

BEFORE THE COMMISSIONER OF STATE TAXES &
EXCISE-CUM-FINANCIAL COMMISSIONER (EXCISE)
HIMACHAL PRADESH, SHIMLA-171009

*CWP No. 8221 of 2011 a/w
connected matters*

IN THE MATTER OF: -

1. CWP No. 8221/2011
M/s Rangar Breweries Ltd.
2. CWP No. 8221/2011
M/s Tiloksans Brewery Ltd.
3. CWP No. 9682/2011
M/s K.M. Distillery Pvt. Ltd. Parwanoo
4. CWP No. 657/2012
M/s Him Queen Distillers and Bottlers
5. CWP No. 517/2013
M/s VRV Foods Ltd
6. CWP No. 2817/2014
M/s Basandrai Bottlers Pvt. Ltd.

.....Petitioners

Versus

State of HP and Others

.....Respondents

Parties Represented by:

1. S/Shri R. N. Sharma, S. K. Awasthi and Sumit Goel Advocates
for the petitioners.
2. Shri Rakesh Rana, Sr. Law Officer for the Respondents.

ORDER

1. The present representations by the petitioners have been filed on being agitated by the directions of the Excise and Taxation Department authorities issued to the petitioners asking them to deposit the salary of Excise staff posted in the breweries, distilleries and bottling plants. There are directions from the Hon'ble High Court of Himachal Pradesh vide order dated 21st November, 2017, for considering all the issues regarding Excise establishment salary and taking action as per law in the matter raised by the petitioners above.
2. The briefs in the matter are that petitioners are holders of D-2 and BWH-2 licenses granted under the provisions of the erstwhile Punjab Excise Act, 1914, and the Himachal Pradesh Excise Act 2011. The petitioners have agitated that



certain levies, particularly salaries of the Excise staff posted at the distilleries, breweries and bottling plants, are being illegally recovered from them without there being any statutory backing of law. The petitioners in the instant writ petitions have submitted that Rule 16 of the Punjab Distillery Rules, 1932 (as applicable to the State of Himachal Pradesh), prescribing for the payment of staff salary to the Excise Establishment posted at the breweries, distilleries and bottling plants has no backing of the law and is, thus, unconstitutional. The petitioners submit that even after the enforcement of the Himachal Pradesh Excise Act, 2011 w.e.f. 18-08-2012, the demand on account of salaries of excise establishment continues to remain illegal and unconstitutional, and further, that the demand for payment of salaries of Excise Establishment being a tax having been levied in contravention of Article 265 of the Constitution be refunded with interest to the petitioners. The petitioners have relied upon the judgment dated 19-04-2007 passed by the Hon'ble Supreme Court in Civil Appeal Nos. 2700, 2701 & 2702/2000 titled as **M/s Gupta Modern Breweries versus State of Jammu & Kashmir & Ors.** In this case a Division Bench of the Hon'ble Supreme Court, while allowing the civil appeal, struck down Rule 17 of the Jammu & Kashmir Distillery Rules, 1946 as having no statutory backing and also being manifestly unjust and arbitrary. Conversely, a three Judge Bench of the Hon'ble Supreme Court in **Civil Appeal No. 7463/1993 titled as State of Madhya Pradesh & Ors. versus M/s KCT Drinks Ltd.,** allowed the appeal and set aside the impugned judgment and order passed by the Hon'ble High Court of Madhya Pradesh and observed as under:-

"In view of the aforesaid settled legal position, the condition empowering the State Government to recover the actual cost of supervisory staff posted at the premises of respondent cannot be said to be in any way illegal or ultra vires as it constitutes the price or consideration which the Government charges to the licensee for parting with its privilege and granting license. In this view of the matter, the impugned judgment and order passed by the High Court requires to be set-aside."

3. The petitioners submit that the staff is posted by the respondent for executing their own official, statutory and supervisory functions encompassing safeguarding and securing government revenue. The petitioners merely are an agency of the state to trade in liquor and for using



this privilege and authorizations on behalf of the State, the petitioners beforehand pay license fee, levies, duties and fee on various accounts. Petitioners submit that by asking the petitioners to deposit/pay establishment expenditure, the Financial Commissioner has travelled beyond the limits of the Punjab Excise Act, 1914 (Himachal Pradesh). Section 21 of the Act authorizes the Financial Commissioner to make rules only for the inspection and examination of distilleries, breweries and warehouses *vis a vis* spirit fermentation, production, storage and sale thereof; provisions of the Act nowhere authorize him to make rules regarding recovery of the salary of the excise establishment posted there. There are no explicit provisions in the Act regarding Excise Establishment salary as has been provisioned under Rule 16 of the Distillery Rules, the latter framed in exercise of the powers conferred by section 21 read with Section 59 of the Punjab Excise Act, 1914 (Himachal Pradesh). Sections 21 and 59 of the Act read as under:--

21. Establishment of licensing of distilleries and breweries: -The Financial Commissioner, subject to such restriction or condition as the State Government may impose -

XXXX

(d) make rule regarding -

(1) XXXXX

(11) any other matters connected with the working of distilleries or breweries.

59. Powers of Financial Commissioner to make rules.—The Financial Commissioner may, by notification, make rules—

(a) regulating the manufacture, supply, storage or sale of any 4[intoxicant] including—

(i) the character, erection, alteration, repair, inspection, supervision, management and control of any place for the manufacture, supply, storage or sale of such article and the fittings, implements, apparatus and registers to be maintained therein;

(a) XXXXXX;

(b) XXXXXXX;

(c) XXXXXXX;

(d) prescribing the scale of fees or the manner of fixing the fees payable in respect of any license, permit or pass, or in respect of the storing of any [intoxicant];

(e) regulating the time, place and manner of payment of any duty or fee;

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The petitioners submit that the Financial Commissioner, in exercise of the powers conferred upon him under clause (4) and (11) of sub section (d) of

section 21, read with section 59 of the Punjab Excise Act, 1914 framed Rules 9.12 to 9.16 of the Distillery Rules pertaining to inspection and examination of the distilleries as contained in part "Inspection" of the said Rules:

9.12. The licensee shall at any time permit the Collector or any officer authorized by the Collector in that behalf, to inspect and examine his licensed distillery, the premises and warehouses connected there with and the spirit made and stored therein, and shall render to the Collector or officer (as aforesaid) all proper assistance in making such inspection and examination.

INSPECTION

9.13. The licensee shall agree to the posting of a Government Excise Establishment to his distillery for the purpose of ensuring the due observance of these rules and for watch and ward. The establishment shall consist of an Inspector and as many sub-Inspectors and peons as the Financial Commissioner shall deem sufficient for the requirements of the distillery. This staff shall be subject to the inspection by the Financial Commissioner and the Collector and be under the Administrative control of the Collector.]

9.14. The licensee shall provide within his distillery enclosure an office for the inspector, as well as quarters, to be approved by the Financial Commissioner, for the inspector and the peons, who will be required to remain within the distillery enclosure on night duty.

9.15. The licensee shall, if required by the Financial Commissioner, provide residential quarters for the Government excise establishment posted to the distillery.

9.16. The licensee shall, if required by the Financial Commissioner make into the Government treasury such payment as may be demanded on account of the salaries of the Government excise establishment posted to the distillery, but he shall not make any direct payment to any member of such establishment.

Interpreting the above quoted provisions of the Act and Rules thereunder, the petitioners argued that, by charging salary of the Excise staff, the Financial Commissioner has only travelled beyond the limits of the Act (of 1914) asserting that there are no exclusive provisions for charging the Excise-staff salary from the petitioners. Section 21 of the Act, as per understanding of the Ld. Counsel for the petitioners, authorizes the Financial Commissioner to make rules only for the inspection and examination of distilleries/breweries and bottling plants or warehouses connected therewith liquor made and/or stored. The language of the Act, to the knowledge of the petitioners, nowhere authorizes the Financial



Commissioner to make rules regarding recovery of Excise-staff salary as such Rule 16 purported to have been framed under the aegis of section 21 of the Act supra, travels beyond and exceeds the authority conferred by the Act. Petitioners, thus, contend that as Section 21 (d) 11 of the Excise Act deals with any matter connected with the working of the distilleries only and in no conceivable way it is a provision authorizing the imposition of tax, duty or fee, rather this sub-section specifically deals with the ancillary matters relating to the working of distilleries only, therefore, they (the petitioners) are not liable to reimburse the cost of deployment of government Excise-staff. The petitioners rued that the sub-ordinate authorities without assigning proper reasons have rejected the above plea of the petitioners above, and without legitimacy and authority have insisted upon the petitioners for payments on account of staff salary. Petitioner-counsels added that statute must explicitly empower the State to impose tax, levies, duty, fee etc. Fee is intended by the legislature to mean fee for a license, permit or pass and not the salary of the Government Excise Establishment.

4. The petitioners also submitted that the Financial Commissioner posts the Government Excise Establishment at the distilleries/breweries and bottling plants for ensuring due observance of the Rules and for the watch and ward. Under Rule 16, the Financial Commissioner, if so desires, is authorized to demand payment from the petitioners on account of salaries of the Government Excise Establishment. Petitioners submit that Section 34 (1) of the Act provides for levy of fee for terms, conditions, forms and duration of licenses, permits and passes granted; and Section 34 (2) under heading 'Security' authorizes the license granting authority to require from the licensee to give such security for the observance of the terms of his license, or to make such deposit in lieu of security, as such authority may deem fit. Petitioners submit that for parting with its exclusive privilege to deal in liquor, the State charges from the petitioners various fees, duty and levies at every stage of production, storage, sale, transport, import and export.
5. Petitioners, to buttress their arguments in the matter, have relied on the judgment of the Hon'ble Supreme Court of India in **M/s Gupta Modern Breweries Vs State of Jammu Kashmir and others (2007) 6 SCC 317** submitting that the Hon'ble Apex Court scrutinized the provisions of section



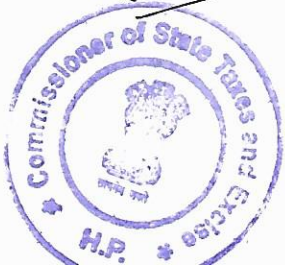
25 (g) of the Jammu and Kashmir Excise Act, 1901 and Rule 17 of Jammu and Kashmir Distillery Rules, 1946 and held that the said rule 17 had no statutory backing and was in excess of the Act and was also unjust and arbitrary. Petitioners have, however referred to the judgment dated 4 March, 2003 by the three bench Judges of the Hon'ble Supreme Court of India in a case titled '**State Of Madhya Pradesh & Others vs M/S K.C.T. Drinks Limited**' where the Hon'ble Supreme Court was pleased to order that '*the condition empowering the State Government to recover the actual cost of supervisory staff posted at the premises of respondent cannot be said to be in any way illegal or ultra vires as it constitutes the price or consideration which the Government charges to the licensee for parting with its privilege and granting licence.*' Ld. Counsels for the petitioners argued that the postings of the Excise staff to the petitioners' premises is only for the discharge of their statutory and official duties relating to the excise work of the State Government in its different aspects and for preventing and checking excise evasion. The Department, thus, by posting the Excise establishment only administers the provisions relating to Excise Act and Rules. The posting of the staff is only to protect departmental and State rights and revenue interests under the Excise Act, HP VAT Act, CST Act and other taxation enactments. Within the Excise administration itself, the excise staff is performing virtually similar duties of regulating multiple excise facets of storage, supply, distribution, inspection of arrival and dispatch of liquor consignments at or from the licensed premises, checking of liquor during transition, regulation of liquor loss in storage or during transit, recovery of Excise duty, license fee, import fee, export fee, permit fee, penalties etc. both within and outside the distilleries, breweries, bottling plants, bonded warehouses and in the field as well; but the petitioners are being discriminated against by calling upon them to reimburse the salaries of the excise establishment posted in the petitioners' business premises. No other licensee outside the distillery/brewery/bonded warehouse/bottling plant is required to reimburse the salaries of excise staff. Himachal Pradesh General Industries Corporation Mehatpur who holds license to manufacture and bottle liquor is discriminately exempted from reimbursing the excise staff salary. The department being the high contracting party has adopted compelling and coercing stance to follow its arbitrary and unjustified demand for salaries, such demand is unlawful and illegal. By not yielding to



the above demand, the petitioners are forced to face punitive consequences of cancellation or suspension of the licenses granted by the Department, contended learned counsel for the petitioners.

6. Shri Rakesh Rana, learned Sr. Law Officer for the Department, in rebuttal to the arguments of the petitioners stated that the decision rendered by the three judges' bench of the Hon'ble Supreme Court in **KCT Drinks case**, quoted in paragraph 5 above, still holds the field and is binding as it is against the decision rendered by a Division Bench of the Hon'ble Supreme Court in M/s Gupta Modern Breweries case. In view of this three judges bench judgment the petitioners have no case whatsoever to agitate before this Hon'ble Court and the writ petitions being without any merit are not maintainable and deserve outright dismissal. Ld. Sr. Law Officer also asserted that the licenses granted to the petitioners are subject to certain conditions specified therein in the licenses themselves which the petitioners are bound to comply with. As per specific conditions of the license, the petitioners shall make into the Government Treasury such payment as may be demanded on account of the salaries of the Government Excise establishment posted at the petitioners' premises, under Rule 16 of the Punjab Distillery Rules, 1932 (as applicable in Himachal Pradesh). The aforesaid licenses are issued to the petitioners on their applications to this effect, petitioners knowing well that they have to abide by all the provisions of the Punjab Excise Act, 1914 (as applicable to the State of Himachal Pradesh), Himachal Pradesh Excise Act, 2011 and rules made there under as well as the conditions of granted licenses. Ld. Counsel for the Department referred to a judgment dated 27-12-07 by a Division Bench of the Hon'ble Court of HP in CWP No. 2160 of 2007 titled as **Sh. Ram Lal Versus State of H.P. and ors.** (wherein the petitioners had prayed that the license fee fixed by the respondent be quashed and set-aside and contended that the fee should have been fixed keeping in view the sale of liquor in the previous year), the Hon'ble Court in the case ruled that:

...in a case, like the present one, the parties have entered into a commercial contract with open eyes. The petitioners were well aware that the allotment would be made subject to payment of the fixed fee. It was for him to have decided whether this fee is exorbitant or not. Nobody forced him to take part in the allotment



process. He has willingly taken part in the process. Now he cannot turn around and say that fee is on the higher side..."

In the instant petitions as well, the parties have entered into a commercial contract and the petitioners cannot back out and contend not to abide by the pre-laid terms and conditions of the license, as well as the provisions of the Act and Rules. Ld. Law Officer further submitted that the petitioners were not under any obligation to take the license and it was open to the petitioners to have refrained from taking any license under the Act and rules if they were not willing to pay the price as required by the Government for the grant of privilege to manufacture and sell intoxicants.

7. Shri Rana, Sr. Law Officer and Counsel for the Department further submitted that since rights with regard to intoxicants belong to the State, it is open to the Government to part with those rights for a price or consideration. By virtue of Article-298 of the Constitution, the executive power of the State extends to the carrying on any trade or business and to the making of contracts for any purpose. If the Government is the exclusive owner of the privileges, reliance on Article-14 or Article-19(1) (g) becomes irrelevant. Citizens cannot have any fundamental right to trade or carry on business in the properties or rights belonging to the Government, there is not any infringement of Article-14, if the Government tries to get the best available price for its valuable rights. Section-21 read with Section-59 of the Punjab Excise Act, 1914 and the corresponding provisions of the Himachal Pradesh Excise Act, 2011 empower the Financial Commissioner to direct that a license, permit or pass be granted under the Act on payment of such fees and subject to such restrictions and conditions as he may prescribe.
8. Arguments on behalf of both the parties were heard in detail in the matter. Based upon material placed on record, reliance, quotations and judgments in the matter by various courts including the Hon'ble Apex Court it is undisputed that the power of the Government to charge a price for parting with its rights and the mode of fixing that price, especially in the matter of intoxicants, is what constitutes the essence of the matter. The Hon'ble Supreme Court in **Government of Andhra Pradesh Vs Anabeshahi Wine and Distilleries AIR 1988 SC 771** has accordingly held as under:



"The perusal of the aforesaid provisions of the Act and the Rules leaves no manner of doubt that it was open to the appellant to grant the exclusive privilege of manufacturing and selling wine etc. to the respondent only provided it was, apart from making any other payment, also willing to pay the salaries and allowances referred to in the aforesaid provisions which for the sake of convenience have been described as establishment charges, and which are sought to be recovered as such under the impugned notice of demand. The respondent Company was not under any obligation to take the licence. It was open to it to have refrained from taking any licence under the Act and the Rules if it was not willing to pay the price as required by the Government for the grant of privilege to manufacture and sell intoxicants....."

The staff posted at the premises of the petitioners have to discharge many and multifarious functions such as inspection and/or supervision of excise work, prevention or checking of evasion of excise levies, quality control as trade or business in liquor is inherently vicious and pernicious and is injurious to health, safety and welfare of general public i.e. *res extra commercium*. Article 47 of the Constitution considers intoxicating drinks and drugs as injurious to health. The state can create a monopoly either in itself or in the hands of agency created by it, for manufacture, possession, sale and distribution of the liquor as a beverage and also sell the licenses to the citizens for the said purpose by charging fees. The State can adopt any mode of selling the licenses for trade or business with a view to maximize its revenue. In view of this the plea of discrimination and violation of Article 14 of the Constitution as raised by the petitioners is entirely misconceived and is not upheld to above sought extent.

9. In view of the explicit provisions the Act (the Punjab Excise Act, 1914 and the H.P. Excise Act, 2011), it is open to the respondent to grant the exclusive privilege of manufacturing and selling liquor to the petitioners only provided it was, apart from making any other payment, also willing to pay the salaries and allowances to the establishment of excise staff. It is further re-iterated that it was open for the petitioners to refrain from taking any license under the Act and Rules if it was not willing to pay the price as required by the Government for the grant of privilege to manufacture and sell intoxicants. A Constitution bench of the Hon'ble Supreme Court in **Har Shankar versus**



Deputy Excise & Taxation Commissioner (1975) 3 SCR 254 has held that the amounts charged to the licenses are neither in the nature of tax nor excise duty, but constituted the price or consideration which the Government charges to the licenses for parting with its privileges and granting them the licenses. Therefore, the contention of the petitioners that the respondents have utilized the powers to levy license fee, duty etc. available under the Excise Act is not tenable as the power extends beyond levying of license fee and duties. The Financial Commissioner is competent to frame rules with regard to the recovery of salaries of Government excise establishment posted at the distillery of the petitioners and, therefore, Rule 16 of the Punjab Distillery Rules, 1932 framed under Section-21 read with Section-59 of the Excise Act does not travel beyond the authority or sanction of law as alleged by the petitioners. Section 21(d) (11) of the erstwhile Act duly authorizes the Financial Commissioner to make rules regarding any other matters connected with the working of distilleries or breweries and therefore, the Financial Commissioner is empowered to frame such a rule as Rule 16 above. Section 28 (2) (b) of the Himachal Pradesh Excise Act, 2011 which deals with the matter in hand is being quoted below:

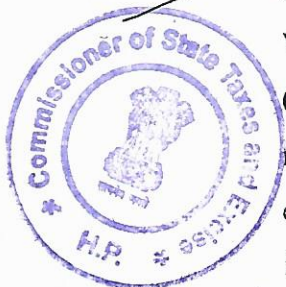
“28. Fees and other conditions for grant of licenses, permits and passes.—
(1) Every license, permit or pass, under this Act, shall be granted— (a) on payment of such fees, if any, (b) in such form and containing such particulars, (c) subject to such restrictions and on such conditions, and (d) for such period, as the Financial Commissioner may direct. (2) For the purposes of sub-section (1), the power of the Financial Commissioner to issue directions shall include the power to direct the licensee of a distillery, brewery, winery or warehouse to- (a) provide free accommodation to the Excise Officer concerned at or near the licensed premises, failing which to pay to the State Government the rent and other charges for such accommodation as may be fixed by the Financial Commissioner; and (b) pay to the State Government the costs, charges and expenses, including salaries and allowances of such Excise Officers, which the State Government may incur in connection with the supervision of such distillery, brewery, winery or warehouse.”

This section empowers the Financial Commissioner to issue directions to the licensee of a distillery, brewery, winery or warehouse to pay to the State Government the cost, charges and expenses, including salaries and



allowances of such excise officers, which the State Government may incur in connection with the supervision of such distillery, brewery, winery or warehouse and therefore, the Financial Commissioner is empowered to frame such a rule as Rule 16 above and issue directions as contained in Section 28(2)(b) of the Himachal Pradesh Excise Act, 2011. As such the action of the respondent is liable to be upheld. Under the above disputed Rule 16, the salary realized by the respondents is a cost of supervision and establishment of excise staff posted at the premises of the petitioners. The provisions of the Excise Act and rules made thereunder leave no manner of doubt that it was open to the respondents to grant the exclusive privilege of manufacturing and selling liquor etc. to the petitioners only provided it was, apart from making any other payment, also willing to pay the salaries and allowances referred to in Rule 16 of the Punjab Distillery Rules, 1932. The respondent State has acted in a fair and just manner and there is nothing unreasonable and unjust to demand reimbursement of salary expenses of the excise staff from the petitioners.

10. In **Sadiq Bakery Vs State of Andhra Pradesh and Others (1988) 68 STC, 167**, it has been held that "Economic wisdom of a tax or lack of it is within the exclusive domain of the legislature". The freedom of the legislature is conceded not only in the choice of Articles to be taxed but also as regards the manner and rate of taxation, e.g. prescribe different rates for different categories of persons, transactions or objects. **The Himachal Pradesh General Industries Corporation, Mehatpur, District Una which has been exempted** from payment of expenses on account of the salaries of the Government Excise Establishment is an instrumentality of the State and therefore Article 14 of the Constitution is not attracted in the present case. Therefore the petitioners are not being discriminated as alleged. Any special circumstances permit a greater latitude to the State in matters of classification under the fiscal or taxation statutes and consequently the legislature has widest possible discretion and is entitled to pick and choose districts, objects, persons, methods and even rates for taxation (N. Venugopal Ravi Verma Rajah Vs. Union of India (1969) 74 ITR, 49 (SC). It is well settled that the presumption that the classification is reasonable is enhanced in the case of laws of taxation and laws regulating economic activities as distinguished from laws touching civil rights, e.g. freedom of speech, religion etc. (**Garg Vs. Union of India, AIR 1981 SC,**




2138). Equally so as held in **Charanjit Lal Chaudhary Vs. Union of India (1951) SCJ, 29** "*It must be admitted that the guarantee against the denial of equal protection of laws does not mean that identically the same rules of laws should be made applicable to all persons within the territory of India in spite of differences of circumstances and conditions.....*". Thus, the plea of discrimination and violation of Article 14 of the Constitution as raised by the petitioners is entirely misplaced and requires to be dismissed.

11. In view of the expenditure incurred by the Government to maintain the requisite excise staff at the distillery premises of the petitioners as contemplated by the relevant provisions of the Act and Rules would not become illegal or vulnerable; the respondents are entitled to claim payment of salary of the excise staff in view of the law laid down by the Hon'ble Apex Court in **M/s KCT Drinks Ltd. 2003. (2) SCR** wherein it has been held that the condition empowering the State Government to recover the actual cost of supervisory staff posted at the premises cannot be said to be in any way illegal or *ultra vires* as it constitutes the price or consideration which the Government charges from the licensee for parting with its privilege and granting license, still holds the field. It is further reiterated that it was open to the petitioners to refrain from taking any license under the Act and Rules if it was not willing to pay the price as required by the Government for the grant of privilege to manufacture and sell intoxicants.
12. In view of above discussion, interpretation of the provisions of the Act and Rules in above quoted judgments and law laid down by the various Courts including the Hon'ble Apex Court, the provisions in the Acts and Rules regarding demand for salary by the respondent are legal, non-discriminatory and justified. The representations of the petitioners, after thorough examination, are rejected accordingly. All the parties be informed accordingly. Files after due completion be consigned to records.



Announced: 24-06-2020


Financial Commissioner (Excise),
Himachal Pradesh.

13480-88
Endst. No. FC (E) /Reader-Appeals/

/2020-21 Dated: 25-06-2020

Copy forwarded to:

1. M/S Rangar Breweries Limited, 1 & 130, Industrial Area, Mohatpur, Distt. Una, Himachal Pradesh -171315
2. M/s Tiloksns Brewery and Distillery Manthapal, Nahan, District Sirmour
3. M/s K.M Distillery Pvt Ltd, Sector-5, Parvahoo, Solan.
4. M/s Hno Queen Distillers & Bottlers Vill Kunani P.O. Tippet Teh Barsar Distt Hamirpur H.P.
5. Ms. VRV Foods Ltd. PLOT NO 2 PHASE 111 SANSARPUR TEARACE DISTT KANGRA HIMACHAL PRADESH HP 173212
6. M/s Basandrai Bottlers Pvt. Ltd. Industrial Area, Ner Chowk (Rati), Distt. Mandi Himachal Pradesh.
7. Shri S.K. Awasthi, Advocate, House No.146/9, Bhojpur Bazaar, Mandi Distt. Mandi (H.P.)
8. Sh. R. N. Sharma, Advocate, H. No. A-157, Sec. 3, (New) Shimla-9
9. Sr. Law Officer, Legal Cell HQ.


Reader to the
Financial Commissioner (Excise),
Himachal Pradesh.