IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

SALES TAX REFERENCE NO. 20 OF 2010
IN
REFERENCE APPLICATION NO. 02 OF 2003

The Commissioner of Sales Tax,
Maharashtra State,
8th Floor, Vikrikar Bhavan,
Sardar Balwant Singh Dhodi Marg,
Mazgaon, Mumbai-400 010. … Applicant

Versus

M/s. Associated Cement Company Limited,
Cement House, 1st floor, 121, Maharishi Karve Road, Mumbai – 400 020. … Respondent

WITH
SALES TAX REFERENCE NO. 51 OF 2010
IN
REFERENCE APPLICATION NO. 180 OF 2008

The Addl. Commissioner of Sales Tax (VAT)3
Mumbai, 8th Floor, Vikrikar Bhavan, Sardar Balwantsingh Dhodi Marg, Mazgaon, Mumbai – 400 010 … Applicant

Versus

M/s. Associated Cement Co. Ltd. ("ACC Ltd.")
Cement House, First Floor, 121, Maharashi Karve Road, Mumbai – 400 020. … Respondent

WITH
SALES TAX REFERENCE NO. 22 OF 2011
IN
REFERENCE APPLICATION NO. 23 OF 2009

The Addl. Commissioner of Sales Tax (VAT)3
Mumbai, 8th Floor, Vikrikar Bhavan, Sardar Balwantsingh Dhodi Marg, Mazgaon, Mumbai – 400 010 … Applicant

Versus

M/s. Associated Cement Co. Ltd. ("ACC Ltd.")
Cement House, First Floor, 121, Maharashi Karve Road, Mumbai – 400 020. … Respondent

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Ms. Jyoti Chavan, Addl. G.P. a/w Mr. Himanshu Takke, A.G.P., for the Applicant/s.

Mr. P. C. Joshi a/w Mr. Piyush Shah, for Respondent/s.

CORAM : M.S. Sonak &
Jitendra Jain, JJ.
RESERVED ON : 31 July 2025
PRONOUNCED ON : 05 August 2025

JUDGMENT : *(Per M. S. Sonak, J.)*

1. The learned counsel for the parties submit that a common order can dispose of these three References, since the issue involved is the same. However, they point out that the References pertain to different years and therefore, were

instituted separately. Sales Tax Reference ("STR") No. 20 of 2010 is taken as the lead Reference.

2. The STR No. 20 of 2010 arises out of the Judgment and Order dated 11 October 2002 in Appeal No. 170 of 1997, made by the Maharashtra Sales Tax Tribunal ("the Tribunal"). The Reference Application No. 2 of 2003 was disposed of by the Special Bench by Judgment and Order dated 19 November 2005, referring the following questions to this Court for its decision:

(i) *"Whether on the facts and in the circumstances of the case and on true and correct interpretation of Section 15A of the Bombay Sales Tax, 1959, the Tribunal was justified in law in holding that section 15A is not a changing section and does not create any levy but merely declares the rate of tax?*

(ii) *Whether on the facts and true interpretation of the case and on true interpretation of this contract for sale of packed cement, whether the Tribunal was justified in holding that there is an express and independent contract for sale of HDPE bags in which cement was sold?"*

3. The Respondent M/s. Associated Cement Company Limited ("ACCL") is a manufacturer of cement, with factories located across the country, including at Chandrapur in the state of Maharashtra. For the period 01 April 1991 to 31

March 1992, ACCL was assessed by the Assistant Commissioner of Sales Tax, Churchgate Division, Mumbai, vide order dated 31 March 1995. In this order, the Assessing Authority held that ACCL had not effected the separate activity of reselling of packing material but had used the entire packing material in the process of manufacture of cement. On this ground, the Assessing Authority disallowed the ACCL's claim of resales.

4. ACCL appealed against the order dated 31 March 1995 to the Deputy Commissioner of Sales Tax (Appeals), Mumbai. This Appeal was allowed, and the ACCL was granted a refund of Rs. 11,39,288/- on account of the claim of resale of the HDPE bags in which the manufactured cement was sold. The Deputy Commissioner's (Appeals) order was revised by the Additional Commissioner of Sales Tax, Mumbai Zone, vide order dated 31 March 1997. The relief granted by the Deputy Commissioner (Appeals) on account of the resale claim concerning HDPE bags was withdrawn. Certain other benefits given by the First Appellate Authority were also withdrawn, and consequently, a demand of Rs. 1,81,26,495/- was made against ACCL.

5. Aggrieved by the revisional order dated 31 March 1997, ACCL instituted Appeal No. 170 of 1997 before the Tribunal. The Second Bench of the Tribunal referred the matter to the Special Bench to consider whether ACCL was entitled to a resale claim in respect of packing material, i.e., HDPE bags,

which were used to pack the cement manufactured by ACCL. The Special Bench, by the order dated 11 October 2002, allowed the Appeal, set aside the revisional order dated 31 March 1997 and held ACCL to be entitled to a resale claim of HDPE bags.

6. Aggrieved by the above order, the Revenue applied for reference vide Reference Application No.2 of 2003. The Reference Application No.2 of 2003 was disposed of by the Special Bench vide order dated 19 November 2005, referring the above two questions for the decision of this Court.

7. We have heard Ms. Jyoti Chavan, Addl. G.P. along with Mr. Himanshu Takke, A.G.P., for the Appellant and Mr. P. C. Joshi along with Mr. Piyush Shah, for Respondent-ACCL.

8. Ms. Chavan argued that cement cannot be sold without appropriate packing material. She stated that no separate charge was made for the HDPE bags, which are the packing material. There was no separate sale, either expressed or implied, of the packing material. Therefore, even after applying the guidelines from the decision of the Hon'ble Supreme Court in the case of Raj Sheel and Ors. V/s. State of Andhra Pradesh and Ors., the Tribunal was not justified in ruling that there was an explicit and independent contract for the sale of HDPE bags in which the cement was sold.

9. Ms. Chavan also submitted that Section 15A of the Bombay Sales Tax Act, 1959, was a charging provision and

not a provision merely declaring the rate of tax. She submitted that the title to the Section or the marginal note is never conclusive in such matters. By referring to the actual provisions, she contended that the provision was a charging provision and not a provision dealing with the rate of tax.

10. Mr. Joshi, the learned counsel for ACCL, contested the above contentions. He submitted that the Tribunal, after detailed consideration of the decision in ***Raj Sheel*** (supra) and applying its ratio to the facts borne out from the record, has correctly concluded that there was an express and independent contract for the sale of HDPE bags in which ACCL sold the cement. He submitted that since this conclusion was backed by overwhelming evidence on record, this Court should consider endorsing the view expressed by the Tribunal in its Judgment and Order dated 11 October 2002, disposing of Appeal No. 177 of 1997.

11. Mr. Joshi submitted that Section 15A was expressly stated as a Section dealing with rates of taxes. Besides, he submitted that this Section was similar to Section 6-C of the Andhra Pradesh General Sales Tax Act, which was analysed by the Hon'ble Supreme Court in ***Raj Sheel*** (supra) and by the Co-ordinate Benches of this Court, in the case of ***Commissioner of Sales Tax, Maharashtra State, Mumbai V/s. Indian Dyestuff and Chemical Manufacturing Company***[1] *and* ***Shantilal Kunvarji & Co. V/s. State of Maharashtra***[2]***.***

[1] [2010] 30 VST 286 (Bom)

[2] 1995 (99) STC 173

12. Accordingly, Mr. Joshi submitted that both the referred questions may be answered against the Revenue and in favour of the Assessee, i.e. ACCL, in the facts and circumstances of the present case.

13. The rival contentions now fall for our determination.

14. In this Reference, we propose to consider the second question concerning the express and independent contract for the sale of HDPE bags in which ACCL sold its cement first. This is because we verily believe that if we decide this question against the Revenue and in favour of ACCL, then there would be no necessity to determine the first question relating to the interpretation of Section 15A of the Bombay Sales Tax Act, 1959.

15. The leading authority for determining whether a transaction of sale may consist of a sale of the product and a separate sale of the packing material housing the product, with respective sale considerations for the product and the packing material separately, is the decision of the Hon'ble Supreme Court in the case of ***Raj Sheel*** (supra) upon which reliance was placed by both the parties.

16. In ***Raj Sheel*** (supra) the Hon'ble Supreme Court has held that a transaction of sale may consist of a sale of the product and a separate sale of the container housing the product with respective sale considerations for the product and the container separately; or it may consist of a sale of the

product and a sale of the container but both sales being conceived of as integrated components of a single sale transaction; or, what may yet be a third case, it may consist of a sale of the product with the transfer of the container without any sale consideration therefor. The question in every case will be a question of fact as to what the nature and ingredients of the sale are.

17. The Hon'ble Supreme Court further held that it is not right in law to pick 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. The problem always requires factual investigation into the nature and ingredients of the transaction.

18. The Hon'ble Supreme Court further observed that it was perfectly plain that the issue as to whether the packing material has been sold or merely transferred without consideration depends on the contract between the parties. The fact that the packing material is of insignificant value in relation to the value of the contents may imply that there was no intention to sell the packing material. In a case where the packing material is an independent commodity and the packing material as well as the contents are sold independently, the packing material is liable to tax on its own footing.

19. The Hon'ble Supreme Court explained that whether a transaction for sale of packing material is an independent transaction will depend upon several factors, some of them being: (1) the packing material is a commodity having its own identity and is separately classified; (2) there is no change, chemical or physical, in the packing either at the time of

packing or at the time of using the contents; (3) the packing is capable of being reused after the contents have been consumed; (4) the packing is used for convenience of transport and the quantity of the goods as such is not dependent on packing; (5) the mere fact that the consideration for the packing is merged with the consideration for the product would not make the sale of packing an integrated part of the sale of the product.

20. The Tribunal, in its impugned Judgment and Order dated 11 October 2002 in Appeal No. 170 of 1997, after taking cognisance of the law laid down in ***Raj Sheel*** (supra) and upon a detailed consideration of the facts as borne out from the record, summarized the factual position as follows:-

(i) Dealer is a manufacturer of cement. The dealer is having one manufacturing unit at Chandrapur in Maharashtra State. Cement manufactured is either packed in HDPE bags, Jute bays or paper bags. On specific bulk orders, it is also supplied through specially built tankers.

(ii) Most of the sales are to stockists appointed by the company. It is not sold in retail to individual retailers or customers except consumers like Mumbai Municipal Corporation or Public Works Department.

(iii) Sale bills are issued in respect of each and every sale. In the sale bills issued, packing charges are

separately shown. HDPE bags are purchased from registered dealers. The resale claims made exclusively for HDPE bags. No resale claim is made for packing material such as Jute bags and paper bags.

(iv) Price of bags (HDPE) and cement are separately fixed. Price of bags is fixed at Mumbai after taking into consideration several factors such as investment made, overhead expenses and profit. Prices of cement are fixed depending upon demand and supply position, during a particular period and the competitors' price in the region.

(v) When an order is placed by the stockist, he is informed of the separate consideration which he will have to pay for HDPE bags and for cement. The transaction of supply of HDPE bags for a particular consideration is to the knowledge of the purchaser.

(vi) Physical transfer of property to the stockist in HDPE bags for consideration takes place when packed cement is sold.

(vii) Consideration charged for HDPE bags is not static. It varies depending upon the procurement price of the bags. The price of HDPE bags to be charged is fixed every month and communicated to the required marketing centers, who in turn communicate the same to the stockist at the time

of placing of orders. On number of occasions the price of cement has remained same but prices of HDPE bags have changed. On certain occasions price of cement is changed but price of HDPE bags remain the same.

(viii) Type of packing material is used for which the stockists' purchases have preference.

(ix) In respect of Municipalities, semi-Government, institutions etc., when orders are placed, they specifically mention the description of the packing material in which the cement should be supplied.

(x) The company has treated them (i.e. HDPE bags) as a separate trading activity. Huge investment is made in purchasing bags. The company is considering the profit margin also while fixing the consideration to be charged for packing material.

(xi) The trial balance give details of purchase turnover of HDPE bags and the receipt against packing charges, which would disclose that profit is made while fixing the price. Certificate from the Chartered Accountant given on the basis of the books maintained.

(xii) The percentage of the cost of packing with the sale price is about 11 per cent."

21. The Revenue was unable to point out any factors or any factual material based upon which the above findings

summarised by the Tribunal could be held as vitiated by perversity or even otherwise. Ms. Chavan, however, argued that in this case, no sale of cement was possible without the packing material, and not sufficient emphasis was laid on this circumstance by the Tribunal. She also pointed out that there was no written agreement for the sale of the packing material, i.e. the HDPE bags, and even this aspect has not been sufficiently considered by the Tribunal.

22. In ***Raj Sheel*** (supra), the Hon'ble Supreme Court has explained that the issue whether there was an agreement to sell the packing materials is a pure question of fact and such a question cannot be decided on fiction or surmises. The Hon'ble Supreme Court also held that the burden lies on the Revenue to prove that a turnover is liable to tax. No doubt, the Revenue can require the Assessee to produce the relevant material and where such material is not produced, the Revenue can also draw an adverse inference. The Hon'ble Supreme Court also held that the parties could rely on oral statements, accounts and other documents, personal inquiries and relevant circumstances such as the nature and the purpose of the packing materials used.

23. The Revenue, in this case, produced no material to discharge the burden which the law had placed upon it. The Tribunal has recorded that the ACCL produced certificates received from stockists/customers, a set of sale bills issued by ACCL, copies of trial balance showing separate account codes

for the sale of cement and an audited certificate certifying the separate sale of packing materials. The Tribunal has also referred to the statement showing the price of packing compared with the cement price with supporting invoices, purchase orders received from customers, registration certificates showing packing as traded goods, packing monthly price circulars, statement showing behavior of the price of cement vis-à-vis the packing materials and other materials, which, the Tribunal held was sufficient to conclude an implied sale. The Tribunal was also conscious of the overarching principle that the onus was on the Revenue. Further, there was no case made out for drawing any adverse inference against the ACCL.

24. The Tribunal evaluated the facts on record and, after applying the principles laid down in ***Raj Sheel*** (supra), held in favour of the ACCL. Accordingly, we are satisfied that the Tribunal's findings of fact are not vitiated by any perversity or even lack of sufficient material to sustain the same. The Tribunal has considered in detail the law and the principles laid down by the Hon'ble Supreme Court in ***Raj Sheel*** (supra) and upon applying such law and the principles to the facts as borne from the record, the Tribunal has correctly concluded that in the facts and circumstances of the present case, the ACCL was involved in the sale of the packing material i.e. the HDPE bags separately and independently of the packed product i.e. cement.

25. The circumstances mentioned by Ms Chavan, even if accepted as correct, are by no means enough or conclusive to overturn the findings of fact or the conclusion reached by the Tribunal. In such cases, the combined effect of several relevant factors must be considered, and it is not legally correct to focus only on one element to the exclusion of others and to draw a conclusion about the nature of the transaction. It is not as if the Tribunal was not conscious of the factors now urged by Ms Chavan.

26. In this case, the material on record evaluated by the Tribunal shows that HDPE bags used to pack the cement were a distinct commodity with its own identity and were classified separately; there was no chemical or physical change in the packing either at the time of packing or at the time of use of the contents; the packing is capable of being reused after the contents have been consumed; there was evidence of reuse or resale, which was not challenged by the revenue. The HDPE bags were used to pack the cement for ease of transportation and convenience. A range of packing products was available, out of which the ACCL chose the HDPE bags. The Hon'ble Supreme Court has held that the mere fact that the consideration for the packing is merged with the consideration for the product does not make the sale of packing an integral part of the sale of the product.

27. The Hon'ble Supreme Court has clarified that the question whether there was an agreement to sell the packing materials is purely factual, and such a question cannot be determined based on fiction or conjecture. The Hon'ble Supreme Court also held that the burden rests on the Revenue to prove that a turnover is subject to tax. Therefore, after examining the material on record and considering the factors highlighted by Ms Chavan, we see no reason to overturn the findings of fact or the conclusion reached by the Tribunal in these cases.

28. Accordingly, for all the above reasons, in the facts and circumstances of the present case, we answer the second question referred for our determination against the Revenue and in favour of the Assessee, i.e. ACCL,

29. Regarding the first question referred for our decision, we believe that no ruling is necessary at this point, as we have upheld the Tribunal's findings that there was an independent and separate contract for the sale of HDPE bags in which the cement was sold. The first question might have had relevance if we had answered the second question, which was referred to us, favouring the Revenue and opposing the Assessee.

30. Still, we note that the provisions of Section 15A of the Bombay Sales Tax Act, relevant for our purposes, read as follows: -

"Section 15A. Rate of tax on packing materials

> *Where any goods are sold or purchased and such goods are packed in any materials, the tax shall be leviable on the sale or purchase of such packing materials (whether such materials are separately charged for or not) at the same rate of tax (if any) as is set out in the relevant Schedule, against such goods packed."*

31. The title to Section 15A refers to the rate of tax on packing materials. However, it is well settled that such a title is never conclusive but, at the highest, may be used as an aid to interpret an ambiguous provision. The Tribunal has referred to provisions similar to Section 15A of the Bombay Sales Tax Act, in legislations enacted by other States like Gujarat, Karnataka, Kerala, Andhra Pradesh, Tamil Nadu, Uttar Pradesh, etc. It has been noted that, except in Section 15A of the Bombay Sales Tax Act, similar Sections in other State Legislations invariably open with a non-obstante clause like "notwithstanding…".

32. Section 6-C of the Andhra Pradesh General Sales Tax Act, 1957, fell for consideration in ***Raj Sheel*** (supra) and in the context of the said provision, the Hon'ble Supreme Court observed as follows:-

> *"Turning to section 6-C of the Act, it seems to envisage a case where it is the goods which are sold and there is no actual sale of the packing material. The section provides by legal fiction that the packing material shall be deemed to have been sold along with the goods. In other words, although there is no sale of the packing material,*

it will be deemed that there is such a sale. In that event, the section declares, the tax will be leviable on such deemed sale of the packing material at the rate of tax applicable to the sale of the goods themselves. It is difficult to comprehend the need for such a provision. It can at best be regarded as a provision by way of clarification of an existing legal situation. 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 none the less 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. No matter what may be the component which enters into such price, the parties understand between them that the purchaser is paying the price of the goods. Section 6-C merely clarifies and explains that the components which have entered into determining the price of the goods cannot be treated separately from the goods themselves, and that no account was in fact taken of the packing material when the transaction took place, and that if such account must be taken then the same rate must be applied to the packing material as is

> *applicable to the goods themselves. We find it difficult to accept the contention of the appellants that a rate applicable to the packing material in the Schedule should be applied to the sale of such packing material in a case under section 6-C, when in fact there was no such sale of packing material and it is only by legal fiction, and for a limited purpose, that such sale can be contemplated. In the circumstances, no question arises of section 6-C being constitutionally discriminatory, and therefore invalid."*

33. We do not wish to pursue the determination of the first question referred to us on the interpretation of Section 15A, because, given our conclusion on the second question referred to us, the issue of interpretation of Section 15A is rendered only academic. Once it is held that, in the facts and circumstances of the present case, there was an independent and separate sale of the HDPE bags in which the cement was sold, there is no question of levying any sales tax at the same rate as that levied on cement. Therefore, the issue of whether Section 15A is a charging Section or merely declares the rate of tax becomes academic and need not be answered in this Reference.

34. For all the above reasons, we dispose of this Reference by answering the second question referred to us against the Revenue and in favour of the Assessee. Given our answer to the second question, we believe that the determination of the first question referred to us is only academic and does not need to be answered by us in the facts and circumstances of the present case. The first question is, therefore, left open to

be decided in an appropriate case where the facts and circumstances so warrant. The Sales Tax Reference No. 20 of 2010 is disposed of in the above terms without any costs order.

35. The Sales Tax Reference Nos. 51 of 2010 and 22 of 2011, involve the very same issues as were involved in the Sales Tax Reference No.20 of 2010, except that they relate to different Assessment Years. Accordingly, by following the above reasoning, we dispose of Sales Tax Reference Nos. 51 of 2010 and 22 of 2011 on the same terms, and again, without any order for costs.

36. All the References are disposed of in the above terms without any order for costs.

(Jitendra Jain, J) **(M.S. Sonak, J)**