

M/s K. K. Mittal and Co. v. Union of India and others  
(Amarjeet Chaudhary, J.)

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(17) For the reasons recorded above, we allow the writ petition and issue a writ of prohibition restraining the respondents from collecting the excise duty on the commodity in dispute, which is admittedly partly skim milk powder under the guise of existing sub-heading 0401.13 and hold that under the existing Tariff, no excise duty is leviable on the commodity in dispute.

(18) We also issue a writ, order and direction to the respondents to refund the amount of excise duty collected by them on the commodity in dispute with effect from 1st March, 1989, to the petitioner within a period of six months from today, failing which the petitioner would be entitled to have interest thereon at the rate of 12 per cent per annum. However there will be no order as to costs.

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R.N.R.

*Before G. C. Mital & Amarjeet Chaudhary, JJ.*

M/S K. K. MITTAL AND CO.,—*Petitioner.*

*versus*

UNION OF INDIA AND OTHERS,—*Respondents.*

*Amended Civil Writ Petition No. 7161 of 1989.*

4th May, 1990.

*Income Tax Act (XLIII of 1961)—Ss. 44AC and 206(c)—Punjab Excise Act (1 of 1914)—L. 13 and L. 14 licences—Direct Tax Laws (Amendment) Act, 1989—S. 10, Inserting proviso to S. 44AC with effect from 1st April, 1989—Country liquor licencees holding L. 13 and L. 14 licences—L. 13 licencees—Whether liable to pay tax at source under section 206(c) in view of the proviso to S. 44AC as introduced by Amendment Act 1989—L. 14 licencees not required to pay Income Tax on excise duty in view of the decision of the Central Board of Direct Taxes, Delhi—Issue price not to form part of purchase price and cannot be considered in determining profits under section 44AC for collection of tax at source—Directions of the Central Board of Direct Taxes in relation to Uttar Pradesh licencees will apply equally to licencees in other States—Principle of non-discrimination.*

*Held*, the persons holding L. 13 licences are not liable to pay tax at the stage of purchase of the country liquor, in view of the proviso to clause (a) of sub section (1) of Section 44 AC of the Income Tax Act, 1961 circulated by the Central Board of Direct Taxes, Delhi dated 26th June, 1989.

(Para 10)

*Held*, that since it has been decided by the communication of the Central Board of Direct Taxes, New Delhi that Nirgam Mulya or issue price will not form part of purchase price and consequently it will not be taken into consideration for determining the profits under Section 44 AC for collection of tax at source under Section 206 C of the Act. On the basis of this communication, the relief sought is that the persons holding L-14 licences are not liable to pay tax on the purchase price and no advance tax is payable on the excise duty.

(Para 11)

*Held*, we are of the view that since the Government of India have taken a decision exempting the Uttar Pradesh contractors from payment of tax on the excise duty, why the discrimination in the matter has been made in the case of petitioners holding L-14 licences. In our democratic set-up, the rule of law prevails and the Constitution of India provides equal right to all the citizens of the country. Once the Government have extended a positive relief in a particular State, the same cannot be denied in other States similarly situated. The Government of India should have taken a uniform decision and the petitioners should not have been discriminated in the matter. Therefore, we hold that the petitioners holding L-14 licences before us are also entitled to the same relief which is being given to their counter-parts in the State of Uttar Pradesh.

(Para 13)

*Civil Writ Petition Under Articles 226/227 of the Constitution of India praying that this Hon'ble Court may be pleased to:—*

- (i) Call for the records of the case from the respondents and after perusal of the same to issue a writ of Mandamus directing the respondents not to charge/deduct Income Tax under section 44AC in view of the proviso to clause (a) of sub section (1) of Section 44 AC of the Act. The proviso circulated by Central Board of Direct Taxes, Delhi is dated 26th June, 1989, which is attached as Annexure P-1;
- (ii) Dispense with the filing of certified copy of the Annexure P-1;
- (iii) dispense with the service of advance notices upon the respondents;

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- (iv) award the costs of the writ petition in favour of the petitioner;
- (v) issue any other writ, order or direction which this Hon'ble Court may deem fit and proper under the facts and circumstances of the case.

It is, respectfully prayed that a Writ of Mandamus be issued directing the respondents not to charge/deduct Income Tax Under Section 44 AC in view of the proviso to clause (a) of sub section (1) of section 44 AC of the Act. The proviso circulated by the Central Board of Direct Taxes, Delhi is dated 26th June, 1989 which is attached as Annexure P-1. And/Or any other order or direction which this Hon'ble Court may deem fit and proper in the interest of justice be given to the respondents. During the pendency of Writ Petition the operation of Section 44 AC of the Act may kindly be stayed and respondents be directed not to deduct Income Tax as source till the final decision of Writ Petition.

C.M. No. 39/90:—Application Under Section 151 CPC on behalf of Respondent No. 4 praying that *ad-interim* orders of stay granted by this court may be modified in the terms as has been done in CM No. 19378 in CWP No. 14318 of 1989.

C.M. No. 20963 of 1989:—Application under section 151 of the Code of Civil Procedure on behalf of Respondent No. 3, praying that *ad-interim* order of stay granted by this Hon'ble Court may be modified in the same terms as has been done in C.M. No. 19978 of 89 in CWP No. 14318 of 1989.

Mohan Jain, Advocate, for the Petitioner.

R. S. Chohan, Advocate, for the Respondent No. 1.

S. C. Mohunta, A.G., Haryana, with S. K. Sood, D.A., for Respondent No. 2.

P. S. Saini, Advocate, for Respondents Nos. 3 to 5.

#### JUDGMENT

*Amarjeet Chaudhary, J.*

(1) This order will also dispose of Civil Writ Petition No. 8337 of 1989, in which the petitioners have taken an additional ground that no deduction of tax at source can be made from the L-14 licencees. For the purpose of the order, the facts are being initiated from CWP 7161 of 1989.

(2) The petitioners who are the country liquor contractors and holding L-14 and L-13 licences under the Punjab Excise Act (1 of 1914), have challenged the application of Section 44 AC and consequently Section 206(c) of the Income Tax Act (for short the Act) claiming that as a result of the proviso introduced with effect from 1st April, 1989, they are not liable to be assessed as per the provisions of Section 44 AC and to pay tax at source under Section 206(c) of the Act. The relief has been sought on two grounds, firstly, the country liquor is not obtained by them by auction and, secondly, the liquor is purchased and sold by them at a price fixed by the State Government. The Wine Contractors used to obtain L-14 licence in a public auction which is held annually generally in the month of March, as the highest bidder.

(3) Before coming to any conclusion, it will be worthwhile to bring on record that the country liquor contractors had also challenged the constitutional validity of the insertion of Section 44 AC read with Section 206 of the Act by filing writ petitions in this Court which were dismissed on 2nd August, 1979 and the constitutional validity of the above sections was upheld in those petitions.

(4) At the outset, it was urged at the Bar that during the pendency of the writ petition in this Court, the High Court of Himachal Pradesh has given a verdict in Civil Writ Petition No. 495 of 1988 (*M/s. Gian Chand Ashok Kumar and Co. vs. Union of India and another*) on 6th March, 1990 and the questions of law and fact before that Court were identical to those involved in the present petition. It was, therefore, submitted that in view of the decision rendered in the above case, the petitioners are entitled to the relief prayed for. Shri R. S. Chahar, Standing Counsel appearing on behalf of the Union of India, however, stated at the Bar that though the matter stands adjudicated upon by the Himachal Pradesh High Court but the case of the L-14 licencees had not been taken into account as it was not before that Court.

(5) Written statement in the present case was filed before the decision by the Himachal Pradesh High Court was rendered in the case mentioned above.

(6) The petitioners are holding L-13 licences which were obtained in a public auction by them as the highest bidders, held in the month of March for the year 1989-90 (1st April, 1989 to 31st

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March, 1990) for a specified area. The number of the bottles to be sold by the petitioners is fixed by the Excise authorities. The terms and conditions are read out at the time of auction. The petitioners cannot sell more than the quantity of liquor fixed by the excise authorities and similarly the excise authorities are under obligation to supply the requisite quantity of liquor against permits issued by them from time to time. The minimum and maximum price of each size of the bottles is fixed by the excise authorities and the contractors can manipulate the price to be sold at their vends, between the two extremes of minimum and maximum so fixed. The liquor left unsold at the end of the financial year, that is, after the expiry of the permits, is to be handed over to the successor under the orders of the Excise Collector. The licence L-13 is granted on payment of fixed licence fee of Rs. 25,000 in the State of Haryana and Rs. 10,000 in the State of Punjab for a period of one year. No auction is held for granting L-13 licences.

(7) It is necessary and appropriate at this stage to notice the relevant provisions of Section 44 AC and 206(c) of the Income Tax Act, 1961. The amendments to these Sections were made by the Finance Act of 1988 and the Direct Tax Laws (Amendment) Act, 1989, respectively. The amendment in the former Section came into force, with effect from 1st April, 1989 whereas in the latter Section, it was made with retrospective effect from 1st June, 1988. They are reproduced in extenso:

“44 AC: Special provision for computing profits and gains from the business of trading in certain goods;

(1) Notwithstanding anything to the contrary contained in Sections 28 to 43 C, in the case of an assessee, being person other a public sector company (hereafter in this Section referred to as the Buyer), obtaining in any sale by way of auction, tender or any other mode, conducted by any other person or his agent (hereinafter in this Section referred to as the seller);

(a) any goods in the nature of alcoholic liquor for human consumption (other than Indian-made foreign liquor), a sum equal to forty per cent of the amount paid or payable by the buyer as the purchase price in respect of

such goods shall be deemed to be the profits and gains of the buyer from the business of trading in such goods chargeable to tax under the head "profits and gains of business or profession.

- (b) the right to receive any goods, of the nature specified in column (2) of the Table below, or such goods, as the case may be, a sum equal to the percentage, specified in the corresponding entry in Column (3) of the said Table, of the amount paid or payable by the buyer in respect of the sale of such rights or as the purchase price in respect of such goods shall be deemed to be the profits and gains of the buyer from the business of trading in such goods chargeable to tax under the head "profits and gains of business or profession."

TABLE

Sr. No.	Nature of goods	Percentage
(i)	Timber obtained under a forest	Thirty-five per cent
(ii)	Timber obtained by any mode other than under a forest lease.	Fifteen per cent
(iii)	Any other forest produce not being timber.	Thirty-five per cent

(2) For the removal of doubts, it is hereby declared that the provisions of sub-section (1) shall not apply to a buyer (other than a buyer who obtains any goods, from any seller which is a public sector company) in the further sale of any goods obtained under or in pursuance of the sale under sub-section (1).

(3) In a case where the business carried on by the assessee does not consist exclusively of trading in goods to which this section applies and where separate accounts are not maintained or are not available, the amount of expenses attributable to such other business shall be an amount which bears to the total expenses of

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the business carried on by the assessee the same proportion as the turnover of such other business bears to the total turnover of the business carried on by the assessee.

*Explanation* : For the purpose of this section "seller" means the Central Government, a State Government or any local authority or corporation or authority established by or under a Central, State or Provincial Act, or any company or firm."

"Profits and gains from the business of trading in alcoholic liquor, forest produce, scrap etc. 206 C: (1) Every person, being a seller referred to in section 44 AC, shall, at the time of debiting of the amount payable by the buyer referred to in that section to the account of the buyer or at the time of receipt of such amount from the said buyer in cash or by the issue of a cheque or draft or by any other mode, whichever is earlier, collect from the buyer of any goods of the nature specified in column (2) of the Table below, a sum equal to the percentage, specified in the corresponding entry in column (3) of the said Table, of such amount as income tax on income comprised therein.

TABLE

Sr. No.	Nature of Goods	Percentage
(i)	Alcoholic liquor for human consumption (other than Indian-made foreign liquor)	Fifteen per cent
(ii)	Timber obtained under a forest lease	Fifteen per cent
(iii)	Timber obtained by any mode other than under a forest lease	Fifteen per cent
(iv)	Any other forest produce not being timber	Fifteen per cent

Provided that where the Assessing Officer, on an application made by the buyer, gives a certificate in the prescribed form that to the best of his belief any of the goods referred to in the aforesaid Table are to be utilised for the purpose of manufacturing, processing or producing articles or things and not for trading purposes, the provisions of this sub-section shall not apply so long as the certificate is in force.

(2) The power to recover tax by collection under sub-section (1) shall be without prejudice to any other mode of recovery.

(3) Any person collecting any amount under sub-section (1) shall pay within seven days the amount so collected to the credit of the Central Government or as the Board directs. (4) Any amount collected in accordance with the provisions of this section and paid under sub-section (3) shall be deemed as payment of tax on behalf of the person from whom the amount has been collected any credit shall be given to him for the amount so collected on the production of the certificate furnished under sub-section (5) in the assessment made under this Act for the assessment year for which such income is assessable.

(5) Every person collecting tax in accordance with the provisions of this section shall within ten days from the date of debit or receipt of the amount furnish to the buyer to whose account such amount is debited or from whom such payment is received, a certificate to the effect that tax has been collected, and specifying the sum so collected, the rate at which the tax has been collected and such other particulars as may be prescribed. 5-A Every person collecting the tax in accordance with the provisions of this section shall prepare half yearly returns for the period ending on 30th September and 31st March in each financial year, and deliver or cause to be delivered to the prescribed income-tax authority such returns in such form and verified in such manner and setting forth such particulars and within such time as may be prescribed. (6) Any person responsible for collecting the tax who fails to collect the tax in accordance with the provisions of this section, shall, notwithstanding such failure, be liable to pay the tax to the credit of the Central Government in accordance with the provisions of sub-section (3) & (7). Without prejudice to the provisions of sub-section (6), if the seller does not collect the tax or after collecting the tax fails to pay it as required under this section, he shall be liable to pay simple interest at the rate of two per cent per month or part



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thereof on the amount of such tax from the date on which such tax was collectable to the date on which the tax was actually paid.

(8) Where the tax has not been paid as aforesaid, after it is collected, the amount of the tax together with the amount of simple interest thereon referred to in sub-section (7) shall be a charge upon all the assets of the seller."

(8) The star argument on behalf of the petitioners is that with the insertion of proviso to Section 44 AC of the Act, with effect from, 1st April, 1989, the petitioners are not liable to pay income-tax at the time of purchase of the country liquor in accordance with the provisions of Section 44 AC of the Act and are, thus, exempted from the payment thereof in view of the proviso to Clause (a) to sub-section (1) of Section 44 AC of the Act circulated,—*vide* communication dated 26th June, 1989, Annexure P-1.

(9) The High Court of Himachal Pradesh in *M/s. Gian Chand Ashok Kumar's case* (supra) elaborately analysed the scope of proviso to Section 44 AC of the Act and extensively noticed the statement of objects and reasons of the Finance Bill of 1988 to know the state of affairs prevailing at the time of enactment of the proviso to Section 44 AC into the Act and also the purpose to be achieved. It was noticed that a class of persons to whom the provisions of Section 44 AC and 206 of the Act were to apply, are not traceable after the close of their business and the revenue suffers in consequence thereof. The Union of India received representations and made further amendment to Section 44 AC by virtue of Section 10 of the Direct Tax Laws (Amendment) Act, 1989 which reads thus :

"10. Amendment of Section 44 AC—In section 44 AC of the Income Tax Act (as inserted by Section 15 of the Finance Act, 1989 (26 of 1988), in sub-section (1), in clause (a), the following proviso shall be inserted, namely;

'Provided that nothing contained in this clause shall apply to a buyer where the goods are not obtained by him by way of auction and where the sale price of such goods to be sold by the buyer is fixed by or under any State Act.'

(10) The abovesaid amendment came into force with effect from 1st April, 1989. The Himachal Pradesh High Court observed that the proviso to Section 44 AC of the Act covers the case of the contractors holding L-13 licences. It was held thus;

“Examination of fundamental provisions governing the grant of L-13 licences clearly shows that the provisions of Sections 44 AC and 206 were unduly harsh and arbitrary in their application to cases where the transaction was strictly to be carried on in accordance with specific provisions. It was this mischief which was intended to be eliminated by the new amendment. Otherwise, as calculated by the petitioners, they were to pay tax much more than the expected returns which could not be considered to be the object of legislation as it originally stood. L-13 licencees appear to be a class which in view of the existing system of the transaction of sale of country liquor, cannot be considered to be a class evading payment of tax and thus falling under the category of others for whom Sections 44 AC and 206 C were brought into statute book, history and object and reasons of which we have specifically dealt with quite elaborately in the initial part of this judgment.

The net result of our examination of the matter is that the present petitioners (L-13 Licencees) come within the purview of this proviso and provisions of Section 206 C and other parts of Section 44 AC (1) do not apply to buyers covered by the proviso.

The demand of tax at the purchase point from the petitioners by the respondent has no authority of law and they are restrained from doing so.”

Therefore, so far as the case of L-13 licencees is concerned, the verdict rendered by the Himachal Pradesh High Court in *M/s Gian Chand and Ashok Kumar's case* (supra) is the complete answer to the questions of law raised before us. We also have ourselves closely examined the matter at our level. We see no reason why the view taken by the Himachal Pradesh High Court should not be endorsed in the case of petitioners before us so far as it relates to L-13 licences. Accordingly, we might observe, though at the cost of repetition, that the persons holding L-13 licences are not liable

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to pay tax at the stage of purchase of the country liquor, in view of the proviso to clause (a) of sub-section (1) of Section 44 AC of the Act circulated by the Central Board of Direct Taxes, Delhi, dated 26th June, 1989 (Annexure P-1).

(11) In Civil Writ Petition No. 8337 of 1989, the petitioners have made an additional prayer for issuance of a mandamus directing the respondents not to charge/deduct income-tax on the excise duty and to collect income-tax from them at the purchase point. In order to claim this relief, the petitioners have appended alongwith the petition a letter, Annexure P-2, which is a communication from the Government of India, Ministry of Finance, Department of Revenue, Central Board of Direct Taxes addressed to the Director (TPL-II), Central Board of Direct Taxes, New Delhi. This communication was issued after taking decision on the representation made by the Uttar Pradesh Country Liquor Traders Association. A perusal of this communication reveals that after examining the issue, it was decided by the Government of India that Nirgam Mulya or issue price will not form part of purchase price and consequently it will not be taken into consideration for determining the profits under Section 44 AC for collection of tax at source under Section 206 C of the Act. On the basis of this communication, the relief sought is that the persons holding L-14 licences are not liable to pay tax on the purchase price and no advance tax is payable on the excise duty.

(12) Though the respondents have filed a detailed written statement but they have not disputed the issuance of letter Annexure P-2 by the Government of India on the basis of which the Uttar Pradesh Country Liquor Traders have been exempted from payment of tax on the issue price.

(13) On a careful consideration of the matter, we are of the view that since the Government of India have taken a decision exempting the Uttar Pradesh contractors from payment of tax on the excise duty, why the discrimination in the matter has been made in the case of petitioners holding L-14 licences. In our democratic set-up, the rule of law prevails and the Constitution of India provides equal right to all the citizens of the country. Once the Government have extended a positive relief in a particular State, the same cannot be denied in other States similarly situated. The Government of India should take a uniform decision and the

petitioners should not have been discriminated in the matter. Therefore, we hold that the petitioners holding L-14 licences before us are also entitled to the same relief which is being given to their counter-parts in the State of Uttar Pradesh.

(14) For the foregoing reasons, we allow these petitions and issue a writ of prohibition directing the respondents not to deduct/charge income tax from the L-13 licensees in view of the proviso to Clause (a) of Sub-section (1) of Section 44 AC of the Income Tax Act; and to implement the circular, dated 26th June, 1989, Annexure P-1. They are also directed not to charge/deduct income-tax on the excise duty payable by the petitioners, holding L-14 licences. No costs.

(15) Civil Misc. Nos. 39 of 1990 and 20963 of 1989 in CWP. 7161 of 1989 also stand disposed of accordingly.

R.N.R.

Before I. S. Tiwana & G. R. Majithia, JJ.

PUNJAB FINANCIAL CORPORATION, CHANDIGARH,—*Petitioner.*

*versus*

THE UNION TERRITORY, CHANDIGARH AND OTHERS,—*Respondents.*

*Amended Civil Writ Petition No. 2584 of 1985.*

7th June, 1990.

*Industrial Disputes Act, 1947—Ss. 2(a)(ii) and 10—Industrial Disputes (Central) Rules, 1957—Rl. 2(f)—Constitution of India, 1950—Art. 239—General Clauses Act (X of 1897)—S. 3(60) and 8(b) (iii)—Punjab Reorganisation Act (31 of 1966)—Ss. 4 and 88—Chandigarh (Delegation of Powers) Act, 1987 (2 of 1988)—S. 4—Industrial reference—Jurisdiction to refer disputes arising in Union Territory, Chandigarh—Appropriate Government—In relation to a Union Territory appropriate government is the Central Government—Where appropriate government is Central Government reference to Central Government shall be construed as reference to the administrator of U.T.—Administrator of U.T. competent to refer industrial dispute—Reference expressed in the name of the administrator but authenticated by subordinate authority does not amount to sub-delegation—Such exercise of power saved by the Chandigarh (Delegation of Powers) Act with retrospective effect—Retrospective saving is within legislative competence.*