

**(1992) 11 KAR CK 0025**

**In the Karnataka High Court**

**Case No : S.T.R.P. No's. 32, 34, 35, 36 and 37 of 1988**

Shaw Wallace and Co. Ltd.

APPELLANT

Vs

State of Karnataka

RESPONDENT

**Date of Decision : 04-11-1992**

**Acts Referred:**

Karnataka Sales Tax Act, 1957 — Section 2 (1), 2 (1) (v), 5, 5 (1), 5 (3) (a)

**Citation : (1993) 91 STC 45**

**Hon'ble Judges : R. Ramakrishna, J;K. Shivashankar Bhat, J**

**Bench : Division Bench**

**Advocate : M/s King and Patridge, for the Appellant; H.L. Dattu, Government Advocate, for the Respondent**

## **Judgement**

K. Shivashankar Bhat, J.—These revision petitions filed under the provisions of the Karnataka Sales Tax Act, 1957 ("The Act", for short) govern the assessment years from April 1, 1979 to December 31, 1983. The questions to be considered pertain to the taxability of the components of chemical fertilizer mixtures; deductibility of the value of packing materials and the mode of levying tax on the liquor contained in the bottles, i.e., as to whether bottles are to be taxed along with their contents (liquor) by the rate applicable to "bottled liquor", irrespective of the terms of the contracts of sale.

2. The petitioner, inter alia, is engaged in the manufacture and sale of chemical fertilizer mixture, falling within entry 48-A(ii) of the Second Schedule to the Act. The Revenue contends that, since the sale or purchase of several components of the chemical fertilizer mixture were not subjected to tax under the Act, they should also be taxed u/s 5(1) of the Act, apart from the levy of tax on the sale of chemical fertilizer mixtures; for this, a notification issued u/s 8-A of the Act, prior to the introduction of entry 48-A(ii) was relied. This question is now concluded against the Revenue, by the decision of a Full Bench of this Court, in the very petitioner's case; the opinion of the Full Bench is reported in Shaw Wallace and Co. Ltd. Vs. State of Karnataka, After the receipt of the opinion of the Full Bench,

the revision petition of the assessee was allowed, under similar circumstances.

3. Following the above decision, these petitions are also allowed to that extent; the assessing authority, therefore, is directed to redo the assessment by applying the above decision regarding the chemical fertilizer mixture and its components. The learned Government Advocate sought a liberty to apply section 6 of the Act in respect of the components of the chemical fertilizer mixture; we are of the view that it is too late for the Revenue to raise this plea and hence reject the prayer without expressing any opinion about its legality.

4. The petitioner is also a dealer in liquor. The petitioner has been selling the liquor, bottles and other packing materials separately, in accordance with the agreements with the purchasers; separate price lists and invoices in this regard were produced to prove the nature of those transactions as independent of each other. The petitioner claimed the benefit of rule 6(4)(ff) of the Rules made under the Act, which provides for the deduction of the packing charges from the total turnover of the dealer. Further, as to the bottles, the assessee claimed that liquors were being sold in bottles as required by the relevant excise law; however, there were two contracts of sale - one governing the bottles and the other governing the liquor; two are independent goods, which are separately dealt with by section 5 of the Act which is the charging section. "Bottle" as a goods was covered by entry 109 of the Second Schedule while "all liquor" was governed by entry 38 of the said Schedule. By Karnataka Act 13 of 1982, entry 38 was amended retrospectively with effect from March 15, 1980. By this amendment the entry came to be read as "all liquor including bottled liquor"; further, by this amendment, this subject-matter for the levy of tax was classified into two classes; where the consideration for the sale or purchase of liquor includes the duties of excise payable under the Karnataka Excise Act, 1965, the rate of sales tax was 30 per cent; if the excise duties were not part of the sale consideration, then the rate of sales tax was 65 per cent. (These tax rates were further modified; however, the two classifications were maintained). It was held by the Appellate Tribunal that this entry 38 provided for the levy of tax on the entire sale price of bottles and the liquor sold, because, the reference is to "bottled liquor". The learned counsel for the assessee contended before us that, the purpose of the amendment (introduced with effect from March 15, 1980) was to get over the difficulties caused by a decision of the Supreme Court upholding a manufacturer's claim that, if excise duties were not made part of the sale consideration, sales tax cannot be charged on it by including it in the sale price, even though under the excise law, duty of excise is levied on the manufactured liquor; it was held, that, payment of excise duty on the manufactured liquor may be paid by the purchaser of the liquor also, and that under the circumstances and in such a situation, it will not be part of the sale price of the liquor of the manufacturer. It is in these circumstances, the State Legislature enhanced the rate of sales tax on the sale of liquor, when consideration for the sale did not include the excise duty payable on the liquor. The decision of the Supreme Court was in *Mcdowell and Company Ltd. Vs. Commercial Tax Officer VII Circle*,

Hyderabad, McDowell and Company Ltd. Vs. Commercial Tax Officer VII Circle, Hyderabad, To get over the ration of this decision, the State of Andhra Pradesh amended the Distillery Rules making it obligatory in effect, for payment of excise duty by the manufacturer; this amendment was made in August, 1981. According to the petitioner, the State of Karnataka, found it expedient to differentiate between the liquor on which the excise duty was paid and the liquor on which excise duty was not paid by the time of its sale by the manufacturer, by amending entry 38, so that revenue yield from the levy of sales tax may not suffer by the means adopted in the matter of paying the excise duty. The learned counsel for the assessee further contended that the phrase "bottled liquor" added to the entry, was to treat the bottles in which liquor sold as part of the liquor, when the agreement of sale between the manufacturer and the purchaser is silent as to the bottles.

Re. rule 6(4)(ff) :

5. Section 2(1)(v) of the Act defines the term "turnover"; as per its explanation (ii), the amount for which goods are sold include any sums charged for anything done by the dealer in respect of the goods sold at the time of or before the delivery thereof, shall be included in the turnover of the dealer. "Taxable turnover" as per section 2(1)(u-1) means the turnover on which a dealer shall be liable to pay tax as determined after making such deductions from his total turnover and in such manner as may be prescribed (remaining part of the definition not relevant here). Thus from the "total turnover" deductions are to be made as prescribed under the Rules. Packing of the goods at the time of its sale or before its delivery would be covered by the explanation (ii) to section 2(1)(v) and thus the said packing charges would be part of the "turnover" of the dealer. The relevant rule providing for the deduction from the "total turnover" defined in sub-clause (u-2), have to be read so as to be in consonance with sub-clause (v) of section 2(1), to arrive at "turnover". The relevant rule relied upon by the petitioner is rule 6(4)(ff), which provides for the deduction of "charges for packing materials and cost of labour" from the total turnover to arrive at the "turnover" of the dealer. Explanation (ii) to section 2(1)(v) clearly includes the pre-sale and pre-delivery packing charges in the "turnover". Therefore, such packing charges cannot be deducted at all from the "total turnover"; any such deduction would be opposed to the definition of "turnover". Therefore, rule 6(4)(ff) has to be interpreted confining its application to the packing charges, etc., collected in respect of post-sale or post-delivery packings and services. In other words, packing charges collected at the time of sale would be part of the sale price and hence of the "turnover".

State of Tamil Nadu v. V. V. Vanniaperumal & Co. [1990] 76 STC 203 is a decision of a Full Bench of Madras High Court, wherein it was pointed out that when oil contained in a tin is sold, the bargain of sale was for "tin of oil" and the goods sold were composite goods and thus the "turnover" would include the price of tins also; the fact that charge for the tin was separately shown in the bills, was

immaterial. Rule 6(cc)(i) of the Tamil Nadu Rules and section 2(v) of the Madras Act are similar to the respective Karnataka provisions with which we are concerned. The Full Bench agreed with the view expressed by this Court in Premier Breweries Ltd. Vs. The State of Karnataka, The Full Bench also agreed with the decision of a Bench of the Madras High Court in Natarajan and Sons v. State of Tamil Nadu [1977] 39 STC 443 The Full Bench observed, at page 206 :

"What is sold is 'tin of oil'. Not oil alone. Therefore the goods sold is 'tin of oil'. It may be called a composite goods. The bargain of sale is for this 'tin of oil'. Hence it follows that the price of the goods, i.e., tin of oil is taxable and no question of price of the oil content alone being taxable arises. Thus while calculating the total turnover, the total turnover price of the tins of oil sold has to be calculated. Thus it appears to us, when it is stated in K. Natarajan and Sons Vs. The State of Tamil Nadu, that the packing charges subsequent to the sale alone is deductible, it is correct. For instance when small tins of oil are sold and they are to be packed for delivery, then the expenditure of such packing is deductible."

In fact, we are bound by the decision of this Court in Premier Breweries Ltd. case [1984] 56 STC 14 wherein, the Court held :

"Freight and handling charges if they become part of the price for which the goods are sold, then they are not liable to be excluded under rule 6(4)(f) and (ff) of the Karnataka Sales Tax Rules, 1957. If, on the other hand, they are incurred as incidents of sale or incurred after the sale, then rule 6(4)(f) and (ff) would come to the relief of the assessee."

Rule 6(4)(f) provides for the deduction of "all amounts falling under the head 'freight', when specified and charged for by the dealer separately without including such amounts in the price of the goods". This was held to be, post-sale charges and not pre-sale charges of freight in Smt. Narayani Rao Vs. Commissioner of Commercial Taxes in Karnataka and another, The Full Bench held at page 2188 (at page 119 of STC) :

"If cost incurred by the dealer is incidental to his acquisition of the goods, it would be part of his expenditure and would necessarily form a component of the price when he sells the goods. However, if the cost of freight is charged by the dealer because the transportation of the goods is for and on behalf of the purchaser who purchased the goods from him, it will be a case of post-sale expenditure to which the benefit of rule 6(4)(f) will be available. Similarly, if the dealer incurs the expenditure towards freight of his own goods, normally it would add itself to the cost of his goods and hence will be an element of the price for the goods when he sells it.

Only because the freight is specified and separately charged, without including such an amount in the sale price, it cannot automatically held as a deductible item. The facts of each case will have to be examined to see the real nature of the alleged cost of freight, though specified and separately charged, so that cost

which would normally be a component of the cost of goods to the dealer may not escape the tax net."

The substance of sub-rule (f) and of sub-rule (ff) of rule 6(4) is the same, conveying similar ideas. The basic idea is that, the cost which would normally be a component of the cost of goods to the dealer, would be part of the "turnover" and therefore would be caught by the tax net.

It has been found in the instant case, that the charges for packing materials and cost of labour were pre-sale expenditure; if so, certainly they are not eligible for deduction. Petitioner's contention is accordingly rejected.

Re. "Bottled liquor" and entry 38 :

6.1. The entry in the Second Schedule is in the inclusive language. For the purpose of levying different rates of tax on excise paid liquor and liquor on which excise duty was not paid, reference to "bottled liquor" specifically, was unnecessary. Excise duty is on the manufacture of liquor and the term "all liquor" would normally include "bottled liquor" also. Therefore, the purpose of specifically including "bottled liquor" in the entry shall have to be found elsewhere.

6.2. In *The State of Karnataka Vs. Shaw Wallace and Co. Ltd.*, the present petitioner's case for an earlier period (before the amendment of entry 38 with effect from March 15, 1980) was involved. The assessee had shown the price of liquors and that of bottles separately, in view of the separate agreements in regard to the sale of bottles and crates; assessee claimed that bottles were to be taxed under entry 109. The Bench held at page 171 :

"From the facts found by the Tribunal it is clear that there was an agreement to sell the bottles and crates in which the liquor was conveyed and there was also agreement in regard to the price of these containers. Therefore, the turnover in regard to these items had to be determined and the appropriate rate of sales tax could be charged as provided in the Act. It is seen that under the provisions of the Karnataka Excise Act, liquor had to be sold in sealed containers. This does not automatically lead to the conclusion that the same rate of sales tax is applicable to the containers also. No such presumption can be made and especially so when separate rates are specified in the Act itself in regard to the containers as well as the contents. Those specific provisions would have to be applied; otherwise the imposition of tax would not be in accordance with law."

We may also add here, that, u/s 5(3)(a) of the Act, in the case of sale of any goods mentioned in column (2) of the Second Schedule, tax is levied at the rate specified in the corresponding entry of column (3). "Bottles" would be covered by entry 109, while "liquor" was covered by entry 38. Therefore, when there were two independent sales - one of bottles and the other of liquor, though liquor and bottles were transferred together - tax was leviable on each sale distinctly. Container and the content were not to be considered as one or composite goods,

unless, the charging section or the entry in the Second Schedule referred to any such composite goods.

In the aforesaid decision, the Bench had noticed another reasoning of the Tribunal thus :

"The Tribunal further noticed that item 38 of the Second Schedule only mentioned liquor other than country liquor and did not specify that it should be sold in any sealed container. Item 98 of the Second Schedule makes provision for tinned, canned and bottled foods and fruits including foods and fruits packed in sealed containers. There was thus a distinction in regard to the articles chosen for tax at particular rates. Item 109 of the Second Schedule makes provision for taxing glass-ware and glass bottles."

This decision was rendered on March 18, 1981, but it is not clear as to the assessment year involved in the said case. The amendment to entry 38, obviously, was arrived at to nullify the reasoning of the Tribunal in the above case, which had contrasted entry 38 with other entries regarding "canned and bottled foods", etc.

6.3. Mr. Kumar contended that this amendment would not affect the case of an assessee who sold the liquor and the bottles separately under two distinct contracts; the entry as amended was to cover cases where liquor is sold with bottles, under a single contract and in the latter case, the sale consideration is not liable to be bifurcated into two - one towards the liquor and the other towards the bottle. However, when there are two specific agreements, as in the instant case, entry 38 cannot be attracted to levy tax on the sale price of the bottle.

6.4. The learned counsel relied on the decision of the Supreme Court in *Raj Sheel v. State of Andhra Pradesh* [1989] 74 STC 379. In the year 1983, section 6-C was inserted in the Andhra Pradesh General Sales Tax Act, stating that when goods packed in any materials are sold or purchased the materials in which the goods are so packed shall be deemed to have been sold or purchased along with the goods and the tax shall be leviable on such sale or purchase of the materials at the rate of tax as applicable to the sale, or, as the case may be, purchase of goods thereunder. There, the rate of tax levied on the container was to be the rate levied on the content. The turnover in question included bottles containing beer, or gunny bags for packing cement. The High Court proceeded on the basis that having regard to the nature of the goods and to the trade practice in respect of beer and cement the containers were necessary concomitants in the transactions, and the transfer of property in the containers was incidental or unavoidable, that the sale transactions had to be regarded as composite and integrated sales of the containers and their contents and what was sold was the bottled beer or the cement packed in gunny bags. The Supreme Court, however, took a different view and held that it is a question of fact in each case as to what extent container was sold with the content; it was observed at page 384 :

"It is commonly accepted that a transaction of sale may consist of a sale of the product and a separate sale of the container housing the product with respective sale considerations for the product and the container separately; or it may consist of a sale of the product and a sale of the container but both sales being conceived of as integrated components of a single sale transaction; or, what may yet be a third case, it may consist of a sale of the product with the transfer of the container without any sale consideration therefore, The question in every case will be a question of fact as to what are the nature and ingredients of the sale. It is not right in law to pick on one ingredient only to the exclusion of the others and deduce from it the character of the transaction. For example, the circumstance that the price of the product and the price of the container are shown separately may be evidence that two separate transactions are envisaged, but that circumstance alone cannot be conclusive of the true character of the transaction. It is not unknown that traders may, for the advantage of their trade, show what is essentially a single sale transaction of product and container, or a transaction of a sale of the product only with no consideration for the transfer of the container, as divisible into two separate transactions, one of sale of the product, and the other a sale of the container, with a distinct price shown against each. Similarly where a deposit is made by the purchaser with the dealer, the deposit may be pursuant to a transaction where there is no sale of the container and its return is contemplated, and in the event of its not being returned the security is liable to forfeiture. Alternatively, it may be a case where the container is sold and the deposit represents the consideration for the sale, and in the event of the container being returned to the dealer the deposit is returned by way of consideration for the resale. In every case, the assessing authority is obliged to ascertain the true nature and character of the transaction upon a consideration of all the facts and circumstances pertaining to the transaction."

At page 386, the decision of this Court in Shaw Wallace case [1981] 48 STC 169 was referred. The approach to the question was to be with reference to several factors; it was held at page 387 :

"Whether a transaction for sale of packing material is an independent transaction will depend upon several factors, some of them being :

1. The packing material is a commodity having its own identity and is separately classified in the Schedule;
2. There is no change, chemical or physical, in the packing either at the time of packing or at the time of using the content;
3. The packing is capable of being reused after the contents have been consumed;
4. The packing is used for convenience of transport and the quantity of the goods as such is not dependent on packing;
5. The mere fact that the consideration for the packing is merged with the

consideration for the product would not make the sale of packing an integrated part of the sale of the product."

The relevant provision, section 6-C was then considered, at page 388. The court held :

"Turning to section 6-C of the Act, it seems to envisage a case where it is the goods which are sold and there is no actual sale of the packing material. The section provides by legal fiction that the packing material shall be deemed to have been sold along with the goods. In other words, although there is no sale of the packing material, it will be deemed that there is such a sale. In that event, the section declares, the tax will be leviable on such deemed sale of the packing material at the rate of tax applicable to the sale of the goods themselves. It is difficult to comprehend the need for such a provision. It can at best be regarded as a provision by way of clarification of an existing legal situation."

As again,

"We find it difficult to accept the contention of the appellants that a rate applicable to the packing material in the Schedule should be applied to the sale of such packing material in a case u/s 6-C, when in fact there was no such sale of packing material and it is only by legal fiction, and for a limited purpose, that such sale can be contemplated."

The purport of section 6-C was to deem the sale of the packing material, when there was a sale of the content only. After deeming such a sale, packing material is to be taxed at the rate governing the content.

6.5. Mr. Kumar further contended that when there is a sale of liquor with the bottle container it, it is a case of sale of bottled liquor; however, if there were two sales - one of bottle and another of liquor, entry 38 was not attracted, because, there is a separate, specific entry governing the sale of bottle; entry 38 nowhere brings in any legal fiction by deeming the sale of bottle along with the sale of liquor; entry 38 is not aimed at, wiping out the two agreements and replace them with a single agreement of sale of the bottle and the liquor. According to the learned counsel for the petitioner, the five factors enumerated by the Supreme Court in *Raj Sheel* case [1989] 74 STC 379 would still govern the field while examining the question; as the bottle has its own identity and retains its identity throughout and is capable of being reused after the liquor is consumed, first three factors are in favour of the petitioner. The fifth factor, also, is in favour of the petitioner, because, here, consideration for the bottle is not even merged with the consideration for liquor. The fourth factor, could be held in favour of the petitioner, because, in *Raj Sheel*'s case [1989] 74 STC 379 the Supreme Court had not found the said factor against the petitioner, even though the subject-matter included beer and the bottle in which beer was sold. The fact that under excise law, liquor is compelled to be sold in bottles is irrelevant to the fact-situation, as held by this Court in *Shaw Wallace* case [1981] 48 STC 169 as well as by the Supreme Court in *Raj Steel and Others Vs. State of A.P.* and

Another, It is only in a case where there are no two independent sales (of bottle and liquor), entry 38 would be attracted, because, in such a case, the seller cannot plead, that the said sale should be dissected into two components.

7. In answer to the above, Mr. Dattu, the learned Government Advocate placed strong reliance on certain observations of this Court in *Ranganatha Associates v. State of [1990] 78 STC 1 Kant* at page 24 (para 29). In para 29, it was observed :

"A seller who sells the bottles only and the purchaser who purchases them as such, are not concerned with anything else, except the marketability of the bottles. But the person who sells liquor contained in a bottle, and a person who purchases such a liquor, is concerned with the liquor and its marketability; the payment of a price for the bottle in such a situation, is part of the bargain for the sale and purchase of the liquor. In other words, the sale and purchases of the bottles, here, is incidental to and integrated with the sale and purchase of the liquor. This makes all the different and for the purpose of the levy of sales tax, this distinction between the two types of sales which classify the dealers differently, i.e., a trader who sells or purchases only bottles and another dealer who sells or purchases the bottles, because they contain the liquor, cannot be held as an arbitrary classification, bearing no nexus to the object of the Act. Such a classification also makes the levy and collection simpler reducing the area of disputes to the minimum; it also, prevents the dealers from resorting to tax evading mechanisation, while dealing in goods which are sold in containers or in packed condition by showing unrealistic prices for the container (or the packing materials) and the goods, so as to reduce the sales tax payable in a given case, i.e., if the sale of the goods attracts a higher rate of taxation, then, the dealers are likely to sell the goods for a lesser price and offset the reduction by increasing the sale price of the container; section 5(3-D), thus, prevents the dealers from being tempted to resort to such a scheme of tax evasion. Taxation operates in the sphere of realities and a law levying a tax normally takes note of such realities."

8. We may note here, that in the above case, the court was considering the validity of section 5(3-D) of the Act (which is quoted at para 21 of the said judgment). The newly introduced section 5(3-D) is widely worded and clearly ropes in, the container along with its content, for the levy of tax at the same rate. It is in the context of considering the reasonableness of the provision, the observations referred to above, were made. The idea was to emphasise that, if the Legislature acts to treat the container in the same manner as the content, there is nothing arbitrary or discriminatory in it. The above observation cannot be read in isolation, so as to convey a meaning which would run counter to the observations of the Supreme Court in *Raj Steel and Others Vs. State of A.P.* and Another, The Supreme Court has recognised the fact, that in reality, a packing material may have its own identity; therefore individual transactions are to be closely scrutinised with reference to several factors, of which five were

numerated. The reason for upholding section 5(3-D) is also found in paras 25 and 26 where, it was observed :

"The principle behind section 5(3-D) seems to us to be that a buyer bargains for the goods and pays a price in its entirety inclusive of the value of the packing material, whenever the goods are sold in a packed condition (or housed in a container); the consideration for the sale essentially, is the consideration for the goods, though, the price (i.e., the consideration) may have as a component of it, the price of the packing material (or of the container). This is not an irrelevant principle at all, if one considers the practical aspect of a trading transaction. Here, u/s 5(3-D) the Legislature has thought it fit and convenient to treat the sale of goods contained in a container as an integrated, single transaction of sale of the goods; this levy makes it simpler for the assessee to maintain his accounts, and convenient for the Revenue to levy and collect the tax; it makes it unnecessary to analyse the components of a particular sale and enter upon investigation to find out the real (i.e., genuine price) at which the packing material (or the container) is purported to have been sold, and separate it from the computation of the turnover regarding the particular goods (which was packed in the packing materials or housed in the container).

Simplicity of procedure and convenience of the tax collection are not irrelevant while considering the validity of a particular levy. Section 5(3-D) on the face of it elevates the status of the container (or the packing material) to that of the goods dressed in it. Such a container/packing material is distinct from, another container/packing material which has not housed any goods."

9. It is always open to the Legislature to evolve a mode of levy to prevent tax avoidance or tax evasion by amending the charging section. In the instant case, the charging section stood unamended till the introduction of section 5(3-D); we are concerned with the entry 38 which was widened by the inclusion of the term "bottled liquor". It can only mean, that, if the sale is of "bottled liquor", the sale cannot be bifurcated into two sales; however, in a case, where, there were two sales - one of liquor and another of bottle - the sales cannot be deemed to be a single sale; such a legal fiction was not found anywhere till the introduction of section 5(3-D); unless the existing law, as declared by courts, it clearly altered by the Legislature, the existing law should continue to operate; courts cannot assume an unexpressed intention as the cause for the widening of the subject-matter of the levy.

10. The decision of the Kerala High Court in *Seven Seas Distillery (P) Ltd. v. State of Kerala* [1991] 82 STC 71 is based on section 5(5) of the Kerala Act; value of cartons was held to be not in the nature of "charges for delivery".

11. In *Commissioner of Sales Tax, U.P. Vs. M/s. Rai Bharat Das and Bros.*, the Supreme Court was considering the transactions under which silica sand had to be packed in gunny bags under the terms of contract; therefore, the consideration for sale included the packing charges. This decision is relevant on

the question of packing charges and rule 6(4)(ff), which, we have already considered.

12. Jamana Flour and Oil Mill (P) Ltd. Vs. State of Bihar, is a decision of the Supreme Court on the scope of the taxability of the packing material; it was held that turnover of gunny bags was assessable.

13. In the case before us, taxability is not the issue, but the rate of tax leviable is the real issue, and this depends upon the construction of entry 38 read with entry 109.

14. Ramnagar Cane & Sugar Co. Ltd. v. Commercial Taxes Officer [1987] 64 STC 96 is a decision rendered by the Rajasthan High Court. Value of tins was separately charged in the sale bills, while selling the ghee in tins; assessee contended that tax on the turnover of tins should be assessed at the rate applicable to tins. The High Court rejected this contention, relying on section 5(1) (v) of the Rajasthan Sales Tax Act; said provision, quoted at page 101 reads :

"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."

As to facts, it was held, at page 107 :

"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."

The decision assumes that the seller would be entitled to charged for the tins separately, only if he is a dealer in it; however, the words "when not separately charged for", in section 5(1)(v) were not specifically dealt with in the judgment; may be, those words are to bear the same meaning as rule 6(4)(f) or (ff) of the Karnataka Sales Tax Rules.

15. Commissioner of Taxes Assam, Shillong Vs. Prabhat Marketing Co. Ltd., Gauhati, and the earlier decision in Hyderabad Deccan Cigarette Factory v. State of Andhra Pradesh [1966] 17 STC 624 (SC) were considered by the Supreme Court in Raj Sheel's case [1989] 74 STC 379

16. Rasiklal & Co. v. State of Gujarat [1992] 86 STC 238 (Guj) refers to section 21 of the Gujarat Sales Tax Act which is in pari materia with section 6-C of the Andhra Pradesh Act, referred to in Raj Steel and Others Vs. State of A.P. and Another, The High Court held that "whether the container in which the articles housed formed part of the article and could be conceived of as integrated

component of a single sale transaction or it is to be considered as separate sale is a question of fact". The Tribunal was to examine the facts in the light of Raj Sheel's case [1989] 74 STC 379 At page 243 (para 10), the High Court also pointed out that, "mere fact that two separate quotations, one for oil engines and another for wooden boxes were invited and the fact that the price of two different items were shown in the bills cannot be treated as a conclusive evidence for arriving at a decision that there were two separate sales".

17. There can be no doubt that it is permissible to have two distinct agreements of sales, one pertaining to the liquor and the other pertaining to the bottles. How far and to what extent such agreements could be accepted as evidencing bona fide transactions, it is essentially a question of fact. The fact that liquor is sold in a bottle and it is not practical nor legal to sell liquor in any other mode by itself is not conclusive to find out the real nature of the transaction. In Raj Sheel's case [1989] 74 STC 379 the Supreme Court held that this depends upon several factors; out of several factors, only five were enumerated. In fact, it is not possible to envisage exhaustively the several factors that may have to be considered. One of the factors would be to examine whether the transaction is a device to avoid tax. (Vide : McDowell and Co. Ltd. Vs. Commercial Tax Officer, In the case of liquor having a brand name or a trade mark, the embossment of the said brand name or trade mark on the bottle would indicate the integrality of the bottle with the liquor contained in it; the transaction of sale, will be the sale of the particular liquor with that brand name or trade mark and the goodwill attached to the name or the trade mark could be considered as having gone into the bargain of sale; liquor on its own cannot bear this brand name or trade mark. This will certainly be a relevant factor to be considered along with other factors referred to in Raj Steel and Others Vs. State of A.P. and Another, there may, still be other factors. None has considered the instant case in the light of Raj Steel and Others Vs. State of A.P. and Another, The Tribunal and statutory authorities thought it unnecessary to examine the facts in view of entry 38. We do not consider it legal to levy the tax under entry 38 on the bottle and the liquor solely because, liquor was contained in the bottle at the time of the sale of the liquor. All the relevant factors require to be examined in this regard.

18. In the result, these petitions are partly allowed. The assessment orders in question are set aside with a direction to make fresh orders in the light of this judgment, regarding "chemical fertilizer mixtures" and the "liquor including bottled liquor". Petitions allowed to the above extent.

No costs.

19. Petitions partly allowed.