
(2011) 09 SC CK 0089

In the Supreme Court Of India

Case No : Civil Appeal No's. 4708, 4709, 4710, 4711, 4712 and 4713 of 2002

State of U.P. and Others

APPELLANT

Vs

Mohan Meakin Breweries Ltd. and Another

RESPONDENT

Date of Decision : 23-09-2011

Acts Referred:

Income Tax Act, 1961 — Section 206C, 44AC

Punjab Excise Act, 1914 — Section 32

Uttar Pradesh Bottling of Foreign Liquor Rules, 1969 — Rule 6, 7, 7(10), 7(11)

Uttar Pradesh Brewery Rules, 1961 — Rule 31,

Citation : AIR 2012 SC 2674 : (2012) AIRSCW 2578 : (2012) 1 AWC 891 :
(2011) 187 ECR 378 : (2011) 11 SCALE 44 : (2011) 13 SCC 588 : (2011) 6 UJ
3865

Hon'ble Judges : R.V. Raveendran, J;P. Sathasivam, J

Bench : Division Bench

Advocate : Dinesh Dwivedi, H.V. Salve, Salman Khurshid, Rakesh Kumar Khanna, Ravi Prakash Mehrotra, Garvesh Kabra, Rashmi Khanna, Surya Kant, Suruchi Aggarwal, Riteesh Singh, Jhanvi Waraha, Pranav Vyas and Faizy Ahmad Syed, for the Appellant;

Final Decision : Allowed

Judgement

R.V. Raveendran, J.—Civil Appeal Nos. 4708-4709 of 2002 are filed by the State of Uttar Pradesh aggrieved by the common order dated 15.3.2002 of the Allahabad High Court allowing CMWP No. 3968 of 1978 and CMWP No. 4043 of 1978 filed by two Breweries. Civil Appeal Nos. 4710, 4711, 4712 and 4713 of 2002 are filed by the Breweries aggrieved by the said common order dated 15.3.2002, dismissing their writ petitions - CMWP Nos. 1375 of 1978, 3690 of 1979, 4136/1978 and 4157/1978. The appeals by the state relate to imposition of duty and additional duty on excess wastage in the brewery. The appeals by the Breweries relate to imposition of duty and additional duty on excess bottling wastage.

Civil Appeal No. 4708 of 2002

2. The first Respondent (for short the 'Brewery') held a Brewery Licence issued u/s 18(c) of the Uttar Pradesh Excise Act, 1910 ('Act' for short) in Form-B1 and a Bottling Licence for bottling liquor for sale issued u/s 17(1)(d) of the Act in Form FL-3. The Brewery was carrying on the manufacturing of beer and bottling of beer in bond, under the said Licences.

3. The Excise Inspector in-charge of the Brewery maintains a Register of manufacture and issue of beer in Form B-16. The Excise Inspector is required to examine the accounts of the brewery and take stock of the beer in hand in the brewery, on the last working day of every calendar month (prior to 19.7.1975, such examination was required to be done at the end of each quarter) after all the issues for that day are made. If he found that the actual quantity of beer in stock in the brewery was less than the quantity shown in the stock account, but the deficiency did not exceed 9%, he had to disregard the same as allowance up to 9% was permitted to cover the losses due to evaporation, sullage and other contingencies. But where the deficiency exceeded 9%, he was required to enquire into the cause and submit a report of the result to the Excise Commissioner in that behalf. The Excise Inspector in-charge, was accordingly sending reports to the Excise Commissioner whenever there was excess wastage in the case of the first Respondent brewery. The Excise Commissioner issued show-cause notice giving opportunity to the Brewery to explain the excess wastage. After considering the explanation, the Excise Commissioner found that there was no satisfactory explanation and made ten orders between 26/28.6.1966 and 24.11.1973 in regard to excess 'manufacturing wastage' during the period September, 1963 to March, 1973, and levied and demanded in all `81,94,310/- as excise duty and an equal amount as additional duty in regard to the deficiency in excess of 9% of the total stock of beer (10% prior to 19.7.1975). The said orders were challenged by the first Respondent by filing a revision before the state government. The state government by order dated 12.4.1978 dismissed the revision petition and upheld the demands by the Excise Commissioner.

4. The first Respondent challenged the orders of the Excise Commissioner and the state government in Civil Misc. Writ Petition No. 3968 of 1978. A Division Bench of the High Court allowed the said writ petition with other connected petitions by a common order dated 15.3.2002. It quashed the revision order dated 12.4.1978 and directed the state government to decide the revision afresh "after calculating the stock of beer for the purpose of original Rule 53 of UP Brewery Rules 1961 (Para 912 of UP Excise Manual as it then existed) and Section 28-A of the UP Excise Act, when after filtration the same has assumed the shape as a finished product which is normally consumed by human beings as beverage or drink". In short the High Court has held that the point at which the liquor manufactured by the brewery was exigible to duty was at the stage, when the beer is capable of being consumed by human beings as a beverage, comes into existence and the deficiency should be worked out with reference to measurement at such stage. The High Court rejected the contention of the

Appellants that as soon as wort along with yeast is received in the fermenting vessels and ferments, the process of manufacture is complete. Feeling aggrieved by the decision of the High Court, the Appellant has filed this appeal.

Contention of Parties

5. The State contends that the liquor becomes exigible to duty when the wort (processed extract of malt) along with yeast is received in the fermenting vessels and ferments. It is contended that as the wort is placed in the fermentation tanks and the yeast is added to it, fermentation starts immediately with the conversion of sugar into alcohol. After the addition of yeast when alcohol is first formed, the liquid in the fermentation tank becomes alcoholic liquor for human consumption. It is pointed out that Entry 51 of List II of Seventh Schedule uses the words "alcoholic liquor for human consumption" and not "alcoholic liquor fit for human consumption" and therefore, beer is 'manufactured' when the fermenting agents are added to the wort and fermentation process commences. The State contended that excise duty is leviable on the manufacture and production of goods; and that the stage at which it should be imposed, the manner of collection thereof and the rate at which it is to be imposed, are matters within the discretion of the State. It is lastly submitted that the power to impose a tax or duty implicitly carries with it the power to provide against evasion thereof. It is submitted that what is in issue is not levy of excise duty, but the validity of measures introduced to identify the unauthorised or illegal diversion of beer resulting in evasion of excise duty.

6. The case of the state government as put forth in the counter affidavit to the writ petition is extracted thus: Wort is passed into the fermentation vat and fermenting yeast is added to the wort by a simultaneous process. As soon as the wort along with yeast is received in the fermenting vessels or fermenting vat, it ferments and process of manufacture of beer is complete. It is gauged to find out its quantity and this quantity is entered in the register in Form B-4. In the said register in Form-B4 the dip and gravity of the wort is taken. As fermentation starts simultaneously the quantity determined by dip and gravity is taken to be beer produced. On the register in Form B-4 the Brewers put in their initials. It is denied that process of manufacture of beer ends when sullage and yeast calls are removed by filtration. In fact quantity of yeast and sullage filtered out may vary from one filtration to another in different process. Even after filter beer contains both some yeast and sullage and Petitioner cannot say that he is only entitled to pay excise duty on such quantity after excluding all such yeast and sullage. The filtration is only a process to make it more marketable in this competitive business but could not be part of manufacture. The event of excisable article going into human consumption has no connection with the taxable event in the case of excise duty and excise duty is imposed at the stage of manufacture of goods and not at the stage of excisable article going into human consumption.

7. The Brewery contended that the stage for levy and realisation of excise duty on beer was the stage of issue of beer from the brewery/bottling bonded

warehouse after complying with the statutory provisions and Regulations prescribed for bottling and issue for sale. It was submitted that no excise duty could be imposed prior to the stage of occurrence of the excisable event, namely the issue of beer from the brewery/bottling bonded warehouse for sale and human consumption. Alternatively, it was submitted that beer manufactured was exigible to duty at the time or stage when the finished product (beer) is received in the storage/bottling tanks, after filtration and not at any earlier stage of manufacturing process. It is submitted that the system of collection of excise duty on beer, does not permit levy or realisation of any amount by way of excise duty or fine on the quantity of beer which is wasted in the manufacturing process before it become exigible to excise duty. It is contended that the legislative competence to levy excise duty under Entry 51(a) of List II of Seventh Schedule to Constitution of India is with reference to 'alcoholic liquors for human consumption'. As the wort solution cannot be described as alcoholic liquor for human consumption at the stage of fermentation and filtration, the state government cannot levy any excise duty or additional duty equal to excise duty, in regard to wastage which occurs with reference a material which is not 'alcoholic liquor for human consumption'. It is contended that the levy of excise duty/additional duty by the Excise Commissioner was on the deficiency, that is, the difference between the quantities of wort and finished product (beer), which comprises of the scum, yeast cells brought on top of fermenting wort, carbon-dioxide evolved, sillage etc., settled at the bottom of vats which impurities are to be eliminated before beer could be said to be manufactured or could be described as an alcoholic liquor for human consumption. It is contended that the Excise authorities had calculated the deficiency in the stock of beer in a wrong manner; and that while taking stock of beer in the brewery, for the purpose of calculating the allowance the authorities have taken the product at an intermediate stage in the process of manufacture instead of taking stock of the finished product.

8. The relevant contentions of the Brewery in the writ petition are extracted below:

(i) The process of manufacturing beer ends when the sillage and yeast cells are removed by filtration and fermentation ceases and the manufactured bulk beer is ready to be transferred: (a) for bottling in bond; and (b) to casks for sale and human consumption as draught beer. (Vide para 8 of the WP).

(ii) The method adopted by the Excise department in working out the deficiency in stock is erroneous. What was required under paragraph 912 of Excise Manual was to compare the stock of manufactured beer as mentioned in the stock account of beer and the actual stock of beer giving allowance for the quantity issued. What has been done in the instant case is to assume certain quantity as part of the stock account of beer which was not beer and was undergoing the process of manufacture into beer. Similarly the quantity of beer issued from the Brewery has not been taken in its entirety to be the quantity of beer issued. The

quantity issued has been equated with the quantity actually bottled with the result that the quantity of beer which has been wasted in the process of bottling has been treated to be part of the stock of beer in the beer account. (Vide para 61)

(iii) If the quantity of beer which is actually issued for bottling from the brewery is taken into account in its entirety for purposes of the stock account, the percentage of deficiency between the stock account of beer and the actual quantity of beer found on physical verification will be below 10; (Vide para 63).

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

Questions for consideration

9. On the contentions urged, the following two questions arise for our consideration:

(i) At what stage does the beer manufactured is exigible to duty?

(ii) Whether the procedure adopted by the Appellants for ascertaining excess manufacturing wastage (excess deficiency) is proper?

To appreciate these issues and find answers to the questions, it is necessary to refer to the process of manufacture of beer, the relevant provisions of the UP Excise Act, 1910 (For short 'the Act') and the relevant Brewery Rules.

Process of manufacture of Beer

10. Encyclopaedia Britannica (15th Edition, Vol.14, and Page 739) describes the stages of brewing process thus:

Beer production involves malting, milling, mashing, extract separation, hop addition and boiling, removal of hops and precipitates, cooling and aeration, fermentation, separation of yeast from young beer, aging, maturing, and packaging. The object of the entire process is to convert grain starches to sugar, extract it with water, and then ferment it with yeast to produce the alcoholic, lightly carbonated beverage.

As the description of the brewing process given in Encyclopaedia Britannica is detailed and very lengthy, we have opted for the following shorter and simpler description of the brewing process given in Wikipedia (<http://en.wikipedia.org/wiki/Beer>) which is in consonance with what is stated in Encyclopaedia Britannica:

The process of making beer is known as brewing. A dedicated building for the making of beer is called a brewery.....The purpose of brewing is to convert the

starch source into a sugary liquid called wort and to convert the wort into the alcoholic beverage known as beer in a fermentation process effected by yeast.

The first step, where the wort is prepared by mixing the starch source (normally malted barley) with hot water, is known as "mashing". Hot water (known as "liquor" in brewing terms) is mixed with crushed malt or malts (known as "grist") in a mash tun. The mashing process takes around 1 to 2 hours, during which the starches are converted to sugars, and then the sweet wort is drained off the grains. The grains are now washed in a process known as "sparging". This washing allows the brewer to gather as much of the fermentable liquid from the grains as possible. The process of filtering the spent grain from the wort and sparge water is called wort separation. The traditional process for wort separation is lautering, in which the grain bed itself serves as the filter medium. Some modern breweries prefer the use of filter frames which allow a more finely ground grist. Most modern breweries use a continuous sparge, collecting the original wort and the sparge water together. However, it is possible to collect a second or even third wash with the not quite spent grains as separate batches. Each run would produce a weaker wort and thus a weaker beer. This process is known as second (and third) running.

The sweet wort collected from sparging is put into a kettle, or "copper", (so called because these vessels were traditionally made from copper) and boiled, usually for about one hour. During boiling, water in the wort evaporates, but the sugars and other components of the wort remain; this allows more efficient use of the starch sources in the beer. Boiling also destroys any remaining enzymes left over from the mashing stage. Hops are added during boiling as a source of bitterness, flavour and aroma. Hops may be added at more than one point during the boil. The longer the hops are boiled, the more bitterness they contribute, but the less hop flavour and aroma remains in the beer.

After boiling, the hopped wort is now cooled, ready for the yeast. In some breweries, the hopped wort may pass through a hopback, which is a small vat filled with hops, to add aromatic hop flavouring and to act as a filter; but usually the hopped wort is simply cooled for the fermenter, where the yeast is added. During fermentation, the wort becomes beer in a process which requires a week to months depending on the type of yeast and strength of the beer. In addition to producing alcohol, fine particulate matter suspended in the wort settles during fermentation. Once fermentation is complete, the yeast also settles, leaving the beer clear.

Fermentation is sometimes carried out in two stages, primary and secondary. Once most of the alcohol has been produced during primary fermentation, the beer is transferred to a new vessel and allowed a period of secondary fermentation. Secondary fermentation is used when the beer requires long storage before packaging or greater clarity. When the beer has fermented, it is packaged either into casks for cask ale or kegs, aluminium cans, or bottles for other sorts of beer.

11. We may next extract the definition of beer, stages of manufacture of beer, and the fermentation process described in Chapter XI (Brewing) from UP Excise Manual (Volume-V):

Beer defined - The term 'beer' as used in the Indian Excise Law, refers to 'fermented, uninstalled liquors, of which malt is the primary base, and are flavoured with a wholesome bitter usually hops'. Beer therefore includes ale, beer, black beer, porter, stout, etc., and the precise manufacture of these products is termed "brewing".

Lager beers - The beers mentioned above are prepared by what is known as a 'top fermentation process; the yeasts employed are designated 'top yeasts and the products 'top fermentation beers'. In contradistinction to the above, lager beers are prepared by employing 'bottom yeasts' and the process is termed 'bottom fermentation'.

Barley - The fermenting raw material commonly used in production of beers are (a) Barley, (b) Barley Malt (or Malt), (c) other unmalted cereals such as maize or rice, which are employed as grits, broken rice or flakes and maize starch, (d) sugars derived almost exclusively from sugarcane and maize starch, such as, cane sugar, invert, etc. The latter two viz., (c) and (d) are known as 'malt adjuncts' as they partially replace the malt.

Manufacture of beer may be considered under the following five stages:

- (a) Preparation of the malt from Barley.
- (b) Infusion of the ground malt or 'grist' and straining the resultant extract or wort.
- (c) Boiling the wort with hops or other bitters, straining of the hops and cooling.
- (d) Fermenting the wort.
- (e) Settling, Racking, cellar treatment and bottling.

Fermentation

Unlike Whisky fermentation, fermentation of beer is conducted in England by employing top fermentation yeast and the different systems only differ in the flocculation and attenuating power of the yeast employed, while in bottom fermentation breweries producing larger beers. The yeast is generally mixed with a small quantity of wort at 65 F and poured into the incoming wort, or if the yeast required in vigorous, it is allowed to come into active fermentation before addition to the fermenting vessel. Yeast food, if any is needed is in a few hours is at its height as can be seen by the maximum temperature reached and is allowed to continue for 5 to 8 days.

The following description of the practice in India is of interest:

Pitching of the wort - The fermentation vats usually has a capacity of 3,000

gallons, which is equivalent to 140 bushels of malt (having a sugar content of 40 per cent). The cooled hopped wort from the malt is mixed at this stage with 300 lb. of sugar and = lb. of ammonium sulphate followed by 60 lb. of yeast in suspension (containing 85 per cent moisture) and allowed to ferment for 5-6 days. The peak of the fermentation is reached in 36 hours. At the end of the fermentation, the vats are slowly aerated by 'Sterilized air'. Fermentation of beer is conducted by employing top fermentation yeast. This and the atmosphere of CO on the top of the vat prevent any bacteria gaining access to the beer. The fermentation is carried on until the gravity of the wort falls down to 1.042, when the wort is run off into fining vessels so as to settle and clarify. Throughout the fermenting stage the temperature of the wort is regulated by coils of piping called at temperature through which cold water is passed.

Fermentation of lager beers. - Bottom fermentation processes used for lager beer differ from top fermentation adopted for ales in that the temperature ranges between 41 degree Fahrenheit and 56 degree Fahrenheit, while the yeast settles as a firm black cover at the bottom of the fermenting vessel. The primary fermentation also lasts for 7 to days at the higher temperature or 12 to 14 days at lower temperatures as the rate of fermentation is considerably slower than in top fermentation systems. Bottom fermentation beer is usually laagered or stored for periods varying from 1 to 9 months (generally 6 to 8 weeks) after this primary fermentation during which slow changes called 'maturation' occur and this gives the name to the beer. Fermentation in the storage stage is due to primary yeasts carried down with the beer from the fermenting vessel. Gassing, Racking and Bottling - Although lager beer is ultimately filtered before racking into casks, clarification is an essential function of the storage.

Uncorroborated top fermentation beers, which include the bulk of British draught ales are either racked directly from the fermenting vessel or settling back to which they are run down from Fermenting vessels. The settling back provides a means of further clarification by sedimentation during 2 to 12 hours. This is also used for addition of primings, colorings and sometimes finings though these are sometimes added to individual casks. The beer loses carbon dioxide and gets aerated. Dry hops are also sometime added to the settling backs. Racking in cylinders and counter pressure racking is also followed.

12. The first Respondent describes (in Annexure-I to the writ petition) the process of manufacturing beer in its brewery thus:

The Process of Manufacturing of Beer - Coarsely crushed barley malt termed "grist" added with cooked maize and rice clakes is boiled at a specific temperature in treated water in the vessel called mashtun by which the starches present in the grain are converted into sugars. The extract from the grain called wort is drawn into another vessel called 'copper' to which hops flowers and sugar is added and boiled with the purpose of sterilizing the wort, separating was table proteins in the form of precipitate, dissolving bittering constituents of hops and imparting aromatic flavour of hops flowers. The spent hops are separated

from the boiled wort which is cooled and passed into fermentation vats.

Brewers yeast is "pitched" to initiate fermentation. The fermentation is carried on at low temperature. Lot of frothing takes place, the yeast cells multiply and bring up dirty heads with resins of hops etc., at the top which are cleared out, the convertible sugars are decomposed into alcohol and carbon dioxide gas; the hanging particles in the wort settled down with coagulated albuminous substances and yeast cells during the process of fermentation which is carried on for 8 to 10 days.

The fermented wort is racked into settling tanks or storage tanks leaving the sillage or sludge at the bottom of fermentation vats. At this stage also (i.e. in storage vats) some yeast cells are present in the fermented wort and secondary fermentation takes place besides some residuary particles in the bulk of fermented wort settling at the bottom of the storage vats. To eliminate secondary fermentation and haze from this, it is passed through filter machines in which 100 to 150 filter sheets are fixed. The filtrate is transferred to bottling tanks for bottling beer in a separate bonded warehouse, which is carried on under the supervision of the officer-in-charge of the warehouse.

13. It is thus evident that the process of brewing beer involves malting, mashing, boiling, fermentation, separation of yeast from the beer, ageing and finishing. The fermented alcoholic liquor that can be identified as 'beer' comes into existence on completion of the process of fermentation. Ageing is carried out only in the manufacture of certain types of beer, by storing beer in storage tanks for certain period. Filtration removes the remaining yeast (the major portion settles as sediment in the fermentation vats and is removed as sillage) and then packed into barrels, bottles or cans. The filtration, ageing and finishing are processes to remove impurities, improve the clarity, taste and increase shelf life.

Relevant provisions of the Act and the Rules

14. The relevant provisions of the UP Excise Act, 1910 are extracted below:

Section 3 (3a). "Excise duty" and "countervailing duty" means any such excise duty or countervailing duty, as the case may be, as is mentioned Entry 51 of List II in the Seventh Schedule to the Constitution; Section 3 (10). "Beer" includes ale, stout, porter and all other fermented liquor made from malt; Section 3 (22a). "Excisable article" means - (a) any alcoholic liquor for human consumption; or (b). any intoxicating drug; Section 28 Duty on excisable articles- (1) An excise duty or a countervailing duty, as the case may be, at such rate or rates as the State Government shall direct, may be imposed, either generally or for any specified local area, on any excisable article-

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

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

(c) transported; or

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

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

x x x

Section 28A - Imposition of additional duty in certain cases - (1) Where the quantity of spirit or beer in a brewery is found, on examination by such officer of the Excise Department as may be authorised by the Excise Commissioner in this behalf to exceed the quantity in hand as shown in the stock account, the brewery shall be liable to pay duty on such excess at the ordinary rates fixed u/s 28.

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

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

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

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

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

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

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

15. Rule 53 of the UP Brewery Rules, 1961 (Paragraph 912 of the Excise Manual) as it stood prior to substitution of the rule on 19.7.1975 provided for quarterly examination of stock and read as follows:

912. Quarterly Examination of Stock. - The accounts of a brewery and the stock of beer in hand in the brewery shall be examined by the Assistant Excise commissioner once a quarter. If the quantity of the beer in stock in the brewery

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

Rule 53 of the Brewery Rules (para 912 of the Excise Manual) as substituted on 19.7.1975 reads as under:

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

Rule 37 of the Brewery Rules (para 896 of the Excise Manual) reads thus:

896. Worts to be drawn off in the order of production: All worts shall be removed successively, and in the customary order of brewing to the under back, coppers, coolers and fermenting vessels, and shall not be removed from the last named vessel until an account has been taken by the officer incharge or until after the expiry of twenty four hours from the time at which the worts are collected in these vessels.

Rule 41 of the Brewery Rules (para 900 of Excise Manual) deals with issue of beer and is extracted below:

900. Beer not to be issued until duty paid or bond executed - (Rule 41). No beer

shall be removed from a brewery until the duty imposed u/s 28 of the UP Excise Act, 1910 (Act No. IV of 1910) has been paid or until a bond u/s 19 of the Act in Form B-7 or B-8 has been executed by the brewer for export of beer outside the State, direct from the brewery.

Legal position enunciated by this Court

16. We may next refer to the decisions of this Court bearing on the issue in R.C. Jall Vs. Union of India (UOI), this Court held:

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

(Emphasis supplied)

17. In Synthetics and Chemicals Ltd. and Others Vs. State of U.P. and Others, this Court held that the expression "alcoholic liquor for human consumption" must be understood in its common and normal sense. The expression "consumption" must also be understood in the sense of direct physical intake by human beings and not utilisation in some other forms for the ultimate benefit of human consumption and the expression is intended to mean "liquor which as it is, could be consumed, in the sense of capable of being taken by the human beings as such as a beverage or drink".

18. In State of U.P. and Others Vs. Delhi Cloth Mills and Another, this Court dealing with section 28 of UP Excise Act, 1910 considered the question whether the excise authorities were entitled to levy excise duty on the wastage of liquor (military rum) in transit and held that the levy of differential duty (that is charging up the duty on the report of excess wastage) did not cease to be an excise duty even if it was levied on declaration of excess wastage. The taxable event was still the production or manufacture. This Court observed:

A duty of excise u/s 28 is primarily levied upon a manufacturer or producer in respect of the excisable commodity manufactured or produced irrespective of its sale. Firstly, it is a duty upon excisable goods, not upon sale or proceeds of sale of the goods. It is related to production or manufacture of excisable goods. The taxable event is the production or manufacture of the liquor. Secondly, as was held in A.B. Abdulkadir and Others Vs. The State of Kerala and Another, an excise

duty imposed on the manufacture and production of excisable goods does not cease to be so merely because the duty is levied at a stage subsequent to manufacture or production. That was a case on Central Excise, but the principle is equally applicable here. It does not cease to be excise duty because it is collected at the stage of issue of the liquor out of the distillery or at the subsequent stage of declaration of excess wastage. Legislative competence under entry 51 of List II on levy of excise duty relates only to goods manufactured or produced in the State as was held in *Bimal Chandra Banerjee Vs. State of Madhya Pradesh etc.*, In the instant case there is no dispute that the military rum exported was produced in the State of Mysore and *Others Vs. D. Cawasji and Company and Others*, which was on Mysore Excise Act, it was held that the excise duty must be closely related to production or manufacture of excisable goods and it did not matter if the levy was made not at the moment of production or manufacture but at a later stage and even if it was collected from retailer. The differential duty in the instant case, therefore, did not cease to be an excise duty even it was levied on the exporter after declaration of excess wastage. The taxable event is still the production or manufacture. Rules 636 and 814 are also of regulatory character and they are precautionary against perpetration of fraud on the excise revenue of the exporting state. If out of the quantity of military rum in a consignment, a part of portion is claimed to have been wastage in transit and to that extent did not result in export, the State would, in the absence of reasonable explanation, have reason to presume that the same have been disposed of otherwise than by export and impose on it the differential excise duty. A statute has to be construed in light of the mischief it was designed to remedy. There is no dispute that excise duty is a single point duty and may be levied at one of the points mentioned in Section 28.

19. In *Mohan Meakin Ltd. Vs. Excise and Taxation Commissioner, H.P. and Others*, this Court examined the question as to when beer is exigible to excise duty under the Punjab Excise Act, 1914 and Punjab Breweries Rules 1932. This Court held that Beer would mean fermented liquor from malt, when it is potable or in consumable condition as beverage. The state of levying excise duty upon alcoholic liquor arises when excisable article is brought to the stage of human consumption with the requisite alcoholic strength thereof and it is only the final product which is relevant. In that case, the levy of excise duty at the stage when the manufacturing of the beer was at wort stage was challenged. This Court posed the question:

Whether the levy of excise duty, on beer when it was in the process of manufacture is correct? This Court answered the question thus:

The levy of excise duty is on alcoholic liquor for human consumption, manufacture or production. At what stage beer is exigible to duty is the question. The process of manufacture of beer is described as under:

The first stage brewing process is the feeding of Malt and adjuncts into a vessel known as Mash Tun. There it is mixed with hot water and maintained at certain

temperature. The objective of this process is to convert the starches of the malt into fermentable sugar.

The extract is drawn from the Mash Tun and boiled with the addition of hops for one to two hours after which it is centrifuged, cooled and received in the receiving wats. At this stage, it is called "Wort" and contains only fermentable sugars and no alcohol. After this it is transferred to the fermentation tanks where Yeast is added and primary fermentation is carried out at controlled temperature. After attenuation (Diminution of density of "Wort" resulting from its fermentation) is reached for fermented wort is centrifuged and transferred to the storage vats for secondary fermentation. After secondary fermentation is over in the storage vats, it is filtered twice-first through the rough filter press and then through the fine filter press and received in the bottling tanks. It is in bottling tanks that the loss of the Carbon Dioxide Gas is made up and bulk beer is drawn for bottling. It is filled into the bottles and then last process of pasteurisation is carried out to make it ready for packing and marketing. Till the liquor is removed from the vats and undergoes the fermentation process as mentioned above the presence of alcohol is nil.

Excisable article would mean any alcoholic liquor for human consumption or any intoxicating drug. The levy or impost of excise duty would be only on alcoholic liquor for human consumption or for being produced in the brewery. Beer would mean fermented liquor from malt, when it is potable or in consumable condition as beverage. It is seen that the levy is in terms of entry 51 of List II of the Seventh Schedule which envisages that duties of excise on the goods manufactured or produced in the State and countervailing duties at the same or lower rates on similar goods manufactured or produced elsewhere in India.

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

(Emphasis supplied)

20. In *Government of Haryana Vs. Haryana Brewery Ltd. and Another*, this Court held:

We agree with the contention of Mr. Divan, and this is also not disputed by Mr. Anand, that the State has jurisdiction to levy excise duty only on beer after it has been brewed and has become fit for human consumption. This is the settled

position as laid down by this Court in Mohan Meakin and Modi Distillery cases. The only question which, to our mind, really arises for consideration is how to determine the quantity of beer which is manufactured on which the excise duty is to be levied. Section 32 gives an answer to this question. The first part of the Section states that subject to the rules which may be made by the Financial Commissioner, Excise Duty is to be levied, inter alia, on the excisable article manufactured in or issued from a distillery, brewery or warehouse. A reading of this Section leaves no manner of doubt that the stage at which excise duty can be levied is only after the process of manufacture has been completed and in fact, it is to be levied when it is issued from the distillery, brewery or warehouse.

(Emphasis supplied)

Re: Question No. (i)

21. The High Court has held that the point at which the liquor manufactured by the brewery is exigible to excise duty is the stage when the finished product (beer) capable of being consumed by human beings as a beverage or drink, comes into existence that is, after the process of fermentation and filtration. In *Synthetics and Chemicals Ltd. and Others Vs. State of U.P. and Others*, and *State of U.P. and Others Vs. Modi Distillery and Others*, this Court held that having regard to 24 Entry 51 of List II of Seventh Schedule to the Constitution, the State would be authorized to impose excise duty on alcoholic liquor for human consumption which meant that the liquor, as itself, was consumable in the sense that it was capable of being taken by human beings as such as a beverage or drink. This Court in *Government of Haryana Vs. Haryana Brewery Ltd. and Another*, held that State has jurisdiction to levy excise duty on beer only after it has been brewed and has become fit for human consumption; and having regard to section 32 of the Punjab Excise Act, 1914, the stage at which excise duty could be levied on beer was after the process of manufacture was complete and when it is issued from the brewery or warehouse.

22. This Court also reiterated the said position in *Mohan Meakin Ltd. Vs. Excise and Taxation Commissioner, H.P. and Others*, but further observed that beer would be exigible to duty when it passes through the fine filter press (after fermentation) and is received in the bottling tank. The words 'received in the bottling tank' obviously referred to beer being received in any container or vessel for storage, after fermentation and filtration. It may however be noted that the said observation that beer is exigible to excise duty only when it passes through the fine filter press would apply only to the standard types of beer which is sold in bottles and cans. Beer is also supplied in casks and barrels, taken directly from fermentation vessels without undergoing any filtration or further processing, known as Draught (or Draft) beer. Such beer is unpasteurized and unfiltered (or even if filtered, only in a limited manner and not fine filtered like beer intended to be sold in bottles or cans). Para 29 of Excise Manual (Vol.V Chapter XI) notes that uncarbonated top fermentation beer, which include draught beer are racked directly from the fermenting vessel. Thus when the fermentation process of wort

is completed, it becomes an alcoholic liquor for human consumption and there is no legal impediment for subjecting beer to excise duty at that stage. Therefore, the State has legislative competence to levy excise duty on beer either after the completion of the process of fermentation and filtration, or after fermentation.

23. Section 29 (e)(i) of the Act makes it clear that in the case of beer manufactured in a brewery, excise duty may be levied, by a rate charged upon the quantity produced or issued from the brewery or issued from a warehouse. This means that in respect of beer that undergoes the process of filtration, the exigibility to excise duty will occur either at the end of filtration process when it is received in storage/bottling tanks or when it is issued from the brewery. In regard to draught beer drawn directly from fermentation vessels, without further processing or filtration, the exigibility to excise duty will occur either at the end of fermentation process or when it is issued from the brewery.

Re: Question No. (ii)

24. The High Court rejected the Brewery's contention that only such beer which comes to the 'bottling tank' after filtration, can be treated as 'manufactured beer' and exigible to excise duty and wastage allowance could be given only with reference to such beer which has become a finished product. But the High Court allowed the writ petition of the Brewery and directed that validity of the demand should be decided afresh, "after calculating the stock of beer for the purpose of original Rule 53 of UP Brewery Rules, 1961 (Para 912 of UP Excise Manual as it then existed) and section 28A of UP Excise Act, when after filtration the same assumes the shape as a finished product which is normally consumed by human beings as a beverage or drink". The real question arising for consideration in this case is not about the stage at which beer is exigible to excise duty, but whether the procedure adopted by the Appellant for ascertaining the excess wastage (or shortage in quantity) and levying duty and additional duty thereon, is legal and valid.

25. The contention which ultimately found favour with the High Court, was based on legislative competence. The brewery contended that section 28A provided for levy of 'excise duty' and an equal amount as additional duty on 'excess wastage' or shortage in quantity manufactured; that the legislative competence to levy excise duty is derived from Entry 51 of List II of Seventh Schedule to the Constitution : "Duties of excise on.....(a) alcoholic liquors for human consumption"; that therefore, if excise duty or additional duty is to be levied u/s 28A, the article that could be subjected to duty should be 'an alcoholic liquor for human consumption'; that the term 'alcoholic liquor for human consumption' means a liquor which could be taken by a human being 'as it is' without the need for any further process; and that in regard to beer, that stage is reached only after fermentation and filtration processes are completed. It was submitted that before filtration, the product-in-process was not an alcoholic liquor for human consumption and therefore there was no legislative competence to levy excise duty or additional duty on such product-in-process.

26. This contention ignores the fact that Entry 51 should be read not only as authorizing the imposition of an excise duty, but also as authorizing a provision which prevents evasion of excise duty. This Court in *Sardar Baldev Singh Vs. Commissioner of Income Tax, Delhi and Ajmer*, held as under:

...Under Entry 54 a law could of course be passed imposing a tax on a person on his own income. It is not disputed that under that entry a law could also be passed to prevent a person from evading the tax payable on his own income. As is well known the legislative entries have to be read in a very wide manner and so as to include all subsidiary and ancillary matters. So Entry 54 should be read not only as authorizing the imposition of a tax but also as authorizing an enactment which prevents the tax imposed being evaded. If it were not to be so read, then the admitted power to tax a person on his own income might often be made infructuous by ingenious contrivances. Experience has shown that attempts to evade the tax are often made.

(Emphasis supplied)

27. In this context, we may also consider the decision of this Court in *Union of India and another etc. etc. Vs. A. Sanyasi Rao and other etc. etc.*, this Court considered the constitutionality of the provisions for presumptive tax in Sections 44AC and 206C of the Income Tax Act, 1961 for collecting tax on profits and gains from trading in alcoholic liquor for human consumption (and other goods specified therein) at the stage of purchase on a presumptive basis. The Respondents therein contended that the said sections lacked legislative competence as income tax was a tax on income, while the levy u/s 44AC was one on purchase when no income had occurred and that the tax was on a hypothetical income and not real income. This Court held that the object in enacting sections 44AC and 206C was to enable the Revenue to collect the legitimate dues of the State from the persons carrying on particular trades, in view of the peculiar difficulties experienced in the past and the measure was so enacted to check evasion of substantial revenue due to the state. Trade or business, results in or produce income, which can be brought to tax. In order to prevent evasion of tax legitimately due on such 'income', Section 44AC and Section 206C were enacted, so as to facilitate the collection of tax on that income which is bound to arise or accrue, at the very inception itself or at an anterior stage and therefore one cannot contend that the aforesaid statutory provisions lacked legislative competence. After all, statutory provisions obliging to pay 'advance tax' were not new and sections 44AC and 206C were similar. The standard by which the amount of tax was measured, being the purchase price, would not in any way alter the nature and basis of the levy viz., that the tax imposed was a tax on income and it could not be labelled as a tax on purchase of goods. The charge for the levy of the income that accrued or arose is laid by the charging sections viz., sections 5 to 9 and not by virtue of section 44AC or Section 206C. The fact that the income was levied at a flat rate or at an earlier stage will not in any way alter the nature or character of the levy since

such matters are completely in the realm of legislative wisdom. What is brought to tax, though levied with reference to the purchase price and at an earlier point is nonetheless income liable to be taxed under the Income Tax Act. This Court referring to the argument about absence of legislative competence to levy tax before accrual of income, referred to Entry 82 of List I of Seventh Schedule ("Taxes on income other than agricultural income") and held as under:

...the word `income occurring in Entry 82 in List I of the Seventh Schedule should be construed liberally and in a very wide manner and the power to legislate will take in all incidental and ancillary matters including the authorization to make provision to prevent evasion of tax, in any suitable manner.

28. To ensure that there is no evasion of excise duty in regard to any beer manufactured, the State is entitled to make a provision to prevent evasion of excise duty being evaded, though it is leviable at the stage of issue from the brewery. The beer brewing process shows once the wort ferments, it becomes consumable, though the manufacturing process to have a finished product may in some cases require filtration, aging carbonization etc. To ensure that there is no evasion of excise duty by diversion of beer (excisable article) before it becomes a finished product, section 28A of the Act has been enacted and that is implemented by Rule 53 of the Brewery Rules, and 31 Rule 7 of the Bottling Rules. The Excise Inspector in-charge is required to take physical stock of the beer in hand in the brewery periodically (once a quarter prior to the amendment of 1975 and once in a month from July 1975) by dip and gravity of the quantities in the fermentation vessels. We may illustrate the method adopted to ascertain whether there is any excess manufacturing wastage (or illegal siphoning of beer) before it reaches the bottling tanks:

a. Litres

The opening balance (actual quantity)

1000

b. Litres

Quantity brewed during the month under survey

2000

c. Litres

Total stock of beer (a + b) in the brewery

3600

d. Litres

Quantity of beer issued during the month

2600

e. Litres

Balance quantity in hand as per stock account (c - d)

1000

f. Litres

Actual balance found on physical examination

600

g. Litres

Wastage in manufacture (difference between quantity shown in stock account and actual quantity in the brewery)

400

h. Litres

Wastage allowable at 9%* of the total stock of beer in the month(3600 litres) under Rule 53 of Brewery

324

(9% is the allowance towards losses due to evaporation, sullage and other contingencies within the brewery).

i. Excess wastage chargeable to duty & addl. duty (g + h) 76 Litres

29. It should be noted that recourse to Section 28A of the Act will be held only when there is abnormal deficiency or shortage in the actual quantity in the brewery when compared to the quantity mentioned in the stock account, that is more than 9%, which would show evasion of excise duty. The standard procedure of levying excise duty is not on the quantity of excisable article in the fermentation vessels. The standard procedure is to levy excise duty when the beer is removed from the brewery. The State was thus collecting excise duty in the usual course with reference to the beer after the entire manufacturing process was completed when it is removed from the brewery. It resorted to Section 28A, Rule 53 of Brewery Rules and Rule 7 of Bottling Rules and levied double the amount of excise duty (excise duty plus equal amount as additional duty) only in those months when the periodic examination showed excessive manufacturing 'wastage'. The procedure adopted was the most logical process to ensure that excisable articles were not clandestinely removed and to ensure that there is no evasion of excise duty having regard to the brewing procedure. If the actual stock assessed is less than the stock as per Stock Account and the difference is less than 9%, the difference was ignored. Only if the difference exceeded 9%, the quantity in excess of 9% was treated as the excess wastage and excise duty and an equal amount as additional duty was charged in regard to such excess. For this purpose necessarily the quantity in the fermentation

vessels had to be considered. If the quantity in the bottling tanks are to be taken as the basis, then there will be no way of finding out whether there was any siphoning off from the fermentation vessel or during filtration process. Fermented wort is beer and it could be removed from fermenting vessels or during storage or filtration. Therefore, the base measurement is taken in the fermentation vessel and 9% standard allowance is provided to cover losses on account of sillage etc.

30. The Act provides that levy of excise duty on beer can not only be with reference to the quantity produced and issued from a brewery, but can also be by calculating the quantity of materials used or by the degree of attenuation of the wash or wort, as the case may be, as the State Government may prescribe. This means the excise duty on the beer manufactured can be levied not only with reference to the actual quantity issued or removed, but can also be by a rate charged in accordance with a scale of equivalent, calculated on the quantity of materials used or by the degree of attenuation of the wash or wort prescribed by the State Government. The said alternative method of levying excise duty does not depend upon the actual quantity manufactured or issued. It is with reference to the deemed quantity manufactured rather than the actual quantity manufactured. Such a procedure has been in vogue in England and it is permissible in India. Rule 42 of Chapter XI of the Excise Manual (Vol. 5) gives a detailed description of the attenuation method of charging duty on beer and it is extracted below:

42. The attenuation method of charging duty on beer. - In the United Kingdom, the duty is levied on beer in proportion to the original gravity of the wort. Really speaking, the Excise control of breweries is much less stringent than in the case of distilleries. No excise locks are used. The constant presence of an officer is only considered necessary in the case of every large breweries working continuously. The safety of the revenue depends on notices of all essential operations which are required to be given to the Excise. The length of notice to be given depends on the importance of the particular operation and on the facility with which the local officer can attend. One officer is, in general, in charge of a group of the smaller breweries.

A brewer must give timely notice of:

- (1) his attention to brew;
- (2) the nature and amount of materials to be used;
- (3) the time at which he expects his mash-tun to be drained (this is to enable the officer to take a dip of the drained grains which must lie for two hours after draining or until the officer arrives).
- (4) his intention to mix the products of one or more brewings;
- (5) any modification in his routine methods of brewing;

(6) any alterations he proposes to make in the position etc., of his brewing vessel;

(7) Finally and most important of all, the brewer is required to give notice to the officer of his intention to 'collect beer', ie., he must intimate as closely as possible the time when the wort will be ready for pitching with yeast. When the wort is collected for fermentation the brewer must forthwith take the specific gravity with his saccharometer and also the dip, in order that the density and gallonage may be recorded in case the officer does not attend. In cases where the officer attends before fermentation has materially affected the gravity he is able to verify these figures and above all to see that they have been recorded properly by the brewer.

In order that his control may be effective, the officer must time his visits to the brewery so as to arrive when fermentation has not advanced too far for check and so that the brewer has had reasonable time to make his entries of gravity and gallonage. If having had reasonable time, the brewer has failed to make his entry this omission is treated as a serious excise offence.

It may be asked why stress is not laid on the necessity for the attendance of the officer at the time of pitching the wort. This, bow ever, is generally impracticable seeing that usually brewers 'collect' at the same hour and that the presence of the officer at more than one brewery is impossible. This being so, his visits must be unexpected, the responsibility for honest declaration of gravity and dip being imposed on the brewer. The brewer's records, if confirmed by the officer, are thus the basis on which the duty is levied.

31. This Court in Haryana Brewery Ltd. (supra) recognized the alternative method of calculating the quantity of beer manufactured to be valid. This Court held:

The proviso to Section 32 uses the expression "provided that duty may be levied....." Clause (b) of the proviso state that the calculation of the beer manufactured would be according to such scale or equivalents calculated on the quantity of materials used or by the degree of attenuation of the wash or wort. The opening part of Clause (b) of the proviso indicates as to how the beer manufactured is to be determined. The proviso is only a manner of computing the end-product with reference tot he raw material which has been used in the input. The tax is on the end-product and not on the raw material. What this proviso read with Rule 35 indicates that in order to determine what is the quantity of beer manufactured which is fit for human consumption, after all the processes have been gone through, you seen what is the quantity of raw material which has been utilised for the manufacture of beer and in the process of manufacturing give an allowance for wastage of 7 per cent. After doing this, you determine the quantity of beer manufactured. An example which has been given is that a 1000 kgs. of malt should ordinary yield 6500 litres of beer. By giving an allowance of wastage which must occur during the process of the manufacture of

the end-product and limiting that allowance to 7 per cent, the quantity of beer manufactured on which excise duty would be levied would be 6500 litres less 7 percent.

14. It appears to us that the proviso to Section 32 read with Rule 35 does nothing more than to give a rough and ready method of calculating the quantum of beer which should have been manufactured in the normal process which is calculated on the basis of the raw material used. The idea, perhaps, is that full quantity of beer which is manufactured is accounted for. It will be seen that registers are maintained by the manufacturer and the figures are taken from there. From the records of the manufacturer, excise authorities will be able to ascertain the quantum of raw material used. It is open to the excise authorities to accept the figure indicated in the records of the manufacturer of the total quantity of beer manufactured. Duty can be levied on this and this would be inconsonance with the first part of Section 32. It is, perhaps, only to cross-check whether the figure which is indicated in the books of the manufacturer is correct that a formula can be used for determining the amount of beer which could or should or must have been manufactured. This is by taking into account the quantity of raw material used, the quantity which is in the process and as entered in the brewing book and from there giving an allowance of 7 per cent for wastage. It appears to us that the allowance of 7 per cent has to be in arriving at the figure of the manufactured beer as loss of quantity during the process of manufacture. It cannot be that on the figure of manufactured beer, arrived at on the basis of the books of the Respondent, an allowance of 7 per cent has then to be given. If the figure taken for the purpose of calculating the excise duty is only of the end-product, viz., the beer produced, and not the quantity of raw material used in the manufacture of beer during which loss of some quantity as wastage would have occurred, there cannot be a deduction of any sum or proportion as wastage from the quantity of end-product in order to arrive at the quantity. The excisable product is the quantity of beer produced and not the quantity produced, and thus excisable, minus 7 per cent.

Therefore there is nothing wrong in adopting the procedure prescribed in section 28A and Rule 53 of Brewery Rules to determine the excess manufacturing wastage.

32. The Brewery wants the wastage allowance to be given, not with reference to the quantity in the fermentation tank, but with reference to the quantity in the storage/bottling tanks (after completion of fermentation and filtration process) when the manufacturing process is complete and only bottling remains. The argument of the Respondent is that the measurement should be taken only when the manufacture is complete and not when it is still in the process of manufacture; and the manufacture process is completed not when the wort is in the fermentation tank but only when the filtration process is finished. But this contention ignores the fact that when manufacturing process is complete and the beer has reached storage/bottling tanks, there is no question of any

manufacturing loss. The allowance of 9% is made to cover loss due to evaporation, sillage and other contingencies within the brewery. 9% is allowed as loss in quantity because the quantity in fermentation tank is measured and taken as the base and thereafter the sillage/yeast heads are removed as sediment in the fermentation vessels or by the filtration process and there will also be certain amount of evaporation during the process of filtration, racking and storage etc. In fact, the Brewery specifically admits this position in Annexure-I to the writ petition while describing the process of manufacturing beer:

From the above brief description of manufacturing process, it will be observed that the deficiency between the quantity of wort to the point when beer is ready for bottling, occurs because of elimination of impurities" viz., yeast cells and dirty heads brought up in fermentation at top, evaporation taking place; carbon dioxide evolved out; and sillage settled at the bottom. The quantity of these impurities accounting for the said deficiency in the process of manufacture cannot be taken as beer and excisable article for purposes of levy of duty. For culmination of these impurities and other contingencies mentioned of in Rule 912, an allowance of 10% is fixed.

33. If the quantity measured after the fermentation and filtration processes should be the base figure, for purpose of allowance to cover loss on account of sillage, evaporation etc., there will be no need for granting any allowance because once it have passed the filtration stage the sillage and other impurities has been removed and the beer is ready for being filled in barrels, casks or bottles. The 9% allowance is for the wastages occurring during the stages of fermentation and filtration and not in regard to the stages between storage after filtration and removal. The Brewery has virtually mixed up the issue relating to the question as to when beer is exigible to excise duty with the question as to the quantity on which the allowance of 9% should be granted. As noticed above, a combined reading of Rules 37 and 53 of Breweries Rules, with or without Section 28A make it clear that the allowance of 9% as losses in the brewery (10% as losses in the course of manufacture in the brewery prior to 1975) is with reference to the quantity in the fermentation tank and not with reference to the quantity of beer in the storage/bottling tanks after filtration.

34. We may now consider the contention on behalf of brewery that they are entitled to allowance up to 9% towards such wastage from the quantity measured in the storage/bottling tanks after fermentation and filtration. We extract below the contention of the Brewery in this behalf from its writ petition:

(X) That section 28A(2) in so far as it purports to provide for permissible wastage could operate only from the stage the State Government became competent to impose excise duty/additional duty and till beer is brought to such a stage that it is rendered fit for human consumption, the State Legislature has no legislative competence to levy excise duty/additional duty and hence the State Legislature cannot take into consideration for the purposes of levy of excise duty/additional duty any wastage prior to the stage when the liquor/beer

becomes fit for human consumption.

A large allowance up to 9% of the total stock of beer has been provided towards wastage, only to cover the loss occurring from fermentation stage to post-filtration stage, as the quantity has been calculated with reference to the fermentation vats and there will be considerable wastage due to sillage and evaporation. Rules 37 and 53 of the Breweries Rules (paras 896 and 912 of the Excise Manual) also proceeded on that basis that the measurement would be with reference to the quantities in the fermentation vessels taken by dip and gravity method.

35. In fact, the brewery describes the nature of these losses in the brewery in Annexure I to the writ petition (in the connected WP No. 1375/1978) as under:

MANUFACTURING LOSSES

(i) Varying constituents of Malt viz. percentage of proteins etc. produced sludge or sillage in more or less quantity. Thus sillage to be removed will have differing percentages.

(ii) Depending on the process - top and bottom fermentation etc. there may be more or less of scum and dirty heads containing yeast cells to be removed, thus losses will be variable at this stage.

(iii) The removal of solids is continuously carried on at different stages in the manufacturing process. With frequency of the centrifugal machines or the Filtration Plants having to be opened depending upon the quantity and turbidity of the fermented wort or green beer to be cleared off to be sparklingly clear, the losses will be more or less. With the banking of import of quality filter sheets, the indigenously made filter sheets have to be used which are to be more frequently changed than the imported ones. There are losses in absorption in filter sheets and leakage at ends of plates.

(iv) Some quantity of fermenting wort is lost in removal of scum and dirty heads and in removal of sillage from the bottom of the tanks.

(v) Every time the fermenting or fermented wort or green beer is transferred by means of pipes, what is left over in pipes has to be drained off, water and steam is run in pipes to sterilize them, so that there may be no contamination to spoil beer.

The varying losses at each stage in the manufacturing process are natural and unavoidable. With the above mentioned variable losses, accidental, off chance occurrence or those losses which are incidental to the process of manufacture are provided for in Rule 912 under "Contingencies".

The contingent losses, a few of which are given below, make the losses in manufacturing process vary and erratic.

(a) Due to failure of electricity and refrigeration, there may be brisk fermentation

and wild bacterial infection, which may make it sour to be turned into vinegar, or if more spoilt, may have to be destroyed.

(b) By sudden leakage of brine coiled pipes, the fermenting wort may be mixed up with brine which becomes unpalatable and has to be destroyed.

(c) With haziness persisting after filtration once, it may have to be treated with approved chemicals and refiltered.

(d) Bursting of transfer pipes, leakage of valves etc.

36. If the quantity measured in the storage/bottling tanks (after filtration) should form the basis, there was no occasion or need for making a huge allowance of 9% for sullage, evaporation and other contingences, as there would be no sullage, evaporation or other wastages after that stage (that is completion of manufacture) and the allowance u/s 28A of the Act will become redundant, except for the small percentage provided for wastage during bottling and storage.

37. The Brewery placed strong reliance upon the decision of this Court in State of U.P. and Others Vs. Modi Distillery and Others, . In that decision, this Court was considering the validity of demand for excise duty on the wastage of high strength spirit (80% to 85%) during transportation in containers from distillery to warehouse (referred to as 'Group B' cases). This Court held:

In other words, ethyl alcohol (95 per cent) was not an alcoholic liquor for human consumption but could be used as a raw material or input, after processing and substantial dilution in the production of whiskey, gin, country liquor etc. In the light of experience and development, it was necessary to state that 'intoxicating liquor' meant only that liquor which was consumable by human beings as it was.

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

The said decision will not assist the first Respondent - brewery as that was a case of levy of excise duty on raw materials or inputs which were still in process. That matter related to distilled alcohol and not fermented beer. The wastage considered by this Court was all with reference to alcohol that had not been diluted and therefore was not 'alcoholic liquor for human consumption'. This Court held that the State is not empowered to levy duty on the raw material or inputs that is in the process of being made into an alcoholic liquor for human consumption. The position is different here. When the quantity of the liquid in the fermentation vessels were measured, on account of fermentation, the liquid was already in the process of conversion into an 'alcoholic liquor for human

consumption', though had not become a finished product of beer. Therefore, the principles in Baldev Singh and A. Sanyasi Rao, will apply and not the decision in Modi Distillery. Therefore we hold that there is no infirmity in the method adopted by the excise department to arrive at the excess wastage or in making a demand for excise duty and additional duty in regard to such excess wastage.

Re: CA No. 4709 of 2002:

38. The question arising in this appeal is the same as in CA No. 4708 of 2002 and the facts are also similar to the facts of CA Nos. 4708 of 2002. The only difference in facts is that the demand in this case related to the period 3.6.1970 to 5.9.1972 and the amount of duty/additional duty that was demanded was Rs. 1,40,596.89. For the reasons stated in CA No. 4708/2002, this appeal is also allowed.

Re: CA Nos. 4710, 4711, 4712, 4713 of 2002

39. All these four appeals relate to demands made upon the breweries for duty on excess wastage in bottling and storage of beer. The first Appellant brewery has described the process of bottling of beer thus (in Annexure P2 to the writ petition - WP No. 1375/1978):

Before carbonated beer is conveyed to the automatic bottling machine through pipes, the whole line is cleaned and sterilized to ensure that there are no wild bacteria which may spoil the beer passed through these pipes.

Bottles which are cleaned and sterilized in Automatic Bottle Washing Plant, are fed by conveyors to the beer bottling machine. While the bottles are filled, some quantity of beer is spilt by foaming which takes place and with pressure of Co gas bottles burst in the process of bottling. The beer which is spilt is mixed with broken glass pieces, oil etc. on the conveyor belts. It is contaminated and has to go waste.

To increase the shelf life of beer, the filled bottles are placed in pasteurization tanks and the water in which these bottles are immersed is gradually raised to temperature of 65O and after keeping these bottles for a fixed time in hot water, these are cooled down.

With the expansion of Co gas during this process some bottles burst and 2 the beer contained therein gets mixed up with water.

Leaky bottles are also taken out from the pasteurization tanks, which are decanted for reprocessing of their contents. Some wastage occurs in the process of decanting.

After pasteurization of filled bottles, capsuling, labeling and packing is done, in which some bottles break. During the process of bottling what goes waste in spilling as mentioned above, is unavoidable. It does not exist in the form of goods for sale and human consumption. Thus being not an excisable article is not leviable with duty.

The Breweries have also described the various instances of bottling wastages in the writ petition as under:

BOTTLING WASTAGES

The wastages occur at different stages in bottling process as under:

(a) Loss of beer in transfer pipe from Bottling Tank to bottling machine, which has to be washed away to sterilize pipes before bottling operations are began every day.

(b) There being pressure of CO gas in beer there is loss by bursting of 2 bottles in filling and capping machines. With the pressure of gas foaming takes place and there is spillage of beer between the bottling and capping machines. The spilt beer cannot be recovered as it gets mixed up with oil on the conveyor belts and is contaminated.

(c) There are some breakages on conveyors between capping machine and pasteurization tanks.

(d) During pasteurization the filled bottles are immersed in water and the temperature of water is gradually raised to about 65°C after keeping for a fixed time, it is gradually cooled, with the expansion of gas the bottles burst to a varying percentage depending on the varying quality of bottles from mould to mould and batch to batch and beer is mixed with water in the tanks.

(e) Some breakages do occur in capsuling, labelling and packing of filled bottles.

(f) Sometimes rebottling may have to be done and loss on this account may occur.

40. The Appellant breweries are holding bottling licences in form No. FL3 to bottle beer, governed by the U.P. Bottling of Foreign Liquor Rules, 1969 ('Bottling Rules' for short). Rule 6 provides that every licence granted in Form No. FL3 shall be subject to the conditions enumerated therein. Rule 7 enumerates the additional special conditions applicable to bottling of India made liquor in bond under FL3 licence. Sub-rules (10) and (11) of Rule 7 are relevant for our purpose and they are extracted below:

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

(1) to (9) x x x x x omitted as not relevant

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

(11) (a) An allowance up to one per cent may be made on the total quantity of

spirit and beer stored during a month for actual loss in bottling and storage. The licensee shall be responsible for the payment of duty on wastage in excess of one per cent,

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

41. The Appellants contended that Section 28A provides for an allowance of 10% to cover losses due to evaporation, sullage and other contingencies within the brewery and also to cover losses in bottling and storage. Rule 53 of the Brewery Rules as amended on 19.7.1975 (Rule 912 of the Excise Manual) provides for an allowance of 9% of the total stock of beer in the month to cover losses due to evaporation, sullage and other contingencies within the brewery. Rule 7(11)(a) of the Bottling Rules provides for an allowance up to one per cent of the total stock of spirit during a month, for actual loss in bottling and storage. The Appellants submitted that Section 28A did not make such a division of 10% allowance, into 9% for loss in the brewery and one percent for loss in bottling; and that therefore it is impermissible to divide the wastage under two separate heads of 9; wastage to cover losses due to evaporation, sullage and other contingencies within the brewery under Rule 53 of the Brewery Rules, (para 912 of U.P. Excise Manual) and only one percent for losses in bottling and storage under the Bottling Rules. According to them the wastage in bottling can itself go to an extent of 10%. At all events, if the total wastage due to evaporation, sullage and other contingencies in the brewery and the total wastage in bottling and storage, together did not exceed 10%, no duty or additional duty could be levied on the assumption that the losses in bottling and storage was restricted only to one percent, as such division would be contrary to section 28A of the Act.

42. Rule 53 of Brewery Rules made in 1961 (para 912 of the Excise manual) before the amendment on 19.7.1975 provided for allowance of a deficiency not exceeding 10% to cover losses in bulk due to evaporation, sullage and other contingencies within the brewery. At that time a separate licence for bottling was not contemplated. The Bottling Rules made in 1969 provided for an allowance of one percent loss in bottling and storage. On 19.7.1975, Rule 53 (para 912 of Excise manual) was substituted and the allowance to cover losses due to evaporation, sullage and other contingencies within the brewery was reduced to 9% in view of the provision in the Bottling Rules providing for an allowance of one percent for losses in bottling and storage. Section 28A was inserted by U.P. Act 9 of 1978 (with a provision that the section shall be deemed always to have been inserted) providing for an allowance to a total extent of 10% in regard to losses within the brewery and the losses in bottling and storage. It is not in

dispute that the process of brewing beer and the process of bottling beer are considered to be distinct and separate processes governed respectively by the Brewery Rules and Bottling Rules. The operations connected with bottling are required to be conducted in a separate premises under a different licence. The process of bottling begins with the transfer of bulk beer from the brewery for bottling. Sub-section (2) of Section 28A refers to an allowance to an extent of 10% not only in regard to losses within the brewery but also to cover losses in bottling and storage. As noticed above, Rule 53 of the Brewery Rules and Rule 7(11) of the Bottling Rules when read conjointly show that the said rules are supplementary to each other and together implement Section 28A of the Act. At all events, the validity of neither Rule 53 of Brewery Rules nor Rule 7(11) of Bottling Rules is under challenge. Be that as it may.

43. The brewery having obtained the bottling licence subject to the special conditions which include the condition in Rule 7(11) of the Bottling Rules, cannot ignore the said Rule and contend that the allowance for losses in bottling could be more than one percent, that is up to ten per cent. In view of the above there is no merit in the contention of the breweries that they are entitled to allowance of ten per cent towards losses in bottling and storage after the excisable article has left the Brewery. The appeals are therefore liable to be dismissed.

Conclusion:

44. CA Nos. 4708-4709/2002 are allowed and the order of the High Court in Civil Misc. WP Nos. 3968/1978 and 4043/2008 are set aside and the said writ petitions are dismissed.

45. CA Nos. 4710, 4711, 4712 & 4713/2002 are dismissed affirming the decision of the High Court dismissing C.M. W.P. Nos. 1375/1978, 3690/1979, 4136/1978 and 4157/1978, though for reasons, somewhat different from the reasoning of the High Court.