

GAHC010003142019



**THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)**

Case No. : WP(C)/196/2019

MOTIBUL HUSSAIN HAZARIKA
SON OF LATE MOHIBUL HUSSAIN HAZARIKA, PROPRIETOR AND
LICENCEE OF M/S M.H. HAZARIKA BONDED WAREHOUSE, BAZAR ROAD,
WARD NO. 9, NORTH LAKHIMPUR, ASSAM.

VERSUS

THE STATE OF ASSAM AN 3 ORS.
REP. BY THE SECRETARY TO THE GOVERNMENT OF ASSAM, EXCISE
DEPARTMENT, DISPUR, ASSAM.

2:THE COMMISSIONER OF EXCISE
ASSAM
HOUSEFED COMPLEX
DISPUR
GUWAHATI- 781006.

3:THE SUPERINTENDENT OF EXCISE

C/O OFFICE OF THE DEPUTY COMMISSIONER
NORTH LAKHIMPUR
ASSAM- 787001.

4:THE ACCOUNTANT GENERAL OF ASSAM
MAIDAMGAON
KRISHNAPUR
BELTOLA
GUWAHATI- 781028

Advocate for the Petitioner : MR. B C DAS, MR B PUSHILAL,MR. S K SINGH

Advocate for the Respondent : SC, EXCISE DEPTT., MR. P N GOSWAMI,SC, AG,MR. C

BARUAH

BEFORE

HON'BLE MR JUSTICE ARUN DEV CHOUDHURY

For the Petitioner : Mr.S. K. Singh, Sr. Adv.
Assisted by Mr. B. Pushilal, Adv.

For the Respondents : Mr.I. Borthakur,
Standing Counsel, Excise Department
Mr. D. Bhattacharya, Adv.

Date of Hearing : 01.08.2024.

Date of Judgment : 22.08.2024.

JUDGMENT & ORDER (CAV)

1. Heard Mr. S. K. Singh, learned Senior Counsel assisted by Mr. B. Pushilal, learned counsel for the petitioner. Also heard Mr. I. Borthakur, learned Standing Counsel for the Excise Department and Mr. D. Bhattacharya, learned counsel for respondent No. 4.

2. The petitioner is aggrieved by a demand of excise duty for Rs. 36,51,060/- . The facts of the case in a nutshell are recorded herein below:-

I. The petitioner is having a license of bonded warehouse in terms of the Assam Bonded Warehouse Rules, 1965 (hereinafter referred to as Rules, 1965).

II. By a communication dated 14.03.2016, the Officer-in-Charge of the bonded warehouse asked the petitioner to physically segregate the old inferior stock of beer with the rest of the stocks. After segregation, by a communication dated 15.03.2016, the Superintendent of Excise, North Lakhimpur, requested the Commissioner of Excise, Assam seeking his approval to destroy the inferior stocks.

III. Thereafter, the Commissioner of Excise, Assam by his communication dated 28.03.2016, asked the Superintendent of Excise, North Lakhimpur to send samples of unfit/sedimented beer. Such samples were sent and on 03.05.2016, the Chemical Examiner of Excise, Assam, prepared eight different reports confirming that the stocks of beer became unfit for human consumption.

IV. On 10.05.2016, the petitioner sought for permission from the Superintendent of Excise, North Lakhimpur to destroy the unfit stocks. In turn, the Superintendent of Excise, North Lakhimpur by its communication dated 25.05.2016, sought approval from the Commissioner of Excise, Assam to destroy the unfit stocks and while seeking such approval for destruction, the Superintendent of Excise, North Lakhimpur also forwarded the copies of the Chemical Examiner's report.

V. Thereafter, on 31.05.2016, the Commissioner of Excise, Assam accorded permission for the destruction of the unfit stocks as per the provision of Rules, 1965 and with a further direction that the entire process should be documented and a report be sent to the Commissioner. Accordingly, on 08.06.2016, the Superintendent of Excise, North Lakhimpur directed the Officer-in-Charge of the petitioner's bonded warehouse to destroy the unfit stocks

VI. Thereafter, the destruction was carried out on the 19th, 24th, 25th and 26th of June, 2016 in the bond premises and accordingly, a report was submitted by the Officer-in-Charge of the bonded warehouse to the Commissioner of Excise, Assam by its communication dated 13.07.2016.

VII. Thereafter, by its communication dated 16.08.2016. the petitioner prayed before the Commissioner of Excise, Assam for exemption from

payment of ad valorem excise duty by its communication dated 16.08.2016. The Commissioner of Excise, Assam by its communication dated 30.08.2016 intimated his approval for exemption subject to any objection by the Audit

VIII. However, subsequently, there were audit objections as regards exemption and accordingly, demands were made. Being aggrieved, the present writ petition is filed.

3. Mr. S. K. Singh, learned Senior Counsel for the petitioner referring to Rules 41 and 42 of the Rules, 1965, submits that as the beers were destructed within the premises of the bonded warehouse without sale and therefore, the petitioner, under the Excise Act, 1910 and the Rules, 1965 framed thereunder, is not liable for payment of excise duty. According to the learned Senior Counsel, when liquors kept in a bonded warehouse, are transferred or removed for sale, then only, such goods can be subjected to excise duty in terms of Section 22(c) (ii) of the Excise Act, 1910. It is his further case that the destruction was carried out with due approval from the Commissioner and under the supervision of the excise authority and approval for exemption was also duly granted. Therefore, the authority now cannot turn around and change the decision to the detriment of the petitioner.

4. Per contra, Mr. I. Choudhury, learned Standing Counsel for the Excise Department, referring to the judgment of the Hon'ble Apex Court in the case of **State of U.P. –Vs- Delhi Cloth Mills** reported in **1991 1 SCC 454**, argues that wastage or damage of the liquor in the premises of the bonded warehouse did not cease the material to be an excisable material as the taxable event was the production or the manufacture of the liquor which had already taken place in the present case.

5. Mr. Borthakur, learned Standing Counsel by referring to Rule 27 of the Rules, 1965 further contends that without payment of excise duty, in terms of the agreement of bond, no excisable material can be removed from the premises of the bond and the natural corollary is that irrespective of sale, the excise is to be leviable. According to Mr. Borthakur, learned Standing Counsel such removal in the context of the Excise Act, 1910 shall necessarily include a damage or destruction inside the bond premises.

6. Mr. Borthakur, learned Standing Counsel referring to the proviso to Rule 37 of the Rules, 1965 submits that even in the case of wastage, excise is leviable subject to the provision that the exemption can be granted up to 1.5% when such damage is caused due to accident or any other unavoidable cause. However, according to Mr. Borthakur, learned Standing Counsel, in the present case, it is an admitted fact that the liquor in question was destroyed for the reason of the same being not sold within its expiry date and therefore, such proviso also shall not save the petitioner and therefore, the excise would be leviable in this case.

7. Mr. Borthakur, learned Standing Counsel further contends that it is true that the Excise Commissioner has proposed for exemption, however, such exemption being without jurisdiction and beyond the scope of the Excise Act, 1910 and Rules, 1965, no right shall accrue upon the petitioner on the basis of such recommendation.

8. Mr. Singh, learned Senior Counsel for the petitioner while countering the argument of Mr. Borthakur, learned Standing Counsel for the Excise Department, submits that the judgments as relied by Mr. Borthakur, are not applicable in the given facts of the present case. It is contended that in the case of **State of Uttar Pradesh and Others–Vs- McDowell and Company Limited** reported in 2022 SCC Online SC 15, the Hon'ble Apex Court found that there was destruction by fire and there was also no negligence on the part of the distillery and therefore, the excise was not leviable. Therefore, a similar proposition is

applicable in the present case. Mr. Singh, learned Senior Counsel submits that there is no doubt that spirit becomes excisable at the factory outlet and therefore, it is the distillery who is liable for the payment of excise and not the bonded house that too without happening of event of sale. Referring to Section 22(e) of the Act, 1910, Mr. Singh, learned Senior Counsel argues that such provision is very much clear that the item becomes excisable at the distillery itself and when excisable product gets damaged without sale, it is the distillery who will have to make payment.

9. Referring to paragraphs 9 and 22 of the writ petition, Mr. Singh, learned Senior Counsel contends that the petitioner has been singled out not to give such benefit inasmuch as similarly situated two bonded warehouses, were granted benefit on the ground that there was no negligence on the part of the said bonded warehouse where the beer bottles were found with sedimentation. It is also the contention of Mr. Singh, learned Senior Counsel that such a statement has not been denied by the respondent authorities in their affidavit, though they had filed two affidavits.

10. Mr. Singh, learned Senior Counsel also relies upon Rule 28 of the Rules, 1965 and contends that until and unless an excisable material is removed from the bonded warehouse, the bonded warehouse cannot be liable for payment of excise and in the case in hand, before removal, beer bottles got sedimentation.

11. In the backdrop of the argument, the vital issues for determination in this writ petition are:

- (i) Whether the event of sale is necessary for levy of excise duty under the Act, 1910 read with Rules, 1965?
- (ii) Whether the demand in question is authorized under law and whether the excise commissioner is having authority to grant exemption from payment of excise duty in the given facts of the present case?

12. In the backdrop of aforesaid issues, let this court first look into the power

to levy excise duty. Article 265 of the Constitution of India prescribes that levy and collection of tax must be authorized by law. The States are empowered under Entry 51 of List-2 of 7th Schedule of the Constitution to impose a duty of excise on alcoholic liquors for human consumption, manufactured or produced in the State.

13. Assam Excise Act, 1910, which was in force in Eastern Bengal and Assam relating to the import, export, transport, manufacture, sale and possession of intoxicating liquor and intoxicating drugs was consolidated and amended to be in conformity with constitutional provision.

Section 3(7) of the Act, 1910 defines excisable articles as any alcoholic liquor for human consumption or any intoxicating drugs.

Excise duty is defined under Section 3(7)(a) of the Act, 1910 as duty mentioned in Entry 51 of List -2 of the Seventh Schedule of the Constitution of India.

Manufacturing is defined under Section 3(15), which means and includes any process whether natural or artificial, by which any intoxicant is produced or prepared and re-distilled, the process of their rectification, flavouring, blending and colouring.

Transport has been defined to mean moving from one place to another within the territories to which the Excise Act ,1910 applies.

14. **Import, Export, and Transport** have been restricted subject to the fulfillment of certain conditions under Section 11 of the Act, 1910. It provides that no intoxicant shall be exported or transported without payment of duty if any, payable under the Act' 1910 has been paid or a bond has been executed for payment thereof. Thus, export and transportation of liquor is permitted with a pre-condition that excise duty has been paid or if not paid, a bond has been executed for payment thereof.

15. **Section 16** of the Act, 1910, to be precise clause-(d) of Section 16 empowers the Excise Commissioner, with the sanction of the Board to license a

warehouse wherein any intoxicant may be deposited and kept without payment of duty

16. **Chapter V** of the Act, 1910 deals with duties and fees. **Section 21** under this chapter empowers the State Government to impose excise duty and countervailing duty at such rate applicable generally or to any specified local area on excisable article on its import, export, or transport, manufacture etc.

17. **Section 22** of the Act, 1910 deals with the method of levy of such excise duty. Clause-(e) of Section 22 of the Act, 1910, prescribes that excise duty shall be levied at a rate charged upon the quantity produced or issued from the distillery or brewery when it is spirit or beer manufactured in any distillery or brewery.

18. Thus, in the case of beer, which is bought/transported from a distillery or brewery, it is to be levied excise duty at the distillery or brewery or from the licensed warehouse as the case may be. From a reading of Sections 11, 16, 21 and 22 of the Act, 1910, it is clear that excise duty shall be leviable on transportation of the beer either from the distillery or brewery or from the licensed warehouse, otherwise, the transportation is prohibited without payment of such duty. Thus, the excise duty becomes leviable at the distillery or brewery or in the warehouse and without such duty being paid, there cannot be any transportation of the beer either from the distillery or brewery or licensed warehouse. However, there shall be an exception to such provision in the case of a bonded warehouse as provided under Section 16(d).

19. **Section 36** of the Act, 1910 empowers the State Government to make rules for the purpose of carrying out the provision of the Act or any other law relating to excise revenue. Such power also includes the power to make rules for regulating the import, export, transport or possession of any intoxicant, manufacture, supply, storage or sale of any intoxicant and for prescribing time, place and manner of payment of duty or fee. In exercise of such power, the

Assam Bonded Warehouse Rules, 1965, was enacted.

20. **Bonded Warehouse** is defined under Rule 2(2) as premises or any part of the premises approved and licensed for deposit or storage of spirits, on which duty has not been paid.

21. **Rule 20** of the Rules 1965, prescribes that no spirits shall be received into any bonded warehouse unless accompanied by a pass from the Officer in Charge of the source from which such spirits have been transferred or by a special permit authorizing the receipt of the spirit into the bonded warehouse.

22. **Rule 21** of the Rules, 1965, prescribes that the spirits intended for such warehouse shall be conveyed under a bond and at the sole risk of the licensee of the warehouse.

23. In terms of **Rule 25** of the Rules, 1965, such spirits can be removed from the bonded warehouse for transport to another distillery, warehouse or to export for another State or to another Territory in India, only under bond, when permitted by the Excise Commissioner, otherwise such spirits can be removed for the purpose of local consumption or use and in case of foreign liquor for export to other State or Territory in India, only on payment of duty. The only exception from payment of duty is, when it is purchased or removed on public service by an empowered public servant.

24. **Rule 28** of the Rules, 1965, mandates that the bonded warehouse to pay duty at the prescribed rates, on the quantity received in the warehouse and also for the short quantity detected at the time, when it is measured, gauged and proved for removal. However, there are some relaxations as regards spirits stored in a vessel, which is not relevant for the present case.

25. **Rule 37** of the Rules, 1965 provides for periodical check of stocks and levy of duty on the deficiency. Such provision makes a bonded warehouse liable to pay the duty imposed under Section 21 on all the spirits, which may not even be forthcoming and also on the quantity, which the licensee is unable to account

for within the permissible limit of wastage. It also provides that if the bonded warehouse can prove to the satisfaction of the competent authority that the deficiency over the permissible limit of wastage, has been caused by accident or other unavoidable cause, then competent authority can exempt payment of excise duty on such deficient stocks. Thus, under the scheme of the Rules 1965, the bonded warehouse is liable to pay duty determined in terms of Section 21 of the Act, 1910 subject to the exemption as recorded hereinabove provided under Section 37 of the Act, 1910.

26. It is apposite to record herein that law is by now well settled that in the case of excise duty, the taxable event is the production or manufacture of liquor since excise duty remains a single point duty which could be levied at one point mentioned in Section 22 of the Act, 1910.

27. The Scheme of the Act' 1910 and the Rules 1965 mandates the same principle. The Hon'ble Apex Court in the case of **State of U.P. vs Mohan Meakin Breweries** reported in **(2011)13 SCC 588**, held that the taxable event is the production or manufacture of liquor for it being a duty upon the liquor/spirit not, upon sale or proceeds of sale of the liquor/spirit.

28. At the cost of repetition, it is further recorded that from the conjoint reading of Section 22, Section 16 of the Act, 1910 and Rule 28 of the Rules, 1965, it is clear that the beer became excisable when production or manufacture of the spirits was completed. Such duty is upon the spirit and not upon the sale or proceeds of sale of the spirit. Though there is a provision for deferred payment and transportation from the manufacturing unit etc. to the bonded warehouse at the end of the distillation process is permissible, the availability of such deferred payment shall not absolve from the payment of excise duty in as much as being a bonded warehouse, the payment of duty was only deferred on execution of a Bond to pay the duty at a later point of time and therefore, subject to Rule 37 of the Rules, the spirit shall still be excisable irrespective of its expiry and/ or

becoming non-consumable. Therefore, event of sale is not necessary for levy of excise duty under Act, 1910 read with Rules, 1967. The first issue is answered accordingly.

29. Now the whole ground of seeking exemption was that the spirit became unfit for human consumption. However, proviso to Rule 37 of the Rules, 1965 does not prescribe any exemption from payment of excise duty for spirits becoming unfit for human consumption inasmuch as the report of the Commissioner itself discloses that it is the old stock of beers, manufactured between the month of April 2015 to the month of June 2015 and inspection was carried out in the month of March 2016. Therefore, in view of the determination made hereinabove, the reason of expiry and/ or the beer becoming non-consumable, cannot be a ground for granting benefit under Rule 37 of the Rules, 1965 inasmuch as there is no other provision under, which such exemption can be granted. Though, Rule 43 of the Rules, 1965 permits destruction of spirit that are of inferior quality or otherwise unsuitable for human consumption, however, such rule nowhere prescribes that the destruction under the aforesaid condition can be a ground for exemption of excise duty.

30. Therefore, from the reason and discussion made hereinabove, this Court is of the unhesitant view that in terms of Section 11, Section 21 and Section 22 of the Act, 2019, the excise duty was leviable on the date when the manufacturing of the beer was completed and it was transported to the bonded warehouse of the petitioner. This Court is also of the unhesitant view that though the payment of excise duty can be made at a later point of time, however, such provision under Rule 21, Rule 25 and Rule 28 and Rule 36 of the Rules, 1965 clearly stipulates that irrespective of sale, the excise duty shall still be leviable. It is not a case of the petitioner that exemption was sought under Rule 37 of the Rules 1965. This Court is also of the opinion that the permission to destroy the beer in question was granted under Rule 43 of the Rules, 1965 and no exemption from

payment of excise duty can be granted under such rule by the Excise Commissioner and therefore, in absence of any express provision, the Commissioner of Excise shall have no power to recommend exemption from payment of excise duty except as provided under Rule 37 of the Rules, 1965. The issue No. 2 is answered accordingly.

31. That being the position, it cannot be said that the Excise Commissioner has made any unequivocal promise to the petitioner for exemption of duty inasmuch as there cannot be any such promise against the law. Accordingly, it is held that there is no illegality in demanding the excise duty.

32. Accordingly, the writ petition stands dismissed. Parties to bear their own costs.

JUDGE

Comparing Assistant