

**WP-2366-2016**

*(GWALIOR ALCOBREW PVT. LTD. (FORMERLY GWALIOR DISTILLERS LTD.) RAIRU FARM*

*AGRAM MUMBAI ROAD GWALIOR Vs THE STATE OF MADHYA PRADESH)*

**26-08-2016**

**HIGH COURT OF MADHYA PRADESH PRINCIPAL**

**SEAT AT JABALPUR**

**W.P. No.2366/2016**

Gwalior Alcobrew Pvt. Ltd.

Vs.

State of M.P. & Others

**Present: Honâble Shri Rajendra Menon,**

**The Acting Chief Justice &  
Hon'ble Shri Anurag Shrivastava, J.**

Shri R. K. Khanna, learned Senior Counsel with Shri Puneet Agrawal, Shri Sameer Kumar Shrivastava and Shri Parvez Bapuna, Advocates for the petitioner.

Shri Purushendra Kaurav, learned Additional Advocate General with Shri Swapnil Ganguly and Shri Pushpendra Yadav, Govt. Advocates for the State Government.

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**O R D E R**

**(26.8.2016)**

**Per: Rajendra Menon, Acting CJ:**

Challenge in this petition under Article 226 and 227 of the Constitution is made to an order passed by the Revisional Authority under the M.P. VAT Act/ M.P. Commercial Tax Act Annexure P/10 dated 19.8.2014, the re-assessment order passed by the Assessing Officer on

30<sup>th</sup> December 2013 and the re-assessment proceeding initiated vide notice dated 21.12.2012, Annexure P/3. The orders in question pertain to assessment of tax under the M.P. Commercial Tax Act, 1994 for the financial year 2003-2004.

2. Petitioner is manufacturer of Indian Made Foreign Liquor (IMFL) and spirit. The IMFL manufactured by the petitioner in the State of Madhya Pradesh is sold both within the State and outside. Petitioner holds a valid license issued under the provisions of M.P. Excise Act, 1915 (hereinafter referred to as "Excise Act") including a license under FL-9 i.e. a license for bottling of Indian Made Foreign Liquor. Petitioner is registered under the M.P. Value Added Tax Act with TIN No.23225302. According to the petitioner, by virtue of entry No.18 to Schedule I of the Commercial Tax Act, petitioner is exempted from payment of Commercial Tax and Central Sales Tax on the IMFL manufactured and sold by the petitioner both within and outside the State. It is alleged that during the period under consideration i.e. between 1.4.2003 to 31.3.2004 petitioner had filed the prescribed returns under the Central Sales Tax Act along with M.P. VAT Act and vide assessment order dated 11.1.2007 (hereinafter referred to as "the original assessment order"). In the assessment year 2003-2004 assessment was done and petitioner paid the tax. However, after a period of five years from the date of original assessment respondent No.2 the Divisional Deputy Commissioner,

Commercial Tax, Gwalior, is said to have issued notice dated 21.12.2012 vide Annexure P/3 proposing re-assessment for the year in question, on the ground that the exemption or benefit granted to the petitioner by virtue of Entry No.18 of Schedule I to the Commercial Tax Act was incorrect. It is the case of the petitioner that no where in the assessment order is it indicated specifically that the assessment is in view of a judgment rendered by the M.P. Commercial Tax Appellate Board on 31.1.2007 in the case of **Vindhyachal Distilleries Ltd. Vs. Commissioner, Commercial Tax, M.P. - (2009) 15 STJ 51 (MP- Bd)**, even though it seems to be the reason for reopening the assessment. On the basis of the assessment notice so issued, proceedings were held, objections were filed by the petitioner and after the reassessment order was passed vide Annexure P/7 on 30.12.2013, petitioner preferred a revision petition before the Additional Commissioner respondent No.3 and the revision petition having been dismissed, vide order passed on 19.8.2014, this writ petition has been filed under Article 226 and 227 of the Constitution.

**3.** Shri R. K. Khanna, learned Senior Counsel who appears for the petitioner challenged the orders impugned, mainly on the following grounds :-

(a) That the Indian Made Foreign Liquor exported from Madhya Pradesh is exempted or not liable from payment of Central Sales Tax in view of Entry 18, Schedule I of the M.P. Commercial Tax Act,

wherein exemption is provided to all goods on which duty is or may be levied under the M.P. Excise Act. It is the case of the petitioner that on the IMFL exported by the petitioners out of the State as duty may be levied under the Excise Act the exemption or benefit provided under Entry 18 to Schedule I is applicable.

(b) The show cause notice initiating assessment on the basis that exemption is not available to the petitioner since the condition mentioned in Entry 18 has not been fulfilled is untenable as admittedly under Column No.3 of Entry 18, no condition is mentioned and this column is left blank. It is argued that reason for initiating reassessment is itself unsustainable.

(c) That when IMFL manufactured by the petitioner in the State is not leviable for payment of tax under the Sales Tax Act when sold to buyers within the State, then merely because it is sold to buyers outside the State, imposition of duty or tax is unsustainable.

(d) Various grounds are also raised with regard to legality of the reassessment proceedings on account of the fact that it is barred by limitation. Reassessment or re-opening of assessment after a period of five years is not permissible etc.

**4.** Shri R. K. Khanna, learned Senior Counsel emphasized that right from the year 1958 upto 2009-2010 no duty

was paid or tax assessed for IMFL manufactured and sold in the course of Inter State Trade and Commerce such goods were always exempted from payment of Sales Tax as it was treated to be goods on which duty is or may be levied under the Excise Act. However, all of a sudden, for the assessment year in question the duty/ tax is being charged. Shri Khanna, learned Senior Counsel apart from challenging the tenability of issuing notice for reopening of assessment by advancing various grounds pertaining to conditions for exemption not being notified in Entry 18 to Schedule I of M.P. Commercial Tax Act, invited our attention to the entry in question namely "Entry 18 to Schedule I", Section 15 of the M.P. Commercial Tax Act, 1994, Section 28 and 29 of the M.P. Commercial Act, 1994, in the matter of assessment of turnover escaping assessment, Entry 47 to Schedule I of the M.P. VAT Act as it existed prior to 21.12.2009, between 23.12.2009 to 31.3.2013 and after 1.4.2013, definition of an "exercisable article" as appearing in Section 2 sub section (6) of the Excise Act, meaning of the word "export" as defined in Section 2(9) of the Excise Act; meaning of the word "liquor", " spirit" as appearing in Section 2(13) and 2(17) of the Excise Act; duty chargeable under the Excise Act as contemplated under Section 25, Section 28 and Notifications issued by the Government on 28.3.2008 by virtue of sub section (1) of Section 28 of the M.P. Excise Act in the matter of imposing export fee on foreign liquor; Rule 12 of the

M.P. Foreign Liquor Rules, 1996 and Entry 51 of the State list i.e. list 2 to the VII<sup>th</sup> Schedule, Constitution of India, to argue that the assessment made and the order impugned are unsustainable. He referred to the words appearing in Entry 18 to Schedule I of the M.P. Commercial Tax Act and Entry 47 to Schedule I of the VAT Act and emphasized that if the intention of the legislature or the Law makers as is evident from these entries are given its true meaning, then goods subjected to tax/duty under the M.P. Excise Act or if tax or duty may be levied on the goods under the M.P. Excise Act, the same is exempted from payment of tax/duty under the Commercial Tax Act or the VAT Act. He submitted that if the judgment in the case of **Alembic Distributors Ltd. and Anr. Vs. Assistant Commissioner of Sales Tax - [1962]13 STC 64 (MP)** is read along with the meaning of the words "Goods on which duty is or may be levied" as used in Entry 18 of the Commercial Tax Act or Entry 47 of the VAT Act and given its true or literary meaning, the exemption which has been granted right from the year 1958 till now will have to be granted. He also places reliance on the judgment of **Lilasons Breweries Pvt. Ltd. Bhopal Vs. State of M.P. & Others - (JLJ)(1984)278** to say that even if export fee or export duty is being charged, the same is nothing but in the nature of excise duty payable under the Excise Act and once a duty is paid or payable under the Excise Act by virtue of the provisions of the entry made vide Entry

18 to Schedule I or Entry 47 to Schedule I of the Commercial Tax Act and VAT Act respectively, the exemption is liable to be granted as the goods will fall in the category of tax free good as provided under Section 15 or 16 of the Commercial Tax Act and VAT Act respectively. Apart from making these submissions, learned Senior Counsel made elaborate submissions with regard to the availability of the alternate remedy of appeal, why remedy of appeal cannot be availed of, maintainability of the writ petition before this Court and various other grounds in support of his contention. A detailed written submission has been submitted by him along with additional written submissions which are taken on record. In support of various contentions advanced, Shri Khanna, learned Senior Counsel relied upon the following judgments :-

**Alembic Distributers Ltd. and Anr. Vs. Asstt. Commissioner of Sales Tax - [1962]13 STC 64 (MP); Karnataka Cement Pipe Factory Industrial Estate Vs. Superintendent of Central Excise and Anr. - (1986)23 ELT 313 (Kar.); Tamil Nadu (Madras State) Handloom Weavers Cooperative Society Ltd. Vs. Assistant Commissioner of Central Excise - 1978(2) ELT 57 (Mad.); Assistant Collector of Central Excise, Calcutta Division Vs. National Tobacco Co. of India Ltd. - (1972)2 SCC 560; Wallace Flour Mills Co. Ltd. Vs. CCE - [1989(44) ELT 598 (SC)]; S. K. Pattnaik Vs. State of Orissa**

**and ors. - (2000)1 SCC 413; McDowell & Co. Vs. CTO - [(1985)3 SCC 230]; R. C. JallParsi Vs. UOI - [AIR 1962 SC 1281]; Lilasons Breweries Pvt. Ltd. Bhopal Vs. State of M.P. & Others - (JLJ)(1984)278; Mohan Meakin Breweries Ltd. Vs. State of Uttar Pradesh & Ors. on 31<sup>st</sup> January, - (1977)6 CTR All 181 & MP Tax Board Appeal No.A177/CTAB/13 (Central) Dated 1.3.2016.**

5. Learned Senior Counsel took us through the judgments in the case of **Alembic Distributers Ltd. and Anr.** (supra); **McDowell & Co.** (supra); **S. K. Pattnaik** (supra); **R. C. JallParsi** (supra) and argued that mere remission/exemption/ refund or adjustment of the duty paid by the assessee, does not mean that duty was not levied or that the goods are not amenable to levy under the M.P. Excise Act. He argued that the words used in the entry in question i.e. "is or may be levied" would mean that an excisable article liable for payment of duty under the Excise Act, but on which even if no duty is levied, is exempt from payment of tax under the sales tax or commercial tax Act, an excisable article subjected to payment of duty when sold within the State cannot become a non excisable article merely because of its export will not become a non excisable article. Learned Senior Counsel invites our attention to Section 25 of the Excise Act to say that excise duty can be levied by the State Government on all excisable article other

than medical and toilet preparation, irrespective of the fact that the goods are imported, exported or transported, a product manufactured in the State being a excisable article is exempted and non- payment of excise duty is of no consequence for determining the taxability of the good. Learned Senior Counsel took us through various judgments in this regard, particularly, the judgment in the case of **Alembic Distributers Ltd. and Anr.**(supra); **Lilasons Breweries Pvt. Ltd. Bhopal** (supra) and **S. K. Pattnaik** (supra) and argued that the taxable event of an excisable article is the event of its manufacture and once by virtue of its manufacture in a particular State it becomes a excisable article, the same will not become non excisable merely on a exemption granted in the matter of payment of excise duty. Learned Senior Counsel also relied upon various judgments to say that the reassessment proceedings initiated are unsustainable. With regard to availability of alternate remedy, it is said that when the levy itself is per se illegal and when the jurisdiction exercised for imposing the liability is contrary to settled principles of law and justice, relegating the petitioner to take recourse to the alternate remedy is not proper. Reliance is placed on judgments of the Supreme Court in the cases of **Paradip Port Trust Vs. Sales Tax Officer and others** â (1998)4 SCC 90; **Balco Captive Power Plant Vs. National Thermal Power Corporation - (2007) 14 SCC 234** and the law laid down by this Court in the case

**of Commercial Engineers & Body Builders Co. Ltd. Vs. Divisional Deputy Commissioner, Commercial Tax Office & Anr. (2015)27 STJ (MP)** to say that even if an alternate remedy is available, this petition is maintainable and the petitioners cannot be relegated to take recourse to the remedy of appeal. It is said that duty imposed is illegal and unsustainable, therefore, the petition be allowed and the impugned orders or action quashed.

**6.** Shri P. K. Kourav, learned Additional Advocate General appearing for the State Government refuted the aforesaid contention and argued that against the order impugned, as a statutory remedy of appeal under Section 46 of the VAT Act is available and when mixed questions of law and facts are involved, which can be more appropriately dealt with by the statutory Appellate Authority, this Court should not exercise its extraordinary jurisdiction in the matter under Article 226 and 227 of the Constitution. Learned Additional Advocate General submitted that the contention of Shri R. K. Khanna, learned Senior Counsel cannot be accepted. It is said that there is a difference between IMFL exported in the course of Inter State Trade and Commerce and when sold within the State. Both these IMFL constitute two different class and if for a purpose of imposing duty they are classified differently, this is permissible in law. Learned Counsel took us through the provisions of Section 17 of the Excise Act which deals with license

required for sale of intoxicants; Section 26 with regard to levy of duties, Section 28 dealing with Form and conditions of license etc. Section 62 and sub section (2)(d), (j) of M.P. Excise Act with regard to rule making power of the State Government, the M.P. Foreign Liquor Rules, 1966, Rule 8 pertaining to various categories of license granted like, FL9, FL9A, etc. Rule 12 in the matter of export of foreign liquor, Rule 9 with regard to registration of leviable duties on sale within the State, markings on goods exported with the mark "for sale within the State of M.P." or "outside" to say that there exists a marked difference between IMFL, exported outside the State and sold within the State, the procedure for export of IMFL, to say that the same does not suffer payable excise duty. It is argued that as the liquor exported does not suffer levy of excise duty and as no excise duty is leviable the exemption cannot be granted. Learned counsel submits that levy can only take place when an article is leviable to duty, as IMFL which is exported and which forms a separate class being not leviable for duty under the M.P. Excise Act, Entry 47 to Schedule I or Entry 18 of the Commercial Tax Act would not apply. It is said that leviability of duty being the determining factor and as no tax is levied on IMFL, exported, the contention of the petitioners is not correct. It was argued that on IMFL exported to other States, no advance tax is charged. He took us through Rule 12 sub rule (3) and sub rule (4) to refute the contentions

advanced by Shri Khanna and submits that under the sub rule itself it is clear that duty is not payable under the Excise Act, he argues that what is contemplated under Rule 12 is only a regulatory measure in the matter of controlling export of IMFL, it does not deal with imposition of duty, no excise duty is leviable on foreign liquor exported out of the State and therefore, the act of the Government is proper. In support of his contention, learned counsel relied upon the following judgments :-

**Gram Panchayat Gorakhpur Vs. Khushali Dindayal Sahu - AIR 1973 MP 19 (FB); Bhagwati Prasad Vs. Govt. of M.P. - 1966 MPLJ 557; Surinder Singh Vs. Central Govt. - (1986)4 SCC 667; Orissa State (Prevention & Control of Pollution) Board Vs. Oriental Paper Mill - (2003)10 SCC 421; Printers (Mysore) Ltd. Vs. M.A. Rashid - (2004)4 SCC 460; Some Distilleries Vs. State of M.P. - 1997(I) JLJ 319; Orient Weaving Mills Vs. UOI - AIR 1963 SC 98; Babulal & Bal Govind Vs. State - 1968 MPLJ 5 & M/s Gannon Dunkerley & Co. Ltd. Vs. State of Rajasthan - (1993)I SCC 364.**

7. Both the counsels submitted detailed written arguments, apart from the oral submissions made as stated herein above. We have heard them at length and we shall now proceed to consider their submissions.

**8.** The questions that requires our consideration are :-

(a) Whether Indian Made Foreign Liquor which is not sold within the State but which is sold outside, is subject

to the exemption available under Entry 18 to Schedule I of the Commercial Tax Act or Entry 47 to Schedule I of the VAT Act ?

(b) Whether the petition is maintainable in view of availability of an alternate remedy ?

(c) Whether the re-assessment proceedings conducted in the matter is in accordance with law ?

**9.** We are of the considered view that if the first question, whether Indian Made Foreign Liquor exported from the State is exempted from payment of Commercial Act / VAT Act, in view of Entry 18 to Schedule I of M.P. Commercial Tax Act or Entry 47 to Schedule I of VAT Act, is answered in favour of the petitioner, the imposition of duty/ tax itself would be illegal and then the petition will have to be allowed without even advertent to consider the other issues involved or canvassed before us and therefore, we propose to deal with this aspect of the matter at the very outset.

**10.** To evaluate this questions, we are required to take note of certain statutory provisions as are contained in the M.P. General Sales Tax Act, the M.P. Commercial Tax Act, 1994, the M.P. VAT Act, 2002 and the M.P. Excise Act, 1950. However, before considering the statutory provisions, we may take note of an admitted fact which was canvassed by Shri Khanna, learned Senior Counsel before us, it is said that right from the year 1958 upto 2009-2010, IMFL manufactured in the State but sold in the course of Inter State Trade and Commerce was

always treated as exempted from payment of sales tax on account of the fact that it was being treated as a excisable article on which duty is being or could be levied under the M.P. Excise Act. However, it is after 2009-2010 when the cause of action for filing this petition arose that the taxing authorities changed their view in the matter.

**11.** Initially, under the M.P. General Sales Tax Act, 1958 under Schedule I with respect to tax free goods vide Entry 23 following provisions were made :-

"23. Goods on which duty is or may be levied under the Madhya Pradesh Excise Act, 1915 (No. 2 of 1915) other than medicinal and toilet preparations specified for the time being in the Schedule to the Medicinal and Toilet Preparations (Excise Duties) Act, 1955 (No.16 of 1955) and

Thereafter, when the M.P. Commercial Tax Act, 1994 came into force. Entry 18 to Schedule I to Section 15 provided as under :-

"18. Goods on which duty is or may be levied under the Madhya Pradesh Excise Act, 1915 (No. 2 of 1915) other than medicinal and toilet preparations specified for the time being in the Schedule to the Medicinal and Toilet Preparations (Excise Duties) Act, 1955 (No.16 of 1955).

And thereafter, when the M.P. VAT Act, 2002 came into force, Entry 47 to Schedule I to Section 16 to this Act contemplated a provision which reads as under :-

"**47.** Goods on which duty is or may be levied under the Madhya Pradesh Excise Act, 1915 (No.2 of 1915) other than medicinal and toilet preparations specified for the time being in the Schedule to the Medicinal and Toilet Preparations (Excise Duties) Act, 1955 (No.16 of 1955).

From 22.12.2009 entry 47 was :-

**47.** Goods on which duty is or may be levied under the Madhya Pradesh Excise Act, 1915 (No.2 of 1915) other than medicinal and toilet preparations specified for the time being in the Schedule to the Medicinal and Toilet Preparations (Excise Duties) Act, 1955 (No.16 of 1955).

And from 1.4.2013 onwards it is -

**47.** Goods on which duty is or may be levied under the Madhya Pradesh Excise Act, 1915 (No.2 of 1915) other than -

(i) medicinal and toilet preparations specified for the time being in the Schedule to the Medicinal and Toilet Preparations (Excise Duties) Act, 1955 (No.16 of 1955); and

(ii) liquor sold by a dealer other than a dealer who holds C.S.-2/C.S.2B/F.L.1/ F.L.1AAAA license under the Madhya Pradesh Excise Act, 1915."

Section 15 of the M.P. Commercial Tax Act, 1994 provides that "No tax shall be payable on the sales or purchase of goods specified in the second column of Schedule I, subject to the restriction and exceptions, if any, set out in the corresponding entry in the third column thereof."

**12.** After coming into force of the VAT Act of 2002, Section 16 of the VAT Act provided for tax free good and this Section contemplates that "no tax shall be payable

on the sale or purchase of goods specified in Schedule I, subject to conditions and exceptions, if any, set out in the corresponding entry in the third column" and the relevant entry in this regard is Item 47 . All the provisions, i.e. Entry 23 Schedule-I of the M.P. General Sales Tax Act, Entry 18 to Schedule-I of the Commercial Tax Act and Entry 47 to Schedule-I of the VAT Act provided that "goods on which duty is or may be levied under the M.P. Excise Act of 1955 other than Medicinal and Toilet Preparations are exempted from payment of sales tax, under General Sales Tax or VAT Act as the case may be. It is only from 23.12.2009 that certain conditions are carved out in column No.3 with regard to restricting the applicability of this provision when sold by a dealer other than a dealer who holds the license of the category specified therein. This condition is not relevant for the present in this petition as the same is only applicable after 23.12.2009.

**13.** That apart, Section 2(6) of the M.P. Excise Act defines an "excisable article" to mean - (a) any alcoholic liquor for human consumption; or (b) any intoxicating drug used for human consumption or any intoxicating drug or opium. And under Section 2(9) of the Excise Act "export" has been defined to be an act of taking out of the State i.e. the State of M.P. any excisable good. Chapter V of the M.P. Excise Act deals with payment of duties and fees and Section 25 contemplates payment of duty on excisable article. Sub section (1) of Section 25

provides that "an excise duty or a countervailing duty, as the case may be, shall, if the State Government so directs, be levied on all excisable articles other than medicinal and toilet preparations, as may be specified in the schedule, when they are imported, exported, transported, manufactured, cultivated or collected etc. Proviso to this Section contemplates that it shall be lawful for the State Government to exempt any excisable article from any duty to which the same may be liable under the Act. Section 28 of the Excise Act deals with Forms and conditions of licence, permit and passes and Section 62 is the rule making power available to the State Government and under the Rule making power available, the M.P. Foreign Liquor Rules of 1996 have been formulated wherein, under Rule 8 categories licenses into FL.1, FL.1AAAA etc. and finally Rule 9 deals with export of foreign liquor. Under the 7<sup>th</sup> Schedule, list 2 to the Constitution under Entry 51 duty of excise on the goods manufactured or produced in the State and countervailing duty is permissible to be levied and this include alcoholic liquor for human consumption.

**14.** If we analyze the statutory provisions as are indicated herein above, it would be seen that by virtue of Section 2(6) of the Excise Act of 1950, any alcoholic liquor which is fit for human consumption or a intoxicating drug is an excisable article and if an article is excisable as defined therein, the State Government under Section 25 of the Excise Act may, if it so directs,

levy excise duty on such excisable article and under the proviso to this Section, the State Government is empowered to exempt any excisable article from payment of duty/ tax. License permits and passes granted under the Excise Act are controlled by the provisions of Section 28 and enable the State Government to prescribe such restriction and conditions and such form for the purpose of granting license, permit and passes etc. Various notifications have been issued from time to time fixing the duty for manufacturing, bottling, and various other aspects, these notifications were referred to and it was argued that exercising the powers available under Section 25 i.e. the charging Section read with Section 28 of the Excise Act, excise duty is being charged on foreign liquor and spirit including payment of export fee in cases of export. At this stage, it would be appropriate to take note of Rule 12 of the M.P. Foreign Liquor Rules, 1996 as this rule is very relevant with regard to the issue in question. Rule 12 of the M.P. Foreign Liquor Rules, 1996 reads as under :-

**"12. Export of Foreign Liquor -** (1) Export of only those labels of foreign liquor shall be permitted which are registered with the Excise Commissioner under rule 9.

(2) Only F.L.9 or F.L.9A licensee shall be permitted to export.

...

(4) The exporter shall also deposit the prescribed duty leviable on the full quantity of foreign liquor to be exported, or furnish a bank guarantee for an equal amount from a local branch of a rationalised bank or execute a bond with adequate solvent sureties for the amount in Form F.L.23. After the receipt of the verification report in respect of the despatched consignment from the officer-in-charge of the importing unit, further consignment of foreign liquor involving the same or lesser amount of duty may be exported on the strength of the same cash deposit or bank guarantee or bond.

...

**13. Securing the Verification Report** - The exporter shall obtain a verification report from the officer-in-charge of the importing unit and furnish it to the authority who issued the export permit within 21 days of the expiry of period of permit. If the exporter fails to do so, the leviable duty on the foreign liquor exported shall be recovered from deposits made, bank guarantee furnished or the security bond executed in accordance with sub rule (4) of Rule 12. This shall be in addition to any other penalty which may be imposed under Rule 19. In case the foreign liquor is exported to another country, the licensee exporting the

liquor shall furnish documentary evidence that the consignment has actually left the country."

**15.** Under Entry 18 to Schedule-I of the M.P. Commercial Tax Act, certain goods are exempt from payment of tax, these are the goods on which duty is or may be levied under the M.P. Excise Act. Similarly, under Entry 47 of the VAT Act, particulars of tax free good as contemplated under Section 16 of the VAT Act are specified and it includes good on which duty is or may be levied under the Excise Act. Shri Khanna, learned Senior Counsel had emphasized and argued that the words used in the entries are "goods on which duty is or may be levied". According to him, if excise duty is levied or is charged or paid under the M.P. Excise Act, same is exempted from payment of taxes or duties under the M.P. General Sales Tax Act, the Commercial Tax Act and VAT Act. Apart from that if the goods are such, on which duty even though not actually paid but on which a duty may or can be levied under the M.P. Excise Act, such goods are also exempt from payment of tax or duty. According to him, it is evident from the words used in the statute, that it is not necessary that only such goods are exempted on which excise duty is in fact paid. There may be cases where duties is leviable under a statute but for various reasons the Government may not be levying duty, even such goods are exempted from payment of duty. This was rebutted by Shri Kourav by saying that grant of exemption is of no consequence. If duty is leviable then

only the protection under the entry would be available. If the duty is not at all leviable and when there is no liability to tax, no exemption can be claimed and therefore, IMFL exported according to Shri Kourav, it is not a tax free good.

**16.** It is a cardinal principle of interpretation of statute that a rule or a statutory provision has to be read in a manner to give effect to the legislative intent and if on a bare reading, the intention of the rule maker or its meaning is clear, effect should be given to the provisions by interpreting it in a manner which goes in furtherance to the intention for which a particular rule was legislated. If we analyze the words used in the entries in question, i.e. the relevant entries under all the statutory provisions as detailed herein above, we find that the words used are goods on which duty is levied under the M.P. Excise Act or goods on which duty may be levied under the M.P. Excise Act. Therefore, we are now required to see whether the goods in question i.e. IMFL manufactured in Madhya Pradesh and exported is a product on which duty is or may be levied under the Excise Act ? Answer to this question would determine the issues in question. There is, nor can there be any dispute to the fact that Indian Made Foreign Liquor manufactured in Madhya Pradesh and exported is an excisable good amenable to the provisions of the M.P. Excise Act, 1950, it is infact an "excisable article" and therefore, the State is empowered under the Excise Act

to levy duty on the same. It is also a admitted position that IMFL manufactured in the State and when sold within the State it is subjected to payment of excise duty.

**17.** At this stage, we deem it appropriate to take note of certain judgments having bearing on the issue in question. In the case of **Alembic Distributers Ltd. and Anr.** (supra), Entry 32 to Schedule II of the Central Provinces and Berar Sales Tax Act, 1947 was considered by a Division Bench of this Court, this entry is *para materia* with the entries under the Commercial Tax Act, in the Central Provinces and Berar Sales Tax Act, the entry is identically worded i.e. "goods on which duty is or may be levied" under the Central Provinces and Berar Excise Act, 1915" after taking note of the aforesaid entry in para 7, the learned Bench held as under :-

"On reading this entry, we agree that it is not necessary that duty should have been actually levied on the goods to attract the application, of this entry. It is sufficient if there is power under the relevant Act to impose such a duty. In the present case, the material Act is the Excise Act. In Section 2(6), 'excisable article' has been defined to mean 'any alcoholic liquor for human consumption'. 'Liquor' as defined in Section 2(13) includes 'all liquid consisting of or containing alcohol', Reading these two definitions together, medicinal and toilet preparations, which are liquids and which

contain alcohol, would be liable to excise duty.

"

*(Emphasis Supplied)*

**18.** It is therefore, clear from the aforesaid principle, that it is not necessary that excise duty should be actually levied on goods to attract application of the entry. It is sufficient, if there is power under the relevant act to impose such a duty. This principle in our considered view, squarely applies to the present case also.

**19.** In the case of **Karnataka Cement Pipe Factory Industrial Estate** (supra) a Bench of the Karnataka High Court has held that an excisable good will not become a non excisable good only because it is granted exemption from payment of duty, the High Court was interpreting certain provisions of the Central Excise Act and the rules framed thereunder wherein the words used were "as being subject to a duty of excise". In the case of **S. K. Pattnaik** (supra), the Hon'ble Supreme Court considered certain questions while interpreting the provisions of Bihar and Orissa Excise Act. In this case the appellant imported into the State of Orissa Indian Made Foreign Liquor and stored it in the licensed bonded warehouse from where the liquor was to be released for sale. It seems that when the liquor was so stored in the warehouse a part of the stock became sedimented and became unfit for human consumption. It was therefore, destroyed. When notice was issued for payment of

countervailing duty, the demand was challenged and while considering the question, the Supreme Court held that "excise duty" is essentially a duty on manufacture of goods and the taxable event is the manufacture of the excisable goods and "countervailing duty" according to the Hon'ble Supreme Court on the other hand is imposed when excisable articles are imported into the State. The Hon'ble Supreme Court referred to Section 27 of the Bihar and Orissa Excise Act and found that Section 27 is the charging section for both excise duty and countervailing duty and Section 28 provides for the ways for levying the duty which can be imposed under Section 27. It was held that Section 28 deals with the manner of levying duty which could be imposed under Section 27 of the Act. Thereafter, in para 6 the Hon'ble Supreme Court held that expression "levy" may include both the process of taxation as well as the determination of the amount of tax or duty, the expression "collection" refers to actual collection of the payable duty or the tax. It is held that since the taxable event for attracting excise duty or countervailing duty is the manufacture or import of excisable goods into the State, the charge of incidence of duty stands attracted as soon as the taxable event takes place and the facility of postponement of collection of duty under the Act or the rules framed thereunder, can in no way effect the incidence of duty on the imported goods. If we apply this principle to the facts and circumstances of the present case, then, the moment

liquor is manufactured in the State of M.P., it becomes liable for payment of excise duty. Now once an excisable good liable for charge of duty comes into an existence mere postponement of the collection of duty or exemption in any manner whatsoever, granted cannot be a ground to say that it is not an excisable good or that it is not leviable to duty under the Excise Act. In our considered view once an excisable good comes into existence and the State Government has the power to levy duty on such an excisable good, merely because the State Government thought it appropriate not to levy any duty or deffer its collection that cannot be a ground to say that the exemption or protection available under the provisions of Section 15 or 16 of the Commercial Tax Act or the VAT Act is not applicable. In this regard, we may also take note of certain observations made by the Hon'ble Supreme Court in the case of **McDowell & Co.** (supra). In Para 25, 27, 28 and 29 various judgments of the Supreme Court with regard to leviability of excise have been considered and the matter is so dealt with :-

"**25.** The Federal Court In The Province of Madras v. Messrs. Boddu Paidanna & Sons,(1) held:

"There is in theory nothing to prevent the Central Legislature from imposing a duty of excise on a commodity as soon as it comes into existence, no matter what happens to it afterwards. whether it be sold, consumed,

destroyed, or given away. A taking authority will not ordinarily impose such a duty, because it is much more convenient administratively to collect the duty tax in the case of most of the Indian Excise Acts) when the commodity leaves the factory for the first time, and also because the duty is intended to be an indirect duty which the manufacturer or producer is to pass on to the ultimate consumer, which he could not do if the commodity had, for example, been destroyed in the factory itself. It is the fact of manufacture which attracts the duty, even though it may be collected later; .. "

This view has been followed by this Court and the position has been put beyond doubt by a series of decisions. In R.C. Jall v. Union of India,(2) it has been observed:

"The Excise duty is primarily a duty on the production or manufacture of goods produced or manufactured within the country. Subject always to the legislative competence of the taking authority, the said tax can be levied at a convenient stage so long as the character of the impost 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."

...

**27.** In *M/S. Guruswamy & Co. etc. v. State of Mysore & ors* (2) Sikri, J. (as he then was), spoke for the majority and stated the ratio thus:

"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. "

**28.** In *Jullundur Rubber Goods Manufacturers' Association v. Union of India & Anr.*, (3) Grover, J. after extracting a part of the Judgment in Jall's case (*supra*) spoke for the Court thus:

"The above statement of law in no way supports the argument that excise duty cannot be collected from persons who are neither producers nor manufacturers. Its incidence certainly falls directly on the production or manufacture of goods but the method of collection will not affect the essence of the duty."

**29. In A.B. Abdul Kadir & Ors. v. State of**

Kerala, (4) this Court restated the position thus:

"Excise duty, it is now well settled, is a tax on articles produced or manufactured in the taxing country. Generally speaking, the tax is on the manufacturer on the producer, yet laws are to be found which impose a duty of excise at stages subsequent to the manufacture or production."

Thus, the incidence of excise duty is directly relatable to manufacture but its collection can be deferred to a later stage as a measure of convenience or expediency. "

*(Emphasis Supplied)*

**20.** From the aforesaid principles of law, it is clear that the method of collection does not affect the essence of the duty but only relates to the machinery for collection based on administrative consideration and the incident for payment of excise duty is directly relateable to manufacture but its collection can be postponed or deferred to a later stage and even exemption granted from collection. The Allahabad High Court in the case of **Mohan Meakin Breweries Ltd. Vs. State of Uttar Pradesh & Ors. - (1977)6 CTR All 181** considered similar issues and after taking note of the law laid down by the Supreme Court in the case of **R. C. Jall Parsi Vs. Union of India**, so also various provisions of the Uttar

Pradesh Excise Act of 1910 found that under Section 28 of the Uttar Pradesh Excise Act duty may be imposed on any excisable article exported in accordance with the provisions of the Act or manufactured, found that duty can be levied on manufacture of the product, however, after taking note of the similar rule applicable in the State of U.P. i.e. to Rule 12 as applicable in the State of M.P., held against the Revenue by holding that merely because the State Government did not levy the duty, the goods will not become non excisable or non duty leviable.

**21.** In the case of **Lilasons Breweries Pvt. Ltd.** (supra), a Division Bench of this Court took note of Section 25 of the M.P. Excise Act and held that there cannot be any dispute to the effect that the State is not entitled to charge duty of customs including export duty which falls under Entry 83 of the list I of the Constitution. In the case of **Lilasons Breweries Pvt. Ltd.** (supra) export fee was being charged on Indian Made Foreign Liquor (Beer) and this levy of export fee/ export duty was challenged by saying that export duty cannot be levied by a State in exercise of its power under Entry 51 of list -2 as it is only the Union Government which can impose customs or excise duty under Entry 83 of list 1. The Court, in the aforesaid case took note of the meaning of the word "export", "import" as appearing in the M.P. Excise Act and held that the duty payable by the petitioner with regard to Foreign Liquor exported out of M.P. namely, Beer in the said case, and payment of duty for such

export which is collected as export duty, in real and infact is a duty of excise which is levied at the point of export of beer from M.P. to another State. It has been held in the aforesaid case after taking note of the provisions of Section 25 sub section (1)(b) and 1(e) of the M.P. Excise Act that when an excisable good manufactured within the State is subjected to duty at the point of its export outside M.P. the real nature of duty is not export duty but only excise duty and for upholding this preposition, reliance has been placed on the judgment of Supreme Court in the case of **R. C. Jall Parsi** (supra). We find that in the matter of export of liquor from the State of M.P. also certain export fees are paid and if we take note of Rule 12 of the M.P. Foreign Liquor Rule, we find that a detailed procedure laid down for export of foreign liquor. Under this Rule the exporter is required to deposit the prescribed duty leviable on the full quantity of foreign liquor or in alternate furnish a bank guarantee for an equal amount from a local branch of a Nationalized Bank or execute a bond in Form FL23. It is only after payment of this duty or guarantee for payment of duty by way of security that export is permitted and after the export is affected and duty paid in the State where the material is exported, refund can be claimed by producing a verification report with regard to consignment having paid duty in the exported State. It is therefore, clear from a complete reading of the statutory provisions and the Rules made under the

Excise Act that Foreign Liquor manufactured in Madhya Pradesh is a excisable good, duty is leviable on such good under the Excise Act, when a IMFL manufactured in Madhya Pradesh is sold in Madhya Pradesh duty is charged but when it is exported out of Madhya Pradesh, the manufacturer and the exporter has to either deposit the duty in full or furnish certain security or guarantee equal to the amount of duty payable, then export the goods, pay duty in the exported State and then claim refund as contemplated under the provisions of Rule 12 and 13 of the M.P. Foreign Liquor Rules and if the verification report as contemplated under Rule 13 is not produced within a reasonable time, the amount paid gets forfeited. The aforesaid factual aspect, if analyzed in the backdrop of various legal provisions as are detailed herein above, clearly shows that IMFL manufactured in Madhya Pradesh and sold outside the State, is an excisable article on which duty may or can be levied by the State but instead of levying duty the State has granted certain benefits or exemption on fulfillment of certain conditions and therefore, we have no hesitation to say that the provisions of entry 18 and 47 of Schedule I of the Commercial Tax Act and the VAT Act has to be interpreted by holding that the words used, namely, duty may be levied under the M.P. Excise Act clearly contemplates that Indian Made Foreign Liquor exported out of Madhya Pradesh is leviable to duty under the Excise Act, merely because the State Government is not

levying any duty or is granting certain exemption or concession it cannot be said that it is not a excisable good on which duty is not levied. It is a good on which duty is leviable and once it becomes a excisable good on which duty is leviable, it comes within the category of tax free good as provided under Section 15 and 16 of the Commercial Tax Act and the VAT Act and imposition of duty under the Commercial Tax Act and VAT Act is clearly impermissible.

**22.** Shri P. K. Kourav by referring to various judgments in the case of **Gram Panchayat Gorakhpur** (supra); **Bhagwati Prasad** (supra) and **Som Distilleries** (supra) had argued that IMFL which is exported from Madhya Pradesh forms a separate class which is not leviable for duty under the Madhya Pradesh Excise Act and therefore, the entry would not apply to them.

**23.** We cannot accept the aforesaid proposition putforth. Even if the IMFL exported out of the State form a separate class, still it is leviable to duty under the M.P. Excise Act and once it is found to be leviable to duty under the M.P. Excise Act, it becomes a tax free good, not liable for payment of commercial tax, sales tax or VAT, as the case may be, by virtue of Entry 18 or 47. The contention of Shri Kourav to say that there is no leviability on IMFL exported out of Madhya Pradesh is not correct. Once it is a excisable good, excise duty can always be levied, but merely because the State Government does not levy excise duty, in its own

discretion the benefit of exemption cannot be denied.

**24.** Finally, Shri P. K. Kourav had argued that the provisions of Rule 12(3) and 12(4) of the Foreign Liquor Rules is only a regulatory mechanism to prevent illegal export, security measure for regulating export of liquor from the State of M.P. In our view from the written argument submitted by the State Government itself, it is clear that to avoid double taxation in the matter of payment of excise duty on IMFL manufactured in Madhya Pradesh, Rule 12 has been framed, so that the manufacture is required to pay excise duty only once, i.e. either in the State of M.P. or in the State where it is exported. The Rule as formulated goes to show that the intention of the rule makers were that foreign liquor manufactured in State of M.P. and exported to any other State even though a excisable good is exempted from payment of excise duty in M.P. subject however, to the condition that they pay excise duty in the State to which the good are exported, that being the intention of the rule maker, it has to be held that it becomes a tax free good and as the words used in the entries are "goods on which duty may be levied under the Excise Act", this would and could only mean that duty could be levied on the goods in question but the State Government thought it appropriate not to levy duty and once it is a good on which duty could be levied the exemption has to be granted.

**25.** Before parting, we may also consider the argument

advanced by Shri Kourav in the matter of existence of alternate remedy. The question of existence of alternate remedy has already been considered by the Supreme Court in the case of **Paradip Port Trust** (supra); **Balco Captive Power Plant** (supra) and by Division Bench of this Court in the case of **Commercial Engineers & Body Builders** (supra) and it is well settled principle of law that if any action is found to be contrary to law or unsustainable, then relegating a party to take recourse to the alternate remedy is not necessary. In the case of **Paradip Port Trust** (supra) it is held by the Supreme Court that if a question involved pertains to interpretation of statutory provisions instead of leaving it to the taxing authority to interpret such a provision, the High Court or the Writ Court can exercising the jurisdiction. It has been held consistently not only by the Supreme Court but also by this Court that if the power exercised under the statute is found to be in excess to the power or jurisdiction provided under the statute, is unreasonable, exercised without proper consideration and when disputed questions of fact are not involved, a writ Court can always interfere into such matters. Applying the principles of law laid down in the cases of **Paradip Port Trust** (supra); **Balco Captive Power Plant** (supra) and by Division Bench of this Court in the case of **Commercial Engineers & Body Builders** (supra) , we see no reason to relegate the petitioners to take recourse to the alternate remedy available of filing

appeal, once we find that imposition of tax under the Commercial Tax Act/ VAT Act is unsustainable.

**26.** Once we have found that the imposition of duty is itself unsustainable it is not necessary now for us to go into various other questions canvassed before us at the time of hearing including the power to reopen the assessment, the limitation for reopening assessment, non fulfillment of conditions statutory in nature etc. All these questions are left open are not required to be considered now in this petition and parties are at liberty to take up the matter on such ground if required on a future date.

**27.** With the aforesaid, petition stands allowed. The orders impugned Annexure P/10 dated 19.8.2014, the reassessment order dated 30<sup>th</sup> December 2013 and the reassessment notice dated 21.12.2012 are all quashed.

**28.** Accordingly, the petition stands allowed and disposed of.

**(RAJENDRA MENON)**  
**ACTING CHIEF JUSTICE**

**(ANURAG SHRIVASTAVA)**  
**JUDGE**

mrs. mishra