

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 3RD DAY OF MARCH 2017

PRESENT

THE HON'BLE MR.JUSTICE JAYANT PATEL

AND

THE HON'BLE MR.JUSTICE P S DINESH KUMAR

WRIT APPEAL NO.853/2016 (T-IT)

C/W

WRIT APPEAL NO.854/2016 (T-IT)

C/W

WRIT APPEAL NO.855/2016 (T-IT)

C/W

WRIT APPEAL NO.856/2016 (T-IT)

IN WA NO.853/2016:

BETWEEN:

1. THE COMMISSIONER OF INCOME TAX
BANGALORE-560001
C.R. BUILDING, QUEEN'S ROAD,
BANGALORE-560 001
2. THE DEPUTY COMMISSIONER OF INCOME TAX
CIRCLE-11(5), R.P. BHAVAN,
OPPOSITE RESERVE BANK OF INDIA,
NRUPATHUNGA ROAD,
BANGALORE-560 001

...APPELLANTS

(BY SRI.PRABHULING.K.NAVADGI, ASG AND
SRI.K V ARAVIND, ADVOCATE)

AND:

1. M/S. KARNATAKA STATE BEVERAGES CORPORATION LIMITED
REPRESENTED BY IT'S EXECUTIVE DIRECTOR (FINANCE), SRI. SHRIKANT B VANAHALLI
AGED ABOUT 60 YEARS
NO.78, SEETHALAKSHMI TOWERS,
MISSION ROAD,
BANGALORE-560027
2. STATE OF KARNATAKA
THROUGH ITS ADDITIONAL CHIEF SECRETARY TO,
GOVERNMENT OF KARNATAKA,
FINANCE DEPARTMENT,
2ND FLOOR, VIDHANA SOUDHA,
BANGALORE-560001
3. THE COMMISSIONER OF EXCISE
VOKKALIGARA BHAVAN,
K C R CIRCLE,
BANGALORE-560001

...RESPONDENTS

(BY A.SHANKAR & LAVA, ADVOCATES FOR R1;
SRI M.R.NAIK, ADVOCATE GENERAL;
SRI T.K.VEDAMURTHY, AGA FOR R2 & R3)

THIS WRIT APPEAL IS FILED U/S 4 OF THE
KARNATAKA HIGH COURT ACT PRAYING TO SET ASIDE
THE ORDER PASSED IN THE WRIT PETITION
12872/2013 DATED 18/02/2016.

IN WA NO.854/2016**BETWEEN:**

1. THE COMMISSIONER OF INCOME TAX
BANGALORE-I

C.R. BUILDING,
QUEEN'S ROAD,
BANGALORE-560 001

2. THE DEPUTY COMMISSIONER OF INCOME TAX
CIRCLE-11(5),
R.P. BHAVAN, OPPOSITE RESERVE BANK OF INDIA,
NRUPATHUNGA ROAD,
BANGALORE-560 001

...APPELLANTS

(BY SRI.PRABHULING K.NAVADGI, ASG AND
K.V.ARAVIND, ADVOCATE)

AND:

1. M/S. KARNATAKA STATE BEVERAGES
CORPORATION LIMITED
REPRESENTED BY IT'S EXECUTIVE DIRECTOR
(FINANCE)
SRI. SHRIKANT B VANAHALLI
AGED ABOUT 60 YEARS
NO.78, SEETHALAKSHMI TOWERS,
MISSION ROAD
BANGALORE-560 027
2. STATE OF KARNATAKA
THROUGH ITS PRINCIPAL SECRETARY TO
GOVERNMENT OF KARNATAKA,
FINANCE DEPARTMENT,
2ND FLOOR, VIDHANA SOUDHA,
BANGALORE-560001.
3. THE COMMISSIONER OF EXCISE
2ND FLOOR, TTMC A BLOCK,
BMTc COMPLEX,
K.H. ROAD, SHANTINAGAR,
BANGALORE-560001.

...RESPONDENTS

(BY SRI.A SHANKAR, ADVOCATE FOR R1;

SRI M.R.NAIK, ADVOCATE GENERAL;
SRI T.K.VEDAMURTHY, AGA FOR R2 & R3)

THIS WRIT APPEAL IS FILED U/S 4 OF THE
KARNATAKA HIGH COURT ACT PRAYING TO SET ASIDE
THE ORDER PASSED IN THE WRIT PETITION
14687/2014 DATED 18/02/2016.

IN WA NO.855/2016

BETWEEN:

1. THE COMMISSIONER OF INCOME TAX
BANGALORE - 560004
C R BUILDING
QUEEN'S ROAD
BANGALORE-560001
2. THE DEPUTY COMMISSIONER OF INCOME TAX
CIRCLE - 4(1)(1)
R P BHAVAN
OPPOSITE RESERVE BANK OF INDIA
NRUPATHUNGA ROAD
BANGALORE-560 001

...APPELLANTS

(BY SRI.PRABHULING K.NAVADGI, ASG AND
SRI ARAVIND K V, ADVOCATE)

AND:

1. M/S KARNATAKA STATE BEVERAGES
CORPORATION LIMITED
REPRESENTED BY IT'S EXECUTIVE DIRECTOR
(FINANCE)
SRI SHRIKANT B VANAHALLI
AGED ABOUT 60 YEARS
4TH FLOOR, TTMC BUILDING
'A' BLOCK, BMTC
SHANTHINAGAR

BANGALORE-560027

2. STATE OF KARNATAKA
THROUGH ITS PRINCIPAL SECRETARY TO
GOVERNMENT OF KARNATAKA
FINANCE DEPARTMENT
2ND FLOOR, VIDHANA SOUDHA
BANGALORE-560 001.

3. THE COMMISSIONER OF EXCISE
2ND FLOOR, TTMC A BLOCK
BMTc COMPLEX
K.H.ROAD
SHANTINAGAR
BANGALORE-560 001.

...RESPONDENTS

(BY SRI.A SHANKAR & LAVA, ADVOCATES FOR R1;
SRI M.R.NAIK, ADVOCATE GENERAL;
SRI T.K.VEDAMURTHY, AGA FOR R2 & R3)

THIS WRIT APPEAL IS FILED U/S 4 OF THE
KARNATAKA HIGH COURT ACT PRAYING TO SET ASIDE
THE ORDER PASSED IN THE WRIT PETITION
15910/2015 DATED 18/02/2016.

IN WA NO.856/2016

BETWEEN:

1. THE COMMISSIONER OF INCOME TAX
BANGALORE-560004
C.R. BUILDING, QUEEN'S ROAD,
BANGALORE-560 001
2. THE DEPUTY COMMISSIONER OF INCOME TAX
CIRCLE-4(1)(1)
R.P. BHAVAN, OPPOSITE RESERVE BANK OF INDIA,
NRUPATHUNGA ROAD,

BANGALORE-560 001

...APPELLANTS

(BY SRI.ARAVIND.K.V, ADVOCATE AND
SRI PRABHULING K.NAVADGI, ASG)

AND:

1. M/S.KARNATAKA STATE BEVERAGES
CORPORATION LIMITED
REPRESENTED BY ITS EXECUTIVE DIRECTOR
(FINANCE)
SRI. SHRIKANT B VANAHALLI
AGED ABOUT 60 YEARS
4TH FLOOR, TTMC BUILDING 'A' BLOCK,
BMTC, SHANTHINAGAR,
BANGALORE-560 027
2. STATE OF KARNATAKA
THROUGH ITS PRINCIPAL SECRETARY TO
GOVERNMENT OF KARNATAKA FINANCE
DEPARTMENT,
2ND FLOOR, VIDHANA SOUDHA,
BANGALORE-560 001
3. THE COMMISSIONER OF EXCISE
2ND FLOOR, TTMC A BLOCK, BMTC COMPLEX,
K.H. ROAD, SHANTHINGAR, BANGALORE-01

...RESPONDENTS

(BY SRI.A SHANKAR & LAVA, ADVOCATES FOR R1;
SRI M.R.NAIK, ADVOCATE GENERAL;
SRI T.K.VEDAMURTHY, AGA FOR R2 & R3)

THIS WRIT APPEAL IS FILED U/S 4 OF THE
KARNATAKA HIGH COURT ACT PRAYING TO SET ASIDE
THE ORDER PASSED IN THE WRIT PETITION
17514/2015 DATED 18/02/2016.

THESE WRIT APPEALS HAVING BEEN HEARD AND RESERVED ON 25.01.2017 AND COMING ON FOR PRONOUNCEMENT OF JUDGMENT THIS DAY, **JAYANT PATEL J.**, DELIVERED THE FOLLOWING:

JUDGMENT

As in all the appeals common order of the learned Single Judge is under challenge, they are being considered simultaneously.

2. All the appeals are directed against the common order dated 18.02.2016 passed by the learned Single Judge in the respect of writ petitions whereby the learned Single Judge, for the reasons recorded in the order, has set aside the impugned assessment orders so far as they relate to 'Privilege Fee' as being taxable income. Learned Single Judge has further remanded the matter to the assessing Officer to re-examine in respect of disallowance after giving opportunity of hearing to the respondent-herein the original petitioner in respect of the concerned assessment years.

3. The short facts of the case appears to be that, the respondent-original petitioner is a Company being an undertaking of the Government of Karnataka engaged in the business of canalization of liquor, beer and rectified spirit. In respect of the assessment year of 2009-10, 2010-11, 2011-12 and 2012-13, the assessing officer under Section 143(3) of the Income Tax Act (hereinafter referred to as 'the Act') after making assessment, has passed the order disallowing of privilege fee of the respective amount paid by the respondent-Company to the Government of Karnataka. The other disallowance was also made in the assessment year in respect of certain other expenses.

4. We may, for ready reference, reproduce the details of the original writ petitions, writ appeals, assessment year and the privilege fees which are disallowed by the impugned assessment orders in the respective original writ petitions as under:

Writ Appeal Nos.	Writ Petition Number	Assessment Year	Privilege Fee
853/2016	12872/2013	2010-2011	Rs.570,14,37,000/-
854/2016	14687/2014	2011-2012	Rs.695,14,70,000/-
855/2016	15910/2015	2012-2013	Rs.829,41,58,944/-
856/2016	17514/2015	2009-2010	Rs.479,36,60,000/-

5. The assessing officer has disallowed the privilege fee on the following grounds:

- (i) the privilege fees paid is beyond surplus earned by the Company in the trade of liquor.
- (ii) The distribution of the profits arising in the hands of 50 CL-11 licence holders was taken over by the State Government undertaking namely the respondent-herein;
- (iii) The privilege fees paid is nothing but the appropriation of the income.
- (iv) The Government of Karnataka has taken away not only the profits earned by the assessee-Company in the name of privilege fees but also other income.

- (v) The Company has to compute the profit, pay the taxes on it and only then the surplus if any can be appropriated.
- (vi) The Government of Karnataka has varied the privilege fee every year and there is no fixed rate.
- (vii) The percentage of privilege fee is not known to Company in advance or at the beginning of the year and the payments made by the Company are against the provisions of Companies Act, Income Tax Act and the Accounting standards.
- (viii) The Government Order levying the privilege fee is passed purposefully only at the fag end of the financial year.
- (ix) The respondent-Company is parting with its taxable profits to the Government under the name of 'privilege fee.'
- (x) The provisions of Section 40(a)(ii) would be applicable.

- (xi) The privilege fee does not specify the definition of 'fee' as all the elements of 'tax' levied are imposed.
- (xii) The payment of privilege fees is not an expenditure incurred towards earning of income.
- (xiii) Section 40(a) (iib) is held as clarificatory in nature.
- (xiv) The amendment made in Section 24 of the Karnataka Excise Act, 1965 is illegal.

6. The respondent-Company filed respective writ petitions before the learned Single Judge challenging the aforesaid assessment orders for the respective years passed by the Assessment Officer and prayed to declare disallowance of the privilege fee in the assessment year as in violation of the powers of the State to have its statute as per Entry No.8 of List.II of Seventh Schedule within the power of the State under Article 245(1) and 246(3) of the Constitution of India.

7. It was also prayed to declare that the assessing officer is not entitled to question the State Act passed by the State legislature more so when the Government of Karnataka is not party in the assessment proceedings under the Act. There were also other prayers made and the ultimate prayer was to quash the assessment orders passed by the assessing officer under the Act for the respective assessment year and consequential prayer to quash the demand notice pursuant to the assessment orders passed for the respective years.

8. The learned Single Judge found that the unreasonableness of the privilege fee payable is not a ground to hold that it is a device by which the petitioner and the State Government are avoiding payment of tax. He also held that the privilege fee payable by the original petitioner to the State Government would be taxable with effect from 1.4.2014 in view of the amendment which is prospective in nature and not prior

thereto as the amendment came into force from 1.4.2014.

9. The learned Single Judge found that there is no illegality committed by the original petitioner in paying such privilege fee to the State Government and it was not open to the assessing officer to hold that the privilege fee appears to be relatable to the profit earned or that large chunk of it is transferred to the State Government in the name of privilege fee. The learned Single Judge therefore, found that the same could not have been disallowed by the assessing officer. Ultimately the learned Single Judge has allowed the petitions by setting aside the impugned orders so far as they relate to privilege fee to be treated as taxable income and remanded the matter to the assessing officer. Under the circumstances, the present appeals before this Court.

10. We have heard Mr.Prabhuling K.Navadgi, learned ASG with Sri K.V.Aravind, learned counsel for

the appellants, Sri A.Shankar, learned counsel for R1 and Sri Madhusudan R.Naik, learned Advocate General with Sri T.K.Vedamurthy, learned AGA for R2 and R3.

11. The learned ASG appearing for the appellants mainly raised two contentions; one was the maintainability of the writ petition under Article 226 of the Constitution when there was regular statutory remedy available to the assessee to prefer an appeal under the Act and the second contention raised by the learned ASG was that, under Section 37 of the Act, the assessing officer has power to disallow a particular expense if he finds that such expense is not wholly or exclusively for the purpose of business or profession. He submitted that, whether a particular expense is allowable or not as a revenue expenditure is a question of fact and when the assessing officer on facts has found that the expenditure incurred for payment of privilege fee was not available as an expenditure, the

learned Single Judge ought not have interfered with that too in a petition under Article 226 of the Constitution and it was a case where the matter ought to have been relegated to the remedy of regular appeal under the Act. He contended that, in any case, so far as privilege fee is concerned, there is already an amendment made under Section 40(iib) of clause (a) inserted with effect from 1.4.2014 and such amendment also can be termed as clarificatory in nature but he candidly admitted that the said insertion has come into effect from 1.4.2014 and as per him, the said amendment would not permit deduction of amount paid as the privilege fee.

12. Learned ASG relied upon certain decisions which shall be referred hereinafter to the extent found relevant.

13. The learned counsel appearing for the respondent supported the order passed by the learned

Single Judge and contended that it calls for no interference.

14. We may at the outset mention that, on the question of entertainment of petition under Article 226 of the Constitution in a case where statute provides alternative remedy, is by now well settled. If the action is wholly without jurisdiction or is *ultravires* to the power, the existence of alternative remedy is no bar to the entertainment of the petition under Article 226 of the Constitution. To put it in other words, unless an exceptional case is made out warranting interference to invoke extra-ordinary jurisdiction under Article 226, this Court would, by self imposed restriction, may decline to entertain a petition.

15. In our view, if the action is wholly without jurisdiction or is *ultravires* to his power, such order would fall in the category of exceptional case to make a departure from the normal principles of non-

entertainment of the petition under Article 226 of the Constitution when alternative statutory remedy is available.

16. In order to find out as to whether the case falls in the exceptional category or as to whether the action by the assessing officer in the assessment proceedings disallowing the expenditure incurred for payment of privilege fee can be said to be wholly without jurisdiction or *ultravires* to the power, we need to further examine the matter.

17. Section 37(1) of the Income Tax Act which is pressed into service by the learned ASG (with explanation 1 and 2):

“37. (1) Any expenditure (not being expenditure of the nature described in Sections 30 to 36 and not being in the nature of capital expenditure or personal expenses of the assessee), laid out or expended wholly and exclusively for the

purposes of the business or profession shall be allowed in computing the income chargeable under the head "Profits and gains of business or profession".

(Explanation) For the removal of doubts, it is hereby declared that any expenditure incurred by an assessee for any purpose which is an offence or which is prohibited by law shall not be deemed to have been incurred for the purpose of business or profession and no deduction or allowance shall be made in respect of such expenditure).

18. The plain reading of the aforesaid section shows that any expenditure other than capital expenditure or personal expenditure made wholly or exclusively for the purpose of business or profession shall be allowed in computing the income chargeable under the head 'Profits and gains of business or profession' and any expenditure incurred by an assessee for any purpose which is an offence or which is prohibited by law same shall not be deemed to have

been incurred for the purpose of business or profession and no deduction shall be allowed for such expenditure. It is not the case of the appellant that payment of privilege fee is an offence or is prohibited by law save and except aforesaid amendment in sub-clause (iib) of clause (a) of Section 40 of the Act which has come into effect only from 1.4.2014 and the assessments in question are for the respective assessment year prior thereto.

19. It is by now well settled that, when any taxing statute is introduced or amendment is made to any taxing statute, unless it is expressly made retrospective, it would be prospective. Considering the amendment brought about with effect from 1.4.2014 and its language, it is not possible for us to accept the contention that the amendment brought about could be termed as clarificatory in nature but, is prospective and

applies to the period after 1.4.2014 i.e. later to the assessment years in question.

20. Learned ASG mainly relied upon the decision of the Apex Court in case of S.A.Builders vs. Commissioner of Income Tax (Appeals) reported in 2007(1)SCC 781 and more particularly the observations made at paragraphs No.24 to 27 in the said Judgment and contended that it was within the powers of an assessing officer to decide that whether there was any commercial expediency for incurring a particular expenditure and therefore, the action could not be said to be wholly without jurisdiction or *ultravires* to his power if the assessing officer has disallowed the fee.

21. In order to appreciate the contention, we may reproduce paragraphs No.24 to 27 of the aforesaid decision which reads as under:

“24. In our opinion, the decisions relating to Section 37 of the Act will also be

applicable to Section 36(1) (iii) because in Section 37 also the expression used is “for the purpose of business”. It has been consistently held in decision relating to Section 37 that the expression “for the purpose of business” includes expenditure voluntarily incurred for commercial expediency, and it is immaterial if a third party also benefits thereby.

25. Thus, in *Atherton v. British Insulated & Helsby Cables Ltd.* it was held by the House of Lords that in order to claim a deduction, it is enough to show that the money is expended, not of necessity and with a view to direct and immediate benefit but voluntarily and on grounds of commercial expediency and in order to indirectly facilitate the carrying on of the business. The above test in *Atherton* case has been approved by this Court in several decisions eg. *Eastern Investments Ltd., vs. CIT*, *CIT vs. Chandulal Keshavalal & Co.*, etc...

26. In our opinion, the High Court as well as the Tribunal and other Income Tax

Auhorities should have approached the question of allowability of interest on the borrowed funds from the above angle. In other words, the High Court and other authorities should have enquired as to whether the interest free loan was given to the sister company (which is a subsidiary of assessee) and as a measure of commercial expediency and if it was, it should have been allowed.

27. The expression “commercial expediency” is an expression of wide import and includes such expenditure as a prudent businessman incurs for the purpose of business. The expenditure may not have been incurred under any legal obligation but yet it is allowable as a business expenditure if it was incurred on grounds of commercial expediency.”

(Emphasis supplied)

22. The perusal of the aforesaid observation made by the Apex Court shows that for examining the commercial expediency, the Apex Court has mainly

relied upon the earlier decision of House of Lords in case of ***Atherton v. British Insulated & Heisby Cables Ltd.***, and the relevant observations are as under:

“....in order to claim a deduction, it is enough to show that the money is expended, not of necessity and with a view to direct and immediate benefit, but voluntarily and on grounds of commercial expediency and in order to indirectly facilitate the carrying on of the business.....”

Therefore, the aforesaid observation exclude the expenditure incurred for necessity or not with a view to have direct and immediate benefit but such observations apply to the expenses incurred voluntarily and on the ground of commercial expediency or in order to indirectly facilitate the carrying on the business. To put it in other words, if the expenses are incurred for necessity or with a view to get the direct and immediate

benefit, for business or profession, the above decision or the observation made have no applicability.

23. Apart from the above, if one is to trace the expenditure incurred for necessity, it would certainly include the statutory liability for running of the business. On the contrary, if the statute is not obeyed and resultantly the person is unable to do business, such expenditure incurred for compliance of the statute would in any case fall under the expenditure for necessity. As we are not required to examine the other expenditure which may fall as necessity, we would not be required to further discuss in detail.

24. Even if it is to be considered under the head of direct and immediate benefit for the purpose of considering the nature of expenditure, then, also the same has no applicability for testing the commercial expediency. For example, if one is to make the payment of the raw material for producing the finished product,

there is a direct and immediate benefit. Same way, if one is to pay fees for getting licence to do a particular business, it has a direct and immediate benefit. There can be various categories of expenditure which may fall under the heading of expenditure for direct and immediate benefit but we do not propose to categorize in detail. But, suffice it to state that the decisions upon which reliance has been placed by the learned ASG are for expenditure incurred voluntarily and or on the ground of commercial expediency or to indirectly facilitate carrying on the business or profession.

25. Again coming to the facts, principally the business of liquor is reserved by the State of Karnataka but by enacting legislature known as Karnataka Excise Act.1965, it is regulated as per the said Act. Sec.24 provides as under;

**“Sec.24: Payment of fees for
grant or renewal of lease or licence-**

(1) Instead of or in addition to any

excise duty or countervailing duty leviable under Sections 22 and 23, the State Government may, Levy and Collect such amount as licence fee or privilege fee as may be, determined by notification by the State Government, subject to such rules as may be prescribed in consideration of grant or renewal of licence or lease or both, by or under this Act.

(2) In consideration of grant or renewal of Distributor licence by or under this Act, the State Government shall levy privilege fee at such rate or amount as may be determined by notification subject to such rules as may be prescribed and the privilege fee may be collected in the notified manner at any time of the year.”

(Emphasis supplied)

26. Rule-4 of the Karnataka Excise (Sale of Indian and Foreign Liquors) Rules, 1968 empowers the Commissioner to demand privilege fee as per State Government guidelines which reads as under:

“Rule 4: Application for licence: (1) Any person desiring to obtain. – (a) a distributor licence or a distributor licence to sell foreign liquor shall make the application to the Excise Commissioner; and (b) any licence other than distributor licence and distributor licence to sell foreign liquor shall make the application to the Deputy Commissioner of the concerned District where the licence has to be sanctioned in Form CL-1A. (2) The application shall contain the following particulars namely.- (i) Name and address of the application; (ii) If the applicant is a company or a firm, the names and addresses of all the Directors or partners of the Company or firm; (iii) location of the premises where the applicant intends to conduct the business under a licence; (iv) If the sale is in more than one district, the names of Districts.”

27. It is an undisputed position that, the respondent-original petitioner has entered into agreement with the Government of Karnataka and as

per such agreement, the fee is agreed to be paid for grant of lease by the State Government to the respondent-Company. The State Government, in exercise of its delegated statutory power has to notify the privilege fee for the respective financial year which the respondent-Company has agreed to pay. The character of liability to pay privilege fee is not only by virtue of the contract but is by way of a statutory obligation once lease is granted in favour of the respondent-Company by the State. It is on account of the lease so granted, the respondent-Company is in a position to undertake the business of the liquor as per the terms and conditions of the licence. Hence, in any case, payment of privilege fee can be termed as by way of necessity. If any assessee has incurred expenses to discharge its statutory obligation for doing of business, the same by no stretch of imagination can be termed as not for the purpose of business or profession.

28. In our view, the aspects of expenditure for necessity and the expenditure having direct benefit are specifically excluded when the House of Lords in the above referred decision in case of **Atharion** (supra) made the observation for the expenditure incurred on the ground of commercial expediency or to indirectly facilitate carrying on of the business.

29. Even otherwise also, if any businessman or a professional has incurred expenses by way of discharge of statutory obligation to get a licence to do business or to get a licence to undertake profession such expenditure in any case can be termed as an expenditure on account of necessity of the business or profession. Since in the present case, it is privilege fee and the liability to pay the said amount arises on account of the statutory obligation even if the payment of which is agreed upon by contractual arrangement, such expenditure would not fall into the arena of

voluntariness or the ground of commercial expediency or facilitation in carrying on of the business. Even if the decision upon which the reliance has been placed by the learned ASG are considered, the assessing officer will have a power to examine the commercial expediency for the expenditure incurred but it cannot be said that he will have jurisdiction to disallow the expenditure incurred for necessity or with a view to have a direct benefit in the business of liquor.

30. On the contrary, the assessing officer being a statutory authority under the Act is bound to respect all the laws may be made by the Parliament or may be made by the State Legislature. He has no jurisdiction to examine the constitutional validity of any Act or the statute or a subordinate legislation which creates statutory liability upon the assessee to make the payment by way of an expenditure incurred.

31. Under the circumstances, we find that the action of disallowance of the payment of the privilege fee by the assessing officer for the respective period of assessment years which is prior to 1.4.2014 is *per se* without jurisdiction and also *ultravires* to his power under the Act.

32. In our view, the learned Single Judge has rightly observed that the assessing officer has no authority or competence to hold that the privilege fee is not having the character of statutory fee or that the State Legislature or the State Government in exercise of its power by way of a delegated legislation, cannot decide the quantum of fee or the percentage of the revenue on the income earned from the business. Be it recorded that the assessing officer was not exercising the power as that of a constitutional Court nor at any point of time the constitutional validity of the Karnataka Excise Act read with the Rules which include the grant

of licence and payment of the privilege fees were under the challenge. It is not the case of the appellant that the assessing officer had any authority, competence or jurisdiction to examine the constitutional validity of the State Legislature or subordinate legislation in exercise of the delegated power.

33. Under the circumstances, the observations made by the assessing officer in the impugned order so far as privilege fee is concerned can be said to be *ultravires* to his power under the Act.

34. In view of the above, if an action of disallowance of the deduction of privilege fee, the expenditure of privilege fee is wholly without jurisdiction and *ultravires* to his power, it would be the case falling under exceptional category for entertainment of writ power under Article 226 of the Constitution of India.

35. In view of the above, the disallowance of the deduction of privilege fees as expenditure is wholly without jurisdiction and the observations made by the assessing Officer so far as constitutional validity of the relevant Act and the Rules and the power exercised by the State for delegated legislation for fixation of the quantum of fees can also be said as *ultravires* to his power because he has no power or authority to test the validity of any statutory provision, may be made by the State Legislature or the Parliament.

36. Under the circumstances, we find that the case would fall in the exceptional category to make a departure from the normal principle of relegating the party to the statutory remedy by way of appeal in exercise of power under Article 226 of the Constitution.

37. The exercise of the power by the learned Single Judge for remanding the matter to the Assessing Officer for consideration other than of privilege fees also

cannot be said as erroneous because the assessment order is a composite order on account of the finding recorded that the action of disallowance of the expenditure for payment of privilege fees is without jurisdiction and *ultravires* to the power. Consequently change/modification will have to be made in the order including the clause with all the interest etc..

38. In view of the above, we find that appeals being meritless deserve to be dismissed.

Hence, they are dismissed.

**Sd/-
JUDGE**

**Sd/-
JUDGE**

Sk/-