A M/S. KALYANI BREWERIES LTD.

v.

STATE OF WEST BENGAL AND ORS.

SEPTEMBER 15, 1997

B [S.P. BHARUCHA AND M. JAGANNADHA RAO, JJ.]

Sales Tax :

C *Sales Tax on sale of containers—Sale of Beer—Deposit collected on bottles—Refundable on return—No time limit for return of bottles—Balance deposit amount left with assessee—Subjected to sales tax—Tribunal held that transaction was sale and not a Bailment—Held, bailee not aware of bailment terms—Deposit rate equal to cost of bottles—No strong intention to get back bailment—Imposition of sales tax justified.*

D **The appellant-assessee, a manufacturer and seller of beer, collected deposit for bottles from customers. These were credited to "Deposit on Bottles" account. On return of empty bottles refund was made. There was no time limit fixed for return of bottles. The deposits were kept for three months in the account as a liability and the balance in that account was transferred** E **to an account called the "Bottle Deposit Forfeited Account". The Commercial Tax Officer levied sales tax on the forfeited deposit amount. The order was confirmed by both the Assistant Commissioner and Commercial Taxes Tribunal. On appeal, the Taxation Tribunal held that the transaction of the beer bottles was not a bailment but was a sale. Hence the present appeal.**

F **The contention of the appellant-assessee was that substantial sum had been refunded from the bottle deposit account to the customers who returned the empty bottles. Thus there was only a bailment of bottles to the customers and no intention to sale.**

G **Dismissing the appeal, this Court**

HELD : 1.1 On the facts and circumstances it seems that there was really a sale of the bottles to the customers, the assessee buying back the empties from some customers. The amount shown as forfeited was rightly made liable to Sales-tax. Had there been a bailment which necessarily pre-
H **supposes that the bailee was aware of the term thereof, a larger refund would**

have been shown. [120-G] A

1.2. The facts and circumstances must be ascertained to determine whether or not the assessee had sold the beer bottles to its customers so as to become liable to pay sales tax on the price of deposit realised thereof. The two factors that would militate against the sale of beer bottles are, first, the invoices that speak of the "deposit on bottles" and, secondly, the refund out of B the aggregate amount of the deposit. [120-C-D]

2. There is nothing on record to indicate that the terms under which the deposits be repaid were communicated to the assessee's customers. There is no suggestion that there was an oral communication of such terms to the C customers or that there was any trade usage in this behalf. It is difficult to visualise a bailment the terms whereof are not made known to the bailee. [120-E]

3. The forfeiture of amounts in the assessee's "deposit on bottles" account does not appear to bear out the assessee's case that the empties were D refundable at any time. It must also be taken into account that the customers were required to deposit for the beer bottles at rate which was exactly equal to the cost of the bottles; this suggests the sale thereof more strongly than the intention to get the back on bailment. [120-F]

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United Breweries Ltd. v. *State of A.P.*, [1997] 3 SCC 530 and *Raj Steel and Ors.* v. *State of A.P. and Ors.*, [1989] 3 SCC 262, distinguished.

Raj Steel and Others v. *State of A.P. and Ors.*, [1989] 3 SCC 262, referred to.

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Benjamin's Sale of Goods (Third Edition) and Curzon's Dictionary of Law (Fourth Edition), referred to.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4524 of 1989.

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From the Judgment and Order dated 21.7.89 of the West Bengal Taxation Tribunal Calcutta in Case No. R. N.-92 of 1989.

Sunil Gupta and Mrs. A.K. Verma for M/s JBD and Co. for the Appellant.

B. Sen, Dilip Sinha and J.R. Das for the Respondents. H

A The Judgment of the Court was delivered by

S.P. BHARUCHA, J. Under challenge in this appeal by special leave is a judgment and order of the West Bengal Taxation Tribunal.

The Assessment Year with which we are concerned is the Assessment B Year 1974-75. The assessee, the appellant, brewed and sold beer in beer bottles. For the beer it gave to its purchasers one invoice and another for "the deposit on bottles". On record are two such corresponding invoices. On the invoice which relates to "deposit on bottles" there is another item, of "truck charge". It was the case of the assessee that the rate per bottle of the deposit was adjusted so as to cover the cost of the bottles that were purchased by C it. Upto 1st March, 1974, the rate was Rs. 4.80 per dozen bottles but, due to the increase in their cost, the rate was raised to Rs. 9 per dozen bottles with effect from 2nd March, 1974. The amounts received as such deposit were credited to an account entitled "Deposit on Bottles" in the assessee's ledger. When the empty bottles were returned by customers, refunds were made at D the same rate. There was no time limit for the return and bottles taken from the assessee in one year might be returned in the next year. The following accounting procedure was adopted : Deposits for three months were kept in the aforementioned account as a liability and the balance in that account was transferred to an account called the "Bottle Deposit Forfeited Account". The amount of bottle deposit receipts, returns and forfeiture were shown by the E assessee thus :

"1.4.74 - By Balance	. . Rs. 6,84,152.00
Add : Deposits	. . Rs. 30,57,143.00
	. . Rs. 37,41,295.00
F *Less* : Refund	. . Rs. 11,62,974.00
	. . Rs. 25,78,321.00
Less : Amount	
G Forfeited	. . Rs. 16,55,355.00
Balance on 31.3.75	. . Rs. 9,22,966.00"

The Commercial Tax Officer treated the amount of Rs. 16,55,355, being the forfeited deposit amount aforestated, as a part of the assessee's sales H realisations and taxed it. The Assistant Commissioner confirmed the order, as

did the West Bengal Commercial Taxes Tribunal. The matter was carried to the West Bengal Taxation Tribunal, whose order is under appeal. Both Tribunals placed emphasis upon the fact that it had been admitted by the assessee that there was no time limit for the return of the empty bottles. They found that the transaction in respect of the beer bottles was not one of a bailment as contended by the assessee but one of sale.

Learned counsel for the appellant relied upon Benjamin's Sale of Goods (Third Edition) where it is stated, "it is a question of construction whether sacks, barrels, bottles and similar containers in which goods are sold are themselves the subject of a sale or are merely bailed to the buyer, remaining at all times the property of the seller or the original manufacturer. It is not decisive of the issue that a charge is made for the non-return of the container, nor will the payment of such a charge necessarily transfer the ownership of the container to the person who pays it". Learned counsel also referred to the Curzon's Dictionary of Law (Fourth Edition) which defines a deposit to mean "a sum of money paid on terms under which it will be repaid.....". Great emphasis was laid by learned counsel on the judgment of this Court in *United Breweries Ltd. v. State of A.P.*, [1997] 3 SCC 530. and *Raj Steel and Others* v. *State of A.P. and Others,* [1989] 3 SCC 262. In learned counsel's submission, what had to be seen was whether the transaction in respect of the beer bottles was a sale. The intention of the assessee transaction was not to sell the beer bottles. The fact that the relevant invoice spoke of a deposit and the fact that so substantial a sum as Rs. 11 lakhs had been refunded from out of the Bottle Deposit Account to customers who returned the empties showed that there was only a bailment of the beer bottles to the customers.

The *United Breweries Ltd.* case, decided by a Bench of three learned Judges, involved a brewer making and selling beer in bottles. In respect of the beer bottles the brewer had issued circulars to its buyers. Four things were found by this Court to emerge therefrom, namely-

> "(1) The refundable deposits were being collected on the bottles and the crates.
>
> (2) The appellant advised its customers to collect forty paise per bottle from the consumers as deposit.
>
> (3) The customers were advised to collect the empty bottles from the consumers and return them to the appellant.

A (4) The empty bottles and crates were to be taken back by the trucks of the appellant, the drivers of which were authorised to issue a receipt for the empties against which the appellant would issue credit notes. At the time of the booking of the next consignment, the customers would get advantage of the credit notes."

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

In *Raj Steel and Others* v. *State of A.P. and Others,* [1989] 3 SCC 262, F this Court was again concerned with brewers who sold beer in bottles and the question was whether the bottles were exigible to sales tax. Learned counsel for the assessee relied upon the following observations therein :

"7. It is commonly accepted that a transaction of sale may consist of G 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 H container without any sale consideration therefor. 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. That the problem almost always requires factual investigation into the nature and ingredients of the transaction has been repeatedly emphasised by this Court. In *Hyderabad Deccan Cigarette Factory* v. *State of Andhra Pradesh,* (1966) 17 STC 624 SC this Court said :

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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 visualized 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 container. 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

G H

A considering the relevant factors which would sustain or negative any such agreement,''

This Court added that the question whether the packing material had been sold or merely transferred without consideration was dependent upon the contract between the parties. It found that there was a lack of adequate and B clear factual material and, therefore, remanded the matter to the assessing authority for fuller investigation.

There can be no doubt that the facts and circumstances must be ascertained to determine whether or not the assessee had sold the beer C bottles to its customers so as to become liable to pay sales tax on the price or deposit realised therefor.

The two factors that may be said to militate against the sale of the beer bottles are, first, the invoices that speak of the ''deposit on bottles'' and, D secondly, the refund of Rs. 11,62,974.00 out of the aggregate amount of the deposits, namely, Rs. 30,57,143.00.

Now, there is nothing on record which indicates that the terms under which the deposits would be repaid were communicated to the assessee's customers. There is no suggestion that there was an oral communication of E such terms to the customers or that there was any trade usage in this behalf. It is difficult to visualise a bailment the terms whereof are not made known to the bailee. The forfeiture of amounts in the assessee's ''Deposit on Bottles'' account does not appear to bear out the assessee's case that the empties were returnable at any time. This must also be taken into account that the F customers were required to deposit for the beer bottles a rate which was exactly equal to the cost of the bottles; this would suggest the sale thereof more strongly than the intention to get them back upon bailment. It seems to us upon these facts and circumstances that there was really a sale of the bottles to the customers, the assessee buying back the empties from some G customers. It is, therefore, that the assessee could show a refund of Rs. 11,62,974 out of the total amount of deposits, namely, Rs. 30,57,143. Had there been a bailment, which necessarily pre-supposes that the bailee was aware of the terms thereof, a larger refund would have been shown.

The judgment in the case of *United Breweries Ltd.*, proceeded upon the H very clear terms of the bailment that were made known by circulars to the

customers. The judgment found that the intention of the brewer was to get the empties back, as evidenced by the fact that the rate of the deposit was less than the cost of the beer bottles. A

For the reasons aforestated, we are of the view that the amount of Rs. 16,55,355, being the amount shown as forfeited as aforementioned, was rightly made liable to sales tax. B

The appeal fails and is dismissed. No order as to costs.

S.V.K.I. Appeal dismissed.