
(2013) 01 AP CK 0020

In the Andhra Pradesh High Court

Case No : T.R.E.V.C No"s. 43, 44 and 45 of 2007, W.P. No. 21115 of 2005, W.P. No. 856 of 2006 and W.P. No. 25588 of 2007

M/s. Hindustan Coco Cola Beverages P Limited

APPELLANT

Vs

State of Andhra Pradesh and another

RESPONDENT

Date of Decision : 02-01-2013

Acts Referred:

Andhra Pradesh Value Added Tax Act, 2005 — Section 29, 4(8), 6
Constitution of India, 1950 — Article 366(29A)(d)

Citation : (2013) 198 ECR 443 : (2013) 61 VST 393

Hon'ble Judges : M.S. Ramachandra Rao, J;Goda Raghuram, J

Bench : Division Bench

Advocate : S.R. Ashok, Sri. K. Raji Reddy and Sri. S. Dwarakanath, for the Appellant; Balaji Varma, Special Government Pleader for Commercial Taxes for respondent No. 1 and Sri. M.V.J.K. Kumar, for the Respondent

Judgement

M.S. Ramachandra Rao, J.—Since common issues of law and fact arise in these cases, they are being disposed of together. Heard Sri. S.R. Ashok, Senior Advocate, Sri. K. Raji Reddy, Sri. S. Dwarakanath, for the petitioners and Sri. Balaji Varma, Special Government Pleader for Commercial Taxes and Sri. M.V.J.K. Kumar for the impleaded respondents.

2. T.R.E.V.C Nos. 43, 44 and 45 of 2007 are filed by M/s. Hindusthan Coco Cola Beverages (P) Limited (Formerly known as M/s. Bharat Coco Cola South East (P) Limited), Hyderabad (herein after referred to as "assessee") u/s 22 of the Andhra Pradesh. General Sales Tax Act, 1957 challenging the common order dated 17.10.2007 in T.A. Nos. 1323 of 2003, 911 of 2003 and 912 of 2003 of the Sales Tax Appellate Tribunal, Hyderabad for the assessment years 1998-99 (APGST), 1997-98 (APGST) and 1997-98 (CST) respectively.

3. The petitioner is a manufacturer and dealer in Soft Drinks and aerated water having its factory at Moula Ali, Hyderabad. It is registered on the rolls of the Commercial Tax Officer, Malkajigiri. It manufactures Soft Drinks with the brand

names such as Thums Up, Citra and Limca, puts them in the standard glass bottles of 200 ml, 300 ml and 350 ml and transports the same to the Wholesale Dealers in crates housing 24 bottles in each crate. The Wholesale Dealers in turn sell the same to the retailers. The retail dealers sell the same to the consumers who after consuming the soft drinks, return the bottles to the retailers. The retailers return the same to the wholesalers who in turn return the same to the manufacturers and this circle continues until the bottles and crates become useless. In order to secure the return of bottles, the manufacturers have been collecting rentals on the bottles and crates.

4. For the assessment year 1997-98, the petitioner was assessed under the Andhra Pradesh General Sales Tax Act, 1957 and the Central Sales Tax Act, 1956 by the Commercial Tax Officer, Malkajigiri Circle vide separate orders dated 21.03.2001. The assessing authority levied tax @ 5% on the turnover representing the value of rentals on the bottles and crates u/s 5E of the A.P General Sales Tax Act, 1957.

5. The Deputy Commissioner (CT), Hyderabad Rural Division, Hyderabad, the Revisional Authority, examined the orders of assessment for 1997-98 (APGST and CST) and opined that the assessing authority erred in treating the said turnover as rentals on bottles and crates; that it is nothing but part and parcel of the value of the Soft Drink itself; that in the chain of transactions what is sold by the manufacturers is only soft drinks and the bottles and crates are only a medium of transport to transfer the soft drinks from the manufacturers to the customer in fixed quantities; the wholesale dealers or the retail dealers do not take bottles and crates on lease; they have no say in the method of manufacturing of soft drinks or the shape and size of bottles in which the soft drinks are bottled. So, the Revisional Authority opined that what was shown and collected as rentals is nothing but the sale value of the soft drinks and the turnover is liable to be taxed @ 12% under entry 21 of the VI Schedule of the Act. He issued a show cause notices dated 19.3.2002 (for 1997-98 APGST and CST) and proposing revision of assessment to tax the crate rental @ 12% as applicable to soft drinks.

6. The assessee filed objections on 30.4.2002 contending that the assessing authority rightly levied tax @ 5% and that the said order of the assessing authority did not warrant any interference.

7. The Deputy Commissioner overruled the objections and confirmed the proposed Revision by separate orders dated 6.2.2003 under the A.P General Sales Tax Act, 1957 and the Central Sales Tax Act, 1956 for 1997-98.

8. The assessee filed appeals T.A. No. 911 of 2003 and T.A. No. 912 of 2003 before the Sales Tax Appellate Tribunal, Hyderabad (for short "STAT") contending that the sale invoice evidenced two different transactions and the nature of the transactions cannot be changed contrary to the recitals of the contract and pleaded for assessment u/s 5E of the Act for crate and bottle rental.

9. For the assessment year 1998-99, the petitioner was assessed under the AP General Sales Tax Act, 1957 by the Commercial Tax Officer, Malkajigiri Circle by order dated 30.03.2002. He held that with the substitution of Sl. No. 19 of the First Schedule by Act 30 of 1997 with effect from 12.5.1997, packing material has to be taxed at the same rate as the content.

10. For the assessment year 1998-99, the assessee filed an appeal to the Deputy Commissioner (Appeals) who upheld the assessment order stating that the claim for assessment u/s 5E of the Act cannot be maintained in view of Section 6C of the Act by order dated 14.2.2003.

11. The assessee filed TA No. 1323 of 2003 to the Sales Tax Appellate Tribunal, Hyderabad stating that Act 30 of 1997 has no relevance to the controversy and if there was no sale of packing material, Section 6C of the Act has no relevance.

12. On 30.9.2004, a judgment was delivered by the Tribunal wherein the Chairman agreed with the assessee and held that the crate rental represented a transaction of right to use taxable u/s 5E of the Act and allowed the appeal, but the Departmental Member disagreed with him and dismissed the appeal. Thereafter, the matter was placed before a Larger Bench of the Tribunal.

13. The Revenue filed applications to group the appeals of the wholesalers from the assessee, who had preferred appeals against the denial of tax set off under the Proviso to Sl. No. 21 of Schedule VI. The said application included appeal grounds of M/s. Vijayalakshmi General Stores from the order of the Deputy Commissioner, Chittoor dated 13.10.2004 and also application of grounds of wholesalers including Sri. Vinayaga Agencies, Kadapa. The Wholesalers pleaded that they merely recouped the very same amount of rental for bottles and crates; that they had contracted to pay for the prize of the soft drink and crate rental and that the so called rentals for crates and bottles is nothing but part of the sale price. The appeals filed by the wholesalers were heard along with the appeals filed by the assessee.

14. While the appeals were pending, the AP General Sales Tax Act, 1957 was repealed and the AP VAT Act, 2005 came into force with effect from 1.4.2005. For the period April to July, 2005, the assessee filed the monthly returns admitting the liability on the sale of soft drinks @ 12.5% but in respect of bottles and crates which are used for the purpose of transportation and easy handling and which are to be returned after the consumption of the liquid beverage is over, it admitted liability only to the extent of 4% under entry 90 of the First Schedule to the AP VAT Act, 2005. The Assistant Commissioner (CT), LTU, Saroornagar Division, Hyderabad issued a notice dated 1.9.2005 under Rule 25(5) of the Andhra Pradesh VAT Rules, 2005 proposing to levy a differential tax of Rs. 1.76 crores for all the four months observing that the entire turnover of sales including the turnover on lease of packing material is liable to tax @ 12.5%, that the assessee had admitted liability of only 4% on the turnover relating to the lease of packing material and this is not permissible as the total

consideration relates to sales only. The petitioner filed objections on 14.9.2005. By order dated 15.9.2005, the Deputy Commissioner (CT), Saroornagar Division rejected the objections of the petitioner and relying on Section 6 of the AP VAT Act, 2005 held that the rate of tax applicable for the container with content is the rate applicable to the content only; that the soft drink (content) is being sold with container (bottles and crates) and confirmed the tax demand as per the proposal in the notice dated 1.9.2005. Challenging the same, the petitioner filed W.P. No. 21115 of 2005 inter alia contending that the Revenue cannot tax the entire turnover @ 12.5% ignoring the terms and conditions between the parties; that the dispute whether the bottles and crates were subject matter of lease or infact sold along with soft drinks and hence taxable at a higher rate was a controversial issue between the petitioner and the Revenue even under the repealed AP General Sales Tax Act, 1957 and appeals are pending for various years commencing from 1997 to 2003 before the STAT; that the impugned assessment order was passed without application of mind; that it was never the case of the revenue that the turnover of bottles and crates shown under 4% category is taxable at 12.5% in view of the provisions of Section 6 of the VAT Act, 2005; that there was no reference to Section 6 at all in the show cause notice and therefore, the said assessment order should be suspended. On 28.9.2005, in W.P.M.P. No. 27041 of 2005, this Court granted interim suspension of the said order.

15. For September, 2005, the Assistant Commissioner (CT) (LTU), Saroornagar Division, Hyderabad passed orders dated 8.12.2005 also taxing the turnover on rental for bottles and crates @ 12.5% and issued show cause notices for October, 2005 proposing to tax the entire consideration @ 12.5% on the alleged ground that the total value received by the petitioner is towards price of soft drink only and there is no question of lease of bottles in this line of trade apart from proposing to restrict in put tax credit disputing the calculation made by the petitioner. The petitioner, therefore, filed W.P. No. 856 of 2006 to set aside the assessment order dated 8.12.2005 for September, 2005, to restrain the revenue from taking any action pursuant to its notice dated 8.12.2005 for October, 2005 and to restrain the revenue from issuing any notices for the months of November, 2005 onwards till decision is taken by the STAT in T.A. No. 911 of 2003, T.A. No. 912 of 2003 and T.A. No. 1323 of 2003. In the said writ, the petitioner filed W.P.M.P. No. 1008 of 2006 for suspension of the order of the assessment authority dated 8.12.2005 for September, 2005; W.P.M.P. No. 1007 of 2006 for stay of all further proceedings pursuant to the notice dated 8.12.2005 for October, 2005; W.P.M.P. No. 1006 of 2006 to restrain the respondents from issuing any notices for the tax period commencing from November, 2005 onwards. By separate orders dated 17.1.2006, interim suspension was granted by this Court in all the three W.P.M.Ps.

16. The Larger Bench of the Tribunal by a common order dated 17.10.2007 in T.A. No. 911 of 2003, T.A. No. 912 of 2003, T.A. No. 1323 of 2003 and others held inter alia that the return of the bottles by the end customers and the return

of the bottles and crates by the retailers to the wholesale dealers and by the wholesale dealers to the manufacturers is not in dispute; that the manufacturers collected deposits and the deposits will be kept with them till the agreement is in force; the purpose of housing the soft drink in the bottle and sending the bottles in crates is only to serve the purpose of making the soft drink available to the end customers; that the end customer is not conferred with any right to use the crates and bottles; that the end customer consumes the soft drink and returns the bottles; and therefore, what is paid by the end customer is the consideration for soft drink and not for getting any bottles or crates; when the price of soft drink is collected from the end customers for the supply of soft drink in a sealed and duly carbonated bottle to enable the customer to consume the soft drink, the manufacturers are not justified in splitting of the price into cost of soft drinks and rental value of crates and bottles; that the same appears to be a colourable device adopted by the manufacturers to avoid payment of tax; that neither the wholesalers nor the retailers can use the bottles and crates for any other purpose except to make the soft drink available to the end customer; therefore, there is no "use" of the bottles and crates by the wholesale dealers to the end customers and as such Section 5E of the Act is inapplicable; that there is no transfer of right to use goods eligible to tax u/s 5E of the Act as neither the wholesale dealers nor the retailers or the end customers have any control or domain over the bottles and crates; that no agreements between the manufacturers and the wholesale dealers have been filed and only invoices were filed to show the separate sale of soft drinks and lease of bottles and cartons; that the deposits made by the wholesale dealers have nothing to do with the turnover as the deposits were only for the purpose of security for return of bottles and crates; as such the amount collected under the garb of container charges is in fact a part of the sale price and the same is segregated from sale price and collected as container charges only to claim exemption from sales tax; since the soft drinks cannot be separated from the bottles, there cannot be any split up of price of bottles and soft drinks; that sale invoices may be helpful for determining the value of the goods and for determining the turnovers but they are not conclusive evidence and invoices themselves without any corroborative evidence cannot establish the agreement between the parties; non filing of agreements/contracts between the manufacturers and the wholesale dealers is willful and therefore adverse inference has to be drawn; that the contention of the distributors and the wholesalers that the so called rentals for crates and bottles is nothing but part of the sale price is to be upheld and consequently all the appeals filed by the manufacturers have to be dismissed and all the appeals filed by the wholesale dealers have to be allowed.

17. Challenging the said order in T.A. No. 911 of 2003, T.A. No. 912 of 2003, T.A. No. 1323 of 2003, the petitioner filed TREVC Nos. 44, 45 and 43 of 2007 in this Court respectively.

18. On 27.11.2007, the Deputy Commissioner (CT) (LTU), Saroornagar Division issued notice u/s 29 of the AP VAT Act, 2005 to the petitioner's banker City

Bank, Hyderabad to pay Rs. 6,86,098/- for 1997-98 and Rs. 50,03,191/- for 1998-99 towards AP General Sales Tax dues of the petitioner. Challenging the same, the petitioner filed W.P. No. 25588 of 2007 and sought directions to the said officer restraining him from taking any coercive steps for recovery of the said amounts pending disposal of the TRC Nos. 43 and 44 of 2007. The said writ petition was admitted on 30-11-2007 and in W.P.M.P. No. 33332 of 2007, this Court granted interim stay of the notice dated 27-11-2007 issued u/s. 29 of the Andhra Pradesh VAT Act, 2005 by the Deputy Commissioner (CT)(LTU), Saroornagar Division.

19. As can be seen from the above fact, the three revisions TREVC Nos. 43 to 45 of 2007 have been filed by the manufacturer of soft drinks and beverages against the common order of the Larger Bench of the STAT, Hyderabad dated 17-10-2007 in a batch of appeals preferred by similarly placed manufacturers of soft drinks and beverages and by wholesale dealers as well. These revisions are restricted to the decision of the Tribunal insofar as it pertains to rejection of the appeals by the manufacturers. However, the decision of the Tribunal insofar as it allowed appeals preferred by the wholesale dealers, on interpretation of the same transactional documents has become final as the State has not chosen to prefer any revision against the common order of the Tribunal insofar as the Tribunal decided in favour of the wholesale dealers.

20. Since the same transaction was in issue, both in the appeals preferred by the manufacturers as well as the wholesale dealers, though the decision in these revisions may not have an impact on the liability to tax of the wholesale dealers (since the State has not preferred any revisions), it was felt that hearing of the views of the wholesale dealers would aid holistic adjudication of the issue involved in the revisions. Therefore, when the State filed TREVC M.P. No. 239 of 2012 in TREVC No. 43 of 2007 to implead the wholesale dealers/distributors, the said application was ordered on 01-11-2012 by this Court rejecting the objection of the petitioner in the TREVC No. 43 of 2007 that such application is not maintainable and that the State cannot plead the case of the distributors.

21. After notices on the distributors impleaded in the TREVC No. 43 of 2007 were served, these revisions and writ petitions were heard.

22. The Counsel for the petitioners/manufacturers contended that the Tribunal having held that there was no sale of the bottles and crates and that they were delivered on bailment on returnable basis and continuously recycled, committed grave error in law in concluding that there was sale of packing material; that S. 6-C would apply only if there is evidence of sale of the bottles and crates whereas in the present case there was never an assessment or revision of assessment to tax of the value of the glass bottles or crates and controversy pertained only to the liability of crate rental u/s. 5-E of the Act; the Tribunal failed to note that even Serial No. 21 of Schedule-VI r/w S. 5(1) on its terms applied to sale of the content with the container, whereas, in the case on hand, the lower authorities had found that the empty bottles and crates were delivered on returnable basis

collecting security deposit and these containers were recycled remaining the property and asset of the petitioners; the Tribunal committed serious error of law and jurisdiction in disregarding the line of decisions of the Taxation Tribunals and the Hon"ble Supreme Court for periods prior to 1985 and for years thereafter holding that crate rentals for bottles and crates was a trade practice and the rent did not constitute the wholesale price for assessment of beverage. These decisions also provided evidence of trade practice to realize a rental on crates; the Tribunal erred in holding that splitting the charges on sale of soft drinks and rentals for crates and bottles is a device to defeat the law or to lower the tax due, whereas there were Apex Court rulings accepting a trade practice to deliver on bailment the glass bottles and crates on returnable basis while charging a rental on the investment; the Tribunal misdirected itself in placing reliance on Hindusthan Sugar Mills Vs. State of Rajasthan and Others, which dealt with a contract which was incompatible with the Cement Control Order whereas it was not even pleaded that charging crate rental was contrary to any law of the land; the Tribunal committed serious error of law in relying upon the self-serving case of the distributors that what was collected in the name of rental of bottles and crate was an integral part of the price of the soft drink, whereas the wholesalers had transacted accepting the invoice of the petitioners for a number of years and paid for crate rental for the use and return of the bottles and crates; the Tribunal committed serious error of law and jurisdiction in permitting the distributors to orally argue a case contrary to their own pleadings set out in the Memorandum of Grounds as well as the stand of the wholesalers before the assessing authorities to the effect that the crate rental paid to the petitioner/manufacturer was recouped and the same cannot be taxed twice over; The Tribunal committed error of law in relying upon Sri Satya Winery and Distillery Pvt. Ltd. Vs. State of A.P., Premier Breweries Vs. State of Kerala, which pertained to cases of sale of IMFL in bottles and packing materials for which independent tax treatment was denied in the light of S. 6-C and corresponding provisions and were not at all matters where glass bottles and crates were delivered on returnable basis on bailment; the Tribunal committed error in so far as relying on a passage from the minority opinion in the judgment of 20th 20th Century Finance Corpn. Ltd. and Another Vs. State of Maharashtra, ; The Tribunal committed serious error of law and jurisdiction in disregarding and distinguishing the judgment of the Hon"ble Supreme Court in State of Orissa and Another Vs. Asiatic Gases Ltd., which authoritatively ruled that once the cylinder containing oxygen was given on loan, the transfer of right to use the goods came into existence, and the case on hand was admittedly one where bottles and crates came to be delivered on bailment on returnable basis; the finding of the Tribunal that the petitioners allegedly contended that "they would file copies of the agreement to prove the nature of the agreement, but they have not filed any document to show the agreement executed between them and the wholesalers" is a purported finding without any basis since at no stage, the petitioners admitted to the agreements with wholesalers in any formal form nor undertook or agreed to file any such document. The Tribunal has not stated the occasion and the time when either the

formal agreement was called for, or copy thereof was agreed to be provided. Accordingly, in challenging the above finding, the petitioners are also moving the Hon"ble Tribunal for rectification and for deletion of the paragraph; the Tribunal ought to have seen that the burden was on the Revenue to show that the ostensible evidence of the invoice was untrue which was not done; the Tribunal had no material to state that the petitioners did not transfer right to use to the wholesalers of the bottles and crates, and the reasoning of the Tribunal that because allegedly the end-customer had no right of use, there was no transfer of right to use in the bottles and crates to the wholesalers is irrational. The petitioners therefore contended that the TREVCs and the W.Ps be allowed.

23. On the other hand, the counsel for the Revenue contended that the Tribunal had rightly held that there is no separate sale of soft drink without bottles and crates; that the amount collected towards rental charges is in fact a part of the sale price; that the segregation from sale price of the rental charges was only done as a device to escape sales tax from that part of the turn over; that there is no transfer of right to use bottles and crates; that S.5-E is not applicable to the transactions between the manufacturers and wholesale dealers/distributors; that the decisions cited by the petitioners are inapplicable to the facts of the case; that the Tribunal rightly drew adverse inference when the manufacturers did not produce copies of the agreements between them and the wholesalers having pleaded in the grounds of appeal before the Tribunal that such agreements existed; that what is sold by the manufacturer is placing the soft drink (content) in a bottle (container) and therefore what is sold is both the content and the container; the intention of the manufacturer is that the soft drink should reach the consumer in that container directly and the mere handling in between by the wholesaler or distributor is irrelevant; that the bottle hire/rental issue therefore has to be ignored as there is a sale directly of the soft drink in the container to the customer; that the artificial contract, if any, between the manufacturer and the distributor is a colourable one; and therefore the TREVCs and W.Ps should be dismissed.

24. Sri. M.V.J.K. Kumar, Counsel for some of the distributors/wholesalers whose appeals before the STAT were allowed and which orders have not been challenged before this Court by way of revision contended that the orders of the Tribunal are correct; that the Tribunal has rightly held that the rentals for crates and bottles is nothing but part of the sale price; and in any event, irrespective of the decision in these TREVCs/W.Ps, the set off already given to the distributors/wholesalers under the proviso to entry 21 of schedule VI to the AP General Sales Tax Act, 1957 cannot be disturbed in view of the decision of the Tribunal in their appeals which has become final.

25. We have considered the respective contentions.

26. Entry 21 of Schedule -VI to the A.P General Sales Tax Act, 1957 reads "aerated water and bottled soft drinks sold under a brand name whether or not flavoured or sweetened and whether or not containing vegetable or fruit juice or

fruit pulp, including squashes, jams, jellies, juices when sold in sealed or capsuled or corked bottles, jars, tins, drums or other containers and mineral water sold under a brand name".

27. S.5-E of the A.P General Sales Tax Act, 1957 states as follows:

S.5-E Tax on the amount realized in respect of any right to use goods:
"Notwithstanding anything contained in this Act:-

(a) Every dealer who transfers the right to use any goods for any purpose, whatsoever, whether or not for a specified period, to any lessee or licensee for cash, deferred payment or other valuable consideration, in the course of his business shall, on the total amount realized or realizable by him by way of payment in cash or otherwise in such transfer or transfers of the right to use such goods from the lessee or licensee (pay a tax at the rate of eight paise on every rupee) of the aggregate of such amount realized or realizable by him during the year;

(b) the transfer of right to use any such goods entered into by any dealer, shall be deemed to have taken place in this State whenever the goods are used within the State, irrespective of the place where the agreement whether written or oral for such transfer of right is made. (provided that no such tax shall be levied if the total turnover of the dealer including such aggregate is less than Rs. two lakhs)

28. The petitioners are manufacturers of beverages and in the course of their business, they purchased and used crates and bottles with their respective brand names; they put the soft drinks in the standard bottles of 200 ml, 300 ml and 350 ml and transport the same to the Wholesale Dealers in the crates housing 24 bottles in each crate; the Wholesale Dealers in turn sell the same to the retailers; the retail dealers sell the same to the consumers who after consuming the soft drinks, return the bottles to the retailers; the retailers return the same to the wholesalers who in turn return the same to the manufacturers and this circle continues until the bottles and crates become useless; the manufacturers collect deposits/rentals towards these bottles and crates as security which is refundable.

29. The issue to be decided is whether the rental charges collected by the manufacturer from the distributors/wholesalers for bottles and crates is to be treated as part of the sale price of the soft drinks or is to be treated as a compensation for transfer of possession thereof for a limited period assessable under S.5-E of the AP General Sales Tax Act, 1957.

30. It is important to note that the Tribunal has held in Paragraph 28 of its order that bottles are returned by the end-customer to the retailers, that bottles and crates are returned by the retailers to the wholesalers and by the wholesalers to the manufacturers.

31. In view of the said finding by the Tribunal, we are of the view that when an end-customer purchases a soft drink in a bottle, the bottle is not also sold to the end-customer. If there is such a sale of the bottle also, the question of the

customer returning the bottle to his vendor/retailer, the retailer in turn returning the bottle in the crate to the wholesaler and the wholesaler to the manufacturer would not arise. While the Tribunal does not say in so many words that there is a sale by the manufacturer of the bottle and crates also to the wholesaler, it relies upon the language in entry 21 of Schedule -VI of the AP General Sales Tax Act, 1957 to hold that the said entry uses the words "bottled soft drinks sold under a brand name" and not "soft drinks" only; that the soft drinks cannot reach the end-customer without bottle; that the end-customer is neither using the bottle nor the crate and he simply consumes the soft drink and returns the bottles; that therefore what is paid by the end-customer is the consideration for the soft drink and not for getting any bottles or crates and consequently the manufacturers are not justified in splitting the price into cost of soft drinks and rental value of crates and bottles (collected by them from distributors) and that it is a colourable device adopted by the manufacturers to avoid the payment of tax.

32. We are unable to appreciate the above reasoning of the Tribunal. In our view the bottle is used only for storing the contents (soft drinks), and when the bottle is returned to the retailer by the customer and so on to the manufacturer, the cost of the bottle cannot be said to get included in the cost of the soft drink. The Tribunal has not explained how on the basis of entry 21 of Schedule-VI to the AP General Sales Tax Act, 1957 it can be said that the cost of the soft drink would include the cost of the bottle also. In our view, entry 21 of Schedule-VI to the AP General Sales Tax Act, 1957 imposes Sales Tax only on the soft drinks which are bottled and sold under a brand name and merely because the words "bottled soft drinks under a brand name" are used in the entry, it does not follow that the bottle has to be taken as sold along with the soft drink. Merely because the soft drinks and bottles cannot be separated till they reach the end-customer, in the absence of sale of the bottle, it cannot be said that there is no transfer of the right to use the bottle. In our view there is a transfer of the right to use, such use being "for storing the contents", thereby attracting S.5-E of the Act.

33. In *Asiatic Gases Limited's* case (6 Supra) the Supreme Court considered the question whether there was a transfer of the right to use the goods for consideration under the extended definition of the word "sale" u/s. 2(g)(iv) of the Orissa Sales Tax Act, 1947 which incorporates the concept of transfer of the right to use any goods from Art. 366(29-A) (d) of the Constitution of India. The Supreme Court was considering whether there was a transfer of the right to use the cylinders (in which the gas was housed) and whether the charge levied by the assessee/manufacturer for over retention of the gas cylinders was in the nature of a penalty and therefore did not form part of the sale price as defined in S.2(h) of the said Act. The Supreme Court was of the opinion that the commodity in question being medical oxygen/industrial gases which require a container, the said commodity cannot be sold without the containers, the property in the goods (oxygen/gas) cannot pass to the customers without such containers and the cylinders together with its content namely gas/oxygen constitute goods. But a customer can buy the gas cylinder or borrow it on loan from the assessee. For

the first 14 days, the loan was free of payment of any charges. However, thereafter a fixed amount was levied by the assessee as a charge for over retention. The assessee required empty cylinders to be returned so that the cylinders could be re-filled and sold/transferred by way of loan. The Supreme Court held that when the said goods (cylinder containing medical oxygen) were given on loan to the customer, the transfer of the right to use the said goods came into existence; it may be that for the first 14 days the said loan is free from payment of any charges; however, exemption from payment would not militate against the concept of transfer of the right to use the goods which is included within the definition of the term "sale" defined under the said Act and that the levy of tax was not on the transfer of the goods itself but the levy was on the transfer of the right to use such goods for consideration.

34. We are of the view that the said decision applies on all fours to this case and it has to be held that there is only a transfer of the right to use the bottle or crate and there is no sale of the bottle or crate as the bottle is to be returned by the end-customer to the retailer and by the retailer to the wholesaler and by the wholesaler to the manufacturer. The Tribunal erred in distinguishing the said case simply on the ground that entry 118 of Schedule-I to the Act mentions "industrial gases other than petroleum gases and gases specified elsewhere in the schedules" i.e., only "gases" were mentioned and not "bottled gases".

35. We are also of the view that the decision of this Court in Sri. Satya Winery & Distillery Private Limited's Case (2 Supra), Amrut Distilleries's case (3 Supra) and Premier Breweries's case (4 Supra) relied on by the Tribunal would not apply because it was admitted in those cases that there is a sale of the bottle along with the content whereas in the present case, it is a case where glass bottles and crates were delivered on returnable basis on bailment.

36. The Tribunal at para 29 of its order extracted certain portions from the minority judgment in 20th Century Finance Corporation Limited's Case (5 Supra) in coming to a conclusion that a transfer within the meaning of Art. 366 (29-A) (d) would be complete when the contract is executed and the control/domain of the goods which are the subject of the contract are given to the hirer. But the majority in the said case held (at para 26 to para 28) that a transfer of the right to use any goods will be a deemed sale in the case of sub-clause(d); and that if the goods are available, the transfer of the right to use takes place when the contract in respect thereof is executed and the delivery of goods cannot constitute a basis for levy of tax on the transfer of right to use any goods. They held that where the goods are in existence, the taxable event on the transfer of the right to use goods occurs when a contract is executed between the lessor and the lessee and sites of sale of such a deemed sale would be the place where the contract in respect thereof is executed. In the present case, the end-customer might retain the bottle for more than 24 hours and after consuming the contents may even use it for storing water or other liquids. Similarly, the wholesaler/retailer might be in possession of the crates/bottles for a period of

time extending upto may be even six months. Thus for the said period both the end customer and the retailer/wholesaler would have control or domain over the bottles and crates. Therefore, it cannot be said that there is no transfer of the right to use the goods eligible to tax u/s. 5-E of the Act.

37. Admittedly, the sale invoices indicate the price of the soft drink separately and the rentals on bottles and crates separately. The Tribunal at para 32 of its order observed that the legislative entry i.e., entry 21 of Schedule-VI to the Act was introduced from 01-08-1996 when S.5-E was introduced on the statute book and that the sale invoices are therefore contrary to the legislative entry and not in conformity with the said entry. The Tribunal appears to have not noticed that even prior to 01-08-1996, the same entry was there from 01-09-1976 as entry 108 in Schedule-I to the Act taxable at the point of first sale. It was omitted w.e.f. 1-8-1996 from Schedule-I and introduced as entry 21 in Schedule-VI making soft drinks taxable at every point, such tax to be determined after deducting the tax levied on the turn over on such goods at the immediately preceding point of sale by registered dealer from the tax leviable on the turn over of the same goods at the point of sale by the selling dealer. Only "mineral water sold under brand name" was added for the first time at the end of the entry w.e.f., 1-8-1996.

38. In *Commissioner of Sales Tax Vs. Gill and Company Ltd.*,) and in *Government of Madras vs. Simpson & Co., Limited* (1968) 21 STC 16 (SC), it was held that in the absence of any other material, recitals in invoices will furnish good proof of the intention of the parties relating to the terms of the agreement and that by themselves, they will be inclusive piece of evidence. The Revenue, in the present case, has not adduced any evidence to rebut the contents of the invoices filed by the manufacturers nor did the Revenue dispute the correctness of the contents of the invoices by pleading that they are fabricated and not genuine. Therefore, in our opinion, the invoices filed by the manufacturers, which show clearly the separate charge on the sale of soft drinks and rental charges on crate and bottles indicate a contract between the parties to treat both as separate categories (to be charged at the rate of 12 % (u/s. 5 of the Act) and 5 % (u/s. 5-E of the Act) respectively) have to be accepted and tax levied accordingly. The statement in the grounds of appeal before the STAT that there is a written contract between the manufacturers and the distributors appears to be erroneously made by the manufacturers as admittedly there is no such written contract between them and none was filed even by the distributors. The Tribunal therefore, in the facts and circumstances of the case, erred in drawing an adverse inference against the manufacturers for not filing the alleged written contract between them and the distributors and holding against the manufacturers on the said count.

39. The decision in *Hindustan Sugar Mills's case* (1 Supra) relied on by the Tribunal is also not applicable because in the said case, there was a contract which was incompatible with the Cement Control Order. The Control Order's

scheme was that freight was payable by the producer and he must recover it from the purchaser as part of the F.O.R destination railway price. It was held that the provision in the contract that the delivery to the purchaser was complete as soon as the goods were put on rail and payment of the freight was the responsibility of the purchaser was wholly inconsistent with the scheme of the Control Order and must be held to be excluded by it. On the other hand, in the present case, the Revenue has not pleaded that collection of rental charges for crates/bottles by the manufacturer is prohibited by any law. Therefore, the said decision cannot apply here.

40. It is not disputed that the manufacturers make investment on bottles and crates and they need to recoup this investment. The rotation of the bottles and crates takes place about six times during their lifetime and the manufacturers are entitled to calibrate their charges keeping this in mind. In our view this cannot be said to be a colourable device adopted by the manufacturers to evade tax.

41. Section 6-C of the Andhra Pradesh General Sales Tax Act, 1957 states as follows:

S.6-C Levy of tax on packing material: "Notwithstanding anything contained in Section 5, Section 5F, Section 6 and Section 6A, the rate of tax on packing material sold with the goods shall be the same as that of the goods packed or filled, whether or not there is separate sale or agreement for sale for the packing material and the goods packed or filled.

42. In our opinion S.6-C would apply only if the packing material is sold with the goods and as that is not the case here as bottles are returned to the retailer and ultimately to the manufacturer, S.6-C has no application to the facts of these cases.

43. Therefore, the TREVCs No. 43 to 45 of 2007 are allowed and the order dated 17-10-2007 passed therein by the STAT is set aside.

44. Coming to the Writ Petitions, where order dated 15-09-2005 for assessment for the period April to July, 2005 passed by the assessing officer under the Andhra Pradesh VAT Act, 2005 and the order of assessment dated 08-12-2005 for assessment for September, 2005 is questioned, the assessing officer purported to rely on S. 6 of the Andhra Pradesh VAT Act, 2005.

45. S. 6 of the Andhra Pradesh VAT Act, 2005 states as follows:

6. Tax on packing material:- Where goods sold or purchased are contained in containers or are packed in any packing material liable to tax under the Act, the rate of tax applicable to such containers or packing material shall, whether the price of the containers or packing material is charged for separately or not, be the same as the rate of tax applicable to such goods so contained or packed, and where such goods sold or purchased are exempt from tax under the Act, the containers or packing material shall also be exempted.

46. We have already held that in the business of sale of soft drinks, there is a facility and practice of recycling the bottles and crates in which beverages are sold and that the charges for such limited user of bottles and crates is recovered separately. Since the bottles and crates constitute packing material, such turnover is liable to be taxed @ 4 % u/s. 4(8) of the Andhra Pradesh VAT Act, 2005 r/w Item No. 90 of Schedule-IV of the said Act. The Revenue therefore is not entitled to treat the entire turnover as taxable @ 12.5 % by placing reliance on S. 6 of the Andhra Pradesh VAT Act, 2005 which was not even mentioned by the assessing authority in the show cause notice issued by him to the petitioner. The view taken by the assessing officer that the petitioner cannot split the turnover on the sales of soft drinks and the lease rentals on the bottles and crates and therefore the total consideration including both categories is liable to tax @ 12.5 % is not correct as held by us above. The assessing officer has also not made any enquiries from the wholesalers/retailers regarding the claim of the petitioner that the bottles and crates were given on lease while the soft drink is subject matter of an outright sale. It is clear that the assessing authority ignored the terms and conditions between the parties and the fact that tax can only be levied on the transaction as it existed between the parties and not on what is presumed by him without any basis. Therefore, the Writ Petitions are allowed and the assessment order dated 15-09-2005 impugned in W.P. No. 21115 of 2005, the assessment order dated 08-12-2005 for September, 2005 impugned in W.P. No. 856 of 2006 and the notice dated 27-11-2007 of the Assistant Commissioner (CT) (LTU), Saroornagar division, Hyderabad u/s. 29 of the Andhra Pradesh VAT Act, 2005 are set aside and the respondent therein is restrained from taking any action pursuant to his notice in form VAT 305-A dated 8-12-2005 for October, 2005 and from issuing any notices for the months of November, 2005 onwards contrary to our decision in these cases. Therefore, the TREVCs and the writ petitions are allowed. No costs.