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**(1985) 03 RAJ CK 0016**

**In the Rajasthan High Court**

**Case No : Sales Tax Reference No. 7 of 1979**

Ramnagar Cane and Sugar Co. Ltd.

APPELLANT

Vs

Commercial Taxes Officer

RESPONDENT

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**Date of Decision :** 27-03-1985

**Acts Referred:**

Rajasthan Sales Tax Act, 1954 — Section 5(v)

**Citation :** (1987) 64 STC 96

**Hon'ble Judges :** N.M. Kasliwal, J;D.L. Mehta, J

**Bench :** Division Bench

**Advocate :** Bharat Khaitan and Prag Rustogi, for the Appellant; G.S. Bapna, for the Respondent

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## **Judgement**

N.M. Kasliwal, J.—The Board of Revenue by order dated October 31, 1977, has referred the following question of law for the opinion of this Court:

On the facts and circumstances of the case what should be the rate of tax on sealed tins which are sold filled with vanaspati and for which separate charges are made in the bills ?

2. Brief facts leading to this reference are that Shri Suraj Bhan Bhargava, Assistant Commercial Taxes Officer, made an inspection of the premises of M/s. Ramnagar Cane and Sugar Company Ltd., Jaipur (hereinafter referred to as "the assessee"), on November 11, 1971. On inspection it was found that tins of vanaspati ghee of 16.5 kg. sold prior to October, 1971, the price of tins was not realised separately and sales tax used to be realised at the rate of vanaspati ghee itself. However, after October, 1971, the assessee started showing the price of the tins separately and charged sales tax at the rate of 3 per cent. The sales tax on vanaspati ghee was at the rate of 10 per cent. The Commercial Taxes Officer issued a notice to show cause to the assessee as to why sales tax at the rate of 10 per cent may not be charged on the sale of tins also and why a penalty should not be imposed for evading tax at the rate of 7 per cent. The assessee in reply to the show cause notice submitted that he had realised the tax in

accordance with law. It was submitted that under proviso (v) to Section 5 of the Rajasthan Sales Tax Act, 1954 (hereinafter referred to as "the Act"), the sales tax was payable at the rate which was applicable to packing material, when such packing material is separately charged. The rate of 10 per cent applicable to the sale of vanaspati ghee could only be charged on the sale of tins when not separately charged for but not in a case where price of the packing material was separately charged. It was submitted by the assessee that there could be 3 types of transactions. In the first kind of transaction, the purchasers used to supply the tins and the assessee used to sell vanaspati ghee and in that case 10 per cent sales tax used to be charged on the sale of vanaspati ghee. In the second case, the purchasers used to purchase vanaspati ghee in a sealed tin and in that case the consolidated price of ghee and tin used to be charged and in that case also 10 per cent sales tax was charged on the total sale. In the third case, the purchaser used to ask the assessee to charge the price of ghee and tins separately and in such a case the assessee used to charge the price separately and in that case the sales tax was also realised separately according to the respective rates of ghee and tins. It was thus submitted by the assessee that the transactions in question, which related to the period from September 1, 1971, to October 31, 1971, fell under the third category and in these circumstances he had rightly charged sales tax at the rate of 3 per cent on the sale of tins.

3. The Commercial Taxes Officer did not consider the explanation of the assessee to be correct inasmuch as it was found that the assessee was not dealing in the business of sale of empty tins. It was held by the Commercial Taxes Officer that the main business of the assessee was to sell vanaspati ghee and to sell the same by filling in tins. It was also held that after the inspection of the assessee made by the Assistant Commercial Taxes Officer, the assessee had again started realising sales tax at 10 per cent on the sale of vanaspati ghee as well as the tins. The Commercial Taxes Officer as such by order dated January 24, 1972, held that the assessee had deposited Rs. 157.85 less at the rate of 7 per cent on the sale of tins amounting to Rs. 2,254.50. The penalty of Rs. 157.85 was also imposed on the assessee.

4. The assessee, aggrieved against the order of the Commercial Taxes Officer filed an appeal before the Deputy Commissioner (Appeals-I), Commercial Taxes, Jaipur. It was argued on behalf of the assessee that imposition of tax at 10 per cent on sales of empty tins was not justified as he had charged 3 per cent in view of entry No. IV of Notification dated March 27, 1971. It was also submitted that the sale of tins had been shown separately according to proviso (v) of Section 5 of the Act when the cost of packing material was charged separately and he was authorised to charge tax at 3 per cent on the sale of empty tins. It was also argued on behalf of the assessee that he was manufacturing tins also and the inference drawn in this regard by the assessing authority was wrong. The assessee had applied on August 16, 1971, for entering tin plates in its registration certificate as raw material to be used by him. The impugned assessment was done after August 16, 1971 as the period of assessment was

September, 1, 1971, to October 31, 1971 and as such he was entitled to get an advantage of the notification dated March 27, 1971.

5. The learned Deputy Commissioner held that although the appellant-assessee had applied for getting tin plates entered in his registration certificate but no evidence had been produced to show that he actually purchased tin plates and manufactured empty tins.

6. It was further observed by the Deputy Commissioner that if this was so why the assessee reverted back to charging 10 per cent on the combined sale of the empty tins and the vanaspati ghee sold by him after the inspection of the Assistant Commercial Taxes Officer. It was thus clear that the assessee was not manufacturing empty tins and cannot, therefore, get the benefit of the Notification dated March 27, 1971. In this view of the matter the appeal of the assessee on this score was dismissed.

7. The assessee then filed a revision before the Board of Revenue. The Division Bench of the Board of Revenue heard the matter and similar arguments were raised before the Board of Revenue as were raised before the Deputy Commissioner and the assessing authority. The Board of Revenue held that the concessional rate of 3 per cent could only be available to the assessee if the tin containers had been sold separately to the customer and not after the same were filled with vegetable oil and sold along with vegetable oil contained therein. It was held by the Board of Revenue that in the present case, it was not disputed that vegetable oil was sold in the tin containers. The firm had shown sale of the tin containers and the vegetable oil separately, but this has been done in the same bill. This lends support to the inference that vegetable oil was sold in the tin containers and which have been subjected to sales tax at the rate applicable to the vegetable oil and not separately at the rate applicable to the tin containers and the view taken by the Commercial Taxes Officer and the Deputy Commissioner was correct in considering the rate chargeable at 10 per cent and not at 3 per cent. The Board of Revenue held that the penalty u/s 16(i) of the Act was wrongly imposed and as such remitted the penalty. The revision petition was thus partly allowed by order dated October 21, 1976.

8. The assessee then submitted an application u/s 15 of the Act for referring the question of law for the opinion of this Court and the Board of Revenue by order dated October 31, 1977, has referred the question mentioned above for the opinion of this Court.

9. In order to appreciate the controversy raised in the present case it would be proper to quote proviso (v) of Section 5 of the Act. Proviso (v) of Section 5 of the Act reads as under :

Section 5. Rate of tax.-(1) The tax payable by a dealer under this Act shall be at such single point in the series of sales by successive dealers as may be prescribed and shall be levied at such rate (not exceeding sixty per cent) on the taxable turnover, as may be notified by the State Government in the Official

Gazette.

(v) Provided also that when any goods are sold, packed in any materials, the tax shall be leviable on the sale of such packing materials (when not separately charged for) at the same rate (if any) as is applicable to the sale of the goods themselves.

10. It may also be mentioned that by Notification No. F. 5(21) FD (T)/71-3 dated March 27, 1971, a rate of 3 per cent was made leviable on the sale of empty tins. The assessee had started preparing the bills in the following manner, a copy of bill dated October 16, 1971 (annexure 4), is reproduced for illustration :

R.S.T. No. 232/90 C.S.T. No. 14/Central/II/JP RAMNUGGER CANE AND SUGAR CO. LTD. (Vanaspati Division) Vanaspati Soap and Allied Products 164/181 Industrial Area, Jaipur-6 Bill No. 71-72/R/72 Dated 16-10-1971 M/s. Sethi Ludha Ram Relumal Subzi Mandi, Kota. C.S.T. No. 159 R.S.T. No. 23667

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|--------------------------------------------------------------------------------|-------|-----|-----|-------|
| G. R. No. 21367 Dated: 14-10-1971 Documents through Bharat Goods Transport Co. | Truck | No. | RJR | 7311. |
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|----------|-------------------------------------|--------|--------------|--------------------------------------------------------------------|-------|----------|-----------------------------------|-----------------------------------|--------------|-------|----------|----------------|----------|-------|-------|----------|
| Quantity | Particulars                         | Rate   | Amount       | 100 Tins "Maharaja" brand Vanaspati each containing 16.5 Kg. nett. | 72.40 | 7,240.00 | Excise duty as per G.P.I. No. 106 | 384.50                            | _____        | Total | 7,624.50 | Sales tax 10 % | 762.45   | _____ | Total | 8,386.95 |
| Cost of  | 100 empty tin containers as per VDP | 450.00 | Sales tax 3% | 13.50                                                              | _____ | Total    | 8,850.45                          | Vide Challan No. 107 dt. 14-10-71 | Less freight | 61.00 | _____    | Grand Total    | 8,789.45 | _____ |       |          |

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E & O E For Ramnugger Cane and Sugar Co. Ltd., Sd/- M. P. Kedia.

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11. It was contended by Mr. Khetan, learned counsel for the assessee, that the rate of sales tax at 10 per cent was leviable on the sale of vanaspati and not on the sale of tins. Under the proviso (v) of Section 5(1) of the Act it was clearly mentioned that when any goods are sold, packed in any materials, the tax shall be leviable on the sale of such packing materials as is applicable to the sale of the goods themselves, when not separately charged for. It was submitted that in the present case, the assessee had clearly charged for the packing materials, i.e., empty tin containers, separately and in this view of the matter the assessee had rightly charged sales tax at 3 per cent on the cost of empty tins.

12. On the other hand, it was submitted by Mr. Bapna, learned counsel for the department, that the assessee was not a dealer of empty tins and there was no express or implied contract of sale of the packing material, i. e., empty tins and a mere mention of the cost of empty tin containers separately in the bills cannot give advantage to the assessee to charge sales tax at the concessional rate under the impugned notification.

13. We would first discuss the cases cited at the Bar.

14. In *Hyderabad Deccan Cigarette Factory v. State of Andhra Pradesh* [1966] 17 STC 624, a notification had been issued by the Andhra Pradesh State Government that sales or purchases of tobacco and all its products were exempted from sales tax. The department sought to assess the appellant a manufacturer of and dealer in cigarettes, on the turnover in respect of packing materials consisting of cardboard and dealwood. The appellant contended that there was no sale of the packing materials as it sold only cigarettes at Rs. 8.50 per thousand without charging extra for packing materials and that the price was the same to whatever place they were sent. It was not disputed that there was no express contract of sale of the packing materials.

15. It was held by their Lordships of the Supreme Court that:

Whether there was an agreement to sell the packing materials was a pure question of fact and that question could not be decided on fictions or surmises. The burden lay upon the Commercial Tax Officer to prove that a turnover was liable to tax and he could ask the assessee to produce relevant material. If the assessee did not produce the same, he could draw adverse inferences against the assessee; but he had to decide the crucial question whether the packing materials were the subject of the agreement of sale, express or implied. To ascertain these facts he could rely upon oral statements, accounts and other documents, personal inquiry and other relevant circumstances such as the nature and purpose of the packing materials used.

16. The Supreme Court remanded the case to the High Court with a direction to consider afresh the question whether the packing materials were subject-matter of the agreement of sale having regard to the relevant material and in the light of the observations made in the judgment.

17. A perusal of the above case clearly shows that the question whether there was an agreement to sell the packing materials, is a pure question of fact and has to be decided upon oral statements, accounts and other documents, personal inquiry and other relevant circumstances such as the nature and purpose of the packing materials. In the case in hand before us, the assessee has only relied upon separate entry of cost of empty tin containers made in the bills. The assessee had produced no evidence to show that he actually purchased tin plates and manufactured empty tins at least during the relevant period. The Board of Revenue had arrived at the finding that the concessional rate of 3 per cent was available only if the tin containers had been sold separately to the customers and not after they were filled up with vegetable oil and sold along with vegetable oil contained therein. It was also observed that in the present case it was not disputed that vegetable oil was sold in the tin containers. It was also held by the Board of Revenue that the bill had shown sale of the tin containers and the vegetable oil separately, but this has been done in the same bill and this lends support to the inference that vegetable oil was sold in the tin containers. On the basis of this finding of fact given by the Board of Revenue, the transaction of the sale of packing materials, i. e., empty tins, will also be leviable on the same rate

as applicable to the sale of the goods themselves, i. e., vegetable oil. Mr. Khetan, learned counsel for the assessee vehemently contended that the assessee had separately charged the empty tins in the bills and the burden lay heavily on the Commercial Taxes Officer to prove that no separate agreement of sale of empty tins was made by the assessee with the purchasers. We find no force in this argument; even if the burden lay on the Commercial Taxes Officer, the same has been discharged and the Board of Revenue was entitled to hold in the facts and circumstances of the case that the tin containers had not been sold separately to the customers and vegetable oil was sold along with the tin containers.

18. In *Commissioner of Taxes, Assam v. Prabhat Marketing Co. Ltd.* [1967] 19 STC 84, the respondent, Prabhat Marketing Co. Ltd., had sold hydrogenated oil which was exempt from sales tax under the Assam Sales Tax Act, 1947. The question was whether the value of the containers in which hydrogenated oil was sold could be assessed to sales tax under the Act. The High Court held that the value of the containers was not assessable to sales tax unless separate price had been charged for the containers. On appeal the Supreme Court held that the value of the containers was assessable to sales tax under the Act if there was an express or implied agreement for the sale of such containers and the mere fact that the price of the containers was not separately fixed made no difference to the assessment of sales tax. It was further observed 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.

19. In *Hyderabad Asbestos Cement Products Ltd. v. State of Andhra Pradesh* [1969] 24 STC 487, Hyderabad Asbestos Cement Products Ltd. (in short company) sent goods to outstation customers by rail under railway receipts with freight to pay. It made out an invoice at the catalogue rate and the customers paid the amount of the invoice less the freight. The result was that net price received by the company was the catalogue rate less the railway freight charged in respect of the goods transported to the destination. In a sample invoice relied upon by the State the company had made out the invoice at the catalogue rate deducted discount therefrom, charged sales tax on the balance and thereafter deducted the railway freight "to pay". The question was whether in assessing the turnover of the appellant-company under the Andhra Pradesh General Sales Tax Act, 1957, for the year 1959-60 deduction could be allowed of the sum of Rs. 57,970.37 in respect of railway freight on articles supplied to outstation customers. It was held by their Lordships of the Supreme Court that under the terms of the contract there was no obligation on the part of the company to pay the freight and the price received by the company for the sale of the goods was the invoice amount less the freight. It was also held that the form in which the invoice was made out was not determinative of the contract between the company and its customers. If, apprehending that it may have to pay sales tax on the freight, the company collected sales tax on the freight, the true nature of the contract between the company and the purchasers cannot on that account be altered. That the company may be liable to refund the amount of excess sales

tax to its purchasers was a matter between the company and the purchasers and the State could not seek to levy tax on railway freight if it was not made part of the price.

20. In *Birla Jute Manufacturing Co. Ltd. v. Commissioner of Sales Tax, Madhya Pradesh, Indore* [1972] 29 STC 639, the case of *Hyderabad Asbestos Cement Products Ltd.* [1969] 24 STC 487, was distinguished and it was held that the price of the cement sold by the assessee, as the agent of the State Trading Corporation, being f.o.r. destination was an all-inclusive price, including the cost of freight till destination. Also, the railway freight could not be considered as "separately charged" for the purposes of the definition contained in Section 2(h) of the Central Sales Tax Act, 1956. Therefore, the amounts representing railway freight incurred in respect of inter-State sales were not liable to be excluded from the assessee's taxable turnover. This case was, however, based on the sale of cement which was at the time a controlled commodity. Under the Cement Control Order, 1961, the assessee had to sell the entire quantity of cement produced by it to the State Trading Corporation at ex works price and then had to act as an agent of the State Trading Corporation in effecting sales to the consumers. The price at which the State Trading Corporation could sell cement was fixed and it was f.o.r. destination, i.e., inclusive of railway freight. This case is of no relevance to the case in hand before us.

21. In *Patel Volkart Private Ltd. v. Commissioner of Sales Tax, M.P.* [1972] 29 STC 515, another case of the Madhya Pradesh High Court, it was held that on the facts and circumstances of the case, the Tribunal was correct in holding that there was an implied contract of sale of packing materials, i.e., bardana and patti, along with the sale of cotton bales. It was also held that when different articles are transferred under a composite contract the rate available for either of the two cannot be charged. The different items will have to be charged at the different rates. The Tribunal was, therefore, justified in holding that the packing material cannot be charged at the rate prescribed for cotton. This case also does not render any assistance to the assessee as in this case it was also found as a matter of fact that the assessee was a dealer in packing material as well. Apart from that, there was no provision like proviso (v) to Section 5(1) of the Act which laid down that when any goods were sold, packed in any materials, the tax shall be leviable on the sale of such packing materials as was applicable to the sale of the goods themselves. Though of course in the proviso mentioned above it has been clearly mentioned "when not separately charged for" but we have already considered the impact and scope of the above words in the facts and circumstances of the case.

22. The Madras High Court in *K. Natarajan and Sons v. State of Tamil Nadu* [1977] 39 STC 443 held that as the kerosene and the tins had been charged separately, the turnover referable to the sale of the tins could not be taxed at the same rate at which kerosene was taxed. The position might have been different if a single consolidated or composite price had been charged for the kerosene

along with the tins. Consequently, the Appellate Assistant Commissioner was right in directing assessment of the turnover relating to sale of tins at 3 per cent multi-point.

23. In the above case kerosene was liable to single point levy at the rate of 51/2 per cent. Entry 35 of Schedule I of the Tamil Nadu General Sales Tax Act, 1959, merely refers to kerosene and nothing more. In the above circumstances it was held by the Bench of the Madras High Court that when there had been an implied contract for the sale of the tins, the turnover referable to the sale of the tins could not be taxed at the same rate as the turnover relating to kerosene. The position might have been different, if a single, consolidated or composite price had been charged for the kerosene along with the tins. The Madras High Court placed reliance on Patel Volkart's case [1972] 29 STC 515 , which we have already distinguished.

24. In Hindustan Sugar Mills Ltd. v. State of Rajasthan [1979] 43 STC 13 , the question was whether the amount of freight deducted from the f.o.r. destination railway station price in the invoices made out by the assessee and paid by the purchasers formed part of the "sale price" within the meaning of the definition of that term in Section 2(p) of the Rajasthan Sales Tax Act and Section 2(h) of the Central Sales Tax Act. It was held by their Lordships of the Supreme Court that the scheme of the Cement Control Order was that the freight was payable by the producer and he recovered it from the purchaser as part of the f o.r. destination railway station price. The Control Order was paramount ; it had overriding effect and if it stipulated that the freight was payable by the producer, such stipulation must prevail, notwithstanding any term or condition of the contract to the contrary. This case is totally distinguishable and lends no assistance for deciding the controversy raised in the present case before us.

25. In State of Karnataka v. Shaw Wallace and Co. Ltd. [1981] 48 STC 169, a Division Bench of the High Court of Karnataka held that from the facts found by the Tribunal, it was clear that there was an agreement to sell the bottles and crates in which liquor was conveyed and there was also an agreement in regard to the price of those containers. Therefore, the turnover in regard to those items had to be determined and the appropriate rate of sales tax could be charged as provided in the Act. It was held that the value of glass bottles should be taxed under item 109 of the Second Schedule of the Karnataka Sales Tax Act, 1957 and the crates which were of wooden material should be taxed u/s 5(1) of the Act. This case is based on the provisions contained in the Karnataka Sales Tax Act and can give no assistance for interpreting the provisions of proviso (v) to Section 5 of the Act with which we are concerned.

26. In State of Orissa v. Habib Rahimutulla and Co. [1982] 51 STC 403 , it was held that where under the contract there was an obligation on the part of the assessee for the supply of rice in gunny bags to the buyers, the sales turnover of gunny bags would be taxed at the rate prescribed for rice on the basis of the fifth proviso to Section 5(1) of the Orissa Sales Tax Act, 1947 and not at the rate

prescribed for containers under the Act. In this case the fifth proviso to Section 5(1) of the Orissa Sales Tax Act, 1947, provided that the sale of containers of taxable goods, when sold with such goods, but not charged separately, shall be subject to payment of tax at the same rate as the goods contained therein. The above provision is identical to proviso (v) of Section 5(1) of the Rajasthan Sales Tax Act, 1954. A Division Bench of the High Court of Orissa held that the sale of gunny bags would be taxed, was not in dispute. The only question was what would be the appropriate rate of tax. It was observed that admittedly under the contract there was an obligation for supply of rice in bags on the part of the assessee and the Tribunal relying on this part of the agreement had invoked the fifth proviso of Section 5(1) of the Act. Admittedly at the relevant time rice was exigible to purchase tax at 3 per cent. The direction of the Tribunal to reduce the tax on the sales turnover of gunny bags on the basis of the fifth proviso therefore, was not open to challenge. It may be pertinent to observe that the Tribunal in the above case had held that the gunny was supplied along with the rice. Hence, in fitness of things, the gunny should be taxed at 3 per cent and not at 7 per cent and 8 per cent as done. It was further observed that a point may arise that the price of gunny had been separately charged, but as per the terms of the agreement, the assessee was only required to charge Rs. 3.25 for each quintal of rice supplied. Hence the price of gunny had intimate connection with the supply of rice even though separately charged. Though, in the above case the rate of tax on rice was 3 per cent, while that of gunny bags was 7 or 8 per cent but the supply of gunny bags having intimate connection with the supply of rice, even though separately charged, the rate of tax on gunny bags was taken to be the rate as applicable to the sale of rice.

27. The facts found in the present case by the Board of Revenue also show that the supply of tins had an intimate connection with the supply of vegetable ghee as the assessee was not doing the business of empty tins at the relevant period and there could not have been any express or implied agreement to sell empty tins separately. In the facts and circumstances of this case there was one composite agreement to sell vegetable ghee in a tin and as such the view taken by the Board of Revenue is correct.

28. In the result, it is held that on the facts and circumstances of the case the rate of tax on sale of tins which were sold filled with vanaspati ghee and for which separate charges were made in the bills, the rate of tax shall be 10 per cent.

29. The reference is answered in the manner indicated above. The parties shall bear their own costs.