Excise law falls outside the entries 51, 62, 66 in List II of the Seventh Schedule to our Constitution which enable the making of legislation for imposition of tax, duty or cess. However, the State is competent to levy such fee under entry 8 List II. Section 24A is, therefore, intra vires State's power to legislate. The power exercisable by the Excise Commissioner in the matter of the mode of levy and collection of the "licence fee" and "fixed fee" under the Excise (Amendment) Rules is also intra vires.

The Court specifically posed the question and answered in negative as under:

"The term "licence fee" or "fixed fee" used in the context of the U.P. Excise Act, the Ordinance read with the preamble and the. Excise (Amendment) Rules, if, as indicated by us, are the amount of consideration receivable by the State Government for parting with its exclusive privilege or right in dealing with liquor or drugs including the exclusive privilege of vending foreign liquor in favour of a private party under a licence (contract), the next question is whether such amount of consideration receivable by the Government could form the subject-"fee" or "tax" or "duty" or "cess" referred to as such, in one or the other entry of List II of the Seventh Schedule to the Constitution, on which a State gets competence to legislature. Our answer to this question, ought to be in the negative."

This judgment which is in line with the view expressed in this regard by the Hon'ble Supreme Court in Har Shankar's case (supra) which has taken into consideration a number of Constitution. Bench decisions of Hon'ble Supreme Court.

54. It was also clearly held by the Constitution Bench of Hon'ble Supreme Court in Har Shankar's case (supra) that right to deal in every form of activities in

relation to potable intoxicant its manufacture, storage, export, import, sale and possession are vested in the State and that power of the State Government to charge a price for parting with its right is essence of the matter and not the mode in which price for parting with its exclusive privilege is fixed, which determine its character and that the label affixed to the price does not determine either the true nature of the charge levied by the Government or its right to levy the same. This was reiterated by the apex Court in Sheopat Rai's case (supra).

The Hon^{ble} Supreme Court clearly said that the terms "licence fee" or the "fixed fee" used in the context of U.P. Excise law fall outside the entries 51, 62, 66 in List II of the Seventh Schedule to our Constitution which enables the making of legislation for imposition of tax, duty or cess.

55. Bottling of Indian made foreign liquor whether it be taken to be a part of manufacture to make it marketable or part of process of sale for making it more convenient for marketing, it remains part of one of manifestation of dealing with alcohol and intoxicants meant for human consumption and the amount which the State Government charges for parting with its exclusive right in respect of bottling fee must also partake the same character as price charged for parting with its privilege to manufacture, to distribute, to transport or to sell liquor.

56. One of the important indicia of a fee as an impost is that it must necessarily authorise by law made by primary legislation.

57 In Bimal Chandra Banerjee Vs. State of Madhya Pradesh etc., the Supreme Court said :

"It can now be taken to be well settled that no tax, fee, or any compulsory charge can be imposed by any bye-law, rule or regulation unless the Statute under which the subordinate legislation is made specifically authorises the imposition."

It was emphasized again by Supreme Court in Ahmedabad Urban Development Authority Vs. Sharadkumar Jayantikumar Pasawalla and others, that :

"In a fiscal measure it will not be proper to hold that even in the absence of express provision a delegated authority can impose tax or fee. In our view, such power of imposition of tax or fee by delegated authority must be very specific and there is no scope or implied authority for imposition of such tax or fee."

58. These decisions establish beyond any manner of doubt that the expression licence fee or fixed fee used in the context of the State Excise law relating to potable liquor is the amount of consideration receivable by the State Government for parting with its exclusive privilege or right in any of its manifestations in dealing with liquor or intoxicants meant for human consumption including the manufacture, storage, export, import or possession or sale as an essential part of its exclusive right to carry on trade or business in intoxicating liquors meant for human consumption. On this premises, irresistible conclusion is that bottling fee chargeable under Rajasthan Excise Act, 1950, r/w Rule 69 of Excise Rules, 1956,

cannot but be consideration for parting with States" right to exclusive privilege, whether bottling is considered as a part of manufacturing process or a process to facilitate sale of liquor, and cannot be considered as "fee" as one of the specie of tax or impost by the State.

Apparently if bottling fee could be charged by the State for permitting a person to use exclusive privilege of State to bottle the potable liquor, as part of its exclusive privilege to deal in such commodity it did not require specific legislation but could have been charged by State in exercise of its exclusive authority to enter into contracts. Merely because for regulating its own exclusive right to trade in potable liquor, the State has legislated on the subject it cannot alter the character of bottling fee from consideration for use of privilege to exaction for services performed by the State.

59. Before the Division Bench of Calcutta High Court in the case of CIT v. Varas International (P) Ltd. (supra), this question directly arose whether bottling fee payable by the assessee under the West Bengal Excise (Manufacture of Country Spirit in Labelled and Capsuled Bottles) Rules, 1979 is a tax, duty, cess or fee within the meaning of Section 43B of the IT Act, 1961, so as to attract this provision.

The Division Bench of Calcutta High Court speaking through Hon"ble Shri V.N. Khare, Chief Justice, as His Lordships then was, opined that a reading of Section 43B shows that if the charge/price which the assessee has to pay to the State Government for obtaining the licence/contract for manufacture of country liquor is not tax, duty or cess or fee, deduction can be claimed by him without paying the licence fee to the State Government.

60. Referring to the decision in the case of Government of Andhra Pradesh Vs. Anabeshahi Wine and Distilleries Pvt. Ltd., and Sheopat Rai's case (supra) in which all the aforesaid cases have been considered, the Bench concluded :

"All the aforesaid judgments were considered by the Supreme Court in State of Uttar Pradesh v. Sheopat Rai AIR 1994 SC 813, where it was held that the periodical licence for retail vend of foreign liquor granted on the basis of a "fixed fee" or "licence fee" connote and mean consideration received by the Government for parting with its exclusive privilege to deal in intoxicants and such fee is neither a tax, nor a fee, nor an excise duty nor cess and the same can only be levied under entry 8 of List 2 of Schedule VII to the Constitution.

In that view of the matter, it now stands concluded that, the fee or charges received by the Government for parting with its exclusive right to manufacture or vend intoxicants is neither a tax nor a duty nor a fee nor a cess.

Section 43B of the IT Act says that unless tax or duty or fee or cess in whatever name and same may be called, is paid in fact during the concerned year the assessee shall not be entitled to the deduction in the matter of computation of his income. If the amount payable is neither tax nor duty nor fee nor cess, the

question of applying the provisions of the said section does not and cannot arise."

It was further observed that the legislature in Section 43B of the IT Act has used the expression "by way of". Therefore, it is the obligation of the AO to ascertain whether the deduction sought to be tested on the touchstone of Section 43B(a) is the amount payable is by way of tax or duty or fee or cess.

61. We are in respectful agreement and are fortified in the conclusion to which we have reached that label of charge as tax or fee is not conclusive of its character. It is only if any amount becomes payable by way of tax, duty, cess, or fee, it falls within the purview of Section 43B.

62. In the aforesaid context, if the provisions of Rajasthan Excise Act are seen it is to be noticed that Sub-section IV of Section 3 defines "excisable article" which includes amongst others spirit, fermented liquor or any alcoholic liquor for human consumption or denatured spirit or denatured spirituous preparation. The Indian made foreign liquor the commodity for which license was issued in favour of the assessee permitting him bottling thereof, is an alcoholic liquor for human consumption is not a matter of contention.

63. Section 16 of the Rajasthan Excise Act prohibits manufacture of any excisable article and also prohibits bottling of liquor for sale except under the authority and subject to the terms and conditions of a licence granted in that behalf by the Excise Commissioner or by the Excise Officer duly empowered in that behalf. Sub-section (2) of Section 16 prescribes that no distillery, brewery, or pot-still shall be constructed or worked except under the authority and subject to the terms and conditions of a licence granted in that behalf by the Excise Commissioner.

Section 20 of the Rajasthan Excise Act states that no excisable article shall be sold without a licence from the Excise Commissioner or any excise officer duly empowered in that behalf.

Section 21 specifically prohibits bottling of liquor for sale and sale of any excisable article otherwise than in accordance with the terms and conditions of a licence granted in this behalf.

Section 24 says that subject to the provisions of Section 31, the Excise Commissioner may order the grant to any person of a licence for the exclusive privilege of manufacturing or of supplying by wholesale, or of both, or of selling by wholesale or by retail or of manufacturing or of supplying by wholesale or of both and of selling by retail.

These provisions clearly indicate that bottling of liquor for human consumption either as end stage of manufacture or for sale is a part of exclusive privilege of State which can be parted with in favour of someone only by issuing licence in favour of him exclusively or with one or more manifestations depending upon granting authority under the Act.

64. Significantly Chapter V deals with duty and fees,

Section 28 deals with excise duty or a countervailing duty, as the case may be, at such rate or rates as the State Government shall direct, may be imposed either generally or for any specified local area, on any excisable article imported or exported or transported or manufactured, cultivated or collected under any licence granted under this Act or manufactured in any distillery, pot-still or brewery established or licensed under this Act,

Section 29 provides for mode of levying duty chargeable u/s 28 of the Act.

Section 30 of the Rajasthan Excise Act, 1950 provides that instead of or in addition to any duty leviable under the Chapter, the Excise Commissioner may accept payment of a sum in consideration of the grant of the licence for exclusive privilege u/s 24.

Section 34 of the Rajasthan Excise Act states that the State Government reserves its right to cancel and suspend licenses.

65. It was held long back while considering the provisions of Rajasthan Excise Act and Rules framed thereunder in *Pannalal v. State of Rajasthan* (supra) that the licence fee stipulated to be paid by the licensee was the price or consideration or rental which the State Government, charged them for parting with its privilege and that it was a normal incident of trading or business transaction.

66. These provisions further indicate that while taxation power of the State in respect of potable liquor as indicated in Chapter V has included only excise duty or countervailing duty as part, of impost in exercise of its sovereign authority but license fee has not been manifested as impost to form part of taxation, but is left to be determined by delegate as consideration for parting with exclusive privilege of the State to deal in potable liquors which also include to prescribe bottling fee as consideration for parting with its exclusive privilege, to bottle the liquor for sale.

67. We have noticed above Section 30 of the Act which empowers the Excise Commissioner to accept payment of a sum in consideration of grant of the licence for exclusive privilege u/s 34.

68. In this connection attention may be invited to the case of *State of Haryana v. Jage Ram* (supra). In the said case, the Court was concerned with the provisions of Haryana Excise law and rules framed thereunder which envisaged that licence could have been made to depend on payment of lump sum.

The Court in the circumstances opined that if in the event payment of lump sum in lieu of licence is charged any part of it cannot be termed as excise duty merely because it is payable in a different mode will not alter its character from charge of price for parting with exclusive privilege to charge of excise duty or tax.

69. In fact the fee in its technical sense means compulsory exaction by the State

in respect of services performed by the State for the benefit of fee payers. The expression "fee" under Rajasthan Excise Act and Rules has been used as price for consideration for use of privilege by the licensee which is in exclusive control of the State. The former falls within the domain of compulsory exaction by the State in exercise of its taxation power. The latter falls in the realm of term of contract.

70. From the aforesaid discussion, conclusion is irresistible that bottling fee was charged from the respondent-assessee by the State Government by way of consideration for parting with its exclusive privilege to bottle liquor, whether as part of manufacturing process or for facilitating its sale, it does not alter its character from price charged by the State for parting with its "exclusive privilege of bottling potable liquor as one of the manifestations to deal in potable liquor to a charge by way of "fee" as an impost as a facet of taxation as defined in Article 366(28). Consequently, if the assessee maintains his books of account as per mercantile system, he is entitled to claim deduction of such expenses incurred by him by way of bottling fee for the accounting period when it becomes payable to the State Government as consideration. Such liability is allowable deduction as an expenditure in the year in which it is incurred even if actual payment is deferred. Section 43B is not attracted in such case.

71. Lastly, it was contended that so far as asst. yr. 1988-89, in this case, is concerned, provisions of Section 43B were extended only to the tax and duty. Cess and fees had not been included in the inhibition against allowance of liability incurred on account of cess and fee as a deduction unless it is actually paid. It is contended that for the assessment year in question even if bottling fee is considered to be "fee" in its technical sense of the term, the same cannot be disallowed by invoking Section 43B of the IT Act.

72. Prior to Clause (a) of Section 43B was substituted by Finance Act, 1988 with effect from 1st April, 1989, it read "any sum payable by assessee by way of tax or duty under any law for the time being in force."

For the asst. yr. 1988-89, with which this appeal is concerned, the unamended provisions govern the computation of taxable income.

The provision has expressly included only two species of taxation, namely "tax" or "duty" and has also not used wider expression "by whatever name called" so as to make applicable the provisions of Section 43B(a) to the tax in generic sense to include within expression all forms of imposts as defined under Article 366(28) of the Constitution of India.

73. It may be seen that under the substituted provisions, the legislature has extended the operation of Section 43B by using the expression "tax", duty, cess or fee by whatever name called" opening way to construe the provisions by applying the principle of ejusdem generis which was absent in its first incarnation. In such circumstances, it is not possible to extend meaning of expression "tax" or "duty" as it existed during the relevant period in question, to

include all other specie of taxation like cess or fee also within its ambit. It gives altogether restricted operation to it. In their nature tax, duty, cess and fees differ on the basis of purpose for which such levies are imposed. The difference between tax, duty, cess or fees is well known. Broadly speaking in its jural connotation, "tax" is an imposition made for public purpose without reference to any services rendered by the State or any specific benefit to be conferred upon taxpayer. The object of levy is to raise the general revenue.

The fees, as an impost or compulsory exaction, is charge/levied by the State in respect of services performed by it for the benefit of the individual or the class to which individual belonged. It is founded on principle of quid pro quo for services rendered by State and benefit of it enjoyed or enjoyable by the individual from whom the fee is to be exacted. Quid pro quo need not be in exact proportion to benefit extended nor it necessarily means that any particular individual actually enjoys such benefit.

74. Apparently, it is not the case before us by the Revenue that bottling fee can be described as tax or duty or cess properly so-called. The contention is that the bottling fee is a fee chargeable by the State for regulating the liquor trade and which is founded on quid pro quo. Therefore, in our opinion when inhibition contained in Section 43B was not extended to all the species of taxation but only to two of its species viz. tax and duty, the distinct nature of different form of levies become relevant for the purpose of applicability of Section 43B. Since "fee" as distinct from tax or duty has not been subjected to provisions of Section 43B prior to 1st April, 1989, the liability incurred on account of bottling fee during the accounting period relevant to the assessment year in question would not be subjected to Section 43B of the Act even if it be assumed to be "fee" in its technical sense as specie of taxation. In this conclusion we are fortified by Division Bench decision of Andhra Pradesh High Court in the case of Srikakollu Subba Rao and Co. and Others Vs. Union of India and Others,

75. Before the Andhra Pradesh High Court the question arose about the applicability of Section 43B to claim deduction of the liability incurred to tax under the Sales-tax Rules as well as liability incurred on account of market cess under the Agricultural Produce Marketing Act. The petitioner had also challenged the constitutional, validity of Section 43B.

While considering and upholding the constitutional validity of Section 43B, the Andhra Pradesh High Court drew distinction between tax or duty on the one hand and fee on the other hand and held that sales-tax payable for the month of March, 1984 would not be disallowed u/s 43B as the same related to period before Section 43B came into operation. The sales-tax payable after March, 1984 was held to be not allowable unless actually paid when payable. Importantly, for market cess, it was held that market cess is not in the nature of either tax or duty, therefore, the provisions of Section 43B are not applicable to market cess. The Court held, following its earlier decision in Om Parkash Agarwal and Others Vs. Giri Raj Kishori and Others, that market cess is not a tax and said :

"We, therefore, hold that deduction on account of "market cess", liability for the payment of which was incurred in the accounting year relevant to the assessment year under consideration, cannot be disallowed on the ground that it was not paid before the close of the accounting year. The provisions of Section 43B have no application to "market cess"."

76. In like manner in CIT v. Mohan Singh & Sons (1995) 216 ITR 432 , Madhya Pradesh High Court took the view that Mandi tax is a fee and not the tax. In that view of the matter, Mandi fee cannot attract the provisions of Section 43B(a) for assessment year prior to year 1989-90, Same view was reiterated in Commissioner of Income Tax Vs. Dinesh Kumar Gordhanlal, by M.P. High Court.

77. In Commissioner of Income Tax Vs. Mansukhlal Prahjibhai and Co., which relates to the asst. yr. 1986-87, the Court considered the case of amount that became due during relevant accounting period relevant to asst. yr. 1986-87 as Mandi tax. The AO held that the Mandi tax unless actually paid when payable cannot be allowed as deduction in view of Section 43B. The M.P. High Court said :

"Section 43B as it stood during the period relevant to the assessment year in question provided that notwithstanding anything contained in any other provision of the Act, a deduction otherwise allowable under the Act in respect of any sum payable by the assessee by way of tax or duty under any law for the time being in force shall be allowed only in computing the income of the previous year in which such sum is actually paid by the assessee. By an amendment by the Finance Act, 1988, sums payable towards cess and fee were also included which clearly indicates that the provisions as they stood at the relevant time did not include or encompass cess or fee. The short question that falls for our consideration, therefore, is whether the Mandi tax or market fee is a tax or a fee as in case it is a fee, the provisions of Section 43B, as it then stood, would not apply. The levy of tax is for the purpose of general revenue and there is no element of quid pro quo between a taxpayer and the public authority whereas a fee is generally levied for special services rendered. The Supreme Court in Kewal Krishan Puri and Others Vs. State of Punjab and Another, has held that such amounts charged are "fees" having the requisite element of quid pro quo.

From the above decision, it is clear that notwithstanding the nomenclature applied, the amount for which the provision was made was "fee" and not tax and, therefore, the provisions of Section 43B in the year in question, were not attracted."

78. In view thereof for the additional reason also for asst. yr. 1988-89, liability incurred by assessee towards payment of bottling "fee" under the Rajasthan Excise Act, 1950, r/w Rule 69 of the Rajasthan Excise Rules does not attract provisions of Section 43B and, therefore, liability was allowable as deduction for assessment year in question accounts being maintained on mercantile basis.

79. As a result of aforesaid discussions, the order of the Tribunal relating to ITA No. 462/Jp/90 for the asst. yr. 1988-89 relating to allowance of deduction of Rs.

53,862 on account of landscaping expenses is set aside as the same are held to be capital in nature and not allowable as deduction in computing taxable income. Allowance of transportation charges amounting to Rs. 7,550 as deduction is upheld though for different reason than what has prevailed with the Tribunal. So also the claim of assessee for "deduction" on account of liability incurred to pay bottling fee under the Rajasthan Excise Act, 1950 r/w Rule 69 of the Rajasthan Excise Rules is not a fee in its technical sense as an impost and is allowable as revenue expenditure as price paid to the State for parting with its exclusive privilege as an incident of trading activities by the State for assessment year in question as rightly held by the Tribunal. The appeal is accordingly partly allowed. No order as to costs.