State Of Kerala And Ors vs Maharashtra Distilleries Ltd. And Ors on 6 May, 2005

Equivalent citations: AIR 2005 SUPREME COURT 2594, 2005 AIR SCW 2944, (2005) 5 JT 427 (SC), 2005 (5) SCALE 2, 2005 (11) SCC 1, 2005 (5) JT 427, 2005 (4) SLT 504, (2005) 59 KANTLJ(TRIB) 193, (2005) 4 SUPREME 435, (2005) 5 SCALE 2, (2005) 4 SCJ 421, (2005) 141 STC 358

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Bench: N. Santosh Hegde, S.N. Variava, B.P. Singh, H.K. Sema, S.B. Sinha

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           CASE NO.:
Appeal (civil)  2249-2257 of 2000

PETITIONER:
State of Kerala and Ors.

RESPONDENT:
Maharashtra Distilleries Ltd. and Ors

DATE OF JUDGMENT: 06/05/2005

BENCH:
N. Santosh Hegde & S.N. Variava & B.P. Singh & H.K. Sema & S.B. Sinha

JUDGMENT:
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JUDGMENT B.P. Singh, J.

Leave granted in Special Leave Petition (C) No. 1032 of 2003.

In these two batches of appeals, a common question arises, inter alia for consideration by this Court, namely - Whether the incidence of excise duty, having regard to the provision of the Kerala Abkari Act and the relevant Rules, falls upon the manufacturer/distiller such as the respondents herein and therefore includable in their turnover for the purpose of levy of turnover tax, or whether the incidence of excise duty falls on the Kerala State Beverages (Manufacturing and Marketing) Corporation Limited, a Government company which alone is liable to pay the excise duty on Indian Made Foreign Liquor, and consequently the said component is not includable in the turnover of the respondents/distillers?

These appeals came up for hearing before a 3 Judge Bench of this Court. After hearing the parties for sometime, by order dated October 17, 2001, it was observed that the point involved was an important one and it would be appropriate if the cases are heard by a Larger bench. The referring Bench observed thus :-

"The question which arises for consideration in these cases is, whether the excise duty levied under the provisions of the Kerala Abkari Act on Indian Made Foreign Liquor which is manufactured forms part of the turn over of the manufacturer for the purpose of levy of turn over tax under the relevant provisions of the Kerala Sales Tax Act?

The liquor which is manufactured by the respondents has to be sold to the Beverages Corporation which can be regarded as sole selling agent or the canalizing agency. The liquor manufactured is removed to the bonded warehouse of the Beverages Corporation. At the time when the liquor is removed from that bonded warehouse, the excise duty is paid by the Beverages Corporation.

In the notices which were sent to the respondents, it was stated that this excise duty which was paid by the Beverages Corporation really forms part of the turn over of the respondents in the sale of liquor by them to the Beverages Corporation and, therefore, turn over tax was payable on this element as well. The contention of the State was that this excise duty was really an obligation of the manufacturer and merely because the obligation was discharged by the Beverages Corporation would not mean that the same would not form part of the turn over of the manufacturer.

The High Court, on a challenge being made by the respondents, decided in their favour and came to the conclusion that this excise duty which was in fact paid by the Beverages Corporation would not be regarded as being part of their turn over for the purpose of levy of turn over tax.

Mr. T.L.V. Iyer, learned senior counsel has drawn our attention to a decision of this Court in the case of Mohan Breweries & Distilleries Ltd. v. Commercial Tax Officer, Madras and Ors., [1997] 7 SCC 542. In that case this Court was concerned with the levy of turn over tax in respect of liquor which was produced and sold to the State Marketing Corporation. It is the contention of Mr. Iyer that the provisions of the law in Tamil Nadu relating to the levy of this tax is more or less parimateria with the corresponding provisions of law in Kerala. In particular, reliance was placed on paragraph 7 of the aforesaid decision which reads as follows:

`7. Excise duty is levied upon goods manufactured or produced (Entry 84 of List I and Entry 51 of List II of the Seventh Schedule to the Constitution). Its incidence falls, therefore, on the manufacturer or producer of the goods. The collection of excise duty may be deferred to such later stage as is, administratively or otherwise, most convenient'.

Basing itself on the aforesaid observations, this Court concluded that even if Rule 22 of the Tamil Nadu Rules provides for realization of the excise duty from the Corporation that was only a convenient method of collection, the primary obligation to pay excise duty being only of the manufacturer. Mr. Iyer, therefore, contended that

following the said decision the appeals should be allowed.

Mr. F.S. Nariman, learned senior counsel for the respondents has drawn our attention to three Constitution Bench decisions of this Court. In the case of A.B. Abdulkadir and Ors. v. The State of Kerala and Anr., [1967] Supp. 2 SCR 741, where at page 751 it was observed as follows :

`It may also be accepted that generally speaking the tax is on the manufacturer or the producer, though it cannot be denied that laws are to be found which impose a duty of excise at stages subsequent to the manufacture or production.' (emphasis added) In R.C. Jall v. Union of India, [1962] Supp. 3 SCR 436, at page 451, it was contended that the excise duty cannot be legally levied on the consignee who had nothing to do with the manufacture or production of coal. This argument was repelled and at page 451, it was observed as follows :

`Excise duty is primarily a duty on the production or manufacture of goods produced or manufactured within the country. It is an indirect duty which the manufacturer or producer passes on to the ultimate consumer, that is, its ultimate incidence will always be on the consumer. Therefore, subject always to the legislative competence of the taxing authority, the said tax can be levied at a convenient stage so long as the character of the impost, that is, it is a duty on the manufacture or production, is not lost. The method of collection does not affect the essence of the duty but only relates to the machinery of collection for administrative convenience.' In M/s. Guruswamy & Co. Etc. v. State of Mysore and Ors., [1967] 1 SCR 548, at page 562, another Constitution Bench held as follows :

`These cases establish that in order to be an excise duty (a) the levy must be upon `goods' and (b) the taxable event must be the manufacture or production of goods. Further the levy need not be imposed at the stage of production or manufacture but may be imposed later."

(Emphasis added) Relying upon the aforesaid observations of this Court, in cases referred to hereinabove, Mr. Nariman contends that the observations of this Court in Mohan Breweries' case (supra) seem to run counter to the earlier decisions of the Constitution Benches. He submits that the Constitution Benches have laid down in no uncertain terms that an excise duty need not necessarily be regarded as being a levy only on the manufacturer and it is possible for a law to provide that excise duty may be levied not on the manufacturer but at a later point of time. He, therefore, contends that the observation to the contrary in Mohan Breweries ` case does not reflect the position in law correctly and he submits that in the present cases, on a correct interpretation of Sections 17 and 18 of the Abkari Act of Kerala, it must be held that the levy of excise duty, is not on the manufacturer but is at the stage when the liquor is removed by the Beverages Corporation from the warehouse and therefore the same cannot form part of the respondents' turn over.

In our opinion, the point involved is an important one and it would be appropriate if this and the connected cases are heard by a larger Bench.

We direct, the papers be laid before Hon'ble the Chief Justice for appropriate orders."

That is how these appeals have been placed by the Hon'ble Chief Justice before this Bench for disposal.

The first batch of appeals arise out of writ petitions filed in the years 1998 - 1999 which were disposed of by a common judgment and order of a Division Bench of the High Court dated 27th November, 1999 in OP Nos. 23008-23903/98, 818, 2255, 2264, 12893, 3283; 7437 and 19686/99 whereby the High Court allowed the writ petitions filed by the respondents/distillers holding inter alia that under the Scheme of the Kerala Abkari Act and the Rules, the incidence of excise duty on the manufacture of Indian Made Foreign Liquor was required by law to be borne by the Kerala Beverages Corporation to whom the liquor was sold at a price which did not include the element of excise duty. Consequently the State of Kerala and its officers were not entitled to levy turnover tax on the respondents/distillers by including in their turnover the excise duty payable on the liquor manufactured and sold by the respondents/distillers to the Kerala State Beverages Corporation. The High Court also declared that Section 2(xxvii) of the Kerala General Sales Tax Act authorizing the levy of turnover tax on the amounts of excise duty paid by the Kerala State Beverages Corporation on the distillers was unconstitutional and void.

After the judgment of the High Court in the first batch of writ petitions, and while the appeals against the said judgment and order were pending before this Court, on 1.4.2001 the State of Kerala amended Section 5(2C) of the Kerala General Sales Tax Act, by the Finance Act of 2001, by adding an explanation which was brought into effect retrospectively from July 1, 1987 which reads as follows :-

> "Explanation : For the removal of doubt it is hereby clarified that any distillery in the State which sells liquor manufactured by it within the State to the Kerala State Beverages Corporation shall be liable to pay turnover tax on the turnover of sale of liquor by it to the said Corporation and the turnover for the purpose of this sub-section shall include any duty of excise liable on such liquor at the hands of such manufacturer whether such duty is paid by the manufacturer or by the said Corporation."

Since the Sales Tax authorities issued notices to the respondents/distillers proposing to provisionally assess the turnover tax payable by the manufacturers from April 2001 at various rates, the respondents/distillers filed several writ petitions challenging the validity of Section 5(2C) of the Kerala General Sales Tax Act read with Section 3A of the Kerala Finance Act, 2001 as being unconstitutional, both in its retrospective and prospective operation. They also challenged the consequent actions initiated against them by the Sales Tax authorities. A Division Bench of the Kerala High Court allowed these writ petitions by a common judgment and order of August 9, 2002 in OP Nos. 3736, 5139, 1705, 4464, 6075, 6113, 6116, 6122, 6239, 6336, 7639, 7666 of 2002 and

31153 of 2001. The Division Bench disposing of the aforesaid writ petitions did not agree in principle with the law as laid down in the earlier judgment disposing of the first batch of writ petitions and was of the view that the incidence of excise duty fell squarely on the respondents/distillers and as such was includable in their total turnover for purpose of computation of turnover tax under the Kerala General Sales Tax Act. However, the Division Bench held itself bound by the earlier decision rendered by the High Court and, therefore, following the earlier decision held that by adding an explanation to Section 5(2C) by the Kerala General Sales Tax Act the constitutional lacuna pointed out in the earlier judgment had not been removed by appropriate amendment to the Kerala Abkari Act. By merely adding the explanation to Section 5(2C) of the Kerala General Sales Tax Act, the excise duty element paid by the Corporation could not be added to the turnover of the respondents/distillers since it had been held in the earlier judgment that excise duty was leviable only on the purchaser, namely, the Kerala State Beverages Corporation.

In this view of the matter the High Court allowed the writ petitions and declared that the explanation appended to Section 5(2C) of the Kerala General Sales Tax Act was unconstitutional and invalid both in its prospective operation from 1st April, 2001 and in its retrospective effect from 1st July, 1987.

OP No. 14771/2002 out of which C.A. No. 7954 of 2003 arises was also disposed of in the same terms by the High Court by its order dated August 12, 2002.

To appreciate the rival contentions of the parties it is necessary to refer to the relevant provisions of the Kerala Abkari Act and the relevant Rules as also the provisions of the Kerala General Sales Tax Act, 1963. The provisions have to be viewed in the light of the policy decision of the Government of Kerala to create a State monopoly in manufacture, wholesale purchase and sale of Indian Made Foreign Liquor (IMFL) with effect from 1.4.1984. A Government company was incorporated, namely Kerala State Beverages (Manufacturing and Marketing) Corporation Limited (Kerala Beverages Corporation). Necessary amendments to the Abkari Act and the relevant Rules were made with a view to effectuate this policy. The respondents/distillers could not, in view of the monopoly created in favour of the Kerala State Beverages Corporation, sell IMFL manufactured by them to anyone, and had to deliver the same to the Kerala State Beverages Corporation for which purpose they had to submit tenders each year for the various brands of IMFL manufactured by them. The Kerala State Beverages Corporation was granted licence in Forms BW1 and FL9 under the Bond Rules. The IMFL supplied by the respondents/distillers was stored in bonded warehouses maintained by the Kerala State Beverages Corporation in accordance with the Bond Rules. The Kerala State Beverages Corporation also executed an agreement in Form - A under which it was obliged to observe the provisions of the Abkari Act and not to remove goods without payment of duty. The price paid by the Kerala State Beverages Corporation to the respondents/distillers did not include the element of excise duty which was later paid by the Kerala State Beverages Corporation when the liquor moved out of its warehouses.

In view of the policy to create a State monopoly, and having regard to the Scheme of the Kerala Abkari Act and the relevant Rules, the respondents/distillers contended that the Kerala Abkari Act did not impose a liability on the respondents/distillers to pay excise duty since such a liability was

imposed only on the Kerala State Beverages Corporation which actually paid excise duty payable on the IMFL. Consequently the element of excise duty did not form part of the turnover of the respondents/distillers and was therefore not includable in the total turnover of the respondents/distillers for purpose of computation of turnover tax payable by them under the Kerala General Sales Tax Act.

The Kerala Abkari Act was formerly known as Cochin Abkari Act enacted in the year 1902. It applied to the territories comprised within the State of Cochin but with effect from 11th July, 1967, by Act 10 of 1967, the provisions of the Act were extended to the whole of the State of Kerala. Chapter IV of the Act deals with manufacture, possession and sale of liquor. The relevant part of Section 12 reads as follows :-

> "12. (1) Manufacture of liquor or intoxicating drug prohibited except under the provisions of this Act:- No liquor or intoxicating drug shall be manufactured.
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> ....
>
> except under the authority and subject to the terms and conditions of a licence granted by the Commissioner in that behalf, or under the provisions of Section 21;
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> ....
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> Section 14 deals with establishment and control of distilleries, Beverages, warehouses etc. and provides as follows :-
>
> "14. Establishment and control of distilleries, breweries, warehouses, etc. :- The Commissioner may, with the previous approval of the Government :-
>
> (a) establish public distilleries, breweries or wineries, or authorize the establishment of private distilleries, breweries, wineries or other manufactories in which liquor may be manufactured under a license granted under this Act;
>
> (b) establish public warehouse or authorize the establishment of private warehouses wherein liquor may be deposited and kept without payment of duty under a license granted under this Act;
>
> (c) discontinue any public or private distillery, brewery, winery or other manufactory or warehouse so established;
>
> (d) prescribe the mode of supervision that may be necessary in a distillery, brewery, winery or other manufactory or warehouse so established, or in any other manufactory where preparation containing liquor or intoxicating drugs are manufactured, to ensure the proper collection of duties; taxes and other dues payable under this Act or the proper utilization of liquor or intoxicating drugs;

....

Chapter V of the Act deals with duties, taxes and rentals. Sections 17 and 18, which are relevant, provide as follows :-

"17. Duty on liquor or intoxicating drugs :- A duty of excise or luxury tax or both shall, if the Government so direct, be levied on all liquor and intoxicating drugs

(a) permitted to be imported under Section 6; or

(b) permitted to be exported under Section 7; or

(c) permitted under Section 11 to be transported ; or

(d) manufactured under any licence granted under Section 12; or

(e) manufactured at any distillery, brewery, winery or other manufactory established under Section 14; or

(f) issued from a distillery, brewery, winery or other manufactory or warehouse licensed or established under Section 12 or Section 14; or

(g) sold in any part of the State ;

Provided that no duty or gallonage fee or vend fee or other taxes shall be levied under this Act on rectified spirit including absolute alcohol which is not intended to be used for the manufacture of potable liquor meant for human consumption.

Explanation :- For the purpose of this section and Section 18, the expression "duty of excise", with reference to liquor or intoxicating drugs, include countervailing duty on such goods manufactured or produced elsewhere in India and brought into the State."

"18. How duty may be imposed :- (1) Such duty of excise may be levied :

(a) in the case of spirits or beer, either on the quantity produced in or passed out of a distillery, brewery or warehouse licensed or established under Section 12 or Section 14 as the case may be or 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 or on the value of the liquor as the case may be as the Government may prescribe ;

....

....

Section 18A of the Act provides as follows :-

"18A. Grant of exclusive or other privilege of manufacture, etc., on payment of rentals :- (1) it shall be lawful for the Government to grant to any person or persons, on such conditions and for such period as may deem fit, the exclusive or other privilege-

(i) of manufacturing or supplying by wholesale; or

(ii) of selling by retail; or

(iii) of manufacturing or supplying by wholesale and selling by retail, any liquor or intoxicating drugs within any local area on his or their payment to the Government of any amount as rental in consideration of the grant of such privilege. The amount of rental may be settled by auction, negotiation or by any other method as may be determined by the Government from time to time, and may be collected to the exclusion of, or in addition, to the duty or tax leviable under Sections 17 and 18.

(2) No grantee of any privilege under sub-section (1) shall exercise the same until he has received a licence in that behalf from the Commissioner.

(3) In such cases, if the Government shall by notification so direct, the provisions of Section 12 relating to toddy and toddy producing trees shall not apply."

We may notice at this stage that Section 17 has been amended with effect from April 1, 2003, to the effect that the words "if the Government so directs", and clauses (b), (c), (f) and (g) stand deleted.

In exercise of powers conferred by Section 29 of the Abkari Act the Government of Kerala has framed Rules for the establishment and working of Distilleries, Warehouses and Excise Depots for regulating the issue and transport of spirits known as the Kerala Distillery and Warehouse Rules, 1968. Rule 47 which deals with removal of spirits from distilleries and warehouses provides as follows :-

"47. Removal of spirits from distilleries and warehouses. - Spirits may be issued from distilleries and warehouses.

(1) Under bond

(a) for export to any other State in India or to any place out of India or to any other licensee subject to such restrictions and to payment of such amounts as may be prescribed by the Government from time to time.

(b) for transport to another distillery or warehouse, licensed under these rules or to the warehouse licensed under the Foreign Liquor Storage in Bond Rules, 1961.

(2) On payment of duty or gallonage fee or vending fee or other taxes, for consumption within the State to licensees authorized to purchase the same.

(3) Without payment of duty and without bond or on payment of such reduced rates of duty, taxes or fee as may, from time to time, be prescribed by the Government (in the case of spirits other than denatured spirits) if sold to officers of Government or other persons specially exempted from payment of duty or taxes or fees in full or part and empowered to purchase them.

(4) From distilleries, only, free of duty but on payment of gallonage fee or vending fee or taxes as may be prescribed by the Government, after denaturation under the rules prescribed under the Act."

Rule 50 deals with removal under Bond and reads as follows :-

"50. Removals under bond. - When spirits are removed from the distillery or warehouse without payment of duty, the distiller or warehouse keepers shall execute bond for the payment of duty on them at the prescribed rate in case of his failure to account for them to the satisfaction of the Commissioner. In the case of spirits exported, bond shall be executed with one or more sureties."

The relevant part of Rule 52 provides as follows :-

"52. To whom issues for local consumption may be made. - (1) Indian Made Foreign Spirit may be issued for consumption within the State only to the FL9 licensees in the State.

....

Foreign Liquor Rules, 1953 have also been framed under Sections 10, 24 and 29 of the Cochin Abkari Act. Rule 13 sub-rule 9 which deals with issue of licenses in Form FL9 reads as follows :-

"(9) License for possession and supply of foreign liquor in wholesale by the Bonded Warehouse Licensees to Foreign Liquor-1 Licensees, Foreign Liquor-3 Hotel Restaurant Licensees, Foreign Liquor-4 Club Licensees, Foreign Liquor-4A Club Licensees, Foreign Liquor 11 Beer/Wine parlour licensees and Foreign Liquor-12 Beer retail sale outlet licensees in the State :- Licenses in Form FL9 shall be issued by the Excise Commissioner, only to the Kerala State Beverages (Manufacturing and Marketing) Corporation Ltd., possession licenses in Form BW1 under the Foreign Liquor (Storage in Bond) Rules, 1961 on payment of an annual rental of Rs.25,00,000 (Rupees twenty five lakhs only)....."

The aforesaid sub-rule was amended by the Government of Kerala by Notification dated 5th January, 1999. By the said amendment in the heading the words "by the Bonded Warehouse licensees" were omitted. Similarly in the first sentence the words "possessing licences in Form BW1 under the Foreign Liquor (Storage in Bond) Rules, 1961" were omitted. In Form FL9 in the heading,

the words "BY THE BONDED WAREHOUSE" were omitted. This amendment was brought about by the Government to avoid duplication of work. Under the unamended provision the KSBC had to keep the stock of IMFL in the Bonded Warehouses and when the stock was taken out for supply to other licensees excise duty had to be paid by the aforesaid Corporation. This system was done away with and by amendment of sub-rule 9 of Rule 13 the KSBC was obliged to pay the excise duty on the IMFL to the manufacturer and thereafter stock duty paid liquor for supply to other licensees.

This fact has been noticed by the High Court in its judgment in the first batch of writ petitions. The Court after noticing the said amendment observed that with effect from 5th January, 1999, in view of the amendment of the Foreign Liquor Rules, the KSBC had been purchasing IMFL from the manufacturers after payment of excise duty. All sales of liquor by the manufacturers to the Corporation took place after the excise duty had been remitted by the KSBC with the result that the system of Bonded Warehouse in so far as IMFL is concerned was done away with. The KSBC paid excise duty on IMFL before it purchased the same from the concerned manufacturer and therefore the amount of excise duty was paid by the Corporation when it purchased IMFL from the manufacturer. The amount of excise duty paid formed part of consideration for which the property in the goods viz. IMFL was purchased by the Corporation from the manufacturer concerned. It was only after payment of the excise duty that the goods were consigned to the concerned FL9 licensed premises owned and controlled by the KSBC.

The Rules next to be noticed are the Foreign Liquor (Storage in Bond) Rules, 1961 which have been framed under Sections 14(d) and 29(2) of the Cochin Abkari Act. Under the Rules "bonded warehouse" means a warehouse where foreign liquor is stored in bond. Sub-section (vi) of Section 2 explains the words "to store foreign liquor in bond" as under :-

> "with all its grammatical variations means to store, deposit or keep foreign liquor in a bonded warehouse without payment of the excise duty payable thereon."

Rule 3 provides as follows :-

> "3 (a) Any person desiring to store in bond foreign liquor shall make an application for a licence in that behalf to the Commissioner of Excise through the concerned officer-in-charge of the Excise Division. The application shall contain the following particulars namely :-
>
> (1) name and address of the applicant in the case of a firm or company, the names and addresses of the partners or directors should be furnished ;
>
> (2) name and address of the place where foreign liquor is to be stored or bond together with the description and the correct plan of the building or rooms to be used as a warehouse in triplicate;
>
> (3) the maximum quantity of each kind of foreign liquor required to be stored in bond at any one time ;

(4) the date from which the applicant desires to store foreign liquor in bond ;

(5) whether the applicant is prepared to deposit the amount of security fixed by the Commissioner of Excise as a guarantee for the observance of the provisions of the Act and the Rules and orders made hereunder;

(6) whether the applicant holds a wholesale licence granted under the Cochin Foreign Liquor Rules.

(b) the applicant shall execute an agreement in Form A undertaking to abide by the provisions of the Act and the Rules and orders made thereunder and the conditions of the licence and also agreeing to pay the prescribed duty therefor.

(c) the applicant shall take out a licence in Form FL.9 appended to the Rule for the levy of gallonage fee, etc. and for the issue of licences for the sale of foreign liquor, punished under Notification No. S.R.4 1859/52/RD dated 17.1.1953, as subsequently amended, for the supply of foreign liquor in wholesale to the other foreign liquor licensees.

Provided that nothing contained in sub-rule (c) shall be applicable to the applicant for a licence in Form BW1(A).

Rule 3(b) refers to the execution of an agreement in Form A. The relevant part of Appendix incorporated therein is as follows :-

"Now the condition of this bond is that if the obliger(s) shall observe all the provisions of Abkari Act, the Rules, Notifications and Orders thereunder and the Foreign Liquor (Storage in Bond) Rules, 1961 and in particular shall deposit all Foreign Liquor allowed to be imported to the bonded warehouse in a storeroom or other place of storage approved by the Commissioner (hereinafter referred to as "licensed premises") and shall not remove or issue from the licensed premises before the proper duty or fee, if any has been paid, any Foreign Liquor except as provided for in the said Rules.

And if the obliger(s) pay/pays into the Government Treasury all dues whether excise duty or fees payable by the obliger(s) under the provisions of the Cochin Abkari Act 1 of 1077 and the Rules and Orders made thereunder and complies with dirth (sic) all the provisions of the said Act, the said Rules and the Orders and Notifications issued thereunder.

This obligation shall be void but otherwise and on breach in the performance of all or any of the terms and conditions herein contained the same shall be in full force.

....

Rules 11 and 14 are also relevant which read as follows :-

"11. (1) Foreign liquor stored in the bonded warehouse shall be removed only to the premises licensed under the F.L. 9 licence referred to in sub- rule (c) of Rule 3, held by the bonded warehouse licensee, and such removal shall be only under cover of a pass granted in that behalf and on payment of the Excise duty due. Foreign Liquor intended for export to foreign countries on the strength of the export authorization from the Government of India shall also be brought and stored in the Bonded Warehouse and the removal therefrom shall be only under cover of a pass granted in that behalf. The pass shall be granted on the execution a bond to pay excise duty at full rate payable on the quantity not exported as evidenced from the certificate from the "customs authority" of the port of export.

Provided that nothing contained in sub-rule (1) shall be applicable to the licensee in Form BW 1(A).

(2) If the licensee wants to issue or remove any quantity of foreign liquor from the bonded warehouse, he shall make an application to the Officer-in-

Charge of the Excise Division through the Officer-in-Charge in that behalf."

"14. A licence in Form BW1 shall be granted to the Kerala State Beverages (Manufacturing and Marketing) Corporation Limited and a licence in Form BW1 (A) shall be granted to the Canteen Stores Department, Ministry of Defence for the purpose of storage in Bond and supply of Foreign Liquor including beer in wholesale to the FL-9 licensees and FL-8 licensees respectively under the Foreign Liquor Rules, 1953."

Under the Kerala Abkari Shops (Disposal in Auction) Rules, 1974 as amended with effect from 1st April, 1989, Rule 3(1A) provides as follows :-

"3(1A). The Kerala State Beverages (Manufacturing and Marketing) Corporation Limited shall have the exclusive privilege to obtain FL-9 Licence for the purpose of distribution of Foreign Liquor to Foreign Liquor 1 Licensee, Foreign Liquor 3 hotel (Restaurant) Licensees, Foreign Liquor 4 Club Licensees, Foreign Liquor 4A Club Licensees, Foreign Liquor 11 beer/wine parlour Licensees, Foreign Liquor 12 Beer Retail Sale Outlet Licensees and Foreign Liquor, 6 Special Licensees in the State."

From the above provisions it will be seen that the Kerala State Beverages (Manufacturing and Marketing) Corporation Limited have the exclusive privilege to obtain FL-9 licence for the purpose of distribution of IMFL. A licence in Form BW1 is also required to be granted only to the said Corporation. The aforesaid Corporation has also executed an agreement in Form A as contemplated by Rule 3(b) of the Bond Rules, 1961. To give effect to the monopoly created in favour of the Kerala State Beverages (Manufacturing and Marketing) Corporation Limited the respondents/distillers are

required to supply IMFL to the said Corporation under a rate contract. Offers are required to be made in sealed covers which are subject to certain conditions. The format in which the offers are to be made is titled `Data Sheet' which includes all necessary particulars. A clause in the data sheet provides as follows:-

> "The above rate includes freight, insurance, export duty, CST, B-deposit, packing charges, handling charges, unloading charges, warehouse, other levies etc., but does not include Kerala Import Duty, Kerala Excise Duty and Kerala Sales Tax."

As we have noticed earlier, with effect from January 5, 1999, by amendment of the Foreign Liquor Rules, KSBC was required to pay to the distillers/manufacturers, the duty element levied under Section 17, before removing the IMFL to its licensed premises.

We may now briefly refer to the facts of the cases before us. The representative facts are taken from the writ petition filed by M/s. Kerala Distilleries and Allied Products Ltd., now renamed as Maharashtra Distilleries Limited as per the Scheme of Amalgamation sanctioned by the High Court of Kerala. The aforesaid petitioner is engaged in the manufacture and sale of IMFL. It is registered as dealer both under the Kerala General Sales Tax Act. 1963 and the Central Sales Tax Act, 1956. Pursuant to the policy of the Government creating a monopoly in favour of the Kerala State Beverages (Manufacturing and Marketing) Corporation Limited, the petitioner has been submitting tenders as required for sale and supply of IMFL. The prices quoted of the various brands of IMFL do not include the sales tax or the excise duty since it was only the Kerala State Beverages Corporation which was liable to pay the tax. Excise duty was not paid by the petitioner (respondent herein) since the IMFL was required to be delivered to the Kerala State Beverages Corporation and no excise duty was payable by the petitioner (respondent herein). The offer made as per the requirement of the tender document clearly stipulated that the price quoted did not include excise duty.

Accordingly assessments were made from time to time on the basis that liability to pay sales tax and excise duty was on the Kerala State Beverages Corporation. The petitioner (respondent herein) paid turnover tax on the basis of price paid to it by the Kerala State Beverages Corporation. It, therefore, did not include the excise duty element while computing its total turnover having regard to the entry at Sl. No.53 of the First Schedule of the Kerala General Sales Tax Act. Some of the assessments were finalized upto the year 1995-96. However, Sales Tax authorities on 19th July, 1998 called upon the petitioner to submit revised returns including element of excise duty paid by the Corporation. A notice was also issued proposing to impose penalty for less payment of turnover tax having regard the fact that the turn over did not include the element of excise duty payable on the IMFL. The petitioner filed its objections on 15th September, 1998 but without giving serious consideration, an order of the assessment for the period April to July, 1998 was made and order imposing penalty was also passed. Thereafter the Deputy Commissioner of Commercial Tax issued a notice on 28th September, 1998 for the years 1991-92 to 1995-1996 in exercise of powers under Section 35 of the Kerala General Sales Tax Act on the ground that the assessments made were prejudicial to the interest of the revenue inasmuch as the assessing authority did not take into account the element of excise duty paid by the fourth respondent, namely the Kerala State Beverages (Manufacturing and Marketing) Corporation Limited and did not levy turnover tax on the petitioner. A follow-up notice

was issued calling upon the petitioner (respondent herein) to produce books of account relating to the years in question. In these circumstances the petitioner (respondent herein) filed the writ petition praying for quashing of the proceedings and for declaration that it was not liable to pay the turnover tax on the amount of excise duty paid by the Kerala State Beverages Corporation on IMFL sold by it to the Corporation. The levy of turnover tax on such amount of excise duty was sought to be quashed as being ultra vires and beyond the legislative competence and therefore unconstitutional.

The State in its counter-affidavit contended inter alia that the excise duty paid by the Kerala State Beverages Corporation formed part of the sale turnover of the manufacturer, since it is the obligation of the manufacturer to pay excise duty, though it may be discharged by others. Relying upon the decision of this Court in Mohan Breweries and Distilleries Limited v. Commercial Tax Officer, Madras and Ors., [1997] 7 SCC 542 it was contended that excise duty element formed part of the total turnover which was chargeable to turnover tax under Section 5(2C) of the Kerala General Sales Tax Act, 1963.

The Kerala State Beverages Corporation which was respondent No.4 in the writ petition accepted the fact that the excise duty on IMFL purchased by it from the petitioner (respondent herein) was paid by it and the same is included in its price which it realized as a wholesale dealer from its purchasers, and the turnover of the Corporation is computed on that basis and the turnover tax paid accordingly.

The turnover tax was introduced with effect from July 1, 1987 by amendment of the Kerala General Sales Tax Act, 1963. The turnover tax was then payable only by those dealers who were not liable to pay sales tax on any goods under Section 5(1) of the Act. However, by amendment of August 1, 1991 turnover tax was made payable by every dealer in foreign liquor on the turnover as specified at all points. Section 5(2A) of the Act was renumbered as Section 5(2C) with effect from April 1, 1998 which provided that every dealer in Foreign Liquor (Indian Made) shall pay turnover tax on the turnover of goods as specified in entries against Serial Nos. 53 and 54 of the First Schedule @ 5 % on the turnover at all points.

At this stage we may notice the relevant provisions of the Kerala General Sales Tax Act, 1963. "Turnover" has been defined under the Act and the relevant part thereof reads as follows :-

> " `turnover' means the aggregate amount for which goods are either bought or sold, supplied or distributed by a dealer, either directly or through another, on his own account or on account of others, whether for cash, or for deferred payment or other valuable consideration, provided that the proceeds of the sale by a person of agricultural or horticultural products, grown by himself or grown on any land in which he has an interest whether as owner, usufructuary, mortgage, tenant or otherwise, shall be excluded from his turnover."

Section 5 provides for the levy of tax on sale/purchase of goods with which we are not directly concerned but the relevant part thereof may be noticed :-

"5. Levy of tax on sale or purchase of goods :- (1) Every dealer (other than a casual trader or agent of a non-resident dealer) whose total turnover for a year is not less than `two lakh rupees and every casual trader or agent of a non-resident dealer, whatever be his total turnover for the year, shall pay tax on his taxable turnover for that year.

(i) in the case of goods specified in the First or Second Schedule, at the rates and only at the points specified against such goods in the said Schedules;

...."

The relevant part of Section 5(2C) reads as follows :-

"5(2C) (i) Notwithstanding anything contained in this Act or the Rules made thereunder every dealer shall pay turnover tax on the turnover of goods as specified hereunder, namely :-

(a) by an oil company defined in the Explanation under serial number 97 of the First Schedule to this Act whose total turnover in a year exceeds rupees fifty lakhs at the rate of three percent on the turnover from the 1st day of April, 1991 till 31st day of July, 1991 and thereafter at the rate of four percent on the turnover ;

(b) by any dealer in Foreign Liquor (Indian made) or Foreign Liquor (Foreign made) as specified in entries against serial numbers 53 and 54 of the First Schedule at the rate of five percent on the turnover at all points;

. . . .
. . . . ."

The entry against Serial No.53, which is relevant is to the following effect :-

"53. Foreign liquor At the point of sale by the Kerala State (Indian Made) Beverages (Manufacturing and Marketing) Corporation Limited and at the point of first sale in the State by a dealer who is liable to tax under Section 5 (except where the sale is to the Kerala State Beverages (Manufacturing and Marketing) Corporation Ltd."

In the first batch of writ petitions which were disposed of by a Division Bench by its judgment and order of November 27, 1999 it was held that Entry 51 of List II of the 7th Schedule of the Constitution of India is only the source of power for the legislature concerned empowering it to enact a law for the levy of excise duty on consumable alcohol manufactured within the State. Excise duty, though an incidence of the manufacture of goods, it was not axiomatic that the manufacture of goods would immediately result in a liability of excise duty merely on the wording of Entry 51 in List II. The liability of excise duty depended on the charging provision in the statute providing for such levy.

In the instant case, Bonded Warehousing Licence in Form FL9 had been issued only to the Beverages Corporation which was constituted as the sole marketing agency for the purchase and distribution of IMFL. Rule 11 of the Storage in Bond Rules permitted removal of IMFL from bonded warehouse only to premises licensed under FL9 Licence, under cover of a pass on payment of excise duty due. Levy of excise duty was, therefore, traceable to Section 17(f) of the Act. These two provisions have to be read together.

The Beverages Corporation had executed a bond under which it had bound itself to pay excise duty payable on the IMFL. Therefore, the statutory provisions read together do not contemplate payment of excise duty on IMFL by the manufacturer within the State at any stage prior to the removal from the warehouse of the Beverages Corporation. Under such circumstances it was impossible for the manufacturers to pay the excise duty at any stage after the manufacture of goods and before its removal from the distillery to the bonded warehouse of the Beverages Corporation in course of sale effected in favour of the said Corporation. The manufacturer lost control over the goods in question and property passed on from the distillery to the Beverages Corporation.

The levy of excise duty in terms of Section 17(f) of the Act read with Rule 11 of the Storage in Bond Rules constituting the charging provision of the excise duty under the Abkari Act came into operation at a stage after the property in the goods, namely the IMFL manufactured by the distillers had been transferred in favour of the Beverages Corporation. In other words the charging provision under the Act came into operation at a point of time subsequent to the transfer of property in goods in favour of the Beverages Corporation. Under such circumstances it was difficult to accept the argument that the amount payable by way of excise duty necessarily became part of the turnover of the manufacturers.

On such reasoning the High Court held that the manufacturers/ distillers were not required to pay excise duty which never formed part of their turnover. The finding of the High Court has been summarized in paragraph 41 of the judgment, which is as follows:-

> "(i) that a duty of excise is leviable under Section 17 either at the point of manufacture or at the point of issue from a manufacturer or warehouse.

The choice is that of the Government.

(ii) that the duty may be imposed either on the quantity produced or passed out from a distillery, brewery or warehouse.

(iii) for ad-valorem the value is such at which the Fourth respondent purchases from the suppliers.

(iv) The petitioner does not have any license except for Compounding, Blending and Bottling in Form No.1 in Form No.2 and Form 4.

(v) The fourth respondent is the exclusive marketing organization in the State of Kerala and all sales have to take place to the said organization.

(vi) The fourth respondent alone holds license in FL9 and is alone competent to have a Bonded Warehouse granted under BW1. They have executed requisite Bond in Form A and entered into an agreement with the Government for payment of duty of excise.

(vii) Duty is imposed and collected when the 4th respondent removes goods from its Bonded warehouse under Rule 11(1) of the Bond Rules. At that point duty is paid by the fourth respondent in discharge of its statutory liability to pay the duty.

(viii) Under the provisions of Section 5 read with Serial No.53 of the First Schedule of KGST Act, the sale by the fourth respondent is the first sale attracting tax. In other words the sale by the petitioner to the Fourth respondent is not treated as a sale liable to tax.

(ix) That there is no necessity to submit monthly/ Quarter/Half yearly or Annual Returns to the Excise Authorities on the part of the petitioner. In other words the petitioner is not subjected to any assessment made under the provisions of the Kerala Abkari Act or Rules made thereunder."

The High Court, therefore, allowed the writ petitions.

The State of Kerala preferred the instant appeals before this Court but pending the disposal of the appeals, it amended Section 5(2C) of the Kerala General Sales Tax Act by the Finance Act of 2001 adding an explanation with a view to remove any doubt. We have earlier quoted the explanation which was brought into effect retrospectively from July 1, 1987 and which clarified that any distillery in the State which sells liquor manufactured by it within the State to the Kerala State Beverages Corporation shall be liable to pay turnover tax on the turnover of sale of liquor by it to the said Corporation and the turnover for the purpose of this sub-section shall include any duty of excise liable on such liquor at the hands of such manufacturer whether such duty is paid by the manufacturer or by the said Corporation. In view of the amended provision, proceedings were again initiated by the Sales Tax authorities and the same were again challenged before the High Court.

The second batch of writ petitions was disposed of by a common judgment and order of the High Court dated August 9, 2002. The High Court while disposing of the second batch of writ petitions considered the binding precedents on the subject and observed that irrespective of the manner in which the rules and agreements between the parties changed the point of collection, excise duty in its true character is always a duty payable by the manufacturer of an article and remains the liability of the manufacturer. If as a result of the rules and the agreements it is discharged by someone else such discharge must be held on account of the manufacturer himself. The learned Judges referred to the decision of this Court in Mohan Breweries and Distilleries Limited (supra) which according to the learned Judges squarely governed the case. After noticing several judgments of this Court the learned Judges were not inclined to agree with the view of the earlier Bench on this aspect of the matter, but finding themselves bound by the earlier decision, they proceeded to dispose of the writ petitions on the basis that the manufacturers/distillers were not liable to pay turnover tax under the Abkari Act. It held that the earlier judgment could not be said to have been rendered per incuriam because the judgment was rendered after considering the binding judgments of the Supreme Court. The High Court also noticed the fact that appeals were pending before this Court against the

judgment in the first batch of writ petitions.

Having held itself bound by the judgment of the High Court in the first batch of writ petitions, it held that the explanation to Section 5(2C) of the Act did not advance the case of the State because once it is held that the provisions of the Abkari Act read with the Rules framed thereunder did not cast the liability for payment of excise duty on foreign liquor sold in the state of Kerala on the manufacturers and that the payment of excise duty was the liability of the Beverages Corporation, the explanation added to Section 5(2C) did not change the legal position unless the Abkari Act was suitably amended so as to impose the liability of payment of excise duty on the manufacturers/ distillers. The explanation introduced by way of amendment was a futile attempt to revalidate the levy without curing the inherent constitutional disability.

It, however, negatived the plea of the manufacturers/distillers that the levy of turnover tax under Section 5(2C) of the Act in so far as it deals with foreign liquor can only be on the sale / turnover of the dealers as specified in Entry 60 of the First Schedule (corresponding to Entry 53). It held that the reference to Serial No. 60 (Serial No. 53 in the first batch of writ petitions) of the First Schedule is only with a view to ascertaining the description of the type of foreign liquor sold. The words "as specified hereunder" under Section 5(2C) of the Act must be read as qualifying the substantive goods and not as qualifying the substantive dealer. This was because the said entry in the First Schedule describe the person on whom the levy falls and the points at which the levy falls. The rates were also prescribed. Moreover sub-section (2C) started with a non obstante clause "notwithstanding anything contained in this Act or the Rules made thereunder". Thus the payment of turnover tax under sub-section (2C) was not subject to restrictions enumerated in sub-section (1) and sub- section (2) of Section 5 of the Act. One such restriction pertains to the number of points at which the levy can be made. On an interpretation of the aforesaid provision it recorded a categoric finding that the contention of the manufacturers/distillers that the levy of turnover tax fall on the Beverages Corporation and not on them was not acceptable.

Learned counsel appearing on behalf of the State of Kerala drew our attention to the provisions of the Abkari Act and the various other Rules which have been noticed earlier in the judgment. He submitted that it is not in dispute that upto 1.4.1984 the excise duty on the manufacture of liquor was being paid by the distillers/manufacturers like the respondents. With effect from 1.4.1984 the KSBC came into existence and a monopoly was created in its favour for wholesale marketing in foreign liquor. The manufacturers/distillers were obliged to sell their products to the aforesaid Corporation which distributed the same to the retailers all over the State. In view of the powers conferred by Section 17 of the Abkari Act Notifications levying the excise duty were issued from time to time which cast the liability to pay excise duty on the distillers/manufacturers under the Abkari Act. He has drawn our attention, in particular, to 2 Notifications being SRO No. 60/61 dated 18.3.1961 and SRO No. 330/96 which came into force on 1st April, 1996. The first of these Notifications shorn of unnecessary details is to the effect that in exercise of the powers conferred by Section 17 of the Abkari Act, the Government of Kerala directed that the duty under the said Section shall be levied on the following kind of liquors manufactured in the area where the said Act is in force or manufactured elsewhere in India and imported into the said area by land or under bond by sea, at the rates mentioned against each kind of liquor. The first item mentioned is Indian Made

Foreign Spirits except Indian Made Foreign Spirits consumed by Defence Services. The second Notification is in similar terms wherein in exercise of powers conferred by the Sections 6, 7, 17 and 18 of the Abkari Act the Government of Kerala directed that the import and export fees, the excise duty and luxury tax under the said sections shall be levied on the following kinds of liquors manufactured in the State and exported outside the State under bond in force or manufactured elsewhere in India and imported into the State by land, air or sea under bond, at the rates mentioned against each kind of liquor. The first item mentioned under the heading - kind of liquor - is "Indian Made Foreign Liquor including beer except those consumed by Defence Service". He submitted that similar Notifications were issued in exercise of powers conferred by Section 17 of the Abkari Act which leave no room for doubt that the levy of excise duty was on the manufacture of liquor in the State. He, therefore, pointed out that having regard to the Notifications issued in exercise of powers conferred under Section 17 of the Abkari Act, what was levied was excise duty on IMFL manufactured in the State. The liability to pay excise duty, therefore, was that of the manufacturer. He relied upon Rule 47 of the Kerala Distillery and Warehouse Rules, 1968 whereunder no liquor could move out of the distillery premises except on payment of excise duty or under bond executed by the distillery undertaking to pay the excise duty. The incidence of execution of bond was itself proof of the fact that the liability to pay excise duty was cast on the distillers or the manufacturers. Relying upon sub-rule (1) of Rule 16 of the Kerala Distillery and Warehouse Rules, 1968 it was submitted that the definition of "warehouse" clearly meant that part of a distillery where spirits for issue are kept. The warehouse referred to in Rule 47 related to the warehouse in the distillery where the distillery kept liquor produced by it before it was removed therefrom. After the monopoly was created in favour of KSBC with effect from 1.4.1984 the liquor stored in the warehouse of the distillery was removed under bond to the Corporation bonded warehouse licenced in Form BW1 under the Storage and Bond Rules. Corporation also was required to execute a bond in Form A undertaking to pay the excise duty. He, therefore, submitted that the liability to pay excise duty was clearly on the manufacturers/ distillers. The amendment made to the Rules only enabled the KSBC to procure IMFL from the manufacturers without payment of excise duty and stock the same in its bonded warehouses. The liability to pay excise duty which was cast on the manufacturer was never shifted. That liability arose at the point of manufacture and there was no amendment to the relevant statutory provision whereby the liability to pay excise duty was shifted from the manufacturers to the KSBC. As a matter of convenience the amended rules provided for payment of excise duty, which was the primary liability of the manufacturers, by the KSBC and therefore it was the liability of the manufacturer which was discharged by the KSBC. Reliance was placed on a decision of this Court in Mohan Breweries and Distilleries Limited (supra) and Modowell & Co. Ltd. v. C.T.O., [1985] 3 SCC 230 and State of Kerala v. Madras Rubber Factory, [1998] 1 SCC 616 and Deputy Commissioner of Sales Tax (Law), Board of Revenue (Taxes), Ernakulam v. Hindustan Petroleum Corporation, [2000] 10 SCC 535. Reliance was also placed on a Full Bench decision of the Kerala High Court in Hindustan Petroleum Corporation v. State of Kerala : (1989) STC 106. Counsel also placed reliance on two Division Bench decisions of the Kerala High Court in TRC No. 92 of 1987 M/s. South Travancore Distilleries and Allied Products, Trivandrum v. State of Kerala, dated 2nd August, 1989 wherein it was held that the liability to pay excise duty was on the manufacturer which has not been shifted by law from the manufacturer to the KSBC. The duty discharged by the KSBC would still formed part of the deposit and total sale turnover of the manufacturers. According to him this judgment was approved by this Court by dismissal of CA No. 3020 of 1990 by order dated

October 24, 1990. This Court held :

> "On our aforesaid finding that the demand of sales tax on excise duty which would have merged into price to be charged by the manufacturer to the Corporation, the liability for tax on excise duty should be taken as final against the appellant."

Reliance was placed on the decision of the Division Bench in OP No.9295 of 1989 decided on April 12, 1991. He, therefore, submitted that the law is well settled that excise duty is a tax on the manufacture of goods and this liability falls on the manufacturer though its collection may be deferred to a later stage upto the stage of consumption. He also relied upon various decisions of this Court in support of this proposition. He further submitted that the use of the words "if the Government so directs" in Section 17 of the Abkari Act only gives to the Government the discretion to levy or not to levy the excise duty. It has no relation to the stage at which the excise duty was to be levied or collected. The liability arose once the Government directs to levy the duty and issues Notification in that regard. The collection may be at one or the other points referred to in clauses (c) to (g). The charging section itself imposes the liability on all those mentioned in clauses (c) to (g) all of which are related to manufacture. According to him all that is required is for the Government to evince its intention by levying the duty by appropriate Notification. Such Notifications have been issued from time and time and those Notifications specified that duty is imposed on the manufacturer of IMFL. That the excise duty liability is of distiller is also evident from the fact that the duty payable is on the value/sale price of the liquor sold by the distillery to the KSBC and not on the basis of the sale price of the KSBC to retailers. He, therefore, submitted that the amendment of the Rules, particularly the (Storage in Bond) Rules, did not shift the liability of the manufacturer under the Notification issued under Section 17 of the Abkari Act. It only enabled the IMFL to be removed from the distillers warehouse to the premises of the FL9 licensees namely, the KSBC under the cover of a pass granted in that behalf and on payment of excise duty. The excise duty liability has never been obliterated or dispensed with by statutory provision. The liability continued and only the collection was postponed in cases where the liquor was removed from the bonded warehouses of the distillers to the bonded warehouses of the KSBC without payment of excise duty.

He further submitted that in view of the Government's order dated 5th January, 1999 the Foreign Liquor Rules were amended and, thereafter the KSBC was obliged to pay the excise duty at the time of purchase itself so that what was stocked in the premises of the KSBC was duty paid IMFL. There could be no doubt that thereafter the excise duty element formed part of the sale price of the distillers yet the High Court in the first batch of writ petitions granted relief in very broad terms ignoring this aspect of the matter. He further submitted that the tax did not offend Article 311 of the Constitution of India and there was no violation of Article 304(1) inasmuch as there was no discriminatory levy on liquor imported from outside the State, to which locally manufactured liquor was not subject. It was also submitted that what was levied under the Act was excise duty and not price paid for the privilege of grant of exclusive right to manufacture and market liquor. Lastly it was submitted that Entry 53 of the First Schedule to the Kerala General Sales Tax Act read with Section 5(2C) of the Act levied turnover tax on sales of IMFL at all points by the dealers. Entry 53 did not govern Section 5(2C) which began with a non obstante clause and reference to Entry 53 in the aforesaid Section is only to the definition of foreign liquor in that entry. The section applied to the

goods referred to in Entry 53 and had no reference to the dealers by whom tax was payable because the turnover tax on foreign liquor was payable by all dealers on all points of sale.

Mr. Nariman appearing on behalf of the respondents submitted that the levy of duty on liquor was not referable to Entry 51 of List II but falls under Entry 8 of List II of the Seventh Schedule. He submitted that a close examination of Section 17 of the Abkari Act will reveal that the Government has a discretion to impose the levy, and the taxable events are those enumerated in clauses (a) to (g) which include levy on liquor permitted to be imported or exported or transported or manufactured under any licence granted under Section 12 or manufactured at any distillery, brewery, winery or other manufactory established under Section 14 or issued from a distillery. brewery, winery or other manufactory or warehouse licensed or established under Section 12 or Section 14, or sold in any part of the State. He submitted that the duty of excise is levied on the manufacture of the goods. The levy contemplated by clauses (a) to (g) of Section 17 is not necessarily connected with manufacture of liquor, as it also envisaged the levy of duty on liquor exported or transported under clauses (b) and (c) or even issued from the distillery as contemplated by clause (f) or sold in any part of the State as contemplated by clause (g). Levy under these clauses cannot be characterized as levy of excise duty because they are not related to the manufacture of goods. Section 18 prescribes how duty can be imposed and in essence the basis of duty under the Abkari Act is either on the quantity produced in, or passed out of, a distillery, brewery or warehouse. The Section, therefore, gives a discretion to the State to impose such duty either on a distillery or brewery or warehouse. Excise duty in essence is a duty on manufacture but Section 18(A) of the Act also contemplates grant of exclusive or other privilege of manufacturing or supplying by wholesale on payment of rentals. Section 18(A) is an enabling provision and apparently the levy under Section 18(A) which was inserted in 1964 must fall under Entry 8 of List II. The State is enabled to part with its privilege of manufacturing or supplying liquor in wholesale or of selling in retail. Since the levy is relatable to Entry 8 of List II it cannot be construed as a levy of excise duty on manufacture in terms of Entry 51 of List II of the Seventh Schedule of the Constitution of India. He, therefore, submitted that the levy under Section 17 or 18(A) of the Abkari Act is not levy of excise duty stricto sensu though it is loosely so described in the Abkari Act.

He submitted that there is a line of decisions which holds that ordinarily excise duty is the liability of the manufacturer unless the law provides otherwise. These decisions were, however, rendered in the context of excise duty properly so-called. The character of a levy is not to be determined merely by the words used in a statute but in a wider sense i.e. the nature of the levy. Relying upon the decisions of this Court in Southern Pharmaceuticals and Chemicals v. State of Kerala, AIR (1981) SC 1863 and Synthetic and Chemicals Ltd. and Ors. v. State of U.P. and Ors., [1990] 1 SCC 109 and of the Kerala High Court in Moni Simon v. State of Kerala, (1984) KLT 1060, he submitted that these cases disclose an approach which was different while dealing with a duty under Section 17 of the Abkari Act, than while dealing with the levy of excise duty stricto sensu. The levy under Section 17 not being strictly speaking in the nature of duty of excise, the liability of the Corporation has not to be determined on any preconceived notion of levy of excise duty i.e. the liability must fall on the manufacturer, but on the language of Section 17 which makes it clear that it does not fall under Entry 51 of List II. At best the levy is relatable to Entry 8 of List II. There can be no excise duty on sale or supply as contemplated by Section 17. Therefore, the liability to pay the duty was on the

KSBC and not on the manufacturer. He also referred to the Notifications issued by the State which went on to show that the levy was not in the nature of excise duty. An essential element of excise duty is uniformity of incidence which cannot vary from Notification to Notification. The Scheme of the Act itself supports the inference that though it is imposed under the Abkari Act, yet it is not a duty of excise on manufacture, but a consideration for parting with State's privilege, referable to Entry 8 of List II.

Before the High Court the same submission was advanced on behalf of the Respondents which is noticed in paragraphs 44 and 46 of the judgment, but no finding has been recorded by the High Court on this aspect of the matter.

Alternatively, and assuming without conceding, that the duty imposed is excise duty, Mr. Nariman submitted that the observations in Mohan Breweries (supra) that the incidence of excise duty falls on the manufacturer or producer of the goods is not a rule of universal application, as it must depend upon the words the statute employs. He relied upon decisions of this Court in support of his submission that the incidence of excise duty may fall on a person other than the manufacturer, if the statute so provides. In the present case, he submitted that upto the time the Abkari Act was amended in 2003, it gave an option to the Government to levy excise duty on liquor either on the manufacturer who was licensed under Section 14 or on the issue of the liquor from the warehouse of the licensed warehouse keeper. According to him, the licensed warehouse keeper referred to in Section 14(f) means the KSBC. According to him the KSBC being the sole and exclusive warehouse keeper under the Government order of February 1, 1984 read with Rule 11 of the (Storage in Bond) Rules, it was the KSBC on which the duty to pay the duty was imposed. Under Rule 11(1) of the aforesaid Rules the foreign liquor stored in the Bonded Warehouse could be removed only to the premises licensed under the FL9 licence, and the FL9 licence could be issued only in favour of the KSBC. Since the primary obligation to pay excise duty under the Abkari Act is that of the licensee of the foreign liquor bonded warehouse and the License in Form FL9 could be issued only to the KSBC, the liability was squarely on the aforesaid Corporation. Rule 3(1)(b) of the (Storage in Bond) Rules, 1961 imposes the primary obligation to pay the duty under the Abkari Act on the licensee of a foreign liquor bonded warehouse. Only the KSBC held the licence in Form FL9 as also BW1 , and also executed an agreement in Form A agreeing to pay the prescribed duty. The aforesaid Rules constitute the direction contemplated by Section 17 of the Abkari Act. The liability to pay the duty is clearly cast on the KSBC.

He submitted that a close examination of Section 17 of the Act would reveal that the duty imposed under it is not necessarily leviable on the manufacturer. There are so many other categories. Sections 17 and 18 also give to the Government an option as to how the duty is to be imposed and on whom, whether on the distillers/manufacturers or warehouse owners. He relied upon the provisions of the Abkari Act and the relevant Rules and submitted that the Government has chosen to impose the liability on the KSBC and not on the manufacturer. The Government had the power to do so. The licence issued to the KSBC obliged it to pay all excise duties which was a condition of the licence and, therefore, the payment of excise duty by the KSBC was not on behalf of anyone else but in terms of its own licence.

He further submitted that if payment of excise duty made by the Corporation is treated as made on behalf of the manufacturer on the hypothesis that the excise duty liability is that of the manufacturer, it must follow that the payment of turnover tax by the Corporation must be similarly treated as having been made on behalf of the manufacturer. He submitted that if the turnover tax on excise duty is paid by the Corporation on its own behalf, then it cannot be treated as part of the turnover of the manufacturer. However, if the excise duty is to be treated as paid on behalf of the manufacturer, then it must follow that the turnover tax on that duty must also be treated as having been paid on behalf of the manufacturer. Therefore, there could be no additional liability on the manufacturer to pay turnover tax since the same had already been paid by the Corporation.

Mr. Ashok Desai, Senior Advocate appearing on behalf of some of the respondents supplemented the arguments advanced by Shri Nariman and submitted that having regard to the scheme of the Abkari Act and the Rules, the exigibility to the duty of excise was on KSBC which has the sole marketing and monopolistic rights as from 1st April, 1984. In fact that is how the authorities also understood the law till the judgment in Mohan Breweries (supra) case. According to him under the legal frame work the duty of excise can be paid only by the Corporation and not by the distillers. He also referred to the various provisions of the Act and the relevant Rules in support of his arguments. He also submitted that on a strict construction of the taxing statute there can be no levy of turnover tax at all on the manufacturers. Reading Sections 5(1) and 5(2C) of Kerala General Sales Tax Act with the Schedule to the said Act he submitted that the manufacturer was not liable to pay turnover tax by including in his turnover the amount of excise duty payable by KSBC. Relying upon the judgment of this Court in State of Punjab and Anr v. M/s. Devans Modern Breweries and Anr., (2003) JT (10) 485, he also submitted that all the rights relating to liquor are vested in the State and the State may part with the privilege for a consideration. The levy of duty by the State of Kerala in the instant case was really the consideration for which the State parted with its privilege in favour of the aforesaid Corporation.

We shall first take up for consideration the submission urged on behalf of the State of Kerala that the levy of duty in the insant case is really a levy of duty of excise under Section 17 of the Abkari Act. The scheme under the Rules, after KSBC was constituted, provided for collection of the said excise duty from the aforesaid Corporation as a matter of administrative convenience. Liability, therefore, remained that of the distillers/manufacturers and only the stage of collection of the said excise duty was deferred. On the other hand counsel for the respondents submitted that the levy of duty in the instant case, though under Section 17 of the Abkari Act was not levy of duty of excise, though loosely so called. It was in effect the consideration for parting with exclusive privilege of the State of Kerala in favour of KSBC for wholesale trade in the business of liquor permissible under Section 18A of the Abkari Act and, therefore, payable only by the KSBC.

Mr. Nariman contended that even if the submission advanced by Mr. T.L.V. Iyer. that the collection of the duty of excise may be deferred to a later stage for the sake of convenience, may not be disputed, yet it must first be shown that the duty levied is in reality a duty of excise. The mere fact that it has been described as a duty of excise is not conclusive unless it is also shown that the duty is on manufacture. There is force in his contention because the mere fact that a duty is described as a duty of excise in a statute may not be conclusive, particularly when there is a competing entry under

which such a duty may be levied. It is, therefore, always a question for the Court to consider under which entry the tax falls. In Synthetics and Chemicals Ltd. and Ors. v. State of U.P. and Ors ., [1990] 1 SCC 109 this Court has taken judicial notice of the fact that in many statutes excise duty and price of privilege were regarded as one and the same. This Court in paragraph 87 of the report observed :-

> "87. On an analysis of the various Abkari Acts and Excise Act, it appears that various provinces/States reserve to themselves in their respective States the right to transfer exclusive or other privileges only in respect of manufacture and sale of alcohol and not in respect of possession and use. Not all but some of the States have provided such reservation in their favour. The price charged as a consideration for the grant of exclusive and other privileges was generally regarded as an excise duty. In other words, excise duty and price for privileges were regarded as one and the same thing. So-called privilege was reserved by the State mostly in respect of country liquor and not foreign liquor which included denatured spirit."

Learned counsel for the parties have referred to several decisions of this Court on the question as to what is the nature of a duty of excise. It may be useful to refer to some of the decisions.

In Re : Central Provinces and Berar Sales of Motor Spirit and Lubricants Taxation Act, (1938) AIR 1939 FC 1 after considering the meaning usually given to the term `duty of excise' this Federal Court concluded :-

> "But its primary and fundamental meaning in English is still that of a tax on articles produced or manufactured in the taxing country and intended for home consumption. I am satisfied that that is also its primary and fundamental meaning in India ; and no one has suggested that it has any other meaning in Entry (45)....."

> "The expression `duties of excise', taken by itself, conveys no suggestion with regard to the time or place of their collection. Only the context in which the expression is used can tell us whether any reference to the time or manner of collection is to be implied. It is not denied that laws are to be found which impose duties of excise at stages subsequent to manufacture or production; but, so far as I am aware, in none of the cases in which any question with regard to such a law has arisen was it necessary to consider the existence of a competing legislative power, such as appears in entry (48)."

Here again it was emphasized that the Courts are entitled to look at the real substance of the Act imposing the duty, and what it does and not merely what it says in order to ascertain the true nature of the tax.

In The Province of Madras v. Messrs. Boddu Paidanna and sons : AIR (1942) FC 33 the Federal Court observed as under :-

> "There is in theory nothing to prevent the Central Legislature from imposing a duty of excise on a commodity as soon as it comes into existence, no matter what happens to it afterwords, whether it be sold, consumed, destroyed or given away. A taxing authority will not ordinarily impose such a duty, because it is much more convenient administratively to collect the duty (as in the case of most of the Excise Acts) when the commodity leaves the factory for the first time, and also because the duty is intended to be an indirect duty which the manufacturer or producer is to pass on to the ultimate consumer, which he could not do if the commodity had, for example, been destroyed in the factory itself. It is the fact of manufacture which attracts the duty, even though it may be collected later."

In Governor-General in Council v. Province of Madras, AIR (1945) PC 98 the Privy Council noticed the earlier decisions of the Federal Court and rejected the contention before it that the power to impose a duty of excise, which is given to the Federal Legislature alone by Entry No. 45 of the Federal List, entitles that Legislature and no other to impose a tax on first sales of goods manufactured or produced in India. Their Lordships observed "To their Lordships this contention does not appear well-founded. The term "duty of excise" is a somewhat flexible one : it may, no doubt, cover a tax on first and perhaps on other sales ; it may in a proper context have an even wider meaning. An exhaustive discussion of this subject, from which their Lordships have obtained valuable assistance, is to be found in the judgment of the Federal Court in 1939 F.C.R. 18. Consistently with this decision, their Lordships are of opinion that a duty of excise is primarily a duty levied upon a manufacturer or producer in respect of the commodity manufactured or produced. It is a tax upon goods not upon sales or the proceeds of sale of goods. Here again their Lordships find themselves in complete accord with the reasoning and conclusions of the Federal Court in the Boddu Paidanna case. The two taxes, the one levied upon a manufacturer in respect of his goods, the other upon a vendor in respect of his sales, may, as is there pointed out, in one sense overlap. But in law there is no overlapping. The taxes are separate and distinct imposts. If in fact they overlap, that may be because the taxing authority, imposing a duty of excise, finds it convenient to impose that duty at the moment when the exciseable article leaves the factory or workshop for the first time upon the occasion of its sale. But that method of collecting the tax is an accident of administration : it is not of the essence of the duty of excise which is attracted by the manufacture itself."

In R.C. Jall v. Union of India, [1962] Sppl 3 SCR 436 this Court noticed the earlier three decisions referred above and laid down the principle as follows :-

> "With great respect, we accept the principles laid down by the said three decisions in the matter of levy of an excise duty and the machinery for collection thereof. Excise duty is primarily a duty on the production or manufacture of goods produced or manufactured within the country. It is an indirect duty which the manufacturer or producer passes on to the ultimate consumer, that is, its ultimate incidence will always be on consumer. Therefore, subject always to the legislative competence of the taxing authority, the said tax can be levied at a convenient stage so long as the character of the impost, that is, it is a duty on the manufacture or production, is not

> lost. The method of collection does not affect the essence of the duty, but only relates to the machinery of collection for administrative convenience. Whether in a particular case the tax ceases to be in essence an excise duty, and the rational connection between the duty and the person on whom it is imposed ceased to exist, is to be decided on a fair construction of the provisions of a particular Act."

The next decision of this Court which may be noticed is the decision of the Full Court in Re : The bill to amend Section 20 of the Sea Customs Act, 1878 and Section 3 of the Central Excises and Salt Act, 1944 [1963] 3 SCR 787 in which the law was stated in the following words :-

> "This will show that the taxable event in the case of duties of excise is the manufacture of goods and the duty is not directly on the goods but on the manufacture thereof. We may in this connection contrast sales tax which is also imposed with reference to goods sold, where the taxable event is the act of sale. Therefore, though both excise duty and sales-tax are levied with reference to goods, the two are very different imposts ; in one case the impositions is on the act of manufacture or production while in the other it is on the act of sale. In neither case therefore can it be said that the excise duty or sale tax is a tax directly on the goods for in that event they will really become the same tax. It would thus appear that duties of excise partake of the nature of indirect taxes as known to standard works on economics and are to be distinguished from direct taxes like taxes on property and income."

The principle was stated in some what similar terms in M/s. Guruswamy and Co. etc. v. State of Mysore and Ors., [1967] 1 SCR 548 which is as follows :-

> "These cases establish that in order to be an excise duty (a) the levy must be upon `goods' and (b) the taxable event must be the manufacture or production of goods. Further the levy need not be imposed at the stage of production or manufacture but may be imposed later."

The same principles have been reiterated in M/s. Mcdowell & Co. Ltd. v. C.T.O., [1977] 1 SCC 441 ; M/s. Mcdowell & Co. Ltd. v. C.T.O., [1985] 3 SCC 230 ; Mohan Breweries & Distilleries Ltd. v. Commercial Tax Officer, [1997] 7 SCC 542 and State of Kerala v. Madras Rubbery Factory Ltd., [1998] 1 SCC

616. We shall deal with the submissions urged on the basis of the decisions of this Court in Mohan Breweries (supra) and Madras Rubber Factory, (supra) later.

In the light of these principles we now proceed to examine the question as to whether the imposition of duty in the instant case under Section 17 of the Abkari Act was really a `duty of excise'.

As we have noticed earlier the duty on liquor is imposed under Section 17 of the Abkari Act. There is no doubt that it is described as a `duty of excise'. The Government has a discretion to levy or not to

levy such duty on all liquor and intoxicating drugs in cases covered by clauses (a) to (g) of Section 17. Clauses (d) and (e) which relate to liquor manufactured under any licence granted under Section 12 or manufactured at any distillery, brewery, winery or other manufactory established under Section 14, no doubt relate to imposition of duty of excise properly so called because the duty levied on liquor manufactured under a licence granted under Section 12 or 14 is duty on manufacture and will squarely falls within the meaning of the term `duty of excise'. However, clauses (b), (c),

(f) and (g) contemplate events which are not related to manufacture, such as liquor permitted to be exported or permitted to be transported under clauses (b) and (c) or liquor issued from a distillery under clause (f) or sold in any part of the State under clause (g). If the duty of excise is levied under Section 17 read with clauses (b), (c), (f) and (g) it may not be possible to contend that what is levied is a duty of excise since the taxing event envisaged under the aforesaid clauses do not relate to manufacture. Learned counsel for the respondents, in particular, emphasized clause (f) of Section 17 because it is their contention that in the instant case the levy of duty is under clause (f) of Section 17 since the State intended to recover duty from KSBC on the issue of liquor from its warehouses in course of its monopoly wholesale trade. It was further emphasized that Section 18A which related to grant of exclusive or other privilege of manufacturing or supply by wholesale etc. enabled the State to grant such privilege on the basis of annual rental by way of consideration for the grant of such privilege and the rental could be collected to the exclusion of or in addition to the duty or tax leviable under Sections 17 and 18.

So viewed there can be no doubt that the levy of duty under Section 17 need not necessarily be a duty of excise stricto sensu. In each case the Court has to consider whether, having regard to the nature of levy, it is a duty of excise or other impost.

We have earlier noticed that under Rule 11 of the Foreign Liquor (Storage in Bond) Rules, 1961, foreign liquor stored in the bonded warehouse can be removed only to the premises licensed under FL 9 licence held by a bonded warehouse licensee and such removal shall be under cover of a pass granted in that behalf and on payment of excise duty due. The same Rules provide that any person desiring to store in bond foreign liquor shall make an application for licence in that behalf to the Commissioner of Excise containing the particulars mentioned therein. It also obliges the applicant to execute an agreement in Form A undertaking to abide by the provisions of the Act, the Rules and orders made thereunder and the conditions of the licence and also agrees to pay the prescribed duty therefor. Rule 14 of the Rules provides for the issuance of a licence in Form BW1 to KSBC for the purpose of storage in bond and supply of foreign liquor in wholesale to FL9 licensee under the Foreign Liquor Rules, 1953. Rule 13(9) of the Foreign Liquor Rules mandates that licence in Form FL9 shall be issued by the Excise Commissioner only to KSBC possessing licence in Form BW1 under the Foreign Liquor (Storage in Bond) Rules, 1961.

These Rules leave no manner of doubt that they create a complete monopoly in favour of KSBC insofar as wholesale trade in IMFL is concerned. The manufacturer must sell all their produce to KSBC which alone is entitled to the issuance of licence in Form FL9 and which is also issued a licence in Form BW1. The Corporation has also executed an agreement in Form A which obliges it to pay duties payable on the liquor. In view of these Rules, it was submitted that in effect the State of

Kerala has parted with its privilege of wholesale business in IMFL in favour of KSBC for a consideration. The licence issued in favour of KSBC obliges it to pay the duty and it does so not on behalf of anyone else but in terms of its own licence.

Learned counsel for the parties have also drawn our attention to the Notifications issued by the Government from time to time under Section 17 of the Act. The relevant portion of the Notificatiosn reads thus :-

> The Government of Kerala hereby direct that the duty under the said Section shall be levied on the following kind of liquors manufactured in the area where the said Act is in force or manufactured elsewhere in India and imported into the said area by land or under bond by sea, at the rates mentioned against each kind of liquor."
>
> It was argued that the Notifications suggest that such duties are levied either on goods manufactured in the area or imported into the area. It was also submitted that an essential characteristic of `duty of excise' is a uniformity of incidence. It cannot vary from notification to notification.
>
> From a perusal of Notification No. SOR 60/61 issued on 18th March, 1961 it appears that different rates of duties have been prescribed for different kinds of liquor. So far as Indian Made Foreign Spirits, except that consumed by defence services personnel, the rate of duty prescribed was Rs. 12/- per proof litre. For the Indian Made Foreign Spirits for defence services the rate was Rs. 3 per proof litre. This was subsequently substituted by Notification dated 23rd April, 1964 whereunder for the Indian Made Foreign Spirits when exported by distillers to Goa and not re- imported into the State, the rate of duty was 45 np. per proof litre subject to the enumerated conditions being satisfied. In other cases it was Rs. 14/- per proof litre. However, in the case of Indian Made Foreign Spirits for defence services personnel supplied through Canteen Stores Department etc. the duty is Rs.3/- per proof litre. Similarly under Notification No. 330 of 1996 the rate of duty on Indian Made Foreign Liquor when exported by distillers and not re-imported into the State was Rs. 5/- per proof litre subject to the conditions being satisfied. In other cases the rate of excise duty levied was an amount equivalent to 100 % of its value. It is, therefore, apparent that under the same Notification purported to be issued under Sections 6, 7, 17 and 18 of the Abkari Act duties were levied on liquors manufactured in the State or exported outside the State or manufactured elsewhere in India and imported into the State by land or sea under bond. The duty levied on import of liquor would be impermissible under Entry 51 of List II. Apparently, therefore, the duty is referable to Entry 8 of List II. It was rightly submitted that if the duty imposed was in the nature of excise duty on manufacture, different rates could not have been prescribed depending upon whether it is sold in the market or consumed by the defence services personnel.
>
> It should also be noticed that having regard to the language of the Notifications it cannot be said that duty is levied on manufacturer because Notifications suggest that

such duty would be levied either on the goods manufactured in the area or imported in the area. As earlier observed, the duty levied on import of liquor is referable only to Entry 8 of List II and not Entry 51 thereof.

We may also notice that the stand of KSBC before the High Court and before this Court has been that supplies were effected to it by the manufacturers/distillers in accordance with the relevant Rules without charging excise duty when the supplies were effected. In accordance with the provisions of the Abkari Act and Rule 11 of the Foreign Liquor (Storage in Bond) Rules, 1961, goods purchased by the Corporation during the relevant period were without payment of excise duty and the excise duty thereon was payable at the time of removal of goods from the bonded warehouse to FL9 premises. The Corporation remitted turnover tax on the total value of turnover of the Corporation for each year at the rate of turnover tax prevalent during the relevant year. The turnover of the Corporation was computed so as to include the value of the goods at which the supplies were received by the Corporation, excise duty paid by the Corporation, profit margin of the Corporation and sales tax paid by the Corporation. It is thus admitted by the Corporation that under Rule 11 of the (Storage in Bond) Rules the duty was payable when the goods moved out from its bonded warehouse to FL9 premises. This also supports the submission of the respondents that the duty was levied at the stage of movement of the goods from the bonded warehouse of the Corporation to the FL9 premises and, therefore, the levy of duty in terms of Rule 11 must necessarily be traced to Section 17(f) which levied duty on liquor "issued from a distillery, brewery, winery or other manufactory or warehouse licensed or established under Section 12 or Section 14". Even the parties understood that it was for the KSBC to pay the duty in terms of licence. Notifications have been issued under Section 17 and not specifically under any of the sub-clauses thereof. It would, therefore, not be correct to contend that the duty was levied on manufacture only.

In this connection we may usefully refer to the decision of this Court in State of Punjab and Anr. v. M/s. Devans Modern Brewaries Ltd. and Anr., (supra). In that case the State of Kerala was also a party. The State had imposed tax on import of potable liquor manufactured in other States. The stand of the State was that it was within the province of the State to impose restriction on import of potable liquor by imposing import duty. The aforesaid duty had not been imposed by the State in exercise of its statutory power conferred upon it in terms of Entry 51 List II of the Seventh Schedule to the Constitution but regulatory power as envisaged in Entry 8 thereof. The contention raised on behalf of the respondents was that the requirements of Articles 301 & 304 of the Constitution of India were to be complied with in view of the fact that the duty of import must conform to the provisions of Entry 51 of List II. The submission of the respondents was rejected and those advanced on behalf of the State of Kerala were accepted. This Court observed that the word `fee' is not used in the strict sense to attract the doctrine of quid pro quo. This was the price or consideration which the State Government had charged for parting with its privilege and granting the same to the vendors. Therefore, the amount

charged was neither a fee nor a tax but was in the nature of price of a privilege which the purchaser had to pay in any trading and business in noxious article/goods. This Court held that the permissive privilege to deal in liquor is not a `right' at all. The levy charged for parting with its privilege is neither a tax nor a fee. It is simply a levy for the act of granting permission or for the exercise of power to part with that privilege. This Court referred to numerous decisions of this Court which have clearly held that the State has a right to exercise all forms of control in relation to all aspects regarding potable alcohol and the State Legislature has exclusive competence to frame laws in that regard. The State has exclusive right in relation to potable liquor and there was no fundamental right to do trade or business in intoxicants. The State in its regulatory power has the right to prohibit absolutely every form or activity in relation to intoxicants - its manufacture, storage, export, import , sale and possession and all these rights are vested in the State and indeed without such vesting there can be no effective regulation of various forms of activities in relation to intoxicants. In Devans Modern, case (supra) this Court held :-

"The Kerala State Beverages Corporation has licence only for wholesale and retail and retail of liquor which will not authorize them to import liquor and that the only licence issued to import liquor into the State is the permit issued on payment of the import fee and, therefore, it is seen that the levy of import fee is authorized by sections 6 and 24 of the Abkari Act, 1077. It is not excise duty or countervailing duty referable to Entry 51 of List II. It is a collection failing under Entry 8 of List II. It is the price paid to the State for parting with its exclusive privilege of dealing in liquor which includes every fact of it including its import. In my view, the State has the right to prohibit every form of activity in relation to intoxicant including its import."

It, therefore, held that the levy was permissible and authorized under Sections 6, 7, 17 and 18 of the Abkari Act. This decision supports the view that the levy of so called excise duty under the Abkari Act may be referable to Entry 8 of List II and not Entry 51 thereof.

In the passing we may observe that the majority decision has also referred to the judgment of the Kerala High Court in the first batch of appeals before us, and two passages from the impugned decision have been quoted with approval in paragraph 335 of the report, which reads as under:-

"The manufacture and sale of liquor are the exclusive privilege of the State and the State, by the process of licensing, is parting with the said privilege and what is charged by the State is only the privilege price through the process of licensing and it is not excise duty."

"The concept of excise duty on production and manufacture as understood in the Central Excise Act cannot be equated in the case of excise duty under the Abkari Act since the manufacture and the sale of liquor are the exclusive privilege of the State and the State, by the process of licensing is parting with the said privilege and what is charged by the State is only the privilege price through the process of licensing the

price and it is not excise duty."

We have carefully perused the impugned judgment but we find that the passages quoted therein were not the findings of the High Court but the submissions advanced on behalf of the petitioners (respondents herein) which are to be found in paragraphs 15 and 44 of the impugned judgment. In fact as we have noticed earlier in this judgment, the High Court in the first batch of writ petitions proceeded on the basis that the duty levied was a duty of excise but the liability did not fall on the manufacturers/distillers and was payable only by the KSBC after sale of the liquor by the manufacturers.

So far as the judgment in Mohan Breweries, (supra) is concerned it may be noticed that the question which has been raised in this batch of appeals was not raised therein, and the Court proceeded on the basis that the levy was in the nature of duty of excise as is ordinarily understood. In Madras Rubber Factory, case (supra) the charging section imposing the rubber cess was quite clear. Sub-section (1) provided for the levy and collection as a cess a duty of excise on all rubber produced in India at such rate not exceeding one anna per pound of rubber so produced as the Central Government may, by the same or a like notification, from time to time fix. Sub-section (2) provided that the said duty of excise shall be payable by the owner of the estate on which the rubber is produced, and shall be paid by him to the Board within one month from the date on which he received a notice of payment therefore from the Board. In view of the clear language of the charging section which saddled the owner of the estate on which the rubber is produced with the liability to pay the said duty of excise, this Court held that the liability to pay the said amount of cess got attached to the rubber so produced and, therefore, if the rules did not provide for the excise duty to be paid by the producer then who ever purchased the said rubber would be purchasing goods to which the liability of payment of duty was attached. We do not find such a provision in the Kerala Abkari Act.

From the above discussions the following conclusions emerge:-

1. Section 17 of the Kerala Abkari Act deals with imposition of duty not necessarily connected with manufacture of liquor and, therefore, the duty levied must in each case be examined before coming to a conclusion as to whether it is in reality a duty of excise.

2. The use of the words "duty of excise" in Section 17 of the Act is not conclusive and it is for the Courts to examine in each case as to whether it is in fact a "duty of excise".

3. In order that a duty may be characterized as "duty of excise" it must be shown that it is a duty on manufacture of goods. If it is unrelated to the manufacture of goods, it may be any other impost permitted by law, but would not qualify as a duty of excise.

4. Section 18A of the Act permits the State of Kerala to grant exclusive or other privilege of manufacture etc. on payment of rentals which includes the privilege of supplying liquor by wholesale or by retail.

The annual rental payable under Section 18A may be collected to the exclusion of or in addition to duty or tax leviable under Sections 17 and 18 of the Act.

5. That the State of Kerala by amendment of the Act and the relevant Rules created a monopoly in favour of the Kerala State Beverages Corporation. Licences in Form FL9 and BW1 have been given exclusively to the aforesaid Corporation which has also executed an agreement in Form A undertaking to pay the duty. A monopoly has been created in favour of the aforesaid Corporation in the wholesale trade of IMFL. In view of Rule 11 of the (Storage in Bond) Rules duty is payable on the movement of IMFL from the bonded warehouse of the Beverages Corporation to the FL9 licensed premises. It is payable when IMFL is issued from the bonded warehouse of the Corporation.

6. The levy of duty on IMFL issued from a bonded warehouse licensed or established under Section 12 or Section 14 of the Act is referable to the duty levied under Section 17(f) of the Kerala Abkari Act.

7. The Notifications issued by the Government relate both to goods manufactured in the area or imported into the area .

8. The duty levied is on goods and not on manufacture.

Taking all these factors into account and having regard to the Scheme of monopoly introduced by the State of Kerala in the year 1984 we must hold that the levy of duty is not a levy in the nature of `duty of excise' but is the privilege price payable by KSBC in consideration of the State parting with its exclusive privilege of wholesale trade in IMFL in favour of the aforesaid Corporation.

It was alternatively submitted on behalf of the State that even if it is held that what is levied is privilege price it will still form part of the sale price of the liquor sold by the distillers to the Beverages Corporation and hence part of the taxable turnover for the purpose of levy of turnover tax. The respondents on the other hand contend that by its very nature the privilege price must be paid by the beneficiary and is not capable of being transferred to the manufacturers/distillers from whom the IMFL is purchased for wholesale trade.

We are of the view that if the privilege price is a part of the consideration payable by the Corporation to the manufacturers for supply of IMFL to the Corporation it will certainly be a component of the sale price of the liquor sold by the manufacturers to the Beverages Corporation. If it is not so, then the respondents are right in contending that having regard to its very nature, privilege price is a price which the beneficiary, in whose favour the State parts with its privilege, must pay. In this case since the State has parted with its exclusive privilege of wholesale trade in IMFL and that right has been conferred exclusively on the Beverages Corporation, it is the Beverages Corporation which must pay the privilege price in addition to the annual rental payable by it.

In view of our above finding, it is not necessary to consider the alternative submission of Mr. Nariman that even if the levy is found to be a duty of excise, its incidence did not fall on the manufacturer or the producer.

In view of our finding that the duty imposed is not a duty of excise but represents the privilege price charged by the Government from KSBC as a consideration for parting with its exclusive privilege to sell liquor by wholesale in the State of Kerala, the respondents are not liable to include that duty paid by the Beverages Corporation in their turnover. However, the position changed radically with effect from January 5, 1999. The High Court noticed this fact in paragraph 67 of the judgment, namely - that with effect from January 5, 1999 in view of the amendment to Foreign Liquor Rules, the KSBC could not purchase IMFL from the manufacturers/distillers without payment of duty. In view of the amendment, the KSBC had to pay duty before it could lift the stock of IMFL from the manufacturers' warehouse to its own licensed premises. Thus the KSBC paid to the manufacturers the duty payable in respect of IMFL and consequently the amount of duty paid formed part of the consideration for which the property in goods passed to the KSBC. We have earlier noticed the amendments made to the Foreign Liquor Rules which leave no room for doubt that with effect from January 5, 1999 the manufacturers/ distillers (respondents herein) were bound to include in their turnover the amount paid to them by the KSBC by way of duty levied under the Abkari Act together with the price of the liquor purchased from them. The learned Judges noticed this fact but granted relief in broad terms as prayed for by the respondents. In our view the High Court fell into an error in doing so. It ought to have held that in any event with effect from January 5, 1999 the respondents - manufacturers/distillers were bound to include in their turnover the amount of duty paid to them by the KSBC since that formed part of the consideration for sale of IMFL to the said Corporation. We, therefore, hold that from January 5, 1999, the date with effect from which the KSBC started paying duty to the manufacturers/distillers before lifting the stock of IMFL to its own licensed premises, the amount of duty paid formed part of the consideration paid by the Corporation to the manufacturers and consequently it formed part of the turnover of the manufacturers.

Mr. Ashok Desai, Senior Advocate appearing on behalf of some of the respondents strenuously urged before us that in view of the provisions of Section 5(1) and Section 5(2C) of the Kerala General Sales Tax Act, there was no liability on the manufacturer of liquor to pay turnover tax on the sale of IMFL. We find no merit in this submission.

The levy of tax under the Kerala General Sales Tax Act, 1963 is by virtue of Section 5. Section 5(1) deals with levy of Sales Tax, whilst Section 5(2C)(i) deals with turnover tax. The relevant portion of this Section reads as follows :-

> "5. Levy of tax on sale or purchase of goods :- (1) Every dealer (other than a casual trader or agent of a non-resident dealer) whose total turnover for a year is not less than `two lakh rupees and every casual trader or agent of a non-resident dealer, whatever be his total turnover for the year, shall pay tax on his taxable turnover for that year,-
>
> (i) in the case of goods specified in the First or Second Schedule, at the rates and only at the points specified against such goods in the said Schedules."
>
> "5(2C)(i) Notwithstanding anything contained in this Act or the Rules made thereunder every dealer shall pay turnover tax on the turnover of goods as specified

hereunder, namely :-

. . . .
. . . . .

(b) by any dealer in Foreign Liquor (Indian made) or Foreign Liquor (Foreign made) as specified in entries against serial numbers 53 and 54 of the First Schedule at the rate of five percent on the turnover at all points."

Thus under Section 5(1)(i) tax is payable (a) on goods specified in the First and Second Schedule, (b) at the rates and (c) at the points specified against such goods in the said Schedules. However, under Section 5(2C) which is the charging Section "Notwithstanding anything contained in this Act or the Rules" "every dealer shall pay turnover tax." Thus, no dealer is exempted from paying turnover tax. The turnover tax is to be paid "as specified hereunder", and not at rates and at points specified in the First Schedule. The rate is specified in (2C)(i)(b) at 5% on the turnover at all points. Thus under Section 5(2C)(i) every dealer has to pay at the rate of 5% at all points. The opening part of Section 5(2C)(i)(b), i.e., the words "by any dealer in Foreign Liquor (Indian made) or Foreign Liquor (Foreign made) as specified in entries against serial numbers 53 and 54 of the First Schedule", do not detract from this portion. Here also the tax is to be paid by "any dealer", "as specified in entries against serial numbers 53 and 54 of the First Schedule" go with the words "in Foreign Liquor (Indian made) or Foreign Liquor (Foreign made)". It is the Foreign Liquor which is specified in entries 53 and 54. The words "By any dealer" only go with "in Foreign Liquor (Indian made) or Foreign Liquor (Foreign made)". In other words, it is the goods, which are specified in entries 53 and 54 of the First Schedule. This becomes very clear if one looks at the First Schedule. The First Schedule deals with "goods in respect of which a single point of tax is leviable under sub-section (1) or sub-section (2) of Section 5". The four columns in the First Schedule set out (1) the Serial Number, (2) Description of goods, (3) Point of levy and (4) Rate of Tax - %. In the First Schedule there is no column for dealer. The reference to a dealer is only in column (3) which will indicate the point of time at which a dealer will pay tax. If under the charging Section the point of time is not to be as per the First Schedule, then one will not consider column (3) at all. This is clear as the only items are "goods", "point of levy" and "Rate of Tax - %". With this in mind if one now look at Section 5(1)(i) it becomes clear that thereunder the Sales Tax is payable on the "goods", "at the points" and "at the rates" specified in the Schedules. Whilst considering point and rate at which levy is to be made under Section 5(1)(i) the levy and rate will be as per the First Schedule but under Section 5(2C)(i)(b) the levy is at all points and at 5% of the turnover. It is only if one has to see at what point and at what rate the levy is to be made that one will take columns (3) and (4) of the First Schedule into consideration. As against this under Section 5(2C)(i) the turnover tax is on "Foreign Liquor"

specified in entries 53 and 54, i.e., in column (2) of entries 53 and 54. The turnover tax is at the fixed rate of 5% on the turnover at all points. Thus, in Section 5(2C)(i) there is no reference to columns (3) and (4) of the First Schedule. This is clear from the fact that under Section 5(2C), which is the charging Section, turnover tax is payable by "all dealers".

The term "dealer" is defined in Section 2(viii) and admittedly covers the Respondents. If the interpretation sought to be placed by the Respondents is accepted then there would be a conflict between Section 5(2C)(i) which prescribed rate of 5% on the turnover at all points and columns (3) and (4) of the First Schedule under which tax is only at point of first sale in the State and at rate of 75%. It must, therefore, follows that the words "goods as specified" in Section 5(2C)(i), has reference only to the description of goods under Entry 53 of Schedule I, namely "Foreign Liquor (Indian made)". In the case of inconsistency, Section 5(2C)(i) must prevail over the Schedule in view of the non obstante clause.

If submission on behalf of the Respondents is accepted and it is held that the words "as specified in entries against serial numbers 53 and 54 of the First Schedule" go with the words "by any dealer", even then under column (3) of Entries 53 and 54 of the First Schedule the relevant words are "by a dealer who is liable to pay tax under Section 5". Admittedly, the Respondents are dealers who are liable to pay tax under Section 5. They only get exempt from paying tax under Section 5(1)(b) because the sales tax is to be paid "at the rates" and "only at points specified against the goods in the First Schedule". Under column (3) of the First Schedule in entries 53 and 54 the points of levy are (a) for the Kerala State Beverages Corporation the point of levy is at time of sale, (b) by a dealer, who is liable to tax under Section 5, the levy is at point of first sale. However, if the first sale is to Kerala State Beverages Corporation then at that point there is no levy under Section 5(1)(b) because the charging Section provide that the levy is to be as per the Schedule. Section 5(2C)(i) does not lay down that tax is to be paid at the point and at the rate specified against the goods in the Schedule. Under Section 5(2C)(i) the tax is at the rate of 5% on the turnover at all points.

Thus the Respondent would in any event be liable to pay turnover tax on their turnover. Further, in the 1st judgment there is no discussion on this aspect at all. In the 2nd judgment the decision is against the Respondents on this aspect against which they have filed no Appeal. We entirely concur with the view of the High Court in the second batch of writ petitions on this aspect of the matter.

The High Court, however, held that the amendment of Section 5(2C) of the Kerala General Sales Tax Act by adding an explanation which was brought into effect retrospectively from July 1, 1987, did not remove the constitutional invalidity in the statute because in view of the finding recorded by the High Court that the manufacturers were not liable to pay excise duty, an amendment to the Sales Tax Act could serve no purpose unless lacuna was removed by appropriate amendment to the Abkari Act. We find ourselves in complete agreement with the view of the High Court because if the Act imposing the levy did not impose upon the manufacturers the liability to pay excise duty, by an amendment of the Sales Tax Act the same could not be included in their turnover.

In the result Civil Appeal Nos.2249-2257 of 2000 are partly allowed and it is declared that the respondents - manufacturers/ distillers are liable to pay turnover tax. It is declared that the respondents - manufacturers are liable to include in their turnover the amount of duty paid to them by KSBC and included in the consideration for sale of IMFL to the aforesaid Corporation with effect from January 5, 1999 and pay the turnover tax accordingly.

Civil Appeal Nos. 95 of 2003; 102 of 2003 ; 622 of 2003 ; Appeal arising out of SLP (c) No. 1032 of 2003 ; Civil Appeal Nos. 5099 of 2003 ; 5100 of 2003 ; 5101 of 2003 ; 5102 of 2003 ; 5103 of 2003 ; 6515 of 2003 ; 6516 of 2003 ; 7952 of 2003 and 7954 of 2003 are dismissed.

No order as to costs.