

(1998) 03 P&H CK 0044

In the Punjab And Haryana At Chandigarh

Case No : Civil Writ Petition No. 12473 and 12474 of 1992 and Sales Tax Cases No"s. 21 to 25, 27 and 28 of 1992

Punjab Breweries Limited

APPELLANT

Vs

State of Punjab and others

RESPONDENT

Date of Decision : 18-03-1998

Acts Referred:

Central Sales Tax Act, 1956 — Section 9
Contract Act, 1872 — Section 148, 74
Punjab General Sales Tax Act, 1948 — Section 10, 11, 2, 21, 22
Sales of Goods Act, 1930 — Section 19, 20, 21, 22, 23

Citation : (1998) 120 PLR 423 : (1998) 3 RCR(Civil) 600

Hon'ble Judges : Iqbal Singh, J;G.S. Singhvi, J

Bench : Division Bench

Judgement

G.S. Singhvi, J.—By this order, we are deciding the abovementioned two writ petitions and seven reference applications filed by the petitioner because the issues of fact and the questions of law raised and/or sought to be raised in these cases are more or less identical.

2. A perusal of the record of the writ petitions, reference applications and the orders produced by the learned counsel for the parties shows that the petitioner is engaged in the business of manufacture of beer in the brewery set up by it at Focal Point, Ludhiana in pursuance of the licence granted under the Punjab Excise Act. The goods manufactured by it are sold to L-I licensees (wholesalers) in sealed bottles who, in turn, sell them to the retailers. The last transaction of sale of beer is between the retailers and the consumers. The petitioner is a registered dealer under the Punjab General Sales Tax Act, 1948 (hereinafter referred to as "the State Act") and also under the Central Sales Tax Act, 1956 (hereinafter referred to as "the Central Act"). It is being assessed under both the Acts.

3. For last many years, the petitioner has been claiming that the bottles sold along with beer remain its property for which security is charged from L-I

licensees. A specimen of the receipt for security of empty bottles has been placed on the record of C.W.P. No. 12473 of 1992 as annexure P1. Vide its order dated April 12, 1982, the Assessing Authority, Ludhiana, created a demand of Rs. 9,266.99 against the petitioner for the assessment year 1979-80. That order was revised by the revisional authority, Ludhiana, who passed order dated February 25, 1983 and held that the turnover of Rs. 10,67,653 escaped assessment and the petitioner is liable to pay tax on the same rate. He accordingly created an additional demand of Rs. 1,08,900 and directed the Assessing Authority to issue necessary tax demand notice and challan form. The revisional authority also directed the issuance of notice u/s 10(7) of the State Act. Aggrieved by the order of the revisional authority, the petitioner filed one application u/s 21(3) of the State Act and the other u/s 9(2) of the Central Act read with section 21(3) of the State Act before the Sales Tax Tribunal, Punjab. After hearing the parties, the revisional authority applied the ratio of the Supreme Court's decision in Punjab Distilling Industries Ltd. Vs. The Commissioner of Income Tax, Simla, and held that the bottles sold along with the liquor were liable to tax. The relevant portion of the order passed by the Tribunal on September 19, 1983 is extracted below :

"I have considered the arguments of learned counsel of both the sides and have perused the record. I have also perused the departmental file which was produced before me and find that several opportunities had been afforded to the applicant-dealer to produce books and to show the accounts relating to purchases and sales of bottles. On at least one occasion the applicant had sought more time to collect the material and present it to the revisional authority, as required by the revisional authority, were produced on any occasion. I would therefore find that sufficient opportunity had been given to the applicant-dealer to produce the books and only in the absence of the same, the revisional authority proceeded to estimate the turnover on the basis of best judgment. Surely, the factum of ensuing annual general meeting which was to be held some time after February 23, 1983 the date fixed by the Assistant Excise and Taxation Commissioner, could not have prevented the applicant-dealer to produce his books before the Assistant Excise and Taxation Commissioner. More so the proceedings had been initiated by the Assistant Excise and Taxation Commissioner as early as December 22, 1982. I would therefore hold that the rejection of request for adjournment on February 25, 1983 was justified. As regards the time-limit still being available for the Assessing Authority to initiate proceedings u/s 11-A, I am afraid, it is not relevant to the jurisdiction of the revisional authority to take up a case for examining and correcting any illegality or impropriety in an earlier order of an Assessing Authority, which powers vest only in the revisional authority u/s 21. What the revisional authority did namely correcting an illegality or impropriety, is not what the Assessing Authority could do u/s 11-A. The two are independent proceedings under different sections and merely because limitation is available for proceedings by the Assessing Authority itself does not wipe off any illegality or impropriety if it exists in an order; and if it so exists, section 21 gets attracted. For this, I would rely upon the judgment of

the Punjab and Haryana High Court [Full Bench] in the case of Hari Chand Rattan Chand & Co. reported in [1969] 24 STC 258. A similar matter was examined also by the honourable Supreme Court in the case of Gurbaksh Singh reported in [1976] 37 STC 425 where it was held that in exercising revisional powers, the revisional authority was not encroaching upon the powers of the Sales Tax Officer. A similar principle was enunciated by the Supreme Court also in the case Swastic Oil Mills reported in [1968] 21 STC 383. In view of the foregoing discussion, it must be held that the revisional authority had jurisdiction in the matter which it exercised properly. I agree with the contention of the learned State counsel that the method of billing is not conclusive proof of the nature of the transactions and where the legal position is that the purchasing dealer, the wholesales L-I licensee, to whom the applicant-dealer had sold the beer must receive beer in scaled bottles and the wholesaler has to part with the same in turn in favour of his clients, the L-II licensees in the same form, i.e., beer in bottles with same seal intact. The billing method showing separately the price of bottles as security as adopted by the applicant-dealer can make no difference as the purchasing dealer, the L-I licensee, under the mandate of law is left with no domain or volition over the bottles, which he must sell, filled with beer and in scaled form. The legal position is to prevail over any billing or accounting method of an individual dealer. The honourable Supreme Court in the case of Punjab Distilling Industries Ltd. Vs. The Commissioner of Income Tax, Simla, had held as follows :

"We think that the High Court took substantially a correct view of the matter when it said that in realising these amounts "the company was really charging an extra price for the bottles". It is clear to us that the trade consisted of sale of bottled liquor and the consideration for the sale was constituted by several amounts respectively called, the price of the liquor, the price of the bottles and the security deposit. Unless all these sums were paid the appellant would not have sold the liquor. So the amount which was called security deposit was actually a part of the consideration for the sale and therefore part of the price of what was sold. Nor does it make any difference that the price of the bottles was entered in the general trading account while the so-called deposit was entered in a separate ledger termed "empty bottles return deposit account" for, what was a consideration for the sale cannot cease to be so by being written up in the books in a particular manner."

In the same case the honourable Supreme Court had further observed :

"In the present Case, unlike in K.M.S. Lakshmanier and Sons Vs. Commissioner of Income Tax and Excess Profits Tax, Madras, the amount paid has a relation to the price of the goods sold; it is part of that price as we have earlier said. It was a condition of each transaction of sale by the appellant. It was refundable to the wholesaler as soon as he returned the bottles in which the liquor had been supplied to him in the transaction in respect of which the deposit had been made. The deposit in the present case was really not a security at all; it did not

secure to the appellant anything. Unlike K.M.S. Lakshmanier and Sons Vs. Commissioner of Income Tax and Excess Profits Tax, Madras, in the present case a deposit was made every time a transaction took place and it was refundable under the terms of that transaction independently of other deposits under other transactions. In K.M.S. Lakshmanier and Sons Vs. Commissioner of Income Tax and Excess Profits Tax, Madras, the deposit, was in the nature of the assessee's trading structure and anterior to the trading operations, as were the deposits considered in the Shell Company case [1951] 32 Tax Cas 133. In the case in hand the deposit was part of each trading transaction. It was refundable under the terms of the contract relating to a trading transaction under which it had been made; it was not made under an independent contract nor was its refund conditioned by a collateral contract, as happened in K.M.S. Lakshmanier and Sons Vs. Commissioner of Income Tax and Excess Profits Tax, Madras, ."

4. I am afraid, the instant case is not one of "bailment" as was the finding given in the judgment of the Allahabad High Court reported in [1972] 29 STC 69 (Dyer Meakin Breweries v. Commissioner of Sales Tax, U.P.) relied upon by the learned counsel for the applicant, and the same is distinguishable on facts and law. This matter also came to be examined by the Bombay High Court (Division Bench) in the case of Arlem Breweries Ltd. reported in [1983] 53 STC 172 where the honourable Court observed as follows :

"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. [1972] 29 STC 69 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."

5. In the instant case also, there is no statutory rule casting any obligation for the return of bottles. On the contrary, the obligation on the purchasing dealers with whom the applicant-dealer claims to have entered into an agreement, are under statutory obligation to supply bottled beer in sealed form. The applicant-dealer has no control over the return of the bottles sold by him to the wholesalers, who, in turn, would sell the same to the retailers and the retailers selling the same to the consumers. The ratio of the Supreme Court judgment in Punjab Distilling Industries Ltd. Vs. The Commissioner of Income Tax, Simla, fully applies to the instant case, and, from the above extracted portion of that judgment of the Supreme Court, it will be seen that the basic finding of the Supreme Court was that the security deposit was a part of the sale price and formed consideration therefrom.

6. A perusal of the record of C.W.P. No. 12473 of 1992 shows that in respect of

the assessment years 1981-82, 1982-83 and 1983-84, the Assessing Authority treated the security deposit of bottles as a part of sale consideration and finalised the assessment by creating additional demands amounting to Rs. 2,84,217, Rs. 9,14,119 and Rs. 9,49,465 as tax on bottles under the Central Act. The appeals filed by the petitioner against the orders dated May 12, 1987 passed by the Assessing Authority were dismissed on December 4, 1987 by the Deputy Excise and Taxation Commissioner (A), Patiala. The Sales Tax Tribunal also expressed its agreement with the orders passed by the Assessing and the appellate authorities and upheld the additional demand by holding that it was not a case of bailment but of sale. The relevant portion of the order passed by the Tribunal on February 22, 1990 dismissing the appeal of the petitioner in respect of the assessment year 1983-84, which has been placed on record as annexure P2 reads as under :

"I have considered the arguments of counsel for both the parties and seen the record. The main point involved is that whether security deposited in respect of empty bottles is bailment or a sale. If security deposit is treated as part of sale price then what should be the rate of tax on the sale of bottles in the absence of C forms. For this contention of the appellant is that containers that is empty bottles are a cheap mode of transporting beer to purchaser and there is no express or implied contract for the sale thereof. Further, these bottles are returnable and before bottled beer is sold to the purchaser, appropriate amounts of security is furnished by the purchaser in order to ensure the returns of empties. Accordingly, it was argued that it was a case of bailment and not of sale. All these points have been raised earlier and adjudicated upon by this Tribunal in its order dated September 19, 1983 passed in the Revision Nos. 70-71 of 1982-83. As pointed out by the learned State counsel, the empty beer bottles are reusable and command a substantial price as these are put to multifarious uses. It is a settled law to presume that there is an implied contract for the sale of packing material along with the actual product where the containers or bardana command substantial resale price. The contention of the counsel for the appellant that there is no express or implied contract for the sale of bottles has no substance. Further, according to section 148 of the Indian Contract Act, 1872 bailment is delivery of goods by one person to another for some purpose, upon a contract that they shall, when purpose is accomplished, be returned to or otherwise disposed of according to the directions of the person delivering them. In the present case in actual practice, the appellant sells bottled beer to various L-1 licensees (wholesalers) who sell the same to the retailers and they, in turn sell the same to consumers. In this situation, the original suppliers, i.e., the breweries, and in the instant case, the appellants have no means to keep a track of the bottles being sold by them. A perusal of the record shows that neither empties were received back nor any, evidence was led before me to substantiate facts, the security deposits are ultimately adjusted in the account books and to me it seems an obvious method to escape levy of tax on bottles. Due to these facts, I have no reasons to differ with the decision of my predecessor taken on September 19, 1983 in Revision Nos. 70-71 of 1982-83,

who has discussed the entire matter in detailed manner including the view points of the counsel for the appellant. Accordingly, I hold that addition to the turnover on account of security deposit for empty bottles was correctly made for levying of tax by considering security deposits as a part of the sale price.

The counsel for the appellant insisted that if security deposit is not to be treated as a bailment but as a part of sale price then concessional rate of tax on inter-State sales against "C" forms already supplied for beer except price of beer bottles be applied. No doubt, concessional rate of tax can be claimed but only against "C" forms produced. I find the "C" forms produced cover the sale value of beer only and these do not cover the value of empty bottles used. Shri Jhingan emphasized that "C" forms should be considered for a transaction and not for the value of the transaction. I hold that the appellant should have secured "C" forms covering the sale of bottles and produced the same" before the lower authorities as he had enough time to do so. Since this was not done, so no relief is admissible to him in this behalf. In the light of foregoing discussion, I find that bottles in this trade are not only means of transportation of the goods but also means to attract consumers. Their utility and importance is apart from the contents which are sold through them. Bottles are taken by the customer for the consumption of the contents and it is an outright sale. Further, I hold that the security deposit received by the appellant against bottles is part of the sale price. Concessional rate of tax on such deposits cannot be applied in the absence of "C" forms as the transaction is not a case of bailment but is a case of sale. The appeal is accordingly dismissed."

7. Similar orders were passed in respect of other assessment years. Rectification applications filed by the petitioner have been dismissed by the Tribunal vide separate orders dated February 28, 1991 (annexures P4 to P6).

8. The petitioner has challenged the orders passed by the Tribunal and has prayed for quashing the order passed by it refusing to rectify the orders passed on the appeals preferred by the petitioner.

9. The averments made in C.W.P. No. 12474 of 1999 show that the Assessing Authority levied interest amounting to Rs. 5,90,943 under the Central Act and Rs. 16,003 under the State Act on account of the petitioner's failure to pay the tax on the bottles with the return. The Assessing Authority also imposed penalty amounting to Rs. 5,00,000 under the Central Act and Rs. 10,000 under the State Act. The appeals filed by the petitioner against the orders dated April 20, 1988 passed by the Assessing Authority were dismissed by the Appellate Authority on March 30, 1989. Vide orders, annexures P1 and P2, dated February 28, 1990, the Tribunal dismissed further appeals preferred by the petitioner. The relevant extracts of these orders are reproduced below

Order dated February 28, 1990 in respect of penalty

"I have considered the arguments of the counsel of both the parties and gone through the record of the case produced before me. The point for consideration is

whether penalty imposed u/s 10(7) of the State Act ibid by the Assessing Authority and upheld by the Appellate Authority is correct or not. Firstly the case regarding imposition of tax cannot be taken into view as it is the case of imposition of penalty and not of charging of tax. Even if it is so, charging of tax on the so-called security deposit of bottles has already been upheld in the Appeal No. 204 of 1988-89 decided on February 22, 1990. The only point left is whether penalty is leviable if leviable then on what amount. The facts of the case are being stated in brief to appreciate the correct position. The appellant is running a brewery at Ludhiana and manufacture various brand of beer. The beer so manufactured is sold to purchasers in bottles but while preparing sale vouchers, the prices of bottles is not shown on the ground that these bottles are convenient mode of transportation of the product and are not taxable. The appellant had been canvassing that they do not sell bottles with the beer as they are given on security obtained which in turn is refundable on the receipt of empties. Thus, their plea has been taken supply of bottle is a case of bailment and not for sale. This contention has been considered and rejected by various courts and also by this Tribunal in the year 1983 in the case of this very firm in Revision Nos. 70-71 of 1982-83 decided on September 19, 1983. As such, I do not find in going over the matter all over again. Since the bottles sold with beer form part of turnover of the appellant-firm, they should have paid tax along with the returns. This was not done inspite of clear decision of this Tribunal on the point on September 19, 1983 so they failed to file correct returns as required under the law. Dealer did not disclose the sale turnover of the bottles. This resulted in the non-payment of tax due, There is no difference in tax due and tax payable as held by the Supreme Court of India in Associated Cement Co. Ltd. v. Commercial Tax Officer [1981] 48 STC 466. Therefore, the provisions of section 10(7) of the Act have been clearly violated by the appellant and penalty has been rightly imposed by the Assessing Authority. Accordingly the appeal is dismissed."

Order dated February 28, 1990 in respect of interest :

"After considering the arguments of counsel of both the parties and seeing the record of the case, I find that the short point for consideration in this appeal is question of levy of interest u/s 9(2) of the Central Sales Tax Act, 1956 read with section 2-D of the Punjab General Sales Tax Act. If leviable then it should be charged at the concessional rate of tax against "C" forms already supplied and it should be from the date of assessment order and not from the date of filing of return. The Tribunal has decided that there will be an addition to turnover due to security deposit obtained against the bottles supplied in inter-State sale. All the case laws relied upon by the appellant were duly considered in the decision of the Supreme Court in the case of Associated Cement Co. Ltd. [1981] 48 STC 466. Apart from this the stand of the appellant-dealer in respect of non-taxability of sale value of bottles and rejected by the Tribunal concerning the assessment year 1983-84 in Appeal No. 204 of 1988-89 dated February 22, 1990. As regards concessional rate of tax addition to turnover there is no case as concessional rate of tax is available against "C" form. The appellant is insisting on the acceptance

of "C" forms already submitted and concessional rate thereof on the "C" forms based on transaction. Accordingly the appellant-dealer admittedly did not pay the tax due on the turnover representing sale of bottles, the levy of interest was justified in the view of the Supreme Court judgment reported in [1981] 48 STC 466 (Associated Cement Co. Ltd. v. Commercial Tax Officer). Accordingly there is no force in the appeal of the appellant-dealer for interest u/s 11-D of the Punjab General Sales Tax Act read with section 9(2) of Central Sales Tax Act, 1956 and the same is dismissed."

10. Since the rectification applications filed by the petitioner u/s 9(2) of the Central Act read with section 21-A of the State Act have also been dismissed, the petitioner has invoked writ jurisdiction of the High Court for quashing the orders for levy of interest and imposition of penalty.

11. In S.T.C. No. 21 of 1992, the petitioner has prayed for directing the Sales Tax Tribunal to make reference of the following questions of law :

"(i) Whether, in the facts and circumstances of the case the containers, viz., the bottles supplied with the sale of beer can be held to be sale of bottles and subjected to tax at the rate of 10 per cent is sustainable in law ?

Note. - Penalty is related to tax which ought to have been charged at 4 per cent.

(ii) Whether, in the facts and circumstances of the case, the provisions of section 10(7) of the Punjab General Sales Tax Act can be invoked and the penalty imposed and upheld by the Tribunal, can be sustainable in law ?"

12. The facts incorporated in this petition show that the order passed by the Assessing Authority on May 12, 1987 creating additional demand of Rs. 9,49,465 in respect of the assessment year 1983-84 has been upheld by the appellate authority as well as by the Tribunal. Likewise, the orders passed by the Assessing Authority u/s 9(2) of the Central Act and section 10(7) of the State Act have been upheld by the appellate authority and the Tribunal. The reference application filed by the petitioner has also been dismissed by the Tribunal.

13. In S.T.C. No. 22 of 1992 filed u/s 22(2) of the State Act, the petitioner has prayed for directing die Tribunal to refer the following questions of law to this Court :

(i) Whether, in the facts and circumstances of the case, and the course of dealings between the parties show that the amount of money claimed by the dealer which has been, received as security was in fact a part of the sale and what is the effect thereof on the liability of the assessment ?

(ii) Whether, in the facts and circumstances of the case and on the true interpretation of the terms between the parties can it be said that the bottles which were supplied with the beer for which security was charged amounts to sale of bottles in law ?

(iii) Whether in the facts and circumstances of the case assuming that there was

sale of bottles can the agreement be bifurcated and the bottles subjected higher rate of tax, viz., 10 per cent than the contents which have been charged tax at 4 per cent ?

(iv) Whether, in the facts and circumstances of the case, C forms already supplied with respect to the beer cannot in law be held to be sufficient to charge the concessional rate of tax on bottles also ?

(v) Whether the approach of the Tribunal for holding that it is a case of sale of bottles and not bailment is not perverse ?

(vi) Whether in the facts and circumstances of the case the containers, viz., bottles supplied with sale of beer can be subjected to tax at 10 per cent and the same can be sustained in law ?

Reference of these questions has been sought in the context of the orders passed by the Assessing Authority, the Appellate Authority and the Tribunal in respect of the assessment year 1982-83.

14. In S.T.C. No. 23 of 1992, the petitioner has sought reference of the following questions of law :

(i) Whether, in the facts and circumstances of the case, the containers, viz., the bottles supplied with sale of beer can be held to be a sale of bottles and subjected to tax at the rate of 10 per cent and the same is sustainable in law ?

(ii) Whether, in the facts and circumstances of the case, the rate of tax was leviable on bottles at the same rate of 4 per cent and not 10 per cent ? The same rate ought to have been charged which has been levied on beer ?

(iii) Whether, in the facts and circumstances of the case, the provisions of section 11-D are attracted and tax can be charged in law from the date when the return was due or it could only be levied from the date of the assessment order ?

(iv) And lastly, whether in the facts and circumstances of the case, the order of the Tribunal upholding the levy of interest from the date when returns were filed is sustainable in law ?

The orders placed along with record of this petition relate to the assessment year 1983-84.

15. In S.T.C. No. 24 of 1992, the petitioner has sought reference of the following questions of law :

(i) Whether the facts and circumstances of the case and the course of dealings between the parties show that the amount of money claimed by the dealer which has been received as security was in fact a part of the sale and the effect thereof on the liability of the assessment ?

(ii) Whether, in the facts and circumstances of the case and on the true interpretation of the terms between the parties, can it be said that the bottles

which were supplied with the beer for which security was charged amounts to sale of bottles in law ?

(iii) Whether, in the facts and circumstances of the case, assuming that there was sale of bottles can the agreement be bifurcated and the bottles subjects to higher rate of tax, viz., 10 per cent than the contents which have been charged tax at 4 per cent ?

(iv) Whether, in the facts and circumstances of the case, C forms already supplied with respect to the beer cannot in law be held to be sufficient to charge the concessional rate of tax on bottles ?

(v) Whether the approach of the Tribunal for holding that it is a case of sale of bottles and not bailment is not perverse ?

(vi) Whether in the facts and circumstances of the case the containers, viz., bottles supplied with sale of beer can be subjected to tax at 10 per cent and the same can be sustained in law ?

The orders placed along with record of this petition relate to the assessment year 1983-84.

16. In S.T.C. No. 25 of 1992, the petitioner has sought reference of the following questions of law :

(i) Whether, in the facts and circumstances of the case the containers, viz., the bottles supplied with the sale of beer can be held to be sale of bottles and subjected to tax at the rate of 10 per cent is sustainable in law ?

(Note. - Penalty is related to tax which ought to have been charged at 4 per cent).

(ii) Whether, in the facts and circumstances of the case, the provisions of section 10(7) of the Punjab General Sales Tax Act can be invoked and the penalty imposed and upheld by the Tribunal can be sustained in law ?

The orders placed along with record of this petition relate to the assessment year 1983-84.

17. In S.T.C. No. 27 of 1992, the petitioner has sought reference of the following questions of law :

(i) Whether, in the facts and circumstances of the case and the course of dealings between the parties show that the amount of money claimed by the dealer which has been received as security was in fact part of the sale and the effect thereof on the liability of the assessment ?

(ii) Whether, in the facts and circumstances of the case and on the true interpretation of the terms between the parties can it be said that the bottles which were supplied with the beer for which security was charged amounts to sale of bottles in law ?

(iii) Whether, in the facts and circumstances of the case assuming that there was sale of bottles, can the agreement be bifurcated and the bottles subjects to higher rate of tax, viz., 10 per cent than the contents which have been charged at 4 per cent ?

(iv) Whether, in the facts and circumstances of the case, C forms already supplied with respect to the beer cannot in law be held to be sufficient to charge the concessional rate of tax on bottles also ?

(v) Whether the approach of the Tribunal for holding that it is a case of sale of bottles and not bailment is not perverse ?

(vi) Whether, in the facts and circumstances of the case. The containers, viz., bottles supplied with sale of beer can be subjected to tax at 10 per cent and the same can be sustained in law ?

The orders placed along with record of this petition relate to the assessment year 1981-82.

18. In S.T.C. No. 28 of 1992, the petitioner has sought reference of the following questions of law :

(i) Whether, in the facts and circumstances of the case, the containers, viz., the bottles supplied with sale of beer can be held to be a sale of bottles and subjected to tax at the rate of 10 per cent and the same is sustainable in law ?

(ii) Whether, in the facts and circumstances of the case, the rate of tax was leviable on bottles at the same rate of 4 per cent and not 10 per cent. The same rate ought to have been charged which has been levied on beer ?

(iii) Whether, in the facts and circumstances of the case, the provisions of section 11-D are attracted and tax can be charged in law from the date when the return was due or it could only be levied from the date of the assessment order ?

(iv) And lastly, whether in the facts and circumstances of the case, the order of the Tribunal upholding the levy of interest from the date when returns were filed is sustainable in law ?

The orders placed along with record of this petition relate to the assessment year 1983-84.

19. The first question that requires adjudication in these cases is whether the transaction involving sale of bottled beer can be segregated into two and the prices of bottles is not includible in the turnover of the petitioner for the purpose of assessment under the State Act and the Central Act. Shri B. K. Jhingan heavily relied on annexure P1 enclosed with C.W.P. No. 12473 of 1992 and argued that the licensees to whom beer was supplied were under an obligation to return the empty bottles to the petitioner in terms of the agreement entered into between the parties and they had furnished security deposits for return of the empty bottles within one month of the date of supply. Learned counsel argued that the

receipt issued by the petitioner in lieu of the security deposits given by the wholesalers is clearly indicative of the fact that the bottles in which the beer was supplied did not form part of the transaction of sale but constituted bailment within the meaning of section 148 of the Contract Act and the licensees were required to return the bottles after the consumption of beer, else the petitioner could forfeit the amount of security and refused to supply further stocks of beer. Shri Jhingan relied on Food Corporation of India and Another Vs. The State of Haryana and Others, State of Haryana Vs. Janki Dass and Co., Deputy Commissioner of Sales Tax (Law), Board of Revenue (Taxes) Vs. McDowell and Co. Limited, The State of Tamil Nadu Vs. McDowell and Company Ltd., Raj Steel and Others Vs. State of A.P. and Another, United Breweries Ltd. Vs. State of Andhra Pradesh, Dyer Meakin Breweries Vs. Commissioner of Sales Tax, The Britannia Biscuit Co. Ltd. Vs. The State of Maharashtra, . He distinguished the judgment of the three-Judge Bench of the Supreme Court in Punjab Distilling Industries Ltd. Vs. The Commissioner of Income Tax, Simla, by arguing that the same was rendered on the interpretation of the provisions of the Income Tax Act and not the State Act and the Central Act. Mrs. Charu Tuli submitted that in view of the fact that the Assessing Authority, the appellate authority and the Tribunal have concurrently held that the transaction in question does not constitute bailment within the meaning of section 148 of the Contract Act, 1872 but amounts to sale, the petitioner cannot escape the liability to pay the tax. She pointed out that in terms of rule 40 of the Punjab Breweries Rules, the petitioner can sell only bottled beer and L-1 licensees to whom the petitioner sold the beer were under an obligation to receive the same in sealed bottles and effect further sale to L-2 licensees in the same condition and, therefore, the price of bottles has been rightly included in the taxable turnover of the petitioner. She submitted that the paper method devised by the petitioner to show the receipt of security for return of empty bottles was nothing but an attempt to avoid its liability to pay tax on the price of the bottles. She argued that in the face of the statutory provisions governing the licence granted to the petitioner for manufacture of beer as well as L-1 and L-2 licensees, the sale of bottled beer constituted an integral part of the transaction between the petitioner and the wholesalers on the one hand and the wholesalers and the retailers on the other hand and as such the same could not be bifurcated into two separate transactions so as to relieve the petitioner of its obligation to pay tax on the total price of the goods, i.e., the beer sold in sealed bottles. Mrs. Tuli relied on Punjab Distilling Industries Ltd. Vs. The Commissioner of Income Tax, Simla, Arlem Breweries Ltd. Vs. The Assistant Commissioner of Sales Tax, Panaji, and Punjab Breweries Limited v. State of Punjab [1993] 90 STC 211 (P&H). She pointed out that the judgment of the Bombay High Court in Britannia Biscuit Co. Ltd. v. State of Maharashtra [1983] 53 STC 179 relied upon by Shri Jhingan has been reversed by the Supreme Court in State of Maharashtra v. Britannia Biscuit Company, Limited [1995] 96 STC 642. She further submitted that the ratio of Bombay High Court's judgment in Arlem Breweries Ltd. v. Assistant Commissioner of Sales Tax [1983] 53 STC 172 has been expressly approved by the Supreme Court in State of Maharashtra v.

Britannia Biscuit Co. Ltd. [1995] 96 STC 642 and therefore, the decisions of the authorities constituted under the State Act and the Tribunal do not call for interference by the High Court.

20. The question whether there has been sale of bottles along with beer has to be determined on the precise terms of transaction between the petitioner and its customers, i.e., L-1 licensees (wholesalers). First of all, it is to be seen whether there was an obligation upon the purchaser to return the bottles. In our opinion, neither the terms of agreement nor annexure P1 can be said to create an obligation on the wholesaler to return the empty bottles. All that annexure P1, i.e., the receipt issued in lieu of the security deposit states is that the bottles are the property of the petitioner and should invariably be returned to the brewery within one month from the date of supply and if they are not returned, the amount of security will be forfeited and the petitioner may refuse to supply further stocks in the case of shortage of empty bottles in the brewery. The authorities constituted under the State Act and the Tribunal considered this : while determining the liability of the petitioner to pay the tax and recorded concurrent finding that in law the wholesaler was not duty bound to return the empty bottles and as a matter of fact empty bottles were not returned. In the order dated September 19, 1983, passed by it, the Tribunal referred to the argument raised with reference to the method of billing and held that it is not conclusive proof of the nature of transaction because the purchasing dealer, i.e., wholesale licensees to whom the applicant-dealer had sold the beer had to receive the same in sealed bottles and the wholesaler had to part with the same in turn in favour of his clients, i.e., L-2 licensees in the same form, i.e., the beer in bottles with seals intact. The Tribunal further observed that the billing method showing separately the price of bottles as security as adopted by the applicant-dealer can make no difference as the purchasing dealer, the L-1 licensee, under the mandate of law is left with no domain or volition over the bottles, which he was liable to sell filled with beer in sealed form. The Tribunal rejected the contention urged on behalf of the petitioner that the transaction was one of bailment and not of sale. It distinguished the judgment of the Allahabad High Court in *Dyer Meakin Breweries v. Commissioner of Sales Tax* [1972] 29 STC 69 and followed the decision of the Bombay High Court in *Arlem Breweries Ltd.* [1983] 53 STC 172. The same view has been reiterated by the Tribunal in its order dated February 22, 1990 in the following words :

"The contention of the counsel for the appellant that there is no express or limited contract for the sale of bottles has no substance. Further, according to section 148 of Indian Contract Act, 1872 bailment is delivery of goods by one person to another for some purpose upon a contract that they shall when purpose is accomplished, be returned to or otherwise disposed of according to the directions of the person delivering them. In the present case in actual practice, the appellant sells bottled beer to various L-1 licensees (wholesalers) who sell the same to the retailers and they, in turn, sell the same to consumers. In this situation, the original suppliers, i.e., the breweries, and in the instant

case, the appellant have no means to keep a track of the bottles being sold by them. A perusal of the record shows that neither empties were received back nor any evidence was led before me to substantiate facts, the security deposits are ultimately adjusted in the account books and to me it seems an obvious method to escape levy of tax on bottles.

21. Learned counsel for the petitioner has failed to point out any error in the finding recorded by the Tribunal. Therefore, we do not find any reason to upset the same. Moreover, once it is held that there was no obligation to return the bottles, the theory of bailment falls to the ground. It would then not be a case where some property of the respondent was entrusted to the purchasers/customers with stipulation that they should be returned or otherwise disposed of according to the directions of the respondents, within the meaning of section 148 of the Contract Act, which defines the expression "bailment". The definition reads :

"A "bailment" is the delivery of goods by one person to another for some purpose, upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them. The person delivering the goods is called the "bailor". The person to whom they are delivered is called the "bailee"."

22. In our opinion, the transaction is neither a bailment nor a pledge. It was a composite transaction. It was to start with an entrustment which could result in a sale of bottles in case of non-return of the bottles.

23. Section 24 of the Sale of Goods Act, 1930, reads as under

"24. Goods sent on approval or "on sale or return". - When goods are delivered to the buyer on approval or "on sale or return" or other similar terms, the property therein passes to the buyer -

(a) when he signifies his approval or acceptance to the seller or does any other act adopting the transaction;

(b) if he does not signify his approval or acceptance to the seller but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the expiration of such time, and if no time has been fixed, on the expiration of a reasonable time."

24. Section 24 has to be read along with sub-section (3) of section 19 which says that "unless a different intention appears, the rules contained in sections 20 to 24 are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer. Section 24 appears to be practically in the same terms as section 18 of the English Sale of Goods Act, 1979, which itself is but a repetition for the common law rule to that effect. The law in this behalf is stated in Halsbury's Laws of England, IV Edition, Volume 41, paragraph 727, in the following words :

"727. When property passes. - Unless a different intention appears, when goods are delivered to the buyer on approval, or on sale or return, or other similar terms, the property in the goods passes to the buyer when he signifies his approval or acceptance to the seller or does any other act adopting the transaction; and if he does not signify his approval or acceptance to the seller but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the expiration of that time and, if no time has been fixed, on the expiration of a reasonable time. What is reasonable time is a question of fact."

In paragraph 728, it is stated :

"728. Similar terms. - A delivery of goods is not made on terms similar to a delivery on approval or on sale or return unless the effect of the transaction is that the bailee has the option of becoming the owner of the goods and on terms substantially the same as those already mentioned"

25. The principle of section 24, inter alia, is that where the goods are delivered to the buyer on terms similar to the delivery of goods on approval or "on sale or return", the property in the goods therein passes to the buyer, if he does not signify his approval or acceptance and also does not return the goods within the time prescribed therefor. According to the said principle, the position of the purchaser, until he returns the goods within the prescribed period, is that of a bailee and on the expiry of the said period, he becomes a purchaser. Where, however, the person to whom the goods are delivered is under an obligation to return the goods, there is no question of sale ever coming into being and the person to whom the goods are delivered remains a bailee. The transaction herein is in its nature nearer to the situation contemplated by and to the principle of section 24 - inasmuch as the bottles were delivered to the buyer with the stipulation that if he returns the bottles in which the beer was sold in good condition within three months he will get back the deposit kept by him in that behalf. It meant that after the expiry of the said period, he had no right to claim the refund on return of goods. The transaction then became a sale. As stated above, the customer was under no obligation to return, as explained hereinbefore; he had a right to return the bottles in good condition within three months. Correspondingly, the petitioner-assessee was under an obligation to refund the deposit amount if the bottles were returned within three months in good condition; after the expiry of three months, the assessee was under no such obligation though it may be that for his own business or other reasons, it may yet accept the return of bottles and refund the deposit.

26. In Punjab Distilling Industries Ltd. Vs. The Commissioner of Income Tax, Simla, the question that arose for consideration before the Supreme Court was whether the collections by the assessee-company described in its accounts as "empty bottles return security deposit" were income assessable u/s 10 of the Income Tax Act ? The High Court answered the question in affirmative in Punjab Distilling Industries Ltd. Vs. Commr. of Income Tax, Simla, . Their Lordships of

the Supreme Court approved the decision of the High Court and held :

"That the amounts paid to the assessee and described as "empty bottles return security deposit" were trading receipts and therefore income of the assessee assessable to tax. In realising these amounts the company was really charging an extra price for the bottles. The trade consisted of sale of bottled liquor and the consideration for the sale was constituted by several amounts respectively called, the price of the liquor, the price of the bottles and the security deposit. Unless all these sums were paid the assessee would not have sold the liquor. So the amount which was called security deposit was actually a part of the consideration for the sale and therefore part of the price of what was sold. The fact that the money paid as price of the bottles was repaid as and when the bottles were returned while the other moneys were repaid in full when 90 per cent of the bottles were returned did not affect the question for none of these sums ceased to be parts of the consideration because it had been agreed that they would be refunded in different manners."

27. While dealing with the argument urged on behalf of the appellant on the basis of the decision rendered in (1938) 22 Tax Cas 51 (Morley v. Tattersall) their Lordships of the Supreme Court observed :

"Mr. Sastri referred us to the observations of Sir Wilfrid Greene M.R. in 1938 (22) Tax Cas 51 to the effect that :

"The money which was received was money which had not got any profit making quality about it; it was money which, in a business sense, was a client's money and nobody else's".

and contended that the amounts involved in the present case were of the same nature. We are unable to agree. If we are right in our view that the amounts were trading receipts, it follows that they must have a profit making quality about them. Their payment was insisted upon as a condition upon which alone the liquor would be supplied with an agreement that they would be repaid on the return of the bottles. They were part of the transactions of sale of liquor which produced the profit and therefore they had a profit-making quality. Again, a wholesaler was quite free to return the bottles or not as he liked and if he did not return them, the appellant had no liability to refund. It would then keep the moneys as its own and they would then certainly be profit. The moneys when paid were the moneys of the appellant and were thereafter in no sense the moneys of the persons who paid them."

28. In *Arlem Breweries Ltd. v. Assistant Commissioner of Sales Tax* [1983] 53 STC 172, the Bombay High Court applied the ratio of the Supreme Court's decision in *Punjab Distilling Industries Ltd. Vs. The Commissioner of Income Tax, Simla*, and held that 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. The said decision of the Bombay High Court

has been followed by the Division Bench of this Court in Punjab Breweries Ltd. v. State of Punjab [1993] 90 STC 211. While dealing with the question which is identical to the one which is under consideration before us, the division Bench made reference to the provisions of the Punjab Excise Act and observed :

"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 L1 licensee. Under the same Act and Rules L1 licensees cannot sell the contents of the bottle, i.e., the beer only but has to sell beer in bottled condition. Opened beer bottles cannot be sold by a L1 licensee to the consumers. L1 licensee is under no obligation in the matter of return of bottles to the dealer, further L1 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. Factually, it was conceded before the Tribunal that not a single bottle was in fact returned by the L1 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 was a case of sale of bottles by the dealer to the L1 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."

29. The Division Bench referred to the decisions of the Supreme Court in Raj Sheel v. State of Andhra Pradesh [1989] 74 STC 379 and 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. It also considered the decisions relied upon by the learned counsel for the dealer, namely, Dyer Meakin Breweries Vs. Commissioner of Sales Tax, Deputy Commissioner of Sales Tax (Law), Board of Revenue (Taxes) Vs. McDowell and Co. Limited, and Britannia Biscuit Co. Ltd. v. State of Maharashtra [1983] 53 STC 179 (Bom) and then observed :

"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 device 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 L1 licensee and further L1 licensee could sell beer in the bottled condition only. Opened beer bottles could not be sold by L1 licensee to his customers. L1 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. 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 L1 licensee to return the bottles to the dealer. These words, in the absence of any other evidence, would not create an obligation on L1 licensee to return the bottles to the dealer specially when L1 licensee sells the beer to his customers in bottled condition with no corresponding obligation on the customer to return the empty bottles to the L1 licensee. It may further be noticed that there was no time frame fixed for the return of bottles by L1 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 L1 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 L1 licensee to the dealer. We are in agreement with the view taken by the Bombay High Court in Arlem Breweries" case [1983] 53 STC 172 which in a way stands approved by their Lordships of the Supreme Court in Raj Sheel's case [1989] 74 STC 379. 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."

30. The judgment of the Kerala High Court in Deputy Commissioner of Sales Tax (Law), Board of Revenue (Taxes) Vs. McDowell and Co. Limited, and The State of Tamil Nadu Vs. McDowell and Company Ltd., relied upon by Shri Jhingan have been dissented by the Division Bench and we fully subscribe to the views expressed by the Division Bench in Punjab Breweries Limited v. State of Punjab [1993] 90 STC 211 (P&H).

31. The judgment of the Bombay High Court in Arlem Breweries Ltd. Vs. The Assistant Commissioner of Sales Tax, Panaji, has been expressly approved by the Supreme Court in State of Maharashtra, Bombay and Others Vs. Britannia Biscuits Co. Ltd. and Others, as would appear from the following observations made in the said decision :

"We may mention in this connection that the decision of the Bombay High Court (Goa Bench) in Arlem Breweries [1983] 53 STC 172 referred to and distinguished in the judgment under appeal has been noticed by this Court in Raj Steel and Others Vs. State of A.P. and Another, . In our opinion, just as in Arlem Breweries Ltd. Vs. The Assistant Commissioner of Sales Tax, Panaji, in this case too, payment of an amount for the bottles in advance (called deposit) was a term of the sale,"

32. In view of these decisions, it is not necessary to refer to the judgments of the other High Courts, on which reliance has been placed by Shri Jhingan, but we deem it necessary to refer to the judgment of the Supreme Court in United Breweries Ltd. Vs. State of Andhra Pradesh, decided by a three-Judge Bench in which the apex Court distinguished the judgment of Punjab Distilling Industries Ltd. Vs. The Commissioner of Income Tax, Simla, and State of Maharashtra, Bombay and Others Vs. Britannia Biscuits Co. Ltd. and Others, and held that as the bottles in which the beer was sold and the crates were not intended to be sold along with beer, the price thereof was not includible in taxable turnover. The facts of that case, as noticed in the judgment of the Supreme Court, show that the appellant-company which carries on the business of manufacture and sale of beer used to sell beer to the retailers and wholesalers in bottles which were ultimately returned to it after the consumption of beer. With a view to ensure the

return of bottles, a deposit used to be collected from the customers. The assessee issued circulars to its customers making it clear that the empty bottles and crates were not being sold and the bottles were to be returned so that the process of bottling beer could continue smoothly and steady supply could be maintained. The fresh supplies were made to the dealers upon the return of empty bottles. The assessee not only produced the circulars issued by it before the sales tax authority but also submitted figures to show that a substantial part of the bottles was returned by the customers. Their Lordships of the Supreme Court noticed the contents of the circular and then observed :

"The Commercial Tax Officer was also of the view that the bottles and crates were higher in value than the amounts deposited as security. For these two reasons, it was held that the scheme was not genuine. Therefore, the taxable turnover had to be computed not only by taking into account the sale price but also the value of the bottles

Four things emerge from this circular set out herein -

- (1) The refundable deposits were being collected on the bottles and the crates.
- (2) The appellant advised its customers to collect forty paise per bottle from the consumers as deposit.
- (3) The customers were advised to collect the empty bottles from the consumers and return them to the appellant.
- (4) The empty bottles and crates were to be taken back by the trucks of the appellant, the drivers of which were authorised to issue a receipt for the empties against which the appellant would issue credit notes. At the time of the booking of the next consignment, the customers would get advantage of the credit notes."

Their Lordships then referred to the provisions of the Sale of Goods Act and held :

"From the memorandum issued by UB, it appears that UB was very anxious not to lose the bottles and crates in which the beer was supplied. Forty paise was charged as deposit and the customers were also advised to do likewise when they sold the beer to the consumers. The whole intention was to get back the bottles from the consumers through the customers. The scheme was that UB would regularly send trucks with beer to the customers to supply beer and get back the empties. These empties will be filled up again for further supplies. This recycling of bottles will keep down the costs and this process will have the effect of keeping down the price of the beer which in turn will increase the sales. This does not appear to be a case where UB was selling beer in bottles and washing off its hands thereafter. It wanted to use the empty bottles. It was anxious to get back the bottles and that is why it not only charged 40 paise per bottle from customers but even advised them to do likewise, and collect 40 paise as deposit per bottle of beer from consumers to ensure that the bottles ultimately are returned to UB

Having regard to the facts of this case, we are of the view that an out and out sale of the bottles did not take place when beer was supplied in bottles by UB to its customers against the deposits which had to be refunded when the bottles were returned. Having regard to the scheme and the nature of the transactions, we are of the view that the High Court was in error in holding that when beer was sold in bottles, not only beer but also the bottles were sold and the price of beer along with the deposits became exigible to sales tax.

Mr. Ganguli argued that the very fact that UB had a right to forfeit the deposits on the failure of the customer to return the bottles indicates that the bottles were sold. The deposits were nothing but price of the goods which was returnable when the bottles were resold.

We are unable to uphold this contention. Whether the bottles and the crates were sold along with the beer or not will depend upon the intention of the parties. We have set out the terms and conditions under which the beer was sold and it does not appear from these terms and conditions that UB intended to sell crates and bottles to the customers. On the contrary, it was very anxious to get back these crates and bottles in order to use them again for further supplies. The fact that UB advised their customers to charge similar deposits from their consumers and get back the bottles from them goes to show that an out and out sale of the bottles had not taken place. By taking the deposits UB merely ensured the return of the bottles and the crates. A deposit of forty paise per bottle was taken to ensure return of the bottles. In our view, the deposit amount which was liable to be forfeited on failure of the return of bottles was in the nature of liquidated damages recoverable by the supplier u/s 74 of the Contract Act. An overall view has to be taken of the dealings and transactions between the manufacturer of the beer, its customers and the consumers. The intention of UB does not appear to have been to sell the beer bottles. Nor was there any intention of the retailers to sell the bottles to the consumers. On the contrary, by the terms and conditions of the agreement UB was trying to ensure that the bottles in which the beer was supplied to the consumers through their customers were brought back to it so that they could be used again for fresh supply of beer at a cheap rate."

33. This decision has been referred to and distinguished in Kalyani Breweries Ltd. Vs. State of W.B. and Others, . The facts of this case show that the assessee brewed and sold beer in beer bottles. For the beer, it gave to its purchasers one invoice and another for "the deposit on bottles". The amounts received under the second invoice were credited to an account entitled "Deposit on bottles" in the assessee's ledger and when the empty bottles were returned by the customers, refunds were made at the same rates. The Commercial Tax Officer treated the deposit amount as a part of the assessee's sales realisations and taxed it. The Assistant Commissioner and the West Bengal Commercial Taxes Tribunal confirmed the order of the Assessing Authority. By relying on the decisions of United Breweries Ltd. Vs. State of Andhra Pradesh, and Raj Steel and Others Vs. State of A.P. and Another, it was urged on behalf of the appellant that the

transaction did not involve sale of bottles. S. P. Bharucha, J., speaking for the court, referred to the analysis of the circular as made by the three-Judge Bench in *United Breweries Ltd. Vs. State of Andhra Pradesh*, and then observed :

"This arrangement suggested to this Court "a continuous process by which the appellant will sell beer to its customers in bottles and crates and collect the sale price of beer and also deposits for the crates and the bottles. The customer, in their turn, will sell beer to the consumers and apart from the price of the beer, will recover forty paise per bottle as deposit to ensure return of the bottles. The bottles will ultimately be taken back by the appellant for which the trucks will be sent and the credit notes will be given to the customers for return of the empties. This scheme of recycling the bottles and crates will keep down the costs and ultimately will have the effect of reducing the price of beer and encouraging the customers to buy beer in larger quantities". It was also found, as a matter of fact, that the rate at which the customer was required to make the deposit for the beer bottles was less than the cost of the beer bottles. Upon this basis this Court came to the conclusion that the intention of the brewer did not appear to have been to sell the beer bottles; on the contrary, the brewer was trying to ensure that the bottles in which the beer was supplied to consumers through its customers were brought back to it so that they could be used again. It was in this context that it was said, "It does not appear that any time-limit was fixed for return of bottles in this case. But, even if such limit was fixed, it is well-settled that time is not of the essence of the contract unless the parties specifically make it so."

34. His Lordship then referred to the facts of the case of *Kalyani Breweries Ltd. Vs. State of W.B. and Others*, and pointed out that :

"Now, there is nothing on record which indicates that the terms under which the deposits would be repaid were communicated to the assessee's customers. There is no suggestion that there was an oral communication of such terms to the customers or that there was any trade usage in this behalf. It is difficult to visualise a bailment the terms whereof are not made known to the bailee. The forfeiture of amounts in the assessee's "Deposit on Bottles" account does not appear to bear out the assessee's case that the empties were returnable at any time. This must also be taken into account that the customers were required to deposit for the beer bottles a rate which was exactly equal to the cost of the bottles; this would suggest the sale thereof more strongly than the intention to get them back upon bailment. It seems to us upon these facts and circumstances that there was really a sale of the bottles to the customers, the assessee buying back the empties from some customers."

35. In the background of this analysis, it is to be seen whether the decisions of the Assessing Authority, the Appellate Authority and the Tribunal holding that the bottles in which beer was sold by the petitioner to the L1 licensees constituted an integral part of the transaction of sale and, therefore, the amount taken by the petitioner as security deposit was includible in the taxable turnover. In this

regard, it is necessary to observe that the nature of commodity, i.e., beer is such that a container is necessary for its sale and the sale of bottles cannot be treated as an independent transaction. The facts found proved in this case show that in terms of rule 40 of the Punjab Breweries Rules, 1956, the petitioner was under a statutory obligation to take beer out of brewery in sealed bottles and the same was required to be sold to L1 licensees (wholesalers) in sealed bottles who, in turn, had to sell it in the same condition to the retail dealers. The final transaction was between the retail dealers and the consumers of the beer. There was no agreement between the retailers and the consumers for return of bottle nor there was any such agreement between retail licensees and the wholesale licensees. The security deposit taken by the petitioner from L1 licensees (wholesalers) contained a stipulation that the latter was to return the bottles within one month with a further stipulation that in the event of non-return of bottles within the stipulated period, the amount of security will be forfeited and there may be refusal to supply further stocks in case of shortage of empty bottles in the brewery. However, the wholesalers were not under any statutory obligation to return the bottles. The, agreement also did not cast a mandatory duty on the wholesalers to return the bottles. It only envisaged two consequences of non-return of bottles, namely, the forfeiture of deposit made in lieu of. bottles and the possibility of non-supply of stocks in the case of shortage of empty bottles in the brewery. The Assessing Authority, the Appellate Authority and the Tribunal have found that as a matter of fact, the bottles were never returned by the wholesalers to the brewery. No evidence was produced by the petitioner to establish the return of bottles by the wholesalers in terms of the conditions incorporated in the receipts like annexure P-1. Therefore, it must be held that the transaction between the petitioner and the wholesalers did not amount to bailment within the meaning of section 148 of the Contract Act but was a sale and the price of bottles was includible in the taxable turnover. In our opinion, the ratio of the decisions of Bombay High Court in Arlem Breweries Ltd. case [1983] 53 STC 172 of this Court in Punjab Breweries Ltd. case [1993] 90 STC 211 and the decision of the Supreme Court in Kalyani Breweries Ltd. Vs. State of W.B. and Others, is attracted in the facts of this case. The judgment of United Breweries Ltd. Vs. State of Andhra Pradesh, is clearly distinguishable because in that case, the apex Court took into consideration the peculiar facts relating to the nature of transaction entered into between the appellant and the licensees, the circulars issued by the appellant as well as the factum of return of almost entire quantity of bottles and crates by the users to the brewery and then held that the transaction involving sale of beer did not involve sale of bottles and crates. The decisions of this Court in Food Corporation of India v. State of Haryana [1987] 66 STC 7 and State of Haryana v. Janki Dass and Co. [1990] 79 STC 1 are also distinguishable. In the first case, which related to the transaction of rice through F.C.I. within the State, this Court held that there was no implied agreement between the parties to sell the packing material as a part of the goods and, therefore, the same was not taxable. In the second case, the court held that the freight payable by the purchaser at destination cannot be included

in taxable turnover under the State Act and the Central Act. Neither of these decisions have any bearing on the issue raised in the cases in hand.

36. The second question which deserves to be examined in these cases is whether the bottles sold along with beer can be subjected to higher rate of tax, i.e., at the rate of 10 per cent as against 4 per cent tax levied on the beer. Shri Jhingan argued that the view taken by the Assessing Authority, the Appellate Authority and the Tribunal on the issue of levy of tax at the rate of 10 per cent is against the settled principles of law. He submitted that in view of their finding that the bottles in which beer was sold formed an integral part of transaction of the sale of goods, the respondents could not have charged tax on the price of bottles at the rate of 10 per cent. "Shri Jhingan relied on *State of Orissa v. Habib Rahimutulla & Co.* [1982] 51 STC 403 (Ori) *Raj Sheel Vs. The State of Andhra Pradesh, The Malva Vanaspati and Chemicals Co. Ltd. Vs. Commercial Taxes Officer, State of Tamil Nadu v. V. V. Vanniaperumal & Co.* [1990] 76 STC 203 (Mad.) and *Premier Breweries Vs. State of Kerala*, . Mrs. Charu Tuli countered the submissions of Shri Jhingan and argued that if the petitioner wanted to avail the concessional rate of tax on bottles, then it should have submitted separate "C" forms before the Assessing Authority in respect of bottles.

37. Having thoughtfully considered the respective submissions, we find merit in the argument of Shri Jhingan that the respondents cannot levy tax at different rates on the bottles and the beer. Admittedly, what was sold by the petitioner was bottled beer and not beer alone or bottles alone. The agreement between the petitioner and the licensees involved sale of bottled beer. Even as per the provisions of statute, the petitioner was required to sell beer in sealed bottles. This means that the bottles were sold along with beer. In fact, this is also the finding of fact recorded by the Assessing Authority, the Appellate Authority and the Tribunal. Therefore, there can be no justification to charge tax on the bottles at a rate higher than 4 per cent and the failure of the petitioner to separately furnish "C" forms for bottles cannot be a valid ground to charge tax at the higher rate.

38. In *State of Tamil Nadu v. V. V. Vanniaperumal & Co.* [1990] 76 STC 203 the Full Bench of Madras High Court examined a similar issue on the context of sale of tin of oil. The question that arose for consideration before the Full Bench was whether separate rates of taxes could be charged in respect of oil and tins when the goods sold were tin of oil. After examining the provisions of Tamil Nadu General Sales Tax Act, the Full Bench held :

"But we do not agree with the other finding in that judgment referred to earlier that the sale price of the oil shall be separately taxed and the sale price of the tin should be separately taxed at the rates applicable to each of them. As we said above only tin of oil is sold. There is no intention for sale or purchase of tin. The intention is to purchase of oil which of course is in tin. Therefore, whatever is the price paid, it must be taken to be the price of the oil. May be if more oil is sold and delivered in a container brought by the purchaser the price may be lesser

than the oil sold in tin container, but nevertheless, when oil is sold in tin, the price that is paid is the price of the oil. Therefore, total turnover of the price has to be taxed and there is no question of taxing separately for the price of oil and price of tin at different rates."

39. The same view has been expressed by Andhra Pradesh, Orissa and Rajasthan High Courts in the judgments relied upon by Shri Jhingan. However, it is not necessary to make a detailed reference to these decisions in view of the recent verdict of the apex Court in *Premier Breweries v. State of Kerala* [1998] 108 STC 598; JT(1997) 10 SC 22. A perusal of the facts of this case show that the appellant who is engaged in the sale of liquor pleaded for levy of separate tax on cardboard cartons in which bottles of liquor were sold. It was pleaded that the tax at the rate of 8 per cent only is leviable on the cardboard cartons under entry 97 of the First Schedule of the Kerala General Sales Tax Act, 1963 and not at the rate of 15 per cent applicable to sale of liquor. The appellant's case was that it had charged its customers separately for the liquor and the cartons and there was no reason to include the value of the cartons in the value of the liquor for the purpose of levy of tax. The Assistant Commissioner of Sales Tax accepted the appellant's plea but the same was reversed by the Deputy Commissioner, Palghat, who exercised his revisional power to set aside the assessment order. Thereafter, the assessment was revised in the manner indicated by the Deputy Commissioner. The revised order was upheld by the Tribunal and the High Court. Their Lordships interpreted the provisions of Kerala General Sales Tax Act and held :

"The underlying idea behind these rules is that packed goods are to be taxed as composite units. In calculating the turnover of the goods, the turnover of the containers will have to be included. The appropriate rate of tax will be the rate payable on the goods. It will not make any difference, if the containers are shown to have been sold and charged separately. The logical corollary to this principle is that when the goods are exempted from tax, no tax is leviable on the containers. This will be the position even when the goods and the containers are sold and charged separately.

Various rates of tax have been fixed by the Act for sale or purchase of various types of goods. If the goods are sold in packages or containers then for the purpose of imposition of tax, the turnover of goods will have to be calculated by including therein the turnover of the packages or the containers. The rate of tax applicable to the turnover so calculated will be the rate payable on the goods contained in the containers. It follows that if bottled beer is sold in containers, the tax payable on beer will be the appropriate rate of tax payable on the turnover calculated in the manner stated hereinabove. It has not been found by any of the authorities who heard the case that the cartons were specially provided for protection of the bottles and bottled beer usually was not delivered in cartons even in cases of bulk sales. The argument based on secondary packing is misconceived."

40. In view of these decisions, we accept the contention of Shri Jhingan that the respondents have acted illegally by charging tax on the bottles at the rate of 10 per cent on the ground that separate "C" forms had not been furnished by the petitioner.

41. The third question that requires consideration is whether the interest could be levied on the petitioner. A look at the order dated February 28, 1990 shows that the levy of interest has been upheld by the Tribunal on the basis of the judgment of the Supreme Court in *Associated Cement Co. Ltd. v. Commercial Tax Officer* [1981] 48 STC 466.

42. If the decision of the Supreme Court relied upon by the Tribunal had held ground, the levy of interest may have been sustained but in view of the later decision of the Constitution Bench in *J. K. Synthetics Ltd. v. Commercial Taxes Officer* [1994] 94 STC 422 by which the apex Court overruled the majority decision in *Associated Cement Company Limited Vs. Commercial Tax Officer, Kota and Others*, the levy of interest u/s 9(2) of the Central Act read with section 11-D of the State Act prior to the date on which the additional demand was created cannot be upheld. In *J.K. Synthetics Limited and Birla Cement Works and another Vs. Commercial Taxes Officer, State of Rajasthan and another*, the Constitution Bench interpreted the provisions of Rajasthan Sales Tax Act, which are more or less in pari materia with the contemporaneous provisions of the State Act and held :

"Under section 11B of the Rajasthan Sales Tax Act, 1954, before its substitution by Act No. 4 of 1979 with effect from April 7, 1979, the liability to pay interest on unpaid tax amount accrued on the dealer in two situations only, viz., (i) failure to pay the tax due under sub-sections (2) and (2A) of section 7, and (ii) failure to pay the tax within the time allowed by the notice of demand or thirty days from the receipt of the notice by the dealer. Section 11B before its amendment nowhere provided for payment of interest on the unpaid tax amount as found on final assessment from the date of the filing of the return u/s 7 of the Act. If the amount of tax payable under sub-section (2) is paid on the basis of return, not on the basis of final assessment, there can be no question of payment of interest under clause (a) of section 11B. Similarly, if the tax is paid according to the return as required by sub-section (2A), in other words, if the full amount of tax due "shown" in the return is paid, there can be no question of charging interest under clause (a) of section 11B. So far as clause (b) is concerned it is a post-assessment situation. Where tax is found due on final assessment and the dealer is required to make good the difference, a notice of demand will issue. If the dealer fails to pay the tax within the time specified in the notice, and if no time is specified within 30 days from the receipt of notice, he is required to pay interest at the rates prescribed by the sub-section. But if he pays the difference of tax within the prescribed time, there is no question of charging interest.

The conjoint reading of section 7(1), (2) and (2A) and section 11B of the Act leaves no room for doubt that the expression "tax payable" in section 11B can

only mean the full amount of tax which becomes due under sub-sections (2) and (2A) of the Act when assessed on the basis of the information regarding turnover and taxable turnover furnished or shown in the return. Therefore, so long as the assessee pays the tax which according to him is due on the basis of information supplied in the return filed by him, there would be no default on his part to meet his statutory obligation u/s 7. It is not possible to visit the assessee who pays the tax which according to him is due on the basis of the information supplied in the return filed by him with the liability to pay interest under clause (a) of section 11B. The law did not envisage the assessee to predict the final assessment when he filed the return and expect him to pay the tax on that basis to avoid the liability to pay interest.

Where returns of turnover for the assessment years 1975-76 to 1977-78 were filed by the appellant on the basis that the amount of freight charged in respect of sale of cement under the Cement Control Order did not form part of the sale price for payment of sales tax and paid the tax accordingly, and had raised the contention bona fide, but the Supreme Court in 1978 held that the freight element formed part of the price of cement and sales tax was leviable on the sale price inclusive of the freight amount, and the appellant was required to pay additional sales tax on the basis

Held accordingly, that the appellant was not liable to pay interest u/s 11B (as it stood prior to its substitution in 1979) on the additional sales tax from the date on which the original returns were filed but interest had to be paid only for the period subsequent to determination of sales tax under the final assessment after the expiry of the period allowed under the notice of demand."

In view of this decision, the levy of interest from a date prior to the date of assessment and the time within which the petitioner was to pay the additional tax in terms of the order of assessment cannot be upheld.

43. The last question that needs determination relates to the imposition of penalty. Shri B. K. Jhingan strenuously urged that the levy of penalty u/s 10(6) and (7) of the State Act should be quashed because the petitioner did not refrain from making payment of tax with an oblique motive but was contesting its liability to pay the tax on the amount of security deposit received in lieu of the bottles. He relied on *Oswal Spinning & Weaving Mills Ltd. v. State of Punjab* [1996] 103 STC 491 (P&H) *State of Rajasthan Vs. Jaipur Udyog Ltd., Addl. Commissioner of Income Tax, Gujarat Vs. Chandravilas Hotel, ARVIND BOARDS and PAPER PRODUCTS LTD Vs. COMMISSIONER OF Income Tax, GUJARAT-IV, Hindustan Steel Ltd. Vs. State of Orissa, Khosla Mills Vs. The State of Punjab and Others, and Cement Marketing Co. of India Ltd. Vs. Assistant Commissioner of Sales Tax, Indore and Others, .* The learned Deputy Advocate-General justified the imposition of penalty upon the petitioner by arguing that the petitioner had knowingly ~filed false returns excluding the amount of security deposit which constituted the part of sale price of the beer and, therefore, the action taken u/s 10(7) is fully justified.

44. After considering the submissions made by the learned counsel and perusing the judgments relied upon by Shri Jhingan, we are of the opinion that the imposition of penalty on the petitioner cannot, in principle, be declared illegal. The record produced before the court shows that as early as on September 19, 1983, the Tribunal had dismissed the revision petition filed by the petitioner in respect of assessment year 1979-80. Perusal of order dated July 21, 1987 shows that the Assessing Authority had framed assessment vide orders dated March 6, 1980, January 6, 1981, January 14, 1982 and June 12, 1981 in respect of the assessment years 1976-77, and 1978-79 under the State Act and for the years 1976-77, 1977-78 and 1978-79 under the Central Act. These orders were revised by the Assistant Excise and Taxation Commissioner, Ludhiana, on the lines of the order dated September 19, 1983. It is, therefore, reasonable to hold that the petitioner was fully aware of the fact that the authorities constituted under the Act had consistently taken the view that the security deposit in respect of the bottles constituted a part of the sale price of the beer and, therefore, the petitioner was bound to deposit the tax on the amount received in lieu of bottles, while filing return u/s 10. Admittedly, this was not done by the petitioner. Rather, it continued to adopt the illegal practice of not including the price of the bottles in the taxable turnover. Thus, the respondents have rightly held him liable to pay penalty u/s 10(7) of the Act and we do not find any ground to interfere with the same subject to the direction that the amount of penalty deserves to be reduced proportionately in view of our finding that the tax on bottles is payable at the rate of 4 per cent.

45. For the reasons mentioned above, we hold that the price of the bottles supplied along with beer was includible in the taxable turnover of the petitioner and no illegality has been committed by the authorities constituted under the Act and the Central Act and the Tribunal in imposing and upholding the tax on the sale of the bottles. However, it is declared that the levy of tax on the sale of the bottles at the rate of 10 per cent is illegal and the petitioner is liable to pay tax on the sale of the bottles at the same rate at which tax is chargeable on the sale of beer. It is further held that the petitioner is liable to pay interest only in accordance with the judgment of the Supreme Court in *J. K. Synthetics Limited v. Commercial Taxes Officer* [1994] 94 STC 422. The levy of penalty u/s 10(7) is upheld subject to the modification that the amount of penalty shall be proportionately reduced in view of our finding that the rate of tax payable on the sale of bottles shall be the same as the rate of tax on the sale of beer. The writ petitions are disposed of in the manner indicated above.

46. In S.T.C. Reference Nos. 21 of 1992, 22 of 1992, 23 of 1992, 24 of 1992, 25 of 1992, 27 of 1992 and 28 of 1992, the following common questions of law arise for adjudication by this Court :

(i) Whether in the facts and circumstances of the case, the bottles supplied along with beer can be subjected to tax at the rate of 10 per cent and not 4 per cent ?

(ii) Whether the levy of interest from the date of filing of returns can be upheld

in the view of the decision of the Supreme Court in J. K. Synthetics Limited v. Commercial Taxes Officer [1994] 94 STC 422

(iii) Whether the penalty imposed on the petitioner is liable to be reduced if the finding on question No. (i) is in favour of the assessee ?

47. The Sales Tax Tribunal, Punjab is directed to refer the abovementioned questions and remit the record of the cases to this Court. S.T.C. Nos. 21 to 25, 27 and 28 of 1992 are decided accordingly.