
(2009) 12 P&H CK 0084
In the Punjab And Haryana At Chandigarh

Haryana Distillery Yamunanagar and The Panipat Co-operative Sugar Mills Ltd.

APPELLANT

Vs

The State Government of Haryana and Others

RESPONDENT

Date of Decision : 24-12-2009

Acts Referred:

Punjab Excise Act, 1914 — Section 21

Citation : (2010) 157 PLR 489

Hon'ble Judges : Jora Singh, J; Hemant Gupta, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Hemant Gupta, J.—This order shall dispose of Civil Writ Petition Nos. 520 and 922 of 1987, wherein the challenge is to the imposition of the excise duty by the authorities under the Punjab Excise Act, 1914 (for short 'the Act'), on the excess wastage of Double Distilled Spirit (hereinafter for short referred to as 'DDS'). The petitioner has also challenged the legality of Rule 101-A of the Punjab Distillery Rules, 1932 (for short 'the Rules'), fixing scale of wastage allowance for spirit.

2. The petitioner is licensee for distillery u/s 21 of the Act. Such licence is being renewed on yearly basis. It is asserted that as per the statutory provisions, all the processes such as maturation of the spirit; rectification; flavouring, colouring and bottling etc. are performed in the distillery enclosure itself under the control and supervision of the officials of the excise department of the State Government. During this process, wastage of spirit also takes place in the distillery at various stages of manufacture. The extent of wastage is dependent upon the process of manufacture and storage. It varies from plant to plant and from time to time.

3. The petitioner contends that the Department issued show cause notice for the loss or wastage of the spirit in the distillery in the year 1978-79 to be excessive and beyond the limit prescribed by the Rule 101-A of the Rules. On the basis of

such Rules, it has been found that DDS out of which Indian made foreign spirit was manufactured in the spirit room exceeded the permissible limit of 2%, therefore, the petitioner is liable to pay excess wastage amounting to Rs. 1,55,012/-vide order dated 23.4.1985. The petitioner was called upon to pay the said amount as excess wastage. The said order was affirmed in appeal as well. It has been found that it is not the case of the extra-ordinary wastage, but excess wastage against statutory norms. Therefore, in terms of para 1152 of Punjab Excise Manual Volume-III, the petitioner is liable to pay for the excess wastage.

4. Before considering the arguments raised by the counsel for the parties, some of the statutory provisions of the Act, Rules and Punjab Excise Manual, which are relevant, need to be extracted:

(5) Denatured.-denatured means effectually and permanently rendered unfit for human consumption.

(6) Exciseable article.-Exciseable article means:

(a) any alcoholic liquor for human consumption; or

(b) any intoxicating drug.

(6-a). excise bottle means a bottle of such type or description as may be or may have been at any time permitted for the bottling of liquor or beer by rules made under this Act.

xx xx xx (12-a) -Intoxicant means any liquor or intoxicating drug.

xx xx xx (14) Liquor. -Liquor means intoxicating liquor and includes all liquid consisting of or containing alcohol; also any substances which the State Government may by notification declare to be liquor for the purposes of this Act.

xx xx xx 31. Duty on excisable 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 20; or

(c) manufactured in any distillery established or any distillery or brewery licenced u/s 21;

xx xx xx 32. Manner in which duty may be levied. -Subject to such rules regulating the time, place and manner as the Financial Commissioner may prescribe, such duty shall be levied rateably, on the quantity of excisable article imported, exported, transported, collected or manufactured in or issued from a distillery brewery or warehouse;

xx xx xx Extracts from the Punjab Distillery Rules, 1932 (as applicable to Haryana).

35. (1) The licensee shall, if there is a demand upon his distillery for such a quantity, produce during each calendar year at least 90 per cent of the outturn of plain and spiced country spirit which his stills are capable of producing according to the estimate of their capacity entered in his licence. The calculation of the outturn shall be as under:

(i) Fermentation of efficiency

84.00% of fermentable Sugar contents present in molasses

(ii) Distillation efficiency Minimum recovery of Alcohol

...97% of alcohol present in the wash.

...52.5 litres of alcohol per quintal of fermentable Sugar present in molasses consumed for production of alcohol.

(2) Failure to maintain the prescribed minimum efficiency and recovery of alcohol shall render the distillery to cancellation of license and forfeiture of security in addition to any other penalty imposed under the Punjab Excise Act.

xx xx xx 101. If it is found that the wastage in any distillery is excessive the Financial Commission may prescribe a scale of wastage and the licensee shall pay duty as on issue, respect of all losses attributed to wastage, in excess of the scale fixed.

5. Rule 101-A of the Rules was substituted by the then Excise and Taxation Commissioner exercising the powers of the Financial Commissioner vide notification dated 15.3.1965. The substituted Rule reads as under:

101-A. The following scales of wastage allowance for spirit are prescribed for a distillery licensed in Punjab:

Wastage Allowance in case of

Spirit store room

Bottling operations

Bottled-spirit room

2 per cent

1.5 per cent

1 per cent

Rule prior to the amendment in the year 1965:

101-A (1).-The following scales of wastage allowance for spirit are prescribed for the under mentioned distilleries:

Wastage allowance in case of:

Name of distillery

Wastage allowance in case of

Sprit Storeroom

Bottling operations

Bottled spirit room

(i) Khasa distillery

2 percent

1.5 percent

1 percent

(ii) Karnal distillery

2 percent

1.5 percent

1 percent

(iii) Hamira distillery

2 percent

1.5 percent

1 percent

The above scales will apply both to country spirit and Indian made foreign spirit. Where the wastage of spirit exceeds the prescribed limit duty on wastage of each kind of spirit, for which a separate rate of duty is fixed will be calculated separately, but, for this purpose, various brands of Indian made foreign spirit, which are chargeable to the same rate of duty, shall be taken up together.

(2) Wastage shall be calculated for each month, but the charge on account of duty shall be made at the end of the financial year and the distilleries shall be allowed to set off the results of the month, in which the wastage of spirit was less than the prescribed scale against those of the months, in which the wastage exceeded this scale.

(3) The excess wastage in various operations, namely, spirit, store room, bottling operation, bottled spirit room and redistillation shall be worked out separately in form D-26, D-27, D28 and D-29.

(4) Duty shall be charged, as on issue, at the rate applicable to the particular kind of spirit, subject to the following exceptions:

(a) Duty on excess wastage of plain country spirit above the strength of 43 degree over proof shall be charged at the rate prescribed for plain Country spirit and not at the rate, prescribed for rectified spirit.

(b) No duty on excess wastage of denatured spirit shall be charged; provided that the denatured spirit is stored separately within the distillery enclosure.

(c) Duty on excess wastage of matured spirit, if any, shall be charged under Rule 102, read with Sub-rule (16) of Rule 90, and not under this rule.

102. In case extraordinary wastage of spirit occurs in a distillery owing to any cause an enquiry into the circumstances shall be made immediately under the orders of the Collector or Financial Commissioner and if it is found that the wastage was due to preventable causes which the licensee should have foreseen or guarded against, and that the spirit was required to demand, made on the distillery the meeting of which was delayed by reason of the loss, the licensee shall if directed to do so by the Financial commissioner, pay all or such part, as seems reasonable, of the duty that would have been recovered on the wasted spirit if it had been issued.

6. Sub Rules (2), (3) and (4) have been again inserted in Rule 101-A of the Rules, vide notification dated 24.3.1982, corresponding to the Rules, which were in existence prior to the substitution of Rule 101-A vide notification dated 16.3.1965.

Para 11.52 of the Punjab Excise Manual

11.52. It was noticed that one of the Punjab distilleries was showing abnormal wastage of spirit held in stock. The Financial Commissioner in exercise of his powers under Rule 9.101 of the Punjab Excise Manual, Volume-II, has therefore prescribed for each distillery a scale of wastage. Wastage in excess of the scale is liable to duty. The scale is laid down in Rule 9.101-A of the Punjab Excise Manual Volume-II. The wastage is calculated at the close of each financial year. For this purpose rectified spirit is treated as plain country spirit and wastage of spirit both in spirit store and in bottling is taken into account. The following procedure should be adopted in calculating dutiable wastage:

(a) add to the last year's closing balance, the quantity of bulk spirit passed into store during the year,

(b) add together quantity of spirit issued in bulk and for bottling and closing balance of bulk spirit.

(c) subtract (a) from (b), the difference will be total wastage,

(d) ascertain allowable wastage on (a) at the rate prescribed for the distillery,

(e) the difference between (c) and (d) is liable to duty at the rate applicable to the particular class of spirit.

Separate calculations should be made for each kind of spirit and the distiller

should be required to deposit the total amount of duty assessed within one week of the notice of assessment given to him.

7. Learned Counsel for the petitioner has relied upon the judgment of the Hon"ble Supreme Court in State of U.P. and Others Vs. Modi Distillery and Others, , following the earlier judgment of the Supreme Court in State of U.P. and Others Vs. Delhi Cloth Mills and Another, , to contend that imposition of excise duty on DDS is beyond the legislative competence of the State or its functionaries as such DDS is not fit for human consumption which alone empowers the State to legislate in respect of liquor for human consumption as provided in Entry 51, List-II, Schedule 7 of the Constitution of India. It is argued that the DDS is a product saleable to L-11 licensees i.e. the licensees permitted to bottle Indian made foreign liquor in terms of Punjab Excise Fiscal Order, 1932. Therefore, such DDS is a marketable commodity as a raw material for the bottling plants but is not fit for human consumption. Hence, the State Government has no legislative competence to impose any excise duty on the manufacture or the wastage thereof.

8. It is argued by learned Counsel for the petitioner that the Financial Commissioner can prescribe a scale of wastage if such wastage in any distillery is excessive in terms of Rule 101 of the Rules. However, the scales of wastage fixed under Rule 101-A of the Rules is an independent provision and are not in exercise of the powers conferred on the Financial Commissioner under Rule 101 of the Rules.

9. It is also contended that Rule 102 of the Rules deals with the extra-ordinary wastage and therefore, Rule 101-A has been introduced as an independent clause to allow wastage, but that does not control the scale of wastage which can be fixed by the Financial Commissioner under Rule 101.

10. Learned Counsel for the petitioner has further argued that prior to 1965, the wastage was to be calculated month-wise though the wastage was to be accounted for at the end of the year. By virtue of amendment in the year 1965, such methodology of counting wastage has been done away with, but has been re-introduced in the year 1982. Therefore, the authorities could not assess the excess wastage on yearly basis. It is argued that 2% wastage is permitted but such wastage has to be calculated every month. If wastage is calculated @ 2% every month, there would be no excess wastage in the present case, which may attract excise duty.

11. On the other hand, learned Counsel for the respondents has argued that DDS out of which Indian Made Foreign Spirit (IMFS) was manufactured is an excisable article as in as much as it can be consumed by the human beings. It is alleged in the written statement that IMFS is nothing, but DDS minus flavours and colours etc. It is also argued that excisable article in terms of Section 3(6) of the Act is alcoholic liquor for human consumption. The liquor u/s 3(14) of the Act means intoxicating liquor and includes all liquids consisting of or containing alcohol. The

manufacture in terms of Section 3(16) includes every process whether natural or artificial by which any intoxication is produced or prepared and also re-distillation and every process for rectification, reduction, flavouring, blending or colouring of liquor. Relying upon Sub-section (5) of Section 3, it is contended that denatured alcohol alone is not fit for human consumption. Therefore, the same is not excisable under the Act. The DDS less flavouring and colouring is said to be fit for human consumption and therefore, the State Government is competent to levy excise duty on the wastage. It is contended that the stand of the State that DDS is fit for human consumption, has not been controverted, by filing a rejoinder nor such an argument raised before the authorities under the Act. Therefore, the petitioner cannot be permitted to assert that DDS is not fit for human consumption.

12. The argument that the DDS is not fit for human consumption is not borne out from the record. Firstly, the petitioner has not controverted the assertion made by the respondents in the written statement that DDS is fit for human consumption. Secondly, it is not the case of the petitioner before the authorities under the Act that DDS is not alcoholic liquor and not fit for human consumption. Therefore, by accepting the assertions of the respondent in the written statement, we are of the opinion that DDS is fit for human consumption.

13. The petitioner has relied upon Punjab Fiscal Order, 1932 to assert that DDS is a saleable commodity to the licensees engaged in bottling of Indian made foreign liquor, therefore, such DDS is a raw material and not a finished product. As per the averments made in the written statement, DDS is fit for human consumption. May be, it cannot be marketed unless bottled, but that will not make the DDS as not fit for human consumption. The fact that DDS is marketable to the licensees of the bottling plants is not an inference that it is not fit for human consumption.

14. The judgment of the Hon'ble Supreme Court in Modi Distillery's case (supra) dealt with the four different situations, as mentioned in para No. 3 of the judgment, which read as under:

Group `A" The demands for excise duty were on the wastage of Indian made foreign liquor (IMFL) which was exported outside the State of Uttar Pradesh.

Group `B" related to demands made for excise duty on wastage, during transportation in containers, of high strength spirit, of 80 to 85%, from distillery to warehouse.

Group `C" related to the demand of excise duty on obscuration.

Group `D" related to excise duty sought to be levied on pipeline wastage.

15. The petitioner draws parity, in support of his arguments to Group-B. Para Nos. 10 and 11 of the judgment deal with the levy of excise duty upon the liquor falling within Group-B. It was held to the following effect:

10. What the State seeks to levy excise duty upon in the Group `B" cases is the

wastage of liquor after distillation, but before dilution; and, in the Group `D" cases, the pipeline loss of liquor during the process of manufacture, before dilution. It is clear, therefore, that what the State seeks to levy excise duty upon is not alcoholic liquor for human consumption but the raw material or input still in process of being rendered fit for consumption by human beings. The State is not empowered to levy excise duty on the raw material or input that is in the process of being made into alcoholic liquor for human consumption.

11. That the measure of excise duty upon alcoholic liquor for human consumption is the alcoholic strength thereof does not make any difference in this behalf. It is only the alcoholic strength of the final product which is relevant.

16. In our opinion, there is no parity of the DDS with the wastage of liquor falling in Group `B" in the Modi Distillery's case (supra). Group `B" dealt with demands made for excise duty on wastage, during transportation in containers of high strength spirit of 80 to 85%, from distillery to warehouse. In the aforesaid case, ethyl alcohol (95%) was found to be not alcoholic liquor for human consumption, as such alcohol could be used only as a raw material or input in the production of whisky, gin, country liquor etc. In the present case, it remains uncontroverted that DDS is nothing but IMFS, except colouring and flavours. Thus, the aforesaid judgment provides no assistance to the argument raised by the learned Counsel for the petitioner. Thus, the levy of excise duty in the present case, is upon the alcoholic liquor fit for human consumption.

17. The judgment of the Hon"ble Supreme Court in Delhi Cloth Mills's case (supra), deals with the levy of excise duty on the wastage of liquor in the process of export from one State to another. The issues raised in the aforesaid case are not the issues raised in the present case. However, it was held therein that absolute equity and justice is not attainable in taxing law. Since the DDS has been found to be fit for human consumption in the present case, therefore, it falls within the competence of the State Legislature and thus, cannot be said to be beyond the legislative competence of the State Government.

18. The argument that Rule 101-A of the Rules is an independent provision and, therefore, the wastage cannot be restricted to the limits contemplated u/s 101-A. We do not find any merit in the said argument as well. Under Rule 35 of the Rules, a Distillery is to ensure outturn on the basis of the installed capacity. The Distillery is liable to pay excise duty on the outturn parameters. Rules 101 and 101-A relate to relaxation of the outturn provision fixed under Rule 35. In terms of Rule 101, the Financial Commissioner could fix the scale of wastage in respect of each distillery, may be after the end of the year or before the Financial Year. Such powers of the Financial Commissioner could be challenged on the ground that it is arbitrary and without any guidelines. To prevent abuse of such powers contemplated under Rule 101 by the Financial Commissioner, Rule 101-A was incorporated. By incorporation of Rule 101-A, the scale of wastage, which was left to the discretion of the Financial Commissioner under Rule 101 has been circumscribed. Therefore, Rule 101-A is proviso to Rule 101. Only extraordinary

wastage on account of natural circumstances or otherwise, is left to the discretion of the competent authority which discretion is subject matter of judicial review. Therefore, it cannot be said that the scale of wastage fixed by incorporation of Rule 101-A is Arbitrary or illegal. Such scale has been fixed in exercise of powers to frame Rules and thus, is in exercise of legislative functions. There is no material or reason to show that such scale of wastage is not germane to the subject or is in violation of any provision of the Act and the Constitution. Consequently, we do not find any merit in the challenge to the scale of wastage fixed under Rule 101-A of the Rules as well.

19. The argument that the wastage was required to be computed on monthly basis, but has been computed on yearly basis, does not have any substance. Prior to substitution of Rule 101-A in the year 1965, it contemplated that the wastage was to be determined on monthly basis, but was to be accounted for at the end of the year. Such provision has been reintroduced in the year 1982. Therefore, for the relevant year i.e. 1978-79, in the absence of any statutory rule, the provisions in the Punjab Excise Manual i.e. instructions could be relied upon. Such instructions cannot be said to be contrary to the Rules framed during the period 1965-82. Therefore, it cannot be said that the order passed by the authorities relying upon Para 11.52 of the Punjab Excise Manual, is illegal and liable to be set aside.

20. In view of the above, we do not find any merit in the present writ petitions. Hence, the same are dismissed.