IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE C.K.ABDUL REHIM

&

THE HONOURABLE MR.JUSTICE T.V.ANILKUMAR

THURSDAY, THE 30TH DAY OF APRIL 2020 / 10TH VAISAKHA, 1942

ITA.No.135 OF 2019

AGAINST THE ORDER IN ITA 537/COCH/2018 OF S.T.A.TRIBUNAL, ERNAKULAM

APPELLANT/APPELLANT:

KERALA STATE BEVERAGES(MANUFACTORING AND MARKETING)CORPORATION LIMITED
PALAYAM,VIKAS BHAVAN P.O., THIRUVANANTHAPURAM-695033,
REPRESENTED BY ITS MANAGING DIRECTOR,
MR. SPARJAN KUMAR,IPS

BY ADVS.
SRI.ANIL D. NAIR
SRI.SREEJITH R.NAIR
SRI.ACHYUT K PADMARAJ
SMT. ARYA ANIL
SHRI.GOKULRAJ L.

RESPONDENT/RESPONDENT:

ASSISTANT COMMISSIONER OF INCOME TAX
CIRCLE-1 (I), TRIVANDRUM

BY ADV. SHRI.P.VIJAYAKUMAR, ASG OF INDIA

THIS INCOME TAX APPEAL HAVING BEEN FINALLY HEARD ON 04-03-2020, ALONG WITH ITA.146/2019, ITA.313/2019, THE COURT ON 30-04-2020 DELIVERED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE C.K.ABDUL REHIM

&

THE HONOURABLE MR.JUSTICE T.V.ANILKUMAR

THURSDAY, THE 30TH DAY OF APRIL 2020 / 10TH VAISAKHA, 1942

ITA.No.146 OF 2019

AGAINST THE ORDER IN ITA 536/COCH/2018 DATED 04-04-2019 OF I.T.A.TRIBUNAL,COCHIN BENCH

APPELLANT/APPELLANT:

KERALA STATE BEVERAGES (MANUFACTURING AND MARKETING) CORPORATION LTD.
PALAYAM, VIKAS BHAVAN P.O, THIRUVANANTHAPURAM
REPRESENTED BY ITS MANAGING DIRECTOR,
MR. SPARJAN KUMAR, IPS

BY ADVS.
SRI.ANIL D. NAIR
SRI.SREEJITH R.NAIR
SRI.ACHYUT K PADMARAJ
SMT. ARYA ANIL
SHRI.GOKULRAJ L.

RESPONDENT/RESPONDENT:

ASSISTANT COMMISSIONER OF INCOME TAX
CIRCLE -1 (1), TRIVANDRUM 695 001

BY ADV. SHRI.P.VIJAYAKUMAR, ASG OF INDIA

THIS INCOME TAX APPEAL HAVING BEEN FINALLY HEARD ON 04-03-2020, ALONG WITH ITA.135/2019, ITA.313/2019, THE COURT ON 30-04-2020 DELIVERED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE C.K.ABDUL REHIM

&

THE HONOURABLE MR.JUSTICE T.V.ANILKUMAR

THURSDAY, THE 30TH DAY OF APRIL 2020 / 10TH VAISAKHA, 1942

ITA.No.313 OF 2019

AGAINST THE ORDER DATED 11-10-2019 IN ITA 537/COCH/2018 OF I.T.A.TRIBUNAL,COCHIN BENCH

APPELLANT/APPELLANT:

**KERALA STATE BEVERAGES (MANUFACTURING AND MARKETING) CORPORATION LTD.
PALAYALAM, VIKAS BHAVAN P.O.
THIRUVANANTHAPURAM 695 033, REPRESENTED BY ITS MANAGING DIRECTOR MR. G. SPARJAN KUMAR IPS.**

**BY ADVS.
SRI.ANIL D. NAIR
SRI.R.SREEJITH
SHRI.GOKULRAJ L.
SMT. ARYA ANIL
SMT.SRI HARINI S.P.**

RESPONDENT/RESPONDENT:

**ASSISTANT COMMISSIONER OF INCOME TAX
CIRCLE 1 (1), TRIVANDRUM 695 001.**

R1 BY ADV. SRI.P.VIJAYAKUMAR

THIS INCOME TAX APPEAL HAVING BEEN FINALLY HEARD ON 04-03-2020, ALONG WITH ITA.135/2019, ITA.146/2019, THE COURT ON 30-04-2020 DELIVERED THE FOLLOWING:

'C.R.'

C.K. ABDUL REHIM, J.
&
T.V. ANILKUMAR, J.

I.T. Appeal Nos. 135, 146 & 313 OF 2019

DATED THIS THE 30th DAY OF APRIL, 2020

J U D G M E N T

Abdul Rehim, J:

Income Tax Appeal Nos. 135/2019 & 146/2019 are filed challenging a common order passed by the Income Tax Appellate Tribunal, Cochin Bench in ITA Nos.536/Coch/2018 and 537/Coch/2018, dated 12-03-2019. Income Tax Appeal No.313/2019 is filed against the revised order passed by the same Tribunal ITA No.537/Coch/2018, dated 11-10-2019. The assessee was the appellant before the Tribunal, who is the appellant herein. The revenue is the respondent.

2. Appellant is a company registered under the Companies Act, engaged in wholesale and retail trade of beaverages within the State of Kerala, and is a 'State Government Undertaking' falling within the 'Explanation' provided under Section 40 (a) (iib) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act' for short). With respect to

the assessment year 2014-2015, the Deputy Commissioner of Income Tax, Circle-2 (1), Thiruvananthapuram finalized the assessment of income tax against the appellant, under Section 143 (3) of the Act, through the order of assessment dated 14-12-2016. But, the Principal Commissioner of Income Tax, Thiruvananthapuram initiated proceedings under Section 263 of the Act and set aside the order of assessment, on holding that the same is erroneous and is prejudicial to the interest of the revenue, to the extent it failed to disallow the debits made in the Profit and Loss Account of the assessee with respect to the amount of surcharge on sales tax and turn over tax paid to the State Government, which ought to have been disallowed under Section 40 (a) (iib) of the Act. Against order of the Principal Commissioner of Income Tax, issued under Section 263 of the Act, dated 25-09-2018, the appellant approached the Tribunal in ITA No.536/Coch/2018.

3. With respect to the assessment year 2015-2016, assessment against the appellant was completed under Section 143 (3) of the Act by the Assistant Commissioner of Income Tax, Circle-1 (1), Thiruvananthapuram, through the order of assessment, dated 28-12-2017. Debits contained in the Profit and

Loss Account of the appellant with respect to payment of Gallonage Fee, Licence fee, Shop rental (Kist) and Surcharge on Sales Tax, amounting to a total sum of Rs.811,90,88,115/- was disallowed under Section 40 (a) (iib). Aggrieved by the said order the appellant approached the Commissioner of Income Tax (Appeals), Thiruvananthapuram. But the first appellate authority had dismissed the appeal. The appellant took up the matter in second appeal before the Tribunal in ITA No.537/Coch/2018.

4. The Tribunal considered ITA Nos.536 & 537/Coch/2018 together and dismissed them through a common order passed on 12-03-2019. The assessee thereafter filed MP No.47/Coch/2019 seeking rectification of a mistake in the order of the Tribunal in ITA No.537/Coch/2018, on the ground that the Tribunal had failed to consider the issue agitated against disallowance of the surcharge on sales tax, and there occurred failure to adjudicate on that issue. Hence the order passed by the Tribunal in ITA No.537/Coch/2018, dated 12-03-2019 was requested to be recalled. The Tribunal allowed the Miscellaneous Petition and recalled the order dated 12-03-2019 in ITA No.537/Coch/2018. The issue mentioned above was reconsidered and a fresh order was passed on 11-10-2019, finding the issue against the

appellant and dismissing the appeal. It is the said order of the Tribunal dated 11-10-2019 which is challenged in ITA No.313/2019. Since the issue to be considered is common in all the three appeals, the above appeals were heard together and disposed of through this common judgment.

5. Heard; Shri. Anil D. Nair, learned counsel for the appellant and Shri. P. Vijayakumar, learned Assistant Solicitor General appearing for the respondent-Assessing Officer,

6. Common question of law arising in these cases is that, whether the Gallonage Fee, Licence fee, Shop rental (Kist) and Surcharge on sales tax and turn over tax, with respect to which debits were made by the assessee in their Profit and Loss Account, are liable to be disallowed while computing the income derived as “profit and gains of business or profession”, under Section 40 (a) (iib) of the Act, by treating them as amounts paid by the assessee “by way of royalty, licence fee, service fee, privilege fee, service charge or any other fee or charge by whatever name called, which is levied exclusively on” the assessee.

7. With respect to the assessment year 2014-2015 the Principal Commissioner of Income Tax, while setting aside the original assessment, directed the Assessing Officer to disallow an amount of Rs.96,076.20 lakhs debited to the Profit and Loss Account of the assessee towards surcharge on sales tax and turn over tax, by invoking Section 40 (a) (iib). With respect to the assessment year 2015-2016 the Assessing Officer had disallowed a total debit of Rs.811,90,88,115/- being the amount paid as, Gallonage Fee, Licence Fee, Shop Rental (kist) and Surcharge on Sales Tax, which was confirmed by both the appellate authorities.

8. For a better appreciation of the question of law raised, it is necessary to evaluate the relevant provisions in the Act. Chapter IV of the Act deals with computation of business income. Section 40 provides about the amounts which are not deductable while computing the business income. It specifies the amounts which shall not be deducted in computing income under the head, “profit and gains of business or profession.” Sub-Section (a) (iib) of Section 40 reads as follows:

> *“40. Notwithstanding anything to the contrary in sections 30 to 38, the following amounts shall not be deducted in*

computing the income chargeable under the head "Profits and gains of business or profession".- (a) in the case of any assessee-

(iib) any amount-

(A) paid by way of royalty, licence fee, service fee, privilege fee, service charge or any other fee or charge, by whatever name called, which is levied exclusively on; or

(B) which is appropriated, directly or indirectly, from, a State Government undertaking by the State Government.

Explanation.—For the purposes of this sub-clause, a State Government undertaking includes—

(i) a corporation established by or under any Act of the State Government;

(ii) a company in which more than fifty per cent of the paid-up equity share capital is held by the State Government;

(iii) a company in which more than fifty per cent of the paid-up equity share capital is held by the entity referred to in clause (i) or clause (ii) (whether singly or taken together);

(iv) a company or corporation in which the State Government has the right to appoint the majority of the directors or to control the management or policy decisions, directly or indirectly, including by virtue of its shareholding or management rights or shareholders agreements or voting agreements or in any other manner;

(v) an authority, a board or an institution or a body established or constituted by or under any Act of the State

Government or owned or controlled by the State Government;"

Relevant portion of the 'Explanatory Note' appended to the amendment which introduced Section 40 (a) (iib), reads as follows;

"In order to protect the tax base of State Government undertakings vis-a-vis exclusively levy of fee, charge, etc or appropriation of amount by the State Government from its undertakings, section 40 of the Income Tax Act has been amended to provide that any amount paid by way of fee, charge, etc, which is levied exclusively on, or any amount appropriated, directly or indirectly, from a State Government undertaking, by the State Government, shall not be allowed as deduction for the purposes of computation of income of such undertakings under the head – Profits and gains of business or profession. The expression – State Government Undertaking for this purpose includes-

(i) a *corporation established by or under any Act of the State Government;*

(ii) a company in which more than fifty per cent of the paid-up equity share capital is held by the State Government;

(iii) a company in which more than fifty per cent of the paid-up equity share capital is held by the entity referred to in clause (i) or clause (ii) (whether singly or taken together);

(iv) a company or corporation in which the State Government has the right to appoint the majority of the directors or to control the management or policy decisions, directly or indirectly, including by virtue of its shareholding or management rights or shareholders agreements or voting agreements or in any other manner;

(v) an authority, a board or an institution or a body established or constituted by or under any Act of the State Government or owned or controlled by the State Government;"

On the basis of the contentions raised by both side, we may now deal with the question regarding disallowance of each of the items of fee or charges, separately;

9. **Gallonage Fee**

The Assessing Officer found that the Gallonage Fee is levied as per Section 18 of the Abkari Act, under Rule 15(A) of the Foreign Liquor Rules. Fact revealed makes it clear that, the assessee is dealing with wholesale and retail of Indian Made Foreign Liquor (IMFL) and Foreign Made Foreign Liquor (FMFL), for which they are holding licences issued by the Excise Department of the State Government. The assessee is holding FL-1 Licence with respect to the sale of foreign liquor in sealed bottles, without the privilege of consumption within the premises. They are also having FL-9 Licence for wholesale of

foreign liquor, which they are selling to FL-1, FL-3, FL-4, 4A, FL-11, FL-12 licence holders. Rule 15(A) of the Foreign Liquor Rules provides that, Gallonage Fee at such rate as the Government may prescribe from time to time, shall be paid by the FL-9 licencees on the quantity of foreign liquor sold by such licencees. It is found by the Assessing Officer that, FL-9 licencees for wholesale of foreign liquor is issued by the State Government exclusively to the assessee company and therefore the Gallonage Fee levied with respect to FL-9 licence is an 'exclusive levy' imposed on the assessee. The above view has been upheld by the first appellate authority. Contention of the appellant is that, apart from Rule 15(A) of the Foreign Liquor Rules, Gallonage Fee is also collected from other agencies under Rule 14 of the Kerala Rectified Spirit Rules, 1972. For instance, it was pointed out that, Government is collecting Gallonage Fee from agencies like, Vikram Sarabhai Space Centre, Thiruvananthapuram, Travencore Sugers and Chemicals, Thiruvananthapuram, Malabhar Distilleries Ltd, Chittur, Palakkad, Earnest Brothers, Vellanikkara etc. Therefore it is contended that the collection of Gallonage Fee is not an exclusive levy on the assessee as envisaged under Section 40 (a) (iib). It is levied on FL-9 licence

holder as well as consumers of rectified spirit, other than pharmaceutical manufactures, as per Rule 14 of the Kerala Rectified Spirit Rules, 1972, framed under the Abkari Act. Inorder to constitute the levy 'an exclusive levy' as envisaged in Section 40 (a) (iib), it shall be intended on the entity alone and not on any particular product. The levy of Gallonage Fee falls on the assessee, as it happens to be the wholesale dealer of foreign liquor within the state. But when similar levy is being charged on various other state government and central government undertakings as well as on private licencees., the levy of Gallonage Fee on the assessee is not an 'exclusive levy' imposed on the assessee as a state government undertaking, was the contention.

10. The first appellate authority found that, merely because a fee in the name of Gallonage Fee is levied under Rule 14 of the Kerala Rectified Spirit Rules also, it is not relevant for the purpose of examining applicability of Section 40 (a) (iib), with respect to fee paid under the Foreign Liquor Rules. As long as the FL-9 licence is exclusively granted to the appellant, the Gallonage Fee paid by the appellant is an 'exclusive levy' on the assessee, which will attract provisions of Section 40 (a) (iib), is

the finding. The view held by the first appellate authority was also reiterated by the Tribunal, in the order passed on 12-03-2019. It was held that, the fact that a fee in the name of Gallonage Fee is also levied under Kerala Rectified Spirit Rules, 1972, is not relevant for the purpose of examining applicability of the provisions under Section 40 (a) (iib), with respect to the fee paid under the Foreign Liquor Rules, the Tribunal held.

11. Before this court, learned counsel for appellant contended that, inorder to attract provisions of Section 40 (a) (iib) the twin test to be satisfied are; firstly whether the levies are imposed directly on the state government undertaking; and secondly whether the levy paid by the assessee is exclusively imposed on such state government undertaking. Since the levy is made by the Excise Department of the State Government and since similar levy is imposed on other undertakings also, it cannot be considered as an 'exclusive levy' imposed directly by the State Government, is the argument. Per contra, learned Assistant Solicitor General contended that, Gallonage Fee is imposed on the assessee with respect to the wholesale trade on foreign liquor conducted by it under Section 18 of the Abkari Act. It is not in dispute that the wholesale trade in foreign liquor

is exclusively licenced to the assessee herein, under the FL-9 licence. Therefore Gallonage Fee with respect to wholesale of foreign liquor, imposed under the Foreign Liquor Rules, is an 'exclusive levy' on the assessee. It is contended that the test of 'exclusivity' has to be assessed depending on the mode of levy of the charges. Since the Gallonage Fee is confined to the wholesale trade of foreign liquor licenced under FL-9, any other imposition of Gallonage Fee under a different context with respect to other organisations for other purposes cannot be considered to make the provisions of 40 (a) (iib) as not applicable to the assessee. The Gallonage Fee paid by the assessee under Rule 15A of the Foreign Liquor Rules with respect to the wholesale trade in foreign liquor for human consumption, cannot be equated or in any way identical to the Gallonage Fee paid by any industrial or research undertaking, in respect of the rectified spirit / industrial spirit dealt with them, which are governed by provisions of the Kerala Rectified Spirit Rules. Both the levies cannot be considered as similar, because the levies are on different trades for different products, charged under separate statutes. Merely because the same nomenclature of Gallonage Fee is used, it cannot be contended that there is no

exclusivity with respect to the levy of Gallonage Fee from the assessee, is the argument.

12. We are persuaded to accept the view taken by the Tribunal, which confirmed the view of the authorities below. As supported by the learned Assistant Solicitor General of India, as long as it is not in dispute that the wholesale trade in foreign liquor under FL-9 licence is an exclusive trade in the state permitted to the assessee herein alone, the Gallonage Fee levied under the Foreign Liquor Rules becomes an 'exclusive levy' on the assessee. Therefore we are of the considered opinion that the levy of Gallonage Fee with respect to the wholesale trade under the FL-9 licence will squarely fall within the scope of the disallowances provided under Section 40 (a) (iib). Hence the finding of the Tribunal in this regard need to be upheld.

13. **Licence Fee and Shop Rental (Kist)**.

Licence fee is levied under Section 18 of the Abkari act and under the provisions of the Foreign Liquor Rules. The assessee is paying licence fee with respect to the FL-9 licence, for the warehouses in the wholesale trade. They are also paying licence fee with respect to FL-1 shops (retail outlets) wherein foreign liquor in sealed bottles are sold. As discussed above, the

business activities under FL-9 licence is the monopoly of the assessee. Assessee is the exclusive licencee with respect to the wholesale trade. With respect to FL-1 licence for retail trading in foreign liquor in sealed bottles, it is not in dispute that the business activity is exclusively earmarked for two public sector undertakings of the State Government, the assessee herein as well as the Consumer Federation. The Assessing Officer found that, in both the cases the licences are granted only to public sector undertakings and therefore the levy of the licence fee is an 'exclusive levy' on the assessee. With respect to Shop Rental (Kist), the assessee is liable to pay such levy for each warehouses of the wholesale trade authorised under FL-9 licence and for each retail shops dealing with the business under FL-1 licences. In this case also, the Assessing Officer as well as the first appellate authority found that, there is exclusivity with respect to the levy on the assessee - public sector undertaking. The Tribunal found that the assessee is paying the licence fee and shop rental (kist) in respect of the exclusive licences granted by way of FL-1 and FL-9 licences. Finding that there is no dispute with respect to the exclusive nature of the licence fee and shop rental (kist), the disallowance was upheld. Before both

the authorities, the appellant contended that, the licences granted to the assessee are under Section 18 (A) of the Abkari Act, which deals with granting of exclusive or other privileges for manufacture etc., on payment of rentals. The Foreign Liquor Rules stipulates that, for getting such licence to conduct trade in liquor, the fee prescribed in the Rules has to be paid. The Foreign Liquor Rules provide for issue of various type of licences in trade of liquor in the state. The assessee pointed out that, such licence fee is also payable with respect to the right granted in trade of Toddy. There are different kinds of licences granted for sale of different type of spirit products, like rectified spirit, denatured spirit etc., Such licences are issued to persons dealing with such products and to different categories of sellers of foreign liquor and beer. Therefore it was contended that the licence fee levied for conducting the trade in foreign liquor is not an exclusive levy attracting Section 40 (a) (iib). The Tribunal discarded the above contention on the finding that, the appellant is paying licence fee and shop rental (kist) in respect of the exclusive licences granted, FL-1 and FL-9, issued by the State Government.

14. Before this court, learned counsel for the appellant argued that, the licence fee as well as shop rental (kist) are also not levies paid directly to the State Government and they are not levies imposed exclusively on the appellant. Those levis are also imposed on other dealers who are licenced for same type of trade and those are levies charged on other traders by virtue of similar provisions in other statutes. On the other hand, learned Assistant Solicitor General of India contended that, the licence fee is charged specifically and exclusively on the assessee with respect to each premises of the business sanctioned under FL-9 licence. Similarly the licence fee is levied with respect to FL-1 licences, only from two state government undertakings, the appellant and the Consumer Federation. Therefore it is contended that the licence fee are levied exclusively on the state government undertakings, on vesting with them the right and privilege of retail trade of foreign liquor. Hence the licence fee will squarely fall within the ambit and scope of the disallowances enumerated under Section 40 (a) (iib). It is on the basis of the 'exclusivity' provided with respect to the state government owned corporations (companies) that the levy becomes chargable. Similar contentions were also raised with respect to

the shop rental (kist). Since state government undertakings alone have monopoly in the wholesale and retail trade in foreign liquor under FL-9 and FL-1 licences, the 'exclusivity' with respect to the above said levies remains specified, is the contention.

15. On assimilation of the rival contentions, as already held in the case of Gallonage Fee, the licence under FL-9 for wholesale trade in foreign liquor is exclusively granted to the appellant herein. Therefore the licence fee is a levy charged exclusively on the appellant for conduct of the business authorised under FL-9 licence. So also the shop rental (kist) as far as FL-9 licence is concerned is levied only on the wholesale warehouses of the appellant / assessee. Therefore the arguments of the assessee in this regard cannot be sustained, with respect to the levies of licence fee and shop rental (kist) for the business conducted based on the FL-9 licence, as they are exclusively levied from the appellant.

16. With respect to licence fee and shop rental (kist) levied for the retail business is concerned, both sides have advanced conflicting arguments. The situation is that, the business of retail in foreign liquor is restricted to the appellant and to the

Consumer Federation,both being state government undertakings. The trade in toddy or other kind of spirits cannot in any manner be equated with the business of retail sale in foreign liquor, for the purpose of human consumption. Contention of the appellant seems to be that, since the said business is permitted also to one another state government undertaking, namely the Consumer Federation, the exclusivity of the levy for the purpose of Section 40 (a) (iib) will be lost. It was argued that, provision under Section 40 (a) (iib) makes it abundantly clear that the levy imposed or the amount appropriated from a state government undertaking shall not be allowed as deduction when the levy is imposed exclusively on such a state government undertakings. Since the levy is made from one more state government undertakings, the 'exclusivity' is not there. In this regard, findings of the Tribunal is that, the wordings of Section 40 (a) (iib), “which is levied exclusively on” indicates that the fee or charge should be one exclusively levied from the state government undertakings, and it is not any fee or charge which is levied exclusively from the assessee by the state government. Therefore the question is whether the 'exclusivity' will be lost if it is levied from more than one State Government

undertaking. Sub-clause (iib) of Clause (a) of Section 40 provides that, any amount paid by way of royalty, licence fee, service fee, privilege fee, service charge, or any other fee or charge "which is levied exclusively on" a state government undertaking by the State Government *(emphasis supplied)* alone will satisfy the ingredients for disallowance. The statute has not used the word; levied exclusively on the state government undertakings by the State Government. Instead, the word used is "exclusively on" "a state government undertaking". Therefore, inorder to bring the disallowance within the ambit and scope of Section 40 (a) (iib), it should be an exclusive levy on the assessee, which should be a state government undertaking. Since the licence fee and shop rental (kist) are also levied from the Consumer Federation with respect to the FL-1 licence granted, it becomes out of the purview of the term 'levied exclusively on a state government undertaking, contained in 40 (a) (iib). Therefore we are persuaded to hold that the disallowance made with respect to the licence fee and shop rental (kist) paid with respect to the FL-1 licences granted to the appellant for retail trade in foreign liquor, cannot be sustained.

17. **Surcharge on Sales Tax and Turnover tax**

Referring to provisions contained in the Kerala Surcharge on Taxes Act, 1957, the appellant contended before the first appellate authority that, the said legislation itself was brought into force when the Government considered it necessary to increase the taxes. Nowhere it is mentioned that the Act is intended to provide any levy on the appellant. Before the first appellate authority it was pointed out that, the surcharge is imposed on agricultural income tax also. There are many assessees in the state paying surcharge on agricultural income tax, which include the state and central government undertakings as well as many private persons. Hence it is contended that the levy of surcharge on taxes is not a legislative arrangement made by the state to appropriate any profit of the appellant / assessee. Section 3 (1) of the Kerala Surcharge on Taxes Act, 1957 provides that, taxes payable under Section 5 (1) of the Kerala General Sales Tax Act (KGST) by a dealer in IMFL shall be increased by a surcharge @ 10%. Since it is applicable to agricultural income tax and to other assesses, it is not an exclusive levy on the appellant and hence it will never come within the scope of Section 40 (a) (iib), is the argument

advanced. The first appellate authority found that there is no dispute that provisions of Section 3 of the Surcharge on Taxes Act, 1957 are applicable exclusively to the appellant, since it is an exclusive levy on a state government undertaking, it will fall within the provisions of Section 40 (a) (iib), is the finding.

18. As observed in the foregoing paragraphs, while passing the common order in ITA Nos.536 & 537/Coch/2018 on 12-03-2019, the Tribunal had omitted to consider the contentions raised against disallowance of the surcharge on sales tax and turnover tax. After recalling the order passed in ITA No.537/Coch/2018, the issue was considered by the Tribunal elaborately. It was pointed out before the Tribunal that, the wording of Section 40 (a) (iib), “any amount paid by way of royalty, licence fee, service fee, privilege fee, service charge, or any other fee or charge by whatever name called”, would clearly indicate that the disallowance is intended with respect to 'fee or charges' and it will not take within its ambit and scope any amount collected by way of tax. The categorisation of surcharge also under the group of 'fee or charges' provided under Section 40 (a) (iib), by the Assessing Officer by depending upon the wording, “by whatever name called” cannot be sustained,

because the principle of e*jusdem generis* would apply and it should be of the same kind of 'fee or charge'. Surcharge on sales tax is nothing but sales tax and the wording of the Kerala Surcharge on Taxes Act itself would make it clear that an increase with respect to the tax payable under Section 5 (1) of the KGST Act is the only effect of the legislation. In other words, surcharge is introduced as an increment in the sales tax payable, and nothing else. It was also argued that the payment of tax is compulsory and refusal to pay would invite punishment. There is no direct *quid pro quo* between the tax payer and the levying authority. A 'fee or charge' is a compulsory payment to be made for special service rendered by the Government. It confers a specific advantage on the person paying it. Therefore 'fee or charge' is payable only for conferring an advantage or for agreeing to confer an advantage on the payer. The *'ejusdem generis'* principle cannot be applied with respect to surcharge paid on tax, which is totally different in nature and character, is the contention. There is no 'exclusivity' as far as surchrage on sales tax and turnover tax is concerned, was another argument raised before the Tribunal. It was pointed out that, surcharge on sales tax and turn over tax is payable by persons who are

carrying out sales and purchase of goods. Apart from the assessee there are other entities which deals with retail of IMFL who pays surcharge under the Kerala Surcharges Act. The Hotels which are dealing in liquor are also liable to pay turnover tax and surcharge on sales tax, in connection with sale of liquor. Therefore the levy of surcharge is not an exclusive 'fee or charge' imposed on the state government undertaking, was the argument. The Tribunal, after considering the above said contentions, found that, surcharge is exclusively levied on the assessee based on the FL-9 licence granted, which is not given to any other undertaking. Being so, the appellant had incurred the expenditure for obtaining the specific benefits from the State Government and it cannot be said that there is no element of *quid pro quo*. Since the other assessees pointed out, who are paying surcharge, are not granted with FL-9 licence under the Abkari Act, and the appellant alone is the FL-9 lincencee, the surcharge paid will fall within the ambit and scope of Section 40 (a) (iib), is the finding. The argument that the surcharge is nothing but sales tax paid by the assessee, is rejected by stating that, surcharge is not collectable or recoverable from the customers to whom the goods are sold, because of the express

restrainment contained in the provisions of the Kerala Surcharge on Taxes Act. Hence the surcharge is not equivalent of sales tax, is the finding of the Tribunal.

19. Before this court, learned counsel for appellant raised contention that, a 'tax' is not a 'fee or charge'. Section 3 (1) of the Kerala Surcharge on Tax Act was reiterated to content that, it provides only an increment in the 'tax' payable under Sub-Section (1) of Section (5) of the KGST Act by a dealer in foreign liquor by way of surcharge at 10%. Further, it is provided that, provisions of the KGST Act shall apply in relation to surcharge, as they apply in relation to tax payable under the KGST Act. It is pointed out that, from a plain reading of the provision it is clear that surcharge on sales tax is nothing but a tax and it partakes all the characteristics of tax levied under a specific fiscal statute. Hence the disallowance is made only by way of rewriting Section 40 (a) (iib), under the guise of interpreting the said provision, is the argument. From a plain reading of Section 40 (a) (iib) it is clear that, the provision was never intended to apply to the taxes levied by the state in exercise of its sovereign power. Learned counsel had drawn attention of this court to the CBDT Circular No.3 of 2014, which specifically made it clear that, only the

privilege fee, licence fee, royalty etc will fall within the category of 'fee or charges' and it will not be applicable to 'taxes' such as sales tax. Therefore it is contended that the application of Section 40 (a) (iib) in the case of surcharge on sales tax would directly goes against the aforesaid Circular.

20. Learned Assistant Solicitor General of India pointed out that, on an analysis of the provisions contained in Kerala Surcharge on Taxes Act, 1957, especially Section 3 thereof, it reveals that the feature of the surcharge is only an increment in sales tax. But it is not a sales tax. He placed reliance on Sub-Section (2) of Section 3 which prohibits, the passing of the liability of surcharge to the subsequent purchasers. So also it is pointed out that, Sub-Section (3) & (4) of Section 3 had made it a penal offence to pass on such liability to the subsequent purchasers. Therefore it is contended that, surcharge cannot be deemed to be sales tax. According to learned ASGI, surcharge necessarily comes under the term 'surcharge' and payment in the name of 'surcharge' would also fall under Section 40 (a) (iib). Since 'surcharge' being a creation under a distinct statute and the same being not permitted to be passed on to the subsequent purchases, unlike the sales tax there cannot be any deduction of

the 'surcharge' paid from the taxable income, is the contention.

21. Learned counsel for the appellant placed reliance on the a Division Bench decision of this court in **Income Tax Appeal No.68/2015 and connected cases,** dated 10th August, 2016. Those are appeals filed by the revenue against the appellant herein. While deciding the question whether surcharge paid by the assessee under the Kerala Surcharge on Taxes Act, 1957 and Turnover Tax levied under Section 5 (2) (1) of the KGST Act, 1963, are allowable deductions under Section 37 of the Income Tax Act or not, it was found that, the levy of tax under the KGST Act and the Surcharge Act on the turnover, are not on the income and therefore the assessment of income tax made by disallowing those payments, is sustainable. Learned counsel had also placed reliance on a decision of the Hon'ble Supreme Court in **Commissioner, Hindu Religious Endowments, Madras V. Sri. Lakshmindra Thirtha Swamiar of Sri Shirur Mutt (1954 SCR 1005)** and on some other cases to emphaise that, tax is not a compulsory extraction of money by public authority for a public purpose enforcible and is not a payment made for services rendered. A fee may be

generally defined as a charge for special services rendered to individuals by some Governmental agencies. Various decisions of other High Courts are also pressed into service to content that 'tax' and 'dues' are not same as 'cess or fee or charge'.

22. On analysing the rival contentions, we take note of the fact that the surcharge on sales tax was introduced only as an increase in the tax payable. Merely because the statute imposed a prohibition with respect to passing on such liability to others, the basic characteristics of the levy is not changed. As settled through various legal precedents, a 'tax' cannot by equated with a 'fee or charge'. When the provisions contained in Section 40 (a) (iib) is clear in its terms that it will take in only 'fee or charges' enumerated therein or any 'fee or charge by whatever name called, it is clear that any levy of 'tax' is outside the ambit and scope of the said provision. Inorder to include surcharge on sales tax or turnover tax within the sweep of Section 40 (a) (iib), it becomes necessary to read something into the provision. Therefore we are inclined to accept the view as contended by the appellant, that the disallowance of surcharge on sales tax and turnover tax cannot be sustained.

23. While summing up the conclusions, we are persuaded to answer the question of law raised, partly in favour of the revenue and partly in favour of the assessee. We hold that the levy of Gallonage Fee, Licence Fee and Shop Rental (kist) with respect to the FL-9 licences granted to the appellant will clearly fall within the purview of Section 40 (a) (iib) and the amount paid in this regard is liable to be disallowed. The amount of Gallonage Fee, Licence Fee, or Shop Rental (kist) paid with respect to FL-1 licences granted in favour of the appellant, with respect to the retail business in foreign liquor, is not an exclusive levy on the appellant, which is a state government undertaking. Therefore the disallowance made with respect to those amounts cannot be sustained. The surcharge on sales tax and turnover tax is not a 'fee or charge' coming within the scope of Section 40 (a) (iib) and is not an amount which can be disallowed under the said provision. Therefore the disallowance made in this regard is liable to be set aside.

24. In the result the assessment completed against the appellants with respect to the assessment years 2014-2015, 2015-2016 are hereby set aside. The matter is remitted to the Assessing Officer to pass revised orders, after computing the

liability in accordance with the position settled hereinabove, on affording an opportunity of hearing to the appellant. The needful steps in this regard shall be completed at the earliest, at any rate, within three months from the date of receipt of a copy of this judgment.

The above Income Tax Appeals are hereby disposed of accordingly.

Sd/-

C.K.ABDUL REHIM

JUDGE

Sd/-

T.V.ANILKUMAR

JUDGE

AMG

APPENDIX OF ITA 135/2019

APPELLANT'S EXHIBITS:

ANNEXURE-A	**TRUE COPY OF THE ASSESSMENT ORDER DATED 28.12.2017 FOR THE YEAR 2015-16 ISSUED TO THE APPELLANT**
ANNEXURE-B	**TRUE COPY OF THE ARGUMENT NOTE FILED BEFORE THE COMMISSIONER OF INCOME TAX(APPEALS)**
ANNEXURE-C	**TRUE COPY OF THE ORDER DATED 5.11.2018 OF THE COMMISSIONER OF INCOME TAX (APPEALS) TO THE APPELLANT**
ANNEXURE-D	**TRUE COPY OF THE GROUND OF APPEAL BEFORE THE INCOME TAX APPELLATE TRIBUNAL**
ANNEXURE-E	**TRUE COPY OF THE ORDER OF THE INCOME TAX APPELLATE TRIBUNAL DATED 12.3.2019**

APPENDIX OF ITA 146/2019

APPELLANT'S EXHIBITS:

ANNEXURE A	**TRUE COPY OF THE ORDER DATED 14-12-2016 FOR THE YEAR 2014-15 ISSUED TO THE APPELLANT**
ANNEXURE B	**TRUE COPY OF THE ORDER DATED 25-09-2018 OF THE PRINCIPAL COMMISSIONER OF INCOME TAX TO THE APPELLANT**
ANNEXURE C	**TRUE COPY OF THE ORDER OF THE INCOME TAX APPELLATE TRIBUNAL DATED 12-3-2019.**

APPENDIX OF ITA 313/2019

APPELLANT'S EXHIBITS:

ANNEXURE A	**TRUE COPY OF THE ASSESSMENT ORDER DATED 28.12.2017 ISSUED BY THE 1ST RESPONDENT.**
ANNEXURE B	**TRUE COPY OF THE ARGUMENT NOTE FILED BEFORE THE COMMISSIONER OF INCOME TAX (APPEALS).**
ANNEXURE C	**TRUE COPY OF THE ORDER OF THE FIRST APPELLATE AUTHORITY DATED 5.11.2018.**
ANNEXURE D	**TRUE COPY OF THE GROUNDS OF APPEAL BEFORE THE INCOME TAX APPELLATE TRIBUNAL.**
ANNEXURE E	**TRUE COPY OF ORDER OF THE INCOME TAX TRIBUNAL DATED 12.3.2019.**
ANNEXURE F	**TRUE COPY OF THE MISCELLANEOUS APPLICATION FILED BEFORE THE TRIBUNAL.**
ANNEXURE G	**TRUE COPY OF THE ORDER OF THE INCOME TAX TRIBUNAL DATED 11.10.2019.**