

M/S. BALKRISHNA HATCHERIES

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v

CLARIFICATION & ADVANCE RULING AUTHORITY

SEPTEMBER 11, 2006

[ASHOK BHAN AND MARKANDEY KATJU, JJ.]

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Karnataka Sales Tax Act, 1957—Section 5(3)(A), Second Schedule, Part F Entry 8(viii)—Dressed chicken sold in polythene bag—Closed by stapling/crimping or by rubber band—Sales tax—Levy of—Held: In stapling/crimping, staples and pins could be removed by the customer without breaking anything—As such dressed chicken are not sold in sealed containers and hence, exempted from sales tax.

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The question which arose for consideration in these appeals was whether dressed chicken sold in a polythene bag closed by stapling/crimping and twisting an aluminium wire around the crimp, and also closed by a rubber band could be considered to be a sale in a sealed container to make it liable to sales tax under section 5(3)(a) of Karnataka Sales Tax Act, 1957.

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Appellant-assessee contended that 'sealed container' is one where access to the contents cannot be had without breaking the fastening on the container or the container itself and where the container is hermetically sealed; that the staple or crimp wire used for closing polythene bag in which it sells the dressed chicken, can be removed by opening the two closed ends of the staple/crimp wire, without breaking and damaging the polythene bag; that stapling or crimping is done only to facilitate easy carrying and to ensure that the dressed chicken does not slip out of the plastic bag; that stapling or crimping does not make the polythene bag airtight or watertight; and that the goods sold in a polythene bag which is merely stapled or crimped cannot be said to be sold in a sealed container.

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Allowing the appeals, the Court

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HELD: 1.1. The container is considered to be a sealed container if it is closed in a manner that it is not possible to access the contents or remove the contents without breaking either the container or the fastening if it is closed.

[870-G]

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A 1.2. Undoing cannot amount to breaking. When a staple is applied, the wire can be removed by straightening the two bent ends without breaking the wire or tearing the paper. Hence, it cannot be accepted that undoing the fastening amounts to breaking the fastening. In cases of both stapling and crimping the staples and pins can be removed by the customer without breaking anything. Hence, the dressed chicken are not sold in sealed
 B containers and thus, are exempt from sales tax. Order of High Court as well as Authority for Clarification and Advance Ruling are set aside.

[871-C, D; 872-C]

C *The Martand Dairy & Farm v. The Union of India and Ors.*, [1975] 4 SCC 313; *Commissioner of Sales Tax v. National Chikki Mart*, 39 (1977) STC 447 and *Nanjundeswara Mart v. State of Karnataka*, 84 (1992) STC 534, referred to.

Commissioner of Sales Tax, Delhi v. Pop Corn, 49 (1982) STC 336, approved.

D *Commissioner of Sales Tax, U.P. v. G.G. Industries*, 21 (1968) STC 63, relied on.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7623 of 2005.

E From the Judgment and Order dated 16.1.2004 of the High Court of Karnataka at Bangalore in STA. No. 74 of 2003.

WITH

C.A. No. 7624 of 2005.

F R.F. Nariman, Pratap Venugopal, Surekha Raman, Harshad V. Hameed and Dileep P. For M/s. K.J. John & Co. for the Appellant.

Sanjay R. Hegde for the Respondent.

The Judgment of the Court was delivered by

MARKANDEY KATJU, J.

G C.A. No. 7623/2005

This appeal has been filed against the impugned Judgment and Final Order of the Karnataka High Court dated 16.1.2004 in STA No.74 of 2003 under Section 24(1) of the Karnataka Sales Tax Act, 1957.

H Heard Shri R.F. Nariman, learned Senior counsel for the appellant and

Shri Sanjay R. Hegde, learned counsel for the respondent.

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The appellant is engaged in poultry farming. It sells dressed chicken. The term "dressed" with reference to chicken means chicken which is bled, scalded, feathered, boned and freezed. The dressed chicken is sold by the appellant in polythene bags. The polythene bags are closed either by stapling or by crimping and fastening. Stapling is done by using ordinary stapler. Crimping and fastening (by twisting an aluminium wire around the crimped portion) is done by using a crimping machine. The name and address of the appellant and the description of the contents are printed on the polythene bag.

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Entry 22 of the Fifth Schedule to the Karnataka Sales Tax Act, 1957 (hereinafter referred to as "the Act") exempts from tax "eggs and meat including flesh of poultry except when sold in sealed containers." Correspondingly, Entry 8(viii) of Part-F of Second Schedule subjects "meat and dressed chicken sold in sealed containers" to tax under Section 5(3)(a) of the Act, at 9% from 1.6.2003.

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The appellant contends that only where a container is hermetically sealed, that is, made airtight and watertight, can it be said to be a sealed container. Alternatively, it is submitted that 'sealed container' is one where access to the contents cannot be had without breaking the fastening on the container or the container itself. The appellant alleges that the staple or crimp wire used for closing the polythene bag in which it sells the dressed chicken, can be removed by opening the two closed ends of the staple/crimp wire, without breaking them and without damaging the polythene bag which can be opened and the dressed chicken can be taken out without tearing or damaging the plastic bag. It is contended that stapling or crimping is done only to facilitate easy carrying and to ensure that the dressed chicken does not slip out of the plastic bag. Stapling or crimping does not make the polythene bag airtight or watertight. According to the appellant, when goods are sold in a polythene bag which is merely stapled or crimped and where the contents can be removed by merely opening the staple/crimp wire without tearing the polythene bag and without breaking the staple/crimp wire, the container cannot be considered to be a sealed container.

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Since the Department was expressing a view that the sale by appellant attracted sales tax, the appellant made an application to the Authority for Clarification and Advance Ruling under Section 4 of the Act. The said Authority after hearing, passed an order dated 22.9.2003 holding that sale of 'dressed

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A chicken' in polythene bags closed by either stapling/crimping is covered under Entry 8(viii) of Part-F of Second Schedule as it is 'sale of dressed chicken in sealed containers.'

The aforesaid order of the Authority was challenged in the appeal under Section 24(1) before the Karnataka High Court on which the impugned judgment was given.

The short question in this case is whether dressed chicken when sold in a polythene bag which is closed by a staple or closed by crimping and twisting an aluminium wire around the crimp can be considered to be a sale in a sealed container. If it is sale in a sealed container, it is not exempt from Sales Tax, but if it is not, it is exempt.

The term 'sealed container' was considered by this Court in *Commissioner of Sales Tax, U.P. v. G.G. Industries*, 21 (1968) STC 63. The question that arose for consideration in that case was whether sale of confectionery (chocolates, lollipops, etc.) packed in tins and card box and closed by the use of cellophane paper amounted to sale in a sealed container. The Allahabad High Court held that the sale was not in a sealed container, accepting the contention of the assessee that the word "sealed" meant "bearing the impression of a signet in wax etc. as evidence or guarantee of authenticity, or fastened with a seal so close that access to the contents is impossible without breaking the fastening." This Court did not agree. Reversing the decision of the Allahabad High Court, this Court held thus :

"The learned counsel for the Appellant (Department) contends that the expression 'sealed container' means a container which is so closed that access (to the contents) is impossible without breaking the 'fastening'. This is one of the meanings given to the word 'sealed' in the Shorter Oxford English Dictionary. We are of the opinion that his contention must be accepted..... There are four ways of selling confectionery : (1) in sealed tins; (2) in sealed card boxes or bottles; (3) in non-sealed card boxes or bottles; and (4) loose. According to the learned counsel for the respondent the only category which does not enjoy the exemption given by the notification is the first category, i.e., sale in sealed tins. But it is difficult to appreciate why the authority issuing the notification should distinguish between category one and category two. In the case of a sealed tin it has to be cut; in the case of a sealed card box, the covering has to be torn. A sealed tin may

or may not be hermetically sealed. Therefore, the fact that a sealed tin may be air tight and a sealed card box is never really air tight does not assist us in deciding the point it seems to us that this packet would fall within the expression 'sealed container' occurring in notification.”

This Court in *The Martand Dairy & Farm v. The Union of India and Ors.*, [1975] 4 SCC 313, held:

“Sealed container” merely means a container which is “so closed that access ‘to the contents’ is impossible *without breaking the fastening*”. The expression ‘seal’ in this context does not involve an affixture of the seal of the seller such as impressing a signet in wax, etc., as evidence or guarantee of authenticity. An article may be regarded as put in sealed containers if it is closed securely in any vessel or container by any kind of fastening or covering that *must be broken before access can be obtained to what is packed inside*”

In *Commissioner of Sales Tax v. National Chikki Mart*, 39 (1977) STC 447, the Bombay High Court following the decision in *G.G. Industries* (supra) held:

“To determine whether a container is sealed or not, it is not relevant to consider whether to break the covering any instrument or knife is needed or whether it could be done with bare hands or fingers. What is really to be considered is whether the contents of the container could be got at or whether access could be had to them *without in any manner breaking any portion of the cover*. It is not necessary for a container to be a sealed container that to get access to its contents the container or cover has to be broken by removing the fastening although it would be the most common method of opening a sealed container. All that is necessary for a container to be a sealed container is that access cannot be had to its contents without breaking the fastening or some portion of the container.”

In *Nanjundeswara Mart v. State of Karnataka*, 84 (1992) STC 534, a Division Bench of Karnataka High Court considered whether sale of Instant Idli Mix, Instant Vada Mix, Instant Gulab Jamoon Mix packed in polythene bags stitched at the openings were taxable as food packed in sealed containers. The Karnataka High Court by applying the definition laid down by this Court

A in *G.G. Industries* (Supra) that container which is “so closed that access (to the contents) is impossible without breaking the fastening is a sealed container,” held that as the bag in which the goods were sold stitched at the openings, and as it was impossible to have access to the contents without breaking the fastening, the goods were to be considered as sold in sealed containers.

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 On the other hand, learned counsel for the appellant placed strong reliance on the decision of the Delhi High Court in *Commissioner of Sales Tax, Delhi v. Pop Corn*, 49 (1982) STC 336, wherein the decision in *G.G. Industries* (Supra) was distinguished. The Delhi High Court considered the question whether Pop Corn sold in loosely stapled polythene bags can be considered as sale in sealed containers. Distinguishing the decision in *G.G. Industries* (Supra), the Delhi High Court observed thus :

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 “In the present case, the finding of the Financial Commissioner is that the stapling was loose. A polythene bag containing pop corns loosely stapled was produced before us an example of the type of stapling that had been done by this dealer during the relevant period. Mr. Chawla, for the Commissioner of Sales Tax, does not dispute this sample, but submits that normally a person would break the stapling even in such a case in order to extract the pop corn easily.

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 Mr. Chawla may be correct and it is probable that a person greedily anxious to get at the contents would break the staples to do so, yet it is possible to get at the pop corn without breaking the staples.

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 As such, in the facts and circumstances of this case, we feel that the stapled polythene bags are not sealed containers, especially as the Supreme Court in *G.G. Industries* (1968) 21 STC 63 SC held that *access should be impossible without breaking the fastening.*”

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 From a reading of the aforesaid decisions it appears that the law is well settled that the container is considered to be a sealed container if it is closed in a manner that it is not possible to access the contents or remove the contents without breaking either the container or the fastening if it is closed.

The Karnataka High Court in para 9 of the impugned judgment has observed :

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 “Breaking the container or breaking the fastening’ does not

necessarily mean cutting or breaking the container or the fastening to pieces. 'Breaking' refers to parting, dividing, tearing, rupturing or severing, either wholly or partially, by applying a strain or force. For Example, a staple which is 'fastening' on the container is 'broken' not only when it is severed or cut into pieces, but even when the two closed ends are 'opened' or 'parted' and it is pulled out. Similarly if a crimped bag is closed by twisting an aluminium wire or by putting an elastic band over the crimped portion, the removal of such fastening would amount to breaking the fastening. Anything done to the fastening which has the effect of undoing the fastening will be 'breaking the fastening'."

We regret we are unable to agree with the view taken by the High Court. In our opinion, undoing cannot amount to breaking. When a staple is applied, the wire can be removed by straightening the two bent ends without breaking the wire or tearing the paper. Hence, we cannot agree that undoing the fastening amounts to breaking the fastening.

If the view of the Karnataka High Court is accepted then logically it will have to be accepted that every container will be a sealed container if it is closed in any manner. Such a view obviously cannot be countenanced.

In our opinion in cases of both stapling and crimping the staples and pins can be removed by the customer without breaking anything. Hence, in view of the decision of this Court in *Commissioner of Sales Tax, U.P. v. G.G. Industries*, (Supra), it has to be held that the chicken in question is not sold in sealed containers. We, therefore, agree with the decision taken by the Delhi High Court in *Commissioner of Sales Tax, Delhi v. Pop Corn* (Supra).

For the reasons given above, this appeal is allowed. Impugned judgment of the Karnataka High Court as well as the order of the Authority for Clarification and Advance Ruling dated 22.9.2003 under Section 4 of the Act are set aside and it is held that the 'dressed chicken' in question are exempt from Sales Tax as they are not sold in sealed containers. No costs.

C.A. No. 7624/2005

This appeal has been filed against the impugned judgment of the Karnataka High Court dated 7.1.2005 in STA No. 12/2004 under Section 24(1) of the Karnataka Sales Tax Act, 1957.

A Heard learned counsel for the parties.

The facts of this case are similar to the facts in C.A. No. 7623/2005 which we have allowed hereinabove. The only difference is that in the present case, the 'dressed chicken' in polythene bags is closed by a rubber band, whereas, 'dressed chicken' in polythene bags in CA No. 7623/2005 was

B closed by stapling or crimping.

For the reasons given in C.A. No. 7623/2005, this appeal is allowed. The impugned judgment of the Karnataka High Court dated 7.1.2005 as well as the order of the Authority for Clarification & Advance Ruling dated 5.3.2004 are set aside and it is held that the 'dressed chicken' in question are exempt from

C sales tax as they are not sold in sealed containers. No costs.

N.J.

Appeals allowed.