2022 INSC 4

**REPORTABLE**

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

**CIVIL APPEAL NO. 11 OF 2022**

[Arising out of S.L.P.(C) No.12859 of 2020]

Kerala State Beverages Manufacturing &
Marketing Corporation Ltd. ...Appellant

v.

The Assistant Commissioner of Income Tax
Circle 1(1) ...Respondent

W I T H

**CIVIL APPEAL NO. 12 OF 2022**

[Arising out of S.L.P.(C) No.12162 of 2020]

**CIVIL APPEAL NO. 13 OF 2022**

[Arising out of S.L.P.(C) No.12768 of 2020]

AND

**CIVIL APPEAL NO. 14 OF 2022**

[Arising out of S.L.P.(C) No.14150 of 2020]

**J U D G M E N T**

**R. SUBHASH REDDY, J**.

**1.** Leave granted.

**2.** These appeals are preferred, by the State-owned Undertaking, Kerala State Beverages Manufacturing & Marketing Corporation Ltd., a

company registered under the Companies Act, 1956, engaged in the wholesale and retail trade of beverages, aggrieved by the common judgment and order dated 30.04.2020 passed in I.T.A. No.135; 146 and 313 of 2019 by the High Court of Kerala at Ernakulam. The Civil Appeal arising out of S.L.P.(C)No.12859 of 2020 is filed by the assessee and other three appeals are preferred by the revenue.

**3.** For the assessment year 2014-2015, the Deputy Commissioner of Income Tax, Circle-2(1), Thiruvananthapuram finalised the assessment of income of the appellant under Section 143(3) of the Income-tax Act, 1961 (in short, 'the Act') vide Assessment Order dated 14.12.2016. The Principal Commissioner of Income Tax, Thiruvananthapuram has exercised power of revision as contemplated under Section 263 of the Act and set aside order of assessment on the ground that 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 & Loss Account of the assessee, with respect to the amount of surcharge on sales tax and turnover 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, Income Tax, dated

25.09.2018, the appellant herein filed appeal before the Income Tax Appellate Tribunal (in short, 'the Tribunal') in ITA No.536/Coch/2018.

**4.** With respect to 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 vide order of assessment dated 28.12.2017. Debits contained in the Profit & 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/- were disallowed under Section 40(a)(iib) of the Act. Aggrieved by the said order, appellant herein has filed appeal before the Commissioner of Income Tax (Appeals), Thiruvananthapuram and the same was dismissed. The appellant carried the matter by way of second appeal before the Tribunal in ITA No.537/Coch/2018.

The Tribunal has dismissed the ITA Nos.536-537/Coch/2018 by a common order dated 12.03.2019. The appellant herein thereafter has filed miscellaneous application in MP No.47/Coch/2019 on the ground that the Tribunal had failed to consider the issue agitated against the disallowance of the surcharge on sales tax. The said miscellaneous application was allowed by recalling earlier order dated 12.03.2019 passed in I.T.A.No.537/Coch/2018 and a fresh order was passed on

11.10.2019, finding the issue against the appellant and dismissing the appeal. Aggrieved by the aforesaid three orders, the appellant herein has filed Income Tax Appeals before the High Court in ITA Nos.135; 146 and 313 of 2019 which are disposed, by the common impugned order. In the common impugned order passed by the High Court, the question of law raised, was answered partly in favour of the assessee/appellant and partly in favour of the revenue. Para 23 and 24 of the judgment read as under :

> "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.
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> 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 I.T. Appeal Nos. 135, 146 &

> 313/2019 -32- 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."

**5.** For the purpose of disposal, we refer to the parties, as arrayed in the appeal filed by Kerala State Beverages Manufacturing & Marketing Corporation Ltd. (KSBC).

**6.** We have heard Sri S. Ganesh, learned senior advocate for the appellant and Sri N. Venkataraman, learned Additional Solicitor General appearing for the respondent.

**7.** Section 40 of the Income-tax Act, 1961 is the provision dealing with 'amounts not deductible'. The amounts as detailed in the Section are not deductible, in computing the income chargeable under the head "Profits and gains of business or profession". By the Finance Act, 2013 (Act 17 of 2013), Section 40 of the Act is amended by inserting Section 40(a)(iib), which has come into force from 01.04.2014. The said provision under Section 40(a)(iib) reads as under :

> "**40. Amounts not deductible.**- Notwithstanding anything 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-

(i) … … … …

… … … …

(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;".

**8.** While it is the case of the assessee/appellant that the gallonage fees, licence fee and shop rental (*kist*) for FL-9 licence and FL-1 licence, the surcharge on sales tax and turnover tax do not fall within the purview of the abovesaid amended Section, the case of the revenue is that all the aforesaid amounts are covered under Section 40(a)(iib) as such, such amounts are not deductible for the purpose of computation of income, for the assessment years 2014-2015 and 2015-2016.

**9.** During the assessment years 2014-2015 and 2015-2016 the appellant was holding FL-9 and FL-1 licences to deal in wholesale and retail of, Indian Made Foreign Liquor (IMFL) and Foreign Made Foreign Liquor (FMFL) granted by the Excise Department. FL-9 licence was issued to deal in wholesale liquor, which they were selling to FL-1, FL-3, FL-4, 4A, FL-11, FL-12 licence holders. The FL-1 licence was for sale of foreign liquor in sealed bottles, without privilege of consumption within the premises. The gallonage fee is payable as per Section 18A of the Kerala Abkari Act and Rule 15A of the Foreign Liquor Rules. The appellant was the only licence holder for the relevant years so far as FL-

9 licence to deal in wholesale, and so far as FL-1 licences are concerned, it was also granted to one other State owned Undertaking, i.e., Kerala State Co-operatives Consumers' Federation Ltd.. By interpreting the word 'exclusively' as worded in Section 40(a)(iib)(A) of the Act, High Court in the impugned order has held that the levy of gallonage fee, licence fee and shop rental (*kist*) with respect to FL-9 licences granted to the appellant will clearly fall within the purview of Section 40(a)(iib) of the Act and the amounts paid in this regard is liable to be disallowed. At the same time the amount of gallonage fee, licence fee and shop rental (*kist*) paid with respect to FL-1 licences granted in favour of the appellant for retail business, the High Court has held that it is not an exclusive levy, as such disallowance made with respect to the same cannot be sustained. With regard to surcharge on sales tax and turnover tax, it is held that same is not a 'fee' or 'charge' within the meaning of Section 40(a)(iib) as such same is not an amount which can be disallowed under the said provision.

**10.** Sri Ganesh, learned senior counsel appearing for the appellant by referring to Explanatory Note to the Finance Act, 2013, and Section 40(a)(iib) of the Act, has submitted that the levy of gallonage fees, licence fee and shop rental (*kist*) on FL-9 licence is not on any State Government Undertaking but same is a levy on the licensee. It is

submitted that the levy was on the licence holder whoever he or it might be and only in view of the Abkari Policy of the relevant years licences were granted to the appellant as such it cannot be said that same was exclusive levy on the appellant attracting Section 40(a)(iib) of the Act so as to disallow the same. It is submitted that the mere fact that in a particular year, the licence holder happens to be State Government Undertaking does not make the levy, one, which is imposed directly and exclusively on the State Government Undertaking. It is submitted that High Court has failed to appreciate that the decision as to whom FL-9 licences are to be granted, depends only on the State Government's Abkari Policy, which may vary from year to year. It is submitted that said submission also holds good with regard to gallonage fee, licence fee and shop rental for FL-1 licence, which issue is already decided in favour of appellant, by the High Court. With regard to surcharge on sales tax and turnover tax, it is submitted that taxes levied, are completely outside the ambit of Section 40(a)(iib) of the Act. It is submitted that the Kerala Surcharge on Taxes Act, 1957 (for short, 'KST Act') is enacted only to increase the taxes, *inter alia*, on the sale or purchase of goods, as such it is nothing but an increment to the basic sales tax levied under Section 5(1) of Kerala General Sales Tax Act, 1963 (for short, 'KGST Act'). It is submitted that surcharge on

sales tax is nothing but an enhancement of tax itself. In support of the said submission, the learned counsel has placed reliance on the judgments of this Court in the case of **C.I.T.** v. **K. Srinivasan**[1] and in the case of **Sarojini Tea Co. Ltd.** v. **Collector, Dibrugarh**[2]. Reference is also made on the CBDT Circular No.3/2018 dated 11.07.2018, to buttress the said submission. Learned counsel, by drawing our attention to the distinction between 'fee' and 'taxes' which is maintained throughout the scheme under Section 40(a) has submitted that, the sales tax and turnover tax is outside the scope of Section 40(a)(iib) of the Act. Lastly it is submitted that for the assessment year 2014-2015, the assessing officer has allowed deductions in respect of surcharge on sales tax and turnover tax, the Commissioner interfered, in exercise of power of revision under Section 263 of the Act. It is submitted that the view taken by the assessing officer was a possible view, as such the very invocation of revisional power was not permissible, to interfere with the order of the assessing officer.

With the aforesaid submissions, learned counsel has submitted to allow the appeal filed by the assessee and dismiss the appeals filed by the revenue.

[1] (1972(4) SCC 526
[2] (1992) 2 SCC 156

**11.** Sri Venkataraman, learned ASG appearing for the revenue, by drawing our attention to the provisions under Articles 285 and 289 of the Constitution of India, has explained the intent behind the amendment to Section 40 of the Income-tax Act, 1961, by Act 17 of 2013. It is submitted that in terms of Article 289 of the Constitution, the property and income of a State is exempted from Union taxation. The constitutional protection under Article 289 had led the States in shifting income/profits from the State Government Undertakings into Consolidated Fund of the States. It is submitted that State Government Undertaking – KSBC, which in this case is a company like any other commercial concern, is engaged in trade and business and commercial activity, therefore, is to be treated like any other business entity. However, when it came to filing of Return of Income, the State as the only shareholder or major shareholder in this type of undertakings, exercise control over it and shift profits by appropriating the whole of the surplus or a part of it by way of taxes, fee or similar such appropriations. It is submitted that this resulted in erosion of profits in the hands of State Government Undertakings leading to lesser payment of taxes, since these appropriations by the respective States from their State Government Undertakings were accounted for as allowable expenditure under Section 40(a) and these undertakings

claimed deduction of the same from the income earned, therefore could not be taxed in the hands of the State Government Undertakings. It is further submitted that the shifted profit, upon its transfer, went into the Consolidated Fund of the States and on this basis constitutional protection under Article 289 were claimed as a result of which, these amounts could neither be taxed in the hands of the State Government Undertakings nor in the hands of the respective States. Precisely the underlined spirit in bringing out the said amendment by inserting Section 40(a)(iib), is to plug the possible diversion or shifting of profits from these undertakings into State's treasury. Learned counsel also referred to the Memorandum attached to the Finance Bill of 2013 which explains the provisions relating to direct taxes. The relevant portion of the Memorandum reads as under :

> "**Disallowance of certain fee, charge, etc. in the case of State Government Undertakings**
>
> The existing provisions of section 40 specifies the amounts which shall not be deducted in computing the income chargeable under the head "Profits and gains of business or profession". The non-deductible expense under the said section also includes statutory dues like fringe benefit tax, income-tax, wealth-tax, etc.
>
> Disputes have arisen in respect of income-tax assessment of some State Government undertakings as to whether any sum paid by way of privilege fee, license fee, royalty, etc. levied or charged by the State Government exclusively

> on its undertakings are deductible or not for the purposes of computation of income of such undertakings. In some cases, orders have been issued to the effect that surplus arising to such undertakings shall vest with the State Government. As a result it has been claimed that such income by way of surplus is not subject to tax. It is a settled law that State Government undertakings are separate legal entities than the State and are liable to income-tax.
>
> In order to protect the tax base of State Government undertakings vis-à-vis exclusive levy of fee, charge, etc. or appropriation of amount by the State Governments from its undertakings, it is proposed to amend section 40 of the Income-tax Act 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". It is also proposed to define the expression "State Government Undertaking" for this purpose.
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> This amendment will take effect from 1st April, 2014 and will, accordingly, apply in relation to the assessment year 2014-15 and subsequent assessment years."

**11.1.** With regard to gallonage fees, licence fee and the shop rental (kist), it is submitted that High Court has upheld the disallowance in favour of the revenue with regard to FL-9 licence on the ground that the appellant – KSBC is the exclusive licence holder, so far as FL-9 licences are concerned. It is submitted that so far as FL-1 licences are concerned only on the ground that similar licences are also given for

another licence holder, viz., to Kerala State Co-operatives Consumers' Federation Ltd., the High Court has held that there is no exclusivity so far as FL-1 licences are concerned. It is the contention of the learned counsel that the disallowance under Section 40(a)(iib) is not contingent upon the nature of licence. The test should be whether levy under the Abkari Act is exclusive or not and in this case it is exclusive. It is submitted that the restricted interpretation made by the High Court to the extent of FL-1 licences issued in favour of the appellant runs contrary to object and intent of Section 40(a)(iib) of the Act and makes the said provision redundant and *otiose*. It is the case of the revenue that the aspect of exclusivity used under Section 40(a)(iib) of the Act, has to be viewed from the nature of undertaking on which levy is imposed and not on the number of undertakings on which levy is imposed. It is further submitted that the KSBC and the Kerala State Co-operatives Consumers' Federation Ltd. are undertakings of the State of Kerala, therefore, the levy is an exclusive levy on such State Government Undertakings which are licensees.

**11.2.** So far as surcharge on sales tax is concerned, again it is submitted that such a levy is an exclusive levy on KSBC alone, therefore, attracts Section 40(a)(iib)(A) itself. Alternatively, it is further submitted that even assuming that such tax is not attracted by Section

40(a)(iib)(A), it would fall under Section 40(a)(iib)(B) for the reason that surcharge on sales tax is a 'tax' and tax is a form of appropriation by the State from KSBC. It is submitted that the surcharge levied under Section 3(1) of the KST Act is on the tax payable by a dealer in foreign liquor under Section 5(1) of the KGST Act. It is the contention of the learned counsel that, the cumulative reading of Section 3(1) of the KST Act and Section 5(1)(b) of the KGST Act would reveal that surcharge is levied on the tax payable by a dealer in foreign liquor under Section 5(1) of KGST Act. It is submitted that Section 3(1) does not deal with any other category and specifically pertain only to a dealer in foreign liquor. It is submitted that as much as Section 5(1)(b) of the KGST Act refers to trade in foreign liquor and it applies specifically and exclusively to KSBC and further surcharge levied under Section 3(1) of KST Act is on the sales tax, exclusively payable by KSBC under Section 5(1)(b) of KGST Act. As such, the inevitable conclusion, therefore is that it qualifies as an exclusive levy attracting Section 40(a)(iib) of the Act. To show that the distinction between a 'tax' and a 'fee' has substantially been effaced in the development of constitutional jurisprudence, learned counsel, has placed reliance on a recent judgment of this Court

in the case of **Jalkal Vibhag Nagar Nigam & Ors.** v **Pradeshiya Industrial and Investment Corporation and Another**[3].

**11.3.** With regard to turnover tax, it is submitted that unlike surcharge which is an exclusive levy on KSBC, it is fairly submitted that such tax was imposed not only on KSBC under Section 5(1)(b) of the KGST Act, but also was being imposed on various other retail dealers specified under Section 5(2) of KGST Act. It is submitted that as the issue has not been dealt and examined in detail by the High Court, made a request to leave it open for fresh adjudication since facts and figures need to be verified.

With the above submissions, learned ASG has pleaded to allow the appeals filed by the revenue and dismiss the appeal filed by the KSBC.

**12.** Having heard the learned counsels on both sides we have perused the impugned order and other material placed on record.

**13.** Section 40 of the Income-tax Act, 1961 is a provision which deals with the amounts which are not deductible while computing the income chargeable under the head 'Profits and gains of business or profession'. Section 40 of the Act is amended in the year 2013, and 40(a)(iib) is inserted by Amending Act 17 of 2013, which has come into force from 01.04.2014. In terms of Article 289 of the Constitution of

[3] 2021 SCC OnLine SC 960

India, the property and income of a State shall be exempt from Union taxation. Therefore, in terms of Article 289, the Union is prevented from taxing the States on its income and property. It is the constitutional protection granted to the States in terms of the abovesaid Article. This protection has led the States in shifting income/ profits from the State Government Undertakings into Consolidated Fund of the respective States to have a protection under Article 289. In the instant case the KSBC, a State Government Undertaking, is a company like any other commercial entity, which is engaged in the business and trade like any other business entity for the purpose of wholesale and retail business in liquor. As much as these kind of undertakings are under the control of the States as the total shareholding or in some cases majority of shareholding, is held by States. As such they exercise control over it and shift the profits by appropriating whole of the surplus or a part of it to the Government by way of fees, taxes or similar such appropriations. From the relevant Memorandum to the Finance Act, 2013 and underlying object for amendment of Income-tax Act by Act 17 of 2013, by which Section 40(a)(iib)(A)(B) is inserted, it is clear that the said amendment is made to plug the possible diversion or shifting of profits from these undertakings into State's treasury. In view of Section 40(a)(iib) of the Act any amount, as indicated, which is

levied exclusively on the State owned undertaking (KSBC in the instant case), cannot be claimed as a deduction in the books of State owned undertaking, thus same is liable to income tax.

**14.** In the instant case the gallonage fee, licence fee, shop rental (*kist*), surcharge and turnover tax are the amounts of which assessee claims that they are not attracted by Section 40(a)(iib) of the Act. On the other hand it is the case of the respondent/revenue that all the said components attract the ingredients of Section 40(a)(iib)(A) or Section 40(a)(iib)(B), as such they are not deductible. Broadly these levies can be divided into three categories. Gallonage fee, licence fee and shop rental (*kist*) are in the nature of fee imposed under the Abkari Act of 1902. These are the fees payable for the licences issued under FL-9 and FL-1. In the impugned order, the High Court has held that the gallonage fee, licence fee and shop rental (*kist*) with respect to FL-9 licence are not deductible, as it is an exclusive levy on the Corporation. Further a distinction is drawn from FL-1 licence from FL-9 licence, to apply Section 40(a)(iib), only on the ground that, FL-1 licences are issued not only to the appellant/KSBC but also issued to one other Government Undertaking, i.e., Kerala State Co-operatives Consumers' Federation Ltd. High Court has held that as there is no other player holding licences under FL-9 like KSBC as such the word 'exclusivity'

used in Section 40(a)(iib) attract such amounts. At the same time only on the ground that FL-1 licences are issued not only to the KSBC but also to Kerala State Co-operatives Consumers' Federation Ltd., High Court has held that exclusivity is lost so as to apply the provision under Section 40(a)(iib). If the amended provision under Section 40(a)(iib) is to be read in the manner, as interpreted by the High Court, it will literally defeat the very purpose and intention behind the amendment. The aspect of exclusivity under Section 40(a)(iib) is not to be considered with a narrow interpretation, which will defeat the very intention of Legislature, only on the ground that there is yet another player, viz., Kerala State Co-operatives Consumers' Federation Ltd. which is also granted licence under FL-1. The aspect of 'exclusivity' under Section 40(a)(iib) has to be viewed from the nature of undertaking on which levy is imposed and not on the number of undertakings on which the levy is imposed. If this aspect of exclusivity is viewed from the nature of undertaking, in this particular case, both KSBC and Kerala State Co-operatives Consumers' Federation Ltd. are undertakings of the State of Kerala, therefore, levy is an exclusive levy on the State Government Undertakings. Therefore, we are of the considered view that any other interpretation would defeat the very object behind the amendment to Income-tax Act, 1961.

**14.1.** It is fairly well settled that the interpretation is to be in the manner which will subserve and promote the object and intention behind the legislation. If it is not interpreted in the manner as aforesaid it would defeat the very intention of the legislation. To defeat the said provision, the State Governments may issue licences to more than one State owned undertakings and may ultimately say it is not an exclusive undertaking and therefore Section 40(a)(iib) is not attracted. The submission of Sri Ganesh, learned senior counsel for the appellant is that the gallonage fee, licence fee and the shop rental (*kist*) are the levies under the Abkari Act on all the licence holders, as such it cannot be said that same is an exclusive levy on the appellant/KSBC. It is submitted that because of the Abkari Policy in particular year, licences are issued in favour of the appellant – State owned Undertaking, as such it cannot be said that the statutory levies under the Abkari Act are on the State Government Undertaking and such levies are only on the licensees but not on the State-owned Undertakings like KSBC. The said submission cannot be accepted for the reason that by virtue of licence which is granted in favour of State-owned Undertaking, the statutory fees etc., viz., gallonage fees, licence fee and shop rental (*kist*) are payable by the appellant-Undertaking, i.e., KSBC. Once the State Government Undertaking takes licence, the statutory levies referred

above are on the Government Undertaking because it is granted licences. Therefore, we are of the view that the finding of the High Court that gallonage fee, licence fee and shop rental (*kist*) so far as FL-1 licences are concerned, is not attracted by Section 40(a)(iib), cannot be accepted and such finding of the High Court runs contrary to object and intention behind the legislation.

**14.2.** Further, because another State Government Undertaking, i.e., Kerala State Co-operatives Consumers' Federation Ltd. was also granted licences during the relevant years, as such exclusivity mentioned in Section 40(a)(iib) is lost, also cannot be accepted, for the reason that exclusivity is to be considered with reference to nature of licence and not on number of State owned Undertakings. If the interpretation, as held by the High Court, is accepted, the legislative intent can be defeated by issuing licences in FL-1 to several State Government Undertakings and then make a contention that exclusivity is lost. Said interpretation runs contrary to the intent of the amendment.

**14.3.** So far as surcharge on sales tax is concerned, the High Court has held in favour of KSBC and against the revenue. The reasoning of the High Court is that surcharge on sales tax is a tax and Section 40(a)(iib) does not contemplate 'tax' and surcharge on sales tax is not a 'fee'

or a 'charge'. Therefore, High Court was of the view that surcharge levied on KSBC does not attract Section 40(a)(iib) of the Act. The submission of Sri Venkataraman, learned ASG with regard to surcharge on sales tax is two-fold. One is that the levy of surcharge on sales tax is also an exclusive levy on KSBC, therefore, attracts Section 40(a)(iib)(A) itself. Secondly, it is submitted, as an alternative submission that if the same is not covered by Section 40(a)(iib)(A) it would fall under Section 40(a)(iib)(B) of the Act, for the reason that the surcharge on sales tax is a tax and tax is a form of appropriation by the State from KSBC. The learned counsel placed reliance on a recent judgment of this Court in the case of **Jalkal Vibhag Nagar Nigam and Others**[3]. On the other hand it is the case of the appellant/assessee that the sales tax is outside the scope of Section 40(a)(iib) and the surcharge is nothing but is an enhancement of the tax. By referring to words used in Section 40(a)(iib), learned counsel Sri Ganesh has submitted that the said provision is to be interpreted by applying the doctrine of *ejusdem generis*. It is submitted that the words 'any other fee or charge' immediately following the words 'royalty, licence fee, service fee, privilege fee, service charge' relate to such similar charges and none of the terms can possibly cover a tax, like sales tax or surcharge on sales tax. With regard to surcharge on sales tax, we are in agreement with

the submission of Sri Ganesh, learned senior counsel appearing for appellant. The 'fee' or 'charge' as mentioned in Section 40(a)(iib) is clear in terms and that will take in only 'fee' or 'charge' as mentioned therein or any fee or charge by whatever name called, but cannot cover tax or surcharge on tax and such taxes are outside the scope and ambit of Section 40(a)(iib)(A) and Section 40(a)(iib)(B) of the Act. The surcharge which is imposed on KSBC is under Section 3(1) of the KST Act which reads as under :

> "**3. Levy of surcharge on sales and purchase taxes.** –
> (1) The tax payable under sub-section (1) of section 5 of the Kerala General Sales Tax Act, 1963, by a dealer in foreign liquor shall be increased by a surcharge at the rate of ten per cent, and the provisions of the Kerala General Sales Tax Act 1963 shall apply in relation to the said surcharge as they apply in relation to the tax payable under the said Act.
>
> Provided that where in respect of declared goods as defined in clause (c) of section 2 of the Central Sales Tax Act, 1956 the tax payable by such dealer under the Kerala General Sales Tax Act, 1963 together with the surcharge payable under this sub-section, exceeds four per centum of the sale or purchase price, the rate of surcharge in respect of such goods shall be reduced to such an extent that the tax and the surcharge together shall not exceed four per centum of the sale or purchase price."

Section 5(1)(b) of the Kerala General Sales Tax Act, 1963 reads as under :

> **5. Levy of tax on sale or purchase of goods**: - (1) Every dealer (other than a casual trader or agent of a non-resident dealer or the Central Government, or Government of Kerala or the Government of any other state or of any Union Territory, or any local authority) whose total turnover for a year is not less than two lakhs rupees and every casual trader or agent of a non-resident dealer, the Central Government, Government of Kerala, the Government of any other state or of any Union Territory, or any local authority whatever be its total turnover for the year in respect of goods included in the Schedule at the rate mentioned against such goods,-
>
> (a) … … … …
>
> (b) in respect of Foreign liquor, at the point of sale by the Kerala State Beverages (Manufacturing and Marketing) Corporation Limited and at the point of first sale in the State by a dealer liable to tax under this section except where the sale is to the Kerala State Beverages (Manufacturing and Marketing) Corporation Limited.
>
> (c) … … … …"

**14.4.** A reading of preamble and Section 3(1) of the KST Act, make it abundantly clear that the surcharge on sales tax levied by the said Act is nothing but an increase of the basic sales tax levied under Section 5(1) of the KGST Act, as such the surcharge is nothing but a sales tax. It is also settled legal position that a surcharge on a tax is nothing but the enhancement of the tax. In this regard, in support the said view, ready reference can be made to the judgments of this Court in the case

of **K. Srinivasan**[1] and **Sarojini Tea Co. Ltd.**[2]. Para 7 of the judgment in the case of **K. Srinivasan**[1] reads as under :

> "**7.** The above legislative history of the Finance Acts, as also the practice, would appear to indicate that the term "Income tax" as employed in Section 2 includes surcharge as also the special and the additional surcharge whenever provided which are also surcharges within the meaning of Article 271 of the Constitution. The phraseology employed in the Finance Acts of 1940 and 1941 showed that only the rates of income tax and supertax were to be increased by a surcharge for the purpose of the Central Government. In the Finance Act of 1958 the language used showed that income tax which was to be charged was to be increased by a surcharge for the purpose of the Union. The word "surcharge" has thus been used to either increase the rates of income tax and super tax or to increase these taxes. The scheme of the Finance Act of 1971 appears to leave no room for doubt that the term "Income tax" as used in Section 2 includes surcharge."

Para 20 of the judgment in the case of **Sarojini Tea Co. Ltd.**[2] reads as under :

> "**20.** For the reasons aforesaid, we are unable to endorse the view of the High Court that surcharge on land revenue payable under the Surcharge Act is not land revenue but a levy which is distinct from land revenue. In consonance with the law laid down by this Court in *Vishwesha Thirtha Swamiar case* [(1972) 3 SCC 246 : (1972) 1 SCR 137 : AIR 1971 SC 2377] it must be held that the surcharge on land revenue levied under the Surcharge Act, being an enhancement of the land revenue, is part of the land revenue and has to be treated as such for the

purpose of assessing compensation under Section 12 of the Ceiling Act."

**14.5.** Further, CBDT itself has issued circular in Circular No.3/2018 which is issued, as a measure for reducing litigation, by revision of monetary limits for filing appeals by the Department before the Income-tax Appellate Tribunal, High Courts and SLP/appeals before this Court. In the said circular it is clearly mentioned that for considering tax effect it includes applicable surcharge and cess. Same will also strengthen the stand of the assessee. Thus it is clear that the surcharge which is sought to be levied is nothing but the enhancement of sales tax, which is levied under Section 5(1) of the KGST Act. When the basic sales tax paid by KSBC under Section 5(1)(b) of the KGST Act, deduction was allowed, there is no reason not to allow deduction of surcharge on sales tax. If the revenue does not consider Section 40(a)(iib) is applicable to the basic sales tax paid by KSBC under Section 5(1)(b) of the KGST Act, it is not known how the surcharge on sales tax, which is nothing but the sales tax, can be brought in the net of Section 40(a)(iib)(A) or 40(a)(iib)(B) of the Act. Further a clear distinction between 'fee' and 'tax' is carefully maintained throughout the scheme under Section 40(a) of the Act itself. Wherever the Parliament intended to cover the tax it specifically mentioned as a tax. Section 40(a)(i) and 40(a)(ia) specifically

relate to tax related items. Section 40(a)(ic) refers to a sum paid on account of fringe benefit tax. At the same time, Section 40(a)(iib) refers to royalty, licence fee, service fee, privilege fee or any other fee or charge. If these words are considered to include a tax or surcharge like sales tax, the distinction so carefully spelt out in Section 40 between a tax and a fee will be obliterated and rendered meaningless. It is settled principle of interpretation that where the same Statute, uses different terms and expressions, then it is clear that Legislature is referring to distinct and different things. To support the said view ready reference can be made to judgments of this Court in the case of **DLF Qutab Enclave Complex Educational Charitable Trust** v. **State of Haryana & Ors.**[4]; **Kailash Nath Agarwal & Ors.** v. **Pradeshiya Industrial & Investment Corporation of U.P. Ltd. & Anr.**[5]; and **Shri Ishar Alloy Steels Ltd.** v. **Jayaswals Neco Ltd.**[6]. The judgment relied on by the learned ASG in the case of **Jalkal Vibhag Nagar Nigam and Others**[3] would not render any assistance to support the case of the revenue. The said judgment only considers whether the levy of water tax under Section 52A of the U.P. Water Supply and Sewerage Act is a fee or whether it is a tax covered by Entry 49 of List II of the seventh schedule

[4] (2003) 5 SCC 622
[5] (2003) 4 SCC 305
[6] (2001) 3 SCC 609

to the Constitution. The said judgment in fact maintains and does not take away the basic constitutional distinction between 'fee' and 'tax'. Having regard to language used in Section 40(a)(iib), we are of the view that the aforesaid judgment does not support the case of the revenue. Even the other alternative submission of the learned counsel that it may attract Section 40(a)(iib)(B) also cannot be accepted for the reason that wherever the Parliament intended to include tax, referred clearly to taxes clearly in the very Section 40. That itself indicates that the surcharge or tax were never intended to be included in the net of amended Section 40(a)(iib)(A) or 40(a)(iib)(B) of the Income-tax Act, 1961.

**15.** So far as turnover tax is concerned it is submitted by the learned ASG appearing for the revenue that such tax was imposed not only on KSBC in terms of Section 5(1)(b) of KGST Act, but it is imposed on various other retail dealers specified under Section 5(2) of the said Act. Further turnover tax is also a tax. The very same reason which we have assigned above for surcharge, equally apply to the turnover tax also. As such turnover tax is also outside the purview of Section 40(a)(iib)(A) and 40(a)(iib)(B).

**16.** For the aforesaid reasons, we hold that the gallonage fee, licence fee and shop rental (*kist*) with respect to FL-9 and FL-1 licences

granted to the appellant will, squarely fall within the purview of Section 40(a)(iib) of the Income-tax Act, 1961. The surcharge on sales tax and turnover tax, is not a fee or charge coming within the scope of Section 40(a)(iib)(A) or 40(a)(iib)(B), as such same is not an amount which can be disallowed under the said provision and disallowance made in this regard is rightly set aside by the High Court.

**17.** Accordingly, the civil appeal filed by the assessee is dismissed and the civil appeals filed by the revenue are partly allowed to the extent indicated above. In result, the assessments completed against the assessee with respect to assessment years 2014-2015 and 2015-2016 stand set aside. The assessing officer to pass revised orders after computing the liability in accordance with the directions as indicated above. As the dispute relates to assessment years 2014-2015 and 2015-2016, the assessing officer shall pass appropriate orders, within a period of two months from the date of receipt of this judgment.

**.....J.**
**[R. Subhash Reddy]**

**.....J.**
**[Hrishikesh Roy]**

**New Delhi.**
**January 03, 2022.**