

(1997) 06 KL CK 0032**High Court Of Kerala****Case No:** Writ Appeal No. 1391 of 1995

Special Secretary to Government
of Kerala and Others

APPELLANT**Vs**

Similia Homoeo Laboratory

RESPONDENT**Date of Decision:** June 10, 1997**Acts Referred:**

- Medicinal and Toilet Preparations (Excise Duties) Act, 1955 - Section 2, 3, 4, 9

Citation: (1997) 72 ECR 4 : (1997) 3 ILR (Ker) 379**Hon'ble Judges:** U.P. Singh, C.J; S. Sankarasubban, J**Bench:** Division Bench**Final Decision:** Dismissed**Judgement**

S. Sankarasubban, J.

The above writ appeal is filed by the respondents against the judgment rendered by the learned single Judge in O.P. No. 2854 of 1991. Appellants are the Special Secretary to Government of Kerala (Taxes), the Commissioner of Excise, Board of Revenue and the State of Kerala. Respondent in the W.A. is the petitioner in the O.P. viz. M/s. Similia Homoeo Laboratory, represented by the partner and General Manager. Respondent-petitioner is engaged in the manufacture of Homoeopathic medicines. The Homoeopathic preparations are made with alcohol as one of the contents. For this purpose, respondent/petitioner had taken licence under the Medicinal and Toilet preparations (Excise Duties) Rules, 1956, hereinafter referred to as "the Rules". This licence enables the respondent to make Homoeopathic preparations containing alcohol out of bond.

2. Pursuant to the issue of the licence, a permit was issued to the respondent for lifting 1000 litres of rectified spirit from Chicops Distillery at Menonpara. The Circle Inspector, Chicops collected an amount of Rs. 28,230/- from the respondent as excise duty and gallonage fee for 1000 litres of rectified spirit. The excise duty was

collected at the rate of Rs. 15.50 per bulk litre and the gallonage fee was collected at Rs. 2.50 per litre. The respondent objected to the claim of the Circle Inspector in collecting the excise duty at Rs. 15.50 per bulk litre and also the collection of gallonage fee. According to the respondent, the excise duty leviable at the relevant time was only Rs. 13.20 per litre and the petitioner was not liable to pay gallonage fee as per the provisions of Rule 14 of the Rectified Spirit Rules. To the above effect, respondent filed a representation before the Commissioner of Excise, Board of Revenue. On this representation, the Commissioner of Excise passed an order on 10.8.1989, copy of which is produced and marked as Ext. P1 along with the O.P. The Commissioner accepted the respondent's case that no gallonage fee can be collected on rectified spirit issued for the use in the manufacture of medicinal preparations as per Rule 14(1) of the Rectified Spirit Rules. Hence he ordered refund of the gallonage fee collected. With regard to the excise duty, the Commissioner did not decide as to what was the correct rate of duty. On the other hand, he gave freedom to the respondent to apply for the rebate for any excise duty collected over and above the duty actually payable u/s 4 of the Medicinal and Toilet Preparations Act, hereinafter referred to as "the Act."

3. Against the above order, respondent filed an appeal under Rule 127 of the rules before the Government of Kerala challenging the illegal levy of excise duty. The appeal memorandum was produced as Ext. P2 along with the O.P. The Government, by order dated 17.12.1990, which is produced as Ext. P3, dismissed the appeal. According to Ext. P3 order, duty on rectified spirit is Rs. 15.50 per proof litre as per notification published as S.R.O. No. 60/61, u/s 17 of the Abkari Act, Act 10/77. The contention of the respondent that the duty was at the rate of Rs. 13.20 as per item 3 of schedule to the Act was rejected. According to the Government, the duty stated in the schedule to the Act is for Homoeopathic preparations and not for rectified spirit meant for preparations. Hence, it refused to refund any amount which was collected as excise duty. At the same time, it held that no gallonage fee was payable on rectified spirit issued for Homoeopathic preparations. It was challenging Ext. P3 order that the respondent filed the O.P.

4. According to the respondent-petitioner, excise duty is leviable u/s 3 read with schedule to the Act. Item 3 in the schedule is Homoeopathic preparations containing alcohol. At the relevant time, the duty payable was Rs. 13.20 per litre for pure alcohol. Respondent further contended that the notification issued u/s 17 of the Abkari Act did not apply to a licence issued under the Act. Respondent prayed for quashing for Exts. P1 and P3 orders in so far as they are against the respondent and for a declaration that the respondent was liable to pay excise duty only at the rate of Rs. 13.20 per bulk litre as per item 3 in the schedule to the Act.

5. A counter affidavit was filed on behalf of the second appellant. In the counter affidavit, it was stated that no duty had been collected from the respondent under the provisions of the Act. The duty and gallonage fee collected from him had been

as per the provisions of the Rectified Spirit Rules. According to the counter affidavit, respondent was supplied with rectified spirit under the provisions of the Kerala Rectified Spirit Rules for the manufacture of Homoeopathic medicines and as such duty at the rate provided under S.R.O. No. 60/61 was imposed. Section 3 of the Act was not applicable. Hence the collection of excise duty at the rate of Rs. 15.50 per proof litre was justified.

6. The learned single Judge, after hearing both sides, allowed the O.P. by judgment dated 8.2.1995. The learned single Judge held that the levy of excise duty in the instant case was governed by Section 3 read with item 3 of the schedule to the Act. The learned single Judge further relied on the decision in W.A. No. 1341/93 (State of Kerala v. Anthrayosc) that no excise duty is leviable on rectified spirit as it is meant for human consumption. Hence the learned single Judge directed the appellants to refund to the respondent the excise duty collected from it over and above the rate of Rs. 13.20 per litre. The present appeal is filed against the above judgment.

7. In the appeal memorandum, appellants have changed their stand. According to the appellants, levy of Rs. 15.50 per proof litre was not under the Kerala Rectified Spirit Rules, 1972. It was under the Act only. According to the appellants, under the rules, a duty at the rate of Rs. 15.50 was leviable. The rate of Rs. 13.20 per litre of pure alcohol provided under the schedule to the Act was actually for the alcohol contents for the finished products of Homoeopathic medicines. Reliance was placed on Rule 49 of the rules. Respondent had purchased rectified spirit which is of 166 degree proof strength. Subsequently, the memorandum of appeal was amended by adding some more grounds. The main thrust of the grounds was that the licence was granted to the respondent for the manufacture of Homoeopathic preparations containing alcohol out of bond and as per the rules, he has to use only duty paid rectified spirit for manufacturing Homoeopathic preparations containing alcohol. As per Rule 49 of the rules, the rectified spirit required by a licensee of non-bonded manufactory shall be obtained on an indent prepared in triplicate in Form IDI from any Distillery or spirit warehouse approved by the Excise Commissioner. The excise duty on rectified spirit to be supplied to the manufacturer is Rs. 80/- per proof litre from 1.3.1989 onwards and not Rs. 15.50 per litre. The excise duty leviable under Rule 49 read with Rule 51 legally correct. The duty indicated in the schedule to the Act is not applicable.

8. We heard the learned Advocate General appearing for the appellants and Shri V.K. Beeran Sahib, Senior Advocate appearing on behalf of the respondent. It is now conceded by the learned Advocate General that duty imposed as per the notification issued under the Abkari Act, 1977 is not applicable to the facts of his case. Hence the question for consideration in this appeal is what is the rate of duty leviable on the rectified spirit supplied to the respondent for the manufacture of Homoeopathic preparations under the Act and the Rules.

9. Medicinal and Toilet Preparations (Excise Duties) Act was enacted to provide for the levy and collection of duty of excise on medicinal and toilet preparations containing alcohol, opium, Indian hemp or other narcotic drug or narcotic. Medicinal preparations has been defined u/s 2(g) of the Act, as including all drugs which are a remedy or prescription prepared for internal or external use of human beings or animals and all substances intended to be used for or in the treatment, mitigation or prevention of disease in human beings or animals. Section 3 of the Act deals with levy and collection of duties. Sub-section (1) of Section 3 of the Act states that there shall be levied duties of excise, at the rates specified in the schedule, on all dutiable goods manufactured in India. Section 9 of the Act gives the power to the Central Government to make rules for the purpose of the Act. The schedule to the Act gives the rate of duty leviable. Item No. 1 deals with Allopathic Medicinal preparations. Item No. 2 deals with medicinal preparations in Ayurvedic, Unani or other indigenous systems of medicine. Item No. 3 deals with Homoeopathic preparations containing alcohol. Item No. 4 deals with toilet preparations containing alcohol or narcotic drug or narcotic. We are concerned with the case of Homoeopathic preparations. At the time of purchase of the spirit by the respondent, the rate of duty was Rs. 13.20 per litre of pure alcohol. Subsequently, by Act 13/89, this has been increased to Rs. 20/- per litre of pure alcohol, thus, going by the Act, the excise duty leviable on Homoeopathic preparations containing alcohol depends upon the number of litres of pure alcohol.

10. In this context, it is relevant to refer to the Kerala Rectified Spirit Rules, 1972, hereinafter referred to as the Kerala Rules. Rectified spirit has been defined as the plain undenatured alcohol of a strength not less than 50 \ddagger over proof and includes absolute alcohol. Rule 13 of the above Rules reads as follows:

No duty to be levied on spirit used for manufacture of medicinal and toilet preparations:

(1) If the rectified spirit imported or purchased under these rules is used for the manufacture of medicinal and toilet preparations on which duty of excise is leviable under the Medicinal and Toilet Preparations (Excise Duties) Act, 1955, no duty shall be collected under the Abkari Act, 1955, no duty shall be collected under the Abkari Act, 1 of 1077, on as much quantity of alcohol as is present in the finished product.

(2) The assessment of duty under the Medicinal and Toilet Preparations (Excise Duties) Act, 1965 being applicable only to the quantity of spirit existing in the finished product, all spirit wasted during the course of manufacture of any medicinal or toilet preparation shall be assessable to duty under the Abkari Act, 1 of 1077.

Provided that the Government may, in consultation with the Drugs Controlled and the Chemical Examiner, by notification in the Gazette, permit such allowance as they think fit for such wastages during the manufacture.

(3) Until the Government prescribe the rates of allowances for wastage under the proviso to Sub-rule (2), the actual wastage noticed in the manufacture subject to a maximum of 10 per cent of the alcohol used for each batch of manufacture shall be allowed as wastage in the ease of preparations in which solid raw materials are used for manufacture. No allowance shall be made in the case of preparations in which liquid ingredients alone are used.

11. The Medicinal and Toilet Preparations (Excise Duties) Rules, 1956 were framed in exercise of the powers conferred by Section 19 of the Act. Rule 4 of the Rules states that the State Government may appoint such number of Excise Officers as it thinks fit to exercise all or any of the powers conferred or to discharge all or any of the duties imposed by the Act or these rules and define the jurisdiction of every such officer. Chapter III deals with levy and refund of, and exemption from duty. Rule 6 says that every person who manufactures any dutiable goods, or who stores such goods in a warehouse, shall pay the duty or duties leviable on such goods under the Act, at such time and place and to such person as may be designated in, or under the authority of these rules, whether the payment of such duty or duties is secured by bond or otherwise. Chapter IV of the Rules deals with manufacture. Rule 18 of the Rules says that the rectified spirit shall ordinarily be supplied to a manufacturer from a distillery or a spirit warehouse of the State in which the manufactory is situated. Section A of Chapter IV deals with manufacture in bond of medicinal and toilet preparations containing alcohol, opium, Indian hemp and other narcotic drugs and narcotics, while Section B deals with manufacture outside bond of medicinal and toilet preparations containing alcohol, opium, Indian hemp and other narcotic drugs and narcotics. Since in this case we are concerned with the manufacture of Homeopathic preparations outside bond. Rules coining u/s B are relevant. Rule 47 of the rules deals with building arrangements. Rule 47(vi) states that there shall be separate "spirit store" for the rectified spirit purchased at the duty of Rs. 1.10 paise, Rs. 3.85 paise and Rs. 15.50 paise per London Proof Litre. Rule 49 of the Rules deals with indent for rectified spirit. Rectified spirit required for manufacturing medicinal and toilet preparations shall be obtained on an indent prepared in triplicate, Form IDI from any distillery or spirit warehouse approved by the Excise Commissioner. The cost of such rectified spirit shall be paid by the licensee of the manufactory to the distiller or spirit warehouse-keeper. The licensee shall credit the duty payable on the spirit indented for into a Government treasury. The officer in charge of the distillery or spirit warehouse, after satisfying himself that the correct amount of duty has been paid, as evidenced by the challan enclosed, shall order the issue of rectified spirit required. The rectified spirit so brought into the non-bonded manufactory shall be immediately transferred to the spirit store and the necessary accounts written up then and there in the register in Form R.G. 2. Accounts of all transactions in respect of rectified spirit purchased paying the duty of Rs. 1.10 paise, Rs. 3.85 paise and Rs. 15.50 paise per London Proof Litre shall be maintained separately.

12. Rule 51 of the Rules deals with restrictions on manufacture. The above rule imposes restriction on the sale or transfer of the rectified spirit obtained by him to any other person and also it restricts preparation of certain medicinal preparations on certain rectified spirit. The amounts mentioned in Rule 49 have been amended as Rs. 6.60, Rs. 13.20/- and Rs. 52.80/-. Subsequently, this has been amended in 1989 as Rs. 10/-, Rs. 20/- and Rs. 80/- per litre.

13. The learned Advocate General contended that as per Rule 49 of the Rules, the respondent had to pay at the relevant time excise duty at the rate of Rs. 15.50/- per litre. After the preparations are made, then so much of pure alcohol as it is consumed for the Homoeopathic preparations would be levied excise duty at the rate of Rs. 13.20/- and the balance would be refunded to the respondent. He further contended that under Rule 13(2) of the Kerala Rectified Spirit Rules, 1972, the quantity of spirit wasted during the course of manufacture of any medicinal or toilet preparations was to be assessed under the Abkari Act. 10/77. The excess amount collected would be refunded only after adjusting the amount which was to be levied as duty for the quantity of spirit wasted. Hence he justified the collection of excise duty at the rate of Rs. 15.50/- at the time of selling the same to the respondent. According to him, Rs. 15.50/- has now been enhanced to Rs. 80/- per litre and hence at present if the respondent wants to purchase the rectified spirit for Homoeopathic preparations, it has to pay duty at Rs. 80/- per litre. After the manufacture of the Homoeopathic preparations duty would be levied on it at Rs. 20/- per litre and the balance would be refunded to the respondent after adjusting the duty, if any for the wasted spirit. Shri V.K. Beeran, Senior Advocate, submitted that there was no justification for collecting a higher amount of duty at the time of sale of the same to the respondent. He further contended that on 22.8.1988, the figures in Rule 49 of the Rules stood as Rs. 6.60/-, Rs. 13.20/- and Rs. 52.80/- per litre. The figure mentioned by the Advocate General is not correct. The figures of Rs. 6.60/-, 13.20/- and Rs. 52.80/- have now been enhanced to Rs. 10, Rs. 20/- and Rs. 80/- per litre. This amendment of the rule is in conformity with the amendment in the Schedule. Hence, according to the learned Counsel, at the time when the impugned sales were effected the respondent was bound to pay excise duty only at the rate of Rs. 13.20/- per litre, which was the duty leviable under the Schedule to the Act. So far as any spirit that was wasted, the authorities could levy duty as per the Abkari Act. It is not necessary to collect a higher amount at the time of initial purchase. The rectified spirit purchased by the respondent is exclusively used for the manufacture of Homoeopathic preparations.

14. After hearing the arguments of both sides, we are of the view that the appellants cannot succeed. The argument of the learned Advocate General that the excise duty is levied on the spirit that is supplied for the purpose of Homoeopathic preparations is not correct. Rule 13 of the Rectified Spirit Rules, 1972 is an answer to the contention raised by the learned Advocate General. Rule 13 of the Rectified Spirit Rules specifically states that if excise duty is leviable under the Act for the

manufacture of medicinal and toilet preparations then no duty shall be collected under the Abkari Act on so much quantity of alcohol as is present in the finished product. It is by virtue of the power granted u/s 3 of the Act that the duty is levied. At the time when the impugned purchase was made, the duty that was leviable for Homoeopathic preparations with alcohol content was Rs. 13.20 per litre. Hence the appellants were legally empowered only to collect the excise duty at Rs. 13.20 per litre for the rectified spirit supplied to the respondent for manufacturing Homoeopathic preparations. Rule 49 of the Rules could not also be of any help to the appellants. That rule also specified the same duty as it is specified in the Schedule to the Act. The contention that the excise duty at the rate of Rs. 15.50 was claimed on the basis of Rule 49 of the Rules does not have any sound basis. In fact, the figures had been amended subsequently in tune with the amendment to the Schedule to the Act. The duty mentioned in Rule 49 of the Rules could only be in accordance with what is mentioned in the Schedule to the Act. Hence the appellants could not collect any amount higher than what was prescribed under the Schedule to the Act. If any spirit is wasted then excise duty could be levied on it as per the Rectified Spirit Rules. It was not necessary for this purpose to collect higher amount. The licence and permit are issued on certain conditions and if these conditions were violated, the authorities were competent to cancel those licence and permit. Now, we are told that the excess amount collected had been refunded to the respondent. Hence it is not necessary further to order refund of the excess amount collected. In the above view of the matter, we do not find any merit in the appeal and it is accordingly dismissed.