

(2002) 03 KAR CK 0007
In the Karnataka High Court
Case No : Writ Petition No. 40828 of 1999

Thirumala Distilleries, Tumkur

APPELLANT

Vs

State of Karnataka and Others

RESPONDENT

Date of Decision : 15-03-2002

Acts Referred:

Karnataka Excise (Distillery and Warehouse) Rules, 1967 — Rule 14, 16, 18, 24, 25
Karnataka Excise Act, 1965 — Section 22 (1), 23, 61 (2)

Citation : (2002) ILR (Kar) 2889 : (2002) 3 KarLJ 629 : (2002) 4 KCCR 280 SN

Hon'ble Judges : Mohamed Anwar, J

Bench : Single Bench

Advocate : P.R. Ramesh, for the Appellant; A.N. Jayaram, General and Nilofer Akbar, High Court Government Pleader, for the Respondent

Final Decision : Allowed

Judgement

Mohamed Anwar, J.—By this petition, the petitioner prays:

"(i) Issue a writ of certiorari or any other appropriate writ, order or direction, quashing the order of the third respondent in No. DTCR. 89/94-95, dated 3-6-1995 vide Annexure-G;

(ii) Issue a writ of certiorari or any other appropriate writ, order or direction, quashing the order of the second respondent in No. ECS/44/APP/99, dated 19-8-1999 vide Annexure-J;

(iii) Grant all other consequential reliefs including costs deemed fit to grant in the circumstances of the case in the interest of justice and equity".

2. The impugned Annexure-G is the order dated 3-6-1995 of respondent 3- Deputy Commissioner (Excise), Tumkur District, Tumkur (hereinafter referred to as "R-3"), by which the petitioner-Distillery is directed to pay the total amount of Rs. 21,18,989/- towards the excise duty, sales tax and surcharge, for the unaccounted shortage of 11,624 litres of rectified spirit from the petitioner-Distillery, on the assumption that the said rectified spirit had been illegally

converted by the petitioner into Indian Made Liquor ("I.M.L." for short) and had been sold in the market. The impugned Annexure-J, dated 19-8-1999 is the order of respondent 2-Appeal Authority - Commissioner of Excise, Bangalore ("R-2" for short) passed dismissing the petitioner's appeal u/s 61(2) of the Karnataka Excise Act, 1965 ("Excise Act" in short) against R-3's said order at Annexure-G and affirming the same.

3. The undisputed facts giving rise to this petition may be stated as under:

3.1 The petitioner is a licensed Distillery running under the valid licence granted by the Competent Authority under the provisions of the Karnataka Excise (Distilleries and Warehouse) Rules, 1967 ("the Rules of 1967" in short) for manufacture of I.M.L. Petitioner is hereinafter referred to as "the Distillery". It is represented by its Managing Partner Sri D.S. Kumar.

3.2 On 30-7-1994, when physical stock of rectified spirit of the Distillery was inspected by the concerned Distillery Officer, he found the short-ago of 11,624 bulk litres thereof. This shortage was not accounted for by the Distillery. Therefore, on the same day, Criminal Case No. 1/94-95 for the offence u/s 36 of the Excise Act against the Distillery was booked by the said officer and the copies of the F.I.R. were submitted by him to R-2 and R-3.

3.3 On 30-8-1994, the said D.S. Kumar, Managing Partner of the Distillery (hereinafter referred to as "the M.D.") gave a representation to the Commissioner of Excise, Government of Karnataka, Bangalore, requesting him to have the said case No. 1/94-95 compounded Departmentally as he was ready to pay the compensation fee in respect of the said deficit rectified spirit, per Government Notification No. FD II PN 93, dated 30-3-1993. A photocopy of this representation is produced at Annexure-B and the true English copy thereof at Annexure-B1. Annexure-B was followed by his similar representation dated 24-9-1994 given to the concerned Assistant Commissioner of Excise, Tumkur, the photocopy whereof is at Annexure-A and its true English copy at Annexure-A1. Thereupon, in exercise of the power u/s 45 of the Excise Act, the order dated 12-12-1994, vide Annexure-D, was passed by R-3 compounding the said Criminal Case No. 1/94-95 against the Distillery imposing Rs. 5,000/- as compensation; and further directing additional payment of the total amount of Rs. 27,52,000/- on account of "current duty, sales tax and surcharge". That order was challenged in Appeal No. ECS 1 APP 95 u/s 61 of the Excise Act before R2-Commissioner, who, by his order dated 20-4-1995, vide Annexure-E, set aside R-3's order at Annexure-D, dated 12-12-1994 and remitted the case to him with a direction to decide it afresh by a speaking order after giving opportunity of hearing to the petitioner.

4. Thereafter, the matter was taken up afresh on the file of R-3 for hearing. Then a detailed written statement by way of submissions of petitioner was filed before R-3 by its M.D., vide Annexure-F, contending that in the light of legal propositions laid down by various decisions of this Court and of the Hon'ble Supreme Court

stated therein, that different imposts sought to be levied on the said missing quantity of the "rectified spirit" from the Distillery cannot be imposed in law. Thereafter, R-3 passed his fresh speaking order dated 3-6-1995, vide Annexure-G, rejecting the contention of the Distillery and imposing the excise duty of Rs. 11,50,875/-, Sales Tax (S.T.) of Rs. 8,41,838/-, and Surcharge on S.T. at Rs. 1,26,989/-, totalling Rs. 21,18,989/- against the Distillery on the assumption that the said missing quantity of rectified spirit was used by it in clandestine manufacturing and sale of I.M.L. This amount was levied under that R-3's order in addition to the said compounding amount of Rs. 5,000/-.

5. It is not in dispute that the compensation of Rs. 5,000/- compounded Departmentally in the said Criminal Case No. 1/94-95 against the Distillery was paid by it to the respondent-Excise Department on 6-6-1995.

6. As regards the said order of R-3 under Annexure-G relating to payment of the said amount of Rs. 21,18,989/-, the same was challenged before this Court in W.P. No. 21808 of 1995. That writ petition was dismissed by order dated 24-6-1999 of this Court, vide Annexure-H, on the ground that the Distillery had the efficacious remedy of appeal before R-2; and, therefore, the Distillery was permitted to prefer the said appeal within four weeks.

7. After disposal of the said W.P. No. 21808 of 1995, the petitioner preferred its appeal u/s 61(2) of the Excise Act before R2-Commissioner against the said portion of R-3's order under Annexure-G. That appeal came to be dismissed by R-2's order dated 19-8-1999, vide Annexure-J, agreeing with the conclusion of R-3 that the said missing quantity of rectified spirit from the Distillery had been converted into I.M.L., and the State was entitled to collect the said amount of Rs. 21,18,989/- towards "excise duty, sales tax and surcharge", and further held that "The appellant. . . Having given consent to compound this case Departmentally, the appellant cannot go back after compounding the case". It was also held that in terms of the order of this Court in said W.P. No. 21808 of 1995, the appeal was required to be filed by the Distillery before R-2 on or before 21-7-1999 and that the same having been filed on 26-7-1999 was barred by time.

8. As regards R-2's observation in his impugned appellate order, vide Annexure-J, that the Distilleries appeal filed about 5 days after 21-7-1999 was barred by time and, therefore, was liable to be rejected on this score also, I need to state at once that in the peculiar circumstances, the four weeks' time granted by this Court's order dated 24-6-1999 under Annexure-H for the Distillery to prefer its appeal before him (R-2) cannot be too technically calculated so as to treat the delay of three or four days as entailing dismissal of the appeal regardless of the ends of justice. Therefore, in the facts and circumstances of the case, it is just and reasonable to infer that the said period of four weeks had been bona fide construed by the petitioner, as was contended by its learned Counsel, as ending on 24-7-1999; and that the following day i.e., 25-7-1999, being a Sunday, the appeal filed on 26-7-1999 before R2-Commissioner was in time. In that view of the matter, the delay of two days caused in filing of the appeal was entitled to be

and should have been condoned, and the same could not have been treated by R-2 as a ground for dismissal thereof.

9. Mr. P.R. Ramesh, learned Counsel for petitioner, invited the Court's attention to the relevant provisions of the Excise Act and the Rules of 1967 viz., Sections 22 and 45 of the Act and Rules 14, 16, 18, 24 and 25 of the Rules of 1967 read with Section 2(8), 2(18) and 2(26); and Rules 1-A(b) and 2-C of the Karnataka Excise (Excise Duty and Fees) Rules, 1968 (the Rules of 1968" in short), and relying on the authorities mentioned below, argued that the impugned orders of R-2 and R-3, imposing levy of the said amount of Rs. 21,18,989/- against the Distillery is wholly misconceived and arbitrary. He further contended that R-3 had no authority and jurisdiction under the Excise Act or the Rules framed thereunder to impose the said taxes on the Distillery on the notional basis that the said missing quantity of rectified spirit was used by it to manufacture I.M.L. and for sale thereof. The following decisions were cited by him in support of his contentions:

1. K.H.K. Rehman v. State of Mysore ILR 1973 Mys. 124
2. K.H. Abdul Salam v. State of Karnataka 1980(1) Kar. L.J.104
3. Gemini Distilleries (Private) Limited v. State of Karnataka and Ors.,
4. United Breweries and Anr. v. State of Karnataka and Anr.,
5. Synthetics and Chemicals Limited v. State of Uttar Pradesh and Ors.,
6. Deccan Sugar and Abkari Co. Ltd. Vs. Commissioner of Excise, A.P.,
7. M. Narasimhaiah Vs. Deputy Commissioner for Transport, Bangalore Division, Infantry Road, Bangalore and Another,
10. The further contention of Mr. Ramesh was that the R-3's impugned order, vide Annexure-G, was passed by him in flagrant violation of the authoritative pronouncements of this Court and of the Supreme Court in the above stated decisions, though they were brought to his notice by mentioning them in the petitioner's written statement, vide Annexure-F. It was, therefore, submitted that R-3 be proceeded against for contempt of Court. To support this contention, Mr. Ramesh proposed to rely on a decision of this Court in Habeeb Khandasari Industries v. Karnataka Appellate Tribunal and Anr. 1987(1) Kar. L.J. 57
11. In support of the impugned orders, the detailed counter dated 18-1-2000 was filed by learned High Court Government Pleader representing respondents. Besides, to meet the aforementioned citations produced by Mr. Ramesh, learned Counsel for petitioner, the written reply argument of respondent was also filed contending that those authorities are not applicable to the case on hand and that the impugned orders are perfectly justified in law. A photocopy of the certified copy of a Division Bench decision of this Court in State of Karnataka and Ors. v. J.P. Distilleries and Ors., was produced for respondents. Besides, a Full Bench decision of this Court in Umesh S. Naik Vs. Karnataka Food and Civil Supplies

Corporation, was also relied on for the respondents in support of the propositions that once the offence was willingly got compounded by an accused, he cannot thereafter come to Court questioning the order of the compounding authority. Obviously, it is not a relevant decision for our purpose. Learned Government Pleader Ms. Nilofer Akbar, as also the learned Advocate General at a later stage of argument, vehemently argued for respondents supporting the validity of the impugned orders. The gravamen of their argument canvassed in their support was that from the failure of the Distillery to account for the said missing quantity of the rectified spirit, the inescapable conclusion which follows and has been rightly drawn by both R-3 and R-2 is, that the petitioner had unlawfully manufactured I.M.L. by using the said rectified spirit and has sold the same and, therefore, it is liable to be assessed for the said taxes, and it is bound to pay the same. It was further contended by them that the petitioner's plea taken before R-2 and R-3 and in his representations, vide Annexure-B (B1) and A (A1) that, he could be charged with a fee of 50 ps. per litre of the said missing quantity of rectified spirit as per Rule 2(c) of the Karnataka Excise (Excise Duty and Fees) Rules, 1968 ("the Excise Duty Rules" in short), and as per Notification No. FD II PN 93, dated 30-3-1993 was legally untenable, since the said fee had already been charged against the issuing Distillery and the question of doubly charging it against petitioner does not arise under any of the provisions of the Act or the Excise Duty Rules of 1968.

12. As has been stated above, admittedly, under the impugned orders of R-3 and R-2, the petitioner has been assessed to and charged for the said "excise duties, sales tax and surcharge", totalling Rs. 21,18,989/-, solely on the basis of the presumption or assumption that the petitioner-Distillery has manufactured I.M.L. using whole of the said missing quantity of 11,624 litres of rectified spirit and has sold the same clandestinely and, therefore, it is liable to pay the said amount towards various taxes payable thereon. The petitioner, on the other hand, has stoutly denied the allegation of its manufacturing of I.M.L. out of the said missing quantity of rectified spirit and selling the same to the public.

13. The earliest version given by the petitioner about the said shortage of 11,624 litres of rectified spirit from its Distillery is to be found in its representation dated 30-8-1994 vide Annexure-B (B1) given to the Commissioner of Excise, Government of Karnataka, Bangalore, and the same is reproduced below:

".....

I, D.S. Kumar, Thirumala Distilleries, Siddhartha Nagar, Tumkur, submit that during the last week of July, I had gone on a pilgrimage, along with my family and during that period, in our Distillery, it was found that there is a deficit of 11,624.000 Ltrs. of liquefied spirit in our books of accounts and accordingly, the Excise Inspector, Thirumala Distilleries, Siddharthanagar, Tumkur, has filed Case No. 1/94-95. This mistake has been committed by my Manager, during the time I was out of station.

Hence, I request you to pardon the said mistake, then settle the case within the Department, and I am ready to pay the compensation fee in respect of deficit rectified spirit vide Notification No. PD II PN 93, dated 30-3-1993.

Yours faithfully, (D.S. KUMAR)"

In the present writ petition, it is stated that during the relevant period, certain repairs were undertaken in the Distillery after obtaining permission from R-4, the Superintendent of Excise-in-charge of petitioner-Distillery (vide paragraph 5) and during that period its M.D. had gone on a pilgrimage (vide paragraph 7), and that during that period, there had been leakage and evaporation of the rectified spirit from its tank, as a result of which, the said shortage was found. The material fact that the Distillery was under repair with the permission of R-4, the Superintendent of Excise, is not specifically denied by the respondent and that the same is not in dispute.

14. Considering the rival contentions of both sides, the material questions of law and fact which arise for my decision for effective disposal of the petition are:

(i) Whether R-3 has the authority and power under the Excise Act or the relevant Rules framed thereunder to assess and levy the imposts in question against the petitioner-Distillery on the assumption that 11,624 litres of rectified spirit found missing from the Distilleries tank on 30-7-1993 was used by it in manufacture of I.M.L. and that whole quantity of that I.M.L. was surreptitiously sold to unknown person/persons?

(ii) If so, are the imposts of excise duty, sales tax and surcharge in question levied by R-3 are legally correct and sustainable?

15. Reg. Question No. (i).--Sub-section (1) of Section 22 of the Excise Act is the material taxing provision for our purpose which runs:

"22. Excise duty or countervailing duty on excisable Articles.--(1) An excise duty at such rate or rates as the State Government may prescribe, shall be levied on any excisable article manufactured or produced in the State under any licence or permit granted under this Act.

(2) A countervailing duty at such rate or rates as the State Government may prescribe.....

(3)..... .".

This power of the State to legislate on excise duty on excisable articles is derivable from Entry 51 of List II of the Seventh Schedule of the Constitution. The material portion thereof is reproduced below:

"51. Duties of excise on the following goods manufactured or produced in the State and countervailing duties.....

(a) alcoholic liquors for human consumption;

(b).....".

Likewise, the State Legislature has, deriving its power from Sub-clause (3) of Article 246 read with Entry 54 of List II of Seventh Schedule, enacted the Karnataka Sales Tax Act, 1957 providing for the levy of taxes on "the purchase or sale of goods". Sections 5, 5-A to 5-C, and 6 are the charging provisions of this Act.

16. There is no dispute that the rectified spirit is the liquor within the meaning of this term denned by Sub-section (18) of Section 2; but, it is a spirit "unfit for human consumption". The "Rectified Spirit" is defined by Sub-clause (f) of Rule 2 of the Karnataka Excise (Rectified Spirit) Rules, 1967 as "the plain indentured alcohol of a strength not less than 52 degrees OP and includes absolute alcohol". This same definition is contained in Sub-clause (b) of Rule 1-A of the Excise Duties Rules, 1968. Since it is admittedly unfit for human consumption, it falls outside the scope of Entry 51 in List II of Seventh Schedule of the Constitution and thus beyond the competence of the State to make law levying any excise duty on it and, rightly, the State has not done so under the Excise Duties Rules, 1968 (vide the cases of K.H. Abdul Salam, *supra*; Gemini Distilleries (Private) Limited, *supra*; and Synthetics and Chemicals Limited, *supra*).

17. Now, advertng to the justifiability or validity or otherwise of the presumption to be drawn against a Distillery of its having converted the said quantity of the missing rectified spirit from its Distillery into I.M.L. and having sold it to some purchaser, it must be stated at once that there is no express provision either under the Karnataka Excise Act or under the Karnataka Sales Tax Act, 1957 or for that matter under the relevant Rules framed thereunder providing for such a presumption. Then, the moot point for consideration would be, in the absence of any express provision of law in these statutes, could the authorities be permitted to draw such a presumption from the mere fact that the said quantity of rectified spirit was found missing from the Distillery; and that, assuming for a moment, its disappearance was not satisfactorily accounted for by the petitioner. In this behalf, we have to bear in mind that we are dealing with the taxation statutes.

18. The exposition of the law in regard to interpretation of the statutory provisions relating to taxation made by Rowlatt, J., in *Cape Branday Syndicate v. Inland Revenue Commissioners* (1921) 1 KB 64 needs be recalled with advantage.

"..... It simply means that in a taxing Act, one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used".

The above principle of construction of taxing statutes is quoted with approval by Supreme Court in *Member-secretary, Andhra Pradesh State Board for Prevention and Control of Water Pollution Vs. Andhra Pradesh Rayons Ltd. and Others*, of its judgment, observing:

"6. It has to be borne in mind that this Act with which we are concerned is an Act imposing liability for cess. The Act is fiscal in nature. The Act must, therefore, be strictly construed in order to find out whether a Liability is fastened on a particular industry. The subject is not to be taxed without clear words for that purpose; and also that every Act of Parliament must be read according to its natural construction of words. There is no room for any intendment. There is no equity about a tax. There is no presumption as to tax. Nothing is to be read in, nothing is to be implied. One has to look fairly at the language used. See the observations in Cape Brandy Syndicate's case, *supra*. This Court has also reiterated the same view in Gursahai Saigal Vs. Commissioner of Income Tax, Punjab,

In this connection, the dictum of Lord Simon stated in *Ransom v. Higgs* (1974)3 All ER 949 calls for notice. He said:

"..... In some fiscal systems there is a general provision that any transaction the paramount object of which is the avoidance of tax shall be void for that purpose though valid for all other purposes. Our own fiscal system has no such provision, but rather attempts to deal with tax avoidance schemes specifically as they come to notice. The inevitable result of this and of other matters is a fiscal code of such complexity that many ordinary citizens, particularly those engaged in commerce and industry, seek the aid of experts in handling the tax affairs of themselves and the corporations for which they have responsibility; and, since the burden of taxation is heavy (in some circumstances punitive). there is a strong incentive for such experts to devote their talents to devising tax avoidance schemes for clients, actual or potential, and for such clients to adopt the schemes devised. It may seem hard that a cunningly advised tax-payer should be able to avoid what appears to be his equitable share of the general fiscal burden and cast it on the shoulders of his fellow citizens. But for the Courts to try to stretch the law to meet hard cases. is not merely to make bad law but to run the risk of subverting the rule of law itself. ...".

The case in *Narasimhaiah*, *supra*, was cited for the petitioner in support of the proposition for strict construction of provisions relating to levy of tax.

In *Commissioner of Sales Tax, Uttar Pradesh Vs. The Modi Sugar Mills Ltd.*, the Constitution Bench of the Supreme Court at paragraph (11) of its judgment, laid down the trite rule of construction of the taxing statutes thus:

"(11). In interpreting a taxing statute, equitable considerations are entirely out of place. Nor can taxing statutes be interpreted on any presumptions or assumptions. The Court must look squarely at the words of the statute and interpret them. It must interpret a taxing statute in the light of what is clearly expressed: it cannot imply anything which is not expressed; it cannot import provisions in the statutes so as to supply any assumed deficiency".

Therefore, in the light of these authoritative pronouncements and the relevant provisions in Section 22(1) of the Excise Act and Sections 5, 5-A, 5-C, 6, and 6-B

to 6-D of the Sales Tax Act, it clearly emerges that there was absolutely no legal justification for R-3 to draw the presumption from the unaccounted shortage of the said quantity of the rectified spirit from the petitioner-Distillery, that the same was converted into I.M.L. and was sold by it clandestinely to some unknown purchaser or purchasers.

19. Apart from the above legal position, various provisions of the Rules of 1967 envisage the active participation of the officials of respondent-Excise Department in processing through the various legal checks and controls, the delivery of possession, storage and utilisation of the rectified spirit by the Distillery, and issuance of its product. They violently militate against any such presumption as has been drawn by R-3 in support of his impugned order, vide Annexure-G, as also by R-2 for his impugned appellate order at Annexure-J. It is not in dispute that in compliance with the dictates of Rules 14 and 17, the "Supervisory Staff" for the petitioner-Distillery was appointed by R2-Commissioner and that R4-Superintendent of Excise was in charge of the Distillery. As provided by Rule 17, the "Distillery Officer" of the official staff so appointed by R2-Commissioner for the Distillery, was residing in the quarters provided within the premises of the Distillery. Rule 20 contemplates that:

"20. Supervision of distillery.--The distillery shall be under the direct supervision of the Distillery Officer who shall be subordinate to the Deputy Commissioner and carry out all the provisions of these rules either in person or through his subordinates as the Deputy Commissioner may from time to time direct".

Rule 21 states:

"21. Admission into distillery of the persons.--No person other than the licensee or his authorised vendors or agents or employees of the Distillery shall be allowed to enter the distillery premises without the permission of the Distillery Officer. A list of such employees of the Distillery shall be furnished to the Distillery Officer by the Distiller".

Rule 22 enjoins:

"22. Control over the persons entering the distillery.-All persons entering the distillery shall be under the orders of the Distillery Officer in respect of their conduct and proceedings within the distillery and shall be liable to search on their exit, at the discretion of the Distillery Officer".

Rule 16 is a very material provision which casts a very important duty on the Distillery Officer and the Distiller both. It runs:

"16. Receipt of spirit into the Distillery.--No spirit shall be received into Distillery unless they are accompanied by the permits issued by the Deputy Commissioner. All such spirits shall be gauged and proved on their arrival in the presence of the Distiller or his representative, who will be responsible for the quantity and strength of the spirits received and stored in the warehouse, which are under the joint lock and key of the Distillery Officer and the Distiller"".

(emphasis supplied)

A conjoint reading of all these relevant provisions leads to inescapable conclusion that without the connivance or the knowledge or consent of the concerned Distillery Officer, the missing of any considerable quantity of the rectified spirit from its tank, much less the huge quantity of 11,624 litres, could not be possible. In view of these statutory regulatory measures to be taken by the "Supervisory Staff" appointed for the petitioner-Distillery, it becomes rather preposterous for R-3 and R-2 to proceed to levy the aforesaid duties in question against petitioner on the presumption that the petitioner has distilled and manufactured I.M.L. out of the said quantity of rectified spirit and had sold the same clandestinely to some persons.

20. It was also incidentally submitted for respondents that the petitioner is bound to pay the said tax amounts in compliance with the impugned orders because in his representations dated 30-8-1994 vide Annexure-B, and dated 24-9-1994 vide Annexure-A, it was agreed by him that he would pay "the fees" on the missing quantity of rectified spirit in terms of the Government Notification No. FD II PN 93, dated 30-3-1993 and also because Rule 25 of the Rules 1967 makes it obligatory on his part to pay the said duties. I do not find any legal force and substance in this contention also for the reasons stated herein below. The said Government Notification dated 30-3-1993 was produced by the learned Government Pleader. It contains the publication of the Karnataka Excise (Excise Duties and Privilege Fee) (Amendment) Rules, 1993 (hereinafter referred to as "the Amendment Rules of 1993"). These Rules bring about certain amendment in Rules 2-B, 2-C, 3, 3-B and in Schedules A, B and C of the Karnataka Excise (Excise Duties and Privilege Fee) Rules, 1968 (hereinafter referred to as "the Rules of 1968"). The Rules of 1968 are framed by the Government of Karnataka in exercise of the powers conferred by Section 71 of the Excise Act for giving effect to Sections 22, 23 and 66 thereof. As indicated, Section 22 is the main provision of the Act which creates liability to pay "excise duty" or countervailing duty, as the case may be, on excisable articles at the rates as prescribed by the State Government. Section 23 makes provision for the Government to prescribe the modes for levy of the excise duty and countervailing duty contemplated in Section 22. Section 66 provides for re- fund of duty in respect of manufacture or production of any liquor in one State and exported to another State, in the circumstances stipulated thereunder. Rule 2 of 1968 Rules lays down the manner in which the "excise duties" are to be levied on the excisable articles specified in column (2) of Schedules A and B annexed thereto at the rates specified in corresponding entries in column (3) thereof. A perusal of the contents of Schedules A and B show that the rectified spirit is not made taxable, of course rightly, to any excise duty. Nor is it the case of respondents that under the impugned orders any such duty was levied against the petitioner-Distillery. Going by the Entry 51 in List II of the Seventh Schedule of the Constitution, "rectified spirit" being not fit for human consumption, cannot be the subject of State Legislation for the purpose of levying excise duty thereon [vide K.H.K.

Rehaman's case, supra and an unreported decision of this Court in Gemini Distilleries (Private) Limited, supra]. Further, Rule 2-C of the Rules of 1968 provides for collection of fee on rectified spirit or denatured spirit. Rule 2-D provides for collection of fee on the rectified spirit exported outside the State of Karnataka for the purpose of manufacture of potable liquors at the rate specified therein. Therefore, this Rule is not relevant for our purpose. Rule 2-C prohibits a licensee "who produces rectified spirit or manufactures denatured spirit" from issuing the same from his distillery without paying the fee at the rate specified in Schedule C. Sub-clause (c) thereof prohibits export by a licensee of the rectified spirit for use other than the manufacture of liquor or the denatured spirit unless he pays the fees specified in Schedule C on such rectified spirit or denatured spirit. By Amendment Rules of 1993, the rate of fee payable on such rectified spirit under Rule 2-C is shown in Schedule C at Rs. 0.50 per bulk litre. It is not the case of respondents under their impugned orders that the petitioner-industry was liable to pay this prescribed fee at 50 ps. per bulk litre on the said quantity of missing rectified spirit. On the other hand, it is their case that the fee at this rate on the rectified spirit in question was liable to be paid by the licensed producer under Sub-clause (a) of Rule 2-C and that the same had been duly collected from him. Of course, it was submitted by Mr. Ramesh that as represented by petitioner's M.D. in his representations at Annexure-A and C, he was agreeable to pay the fee at 50 ps. per bulk litre on the whole of the said missing quantity of rectified spirit as contemplated by Sub-clause (c) of Rule 2-C. But then, the question would be whether the petitioner was under any legal liability under Sub-clause (c) of Rule 2-C to pay any such fee, albeit he was willing to pay the same. This provision states:

"2-C. Fee on rectified spirit or denatured spirit.--

(a) xxx xxx xxx

(b) xxx xxx xxx

(c) No licensee shall export.--

(i) rectified spirit for use other than the manufacture of liquor; or

(ii) denatured spirit, unless he pays the fees specified in Schedule "C" on such rectified spirit or denatured spirit".

There is no material brought on record by either side nor is it the case of any party that the petitioner-Distillery was granted licence under the relevant rules to produce or manufacture the rectified spirit and to issue and deal with the same, so as to attract applicability of Sub-clause (c) of Rule 2-C of the Excise Duties Rules, 1968 so as to saddle it with liability to pay the said fees. Therefore, in the absence of any legal obligation on the part of the petitioner, it cannot be compelled to pay the fees stipulated in Sub-clause (c) of Rule 2-C, despite he having expressed his willingness to pay the same through his representations, vide Annexure-A and C.

21. Now, let me deal with the contention of respondents that by virtue of Rule 25 of the Rules of 1967, the petitioner is liable to pay the duties levied under the impugned order at Annexure-G of R-3. Rule 25 reads:

"25. Distiller to account deficiency in stock.--An account shall be taken of the stocks of spirits kept in the distillery at such intervals not exceeding three months and in such manner as the Deputy Commissioner may direct. The distiller shall pay such duty on all spirits which are not forthcoming and which could not be accounted for to the satisfaction of the Deputy Commissioner, excess of an allowance of one per cent of wastage. The wastage shall be calculated at the end of every twelve months or at the end of licence period, if it is shorter, for purpose of calculating duty on the excess as aforesaid:

Provided that if it is proved to the satisfaction of the Deputy Commissioner or any officer appointed by him that any deficiency in excess of the margin allowed could not have been prevented by the exercise of proper care and precaution, the payment of duty on such deficiency may be waived".

22. The respondents' contention was that since the above Rule 25 makes the Distiller liable to pay "such duty on all spirits which are not forthcoming and which could not be accounted for to the satisfaction of the Deputy Commissioner, in excess of an allowance of one per cent of wastage", the petitioner was liable under this provision to pay the duties assessed and levied against it by R-3 under his impugned order. Elaborating the argument on this point, it was submitted that considering the definition of "spirit" contained in Section 2(26) as defined to mean "any liquor containing alcohol and obtained by distillation whether it is denatured or not;", the rectified spirit squarely falls within the purview of this definition and, therefore, the petitioner having failed to account for the said shortage of rectified spirit, he is bound to pay the duties in question as determined by R-3 per his order Annexure-G. This contention has to be rejected outright for the reasons already discussed hereinabove and in view of my conclusion arrived at that the State Legislature is incompetent to make law for levy of any "excise duty" on the "rectified spirit" in view of the description of the nature of the "excisable article" mentioned in Entry 51 of List II of Seventh Schedule of the Constitution. Rule 25 has to be read as subservient to the mandate of the Constitution contained in Entry 51 of List II.

23. Apart from the above, a plain reading of the provisions in Section 22 of the Excise Act read with the contents of Entry 51 of List II in Seventh Schedule to the Constitution, makes it crystal-clear that the excise duty could be levied on any such excisable article only when the event of its manufacture or production actually takes place. In the instant case, the excisable article in question on which duties are assessed under the impugned orders is the I.M.L. Admittedly, there is not an iota of material brought on record by respondents in prime facie proof of the fact that any quantity of I.M.L. much less the whole quantity of the I.M.L., which is the subject of levy of the excise duty under the impugned orders, was, in fact, manufactured or produced by the petitioner out of the said missing

quantity of the rectified spirit from the Distillery. The fact of production of the said quantity of I.M.L. is the respondents' figment of imagination which has already been held as unwarranted in law. So also the sales tax in question levied against the Distillery is uncalled for. The law on this point is expounded by Supreme Court in J.K. Jute Mills Co. Ltd. Vs. The State of Uttar Pradesh and Another, of its judgment. Dealing with the constitutional validity or otherwise of the Uttar Pradesh Sales Tax (Validation) Act, 1958 (Uttar Pradesh 15 of 1958), the Supreme Court said:

"(11) The point for decision, stating it succinctly, is whether the Validation Act is within the ambit of Entry 54 in List II of the Seventh Schedule to the Constitution. That entry confers on the States authority to enact a law with respect to tax on sales of goods. Now what is the extent of that authority? There must be in fact a sale as recognised by law. It is only then a tax could be imposed...".

24. Therefore, for all the reasons discussed above and in view of my conclusions arrived at, my answer to material question No. (1) is in the negative.

25. As regards the Division Bench judgment of this Court in W.A. Nos. 3501 to 3540 of 1997 decided on 16-3-2001, the photocopy of the certified copy whereof was produced for the respondents, it is not made clear by learned High Court Government Pleader/learned Advocate General for what legal proposition this judgment was produced. However, on going through the same, I find it of no help to the respondents' case as it is not of any relevance to the question at issue.

26. Reg. Question No. (ii).--In view of my negative finding on material question No. (1), obviously this question does not survive for consideration.

27. As regards petitioner's submission that contempt of Court proceedings be initiated against R-3, I find the same, in the facts and circumstances, not entitled to acceptance. In the reply arguments filed for R-3, it has been explained that in good faith and according to his understanding of the law and facts, he found the decisions cited by the petitioner before him in course of the enquiry proceeding as distinguishable and inapplicable.

28. For the reasons aforesaid, the petition is entitled to succeed. Hence, the following:

ORDER

The petition is allowed. Rule is made absolute. The impugned order of R-3 vide Annexure-G bearing No. DTCR. 89/94-95, dated 3-6-1995 and the impugned order of R-2 vide Annexure-J bearing No. ECS/44/APP/99, dated 19-8-1999 are quashed. The amount of Rs. 11,00,000/-, if deposited by the petitioner with R-3 in compliance with the interim order dated 7-6-2000, shall be refunded to the petitioner's representative - Managing Partner, on or before 30th April, 2002, failing which the said amount becomes payable to the petitioner with simple interest at 12% p.a. thereon calculated from the date of its deposit till full

payment thereof to the petitioner and that the latter shall be entitled to refund of the same with interest accordingly.

Parties to bear their own costs in the circumstances.