

**SUPREME COURT OF INDIA**

Mohan Meakin Ltd.

Vs.

State of H.P.

C.A.No. 7403 of 2008

(S.B. Sinha and Cyriac Joseph JJ)

18.12.2008

**JUDGMENT**

**S.B. SINHA, J**

1. Leave granted.

2. Constitutional validity of increase in levy made by the State of Himachal Pradesh inter alia on import/ transport of rectified spirit and/ or potable alcohol is in question in these appeals which arise out of a judgment and order dated 27.06.2007 passed by the High Court of Himachal Pradesh, Shimla in C.W.P. No. 251 of 1999.

3. Appellant is a public limited company registered and incorporated under the Companies Act, 1956. It is carrying on business of manufacture and sale of India Made Foreign Liquor (IMFL) and beer, etc. Its distillery is situated at Kasauli in the District of Solan. It holds a licence in Form D-2

granted by the State of Himachal Pradesh in terms of the provisions of the Punjab Excise Act, 1914 (for short "the Act") and the Rules framed there under. For the purpose of running the said distillery, it imported 'Malt Spirit of over proof strength' from its distillery situated at Mohan Nagar in the State of Uttar Pradesh. For the said purpose, it was required to obtain import permit from the Collector Excise, Himachal Pradesh. It also transported some quantities of Malt Spirit of over proof strength from M/s. Rangar Breweries Ltd., Mehatpur, Distt. Una as well as from its distillery situated at Mohan Nagar, Distt. Ghaziabad during the relevant years, viz., 1997-98 and 1998-99.

4. Admittedly, prior to 1.04.1996, no payment was required to be made for obtaining permit/transport fee on transportation of IMFL, country spirit, beer, etc. It was directed to be levied for the first time in terms of an excise policy for the year 1996 - 97 dated 12.03.1996. A permit fee at the rate of Rs. 2.50 per bulk litres on denatured spirit, Rs. 2.00 per proof litre and Rs. 1.00 per proof litre on foreign spirit and country liquor respectively became leviable. Such permit fee was payable at the time of grant of permission for transportation of liquor. It was payable by a person who makes an application for grant of permission for import and/ or transport of foreign liquor or country liquor or both. A demand of Rs. 8,21,992/- was made by the Excise and Taxation Officer on or about 28.10.1997 towards permit fee on the spirit imported by the appellant during the year 1996-97. Another demand for a sum of Rs. 17,68,346/- was made upto 6.02.1999 for making similar import. Indisputably, no amount towards payment of licence fee was due from the appellant. It is also not in dispute that export duty at the rate of Rs. 1.00 per proof litre on Indian Made Foreign Spirit and at the rate of Rs. 0.50 per bulk litre on beer with alcoholic content upto 5% and at the rate of Rs. 0.75 per bulk litre with alcoholic content exceeding 5% has been paid by the appellant. It has also paid import fee at the rate of Rs. 6/- per proof litre on spirit imported by it.

5. A representation was made by the appellant in respect of the said demands by a letter dated 30.01.1999 inter alia contending that the State of Himachal Pradesh had no jurisdiction to levy such fee. In any event, no services having been rendered to the appellant, quantum jump of the licence fee in the name of such permit fee was not justified.

The said representation of the appellant was rejected by an order dated 10.02.1999.

6. The High Court, however, by reason of the impugned judgment rejected the contentions of the appellant.

7. Mr. Anoop G. Chaudhary and Mr. Rakesh Dwivedi, learned senior counsel appearing on behalf of the appellant, would submit:

(i) Transportation of industrial alcohol and/ or rectified spirit being not within the legislative

competence of the State, it cannot exercise any control thereover.

(ii) The High Court committed a serious error as it proceeded on the premise that there does not exist any distinction between import of potable liquor and that of Malt Spirit of over proof strength.

(iii) The element of quid pro quo being inherent in the levy of fee and as no material was produced by the State to justify its demand, the impugned judgment cannot be sustained.

8. Mr. Naresh K. Sharma, learned counsel appearing on behalf of the respondents, on the other hand, would contend that the State has to incur a huge expenditure towards maintenance of staff for regulating the business of liquor. Permit is granted for import of country spirit, beer, IMFL, etc. in the interest of the permit holders themselves so that abuse of import by non-permit holders can be prevented. Business in both potable liquor as also Malt Spirit of over proof strength is required to be regulated by the State for which the State must have machinery.

9. We will assume, as has been contended, that no person has any fundamental right to carry on business in liquor, it being *res extra commercium*.

10. The question which would, however, arise for consideration is as to whether the State has the jurisdiction to impose any restriction on the movement of industrial alcohol and/ or Malt Spirit of over proof strength.

11. Part XI of the Constitution of India provides for relations between Union and the States. Chapter I thereof provides for legislative relations. In terms of Article 245(1) of the Constitution of India, ordinarily the Parliament has the exclusive legislative competence to make laws for the whole or any part of the territory of India and the Legislature of a State may make laws for the whole or any part of the State. Article 246 provides for the subject matter of laws made by the Parliament and by the Legislatures of States. Indisputably, the Parliament has the exclusive power to make laws, in respect of the matters enumerated in List I of the Seventh Schedule of the Constitution whereas the State has the exclusive legislative power to make laws with respect to any of the matters enumerated in List II of the Seventh Schedule of the Constitution. We are not concerned herein with the legislative competence of the Union as also the State as contained in List III of the Seventh Schedule of the Constitution of India. Entry 42 of List I of the Seventh Schedule of the Constitution provides for inter-State trade and commerce. Entries 52, 84 and 97 of List I of the Seventh Schedule of the Constitution read as under:

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

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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.

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97. Any other matter not enumerated in List II or List III including any tax not mentioned in either of those Lists."

12. Entry 8 of List II of the Seventh Schedule of the Constitution confers legislative power upon the State in respect of "Intoxicating liquors, that is to say, the production, manufacture, possession, transport, purchase and sale of intoxicating liquors". Entry 51 of List II thereof provides for an exception to the Parliament's power to impose levy of tax on manufacture of the article, in respect of:

"(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."

Entry 66, List II of the Seventh Schedule of the Constitution reads as under:

"66. Fees in respect of any of the matters in this List, but not including fees taken in any court."

13. The Act is a pre-constitutional statute. Section 3(18) of the Act defines spirit and Section 3(14) thereof defines liquor. These definitions cover even denatured spirit. They are broadly worded pre-constitutional definitions. Malt spirit is said to be spirit obtained by distillation of barley or other grain. The strength of Malt Spirit after distillation is said to be 66% to 70% v/v. It is also with over proof strength. Proof liquor is of around 50% v/v. Liquor which is sufficiently below the same is

termed as under proof liquor.

14. Appellant herein contends that it had imported Malt Spirit of over proof strength and the application for grant of permit vis-à-vis levy of fee pertained only thereto. It has furthermore been contended that the Malt Spirit imported by it being rectified spirit, it is not potable as per ISI Specifications. It is not bought and sold in the market as potable liquor. It is used as a raw material for blending to manufacture IMFL. Contention of the appellant, therefore, is that it is not an excisable article within the meaning of the provisions of Section 3(6) of the Act. Section 16 of the Act restricts import, export and transportation of intoxicants, except upon payment of any duty or execution of a bond or compliance with such conditions as the State Government may impose. Section 18 provides for issuance of passes for import, export and transport to be granted in terms of Section 19 thereof. Sub-section (2) of Section 20 forbids construction or working of any distillery or brewery, save and except under the authority and subject to the terms and conditions of the licence granted in that behalf by the Financial Commissioner under Section 21 of the Act, which reads as under:

"21. The Financial Commissioner, subject to such restrictions or conditions as the State Government may impose, may - (a) establish a distillery in which spirit may be manufactured under a license granted under section 20;

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(d) make rules regarding -

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(11) any other matters connected with the working of distilleries or breweries."

The rule making power is conferred upon the Financial Commissioner by reason of Section 59 of the Act, which reads as under:

"59. The Financial Commissioner may, by notification, make rules -

(a) \*\*\*

(b) \*\*\*

(c) \*\*\*

(d) prescribing the scale of fees or the manner of fixing the fees payable in respect of any license, permit or pass or in respect of the storing of any intoxicant;

(e) regulating the time, place and manner of payment of any duty or fee;

(f) prescribing the authority by, the restrictions under and the conditions on which, any license, permit or pass may be granted - "

15. Pursuant to or in furtherance of the said power, the Financial Commissioner made rules known as the Punjab Liquor Permit and Pass Rules, 1932 (for short "the Rules). The Rules are applicable subject to such modifications as has been made in the State of Himachal Pradesh, the relevant provisions whereof are as under:

"7.2 Subject to the provisions of order 23 of the Himachal Pradesh Liquor Import, Export, Transport and Possession Orders, 1965, a person importing, exporting or transporting foreign liquor, country spirit, rectified spirit or denatured spirit must obtain -

(a) a permit in form L-32 in the case of import and transport or corresponding permit in case of export from the officer authorized to grant such permits in the district, State or Union territory of destination; and

(b) a pass in form L-34 for export and transport and a corresponding pass for import from the officer authorized to grant such passes in the place of issue;

Provided that a pass for the removal of spirit and beer from a licensed distillery or brewery or a

warehouse issued in accordance with the rules made by the Financial Commissioner, shall be deemed to be a pass for the purpose of this rule; Provided further that a permit shall not be required for the transport or foreign liquor, country spirit, rectified spirit or denatured spirit within a district, except when denatured spirit is transported from the bonded warehouse of a licensed distillery; Provided further that the members of the diplomatic staff of a foreign embassy located in the State of H.P. shall not be required to obtain a permit for import and transport of imported liquor. 7.2A. A fee at the rate of (a) Rs. 2.00 per proof litre of foreign liquor (excluding beer, sacramental wine, wine and cider) and (b) Re. 1.00 per proof litre of country spirit shall be payable by a person who makes an application for the grant of permission to import and/ or transport of the foreign liquor; (excluding beer sacramental wine, wine and cider) or country liquor or both: Provided that in the case of events covered by the second proviso to clause (b) of rule 2, the fee shall also be payable at these rates by a licensee who makes an application for the grant of permission to transport foreign liquor (excluding beer, sacramental wine and cider) or country spirit or both:

Provided further no fee shall be payable on the quantity of Foreign liquor (excluding beer sacramental wine, wine and cider) on which such fee has already been paid and recovered previously in Himachal Pradesh.

Explanation -1. In this rule, the expression "transport" shall not include the transport of Foreign Spirit or country spirit in course of 'export' inter - State or across the customs frontier of India.

2. The fee specified in this rule shall not be payable on denatured spirit rectified spirit or perfumed spirit."

By reason of notifications dated 1.04.1997 and 1.04.1998, the rates of fees mentioned in Rule 7.2-A were modified.

16. Rule 7.9 of the Rules reads as under:

"7.9 All passes granted to cover the import of country spirit and foreign liquor, shall be subject to the condition that no consignment shall be brought into use until it has been examined by the excise inspector or sub-inspector of the district of destination, to whom intimation of the arrival of the consignment shall be given; such examination shall be conducted within seven days of the receipt of the intimation which shall be dispatched by the importer on the day following the receipt of the consignment."

17. The Financial Commissioner also made the Excise Barriers' Rules, 1939; Rules 19.1 and 19.2 thereof read as under:

"19.1 The Financial Commissioner may establish excise outposts at such places as he may think fit on any road, or at any ferry, for the prevention of the smuggling of excisable articles or opium, and may depute Excise Inspectors to be in charge of such outposts. 19.2 The driver of any vehicle or laden animal arriving at an excise post shall stop his vehicle or animal or arrival at the outpost until the excise officer has conducted his search. The excise officer will proceed with the search forthwith."

18. Indisputably, the State has the exclusive authority to grant licence. Our attention has been drawn to one of the conditions of the licence granted in favour of the appellant in Form D-2 which reads as under:

"1. The licensee shall observe the provisions of the Punjab Excise Act, 1 of 1914 and all rules made thereunder and all rules made under any other law for the time being in force applicable to the manufacture, issue and sale of spirit."

19. Indisputably, the appellant being a licensee must abide by the terms and conditions of licence. It is also bound to follow the rules framed in this behalf. A subordinate legislation which, however, is beyond the legislative competence of the State would be ultra vires. Furthermore, there cannot be any doubt that the State possesses the right to have complete control over all aspects of intoxicants, viz., manufacture, collection, sale and consumption, etc. It also has the exclusive right to manufacture and sell liquor and to transfer the said right with a view to raise revenue. Right to fix the amount of consideration for grant of said privilege for manufacturing or vending liquor is also beyond any doubt or dispute.

20. The State has to make distinction between a Malt Spirit of over proof strength and potable liquor. Entries 8, 51 and 66 of List II of the Seventh Schedule of the Constitution of India confer jurisdiction upon the State only to exercise its legislative control in respect of matters which are covered thereby. Industrial alcohol or spirit having regard to Entry 52 of List I of the Seventh Schedule of the Constitution of India cannot be subject matter of any regulation or control by the State; it being not alcoholic liquor for human consumption.

The question is well-settled in view of the decision of a Seven-Judge Bench of this Court in *Synthetics and Chemicals Ltd. and Others v. State of U.P. and Others* [(1990) 1 SCC 109] wherein it

was categorically held:

"53. It was further submitted by the State that the State has exclusive right to deal in liquor. This power according to the counsel for the State, is reserved by and/or derived under Articles 19(6) and 19(6)(ii) of the Constitution. For parting with that right a charge is levied. It was emphasised that in a series of decisions some of which have been referred to hereinbefore, it has been ruled that the charge is neither a fee nor a tax and termed it as privilege. The levy is on the manufacture, possession of alcohol. The rate of levy differs on its use, according to the State of U.P. The impost is also stipulated under the trading powers of the State under Article 298 and it was contended that the petitioners and/or appellants were bound by the terms of their licence. It was submitted that the Parliament has no power to legislate on industrial alcohol, since industrial alcohol was also alcoholic liquor for human consumption. Entry 84 in List I expressly excludes alcoholic liquor for human consumption; and due to express exclusion of alcoholic liquor for human consumption from List I, the residuary Entry 97 in List I will not operate as against its own legislative interest. These submissions have been made on the assumption that industrial liquor or ethyl alcohol is for human consumption. It is important to emphasise that the expression of a constitution must be understood in its common and normal sense. Industrial alcohol as it is, is incapable of being consumed by a normal human being. The expression 'consumption' must also be understood in the sense of direct physical intake by human beings in this context. It is true that utilisation in some form or the other is consumption for the benefit of human beings if industrial alcohol is utilised for production of rubber, tyres used. The utilisation of those tyres in the vehicle of man cannot in the context in which the expression has been used in the Constitution, be understood to mean that the alcohol has been for human consumption.

54. We have no doubt that the framers of the Constitution when they used the expression 'alcoholic liquor for human consumption' they meant at that time and still the expression means that liquor which as it is is consumable in the sense capable of being taken by human beings as such as beverage of drinks. Hence, the expression under Entry 84, List I must be understood in that light. We were taken through various dictionary and other meanings and also invited to the process of manufacture of alcohol in order to induce us to accept the position that denatured spirit can also be by appropriate cultivation or application or admixture with water or with others, be transformed into 'alcoholic liquor for human consumption' and as such transformation would not entail any process of manufacture as such. There will not be any organic or fundamental change in this transformation, we were told. We are, however, unable to enter into this examination. Constitutional provisions specially dealing with the delimitation of powers in a federal polity must be understood in a broad commonsense point of view as understood by common people for whom the Constitution is made. In terminology, as understood by the framers of the Constitution, and also as viewed at the relevant time of its interpretation, it is not possible to proceed otherwise; alcoholic or intoxicating liquors must be understood as these are, not what these are capable of or able to become. It is also not possible to accept the submission that vend fee in U.P. is a pre-Constitution imposition and would not be subject to Article 245 of the Constitution. The present extent of imposition of vend fee is not a pre-Constitution imposition, as we noticed from the change of rate from time to time."

21. The doctrine of *res extra commercium* as applied by this Court in respect of potable alcohol in its various judgments including *Khoday Distilleries Ltd. and Others v. State of Karnataka and Others* [(1995) 1 SCC 574] and *State of Punjab and Another v. Devans Modern Breweries Ltd. And Another* [(2004) 11 SCC 26] would have no application to industrial alcohol which is produced in an industry controlled and regulated in terms of Entry 52, List I of the Seventh Schedule of the Constitution of India. If manufacture and transport of industrial alcohol and/ or Malt Spirit of over proof strength is not *res extra commercium* in view of the binding decisions of this Court in *Synthetics and Chemicals Ltd. (supra)*, it is axiomatic that the provisions of Article 301 of the Constitution of India shall apply in relation to inter-State trade. The State's power to exercise control of inter- State transport which is within the exclusive legislative competence of the Parliament having regard to Entry 42, List I of the Seventh Schedule of the Constitution of India would, thus, be limited. Its power to impose compensatory tax and/ or fee would also be limited as envisaged by Article 304(b) of the Constitution of India.

22. The State has not made any distinction between import/ export of spirit and potable alcohol. By its letter dated 28.10.1997, it was stated:

"Whereas you have imported/ transported 4,46,880.00 PLs of spirit from R.B.L. Mehatpur and Mohan Meakin Limited, Mohan Nagar (UP) to Kasauli Distillery for the year 1996-97 upon which permit fee @ Rs. 2/- per P.L. was leviable. Out of the quantity mentioned above 35,884,350 PLs of IMFS was (sic) and you have paid the permit fee @ Rs. 2/- per PL for the said quantity." [Emphasis supplied]

The said demand was reiterated by the State in terms of its letter dated 27.01.1999.

In its representation dated 30.01.1999, the appellant averred:

"3. Under entry 51 of List II of Seventh Schedule to Constitution of India, State is empowered to levy and charge Excise Duty on "Alcoholic Liquors for human consumption" and similarly under item No. 66 the State is empowered to levy and charge fees in respect of matters in this list i.e. on Alcoholic liquors for human consumption. Bulk spirit on which Permit/ Transport Fee is sought to be charged is of over proof strength and is not an Alcoholic Liquor for human consumption. Thus, State is not empowered to levy/ charge permit/ transport fee on transport of spirit of over proof strength. Levy of any duty or fee on spirit of over proof strength is within the competence of Government of India as mentioned in entry 84 and 96 of List I to Seventh Schedule to the Constitution of India. In view of this position the demand is illegal and against the provision of Constitution of India."

Appellant, in its representation dated 25.02.1999, stated: "The permit fee is being demanded on the import/ transport of spirit of over proof strength which is of alcoholic liquor for human consumption and does not fall within the ambit of entry 51 of List II of VIIth Schedule to Constitution of India read with item 66 ibid. The State is empowered to levy permit fee on transport of Alcoholic Liquor for human consumption only. Levy of duty or fee on spirit of over proof strength is within the

competence of Union of India/ Parliament of India as mentioned in entry 84 and 96 of List I to VIIIth Schedule to Constitution of India.

" 23. We may, on the other hand, notice the contentions of the State, in its counter affidavit before the High Court: "Accordingly, grant and issue of permit is essentially regulatory in character. Viewed in this perspective, the permit fee is not under Entry 51, and has no lineage whatsoever with the duties of excise or countervailing duties on alcoholic liquors meant for human consumption. It is, thus, not only patently incorrect but also wrong to draw a nexus between Entry 51 and the permit fee. The object of permit is to regulate transport, (which includes import as well) under Entry 8 of the said List II of the Seventh Schedule to the Constitution. Therefore, the proper linkage, for the purposes of permit fee, is between Entry 8 and Entry 66 of List II of the Seventh Schedule."

It was furthermore stated:

"It is, therefore, submitted that the malt spirit whether in over proof strength or in under proof strength, is meant for potable purposes and in both the cases it does not lose the basic character of intoxicating liquors and the State Government under Entry No. 8 and 51 read with Entry 66 of List II of Seventh Schedule to the Constitution of India is competent to legislate and to levy the duties/ fees. Contentions of the petitioner to the contrary are denied."

The contention of the State as would appear from its counter-affidavit filed before us is as under:

"...It is further submitted that the fee in question is neither a tax nor duty so as to attract the provisions of Entry 42 of List - I of Seventh Schedule to the Constitution of India. Permit fees, it is reiterated is not levied on the import of liquor rather it is charged on every permit to import/ transport the liquors whether inter - state or intra- state for the services. Therefore, the Hon'ble High Court is justified to hold that the State Government is empowered to make rules authorizing it to levy permit fee."

The State furthermore asserts its right to regulate the business of liquor including over proof spirit in terms of the provisions of the Act and the Rules framed there under.

24. We have noticed hereinbefore that even in terms of the explanation appended to Rule 7.2A of the Rules, the fees specified in the said Rule would not be payable on denatured spirit, rectified spirit or perfumed spirit and the transport shall not include the transport of Foreign Spirit or Country Spirit in course of export inter-State or across the customs frontier of India. The levy, therefore, ex facie could not have been imposed on rectified spirit.

The jurisdiction of the State to impose such a levy is limited. It has been so held in *State of U.P. and Others v. Vam Organic Chemicals Ltd. And Others* [(2004) 1 SCC 225] in the following terms:

"29. The State's power is thus limited to (i) the regulation of non-potable alcohol for the limited purpose of preventing its use as alcoholic liquor, and (ii) the charging of fees based on quid pro quo."

It was furthermore held:

"43. Considering the various authorities cited, we are of the view that the State Government is competent to levy fee for the purpose of ensuring that industrial alcohol is not surreptitiously converted into potable alcohol so that the State is deprived of revenue on the sale of such potable alcohol and the public is protected from consuming such illicit liquor. But this power stops with the denaturation of the industrial alcohol. Denatured spirit has been held in *Vam Organics-I* to be outside the seisin of the State Legislature. Assuming that denatured spirit may by whatever process be renatured (a proposition which is seriously disputed by the respondents) and then converted into potable liquor, this would not give the State the power to regulate it. Even according to the demarcation of the fields of legislative competence as envisaged in *Bihar Distillery industrial alcohol for industrial purposes* falls within the exclusive control of the Union and according to *Bihar Distillery* "denatured rectified spirit, of course, is wholly and exclusively industrial alcohol" (SCC p. 742, para 23)."

As regards imposition of fee, it was opined:

"44. Besides, the fee is required to be justified with reference to the cost of such regulation. The industry is already paying a fee under Rule 2 for such regulation. Indeed, the justification for levying the fee under Rule 3(a) is the identical justification given by the State for levying the fee under Rule 2. Presumably, a full complement of excise officers and staff are appointed by the State in the Excise Department to carry out their duties under the Act to oversee, control and keep duty on the various kinds of intoxicants under the Act. Having regard to the decision in *Vam Organics-I* we

must also assume that apart from the normal strength, additional officers and staff were appointed to regulate the denaturation of the industrial alcohol. There is nothing to show that there has been any deployment of any additional staff to oversee the possibility of renaturation of the denatured spirit."

25. The question as regards 'aspects of power to levy fee vis-à-vis tax' came up for consideration before this Court in *Jindal Stainless Ltd. (2) and Another v. State of Haryana and Others* [(2006) 7 SCC 241] wherein this Court held:

"38. In the generic sense, tax, toll, subsidies, etc. are manifestations of the exercise of the taxing power. The primary purpose of a taxing statute is the collection of revenue. On the other hand, regulation extends to administrative acts which produce regulative effects on trade and commerce. The difficulty arises because taxation is also used as a measure of regulation. There is a working test to decide whether the law impugned is the result of the exercise of regulatory power or whether it is the product of the exercise of the taxing power. If the impugned law seeks to control the conditions under which an activity like trade is to take place then such law is regulatory. Payment for regulation is different from payment for revenue. If the impugned taxing or non-taxing law chooses an activity, say, movement of trade and commerce as the criterion of its operation and if the effect of the operation of such a law is to impede the activity, then the law is a restriction under Article 301. However, if the law enacted is to enforce discipline or conduct under which the trade has to perform or if the payment is for regulation of conditions or incidents of trade or manufacture then the levy is regulatory. This is the way of reconciling the concept of compensatory tax with the scheme of Articles 301, 302 and 304. For example, for installation of pipeline carrying gas from Gujarat to Rajasthan, which passes through M.P., a fee charged to provide security to the pipeline will come in the category of manifestation of regulatory power. However, a tax levied on sale or purchase of gas which flows from that very pipe is a manifestation of exercise of the taxing power. This example indicates the difference between taxing and regulatory powers (see *Essays in Taxation* by Seligman). Difference between "a tax", "a fee" and "a Compensatory Tax"

#### Parameters of Compensatory Tax

39. As stated above, in order to lay down the parameters of a compensatory tax, we must know the concept of taxing power."

It was observed:

"43. In the context of Article 301, therefore, compensatory tax is a compulsory contribution levied broadly in proportion to the special benefits derived to defray the costs of regulation or to meet the outlay incurred for some special advantage to trade, commerce and intercourse. It may incidentally

bring in net revenue to the Government but that circumstance is not an essential ingredient of compensatory tax."

This Court furthermore opined that the burden of proof in this behalf would be on the State, stating:

"46... As soon as it is shown that the Act invades freedom of trade it is necessary to enquire whether the State has proved that the restrictions imposed by it by way of taxation are reasonable and in public interest within the meaning of Article 304 (b) [see para 35 (of AIR) of the decision in Khyerbari Tea Co. Ltd. v. State of Assam]."

Furthermore, it was held in *A.P. Paper Mills Ltd. v. Govt. of A.P. and Another* [(2000) 8 SCC 167] that even if a fee is levied for issuance of permit, it was only for the purpose of recovering the administrative charges. [See also *Ashok Lanka and Another v. Rishi Dixit and Others* (2005) 5 SCC 598]

26. This Court in *Kerala Samsthana Chethu Thozhilali Union v. State of Kerala and Others* [(2006) 4 SCC 327], upon noticing *State of Kerala and Others v. Maharashtra Distilleries Ltd. and Others* [(2005) 11 SCC 1], opined:

"39. In *State of Kerala v. Maharashtra Distilleries Ltd.* this Court took notice of the provisions of Section 18-A of the Act. It was held that the State had no jurisdiction to realise the turnover tax from the manufacturers in the garb of exercising its monopoly power. It was held that turnover tax cannot be directed to be paid either by way of excise duty or as a price of privilege."

27. Even while levying a fee, a quantum jump is deprecated. In *Indian Mica Micanite Industries v. The State of Bihar and Others* [(1971) 2 SCC 236], it has been held:

"17... There cannot be a double levy in that regard. In the opinion of the High Court the subsequent transfer of denatured spirit and possession of the same in the hands of various persons such as wholesale dealer, retail dealer or other manufacturers also requires close and effective supervision because of the risk of the denatured spirit being converted into palatable liquor and thus evading heavy duty. Assuming this conclusion to be correct, by doing so, the State is rendering no service to the consumer. It is merely protecting its own rights. Further in this case, the State which was in a position to place material before the Court to show what services had been rendered by it to the appellant and other similar licensees, the costs or at any rate the probable costs that can be said to have been incurred for rendering those services and the amount realized as fees has failed to do so.

On the side of the appellant, it is alleged that the State is collecting huge amount as fees and that it is rendering little or no service in return. The co-relationship between the services rendered and the fee levied is essentially a question of fact. Prima facie, the levy appears to be excessive even if the State can be said to be rendering some service to the licensees. The State ought to be in possession of the material from which the co-relationship between the levy and the services rendered can be established at least in a general way. But the State has not chosen to place those materials before the Court. Therefore the levy under the impugned Rule cannot be justified."

In this case, the State in fact has not produced any material whatsoever before the High Court. In *Commissioner of Income Tax and Another v. Distillers Co. Ltd.* [(2007) 5 SCC 353], this Court held that even for the purpose of levy of excise duty, the same must have a direct relationship with the manufacture of arrack.

28. We, therefore, are of the opinion that the impugned judgment cannot be sustained. It is set aside accordingly and the matter is remitted to the High Court for consideration of the Writ Petition filed by the appellant afresh. The parties shall be at liberty to file additional affidavits/ evidence before the High Court, if they so desire. The appeals are allowed. Respondents shall bear the cost of the appellant. Counsel's fee assessed at Rs. 50,000/-.