
(2013) 09 MAD CK 0289

In the Madras High Court

Case No : Tax Cases (Revision) No"s. 637, 639, 640, 641, 644 of 2006 and 1634, 1662, 1712, 1729, 1730, 1738 of 2008

Mohan Breweries and Distilleries Ltd.

APPELLANT

Vs

State of Tamil Nadu

RESPONDENT

Date of Decision : 19-09-2013

Acts Referred:

Citation : (2014) 67 VST 102

Hon'ble Judges : T.S. Sivagnanam, J;Chitra Venkataraman, J

Bench : Division Bench

Advocate : C. Natarajan, for N. Inbarajan, for the Appellant; A.L. Somayajji, Advocate-General assisted by Manoharan Sundaram, Additional Government Pleader (Taxes), A.R. Jaya Prathap, Government Advocate (Tax) and J. Adithya Reddy, for the Respondent

Judgement

Chitra Venkataraman, J.—The assessee is on revision as against the common order passed by the Sales Tax Appellate Tribunal relating to the assessment years 1982 to 1986. T.C. Nos. 640 of 2006 and 1730 of 2008 relating to assessment year 1982-83; T.C. Nos. 644 of 2006 and 1738 of 2008 relating to assessment year 1983-84; T.C. Nos. 641 of 2006 and 637 of 2006 relating to assessment year 1984-85 and T.C. Nos. 639 of 2006 and 1662 of 2008 relating to assessment year 1985-86, raises the common question of law as to whether the vend fee paid by the licensee-Tamil Nadu State Marketing Corporation Limited (in short, "TASMAC") was to be included in the taxable turnover of the assessee.

2. Whereas T.C. No. 1634 of 2008 relating to assessment year 1983-84; T.C. No. 1712 of 2008 relating to assessment year 1984-85 and T.C. No. 1729 of 2008 relating to assessment year 1985-86 raises the question regarding levy of penalty u/s 12(5)(iii) of the Tamil Nadu General Sales Tax Act, 1959 in respect of revision of assessment.

3. (a) The question of law framed on the vend fee inclusion is as follows:

Whether the vend fee imposed and collected by the Government under rule 15 of the Tamil Nadu Indian Made Foreign Spirits (Supply by Wholesale) Rules, 1981 from the Tamil Nadu State Marketing Corporation Limited is an exaction on the said purchaser-Wholesale Corporation so that the said vend fee, which was neither contracted or collected by the petitioner-manufacturers, is outside the sale price of the petitioners?

(b) The question of law raised in T.C. No. 1634 of 2006 relating to levy of penalty u/s 12(5)(iii) of the Tamil Nadu General Sales Tax Act, 1959 is as follows:

Whether the Sales Tax Appellate Tribunal committed an error of law in confirming the levy of penalty u/s 12(5)(iii) of the Tamil Nadu General Sales Tax Act, 1959 on the sales tax levied on excise duty, when in fact there was uncertainty in the legal position during the assessment year 1983-84 as to whether sales tax was at all leviable on the excise duty element in a situation where the incidence of excise duty was on the buyer of the IMFL and beer, namely, the Tamil Nadu State Marketing Corporation?

4. Since the facts in all these cases are common and the order passed by the Sales Tax Appellate Tribunal is also common, it is suffice to refer to the facts as given in T.C. No. 640 of 2006.

5. The assessee herein is a company engaged in the manufacture of Indian-made foreign liquor. For the assessment year 1982-83, originally, the assessing officer finalised the assessment holding that the assessee had a taxable turnover of Rs. 3,41,42,842. While finalising the assessment, the assessing officer included the excise duty and vend fee on the manufactured Indian-made foreign liquor at the hands of the dealers. Subsequently, the assessment was sought to be revised to include the vend fee paid by the licensee TASMAL in terms of rule 15(2) of the Tamil Nadu Indian-Made Foreign Spirits (Supply by Wholesale) Rules, 1981. The assessee contended that unlike the vend fee imposed under rule 22(3) of the Tamil Nadu Indian-Made Foreign Spirits (Manufacture) Rules, 1981 vend fee imposed under rule 15(2) of the Tamil Nadu Indian-Made Foreign Spirits (Supply by Wholesale) Rules, 1981 on the TASMAL was not exigible to tax, since the liability cleared by the wholesale dealer was independent of the sale and the vend fee and excise duty on manufacture levied under rule 22(3) of the Tamil Nadu Indian-Made Foreign Spirits (Manufacture) Rules, 1981. Thus the liability under rule 15(2) of the Tamil Nadu Indian-Made Foreign Spirits (Supply by Wholesale) Rules, 1981 was independent of rule 22(2) of the Tamil Nadu Indian-Made Foreign Spirits (Manufacture) Rules, 1981. Rejecting the assessee's contention on the vend fee paid by the purchaser in terms of the wholesale vending rules, the assessment was completed by including the said amount too, at the hands of the assessee. The assessee objected to the above and submitted that even after the judgment of this court in Mohan Breweries and Distilleries Ltd., etc. Vs. Commercial Tax Officer, Madras and others, , the question of inclusion of the vend fee paid by the purchaser at the hands of assessee would not arise. Thus the vend fee incurred by TASMAL imposed under the Tamil Nadu

Indian Made Foreign Spirits (Supply by Wholesale) Rules, 1981 would have no relevance to include the same in the taxable turnover of the assessee, as the said payment was totally unrelated to the sale by the manufacturer. Consequently, the reassessment was bad. The assessing officer held that on the earlier round of litigation, for the assessment year 1982-83, which went up to the Supreme Court on the inclusion of excise duty and vend fee, it was held that the same would form part of the taxable turnover. Hence, the assessing officer, rejected the said contention and ultimately confirmed the assessment u/s 16 of the Tamil Nadu General Sales Tax Act.

6. Aggrieved by this inclusion of the vend fee levied on the wholesale dealer in the assessment the assessee went on appeal before the Appellate Assistant Commissioner. The first appellate authority pointed out that insofar as the excise duty payment was concerned, the decision of the apex court reported in *Mohan Breweries and Distilleries Ltd., etc. Vs. Commercial Tax Officer, Madras and others*, , in the assessee's own case would have a direct bearing. Consequently, he directed the assessing officer to reassess the turnover actually arrived on the basis of the excise duty and the actual sales effected by the assessee. As regards the vend fee, paid by the wholesale dealer, viz., the TASMAC, the first appellate authority pointed out that there were two vend fees, viz., one under rule 22(2) of the Tamil Nadu Indian-Made Foreign Spirits (Manufacture) Rules, 1981, wherein, the vend fee was to the tune of Rs. 2 per bulk litre paid by the manufacturer. The vend fee, to be collected from the TASMAC was included in their cost and suffered sales tax in their hands. In support of this, the assessee filed a copy of the certificate issued by the TASMAC in respect of another manufacturer, viz., Tvl. Balaji Distilleries Ltd., since the excise policy and pricing was uniform to all the manufacturers and TASMAC was the wholesale seller in the State. The first appellate authority accepted this. Besides rule 22(2) of the Tamil Nadu Indian-Made Foreign Spirits (Manufacture) Rules, 1981, he pointed out that under rule 15(2) of the Tamil Nadu Indian-Made Foreign Spirits (Supply by Wholesale) Rules, 1981, the vend fee was again specified and collected from the wholesale seller, viz., TASMAC. The first appellate authority pointed out that the scrutiny of the records filed by the assessee revealed that this vend fee collected from the wholesale dealer as per rule 22(2) of the Tamil Nadu Indian-Made Foreign Spirits (Manufacture) Rules, 1981 was already included for taxation at the hands of the assessee; the decision of this court as well as the apex court in the assessee's own case, did not deal with vend fee paid by the wholesale dealer under rule 15(2) of the Tamil Nadu Indian-Made Foreign Spirits (Supply by Wholesale) Rules, 1981. As far as the vend fee paid by the wholesale dealer under rule 15(2) of the Tamil Nadu Indian-Made Foreign Spirits (Supply by wholesale) Rules, 1981 is concerned, it was an independent obligation on the part of the wholesale dealer, i.e., TASMAC to pay the vend fee. In the circumstances, he remitted the matter back to the assessing officer for reconsideration of this issue.

7. Aggrieved by this, the assessee once again went on appeal before the Sales Tax Appellate Tribunal contending that when rule 15(2) of the Tamil Nadu Indian

Made Foreign Spirits (Supply by Wholesale) Rules, 1981 clearly stated that the vend fee payable by the wholesale dealer, viz., TASMAL, on its sale, the same would not form part of the turnover of the assessee. Thus there was no need for a remand.

8. By a common order dated September 9, 2002, the Sales Tax Appellate Tribunal considered the appeals filed by the assessee relating to the assessment years 1982-83 to 1986-87 and ultimately came to the conclusion holding that the vend fee paid by the wholesaler was liable to be included at the hands of the assessee's taxable turnover. In so holding it referred to the decision of the apex court reported in Mohan Breweries and Distilleries Ltd., etc. Vs. Commercial Tax Officer, Madras and others, and thus the assessee's appeals were dismissed.

9. It may be of relevance to note herein that while passing the revision of assessment, the assessing authority also levied penalty invoking section 12(5) (iii) of the Tamil Nadu General Sales Tax Act, 1959. Having regard to the assessment upheld by the Sales Tax Appellate Tribunal, the penalty also stood attracted in respect of the assessment years 1983-84, 1984-85, 1985-86. As far as the assessment year 1982-83 is concerned there was no levy of penalty. Hence, the penalty levied has to be restricted to consideration of the assessment years 1983-84 to 1985-86.

10. We may also note herein that while the assessee filed an appeal before the Sales Tax Appellate Tribunal as against the remand order passed by the first appellate authority, the State also preferred appeals on the remand made. Thus, ultimately, the Sales Tax Appellate Tribunal allowed the State appeals on the aspect of vend fee.

11. Aggrieved by the orders of the Sales Tax Appellate Tribunal, the assessee is on revision before this court.

12. The learned senior counsel appearing for the assessee submitted that as far as the levy of vend fee is concerned, rule 22(2) of the Tamil Nadu Indian-Made Foreign Spirit (Manufacture) Rules, 1981, as it stood at the relevant point of time, imposed the liability on excise duty as well as on vend fee to be discharged by the wholesale vendor, viz., TASMAL. Rule 22 made it clear that the liability to make the payment was shifted to the licensee, viz., TASMAL and that payment would be for and on behalf of the manufacturer. However, on the vend fee levied as per rule 15(2) of the Tamil Nadu Indian-Made Foreign Spirits (Supply by Wholesale) Rules, 1981, no sales tax could be levied on the manufacturer, it being a separate fee for the privilege granted to the TASMAL as a wholesale dealer. The basis of calculation on the vend fee payable by TASMAL is totally different from what is contemplated under rule 22 of the Tamil Nadu Indian-Made Foreign Spirit (Manufacture) Rules, 1981 is concerned. He further pointed out that for inclusion under the definition of "turnover", only such of those amounts, which are totally linked to the sale stands attracted and anything the purchaser has to pay post-sale would be the liability of the purchaser, viz., TASMAL only. On

no count, the same could be brought under the taxable turnover concept of the assessee. Referring to rule 17C of the Tamil Nadu Prohibition Act, 1937 learned Senior Counsel pointed out that the provision contemplates grant of an exclusive or other privileges on manufacturing of Indian-made foreign spirits and selling it by retail within any local area. However, as far as the wholesale dealership is concerned, the Act recognised the Tamil Nadu State Marketing Corporation (in short TASMAC) as having the sole, exclusive privilege to supply by wholesale Indian-made foreign spirits for the whole of State of Tamil Nadu and no person is entitled to any such privilege. Considering such privilege granted, the levy contemplated u/s 17D of the Tamil Nadu Prohibition Act, 1937 is by way of licence fee and any amount paid has to be considered as one in the way of privilege fee and even if we give it a name as vend fee or excise duty, the same could only be read as a privilege fee, it having no correlation to an excise levied in the normal legal sense. Thus for doing wholesale business, the privilege fee fixed is different from the excise duty or vend fee payable by TASMAC on behalf of the manufacturer. The levy collected under rule 15 of the Tamil Nadu Indian-Made Foreign Spirits (Supply by Wholesale) Rules, 1981 would be only on account of the privilege granted to TASMAC as an exclusive wholesale dealer and it could never form part of the price or the consideration that the TASMAC had to pay for purchasing of the manufactured product from the stock of the assessee. In this connection, learned senior counsel placed reliance on the decision of the apex court reported in *State of Kerala and Others Vs. Maharashtra Distilleries Ltd. and Others*, wherein, similar such provision was considered and held that a fee paid for the privilege of marketing would not be part of the consideration and hence the turnover of the manufacturer. Referring to the decision in the assessee's own case reported in [1990] 78 STC 461 (Mad) (*Mohan Breweries and Distilleries Ltd. v. Commercial Tax Officer, Porur Assessment Circle, Porur, Madras*) confirmed by the apex court in the decision reported in *Mohan Breweries and Distilleries Ltd., etc. Vs. Commercial Tax Officer, Madras and others*, learned senior counsel submitted that the issue raised herein has no relevance to what had been decided by this court.

13. He further pointed out that the assessee therein raised both the issues, viz., vend fee as well as excise duty. This court had considered the inclusion of excise duty payable by the assessee, but collected from the TASMAC as part of the taxable turnover. The question now raised as regards the inclusion of vend fee paid by the TASMAC under rule 15 of the Tamil Nadu Indian-Made Foreign Spirits (Supply by Wholesale) Rules, 1981 was never the subject matter of the said case and has nothing to do with vend fee under rule 22 of the Tamil Nadu Indian-Made Foreign Spirit (Manufacture) Rules, 1981. In the circumstances, the order of the Sales Tax Appellate Tribunal failed to consider the scope of rule 15(2) of the Tamil Nadu Indian-Made Foreign Spirits (Supply by Wholesale) Rules, 1981, which would be of relevance to the facts and circumstances of this case.

14. As far as the penalty levied u/s 12(5)(iii) of the Tamil Nadu General Sales Tax Act, 1959 is concerned, learned senior counsel submitted that once the

assessment has been reopened u/s 16 of the Tamil Nadu General Sales Tax Act, the only relevant provision to levy penalty will be section 16(2) of the Tamil Nadu General Sales Tax Act and it can never be u/s 12(5)(iii) of the Act, which is related to an original assessment. Thus conceptually, the scope of section 12(5)(iii) is different from section 16 of the Act and that the penalty follows only when the turnover had escaped assessment and there could be no demand of penalty u/s 12(5)(iii) of the Act. The assessment herein was made u/s 16(1)(a) of the Tamil Nadu General Sales Tax Act, 1959 by way of the turnover referring under assessment. Thus, learned senior counsel relied on the decision of this court reported in *State of Tamil Nadu Vs. Indian Silk Traders*, wherein, this court had pointed out the clear distinction between "incomplete and incorrect" return as appearing u/s 12(5)(iii) of the Act which does not imply any deliberate, suppression or willfulness, and penalty u/s 16(2) of the Act where willfulness on the suppression of turnover would be of relevance. In the absence of any definite finding on the contumacious conduct of the assessee in deliberately suppressing the turnover, the penalty levied u/s 12(5)(iii) of the Tamil Nadu General Sales Tax Act, 1959 has no legal basis. Hence, it is liable to be set aside.

15. Countering the claim of the assessee, learned Advocate-General appearing for the Revenue placed heavy reliance on the order of assessment as well as the orders passed by the Sales Tax Appellate Tribunal and submitted that even going by the provisions of the Act as well as the Rules made with reference to supply by wholesale as well as by manufacturing the levy of vend fee under rule 15(2) of the Tamil Nadu Indian-Made Foreign Spirits (Supply by Wholesale) Rules, 1981, has to be treated as a levy payable by the assessee, but collected through TASMAL. In the circumstances, no exception could be taken to the inclusion of vend fee paid by TASMAL at the hands of the assessee for the purpose of taxable turnover. He further pointed out that the assessee had filed writ petition before this court, which came up for consideration in the decision reported in [1990] 78 STC 461 (Mad) (*Mohan Breweries and Distilleries Ltd. v. Commercial Tax Officer, Porur Assessment Circle, Porur, Madras*) and there was no argument regarding the independent vend fee payable by the wholesaler. Consequently this court had decided only on the inclusion of excise duty levied at the hands of the assessee, which means the assessee had no grievance as regards the vend fee. Consequently, it is not open to the assessee now, to raise this issue in the present tax case. In other words, the decision of this court reported in [1990] 78 STC 461 (Mad) (*Mohan Breweries and Distilleries Ltd. v. Commercial Tax Officer, Porur Assessment Circle, Porur, Madras*), as confirmed in *Mohan Breweries and Distilleries Ltd., etc. Vs. Commercial Tax Officer, Madras and others*, by the apex court would cover the issue on hand. Consequently, no grievance could be made on the inclusion of vend fee paid by the TASMAL as per rule 15 of the Tamil Nadu Indian-Made Foreign Spirits (Supply by Wholesale) Rules, 1981, which could be a subject-matter for distinguishing these tax cases.

16. The learned Advocate-General, reiterating the reliance placed on the decision of this court reported in [1990] 78 STC 461 (Mad) (*Mohan Breweries and*

Distilleries Ltd. v. Commercial Tax Officer, Porur Assessment Circle, Porur, Madras), pointed out that the assessee raised a specific issue as regards the inclusion of excise duty in the taxable turnover of the assessee. The assessee contended therein since the payment for excise duty fell on the wholesaler, viz., TASMAC, the same could not be part of the sale price to be assessed at the hands of the assessee. This court rejected such contention following the decision reported in McDowell and Co. Ltd. Vs. Commercial Tax Officer, holding that the incidence of excise duty falls directly on the manufacturer irrespective of the point of collection. The said component would nevertheless form part of the turnover. In the circumstances, this court held that excise duty admittedly paid by the purchaser, viz., TASMAC was includible in the taxable turnover for the purpose of assessment at the hands of the assessee.

17. Heard Mr. C. Natarajan, learned senior counsel appearing for the petitioner and Mr. A.L. Somayaji, learned Advocate-General appearing for the Revenue and perused the records.

18. It is no doubt true that the affidavit filed before this court as produced by the learned Advocate-General shows that the assessee had canvassed excise duty as well as vend fee included in the assessment of the assessee. The fact remains that this court's decision rested only on the excise duty ultimately paid by TASMAC-the wholesale dealer, and on an Appeal before the apex court in the decision reported in Mohan Breweries and Distilleries Ltd., etc. Vs. Commercial Tax Officer, Madras and others, , the decision of this court reported in [1990] 78 STC 461 (Mad) (Mohan Breweries and Distilleries Ltd. v. Commercial Tax Officer, Porur Assessment Circle, Porur, Madras) was confirmed holding that the mere fact of deferring the collection of excise duty to be collected at the hands of the purchaser, viz., TASMAC would not make any difference for the purpose of inclusion of excise duty in the taxable turnover of the assessee. The apex court pointed out that rule 22 of the Tamil Nadu Indian-Made Foreign Spirits (Manufacture) Rules, 1981, provided a mode of collecting excise duty, a mode, which was obviously convenient for the party, who collected the Indian-Made Foreign Liquor from the factory, to pay in advance the excise duty thereon.

19. The Tamil Nadu Prohibition Laws provided that all liquor manufactured should be supplied in the State of Tamil Nadu by wholesale only through TASMAC, who are to pay the excise duty and vend fee levied under rule 22, on account of the manufacture. As far as excise duty inclusion is concerned, as of today, the levy being contemplated under rule 22 of the Tamil Nadu Indian-Made Foreign Spirits (Manufacture) Rules, 1981, rightly no dispute is raised on the levy collected from TASMAC and assessed at the hands of the assessee irrespective of who paid the amount.

20. As far as the position on rule 15 of the Tamil Nadu Indian Made Foreign Spirits (Supply by Wholesale) Rules, 1981 is concerned, we do not think this on the same footing as payment of excise duty and vend fee under rule 22 of the Tamil Nadu Indian-Made Foreign Spirits (Manufacture) Rules, 1981. The relevant

provision of the Tamil Nadu Prohibition Act, 1937 dealing with the exclusive privilege granted to the manufacturer/wholesaler right on TASMAL, rule 22 of the Tamil Nadu Indian-Made Foreign Spirits (Manufacture) Rules, 1981 and rule 15 of the Tamil Nadu Indian-Made Foreign Spirits (Supply by Wholesale) Rules, 1981, as it stood at the relevant time, need to be noted.

Sections 17C and 17D of the Tamil Nadu Prohibition Act, 1937 read as under:

17C. Exclusive privileges of manufacture, etc., may be granted.--(1) It shall be lawful for the State Government to grant to any person or persons on such conditions and for such period as they may deem fit the exclusive or other privilege--

(a) of manufacturing (. . .) Indian-made foreign spirits or;

(b) of selling by retail (. . .) Indian-made foreign spirits within any local area

(. . .) amended as per Tamil Nadu Act 14 of 1993.

(1A)(a) Notwithstanding anything contained in this Act, the Tamil Nadu State Marketing Corporation Limited, which is a Corporation wholly owned and controlled by the State Government, shall have the exclusive privilege of supplying, by wholesale (. . .) Indian-made foreign spirits for the whole of the State of Tamil Nadu and no other person shall be entitled to any privilege of supplying by wholesale, (. . .) Indian-made foreign spirits for the whole or any part of the State.

(b) Notwithstanding anything contained in this Act, Tamil Nadu State Marketing Corporation Limited shall be granted the licence by the Commissioner for the exercise of the exclusive privilege referred to in clause (a) and such licence shall be subject to the rules made by the State Government in this behalf and to such conditions and restrictions as the Commissioner may, from time to time, specify.

(c) The Tamil Nadu State Marketing Corporation Limited shall, as soon as may be, after the grant of the licence under clause (b) for the exercise of the exclusive privilege referred to in clause (a), open its branches in the State in such places and subject to such conditions as the Commissioner may specify:

Provided that the said Corporation shall open not less than one branch in each district.

(1B) (. . .) Substituted by Tamil Nadu Act 23 of 1981.

(2) No grantee of any privilege under this section shall exercise the same until he has received a licence in that behalf from the prescribed authority.

17D. Payment of a sum in consideration of the grant of any exclusive or other privilege or fee on licences for manufacture or sale.--The State Government may, by rules, levy a sum or fee or both in consideration of the grant of any exclusive or other privilege u/s 17C and also a fee on licences granted u/s 17C.

Rule 22 of the Tamil Nadu Indian-Made Foreign Spirits (Manufacture) Rules, 1981:

22. Payment of excise duty and vend fee.--(1) An excise duty, at such rate as the State Government may prescribe from time to time, shall be paid by the person who removes the goods from a manufactory, on the stock of Indian-made foreign spirits so removed from the manufactory.

(2) A vend fee of rupees two per bulk/litre shall be paid by the licensee on all stocks of Indian-made foreign spirits issued from the manufactory.

Explanation (1).--The quantities of liquor and medicated wine shown in the accounts maintained under these rules shall be expressed in terms of litres and milliliters.

Explanation (2).--Notwithstanding anything contained in Explanation (1), in the case of bottled liquor, the quantities of liquor for purposes of sale or levy of vend fee shall be reckoned according to the following scale, namely:--

Rule 15 of the Tamil Nadu Indian-Made Foreign Spirits (Supply by Wholesale) Rules, 1981 during the relevant period reads as under:

15. Payment of excise duty and vend fee.--(1) The licensee shall pay the excise duty on the stock of Indian-made foreign spirits removed by him from a manufactory in the State as required under sub-rule (1) of rule 22 of the Tamil Nadu Indian-Made Foreign Spirits (Manufacture) Rules, 1981 or the countervailing duty on the stock of Indian-made foreign spirits imported from a manufactory outside the State or the excise duty or countervailing duty, as the case may be, on the stock of Indian-made foreign spirits removed by him from a bonded warehouse licensed under the Tamil Nadu Indian-made Foreign Spirits (Storage-in-Bond) Rules, 1981.

(2) In addition to the excise duty or countervailing duty, as the case may be paid in accordance with the provisions of sub-rule (1) above, a vend fee at the rates specified below shall also be collected from the licensee on the stock of Indian-made foreign spirits either received from a manufactory inside the State or removed from a manufactory outside the State or removed from a bonded warehouse licensed under the Tamil Nadu Indian-made Foreign Spirits (Storage-in-Bond) Rules, 1981:

(a) Liquor for consumption as ordinary alcoholic beverage:--

(i) to (iii) . . .

(b) Brandy and medicated wines for medicinal purposes:--

(i) to (iii) . . .

Explanation (1).--The quantities of liquor and medicated wine shown in the accounts maintained under these Rules shall be expressed in terms of litres and milliliters.

Explanation (2).--Notwithstanding anything contained in Explanation (1), in the case of bottled liquor, the quantities of liquor for purposes of sale or levy of vend fee shall be reckoned according to the following scale, namely:--

...

21. u/s 17C of the Tamil Nadu Prohibition Act, 1937, the State has the authority to grant to any person or persons on such conditions and for such period as it deemed fit an exclusive or other privilege insofar as manufacture or selling by retail within any local area of Indian-made foreign liquor. As far as section 17C(1A) is concerned, the exclusive privilege on wholesale vending is given to TASMAL, a corporation wholly owned and controlled by the State Government for the whole of the State of Tamil Nadu and the provision is emphatic that no other person is entitled to any privilege of supplying, by wholesale Indian-made foreign spirit for the whole or any part of the State.

22. Sub-clause (b) to sub-section (1A) of section 17C of the Act, states that TASMAL shall be granted the licence by the Commissioner for the exercise of the exclusive privilege referred to in clause (a) and such licence shall be subject to the rules made by the State Government in this behalf and to such conditions and restrictions as the Commissioner may, from time to time, specify.

23. Section 17D of the Tamil Nadu Prohibition Act, 1937 provides for payment of a sum on consideration of the grant of exclusive or other privilege or fee on the exclusive privilege u/s 17C and also a fee on licence granted u/s 17C. Thus, in tune with sections 17C, 17D of the Act in consideration of the grant of exclusive or other privilege, the State may, levy a sum or fee or both, apart from charging a licence fee to be granted u/s 17C of the Act.

24. In tune with the said Rules, rule 22(1) of the Tamil Nadu Indian-Made Foreign Spirits (Manufacture) Rules, 1981 provides for levy of excise duty and vend fee payable by the licensee on the stock of Indian-made foreign spirit issued from the blending unit for local consumption. Rule 22(2) touches on the vend fee on the Indian-made foreign spirit issued from the manufactory for consumption. Apart from these Rules, we have the Tamil Nadu Indian-Made Foreign Spirits (Supply by Wholesale) Rules, 1981. Rule 15 relates to the levy of vend fee on the wholesale dealer. According to this, vend fee at the rate specified in the table under rule 15 would be collected from the holder of the wholesale licence. The assessee challenged the levy of sales tax on the excise duty collected from the wholesale dealer on the ground that it was not part of the sale consideration to form part of the turnover. The writ petition filed before this court was dismissed and the assessee went on appeal before the apex court. In the decision reported in Mohan Breweries and Distilleries Ltd., etc. Vs. Commercial Tax Officer, Madras and others, , the apex court held that the liability to pay excise duty on the Indian-made foreign spirit was on the manufacturer-petitioner and rule 22 merely provided the mode for collecting the excise duty, a mode which was convenient for the State, for it required the party removing the Indian-

made foreign spirit from the factory to pay it in advance. Thus the apex court held that the excise duty though paid by the wholesaler was part of the sale consideration and was liable to be included in the turnover.

25. As far as the vend fee payable under the Tamil Nadu Indian-Made Foreign Spirit (Supply by Wholesale) Rules, 1981 is concerned, it has nothing to do with the manufacturer. A reading of the provisions of this rule shows that it essentially deals with the grant or privilege and licence to sell the Indian-made foreign spirit on a wholesale basis. As may be noted from the provisions of the Act and the Rules made, the privilege and the licence granted to manufacture and the privilege and the licence to sell as a wholesale dealer is treated differently from the licence/privilege given to the wholesale dealer, by framing two different Rules, namely, Tamil Nadu Indian-Made Foreign Spirits (Manufacture) Rules, 1981 and Tamil Nadu Indian-Made Foreign Spirits (Supply by Wholesale) Rules, 1981, respectively. As far as the wholesale dealer-licensee is concerned, apart from discharging the liability of the manufacturer to pay the excise duty and the vend fee, the wholesale dealer is also obliged to pay vend fee. Thus, the vend fee of Rs. 2 per bulk litre again has to be paid by the licensee on all stocks of Indian-made foreign spirits supplied by the manufacturer. The licensee herein is TASMAL and as already pointed out in terms of the decision of the apex court, there is no dispute from the side of the assessee as regards the inclusion of excise duty and vend fee levied as per rule 22 of the Tamil Nadu Indian-Made Foreign Spirits (Manufacture) Rules, 1981 at the hands of the assessee as part of the sale consideration and hence as part of the turnover.

26. Rule 15 of the Tamil Nadu Indian-Made Foreign Spirits (Supply by Wholesale) Rules, 1981 specifically reads that in addition to excise duty, the wholesaler has to pay the vend fee at the table given under rule 15 of the Tamil Nadu Indian-Made Foreign Spirits (Supply by Wholesale) Rules, 1981. Reading rule 15 of the Tamil Nadu Indian-Made Foreign Spirits (Supply by Wholesale) Rules, 1981 and rule 22 of the Tamil Nadu Indian-Made Foreign Spirits (Manufacture) Rules, 1981, the Tamil Nadu Indian-Made Foreign Spirits (Supply by Wholesale) Rules, 1981 of the manufacture rule, it is clear that both are different. In fact a reading of rule 15(2) of the Tamil Nadu Indian-Made Foreign Spirits (Supply by Wholesale) Rules, 1981 shows that in addition to the excise duty or countervailing duty, in accordance with the provisions of sub-rule (1), there is also the levy of vend fee at the rates, which would be collected from the licensee, TASMAL on the stock of Indian-Made Foreign Spirits either received from a manufactory inside the State or removed from the manufactory outside the State or removed from the bonded warehouse licensed under the Tamil Nadu Indian-Made Foreign Spirits (Storage in Bond) Rules, 1981.

27. Thus, a comparative reading of rule 15(2) of the Tamil Nadu Indian Made Foreign Spirits (Supply by Wholesale) Rules, 1981 as well as rule 22 of the Tamil Nadu Indian-Made Foreign Spirits (Manufacture) Rules, 1981 clearly shows that there is a clear distinction as regards the levy made as per the table given

thereunder. Both the Rules show that they stand no comparison at all. As already seen, rule 15(2) of the Tamil Nadu Indian Made Foreign Spirits (Supply by Wholesale) Rules, 1981 makes no reference at all to rule 22(3) of the Tamil Nadu Indian-Made Foreign Spirits (Manufacture) Rules, 1981. In contrast, sub-rule (1) of rule 15 of the Tamil Nadu Indian-Made Foreign Spirits (Supply by Wholesale) Rules, 1981 makes specific reference as regards excise duty in addition to the vend fee.

28. Thus on a plain reading of rule 15(2) of the Tamil Nadu Indian-Made Foreign Spirits (Supply by Wholesale) Rules, 1981, we have no hesitation in accepting the case of the assessee that the vend fee paid by the licensee-TASMAC as per rule 15(1) of the Tamil Nadu Indian-Made Foreign Spirits (Supply by Wholesale) Rules, 1981 has no relevance to what is paid under rule 22(2) of the Tamil Nadu Indian-Made Foreign Spirits (Manufacture) Rules, 1981, which is for the discharge of the liability on the manufacturer and were liable to be included in the taxable turnover of the assessee. Consequently, the Rules thus being very clear, we have no hesitation in holding that the Sales Tax Appellate Tribunal committed serious error in holding that the contention of the Revenue that the vend fee paid by the licensee-TASMAC should be included in the assessee's taxable turnover.

29. The learned Advocate-General submitted that the assessee had not produced any material as above for consideration and sought for a remand. We do not think that it is necessary at all even for a remand, considering the fact that TASMAC had already given the necessary certificate as regards the vend fee paid as per rule 22(2) of the Tamil Nadu Indian-Made Foreign Spirits (Manufacture) Rules, 1981. As pointed out in the preceding paragraphs, rule 15(2) of the Tamil Nadu Indian-Made Foreign Spirits (Supply by Wholesale) Rules, 1981, has no relevance at all to the payment made by the wholesaler on the vend fee payable by the manufacturer under rule 22(2) of the Tamil Nadu Indian-Made Foreign Spirits (Manufacture) Rules, 1981. The wholesalers' payment has nothing to do with the assessee and the determination of its turnover does not depend on the payment by the wholesale dealer, namely, TASMAC. Consequently, we reject the plea for a remand.

30. Thus, we have no hesitation in holding that the assessment included vend fee paid under rule 15(1) of the Tamil Nadu Indian-Made Foreign Spirits (Supply by Wholesale) Rules, 1981 by TASMAC, does not form part of the taxable turnover of the assessee.

31. Apart from this, it may also be noted that sub-rule (2) was included to the provisions of rule 15 of the Tamil Nadu Indian Made Foreign Spirits (Supply by Wholesale) Rules, 1981, wherein there is a specific additional vend fee levied at the rates specified therein. Going through the scope of rule 15(2), the Tamil Nadu Indian-Made Foreign Spirits (Supply by Wholesale) Rules, 1981 and the rates history, we hold that the contention of the Revenue cannot be countenanced. Further rule 15(2) of the Tamil Nadu Indian-Made Foreign Spirits

(Supply by Wholesale) Rules, 1981 contains a table as regards the rate on vend fee on liquor for consumption as ordinary-alcoholic beverage and a table on brandy and medicated wines for medicinal purposes. Rule 22 of the Tamil Nadu Indian-made Foreign Spirits (Manufacture) Rules, 1981 makes no such distinction giving one rate for ordinary alcoholic beverage and one for medicinal purposes. The additional vend fee under sub-rule (2) of rule 15 of the Tamil Nadu Indian-Made Foreign Spirits (Supply by Wholesale) Rules, 1981 relates to the levy on the sale of alcoholic liquor and the same is quantified based on the actual sale by the licensee. Thus the distinction being very clear even for a normal reading we hold that the revision of assessment by the Revenue cannot be sustained on any legal provision. Consequently, we have no hesitation in allowing the tax case revisions filed by the assessee, thereby setting aside the order of the Sales Tax Appellate Tribunal confirming the order of assessment.

32. It may also be of relevance to note that in the case reported in State of Kerala and Others Vs. Maharashtra Distilleries Ltd. and Others, , the apex court pointed out that the duty levied u/s 17 of the Abkari Act was not the duty connected with the manufacture of liquor. The State of Kerala by the amendment of the Act and the Rules created a monopoly in favour of Kerala State Beverages Corporation in the wholesale trade of Indian-made foreign liquor. Under rule 11 of the (Storage in Bond) Rules, 1961, duty was payable when Indian-made foreign liquor was issued from the bonded warehouse of the Corporation. The duty levied was more in the nature of a privilege price payable by the Corporation in consideration of the State parting with the exclusive privilege of wholesale trade rates in Indian-made foreign liquor in favour of the Corporation.

33. Even though the said decision was with reference to the provision of section 17 of the Abkari Act, yet the decision of the apex court governs the issue herein and is relevant in understanding the levy under rule 15(2) of the Tamil Nadu Indian-Made Foreign Spirits (Supply by Wholesale) Rules, 1981. As pointed out by the apex court, the levy is more in the nature of grant of exclusive privilege granted to TASMAL as wholesale dealer in Tamil Nadu. In the circumstances we agree with the assessee that the vend fee paid by TASMAL under rule 15 of the Wholesale Rules cannot be included in the turnover. Consequently, we have no hesitation in setting aside the order of the Tribunal, thereby the assessment.

34. As far as the levy of penalty u/s 12(5)(iii) of the Tamil Nadu General Sales Tax Act, 1959 is concerned, admittedly the assessment in all these cases were made u/s 16 of the Tamil Nadu General Sales Tax Act which deals with assessment of escaped turnover. Sub-section (1) of section 16 of the Act, speaks about the jurisdiction of the officer to assess the turnover escaping assessment and section 16(1)(b) refers to the turnover, which has been assessed at a rate lower than the rate at which it is assessable. Sub-section (2) of section 16 of the Act, speaks about the levy of penalty in a case of assessment under clause (a) to sub-section (1) of section 16 of the Act.

35. A reading of sub-section (2) to section 16 of the Act shows that the levy of

penalty in respect of the assessment u/s 16(1)(a) is possible only when the assessing officer is satisfied that the escape from the assessment is due to willful non-disclosure of the assessable turnover by the assessee. Thus the criteria for levying penalty u/s 16(2) with reference to 16(1)(a) is a willful non-disclosure, a fact, which the officer has to necessarily record as a matter of satisfaction while invoking such provision.

36. Section 12(5)(iii) of the Tamil Nadu General Sales Tax Act relates to a regular assessment. Section 12(5) of the Act is a provision relating to penalty under three categories. For the purpose of this case, section 12(5)(iii) is the provision invoked by the officer, which relates to the submission of incorrect and incomplete return. Thus, while making an assessment, if the officer is satisfied that the accounts maintained by the assessee are correct and the returns submitted by the assessee are found to be incorrect or incomplete, the assessing officer may either by a separate order or in the order of assessment, levy penalty at a sum not less than 50 per cent of the sum and not more than 150 per cent of the difference in the tax payable on the turnover disclosed in the return and thus determined by the officer. The proviso to said section says that no penalty under sub-sections (3) and (5) shall be imposed after a period of five years from the expiry of the year to which the assessment relates to and unless a dealer affected has had a reasonable opportunity of showing cause against the imposition.

37. The learned senior counsel appearing for the assessee, submitted that for the assessment thus made u/s 16(1)(a) of the Act, if the Revenue has to levy any penalty, that could be only u/s 16(2) of the Act. Thus the levy of penalty u/s 12(5)(iii) of the Act is totally without jurisdiction and hence not sustainable.

38. We may point out herein that quite apart from what is stated above, considering the fact that this court has allowed the tax cases filed by the assessee on the aspect of vend fee collected from the licensee-TASMAC in terms of rule 15 of the Tamil Nadu Indian-Made Foreign Spirits (Supply by Wholesale) Rules, 1981, holding thereby that it cannot be included in the turnover of the assessee, the question of levy of penalty does not arise at all. Consequently, even those revisions filed as against the levy of penalty u/s 12(5)(iii) of the Act have to be necessarily allowed by this court as there is no liability at all u/s 16(1)(a) of the Act.

39. The learned Advocate-General pointed out that mere quoting of wrong provision per se would not stand in the way of levy of penalty. We disagree with the line of argument advanced, for the reason that the provisions u/s 12(5)(iii) and section 16(2) of the Tamil Nadu General Sales Tax Act are totally different. While u/s 12(5)(iii) of the Act, the penalty is levied for the case of "incorrect and incomplete" return, u/s 16(2) of the Act, it is the case of suppressed turnover, where the task of proving willful suppression is on the Revenue as against what is contemplated u/s 12(5)(iii) of the Act.

40. In any event, the said issue relating to incorrect and incomplete return came up for consideration before this court in State of Tamil Nadu Vs. Indian Silk Traders wherein, this court pointed out to the phrases used in section 12(5)(iii), viz., "incorrect and incomplete return" and held that the words "incorrect and incomplete" do not imply such deliberateness, suppression or willfulness in making a return. This court observed, that even to come to a conclusion that penalty could be levied in a case of incomplete return and incorrect return, the assessing authority has to take note of the exceptional cases where an assessee bona fide believes that he is not liable to include a turnover in the return or whether a particular turnover attracts duty under one or other of the entries in the First Schedule to the Act or whether the item is taxable as a multi-point item.

41. Thus following the Supreme Court's decision reported in Cement Marketing Co. of India Ltd. Vs. Assistant Commissioner of Sales Tax, Indore and Others, , this court came to the conclusion that unless there is willful non-disclosure or suppression established by the Revenue, the question of levy of penalty would not arise. This court further observed while the element of deliberateness, willfulness or a blameworthy conduct on the part of the assessee may not be necessary for invoking section 12(5) of the Act, the bona fides of the assessee have to be gone into before imposing penalty.

42. Thus, in the light of the decision of this court and on the facts seen that the assessment was one u/s 16 of the Act, where the parameter for levy of penalty is stringent we do not find any justification even otherwise to uphold the penalty. In the circumstances, we allow the revisions filed by the assessee with regard to levy of penalty.

43. It may be also of relevance to note that one of the contentions raised by the Revenue was that when the apex court had already rendered a decision as early as 1985 in the case of McDowell & Company Limited v. Commercial Tax Officer reported in McDowell and Co. Ltd. Vs. Commercial Tax Officer, the non-reporting of the turnover on vend fee would certainly amount to avoidance of tax. We do not agree with this contention, since on facts, this question does not arise at all.

44. To sum up, we hold that the vend fee collected from the licensee-viz., TASMAL as per rule 15(2) of the Tamil Nadu Indian-Made Foreign Spirits (Supply by Wholesale) Rules, 1981 cannot be included in the taxable turnover of the assessee and consequently, the assessment cannot be sustained. On the same line of reasoning the question of levying of penalty also does not arise in these cases. In the result, all the tax case revisions filed by the assessee are allowed and the orders of the Sales Tax Appellate Tribunal are set aside. No costs.

1 Inserted by (Tamil Nadu) Act 51 of 1981.