

Suchitra

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO.2290/2021 (F)

UNITED SPIRITS LTD.,
A company registered under the
Companies Act, 1956 having their
registered office at UB Tower,
UB City, 24 Vittal Mallya Road,
Bengaluru - 560 001 and having
their Goa Office at Bethora
Industrial Estate, Bethora Ponda,
Goa Through their Authorised
Signatory Reena Lamba,
Authorised by Board Resolution
dated 16th October 2018 having
her office at UB Tower, UB City,
24 Vittal Mallya Road,
Bengaluru — 560 001.

...PETITIONER

Versus

1. STATE OF GOA, through the
Finance Secretary, having his
office at Secretariat,
Porvorim, Goa.

2. COMMISSIONER OF STATE TAX,
Goa, Department of Commercial Taxes,
Vikrikar Bhavan, Panaji, Goa.

3. COMMISSIONER OF COMMERCIAL
TAXES, Vikrikar Bhavan, Old High Court
Building, Panaji, Goa.

...RESPONDENTS

**Mr. Rohan Shah, Nikhil Pai, Srisabari Rajan, and Mr. Narcinha
A. S. Verekar, Advocates for Petitioner.**

**Mr. D. Pangam, Advocate General with Ms. Maria Correia,
Additional Government Advocate *for the State.***

**WITH
WRIT PETITION NO.402/2021**

PERNOD RICARD INDIA (P)
LTD., A company registered
under the Companies Act, 1956
having their Registered office at
Ateliar, No. 10, Level 1, Worldmark 2,
Aerocity, New Delhi — 110 0110
and their Goa office at Plot 99 & 100,
Bicholim Industrial Estate,
Bicholim, Goa through their
Authorised Signatory Mr. Manoj Mishra
authorised by Power of Attorney dated
12th October 2021.

... PETITIONER

Versus

1. STATE OF GOA, through the
Finance Secretary, having his
office at Secretariat,
Porvorim, Goa.

2. COMMISSIONER OF STATE TAX,
Goa, Department of Commercial Taxes,
Vikrikar Bhavan, Panaji, Goa.

3. COMMISSIONER OF COMMERCIAL TAXES,
Vikrikar Bhavan, Old High Court Building,
Panaji, Goa.

...RESPONDENTS

**Mr. Rohan Shah, Nikhil Pai, Srisabari Rajan, and Mr. Narcinha
A. S. Verekar, Advocates *for Petitioner.***

**Mr. D. Pangam, Advocate General with Mr. Deep Shirodkar,
Additional Government Advocate *for the State.***

**CORAM: M. S. SONAK &
R. N. LADDHA, JJ.**

Reserved on: 2nd March 2022

Pronounced on: 4th March 2022

JUDGMENT: (Per M. S. Sonak, J.)

- 1.** Heard learned counsel for the parties.
- 2.** Rule. The Rule is made returnable forthwith at the request of and with the consent of the learned counsel for the parties. Even otherwise, there were orders already made for the disposal of these petitions at the stage of admission itself.
- 3.** Learned counsel for the parties agree that common issues of law and fact arise in both these petitions and therefore, both these petitions can be disposed of by a common judgment and order by treating Writ Petition No.2290/2021 (F) as the lead petition.
- 4.** The petitioners in both these petitions challenge the insistence on the part of the respondents that the petitioners furnish an undertaking concerning the payment of all taxes, interest, and penalty, in case the GST Council ultimately decides that Extra Neutral Alcohol (ENA) is a commodity covered under the Goods and Services Tax (GST) Law, as a precondition for the

issuance of “C and F Forms” under the provisions of the Central Sales Tax Act, 1956 (CST Act) and Rules made thereunder.

5. The petitioners claim that they have fulfilled the necessary terms and conditions prescribed under the CST Act thereby entitling them to the “C and F Forms”. They submit that there is no provision in the CST Act, 1956, The Central Sales Tax (Registration and Turnover) Rules, 1957 (CST Rules), or the Central Sales Tax (Goa) Rules, 1973 (Goa Rules) based upon which the respondents can insist upon such undertaking. Therefore, the petitioners seek a declaration that the impugned direction in Office Memorandum dated 21.04.2021 (OM) and the impugned undertaking, in the format appended to the said OM is *ultra vires* and the respondents cannot insist upon enforcing the same as a precondition for the issuance of “C and F Forms” to the petitioners.

6. Mr. Rohan Shah, learned counsel for the petitioners adverted to the provisions of the CST Act, CST Rules, and the Goa Rules to submit that there is no provision therein that empowers the respondents to insist upon the impugned undertaking as a precondition for the issuance of “C and F Forms”. He submits that this position has not even been denied by the respondents in their returns. He submits that no source of

power to insist upon such undertaking has been disclosed in the returns. He, therefore, submits that such insistence is *ex facie ultra vires*.

7. Mr. Shah also submits that where a statutory authority is required to do a thing in a particular manner, the same must be done in that manner alone, or not at all. He submits that the State is bound to act within the four corners of the statutory framework and there is no question of insisting upon the impugned undertaking when the statute or the statutory rules do not provide for the same. He relies on *Om Prakash v. Ashwini Kumar – 2010 (8) TMI 465 (SC)* and *Bhavnagar University v. Palitana Sugar Mill Pvt. Ltd. & Ors. - 2003 (2) SCC 111*.

8. Mr. Shah then adverted to the various minutes of the meetings of the GST Council and pointed out that the Council, of which even the State of Goa was a part has taken a conscious decision to continue with the status quo and apply the CST regime in respect of ENA used for the manufacture of alcohol for human consumption (said commodity) pending the final decision on this issue. He submits that the State of Goa, in compliance with this decision does not deny the applicability of the CST regime in matters of inter-State trade or commerce of the said commodity. He points out that even the OM dated 21.04.2021,

after adverting to the decisions taken in the GST Council acknowledges that the said commodity is to be considered as taxable under Section 5(1)(e) of the Goa Value Added Tax Act, 2005 and therefore, the statutory forms like C and F Forms are to be issued by the assessing authorities in terms of the provisions of the said Act. He submits that all the preconditions prescribed for the issue of such forms under the CST regime have been duly complied with by the petitioners. He, therefore, submits that the respondents cannot deny such forms by insisting upon the impugned undertaking that is itself *ultra vires*.

9. Mr. Shah submits that it is impermissible for the respondents to withhold “C and F Forms” on the ground that in the future some tax might become recoverable should the GST Council and the Central Government ultimately decide that the GST regime will be applicable for the inter-state trade and commerce in the said commodity. He submits that such an approach will be contrary to the law laid down in ***Chowhan Machinery Mart v. State of Orissa – 2008 (8) TMI 813 (Orissa)***, ***Tata Steel Ltd. v. Jharkhand & Ors. - 2019 (1) TMI 891 (Jharkhand)*** and ***Manan Auto Link Pvt. Ltd. v. State of Gujarat – 2017 (7) TMI 698 (Gujarat)***.

10. Mr. Shah submitted that the OM dated 21.04.2021, at the highest, is like an executive instruction. He submitted that such an executive instruction cannot amend the provisions of the CST Act, CST Rules, or the Goa Rules and to this extent, the impugned direction and the impugned undertaking are *ultra vires* and cannot be enforced by the State. He points out that there are sufficient provisions under the GST regime for recovery of taxes if and when they become due and therefore it is not legally permissible to the respondents to insist upon the impugned undertaking *inter alia* on the grounds of some potential liability under the GST regime, if and when the same may arise.

11. Mr. Shah contended that the OM dated 21.04.2021 has itself clarified that the ENA used for the manufacture of alcohol for human consumption is to be assessed under the G-VAT Act and therefore, at this stage, it is not even open to the respondents to contend that such ENA is covered under the GST regime. Mr. Shah pointed out to what he contended were inconsistent stands in the return filed by the respondents.

12. Based on the aforesaid, Mr. Shah submitted that the reliefs prayed for in these petitions may be granted.

13. Mr. D. Pangam, the learned Advocate General defended the action of the respondents by firstly adverting to the provisions of Articles 246A, 269A, and 279A of the Constitution of India. He submitted that from the constitutional scheme it was quite clear that the GST Council constituted under Article 279A was only empowered to make recommendations and not binding orders or decisions. He submitted that until the Central Government issues any notification accepting or directing the implementation of such recommendations, the recommendations made, by themselves, would have no statutory force or could not be regarded as statutorily enforceable.

14. Learned Advocate General submitted that the mere fact that the State of Goa and other States had agreed to and were implementing the *ad hoc* arrangement spelled out in the minutes of the GST Council only means and implies that the State in its executive capacity had agreed to treat the said commodity as covered under the CST regime as opposed to the GST regime. He submitted that therefore, the State, in the exercise of its executive powers was entitled to insist upon the impugned undertaking as a precondition for treating such ENA as covered under the G-VAT or the CST regime and there was nothing *ultra vires* in the action of the State Government. Learned Advocate General submitted that the action of the State Government, in

such peculiar facts and circumstances, therefore, could not be tested by reference to the provisions of the CST Act or the rules made thereunder.

15. Learned Advocate General also submitted that no prejudice whatsoever was demonstrated by the petitioners in these matters. He submitted that this was not a case where the respondents were denying the “C and F Forms”. He submitted that subject to fulfillment of requirements under the CST Act and the Rules made thereunder, the State was not at all averse to issuing the “C and F Forms” provided the petitioners were to furnish the undertaking appended to the OM dated 21.04.2021. He submitted that such an undertaking would operate only in the eventuality the GST Council were to decide that the said commodity would be covered under the GST regime but not otherwise. He submitted that if such a decision is taken by the GST Council and accepted by the Central Government, then, the State Government also stands to earn a portion of such taxes so recovered. Therefore, if the State takes reasonable measures in its executive capacity to safeguard its interest in the matters of recovery of such taxes, such an executive action does not attract the doctrine of *ultra vires* or unreasonableness.

16. Learned Advocate General submitted that as the provisions of law now stand, ENA whether for the manufacture of alcohol for human consumption or industrial purposes is a commodity covered under the GST regime. He pointed out that the working arrangement evolved by the GST Council has no statutory force and based on such a decision therefore, there is no question of declaring the impugned undertaking as *ultra vires*. He submits that the action of the State Government, to the extent it seeks to protect its interest in matters of recovery of taxes that may become due to it is perfectly reasonable and does not interfere with any rights, much less any fundamental rights of the petitioners. He submitted that in any case, the Petitioners are companies and not citizens of India who alone are entitled to the fundamental rights guaranteed by Article 19 of the Constitution. He relied on *Tata Power Company Limited v. Reliance Energy Limited & Ors. - (2009) 16 SCC 659*.

17. For all the aforesaid reasons learned Advocate General submits that these petitions may be dismissed.

18. The rival contentions now fall for our determination.

19. The challenge in these petitions is only to the portion of the OM dated 21.04.2021 and the undertaking appended to this

OM. However, to better appreciate the rival contentions, we transcribe the entire OM dated 21.04.2021 and the impugned undertaking appended to it:-

“ Office Memorandum

Subject: Clarification regarding taxability of Undenatured ethyl alcohol of any alcoholic strength (including neutral and extra neutral alcohol) when used in the production of alcoholic liquors for human consumption”.

In view of various representations received by the Government and this office on the subject of issuing 'C' forms for interstate purchase of Extra Neutral Alcohol (ENA) when used in manufacturing of Alcoholic Liquor for Human Consumption (herein after referred to as “said commodity”), clarification was sought from Government on the matter.

In view of this, Government has clarified that, pending the GST Council decision the said commodity is to be considered as taxable under section 5(1)(e) of Goa Value Added Tax Act, 2005 (hereinafter referred to as “said Act”) and hence all statutory forms may be issued by the Assessing Authorities as per the provisions of said Act.

It is further directed that, since the matter is under consideration with GST Council, all statutory forms for said commodity shall be issued only after obtaining an undertaking from the applicant taxpayer in the given format enclosed herewith.

This is for strict compliance of all assessing authorities.

Enclosure as above.

Sd/-

(Hemant Kumar, IAS)

Commissioner of State Tax,

Goa. ”

“ **UNDERTAKING**

I/we Proprietor/Partner(s)/Manager/ Director/ Karta of HUF/Principal Officer managing the business/ Society of registered vide Tax Identification No. under Goa Value Added Tax Act, 2005, do hereby undertake that, in case the GST Council decides that ENA is a commodity covered under Goods and Services Tax law, all the taxes, interest and penalty arising due to such decision would be paid me/us to the Government.”

20. The boldened portion of the above OM dated 21.04.2021 has been styled by the petitioners as the “*impugned direction*” and the above undertaking appended to the OM dated 21.04.2021 has been styled as the “*impugned undertaking*”. The challenge in these petitions, as noted at the outset, is to the above referred impugned direction and the impugned undertaking as a precondition for the issuance of “C Forms” or the “F Forms” for inter-state sale and purchase of ENA when used in the

manufacturing alcoholic liquor for human consumption (said commodity).

21. Now there is no dispute that the “C Forms” referred to in the OM dated 21.04.2021 or the “F Forms” referred to in these petitions are the “C Forms” and “F Forms” as contemplated in the CST Act, 1956, CST Rules, 1957 and the Goa Rules, 1973.

22. Therefore some reference is necessary to the relevant provisions of the CST Act, 1956, CST Rules, 1957, and the Goa Rules, 1973 to appreciate and adjudicate upon the rival contentions.

23. The CST Act, 1956 *inter alia* provides for the levy, collection, and distribution of taxes on the sale of goods in the course of inter-State trade or commerce and specifies the restrictions and conditions to which the State laws imposing taxes on the sale or purchase of such goods of special importance shall be subject. The CST Act, 1956, as it presently stands however applies only to “goods” as defined under Section 2(d) of the said Act. This definition includes *alcoholic liquor for human consumption*.

24. Section 6 of the CST Act 1956 provides for the liability to tax on inter-State sales. Section 6A is concerned with the burden of proof, etc., in case of transfer of goods claimed otherwise than by way of sale. Section 8 of the CST Act, 1956 provides for the rates of tax on sales in the course of inter-State trade or commerce. Section 9 of the CST Act provides for levy and collection of tax and penalties and Section 13 of the said Act deals with the power to make rules.

25. Section 13(1) and 13(2) are concerned with the rule-making power vested in the Central Government. Sections 13(3) and 13(4) are concerned with the rule-making power of the State Governments. Section 13(5) provides that in making any rule under Section 13, the Central Government or the State Government as the case may be may direct that a breach thereof shall be punishable with a fine as prescribed.

26. The Central Government has framed the Central Sales Tax (Registration and Turnover) Rules, 1957 in the exercise of rulemaking power vested in it in terms of Section 13(1) and 13(2) of the CST Act. Similarly, the State Government has framed the Central Sales Tax (Goa) Rules, 1973 in the exercise of rulemaking power vested in it under Sections 13(3) and 13(4) of the CST Act.

27. Rule 12 of the Central Rules, 1957 provides that the declaration and certificate referred to in Section 8(4) of the CST Act shall be in Forms C and D respectively. Similarly, Rule 12(5) provides that the declaration referred to in Section 6A(1) of the CST Act shall be in Form F. The statutory Forms C, D, and F have been appended to the Central Rules.

28. The scheme that emerges from the conjoint reading of the aforesaid provisions of the CST Act, 1956, CST Rules, 1957, and the Goa Rules, 1973 is that the dealer, who in the course of inter-State trade or commerce sells to a registered dealer the goods as defined under Section 2(d) of the CST Act, shall be liable to pay tax which shall be 2% of his turnover or at the rate applicable to the sale or purchase of such goods inside the appropriate State under the Sales Tax law of that State whichever is lower. This means that the dealer, in the origin State will have to normally pay tax at the rate of 2% of his turnover unless the rate of tax in such State is lower. In the destination state, however, the dealer will have to pay full tax as may be prescribed in the destination state, in the event of the sale taking place in such destination State.

29. The scheme also envisages that the destination state issues a C Form in terms of Section 8 of the CST Act read with Rule 12

of the CST Rules, 1957 to the dealer, so that such dealer can then submit the same to the origin State. Upon such C Form being submitted to the origin State, the origin State is not permitted to levy any further tax upon such goods. However, if no such C Form is submitted by the dealer to the origin State then, the origin State will be entitled to recover full tax from such dealer.

30. The petitioners have pointed out that non-issuance of C Form by the destination State and the consequent non-submission of C Form by a dealer to the origin State would result in tax demand at the full rate usually ranging between 12% to 20% in the origin State.

31. Section 6A of the CST Act, 1956 applies in the case of the transfer of goods not for sale i.e. from one branch of the dealer to another, etc. In such a situation also, the position is not quite different from the one described above, except that there is no liability for payment of any tax in the origin State and the destination State is required to issue F Form evidencing the branch transfer or transfer not for sale. However, if the F Form is not issued by the destination State and the dealer is unable to submit such F Form to the origin State then that might result in tax demand at the full rate usually ranging between 12% to 20% at the origin State.

32. Thus, the importance of the issuance of C or F Form in the course of inter-state trade or commerce cannot be undermined. In *Salvicate (Bangalore) PVT. LTD. vs. Sales Tax Officer - 1998 (109) STC 543*, the Kerala High Court has held that withholding of C Forms may sometimes result in the complete destruction of trade or business in which event it may amount to a total restriction that is impermissible in law. In *M/s. Tata Steel LTD (supra)* the Jharkhand High Court has held that a denial of C Form might amount to a violation of rights guaranteed under Article 19(1)(g) read with Article 19(6) of the Constitution of India. The petitioners have also pleaded that on account of non-issuance of C Form by the State of Goa which is the destination State, the petitioners have had to pay tax at the full rate in the origin State i.e. Rajasthan.

33. In *M/s. Tata Steel LTD (supra)* the Jharkhand High Court has analyzed the provisions of the CST Act, 1956, CST Rules, 1957, and the provisions of the Central Sales Tax (Jharkhand) Rules, 2006 and has held that C Form has to be given to a registered dealer who fulfills the following conditions:-

- (a) When a person who has applied for Form-C is a registered dealer,

(b) When the goods in respect of which Form-C is to be used, are included in the certificate of registration,

(c) When the applicant of Form-C has paid the necessary amount for getting Form-C and produced the proof of the payment of such amount, and

(d) If the registered dealer or the applicant of Form-C has followed provisions of Rule 8 of Central Sales Tax (Jharkhand) Rules, 2006.

34. Now the provisions of the Goa Rules, 1973 are not substantially different from the provisions of the Jharkhand Rules, 2006. Therefore, C Form will have to be issued by the State of Goa, being a destination State in this case provided the petitioners fulfill the aforesaid conditions as prescribed in CST Act, 1956, CST Rules, 1957, and Goa Rules.

35. Apart from the aforesaid conditions, no other conditions were pointed out to us by the learned Advocate General as a precondition for the issuance of either C and F Forms by reference to the CST Act, 1956, CST Rules, 1957, or the Goa Rules, 1973. No doubt, the learned Advocate General did contend that ENA was not at all alcoholic liquor for human

consumption and therefore the same was not “goods” as defined under Section 2(d) of the CST Act, 1956 and consequently ENA was governed by the Integrated Goods and Services Tax Act, 2017 and not the CST Act of 1956. We propose to deal with this contention of learned Advocate General separately. But suffice to point out that except for raising this contention, the learned Advocate General did not point out any provisions of the CST Act, 1956, CST Rules, 1957, or the Goa Rules, 1973 that entitled the State Government to insist upon the petitioners’ furnishing the impugned undertaking as a precondition for the issuance of C Form or F Form as the case may be.

36. In the return filed on behalf of the state government as well, there is no reference to any provisions of the CST Act, 1956, CST Rules, 1957, or the Goa Rules, 1973 based on which the insistence of the petitioners’ furnishing the impugned undertaking as a precondition for the State issuing the C Form or the F Form has been disclosed. This means that the State Government has failed to indicate any statutory provisions or for that matter, its source of power based on which it was insisting upon the impugned undertaking being furnished by the petitioners as a precondition for the issuance of C Form or F Form as the case may be.

37. In the absence of any provision under the CST Act, 1956, CST Rules, 1957, or the Goa Rules, 1973, and further in the absence of the State Government's inability to even indicate its source of power, we think that the State Government was not entitled to insist upon petitioners' furnishing the impugned undertaking as a precondition for the issuance of C Form or F Form. Such insistence is exclusively based upon the OM dated 21.04.2021 and the impugned direction therein.

38. From the evaluation of the above provisions of the CST Act, 1956, CST Rules, 1957, or the Goa Rules, 1973 it is clear that the subject of issuance of C and F Forms is squarely governed by the statutory provisions that prescribe not only the authorities competent to issue these forms but also the conditions subject to which such forms are to be issued. Admittedly, the OM dated 21.04.2021 is like an executive instruction. Such an executive instruction cannot interfere with the statutory provisions or introduce any additional conditions of furnishing the impugned undertaking, when in fact the statutory provisions do not provide or contemplate the issuance of any such undertaking.

39. In *M/s. Tata Steel LTD (supra)*, the issue that arose for consideration was whether the State of Jharkhand was justified in law in refusing to issue the C Form to the petitioner in respect of

certain inter-State purchases of goods made by it by prejudging or adjudicating the legality and propriety of the transactions of inter-State purchases of goods made by the petitioner by way of transit purchases. The challenge, therefore, was to the denial or withholding of the C Forms by the State of Jharkhand based on the potential liability of the petitioner to pay certain taxes on the transactions in question or the apprehension of the misuse of such forms.

40. In the above context the Court after analyzing and listing the conditions prescribed by the CST Act, 1956, CST Rules, 1957, and the Jharkhand Rules, 2006 proceeded to formulate the conditions that a dealer is required to fulfill before he can insist upon the State issuing the C Form. *The High Court then concluded that once these conditions are fulfilled, there is a corresponding duty on the State to issue the C Forms and further, the State authorities cannot refuse the C Forms at the whims and caprice of the officers of the State.* The High Court held that sometimes, over-anxious officers of the State fall in the track (sic) of looking at the nature of the transactions or looking to the uses of C Forms by the registered dealers and held that this is not permissible at the stage of issuance of C Forms.

41. The High Court held that while issuing C Forms or other statutory forms, there is no scope for analyzing controversial issues. Such controversial issues have to be determined and adjudicated at the time of regular assessment. The State authorities should not act to defeat the very purpose of Section 8 of the CST Act, 1956. *The statute provides that C Forms should be issued in a particular manner as analyzed by the High Court and that must be strictly adhered to. If the dealer fulfills such conditions, C Form must be issued to the registered dealer.* At this stage the officers of the State cannot embark upon any inquiry as to the nature of the transaction or whether the dealer is likely to misuse the C Forms. All such inquiries can be made at the stage of regular assessment and the State authorities cannot prejudge such issues about the nature of transactions or whether the C Forms were being demanded for the evasion of payment of tax. Finally, the Court directed the State to consider and dispose of the petitioner's application for supply of C Forms in accord with law and the observations made in the Judgment and Order. The Special Leave Petition (Civil) Diary No(s).19097/2019 instituted by the State of Jharkhand was dismissed by the Hon'ble Supreme Court on 28.05.2020.

42. A similar issue in the context of the issue of C Forms arose before the Division Bench of the Orissa High Court in *Chowhan*

Machinery Mart (supra). There, the State of Orissa refused C Forms to the petitioner on the ground that the petitioner had failed to pay the entry tax under the Orissa Entry Tax Act, 1999 (OET Act). One of the main issues for determination was therefore whether the State could refuse to issue an adequate number of C Forms on grounds other than those stipulated in Section 8 of the CST Act, 1956, rule 12 of the CST Rules, 1957, and Rule 6 of the Central Sales Tax (Orissa) Rules.

43. The Court analyzed the aforesaid provisions and concluded that under the provisions of Section 8(1) of the CST Act read with Rule 8(4), a registered dealer has a right to obtain a declaration form from the prescribed authority to avail concession in payment of tax on inter-State transactions. Neither Section 8 of the Act nor Rule 12 imposes any restriction on the supply of "C" declaration form by the notified authority to a dealer registered under the Act. Under the provisions of Section 10 of the CST Act only if a person misuses the "C" form he is liable to a penalty. It is only Rule 6 of the CST (O) Rules which imposes certain restrictions on the supply of the "C" declaration form.

44. The Court held that a coherent reading of Section 8 of the Act, Rule 12 of the CST (R&T) Rules, and Rule 6 of the CST (O) Rules, makes it amply clear that once a dealer satisfies the

conditions that he is a registered dealer authorized to purchase goods mentioned in the certificate of registration and charges for obtaining "C" forms were paid and a true copy of the accounts of the forms last supplied was furnished, the authorities are bound to issue him "C" form and *the same cannot be refused on any ground other than those Stipulated in Rule 6 of the CST (O) Rules* so long his certificate of registration remains valid.

45. The Court finally held that even if a dealer was found to have defaulted in the payment of entry tax, the State cannot refuse the issue of C Forms to such dealer. The Court then referred to the historical background leading to the enactment of Section 8 of the CST Act, 1956 and the provision to issue C Forms and held that this provision having been made in the public interest, the Revenue Authorities should not act in any manner to defeat the very purpose of this enactment. *The Court further held that the statute provides that the "C" form should be issued in a particular manner and this must be strictly adhered to. If a dealer fulfills the conditions required under the statute for getting a "C" form or any other statutory forms, the Revenue authorities are bound to issue such forms. They cannot refuse to issue "C" forms or other statutory forms on some plea or other.*

46. The Orissa High Court held that it is a well-settled position of law that what cannot be done "*per directum is not permissible to be done per obliquum*", meaning thereby, whatever is prohibited by law to be done, cannot legally be effected by an indirect and circuitous contrivance, on the principle of "*quando aliquid prohibetur, prohibetur et omne per quod devenitur ad illud*". The Court accordingly found that the authorities are not issuing the required number of "C" forms on irrelevant grounds.

47. The Orissa High Court also referred to the decision of the Hon'ble Supreme Court in *Dabur India Ltd. v. State of Uttar Pradesh – AIR 1990 SC 1814* in which it was observed that the Government, Central or State, cannot be permitted to play dirty games with the citizens of this country to coerce them in making payments which the citizens were not legally obliged to make. If any money is due to the Government, the Government should take appropriate steps, but it should not take extra-legal steps or adopt the course of maneuvering.

48. In *Manan Auto Link Pvt. Ltd. (supra)*, the Division Bench of Gujarat High Court was concerned with the action of the State authorities refusing C Forms to the petitioners on its inter-State purchase of vehicles. The State had reasoned that in terms of its Circular dated 16.11.2009, a dealer should have filed his

periodical quarterly returns and should have paid the self-assessed tax as per such returns and generated a computerized receipt for the same. Since the petitioners had failed to fulfill this essential condition stipulated by the Circular dated 16.11.2009, the State argued that it was entitled to refuse C Forms to the petitioners.

49. The Gujarat High Court noted that there was no dispute of the petitioner having made local sales of vehicles purchased from outside the State. There was also no dispute that the petitioner had failed to deposit the self-assessed tax with the State authorities. The Court also noted that the Circular dated 16.11.2009 issued by the State Government did provide for the deposit of self-assessed tax as a precondition for the issuance of C Forms. Based on all this, the Court posed to itself the question as to whether the requirement of deposit of self-assessed tax as a precondition for the issuance of the C Forms was legally permissible?

50. The Gujarat High Court then considered the provisions and scheme of the CST Act, 1956 including in particular the provisions of Sections 6, 6A, 8, 9, and 13 of the said Act. The Court also took note of the provisions in Rule 12 of the CST Rules, 1957 as also the provisions of the Gujarat VAT Act that contain detailed provisions for assessing and levying of taxes and

finally held that none of these provisions had prescribed that before the purchasing dealer can generate a request for authentication of C Forms, the dealer must have discharged its full liability towards the payment of the VAT. The Court noticed that detailed provisions had been made for the assessment and collection of tax under the VAT Act and held *that in the absence of a specific rule requiring the deposit of full tax before obtaining C form authentication, no such requirement could be introduced by the State Government.*

51. The Gujarat High Court also dealt with the contention on behalf of the State Government that Section 13 of the CST Act, 1956 gave it wide powers to frame rules to carry out the purposes of the Act, and therefore the State could, by executive action add a precondition for the issuance of the C Form. The Court however held that though the rulemaking powers of the State Government are undoubtedly wide, the two main limitations on the exercise of such powers appear to be that any rules so framed cannot be inconsistent with the provisions of the CST Act or the Rules made by the Central Government and that the same should be framed to carry out the purposes of the Act. The Court noted that whether such rulemaking powers would include effecting collection of unpaid VAT by the purchasing dealer before the C form can be generated by him need not be answered because no

rule had been brought to the notice of the Court that it prescribed such a requirement or a precondition. The only source of insistence by the State Government was the Circular dated 16.11.2009. There was no independent source of this prescription outside the said circular.

52. The Court also noted that such a Circular essentially amounted to a mode of tax recovery. Even if the circular referred to the self-assessed tax, the prescription of the Circular did not lose its essential character of one being in the nature of tax collection. The Court finally held *that unless and until such a condition is backed by any statutory provision, it would not be possible for the State Government to provide such a mode of tax recovery making it a precondition for the generation of C forms.*

53. The Court noted that had such a condition been introduced by framing statutory rules in the exercise of powers under Section 13(3) and 13(4) of the CST Act, the matter would have been examined further. However, the circular in the form of executive instructions cannot take the shape of a statute. What is envisaged in sub-section (3) and (4) of Section 13 is the power of delegated legislation vested in the State Government for carrying out the purposes of the CST Act. Such rule-making power cannot be substituted by executive instructions. *The circular in question*

is certainly not in the exercise of the rule-making powers exercised by the State Government. The Court finally held that the action of the respondent State in not allowing the petitioner to generate a C Form solely on the ground that the petitioner had not paid the self-assessed tax for the relevant period under the VAT Act is illegal. The Special Leave Petition (C) No.002847/2018 instituted by the State Government questioning this judgment was dismissed by the Hon'ble Supreme Court on 27.01.2018.

54. Thus from the conspectus of the statutory provisions, the statutory schemes, and the precedents on the issue, we think that the impugned direction and the impugned undertaking that in effect, introduces an additional pre-condition of furnishing the impugned undertaking for the issuance of the C Forms, is indeed *ultra vires* and liable to be declared as such. The State authorities without amending the statutory rules cannot, through some executive instruction, insist upon the petitioners providing the impugned undertaking as a precondition for the issuance of the C Forms.

55. The State Government's contention that its decision to depart from the GST regime and choose to assess the inter-state trade in the said commodity was itself an executive decision and

therefore nothing prevented the State Government from introducing this additional condition through an executive instruction, does not, with respect, appeal to us. In the first place, the representative of the State Government was very much a part of the GST Council and had even taken part in the deliberations on this precise issue of the treatment of ENA *qua* the GST regime. No such issue was ever raised by the State representative at any stage. For almost two years until the issue of the OM dated 21.04.2021, C Forms were issued without insisting upon any undertakings.

56. Secondly, even if it is assumed that the decision to depart from the GST regime was an executive decision, such decision was merely to apply the provisions of the CST Act, 1956 and the rules made thereunder when dealing with the inter-State sale or purchase of the said commodity. Once such a decision, even assuming it was an executive decision was taken, the State, could no longer insist upon virtually amending or altering the provisions of the CST Act, 1956 or the statutory rules made thereunder, based on some executive instructions or in the exercise of its executive powers. By executive order, therefore, the State cannot add, alter or amend statutory provisions and thereby insist that the petitioners furnish the impugned undertaking as a precondition for the issuance of C and F Forms. Here the State,

by an executive order attempts to add to, alter or amend Central legislation, which we believe is impermissible.

57. In the returns filed by Mr. Hemant Kumar (IAS), Commissioner of Commercial Tax, Government of Goa in paragraph 13 there is an admission that the impugned OM is in the nature of execution instruction, but the plea is that the same is issued in the public interest and the interest of the State Exchequer. The affiant further proceeded to state that on account of the interdependency of the CST Act and the CGST Act, the impugned memorandum and the *impugned declaration fill a vacuum in the legislation*. He has further stated that subject to the decision of the GST Council that ENA is subject to the GST regime, any recovery under CGST Act on ENA may be prejudiced on account of section 73 which is restricted to tax '*which has not been paid or short paid or erroneously refunded, or where input tax credit has been wrongly availed or utilised for any reason, other than the reason of fraud or any wilful-misstatement or suppression of facts to evade tax*'. The affiant has further stated that the *said vacuum in the legislature* is sought to be supplemented by the impugned memorandum and the impugned declaration.

58. From the aforesaid, it is quite apparent that the State upon perceiving that the statutory provisions may not be sufficient to protect its interests at revenue collection has virtually attempted to add to or alter the statutory provisions enacted by the Central Government. Merely styling such acts as *filling the vacuum in the legislation* or *supplementing the legislative vacuum* is not sufficient to mask the true nature of the exercise. In paragraph 12 of the affidavit, the affiant seeks to invoke some presumption about the validity of the impugned OM as if the impugned OM was itself some Parliamentary statute or some statute enacted by the State Legislature. Fortunately, even the learned Advocate General did not subscribe to this line of thought of the affiant. The presumption of constitutionality that attaches to legislation does not extend to an executive act or an executive instruction like the OM in the issue.

59. Learned Advocate General however did invite us to independently go into the issue as to whether the inter-State trade and commerce in the said commodity being covered under the GST regime, including in particular the Integrated Goods & Services Tax Act, 2017. He referred to the decisions in *M/s. Synthetics and Chemicals Ltd. v. State of U.P. & Ors. - AIR 1990 SC 1927* and *State of U.P. v. Modi Distillery – (1995) 5 SCC 753* to submit that ENA, *per se* cannot be regarded as

alcohol for human consumption. He submitted that unless the petitioners establish that they were legitimately excluded from the GST regime and covered under the CST or the VAT regimes, the petitioners could not even insist on the issue of C or F Forms.

60. According to us, at least in this matter, it is not open to the State Government to raise the above plea. The State representative is a party to the deliberations of the GST Council. The GST Council has admittedly decided to continue with the status quo about the said commodity. This status quo implies that the said commodity will, until further orders, be not be covered under the GST regime. The State of Goa has not only accepted this arrangement but has acted based on the same which is evident from the first two paragraphs of the OM dated 21.04.2021 itself.

61. Mr. Shah further invited our attention to the assessment order dated 29.07.2021 made by the State authorities against the petitioners invoking, in clear terms the CST Act, 1956 and the Goa Rules, 1973 in matters of inter-State sales of the said commodity. Mr. Shah pointed out that until the assessment year 2018-19, the State authorities were issuing the C and F Forms subject to the petitioners' complying with the statutory provisions without insisting upon any undertaking. All this was never even denied because perhaps it was undeniable. Having regard to all

these circumstances, we decline in these petitions, to go into the larger issue of ENA for the manufacture of alcohol for human consumption being covered under the GST regime or not because such an issue does not properly arise in these petitions.

62. Besides, Mr. Shah pointed out that the GST Council constituted under Article 279-A of the Constitution of India is empowered to make recommendations to the Union and the States *inter alia* on the goods and services that may be subjected to or exempted from Goods and Services Tax. He also pointed out that the GST Council while discharging the functions conferred by Article 279-A, shall be guided by the need for a harmonized structure of Goods and Services Tax and the development of a harmonized national market for goods and services. Admittedly, as of now, this issue is pending consideration by the GST Council and the State of Goa has itself chosen to presently exclude such ENA from the GST regime and apply to such ENA the CST or the VAT regime. Having consciously chosen this path, the only question is whether the State can disregard the statutory provisions or add and alter them by mere executive action or executive instructions. We think the State cannot, given the statutory regime and the scheme of the statutory provisions.

63. The contention that no prejudice will occasion the petitioners if the impugned undertaking is given is again something that does not appeal to us. The insistence at compliance with something that may be *ultra vires* the statutory provisions or foreign to the preconditions prescribed by the statutory regime may itself constitute prejudice. From the returns filed by the respondents, it is apparent that the respondents perceive the existing statutory provisions as deficient to protect their revenue interest should the GST Council in the future decide to alter the present status quo. Now even assuming that such a perception is correct, the same cannot be redressed by issuing some executive instruction or by insisting upon the petitioners furnishing the impugned undertaking devoid of any statutory underpinning. The returns also speak about some lacunae in the Legislations that cover this field and the attempt to remove the same. Now, the lacunae, if any are in the Central legislations. Such lacunae, if any, cannot be attempted to be removed by the State authorities acting in their executive capacity or by issuing executive instructions. The prejudice is quite inherent, if based upon such an impermissible action the Petitioners are compelled to furnish the impugned undertaking even though the statutory regime does not contemplate the furnish of any such undertaking.

64. Mr. Shah also pointed out that by furnishing the impugned undertaking, the petitioners might unnecessarily expose themselves to liabilities that the existing statutory provisions do not contemplate. He referred to the decisions in *Rexnord Electronics and Controls Ltd. v. Union of India & Ors. - 2008 (3) TMI 8 (SC)*, *Fortis Hospital Limited v. Commissioner of Customs, Import – (2015) 12 SCC 715*, *Commissioner of Customs (Port) v. Settlement Commission, Cus. & C.Ex. - 2004 (8) TMI 116 (Calcutta High Court)* and *Fal Industries Limited v. Directorate General of Foreign Trade & Other – 2013 (9) TMI 661 (Madras High Court)* to submit that liability under a bond/undertaking can, in a given case, be construed as a contractual liability independent of the liability under a statute.

65. There is according to us no necessity to go into the issue of whether any fundamental right of the petitioners as guaranteed by Article 19(1)(g) of the Constitution is breached in this particular case. Learned Advocate General referred to *Tata Power Company Limited (supra)* in which it is held that a company incorporated under the Companies Act being not a citizen of India does not have any fundamental right to carry on business in terms of Article 19(1)(g) of the Constitution though its shareholders and

directors may have such a right. Besides, there is also the issue of *res extra commercium* when it comes to dealings in alcohol.

66. But this is not a case where the petitioners have not established any prejudice or a right to challenge the impugned direction and the impugned undertaking. An insistence to furnish the impugned undertaking *dehors* the statutory provisions or *ultra vires* the statutory provisions is, prejudice enough. The situations that the petitioners might expose themselves to by furnishing the impugned undertaking, to say the least, are imponderable. If we have to go by the rulings referred to by Mr. Shah, then possibly, the entire object of insisting upon the impugned undertaking as a precondition for the issuance of C and F Forms is to foist some liability upon the petitioners, which liability the respondents perceive they may not be in a position to place on the petitioners, given the present statutory regime. This also spells out the prejudice that entitles the petitioners to maintain these petitions.

67. For all the aforesaid reasons, we declare that the impugned direction and the impugned undertaking are *ultra vires* and restrain the respondents from enforcing the same. As a consequence, we direct the respondents to consider petitioners' applications for issuance of C and F Forms in accord with the law

but without insisting upon the petitioners furnishing the impugned undertaking. The Petitioners' applications must be disposed of expeditiously and in any case, within six weeks from today.

68. The Rule is made absolute in both these petitions to the aforesaid extent. There shall be no order for costs.

R. N. LADDHA, J.

M. S. SONAK, J.