

# PUNJAB AND HARYANA HIGH COURT

Jagatjit Distilling & Allied Industries Ltd

Vs

State of Punjab

General Sales Tax Reference No. 8 of 1969

(D.K. Mahajan and H.R. Sodhi, JJ.)

03.08.1971

## JUDGMENT

### **Mahajan, J.**

1. This order will dispose of six references (Sales Tax References Nos. 8, 9 and 10 of 1969 and 1, 2 and 2-A of 1970). Out of these references, five are under section 22 of the Punjab General Sales Tax Act, 1948 (East Punjab Act 46 of 1948) (hereinafter referred to as the Act) and the sixth reference is under section 9(3) of the Central Sales Tax Act, 1956 (hereinafter referred to as the Central Act) read with section 22(1) of the Punjab General Sales Tax Act.

2. Certain questions of law were not referred by the Tribunal under section 22(1) of the Act. Consequently, an application was made to this Court under section 22(2) and a question of law set out below was agreed to be framed in place of question No. 2. This question was deemed to have been substituted in all the references :-

"Whether on the facts and in the circumstances of these cases is the price of bottles liable to sales tax when bottled liquor is sold ?"

The assessee is the Jagatjit Distilling and Allied Industries Limited, Hamira. The assessee is engaged in distilling liquor. For purposes of sale, the liquor is either sold in bottles or in barrels. In the present case, we are concerned with the sale of liquor in bottles. The Assessing Authority brought to tax the price of bottles. Its plea was that when liquor was sold in bottles, there was a sale of the bottles as well and that sale was liable to sales-tax under the Act. This stand of the Department was controverted by the assessee but without success either before the Assessing Authority or the Appellate Authority or the Sales Tax Tribunal. The Department took the view that when liquor is sold in bottles there is a sale of the bottle as well and the sale-price of the bottle is liable to sales-tax. The plea of the assessee that there was no sale of the bottle was negatived.

3. The following questions of law now fall for determination :-

"1. Whether the Additional Deputy Excise and Taxation Commissioner exercising the power of the Commissioner under section 21(1) of the Punjab General Sales Tax Act, 1948, could not assess escaped turnover after the expiry of the period of four years from the expiration of the assessment year as provided in section 11-A of the Punjab General Sales Tax Act ?

2. Whether on the facts and in the circumstances of these cases the price of bottles is liable to sales tax when bottled liquor is sold ?

3. Whether on the facts and circumstances of the case, there was any sale of the packing material (bottles) in view of the goods having been delivered at the instance of the Excise Authorities under the Punjab Excise Act, 1914 and the Rules framed thereunder to such persons to whom the license had been granted or the Delivery Order had been issued ?

4. Did the dealer have any volition in the sale of the goods ordered to be delivered to a particular licensee, and whether such a delivery could constitute sale within the meaning of the definition as given in the Sale of Goods Act ?

5. Whether the company could be held to be dealer in straw covers and was liable to pay sales tax on the value of straw covers used for packing ?

4. The first three references in their serial order relate to the years 1956-57, 1957-58 and 1958-59. The next two references relate to the years 1962-63 and 1963-64, and the last one relates to the year 1963-64 and is under the Central Act. The first question only arises in the first three references and in these references the last question does not arise which only arises in the last three references. The remaining three questions are common to all the references. We propose to deal with these questions in the same order in which they have been set out above.

*Question No. 1 :*

5. The contention of the learned counsel for the assessee is that the Additional Deputy Excise and Taxation Commissioner could not *suo motu* act under section 21(1) of the Act. The contention proceeds that in fact what the Additional Deputy Excise and Taxation Commissioner was doing was bringing to tax escaped turnover or under-assessed turnover and, therefore, was acting under section 11-A of the Act. It is stated that the assessment was made on 6th of November, 1960, and the period of four years within which proceedings under section 11-A could be initiated expired on the 29th of July, 1965 and therefore, the order under section 11-A is wholly without jurisdiction. The learned counsel relies on *Hari Chand Rattan Chand v. Dy. E. & T. Commr<sup>l</sup>.*, for his contention that the power under section 21 cannot be exercised so as to re-assess a dealer in respect of any turnover which had escaped assessment or which had been under-assessed in consequence of any definite information which comes into his possession after the original order of assessment was made. The revisional authority has to confine itself to the record which is called for by it. It cannot take into consideration any fresh material in order to come to a different conclusion than the one to which the Assessing Authority came on the material before it.

6. The Assessing Authority did not take into account the price of bottles while dealing with the gross turnover of the dealer. This is clear from the order of the Assessing Authority dated 26th

February, 1960. It was only while acting under section 21(1) that the Deputy Excise and Taxation Commissioner ruled that the respondents were liable to pay sales-tax on the sales of bottles as containers. This happened after the period prescribed in section 11-A. It is now conceded by Mr. Bhagirath Dass that this argument is only available to him with regard to the assessments for the years 1956-57 and 1957-58. So far as the year 1958-59 is concerned, the matter was taken notice of by the Assessing Authority, and for that year there will be no question of the authority under section 21(1) trying to re-assess a dealer in respect of any turnover which had escaped assessment or which had been under-assessed. In our opinion, this contention has merit and must prevail. In fact, there was no material on the record before the Assessing Authority in the assessment years 1956-57 and 1957-58, whether there was any sale of the bottle as such. It is only in the assessment year 1958-59 and thereafter that such a material was placed on the record. Therefore, the Deputy Excise and Taxation Commissioner while acting under section 21(1) could not revise the order on the grounds specified therein. He was in fact trying to assess the turnover which had escaped assessment. In our opinion, the order of the revisional authority under section 21 with regard to the assessment years 1956-57 and 1957-58 was without jurisdiction. We hold accordingly.

*Question No. 2 :*

7. So far as this question is concerned, the position seems to be more or less settled by authority. A large number of decisions were cited but no useful purpose will be served in adverting to all of them. Reference need only be made to two decisions of the Supreme Court in *The Government of Andhra Pradesh v. Guntur Tobaccos Ltd<sup>2</sup>*, and *Commissioner of Taxes, Assam v. Prabhat Marketing Co. Ltd<sup>3</sup>*, which lay down the principle in determining whether the value of the container is liable to sales-tax under the Act or not ? Their Lordships observed :-

"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."

Their Lordships referred with approval to the observations of Subba Rao, J., (as he then was) in *Hyderabad Deccan Cigarette Factory v. The State of Andhra Pradesh<sup>4</sup>*, which are in the following terms :-

"In the instant case, it is not disputed that there were no express contracts of sale of the packing materials between the assessee and its customers. On the facts, could such contracts be inferred ? The authority concerned should ask and answer the question whether the party in the instant case, having regard to the circumstances of the case, intended to sell or buy the packing materials, or whether the subject-matter of the contracts of sale was only the cigarettes and that the packing materials did not form part of the bargain at all, but were used by the seller as a convenient and cheap vehicles of transport. He may also have to consider the question whether, when a trader in cigarettes sold cigarettes priced at a particular figure for a specified number and handed them over to a customer in a cheap cardboard container of insignificant value, he intended to sell the cardboard container and the customer intended to sell the cardboard container and the customer intended to buy the same. It is not possible to state as a proposition of law that whenever particular goods were sold in a container the parties did not intend to sell and

buy the container also. Many cases may be visualised where the container is comparatively of high value and sometimes even higher than that contained in it. Scent or whisky may be sold in costly containers. Even cigarettes may be sold in silver or gold caskets. It may be that in such cases the agreement to pay an extra price for the container may be more readily implied."

8. In Guntur Tobacco's case (supra) again it was observed at page 258 :-

"Whether a contract for service or for execution of work, involves a taxable sale of goods must be decided on the facts and circumstances of the case. The burden in such a case lies upon the taxing authorities to show that there was a taxable sale, and that burden is not discharged by merely showing that property in goods which belonged to the party performing service or executing the contract stands transferred to the other party",

and the principle that was enunciated in this case is to be found at page 256 of the report :-

"In order that there should be a sale of goods which is liable to sales tax as part of a contract for work under a statute enacted by the Provisional or State Legislature, there must be a contract in which there is not merely transfer of title to goods as an incident of the contract, but there must be a contract, express or implied, for sale of the very goods which the parties intended should be sold for a money consideration, i.e., there must be in the contract for work an independent term for sale of goods by one party to the other for a money consideration."

In this very case, reference was made to certain decided cases wherein it was held that the packing material had not become an integral part of the product entrusted in the work contract and, therefore, its price was liable to sales tax. In the present case, the Sales Tax Tribunal on this matter came to the following conclusion :-

"The second ground urged before me by the learned counsel is that the petitioner firm is required by the Punjab Government to sell liquor in bottled form and under the Punjab Distillery Rules and the company is required to maintain certain stocks of empty bottles and bottled liquor every day and the company cannot sell liquor except in bottled form; that the bottling process forms a part of the process of manufacture of the finished article i.e., bottled liquor which like other manufacturing processes is carried on under the strict supervision of the Punjab Excise Staff stationed at the Distillery. It has been argued that a bottle containing the liquor is an integral part of the finished goods and is sealed with pilfer-proof seals and is labelled with the labels approved by the Punjab Excise Department and what the company sells is the finished product, namely, the bottled liquor, further that the Registration Certificate issued to the petitioner company mentions bottles as a commodity which is purchased by the petitioner-company for the purpose of manufacture which shows that the Department always thought that bottling was a process of manufacture. Under the circumstances it has been urged that it cannot be said that the petitioner-company is selling bottles as separate articles on which it is liable to pay sales-

tax; further that the essential containers of goods without which the contents cannot be sold are an integral and inseparable part of the finished product and sold and no sales-tax is leviable thereon. In Rule 110 of the Punjab Distillery Rules, 1932, the following passage appears ;

"Provided that not more than 2,250 litres shall be supplied at one issue to a licensed vendor who desires an issue of bottled spirit and in case of bulk spirit who desires his issues to be made in casks of capacity of at least 225 litres each supplied by himself or by the distillery on his behalf and tendered at the time to be filled. This shows that the spirit can be supplied both in casks and in bottles; the casks are to be of capacity of at least 225 litres each supplied by the licensed vendor or by the distillery on his behalf. I have seen a copy of the Distillery License in Form D-2 granted to M/s. Jagatjit and Allied Industries, Hamira, under section 21 of the Punjab Excise Act, 1914. In that license it is mentioned that it is granted to the petitioner under section 21 of the Punjab Excise Act, 1914, to manufacture :-

(a) country spirit

(b) special country spirit (prepared for persons of distinction under special permit of the Collector)

(c) foreign liquor

(d) rectified spirit

(e) denatured spirit

in the premises specified in that license. Para 5 of that license is as follows :-

'5. He shall comply with all directions of the Financial Commissioner regarding the character or purity of the liquor to be manufactured, the stock of spirit or material to be maintained and all other matters in which compliance is prescribed by rules made under the Punjab Excise Act 1 of 1914.'

9. Section 21 of the Excise Act is :

21. The Financial Commissioner subject to such restrictions or conditions as the State Government may impose, may -

(a) establish a distillery in which spirit may be manufactured under a license granted under section 20;

(b) discontinue any distillery so established;

(c) license the construction and working of a Distillery or brewery;.....'.

\* \* \* \* \*"

All this shows that what is manufactured is the spirit or liquor which is later put in the casks or the bottles as containers. There is thus no force in the pleas that the petitioner manufactures bottled spirit or bottled liquor, that it was enjoined upon the petitioner to deliver liquor in bottled form only and that bottling process forms a part of the finished articles - bottled spirit or liquor. License is given to the petitioner for the manufacture of spirit and liquor and bottling is a separate process which does not form part of the process of manufacture of spirit or liquor but takes place after the process of manufacturing of spirit or liquor has been completed; further the act of putting the liquor into casks or bottles does not make the containers an integral or inseparable part of the finished product - the spirit or liquor.

It will be useful at this stage to make a review of the nature of the arrangement to which the parties are the State Excise and Taxation Department, the owners of Distilleries and liquor licensees. Every Distillery is run under a license granted to the owner of the Distillery under section 21 of the Punjab Excise Act No. 1 of 1914 to manufacture country spirit, liquor etc. The grant of such licensees is strictly or rather severely limited in order to obviate unhealthy competition and thus safeguard the interests of the owners of the Distilleries. A new license is issued only if the existing Distilleries cannot meet the requirements and demand of country spirit and liquor made upon them by the liquor licensees : this demand is determined at the time of the annual auction of liquor vends for which substantial payments are made by those licensees for the benefit of the State Exchequer which in the welfare State are used for the benefit of the people. The price at which liquor is to be supplied by the Distilleries to the liquor licensees is determined and reviewed every year by joint deliberations between the representatives of the Distilleries and the State Department. A representative of the Government of India who is a senior Cost Accounts Officer in the Ministry of Finance is also invited to join the deliberations. During the course of these meetings the representatives of the Distilleries place their points of view before the Committee, the cost factor of various items involved is taken into consideration. One of the important consideration will be that while the owners of the Distilleries get their due profit, the price should not be such that it may lead to illicit distillation; in this way the interest of the public to get the liquor at reasonable rates is safeguarded, while at the same time providing the Distilleries, their legitimate profits. While the Distilleries' point of view is to make maximum profit, this has to be balanced by the other factors of State Policy pointed out above. When the State Government safeguards their interests by issuing only strictly limited number of licenses for distilleries and providing them the necessary facilities, it has every right to safeguard its own interest by reasonable restrictions which ultimately work to the benefit of the Distilleries also. The counsel for the petitioner has argued that the price of liquor to be supplied by the Distilleries is controlled and is fixed by the Financial Commissioner. The latter determines the ceiling and leaves it to the Distilleries to offer competitive price. The discussion above shows that while arriving at the ceiling price, full discussion is held with the representatives of the Distilleries and their points of view including cost factor are taken into consideration; the Distilleries have a say in the fixing of the price of liquor to be supplied by them and their point of view is kept in mind in the overall context pointed out above which method ultimately benefits the Distilleries also. That this price is more than remunerative is shown by the fact that the petitioner has been giving a discount to the liquor licensees purchasing liquor from him to attract more custom (in addition to the petitioner's Distillery there were also the Distilleries at Khasa and Karnal). The giving of discount as pointed out above provides the petitioner with considerable freedom in arriving at agreements of sale of its liquor with the licensees who are numerous."

10. It was also not disputed that while fixing the price of the bottled liquor, the price of bottle was taken into account. We entirely agree with the approach and the conclusion of the Tribunal. The same is fully warranted by the decision of the Supreme Court already referred to. The answer to this question would be in the affirmative. But it would be subject to the answer that will have to be recorded to Question No. 4. If it is held on question No. 4, that there is no sale in law because there was no voluntary contract as such for the sale of liquor, then there will be no question of sale of bottle as such. It is not that the bottle as such has been sold. It is the liquor of which bottle is the container that has been sold. Primarily, the sale is of liquor and if the sale of liquor is not sale within the meaning of that expression in the Sale of Goods Act, there would be no sale of the bottle.

*Question Nos. 3 and 4.*

11. Question Nos. 3 and 4 are inter-connected. They depend on the answer to the question whether there was a sale of liquor and this sale of bottles within the meaning of that expression in the Sale of Goods Act. It was held in *State of Madras v. Gannon Dunkerley and Co. (Madras) Ltd<sup>5</sup>*, and *New India Sugar Mills Ltd. v. Commissioner of Sales Tax, Bihar<sup>6</sup>*, that "the Legislature was competent to legislate for levy of tax only on transactions which were 'sales' within the meaning of the Indian Sale of Goods Act, 1930." The observations in *New India Sugar Mills* case (supra) are very pertinent and may be reproduced for facility of reference :-

"In popular parlance 'sale' means transfer of property from one person to another in consideration of price paid or promised or other valuable consideration. But that is not the meaning of 'sale' in the Sale of Goods Act, 1930. Section 4 of the Sale of Goods Act provides by its first sub-section that a contract of sale of goods is a contract where the seller agrees to transfer the property in goods to the buyer for a price. 'Price' by clause (10) of section 2 means the money consideration for sale of goods and 'where under a contract of sale the property in the goods is transferred from the seller to the buyer, the contract is called a sale; but where the transfer of the property in the goods is to take place at the future time or subject to some condition thereafter to be fulfilled, the contract is called an agreement to sell (sub-section (3) of section (4)). It is manifest that under the Sale of Goods Act a transaction is called sale only where for money consideration property in goods is transferred under a contract of sale. Section 4 of the Sale of Goods Act was borrowed almost verbatim from section 1 of the English Sales of Goods Act, 56 and 57 Vict : c. 71. As observed by Benjamin in the 8th Edn., of his work on 'Sale', 'to constitute a valid sale there must be a concurrence of the following elements, viz., (1) parties competent to contract; (2) mutual assent; (3) a thing, the absolute or general property in which is transferred from the seller to the buyer; and (4) a price in money paid or promised."

12. In *Chittar Mal Narain Das v. Commissioner of Sales Tax, U.P<sup>7</sup>*, it was observed :-

"If there be a contract, the restrictions imposed by statute may not vitiate the consent. But the contract cannot be assumed."

In the present case, the entire produce and sale of liquor is regulated under the Excise Act. The producer is not free to sell to whomsoever he likes. It has to be sold to permit-holder and also at the price fixed. The only volition left is to the permit-holder to ask for a permit on Distillery A or Distillery B. The mere fact that the Distillery-holder may give some discount to attract a purchaser to obtain permits on its Distillery does not mean that there is a contract between the Distillery and the purchaser in the matter of sale of liquor. It is still open to the authorities not to give a permit on a particular Distillery. The learned counsel for the State could only draw our attention to the Punjab Liquor Permit and Pass Rules, 1932 and Form L-32 which leaves the total quantity of full strength and variety, sizes, grades and strength to the discretion of the permit-holder, but that does not bring about a contract between the permit-holder and the Distillery. The Distillery is bound to supply the liquor mentioned in the permit. In our opinion, this case is more or less analogous to the case that was before their Lordships of the Supreme Court in Chittar Mal Narain Das's case (supra).

13. For the reasons recorded above, we answer the third and the fourth questions in the negative, namely that there is no sale of liquor and consequently of the packing material, that is, the bottle.

*Question No. 5 :*

14. This question was not pressed by the learned counsel for the assessee. We answer this question in the affirmative, that is, in favour of the Department and against the assessee.

15. The net result, therefore, is that the first question is answered against the Department with regard to the assessments for the years 1956-57 and 1957-58, and in its favour for the assessment year 1958-59. The second question is answered in favour of the Department but its answer would be of no material consequence in view of our answer to questions 3 and 4. Those questions have been answered against the Department. Question No. 5 has been answered in favour of the Department. In the circumstances of the case, there will be no order as to costs.

Cases Referred.

124 S.T.C. 258

216 S.T.C. 240

319 S.T.C. 84

417 S.T.C. 624

51959 S.C.R. 379

614 S.T.C. 316

726 S.T.C. 344