IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/TAX APPEAL NO. 2177 of 2010
With
R/TAX APPEAL NO. 2178 of 2010
With
R/TAX APPEAL NO. 2179 of 2010
With
R/TAX APPEAL NO. 2180 of 2010
With
R/TAX APPEAL NO. 2181 of 2010
With
R/TAX APPEAL NO. 2182 of 2010
With
R/TAX APPEAL NO. 2183 of 2010
With
R/TAX APPEAL NO. 2184 of 2010

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR. JUSTICE BHARGAV D. KARIA
and
HONOURABLE MR. JUSTICE PRANAV TRIVEDI

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Approved for Reporting	Yes	No

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STATE OF GUJARAT
Versus
HINDUSTAN COCA COLA BEVERAGES PVT. LTD.

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Appearance:
MR UTKARSH SHARMA, AGP for the Appellant(s) No. 1
MR KUNAL NANAVATI FOR NANAVATI ASSOCIATES(1375) for the Opponent(s) No. 1

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CORAM:**HONOURABLE MR. JUSTICE BHARGAV D. KARIA**
and
HONOURABLE MR. JUSTICE PRANAV TRIVEDI

Date : 01/10/2025
COMMON ORAL JUDGMENT

(PER : HONOURABLE MR. JUSTICE BHARGAV D. KARIA)

1. Heard learned Assistant Government Pleader Mr. Utkarsh Sharma for the appellant and learned Advocates Mr. Kunal Nanavati and learned advocate Mr. Kaustubh Shrivastav for Nanavati Associates for the opponent.

2. This group of appeals is filed by the Revenue under section 78 of the Gujarat Value Added Tax Act, 2003 (for short 'the VAT Act'] challenging the order of the Gujarat Value Added Tax Tribunal, Ahmedabad [for short 'the Tribunal'] dated 28.06.2007 in Second Appeal Nos. 402 to 409 of 2006. The Tax Appeals are admitted by order dated 07.12.2012 for

consideration of the following substantial questions of law:

(i) Whether the Gujarat Value Added Tax Tribunal was right in law and in facts in coming to the conclusion that respondent had not collected any amount by way of tax?

(ii) Whether the Gujarat Value Added Tax Tribunal was right in holding that the provisions of section 56 of the Gujarat Sales Tax Act are not attracted in the present case?

3. The respondent-M/s. Hindustan Coca Cola Beverages Pvt. Ltd. (hereinafter to be referred to as 'the assessee'] is

engaged in manufacture/trading of soft drink, packaged drinking water etc. and registered under the provisions of the Gujarat Sales Tax Act, 1969 [for short 'the Sales Tax Act'] and under Central Sales Tax Act, 1956 [for short 'the CST Act'].

3.1 The assessee had obtained sales tax exemption certificate under section 49(2) of the Sales Tax Act and availed sales tax exemption of Rs. 49,54,14,504/- till 24.11.2003 on the sale of manufactured products at its plant situated at Goblej, District-Kaira.

3.2 The assessee started payment of sales tax from 25.11.2003. The Sales

Tax Officer issued a show-cause notice to the assessee to show cause as to why penalty under sub-section (1) of section 46 of the Sales Tax Act should not be imposed for violation of sub-section (1) of section 56 of the Sales Tax Act in view of the following findings:

(i) The assessee manufactures soft drinks in glass bottles, canisters and packaged drinking water in jar. The assessee is not having the facility of manufacturing soft drink in PET bottles in Gujarat. Most of the requirement/demand of soft drink in glass bottles, canisters and

packaged drinking water was fulfilled at their Goblej plant. The assessee also receives soft drink in PET bottles/ can / tetra-pack and packaged drinking water from their plant which is situated outside Gujarat State and these products are also received from other suppliers.

(ii) The assessee paid sales tax in cash i.e. by depositing in Government Treasury on the sale of these products. It was a case of the department that though the assessee had common distributor area-wise for selling all the products, no declaration on glass

bottles, PET bottles, Cans, tetra-pack etc. was made on the packing material so as to identify exempted products or non-exempted products.

3.3 According to the Sales Tax Officer in the true spirit of the Scheme of Incentive, the representation that the product is exempted from tax should be made known to the end consumer who bears the burden of tax and therefore, the end consumer must be informed regarding sales tax benefit for the product which was purchased. Accordingly, when incentive of sales tax exemptions is granted, the representation should be made known to

the end consumer that the product is exempted from sales tax. However, in the facts of the case, and in the chain of transaction from the assessee to the distributors, distributors to the retailers and to the final consumers, end consumer was not at all made aware that the product purchased was exempted from sales tax.

3.4 The Sales Tax Officer has, after observing selling price pattern prevailing during the relevant period, as submitted by one Mr. Samir Shah, Associate Finance Manager of the Company, found that total price showed aggregate amount charged from the customers and after deducting crate

rental/ wear and tear charges, net price was worked out and since the sale price was inclusive of the tax if any, the component on taxable sale was calculated by working back from net price and the tax component thus calculated was subtracted from the net price to arrive at a price excluding sales tax.

3.5 The Sales Tax Officer, therefore, was of the that selling price pattern has remained same since beginning and thus, net price which was inclusive of sales tax, if any, was charged form the end consumer and no charge was collected towards sales tax separately invoice or commercial invoice in any case.

3.6 The Sales Tax Officer therefore, made comparison between the price pattern for the period prior to the completion of incentive period and after that and it was found that there was no change in price structure and net price remained the same. It was therefore, concluded that in the net price, the component of sales tax was included even for the period of exemption availed by the assessee.

3.7 The Sales Tax Officer therefore, made investigation with regard to accounting of the sale of the products by the assessee and it was found that assessee was having "Jaguar" software for billing purpose. The data of this

software was converted in “excel” on month end for calculation of sales tax which contained various columns like bill amount, distributor’s margin, retailer’s margin, sales tax rate, sales tax etc. It was found by the Sales Tax Officer that on the basis of such data, sales tax working was prepared and the column “bill amount” showed the inclusion of sales tax and on further verification of the software, it was observed that software was used not only for billing purpose but also for preparation of ledgers of distributors. It was also found that for preparing bills/invoices, the required data was entered in the Jaguar software, and the price of the product

was generated automatically with the help of the previous command to the computer. During verification it was noticed that there was a menu of "sales tax register" and a report can be generated with the help of such menu. It was also found that there were columns of gross amount, taxable amount, tax, amount with tax etc. in the report called sales tax register.

3.8 It was also found that the column of tax shown "zero" by default, irrespective of the nature of the transaction whether taxable or exempted and column of "amount with tax" showed that the component of tax was included in the price determination.

3.9 The Sales Tax Officer, therefore, took out some samples/indicative printouts of such report of the sales tax register to find out that how the billing was made by the assessee-company to its distributors because as per the Jaguar Software used by the assessee, report of sales tax register was automatically generated including the amount with tax.

3.10 The sales Tax Officer also found that the assessee was maintaining "Scala" software to prepare its account. The Sales Tax Officer, relying upon the statement of dated 06.07.2004 of Shri Samir Shah, opined that the

report of sales tax register generated by Jaguar software was the only source for making entries in the account and therefore, the assessee was not sure of the data on the format contained therein which was misleading with an intention to give willful misstatement before the investigating/adjudicating authority during the course of discharging their functions under the Sales Tax Act.

3.11 The Sales Tax Officer found that the "Scala" generated sales tax account under Code No. 4114001 which showed the provision of the amount of sales tax which was otherwise computed on the exempted sales transaction. The

Sales Tax Officer, therefore, came to the conclusion that the account of sales tax is being maintained by the assessee irrespective of the transaction whether its taxable or exempted. It was also found on perusal of the sales tax working that to calculate sales tax on taxable goods, component of sales tax was calculated by working back from the net price and to calculate the quantum of sales tax exemption to be availed, the assessee calculated the sales tax directly instead of working back method with an intention to create an illusion that the sales was made without inclusion of the sales tax.

3.12 The Sales Tax Officer however, relying upon the price pattern of the assessee being "inclusive of tax" concluded that the assessee could not have computed the sales tax exemption without including the same in the sale price and therefore, net price or the Maximum Retail Price of the assessee was inclusive of the sales tax.

3.13 The Sales Tax Officer further found that a sales register maintained in "Jaguar" software clearly indicated the sales tax component in the sale price of each product and the assessee had considered the tax component in the turnover of the

exempted sales and therefore, it amounts to collection of the sales tax from the end consumer instead of passing the exemption availed by the assessee by reducing sales tax from the net price or MRP charged on each product which, according to Sales Tax Officer was, willful, wrong and ineligible collection.

3.14 The Sales Tax Officer, after considering the evidence collected during the course of investigation as well as the statements of Shri Samir Shah recorded under section 63 of the Sales Tax Act on 23.06.2004 and 06.07.2004 along with documents submitted that by the assessee

containing sales tax accounts, sales tax working papers, balance lists etc., formed an opinion that method of computing sales tax for different products coupled with computerized records clearly show the tax collection by the assessee-company while fixing the price of soft drink in glass bottles, canisters, packaged drinking water in jar etc. produced at their Goblej factory and sale price collected by the assessee was inclusive of the sales tax though the assessee has availed the exemption from payment of sales tax under Entry 69 of section 49(2) of the Sales Tax Act resulting into violation of the provisions of section 56(1) of the Sales Tax Act.

3.15 According to the Sales Tax Officer, the assessee collected the following amount by way of tax in respect of the sales of products manufactured at Goblej plant by virtue of the notification issued under section 49(2) though no tax was payable as per the notification issued under section 49(2) of the Sales Tax Act:

	Period	Amount of tax
1	Calendar Year 2000	12,85,48,279/-
2	Calendar Year 2001	11,77,00,515/-
3	Calendar Year 2002	10,76,12,727/-
4	Calendar Year 2003 (upto 24.11.2003)	9,34,20,455/-
	Total	44,74,90,976/-

3.16 This group of Eight appeals relate to the assessment for the purpose of the above Four years under

the Sales Tax Act as well as under the CST Act and only the amount of tax, penalty etc. is different.

3.17 The assessee, in response to the show-cause notice, filed its reply contending *inter alia* as under:

> "1. A perusal of section 46 would make it clear that penalty proceedings can be initiated "in the course of any proceedings under this Act….No proceedings for that matter before any other authority during the course of which the current proposal of penalty can be said to have arisen.
>
> 2. Cited the observations of the Hon. High Court in the case of Ahmedabad Steel Craft and

Rolling Mills-Vs. State of Gujarat (1985) 0052 STC 0227

"It is apparent that the penal provision is attracted where any person collects any amount by way of tax in contravention of the provisions of section 56.…"

3. The allegation made in the SCN that the Company had collected sales tax on its exempted products manufactured at Goblej are without basis and unsustainable.

4. The SCN proceeds on the entirely erroneous footing that by considering the sales tax element in the pricing of its exempted products, the company has in effect collected sales tax on exempted goods and, therefore, violated the

provisions of Section 56(1) and to apply the same to any case.

5. The question of applying section 56(1) would arise only when there is collection of tax amount.

6. The Company has not only collected any amount towards sales tax on exempted goods but, it is important to note that the way the industry works it does not collect any sales ‘tax, though permissible under law, in case of taxable goods also, but bears the burden itself.

7. In the case of Bhaidas Cursondas V. CTO 35 STC 459, the Hon. Karnataka High Court has held that in order to establish that a dealer has collected sales tax in respect

of a transaction of sale, it must be unmistakably shown that the Maharashtra (1983) 53 STC 104, Delhi Cloth & General Mills Vs. Commissioner 28 STC 331, Tata Engineering and Locomotive Company Ltd and another Vs. the Municipal Corporation of the city of Thane and others AIR 1992 (SC) page 645 at 664.

11. As would be evident from a perusal of the invoices raised by the Company, no sales tax amount has been charged and separately collected by them for the sale of its goods more particularly exempted goods. They have strongly denied having collected any tax amount and section 56(1) cannot be therefore invoked in their case.

12. There is no statutory obligation case on them to disclose to end consumers that their goods are exempt from sales tax.

13. The Company bears the sales tax burden on non-exempted goods.

14. Any increase or decrease in the tax rates may not result in corresponding affect on the price of the company's product. The selling prices are totally market driven and independent of tax rates. The industrial policy and scheme of incentives were intended to create greater employment opportunities and nowhere is it specified that any grant of exemption from sales tax should result in a reduction in selling price.

15. They have also relied upon the judgment of Hon. High Court of Delhi in the case of Modi Rubber Ltd., V. UOI-1978 ELT JI27 wherein it has been held that "If the objective of the Govt. in granting an exemption is to benefit the consumer by the reduction of the selling price of the goods, then the Govt. Notification granting the exemption should itself say so. Such a condition has to be a part of the exemption notification…"

16. Sales Tax Register report mentioned in the SCN are of no utility to them even for the purpose of accounting for sales tax on taxable goods, the relevant account for which is maintained in "Scala". Further

they have been using the jaguar software only since 29.09.2001 and hence any demand based on this software pertaining to periods prior to this date are clearly unsustainable.

17. They are passing certain scheme of entries involving determination of amounts pertaining to the exemption entitlement in a separate set of books of account being maintained as per USGAAP. These transactions recorded in the USGAAP accounts are totally delinked from the actual transactions and have absolutely no relevance for sales tax purposes of for understanding the actual transactions with the parties.

18. They assume that the entire sales in a month are taxable goods and accordingly calculate the total sales tax amount thereon in the USGAAP books of account. Even the USGAAP books of account do not reflect any amount being charged by way of sales tax on exempted goods.

19. Further the USGAAP entries do not consider 'the actual operations and sales of the unit as the above scheme of entries is based on the principle that the tax advantages arising as a result of a tax exemption obtained should be considered to accrue to the business uniformly over the period for which the unit needs to carry on operations under the industrial policy.

20. They have relied on the judgment of Hon. High Court of Gujarat in the case of Cynides Chemicals Co. V. State of Gujarat reported in 2000 (118) STC 228 which held the extent of exemption utilized is to he determined by applying the sales tax rate on the total price charged by the dealer for sale of exempted goods and not by bifurcating a notional sales tax element by applying sub-rule (ii) of Rule 50 which has been so done by the Company.

21. There is no basis whatsoever for alleging that the Company had collected an amount of Rs. 44,74,90,976/- by way of tax in respect of Goblej, manufactured goods sold during the period 01.01.2000 to 24.11.2003. There has beenno

contravention of Section 56 (1) of the GST Act by them as alleged or otherwise and hence no cause arised for penalty levy u/s. 16(1) of the GST Act."

3.18 The assessee also filed affidavit of the distributors and retailers. After considering the written reply and the submissions made on behalf of the assessee, the Sales Tax Officer passed the following order:

"In view of these delineation in pre-paras it is beyond doubt that the Company has violated the specific provision of section 56(1) of the Gujarat Sales Tax Act, 1969 by collecting sales tax on Goblej

manufactured products in spite of the fact that they were eligible of sales tax exemption under entry 69 of Section 49(2) of the G.S.T. Act. 1969.

The Company has not produced books of accounts and therefore on the basis of the details of the year wise exemption availed given by them after calculating working back method in respect of inter state transactions, the unauthorized collection of sales tax in respect of sale of Goblej manufactured product on which by virtue of notification issued under section 49(2), no tax is payable is worked out to the tune of Rs. 12,76,53,533/-. From the above discussion, it is justified that the company has wailfully contravene the provision of section 56(1) of

the G.S.T. Act 1969 the penalty of double the amount collected as sales tax to the tune of Rs. 25,53,07,066/- is required to be imposed upon the Company.

Therefore, I pass the following order.

ORDER

Impose the penalty of Rs. 25,53,07,066/- (Rupees Twenty Five Crores Fifty Three Lacs Seven thousand and sixty six only) under section 46(1)(i) of the Gujarat Sales Tax Act, 1969 as the Company has willful contravened the provisions of section 56(1) of the Act.

This order is issued without prejudice to any other action that may be taken against them under the Gujarat Sales Tax

act, 1969 or any other Rules of the time being force."

3.19 Feeling aggrieved by the assessment order, the assessee preferred First Appeals before the Deputy Commissioner of Commercial Tax which were dismissed by confirming the assessment made by the Sales Tax Officer on the ground that the appeals were without any merit inasmuch as the assessee/appellant collected sales tax from the distributors and retailers and therefore, it was liable to be penalized and consequently, orders of penalty were also upheld in the First Appeals. The Deputy Commissioner dismissed the appeals filed by the assessee after considering the Books of

Accounts maintained by the assessee under two different account systems: one under the USGAAP [Generally Accepted Accounting Principles in USA)and other under IGAAP [Generally Accepted Accounting Principles in India].

3.20 It is not in dispute that the assessee has shown the sales tax component on the basis of the reverse working under the accounting system maintained by the assessee in USGAAP, however, there is no reference to collection of sales tax as such entries made by the assessee was reversed while preparing the accounts in IGAAP.

3.21 Being aggrieved, the appellant-assessee preferred Appeals before the Tribunal by mainly contending that it had not collected sales tax from the distributors, customers and retailers and therefore, there is no reference to collection of sales tax in accounts maintained in IGAAP. It was contended that the assessee was required to maintain Books of Accounts as per IGAAP as well as under USGAAP as the parent company of the assessee is situated in USA where there is no provision for tax exemption as is available in India and therefore, a notional entry of tax was required to be posted in the accounts maintained in USGAAP. It was also contended that no

sales tax was ever collected and therefore, there was no violation of the condition committed by the assessee.

3.22 The Tribunal, after considering the submissions made on behalf of the appellant-Revenue and the assessee, allowed the appeals by setting aside the orders passed by the Assessing Officer as well as the First Appellate Authority by observing as under:

> "64. Simply because the price of the goods during exemption period and the price thereof thereafter is the same, it cannot be inferred that the appellant has collected some amount by way of tax during

exemption period from its customers. It is true that the appellant was not at liberty to collect sale tax from its customers during exemption period. At the same time, the appellant was and is also not bound to collect sale tax from customers after the said period of exemption.

65. When the appellant did not collect tax from its customers before and after exemption period, it may suggest that the appellant has not considered sale tax element as a basic material or basic component of the sale price of the product."

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"74. Apart from the absence of any direct evidence of collection of any amount by way of tax, there is no other material from which it

can be said even impliedly that there is some further material on records (apart from USGAAP entry) leading to an inference that the appellant can be said to have received some amount by way of tax, even on appreciation of materials on records. In other words there is no direct or implied or indirect material on records to suggest that the appellant has collected some amount by way of tax, in some different name or under some different guise during exemption period."

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"76. In view of the above discussion it is emply clear that

A. There is no evidence on record to show that the appellant has collected some amount by way of

tax from distributors, retailers and customers.

B. Sale invoices do not show collection of tax in any manner, in any form, in any name.

C. Sale invoices contain endorsement that the sales are exempted from payment of tax.

D. There are positive affidavits of distributors indicating that there was no agreement between the appellant and the distributor regarding payment of sales tax on the sale of the product in question made by the appellant to the distributor. The affidavits further show that the no sales tax has been paid by the distributors to the appellant.

E. It has also come on record that the appellant has not been collecting tax from the distributor and retailers. This is so when the exemption was available to the appellant. The said practice has been continued by the appellant even after the expiry of the period of exemption.

F. It is true that there is some reference to sales tax collection in USGAAP accounting system of the appellant. The appellant has explained the situation. It would therefore not be possible to say with certainty, on account of books of account, that the appellant has collected some amount by way of tax from the distributors and retailers.

G. The appellant has not shown any amount as collection of tax in the

books of accounts maintained in accordance-with IGAAP system.

H. Even in the income-tax assessment returns, there is no mention about the collection of any amount as tax.

Simply because the sale has been made inclusive of tax, if any, it is difficult to infer that the appellant has collected some amount by way of tax. The statement of Mr. Samir Shah as aforesaid is not indicative of the fact that the appellant has collected some amount by way of tax from the retailers and distributors.

J. Even if we take it that the appellant has sold the goods saying that sale price is inclusive of everything, it would

no be possible to hold from the circumstances of the matter that the appellant has collected some amount by of tax from the distributors and retailers.

77. In above view of the matter, it is extremely difficult for this Tribunal to agree with the arguments advanced by the learned Additional Advocate General to the effect that the appellant has collected certain amounts by way of tax from the distributors and retailers. Therefore the learned assessing officer as well as the learned appellate Officer both have committed an error in appreciation of evidence on record and that this error has resulted into a wrong finding of fact that the appellant has collected some amount by way of tax from the distributors and retailers. This

Tribunal is of the view that the appellant is not proved to have collected any amount by way of tax from the distributors and retailers. The penalty has been levied only on account of the fact that the appellant has collected some amount from the distributors and the retailers by way of tax. Therefore, when the collection of some amount by way of tax is not found to have been proved, there would be no question for levy of penalty against the appellant. Therefore when the appellant is not proved to have collected some amount by way of tax from the distributor and retailers, the orders regarding levy of penalty are not in accordance with law and therefore they are required to be set aside. For foregoing reasons and discussions, this Tribunal is of an opinion that on one hand the

appellant is not proved to have collected some amount by way of tax from the distributor and retailers. On the other hand, the penalty has been imposed only on such a finding. Therefore after considering the facts of the matters, the documents on record, the arguments advanced by Mr. Nanavati, learned senior Advocate for the appellant and Mr. Mihir Joshi learned Additional Advocate General for the respondent and after going through and keeping in mind the principle enunciated in the case laws shown on behalf of both the parties, this Tribunal is of a considered opinion that the appellant is not proved to have collected any amount by way of tax from the distributors or retailers. Consequently the appellant is not liable to pay penalty. Therefore the assessment

orders as well as the appellate orders imposing penalty on the appellant are illegal and hence they are required to be set aside. Hence we pass following order.

ORDER

1. These second appeals are allowed and the penalty orders u/s. 46 read with sec. 56 of the Gujarat Sales Tax Act 1969 as well as the orders in first appeals are set aside.

2. It is hereby held that the appellant is not liable to pay penalty under section 46 read with sec: 56 of the Gujarat Sales Tax Act 1069."

3.23 Being aggrieved by the aforesaid common order passed by the

Tribunal, the appellant-Revenue has preferred these appeals which are admitted on the above mentioned questions of law.

4. Learned advocate Mr. Utkarsh Sharma for the appellant, after going through the impugned common order passed by the Tribunal, submitted that the Tribunal has committed an error to arrive at a finding that there was no evidence regarding collection of tax by the assessee overlooking the relevant facts regarding the invoices issued by the assessee together with the report on sales tax register prepared by "Jaguar" software which clearly showed that the sale price was inclusive of the sales

tax though in the invoice, the assessee has shown 'Nil' against the column of sales tax to escape from penal liability. It was further submitted that the voucher entries in parallel accounts in "Scala" software indicated collection of sales tax relatable to the exempted sales.

4.1 Learned advocate Mr. Sharma invited attention of the Court to the documents placed on record before the Tribunal to submit that the respondent-assessee has collected sales tax on the exempted goods which is evident from the computation of the amount of sales tax on the total sales including the exempted sales shown as sales tax

expenses and by debiting the sales tax payable account which referred sales tax account and further by debiting the deferred sales tax with sales tax incentive account being the notional sales tax exemption. It was pointed out that in the balance lists there is a clear entry of deferred sales tax asset comprising the deferred sales tax accounted by the assessee-company. It was also pointed out from the record that the assessee was showing sales tax amount on exempted sales as sales tax expenses as well as sales tax payable and thereafter, creating a deferred sales tax asset which was to be allocated over a lock-in-period of 10 years and sales tax expenses was

thereafter transferred to Profit and Loss account on debit side and showed as expenses. It was therefore, submitted that the assessee-company considered the sales tax expenses even on the sale of exempted goods which clearly proved that the assessee was collecting sales tax by including the same in the Net/MRP. In support of his submissions, reliance was placed on the decision of the Hon'ble Apex Court in case of **Amrit Banaspati Co. Ltd and anr vs. State of Punjab and anr.** reported in [1992] 085 STC 493.

4.2 Learned advocate Mr. Utkarsh Sharma further referred to and relied upon the decision of Hon'ble Apex Court

in case of **South India Alloy Industries vs. Collector of Central Excise** reported in 1997 (8) SCC 729.

4.3 Learned advocate Mr. Sharma submitted that the Tribunal has clearly erred in relying upon the additional evidence in the Second Appeal, more particularly, the opinion of S.R. Bailiboi & Co., Chartered Accountants and affidavits of Shri D.D.Nageshwar Rao, Shri Sunil Gupta and explanation to entries under USGAAP in the parallel accounts maintained by the assessee, income tax returns and other documents which did not form part of the assessment proceedings or the First Appeal. It was pointed out that such

additional evidence ought not to have been permitted by the Tribunal which were adduced only with a view to plug the loopholes established in the assessment and first appellate proceedings and such documents were not subject to verification or cross-examination and could not have been considered by the Tribunal at the stage of the second appeal. It was further submitted that the finding arrived at by the Tribunal that the respondent-assessee had not collected any amount by way of tax which would mean that no sum was designated as tax and therefore, it cannot be presumed that no amount of tax was collected by the respondent-assessee contrary to the

stand of the Revenue that the amount which was charged by the respondent-assessee was inclusive of the tax as there was no difference in the MRP charged by the respondent-assessee during the period of exemption granted under section 49(2) of the Sales Tax Act and on expiry of such period. It was therefore, submitted that if such a construction adopted by the Tribunal is to be accepted, the provision of section 56 read with section 46 of the Sales Tax Act would be renderred nugatory and any amount collected as tax by the dealer in any name would not be treated as the collection of sales tax. It was therefore, submitted that the Tribunal has committed further

error by accepting the contention of the respondent-assessee that no amount of tax was collected and no further inquiry can be made regarding the amount collected by the assessee for sale of products by treating the part of it towards the collection of sales tax. It was submitted that in the facts of the case, when the assessee itself has maintained two separate accounts under USGAAP and IGAAP and only because under IGAAP, the amount of sales tax collected shown as payable by the assessee was reversed, it cannot be said that the assessee has not collected any sales tax amount on the sale of it products. Merely because in Books of Accounts, respondent-assessee

has reversed the entries pertaining to the sales tax payable account, Deffered Sales Tax Asset account and sales tax expenses account which were created in USGAAP, the respondent-assessee could not have been stated to have not collected sales tax from the end consumers though the exemption on payment of sales tax was available under section 49 (2) of the Sales Tax Act.

4.4 Learned advocate Mr. Sharma therefore, submitted that in the facts of the case, when the assessee itself has maintained two sets of accounts; one showing the component of the sales tax forming part of the amount of sale

price and another by not showing such component and showing the entire amount of sale price without inclusion of the sales tax, such double standards cannot be accepted on the pretext that the assessee was required to show the sales tax component on the exempted sales to its parent company. It was therefore, submitted that the respondent-assessee was liable to pay the sales tax as it was collected from its end users being part of the Net/MRP charge on the sale of the bottles containing soft drink.

4.5 Learned advocate Mr. Sharma also submitted that the Tribunal has committed an error by arriving at a conclusion that the respondent-assessee

did not collect any amount by way of tax and as such, there is clear violation of the provision of section 56 of the Sales Tax Act and Assessing Officer and the First Appellate Officer have rightly computed the amount of tax and penalty payable by the respondent-assessee. It was therefore, prayed that the appeals may be allowed by answering the questions in favour of the Revenue and against the assessee.

5. Per contra, learned advocate Mr. Kunal Nanavati appearing for the respondent-assessee submitted that the Tribunal has arrived at a finding of fact after perusal of the documents produced on record by both the sides and has

accepted the contention of the respondent-assessee that no amount of sales tax was collected by the respondent-assessee and the MRP charged on its products was not having any component of the sales tax. It was further submitted that, the contention on behalf of the Revenue, that there was no difference in the price charged by the assessee during the period of sales tax exemption and on expiry of such period and therefore, the assessee is deemed to have collected sales tax during the period of exemption also, is without any basis because whether Net Price/MRP charged by the respondent-assessee includes sales tax or not is of no consequence as such price is

inclusive price. It was pointed out from the record by learned advocate Mr. Nanavati that in the Books of Accounts maintained by the assessee under the IGAAP, no amount of sales tax was accounted for and the entries made under USGAAP Accounting System were reversed by the assessee in the accounts prepared under IGAAP which was relevant for the purpose of assessment under the Sales Tax Act. It was therefore, submitted that when the respondent-assessee has not shown separately any amount of sales tax on the exempted sales, the price charged by the respondent-assessee cannot be said to be inclusive of sales tax as no tax was collected by the assessee separately as no separate

charges were collected from the buyers either by way of tax or by way of any other charge.

5.1 In support of his submissions reliance was placed on the decision of Karnataka High Court in case of **Spensor & Company vs. The State of Mysore** reported in 1970 (26) STC 283 (Kar).

5.2 Learned advocate Mr. Nanavati also referred to and relied upon the decision of the Hon'ble Apex Court in case of **Deputy Commissioner of Commercial Taxes (Vigilance) vs. Hindustan Liver Limited** reported in (2016) 13 SCC 28 wherein, the Apex Court, in similar facts has held that

MRP stating that it is inclusive of all taxes could be starting point, but would not prove and establish that sales tax has been collected by the seller and same is a question of fact which is to be decided in each case with respect to the facts and material of the case.

5.3 It was further submitted by learned advocate Mr.Nanavati that the Hon'ble Apex Court has also considered the decision relied upon by the Revenue in case of Amrit Banaspati Co. Ltd. (supra) and clarified and distinguished the same.

5.4 It was therefore, submitted that the assessee was entitled to fix Maximum Retail Price of its products by adopting uniform market price throughout India which would not defer in spite of the differences in sales tax payable at the point of sale. It was submitted that it was the business policy of the respondent-assessee and no exception can be taken and uniform market retail price would ensure that the goods from one State do not flow to the other State by distorting the sales. It was therefore, submitted that in similar facts, the Hon'ble Apex Court has clearly held that the respondent-assessee was not liable to pay tax and had not passed on the tax

liability and therefore, the Revenue could not have bifurcated and divided the sale consideration on the basis of any assumption that the sale price received have included the tax and such fiction has no application in the facts of the case.

5.5 It was therefore, submitted that both the questions framed by this Court are squarely answered by the Hon'ble Apex Court in favour of the assessee.

6. Having heard learned advocates for the respective parties and on perusal of the common Judgement and Order passed by the Tribunal together with material placed before the Tribunal, it appears that in the facts of the case, the respondent-

assessee was availing the exemption from payment of sales tax under Entry 69 of section 49(2) of the Sale Tax Act for a period of six years.

7. The Revenue has issued the show-cause notice by making assumption that the sale price fixed by the respondent-assessee to for its product was inclusive of the sales tax amount though the sale of the goods was exempted from payment of sales tax. To arrive at such findings, the Sales Tax Officer has made inquiries and investigation and found that the respondent-assessee was maintaining two separate accounting books; one under USGAAP and another under IGAAP. The respondent-assessee was

using "Jaguar" software for preparation of its invoices and it was also found by the Sales Tax Officer report of sales tax register was also prepared by the said software and entries were passed by the respondent-assessee in accounts maintained under USGAAP regarding the sales tax expenses account, sales tax payable account, sales tax incentive account and deferred sales asset account. The respondent-assessee explained such entries by giving example for the non-exempted finished goods and exempted finished goods as under:

" <u>For Non-Exempted Finished Goods</u>:

(Figures in brackets indicates the account codes)

Sales Tax Expense Account (41 14001)	Dr, 200,000

To Sales Tax Payable Account (2242001/2242002) Cr.200 000

[Being Sales Tax payable on sale of non-exempted finished goods accounted]

For Exempted finished Goods:

II Sales Tax Expense Account (411400).. Dr. 900.000

To Sales Tax Payable Account (2242001/2242002) Cr. 900.000

[Being Sales Tax on the sale of exempted finished goods during the period]

III Sales Tax Payable Account (2242001/2242002) Dr. 1.000.000

To Sales Tax Incentive Account (4114005)… Cr. 1.000.000

[Being Sales Tax Incentive based on Lock-in-Period]

IV Deferred Sales Tax Asset (1491001)…

[Being excess of current year incentive based on lock-in-period over sales tax on exempted goods

8. From the above entries, it is apparent that the respondent-assessee was bifurcating its sale price by showing separately the sales tax component embedded therein as sales tax payable which was later on transferred to sales tax incentive and deferred sales tax account to be spread over overlooking period as per the agreement between the respondent-assessee and the Government to run the plant at Goblej, District-Kaira.

9. However, it is clarified by respondent-assessee that such entries were passed in account only under USGAAP and later, such entries were reversed in the Books of Accounts maintained in IGAAP which

otherwise could have been deleted but, in order to maintain audit trail such entries were reversed and the entire amount of sale consideration was shown as gross sale without any bifurcation between the sale price and the amount of sales tax payable by the respondent-assessee.

10. The assessee has also explained net impact of the entries both in the Books of Accounts maintained USGAAP and in the Books of Accounts maintained under IGAAP before the authorities which was reproduced by the Tribunal in the impugned order as under:

> "1. Incentive is credited in USGAAP books for exempted goods

is on lock-in-period over the incentive actually availed based on actual sales for the period).

2. Deferred Sales Tax Asset for Rs. 100.000 is created. This Deferred Sales Tax Asset is accounted in the books under the assumption that in the future periods the incentive utilization on the actual sale of exempted goods would be greater then the sales tax incentive accounted equally over the lock-in-period. Thus, the above Deferred Sales Tax Asset would be reduced to nil over the lock in period. In case of the unit, this particular account in USGAAP books has become nil in 2003.

To clarify once again these are the entries passed in USGAAp Books.

Q.2 How is the Sales Tax expense accounted in IGAAP books and whether the sales tax incentive on exempted goods and deferred sales tax asset/liability accounts are reflected in IGAAP financial statement?

Reply

As per the general practice followed for the sales tax exempted goods in IGAAP and Sales Tax rules in India no sales tax expense, sales tax liability or deferred sales tax asset/liability is accounted in the books of account.

To conform to the IGAAP practice accounting for sales tax expense and incentive and deferred sales tax asset on exempted goods (i.e.

> entry number II, III and IV above) are reversed at the year end in the books of account to comply with IGAAP. Thus net impact, is that, the actual sales tax expense on the sale of non-exempted finished goods only is accounted for in the statutory books of account maintained as per IGAAP under Indian Companies Act, 1956."

11. From the above, the Tribunal has accepted such explanation and arrived at a finding of fact which is reproduced herein-above to conclude that there is no evidence on record to show that the assessee had collected any amount by way of tax from its distributors, retailers or customers as the sales invoice shows the 'Nil' tax in the sales tax column

along with the fact that there was endorsement on the sales invoice that the sales taxes are exempted from payment of tax.

12. The Tribunal has also referred to the affidavits filed by the distributors indicating that there was no agreement regarding payment of sales tax on the sale of product in question made by the assessee to the distributors and no sales tax was ever paid to the respondent-assessee by any such distributors, retailers or customers. The Tribunal has also found that the respondent-assessee has not collected tax even after the expiry of period of exemption. With regard to two different

accounting systems maintained by the respondent-assessee, the Tribunal has rightly relied upon the accounts maintained in accordance with the IGAAP system which is relevant for the purpose of assessment under the provisions of the Sales Tax Act wherein, no amount was shown as collected as collection of tax by the respondent-assessee and in the returns filed under the provisions of the Sales Tax Act also there was no mention about collection of any amount as tax.

13. The Tribunal has therefore, rightly held that the amount of tax could not have been bifurcated by the Revenue simply because the sales has been inclusive of tax.

14. The finding of fact arrived at by the Tribunal is further fortified by the decision of the Apex Court in case of M/s. Hindustan Liver Limited (supra) wherein, the Apex Court considered the following three questions of law framed by the High Court:

> "5. The High Court to appreciate the controversy framed the following three questions of law:
>
> "(1) Whether the consideration of sales tax in fixing the price of the goods and sale of such goods along with identical goods on which taxes are collected along with the price has not resulted in an implied collection of tax in respect of such sales tax exempted goods?
>
> (2) Whether the assessee who produces identical products, one which is exempt from sales tax and one which sales tax is payable, both being priced on par and sold

off the same shelf, could not lead to the presumption that there is a deemed collection and inclusion of sales tax in the price fixed?

(3) Whether the legend "inclusive of taxes' found on the packets of Dharwad and non-Dharwad tea, the distinction as such being lost on the consumer, whether it cannot be said that taxes are inclined and collected on the tax exempted tea.?

15. The Apex Court thereafter, after considering the facts and submissions made on behalf of the parties, dealt with applicability of the principles stated in case of Amrit Banaspati Co. Ltd and distinguished the said decision in para 18 which reads as under:

"15. First, we shall deal with the applicability of the principle stated in Amrit

Banaspati (supra). The issue raised in the case of Amrit Banaspati (supra) was quite distinct and separate. The question raised was whether the principle of promissory estoppel would apply, for the learned single Judge of the High Court on facts had found that there was sufficient material to direct the State to honour its commitment to refund the sales-tax. The issue involved in the said case relates to refund of tax paid to the State. In this context, this Court observed that refund of tax was made in consequence of excess payment or when it was realized illegally or contrary to law. The refund of tax due and realised in accordance with law cannot be comprehended and no law can be made for refund of tax to a manufacturer realized under the

> statute for the same would be invalid and ultra vires. A promise or an agreement to refund tax which was due under the law and realised in accordance with the law would be a fraud on the Constitution and breach of faith of the people. It is in this context, the aforesaid observations were made in paragraph 11 in the case of Amrit Banaspati (supra).”

16. The Hon’ble Apex Court observed that the reasoning given in case of Amrit Banaspati Co. Ltd, on the contrary, would support the stand of the respondent-assessee who, on the basis of the exemption notification, had set up a new undertaking incurring expenditure as such exemption was granted by way of

valid notification to encourage investment in the backward districts and to overcome initial financial problems for establishing new industries and to recoup an ensure reasonable return on capital expenditure and associated other risks. The Hon'ble Apex Court, therefore, by referring to para 11 in the case of Amrit Banaspati Co. Ltd (supra) held that in the said decision, it was nowhere stipulated that the sale price as fixed must expressly exclude the tax component. The Apex Court has observed that when the exemption is granted, the manufacturer would fix the sale price taking such exemption into account so as to see that both the manufacturer and the consumer would be

benefited. It was therefore, held that "sales tax" is an indirect tax, the purchaser has to pay the same and when the tax is not levied, the purchaser does not pay the same.

17. After considering the facts of the case the Hon'ble Apex Court held as under:

> "23. An assessee is entitled to carry on and conduct business, fix the maximum retail price of its products. In the present case in spite of the multiple units both exempted and non-exempted, the respondent had adopted and followed uniform market price throughout India. The respondent is entitled and can fix a uniform price meant for whole of India. The uniform market price does not

differ in spite of differences in sales-tax payable at the end point, i.e., at the point of sale. This is a matter of business policy and cannot be taken exception to. The respondent has also explained that uniform market retail price at all India level ensures that the goods from one State do not flow to the other State, thereby distorting sales. It avoids and prevents shortages of goods in lower tax area. Uniform pricing cannot be a ground to hold that the respondent was charging sales tax on a sale price of the goods manufactured in the exempt unit. Cost of production in different units of the respondent assessee can vary. Cost of production has various components and is computed with reference to revenue expenditure, rate of

return on the capital expenditure, etc. These are complex commercial and business considerations which cannot be decided with reference to a single factor, i.e., the uniform market retail price. A market retail price stating that it is inclusive of all taxes could be the starting point, but would not prove and establish that the sales-tax has been collected.

24. Reliance placed on T. Stanes & Co. Ltd. (supra) is misconceived. The question involved therein related to interpretation of Section 22 of the Tamil Nadu General Sales-tax Act. The said Section stipulates that no person, who was not a registered dealer would collect any more tax and no registered dealer shall make any such

collection, except in accordance with the provisions of the Act and the rules. The proviso stipulated that the sub-section would not apply to collection of an amount by a registered dealer towards an amount of tax already suffered under the Act in respect to the goods, the sale or purchase price of which was controlled by any law in force. In this background, it was observed that the term 'collected' would include any collection in any manner and purported recoupment as projected and pleaded would be nothing but collection. The contention of the assessee that he was only recouping and was not collecting the tax was rejected. Thus, the factual score is totally different.

In this context, it would be relevant to refer to the decision of the Court in Delhi Cloth and General Mills Co. Ltd. (supra). This case relates to Madhya Pradesh General Sales-tax Act, 1958. While interpreting the words "turnover" and "sale price" in the context of the charging Section it was observed that the liability to pay tax was on the dealer and the purchaser had no liability to pay tax. If a dealer had to pass the tax burden on to the purchaser, he could only do by adding the tax in question to the price of the goods sold. If that be so, the taxes collected by the dealer from the purchaser became a part of the sale price as fixed. Thus, the amount recovered by the dealer was in reality a part of the entire sale consideration. To appreciate the

principle we may usefully reproduce certain passages from the said authority:-

"6. Under Section 4 the liability to pay tax is that of the dealer. The purchaser has no liability to pay tax. There is no provision in the Act from which it can be gathered that the Act imposes any liability on the purchaser to pay the tax imposed on the dealer. If the dealer passes on his tax burden to his purchasers he can only do it by adding the tax in question to the price of the goods sold. In that event the price fixed for the goods including the tax payable becomes the valuable consideration given by the purchasers for the goods purchased by him. It that be so, the tax collected by the dealer from his purchasers becomes a part of the sale price fixed, as defined in Section 2(o). In some of the Sales Tax Acts power has been conferred on the dealers to pass on the incidence of tax to the purchasers subject to certain conditions. Those provisions may call for different consideration. In the Act there is no such provision except Section 7-A

which was introduced into the Act by Madhya Pradesh Act of 1963. That provision would have relevance only in respect of the assessment for the year 1963-1964.

Section 7-A says:

"7-A. Dealer not to pass incidence of tax to agriculturists and horticulturists under certain circumstances.-No dealer shall collect any amount, by way of sales tax or purchase tax, from a person who sells agricultural or horticultural produce grown by himself or grown on any land in which he has an interest, whether as owner, usufructuary mortgagee, tenant or otherwise, when such produce is sold in the form in which it was produced, without being subjected to any physical, chemical or other process for being made fit for consumption save mere dehusking, cleaning, grading or sorting."

7. In these appeals, it is not necessary to examine the relevance of that provision. But that provision does any give only statutory power to collect sales tax as such from any class of

buyers. There is no other provision in the Act which confers such a power on the dealers. Unless the price of an article is controlled, it is always open to the buyer and the seller to agree upon the price to be payable. While doing so it is open to the dealer to include in the price the tax payable by him to the Government. If he does so, he cannot be said to be collecting the tax payable by him from his buyers. The levy and collection of tax is regulated by law and not by contract. So long as there is no law empowering the dealer to collect tax from his buyer or seller, there is no legal basis for saying that the dealer is entitled to collect the tax payable by him from his buyer or seller. Whatever collection that may be made by the dealer from his customers the same can only be considered as valuable consideration for the goods sold.

* * *

10. From all these observations, it is clear that when the seller passes on his tax liability to the buyer, the amount recovered by the dealer is really part of the entire consideration paid by

the buyer and the distinction between the two amounts, — tax and price — losses all significance."

The relevance of this decision is that it holds that in a given case the tax component may form a part of the sale price and cannot be treated as a separate component.

In the case at hand, when the respondent was not liable to pay tax and had not passed on the tax liability, we do not think, sale consideration received should be bifurcated and divided on the basis of any assumption that the sale price received must have included the tax. This fiction has no application in the present case. There is neither such principle nor any precept in law.

In any case the finding of fact is to the contrary."

18. In view of the above dictum of law and considering the facts of the case, the only ground on which the penalty was levied under section 46 read with section 56(1) of the Sales Tax Act was that the price while fixed by the respondent-assessee was inclusive of tax which was required to be bifurcated and thereby alleging that the respondent-assessee had collected the tax in spite of availing exemption would not stand as rightly held by the Tribunal by discarding submissions made by the Revenue to the effect that the assessee had collected the amount by way of tax from the distributors and retailers. We

are therefore, in complete agreement with the reasons assigned by the Tribunal holding that the Assessing Officer and the Appellate Authority had committed an error in appreciation of the evidence on record resulting into wrong finding that the assessee had collected some amount by way of tax from the distributors and retailers.

19. We are fortunate to have the benefit of decision of the Hon'ble Apex Court in case of Hindustan Lever Limited (supra) which was not available at the relevant time before the Tribunal and therefore, in the facts of the case, we are of the opinion that the Tribunal cannot be said to have committed any error by holding

that the respondent-assessee had not collected any amount by way of tax and therefore, the provision of section 56 of the Sales Tax Act could not be attracted in the facts of the case. Both the questions are therefore, answered in favour for the assessee and against the Revenue. The appeals are therefore, being devoid of any merit and are accordingly dismissed.

(BHARGAV D. KARIA, J)

(PRANAV TRIVEDI,J)

JYOTI V. JANI