Before : Hon'ble S. S. Sodhi & Ashok Bhan, JJ.

M/S PUNJAB BREWERIES LIMITED, LUDHIANA,—*Petitioner.*

versus

THE STATE OF PUNJAB,—*Respondent.*

General Sales Tax Reference No. 23 of 1985

October 3, 1991.

Punjab General Sales Tax Act 1948—*Punjab Excise Act* 1914—*Sale of bottled beer—No obligation to return empty bottles—Bottles supplied against security deposit—Whether assessee liable to pay tax on price of bottle.*

Held, that the transfer of bottles against the security deposit instead of outright sale is only a devise to evade the tax on the bottles. Opened beer bottles could not be sold by licensee to his cutomers. The licensee was under no obligation to return the bottles to the dealer and further he had no domain over the bottles which he sold to his customers as under law he could sell the beer only in sealed bottles. It may further be noticed that there was no time frame fixed for the return of bottles by licensee to the dealer to obtain the refund. The amount of money claimed by the dealer as having been received as security was in fact part of the sale price and that the assessee is liable to pay sales tax on the same.

(Para 10)

B. K. Jhingan, Advocate, *for the appellant.*

Rajiv Narain Raina, A.A.G. Punjab. *for the Respondent.*

JUDGMENT

Ashok Bhan, J.

(1) This judgment shall dispose of General Sales Tax References (for Short 'Reference') No. 23 and 24 of 1985. Reference No. 23 is under the Punjab General Sales Tax Act and Reference No. 24 is under the Central Sales Tax Act. Assessment year is 1979-80. The factual position is the same. The Presiding Officer, Sales Tax Tribunal (hereinafter referred to as the Tribunal) Punjab, has referred to this Court the following question of law for its opinion :—

> Whether on the facts and circumstances of the case the course of dealings between the parties shows that the amount of

money, claimed by the assessee to have been received as security, was in fact part of the sale price and if the answer be in the negative, the effect thereof on the liability of the assessee to tax ?

(2) The facts :

(3) M/s Punjab Breweries Limited, Ludhiana, (hereinafter referred to as the 'dealer') is a registered dealer engaged in manufacture and sale of beer etc. The assessee filed his quarterly returns showing gross turnover at Rs. 1,81,59,219.56. The deductions were claimed in respect of sales-tax of free goods and sales made to the registered dealers. The Assessing Authority Ludhiana,—*vide* its order dated 12th April, 1982, assessed the dealer to sales tax including penalty and interest at Rs. 5,23,262.35 for the assessment year 1979-80 under the Punjab General Sales Tax Act and to Central sales-tax including penalty and interest at Rs. 9,266.99. Assistant Excise and Taxation Commissioner, Ludhiana, exercising the powers of Commissioner (hereinafter referred to as the Revisional Authority) in its revisional jurisdiction initiated the proceedings to examine the legality of propriety of the assessment orders framed by the Assessing Authority, Ludhiana. It was discovered that the dealer did not include sale price of bottles supplied with beer in the gross turnover and that the dealer was liable to pay sales tax at the rate of 10 per cent under the Punjab General Sales Tax Act (hereinafter referred to as the State Act) and the Central Sales Tax Act (hereinafter referred to as the 'Central Act'). Revisional Authority, Ludhiana,—*vide* its order dated 25th February, 1983 created additional demand of Rs. 1,08,900 and Rs. 2,43,563 under the State Act and the Central Act respectively. The dealer filed two applications for revision before the Tribunal under the State Act and the Central Act. The Tribunal,—*vide* its order dated 19th September, 1983 partly allowed the revision applications. The dealer filed reference applications under section 22(1) of the State Act claiming five questions of law to be referred which according to him, arose out of the order of the Tribunal. The Tribunal, however, referred only one question of law which has been reproduced at the outset.

(4) Assistant Excise and Taxation Commissioner (Inspection), Ludhiana, while initiating *suo moto* revisional jurisdiction on examination of the trading account drawn for the financial year of the dealer came to the conclusion that the purchase/consumption of sale of bottles with beer did not appear in the credit as well as debit side of the trading account and that the sale price of the bottles supplied

with the beer was not included by the dealer in gross turnover and placed on the file and consequently the turnover relating to sale/ supply of bottles with beer had escaped assessment. The dealer was given several opportunities to produce the complete books of accounts for the relevant assessment year which he failed to produce and ultimately the Revisional Authority framed the best judgment assessment. Besides, the dealer even did not choose to file any reply giving his explanation to the show cause notice before the Revisional Authority. Before the Tribunal, the case set up by the dealer was that he had not been given proper opportunity by the Revisional Authority. This plea of the dealer was negatived by the Tribunal. On merits, the case set up before the Tribunal was that the dealer did not sell the bottles to the L-1 licensee; that it was taking the deposit for return of bottles and the instant case was one of bailment and not of sale and that the department had erred in raising an assumption of 'sale' of bottles under the circumstances. The Tribunal negatived this plea for the reasons under mentioned.

(5) Under the Punjab Excise Act, 1914, which is applicable in the present case, a brewery like the present dealer can sell only bottled beer to L-1 licensee. Under the same Act and rules L-1 licensees cannot sell the contents of the bottle, that is the beer only but has to sell beer in bottled condition. Opened beer bottles cannot be sold by a L-1 licensee to the consumers. L-1 licensee is under no obligation in the matter of return of bottles to the dealer; further L-1 licensee is left with no domain over the bottles sold to the customers as under mandate of law beer can only be sold in sealed bottles. Fectually. it was conceded before the Tribunal that not a single bottle was in fact returned by the L-1 licensee to the dealer. Such being the position, the Tribunal came to a firm finding of fact that the present case was not a case of bailment but a case of sale of bottles by the dealer to the L-1 licensees and, therefore, the dealer was liable to pay the sales tax on the price of bottles as had been held by the Revisional Authority.

(6) We have heard the learned counsel for the parties at length.

(7) The question to be determined in this back-drop of facts is as to whether this was a case of 'bailment' as claimed by the dealer or a case of 'sale' of bottles as found by the Tribunal ? The word 'sale' has to be understood in its meaning as given under the Sale of Goods Act. The distinction between 'sale' and 'bailment' is "in a sale. property in the goods passes from the seller to the buyers". In bailment a person delivers possession of the goods to another person

for some purpose on the agreement that the latter shall, when the purpose is accomplished, return the goods or otherwise dispose them of according to the directions of the owner. In the case of 'bailment', the bailor has a right to claim return of goods. Apex Court in *Raj Sheel and others* v. *State of Andhra Pradesh and others* (1), has held that 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."

(8) Learned counsel cited the following judgments :—

(i) *Dyer Meakin Breweries* v. *Commissioner of Sales Tax U.P.* (2).

(ii) *Deputy Commissioner of Sales Tax (Law), Board of Revenue (Taxes), Ernakulam* v. *Mcdowell & Co. Limited* (3).

(iii) *The Britannia Biscuit Co. Ltd.* v. *The State of Maharashtra* (4), to canvass the proposition that under the circumstances of the present case, it was a case of bailment and not of sale of goods by the dealer to its purchasing dealers. In all the cases referred to above, under the facts and circumstances of each particular case, the Court came to the conclusion that it was case of bailment and not sale of bottles by the dealer to his purchasing dealers.

(9) As against this, the learned counsel appearing for the State relied upon *Punjab Distilling Industries Ltd.* v. *Commissioner of Income-tax, Simla* (5), *Arlem Breweries Ltd.* v. *The Assistant Commissioner of Sales Tax, Panaji* (6) and *Raj Sheel and others* v. *State of Andhra Pradesh and others* (7). In *Arlem Breweries case* (supra). under somewhat similar circumstances, the High Court held as under :—

"(ii) that the agreement by the assessees with the wholesalers did not create any obligation on the purchasers to return the bottles nor did it fix any time for their return. The

(1) 74 S.T.C. 379.
(2) 29 S.T.C. 69 (Allahabad High Court).
(3) 46 S.T.C. 79 (Kerala).
(4) 53 S.T.C. 179 (Bombay).
(5) A.I.R. 1959 S.C. 346.
(6) 53 S.T.C. 172 (Bombay).
(7) 74 S.T.C. 379 (S.C.).

agreement also made the payment of amount for the bottles in advance as the term of sale and referred to the amount taken for the bottles as cost of the bottles. Therefore the amount taken by the assessees from their purchasers towards the bottles, though termed as "deposit" was the sale price thereof, the transactions constituting sales of bottles by the assessees 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 Act. But the assessees would be liable to pay sales tax only in respect of the unrefunded amount."

Their lordships of Bombay High Court in *Arlem Breweries' case* (supra) relied upon a Supreme Court judgment in *Punjab Distilling's case* (supra) the same judgment on which reliance was placed by the Tribunal in its order as well, to come to the conclusion that since an agreement between the dealer and the purchasing dealer did not create any obligation on the purchaser for return of bottles coupled with the fact that no time limit was fixed for the return of the bottles. The case was one of 'sale' and not 'bailment', further their lordships differed with the view taken by Kerala High Court in *Deputy Commissioner of Sales Tax (Law), Board of Revenue (Taxes), Erankulam's case* (supra) and *The State of Tamil Nadu* v. *Mcdowell and Company Ltd* (8), on which reliance has been placed by the learned counsel appearing for the dealer to canvass the proposition that the present case is one of 'bailment' and not 'sale' of goods. We agree with the view taken in *Arlem Breweries's case* (supra) and are unable to subscribe to the view taken in Deputy Commissioner of Sales Tax (Law) Board of Revenue (Taxes) Ernakulam's case (supra). Under somewhat similar circumstances, the matter was considered by the apex Court in *Raj Sheel's case* (supra) where their lordships have indirectly approved the view taken by the Bombay High Court and held as under :—

"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.

There can be as many different kinds of transactions as the circumstances of the case may require either by reason or prevailing trade practice or market conditions or personal convenience, and as human ingenuity may devise for *bona*

(8) 46 S.T.C. 85 (Madras).

fide reducing the burden of tax. In *State of Karnataka* v. *Shaw Wallace and Co. Ltd.* (1981) 48 S.T.C. 169 the High Court of Karnataka pointed out that there was an agreement to sell the bottles and crates in which the liquor was conveyed and there was also an agreement in regard to the price of those containers, and therefore the turnover in regard to those items had to be determined and the appropriate rate of sales tax had to be charged as provided in the Karnataka Sales Tax Act. Reference was made to the requirement in the Karnataka Excise Act, 1966 that the liquor had to be sold in sealed container but that, the High Court said, did not automatically lead to the conclusion that the same rate of sales tax was applicable to containers also. It was observed that such a presumption could not be made, specially when separate rates were specified in the Sales Tax Act in regard to the containers and the contents. In *Arlem Breweries Ltd.* v. *Assistant Commissioner of Sales Tax* (1983) 53 S.T.C. 172 the Panaji Bench of the High Court of Bombay noted that item 22 of the First Schedule to the Goa, Deman and Dieu Sales Tax Act, 1964, which spoke of the item "foreign liquor and Indian made foreign liquor" indicated that the tax was levied only on the liquor and not against the bottles and liquor or bottled liquor. The sale was of beer and the bottles were treated separately. It was also pointed out that the agreement by the assessee with the wholesaler did not create any obligation on the purchasers to return the bottles nor did it fix any time for their return. The payment of an amount for the bottles in advance as a term of the sale was referred to as cost of the bottles and this, the High Court said, constituted the sale price of the bottles although described as a deposit. In Jamana Flour and Oil Mills (P) Ltd. *v.* State of Bihar (1987) 65 S.T.C. 462; A.I.R. 1987 S.C. 1207 this Court affirmed the finding that there was an implied agreement of the sale of gunny bags. It said :

"Admittedly gunny bags are different commodity and sale thereof is assessable to tax at 4½ per cent. It is not disputed that the appellant bought gunny bags for packing wheat products for the purpose of sale. The Control Order contemplates a net weight which means that the weight of the bag is included in the price to be charged by the dealer. Under the explanation when

packing is done in cloth bags, a higher rate is admissible. The scheme clearly suggests that the price of gunny bags is inclusive and where cloth bag is used, a higher price over and above what has been provided for ordinary containers is permitted."

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

1. The packing material is a commodity having its own identity and it 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 could not make the sale of packing an integrated part of the sale of the product."

(10) A perusal of the above quoted judgment of the Supreme Court would show that the apex Court has held that the question as to whether there is an agreement of sale of packing material is a pure question of fact depending upon the facts of each case and further their lordships have approved the view taken by the Bombay High Court in *Arlem Breweries' case* (supra). On the facts of the present case, we are satisfied that method of billing adopted by the dealer

showing "the transfer of bottles against the security deposit instead of outright sale is only a devise to evade the tax on the bottles" and cannot be taken as a proof of nature of transaction. Under the statutory provisions, a dealer could sell only bottled beer to the L-1 licenses and further L-1 licensee could sell beer in the bottled condition only. "Opened beer bottles could not be sold by L-1 licensee to his customers. The L-1 licensee was under to obligation to return the bottles to the dealer and further he had no domain over the bottles which he sold to his customers as under law he could sell the beer only in sealed bottles". We do not find any substance in the submission of learned counsel appearing for the dealer that the words "security deposit" implied an obligation on the L-1 licensee to return the bottles to the dealer. These words, in the absence of any other evidence, would not create an obligation on L-1 licensee to return the bottles to the dealer specially when L-1 licensee sells the beer to his customers in bottled condition with no corresponding obligation on the customer to return the empty bottles to the L-1 licensee. "It may further be noticed that there was no time frame fixed for the return of bottles by L-1 licensee to the dealer to obtain the refund". It was further conceded by the learned counsel appearing for the dealer in this Court that on every consignment to the L-1 licensee a fresh deposit of security was taken for the bottles supplied. It is admitted position in this case that not a single bottle was in fact returned by the L-1 licensee to the dealer. We are in agreement with the view taken by the Bombay High Court in *Arlem Breweries' case* (supra) which in a way stands approved by their lordships of the Supreme Court in *Raj Sheel's case* (supra). Accordingly we answer the question in the affirmative, i.e. in favour of the Revenue and against the dealer and hold that the course of dealings between the parties show that "the amount of money claimed by the dealer as having been received as security was in fact part of the sale price and that the assessee is liable to pay sales tax on the same."

S.C.K.

Before : *Hon'ble G. R. Majithia, J.*

BALDEV KRISHAN AND OTHERS,—*Petitioners.*

versus

STATE OF PUNJAB,—*Respondent.*

Criminal Misc. No. 6435-M of 1991

November 25, 1991.

Code of Criminal Procedure, 1973—*Section* 482—*Quashing*—*Insecticides Act* 1968—*Sections* 24(3), 24(4)—*Petitioners summoned*