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in Penual & Consumption  
16/1/18

F.No.354/ 117 /2017-TRU  
Government of India  
Ministry of Finance  
Department of Revenue  
Tax Research Unit  
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Room No.146 G, North Block,  
New Delhi, the 16th January, 2018

OFFICE MEMORANDUM

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Subject: Applicability of Goods and services Tax on Extra Neutral Alcohol (ENA)

The undersigned is directed to refer to 20<sup>th</sup> meeting of GST Council held on 05.08.2017, wherein the matter regarding taxation of rectified spirit/ Extra Neutral Alcohol (ENA) under GST was deliberated upon and it was agreed that legal opinion of the Attorney General of India may be sought on the matter.

2. Accordingly, the matter regarding levy of GST on supply of ENA for manufacture of alcoholic liquor for human consumption within the prevailing constitutional provisions, was referred to Ld. Attorney General, who has conveyed his considered opinion on the matter, through the Ministry of Law and Justice.

3. In this context, find attached herewith the opinion of the Ld. Attorney General for circulation to concerned GST officers of state and central government in all States.

Encl: As above.

Mohit Tewari  
16/1/18  
(Mohit Tewari)  
Under Secretary (TRU- I)

The Commissioner,  
GST Council Secretariat,  
5th Floor, Tower II, Jeevan Bharti Building, Janpath Road,  
Connaught Place, New Delhi-110 001.

Office of the Commissioner of Taxes  
Receipt No. 2393  
Date 23/1/18

- 10 -  
No.AG16/2017-Adv.C  
Office of the Attorney General for India  
Supreme Court

The Union of India, Ministry of Finance, has sought my opinion on the legality of the levy of Goods and Services Tax (GST) on supply of extra neutral alcohol (ENA) for manufacture of alcoholic liquors for human consumption.

I must state at the outset that while there is no dispute between the Centre and the States as to the levy of GST on industrial alcohol (i.e., denatured ENA), there is divergence of opinion in regard to ENA that is used for manufacture of 'alcoholic liquor for human consumption.' The brief for opinion annexes a note containing the views received from the State of West Bengal. The State objects to the levy of GST on ENA by relying on the judgment of the Supreme Court of India in *Bihar Distillery v. Union of India* (1997) 2 SCC 727. The State contends that no GST can be levied on ENA that is used to manufacture alcoholic liquor for human consumption and the power to regulate and impose taxes on ENA is vested exclusively in the States. Subsequently, on 24<sup>th</sup> October 2017, the Ministry of Finance has forwarded a copy of the representations received from the Government of Tamil Nadu, Rajasthan and Andhra Pradesh. These States also place reliance on the judgment of the Supreme Court in *Bihar Distillery (supra)* to contend that no GST can be levied on ENA. Thereafter, on 18<sup>th</sup> November 2017, at the request of the Ministry of Finance, I held a conference with the representatives of the States of West Bengal, Karnataka, Andhra Pradesh, Tamil Nadu, Rajasthan and Maharashtra. During the conference, these States have once again placed reliance on the judgment of the Supreme Court in *Bihar Distillery* to submit that the power to levy tax on ENA would vest exclusively with the State Governments and therefore, no GST can be levied.

It is in this background that the Ministry of Finance has sought my opinion. I have examined the facts in detail and I am of the view that even though the judgment of the Supreme Court in *Bihar Distillery (supra)* does hold that the States have the power to control rectified spirit removed for manufacturing potable liquors, this judgment cannot be used as precedent for the proposition that the States have absolute power to impose taxes on ENA that is used to manufacture 'alcoholic liquor for human consumption.' This is because:

1. The court in *Bihar Distillery* was not concerned with the power of the State to levy Excise under Entry 51. To that extent, the court did not deal with the meaning of the words 'alcoholic liquor for human consumption' as used in Entry 51. On the other hand, the Court was only concerned with the regulatory power of the State under Entry 8 of List II. Entry 8 in its entirety reads -- 'intoxicating liquors, that is to say, the production, manufacture, possession, transport, purchase and sale of intoxicating liquors'. Nowhere does Entry 8 use the phrase 'alcoholic liquor for human consumption'
2. The meaning of the term 'alcoholic liquor for human consumption' has been dealt with categorically in *Synthetics and Chemicals v. State of UP* (1990) 1 SCC 109 (7 judges) and *State of UP v. Modi Distillery* (1995) 5 SCC 753 (3 judges). In *Synthetics*, the Court has held that the expression 'alcoholic liquor for human consumption' means that liquor



which as it is consumable in the sense capable of being taken by human beings as such as beverage of drinks. In *Modi Distillery*, the Court held that ethyl alcohol (95 per cent) was not an alcoholic liquor for human consumption but could be used as a raw material or input, after processing and substantial dilution, in the production of whisky, gin, country liquor, etc.

3. The two judge bench of the Court in *Bihar Distillery (supra)* has not referred to the three judge bench decision in *Modi Distillery* where the Court, dealing with the power of the State under Entry 51 List II, clearly held that "by common standards, ethyl alcohol (which had 95 per cent strength) was an industrial alcohol and was not fit for human consumption."
4. The Supreme Court has subsequently overruled *Bihar Distillery* on the very question of imposition of excise duty by the State on rectified spirit. In *Deccan Sugar & Abkari Co. Ltd. v. Commissioner of Excise, A.P.*, (1998) 3 SCC 272 the Supreme Court once again dealt with the question of the power of the State to levy Excise duty on rectified spirit and after noticing the judgment in *Bihar Distillery*, the Court referred the matter to a larger bench for consideration of the question whether any excise duty can be levied by the State on the manufactured rectified spirit which may ultimately be used for production of potable liquor. At Para 4 of the judgment, the Court held:

'4. It is to be kept in view that the aforesaid decision rendered in *Bihar Distillery* case [(1997) 2 SCC 727] by a Bench of two learned Judges of this Court was strictly concerned with the question whether the State could cancel licences given to a distillery manufacturing rectified spirit on the grounds as alleged to be relevant for such cancellation. Therefore, strictly speaking there was no occasion for this Court in *Bihar Distillery* case [(1997) 2 SCC 727] to consider the wider question whether any excise duty can be levied by the State on the manufactured rectified spirit which may ultimately be used for production of potable liquor. Even that apart the aforesaid observations made in *Bihar Distillery* case [(1997) 2 SCC 727] by the Division Bench of this Court prima facie run counter to the scheme of legislative competence as examined by the Constitution Bench of this Court as well as in the three-Judge Bench decision of this Court in *Modi Distillery* [(1995) 5 SCC 753]. Consequently, in our view these matters are required to be placed for decision before a larger Bench of three learned Judges of this Court for reconsideration of the judgment in *Bihar Distillery* case [(1997) 2 SCC 727]. We therefore direct the Registry to place all these appeals for disposal before a larger Bench of three learned Judges.....'

5. Thereafter, a three judge bench of this Court was constituted. This bench considered the matter on 13<sup>th</sup> February 2002 and in a judgment reported in (2004) 1 SCC 243 it held that "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".

6. Lastly, in *State of Bihar v. Industrial Corporation*, (2003) 11 SCC 465, the Supreme Court, while dealing with the question of the power of the State to levy a penalty for loss or wastage of molasses, rejected the argument of the State that molasses were diverted towards manufacturing liquor which is fit for human consumption and held that 'no penal duty could have been imposed on rectified spirit'. At Para 23 of the judgment, the Court, after referring to *Bihar Distillery (supra)* has held:

*24. How far and to what extent the said observations are correct need not be considered by us but suffice it to point out that this decision had not noticed the earlier decision given by a Bench of three learned Judges in Modi Distillery. Modi Distillery applies on all fours to the facts of the present case and we are bound thereby....*

ENA typically contains 95% alcohol by volume and as such, is not fit for human consumption. Under Article 246A (1) read with 366(12A), GST cannot be levied on the 'supply' of 'alcoholic liquor for human consumption.' ENA that is used for the manufacture of alcoholic liquor is not supply for the purpose of human consumption as it is not consumed directly, but goes through a process of manufacture.

For the reasons mentioned above, I am of the opinion that the judgment of the Court in *Bihar Distillery* does not denude the Centre or the States of the power to levy GST on ENA that is used to manufacture 'alcoholic liquor for human consumption'.

I advise accordingly.

Yours sincerely,

  
(K.K. Venugopal)

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See Memo No  
KKV/KCS/04/2019  
dt. 23/10/19 in place  
below for n.a. please