CASE NO.:
Appeal (civil) 2124 of 2007

PETITIONER:
M/s Co-operative Company Ltd

RESPONDENT:
Commissioner of Trade Tax, U.P

DATE OF JUDGMENT: 24/04/2007

BENCH:
S.B. Sinha & Markandey Katju

JUDGMENT:
J U D G M E N T
[Arising out of S.L.P. (Civil) No. 13194 of 2006]

S.B. SINHA, J :

Leave granted.

Appellant is a co-operative society registered under the U.P. Co-operative Societies Act. It carries on business of manufacture and sale of India Made Foreign Liquor (for short, 'IMFL') and country liquor.

In respect of the assessment year 1989-90, the books of accounts maintained by it were rejected by the Assessing Authority, inter alia, on the premise that tax would be payable in respect of bottles being containers of the country liquor. An appeal was preferred thereagainst by Appellant before the Deputy Commissioner (Appeal) and by reason of an order dated 11.01.1994, the said appeal was allowed in part holding that no sales tax could be imposed on the bottling charges for country made liquor. A Second Appeal thereagainst was preferred before the Trade Tax Tribunal by the Revenue, which was dismissed. A Revision was preferred before the High Court against the said judgment of the Tribunal and by reason of the impugned judgment, the High Court opined that bottling charges are part of the turnover and are liable to tax.

Mr. K. Radhakrishnan, the learned Senior Counsel appearing on behalf of Appellant, would submit that the High Court committed a serious error in passing the impugned judgment insofar as it failed to take into consideration :

1) The assessee is not a dealer in bottles as it does not carry on any business therein.
2) There being no other alternative, bottles are used as a cheap and convenient mode of transport and sale of country made liquor.
3) Amounts of Rs. 2.60, Rs. 2.30 and Rs. 1.57 represent only the charges for P.P. caps, sales and filling charges, which are collected under the head of bottling charge and, thus, the same is a payment for the job work undertaken for packing the country made liquor.
4) Neither there is any sale of bottles nor any price is charged therefor.
5) There is no express or implied agreement to sell bottles.
6) The department has not discharged its burden to prove that there was an implied agreement to sell the bottles.
7) The purchasers were purchasing only country made liquor and the appellant had only been selling the same.
8) Cost of packing material is very less and insignificant as compared to the cost of country made liquor and price of the goods is the same with or without bottles.
9) Tax on bottling charges is sought to be recovered only from tax free country liquor, and in the course of sale of IMFL, the sale of bottle has not been held to be a separate sale and, thus, double standards

adopted by the department is not justified.

10) Section 3AB inserted in the U.P. Trade Tax Act, 1948 (for short, 'the Act') on 01.08.1990, being clarificatory/declaratory has retrospective effect.

The learned counsel has placed strong reliance on a decision of the Allahabad High Court in Chhatta Sugar Company Ltd. v. Commissioner, Trade Tax, U.P., Lucknow [124 STC 33], in support of the said contention.

Mr. Dinesh Dwivedi, the learned Senior Counsel appearing on behalf of the respondent, on the other hand, would submit that as sale of bottles finds place in Entry 20 in the Scheduled appended to the Act, despite the fact that no sales tax is payable on country liquor, the assessee would be liable therefor having regard to the definition of 'turnover' as contained in Section 2(i) of the Act.

A notification was issued on or about 07.09.1981 by the State of Uttar Pradesh in exercise of its power conferred upon it under the proviso appended to clause (e) of sub-section (1) of Section 3-A of the U.P. Sales Tax Act, 1948, in terms whereof glass bottles and phials, other than hand made glass phials is exigible to tax @ 4% have been included in Entry 20 thereof.

Appellant herein is a dealer of country liquor. It also carries on business in IMFL. Curiously, whereas in respect of IMFL, no sales tax has been levied on bottles, such a levy is sought to be made on bottles for sale of country liquor. Business in country liquor is res extra commercium. It is governed by the provisions of the U.P. Excise Act. Each stage of manufacture, bottling, distribution and sale of country liquor is governed not only by the provisions of the U.P. Excise Act and the rules framed thereunder, but also the terms and conditions of licence.

It is not in dispute that Appellant charged from his customers a sum of Rs.2.60, 2.30 and Rs.1.57 under the heading "P.P. Caps, Seal and Filling'. The question which arose for consideration was as to whether imposition of such charge would amount to the charge of price of the bottles as contra-distinguished from the bottling charges.

The Assessing Officer found the same to be exigible to sales tax, despite noticing that there existed a dispute as to whether sale of bottles was admitted or the charges levied were bottling charges, it proceeded to hold :

"\005Thus, it is clear that for this purpose the bottles purchased from outside the province has been used. In view of the aforesaid, as far as the question of tax liability on the amount of aforesaid bottles is concerned, as per the order of the Commissioner Excise the rates of 2.30, 2.20 and 2.10 which has been fixed for the bottles of 750 M.L. 375 ML and 180 ML capacity is completely for the empty bottles for the sale of country liquor. As far as the price of these empty bottles under these charges is concerned, the alleged labour charges with regard to the use of caps cork and labelling at different rates is negligible in comparison to the price of the bottles of the assessee and how much amount with regard to this work is included in the said rate of 2-30, 2.20 and 2.10 has not been mentioned in the aforesaid order of the Excise Commissioner. In this way, the recovery of the amount by the assessee under the head of bottling charges is the sale of cap and cork and labelled empty bottles in a separate contract under the definition of Section 2-H of the Provincial Sales Tax Act. As far as the question of two judgments referred by the assessee is concerned, the facts of the aforesaid judgments were not relating to the

bottling charges as the fact of this case. In the case of M/s Gannon Dunkerley & Co., the Hon'ble Supreme Court has held that to constitute sale, the existence of two parties, transfer of goods and passing of consideration from purchaser to seller for this purpose is necessary. These all facts are present in the case under consideration and in view of the same the amount shown as the bottling charges, is the sale of label, cap & cork used on the bottle. Under the case under consideration, the assessee has shown the price of the bottles as bottling charges and has not admitted the sale of the bottles, while amount recovered in the form of bottling charges is the clear cut sale of bottles\005"

The Appellate Authority, on the other hand, held :

"It is clear on the basis of the aforesaid principles that the bottling charges have not been taken due to the sale because in this case, the cost of the packing material is very less than the price of the main material and the appellant had no other business alternative that he could sale and transport the liquor without packing materials and there was no relaxation in price for the purchaser of the liquor in case of absence of the packing materials. Therefore, the sale of packing material could not be held as a separate sale agreement and in case of sale no sales tax could be imposed on the bottling charges.

It is also pertinent to mention here that the sale of foreign liquor and the sale of bottles have not been held to be a separate sale and the same rate has been imposed over the same. The double standard adopted by the Tax Assessment Officer in the same case shall not be held justifiable."

The Trade Tax Tribunal opined :

"As regards the bottling charges, we are of the opinion that the assessee is neither a dealer in bottles nor does any business of bottles. The bottles have been used by the assessee only as a cheap and convenient mode of transport, since there was no commercial alternative available, the amount of 2.60, 2.30, 1.57 only represents the charge for P.P. Caps, seals, labels and filling charges and not for bottles and this charge has been collected under the head of bottling charges and the same does not represent any cost of the bottles, label etc. It was merely a payment for the job work undertaken for packing the liquor, since no price was charged for bottles, there can be no sale of bottles as was held by the Hon'ble Court in the case of State of Madras v. Ganon Dunkerley & Co. Ltd. (1958) STC 383 S.C.

The Hon'ble Supreme Court and the various High Courts have repeatedly held that it is the onus of the department to prove that an implied agreement to sell existed and how the price has been charged for the packing material. The assessee was required to prove negative. This burden has not been discharged successfully by the department. Therefore, the assessment to tax on this point was totally illegal. The inference of alleged implied sale is baseless since firstly no price for bottles is charged and whatever was

the cost of bottles, it goes into the overheads of and is debited to the profit and loss account. Moreover, the packing material, which is used by the assessee is a bare minimum necessary as the assessee has no other commercial alternative."

Differing with the findings of fact arrived at by the Appellate Authority as also the Tribunal, the High Court, in exercise of its revisional jurisdiction, however, in its judgment which is being impugned before us proceeded on the basis that in view of the definition of 'turnover' as contained in Section 2(i) of the Act, and also the fact that the liquor could not be sold without packing, a contract of sale of bottles would be presumed, holding :

"The aforesaid two decisions of the Apex Court clearly hold that in case where the goods are sold in packed form, there is implied contract for sale of material even if the price are separately charged for. It has been further held that the packing charges charged for the packing material and for labour charges etc. falls within the purview of "any sums charged for anything done by the dealer in respect of the goods at the time of or before the delivery thereof" and thus, it is the part of turnover. Bottling of liquor is an integral part of the process of manufacturing. Liquor becomes marketable only after bottling. Liquor can not be sold without packing. Thus, the packing charges are liable to be included in the turnover and liable to tax. I do not agree that bottling charges is a delivery charges."

There is no finding by the High Court that there was an implied condition of sale in regard to sale of bottles. The High Court while arriving at the said finding did not deal with the question as to whether the charges levied by Appellant from its customers, which admittedly stand approved by the Excise Authority, represent bottling charges or sale of bottles.

A contract of sale of goods must be construed having regard to the terms and conditions thereof. A person purchasing a property must know as to what he had bargained for. The parties might not have bargained for the containers but might have bargained only for the contents.

In absence of any stipulation made in the contract of sale for the purpose of levy of sales tax or otherwise, the Revenue Authorities must arrive at a finding as to whether there had been any implied condition of transfer, burden of proof wherefor would be on the Revenue. Consideration of a part of goods may be held to be a condition precedent for constituting a sale, but therefor each case must be judged on its own facts.

The High Court, in our opinion, failed to take into consideration the fact that the question as to whether there had been an implied contract for sale of bottles and any amount has separately been charged therefor was required to be determined. Each case is required to be determined on consideration of the relevant materials placed on record by the parties.

The Assessing Officer proceeded on the basis that the assessee admitted to have levied charged for the bottles. It, however, failed to make a distinction between 'bottling charges' and the 'price of bottles'. When the excise articles are sold in a bottle, it must have a label containing the requisite informations as envisaged under the Excise Act and the Rules framed thereunder or the terms and conditions of licence authorising the dealer to deal with in the commodity in question. The Assessing Officer did not proceed on the basis that the price of bottles form a part of the turnover as contended by Mr. Dwivedi.

The question came up for consideration before different High Courts. We may notice only a few of them.

In Commissioner of Sales Tax, Madhya Pradesh, Indore v. The Bhopal Sugar Industries Ltd. [48 STC 45], Division Bench comprising of G.P. Singh and U.N. Bhachawat, J., (as the learned Judges then were) opined :

"7. Sales tax on gunny bags can be imposed only on the basis that the assessee sold the bags to the purchasers of sugar. There was no express agreement for sale of gunny bags. The Tribunal has stated that there was no evidence to show even an implied agreement for sale of gunny bags. The learned Government Advocate, who appeared for the department, however, submitted that the other facts stated by the Tribunal lead to the inference that there was an implied sale of gunny bags. It is this argument which we have to examine. The property in the gunny bags no doubt passed to the purchasers of sugar and the gunny bags did not become useless in the hands of the purchasers. But from this alone it is not possible to hold that there was an implied sale of gunny bags. When goods packed in containers are sold, the property in the containers no doubt is transferred to the purchaser. But before holding that there was an implied sale of containers, one has to exclude the possibility that the containers were used by the dealer as a convenient and cheap mode of transporting the goods to the purchaser without charging any price for them. It has also to be kept in mind that the burden of proof that there was an implied sale of packing material or container is on the department and the assessee is not required to prove the negative. Viewed on these principles, in our opinion, the facts do not warrant the conclusion of implied sale of gunny bags. It is not practicable for a manufacturer of sugar like the assessee to sell sugar in loose and the assessee has to use some form of packing material for transporting the sugar sold by it to the purchaser. Indeed, the mode of packing sugar in gunny bags was prescribed under the Control Order which was binding on the assessee. The assessee did not charge any separate price for gunny bags. The price of 100 kgs. of sugar packed in gunny bag was fixed under the Control Order and it is this price which the assessee charged from the purchasers. May be, that in fixing the price of 100 kgs. sugar packed in gunny bag, the Government took into account the price of the packing material just as it must have taken into account manufacturing cost and other incidental charges and expenses of the producer. But from this alone, it cannot be said that the assessee charged the price of gunny bags from the purchasers or that there was an implied sale of gunny bags to the purchasers. The Sugar Control Order authorises the Government to fix the ex factory price of sugar and not the price of gunny bags. The price fixed by the Control Order and charged by the assessee was the price of sugar. The cost of gunny bag is insignificant as compared to the cost of sugar packed in it. Having regard to all these circumstances, in our opinion, it is not possible to infer that there was any implied sale of gunny bags."

Yet again in Commissioner of Sales Tax, M.P. v. Swadeshi Cotton and Flour Mills Ltd. [46 STC 138], Sohani, J., (as His Lordship then was) stated the law thus :

"4. Having heard the learned counsel for the parties, we have come to the conclusion that this reference must be answered in favour of the assessee and against the department. As regards the grievance that the Board had not given any clear findings, all that we can say is that no such grievance can be made in view of the question referred to us. That question is based on the assumption that there was material before the Board for giving a finding and that finding was accordingly given by the Board that there was no implied sale of the packing materials. In point of fact, the question referred to this Court is a question of fact. The burden was on the department to prove that there was an implied sale of the packing materials. In the instant case, it was not disputed that there was no express agreement for the sale of the packing materials. The assessing authorities had not found that price was separately charged for the packing material. The contention advanced on behalf of the assessee before the Board that the price charged by the assessee for the cloth was either on the basis of meterage or on the basis of weightage was impliedly upheld by the learned Member as he relied upon the decision reported in Binod Mills Co. Ltd. v. Commissioner of Sales Tax 1971 M.P.L.J. 1009, where a similar finding had been given. It must, therefore, be held that the Board had found that the burden to prove that there was sale of the packing material was not discharged by the department. In our opinion, therefore, the Board rightly relied upon the decision reported in Binod Mills Co. Ltd. v. Commissioner of Sales Tax 1971 M.P.L.J. 1009 for coming to the conclusion that there was no implied sale by the assessee of the packing materials."

This Court in Hyderabad Deccan Cigarette Factory v. The State of Andhra Pradesh [17 STC 624], observed :

"This passage indicates that the Tribunal rejected the contention on the ground that the value of the packing materials must have been taken into consideration in fixing the price of the cigarettes. But that reasoning does not answer the contention that howsoever the price was fixed, the cigarettes were sold, whether packed in cardboards or wooden boxes, in or outside the State of Andhra Pradesh, at the same rate. The High Court also held that though there was no express contract to sell the packing materials and the packets separately, such a contract was implicit in the contract for the sale of the goods. This implied agreement was based on the fact that the packet cigarettes were sold at a price and on the surmise that in fixing the price the assessee might have taken into consideration the cost of all the materials used in the packing. The High Court also ignored the aforesaid contention of the assessee. It also did not consider the relevant material to come to the conclusion that the assessee agreed to sell the packing materials to the customers.

A perusal of the orders of the various authorities and the High Court shows that a simple question of fact has been sidetracked by copious citations. Whether there was an agreement to sell the packing materials is a pure question of fact and that question cannot be decided on fictions or surmises. That is what has happened in this case. The Commercial Tax Officer invoked a fiction; the Assistant Commissioner of Commercial Taxes relied

upon the doctrine of "finished product", the Appellate Tribunal relied upon surmises; and the High Court on the principle of implied agreement\005"

Definition of 'turnover', in our opinion, for the purpose of determining the question, is not very relevant. Interpretation clause must be construed having regard to the purport and object of the Act it seeks to achieve. The term 'turnover' may contain several ingredients. One of the ingredients of the said term, however, cannot be taken in isolation for the purpose of imposition of levy. Imposition of tax would be on the total turnover, assuming that the prices of the bottles were to be included in the price of the country liquor, provided one is leviable. If an exemption has been granted, it would be on sale of the articles in a deliverable form. There exists a serious dispute as to whether for the purpose of levying sales tax, a part of the commodity which is sold as a composite whole would come within the purview of the Act when sale of two different commodities can be bifurcated for levy of tax.

Containers of the principal commodity which is the subject matter of the contract of sale may have to be taken into consideration for the purpose of arriving at the total turnover, but even for that purpose there has to be an element of ad idem of mind between the purchaser and seller. If by reason of express contract or implied contract, the containers are also sold, indisputably the same would be exigible to tax, as has been held in Commissioner of Taxes Assam v. Prabhat Marketing Co. Ltd., Gauhati [AIR 1967 SC 602], but it is difficult to accept the contention of Mr. Dwivedi that even in absence of such a contract, sales tax would be leviable. Reliance has been placed by Mr. Dwivedi on Jamana Four and Oil Mills (P) Ltd. v. State of Bihar [(1987) 3 SCC 404], wherein this Court was not dealing with a situation of the present nature. It was held :

"3. The dealer filed a revision before the Tribunal and contended that the demand of Sales Tax payable at different rates on the calculated turnover of gunny bags was not at all warranted as no price had been charged for the containers. The Tribunal found:
(1) The dealer transferred the property in the gunny bags, the packing material, to the purchasers for price.
(2) The price of the gunny bags was included in the consolidated rates of price charged by the dealer.
(3) There was an implied agreement for the sale of gunny bags between the dealer and the different purchasers to whom the wheat products were supplied.
(4) The transfer of gunny bags was impliedly covered by the contract of sale with regard to the wheat products.
On these findings the Tribunal held:
We hold that the learned lower courts were justified in levying tax at a different rate on the turnover on account of sale of gunny bags in which the wheat products were sold.
It further found:
The learned Deputy Commissioner has given a direction for determination of the turnover on account of sale of gunny bags. On being asked the applicant accepted that the accounts maintained by him would reveal the exact number of gunny bags used in the transaction of sale under consideration as also the price of the same. Hence we direct in modification of the orders passed by the learned Deputy Commissioner in this behalf that the learned Assessing Officer should ascertain from the accounts, the turnover on account of sale of gunny bags as container of wheat products during the period under consideration and assess tax thereon at the prescribed rate of 4=per cent The balance turnover shall be assessed at 2 per cent."

Reliance has also been placed by Mr. Dwivedi on M/s Chhatta Sugar Company Ltd., Mathura v. Commissioner of Sales Tax [1991 UPTC 341], wherein a learned Single Judge of the Allahabad High Court, without any discussion, opined that the containers would also be taxed.

Inclusion of bottles as a separate item in the notification dated 07.09.1981, in our opinion, is not relevant. Appellant is not a dealer of bottles. Had it been a dealer of the bottles, he might have been exigible to sales tax in terms of the said provision.

Thus, without adverting to the question as to whether there had been an implied sale, Entry 20 will have no role to play.

We may also consider the matter from another angle. A tax may be leviable at different rates. Definition of 'turnover' having undergone an amendment and being expansive in nature, would it be permissible to segregate it to make different commodities for the purpose of imposition of tax at a higher rate, would, in our opinion, merit consideration. We are not oblivious of the fact that if the sale is in relation to two different commodities, it may be permissible to levy tax at different rates, but not when the definition of 'turnover' includes a wide range of subjects including the package. Only for the purpose, the concept of implied contract of sale would assume significance.

We, however, are not impressed with the arguments of Mr. Radhakrishnan that Section 3AB of the Act introduced in the statute by reason of the U.P. Trade Tax Tax (Amendment) Act, 1991 is clarificatory in nature. The said amendment came into force with effect from 25.04.1990. The assessment year, as noticed hereinbefore, is 01.04.1989 to 31.03.1990. The Act having been brought into force from a particular date, no retrospective operation thereof can be contemplated prior thereto. The said provision furthermore contains a substantive provision which is itself a pointer to the fact that for the earlier period packing materials would not be exempted merely because main commodity is exempted from tax, but albeit subject to the condition that there was an agreement to sell in respect thereof. The amendment sought to deal with a matter which created some problem in implementation of the Act.

We, therefore, are of the opinion that the matter requires reconsideration by the High Court. The High Court must on the basis of the materials available on records arrive at a finding as to whether there existed any implied contract for sale and/or whether in effect and substance keeping in view the fixation of price of different materials by the excise authorities in terms of the U.P. Excise Act and/or rules framed thereunder any separate charges have been levied for prices of the bottles separately or not.

For the reasons aforementioned, the impugned judgment cannot be sustained, which is set aside accordingly. The appeal is allowed. The matter is remitted to the High Court for its consideration afresh. No costs.