
(1999) 07 KL CK 0023

In the High Court Of Kerala

Case No : W.A. No's. 1692, 1962 and 2263 etc. of 1998

State of Kerala and Others

APPELLANT

Vs

Sabu George and Others

RESPONDENT

Date of Decision : 30-07-1999

Acts Referred:

Foreign Liquor Rules — Rule 17A, 18, 22

Kerala Abkari Act, 1077 — Section 11, 12, 14, 14(1), 14(2)

Citation : (1999) 07 KL CK 0023

Hon'ble Judges : T.M. Hassan Pillai, J;K. Narayana Kurup, J

Bench : Division Bench

Advocate : V.V. Asokan, Government Pleader, for the Appellant; Pathrose Mathai, K.P. Satheesan, C.C. Thomas, George Poonthottam, M. Unnikrishnan Nair, M.V.S. Nampoothiri, P.C. Chacko, Rajan Joseph, R. Anil Kumar, A.K. Avira, S. Ananthakrishnan, Babu Varghese, A.N. Rajan, Babu and K. Jaju Babu and K. Sudhakaran, for Respondents 1 to 8, for the Respondent

Final Decision : Allowed

Judgement

K. Narayana Kurup, J.—The State of Kerala, the Board of Revenue and the officials of the Excise Department are the Appellants in these appeals who figured as Respondents in the Original Petitions. The appeals are directed against the judgment of the learned Single Judge dated 11th June 1997 in O.P. No. 5111 of 1996 and connected cases. The Respondents herein are licensees u/s 18 A of the Kerala Abkari Act (Act 1/1077) (for short "the Act"). They challenged the levy and collection of differential duty of excise payable by them. The proviso to Section 18(3) of the Act authorises the department to levy differential duty of excise from licensees in respect of all stocks of Indian made foreign liquor held by them at the close of the former period. It was the case of the Respondents/ Petitioners before the learned Single Judge that mode of levy of excise duty as provided in Clauses (a) to (g) in Section 17 of the Act are mutually exclusive, that the department having opted the mode as provided in Section 17(f) of the Act, they cannot levy the differential excise duty by any other mode. According

to them, the above proviso is not applicable in the instant case and even if it is applicable the proviso is ultra vires the Constitution and charging section [Section 17(f) of the Act] and is liable to be set aside. The State justified the levy relying on the proviso which enable the department to levy and collect the differential duty of excise as between two licence periods from the licensee who hold the stock during the last day of the previous period. A learned Single Judge of this Court while sustaining the proviso to Section 18(3) of the Act, however, held that the department cannot levy and collect differential duty from the licensees and in that view allowed the Original Petitions and hence these appeals.

2. We heard counsel on both sides. Before proceeding to discuss the legal issues arising in these appeals we think it desirable to have a survey of the various statutory provisions governing the field. Section 17 of the Act is the charging section which is as follows:

17. Duty on liquor or intoxicating drugs.- A duty of excise or luxury tax or both shall, if the Government so direct, be levied on all liquor and intoxicating drugs-

- (a) permitted to be imported u/s 6; or
- (b) permitted to be exported u/s 7; or
- (c) permitted u/s 11 to be transported; or
- (d) manufactured under any licence granted u/s 12; or
- (e) manufactured at any distillery, brewery, winery or other manufactory established u/s 14; or
- (f) issued [from a distillery, brewery, winery or other manufactory or warehouse licensed or established u/s 12 or Section 14; or
- (g) sold in any part of the State:

Provided that no duty or gallonage fee or vend fee or other taxes shall be levied under this Act on rectified spirit including absolute alcohol which is not intended to be used for the manufacture of potable liquor meant for human consumption.

Explanation.-For the purpose of this Section and Section 18, the expression "duty of excise", with reference to liquor or intoxicating drugs, include countervailing duty on such goods manufactured or produced elsewhere in India and brought into the State.

Section 18 of the Act prescribes the rate of excise duty payable by the licensees. The duty was increased from Rs. 20 per proof litre to Rs. 200 per proof litre as per an amendment introduced by Ordinance No. 2/96 and later replaced by Act 4/96 which was preceded by a policy published by the Government evidenced by Ext. P-1 dated 14th February 1996. The revised rate had come into force with effect from 1st April 1996. Section 18 so far as it is relevant to the context is extracted below:

18. How duty may be imposed.- One such duty of excise may be levied:

(a) In the case of spirits or beer, either on the quantity produced in or passed out of a distillery, brewery or warehouse licensed or established u/s 12 or Section 14 as the case may be or in accordance with such scale of equivalents, calculated on the quantity of materials used or by the degree of attenuation of the wash or wort or on the value of the liquor as the case may be, as the Government may prescribe;

(b) in the case of intoxicating drugs on the quantity produced or manufactured or issued from a warehouse licensed or established u/s 14;

(c) * * * * (d) * * * * (e) in the case of toddy, or spirits manufactured from toddy in the form of a tax on each tree from which toddy is drawn, to be paid in such instalments and for such period as the Government may direct; or

(f) by import, export or transport duties assessed in such manner as the Government may direct;

(2) The luxury tax on liquor or intoxicating drugs shall be levied:

(i) in the case of any liquor in the form of a fee for licence for the sale of the liquor and in the form of a gallonage fee or vending fee, or in any one of such forms; and;

(ii) in the case of an intoxicating drug, in the form of a fee for licence for the sale of the intoxicating drug.

(3) The duty of excise under Sub-section (1) and the luxury tax under Sub-section (2) shall be levied at such rates as may be fixed by the Government, from time to time, by notification in the Gazette, not exceeding the rates specified below:

(1) Duty of excise Maximum rates

(i) Duty of excise on Rs. 200 per proof litre or an liquors (Indian made) amount equal to 200 per cent of the value of the liquor

(ii) Duty of excise on Rs. 1 per gram or Rs. 933.10 intoxicating drugs per seer

(iii) Duty of excise in the Rs. 50 per tree per half-year form of tax on trees or part thereof tapped for toddy * * * *

Proviso to Section 18(3) however, carves out an exceptional circumstance enabling the authorities to collect the differential duty of excise from the licensees who hold stocks of liquor on the close of the former period, in the event of revision of rates of excise duty. The proviso to Section 18(3) is as under:

Provided that where there is a difference of duty of excise or luxury tax it between two licence periods, such difference may be collected in respect of all stocks of Indian made foreign liquor or intoxicating drugs held by licensees at the

dose of the former period.

3. As already noted, as per the Abkari (Amendment) Ordinance, 1996 (2 of 1996) the maximum rate of duty of excise on Indian made foreign liquor was enhanced from Rs. 20 per proof litre to Rs. 200 per proof litre or an amount equal to 200 per cent of value of liquor. The Ordinance was replaced by an Amendment Act, viz. the Abkari (Amendment) Act, 1996 with, retrospective effect from 16th February 1996. In the proviso to Section 18(3) of the Act for the words "country liquor" the words "Indian made foreign liquor" was substituted so as to enable the Government to collect the difference of excise duty as between two licence periods in respect of all stocks of Indian made foreign liquor held by the licensees at the close of the former period. In accordance with the statutory provision a notification was also issued as G.O.(P) No. 76/96/T.D. (S.R.O. 330/96) dated 30th March 1996 prescribing the fate of excise duty with effect from 1st April 1996. As per the said notification the excise duty on Indian made foreign liquor was fixed as an amount equal to 200 per cent of its value. The Government have also amended the Foreign Liquor Rules (for short "Rules") with effect from 1st April 1996 and as per the said amendment, Rule 17-A was introduced which says that when there is a difference of duty of excise or luxury tax as between two licence periods such differences shall be collected in such manner as may be directed by the Excise Commissioner in respect of all stocks of Indian made foreign liquor held by the licensees at the close of the former period of licence. The rule further stipulates that under no circumstances the licensee shall be allowed to sell the liquor without payment of difference of tax under the rules. The proviso to Rule 18 stipulates that before the issue of any licence under the rules, the difference in tax under Rule 17A, if any, due shall also be collected. In this connection it is pertinent to note that in condition No. 18 of licence in Form F.L. 1 and 1 in condition No. 24 of licence in Form F.L. 3 also it is stipulated that where there is a difference of duty of excise as between two licence periods, such differences shall be remitted in respect of all stocks of Indian made foreign liquor held by the licensees at the close of former period. As per the amended rules the licensees can get the licence renewed only after the remittance of differences of excise duty on all stocks of Indian made foreign liquor held by them at the close of the licence period. In all these cases the Respondents/ Petitioners have got their licences renewed before 1st April 1996 without remitting the difference of excise duty as stipulated in the Act and Rules and the conditions of licence which stipulates in categorical terms that the licensees shall be bound by all the rules which have been made under the Abkari Act as amended from time to time.

4. The question now to be considered is that whether the Government is legally competent to collect the difference of excise duty on all stocks of Indian made foreign liquor held by the licensees at the close of their former licence period whenever a difference of excise duty as between two licence periods may occur as contemplated by the proviso to Section 18(3) of the Act and other enabling provisions. The Appellant/State sought to justify the demand by resort to the

proviso to Section 18(3) of the Act which authorises the department to levy differential duty of excise from the licensees who hold excess stock during the close of the previous year. Per contra it was submitted by the Respondents that the proviso to Sub-section (3) of Section 18 of the Act has no relevance or application to them who do not come within the purview of the charging Section 17 and no excise duty is levied or charged on them. According to them, since they have already paid the excise duty component of the sale price to the Beverages Corporation on whom the levy is originally charged u/s 17(f) of the Act, there cannot be a further collection of excise duty from them by enhancing the rate and that such differential duty is to be collected from the person who is liable to pay the duty originally, viz. the Beverages Corporation. They would submit that unless and until there was a liability to pay excise duty originally there is no question of payment of any difference in duty under the proviso. Therefore, it is submitted that the proviso is totally inapplicable to the Respondents who are not liable to pay any duty and who have not paid any duty at all. In other words, they would contend that since the goods in question have already suffered excise duty at the time of removal of the goods from the warehouse of the Beverages Corporation there cannot be a subsequent levy of excise duty on them and consequently no collection is permissible against them by resorting to proviso to Section 18(3) of the Act which would amount to a fresh impost.

5. Having considered the rival contention we are of opinion that the levy of differential duty under proviso to Section 18(3) is not a case of fresh impost of excise duty on the licensees. The impost of excise duty is only on the manufacturer and the proviso only enables the department to collect such increased differential excise duty as between two licence periods in respect of all stocks of Indian made foreign liquor held by the licensees at the close of the former period. Merely because the collection is attempted to be made from the licensees who admittedly hold the stocks of Indian made foreign liquor it cannot be said that the collection is not sanctioned by law. Excise duty is primarily a duty on the manufacture or production of goods manufactured or produced within the country. Subject always to the legislative competence of the State the said duty including the difference thereon between two licence periods can be levied at a convenient stage so long as the nature and character of the impost is not lost. The method of collection nor its timing necessitated by exigencies of fiscal policy warranting enhancement of duty does not affect the essence of the duty as such but only relates to the timing of collection for administrative convenience. Further, there is no rule of thumb to say that the levy of excise duty can be imposed only at the stage of manufacture or production and in fact it has been held by a catena of decisions of the Hon'ble Supreme Court that the levy of excise duty need not be imposed at the stage of manufacture or production but may be deferred to a later date and that is what is exactly done in the instant case. The apex Court has gone to the extent of holding that excise duty can be collected from persons who are neither producers nor

manufacturers. In Mohan Breweries and Distilleries Ltd., etc. Vs. Commercial Tax Officer, Madras and others, it was observed as follows:

As we look at it, the primary obligation to pay excise duty on the IMFL is of the manufacture thereof. Rule 22 only provides for a convenient method for its collection. When the excise duty is collected from a party removing the IMFL from the factory of its production, other than the manufacturer, the payment of excise duty that party makes is in discharge of the obligation of the manufacturer.

Therefore, the Respondents cannot wriggle out of the statutory obligation by pleading that proviso to Section 18(3) has no relevance or application to them on the ground that they do not come within the purview of the charging Section 17 and no excise duty is levied or charged on them. Though the incidence of excise duty falls directly on the production or manufacture of goods its method of collection will not affect the essence of the duty [vide Jullunder Rubber Goods Manufacturers' Association Vs. The Union of India (UOI) and Another, . In A.B. Abdul Kadir and Others Vs. State of Kerala, the Supreme Court ruled as follows:

Excise duty, it is now well settled, is a tax on articles produced or manufactured in the taxing country. Generally speaking, the tax is on the manufacturer or the producer, yet laws are to be found which impose a duty of excise at stages subsequent to the manufacture or production.

Thus the incidence of excise duty is directly relatable to manufacture but its collection can be deferred to a later stage even from persons who may be neither manufacturers nor producers nor persons on whom original levy has been made in the exigencies of administration provided it is supported by law. No provision of law or authority of acceptance has been cited before us by the Respondents in support of the proposition that excise duty is a liability exclusively liable to be fastened on the manufacturer and its collection cannot be deferred to a later date. In the aforesaid view we have no hesitation in holding that the State was well within its power to demand difference of duty of excise as between two licence periods in respect of all stocks of Indian made foreign liquor held by the licensees at the close of the former period as provided under the proviso to Sub-section (3) of Section 18 of the Act.

6. As far as taxing statutes are concerned the broad rule is that where two interpretations are reasonably possible the interpretation which would lean in favour of the subject has to be adopted. On the other hand, if the plain and natural meaning of the words used is against the Assessee and the application of the literal rule does not lead to any manifest absurdity and if there is no ambiguity the statute may have to be interpreted against the Assessee. On a plain reading of the statutory provisions, viz. proviso to Section 18(3) of the Act we are of the opinion that the intention of the legislature is to fasten liability on all licensees for payment of difference of duty of excise as between two licence periods in respect of all stocks of Indian made foreign liquor held at the close of the former period. The Respondents effected purchase of huge stocks of Indian

made foreign liquor after the announcement by the Government of its policy of revising the rate of excise duty from Rs. 20 per proof litre to Rs. 200 per proof litre as per Ext. P-1 dated 14th February 1996. The purchase in question was made by the Respondents with full knowledge of the statutory provision, viz. proviso to Section 18(3) of the Act under which they are liable to pay the difference of duty of excise as between two licence periods in respect of all stocks of Indian made foreign liquor at the close of the former period. Having done so, in our opinion they cannot be permitted to turn round and wriggle out of the statutory obligation by pleading that in the absence of a levy u/s 17(g) of the Act they are not liable to be proceeded against under the proviso to Section 18(3). This plea if accepted would result in absurd consequences in the sense the entire stock of Indian made foreign liquor held by them will have to be exempted from payment of differential excise duty with the result there will be two price pattern for the Indian made foreign liquor thereby defeating the governmental policy of having a uniform price for Indian made foreign liquor and also resulting in huge loss of revenue to the State. In our opinion the Respondents should not have purchased unlimited quantities of Indian made foreign liquor from the Beverages Corporation after 15th February 1996 when the policy was made known. Had they limited the purchase to their actual requirement for the remaining period of licence there would not have been substantial stock of Indian made foreign liquor at the close of the licence period. On the contrary, they went into a spree of purchase of large quantity of Indian made foreign liquor from the Beverages Corporation with the oblique motive of evasion of payment of enhanced rate of excise duty and sales tax thereon. In our opinion they have purchased the Indian made foreign liquor with full knowledge of the fact and with eyes wide open that they will be legally bound to pay the difference of duty of excise on all stocks of Indian made foreign liquor held by them at the close of the licence period in view of the proviso to Section 18(3) of the Act. Any other interpretation will render proviso to Section 18(3) of the Act otiose, redundant and superfluous which would have been the last thing intended by the legislature. There is yet another important factor which we cannot lightly brush aside in this connection, viz. had the Respondents/licensees not effected the bulk purchase of Indian made foreign liquor from the Beverages Corporation the said stock would have remained with the Beverages Corporation in which case the State would have gained crores of rupees by way of excise duty. Therefore, we are inclined to take the view that the payment of differential duty of excise by the Respondents under proviso to Section 18(3) would amount to meeting the obligation of the Beverages Corporation with whom the stock would have remained but for the purchase effected by the Respondents. The object sought to be achieved by the proviso to Section 18(3) of the Act is to meet the contingencies as in the present case where revision of duty of excise has been effected and to prevent the abuse of evasion of excise duty by resorting to dubious methods. Therefore, going by the plain statutory language used in proviso to Section 18(3) it has to be held that the Respondents are liable to pay the difference of duty of excise in respect of all stocks of Indian made foreign

liquor held by them at the close of the former period.

7. That apart, here is a case where the goods have already passed from the warehouse of the Beverages Corporation to the hands of the licensees in which case the department will perforce have to resort to the proviso to recover the difference of duty of excise. The amount demanded under the proviso cannot at all be characterised as a fresh impost of excise duty. On the other hand, it is only a collection of difference of duty of excise consequent on the revision of rates effected by the Government. Even assuming the levy to be a fresh impost of excise duty such a levy will be perfectly justified provided it is supported by authority of law. In other words, once a demand of difference of excise duty is made pursuant to a valid law such a demand is not liable to be attacked on the ground that the Government have levied excise duty more than once and at more than one point during the progress of the excisable goods from the time they leave the bonded warehouse till the time they reach the consumer. [See in this connection the observations made by Wanchoo, J. in *The State of Bombay Vs. S.S. Miranda Limited*, at 902 Para 12].

8. Besides, we take note of the position that excise duty on liquor is in the nature of an indirect tax which will ultimately be paid by the consumer and not by the licensee. The excise duty will be actually collected by the licensee(s) when the liquor is sold to the consumer and not at the time they purchase the Indian made foreign liquor from the Beverages Corporation. It is true that the purchase price of Indian made foreign liquor will include excise duty, sales tax, cost of liquor and the profit margin of Beverages Corporation. The foreign liquor licensees are selling the Indian made foreign liquor to consumers on a higher rate than the purchase price which includes their profit margin also. If the licensees sell the liquor at the enhanced rate, due to the enhancement of excise duty, they need not pay anything from their pockets as the selling price of Indian made foreign liquor includes the enhanced rate of excise duty as well and they will not incur any loss also. Hence, it will not affect them adversely in any way. On the other hand, if the difference of excise duty on the stocks of Indian made foreign liquor held by them at the close of licence period is not paid by them, it will adversely affect the financial interest of the Government. In the wake of new Abkari policy for 1996-97, most of the licensees including the Petitioners the Original Petitions piled up their stock of Indian made foreign liquor in order to defraud the Government, as well as the customers. It is also pertinent to note that all the licensees including the Petitioners have sold their old stock of Indian made foreign liquor at the enhanced rate. It means that they are neither remitting the excise duty due to Government nor giving any concession to the customers. At the expenses of Government as well as the customers, the Petitioners have made exorbitant profit and undue advantage.

9. In the light of the foregoing discussion we are of the opinion that the view taken by the learned Single Judge cannot be legally sustained for more than one reason. According to learned Single Judge the State having imposed the levy u/s

17(f) of the Act they are precluded from demanding differential duty of excise under proviso to Section 18(3). The aforesaid view of the learned Single Judge is not correct for the following reasons: (i) The demand and collection of differential duty of excise is sustainable against the licensees/Respondents by virtue of the proviso to Section 18(3) of the Act read with Rule 17-A of the Foreign Liquor Rules which is categorical and unambiguous in which case it will have to be given effect to in full measure. The learned Single Judge also fell into error in assuming that what is sought to be collected from the Respondents/licensees is a fresh impost of excise duty whereas it is really not so. What is attempted is only collection of differential excise duty from the Respondents/licensees who are holding stocks of liquor at the close of the former period in consequence of revision of excise duty as between two licence periods. (ii) The learned Single Judge also fell into error while reading Sections 17 and 18 disjointly and in isolation which in our view is to be read conjointly. Section 17 declares the duty leviable, whereas, the method of imposition is prescribed in Section 18. So Sections 17 and 18 together constitute the law for the levy of duty in which case obviously the proviso to Section 18(3) will apply to the present case.

10. The reliance placed by the learned Single Judge on the two decisions, viz. *Premier Breweries Ltd. v. State of Kerala* and *Ors.* 1980 KLT 547 and *The State of Bombay Vs. S.S. Miranda Limited*, are also misplaced as the ratio decided in those cases has no application to the facts of the present case. In *Premier Breweries* case 1980 KLT 547 there was no question of collection of any differential duty nor the Court had any occasion to consider the impact of the proviso to Section 18(3) of the Act. That is a case where the original excise duty was not paid by the person who ought to have paid the excise duty and attempt was made to realise the duty from the Petitioner therein. In that context only the Court held that it is not permissible. The levy of excise duty was u/s 17(f) of the Act and therefore no other mode could be adopted to collect the excise duty whereas the position here is entirely different. Likewise, the ratio decided in *Miranda The State of Bombay Vs. S.S. Miranda Limited*, also cannot have any application to the facts of the present case. There also, the Supreme Court has not considered the statutory provision similar to the present one. In fact certain observations made by the Court therein will go against the Respondents as already noted.

11. Learned senior counsel Mr. K. Sudhakaran appearing for some of the Respondents placed strong reliance on the decisions reported in *Chandrasekhara Prabhu v. State of Kerala* ILR 1976 Ker 637 in support of his contention that the proviso cannot be pressed into service to recover the difference of duty of excise. Having bestowed our anxious consideration we are unable to find anything therein to support the case of the Respondents. That is a case where after the completed sale, price of kerosene was increased and an attempt was made to collect the differential cost from the vendees. In that context only this Court held that the differential costs cannot be collected from the vendee after the concluded sale. The factual situation in this case has no comparison to the

aforesaid case. Reliance was also sought to be placed on the decision of the Hon'ble Supreme Court reported in Collector of Central Excise, Hyderabad etc. etc. Vs. M/s. Vazir Sultan Tobacco Company Limited, Hyderabad Etc. Etc., and M/s. Ponds India Ltd. Vs. Collector of Central Excise, Madras, in support of the proposition that excise duty being a tax on manufacture it cannot be charged if the increase is after the date of manufacture. These decisions had been distinguished on facts even by the learned Single Judge himself by agreeing with the learned Advocate General that the above decisions are not laying down such a proposition. That apart, in the face of the express language of the proviso to Section 18(3) which fastens liability on licensees who are holders of stocks of Indian made foreign liquor there can be no escape from the conclusion that they will be liable for the payment of the difference of duty of excise.

12. Before we conclude, we feel it necessary to refer to the observations made by the Supreme Court in R.K. Garg and Others Vs. Union of India (UOI) and Others, which in our opinion is relevant to the present context:

Another rule of equal importance is that laws relating to economic activities should be viewed with greater latitude than laws touching civil rights such as freedom of speech, religion, etc. It has been said by no less a person than Holmes, J. that the legislature should be allowed some play in the joints, because it has to deal with complex problems which do not admit of solution through any doctrinaire or strait-jacket formula and this is particularly true in case of legislation dealing with economic matters, where, having regard to the nature of the problems required to be dealt with, greater play in the joints has to be allowed to the legislature. The Court should feel more inclined to give judicial deference to legislative judgment in the field of economic regulation than in other areas where fundamental human rights are involved. Nowhere has this admonition been more felicitously expressed than in *Morey v. Doud* 354 U.S. 457 : (1957) 1 L. Ed. 2 d 1485 where Frankfurter, J. said in his inimitable style:

In the utilities, tax and economic regulation cases, there are good reasons for judicial self-restraint if not judicial deference to legislative judgment. The legislature after all has the affirmative responsibility. The Courts have only the power to destroy, not to reconstruct. When these are added to the complexity of economic regulation, the uncertainty, the liability to error, the bewildering conflict of the experts, and the number of times the judges have been overruled by events-self-limitation can be seen to be the path to judicial wisdom and institutional prestige and stability.

The Court must always remember that "legislation is directed to practical problems, that the economic mechanism is highly sensitive and complex, that many problems are singular and contingent, that laws are not abstract propositions and do not relate to abstract units and are not to be measured by abstract symmetry"; "that exact wisdom and nice adaption of remedy are not always possible" and that judgment is largely a prophecy based on meagre and uninterpreted experience". Every legislation particularly in economic matters is

essentially empiric and it is based on experimentation or what one may call trial and error method and therefore it cannot provide for all possible situations or anticipate all possible abuses. There may be crudities and inequities in complicated experimental economic legislation but on that account alone it cannot be struck down as invalid. The Courts cannot, as pointed out by the United States Supreme Court in *Secretary of Agriculture v. Central Reig Refining Co.* 94 L.Ed. 381 : 338 U.S. 604 (1950), be converted into tribunals for relief from such crudities and inequities. There may even be possibilities of abuse, but that too cannot of itself be a ground for invalidating the legislation, because it is not possible for any legislature to anticipate as if by some divine prescience, distortions and abuses of its legislation which may be made by those subject to its provisions and to provide against such distortions and abuses. Indeed, howsoever great may be the care bestowed on its framing, it is difficult to conceive of a legislation which is not capable of being abused by perverted human ingenuity. The Court must therefore adjudge the constitutionality of such legislation by the generality of its provisions and not by its crudities or inequities or by possibilities of abuse of any of its provisions. If any crudities, inequities or possibilities of abuse come to light, the legislature can always step in and enact suitable amendatory legislation. That is the essence of pragmatic approach which must guide and inspire the legislature in dealing with complex economic issues.

Again, the Constitution Bench of the apex Court in *McDowell and Co. Ltd. Vs. Commercial Tax Officer*, ruled as follows:

We think that time has come for us to depart from the West-minister principle as emphatically as the British Courts have done and to dissociate ourselves from the observations of Shah, J. and similar observations made elsewhere. The evil consequences of tax avoidance are manifold. First there is substantial loss of much needed public revenue, particularly in a welfare State like ours. Next there is the serious disturbance caused to the economy of the country by the piling up of mountains of black money, directly causing inflation. Then there is "the large hidden loss" to the community (as pointed out by Master Sheatcroft in 18 *Modern Law Review* 209) by some of the best brains In the country being involved in the perpetual war waged between the tax-avoider and his expert team of advisers, lawyers and accountants on one side and the tax-gatherer and his perhaps not so skillful advisers on the other side. Then again there is the sense of injustice and inequality which tax avoidance arouses in the breasts of those who are unwilling or unable to profit by it. Last but not the least is the ethics (to be precise, the lack of it) of transferring the burden of tax liability to the shoulders of the guileless good citizens from those of the, "artful dodgers". It may, indeed, be difficult for lesser mortals to attain the state of mind of Mr. Justice Holmes, who said, "Taxes are what we pay for civilized society. I like to pay taxes. With them I buy civilization." But, surely, it is high time for the judiciary in India too to part its ways from the principle of Westminister and the alluring logic of tax avoidance, we now live in a welfare State whose financial needs, if backed by the law, have to be respected and met. We must recognise

that there is behind taxation laws as much moral sanction as behind any other welfare legislation and it is a pretence to say that avoidance of taxation is not unethical and that it stands on no less moral plane than honest payment of taxation. In our view, the proper way to construe a taxing statute, while considering a device to avoid tax, is not to ask whether the provisions should be construed literally or liberally, nor whether the transaction is not unreal and not prohibited by the statute, but whether the transaction is a device to avoid tax, and whether the transaction is such that the judicial process may accord its approval to it. A hint of this approach is to be found in the judgment of Desai, J. in *Wood Polymer Ltd. and Bengal Hotels Limited* (1977) 47 Com Cas 597 (Guj.) where the learned Judge refused to accord sanction to the amalgamation of companies as it would lead to avoidance of tax.

13. In the result, the judgment under appeal is hereby set aside and as a sequel the appeals will stand allowed. No order as to costs.