
(1963) 12 P&H CK 0029
In the Punjab And Haryana At Chandigarh
Case No : Civil Writ No. 1330 of 1963

Bhagwan Hotel

APPELLANT

Vs

The Assessing Authority and Another

RESPONDENT

Date of Decision : 03-12-1963

Acts Referred:

Constitution of India, 1950 — Article 226
Punjab General Sales Tax Act, 1948 — Section 11, 4, 5, 6

Citation : (1964) 15 STC 319

Hon'ble Judges : Mehar Singh, J;H.R. Khanna, J

Bench : Division Bench

Advocate : G.C. Mittal and N.C. Jain, for the Appellant; H.S. Doabia, A.A.G., for the Respondent

Final Decision : Dismissed

Judgement

Mehar Singh, J.—In this petition under Article 226 of the Constitution the petitioner is Bhagwan Dass who is the proprietor of Bhagwan Hotel in Civil Lines at Rohtak. By an order of 24th June, 1963, the assessing authority, respondent 1, assessed the petitioner to sales tax in the amount of Rs. 319-23 nP. for the assessment year 1959-60, finding that the establishment maintained and carried on by the petitioner is a hotel and not a dhaba.

2. The petitioner questions the finding of fact by the assessing authority that his establishment is a hotel and urges that it is a dhaba. The Punjab General Sales Tax Act, 1948 Punjab Act 46 of 1948, by Section 4 creates liability to pay sales tax and in Section 5 provides the manner of levy of the same and fixation of the rate of sales tax for that purpose. Leaving out Sub-section (2), which is not material here, Sub-section (1) of Section 6 says—"No tax shall be payable on the sale of goods specified in the first column of Schedule B subject to the conditions and exceptions, if any, set out in the corresponding entry in the second column thereof and no dealer shall charge sales tax on the sale of goods which are declared tax-free from time to time under this section." In Schedule B, item 49

exempts "Indian food preparations ordinarily prepared by tandoorwalas, lohwalas and dkabas : when sold by persons running tandoors, lohs and dhabas exclusively." It is the benefit of this exemption that the petitioner claims when he avers that his establishment is a dhaba and not a hotel. The second question that is raised by the petitioner is that under Sub-section (4) of Section 11 the assessing authority must proceed to assess, in the case of best judgment assessment, within three years preceding the date of assessment; otherwise it is said that assessment is barred under that provision as has been held in *Madan Lal Arora Vs. Excise and Taxation Officer, Amritsar*, in which their Lordships have held that the three years within which the authority could proceed to make the best judgment assessment have to be counted from the end of each quarter in respect of which the return had been filed.

3. However, while the petitioner has been resisting the levy of sales tax upon his establishment, there have been changes in the law by amendments of Punjab Act 46 of 1948 which, according to the respondents, completely negative the two stands taken by the petitioner in this petition.

4. In so far as the second question raised by the petitioner is concerned, the argument is confined to the quarter ending 31st March, 1960. On 23rd March, 1963, was enacted the Punjab General Sales Tax (Amendment) Act, 1963 (Punjab Act 2 of 1963); which has by its Section 5 amended Sub-section (4) of Section 11 to raise the period of three years mentioned in it to four years. This amendment becomes operative from 23rd March, 1963. Before this amendment of Sub-section (4) of Section 11, for this quarter, assessment could be made within three years, which means up to 31st March, 1963. However, before 31st March, 1963, and on 23rd March, 1963, the amending Punjab Act 2 of 1963 by its Section 5 has increased the period of three years to four years. It is obvious that if the period of four years applies then the order of the assessing authority made on 24th June, 1963, is within the time prescribed by the amended Sub-section (4) of Section 11. It is, however, urged on behalf of the petitioner that this amending Punjab Act 2 of 1963 came into force on 23rd March, 1963, and the period of three years must be counted up to that date, though the period of four years may be counted after that date. There is no substance in this argument for before the right to assess against the petitioner became barred by time Section 5 of Punjab Act 2 of 1963 extended the period of assessment by another year and the extended period would apply to all cases in which the assessment has not already become barred by time under Sub-section (4) of Section 11. If effect was given to this argument on behalf of the petitioner it would mean splitting the last quarter into a period up to 23rd March, 1963, and period between that date and 31st March, 1963. But the sales tax is chargeable quarterly. The quarterly period cannot be split in this manner. Besides, their Lordships have pointed out in *Madan Lal Arora Vs. Excise and Taxation Officer, Amritsar*, that the period provided in Sub-section (4) is to be counted from the end of each quarter. It follows that it cannot be counted from any point in the middle of the quarter. This argument is entirely without force. Section 5 of the

amending Punjab Act 2 of 1963 having extended the period under Sub-section (4) of Section 11 from three to four years before the right to assess under the unamended Sub-section (4) of Section 11 expired in: the case of the petitioner, the assessing authority has been right in making the assessment on the petitioner within the time prescribed under Sub-section (4) of Section 11 as it stood on the date it made the assessment order.

5. The Punjab General Sales Tax (Amendment) Act, 1962 (Punjab Act 8 of 1962), has by Section 2 amended Sub-section (5) of Section 4 of Punjab Act 46 of 1948 and thereby added to that sub-section Clause (bb) which when incorporated in Sub-section (5) reads in this manner : - "In this Act the expression "taxable quantum" means - (bb) in relation to any dealer, who runs a tandoor, loh, dhaba, hotel, restaurant or other similar establishment wherein Indian food preparations including tea are served, 25,000 rupees." Having made these establishments liable to sales tax at the taxable quantum of Rs. 25,000, this amending Punjab Act 8 of 1962 in Section 3 proceeds to say that "in Schedule B to the principal Act, item 49 shall be omitted." This means that from the date of the amending Punjab Act 8 of 1962, which is 2nd June, 1962, the exemption previously given to dhabas as is the claim of the petitioner in this petition in item 49 of Schedule B to the principal Act has been withdrawn or taken away. If the matter had so stood there, this withdrawal or taking away of this exemption would obviously be operative from the date of the enactment of this amending Act which, as stated, is 2nd June, 1962. However, Sub-section (2) of Section 1 of this amending Punjab Act 8 of 1962 provides that this Act shall be deemed to have come into force on the first day of April, 1959. The effect of this is to give retrospective operation to Punjab Act 8 of 1962 from 1st April, 1959. So the exemption under item 49 in Schedule B to the principal Act has been withdrawn or taken away on or from 1st April, 1959. There is no manner of doubt or ambiguity in this respect."

6. It is first urged by the learned counsel for the petitioner that exemption under item 49 in Schedule B to Punjab Act 46 of 1948 having been enjoyed by the petitioner up to 2nd June, 1962, it cannot be taken away retrospectively. In support of this he relies upon *Sewak Hotel v. Excise and Taxation Officer, Bhatinda* [1963] 14 S.T.C. 524 which was a case on this aspect of the matter similar to the present case. The question posed was whether "the petitioner was exempt from the levy of sales tax u/s 6 of the Punjab General Sales Tax Act and that the exemption was withdrawn by Punjab Act 8 of 1962 which came into force on the 2nd June, 1962, and, therefore, unless there is a specific provision charging sales tax retrospectively the firm cannot be made liable to pay the sales tax retrospectively". After referring to the amending Punjab Act 8 of 1962 the learned Judge proceeded to observe: "It is significant that at the time when the exemption was granted, Section 1(2) of the amending Act was not on the statute book. The exemption, therefore, could be and was validly granted. That exemption was enjoyed right up to the date of the amendment which came into force on the 2nd of June, 1962. The exemption was not withdrawn at any stage

before 2nd of June, 1962. For the period in dispute the petitioner has been specifically granted exemption u/s 6(1) of the Act and by reason of this he was not liable to sales tax. The effect of the amendment no doubt is to withdraw that exemption. The withdrawal of the exemption by the deeming provision retrospectively cannot in fact obliterate the actual fact, namely, that the exemption has been enjoyed and at the time when the exemption was enjoyed it was lawfully enjoyed. No deeming provision can make what is lawful unlawful. If the Legislature wants to impose a tax retrospectively it would say so. The authorities cannot recover a tax retrospectively by recourse to the deeming provision which merely withdrew the exemption. I cannot attribute to the Legislature an intention to take away the exemptions enjoyed by persons who were lawfully exempted from the tax under the Act. If the Legislature wanted to do so, it would have expressly said so. There is no provision in the amending Act authorising levy of sales tax retrospectively, and the tax which had not been imposed cannot be deemed to have been imposed by recourse to Section 3 read with Section 1(2) of the amending Act, as is sought to be done by the authorities in this case." Relying on this case learned counsel for the petitioner has contended that not only that the petitioner having enjoyed the exemption cannot be liable to pay sales tax for the period he has actually enjoyed the exemption, but that what is claimed on behalf of the respondents is that the effect of the amending Punjab Act 8 of 1962 is to re-enact by this amending Act the charging provisions twice over, which the learned counsel presses the Legislature cannot do. He urges that the Legislature cannot make a charging provision in a taxing statute twice over again. I think there is some misapprehension so far as these arguments are concerned. In *A. V. Fernandez v. State of Kerala* [1957] 8 S.T.C. 561 Ker at p. 574 their Lordships of the Supreme Court observed: "There is a broad distinction between the provisions contained in the statute in regard to the exemptions of tax or refund or rebate of tax on the one hand and in regard to the non-liability to or non-imposition of tax on the other. In the former case, but for the provisions as regards the exemptions or refund or rebate of tax, the sales or purchases would have to be included in the gross turnover of the dealer because they are prima facie liable to tax and the only thing which the dealer is entitled to in respect thereof is the deduction from the gross turnover in order to arrive at the net turnover on which the tax can be imposed. In the latter case, the sales or purchases are exempted from taxation altogether." Now, it becomes clear that when an exemption is withdrawn it is not a case of making a provision for charging of sales tax a second time. But it is merely the revival of the charging provision which has remained dormant or ineffective while the exemption has been in operation. As soon as the exemption is withdrawn, the sales tax which was already chargeable under the charging section or sections as Sections 4 and 5 in Punjab Act 46 of 1948, becomes immediately realisable because the provision which stood in the way of its levy and recovery has been removed. The withdrawal of an exemption is, therefore, not a case of making a second provision charging sales tax a second time. If I may say so with respect to the view expressed by the learned Judge in *Sewak Hotel Vs. The Excise and*

Taxation Officer and Another, the amending Punjab Act 8 of 1962 has been made expressly operative by Section 1(2) of it on and from 1st April, 1959. The Legislature in this respect could not possibly have expressed itself in any other clearer language. The effect of Section 1(2) of this amending Punjab Act 8 of 1962 is to withdraw the exemption in item 49 of Schedule B of the principal Act on and from 1st April, 1959. This is an express statement in this amending Act. The Legislature has power to grant exemption as also to withdraw an exemption. It has power to make taxing law retrospectively imposing tax where previously there was no imposition of tax, *The Union of India Vs. Madan Gopal Kabra, Tata Iron & Steel Co. Ltd. v. State of Bihar* [1958] 9 S.T.C 267 *Chhotabhai Jethabhai Patel and Co. Vs. The Union of India and Another, and Rai Ramkrishna and Others Vs. The State of Bihar*, and in my opinion it follows from these authorities that the Legislature can not only make a taxing statute imposing tax retrospectively but it can withdraw an exemption already granted retrospectively. A deeming provision creates a statutory fiction, and while such a statutory fiction is to be strictly construed, to the extent it is effective and clear it must be given effect to. When Section 1(2) of the amending Punjab Act 8 of 1962 says that this amending Act shall be deemed to have come into force on 1st April, 1959, the intention of the Legislature is clear that this amending Act is operative on and from 1st April, 1959. There is no manner of doubt in this express legislation. It means, as I have already said, that an exemption granted under item 49 in Schedule B to Punjab Act 46 of 1948 has ceased to exist on and from 1st April, 1959. This to my mind is the express provision in the amending Punjab Act 8 of 1962, and the Legislature could not have expressed itself in any other clearer words. It was not imposing sales tax by this amending Act. Sales tax had already been levied and imposed by Sections 4 and 5 of Punjab Act 46 of 1948, but it had remained not payable and recoverable because of the existence of the exemption which exemption having been taken away on and from 1st April, 1959, the tax of its own rigour becomes payable on and from that date. I have not quite been able to appreciate how the taking away of the exemption retrospectively is not operative against the petitioner and what is the meaning of his having enjoyed the exemption and because of such enjoyment not being liable to pay sales tax. Learned counsel for the petitioner has referred to Sub-section (1) of Section 6 of Punjab Act 46 of 1948 and has contended that the last two lines in this Sub-section show that a dealer has been permitted to charge sales tax on the sale that he makes, in other words, a dealer has been given permission to charge sales tax from the purchaser or the consumer. He urges that if the exemption had not existed, the petitioner would have charged sales tax from his customers and passed it on to the State, but because of the existence of the exemption he did not charge sales tax from his customers and now that the exemption has been withdrawn retrospectively it has become impossible for him to recover sales tax from the customers whom he served during the taxable quarter in question in this case. It is in this manner that the learned counsel urges that the petitioner has enjoyed the exemption and by retrospective, withdrawal of the exemption, he cannot be made to pay sales tax.

This argument was urged by the then learned Attorney-General before the Supreme Court in the case of Tata Iron & Steel Company Ltd. [1958] 9 S.T.C. 267 and was negatived by their Lordships observing, "The argument on this point is that sales tax is an indirect tax on the consumer. The idea is that the seller will pass it on to his purchasers and collect it from them. If that is the nature of the sales tax then, urges the learned Attorney-General, it cannot be imposed retrospectively after the sale transaction has been concluded by the passing of title from the seller to the buyer, for it cannot, at that stage, be passed on to the purchaser. According to him the seller collects the sales tax from the purchaser on the occasion of the sale. Once that time goes past, the seller loses the chance of realising it from the purchaser and if it cannot be realised from the purchaser, it cannot be called sales tax. In our judgment this argument is not sound. From the point of view of the economist and as an economic theory, sales tax may be an indirect tax on the consumers, but legally it need not be so. Under the 1947 Act the primary liability to pay the sales tax, so far as the State is concerned, is on the seller. Indeed before the amendment of the 1947 Act by the amending Act the sellers had no authority to collect the sales tax as such from the purchaser. The seller could undoubtedly have put up the price so as to include the sales tax, which he would have to pay but he could not realise any sales tax as such from the purchaser. That circumstance could not prevent the sales tax imposed on the seller to be any the less sales tax on the sale of goods." Similarly, under Punjab Act 46 of 1948, the primary liability to pay sales tax is that of the dealer and the fact that Sub-section (1) of Section 6 of that Act says that the dealer may collect it from the consumer or the purchaser does not prevent the sales tax imposed on the dealer or the seller to be any the less sales tax on the sale of goods. This argument is thus without substance.

7. The consequence is that the two arguments urged on behalf of the petitioner fail and so his petition is dismissed, but, in the circumstances, the parties are left to bear their own costs.

H.R. Khanna, J.

8. I agree.