MANU/MH/0001/2010

Equivalent Citation : 2010 (112)BOMLR 127

IN THE HIGH COURT OF BOMBAY

Writ Petition No. 7852 of 2008

Decided On: 05.01.2010

Appellants: Karan Dileep Nevatia
Vs.
Respondent: The Union of India (UOI) through the Commerce Secretary, Ministry of Commerce and Industry, The State of Maharashtra through Secretary, Home Department, The Commissioner of State Excise and The Collector of Mumbai (City)

Hon'ble Judges/Coram:
Ranjana Prakash Desai and A.A. Sayed, JJ.

Counsels:
For Appellant/Petitioner/Plaintiff: Erach Kotwal, Adv., i/b., Rajiv Deokar, Adv.

For Respondents/Defendant: D.J. Khambata, Addl. Solicitor General, S.V. Bharucha and D.A. Dube, Advs. for Respondent 1 and S.S. Bhende, A.G.P. for Respondents 2 to 4

Subject: Commercial

Catch Words

Mentioned IN

Acts/Rules/Orders:
Bombay Prohibition Act, 1949 - Section 3, Bombay Prohibition Act, 1949 - Section 58A, Bombay Prohibition Act, 1949 - Section 139(1), Bombay Prohibition Act, 1949 - Section 143(2); Income Tax Act, 1961 - Section 90, Income Tax Act, 1961 - Section 90(2); General Clauses Act - Section 3(29); Punjab Municipal Corporation Act - Section 90(5); Tamil Nadu Motor Vehicles Taxation Act ;Constitution of India - Article 14, Constitution of India - Article 19(1), Constitution of India - Article 19(5), Constitution of India - Article 51, Constitution of India - Article 73, Constitution of India - Article 226, Constitution of India - Article 245, Constitution of India - Article 246, Constitution of India - Article 246(3), Constitution of India - Article 247, Constitution of India - Article 248, Constitution of India - Article 249, Constitution of India - Article 250, Constitution of India - Article 251, Constitution of India - Article 252, Constitution of India - Article 253, Constitution of India - Article 256; Bombay Foreign Liquor and Rectified Spirit (Transport) Fee Rules, 1954 ;Maharashtra Potable Liquor (Fixation of Maximum Retail Prices) Rules, 2009

Cases Referred:
Maganbhai Ishwarbhai Patel v. Union of India and Anr. AIR 1969 SC 783; State of West Bengal v. Kesoram Industries Limited and Ors. (2004) 10 SCC 201; P.B. Samant and Ors. v. The Union of India

and Anr. 1994 (4) Bom. C.R. 491; Government of Maharashtra and Ors. v. Deokar's Distillery 2003 (5) SCC 669; Union of India and Anr. v. Azadi Bachao Andolan and Anr. AIR 2004 SC 1107; Peoples Union for Civil Liberties v. Union of India (2005) 2 SCC 436; Vishakha v. The State of Rajasthan (1997) 6 SCC 241; V/O. Tractoroexport Moscow v. Tarapore & Co., Madras and Anr. AIR 1971 SC 1; Gramophone Company of India Limited v. Birendra Bahadur Pandey and Ors. AIR 1984 SC 667; Kuldip Nayar v. Union of India and Ors. AIR 2006 SC 3127; Indian Express Newspapers (Bombay) Private Limited and Ors. v. Union of India and Ors. AIR 1986 SC 515; J.K. Industries Ltd. and Anr. v. Union of India and Ors. [2008] 143 Company Cases 325 (SC); Mahalakshmi Sugar Mills Ltd. and Anr. v. Union of India and Ors. AIR 2009 SC 792; Secretary, Ministry of Chemicals & Fertilizers, Government of India v. Cipla Limited and Ors. (2003) 7 SCC 1; Avinder Singh v. State of Punjab and Anr. AIR 1979 SC 321; A. Venugopal and Ors. v. State of Tamil Nadu and Ors. AIR 1999 Madras 431; Soni India Limited v. The Commercial Tax Officer, The State of Tamil Nadu (2007) 5 MLJ 881; East India Tobacco Co. v. Andhra Pradesh AIR 1962 SC 1733; Moopil Nair v. The State of Kerala; C.F. Khandige Sham Bhatt v. Agricultural Income Tax Officer AIR 1963 SC 591

Authorities Referred:
Commercial Arbitration; Halsbury's Laws of England, Vol.36, page 414

Citing Reference:

Discussed

10

Distinguished

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Mentioned

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Case Note:
Constitution - Legislation for giving effect to International Treaties - Notifications issued by state legislature imposing additional tax on imported wine - Conflict between impugned notifications and International Treaty - Effect of conflict - Necessity of legislation for giving effect to International Treaties - Article 253 of Constitution of India - Petitioner, engaged in import of foreign liquor, challenged the legality and constitutional validity of impugned notifications issued by Respondent-State imposing additional duties, taxes and fees on imported wines in the State of Maharashtra - Petitioner contended that impugned notifications discriminated between imported wines and domestic wines for imposition of duties and taxes and therefore, is in violation of International Treaties like GATT agreement entered into by Union of India - Hence, present petition - Whether impugned notifications liable to be struck down on ground of it being in violation of provisions of GATT agreement to which India is a signatory - Held, stipulations of said Treaties duly ratified by the Central Government do not by virtue of the treaties alone have the force of law - They are not by their own force binding upon Indian nationals - When the Treaty or Agreement restricts or affects

the rights of citizens or others or modifies the law of India, it is necessary for Parliament to make a law in respect thereof under Article 253 of the Constitution and not otherwise - Admittedly, in this case, Parliament has not made any law under Article 253 of the Constitution - Therefore, in as much as the Parliament has not enacted any law for implementation of the GATT, the impugned Notifications cannot be struck down on the ground that they are violative of Article 253 of the Constitution - Petition dismissed

Constitution - Conflict between Delegated Legislation and International Treaty - Effect of conflict between a domestic law and international Treaty - Notifications issued by state legislature imposing additional tax on imported wine - Impugned notification to be in conflict with International Treaty - Whether impugned notifications to prevail over International Treaty - Held, Rules of International Law may be accommodated in the Municipal Law even without express legislative sanction provided they do not run into conflict with Acts of Parliament - But when they do run into such conflict, the sovereignty and the integrity of the Republic and the Supremacy of the constituted legislatures in making the laws may not be subjected to external rules except to the extent legitimately accepted by the constituted legislatures themselves (Ratio in Gramophone Company of India Limited v. Birendra Bahadur Pandey and Ors applied - Therefore, impugned Notifications must prevail over the International Treaties - Petition dismissed.

Constitution - Conflict between Delegated Legislation and International Treaty - Effect of conflict - Notifications issued by state imposing additional tax on imported wine to be in conflict with GATT treaty - Whether impugned notifications liable to be struck down on ground of violation of provisions of International Treaty - Held, if Parliament has not made any law in respect of an International Treaty under Article 253, delegated legislation cannot be struck down on the ground that it is contrary to a provision of an International Treaty - In such a situation delegated legislation cannot be made subject to an International Treaty - Petition dismissed.

Constitution - Conflict between Delegated Legislation and International Treaty ratified by Central Government - State issued notifications imposing additional tax on imported wine - Impugned notifications in conflict with GATT treaty - Impugned notifications to be in breach of policy decision of Central Government - Whether impugned notifications arbitrary and in breach of policy decision of the Government of India - Held, it is only when the same entity makes the policy and then acts contrary to it whilst making delegated legislation that the delegated legislation can be challenged as ex facie contradictory and therefore, "manifestly arbitrary" - This principle cannot apply when the maker of the policy is alleged to be the Union of India and the maker of the delegated legislation is a different entity, i.e. the State of Maharashtra - Petition dismissed.

Constitution - Conflict between Delegated Legislation and International Treaty ratified by Central Government - Issuance of notifications by state legislature imposing additional tax on imported wine - Impugned notifications allegedly not providing for valid classification between domestic and imported wine - Allegation of hostile discrimination - Burden of proof - Petitioner contended that the impugned notifications are arbitrary and discriminatory and do not provide for any valid classification between the domestic and imported wines and therefore, to be struck down - Held, a taxing statute is as much subject to Article 14 of the Constitution as any other statute and when hostile discrimination is pleaded, the burden of proving the same rests heavily on the person complaining of discrimination - In instant case, the Petitioner has not discharged the said burden - No decision has been cited by the Petitioner to support the argument that the classification between the imported goods and domestic goods is bad - Petition dismissed.

Constitution - Notifications issued by state legislature imposing additional tax on imported wine - Alleged Notifications discriminating between imported goods and domestic goods for imposition of tax - Discretion of state in imposition of tax - Interference by Court - Held, undisputedly, the State has wide discretion to impose higher taxes or levies - Several fiscal considerations are involved in the Government's decision to impose higher tax on certain items - Courts are therefore, not expected to interfere with the discretion of the State unless a very strong case of hostile discrimination is made out and unless the taxing statute operates unequally within the range of its selection - No such case is made out by the Petitioner - Petition dismissed.

Constitution - Notifications issued by state legislature imposing tax on imported wine - Classification of imported wine and domestic wine by impugned notifications for imposition of tax - Alleged classification not valid - Violation of Article 14 - Whether the classification of imported goods and fixing of higher rate of taxes on imported goods as against the domestic goods was violative of Article 14 of the Constitution - Held, Article 14 of the Constitution forbids class legislation, but it does not forbid reasonable classification (Ratio in Soni India Limited v. The Commercial Tax Officer, The State of Tamil Nadu applied) - In case on hand, since imported wines never loose their character as imported wines, if they are classified as a group and subjected to heavier duty, the classification would be a reasonable classification founded on an intelligible differentia - Petition dismissed.

Ratio Decidendi:
"International Treaties ratified by Central Government do not by virtue of treaties alone have the force of law and for provisions of such treaties to have a binding force on Indian Nationals, Parliament has to enact a law under Article 253 of Constitution for implementation of provisions of said treaties."

"Rules of International Law may be accommodated in the Municipal Law even without express legislative sanction provided they do not run into conflict with Acts of Parliament but when they do run into such conflict, the sovereignty and the integrity of the Republic and the Supremacy of the constituted legislatures in making the laws may not be subjected to external rules except to the extent legitimately accepted by the constituted legislatures themselves."

"If Parliament has not made any law in respect of an International Treaty under Article 253, delegated legislation cannot be struck down on the ground that it is contrary to a provision of an International Treaty and in such a situation delegated legislation cannot be made subject to an International Treaty."

"It is only when the same entity makes the policy and then acts contrary to it whilst making delegated legislation that the delegated legislation can be challenged as ex facie contradictory and therefore, "manifestly arbitrary" and this principle cannot apply when the maker of the policy is alleged to be the Union of India and the maker of the delegated legislation is a different entity."

"A taxing statute is as much subject to Article 14 of the Constitution as any other statute and when hostile discrimination is pleaded, the burden of proving the same rests heavily on the person complaining of discrimination."

"State has wide discretion with regard to imposition of tax and Courts are not expected to interfere with said discretion of State unless a very strong case of hostile discrimination is made out and unless the taxing statute operates unequally within the range of its selection."

"Article 14 of the Constitution forbids class legislation, but it does not forbid reasonable classification."

JUDGMENT

Ranjana Prakash Desai, J.

1. Rule. Respondents waive service. By consent of the parties, taken up for final hearing forthwith.

2. The petitioner is engaged in the import of foreign liquor viz. wines and distribution of the same under FL-I Licence No. 113 granted by the Collector of Mumbai city. Respondent 1 is the Union of India, through the Commerce Secretary, Ministry of Commerce & Industry. Respondent 2 is the State of Maharashtra. Respondent 3 is the Commissioner of State Excise appointed under Section 3 of the Bombay Prohibition Act, 1949. Respondent 4 is the Collector of Mumbai city.

3. Gist of the petitioner's case needs to be briefly stated. Sometime in the month of May, 2007, the petitioner filed an application with respondent 4 in the name of his proprietary concern, M/s. Kunal Vintners, for the purpose of obtaining a wholesale licence under the Bombay Prohibition Act, 1949 known as "FL-I" for distribution of wines and liquor in the State of Maharashtra. The same was granted to the petitioner on 10/6/2008 being FL-I Licence No. 113.

4. On or about 8/7/1948, the Government of India became a signatory and subsequently ratified trading agreements with various countries known as the "General Agreement on Tariffs and Trade" (for short, "GATT"). The organization overseeing the multilateral trading system was then known as "GATT, 1947" and the signatory countries to the said Agreements were officially known as "GATT contracting parties".

5. Sometimes in the year 1994, certain amendments, popularly known as the "Dunkel Proposals" were made to GATT, 1947 and fresh agreements were entered into by the Governments of 128 countries around the world, including the Government of India, which agreements incorporated the revised and updated GATT, 1947.

6. On 1/1/1995, the World Trade Organization (for short "WTO") replaced GATT as the organization for overseeing and regulating the functioning of the multilateral trading system. Upon signing the new WTO agreements, which included the updated GATT, 1947, these contracting countries officially became known as "WTO members".

7. Two important principles of GATT, 1947 are (a) the "Most Favoured Nation" and (b) the "National Treatment". The former implies that the treaty members may not discriminate against the other members of the treaty in the matters of applying the provisions of the treaty. The "National Treatment" implies that any discrimination against foreign products has to be made at the national borders i.e. the customs borders and once foreign goods cross the national border, they are required to be treated equally with domestically produced goods. GATT, 1947 also deals with all the subjects covered by Article 246 of the Constitution of India i.e. List I - Union List, List II - State List and List - III

- Concurrent List. Under the principles of "National Treatment" of GATT, 1947, the Government of India and also the States of India including the State of Maharashtra, are bound to treat the imported goods on equal terms with domestically produced goods, once the customs duty has been paid on the imported goods and they have crossed the Customs border and there can be no discrimination between them of any nature whatsoever.

8. The contracting countries have also entered into another agreement known as "the Agreement On Subsidies And Countervailing Measures", (for short, "SCM Agreement").

9. By the present petition, the petitioner is challenging the legality and constitutional validity of Notification (1) No. BWR.1105/CR-9/EXC-3 dated 31/3/2006 (2) No. MIS. 1107/CR-33(2)/EXC-3 dated 10/7/2007, (3) No. MIS. 1107/CR.33(1)/EXC-3 dated 12/11/2007, (4) No. MIS. 1107/CR-40/II/EXC-3 dated 28/8/2008, (5) No. BWR, 0509/IMP/CR-143/EXC-3 dated 22/7/2009 amending the Bombay Foreign Liquor and Rectified Spirit (Transport) Fee Rules, 1954 and (6) No. BWR.0509/IMP/CR-143/EXC-3 dated 22/7/2009 amending the Maharashtra Potable Liquor (Fixation of Maximum Retail Prices) Rules, 2009 issued by respondent 2 (for brevity, "the impugned Notifications"). According to the petitioner, by these Notifications, respondent 2 has made a hostile discrimination between locally produced wines and imported wines, thereby stifling the business of the petitioner. The case of the petitioner is that the impugned Notifications are in gross violation of the Union of India's trade agreements with 153 countries around the world and particularly the principle of "National Treatment" and "Agreement On Subsidies And Countervailing Measures" and also the specific direction of the year 2007 of the Union of India to the State of Maharashtra to levy duties, taxes and fees, etc. on imported spirits and wines at rates not exceeding the rates of such duties, taxes, fees, etc. levied on similar domestically produced wines and liquor. According to the petitioner, these Notifications are ultra vires, unconstitutional, arbitrary, unreasonable and unjust and are violative of Article 253, 14 and 19(1)(g) of the Constitution of India ("for short, "the Constitution").

10. To understand the challenge raised by the petitioner, it is necessary to see what are the implications of the said Notifications as perceived by the petitioner. By impugned Notification No. BWR.1105/CR-9/EXC-3 dated 31/3/2006, respondent 2 remitted the whole of excise duty leviable under the Bombay Prohibition Act, 1949 (for short, "the said Act") in respect of wine manufactured from the grapes produced within the State of Maharashtra and without using alcohol or without blending of any wines for the period upto 23/12/2011. Thus, wine produced from domestically grown grapes is offered favoured treatment in comparison with imported wines sold in Maharashtra.

11. By impugned Notification No. MIS/1107/ CR-33(2)/EXC-3 dated 10/7/2007, respondent 2 imposed additional fees/levy on imported wines and liquor. This Notification imposed Authorization Fees and Label Registration Fees on imported wines. No such fees are levied on domestically produced wines. Thus, imported wines are discriminated against in violation of GATT, 1947.

12. Respondent 2 vide impugned Notification No. MIS. 1107/C.R.33(1)/EXC-3 dated 12/11/07 revised the special fees payable on imported wines. Special fees levied on wines stood increased to 200% of the assessable value or Rs. 200/- per bulk litre, whichever is higher. This again shows gross discrimination between locally produced wines and imported wines and is violative of GATT, 1947.

13. Respondent 2 issued impugned Notification No. MIS/1107/CR-40/ 11/EXC-3 dated 28/8/2008 after the petitioner filed Writ Petition No. 2060 of 2008. A statement was made during the hearing

of this petition that in view of this Notification, the petitioner's grievance would not survive. However, as a statement was made by the counsel for the petitioner that this Notification did not alleviate the petitioner's grievance, the petition was disposed of by this Court on 20/10/2008 granting liberty to the petitioner to approach the respondents to explain to them that the said Notification did not alleviate their grievance.

14. Impugned Notification No. BWR.0509/IMP/CR-143/ EXC-3 dated 22/7/2009 amending the Bombay Foreign Liquor and Rectified Spirit (Transport) Fee Rules, 1954 levies Special fees and discriminates against products of WTO Member countries and gives uncalled for protection to domestic wine merchants.

15. Impugned Notification No. BWK.0509/IMP/CR-143/ EXC-3 dated 22/7/2009 amending the Maharashtra Potable Liquor (Fixation of Maximum Retail Prices) Rules, 2009 increases the disparity of pricing between imported wines and domestic wines particularly since the Special fees levied earlier at Rs. 200/- per bulk/litre have been doubled to Rs. 400/- per bulk/litre in respect of imported wines having MRP of less than Rs. 900/-.

16. It is the petitioner's case that he has expended a huge amount on the business of import and distribution of foreign wines for the year 2008-2009, the petitioner has deposited Rs. 4,40,000/- as wholesale licence fees. The petitioner has deposited an amount of Rs. 2,50,000/- as authorization fees for the year 2008-2009. On 18/6/2008, the petitioner has paid an amount of Rs. 2,50,000/- as fees for authorization to remove imported liquor from Custom frontier. For the year 2008-2009, the petitioner has paid Rs. 1,05,000/- towards label registration charges and an amount of Rs. 79,212/- towards supervision fees. While, the petitioner's wines are subject to heavy taxes in the form of `Special Fees', `Authorization Fees', `Label Registration Fees' etc., local wines are completely exempted from excise duty. The petitioner is, therefore, running heavy losses. According to the petitioner, due to the impugned discriminatory Notifications, the petitioner is not able to clear the wines from Custom Bonded Warehouses causing tremendous financial loss to him.

17. It is pointed out by the petitioner that the countries belonging to the European Union have filed a complaint with the WTO against discriminatory taxes levied by certain States in India, including the State of Maharashtra.

18. Attention of the court is drawn to letter dated 16/5/2007 addressed by the Government of India to the Chief Secretary, Government of Maharashtra, communicating to him that it was tentatively decided in the meeting held on 14/5/2007 under the chairmanship of the Revenue Secretary that the additional duty of customs on imports of wines and spirits would be withdrawn by the Central Government through a notification and the States would have to thereupon rationalize their duty structure for imported wines and spirits in a manner which would meet the principle of `National Treatment'. The letter refers to paragraphs 1 and 2 of Article III of the GATT and states that `National Treatment' implies that the domestic duties, taxes and fees have to be levied at the same rates on the like products of both domestic as well as imported (from other countries) origin. The State of Maharashtra is requested to review the duty structure presently applicable to imported liquor. Minutes of the meeting held under the chairmanship of the Commerce Secretary on 15/6/2007 are also on record. They inter alia record the decision taken in the meeting that the states will put in place a mechanism for the imposition of taxes / fees on imported wines and spirits in accordance with the principle of `National Treatment". Several other letters addressed by the Government of India to the relevant departments of the State of Maharashtra are on record, which are in tune with

the above stand of the Government of India. It is submitted that despite these repeated requests made by the Government of India, the State of Maharashtra has gone ahead and issued the impugned Notifications and persisted in giving discriminatory treatment to foreign wines. The State of Maharashtra has thus challenged the superior powers of the Government of India by violating the important principles of GATT, 1947 and "Agreement On Subsidies And Countervailing Measures".

19. Attention of the Court is also drawn to the affidavit in reply dated 20/10/2008 filed by respondents 2, 3 and 4 in Writ Petition No. 2060 of 2008 which was filed by the petitioner. In that affidavit, it is admitted that in the year, 2007, the Government of India emphasized that the principle of "National Treatment" has to be observed while imposing any levy on the imported wines and spirits and that the States are free to levy duties, taxes and fees, etc. on imported spirits at the rate not exceeding the rates of such duties, taxes, fees, etc. levied on domestic liquor.

20. In the circumstances, the petitioner has, inter alia, prayed that the impugned Notifications be quashed and set aside; that a writ of mandamus be issued against respondents 2, 3 and 4 restraining them from acting in furtherance and in pursuance of the impugned Notifications and that a writ of mandamus be issued against respondents 2, 3 and 4 directing them to refund to the petitioner the amounts recovered/and which are being recovered from the petitioner in pursuance of the impugned Notifications.

21. We have heard Mr. Kotwal, learned Counsel appearing of the petitioner, Mr. Khambatta, learned Additional Solicitor General for respondent 1 - Union of India and Ms. Bhende, learned A.G.P. for the State of Maharashtra. Written submissions have been filed by the petitioner, respondent 1 and the State of Maharashtra.

22. The basic submission canvassed by Mr. Kotwal, learned Counsel appearing for the petitioner is that the impugned Notifications issued by respondent 2 challenge the paramountcy and supremacy of the Union of India and are an attempt by respondent 2 to override the superior powers of the Union over the States. According to the petitioner, the impugned Notifications are in violation of Article 253 of the Constitution and of "the GATT" and its underlying principles of "Most Favoured Nation" and "National Treatment". It is urged by the petitioner that the impugned Notifications are in violation of Article 253 of the Constitution and of "Agreement On Subsidies And Countervailing Measures" entered into by the Government of India with 153 member countries around the world. It is further urged that once the Government of India has entered into Agreements with international countries particularly "the GATT" and "Agreement On Subsidies and Countervailing Measures" which deal with matters which are also in the State List i.e. List II [Article 246(3)] of the Constitution, the State cannot act in contravention and in violation of the said Agreements including those matters which are in the State List.

23. Mr. Khambatta, learned ASG raised a preliminary objection to the maintainability of this petition. Mr. Khambatta referred to Article 253 of the Constitution and submitted that it is an overriding Article which starts with a non-obstante clause. It confers exclusive powers upon Parliament to make any law for implementing any Treaty, Agreement or Convention. He submitted that the foregoing provisions of this Chapter referred to in this Article pertain to Article 256 and thus even if a matter falls within the State List of the VIIth Schedule to the Constitution, if the subject matter is covered by an International Treaty, Parliament has the exclusive jurisdiction to make laws for implementing such International Treaty, Agreement or Convention. Mr. Khambatta submitted that Parliament has not made any law for implementation of the GATT under Article 253 of the Constitution and,

therefore, the impugned Notifications cannot be struck down as being violative of Article 253 of the Constitution. In this connection, Mr. Khambatta relied on the judgment of the Supreme Court in Maganbhai Ishwarbhai Patel v. Union of India and Anr. MANU/SC/0044/1969MANU/SC/0044/1969 : AIR 1969 SC 783. Mr. Khambatta also relied on the judgment of the Supreme Court in State of West Bengal v. Kesoram Industries Limited and Ors., MANU/SC/0038/2004MANU/SC/0038/2004 : (2004) 10 SCC 201 and a judgment of this Court in P.B. Samant and Ors. v. The Union of India and Anr. MANU/MH/0055/1994MANU/MH/0055/1994 : 1994 (4) Bom. C.R. 491.

24. Mr. Khambatta further submitted that the issue as regards the said Notifications/Rules is the subject matter of the consultations between the Union of India and European Union pursuant to the consultation request dated 25/9/2008 made by the European Union and circulated by the WTO. The bilateral consultations which are underway are under the "Understanding on Rules and Procedures Governing the Settlement of Disputes" (for short, "the Dispute Settlement Understanding" or "DSU"). He submitted that any alleged violation of GATT can be brought by a country which is a contracting party before the Dispute Settlement Body of the WTO. Learned ASG submitted that any consideration of these issues by this Court will affect the national position which will have to be taken by the Union of India (representing the State of Maharashtra and other States of India) both in these consultations as well as (assuming any complaint is filed) before the Dispute Settlement Understanding. Mr. Khambatta submitted that the issues raised in this petition pertain to the public policy of India and the national interest of India and, therefore, the present petition filed under Article 226 of the Constitution ought not to be entertained by this Court.

25. In response to the preliminary objection, Mr. Kotwal submitted that in P.B. Samant's case (supra), this Court has clarified that the executive power conferred under Article 73 of the Constitution is to be read along with the power conferred under Article 253 of the Constitution and in case the Government enters into any Treaty or Agreement, then in respect of the implementation thereof, it is open for Parliament to pass a law which deals with the matters which are in the State List. This Court has further observed that in case Parliament is entitled to pass laws in respect of matters in the State List in pursuance of the Treaty or the Agreement, then it is difficult to appreciate how it can be held that the Central Government is not entitled to enter into Treaty or Agreement which affects the matters included in the State List.

26. Mr. Kotwal also drew our attention to the following paragraph of the Judgment of the Supreme Court in Kesoram Industries Limited's case (supra).

Para 264 ...India is a signatory to various international treaties and covenants and being a party to WTO and GATT, it is obligated to fulfill its trans-national obligations. If for the purpose of giving effect to the international treaties, it in exercise of its power under Article 253 of the Constitution of India had taken over the legislative field occupied by List II of the Seventh Schedule of the Constitution, no exception thereto can be taken.

Mr. Kotwal submitted that the above observations of the Supreme Court establish the applicability of GATT to India beyond doubt.

27. Mr. Kotwal also relied on People's Union for Civil Liberties v. Union of India MANU/SC/0039/2005MANU/SC/0039/2005 : (2005) 2 SCC 436 where the Supreme Court has held that there is a prima facie presumption that Parliament did not intend to act in breach of international law, including State treaty obligations and it is well settled that in construing any

provision in domestic legislation which is ambiguous, in the sense that it is capable of more than one meaning, the meaning which conforms most closely to the provisions of any international instrument is to be preferred, in the absence of any domestic law to the contrary. Mr. Kotwal also relied on the judgment of this Court in Manuel Theodore D'Souza's case, 2000 (2) BCR 244, where this Court has reiterated the above principles.

28. We shall first deal with the preliminary objection raised by Mr. Khambatta, learned ASG. To appreciate the submissions of Mr. Khambatta, it is necessary to have a look at the relevant Constitutional provisions.

29. Chapter I of Part XI of the Constitution is captioned as "Relations Between the Union and the States". Article 245 of the Constitution, inter alia, states that subject to the provisions of the Constitution, the Parliament may make laws for the whole or any part of the territory of India and the legislature of a State may make laws for the whole or any part of the State. Article 246 refers to the subject matter of laws made by the Parliament and by the legislatures of the States. Clause (1) thereof states that notwithstanding anything in Clauses (2) and (3), the Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule (Union List). Clause (2) states that notwithstanding anything in Clause (3), Parliament and, subject to Clause (1), the Legislature of any State also, have power to make laws with respect to any of the matters enumerated in List III in the Seventh Schedule (Concurrent List). Clause (3) thereof states that subject to Clauses (1) and (2), the legislature of any State has exclusive power to make laws for such State with respect to any of the matters enumerated in List II in the Seventh Schedule (State List). Clause 4 states that the Parliament has power to make laws with respect to any matter for any part of the territory of India in a State notwithstanding that such matter is a matter enumerated in the State List. Articles 247 - 252 need not detain us. Article 253 is important. It states that notwithstanding anything in the foregoing provisions of this Chapter, the Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body. Thus, this Article confers legislative power on the Parliament to legislate or enact a law inter alia for the whole or any part of the territory of India, inter alia, for implementing any treaty with any other country. Entries 10 and 14 of List I of the Seventh Schedule contain power of the Parliament to legislate in respect of treaties.

30. It is now necessary to turn to Article 73 of the Constitution, which delineates the extent of executive power of the Union. It states that the executive power of the Union shall extend (a) to the matters with respect to which the Parliament has power to make laws and it extends (b) to the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or agreement. Proviso to this Article states that the executive power referred to in Sub-clause (a) shall not save as expressly provided in this Constitution or in any law made by the Parliament extend in any State to matters with respect to which the legislature of the State has also power to make laws.

31. Stated in simple language the contention of the petitioner is that by issuing the impugned Notifications, the State of Maharashtra has challenged the supremacy of the Government of India. The subject matter of the international treaties also falls in the State List. Therefore, according to the petitioner, the State of Maharashtra could not have issued any Notifications which violate any of the stipulations of the said treaties. We, therefore, need to examine whether the said treaties have a force of law. Validity of the petitioner's argument needs to be examined against the backdrop of the

above mentioned constitutional provisions. Fortunately for us, law in this behalf is well settled by the Supreme Court in Maganbhai's case to which our attention is drawn by Mr. Khambatta, learned ASG and, therefore, it is not necessary for us to conduct the exercise of interpretation of the relevant Articles.

32. In Maganbhai Patel's case (supra), the Constitution Bench was concerned with the question whether the Award dated 19/2/1968 of the Indo-Pakistan Western Boundary Case Tribunal may be implemented by a constitutional amendment and not otherwise. It was the case of the appellant before the Constitution Bench that the Award may be implemented only by an amendment modifying the relevant provisions in Schedule I to the Constitution, because in giving effect to the Award of the Tribunal, cession of the Indian Territory is involved, and the executive is incompetent to cede Indian territory without the authority of a constitutional amendment. The Union of India contended that the Award merely fixes or demarcates the boundary between the State of Gujarat in India and West Pakistan regarding which there were disputes and much friction, and by the Award no cession of Indian territory is contemplated, and for implementing it, amendment of the Constitution is not needed. While dealing with this question, the Constitution Bench quoted the relevant paragraphs from Oppenheim's International Law, 8th Edn., at pg. 40, which reads thus:

Such treaties as affect private rights and, generally, as required for their enforcement by English courts a modification of common law or of a status must receive parliamentary assent through an enabling Act of Parliament. To that extent binding treaties which are part of International Law do not form part of the law of the land unless expressly made so by the legislature" and at p. 924 it is stated:

The binding force of a treaty concerns in principle the contracting States only, and not their subjects. As International Law is primarily a law between States only and exclusively, treaties can normally have effect upon States only. This rule can, as has been pointed out by the Permanent Court of International Justice, be altered by the express or implied terms of the treaty, in which case its provisions become self-executory. Otherwise; if treaties contain provisions with regard to rights and duties of the subjects of the contracting States, their courts, Officials, and the like, these States must take steps as are necessary according to their Municipal Law, to make these provisions binding upon their subjects, courts officials, and the like.

33. The Constitution Bench also referred to the observations of the Judicial Committee in MANU/PR/0031/1937MANU/PR/0031/1937 : AIR 1937 PC 82 in the context of rule applicable within the British Empire. The Judicial Committee observed that the making of a treaty is an executive act, while the performance of its obligations, if they entail alteration of the existing domestic law, requires legislative action. Unlike some other countries, the stipulations of a treaty duly ratified do not within the Empire, by virtue of the Treaty alone, have the force of law. The Judicial Committee further observed that if the national executive, the Government of the day, decides to incur the obligations of a Treaty which involve alteration of law they have to run the risk of obtaining the assent of Parliament to the necessary statute or statutes. The Judicial Committee further observed that Parliament, no doubt, has a constitutional control over the executive, but it cannot be disputed that the creation of the obligations undertaken in treaties and the assent to their form and quality are the function of the executive alone. Once they are created, while they bind the State as against the other contracting parties, Parliament may refuse to perform them and so leave the State in default. The Constitution Bench observed that the above observations are valid in the context of our constitutional set up. The Constitution Bench further observed as under:

By Article 73, subject to the provisions of the Constitution, the executive power of the Union extends to the matters with respect to which the Parliament has power to make laws. Our Constitution makes no provision making legislation a condition of the entry into an international treaty in times either of war or peace. The executive power of the Union is vested in the President and is exercisable in accordance with the Constitution. The executive is qua the State competent to represent the State in all matters international and may by agreement, convention or treaties incur obligations which in international law are binding upon the State. But, the obligations arising under the agreement or treaties are not by their own force binding upon Indian nationals. The power to legislate in respect of treaties lies with the Parliament under Entires 10 and 14 of List I of the Seventh Schedule. But making of law under that authority is necessary when the treaty or agreement operates to restrict the rights of citizens or others or modifies the laws of the State. If the rights of the citizens or others which are justiciable are not affected, no legislative measures is needed to give effect to the agreement or treaty.

34. The Constitution Bench then turned to Article 253 of the Constitution which deals with legislative relations i.e. distribution of legislative powers. The Constitution Bench observed that the effect of Article 253 is that if a treaty, agreement or convention with a foreign State deals with a subject within the competence of the State Legislature, Parliament alone has, notwithstanding Article 246(3) of the Constitution, the power to make laws to implement the treaty, agreement or convention or any decision made at any international conference, association or other body. The Constitution Bench further clarified that in terms, this Article deals with legislative power : thereby power is conferred upon the Parliament which it may not otherwise possess. But, it does not seek to circumscribe the extent of the power conferred by Article 73. The Constitution Bench clarified that if, in consequence of the exercise of executive power, rights of the citizens or others are restricted or infringed, or laws are modified, the exercise of power must be supported by legislation: where there is no such restriction, infringement of the right or modification of the laws, the executive is competent to exercise the power.

35. This judgment lays down the principles in respect of Article 253 and the effect of international treaties. They can be summarized as under:

(i) The stipulations of a treaty duly ratified by the Central Government, do not by virtue of the treaty alone have the force of law.

(ii) Though the Executive (Central Government) has power to enter into international treaties/agreements / conventions under Article 73 (read with Entries 10 & 14 of List I of the VII Schedule to the Constitution of India) the power to legislate in respect of such treaties / agreements / conventions, lies with Parliament. It is open to Parliament to refuse to perform such treaties / agreements / conventions. In such a case, while the treaties / agreements / conventions will bind the Union of India as against the other contracting parties, Parliament may refuse to perform them and leave the Union of India in default.

(iii) Though the applications under such treaties / agreements / conventions are binding upon the Union of India (referred to as "the State" in Maganbhai's case) these treaties / agreements / conventions "are not by their own force binding upon Indian nationals".

(vi) The making of law by Parliament in respect of such treaties / agreements / conventions is necessary when the treaty or agreement restricts or affects the rights of citizens or others or modifies the law of India.

(v) If the rights of citizens or others are not affected or the laws of India are not modified then no legislative measure is needed to give effect to such treaties / agreements / conventions.

36. In Kesoram Industries Limited's case (supra), the Constitution Bench was concerned with questions of constitutional significance centering around Entries 52, 54 and 97 in List I and Entries 23, 49, 50 and 66 in List II of the Seventh Schedule to the Constitution as also the extent and purport of the residuary power of the legislation vested in the Union of India. It is not necessary to go into the facts of this case. Suffice it to say that in this case, the Constitution Bench reiterated its view in Maganbhai Patel's case (supra) and held that a treaty entered into by India cannot become the law of the land and it cannot be implemented unless the Parliament passes a law as required under Article 253 of the Constitution. The Constitution Bench further held that in view of the non-obstante clause in Article 253 of the Constitution, the State Legislatures would lack legislative competence in respect of any such matters notwithstanding that legislative power was conferred upon them under Article 256 of the Constitution. In other words, Article 253 of the Constitution operated notwithstanding anything contained in Article 245 and Article 246 of the Constitution.

37. In P.B. Samant's case (supra), the petitioners were seeking a writ of mandamus restraining the Union of India and others from entering into final treaty relating to Dunkel Proposals without obtaining sanction of Parliament and State Legislatures. It was urged that it is not open in exercise of executive powers under Article 73 of the Constitution to enter into any treaty with foreign countries in respect of matters which are covered by the State List. It was urged that Dunkel proposals deal with subjects which are exclusively in the State List and, therefore, it is not permissible for the Central Government to exercise powers to enter into treaty with foreign countries. This Court referred to Maganbhai Patel's case (supra) and reiterated the principles laid down by the Constitution Bench therein. This Court held that the observations of the Constitution Bench that the executive power conferred under Article 73 is to be read along with the power conferred under Article 253 of the Constitution leave no manner of doubt that in case the Central Government enters into treaty or agreement, then in respect thereof, it is open for Parliament to pass a law which deals with matters which are in the State List. The court observed that in case Parliament is entitled to pass laws in respect of matters which are in State List, it is difficult to appreciate how it can be held that the Central Government is not entitled to enter into treaty or agreement which affects the matters included in the State List. The Central Government was, therefore, well within its powers to enter into treaties with foreign countries in respect of matters included in the State List. In our opinion, Kesoram Industries' case and P.B. Samant's case do not help the petitioner. On the contrary, they lend support to the case of respondent 1.

38. It was urged by Mr. Kotwal, learned Counsel for the petitioner that the State cannot bring a Notification or an amendment of rules which violates its obligation to fulfill an international agreement to which India is a signatory. Reliance was placed by Mr. Kotwal on the Supreme Court's judgment in Government of Maharashtra and Ors. v. Deokar's Distillery MANU/SC/0216/2003MANU/SC/0216/2003 : 2003 (5) SCC 669. In that case, the respondents were holding a licence for manufacture of Indian made foreign liquor. All transactions pertaining to receipt, transport, storage of spirit, etc. are required to be under Excise supervision under the relevant rules. Under Section 58A of the Bombay Prohibition Act, 1949, the State Government is

empowered to permit the manufacture and other related activities in respect of any intoxicant under the supervision of Excise staff and the cost of such staff is to be paid by the manufacturer to the State Government. Demand notices were issued by the State Government calling upon the respondents to pay the differential amount on account of revision of pay scale with retrospective effect vide Notification dated 10/12/1999. By Notification dated 10/12/1998, the pay scales of the Government employees were revised with retrospective effect from 1/1/1996. The Supreme Court was considering whether the State Government is empowered to do so. The principal question which the Supreme Court was considering was whether the State Government was entitled to recover supervision charges retrospectively. The Supreme Court was not concerned with the question of alleged discrimination in levying taxes by the State Government between the domestic goods and imported goods. Besides, the observations of the Supreme Court on which reliance is placed by the petitioner are from the dissenting judgment of the Supreme Court. In any case, in the said paragraph, the Supreme Court has repeated the settled position that the State Government cannot make discrimination between the citizens who are qualified to carry on trade or business. It is important to note that the Supreme Court was not concerned with the question of levy of taxes on domestic and foreign liquor, alleged discrimination between the two, doctrine of reasonable classification and the effect of international treaties. This judgment, therefore, has no relevance to the present case.

39. In our opinion, the judgment of the Supreme Court in Union of India and Anr. v. Azadi Bachao Andolan and Anr. AIR 2004 SC 1107 is also not applicable to the present case. That was a case where Parliament itself had enacted a law in the form of Section 90 of the Income Tax Act, 1961. Under Section 90 of the Income Tax Act, 1961 the Central Government was empowered to enter into taxation agreement or treaties with foreign countries and to implement them by a Notification in the official gazette .Section 90(2) of the Income Tax Act provided that such agreements / treaties could be availed of to the benefit of the assessee. As rightly contended by Mr. Khambatta, learned ASG, Section 90 of the Income Tax Act is an example of law made by Parliament under Article 253 of the Constitution. The only issue which the Supreme Court was considering was whether a citizen of a third State was also entitled to the benefits of the Indo-US treaty on avoidance of double taxation. Reliance placed on this judgment is, therefore, misplaced. belying

40. The upshot of the above discussion is that the Central Government has in exercise of its executive powers under Article 73 of the Constitution read with Entries 10 and 14 of List I of the VIIth Schedule entered into international treaties with which we are concerned here. The stipulations of the said treaties duly ratified by the Central Government do not by virtue of the treaties alone have the force of law. They are not by their own force binding upon Indian nationals. When the treaty or agreement restricts or affects the rights of citizens or others or modifies the law of India, it is necessary for Parliament to make a law in respect thereof under Article 253 of the Constitution and not otherwise. In any case, it is open to Parliament to refuse to perform such treaties. Admittedly, in this case, Parliament has not made any law under Article 253 of the Constitution. Therefore, the stipulations in the instant treaties do not have a binding effect. The argument that legislation is not a pre-requisite for the court to take cognizance and apply international policy must, therefore, be rejected.

41. The matter can be looked at from another angle as rightly argued by Mr. Khambatta. The Constitution recognizes only two sources of legislation i.e. Parliament (Article 246 read with List I and III of the Seventh Schedule and Article 253) and the State Legislatures (Article 246 read with List II of the Seventh Schedule to the Constitution). The legislative powers of these two sources (and of

their delegates in the case of subordinate/delegated legislation) cannot under the Constitution be made subject to the provisions of international treaties / agreements / conventions albeit those to which the Union of India (vide its executive powers) is a signatory.

42. It cannot be disputed that the State of Maharashtra had legislative competence to issue the impugned Notifications / rules (Entry 8 of List II of the VIIth Schedule pertaining to intoxicating liquors and Entry 51 thereof pertaining to excise duty, Sections 139(1)(d-1) and 143(2)(b) of the Bombay Prohibition Act, 1949). It was urged by learned Counsel for the petitioner that there is a direct conflict between the provisions of the GATT, 1947 and the Agreement On Subsidies and Countervailing Measures on one hand and the impugned Notifications / rules on the other. It was urged that the impugned Notifications are subordinate legislation and they are not on par with the Act of Parliament or a statute. We shall examine this argument.

43. Article 13(3)(a) of the Constitution provides as follows:

law includes any Ordinance, Order, by-law, rule, regulation, notification, custom or usage having in the territory of India the force of law.

44. Section 3(29) of the General Clauses Act provides as follows:

Indian law' shall mean any Act, Ordinance, Regulation, Rule [Order, Bye-law or other instrument] which before the commencement of the Constitution had the force of law in any Province of India or part thereof, or thereafter has the force of law in any Part A State or Part C State or part thereafter, but does not include any Act of Parliament of the United Kingdom or any Order in Council, rule or other instrument made under such Act.

Therefore, the argument that the impugned Notifications do not constitute municipal or domestic law of India must be rejected.

45. We shall now see what would be the effect of a conflict between a domestic law and international treaty. Mr. Kotwal has relied on Peoples Union for Civil Liberties v. Union of India MANU/SC/0039/2005MANU/SC/0039/2005 : (2005) 2 SCC 436, where the Supreme Court has held that there is a prima facie presumption that Parliament did not intend to act in breach of international law, including State treaty obligations. In Kesoram's case, the Supreme Court has held that a court is required to interpret domestic / municipal laws in conformity with the provisions of international treaties / agreements / conventions unless the provisions of municipal / domestic laws are intractable or in conflict with the international treaties / agreements / conventions. International conventions and norms may also be applied under the Indian law "in the absence of enacted domestic law occupying the field" i.e. where "there is a void in the domestic law" [Kesoram's case, Vishakha v. The State of Rajasthan MANU/SC/0786/1997MANU/SC/0786/1997 : (1997) 6 SCC 241].

46. In V/O. Tractoroexport Moscow v. Tarapore & Co., Madras and Anr. MANU/SC/0003/1969MANU/SC/0003/1969 : AIR 1971 SC 1, the Supreme Court was considering important points in respect of international commercial arbitration arising out of a suit instituted on the original side of the Madras High Court. It is not necessary to go into the facts of that case, but the observations of the Supreme Court made while dealing with the question as to how domestic law is to be construed when it is likely to conflict with or trench on treaty obligations are important for the present case. The Supreme Court quoted Halsbury's Laws of England (Vol.36 page 414) where

it is stated that there is a presumption that Parliament does not assert or assume jurisdiction which goes beyond the limits established by the common consent of nations and statutes are to be interpreted provided that their language permits, so as not to be inconsistent with the comity of nations or with the established principles of International Law. The Supreme Court clarified that this principle applies only where there is an ambiguity and must give way before a clearly expressed intention. If statutory enactments are clear in meaning, they must be construed according to their meaning even though they are contrary to the comity of nations or International Law. It was further observed that if the terms of the legislative enactment do not suffer from any ambiguity or lack of clarity, they must be given effect to even if they do not carry out the treaty obligations. But, the treaty becomes important, if the meaning of the expressions used by Parliament is not clear and can be construed in more than one way, because if one of the meanings which can be properly ascribed is in consonance with the treaty obligations and the other meaning is not so consonant, the meaning which is consonant is to be preferred.

47. This principle is reiterated by the Supreme Court in Gramophone Company of India Limited v. Birendra Bahadur Pandey and Ors. MANU/SC/0187/1984MANU/SC/0187/1984 : AIR 1984 SC 667. The Supreme Court observed thus:

There can be no question that nations must march with the international community and the Municipal law must respect rules of International Law even as nations respect international opinion. The comity of nations requires that Rules of International Law may be accommodated in the Municipal Law even without express legislative sanction provided they do not run into conflict with Acts of Parliament. But when they do run into such conflict, the sovereignty and the integrity of the Republic and the Supremacy of the constituted legislatures in making the laws may not be subjected to external rules except to the extent legitimately accepted by the constituted legislatures themselves. The doctrine of incorporation also recognizes the position that the rules of international law are incorporated into national law and considered to be part of the national law, unless they are in conflict with an Act of Parliament. Comity of nations or no Municipal Law must prevail in case of conflict.

Similar view has been taken by the Supreme Court in Kuldip Nayar v. Union of India and Ors. MANU/SC/3865/2006MANU/SC/3865/2006 : AIR 2006 SC 3127. In Manuel Theodore's case, which is cited by Mr. Kotwal, a Division Bench of this Court has reiterated the same principles.

48. Therefore, assuming the argument of Mr. Kotwal that the impugned Notifications are in conflict with the international treaties is valid, the impugned Notifications must prevail over the international treaties.

49. Mr. Kotwal has laid stress on the communications addressed by the Ministry of Commerce, Union of India to the State of Maharashtra to emphasize the point that despite the direction from the Government of India, the State of Maharashtra has brazenly gone on issuing discriminatory Notifications which violate stipulations contained in international treaties to which India is a signatory. Mr. Khambatta has submitted they are advisory and persuasive in nature and they do not constitute any direction from the Government of India to the State of Maharashtra nor any statement of policy on the part of the Union of India. We find substance in this submission. Even if it is assumed that the said communications contain any direction, it would not be a law under Article 253 so as to be binding on the State of Maharashtra.

50. Mr. Kotwal contended that subordinate legislation does not carry the same degree of immunity which is enjoyed by a statute passed by a competent legislature. In this connection, he relied on Indian Express Newspapers (Bombay) Private Limited and Ors. v. Union of India and Ors. MANU/SC/0406/1984MANU/SC/0406/1984 : AIR 1986 SC 515. Following paragraph was particularly relied upon:

73. A piece of subordinate legislation does not carry the same degree of immunity which is enjoyed by a statute passed by a competent legislature. Subordinate legislation may be questioned on any of the grounds on which plenary legislation is questioned. In addition it may also be questioned on the ground that it does not conform to the statute under which it is made. It may further be questioned on the ground that it is contrary to some other statute. That is because subordinate legislation must yield to plenary legislation. It may also be questioned on the ground that it is unreasonable, unreasonable not in the sense of not being reasonable, but in the sense that it is manifestly arbitrary. In England, the Judges would say "Parliament never intended authority to make such rules. They are unreasonable and ultra vires.

Mr. Kotwal also relied upon J.K. Industries Ltd. and Anr. v. Union of India and Ors. MANU/SC/8111/2007MANU/SC/8111/2007 : [2008] 143 Company Cases 325 (SC) where the Supreme Court has taken the same view and quoted the above paragraph from Indian Express Newspaper's case. Mr. Kotwal also relied on Mahalakshmi Sugar Mills Ltd. and Anr. v. Union of India and Ors. MANU/SC/1772/2008MANU/SC/1772/2008 : AIR 2009 SC 792. There obviously cannot be dispute about the propositions of law laid down in these judgments. But if Parliament has not made any law in respect of an international treaty under Article 253, delegated legislation cannot be struck down on the ground that it is contrary to a provision of an international treaty. In such a situation delegated legislation cannot be made subject to an international treaty.

51. It was submitted on behalf of the petitioner that the impugned Notifications are contrary to Article 51 of the Constitution of India and are, therefore, liable to be struck down. The Directive Principles of State Policy are not enforceable. Language of Article 51 itself makes it clear that it is only upto the State to endeavour to abide by the provisions of international treaties and agreements. This submission is, therefore, rejected.

52. It was urged by Mr. Kotwal that the impugned Notifications are in breach of a policy decision of the Government of India and, therefore, suffer from the vice of arbitrariness. In this connection, Mr. Kotwal relied on the following paragraph from Secretary, Ministry of Chemicals & Fertilizers, Government of India v. Cipla Limited and Ors. MANU/SC/0514/2003MANU/SC/0514/2003 : (2003) 7 SCC 1.

4.1. It is axiomatic that the contents of a policy document cannot be read and interpreted as statutory provisions. Too much of legalism cannot be imported in understanding the scope and meaning of the clauses contained in policy formulations. At the same time, the Central Government which combines the dual role of policy-maker and the delegate of legislative power, cannot at its sweet will and pleasure give a go-bye to the policy guidelines evolved by itself in the matter of selection of drugs for price control. The Government itself stressed the need to evolve and adopt transparent criteria to be applied across the board so as to minimize the scope for subjective approach and therefore came forward with specific criteria. It is nobody's case that for any good reasons, the policy or norms have been changed or have become impracticable of compliance. That being the case, the Government exercising its delegated legislative power should make a real and

earnest attempt to apply the criteria laid down by itself. The delegated legislation that follows the policy formulation should be broadly and substantially in conformity with that policy; otherwise it would be vulnerable to attack on the ground of arbitrariness resulting in violation of Article 14.

4.3 True, the breach of policy decision by itself is not a ground to invalidate delegated legislation. But, in a case like this, the inevitable fallout of the breach of policy decision which the Government itself treated as a charter for the resultant legislation is to leave an imprint of arbitrariness on the legislation.

Mr. Kotwal submitted that the submission that there was no policy decision taken by the Government of India is not correct because it has reduced its customs duty on imported wines in accordance with WTO guidelines on 3/7/2007. The correspondence between the Government of India and the State of Maharashtra sets out that the Government of India considers it imperative that the duty structure applied by the State of Maharashtra on imported wines conforms with WTO guidelines and the provisions of GATT and, there is always a presumption that the State would honour its international treaty obligations (Peoples' Union of Civil Liberties' case (supra)).

53. Mr. Khambatta, learned ASG has informed us that in this case, the Government of India has not issued any policy document. In any case, even if it is assumed that the GATT reflects the policy decision of the Government of India, Cipla Limited (supra) does not help the petitioner. Cipla Limited (supra) speaks of a situation where the Central Government combines the dual role of a policy maker and the delegate of legislative power and states that in such a situation, the Central Government cannot at its sweet will and pleasure give go-by to the policy guidelines evolved by itself. Thus, it is only when the same entity makes the policy and then acts contrary to it whilst making delegated legislation that the delegated legislation can be challenged as ex facie contradictory and, therefore, "manifestly arbitrary". This principle cannot apply when the maker of the policy is alleged to be the Union of India and the maker of the delegated legislation is a different entity i.e. the State of Maharashtra. This argument of Mr. Kotwal must, therefore, be rejected.

54. It is now necessary to deal with the argument of Mr. Kotwal, learned Counsel for the petitioner that the impugned Notifications are arbitrary and discriminatory and do not provide for any valid classification between the domestic and imported wines. In this respect, learned ASG has drawn our attention to the judgment of the Supreme Court in Avinder Singh v. State of Punjab and Anr. MANU/SC/0299/1978MANU/SC/0299/1978 : AIR 1979 SC 321, judgment of the Madras High Court in A. Venugopal and Ors. v. State of Tamil Nadu and Ors. MANU/TN/0378/1999MANU/TN/0378/1999 : AIR 1999 Mad 431 and in Soni India Limited v. The Commercial Tax Officer, The State of Tamil Nadu MANU/TN/9256/2007MANU/TN/9256/2007 : (2007) 5 MLJ 881. He submitted that classification of foreign wines as a distinct class for the purpose of taxation is not discriminatory as the State has a wide discretion in that behalf. He submitted that the Courts should not interfere with that discretion unless within the rank of its selection the taxation law operates unequally. He submitted that such is not the case here and therefore this submission deserves to be rejected. In its written submissions, the State of Maharashtra has placed reliance on the judgment of the Madras High Court in Sony India Limited in support of its contention that the classification between the imported wines and domestic wines is founded on an intelligible differentia and the differentia has a rational relation to the object sought to be achieved by the statute and, therefore, the impugned Notifications cannot be struck down on the ground that they are discriminatory.

55. It is well settled that a taxing statute is as much subject to Article 14 of the Constitution as any other statute and when hostile discrimination is pleaded, the burden of proving the same rests heavily on the person complaining of discrimination. In our opinion, the petitioner has not discharged the said burden. No decision has been cited by the petitioner to support the argument that the classification between the imported goods and domestic goods is bad. In a long line of judgments, the Supreme Court has held that the State has a very wide discretion in selecting the persons or objects it will tax, and that exercise is not open to attack unless within the class chosen by the State, there is discrimination. In this connection, we may quote the observations of the Supreme Court in East India Tobacco Co. v. Andhra Pradesh MANU/SC/0064/1962MANU/SC/0064/1962 : AIR 1962 SC 1733.

It is not in dispute that taxation laws must also pass the test of Article 14. That has been laid down recently by this Court in Moopil Nair v. The State of Kerala. But in deciding whether a taxation law is discriminatory or not it is necessary to bear in mind that the State has a wide discretion in selecting the persons or objects it will tax, and that a statute is not open to attack on the ground that it taxes some persons or objects and not others. It is only when within the range of its selection, the law operates unequally and that cannot be justified on the basis of any valid classification, that it would be violative of Article 14. The following statement of the law in Willis on "Constitutional Law" page 587, would correctly represent the position with reference to taxing statutes under our Constitution:-"A State does not have to tax everything in order to tax something. It is allowed to pick and choose districts, objects, persons, methods and even rates for taxation if it does so reasonably .... The Supreme Court has been practical and has permitted a very wide latitude in classification for taxation.

56. In C.F. Khandige Sham Bhatt v. Agricultural Income Tax Officer MANU/SC/0189/1962MANU/SC/0189/1962 : AIR 1963 SC 591, the Supreme Court has clarified that in view of the inherent complexity of fiscal adjustment of diverse elements in case of taxing statutes, a larger discretion has to be permitted to the legislature for classification so long as there is no transgression of the fundamental principles underlying the doctrine of classification.

57. We may also refer to the judgment of the Supreme Court in Avinder Singh's case. In that case, the validity of the tax on Indian Made Foreign Liquor was impeached. The State of Punjab issued a notification under Section 90(5) of the Punjab Municipal Corporation Act. The notification required the Municipal Corporation of Ludhiana to impose tax on the sale of Indian Made Foreign Liquor at the rate of Rs. 1/- per bottle. The notification was challenged entirely on the ground that there were no guidelines for the exercise of the vagariously wide fiscal power of the corporation or Government which make it too unreasonable to be salvaged by Article 19(5) and too arbitrary to be "equal" under Article 14 of the Constitution. It was argued that unequals are being treated equally because the tax of Rs. 1/- per bottle at a flat rate disregards germane considerations like the price of the liquor or the degree of alcoholic content. It was argued that there was patent discrimination in the sense of treating dissimilar things similarly. After following the judgment of the Supreme Court in East India Tobacco Co., the Supreme Court negatived this contention. We may quote the relevant observations of the Supreme Court.

In the field of taxation many complex factors enter the fixation enter the fixation and flexibility is necessary for the taxing authority to make a reasonably good job of it. Moopil Nair's case MANU/SC/0042/1960MANU/SC/0042/1960 : (1961) 3 SCR 77 : AIR 1961 SC 552 does not discredit as unconstitutional anathema all flat rates of taxation. Maybe, in marginal cases where the virtual

impact of irrationally uniform impost on the same subject is glaringly discriminatory, expropriatory and beyond legislative competence, different considerations may arise; but to condemn into invalidity a tax because it is levied at a conveniently flat rate having regard to the commodity or service which has a high range of prices and the minimal effect on the overall price, its easy means of collection and a variety of other pragmatic variables, is an absurdity, especially because in fiscal matters large liberality must be extended to the Government having regard to the plurality of criteria which have to go into the fiscal success of the measure. Of course, despite this forensic generosity, if there is patent discrimination in the sense of treating dissimilar things similarly of vice versa, the court may treat the tax as suspect and scrutinise its vires more closely. In the present case, intoxicating liquids falling in the well known category of foreign liquors form one class and a flat minimal rate of Re. 1/- per bottle has no constitutional stigma of inequality. It is so easy to conceive of innumerable taxes imposed in this manner in the daily governance of the country that illustrations are unnecessary. As excisable article go, foreign liquor is a distinct category and absence of micro-classification within the broad genus does not attract the argument of inequality. Likewise, picking and choosing within limits is inevitable in taxation.

58. Mr. Kotwal submitted that in this case, the issue involved was about differential rates of taxation between `Indian Made Foreign Liquor' popularly known as IMFL consisting of whisky, brandy, gin, etc. vis-a-vis traditionally produced local wines e.g. Mahuwa, Toddy, Arrack, etc. He submitted that the words `Foreign liquor' used there, are not to be confused with `Imported liquor'. Assuming Mr. Kotwal is right in so submitting that does not make Avinder Singh inapplicable to this case. There is no indication in the said judgment that the words `Foreign liquor' were used to identify imported foreign liquors. The Supreme Court held that Indian Made Foreign Liquor is a distinct category and absence of micro classification within the broad genus does not attract the argument of inequality. The principle which the Supreme Court reiterated and which needs to be noted is that the State can on larger considerations of fiscal policy, choose to levy higher taxes or duty on certain objects. Thus, there is nothing wrong in treating Indian Made Foreign Liquor as a class and imposing a higher duty/tax on it. The State has great latitude in fiscal matters and that is an area where the courts do not trade unless compelling circumstances require them to do so. We do not perceive the presence of such circumstances in this case.

59. We may also refer to the judgment of learned Single Judge of the Madras High Court in A. Venugopal's case. In that case, the petitioners were aggrieved by the classification made between imported vehicles and locally made vehicles. The Supreme Court was concerned with the Tamil Nadu Motor Vehicles Taxation Act under which the Government was empowered to increase the rate of tax specified in the Schedule from time to time by way of notification. The Madras High Court held that even though higher rate of tax is levied for imported vehicles than the tax levied for Indian made vehicles, it does not make any discrimination between the owners of motor vehicles. It is observed that since the classification is between "imported vehicles" or locally made vehicles and, there is no classification made between the owners, it is not violative of Article 14 of the Constitution. The Madras High Court observed that the prime difference between imported vehicles and Indian made vehicles is their origin or place of manufacture and the Government has powers to decide whether or not to encourage the influx of imported items.

60. In written submissions tendered on behalf of the petitioner, it is submitted that A. Venugopal though delivered in 1999 was delivered in writ petitions which were filed in 1990, which was four years prior to the signing of GATT, 1994. We have already dealt with the submission as regards international treaty and its binding effect. We have already observed that inasmuch as the

Parliament has not enacted any law for implementation of the GATT, the impugned Notifications cannot be struck down on the ground that they are violative of Article 253 of the Constitution. Therefore, assuming A. Venugopal pertains to petitions filed prior to the GATT that hardly has any relevance to the present case. The question is of classification of wines as `imported wines' and `domestic wines'. On that issue, observations of the Madras High Court in A. Venugopal would certainly be material.

61. In Soni India Limited's case, the Madras High Court was concerned with the question whether the classification of imported goods and fixing of higher rate of taxes on imported goods as against the domestic goods was violative of Article 14 of the Constitution. The Madras High Court observed that the imported goods once cleared from customs, get mingled with other goods but they do not loose their identity as foreign goods. The Madras High Court further observed that Article 14 of the Constitution forbids class legislation, but it does not forbid reasonable classification. Before the Madras High Court, reliance was placed on the GATT and it was argued that there cannot be a different pattern in respect of imported and indigenous goods. The Madras High Court considered various judgments including the judgment in Magambhai Ishwarbhai Patel's case and observed that the GATT does not in any way curtail the State Government's power to identify the imported goods as separate class and to levy higher rate of tax. It is pointed out to us by learned Counsel for the petitioner that this decision of the Madras High Court has been set aside by the Supreme Court. Learned Counsel is right in so contending. But the judgment of the Supreme Court indicates that instead of filing a statutory appeal, Soni India Limited had chosen to file an application to the Tamil Nadu Taxation Special Tribunal for declaration as to the invalidity of the classification of imported goods. The Tribunal had upheld the provisions of higher rate of tax. Soni India Limited then filed a writ petition in the Madras High Court seeking to set aside the Tribunal's order and for a declaration that the impugned provisions are ultra vires the Constitution. The Supreme Court directed Soni India Limited to pursue their statutory appeal before the First Appellate Authority and since the matter was to be decided in appeal, the First Appellate Authority was directed to consider the matter uninfluenced by the observations made by the Tribunal or by the Madras High Court. The Supreme Court also observed that the First Appellate Authority was not bound even by the observations made by the Supreme Court. The Supreme Court observed that it has expressed no opinion on the merits of the case. It is clear, therefore, that the said judgment was not set aside on merits.

62. Assuming that in view of the fact that the judgment of the Madras High Court in Soni India Limited is set aside by the Supreme Court, it cannot be relied upon by the State of Maharashtra, in our opinion, the judgments of the Supreme Court in East India Tomacco Co., Cr. Khandige Sham Bhatt and Avinder Singh, clearly support the case of the respondents. Undisputedly, the State has wide discretion to impose higher taxes or levies. Several fiscal considerations are involved in the Government's decision to impose higher tax on certain items. The courts are therefore, not expected to interfere with the discretion of the State unless a very strong case of hostile discrimination is made out and unless the taxing statute operates unequally within the range of its selection. No such case is made out by the petitioner.

63. We are of the opinion that since imported wines never loose their character as imported wines, if they are classified as a group and subjected to heavier duty, the classification would be a reasonable classification founded on an intelligible differentia. This submission of Mr. Kotwal must, therefore, fail.

64. In view of the above, in our opinion, there is no substance in the petition and the petition is dismissed.