
(2017) 05 AHC CK 0176
In the Allahabad High Court
Case No : 3221 of 2017

Starlight Bruchem Ltd.,(Formally Known As Narang Distillery)	APPELLANT
Vs	
State of U.P. Thru. Prin. Secy., Deptt. of Excise & 6 Others	RESPONDENT

Date of Decision : 31-05-2017

Acts Referred:

Constitution of India, Article 226 -
Power of High Courts to Issue certain writs
Central Excise Act, 1944, Section 4(4)(c) -
Uttar Pradesh Excise (Settlement of Licenses for Wholesale Country Liquor) (Fifth
Amendment) Rules, 2011, Rule 6(1)

Citation : (2017) 05 AHC CK 0176

Hon'ble Judges : Narayan Shukla, Sheo Kumar Singh

Bench : Division Bench

Advocate : Manish Mathur, Alok Kapoor, Prashant Singh Atal, Amit Kumar Singh Bhadauri, Anurag Kr. Singh, Dhruv Mathur, Sameer Kalia

Judgement

1. Heard Mr. Mohan Jain, learned Senior Counsel assisted by Mr. Manish Mathur, Mr. Alok Kapoor & Mr. Prashant Singh Atal, learned counsels for the petitioner and Mr. Rakesh Dwivedi, learned Senior Counsel assisted by Mr. Subhash Vidyarthi, learned counsel for the opposite party No.3, Mr. S.K.Kalia, learned Senior Counsel assisted by Mr. Sameer Kalia, learned counsel for opposite party No.4, Mr. Jaspreet Singh, learned counsel for opposite party No.5, Mr. Anurag Singh, learned counsel for the opposite party No.6 and Mr. Jaideep Narain Mathur, learned Senior Counsel assisted by Mr. Dhruv Mathur & Mr. Amit Kumar Singh Bhadauria, learned counsels for opposite party No.7 as well as learned Additional Chief Standing Counsel. 2. The petitioner is a Company registered under the Companies Act 1956. The petitioner has claimed to be busy in the business of manufacturing of country liquor since the year 1942. The State Government on 11 February 2009 framed Excise Policy for the year 2009-10. The Excise Year starts from 1st April of every year and ends on 31st March of every year. In view of the policy laid down by the State Government the Excise Commissioner, Uttar Pradesh amended the Uttar Pradesh Excise (Settlement of

Licenses for Wholesale of Country Liquor) Rules, 2002. It issued a notification dated 13 February 2009, whereby it framed the Uttar Pradesh Excise (Settlement of Licenses for Wholesale of Country Liquor) (Fourth Amendment) Rules, 2009, which continued till the next amendment i.e. Fifth amendment, which was made in the Rules by Notification dated 31 March 2011. 3. Since the State Government has changed its policy to some extent for the Excise year 2012-13 by amending the Rules, the State Government framed Uttar Pradesh Excise (Settlement of Licenses for Wholesale Country Liquor) (Fifth Amendment) Rules, 2011. Rules 2011 and substituted new provisions of Rule 6(1) in place of old provisions. We quote new provisions of Rule 6 as under:- "6(1) Licence for shops of whole sale of country liquor in every Zone may be given to: An Individual, a partnership firm or company, Excluding Consortium shall be eligible. It shall be necessary to produce Article of Association, Memorandum of Association and certificate of incorporation in case of company, certified copy of the registered partnership deed in case of partnership firm and copy of domicile certificate issued by the Competent Authority in case of individual; (2) The Applicant must have turn over of Rs.400 crores during anyone of the past three Excise years inclusive of the current year. Certificate of Chartered Accountant and certificates of Excise or Commercial Department of States and Union Territories shall be acceptable; (3) The applicant should have experience of wholesale vend of liquor as licensee but he shall not be producer of alcohol or manufacturer of liquor. (4) The applicant shall also produce Balance Sheet certified by Chartered Accountant and his PAN number. In the event of death, if a licence is held by an individual, his legal heir(s), if otherwise eligible, may continue to hold the licence for the remaining period of the licence. (5) The applicant has not been a defaulter/blacklisted for the excise dues or debarred from holding an Excise Licence under the provisions of any rules made under the Act. (6) The applicant does not possess any licence for retail sale of country liquor, foreign liquor and beer in the State. (7) The applicant shall submit an affidavit duly verified by notary public as proof of the following, namely: (I) that he possesses or has an arrangement for taking on rent a suitable premise in that locality for opening the shop in accordance with the provisions of Uttar Pradesh Number and Location of Excise Shop Rules, 1968 as amended from time to time. (II) that his proposed premises of the shop have to been constructed in violation of any law or rules. (III) that he and his family members/Directors of the Company possess good moral character and have no criminal back ground nor have been convicted of any offence punishable under United Provinces Excise Act, 1910 or Narcotics Drugs And Psychotropic Substances Act, 1985 or any other cognizable and non-bailable offence; (IV) that in case he is selected as Licensee he shall furnish a certificate issued by Senior Superintendent of Police/Superintendent of Police of the district of which he is the resident, showing that he as well as his family members possess good moral character and have no criminal background or criminal record, within 30 days of the grant of licence; (V) that he shall not employ any salesman or representative who has criminal background as mentioned in sub-clause (iii) or who suffers from any infectious or contagious diseases or is below 21 years of age or a woman;

(VI) that he is not in arrear of any public dues or Government dues; (VII) that he is solvent and has the necessary funds or has made arrangements for the necessary funds, for conducting the business, the details of which shall be made available to licensing authority if required." 4. The matter of grant of license for Wholesale county liquor is governed under the Rules 2011. On 17 February 2016 the State Government had determined the Excise policy for the year 2016-17 and 2017-18. Clause 1.12 titled as "Wholesale supply of the country liquor" provided as under:- "Keeping the arrangement of the wholesale supply of country liquor of the year 2015-16, annual renewal of all the C.L.-1B licensee established for the year 2015-16 in the State, will be done for the year 2016-17 and 2017-18 according to the following arrangements:- (a) Dues for the license of C.L.-1B

S. No. Name of Item Dues per license of the year 2015-16 (Rs.in Crores) Dues per license fixed for the year 2016-17 (Rs.in Crores) Dues per license fixed for the year 2017-18 (Rs.in Cores)

1	2	3	4	5
1. Renewal fees	0.045	0.050	0.050	
2. License fees	13.25	14.50	15.10	
3. Surety Amount (one time at the time of application)	1.33	1.45	1.51	
4. Payment of the first installment of the license fee at the time of application	4.75	5.00	5.10	
5. Payment of second installment of license fee upto the month of June of the concerned financial year.	4.25	4.75	5.00	
6. Payment of third installment of license fee upto the month of September of the concerned financial year.	4.25	4.75	5.00	

(b) License of C.L.-1C The Licence C.L.-1C for the year 2016-17 and year 2017-18 in each Janpad will be mandatory to be renewed by the licensee of C.L.1-B of the year 2016-17 and year 2017-18 by giving license fee and surety as given below. The prescribed dues per licence for the year 2016-17 and year 2017-18, are as under:-

Name of item Prescribed dues for the year 2015-16 Prescribed dues for the year 2016-17 Prescribed dues for the year 2017-18.

Renewal Fees	Rs.25,000	Rs.30,000	Rs.30,000
Licence	Rs.2.00 Lacs	Rs.2.25 Lacs	Rs.2.25 Lacs
Surety amount	Rs.20,000	Rs.22,500	Rs.22,500

Clause 7.5 of the Policy Titled as "Implementation of the policy of the year

2017-18 read as under: The establishment of the licences for the year 2017-18 will be done by the Excise Commissioner at the appropriate time according to the programme fixed according to the procedure mentioned above with the prior permission of the Government. In terms of policy framed by the State Government for the year 2016-17 and 2017-18 the Excise year 2016-17 has expired. However, before commencement of the Excise Year 2017-18 the petitioner has filed the present writ petition, whereby he has prayed for quashing the clause 1.12 as well as clause 7.5 of the Excise Policy 2016-17 being against the provisions of Uttar Pradesh Excise Act 1910 as also for issuing a writ of mandamus to the respondents to allot C.L.-1B licence by way of draw of lots/ auction and has further prayed to quash the C.L.-1B licenses allotted to the respondents 3 to 6. It is stated that under the policy of 2009-10 the whole State was divided into four Zones i.e. Lucknow, Varanasi, Meerut and Agra. Sub-clause 10 of Clause 3.8 of the policy 2009-10 has provided as under:- "It shall be necessary to make the proper advertisement in the newspapers by the Commissioner of Excise, Uttar Pradesh for this license. The selection of the qualified applicant shall be made by way of lottery in case of being more than one in the received applications. In case of only one application such single applicant shall be given the license if not otherwise incapable for the same." 5. However, the Rules 2009 had provided the different mode for grant of licences. Rule 4(1) reads as under:- "Rule 4(1) The licence for wholesale of country liquor shall be granted by Excise Commissioner or an officer authorised by him, not below the rank of Deputy Excise 3 Commissioner on payment of licence fee and deposit of the security amount in accordance with the provisions of these rules, in every zone in Form CL-1B on application of applicant along with earnest money as may be decided by the State Government. This licence entitles the licensee to run the wholesale vend of country liquor in each district of the zone in Form CL-1C." 6. The petitioner has emphasized that the entire liquor trade in the whole State is benefiting the Chadha family, since under Rule 6(a)(1) a condition has been imposed that the applicant shall have turn over of minimum Rs.400 crores in any of the three years including the current year. It is stated that it is the members of the Chadha family who are Directors and share holders of the respondent No.3 and its subsidiaries. It is stated that the respondents 3 to 6 are under the control of shell companies of Chadha family in three major distilleries in the State of Uttar Pradesh viz:- (i) Wave Distilleries and Breweries Ltd. (ii) Mohan Gold Water Breweries Ltd. (iii) Lord's Distillery. It has been urged that the respondents 3 to 6 have been granted licences in violation of clause 3.8(A)(7) of the Excise Policy 2009-2010. We quote clause 3.8(A)(7) as under:- "Clause 3.8(A)(7). Such applicant shall not be a producer of alcohol and manufacture of liquor." 7. Mr. Jain learned Senior Counsel has stated that the Excise Department of the State is promoting monopoly by imposing such a condition which can be fulfilled by only a class of persons. He mainly has adverted the arbitrariness of the State in adopting the renewal policy for renewal of licenses in the year 2017-18 in accordance with the same procedure, whereas according to him no procedure has been explained for issuance of CL-1B licence.

Thus it is stated that the policy was framed for benefiting new persons only. It is stated that with introduction of CL-1B licence petitioner's distillery has been unable to sell country liquor. They had written numerous letters to the Excise Department to purchase liquor from its distillery, but of no avail. He stated that since Chadha Group owns all the CL-1B licenses of all the Zones and also the majority of CL-1C licenses this Group is purchasing the majority of liquor from its own Wave Distillery. The petitioner has submitted a chart of its sale before and after introduction of CL-1B licence:-

Year	Earning
2005-2006	Rs.29 Crores
2006-2007	Rs.28.6 Crores
2007-2008	Rs.22 Crores
2008-2009	Rs.22.8. Crores
2009-2010	Nil
2010-2011	Nil
2011-2012	Nil
2012-2013	Nil
2013-2014	Nil
2014-2015	Nil
2015-2016	Nil
2016-2017	Nil

8. Thus, it has been stated that Chadha Group is indirectly controlling the entire liquor trade in State of Uttar Pradesh since by making the policy as well as framing the Rules convenient to Chadha family the State Government has created a monopoly in favour of Chadha Group. There is no transparency in the procedure to allot CL-1B licence. The procedure for grant of CL-1B licence is totally discriminatory, arbitrary and illegal, therefore it is not sustainable in the eye of law. It has been submitted that before the policy framed in 2009-10 four Excise Zones had been created, but thereafter the Excise Department created a new type of CL-1B licences to be given as a single licence for wholesale of country liquor. 9. Through the rejoinder affidavit the petitioner has submitted that a scam running in the crores of rupees has been brought to the knowledge of this Court fully supported with evidences appended as Annexure No.5 to the writ petition. Through the rejoinder affidavit the petitioner has also pleaded that all CL-1B liquor licences have been incorporated with the sole objective to perpetuate a fraud on other liquor manufacturing companies as well as on the State. Therefore, it is utmost important that the Corporate veil should be lifted

from the private respondent companies to unearth the fraud and illegalities committed by the private respondents in connivance with the official respondents since 2009-10, which is continuing till now and if it is not stopped it will cause massive loss to the State exchequer which cannot be compensated later by any manner. 10. Mr. Jain learned Senior Counsel appearing for the petitioner has also cited a decision of the Punjab and Haryana High Court rendered in the case of Amarjit Singh Sidhu v. State of Punjab and others, CWP No.5593 of 2016, in which the High Court held as under:- "36. Keeping in view the consideration of revenue of the State and the subsequent events, we mould the relief as under:- (i)The respondent is empowered to incorporate sub clause (ii) of clause 2.14 in the Excise Policy 2016-17 but the same is held to be invalid and inoperative to the extent it does not prescribe the manner and the method of its issuance by the manufacturers or the distilleries. It shall be open to the respondent-authorities to make appropriate amendment and prescribe necessary guidelines to the manufacturers/distilleries or issuing consent/authority letter to eligible applicants either by draw of lots, auction or any other mode providing equal opportunities in a transparent and objective manner. It shall, however, be open for the respondents to retain such right with the concerned authority, if so required. (ii) If after taking corrective measures and inviting fresh applications/offers, in case o fresh offer or application comes forth, the allotments, if any, already made shall continue for the rest of the period. 37. The writ petitions are disposed of in the manner indicated above." 11. The State as well as licensees had preferred an appeal against the judgment of the High Court before the Hon"ble Supreme Court. The Hon"ble Supreme Court dismissed the Special Leave Petition and upheld the judgment of the Punjab and Haryana High Court. It is stated that the present dispute is alike to the dispute raised before the Punjab and Haryana High Court, therefore, it should be dealt with accordingly. He also supported his contentions with the judgment of the Hon"ble Supreme Court rendered in the case of State of M.P. and others v. Nandlal Jaiswal and others, reported in (1986) 4 SCC 566, in which the Hon"ble Supreme Court held that "though a citizen has no fundamental right to carry on trade or business of liquor but where the State decides to grant the right or privilege to carry on this trade, in such a situation, the State cannot escape the rigour of Article 14." 12. He further cited another decision of the Hon"ble Supreme Court rendered in the case of Khoday Distilleries Ltd. And others v. State of Karnataka and others, reported in (1995) 1 SCC 574. In this case the Hon"ble Supreme Court has summarized the law on the rights of the citizens to trade or business in liquor. "60(g) When the State permits trade or business in the potable liquor with or without limitation, the citizen has the right to carry on trade or business subject to the limitations, if any, and the State cannot make discrimination between the citizens who are qualified to carry on the trade or business." 13. Adverting to the aforesaid facts as well as law Mr. Mohan Jain, learned Senior Counsel appearing for the petitioner has cited the following decisions of the Hon"ble Supreme Court:- (1)Cooverjee B. Bharucha v. Excise Commissioner and the Chief Commissioner, Ajmer and others, AIR 1954 (SC) 220. Relevant paragraphs 8 and

10 are reproduced hereunder:- "8. The contention that the effect of some of these provisions is to enable Government to confer monopoly rights on one or more persons to the exclusion of others and that creation of such monopoly rights could not be sustained under article 19 (6) is again without force. Reliance was placed on the decision in *Rashid Ahmad v. Municipal Board of Kairana*, AIR 1950 SC 163(B). That decision is no authority for the Proposition contended for. Elimination and exclusion from business is inherent in the nature of liquor business and it will hardly be proper to apply to such a business principles applicable to trades which all could carry. The provisions of the regulation cannot be attacked merely on the ground that they create a monopoly. Properly speaking, there can be a monopoly only when a trade which could be carried on by all persons is entrusted by law to one or more persons to the exclusion of the general public. Such, however, is not the case with the business of liquor. 14. Reference in this connection may be made to the observations of Lord Porter in *Commonwealth of Australia v. Bank of New South Wales*, 1950 AC 253 (C). This is what his Lordship said: "Yet about this as about every other proposition in this field a reservation must be made. For their Lordships do not intend to lay it down that in no circumstances would exclusion of competition so as to create a monopoly either in a State or Commonwealth agency or in some other body be justified. Every case must be judged on its own facts and in its own setting of time." Further it seems to us that this argument suffers "from a fallacy. Under the rules every member of the public who wishes to carry on trade in liquor is invited to make bids. This is the only method by which carrying on of liquor trade can be regulated. When the contract is thrown open to public auction, it cannot be said that there is exclusion of competition and thereby a monopoly is created. For all these reasons we are of opinion that the contention that the provisions of the regulation are unconstitutional as they abridge the rights of the petitioner to carry on liquor trade freely cannot be sustained. 10. As regards the other contentions of the learned counsel, it is sufficient to say that if there has been any breach of the rules framed under the regulation by the officers concerned, the remedy for such breaches is provided for in the regulation itself. Mere irregularities committed in conducting an auction sale cannot be said to have abridged the petitioner's fundamental rights and so article 32 is not attracted. It is open to the petitioner under article 226 to approach the-High Court for a mandamus if the officers concerned have conducted themselves not in accordance with law or if they have acted in excess of their jurisdiction. The same is the answer to the petitioner's next contention that the sale could not be confirmed by the Minister and that under the rules it was only the Chief Commissioner who was authorised to confirm it. Then point of discrimination was not seriously argued before us." (2) *Ashok Lanka and another v. Rishi Dixit and others*, 2005 (5) SCC 598. Relevant paragraphs 55 and 57 are reproduced hereunder:- "55. The Commissioner of Excise issued a circular letter dated 14.2.2005 which power evidently he did not possess in terms of Section 7 of the Act. Although the State may delegate its power to the Commissioner of Excise, such a delegation cannot be made in relation to the matters contained in the rule

making power of the State. The matters which are, therefore, outside the purview of the rules only could be the subject-matter of delegation in favour of the Commissioner of Excise. The Commissioner of Excise is a statutory authority. He is bound to exercise his power only within the four-corners of the Act or the rules framed thereunder and not de" hors the same. 57. It is interesting to note that the Rules were amended only for one excise year. The rule making power should be exercised having regard to the policy to be adopted by the State. Such a policy may vary from time to time. Having regard to the exigency for the situation, rule may also be amended but we do not see any reason as to why an attempt should be made to amend the rule only with a view to justify an illegal action on the part of the Commissioner of Excise for the year 2005-06. Although the validity of the rules have not been challenged, the court cannot shut its eyes from considering this aspect of the matter. We are not oblivious of the fact that framing of rules is not an executive act but a legislative act; but there cannot be any doubt whatsoever that such subordinate legislation must be framed strictly in consonance with the legislative intent as reflected in the rule making power contained in Section 62 of the Act." (3) Kerala Samsthana Chethu Thozhilali Union v. State of Kerala and others 2006 (4) SCC 327. Relevant paragraphs 19,23, 26, 28, 29, 58, 59 and 60 are reproduced hereunder:- "19. Rules 4(2) and 9(10)(b) in the Rules were introduced six years after the trade in arrack was completely prohibited. In the aforementioned backdrop of events, the question as regard applicability of the provisions of Sections 18A, 24(c) and (d) of the Act is required to be construed. Section 18A of the Act recognises the common law right of the State to part with the privilege. The State's exclusive privilege of supply or sale of liquor is also not in question. But, we may notice that Section 18A is an enabling provision. It was enacted evidently having regard to Article 47 of the Constitution of India. The State while parting with its exclusive privilege or a part thereof, may impose such conditions but once such terms and conditions are laid down by reason of a statute, the same cannot be deviated from." "23. In State of M.P. and Others v. Nandlal Jaiswal and Others [(1986) 4 SCC 566], this Court opined: (SCC pp.604-04, para 33) "The State under its regulatory power has the power to prohibit absolutely every form of activity in relation to intoxicants its manufacture, storage, export, import, sale and possession. No one can claim as against the State the right to carry on trade or business in liquor and the State cannot be compelled to part with its exclusive right or privilege of manufacturing and selling liquor. But when the State decides to grant such right or privilege to others the State cannot escape the rigour of Article 14. It cannot act arbitrarily or at its sweet will. It must comply with the equality clause while granting the exclusive right or privilege of manufacturing or selling liquor. It is, therefore, not possible to uphold the contention of the State Government and Respondents 5 to 11 that Article 14 can have no application in a case where the licence to manufacture or sell liquor is being granted by the State Government. The State cannot ride roughshod over the requirement of that article." 26. Its power, therefore, was to make rules only for the purpose of carrying out the purposes of the Act and not de" hors the same. In other words, rules cannot be

framed in matters that are not contemplated under the Act. 28. The Rules in terms of sub-section (1) of Section 29 of the Act, thus, could be framed only for the purpose of carrying out the provisions of the Act. Both the power to frame rules and the power to impose terms and conditions are, therefore, subject to the provisions of the Act. They must conform to the legislative policy. They must not be contrary to the other provisions of the Act. They must not be framed in contravention of the constitutional or statutory scheme. "29. In *Ashok Lanka and Another v. Rishi Dixit and Others* [(2005) 5 SCC 598], it was held: (SCC p.622, para 57) " We are not oblivious of the fact that framing of rules is not an executive act but a legislative act; but there cannot be any doubt whatsoever that such subordinate legislation must be framed strictly in consonance with the legislative intent as reflected in the rule-making power contained in Section 62 of the Act." 58. "Take it or leave it" argument advanced by Mr. Chacko is stated to be rejected. The State while parting with its exclusive privilege cannot take recourse to the said doctrine having regard to the equity clause enshrined under Article 14 of the Constitution of India. The State must in its dealings must act fairly and reasonably. The bargaining power of the State does not entitle it to impose any condition it desires. 59. In *Hindustan Times and Others v. State of U.P. and Another* [(2003) 1 SCC 591], wherein one of us was a member, this Court observed: (SCC p. 604, para 39) "39. The respondents being a State, cannot in view of the equality doctrine contained in Article 14 of the Constitution of India, resort to the theory of "take it or leave it". The bargaining power of the State and the newspapers in matters of release of advertisements is unequal. Any unjust condition thrust upon the petitioners by the State in such matters, in our considered opinion, would attract the wrath of Article 14 of the Constitution of India as also Section 23 of the Indian Contract Act. See *Central Inland Water Transport Corpn. Ltd. v. Brojo Nath Ganguly and Delhi Transport Corpn. v. D.T.C. Mazdoor Congress*. It is trite that the State in all its activities must not act arbitrarily. Equity and good conscience should be at the core of all governmental functions. It is now well settled that every executive action which operates to the prejudice of any person must have the sanction of law. The executive cannot interfere with the rights and liabilities of any person unless the legality thereof is supportable in any court of law. The impugned action of the State does not fulfil the aforementioned criteria." 60. We, however, accept the submission that Rule 4(2) of the Rules must be held to be ultra vires in its entirety as even that part of it, vis-a-vis, the toddy workers, is not severable. Hence Rule 4(2) is declared under vires in its entirety." (4) *Union of India and others v. International Trading Co. and another*, reported in 2003 (5) SCC 437. Relevant paragraphs 14 and 15 are reproduced hereunder:- "14. It is trite law that Article 14 of the Constitution applies also to matters of governmental policy and if the policy or any action of the Government, even in contractual matters, fails to satisfy the test of reasonableness, it would be unconstitutional. 15. While the discretion to change the policy in exercise of the executive power, when not trammelled by any statute or rule is wide enough, what is imperative and implicit in terms of Article 14 is that a change in policy must be made fairly and should not give impression

that it was so done arbitrarily on by any ulterior criteria. The wide sweep of Article 14 and the requirement of every State action qualifying for its validity on this touchstone irrespective of the field of activity of the State is an accepted tenet. The basic requirement of Article 14 is fairness in action by the state, and non-arbitrariness in essence and substance is the heart beat of fair play. Actions are amenable, in the panorama of judicial review only to the extent that the State must act validly for a discernible reasons, not whimsically for any ulterior purpose. The meaning and true import and concept of arbitrariness is more easily visualized than precisely defined. A question whether the impugned action is arbitrary or not is to be ultimately answered on the facts and circumstances of a given case. A basic and obvious test to apply in such cases is to see whether there is any discernible principle emerging from the impugned action and if so, does it really satisfy the test of reasonableness." (5) *Tata Chemicals Limited v. Commissioner of Customs (Preventive)*, Jamnagar, reported in 2015 (11) SCC 628. Relevant paragraph 18 is reproduced hereunder:- "18. The Tribunal's judgment has proceeded on the basis that even though the samples were drawn contrary to law, the appellants would be estopped because their representative was present when the samples were drawn and they did not object immediately. This is a completely perverse finding both on fact and law. On fact, it has been more than amply proved that no representative of the appellant was, in fact, present at the time the Customs Inspector took the samples. Shri K.M. Jani who was allegedly present not only stated that he did not represent the Clearing Agent of the appellants in that he was not their employee but also stated that he was not present when the samples were taken. In fact, therefore, there was no representative of the appellants when the samples were taken. In law equally the Tribunal ought to have realized that there can be no estoppel against law. If the law requires that something be done in a particular manner, it must be done in that manner, and if not done in that manner has no existence in the eye of law at all. The Customs Authorities are not absolved from following the law depending upon the acts of a particular assessee. Something that is illegal cannot convert itself into something legal by the act of a third person." 15. Mr. Jain learned Senior counsel has further submitted that since the respondent Nos.3 to 6 are directly or indirectly related in the business of liquor, they are said to be related persons. Section 4 (4)(c) of the Central Excise Act 1944 defines the related persons as under:- "(c) 'related person' means a person who is so associated with the assessee that they have interest directly or indirectly, in the business of each other and includes a holding company, a subsidiary company, a relative and a distributor of the assessee, and any sub-distributor of such distributor." Explanation attached to this clause speaks that in this "holding company", "subsidiary company" and "relative" have the same meanings as in the Companies Act, 1956. Mr. Jain, learned Senior counsel appearing for the petitioner, in this regard, cited the following decisions:- (1) *Commissioner of Central Excise, Hyderabad v. Detergents India Limited* and another, reported in (2015) 7 SCC 198. Relevant portion of paragraphs 13, 17, 18, 19 and 27 is reproduced hereunder:- "13. When we come to the definition of 'related person'

the legislature has used a well known technique. It first employs the expression "means" and states that persons who are associated with the assessee so that they have a direct or indirect interest in the business of each other would get covered. The definition then goes on to use the expression "and includes" thereby indicating that the legislature intends to extend the definition to also include various persons that would not otherwise have so been included. These include a holding company, a subsidiary company, a relative and a distributor of the assessee and any sub-distributor of such distributor. The necessity for including holding and subsidiary companies as defined under the Companies Act, 1956 is to lift the corporate veil in order to get to the economic realities of the transaction. 17. So far as "related persons" are concerned, the Court in the case of *Union of India v. Bombay Tyre International Ltd.*:1984 (1) SCC 467 stated (SCC pp.501-03, paras 43- 45) "45.....The challenge made on behalf of the assessee is powerful and far-reaching. But it seems to us unnecessary to enter into that question because we are satisfied that the provision in the definition of "related person" relating to a distributor can be legitimately read down and its validity thus upheld. In our opinion, the definition of related person should be so read that the words "a relative and a distributor of the assessee" should be understood to mean a distributor who is a relative of the assessee. It will be noticed that the Explanation provides that the expression "relative" has the same meaning as in the Companies Act, 1956. As regards the other provisions of the definition of "related person", that is to say, "a person who is so associated with the assessee that they have interest, directly or indirectly, in the business of each other and includes a holding company, a subsidiary company....", we think that the provision shows a sufficiently restricted basis for employing the legal fiction. Here again, regard must be had to the Explanation which provides that the expression "holding company and subsidiary" have the same meanings as in the Companies Act, 1956. Reference in this connection may be made to *Tata Engineering and Locomotive Co. Ltd. v. State of Bihar* [AIR 1965 SC 40 : (1964) 6 SCR 885 : 34 Comp Cas 458] where the principle was approved by this Court that the corporate veil could be lifted where the companies shared the relationship of a holding company and a subsidiary company, and to *Juggi Lal Kamalapat v. C.I.T.* [AIR 1969 SC 932 : (1969) 1 SCR 988 : (1969) 73 ITR 702] where this Court held that the veil of corporate entity could be lifted to pay regard to the economic realities behind the legal facade, for example, where the corporate entity was used for tax evasion or to circumvent tax obligation." 18. On a reading of the aforesaid paragraphs in *Union of India v. Bombay Tyre International Ltd.* (1984) 1 SCC 467, it is clear that proviso (iii) would be referable only to tainted transactions. Only such cases would raise an irrefutable presumption which will then be governed by the said proviso. It is also interesting to note that the definition of "related person" was read down by this Court to make the distributor covered by it to be a relative of the assessee. When "holding company" and "subsidiary company" was spoken of, the Court held again that the idea of including these two types of companies within the definition of related person is only so that the corporate veil of such companies

can be lifted so that economic realities behind the legal facade can be looked at so that tax is not evaded or avoided. 19. Some other decisions may be taken note of at this stage. In *Flash Laboratories Limited v. Collector of Central Excise, New Delhi*, (2003) 2 SCC 86, the appellant was a subsidiary company of M/s Parle Products Limited. M/s Parle Biscuits Limited is also a subsidiary company of M/s Parle Products Limited. What was in question in that case was the relationship between two subsidiary companies. It is clear that the relationship between a subsidiary company and another subsidiary company would not be governed by the second part of Section 4(4) (c). In order that the second part of Section 4(4) (c) be attracted, it must be shown that the related person must either be a holding company or a subsidiary company of the assessee." 27. Section 4(4)(c) is in two parts. The first part requires the department to apply a de facto test, whereas the second part requires the application of a de jure test. ".....A reading of the definition of "relative" would show that the relative need not be a person who is so associated with the assessee that they have mutual interest in each other's businesses. If that were the case, the expression "relative" in the second part would be otiose inasmuch as a relative would be subsumed within "person" in the first part. Thus, "relatives" would also be "persons" who are so associated with the assessee that they have a mutual interest in each other's businesses. The legislature by application of a de jure test has extended the meaning of "related persons" to include the entire list of relatives per se without more as related persons. Similarly, holding companies and subsidiary companies by virtue of the exercise of control by a holding company over a subsidiary company are similarly included by application of a de jure test." (2) *Tata Engineering & Locomotive Co. Ltd. v. State of Bihar and others*, reported in AIR 1965 SC 40. Relevant paragraphs 24, 25 and 26 are reproduced hereunder:- "24. The true legal position in regard to the character of a corporation or a company which owes its incorporation to a statutory authority, is not in doubt or dispute. The corporation in law is equal to a natural person and has a legal entity of its own. The entity of the corporation is entirely separate from that of its shareholders; it bears its own name and has a seal of its own; its assets are separate and distinct from those of its members; it can sue and be sued exclusively for its own purpose; its creditors cannot obtain satisfaction from the assets of its members; the liability of the members or shareholders is limited to the capital invested by them; similarly, the creditors of the members have no right to the assets of the corporation. This position has been well-established ever since the decision in the case of *Salomon v. Salomon & Co.* was pronounced in 1897; and indeed, it has always been the well-recognised principle of common law. However, in the course of time, the doctrine that the corporation or a company has a legal and separate entity of its own has been subjected to certain exceptions by the application of the fiction that the veil of the corporation can be lifted and its face examined in substance. The doctrine of the lifting of the veil thus marks a change in the attitude that law had originally adopted towards the concept of the separate entity or personality of the corporation. As a result of the impact of the complexity of economic factors,

judicial decisions have sometimes recognised exceptions to the rule about the juristic personality of the corporation. It may be that in course of time these exceptions may grow in number and to meet the requirements of different economic problems, the theory about the personality of the corporation may be confined more and more. "25. But the question which we have to consider is whether in the circumstances of the present petitions, we would be justified in acceding to the argument that the veil of the petitioning corporations should be lifted and it should be held that their shareholders who are Indian citizens should be permitted to invoke the protection of Article 19, and on that basis, move this Court under Article 32 to challenge the validity of the orders passed by the Sales-tax Officers in respect of transactions which, it is alleged, are not taxable. Palkhivala has very strongly urged before us that having regard to the fact that the controversy between the parties relates to the fundamental rights of citizens, we should not hesitate to look at the substance of the matter and disregard the doctrinaire approach which recognises the existence of companies as separate juristic or legal persons. If all the shareholders of the petitioning companies are Indian citizens, why should not the Court look at the substance of the matter and give the shareholders the right to challenge that the contravention of their fundamental rights should be prevented. He does not dispute that the shareholders cannot claim that the property of the companies is their own and cannot plead that the business of the companies is their business in the strict legal sense. The doctrine of lifting of the veil postulates the existence of dualism between the corporation or company on the one hand and its members or shareholders on the other. So, it is no good emphasising that technical aspect of the matter in dealing with the question as to whether the veil should be lifted or not. In support of his plea, he has invited our attention to the decision of the Privy Council in *The English and Scottish Joint Co-operative Wholesale Society Ltd. v. Commissioner of Agricultural Income-tax, Assam*, as well as the decision of the House of Lords in *Daimler Company Ltd. v. Continental Tyre and Rubber Company (Great Britain) Ltd.*" "26. It is unnecessary to refer to the facts in these two cases and the principles enunciated by them, because it is not disputed by the respondents that some exceptions have been recognised to the rule that a corporation or a company has a juristic or legal separate entity. The doctrine of the lifting of the veil has been applied in the words of Palmer in five categories of cases : where companies are in the relationship of holding and subsidiary (or sub-subsidiary) companies; where a shareholder has lost the privilege of limited liability and has become directly liable to certain creditors of the company on the ground that, with his knowledge, the company continued to carry on business six months after the number of its members was reduced below the legal minimum; in certain matters pertaining to the law of taxes, death duties and stamps, particularly where the question of the "controlling interest" is in issue; in the law relating to exchange control; and in the law relating to trading with the enemy where the test of control is adopted. In some of these cases, judicial decisions have no doubt lifted the veil and considered the substance of the matter." (3) *Juggilal Kamlatpat v. Commissioner of Income Tax, U.P.*, reported in AIR 1969 SC

932. Relevant paragraph 7 is reproduced hereunder:- "7. On behalf of the appellant Mr. Sukumar Mitra stressed the argument that the High Court failed to appreciate that the assessee-firm was a distinct legal entity and was different from J. K. Commercial Corporation which was a separate legal entity in the eye of law and the mere fact that the shareholdings of the partners of the assessee-firm in the J. K. Commercial Corporation was of a considerable preparation should not have led the High Court to the inference that the rights of the assessee-firm were not destroyed, sterilized or lost on account of the transaction. To put it differently, the contention of the appellant was that the High court was not entitled to go behind the legal form of the transaction and to find out what was the substance. We are unable to accept the argument of Mr. Sukumar Mitra as correct. In the present case the Appellate Tribunal has found that the transaction of termination of the managing agency was a colourable transaction and the real purpose was to hand over a sum of Rs. 2 lacs to the assessee firm. It was also found that the payment was collusive and the partners of the firm continued to run and enjoy the benefit of managing agency as shareholders and Directors of the newly formed company by reason of their holding a majority of shares in that company. It was also held by the Appellate Tribunal that the reason for terminating the managing agency was not a true reason but was merely a fake one and the whole transaction was a hoax for the purpose of evading income-tax. In other words, it was a collusive device practised by the managed company and the assessee firm for the purpose of evading income-tax both in the hands of the payer and of the payee. The Appellate Tribunal also found that there was only a change of personnel in the managing agency and not a change in office and that the assessee had no right of compensation for any loss of office. In a matter of this description it is well-established that the Income-tax authorities are entitled to pierce the veil of corporate entity and look at the reality of the transaction. It is true that from juristic point of view the company is a legal personality entirely distinct from its members and the company is capable of enjoying rights and being subjected to duties which are not the same as those enjoyed or borne by its members. But in certain exceptional cases the Court is entitled to lift the veil of corporate entity and to pay regard to the economic realities behind the legal facade. For example, the Court has power to disregard the corporate entity if it is used for tax evasion or to circumvent tax obligation or to perpetrate fraud. For instance, in *Apthorpe v. Peter Schoenhofen Brewing Co.* (4 T.C. 41) the Income Tax Commissioners had found as a fact that all the property of the New York company, except its land, had been transferred to an English company, and that the New York company had only been kept in being to hold the land, since aliens were not allowed to do so under New York law. All but three of the New York company's shares were held by the English company, and as the Commissioners also found, if the business was technically that of the New York company, the latter was merely the agent of the English company. In the light of these findings the Court of Appeal, despite the argument based on *Salomon's* ([1897] A.C. 22) case held that the New York business was that of the English company which was liable for English

income tax accordingly. In another case *Firestone Tyre and Rubber Co. v. Lewellin* ([1957] 1 W.L.R. 464) an American company had an arrangement with its distributors on the Continent of Europe whereby they obtained supplies from the English manufacturers, its wholly owned subsidiary. The English company credited the American company with the price received after deducting the costs plus 5 per cent. It was conceded that the subsidiary was a separate legal entity and not a mere emanation of the American parent, and that it was selling its own goods as principal and not its parent's goods as agent. Nevertheless, these sales were a means whereby the American company carried on its European business, and it was held by the House of Lords that the substance of the arrangement was that the American company traded in England through the agency of its subsidiary. It was accordingly held that the trade of selling tyres to persons outside the United Kingdom was carried on within the United Kingdom and was exercised by the American company through the English Co. as its agent. Therefore, the tax was chargeable in respect of that trade under Schedule D, para 1(a)(iii), to the Income Tax Act, 1918, and the English Co. was the regular agent of the American Co. in whose name it was properly assessed to tax on profits of that trade under rules 5 and 10 of the All Schedules Rules. In our opinion the principle applies to the present case, and the Court is entitled to lift the mask of corporate entity if the conception is used for tax evasion or to circumvent tax obligation, or to perpetrate fraud. We accordingly reject the argument of Mr. Sukumar Mitra on this aspect of the case." 16. In view of the law laid down by the Hon'ble Supreme Court above, Mr. Jain learned Senior Counsel appearing for the petitioner has submitted that keeping in view the inter connection of Directors as well as share holders of the respondents 3 to 6, the Court is entitled to lift the veil of Corporate entity and to pay regard to the economic realities behind the legal facade. For example the court has power to disregard the corporate entity if it is used for tax evasion or to circumvent tax obligation or to perpetrate fraud. As in the case of *Juggilal Kamlatpat* (Supra) the Hon'ble Supreme Court has held that the Court is entitled to lift the mask of corporate entity if the conception is used for tax evasion or to circumvent tax obligation, or to perpetrate fraud. The learned Senior Counsel appearing for the petitioner has submitted that Jatinder Kaur, Rajinder Singh Chadha and Manpreet Singh Chadha are share holders of Ringold Town Planners Pvt. Ltd. as well as New Fort Infrabuild Pvt. Ltd. and holds the shares in respondent No.3 i.e. M/s. Flora and Fauna Housing and Land Development Private Limited. Mr. Rajinder Singh Chadha and Mr. Manpreet Singh Chadha are also the Directors and share holders of third respondent's subsidiaries Wave Center Pvt. Ltd., Wave One Pvt. Ltd. as well as Wave Vertika Pvt. Ltd. 17. Mr. Rajinder Singh Chadha, Mr. Manpreet Singh Chadha and Ms. Jatinder Kaur are also share holders of M/s. A.B. Sugar Private Limited, who are the share holder of Wave Vertika Pvt. Ltd. 18. Rajinder Singh Chadha and Jatinder Kaur are also the share holders of Chadha Papers Limited, who is the Director of Patiala Kings Liquor Pvt. Ltd., respondent No.4. Seventh respondent Chadha Holdings Pvt. Ltd. Along with Manpreet Singh Chadha and Rajinder Singh Chadha are share holders of Ever Youth Traders Pvt.

Ltd., which has 99.9 per cent shares of Lord's Distillery Ltd. and Chadha Holdings Pvt. Ltd. has 99.9 per cent shares of Ever Youth Traders Pvt. Ltd. Mr. Rajinder Singh Chadha, Mr. Manpreet Singh Chadha and Ms. Jatinder Kaur are also Directors and share holders of Mohan Gold Water Breweries Pvt. Ltd. 19. In view of the aforesaid intra family relationship, the learned Senior Counsel appearing for the petitioner has submitted that it is very necessary to lift the veil of the private respondents to abolish the monopoly created by the private respondents in Excise business. 20. Mr. Rakesh Dwivedi, learned Senior Counsel has appeared for respondent No.3 and submitted that the State Government has formulated the Excise Policy for the year 2009-10 on 12.2.2009, which entitled the Companies registered under the Companies Act 1956 to apply for grant of licence. 21. Through the aforesaid policy the State Government introduced new kind of licence called as CL-1B Licence in place of CL-2 Licence. In reference to the aforesaid policy the State Government had also amended the Uttar Pradesh (Settlement of Licenses for Wholesale of Country Liquor) (4th Amendment) Rules 2009 (in short Rules 2009). Rule 3 provides that the period of licence shall be for a excise year or part thereof to get renewed or extended for the next year on such restrictions and conditions as decided by the State Government. Rule 6 introduced certain new conditions of licence which is objectionable to the petitioner. Sub-rule (2) of Rule 6 provides that the applicant must have turn over of Rs.400 crores during any one of the past three excise years inclusive of the current year. Sub-rule (3) provides that an applicant should have experience of wholesale vend of liquor as licensee, but he shall not be producer of alcohol or manufacturer of liquor. In terms of Rules 2009 as well as the Excise Policy 2009-10 the applications were invited for grant of CL-1B licences, by issuing an advertisement dated 13.2.2009. Third respondent had applied for grant of CL-1B licence. Since he was found eligible as per Rules 2009 by the Committee constituted by the Excise Commissioner to examine the eligibility of the applicants, he was granted CL-1B licence on 26.2.2009. The licence of the answering respondent was renewed for the Excise year 2010-11. For the excise year 2011-12 again an advertisement was issued on 12.3.2011. The answering respondent had applied and was granted CL-1B licence for the Excise year 2011-12. Licences granted to the petitioner have been renewed from time to time for years 2012-13, 2013-14, 2014-15, 2015-16, 2016-17 and 2017-18. The State Government had proposed some change in the Excise Policy 2011-2012 and 2012-13. Therefore, the Rules 2002 were again amended in 2011 called as the Uttar Pradesh Excise (Settlement of Licenses for Wholesale Country Liquor) (Fifth Amendment) Rules 2011 (in short Rules 2011). In the new policy a new Zone as "Gorakhpur Zone" was created. Therefore for the purpose of excise trade the whole State was divided into five Zones, namely, Meerut Zone, Lucknow Zone, Agra Zone, Varanasi Zone and Gorakhpur Zone. 22. Mr. Dwivedi, learned Senior Counsel has raised certain objections against the maintainability of the writ petition. He has urged that the writ petition suffers from gross delay and laches and deserves to be dismissed on this ground alone. He stated that CL-1B licence was introduced for the first time on 26.2.2009. The answering

respondent was granted licence for the excise year 2009-10, which was renewed for the excise year 2010-11, but the petitioner did not challenge the grant of CL-1B licence to the answering respondent nor did he challenge the Rules providing for renewal or even renewal granted to the answering respondent. Under the Rules 2011 when the advertisement was issued inviting applications for grant of licence, the petitioner did not apply for licence. He also did not challenge the excise policy 2011-12 or the Fifth Amendment Rules 2011 or the grant of licence to the answering respondent. The petitioner even when excise policy 2016-17 was issued with the clause of renewal for 2017-18 also had not come forward to challenge promptly as this policy was enforced on 17.2.2016, rather he filed the present writ petition at the verge of excise year 2016-17 in the month of January 2017. In support of his submission he cited the following decisions:- (1) State of W.B. v. Monotosh Roy and another (1999) 2 SCC 71. Relevant paragraph 9 is reproduced hereunder:- "(9) In the writ petition there is no challenge whatever to the provisions of the Rules, as amended by the notification dated 22/5/1987; nor has the writ petitioner chosen to challenge the notification as such. On the other hand the prayers in the writ petition are directed only against the memorandum dated 16/4/1987, as stated already. Consequently, the first respondent is" not entitled to any relief whatever in the writ petition and it deserves to be dismissed. This aspect of the matter has been completely ignored by the division bench of the High court. This appeal has to be allowed on that short ground." (2) Sanjay Kumar & Ors. v. Narinder Verma & Ors. (2006) 6 SCC 467. Relevant paragraph 13 is reproduced hereunder:- "13. Mr. Raju Ramachandran, learned senior counsel appearing for the Third Respondent in Civil Appeal Nos. 5430-34/2004, however, urged that one of the grounds of challenge before the Division Bench was that the statutory qualification was discriminatory. He, therefore, contended that in view of the said contention it was open to the High Court to read down the offending rule instead of striking it down. Having read the portion of the impugned judgment on which this argument is based, we are not satisfied that such a contention was really urged. It is not in dispute that the writ petitions were not directed towards challenge to the applicable Rules. Merely because an argument was made in the Letters Patent Appeal that the Rules were discriminatory, it was not open to the High Court to have struck down the Rules. The Letters patent Appeals could have proceeded only on the basis of the writ petitions and the judgment of the learned Single Judge, which was being challenged. There being no substantive challenge to the Rules, there was no question of striking down the Rules, nor was there any situation of reading down the Rules. Reliance placed by the Mr. Raju Ramachandran on the judgment of this Court in Umesh Chandra Shukla v. Union of India and others (1985) 3 SCC 721 is of no avail. That was entirely a different situation where this Court was of the view that the applicable Rules had not been followed as the select list had been interfered with by exercising a power which did not arise from Rule 18 of the applicable Rules to fix the minimum marks in order to include candidates in the final select list. Such is not the situation before us and, therefore, this authority is of no help to us." (3) Central Government of

India and others v. Kirishnaji Parvetesh Kulkarni (2006) 4 SCC 275. Relevant paragraph 11 is reproduced hereunder:- "11. An IVP is akin to an ordinary currency note. It bears no name of the holder. Just as a lost currency note cannot be replaced, similarly the question of replacing a lost IVP does not arise. Rule 7(2) makes the position clear that a certificate lost, stolen, mutilated, defaced or destroyed beyond recognition will not be replaced by any post office. Similar is the position as regards the certificate which is either lost or stolen. Indisputably there was no challenge to the legality of the Rule 7(2). In the absence of a challenge to the provision, any direction should not really have been given. It is fundamental that no direction which is contrary to law can be given." Mr. Dwivedi, learned Senior Counsel has raised the question on the petitioner's locus standi and contended that admittedly the petitioner is a manufacturer of both potable and industrial liquor and therefore in view of clause 3.8(A)(7) of the Excise Policy 2009-2010 and Rules 6(2) of the Fourth Amendment Rules 2009 he is ineligible to obtain CL-1B licence. Therefore, he cannot be said to be an aggrieved person against the grant of licence to the answering respondent. He stated that the petitioner further lacks the eligibility to seek the licence since he does not have experience in the wholesale of liquor and further the turn over of Rs.400 crores per year. In support of his submission he cited a case of S.S. & Company v. Orissa Mining Corporation Limited, reported in (2008) 5 SCC 772. In this case the Hon"ble Supreme Court held that a grievance against the amendment, either based on the plea of mala fide or on the substance of the amendment can only be raised by someone whose position gets adversely affected by the amendment. We quote paragraph 51 as under:- "51. It is thus evident to us that the appellant SCC did not satisfy the eligibility criteria with regard to past experience even in terms of the unamended Clause 8(i). had the appellant been qualified in terms of the unamended clause and faced exclusion only as a result of the amendment in the criterion it might have been open to it to assail the introduction of the amendment. But that is not the case here. As noted above, the appellant was liable to be excluded, and was in fact excluded, even under the unamended Clause 8(i) and, therefore, all arguments either based on mala fide or on the substance of the amendment lose all their relevance." 23. He further stated that the writ petition suffers from non-joinder of necessary parties and deserves to be dismissed on this ground alone since the petitioner has made allegations against the several officials of Excise Department without making them parties. 24. He further asserted that there is a suppression of material facts and perjury in the writ petition. It is stated that the petitioner has stated that it has been unable to sell any country liquor after the induction of CL-1B licence because of arbitrary terms and conditions imposed therein. The petitioner has mentioned a chart to show that after the year 2008-09 his earning was nil and further has annexed some letters to establish that those letters were written to the Excise Department and CL-1B licensees for lifting supplies, but the licensees have purchased majority of liquor from Wave Distilleries. The documents submitted by him are fabricated. In support of his submission he stated that the petitioner being holder of PD 2 licence is entitled to manufacture

absolute alcohol, rectified spirit, denatured spirit, IMFL and country liquor and to store denaturants, whereas CL-1B licence pertains to country liquor. Even though if he has felt any problem with CL-1B licence, he could have manufactured IMFL and industrial alcohol, but he did not produce any spirit at all and therefore its earning was nil. 25. Secondly, the petitioner's distillery was established earlier in the name of Narang Distillery Ltd., which was changed to Starlight Bruchem Ltd. on 27.6.2011. The PD 2 licence is of Starlight Bruchem, which was renewed on 24.9.2016 retrospectively for the period of 2014-15, 2015-16 and 2017-18, which indicates that it did not have PD-2 licence until the renewal granted on 24.9.2016. Thus it is completely false statement of the petitioner that CL-1B licensees are not purchasing liquor from its distilleries. 26. Thirdly, the petitioner had annexed two letters dated 24.4.2012 written to the Royal Beverages and Patiala Kings Liquor Pvt. Ltd. Respectively. These letters have been written on behalf of Narang Distillery Ltd., which was non existent on 24.4.2012 since this name has ceased to exist on 27.6.2011. Further there was no letter written to respondent No.3, which holds CL-1B licence for Meerut and Lucknow Zone. The petitioner's Distillery is in district Gonda which falls in Lucknow Zone and it is answering respondent No.3, who holds CL-1B license for Meerut and Lucknow Zone. Similarly the letter written to M/s Patiala Kings, respondent No.4 which has no concern with Lucknow Zone. That apart the petitioner had not written any letter either before March-April 2012 or thereafter to any CL-1B licensee for supply of liquor. Moreover these two letters do mention any specific quantity of country liquor which petitioner wanted to supply. 27. Fourthly there are ten distilleries apart from the petitioner who are actually manufacturing country liquor and they are all supplying country liquor to answering respondent. It is stated that 3rd of the supply has been obtained from distilleries other than Wave Distillery and Lords Distillery. Thus it is very much clear that the petitioner has attempted to mislead the court by presenting false facts and annexing with fabricated documents. Therefore, the writ petition deserves to be dismissed on the ground of his gross misconduct and for approaching the court without clean hands. 28. Mr. Dwivedi, learned Senior Counsel has stated that more emphasis has been given by the petitioner on the point of creation of monopoly in favour of respondents since by Fourth Amendment Rules a condition has been imposed upon the applicant that the applicant must have turn over of Rs.400 crores during any one of the past three excise years inclusive of the current year. It is stated that this condition has been laid down in Rule 6(2) of the Fifth Amendment Rules 2011, but despite suggestions by the Court made during the course of hearing the petitioner did not choose to challenge the Rule 6(2) of the Fifth Amendment Rules 2011. That apart he submitted that creation of monopoly by State for liquor trade either in itself or any agency created by it has been well recognized by the Supreme Court in several cases. In the case of Cooverjee B.Bharucha v. Excise Commissioner and the Chief Commissioner, Ajmer and others, reported in AIR 1954 (SC) 220 the Supreme Court held that Elimination and exclusion from business is inherent in the nature of liquor business and it will hardly be proper to apply to such a business principles applicable to trades which

all could carry. 29. In the case of *Khoday Distilleries Ltd. and others v. State of Karnataka and others*, reported in 1995 (1) SCC 574, there were two questions for consideration before the Supreme Court; No.(i) whether a monopoly for the manufacturer, trade or business in liquor can be created in favour of the State and (ii) whether reasonable restrictions under Article 19(6) of the Constitution can be placed only by Act of Legislature or by a subordinate legislation as well. He referred to the paragraph 60 (e) to (h) in particular and all sub-paragraphs of para 60 in general to establish that the Supreme Court held that the State can create a monopoly either in itself or in the agency created by it for the manufacture, possession, sale and distribution of the liquor. We quote paragraph 60 (e), (f), (g) and (h) as under:- "(e) For the same reason, the State can create a monopoly either in itself or in the agency created by it for the manufacture, possession, sale and distribution of the liquor as a beverage and also sell the licences to the citizens for the said purpose by charging fees. This can be done under Article 19(6) or even otherwise. (f) For the same reason, again, the State can impose limitations and restrictions on the trade or business in portable liquor as a beverage which restrictions are in nature different from those imposed on the trade or business in legitimate activities and goods and articles which are *res commercium*. The restrictions and limitations on the trade or business in potable liquor can again be both under Article 19(6) or otherwise. The restrictions and limitations can extend to the State carrying on the trade or business itself to the exclusion of and elimination of others and/or to preserving to itself the right to sell licences to do trade or business in the same, to others. (g) When the State permits trade or business in the potable liquor with or without limitation, the citizen has the right to carry on trade or business subject to the limitations, if any, and the State cannot make discrimination between the citizens who are qualified to carry on the trade or business. (h) The State can adopt any mode of selling the licences for trade or business with a view to maximise its revenue so long as the method adopted is not discriminatory." 30. In the case of *State of Kerala and others v. Kandath Distilleries*, reported in (2013) 6 SCC 573 the Supreme Court held that the State has, the exclusive right or privilege in respect of potable liquor. We quote paragraph 24 as under:- "24. Article 47 is one of the Directive Principles of State Policy which is fundamental in the governance of the country and the State has the power to completely prohibit the manufacture, sale, possession, distribution and consumption of liquor as a beverage because it is inherently dangerous to the human health. Consequently, it is the privilege of the State and it is for the State to decide whether it should part with that privilege, which depends upon the liquor policy of the State. State has, therefore, the exclusive right or privilege in respect of portable liquor. A citizen has, therefore, no fundamental right to trade or business in liquor as a beverage and the activities, which are *res extra commercium*, cannot be carried on by any citizen and the State can prohibit completely trade or business in portable liquor and the State can also create a monopoly in itself for the trade or business in such liquor. This legal position is well settled. State can also impose restrictions and limitations on the trade or business in liquor as a beverage, which

restrictions are in nature different from those imposed on trade or business in legitimate activities and goods and articles which are res commercium. Reference may be made to the judgments of this Court in *Vithal Dattatraya Kulkarni and Others v. Shamrao Tukaram Power SMT and Others* (1979) 3 SCC 212, *P. N. Kaushal & Others v. Union of India & Others* (1978) 3 SCC 558, *Krishna Kumar Narula etc. v. State of Jammu & Kashmir & Others* AIR 1967 SC 1368, *Nashirwar and Others v. State of Madhya Pradesh & Others* (1975) 1 SCC 29, *State of A. P. & Others v. McDowell & Co and Others* (1996) 3 SCC 709 and *Khoday Distilleries Ltd. & Others v. State of Karnataka & Others* (1995) 1 SCC 574." At this stage he has referred to the provisions of Section 24, 24-A, 24-B and 26 of the United Provinces Excise Act, 1910 and submitted that the provisions of these Sections of the Act shows that the Excise Commissioner holds the exclusive privilege over the excise trade. However, he may grant it by way of licence to any person of manufacturing or of supplying by wholesale, or of both or of selling by wholesale or by retail, or of manufacturing or of supplying by wholesale, or of both, and of selling by retail, any country liquor or intoxicating drug within any local area. We quote Sections 24, 24-A, 24-B and 26 as under:- "24. Grant of exclusive privilege of manufacture, etc. - Subject to the provisions of Section 31, the Excise Commissioner may grant to any person a licence for the exclusive privilege:- (1) of manufacturing or of supplying by wholesale, or of both, or (2) of selling by wholesale or by retail, or (3) of manufacturing or of supplying by wholesale, or of both, and of selling by retail, and country liquor or intoxicating drug within any local area. 24-A. Grant of exclusive or other privilege in respect of foreign liquor:- (1) Subject to the provisions of section 31, the Excise Commissioner may grant to any person a licence or licences for the exclusive or other privilege,- (a) of manufacturing or supply by wholesale, or of both; or (b) of manufacturing or of supplying by wholesale, or of both and selling by retail; or (c) of selling by wholesale (to wholesale, or retail vendors); or (d) of selling by retail at shops (for consumption "off" the premises only) any foreign liquor in any locality. (2) The grant of licence or licences under clause (d) of sub-section (1) in relation to any locality shall be without prejudice to the grant of licences for the retail sale of foreign liquor in the same locality in hotels and restaurants for consumption in their premises. (3) Where more licences than one are proposed to be granted under clause (d) sub-section (1) in relation to any locality for the same period advance intimation of the proposal shall be given to the prospective applicants for every such licence. (4) The provisions of section 25, and provision to Section 39 shall apply in relation to grant of a licence for an exclusive or other privilege under this section as they apply in respect of the grant of a licence for an exclusive privilege under Section 24. 24-B. Removal of doubts. - For the removal of doubts, it is hereby declared- (a) that the state Government has an exclusive right or privilege of manufacture and sale of country liquor and foreign liquor and foreign liquor; (b) that the amount described as licence fee in clause (c) of Section 41 is in its essence the rental or consideration for the grant of right or privilege by the State Government; (c) that the Excise Commissioner as the head of the Excise Department of the state shall

be deemed, while determining or realizing such fee, to act for and on behalf of the state Government." 26. Grantee of exclusive privilege may let or assign.- Subject to the conditions of his licence the grantee of any exclusive privilege may let or assign the whole, or any portion of his privilege; but no lessee or assignee of such privilege or portion of a privilege shall exercise any rights as such unless and until a licence has been granted to him by the Excise Commissioner on application made by the grantee." He further invited attention of this Court towards the provisions of Section 30 of the Act 1910, which deals with the payment for exclusive privileges. We quote it as under:- "30. Payment for exclusive privileges.- (1) Instead of or in addition to any duty leviable under this Chapter, the State Government or on its behalf the Excise Commissioner may accept payment of a sum in consideration of the grant of licence for any exclusive or other privilege under Section 14 or Section 24-A. (2) The sum payable under sub-section (1) may either be fixed by auction or inviting tenders or otherwise or be assessed on the basis of the sales made or quota lifted under the licence or partly fixed and partly assessed in the aforesaid manner. (3) For the financial year commencing on April 1, 1983 apart from the sum fixed for grant of licence under Section 24-A, the sum assessed, called as assessed fee, on the basis of sales under the licence shall be payable, at the rate of rupees five per reputed quart bottle of all kinds of spirit, wine, liquor and cordial and at the rate of paise sixty per reputed quart bottle of beer, stout and other fermented liquors by the wholesale vendors of foreign liquor." In view of the aforesaid provisions Mr. Dwivedi asserted that the licence holder is an agency created by the State to enjoy the privilege of State parted by it. In fact even a Government Company or Society has to take licence under the Act to do business in liquor and monopoly in its favour is created only by licence. 31. Chapter VI of the Act 1910 deals with the licences, permits and passes. It contains Section 31 to Section 37. Section 31 provides that every licence, permit or pass granted under this Act shall be granted:- (a) on payment of such fees (if any), (b)..... (c)..... (d) shall be granted for such period as the State Government may, in like manner, direct. He further invited attention of this Court towards the provisions of Section 36-A of the Act 1910, which deals with the provisions of right of renewal and compensation. It reads that:- "36-A. Bar to right of renewal and compensation.- No person to whom a licence has been granted under this Act shall have any claim to the renewal of such licence or any claim for compensation on the determination or non-renewal thereof." Section 37 speaks that no person to whom a licence has been granted under this Act shall have any claim to the renewal of such licence or any claim for compensation on the determination or non-renewal thereof, however, it is stated that the State can by its policy grant the renewals. Mr. Dwivedi, learned Senior Counsel has stated that the liquor trade is *res extra commercium* and is not comparable with other business. 32. In so far as the requirement of the applicant to have a minimum turn over of Rs.400 crores in any of the preceding three years is concerned, it is stated that it is absolutely rational since the State policy itself it introduced in order to secure the revenue of the State in the light of the amount involved in

the trade. It is submitted that the MGQ for Meerut Zone is 10,14,133,80.00 BL (bulk liters) and the MGQ for Lucknow Zone is 5,53,59,237.00 BL. The total MGQ of both the zones is 15,67,72,616.00. The rate at which country liquor is supplied to the respondent No.3 is Rs.255.30/BL which includes Rs.226.00/BL excise duty. Therefore yearly cost of purchase of Respondent No.3 is approximately Rs.4002.40 crores. The total MGQ for the State is prescribed as 33.330 BL (See Pg. 101 W.P.) In view of the above it cannot be said that the requirement of a minimum turn over of Rs.400 crore is excessive or irrational or arbitrary. It is stated that the petitioner had attempted to demonstrate arbitrariness in the condition of Rs.400 crores of the turn over by merely referring to the license fees of Rs.13 crores which was to be paid in three instalments. To explain this he stated that the totality of country liquor business under CL-1B licence involves a liability of Rs.4002 crores for Meerut and Lucknow Zone (Meerut approximately 2600 crores and Lucknow approximately 1400 crores). Therefore the CL-1B licensee should have sufficient financial soundness to meet this annual liability. This liability is in addition to the investments which may be involved in creating storage capacity, ensuring smooth supply of country liquor and payment of wages of workers as well as taxes under the other laws. Therefore, the condition of Rs.400 crores turn over cannot be castigated as irrational or arbitrary. The learned Senior Counsel appearing for the petitioner without challenging the policy as well as the Rules has emphasized his argument for lifting of veil since the third respondent has common Directors/share holders with Wave Distilleries, Lord Distilleries & the Mohan Gold Water Breweries Ltd. He stated that if the corporate veil of respondent No.3 is lifted, it is ineligibility under clause 3.8(A)(7) of the Policy 2009- 10. 33. In reply Mr. Dwivedi, learned Senior counsel appearing for the answering respondent has submitted that Rule 6(1) has provided that an individual, a partnership firm or company, Excluding Consortium shall be eligible. Indisputably respondent No.3 is a Company, therefore, it is eligible to be an applicant for grant of licence. The word "Company" has been defined under Rule 2(l) as under:- "(l) "Company" means a Company registered under Section 12 of the Indian Companies Act, 1956. Rule 6(1) excludes the consortium from the eligibility criteria of licensee. The word "Consortium" has been defined under Rule 2(m) as under:- "(m)"Consortium" means an association of two or more individuals, Companies, Partnership firms (or any combination of these entities) with the objective of participating in a common activity or pooling their resources for achieving a common goal." In view of the definition, it is obvious that when two or more individuals or two or more Companies or partnership Firms are associated to each other with the objective of participating in a common activity or going to achieve common goal, then they would be covered under the word consortium and to be ineligible for grant of licence. Respondent No.3 is a Company without having an association either with individual or with other Company to get the licence of CL-1B. Since the Company has distinct legal entity being independent to its share holders and Directors. It is stated that merely because two Companies share common share holders/Directors does not mean that the entity of two Company are one and the same.

In support of his submission he cited the following decisions of the Hon'ble Supreme Court:- (1) *Mrs. Bacha F. Guzdar v. Commissioner of Income Tax, Bombay*, (AIR 1955 SC 74). Relevant paragraph 7 is reproduced hereunder:- "7. It was argued by Mr. Kolah on the strength of an observation made by Lord Anderson in *Commissioners of Inland Revenue v. Forrest* (1924) 8 Tax Cas. 704 at p. 710(A), that an investor buys in the first place a share of the assets of the industrial concern proportionate to the number of shares he has purchased and also buys the right to participate in any profits which the company may make in the future. That a shareholder acquires a right to participate in the profits of the company may be readily conceded but it is not possible to accept the contention that the shareholder acquires any interest in the assets of the company. The use of the word "assets" in the passage quoted above cannot be exploited to warrant the inference that a shareholder, on investing money in the purchase of shares, becomes entitled to the assets of the company and has any share in the property of the company. A shareholder has got no interest in the property of the company though he has undoubtedly a right to participate in the profits if and when the company decides to divide them. The interest of a shareholder vis-a-vis the company was explained in the case of *Chiranjitlal Chowdhuri v. The Union of India and Others* AIR 1951 SC 41 at pp. 54, 55 (B). That judgment negatives the position taken up on behalf of the appellant that a shareholder has got a right in the property of the company. It is true that the shareholders of the company have the, sole determining voice in administering the affairs of the company and are entitled, as provided by the Articles of Association to declare that dividends should be distributed out of the profits of the company to the shareholders but the interest of the shareholder either individually or collectively does not amount to more than a right to participate in the profits of the company." 34. The company is a juristic person and is distinct from the shareholders. It is the company which owns the property and not the shareholders. The dividend is a share of the profits declared by the company as liable to be distributed among the shareholders. Reliance is placed on behalf of the appellant on a passage in Buckley's Companies Act, 12th Ed., page 894, where the etymological meaning of dividend is given as dividendum, the total divisible sum but in its ordinary sense it means the sum paid and received as the quotient forming the share of the divisible sum payable to the recipient. This statement does not justify the contention that shareholders are owners of a divisible sum or that they are owners of the property of the company. 35. The proper approach to the solution of the question is to concentrate on the plain words of the definition of agricultural income which connects in no uncertain language revenue with the land from which it directly springs and a stray observation in a case which has no bearing upon the present question does not advance the solution of the question. There is nothing in the Indian law to warrant the assumption that a shareholder who buys shares buys any interest in the property of the company which is a juristic person entirely distinct from the shareholders. 36. The true position of a shareholder is that on buying shares an investor becomes entitled to participate in the profits of the company in which he holds the shares if and when the

company declares, subject to the Articles of Association, that the profits or any portion thereof should be distributed by way of dividends among the shareholders. He has undoubtedly a further right to participate in the assets of the company which would be left over after winding up, but not in the assets as a whole as Lord Anderson puts it." (2) *Mangi Lal v. K.R. Pawar & Anr.* 1971 (2) SCC 399. Relevant paragraph 9 is reproduced hereunder:- "9. On appeal, Dr. Singhvi has re-agitated all these points. We may first dispose of the point of disqualification. Section 9 of the Act on which the entire argument rests, reads:- "Disqualification for Government contracts. A person shall be disqualified, if, and for so long as, there subsists a contract entered into by him in the course of his trade or business with the appropriate Government for the supply of goods to, or for the execution of any works undertaken by, that Government." "It is unnecessary for the purpose of this case to reproduce the explanation. It is clear that this section only covers contracts which have been entered into by a person in the course of his trade or business with the appropriate Government for the supply of goods to or for the execution of any works undertaken by that Government. Dr. Singhvi contended that the supply of electricity would amount to the supply of goods. That perhaps is so. But, in our opinion, the contract of supply of electricity by the Electric Supply Company can by no means be considered to be a contract entered into by respondent No. 1 in the course of his trade or business by reason merely of the fact that he was at the relevant time Chairman of the Board of Directors of the Company. It is not possible to describe the business of the Company to be the trade or business of the Chairman of the Board of Directors. A Company registered under the Indian Companies Act, it is settled beyond dispute, is a separate entity distinct from its shareholders. The Chairman of the Board of Directors of the Company while functioning as such cannot be said to be engaged in his trade or business as contemplated. by Section 9A of the Act. The legal position is so clear that the appellant's learned counsel, after an unsuccessful attempt to persuade us to the contrary view, felt constrained not to pursue this point seriously." (3) *Indowind Energy Limited v. Wescare (India) Limited & Anr.* (2010) 5 SCC 307. Relevant paragraph 17 is reproduced hereunder:- "17. It is not in dispute that Subuthi and Indowind are two independent companies incorporated under the Companies Act, 1956. Each company is a separate and distinct legal entity and the mere fact that two companies have common shareholders or common Board of Directors, will not make the two companies a single entity. Nor will existence of common shareholders or Directors lead to an inference that one company will be bound by the acts of the other. If the Director who signed on behalf of Subuthi was also a Director of Indowind and if the intention of the parties was that Indowind should be bound by the agreement, nothing prevented Wescare insisting that Indowind should be made a party to the agreement and requesting the Director who signed for Subuthi also to sign on behalf of Indowind." (4) *Shree Sidhballi Steels Limited & Ors. v. State of Uttar Pradesh & Others* (2011) 3 SCC 193. Relevant paragraph 25 is reproduced hereunder:- "25. A company not being a citizen has no fundamental right under Article 19. When a law infringes the fundamental

right of a company, a shareholder cannot normally apply under Article 32 for enforcement of company's fundamental right as in the eye of the law the two are distinct entities. A corporation in law is equal to a natural person and has legal entity of its own. The entity of a corporation is entirely separate from that of its shareholder applying the doctrine of piercing or lifting of veil and it cannot be said that the petition by a corporation is a petition by the shareholder. It is important to mention that the petitioner are the companies registered under the provisions of the Companies Act, 1956. It is well settled that a company cannot maintain a petition under Article 32 of the Constitution for enforcement of fundamental rights guaranteed under Article 19 of the Constitution. A company, being not a citizen, has no fundamental rights under Article 19 of the Constitution. Nonetheless, the companies would be entitled to claim right under Article 14 of the Constitution and, therefore, it would be relevant to examine whether the respondents have committed breach of Article 14 by withdrawing the concession in electricity rates given/granted earlier."2011 (3) SCC 193 para 25...." 37. He further asserted that it is very much explicit that a Company has its own entity and since merely the Directors and Share holders are common, the doctrine piercing or lifting of veil shall have no application in the present case, therefore, lifting of veil is not warranted at all. He stated that the lifting of veil is an exception of the principles discussed above and the court resort to piercing the veil of the Company in exceptional cases in case of tax evasion, fraud, trade with enemy company, crime or where statute requires and the burden is on the person alleging that a shell company has been created for evading liability under the law or committing crime or for evading tax. 38. In support of his submission he cited the following decisions:- (1) Life Insurance Corporation of India v. Escorts Ltd. and others, (1986) 1 SCC 264. Relevant portion of paragraphs 90 and 91 are extracted below:- "90.....Generally and broadly speaking, we may say that the corporate veil may be lifted where a statute itself contemplates lifting the veil, or fraud or improper conduct is intended to be prevented, or a taxing statute or a beneficent statute is sought to be evaded or where associated companies are inextricably connected as to be, in reality, part of one concern. 91..... Lifting the veil is necessary to discover the nationality or origin of the shareholders and not to find out the individual identity of each of the shareholders. The corporate veil may to lifted to that extent only and no more." (1) Vodafone International Holdings BV v. Union of India & Anr. (2012) 6 SCC 613 "72. The approach of both the corporate and tax laws, particularly in the matter of corporate taxation, generally is founded on the above mentioned separate entity principle,i.e., treat a company as a separate person. The Indian Income Tax Act, 1961, in the matter of corporate taxation, is founded on the principle of the independence of companies and other entities subject to income-tax. Companies and other entities are viewed as economic entities with legal independence vis-a-vis their shareholders/participants. It is fairly well accepted that a subsidiary and its parent are totally distinct tax payers. Consequently, the entities subject to income-tax are taxed on profits derived by them on standalone basis, irrespective of their actual degree of economic independence

and regardless of whether profits are reserved or distributed to the shareholders/participants. Furthermore, shareholders/participants, that are subject to (personal or corporate) income-tax, are generally taxed on profits derived in consideration of their shareholding/participations, such as capital gains. Now a days, it is fairly well settled that for tax treaty purposes a subsidiary and its parent are also totally separate and distinct tax payers. 75. The common law jurisdictions do invariably impose taxation against a corporation based on the legal principle that the corporation is "a person" that is separate from its members. It is the decision of the House of Lords in *Salomon v. Salomon* (1897) A.C. 22 that opened the door to the formation of a corporate group. If a "one man" corporation could be incorporated, then it would follow that one corporation could be a subsidiary of another. This legal principle is the basis of Holding Structures. 79. When it comes to taxation of a Holding Structure, at the threshold, the burden is on the Revenue to allege and establish abuse, in the sense of tax avoidance in the creation and/or use of such structure(s). In the application of a judicial anti-avoidance rule, the Revenue may invoke the "substance over form" principle or "piercing the corporate veil" test only after it is able to establish on the basis of the facts and circumstances surrounding the transaction that the impugned transaction is a sham or tax avoidant. To give an example, if a structure is used for circular trading or round tripping or to pay bribes then such transactions, though having a legal form, should be discarded by applying the test of fiscal nullity. Similarly, in a case where the Revenue finds that in a Holding Structure an entity which has no commercial/business substance has been interposed only to avoid tax then in such cases applying the test of fiscal nullity it would be open to the Revenue to discard such interpositioning of that entity. However, this has to be done at the threshold." Mr. Dwivedi, learned Senior Counsel has introduced the "look at" and "look through" principle and submitted that here in the present case only "look at" theory can be applied to ascertain the true legal nature of transaction. He further submitted that since the Company as well as Directors and share holders have separate entity, their genuineness with regard to liquor trade should be ascertained by applying "look at" theory. There is no need to look through the Directors/investors of the Company to test the genuineness of the trade run by the Company. He drew attention of this Court towards the same very judgment *Vodafone International Holdings* (Supra). The relevant paragraphs 80, 81 and 82 are reproduced hereunder:- "80. In this connection, we may reiterate the "look at" principle enunciated in *Ramsay* (supra) in which it was held that the Revenue or the Court must look at a document or a transaction in a context to which it properly belongs to. It is the task of the Revenue/Court to ascertain the legal nature of the transaction and while doing so it has to look at the entire transaction as a whole and not to adopt a dissecting approach. The Revenue cannot start with the question as to whether the impugned transaction is a tax deferment/saving device but that it should apply the "look at" test to ascertain its true legal nature [See *Craven v. White* (supra) which further observed that genuine strategic tax planning has not been abandoned by any decision of the

English Courts till date]. 81. Applying the above tests, we are of the view that every strategic foreign direct investment coming to India, as an investment destination, should be seen in a holistic manner. While doing so, the Revenue/Courts should keep in mind the following factors: the concept of participation in investment, the duration of time during which the Holding Structure exists; the period of business operations in India; the generation of taxable revenues in India; the timing of the exit; the continuity of business on such exit. 82. In short, the onus will be on the Revenue to identify the scheme and its dominant purpose. The corporate business purpose of a transaction is evidence of the fact that the impugned transaction is not undertaken as a colourable or artificial device. The stronger the evidence of a device, the stronger the corporate business purpose must exist to overcome the evidence of a device." 39. He further submitted that the question of providing "look through" in the statute or in the treaty is a matter of policy. It is to be expressly provided for in the statute or in the treaty. We quote para 93 of the judgment of Vodafone International Holdings BV (Supra) as under:- "93. The question of providing "look through" in the statute or in the treaty is a matter of policy. It is to be expressly provided for in the statute or in the treaty. Similarly, limitation of benefits has to be expressly provided for in the treaty. Such clauses cannot be read into the Section by interpretation. For the foregoing reasons, we hold that Section 9(1)(i) is not a "look through" provision." 40. He supported his submissions further by adding para 101, 102 and 103 of the judgment of Vodafone International Holdings BV (Supra). We quote para 101, 102 and 103 as under:- "101. A company is a separate legal persona and the fact that all its shares are owned by one person or by the parent company has nothing to do with its separate legal existence. If the owned company is wound up, the liquidator, and not its parent company, would get hold of the assets of the subsidiary. In none of the authorities have the assets of the subsidiary been held to be those of the parent unless it is acting as an agent. Thus, even though a subsidiary may normally comply with the request of a parent company it is not just a puppet of the parent company. The difference is between having power or having a persuasive position. Though it may be advantageous for parent and subsidiary companies to work as a group, each subsidiary will look to see whether there are separate commercial interests which should be guarded. 102. When there is a parent company with subsidiaries, is it or is it not the law that the parent company has the "power" over the subsidiary. It depends on the facts of each case. For instance, take the case of a one-man company, where only one man is the shareholder perhaps holding 99% of the shares, his wife holding 1%. In those circumstances, his control over the company may be so complete that it is his alter ego. But, in case of multinationals it is important to realise that their subsidiaries have a great deal of autonomy in the country concerned except where subsidiaries are created or used as a sham. Of course, in many cases the courts do lift up a corner of the veil but that does not mean that they alter the legal position between the companies. 103. The directors of the subsidiary under their Articles are the managers of the companies. If new directors are appointed even at the request

of the parent company and even if such directors were removable by the parent company, such directors of the subsidiary will owe their duty to their companies (subsidiaries). They are not to be dictated by the parent company if it is not in the interests of those companies (subsidiaries). The fact that the parent company exercises shareholder's influence on its subsidiaries cannot obliterate the decision-making power or authority of its (subsidiary's) directors. They cannot be reduced to be puppets. The decisive criteria is whether the parent company's management has such steering interference with the subsidiary's core activities that subsidiary can no longer be regarded to perform those activities on the authority of its own executive directors." 41. The Supreme Court in the case of *Balwant Rai Saluja v. AIR India Ltd.*, (2014) 9 SCC 407 has well discussed the doctrine of piercing the corporate veil. We quote relevant paragraphs 70, 71, 72, 73 and 74 as under:- "70. The doctrine of "piercing the corporate veil" stands as an exception to the principle that a company is a legal entity separate and distinct from its shareholders with its own legal rights and obligations. It seeks to disregard the separate personality of the company and attribute the acts of the company to those who are allegedly in direct control of its operation. The starting point of this doctrine was discussed in the celebrated case of *Salomon v. A Salomon & Co Ltd.*, Lord Halsbury LC, negating the applicability of this doctrine to the facts of the case, stated that:(AC pp.30 & 31). "...a company must be treated like any other independent person with its rights and liabilities legally appropriate to itself ...,whatever may have been the ideas or schemes of those who brought it into existence." Most of the cases subsequent to the *Salomon* case (supra), attributed the doctrine of piercing the veil to the fact that the company was a "sham" or a "facade". However, there was yet to be any clarity on applicability of the said doctrine. 71. In recent times, the law has been crystallized around the six principles formulated by Munby J. in *Ben Hashem v. Ali Shayif*, [2008] EWHC 2380 (Fam). The six principles, as found at paragraphs 159- 164 of the case are as follows- (i) ownership and control of a company were not enough to justify piercing the corporate veil; (ii) the Court cannot pierce the corporate veil, even in the absence of third party interests in the company, merely because it is thought to be necessary in the interests of justice; (iii) the corporate veil can be pierced only if there is some impropriety; (iv) the impropriety in question must be linked to the use of the company structure to avoid or conceal liability; (v) to justify piercing the corporate veil, there must be both control of the company by the wrongdoer(s) and impropriety, that is use or misuse of the company by them as a device or facade to conceal their wrongdoing; and (vi) the company may be a "facade" even though it was not originally incorporated with any deceptive intent, provided that it is being used for the purpose of deception at the time of the relevant transactions. The Court would, however, pierce the corporate veil only so far as it was necessary in order to provide a remedy for the particular wrong which those controlling the company had done. 72. The principles laid down by the *Ben Hashem* case (supra) have been reiterated by UK Supreme Court by Lord Neuberger in *Prest v. Petrodel Resources Limited and others*, [2013] UKSC 34, at paragraph 64. Lord

Sumption, in the Prest case (supra), finally observed as follows: (AC p.488, para 35) "35. I conclude that there is a limited principle of English law which applies when a person is under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control. The Court may then pierce the corporate veil for the purpose, and only for the purpose, of depriving the company or its controller of the advantage that they would otherwise have obtained by the company's separate legal personality. The principle is properly described as a limited one, because in almost every case where the test is satisfied, the facts will in practice disclose a legal relationship between the company and its controller which will make it unnecessary to pierce the corporate veil." 73. The position of law regarding this principle in India has been enumerated in various decisions. A Constitution Bench of this Court in Life Insurance Corporation of India v. Escorts Ltd. & Ors., (1986) 1 SCC 264, while discussing the doctrine of corporate veil, held that: (SCC pp. 335-36, para 90) "90. ... Generally and broadly speaking, we may say that the corporate veil may be lifted where a statute itself contemplates lifting the veil, or fraud or improper conduct is intended to be prevented, or a taxing statute or a beneficent statute is sought to be evaded or where associated companies are inextricably connected as to be, in reality, part of one concern. It is neither necessary nor desirable to enumerate the classes of cases where lifting the veil is permissible, since that must necessarily depend on the relevant statutory or other provisions, the object sought to be achieved, the impugned conduct, the involvement of the element of the public interest, the effect on parties who may be affected etc." 74. Thus, on relying upon the aforesaid decisions, the doctrine of piercing the veil allows the Court to disregard the separate legal personality of a company and impose liability upon the persons exercising real control over the said company. However, this principle has been and should be applied in a restrictive manner, that is, only in scenarios wherein it is evident that the company was a mere camouflage or sham deliberately created by the persons exercising control over the said company for the purpose of avoiding liability. The intent of piercing the veil must be such that would seek to remedy a wrong done by the persons controlling the company. The application would thus depend upon the peculiar facts and circumstances of each case." 42. He has further referred to the judgment of Hon"ble Supreme Court rendered in the case of P.C. Agarwala v. Payment of Wages Inspector (2005) 8 SCC 104. Relevant paragraph 22 is reproduced hereunder:- "22. The doctrine of lifting of the veil has been applied, in the words of Palmer, in five categories of cases: where companies are in relationship of holding and subsidiary (or sub-subsidiary) companies; where a shareholder has lost the privilege of limited liability and has become directly liable to certain creditors of the company on the ground that, with his knowledge, the company continued to carry on business six months after the number of its members was reduced below the legal minimum; in certain matters pertaining to the law of taxes, death duty and stamps, particularly where the question of the "controlling interest" is in issue; in the law relating to exchange control, and in the law

relating to trading with the enemy where the test of control is adopted (Palmer's Company Law, 20th Edn., page 136, now page 215, 24th Edn. 1987). In some of these cases judicial decisions have no doubt lifted the veil and consider the substance of the matter." 43. He elaborated, narrated the history of the existence of respondent No.3 as well as its subsidiaries and submitted that respondent No.3 was incorporated on 16.9.2006 much before the excise policy 2009-10. Wave Distilleries and Beverages Limited was incorporated on 8 July 2008 and are engaged in the business of manufacturing since June 2009. Lords Distillery Limited was incorporated on 19.9.1974 and is engaged in the business of manufacturing since inception. Similarly the Mohan Gold Water Breweries Ltd. was incorporated on 18.3.1969. It is stated that respondent No.3 was not a shell company but was engaged in wholesale supply of liquor under the valid licence. It is stated that the Wave and Lord's distilleries are neither holding nor subsidiary companies of respondent No.3 Once again he has drawn attention of this Court towards Fifth Amendment of Rules 2011 and submitted that Rule 6 has imposed a condition to be fulfilled by the applicant only, either it is an individual or Company or partnership firm. Rule 6(2) provides that the applicant must have turn over of Rs.400 crores during any one of the past three excise years inclusive of the current year. It does not speak about the turn over either Director or share holder of the Company. Rule 6(3) provides that the applicant should have experience of wholesale vend of liquor licensee, meaning thereby it is the applicant either individual or Company or partner-ship firm who should have experience of wholesale vendor of liquor as licencess. The second part of sub-rule (3) provides that an applicant shall not be producer of alcohol or manufacturer of liquor. It is stated that in case of Company being an applicant the qualification/disqualification provided under the Rules is not extended to its Directors or share holders. Consequently Rules 2011 would not warrant lifting of veil applying Rule 6(2)(3). However, by referring to sub-rule (7)(III) of Rule 6 he submitted that definitely the doctrine of lifting of veil is contemplated by Rule 6 (7)(III) for enabling looking at moral character and criminal background of Directors of Company. Even this particular Rule is not extended to the share holders. Rule 6(7)(iii) indicates towards the good moral character of family members also. We quote sub-rule (7)(III) of the Rule 6 as under:- "(III) that he and his family members/Directors of the Company possess good moral character and have no criminal back ground nor have been convicted of any offence punishable under United Provinces Excise Act, 1910 or Narcotics Drugs And Psychotropic Substances Act, 1985 or any other cognizable and non-bailable offence." Rule 2 (d) of Fifth Amendment Rules 2011 defines the word "family". "family" means and includes spouse (husband or wife), dependent son(s), unmarried daughter(s) and dependent parents." Thus in view of the aforesaid Rules the moral character and criminal background of brothers/sisters and independent sons and married daughters as well as independent parents cannot be seen. 44. In so far as the reference of cases given by the petitioner viz:CCE v. Detergents India Ltd. (2015) 7 SCC 198 and UIO v. Bombay Tyre International Ltd. (1984) 1 SCC 467 are concerned, these cases are in the context of the

Central Excise and Salt Act, which are not relevant to the present case. It is stated that the judgment of Amarjit Singh Sidhu (Supra) does not support the petitioner's case at all as the provisions of Act and Rules were different. However, clause 2.14(iii) of the Excise policy has some bearing. It requires that manufacturing company will give consent letter to that person/company "who is at arms length distance from the manufacturing company provided that there is no promoter, director, partner in the manufacturing company." This provision shows that where the State wants arms length distance it expressly provides for that, whereas the Excise Policy and Rules framed therefor by the State of U.P. have no such provision. In Telco's case (AIR 1965 SC 40) the Supreme Court has refused to lift the veil in the context of Article 32. In Juggilal's case (Supra) the Supreme Court had applied doctrine of veil since the shell company has been created for evasion of income tax, whereas in contrary in the case of Mangi Lal v. K.R. Pawar (Supra) and in the case of Vodafone (Supra) the Supreme Court refused to apply the doctrine of lifting of veil. In Mangilal's case the requirement was that a person should not have entered into a contract in the course of his trade or business with government. The returned candidate was a Chairman of Board of Directors of a Company which had a contract with Government. The court held that:- "It is not possible to describe the business of the Company to be the trade or business of the Chairman of the Board of Directors. A company registered under the Indian Companies Act, it is settled beyond dispute, is a separate entity distinct from its shareholders. The Chairman of the Board of Directors of the Company while functioning as such cannot be said to be engaged in his trade or business as contemplated by Section 9-A of the Act. The legal position is so clear that the appellant's learned Counsel, after an unsuccessful attempt to persuade as to the contrary view, felt constrained not to pursue this point seriously." Mr. Dwivedi, learned Senior Counsel has submitted that even otherwise the respondent No.3 has no common directors/share holders with Wave Distilleries Pvt. Ltd. and Lord's Distillery. Mohan Gold Water Breweries Ltd. is manufacturer of beer. Thus it is stated that it is simply a brewery and it possesses no distillery. In any event it does not possess any CL-1B licence. Whereas Rule 6(2) has to be understood in the context of grant of licence in favour of CL-1B licensee for wholesale supply of country liquor. He stated that the expression "producer of alcohol or manufacturer of liquor" as has been referred to in sub-rule (3) of Rule 6 has to be understood in the context of country liquor. He asserted that even the existence of common share holders by itself is of no significance as they have no interest in the property of Company. Their interest is individual one, which could not attract Rule 6(2). Lastly, in view of the statements of rejoinder affidavit for discerning the fraud to be committed by the answering respondent by lifting the veil, Mr. Dwivedi has submitted that there was no pleading with regard to the assertion of fraud and motive as the petitioner has referred to the fact of commission of fraud in the rejoinder affidavit in the context of doctrine of lifting of veil. It is stated that these assertions are completely irresponsible and they need foundation in the pleading. Whereas, the petitioner is under obligation to place the material particulars for

pleading fraud since general allegations are not enough. Thus he stated that the allegations of fraud are completely general in nature. In support of his submission he cited the following decisions:- (1) Bishundeo Narain and another v. Seogeni Rai and Jagernath reported in AIR 1951 SC 280. Relevant Paragraph 28 is reproduced hereunder:- "28. It is also to be observed that no proper particulars have been furnished. Now if there is one rule which is better established than any other, it is that in cases of fraud, undue influence and coercion, the parties pleading it must set forth full particulars and the case can only be decided on the particulars as laid. There can be no departure from them in evidence. General allegations are insufficient even to amount to an averment of fraud of which any court ought to take notice however strong the language in which they are couched may be, and the same applies to undue influence and coercion. See Order 6, Rule 4 of the Civil Procedure Code." (2) Bijendra Nath Srivastava (Dead) through LRs v. Mayank Srivastava and others (1994) 6 SCC 117. Relevant portion of paragraph 13 is reproduced hereunder:- "13.....This is in consonance with the rule that a charge of fraud must be substantially proved as laid and that when one kind of fraud is charged, another kind of fraud cannot, upon the failure of proof, be substituted for it. (See : Abdool Hoosein Zenail Abadin v. Charles Agnew Turner.) The same is true for the charge of misconduct. This means under Order 6, Rule 4 CPC particulars have to be furnished of the plea of fraud or misconduct raised in accordance with Order 6, Rule 2 CPC and it is not permissible to introduce by way of particulars a plea of fraud or misconduct other than that raised in the pleadings." Respondent Nos.1 and 2 i.e. State Government as well as Excise Commissioner have filed their counter affidavits through which they have supported the Excise policy as well as the Rules framed, pursuant thereto for implementation of the policies. The learned Additional Chief Standing Counsel Mr. H.P. Srivastava, has submitted that the petitioner had never come forward to challenge the policies or the Rules framed pursuant thereto by the State Government. It is stated that the respondents 3 to 6 were found eligible in terms of Rules, therefore, they were granted licence. Moreover the petitioner, since it does not manufacture the country liquor, does not come within the eligibility criteria of CL-1B licence. He submitted that the Hon'ble Supreme Court in the case of State of Punjab and another v. Devans Modern Breweries Ltd. And another (2004) (11) SCC 26 held that the Article 14 and 19 cannot be applied in the trade of liquor as the State has exclusive privilege to trade in liquor which is *res extra commercium*. The State can create monopoly in itself as well as for its agencies and nobody has fundamental right to trade in liquor. Mr. S.K. Kalia, learned Senior Counsel, Mr. Jaspreet Singh, learned counsel as well as Mr. Jaideep Narain Mathur, learned Senior Counsel appearing for the respondents 4, 5 and 6 respectively have supported the arguments of Mr.Dwivedi, recorded above. They have placed one judgment of Rajesh Gupta v. State of U.P. and others and connected matters Civil Misc. Writ Petition(Tax) No.815 of 2009, decided by the Division Bench of this court. In this case the Coordinate Bench of this Court has well discussed the every issue in which the Excise Policy 2009 was challenged. However this Court after

considering the various laws referred to on the point upheld the policy framed by the State Government. Conclusions:- 45. We have given thoughtful consideration of the submissions made by the learned counsels for the petitioner as well as respondents and on close scrutiny of the submissions of the respective parties we arrive at the following conclusions:- The petitioner had filed the present writ petition in the month of January 2017 i.e. at the verge of completion of excise year 2016-17. Clause 3.8(A)(7), which provides that the applicant shall not be producer of alcohol or manufacturer of liquor, was introduced under the Excise Policy framed for the year 2009-10. Moreover, CL-1B licence was also introduced through the same very policy. Rule 6 of Fourth Amendment Rules 2009, which was enforced by means of Notification dated 13 February 2009 has envisaged the provisions :- (1) the applicant shall have turn over of minimum Rs.400 crores in any of the three years including the current year as well as (2) the applicant should have experience of wholesale vend as licensee, but he shall not be producer of alcohol or manufacturer of liquor. The respondents 3 to 6 had applied for grant of licence in the excise year 2009-10 and since they were found eligible they were granted licence CL-1B and CL-1C. Moreover, the excise policy 2016-17 which contained the clause for renewal of licence for the next year 2017-18 was also introduced in 2016, but the petitioner did not choose to challenge the policy 2016-17 promptly. Therefore, the lapses on the part of the petitioner to challenge the conditions imposed through the policies as well as Rules are apparent. CL-1B licence is granted to manufacturer of country liquor. The petitioner holds PD-2 licence to manufacture absolute alcohol, rectified spirit, denatured spirit, Indian Made Foreign liquor and country liquor and to store denaturants. Whereas CL-1B licence granted to the respondents 3 to 6 pertains only to country liquor. Therefore, if there was any problem with him, due to CL-1B licence granted to the respondents 3 to 6, he should have manufactured Indian Made Foreign Liquor and industrial alcohol, but it is admitted fact that the petitioner's distillery did not produce any spirit after the excise year 2008-09. The petitioner has brought on record some letters dated 24.4.2012 written to the respondents 4 and 5 under the seal and signature of Narang Distillery Ltd., whereas this name ceased to exist on 27.6.2011. Further it is respondent No.3 who holds CL-1B licence for Meerut and Lucknow Zone, but no letter was written to respondent No.3 for supply of country liquor. The respondents 4 and 5 are allotted to the different Zone. The petitioner was under obligation to seek supply of liquor from the wholesale established in the same Zone, therefore, the petitioner cannot be said to be an aggrieved person against the grant of licence to the respondents 3 to 6. The provisions of Section 24, 24-A, 24-B and 26 of the United Provinces Excise Act 1910 permits the State to hold exclusive privilege either itself or through its agency and to charge the fee for parting its privilege to other. The Supreme Court in the case of Khoday Distilleries Ltd.(Supra) has discussed the law on the excise trade and held that the State can create a monopoly either in itself or in the agency created by it for the manufacture, possession, sale and distribution of the liquor as a beverage and also sell the licences to the citizens for the said purpose by charging fees. The Supreme Court

further held that the State can adopt any mode of selling the licences for trade or business with a view to maximise its revenue so long as the method adopted is not discriminatory. The liquor trade is *res extra commercium* and is not comparable with other business. After Fourth amendment of Rules 2009 the State Government notified Fifth Amendment Rules 2011 on 31 March 2011, which are still in force to govern the matter of grant of licence of wholesale country liquor. Rule 6(1) reads that an individual, a Partnership Firm or Company excluding consortium shall be eligible. The applicant must have turn over of Rs.400 crores and the applicant should have experience of wholesale vend of liquor as licensee, but he shall not be producer of alcohol or manufacturer of liquor. According to the petitioner the offending part of the Rules is sub-rule (2) and sub-rule (3) of the Rule 6 of Fifth Amendment Rules 2011. 46. The total guarantee quota fixed for the respondent No.3 for Meerut Zone and Lucknow Zone is 15,67,72,617.00 bulk liters. The yearly cost of purchase of minimum quota is approximately Rs.4002.40 crores. Therefore we are of the view that to do the business of such high financial stake, the solvency as well as potentiality of the licensee is necessary to be of a such status as a licensee may be financially so strengthful to do its business for the whole year. There may be one more reason to fix the applicant's capacity of Rs.400 crores turn over in a year as the licensee has to bear its liability after grant of licence to pay the costs of minimum guarantee quota either it continues with the business for the whole year or it discontinues even in the mid of the year. This requirement of financial status of the applicant has been fixed for the applicant, either he is either individual or partnership firm or Company, therefore, it cannot be said that the State has committed any discrimination with others. The more important point which has been raised by the learned counsel for the petitioner is to apply the doctrine of lifting the veil in the matter. He asserted that the Directors as well as share holders of the respondents 3 to 6 are inter connected in doing the liquor trade as well as with some other subsidiaries, which manufacture and produce alcohol, whereas Rule 6(3) provides that the applicant shall not be the producer of alcohol and manufacturer of liquor. Thus, it was contended that being Directors and Share holders of the subsidiary Companies of the respondents, which produce the alcohol and manufacture liquor, they suffer from disqualification for grant of licence. We have examined Rule 6 as a whole and found that Rule 6(1) provides that an individual, partnership firm or Company excluding consortium shall be eligible. The Supreme Court has held in the case of *Mangi Lal*(Supra) that a Company has its independent entity from its Directors and share holders, therefore, if the Company has been an applicant, the eligibility of Company itself shall be examined in view of the conditions laid down under the Rules. "Partnership Firms", "Individual", a "Company" and "Consortium" have been defined under Section 2 (j), (k), (l) and (m) of the Fifth Amendment Rules 2011. The consortium has been excluded from the eligibility criteria. A consortium has been defined as an association of two or more individuals, Companies, Partnership firms (or any combination of these entities) with the objective of participating in a common activity or pooling their resources

for achieving a common goal. Here it is not the case of the petitioner that here in the present case two or more individuals or Companies have joined to take licence of CL-1B. The petitioner has referred to Wave and Lord's Distilleries, which are neither holding nor subsidiary Companies nor even the share holder of respondent No.3. In so far as the assessment of turn over of the applicant is concerned, that shall be assessed only of the applicant either it is a Company or individual without clubbing the turn over of its directors and share holders. Therefore, in view of law laid down in the cases of Shree Sidhali Steels Limited (Supra), Life Insurance Corporation of India(Supra), Vodafone International Holdings BV (Supra) and Balwant Rai Saluja (Supra) as well as P.C.Agarwala (Supra) we are of the view that it is not a such case as it requires the application of doctrine of lifting of veil. In so far as the allegation of fraud is concerned, the learned counsel for the petitioner has stated that the CL-1B liquor licensee Companies have been incorporated with the sole objective to perpetuate fraud on other liquor manufacturing companies as well as on the State and public of the State and therefore, it is utmost necessary that the corporate veil should be lifted from the private respondent-Companies to unearth the fraud being committed by the private respondents in connivance with the official respondents. 47. We have considered the aforesaid submissions of learned counsel for the petitioner in view of the submissions made by the respective parties and found that the commonness of the Directors and shareholders of the different Companies does not establish the commission of any fraud since as an applicant the entity of the individual, a partnership firm or Company has to be examined in light of the conditions laid down under the Rules. Therefore, we are of the view that the commonness of the Directors as well as shareholders does not persuade us to form the opinion that it is a fraud committed by the applicant, since under the Companies Act anybody can be Director or share holder of different Companies simultaneously. In definite terms it can be said that it is a Company whose status shall be examined. 48. It is very significant to point out that the petitioner through the present writ petition has not chosen to challenge, even on the suggestion of the Court, either the policies or the Rules framed by the State Government i.e. Fourth Amendment Rules 2009 and Fifth Amendment Rules 2011, therefore, there was no occasion for us to examine the validity of the Rules. We have examined the respondents' eligibility as well as qualification to get the licence and as per discussions made above, we are of the view that the respondents do not incur any ineligibility or disqualification to get the licence. Therefore, in conclusion we hold that the petitioner's case fails. In the result the writ petition stands dismissed. There shall be no order as to costs.

Petition Dismissed.