IN THE HIGH COURT OF DELHI AT NEW DELHI

W.P.(C) 4156/2002 & CM 7073/2002

Reserved on: August 18, 2010
Decision on: September 14, 2010

GOVERNMENT OF NATIONAL CAPITAL
TERRITORY OF DELHI THORUGH
PRINCIPAL SECRETARY (FINANCE) ..... Petitioner
Through Ms. Avnish Ahlawat with
Ms. Latika Chaudhary, Ms. Simran and
Mr. Nitesh Singh, Advocates

versus

CENTRAL DISTILLERY AND BREWERIES LTD. AND ANR.
..... Respondents
Through Mr. Neeraj Kishan Kaul and
Mr. Jayant Nath, Senior Advocates with
Mrs. Anjali K. Verma with
Mr. Niraj Gupta, Advocates.

WITH

W.P.(C) 4686/2002 & CM 7992/2002

GOVERNMENT OF NATIONAL CAPITAL
TERRITORY OF DELHI THORUGH
PRINCIPAL SECRETARY (FINANCE) ..... Petitioner
Through Ms. Avnish Ahlawat with
Ms. Latika Chaudhary, Ms. Simran and
Mr. Nitesh Singh, Advocates

versus

CENTRAL DISTILLERY AND BREWERIES LTD. AND ANR.
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Through Mr. Neeraj Kishan Kaul and
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W.P.(C) 4687/2002 & CM 7991/2002

GOVERNMENT OF NATIONAL CAPITAL
TERRITORY OF DELHI THORUGH
PRINCIPAL SECRETARY (FINANCE) ..... Petitioner
Through Ms. Avnish Ahlawat with
Ms. Latika Chaudhary, Ms. Simran and

Mr. Nitesh Singh, Advocates

Versus

BALBIR DISTRILLERIES LTD. ..... Respondent
Through None.

W.P.(C) 4689/2002 & CM 7994/2002

GOVERNMENT OF NATIONAL CAPITAL
TERRITORY OF DELHI THORUGH
PRINCIPAL SECRETARY (FINANCE) ..... Petitioner
Through Ms. Avnish Ahlawat with
Ms. Latika Chaudhary, Ms. Simran and
Mr. Nitesh Singh, Advocates

versus

COX INDIA LTD ..... Respondent
Through None

W.P.(C) 4782/2002 & CM 8153/2002

GOVERNMENT OF NATIONAL CAPITAL
TERRITORY OF DELHI THORUGH
PRINCIPAL SECRETARY (FINANCE) ..... Petitioner
Through Ms. Avnish Ahlawat with
Ms. Latika Chaudhary, Ms. Simran and
Mr. Nitesh Singh, Advocates

versus

BALBIR DISTILLERIES LTD. ..... Respondent
Through None.

AND

W.P.(C) 5974/2002 & CMs 10168/02 & 13371/03

GOVERNMENT OF NATIONAL CAPITAL
TERRITORY OF DELHI THORUGH
PRINCIPAL SECRETARY (FINANCE) ..... Petitioner
Through Ms. Avnish Ahlawat with
Ms. Latika Chaudhary, Ms. Simran and
Mr. Nitesh Singh, Advocates

Versus

MCDOWELL AND CO. LTD AND ANR. ..... Respondents
Through Mr. Jayant Nath, Senior Advocate with
Mrs. Anjali K. Verma with
Mr. Niraj Gupta, Advocates

CORAM: JUSTICE S. MURALIDHAR

1. Whether Reporters of local papers may be allowed to see the judgment? No
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in Digest? Yes

JUDGMENT
14.09.2010

1. These are six writ petitions which involve the interpretation of clause 7.4 of the Terms and Conditions attached to the licences granted by the Government of National Capital Territory of Delhi ('GNCTD') to each of the Respondents permitting them to sell liquor at certain prices fixed by the Commissioner (Excise) under the Punjab Excise Act, 1914 ('PEA 1914').

2. Under PEA 1914, the Delhi Liquor Licence Rules, 1976 ('Rules') have been framed which prescribe the procedure for grant of licence in the category of L-1 to L-20. L-1 is a licence for a wholesale vend of foreign liquor to be supplied to L-2, L-3, L-4, L-5, L-5A and L-19 licencees. The excise policy is announced by the GNCTD every year for each Financial Year in which the basic criteria for sale of liquor in Delhi is prescribed. After the issuance of the excise policy, the Commissioner (Excise) calls for applications for grant of various types of licences for supply of liquor in Delhi as per terms and conditions finalized by the Commissioner (Excise).

3. Clause 7.4 of the terms and conditions of the licence, as announced for the year 2000-01 reads as under:

> "7.4 The ex-distillery price shall be determined uniformly on the following basis:
>
> (a) In case of all IMFL brands excluding beer, prices will be

fixed on the basic premise of lowest ex-distillery price net of all duties, discounts/commissions of whatsoever nature allowed in respect of any market in India excluding National Capital Territory of Delhi, as on 31st March 2000 fixed for 2000-2001. Thus, the existing linkage with CSD will be delinked.

(b) Beer price fixation

The ex-distillery price of all brands of beer irrespective of the fact that they are new entrants or existing brands will be fixed on the basis of minimum ex-distillery price prevalent in any market of India as on 31st March 2000 provided that these are supported by invoices, documents and declarations.

(c) The linkage with CSD price in fixation of ex-distillery price will continue."

4. A number of distilleries including the Respondents in these petitions applied for L-1 license for wholesale supply of Indian Made Foreign Liquor ('IMFL') in Delhi. Since the facts in these cases are more or less similar, the contentions advanced in detail in the case of W.P. (C) No. 4156 of 2002 concerning the Central Distillery and Breweries Limited ('CDBL') are discussed hereafter in some detail.

W.P. (C) 4156 of 2002

5. The CDBL, the Respondent in Writ Petition (Civil) No. 4156 of 2002, submitted an application on 2nd May 2000 for grant of L-1 licence for the year 2000-01. Along with the application, it submitted a declaration giving the sales figures all over India, the minimum Ex- Distillery Price ('EDP') all over India excluding Delhi, and the minimum EDP with respect to supplies made to the Canteen Stores Department (CSD). Along with the application, it also

enclosed Appendix – C statement indicating information for each brand of IMFL. With respect to Royal Challenge Whisky ('RCW') the Respondent CDBL indicated that such brand has been sold all over India except Kerala, and while giving the minimum wholesale prices against Tamil Nadu and Kerala, it was indicated that it was "Not sold". On the basis of the information provided, the L-1 licence was granted to CDBL on 27th June 2000. It is further stated that for fixation of price of various brands, CDBL was called for a hearing and thereafter on 7th July 2000 an order was passed by the Excise Commissioner ('EC') fixing the EDP of RCW at Rs. 1400 per quart case and maximum retail price ('MRP') at Rs. 340/- per quart case. The reasoning of the EC was as under:

> "45. Royal Challenge Whisky – registered with CSD. The existing and CSD prices both are Rs. 1328.38 per quart case and MRP of Rs. 325/- per quart. Seeks revision on the ground that the price was fixed 3 years back, upgradation of packing by providing guala caps. At EDP of Rs. 1400/- and MRP of Rs. 340/-, revenue goes up by Rs. 8.73 per quart out of enhancement of Rs. 15/- per quart.
>
> 46. EDP/MRP in UP is Rs. 2100/425, in Rajasthan Rs. 2300/400, in Haryana Rs. 2550/350, in Punjab Rs. 1921/400, in Chandigarh Rs. 2100/350, in Himachal Rs. 2160/400. The proposed EDP and MRP is still the lowest anywhere in India. Keeping the revenue enhancement and parity with the adjoining States, EDP of Rs. 1400/- per quart case and MRP of Rs. 340/- per quart is allowed."

6. According to the Petitioner, it later transpired that the CDBL had, while submitting the All India EDP, deliberately not disclosed the Tamil Nadu price for RCW, which was much lower than the price in the CSD and other States.

7. By a letter dated 20th September 2000, the Tamil Nadu State Marketing Corporation Limited ('TASMAC') was requested to submit the wholesale price and MRP of all the brands of liquor supplied in Tamil Nadu. By its letter dated 4th October 2000, TASMAC enclosed a copy of the Price List as on 1st June 2000 containing manufacturer's basic price, wholesale price and MRP. From the information supplied by TASMAC, it appeared that for Shiva Distilleries Limited which manufactured 1000 ml and 750 ml of RCW, the EDP for 1000 ml pack size was Rs. 962/- and the EDP of 750 ml pack size was Rs. 1003/-. For Shaw Wallace & Company which manufactured Royal Challenge Premium Whisky ('RCPW'), the EDP for 1000 ml pack size and 750 ml pack size was Rs. 962/- and Rs. 1003/- respectively.

8. Accordingly, a show cause notice was issued by the EC to CDBL on 24th October 2000 under Rule 17-B of the Rules as to why the differential amount, by taking the Tamil Nadu rate as the lowest EDP, be not recovered and their L-1 licence not revoked. After taking extension of time, the CDBL finally filed its reply on 18th December 2000 stating that M/s. Pampasar Distillery Limited was a different company and a separate legal entity. It further stated that the whisky sold in Tamil Nadu is Royal Challenge Premium Malt Whisky ('RCPMW'), which is different from RCW being sold by CDBL in the NCT of Delhi. CDBL produced a sample bottle of RCPMW sold in Tamil Nadu by another company, i.e., M/s. Pampasar Distilleries Limited as well as a sample bottle of RCW being supplied by CDBL in the NCT of Delhi. It was maintained that the brand RCW was not sold by CDBL in Tamil Nadu as indicated in the affidavit dated 1st May 2000. This was conveyed to the EC by

the affidavit dated 2nd May 2000 where the lowest EDP for RCW was declared as Rs. 1904/- per quart case and that the said price is correct. It was stated that "the said brand which is claimed to have been sold in Tamil Nadu at the alleged ex-distillery price of Rs. 1003/- per case has not been manufactured or sold by us." It was further stated that CDBL itself did not have any manufacturing facilities in the State of Tamil Nadu and, therefore, was not responsible for the discrepancies in the alleged prices. It was then stated as under:

> "Without prejudice to the foregoing, it is also pertinent to mention herein that in the last few months no IMFL in the name of Royal Challenge Whisky and/or Royal Challenge Premium Malt Whisky has been supplied and sold in the State of Tamil Nadu. In fact, what has been sold is the Royal Challenge Gold Whisky by other manufacturers the EDP of which is much higher than the EDP for NCT of Delhi."

It was accordingly prayed by the Respondent CDBL that the show cause notice be withdrawn.

9. By a letter dated 22nd/26th December 2000, the EC passed an order fixing the revised EDP for RCW in Tamil Nadu at Rs. 1003/- per quart case under Rule 17-B of the Rules and in accordance with Clause 7.4 of the terms and conditions for the grant for L-1 licence for the year 2000-2001. Consequently, the EC issued directions which read as under:

> "19. For EDP of Rs. 1003/- per quart case, the wholesale price comes to Rs. 93.28 per quart, the MRP for the quart bottle is fixed at Rs. 280/-.
>
> Accordingly, for pints EDP comes to Rs. 1015/- per pint case, wholesale works out to Rs. 47.16 per pint and MRP Rs. 140/- per

pint. For nips the EDP works out to Rs. 1027/-, wholesale price works out to Rs. 23.80 and MRP Rs. 70/-.

DEO(IMFL) is directed to issue a detailed price structure as above effective from 30th December 2000.

20. The licensee is directed to have the labels of new MRP as above affixed on every bottle stocked in the bonded warehouse before 30th December 2000 and new MRP printed on the labels on new imports of stocks.

21. A separate order regarding price differential to be recovered from the licensee for the supplies made during 18th July 2000 to 29th December 2000 shall be issued. "

10. The Respondent CDBL filed an appeal against the above order before the Financial Commissioner ('FC'). Since at the relevant time no FC was appointed by the GNCTD, the CDBL approached this Court with Writ Petition (Civil) No. 960 of 2000. The following order was passed by the Division Bench of this Court:

"Admittedly the appeal is pending before the Financial Commissioner, Respondent No. 2 against the impugned order. Therefore, we would not like to comment on the merits of the controversy involved in this case. However, we direct Respondent No. 2 to decide the appeal finally within three months from today. Pending final decision of the appeal, the Petitioner is permitted to continue to sell its product at the rate of Rs. 1,400/- per quart case ex-distillery price. The Petitioner will keep the amount of difference between Rs. 1,400 and Rs. 1,003/- in a separate bank account to be opened in a nationalized bank. The Petitioner will supply monthly statement of account with respect to the deposit to the Respondent No. 3.

List the petition for directions regarding further orders with respect to the interim order passed today, i.e. with respect to the amount being kept in the separate bank account in pursuance of this order, on 17th July 2001.

Interim order dated 12th February 2001 will continue to remain in force.

So far as the amount of Rs.1,93,74,335.90p as per Annexure P-8 is concerned, the learned counsel for the Petitioner gives an undertaking to abide by the decision with respect to the said amount at the final stage. This is without prejudice to the contention of the Petitioner that this demand is without authority. In view of the permission granted by us to the Petitioner to sell at the rate of Rs. 1,400/- per quart case, if some directions from Respondent No. 3 are required to be issued to enable the Petitioner to market its product, the said Respondent will issue the same."

11. Thereafter the appeal was heard by the FC and was disposed of by an order dated 7th February 2002. After noticing the submissions of learned counsel till para 8 of the order, the learned FC held in paras 9 and 10 as under:

"9. I am satisfied with the arguments advanced by the Appellant and am of the opinion that the Excise Commissioner should have allowed the minimum EDP fixed for 2000-2001 as stipulated under clause 7.4 of the terms and conditions for grant of licence and also keeping in view that the brand is different and prices of raw materials and other charges are increasing every year.

10. Therefore, in view of the above, I accept the appeal and set aside the order dated 22nd/26th December 2000 and the demand notice dated 5th January 2001 issued by the Excise Commissioner. The minimum EDP for 2000-2001 is given at Rs. 1400/- per quart case. Consequently, the EDP of Rs. 1,400/- per

quart case which is the minimum among the States in which supplies were being made by the Appellant is allowed for the excise year 2000-2001 in respect of 'Royal Challenge Whisky' brand."

Aggrieved by the above decision, the GNCTD has filed the present writ petition.

Pleadings

12. The case of the GNCTD in the writ petition is that the EDP shall be determined, in terms of Clause 7.4 of the terms and conditions, uniformly while taking the basic premise of the lowest EDP in respect of any market in India excluding National Capital Territory of Delhi. It is pointed that the Respondent CDBL deliberately did not disclose the Tamil Nadu EDP when clearly the Royal Challenge brand was being sold in Tamil Nadu by different distilleries i.e. Shiva Distilleries Limited and Shaw Wallace & Company. Although it did not refer to M/s. Pampasar Distillery Limited as one of the manufacturers of Royal Challenge Brand, it was perhaps possible that later M/s. Pampasar Distillery also started manufacturing the Royal Challenge Brand under their franchise. It is contended that it may have made no difference whether the whisky was RCPMW or RCW and the fact remains that both brands were identical in quality and, therefore, both are having the same rates. It is further submitted that the FC's order is in fact a non-reasoned one. It is submitted that mere shifting of brand from one distillery to another cannot absolve the Respondent from ensuring that the EDP is correctly fixed under Clause 7.4. An erroneous interpretation has been placed by the FC in concluding that since the brand was different and prices of raw material and other charges were increasing every year, higher EDP was permissible. This

will defect the very price fixation policy.

13. In the counter affidavit filed by CDBL, a preliminary objection was raised to the maintainability of a writ petition filed by the EC, whose rank is below the FC. The applications praying for impleadment of GNCTD as Petitioner No. 1 and consequential amendment of the writ petition were filed way back in the year 2003. They have been allowed by a separate order passed by this Court. This Court accordingly rejects the preliminary objection.

Submissions of Counsel

14. Ms. Avnish Ahlawat, learned counsel appearing for the Petitioner submitted that at the time the EDP was initially fixed, the EC did not have the information that was later on furnished by TASMAC. This clearly showed that the EDP of 750 ml RCW sold by Shiva Distilleries Limited was Rs. 1003/-. Likewise, the EDP of 750 ml of RCPW manufactured by Shaw Wallace & Company was also Rs. 1003/-. The FC overlooked the above facts in fixing the price at Rs. 1400/- per quart case. It was further submitted that though the public at large had paid the higher price, the Respondent cannot get the benefit of unjust enrichment in the matter. It is pointed out that the extra benefit which the Respondent derived has to go back to the State as the money coming to the State is utilised for the public. The question was not of higher revenue generated by the State but was about the customer having to pay more for a brand of whisky that was sold cheaper elsewhere. According to Ms.Ahlawat, the doctrine of unjust enrichment is not applicable so far as the State is concerned. The liberalised policy with respect to price fixation was adopted in later years and such later policy will not be applicable for

determination of price fixation for the year in question. It is further pointed out that it is the price of the brand which is required to be seen and not the company or distillery manufacturing that brand.

15. It is submitted by Mr. Neeraj Kishan Kaul and Mr. Jayant Nath, learned Senior counsel for the Respondent CDBL that for the subsequent excise year 2002-03, Clause 7.4 of the terms and conditions has been modified and now the prices of IMFL brands excluding beer shall be fixed "on the basic premise of the lowest ex-distillery price net of all duties, discounts/commissions of whatsoever nature allowed in respect of any market in India, irrespective of the fact whether the brand is supplied by the applicant distillery/brewery/ bottling plant or any other distillery/brewery/bottling plant under any kind of usership/franchise agreement or under any other arrangement. For this purpose, the minimum ex-distillery price as on 31st March 2002 will be the basis for fixation of prices." Therefore for the earlier year unless the Respondent CBDL itself manufactured and sold RCW at a lower EDP elsewhere, lowest EDP could not be that charged by some other distiller. It is accordingly submitted that the Petitioner was trying to misread Clause 7.4 of the terms and conditions. Reference is also made to test report which brought out the distinction between the RCPMW manufactured by Pampasar Distilleries Limited in Tamil Nadu and the RCW which has been manufactured and marketed by CDBL in Delhi. According to the Respondent, RCW manufactured by it has a distinctive and superior bottle, mono-carton, logo, design and cap etc. The alcohol content and the blend also justified the higher price. It is further submitted that the price list furnished by TASMAC did not give the sales figures and, therefore, both parties had proceeded on the

assumption that RCW was not being sold in Tamil Nadu at all by anyone. During the relevant period, what was sold was only RCPMW. It was for this reason that the EC had undertaken a comparison of the test results of the two brands which were called for by him. The Petitioner was trying to change the very basis of this case in this Court by producing a price list sent by TASMAC, which was never produced either before the FC or before the EC and, also not shown to the Respondent.

16. It is further submitted that an identical order was passed by the FC for the subsequent year 2001-02 for the same brand of IMFL whisky. That order had been accepted by the GNCTD and had become final. Reference is made to the decisions in ***Union of India v. Kaumudini Narayan Dalal (2001) 249 ITR 219*** and ***Commissioner of Central Excise & Customs, Cochin v. Alsthom T&D Transformers Ltd (2005) 12 SCC 419***. It is submitted that since the FC's similar order for the subsequent year has been accepted by the GNCTD, the present petition by the GNCTD for the earlier year challenging the FC's order was misconceived. It is further pointed by Mr. Kaul that pursuant to the interim order passed by this Court, the difference in the price between Rs. 1400/- per quart case and Rs. 1003/- per quart case was deposited by the Respondent in a separate bank account. This amount then got released to them in pursuance of the order dated 22nd May 2002 passed by the Division Bench of this Court after the impugned order was passed by the FC. By the time the present writ petition was filed, the said amount was already released back to the Petitioner. By filing the present writ petition, the GNCTD was seeking to recover the amount which has been permitted by this Court to be released to the Respondent after the order of the FC. He submitted that this was

impermissible in law.

17. It is next submitted that on the date of the order passed by the EC i.e. on 22nd/26th December 2000, the sale of RCPMW had discontinued even in Tamil Nadu. A further objection was raised by Mr. Jayant Nath, learned Senior counsel that the EC wrongly relied upon Rules 33 (17A) and 33 (17B), which had in fact been amended on 16th May 1994. Under the amended Rule 33 (17A), the criteria for fixation of price had to be with the prior approval of the Lieutenant Governor ('LG'). In the present case, the Petitioner had not shown any document which would indicate that the LG had approved the terms and conditions.

18. The above submissions have been considered by this Court.

Interpretation of Clause 7.4 of terms and conditions

19. The interpretation of Clause 7.4 of the terms and conditions which has been extracted hereinabove makes a distinction between beer and other IMFL brands of liquor. In the present case, the criteria for fixing the price as announced for the year 2000-01 arises for consideration. It is immaterial whether Clause 7.4 of the terms and conditions has been differently worded for the subsequent years. Even otherwise, the wording of Clause 7.4 for the subsequent year does not, in the view of this Court, introduce any new criteria. It is but clarificatory of the criteria set out in the year 2000-01. This Court is unable to accept the contention of the learned Senior counsel for the CDBL that the lowest EDP charged elsewhere for the same brand of liquor would become applicable only where such brand has also been manufactured

by the CDBL and not if manufactured by some other distiller. The wording of Clause 7.4 does not permit such a restricted meaning. The words "the basic premise of lowest ex-distillery price net of all duties, discounts/commissions of whatsoever nature allowed in respect of **any market in India** excluding National Capital Territory of Delhi" obviously refers to the same brand sold elsewhere, whether manufactured by the same distiller or not. These are, after all, IMFLs where the original formulation is that of the foreign party. The distiller in India is able to bottle the IMFL under a licence or a franchise agreement. The brand name is more or less the same and any variations would also be only to the extent permitted by the foreign party. Secondly, it is unlikely that the bottler of a foreign brand whisky in Delhi will not know what the price of the same brand is in Tamil Nadu or Kerala or Karnataka. The nature of the IMFL trade is such that each bottler, and each state, must be keeping a close watch on prices and that affects movement of stocks across state borders and possible loss of revenue if the price difference between the brand sold in adjoining states is significant.

20. While fixing the EDP of a brand under clause 7.4, the EC has to, in the first place, rely upon the information provided by the licence holder as to the number of approved brands of IMFL which it proposes to sell wholesale. The licence holder is required to make a declaration on affidavit that the particulars and contents of the application for renewal of licence are correct and that if any information given in the application form is found to be false, it would render the licence liable for cancellation as per the PEA 1914 and the rules framed thereunder. In the present case, the authorised signatory of CDBL indicated the different brands of the IMFL it proposed to sell in Delhi.

This included RCW at Serial no. 1. The information provided by the Respondent regarding the minimum EDP 'as indicated in Column 2 of Appendix B' was Rs. 2,550/- per litre. CDBL declared that the RCW manufactured by it was not sold in Tamil Nadu. Significantly, the heading of Column 2 in Appendix B is the "Actual sale figure for all over India excluding NCT of Delhi during the last two years". Even when the matter went before the EC, it was maintained by the Respondent that the "EDP/MRP in Uttar Pradesh is Rs. 2100/425, in Rajasthan Rs. 2300/400, in Haryana Rs. 2550/350, in Punjab Rs. 1921/400, in Chandigarh Rs. 2100/350 and in Himachal Rs. 2160/400". On this basis, the EC initially fixed the EDP of Rs. 1400/- per quart case and MRP of Rs. 340/- per quart since there was an increase in revenue by Rs. 8.73 per quart over the price fixed three years earlier.

21. The EC wrote to the Managing Director, TASMAC on 20th September 2000 asking for the "price structure (ex-distillery price, wholesale price and MRP) for last 3 years of the liquor brands being marketed by your Corporation." In response to this letter, a reply dated 4th October 2000 was made by TASMAC enclosing "a copy of price list as on 1st June 2000 containing Manufacturer's basic price, Wholesale price and Maximum Retail Price." As per the TASMAC list, as on 1st June 2000, RCW 1000 ml and RCW 750 ml was sold at Rs. 962/- and Rs. 1003/- respectively by Shiva Distillery Ltd. and 1000 ml of RCPW was sold at Rs. 962/- and 750 ml of RCPW was sold at Rs. 1003/- by Shaw Wallace & Co.

22. CDBL has been unable to counter the above figures furnished by

TASMAC except saying that there was no sale of RCW in Tamil Nadu during the relevant time even by the above two distillery companies. Nothing has been brought on record to substantiate the above contention of the CDBL. There is no merit in the contention of the Respondent that the order of the EC is in violation of the principles of natural justice since the price list was not disclosed to the Respondent. The order of the EC refers to the price indicated in the price list submitted by TASMAC in para 6 of the order dated 22nd /26th December 2000 as the basis of issuance of show cause notice dated 24th October 2000 to the Respondent. In reply to the said show cause notice, on 28th November 2000 no complaint was made by the Respondent that it was not given a copy of the price list sent by TASMAC. It only maintained that RCW was not being sold in Tamil Nadu and further that the brand being sold in Tamil Nadu was a different product which was sold in a bottle and not in monocartons. This Court finds that it is the Respondent that has changed its case in contending that it ought to have been given a price list offered by TASMAC whereas no such complaint was made either before the EC or before the FC. Further, the present petition enclosing the TASMAC price lists has been pending for more than eight years. There was enough time for the CDBL to verify the correctness of the figures given in the TASMAC price list. The market would basically respond to the name 'Royal Challenge' which is the dominant feature of the brand name. If indeed the RCW and RCPMW were two entirely different brands, quality wise, they are unlikely to have been sold at the same price for the relevant period even in Tamil Nadu.

Comparison of brands

23. While the TASMAC price list talks of Shiva Distilleries and Shaw Wallace, CDBL appears to have brought in Pampasar Distilleries as yet another bottler of RCW. What is significant though is that even according to CDBL, RCPMW was sold in Tamil Nadu during the relevant period. It produced a sample of the bottle of RCPMW sold by Pampasar before the EC. This prompted the EC to seek the laboratory test results of the said brand and that of the RCW sold by CDBL to ascertain if there was any significant qualitative difference between the two as claimed by CDBL. The approach of the EC appears to be consistent with the requirement of Clause 7.4.

24. According to the CDBL the following features of the two brands bring out the differences and justify a different price for each:

S.No.	Particular	Tamil Nadu	Delhi
1.	Label	Royal Challenge Premium Malt Whisky	Royal Challenge Whisky
2.	Design of label	Simple	Rich quality
3.	Capsule	Simple	Good quality with guala caps in Lt and Qt sizes
4.	Bottle quality	Simple	Costly
5.	Mono cartons	Not used	Used for all sizes of very rich quality

Although the Respondent would like this Court to proceed on the footing that the above differences are significant, it belies the fact that both are sold at the same price in Tamil Nadu. Even if there may be different manufacturers for the same brands of whisky, they are manufacturing under a franchise agreement with the brand owner. In that case, it would not be open to the

distilleries to change the quality of the brand. Clearly, the distillery would appreciate the difference in the qualities. If there was indeed so much difference between the two brands, it would be unlikely that they would be sold at the same price.

25. The EC has not gone by the above findings as projected by the Respondent. But it has made a further detailed analysis on the laboratory test. It is evident from para 14 of the order dated 22nd/26th December 2000 passed by the EC where a comparison is made between its results as to the two different brands:

Sl.No.	Particulars	B.No. 558 sold in Delhi 20/1	B.No. 260 sold in Tamil Nadu 20/2
1.	Test of Ethyl Alcohol	Positive	Positive
2.	Proof Strength Percentage of alcohol V/V	75.12 42.93	74.60 42.63
3.	Total acid as acetic acid (100ml of absolute alcohol in mgs.)	--	--
4.	Volatile acid as acetic acid (100ml of absolute alcohol in mgs)	2.40	2.42
5.	Ester as Ethyl acetate (100 ml of absolute alcohol in mgs)	35.25	24.85
6.	Furfural	Positive	Positive
7.	Copper (above 10 PPM)	--	--
8.	Iron (above 10 PPM)	--	
9.	Test of Methyl Alcohol	Negative	Negative
10.	Higher alcohol as amyl alcohol in grams 100 litres of absolute alcohol	Within limit	Within limit
11.	Aldehyde as acetaldehyde in grams Per 100 litres of absolute alcohol	1.02	0.5160

In the note of the laboratory report it has been mentioned that "aroma of

blending of scotch is better in sample B.No. 558 for sale in Delhi."

26. The EC has, in view of this Court, rightly concluded that the above laboratory test reports pointed only to the "slight difference in alcoholic strength and aroma has been reported which is a natural difference from consignment to consignment." The conclusion that the above laboratory test "has conclusively established that the product in question is same in Tamil Nadu and Delhi" cannot be said to be perverse or contrary to the evidence brought on record.

27. This Court is, therefore, unable to appreciate how without even discussing the detailed reasons given by the EC, the FC has in one paragraph set aside and recorded the satisfaction that the EC "should have allowed the minimum EDP fixed for 2000-2001 as stipulated under Clause 7.4 of the terms and conditions for grant of license……" and further without giving any reasons, the FC has accepted the Respondent's appeal and set aside the order passed by the EC.

28. For passing a wholly unreasoned order, the FC's impugned order ought to be set aside on that ground alone, and the appeals should revert back to the FC. However, considering the fact that these writ petitions have been pending for eight years, reverting back to the FC would only further delay the proceedings. Moreover in their submissions before this Court, the entire facts of both the parties that are relevant have been discussed by them. For this reason, this Court has proceeded to discuss the matter on merits.

Effect of release of differential EDP to the Respondent

29. The contention on behalf of the CDBL that the Petitioner is seeking to recover the money that was released to CDBL pursuant to the order dated 22nd May 2002 passed by the Division Bench of this Court is, in the considered view of this Court, misconceived. The correct sequence of events is that pursuant to the interim order dated 27th February 2001 passed by the Division Bench, the Respondent had been depositing the difference in the prices between Rs. 1400/- per quart case and Rs. 1003/- per quart case in a separate bank account. After the order was passed by the FC, an application was filed in the disposed writ petition seeking to withdraw the money and this Court on 22nd May 2002 permitted CDBL to withdraw the amount lying in the separate bank account. The said order reads as under:

> "**CW 960/2001 & CM 3376/2001**
>
> On 7th July 2000 Respondent No. 3 Excise Commissioner, Government of National Capital Territory of Delhi fixed the sale prices of Royal Challenge Whisky sold by the Petitioner at Rs. 1400/- per quart case. By the impugned order dated 22nd/26th December 2000 the third Respondent reduced the sale price to Rs. 1003 per quart for the year 2000-2001. Aggrieved by the order passed by the third Respondent, the Petitioner filed an appeal to the second Respondent, Financial Commissioner. At the same time, the Petitioner filed the instant writ petition.
>
> On 27th February 2001, a direction was issued to the Respondent No. 2 to decide the appeal within three months. Pending final decision of the appeal the Petitioner was permitted to sell its brand of Whisky at Rs. 1400/- per quart. However, the petitioner was directed to keep the difference of sale price of Rs. 1400/- per quart and price of Rs. 1003 per quart case fixed by the third Respondent per quart case in a separate bank account. It is not disputed that Respondent No. 3, on 7th February 2002 accepted

the appeal of the petitioner and restored the minimum EDP for 2000-2001 at Rs. 1400 per quart case. In view of the acceptance of the appeal, learned counsel for the Petitioner wishes to withdraw the appeal with the prayer that the amount deposited, pursuant to the order dated 27th February 2001 be allowed to be withdrawn. It may be mentioned that for the purpose of seeking withdrawal of the amount which was deposited in accordance with the order dated 27th February 2001 the Petitioner filed CM No. 335 of 2002. In the CM, notice was issued to the Respondents on 22nd March 2001. On April 10, 2002 learned counsel appearing for the Respondents sought time to file a reply. However, no reply has been filed. Since the appeal of the Petitioner has been accepted by the Financial Commissioner, the amount which was directed to be deposited by order dated 27th February 2001 can be allowed to be withdrawn by the Petitioner.

Accordingly, the Petitioner is allowed to withdraw the writ petition with liberty to withdraw the amount which was deposited in accordance with the order dated February 27, 2001. We order accordingly.

A copy of this order be given dasti to learned counsel for the Petitioner."

30. At the time when the above order was passed, the present writ petition had not been filed. It was filed on 31st May 2002. This Court fails to appreciate how the above order can come in the way of the Petitioner filing the present writ petition challenging the order of the FC. The outcome of the present writ petition would have to be given effect to irrespective of the fact that the Division Bench of this Court on 22nd May 2002 permitted the amount deposited by CDBL, when the matter was pending before the FC, to be withdrawn by it after the conclusion of the proceedings before the FC. The

present proceedings before the Court challenging the order of the FC cannot be sought to be precluded or barred on the principles of acquiescence or *res judicata* on account of the order dated 22nd May 2002. The said contention is accordingly rejected.

Effect of not challenging the FC's order for the subsequent year

31. The mere fact that the orders for the subsequent years have not been challenged before the EC will not preclude the Petitioner from challenging the order of the FC for 2000-01. In this connection, reliance placed by the Respondent on the decisions in ***Union of India v. Kaumudini Narain, Berger Paints v. Commissioner of Income-tax (2004) 12 SCC 42, Commissioner of Income-tax v. Narendra Doshi (2004) 2 SCC 801*** and ***Commissioner of Central Excise v. Alsthom T & D*** is misplaced. The first two decisions deal with the issue of appeals filed in respect of the assessment made under the Income Tax Act, 1961. In the considered view of this Court, the principles that should weigh with the Court while deciding the appeals under the Income Tax Act, 1961 and the Central Excise Act, 1944 would not be relevant and applicable for adjudging the legality of the orders passed under the local laws fixing the prices of different commodities. It is settled law that as regards 'price fixation', the scope of interference by the Court is extremely limited. (***Union of India v. Cynamide India AIR 1987 SC 1802***) Also, the price fixation for each licensing year is a separate exercise. The acceptance of the price fixed for a later year cannot preclude a challenge to a price fixed for an earlier year. The Petitioner is right in contending that the Respondents have got a higher benefit by selling RCW at a price higher than the one which ought to have been fixed had the complete information been furnished by the

Respondent. There is an element of unjust enrichment of the Respondent by selling RCW in Delhi at a price higher than the one at which it was being sold elsewhere during the same period.

Other contentions

32. It was sought to be contended that the objective of the whole policy was to prevent smuggling and, therefore, "what ought to have been seen by the EC is the MRP of the brand and not the EDP alone." Clause 7.4 of the terms and conditions does not talk of the MRP but of the EDP. There is no challenge either to the policy for 2000-2001 or the validity of Clause 7.4 itself. Having submitted to the procedure of price fixation as determined by that policy, and having furnished information pursuant thereto, it is not permissible for the Respondent to take a stand that the EC should have considered the difference in the MRP of the prices and not the EDP. This contention is accordingly rejected.

33. There is no merit in the contention that the requirement under the amended Rules 33 (17A) of the LG to have approved the criteria for fixing of the prices has not been complied with in the present case. Ms. Ahlawat submitted that on the basis of the records of the GNCTD, it is only after the criteria was settled by the LG that the terms and conditions for grant of licence from L-1 for the year 2000-2001 were announced. Such argument was never raised by the Respondent at any earlier stage of the present proceedings. Be that as it may, it appears that there is in fact no violation of Rules 33 (17A), as amended on 16th May 1994.

34. It is then contended that the price structure relied upon by the EC is effective from 1st June 2000, whereas in accordance with mandate of the terms and conditions the EC should have taken into consideration the price structure applicable on 31st March 2000. This Court finds that the above submission is based on misreading of the prices, as submitted by the TASMAC with its letter dated 4th June 2000. The price list indicated the prices "as on 1st June 2000" and not "effective from 1st June 2000". There is nothing to indicate that the above prices "as on 1st June 2000" were not prevailing on 31st March 2000. This submission is misplaced and is rejected as such.

35. It is sought to be contended that the terms and conditions themselves have been in excess of the delegatory powers as rules do not authorise the EC to fix the lowest EDP in Delhi. No such contention appears to have been raised at any time earlier either before the FC or the EC. The Respondent cannot be allowed to raise this objection at this stage. In any event, while exercising his powers in matters relating to price fixation, the EC is acting for and on behalf of the GNCTD. Clause 13 of the terms and conditions requires the information to be furnished by the licencing holder "within a reasonable time as may be prescribed by the Commissioner or Collector or the District Excise Officer or the Excise Officer." In the present case, initial fixation of the price was in fact done by the EC. At that stage, no objection was raised that he had no power to do so. Consequently, there is no merit in this contention as well.

36. It is then contended that in another case, by an order dated 10th January 2001, the EC had accepted the contention that the whisky in Kerala was

different from the whisky being supplied in Delhi. A perusal of the said order shows that the matter had been discussed with the Incharge, Excise Laboratory regarding the laboratory test for determining the contention whether extra blending of the brand being sold in Delhi was established. It was, in this context, observed that the improved quality on account of extra blending is basically a matter of brand equity. This Court does not find any discrimination having being brought out against the Respondent. The EC has satisfactorily explained the basis for the conclusion that RCMPW sold in Tamil Nadu was no different from RCW sold in Delhi.

Conclusion

37. In that view of the matter, the impugned order of the FC dated 7th February 2002 is hereby set aside and the order dated 22nd/26th December 2000 passed by the EC is restored. The differential EDP will now be recovered by the Petitioner from the Respondent forthwith together with interest in accordance with law.

38. The petition is allowed with costs of Rs. 15,000/-, which shall be paid by the Respondent to the Petitioner within a period of four weeks.

WP (C) 4686 /2002

39. Mr. Jayant Nath, learned Senior counsel appearing for the Respondent states that the present petition has been rendered infructuous since no benefit was taken of the order of the FC by the Respondent in the matter as it did not sell the brand in question in Delhi in the year 2001-02. This is confirmed by Ms. Ahlawat, learned counsel for the Petitioner. Consequently, this petition is

disposed of as having become infrucutous since the impugned order of the FC has not been acted upon. It is clarified that the impugned order of the FC will not be treated as a precedent.

WP (C) 4687/2002

40. In this case the EC has fixed the EDP of the IMFL brand of the Respondent 'Old Tavern Whisky' at Rs. 316.11. The FC, by the impugned order dated 18th December 2001, allowed the appeal of the Respondent and fixed the EDP of the Respondent at Rs. 362.80. While fixing the EDP of the Respondent at Rs. 316.11 per quart case, the EC relied upon the price at which another company/distillery was selling the 'Old Tavern Whisky' in Tamil Nadu. In Tamil Nadu, the 'manufacture's vend fee' was taken to be Rs. 165/-. This was then deducted from the price prevailing in Tamil Nadu and the figure at Rs. 316.11 was arrived at.

41. In the rejoinder, the Petitioner has admitted that the EC took the manufacturing vend fee wrongly at Rs. 165 when actually it was Rs. 120/-. The Respondent submits that if Rs. 45/- is added back to this figure, it comes out to Rs. 361.11 whereas the FC had fixed the EDP at Rs. 362.80. The Respondent submits that since the difference is marginal and of absolutely no consequence whatsoever, this Court need not interfere with the impugned order of the FC. The Petitioner, however, states that after deducting the vend fee from the Tamil Nadu price, the CSD price became the lowest EDP and, therefore, the learned FC was required to fix the price at the minimum of the EDP at CSD rates i.e. Rs. 346/- and not Rs. 362.80/-. This Court finds merit in the contention of the Petitioner. Accordingly, the EDP of Rs. 346/- is

allowed for the brand of Excise Year 2001-2002.

42. The order dated 18th December 2001 passed by the learned FC is hereby set aside. The writ petition is allowed in the above terms. The Petitioner will proceed to recover the differential EDP with interest from the Respondent in accordance with law.

WP (C) 4689/2002

43. It is pointed out in the written submissions of the Respondent that the Petitioner had not implemented the order of the FC and did not give the Respondent the benefit of the enhanced price as ordered by the FC. The price structure issued by the Petitioner on 12th July 2001, prior to passing of the impugned order dated 15th January 2002 of the FC was the same as the price structure after the order of the FC. In other words, the price of the 'Monitor Whisky' remained the same even after the order of the FC. Consequently, the FC's order has not been given effect to. Nothing survives in this petition and it is dismissed as such. It is clarified that the impugned order of the FC will however not constitute a precedent.

W.P. (C) 4782/2002

44. Here the EC has fixed the EDP of the IMFL brand of the Respondent 'Director's Special Whisky' at Rs. 390/- per quart case. The FC, while allowing the appeal of the Respondent, fixed the EDP at Rs. 433.44 per quart case.

45. In the rejoinder, it is admitted by the Petitioner that EC took the

manufacture's vend fee wrongly at Rs. 165 when actually it was Rs. 120/-. There was an excess of Rs. 45/-. The Respondent submits that if Rs. 45/- is added back to the EDP fixed by the EC which is Rs. 390/-, it works out to Rs. 435. The FC had in fact fixed the EDP at Rs. 433.44. The Respondent submits that the Petitioner has attempted to mislead this Court by taking for the first time in his rejoinder affidavit a new plea that the FC should have given Rs. 416.64 per quart case for the brand in question. However, this Court does not find any merit in this contention of the Respondent. The relevant part of the order dated 28th June 2001 passed by the EC dealing with the CSD rate of the brand Director Special Whisky is as follows:

> "The brand Director Special Whisky was being sold for EDP of Rs. 416.44 during 1999-2000 and at Rs. 433.44 during 2000-2001 in Delhi. **CSD rate is Rs. 416.64** for the last two years and in Tamil Nadu at Rs. 555/-. It is stated that the manufacturers vend fee in Tamil Nadu is Rs. 165/- which is paid back by the company to the Govt. of Tamil Nadu. Deducting it from Rs. 555**/-, it comes to Rs. 390/- which is the minimum in the country**. Accordingly, EDP of Rs. 390/- per quart case is allowed for the brand of Excise Year 2001-2002."
>
> (Emphasis supplied)

46. In that view of the matter, the writ petition is allowed. The order of the learned FC dated 28th December 2001 is hereby set aside. Accordingly, the EDP of Rs. 416.64/- is allowed for the brand of Excise Year 2001-2002. The Petitioner will now proceed to recover the differential EDP with interest in accordance with law.

W.P.(C) 5974/2002

47. In the present case, the EC has fixed the EDP of the Respondent's brand

'McDowell No. 1 Whisky' at Rs. 387.16 per quart case for the excise licencing year 2001-02. The FC has set aside the above order and fixed the EDP at Rs. 525.10. However, it appears that even after the order of the FC, the Petitioner did not permit the Respondent to sell the above whisky for the excise licencing year 2001-02 and the entire stocks had to be re-exported to other States. The Respondent did not sell the brand in question in Delhi during the excise year 2001-02. Since the FC's order had not been given effect to, and in any event since no stock of the above brand was sold in Delhi during the excise licencing year 2001-02, the writ petition is dismissed as having become infructuous. However it is clarified that the impugned order of the FC will not constitute a precedent.

48. All the pending applications stand disposed of.

S. MURALIDHAR, J

SEPTEMBER 14, 2010
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