
(2012) 01 UK CK 0021

In the Uttarakhand High Court

Case No : Writ Petition No. 1202 of 2007 (M/B)

M/s India Glycols Limited

APPELLANT

Vs

State of Uttarakhand and another

RESPONDENT

Date of Decision : 09-01-2012

Acts Referred:

Constitution of India, 1950 — Article 305
Industries (Development and Regulation) Act, 1951 — Section 18G
Uttar Pradesh Excise Act, 1910 — Section 28
Uttar Pradesh General Clauses Act, 1904 — Section 20, 6C
Uttar Pradesh Reorganisation Act, 2000 — Section 24A, 24B

Citation : (2013) 1 UC 622

Hon'ble Judges : Barin Ghosh, C.J; Umesh Chandra Dhyani, J

Bench : Division Bench

Judgement

Barin Ghosh, C.J.—Principal challenge in the amended writ petition is to the Notification dated 24th May, 2005 and the amendment thereto as far as the same relate to imposition of export fee on rectified spirit, extra neutral alcohol and Indian made foreign liquor, exported by the petitioner to various buyers outside the country.

2. The fact, however, remains that export fee, levied by Notification dated 24th May, 2005, initially upto 31st March, 2006 and extended upto 31st March, 2007 by Notification dated 19th May, 2006, has been paid by the petitioner. By the orders dated 9th April, 2007; 10th May, 2007; 11th July, 2007; and 6th August, 2007, respondent No. 2 levied fee at the rate of Rs. 1 per bulk litre. By two orders dated 2nd September, 2007, export fee at the rate of Rs. 2.50 per bulk litre was charged. By a representation dated 30th May, 2006, a request was made by the petitioner to permit exports without export fee. The said representation was followed by many other representations. In the circumstances, contending that the petitioner is not obliged to pay any export fee for export of rectified spirit, extra neutral alcohol and Indian made foreign liquor; the present writ petition was filed, on which, on 13th November, 2007, an interim

order was passed restraining the respondents from realising export fee on the exports made or to be made by the petitioner beyond the territories of India till the next date of hearing, which order was continued from time to time and is still in force.

3. On 26th July, 2011, respondents consolidated their claim aggregating to Rs. 12,47,81,333.45 on account of export of 4,89,98,100.00 bulk litres of extra neutral alcohol; 9,55,000.00 bulk litres of rectified spirit; and 51,435.75 bulk litres of Indian made foreign liquor, charged respectively at the rates of Rs. 2.50, Rs. 2.25 and Rs. 2.67 per bulk litres.

4. There is no dispute in the pleadings that extra neutral alcohol and rectified spirit are though liquid consisting of or containing alcohol, but they are not fit for human consumption and, at the same time, there is also no dispute that Indian made foreign liquor is such alcoholic liquor, which is fit for human consumption.

5. On 12th June, 1910, The United Provinces Excise Act, 1910 (hereinafter referred to as the "Act") came into force. Initially, the Act extended to the whole of United Provinces. In 1950, the word "United Provinces" was replaced by the word "Uttar Pradesh". Section 28 of the Act authorised imposition of duty, amongst others, on export of intoxicants, which means, amongst others, any liquor as defined by the Act. According to the Act, "liquor" means intoxicating liquor and includes spirits of wine, spirit, wine, tari, pachwai, beer and all liquid consisting of or containing alcohol, also any substance which the State Government may, by notification, declare to be liquor for the purposes of the Act. The Act empowered issuance of notifications and directed that the same shall take effect from the date of their publication. A Notification was published on 13th March, 1931, whereunder immediately before 24th May, 2005, a duty of Rs. 2.25 per bulk litre and of Rs. 2.50 per bulk litre respectively was levied in respect of export of rectified spirit and extra neutral alcohol.

6. On 26th January, 1950, the Constitution of India came into force. The Act and the said Notification were in force immediately before commencement of the Constitution. It was felt that the Act, to the extent the same authorised imposition of duty on export of liquor; and the said Notification imposing duty on export of rectified spirit and extra neutral alcohol, are not inconsistent with the provisions of Part III of the Constitution of India and, accordingly, levy of export duty in accordance therewith was not questioned. In exercise of power under Article 305 of the Constitution of India, the President of India also did not interfere with imposition of such levy. However, by the Constitution of India, the field of legislation by the States was curtailed to intoxicating liquors and their power to impose excise duty was also curtailed to alcoholic liquors fit for human consumption; whereas the power to levy all duties of excise, except alcoholic liquors fit for consumption, was vested in the Union of India, i.e. the Central Government. At the same time, the Constitution of India extended the legislative field in respect of industries to the States, subject, however, to the industries, declared by Parliament by law to be necessary for the purpose of defence or for

the prosecution of war, and industries, the control of which by the Union of India is declared by Parliament by law to be expedient in public interest. In exercise of power in the legislative field pertaining to industries, the control of which by the Union may be declared by Parliament by law to be expedient in public interest, the Parliament enacted The Industries (Development and Regulation) Act, 1951 (hereinafter referred to as "IDR Act"). By virtue of the said enactment, Parliament took over the control of the industries specified in the First Schedule thereto, denuding the States of control over those industries. In the year 1956, w.e.f. 1st March, 1957, the First Schedule to IDR Act was amended and, thereby, fermentation industries (1) alcohol; (2) other products of fermentation industries, were included in the Schedule to IDR Act. Despite such changes in the law, State of Uttar Pradesh continued to levy duty on export of liquid containing alcohol, whether the same were fit for human consumption or not.

7. The right to claim excise duty on liquid containing alcohol not fit for human consumption, as was being claimed by the State of Uttar Pradesh, was challenged before the Hon^{ble} Supreme Court, when a Constitution Bench of the Hon^{ble} Supreme Court decided the merit of the said claim in its judgment rendered in the case of Synthetics and Chemicals Ltd. and Others Vs. State of U.P. and Others, . At the same time, challenge was also thrown to the Bombay Prohibition Act, 1949, whereby the State armed itself with the exclusive privilege of, amongst others, exporting any intoxicant and, on the basis thereof, increased the rate of transport fee from Rs. 0.17/- to Rs. 1.25/-. The Hon^{ble} Court held, amongst others, that the States cannot claim under Entry 33 of List III that it can regulate industrial alcohol, which is unfit for human consumption and a product of the scheduled industry, because the Union, u/s 18-G of the IDR Act, has evinced a clear intention to occupy the whole field and, even otherwise, Sections 24-A and 24-B of the U.P. Act do not constitute any regulation in respect of industrial alcohol, a product of the scheduled industry. It held that those sections purport to deal with the so called transfer of privilege regarding manufacture and sale. Section 28 of the Act was, however, not specifically dealt in the said judgment. It, at the same time, specifically pronounced that, after the amendment was effected to IDR Act, the State is left with the following powers to legislate in respect of alcohol:

- a. It may pass any legislation in the nature of prohibition of potable liquor referable to Entry 6(8) of List II and regulating powers.
- b. It may lay down regulations to ensure that non-potable alcohol is not diverted and misused as a substitute for potable alcohol.
- c. The State may charge excise duty on potable alcohol and sales tax under Entry 52 of List II. However, sales tax cannot be charged on industrial alcohol in the present case, because under the Ethyl Alcohol (Price Control) Orders, sales tax cannot be charged by the State on industrial alcohol.
- d. However, in case State is rendering any service, as distinct from its claim of so-

called grant of privilege, it may charge fees based on quid pro quo.

8. On 18th May, 1990, a Notification was issued by the State of Uttar Pradesh and, thereby, it provided for requirement of a new licence for denaturation of spirit and imposed a denaturation fee of 7 paise per litre in advance. The object thereof was to ensure that rectified spirit is not converted into potable liquor. The said action on the part of the State of Uttar Pradesh was subject matter of a decision rendered by the Hon^{ble} Supreme Court in *Vam Organic Chemicals Ltd. and Another Vs. State of U.P. and Others*, . The Hon^{ble} Court considered its judgment rendered in the case of *Synthetics and Chemicals* and held that the Hon^{ble} Court in the said judgment did not hold that the State will have no power whatsoever in relation to industrial alcohol. It, then, referred to that portion of the judgment rendered in the case of *Synthetics and Chemicals* as quoted above and held that denaturation of spirit, meant for industrial use, was to prevent misuse of non-potable alcohol for human consumption and the same was specifically mentioned in *Synthetics and Chemicals* to be within the legislative competence of the State. The Hon^{ble} Court, then, referred to the case of *Shri Bileshwar Khand Udyog Khedut Sahakari Mandali Ltd. Vs. State of Gujarat and Another*, , where validity of demand for maintenance of the excise staff for supervision of manufacture of industrial alcohol was considered and the Hon^{ble} Court held that a provision enacted by the State for supervision, which is squarely covered under Entry 33 of the Concurrent List and which deals with production, supply and distribution, which includes regulation; cannot be assailed and that, in *Synthetics and Chemicals* case, the Hon^{ble} Court made it clear that even though the power to levy tax or duty on industrial alcohol vests in the Central Government, the State was still left with the power to lay down regulations to ensure that non-potable alcohol is not diverted and misused as substitute for potable alcohol. The Hon^{ble} Court, then, noticed that, in case of regulatory fee, like licence fees, existence of quid pro quo is not necessary, although the fee imposed must not be, in the circumstances of the case, excessive. The Hon^{ble} Court, lastly, observed that, keeping in view the quantum and nature of the work involved in supervising the process of denaturation and the consequent expenses incurred by the State, the fee of 7 paise per litre was reasonable and proper.

9. At about the same time, the Hon^{ble} Supreme Court decided the case of *Bihar Distillery and Another Vs. Union of India (UOI) and Others*, . In that case, the Hon^{ble} Supreme Court felt the right to levy duty in between the Union and the States depends on the purpose for removal / clearance of spirit and not on the product as it stood manufactured. This view was felt by the Hon^{ble} Supreme Court, in a later judgment rendered in *Deccan Sugar and Abkari Co. Ltd. Vs. Commissioner of Excise, A.P.*, , to be contrary to the pronouncement of the Hon^{ble} Court in the case of *Synthetics and Chemicals* and, accordingly, was referred to a larger Bench.

10. When the law, thus, stood, carving out a part of the State of Uttar Pradesh,

State of Uttarakhand was created. By virtue of the provisions contained in the Uttar Pradesh Reorganisation Act, 2000, the laws made by the State of Uttar Pradesh, including those referred to above, squarely applied to the territory of the State of Uttar Pradesh, which became the territory of the State of Uttarakhand. In the meantime, by a Notification dated 13th January, 1990, a licence fee of 15 paise per litre was sought to be imposed on the quantity of specially denatured spirit. The said action came to be finally decided by the Hon?ble Supreme Court in the case of State of U.P. and Others Vs. Vam Organic Chemicals Ltd. and Others, . The Hon?ble Court held that, in the case of State of U.P. and Others Vs. Modi Distillery and Others, , it was pronounced that the State cannot legislate on industrial alcohol despite the fact that such industrial alcohol has the potential to be used to manufacture alcoholic liquor. The Hon?ble Court, then, noted the decision of Synthetics and Chemicals and pronounced that the State?s power is limited to, (i) regulation of non-potable alcohol for the limited purpose of preventing its use as alcoholic liquor; and (ii) the charging of fees based on quid pro quo. It, then, posed a question, whether the levy in question is justifiable as such fee, i.e. based on quid pro quo. The Court, then, noted its judgment rendered in Vam Organic Chemicals Ltd. and, in particular, the finding that there was a broad co-relationship between the amount of fee charged and the expenses incurred for implementing and overseeing the regulation. The Hon?ble Court, then, pronounced that the State Government is competent to levy fee for the purpose of ensuring that industrial alcohol is not surreptitiously converted to potable alcohol so that State is deprived of revenue on the sale of such potable alcohol and the public is protected from consuming such illicit alcohol, but this power stops with denaturation of industrial alcohol. It, then, observed that fee is required to be justified with reference to the cost of the regulation and since the industry is already paying a fee for such regulation and since there is nothing to show that there has been deployment of any additional staff to oversee the possibility of renaturation of denatured spirit, which was the purported purpose of levy of the said fee, the same could not be levied.

11. In Deccan Sugar and Abkari Co. Ltd. vs. Commissioner of Excise, AP, reported in (2004) 1 SCC 243, a larger Bench of the Hon?ble Supreme Court, without referring the judgment in Bihar Distillery, held contrary to what was held in Bihar Distillery and, accordingly, impliedly over-ruled the same. At this juncture, it would be appropriate to note that the Hon?ble Supreme Court, in the later case of Vam Organic Chemicals Ltd., also did not agree to follow the ratio of the decision rendered in Bihar Distillery?s case.

12. It is the contention of the writ petitioner that there is no quid pro quo in relation to imposition of export fee on rectified spirit, extra neutral alcohol and Indian made foreign liquor and, in any event, there is no co-relation between the levy imposed and the counter payment or quid pro quo. It is the case of the respondents that the Notification brought in regulatory measure and the fee was levied to compensate cost of supervision. Insofar as the regulatory measure is concerned, as will be evidenced from the orders referred to above, that the same

directed, amongst others, that consignment / container should be sealed carefully by the Excise Officer in charge of the distillery and the same shall be checked and verified by the Officer-in-Charge of Excise posted at the ICD Depot, Tughlakabad, New Delhi, or by the Officer-in-Charge of Excise ICD Depot, Dadri, Uttar Pradesh. In other words, the orders made it clear that only an additional supervision by the Excise Officer, in charge of the distillery is required to be made to ensure that each consignment / container is sealed. The remaining is left with the Excise Officer, appointed by the State of Delhi or by the State of Uttar Pradesh. In the counter affidavit, nothing has been brought on record what extra expenditure the State of Uttarakhand is incurring to ensure compliance of the regulation, i.e. that each consignment / container is sealed and the same is checked and verified at New Delhi or at Dadri, Uttar Pradesh. However, the fact remains that Indian made foreign liquor is undisputedly potable alcohol and, accordingly, the State of Uttarakhand had and has every power to legislate thereon and also to impose duty in relation thereto. Even if such duty is imposed by calling the same as fee and even if no quid pro quo in relation to such imposition is established, still then, it cannot be contended that the State of Uttarakhand was incompetent to impose export fee on Indian made foreign liquor. It was not contended that such imposition was contrary to the provisions contained in Part XIII of the Constitution of India. Furthermore, as would be evidenced from what has been stated above, State of Uttarakhand is claiming export fee at the rate of Rs. 2.67 per bulk litre in respect of Indian made foreign liquor. The Notification dated 24th May, 2005 does not impose any such fee. Petitioner has not brought on record appropriate Notification in relation to the said imposition and, accordingly, has not challenged the said imposition. We, accordingly, make it absolutely clear that we have not decided the right of the respondent State to claim such fee and liability of the petitioner to pay the same. The questions, in regard thereto, are res integra. But, at the same time, for the reason that the State of Uttarakhand has failed to establish counter payment or quid pro quo in relation to the regulation for export of extra neutral alcohol and rectified spirit; we have no other option but to hold that the said imposition is unsustainable. Even then, we would not absolve petitioner from its obligations under the Notification dated 24th May, 2005, by which, the said imposition was made, inasmuch as, there is no pleading that the export fees paid on the basis thereof were not passed on to the customers of the petitioner.

13. By the Notification dated 24th May, 2005, as aforesaid, an amendment was effected to the Notification dated 13th March, 1931 and, thereby, clause (10) of the Notification dated 13th March, 1931 was substituted and, thereby, it was indicated that fee of Rs. 1 per bulk litre for export of industrial alcohol shall be levied in place of Rs. 2.25 per bulk litre and Rs. 2.50 per bulk litre respectively for export of rectified spirit and extra neutral alcohol. The said Notification made it clear that the same would be effective for six months from the date of the said Notification. By a Notification dated 24th November, 2005, the validity of the Notification dated 24th May, 2005 was extended until 31st March, 2006. No

further extension was made.

14. The fact remains, there being no co-relation between the levy imposed by the said Notification and the counter payment or quid pro quo in relation thereto; the said imposition, in view of the law laid down by the Hon^{ble} Supreme Court in *Synthetics and Chemicals*, is not sustainable. Furthermore, by the Notification dated 24th November, 2005 and extension thereof by the Notification dated 19th May, 2006, clause (10) of the Notification dated 13th March, 1931 was repealed and substituted by a new clause, which remained in force until 31st March, 2006. A similar situation was considered by the Hon^{ble} Supreme Court in the case of *West Uttar Pradesh Sugar Mills Association and Others Vs. State of Uttar Pradesh and Others*, where, by a Notification dated 24th April, 1992, old rule set out in column 1 of the said Notification was substituted by the rule set out in column 2 thereof. The Hon^{ble} Court held that, once the old rule was substituted, the same stood repealed and, since the substituted rule was to remain in force for a period mentioned in the Notification, the substituted rule stopped operating since after expiry of the period. It was pronounced that, after expiry of the substituted rule, the repealed rule, which was substituted, did not resurrect. While dealing with the matter, the Hon^{ble} Court considered the provisions of Section 6-C of the U.P. General Clauses Act and omission thereof in Section 20 of the said Act, which applies, with equal force, to the State of Uttarakhand, and held that, in the absence of application of Section 6-C in a situation of that nature, after the substituted rule became inoperative, the old rule did not revive. In that view of the matter also, it must be deemed that, after expiry of 31st March, 2006, there is no legislation imposing fee for export of rectified spirit and extra neutral alcohol. In the circumstances, w.e.f. 1st April, 2006, petitioner had and has no obligation to pay any export fee in respect of rectified spirit and extra neutral alcohol.

15. With the declaration as above, we hold that any demand, made in respect of fee for export of rectified spirit and extra neutral alcohol, upon the petitioner for export of rectified spirit and extra neutral alcohol subsequent to 31st March, 2006, i.e. on and from 1st April, 2006, is invalid, unsustainable and irrecoverable. This declaration, however, will not stand in the way of the State of Uttarakhand claiming such fee, in the event, petitioner has passed on such fee to its buyers, although it has not paid the same to the State of Uttarakhand and, for that matter, State of Uttarakhand shall be entitled to take such steps as it may be entitled to take in accordance with law.

16. The writ petition is, accordingly, disposed of.