THE HON'BLE SRI JUSTICE NOOTY RAMAMOHANA RAO

AND

THE HON'BLE MRS. JUSTICE ANIS

SPECIAL APPEAL NO. 10 OF 2002

ORDER: (*Per Hon'ble Sri Justice Nooty Ramamohana Rao)*

This special appeal is preferred by the assessee against the orders passed by the Commissioner of Commercial Taxes on 30.01.2002, exercising the power available to him under Section 20 of the Andhra Pradesh General Sales Tax Act, 1957 (for short, henceforth referred to as 'Act'), by setting-aside the order passed by the Appellate Deputy Commissioner, Kurnool on 24.09.1998, who by the said order has partly allowed and partly remanded the appeal.

The appellant/assessee, a manufacturer of alcoholic beverages was aggrieved by the assessment made by the C.T.O-II, Chittoor holding the turn-over of the primary packing material namely bottles and secondary packing material namely cartons and or other similar packing material and other cartons to tax for the assessment year 1994-95. As per the sale invoices, the cost of the bottles and other cartons involved in sales is recorded to be of a total turn-over of Rs.3,36,78,270/-. That has been subjected to taxation. The objection raised by the assessee was that alcoholic beverages are in the form of liquids and since they cannot be sold without there being a container and hence the bottles have been purchased from a local dealer and therefore, the sale of liquor through such bottles indulged in by the assessee cannot be subjected to tax at the same rate as that of the content. The Appellate Deputy Commissioner has taken the view that the packing material has to be segregated based on the nature of its use, such as, the primary material, secondary material and other packing material and the second sales of the packing material other than bottles and cartons cannot be subjected to tax. Further, it was held that without the primary packing material namely bottles the content namely liquor cannot be sold as it was not permitted to be sold in loose quantity and hence the packing material having its own identity and is separately classified in the Schedules of the Act and further the primary packing material will not undergo any change by virtue of the packing of the content therein and the packing material is only used for the sake of convenience of transportation. He, therefore, came to the conclusion that the appellant having purchased the packing material i.e bottles from the local registered dealers and hence the same is exempt in the hands of the appellant. Insofar as the secondary packing material is concerned, it was recorded that the disputed turn-over relating to the cartons falling under entry 19 of the First Schedule of the A.P.G.S.T Act and hence it is taxable at the point of first sale in the State. Since, the appellant has purchased these cartons from the local registered dealer, the disputed turnover is therefore exempted from taxation. Insofar as the set-off claimed to the extent of Rs.4,35,133/-, it was held that the set-off cannot be granted.

Section 20 of the Act empowered the Commissioner of Commercial Taxes to initiate a revision against any *suo motu* order passed by any officer subordinate to him and accordingly by a show-cause notice issued on 26.02.2001 he has proposed to revise the orders passed by the Appellate Deputy Commissioner on 24.09.1998. In response thereto, the assessee has filed his explanation reiterating that the disputed turn-over is not liable for assessment. The Commissioner of Commercial Taxes passed final orders on 30.01.2002, *interalia*, holding that as per the judgment of the Supreme Court in ***Raj Sheel and others vs. State of A.P and others***, the taxability of packing material is a question of fact and tax cannot be levied on packing material. Based upon presumptions and trade practices, the Commissioner of Commercial Taxes, the Revisioning Authority has found that the commodity liquor cannot be sold in any other form without there being a container. The question is whether the commodity liquor manufactured by the assessee, which is sold during the assessment year to the Andhra Pradesh Beverages Corporation with a glass bottle container is liable to suffer tax for the bottle also at the same rate at which the content thereof is liable to suffer or the bottle being a primary container should be subjected to an assessment, independent of the content of such bottle.

Learned counsel for the appellant would contend that every commodity which is in a liquid form does require for its supply an outer content. Therefore, the content is independent of the container and a particular type of container is not required at all for purposes of sale of the content. Therefore, variety of types of containers for supplying the liquid content are devised. There are several commodities which are sold in liquid form. Some of them would easily be transported and transferred by way of sale also, even if they are packed in plastic pouches or hard paper cups.

Whereas, the commodity liquor being an easily evaporable commodity, it requires a better container, not only to prevent any possible leakages, but also for purposes of maintaining its integrity all through its transportation till the commodity reaches the customer. Therefore, the content in the instant case namely bottle is not integral for sale of liquor. It is independent thereof. It is only for purposes of enabling the manufacturers to transport the fixed quantities and to avoid any possible leakages or tampering the quality of the content, bottles are conceived and seals are applied. Therefore, the learned counsel would urge that the involvement of sale of a bottle while selling liquor is only resorted for the sake of convenience not purposes of integral necessity for sale of the commodity itself. Learned counsel for the appellant would place heavy reliance upon the provision contained in Section 6-C of the Act, as it stood prior to its amendment and as is applicable for the assessment year 1994-1995. The provision 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."

A careful analysis of the above provision makes it clear that the rate of tax of 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. Whereas, prior to 01.04.1995, the provision read that 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. This, according to the learned counsel for the petitioner would draw a clear distinction between the sale of the container namely the bottle and the sale of the content namely the liquor. The bottles in question having been purchased by the appellant from a local dealer, their subsequent sale to the Andhra Pradesh Beverages Corporation is therefore not liable to suffer taxation at all and in the alternative, even if a sale is recognized of the container, it should be independently subjected to tax, as applicable for sale of a bottle.

Per contra, the learned Special Government Pleader for Commercial Taxes would contend that the issue raised in the instant case has already been addressed by this very Court in ***Sri Satya Winery & Distillery Pvt. Ltd., Nagole & Others vs. State of Andhra Pradesh*** .

In that case assessability of the tax on the packing material namely containers, i.e. bottles and cartons at the rates specified in the respective entries in the First Schedule to the Act, was the question that has fallen for consideration. After noticing the principle enunciated by the Supreme Court in ***State of Tamil Nadu vs. McDowell and Co. Ltd*** and ***United Breweries Ltd. vs. State of Andhra Pradesh*** and also ***Kalyani Breweries Ltd. vs. State of West Bengal*** and ***Hyderabad Deccan Cigarette Factory vs. State of A.P***. this Court had arrived at a conclusion that whether goods sold contained in a container, the rate of tax payable on the container shall be the same as that applicable to the goods contained therein. Accordingly, the assessee is subjected to tax of the sale of bottles at the same rate as that of the content itself.

The Division Bench of this Court has also noticed the judgment in ***M/s. Rajsheel Wine Merchants, Himayathnagar, Hyderabad*** and had arrived at a finding that the sale of bottles and cartons was not separate from the sale of liquor content therein and hence, the packing material is liable to suffer tax at the same rate as that of the content.

We are in respectful agreement with the view taken by the Division Bench in Sri Satya Winery & Distillery Pvt. Ltd. Case, on the primary issue of assessing the bottles containing liquor to tax at the same rate as that of the content.

But, however, that does not dispose of this appeal. The learned counsel for the appellant has urged that the appellant is entitled to claim set-off for an amount of Rs.4,35,133/-, it is the amount which was paid at the point of first sale of the bottles by the dealer of the appellant, the manufacturer and supplier of the bottles, to the assessee.

Fortunately, there is no controversy on this aspect generated at the Bar. The learned Special Government Pleader has clearly pointed out that the bottles have been purchased by the appellant manufacturer from one of the local dealers, who is a dealer indulging in sale of empty bottles. Therefore, to the extent of the first sale of such bottles has taken place the tax was levied thereon and hence, the appellant is entitled to seek a set-off. Hence, to this extent, the order passed by the Commissioner of Commercial Taxes is modified declaring that the appellant is entitled only for the set-off claimed by it and the rest of the order under appeal is affirmed. Hence, the appeal fails, but however without costs.

Accordingly, the appeal stands disposed of with this order on the above terms.

Consequently, miscellaneous applications pending if any shall also stand closed.

JUSTICE NOOTY RAMAMOHANA RAO

JUSTICE ANIS

18.11.2015

sp