Supreme Court of India

M/S. Guruswamy & Co.Etc vs State Of Mysore & Ors on 26 September, 1966

PETITIONER:
M/S. GURUSWAMY & CO.ETC.

Vs.

RESPONDENT:
STATE OF MYSORE & ORS.

DATE OF JUDGMENT:
26/09/1966

BENCH:

ACT:
Mysore Health Cess Act, 1962-Competence of the State Legislature to levy health cess-Validity of Act-Cess whether excise duty under item 1 of Schedule A of the Act.
Mysore Excise Act (Act 5 of 1901) s. 18, and Hyderabad Abkari Act (Act 1 of 1916 F)-Levy of duty on liquor by way of shop rent-Highest bidder given exclusive right to sell-Such duty whether an excise duty within meaning of Entry 51 of List II of the Constitution.

HEADNOTE:
The Mysore Health Cess Act 1962 provided in s. 3 for the levy and collection of a health cess at the rate of nine naye paise in the rupee, inter alia, on the items of the State revenue mentioned in Schedule A. Item 1 of Schedule A mentioned duties of excise leviable by the State under any law for the time being in force in any area of the State on alcoholic liquors for human consumption (and opium etc.) manufactured or produced in the State and for countervailing duties levied on similar goods manufactured or produced elsewhere. The Mysore Excise Act, 1901 empowered the State Government to grant exclusive or other privilege of selling by retail any country liquor or intoxicating drugs to any person or persons on such conditions and for such period as it thought fit. According to s. 18 of the Act the privilege of sale in a specified shop was to be disposed of periodically by public auction held by the excise authorities. As a result of such public auctions held subject to the terms and conditions notified by the State Government the appellants were granted the exclusive privilege of selling country liquor in certain arrack shops, beer taverns and toddy shops in consideration of their agreeing to pay specified 'shop rent' thereon at the rate of nine naye paise in the rupee. The appellants challenged the levy of the health cess on the shop rent in writ petition

before the High Court and thereafter appealed to this Court with the following contentions :

(1) That the Mysore Legislature was not competent to enact the impugned Act because no entry in List It or List III authorities a tax on tax or a health-tax and that if the intention was to levy a surcharge on existing items of revenue the State legislature could have easily used the words 'surcharge' or 'additional revenue'.

(2) Even if the impugned tax was valid the Act did not empower the levy of health cess on shop rent because shop 'rent was not an excise duty falling within Schedule A -of the impugned Act or Entry 51 of List II.

HELD:Per Subba Rao, C. J., Sikri and Dayal, JJ. (i) By the impugned Act the State Legislature was levying a health cess on a number of items of State revenue or tax and it adopted the form of calling it a cess and prescribed the rate of nine naye paise in the rupee on the State revenue or tax. Section 4 of the impugned Act makes it quite clear that the cess is leviable and recoverable in the same manner as items of land revenue, State revenue or tax. In the context, the word on' in s. 3 does not indicate that the subject matter of taxation is land

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revenue or State Revenue but that 9% of the land -revenue or State revenue is to be levied and collected, the subject matter remaining the same as in the law imposing land revenue or any duty or tax. If we read ss. 3 and 4 together the fact that the words 'surcharge' or 'additional duty' halve not been mentioned does not detract from the real substance of the legislation. Accordingly the Mysore Legislature Was competent to enact the law under the various entries of List II which enable it to levy land revenue or the duties of excise or the other taxes mentioned in s. 3(iii) of the impugned Act. [560 A-C]

(ii) For a duty to be a duty of excise it must be shown that the duty has been levied on goods which have been produced or manufactured, the taxable event being production or manufacture of goods. However,, it is not easy to decide in a particular case whether the particular levy is a levy in respect of manufacture or production of goods. This question has to be decided on the facts of each case but in deciding it certain principles must be borne in mind. First, one of the essential characteristics of an excise duty is uniformity of incidence. Secondly, the duty must be closely related to production or manufacture of goods. It does not matter if the levy is made not at the moment of production or manufacture but at a later stage. If a duty has been levied on an excisable article but this duty is collected from a retailer it does not necessarily cease to be an excise duty. Thirdly, if a levy is made for the privilege of selling an excisable article and the excisable article has already borne the duty and the duty has been paid, there must be clear terms in the charging section to

indicate that what is being levied for the purpose of the privilege of sale is in fact a duty of excise. [562 E-F; 563 H]

There is no presumption that if no other taxable event has intervened, the levy must be treated to be connected with production or manufacture.

The levy in the present case was a payment for the exclusive privilege of selling today from certain shops. The licencee paid what he considered to be equivalent to the value of the right. Secondly, it had no close relation to the production or manufacture of toddy. Thirdly, the only relation it had to the production or manufacture of toddy, was that it enabled the licencee to sell it. But he might sell little, less or more than he anticipated, depending on various factors. Fourthly, toddy had already paid one excise duty in the form of tree tax., but he need not tap himself. Fifthly, the duty was not uniform in incidence because the amount collected had no relation to the quantity or quality of the produce but had only relation to what the Petitioner thought be could recoup by the sale of the excisable articles. What be recouped would depend upon the amount of sales and the conditions prevailing during the licensing year. Sixthly, there were no express words showing that what was being realised by the appellants was an excise duty. Seventhly the privilege of selling was auctioned well before the goods came into existence. [564 B-E]

For the above reasons the duty was not an excise duty within the meaning of item (1) of Schedule A of the Health Cess Act or Entry 51 of List 11 of the Constitution. The State of Mysore had therefore no authority to levy and collect health cess on shop rent. [567 G-H]

Per Bachawat J (concurring) : A charge for licence to sell an excisable article may be a fee or a tax. If it is a tax, it can satisfy the test of a duty of excise when it is so connected with the manufacture or production of an article as to be in effect a tax on the manufacture or production. Otherwise such a tax does not fall within the classification of a duty of excise. In the present case the shop rent was not connect-

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ed with the production or manufacture of arrack, beer or toddy and was therefore not a duty of excise. The State Legislature was not competent to make a law levying a surcharge on the shop rent under Entry 5 1, List H. [584 C-F]

Per Hidayatullah, J. (dissenting) : The persons who bid at these auctions were themselves the producers or manufacturers. They bid for the exclusive privilege or selling which in so far as Government was concerned was a means of collecting the anticipated excise duty at one go from a producer or manufacturer before the goods became a part of the general stock of goods in the country. In other words the person who was charged was the producer or

manufacturer and the duty was levied from him before he could sell or obtain liquor which had not borne excise duty so far. The duty was therefore clearly a duty of excise whether the matter was considered in the light of economic theory, legislative practice or judicial authority. [572 D-E]
Case law considered.

JUDGMENT:

CIVIL APPELLATE JURISDICTION : Civil Appeals Nos. 15801588 and 1590-1600 of 1966.

Appeals from the judgment and order dated November 17, 1965 of the Mysore High Court in Writ Petitions Nos. 295 to 300, 453 and 914/63, 1076, 1175 to 1175, 2053 and 2076/64 and 1132, 1260, 1420 and 1321/65.

D. R. Venkatesa Iyer, O. C. Mathur, J. B. Dadachanji and Ravinder Narain, for the appellants (in C. As. Nos. 1580- 1586 and 1588 of 1966).

M. K. Nambyar, D. -R. Venkatesa Iyer, O. C. Mathur, J. B. Dadachanji and Ravinder Narain, for the appellants (in C. As. Nos. 1590-1594, 1596 and 1599-1600 of 1966). M. C. Setalvad, D. R. Venkatesa lyer, O. C. Mathur, J. B. Dadachanji and Ravinder Narain, for the appellants (in C. As Nos. 1597 and 1598 of 1966).

K. R. Chaudhuri, S. P. Satyanarayana Rao and K. Rajendra Chaudhuri, for the appellant (in C. A. No. 1595 of 1966). R. H. Dhebar, for the respondents (in C. As. Nos. 1580- 1586, 1588 and 1595 of 1966).

H. R. Gokhale, B. R. L. Iyengar and R. H. Dhebar, for the respondents (in C. As. Nos. 1590-1600 of 1966). The Judgment of SUBBA RAO, C.J. and SiKRi and RAGHUBAR DAYAL, JJ. was delivered by SiKRi, J. HIDAYATULAH, J. delivered a dissenting Opinion. BACHAWAT, J. delivered a separate concurring Opinion Sikri, J. These appeals are directed against the judgment of the High Court of Mysore, dated November 17, 1965, disposing of 49 petitions filed under art. 226 of the Constitution. The High Court disposed of the petitions by one common judgment as identical questions of law were involved in all of them. We will also dispose of these appeals by this judgment because they raise substantially identical questions of law. These appeals may, however, be divided into two groups; one dealing with the licences for the sale of Toddy and the other dealing with the licences for the sale of arrack. We may give the facts in one appeal, Civil Appeal No. 1590 of 1966, arising out of Writ Petition No. 1076 of 1964. The appellant, M/s Guruswami & Co.-hereinafter referred to as the petitioner filed writ petition alleging that the firm was a licensed Excise contractor with its principal office at Bangalore, and that it had been the licensee of the Bangalore Urban group of 26 shops for the year July 1, 1963 to June 30, 1964. The petitioner continued to be the licensee for the same group of shops with five more new shops to be opened for two more years, viz., 1964-65 and 1965-66. The petitioner paid shop rent or the 'kist' for this group of toddy shops amounting to Rs. 3,61,116 a month during the year 1963-64 and Rs. 4,41,216 a month for the next two years. This kist

amount was determined at the tender-cum-auction sale of the exclusive privilege of vending toddy in the shops of this group during the relevant period. The petitioner paid amount equal to two months kist as initial and security deposit for each of these years. It was further stated that notice was given under the notification dated April 20, 1963, that the exclusive privilege of selling country liquors during the twelve months, beginning from July 1, 1963, and ending with June 30, 1964, in the shops or groups of shops specified in Schedules 1 and 11 of the notification, situated in the district of Bangalore will be disposed of by tender-cum- auction by the Deputy Commissioners of the respective districts or other officers specially empowered by the Deputy Commissioners for the purpose. The notification, in para 16, mentioned rates of duty, price, etc. on the several kinds of excisable articles. For instance, on molasses arrack 35 U.P. the duty was Rs. 2.73 per litre, price Rs. 0.55 per litre and the minimum retail selling price Rs. 0 . 61 per decilitre. Under the head Toddy is given:

> "Tree tax per tree
>
> 1. Date .. .. Rs. 7.50
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> 2. Coconut .. .. Rs. 8.50 (per each half-year ending December and June)."

Then the minimum selling price of toddy is prescribed.It was further stated in para 25 of the notification as follows:

> "25.For the shops of Bangalore North and South Taluks, City and Civil Area, tapping may be allowed p, Cl/66-7 in such areas of Tumkur and Hassan Districts or other Districts as may be notified by the Excise Commissioner and the areas so notified may at any time be altered by notification by the Excise Commissioner.
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> For shops of Taluks of Bangalore, Rural District, similar facilities may be given if found necessary."

Para 18 of the notification further provides that "sales tax and octroi at the prescribed rates and other taxes that may be levied under any other law shall also be payable." The petitioner further alleged that he was paying tree rent to the owners of toddy-yielding trees for allowing him to draw today from the trees. The petitioner also paid education and health cess at the prescribed rates in pursuance of the condition in para No. 17 of the aforesaid notification.

A similar notification was issued on April 27, 1964, for the sale of excise privileges for 1964-65, and alternatively for 1965-66. It was mentioned in para 18 of this notification that health cess at the rate of nine naye paise per rupee shall also be payable on the shop rent and tree tax on toddy and other duties of excise levied on the following articles in accordance with the Mysore Health Cess Act (Mysore Act No. 28 of 1962), hereinafter referred to as the impugned Act, namely, (1) Mandya made Special Liquor; (2) I.M.F.L.; (3) arrack; and (4) beer. The petitioner alleged that as a result of the impugned Act it would have to pay Rs. 86,518 more as health cess for the year 1964-65.

The petitioner then challenged the impugned Act as ultra vires on various grounds which need not be mentioned at this stage. The petitioner claimed the following reliefs:

> (a) to declare that the State of Mysore has no authority to levy and collect 'health cess' under the Mysore Health Cess Act 1962, and its predecessor Act of 1951 on shop-rent, tree- tax, tree-rent or any other item of revenue payable by the petitioner in respect of its business in toddy;
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> (b) to issue a writ, order or direction quashing condition No. 18 in the notification dated April 27, 1964, which relates to the levy of health cess on their business of toddy;

(c) to issue a writ of prohibition or order or direction in the nature of a writ restraining all or any of the respondents from enforcing the above impugned condition or by any other similar demand for payment of health cess under the Health Cess Act; and .lm15

(d) to issue a writ of mandamus directing refund of health cess illegally collected from the petitioner or any other consequential order and direction as may meet the ends of justice, for refund of Health Cess already collected under the provisions of the Health Cess Act of 1962 and 1951 in respect of toddy.

We may mention that before the High Court a number of points were raised which have not been debated before us. Before the High Court it was agreed ' by all the parties that the levy made under the impugned Act was a tax though called a cess. In view of this concession, the High Court considered it unnecessary to examined the nature of the levy made under the Act. The High Court held that the impugned Act, except the Explanation to Clause 1 of Schedule A, was valid and it accordingly allowed the petition only to the extent of striking down the Explanation.

Mr. Nambyar, who appears for the appellants, in the appeals connected with sale of toddy, has taken two main points before us :

(a) That the Mysore Legislature was not competent to enact the impugned Act because (a) the health cess under the impugned Act was in reality a tax and not a mere cess; (b) the State Legislature had no competence to levy a health tax; and (c) the levy was in substance a tax on tax not permissible under the Constitution.

(2) If the impugned Act was valid, the Act did not empower the levy of health cess on shop rent because shop rent did not fall within Schedule A of the impugned Act or Entry 51 of List II.

We may mention that he conceded that the tree-tax was an excise duty and he confined his case to shop rent or kist. Before we deal with the points raised by the learned counsel, it is necessary to set out the relevant provisions of the Mysore Excise Act (Act V of 1901) and the impugned Act. We may mention that in some -appeals the relevant law is the Hyderabad Abkari Act No. 1 of 1316 Fasli, and not the Mysore Excise Act, but it is common ground between the parties that there is no material

difference between the provisions contained in the Mysore Excise Act and the Abkari Act. The Mysore Excise Act was enacted in 1901. In S. 3(1) it defined "excise revenue" to mean "revenue derived or derivable from any duty, fee, tax, rent, fine or confiscation imposed or ordered under the provisions of this Act or of any other law for the time being in force relating to liquor or intoxicating drugs". There was no definition of the words "excise duty" in this Act at all. This Act substantially followed the Madras Abkari Act, 1886 (Madras Act 1 of 1886). It is interesting to note that the Madras Abkari Act was amended by the Adaptation of Indian Laws Order, 1937, and clause (22) was inserted in the definition section, s. 3, as follows :

> "(22) "excise duty" and "countervailing duty" mean any such excise duty or countervailing duty, as the case may be, as is mentioned in item 40 of List 11 in the Seventh Schedule to the Government of India, Act 1935."

But the definition of "abkari-revenue" continued to exist in the Madras Abkari Act even after the Adaptation of Indian Laws Order, 1937. Clause (14) of s. 3 of the Mysore Excise Act defined " sale' or "selling" as including any transfer otherwise than by way of gift. Clause (18) defined "manufacture" as including every process, whether natural or artificial, by which any fermented spirituous or intoxicating liquor or intoxicating drug is produced or prepared, and also re-distillation and every process for the rectification of liquor. Section 12 provides as under "12. No liquor or intoxicating drug shall be manufactured no hemp plant (Cannobis Sativa or Indica) or coca plant (Erythroxylum coca) shall be cultivated; no toddy-producing trees shall be tapped; no toddy shall be drawn from any tree; no portion of the hemp or coca plant from which any intoxicating drug can be manufactured shall be collected; no distillery or brewery shall be constructed or worked; no liqour shall be bottled for sale; and no person shall use, keep, or have in his possession any materials, still utensil, implement or apparatus whatsoever for the purpose of manufacturing any liquor other than toddy or any intoxicating drug except under the authority and subject to the terms and conditions of a license granted by the Deputy Commissioner in that behalf, or under the provisions of Section 21:

Provided that the Government may, by notification, direct that in any local area it shall not be necessary to take out a license for the manufacture of liquor for bona fide home consumption.

Licenses granted under this section shall extend to and include servants and other persons employed by the licensees and acting on their behalf."

We have seen various acts which were in force In some of the a provinces of British India and similar definition was inserted In all then Acts; eg. (1) The Punjab Excise Act (punjab Act-I of 1914) (2) The Bombay Abkari Act (Bombay Act 5 of 1878) (3) The Bengal Excise Act (Bengal Act 5 of 1909) (4) The United Provinces Excise Act (U.P. Act 6 of 1910) In short, the section prohibits the manufacture of liquor or intoxicating drugs except under the provisions of the Act. Section 15 prohibits the sale of liquor and intoxicating drugs without license, and gives power to exempt sale of toddy. Section 16 reads thus :

> "It shall be lawful for the Government to grant to any person or persons on such conditions and for such period as may seem fit the exclusive or other privilege- (1) of

manufacturing or supplying by whole-

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sale, or
(2)   of selling by retail, or
(3)    of   manufacturing  or   supplying   by
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wholesale and selling by retail, any country liquor or intoxicating drugs within any local area.

No grantee of any privilege under this section shall exercise the same until he has received a license in that behalf from the Deputy Commissioner.

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."

The notifications set out above may be taken have been issued under s. 16 for the purpose of giving a privilege of selling by retail [see S. 16(2)]. Sections 17 and 18 may be set out in full :

"17. A duty 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) manufactured under any license granted under section 12; or

(d) manufactured at any distillery established under section 14; or

(e) permitted under section II to be transported;

(ee) issued from a distillery or warehouse licensed or established under section 12 or section 14; or

(f) sold in any part of Mysore;

of such amount as the Government may, from time to time, prescribe."

18. Such duty may be levied in one or more of the following ways :-

(a) by duty of excise to be charged 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, as the case may be, as the Government

may prescribe;

(b) in the case of intoxicating drugs, by a duty to be rateably charged on the quantity produced or manufactured or sold by wholesale or issued from a warehouse licensed or established under section 14;

(c) by payment of a sum in consideration of the grant of any exclusive or other privilege- (1) of manufacturing or supplying by whole- sale; or (2) of selling by retail or (3) of manufacturing or supplying by whole- ,sale and selling by retail any country liquor or intoxicating drug in any local area and for any specified period of time;

(d) by fees on licensed for manufacture or of sale;

(e) in the case of toddy, or spirits manu- factured from toddy, by a tax on each tree from which toddy is drawn, to be paid in such instalments and for such period as the Government may direct; or

(f) by import, export or transport-duties assessed in such manner as the Government may direct.

Provided that when there is a difference of duty as between two license periods such difference may be collected in respect of all stocks of country liquor or intoxicating drugs held by licensees at the close of the former period."

It would be noticed that the words "a duty" occur in s. 17 and in S. 18(a) the words "duty of excise" occur. In the Madras Abkari Act, 1886, S. 17, before the Adaptation Order, 1937, was also in similar terms, but after the Adaptation -Order the opening part of s.17 read as follows :

An excise duty or countervailing duty of such amount as the State Government may prescribe shall, if they so direct, be levied on all excisable articles."

We may mention that "excisable article" was defined in S. 3(23) or the Madras Abkari Act to mean (a) any alcoholic liquor for human consumption; or (b) any intoxicating drug. Section 28 of the Mysore Excise Act is also relevant and the relevant part reads as follows :

"All duties, taxes, fines and fees payable to the Government direct under any of the provisions of this Act or of any license or permit issued under it, and all amounts due to the Government by any grantee of a privilege or by any farmer under this Act or by any person on account of any contract relating to the Excise revenue, may be recovered from the person primarily liable to pay the same, or from his surety (if any), as if they were arrears of land revenue.....

Section 29 enables rules to be made and the rules throw some light on the conditions of the license and the privilege obtained by the petitioner. Section V of the Mysore Rules regulating sales of excise

privileges prescribes the conditions applicable to toddy licenses. Condition No. reads as follows :

> "For the supply of toddy to his shops, the licensee shall have the privilege of obtaining subject to tree-tax rules, toddy-yielding trees in the groves assigned to his shops or groups of shops, and he shall be at liberty to manufacture toddy from the trees in private lands under private arrangements, between himself and the owners of such lands.....

Condition No. 2 further enables the Deputy Commissioner to refuse to grant license for tapping certain trees. Licensees are entitled to purchase toddy from any licensed toddy shop-keeper on application to the Inspector or Assistant Inspector who will grant the required permits on proof of the necessity for the same in certain cases. Condition No. 4 reads as follows :

> "The licensee shall be responsible to Government for all payments of instalments of fees due on account of tree-tapping licenses granted on his application in his own name or in the names of his nominees under the conditions set forth therein and in the rules relating thereto."

Condition No. 7 provides for tree rent at Rs. 0-8-0 per tree on Government trees sought to be tapped. Condition No. 8 prescribes conditions for tapping the trees Condition No. 17 enables treetapping licenses to be given to the licensed toddy shop- keepers.

Let us first examine the above provisions of the Mysore Excise Act, and the rules and notifications made under it. It appears to us that by ss. 12 and 15 of the Act manufacture and sale of toddy is prohibited, but s. 16 enables the government to grant an exclusive or other privilege, inter alia, of manufacturing or selling by retail. It is the latter privilege which was auctioned under the two notifications mentioned above. Section 17 is the charging section and it is quite clear that the word 'duty' in the opening sentence does not mean only excise duty. If an import duty or export duty is levied under s. 17 it would not be an excise duty within Entry 51 List II. Section 18 prescribes the modes of levy of the duties. We are concerned with the mode mentioned in s. 18(c) (2), i.e. by payment of a sum in consideration of the grant of exclusive or other privileges of selling by retail. It is noteworthy that s. 28 distinguishes amount due to the government by any grantee of a privilege from duties, taxes and fees.

Mr. Setalvad, who appears for the appellants in arrack appeals draws our attention to the existence of the words "duty of excise" in S. 18(a) and the absence of the word "excise" in s. 18(b), and contends that apart from the duties collected under s. 18(a) no other duty was excise duty. We are unable to accept this contention because some at least of the duties collected under s. 18(b) would be excise duties. However, this much may be conceded that the Mysore Excise Act not only does not expressly call the duty collected under s. 18(c) (2) an excise duty, but in s. 28 seems to mention it differently.

The licences granted to the petitioner were governed by detailed regulatory provisions regarding sale, but condition No. 2 makes it clear that the license is in the main for selling. Further if he taps

toddy he has to obtain toddy- tapping licenses and pay fees.

We have already mentioned that the petitioner obtained the privilege of selling toddy at certain shops by bidding at auctions held in pursuance of the two notifications mentioned above.

We may now notice the provisions of the Mysore Health Cess Act, 1962. Section 3 is the charging section and reads as follows :

> "3. Levy of health cess-There shall be levied and collected a health cess at the rate of nine naye paise in the rupee on,-
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> (i) all items of land revenue;

(ii) the items of State Revenue mentioned in Schedule A; and .lm15

(iii) the items of taxes mentioned in Schedule B levied under any law for the time being in force by a local authority."

Section 4 reads thus "4. Recovery of health cess-The health cess payable under section 3 shall be levied, assessed and recovered alongwith the items of land revenue, State revenue or tax on which such cess is levied, and the provisions of the law and the rules, orders and notifications made or issued thereunder for the time being in force, shall apply to the levy, assessment and recovery of the health cess as they apply in respect of the levy, assessment and recovery of the said items of land revenue, State revenue or tax."

We are concerned with s. 3(ii), i.e. items of State revenue mentioned in Schedule A, and these items in Schedule A are as follows "SCHEDULE A.

1. Duties of excise leviable by the State under any law for the time being in force in any area of the State, on the following goods manufactured or produced in the State and countervailing duties levied on similar goods manufactured or produced elsewhere :-

(a) Alcoholic liquors for human consumption;

(b) Opium, Indian hemp and other narcotic drugs and narcotics.

Explanation.-The duty of excise leviable under this item includes the duties, payments, fees and other amounts payable under section 18 of the Mysore Excise Act, 1901, and similar impost or payment by whatever name called payable under any other law in force in any area of the State of Mysore."

We have already mentioned that the Explanation has been held by the High Court to be ultra vires. It will be noted that the remaining part of Item I in Schedule A is in substance, a reproduction of entry 51 of List 11 of the Constitution. We may now take up the points raised by Mr. Nambyar.

Regarding the first point, he says that it is a tax on a tax and as no entry in List II or List III mentions a tax on a tax, or health tax, the impugned Act is invalid. He further says that if it was the intention to levy a surcharge on existing items of revenue, the legislature could have easily used the words 'surcharge' or 'additional duty" in accordance with the existing legislative practice. He says that it is not open to us to add or omit any words and that the nature or identity of the subject-matter can only be gathered from S. 3 which is the charging section. We are, however, not impressed by any of these arguments. It seems to us clear that the legislature was levying a health cess on a number of items of State revenue or tax and it adopted the form of calling it a cess and prescribed the rate of nine naye paise in the rupee on the State revenue or tax. Section 4 of the impugned Act makes it quite clear that the cess is leviable and recoverable in the same manner as items of land revenue, State revenue or tax. In the context, the word 'on' in s. 3 does not indicate that the subject-matter of taxation is land revenue or State revenue, but that 9 % of the land revenue or State revenue is to be levied and collected, the subject-matter remaining the same as in the law imposing land revenue or any duty or tax. If we read ss. 3 and 4 together the fact that the words "surcharge' or "additional duty" have not been mentioned does not detract from the real substance of the legislation. Accordingly we hold that the Mysore Legislature was competent to enact the law under the various entries of List II which enable it to levy land revenue or ,the duties of excise, or the other taxes' mentioned in s. 3(iii) of the impugned Act. This takes us to the second point raised by the learned counsel. He says that the shop rent is not a duty of excise and does not fall within Entry 51 of List 11, or Schedule A of the Act. We have already mentioned that he has conceded that the tree-tax is an excise duty and we need not consider the question of tree-tax at all. His argument in brief is as follows :

The duty of excise is primarily a duty levied on manufacture or production of goods, the taxable event being the manufacture or production. He says that the taxable event in this case is not manufacture or production. He further says that the shop rent is the price given by the petitioner for the privilege of selling toddy, i.e., for the privilege of carrying on a business. This privilege of selling, he says, had no relation to production or manufacture of toddy because the production or manufacture of toddy was complete before the petitioner started to sell toddy in his shops. He further says that the petitioner pays tree-tax which is an excise duty. He also contrasts the language of ss. 17 and 18 of the Mysore Excise Act and says that the words "excise duty" are used in s. 18(a) and not in s. 18(c). He has relied on a number of cases which we will presently consider.

Mr. Gokhale, the learned counsel for the State, controverts these arguments, but we may mention that he has not sought to sustain the levy on shop rent on any other entry apart from entry 51 of List II. Therefore, we should not be taken to have expressed any opinion on the point whether levy on shop rent or kist can be justified under any other entry in List 11. The point was expressly put to him and he said that he relied only on Entry 5 1, List 11.

Mr. Gokhale relies strongly on A. B. Abdulkadir v. The State of Kerala(1), and says that the appeal cannot be decided against him without dissenting from the decision in that case. Mr. Gokhale has put two propositions before us. He says: (1) that every duty on goods produced or manufactured is excise duty unless it is established that it is some other duty; and (2) that, at any rate, if it is a levy made from the stage of production to the stage of consumption it is an excise duty. If in this period

no other taxable event has intervened then the levy must be treated to be connected with production or manufacture and the method by which the levy is collected is not decisive.

The nature of excise duty has been considered by the Federal Court, the Privy Council and this Court on a number of occasions, and it will serve no useful purpose to reproduce the relevant portions of the judgments in these cases. It will suffice if we mention two decisions of this Court and the language employed by this court in those cases. In R. C. Jall v. Union of India(2), Subba Rao, J., as he then was, speaking for the Court, after noticing In re the Central Provinces and Berar Act No. XIV of 1938,(3) The Province of Madras v. Boddu Paidanna & Sons,(4) and Governor-General in Council v. Province of Madras(s) observed 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 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. 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."

(1) [1962] Supp. 2 S.C.R. 741.

(2) (1962] Supp. 3 S.C.R. 436.

(3) [1939] F.C.R. 18.

(4) [1942] F.C.R.90.

(5) 72 I.A. 91.

Sinha, C. J., speaking for the Full Court in In re The bill to amends. 20 of the Sea Customs Act 1878 etc.(1) quoted with approval the passage set out above and added:

> "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 imposition 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 sales 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."

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.

But it is not easy to decide in a particular case whether the particular levy is a levy in respect of manufacture or production of goods. It appears,to us that this question has to be decided on the facts of each case, but in deciding the question certain principles must be home in mind. First, one of the essential characteristics of an excise duty is uniformity of incidence. This characteristic was mentioned by the Privy Council in Governor-General in Council v.Province of Madras(2) in these terms :

> "The tax imposed by the Madras Act is not a duty of excise in the cloak of a tax on sales. Lacking the characteristic features of a duty of excise, such as uniformity of incidence and discrimination in subject-matter, it is in the general scope and in its detailed provisions a "tax on sales."

This also seems to follow from the wording of the entry itself. Entry 51 List 11 reads thus :

"Duties of excise on the following goods manu-

factured or produced in the State and countervailing (1) [1964] 3 S.C.R. 787 (2) [1945] F.C.R. 179.

duties at the same or lower rates on similar goods manufactured or produced elsewhere in India:-

(a) alcoholic liquors for human consumption;

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

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

It is difficult to see how the State can fix countervailing duties at the same or lower rates unless the rate of excise as such is known or can be ascertained. Similarly, s. 64A of the Indian Sale of Goods Act, 1950, contemplates a uniformity of incidence and reads thus "64. A. In contracts of sale amount of increased or decreased duty to be added or deducted.

In the event of any duty of customs or excise on any goods being imposed, increased, decreased or remitted after the making of any contract for the sale of such goods without stipulation as to the payment of duty where duty was not chargeable at the time of the making of the contract, or for the sale of such goods duty paid where duty was chargeable at that time,-

(a) if such imposition or increase so takes effect that the duty or increased duty, as the case may be, or any part thereof, is paid, the seller may add so much to the contract price as will be equivalent to the amount paid in respect of such duty or increase of duty, and he shall be entitled to be paid and to sue for and recover such addition, and

(b) if such decrease or remission so takes effect that the decreased duty only or no duty, as the case may be, is paid, the buyer may deduct so much from the contract price as will be equivalent to the decrease of duty or remitted duty and he shall not be liable to pay, or be sued for or in respect of such deduction."

Secondly, the duty must be closely related to production or manufacture of goods. It does not matter if the levy is made not at the moment of production or manufacture but at a later stage. If a duty has been levied on an excisable article but this duty is connected from a retailer it would not necessarily cease to be an excise duty. Thirdly, if a levy is made for the privilege of selling an excisable article and the excisable article has already borne the duty and the duty has been paid, there must be clear terms in the charging section to indicate that what is being levied for the purpose of privilege of sale is in fact a duty of excise. What is the true character or nature of the levy in this case? First, it is a payment for the exclusive privilege of selling toddy from certain shops. The licensee pays what he considers to be equivalent to the value of the right. Secondly, it has no close relation to' the production or manufacture of toddy. Thirdly. the only relation it has to the production or manufacture of toddy is that it enables the licensee to sell it. But he may sell little, less or more than he anticipated, depending-on various factors. Four'thly, toddy has already paid one excise duty in the form of treetax. If the petitioner taps toddy he pays tree tax, but he need not tap himself. Fifthly, the duty is not uniform in incidence because the amount collected has no relation to the quantity or quality of the product but has only relation to what the petitioner thought he could recoup by the sale of the excisable articles. What he recoups would depend upon the amount of sales and the conditions prevailing during the licensing year. Sixthly, there are no ,express words showing that what is being realised from the petitioner is an excise duty. In fact what s. 16 of the Mysore Excise Act says is that a privilege has been granted to him for selling by retail. Section 28 refers specifically to an amount due to the Government by any grantee of the privilege and the legislature apparently did not think that this amount would be covered by the expression "all duties, taxes,fines and fees payable to the Government occurring in s. 28. Seventhly, the privilege of selling is auctioned well before the goods come into existence. In this case it would be noticed that the second notification dated April 27, 1964, was for the sale during the next two years. In view of these characteristics, can it be said to be an excise duty? In our opinion answer is in the negative. The taxable event is not the manufacture or production of goods but the acceptance of the license to sell. In other words, the levy is in respect of the business of carrying on the sale of toddy. There is no connection of any part of the levy with any manufacture or production of any goods. To accept the contention of the State would mean expanding the definition of "excise duty" to include a levy which has close relation to the sale

of excisable goods. It is now too late in the day to do so.

Our conclusion is supported by the observations of Gwyer,C. J., in In re the Central Provinces and Berar Act XIV of 1938:(1) "But here again after examining various provincial Acts relating to the control of alcohol, I have been unable to find any case of excise duties payable otherwise (1) [1939] F.C.R. 18, 54.

.lm15 than by the producers or manufacturers or persons corres- ponding to them; I am speaking of course only of alcohol manufactured or produced in the Province itself. The Advocate-General of India referred us to an act of the Central Provinces (Central Provinces Excise (Act No. 11 of 1915) which was said to make provision for the imposition of an excise duty on retail sales. I have been unable to find any such provision in the Act; it provides, it is true, as do other provincial Acts, for lump sum payments in certain cases by manufacturers and retailers, which may be described as payments either for the privilege of selling alcohol, or as consideration for the temporary grant of a monopoly; but these are clearly not excise duties or anything like them. Provision was also made in most provincial Acts for the payment of licence fees in connection with the production or sale of alcohol in the Province; but these fees are mentioned in the Devolution Rules entry in addition to excise duties and are therefore something different from them."

Mr. Gokhale also relies on the legislative practice existing before the Government of India Act, 1935, came into force and his contention is that all the acts existing before the Government of India Act, 1935, imposed excise duties and collected them by auctioning the privilege of sale or manufacture. The legislative practice is not of any assistance because all duties collected under these Acts were not excise duties. We are not concerned here with the case of manufacture or the privilege of manufacture, and it is not necessary for us to decide whether Chief Justice Gwyer was right in so far as the auction of the privilege of manufacturing excisable articles is concerned. But it is interesting to note that even in Australia where a very wide meaning has been given to the word "excise", a fee for a mere licence to engage in business even if it be indirectly connected with production or manufacture has not been held to be an excise duty. The High Court of Australia held in Peterswald v. Bartley() that the State Act imposing a licence fee upon brewers as a condition precedent to the carrying on of their business and punishing non-compliance with its provisions was not opposed to S. 90 of the Australian Constitution. It may be that Chief Justice Gwyer had this case in mind when he made the observations reproduced above. Recently in Dennis Hotels Pty Ltd. v. Victoria,(2) the High Court of Australia, by majority, held that S. 19(1)(a) of the Licensing Act, 1958 (Vic.) which imposed fees for a Victualler's licence calculated at "equal to the sum of six per centum of the gross amount (including any duties thereon) paid or payable for all liquors which during the 12 months ended on the last day of June preceding the date of application for the (1) I C.L.R. 497. (2) 33 A.L.J.R. 470.

grant or renewal of the licence was purchased for the premises" was valid as it did not impose any excise duty within s. 90 of the Australian Constitution. It is now necessary to consider the decision of this Court in A. B. Abdulkadir v. The State of Kerala.(1) This decision is of course binding on us, but, in our opinion, this case is distinguishable. The question before the Court was whether Cochin Tobacco Act, 1084 (Cochin Act VII of 1084 M.E.) and Travancore Tobacco Regulation, 1087

(Travancore 1 of 1087 M.E.) were laws corresponding to the Central Excise Act, and within ss. 11(1) and 13(2) of the Finance Act, 1450. The Court was not concerned with the question whether the levies being made under these acts were strictly excise duties within item 51 List 11, and this is quite apparent from the fact that even though these acts also imposed import duties, these were held in substance to be acts corresponding to the Central Excise Act. Further the only system in force for the collection of tobacco revenue was to auction what was called A class and B class shops. There was no other duty levied on tobacco at all. As we have already said, it depends on the facts of each case whether in view of the scheme of the act and the various provisions and the rules the revenue being obtained is an excise duty or not. It is true that Wanchoo, J., referred to the practice of public auctions of the right to possess and sell excisable goods, but what he said was that the amount realised from these auctions was excise revenue; he did not say that the amount realized was excise duty as such in the strict sense of the term.

We may now deal with the propositions submitted by Mr. Gokhale. The first point taken by Mr. Gokhale is not sound. It is contrary to what has been consistently laid down by this Court: that it must be shown in every case that the duty has been levied on goods which have been produced or manufactured, the taxable event being production or manufacture of goods.

We also consider that his second proposition is not sound. There is no presumption that if no other taxable event has intervened, -the levy must be treated to be connected with production or manufacture. This, as we have said above, must depend upon the facts of each case. But it must be positively shown that the taxable event for the duty which has been levied is manufacture or production of the article. We agree with his contention that the method of its collection is not decisive but, in our opinion, in cases of doubt it may throw some light on this question. Mr. Setalvad, who appears in the appeals concerned with licenses for arrack points out that para 29(a) of the General Conditions applicable to all excise and opium licenses specifically provides that the manufacturers of arrack and other country spirits (1) [1962] Supp. 2 S.C.R. 741.

as well as the licenses of arrack Bonded Depots are prohibited from holding any interest in the retail vend of arrack or in the vend of other country spirits and from employing any person who has such interest. He says that this strengthens his case because the money realised by the sale of licenses for vending arrack can have no relation to the manufacture or production of arrack. There is force in his contention.

In the result we hold that the health cess sought to be levied under the impugned act on shop rent does not fall within item 1 of Schedule A of the impugned act or entry 51 List II of the Constitution.

In W.P. No. 1076 of 1964 and in some other petitions in the High Court the petitioners have challenged the validity of the Mysore Health Cess Act, 1951. This Act was not referred to in the course of arguments. Section 3 of the Health Cess Act, 1951, reads thus:

> "3. (1) There shall be levied and collected a health cess at the rate of six pies in the rupee on all items of land revenue and at such rate not exceeding one anna in the rupee as may be specified by Government by notification on all other items of

revenue o n which education cess is leviable.

(2) The Government may by notification levy health cess at such rate not exceeding one anna in the rupee as may be specified in the said notification on such other items of revenue as they deem fit."

No notification or notifications issued under s. 3 were placed before us. We are, therefore, unable to say whether the levy of the Health Cess under the Act of 1951 stands on the same basis. Further no particulars are given in the petitions as to the dates of payments and no reason is given why the levy of Health Cess under the Act of 1951 was not challenged earlier. In the circumstances we decline to adjudge on the validity of the Health Cess Act, 1951, and the notifications issued under it. The petitioners will, however, be at liberty to file suits, if so advised, to recover the amounts alleged to have been paid by them under the Health Cess Act, 1951.

In the result the appeals are allowed and it is declared that the State of Mysore had no authority to levy and collect health cess under the Mysore Health Cess Act, 1962, on shop rent, and an order or direction in the nature of writ of mandamus be issued restraining the respondents from enforcing the demand for payment of health cess under the impugned Act, and further an order be issued directing the respondents to refund the health cess illegally collected under the Health Cess Act, 1962. There would be no order as to costs.

up.CI/66-8 Hidayatullah, J. I regret I do not agree. I shall not trouble myself with reciting the facts of these simple cases. They will find ample mention in the judgment as I deal with them. I shall, therefore, pass on at once to the legal question on which I find myself in disagreement. The Mysore Legislature passed the Mysore Health Cess Act, 1962 (Act 28 of 1962) on September 22, 1962 levying retrospectively a health cess in the State of Mysore from the 1st day of April, 1962. This cess is levied at the rate of 9 paise per rupee, on (a) all items of land revenue, (b) the items of State Revenues specified in the Act, in a Schedule numbered A and (c) on all items of taxes levied, under any law for the time being in force, by a local authority and specified in Schedule B. The first of the three items in Schedule A reads:

"1. Duties of excise leviable by the State under any law for the time being in force in any area of the State, on the following goods manufactured or produced in the State and countervailing duties levied on similar goods manufactured or produced elsewhere:-

(a) Alcoholic liquors for human consumption;

(b) Opium, Indian hemp and other narcotic drugs and narcotics.

Explanation-The duty of excise leviable under this item includes the duties, payments, fees and other amounts payable under section 18 of the Mysore Excise Act, 1901, and similar impost or payment by whatever name called payable under any other law in force in any area of the State of Mysore.

The other two items in Schedule A are water rate and tax on cinema to graph shows. In Schedule B are mentioned taxes on

(a) lands and buildings, (b) vehicles, (c) professions, trades, callings and employments, and (d) advertisements. We are concerned with Schedule A(i) quoted above. The cess collected on that item is said by the appellants, for various reasons, to be an illegal impost. They challenged it by petitions under Arts. 226/227 of the Constitution before the High Court of Mysore, but the High Court after striking out the Explanation upheld the cess and hence these appeals.

The appeals can be divided into two groups. Some are con- cerned with toddy which is tapped from palm trees and the others with arrak which is- prepared from molasses. Both are country liquors and the difference in the kind of liquor makes no difference to the questions of law and we may forget it. These liquors are subject to excise laws in force in the Mysore State but as different parts of the State are governed by different Acts we have for consi-

deration the Mysore Excise Act passed as for back as 1901 by the Ruler of the former Mysore State (Act No. V of 1901) and the Hyderabad Abkari Act (No. 1 of 1316 F). The two Acts are so alike in their provisions that no point depending on any difference was made before us and I shall, therefore, refer to the Mysore Act throughout. What I say about it will apply, with suitable adaptation to the Hyderabad Act. Under the Mysore Excise Act import, export and transport of liquor is banned except under a permit and on payment of duty, if any, to which the liquor may be made liable under the Act. The Act also bans the manufacture of liquor, the tapping of toddyproducing trees, the drawing of toddy from trees, the construction of a brewery or distillery, the bottling of liquor for sale, except under the authority or subject to the terms and conditions of a license granted by the Deputy Commissioner or by a person to whom the exclusive privilege of manufacturing toddy has been granted. Sale of liquor except under a license is prohibited. The Act, however, makes it 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 of manufacturing or supplying by wholesale, or selling by retail or of manufacturing or supplying by wholesale and selling by retail, any country liquor within a local area. But such grantee must obtain a license from the Deputy Commissioner (s. 16). A duty, if Government so directs, is leviable on all liquor imported or exported or manufactured under a license or manufactured at a distillery or permitted to be transported or issued from a licensed distillery or a licensed warehouse or sold in any part of Mysore, of such amount as the Government may from time to time, prescribe (S. 17). There are various ways of levying the duty. These are described in s. 18 which may be reproduced here:

> "18. How duty may be imposed.
>
> Such duty may be levied in one or more of the following ways:-
>
> (a) by duty of excise to be charged 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 (b) as the case may be; or in accordance with such scale of equivalents, calculated on quantity of materials used or by the

degree of attenuation of the wash or wort, as the case may be, as the Government may prescribe;

(b) in the case of intoxicating drugs, by a duty to be rateably charged on the quantity produced or manufactured or sold by wholesale or issued from a warehouse licensed or established under section 14;

(c) by payment of a sum in consideration of the grant of any exclusive or other privilege- (1) of manufacturing or supplying by wholesale, or (2) of selling by retail, or (3) of manufacturing or supplying by wholesale and selling by retail any country liquor or intoxicating drug in any local area and for any specified period of time;

(d) by fees on licenses for manufacture or sale;

(e) in the case of toddy, or spirits manufactured from toddy, by a tax on each tree from which toddy is drawn, to be paid in such instalments and for such period as the Government may direct; or

(f)by import, export or transport-duties assessed in such manner as the Government may direct.

Provided that when there is a difference of duty as between two license periods such difference may be collected in respect of all stock of country liquor or intoxicating drugs held by licensees at the close of the former period."

We are concerned mainly with (c) and (e) above and one of the questions is whether these fall within item (1) of Schedule A of the Act already set out in full. The appellants are licensed excise contractors who have pur- chased in auction the exclusive privilege to sell liquor at liquor shops at fixed places. They have obtained the exclusive right for 1-2 years and are paying the amount of their bid by monthly instalments which are popularly known as shop rent, although the instalment has no element of rent in it. I shall avoid the term shop rent because it raises an image which takes the mind away from the auction of the exclusive privilege to sell liquor. The notification calling for tenders before the auction specified the price per litre at which liquor may be sold and the amount of duty per litre payable. In this way the duty which may be passed on to the consumer is fixed. 'the advantage of the auction system is that Government collects the duty at once and the contractor buys the privilege and is not concerned to pay the duty as he manufactures or sells his manufactured goods. He also hopes to make a profit, and often does, although he may sometime suffer a loss. This is really taking a composition amount as duty without having to go to the trouble of calculating the duty or recovering it as manufac- ture or sales proceed. The system has been in vogue as long as Abkari Laws have existed in India and the Acts passed are uniformly the same. For the excise contractor it is in a sense a specu-

lative venture. In addition to this there is leviable a tree tax for the right to tap toddy from trees and tree rent is also payable to the owner of toddy trees. The Health Cess is not a new levy. It existed as

far back as 1951 and was at first at the rate of one anna per rupee. The health tax is made payable with the monthly kist above- mentioned, the tree tax and other duties of excise. The appellants do not object to the payment of the health cess levied on the tree 'tax but raise objections to its being levied on the amount of the kist. It may be mentioned here that every excise contractor who obtains this privilege by auction is assigned tree groves earmarked for the shop and is entitled to tap or draw toddy and, if he obtain an arrak shop, also to manufacture arrak. In fact, he sells at the shops his own produce or manufacture and pays a tax on the tapping of trees, the amount bid by him for the privilege of selling and in addition pays the health cess on both these sums at nine paise per rupee. Where he sells beer or such other liquor he obtains his supplies from breweries and distilleries at fixed prices which do not include excise duty.

Now the health cess is first assailed on the ground that there is no entry 'health cess' as such in the legislative entries. The word , cess' is used in Ireland and is still in use in India although the word rate has replaced it in England. It means a tax and is generally used when the levy is for some special administrative expense which the name (health cess, education cess, road cess etc.) indicates. When levied as an increment to an existing tax, the name matters not for the validity of the cess must be judged of in the same way as the validity of the' tax to which it is an increment. By Schedule A(1) read with s. 3 of the Act, it is collected as an additional levy with a tax, which, as described in Schedule A, is undoubtedly one within the powers of the State Legislature and has been so even prior to the Constitution. The question, however, is whether the amount paid for the exclusive privilege of selling liquor is an excise duty for if it is not then the health cess is also not an excise duty and however immune the original impost may be from attack, because of the protection the Constitution gives to old taxes, the new addition will not be equally protected, unless it can justify itself under the Constitution. To that question which is the core of this case I shall address myself after dealing with another minor objection which need not detain us long.

It is contended that the Legislature had no jurisdiction to impose the cess retrospectively from a prior date. This contention has no substance. Excise duty may be increased or decreased. This is to be found in almost all parts of the Commonwealth. English examples are the Finance Acts of 1894 (57 & 58 Vict. c. 30), 1900 (63 & 64 Vict. c. 27). 1901 (I Edw. VII c. 7), 1902 (2 Edw.

VII c. 7), 1927 (17 & 18 Geo V c. 10) and several others. In Australia the Excise Tariff 1921-23, 1936, 1921-48 increased the excise duty retrospectively. In Canada Customs Tariff Act (18 & 19 Geo V c. 17), 1 Edw VIII c. 37, 3 Geo VI c. 43 are examples. In India the Tariff Act formerly contained provisions enabling change of duty retrospectively. Now they are found in the Sale of Goods Act (s. 64A). The validity of such retrospective levy has been upheld in Chhotabhai Jethabhai Patel and Co. v. The Union of India and Another.(1) It must be remembered that Parliament when it imposes taxes has many ancillary powers, and can interfere with vested rights by validating past unlawful collections and by making retrospective laws. This brings me to the main question whether the amount for which the exclusive privilege of selling liquor is sold by auction can be said to be a duty of excise. In this connection I must bring to the fore and emphasise certain matters which must not be lost sight of. The persons who bid at these auctions are themselves the producers and manufacturers. They bid for the exclusive privilegd of selling which in so far as Government is concerned, is a means of collecting the anticipated excise duty at one go from a producer or

manufacturer before the goods become a part of the general stock of goods in the country. In other words, the person who is charged in the producer and manufacturer and the duty is levied from him before he can sell or obtains liquor which has not borne excise duty so far. The short question is: Is this a duty of excise? My emphatic answer is that it is, whether the matter is considered in the light of economic theory, legislative practice or judicial authority. I shall examine the question from these three angles.

Before I deal with the economic theory I must say that I am aware that the economists' definitions were not treated as conclusive by the Privy Council in Toronto v. Lamba(2) and by Sulaiman J. in In re C.P. & Berar Act No. XIV of 1938(3) although in the first case Lord Hobhouse commended reference to works on Economics and Lord Thankerton in Attorney General v. King come Navigation Co.(4) actually used Mill's definition of direct and indirect taxes. In this connection it is not necessary to refer to many books. In the Encyclopedia of Social Sciences "Excise" is described as a tax on commodities of domestic manufacture levied either at some stage of manufacture or before sale to home consumer. It is also pointed out that the excise duty may be levied on the raw material or the finished article or it may attach to an intermediate stage of the production process. This is also endorsed by Findlay Shirras Science of Public Finance (1936) Vol. II Chapter XXVH. It will thus appear that excise duty does not cease to be an excise (1) [1962] Supp. 2 S.C.R. 1.

(3) [1939] F.C.R. 18 at 58.

(2) (1887) 12 A.C. 575, 581, 582.

(4) 1934] A.C. 45 at 51.

duty when it is levied at any stage from raw material to finished article before sale to consumer. As Gwyer C. J. observed in the In re The C.P. & Berar case(1) its primary and fundamental meaning is that of a tax on articles produced or manufactured in the taxing country for home consumption. In the economist's view therefore, a tax on toddy, arrak, tavern beer or spirits distilled in India for home consumption is an excise duty and it can be levied from the stage of raw material to finished goods or at any intermediate stage. In economic theory the manner of collection does not enter into the discussion provided the tax is in respect of the home produced goods destined for home consumption.

Turning now to the legislative practice I find that excise duties were collected by auction of the exclusive privilege to sell excisable articles, in every State of India and as far back as the first Abkari Act. In fact the method is so universal that Findlay Shirras makes a special mention of the contract system under which rights to manufacture or vend spirit or liquor is disposed of by tender or sale. In view of the existing practice which had grown hoary by then, the Devolution Rules while including Excise in the Provin- cial Subjects (Rule 3 Schedule 1 Part 11) framed entry No. 16 as follows:-

> "16. Excise, that is to say, the control of production, manufacture, possession, transport, purchase and sale of alcoholic liquor and intoxicating drugs, and the levying of excise duties and license fees on or in relation to such articles, but

> excluding, in the case of opium, control of cultivation, manufacture and sale for export".

It will be noticed that this entry follows closely the provisions of the Abkari Acts which are in their turn copied by s. 17 of the Mysore Act. These statutes, as I have said already, existed for several decades. Excise duty was thus considered leviable by the auction system and special constitutional recognition was given by the Government of India Act and the Devolution Rules. The Government of India Act, 1935 did not repeat the Devolution Rule entry in one place. It put the entire subject of intoxicating liquors within the legislative competence of the Provinces by entry 31 in List II. The power to levy excise duties was divided between the Centre and the States. By entry 45 of the Central List in the 7th Schedule duties of excise on tobacco and goods manufactured or produced in India, other than those mentioned in the Provincial List, were given to the Centre. The Provincial List by entry 40 included excise duty on alcoholic liquors for human consumption manufactured or produced in the Province and countervailing duties at the same or lower rates on similar goods manufactured or produced elsewhere in India. The whole of the power to levy excise duty on alcoholic liquors for human comsumption was (1) [1939] F.C.R. 18 at 58.

passed on to the Provinces. The subject of excise duties was thus plenary in so far as alcoholic liquors were concerned and this power was no whit less than the power conferred by the Devolution Rules and no limitation could be read into it. Excise duty on alcoholic liquors could be collected at all stages from production till they were parted with to the consumer. The present Constitution has repeated the entries and the same classification of excise duties as in the Constitution Act of 1935 except for a few changes with which we are not concerned. It would thus appear that the legislative practice is entirely in support of collection of excise duty by the contract system. I am reminded of the dictum of Lord Blackburn in Trustees of Clyde Navigation v. Laird & Sons(D in which a departmental practice extending there over 18 years was said to raise a strong prima facie ground for thinking that there must be some legal ground on which it could be rested. Here the practice is over a century old and has not been questioned under three different constitutional documents till today. The judicial interpretation of the relevant entries has not militated against, the above practice but has rather supported it. In Governor General in Council v. The Province of Madras(2) Lord Simonds observed that "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." After approving the definition of 'excise' given by the Federal Court in the In re C.P. & Berar case, Lord Simods observes:

> "..... Consistently with this decision their Lordships are of opinion that a duty of excise is primarily a duty levied on a manufacturer or producer in respect of the commodity manufactured or produced. It is a tax on goods not on 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.(3) The two taxes, the one levied on a manufacturer in respect of his goods, the other on 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 excisable article leaves the factory or workshop for the first time on the occasion of its sale. But that method of colle cting the tax is an accident of administra-

(1) (1883) 8 A.C. 658.

(3) (1942] F.C.R. 90.

(2) 721 I.A. 91.

tion; it is not of the essence of the duty of excise, which is attracted by the manufacture itself. That this is so is clearly examplified in those excepted cases in which the Provincial, not the Federal, legislature has power to impose a duty of excise. In such cases there appears to be no reason why the Provincial legislature should not impose a duty of excise in respect of the commodity manufactured and then a tax on first or other sales of the same commodity. Whether or not such a course is followed appears to be merely a matter of administrative convenience. So, by parity of reasoning may the Federal legislature impose a duty of excise on the manufacture of excisable goods and the Provincial legislature impose a tax on the sale of the same goods when manufactured. The above passage clearly shows that where the power to levy sales-tax as well as excise duty resides in the same legislature, the levy of excise duty may be made at some earlier stage but so long as the tax is levied in respect of manufacture there can be no objection that it was not levied at the stage when the goods left the manufacturer for the first time.

Fine distinctions were drawn in the Federal Court case because the Act considered there was concerned with sales- tax, not on alcoholic liquors but on petroleum and lubricants, which were excisable by the Centre. The question, therefore, arose whether the tax which the Central Provinces and Berar Legislature was levying was an excise duty within the power of the Federal Legislature of sales- tax within the powers of the Provincial Legislature of the Province. Under that constitutional system, which allowed the levy of Duty of excise to the Centre and the levy of sales-tax on the same goods to the Provinces, the line had to be drawn at a point where the goods left the producer or the manufacturer. The Centre then would be on the right side of the line so long as it taxed the goods with the producer or the manufacturer and the tax was related to the production of manufacture of the goods and the Provinces on their side of the line if they taxed the sale. But if the Centre put the tax on the sale it would clash with the powers of the Provincial Legislature and vice-versa. Such a contingency does not arise here when the same legislature has all the powers in respect of the goods from production to consumption. Such a legislature may collect the excise duty as excise duty at any stage so long as the tax is not purely a sales tax on the sale of goods. Short of this, excise duty can be collected in any way the legislature thinks convenient.

In R. C. Jall v. Union of India(1) the following observations are found:-

(1) [1962] Supp. 3 S.C.R. 436.

> "With great respect, we accept the principles laid down by the said three decisions in the matter of Ievy 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 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. 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."

There is a slight difference between the Privy Council case and the case of this Court. In the former excise duty was said to be primarily a duty levied on a manufacturer or producer in respect of the commodity manufactured or produced while in the Supreme ,Court case it was said to be primarily a duty on the production or manufacture of goods produced or manufactured within the country. It is useless to enter into a discussion which of the two is the proper way to describe a duty of excise since the Supreme Court case is binding on me and the description there given has again been applied in In re The Bill to Amend s. 20 of the Sea ,Customs Act, 1878, and s. 3 of the Central Excises and Salt Act, 1944(1) although without fresh discussion. But even if the tax is treated as a duty on production, it is clear that the goods which were taxed were produced or manufactured in India and were not to bear the tax for any other reason. As the tax was in relation to the production or manufacture of goods it was clearly a duty of excise. As Gwyer C. J. said in the In re C.P. & Berar(2) case:

> "The ultimate incidence of an excise duty. a typical indirect tax, must always be on the consumer, who pays as he consumes or expends; and it continues to be an excise duty, that is, a duty on home-produced or home-manufac-

tured goods, no matter at what stage it is collected. The definition of excise duties is therefore of little assistance in determining the extent of the legislative power to impose 804, 822.

(2) [1939] F.C.R. 18.

.lm15 them; for the duty imposed by a restricted legislative power does not differ in essence from the duty imposed by an extended one."

In fact Gwyer C. J. cited with approval Patton v. Brady(1) where it was observed:

> "Within the scope of the various definitions we have quoted, there can be no doubt that the power to excise continues while the consumable articles are in the hands of the manufacturer or any intermediate dealer, and until they reach the consumer. Our conclusion then is that it is within the power of Congress to increase an excise, as well

> as a property tax, and that such an increase may be made at least while the property is held for sale and before it has passed into the hands of the, consumer".

The learned Chief Justice pointed out that this was true when there was no competing legislature and observed in another passage as follows:-

> "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, as 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."

Referring to the Australian case of Commonwealth Oil Refine- ries Ltd. v. South Australia(2) the Chief Justice observed:-

> "But a closer examination of the judgments delivered shows that the majority of the Judges took the view that the duty on the first sale of the commodity was in fact a tax on the producer and for that reason a duty of excise without doubt".

He thus approved of these cases, as he says, by relating the duty back to the stage of production, even though the person made liable for payment was not (and indeed could seldom have been) the original producer himself". (p. 52). All these observations have my respectful concurrence and in my judgment they are a true exposition of the width of the expression "duty of excise" when it is used in a context in which it has not to compete with the exercise of a rival power Looked (1) (1901) 184 U.S. 608, at 623.

(2) (1926) 38 C.L.R. 408.

at in this way the tree tax and the composition amount obtained by the auction of the right to bring to sale home produced alcohol is a proper excise duty. It certainly is not shop rent even if the amount is payable by monthly instalments and is described loosely as rental, or Baithak or shop rent.

The objections to the views I have propounded here may be noted. It was argued that there is no close relation of the tax or levy to production or manufacture and it is related to the ability to sell, that the duty is not uniform because it has no relation to quantity or quality, that the collection of the duty is before the excisable goods come into existence, and that there is already a tree tax which is of the nature of excise duty. It is also said that if the right is auctioned how can countervailing duties at the same or lower rates be charged. I think none of them is a valid argument. Firstly, we must recognize the ambit of the entry and the fact that we are dealing with a legislature which enjoys plenary powers. Next we must bear in mind that goods on which excise duty is being demanded are produced or manufactured in the State and the State can legitimately subject them to a payment of

excise duty. The levy is thus in respect of goods produced or manufactured in the State and is on production or manufacture. The method of collection does not change the nature of the tax or run counter to any legislative power, rival or other. The duty is uniform. Each notification fixes the amount of duty payable and the sale price including the duty. Where goods have first to be obtained from breweries or distilleries the price at which they can be got (which price does not include excise duty) is also fixed. The excise contractor who bids at the auction knows the fixed sale price, the amount of duty which his bid would represent and then estimates the likely sales and bids for the privilege. The right to collect excise duties is thus farmed to him for a lump payment which the State takes as the excise duty in final settlement. As I said the business of excise contractors is a speculative business. Government is not concerned with whether they sell more or less. The Government fixes the upset price for such auctions based on statistics of sales and consumptions available to it and is quite satisfied when the highest bid is satisfactory. To say that such a collection of excise duty renders the levy into a rent for a shop is to miss the reality.

Nor do I see any difficulty in the matter of countervailing duties. The rate of duties is fixed and the ditty may be collected at that rate on liquor produced elsewhere in India without infringing the Constitution. In all such matters a broad view of the matter has to be taken. Machinery sections do not enter into the rate but only the charging section does. if the privilege to sell liquor produced in the State and that produced elsewhere in India are both auctioned on the condition that the duty on both kinds of liquor is the same, the requirements of the constitutional provision as to countervailing duties would be amply satisfied. It would be making a fetish of equal rates if one wanted absolute equality not only in rates but in everything. Further imposition of countervailing duties is not compulsory. The legislature need not impose them if it cannot make them equal.

The view I have taken is fortified by two cases of this Court which are precedents to follow in the decision of the case in hand. In Cooverjee B. Bharucha v. The Excise Commissioner, Ajmer and others(1) in dealing with Excise Regulation 1 of 1915, the amounts raised by public auction and described as fees were held to be more in the nature of taxes than fees. Revenue was collected by the grant of contracts to carry on trade in liquors and these contracts were sold by auction. The grantee was given a license on payment of the auction price. If this was treated not as a fee but as a tax it could only be justified as an excise duty. The power to raise excise revenue was exercisable only through the imposition of excise duties and it is obvious that the levy was regarded as a duty of excise. There was otherwise no other power under which revenue could be raised. Describing the tax Mahajan C. J. made the following observations:-

> "The pith and substance of the regulation is that it raises excise revenue by imposing duties on liquor and intoxicating drugs by different methods and it also regulates the import, export, transport, manufacture, sale and possession of intoxicating liquors. Section 18 says that the Chief Commissioner may lease to any person, on such conditions and for such period as he may think fit, the right of manufacturing of supplying by wholesale, or of both, or of selling by wholesale or by retail, or of manufacuturing or of supplying by whole, or of both and of selling by retail any country hquor or intoxicating drug within any specified area.....

> The second case A. B. Abdulkadir and other v. The State of Kerala and another(2) is even clearer. There a system of auctions for the collection of tobacco revenue was in force in Travancore Cochin. After the coming into force of the Constitution the Finance Act, 1950 (25 of 1950) extended the Central Excises and Salt Act, 1944 to Travancore-Cochin State.

A question arose whether this levy on tobacco corresponded to the excise duty (1) [1954] S.C.R. 873,877,878.

(2) [1962] Sup. 2 S.C.R. 741,754,755.

under the Finance Act, because if it did, then by s. 13(2) of the Finance Act the State law stood repealed. It was held that the amounts realized by the auctions were what would be duty under s. 3 of the Central Act. This Court observed:

"We have already indicated that the essence of the duty of excise as held by the Federal Court and the Privy Council is that it is a duty on the goods manufactured or produced in the taxing country. Further as generally the duty is on the goods produced or manufactured it is paid by the producer or manufacturer, though as in the case of all indirect taxes it is passed on eventually to the consumer in the shape of being included in the price and is thus really borne by the consumer. Further the cases on which reliance has been placed on behalf of the State also show that laws are to be found which impose duty of excise at stages subsequent to manufacture or production. As a matter of fact, even in British India before 1935 there used to be public auctions of the right to possess and sell excisable goods like country liquor, ganja and bhang and the amount realised was excise revenue . It seems under the circumstances that the auction system which was in force was only a method of realising duty through the grant of licences to those who made the highest bid at the auctions."

It is argued that the words used here are "excise revenue" and not "excise duty". It is hardly a question of semantics. The distinction sought to be made is without a difference. Wanchoo J. had discussed the nature of excise duty before proceeding to compare the auction money with duties of excise and he found that sale of the privilege to the highest bidder was a method of realising "duty" and he obviously meant excise duty.

These two cases are binding. I was a party to the second case and on reconsidering it in the light of arguments now advanced I find that it furnishes a complete answer and is indistinguishable on the slender ground that the expression "excise revenue" or "duty" have been used and not the expression "excise duty". To hold otherwise is to depart from this and the earlier case and to overrule them.

I am, therefore, of the opinion that the so called shop- rent was only a means of collecting excise duty and the health cess which was an additional levy along with the excise duty was perfectly valid. Being a new tax it cannot be described as a tax on tax. The earlier tax only furnished a measure. I would accordingly confirm the decision of the High Court and dismiss the appeals with costs.

Bachawat, J. The Mysore Health Cess Act, 1962 (Mysore Act No. 28 of 1962) levied a health cess at the rate of nine naya paise in the rupee on (1) all items of land revenue, (2) the items of State Revenues mentioned in Schedule A and (3) the items of taxes levied by any local authority and mentioned in Schedule B. The Act, on its true construction, levied a surcharge and increased the amounts of the existing imposts. There was no levy of a new head of tax or of a tax on a tax.

The Act levied a health cess inter alia on the following item of State Revenue mentioned in Schedule A:

> "(1)Duties of excise leviable by the State under any law for the time-being in force in any area of the State, on the following goods manufactured or produced in the State and countervailing duties levied on similar goods manufactured or produced elsewhere:-
>
> (a) Alcoholic liquors for human consumption.
>
> (b) Opium, Indian hemp and other narcotic drugs and narcotics.
>
> "Explanation-The duty of excise leviable under this item includes the duties, payments, fees and other amounts payable under section 18 of the Mysore Excise Act, 1901, and similar impost or payment by whatever name called payable under any other law in force in any area of the State of Mysore."

The Explanation to item 1, Schedule A was struck down by the High Court. There is no appeal by the State, and this part of the order of the High Court has become final. The Mysore Excise Act, 1901 (Mysore Act No. 5 of 1901) is in force in the old Mysore area of the Mysore State. Section 16 empowers the State Government to grant exclusive or other privilege of selling by retail any country liquor or intoxicating drugs to any person or persons on such conditions and for such period as it thinks fit. The privilege of sale in a specified shop is disposed of periodically as a result of a public auction held by the excise authorities. The amount paid for the grant of this privilege is called the shop rent. Sections 17 and 18 show that this payment is the levy of a duty. It is common case that similar law and practice prevail in the old Hyderabad area of the State, where the Hyderabad Abkari Act (No. 1 of 1316 Fasli) is in force. Both the Acts continue to be in force by virtue of Art. 372 of the Constitution. As a result of public auctions held subject to the terms and conditions notified by the State Government, the appellants were granted the exclusive privileges of selling liquor in certain arrack shops, beer taverns and toddy shops in consideration of their agree-

ing to pay specified shop rents and health cess thereon at the rate of nine naya paise in the rupee.

Counsel for the State submitted that shop rent is a duty of excise, the Mysore Cess Act, 1962 levied a surcharge on this duty and the State Legislature was competent to make this levy, having regard to Entry 51, List II of Seventh Schedule to the Constitution.

The subject of duties of excise and fees in connection therewith is divided between the Union and the States, see Entries 84 and 96, List I and Entries 51 and 66, List II. The power to make laws with respect to duties of excise carries with it the ancillary power to make licensing laws for preventing the evasion of the .duty. See Chaturbhai. M. Patel v. The Union of India(1). The subject of intoxicating liquors, that is to say, their production manufacture, possession, transport, purchase and sale is exclusively assigned to the States under List II, Entry 8. In this background the expression "excise" iS often used to denote the entire subject of the control of production, manufacture, possession, transport purchase 'and sale of alcoholic liquor and intoxicating drugs and the levying of excise duties and license fees on and in relation to such articles, and it was used in that sense in Entry 16 in the list of provincial subjects in the Devolution .Rules of 1920. Though an excise law may contain provisions for the control of production, manufacture, possession, transport, purchase and sale of the excisable .commodity, it does not follow that a tax on these several activities 1s a duty of excise.

What then is a duty of excise on goods manufactured or produced locally ? It is not a tax on property, see In re Sea Customs Act(2), nor is it a tax on sales, In re The Central Provinces and Berar Act No. XIV of 1938(3) nor a tax on the first sale of goods, Governor-General in Council v. Province of Madras(4). The language of the Entries in List I, Entry 84 and Entry 51, list II is necessarily qualified by the language of other Entries coveting other fields Of taxation.

Likewise, a duty of excise is not a tax on income or on professions, trades, callings and employments. It is not a tax on the capital 'value, nor is it a duty. on the export, import, transport, carriage or ,entry of goods. Shortly put, the duty of excise is a tax in respect of the manufacture or production of goods. There can be no controversy that a tax levied on a manufacturer or producer with reference to the quantity or value of the article produced at the moment of its production is a duty of excise. But the levy may be made in other ways, ,(1) [1960] 2 S.C.R. 362. (2) [1964] 3 S.C.R. 787, 804, 822.

(3) [1939] F.C.R. 18. (4) [1945] F.C.R.

179. and it may then become necessary to ascertain the real character of the tax. In determining whether the tax is a duty of excise, several tests may be suggested. Is the tax levied on the manufacturer or producer? Is it levied with reference to the value, quantity, weight or volume of the goods? Does it affect the goods as subjects of manufacture or production" Is it a levy at the stage of or in connection with the manufacture or production? None of these tests is conclusive or decisive. A duty of excise may be collected at such time, in such manner and on such person as may be convenient or beneficial to the revenue, e.g. by a levy on the producer with reference to the quantity or value of the article produced, when it leaves the factory, see Governor- General in Council v. Province of Madras (1) at p. 193 by a levy on the producer of toddy with reference to the toddy producing tree, or by a levy on the consignee of coal despatched from the colliery by means of a surcharge on freight, R. C. Jall v. Union of India (2). The Court examines the substance of the levy. If it is a tax in respect of the manufacture or production of goods, it is a duty of excise, however it may have been collected or realised.

If the duty of excise is levied with reference to the quantity, volume, weight or value of the goods, each unit will bear the same amount of tax. But the incidence of the duty on the goods will not necessarily be uniform, where the levy is by a rate on each toddy producing tree, see s, 18(e) of the Mysore Excise Act, 1901, or on each acre of hemp producing land, see s.26(1) of the C.P. & Berar Excise Act, 1915. Every tree and every acre of land may not produce the same quantity, volume, weight or value of the excisable commodity. Normally, the ultimate incidence of the tax is on the consumer, but the producer may not be able to pass on the tax to the consumer in all cases, see Chholabhai Jethabhai Patel v. The Union of Indian(3). The question is whether the revenue realised at a public auction of the privilege to sell an excisable commodity is a duty of excise his method of raising revenue is specifically authorised by many Provincial Acts and laws of Princely States. In Coverjee B. Bharucha v. The Excise Commissioner and the Chief Commissioner, Ajmer and others (4) this Court held that the price realised at such public auction held under the Ajmer Excise Regulation 1 of 1915 was more in the nature of a tax than a license fee. In A. B. Abdulkadir v. The State of Kerala (5), Wanchoo, J. said that such an auction under the Cochin Tobacco Act, 1084 M.E. and the Travancore Tobacco Regulation, 1087 M.E. was a method of realising duty on tobacco and the substantial part of the income from the auction was in the nature of excise duty. These laws (1) [1945] F.C.R. 179. (2) [1962] Supp. 3 S.C.R.

436. (3) [1962] Supp. 2 S.C.R. 1. (4) [1954] S.C.R. 873, 882. (5) [1962] Supp. 2 S.C.R. 741.

C.1/66-9 were passed. by law-makers whose powers were not fettered by legislative lists, and the question whether the levies were duties of excise within Entry 84, list 1 and Entry 51, List 11 did not arise for decision in the two cases. Section 18 of the C.P. and Berar Excise Act, 1915 empowered the State Government to lease the right of selling liquor or intoxicating drug to any person on such conditions and for such period as it might think fit. In re Tile Central Province and Berar Act No. XIV of 1938 (1) at p. 54, Gwyer, C. J. observed that the lump sum payments for the privilege of selling alcohol under the aforesaid Act were clearly not excise duties or anything like them.

My conclusion may be stated briefly. A charge for a license to sell an excisable article may be a fee or a tax. If it is a tax, it can satisfy the test of a duty of excise, when it is so connected with the manufacture or production of the article as to be, in effect, a tax on the manufacture or production. Otherwise, such a tax does not fall within the classification of a duty of excise.

The arrack license gives the privilege of sale of attack distilled in a Government distillery. The licensee is not a producer of arrack. He obtains the arrack on payment of the price and the prescribed duty per litre. He has no connection with the production of the liquor. Likewise, the beer license gives the privilege of sale of country beer or porter in beer taverns. The beer is brewed elsewhere. There is a prescribed duty per bulk litre of beer. The charge paid for the license to sell either arrack or beer has no connection with the production of the liquor. The toddy license gives the privilege of sale of toddy. The licensee is not necessarily a producer of toddy. If he produces toddy, he pays tax at the prescribed rate on each tree from which toddy is drawn. As a producer of toddy he pays the tree tax. The charge for the toddy license has no connection with the production of toddy. The shop rent or the charge for the license to sell arrack, beer or toddy does not satisfy the test of a duty of excise. As the shop rent is not a duty of excise, the state legislature is not competent to make

a law levying a surcharge on the shop rent under Entry 51, List. II. The Mysore Health Cess Act, 1962, in so far as it purports to levy a surcharge on the shop rent cannot be sustained under Entry 51, List 11. I express no opinion on the question whether this levy under the Mysore Health Cess Act. 1962 can be justified under some other Entry in List 11, But as counsel for the State did not seek to justify the levy under any other Entry, I am bound to hold that the Act, so far as it makes this levy, is unconstitutional. (1) [1939] F.C.R. 18.

In their writ petitions, the appellants claimed refund of the health cess collected from them under the Mysore Health Cess Act, 1962 and the Mysore Health Cess Act, 1951. Counsel for none of the parties addressed any argument on the question of refund or on the question of the validity of the Mysore Health Cess Act, 1951. The entire records of all the tenders-cum-auctions are not before us. It is not quite clear whether the surcharge of nine naya paise in the rupee on the shop, rent, though called a health cess, can be justified independently of the Health Cess Act 1962. Under the Mysore Excise Act and the Hyderabad Abkari Act, the State Government could grant the exclusive privileges of sale of liquor on such terms and conditions as it thought fit. It could impose the condition that the grantees would pay a fixed shop rent and a surcharge of nine naya paise in the rupee thereon. A charge of Rs.500/as shop rent and a surcharge of nine naya paise in the rupee thereon are, in effect, a charge of Rs. 545/- for shop rent. The appellants can not claim refund of the surcharge called the health cess on shop rent, if it was or could be collected by the State Government by virtue of its powers under the existing excise Acts. On the other hand, the State Government is liable to refund the surcharge if it was and could be collected under the Mysore Health Cess Act 1962 only. In the absence of arguments and fuller materials, the point is left open. In the result, the appeals are allowed in part, it is declared that the Mysore Health Cess Act, 1962, so far as it makes a levy of health cess on shop rent is beyond the powers of the State legislature and is invalid. The question whether the Mysore Health Cess Act, 1951 is valid as also the question whether the appellants are entitled to refund of the health cess collected from there are left open, and they are relegated to a suit.

ORDER in accordance with the Opinion of the majority the appeals are allowed. There would be no order as to costs. G. C. G.C