**SUPREME COURT OF INDIA**

A. B. Abdul Kadir

Vs.

State of Kerala

(H. R. Khanna, P. N. Bhagwati and S. Murtaza Fazl Ali, JJ.)

C.A.Nos.1689, 1692 and 1694-1705 of 1972

12.11.1975

**JUDGEMENT**

**KHANNA, J.:-**

1. Whether the provisions of the Luxury Tax on Tobacco (Validation) Act, (Act 9 of 1964) (hereinafter referred to as the Act) enacted by the State Legislature of Kerala are void on the grounds that (1) the State Legislature lacked the legislative competence to enact that Act, and (2) the provisions of the Act contravened Article 301 of the Constitution and were not protected by Article 304 is the main question which arises for determination in these 16 Civil Appeals Nos.- l689, 1690 and1692 to 1705 filed on certificate against the judgment of the Kerala High Court .A Division Bench of the High Court has upheld the validity of the Act.

2. We may set out the chequered history giving rise to Civil appeals 1689 and 1692. Learned counsel for the parties are agreed that it is not necessary to set out the facts of the other cases and that the decision in the above two appeals would also govern those other cases. The appellants were dealers in tobacco and tobacco preparations in Mattancherry in erstwhile Cochin State. In 1909

Cochin Tobacco Act (Act 7 of 1084 M. E.) was enacted by the Maharaja of Cochin. Section 4 of that Act prohibited the transport, import or export, sale and cultivation of tobacco, except as permitted by the Act and the rules framed thereunder. In pursuance of the power given by that Act the Diwan of Cochin made rules relating to matters specified in the Act. Under the rules it became necessary to obtain a licence for cultivation of tobacco plant. Drying, curing manufacturing and the storing of tobacco cultivated in the State was to be done under the supervision of an Excise Officer in licenced manufacturing yards and store houses. The system which was in force for the collection of tobacco revenue upto August 1950 was to auction what were called A class and B class shops. In addition, there were C class shops, the licence for which was granted either on the recommendation of or in consultation with B class licensees. A somewhat similar law was in operation in the erstwhile 'Travancore State. On April 1, 1950 after the Constitution had come in force and Travancore- Cochin had become a Part B State, Finance Act (No. 25 of 1950) extended the Central Excises and Salt Act (No, 1 of 1944) to Part B State of Travancore- Cochin by Section 11 thereof. Section 13 (2) of the Finance Act provided that "if immediately before the 1st day of April, 1950, there is in force in any State other than Jammu and Kashmir a law corresponding to, but other than, an Act referred to in sub-sections (1) or (2) of Section 11, such law is hereby repealed with effect from the said date .....". In consequence of this provision in Finance Act, 1950, the rules which were in force on April 1, 1950 were changed in the Cochin area by notification dated August 3, 1950 and the system of auction sales of A class and B class shops was done away with and instead graded licence fees were introduced for various classes of licensees, including C class licensees. Similar change was made for the Travancore area. Notification dated January, 25. 1951 was issued in this context. A class licensees under the new rules were called stockiest, B class licensees were wholesale sellers and C class licensees were retailers. A class licensees were to pay a specified minimum fee for a fixed maximum quantity of tobacco and tobacco goods possessed by them and an additional fee for an additional quantity. The fee was to be levied only in respect of the tobacco imported into the State. The State of Travancore-Cochin collected licence fee from the appellants for the period from August 17,1950 to December 31, 1957. In 1956 the appellants, who were A class licensees, filed writ petitions in Kerala High Court for refund of the licence fee collected from them on the ground that the Cochin and Travancore Tobacco Acts stood repealed by the Finance Act of 1950 because of the extension of the Central Excises and Salt Act to Part B State of Travancore-Cochin. The petitions were opposed on behalf of the State and it was contended that the Cochin Act or the similar Travancore Act did not stand repealed from April 1, 1950. It was urged that the State was competent to frame new rules under the Cochin Tobacco Act and the corresponding Travancore Act. It was further stated that the tax in question could be validly levied under Entry 60 or 62 of List II of the Seventh Schedule to the Constitution. The High Court dismissed the petitions holding that the laws under which the new rules were framed were in force and were valid under Entry 62 of List II of the Seventh Schedule. The appellants then came up in appeal to this Court. It was held by this Court in its judgment dated January 24, 1962 reported in (1962) Supp 2 SCR 741 = (AIR 1962 SC 922) that the Cochin Tobacco Act of 1084 and the rules frame thereunder as also similar provisions in Travancore, requiring licences to be taken out for storage and sale of tobacco and, for payment of licence fee in respect thereof were law corresponding to the provisions of the Central Excises and Salt Act 1944 and hence stood repealed on April 1, 1950 by virtue of Section 13 (2) of the Finance Act 1950. It was further held that as the parent Acts, namely the Cochin Tobacco Act and corresponding Travancore Act had stood repealed the new rules framed in August 1950 and January 1951 under those Acts for the respective areas of Cochin and Travancore for the issue of licences and payment of fee therefor for storage of tobacco were invalid ab initio. .

3. After the above decision of this Court the appellants made a demand to the respondent-State that the amounts of Rs. 1,14,750 collected by the State from them by way of licence fee under the invalid rules might be refunded to them. The Respondent-State refunded Rupees 73,500 to the appellants on April 29, 1963. On July 10, 1963 the appellants filed original petition No. 1268 of 1963 in the Kerala High Court for issue of a writ to the respondent-State to pay the balance amount of Rs. 41,250 which along with interest came to Rs. 52,800 to the appellants. During the pendency of the above petition on December l6, 1963 the Governor of Kerala promulgated ordinance No, 1 of 1963 which was later replaced by Kerala Luxury Tax on Tobacco ( Validation ) Act of 1964 (Act 9 of 1964). This Act received the assent of the President on March 3, 1964 Original petition No. 1268 of 1963 was thereupon amended with a view to challenge the validity of the above mentioned Act. In the meanwhile, on January 21, 1964 demand was made in view of the Ordinance by the State Government calling upon the appellants to pay the amount of Rs. 73,500 which had been refunded to them by the State Government. Original Petition No.934 of 1964 was filed by the appellants in the Kerala High Court to challenge the validity of demand notice dated January 21, 1964 as also the vires of the Act.

4. At this stage it may be appropriate to refer to the relevant provisions of the Act. The preamble of the Act reads as under:

"Preamble: whereas it is expedient to provide for the levy of a luxury tax on tobacco for the period beginning with the 17 th day of August, 1950 and ending on the 31st day of December, 1957, and the validation of the levy and collection of fees for licences for the vend and stocking of tobacco for the aforesaid period:

Be it enacted in the Fifteenth Year of the Republic of India as follows:-"

Section 2 (ii) of the Act defines tobacco to include leaf of the tobacco plant, snuff, cigars, cigarettes, beedies, beedi tobacco, tobacco powder and other preparations or admixtures of tobacco. Sec. 3 is the charging section and provides that "for the period beginning with the 17th day of August, 1950 and ending on the 31st day of December, 1957, every person vending or stocking tobacco within any area to which this Act extends shall be liable and shall be deemed always to have been liable to pay a luxury tax on such tobacco in the form of a fee for licence for the vend and stocking of the tobacco, at such rates as may be prescribed, not exceeding the rates specified in the Schedule." Section 4 (1) of the Act gives power to the State Government to make rules by publication in the gazette to carry out the purposes of the Act. According to sub-section (3) of Section 4 of the Act, "the rules and notifications specified below purported to have been issued under the Tobacco Act of 1087 (Travancore Act I of 1087) or the Cochin Tobacco Act, VII of 1084, as the case may be, in so far as they relate or purport to relate to the levy and collection of fees for licences for the vend and stock of tobacco, shall be deemed to be rules issued under this section and shall be deemed to have been in force at all material times." Among the rules and notifications specified in sub-section (3) of Section 4 are rules published on August 3, 1950 and January 25, 1951, Section 5 and 6 read as under:

"5. Validation - Notwithstanding any judgment, decree or order of any court, all fees for licences for the vend or stocking of tobacco levied or collected or purported to have been levied or collected under any of the rules or notification specified in subsection (3) of Sec. 4 for the period beginning with the 17th day of August, 1950 and ending on the 31st day of December, 1957, shall be deemed to have been validly levied or collected in accordance with law as if this Act were in force on and from the 17th day of August, 1950 and the fees for licences were a luxury tax on tobacco levied under the provisions of this Act, and accordingly.-

(a) no suit or other proceeding shall be maintained or continued in any court for the refund of any fees paid or purported to have been paid under any of the said rules or notifications; and

(b) no court shall enforce a decree or order directing the refund of any fees paid or purported to have been paid under any of the said rules or notifications.

6. Recovery of Licence fees refunded

Where any amount paid or purported to have been paid as a fee for licence under any of the rules or notifications specified in sub-section (3) of Sec. 4 has been refunded after the 24th day of January, 1962, and such amount would not have been liable to be refunded if this Act had been in force on the date of the refund, the person to whom the refund was made shall pay the amount so refunded to the credit of the Government in any Government treasury on or before the 16th day of April, 1964, and, where such amount is not so paid, the amount may be recovered from him as an arrear of land revenue under the Revenue Recovery Act for the time being in force."

5. According to the appellants, the label given to the tax imposed by the charging section was only a cloak to disguise its real nature of being an excise duty. The State Legislature, as such, was stated to be incompetent to levy excise duty on tobacco. It was also stated that the provisions of the Act were violative of the provisions of Article 301 of the Constitution. In the meanwhile, a single Judge of the High Court dismissed on July 20, 1964 original petition No. 1268 of 1963, which had been filed by the appellants. The appellants thereupon filed appeal before a Division Bench of the High Court against the judgment of the learned single Judge. The learned Judges of the Division Bench allowed original petition No. 963 of 1964 and quashed demand notice dated January 21, 1964 issued by the State asking for refund of Rs. 73,500. The High Court relied upon a decision of this Court in the case of Kalyani Stores v. State of Orissa, (1966) 1 SCR 865 = (AIR 1966 SC 1686) and held that in the absence of any production or manufacture of tobacco inside the appellant-State it was not competent for the State Legislature to impose a tax on tobacco imported from outside the State. The provisions of Act 9 of 1964 were held to violate Article 301 of the Constitution and not protected by Article 304. The learned Judges also set aside the judgment of the single Judge and allowed the

appeals against that judgment in original petition No, 1268 of 1963.

6. The State of Kerala thereafter came up in appeal to this Court. As per judgment dated July 30,1969 reported in ( 1970) 1 SCR 700 = AIR 1970 SC 1912) this Court held that the High Court had not correctly appreciated the import of the decision in Kalyani Stores , ( AIR 1966 SC1686) ( supra). It was held that only such restrictions or impediments which directly and immediately impeded the free flow of trade, commerce and intercourse fell within the prohibition imposed by Article 301. This Court further observed that unless High Court first came to the finding whether or not there was the infringement of guarantee under Article 301 of the Constitution, the further question as to whether the statue was saved under Article 304 (b) did not arise. The case was accordingly sent back to the High Court with the direction to take further affidavits in the matter. The Court left it open to the parties to argue as to whether the levy in question was in substance a duty of excise and as such whether it was not competent for the State legislature to enact the provisions in question.

7. After remand affidavits were filed on behalf of the appellants and the respondent-State. The learned Judges of the High Court as per judgment under appeal gave the following findings :

(1) The levy being in respect of goods produced outside the State, it cannot be, and is not an excise duty falling within Entry 84 of the Union List.

(2) The tax is on tobacco, an article of luxury, consumed within the taxing territory, levied on the occasion of its stocking and vending by the importers into the taxing territory. It clearly answers the description of luxury tax falling within Entry 62 of the State List.

(3) There being no competing internal goods, the mere fact that the levy is only on imported goods can only have, like any other tax, the economic effect of reducing the demand by reason of increasing the price. The consequent diminution in the quantity of goods imported into the taxing territory is too remote an effect to be a direct impediment to the free flow of trade offending Article 301 of the Constitution.

(4) However, the payment of the tax in the shape of a licence fee being a condition precedent to bringing the goods into the taxing territory, there would appear to be a direct impediment on the free flow of goods and therefore of trade into that territory notwithstanding that the taxable event is not the movement of the goods but the stocking after completing their journey and reaching their destination, the levy in advance being only for convenience of collection.

(5) Even assuming that the levy offends Article 301, it is saved by Article 304(b) being a reasonable tax levied in the public interest, the condition in the proviso thereto being satisfied by the assent of the President in view of Article 255.

(6) The guarantee in Article 301 and the saving in Article 304 (b) being in respect of both inter-State and intra-State trade, the fact that the taxing territory is only a part of the State is of no consequence."

8. On behalf of the appellants their learned counsel Mr. Krishnamurthy Iyer has at the outset contended that the question as to whether the levy of the licence fee upon the appellants constitutes excise duty is concluded by the decision of this Court of January 24, 1962 and the same operates as res judicata. As against that, Mr. Patel on behalf of the respondent- State submits that the question decided by this Court on January 24, 1962 was different from that which arises in these appeals and that the said decision does not operate as res judicata. The above submission of Mr, Patel, in our opinion is well founded. What was decided by this Court in its judgment dated January 24, 1962 was that the Cochin Tobacco Act and the similar Travancore Act taken along with the rules framed under those Acts by the respective Diwans were in substance law corresponding to the Central Excises and Salt Act. The Cochin Tobacco Act and the similar Travancore Act, it was further held, stood repealed on April 1, 1950 by virtue of Section 13 (2) of the Finance Act, 1950. So far as the rules are concerned which were issued on August 3, 1950 and January 25, 1951, this Court held that as the parent Acts under which those rules were issued stood repealed on April 1, 1950, there would be no power in the State Government thereafter to frame new rules in August 1950 and January 1951 for there would be no law to support the new rules. The above question does not arise for determination in these appeals before us. What we are concerned with is the constitutional validity of the Kerala Act 9 of 1964. This Act was enacted subsequent to the above decision of this Court rendered on January 24. 1962. No question relating to the validity of the above mentioned Act in the very nature of things could arise at the time of the earlier decision in 1962. We, therefore, are of the view that the judgment dated January 24, 1962 of this Court does not operate as res judicata regarding the points of controversy with which we are concerned in these appeals.

9. It has next been argued on behalf of the appellants that the levy for the licence fee for stocking and vending of tobacco, even though described as luxury tax in charging Section 3 of the Act, is in reality and substance an excise duty on tobacco. Excise duty on tobacco under Entry 84 of List I of the Seventh Schedule to the Constitution can only be levied by Parliament and, as such, according to the learned counsel for the appellants the State Legislature was not competent to enact the impugned Act 9 of 1964, This contention, in our opinion, is equally devoid of force. Excise duty, it is now well settled, is a tax on articles produced or manufactured in the taxing country. Generally speaking, the tax is on the manufacturer or the producer, yet laws are to be found which impose a duty of excise at stages subsequent to the manufacture or production (see pages 750-51 of the judgment of this Court delivered on January 24, 1962 in the case between these very parties, reported in (1962) Supp 2 SCR 741) = (AIR 1962 SC 922).

10. The fact that the levy of excise duty is in the form of licence fee would not detract from the fact that the levy relates to excise duty. It is, however, essential that such levy should be linked with production or manufacture of the excisable article. The recovery of licence fee in such an event would be one of the modes of levy of the excise duty. Where, however, the levy imposed or tax has no nexus with the manufacture or production of an article, the impost or tax cannot be regarded to be one in the nature of excise duty.

11. In the light of what has been stated above, we may now turn to the provisions of the impugned Act 9 of 1964. The charging Section 3 of this Act create a liability for payment of luxury tax on the stocking and vending of tobacco. There is no provision of this Act which is concerned with production or manufacture of tobacco or which links the tax under its provisions with the manufacture or production of Tobacco. The same is the position of the rules issued on August 3, 1950 and January, 25, 1951 and Mr, Krishnamurthy Iyer on behalf of the appellants has frankly conceded that those rules are in no way concerned with the production or manufacture of tobacco. It would, therefore, follow that the levy of tax contemplated by the provisions of Section 3 of the Act has nothing to do with the manufacture or production of tobacco and, as such, cannot be deemed to be in the nature of excise duty. Argument that the provisions of the Act fall under Entry 84 of List I of the Seventh Schedule to the Constitution must, therefore, be held to be bereft of force.

12. The next argument which has been advanced on behalf of the appellants is that the tax on the vending and stocking of tobacco cannot be considered to be luxury tax, as contemplated by Entry 62 of List II of the Seventh Schedule to the Constitution. According to that entry, the State Legislatures can make laws in respect of "taxes on luxuries including taxes on entertainment's, amusements, betting and gambling." Question, therefore, arises as to whether tobacco can be considered to be an article of luxury. The word "luxury" in the above context has not been used in the sense of something pertaining to the exclusive preserve of the rich. The fact that the use of an article is popular among the poor section of the population would not detract from its description or nature of being an article of luxury. The connotation of the word luxury" is something, which conduces enjoyment over and above the necessaries of life. It denotes something, which is superfluous and not indispensable and to which we take with a view to enjoy, amuse or entertain ourselves. An expenditure on something which is in excess of what is required for economic and personal well-being would be expenditure on luxury although the expenditure may be of a nature which is incurred by a large number of people, including those not economically well off. According to Encyclopaedia Britannica, luxury tax is "a tax on commodities or services that are considered to be luxuries rather than necessities. Modern examples are taxes levied on the purchase of jewellery, perfume and tobacco".' It has further been said:

"In the 19th and 20th centuries increased taxes have been placed on private expenditure upon alcohol, tobacco, entertainment and automobiles. Such expenditure is superfluous in the sense that a large part of it may be said to be in excess of what is required for economic efficiency and personal well-being, although the expenditure affects large numbers of people."

In.Re The Central Provinces and Berar Sales of Motor Spirit and Lubricants Taxation Act, 1938, 1939 FCR 18 = (AIR1939 FC1) Gwyer C.J. while dealing with excise duty described spirits, beer and tobacco as articles of luxuries.

13. It is no doubt true that for those who have been lured by the charms and blandisments of Lady Nicotine there are few things which are soothing to the distraught nerves and so entertaining as tobacco and its manifold preparations. One of them has gone to the extent of saying that he who doth not smoke hath either known no great griefs, or refuseth himself the softest consolation next to that which comes from heaven (Bulwer- Lytton, What will he Do with It?). Charles Lamb in "A Farewell to Tobacco" observes: "For thy sake, tobacco, I would do anything but die". The fact all the same remains that the use of tobacco has been found to have deleterious effect upon health and a tax on tobacco has been recognized as a tax in the nature of a luxury tax. One of the earliest indictments of tobacco is in Robert Burton's Anatomy of Melancholy wherein he says:

"It's a plague, a mischief, a violent purger of goods, lands, health hellish, devilish, and damned tobacco, the ruin and overthrow of body and soul."

Another indictment is from James I of England (Counterblaste to Tobacco) when it is said:

"A custom (smoking) loathsome to the eye, harmful to the brain, dangerous to the lungs, and in the black stinking fume thereof, nearest resembling the horrible Stygian smoke of the pit that is bottomless."

The taxation of the objects or procedures of luxurious consumption has aimed at two purposes, on the surface contradictory: the suppressing or limiting of this consumption and the deriving of a public income from it. On closer inspection a good deal of this contradiction vanishes, when it is seen that prohibition and taxation of luxury tend equally to fix certain levels and standards of living, as against economic and social progress, which is tending to "level" such differences (see page 634 of the Encyclopaedia of the Social Sciences Volumes IX-X, 14th Printing). .

14. It may be added that there is nothing static about what constitutes an article of luxury: The luxuries of yesterday can well become the necessities of today. Likewise, what constitutes necessity for citizens of one country or for those living in a particular climate may well be looked upon as an item of luxury for the nationals of another country or for those living in a different climate. A number of factors may have to be taken into account in adjudging a commodity as an article of luxury. Any difficulty which may arise in border line case would not be faced when we are dealing with an article like tobacco, which has been recognised to be an article of luxury and is harmful to health.

15. The learned Judges of the High Court were of the opinion that the levy of tax in question was violative of Article 301 of the Constitution,according to which subject to provisions of Part XIII, trade, commerce and intercourse throughout the territory of India shall be free. The learned Judges in this connection took the view that the levy of tax as a condition preceding to the entry of goods into a place directly impeded the flow of trade to that place. The conclusion arrived at by the High Court in this respect, in our opinion, was correct and sound. The appellants were A class licensees. According to Rule 16 of the rules issued on January 25, 1951, A class licensees shall be entitled to purchase tobacco from any dealer within or without the , State without any quantitative restriction. This class of licensees could sell only to others. A class licensees or B class licensees. It was also mentioned in that rule that the licence fee would be realised only for the quantities brought in from outside . Perusal of the rules shows that it was imperative for the A class licenesees to pay the licence fee in advance before they could bring tobacco within the taxable territory. We agree with the learned Judges of the High Court that such levy directly impedes the free flow of trade and as such is violative of Article 301 of the Constitution.

16. The next question which arises for consideration is whether the levy of tax is protected by Article 304 ,(b) of the Constitution. Article 304 (b) reads as under:

"304. Notwithstanding anything in Article 301 or Article 303, the Legislature of a State may by law

(a) ..... ..... .....

..... ..... .....

(b) Impose such reasonable restrictions on the freedom of trade, commerce or intercourse with or within that State as may be required in the public interest:

Provided that no Bill or amendment of the purposes of clause (b) shall be introduced or moved in the Legislature of a State without the previous sanction of the President."

We may observe that the requirement of the proviso regarding the sanction of the President has been satisfied. It is no doubt true that the assent of the President was given subsequent to the passing of the Bill by the legislature but that fact would not affect the validity of the impugned Act in view of the provisions of Article 255 of the Constitution.

17. Clause (b) of Article 304 empowers the Legislature of a State notwithstanding anything in

Article 301 or Article 303 but subject to the sanction of the President to impose reasonable restrictions on the freedom of trade, commerce or intercourse with or within that State as may be required in the public interest. Article 302 confers power upon Parliament to impose by law such restrictions on the freedom of trade, commerce or intercourse between one State and another or within any part of the territory of India as may be required in the public interest. Perusal of Article 302 and Article 304 shows that while Parliment can impose restrictions on the freedom of trade, commerce, or intercourse between one State and another or within any part of the territory of India as may be required in the public interest, so far as the State Legislatures are concerned, restrictions must satisfy two requirements, firstly, they must be in the public interest and, secondly the restrictions should be reasonable. Shah J. speaking for the majority of the Constitution Bench in the case of State of Madras v. N.K. Nataraja Mudaliar, (1968) 3 SCR 892 = (AIR 1969 SC 147) observed that the exercise of the power to tax may normally be presumed to be in the public interest. The above observations though made in the context of Article 302 have equal relevance under Art. 304. Not much argument is needed to show that the power to tax is essential for the maintenance of any government system. Taxes are levied usually for the obvious purpose of raising revenue. Taxation is also resorted to as a form of regulation. In the words of Justice Stone, "every tax is in some measure regulatory" (Sonzinsky v. United States (1937) 300 US 506). According to Roy Blough, the taxing power "becomes an instrument available to Government for accomplishing objectives other than raising revenues" The Federal Taxing Process, page 410 (quoted on page 263 of American Constitutional Law by Tresolini and Shapiro, 3rd Ed.).

To some extent every tax imposes an economic impediment to the activity taxed as compared with others not taxed, but that fact by itself would not make it unreasonable. It is well-settled that when power is conferred upon the legislature to levy tax, that power must be widely construed; it must include the power to impose a tax and select the articles or commodities for the exercise of such power; it must likewise-include the power to fix the rate and prescribe the machinery for the recovery of tax. This power also gives jurisdiction to the legislature to make such provisions as, in its opinion, would be necessary to prevent the evasion of the tax. As observed by Chief Justice Marshall in M'culloch v. Maryland, (1819) 4 Law ed 579, 607 "the power of taxing the people and their property is essential to the very existence of Government, and may be legitimately exercised on the object to which it is applicable to the utmost extent to which the Government may choose to carry it." There can also be no doubt that the law of taxation in the ultimate analysis is the result of the balancing of several complex considerations. The legislatures have a wide discretion in the matter.

18. In considering the question as to whether the restriction is reasonable in public interest, the court will have to balance the importance of freedom of trade as against the requirement of public interest. Article 304 (b) necessarily postulates that considerations of public interest may require and justify the imposition of restrictions on the freedom of trade provided they are reasonable. In determining the reasonableness of the restriction, we shall have to bear in mind the importance of freedom of trade and the requirement of public interest. It is a question of weighing one relevant consideration, against another in the context of the larger public interest (see Khyerbari Tea Co. Ltd. v. State of Assam, (1964) 5 SCR 975 = (AIR 1964 SC 925).

19. We agree with Mr. Krishnamurthy Iyer that the onus of showing that the restrictions on the freedom of trade, commerce or intercourse in the public interest are reasonable, is upon the State. It is also true that no effort was made in the affidavit filed on -behalf of the State in this case to show as to how the restrictions were reasonable, but that fact would not necessarily lead the court to hold that the restrictions are unreasonable. If the court on consideration of the totality of facts finds that the restrictions are reasonable, the court would uphold the same in spite of lack of details in the affidavit filed on behalf of the State. In judging the question of reasonableness of restriction in the present case, we must bear in mind that the levy of luxury tax relates to tobacco, the consumption of which involves health hazard. Regulation of the sale and stocking of an article like tobacco Which has a health hazard and is considered to be an article of luxury by imposing a licence fee for the same, in our opinion, is a permissible restriction in public interest within Article 304(b) of the Constitution. The material on record shows that except for cultivation of tobacco on experimental basis, no tobacco is grown in the area with which we are concerned. The levy of luxury tax is bound to result in raising the price of tobacco in the area of erstwhile States of Travancore and Cochin of the likely effects of the enhancement of the price of a commodity entailing health hazards is to lower its consumption.

20. The fact that there is no commercial production of tobacco in the area with which we are concerned would show that there is no discrimination between tobacco brought from outside that area and the locally grown tobacco because in fact there is no tobacco of the latter category, except that grown on experimental basis.

21. Argument has been advanced on behalf of the appellants that the provisions of the Act do not apply to the entire State of Kerala but apply only to those areas which were parts of erstwhile States of Travancore and Cochin. The restriction of the operation of the Act to only a part of the area of the State would show, it is urged, that the restriction is unreasonable. This contention, in our opinion, is not well-founded. The fact that the operation of the Act is confined to a particular area and does not extend to the entire State is due to historical reasons. The object of the Act was to validate the recoveries already made. In the case of Nazeeria Motor Service v. State of Andhra Pradesh, (1970) 2 SCR 52 = (AIR 1970 SC 1864), the appellants, who were motor transport operators, challenged the increase in surcharge of the fares and freights imposed by the Andhra Pradesh Motor Vehicles (Taxation of Passengers and Goods) Amendment and Validation Act, 1961. It was urged that the Act fell within the mischief of Article 301 of the Constitution and was not protected by Article 304 (b) and Article 19(1) (f) of the Constitution. Contention was also advanced that the provisions of the said Act were violative of Article 14 of the Constitution. In support of the above contentions, reference was made to the fact that the Act had been made applicable to the Andhra area and had not been made applicable to the Telengana area. Some other grounds were also relied upon to challenge the validity of the Act. This Court upheld the validity of the Act and repelled the contentions. No doubt this Court referred to the circumstance that the levy of tax was confined only to the Andhra area and was not operative in the Telengana area in context of the argument that the Act was violative of Article 14 of the Constitution the fact all the same remains that one of the grounds advanced with a view to assail the validity of the Act was that its provisions were not applicable to the Telengana area. We are unable to accede to the submission that this Court lost sight of the fact that the Act was not applicable to the Telengana area in holding that its provisions were protected by Article 304(b) of the Constitution.

22. It also true that the levy of tax relates only to the period from August 17, 1950 to December 31, 1957, but that too was due to the historical reason that the licence fee had been realised only during that period and the object of the impugned Act was to validate the recovery already made.

23. Argument has also been advanced by Mr. Krishnamurthy Iyer that the impugned Act is a colourable piece of legislation because what is sought to be done is to validate the levy made under provisions of law which were found to have been repealed. It is further pointed out that those provisions of the law were found by this Court to be similar to the provisions of the Central Excises and Salt Act and, as such, those provisions were beyond the competence of a State Legislature. Any levy made under those provisions cannot, according to the learned counsel, be validated by the State Legislature. The above argument has a seeming plausibility, but, on deeper examination, we find it to be not tenable. It is no doubt true, as stated by this Court in the case of Jaora Sugar Mills (P) Ltd v. State of Madhya Pradesh, (1966) 1 SCR 523 = (AIR 1966 SC 416), that when an Act passed by a State Legislature is invalid on the ground that the State Legislature did not have legislative competence to deal with the topics covered by it, in that event even Parliament cannot validate such an Act, because the effect of such attempted validation, in substance, would be to confer legislative competence on the State Legislature in regard to a field or topic which, by the relevant provisions of the schedules to the Constitution, is outside its jurisdiction. Where a topic is not included within the relevant List dealing with the legislative competence of the State Legislature, Parliament, by making a law cannot attempt to confer such legislative competence on the State Legislatures. The above principle would, however, have no application where, as in the present case, what is sought to be done is to validate the recovery of licence fee for stocking and vending of tobacco. The impugned provisions under which that levy is sought to be made with a retrospective effect have nothing to do, as already pointed out above, with production and manufacturer of tobacco. The levy is sought to be made as luxury tax which is within the competence of the State Legislature and not as excise duty which is beyond the legislative competence of the State Legislature. If the levy in question can be justified under a provision which is within the legislative competence of the State Legislature, the levy shall be held to be validly imposed and cannot be considered to be impermissible.

24. Where a challenge to the validity of a legal enactment is made on the ground that it is a colourable piece of legislation, what has to be proved to the satisfaction of the court is that though the Act ostensibly is within the legislative competence of the legislature in question, in substance and reality it covers field which is outside its legislative competence. in the present case we find that in enacting the impugned provisions, the State Legislature, as already pointed out above, has exercised a power of levying luxury tax in the shape of licence fee on the vend and stocking of tobacco. The enactment of a law for levying luxury tax is unquestionably within the legislative competence of the State legislature in view of Entry 62 in List II of the Seventh Schedule to the Constitution. As such, it cannot be said that impugned Act is a colourable piece of legislation. In the case 1 SCR 523 = (AIR 1966 SC 416) a cess was levied under the Madhya Pradesh Sugarcane (Regulation of Supply and Purchase) Act, 1958 on sugarcane. This Court in the earlier case of Diamond Sugar Mills. (1961) 3 SCR 242 = (AIR 1961 SC 652) had held that such a leavy was not valid. Following the above decision the Madhya Pradesh High Court struck down S.23 which was the charging section of the Madhya Pradesh Sugarcane (Regulation of Supply and Purchase) Act,

1958. There were similar Acts in several other States which suffered from the same infirmity and to meet that situation, Parliament passed the Sugarcane Cess (validation) Act, 1961. The Act made valid by Section 3 all the assessments and collections made before its commencement under the various State Acts and laid down that all the provisions of the State Acts as well as the relevant notifications, rules, etc., made under the State Acts would be treated as part of Section 3. It was further provided that the said section shall be deemed to have existed at all material times when the cess was imposed, assessed and collected under the State 'Acts. The appellant, a sugar factory, was asked to pay the cess for the years 1959-60 and 1960-61. The appellant challenged the levy' The High Court having dismissed the petition, the appellant came to this Court. Among the various contentions which were advanced on behalf' of the appellant in the case were: (1) What the validation of the Act had done was to attempt to cure the legislative incompetence of the State Legislatures by validating State Acts which were invalid on the ground of absence of legislative competence in the respective State Legislatures: (2) Parliament had passed the Act in question not for the purpose of levying a cess of its own, but for the purpose of enabling the respective States to retain the' amounts which they had illegally collected. The Act was, therefore, a colourable piece of legislation: and (3) The Act had not been passed for the purposes of the Union of India and the recoveries of cessses which were retrospectively authorised by it were not likely to go into the Consolidated Fund of India. The Constitution Bench of this Court speaking through Gajendragadkar C. J. repelled all the above contentions. It was held by this Court that if collections are made under statutory provisions which are invalid because they deal with a topic outside the legislative competence of the State Legislature, the Parliament can in exercise of its undoubted legislative competence, pass a law retrospectively validating the said collections by converting their character into collections made under its own statute operating retrospectively. So far as the present case is concerned we have already pointed out above that it was within the competence of the State Legislature to make a law in respect of luxury tax and to recover that tax in the shape of licence fee for vend and stocking of tobacco. The State Legislature has sought to validate the recovery of the amounts already made by treating those amounts as luxury tax. The fact that the validation of the levy entailed converting the character of the collection from an impermissible excise duty into permissible luxury tax would not render it unconstitutional, The only conditions are that that levy should be of a nature which can answer to the description of luxury tax and that the State Legislature should be competent to enact a law for recovery of luxury tax. Both these conditions as stated above are satisfied.

25. As regards the power of the legislature to give retrospective operation to a tax legislation, we may also refer to the case of Ramkrishna v. State of Bihar. (1964) 1 SCR 897 = (AIR 1963 SC 1667) wherein it was held that where the legislature can make a valid law, it can provide not only for the prospective operation of the material provisions of the said law but can also provide for the retrospective operation of the said provisions. The legislative power was held to include the subsidiary or the auxiliary power to validate law which had been found to be invalid. It was also observed that in judging the reasonableness of the retrospective operation of law for the purpose of Article 304 (b), the test of length of time covered by the retrospective operation could not by itself be treated as decisive. Again in the case of Epari Chinna Krishna -Moorthy v. State of Orissa (1984) 7 SCR 185 (AIR 1904 SC 1581) the Constitution Bench of this Court repelled the argument that a legislation should be held to be invalid because its retrospective operation might operate harshly in some cases.

26. As e result of the above, we would hold that the impugned provisions are protected by Article 304 (b) of the Constitution.

27. Lastly, it has been argued that section 6 of the impugned Act is invalid because it provides for payment of an amount, which had been refunded in pursuance of the order of this Court. Section 6 is thus stated to be an encroachment by the legislature upon a judicial field. This contention, in our opinion, is bereft of force. If a provision regarding the levy of luxury tax is within the competence of the state Legislature, the said Legislature would be well within its competence to enact a law for recovery of an amount which, though already refunded to a party. partakes of the nature of luxury tax in the light of that law. If an amount can answer to the description of luxury tax, there would be no legal impediment to recovering the same as luxury tax, even though initially it was recovered or sought to be recovered as something different from luxury tax.

28. As a result of the above, we dismiss these appeals, but in the circumstances, leave the parties to bear their own costs.

Appeals dismissed.