

*** THE HON'BLE SRI JUSTICE RAMESH RANGANATHAN
AND
THE HON'BLE SRI JUSTICE S. RAVI KUMAR**

+ Special Appeal No.9 of 2002

% Dated 03-07-2015

M/s.Orient Cement, Devapur, Adilabad rep. by its Senior Manager-
Accounts, Mr.R.C.Mantri

.... Appellant

Vs.

\$ The Commissioner of Commercial Taxes, AP, Nampally, Hyderabad.

.... Respondent

! Counsel for the appellant: Sri S.Dwarakanath

^ Counsel for respondent: Sri J.Anil Kumar, Spl. Standing Counsel for
Commercial Taxes.

<GIST:

> HEAD NOTE:

? Citations:

[1] 74 STC 379

² AIR 1978 SC 1496 = 43 STC 13

³ AIR 1993 SC 123

⁴ 2013 SCC Online AP 44 (Judgment in Special Appeal No.2 of 2010
dated 13.02.2013)

⁵ (Judgment in Special Appeal No.19 of 2000 dated 30.04.2015)

⁶ (1966) 17 STC 624

⁷ (1967) 19 STC 84 (SC)

**THE HON'BLE SRI JUSTICE RAMESH RANGANATHAN
AND
THE HON'BLE SRI JUSTICE S. RAVI KUMAR**

SPECIAL APPEAL NO.9 OF 2002

JUDGMENT: (per Hon'ble Sri Justice Ramesh Ranganathan)

This Special Appeal is preferred, under Section 23(1) of the APGST
Act, by the appellant-dealer aggrieved by the order of the Commissioner of
Commercial Taxes dated 26.02.2002 revising the order of the Deputy

Commissioner (CT), Hyderabad dated 17.01.1999, and the order of the Commercial Tax Officer, Mancherial dated 20.03.1998.

Facts, to the extent necessary, are that the appellant herein manufactures cement, and is a registered dealer under the APGST Act. They are assesseees on the rolls of Commercial Tax Officer, Mancherial who finally assessed them to tax, for the assessment year 1994-1995 under the APGST Act, exempting the turnover of Rs.3,59,25,700, relating to the corresponding sale value of HDPE bags, from tax holding that it was not the first sale within the State, as the HDPE bags had earlier suffered tax in the State of Andhra Pradesh. The said assessment order was revised by the Deputy Commissioner (CT), Hyderabad on 07.01.1999 levying tax on the self consumption of cement and steel, subjecting them to tax at 4%. The Deputy Commissioner (CT), however, did not revise the order of the Commercial Tax Officer granting the appellant exemption on the turnover relating to the sale of packing material i.e HDPE bags. After the Deputy Commissioner (CT) passed the revision order dated 07.01.1999, a revised assessment order, along with the demand notice, was served on the appellant on 27.01.1999.

The Commissioner, Commercial Taxes found the orders of the Commercial Tax Officer and the Deputy Commissioner (CT) to be incorrect and prejudicial to the interests of the revenue. On the ground that the Commercial Tax Officer had not correctly analysed the facts, before granting exemption on the turnover of HDPE/Gunny bags as secondary sale of packing material, the Commissioner, Commercial Taxes exercised the powers vested in him under Section 20(1) of the APGST Act, and issued a show cause notice to the appellant proposing to assess the turnover of HDPE/Gunny bags to tax at 13.80%.

The show cause notice dated 30.11.2001 records the tentative opinion of the Commissioner that the appellant had sold cement packed either in gunny bags or HDPE bags; cement was a product which was not sold naked or in a loose manner in the market; the price of cement as understood by the consumer, and for which payment was made by them, is

for a bag of cement, and not exclusively for cement or for the gunny bag; the transaction of sale of cement, and the sale of its container, were integral components of a single transaction; HDPE bags were primary packing material for sale of cement; sale of cement could not be visualised without the HDPE bag; the property in the HDPE bag, along with its contents i.e cement, was passed on to the consumer, and not separately; there was no agreement, either implied or express, between the seller and buyer for sale of the HDPE bag independent of the sale of cement; and these facts showed that the transaction was a composite and integrated transaction of sale of cement and the HDPE bag. A copy of show cause notice was served on the appellant on 05.12.2001.

In their reply submitted thereto on 26.12.2001, the appellant informed the Commissioner that the initial time of fifteen days, allowed by him for submitting their reply, was insufficient having regard to the fact that the assessment year was old, and involved verification of voluminous records; the issue regarding the transaction of packing material was a factual issue, and required the old records to be studied; in response to their letter dated 17.12.2001 seeking one month time, they had received a telegram granting only one week time; they were also informed that the appeal was posted for hearing to 27.12.2001; the one week adjournment granted to them was insufficient to submit their objections; without prejudice to their request, they were submitting their preliminary objections on the legal issues; they reserved their right to elaborate, on further factual details, by the next date of hearing; the issue of exemption of second sales of HDPE bags was the subject matter of the assessment order dated 28.03.1998; this issue did not arise in the order of Deputy Commissioner; purporting to revise the order of the Deputy Commissioner, the Commissioner of Commercial Taxes had, in effect, revised the order of the Commercial Tax Officer; and this amounted to revision of the assessment order for a second time, which was impermissible. They also put forth their objections on merits disputing the tentative opinion of the Commissioner that sale of HDPE bags by them was not independent of the sale of cement.

The appellant also raised alternative contentions that, in any event, the proposal to levy tax at 13.8% on the value of packing material was not tenable; they had effected sales of cement at different rates during the year (a) at 4% against Form G; (b) at the regular rate where the customers were not eligible; the relevant break up of the turnover was being compiled from their accounts, and they would file the break up by the date of personal hearing; in any event, in view of G.O.Ms. No.374 dated 25.04.1987, the tax paid on packing material was eligible for set off from the tax payable on cement; and the set-off calculations would be filed by them by the date of personal hearing. The appellant requested the Commissioner to drop the revision, and give them an opportunity of personal hearing before final disposal of the case.

In the order under appeal, the Commissioner of Commercial Taxes observed that the question to be decided was whether the depiction of the value of cement and packing material separately in the A-2 returns was conclusive proof of two independent and distinct sales; the assessee routinely packed cement, manufactured by it, in HDPE bags; hitherto cement companies used to pack cement in gunny bags; but, with the advent of plastics into the market, all the cement companies, including the assessee company, had shifted from gunny bags to HDPE bags, as HDPE bags had a distinct advantage over gunny bags as packing material for cement; HDPE bags were light in weight; they were non-porous when compared to gunny bags; cement, packed in HDPE bags, retain its quality much longer; cement is a product which gets hardened if exposed to moisture; it is necessary to keep it always in a packed condition; in the relevant assessment year, the assessee mostly used HDPE bags as packing material; these facts made it clear that packing material was an essential ingredient in the sale of cement; sale of cement, without packing material, was incomprehensible; if cement is sold in a loose condition, customers would not purchase it; the assessee company, in its own interest, packs cement in HDPE bags as soon as it is produced, and dispatch them to their distributors both within and outside the State; these

distributors purchase cement from the assessee company, and sell it to their customers; they receive cement, as cement in bags, from the assessee company, and sell it to the ultimate customers as cement in bags only; from the point of manufacture till the ultimate use by the customer, cement always exists in a packed condition, and is sold in that condition only; though they had artificially bifurcated the value of cement and packing material, as reported in the A-2 returns, they had not charged the value for cement and packing material separately in the sale invoices raised by them; in the absence of such separate depiction, sale of cement and HDPE bags is an integral sale; even if the value of cement and HDPE bags are separately shown in the invoices, the customer would only be interested to know how much he is paying per bag of cement; he would not be interested in knowing whether the distributor has split the value of Rs.120/- or Rs.150/- into two separate components; for him the splitting of the value into different components is only a formatting of the bill in which he is not interested; in the instant case, there is no splitting in the value of the goods, and it is an integrated sale of cement only; there is no evidence to show that the dealers depicted the price of cement and HDPE bags separately; it must be construed that such depiction, by the manufacturer alone, is merely an attempt to reduce the tax burden; it does not prove that there is a separate sale of cement and packing material; the assessee had failed to prove that the sale of packing material, involved in the sale of cement, is a separate and independent sale; the burden of proving that the sale or purchase, effected by a dealer, is not liable to be taxed or is liable to be taxed at a reduced rate lies on the dealer in view of Section 7-A of the APGST Act; the assessee had indulged in an inconvenient artificial bifurcation of the invoice; in the light of the judgment of the Supreme Court in **Raj Sheel v. State of A.P.**^[1]; it was clear that there is no separate sale of packing material; except depicting the value of HDPE bags separately in the A-2 returns, the assessee did not produce any other evidence to prove its case; where the sale of packing material is integral to the sale of its contents, splitting the sale value in the A2 returns into various components does not strengthen the case of the assessee; most of the

sales by the assessee is to its distributors; only on a few occasions did it sell cement directly to the customers; there were no purchase orders on record to show that the distributors placed separate orders for the purchase of packing material, or that they had accepted a separate price structure for cement and packing material, or that they had requested for a specific mode of packing of cement; the assessee did not place on record any periodical price charts or quotations prepared and sent to its customers showing the value of cement and packing material separately; it could not, therefore, be said that the customers consciously purchased the packing material in addition to the purchase of cement; both the parties involved did not intend to sell and buy the packing material separately; the depiction of the value of HDPE bags separately by the assessee company was a one sided act, and did not imply any independent sale of HDPE bags; this was merely an attempt to reduce the tax burden; in **Raj Sheel**¹, the Supreme Court held that one should decide whether or not there is an independent sale of packing material, purely based on facts; this principle was followed in **Hindustan Sugar Mills v. State of Rajasthan**^[2], and **TVL Ramco Cement Distribution Co. Ltd. v. State of Tamilnadu**^[3], wherein it was held that packing material charges cannot be deducted even if they are charged separately under the Act; in the present case, customers negotiate and purchase cement packed in bags from the assessee company at a particular price per bag; the packing material i.e., HDPE bags, being the primary packing material, reach the ultimate consumer; the transfer of property, in the HDPE bags, is integral and inseparable from the sale of cement; the total amount collected by the assessee in the invoice represents a single sale to be taxed at the rate applicable to the cement; the contention of the assessee that there was a separate sale of packing material was not acceptable; there was only one integrated sale of cement and the bags; and the entire amount collected by the assessee, in its invoices, was liable to be taxed at the rate applicable to cement, and not at two rates as pleaded by the authorised representative. The Commissioner confirmed the earlier proposal to revise the order of the Deputy Commissioner.

The points, which arise for consideration in this appeal, are:

1. Is the order of the Commissioner, Commercial Taxes dated 26.02.2002 in violation of principles of natural justice, and was the appellant denied a reasonable opportunity of being heard?
2. Is the Commissioner of Commercial Taxes barred from exercising his powers of revision, under Section 20(1) of the APGST Act, in cases where the order of the assessing authority has been subjected to revision by the Deputy Commissioner (Commercial Taxes)?
3. Is levy of tax on packing material i.e., HDPE bags, at the same rate at which tax was levied on its contents i.e., cement, valid?
4. Was the Commissioner justified in not considering the appellants alternate submissions that (i) tax exceeding 4% could not be levied on that part of the turnover covered by G- Forms; (ii) they should have been extended the benefit of set off under G.O.Ms. No.374 dated 25.04.1987; and (iii) as the rate of tax on cement varied during the assessment year 1994-95, tax could not have been uniformly levied throughout the year at the maximum rate of 13.8%?

POINT NO: I

Sri S.Dwarakanath, Learned Counsel for the appellant, would submit that the order of the Commissioner is in violation of principles of natural justice; the sales invoices, filed along with the Special Appeal before this Court, show that packing material is separately charged; it is only because they were not afforded a reasonable opportunity of being heard, that they were unable to place these sales invoices before the Commissioner; in their reply to the show cause notice dated 26.12.2001, the appellant had reserved their right to file additional objections at the time of hearing; the revisional authority had failed to give the appellant a reasonable opportunity of being heard; the Commissioner had issued a show cause notice on 30.11.2011 proposing to levy tax on HDPE bags at the rate applicable to cement; the appellant had, by his letter dated 17.12.2001, requested one month time; they had, by their letter dated 26.12.2001, filed preliminary objections, and had sought further one month time; the Commissioner had fixed the date of hearing as 11.01.2002; the appellant requested time as their Counsel was indisposed; they were

intimated by phone on 20.02.2002 that the hearing would be held on 22.02.2002; they requested time on 22.02.2002, as they were held up before the Deputy Commissioner at Mancherial, in connection with the show cause notice issued by him which had a tax effect of more than Rupees two crores for the assessment years 1997-98 and 1998-99; and, without any further opportunity, the Commissioner had confirmed the revision by his order dated 26.2.2002.

The Commissioner, Commercial Taxes issued show cause notice dated 30.11.2001 proposing to disallow the exemption granted by the assessing authority on the second sale of HDPE bags. The appellant was granted 15 days time to submit their objections thereto. By their letter dated 17.12.2001, the appellant sought one (1) month time to file their objections. The one month time, sought for by the appellant, expired on 17.01.2002. The respondent, however, posted the matter to 27.12.2001. While submitting their preliminary objections the appellant, by their letter dated 26.12.2001, requested one more month time to present their case. The one month further time, sought for by the appellant on 26.12.2001, expired on 26.01.2002 before which date the appeal was posted for hearing on 11.01.2002. The appellant again sought time. They were informed by the office of the Commissioner, more than a month thereafter on 20.02.2002, that the case was posted for hearing to 22.02.2002.

While the appellant contends that the two days time granted to them from 20.02.2002 to 22.02.2002 was extremely short, and they were thereby denied the opportunity to prepare their case, the fact remains that the appellant was granted two adjournments firstly for a fortnight from 27.12.2001 to 11.01.2002; and, thereafter, for more than a month from 11.01.2002 to 22.02.2002. As the order of the Commercial Tax Officer, which was sought to be revised, was passed on 20.03.1998, the four year period of limitation, prescribed under Section 20(3) of the APGST Act, was to expire in March, 2002. In order to avoid the possibility of the revisional order getting barred by limitation, and as a copy of the order was also required to be served on the appellant thereafter, the Commissioner passed the revision order on 26.02.2002. The appellant was granted a

reasonable opportunity of being heard and their contention, that the order of the Commissioner dated 26.02.2002 is in violation of the principles of natural justice, does not merit acceptance. Point No.1 is answered accordingly.

POINT No.2:

Sri S. Dwarakanath, Learned Counsel for the appellant, made a feeble attempt to contend that, as the APGST Act did not provide for a second revision, the Commissioner of Commercial Taxes could not again revise the order of the assessing authority as the said order had already been subjected to revision by the Deputy Commissioner. Learned Counsel would, however, fairly state that, in view of the judgment of the Division bench in **M / s . Agarwal Industries Limited v. The Commissioner of Commercial Taxes, A.P., Hyderabad**^[4], this contention may not be available to be urged before this Court.

Section 20 of the APGST Act related to revision by the Commissioner of Commercial Taxes and other prescribed authorities. Section 20(1) enabled the Commissioner of Commercial Taxes to, *suo motu*, call for and examine the record of any order passed or proceeding recorded by any authority, officer or person subordinate to him, under the provisions of the APGST Act, including Section 20(2); and, if such order or proceeding recorded was prejudicial to the interests of revenue, to make such enquiry, or cause such enquiry to be made, and, subject to the provisions of the APGST Act, to initiate proceedings to revise, modify or set aside such order or proceeding, and to pass such order in reference thereto as he thought fit. Section 20(2) stipulated that the powers of the nature referred to in Section 20(1) could also be exercised by the Additional Commissioner, the Joint Commissioner, the Deputy Commissioner or the Assistant Commissioner and the Commercial Tax Officer in the case of orders passed or proceedings recorded by authorities, officers or persons subordinate to them. Section 20(3) provided that, in relation to an order of assessment passed under the APGST Act, the powers conferred by sub-sections (1) and (2) of Section

20 should be exercised only within such period not exceeding four years from the date on which the order was served on the dealer. While Section 20(2) of the APGST Act enabled Officers, subordinate to the Commissioner, to revise the orders passed by their subordinates, Section 20(1) enabled the Commissioner to revise the orders passed by officers subordinate to him, including those under Section 20(2) of the Act. Section 20(1) of the APGST Act was a special provision which conferred power on the Commissioner not only to revise the order passed by the original authority, but also to revise the order, passed by the revisional authorities, under Section 20(2) of the Act.

In **M/s. Agarwal Industries Limited**⁴, a Division bench of this Court held that Section 20(1) of the APGST Act authorized the Commissioner of Commercial Taxes to revise the revisional order passed by any subordinate officer under Section 20(2) of the said Act. In **Handum Iron & Steel Enterprises (P) Ltd v. Commissioner of Commercial Taxes**^[5], a Division bench of this Court held that the Commissioner could exercise the power of revision, vested in him under Section 20(1) of the APGST Act, and revise an order passed, or proceeding recorded, by any authority, officer or person subordinate to him under the provisions of the APGST Act, including under Section 20(2) thereof, within four years from the date of service on the dealer, the order of the subordinate officer whose order was under revision.

It is necessary to note that the exemption granted by the assessing authority, for the second sales of HDPE bags, was not the subject matter of revision by the Deputy Commissioner of Commercial Taxes. As such a power is explicitly conferred under Section 20(1) of the APGST Act, the submission that the Commissioner, Commercial Taxes lacks jurisdiction to revise the order of the assessing authority, when it has been subjected to revision by the Deputy Commissioner *albeit* on a different ground, is not tenable. Point No.2 is answered accordingly.

POINT No.3:

Sri S. Dwarakanath, Learned Counsel for the appellant, would

contend that the reference to the A-2 returns, in the order of the Commissioner, is without jurisdiction as it is not mentioned in the show cause notice; the Commissioner erred in levying tax on HDPE bags at the rate on which tax is leviable on cement; HDPE bags are classified in item 188 of the First Schedule to the APGST Act; they are durable and reusable; they are of significant value, the cost being Rs.5.50ps per bag during 1994-95; the sale of cement was not dependent on the HDPE bags, as it could be sold loose or in a gunny bag or in a paper bag; during 1994-95 the appellant had, in fact, sold cement in loose, by rail wagons, to Hyderabad Industries Limited; the issue must be viewed from the point of view of the marketing structure in the cement Industry and different types of containers, and not from a narrow angle; item 18 of the First Schedule was amended with effect from 01.08.1996, providing for dual rates of tax on the sale of cement; the legislature had, itself, visualised that cement could be sold without involvement of packing material; it is only from 01.04.1995 that Section 6-C was amended to provide for levy of tax on containers on par with its contents, whether or not there was separate sale of packing material; from the amendment to Section 6-C, and item 18 of the First Schedule, it is evident that it is legal and practical to sell cement without a container, or in a variety of containers; and there is an implied sale of HDPE bags, along with the sale of cement.

On the other hand Sri J. Anil Kumar, Learned Special Standing Counsel for Commercial Taxes, would submit that neither did the appellant produce the sales invoices before the Commissioner, nor did they even refer to the sales invoices in the show cause notice; in the absence of even a reference thereto, in the reply filed by the appellant to the show cause notice, the Commissioner could not be faulted for not taking into consideration the alleged sales invoices; the Commissioner had rightly come to the conclusion that the sale of cement and HDPE bags is an integrated sale, and was liable to be taxed under Section 6-C of the APGST Act; and the order of the Commissioner does not necessitate interference.

It is for the first time before this Court that Sri S. Dwarakanath, Learned Counsel for the appellant, has placed reliance on certain invoices to contend that there is an independent sale of HDPE bags; it is not liable to tax as it is the second sale within the State; and HDPE bags cannot be subjected to tax at the rate applicable to cement. In the reply to the show-cause notice submitted to the Commissioner, the appellant had contended that the issue of sale of packing material was always a question of fact as to whether the container was the subject matter of bargain and sale, or was only a mode of conveying the contents; this depended upon the nature of packing material, and the terms of agreement between the parties; HDPE bags are classified in item 188 of the First Schedule to the APGST Act; they are durable and reusable; they are of significant value, the cost being Rs.5.50ps per bag during 1994-95; the sale of cement was not dependent on the HDPE bags, as it could be sold loose or in a gunny bag or in a paper bag; during 1994-95 they had, in fact, sold cement in loose, by rail wagons, to Hyderabad Industries Limited; a retail consumer alone cannot be kept in view; bulk consumers and wholesalers, who were their immediate customers, constituted a major part of the turnover; the consumer had the right to choose between cement sold in gunny bags, HDPE bags, and paper bags; the consumer consciously exercises a choice, balancing the cost and convenience; the issue must be viewed from the point of view of the marketing structure in the cement industry and different types of containers, and not from a narrow angle; without any enquiry from the stockists and the buyers, it cannot be surmised that there cannot be sale of cement without a container; the crucial aspect, that several types of containers exist in the cement market, cannot be overlooked; the transaction of sale of cement and the HDPE bag cannot be clubbed and integrated on the pretext that sale of cement without a bag cannot be visualised; the sale of loose cement is possible and was, in fact, effected by them; when there are multiple options, and as HDPE bags and gunny bags are separately classified in the First Schedule to the APGST Act, integrating the transaction of sale of the bag, with the sale of cement, is contrary to the judgment of the Supreme Court in **Raj Sheel**¹; item 18 of the First Schedule was amended with effect from 01.08.1996, providing for

dual rates of tax on the sale of cement; the legislature had, itself, visualised that cement could be sold without involvement of packing material; it is only from 01.04.1995 that Section 6-C was amended; the sales tax authorities could not estimate the value of containers, and levy tax on the basis of its statutory classification, significant value and durability of the container, even though the contents are exempt, or are taxable at concessional rates; it is not correct to state that there is no express or implied agreement for sale of the bag; the guidelines laid down by the Supreme Court, to infer separate sale of packing material, are satisfied in their case; there is an implied sale of HDPE bags, along with the sale of cement; they were once again verifying their old records for the correspondence, circulars and stockists agreements to locate and demonstrate an express agreement of sale of the HDPE bags; even dehors such evidence, and having regard to the nature of the packing material, an implied agreement can always be inferred.

It was not even the appellant's case, in their reply to the show cause notice issued by the Commissioner, that the invoices reflected the sale of HDPE bags, independent of the sale of its contents ie., cement. The Commissioner of Commercial Taxes cannot, therefore, be faulted for not referring to the sales invoices as the appellant neither made any reference thereto in the reply to the show cause notice nor did they produce copies thereof before him. Even before us the appellant has not placed any correspondence, circulars or stockists agreements to demonstrate an express agreement of sale of the HDPE bags.

Entry 18 of the First Schedule to the APGST Act related to cement. Prior to its amendment with effect from 01.08.1996, cement was taxable at the point of first sale in the State. Entry 188 of the First Schedule to the APGST Act, during the relevant period, related to High Density polyethylene polypropylene (HDPE/PP) woven sacks. The assessing authority exempted the appellant's turnover of Rs.3,59,25,700/-, relating to the corresponding sale value of HDPE bags, from payment of tax on the ground that these HDPE bags, which were used for packing of cement, had already suffered tax within the State.

In examining the question whether the appellant intended to sell, and their customers intended to buy, HDPE bags independent of the sale of cement, certain tests laid down by the Supreme Court must be taken note of. 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. However, where the packing material is of a significant value, it may imply an intention to sell the packing material. (**Raj Sheel**¹). It is not possible to state, as a proposition of law, that whenever particular goods are sold in a container, the parties did not intend to sell and buy the container also. There may be cases where the container is comparatively of a high value, and sometimes even higher than that contained in it. In such cases the agreement to pay an extra price for the container may be more readily implied. (**Hyderabad Deccan Cigarette Factory v. The State of Andhra Pradesh**^[6]; **Commissioner of Taxes, Assam v. Prabhat Marketing Co., Ltd**^[7]). In cases 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 be taxed on its own footing. Whether a transaction for sale of packing material is an independent transaction will depend upon several factors, some of which are (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. (**Raj Sheel**¹).

In determining whether the turnover, relating to sale of HDPE bags, is liable to tax the question to be asked is whether the parties, having regard to the circumstances of the case, intended to sell or buy the packing material or whether the subject-matter of the contract of sale was only the

article, and the packing material did not form part of the bargain at all, but were used by the seller as a convenient and cheap vehicle of transport. The assessing, appellate and revisional authorities can ask the assessee to produce relevant material and, if he does not produce the same, they may draw an adverse inference against him. To ascertain the said fact, reliance can be placed upon oral statements, accounts and other documents, personal enquiry and other relevant circumstances such as the nature and the purpose of the packing material used. (**Hyderabad Deccan Cigarette Factory⁶; Prabhat Marketing Co., Ltd⁷**).

Before us the appellant has furnished details of the packing material purchased by them, from different dealers, during the year 1994-95, as also sample invoices of the sale of cement to six dealers i.e., Sri Sai Trading Company, Sri Krishna Cement, Sri N.B. Vishal, Tribal Welfare Department, APHB and Visakha Industries, in support of their submission that packing material ie HDPE bags were sold independent of its contents i.e, cement; and, as such, sale of HDPE bags could not have been subjected to tax under the Act, as it had already suffered tax when the appellant had purchased these goods within the State.

The invoice, for sale of cement to Sai Trading Company, shows that 20 metric tonnes of cement was sold in HDPE bags for Rs.28,388/-, and the value of packing material was shown separately therein as Rs.2,000/-. As 20 metric tonnes of cement was sold, the value of packing material recorded in the invoice is Rs.2,000/- ie 20 metric tonnes at Rs.100/- per metric tonne. It is evident that packing material was not sold independent of its contents and, though the value of packing material is separately shown in the invoice, its value is arrived at on the basis of the weight of its contents i.e., cement. The invoice, whereby cement was sold to Sri Krishna Cement, also shows the price of packing material separately at Rs.100/- per metric tonne; and, as 10 metric tonnes of cement was sold, the invoice reflects the value of packing material as Rs.1,000/-. The invoice, raised on N.B. Vishal, shows the price of packing material as Rs.115/- per metric tonne; and, as 20 tonnes of cement was sold, the value of packing material is shown as Rs.2,300/-. The value of packing material

is shown, in the invoice relating to the Tribal Welfare department, as Rs.115/- per metric tonne; and, as 117 metric tonnes of cement were sold, the value of packing material is shown to be Rs.13,455/-. The invoice raised, for the sale of cement to the A.P. Housing Board, shows the value of packing material as Rs.115/- per tonne; and, as 12 tonnes of cement was sold, the price of packing material is shown therein as Rs.1,380/-. The invoice raised on Vishal Industries also shows the value of packing material as Rs.115 per metric tonne; and, as 349 metric tonnes of cement was sold, the price of packing material is reflected therein as Rs.40,135/-.

These invoices were not placed before the Commissioner of Commercial Taxes, and have been brought on record for the first time in this appeal. While the appellant has, no doubt, charged a separate price for packing material, the very fact that the price of HDPE bags is not computed per bag, but on the quantity of the cement sold, goes to show that there was an integrated sale of cement and HDPE bags; and neither the appellant nor the consignee intended to purchase HDPE bags independent of its contents ie cement. The very fact that the price charged for HDPE bags is less than 10% of the value of its contents ie cement, makes it clear that the value of packing material, when compared to the value of its contents, is insignificant. This would also imply that there was no intention to sell the packing material independent of its contents. As has been noted by the Commissioner, cement is a product which gets hardened when exposed to moisture. While HDPE bags have an independent identity, and are capable of being reused, they are also durable and non-porous. HDPE bag is a convenient packing material for transporting its contents, and are used to avoid damage thereto during transit. While the appellant does appear to have sold cement to Hyderabad Industries in containers, and not in HDPE bags, the sale of cement to other customers is only in HDPE bags. A customer, who purchases cement in HDPE bags, intends only to purchase cement, and not the HDPE bags. It is evident, therefore, that there is no implied sale of HDPE bags independent of its contents i.e, cement.

After an elaborate analysis of the purposes for which the HDPE bags were used and its utility, the Commissioner has concluded that both the seller and the buyer did not intend to sell HDPE bags; and their intention was only to sell and buy the cement contained in those HDPE bags. While the submission of Sri S. Dwarakanath, Learned Counsel for the appellant, that the Commissioner could not have placed any reliance on the A-2 returns, without referring to it in the show cause notice, has considerable force, the fact remains that, even if this finding of the Commissioner is ignored, his finding that there was an integrated sale of cement and HDPE bags, and the parties never intended to either sell or buy HDPE bags independent of its contents ie cement, is based on an elaborate analysis of the material on record, and the prevalent practice in the cement industry. The Commissioner, Commercial Taxes has, on the material on record, rightly contended that there was no intention on the part of the appellant to sell, or on the part of the consignee to buy, the HDPE bags; and these bags were used by the appellant as a convenient and cheap mode of transport.

Section 6 (C) of the APGST Act related to levy of tax on packing material. Prior to its substitution by Act 22/1995, with effect from 01.04.1995, Section 6 (c) read thus:

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.

Section 6[c] of the APGST Act, as it stood prior to 01.04.1995, envisaged a situation where it was the goods which were sold, and there was no actual sale of the packing material. The Section provided, by legal fiction, that the packing material shall be deemed to have been sold along with the goods. In other words, although there was no sale of packing material, it was to be deemed that there was such a sale. In that event, the Section declared that tax would be leviable on such a deemed sale of packing material at the rate of tax applicable to the sale of the goods themselves. This provision was a clarification of an existing legal situation.

If the transaction was one of sale of the goods only, clearly all that could be taxed, in fact, was the sale of the goods, and the rate to be applied should be the rate as in the case of such goods. Even if the price of the goods was determined upon a consideration of several components, including the value of the packing material, nonetheless the price was the price of the goods. It was not open to anyone to say that the value of the different components, which had entered into the determination of the price of the goods, should be analysed and separated, in order that different rates of tax should be applied according to the character of the component (for example, packing material). What Section 6[c] intended to lay down was that, even upon such an analysis, the rate of tax to be applied to the component would be the rate applied to the goods themselves, for the reason that it was the price of the goods alone which constituted the transaction between the dealer and the purchaser. No matter what the component which entered into such price was, the parties understood, between them, that the purchaser was paying the price of the goods. Section 6C merely clarified and explained that the components, which had entered into in determining the price of the goods, could not be treated separately from the goods themselves; no account was, in fact, taken of the packing material when the transaction took place; and that, if such account must be taken, then the same rate must be applied to the packing material as is applicable to the goods themselves. (**Raj Sheel**¹). As neither the appellant who sold cement, nor their customers who bought it, intended to purchase HDPE bags independent of its contents ie cement Section 6-C, as it stood prior to its amendment w.e.f. 01.04.1995, is attracted, and in view of the legal fiction provided therein, it must be deemed that the appellant had sold the HDPE bags along with cement, and the sale of HDPE bags was rightly subjected to tax at the same tax rate as was applicable to the sale of cement.

It is no doubt true that, with effect from 01.08.1996, Entry 18(a) of the First schedule to the APGST Act stipulated that, where the sale price of cement included the value of the packing material, the point of levy would be the point of first sale in the State, and the rate of tax would be 16%; and

Entry 18 (b) stipulated that where packing material and cement are sold separately, and the sale price of cement did not include the value of packing material, the point of levy would be at the point of first sale in the State and the rate of tax would be 20%. The amendment to Entry 18 to the First Schedule w.e.f. 01.08.1996 has no application to the present case as the assessment year in question is 1994-95. The mere fact that, subsequent to 01.08.1996, the Legislature has chosen to prescribe two different tax rates one for sale of cement and packing material separately, and the other for an integrated sale of cement and packing material, does not mean that, prior thereto, tax could not be levied on the sale of HDPE bags, at the tax rate applicable to its contents ie cement. The subsequent amendment to the Entry with effect from 01.08.1996 only makes it explicit, what was implicit earlier, that in cases where packing material is sold along with its contents, the rate of tax applicable to the sale of packing material would be the rate of tax applicable to its contents.

Section 6-C of the APGST Act, as substituted by Act 22 of 1995 with effect from 01.04.1995, provided that, notwithstanding anything contained in Sections 5, 5F, 6 and 6A of the APGST Act, the rate of tax on packing material, sold with the goods, should be the same as that of the goods packed or filled, whether or not there was a separate sale or agreement for the sale of packing material, and the goods packed or filled. The substituted Section 6C stipulated that the rate of tax on packing material, sold with the goods, was the same as that of the goods packed in such packing material whether or not the packing material, and the goods packed, were sold separately. Prior to its substitution, Section 6-C was attracted only in cases where there was an integrated sale of both the packing material and its contents, and the parties to the contract did not intend to sell packing material independent of its contents. The pre-amended Section 6-C was not attracted where packing material was sold independent of the sale of its contents. As is evident, from the material on record, both the appellant who sold cement, and the consignee who purchased it from the appellant, sold/purchased HDPE bags only because of the sale/purchase of its contents ie cement. Neither of the parties

intended to sell/purchase packing material ie HDPE bags *dehors* its contents i.e., cement. Reliance placed by Sri S. Dwarakanath, Learned Counsel for the appellant, on the amended Section 6C of the APGST Act is, therefore, of no avail.

In their reply to the show cause notice, issued by the Commissioner proposing to subject the sale of HDPE bags to tax at the rate of its contents, the appellant sought time contending that they were verifying the old records, correspondence, circulars, and stockists agreements to demonstrate an express agreement of sale of the HDPE bags. Except to produce the few sales invoices, referred to hereinabove, the appellant has not produced the purchase orders or the price charts or the quotations, if any, prepared by them and sent to their customers showing the value of cement and packing material separately. We see no reason, therefore, to differ from the conclusion of the Commissioner that the appellant intended to sell HDPE bags only as packing material for cement, and not independent thereof. Point No.3 is answered accordingly.

POINT No.4:

Sri S. Dwarakanath, Learned Counsel for the appellant, would submit that the Commissioner, having noted the appellants alternative submissions that (i) a part of the turnover was covered by G-Forms under Section 5B, and tax exceeding 4% could not be levied, (ii) even if Section 6-C is applied for packing material, set off under G.O.Ms. No.374 dated 25.04.1987 is required to be given; and (iii) though the rate of tax on cement varied during the assessment year 1994-95, tax was levied throughout the year uniformly at the maximum rate of 13.8%, did not consider the same in the order under appeal.

Though the Commissioner, Commercial Taxes has, in the order under appeal, recorded the appellants alternative contentions, no finding is recorded, in the order, in respect thereto. It does appear that, during the year 1994-95, the rate of tax on the sale of cement varied periodically from time to time. While the rate of tax on the sale of cement was 13.2% from

01.04.1994 to 30.06.1994, it was 12.65% from 01.07.1994 to 31.12.1994, and 13.8% from 01.01.1995 till 31.03.1995.

With regards the appellant's contention regarding entitlement of concessional rate of tax, on production of G forms, Section 5B of the APGST Act provided for the levy of concessional tax in respect of component parts. Under Sub-Section (1) (a) thereof, notwithstanding anything contained in the APGST Act, every dealer was required to pay tax at the rate of 4%, or at the rates specified in Section 5 in respect of goods other than declared goods, or under Section 6 in respect of declared goods, whichever was lower and the turnover relating to such sale, when a dealer sold any goods to another dealer for use by the latter, would include component parts, sub-assembly parts, intermediate parts, and packing material in the manufacture or processing of goods inside the State. Rule 30-A(1) of the Andhra Pradesh General Sales Tax Rules stipulated that every manufacturer, who intended to purchase raw material, component parts, sub-assembly parts, intermediate parts and packing material etc., under Section 5B (1)(a) of the APGST Act for use in the manufacture of any goods inside the State, should submit an application in Form-G1 to the Commercial Tax Officer for registration as a manufacturer. Rule 30-B(1) (a) required every manufacturer to prepare a declaration in Form 'G' in triplicate, and issue the original and duplicate to the dealer from whom he purchased raw material, packing material etc under Section 5-B(1) (a), at the concessional rate of tax. Where goods were sold to a manufacturer, who intended to use it as a raw material and had furnished a declaration in Form 'G', the selling dealer was liable to pay only the concessional rate of tax of 4%. It is the appellant's case that a part of their turnover is eligible for concessional rate of tax as 'G' Forms had been furnished.

None of these aspects have been considered and decided by the Commissioner, Commercial Taxes in the order under appeal. We see no reason to examine these contentions regarding the extent of sale of packing material during different periods in 1994-95, or the turnover covered by G forms under Section 5(b), or the validity of the appellant's

claim for set off in terms of G.O.Ms. No.374 dated 25.04.1987, in this appeal as these are all matters which the Commissioner should have dealt with while exercising his power of revision under Section 20(1) of the APGST Act.

To this limited extent, the matter is remanded to the Commissioner, Commercial Taxes, who shall, after giving the appellant an opportunity of being heard, consider the aforesaid alternate submissions, and pass orders afresh in accordance with law. The appeal is, accordingly, disposed of. The miscellaneous petitions pending, if any, shall also stand disposed of. No costs.

RAMESH RANGANATHAN, J

S.RAVI KUMAR, J

Date:03.07.2015.

Note: L.R. copy to be marked
B/o
MRKR/CS

[\[1\]](#) 74 STC 379

[\[2\]](#) AIR 1978 SC 1496 = 43 STC 13

[\[3\]](#) AIR 1993 SC 123

[\[4\]](#) 2013 SCC Online AP 44 (Judgment in Special Appeal No.2 of 2010 dated 13.02.2013)

[\[5\]](#) (Judgment in Special Appeal No.19 of 2000 dated 30.04.2015)

[\[6\]](#) (1966) 17 STC 624

[\[7\]](#) (1967) 19 STC 84 (SC)