

THE HON'BLE SRI JUSTICE K.C. BHANU

AND

THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

Special Appeal No.9 of 2001

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JUDGMENT: (per Hon'ble Sri Justice M. Seetharama Murti)

This appeal under Section 23(1) of the Andhra Pradesh General Sales Tax Act, 1957 ('the Act' for short) read with Rule 41 of the Rules under the said Act by the appellant/assessee is directed against the orders dated 05.05.2001 of the Commissioner, Commercial Taxes in CCT's.Ref.L.V(2)/2103/98-2.

2 .We have heard the submissions of the learned Senior Counsel for the appellant/assessee ('the appellant' for brevity) and the learned Special Government Pleader for Taxes representing the Commissioner/respondent ('the respondent' for short). We have perused the material record.

3. The facts, which are necessary for consideration, in brief, are as follows: -

The appellant is a registered dealer on the rolls of the Commercial Tax Officer, Seetharampuram, Vijayawada. The appellant is engaged in the business of manufacture and sale of cement. Cement is taxable under item 18 of first schedule; and, HDPE bags are taxable under the then relevant item 188 of first schedule to the said Act. The appellant was finally assessed for the assessment year 1991-92 under the APGST Act by the Commercial Tax Officer concerned ('the CTO' for short) and the CTO had passed final orders dated 17.03.1996 levying tax at the rate of 14.05% on the turnover of Rs.4,80,86,526/- representing the amount received by the dealer towards the sales of packing material i.e., HDPE bags/gunnies in which the cement was packed and sold. The CTO had thus levied tax at a higher rate i.e., on a rate on par with the rate of tax that was applicable to the sale of cement in that assessment year by invoking the provision of Section 6-C of the Act. Aggrieved of the said orders of the CTO, the appellant had preferred an appeal before the Appellate Deputy Commissioner (CT) ('the ADC' for short) by *inter alia* contending that the sale of packing material is separate from the sale of cement and that the sale of packing

material and cement is not an integrated sale. The appellant had further contended before the ADC that the turnover of packing material shall be subjected to tax at the rate applicable to the packing material/HDPE bags and that exemption shall be allowed on the sale of the said packing material to the extent purchased from other local registered dealers and sold along with the cement. The ADC had accepted the contentions of the appellant and had allowed the appeal by his orders dated 22.03.1997. Pursuant to the orders of the ADC, the CTO had given effect to the orders of the ADC and had passed consequential orders dated 22.04.1999. The respondent, having examined the CTO's original order and the ADC's order, was of the view that the order of the ADC is not in accordance with law. He had, therefore, entertained a revision *suo motu* in exercise of the powers vested in him under Section 20(1) of the Act and had issued a show cause notice proposing to revise the order of the ADC in regard to the turnover of Rs.4,80,86,526/-. After giving an opportunity to the appellant to file objections and make submissions, the respondent had passed the impugned orders confirming the proposal in the show cause notice. The respondent had finally held that the appellant had failed to prove that there is a separate sale of packing material and that therefore, there is only one integrated sale i.e., sale of cement with bags and hence, the entire amount collected by the appellant company in its invoice is to be taxed at the rate applicable to the cement. Accordingly, the respondent had set aside the orders of the ADC and had restored the original order of the CTO. Therefore, the aggrieved appellant is before this Court.

4. In this factual milieu, the learned senior counsel while narrating the facts, which lead to the filing of this appeal, which are not in dispute, had contended as follows: -

The sale of cement and the packing material, in which the cement was packed and sold, are two independent and distinct sales and, therefore, the said two commodities should be taxed independently at the relevant rates applicable as per the relevant entries in the schedule to the Act. Packing material, which is purchased from other local registered dealers, should be granted exemption in the hands of the appellant as second or subsequent sale. The sale invoice is itself a contract between the appellant and its buyer. The buyers had consciously paid for cement and packing material on independent terms. There is an express/implied sale of packing material. The appellant had separately charged for cement and packing material in the invoice. The payments were made accordingly. The HDPE bags are specifically taxable under the then relevant item 188 of first schedule. There will not

be any chemical or physical change in the bag after emptying the cement. The same are durable and re-usable. The packing material is used for convenience of transport; and, the quantity of goods as such is not dependant upon packing. The cement was sold in quantities of metric tonnes as is evident from the invoice. The rate of cement and the cost of packing material are separately shown in the invoice. The facts of the case and the documents produced clearly established that there is a separate sale of packing material and there is no integrated sale of cement with HDPE bags/packing material. The appellant has not provided the bag free of cost considering the significant cost of the bag. The respondent did not properly appreciate the facts, the legal position and the ratios in the precedents and had, therefore, erroneously held against the appellant both on facts and on law. The appellant's specific case is that as per the ratio in the decision of the Hon'ble Supreme Court in the case of **Raj Sheel & Others v. State of A.P. and others [1989 74 STC page 379]**, the packing material has to be taxed on its own footing if there is an express or implied sale of packing material. It is the case of the appellant that there is a separate sale of HDPE bags/packing material. Hence, the second sale of packing material has to be exempted and the first sale of packing material has to be taxed at the rate of tax applicable to the packing material (gunnies)/HDPE bags. However, the tax was levied on first and second sales of packing materials on the rate applicable to the contents i.e., cement. The ADC had rightly allowed the appeal by correctly appreciating the facts and following the correct principles of law. In appellant's own cases for earlier assessment years, the Sales Tax Appellate Tribunal had upheld the contentions of the appellant on similar issues based on similar facts and had remanded the matters to the CTO; and, after such remand, the CTO had granted relief to the appellant and the said orders have become final. The respondent did not grant set off of tax paid on HDPE bags as per the terms of G.O.Mos.No.374 dated 26.04.1987. The recitals in the sale invoices are evidence of nature of transaction. Hence, packing material is not liable to tax at the rate of the content i.e., cement. It is pertinent to note that there is an amendment to entry 18 of Schedule I with effect from 01.08.1996. Though the said amendment is operative from 01.08.1996 the legislature itself recognizes that there can be separate sale of packing material and cement. Therefore, the order of the respondent is liable to be set aside and the order of the ADC and the consequential order of the CTO are to be restored.

5. On the other hand, the learned Special Government Pleader would submit as

under:

The respondent having examined the factual aspects of the matter had recorded a categorical finding that the appellant had failed to prove that there is a separate sale of packing material. The said finding of fact needs no interference by this Court. In case of commodities like Cement, the packing and the tolerance requirements of the packing material shall be in accordance with relevant provisions of the Standards of Weights and Measures (packaged commodities) Rules, 1977 ('the Rules' for short) and the standards prescribed by Bureau of Indian Standards ('the BIS' for short). The manufacturing process of cement in this case would show that the cement ultimately produced is being conveyed to automatic electronic packers and is being packed in 50 Kg polythene bags for dispatch in trucks. As per relevant Rules and the standards prescribed, any cement shall be packed in bags of whatever kind suitable and be delivered in bags/packing material and even the bags like HDPE bags must conform to the standards. Therefore, the contention that the cement and the bags are separately sold cannot be countenanced. The sale must be construed as an integrated sale. The question whether there is an agreement to sell packing material is a pure question of fact and it depends upon the circumstances that may be found in each case. Therefore, it is the duty of the appellant to discharge the burden of proof and establish that there is an agreement to sell packing material separately. Except the invoice, which is being stated to be a contract by itself, there is admittedly no agreement in that regard. Even though the invoice shows sale of cement in quantity of tonnes and sale of packing material separately, the cement sold was delivered in bags and the cement and packing material has gone to the hands of the purchaser as an integrated commodity. It is not feasible for the appellant to sell cement to various customers in loose condition and a commodity like cement cannot be sold unless it is packed in a suitable packing material as per the prescribed norms. Looking at the nature of article sold i.e., the cement, there is no option either for the seller or the purchaser but to sell or purchase cement except in packed condition. The Rules and the BIS do not allow the sale of cement contrary to the Rules and Standards. Considering that the commodity sold is cement, it cannot be accepted that there are two different and distinct sales of cement and bags.

6. (a) In support of his submissions, the learned Special Government Pleader had

placed strong reliance on the following decisions: (i) **Bengal Electric Lamp Works Ltd., v. State of Gujarat**; (ii) **Dalmia Cement (Bharat) Limited v. State of Tamil Nadu**; and (iii) **Annapurna Insecticides Industries v. Commissioner of Commercial Taxes**.

6. (b) On the other hand, the learned Senior Counsel for the appellant had placed reliance on the following decisions:

1. **Raj Sheel & Others v. State of A.P. and others**
2. **Priyadarshini Cements v. State of A.P**
3. **Commissioner of Taxes, Assam v. Prabhat Marketing Co., Ltd.,**
4. **Jamana Flour & Oil Mill (P) Ltd., v. State of Bihar**
5. **State of Tamilnadu v. EID Parry (India) Ltd.,**
6. **State of Tamilnadu v. Subramania Chettiar**
7. **Annapurna Insecticides Industries v. Commissioner of CT**
8. **The Government of Madras v. Simpson & Co.Ltd.,**
9. **Hindustan Coco Cola Beverages Pvt.Ltd., v. State of A.P.**
10. **Commissioner of Sales Tax., M.P. v. Gill & Co.,Ltd., Ujjain**

7. Now the points that arise for consideration in this appeal are:

(i) **Whether the appellant/dealer had established that the sale of cement and the containers/bags is not an integrated sale and that the sale of cement and HDPE bags/packing material i.e., the containers are distinct and separate sales and that there was a contract express/implied for such separate sales of cement and the bags/packing material?**

(ii) **Whether, in the facts and circumstances of the case, the Order of the Commissioner/respondent is liable to be set aside and the order of the ADC and the consequential order of the CTO are to be restored as contended by the appellant/dealer?**

8. POINTS 1 and 2:

8. (a) There is no dispute with the facts, which are narrated supra. We have given

earnest consideration to the facts, the submissions and the law applicable. The appellant is contending that there is a contract and that it is the agreement and intention of the parties that the sales of cement and packing material/HDPE bags are distinct and separate sales and that the sale of cement with packing material is not an integrated sale and that therefore, the packing material as well as the contents which are sold independently are to be assessed separately at the relevant rates of taxes applicable to cement and the bags respectively after extending necessary benefits of exemption to the appellant to the extent applicable insofar as the HDPE bags/packing materials are concerned. On the other hand, the respondent had held on facts that the dealer/appellant had failed to establish that the sales of cement and packing material are distinct and separate. Thus, the respondent had held that the sale of cement and packing material is an integrated sale. Before proceeding to determine the issues based on the factual matrix of the matter, it is necessary to refer to the following decisions.

8.(b) In *Raj Sheel v. State of Andhra Pradesh* (4 *supra*) the Supreme Court having regard to the facts of the case had held as follows:

'It is, therefore, perfectly plain that the issue as to whether the packing material has been sold or merely transferred without consideration depends on the contract between the parties. The fact that the packing is of insignificant value in relation to the value of the contents may imply that there was no intention to sell the packing, but where any packing material is of significant value it may imply an intention to sell the packing material. In a case where the packing material is an independent commodity and the packing material as well as the contents are sold independently, the packing material is liable to tax on its own footing. Whether a transaction for sale of packing material is an independent transaction will depend upon several factors, some of them being:

- 1. The packing material is a commodity having its own identity and is separately classified in the Schedule;**
- 2. There is no change, chemical or physical, in the packing either at the time of packing or at the time of using the content;**
- 3. The packing is capable of being reused after the contents have been consumed;**
- 4. The packing is used for convenience of transport and the quantity of the goods as such is not dependent on packing;**
- 5. The mere fact that the consideration for the packing is merged with the consideration for the product would not make the**

sale of packing an integrated part of the sale of the product.’

The Hon’ble Supreme Court having delineated some of the several factors as above, having regard to the facts of the cited case, had observed as follows:

‘We are constrained to observe that no attempt has been made by the tax authorities to ascertain the facts of each case and to determine what were the actual ingredients of the contract and the intention of the parties..... We are unable, in the circumstances, to hold that the cases can be regarded as disposed of finally. It is regrettable but the cases must go back for proper findings on facts to be ascertained on fuller investigation.

In the circumstances, the appeals are allowed, the impugned judgment and order of the High Court in the several cases are set aside and the cases are remanded to the High Court for further consideration and disposal in the light of the observations made by us. In the case of the writ petitions before us, the assessing authority will allow the dealer to show cause and thereafter upon evidence led before it determine the matter.’

In **Vasavadatta Cements v. State of Karnataka and another** the Hon’ble Supreme Court while following the ratio in the above-cited decision, had held as follows: -

‘The appeals are, therefore, allowed and the writ petitions filed by the appellants are disposed of with the direction that the liability of the appellants for sales tax under Section 5(3-D) on the gunny bags/plastic bags in which the cement manufactured by the appellants is packed for sale would have to be determined after investigation into the facts and determining what were the ingredients of the contract and the intention of the parties.’

In the decision in **State of A.P v. Priyadarshini Cements, Hyderabad**, the short question that arose in the Tax Revision Case preferred by the State before the Tribunal was – ‘whether the packing material has to be taxed at the rate at which the contents are taxable’. While confirming the decision of the Tribunal, this Court had held as follows: - **‘We are unable to hold that the Tribunal has decided the question of law erroneously. The TRC is devoid of merits and it is accordingly dismissed.’** It is pertinent to note that the Tribunal in that case followed the decision in Raj Sheel case (4 Supra).

In Hyderabad Deccan Cigarette Factory v. The State of Andhra Pradesh

the facts of the case show that there was no express contract of sale of packing material between assessee and its consumers. Therefore, the question that fell for consideration was – ‘whether the packing materials were the subject of the agreement of sale, express or implied’. The Hon’ble Supreme Court having regard to the facts and the legal position obtaining held as follows: -

‘In the result, the order of the High Court is set aside. The High Court may consider afresh the question whether the packing materials were the subject-matter of the agreements to sell, having regard to the relevant material and in the light of the observations made in the judgment. If in its opinion the necessary material is not on record, it can get a finding from the Sales Tax Appellate Tribunal in that regard.’

In Commissioner of Taxes, Assam v. Prabhat Marketing Co.,Ltd., (6 supra) the respondents sold hydrogenated oil which was exempted from sales tax under the Assam Sales Tax Act. The question involved was this: ‘Whether the value of the containers in which the oils were sold can be assessed to sales tax? The Supreme Court held as follows: -

‘The value of the containers was assessable to sales tax under the Act if there was an express or implied agreement for the sale of such containers and the mere fact that the price of the containers was not separately fixed made no difference to the assessment of sales tax.

The question as to whether there is an agreement to sell packing material is a pure question of fact depending upon the circumstances found in each case.’

In Jamana Flour & Oil Mill (P) Ltd., v. State of Bihar (7 supra) the Supreme Court had considered the ratio in the before mentioned cited case. In **State of Tamil Nadu v. E.I.D. Parry (India) Ltd., (8 supra)** the facts show that the respondent dealer had sold sugar, a controlled and exempted commodity, in gunny bags and chemicals in plastic jerricans. The assessing authority brought to tax an estimated turnover of gunny bags and the turnover of plastic jerricans for the years, which are relevant. He had disallowed the exemption under Section 6(2) of the Central Sales Tax Act, 1956 for failure to file the declarations in form E-1. On appeal, the appellate Assistant Commissioner had allowed exemption on the gunny bags and confirmed the assessment order in other respects. The respondent appealed to the Tribunal

contending for the first time that there was no sale of the polythene jerricans and that the deposits which were collected from the customers therefor were returned when the cans were returned. The department had filed enhancement petitions in respect of the turnover of gunny bags. The Tribunal had dismissed the enhancement petitions and ordered remand of the dealer's appeals in two respects i.e., in respect of the collection of deposit for the sale of chemicals in the polythene jerricans and refund of the same as and when the said cans were returned, besides allowing exemption therefor; and in respect of the exemption claimed on the basis of "E1" forms to consider the genuineness or otherwise of "E1" forms and to grant relief therefor. The High Court of Madras while answering the question – whether the gunny bags, in which sugar – a controlled commodity – is packed and sold is assessable to sales tax, by including it in the turnover of the assessee, when especially sugar is exempt from tax had held as follows:

'On the face of the rationale or reasoning, as projected in the decisions referred to above, it goes without saying that in the instant case also, gunny bags, in which sugar – an exempted commodity – is packed and sold cannot at all be said to be exempt from tax on the ground that the contents of the container are exempt from tax.'

It is not out of place to state that in **Raj Sheel case (4 supra)** the Supreme Court upheld the validity of Section 6-C which was inserted by Act 11 of 1984 and had held that the said provision was only clarificatory in nature and observed that the question whether there was actual sale of containers or not is a question of fact to be determined on the facts of each case. Further, in **Raasi Cement Ltd., v. The Commercial Tax Officer, Miryalaguda** the constitutional validity of Section 6-C after its amendment as amended by Act 22 of 1995 with effect from 01.04.1995 fell for consideration. This Court had upheld the constitutional validity of the provision in the said decision.

The amended Section 6-C as it now stands on the Statute Book reads as under:

6-C Levy of tax on packing material: Notwithstanding anything contained in Section 5, Section 5F, Section 6 and Section 6A, the rate of tax on packing material sold with the goods shall be the same as that of the goods packed or filled, whether or not there is separate sale or agreement for sale for the packing material and the goods packed or filled.

In the present case the assessment year being 1991-1992, the section 6C as it stood prior to its amendment in 1995 is applicable.

Section 6-C prior to its amendment reads as under:

6-C Levy of tax on packing material: Notwithstanding anything in Sections 5 and 6-A, where goods packed in any materials are sold or purchased, the materials in which the goods are so packed shall be deemed to have been sold or purchased along with the goods and the tax shall be leviable on such sale or purchase of the materials at the rate of tax, if any, as applicable to the sale, or, as the case may be, purchase of goods themselves.

8. (c) In the amended new Section 6-C the words ‘whether or not there is separate sale or agreement for sale for the packing material and the goods packed or filled’ were introduced. Therefore, the amended section provides that the rate of tax on packing material sold with the goods shall be the same as that of the packed or filled “whether or not there is separate sale or agreement for sale for the packing material and the goods packed or filled”. The said words were not there in the unamended Section 6-C. A reading of the provisions of the above sections would show that prior to the amendment of the section, it is permissible under law to have an agreement for the separate sale of packing material and the goods packed or filled. A reading of all the cited cases including the cases cited on behalf of the respondent would show that the question now before this court is a pure question of fact and the decision on the issue depends upon facts of this case.

8. (d) As already noted, in the case on hand, except the invoice there is no [other] contract. A reading of the invoice would clearly show that the sale of cement and packing material is not an integrated sale and that the sale of cement and packing material are distinct sales. The invoice on a perusal would lay bare that the cement was sold in quantities of metric tonnes and that the rate of cement and the cost of packing material are separately shown. Therefore, the invoice produced clearly establishes that there is a separate sale of packing material and that there is no integrated sale of cement with HDPE bags/packing material and that the appellant had not provided the bag free of cost considering the significant cost of the bag. Therefore, from the contents of the invoice, the contention of the appellant that there is a separate and distinct sale of cement and packing material appears to be correct.

Then the next question is – ‘Whether the invoice can be construed as a contract? This question need not detain us for long. In **Commissioner of Sales Tax, M.P v. Gill & Company Ltd., Ujjain (13 supra)** and in **Government of Madras v. Simpson and Co., Ltd., (11 supra)** it was held that in the absence of any other material, recitals in invoices will furnish good proof of the intention of the parties relating to the terms of the agreement and that by themselves, they will be inclusive piece of evidence. In **Commissioner of Sales Tax, M.P (13 supra)** the question before the Supreme Court was whether the Railway freight deducted in the bill is not part of the sale price as defined in Section 2(o) of the M.P.General Sales Tax Act, 1958? While answering the question, the Supreme Court had held as follows: -

‘Two things are necessary in order to make the freight a part of the sale price. Firstly, there should be no agreement about charging freight separately and, secondly, it should not be charged separately, but it should be a part and parcel of the total sale price that the assessee-dealer might charge the purchaser-customer. If these two things are present, the amount of freight or other sundry expenses can be said to constitute a part of the sale price. But, if there be other materials to show that there was agreement in this behalf not to charge freight so as to be included in the sale price, in that event, the freight cannot at all be made a part and parcel of the sale price and the bills would certainly constitute inclusive piece of evidence. But they cannot be treated to be a conclusive piece of evidence. After all, the presumption arising on account of the recitals in the bills would be rebuttable and if there be other material, in that event, and on proof of the two things, namely, that there was an agreement not to charge freight as part of the price and that actually it was not so charged, the freight cannot constitute a part and parcel of the sale price as defined by section 2(o) of the M.P. General Sales Tax Act, 1958.’

In the case on hand, there is no rebuttable evidence to rebut the presumption, which can be drawn, on the basis of the invoice which constituted an inclusive piece of evidence. Therefore, on facts we are satisfied that the appellant is able to establish that the sale is not an integrated sale but, the sale of cement and packing material is distinct and separate. Therefore, when there is an agreement to sell separately the packing material and the goods packed or filled, the appellant/dealer can successfully contend that the sale of cement and the sale of packing material are different and distinct.

8.(e) Before parting with the case, it is necessary to advert to and consider the

contention of the learned Government Pleader to the effect that the law never contemplated sale of cement and packing material separately and that the Rules and the specifications of Bureau of Standards of India mandate that cement should be sold in packed condition and that, therefore, the contention of the dealer/appellant that there is no integrated sale of the cement and the HDPE bags/packing material cannot be accepted. In regard to these contentions, suffice it is observed that such a contention cannot be countenanced more particularly in view of the amendment to entry 18 of First Schedule of the Act which came into effect with effect from 01.08.1996 and which reads as under:

S.No.	Description of goods	Point of levy	Rate of tax	Effective from
18.	* Cement (1018)(a) Where the sale price of cement includes the value of packing material.(b) Where the packing material and cement are sold separately and or the sale price of cement does not include the value of packing material.	At the point of first sale in the State. --do--	16 paise in the rupee 20 --do--	01.08.1996 01.08.1996

Therefore, even the legislature contemplated a situation where cement and packing material are sold separately, which is suggestive of the fact that two commodities namely the cement and the packing material can be sold separately. The said entry is relevant to this limited extent in the present context of the matter. Coming to the decisions (1 to 3 supra) relied upon by the learned Government Pleader, in our well considered view, the said decisions are not helpful to advance the case of the respondent as the decision in the instant case has to be made having regard to the facts of the instant case as per the ratios in the decisions, particularly, the decisions of the Supreme Court. The decision in **Bengal Electric Lamp Works Ltd., v. State of Gujarat (1 supra)** was rendered by the High Court of Gujarat. Even in that decision the Gujarat High Court found that the decision was rendered by the Tribunal being very much conscious of the fact that the facts and circumstances before the tribunal were entirely different from the cases cited before it. The decision in **Dalmia Cement (Bharat) Limited v. State of Tamilnadu (2 supra)** was rendered by the High Court of Madras. In this decision, it was pointed out that the proper way to locate the transactions would be to find out whether there was express/implied agreement between the parties to sell the goods along with the packing materials; and, in that case there is an implied agreement to sell magnesite

in gunny bags. In the decision in **Annapurna Insecticides Industries v. Commissioner of Commercial Taxes (3 supra)** this High Court remanded the matter to the Commissioner with a direction to consider the matter afresh taking into consideration the entire correspondence etcetera after giving reasonable opportunity to the assessee in accordance with law. Thus, all the three decisions were rendered on the facts peculiar to the cited cases.

8. (f) Further, it is an admitted fact that in appellant's cases for earlier assessment years, the Sales Tax Appellate Tribunal had upheld the contentions of the appellant on similar issues based on similar facts and had remanded the matters to the CTO and after such remands, the CTO had granted reliefs to the appellant and the said orders have become final. Therefore the contention of the respondent that a different view in the present case based on similar facts is possible cannot be accepted.

9. Having regard to the findings coupled with reasons, we answer point No.1 accordingly holding that the appellant had established that the sale of cement and the HDPE bags/containers is not an integrated sale and that the sale of cement and HDPE bags/packing material i.e., the containers are distinct and separate sales and that there was a contract for such separate sales of cement and the bags/packing material. As a sequel to the said finding, we hold that the appeal is having merit and, therefore, deserves to be allowed and that the impugned order of the Commissioner, which is contrary to facts and legal position obtaining at the relevant time, is liable to be set aside. Points are accordingly answered.

10. Accordingly, the Special Appeal is allowed and the order impugned of the respondent is set aside and the order of the ADC and the consequential orders of the CTO, which were passed pursuant to the orders of the ADC, are restored.

Miscellaneous petitions, if any, pending in this appeal shall stand closed.

K.C. BHANU, J

M. SEETHARAMA MURTI, J

17th April 2015

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