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Court No. 3

Case :- WRIT TAX No. - 378 of 2021

Petitioner :- M/S Jain Distillery Private Limited
Respondent :- State Of U.P. And 5 Others
Counsel for Petitioner :- Nishant Mishra, Tanmay Sadh
Counsel for Respondent :- C.S.C.,A.S.G.I., Dhananjay Awasthi, Satendra Kumar Upadhyay

With

Case :- WRIT TAX No. - 369 of 2021

Petitioner :- M/S Mohit Petrochemicals Private Limited
Respondent :- State Of U.P. And 5 Others
Counsel for Petitioner :- Nishant Mishra, Tanmay Sadh
Counsel for Respondent :- C.S.C.,A.S.G.I., Dhananjay Awasthi, Satendra Kumar Upadhyay

With

Case :- WRIT TAX No. - 370 of 2021

Petitioner :- M/S Mohit Petrochemicals Private Limited
Respondent :- State Of U.P. And 5 Others
Counsel for Petitioner :- Nishant Mishra, Tanmay Sadh
Counsel for Respondent :- C.S.C.,A.S.G.I., Anupama Parashar, Dhananjay Awasthi

With

Case :- WRIT TAX No. - 383 of 2021

Petitioner :- M/S Mohit Petrochemicals Private Limited
Respondent :- State Of U.P. And 5 Others
Counsel for Petitioner :- Nishant Mishra, Tanmay Sadh, Yashonidhi Shukla
Counsel for Respondent :- C.S.C.,A.S.G.I.,Krishna Agarawal, Ravi Prakash Singh

With

Case :- WRIT TAX No. - 371 of 2021

Petitioner :- M/S Jain Distillery Private Limited
Respondent :- State Of U.P. And 5 Others
Counsel for Petitioner :- Nishant Mishra, Tanmay Sadh
Counsel for Respondent :- C.S.C.,A.S.G.I., Anupama Parashar, Dhananjay Awasthi

With
Case :- WRIT TAX No. - 364 of 2021

Petitioner :- M/S SVP Industries Limited
Respondent :- State Of U.P. And 4 Others
Counsel for Petitioner :- Suresh Kumar Maurya, Pawan Shri Agarwal

With

Case :- WRIT TAX No. - 451 of 2021

Petitioner :- M/S Dcm Shriram Limited
Respondent :- State Of U.P. And 4 Others
Counsel for Petitioner :- Suresh Kumar Maurya, Pawan Shri Agarwal
Counsel for Respondent :- C.S.C.,A.S.G.I., Ashok Singh, Gopal Verma

With

Case :- WRIT TAX No. - 355 of 2020

Petitioner :- U.P. Sugar Mills Association Through Its Secretary General Mr. Deepak Guptara And Another
Respondent :- State Of U.P. Through Its Principal Secretary And 2 Others
Counsel for Petitioner :- Rahul Agarwal, Priya Agrawal
Counsel for Respondent :- C.S.C.,A.S.G.I.

And

Case :- WRIT TAX No. - 385 of 2021

Petitioner :- M/S Jain Distillery Private Limited
Respondent :- State Of U.P. And 5 Others
Counsel for Petitioner :- Tanmay Sadh, Nishant Mishra
Counsel for Respondent :- C.S.C., A.S.G.I., Dhananjay Awasthi

Hon'ble Naheed Ara Moonis, J.
Hon'ble Saumitra Dayal Singh, J.

1. Heard Shri Navin Sinha, learned Senior Advocate, assisted by Shri Nishant Mishra, learned counsel for the petitioner in Writ Tax Nos. 378 of 2021 and 383 of 2021; Shri Nishant Mishra in Writ Tax Nos. 369 of 2021, 370 of 2021, 371 of 2021 and 385 of 2021; Shri Rahul Agarwal, learned counsel for the petitioner in Writ Tax No. 355 of 2020; Shri Pawan Shri Agarwal, learned counsel for the petitioner in Writ Tax Nos. 364 of 2021 and 451 of 2021; Shri Manish Goel, learned Additional Advocate General assisted by Shri Apurva Hajela and Shri A.C. Tripathi, learned Standing Counsel, for the State.

2. In Writ Tax No. 378 of 2021, the petitioner has sought relief in the nature of a declaration that the State legislature (of Uttar Pradesh) lost its

legislative competence to impose or levy tax on sale of **Extra Neutral Alcohol** (in short, 'ENA'), after enactment of the 101st Constitution Amendment, with effect from 01.07.2017 – as a direct consequence of the enactment of Article 246A read with Article 366 (12-A) of the Constitution of India, read with the substituted Entry 54 of List II of the Seventh Schedule, to the Constitution of India. Further relief has been sought, to seek quashing of the Notification No. KA.NI-2-1793 dated 17 December 2019, issued under Section 74 read with Section 4(4) of the Uttar Pradesh Value Added Tax Act, 2008 (in short, UPVAT Act), whereby Schedule entry 1-A was added to the pre-existing Schedule IV (below entry 1), of the UPVAT Act, to impose tax on sale of ENA, at the rate 5 percent, at the point of Manufacturer or Importer, w.e.f. 09.12.2019. Challenge has also been raised to the Circular/letters dated 10.06.2021 and 11.06.2021 issued by the Additional Commissioner Grade-I, Commercial Tax, directing the subordinate authority to charge and collect UPVAT on ENA used in the manufacture of "alcoholic liquor for human consumption". Next, purely alternatively, adjustment of the GST levied and paid on ENA and Special Denatured Spirit (in short, 'SDS'), has been sought, against the UPVAT liability imposed by the State, on the above described commodities. By way of an amendment (allowed), challenge has also been raised to the assessment order dated 30.06.2021, for the A.Y. 2017-18 (U.P. & Central) (01.07.2017 to 31.03.2018), whereby UPVAT & Central Sales Tax has been assessed on ENA, treating that commodity to be covered under entry 1 of Schedule IV of the UPVAT Act.

3. In Writ Tax No. 369 of 2021, besides the challenge raised to the legislative competence and the Notification dated 17.12.2019 (as above), challenge has also been raised to the assessment notice dated 08.06.2021, issued against that petitioner, for A.Y. 2019-20, as also Circular/letters dated 10.06.2021 and 11.06.2021 (as above).

4. Similarly, in Writ Tax No 370 of 2021, besides the challenge raised to the legislative competence (as above), challenge has been raised to the

assessment notice dated 15.06.2021 issued to that petitioner, for A.Y. 2017-18 (01.07.2017 to 31.03.2018); the assessment order dated 30.06.2021 passed under Section 29 of the UPVAT Act, for A.Y. 2017-18 (01.07.2017 to 31.03.2018) and; the Circular/letters dated 10.06.2021 and 11.06.2021 (as above).

5. In Writ Tax No. 383 of 2021, besides the challenge raised to the legislative competence (as above) and the Notification dated 17.12.2019, challenge has also been raised to the assessment notice dated 21.06.2021 issued under Section 28 of UPVAT Act, for A.Y. 2018-19 (U.P.) and, the Circular/letters dated 10.06.2021 and 11.06.2021 (as above).

6. In Writ Tax No. 371 of 2021, besides the challenge raised to the legislative competence and Notification dated 17.12.2019 (as above), challenge has also been raised to the assessment notice dated 08.06.2021 issued under Section 28 of the UPVAT Act, for A.Y. 2019-20 and the Circular/letters dated 10.06.2021 and 11.06.2021 (as above).

7. In Writ Tax No. 364 of 2021, besides the challenge to the legislative competence (as above), challenge has also been raised to two assessment notices, both dated 11.06.2021, issued under Section 29 of the UPVAT Act and the Central Sales Tax Act, seeking to impose tax under the UPVAT Act as also the Central Sales Tax Act, for A.Y. 2017-18 (01.07.2017 to 31.03.2018) (UP & Central).

8. In Writ Tax No. 451 of 2021, besides the challenge to the legislative competence and the Notification dated 17.12.2019 (as above), challenge has also been raised to two assessment notices, both dated 07.07.2021, one issued under Section 28 of the UPVAT Act and the other under Section 9 (2) Central Sales Tax Act, for A.Y. 2019-2020.

9. Writ Tax No. 355 of 2020 has been filed by the U.P. Sugar Mills Association seeking to challenge the legislative competence of the State to levy UPVAT on sales of ENA and Rectified Spirit, used to manufacture “alcoholic liquor for human consumption”. A further challenge has been

raised to the Notification dated 17.12.2019 (as above).

10. In Writ Tax No. 385 of 2021, besides the challenge raised to the legislative competence and Notification dated 17.12.2019 (as above), challenge has also been raised to the assessment notice dated 21.06.2021 issued under Section 28 of the UPVAT Act, for A.Y. 2018-19 as also Circular/letters dated 10.06.2021 and 11.06.2021 (as above).

11. Since identical facts are involved in all the above writ petitions and challenge raised is also identical, we have heard these petitions together. Basic/essential facts, common to all the writ petitions, are extracted below.

12. According to the petitioners ENA, both denatured and un-denatured as also SDS fall under the heading 2207 of the First Schedule to the Customs Tariff Act, 1975. ENA, is concentrated Ethyl Alcohol (Ethanol) having alcohol content about 95 percent. Similarly, SDS is spirit or neutral alcohol used for industrial purposes only. According to the petitioners, they manufacture and sell ENA, both to distilleries that manufacture "alcoholic liquor for human consumption" and to chemical and other industries. Owing to high alcohol content (above 95 percent), both ENA and SDS are unfit for human consumption. Prior to the 101st Constitution amendment and, in light of Article 246 of the Constitution read with Entry 54 of List II (as those provisions then existed), the State legislature had the legislative competence to enact laws to impose tax on sale or purchase of any goods other than newspapers, subject however, to the provisions of Entry 92A of List I. Also, in view of Article 246 of the Constitution read with Entry 51 of List II of the Seventh Schedule, the State Government had the legislative competence to enact laws to impose duties of excise on goods manufactured or produced in the State, being (i) alcoholic liquors for human consumption and (ii) opium, Indian hemp etc.

13. On the other hand, in view of Article 246 read with Entry 92, the Parliament had the legislative competence to enact laws, to impose tax on sale or purchase of newspapers and on advertisements published therein.

Similarly, by virtue of Article 246 read with Entry 84 of List I of the Seventh Schedule, the Parliament had the legislative competence to enact laws to impose duties of excise on tobacco and other goods manufactured or produced in India, except (i) alcoholic liquors for human consumption and (ii) opium, Indian hemp etc.

14. It is an admitted case between the parties, prior to the introduction of 101st Constitution Amendment, various State legislatures had made laws to impose tax on sale and to levy duties of excise on "alcoholic liquors for human consumption". Insofar as the Parliament is concerned, prior to the aforesaid amendment, it had enacted laws imposing duties of excise on manufacture of alcohol - not for human consumption, including ENA and SDS.

15. In the State of Uttar Pradesh, there pre-existed, the United Provinces Sales of Motor Spirit, Diesel Oil and Alcohol Taxation Act, 1939 (hereinafter referred to as the 'United Provinces Act'). Under Section 2 (aaaa) of that Act, the term 'alcohol' was defined as Ethyl Alcohol not being "alcoholic liquor for human consumption". It included, Rectified Spirit, Denatured Spirit and Absolute Alcohol. Under Section 3(c) of the said Act, there existed a provision to levy tax, at the point of first purchase of 'alcohol', at the prescribed rate.

16. With time, under Section 4(1)(c) read with Schedule IV to the UPVAT Act, tax became payable on the sale of goods specified in the said Schedule, (including 'alcohol' as defined under the United Provinces Act), at the rate 32.5 percent. For ready reference, Entry No.1 of Schedule IV to the UPVAT Act, is quoted below:

Sl No	*Name and description of goods*	*Point of Tax*	*Rate of Tax %*
1.	*Spirits and Spirituous Liquors of all kinds including Alcohol, as defined under the United Provinces Sales of Motor Spirit, Diesel Oil and Alcohol Taxation Act, 1939, but excluding country liquors*	*M or I*	*32.5%*

Also, under Section 7(c) of the UPVAT Act, the State Government was delegated a power, to not levy UPVAT on such sale or purchase or, sale or purchase of such goods by such class of dealers, as may be specified in the Notification issued by it, in that regard. In exercise of that power, the State Government issued Notification No. KA.NI-2-14/XI dated 10.01.2008. It reads:

> *"WHEREAS the State Government is satisfied that it is expedient so to do in public interest.*
>
> *Now, Therefore, in exercise of the powers under clause (c) of Section 7 read with Section 74 of the Uttar Pradesh Value Added Tax Ordinance, 2007 [U.P. Ordinance no. 37 of 2007], the Governor is pleased to direct, that no tax shall be payable under the said Ordinance with effect from January 01, 2008, on the sale or purchase of country liquor and spirit and spirituous liquors of all kinds including methyl alcohol in Uttar Pradesh by manufacturer or importer dealer subject to the condition that a certificate prescribed by the Commissioner of Commercial Taxes, Uttar Pradesh is submitted by the concerned dealer with the return of the tax period before the assessing authority to the effect that consideration fee or excise duty payable under the United Provinces Excise Act, 1910 or the United Provinces Sales of Motor Spirit, Diesel Oil and Alcohol Taxation Act, 1939, as the case may be, has been paid."*

17. Thus, UPVAT did not apply to the goods specified in Entry No.1 to Schedule IV of the UPVAT Act, if the Manufacturer or the Importer dealer had paid excise duty under the United Provinces Act and, he had been issued the prescribed certificate, by the Commissioner of Commercial Tax, Uttar Pradesh, in that regard. That Notification was later amended by Notification No. KA.NI-2-879/XI dated 26.03.2008. Thereby, the words 'including methyl alcohol' were substituted with the words 'excluding methyl Alcohol'. Also, the words 'manufacture or importer dealer' were substituted with the word 'dealer'. The words 'consideration fee or excise duty' were replaced by– 'consideration fee, excise duty, fees or purchase tax'.

18. It would be fruitful for our discussion to extract the unamended and amended taxation Entries of List I and List II (as amended by the 101st Constitution Amendment), as have also been extensively referred to by the learned counsel for the parties. A comparative chart showing relevant Entries before and after that amendment read as under:

List II, Seventh Schedule, Constitution of India

Unamended Entries of List II (State List)	*Entries as Amended*
8. Intoxicating liquors, that is to say, the production, manufacture, possession, transport, purchase and sale of intoxicating liquors.	*Same as before*
51. Duties of excise on the following goods manufactured or produced in the State and countervailing duties at the same or lower rates on similar goods manufactured or produced elsewhere in India;- *(a) alcoholic liquors for human consumption;* *(b) opium, Indian hemp and other narcotic drugs and narcotics,* *but not including medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (b) of this entry.*	*Same as before*
54. Taxes on the sale or purchase of goods other than newspapers, subject to the provisions of entry 92A of List I.	*54. Taxes on the sale of petroleum crude, high speed diesel, motor spirit (commonly known as petrol), natural gas, aviation turbine fuel and alcoholic liquor for huma consumption, but not including sale in the course of inter-State trade or commerce or sale in the course of international trade or commerce of such goods.*

List I, Seventh Schedule, Constitution of India

Unamended Entries of List I (Union List)	*Entries as Amended/Inserted*
84. Duties of excise on tobacco and other goods manufactured or produced in India except – *(a) alcoholic liquors for human consumption;* *(b) opium, Indian hemp and other narcotic drugs and narcotics,* *but including medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (b) of this entry.*	*84. Duties of excise on the following goods manufactured or produced in India, namely: –* *(a) petroleum crude;* *(b) high speed diesel;* *(c) motor spirit (commonly known as petrol);* *(d) natural gas;* *(e) aviation turbine fuel; and* *(f) tobacco and tobacco products.*
92. Taxes on the sale or purchase of newspapers and on advertisements published therein.	*Omitted*
92A. Did not exist	*92A. Taxes on the sale or purchase of goods other than newspapers, where such sale or*

	purchase takes place in the course of inter-State trade or commerce. *(Inserted)*

19. Also, by the 101st Constitution amendment, Article 246A was first enacted, as below:

> "***246A.Special provision with respect to goods and services tax.*** *– (1) Notwithstanding anything contained in articles 246 and 254, Parliament, and, subject to clause(2), the Legislature every State, have power to make laws with respect to goods and services tax imposed by the Union or by such State.*
>
> *(2) Parliament has exclusive power to make laws with respect to goods and services tax where the supply of goods, or of services, or both takes place in the course of inter-State trade or commerce.*
>
> *Explanation.– The provisions of this article, shall, in respect of goods and services tax refer to in clause(5) of Article 279-A, take effect from the date recommended by the Goods and Services Tax Council.* "

20. Further, Article 366 (12A) introduced simultaneously, reads thus:

> ***"366. Definitions -*** *In this Constitution, unless the context otherwise requires, the following expressions have the meanings hereby respectively assigned to them, that is to say-*
>
> ***(12A).*** *"goods and services tax" means any tax on supply of goods, or services or both except taxes on the supply of the alcoholic liquor for human consumption."*

21. Consequently, the Parliament also enacted the Central GST Act, 2017. The State legislature, on its part, enacted the UPGST Act, 2017. Also, by Act No.18 of 2017, the Parliament substituted Section 2(d) of the Central Sales Tax Act, 1956. The original and the substituted texts of Section 2(d) of that Act, read as below:

Unamended Section 2(d)	*Section 2(d) as substituted*
(d) "goods" includes all materials, articles, commodities and all other kinds of movable property, but does not include newspapers, actionable claims, stocks, shares and securities;	*(d) "goods" means –* *(i) petroleum crude;* *(ii) high speed diesel;* *(iii) motor spirit (commonly known as petrol);* *(iv) natural gas;* *(v) aviation turbine fuel; and* *(vi) alcoholic liquor for human consumption*

22. Last, the impugned Notification No. KA.NI-2-1793 dated 17.12.2019, reads as below:

Uttar Pradesh Shasan
Sansthagat Vitta, Kar Evam Nibandhan Anubhag-2

In pursuance of the provisions of clause (3) of Article 348 of the Constitution, the Governor is pleased to order the publication of the following English Translation of Government Notificaton no. KA.NI-2-1793/XI-29(134)/17-U.P. Act-5-2008-Order-(80)-2019, dated 17 December, 2019;

NOTIFICATION

No.-KA.NI-2-1793/XI-29(134)/17-U.P.Act-5-2008-Order-(80)-2019
Lucknow : Dated : 17 December, 2019

WHEREAS *the State Government is satisfied that it is expedient so to do in public interest;*
NOW, THEREFORE, In exercise of the powers under sub-section (4) of section 4 read with section 74 of the Uttar Pradesh Value Added Tax Act, 2008 (U.P. Act no.5 of 2008), the Governor is pleased to make with effect from 09. December, 2019, the following amendment in Schedule-IV to the said Act:-

Amendment

In the aforesaid Schedule, after serial no.1 the following serial and entries relating there to shall column-wise be inserted, namely:-

S. No.	*Name and Description of goods*	*Point of Tax*	*Rate of Tax %*
1	*2*	*3*	*4*
1-A	*Any non GST alcohol, when sold for use in the process of manufacture of alcoholic liquor for human consumption against a certificate issued by the Commissioner of State Excise, Uttar Pradesh or by the officer authorised by him in this regard.*	*M or I*	*5%*

23. It has been vehemently urged by Sri Sinha, before the introduction of the 101st Constitution Amendment, the competence of the State legislatures to impose duties of excise on industrial alcohol (i.e. non-potable alcohol), came up for consideration before a seven-Judge Constitution Bench of the Supreme Court, in **Synthetics and Chemicals Ltd. & Ors. Vs. State of U.P. & Ors., (1990) 1 SCC 109**. Relying, both on the majority opinion, as also the concurring opinion, it has been urged, the legislative competence of the States (to levy duties of excise) was confined to "alcoholic liquors for human consumption" - as an existing commodity, on

the date of that levy being imposed. The argument-denatured spirit can also be transformed to "alcoholic liquors for human consumption", and therefore be amenable to duties of excise, by the State legislatures, was specifically rejected. Ethyl Alcohol (95%) (also known as Rectified Spirit) i.e. industrial alcohol, was opined to be not-fit for human consumption. The range of alcohol in potable alcohol i.e. "alcoholic liquors for human consumption" was also opined to be 19% - 43%. The conclusions reached in that decision as recorded in paras 54, 86 and 88 (majority view) and para 101 (concurring view) of the report, read as below:

> "***54.*** *We have no doubt that the framers of the Constitution when they used the expression 'alcoholic liquor for human consumption' they meant at that time and still the expression means that liquor which as it is is consumable in the sense capable of being taken by human beings as such as beverage of drinks. Hence, the expression under Entry 84, List I must be understood in that light. We were taken through various dictionary and other meanings and also invited to the process of manufacture of alcohol in order to induce us to accept the position that denatured spirit can also be by appropriate cultivation or application or admixture with water or with others, be transformed into 'alcoholic liquor for human consumption' and as such transformation would not entail any process of manufacture as such. There will not be any organic or fundamental change in this transformation, we were told. We are, however, unable to enter into this examination. Constitutional provisions specially dealing with the delimitation of powers in a federal polity must be understood in a broad commonsense point of view as understood by common people for whom the Constitution is made. In terminology, as understood by the framers of the Constitution, and also as viewed at the relevant time of its interpretation, it is not possible to proceed otherwise; alcoholic or intoxicating liquors must be understood as these are, not what these are capable of or able to become. It is also not possible to accept the submission that vend fee in U.P. is a pre-Constitution imposition and would not be subject to Article 245 of the Constitution. The present extent of imposition of vend fee is not a pre-Constitution imposition, as we noticed from the change of rate from time to time."*
>
> ***86.*** *The position with regard to the control of alcohol industry has undergone material and significant change after the amendment of 1956 to the IDR Act. After the amendment, the State is left with only the following powers to legislate in respect of alcohol:*
>
> *(a) It may pass any legislation in the nature of prohibition of potable liquor referable to Entry 6 of List II and regulating powers.*
>
> *(b) It may lay down regulations to ensure that non-potable alcohol is not diverted and misused as a substitute for potable alcohol.*
>
> *(c) The State may charge excise duty on potable alcohol and sales tax under Entry 52 of List II. However, sales tax cannot be charged*

> *on industrial alcohol in the present case, because under the Ethyl Alcohol (Price Control) Orders, sales tax cannot be charged by the State on industrial alcohol.*
>
> *(d) However, in case State is rendering any service, as distinct from its claim of so-called grant of privilege, it may charge fees based on quid pro quo. See in this connection, the observations of Indian Mica case [(1971) 2 SCC 236 : 1971 Supp SCR 319 : AIR 1971 SC 1182] .*
>
> ***88.*** *On an analysis of the aforesaid decisions and practice, we are clearly of the opinion that in respect of industrial alcohol the States are not authorised to impose the impost they have purported to do. In that view of the matter, the contentions of the petitioners must succeed and such impositions and imposts must go as being invalid in law so far as industrial alcohol is concerned. We make it clear that this will not affect any impost so far as potable alcohol as commonly understood is concerned. It will also not affect any imposition of levy on industrial alcohol fee where there are circumstances to establish that there was quid pro quo for the fee sought to be imposed. This will not affect any regulating measure as such.*
>
> ***101.*** *Under these circumstances therefore it is clear that the State legislature had no authority to levy duty or tax on alcohol which is not for human consumption as that could only be levied by the Centre."*

24. Then, in **State of U.P. & Ors. Vs. Modi Distillery & Ors., (1995) 5 SCC 753**, an issue had arisen as to competence of the State legislature to impose duties of excise on (i) wastage of IMFL, exported outside the State, (ii) wastage of high strength spirit, during transportation from the distillery to warehouse and (iii) obscuration. Upon consideration of the State's submission in that regard, it was held as below:

> "***10.*** *What the State seeks to levy excise duty upon in the Group 'B' cases is the wastage of liquor after distillation, but before dilution; and, in the Group 'D' cases, the pipeline loss of liquor during the process of manufacture, before dilution. It is clear, therefore, that what the State seeks to levy excise duty upon is not alcoholic liquor for human consumption but the raw material or input still in process of being rendered fit for consumption by human beings. The State is not empowered to levy excise duty on the raw material or input that is in the process of being made into alcoholic liquor for human consumption."*

25. Yet, a contrary view was taken by a two-Judge bench decision of the Supreme Court in **Bihar Distillery & Anr. Vs. Union of India & Ors.**, **(1997) 2 SCC 727**, upon a different reading of the aforesaid Constitution bench decision of the Supreme Court in **Synthetics and Chemicals Ltd. & Ors. Vs. State of U.P. & Ors**. (supra). It was

observed as below:

> *"**10.** A reading of the above entries would immediately disclose that Entry 51 in List II and Entry 84 in List I compliment each other. Both provide for duties of excise but while the States are empowered to levy duties of excise on (a)alcoholic liquors for human consumption and (b) opium, Indian hemp and narcotics manufactured or produced in the State and countervailing duties at the same or lower rates on similar goods manufactured or produced elsewhere in India [but excluding medicinal and toilet preparation containing alcohol or any substance included in sub-para (b) of this Entry], the Union is empowered to levy duties of excise on tobacco and other goods manufactured or produced in India except (a) alcoholic liquors for human consumption and (b) opium, Indian hemp and other narcotic including drugs and narcotics. Medicinal and toilet preparations containing alcohol or any substance included in sub-para (b) which are excluded from Entry 51 in List II are expressly included in this entry. For our purposes, the relevant expression is "alcoholic liquors for human consumption" which is included in Entry 51 in List II and excluded from Entry 84 in List I. The words employed denote that there may be alcoholic liquors meant for human consumption as well as for other purposes. Now coming to Entry 8 in List II, it does not use the expression "alcoholic liquors for human consumption". It employs the expression "intoxicating liquors" which expression is, of course, not qualified by words "for human consumption". This is for the obvious reason that the very word "intoxicating" signifies "for human consumption". Entry 8, it is necessary to emphasize, places all aspects of intoxicating liquors within the State's sphere; production, manufacture, possession, transport, purchase and sale of intoxicating liquors is placed within the exclusive domain of the States. Entry 6, which inter alia speaks of "public health" is relevant only for the reason that it furnishes a ground for prohibiting consumption of intoxicating liquors. Coming to Entry 33 in List III, the language of clause (a) thereof is significant. Even though control of certain industries may have been taken over by the Union by virtue of a declaration made by Parliament in terms of Entry 52 in List I, yet the "trade, commerce in, and the production, supply and distribution of the products" of such industry is placed in the concurrent field, which in the present context means that though the control of alcohol industry is taken over by the Union, trade, commerce in and the production, supply and distribution of the products of alcohol industry can be regulated both by the Union and the States subject, of course, to Article 254. It also means, as will be explained later, that insofar as the field is not occupied by the laws made by the Union, the States are free to legislate.*
>
> ***11.** In the matter of industries mentioned in List II, Entry 24 in List II is in the nature of general entry. It speaks of industries but is made expressly subject to Entries 7 and 52 of List I. By making a declaration in terms of Entry 52 in List I in Section 2 of the IDR Act, Parliament has taken control of the several industries mentioned in the Schedule to the Act. The States have been denuded of their power to legislate with respect to those industries on that account. It has, however, been held by a three-Judge Bench of this Court in State of A.P. v.McDowell & Co. [(1996) 3 SCC 709] that Entry 52 overrides only Entry 24 in List II and no other Entry in List II. It has been held that Entry 8 is not overridden or overborne in any manner by Entry 52 — which means that so far as intoxicating liquors are concerned, they are within the exclusive sphere of the States. We may pause at this stage and append a clarification*

which has become necessary in the light of certain words occurring in para 85 of the judgment of Sabyasachi Mukharji, J. in Synthetics [Whenever we refer to "Synthetics" hereafter, it would mean the judgment of the seven-Judge Constitution Bench reported in (1990) 1 SCC 109.] . At the inception of para 85 of the said judgment, the following statement occurs: (SCC p. 157)

> *"After the 1956 amendment to the IDR Act bringing alcohol industries (under fermentation industries) as Item 26 of the First Schedule to IDR Act the control of this industry has vested exclusively in the Union. Thereafter, licences to manufacture both potable and non-potable alcohol is vested in the Central Government. Distilleries are manufacturing alcohol under the Central licences under the IDR Act. No privilege for manufacture even if one existed, has been transferred to the distilleries by the State."*

12. *It is obvious that the words "both potable and" occur here as a result of some accidental or typographical error. The entire preceding discussion in the judgment repeatedly affirms that so far as potable alcohols are concerned, they are governed by Entry 8 and are within the exclusive domain of the States. The aforesaid words cannot fit in with the said repeatedly affirmed reasoning. We are, therefore, of the opinion that the said passage cannot be understood as holding that even in respect of the industries engaged in the manufacture or production of potable liquors, the control is vested in the Union by virtue of Item 26 of the First Schedule to the IDR Act. In view of the express language of Entry 8 — as has been clearly explained in McDowell [(1996) 3 SCC 709] — so far as potable liquors are concerned, their manufacture, production, possession, transport, purchase and sale is within the exclusive domain of the States and the Union of India has no say in the matter. For a similar clarification with respect to the power of the State to levy sales tax on industrial alcohol, reference may be had to State of U.P. v. Synthetics and Chemicals Ltd. [(1991) 4 SCC 139]."*

26. That decision sought to recognize the competence of the State legislatures, to levy duties of excise on Rectified Spirit, if used to manufacture potable alcohol. Later, the correctness of that view was doubted by another two-Judge bench of the Supreme Court in **Deccan Sugar & Abkari Co. Ltd. Vs. Commissioner of Excise, A.P.**, **(1998) 3 SCC 272**. Upon that reference made, a three-Judge bench of the Supreme Court, in **Deccan Sugar & Abkari Co. Ltd. Vs. Commissioner of Excise, A.P., and connected matters, (2004) 1 SCC 243** again reiterated the earlier ratio of the Constitution bench decision of the Supreme Court, in **Synthetic and Chemicals Limited** (supra), as followed by a three-Judge bench decision in **State of U.P. Vs. Modi Distillery, (1995) 5 SCC 753**. Thus, it was held :

> "***2.*** *It is settled by the decision of this Court in Synthetics and Chemicals Ltd. v. State of U.P., (1990) 1 SCC 109 that the State Legislature has no jurisdiction to levy any excise duty on rectified spirit. The State can levy excise duty only on potable liquor fit for human consumption and as rectified spirit does not fall under that category the State Legislature cannot impose any excise duty. The decision in Synthetics and Chemicals Ltd. v. State of U.P. has been followed in State of U.P. v. Modi Distillery, (1995) 5 SCC 753 where certain wastage of ethyl alcohol was sought to be taxed. This Court following the decision in Synthetics and Chemicals Ltd. came to the conclusion that this cannot be done.*"

27. That confirmed position in law, was reiterated by a two- Judge bench decision of the Supreme Court in **State of U.P. & Ors. Vs. VAM Organic Chemicals Ltd. & Ors., (2004) 1 SCC 225**. Therein, it was opined as below:

> *"**22.** Article 246 gives to Parliament exclusive power to make laws with respect to the matters enumerated in List I of the Seventh Schedule. Entry 84 of List I and Entry 51 of List II were construed by this Court in Synthetics case[(1990) 1 SCC 109 : 1989 Supp (1) SCR 623] to hold that Parliament alone has the exclusive power to legislate and levy excise tax in respect of industrial alcohol. It is unnecessary to refer to the law with regard to the comparative competence of the Union and the States with regard to levy of excise, regulation and control of industrial alcohol prior to the decision of the Constitution Bench in Synthetics[(1990) 1 SCC 109 : 1989 Supp (1) SCR 623] . Whatever the law was earlier, the decision in Synthetics [(1990) 1 SCC 109 : 1989 Supp (1) SCR 623] now holds the field. In that decision the State's power to levy excise duty was held to be limited by Entry 51 to tax on alcoholic liquors for human consumption. It was also held that Section 2 of the Industries (Development and Regulation) Act, 1951 as well as Serial No. 26 of the First Schedule to that Act covered the whole field on industrial alcohol and its products. Therefore, since the coming into force of the IDR Act on 8-5-1952 the State Legislatures are constitutionally incompetent to levy any tax on industrial alcohol.*
>
> ***23.*** *The principle was succinctly reiterated in State of U.P. v. Modi Distillery[(1995) 5 SCC 753] where it was said that the State's power to levy excise duty was limited to alcoholic liquor for human consumption and*
>
> > *that the framers of the Constitution, when they used the expression "alcohol liquors for human consumption", meant, and the expression still means, that liquor which, as it is, is consumable in the sense that it is capable of being taken by human beings as such as a beverage or drink. … Dictionaries and technical books showed that rectified spirit (95 per cent) was an industrial alcohol and not potable as such. … Therefore even if ethyl alcohol (95 per cent) could be used as a raw material or input, after processing and substantial dilution, in the production of whisky, gin, country liquor etc. nevertheless, it was not "intoxicating liquor" which expression meant only that liquor which was consumable by human beings as it was.*
> >
> > *(emphasis supplied)*

> *Thus the State cannot legislate on industrial alcohol despite the fact that such industrial alcohol has the potential to be used to manufacture alcoholic liquor."*

28. Thus, though denuded of any power to enact a law to levy a duty of excise on alcohol-not for human consumption, the State legislatures were conceded the legislative competence to enact regulatory laws, to prevent diversion of industrial alcohol, to manufacture alcohol for human consumption.

29. Reliance has also been placed on another decision of the Supreme Court in **State of Jharkhand & Ors. Vs. Ajanta Bottlers and Blenders Private Ltd., (2019) 7 SCC 545** to emphasize - the levy or impost of duties of excise may fructify only upon completion of the distillation process and not earlier. Hence ENA, prior to its transformation into "alcoholic liquor for human consumption", could not be subjected to a duty of excise by the State legislature. Once transformed, there exists no ENA. Relevant to our discussion, the contents of para 11 of that report read as below: -

> "*11. We have adverted to the abovementioned process, noted in the written submissions filed by the appellant, so as to give proper interpretation to the impugned notification and the subject rules, in particular Rule 106(Tha). English version of the said rule noted in the notification (as translated by the official translator of this Court reproduced in para 2 above), in our opinion, makes it amply clear that the levy or impost fructifies only upon completion of distillation process (in two stages — first from rectified spirit to ENA and then from ENA to IMFL) and in particular converting into a final product "IMFL". The collection of impost is, however, deferred until the bottling of that product. In other words, the levy is not at the stage of import of rectified spirit within the State; nor at the stage of initial distillation thereof to Extra Neutral Alcohol (ENA) and not until the product IMFL is ready for bottling as such. Thus, the levy under the impugned rule ripens or fructifies only after the original raw material (imported rectified spirit) has undergone distillation process at two different stages and transmute and mutate into an intoxicant or potable alcohol palatable to human consumption, but its (impost) collection is effected just before bottling it in that form (potable liquor). Indeed, the levy predicated in this rule is on the total quantity of imported rectified spirit utilised for mutating it in the form of IMFL, a new produce. The last part of the rule stipulates the quantum of charges to be levied on such utilised imported rectified spirit for production of the foreign liquor. For that limited purpose, the quantity of imported rectified spirit utilised in the production of potable liquor, is reckoned."*

30. Then, relying on the decision of the Supreme Court in **Synthetics and Chemicals Limited** (supra) and another Constitution bench decision of the Supreme Court in **M.P.V. Sundararamier & Co. Vs. State of A.P. & Ors., AIR 1958 SC 468** as also the decision of the Supreme Court in **State of Mysore & Ors. Vs. D. Cawasji & Company & Ors., (1970) 3 SCC 710**, it has been submitted, the legislative competence to enact a law imposing tax, cannot be derived from a general entry, falling under either of the three Lists of the Seventh Schedule, to the Constitution of India. Such competence must be derived under a specific taxing entry alone. Therefore, according to learned senior counsel for the petitioner, there is no applicability of Entry 8 of List II of the Seventh Schedule, to the Constitution and that general Entry cannot be referred to or relied upon to enact a law to impose tax on the sale or purchase of ENA.

31. As a fact, in the background law above noted, relying on the pleadings made in the writ petition and the reply furnished in the counter affidavit, it has been submitted, undoubtedly, ENA is not an “alcoholic liquor for human consumption”. Second, there is no denial that GST was paid on ENA, with effect from 01.07.2017. Read in conjunction to the first submission advanced by learned Senior Counsel for the petitioners (as to lack of legislative competence of the State legislature to impose UPVAT on ENA), its delegate, the State Government could not have issued the impugned Notification dated 17.12.2019 and thus colourably or artificially created a commodity by describing it “non-GST alcohol”. Merely because ENA may be used to manufacture another commodity namely, “alcoholic liquor for human consumption”, no new commodity can come into existence, either on a notional or deemed basis nor, it (ENA) can ever be described as a non-GST alcohol, only to impose tax thereon.

32. In any case, GST being levied under authority of law, and therefore paid on ENA, the levy of UPVAT on ENA, created by the impugned Notification is invalid and wholly unenforceable. Sale of ENA may not be made taxable under the UPVAT Act - on the basis of an artificial distinction

drawn relying on the words - “for use in the process of manufacture of…” That line of reasoning was specifically disapproved by the Supreme Court in **State of U.P. & Ors. Vs. VAM Organic Chemicals Ltd. & Ors., (2004) 1 SCC 225** and in **State of Jharkhand & Ors. Vs. Ajanta Bottlers and Blenders Private Ltd.** (supra), applying the ratio of the seven-Judge Constitution bench decision of the Supreme Court in **Synthetics and Chemicals Limited** (supra).

33. Insofar as GST has been levied and paid on ENA and it has not undergone any change, either physical or chemical or as to its commercial identity, (in *presenti*), there arises no legislative competence with the State legislature to impose tax on that commodity because it may eventually be used to manufacture a commodity that may be “alcoholic liquor for human consumption”, that would be taxable under Entry 54 of List II of the Seventh Schedule, to the Constitution of India. The commodity (ENA) would remain outside the purview of that taxing entry, as substituted by the 101st Constitution Amendment.

34. Relying on Article 246A read with Article 366 (12A) of the Constitution of India, it has been further submitted, insofar as taxes on supply of goods/commodities are concerned, upon the 101st Constitution amendment, besides “alcoholic liquor for human consumption”, all other goods or commodities may remain under the GST regime. Therefore, in any case, UPVAT may never be imposed on ENA as it is alcohol not-for human consumption, and therefore necessarily included under the GST regime. That intent of the Constitution of India was acknowledged and statutorily incorporated, by virtue of Section 174(1)(i) of the UPGST Act. It repealed UPVAT Act, 2008 except with respect to laws-to tax goods included under Entry 54 of List II of the Seventh Schedule, to the Constitution of India i.e., with respect to the six commodities (including alcoholic liquor for human consumption), specified under that legislative entry.

35. Thus, of all alcohols, only “alcoholic liquor for human consumption” may be subjected to UPVAT. Correspondingly, the Parliament has

substituted Section 2(d) of the Central Sales Tax Act, 1956 to include “alcoholic liquor for human consumption”, in the definition of 'goods' but it has purposely left out ENA and other alcoholic liquors, not for human consumption, from the ambit of taxation of 'goods' under that Act. For the self-same reason, the Parliament has substituted Entry 84 of List I of the Seventh Schedule, to the Constitution of India, to save to itself, the legislative competence to levy duties of excise only on the same commodities finding mention in Entry 54 of List II of the Seventh Schedule, to the Constitution of India, besides tobacco & tobacco products but except, “alcoholic liquor for human consumption”. Therefore, the impugned Notification dated 17.12.2019 is beyond the legislative competence of the State Legislature, besides being otherwise invalid, as noted above.

36. Last, it has been submitted, once the State had levied, charged and collected GST on ENA, at the rate of 9 percent, it cannot subject the same sale transaction (of that commodity), to further tax, on the basis of the aforesaid artificial distinction attempted to be made. In fact, if the contention of the State were to be accepted, it would make the State liable to refund the GST on ENA being excess tax suffered by that commodity, under the GST regime.

37. Shri Rahul Agarwal learned counsel for the petitioner in Writ Tax No. 355 of 2020 has adopted the submissions advanced by Shri Sinha. He vehemently urged, besides the admission made by the State in the counter affidavit filed in Writ Tax No. 364 of 2021, it is beyond the pale of doubt, whether ENA is not “alcoholic liquor for human consumption”. It is industrial alcohol. To that end, he has extensively referred to and relied upon another decision of the Supreme Court in **State of Jharkhand & Ors. Vs. Ajanta Bottlers and Blenders Private Ltd.** (supra). In that case, the dispute was to the legislative competence of the State of Jharkhand to levy tax/fee on the import of Rectified Spirit. That challenge had been raised on the premise; Rectified Spirit was not potable liquor, i.e., it was not an alcohol fit for human consumption. While dealing with that issue, the

Supreme Court considered the exact nature of industrial alcohol. Paragraphs 9 and 10 of that report, read as under:

> *"**9.** The seminal issue to be answered in this appeal is about the purport of the Notification dated 6-11-2010 as published on 10-11-2012 and whether it is in the nature of legislation by the State on the subject of industrial alcohol. Alcohol can generally be classified into the following categories:*
>
> > *"I. Isopropyl alcohol (or IPA or isopropanol) is a compound with the chemical formula CH3CHOHCH3. It is a colourless, flammable chemical compound with a strong odour. As an isopropyl group linked to a hydroxyl group, it is the simplest example of a secondary alcohol, where the alcohol carbon atom is attached to two other carbon atoms. If consumed, isopropanol is converted into acetone in the liver, which makes it extremely toxic. Often used for disinfecting skin an antiseptic.*
> >
> > *II. Methyl Alcohol (or Methanol): Chemical formula — CH3OH: Not for human consumption. If consumed, can cause blindness and death. Methanol acquired the name wood alcohol because it was once produced chiefly by the destructive distillation of wood. Today, methanol is mainly produced industrially by hydrogenation of carbon monoxide.*
> >
> > *III. Ethyl alcohol, (also known as Ethanol and abbreviated as EtOH), is a colourless, volatile, and flammable liquid that is soluble in water. Its chemical formula is C2H6O, or can be written as C2H5OH or CH3CH2OH. It has one methyl (-CH3) group, one methylene (-CH2-) group, and one hydroxyl (-OH-) group."*
>
> *The first two categories are poisonous, toxic and fatal for human consumption, rendering its use only for industrial purposes. It is stated that isopropanol and methanol, because of their inherent chemical properties, cannot be purified and used for the production of "intoxicating liquor" or "potable liquor" by adopting "physical means" like decantation, filtration, redistillation, fractional distillation, etc. The third category, namely, Ethyl Alcohol or Ethanol (in India is usually produced from molasses derived from sugarcane) in its concentrated form and it is also known as "rectified spirit" and its strength measured in LPL signifies the strength of alcohol by volume, 13 parts of which weigh exactly equal to 12 parts of water at 51 degrees Fahrenheit.*
>
> ***10.** Be that as it may, rectified spirit after it undergoes certain "physical changes" by adopting "physical means" like re-distillation, rectification (repeated or fractional distillation) to remove impurities, it becomes purer and is known as extra neutral alcohol (ENA). Thereafter, by addition and mixing of colouring and flavouring agents (compounding), as well as after dilution with water, ENA is left for maturation, to be bottled and used as "intoxicating liquor" or "potable liquor" known as Indian Made Foreign Liquor (IMFL). Whereas the country liquor, also known as "desi sharab" is prepared from rectified spirit or low grade ENA having alcohol content below 40% (as decided by different State Governments) which may be coloured (by caramel) and may be spiced too. Notably, the chemical composition of ethyl alcohol or ethanol (C2H6O or C2H5OH or CH3CH2OH) remains the same in the entire process, though addition of colouring and flavouring agents makes it a mild*

concoction/mixture/solution (in chemical parlance a solution of alcohol is known as "tincture") which renders it more palatable to human consumption."

38. Shri Agarwal would therefore submit, in law it cannot be disputed, Extra Neutral Alcohol (ENA) is nothing but Rectified Spirit that has undergone certain physical changes, by adopting physical means like re-distillation and rectification to remove impurities. Through that process, it becomes purer and is therefore known as ENA. If at all, it is rendered more unfit for human consumption on account of the purity of its alcohol content being enhanced. To manufacture alcohol for human consumption, further processes including addition and mixing of colouring and flavouring agents (compounding), as well as dilution with water must be applied. The concoction is then left for maturation, to be bottled and used as an 'intoxicating liquor' or 'potable liquor' known as Indian Made Foreign Liquor (IMFL) etc. All throughout, such processes, the chemical composition of Ethyl alcohol or Ethanol remains the same, yet ENA as such can never be called or classified as "alcoholic liquor for human consumption".

39. Shri Pawan Shree Agarwal learned counsel for some of the other petitioners has adopted the submissions advanced by Shri Sinha and Shri Rahul Agarwal. He further emphasized, by virtue of Section 174 (1)(i) of the UPGST Act, 2017, the UPVAT Act, 2008 was repealed in toto, except with respect to the goods specified under Entry 54 of List II of the Seventh Schedule, to the Constitution of India. That legislative field, became limited (for our discussion) to the commodity "alcoholic liquor for human consumption" upon enactment of the 101st Constitution amendment. Therefore, besides the general legislative incompetence arising upon the amendments made to the Constitution of India, there is a total absence of any parent legislation, as may allow any delegated legislation to arise or exist, to tax sale of any other goods.

40. Then, he has further emphasized, the Constitution recognizes a clear distinction between the taxing entries and the general entries, each of which

creates a field of legislation on which the respective legislative body may enact laws. A general legislative Entry such as Entry 8 of List II of the Seventh Schedule, to the Constitution of India may never come in aid of the State legislature, to enact a law imposing a tax. Reliance has been placed on a 3-Judge bench decision of the Supreme Court in **Hoechst Pharmaceuticals Ltd. & Ors. Vs. State of Bihar & Ors., (1983) 4 SCC 45**. To the same effect, reliance has been placed on another decision of the Supreme Court in **Southern Pharmaceuticals and Chemicals, Trichur & Ors. Vs. State of Kerala & Ors., (1981) 4 SCC 391**.

41. Raising challenge to the Notification dated 17.12.2019, it has been further submitted, the Schedule entry 1-A, thus introduced to Schedule IV of the UPVAT Act is with respect to “non-GST alcohol” only. That phrase or commodity has not been defined either under the UPVAT Act or under the Rules framed or, the Notification issued thereunder. Plainly, in the context of the language of Article 366 (12A) of the Constitution, “non-GST alcohol” refers to “alcoholic liquor for human consumption”. That ENA is not. Reference has also been made to paragraph 35 of the counter affidavit filed in Writ Tax No. 364 of 2021. It has been submitted, there is no quarrel raised by the State that the commodity ENA is not covered under any of the six items enumerated under amended Entry 54 of List II of the Seventh Schedule, to the Constitution of India. In conjunction to the above, reference has been made to the contents of paragraph 17 of that counter affidavit to submit, undisputedly, ENA is only a raw material used to manufacture alcoholic beverage. It contains over 95 percent alcohol by volume. Adopting the submission advanced by Shri Sinha, it has further been submitted, considering unequivocal pronouncements made by the Supreme Court–in **Synthetics and Chemicals Ltd.** (supra), the said commodity ENA is not an alcoholic liquor for human consumption and, that it can never be.

42. Shri Manish Goel, learned Additional Advocate General has stoutly defended the levy of UPVAT on ENA, under the UPVAT Act. He would submit, prior to issuance of the impugned Notification dated 17.12.2019, the

commodity ENA suffered UPVAT at the rate of 32.5 percent. However, by virtue of the impugned Notification and introduction of the new entry 1-A, to Schedule IV to the UPVAT Act, the said commodity became taxable at a lower rate of tax, being 5 percent, with effect from 09.12.2019. Thus, the State Government has reduced the rate of tax on ENA. Hence, there can be no quarrel to the same. As to the identity of ENA, the learned AAG has also referred in extenso, to the discussion made by the Supreme Court in **State of Jharkhand & Ors. Vs. Ajanta Bottlers and Blenders Private Ltd.** (supra). He would, however, contend, it does not lead to the conclusion – ENA falls outside the competence of the State legislature to impose tax on its sale. Here, he would rely on another three-Judge bench decision of the Supreme Court in **State of Bihar & Ors. Vs. Shree Baidyanath Ayurved Bhawan (P) Ltd. & Ors., (2005) 2 SCC 762**. In that case, a question had arisen, to the legislative competence of the State legislature to redefine the word 'intoxicant' appearing in Section 2(12-a) of the Bihar and Orissa Excise Act, 1915, to include therein - medicinal and toilet preparations containing alcohol, as defined under the Medicinal and Toilet Preparations (Excise Duties) Act, 1955. Referring its earlier decision in the case of **Bihar Distillery & Anr. Vs. Union of India & Ors.** (supra), it had been reasoned, Rectified Spirit is produced in a distillery licenced by the State Government. The cancellation of registration/licence had been resisted by that distillery. That dispute travelled to the High Court and then to the Supreme Court. While dealing with that issue, the Supreme Court observed as under:

> "***22.*** *In the case of Bihar Distillery v. Union of India [(1997) 2 SCC 727] a distillery was established. It sold rectified spirit produced by it. The distillery got its licence from the State Government up to the year 1991-92 under the Bihar Act. In 1992 the department proposed to cancel the licence. The distillery objected on the ground that it was manufacturing rectified spirit which came within the exclusive province of the Central Government. With this contention the distillery approached this Court. After noticing the relevant entries in the Seventh Schedule to the Constitution this Court took the view that Entry 84 in List I and Entry 51 in List II complemented each other. Both provide for duties of excise. But while the States are empowered to levy duties of excise on alcoholic liquor for human consumption and on opium and narcotic products in the State but excluding medicinal and toilet preparations containing alcohol, the Union is empowered to levy excise*

duty on tobacco and other goods, except alcoholic liquor for human consumption. This Court further held that Entry 8 of List II covers all aspects of intoxicating liquors within the State; it covers production, manufacture, possession, transport, purchase and sale. Entry 6 speaks of public health. It furnishes a ground of prohibiting consumption of intoxicating liquor. On reading Entries 6, 8 and 51 in List II, this Court held that so far as potable alcohols are concerned, they are squarely covered by Entry 8. They are within the exclusive domain of the State. It was further held that rectified spirit was an industrial alcohol. The State has no power whatsoever to legislate in relation to industrial alcohol. However, the Court observed that in many cases the rectified spirit was an ingredient for intoxicating liquor or alcoholic liquor for human consumption. Hence, so long as alcoholic preparation can be diverted to human consumption, the States shall have the power to legislate as also to impose taxes on such diversion. This is also the ratio of the judgment of this Court in the case of Vam Organic Chemicals Ltd. v. State of U.P. [(1997) 2 SCC 715]."

43. Placing heavy reliance on the aforesaid law laid down by the Supreme Court, it has been submitted, Entry 8 of List II of the Seventh Schedule, to the Constitution of India is wide enough to take within its amplitude and cover, any law to impose tax on sale of ENA if that intoxicating liquor may be diverted to human consumption.

44. To clarify his submission further, the learned AAG would insist, ENA is not Rectified Spirit but only an 'intoxicating liquor'. Intoxicating liquor includes both "alcoholic liquor for human consumption" and alcoholic liquor not for human consumption. Therefore, the State legislature has the legislative competence to enact laws under Entry 8 of List II of the Seventh Schedule, to the Constitution of India with respect to 'intoxicating liquor'. There is no warrant to limit or restrict that legislative field to "alcoholic liquor for human consumption" alone. To do that, would be to read into the legislative field a restriction that plainly does not exist. In that regard, reliance has been placed on the decision of the Supreme Court in **Bihar Distillery & Anr. Vs. Union of India & Ors.** (supra), wherein the law laid down by the Constitution Bench of the Supreme Court, in the case of **Synthetics and Chemicals Ltd. & Ors.** (supra) was considered and, in the submission of the learned AAG, an exception thereto had been carved out. Relevant to our discussions, paragraphs 10, 11 and 12 of the aforesaid report have been noted above.

45. Reliance has also been placed on another decision of the Supreme Court in **VAM Organic Chemicals Ltd. & Anr. Vs. State of U.P. & Ors., (1997) 2 SCC 715**, wherein the Supreme Court again had the occasion to consider the law laid down by its earlier seven-Judge Constitution Bench, in **Synthetics and Chemicals Ltd. & Ors. Vs. State of U.P. & Ors.** (supra). According to the learned AAG, the legislative competence of the State legislature to enact laws on 'intoxicating liquors' included laws on "alcoholic liquor for human consumption" was clearly recognised with reference to Entry 8 of List II of the Seventh Schedule, to the Constitution of India. It was observed thus:

> "***13.*** *...The following part of the judgment can be read with profit: (SCR pp. 681-82: SCC p. 158, para 86)*
>
> *"The position with regard to the control of alcohol industry has undergone material and significant change after the amendment of 1956 to the IDR Act. After the amendment, the State is left with only the following powers to legislate in respect of alcohol:*
>
> *(a) It may pass any legislation in the nature of prohibition of potable liquor referable to Entry 6 of List II and regulating powers.*
>
> *(b) It may lay down regulations to ensure that non-potable alcohol is not diverted and misused as a substitute for potable alcohol.*
>
> *(c) The State may charge excise duty on potable alcohol and sales tax under Entry 52 of List II. However, sales tax cannot be charged on industrial alcohol in the present case, because under the Ethyl Alcohol (Price Control) Orders, sales tax cannot be charged by the State on industrial alcohol.*
>
> *(d) However, in case State is rendering any service, as distinct from its claim of so-called grant of privilege, it may charge fees based on quid pro quo. See in this connection, the observations of Indian Mica case [Indian Mica Micanite Industries v. State of Bihar, (1971) 2 SCC 236] ."*
>
> *Denaturation of spirit meant for industrial use is meant to prevent misuse of non-potable alcohol for human consumption and as such specifically mentioned by the Court to be within the legislative competence of the State.*"

46. Reference has also been made to paragraphs 14 and 17 of the said report, which read as under:

> "***14.*** *It is to be noticed that the States under Entries 8 and 51 of List II read with Entry 84 of List I have exclusive privilege to legislate on intoxicating liquor or alcoholic liquor for human consumption. Hence, so long as any alcoholic preparation can be diverted to human consumption,*

the States shall have the power to legislate as also to impose taxes etc. In this view, denaturation of spirit is not only an obligation on the States but also within the competence of the States to enforce.

17. M/s McDowell & Co., manufacturers of intoxicating liquors challenged the constitutional validity of the Act by which the Prohibition Act was amended to include Section 7-A. One of the grounds of challenge was lack of legislative competence in view of Entry 26 in the First Schedule of the IDR Act which according to the writ petitioners, vested the control of alcohol industries exclusively in the Union and denuded the State Legislature of its power to licence or regulate the manufacture of liquor. This submission was based on the fact that fermentation industries were included in the Schedule of the IDR Act and hence the State was denuded of its power to licence and regulate manufacture of liquor. Entry 26 reads "Fermentation Industries; (1) Alcohol, (2) other products of fermentation industries". It was argued that after the amendment the control and regulation of such industries and their product fell within the exclusive province of the Union and hence the State lost its competence to grant, refuse or renew the licences. After an analysis of all the relevant provisions of the law the Court concluded as under:

> *"(W)e must first carve out the respective fields of Entry 24 and Entry 8 in List II. Entry 24 is a general entry relating to industries whereas Entry 8 is a specific and special entry relating inter alia to industries engaged in production and manufacture of intoxicating liquors. Applying the well-known rule of interpretation applicable to such a situation (special excludes the general), we must hold that the industries engaged in production and manufacture of intoxicating liquors do not fall within Entry 24 but do fall within Entry 8. This was the position at the commencement of the Constitution and this is the position today as well. Once this is so, the making of a declaration by Parliament as contemplated by Entry 52 of List I does not have the effect of transferring or transplanting, as it may be called, the industries engaged in production and manufacture of intoxicating liquors from the State List to Union List. As a matter of fact, Parliament cannot take over the control of industries engaged in the production and manufacture of intoxicating liquors by making a declaration under Entry 52 of List I, since the said entry governs only Entry 24 in List II but not Entry 8 in List II."*

It was reiterated in the later part of the judgment as under:

> *"It follows from the above discussion that the power to make a law with respect to manufacture and production and its prohibition (among other matters mentioned in Entry 8 in List II) belongs exclusively to the State Legislatures. Item 26 in the First Schedule to the IDR Act must be read subject to Entry 8 — and for that matter, Entry 6 — in List II. So read, the said item does not and cannot deal with manufacture, production of intoxicating liquors. All the petitioners before us are engaged in the manufacture of intoxicating liquors. The State Legislature is, therefore, perfectly competent to make a law prohibiting their manufacture and production — in addition to their sale, consumption, possession and transport — with reference to Entries 8 and 6 in List II of the Seventh Schedule to the Constitution read with Article 47 thereof."*

47. Last, reference has been made to a Constitution Bench decision of the

Supreme Court in **Navnit Lal C Javeri Vs. K.K. Sen, Appellate Assistant Commissioner of Income Tax, Bombay, AIR 1965 SC 1375**. In that case, it had been submitted before a five-Judge Constitution Bench of the Supreme Court, Entry 82 of List I of the Seventh Schedule, to the Constitution of India, deals with taxes on income other than agricultural income. In that context, it was observed as under:

> "***8.*** *In dealing with this point, it is necessary to consider what exactly is the denotation of the word "income" used in the relevant Entry. It is hardly necessary to emphasise that the entries in the Lists cannot be read in a narrow or restricted sense, and as observed by Gwyer, C.J. in United Provinces v. Atica Begum [(1940) FCR 110] "each general word should be held to extend to all ancillary or subsidiary matters which can fairly and reasonably be said to be comprehended in it". What the entries in the List purport to do is to confer legislative powers on the respective Legislatures in respect of areas or fields covered by the said entries; and it is an elementary rule of construction that the widest possible construction must be put upon their words. This doctrine does not, however, mean that Parliament can choose to tax as income an item which in no rational sense can be regarded as a citizen's income. The item taxed should rationally be capable of being considered as the income of a citizen. But in considering the question as to whether a particular item in the hands of a citizen can be regarded as his income or not, it would be inappropriate to apply the tests traditionally prescribed by the Income Tax Act as such.*"

48. Thus, it has been submitted, the words used in List II of the Seventh Schedule, to the Constitution of India, should be read widely, to include all ancillary or subsidiary matters that can fairly and reasonably be included therein. Applying that principle, undoubtedly, the State legislature can enact a law with respect to any "intoxicating liquors" with reference to Entry 8 of List II of the Seventh Schedule, to the Constitution of India, including a law to impose tax on such "intoxicating liquors".

49. Having heard learned counsel for the parties and having perused the record, insofar as the identity of the commodity is concerned, there is no dispute between the parties. It is Extra Neutral Alcohol (ENA). While the petitioners contend; the same is alcohol of high purity, above 90%, by volume, the State does not dispute the same. In its counter affidavit, the State also makes pleadings to the same effect. Besides the admission made by the State, it is too late in the day to dispute or deliberate as to the true character or identity or contents of ENA. Thus, the Supreme Court in the

case of **State of Jharkhand & Others Vs. Ajanta Bottlers and Blenders Private Ltd.** (supra) had clearly opined - industrial alcohol is broadly categorised into three categories. The first being Isopropyl alcohol (or IPA or Isopropanol). It is a compound with chemical formula CH3CHOHCH3, linked to a hydroxyl group. It is the simplest example of a secondary alcohol where alcohol carbon is attached to two other carbon atoms. If consumed, Isopropanol is converted into acetone in the liver, making it extremely toxic. The second category of industrial alcohol is Methyl Alcohol or Methanol with chemical formula CH3OH. Its consumption leads to blindness and death. The third category of industrial alcohol is Ethyl Alcohol also known as Ethanol having chemical formula C2H6O which may also be written as C2H5OH or CH3CH2OH.

50. Having thus categorized the three types of industrial alcohols, the Supreme Court further observed, the first two categories i.e., Isopropyl and Methyl Alcohol are poisonous, toxic, and fatal for human consumption. Therefore, they are capable of industrial use only. Further, owing to their inherent chemical properties, those two categories of alcohol cannot be purified or used to produce any “intoxicating liquor” or “potable liquor”, for human consumption. Only the third category of industrial alcohol namely, Ethyl Alcohol or Ethanol is capable of use to manufacture “intoxicating liquor” or potable liquor.

51. Also, as accepted in that decision, in its concentrated form, Ethanol is also known as Rectified Spirit. Such Rectified Spirit upon redistillation, fractional distillation etc., whereby impurities are removed, is rendered purer in content. It then, comes to be described as ENA. Insofar as “intoxicating liquor” is concerned, the Supreme Court clearly observed, it is only by addition and mixing of colouring and flavouring agents (compounding) as well as after dilution with water, ENA is left to mature and is bottled. Thereafter, the “intoxicating liquor” comes into existence whether known as Indian Made Foreign Liquor (IMFL) or country liquor, by whatever name called.

52. What emerges from the above is, whether IMFL or country liquor or

any other liquor that may qualify as "alcoholic liquor for human consumption", it uses ENA as a raw material. ENA, in turn, is derived from Rectified Spirit. At the same time, "alcoholic liquor for human consumption" would not arise either if ENA is left to mature for some time or in certain conditions. Neither its alcoholic content would reduce from the range 90% - 95 % to 19% - 43% nor it would otherwise render itself fit for human consumption. In fact, the counter affidavit of the State itself indicates in no uncertain terms – ENA is not for human consumption. It cannot be described as "intoxicating liquor", for that reason, either.

53. In any case, for a commodity to be described as an "alcoholic liquor for human consumption", it must be capable or ready to be consumed, in that state itself-as a beverage, as held by the seven-Judge Constitution bench of the Supreme Court in **Synthetics and Chemicals Ltd. & Ors. Vs. State of U.P. & Ors**. (supra) and as followed by a three-Judge bench of the Supreme Court in **State of U.P. Vs. Modi Distillery** (supra). An alcoholic liquor having 90%-95% content of Ethanol is certainly not that commodity. Such alcohol is not, and it cannot be marketed for human consumption. If consumed, it would be unbearably toxic and, therefore, never fit for human consumption. Thus, it was held by the Constitution bench of the Supreme Court in **Synthetics and Chemicals Ltd. & Ors. Vs. State of U.P. & Ors.** (supra) – "alcoholic liquor for human consumption" is:

> *"...that liquor which as it is is consumable in the sense capable of being taken by human beings as such as beverage of drinks. ..."*

54. Though that law emerged in the context of Entry 84 of List I of the Seventh Schedule, to the Constitution of India (with reference to imposition of duties of excise) yet, it clearly interprets the term "alcoholic liquor for human consumption", as it now appears under Entry 54 of List II of the Seventh Schedule, to the Constitution of India. The earlier use of the plural of the word liquor is not material. Applying that law, the Constitution bench of the Supreme Court could not be persuaded to accept, that denatured spirit, by appropriate cultivation or application or admixture with water or with

other things, be transformed into an “alcoholic liquor for human consumption”. It concluded, alcoholic or “intoxicant liquor” must be understood as these are, i.e., in the *presenti*, and not what these may become or be capable of or able to become upon application of certain processes etc. Applying that law, even today, as a commodity, ENA remains an alcohol or alcoholic liquor not for human consumption, under Entry 54 of List II of the Seventh Schedule, to the Constitution of India. There is absolutely no room or licence to give a different meaning to that phrase, as claimed by the learned AAG.

55. Rectified Spirit, Ethanol or Extra Neutral Alcohol (ENA) having been opined by the Constitution bench of the Supreme Court (followed, explained and applied in its later pronouncements), to be not alcoholic liquor for human consumption and, since there is no material whatsoever to take a contrary view on facts, it must be emphatically concluded, ENA continues to fall outside the phrase “alcoholic liquor for human consumption”, as it appears under Entry 54 of List II of the Seventh Schedule, to the Constitution of India.

56. We may also recognize, at present the dispute has arisen, not in the context of pre-existing laws but in the context of change of laws arising from the 101st Constitution Amendment. In the first place, by virtue of Article 246A (1) introduced to the Constitution of India, the Parliament and then, subject to Clause (2), the State legislatures have the competence to make laws with respect to goods and service tax. By virtue of Article 366 (12A), the phrase 'goods and service tax' would always mean, tax on supply of goods, or services or both, except tax on the supply of the “alcoholic liquor for human consumption”.

57. Thus, indisputably, tax on all goods and services, except supply of “alcoholic liquor for human consumption” would fall under the GST regime. It is that change to the Constitutional scheme that has been given effect - by substituting the pre-existing Entry 54 of List II of the Seventh Schedule, to the Constitution of India. Under that pre-existing entry, the State legislatures were competent to enact laws to tax sale and purchase of all goods, other

than the newspapers (subject to Entry 92A of List I). Upon enactment of the 101st Constitution Amendment, that power is heavily curtailed (under the substituted Entry 54 of List II of the Seventh Schedule, to the Constitution of India), to certain items specified therein namely, petroleum crude, high speed diesel, motor-spirit/petrol, natural gas, aviation turbine fuel and "alcoholic liquor for human consumption". A corresponding change was made by the Parliament to the definition of the term 'goods', under Section 2(d) of the Central Sales Tax Act, 1956. It was also substituted, to limit the same to the exact six items, finding mention in the substituted Entry 54 of List II of the Seventh Schedule, to the Constitution of India.

58. Whether by virtue of Article 366 (12-A) read with Article 246-A of the Constitution of India or the substituted Entry No. 54 of List II of the Seventh Schedule, to the Constitution of India, the nuanced distinction, between those two Constitutional provisions would have no bearing on the controversy at hand. The State legislature remains denuded of its pre-existing competence to enact a law to tax sale of alcoholic liquor not for human consumption, in both contingencies.

59. To take note of all the changes thus made, correspondingly, the Parliament also amended Entry 84 of List I of the Seventh Schedule, to the Constitution of India, to limit its power to enact laws, to now impose duties of excise on only six items, in place of the pre-existing entry that included all manufactured goods, except "alcoholic liquor for human consumption" and opium, Indian hemp etc.

60. Thus, both the Parliament and the State legislatures, sacrificed their pre-existing, respective legislative competence to - enact laws to impose duties of excise and to tax sales of alcoholic liquors not-for human consumption, at the high altar of the 101st Constitution Amendment, enacted to consecrate the GST laws. The express intent of that Constitutional change appears to be one – to tax all alcohols except "alcoholic liquor for human consumption", under the GST regime, only. Thus, alcoholic liquor not for human consumption or industrial alcohol or non-potable alcohol, is subject to GST laws, only. That Constitutional intent was unequivocally recognized

by the State legislature. It resonates in perfect harmony, through the instrument of incorporation of Section 174(1)(i) to the UPGST Act 2017. For ready reference, that provision of law reads as below:

> "*(1) Save as otherwise provided in this Act, on and from the date of Commencement of this Act.*
>
> *(i) The Uttar Pradesh Value Added Tax Act- 2008, except in respect of goods included in the Entry 54 of the State List of the Seventh Schedule to the Constitution.*"

61. Since the State legislature did not attempt to save the UPVAT Act - to tax alcoholic liquor not for human consumption, two direct consequences arise. First, a consequence arises of recognition of the change in the Constitutional scheme, noted above. Second, yet more directly, the State legislature did not save UPVAT Act to impose tax on any commodity except "alcoholic liquor for human consumption". Hence, in any case, after the enactment of the UPGST Act, 2017 and in absence of any amendment to Section 174 (1) (i) of that Act, there neither survives nor exists any delegated power with the State Government, to issue the impugned Notification, to impose UPVAT on ENA.

62. We cannot help over emphasise the fact that the impugned Notification seeks to overreach the Constitutional scheme, as amended by the 101st Constitution Amendment. By that Constitution Amendment, the only surviving legislative field to impose taxes (saved exclusively with the State legislatures), finds mention in Entry 54 (as substituted). Relevant to our discussion, it is only with respect to "alcoholic liquor for human consumption". Since ENA is not that, the State legislature cannot circumvent the Constitutional scheme by introducing a tax on its sale, by describing it as 'non-GST alcohol'.

63. That phraseology, used to describe ENA is, in any case, a misnomer. It is impermissible. By virtue of Article 366(12-A) of the Constitution of India, 'non-GST alcohol' may only be "alcohol for human consumption". By virtue of the clear dictum of the Supreme Court in **Synthetic and Chemicals Limited** (supra), **Modi Distillery** (supra), **VAM Organic Chemicals Ltd.** (supra) and **Ajanta Bottlers and Blenders Private Ltd.** (supra),

ENA is not fit for human consumption. Hence, for reasons noted above, it would remain a ‘GST-alcohol’, if such a thing exists. Second, the intended use to which a commodity may be put, and the character or identity of the commodity manufactured therefrom, would never be relevant to impose a differential rate of tax on sale of that commodity, depending upon different uses, it may be put to. For a tax to be levied on sale of a commodity, its identity in *presenti* alone is relevant. As a fact, there exists only one type of ENA. It may be put to different uses i.e., to manufacture either potable alcohol or chemicals or other commodities or all or any of them. By looking at any quantity of ENA, its use may never be predicted or pre-determined. To subject it to differential rates of tax under the UPVAT Act, depending solely on the intent of the purchaser (to use it a specified way), may never qualify as a tax on the sale of the goods. It may transform into another kind of tax. Third, in any case, the use to which ENA may be put may be relevant to the legislature to determine the measure or the rate of tax to be suffered by it, but not to the identity of the taxable commodity. That may be established based on its form, shape, and commercial identity, by the people who deal in it. Since ENA is not a 'non-GST' alcohol, the question of measure or rate of tax thereon (based on its use), is extraneous to the issue at hand.

64. What then survives for our consideration is, whether the State may ever be able to defend a taxation law or whether the State may ever be able to enact a taxation law, referable to Entry 8 of List II of the Seventh Schedule, to the Constitution of India, to impose tax on sale. The UPVAT Act, 2017 was not a law enacted with reference to Entry 8 of List II of the Seventh Schedule, to the Constitution of India rather, it was a law referable only to Entry 54 of List II of the Seventh Schedule, to the Constitution of India, as it then existed.

65. Even if, in the context of the challenge raised, the answer to the question - if the State legislature had the competence to enact the UPVAT Act with reference to the said Entry 8 of List II of the Seventh Schedule, to the Constitution, must remain - emphatically in the negative. The law with respect to the scope of legislative entries has been consistently laid down to

mean – taxing power is a special/specific legislative power. It may be exercised with reference to a specific taxing entry. If legislative entries under the Seventh Schedule to the Constitution of India are treated to be mother entries, with reference to the laws that may be enacted, a taxation legislation must be born to a taxing legislative entry alone. It can have no surrogate mother i.e., a general entry, as has been attempted to be established by the learned AAG.

66. In **M.P.V. Sundararamier & Co. Vs. State of A.P., AIR 1958 SC 468**, the Constitution Bench of the Supreme Court held as below:

> "*(i) …*
>
> *(ii) Under the constitutional scheme of division of powers under legislative lists, there are separate entries pertaining to taxation and other laws. A tax cannot be levied under a general entry.*
>
> *(iii) A Constitution is an organic document and has to be so treated and construed.*"

67. Similar principle was laid down by the Supreme Court in **State of Mysore & Ors. Vs. D. Cawasji & Company & Ors.** (supra). It was reiterated in **Delhi Cloth and General Mills Co. Ltd. Vs. Excise Commissioner, U.P., Allahabad, 1973 All LJ 629.** The principle thus laid down by the Supreme Court has been consistently applied without exception. Plainly, Entry 8 of List II of the Seventh Schedule, to the Constitution reads thus:

> "*8. Intoxicating liquors, that is to say, the production, manufacture, possession, transport, purchase and sale of intoxicating liquors.*"

68. That Entry only creates a field of legislation by State legislature to enact any law on intoxicating liquors. The words 'that is to say', restrict and confine the scope and ambit of those laws - with respect to production, manufacture, possession, transport, purchase, and sale and matters incidental or ancillary thereto. It does not grant any legislative competence to the State legislature to impose a tax on intoxicating liquors. In the oft cited decision of the four-Judge bench of the Supreme Court in **State of T.N. Vs. Pyare Lal Malhotra, (1976) 1 SCC 834**, the meaning of the phrase "that is to

say" suffixed to the words "iron and steel" in the then existing Clause (iv) of Section 14 of the Central Sales Tax Act, 1956, was interpreted as below:

> *"7. What we have inferred above also appears to us to be the significance and effect of the use of words "that is to say" in accordance with their normal connotation and effect. Thus, in Stroud's Judicial Dictionary, 4th Edn. Vol. 5, at p. 2753, we find:*
>
> > *"That is to say.—(1) 'That is to say' is the commencement of an ancillary clause which explains the meaning of the principal clause. It has the following properties: (1) it must not be contrary to the principal clause; (2) it must neither increase nor diminish it; (3) but where the principal clause is general in terms it may restrict it; see this explained with many examples, Stukeley v. Butler Hob, 1971."*
>
> *The quotation, given above, from Stroud's Judicial Dictionary shows that, ordinarily, the expression "that is to say" is employed to make clear and fix the meaning of what is to be explained or defined. Such words are not used, as a rule, to amplify a meaning while removing a possible doubt for which purpose the word "includes" is generally employed. In unusual cases, depending upon the context of the words "that is to say", this expression may be followed by illustrative instances. In Megh Raj v. Allah Rakhia [AIR 1947 PC 72 : 74 IA 12] the words— "that is to say", with reference to a general category "land" were held to introduce "the most general concept" when followed, inter alia, by the words "right in or over land". We think that the precise meaning of the word "that is to say" must vary with the context. Where, as in Megh Raj case, the amplitude of legislative power to enact provisions with regard to "land" and rights over it was meant to be indicated, the expression was given a wide scope because it came after the word "land" and then followed "rights over land" as an explanation of "land". Both were wide classes. The object of using them for subject-matter of legislation, was obviously, to lay down a wide power to legislate. But, in the context of single point sales tax, subject to special conditions when imposed on separate categories of specified goods, the expression was apparently meant to exhaustively enumerate the kinds of goods in a given list. The purpose of an enumeration in a statute dealing with sales tax at a single point in a series of sales would, very naturally, be to indicate the types of goods each of which would constitute a separate class for a series of sales. Otherwise, the listing itself loses all meaning and would be without any purpose behind it".*

Similarly, the phrase "that is to say" appearing in Entry 8 of List II of the Seventh Schedule, to the Constitution of India may never be read to bestow legislative competence on the State legislatures to enact a law to tax "intoxicating liqours". That competence must remain confined to the matters specified after that phrase, appearing under that Entry or matters ancillary or incidental thereto, such as regulatory measures.

69. The ratio in the case of **Shree Baidyanath Ayurved Bhawan (P) Ltd. & Ors.** (supra), **Bihar Distilleries** (supra) and **VAM Organic**

(supra), if read as suggested by the learned AAG, it would lead to a conflict between the seven-Judge Constitution bench decision of the Supreme Court in **Synthetics and Chemicals Ltd. & Ors. Vs. State of U.P. & Ors.** (supra), as explained and followed by three-Judge bench decisions of the Supreme Court in **State of U.P. Vs. Modi Distillery** (supra) and **Deccan Sugar & Abkari Co. Ltd.** (supra) and the other decisions of that Court. Therefore, the other decisions may be read, only in the context of the specific disputes involved therein. In **Shree Baidyanath Ayurved Bhawan (P) Ltd. & Ors.** (supra), the dispute was with respect to licence, regulation, use and possession of alcoholic preparation. In **Bihar Distilleries**, the dispute was with respect to cancellation of licence. In **VAM Organic** (supra), what was saved was the power to enact regulatory laws.

70. Even otherwise, once the law stood clarified by the larger/3-judge Bench decision of the Supreme Court in **State of U.P. Vs. Modi Distillery** (supra), there survived no legislative competence to the State legislature to enact a law, referable to Entry 8 of List II of the Seventh Schedule, to the Constitution of India, to impose tax on any intoxicating liquors, with reference to Entry 8 of that List. Therefore, the submission advanced by the learned AAG to the contrary, cannot be accepted. That expansive reasoning is impermissible under the existing Constitutional scheme.

71. The Constitution bench decision of the Supreme Court in **Navnit Lal C Javeri** (supra) is of no help to the State. In that case, the issue was not if the Parliament could enact a law to tax a loan advanced to a shareholder, by taking recourse to a general entry rather, the issue involved in that case was - if, while enacting a law to tax income (referable to Entry 82, List I), the Parliament could enact a law to tax that transaction by treating it as an income. Here, the issue to be examined is - if in the absence of a taxing entry, a taxation law may be enacted. Plainly, that ratio is inapplicable to the facts of this case.

72. Before parting, the State has already charged 9 percent GST on the

sale of ENA with effect from 01.07.2017. Thus, if it were to enforce the impugned Notification dated 17.12.2019, with effect from 09.12.2019, it necessarily would lead to an admission of collection (without authority of law) - of GST on ENA, by 4 to 13 percent. We do not see, what useful purpose the impugned Notification would serve if the argument of the learned AAG were to be accepted.

73. Consequently, all the writ petitions deserve to be allowed. It is declared, the State lost its legislative competence to enact laws, to impose tax on sales of ENA, upon the enactment of the 101st Constitution Amendment. Consequently, and upon considering Section 174(1)(i) of UPGST Act, 2017, the impugned Notification dated 17.12.2019, insofar as it seeks to impose UPVAT on ENA, Rectified Spirit and SDS, is *ultra vires,* both on account of lack of (i) legislative competence and (ii) valid delegation. It is therefore quashed. Consequentially, all assessment Orders/Notices dated 30.06.2021, 21.06.2021, 08.06.2021, 15.06.2021, 11.06.2021, 07.07.2021, the (administrative) Circulars/letters dated 10.06.2021 and 11.06.2021, impugned in these writ petitions, holding otherwise are also quashed.

74. It is further directed, subject to applicability of the rule against unjust enrichment, any amount that may have been deposited by the petitioners (except petitioners claiming under this order, in Writ Tax 355 of 2020), by way of UPVAT on ENA on or after 01.07.2017, may be refunded to them, within a period of one month from today.

75. All writ petitions are **allowed**, as above. No order as to costs.

28.09.2021
AHA