(2010) 08 SHI CK 0227

In the High Court Of Himachal Pradesh

Case No : C.W.P. No''s. 744, 746 and 747 of 2000 and 434 and 435 of 2001

Ranger Breweries Ltd. APPELLANT

Vs

State of H.P. and Others RESPONDENT

Date of Decision : 17-08-2010

Acts Referred:

Constitution of India, 1950 — Article 277
Dangerous Drugs Act, 1930 — Section 2, 3(13), 3(14)
Punjab Distillery Rules, 1932 — Rule 101
Punjab Excise Act, 1914 — Section 12(a), 33A, 59
Punjab Excise Act, 1932 — Section 22(a), 23, 31, 32, 33

Citation : (2010) 3 ShimLC 98

Hon'ble Judges : Kurian Joseph, C.J;Kuldip Singh, J

Bench : Division Bench

Judgement

Kurian Joseph, C.J.—Whether the State is justified in levying excise duty/duty on the wastage of spirit in the process of re-distillation in the distilleries of the Petitioner, is the question that arises for consideration in these cases. It is the contention of the Petitioner that there is no authority for the State either under the Act or the Rules enabling the State to levy duty for the wastage. According to the State, wastage is not contemplated in the process of re-distillation at the relevant time and hence the same is liable to duty, if not excise duty.

2. The Petitioner has been supplied varying quantities of spirit for re-distillation for the purpose of manufacturing liquor, fit for human consumption. It has to be specifically noted at the outset that all these cases pertain to the levy of duty prior to 1999. The significance of the year 1999 is that the wastage in re-distillation was prescribed for the first time under the Rules, only w.e.f. 15.10.1999. After the process of re-distillation, the entire quantity of spirit admittedly is not accounted. Therefore, the State has taken the stand that total quantity of spirit supplied minus the total quantity of alcoholic liquor fit for human consumption has to be taken to be wastage and that wastage is liable to duty.

3. Entry 84 of Union List 1 of Schedule VII of the Constitution of India provides for:-

Duties of excise on tobacco and other goods manufactured or produced in India except (a) alcoholic liquors for human consumption."

Entry 51 of State List 2 provides for:

Duties of excise on the following goods manufactured or produced in the State and countervailing duties at the same or lower rates on similar goods manufactured or produced elsewhere in India:

(a) alcoholic liquors for human consumption.

Therefore, it is the contention of the Petitioner that any duty is permissible only on alcoholic liquor fit for human consumption. Admittedly, the spirit that is supplied to the distillery for the purpose of distillation is not alcoholic liquor fit for human consumption. The duty that is proposed to be levied is only on the spirit, which is not fit for human consumption.

4. We do not think that there can be any formidable resistance on this argument advanced by the Petitioner, in view of the well settled position that excise duty is permissible by the State only on alcoholic liquor fit for human consumption. The Supreme Court has dealt with these aspects in quite a few decisions. In Mohan Meakin Ltd. Vs. Excise and Taxation Commissioner, H.P. and Others, it has been held that:

6. It is, thus, clear that the range of potable alcohol varies between country spirit to whiskey and the ethyl alcohol. The alcoholic strength of each excisable article and its percentage varies as per the ISI specifications but intoxicating liquor necessarily means only that liquor which was consumable by human beings as it was. The State of levying excise duty upon alcoholic liquor arises when excisable article is brought to the stage of human consumption with the requisite alcoholic strength thereof. It is only the final produce which is relevant.

7. Thus, the final product of the beer is relevant excisable article excigible to duty u/s 31 of the Act when it passes through fine filter press and received in the bottling tank. The question is at what stage the duty is liable to be paid? Section 23 specifically envisages that until the payment of duty is made or bond is executed in that behalf as per the procedure and acceptance by the Financial Commissioner, the finished product, namely, the beer in this case, shall not be removed from the place at which finished product was stored either in a warehouse within factory premises or precinct or permitted place of usage. 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.

5. In Bihar Distillery and Anr. v. Union of India and Ors. reported in (1997) 2 SCO 727, it has been held at paragraph 23 and to extent relevant, the same is as

follows:

23.........Where the removal/clearance is for industrial purposes (other than the manufacture of potable liquor), the levy of duties of excise and all other control shall be of the Union but where the removal/clearance is for obtaining or manufacturing potable liquors, the levy of duties of excise and all other control shall be that of the State......

(6) So far as rectified spirit meant for being supplied to or utilised for potable purposes is concerned, it shall be under the exclusive control of the State from the moment it is cleared/removed for that purpose from the distillery-apart from other powers referred to above.

6. In Deccan Sugar & Abkari Company Ltd. v. Commissioner of Excise, A.P., (2004) 1 SCC 243, it has been held that:

2. It is settled by the decision of this Court in Synthetics and Chemicals Ltd. v. State of U.P., that the State Legislature has no jurisdiction to levy any excise duty on rectified spirit. The State can levy excise duty only on potable liquor fit for human consumption and as rectified spirit does not fail under that category the State Legislature cannot impose any excise duty. The decision in Synthetics and Chemicals Ltd. v. State of U.P., has been followed in State of U.P. v. Modi Distillery, where certain wastage of ethyl alcohol was sought to be taxed. This Court following the decision in Synthetics and Chemicals Ltd. came to the conclusion that this cannot be done.

7. As already stated above, the State has no case that the duty that was charged on the Petitioner is on liquor, that is fit for human consumption. Duty is charged on spirit which is not a potable liquor. The learned Additional Advocate General contends that even if excise duty is not leviable, duty on spirit is leviable under the Punjab Excise Act, 1914. No doubt, being a pre-constitutional levy, in case there was enabling provision for such levy on spirit, it is permissible in view of the Article 277 of the Constitution of India, which reads as follows:

Savings.--Any taxes, duties, cesses or fees which immediately before the commencement of this Constitution, were being lawfully levied by the Government of any State or by any municipality or other local authority or body for the purposes of the State, municipality, district or other local area may, notwithstanding that those taxes, duties, cesses or fees are mentioned in the Union List, continue to be levied and to be applied to the same purposes until provision to the, contrary is made by Parliament of law.

8. Then the question is whether there was an enabling provision under the Punjab Excise Act, 1914. Section 33-A of the Punjab Excise Act, 1914 reads as follows:

33-A. Saving for duties being levied at commencement of the Constitution.--(1) Until provision to the contrary is made by Parliament, the State Government may continue to levy any duty which it was lawfully levying immediately before the commencement of the Constitution, under this Chapter as then in force.

(2) The duties to which this Section applies are--

(a) any duty on intoxicants which are not excisable articles within the meaning of this Act: and

(b) any duty on an excisable article produced outside India and imported into Punjab (Haryana) whether across a customs frontier as defined by the Central Government or not.

3. Nothing in this Section shall authorize the levy by the State Government of any duty which, as between goods manufactured or produced in the State and similar goods not so manufactured or produced, discriminates in favour of the former, or which, in the case of goods manufactured or produced outside the State, discriminates between goods manufactured or produced in one locality and similar goods manufactured in produced in another locality.

9. The provision would show that duty is permissible on an intoxicant which is not an excisable article. Intoxicant is defined u/s (12-a) of the Punjab Excise Act, 1914 as any liquor or intoxicating drug.

10. Section 3(13) reads as follows:

(13) "intoxicating drugs" means:-

(i) the leaves; small stalks and flowering or fruiting tops of the Indian hemp plant (Cannabis sativa-L), including all forms known as bhang, sidhi or ganja;

(ii) char as, that is, the resin obtained from the Indian hemp plant, which has not been submitted to any manipulations other than those necessary for packing and transport;

(iii) any mixture, with or without natural materials, of any of the above forms of intoxicating drug or any drink prepared there from; and

(iv) any other intoxicating or narcotic substance which the State Government may by notification, declare to be an intoxicating drug, such substance not being opium coca leaf, or a manufactured drug, as defined in Section 2 of the Dangerous Drugs Act, 1930."

(13 a) Lahan means any solution made from any kind of gur or malassses or both:-

(i) to which a fermentation agent has been added to promote fermentation;

(ii) which has undergone the process of fermentation and from which spirit can be obtained by distillation;

Liquor is defined u/s 3(14), which reads as follows:

3(14) "liquor" means intoxicating liquor, and includes lahan and all liquid consisting of or containing alcohol; also any substance which the State Government may by notification declare to be liquor for the purpose of this Act.

11. In view of the definitions as above, there cannot be any dispute that the spirit that is supplied to the Petitioner for the purpose of redistillation is liquor, since the same is covered under the definition.

12. Then the moot question is whether there is a levy permissible for wastage. Section 59 of the Punjab Excise Act, 1914 provides for power of Financial Commissioner to make rules which inter-alia provides that the Financial Commissioner is empowered to make rules."

regulating the time, place and manner of payment of and duty or fee.

13. At the outset, it has to be noted that the same does not provide for the levy of duty or the payment of duty. It provides for only the manner of payment of duty. Be that as it may. Even assuming for a moment that the Financial Commissioner is empowered to make rules prescribing duty for the liquor, the question is whether there is any such prescription.

14. Under Punjab Distillery Rules, 1932 Rule 101 provides for wastage and loss. The Rule reads as follows:-

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

15. Rule 101-A provides for prescription of wastage in a distillery. It is not disputed that until 1999 no wastage had been prescribed under Rule 101-A, in the process of re-distillation. For the first time, by Notification, dated 14.9.1999, published on 15.9.1999, it was prescribed that 1.5% would be the wastage allowance in the process of re-distillation. It is the contention of the learned Additional Advocate General that until such a prescription was made in the year 1999, it has to be taken and held that no wastage was permissible and hence, if there is any wastage in the process of redistillation, the whole of it was liable to duty u/s 33 read with Rule 101. It is further contended that spirit that is supplied to the Petitioner, is distilled spirit and hence in the process of re-distillation, no further wastage was contemplated and provided for until 1999 and so much so, wastage, if any found in the process of re-distillation of the distilled spirit, the same is liable to duty.

16. We are afraid, the contentions cannot be appreciated. Section 32 of the Punjab Excise Act, 1932 provides for the manner in which duty can be levied. The provision reads as follows:-

32. Manner in which duty may be levied.--Subject to such rules regulating the time, place and manner as the Financial Commissioner may prescribe, such duty shall be levied rateably on the quantity of excisable article imported, exported,

transported, collected or manufactured in, or issued from, a distillery, brewery or warehouse:

Provided that duty may be levied--

(a) on intoxicating drugs by an acreage rate levied on the cultivation of the hemp plant, or by a rate charged on the quantity collected;

(b) on spirit or beer manufactured in any distillery established, or any distillery or brewery licensed, under this Act, 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;

(c) on tari, by a tax on each tree from which the tari is drawn:

Provided further that, where payment is made upon issue of an excisable article for sale from a warehouse established or licensed u/s 22(a) it shall be made:-

(a) if the State Government by notification so directs, at the rate of duty which was in force at the date of import of that article; or

(b) in the absence of such direction by the State Government, at the rate of duty which is in force on that article on the date when it is issued from the warehouse.

17. It is clearly stated in the provision that any duty can be levied only in the manner prescribed under the Rules. Rule 101 provides that if only the wastage is excessive, the Financial Commissioner would prescribe the duty. Necessarily it can only mean that the rules contemplated and provided for wastage in the distillery, be it in the process of distillation or re-distillation. But in case the Financial Commissioner is of the view that wastage in a distillery or in re-distillation process is excessive, then the scales would be prescribed and duty is leviable, only in respect of all losses attributed to the wastage in excess of the scale fixed. The scale was fixed in the matter of wastage in re-distillation process only in the year 1999 providing for permissible wastage of 1.5%. Therefore until 1999 the Financial Commissioner/Excise and Taxation Officer, did not find it necessary to prescribe any scale for wastage since the same was not excessive. When it was found as excessive, the scale was prescribed in the year 1999. In other words, as per the Act and Rules, duty is permissible for wastage in the process of re-distillation only if the same exceeds 1.5% after 15.10.1999, when it was duly published. Until such time, the State/ Financial Commissioner/Excise and Taxation Officer did not deem it necessary to prescribe any scale of wastage since it was not excessive in the opinion of the State.

18. There is another angle also on this issue. The State has heavily relied upon the Punjab Excise Fiscal Orders, 1932 (Annexure R-3) wherein the rate of duty is prescribed. At the outset, it has to be seen that the said fiscal order applies only in respect of spirit removed from the distilleries. To quote:

The following shall be the rates of duty leviable in respect of spirit removed from any of the distilleries licensed in Punjab or when imported into Punjab, from any

State or Union Territory in India per proof liter of the strength of London Proof, to be increased or reduced in proportion, as the strength of spirit, exceed or is less than London Proof:-

Kind of Spirit

Rate of duty per proof litres

1.

Country Spirit:

Rs. P.

a.

Plain

13.00

b.

Ordinary spiced

13.00

c.

Plain when issued to troops

22.80

d.

Ordinary spiced when issued to troops

22.80

2.

Rectified spirit (when issued for purposes other than for use in the manufacture of medicinal and toilet preparations)

5.40

3.

All other sorts of spirits (Indian-made Foreign Spirit) export except denatured Spirit

20.00

4.

Indian-made Rum when issued to troops Through the Canteen Stores Department (India)

6.00

5.

Import fee of IMFS

Note: Besides duty, licence fee at the rate of Rs. 5.00 per bulk litre shall be levied on Indian-made Rum when issued to troops through the Canteen Stores Department (India):

Provided that when such spirits are exported to other States or Union Territories in India, duty shall be charged at the rate as in force in the State or Union Territory of import.

Published-vide Punjab Government Notification No. 5998, dated the 12th November, 1932.

Substituted by the Punjab Excise Fiscal (First Amendment) Order, 1965 (GSR No. 61 of 20th March, 1965).

Note-(1) ORDER 1 was subsequently substituted with effect from April, 1966-vide GSR No. 63 of 29th March, 1966. This notification should be consulted for the existing rate of duty.

(2) The Punjab Excise Fiscal Orders, 1932, have since been republished as amended upto the 30th August, 1965-vide GSR No. 221 of 30th August, 1965.

19. Even otherwise, it only pertains to the rate of duty and the duty is leviable only if it is prescribed under the Rules. The Rules regarding levy of duty for wastage element was prescribed for the first time only in 1999. Even otherwise also, the fiscal orders will not apply since there is, no process of removal of spirit from distillery in the process of redistillation.

20. The Excise and Taxation Commissioner has proposed to levy the duty on the entire wastage since no wastage element had been prescribed during re-distillation, in the case of the Petitioner, prior to 1999. The same view has been affirmed by the Appellate Authority, namely Financial Commissioner. As we have already held above, the pre-constitutional levy of duty, as proposed, is permissible only if the same is duly prescribed. That was prescribed under the Rules only in the year 1999. In the case of the Petitioner herein, the re-distillation admittedly is prior to 1999 and, therefore, there can be no levy of duty on the wastage during the re-distillation process. Hence, the writ petitions are allowed and the impugned orders are quashed. We find that the Petitioner had deposited the amounts under protest, pursuant to interim order, passed by this Court. As we have held that duty, as above, is impermissible under law, the amounts, deposited by the Petitioner, shall be refunded forthwith.

All the petitions stand disposed of, so also the pending application(s), if any.