BOMBAY HIGH COURT

Arlem Breweries Ltd

Vs

The Assistant Commissioner

(D Rege and G Couto , JJ.)

02.02.1983

JUDGMENT

Rege, J.

1. These are six sales tax references in respect of the sales tax assessment of the petitioners' company pertaining to the financial years 1970-71, 1971-72, 1972-73, two for each year, one being under the Central Sales Tax Act and the other under the Goa, Daman and Diu Sales Tax Act, 1964.

2. The applicants, M/s. Arlem Breweries Ltd., are the manufacturers of bottled beer. According to them during the said years they sold their said beer to the wholesalers on an understanding contained in the price list issued by them, from time to time. One of such price lists has been annexed by the petitioners to their application.

3. For all the said years the Sales Tax Officer by his orders dated 30th March, 1974, in Reference Nos. 4 and 5 of 1979, dated 9th March, 1974, in References Nos. 6 and 7 of 1979 and dated 28th April, 1974, in References Nos. 8 and 9 of 1979, assessed the petitioners for sales tax on the total price of beer and the bottle on the basis of the sale being of bottled beer at the rate mentioned in section 7(1)(a), i.e., 12 paise per rupee, being applicable to item 22 of Schedule I to the Goa, Daman and Diu Sales Tax Act, 1964, viz., foreign liquor and Indian-made foreign liquor. He however took into consideration for levy of sales tax towards the sale price of the bottles only that net amount remaining with the dealers as on 31st March of each year after refund on account of return of bottles.

4. In appeals by the petitioners against the said order of assessment, the Assistant Sales Tax Commissioner, by his orders dated 23rd August, 1976, in all the said appeals confirmed the said order of the Sales Tax Officer as to the manner of levying sales tax on the petitioners' sale of beer on the basis of the sale being of bottled beer. Further he also vacated that part of the Sales Tax

Officer's order which gave credit to the petitioners for the amount refunded by the petitioners towards returned bottles.

5. The Administrative Tribunal, in revision against the said orders, by its orders dated 14th April, 1978, upheld the order of the Assistant Sales Tax Commissioner.

6. On an application by the petitioners for making reference to this Court, the Tribunal has referred the following questions for our determination. They are :

> "(1) Whether, on the facts and circumstances of this case, was the Tribunal justified in law in holding that the applicant effected sale of bottles ?
>
> (2) Whether, on the facts and circumstances of this case, was the Honourable Tribunal justified in law in holding that the deposit lodged by the customers against the bottles loaned amounted to sale price within the meaning of section 2(1) of Act 4 of 1964 ?
>
> (3) On the facts and circumstances of this case, was there a sale of beer alone or sale of beer and bottle or sale of bottled beer ?
>
> (4) Was there any material or evidence before the Honourable Tribunal to hold that the applicant sold bottles and that the deposit received amounted to sale price within the meaning of section 2(1) of Act 4 of 1964 ?
>
> (5) Was there any material or evidence to hold that the deposit corresponds to the cost of the bottle so that when the cost increased the deposit is enhanced ?
>
> (6) In case if it is held that there is a sale of bottles then what is the rate of tax applicable to it ?
>
> (7) Was the Honourable Tribunal justified in law in holding that the rate of tax applicable on the sale of bottles was that which was applicable on Indian-made foreign liquor ?
>
> (8) Whether beer is Indian-made foreign liquor within the meaning of entry 22 of the First Schedule to the Act 4 of 1964 and what is the rate of tax payable on it ?"

7. It was agreed between the learned counsel for the parties that the court may answer question Nos. (1), (3), (6) and (8) while the other questions were unnecessary to be answered.

8. We further felt that question No. (3) as framed was not happily worded and so we have with the consent of the learned counsel for the parties reframed the said question as under :

"No. (3) Whether, on the facts and circumstances of this case, levy of the sales tax on the total price of the beer and the bottle as falling under item 22 of the First Schedule to the Goa, Daman and Diu Sale Tax Act would be legal and proper ?"

9. The first point that may be considered is as regards the legality of imposing sales tax on the total price of beer and bottle on the basis of the sale being of bottled beer at the rates mentioned in section 7(1)(a) of the said Act as falling under Item 22, First Schedule to the Act. Item 22 of the First Schedule to the Act or any other item therein does not anywhere provide for levying tax on bottled beer. The said item 22 of the First Schedule to the Act only speaks about the item of sales tax being : "Foreign liquor and Indian-made foreign liquor". The said item shows that taxation is only as against foreign liquor or Indian-made foreign liquor and not against bottle and liquor or bottled liquor. Apart from the contract entered into by the petitioners who are the manufacturers with the wholesalers said to be on the price list annexed by the petitioners to the references shows that sale of beer and bottles was separate and was separately billed. The sale by the petitioners of beer and bottles being separate, in our view assessment of the petitioners to sales tax for sale of beer under item 22 of the First Schedule to the Act on the basis of total price of beer and bottle, was not proper and legal.

10. The second interesting question was whether in the facts and circumstances of this case the amount taken by the petitioners from their purchasers as "deposit" for bottles was really the sale price of the bottle so as to be considered as recovered by sale of bottles for being assessed for sales tax under the Sales Tax Act.

11. It is well-settled that the expression "sale" under the Sales Tax Act has to be understood with reference to the definition of "sale of goods" under the Sale of Goods Act. Further in order to constitute a sale under the Sales Tax Act the following elements should be present, viz., (1) it is necessary that there should be an agreement between the parties for the purposes of transferring title to the goods, (2) that it must be supported by money consideration and (3) that as a result of the transaction, property must actually pass in the goods : *see State of Madras v. Gannon Dunkerley & Co. (Madras) Ltd.* . This position in law cannot be disputed.

12. However the question in this case was that though the contract between the petitioners and their wholesalers described the amount taken by the petitioners for the bottles as "deposit" liable to be refunded to the purchasers on the return of the bottles, whether under the facts and circumstances of the case, the said amount constituted sale price for the bottle and the transaction constituted the sale of bottle liable to be assessed under the Sales Tax Act.

13. To appreciate the real nature of the transaction, it would be first necessary to look to the so-

called agreement between the petitioners and the wholesalers to whom they sold beer, as to be found in the price list circulated by the petitioners and letters addressed to the purchasers, as annexed to the paper book in Reference No. 5 of 1979.

14. The price list firstly states the price of beer as :

(1) Lager Arlem : Rs. 21.00 per dozen quart.

(2) Pilsner Arlem : Rs. 23.40 per dozen quart.

Then it points out inter alia that :

> "The above price are ex-brewery, exclusive of excise duty and cost of bottles." Lastly amongst the terms of sale it provides inter alia :
>
> "Deposit per bottle is 40 paise and the same is refundable on return of empty bottles to the brewery in good condition. Breakages and shortages are to party's account. Full value of order and bottle deposit is payable in advance."

15. Letters dated 2nd April, 1973, and 8th April, 1974, only inform the purchaser of the reduction and increase in the price of beer and bottles respectively and therefore were not of much relevance.

16. We proceed on the basis that terms of agreement between the petitioners and their purchasers for the sale of beer were on the same line as those contained in the said price list. The said price clearly shows three things :

(1) The price of beer quoted therein was exclusive of cost of bottle;

(2) That the said terms of sale did not contain an obligation on the purchasers to return the bottles and the time for such return;

(3) That the payment of deposit for bottles in advance was a term of sale.

Further as the learned Government Advocate has pointed out that under the said agreement the petitioners had also no control over the return of the bottles which would be sold by the wholesalers to the retailers and by the retailers to the consumers.

17. The circumstances as in this case arose in the case before the Supreme Court in its decision in the cse of *Punjab Distilling Industries Ltd. v. Commissioner of Income-tax, Simla* which has been also relied upon by the lower authorities in arriving at their finding.

18. In that case the Supreme Court was concerned with the question whether the deposit taken for the bottle in the sale of liquor was under the Income-tax Act "trading receipts" liable to be taxed under the said Act. In turn, answer to that question depended upon whether the amount taken was the price for the bottle although descriced as "deposit" and the transaction was in the nature of sale of bottles.

19. In the said case before the Supreme Court the facts were :The assessee carried on business as a distiller of country liquor and sold the produce of its distillery to licensed wholesalers. After the war started difficulty was felt in finding bottles in which the liquor was to be sold and to relieve the scarcity the Government devised a scheme whereby the distiller was entitled to charge the wholesaler a price for the bottles in which the liquor was supplied, at rates fixed by the Government, which he was bound to repay when the bottles were returned. In addition to the price fixed under the Government scheme, the assessee took from the wholesalers certain further amounts, described as security deposits, without the Government's sanction and entirely as a condition imposed by the assessee itself for the sale of its liquor. The moneys described as security deposits were also returned as and when the bottles were returned but in this case the entire sum taken in one transaction was refunded when 90 per cent of the bottles covered by it were returned. The price of the bottles received by the assessee was entered by it in its general trading account while the additional sum was entered in the general ledger under the heading "empty bottles return security deposit account". The question before the Supreme Court was whether the assessee could be assessed to tax on the balance of the amounts of these additional sums left after the refunds made thereout. The argument that was raised before the Supreme Court was that both these amounts, which were recovered and which were liable to be refunded on the bottles being returned, could not be considered as the price and therefore they could not be included in the expression "trading receipts". So far as the first part of the amount received was concerned which were under the Government regulations, under "the buy-back scheme" there was no difficulty for the court in coming to the conclusion that it was the price because the scheme itself mentions the same to be the price. However, as regards the other amount, which was entered separately in the assessee's account under the heading "Empty Bottles Return Security Deposit Account" which was contended not to be the price, the Supreme Court found that the method of accounting did not make any difference to the question whether the same was considered to be price or not and that merely because the account was different, if it were the price of sale, it cannot cease to be so by writing up the account in a particular manner. The court also negatived the petitioner's contention that since the price of the bottles was separately fixed the amount taken as deposit was different from and exclusive of it and also that the fact that additional sums might have to be refunded showed that it was not part of the price. It was further contended that the additional amount taken by the assessee from the sellers were only the

deposits for securing the return of bottles and as such they were only security deposits and not trading receipts. While negativing the said contention the court at page 524 of the Reports observed as under :

> "..... There could be no security given for the return of the bottles unless there was a right to their return for if there was no such right, there would be nothing to secure. Now we find no trace of such a right in the statement of the case. The wholesalers were clearly under no obligation to return the bottles. The only thing that Mr. Sastri could point out for establishing such an obligation was the use of the words 'security deposit'. We are unable to hold that these words alone are sufficient to create an obligation in the wholesalers to return the bottles which they had bought. If it had been intended to impose an obligation on the wholesalers to return the bottles, these would not have been sold to them at all and a bargain would have been expressly made for the return of the bottles and the security deposit would then have been sensible and secured their return. The fact that there was no time-limit fixed for the return of the bottles to obtain the refund also indicates that there was no obligation to return the bottles. The substance of the bargain clearly was that the appellant having sold the bottles agreed to take them back and repay all the amounts paid in respect of them."

20. In our view the above observations apply on all fours to the facts and circumstances of this case. The said agreement by the petitioners with the wholesalers does not create any obligation on the purchasers to return the bottles nor does it fix any time for their return. The agreement also makes the payment of the amount for the bottles in advance as the term of sale. The agreement also refers to the amount taken for the bottle as cost of the bottle. As pointed out by the Supreme Court in its aforequoted observations mere describing the said amount as "deposit" or maintaining a separate account for the said amount would not make it a deposit and looking to the above-mentioned nature of the agreement it would still be the price of the bottles.

21. The learned counsel for the assessee has placed strong reliance on the decision of the Kerala High Court in the case of Deputy Commissioner of Sales Tax (Law), Board of Revenue (Taxes), *Ernakulam v. McDowell & Co. Limited*[1] and also on the decision of the Madras High Court in the case of *State of Tamil Nadu v. McDowell & Co. Ltd*[2]. following the aforecited decision of the Kerala High Court.

22. The Kerala High Court in its said decision after distinguishing the above-quoted decision of the Supreme Court in Punjab Distillery's case has taken a contrary view. In that case the court has relied on a decision of the Allahabad High Court in the case of *Dyer Meakin Breweries v. Commissioner of Sales Tax, U.P*[3]. which had taken the view that such a transaction was in the

nature of bailment. It goes without saying that the term "bailment" which was a contract, implied an obligation, a breach of which entails recovery of damages. In fact the observations of the Allahabad High Court quoted and relied upon in the said Kerala High Court judgment, show that under the statutory rule which the court was considering, there was in fact such an obligation to return the bottles on the liquor therein being consumed, as signifying normal course of trade in the business. No such obligation is shown to exist in this case.

23. Secondly, before the Kerala High Court in its said decision in McDowell & Co.'s case [1980] 46 STC 79, its earlier Division Bench decision in *Madura Coats Ltd. v. State of Kerala*[4] was not cited. In its said decision in the case of Madura Coats the same High Court had taken the same view as held by the Supreme Court in the aforecited decision, that the amount paid separately for cones over which the yarn was wrapped though termed as "deposit" was in fact a price, there being no obligation to return the "cones".

24. The said Kerala High Court decision in McDowell's case [1980] 46 STC 79 relied upon by the learned counsel for the assessees has sought to distinguish the said Supreme Court decision in Punjab Distillery's case [1959] 25 ITR 519 (SC) on the ground that the Supreme Court was dealing there with the provisions of the Income-tax Act and not the Sales Tax Act which was before the Kerala High Court. In our view the said Supreme Court decision could not have been distinguished on that ground. Although it is true that the Supreme Court was, in that decision, concerned with a different statute the court was not dealing with the interpretation of the provisions of the said statute, but while making afore-quoted observations, was in fact laying down a general proposition as regards the circumstances under which the so-called deposit really constituted a sale price, for the main question was whether the amount taken for the bottles, though termed as "deposit" was really a sale price to constitute trade receipts.

25. On the facts and circumstances of this case, for the reasons stated above we are unable to agree with the view taken by the Kerala High Court in the aforecited decision on which the learned counsel for the assessee relied upon.

26. In our view, therefore, on the ratio of the said decision of the Supreme Court, the amount taken by the assessee-manufacturers from their purchasers towards the bottles, though termed as "deposit" was the sale price thereof, the transaction constituting the sale of bottles by the assessee to the purchasers liable to be assessed for sales tax though not under section 7(1)(a), but under section 7(1)(c) of the said Act.

27. The last question was whether "beer" could be classified as "Indian-made foreign liquor" liable for sales tax under item 22 of the First Schedule to the Act, viz., "foreign liquor and

Indian-made foreign liquor". Although the Sales Tax Act does not define the said term, the Goa, Daman and Diu Excise Duty Act of 1964 which was also a fiscal statute dealing with same subject, defined in section 2(kk) of the said Act the said expression as meaning "brandy, whisky, gin, rum, milk punch, wines or beer manufactured in India and such other liquor as may be declared by the Government as Indian-made foreign liquor. Apart from the said definition, "beer" which was a drink of foreign origin, and also was a liquor though of lower alcohol percentage could be without any difficulty classified as Indian-made foreign liquor under item 22 of the First Schedule to the said Act.

28. We therefore answer the questions as follows :-

Question (1) : In the affirmative.

Question (2) : Need not be answered.

Question (3) : As reframed. In the negative.

Questions (4) and (5) : Need not be answered in view of our answers to the above questions.

Question (6) : The sale of bottles was liable to tax under section 7(1)(c) of the Sales Tax Act. But the assessee be held liable to pay sales tax only in respect of the unrefunded amount. The assessee to satisfy the Sales Tax Officer from its books of account as to the amount unrefunded.

Question (7) : Not necessary to be answered.

Question (8) : In the affirmative.

29. No order as to costs.

30. The learned counsel for the petitioners makes an oral application for seeking leave to appeal to the Supreme Court. The same is rejected.

Cases Referred.

1[1980] 46 STC 79
2[1980] 46 STC 85
3[1972] 29 STC 69
4[1978] 41 STC 333