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**(1985) 10 RAJ CK 0028**  
**In the Rajasthan High Court**  
**Case No : Sales Tax Revision No. 387 of 1985**

Assistant Commercial Taxes Officer

APPELLANT

Vs

Mansarowar Cold Drinks

RESPONDENT

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**Date of Decision :** 05-10-1985

**Acts Referred:**

Rajasthan Sales Tax Act, 1954 — Section 2(o)

**Citation :** (1987) 65 STC 282 : (1985) 2 WLN 733

**Hon'ble Judges :** Shyam Sunder Byas, J; S.K. Mal Lodha, J

**Bench :** Division Bench

**Advocate :** K.C. Bhandari, for the Appellant;

**Final Decision :** Dismissed

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## Judgement

S.K. Mal Lodha, J.—The Assistant Commercial Taxes Officer, Ward-I, Circle C, Jodhpur (A.C.T.O.) has filed this revision u/s 15(2) of the Rajasthan Sales Tax Act (No. 29 of 1954) (for short "the Act") read with Section 13(6) of the Rajasthan Sales Tax (Amendment) Act, 1984 (No. 20 of 1984) (hereinafter referred to as "the Amendment Act") against the order dated 30th October, 1984, of the Board of Revenue for Rajasthan, Ajmer ("the Board" herein), allowing the revision filed u/s 14(2) of the Act in part holding that the tax amount of Rs. 7,673.68 levied at the rate of 8 per cent on the turnover of Rs. 96,919.85 was not tenable and that it was set aside. The dealer-assessee, at the relevant time was dealing in cold drinks, fruit juice, ice-cream, etc. and supplied them in its restaurant. The period involved is 1st January, 1977 to 31st December, 1978. He was assessed by the assessing authority by its order dated 14th January, 1982. The assessing authority levied tax on Rs. 95,919.85 at the rate of 8 per cent being the taxable turnover of sales of fruit juice. Besides this, he also levied tax on the taxable turnover of Rs. 40,207 at the rate of 5 per cent on the sale of ice-cream. Being dissatisfied with the levy of tax at 8 per cent on the turnover of Rs. 95,919.85, the assessee lodged an appeal before the Deputy Commissioner (Appeals), Commercial Taxes, Jodhpur, which was dismissed by order dated 7th October,

1982. A revision was filed by the assessee-respondent. In that revision, it prayed that in addition to the tax of Rs. 7,673.58 levied on the turnover of Rs. 95,919.85, relief in respect of the tax levied of Rs. 2,010.35 on the turnover of Rs. 40,207 may also be granted. In revision, the additional relief was declined on the ground that it was not claimed in the appeal before the Deputy Commissioner (Appeals), Commercial Taxes, Jodhpur. The Board, after taking into consideration the arguments that were raised on behalf of the assessee-respondent and N.I. Caterers (India) Ltd. v. Lt. Governor of Delhi [1978] 42 STC 386, held that the assessee-respondent is a restaurant serving drinks, ice-cream, etc., in its premises and the customers do not carry away the drinks, ice-cream, etc., served there and as such it cannot be said that there were sales in favour of the customers. The Board, therefore, by its order dated 30th October, 1984, allowed the revision in part and set aside the amount of tax of Rs. 7,673.58 levied at the rate of 8 per cent on the turnover of Rs. 95,919.85. Against that, the revision has then filed as aforesaid.

2. The petitioner, in the revision, as required by Section 15(3) of the Act as substituted by the Amendment Act, has stated that the following question of law is involved in the revision :

Whether, in the facts and circumstances of the case, the Board of Revenue was right in holding that turnover of Rs. 95,919.85 was exempt from tax ?

3. We have heard Mr. K.C. Bhandari, learned counsel for the A.C.T.O., Jodhpur.

4. The main contention of the learned counsel for the A.C.T.O. is that the Board has seriously erred in law in holding that there were no sales in favour of the customers and according to him the principles laid down in N.I. Caterers's case [1978] 42 STC 386 are not applicable. We may state that the Board has reached this conclusion after considering the same portion of the assessment order, which has been reproduced in its impugned order. The material part of that portion is as under :

Atha in sab thathyon ko madhya nazar rakthe huey isey ek hotel wa restaurant maankar hi kar nirdharan kiya jaatha hai.

5. Now, here we may read the definition of "sale" as given in Section 2(o) of the Act, which is as under :

(o) "sale" with all its grammatical variations and cognate expressions, means any transfer of property in goods for cash or for deferred payment or for any other valuable consideration and includes a transfer of property in goods on hire purchase or other system of payment by instalments, but does not include a mortgage or, hypothecation of or a charge or pledge on goods and the word "purchase" or "buy" shall be construed accordingly.

6. In N.I. Caterers (India)'s case [1978] 42 STC 386, the appellant ran a hotel in which lodging and meals were provided on "inclusive terms" to residents. Meals were served to non-residents also in the restaurant, located in the hotel.

The following two questions were referred to the High Court: (1) Whether the supply of meals to residents, who paid a single all-inclusive charge for all services in the hotel, including boarding, was exigible to sales tax ? (2) Whether the service of meals to casual visitors in the restaurant was taxable as a sale (i) when the charges were lump sum per meal, or (ii) when they were calculated per dish ? The Delhi High Court answered the first question in favour of the appellant and the second question against it. The appellant appealed to the Supreme Court on special leave. It was held that the service of meals to visitors in the restaurant of the appellant was not taxable under the Bengal Finance (Sales Tax) Act, 1941 and this was so whether a charge was imposed for the meal as a whole or according to the dishes separately ordered. Their Lordships took into consideration *Electa B. Merrill v. James W. Hodson* LRA 1915 B 481, wherein it was observed as under :

The essence of it is not an agreement for the transfer of the general property of the food or drink placed at the command of the customer for the satisfaction of his desires, or actually appropriated by him in the process of appeasing his appetite or thirst. The customer does not become the owner of the food set before him, or of that portion which is served for his use, or of that which finds a place on his plate or in side dishes set about it. No designated portion becomes his. He is privileged to eat and that is all. The uneaten food is not his. He cannot do what he pleases with it. That which is set before him or placed at his command is provided to enable him to satisfy his immediate wants and for no other purpose. He may satisfy those wants; but there he must stop. He may not turn over unconsumed portions to others at his pleasure, or carry away such portions. The true essence of the transaction is service in the satisfaction of a human need or desire,-ministry to a bodily want. A necessary incident of this service or ministry is the consumption of the food required. This consumption involves destruction and nothing remains of what is consumed to which the right of property can be said to attach. Before consumption title does not pass ; after consumption there remains nothing to become the subject of title. What the customer pays for is a right to satisfy his appetite by the process of destruction. What he thus pays for includes more than the price of the food as such. It includes all that enters into the conception of service and with it no small factor of direct personal service. It does not contemplate the transfer of the general property in the food supplied as a factor in the service rendered.

7. It is, thus, clear that the supply of food or tea to the customers does not partake of the character of a sale of goods. In the aforesaid case of the Supreme Court a review petition was filed. The decision of review petition has been reported in *N.I. Caterers (India) v. Lt. Governor of Delhi* [1980] 45 STC 212 .

8. While dismissing the review petition, it was held that the preparation and service of food both to the residents in the assessee's hotel as well as non-residents, having regard to the facts established in the case, remained a supply and service of food not amounting to a sale. His Lordship Pathak, J., observed as

under:

...that where food is supplied in an eating-house or restaurant and it is established upon the facts that the substance of the transaction, evidenced by its dominant object, is a sale of food and the rendering of services is merely incidental, the transaction would undoubtedly be exigible to sales tax. In every case it will be for the taxing authority to ascertain the facts when making an assessment under the relevant sales tax law and to determine upon those facts whether a sale of the food supplied is intended.

9. Krishna Iyer, J., made the following observations :

The substance of the transaction, the dominant object, the life-style and other telling factors must determine whether the apparent vendor did sell the goods or only supply a package of services. Was there a right to take away any eatable served, whether it be bad manners to do so or not ? In the case we have, the decision went on the ground that such right was absent. In cases where such a negative is not made out by the dealer-and in India, by and large, the practice does not prohibit carrying home-exigibility is not repelled.

10. In *State of Himachal Pradesh v. Associated Hotels of India* [1972] 29 STC 474, the Supreme Court had considered the case where hotels serve meals to guests who stay in the hotel. It was contended that such a transaction did not amount to a sale within the meaning of the Punjab General Sales Tax Act. In that case, the Supreme Court held that the transaction essentially is one of service by the hotelier in the performance of which meals are served as part of and incidental to that service and the bill prepared by the hotelier is one and indivisible not being capable by approximation of being split of into one for residence and the other for meals. After considering *State of Himachal Pradesh's* case [1972] 29 STC 474 and *Northern India Caterers (India)'s* case [1978] 42 STC 386 , the learned Judges of the Andhra Pradesh High Court in *Durga Bhavan v. Deputy Commercial Tax Officer* [1981] 47 STC 104 summarised the effect of the aforesaid decisions, as under :

1. If there is no right to carry away the food there would be no sale in favour of the customer.
2. Even if there is a right to carry away if in essence the transaction is a transaction of service and not a transaction of sale it would not be exigible to tax.
3. If, however, where the customer has a right to take away the food if the dominant object is the sale of food and the rendering of service is merely incidental, then the transaction would be a transaction of sale and not a service contract.
4. The question whether the dominant object was the sale of food or rendering of service would depend upon the facts and circumstances of each case which has to be decided by the assessing authority in the light of the evidence before it.

11. The Board has categorically come to the conclusion that the petitioner is a restaurant and it supplies fruit juice and cold drinks, etc., to its customers which are consumed there as the customers sit in the restaurant and consume them. Applying the tests laid down in *Electa B. Merrill's* case LRA 1915 B 481, which has been referred in *N.I. Caterers India's* case [1978] 42 STC 386 and respectfully following *Durga Bhavan's* case [1981] 47 STC 104 in the light of the definition of the term "sale" as contained in Section 2 of the Act, we are of the opinion that the Board was right in coming to the conclusion that there was no sale of the fruit juice, ice-cream, etc. The view taken by the Board thus, calls for no interference.

12. The result is that the revision petition is dismissed without any order as to costs.