(2023) 11 PAT CK 0043

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No. 4882, 4911, 5376, 5762, 7461, 7473 Of 2020, 6561 Of 2021

United Spirits Limited APPELLANT

Vs

State Of Bihar RESPONDENT

Date of Decision : 24-11-2023

Acts Referred:

Constitution Of India, 1950 — Article 12, 14, 226
Bihar Prohibition and Excise Rules, 2021 — Rule 20, 24
Bihar and Orissa Excise Rules, 1919 — Rule 147, 147(b), 147(c)(d)(f), 147(i)(b)
Bihar Value Added Tax Rules, 2005 — Rule 73
Bihar Excise Act, 1915 — Section 2(6), 2(9), 2(15), 2(21), 2(22), 2(25), 19(4), 27, 28, 43, 93
Bihar Excise Act (Amendment) Act, 2016 — Section 23
Bihar Value Added Tax Act, 2005 — Section 3, 3A
Bihar Prohibition and Excise Act, 2016 — Section 2(21), 2(22), 2(25), 2(61), 27, 92, 92(1), 92(2), 92(3), 93, 93(3)

Citation : (2023) 11 PAT CK 0043

Hon'ble Judges : P. B. Bajanthri, J;Arun Kumar Jha, J

Bench : Division Bench

Advocate : Gopal Jain, Satyabir Bharti, Aditya Mukherjee, Aditya Thyagarajan, Divya Jhalani, P.K. Shahi, Vikash Kumar, Lalit Kishore

Judgement

1. In these bunch of writ petitions, the petitioners have questioned the validity of various orders passed by the official-respondents like the Commissioner of Excise, Government of Bihar, Patna (for short 'Excise Commissioner'), Bihar State Beverages Corporation Limited (for short 'BSBCL'), a Joint Commissioner, State Taxes/Commercial Taxes and the Assistant Commissioner of Excise, Patna (for short 'Assistant Commissioner'). In the cases mentioned herein below; the petitioners have claimed for the refund of similar duties, the cases are:

"(1) In CWJC 4882 of 2020, the petitioner has challenged the order dated 25.09.2019 (Annexure-1), passed by the Commissioner of Excise, Bihar, and the order dated 22.07.2019 (Annexure-2) passed by the Joint Commissioner, State

Taxes/Commercial Taxes, Barh Circle and consequently, sought refund of Excise Duty (2015-16), Bottling and License Fee (2015-16 & 2016-17), License Fees under Section 19B(2015-16 & 2016-17) and 19C(2016-17) (subject levies) and Value Added Tax (In short 'VAT') for the financial year 2015-16, amounting to Rs. 4,00,00,114/- along with applicable interest from the Respondents therein. Additionally, the petitioner has challenged the order dated 22.01.2020 (Annexure-3), passed by the Assistant Commissioner of Excise, Patna, by which he has directed adjustment of the amount refundable to the petitioner from the dues of the Bihar State Beverages Corporation Ltd.

(2) In CWJC 4911 of 2020, the petitioner has challenged the order dated 25.09.2019 (Annexure-1), passed by the Commissioner of Excise, Bihar and consequently claimed for the refund of Excise Duty, Bottling and License Fee, Import Fee (Subject Levies) and Security Deposit for the year 2015-16 which amounts to a total of Rs.1,11,84,189/- by Respondents therein. Additionally, the petitioner has challenged the order dated 22.01.2020, passed by the Assistant Commissioner of Excise, Patna, by which he has directed adjustment of the amount refundable to the petitioner from the dues of the Bihar State Beverages Corporation Ltd.

(3) Further in CWJC 5376 of 2020, there are five petitioners who have challenged the order dated 25.09.2019 (Annexure-15), passed by the Commissioner of Excise, Bihar. Additionally, the petitioners have challenged the order(s), both dated 09.12.2019 (Annexure-17), passed by the Assistant Commissioner of Excise, Patna, by which he has directed adjustment of the amount refundable to the petitioner from the dues of the Bihar State Beverages Corporation Ltd.

The petitioners are claiming refund of the subject levies which are as follows:

(a) Petitioner 1 is claiming refund of Excise Duty deposited on stocks which have been drained out, exported to other states and decanted in the factory, Bottling fee on stocks which have been drained out and decanted and Distributor's license fees on stocks which have been drained out, exported to other states and decanted for the year 2015-16 amounting to Rs. Rs. 4,71,51,884.00 and Advance excise duty, advance bottling fee, advance distributor's license fee, advance label registration fee and advance license fee for 2016-17 amounting to Rs. Rs.10,54,448.00.

(b) Petitioner 2 is claiming refund of Excise Duty deposited on stocks which have been drained out, exported to other states and decanted in the factory, Bottling fee on stocks which have been drained out and decanted and Distributor's license fees on stocks which have been drained out, exported to other states and decanted for the year 2015-16 amounting to Rs. 7,32,88,572.00 and Advance excise duty, advance bottling fee, advance distributor's license fee, advance label registration fee and advance license fee for 2016-17 amounting to Rs. 53,11,969.00.

(c) Petitioner 3 is claiming refund of Excise Duty deposited on stocks which have been drained out, exported to other states and decanted in the factory, Bottling fee on stocks which have been drained out and decanted and Distributor's license fees on stocks which have been drained out, exported to other states and decanted for the year 2015-16 amounting to Rs. Rs. 1,199,87,257.00 and Advance excise duty, advance bottling fee, advance distributor's license fee. advance label registration fee and advance license fee for 2016-17 amounting to Rs. Rs.3,47,770.00.

(d) Petitioner 4 is claiming refund of Excise Duty deposited on stocks which have been drained out, exported to other states and decanted in the factory, Bottling fee on stocks which have been drained out and decanted and Distributor's license fees on stocks which have been drained out, exported to other states and decanted for the year 2015-16 amounting to Rs. Rs. 1,02,22,633.00 and Advance excise duty, advance bottling fee, advance distributor's license fee, advance label registration fee and advance license fee for 2016-17 amounting to Rs. 4,85,895.00.

(4) Similarly in CWJC 5762 of 2020, the petitioner has challenged the order dated 25.09.2019 (Annexure-19), passed by the Commissioner of Excise, Bihar and consequently claimed for refund of Excise Duty, Bottling Fee and Distributor's License Fee amounting to Rs 3,10,53,289.48; further it has also claimed refunds for Advance Bottling Fee, Advance Export Fee, Label Registration Fee (Export), Brewery License Free Form 18, Bottling License fee- Form 20 and Bonded Warehouse- Form 19B amounting to Rs. 48,72,366.90 from the respondents therein;

(5) In CWJC 7461 of 2020, the petitioner has challenged the order dated 25.09.2019 (Annexure-14), passed by the Commissioner of Excise, Bihar and consequently claimed for the refund of license fee, movement fee, label registration fee and Excise Duty deposited on the liquor manufactured and supplied to BSBCL for the year 2015-16 amounting to Rs.23,252,760.00 and also for the refund of Advance Bottling Fee, Advance 19C Fee, Advance Excise Duty and Advance Label Registration Fee amounting to Rs. 1,56,70,123.00 from the respondents therein; Additionally, the petitioner has challenged the order(s), both dated 9.12.2019 (Annexure-17) series, as contained in memo nos 2341 and 2343, passed by the Assistant Commissioner of Excise, Patna, by which he has directed adjustment of the amount refundable to the petitioner from the dues of the Bihar State Beverages Corporation Ltd.

(6) In CWJC 7473 of 2020, the petitioner has challenged the order dated 25.09.2019 (Annexure-13), passed by the Commissioner of Excise, Bihar and consequently sought for refund of Excise Duty, Import Fee and Distributor's License Fee amounting to Rs. Rs.1,21,59,675.00 and also for the refund of advance excise duty, advance distributor's license fees, advance import fees and advance label registration fees amounting to Rs. 76,67,600.00 from the respondents therein.

(7) In CWJC 6561 of 2021 as well, the petitioner has challenged the order dated 03.03.2020 (Annexure-1), passed by Commissioner of Excise, Bihar and consequently asked for the refund of VAT, bottling and license fees, label renewal fees, excise duty and advance excise duty for the year 2015-16 and 2016-17 amounting to Rs. 17.273 crores, which are due and payable along with the applicable interest by Respondents therein.

Submissions:

2. The petitioners are all registered companies under the Companies Act. They were into the manufacture of various kinds of liquors and they were operating manufacturing bottling units/plant and machinery and/or warehouses within the State of Bihar.

3. State of Bihar established Bihar State Beverage Corporation Limited (hereinafter referred to as 'BSBCL') one of the Government of Bihar Enterprises with an object of ease of doing liquor business in the State of Bihar through the BSBCL to wholesalers and retailers while getting supply from the petitioners' company. In this regard, BSBCL evolved Liquor Sourcing Policy, through which tenders were invited for supply of various kinds of liquor and beer. Accordingly, petitioners were supplying liquors to the BSBCL from time to time, such Liquor Sourcing Policy, 2013-2014 was notified by means of Circular No. 1417 dated 26.03.2013. No agreement for 2016-17 was entered in term of Liquor Sourcing Policy of year 2015.

4. Petitioners had executed agreement with BSBCL for the Financial Year 2015-16.

5. State of Bihar- respondent No. 1 issued a notification dated 21.12.2015 of the New Excise Policy, 2015 for the State of Bihar which came into effect from 01.04.2016, by which State sought to prohibit the distribution and consumption of alcohol in State of Bihar in a phased manner. It has made provision only to the extent of prohibiting distribution and consumption of country-made liquor w.e.f. 01.04.2016. However, petitioners are all manufacturer of liquors other than the Country-made Liquor and Masala Liquor like India Made Foreign liquor (for short 'IMFL'), wine, FMFL/FMFW/LAB and Beer.

6. In this backdrop, BSBCL issued a tender on 12.03.2016 titled as 'invitation of offer for supply of IMFL/FMFW/LAB and Beer in State of Bihar (Tender).

7. Whereas, on 31.03.2016, State Government issued a notification imposing absolute ban in manufacture, bottling, distribution, sale, purchase, possession and consumption of country made liquor by any manufacturer, bottling plant, license holder or any other person in the State of Bihar w.e.f. 01.04.2016.

8. On 31.03.2016, State of Bihar issued a notification relating to the Bihar Excise Act (Amendment) Act 2016 (Bihar Act 3 of 2016) (for short Act, 2016). Section 19 (4) of Bihar Excise Act, 1915 (Bihar and Orissa Act- II of 1915) (for short 'Act 1915') was substituted by new provision.

9. The State Government while invoking power under Section 19 (4) of Bihar Excise Act, 1915 (Amended by Act of 2016) proceeded to impose ban on wholesale or retail trade or consumption of foreign liquor by any license holder or any person in the whole of the State of Bihar with immediate effect vide its notification dated 05.04.2016.

10. The aforementioned notification dated 05.04.2016 relating to imposition of ban on wholesale or retail trade and consumption of foreign liquor by any license holder or any person in the whole of the State of Bihar was subject matter of CWJC No. 6675 of 2016 before this Court and it was filed by the Confederation of Indian Alcoholic Beverage Companies which was allowed by the High Court vide order dated 30.09.2016. Notification dated 05.04.2016 insofar as imposition of ban on wholesale or retail trade and consumption of foreign liquor by license holder or any person in the whole of the State of Bihar was found to be ultra vires and it was set aside by this Court in CWJC No. 6675 of 2016.

11. Feeling aggrieved and dissatisfied by the order dated 30.09.2016 passed in CWJC No. 6675 of 2016, the State of Bihar preferred SLP before the Hon'ble Supreme Court assailing the judgment of this Court. On 07.10.2016, the Hon'ble Supreme Court was pleased to stay the judgment dated 30.09.2016 passed in CWJC No. 6675 of 2016.

12. State Government evolved policy for refund of excise duty and VAT deposited by license holder for the Financial Year (FY) 2016-17 with reference to deposit of interim VAT and excise duty which has not been utilized, it was to be refunded on proportionate basis.

13. State of Bihar passed the Bihar Prohibition and Excise Act, 2016 in order to enforce, implement and promote complete prohibition of liquor and intoxicants in Bihar and it came to be in vogue from 02.10.2016. In other words, State of Bihar re-imposed complete prohibition in the State.

14. State Government further proceeded to prohibit the manufacture of IMFL in the State of Bihar which was not prohibited on earlier occasion, in other words, petitioners were earlier permitted to manufacture foreign liquor. By notification dated 24.01.2017, the State Government even prohibited the manufacture of foreign liquor within the State of Bihar. The aforementioned notification also provided that no license would be renewed by the State Government post expiry of licenses on 31.03.2017. Confederation of Indian Alcoholic Beverage Companies preferred application before the Hon'ble Supreme Court seeking periodical extension of time for removal of stocks from the State of Bihar and for sale in other states. Hon'ble Supreme Court was pleased to allow for removal of the stocks for a period upto 31.07.2017 vide orders dated 31.03.2017, 29.05.2017 and 08.06.2017, respectively passed on IA Nos. 61-75 of 2017 in Special Leave to Appeal (C) Nos. 29749-29763 of 2016 (State of Bihar and Other Vs. Confederation of Indian Alcoholic and Beverage Companies and Another).

15. In this backdrop, the petitioners filed application before the Excise

Commissioner/Authorities, inter alia, seeking refund of duties and taxes deposited for manufacture and supply of liquor. The petitioners had also sought for refund of unutilized bottling and license fee and label registration/renewal fees inter alia, on 10.12.2016.

16. Deputy Commissioner of Excise rejected the refund application of the petitioners on 16.08.2017 to the extent that the petitioners were not entitled to refund of VAT and excise duties in the light of Section 23 of Act, 2016. United Spirits Ltd. filed writ petition before this Court and it was numbered as CWJC No. 15316 of 2017 in which they sought for quashing of the order dated 16.08.2017 of the Deputy Commissioner of Excise. Similar writ petitions were filed by Bacardi India Pvt Ltd, Colona Blenders and Bottlers (India) Pvt Ltd and four others and Carlsberg India Pvt Ltd, which was numbered as CWJC No. 13165 of 2018, CWJC No. 16716 of 2017 and CWJC No 514 of 2018 respectively.

17. Assistant Commissioner issued a notice to the petitioner while directing the petitioner to place the documents in support of those claims for the various levies pertained to FY 2016- 17 on 24.05.2018. The petitioners submitted representations and affidavits on 09.06.2018 and 18.06.2018.

18. The petitioner Pernod Ricard filed CWJC No. 18064 of 2018 in which it sought for consideration of representations dated 10.12.2016, 09.06.2018 and 18.06.2018 related to refund of excise duties and other levies with a prayer of refund of excise duty and other levies.

19. The petitioner Molson Coors Cobra India Pvt Ltd filed CWJC No. 6467 of 2019 and the petitioner Molson Coors India Pvt Ltd filed CWJC No. 6757 of 2019, inter alia, seeking refund of the Excise Levies and other deposits lying with the Excise Department.

20. During pendency of the said petition, on 30.04.2019, the writ petitions bearing CWJC No. 15316 of 2017, (USL Judgment) CWJC No. 13165 of 2018, CWJC No. 16716 of 2017 and CWJC No 514 of 2018 were disposed of with the following observations: -

a. Respondent No. 2's position that the Respondent had provided ample opportunity to the Petitioner to export its Stock outside Bihar could not be a ground for denying the claims for refund of Excise Duty on stocks for those manufacturers that could not export finished goods/raw materials outside the State of Bihar.

b. The claims for refund of Excise Duty on Stocks lying with Respondent No. 3 as on 31.03.2017 were required to be considered along with other claims for bottling and license fee.

c. The Respondent were not entitled to retain Bottling and License Fees deposited by the Petitioners, since the same was only payable on "saleable stock" and the Respondent had destroyed such Stock of the Petitioner.

21. On 01.05.2019, order to the following effect was passed in CWJC No. 18064 of 2018 (Pernod Judgment) disposing of the writ petition:-

a. Respondent No. 2 and Respondent No. 3 are under a duty to consider the representations of the Petitioner and dispose of the same.

b. Respondent No. 2 and Respondent No. 3 to examine the Petitioner's claims after giving the Petitioners an opportunity of hearing, within 3 months.

c. The Respondent to consider the claims of the Petitioner, in view of the legal position as settled in the USL judgment.

22. CWJC No. 6467 of 2019 and CWJC No. 6757 of 2019 was disposed of on 7.5.2019, directing the concerned authorities to consider the claim and dispose of the same in accordance with law with an opportunity of hearing to the petitioner, within a period of six weeks of receipt/production of a copy of the judgment.

23. Under the aforesaid facts and circumstances, the petitioners submitted representation to the Commissioner of Excise and BSBCL, inter alia, on 04.09.2019 to comply the directions of the USL Judgment. Petitioners had also requested the Commissioner of Excise orally and filed detailed representation on 21.11.2019 along with certain documents during the period from 06.11.2019 to 06.03.2020, whereas petitioners received partial refund or amount in relation to the claims for advance duties/fees deposited for FY 2016-2017.

24. Commissioner of Excise proceeded to pass orders on 25.09.2029 and 03.03.2020, respectively rejecting the remaining claim of the petitioners, which are impugned in their respective writ petitions. Gist of the impugned order dated 25.09.2029 and 03.03.2020 of the Excise Commissioner are as follows:-

"i Given that the Petitioner had failed to avail of the opportunity to export its stock outside the State of Bihar, the said stock was destroyed. Therefore, the Petitioner was not entitled to claim refund of Excise Duty.

ii Since the Petitioner had enjoyed the privileges granted by the Excise Department in the FY 2015-16 without any hindrance, the amount deposited inter-alia towards 19- C License Fee and Excise Duty had been utilized, and no refund for the same could be granted.

iii The Departmental Gazette Notification dated 18.04.2016 did not allow refund of Bottling and License Fees. Thus, the same was not refundable to the Petitioner.

iv Respondent No. 2 did not consider/provide any reasons for the denial (if at all) of amounts claimed towards advance Import Fees deposited by the Petitioner for FY 2016-17, for stocks that could not even be imported into Bihar due to imposition of complete prohibition."

25. Petitioner Pernod submitted representation on 10.09.2020 to Commissioner of Excise- BSBCL while stating that authorities have failed to consider the claims

of the petitioner in the light of the directions of this Court dated 30.04.2019 passed in CWJC No. 15316 of 2017 read with CWJC No. 18064 of 2018 decided on 01.05.2019.

26. For consideration of the grievance of the petitioner Pernod another representation was submitted on 17.12.2020, thus, as there was no response from the Commissioner of Excise-BSBCL hence the present petitions.

27. Learned Senior Counsel, Mr. Dhruv Mehta appearing for petitioner-Pernod Ricard India (P) Limited (CWJC No. 6561 of 2021), firstly advanced the argument on preliminary issue of non-exhaustion of alternative remedy. It has been contended that impugned order/action of the respondents are arbitrary and violative of Article 14 of the Constitution which is contrary to the extant legal regime and ignorance of the orders of this Court passed in Pernod Judgment read with USL Judgment. It has also been submitted that respondents have not raised any objection in respect of maintainability of the petition by way of their respective pleadings in the counter affidavit and such issue was raised during the course of the argument on 24.08.2023. Further, it is contended that appeal against the impugned order would not be an alternative and efficacious remedy for the petitioner. In the instant case, appeal lies to the State Government against the order of the Excise Commissioner. It is also submitted that State Government has already taken position in their counter affidavit to the extent that the petitioner is not entitled to refund of subject levies. In support of the aforementioned contention, he relied on the following decisions:-

(i) Dhampur Sugar Mills Ltd. Vs State of UP reported in (2007) 8 SCC 338 (Para 23)

(ii) M/s Godrej Sara Lee Ltd. Vs. The Excise and Taxation Officer cum Assessing Authority and Ors. reported in 2023 SCC OnLine SC 95 (Para 4).

(iii) Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Ors. reported in

(iv) Harbanslal Sahnia and Anr. Vs. Indian Oil Corporation Ltd. and Ors. reported in (2003) 2 SCC 107 (Para 7).

28. Learned Senior Counsel, Mr. Dhruv Mehta further submitted that rejection of the petitioners' claim for refund of excise duty by the Excise Commissioner is in violation of the Pernod Judgment read with USL judgment. It is contended that order dated 03.03.2020 of the Excise Commissioner, rejecting claim for refund of excise levies is incorrect, since in the order dated 06.08.2018, passed by the Excise Commissioner, it has already been noticed that:-

(i) Petitioners had not exported their stocks outside the State of Bihar, despite the State of Bihar affording opportunity for them to export the same.

(ii) The petitioners had utilized (allegedly so) the excise duty for FY 2015-16.

(iii) The petitioners' claim could not be allowed in view of Section 23 of Act, 2016.

29. The aforementioned reasoning was rejected by this Court in the USL Judgment by holding as under:-

"It is apparent from reading of the order passed by respondent no.3 that it nowhere considers the claim of the petitioner towards refund of excise duty paid on the stocks lying with the respondent no. 4 or the petitioner as on 31.03.2017. The view taken by the respondent no.3 that the Prohibition and Excise Department provided ample opportunity to the manufacturers of IMFL/BEER to export the finished goods and raw materials outside the State of Bihar and some of the manufacturers availed the opportunity thus provided and taken stocks and raw materials back from the BSBCL Godowns and got them exported outside the State of Bihar, cannot be a reason according to us to take a view that those manufacturers of IMFL/BEER who could not export the finished goods or raw materials outside the State of Bihar during given period would not be liable for refund of the excise duty paid on the stocks. This aspect of the matter has again not been considered by the respondent no.3.

We are willing to agree with the contentions of the petitioner that claim of the petitioner to extent of INR6,73,61,950/- for the refund of excise duty paid on stocks lying with the respondent no.4 and/or the petitioner as on 31.03.2017 is required to be considered along with the other claims on account of bottling and license fee which were deposited by the petitioner. Learned counsel for the petitioner has rightly submitted that the bottling and license fee would be payable on saleable stock of IMFL and since the respondents have destroyed the stocks of the petitioner, they are not entitled to retain the bottling and license fee deposited for these goods. The outstanding claims as shown above in the table on account of excise duty, 19C fees and bottling fee for the financial year 2015-16 together with the carry forward licence fee for the said period and the balance for the period 2016-17 are thus liable to be considered by the respondent no.2.

In the light of the discussions made hereinabove, while we are not willing to interfere with the adjustment of arrears out of the refund of VAT, we leave it open for the petitioner to challenge the adjustment of refunds, in case, they succeed in challenging the assessment order. We are of the considered opinion that the respondent no.2 is required to consider the claim of the petitioner on account of surcharge on VAT and the VAT paid on stock in transit. Let these claims of the petitioner be considered by the respondent no.2 and a reasoned order thereon be passed after opportunity of hearing to the petitioner and the admitted amount be paid to the petitioner within a period of three months from the date of receipt/production of a copy of this order.

Similarly, we are of the view that the Excise Commissioner, Bihar (respondent no.3) would be obliged to consider the claims of the petitioner on account of excise duty paid on stocks lying with the respondent no.4 or the petitioner as on 31.03.2017 and which were not or could not be exported during the available period. The respondent no.3 shall accordingly be also obliged to consider the other claims of the petitioner on account of bottling and license fee for the financial year 2015-16, carry forward bottling and license fee for the financial year 2015-16 and the bottling and license fee for the financial year 2015-16 to the extent it has remained undecided. The respondent no.3 shall thus consider all these claims and pass a reasoned order after opportunity of hearing to the petitioner and refund the admitted amount within a period of three months from the date of receipt/production of a copy of this order. A reasoned decision thereon shall be communicated to the petitioner within the aforesaid period. It will be open for the petitioner to make submissions and produce all relevant materials which may be required for consideration of its claim before the respondent nos.2 and 3 on a date and time to be fixed by the respective respondents.

In consequence of the discussion above while the order of the Deputy Commissioner dated 16.08.2017 impugned in the writ petition is set aside, the order of the Excise Commissioner dated 06.08.2018 in Misc. Case No. 1 of 2018 stands modified to that extent."

30. It is further submitted that Excise Commissioner has rejected the claim of the petitioner on identical grounds which had been rejected by this Hon'ble Court in USL Judgment.

31. Learned Senior Counsel, Mr. Dhruv Mehta on the aforementioned point submitted that Commissioner of Excise cannot reject the claim of the petitioners while assigning the identical reasons when the same has been turned down by this Court earlier in Pernod and USL Judgment. He has cited the decision in the case of Neelima Srivastava Vs. State of Uttar Pradesh and Ors, 2021 SCC online SC 610 (Para Nos. 27, 32 -36) in support of his argument that reconsideration of dispute, which have attained finality inter se parties, is not permissible.

32. It is further submitted that executive cannot sit in appeal over the judicial authorities' decisions and he cited the decision in the case of Union of India and Ors. Vs. K. Shankarappa (2001) 1 SCC 582 (Para 7). It is also submitted that decision of this Court is binding on the Commissioner of Excise. In support of this contention, he has been relying on decision in the case of Union of India and Ors. Vs. Kamlakshi Finance Corporation Ltd., 1992 Suppl (1) SCC 648 (Para Nos. 4,6 and 7). It is also submitted that administrative action cannot be illegal, irrational or arbitrary. On this point he relied on Neelima Mishra vs. Harinder Kaur Pental & Ors. reported in 1990 (2) SCC 746 (Para Nos. 23, 29).

33. Learned Senior Counsel, Mr. Dhruv Mehta further submitted that Commissioner of Excise has failed to consider the petitioner's claim for refund of import fee and has illegally retained the import fee. Rejection of claim for refund of import fee for financial year 2016-17 is contrary to Pernod Judgment, since reasoned order has not been passed. In support of this contention, he relied on decision of S.N Mukherjee Vs. Union of India reported in (1990) 4 SCC 594 (Para Nos. 29-40). He also relied on Union of India and Ors. Vs. Kamlakshi Finance

Corporation Ltd. (cited supra) (Para 4, 6 and 7).

34. The learned Senior Counsel further submitted that Commissioner of Excise has rejected the petitioner's claim for refund of bottling and license fee in violation of Pernod Judgment. The reasons assigned by the Commissioner of Excise is with reference to notification dated 18.04.2016 to the extent that bottling and license fee for Financial Year 2015-16 is not refundable in the light of order dated 06.08.2018. It is submitted that this Court has already examined order dated 06.08.2018, whereas this Court has not accepted the reasoning of the decision of Commissioner of Excise. It is further submitted that respondents have destroyed stocks of the petitioners, they were not entitled to bottling and license fee for these goods as they had rendered them non- saleable. This has been taken note of by this Court in the case of Pernod and USL Judgments. Therefore, rejecting the claim by the Commissioner of Excise in the impugned order insofar as non-consideration of claim of refund of bottling and license fee and holding it to be not refundable is wholly illegal. It was further submitted that reliance placed on Section 23 of the Act, 2016 was incorrect.

35. The decision of Commissioner of Excise is without the authority of law in rejecting the petitioner's claim for refund of 19C license fee. Even on this issue learned senior counsel for the petitioner relied on order dated 06.08.2018 read with USL and Pernod Judgment. The issue has been settled and the learned Senior Counsel relied on the decisions of Neelima Srivastava, K. Shankarappa and Kamalakshi Finance Corporation Ltd. cited supra.

36. It has been submitted that this Court has power to invoke its writ jurisdiction to grant refund of statutory levies collected/retained without the authority of law. On this issue, he relied on decision in the case of USL & Pernod Judgment.

37. It is further submitted that tax cannot be levied or retained without the authority of law and refund of such tax can be sought as a consequential relief in writ proceedings. On this point, he has relied on Idea Cellular Limited vs. Union of India, (2015) SCC OnLine P&H 6354 (Para Nos. 14-19, 21-22), U.P. Pollution Control Board and Ors. Vs. Kanoria Industrial Limited and Anr. reported in (2001) 2 SCC 549 (Para 9, 12 & 17) and Salonah Tea Company Limited & Ors. vs. Superintendent of Taxes, Nawgong & Ors, (1998) 1 SCC 401 (Para No. 6).

38. Learned Senior Counsel, Mr. Gopal Jain appearing on behalf of the United Spirits Limited (CWJC No. 4882 of 2020) submitted that petitioners cannot be relegated to invoke alternative remedy since this preliminary objection does not oust the jurisdiction of this Court. In support of this contention, he relied on the following decisions:-

(i) M/s Godrej Sara Lee Ltd. (cited supra)

(ii) Siemens Ltd. vs. State of Maharastra & Ors. reported in (2006) 12 SCC 33 (Para 2, 8, 9 &11)

(ii) Premier Printing Press vs. State of Rajasthan & Anr. SBCW No. 3677/2015 decided on 23.02.2017 (Para Nos. 17, 26)

(iii) Shrebatsa Mishra vs. State of Odisha & Ors. WPC No. 4881 of 2018 decided on 08.02.2023 (Para 2 to 4 and 12 to 14)

(iv) Bibekanad Mondal vs. State of West Bengal reported in (2002) SCC Online Cal 571 (Para 2, 4- 6).

39. It has been further submitted that impugned orders have been passed without authority of law and are wholly without jurisdiction. On this point, he relied on Idea Cellular Limited (cited supra) (Para 14, 15, 19, 21-22), M/s Whirlpool Corporation (cited supra) (Para 14, 15 & 20), Committee of Management and Anr. vs. Vice Chancellor & Ors. reported in (2009) 2 SCC 630 (Para 22, 23 & 30).

40. It has been further submitted that issue of legal retention of the subject levies and VAT along with applicable charge has been conclusively decided by this Court in its judgment dated 30.04.2019 passed in CWJC No. 15316 of 2017. He relied on certain findings and observations of this court in the aforementioned judgment to contend that impugned orders are not in consonance with the findings of this Court and observation made therein. The authorities side stepped the order of this Court and did not maintain sanctity of its order.

41. It has been further submitted that incidence of VAT and surcharge leviable under Section 3 and 3A of the Bihar Value Added Tax Act, 2005, occurs on sale. In support of this contention, he placed reliance on State of Rajasthan & Anr. vs. Rajasthan Chemists Association reported in (2006) 6 SCC 773 (Para 10, 28, 44, 53).

42. Learned counsel, Mr. Satyabir Bharti appearing on behalf of Molson Coors Cobra India Pvt. Ltd. and other cases submitted that the petitioners have no equally efficacious and speedy alternative remedy for the reasons that Section 92 & 93 of Bihar Prohibition and Excise Act, 2016 (Amended 2018) is impracticable insofar as filing of appeal against the orders of the Commissioner of Excise, since the State of Bihar have not identified the Appellate Authority and Revisional Authority. On this point, learned counsel pointed out that it is merely stated that State Government is the Appellate Authority wherever Excise Commissioner passes an order. The definition of State Government refers to State Government of Bihar. Therefore, there is no identification of particular designated officer. He has also pointed out from Rule 20 and 24 of Bihar Prohibition and Excise Rules, 2021 notified on 27.09.2021 does not specify, as to who shall be the appellate authority. Rule 20 is relating to appeal whereas Rule 24 is relating to procedure of revision. No doubt, Secretary of the department has been identified to decide revision at the same time it is to be noted that in the present case Commissioner of Excise is also holder of the post of Secretary to the Excise Department. Therefore, it is impracticable to prefer any appeal or revision against the impugned orders of Commissioner of Excise. Therefore, the present writ petition is maintainable.

43. Learned counsel, Mr. Satyabir Bharti reiterated the arguments advanced by the learned Senior counsels insofar as impugned order of the Commissioner Excise read with the decision rendered in the United Spirits Limited and Pernod judgment in respect of refund of various levies/fees like Excise Duty, distributor fee, bottling fees, import fee, on stock destroyed at the end of BSBCL and manufacture (plant), which could not be exported during the period from 01.04.2017 to 31.07.2017. It was pointed out that no provision has been made for refund in the Government Order dated 18.04.2016, with respect to stocks, which were manufactured and supplied in the State of Bihar for sale, but could not be sold due to imposition of prohibition in the State on sale and consumption of liquor. On the other hand, there was an exemption of levy on bottling fee by notification dated 06.10.2016. In other words, they are entitled to refund of bottling fee, which has remained unutilized. Bottling fee is levied on per litre basis, that is on the actual quantity of liquor, which is bottled and if liquor has not been bottled from 1.4.2016 to 05.10.2016, they are entitled to refund of bottling fee. It is also submitted that if the Commissioner of Excise/State Government has agreed to refund the excise duty on liquor which has been exported and further refund of certain advance fee, then on the same principle, the Excise Duty and other fees levied on destroyed stocks should also be refunded. He has also contended that Commissioner of Excise has not taken a decision as to whether the petitioners are entitled or not entitled insofar as distributor fee under Section 19C and Import Fees on exported stocks. Overall, it is submitted that respondents have only agreed to settle and refund the (i) excise duty on exported stocks and (ii) excise duty, distributor fee and label fees deposited in advance for the year 2016-2017, but rejected claim for refund of Excise Duty on destroyed stocks, distributor license fee, bottling fees and import fee on destroyed stocks and bottling fees deposited in advance for the period 2016-17, even though no bottling took place and the levy was exempted from 6.10.2016. However, for the earlier period it is stated that they are not entitled for refund of bottling fee.

44. On destroyed stock lying with the BSBCL and with the petitioners, the excise duty, bottling fee, distributor license fees and import fees could not have been denied. This has been taken note of by this Court in the earlier Judgement of USL & Pernod.

45. Referring to Section 43 of the Bihar Excise Act, 1915, as it existed at the time of imposition of prohibition in the State of Bihar, it has been contended by the Learned Counsel Sri Satyabir Bharti, that entitles the licensee to claim refund of the license fees as also compensation, if the license is withdrawn without any prior notice. The licenses of the petitioners were withdrawn without any prior notice and therefore they are entitled for refund of the excise levies in question.

46. Referring to the impugned orders passed by the Assistant Commissioner Excise, who proceeded to adjust demurrages fee levied by BSBCL on 26.09.2019, with reference to demurrages ordered by BSBCL dated 13.08.2019, it was

contended by the Learned Counsel Sri Satyabir Bharti that the same is not permissible and without authority of law in the light of Section 93 of Bihar Excise Act, 1915. On this point, learned counsel for the petitioner pointed out sub-section (9) of Section 2 of Bihar Excise Act, 1915 defines 'Excise Revenue' and demurrage charge levied by BSBCL is not an Excise Revenue, which alone can be recovered by an Excise Officer under Section 93 of the Act.

47. He has pointed out that no doubt Clause 16(d) of Liquor Sourcing Policy 2013-14 on 26.03.2013 relates to demurrages as demanded by the BSBCL, but Clause 16(d) can only be applied under the circumstance that sale of liquor though permitted in the State, it could not be sold resulting it being declared an inactive stock and demurrage charge could not have been recovered taking shelter under the said clause, when prohibition on sale of liquor had been imposed in the State. Besides, Clause 9 of the Policy also refers to “force majeure” conditions under which, the parties are exempted from any liability arising from the agreement/policy. It has also been contended that the order dated 13.08.2019 and 26.09.2019 is without notice to the petitioners. Firstly, how the Assistant Commissioner of Excise adjusted certain alleged dues of BSBCL without any source of power, so also BSBCL has not issued any notice before demand of demurrages on 13.08.2019. On this count, impugned order of the Assistant Commissioner of Excise and so also BSBCL demand dated 13.08.2019 and 26.09.2019 are liable to be set aside, which is under challenge in CWJC NO. 8853 of 2021, CWJC No. 7463 of 2020, CWJC No. 7467 of 2020 and CWJC No.4652 of 2021.

48. It is also submitted that the State parted with its privilege insofar as allowing the parties to conduct its business in liquor by levying of tax or any fees, therefore, the same cannot be withheld by the State if the said privilege was withdrawn. On this issue, learned counsel for the petitioner relied on the following decisions: -

(i) (2004) 11 SCC 26 State of Punjab and Anr. vs. Devans Modern Breweries Ltd. & Anr. (Para Nos. 102 & 103)

(ii) (1990) 1 SCC 109 Synthetics and Chemicals Ltd. And Ors. vs. State of Uttar Pradesh and Ors. (Para 87)

(iii) (2005) 11 SCC 1 State of Kerala and Ors. vs. Maharashtra Distilleris Ltd. & Ors. (Para 58 and 84).

49. Mr. Bharti, learned counsel for the petitioners appearing in CWJC No. 4882 of 2020 and other case further submitted that impugned order dated 22.07.2019 passed by fourth respondent-the Joint Commissioner of Commercial Taxes, Bihar, Patna (In-charge) is without authority of law in view of Section 3-Charge of Tax and Section 3A-Surcharge in Chapter II and incidence of tax under Bihar Value Added Tax Act, 2005 would be levied only on sales with reference to gross turn over of sales calculated from the commencement of the year ending on the day immediately before the commencement of Act, exceeds the specified quantum as

applicable to him under the Bihar Finance Act, 1981. In the present case, claim is for refund of Value Added Tax which has been ordered by the Joint Commissioner of Commercial Taxes, Bihar, Patna (In-charge) towards unsold stocks and such stocks have been destroyed at the behest of State-respondents.

50. Thus it has been submitted that in the light of judicial pronouncements, petitioners are entitled to refund of subject levies and the same cannot be withheld by the respondents.

51. Mr. P.K. Shahi, learned Advocate General representing State-respondents submitted that the writ petitions filed by the petitioners are not maintainable in the light of Section 92 and 93 of Bihar Prohibition and Excise Act, 2016 (for short 'Act, 2016') read with Rules 20 & 24, appeal and revision, Bihar Prohibition and Excise Rules, 2021 (for short 'Rules, 2021') read with Clauses 3(i) and 3(ii) of Fourth Schedule of Rules of Executive Business, 1979 (for short 'Rules 1979'). It has been submitted that petitioners have statutory remedy of appeal and revision. In the absence of identification of appellate authority in the Act, 2016 and Rules, 2021 the appellate authority could be identified under Rules, 1979 (cited supra) to the extent that against the order of Excise Commissioner appellate authority shall be the departmental Secretary or concerned Minister. It is further submitted that petitioners' contention that Excise Commissioner is holder of the post of both Excise Commissioner and Secretary, therefore, it is not efficacious remedy for them, cannot be taken note for the reason that as on the date of impugned order of the Excise Commissioner both the posts of Excise Commissioner and Secretary were manned by two independent Officers. Now, only one official is manning both the posts on ad hoc basis for want of adequate officers of such cadre. In not availing statutory remedy, he has cited and relied on two decisions of Hon'ble Apex Court namely Whirlpool Corporation vs. Registrar of Trade Marks, Mumbai and Ors. reported in (1998) 8 SCC 1 (Para 14 and 15) and Commissioner of Income Tax and Ors. vs. Chhabbil Das Agarwal reported in (2014) 1 SCC 603 (Para 15). Therefore, the present petition is not maintainable on the ground that petitioners have statutory remedy of appeal against the impugned order.

52. It has been further submitted that what is refundable under the head of excise duty has already been determined by the Excise Commissioner on 18.04.2016 and it would be w.e.f. 01.04.2016. The petitioners have not assailed the Notification dated 18.04.2016 so as to claim refund of excise duty for the year 2015-16 and to some extent FY 2016-17.

53. It has further been submitted that license for manufacture of liquor and its sale were not renewed or fresh license were given w.e.f. 01.04.2017. Such decision was taken by the State Government on 24.01.2017. It is further submitted that during the period from 05.04.2016 to 31.03.2017 petitioners were permitted to manufacture and they were not permitted to trade in the liquor business within the State of Bihar. Of course, the time limit was extended by virtue of judicial pronouncement upto 31.03.2017 by Hon'ble Apex Court

decision dated 31.07.2017 (State of Bihar and Ors. vs. Confederation of Indian Alcoholic Beverage Companies and Another). Therefore, there is no infirmity in the impugned decision of the Excise Commissioner.

54. It has further been submitted that liquor sourcing policy was introduced in the year 2013-14 in terms of Clause 16(c) (d)(e)(g) which relates to stocks held for sale. He has also pointed out Clause 18(a)(b)(c) in this regard, in the light of liquor sourcing policy for the year 2013-14 by which agreement form has been prescribed (Annexure-4 to the liquors sourcing policy). These are the material from which it is evident that respondent-Corporation is empowered to levy demurrages in respect of stocks of the petitioners lying with the Corporation. It is further submitted that earlier judgment of CWJC No. 15316 of 2017 decided on 30.04.2019 only remanded the mater to the Excise Commissioner to take decision. It was an open remand. Therefore, under Section 27 and 28 of Bihar Excise Act, 1915 read with Rule 147 excise duty can be levied. In support of the aforementioned issue, he relied on decision of the Hon'ble Apex Court in the case of Mohan Breweriess & Distileries Limited vs. Commerical Tax Officer, Madras & Ors. reported in (1997) 7 SCC 542 (Para 6,7 and 8). He has also cited decision in the case of Moriraku UT India (P) Limited vs. State of Uttar Pradesh & Ors. reported in (2008) 4 SCC 548 (Para 15 and 23).

55. It has also been submitted that insofar as challenge to the order dated 22.07.2019 of the Joint Commissioner (Annexure-2), the petitioners have a statutory remedy under Rule 73 of the Bihar Value Added Tax Rules, 2005.

56. It has further been submitted that under Section 27 of Bihar Excise Act, 1915 read with Section 147(c)(d)(f) and Rule 147(i)(b) excise duty could be levied. Such duty paid in advance is inclusive of sales duty. Therefore, refund of any excise duty to the petitioner is not warranted, hence, writ petitions are liable to be rejected.

57. learned Senior Counsel, Mr. Lalit Kishore for BSBCL submitted that petitioners entered into contracts in terms of liquor sourcing policy of the year 2013-14 (Anneuxre-IV-Agreement) definition of landing cost is to be taken note of and it is inclusive of commission of the BSBCL. It has been submitted that sale and consumption of IMFL liquors was prohibited on 05.04.2016 and manufacturing was permitted upto 31.03.2017. Once the sale and consumption of liquor was prohibited respondent-BSBCL issued a communication to the respective petitioners to lift the remaining stock of liquor which were lying in the BSBCL. This was followed by reminders on 06.04.2016. Thereafter, certain reminders were also sent to the respective petitioners, even though deadline to lift the stock was 31.03.2017. It has to be noted that time limit for stock of beer is 60 days and for liquor 120 days.

58. It has further been submitted that show cause notices were issued on 06.03.2018. Some of the petitioners have questioned the legality but not disputed demurrages levied by the BSBCL. Subsequently, action of the BSBCL

was subject matter of CWJC No. 4652 of 2021. It has also been submitted that Clause 18(c) of liquors sourcing policy permits for adjustment. It is submitted that CWJC No. 16764 of 2019 was filed by Molson on an earlier occasion. It was decided in the light of decision of this Court in the case of United Spirits Limited.

59. Learned counsel for the petitioner, Mr. Satyabir Bharti countered to the BSBCL counsel insofar as demurrage issue is concerned. He has submitted that liquor sourcing policy of the year 2013-14 issued on 26.03.2013 is not applicable to the case in hand. On the other hand, liquors sourcing policy for the year 2016-17 issued on 12.03.2016 is relevant. He has pointed out Clause 16(c), (i) active stock (ii) inactive stock and (d) demurrages and contended that demurrage charges can only be levied on inactive stocks, that is stocks remaining unsold over a period of time, when sale is permitted. Prohibition having been imposed, there is no applicability of the said clause. It has been submitted that there was no agreement executed in the light of new liquors source policy issued in the year 2016, the fact which has not been disputed or denied in the Counter affidavit filed by BSBCL. Therefore, in the absence of any agreement, question of levying demurrages on the petitioner in the light of liquor sourcing policy in the year, 2016 is impermissible. In terms of Annexure-12 dated 30.03.2017, stocks could be taken away from the State of Bihar and time limit was fixed. By that time, the stocks of beer had been rendered unfit for human consumption. Thereafter, it was extended upto 31.05.2017. Further, it was extended upto 31.07.2017. In fact, earlier petition was filed vide CWJC No. 6467 of 2019 by Molson Coors for refund of deposits and it was disposed of on 07.05.2019 directing the concerned parties to hear and dispose of the grievance of the petitioner by a reasoned and speaking order.

60. Mr. Aditya Mukherji, learned Counsel in CWJC No. 4882 of 2020 (United Spirits Limited vs. The State of Bihar & Ors.), CWJC No. 4911 of 2020 (Bacardi India Private Limited vs. The State of Bihar & Ors.) and CWJC No. 6561 of 2021 (Pernod Ricard India (P) Ltd. vs. The State of Bihar & Ors.), countered the learned Advocate General for the State and submitted that from a reading of Section 92(1)(2)(3) read with Rule 20 of Rules, 2021, it is clear that appellate authority has not been identified. In other words, Rules are silent insofar as identification of appellate authority. Statute provides to the extent that appellate authority is required to be provided under the Excise Act read with Rules, 2021 but on the date the impugned order of the Excise Commissioner, the appellate authority was not existing. On this issue, countering the submission of the learned Advocate General, he submitted that Bihar Prohibition and Excise Act, 2016 is a complete code in itself and therefore the Rules of Executive Business, 1979 cannot be relied upon and the post has been identified as a departmental Secretary in Rules, 1979 is not attracted in the present case. Therefore, one has to draw inference that there is no appellate authority. State taking shelter under Rules, 1979 to identify appellate authority with reference to Section 92 of Bihar Prohibition and Excise Act, 2016 is not permissible.

61. In response to the contention that the petitioners have not challenged the validity of 18.04.2016 of the State Government policy decision which was given effect from 01.04.2016, it is submitted that there is no specific denial of grievance of the petitioner insofar as refund of excise duty for the year 2015-16. Therefore, petitioners have not questioned the validity of 18.04.2016. He has also pointed out that the notification dated 18.04.2016 was already taken note of and discussed by this Court in the earlier round of litigation in CWJC No. 15316 of 2017. He has also pointed out that Excise Commissioner is stated to have refunded certain excise duty to some of the persons which has been recorded by this Court in the aforementioned cited decision of this Court. Therefore, question of challenging the order dated 18.04.2016 is not warranted to the petitioner.

62. In response to the contention that pursuant to earlier orders of this Court passed in United Spirits Limited is open remand to the concerned official respondents, Learned counsel for the petitioner cited two decisions namely Vidya Devi vs. Commisioner of Income Tax, reported in SCCOnline Cal 215 (Para 5) and State of Kerala vs. MF Limited 2016 reported in SCCOnline Kerala 1058 (Para 8) in support of the contention that Excise Commissioner cannot travel beyond the order of this Court insofar remanding the matter.

63. Mr. Aditya Mukherji, learned counsel for the petitioner further submitted that decisions cited on behalf of State, viz, Moriraku (cited supra) is not assisting the State. On this case, he has pointed out decision of the Hon'ble Apex Court reported in (1994) 6 SCC 610 Indian Cable Company vs. Kolkata (Para 12 and 13). Further, it is submitted that levy of excise duty is required to be taken note of with reference to marketability of the liquor product. It is submitted that Section 27 of the Act, 1915 read with Section 2(15) and Section 2(6) relate to manufacture and excisable article (duty is only on sale of excisable article). It is further submitted that Rule 147 of Rules, 1919 read with Notification dated 05.04.2006 has no relevancy to the case in hand. It does not stipulate incidence of excise duty but only provides for the rates on which the excise duty is to be levied. There is only one component of levying excise duty, i.e., sale.

64. It is further submitted that Section 3 and 3A of Bihar Value Added Tax Act, 2005 are relating to sale or purchase. In fact, Section 3A is relating to surcharge on sale of goods whereas grievance of the petitioner is with respect to refund of surcharge in respect of destroyed liquor goods. Therefore, in the absence of sale of excise product Section 3 and 3A of Bihar Value Added Tax Act, 2005 is not attracted on such of those goods which were not sold in the market and it were destroyed by the officials of the State-respondent in the BSBCL and in the petitioners' manufacture unit.

65. The State-respondents have not identified break up of VAT like for production, distribution and marketing of product by any statutory Rules or executive order so as to levy VAT at a different stage. Further, reading of Section 3 and 3A of Bihar Value Added Tax Act does not speak of VAT and Surcharge would be levied from the production, distribution and marketing of a product so

as to identify the break up to the extent for production the petitioners are liable to pay VAT. Therefore, the impugned action of the Joint Commissioner of Commercial Taxes (In-charge) is without authority of law.

66. Further, learned counsel for the petitioner, Mr. Aditya Mukherji distinguished the decisions cited on behalf of the learned Advocate General in the case of Commissioner of Income Tax case (cited supra) with reference to Para 15 and 16 or not available to the State -respondent in view of later decisions on the point of alternative remedy.

67. Mr. Satyabir Bharti, learned counsel for the petitioner countered the reply of the State contentions to the extent that Mohan's case cited (supra) is distinguishable with reference to the State of Kerala and Ors. Maharshtra Distilleries reported in (2005) 11 SCC 1 (Para 3, 13, 15, 50, 58, 69, 70, 71, 83 and 84).

68. Mr. Satyabir Bharti, learned counsel for the petitioner submitted that Fourth Schedule of Item no. 3(i) and 3(ii) of Rules of Executive Business, 1979 is not assisting the State-respondent in the light of Mahadev Carrier Pvt. Limited vs. State of Bihar & Ors. reported in 2019 (3) PLJR 740 (Para 28).

Analysis:

69. Before adverting on merits of the case, it is first necessary to take note of Constitutional Provisions and statutory provisions:-

"(I). Entry 51 of List-II of Seventh Schedule of the Constitution of India:

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;

(b) opium, Indian hemp and other narcotic drugs and narcotics;

but not including medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (b) of this entry.

(Underlined for Emphasis)

(II). Sections 2(21), 2(22), 2(25) and 27 of Bihar Prohibition and Excise Act, 2016:

2(21) “duty” means the excisable duty or the countervailing duty as mentioned in Entry 51 of List -II of Seventh Schedule of the Constitution, or as the case may be;

2(22) “excisable articles or items” means-

(i) any liquor or intoxicant as defined under this Act; or

(ii) any intoxicating drug; or

(iii) any intermediate/final product that serve as raw material to any alcohol; or

(iv) Any item or substance that can be used as a substitute of alcohol; or

(v) Any item or substance that can be used or consumed for the purposes of intoxication.

2(25) “excise revenue” means revenue derived or derivable from any duty, fee, tax, payment (other than a fine imposed by a Criminal Court) or confiscation imposed or ordered under this Act or any other law for the time being in force relating to liquor or intoxicating drugs;

27. Fees for terms, conditions, and form of, and duration of, licenses, permits and passes.-

(1) Every licenses renewed or permit/pass granted under this Act-

(a) shall be renewed or granted-

(i) On payment of such fees (if any), and

(ii) Subject to such restrictions and on such conditions, and

(b) shall be in such form and contain such particulars, as the Rules may provide.

(2) Every license renewed or permit or pass granted under this Act shall be for such period (if any) as prescribed by rule made by the State Government under this Act.

Chapter-V (Bihar Excise Act, 2015)

Duty

27. Power to impose duty on import, export, transport and manufacture.-(1) An excise duty or a countervailing duty, as the case may be, at such rate or rates as the State Government may direct, may be imposed, either generally or for any specified local area on-

(a) any excisable article imported, or

(b) any excisable article exported, or

(c) any excisable article transported, or

(d) any excisable article (other than tari) manufactured under any licence granted in respect of clause (a) of Section 13, or

(e) any hemp plant cultivated, or any portion of such plant collected, under any licence granted in respect of clause (b) or clause (c) of Section 13, or (f) any excisable article manufactured in any distillery or brewery licensed, established, authorised or continued under this Act.

Explanation.-Duty may be imposed on any article under this sub-section at different rates according to the places to which such article is to be removed for consumption, or according to the varying strength and quality of such article.

(2) A duty, at such rate or rates as the State Government may direct, may be imposed, either generally or for any specified local area, on any tari drawn under any licence granted under Section 14, sub-section (1).

(3) Notwithstanding anything contained in sub-section (1)-

(i) duty shall not be imposed thereunder on any article which has been imported into India and was liable, on such importation, to duty under the Indian Tariff Act, 1894 (8 of 1894), or the Sea Customs Act, 1878 (8 of 1878) if-

(a) the duty as aforesaid has been already paid, or

(b) a bond has been executed for the payment of such duty.

(ii) [Omitted by A.L.O.]

(Underlined for Emphasis)

28. Ways of levying such duty. Subject to any rules made under Section 60, clause (12) any duty imposed under Section 27 may be levied in any of the following ways:-

(a) on an excisable article imported-

(i) by payment (upon or before importation) in the State or territory from which the article is brought, or

(ii) by payment upon issue for sale from a warehouse established, authorised or continued under this Act,

(b) on an excisable article exported- by payment in the State or territory to which the article is sent;

(c) on an excisable article transported -

(i) by payment in the district from which the article is sent, or

(ii) by payment upon issue for sale from a warehouse established, authorised or continued under this Act

(d) on intoxicating drugs manufactured, cultivated or collected -(i) by a rate charged upon the quantity manufactured under a licence granted in respect of the provisions of Section 13, clause (a), or issued for sale from a warehouse established, authorised or continued under this Act, or

(ii) by a rate assessed on the area covered by, or on the quantity or out turn of, the crop cultivated or collected under a licence granted in respect of the provision of Section 13, clause (b) or clause (c):

(e) on spirit or beer manufactured in any distillery or brewery licensed, established, authorised or continued under this Act, or-

(i) by a rate charged upon the quantity produced in or issued from the distillery or brewery, as the case may be, or issued for sale from a Warehouse established, authorised or continued under this Act, or

(ii) 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; and

(f) on tari drawn under a licence granted under Section 14, sub-section (1)-by a tax on each tree from which the drawing of tari is permitted:

Provided that, where payment is made upon the issue of an excisable article for sale from a warehouse, it shall be at the rate of duty in force on the date of issue of such article from such warehouse:[Provided further that in case of excisable articles imported or transported on payment of duty according to the provisions of sub-clause(i) of clause (a) or clause (c) of this section, the difference of duty resulting from any provision in the rates of duty subsequent to such import shall be realised from, or credited to the account of the importing or transporting licence according to the revised rate of duty which may be higher or lower than the previous rate and the calculation thereof shall be made on the balance stock of excisable article on the date the revised rate of duty comes into effect:

Provided also that no tax shall be levied in respect of any tree from which tari is drawn only for the manufacture of gur or molasses and under such special conditions as the Board may prescribe.

(Underlined for Emphasis)

Rule 147 of the Bihar and Orissa Excise Rules 1919:

147. The duty imposed on-

(i). foreign liquor and country spirit-

(a) imported under bond; or

(b) manufacture in a distillery, and stored in a distillery or excise warehouse,

(ii) ganja and bhang-

(a) imported under bond, or

(b) stored in an excise warehouse, shall be paid before removal from the distillery or excise warehouse unless a bond has been executed for such payment.

[Provided that the additional duty, calculated on the total issue of an excisable article in a calender month, at the rates prescribed, shall be paid by the licencee to whom such article has been issued by the fifth of the following month:]

[Provided [further] that in case of any revision in the rate of duty on an excisable article, the difference of duty shall be realised from or credited to the licensee, to whom such article has been issued on payment of duty prior to such revision according as the revised rate of duty is higher or lower than the old rate and the calculation of the difference of duty shall be made on the quantity of such article that may remain in possession of such licensee when the revised rate of duty comes into force.

(Underlined for Emphasis)

Section 92 of the Bihar Prohibition and Excise Act, 2016:

92. Appeals.-(1). All final orders passed by any Excise Officer other than the Excise Commissioner or Collector under this Act, shall be appellable to the Collector within sixty days from the date of the order.

(2). All final orders passed by the Collector and Excise Commissioner shall be appealable to the Excise Commissioner and the State Government respectively within ninety days from the date of the order complained of.

Provided that no second appeal shall lie against an order passed by the Excise Commissioner on appeal.

(3) The State Government may make rules in this behalf.

(Underlined for Emphasis)

Section 2 (61) of the Bihar Prohibition and Excise Act, 2016 “Rules” Rules made under this Act vide Bihar Prohibition and Excise Rules, 2021.

*FOURTH SCHEDULE UNDER RULE-21 OF THE RULES OF EXECUTIVE BUSINESS (A) DELEGATION OF POWERS IN ADMINISTRATIVE MATTERS

Subject

Decision

1. Matters relating to correspondence. (i)Routine matters, where only information is to be made available.

(ii) Less important matters.

(iii) Important matters.

(iv)Very important matters and very important letters received from the Government of India.

(i) Section Officer/Under Secretary concerned with the matter.

(ii) Deputy Secretary Joint Secretary/Additional Secretary concerned with the matter.

(iii) Special

Secretary/Secretary concerned with the matter.

(iv) Minister (copy of the very important letters will be sent to the Chief Secretary. Chief Minister and the Governor too for perusal as per need.

2.Power to nominate members under Act/ Statute/Rules/Regulation etc. or power to constitute Bodies or committees.

Chief Minister through Chief Secretary after consideration by the Minister.

3.(i) Where the authority to hear the representation under any Act/Statute/ Rules/ Regulations etc is not defined in original jurisdiction and such power is vested in the

(ii) Where authority to hear the Appellate

government. Revision representation is not defined under any Act/Statute/ Rules/ Regulations etc. and such power is vested in the government.

(i) Departmental Secretary.

(ii) Departmental Secretary, provided that the order has not been passed by the Secretary himself/herself but in the matters where the order has been passed by the Secretary himself/herself, the power to hear the appeal/revision will vest in the Departmental Minister.

[Amended by Notification No.-602. Dt-20.03.2007 of Cabinet Secretariat Department. Amended by Notification No.-306, Dt-17.03.2017 of Cabinet Secretariat Department.] 4.Extension of scheme and the temporary posts created under those.

Minister

5.Distribution of works in the Department:-

(i) Among the officers of group 'A' and group ‘B’

(ii) Among the officials of group 'C and group ‘D’

Secretary

(i) Group ‘A’ Departmental Minister.

(ii) Group ‘B’ Secretary

6.Training of officers/employees.

(i) Short term training (up to the period of one month) within the country.

(ii) Long term training (for more than one month) within the country.

(iii) Essential training of all types.

(iv) Foreign training of State Official or their participation in workshop etc organised in foreign countries (where other expenses. except the internal training expenses are being borne by external sources).

(v) Foreign training of State Officials or participation in workshop etc. organised in foreign countries (where internal travelling expenses along with whole or part expense are to be borne by the State Government).

(vi) Training of officers of the All India Services within and outside the country or participation in workshop etc.

(vii) Foreign tour (on personal expenses of the official)

(i) Secretary

(ii) Minister

(iii) Secretary

(iv) Chief Minister

(v)Chief Minister

(vi) Chief Minister (through Chief Secretary)

(vii) Minister

7. Issuance of No-Objection Certificate for obtaining Passport.

(i) Secretary of the cadre controlling department in respect of gazetted officers.

(ii) In respect of non gazetted employees the Head of the Department under the cadre controlling department and where there is no Head of the Department, such officers, not below the rank of Deputy Secretary, authorized by the Secretary.

8. Forwarding of representation for shift to another Service.

(i) Secretary, in respect of gazetted officers.

(ii) Head of Department

in respect of non- gazetted officials.

9. (i) Power to depute gazette officers outside the State.

(ii) Power to depute non-gazetted officers outside the State.

(iii) Power to depute gazetted officers in any other department within the State.

(iv) Power to depute non-gazetted officials to any other department within the State.

(v) Power to send officers of the All India Services on deputation

(i) Chief Minister, through Chief Secretary

(ii) Chief Minister

(iii) Minister of the cadre controlling department.

(iv) Head of Department/Secretary of the cadre controlling department.

(v) Chief Minister through Chief Secretary

[Added by Notification No-1489, Dated-15.12.2016 of Cabinet Secretariat Department.] 10. Proposals for amendment in forms and schedules covered by the Act/Resolution/ Notification/Rules/By Laws etc. sanctioned and issued under the policy decision by the Council of Ministers:

Provided that it is then while such amendment of forms and schedules is not contrary to the policy decision sanctioned / approved by the Council of Ministers.

Departmental Minister

70. Core issues involved in these bunch of petitions are as under:-

(i) Whether writ petition is maintainable in the absence of exhausting statutory remedy or not?

(ii) Whether levying of various kinds of excise duty on unutilized liquor is in order or not?

(iii) What reliefs petitioners are entitled to?

71. Prohibition is the act or practice of forbidding something by law, more particularly the term refers to the banning of the manufacture, storage (whether in barrels or bottles), transportation, sale, possession and consumption of alcohol beverages. Constitutional provisions like Article 47---

The Directive Principle in the Constitution of India states that "the State shall undertake Rules to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health." Alcohol is subject in the State list (List-II) under the Seventh Schedule of the Indian Constitution vide (Entry 51 List-II).

72. Taking note of orders of the Excise Commissioner the petitioners have statutory remedy of appeal under Section 92 and further revision under Section 93 of Act, 2016. Perusal of the aforementioned Sections reveals the State was required to issue statutory Rule under Section 93(3). Rules were framed in the year, 2021 and the relevant Rules are 20 and 24 of Rules, 2021. In the absence of Rules framed under Act, 2016 whether Rules, 1979 read with Schedule-4(3)(i) would be taken note of to the effect that in the absence of any identification of appellate or revisional authorities it could be identified under Rules, 1979 or not? Section 92(3) of Act, 2016 is crystal clear that Rules were required to be framed under the Act, 2016, such Rules were framed in the year, 2021. Reading of Rules 20 and 24, it is not crystal clear that appeals against the Excise Commissioner lies to which authority. Rules, 1979 stipulate departmental Secretary/concerned Minister. Rules, 1979 is not attracted for the reasons that under Section 93(3) of Act, 2016 there is a specific provision in respect of framing of Rules and Rules

were framed in the year 2021 and it is prospective in nature. Appellate authority is not identified. On the other hand Revisional authority is identified as Department Secretary under Rule 24 of Rules, 2021. Having regard to the date of impugned orders of the Excise Commissioner it is evident that they have been issued prior to framing of Rules, 2021. Analyzing of provisions of Act, 2016, Rules, 1979 and Rules, 2021 it is crystal clear that even to this day there is no identification of appellate/revisional authorities under the Act, 2016 read with Rules, 2021. Assuming that departmental Secretary is the appellate authority, as on today the Excise Commissioner is holder of the post of departmental Secretary. Therefore, prima facie, there is no efficacious remedy available to the petitioners. Be that as it may, the present litigation in respect of refund of excise duty etc. is the second round litigation. In an earlier litigation in the case of USL, this Court had an occasion to examine whether the petitioners are entitled to have the benefit of refund of excise duty etc. or not? After due examination of reasoning assigned by the Excise Commissioner on an earlier occasion, this Court has turned down the reasons and remanded the matter to the Excise Commissioner for revisiting the issue. Whereas the Excise Commissioner, after revisiting the subject matter, once again reiterated the reasons that petitioners were having sufficient time to lift the unutilized stocks of liquor with the BSBCL, transit of liquor from the manufacturing unit to BSBCL and liquor stocks lying in the manufacture units. The aforesaid exercise has not been undertaken by the petitioners. Therefore, there was a default on their part. But such reason has already been turned down on an earlier occasion by this Court. Therefore, there is an arbitrary action on the part of the Excise Commissioner. Having regard to the fact that the respondent-State would fall under Article 12 of the Constitution read with the arbitrariness in their action, in such an event, writ Court can exercise power despite the fact that concerned party has a statutory remedy as held by the Hon'ble Apex Court in number of cases.

73. Learned counsel for the petitioners submitted that inter se parties dispute has been settled in the light of earlier judgments in USL and Pernod. Therefore, Excise Commissioner cannot sit over the same issue and proceed to reject it. It is further submitted that excise duty cannot be levied on unutilized liquor stock in terms of statutory provision like Sections 27 and 28 of Act, 1915 read with Rule 147 of Rules, 1919. Therefore, Excise Department has no power to impose or collect excise duty on unutilized liquor stocks. In other words, there is no sale of liquor of particular stocks for which the petitioners are demanding for refund of excise duty collected in advance, hence, levying of excise duty is without authority of law. It is further submitted that authorities are exercising quasi-judicial powers they have not assigned reasons for example denial of import fee no reasons have been assigned to that effect there is no application of mind. It is also submitted that Excise Commissioner and other authorities who have passed the impugned orders have travelled beyond the order of remand. Even on this point, the petitioners need not exhaust the statutory remedy of appeal.

74. The petitioners have cited number of decisions on the issue of maintainability

of the writ petition

(i) Neelima Srivastava Vs. State of Uttar Pradesh and Ors, 2021 SCC online SC 610 (Para Nos. 27, 32 -36).

(ii) Union of India and Ors. Vs. K. Shankarappa (2001) 1 SCC 582 (Para 7).

(iii) Union of India and Ors. Vs. Kamlakshi Finance Corporation Ltd., 1992 Suppl (1) SCC 648 (Para Nos. 4,6 and 7).

(iv) Idea Cellular Limited vs. Union of India, (2015) SCC OnLine P&H 6354 (Para Nos. 14-19, 21-22)

(v) U.P. Pollution Control Board and Ors. Vs. Kanoria Industrial Limited and Anr. reported in (2001) 2 SCC 549 (Para 9, 12 & 17).

(vi) Salonah Tea Company Limited & Ors. vs. Superientendent of Taxes, Nawgong & Ors, (1998) 1 SCC 401 (Para No. 6)

(vii) Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Ors. reported in (1998) 8 SCC 1 (Para 14 and 15).

(viii) Harbanslal Sahnia and Anr. Vs. Indian Oil Corporation Ltd. and Ors. reported in (2003) 2 SCC 107 (Para 7).

(ix) M/s Godrej Sara Lee Ltd. Vs. The Excise and Taxation Officer cum Assessing Authority and Ors. reported in 2023 SCC OnLine SC 95 (Para 4).

(x) S.N Mukherjee Vs. Union of India reported in (1990) 4 SCC 594 (Para Nos. 29-40).

(xi) South Indian Bank Ltd. & Ors. vs. Naveen Mathew Philip & Anr. (2023) SCC Online SC 435 (Para 16, 18).

(xii) Premier Printing Press vs. State of Rajasthan & Anr. SBCW No. 3677/2015 decided on 23.02.2017 (Para Nos. 17, 26).

(xiii) Shrebatsa Mishra vs. State of Odisha & Ors. WPC No. 4881 of 2018 decided on 08.02.2023 (Para 2 to 4 and 12 to 14)

(xiv) Bibekanad Mondal vs. State of West Bengal reported in (2002) SCC Online Cal 571 (Para 2, 4-6).

(xv) Vidya Devi vs. Commisioner of Income Tax , reported in SCCOnline Cal 215 (Para 5).

(xvi) State of Kerala vs. MF Limited 2016 reported in SCCOnline Kerala 1058 (Para 8)

(xvii) State of Haryana vs. PC Wadhwa, IPS, Inspector General of Police and Anr. reported in (1987) 2 SCC 602.

75. On the other hand, Mr. P.K. Shahi, learned Advocate General relied on

Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Ors. reported in (1998) 8 SCC 1 (Para 14 and 15) and Commissioner of Income Tax and Ors. vs. Chhabbil Das Agarwal reported in (2014) 1 SCC 603 (Para 15) to overcome the decisions cited on behalf of the petitioners to the extent that the petitioners have to exhaust the statutory remedy before invoking Article 226 in filing writ petition. The same was distinguished by the petitioners' counsel while giving reply and reiterated latest decision of the Hon'ble Apex Court in the case of M/s Godrej Sara Lee Ltd. Vs. The Excise and Taxation Officer cum Assessing Authority and Ors. reported in 2023 SCC OnLine SC 95 (Para 4) read with Magadh Sugar and Energy Limited vs. State of Bihar & Ors. reported in 2021(4) PLJR 142 (SC).

76. Instead of examining of each and every cited decisions on behalf of the petitioners and learned Advocate General, we thought of taking note of later decision of the Hon'ble Apex Court namely M/s Godrej Sara Lee Ltd. Vs. The Excise and Taxation Officer cum Assessing Authority and Ors. reported in 2023 SCC OnLine SC 95 in which it is held that mere availability of an alternative remedy of appeal/revision would not oust the jurisdiction of the High Court under Article 226 of the Constitution of India. The analysis of the aforementioned decision the power is required to be taken note of for the purpose of entertaining the writ petition under Article 226 of the Constitution of India despite the fact that party has a statutory remedy.

"(i) The power under Article 226 of the Constitution of India to issue writs can be exercised not only for the enforcement of fundamental rights, but for any other purpose as well;

(ii). The High Court has discretion not to entertain the writ petition. One of the restrictions placed on the power of the High Court is an effective alternative remedy is available to the aggrieved person;

(iii) Exceptions to the rule of alternative remedy arises where:

(a) the writ petition has been filed for the enforcement of fundamental right protected by Part-III of the Constitution;

(b) there has been violation of the principles of natural justice;

(c) the order or the proceedings are wholly without jurisdiction; or

(d) the vires of legislation is challenged;

(iv). An alternative remedy by itself does not divest the High Court of its powers under Article 226 of the Constitution of India in an appropriate case though ordinarily; the writ petition should not be entertained when an efficacious remedy is provided by a law;

(v) When a right is created by statute which itself prescribes the remedy or procedure for enforcing the right or the liability the short must be had to that particulars statutory remedy before invoking the discretionary remedy under Article 226 of the Constitution of India;

(vi) This rule of the exhaustion of the statutory remedies is a rule of Policy, convenience and discretion;

(vii) In cases where there are disputed question of facts, the High Court may decide to decline jurisdiction in a writ petition. However, if the High Court is objectively of the view that the nature of the controversy requires the exercise of its writ jurisdiction, such a view would not readily be interference with."

The aforementioned principles have been taken note by the Apex Court in the case of Magadh Sugar & Energy Ltd. Versus State of Bihar and Ors [2021(4) PLJR 142 (SC)].

77. In the light of principle laid down in the aforementioned cases, it is evident that the petitioners have no statutory remedy and identified authority in the absence of Rules framed under Section 92(3) of the Act. As on the date of impugned order, excise duty is not leviable in respect of un-sold or unutilized liquor stock, since there is no provision for levying of excise duty on unsold liquor stock, therefore, levying or retention of excise duty paid in advance is in absence of source of law, therefore action of the State-respondent in retention of excise duty paid by the petitioner in advance is in the absence of any source of power under the Act, 1915 and Rules, 1919 read with any excise liquor sourcing policy or notification issued under statute. There are no valid fresh reasons as to why the petitioners are not entitled to refund of excise duty etc. On the other hand, Excise Commissioner has reiterated the earlier decision in the impugned order. Rules, 1979 read with Schedule 3(i) is not attracted. It is only for the purpose of administration. Further when there is specific provision under Section 92(3) of Act, 2016 for framing of Rules and identification of appellate/revisional authority and the same has not been acted upon, hence, Rules, 1979 is not attracted. Rules, 2021 were notified subsequent to the impugned orders and filing of these bunch of petitions. Even Rule 24 of Rules, 2021 there is no identification of Appellate authority and on the other hand Revisional authority has been identified as Departmental Secretary. Moreover, there are no new reasons assigned by the Excise Department with reference to remand by this Court on earlier occasion. Therefore, there is no point in invoking remedy of appeal. That apart, it is learnt that Excise Commissioner is holder of the post of Departmental Secretary. On all these points, petitioners have made out prima facie case so as to entertain the present writ petitions in the absence of invoking statutory remedy before the appellate and revisional authorities.

78. On merits, whether Excise Department can levy excise duty etc. or retain the advance excise duty paid by the petitioners for the unsold liquors stocks at three points namely certain stocks lying in the manufacture unit, certain stocks were on transit (transport) from manufacture unit to BSBCL and unsold stocks lying with the BSBCL delivered by the petitioners for sale purpose. In this regard, it is necessary to take note of statutory provision of Entry 51 of List II of Constitution of India about power of State to levy excise duties and it could be levied only in respect of alcoholic liquors for human consumption. In respect of the

aforementioned unsold stocks, the same were not consumed by the end users. In other words, there is no sale. Be that as it may, such un-sold stock would be wasteful alcoholic liquors for human consumption in view of the fact that excise departmental authorities have destroyed the unsold stocks which were lying in the manufacture unit, goods that were in transit and goods which were lying with BSBCL.

79. Reading of statutory Sections like Section 2(21), 2 (22), 2(25) and Section 27 of Act, 1915, it is crystal clear that the excise duty can be levied only on sale. No doubt, excise revenue defined under Section 2(25) relates to duty, fee, tax, further excisable article imported or exported or transported and manufactured etc. However, the same has been reflected even in Rule 147 like manufacture in distillery and stored in an excise warehouse in Rule 147(b) of 1919, Rules. In this regard, one of the notifications taken note of by this Court dated 05.04.2006 wherein there is no break up of imposition of excise duty like manufacture in distillery, stored in distillery or excise warehouse. On the other hand, in lump sum, excise duty has been levied. In fact, there is no identification of duties for labeling and bottling and other ancillary levies.

80. Notification dated 05.04.2006 should have been in the form of break up of levy of excise duty like manufacture in distillery stored in distillery or excise warehouse and then sale of liquor in the absence of identification of particular excise duty on manufacture in a distillery, stored in a distillery or excise warehouse and sale of liquor one cannot draw inference that there is a specific levy of excise duty at the stage of manufacture in distillery, stored in a distillery or excise warehouse and sale of liquor. The overall intention of the State is to levy excise duty on alcoholic liquors for human consumption. Therefore, levy of excise duty or retention of petitioners' money towards the levy of excise duty or any adjustment of excise duty towards destroyed liquor stocks is without authority of law.

81. At this stage, it is beneficial to take note of decision of the Hon'ble Apex Court in the case of State of Orissa and Ors. vs. Utkal Distilleries reported in (2022) 5 SCC 326. The relevant para nos. 17 to 23 reads as under:-

"17. The Constitution Bench of this Court in Synthetics & Chemicals [Synthetics & Chemicals Ltd. v. State of U.P., (1990) 1 SCC 109] was considering the issue, as to whether the States are entitled to levy excise duty in respect of industrial alcohol. Different legislations in the different States dealing with such a power of the State Government came up for consideration before the Constitution Bench of this Court in the said case. The Constitution Bench observed thus : (SCC pp. 160-62, paras 95-101)

“95. It was also contended that the State ultimately falls back on the consideration for parting with the privilege to sell alcoholic liquors which has been the basis of series of decisions of this Court based on English and American decisions but according to the learned counsel for the petitioners this doctrine of privilege and consideration for sale of privilege also could be available to the State only in respect of alcohol or alcoholic liquors which are for human consumption. According to the learned counsel by merely widening the definition of intoxicating liquors in respective Excise laws enacted by the States the ambit of authority of taxation could not be enlarged by the State Legislature when in List II Entry 51 the words used are alcoholic liquors for human consumption. Entry 84 in List I reads:

‘84. Duties of excise on tobacco and other goods manufactured or produced in India except—

(a) alcoholic liquors for human consumption;

(b) opium, Indian hemp and other narcotic drugs and narcotics,

but including medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (b) of this entry.’

96. Entry 51 in List II reads:

‘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;

(b) opium, Indian hemp and other narcotic drugs and narcotics;

but not including medicinal and toilet preparations containing alcohol or any substance included in sub-para (b) of this entry.’

97. A comparison of the language of these two entries clearly demonstrates that the powers of taxation on alcoholic liquors have been based on the way in which they are used as admittedly alcoholic liquor is a very wide term and may include variety of types of alcoholic liquors but our Constitution makers distributed them into two heads:

(a) for human consumption;

(b) other than for human consumption Alcoholic liquors which are for human consumption were put in Entry 51 List II authorising the State Legislature to levy tax on them whereas alcoholic liquors other than for human consumption have been left to the Central Legislature under Entry 84 for levy of duty of excise. This scheme of these two entries in Lists I and II is clear enough to indicate the line of demarcation for purposes of taxation of alcoholic liquors. What has been excluded in Entry 84 has specifically been put within the authority of the State for purposes of taxation.

98. Entry 8 in List II reads:

‘8. Intoxicating liquors, that is to say, the production, manufacture, possession, transport, purchase and sale of intoxicating liquors.'

This entry talks of intoxicating liquors and further on refers to production, manufacture, possession, transport, purchase and sale of these liquors. It appears that the State has levied some kind of duties in various names at each of these stages used in this entry, that is, production, manufacture, possession, transport, purchase and sale. But from the scheme of entries in the three Lists it is clear that taxing entries have been specifically enacted conferring powers of taxation whereas other entries pertain to the authority of the legislature to enact laws for purposes of regulation. If we compare Entry 8 in List II with Entry 51 it is clear that when Entry 51 authorises the State Legislature to levy tax and duties on alcoholic liquors falling in Entry 51, Entry 8 confers authority on the State Legislature to enact laws for regulation. Similarly are entries in List I. As regards regulation or regulatory fees it was contended that Entry 52 in List I empowers Parliament to declare the industries which the Union proposes to control in public interest under the Industries (Development and Regulation) Act.

99. Entry 52 List I reads as under:

'52. Industries, the control of which by the Union is declared by Parliament by law to be expedient in the public interest.'

100. Such a declaration is made by Parliament and this industry, that is, industry based on fermentation and alcohol has been declared to be an industry under that Act and therefore is directly under the control of the Centre and therefore even in respect of regulation the authority of the State Legislature in Entry 8 List II could only be subject to the Industries (Development and Regulation) Act or Rules made by the Centre.

101. Under these circumstances therefore it is clear that the State Legislature had no authority to levy duty or tax on alcohol which is not for human consumption as that could only be levied by the Centre."

18. It could thus be seen that the Constitution Bench has held that the Constitution makers distributed the term "alcoholic liquor" into two heads viz. (a) for human consumption; and (b) other than for human consumption. It has been held that the alcoholic liquors, which are for human consumption, are put in Entry 51 List II authorising the State Legislature to levy tax on them, whereas alcoholic liquors other than for human consumption have been left to the Central Legislature under Entry 84 for levy of duty of excise. It has been held that what has been excluded in Entry 84 has specifically been put within the authority of the State for purposes of taxation. The Constitution Bench clearly held that the State Legislature had no authority to levy duty or tax on alcohol, which is not for human consumption as that could be levied only by the Centre.

19. A three-Judge Bench of this Court in State of U.P. v. Modi Distillery [State of U.P. v. Modi Distillery, (1995) 5 SCC 753] was considering the power of the State Government to levy excise duty on wastage of liquor after distillation. Following

the judgment of the Constitution Bench of this Court in Synthetics & Chemicals [Synthetics & Chemicals Ltd. v. State of U.P., (1990) 1 SCC 109] , this Court observed thus : (Modi Distillery case [State of U.P. v. Modi Distillery, (1995) 5 SCC 753] , SCC p. 761, para 10)

"10. 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."

20. It could thus be seen that this Court held that the State was only empowered to levy excise duty on alcoholic liquor for human consumption. This Court held that the State has no power to levy excise duty on wastage of liquor after distillation.

21. Even the perusal of Section 27(1) read with Section 2(6) of the erstwhile Bihar and Orissa Excise Act, 1915 (hereinafter referred to as "the said Act"), which governed the field at the relevant time, would clarify the position. They are reproduced hereunder:

Section 2(6)

"2. Definitions.— In this Act, unless there is anything repugnant in the subject or context

—

***

(6) "excisable article" means—

(a) any alcoholic liquor for human consumption; or

(b) any intoxicating drug;"

"27. Power to impose duty on import, transport and manufacture.— (1) An excise duty or a countervailing duty, as the case may be, at such rate or rates as the State Government may direct, may be imposed either generally or for any specified local area on—

(a) any excisable article imported; or

(b) any excisable article exported; or

(c) any excisable article transported; or

(d) any excisable article (other than tari) manufactured under any licence granted in respect of clause (a) of Section 13; or

(e) any hemp plant cultivated, or any portion of such plant collected, under any licence granted in respect of clause (b) or clause (c) of Section 13; or

(f) any excisable article manufactured in any distillery or brewery licensed, established, authorised or continued under this Act.

Explanation.— Duty may be imposed on any article under this sub-section at different rates according to the places to which such article is to be removed for consumption, or according to the varying strengths and quality of such article.”

22. Perusal of Section 27(1) of the said Act would reveal that the State's power to impose duty on import, export, transport and manufacture is only in respect of any excisable articles imported, exported, transported and manufactured. ‘Excisable article’ has been defined to be any alcoholic liquor for human consumption or any intoxicating drug. It is thus clear that even under the relevant statute, the State has power to levy excise duty only in respect of the alcoholic liquor for human consumption.

23. In view of the legal position as settled by the Constitution Bench of this Court in Synthetics & Chemicals [Synthetics & Chemicals Ltd. v. State of U.P., (1990) 1 SCC 109] and the three-Judge Bench in Modi Distillery [State of U.P. v. Modi Distillery, (1995) 5 SCC 753] and the statutory provisions contained in the said Act, we see no reason to interfere with the impugned judgment and order [Utkal Distilleries v. State, OJC No. 9369 of 1998, order dated 5-12-2008 (Ori)] . The appeals, therefore, are found to be without merit and as such, dismissed. There shall be no order as to costs. All pending applications, if any, shall stand disposed of"

82. In the light of above decision that levy could be only on sale or liquor for human consumption and in the present case for destroyed liquor, levy of Excise duty is not permissible.

83. (a) Petitioners' cited decision in the case of Neelima Srivastava (cited supra), on the issue of reconsideration of disputed issues which have attained finality among the inter se parties is not permissible is relevant to the case in hand in view of the fact that this Court in the case of USL and Pernod Judgment has already considered those issues. Therefore, decision of the Excise Commissioner reiterating the same reasons for rejection of the petitioners’ claim is impermissible, would assist the petitioners' contention to the extent of findings of this Court in the USL and Pernod Cases.

(b) Levy of Duty or retention of the Excise Duty is without authority of law. On this point, petitioners’ have cited the decision in the case of Idea Limited, U.P. Pollution Control Board, Salona Tea Company Limited (cited supra), this decision assists the petitioners’ case.

(c) Imposition of VAT could only on sale of liquor. On this point, petitioners cited the decision in the case of State of Rajasthan Vs. Rajasthan Chemist Association (cited supra) is assisting the petitioners' case to the extent that VAT would arise as and when sale of a product materialises. In the present case, there is no sale of product insofar as destroying the liquors stock on three points, namely, manufacture, transportation and stock lying with BSBCL.

(d) The petitioners submitted that Excise Commissioner had exceeded his jurisdiction with reference to the earlier decision in the cases of USL and Pernod. On this issue, learned counsel for the petitioners submitted that reading of earlier Judgments read with remand, the Excise Commissioner cannot sidetrack the orders of this Court. On this point, they are relying on the decision of Vidya Devi, Commissioner of Income Tax, Allahabad Vs. State of Kerala Vs. MIF Limited (cited supra). It is a relevant decision and is assisting the above contention of petitioner.

(e) Marketability is a sine qua non for levying of excise duty. Petitioner's relying on Indian Cable Company Limited, Calcutta (cited supra) has some bearing in the present case to the extent that the liquor stocks which were destroyed on the three points has not yet reached the market for the purpose of sale. In other words, there is no sale of liquor. Therefore, levying of duty is impermissible.

(f) Rules of Executive Business which has been cited on behalf of the learned Advocate General is not applicable to the present case. On this point, it is submitted that Rules of Executive Business can not be contrary to the provisions of statute which governs the field. Petitioners are relying on a decision in the case of State of Haryana Vs. P.C. Wadhwa (cited supra). In the present case, Section 92(3) of Act, 2016 provides for framing of the rules insofar as the identification of the Appellate and Revisional Authority. By virtue of Rules 24 of Rules 2021, Appellate Authority has not been identified. On the other hand, revisional authority has been identified to the extent that Revisional Authority would be Departmental Secretary. In other words, there is a lacuna insofar as the identification of the appellate authority. Therefore, the above contention that Rules of Executive Business is contrary to the Statute is not acceptable. On the other hand, in the absence of identification, the appellate authority under the Act, 2016 read with Rules 2021, Appellate Authority has not been identified.

(g) Learned counsel for the petitioners submitted that privilege fee has been levied for parting with the privilege and once it has been withdrawn in that event petitioners are entitled for refund of levies.

84. The respondents have taken a policy decision that they would not realize levy of excise duty for the year 2016-17 for unutilized liquors stocks. The same yardstick is applicable to the previous period, i.e., from 02.04.2016 to 05.04.2016 and for subsequent period in view of the fact that total ban of liquors sale in the State of Bihar. It is a State policy decision to ban manufacture, sale of liquor in the State of Bihar, in such an event State should have been fair in not levying excise duty in respect of unutilized liquor. That too, certain stocks have been destroyed in the light of aforementioned policy of banning manufacture, sale and consumption of liquor in the State of Bihar. Once the liquor stocks were

destroyed at three points stated (supra) it is not a consumable and impracticable to consume such destroyed liquors. In other words this is wasteful and it is not available for human consumption so as to levy excise duty.

85. Learned counsel for the respective petitioners vehemently contended that Excise Commissioner and his subordinates have taken a very harsh step while ignoring the observations made by this Court in the case of USL and Pernod. There is a total non application of mind in not considering the fact that there is already a finding given by this Court in respect of destroyed un-sold liquor and State cannot levy excise duty.

86. Perusal of the records, the authorities have determined certain fees like 19C fees, bottling fee-19B, (BSBCL) stock plus factory stock excise duty, label registry fees, excise duty-PLA, these were not identified under the Excise Department Notification dated 05.04.2006. The State have not apprised this Court with any other notification as to how the excise duty would be levied and its break up like on manufacture, bottling, labelling, transport and sales etc. Further, Excise Department have not produced any material to show that what is the principle or structure of levying fees and excise duty as determined by the officials on the terms and conditions. In other words, levying of 19-C fees, bottling fee-19B, label registration fee particular amount is not forthcoming in any of the Government Notification so as to identify the respective fee or excise duty. Therefore, there is a non-application of mind insofar as identification of any fees structure as indicated (supra).

87. Yet another issue involved in the present lis is in respect of levy of demurrages/demand of demurrages on behalf of BSBCL is concerned, we have already del-linked those cases viz. CWJC No. 7463 of 2020 (Molson Coors Cobra India Pvt. Ltd. vs. The State of Bihar & Ors.), CWJC No. 7467 of 2020 (Molson Coors Cobra India Pvt. Ltd. vs. The State of Bihar & Ors.), CWJC No. 8853 of 2020 (Colona Blenders and Bottlers (India) Pvt. Ltd. & Ors. vs. The State of Bihar and Ors.) and CWJC No. 4652 of 2021 (United Breweries Limited vs. The State of Bihar & Ors.) from the present bunch of petitions. These cases would be heard independently after disposal of the present case.

88. Having considered these bunch of petitions, and for the reasons which have been adduced for the present judgment, we accordingly order and direct that :

(i) Petitions filed by the petitioners in CWJC No. 4882 of 2020, against the impugned orders passed by the second respondent-the Commissioner Excise, Govt. of Bihar, Patna dated 25.09.2019 (Annexure-1), fourth respondent-Joint Commissioner of Commercial Taxes, Bihar, Patna/Joint Commissioner of State Tax (I/c), Barh Zone, Barh, Patna dated 22.07.2019 (Annexure-2) and third respondent-Assistant Commissioner, Excise, Patna order dated 22.01.2020 (Annexure-3), in CWJC No. 4911 of 2020, the impugned orders passed by the second respondent-the Commissioner Excise, Govt. of Bihar, Patna dated 25.09.2019 (Annexure-1) and third respondent-Assistant Commissioner, Excise, Patna order dated 09.12.2019 (Annexure-2), in CWJC No. 5376 of 2020, the impugned orders passed by the second respondent-the Commissioner Excise, Govt. of Bihar, Patna dated 25.09.2019 (Annexure-15) and third respondent-Assistant Commissioner, Excise, Patna orders dated 09.12.2019/22.01.2020 (Annexure-17 series), in CWJC No. 5762 of 2020, the impugned order passed by the third respondent-the Commissioner Excise, Govt. of Bihar, Patna dated 25.09.2019 (Annexure-19), in CWJC No. 7461 of 2020, the impugned order passed by the second respondent-the Commissioner Excise, Govt. of Bihar, Patna dated 25.09.2019 (Annexure-14) and third respondent-Assistant Commissioner, Excise, Patna order dated 09.12.2019/22.01.2020 (Annexure-17 series), in CWJC No. 7473 of 2020, the impugned order passed by the second respondent-the Commissioner Excise, Govt. of Bihar, Patna dated 25.09.2019 (Annexure-13), in CWJC No. 6561 of 2021, the impugned order passed by the second respondent-the Commissioner Excise, Govt. of Bihar, Patna dated 03.03.2020 (Annexure-1), are set aside and all these petitions, i.e., CWJC No. 4882 of 2020 (United Spirits Limited Vs. The State of Bihar and Ors.), CWJC No. 4911 of 2020 (Bacardi India Pvt Ltd. Vs. The State of Bihar and Ors.), CWJC No. 5376 of 2020 (Colona Blenders and Bottlers (India) Pvt. Ltd. Vs. The State of Bihar and Ors.), CWJC No. 5762 of 2020 (Carlsbeg India Pvt. Ltd. Vs. The State of Bihar and Ors.), CWJC No. 7461 of 2020 (Molson Coors Cobra India Pvt. Ltd. Vs. The State of Bihar and Ors.), CWJC No. 7473 of 2020 (Molson Coors India Pvt. Ltd. Vs The State of Bihar and Ors.), CWJC No. 6561 of 2021 (Pernod Ricard India Pvt. Ltd. Vs. The State of Bihar and Ors.) are allowed.

(ii) The petitioners are directed to file their respective claim of refund of excise duty before the concerned Excise Commissioner. The Excise Commissioner is directed to verify the records and disburse the withheld excise duty to the respective petitioners within a period of four months from the date of receipt of the respective claim of the each of the petitioners.

(iii)There shall be no order as to costs

(iv)Pending Interlocutory applications, if any, stand disposed of.

