
(1991) 07 AP CK 0004

In the Andhra Pradesh High Court

Case No : Writ Appeal No's. 1477, 1479 and 1481/90, 17 and 37/91

The Excise Superintendent and Others

APPELLANT

Vs

Vijay Krishna Wines Pvt. Ltd. and Others

RESPONDENT

Date of Decision : 02-07-1991

Acts Referred:

Andhra Pradesh (Indian Liquor and Foreign Liquor) Rules, 1970 — Rule 10, 4
Andhra Pradesh Excise Act, 1968 — Section 2(17), 21, 28, 34, 45

Citation : (1991) 3 ALT 376 : (1992) 1 APLJ 117

Hon'ble Judges : Sivaraman Nair, J;M.N. Rao, J

Bench : Division Bench

Advocate : The Government Pleader, for the Appellant; T. Raghunath Reddy, for the Respondent

Final Decision : Allowed

Judgement

Sivaraman Nair, J.—These writ appeals arise from a common judgment disposing of writ petitions, 18367,18308,16430,19482 and 18300 of 1988, respectively. Common questions arise in all these five appeals. The facts are also similar. We will refer to the parties as they appeared in the writ petitions.

2. The writ petitioners had applied for import permits for import of liquor from outside the State- from Punjab in the four cases and from Indore and Madhya Pradesh in the case, W.P.No. 16430/88. The permits were valid for different periods. Liquors were released from the distilleries manufacturing the same within the period of validity of the permits and they reached the State of Andhra Pradesh on dates subsequent to the date of expiry of those permits. In the four cases, the imported liquor reached Andhra Pradesh 11 to 17 days after 1-10-1988, whereas in W.P.No. 16430 of 1988, the imported liquor reached Salur check post in Andhra Pradesh on 1-10-1988. The petitioners had paid the countervailing duty on the quantity of liquor to be imported at the rates prevailing at the relevant time, i.e., when the permits are received. The rates prevailing at that time was Rs. 35/- per bulk litre. By a notification dt.

23-9-1988, the Government issued G.O.Ms.No. 657, Revenue, Excise Department enhancing the countervailing duty with effect from 1-10-1988, to Rs. 45/- per bulk litre. The Revenue demanded the petitioners to pay the difference in duty, since the importation was effected after the expiry of validity of the permits. These demands were challenged in the writ petitions. The learned Single Judge allowed the writ petitions. In respect of W.P.No. 16430/88, the court directed refund of the differential duty which the petitioner had paid under protest along with interest at 12% per annum from the date of payment. The other four petitioners had taken delivery of the stocks after giving bank guarantees for 50% of the difference demanded in pursuance of orders of this court. The learned single Judge directed that the bank guarantees would be cancelled. It is that common judgment that is assailed in these writ appeals.

3. It is necessary for us to refer to the relevant provisions of the A.P. Excise Act, the Rules and notifications for the purpose of understanding the controversy in its proper perspective. Section 2(10) of the A.P. Excise Act defines "excise duty or; countervailing duty as meaning" the duty of excise or Countervailing duty, as the case may be, mentioned in entry 51 in List II of the Seventh Schedule to the Constitution". That Entry is in the following terms:

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

(a) alcoholic liquors for human consumption;.."

4. The other portions are not relevant for the purpose of the present case.

5. Section 2(17) defines "import" to mean, except in the phrase "import into India", as, (a) "to bring into any area of the State to which this Act extends from any other area of the State to which this Act does not extend: (b)" to bring into the State otherwise than from a customs station, as defined in Section 2 of the Customs Act, 1962 (Central Act 52 of 1962)". Section 2(23) defines "notification" as meaning "notification published in the Andhra Pradesh Gazette and that the term" notified" shall be construed accordingly". Section 9 which deals with the import of intoxicant reads as follows:

"9. Import of intoxicant:- (1) No intoxicant shall be imported except under a permit issued by such officer, not below the rank of an Excise Superintendent, and on such terms as may be prescribed and on payment of such excise duty or countervailing duty and fees as may be levied under this Act:

Provided that the said officer may subject to such restrictions and conditions as may be prescribed to ensure the Collection of the excise duty or countervailing duty, permit the import of an intoxicant without the payment of the excise duty or countervailing duty:

Provided further that no countervailing duty shall be payable on the intoxicant which being liable to the payment of duty under the Indian Tariff Act, 1934

(Central Act 32 of 1934) or any other law for the time being in force relating to the duties of customs on goods imported into India, has been dealt with according to such law."

(2) The Officer referred to under Sub-section (1) may, by an order, cancel any permit issued under that Sub-section for breach of any of the terms subject to which it was issued or for any other reasons to be recorded in writing therein."

6. Section 21 of the Act provides for excise duty or countervailing duty on excisable articles and is in the following terms:

"21. Excise Duty or countervailing duty on excisable articles:-(1) The Government may, by notification levy an excise duty on any excisable article manufactured or produced in the State under a licence granted under the Act at such rate, not exceeding the rates mentioned in the Schedule, as may be specified in the notification.

(2) The Government, may by notification, levy a countervailing duty on any excisable article manufactured or produced elsewhere in India and imported into the State under a permit issued or licence granted under this Act at such rate as may be specified in the notification which may not exceed the rates of excise duty on similar excisable articles levied under Sub-section (1).

(3) Different rates may be specified in Sub-sections (1) and (2) for different kinds of excisable articles and different modes of levying duties u/s 22".

7. Licences and permits are dealt with in Chapter VI. Section 28 of the Act provides for form and conditions of licence etc. Offences and penalties are dealt with in Section 34. Section 45 of the Act provides for liability of certain things to confiscation and Section 72 deals with the power to make rules. We have been referred to Sub-section (2) (g) of Section 72 regulating the time, place and manner of payment of any duty or fee and the taking of security for the due payment of any duty or fee; and (2) prescribing the authority by which, the form in which and the terms and conditions on and subject to which any licence or permit shall be granted or issued and may, by, such rules, among other matters, (i) fix the period for which any licence or permit shall continue in force; 8. Rule 4 of the A.P. Foreign Liquor and Indian Liquor Rules, 1970 framed in exercise of the powers conferred u/s 72 deals with the application for an import permit. It states that the application for an import permit shall be in "Form F.L.1". The procedure for payment of excise duty and grant of an import permit are provided in Rule 5. The form of permit is provided in Rule 6. Rule 7 obliges the importer to send intimation in Form F.L. 3 to the Excise Superintendent about the arrival of the liquor. On receipt of such intimation, the Excise Superintendent shall assign verification of imported consignment to an Excise Sub-Inspector and such verification shall be completed within three days of receipt of intimation of arrival of consignment. Rule 10 was introduced in its present form on 11-4-1988 and reads as follows:

" 10 (1) The liquor Beer covered by the import permit shall be brought to its destination within the period of validity and permit holder shall send the intimation of arrival of liquor to the Excise Superintendent of the destination as required under Rule 7 of these rules and obtain acknowledgment.

(2) Where it is not possible for the holder of permit to import liquor, or beer within the validity period specified in the permit for reasons beyond the control of the permit holder, he shall apply to the Excise Superintendent for extension of the period of validity of the permit three days in advance of the expiry of the validity in the said permit specifying the reasons necessitating such extension together with the unutilised import permit in original and a certificate from the Officer of the Exporting Distillery Brewery that no IML Beer has been despatched from the Distillery Brewery against such import permit.

(3) On receipt of application under Sub-rule (2) the Excise Superintendent may, after such enquiry as he may consider necessary and, on being satisfied that IML Beer has not been brought against the said permit, extend the validity of the import permit for a reasonable period.

(4) Where it is established that it is not possible to import liquor beer specified in import permit for the reasons beyond the control of the holder of the import permit, the Excise Superintendent may issue Revised Import Permit specifying the validity period by changing the brand, or Brewery Distillery, as the case may be, against the countervailing duty and import fee already paid after collecting differential duty and import fee, if any, provided the application for such Revised Import Permit is made by the holder of the permit three days in advance of the expiry of the validity of import permit specifying reasons necessitating such Revised Import Permit together with the unutilised Import Permit in original and a certificate to the effect from the officer of a the Export Distillery Brewery that no IML Beer has been despatched from the Distillery Brewery against the said import permit.

(5) Where the import of Liquor Beer is not made within the validity of the import permit or within the extended period of the permit under Sub-rule (3) or Revised Import Permit obtained under Sub-rule (4) the countervailing duty and the import fee paid shall accrue to the Government on expiry of the validity specified in the import permit.

(6) The Countervailing duty and the import fee once paid shall not be refunded in any case."

9. The other rules are not necessary for our present purpose.

10. As we have indicated, the controversy involved in this case is as to whether the importers who have paid the countervailing duty in advance at the rates governing at the time of their applications and the dates of issue of the permits are liable to be compelled to pay higher duty due as on the date of actual import?

11. It is necessary in this connection to refer to Form FL-1 in which an importer

is obliged to file his application. That obliges an applicant to give probable time required for transit (number of days) and also a declaration, among others, to the following effect:

"I have gone through the provisions of the Andhra Pradesh Excise Act, 1968 and the rules and I am bound by the provisions.

I agree to pay any duty or fee that is due on the consignment if it is found that it has not been remitted or short remitted...."

12. The permit which is to be issued in Form FL.2 in column 5 provides for the period of the validity of the permit and contains a recital that the permit is granted under and subject to the provisions of Andhra Pradesh Excise Act, 1968 and the rules made thereunder authorising issue of the above permit subject to certain conditions.

13. On a reading of these provisions, we are of the opinion that an applicant for import permit is obliged to intimate to the licensing authority about the probable time required for transit (number of days) and that authority is entitled to fix the period of validity of the permit. If the import is not effected within the period of the permit, consequences which are provided for under the Act and the Rules, have necessarily to follow. We are informed by Counsel for the Revenue that at the time of grant of import permit, the permit-holder is obliged to execute a counter-part agreement containing the above terms, one of which is that the permit holder agrees to pay any duty or fee that is due on the consignment, if it is found that it has not been remitted or has been short-remitted. This naturally involves a determination by the verifying authority as to whether the import duty due has been remitted in full or has not been remitted at all. The permit holder has obviously undertaken to make good the difference in the duty and fee which are due on the consignment, in the event it is found that the duty was not remitted or the duty has been short-remitted.

14. The same question as to what would be the countervailing duty due on imported liquor was considered in W.A.No. 547 of 1981 dt. 11-12-1986. The relevant facts in that case were that the countervailing duty payable upto 1-10-1979 was Rs. 1.26 per bulk litre. From 1-10-1979, it was enhanced to Rs. 2/- per bulk litre. The writ petitioners imported beer into the State sometime after October, 1979 even though the validity of the permits had expired earlier than that date. A Division Bench of this court considered the question as to what was the duty payable on imports which reached the State subsequent to the date on which the enhanced levy was notified by the State and after the expiry of the period of validity of the permit. Almost identical facts arose for consideration in that case. This court held that the Revenue was entitled to collect the differential duty as per the rates extant as per the valid notifications on the date of importation. Specific reference was made to the fact that there was no provision in the Rules at that time for revalidating the permit and, therefore, any application for extension of validity of the permit must be treated as a fresh

application and duty prevailing on the date on which the import was made should be paid. The learned single Judge had referred to the above judgment and distinguished the same. We will deal with this aspect of the case in the course of this judgment.

15. Counsel for the Revenue brought to our notice the fact that the petitioners had agreed, by positive statements in their applications as also by recitals in the counter-part agreement to pay the duty due on the consignments of imported liquor, if the duty due was not remitted or short-remitted. He has also brought to our notice the facts that the petitioners had in their applications, positively stated that they had read the A.P. Excise Act and the Rules made thereunder and were bound by those provisions. A corresponding provision was contained in the import permit as well. We are of the opinion that Counsel for the Revenue is correct in submitting that it was as if the provisions of the A.P. Excise Act and the Rules were bodily incorporated into the permit itself. If that be so, the liquor ought to have been imported within the period of validity of the permit and if it was not so done, the statutory consequences of prosecution u/s 34 and liability of the liquor for confiscation u/s 45 of the Act necessarily would follow. The Revenue only required the petitioners to pay the difference in countervailing duty due on the date of importation. We find it difficult to agree with the learned single judge that the Revenue was bereft of power to do so. We will give our detailed reasons later.

16. The learned single Judge has chosen to follow a decision of a division Bench of this Court in W.A. No. 1583/84 dt. 1-9-1988. What we have to note is that the learned Judge has stated in the judgment itself that in all those cases, the imports were made even before the expiry date stipulated in those permits. The facts are, therefore, distinguishable. In a case where the import is effected after the expiry of the permit and after enhanced rates are notified, different considerations will naturally arise. It may, perhaps, be that the rates prevailing at the time of issue of the permit may continue to govern the import if it is effected within the period of validity of the permit and before enhanced rates of duty were notified. We should caution ourselves by stating that this question does not arise in this case. So, we are not deciding this question. We are only stating that the facts of the case in W.A.No. 1583/84 are distinguishable from the present set of facts. Where an import is effected after the expiry of the permit, such import in terms of the A.P. Excise Act and the Rules made thereunder, can only be an import not in compliance with the statutory provisions or the rules. The manner in which such import shall be dealt with is not the same as the manner which is applicable to importation in accordance with the terms of the permit and the duty payable thereon.

17. The learned single Judge had referred to the judgment in W.P.No. 689/89 dt. 28-7-1989 to support his finding that enhanced duty was not payable. That decision was rendered on the plea that a condition that the importer shall pay the enhanced duty, if any, at the time of verification of the consignment was not

included in the permit and that such a condition could not be introduced at the time of verification of the consignment. Such a situation of a condition other than that which was included in the permit does not arise for consideration in this case. According to us, it was not right to place reliance on the judgment relating to an entirely different controversy, on the question of competence of the licensing authority for introduction of an additional condition at the stage of verification of consignment to support a finding that the licensing authority could not have demanded differential duty.

18. The learned single Judge adverted to the judgment in W.A.No. 547/81 dt. 11-12-1986 and distinguished it for the reason that there was no occasion for the Bench to consider the effect of Rule 10 as it, at present stands, since it was enacted only subsequent to the date of import, with which the Bench was concerned in that case. We find that the question which was considered by the Bench was the same as arises in the present case, namely, as to whether the duty leviable on import effected subsequent to the date of expiry of validity of the permit was the same as was prescribed on the date of issue of the licence or on the date of import. If the import was beyond the period of validity of the permit, which was fixed in the permit itself, we cannot escape the conclusion that the import was not in terms of the permit or the provisions of the Act. The rate applicable at the time of application for the grant of import permit has absolutely no relevance in deciding the duty leviable on the import which was other than in accordance with the permit. The import after expiry of validity of the permit stands entirely on a different footing from the import in accordance with and within the period of validity of the permit. We see nothing wrong in the Revenue deciding that the duty payable shall be the duty due at the time of importation which was effected otherwise than in compliance with the provisions of the A.P. Excise Act, the Rules made thereunder and the permit conditions.

19. We are also of the opinion that the petitioners who have undertaken by specific recitals in the applications that they shall be bound by the provisions of the A.P. Excise Act and the Rules as also to pay the duty due if it is short-remitted or not remitted cannot wriggle out of that undertaking by approaching this court under Article 226 of the Constitution of India. They are bound by the agreement which can be spelt out from the recitals in the application forms read along with the permit conditions; nor can they escape out of the terms and conditions of the counter-part agreement which they had executed. We are also of the opinion that unless Rules 10, (5) and (6) are validly challenged and successfully avoided, the petitioners should have forfeited the countervailing duty remitted by them in advance if the import was not effected before the expiry of the permits. Any import which reached the States thereafter, would naturally have been confiscated u/s 45 of the Act in addition to exposing the importer to penalty u/s 34 of the Act. In the present case, the State, instead of these extreme measures which law permitted them to take, only demanded difference between the duty paid in advance and that due on the date of import. We do not find any justification for interference by this Court with that attenuated form of

action by the Revenue.

20. One other reason which was stated by the learned single Judge to hold that the import after the expiry of the permit should be deemed to be an import in accordance with the permit was that the provision contained in Rule 10 requiring an importer to apply for extension of the permit three days prior to the date of expiry was only directory and not mandatory. Counsel for the Revenue submitted that if that view is to hold good, there will be no provision obliging an importer to file an application for extension of validity before the expiry of the permit. He can, as well, file an application any time, even after expiry of the permit, or he need not even file any application for extension as happened in the present case.

21. Mr. T. Raghunath Reddy, Counsel appearing for the petitioners stressed before us that according to the recitals contained in the tabular statement prefacing the judgment that the import permits which the petitioners had with them were entrusted to the carrier to accompany the transport with necessary endorsements from the originating distillery, and, therefore, they could not have filed applications for extension of time in accordance with the provisions contained in Rule 10, since such applications could have been submitted only along with the unutilised permit itself. He also submitted that none was a case where the import did not commence within the period of validity of the permit: In all these cases, the import was effected from the originating distillery well within the period of validity of the permits, but there was considerable period of time involved in transit due to circumstances beyond the control of the petitioners. This may, perhaps, be a circumstance which may be pleaded in extenuation in penalty or confiscation proceedings under the Act.

22. We have referred to the fact that in the applications in FL-1, the petitioners are obliged to mention the probable date of transit (number of days) vide column 11. The petitioners, therefore, know that the transit has to be effected during the validity of the permit. If it is not so imported, the result will be that the import will be in contravention of the terms of the Excise Act. In this connection, it is pertinent to refer to Section 34 of the Act: .

"34. Penalties for illegal import etc: Whoever, in contravention of this Act or any rule, notification or order made, issued or passed thereunder or of any licence or permit granted or issued under this Act:

(a) imports, exports, transports, manufactures, collects or possesses any in toxicant; or

(b) cultivates the hemp plant, or fails to take the measures prescribed for checking the spontaneous growth or the extirpation of the hemp plant or collects any portion of such plant from which an intoxicating drug can be manufactured; or

(c) taps any excise tree; or

(d) draws toddy from any excise tree; or

- (e) constructs or works any distillery or brewery; or
- (f) uses, keeps or has in his possession any materials still, utensil, implement or apparatus whatsoever for the purpose of manufacturing any intoxicant other than toddy or apparatus whatsoever;
- (g) bottles liquor for purposes of sale; or
- (h) wells or buys any intoxicant; or
- (i) removes any intoxicant from any distillery, brewery or warehouse licensed, established or continued under this Act shall on conviction be punished.
- (ii) in the case of an offence falling under Clause (a) Clause (e) Clause (f) or Clause (i) with imprisonment for a term which shall not be (less than six months) and with fine which shall not be less than five times the value of the duty payable but shall not exceed ten times of such value in case where the value of duty is assessed and
- (iii) in other cases, with fine which shall not be less than five thousand rupees".

23. We have also adverted sketchily to Section 45 of the Act which makes liquor confiscable, if it is imported in contravention of the terms of the Excise Act or the Rules or the permits. The obligation to obtain a permit and to revalidate it is subject to the condition that failure to comply with the obligation contained in the permit will visit the importer with penal consequences. In other words, failure to apply for a permit or to apply for extension within the prescribed time results in drastic penal consequences. A condition, the non-compliance with which creates an offence and is visited with penalty if definitely mandatory and cannot be treated as directory. May be, the offender may plead successfully that non-compliance was not intentional and, therefore, the penalty may be reduced or may not at all" be imposed; but that possibility does not make the condition any the less mandatory. We are, therefore, not in a position to agree with the finding that the prescription of time within which application for extension shall be submitted is only directory and not mandatory.

24. One other important fact which influences our decision in this batch of writ petitions is that what we are dealing with in this case is indirect taxation. A person on whom it is levied and from whom it is collected is entitled to pass it on to the consumer. In that sense, he is not paying out of his pocket. It is not a share of his profits. It is the duty attached to the goods. The incidence passes on to the successive groups of people who either purchases it for further sale or for consumption. In that sense, the petitioners cannot successfully plead before this court that they are affected by the levy. They must have sold the goods after the enhanced levy was notified on 1-10-1988. We, therefore, assume that the petitioners are entitled to pass on the additional liability to their sub-dealers or to the consumer. We do not see anything on record that this did not happen. The obligation of the petitioners to pay the enhanced duty cannot be considered as in any way arbitrary or illegal or oppressive since their income or profit was not

expected to" be affected by the levy. This important aspect was unfortunately omitted from consideration in assuming that what the petitioners were required to pay was not an indirect tax but a direct levy. If the petitioners could have collected the enhanced levy, any direction of this court to refund such payment, or not to collect the differential duty would only mean unjust and undue enrichment of the petitioners at the expense of an unidentifiable mass of consumers. We are of the opinion that this should not have been done.

25. We are, therefore, not in a position to uphold the judgment of the learned single Judge. We hold that the duty due, which the petitioners agreed to pay in case if it was short-remitted was the duty due at the time of import and therefore, the demand for differential duty was wholly justified. We allow these writ appeals and set aside the common judgment in all the writ petitions and dismiss the writ petitions. The parties will suffer their respective costs. Advocate's fee Rs. 350/-.