

(2001) 07 RAJ CK 0080

In the Rajasthan High Court

Case No : Civil Writ Petition No. 1694 of 1999

Inertia Industries Limited

APPELLANT

Vs

State of Rajasthan and Others

RESPONDENT

Date of Decision : 03-07-2001

Acts Referred:

Rajasthan Excise Act, 1950 — Section 28, 69B

Citation : (2002) 3 RLW 1657 : (2002) 3 RLW 1528 : (2002) 4 WLC 591

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

Bench : Division Bench

Advocate : Naina Saraf, for the Appellant; Sagar Mal Mehta, General assisted by S.P. Sharma and R.B. Mathur, for the Respondent

Judgement

Balia, J.—The petitioner is a company registered under the Indian Companies Act, 1996 and is having its registered office at New Delhi and a brewery at Daruheda, District Rewadi in State of Harayana. In favour of the petitioner, the respondent State of Rajasthan parted with its exclusive privilege to vend in wholesale excisable articles manufactured by it in the State of Rajasthan at village Ramchan-drapura, Ajmer Road, Jaipur for the financial year 1998-99, the period of which was to expire on 31st March, 1999.

2. The petitioner company had commenced operation in the year 1993 and the bonded warehouse was also established in Rajasthan in 1993. The petitioner had continued its operations under the licence until 1996. Thereafter, State of Harayana had imposed prohibition in that State. As a result, the manufacturing activities of the petitioner stood closed. However, when the State of Haryana revoked the prohibition in April, 1998, the petitioner restarted its manufacturing process and again obtained a bonded warehouse licence in June, 1998, as aforesaid. During the period upto 1996, the petitioner has paid to Rajasthan Excise Department by way of Import Duty a sum of Rs. 1,07,18,568 for importing 8,81,300 bulk liter and after July, 1998 as per petitioner's allegation it has paid upto December, 1998 an import duty to the extent of Rs. 20,47,500.

3. The petitioner has sought quashing of the notifications dated 9th December, 1996, 31st March, 1997 and 9th July, 1998 as being ultravires Article 265 of the Constitution of India as well as Entry 51 of List II of Seventh Schedule as well as ultravires Section 28 of the Excise Act to the extent it levied Import Duty on the excisable articles imported within the State of Rajasthan which resulted in levy of import duty on Indian made beer brought by the petitioner from Haryana in addition to Excise Duty and Countervailing duty paid by him under the aforesaid notifications. Two fold consequential prayers made by the petitioner are; firstly, that no further collection be made on import in pursuance of the impugned notifications, and secondly the import duty paid by him under the aforesaid notifications as aforesaid be refunded with interest @ 24% per annum.

4. The primary contentions of the petitioner in substance is that Article 265 envisages that no tax shall be levied or collected except by authority or law. Under Article 246 of the Constitution read with Entry 51 of List 11 in the Seventh Schedule the State legislature has no authority to levy Import Duty on alcoholic liquors for human consumption. So also Section 28 of the Rajasthan Excise Act also authorises levy of excise on the manufacturing of alcoholic liquors for human consumption and countervailing duties on the excisable articles only. It does not authorise levy of any tax in the nature of Import Duty. There being no provision under the parent Act, Same could not have been imposed by framing rule under the rule making authority of the State or by executive authority of the State beyond the area in which it could legislate. That being the position, it was urged that imposing Import Duty as tax is not within the competence of the State legislature or for the delegated authority under the Act. The impugned notifications separately levy the Excise Duty on manufacture, Countervailing Duty on goods brought in State of Rajasthan and also Import Duty on goods imported in the State. Separate provisions for fees have been made wherever the Act and Rules provided for issue of licence or permits yet under the impugned notifications in addition to the Excise Duty and Countervailing Duty, Import Duty has also been imposed on import of excisable article from outside State within the State of Rajasthan as tax,

5. Apart from contending that it is a tax which is not authorised by law to be imposed the State legislation, the petitioner has also contended-

(i) that there being no quid pro quo, Import Duty levied under the impugned Notifications cannot be upheld as fees under Entry 66 also, if by any reason it is held to be not a tax but a fee falling under Entry 66. Element of quid pro quo being essential element of levy of fee, no fee was justified under the provisions of Entry 66 of the State List.

(ii) it was also contended that, since no Import Duty could be levied on import of excisable article under Entry 51, the legislative filed of the State having been curtailed to that extent, a fee could not also be imposed on the area on which the legislative power of the State did not extent.

(iii) In addition to the aforesaid contention, it was further contended that imposition of fee in question contravenes Articles 301 and 304 of the Constitution because it results in putting a barrier on free trade, commerce and intercourse throughout the territory of India and the impugned impost does not fall within the purview of Article 304 firstly because it is not authorised by law and secondly if it is a regulatory measure, it being not a legislation which has been moved with the previous sanction of the President, cannot be effective in view of Clause (b) of Article 304.

(iv) Ancillary to this argument, it was also urged that the impost levied under the aforesaid impugned notifications is exorbitantly high, confiscatory in nature and violates fundamental rights of the petitioner affecting his freedom of trade and to be treated fairly and amounts to unreasonable restrictions.

6. On the other hand, learned Advocate General has not seriously contested the position that an import duty as a matter of tax is not permissible under Entry 51 of the State List. However, the impugned notifications are sought to be justified under Entry 66 of the II list as fees. It has been contended by learned Advocate General that various provisions show that the State is duly empowered to levy fee for bringing the goods into State. The said levy cannot be challenged as violative of Article 19(1)(g) or Article 301 of the Constitution on the ground of being unreasonable restriction as there does not exist any right to trade in intoxicants. It was further contended that charging of fees on bringing beer into the State is regulatory in nature. In giving permission to the petitioner to bring liquor or beer manufactured by him in Haryana for sale within the State of Rajasthan an advantage is given to the petitioner in addition to other advantages of licences and for such additional advantages the fees is charged. This accounts for quid pro quo. It has been said that has the manufacture taken place in the State of Rajasthan, the petitioner would have been liable to pay bottling fee. As the petitioner is manufacturing the excisable article in the State of Haryana and is permitted to bring the same in the State of Rajasthan for selling here he is saved from the payment of bottling fee. Thus, allowing an excisable article manufactured outside the State to be sold in the State of Rajasthan results in loss of revenue to the State in the form of loss of revenue arising from bottling fee. The fee is therefore compensatory in nature.

7. On these precincts the impost has been sought to be justified as fees, though not as a tax as regulatory and compensatory in nature conferring additional benefits to the petitioner, having an element of quid pro quo also. The respondent have also drawn support from the fact that neighboring states are also levying the fees on import of excisable article within the respective States. Reference in this connection has been made to the practice followed in Madhya Pradesh, Punjab, Uttar Pradesh, Haryana, Tamilnadu, Karnataka, Andhra Pradesh, and Maharashtra on these premise, the respondents have sought dismissal of the writ petition. Lastly, it has been urged that even if they levy is invalid, the petitioner is not entitled to claim refund as the petitioner is involved

in the activity of selling excisable article within the State of Rajasthan, he must have passed on the burden of levy on the consumers and having himself not borne, the burden of levy out of his own pocket, the refund of the amount, if at all, can only be claimed by the persons who have really suffered the burden of it and refund of the amount to the petitioner will result in his unjust enrichment. Reference has been made to *Mafatlal Industries Ltd. v. Union of India (I)*, for relying on the principle of unjust enrichment for refusing the refund of import tax ultimately borne by the consumers in the absence of any proof of having it suffered out of his own pocket.

8. It is apparent that no tax in the nature of Import Duty can be levied in view of the Scheme of the Constitution about the imposition of tax on alcoholic liquors for human consumption and the provisions of the Act. Article 265 inhibits the power of the State to impose levy or collect any sum by way of tax except by authority of law. The authority of making law including in the field of taxation by respective legislatures of Union and States is derived from Article 246 of the Constitution read with Seventh Schedule. In respect of matters enumerated in list I in the Seventh Schedule known as the Union List, the Parliament has exclusive power to make laws. On the other hand with respect to any matters enumerated in List II of the Seventh Schedule known as State List, the State legislature has exclusive power to make laws for the State or any part thereof; and Parliament as well as legislatures of State have concurrent power to legislate with respect to any of the matters enumerated in List III in the Seventh Schedule known as Concurrent List. The matters not enumerated in State List or Concurrent List or in the Union List fall exclusively within the domain of Parliament as residuary power of legislature vest in Parliament under Article 248. Article 254 deals with the contingency where inconsistency exist between laws made by Parliament and laws made by the State legislature operative in the same fields.

9. With these precincts, if we examine the Seventh Schedule, the legislative field of taxing alcoholic liquors is covered by Entry 51 of the State List. Entry 51 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 included in sub-paragraph (b). of this entry.

10. Obviously, the Entry 51 confines the power of the State legislature to impose tax on the manufacture or production of alcoholic liquor for human consumption and also authorises to levy Countervailing Duties at the same or lower rates on the goods manufactured elsewhere in other States in India. These are akin to

import duty inasmuch countervailing duties are also levied only on import of article, albeit is inhibited by the limitation that countervailing duties are meant to equalise the burden on import of commodities from outside the stated territory within it with the burden placed by excise duty on commodities produced within the State. Blacks Law Dictionary says countervail means "to counter balance to avail against with equal force or virtue, to compensate for or serve as an equivalent of or substitute for". This will be apparent from principle enunciated by Supreme Court in *Kalyani Stores v. State of Orissa* (2). The apex Court considering the term in Entry 51 of State List said after noticing that expression Countervailing duties has not been defined in Constitution and it has to be understood in its etymological sense in the context in which it has been used in Entry 51, said:

"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."

This was reiterated by the Supreme Court in *State U.P. v. DCM* (3).

11. In *Dunlop India v. U.O.I.* (4), the Court explained that levy of Additional Duties on import of articles equal to excise duty is known as Countervailing Duties.

12. Thus, Countervailing duties are duties imposed on import of goods similar to one manufactured within the territory where such goods are imported, there it is related to equalise excise duty. Entry 51 authorises levy of countervailing duty only to the extent excise duty is imposed within the importing State on alcoholic liquors fit for human consumption. No other duty on import of potable liquor within any State is authorised to be levied by State legislature. -Therefore, executive power of State also cannot extent to impose such duties by prescribing rates of such duties through notification.

13. As the alcoholic liquor for human consumption are manufactured within the State of Rajasthan, the State Government is empowered to levy excise duty on the manufacture of the said goods within its territory as well as countervailing duty on the goods brought within its territory subject to the limitations aforesaid. There is no dispute about the fact that in all the three Notification duties of excise as well as countervailing duties have been levied and are within the precincts of Entry 51. However, a levy in the name of Import Duty has also been imposed in addition thereto. Therefore, levy of import duty under the said notifications as a tax under Entry 51 cannot be sustained.

14. A faint argument was made that if not under entry 51, the tax could be sustained as tax on entry of goods into a local area for consumption, use or sale thereof under Entry 52, This contention, in our opinion, does not hold good. The key words to invite operation of Entry 52 is "entry into a local area". The local area in the context of legislative power of the State has been held to mean an area administered by a local body like a municipality, a district board, a local

board, a union board, a panchayat or the like.

15. In *Diamond Sugar Mills v. State of U.P.* (5), under the U.P. Sugarcane Cess Act cess was levied on entry of sugarcane in the factory premises situated within the State of U.P. The majority opinion expressed its view that the proper meaning to be attached to the words "local area" in Entry 52 of the State List in the Seventh Schedule of the Constitution (when the area is a part of the State imposing the law) is an area administered by a local body like a municipality, a district board, a local board, a union board, a panchayat or the like.

16. In *Shaktikumar M. Sancheti v. State of Maharashtra* (6), the Supreme Court made it clear that State as a whole cannot be considered to be local area for the purpose of Entry 52. It was a case in which the Court was considering the Maharashtra Tax on Entry on Motor Vehicles into Local Areas Act, 1987. Section 3 providing for incidence of tax stated that there shall levied and collected a tax on the purchase value of a motor vehicle, on entry of which is effected into a local area for use or sale therein and which is liable for registration in the State under the Motor Vehicles Act, 1939. Explaining the meaning of local area, the Court said explaining the ratio in *Diamond Sugar Mills Ltd. v. State of U.P.* (supra) that the question whether entire area of the State was an area administered by State Government and was covered in the phrase "local area" was not decided, and held:

"The expression "local area" has been used in various articles of the Constitution namely 3(b), 12, 245(1), 246, 277, 321, 323-A, and 371-D. They indicate that the constitutional intention was to understand the "local area" in the municipal board, district board etc. the High Court on this aspect rightly held that the definition does not comprehend entire State as local area as the use of word "a" before "local area" in the section is significant."

In coming to this conclusion, the Supreme Court relied on its earlier decision in *State of Karnataka v. Hansa Corporation* (7).

17. The impugned notifications require import duty to be paid before the import of goods in the State of Rajasthan and be paid in case it is licensed under bond when it is taken out of the bond. Therefore, it is not a duty imposed on entry into a local area for use consumption or sale within that local area but a duty imposed on import into or entry into the State in its entirety wherever it is imported. It cannot also be sustained under Entry 52.

18. The alternative contention raised by the learned counsel that the nature of Import Duty is not a tax but is a fee under Entry 66 need not detain us for long. The position is well settled now by a chain of decisions of Supreme Court that to carry on the activities relating to intoxicants vests exclusively in the State and it is a privilege of the State whether to part with that privilege in favour of someone or not. Secondly the right to practice any profession or to carry on any occupation, trade or business does not extend to practicing a profession or carrying on an occupation, trade or business which is inherently vicious and

pernicious, and is condemned by all civilised societies. It does not entitle citizens to carry on trade or business in activities which are immoral and criminal and in articles or goods which are obnoxious and injurious to health, safety and welfare of the general public, i.e., *res extra commercium*. (outside commerce). There cannot be business in crime and the Potable liquor as a beverage is an intoxicating and depressant drink which is dangerous and injurious to health and is, therefore, an article which is *res extra Commercium* being inherently harmful, A citizen has, therefore, no fundamental right to do trade or business in liquor. Hence the trade or business in liquor can be completely prohibited.

19. Thus, a person who has been licensed to trade in potable liquor by way of parting with the privilege by the State in his favour does not acquire any fundamental right of freedom of trade in the sense it is understood under Article 19(1)(g). There being no fundamental right to trade in intoxicants and potable liquors, charging of fee does not invite operation of Article 19(1)(g) or 301 which do not impinge on their freedom to carry on any trade or commerce through out the country. The activity of trading in intoxicants can be prohibited totally and this total prohibition includes within its narrower right vesting in the State to permit dealing in intoxicants on such terms of general application as the State deems expedient. Since the right belong to the State, . it is open to the Govt. to part with that for a consideration, it is further beyond pale of doubt that apart from duties imposable on the person licensed to trade in intoxicants any amount chargeable b the State is consideration for exclusive privilege which it has parted with and it is not strictly in sense of nature of levy of fees. The principle was enunciated in *Har Shankar v. Dy. E. & T. Commr.* (8), wherein the court held:

"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 with parting privileges 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."

20. This view has been reiterated by the Supreme Court in *Khoday Distilleries Ltd. and Others Vs. State of Karnataka and Others*, It may be noticed that in *Har Shankar's* case licence fee whether charged by way of auction or fixed fees envisaged under the Punjab Excise Act were held to be consideration for parting with the privilege and not as a fee in its technical sense.

21. In *M/s. Khoday Distilleries Ltd. v. State of Karnataka* (supra), the Court held referring to its earlier decision in *Har Shankar's* case that the Govt. has the power to charge a price for parting with its rights. It also further observed that the licence fee which the State Government charged to the licensee through the medium of auctions or the fixed fee which was charged to the vendors of foreign liquor holding licenses need bear no quid pro quo to the services rendered to the licensees. In this Connection, the Court found that State Government is authorised to levy fees for various kinds of permits or licences which may be required for activities connected with the manufacture, supply or sale of liquor.

The case was concerning labelling liquor bottles and levying fees for such labelling. The Court held:

"Labelling of liquor bottles with brand labels is an essential activity activity connection with the sale and distribution of different varieties of liquor manufactured in the State by different manufactures or imported into or exported outside the State The fee for approval of labels is an aspect of the right to sell or distribute liquor which right the State Govt. has parted with for consideration in the form of a fee. the increase in the fee from Rs. 100/- to Rs. 25,000/- may appear, at first glance, to be exorbitant, but it constitutes an extremely small percentage of the total turnover of various produced.

22. In *State of Orissa v. Narain Prasad* (supra), the Court considered the question of excise duty which was collected from the licensees. Challenge was made to the validity of levy of excise duty. The Court repelled the contention by holding that:

"What all the licensee paid is nothing but for grant of licence and the mere fact that the total consideration fixed comprise several elements (including excise duty), it cannot be said that excise duty is levied upon the licensee. The amounts mentioned in Rules 6 and 6-A as also the undertakings contained therein, together constitute the consideration for grant of privilege/licence determined by auction, as contemplated by Section 29 of the Act. The obligation to remit the excise duty is independent of the sale/purchase of liquor; it is payable on or before the specified dates every month; it is in addition to the monthly installment payable under Rule 6; its remittance is not tied up to the purchase of MGQ except to the extent that the licensee has to pay the prescribed installment of excise duty prior to the lifting of the liquor. It, therefore, cannot be said that there is any levy of excise duty upon the licensee. The concept here is altogether different. It is a case where the consideration payable by the licensee for grant of licence is made up of monthly rental plus excise duty besides the obligation to purchase the MGQ. The licensee pays the rental and excise duty as undertaken by him under the agreement/contract executed by him and as required by conditions of the licence under which he is doing business, i.e. as and by way of consideration."

23. It may be noticed in connection with this case that excise duty is levied on manufacture and not on sale or the purchaser of goods. The apex Court in *State of U.P. v. D.C.M. (12)* while considering the nature of excise duty and countervailing duties leviable u/s 28 of U.P. Excise Act 1910 said:

"A duty of excise u/s 28 is primarily levied upon a manufacturer producer in respect of the excisable commodity manufactured or produced irrespective of its sale."

24. Since the excise duty was leviable on manufacture and the taxing even had already taken place before the obligation to pay under the licence arose on the part of the licensee. Whatever was payable by the licensee in respect of the

obligation of manufacturer which had arisen prior to the grant of licence became part of the price payable for privilege and did not bear the character of the tax or fee by whatever name it is called.

25. Considering the aforesaid principles, this Court has also taken the view in the case of this very petitioner in D.B. Writ Petition No. 6568/99 decided on 3.7.2001 that charging of permit fees for bringing in the IMFL/Indian Made Beer from the State of Haryana within the State of Rajasthan under Rule 69-B is nothing but charging of consideration and is not in the character of a fee, the validity of which can be examined on the anvil of quid pro quo or as regulatory or compensatory measure. The distinction of tax and a fee in that sense is really not called for consideration in the case of charges levied against a licensee on any excisable article under the Rajasthan Excise Act.

26. The real question that calls for consideration is whether it is a tax imposed on the licensee and if so it is authorised by law? If it is not imposed on the licensee then the entire amount payable by the licensee passed into the realm of consideration for parting with the privilege in its favour and does not call for invoking the provisions of Article 19(1)(g) or 301 read with 304 of the Constitution for the simple reason that there being no freedom of trade to deal in potable liquor the very concept of trade under Article 19(1)(g) and free intercourse of trade and commerce in relation thereto under Article 301 cannot be invoked. For coming to this conclusion, the Court relied on the decision in *State of Bombay v. RMD Chamarbaugwala* (13), by holding that where a contract is extra commercium the provisions of Article 19(1)(g), 301 or 304 cannot be invoked by the petitioner to examine the validity of any payment which is part of consideration voluntarily agreed to be paid under a contract. Art. 14 may be invoked to examine the procedure and manner of awarding such exclusive privilege, but not to terms of contract at the instance of grantee. Attention is invited to the decision in *Inertia Industries v. State & Ors.* (14).

27. It is also seen above that even if it is levied as tax but if it is not leviable on the licensee it becomes part of consideration. For example in the case of Excise Duty, the obligation to pay Duty has arisen prior to grant of contract against manufacturer. In such cases, obligation to deposit excise duty before lifting the liquor from warehouse constitute only part of consideration and does not invite any investigation into the question of validity of tax. His locus standi to challenge the validity of such Duty has been denied in such cases.

28. However, it cannot be doubted that the levy of Import Duty is not a levy in the nature of Excise Duty which becomes payable by the manufacturer on manufacture and is otherwise obligation of somebody else than the licensee. Where a such is made payable by a licensee in addition to the price paid by him for lifting the liquor under a licence, it does not bear the character of tax paid by the licensee but it assumes the character of consideration under the contract. A party to the contract cannot challenge the consideration part of the contract which he has voluntarily agreed to pay. However, an import duty is not a tax

which is Imposed on somebody other than licensee, The levy of import duty as a tax, if it is held to be so, it can only be on the importer. If the importer is subjected to a tax as distinguished from consideration payable by him to State, for parting with its privilege in one's favour, the position will have to be examined on the anvil of the provisions of the Constitution.

29. As we have earlier examined that no tax by way of Import Duty can be levied under the scheme of Constitution by the State legislature, such levy also cannot be permitted- to be levied by the delegated authority of the State if it is levied as a tax.

30. In this connection, it may be very pertinent to notice that Section 28 which authorises imposition of tax by the State legislature also does not include levy of Import Duty on the import of excisable article within the State of Rajasthan. Section 28 of the Excise Act reads as under:-

"28. 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 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.

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

31. A bare reading of Section 28 goes to show that it does not authorise levy of tax on import of excisable articles simplicitor.

32. The question which therefore really calls for consideration is whether the import duty chargeable under the impugned Notifications can be properly be held as a tax or was intended to be levied as part of consideration for parting with the exclusive privilege for wholesale vend of excisable article in favour of the petitioner.

33. It need be noticed that import, export and transport of excisable articles have attracted separate provisions under Chapter III from Sections 11 to 15 of the Act, which read as under:

11. Import of excisable article : - No excisable article shall be imported unless:

(a) the State Government has given permission, either general or special, for its import;

(b) such conditions (if any) as the State Government impose, have been satisfied, and

(c) the duty (if any) imposed u/s 28 has been paid or a bond has been executed

for the payment thereof.

12. Export and Transport of excisable article - No excisable article shall be exported or transported unless -

(a) the duty (if any) imposed u/s 28 has been paid or a bond has been executed for the payment thereof, and

(b) such conditions (if any) as the State Govt. may impose, have been satisfied.

13. Power of State Government to prohibit, import, export and transport of excisable article. - The State Government may, by Notification in the Official

(a) prohibit the import or export of any excisable article into or from the territories to which this Act extends or any part thereof;

(b) prohibit the transport of any excisable article.

14. Passes necessary for import, export and transport - No excisable article exceeding such quantity as the State Government may prescribe by Notification in the Official Gazette either generally for all the territories of the State of Rajasthan to which this Act extends or for any local area comprised therein shall be imported, exported or transported except under a pass issued under the provisions of the next following section:

Provided also, unless the State Government shall otherwise direct that no pass shall be required for transport of any excisable article or intoxicating drug exported-under a pass issued by an officer duly authorised in this behalf from any place beyond the limits of those parts of the State of Rajasthan to which this Act extends to any other place beyond the said limits.

15. grant of passes for import, export and transport.- (1) Passes for the import, export or transport of excisable article may be granted by the Excise Commissioner or by an Excise Officer duly empowered in this behalf subject to such restrictions as the State Government may impose in this behalf from time to time.

(2) Such passes may either be general for definite periods and kinds of articles or drugs or special for specified occasions or particular consignments only.

34. A perusal of Sections 11, 12 & 13 show that import, export and transport all have been treated as a separate aspect of the privilege and dealt with separately by the stature. Section 11 is explicit in its terms that it not only envisages imposition of taxes payable u/s 28 on the goods imported within the State but also envisages that State Govt. can give permission either general or special for the import of any excisable article and also prescribes such conditions which has to be specified before the same is permitted. In pursuance of these provisions, under the rules, separate provisions have been made for import, export and transport and possession of country liquor which is governed by Rules 3 to 18-A out of which Rules 3 to 8 govern the import of country liquor so also import and

export of Indian made foreign liquor and beer is dealt with in chapter III of the Rules. Rules 19 to 29 govern the general conditions of import of IMFL/Foreign liquor and beer.

35. Rules 24 and 25 are as under:-

24. Condition of Import- (1) A person holding a licence for the sale of Indian made Foreign Liquor and Foreign Liquor or the Commandant of Regimental units of the Armed Forces of the Union of India stationed in Rajasthan may import Indian made Foreign Liquor on prepayment of import duty in Rajasthan and under a permit issued under the next succeeding rule, from a distillery brewery or warehouse of the exporting State.

Provided that duty paid Rum possessed by any unit of the Indian Armed Forces may be imported into the State without payment of duty and such import shall not require any permit/pass from the State authorities.

(2) If the person authorised to import Indian made Foreign Liquor under Sub-rule (1), does not import the liquor for which he has deposited either the duty or the permit fee or both, he may be allowed refund by the Excise Commissioner.

25. Procedure for permit- (1) for a permit under the preceding rule, an application shall be made in writing to the District Excise Officer or Assistant Excise Officer of the District in which the licensed vendor holds a licence or the unit of the regiment is stationed (as the case may be)

(a) the name of the distillery, brewery, bonded warehouse or bonded laboratory from which the import is to be made.

(b) the name, complete description and quantity of each kind of liquor to be imported and whether the import is to be in bulk or in bottles;

(c) the route of import, and

(d) the amount of import duty to be paid.

(2) A separate application shall be made for each consignment. If the application is in order the District Excise Officer or Assistant Excise Officer shall, after checking and correcting the amount of duty entered therein endorse the application with an order directing the applicant to pay the amount unless there are reasons for rejecting the application.

(3) The applicant shall, after paying the amount of duty as ordered by the District Excise Officer or Assistant Excise Officer, and the prescribed permit fee, produce the receipt and the application before the District Excise Officer or Assistant Excise Officer, who shall issue the permit in quadruplicate, sanctioning the import by the applicant of Indian made Foreign Liquor of the kind and quantity specified in the permit for the purpose mentioned in the permit, One copy of the permit shall be given to the applicant, the second copy shall be sent to the appropriate Excise Officer of the State of Export, the third shall be sent to

the Excise Inspector of the Circle and the forth copy shall be retained by the District Excise Officer or Assistant Excise Officer, for record and for verification (if deemed necessary) of the consignment on arrival.

36. Relevant for our purposes. Rules 24 & 25 of Rajasthan Excise Rules, require that a person holding a licence for the sale of Indian made foreign liquor and foreign liquor or the Commandant of Regimental units of the Armed Forces of the union of India stationed in Rajasthan may Import Indian made Foreign Liquor on prepayment of import duty in Rajasthan and under a permit issued under the next succeeding rule, from a distillery brewery or warehouse of the exporting State provided that duty paid Ram possessed by any unit of the Indian Armed forces may be imported into the State without payment of duty and such import shall not require any permit/pass from the State authorities, if a person authorised to import Indian made foreign liquor does not import the liquor for which he has deposited either the duty or permit fee or both, he may be allowed to refund by the Excise Commissioner. Rule 24, therefore, envisages two separate aspect of payment of duty on import and payment of permit fee and for that purpose.

37. For permit fees separate provisions have been made under Rule 69-B. Rule 25 requires the person desirous of importing IMFL/Beer from other States to the State of Rajasthan to make an application in writing to the District Excise Officer or Assistant Excise Officer of the District in which the licensed vendor holds a licence or the unit of the regiment is stationed. Specifying the distillery, brewery, bonded warehouse or bonded laboratory from which the import is to be made in that district. Sub-rule (3) of Rule 25 envisages paying the amount of duty as ordered by the District Excise Officer or Assistant Excise Officer and the prescribed permit fee and on production of such receipts and the application before the District Excise Officer or the Assistant Excise Officer is required to issue the permit in quadruplicate sanctioning the import by the applicant of Indian made Foreign Liquor of the kind and quantity specified in the permit for the purpose mentioned in the permit.

38. The relevant for our purpose in the context of present controversy is Rule 69-B which reads as under;-

"69-B. Fees for certain permits:- The under mentioned fees are prescribed for a permit for import into, export outside or transport within the State of Rajasthan of the following excisable Articles:

S.No.

Name of Excisable article

Permit fee payable

1.

Methylated Alcohol (Methanol)-

Rs. 1.00 per liter

2.

Denatured Spirit and denatured spirituous preparations

Rs. 2.00 per liter

3.

Indian Made Foreign liquor

Rs. 3.50 per liter

4.

Country Liquor

Rs. 5.00 per Bulk liter

5.

Foreign Liquor

Rs. 4.00 per liter

6.

Bhang

Rs. 5.00 per kg.

39. If we read Section 11 of the parent statute conjointly with Rules 24, 25, 27 and Rule 69-B in the context of other provisions relating to export outside and transport within the State of Rajasthan of excisable articles, it is apparent that parent Act envisages levy of no taxes other than envisaged u/s 28 of the Act namely the Excise Duty and the Countervailing Duty at the rates permissible within the limits envisaged under Entry 51 of the State List. Section 11 envisages a grant of permit by the Govt. of the State in which the excisable article is to be imported whether by general or special order and impose conditions on which the imports can be made. It is also true that the nomenclature of a levy whether as a Duty or Fee or tax is not conclusive of the nature of the levy. Rule 24 only reveals such permission of State to import 1MFL by a person holding a licence for sale of Indian made foreign liquor and foreign liquor of the Commandant of Regimental units of the Armed Forces of the Union of India stationed in Rajasthan on prepayment of import duty in Rajasthan under a permit issued under Rule"24. Thus, it is apparent that notwithstanding there being no authority to levy duties different other than envisaged under Rule 28, Rules 24 and 25 envisage the levy and collection of import duty as well as permit fees at the prescribed rates. While the permit fee required for import, export or transport of excisable article within the State of Rajasthan is prescribed under Rule 69-B, the rate of import duty is not envisaged under the rules but has been prescribed by

the impugned notification only. It is clear under the rules that Import Duty and permit fees have been treated distinctly and cannot be considered one for another. There is no room under the scheme of rules to consider the Duty imposed by the impugned notifications as fees required for permit for import.

40. In the Scheme, of the Act there is no requirement of issuing a licence for import independent of licence to vend and only requirement is of seeking a permit by a licensee, the person authorised to sale IMFL/Beer in Rajasthan, the import duty charged under the Notifications cannot be related to a fees charged for any licence of import. Fees for the licence for vend admittedly has been prescribed otherwise and paid by the petitioner.

41. The permission required u/s 11 read with Rule 24 is to be obtained in the manner prescribed under Rule 25.

42. The permit fee as required under Rule 69-B with effect from 2.11.99 is permissible under the provisions of the statute as per the decision which we have rendered in the Writ Petition No. 6568/99 decided on 3.7.2001 which was filed by the very same petitioner. There being no permit fee prescribed under the relevant Rule 69-B prior to 2.11.99 and the continued levy of permit fee and import duty even after the issuance of the Notification dated 2.11.1999, leaves no room of doubt that the levy imposed vide impugned Notifications were never intended to be fees for parting with the part of privilege by the State in favour of licensee but was charged only as a tax for which, no authority existed with the State either under the statute or under the Constitution.

43. Thus, on the one hand Section II comprehends a licence to import on condition of payment of duties levied u/s 28 and on satisfying the conditions of licence, the rule envisages in addition to Section 28 a levy of import duty as well as a permit fee for import of the goods, therefore rule 24 in our opinion not only merely fixes the charges as consideration for parting with the privilege in form of permit fee for permit required to be obtained under Rule 25 but also envisages levy of import duty by way of a tax.

44. The term "import" signifies bringing in from another State within the State of Rajasthan as has been explained in petitioner's own case referred to above. For bringing in the goods from outside the State to within the State of Rajasthan if two "levies are distinctly envisaged under Rule 24, it cannot be argued that the draftsman of the rule was not aware about the distinction between the duties and fees and whatever the levy of duty, charges of fee are enumerated were alt intended to be levied as duty or fees only.

45. This is clear enough from Sub-rule (2) of Rule 24 and Sub-rule (3) of Rule 25. Sub-rule (2) of Rule 24 envisages in no uncertain terms refund of "Duty or permit fee or both" in case no import is made by licensee referred under sub Rule (1) and Sub-rule (3) of Rule 25 provides for collection of both the import duty and the permit fee by the person applying for permit envisaged under Rule 24.

46. Rule 69-B which was framed for giving effect of permitting a person to bring goods from outside state within the State namely by import provide levy of fees for issue of permit under Rule 24 as per provision prescribed in Rule 25 for import into within the State of Rajasthan. Therefore, the consideration which was envisaged for parting with the privilege in its aspect of import or export or transport were specifically and separately provided under Rule 69-B. The clear meaning in which the word "duty" and "fees" has been used in this connection is further apparent from the fact that while in the first instance on the items stated in table u/s 69-B a unified fees was charged for grant of permit for import, export or transport of excisable article mentioned in the table. However, later on by amending the table, the column No. 3 as originally framed was divided into three sub columns as will be apparent from the table as it stood prior to amendment vide Notification dated 31st march, 1997, which not only provided about amendments in various rules but varied scales of fees chargeable under different provisions of the rules. In this Notification Rule 69-B was amended by substituting the words import and export with the words bringing in and sending out and substituting the tale. The table, as was existing, reads as under:-

"69-P Fees for certain permits:

" The under mentioned fees are prescribed permit fees for import into, export outside of transport within the State of Rajasthan of the following Excisable Articles.

S.No.

Name of Excisable Article

Permit fees per bulk liter/kg

import into Bringing

Export Outside Sending

Transport within State

Rs.

Rs.

Rs.

1.

Absolute alcohol Methylated Alcohol Denatured spirit and preparations thereof

3/-

3/-

3/-

2.

Rectifies spirit Extra Natural alcohol, Malt Spirit, High banquet Spirit & Likewise Spirits/ alcohols.

3.

Imported Liquor and beer

10/-

10/-

10/-

4.

Indian Made Foreign Liquor

4/-

5.

Indian Made Beer

4/-

6.

Country Liquor

5/-

7.

Bhang

5/-

f

47. By this substitution, the former column No. 3 was divided into three sub columns and envisaging separate fees for import, export and transport. In some of the articles where the rule making authority wanted, it levied permit fees for all the three aspects of the privilege namely for permit for importing, permit for exporting and permit for transporting the excisable articles within the State. Under the Notification dated 31st march, 1997 Item No. 1 Absolute alcohol Methylated Alcohol Denatured spirit and preparations thereof as well as item No. 3 imported liquor and beer were stated for levy or permit fee for all the three aspects of the privilege separately whereas on item No. 2, 4, 5, 6 & 7 which also included Indian made beer at Item No. 5 only permit for transport within the State of Rajasthan was chargeable. This provision and Rule 69-B was further amended vide impugned Notification dated 2.11.1999 and Indian made beer as well as IMFL at entry 5 and 4 respectively were subjected to charge of permit fee for bringing in and sending out and for transporting excisable articles separately. Therefore, the consideration for permitting a person to bring concerned excisable

article within the State of Rajasthan were distinctly and separately envisaged under Rule 69-B.

48. It further be noticed that notwithstanding this alteration in Rule 69-B, the imposition of Import Duty in addition to Excise Duty and the Countervailing Duty continued to exist under the impugned Notifications operating for charging the duties u/s 28. It may further be noticed that separate Notification has been issued u/s 28 for charging duties as taxes on excisable articles including potable liquor and separate Notifications have been issued for charging fees leviable under the rules. This background of levying Duties and charging fees wherever they are levied under the rules, clearly goes to show the clear intention of the State in levying tax wherever they wanted to levy it as tax and, wherever they wanted to charge as for parting with the privilege. In that there is no debate that for issuing separate notification for charging "import duty" no authority existed in the Constitution or under the Parent Act, only because of Rule 24 which was in exercise of the authority conferred by the parent Act, Notification for prescribing rates of Import Duty on excisable article was issued. Permit was required to be obtained for person desirous of importing excisable article on payment of separate fee. This charging of fees for permit is consideration for parting with the exclusive privilege which the State had with it namely import of excisable articles within [he State which can also be termed as bringing in excisable articles from outside within the State. This consideration was separately prescribed under Rule 69-B.

49. This conduct of the respondents in framing of the rules and imposing the tax as well as determining the scale of consideration for issuing permit leaves no room of doubt in our mind that under the impugned Notification the levy of import duty is only by way of a tax and not by way of consideration for parting with the privilege of import as contended by the respondents.

50. As there is no doubt about the fact that there is no authority to levy tax in the nature of import Duty with the State legislature, such levy cannot be sustained.

51. This necessitates the consideration for refund. We are of the opinion that since the principle is now settled that in the matter of levy of indirect taxes the ultimate burden is on the consumer. The person on whom the indirect tax is passed on and is burdened is entitled to its reimbursement. In such events, the claim of refund is ordinary not looked favourably by the Court o the principle that no person can be allowed to retain with him the amount to enrich himself unjustly at the cost of others. The principle is well established by a series of decisions of the Supreme Court.

52. Since Notifications dated 9.12.1996 and 31.3.1997 stand superceded by Notification dated 9.7.1998, to the extent it provided new rates of taxes, transactions under the first two Notifications stand concluded long before the challenge to these Notifications and burden of tax already stand transferred to

end consumers, interest of justice requires that only the current Notification dated 9.7.1998 be quashed.

53. Accordingly we, quash the levy of Import Duty vide Notifications dated 9.7.1998 to the extent it prescribes rates of Import Duty on excisable articles.

54. As it appears from the record of the case, there has been stay of charge of import duty from the applicant under Notification dated 9.11.1999 w.e.f. the date of the order until further orders and SLP has been dismissed by the Supreme Court by order dated 21.1.2000. This, the petitioner has not been subjected to levy of import duty since the interim order was passed by this Court in the writ petition. The petitioner has already paid the import duty under his previous licences without demur and must have recovered the same from buyers. The burden of proof was on him to show that he has not transferred this duty to its buyer. For the period prior to interim order and under licence prior to the grant of interim injunction the petitioner must have been passed the duty on to him buyers, in these circumstances, we are not inclined to grant the relief for refund of the import duty paid by the petitioner until the interim order was passed by this Court. However, he shall be absolved from paying the import duty since the date of passing of the interim order by this Court.

55. We may clarify that so far as levy of permit fee u/s 69-B is concerned, we in our separate judgment have upheld its validity as part of consideration.

56. In view of aforesaid, we hold that the State Government has no authority to levy the import duty in addition to excise duty and countervailing duty under Notifications dated 9th July, 1998 and the provisions under Rule 69-B. However, as the burden of this duty must have been passed on to the consumers prior to passing of interim order referred to above, it would be unjust to allow the refund on that ground. No import duty payable ante to interim order shall be refunded. However the respondents were restrained from realising import duty by way of interim orders of Court and SLP against which has been refused we have held the import duty to be invalid recovery shall be effected as a result quashing of the aforesaid Notifications to extent they levy import duty from petitioner.

57. Accordingly, petition is allowed in the stated above.

58. No costs.