

(2000) 06 RAJ CK 0010

In the Rajasthan High Court

Case No : Civil Writ Petition No's. 3025-3027 of 1998

Udaipur Distillery Co. Ltd.

APPELLANT

Vs

Rajasthan Taxation Tribunal and Others

RESPONDENT

Date of Decision : 02-06-2000

Acts Referred:

Constitution of India, 1950 — Article 366(29A)

Rajasthan Sales Tax Act, 1954 — Section 2, 4, 5(1)

Citation : (2003) 132 STC 489

Hon'ble Judges : Rajesh Balia, J; Mohd. Yamin, J

Bench : Division Bench

Advocate : K.N. Joshi, V.C. Sogani and Rajesh Joshi, for the Appellant; Sanjeev Johari, for the Respondent

Final Decision : Allowed

Judgement

1. These three writ petitions are directed against the order dated July 27, 1998 passed by the Rajasthan Taxation Tribunal, Jodhpur, (for short "the Tribunal") whereby the Tribunal has allowed the revisions filed by the Revenue and set aside the orders of the Rajasthan Tax Board allowing the appeals filed by the petitioners pertaining to the assessment years 1989-90, 1990-91 and 1991-92 by a common order.

2. The facts giving rise to these writ petitions are : that the petitioner-company is a manufacturer of Indian Made Foreign Liquor (IMFL) and beer, etc., and is a dealer registered under the provisions of the Rajasthan Sales Tax Act, 1954. By Notification No. F.4(59) FD Gr. IV/80-23 dated March 23, 1987, the State Government in exercise of its powers conferred u/s 4(2) of the Rajasthan Sales Tax Act, 1954 (for short, "the Act"), exempted from tax with effect from April 1, 1987 the sale and purchase of beer and IMFL as declared for the purposes of the Rajasthan Excise Act, 1950. For the assessment years in question, the assessing officer held that though the sale of beer and IMFL are exempted from tax u/s 4 of the Act but as they are being sold contained in bottles, tax is leviable on the

sale of bottles as packing material at 5 per cent. The turnover of the bottles, as sale of packing material which was taken to be 1 per cent of the aggregate of the amount of the sale price received by the dealer in view of the first proviso to the definition of "taxable turnover" as given in Sub-section (s) of Section 2 of the Act. The assessing officer levied tax keeping in view last proviso to Sub-section (1) of Section 5 of the Act and also levied interest and penalty under Sections 11B and 16(1)(n) of the Act respectively as under :

Year

Tax

Interest

Penalty

Total

1989-90

5,21,887

43,838

200

96,225

1990-91

33,969

36,566

200

60,735

1991-92

60,452

37,639

500

98,591

3. Against these assessment orders, the dealer-petitioner preferred appeals before the Deputy Commissioner (Appeals), Udaipur who vide his order dated November 18, 1995 dismissed those appeals. Thereafter, second appeals were preferred before the Rajasthan Tax Board, Ajmer, and the Rajasthan Tax Board vide its order dated July 3, 1997 allowed the appeals filed by the dealer-petitioner and set aside the tax, interest and penalty imposed by the assessing officer and affirmed by the Deputy Commissioner (Appeals). Thereafter, the

Revenue preferred revisions in each case before the Rajasthan Taxation Tribunal. The Rajasthan Taxation Tribunal vide its judgment dated July 27, 1998 allowed the revisions filed by the Revenue and set aside the orders dated July 3, 1997 passed by the Rajasthan Tax Board in each case.

4. Before the Rajasthan Taxation Tribunal, two-fold contentions were raised on behalf of the dealer-petitioner. It was contended that bottling of liquor is an essential process of bringing the goods in marketable condition and, therefore, bottle cannot be considered to be a packing material but is an integral component of the commodity sold, viz., liquor and therefore, the question of selling the commodity contained in packing material does not arise and sale of bottled liquor does not attract the application of the last proviso to Section 5(1) of the Act. Since the commodity itself was exempt from tax, it was the commodity in marketable condition that is exempt and not the commodity at a stage prior to which it comes into the condition of marketability. The liquor or liquid without being placed in proper container does not become marketable at all. In other words, the contention was that the commodity which has been offered for sale by the dealer-petitioner was bottled liquor and not the liquor in bottle.

5. The second contention raised by the dealer-petitioner was that in the present case, it has not been proved by the Revenue that any taxable event of sale of packing material has taken place. According to the dealer-petitioner, there is no deeming provision that when any commodity is sold, it may be assumed that there is a sale of packing material also. The mere fact that the commodity was sold in particular packing does not necessarily result into the sale of such packing material by the dealer.

6. Both these contentions were negated by the Tribunal and the revisions filed by the Revenue were allowed and the orders passed by the Rajasthan Tax Board were set aside. The appellate orders passed by the Deputy Commissioner affirming the assessment orders were maintained. Hence these three writ petition by the dealer-petitioner.

7. We have heard Mr. K.N. Joshi, the learned counsel for the petitioner and Mr. Sanjeev Johari, the learned counsel for the respondents.

8. The first question that crops up for consideration in these writ petitions is whether in the facts and circumstances of this case, bottles can be considered as packing material at all ?

9. For deciding the controversy involved in this case, it would be very useful to quote last proviso to Section 5(1) of the Act in extenso :

"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 seventy five per cent on the taxable turnover, as may be notified by the State Government in the official

Gazette :

(i).....

(a) to c.....

(ii).....

(a) to c.....

Provided further.....

Provided further.....

Provided further.....

Provided also that when any goods are sold, packed in any material, the tax shall be leviable on the sale of such packing material, whether charged separately or not, at the same rate as is applicable to the sale of the goods themselves : and if the goods are exempted from tax u/s 4 or have already been subjected to tax under the Act, then at the rate notified for such packing material from time to time."

10. This last proviso to Section 5(1) of the Act prescribes the rate of tax to be charged on the sale of packing material where the goods are sold packed in any material. It clearly provides that when any goods are sold, packed in any material, the tax shall be leviable on the sale of such packing material whether charged separately or not at the same rate as is applicable to the sale of goods themselves and if the goods are exempted from tax u/s 4 or have already been subjected to tax under the Act, then at the rate notified for such packing material from time to time. Thus, it is clear that when the goods are not sold in packed condition then Section 5(1) of the Act will have no application to such commodity.

11. To understand the correct perspective of the contention raised before us by the petitioner, it appears to us that packing of goods by the manufacturer for bringing it in marketable condition is being sought to be distinguished from packing of the goods which is being done thereafter for the purpose of transportation and carriage of goods for convenient delivery. Learned counsel urged that bottling is an essential part of manufacturing of liquor. He submitted that until and unless the liquor is bottled, it does not reach the stage of its marketability and, therefore, bottling of liquor cannot be termed as packing material. According to him, when the liquor is packed in bottles and those packed bottles are put in cartons, those cartons can only be termed as packing material and not the bottles. This contention does not impress us.

12. The term "packing" is not defined in the Act, However, the meaning of term packing material may be first traced through the dictionary. Term "pack" as per Chambers Dictionary means as under :

"v.i. to make into a bundled pack : to place compactly in a box, bag, or the like : to press together closely : to compress : to fill tightly or compactly :

Packing has been shown to mean the act of putting into packs or of tying up for carriage or storing ; material for packing."

In the Oxford Dictionary, the word "pack" has been defined as under :

"to mean to put things together into bundles, box, bag, etc., for transport or storing.

Prepare and put up meat, fruit, etc., in tins, etc., for preservation put closely together cover thing with something pressed tightly round."

The term pack has been defined in Webster's Dictionary as under :

"v.i. packing p.p. to make a pack or bundle or to put together compactly in a box, trunk, etc., for carrying or storing : to fill (a box, trunk, etc.) for carrying or storing, as he packed his bags ; to put food in cans, boxes, etc., for preservation or sale (b) food in cans, boxes, etc., for preservation or sale ; to press together firmly ; as packed earth ; to lead an animal with a pack and packing means :

Packing the act or process of a person or thing that packs, especially the canning of meats, fruits or vegetables, any material used in packing as a fibrous substance placed around valves to make them water tight, etc."

These meanings of term "pack" and "packing" in its different shades include not only the activity of wrapping or encasing or containing in goods not only for storage and transportation, but also the activity of placing the commodity in a container or wrapper for the purpose of sale and preservation.

The excerpts from Encyclopaedia Britannica on Packaging (Volume 13, pages 854-855, 15th Edition, 1980) throw illuminating light on bottles as packing material.

About the development of packaging, during the course of which, bottles as packing material came in vogue, it stated :

"From the beginning of commerce, packaging has been indispensable in the movement of many kinds of products. Animal skins, baskets woven from reeds, and earthenware vessels may be considered the packages of prehistoric man. The ancient world contributed glass bottles, clay amphorae and leather bags."

About the need of packaging, it was emphasised that packing is not only an essential of distribution but of production as well and various factors contributing to requirement of packing material was expressed as under :

"Virtually all modern manufactured and processed goods require packing at some stage in their production and distribution. Fresh foods need protection and convenience that packaging gives. Specialised knowledge and skills, as well as specific machinery and facilities, are required to produce packages that meet one or more of five basic demands ; protection from the environment ; containment as a handleable unit ; machine performance in the packaging process (such as on filing machines) ; communication to identify and to aid the marketing; and

convenience to everyone concerned with the making, distribution and use of the produce ; in addition disposal of the package must be easy."

About glass and bottles as packing materials, it said :

"great cleanliness and hence is used mainly for food and drink (about 70 per cent) and for drugs, cosmetics and toiletries. A material easily formed into almost any shape with exceptional aesthetic potential. It is widely used to package products dispensed at intervals, over a relatively long period, e.g., perfumes and toilet water."

"The majority of glass containers sold today are discarded when they are empty, with the exception of milk bottles, some beer bottles, and certain carbonated-drink bottles. Successful reuse of returnable bottles depends on the control of the packer over the distribution system."

The Encyclopaedia also refers to a number of packing materials and packing methods in vogue in different stages of commerce and trade. Amongst packaging materials, it importantly includes glass and plastic as packing material to be used in the form of bottles, jars and carboys for holding liquids including liquor. Significantly, it clearly makes out use of packing material both at production stage as well as distribution stage of commodity contained in any package. This signifies, whether packing is used at production stage to bring the commodity to marketable stage, as for storage or preservation or easy handling or for transportation at distribution stage, at no stage, it loses its identity as a commodity classified as packing material, different from the commodity it houses.

13. Here, we may invite attention to the decision of honourable Supreme Court in *Lt. Governor, Delhi and Others Vs. Ganesh Flour Mills Co., Ltd.*, wherein while considering the term "packing material or packing" it has been observed as under :

"It may be noticed that packing materials are necessary not only for solid articles but also for those in liquid and semi-liquid form. According to observations on page 22 of Encyclopaedia Britannica, Vol. 17, 1968 Edition, in a society that produces foodstuffs and manufactured articles in one locality and uses them in another, a wrapping or container is necessary during storage, transport and sale. The functions of a package are :

(1) to contain in a convenient-sized unit or amount of a product ; (2) to protect it in transit ; (3) to aid its safe delivery to the consumer ; and (4) in some cases to display the product and promote its sale or to act as a dispenser of it. Originally instituted to produce simple containers, the packaging industry has expanded to meet the demands for processed and preserved foods, rather than seasonal crops, and to distribute increased varieties of manufactured items. Packaging reflects developments in other industries, especially petrochemicals and plastics, whereby new materials and methods of construction have been provided for containers. It has further been observed that cans, both tin and aluminium, are

now used for ready-cooked products, brewery products, soft drinks, and many oils and semi-solids. Where a reclosable pack is needed, lever-lid or slip-lid cans are used instead of sealed cans."

14. In this connection if we were to look at the meaning of the term "bottle" as understood by the common men as well as meaning given in different dictionaries, one can reach only this conclusion that bottle is nothing but a packing material for liquids.

The Encyclopaedia Britannica describes the word "bottles" as under :

"Narrow-necked rigid or semi rigid containers to hold liquids or semi-liquids."

It further says :

"Bottle a vessel for containing liquids generally as opposed to one for drinking from though this probably is not excluded and with a narrow neck to facilitate closing and pouring, The first bottles were probably made of the skins of animals."

In Webster's New International Dictionary (Volume 1) at page 258, the word "bottle" has been given the following meaning :

"Bottle-la : a rigid or semi-rigid container made typically of glass or plastic, having a round and comparatively narrow neck or mouth that is usu. closed with a plug, screw top, or cap, and having no handle--contrasted with jar, jug ; b: a non-rigid container resembling a bag, made of skin, and usu. closed by tying at one end."

The Oxford Dictionary defines the term "bottle" in the following words :

"Narrow-necked vessel, usu. of glass, for storing liquid : the amount of liquid in it."

The term bottle has been defined in Chambers dictionary in the following words :

"A narrow necked hollow vessel for holding liquids : the contents of such a vessel : liquor or drinking."

15. The above definition, points to the direction that bottles are nothing but narrow necked containers for holding liquor and other liquids and, the bottles may be of glass, plastic or of any other material. Moreover, it has not been "denied" and even cannot be denied that bottles by themselves are independent marketable commodity, and in all cases bottles need not necessarily form part of sale. Instances are not infrequent when either bottles are charged separately, or there is stipulation of deposit of money for return of bottle and right to forfeit the same in case bottles are not returned. There are also cases where price of commodity with or without bottle is different.

We are not dealing with any commodity which becomes an integral part of the commodity, e.g., a toothpaste or shaving cream that is pressed into a "tube" and

becomes integral part of the commodity either for use or sale, or like vials of medicines in which liquid medicines is sold and that medicine can be used only on breaking the vial to be rendered a waste material with no independent marketability after liquid contained has been used for reuse or sale.

16. In this connection, the learned counsel for the petitioner has relied on a decision of the *Surgickem v. State of Gujarat* [1992] 87 STC 40 (Guj) for the purpose of contending that bottles in which the liquid commodity to be sold is contained as component of the commodity itself inasmuch without the container, the commodity does not become marketable and, therefore, the bottles in which liquid is sold must necessarily be considered as component part of the commodity liquor.

17. Having considered the aforesaid decision, with utmost respect, we regret our inability to agree with it. The taxable event which attracts the levy of sales tax is a sale of the commodity and what commodity is taxable and what transaction in respect of which the commodity is taxable depends upon the individual scheme under the sales tax statutes enacted by different States, The decision in *Surgichem's* case [1992] 87 STC 40 (Guj) is founded on the basis of the interpretation given to the commodity in the context of levy of excise duty leviable on manufacturing which cannot be imported for the purpose of considering the transaction of sale of any commodity attracting the levy of sales tax under the sales tax laws. In the former the question is whether any event can be said to be a part of manufacturing activity, the latter deals with actual commodity sold and purchased. In the former nature of activity vis-a-vis commodity is the foundation of levy, in the later case it is the identity of any commodity as independent saleable goods and transaction vis-a-vis such commodity concerns the enquiry.

18. The decision in *M/s. Indian Cable Company Ltd., Calcutta Vs. Collector of Central Excise, Calcutta and others*, on the ratio of which the decision in *Surgichem's* case [1992] 87 STC 40 (Guj) is founded, amply makes out this distinction. The excise duty is leviable on the manufacture of any exciseable goods. Therefore, the question that is relevant for levy of tax under the Excise Act is when the activity of manufacture came to a close. It is in the context of manufacturing activities that the question has been raised whether packing of commodity to bring into existence the stage of marketability, fails in the manufacturing activity so as to attract the levy of tax.

19. While considering the definition of exciseable goods and the goods, a Constitution Bench of the Supreme Court in *Union of India (UOI) Vs. Delhi Cloth and General Mills*, has stated that the definitions make it clear that to become "goods" an article must be something which can ordinarily come to the market to be bought and sold. Considering the aforesaid view, the Supreme Court in *M/s. Indian Cable Company Ltd., Calcutta Vs. Collector of Central Excise, Calcutta and others*,

"The provisions of the Act (Central Excises and Salt Act, 1944), mandate that a finding that the goods are marketable is a prerequisite or "sine qua non" for the levy of duty. "Marketability" is a decisive test for dutiability. It only means "saleable" or "suitable for sale". It need not be in fact "marketed". The article should be capable of being sold or being sold to consumers in the market, as it is, without anything more."

20. It is in the context of the Central Excises and Salt Act, 1944, that the court observed that the manufacture which is liable to excise duty under the Central Excises and Salt Act, 1944 must be to bring into existence a new substance known to the market. Therefore, the court held that marketability is a decisive test for dutiability, which means saleable or suitable for sale and need not be in fact marketed ; and until the goods reach the stage of marketability, the manufacturing activities does not come to a close. This principle cannot be imported where the law envisages actual marketing of the commodity. What is to be looked at is what commodity is marketed to levy tax and determine the amount of tax chargeable thereon. The liquor and bottles are independent marketable commodities capable of independent sale ; contents and the container for the purpose of levy of tax on the sale may also constitute composite sale of content and container together or may be subject of separate sales or sale may be of contents only and passing of property in container may be merely incidental not amounting to sale of such container at all. But merely because a transaction may fall in one or other category does not merge the identity of one commodity into other. The decision in Surgichem's case [1992] 87 STC 40 (Guj), in our opinion does not take notice of the basic difference in the context in which the levy of duty under the Central Excise Act and the levy of tax on sale of commodity requires to be considered for finding out the subject-matter of transaction attracting levy of tax. In the former the taxing event is manufacture and manufacturing activity in a given case may continue until the commodity reaches marketable stage. In the latter case, every commodity which has capacity of being sold has to be considered as commodity and the question in each is whether sale of any identifiable commodity has taken place.

21. Significantly, about the commodity in question, it cannot be said that it becomes integral part of the commodity. The liquid contained in bottle is independent of the bottle. The bottle itself can be marketed separately or it can be marketed along with liquid content with the stipulation either not to return the container or to return the container. Thus, the container involved in a case cannot be said to be an inseparable and is a necessary ingredient of sale of liquid. It depends upon the nature of transaction whether the container is sold along with content ; whether there is one single composite sale or two distinct sale of content and the container or it is a sale only of the content and not of the container. In these circumstances, we are of the opinion that so far as the container or bottle in question are concerned in which the principal object, namely, liquor is sold continues to bear the character of a packing material or container so far as the levy of sales tax is concerned and it has to be dealt with

accordingly. It cannot be considered as an integral part of the principal object liquor which is merely contained content in the container.

22. We, therefore, hold that bottles are nothing but vessels used for selling the liquor containing therein and as such, they are packing material. As per charging Section 3 of the Act every sale is included in turnover and unless exempted or deductible under any provision, becomes part of taxable turnover, and the rate at which taxable turnover is to be taxed is provided, in Section 5. We further hold that if the transfer of property in bottles along with liquid (viz., liquor) contained therein is considered to be sale of the bottles as packing material the rate of tax payable on turnover relating to such sales shall be governed by the last proviso to Section 5(1) of the Act,

23. This brings us to consider the second point raised by the learned counsel for the petitioner whether in the facts and circumstances of the case, there can be said to have come into existence any sale of packing material at all so as to attract levy of sales tax under the Act.

24. It was contended by the learned counsel for the petitioners that the transactions of sale in question were transactions of sale of Indian Made Foreign Liquor only and there was no transaction of sale of bottles, in which liquor was contained. There being no animus of the parties to agreement to sell to enter into the transaction of sale of bottles, no sale of packing materials has come into existence so as to invite operation of Section 5 of the Rajasthan Sales Tax Act, 1954 (for short "the Act") for the purpose of determining the appropriate rate to be applied to the turnover concerning sale of the commodity in question. There being no sale of packing material, whether as a composite part of the sale or independent of the liquor between the parties to the agreement notwithstanding that the property in goods passes to the buyer, no taxable event has taken place in connection with the transfer of the property in the bottles as packing material or the container.

25. It has been urged before us by the learned counsel for the petitioners that there has been no agreement either express or implied to sell the bottles at all. The sale transaction was only of the liquor, may be the commodity was contained in a bottle and the costs of the bottle might have gone in determining the price of the commodity but there being no element of sale of bottle for cash or deferred payment or valuable consideration, it did not become sale of goods even under the extended meaning of the sale and sale price under the amended provisions.

26. On the other hand, it has been contended by the Revenue that "contract" being now not an essential element of construing the transaction to be a transaction of sale of goods, it is enough where the property in goods passes to the buyer under the transaction and consideration under transaction is passed on to the dealer from the buyer. The element of contract being not an essential condition for sale of goods, it must also be treated as sale of bottles as well and

liable to be taxed in accordance with the rates prescribed u/s 5 of the Act.

27. The proposition on first principle cannot be doubted. The expression in entry 54, List II of Schedule VII to the Constitution of India in the context of tax on sale of goods, that being legislative field "the sale of goods" unless otherwise defined for the purpose of entry 54, it is not within the domain of the State legislation to enlarge the definition of "sale" so as to bring within the ambit of taxation transactions which could not be considered a sale according to concept of sale under the laws of contract or sale defined in Sale of Goods Act as a matter governing rates and duties arising from any transaction of sale. The principle is well-settled. The expression sale of goods cannot be considered for the purpose of taxation in its popular sense but must be understood in its legal sense and should be given the same meaning which it has in the Sale of Goods Act, 1930. It is a nomen juris, its essential ingredients being (1) an agreement to sell moveables (2) for a price and (3) property passing therein pursuant to that agreement. In order to constitute a sale, it is necessary that there should be an agreement between the parties for the purpose of transferring title to goods, which presupposes capacity to contract, that it must be supported by money consideration, and that as a result of the transaction property must actually pass in the goods. Unless all these elements are present, there can be no sale. If merely title of the goods passes but not as a result of any contract between the parties, express or implied, there is no sale. Therefore, under the law, there cannot be an agreement relating to one kind of property and a sale as regards another. There must be an agreement between the parties for the sale of the very goods which eventually property passes. The identity of goods in which property is considered to have passed with the goods in which parties intend to pass the property was considered to be essential ingredient of sale. This was the principle enunciated by the Supreme Court in *State of Madras v. Gannon Dunkerley & Co. (Madras) Ltd*, [1958] 9 STC 353 MAD. In that case, the above ratio was laid down in connection with an issue relating to the transfer of property in goods used in execution of a works contract. Since contract was to pass property in the goods or thing contracted to be constructed, viz., the building and the movable property, viz., building material used in execution of such contract were not the commodities, subject-matter of contract of sale. Such indirect passing of property in goods was not considered to be taxable event of sale.

28. Similarly existence of an agreement to sell the commodity intended to be transacted, which could constitute a contract is considered to be an essential condition to constitute "sale" within the meaning of the Sale of Goods Act. Since it needs free consent by the parties to the agreement to bring into existence a valid contract, the transactions which were compelled under the various Control Orders under the Essential Commodities Act were also held to be outside the purview of the "sale" within Sale of Goods Act which could be taxed under the concerned sales tax laws. Reference in this connection may be made to *New India Sugar Mills Ltd. Vs. Commissioner of Sales Tax, Bihar, and State of Tamil*

Nadu etc. Vs. Cement Distributors Private Ltd. etc. etc., In these cases, the Supreme Court has taken the view that in the transfer of controlled commodities in pursuance of a direction under the Control Orders, the element of volition of the seller and mutual assent is absent and therefore, there is no sale as defined in the Sale of Goods Act, 1930. However the Supreme Court took a different view in the later decisions in Oil and Natural Gas Commission Vs. State of Bihar and Others, and Vishnu Agencies (Pvt.) Ltd. Vs. Commercial Tax Officer and Others, ; that where there are statutory compulsions, the statute itself should be treated as supplying consensus. However in Vishnu Agencies (Pvt.) Ltd. Vs. Commercial Tax Officer and Others, while six of the seven honourable Judges presiding the Bench concurred with overruling the decision in New India Sugar Mills Ltd. Vs. Commissioner of Sales Tax, Bihar, the seventh Judge, i.e., M.H. Beg, C.J., held the earlier cases to be distinguishable on facts. Likewise difficulty arose where the property in goods were passed not as a result of sale but as a part of the services rendered to its customers, like in restaurants or hotel business. With all these ambiguities, controversies and constraints, surrounding the impost and frequent questions arising therefrom, the Constitution of India was amended through the Constitution of India (Forty-sixth Amendment) Act, 1982 by inserting Clause (29A) to Article 366 of the Constitution, and the legislative field of levy of "tax on sale or purchase of goods" was amplified by defining the term "tax on sale or purchase of goods" for the purpose of the Constitution by giving it an inclusive definition as under :

"(29A) "Tax on the sale or purchase of goods" includes,--

- (a) a tax on the transfer, otherwise than in pursuance of a contract, of property in any goods for cash, deferred payment or other valuable consideration ;
- (b) a tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract ;
- (c) a tax on the delivery of goods on hire purchase or any system of payment of instalments ;
- (d) a tax on the transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration ;
- (e) a tax on the supply of goods by any unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration ;
- (f) a tax on the supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (whether or not intoxicating), where such supply of service, is for cash, deferred payment or other valuable consideration

and such transfer, delivery or supply of any goods shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply and a

purchase of those goods by the person to whom such transfer, delivery or supply is made."

The insertion of Clause (29A) by itself did not enlarge the scope of various enactments operative in different States beyond their existing scope *proprio vigore* and it needed exercise of legislative actions to impose the tax on the extended legislative field to levy and collect the tax on such transactions which though hitherto did not fall or where there were doubt about their coming within the scope of sale of goods, to impose tax on sale or purchase of such transactions as envisaged under Clause (29A) of Article 366 of the Constitution of India. This position was made clear by the apex Court in *Builders Association of India and Others Vs. Union of India (UOI) and Others*, ; wherein the court said :

"What the Forty-sixth Amendment has done is no more than making it possible for the States to levy sales tax on the price of goods and materials used in works contracts as if there was a sale of such goods and materials."

29. In pursuance of this amendment, the legislative activity did come into existence subjecting the transactions to tax on sales or purchases of goods which fell within the extended meaning of tax on sale or purchase of goods under Clause (29A) of Article 366 of the Constitution of India.

30. In the context of the present controversy and in the light of the arguments raised before us, Sub-clause (a) of Clause (29A) of Article 366 of the Constitution of India in the light of which Section 2(o) of the Rajasthan Sales Tax Act, 1954 was amended, needs special attention which now permits transfer of any property in any goods otherwise than in pursuance of a contract for cash, deferred payment or other valuable consideration can be subjected to levy of tax.

31. The first thing which requires to be considered is whether the element of agreement of any sort is ruled out in all circumstances, in construing the transaction to be a transaction of "sale", since aforesaid amendments have taken place. This in turn begs the question what is the ambit and scope of Sub-clause (a) of Clause (29-A) of Article 366 of the Constitution of India, in consonance of which Section 2(o) of the Rajasthan Sales Tax Act was amended.

32. Having given our thoughtful consideration to the entire scheme of providing an extended field of legislative authority in imposing tax on the sale or purchase of goods, we are of the opinion that there is no warrant to presume that element of agreement for sale has altogether been excluded as an ingredient of sale in all circumstances or to assume that where the sale of goods have taken place in accordance with the general law governing the sale of goods for the purpose of construing what is the subject-matter for the goods which have been the subject of sale and liable to be taxed at particular rate, one can split the same transaction in two transactions, one falling in the class of sale under the Sale of Goods Act and another falling into the extended meaning of sale *de hors* the contract, merely on the basis that transfer of property in goods has taken place

incidentally.

33. It appears to us that Sub-clause (a) of Clause (29A) of Article 366 of the Constitution does no more than to do away with the requirement of a free consent as a necessary ingredient of contract of sale under the Sale of Goods Act, in the case of compulsive transfer of property in movable goods under different statutory provisions. But where the transaction is not under any compulsive imposition by law, but is entered into in the ordinary course of business as a voluntary transaction, then to find the true nature of transaction still general law constituting a sale as per Sale of Goods Act applies to find out the subject of levy of tax.

34. If that were not so and mere passing of property in goods was sufficient to treat as "sale" for the purpose of permissible tax levy, there would have been no requirement of Clauses (b), (e) and (f), which are all cases, where property in goods passes to the transferee, but for one reason or another, it does not constitute a contract of sale of such goods. For example, Sub-clause (b) relates to transfer of property in goods involved in execution of work. It has never been doubted that property in goods involved in execution of work is transferred to the person for whom the works contract has been executed. But the same were not considered sale because identity of subject of transfer between the contracting parties was the completed work and not individual materials used therein. Thus, there being no contract for transferring the material, the transaction was not considered to be a sale of such material used. This was another facet of lack of contract in respect of goods in relation to transfer of which tax was sought to be levied. Similarly where property in goods transferred was not under an agreement to sale, but under a contract of service like food articles are supplied by hotels or restaurants, it was not considered sale of such food articles because of absence of contract to sell the food articles, contract being of rendering service and supply of goods being incidental or part of it. In the like manner goods were supplied by any unincorporated association or body to its members were not considered as sale, because unincorporated association had no legal status as person and the identity of person being not different from its members, no contract could come in between them. For inclusion of such transaction with the permissible tax arena, Sub-clauses (e) and (f) were introduced. It is also to be noticed that in all such cases transfer of property in goods is related to condition "for cash, deferred payment or other valuable consideration". Thus, all the instances are such where inclusive definition has been evoked only to take away the one or other essential ingredient of contract relating to subject, viz., goods in pursuance of which property in them passes to other person. If the legislation was to do away with ingredient of contract in all cases uninhibitedly Sub-clause (a) would have covered all exigencies in which contract was not related to goods in which property in goods has passed in some form or other for cash or other valuable consideration. But for each distinct contingency of lack of contract in proper sense as understood under the Sale of Goods Act, 1930, where though consideration for such transfer was existing, but element of

contract was missing a separate provision was made. It is also significant that where property in goods passes for a consideration not under a contract of sale but under a contract of service, as incidental thereto, the tax net has been extended to only supply of food articles or any other articles for human consumption and for drinks. All these amendments had behind them a history of such transaction falling on the altar of test under Sales of Goods Act, as a contract for sale of such goods when sought to be taxed.

35. If one were to look at the Statement of Objects and Reasons for inserting Clause (29A) of Article 366 of the Constitution of India, one cannot fail to discern the object of insertion of Sub-clause (a) with which we are concerned. It reads as under :

"1. Sales tax laws enacted in pursuance of the Government of India Act, 1935, as also the laws relating to sales tax passed after the coming into force of the Constitution proceeded on the footing that the expression "sale of goods", having regard to the rule as to broad interpretation of entries in the legislative lists, would be given a wider connotation. However, in *The State of Madras Vs. Gannon Dunkerley and Co., (Madras) Ltd.*, ; the Supreme Court held that the expression "sale of goods" as used in the entries in the Seventh Schedule to the Constitution has the same of meaning as in the Sale of Goods Act, 1930. This decision related to works contracts.

2. By a series of subsequent decisions, the Supreme Court has, on the basis of the decisions in *The State of Madras Vs. Gannon Dunkerley and Co., (Madras) Ltd.*, ; held various other transactions which resemble, in substance, transactions by way of sales, to be not liable to sales tax. As a result of these decisions, a transaction, in order to be subject to the levy of sales tax under entry 92A of the Union List or entry 54 of the State List, should have the following ingredients, namely, parties competent to contract, mutual assent and transfer of property in goods from one of the parties to the contract to the other parties thereto for a price.

3. This position has resulted in scope for avoidance of tax in various ways. An example of this is the practice of inter-State consignment transfers, i.e., transfer of goods from head office or a principal in one State to a branch or agent in another State or vice versa or transfer of goods on consignment account, to avoid the payment of sales tax on inter-State sales under the Central Sales Tax Act. While in the case of a works contract, if the contract, treats the sale of material separately from the cost of the labour, the sale of materials would be taxable, but in the case of an indivisible works contract, it is not possible to levy sales tax on the transfer of property in the goods involved in the execution of such contract as it has been held that there is no sale of the materials as such and the property in them does not pass as movables. Though practically the purchaser in a hire purchase agreement gets the goods on the date of the hire purchase, it has been held that there is sale only when the purchaser exercises the option to purchase at a much later date and therefore only the depreciated

value of the goods involved in such transaction at the time the option to purchase is exercised becomes assessable to sales tax. Similarly, while sale by a registered club or other association of persons (the club or association of persons having corporate status) to its members is taxable, sales by an unincorporated club or association of persons to its members is not taxable as such club or association, in law, has no separate existence from that of the members. In the *The State of Punjab Vs. Associated Hotels of India Ltd.*, the Supreme Court held that there is no sale involved in the supply of food or drink by a hotelier to a person lodged in the hotel.

4. In *New India Sugar Mills Ltd. Vs. Commissioner of Sales Tax, Bihar*, ; the Supreme Court took the view that in the transfer of controlled commodities in pursuance of a direction under a Control Order, the element of volition by the seller, or mutual assent, is absent and, therefore, there is no sale as defined in the Sale of Goods Act, 1930, However in *Oil and Natural Gas Commission Vs. State of Bihar and Others*, ; the Supreme Court had occasion to consider its earlier decisions with regard to the liability of transfers of controlled commodities to be charged to sales tax. The Supreme Court held that where there are any statutory compulsions, the statute itself should be treated as supplying the consensus and furnishing the modality of the consensus. In *Vishnu Agencies (Pvt.) Ltd. Vs. Commercial Tax Officer and Others*, ; six of seven Judges concurred in overruling the decision in *New India Sugar Mills Ltd. Vs. Commissioner of Sales Tax, Bihar*, ; while the seventh Judge held the case to be distinguishable. It is, therefore, considered desirable to put the matter beyond any doubt.

5. to 7.....

8. Besides the abovementioned matters, a new problem has arisen as a result of the decision of the Supreme Court in *Northern India Caterers (India) Ltd. Vs. Lt. Governor of Delhi*, ;. States have been proceeding on the basis that the *The State of Punjab Vs. Associated Hotels of India Ltd.*, ; was applicable only to supply of food or drink by a hotelier to a person lodged in the hotel and that tax was leviable on the sale of foodstuffs by a restaurant. But overruling the decision of the Delhi High Court, the Supreme Court has held in the above case that service of meals whether in a hotel or restaurant does not constitute a sale of food for the purpose of levy of sales tax but must be regarded as the rendering of a service in the satisfaction of a human need or ministering to the bodily want of human beings. It would not make any difference whether the visitor to the restaurant is charged for the meal as a whole or according to each dish separately.

9. It is, therefore, proposed to suitably amend the Constitution to include in Article 366, a definition of "tax on the sale or purchase of goods" by inserting a new Clause (29A). The definition would specifically include within the scope of that expression tax on-

- (i) transfer for consideration of controlled commodities ;
- (ii) the transfer of property in goods involved in the execution of a works contract ;
- (iii) delivery of goods on hire purchase or any system of payment by instalments ;
- (iv) transfer of the right to use any goods for any purpose for cash, deferred payment or other valuable consideration ;
- (v) the supply of goods by an unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration ;
- (vi) the supply, by way of or as part of any service, of food or any drink for cash, deferred payment or other valuable consideration (see Clause 4).

10. to 13.....".

It may further be noted that noticed at S. Nos. (i), (ii), (v) and (vi) in para 9 find their expression in Sub-clauses (a), (b), (e) and (f) of Clause (29A). Sub-clause (a) was directly to bring within the scope of expression "tax on sale or purchase of goods", the transfer for consideration of controlled commodities. All other transactions not falling in one or more area of the amplified definition, still stand to be tested on the touchstone of sales under the Sale of Goods Act, 1930.

36. The above Statement of Object and Reasons for insertion of various sub-clauses including Sub-clause (a) to Clause (29A) of Article 366 of the Constitution and corresponding changes in the definition of "sale" in the Rajasthan Sales Tax Act, 1954 in our opinion can only be referred to where a transfer of property in any goods has taken place otherwise than in pursuance of a contract with free consent, i.e., to say not by volition of parties but such transfer of property in goods is referable to some compulsion under laws governing controlled commodities for cash or deferred payment or other valuable consideration then such transfer of property in goods would still be constituted as sale for the purpose of "tax on sale of goods" but where the transfer of property in any goods for cash or deferred payment or for other valuable consideration has taken place as a result of a contract under free consent, then what commodity was subject of sale has to be considered in the light of the contract, viz., where there is an agreement to transfer the property in goods in question for cash or deferred payment or for other money consideration, there is no room for splitting up the contract into, one under the Sale of Goods Act in respect of some of the goods intended to be subject of contract and the another in respect of transfer of property of goods incidentally in other commodity, without reference to the terms of contract. If the consideration of goods subject to contract has been charged by the dealer and paid by the buyer, only in respect of the one or the principal commodity for which agreement to sell exists, it is not permissible to hold that though the agreement exists for transfer of property in goods of one commodity only for whole consideration still as the property in other goods have been transferred incidentally, they must be considered to have

been transferred, for cash or other consideration de hors the contract and to split such whole consideration into two, contrary to contract.

37. This splitting up of one consideration de hors the terms of transfer is not envisaged whether the transfer of property in goods is under a contract voluntarily agreed or under a contract statutorily inferred because of the statutory provisions. In either case, the consideration is related to the subject of the transaction as a whole. If the transaction is in respect of two or more commodities, it would be referable to two or more commodities and splitting up of the cash consideration for transfer of property in two commodities become part of the transaction. But where the consideration is charged only for one commodity and the property in two commodity also passes incidentally, the consideration of one commodity cannot be split up, in absence of any clear legislative intendment, to be related to another commodity to make it a transaction of sale.

38. The consideration of the issue before us not only depends upon what amounts to sale but also to what is meant by the sale price and whether it can be split up. We are tempted to recall the concept of a price for a commodity, as has been stated by Goddard, L.J. in *Love v. Norman Wright (Builders) Ltd.* [1944] 1 All ER 618, wherein the court observed as under :

"Where an article is taxed, whether by purchase tax, customs duty, or excise duty, the tax becomes part of the price which ordinarily the buyer will have to pay. The price of an ounce of tobacco is what it is because of the rate of tax, but on a sale there is only one consideration though made up of cost plus profit plus tax. So, if a seller offers goods for sale, it is for him to quote a price which includes the tax if he desires to pass it on to the buyer. If the buyer agrees to the price, it is not for him to consider how it is made up or whether the seller has included tax or not."

39. This can be articulated in the facts of the present case that the price of the IMFL is what the dealer charges for it. Such price of IMFL is made up of costs plus profit plus tax. The costs entering consideration of fixing price may consist of expenses on account of packing material used for bringing the commodity in marketable condition, in the case of liquor, the cost of bottle in which it is contained. So if the manufacturer offers IMFL for a consideration and the buyer agrees to pay the price, it is not per se as an amalgamated consideration of the separate constituents of the costs but is one composite sum for the end-product. However, if the buyer and the seller intend otherwise the price may be split up as referable to sale of liquor and bottles independently.

40. This brings us to consider the case of sale where the commodity is sold packed in any other material like the one in hand. Had it been a case of compulsory sale of the property under the statutory law, the question of the existence of contract would become irrelevant. Such case may require to be looked into in the light of the statutory provisions of construing compulsory

transfer of property in goods subject to transaction, viz., the commodity which is sought to be transferred, the price which is fixed for transfer of such commodity or commodities under the law and whether subsidiary or ancillary matters as to packing or freight are too provided under statutes governing transfer or is left to the parties to negotiate and settle. However, where the transfer of property in goods is as a result of agreement or contract as envisaged under the Sale of Goods Act, the necessary ingredient of sale of any commodity as enunciated by the Supreme Court in number of cases has to be looked into.

41. The principle has been succinctly stated by the Supreme Court in *Hyderabad Deccan Cigarette Factory v. State of Andhra Pradesh* [1966] 17 STC 624 AP as under :

"That in order to constitute a sale it was necessary that there should be an agreement between the parties for the purpose of transferring title to goods, that it should be supported by money consideration and that as a result of the transaction property should actually pass in the goods. Unless all these elements were present there could be no sale."

42. Thus three ingredients of sale as envisaged in the Sale of Goods Act were generally required to be present before the transaction to be considered to be a sale, viz., (i) there should be an agreement between the parties for transferring the title of goods ; (ii) it should be supported by money consideration ; and (iii) that as a result of the transaction, the property should actually pass in the goods. Unless all these three elements are present, there cannot be any sale as it is generally understood.

43. This view in *Hyderabad Deccan Cigarette Factory's* case [1966] 17 STC 624 (SC), which was expressed in connection with sale of packing material to which we wish to advert to later on while we deal with the facts of the case, was restated by the court in m.

44. It has to be seen that in order to constitute a sale, the three ingredients which are required to be established are depending on each other has to be established cumulatively and even if one of them is missing, it cannot be construed as a transaction of sale. The concept of agreement brought into consideration of the relevant ingredients of the valid contract which included free consent of the parties, the intention to transfer the property in specific goods discloses the integral link between the agreement and the commodity, which is intended to become subject-matter of sale, disclosing unity in identity of goods ; such agreement to transfer property no such goods is to be for the money consideration. This also makes it abundantly clear that consideration must also relate to the commodity which is the subject-matter of transaction of sale. If the agreement to transfer the commodity is there, as a result of this agreement, the property in goods have also to be transferred to the buyer actually, still if no consideration is referable to such intended transfer of property, it would not fall within the expression "sale" for the purpose of levy. The "consideration" like

"agreement" equally forms backbone of sale subjected to tax. This requirement that the consideration must be referable to the commodity in which property is sought to be transferred still exists under Clause (i) of Section 2(o) defining "sale" under the Rajasthan Sales Tax Act as expressed in Clause (a) of Article 366(29A) of the Constitution of India. Even where the property in goods have been transferred, and one may not inquire into the existence of an agreement or a contract for transfer of such commodity in the sense having ingredient of free consent necessary for a valid contract still if there is no link between the consideration which passes from buyer to the dealer with the goods in question, it cannot be considered a transaction of sale.

45. Here, we may make it clear that the question that has arisen in the present case is having somewhat distinctive colour and has arisen in different circumstances than decided cases. The precedents are aplenty where transfer of property in goods have taken place for one single consideration and the dealer concerned has sought to deduct from that single consideration the costs or the price attributable to packing material for the purpose of reducing turnover referable to content of the commodity as distinct from container on finding that transfer of content and container are two separate sale transactions. The controversy has also arisen where separate price has been charged for the commodity packed and the packing material in which the commodity is packed, to make up a clear case of two separate transactions of sale of the principal commodity and the packing material and the Revenue contending otherwise. While in the later case, there is no difficulty for reaching the conclusion that the transferred property in packing material is as a result of transaction of sale exigible to tax. The only question may be relating to rate of tax which ought to be levied on the separate sale of packing material. In the former case, if there is no separate and independent transaction of transfer of property in packing material, the question of segregating consideration for the purpose of levy of tax on packing material independently ordinarily do not arise. In such case, any person who claims that notwithstanding, one apparent price, there are two separate transactions of sale, he has to establish this as a fact. If the dealer claims deduction from single consideration to reduce the tax liability, he has to establish such independent sale of packing material. If the Revenue wishes to bring the turnover separately referable to sale of packing material, where sale of principal commodity is exempt or not amenable to tax, it is for the Revenue to establish that there was in fact a sale of packing material. On the other hand, where separate consideration has been charged on the face for the commodity sold in packed condition and for packing material, the two sales are discernible. In such cases, issue may be at what rate turnover relating to packing material which goes along with principal commodity is to be taxed. That depends on the rate structure envisaged under different statutes.

The question whether there is a transaction of sale of packing material or not really arises only in case where no separate and independent price for packing material is charged and the transaction apparently stands as one individual

transfer of goods in packed condition. In case where statute provides like in the present case, that where commodity is sold packed in any material, tax on the sale of packing material shall be same as applicable to commodity that is packed, whether price is charged separately or not, can it be presumed that where no separate price is charged for packing material still it must be deemed to be two separate sales of commodity packed and packing material ?

46. We do not find any room for raising any such presumption, that in a case where the price is not charged separately and the principal commodity is exempt from tax as a matter of law, it should be presumed that it is a transaction of transfer of the principal commodity as well as packing material for separate considerations so as to constitute two transactions independent of each other.

In this connection, we may refer to the decision of the Supreme Court in Hyderabad Deccan Cigarette Factory's case [1966] 17 STC 624, where the question arose of somewhat like nature in respect of sale of cigarettes. The cigarettes were sold packed in packets of cardboard and dealwood. No express contract of sale of packing material between the assessee and its customers was there. The tobacco and its products were exempted from sales tax during the relevant period and the turnover in respect of sale of tobacco was excluded from the total turnover but on the ground that the exemption did not apply to containers and the packing materials, which consisted of cardboard and dealwood, the C.T.O. sought to assess tax on the assumed turnover in respect of packing material. The assessee contended that there was no sale of packing material at all and it has sold only cigarettes without charging anything extra for the packing material and that price was the same to whatever place they were sent. Thus, the contention of the appellant was that the packing materials were not part of the agreements of sale between itself and its customers. The C.T.O. held that in the circumstances of the case, the assessee must be deemed to have sold the packing materials with the cigarettes and charged a consolidated price for the same. The High Court has upheld the above view of the Revenue. The C.T.O. had based his finding on the alleged procedure followed by the manufacturer in the same field for computing the costs of the packing material in fixing price of cigarettes. However, the Supreme Court held as under :

"A perusal of the orders of the various authorities and the High Court shows that a simple question of fact has been sidetracked by copious citations. Whether there was an agreement to sell the packing materials is a pure question of fact and that question cannot be decided on fictions or surmises. That is what was happened in this case. The Commercial Tax Officer invoked a fiction ; the Assistant Commissioner of Commercial Taxes relied upon the doctrine of "finished product" ; the Appellate Tribunal relied upon surmises ; and the High Court, on the principle of implied agreement. But, none has tackled the real question. The burden lies upon the Commercial Tax Officer to prove that a turnover is liable to tax. No doubt he can ask the assessee to produce the relevant material ; and if he does not produce the same, he may draw adverse

inference against him. But, he must decide the crucial question whether the packing materials were subject of the agreement of sale, express or implied. To ascertain the said fact he can rely upon oral statements, accounts and other documents, personal inquiry and other relevant circumstances such as the nature and the purpose of the packing materials used."

The court further said :

"In the instant case, it is not disputed that there were no express contracts of sale of the packing materials between the assessee and its customers. On the facts, could such contracts be inferred ? The authority concerned should ask and answer the question whether the parties in the instant case, having regard to the circumstances of the case, intended to sell or buy the packing materials, or whether the subject-matter of the contracts of sale was only the cigarettes and that the packing materials did not form part of the bargain at all, but were used by the seller as a convenient and cheap vehicle of transport. He may also have to consider the question whether, when a trader in cigarettes sold cigarettes priced at a particular figure for a specified number and handed them over to a customer in a cheap cardboard container of insignificant value, he intended to sell the cardboard container and the customer intended to buy the same ? It is not possible to state as a proposition of law that whenever particular goods were sold in a container the parties did not intend to sell and buy the container also. Many cases may be visualised where the container is comparatively of high value and sometimes even higher than that contained in it. Scent or whisky may be sold in costly containers. Even cigarettes may be sold in silver or gold caskets. It may be that in such cases the agreement to pay an extra price for the container may be more readily implied. In the present case, if we may say so with respect, all the authorities, including the High Court, dealt with the question as a question of law without considering the relevant factors which would sustain or negative any such agreement."

47. The instant case also raises the same problem. In the case at hand, Indian Made Foreign Liquor ("IMFL") has been sold contained in bottles. The liquor is exempt from payment of tax. There is no separate agreement to sell the container. The Revenue has sought to apply rate of taxes on the sale of bottles for separate consideration because of the provisions contained in proviso to Section 5(1) of the Act referred to above by raising presumption of sale. While it is admitted that transfer of property in bottles have passed on to the buyer but the question in our opinion remains to be answered whether the dealer intended to (1) sell the bottles (2) for a consideration (3) to transfer the property in bottles and the buyer intended to buy the bottles for a price.

The question again cropped up before the Supreme Court in *Commissioner of Taxes v. Prabhat Marketing Co, Ltd.* . It was a case of hydrogenated oil sold in container, Th[1967] 1.9 STC 84e oil was exempt from sales tax. No separate consideration was paid for the container. The revenue splitted the consideration and sought to assess the value of the container. 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 as it has reached to the conclusion that there was no evidence to show that actually separate price was paid for the containers. The Supreme Court reaffirmed the test laid down in Hyderabad Deccan Cigarette Factory's case [1966] 17 STC 624 (SC), and observed that though the High Court has answered the question of law correctly but without addressing itself to the question whether there was in fact an express or implied agreement for the sale of containers and remanded the case back to the High Court for deciding the question by adverting to the material for determining the existence of any such ingredient of sale.

In *M.A. Razack & Company v. State of Madras* [1967] 19 STC 135, the Supreme Court was considering the case of sale of tobacco. Tobacco was exempt from tax but the Revenue sought to tax the packing material used for preparing packets of chewing tobacco. In that case, it was never suggested that there was a contract either express or implied for the sale of packing material between the dealer and the buyer. The court considered the value of packing material as compared to the value of the contents of the packet and held that an agreement to sell packing material independently of chewing tobacco could not under the general law be implied. In reaching this conclusion, the court reiterated the view expressed in Hyderabad Deccan Cigarette Factory's case [1966] 17 STC 624 (SC).

In this connection, the principle enunciated by the Supreme Court in *Raj Sheel v. State of Andhra Pradesh* [1989] 74 STC 379 may be noticed :

"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. If the transaction is one of sale of the goods only, clearly all that can be taxed in fact is the sale of the goods, and the rate to be applied must be the rate as in the case of such goods. It may be that the price of the goods is determined upon a consideration of several components, including the value of the packing material, but nonetheless the price is the price of the goods.

It is not open to anyone to say that the value of the different components which have entered into a determination of the price of the goods should be analysed and separated, in order that different rates of tax should be applied according to the character of the component (for example, packing material). What Section 6-C intends to lay down is that even upon such analysis the rate of tax to be applied to the component will be the rate applied to the goods themselves. And that is for the simple reason that it is the price of the goods alone which constitutes the transaction between the dealer and the purchaser."

48. The above principle emphasises the fact that where the transaction is of the commodity known as principal commodity only, but which is sold contained in a container or packed in packing material, merely because of the cost of various components which have been taken into consideration while fixing the price of the commodity by the dealer, it cannot be presumed to be sale of two different

commodities. It was a case which concerned sale of liquor in bottles and department has sought to tax turnover of bottles. Revenue has contended that consideration paid by the purchaser to the dealer consists not only the price of its content but also includes price of bottles. The court emphasised that :

"Whether there was an agreement to sell the packing materials is a pure question of fact and that question cannot be decided on fiction or surmises. That is what has happened in this case. The Commercial Tax Officer invoked a fiction ; the Assistant Commissioner of Commercial Taxes relied upon the doctrine of "finished product" ; the Appellate Tribunal relied upon surmises ; and the High Court, on the principle of implied agreement. But none has tackled the real question. The burden lies upon the Commercial Tax Officer to prove that a turnover is liable to tax. No doubt he can ask the assessee to produce the relevant material ; and if he does not produce the same, he may draw an adverse inference against him. But, he must decide the crucial question whether the packing materials were subject of the agreement of sale, express or implied."

49. We have also been referred to Premier Breweries Vs. State of Kerala, In Premier Breweries Vs. State of Kerala, the dealer has in fact sold the liquor packed in cardboard cartons. It claimed that it had charged its customers separately for the liquor and the cartons, and that, therefore, the turnover of the cartons could not be included in the turnover of the liquor which was taxable at 50 per cent but that the turnover of the cartons had to be taxed separately at the rate of 8 per cent as provided in entry 97 of the First Schedule to the Kerala General Sales Tax Act, 1963. The High Court rejected the claim.

50. As noticed above, in Premier Breweries Vs. State of Kerala, there was no issue whether the packing material has been sold or not. In fact, the price for packing material had been separately charged and the dealer was claiming that since the sale of packing material was for a separate consideration, it should be taxed as sale of packing material only and not at the rate at which, the content was sold. It was also a case of sale of liquor packed in cardboard carton. The court observed :

"The underlying idea behind these Rules is that packed goods are to be taxed as composite units. 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 the goods will have to be calculated by including therein the turnover of the packages and containers. The rate of tax applicable to the turnover so calculated will be the rate payable on the goods contained in the packages or containers."

51. From the aforesaid, it is clear that the court considered the scope of the provision providing one rate of tax by treating the sale of packed goods as one composite sale and not two different sales. This supports the conclusion that such transaction has to be treated as one composite sale for the purpose of levy of tax notwithstanding there may be two transactions. Even if two transactions

exist, they are to be clubbed together. The rule was against splitting the one apparent transaction into two transactions. This apparently goes to show that the court was not called upon to consider the case whether the scheme not only envisages taxing of goods sold in packing material in all circumstances as one composite unit but in the given circumstances it also envisages splitting a composite transaction into transactions of two sales as is the case under the Rajasthan Sales Tax Act. That makes the present controversy distinct.

52. The proviso to Section 5(1) of the Act merely provides the rate structure to be charged on the commodities which have been sold and if it is analysed minutely, we may bifurcate it into three parts, viz., (i) that where the commodity has been sold in packed condition and no separate consideration is charged for packing material ; (ii) where such commodity is sold in packed condition where price is charged separately for the packing material and with these two conditions ; and (iii) it further provides rates on which turnover of packing material is to be charged. If this provision is read in its entirety, it nowhere raises the presumption that where the commodity is sold in packed condition and no separate price is charged but still for the purpose of computing the turnover it shall be split up into two turnovers of the principal commodity and of the packing material to be aggregated for the purpose of levying the same rate. It is only where the assessee claimed deduction from turnover of the principal commodity by raising claim that there are two separate sales and that law provides notwithstanding there may be two separate sales, rates chargeable on the turnover of two different commodities would be same where the sale of packing material is a part of the one single transaction and the commodity sold in the packing material. It is only in cases where the principal commodity is exempt from tax then the question may arise for levying tax on different rates on the turnovers referable to the packing material. However, merely because different rates have been prescribed for packing material in cases where the goods sold in packed condition are exempt from tax, does not give rise to any such legal fiction to assume that where there is a single price charged for the commodity sold in packed condition, invariably, there is a sale of packing material independent to the sale of the principal commodity. In all such cases where the assessee claimed deduction by raising plea of independent transaction to reduce his taxable turnover of the principal commodity or the Revenue wants to tax it independent of the principal commodity, it has to be established as fact before invoking rates to be applied u/s 5(1) of the Act or provisions thereto that there is a sale of the commodity sought to be taxed in accordance with the well-established norms and one of such norms in all circumstances is the transfer of property in goods where the principal or packing material must be for a consideration referred to such commodity alone. The intendment of the parties to transfer the property in packing material independent of goods packed therein for a price must be shown to exist and if it is transferred under compulsion without there being a voluntary agreement it must be shown that the transfer is of the packing material independent of it.

53. Coming to the finding about the sale of the packing material payable in the present case, we find from the order of the Tribunal that the finding about the sale of packing material has not been reached as a fact but on discussion of law and by relying on the definition of sale price given in Section 2(p) of the Act of 1954 by assuming that since the liquor has been sold in bottle, it is a sale of bottle and liquor both. The presumption of sale of packing material has been drawn from the fact that the sale price to be constituting any sum charged for anything done by the dealer in respect of the goods at the time or before the delivery thereof. We are of the opinion that this is totally a misconstruction of statute inasmuch any charge for anything done by a dealer in respect of the goods on the date or before the delivery thereof, it may include any sum charged for making the goods in deliverable stage by placing it in packing material such expenses may become part of the price of the commodity packed but the provision does not make such expense as a price of the packing material on its sale. It is precisely because of this provision that where the sale price includes the charges or costs for packing of the goods before it is delivered to the buyer or before the transfer of property takes place, it becomes the sale price of the commodity itself. It does not become an independent sale. A dealer cannot claim deduction of such expenses from the turnover of the commodity by segregating the same. The definition of "sale price" given in Section 2(p) of the Act in any circumstances cannot be used for the purpose of splitting the sale price of the commodity into the sale price of the commodity and the packing material relating to different commodities so as to constitute two sales in place of one. The provision is against splitting the cost incurred by dealer before commodity comes to deliverable state.

54. If the question rests on presumption then anything defined in Section 2(p) of the Act, it assists the dealer that once everything done to the goods at the time or before the delivery becomes part of the sale price of the commodity and the commodity being exempt from payment of tax, it cannot thereafter be split up to make it a different transaction inasmuch as the expenses incurred on packing material to bring the goods in deliverable stage, it does not become consideration for the sale of packing material as such but becomes sale price of commodity packed u/s 2(p). The Revenue cannot be permitted to ignore the deeming provision merely because on operation of deeming provision, the cost of packing material becomes part of sale price of a commodity which is exempted from tax. Once the deeming provision operates, its effect cannot be undone by assuming some other fact, which is not provided. In such circumstances, if the Revenue seeks to tax the sale of packing material independent of the sale of the commodity it has to establish that one consideration was charged for two independent transactions amalgamated into one, viz., for transfer of commodity as well as of packing material in which such commodity is packed for cash consideration, may be that such consideration has been named as one. Even if that is proved, it would not entitle the dealer to claim a separate rate of tax on the transaction of packing material of the goods because of the last proviso to

Section 5(1) of the Act. Still the dealer would be liable to make payment of tax at the same rate as payable on the principal commodity on the sale of packing material. It is only in such cases where two transactions, viz., sale of packing material and the sale of packed material are established arising out of the same transaction and the principal commodity is exempt from payment of tax or has already suffered tax and is not liable to be taxed, the distinct transaction of sale of packing material would be exigible to tax at its own rates under the said proviso.

55. Reliance was also placed on proviso to Section 2(s) of the Rajasthan Sales Tax Act, 1954 with reference to which one per cent of aggregate turnover of IMFL has been brought to tax as taxable turnover arising from sale of packing material. This contention also, in our opinion, has no substance. Section 2(s) of the Act of 1954 reads as under :

""taxable turnover" means that part of turnover which remains after deducting therefrom the aggregate amount of the proceeds of sale of goods-

(i) to (iv)..... :

Provided that where a dealer in goods which are exempted from tax unconditionally, sells any bardana, container or any other packing material received along with such goods at the time of purchase thereof by him, the taxable turnover in respect of such sale shall, at the option of such dealer to be exercised in the prescribed manner, be one per cent, of the aggregate amount of the sale prices received or receivable by him in respect of the sale or supply of such goods and of such bardana, container or material:

Provided.....".

A bare reading of the aforesaid first proviso to Section 2(s) of the Act goes to show that this proviso can only be invoked where sale of any bardana or container or any other packing material takes place and it does not create a fiction that there is a sale of bardana or container or any other packing material when any commodity is sold packed in any material. This proviso further shows that it applies only in case of sale of such bardana or container or other packing material which is received along with such goods sold by the purchaser at the time of purchases thereof. The provision is really aimed at determining the turnover of packing material where sale of such packing material has taken place in the circumstances mentioned therein by giving an option to the dealer, either to be taxed at actual sale price, which can be established by him or on estimate basis of the turnover of commodity with the purchase of which bardana, etc., has come to such dealer and sold by him later on. It nowhere speaks about any deemed sales of packing material in any given circumstance. Reliance on Section 2(s) is misplaced.

56. Nothing has been brought on record that cost of bottle in comparison to price of IMFL was substantial enough from which even implied sale of contract for sale

of bottles could be inferred.

57. For the reasons already discussed above, since the Revenue authorities have failed to decide the question about the sale of packing material by establishing that the transfer of property in packing material has taken place for consideration referable to the transfer of property in packing material, no tax can be levied where there is a single transaction of sale of the commodity for one sale price by splitting up the sale price by splitting different items of expenses which goes to make the sale price of the commodity.

58. Accordingly, these writ petitions are allowed and the impugned orders of assessment levying interest and penalty thereon as affirmed by the Rajasthan Taxation Tribunal are set aside.

59. In the facts and circumstances of this case, there shall be no order as to costs.