



ECONOMIC  
LAWS  
PRACTICE  
ADVOCATES & SOLICITORS



# MANUAL OF KEY JUDICIAL PRONOUNCEMENTS

Volume 2: April 2022

## Alcobeve Sector

### INSIDE:

- Anti -Competitive conduct in the industry
- Advertisements & brand extensions
- De-listing of brands
- Constitutionality of prohibition provisions
- GST & Excise issues
- Recent developments

## TABLE OF CONTENTS

S. No.	Legal Principle	Case details	Page No.
<b><u>On Beer Industry and the Uttarakhand CCI Case</u></b>			
1.	Penalty imposed by CCI on various beer companies and their association for alleged cartelization and indulging in alleged anti-competitive behaviour. The matter is pending in appeal before the NCLAT	<i>In Re. Alleged anti-competitive conduct in the Beer Market in India (Suo Moto Case No. 06 of 2017 – CCI)</i>	4
2.	Penalty imposed by CCI on exclusive wholesale licensee for alleged discriminatory conduct and abuse of dominant position, which led to distortion in the market	<i>In Re. International Spirits and Wines Association of India (ISWAI)(Case No. 2 of 2016 – CCI)</i>	5
<b><u>Discriminatory procurement by state</u></b>			
3.	It is the State's duty to implement its policy in an equal way	<i>United Spirits Limited vs. Uttarakhand Agricultural Produce Marketing Board and Ors., 2016(1) UC 270</i>	6
<b><u>On issuance of discounts and rebates</u></b>			
4.	Challenge to the prohibition on extending concessions, rebates or discounts on the sale price of liquor - pending before the Division Bench of the Delhi High Court.	<i>Bhagwati Transformer Corp. and Ors. V. Government of NCT of Delhi (WP(C) 3647/2022) – High Court of Delhi</i>	7
<b><u>On Advertisement of Brand Extensions</u></b>			
5.	Suo moto complaint against OTT advertisement for sparkling water not upheld- sufficient documentary evidence supporting that it is a genuine brand extension	<i>Bacardi India Private Limited – Dewar's Highball Soda Water (CCC Recommendation on 2019-C.2366)</i>	8
<b><u>On Non-Issuance of Form-C</u></b>			
6.	Direction given to State VAT authority to issue Form C within fixed time frame	<i>Carlsberg India Private Limited v. State of Maharashtra, WP 329/2021 (Bom)</i>	9
<b><u>On The Presence of Liquor Shops on Highways</u></b>			
7.	Prohibition imposed on all States and Union Territories on issuance of liquor licenses along National and State highways. Also imposed for advertisements and signages on availability of liquor.	<i>State of Tamil Nadu and Ors. V. K Balu and Ors. AIR 2017 SC 262</i>	10
<b><u>On de-listing of brands</u></b>			
8.	Stay imposed on Excise Department's Order which without following the principles of natural justice, delisted brands which were sold in Uttarakhand but not in neighbouring States	<i>Devans Modern Breweries Ltd v. State of Uttarakhand (WPMS/1303/2021) and Maa Sheetla Distributors Pvt. Ltd. v. State of Uttarakhand (WPMS 1292/2021) – High Court of Uttarakhand</i>	11

<b><u>On constitutionality of prohibition provisions</u></b>			
9.	Certain provisions of the Bombay Prohibition Act 1949 prohibiting possession, sale and production that were not in conformity with Article 19(1)(g) held unsustainable	<i>State of Bombay and Another vs. F.N Balsara, AIR 1951 SC 318</i>	12
<b><u>On state's power to levy excise duty on ENA/SDS</u></b>			
10.	The State cannot impose UPVAT on ENA after the enactment of GST Law	<i>Jain Distillery vs. State of Uttar Pradesh and Ors., 2021 (10) ADJ 69</i>	14
11.	The State has no power to levy excise duty on alcoholic liquor unfit for human consumption	<i>State of Orissa &amp; Ors. vs. Utkal Distilleries Limited, Civil Appeal Nos.5666-5668 OF 2009, Supreme Court</i>	15
<b><u>On real taxable income/distributable surplus</u></b>			
12.	Distributable surplus paid by Respondent assessee held to be 'application of income' and not 'allowable expenditure' under Section 37 – Matter pending in appeal before the Supreme Court	<i>The Pr. Commissioner of Income Tax, Bangalore and Ors vs. Chamundi Winery and Distillery, I.T.A. Nos. 155/2016, 458/2013, 467/2015, 173/2017 and 172/2017, High Court of Karnataka</i>	16
<b><u>On TDS to be deducted on discounts</u></b>			
13.	The discounts offered by the Manufacturer to Retailers could only be treated as sales promotion expenses and not commission	<i>Commissioner of Income Tax vs. United Breweries Limited, (2017) 293 CTR (AP) 500</i>	17
<b><u>Recent developments</u></b>			
14.	GST on Grant of Alcoholic Liquor License		19
15.	Amendments to Food and Safety Standards (Import) Regulations, 2017 for Registration of Foreign Food Manufacturing Facilities		19
16.	Amendments to Food and Safety Standards (Labelling and Display) Regulations, 2020		20
17.	Amendment to Food and Safety Standards (Alcoholic Beverages) Regulations, 2018 on non-alcoholic counterpart of alcoholic beverages and flavoured beer categories		20

## CASE LAWS

## ON BEER INDUSTRY AND THE UTTARAKHAND CCI CASE

**In Re. Alleged cartelization and anti-competitive behaviour in the Beer Market in India****(Suo Moto Case No. 06 of 2017 – CCI)**

*Penalty imposed by CCI on various beer companies and their association for alleged cartelization and indulging in alleged anti-competitive behaviour*



## FACTS OF THE CASE

- A leading beer manufacturer (**OP1**) filed an application for leniency under Section 46 of the Competition Act, 2002, by voluntarily declaring a potential cartelization in relation to the production, marketing, distribution and sale of beer in India. Pursuant to this, a *suo moto* investigation was initiated by the Competition Commission of India (**CCI**).
- The CCI alleged that four entities, viz. 3 beer manufacturers and their industry association, collectively referred to as “OPs” allegedly formed a cartel for determination/fixing of prices in certain States.
- Upon commencement of the investigations, the other two manufacturers (**OP2 and OP3**) also filed their respective leniency applications before the CCI.



## RULING

- Pursuant to the investigations, the Director General, CCI, concluded that the OPs had indulged in exchange of vital information for aligning the prices of their beer brands. This included making periodical requests to the government for increase in prices in different states in India, controlling output to establish higher prices, and controlling supply (especially to institutional buyers) in violation of the provisions of the Act. Further, the industry association had facilitated the alleged cartel activity by providing a platform for sharing, discussing and understanding pricing and other commercially sensitive issues.
- The period of alleged cartelization amongst the OPs was considered as May 20, 2009 to October 10, 2018.
- Based on the DG Report, the CCI observed that the OPs had partaken in alleged anti-competitive behavior on the following counts:
  - Sharing of commercially sensitive pricing information which compromised the integrity of independent bidding /pricing process
  - Agreeing to coordinate in respect of supplies to premium institutions/bulk buyers
  - Restriction or limiting the supplies to protest against action by the State

- Coordination between OPs for usage of second-hand bottles as it results in harm to the bottle collectors
- OPs collectively meeting the Excise authorities under the aegis of AIBA so that there was a better chance of price revisions
- The CCI imposed a penalty on the OPs (except the industry association) on 2% of the turnover of the cartel or 0.5 times of their profits during the continuation of the cartel. A penalty of 3% of the average income for the years 2016-17 and 2017-18 was imposed on the association and the OPs' employees. A cumulative monetary penalty of INR 8.64 billion (approx.) was imposed on the entities.
- Under the leniency provisions, CCI granted complete/partial waiver to each of the OPs based on their contribution to the investigation and the disclosures made by them.
- The matter is now pending in appeal before the National Company Law Appellate Tribunal (NCLAT).



### In Re. International Spirits and Wines Association of India (ISWAI) (Case No. 2 of 2016 – CCI)

*Penalty imposed by CCI on exclusive wholesale licensee for alleged discriminatory conduct and abuse of dominant position, which led to distortion in the market*



#### FACTS OF THE CASE

- The Uttarakhand Excise Policy for 2015-16 provided that Uttarakhand Agricultural Produce Marketing Board (**OP1**) is the exclusive wholesale licensee for foreign liquor, beer, wine including Indian Made Foreign Liquor (**IMFL**). Garhwal Mandal Vikas Nigam Ltd (**OP2**) and Kumaun Mandal Vikas Nigam Limited (**OP3**) were appointed as exclusive sub-wholesalers of alcoholic beverages for Garhwal and Kumaun divisions.
- A complaint was filed against the abovementioned OPs by ISWAI, a representative body of international spirits and wines companies in India including United Spirits Limited (**USL**), Pernod Ricard India Private Limited (**Pernod**), and a few more, before the CCI.
- It was alleged that:
  - As a consequence of the appointment, monopoly had been vested in the OPs.
  - Further, the OPs were placing orders with manufacturers in an arbitrary and discriminatory manner, with disregard to consumer demand.
  - Further, OPs were not maintaining minimum stock levels and were not supplying brands in accordance with retailer's demand.
- OP-1 has also entered into an agreement with IMFL manufacturers which contained unfair and onerous conditions.



#### RULING

- The CCI held that the OPs enjoyed 100% market share in their respective markets, ensuring no competition from any other entities, thus enjoying a dominant position. Further, it was observed that

despite demands raised by retailers, the brands demanded were not being supplied by the OPs, which was an abuse of their dominant position.

- Arbitrary procurement of alcoholic beverages by OP-1 resulted in denial of market access to certain companies, such as USL and Pernod. Further, other brands were attaining an undue advantage over such discriminated brands.
- OP-1 had not communicated to the Excise Department about being unable to comply with the requirement of minimum stock maintenance. Further, they did not take any steps to ensure availability of the brands to retailers. Therefore, in discriminating between different manufacturers and suppliers of IMFL, OP-1 acted in a manner which adversely affected competition in the market.
- OP-1 did not place any orders for certain brands despite being the only route for access to market under the Excise Policy. This indicates limiting or restricting wholesale procurement and distribution of IMFL in Uttarakhand and denial of market access to producers of certain brands of IMFL.
- Therefore, OP-1 had acted in violation of the provisions of Section 4(2)(c), 4(2)(b)(i) and 4(2)(a)(i) of the Competition Act, 2002. As OP-2 and OP-3 were entirely dependent on OP-1 for obtaining supplies and could not procure directly from the manufacturers, they were held not liable under the aforesaid provisions. Accordingly, a penalty of INR 1 Crore was imposed on OP-1.

## DISCRIMINATORY PROCUREMENT BY STATE



### United Spirits Limited vs. Uttarakhand Agricultural Produce Marketing Board and Ors., 2016(1) UC 270

*It is the State's duty to implement its policy in an equal way*



#### FACTS OF THE CASE

- As per the Excise Policy in Uttarakhand, only approved liquor was eligible to be sold in the State. The Uttarakhand Agricultural Produce Marketing Board (**UAPMB**) was engaged in the wholesale of liquor and was procuring IMFL from several brands including the Petitioner's.
- UAPMB sought to procure more volume of other brands and the market sales of the Petitioner's IMFL dropped significantly.
- Aggrieved by the discrimination, the Petitioner filed a Writ Petition before the High Court of Uttarakhand seeking to remedy the lack of express guidelines on various issues including ascertainment of minimum stock (brand-wise), time period within which the minimum stocks should be replenished, process for placing brand-wise orders by the retailer on the basis of actual demand and absence of a mechanism for suppliers and retailers to check the availability of stock (brand-wise) at the warehouse of Respondent.
- The Respondents challenged the maintainability of the Writ Petitions in the wake of an arbitration clause.



## JUDGEMENT

- Relying on several pronouncements wherein an alternative statutory remedy was not considered as a bar on the Constitutional power of the High Courts, the Writ Petitions were held to be maintainable.
- The State has power to completely prohibit, manufacture, sale, possession, distribution, and consumption of liquor and consequently, it is the privilege of the State to decide which liquor policy it decides to continue. Thus, the State may create a monopoly in itself for the trade or business in such liquor. However, the exercise of such statutory discretion must be based on reasonable grounds and cannot be arbitrary.
- There was no explanation provided as to why there was a sudden fall in the supply orders on the Petitioner by UAPMB despite demands being raised by retailers. The Respondents had acted in a completely non-transparent manner, which was detrimental to the Petitioner.
- Directions were given to ensure availability of all brands of foreign liquor. Further, directions were given to fix the minimum stock (brand-wise) of Foreign Liquor to be maintained at all times on the basis of orders placed by the retailers and commensurate to consumer demands.

## ON ISSUANCE OF DISCOUNTS AND REBATES

**Bhagwati Transformer Corp. and Ors. V. Government of NCT of Delhi  
(WP(C) 3647/2022) – High Court of Delhi**

*Challenge to the prohibition on extending concessions, rebates or discounts on the sale price of liquor - pending before the Division Bench of the Delhi High Court.*



## FACTS OF THE CASE

- Prior to 2021, Rule 53 of the Delhi Excise Rules, 2010 specifically disallowed granting of ‘any concession, rebate or discount on the sale price of liquor’. This restriction was omitted *vide* the Delhi Excise (Amendment) Rules, 2021.
- Pursuant to the above amendment, effective November 2021, the Delhi Excise Policy 2021-22 specifically allowed licensees to grant ‘concessions, rebates, discounts on the MRP of liquor’.
- Despite the amendment to the Rules and the provision in the Excise Policy, on February 28, 2022, an Order was issued by the Excise Department, which directed all retail licensees to comply with Rule 54(3) of the Delhi Excise Rules, 2010. It states that once the price of liquor has been fixed by the Commissioner, the licensee is bound to sell the liquor at such price. Effectively, retail licensees have been disallowed to extend any concessions, rebates, discounts on the MRP of liquor.
- The stated reason for this prohibition was that: (a) the discounts offered by licensees have led to overcrowding and general inconveniences to residents, having the potential to increase the number of COVID cases (b) While the intent of the Government was to promote consumer choice and healthy competition by allowing discounts, in practice, some licensees are using discounts for short term business

gains and thus distorting the market, and (c) licensees are promoting their products through social media and banners hoardings placed outside stores, which is impermissible in terms of the Delhi Excise provisions.

- The Order dated February 28, 2022 has been challenged before the Delhi High Court by various license holders for being arbitrary, disproportionate, discriminatory and violative of Article 14 of the Constitution.



#### JUDGEMENT

- The single judge of the Delhi High Court refused to intervene and stay the operation of the Impugned Order as the same would be anti-competitive in nature and promote liquor sales.
- An appeal against the order of the single judge is presently pending before a Division Bench.

**ELP Comments:** Pertinent to note that, the Excise Department issued a fresh order on April 1, 2022 reconsidering their earlier decision and stating that that discounts / rebates / concessions up to 25% of the MRP shall be allowed on the sale of liquor in the National Capital Territory of Delhi, with strict compliance of Rule 20 of the Delhi Excise Rules, 2010. As per Rule 20, the maximum quantity of liquor that can be sold to an individual is capped at nine liters.

## ON ADVERTISEMENT OF BRAND EXTENSIONS



### BACARDI INDIA PVT.LTD. - DEWAR'S HIGHBALL SODA WATER (CCC RECOMMENDATION ON 2019-C.2366)

*Suo moto complaint against OTT advertisement for sparkling water not upheld- sufficient documentary evidence supporting that it is a genuine brand extension*



#### FACTS OF THE CASE

- Bacardi India Private Limited (**Bacardi**) launched Dewar's Highball Soda Water (**Product**), a premium category non-alcoholic carbonated/sparkling water. It released an advertisement on digital media. It sought to also advertise the Product on cable television and, therefore, sought approval from the Central Board of Film Certification as per the Cable TV Network Rules, 1994.
- While the CBFC initially rejected the application, upon making certain minimal modifications to the advertisement, the CBFC granted a 'Certificate of Unrestricted Public Exhibition ('U') for the Product's advertisement.
- In parallel and separately, the Consumer Complaints Committee of the ASCI raised a complaint against the said advertisement questioning whether the said product is a valid brand extension.



**RULING**

- Bacardi was successfully able to establish that all criteria for a valid brand extension as per the Cable TV Network Rules, 1994 read with the Guidelines for a valid Brand Extension issued by the Advertising Standards Council of India (ASCI) had been fulfilled by them.
- Bacardi produced certificates from their statutory auditors and chartered accountant certifying the necessary information and criteria.
- The Consumer Complaints Committee, after investigation and considering Bacardi's submissions dismissed the *suo motu* complaint.

**ON NON-ISSUANCE OF FORM-C****Carlsberg India Private Limited v. State of Maharashtra, WP 329/2021 (Bom)**

*Direction given to State VAT authority to issue Form C within fixed time frame*

**FACTS OF THE CASE**

- The Petitioner, in the course of its business, sold beer to Damania Enterprises, located in Daman on payment of the concessional rate of CST at 2% during the year 2015-16. The Petitioner sought Form 'C' against the said inter-State sales made at 2% for the year 2015-16. However, the VAT Department, Daman refused to issue the said Forms due to outstanding tax dues of Damania Enterprises for a subsequent period.
- On account of failure to produce the Form-C towards sales made to Damania Enterprises, a demand of INR 4.4 crores was raised by the VAT authorities in Maharashtra on the Petitioner.
- The Petitioner filed a petition before the Bombay High Court seeking directions to be issued to the Daman VAT Department to issue Form C to the Petitioner on the ground that all tax liabilities were paid for the tax period for which C Forms were withheld. Further, there was no lapse on the Petitioner's part and that no prejudice would be caused to the Department if the same was issued.

**JUDGEMENT**

- The High Court of Bombay granted the Petitioner leave to make a fresh representation to the Daman VAT Authority for issuance of Form-C, and directions to the VAT authorities to issue the forms within a fixed period.
- Further, direction was given to the VAT authorities to not take any coercive action against the Petitioner.

## ON THE PRESENCE OF LIQUOR SHOPS ON HIGHWAYS



### State of Tamil Nadu and Ors. V. K Balu and Ors. AIR 2017 SC 262

*Prohibition imposed on all States and Union Territories on issuance of liquor licenses along National and State highways. Also imposed for advertisements and signages on availability of liquor*



#### FACTS OF THE CASE

- Several appeals were filed seeking discontinuation of liquor vends on National and State highways across the country in light of the alarming number of road accidents.
- At the Union level, the National Road Safety Council (**NRSC**) and Ministry of Road Transport and Highways (**MRT**) had already agreed that liquor licenses should not be given along National highways. Advisories along the same lines were issued to State Governments. These advisories were challenged by way of writ petition.



#### JUDGEMENT

The Supreme Court, after hearing the NRSC, MRT and various State Governments, laid down the following principles in this landmark judgement:

- The existence of liquor vends on highways provides an opportunity to consume alcohol while driving, in callous disregard to road safety. Similarly, the existence of advertisements and sign boards also draws attention to the availability of liquor.
- Though liquor licenses for potable alcoholic liquor are granted by the State Governments and excise duty is an important source of revenue to the States, a prohibition on the grant of liquor licenses along National and State highways only regulates the grant of licenses in such a manner that ensures road safety.
- Further, no distinction can be made between National and State highways as drunken driving is a concern on both.
- Therefore, the Supreme Court issued strict directions under Article 142 of the Constitution, directing that all States and Union Territories shall cease and desist from granting licenses along national and state highways including stretches in city limits. Further, the prohibition extends to liquor shops in close proximity to highways as well as highway stretches which pass through the limits of cities, towns or local authorities. All signages and advertisements on availability of liquor were also directed to be removed and were prohibited henceforth.
- The Hon'ble Court ordered that existing licences which had been renewed prior to the date of order shall continue only till the term of the license expires but not later than April 1, 2017.

**ELP Comments:** Subsequently, *vide* Order dated March 31, 2017, the directions in the aforesaid order were modified, stating that in areas falling under local bodies with a population of less than 20,000, the restriction is up to 220 meters from the outer edge of the highway, as against a distance of 500 meters in other areas. Further, given that the excise year ends on different dates for different States, the existing licenses would expire as per the expiry date but not later than September 30, 2017.

The Supreme Court *vide* Order dated July 11, 2017 *in Arrive Safe Society of Chandigarh v. Union Territory of Chandigarh and Anr. (SLP (C) No. 10243 of 2017)*, issued a clarification to the effect that the directions on the ban on licensed liquor shops along the highway do not prohibit licensed establishments within municipal areas.

## ON DE-LISTING OF BRANDS



### **Devans Modern Breweries Ltd v. State of Uttarakhand (WPMS/1303/2021) and Maa Sheetla Distributors Pvt. Ltd. v. State of Uttarakhand (WPMS 1292/2021) – High Court of Uttarakhand**

*Stay imposed on Excise Department's Order which without following the principles of natural justice, delisted brands which were sold in Uttarakhand but not in neighbouring States*



#### FACTS OF THE CASE

- Clause 12.5 of the Uttarakhand Excise Policy 2021-22 requires a licensee to sell only those brands in Uttarakhand which are registered and sold in Delhi or neighboring States. Further, an affidavit is to be submitted declaring that the price in Uttarakhand at the time of brand registration is equal to or lesser than the price in Delhi or such other States.
- The Petitioner supplied brands in Uttarakhand which were not sold in Delhi or such other States. The Petitioners declared this fact in the affidavit submitted to the Department along with the brand registration application, which was considered and granted by the Department.
- Proceedings were initiated against the Petitioners alleging that since the brands registered and sold in Uttarakhand were not sold in Delhi, it was a violation of Clause 12.5 of the Policy. Pursuant thereto, the Department immediately delisted the Petitioners and their products from the State Excise portal, making it impossible for the Petitioners to obtain permits and move goods from and to the warehouse and retailer premises. No opportunity of hearing was given to the Petitioners prior to the delisting.
- The Petitioners challenged the Department's actions as arbitrary and illegal on various grounds. The Petitioners also challenged Clause 12.5 of the Excise Policy. The challenge was on the basis that the said requirement was incapable of compliance in view of the directions of the Delhi Excise Department. According to the directions, no new brands were permitted to be registered in Delhi for the period involved.



## JUDGEMENT

- The Court granted *ad-interim* relief and directed the Department to re-list the Petitioner Companies on the Excise portal. The Court further directed that the Department shall neither take any adverse action against the Petitioners, nor create any obstacles in the Petitioners' endeavor to clear their stock. It was also noted that the balance of convenience is in favour of the Petitioners, as if their stock is prohibited from being sold, an irreparable loss would be caused to them.
- Further, the Court observed that prior to an adverse order being issued against any party, a show cause notice needs to be necessarily issued and an opportunity of hearing ought to be given. Thus, *prima facie*, the action of the Department was against the principles of natural justice.
- The matter is pending before the Court and is therefore, yet to attain finality.

## ON CONSTITUTIONALITY OF PROHIBITION PROVISIONS



## State of Bombay and Another vs. F.N Balsara, AIR 1951 SC 318

*Doctrine of Pith and Substance applied to determine the true intent and nature of the Bombay Prohibition Act 1949. Certain provisions prohibiting possession, sale and production that were not in conformity with Article 19(1)(g) held unsustainable*



## FACTS OF THE CASE

- The Bombay Prohibition Act, 1949 (**Bombay Prohibition Act**) repealed the Bombay Akbari Act and the Bombay Opium and Molasses Act. The said Act consisted of provisions *inter alia* prohibiting the purchase, sale, use, consumption, possession, import and export of liquor.
- The Respondent had filed a writ petition before the High Court of Bombay, challenging various provisions of the Bombay Prohibition Act, specifically seeking to exercise his right to possess, consume and use certain articles, namely whiskey, brandy, beer, medicated wine, cologne, etc. The petition also sought to purchase, use or import/ export across the customs frontier, foreign liquor or other preparations containing alcohol and to forbear the State from taking any action against him under the Act. The High Court held some of the provisions to be invalid, while others were held to be valid. Both parties, appealed to the Supreme Court.
- The issues raised before the Supreme Court were:

Whether the whole Act can be declared to be invalid on the following grounds:

- The law is an encroachment on the domain of the Central Legislature under Entry 19 of List I i.e., import and export across customs frontier
- Whether certain provisions interfere with inter-state trade and commerce and transgress Section 297 of the Government of India Act, 1935. The Act provides that any law framed by a Provincial Legislature relating to the subjects in Entry 27 or Entry 29 of List II including the entry into or export from the Province of goods prohibited/restricted, shall be invalid

- As some provisions that were held to be void by the High Court are not severable from the rest of the Act, whether the Act itself should have been declared invalid
- To what extent can the judgement of the High Court be upheld with regards to specific provisions of the Act which have been declared by it to be void?



#### JUDGEMENT

- There is no real conflict between Entry 31, List II which pertains to production, manufacture, possession, transport, purchase and sale of intoxicating liquors and Entry 19 of List I which pertains to import and export across customs frontiers. In terms of Entry 31, the Provincial legislature has the absolute power to prohibit the possession, use and sale of intoxicating liquor.
- Applying the doctrine of pith and substance, the true nature of the Bombay Prohibition Act is in relation to possession, sale etc. of liquor and not of its import or export. Even if the prohibition on purchase, use, possession, transport and sale of liquor affects its import, such encroachment is only incidental and does not affect the competence of the Provincial Legislature to enact the law in question.
- Therefore, the words “possession and sale” in Entry 31 of List II are to be read without any qualification and a limited meaning must be given to the word “import” in Entry 19 of List I to give effect to the general words used in Entry 31 of List II.
- Section 297 (1) (a) of the Constitution of India, has no application to the case, as that provision pertains to encroachment with subjects under Entry 27 or Entry 29, while the present enactment is in exercise of Entry 31.
- Upholding the validity of the specific provisions of the Act, the Court held as follows:
  - Section 2(24) on definition of ‘Liquor’ – The High Court held that the Provincial Legislature may prevent the use of alcoholic liquor for human consumption as well as other alcoholic preparations. The Supreme Court agreed that ‘liquor’ is a wide term that covers all alcoholic liquid, and thus may be regulated under Entry 31.
  - Section 39 on use or consumption of foreign liquor on cargo boats, warships and troopships and in military and naval canteens and messes – *Prima facie*, there is nothing wrong in providing special treatment to persons who form a class by themselves in many respects and who have been treated as such in various enactments and statutory provisions.
  - Rule 67 of the Bombay Foreign Liquor Rules which provides that any foreigner on a tour of India who enters the State of Bombay and desires to possess, use and consume foreign liquor shall apply to certain officers for obtaining a permit, which may be granted for a period not exceeding one month subject to subsequent renewal - The same cannot be assailed as there is no prohibition against any outsider to be granted a permit.
  - Sections 52, 53 and 139(c) which delegated power to the Government to issue permits in cases other than those provided for by the Act, to vary or substitute conditions of the licence, and to exempt persons or classes from the provisions of the Act– These provisions enable the duly authorized officer

to meet contingencies and deal with various situations as they arise and thus cannot be rendered invalid.

- The following Sections were **declared invalid** in entirety by the Supreme Court:
  - While the restrictions imposed on the possession, sale, consumption of liquor for human consumption are in line with the Directive Principles of State Policy, extending this restriction to toilet or medicinal preparations containing alcohol were held unreasonable and void.
  - Section 23(a) and Section 24 (1) (a) imposing a restriction on ‘commending’ any intoxicant or hemp were declared invalid on the ground that they were in conflict with the right to freedom of speech and expression under Article 19 (1) (a) of the Constitution of India.
  - The words “incite” and “encourage” in Section 23(b) were so wide and vague that it is difficult to define or limit their scope and were thus held invalid.
  - Section 136 (1) and Section 136 (2) (b), (c), (e) and (f) pertaining to the powers to arrest and make orders detaining or restricting movements or actions of persons were held invalid as against Article 19 of the Constitution of India.
- The provisions declared void were severable from the rest of the Act and therefore, the whole Act shall not be considered invalid.

**ELP Comments:** In *Khoday Distilleries and Ors. vs. State of Karnataka and Ors. ((1995) 1 SCC 954)*, the Hon’ble Supreme Court held that trade and business in liquor for human consumption is *res extra commercium* (outside commerce) and that Article 19(1)(g) does not confer a fundamental right to trade or do business in liquor as a beverage. Further, while the State can create a monopoly or prohibit alcohol trade, the limitations prescribed by the State cannot discriminate between persons licenced to carry on the trade or business. [Click here to read the full update on this judgement in Volume 1.](#)

## ON STATE’S POWER TO LEVY EXCISE DUTY ON ENA/SDS



### Jain Distillery vs. State of Uttar Pradesh and Ors., 2021 (10) ADJ 69

*The State cannot impose UP VAT on ENA after the enactment of GST Law*



#### FACTS OF THE CASE

- The State Legislature had the legislative competence to: (i) enact laws to impose tax on the sale/purchase of any goods other than newspaper subject to the provisions of Entry 92A of List I and (ii) enact laws to impose excise duty on alcoholic liquor (which was manufactured/produced in the state) for human consumption and/or opium, Indian hemp etc upto July 1, 2017.
- The Constitution (101<sup>st</sup> Amendment) Act, 2016, *inter alia* enacted Article 246A and Article 366 (12-A) which granted both the Center and the States the power to make laws with respect to goods and services tax except on the supply of alcoholic liquor for human consumption.

- As a result of the amendments, several writ petitions were filed challenging the following:
  - Levy of GST on sale of Extra Neutral Alcohol (ENA) w.e.f 0July 1, 2017 by the State,
  - Levy of VAT at the rate of 5% on the sale of non-GST Alcohol at the point of Manufacturer/Importer w.e.f December 9, 2019 (*vide* Notification No.KA.NI-2-1793 dated December 17, 2019 issued under Section 74 read with Section 4 of the UPVAT Act, whereby Entry 1-A was added to Schedule IV).
  - Circulars dated June 10, 2021 and June 11, 2021 issued by the Additional Commissioner Grade – I, Commercial Tax wherein subordinate authorities were directed to charge and collect UPVAT on ENA used in manufacturing alcoholic liquor for human consumption.
  - Assessment order adjusting the GST levied and paid on ENA and Special Denatured Spirit against the UPVAT liability imposed on the same.



#### JUDGEMENT

- The High Court observed that, the State lost its legislative competence to enact laws to impose tax on sale of ENA upon the enactments brought by the 101<sup>st</sup> Constitution Amendment.
- Also, in terms of Section 174 (1) (i) of the UPGST Act, imposing UPVAT on ENA, Rectified Spirit and Denatured Spirit is *ultra vires* as the State lacks legislative competence and valid delegation. It was held that the State is competent to impose taxes only with respect to alcoholic liquor for human consumption and ENA, Rectified Spirit and Denatured Spirit are not for human consumption.
- The Circulars and Assessment Orders were also quashed.



### State of Orissa & Ors. vs. Utkal Distilleries Limited, Civil Appeal Nos.5666-5668 OF 2009, Supreme Court

*The State has no power to levy excise duty on alcoholic liquor unfit for human consumption*



#### FACTS OF THE CASE

- The Excise Rules, 1965 in the State of Orissa did not provide for a provision wherein there is loss of spirit (weak spirit) during re-distillation. Therefore, a Technical Committee on November 21, 1992 recommended an allowance of 2% loss of spirit during the process of re-distillation in the State on which excise would not be leviable.
- The Appellant did not come to a decision with regard to the recommendation by the Committee despite a direction being issued by the High Court of Orissa on November 10, 1995. However, demand notices were issued on the Respondent to pay excise duty on weak spirit as it was said to be above 2%.
- The State Government's authority to levy excise duty on industrial alcohol which is unsafe for human consumption was challenged before the High Court of Orissa which ruled in favour of the Respondent Assessee and stayed the demand notices.



## JUDGEMENT

- The Supreme Court observed that ‘Excisable article’ has been defined to be any alcoholic liquor for human consumption or any intoxicating drug.
- Relying on a Supreme Court judgement in ***Synthesis and Chemicals Ltd., (1990) 1 SCC 109***, the Court observed that the term ‘alcoholic liquor’ was distributed into two heads viz., (i) for human consumption and (ii) other than human consumption. The State has power to impose tax on alcoholic liquor for human consumption *vide* Entry 51 of List II and the alcoholic liquor unsafe for human consumption is governed by the Center *vide* Entry 84 of List I.
- The Court dismissed the appeals by relying on ***State of U.P. and Others vs Modi Distillery and Others (2 (1995) 5 SCC 753*** wherein it was held that the State was only empowered to levy excise duty on alcoholic liquor for human consumption and not on wastage of liquor after distillation.
- Therefore, the State has no competence to levy tax on alcohol unfit for human consumption.

## ON REAL TAXABLE INCOME/DISTRIBUTABLE SURPLUS



**The Pr. Commissioner of Income Tax, Bangalore and Ors vs. Chamundi Winery and Distillery, I.T.A. Nos. 155/2016, 458/2013, 467/2015, 173/2017 and 172/2017, High Court of Karnataka**

*Distributable surplus paid by Respondent assessee held to be ‘application of income’ and not ‘allowable expenditure’ under Section 37*



## FACTS OF THE CASE

- The Respondent entered into an Agreement dated October 30, 2007 with Diageo India Pvt. Ltd., (**Diageo**) to render contract bottling services. The said Agreement *inter alia* provided that the Respondent – who would manufacture and sell wholly and exclusively on behalf of Diageo - shall be entitled to receive only bottling charges per case. Any surplus earned shall be paid to Diageo by the Respondent and taxed in the hands of Diageo.
- The assessing authority for FYs 2008-09 to 2012-13 disallowed ‘distributable surplus’ paid by the Respondent to Diageo as allowable expenditure under Section 37 of the Income Tax Act, 1961.
- The authority also held that there is no ‘diversion of income’ from the Respondent to Diageo by overriding title. However, the appellate authority and the Tribunal allowed the appeals, as a consequence of which the Department filed an appeal under Section 260-A of the Act before the High Court.



## JUDGEMENT

- The source of the surplus income is the manufacture and sale of liquor under the Excise License of the Respondent assessee wherein Diageo has no privity or locus.



- The Respondent was not paying royalty, finance charges, cost of raw materials, etc. to Diageo for the pay-outs to be treated as a 'business expense'. Instead, Diageo was absorbing the whole profit except a small margin per case allocated to the Respondent.
- Therefore, the entire income from manufacture and sale of liquor was taxable in the hands of the Respondent and the distribution of surplus was not an "allowable expenditure" under Section 37.
- Further, the present case was not one of 'diversion of income at source by overriding title' in favour of Diageo as the Excise license was held by the Respondent assessee and the profits and gains were also taxable in their hands.
- The matter is now pending in appeal before the Hon'ble Supreme Court.

## ON TDS TO BE DEDUCTED ON DISCOUNTS



### Commissioner of Income Tax vs. United Breweries Limited, (2017) 293 CTR (AP) 500

*The discounts offered by the Manufacturer to Retailers could only be treated as sales promotion expenses and not commission*



#### FACTS OF THE CASE

- The Respondent sold beer to the Andhra Pradesh Beverages Corporation Limited (**APBCL**), which would in turn, sell such beer, to retail dealers.
- To promote sales, the Respondent provided incentives/trade discounts to the retail dealers through del-credere agents acting as conduits for transferring the same.
- The payment to del-credere agents for their services was treated as commission and TDS was deducted under Section 194H of the Income Tax Act. However, the incentives/trade discounts disbursed by the Respondent through them were not treated as commission and so TDS was not deducted.
- The Assessing Authority held that discounts are generally a reduction in the price which is to be reflected in the invoice which was absent in the present case. Therefore, it was consideration for services rendered eligible as commission on which TDS is to be deducted. The Commissioner of Income Tax (Appeals) held that the payments were made by the Respondent to their del-credere agents and not the Retailers directly. Upon challenge before the ITAT, the Tribunal held that the payments were made to the retail dealers as sales promotion expenses and would fall outside the ambit of commission.
- Thus, an appeal was filed under Section 260A of the Income Tax Act.



#### JUDGEMENT

- The Court observed that the beer sold by the Respondent to APBCL, who would in turn sell the same to retail dealers were transactions independent of each other and on a principal-to-principal basis. No services were rendered by retail dealers to the Respondent and the incentive/trade discounts were only to promote the Respondent's sales.

- It upheld the Tribunal’s decision that in the absence of a principal-agent relationship or a direct relationship, the discounts offered could only be treated as sales promotion expenses, and not as commission, as no services were rendered by the retail dealers to the Respondent.
- It was also observed that an appeal under Section 260A of the Income Tax Act would lie only on a substantial question of law - the findings recorded by the Tribunal did not give rise to any substantial question of law and also did not suffer from any infirmity.

## RECENT DEVELOPMENTS

### GST on Grant of Alcoholic Liquor License

- Upon transition to the GST regime, State Excise licensees were liable to pay GST under the reverse charge mechanism on services (licenses) provided by the State Government.
- The GST Council in this regard, made the following recommendations:
- 26th GST Council Meeting held on March 3, 2018 – “GST was not leviable on licence fee and application fee by whatever name it is called for alcoholic liquor for human consumption”.
- 37th GST Council Meeting held on September 20, 2019 – The Council approved to notify “grant of Liquor License by State Governments against payment of license fee as a "no supply" under Clause (b) to Subsection 2 of Section 7 of the CGST Act, 2017 to remove ambiguity in implementation on the subject”. It specifically stated that “the effect of exemption shall apply from July 1, 2017.”
- However, when Notification No.25/2019 – CT (Rate) dated September 30, 2019 was issued to give effect to the said recommendations, it was not given retrospective effect from July 1, 2017.
- To align with the GST Council recommendations, Clause 118 of the Finance Act, 2022, states that Notification No. 25/2019 – CT (Rate) dated September 30, 2019 shall be effective from July1, 2017.
- However, Clause 118(2) of the Finance Act, 2022 states that no refund shall be granted of GST already collected by the Government on such alcoholic liquor license fees.

### Amendments to Food and Safety Standards (Import) Regulations, 2017 for Registration of Foreign Food Manufacturing Facilities (registration by 1st June 2022)

- Regulation 18(1) of the newly incorporated Regulations states that the Food Authority may from time to time, based on the risk, specify the categories of food products intended for export to India for further regulating control, as specified in these regulations.
- Facilities manufacturing such articles, who desire to export to India are to register with the FSSAI by 1st June 2022.
- A list of food categories to be registered are yet to be notified, as on date. If the AlcoBev sector is notified in this list, foreign manufacturers will have to obtain registration and comply with all allied requirements to export their products to India.

**Amendments to Food and Safety Standards (Labelling and Display) Regulations, 2020 (w.e.f. 1st July 2022)**

- The date marking requirement in Regulation 5(10) has been amended. Earlier, only the month and year were required to be declared for products with shelf life more than 3 months. Now, the manufacture and expiry date can be in the declared format, i.e., DD/MM/YYYY.
- Regulation 5(14) pertaining to declaration regarding food allergens which requires cereals containing gluten (i.e., wheat, rye, barley, oats) to make a declaration as such, has been amended. The amendment grants an exception from the alleged declaration requirement to alcoholic distillates including ethyl alcohol of agricultural origin made using cereals.
- Regulation 7(1) has been amended whereby products containing a caloric/non-caloric sweetener mentioned in Appendix A of the FSS (Food Products Standards and Food Additive) Regulations, 2011 is required to mandatorily contain a declaration stating, 'This contains ... (name of the sweetener)' and such declaration shall not be less than 3mm.

**Amendment to Food and Safety Standards (Alcoholic Beverages) Regulations, 2018 on non-alcoholic counterpart of alcoholic beverages and flavoured beer categories**

The Food Safety Standards (Alcoholic Beverages) Regulations, 2018 have notified two new categories, namely:

- **'Non-alcoholic counterpart of alcoholic beverage', defined in Regulation February 1, 2017 as follows:**

"Non-alcoholic beverage having alcohol content less than or equal to 0.5% abv. It shall meet all the requirements of respective alcoholic beverage of origin except the ethyl alcohol content. Additionally, the alcoholic beverage of the origin must undergo the process of fermentation and the produced alcohol is removed thereafter."

- **'Flavoured beer', defined in Regulation 4.2 (2) as follows:**

"Beer containing flavours as per the provisions prescribed under the Food Safety and Standards (Food Products Standards and Food Additives) Regulations, 2011. Such Beer shall meet all the other requirements of the Beer, as specified under these regulations."

## ABOUT US

“

Established in 2001, Economic Laws Practice is a full-service Tier 1 law firm with 7 offices throughout India. With 200+ qualified professionals – lawyers, chartered accountants, cost accountants, company secretaries and economists – we assist clients on transactional, advisory, litigation, regulatory, trade, competition and tax matters. Ranked amongst the top ten law firms in India (RSG Report 2019), ELP is recognized as a top tier firm by Chambers Global, Legal 500, IFLR 1000 and AsiaLaw Profiles.

ELP has been assisting the alco-bev industry on a wide range of regulatory, tax and policy matters for almost two decades and is considered as the “go to” firm for the alco-bev sector for all legal, regulatory and tax matters.

*We hope you have enjoyed reading our manual. For further information please reach out to:*

**Darshan Bora – Partner**

E: [darshanbora@elp-in.com](mailto:darshanbora@elp-in.com)

**Sweta Rajan – Associate Partner**

E: [swetarajan@elp-in.com](mailto:swetarajan@elp-in.com)

**Samyuktha Srinivasan - Associate**

E: [samyukthasrinivasan@elp-in.com](mailto:samyukthasrinivasan@elp-in.com)

**Geetha Bharwani S - Associate**

E: [geethabharwani@elp-in.com](mailto:geethabharwani@elp-in.com)

To read our previous update on the Alco-bev sector please [click here](#).

*Volume I provides a roundup of significant judicial precedents on right to conduct liquor business (res extra commercium), procedures and restrictions under various State Excise laws, law relating to demands of duties and advertisement of brand extensions.*



## MUMBAI

9th Floor, Mafatlal Centre  
Vidhan Bhavan Marg Nariman Point  
Mumbai 400 021  
T: +91 22 6636 7000

## NEW DELHI

801 A, 8th Floor, Konnectus Tower, Bhavbhuti Marg  
Opp. Ajmeri Gate Railway Station, Nr. Minto Bridge  
New Delhi 110 001  
T: +91 11 4152 8400

## AHMEDABAD

C-507/508, 5th Floor, Titanium Square  
Thaltej Cross Roads, SG Highway,  
Ahmedabad – 380054  
T: +91 79460 04854

## PUNE

202, 2nd Floor, Vascon Eco Tower  
Baner Pashan Road  
Pune 411 045  
T: +91 20 4912 7400

## BENGALURU

6th Floor, Rockline Centre  
54, Richmond Road  
Bengaluru 560 025  
T: +91 80 4168 5530/1

## CHENNAI

No 18, BBC Homes, Flat-7 Block A  
South Boag Road  
Chennai 600 017  
T: +91 44 4210 4863

## GIFT CITY

Unit No. 605, Signature, 6th Floor  
Block 13B, Zone - I  
GIFT SEZ, Gandhinagar 382355  
E: [elplaw@elp-in.com](mailto:elplaw@elp-in.com)

 [elplaw.in](http://elplaw.in)

 [insights@elp-in.com](mailto:insights@elp-in.com)

 [/elplaw.in](https://www.facebook.com/elplaw.in)

 [/ELPIndia](https://twitter.com/ELPIndia)

 [/company/economic-law-practice](https://www.linkedin.com/company/economic-law-practice)

 [elppodcast.buzzsprout.com](http://elppodcast.buzzsprout.com)

## DISCLAIMER:

The information contained in this document is intended for informational purposes only and does not constitute legal opinion or advice. This document is not intended to address the circumstances of any particular individual or corporate body. Readers should not act on the information provided herein without appropriate professional advice after a thorough examination of the facts and circumstances of a particular situation. There can be no assurance that the judicial/quasi judicial authorities may not take a position contrary to the views mentioned herein.