(2002) 03 AHC CK 0115

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No''s. 1375, 3968, 4043, 4136 and 4157 of 1978 and 3690 of 1979

Mohan Meakin Breweries Ltd. and Sri R.C. Jain, Share-holder, Mohan Meakin Breweries Ltd. — APPELLANT

Vs

The State of Uttar Pradesh and The Excise Commissioner — RESPONDENT

Date of Decision : 15-03-2002

Acts Referred:

Calicut City Municipality Act, 1961 — Section 126
Constitution of India, 1950 — Article 265
Uttar Pradesh Bottling of Foreign Liquor Rules, 1969 — Rule 2, 2(1), 2(2), 3, 6
Uttar Pradesh Brewery Rules, 1961 — Rule 2, 41, 42, 43, 44
Uttar Pradesh Excise Act, 1875 — Section 23A, 24, 28A, 7
Uttar Pradesh Excise Act, 1910 — Section 11, 11(1), 11(2), 11(3), 12(1)
Uttar Pradesh Excise Manual (Amendment) Rules, 1975 — Rule 53

Citation : (2002) 03 AHC CK 0115

Hon'ble Judges : Yatindra Singh, J;G.P. Mathur, J

Bench : Division Bench

Advocate : S.C. Budhwar, for the Appellant; P.C. Srivastava, S.C., for the Respondent

Judgement

G.P. Mathur, J.—The controversy involved in all these writ petitions are interconnected and, therefore, they are being disposed of by a common order. The main question involved in writ petitions No. 3968 of 1978 and 4043 of 1978 relates to additional duty on excess wastage while the question involved in the remaining writ petitions is regarding imposition of duty on bottling wastage. It will be convenient to deal with the first group of the writ petitions earlier.

Writ Petition No. 3968 of 1978 and writ petition No. 4043 of 1978

2. In this group, writ petition No. 3968 of 1978 shall be treated as the leading case. This petition has been filed for quashing of ten orders of the Excise Commissioner passed between 26/28.6.1966 to 24.11.1973 by which an amount of Rs. 81,94,310/- has been levied as excise duty and fine on wastage of beer in

excess of ten per cent and also the order dated 12.4.1978 by which the revisions preferred by the petitioner company against the aforesaid orders were dismissed by the State Government,

3. The petitioner company owns a Brewery which is situated at Mohan Nagar, Ghaziabad wherein beer is manufactured under a licence in Form B-I, granted by the Excise Commissioner, U.P. in exercise of power conferred by Section 17 (2)of U.P. Excise Act (hereinafter referred to as the Act). The petitioner has also been granted a licence in Form F.L. 3 for in bond bottling of beer, for sale, by the Excise Commissioner in exercise of power conferred by Section 17(1)(d) of the Act. Para 918 of U.P. Excise Manual, Volume I, provides for maintenance of registers, some by the Officer-in-charge who is of the rank of an Excise Inspector and some by brewer in a brewery. One such register which is mentioned in para 918 (a)(iv) of the U.P. Excise Manual has to be maintained by the Officer-in-charge in Form B-16 and is called the Register of Manufacture and Issue of Beer. The Excise Inspector (Incharge) of the petitioner brewery, alter verification of stock, made a report to the Excise Commissioner regarding wastage in excess of tender cent of stock of beer. The Assistant Excise Commissioner, Meerut recommended for levy of fine in accordance with para 912 of the Excise Manual. The petitioner was required to submit its explanation. After considering the explanation and other material, the Excise Commissioner held that the petitioner had not given any valid reason by way of mitigating circumstances to warrant a fine lower than the maximum contemplated in para 912 of the Excise Manual and accordingly imposed a fine amounting to double the duty chargeable on wastage exceeding ten per cent in each of the cases. The petitioner preferred revisions against the said orders before the State Government which remained pending for a long time. Meanwhile Section 28-A was inserted with retrospective effect in the U.P. Excise Act by means of U.P. Act No. 9 of 1978. The State Government relying upon Section 28-A of the Act, dismissed the revisions.

4. Before examining the contentions raised by learned Counsel for the parties, it will be convenient to reproduce the relevant statutory provisions of at the U.P Excise Act which are us under:

Section 3 (3a) "excise duty" and "countervailing duty" means any such excise duty or countervailing duty, as the case may be, as is mentioned Entry 51 of List II in the Seventh Schedule to the Constitution;

Section 3 (10) "beer" includes ale, stout, porter and all other fermented liquor made from malt; Section 3 (22a) "excisable article" means -

(a) any alcoholic liquor for human consumption; or

(b). any intoxicating drug;

Section 28 Duty on excisable articles-(1) An excise duty or a countervailing duty, as the case may be, at such rate or rates as the State Government shall direct, may be imposed, either generally or for any specified local area, on any excisable article-

(a) imported in accordance with the provisions of Section 12 (1); or

(b) exported in accordance with the provisions of Section 13; or

(c) transported; or

(d) manufactured, cultivated or collected under any licence granted u/s 17; or

(e) manufactured in any distillery established or any distillery or brewery licensed, u/s 18:

Provided as follows -

(i) duty shall not be so imposed on any article which has been imported into India and was liable on such importation to duty under the Indian Tariff Act, 1894, or the Sea Customs Act, 1887.

(ii) ...(omitted)...

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

(2) ...(omitted as not relevant)

(3) ...(omitted as not relevant)

Section 29 Manner in which duty may be levied - Subject to Such rules, (is the (Excise Commissioner) may prescribe to regulate to the time, place and manner of payment, such duty may be levied in one or more of the following, ways as the (State Government) may by notification direct:

(a) ...(omitted as not relevant)

(b) ...(omitted as not relevant)

(c) ...(omitted as not relevant)

(d) ...(omitted as not relevant)

(e) in the case of spirit or beer manufactured in any distillery established or any distillery or brewery licensed u/s 18 -

(i) by a rate charged upon the quantity produced or issued from the distillery or brewery, as the case may be, or issued from a warehouse established or licensed , u/s 18 (d);

(ii) by a rate charged in accordance with such scale of equivalents, calculated on the quantity of materials used or by the degree of attenuation of the wash or wort, as the case may be, as the State Government may prescribe :

Provided that, where payment is made upon issued of an excisable article for sale from a warehouse established or licensed u/s 18(d), it shall be at the rate of duty which is in force on that article on the date when it is issued from the warehouse.

Section 28-A Imposition of additional duty in certain cases - (1)

Where the quantity of spirit or beer in a brewery is found, on examination by such officer of the Excise Department as may be authorised by the Excise Commissioner in this behalf to exceed the quantity in hand as shown in the stock account, the brewery shall be liable to pay duty on such excess at the ordinary rates fixed u/s 28.

(2) Where the quantity of spirit or beer is less than that shown in the stock account on such examination and deficiency exceeds ten per cent; (allowance to that extent being made to cover losses due to evaporation, sullage and other contingencies within the brewery, and also to cover loss in bottling and storage) the Excise Commissioner shall levy an additional duty at the rate of one hundred per cent of ordinary rates of duty in respect of such deficit as exceeds ten per cent over and above the ordinary rates of duty.

5. Section 24 of the U.P. Act No. 9 of 1978 by which Section 28-A was inserted in the Act provides that notwithstanding anything contained in the principal Act or any other law for the time being in force, for levy imposed by the Excise Commissioner before the commencement of this Act in respect of deficit quantity at the rate not exceeding the rate specified in Section 28-A whether described as fine or by any other name shall be deemed to be additional levy imposed under the said Section 28-A as if the provisions of this Act were in force at all material times.

6. The main submission of the learned Counsel for the petitioner is that at the stage of levy and realisation of the excise duty, the respondents have calculated the deficiency in the stock of beer in a wrong manner inasmuch as, while taking the stock of beer in the brewery, the account of beer as finished product was not taken but something in the intermediate stage which was still in the process of manufacture was taken into consideration. It has been urged that no duty can be imposed prior to the stage of the happening of the excisable event and consequently the deficiency in the stock of beer has to be ascertained at that point of time and not at any earlier stage. This has been stated in paragraphs 8, 61 and 93 (b) of the of the writ petition which are being produced below :

8- That the process of manufacturing beer ends when the sullage and yeast cells are removed by filtration and fermentation ceases and manufactured bulk beer is ready to be transferred :

(a) for bottling in bond; and

(b) to casks for sale and human consumption as draught beer.

61- That in working out the deficiency in stock, the method adopted has been erroneous. What was required under paragraph 912 was to compare the stock of manufactured beer as mentioned in the stock account of beer and the actual stock of beer giving allowance for the quantity issued. What has been done in the instant case is to assume certain quantity as part of the stock account of beer which was not beer and was undergoing the process of manufacture into beer. Similarly the quantity of beer issued from the Brewery has not been taken in its entirety to be the quantity of beer issued. The quantity issued has been equated with the quantity actually bottled with the result that the quantity of beer which has been wasted in the process of bottling has been treated to be part of the stock of beer in the beer account,

93(b)-That what is being subjected to the levy of penalty or penal duty before becoming a manufactured saleable article is the deficiency between the wort and the finished beer for sale, comprising of scum and yeast cells brought on top of fermenting wort, Co 2 gas evolved, sullage etc. settled at the bottom of vats which impurities have to be eliminated etc. before beer could become saleable. Thus what has not come to exist as such saleable goods cannot be termed as excisable article.

7. The petitioner has moved an amendment application and in para 4, (xix) and 4(xx) a plea has been raised that u/s 28-A (2) of the Act, the permissible wastage has to be considered from the stage after the beer has been manufactured and allowance up to ten per cent for the wastage has to be given thereafter. The stand of the State, however, is that as soon as wort along with yeast is received in the fermenting vat, it ferments and the process of manufacture of beer is complete. This has been elaborated in para 6 and 62 of the counter affidavit which read as follows:

6. That the contents of paragraph 8 of the writ petition are not admitted. It is submitted that wort is passed into the fermentation vat and fermenting yeast are added to the wort by a simultaneous process. As soon as the wort along with yeast is received in the fermenting vessels or fermenting vat, it ferments and process of manufacture of beer is complete. It is gauged to find out its quantity and this quantity is entered in the resister in Form B-4. In the said register in Form B-4 the dip and gravity of the wort is taken. As fermentation starts simultaneously the quantity determined by dip and gravity is taken to be beer produced. On the register in Form B-4 the Brewers put in their initials. It is denied that process of manufacture of beer ends when sullage and yeast calls are removed by filtration. In fact quantity of yeast and sullage filtered out may vary from one filtration to another in different process. Even after filter beer contains both some yeast and sullage and petitioner cannot say that he is only entitled to pay excise duty on such quantity after excluding all such yeast and sullage. The filtration is only a process to make it more marketable in this competitive business but could not be part of manufacture.

62. That the contents of paragraph 93(a) of the writ petition are admitted. Whereas contents of paragraph 93(b) are not admitted. It is submitted that the

fermented liquor containing alcohol was excisable article and was liable to the payment of Excise duty. Moreover, the petitioner is liable to pay duty on the beer produced by him at the rate of wash or wort or material used in the manufacture of beer.

8. In para 24 of the counter affidavit, it is stated that the event of excisable article going into human consumption has no connection with the taxable event in the case of excise duty and the excise duty is imposed at the stage of manufacture of goods and not at the stage of excisable article going into human consumption.

9. The main question which requires consideration is at what stage the article manufactured by the petitioner can be held to be "beer" which is exigible to the payment of excise duty to the State Government. Section 3 (3a) of the Act defines "excise duty" and it means any such excise duty as is mentioned in Entry 51 of List II in the Seventh Schedule to the Constitution. Entry 51 of List II is duty of excise on alcoholic liquor for human consumption manufactured or produced in the State. Entry 84 of List 1 is duties of excise on tobacco and other goods manufactured or produced in India except alcoholic liquor for human consumption. The scope and extent of these two Entries was considered in Synthetics and Chemicals Ltd. and Others Vs. State of U.P. and Others, and relevant part of paras 54 and 67 are being reproduced below:

Para 54. We have no doubt that the framers of the Constitution when they used the expression ''alcoholic liquor for human consumption'' they meant at that time and still the expression means that liquor which as it is consumable in the sense capable of being taken by human beings as such as beverage of drinks. Hence, the expression under Entry 84, List 1 must be understood in that light....

Para67. ...

As mentioned hereinbefore, the relevant entries in the Seventh Schedule to the Constitution demarcate. legislative fields and are closely linked and supplement one another. In this connection, reference may be made to Entry 84 of List I which deals with the duties of excise on tobacco and other goods manufactured or produced in India except, inter alia, alcoholic liquors for human consumption. Similarly, Entry 51, List II is the counter part of Entry 84 of List I so far as the State List is concerned. It authorises the State to impose duties of excise on alcoholic liquors for human consumption and opium, etc. manufactured or produced in the State and the countervailing duties at the same or lower rates on similar goods produced or manufactured elsewhere in India. It is clear that all duties of excise save and except the items specifically excepted in Entry 84 of List 1 are generally within the taxing power of the Central Legislature. The State Legislature has power, though limited it is, in imposing duties of excise. That power is circumscribed under Entry 51 of List II of the Seventh Schedule of the Constitution....

10. In the State of U.P. v. Modi Distillary J.T1995 (6) . 523, the same view was

taken and it was observed ns follows in para 10 of the reports:

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

11. Clause (e) of Sub-section (1) of Section 28 of the Act provides that an excise duty 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 manufactured in any distillery established or brewery licensed u/s 18. Sub Section (3) of the same Section lays down the maximum rate of duty for different types of excisable articles and beer is one of them. The expression "excise duty" has been defined in Section 3 (3a) of the Act and it means any such excise duty as is mentioned in Entry 51 of List II in the Seventh Schedule to the Constitution. In view of authoritative pronouncement by Supreme Court there can be no doubt that the expression alcoholic liquor for human consumption used in this Entry means that liquor which as it is consumable, in the sense, capable of being" taken by human beings as such, as beverage of drink and consequently it is at this stage that the State will have the power to levy excise duty and not at, any earlier stage.

12. Section 29 of the Act lays down that subject to such rules as the Excise Commissioner may prescribe to regulate the time, place and manner of payment, such duty may be levied in one or more of the ways enumerated in the Section as the State Government may by notification direct. Sub-section (e) of Section 29 deals with manufacture of beer and Clause (i) thereof lays down that excise duty may be levied by a rate charged upon the quantity produced or issued from the distillery or brewery, as the case may be, or issued from a warehouse established or licensed u/s 18(d). Clause (ii) of Sub -section (e) of Section 29 lays down that excise duty may be levied at a rate charged in accordance with such scale of equivalents, calculated on the quantity of materials used or by the degree of attenuation of the wash or wort, as the case may be, as the State Government may prescribe. It appears that some confusion or doubt has arisen on account of Clause (ii) of Sub -section (e) of Section 29 which permits levy of excise duty by a rate charged which is calculated on the quantity of materials used or the degree of attenuation of the wash or wort. Probably for this reason a stand is taken in para 6 of the counter affidavit that as soon as the wort along with yeast is received in the fermenting vat, it ferments and the process of manufacturing of beer is complete and it is gauged to find out its quantity and this quantity is entered in register in Form B-4.

13. The State Legislature has legislative competence to make laws under Entry

51 of List II in the Seventh Schedule to the Constitution and it authorises the State to impose duties of excise on alcoholic liquor for human consumption manufactured or produced in the State. If on a plain interpretation of the language in the Statute, it transgresses limits imposed by the Constitution, the statute should be read down and should be interpreted in a manner which brings it within the constitutional limit. The principle was applied for upholding the validity of the Act while answering the reference made by the Governor-General in the matter of the Hindu Women''s Rights to Property Act, 1937 AIR 1941 72 (Federal Court) In R.M.D. Chamarbaugwalla Vs. The Union of India (UOI), , a Constitution Bench after referring to the aforesaid decision explained the principle as under in para 13 of the reports:

In AIR 1941 72 (Federal Court) , the question arose with reference to Hindu Women''s Rights to Property Act (18 of 1937).That was an Act passed by the Central :Legislature and had conferred on Hindu widows certain rights over properties which devolved by interstate succession and survivorship. While the subject of devolution was within the competence of the Center under Entry 7 List III that was limited to property other than agricultural land which was a subject within exclusive competence of the Provinces under Entry 21 in List II. Act No. 18 of 1937 dealt generally with property, and the contention raised was that being admittedly in ultra vires as regards agricultural lands, it was void in its entirety. It was held by the Federal Court that the Central Legislature must, on the principle, laid down in Macleod v. Attorney General for New South Wales 1891 A.C. 455 (k), be presumed to have known its own limitations and must be held to have intended to enact only laws within its competence, that accordingly the word ''property'' in Act No. 18 of 1937 must be construed as property other than agricultural land, and that, in that view, the legislation was wholly intra vires....

14. In Jothi Timber Mart and Others Vs. Corporation of Calicut and Another, , the expression "a tax shall be levied on timber brought into the city" occurring in Section 126 of Calicut City Municipality Act was interpreted as meaning "brought into municipal limits for the purposes of consumption, use or sale and not for any other purpose" so that the legislation may be compatible with Entry 52 of List II which is "Taxes on Entry of goods into a local area for consumption, use or sale therein."

15. Sub-section (ii) of Sub-section (e) of Section 29 of the Act has therefore to be given a restricted meaning so that It may be completible to Entry 51 of List II in the Seventh Schedule to the Constitution. As held by the apex court, the explanation "alcoholic liquor for human consumption" used in this entry means that liquor which as it is consumable, in the sense, capable of being taken by human beings as such, as beverage of drinks and consequently it is at this stage that State will have the power to levy excise duty and not at any earlier stage. Thus the point at which the liquor manufactured by the petitioner company is exigible to excise duty is the stage when the finished product namely beer

capable of being taken by human beings as a beverage of drink came into existence. The stand of the State as pleaded in para 6 and 62 of the counter affidavit that as soon as wort along with yeast is received in the fermenting vessels or in fermenting vat, it ferments and process of manufacture of beer is complete is, therefore, not justified and cannot be accepted.

16. Learned counsel for the petitioner has further submitted that the point at which the liquor manufactured by the petitioner is exigible to duty is the time when the finished product i,e. beer is received in "bottling tank" and not at any earlier stage. In support of this submission, reliance is placed on para 7 of the judgment of the apex court in Mohan Meakin Ltd. Vs. Excise and Taxation Commissioner, H.P. and Others, . Reliance is also placed on a Division Bench decision of this Court in writ petition No. 359 of 1981 (M/s. Mohan Meakin Brewery Ltd., vs. State of U.P.and Ors.) decided on 24.1.1997, to which one of us (G.P. Mathur, J) was a party.

17. The definition of beer as given In Section 3(10) of the Act shows than beer includes ale, stout, porter and all other fermented liquor made from malt. The use of word "includes" shows that the definition given is an inclusive one and it is not exhaustive. In order to know what is beer, it will be helpful to look to some authoritative books. In 1938 Edition of Encyclopaedia Britannica (Vol. 3 Page 313), the topic of beer has been dealt with in more detail than in later editions. Beer has been described as beverage obtained by the alcoholic fermentation of a malted cereal, usually barley malt with or without other starchy material and to which hops have been added. It is of great antiquity, thought to date back to ancient Babytonia of 6000 B.C. The types of beer and the taxation thereof has been described as under:

Types of Beer- Although the term beer is frequently employed to designate fermented malt beverages in general, a distinction exists between the so-called "lager" beers of the type most popular with the American consumer, and the "ales" brewed mostly in Great Britain, both with respect to their method of production and their final taste characteristics. In the brewing of lager beer, bottom fermentation is employed, so termed because the type of yeast selected settles to the bottom of the fermenting tank after completion of fermentation.

...In ale brewing, on the other hand, the yeast selected is of the top-fermenting type, i.e. it rises to the top of the fermenting ale, forming a relatively thick foam. Also, somewhat higher fermentation temperatures (68?- 75? F.) as well as storage temperatures (40?- 46? F.) are employed.

...Ale , stout and porter are top-fermented beers which now form a relatively small percentage of the total American beer production, but which to this day have retained their popularity in England to the virtual exclusion of lager beers. Ale has a pale bright colour, a rather pronounced hop flavour and a more tart taste than beer. Its alcohol content is also higher, ranging from 4.0-5.0% by weight. It probably originated in England where, in the 15lh century, it was brewed without the addition of hops. Different types of ale are produced, such as cream ales and sparkling ales, so called because their relatively high carbonation produces a rich foam and a strong effervescence when they are poured, in contrast to the common or stock ales with their lower carbonation. Porter is a dark-brown beverage with a full-bodied malty flavour, a slightly sweet taste and a less pronounced hop flavour than ale. Its alcohol content averages about 5.0% by weight. Stout possesses a very dark colour, a rich sweet malty flavour combined with a rather strong bitter hop taste and an alcohol content of 5.0-6.5% by weight.

Taxation and Statistics - Beer has been subject to taxation in one form or another in many countries and for many years. The principles of taxation differ somewhat in different countries. Thus, in England the tax is based upon the strength or specific gravity of the "wort" which is the beer in its unfermented stage. In Canada, on the other hand, the tax is placed upon malt used in brewing. In Germany and several other European countries the tax per unit measure of beer is prorated on the annual production of each brewery, while in the United States a standard tax per barrel of finished beer is imposed.

18. In Encyclopedia Americana (Vol. 3 Page 452 to 454), beer has been described as under:

Beer is the general name for all beverages resulting from the fermentation of a malt and cereal brew, including malt liquor, ale, stout, porter, and bock beer, as well as the beverage known simply as "beer". All are brewed from the same ingredients: starchy cereal grains (principally malted barley), water, hops, and yeast....

19. It is also mentioned that in United States the name "beer" is generally given to a bright, pale golden, light-flavoured, light-bodied, crisply fresh beverage that is drunk chilled, somewhere between 6.6? and 9? C. There are several types of beer like Bock beer, Malt liquor, Lager, Pilsner, Ale, Stout, Porter and Sake (a Japanese brew).

20. In Industrial Microbiology by Prescott & Dunn, Chapter 10 deals with been While dealing with types of beer, the author have stated as under at page 413:

There are two major types of beer which are distinguished mainly on the basis of fermentation differences. Bottom-fermented beers are named from the manner in which the yeast behaves during fermentation. As the fermentation subsides, bottom yeast (Saccharomyces uvarum) tends to flocculate and settle. Top-fermented beers are named analogously. During fermentation, top yeast (S. cerevisaie) rises to the surface where it is recovered by skimming. Some of the yeast during a top fermentation does settle out, but this portion is discarded.

21. Regarding the commonly known varieties, it is stated on page 414 that bottom-fermentation beers are generally called lagers. Pilsner is very pale coloured beer fully attenuated (i.e. fermented as completely as possible) with a

high level of hops. Ale is a type of fermented beer and light lager is made in several varieties distinguished on the basis of colour and body. Stout is a very dark coloured ale, full bodied, with a relatively low level of hop bitterness. This kind of ale is sometimes called porter. In Industrial Microbiology by L.A. Casida, the types of beer have been described as under on page 275:

Various malt beverages, including beer, ale porter, stout and malt tonics, are available, although the process of manufacture is basically similar for these beverages, and the products themselves bear some similarity. Lager beer, the type most commonly produced, refers to a fermented beer that has been allowed to age in the cold and, for this beer, bottom-fermenting yeasts are utilized in contrast to the top-fermenting yeasts employed in the manufacture of ales. Pilsner refers to a beer light in body and color and containing , approximately 3.4 to 3.8 per cent alcohol. Most American beers are included in this category. The seasonal Bock beer is brewed in the winter for sale at Easter time, and the carmalized or roasted malt used in its production provides its dark color, sweet taste, and heavy body. Ale, stout, and porter employ top-fermenting yeasts. High level of hops are utilized in ale manufacture, and the alcohol content of the finished product can be as high as 8 per cent by weight. Stout and porter employ heavy worts without malt adjuncts, resulting in a dark-colored, heavy-bodied, high alcohol-content beverage.

22. The types of beer and the brewing process have also been given in considerable detail in U.P. Excise Manual Vol. V. Para 42 thereof deals with the attenuation method of charging duty on beer. It appears that Section 29 (e) (ii) of the Act was enacted on the pattern of system prevailing in the United Kingdom where the duty is levied on beer in proportion to the original gravity of the wort.

23. These authoritative texts show that there are many types of beer and a distinction has been made by employing bottom or top fermentation. Nevertheless all the varieties of beer are consumable as such and are taken as beverage by human beings. They are all alcoholic liquor for human consumption as mentioned in Entry 51 of List 11 in the Seventh Schedule to the Constitution. As soon as the beer which can be consumed by the human being has been manufactured or produced in the brewery, it becomes exigible to excise duty u/s 28(1)(e) of the Act. Therefore the contention of learned Counsel for the petitioner that only such beer which has come to the "bottling tank" can be treated as "manufactured beer" which may be exigible to duty and on which alone wastage allowance has to be given cannot be accepted.

24. It may be noted that certain types of containers and vessels have been specifically defined in U.P. Brewery Rules, 1961 (hereinafter referred to as the Brewery Rules). Sub-rules (iv),(vi), (xii), (xiv) and (xv) of Rule 2 of the Brewery Rules define "copper", "fermenting vessel", "Mash-tun", "Racking or Settling back" and "Underback" respectively. Reference to some of these words has been made while describing the process of making of beer in Encyclopaedia Britannica, Encyclopedia Americana, Industrial Micro-biology by Prescott & Dunn and by L.A.

Casida and also in U.P. Excise Manual Vol. V. However, there is no mention of "bottling tank" in any one of the above quoted authoritative books and the word is conspicuous by its absence. Technology is making rapid advances and so it is possible that after manufacture beer may be kept in any other kind of container or vessel. Therefore the contention of the petitioner that allowance for wastage should be given only after beer has come in the "bottling tank", has absolutely no substance and has to be rejected. In our opinion, the word "bottling tank" occurring in para 7 of the judgment of Mohan Meakin Ltd. Vs. Excise and Taxation Commissioner, H.P. and Others, and last but one paragraph of judgment of this Court dated 24.1.1997 in civil misc. writ petition No. 359 of 1981, has been used in a general way and not in any strict sense. After the product manufactured in brewery has assumed the shape of beer which as it is and can be consumed as a beverage of drink by human beings it would be exigible to duty in whatever container or vessel it may have been stored and the petitioner would be entitled to claim allowance for wastage at that stage.

25. There is an additional reason in holding as above. "Bottling tank" would mean a container or vessel where liquor is stored immediately before it is filled in bottles for marketing. It is not in dispute that beer is also marketed and sold in cask or barrel, which is known as draft beer. In Encyclopedia Americana Vol. 3 Page 452 and 453, it is stated as under:

Barrelled, or draft, beer intended for quick consumption, is marketed without further processing. Most bottled or canned beer, intended for shelf storage up to four months (cans) or six months (bottles), is pasteurized to prevent further fermentation.... The basic difference between draft beer and beer packaged in a bottle or can has been that draft beer is not pasteurized. Packaged beer is usually pasteurized to prevent re fermentation in the container.

26. Therefore the beer which is marketed in barrels or casks and not in bottles would not be kept or stored in bottling tank. Yet it is beer which is consumable as such as a beverage and is exigible to excise duty. The respondents are entitled to calculate the stock of beer for the purpose of para 912 of U.P. Excise Manual and Section 28-A of the Act when the same has assumed the shape as a finished product which is normally consumed by human beings as beverage of drink. The impugned orders of the Excise Commissioner which are based upon a wrong criteria cannot therefore be sustained and have to be set aside.

Writ Petitions No. 1375 of 1978, 3690 of 1979, 4157 of 1978 and 4136 of 1978

27. The main controversy involved in this group of writ petitions is exactly identical. Writ petition No. 1375 of 1978 shall be treated as the leading case.

28. The District Excise Officer, Meerut, issued a demand notice dated 31.5.1979 asking the petitioner to deposit Rs. 14,59,230.74 towards duty on excess wastage of bottling of beer. Five more demand notices were issued, the last one being on 12.9.1977 asking it to deposit duty towards excess wastage in bottling of beer. The petitioner claims that it preferred appeals against the demand

notices before the Excise Commissioner. Copies of memorandum of appeal against the demand notices dated 31.5.1977 and 12.9.1977 have been filed as Annexures P-7 and P-17 to the writ petition. The State admits that these appeals have not yet been decided. In writ petition No. 4136 of 1978, the challenge is to the four demand notices issued between 3.12.1976 and 20.4.1978 demanding duty of Rs. 7,39,218.97 on excess wastage in bottling of beer. In para 50 to 53 of the writ petition, it is averred that appeals were preferred against the aforesaid demand notices but the stand of the State in para 56 of the counter affidavit, however, is that the appeals are not traceable. In writ petition No. 4157 of 1978 seven similar demand notices were issued between 30.1.1978 and 6.4.1978 directing the petitioner to deposit Rs. 2,75,865.06. The copies of the demand notices have not been filed along with the writ petition but only a chart giving the amount of duty levied has been filed. In this case, no appeal was filed. In writ petition No. 3690 of 1979 the challenge is to the demand of Rs. l7,16,665.61 as duty on the basis of eight demand notices issued between 3.6.1978 and 7.12.1978 on excess wastage in bottling of beer. The copies of demand notices have not been filed along with the writ petition nor the petitioner preferred any appeal. Against the orders passed by the Collector or District Excise Officer, an appeal lies to the Excise Commissioner under Sub -section (1) of Section 11 of the Act. The proviso to this Sub -section lays down that no appeal shall be entertained under this Sub -section unless it is preferred by the aggrieved person within thirty days from the date of communication of such order, and unless the appellant has furnished satisfactory proof of having paid a sum of not less than 25 per cent of the disputed amount of tax, fee, penalty or other dues, if any, as the case may be. The second proviso gives power to the appellate authority to waive or relax the requirements of the proceeding proviso in respect of such disputed amount of tax, fees, penalty or other dues for special and adequate reasons recorded in writing. Sub-section (2) of Section 11 confers revisional power on the State Government which it may exercise either suo motu or on an application by an aggrieved person. In the two writ petitions, the petitioners claim to have preferred an appeal and in the remaining two even the appeals have not been filed. However as the writ petitions were admitted in the year 1978 and the recovery of the amount was stayed, we propose to decide on merit the legal issues involved in the cases.

29. Para 912 of U.P. Excise Manual (rule 53) was amended on 19.7.1975 and the amended provision lays down that if the quantity of beer in stock was found less than that in the stock account and if such deficiency in stock was found to exceed nine per cent, the Excise Commissioner may direct levy of duty on such deficiency as may be found in excess of nine per cent at the rate prescribed for ordinary issue. U.P. Bottling of Foreign Liquor Rules 1969 (hereinafter referred to as the Bottling Rules) were also amended on the same date and rules 7(10) and 7(11)(a) lay down that on the last working day of every calendar month, the Excise Officer shall take stock of unbottled and bottled spirit and beer stored in a bottling warehouse and the licensee shall be responsible for the payment of duty

on wastage in excess of one per cent. The demand notices were issued to the petitioner under Rule 7(11)(a) of afore said Rules on the ground that wastage of beer in bottling exceeded one per cent. The principal submission of S/Sri S.S. Ray and S.C. Budhwar, learned senior counsel for the petitioner is that Section 28-A of the Act which was inserted by U.P. Act No. 9 of 1978 and shall be deemed to have been inforce at all material times gives a composite allowance of ten per cent of wastage to cover loss due to evaporation, sullage and other contingencies within the brewery and also to cover loss in bottling and storage and therefore Rule 7(11)(a) of the U.P. Bottling Rules, 1969, which gives in allowance of one per cent only / for loss in bottling and storage and provides for levy of duty on wastage in excess of one per cent is invalid. It is submitted that the division of wastage under two separate heads by allowing nine per cent wastage to cover loss due to evaporation, sullage and other contingencies within the brewery under para 912 of U.P. Excise Manual and giving allowance of wastage of only one percent in bottling and storage u/s Rule 7 (11)(a) of the Bottling Rules is unwarranted being in conflict with Section 28-A of the Act. The contention is that wastage in bottling could go to the extent often per cent and if the total wastage due to evaporation, sullage and other contingencies including that in bottling did not exceed ten per cent, no duty or additional duty could be levied in view of Section 28-A of the Act.

30. Learned standing counsel has however submitted that para 912 of U.P. Excise Manua and Rule 7 (11)(a) of the Bottling Rules,, 1969 are not inconsistent with Section 28-A of the Act and they are perfectly valid and duty can be levied on wastage in bottling exceeding one per cent.

31. Before examining the contention raised at the Bar, it is necessary to notice the relevant statutory provisions. Rule 2 (i), (ii) and (iii) as amended on 19.7.1975 and Rule 53 of U.P. Brewery Rules, 1961 read as follows:

"Rule 2(i) "Beer" includes ale, stout, port and all other fermented liquor made from malt.

Rule 2(ii) "Brewer" means a person holding licence in Form B-1 for running a brewery.

Rule 2(iii) "Brewery" means a building where beer is brewed and includes every place therein where beer is stored or where from it is issued.

Rule 53. On the last working day of every calendar month after all the issues for that day are made, the Officer-in-charge shall examine the accounts of brewery and take the stock of beer in hand in the brewery. If the quantity of the beer in stock in the brewery on such examination be found to exceed the quantity shown as in hand in the stock account the brewer shall be liable to pay duty on such excess at the rate prescribed for ordinary issue. If the quantity be found less than that shown in the stock account and such deficiency does not exceed nine per cent of the total stock of beer in the month the same may be disregarded allowances to that extent being made to cover losses due to evaporation, sullage and other contingencies within the brewery. But if the deficiency in stock be found to exceed nine per cent the cause shall be enquired into and the result reported to the Excise Commissioner who may direct the levy of duty on such deficiency as may be found in excess of nine per cent at the rate prescribed for ordinary issue. This nine per cent free allowance shall be calculated up on the quantity represented by the actual ascertained balances in hand at the close of the last stock taking together with the total quantity since manufactured or received, as shown in columns 2 and 3 of the register of manufacture and issue (Form B-I6).

32. Rule 53 is the same as para 912 of the U. P. Excise Manual.

33. Rule 2(1)(a) and (b) of the U.P. Bottling of Foreign Liquor Rules, 1969 read as follows:

Rule 2.(1)(a) - A bottling licence in Form F.L.3 may be granted to -

(i) a distillery to bottle spirit

(ii) a brewer to bottle beer; and

(iii) a vintner to bottle wines, by the Collector with the previous sanction of the Excise Commissioner.

(b) The holder of a licence in Form F.L. 3 may assign the whole or any portion of his bottling privilege to-

(a) a distiller, brewer or vintner of another State or Union Territory in India, or

(b) a distiller, brewer or vintner of outside the territory of India or its wholly owned subsidiary unit in India having Letter of Intent or Industrial Licence for manufacture of foreign liquor or having permission to bottle imported foreign liquor in India from the Central Government:

Provided that no such assignee shall exercise any right as such unless a licence in Form F.L.3-A has been granted to him by the Excise Commissioner on an application made by the holder of F.L. 3 licence.

34. Rule 7 (9) of the Bottling Rules, 1969 casts a duty on the Excise Officer Incharge of bottling bonded warehouse to maintain certain registers in prescribed forms F.L.B. 3 to F.L.B. 9. Sub-rule (7), (10) and (11)(a) of Rule 7 read as follows:

Rule 7 (7)- Liquor required for bottling in a distillery, vintnery or brewery shall be measured out and brought into bottling rooms by a permanent fixed pipe fitted within the liquor store with a cock and fastening for an excise lock or such other means as may be approved by the Excise Commissioner.

Rule 7 (10)- On the last working day of every Calendar month, after all the transactions for that day are made, the Excise Inspector Incharge shall take the stock of unbottled and bottled spirit and beer/stored in the bottling warehouse, enter into the prescribed registers and ascertain the wastage of spirit in the bottling operations and storage in the bonded warehouse.

Rule 7 (11)(a)- An allowance up to one per cent may be made on the total quantity of spirit and beer stored during a month for actual loss in bottling and storage. The licensee shall be responsible the payment of duty on wastage in excess of one per cent.

35. Rule 3 of the Bottling Rules requires that a person, applying for a bottling licence under rule 2 shall along with the application furnish the particulars i.e. a detailed plan of the premises showing different rooms or compartments and all the permanent fixtures therein and the place where bottling shall be carried out. Rule 6 provides that every licence granted in Form F.L. 3 shall be subject to the conditions enumerated in the rules. The conditions include that the licensee shall carry on bottling operations in the premises approved by the Collector or the Excise Commissioner and the said premises shall not be used for any other purpose except for bottling and storage of foreign liquor. The licensee shall make no alternations in the said premises without the previous approval in writing of the Collector or the Excise Commissioner. Bottling shall be conducted in separate room, set apart for the purpose and the licensee shall erect bottling vats in bottling room for the storage of liquor. The apparatus for filtration, bottling and processes connected herewith, as may be necessary, shall be set up in the bottling room. The bottled liquor shall be stored in separate rooms and every room shall bear on the outside a board on which shall be painted legibly the purpose for which the room is used. The licensee has to maintain accounts in a register in Form F.L.B.-3. of the quantity, description and strength of liquor received and issued for bottling, in register in Form F.L.B.4 the bottling operations Carried on by him and in register in Form F.L.B.5 the daily account of foreign liquor bottled and stored in licensed premises. Rule 7(4) lays down that operations connected with bottling shall be conducted in separate rooms called bottling rooms set apart for the purpose within the premises near the foreign liquor store. In these rooms, the licensee may set up such apparatus for filtering, bottling and processes connected therewith as may be necessary. In the bottling rooms, bottling vats shall be erected for the storage of foreign liquor. Rule 7 (6) provides that no bottles shall be filled with liquor except in the joint presence of the Excise Inspector and a representative of the licensee.

36. A perusal of the Brewery Rules and the Bottling Rules show that process of brewing or manufacturing beer and that of bottling of beer are in fact and in law entirely separate and distinct operations. The holder of a licence in Form F.L. B-3 to bottle beer can assign the privilege to a distiller, brewer or vintner of another State or Union Territory in India or even to distiller, brewer or vintner of outside the territory of India under Rule 2(1)(b). It may even assign the privilege to a person having permission to bottle imported foreign liquor in India. The plan of the premises where bottling operation is to be carried on has to be submitted along with the application for grant of the licence. The licence granted to bottle

spirit or beer or wine, carry a condition that the premises shall not be used for any other purpose except for bottling and storage of foreign liquor and the licensee is not entitled to make any alteration in the said premises without the previous approval in writing of the Collector or the Excise Commissioner. The operations connected with the bottling have to be conducted in separate rooms set apart for the purpose within the premises where the foreign liquor is stored and all the apparatus for filtering, bottling etc. have to be set up there. The rules show that bottling can be done by a third person or even by an importer having permission to import foreign liquor in India.

37. That bottling is altogether a separate process and is done in a separate building under a different licence is also the case of the writ petitioners. In para 4 of the writ petition, it is stated that manufacture of beer and bottling thereof for sale are two distinctly separate process. In para 5, it is stated that para 645 of the U.P. Excise Manual and the Bottling Rules contemplate that a bottling licence in Form F.L. 3 may be granted even to a whole-sale vendor and therefore a person who may be a manufacturer of beer may not necessarily be one who may be bottler thereof: In para 9, it is stated that bottling operations are carried out in a separate premises approved by the Excise Commissioner. Para 12 of the writ petition describes various kinds of registers which the Officer In-charge has to maintain and F.L.B.-3 is register of receipts and issues of foreign liquor for bottling in the licensed bottling premises. In para 13, it is stated that the maintenance of bottling accounts under F.L.B. 3 starts from the quantity of beer received into the bottling tanks for purpose of bottling in the bonded warehouse of the petitioner company. Writ Petition No. 3968 of 1978 which has been dealt with as the leading case in the earlier part of the judgment, has been filed by the same petitioner viz. M/s. Mohan Meakin Breweries Ltd. and para 7,11,14 and 81 thereof read as follows:

Para 7. That from the process of manufacture and bottling as described in brief in Annexure T, it would be apparent that manufacture and bottling are two distinct and separate processes and are carried out in separate premises under separate licences, namely, B-I and F.L.3 respectively, under the direct supervision and control of the Excise Inspectors posted therein.

Para 11. That the process of bottling begins with the transfer of bulk beer from the brewery for bottling. Bottling is carried on under licence in Form F.L.3, in a separate Bonded Warehouse under the control and supervision of an Officer of the Excise Department.

Para 14. That they maintaining of bottling account under F.L.3 as above relate to the bottling accounts after the transfer of bulk beer for bottling from the brewery.

Para 81. That it is thus obvious that the State Government itself conceded that the process of manufacture was different from the process of bottling as had been contended for by the petitioner company.

38. The provisions of the Brewery Rules, Bottling Rules and also the pleadings in

the writ petition conclusively establish that bottling is a separate process which is carried out in separate premises under a separate licence and the process of bottling starts after the finished product namely beer which is consumable as a beverage of drink is received from the brewery. No further manufacturing process is required to be undertaken in the liquor which is received for bottling and it is complete in all respects. In fact Sub-rules (7) and (8) of Rule 6 of the Bottling Rules provide that the licence in Form F.L..3 shall contain a condition forbidding blending or reducing or addition of any flavouring or colouring material or any other the judgment, has been filed by the same petitioner viz. M/s. Mohan Meakin Breweries Ltd. and para 7, 11, 14 and 81 thereof read as follows:

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39. The provisions of the Brewery Rules, Bottling Rules and also the pleadings in the writ petition conclusively establish that bottling is a separate process which is carried out in separate premises under a separate licence and the process of bottling starts after the finished product namely beer which is consumable as a beverage of drink is received from the brewery. "No further manufacturing process is required to be undertaken in the liquor which is received for bottling and it is complete in all respects. In fact Sub-rules (7) and (8) of Rule 6 of the Bottling Rules provide that the licence in Form F.L..3 shall contain a condition forbidding blending or reducing or addition of any flavouring or colouring material or any other substance in foreign liquor (which will include spirit, wine and beer in view of Section 3 (11) of the Act). Thus under a licence in Form F.L.. 3 the only thing done by a bottler is to transfer the finished product namely foreign liquor (which will include beer) in bottles of different volumes for easy marketability and sale.

40. The main contention of the learned Counsel for the petitioner is that in view of Section 24 of Act No. 9 of 1978, Section 28-A which came into force on 25.4.1978, shall be deemed always to have been inserted. Relying upon State of Travancore-cochin and Others Vs. Shanmugha Vilas Cashew Nut Factory and

Others, , the learned Counsel has submitted that when a statute enacts that something shall be deemed to have been done, which in fact and in truth was not done, the court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to. He has also referred to the off quoted passage of Lord Asquith in East End Dwelling Company Ltd., v. Fins Bury Borrough 1951(2) Alld. E.R. 587 that if you are bidden to treat an imaginary state of affairs as real you must surely, unless prohibited from doing so, also imagine as real the consequence and incident which, if the putative state of affairs had in fact existed, must inevitably had flowed from or accompanied it. If the Statute says that you must imagine certain state of affairs; it does not say that having done you must cause or permit your imagines to boggle when it comes to inevitable corollaries of that state of affairs. Learned counsel has elaborated his contention by urging that Section 41 of the Act does not empower the Excise Commissioner to levy duty. Para 912 of the Excise Manual (Rule 53) as it existed prior to its amendment in 1975 provided for levy of a fine not exceeding double the amount represented by the duty on such deficiency and Rule 7 (11)(a) of Bottling Rules provides for levy of duty on wastage exceeding one per cent. According to the learned Counsel in order to save these provisions, Section 28-A was enacted which was given retrospective operation. It is urged that Section 28-A gives a composite allowance of wastage up to the extent of ten per cent and therefore it is not permissible for the Excise Commissioner to restrict the wastage up to nine per cent in manufacture of beer and up to one per cent in bottling. Learned counsel has? thus, submitted that wastage allowance up to the extent often per cent has to be given without dividing the same and the petitioner can claim an allowance up to ten per cent in wastage in bottling.

41. The argument of the learned Counsel for the petitioner looks attractive at the first blush but a close scrutiny would show that it is devoid of any merit. Rule 2(ii) of Brewery Rules defines a "brewer" and it means a person holding licence in Form B-l for running a brewery. "Brewery" has been defined in Rule 2(iii) of Brewery Rules and it means a building where beer is brewed and includes every place therein where beer is stored or wherefrom it is issued. Section 28-A_says "where the quantity of spirit or beer in a brewery is found..., the brewery shall be liable to pay duty...." The language used in the Section showg in unmistakable terms_ that it can apply to a brewery only. The Section contemplates physical examination by an officer of the Excise Department of the spirit or beer in a brewery and then to find out whether it is less or more than that shown in the stock account. The stock account of beer is taken in a brewery. As shown earlier, the bottling of beer is a different process and is carried out in a different premises specially licensed for this purpose and therefore Section 28-A can have no application to a bottling operation being carried out under a licence granted in Form F.L. 3 under U.P. Bottling of Foreign Liquor Rules, 1969.

42. Chapter V of U.P. Excise Act deals with Duties and Fees. Section 28 is the charging Section and Clause (e) which is relevant here lays down that an excise duty or 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 manufactured in any distillery established or any distillery or brewery licensed u/s 18. Clauses (d) and (e) of Sub -section (1) of Section 28 use the expression "excise duty on excisable articles manufactured". Section 29 (e) also uses the expression "beer manufactured". It is therefore obvious that excise duty can be charged only on manufacture of beer. If no manufacturing process of beer takes place, no excise duty can be levied except in cases covered by Clauses (a), (b) and (c) of Sub -section (1) of the Section 28 of the Act. What is "excise duty" has been explained in several decisions. In Re Central Provinces Berar Act No. XIV of 1938 AIR 1939 I C I, "excise duty" was described thus:

But its primary and fundamental meaning in English is still that of a tax on articles produced or manufactured in the taxing country and intended for home consumption.

In R.C. Jall Vs. Union of India (UOI), , it was held as under:

Excise duty is primarily a duty on the production or manufacture of goods produced or manufactured within the country. It is an indirect duty which the manufacturer or producer passes on to the ultimate consumer, that is, its ultimate incidence will always be on the consumer. Therefore, subject always to the legislative competence of the taxing authority, the said tax can be levied at a convenient stage so long as the character of the impost, that is, it is a duty on the manufacture or production, is not lost. The method of collection does not affect the essence of the duty, but only relates to the machinery of collection for administrative convenience. Whether in a particular case the tax ceases to be in essence an excise duty, and the rational connection between the duty and the person on whom it is imposed ceased to exist, is to be decided on a fair construction of the provisions of a particular Act.

43. This view was reiterated in Jullunder Rubber Goods Manufacturers'' Association Vs. The Union of India (UOI) and Another, . Section 28 of U.P. Excise Act came to be considered in State of U.P. and Others Vs. Delhi Cloth Mills and Another, , it was held as under:

A duty of excise u/s 28 is primarily levied upon a manufacturer or producer in respect of the excisable commodity manufactured or produced irrespective of its sale. Firstly, it is a duty upon excisable goods, not upon sale or proceeds of sale of the goods. It is related to production or manufacture of excisable goods. The taxable event is the production or manufacture of the liquor. Secondly, as was held -in A.B. Abdulkadir and Others Vs. The State of Kerala and Another, , an excise duty imposed on the manufacture and production of excisable goods does not cease to be so merely because the duty is levied at a stage subsequent to manufacture or production. That was a case on central excise, but the principle is equally applicable here. It does not cease to be excise duty because it is collected the stage o f issue of the liquor out of distillery or at the subsequent stage of declaration of excess wastage...".

44. Since there is no manufacture or production of beer in the premises where bottling operation is carried out in a premises licensed under F.L. 3, the taxable event does not happen and there, is no occasion for levying or charging any excise duty.

45. Beer is manufactured in a brewery and therefore U.P. Brewery Rules have made detailed provisions for realisation and payment of excise duty. Chapter E and F thereof deal with ''Issues of Beer'' and ''Allowable wastage and refund of duty'' from Rule 41 to Rule 53. Rule 41 provides that no beer shall be removed from a brewery until the duty imposed u/s 28 of the Act has been paid or until a bond u/s 19 of the Act has been executed by the brewer. Rule 46 provides that no beer shall be removed except under a pass in Form B-12 which is issued either on proof of full payment of duty or on proof of execution of bond. Rule 47 provides that issues of beer may be made from brewery on pre-payment of duty for transport to the wholesale premises of the brewers and for export under bond to other States. Rule 49 confers power on the State Government to remit or order to be repaid duty when any malt, liquor on which duty has been charged or paid is destroyed by accidental fire or other un-avoidable causes. Rule 50 empowers the Excise Commissioner to refund duty when beer on which duty has been charged and paid, becomes unfit for consumption. Since the beer is manufactured in a brewery and the taxing event happens there, these provisions have been made in the Brewery Rules. Similar provisions do not exist in the Bottling Rules.

46. Article 265 of the Constitution provides that no tax shall be levied or Collected except by authority of law. In Bimal Chandra Banerjee Vs. State of Madhya Pradesh etc., , it has been held as under:

No tax can be imposed by any bye-law or. rule or regulation unless the statute under which the subordinate legislation is made specially authorises the imposition even if it is assumed that the power to tax can be delegated to the executive. The basis of the statutory power conferred by the statute cannot be transgressed by the rule-making authority. A rule-making authority has no plenary power. It has to act within the limits of the power granted to it.

47. In para 74, 75, 76 and 80 of the writ petition, it is pleaded that it is the State Government alone which can impose or levy excise duty and the Excise Commissioner has no authority to levy duty. Similar plea has been raised in ground No. 4 and 7 of the writ petition.

48. U.P. Bottling of Foreign Liquor Rules, 1969 have been made by the Excise Commissioner with the previous sanction of the State Government in exercise of power conferred by Section 41 of the Act. Section 41 of the Act does not empower the Excise Commissioner to make a rule providing for levy of excise duty. Therefore any provision in the Bottling Rules providing for levy of excise duty would be hit by Article 265 of the Constitution and would be entirely ultra

vires.

49. Rule 7 of the Bottling Rules provides that the special conditions mentioned in the said Rule (enumerated from 1 to 21) would be applicable to bottling of Indian Made Foreign liquor in bond under F.L. 3 licence. Condition No. 10 provides that on the last working day of every calendar month, after all the transactions for that day are made, the Excise Officer Incharge shall take the stock of unbottled and bottled spirit and beer stored in the bottling warehouse, enter into the prescribed registers and ascertain the wastage of spirit in the bottling operations and storage in the bonded warehouses. Condition No. 11 (a) provides that an allowance of one per cent on the total quantity of spirit and beer stored during a month for actual loss in bottling and storage may be made and the licensee shall be responsible for the payment of duty on wastage in excess of one per cent. The question arises whether the aforesaid condition really imposes "excise duty" on wastage in excess of one per cent or it is something else. As discussed earlier, there being no manufacture of beer in the bottling operations, the provisions of Section 28 of the Act do not get attracted and there is no occasion for levying any excise duty. That apart the Excise Commissioner while making a rule in exercise of power conferred by Section 41 of the Act has no authority to make a provision for levy of excise duty.

50. In my opinion, the word "duty" used in condition No. 11 (a) is a misnomer and in realty it is a "licence fee". Section 17 (1)(d) of the Act provides that no liquor shall be bottled for sale except under the authority and subject to the terms and conditions of a licence granted in this behalf by the collector. Rule 2 (1)(a) of the Bottling Rules provides for grant of a licence and Rule 2 (1)(b) lays down that the holder of a licence in Form F.L. 3 may assign the whole or any portion of his bottling privilege to another person. The word used here is privilege. Rule 2 (2) lays down that subject to a minimum of Rupees one lakh, the licence fee in case of a distiller or a vintner shall be levied on spirit or wine at the rates given in the table appended to the sub-rule. This Sub-rule provides for licence fee for holders of F.L. 3 licence and F.L. 3-A licence according to the capacity of bottle and polypouches. In Har Shankar and Others Vs. The Dy. Excise and Taxation Commr. and Others, , a constitution bench has held that there is no fundamental right to do trade or business in intoxicants and the State under its regulatory powers has the right to prohibit absolutely every form of activity in relation to intoxicants - its manufacture, storage, export, import, sale and possession. The amount charged from the licensee are evidently neither in the nature of tax nor of excise duty. The licence fee which the State Government charges from the licensees need bare no quid pro quo to the services rendered to the licensee. It has been further held that by the words "licence fee" or "fixed fee" is meant price or consideration which the Government charges from the licensees for parting with its privileges and granting them licences. In Government of Andhra Pradesh Vs. Anabeshahi Wine and Distilleries Pvt. Ltd., , it was held that where some employees of the excise department were posted at the factory of the licensee carrying the business of manufacture and sale of wine

and other allied products, the licensee is liable to pay salary and allowances etc. to the excise staff so appointed when demand for payment of the establishment charges is made by the State Government, it was further held that establishment charges, payable by the licensees are neither in the nature of taxation nor excise 4 duty but constitute the price or consideration which the Government ?charges to the licensees for parting with its privileges and granting them to licensees. Rule 7 (2) and (6) specifically enjoin that operations connected with the filling of bottles shall be conducted in presence and under supervision of an Excise Inspector which shows that excise staff is posted where bottling operations are carrying on. State is therefore fully entitled to levy licence fee. The condition No. (11)(a) of the licence F.L. 3 for lew of duty is in fact a provision how "licence fee" in the event of wastage has Jo f be calculated or determined. This has been made to prevent, evasion of licence fee. Rule 2 (2) has prescribed the rates of licence fee on "per bottle" and per "pouch" basis. The wastage in bottling would naturally result in loss of revenue to the State from realisation of licence fee and it is. to guard against the aforesaid loss that condition No. (11) (a) has been made applicable to the licence. To illustrate the point, if the bottler receives 100 litres of liquor, he should produce 100 bottles of one litre capacity. If the licence fee is Rupee one per bottle of one litre capacity, the licence fee would come to Rupees one hundred. In order to avoid payment of licence fee, the bottler may say that there was wastage of twenty bottles and he has produced only eighty bottles of liquor and thus he is liable to pay Rupees eighty only as licence fee. In such a situation, condition No. (11)(a) of the licence would come into operation and allowance of only one per cent will be given and the licensee would be liable to pay Rupees ninety-nine as licence fee. Rule 2 (2) as it was originally made provided for licence fee for all the three categories enumerated in sub-clause (i), (ii) and (iii) of rule 2(1) (a). However by subsequent amendment, the word brewer was deleted and now it provides for levy of licence fee on distillery or vintner only.

51. In view of what has been discussed above, the writ petitioners in this group of cases are in law not entitled to any allowance or concession in excise duty on wastage of beer in bottling operations being carried out in premises licensed under F.L. 3.

52. Shri Ashok Mehta, learned Chief Standing counsel, has made a statement that an allowance in excise duty for wastage occurring in bottling operation up to the extent of one per cent has been given to the writ petitioners. The material on record shows that some sort of practice is being followed by the Excise authorities in the State whereunder an allowance in excise duty is given for wastage in bottling up to the extent of one per cent. The respondents may follow the said practice and give rents'' or allowance in excise duty to the writ petitioners for wastage up to the extent of one per cent occurring in bottling operation.

Yatindra Singh, J.—These six writ petitions deal with interpretation of Section 28-

A of the UP excise Act. 1910 (the Act): Rule 53 of the UP Brewry Rules. 1961 (the Brewery Rules and Rule 7(11) (a) of the UP Bottling Foreign Liquors Rules, 1969 (the Bottling Rules). The essential question revolves around allowances for wastage while calculating excise duty on beer, the stage when it is to be given, and if it can be fixed for different stages.

RELEVANT SECTIONS AND RULES

2 The impugned orders and the demand notices in different writ petitions are of different periods. During this period legislature intervened to amend the law and Excise Commissioner also substituted and framed rules relevant for decision in the cases, it would be convenient, if they were referred to before narrating the facts of different writ petitions.

3. The excise duty on beer is charged u/s 28 of the Act. The relevant part of Section 28 is appedix-1 to this judgement, initially there was no provision in the Act for providing any allowance due to wastage while manufacturing been or for refund of excise duty: the allowance was given under the Brewery Rules, framed by the Excise Commissioner u/s 41 of the Act. Rules 41 to53 of the Brewery Rules provide for allowable wastage and refund of duty and are appropriately headed as ''F: Allowable Wastage and refund of . duty''. They are renumbered as paragraph 908 to 912 in the excise Manual The original rule 53 (quoted in Appendix-2 to this judgement) initially provided allowance of 10% in deficiency due to evaporation sullage and other contingencies within the brewery but in case it was more than that it provided (SIC) exceeding double the amount represented by the duly on such(SIC)

4. The original rule 53 of the Brewery Rules did not specifically mention about deficiency at the stage of bottling. The Bottling Rules are also framed by the Excise Commissioner u/s 41 of the Act. Initially there was also no mention in the Bottling Rules regarding wastage due to bottling. The Brewery Rule and the Bottling Rule were amended by the Government Order dated 13th July 1995 that war. published in the official gazette of 9th August 1975 It substituted new rule 53 in the Brewery Rule (quoted in Appendix -2 to this judgement) and added Rule 7(10) and 01) to the Bottling Rules (quoted in Appendix-2 to this judgement) The substituted rule 53 of the Brewery Rule allows deficiency up to 9% due to evaporation sullage. and other contingencies. In case deficiency is more than 9% then the Excise duty only--unlike the levy of fee double the amount of duty contemplated under the original Rule 53 of the Brewery Rules--can be charged on the excess deficiency. The newly added Rule 7(11)(a) of the Bottling Rules permits allowance of 1% for actual loss in bottling and storage The licensee is required to pay duty for excess deficiency. At present, no fine or additional only can be charged under the Bottling Rules or the Brewery Rules)

5. Section 28-A was incorporated in the Act by UP Ordinance No. 5 of 1998 (published on 21st January 1978) (the amending ordinance) with retrospective effects. This ordinance was replaced by UP Act No. 9 of 1875 (the amending Act).

This Section provides imposition of additional duty equal to the duty in case deficiency is more than 10%. This allowance is given to cover losses due to evaporation sullage, and other contingencies within the brewery and also to cover loss in bottling and storage. Section 24 of the amending Act validates orders previously passed, as is the case in the group-I writ petitions. Sections 7 and 24 of the amending Act--by which Section 28-A was substituted and previous orders have been validated -are quoted in Appendix-1 to this judgement.

FACTS Group-I Wit petitions

6. These six writ petitions are divided into two groups. WP No. 3968 of 1978 and WP No 4043 of 1978 (first and second writ petition) are in group-l. WP Nos. 1370 of 1378. 4136 of 1978. 4157 of 1978 and 3690 of 1979 (third to sixth writ petition-'' are in group-II. In group-l writ petitions, Assistant Excise Commissioner sought explanation from the petitioners regarding deficiency and thereafter Excise Commissioner after considering the explanation imposed fees by non-speaking order on the petitioners on different dates under original Rule 53. Details of these dates along with the amount claimed in the first and the second writ petition are mentioned in Appendix 3 and 4 to this judgement respectively. These orders relate to period and were passed prior to August 9, 1975 when original rule 52 of the Brewery Rules was in existence. The petitioners files revisions before the State Government against these orders u/s 11(3) of the Act These revisions were dismissed on 12.4.1978 by non-speaking orders. During pendency of the writ petitions Advocate General made a statement before the court on 21.9.1908 ((SIC) petition) that the state government is inclined to reconsider its order and decide the revision afresh in accordance with law. The court mace it clear that it was open to the state government to do so. The State Government by similar reasoned orders dated 20.10.1978 again dismissed the revisions in the group-l writ petitions. These orders were filed along with counter affidavit. Broadly the State has justified the fine on the basis of newly added Section 28-A of the Act.

Group-II wit petitions

7 In group-II writ petitions, District Excise Officer claimed duty by different demand notices, allegedly for deficiency of more than 1% in bottling and storage in view of Rule 7(11)(a) of the Bottling Rules. These demand notices admittedly are for a period subsequent to 9.8.1975--the date when rule 7(11)(a) came into force--though this period is prior and subsequent to promulgation of the amending ordinance or the amending Act by which Section 23-A was introduced for the first time. Details of these demand notices and the period are mentioned in Appendix 5 to 8 to this judgement. The petitioners in the third and fourth writ petition have filed copies of the demand notices along with the writ petitions but in the remaining two petitions (the fifth and the sixth writ petitions) copies of demand notices have not been fired and only a statement about these notices has been appended.

8. The petitioners--in the third and the fourth writ petitions -filed appeals against demand notices before Excise Commissioner u/s 11(1) of the Act. Filing of these appeals in the third writ petition is nor disputed. The counter affidavit merely states it is matter of record. Filing of appeals in the fourth writ petition is also not disputed in the sense that counter affidavit (sworn in 1990) says the appeals ore not traceable Sri Ashok Mehta Chief Standing Counsel stated that the Excise Commissioner had no objection in deciding them in case fresh copies of the appeals were filed.

POINTS FOR DETERMINATION

9. We have heard Sri SS Ray, Sri SC Budhwor, Senior Advocates assisted by Sri Arun Tandon, for the petitioners, Sri Ashok Mehta, Chief Standing counsel, and Sri Chandra Shekhar Singh, standing counsel for the respondents Following points arise for determination in these petitions:

Group I Writ Petitions

(i) What is the purpose and interpretation of Section 28-A (or the original Rule S3 of the Brewery Rules)? 1

(ii) At what stages, Excise duty can be levied on beer? Does it become fit for human consumption after fermentation or after further process of filtration? At what stage allpwance of 10%, as envisaged u/s 28-A of the Act, has to be calculated?

(iii) Whether the allowance of 10% has been rightly given in group-I writ petitions.

Group II Writ Petitions

(iv) Rule 7(11)(a) of the Bottling Rule limits the allowance for deficiency in bottling and storage to 1%. Is it reasonable? Can it be limited to 1% or should the allowance--for evaporation, sullage, and other contingencies in the brewery and also to cover the loss in bottling--be 10% as indicated in Section 28-A of the Act?

(v) In case answer to the fourth point is in favour of the respondents then have they calculated the duty correctly in group-II writ petitions?

10. In these writ petitions, petitioners had taken many grounds and sought many reliefs. The amendment applications had been filed raining some more grounds and for adding more reliefs. But during arguments, the petitioners had confined themselves to the grounds relating to previously mentioned points and had restricted their reliefs arising out of the answers to the aforesaid points. The rest of the grounds and reliefs were given up. They had raised question of validity of Section 2S-A of the Act but it was also given up during arguments.

POINT NOS. 1 to 3: ALLOWANCE OF 10%--AFTER FILTERATION

11. The States have power to enact laws exclusively on the matters provided in

List II of the seventh schedule of the Constitution. The two relevant entries of this schedule--regarding liquor--are entry 8 and entry 51.

12. The Act was also amended after Constitution was enforced and sub Section (3a) and (22-a) were substituted in Section 3, in the definition clause. They are as follows;

3 Interpretation- In this Act, unless there is something repugnant in this subject or context-

(3-a)"excise duty and "countervailing duty" mean any such excise duty or countervailing duty, as the case, may be, as is mentioned in entry 51 of List i in the Seventh Schedule to the Constitution; (22-3! "excisable article" means -

(a) any alcoholic liquor for human consumption: or

(b) any intoxicating drug;

The excise duty and excisable article under the Act are now on the same pedestal as the Constitution: it is same as entry 51 of List ii seventh schedule.

13. The entry 8 and 51 of List II seventh schedule were subject matter of (SIC) before a Constitutional bench of 7 judges in the Synthetic Chemical case Synthetics and Chemicals Ltd. and Others Vs. State of U.P. and Others, -- a review of the earlier decision in State of Uttar Pradesh and Others Vs. Synthetics and Chemicals Ltd. and Others, . In the Bihar Distillery and Another Vs. Union of India (UOI) and Others, the Supreme Court explained the synthetic Chemical, case as follows:

The expression "intoxicating liquors" in Entry 8 of List II means and refers to only potable liquors and that the portability is determined by the standards specified by ISI (Indian Standards Instituted, i.e. alcohol content not exceeding 43% v/v Entry 51 of List II was also similarly held limited to potable liquors. The power of the States to legislate in respect of liquors was held to be restricted to potable liquors alone.... The Court held, the power of the States is confine to (1) making a law prohibiting potable liquor and to regulate it, (2) laying down regulations to ensure that non-potable alcohol is not diverted and misused for potable purposes, (3) charging excise duty on potable alcohol and (4) to charge fees for rendering any service.

14. In substance, excise duty can only be imposed on potable alcohol or on alcoholic liquor fit for human consumption. In case it is done at earlier stage then it is liable to be a truck down--being beyond legislative powers--as was done in the Modi distillery case State of UP vs Modi Distillery JT 1995 (6) 523. The Supreme Court in this case held that,

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

15. The points Involved in group-I writ petitions are to be answered In the light of observations in the Synthetic Chemical case (summarised in the Bihar Distillery case) and the Modi Distillery case. But before I do that, let''s consider few facts regarding beer.

Beer: Draft (Draught) Beer

16. Encyclopedia Britannica explains,

''Beer is a verity of alcoholic beverages produced by the fermentation of starchy material derived from grains or other plant sources. Most of the woulds beers are made from mailed bailey and flavoured with hopes.

They may be produced by employing a bottom-fermenting yeast strain, which falls to the bottom of the container when fermentation is completed, or a top-fermenting strain, which releases carbon dioxide and rises to the surface formatting a head.

17 , Beer World: A Guide To Beer Styles, Kindly refer to htt//www.dailyglobe.com/beer/styles.html further explains.

There are four main types of beer: 1) Ales, 2) Lagers, 3) Hybrids, and 4} Specialty Beers. Ales and Lagers are the main two types [and have many sub groups] Hybrids are beers that combine elements of Ales and Lagers. Specialty Beers employ more unusual ingredients and offer almost limitless possibilities of beer flavours.

Ale is the order of the two types and was the only beer available for encentries ...Ales are top-fermenting beers that use the yeast strain known as Saccharomyces Cerevisiae Ales can be produced at warmer temperatures, and are faster fermenting. The by-products of ales are usually more noticeable and when esters and fruit define the character, they tend to have a somewhat pronounced palate.

Lager is a Bottom-fermenting beer, which became the more popular of the two main types in the 1800''s. It was invented by Bavarian Monks about 500 years ago when they found they could produce a clearer brew by storing it during the summer in wooden casks in cold subterranean caves. The word itself comes from the German lagern, which means to store. Lagers are bottom-fermenting beers that use the yeast strain known as Saccharomyces Uvarum, which is also known as S. Carisbergensis. Lagers are produced at colder temperatures, and ferment more slowly than ales. Colder temperatures frustrate the growth of esters and other by-products producing a beer, which is often "cleaner.''

18. Fresh beer is often called draft (also spelt draught) beer. Beer world: A Guide

to Beer styles explains.

[Draft Beer] can be either an ale or a lager. What makes it a draft is being naturally carbonated, un-pasteurised filtered only a little, if at all and served directly from the wooden barrel. When your local American bartender offers you a draft, he is often giving you a beer from a metal keg which has been highly filtered and artificially carbonated. Notwithstanding, these are still better than most American bottled beers. Bottles which claim to be draft beer never are because they are almost always highly filtered and are not stored at any time in any keg, let alone a wooden keg.

(Italics mine).

19. The Beer Info Source (Details quoted below)"1 explains draught (draft) beer as follows:

Technically speaking, draught [draft] beer is beer served from the cask in which it has been conditioned. It has been applied, loosely, to any beer served from a large container. More recently, it has been used as a promotional term for canned or bottled beer to try to convince us that the beer inside tastes like it came from a cask.

(Italics mine)

20 There is reference about draft beer in paragraph 29 of the UP Excise Manual Volume V. It states:

Although lager beer b ultimately filtered before racking into casks, clarification is an essential function of the storage. Uncarbonated top fermentation beers, which include the bulk of British draught [draft] ales are either racked directly from the fermenting vessel or setting back to which they are run down from fermenting vessels. The settling back provides a means of further clarification by sedimentation during 2 to 12 hours. This is also used for addition of primings, colourings and sometimes finings though these are sometimes added to individual casks. The beer loses carbon dioxide and gets aerated. Dry hops are also sometime added to the settling backs. Racking in cylinders and counter pressure racking is also followed.

(Italics mine.)

21. The Encyclopaedia Americans (International Edition Volume 3 page 453) (SIC) That The basic difference between draft beer and beer packaged in a bottle or can has been that draff beer is not pasteurised.

Respondents'' Submission And Decisions

22. The respondents'' submissions are in two parts. They firstly submit that

(i) Section 28-A of the Act (or the Original Rule 53 of the Brewery rule) should be seen in the light of Section 29(e) (ii) of the Act (quoted in Appendix-1 to this judgement). This sub Section (29(e)(ii) permits method of calculating boor produced as a finished product from the material used Section 23-A merely provides that method by explaining what should be quantity of beer actually produced as a finished product after all processes have been undertaken.

(II) Section 28-A of the Act (or original Rule 53 of the Brewery Rules) is merely to check the percentage of quantity of beer obtained in the normal process as a finished product on the basis of the raw material and it nether makes beer exigible to duty while it is in the process of manufacture nor provide excise duty on raw material as suygested by the Supreme Court in the Mohan Meakin case (citation quoted below) in the following words,

If there is any ambiguity in the Rules made by the Government, it may be open to them to regulate the process of manufacture and check the percentage of the quantity obtained in the pieces of manufacture.

(iii) The process of manufacturing potable alcohol from industrial alcohol (rectified spirit) is different than manufacturing beer. In the first case industrial alcohol that has higher alcoholic contents is diluted to make it potable alcohol. In this process industrial alcohol (exclusive domain of the Union! is converted into potable alcohol (exclusive domain of the States) Mohan Meakin Ltd. Vs. Excise and Taxation Commissioner, H.P. and Others, legal complications arise in balancing the rights of the Union and the State. In manufacturing beer yeast is added to ferment wort. Its alcoholic content increases from zero to about 14% depending on the kind of beer, it always remains less than the level for potability as determined by the Supreme Court. Wort or during fermentation or after fermentation ie at every stage of manufacturing bear it remains in exclusive domain of the state. There is neither any necessity of balancing any rights between the Union and the state, nor any justification for reading down Section 26-A or Section 29(e)(ii) of the Act. Both ace valid and full effect must be given 10 them.

23 The respondents'' alternatively submit that:

(i) Yeast is added to the wort in the fermentation vat. After fermentation it becomes alcohol fit for human consumption as held in the Synthetic case and explained in Bihar Distillery case. Its alcoholic content is less than the one specified by ISI 143%W). The state is, at least, emitted to make law as soon as fermentation is over. (ii) Browing consists of six major steps as mentioned in The World Book Encyclopaedia (Vol II pate 505) namely

(1) malting (2) mashing (3) boiling (4) fermentation (5) aging (6) finishing.

Again improves the taste of beer. Brewers age beer in storage tanks for several weeks or months. After beer has been aged, brewers chill and carbonate it. The carbonated beer is filtered several times to remove the remaining yeast and then is packaged in barrels, bottles or cans. Most bottled or canned beer is pasteurised before being packaged.

The aging or finishing is only to improve taste of the beer and increase its shelf life. The beer--fit for human consumption--comes into existence after fermentation ie before aging or finishing (filtration is done at finishing stage).

(iii) Section 28-A permits allowance for deficiency to cover loses due to evaporation, sullage and other contingencies including actual loss in bottling and storage Sullage is removed in filtration. In case deficiency is to be calculated after fiitration then word sullage in Section 28-A would become redundant: there cannot be any sullage after filtration. Such interpretation should not be adopted which will make words in Section 28-A redundant or useless especially when the petitioners have given up its validity.

(iv) Section 28-A is meant to discourage evasion of duty and it, at least, provides what amount of beer as a finished product should be available from the stage it becomes fit for human consumption, namely after fermentation. It is for this reason word sullage has been used. In support of this submission they cite State of U.P. and Others Vs. Delhi Cloth Mills and Another, where the Supreme Court upheld excise duty on excess deficiency in transportation.''

(v) The word sullage is not used in the Punjab ''Excise Act and the Supreme Court decision rendered in Mohan Meakin case (supra) while interpreting the Punjab Excise Act is not relevant for deciding the controversy here. The earlier decision of the division bench in the Mohan Breweries case (citation quoted below)'' is not correctly decided.

(vi) Draft (draught) beer is a beer that is un-pastured and unfiltered or if filtered, then it is not fine filtered to the extent of bottled or canned beer. It is often taken from fermentation vat as explained in paragraph 29 of the excise manual. The petitioners sell and have sold draft (draught) bear in the subsequent years namely, 1995 to 2000 to five star hotels and Defence Services clubs.

(vii) The petitioners cannot claim that allowance for deficiency should be. calculated on the stock register after filtration.

24 There is force in the aforesaid submissions. I would have considered them but refrain from doing so due to the following two decisions.

(i) The decision of the Supreme Court in the Mohan Meak in case (Supra).

(ii) The decision of the division bench of our court in the .Mohan Breweries case (Supra).

25. The Supreme Court in the Mohan Meakin case was concerned with the question: ''At what stage the beer becomes eligible to duty under the Punjab Excise Act. The court held.

Thus, the final product of the beer is relevant excisable article exigible to duty u/ s 31 of the [Punjab Excise] Act when it passes through fine filter press and received in the botteling tank .. under these circumstances, the point at which excise duty is exigible to duty is the time when the finished product i.e. beer was received in bottling tank or the finished product is removed from the place of storage or warehouse etc.

26. The Mohan Meakin case was considered by a division bench of this Court in the Mohan Breweries case (supra) of which one of us (Hon''ble GP Mathur, J.) was a member. This case was one of the bunch cases that we are deciding today. This court after considering the Mohan Meakin case and comparing provisions of the Punjab Excise Act and the Act held as follows:

Since the relevant statutory provisions in the UP Act are exactly similar to the Punjab act, the principle laid down in the above quoted decision [Mohan MeaKin case] will be fully applicable here. Thus the point at which the liquor manufactured by the petitioner company is exigible to duty is the stage when the finished product i.e. beer was received in the bottling tank. The stand of the State as pleaded in paragraph 8 and 11 of the counter affidavit [similar stand has been taken in the Group I writ petitions] that as soon as the wort along with yeast is received in the fermenting vessels or in fermenting vat, it ferments and process of manufacture of beer is complete, is therefore not justified and can not be accepted. The respondents are entitled to calculate the stock of beer for the purpose of Section 28-A of the Act at the stage when the same was received in the bottling tank as a finished product and not at any earlier stage The Supreme Court dismissed the SLP against this judgement.

27. The above-noted two cases are binding on me. In view of these cases, it is held that beer (fit for human consumption) comes into existence only when it is received as finished product after filtration. It is at this stage that excise duty can be charged. And it is at this stage that allowance for deficiency of 10% is to be calculated otherwise it would amount to taxing raw material or input that is in the (SIC) of being made into alcoholic liquor for human consumption.. In the above noted two cases it has been said that beer becomes fit for human consumption when it is received in the Dotting tank. The use of words ''bottling tank'' seems to be mere description rather than any specific receptacle and it is not ratio decindendi (rationale) of these decisions.

The State of UP and other decided on 24.1.1997

28. The Group-I writ petitions (first two) are allowed. The revisional orders of the State government dated 12.4.1978 and 20.10.1978 are quashed. The matter is remitted back to the state government for decision on merits.

POINT NOS. 3 AND 4: ALLOWANCE FOR DEFICIENCY IN BOTTLING CAN BE1%

29. Rule 53 of the Brewery Rules now provides allowance of 9% due to evaporation, sullage and other contingencies in the brewery. Allowance of 1% has been given to cover actual loss in bottling and storage under rule 7(11) of the Bottling Rules. Section 28-A of the Act (substituted by the amending Act with retrospective effects) provides is allowance of 10% due to evaporation, sullage and other contingencies including loss in bottling and storage. It is in this light that the petitioners submit that allowance of wastage in bottling cannot be

confined to 1%, but all allowance should be combined to give benefit of 10%. Let''s consider if ''these provisions operate in the same field.

30. The original Rule 53 of the Brewery Rules provided levying of fee not exceeding double the amount represented by the duty on the deficient amount i.e. it provided for additional fee. Section 28-A of the Act also provides levying of additional duty at the rate of 100% of ordinary rates of duty on deficiency. These two provisions operate in the same field in the sense that they deal with additional duty. There was some doubt if the additional duty could be imposed by rule 53 of the Brewery Rules, (Section 77 of the Act (quoted in Appendix-1) stipulates that all rules and notification shall have effect as if enacted in this Act from the date of such publication. This Section has been commented upon by the Supreme Court in State of U.P. and Others Vs. Delhi Cloth Mills and Another, as follows:

The object of this ancient formula, namely, "as if enacted in this Act" was to emphasis the fact that the notifications were to be as effective as the Act itself. It validity could be questioned in the same way as the validity of the Act could be questioned. It is an ancient from of rule making still to be found in the Act. Thus the Act having provided for fixed wastage allowance also in effect provided that the excess above the allowable wastage will be taxed.. It cannot, therefore., be said that no such charging up of excise duty on the excess wastage in transit could be validly made). Sections 28-A and 24 of the amending Act were introduced to save past transaction and to remove any doubt This is also clear from object and reasons of the Act. The relevant part of the same is as follows:

Similarly Section 28 of. the Act provides for imposition of duty on excisable articles. Rule 53 of the UP Breweries Rules, 1961, provide for the levy of "fine" where shortage of stock beyond permissible limit due to evaporation. sullage and other contingencies is found. For the removal of all doubts it is considered expedient to make explicit provision in the Act for the imposition of additional excise duty.

31. The present rule 53 of the Brewery Rules or Rule 7(11) of Bottling Rules do not deal with additional duty. These rules merely provide of levying of duty if efficiency exceeds the limit prescribed in the rules. These rules in fact do not levy any fresh duty: duty is levied u/s 28 of the Act. They are merety meant to discourage evasion of duty. They neither can be interpreted in light of Section 28-A of the Act providing additional duty, nor in their operation be eclipsed due to Section 23-A of the Act. They operate in different fields.

32. The respondents have provided limits for allowance at different stages. There is nothing to show that it is unreasonable or arbitrary. In view of this allowance of 1% for wastage in bottling and storage can neither be set aside^ nor combined with other allowances at other stage totaling it to 10%. The petitioners are entitled to allowance of 1% in deficiency for actual loss in bottling and storage. If deficiency is more than 1% then they are liable to pay excise duty on

the excess deficiency.

33. The petitioners in the second group of writ petitions have filed writ petitions directly against the demand notices of district excise officer or have filed appeals before appellate authority u/s 11 of the Act, which have not been decided. There is (SIC) dispute between the parties whether allowance of even 1% for actual loss in bottling and storage has been given or not. In these circumstances, it would be appropriate to dismiss Group-II writ petitions (third to sixth writ petition) with liberty to the petitioners to file application before the district Excise Officer in case even 1% allowance for actual loss in bottling and storage has not been allowed. In case applications are filed then the District Excise Officer will decide them by reasoned order in accordance with law.

CAVEAT

34. The Bottling Rules are independent of the Brewery Rules and provide for bottling fee. in our State there is no licensee for bottling only; but it is possible (though not probable) that a person may do bottling only. Rule 7(11) of the Bottling Rules could be for providing allowance in bottling fee rather than in excise dirty. But I am not considering it due to following reasons:

? The original Rule 2(2) of the Bottling Rules specifically provided bottling fee per bottles for different sizes of beer bottles but the present Rule 2(2) (substituted in 1974) does not provide bottling fee per bottle for beer. (It may provide lump sum amount irrespective of number of bottles but I leave this point open as it, neither admitted, nor involved here).

? Respondents have issued demand notices and have taken the case throughout that Rule 7(11) relates to allowance in excise duty.

? This sub-rule also specifically uses the word ''duty and net ''bottling fee''.

? Sri Ashok Mehta Chief Standing Counsel stated before the court that the petitioners are entitled to allowance of 1% for deficiency in Excise duty (and The question about validity of the original Rule 53 has become academic due to not bottling fee) due to actual loss in bottling and storage under Rule 7(11) of the Bottling rules.

? Neither any submissions nor any suggestions were made that this rule could be for allowance in bottling fee rather than excise duty.

35. Apart from above, it does seem odd that for imposing additional duty deficiency in bottling and at other stages have been combined together but so far as the payment of duty is concerned they have not been combined: ideally there should not be any difference. I leave it here; it is for the respondents to consider.

Appendix-1 (Relevant provisions of the Excise Act are as follows)

1. Relevant part of Section 28 of the Act is as follows:

28. Duty on excisable articles: --(1) An excise duty or a counter-vailing 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.--

(e) manufactured in any distillery established, or any distillery at brewery licensed, u/s 18;

provided as follows--

(3) Such duty shall not exceed the maximum as provided hereinafter.--

(e) Excise duty on excisable articles manufactured in any distillery established, or any distillery or brewery licensed, u/s 18:

Item No. Description of excisable articles Maximum rate of duty 2 Liquor manufactured in India and sophisticated or coloured so as to resemble in flavour or colour liquor imported into India: and rectified spirit-(a) Ale, beer, porter, cider and other fermented liquors. 5.00 per litre

2. Section 7 of the amending Act substituting Section 29-A to the Act is as follows:

7. Insertion of new Section 28-A. After Section 28 of the principal Act, the following Section shall be inserted and be deemed always to have been inserted, namely.

28-A. Imposition of additional duty in certain cases. .- (I) Where the quantity of spirit or beer in stock in a brewery is found, on examination by such officer of the Excise Department as may be authorised by the Excise Commissioner in this behalf to exceed the quantity in hand as shown in the stock account, the brewery shall be liable to pay duty on such excess at the ordinary rotes fixed u/s 28.

(2) Where the quantity of spirit or beer is found less than that shown in the stock account on such examination and deficiency exceeds ten per cent, (allowance to that extent being made to cover losses due to evaporation, sullage and other contingencies within the brewery, and also to cover loss in bottling and storage) the Excise Commissioner shall levy an additional duty at the rate of one hundred per cent of ordinary rates of duty in respect of such deficit as exceeds ten per cent over and above the ordinary rates of duty.

3. Section 24 of the amending Act validating action is as follows:

24. Validation. .-- Notwithstanding anything contained in the principal Act or any other law for the time being in force, any levy imposed by the Excise Commissioner, before the commencement of this Act, In respect of deficit quantify at the rate not exceeding the rate specified in Section 28-A. as inserted in the principals Act by this Act. whether decribed as fine or by any other name, shall be deemed to be ''Additional duty'' validity imposed under the said Section 28-A, as if the provisions of this Act. were in force at all material tinies.

4. The relevant part of Section 29 of the Act is as follows:

23. Manner in which duty may be levied- Subject to such rules, as the [excise Commissioner] may prescribe to regulate to the time, place and manner of payment, such duty may be levied in one or more of the following ways as [the State Government] may be notification direct:

(e) In the case of spirit or beer manufactured in any distillery established or any distillery or brewery licensed u/s 18-

(ii) by a rate charged in accordance with such scale of equivalents, calculated on the quantity of materials used or by the degree of attenuation of the wash of wort, as the case may be, as the [State Government] may prescribe;

5.. Section 77 of the Act is as follows:

77. Publication of rules and notification:- All rules made and notifications issued under the Act shall be published in the (Official gazette) and shall have effect as if enacted in this Act from the date of such publication or from such other date as may be specified sin that behalf.

Provided that notwithstanding anything to the contrary contained in the Section or in any judgement, decree or order, the notification No 3842-E/XIII 512-83 dated May, 25. 1953 made by the State Government in exercise the powers u/s 30 shall have effect and be deemed always to have effect on and from April 1,1983.

Appendix-2 (Relevant Rules)

1. The original rule 53 of the Brewery Rules (Paragraph 912 of the Excise manual was as follows:

53 The accounts of a brewery and the stock of beer in hand in the brewery shall be examined by the Assistant Excise commissioner once a quarter. If the quantity of the beer in stock in the brewery on such examination be found to exceed the quantity shown as in hand in the stock account, the brewer shall be liable to pay duty on such excess at double the rate prescribed for ordinary issue. If the quantity be found less than that shown in the stock account, the cause of the deficiency shall be inquired into and the result reported to the Excise Commissioner, who may direct the levy of a fee not exceeding double the amount represented by the duty on such deficiency. Provided that any deficiency not exceeding 10. per cent, shall be disregarded, allowance to the extent being made to cover loss in bulk due to evaporation, sullage and other contingencies within the brewery. This allowance Shall be calculated upon the amount represented by the actual ascertained balance in hand at the date of the last stock taking, together with the total quantity since manufactured or received, as shown in column 2 and 3 of the register of manufacture and issue (form B-16).

2. Rule 53 of the Brewery Rules as substituted on August 3, 1S75 (present paragraph 912) is as follows:

53. On the last working day of every calendar month after all the issues for that

day are made, the Officer-in-charge shall examine the accounts of brewery and take the stock of beer in hand in the brewery. if the quantity of the beer in stock in the brewery on such examination be found to exceed the quantity shown as in hand in the stock account the brewer shall be liable to pay duty on such excess at the rate prescribed for ordinary issue if the quantity be found less than that shown in the stock account and such deficiency does not exceed nine per cent of the total stock of beer in the month the same may be disregarded allowances to that extent being made to cover losses due to evaporation, sullage and other contingencies within the brewery. But if the deficiency in stock be found to exceed nine per cent the cause shall be enquired into and the result reported to the Excise Commissioner who may direct the levy of duty on such deficiency as may be found in excess of nine percent at the rate prescribed for ordinary issue. This nine per cent free allowance shall be calculated up on the quantity represented by the actual ascertained balances in hand at the close of the last stock taking together with the total quantity since manufactured or received, as shown in columns 2 and 3 of the register of manufacture and issue (Form B-1).

3. Rule 7(10), (11) (a) and (b) of the Bottling Rules as added on August 9, 1975 are as follows;

7. Following additional special conditions will be applicable to bottling of Indian Made Foreign liquor in bond under F.I.-3 license,

(10) On the last working, day of every calendar month, after all the transactions for that day are made, the Excise Inspector Incharge shall take the stock of unbottled and bottled spirit 3rd beer/stored in the bottling warehouse, enter into the prescribed registers and ascertain the wastage of spirit in the bottling operations and storage in the bonded warehouse.

(11) (a) An allowance up to one per cent may be made on the total quantity of spirit and beer stored during a month for actual loss in bottling and storage. The licensee shall be responsible for the payment of duty on wastage in excess of one per cent,

(b) when the wastage does not exceed the prescribed limit, no action need be taken by the Excise Inspector Incharge but if an excess is found at the time of monthly stock taking the Excise Inspector shall submit a statement to the Collector by the fifth day of the month in Form F.L.B. 10 showing the quantity of actual wastage and the duty to be paid by the licensee on the excess wastage. On receipt of the statement the Collector shall recover the duty from the licensee at the full rate of duty leviable on Indian made foreign spirit and beer.

Appendix-3 WP No. 3968 of 1978(First writ petition) Detailed chart of the impugned orders of the Excise Commissioner, UP Allahabad imposing fine on wastage (period starting from May 1263)

Sr. No. Date Amount 1. 28.6.1966 6,43,728.00 2. 2.8.1971 31,91,754.36 3. 30.11.71/1.11.71 21,23,816.77 4. 1.11.1972 2,92,648.16 5. 22.11.1972

2,45,821.22 6. 8.12.1972 9,87,986.22 7. 29.6.1973 1,81,532.74 8. 17.7.1973 1,98,468.86 9. 17.7.1973 2,80,091.33 10. 24.11.1973 50,462.54 Total: 81.94.310.20

Appendix-4 WP 4043 of 1978 (Second wit petition) Details of the order passed by the Excise Commissioner imposing fine on wastage

(period starting from June 1970)

Sr. No. Date Amount Rs. 1. 17.5.1973 20,391.89 2. 17.5.1973 3,176.58 3. 17.5.1373 89,576.12 4. 17.5.1973 27,452.30 Total: 1,40,596.89

Appendix-5 WP No. 1375 of 1978 (third wit petition) Details relating to excess wastage in bottling (period Sept. 1975 to June 1977)

Sr. No. Demand Notices Amount in Rs. 1. 542 dt. 31.5.77 14.59.230.83 2. 277 dt. 2.7.77 1.12.782.83 3. 583(1) dt. 25.6.77 68,500.00 4. 583 (II) dt. 28.6.77 1,48,716.65 5. 929 dt. 1.9.77 1,14.755.65 6. 964 dt. 12.9.77 7,65.010.57 Total = 26.68.346.31

Appendix-6 WP No. 4136 of 1978 (fourth wit petition) Details relating excess wastage in bottling (period June 77 to March 78)

Sr. No. Date of Demand Notice Amount in...Rs. 1. 31.12.76 2,34.778.75 2. 31.12.76/28.1.77 11,549.34 3. 12.7.77 2,39,356.07 4. 20.4.78 2,73,634.81 Total: 7,39,218.97

Appendix -7 WP No. 4157 of 1978 (Fifth writ petition) Details relating to excess wastage in bottling (period August 1977 February 1978)

Sr. No Demand Notices Amount in Rs 1. 468(1) dt. 30.1.78 22,560.34 2. 468(2) dt. 30.1.78 34,568.34 3. 468(3) dt. 30.1.78 55,286.35 4. 499(1) dt. 6.2.73 26,672.88 5. 555/Vdt. 18.2.7.8 74,329.84 6. 454/Vdt. 4.3.78 51,883.30 7. 613/ Vdt. 6.4.78 12,570.02 Total: 2,75,865.06

Appendix-8 WP No. 3969 of 1979 (Sixth wit petition) Details relating to excess wastage in bottling (period March 78 to Oct 78)

Sr. No Demand Notices Amount in Rs. 1. 895/V ABKARI dt. 3.6.78 50,074.73 2. 964/V ABKARI dt. 28,6.78 54,328.80 3. 1021/V ABKARI dt. 6.7.78 3,62,799.31 4. 122S(l)/V ABKARI dt.30.8.78 3,42,499.31 5. 1345/V ABKARI dt. 30.9.78 2.80,947.66 6. 70/V ABKARI dt. 6.11.78 3,06,290.76 7. 150(l)/V ABKARIdt. 29.11.78 1,03.179.00 8. 175/''V ABKARI dt. 7.12.78 2,16,445.00 Total: 17,16,665.61

ORDER

Writ petition No. 3968 of 1978 and writ petition No. 4043 of 1978 are allowed and the revisional orders dated 12.4.1978 and 22.10.1978 passed by the State Government are quashed. The State Government shall decide the revisions afresh after calculating the stock of beer for the purpose of original Rule 53 of the U.P. Brewery Rules, 1961 (para 912 of U.P. Excise Manual as it then existed) and Section 28-A of U.P. Excise Act when after filtration, the same has assumed the shape as a finished product which is normally consumed by human beings as a beverage of drink.

Writ petition No. 1375 of 1978, writ petition No. 4136 of 1978, writ petition No. 4157 of 1978 and writ petition No. 3690 of 1979 are dismissed. However if there is any calculation mistake in the orders passed by the District Excise Officer and rebate or allowance in excise duty has not been given for wastage occurring in bottling operation up to the extent of one per cent, it will be open to the writ petitioners to move applications for correction of the orders. If such an application is made the District Excise Officer shall pass appropriate order expeditiously, preferably within two months of the making of the application. Stay orders passed by this Court arc vacated.

