

(1997) 01 P&H CK 0046
In the Punjab And Haryana At Chandigarh
Case No : Civil Writ Petition No. 5358 of 1996

Devans Modern Breweries Limited

APPELLANT

Vs

The State of Punjab and Another

RESPONDENT

Date of Decision : 17-01-1997

Acts Referred:

Constitution of India, 1950 — Article 304
Punjab Excise Act, 1914 — Section 31, 32, 34, 58

Citation : (1997) 2 ILR (P&H) 406 : (1997) 115 PLR 634 : (1997) 2 RCR(Civil) 491

Hon'ble Judges : V.K. Bali, J;N.K. Agrawal, J

Bench : Division Bench

Advocate : Mohan Jain and Rakesh Aggarwal, for the Appellant; Harbhagwan Singh, A.G. and A.S. Masih, AAG, for the Respondent

Judgement

N.K. Agrawal, J.—This is a petition under Article 226 and 227 of the Constitution; challenging the imposition of import fee on beer under the Punjab Excise Fiscal Orders, 1932.

2. The petitioner is a public limited company with its registered office at Jammu. The petitioner-company is engaged in the business of liquor and manufactured beer at its breweries at Jammu. The petitioner was doing business of liquor in the State of Punjab also since 1966 after obtaining L-1 Licence issued by the State of Punjab for doing wholesale business in the "India Made Foreign liquor and beer. The petitioner had a wholesale depot at Ludhiana. The Punjab Excise Act, 1914 (for short, "the Act") governed the business of import, export, transport, manufacture, sale and possession of intoxicating liquor and intoxicating drugs in the State of Punjab. The Government had issued the Punjab Excise Fiscal Orders, 1932, for the purposes of levying taxes, duties and fees under the Act. The Governor of Punjab, in exercise of the powers conferred by sections 31, 32 and 58 of the Act, amended the Punjab Excise Fiscal Orders, 1932 from time to time for varying the rates of taxes, duties and fees on excisable articles. Rules were also framed u/s 58 of the Act for the purposes of carrying put the provisions of

the Act and for the collection of the excise revenue. An import fee was imposed with effect from 1-4-1992 at the rate of 60 paise per bottle of 650 ml. by notification dated 31-3-1992 issued by the Department of Excise and Taxation of the Government of Punjab in exercise of the powers conferred by sections 31, 32 and 58 of the Act. By the said notification, the Punjab Excise Fiscal Orders, 1932, were amended and import fees at the aforesaid rate was levied on all imports of beer. The rate of import fee at 60 paise per bottle remained in force for the years 1992-93 and 1993-94. The rate of import fee was increased to Rs. 1/- per bottle with effect from 1-4-1994 and was subsequently reduced to 50 paise per bottle from 1-4-1995. The fee was, however, drastically increased with effect from 1-4-1996 at Rs. 3/- per bottle approximately. This increase was effected, vide notification dated 27-3-1996 whereby, in exercise of the powers conferred by sections 31, 32 and 58 of the Act, the Governor of Punjab was pleased to further amend the Punjab Excise Fiscal Orders, 1932, and thereby import fee was raised to Rs. 35.88 per box of 12 bottles or, in other words, at the rate Of Rs. 4.60 per bulk litre.

3. The petitioner has challenged the levy of import fee primarily on the ground that such a fee has been imposed without any authority of law. The second ground of challenge is that it is violative of Articles 301 and 304 of the Constitution.

4. The petitioner's first ground of challenge arises from the contention that sections 31, 32 and 58 of the Act do not empower the State Government of Punjab to levy import fee. It is stated that the petitioner has been regularly paying licence fee as required to be paid every year. The petitioner has also no grievance against the payment of excise duty or countervailing duty which has been levied by the State of Punjab u/s 31 of the Act.

5. Clause (6-B) of section 3 of the Act defines "excise duty" and "countervailing duty" as under:-

" "excise duty" and "countervailing duty" mean any such excise duty or countervailing duty, as the case may be, as is mentioned in Entry 51 of List II in the Seventh Schedule to the Constitution."

From the above definition, it is clear that "excise duty" and "countervailing duty" derived their meanings from Entry 51 of List II in the Seventh Schedule to the Constitution.

Import fee has, however, not been defined in the Act. Section 16 of the Act prohibits the import, export and transport of any intoxicant except after payment of any duty to which such intoxicant may be liable under the Act. Section 16 of the Act reads as under:-

" 16. Import, export and transport of intoxicants :- No such intoxicant shall be imported, exported or transported except:-

(a) after payment of any duty to which it may be liable under this Act or

execution of a bond for such payment, and

(b) in compliance with such conditions as the State Government may impose."

6. It is apparent from a reading of section 16, as reproduced above, that any intoxicant imported in the State may be subjected to the levy of any duty which is required to be paid under the Act subject to such conditions as the State Government may impose. Section 31 of the Act provides for the levy, of duty on the excisable articles. There is, however, no mention of any import fee which could be levied under the said section. Section 31 Of the Act reads as under:-

"31. Duty on exciseable articles:- An 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

(a) imported, exported or transported in accordance with the provisions of Section 16; or

(b) manufactured or cultivated under any licence granted u/s 23; or

(c) manufactured in any distillery established or any distillery or brewery licensed u/s 21.

Provided as follows:-

(i) duty shall not to be so imposed on any article which has been imported into India and was liable on importation to duty under the Indian Tariff Act, 1894, or the Sea Customs Act, 1878.

Explanation: - Duty may be imposed under this Section at different rates according to the places to which any excisable article is to be removed for consumption, or according to the varying strength and quality of such article."

7. Excise duty is levied on the excisable articles manufactured or cultivated under a licence and countervailing duty is leviable on the goods imported, exported or transported in accordance with the provisions of Section 16 of the Act. From a conjoint reading of sections 16, and 31, it appears that an excisable article, imported into the State, may be subjected to any duty which has been termed as countervailing duty. There is no reference to any fee which could be levied either u/s 16 or section 31 of the Act. Section 32 provides for the manner in which duty may be levied. Section 58 empowers the State Government to make Rules for the purposes of carrying out the provisions of the Act or any other law for the time being in force relating to excise revenue. Clause (d) of Section 58(2) empowers the State Government to regulate the import, export, transport or possession of any intoxicant or excisable article. Clause (d) of sub-section (2) of Section 58 of the Act reads as under :-

"(2) In particular and without prejudice to the generality of the foregoing provisions, the state Government may make rules: -

(a) x x x x x

(b) x x x x x

(c) x x x x x

(d) regulating the import, export, transport or possession of any intoxicant or Excise bottle and the transfer, price or use of any type or description of such bottle "

8. The notification dated 31-3-1992 issued by the State Government, in exercise of the powers conferred by sections 31, 32 and 58 of the Act, intended to amend the Punjab Excise Fiscal orders, 1932, and thereby import fee for the first time was imposed on imported beer at the rate of 60 paise per bottle of 650 ml. The fee was varied from time to time by similar notifications and the last notification which is under challenge was issued on 27-3-1996 whereby the rate of import fee has been increased six times. In the preceding year, namely, 1995-96, the rate of import fee was 50 paise per bottle and it was increased in the next year, namely, 1996-97, to Rs. 3/- per bottle approximately.

9. Shri Mohan Jain, learned counsel for the petitioner, has argued that the assessee has been paying licence fee as required and payable under law and had also to pay transport charges on the import of beer. The assessee is paying licence fee of Rs. 3,00,000/ per year and the assessee has no grievance against payment of licence fee. The petitioner is also required to pay countervailing duty at the rate of Rs. 48,048/- on one truck of beer containing 800 boxes of 12 bottles each. The petitioner has no grievance against the payment of the aforesaid countervailing duty also inasmuch as the same amount is required to be paid by way of excise duty by the manufacturers of the State of Punjab. Since the Petitioner has been subjected to pay import fee at the rate of Rs. 28,800/- per truck load of 800 boxes of beer, this payment is said to be unauthorized, illegal and in contravention of the provisions of the Act.

10. As has already been discussed, section 31 of the Act empowers the State Government to levy excise duty or a countervailing duty on the excisable articles. Even the articles imported, exported or transported may be subjected to the imposition of such duty. Section 58(2) (d) empowers the State Government to make rules so as to regulate the import, export, transport or Possession of any excisable article. There is thus no power with the State Government to impose import fee besides the levy of excise duty or countervailing duty. What clause (d) of section 58(2) empowers is that the State Government may regulate the import of beer. It does not, however, authorise the State Government to levy any fee as such. Section 16 permits the import of any intoxicant after payment of such duty which may be required to be paid under the Act. Thus, section 16 also does not empower the State Government to levy any duty unless it could be so levied under any provision of the Act. The notification issued by the State Government, whereby import fee was first levied with effect from 1-4-1992 has been issued in exercise of the powers under sections 31, 32 and 58 of the Act. Since none of the three sections empowers the State Government to levy any fee

other than excise duty and countervailing duty, the notification dated 27-3-1996 is found to have been issued without authority of law.

11. Clause (6-B) of section 3 of the Act defines "excise duty" and "countervailing duty" with reference to Entry 51 of List II in the Seventh Schedule to the constitution. It would, therefore, be useful to see if any fee could be treated to be part of the excise duty or countervailing duty within the meaning given to "excise duty" and "countervailing duty" in Entry 51 of List II in the said Schedule.

12. Entry 51 of List II in the Seventh Schedule to the Constitution reads as under:-

" 51. Duties of excise on the following goods manufactured or produced in the State and countervailing duties at the same or lower rates on similar goods manufactured or produced elsewhere in India:-

(a) alcoholic liquors for human consumption;

(b) opium, Indian hemp and other narcotic drugs and narcotics,

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

13. From a reading of the aforesaid Entry, it would appear that excise duty may be imposed on the alcoholic liquors manufactured or produced in the State. Countervailing duties may be imposed on similar goods, manufactured or produced elsewhere in India. Thus, the foresaid Entry 51 gives powers to the State Legislature:-

(a) to impose duties of excise on alcoholic liquors where the goods are manufactured in the State; and

(b) to levy countervailing duty at the same or lower rates on similar goods manufactured elsewhere in India.

14. The countervailing duties are meant to equalise the burden on the alcoholic liquors imported from outside the State and the burden placed by excise duties on alcoholic liquors produced in the State. Countervailing duties can, therefore, be imposed on imported liquors only if goods similar to those which are imported are actually manufactured or produced in the taxing State. If this condition is satisfied, countervailing duty may be imposed on the imported goods whether they are consumed within the taxing State or not. If no alcoholic liquors similar to those imported, into the state are manufactured or produced in the State, the right to impose countervailing duties of excise on the imported goods to counter-balance the burden on the State-produced goods will not arise.

15. Entry 51 of List II in the Seventh Schedule to the Constitution thus empowers the State to levy excise duty and countervailing duties. This Entry does not empower the State to levy any fee.

16. Power to levy fee has been conferred by Entry 66 of List II in the Seventh

Schedule to the Constitution. The said Entry reads as under:-

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

There is no dispute to the principle that the authority levying a fee must render some service for the fee levied. Any imposition cannot be justified under Entry 66 if the authority fails to show that any services were rendered which have a proximate relationship with the imposition. The fee realised must be spent for the purposes of the imposition and should not form part of the general revenue of the State.

17. The respondent-State has not put forward a case, in support of the levy of import fee, that any services were rendered in lieu of the fee. The respondents have justified the levy of import fee on the plea that it was a price for the privilege given to the petitioner to import beer inside the State of Punjab. It is said to be a consideration for certain privileges granted" to the petitioner to trade in liquor and to import liquor during the course of that trade.

18. Section 34 of the Act provides for the levy of fee with respect to the grant of a licence, permit or pass for a specific period. Section 34 of the Act reads as under:-

" 34. Fees for terms, conditions and form of and duration of licences , permits and passes:- (1) Every licence, permit or pass granted under this Act shall be granted

(a) on payment of such fees, if any.

(b) subject to such restrictions and on such conditions,

(c) in such form and containing such particulars,

(d) for such period,

as the Financial Commissioner may direct.

(2) Any authority granting a licence under this Act may require the licensee to give such security for the observance of the terms of his licence, or to make such deposit in view of security, as such authority may think fit."

19. The State Government may grant any licence or permit to a dealer on payment of fee for a specified period. As has been seen earlier, the petitioner has paid licence fee of Rs. 3,00,000/- but that is not under challenge. Section 34 empowers the State Government to levy fee for any licence or permit or pass which may be granted under the Act for a specific period. The levy of import fee has neither been claimed in exercise of powers u/s 34 nor could it be assumed that the import fee can be levied u/s 34 of the Act. The said section specifically relates to the fee for a licence or permit and does not relate to any fee on the import of any excisable article.

20. The petitioner's challenge on the basis of the plea that notification whereby import fee has been levied, is not authorised under any provisions of the Act, is found to have force.

21. The second ground of challenge arises from Articles 301, 303 and 304 of the Constitution. Article 301 lays down that, subject to the other provisions of Part XIII of the Constitution, trade, commerce and intercourse throughout the territory of India shall be free. Article 303 puts a restriction on the Legislative powers of the Union and of the States with regard to trade and commerce. Neither the Parliament nor the Legislature of a State shall have power to make any law giving any preference to one State over another or making any discrimination between one State and another by virtue of any Entry relating to trade and commerce in any of the Lists in the Seventh Schedule. The Parliament may, however, make any law giving any preference or making any discrimination if it is declared by such law that it is necessary to do so for the purpose of dealing with a situation arising from scarcity of goods in any part of the territory of India.

22. Article 304 of the Constitution is, however, relevant to the controversy in hand. The said Article reads as under:-

" 304. Restrictions on trade, commerce and intercourse among States :- Notwithstanding anything in Article 301 or Article 303. the Legislature of a State may by law:

(a) impose on goods imported from other States or the Union territories any tax to which similar goods manufactured or produced in that State are subject, so, however, as not to discriminate between goods so imported and goods so manufactured or produced; and

(b) impose such reasonable restrictions on the freedom of trade, commerce or intercourse with or within that State as may be required in the public interest:

Provided that no Bill or amendment for the purpose of clause (b) shall be introduced or moved in the Legislature of a State without the previous sanction of the President."

23. The petitioner's challenge to the imposition of import fee arises from clause (a) of ` 304, which prohibits discrimination between goods imported and goods manufactured in a State. A State Legislature may, by law, impose any tax on the goods imported from other States or the Union territories to the same extent similar goods manufactured or produced in that State are subjected. But no tax shall be imposed if it led to discrimination between goods imported and the goods manufactured in the state. The petitioner's case is based on the plea that, by imposing import fee, the State of Punjab has discriminated between the goods imported and the goods manufactured in the State. The petitioner has already been subjected to countervailing duty of Rs. 48,048/- which is equivalent to the excise duty levied on the manufacturers of the State of Punjab on one truck of

beer containing 800 boxes of 12 bottles each. Besides, an import fee has been levied on the import of beer at the rate of Rs. 28,800/- for one truck of beer containing 800 boxes of 12 bottles each. Thus, the goods imported have been subjected to the following two taxes :-

(i) Countervailing duty Rs. 48,048/- (ii) Import fee Rs. 28,800/- Total:- Rs. 76,848/- 24. As against total amount of duty and fee payable by a person importing beer in the State of Punjab at Rs. 76,848/-, a manufacturer of the State Of Punjab has to pay Rs. 48,048/- only. Thus, it is a discrimination between goods imported and the goods manufactured and is said to be violative of clause (a) Of Article 304 of the Constitution.

25. Section 33-A of the Act seeks to save and protect the levy of duty which was levied immediately before the commencement of the Constitution. It, however, also incorporates the restrictions which have been specified in clause (a) of Article 304 of the Constitution. Section 33-A of the Act reads as under:-

"33.A.- Saving for duties being levied at commencement of the Constitution :-

(1) Until provision to the contrary is made by Parliament, the State Government may continue to levy any duty which it was lawfully levying immediately before the commencement of the Constitution under this Chapter as then in force;

(2) The duties to which this section applies are :-

(a) any duty on intoxicants which are not exciseable articles within the meaning of this Act; and

(b) any duty on an exciseable article produced outside India and imported into Punjab/Haryana whether across a customs frontier as defined by the Central Government or not.

(3) Nothing in this section shall authorised the levy by the State Government of any duty which, as between goods manufactured or produced in the State and similar goods not so manufactured or produced, discriminates in favour of the former, or which, in the case of goods manufactured or produced outside the State, discriminates between goods manufactured or produced in one locality and similar goods manufactured or produced in another locality."

26. It is clear from sub-section (3) of Section 33-A that State Government is not authorised to levy any duty which would discriminate in favour of the goods manufactured or produced in the State as against the similar goods not so manufactured or produced in the State. Thus sub-section (3) is a reproduction of the restrictions contained in clause (a) of Article 304 of the Constitution. In view of sub-section (3) of section 33-A of the Act, the State of Punjab is found to have no authority or power to levy duty which would favour the manufacturer and discriminate against the importer.

27. The respondents have argued that import fee has been levied under the Punjab Excise Fiscal orders, 1932, which was an existing law before the

commencement of the Constitution.

28. Clause (10) of Article 366 of the Constitution defines "existing law" as under:-

"(10) 'existing law' means any law, Ordinance, order, bye-law, rule or regulation passed or made before the commencement of this Constitution by any Legislature, authority or person having power to make such a law, Ordinance, order, bye-law, rule or regulation;"

29. Article 372 of the Constitution protects the continuance and enforcement of the existing laws by saying that all the laws in force in the territory of India immediately before the commencement of the Constitution shall continue in force until altered or repelled or amended by a competent Legislature or other competent authority.

30. The increase in the import fee has been effected by way of an amendment of the Punjab Excise fiscal orders, 1932 and therefore, the amendments, so made, cannot be treated to be the existing laws and are, therefore, not saved by Article 372 of the Constitution.

31. The Supreme Court in *Kalyani Stores Vs. The State of Orissa and Others*, , has examined the provisions of the Bihar and Orissa Excise Act, 1915, in the context of Articles 301 to 305 of the Constitution. That was a case where a notification, under the said Act imposing countervailing duty on foreign liquor imported into the State, had been issued. The duty was enhanced by a subsequent notification in the year 1961. The petitioner had challenged the earlier as well as the subsequent notifications on the ground that no countervailing duty can be imposed as no foreign liquor was manufactured in the State. Duty of excise on foreign liquor imported into the State was levied at first at Rs. 40/- per L.P. Gallon and from April 1, 1961, at Rs. 70/-. Since the original duty at Rs. 40/- was fixed by notification issued in 1937, that was said to be protected, having been issued under the existing law. However, notification of 1961 was held to be not an existing law and the additional burden imposed was held to be violative of Article 301 of the Constitution. It was held that the notification of 1961 might be saved only if it fell within the exceptions contained in Articles 302, 303 and 304 of the Constitution. Articles 302 and 303 were not attracted. Power to legislate under Article 304 was also not available because no foreign liquor was manufactured or produced in the State. That notification did not comply with the requirements of the Constitution contained in Article 304, clauses (a) and (b). Notification of March, 1961, enhancing the levy by Rs. 30/- was held as invalid. However, earlier notification of 1937 remained operative in view of Article 305.

32. While discussing "countervailing duties", it was observed by the Supreme Court in *Kalyani Stores*" case (supra) as under:-

"The expression "countervailing duties" has not been defined in the Constitution

or the Bihar and Orissa Act 2 of 1915. We have, therefore, to depend upon its etymological sense and the context in which it has been used in Entry 51. In its etymological sense, it means to counter-balance; to avail against with equal force or virtue; to compensate for something or serve as an equivalent of or substitute for (see Black's Law Dictionary, 4th Edn. 421) This would suggest that a countervailing duty is imposed for the purpose of counter-balancing or to avail against something with equal force or to compensate for something as an equivalent. Entry 51 in List II of the Seventh Schedule to the Constitution gives power to the State Legislature to impose duties of excise on alcoholic liquors for human consumption where the goods are manufactured or produced in the State. It also gives power to levy countervailing duties at the same or lower rates on similar goods manufactured or produced elsewhere in India. The fact that countervailing duties may be imposed at the same or lower rates suggests that they are meant to counter-balance the duties of excise imposed on goods manufactured in the State. They may be imposed at the same rate as excise duties or at a lower rate, presumably to equalise the burden after taking into account the cost of transport from the place of manufacture to taxing state. It seems, therefore, that countervailing duties are meant to equalise the burden on alcoholic liquors imported from outside the State and the burden placed by excise duties on alcoholic liquors manufactured or produced in the state. If no alcoholic liquors, similar to those produced or manufactured, imported into the State, are produced or manufactured, the right to impose counter balancing duties of excise levied on the goods manufactured in the State will not arise. It may, therefore, be accepted that countervailing duties can only be levied if similar goods are actually produced or manufactured in the state on which excise duties are being levied."

33. In *R.N. Kumar Vs. R.K. Soral*, , a similar question arose about the powers of the Government to levy tax on goods manufactured locally at a lower rate and to levy of tax at a higher rate on goods imported from outside the State. It was held that the discrimination, effected by applying different rates of tax between goods imported into the State of Gujarat and goods manufactured within that State, must be struck down. It was observed that, while a state Legislature may enact a law imposing a tax on goods imported from other States as is levied on similar goods manufactured in that State, the imposition must not be such as to discriminate between goods so imported and goods so manufactured. It was further held that Article 304(a) enabled the Legislature of a State to make laws affecting trade, commerce and intercourse and thereby it enabled the imposition of taxes on goods from other States if similar goods in the state are subjected to similar taxes so as not to discriminate between the goods manufactured or produced in that State and the goods which are imported from other States.

34. A similar question happened to be again examined by the supreme Court in *Video Electronics Pvt. Ltd. and Anr. v. State of Punjab and Anr.* (1990) 77 STC 82. it was observed therein that the object of Article 301 was to prevent discrimination against imported goods by imposing tax on such goods at the rate

higher than that borne by local goods. The question as to whether the levy of the tax would constitute discrimination, would depend upon a variety of factors including the rate of tax and the item of goods in respect of the sale on which it is levied. Every differentiation is not discrimination. The word "discrimination" is not used in Article 14 but is used in Articles 16, 303 and 304(a). When used in Article 304(a) it involves an element of intentional and purposeful differentiation, thereby creating an economic barrier and an element of an unfavourable bias. If the general rate applicable to the goods locally made and to those imported from other States is the same, nothing more is to be shown by the State to dispel the argument of discrimination under Article 304(a) even though the resultant tax amount on imported goods may be different.

35. The interpretation of Article 304(a) of the Constitution has thus been authoritatively laid down by the Supreme Court and, in the light of the said interpretation, the notification dated 27-3-1996, levying the import fee, has to be held to be violative of Article 304(a) of the Constitution.

36. This Court in Civil writ Petition No. 921 of 1979 (*Dewan Modern Breweries Ltd., Jammu v. The State of Haryana and Ors.*), vide judgment dated 27-4-1982, in the case of present petitioner, has quashed the Punjab Excise Fiscal Orders, 1968, 1969 and 1974, whereby export duty had been levied on rectified spirit.

37. The respondents have argued that the petitioner had no fundamental right to trade in liquor and, if the State Government granted a privilege to the petitioner in lieu of the payment of import fee, that could not be challenged. It is also argued that the petitioner got licence renewed from year to year subject to the conditions of payment of import fee and, therefore, the petitioner had no right to challenge the levy of fee once the petitioner accepted the conditions right from the year 1992-93. The respondents' plea, that the fee was levied in lieu of the privileges granted to the petitioner, has no force inasmuch as the fee has been found to be not authorized in law. Unless there was a specific provision in the Act, no fee could be levied.

38. It is correct that the petitioner did not choose to challenge the levy of import fee in the earlier years. The levy was first imposed with effect from 1-4-1992 and the petitioner carried on its business of Import of beer year after year. The last notification dated 27-3-1996 whereby import fee was levied at Rs. 35.88 per box of 12 bottles, has been challenged immediately thereafter and, therefore, we restrict the challenge to that notification only. The petitioner is, therefore, not entitled to challenge the levy of import fee in respect of the earlier years, inasmuch as no challenge was made against the earlier notifications and the petitioner made the payment of import fee without any grudge.

39. In the result, notification dated 27-3-1996 (Annexure P-3) is held to be unauthorized in law and also violative of Articles 301 and 304(a) of the Constitution of India. The said notification is, therefore, quashed. No order as to costs.