

(2005) 11 DEL CK 0034

In the Delhi High Court

Case No : Writ Petition (C) 1122 of 1982

Claridges Hotel Pvt. Ltd.

APPELLANT

Vs

Sales Tax Officer

RESPONDENT

Date of Decision : 18-11-2005

Acts Referred:

Constitution (Forty-Sixth Amendment) Act, 1982 — Article 336, 6, 6(1), 6(2), 6(3)
Constitution of India, 1950 — Article 226
Delhi Sales Tax Act, 1975 — Section 2, 2(1), 3, 30, 30(6)

Citation : (2005) 125 DLT 445 : (2005) 85 DRJ 580

Hon'ble Judges : T.S. Thakur, J;Badar Durrez Ahmed, J

Bench : Division Bench

**Advocate : Randhir Chawla, Renu Sehgal and S.C. Nayak, for the Appellant;
R.K. Batra, for the Respondent**

Final Decision : Dismissed

Judgement

T.S. Thakur, J.—In this petition, under Article 226 of the Constitution, the petitioner has prayed for a mandamus, directing the respondents to refund to the petitioner with interest a sum of Rs. 1,65,710/-, in terms of an assessment order dated 14th July, 1980, relevant to assessment year 1976-77. The facts giving rise to the filing of the petition may be summarised as under:

2. The petitioner-company is running a hotel in Delhi and is registered as a dealer under the Delhi Sales Tax Act, 1975 (for short "the Act"). For the assessment year 1976-77, the respondent-assessing authority completed the assessment proceedings in terms of an order of assessment dated 14th July, 1980. Relying upon the decision of the Supreme Court in Northern India Caterers (India) Ltd. v. Lt. Governor of Delhi, (1978) 42 STC 386, the assessing authority held that while sales made to non-residents were exigible to sales tax those made to residents in the hotel were not. It accordingly finalised the assessment and determined a total tax liability of Rs. 1,53,963.45 as against an amount of Rs. 3,19,673.17 deposited by the petitioner towards tax. The excess amount of

Rs. 1,65,709.72 was, consequently, held refundable to the petitioner.

3. The petitioner's grievance in the present writ petition now is that although the assessment order held it entitled to the refund of the amount aforementioned and although repeated requests for refund of the said amount have been made in writing to the respondents, the later have not done the needful. A mandamus, directing the respondents to refund the amount, has Therefore, been prayed for.

4. In the counter-affidavit, filed on behalf respondents, several defenses have been set up. It is, inter alia, stated that the petitioner is not entitled to the refund, claimed by it as the burden of the tax had been passed on by it to the customers, implying thereby that the refund would result in unjust enrichment of the petitioner. It is also pointed out that the order of assessment under which the petitioner was held entitled to refund was being suo motu revised u/s 46 by the authority competent to do so. It is further alleged that in the light of the provisions contained in The Constitution (Forty-sixth Amendment) Act, 1982, no refund was admissible to the dealer and that the Commissioner of Sales Tax had in exercise of his powers u/s 30(6) of the Act directed withholding of the refund by his order dated 12th March, 1983. A copy of the order passed by the Assistant Commissioner of Sales Tax u/s 46 of the Act proposing to revise the assessment order and that passed by the Commissioner of Sales Tax, Delhi u/s 30(6) of the Act withholding the refund till the disposal of the suo motu revision proceedings have also been placed on record.

5. We have heard learned counsel for the parties and perused the record.

6. The first limb of the defense set up by the respondents is that the order of assessment was being revised by the competent authority u/s 46 of the Act and that pending such revision, the Commissioner of Sales Tax had, by order dated 12th March, 1983, directed withholding of the refund. At the hearing before us, Mr. Batra was unable to state whether the revisional proceedings initiated by the authority concerned had been taken to their logical conclusion and, if so, to what effect. No information was forthcoming from the respondents regarding the fate of the proceedings initiated in terms of notice dated 1st March, 1983. We regret to say that the respondents have not shown due diligence in keeping their counsel informed about the proceedings which appear to have been initiated at some stage of the controversy. There is an element of callous indifference on the part of the respondents in this regard which leaves much to be desired. The respondents have tremendous resources and man power at their disposal. We fail to understand why the Sales Tax Department cannot provide the requisite information to its counsel to enable him to properly assist the Court. Suffice it to say that in the absence of any information forthcoming regarding the fate of the proceedings initiated under Sections 30 and 46 of the Act, we are forced to assume that either no such proceedings had been initiated and even if initiated, the same were abandoned half way.

7. That leaves us with the question whether the refund prayed for by the

petitioner is permissible even after The Constitution (Forty-sixth Amendment) Act, 1982 has redefined the expression "tax on the sale or purchase of the goods" and validated the enactments passed before the commencement of the said Amendment, any judgment, decree or order of any Court, Tribunal or authority to the contrary notwithstanding. It was argued by Mr. Batra that the Delhi Sales Tax Act envisaged and authorised a tax even on the sale of foodstuff served in hotels and restaurants. He urged that the definition of the word "sale" as provided in Section 2(l) of the Act read with the meaning given to the word "goods" in Section 2(g) thereof, left no manner of doubt that food or drinks served for consumption in a hotel and restaurant would constitute a taxable sale under the Act. He contended that with the introduction of Clause 29A(f) in Article 366 of The Constitution by the Forty-sixth Amendment, referred to earlier, any law that provided for a tax on the supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption is also deemed to be a sale of those goods by the person making the transfer, delivery or supply and a purchase of those goods by the person to whom such transfer, delivery or supply is made. By a fiction of law, Therefore, such transfer, delivery or supply of goods in a hotel which may have been earlier a part of the service and hence not taxable as a sale in the light of the decision of the Supreme Court in *State of Himachal Pradesh v. Associated Hotels of India Ltd.*, (1972) 29 STC 474 and *Northern India Caterers (India) Ltd. v. Lt. Governor of Delhi*, (1978) 42 STC 386 could now be taxed as a sale for purposes of sales tax legislation. He relied upon the provisions of Section 6 of The Constitution (Forty-sixth Amendment) Act, 1982 in support of his submission that any tax levied or collected under any such law in force before the commencement of the Amendment Act was deemed to have always been validly levied and collected and no suit or other proceedings for refund of any such amount were maintainable in any Court, Tribunal or authority and that no enforcement could be made by any Court, Tribunal or authority of any decree or order directing the refund of any such amount.

8. There is considerable merit in that submission. In *Associated Hotel's* case (*supra*), the Court was dealing with a situation where the hotel was receiving guests and providing them with all the amenities along with food and the bill tendered to the guests was all inclusive. The Court observed that while the customers were, during their stay at the hotel, consuming a number of foodstuffs which may tantamount to transfer of property in those foodstuffs from the hotelier to the customers but mere transfer of such property was not conclusive and did not render the event of such supply and consumption sale, primarily because there was no intention to sell and purchase. The sale of any food articles to the customers in a hotel, Therefore, did not become exigible to sales tax. In *Northern India Caterers'* case also the Court was concerned with a similar situation where sales tax was levied on the sale of foodstuffs to the residents of the hotel. Extending the principle stated in *Associated Hotels of India Ltd.'s* case, the Supreme Court held, on an interpretation of the Bengal Finance (Sales Tax)

Act, 1941, as extended to Delhi, that when a hotel serves food to a non-resident, it did not amount to a taxable sale. The rationale behind that view is stated in the following passage from the said decision:

"It has already been noticed that in regard to hotels this Court has in *M/s. Associated Hotels of India Limited* adopted the concept of the English law that there is no sale when food and drink are supplied to guests residing in the hotel. The court pointed out that the supply of meals was essentially in the nature of a service provided to them and could not be identified as a transaction of sale. The court declined to accept the proposition that the revenue was entitled to split up the transaction into two parts, one of service and the other of sale of food-stuffs. If that be true in respect of hotels, a similar approach seems to be called for on principle in the case of restaurants. No reason has been shown to us for preferring any other. The classical legal view being that a number of services are concomitantly provided by way of hospitality, the supply of meals must be regarded as ministering to a bodily want or to the satisfaction of a human need. What has been said in *Electra B. Merrill* appears to be as much applicable to restaurants in India as it does elsewhere. It has not been provided that any different view should be taken, either at common law, in usage or under statute."

9. A careful reading of the above would show that the reason why the service of meals to a customer in a hotel or restaurant does not constitute a sale of food for the purpose of levy of sales tax was that service of meals was regarded as the rendering of a service in the satisfaction of a human need or ministering to the bodily want of human beings. To overcome the difficulties arising from the aforementioned decisions and other decisions in relation to taxability of works contract, the Parliament enacted The Constitution (Forty-sixth Amendment) Act, 1982. The Amendment, as is evident from the Statement of Objects and Reasons was intended, inter alia, to widen the scope of the expression "tax on the sale or purchase of goods;" by including therein supply of food or any drink by way of or as part of any service. Clause 29A was, to that effect, added to Article 366 of The Constitution, which, to the extent the same is relevant, may be extracted:

"(29A)" tax on the sale or purchase of goods" includes-

(a) to (d) XXX XXX XXX

(f) a tax on the supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (whether or not intoxicating), where such supply or service, is for cash, deferred payment or other valuable consideration,

and such transfer, delivery or supply of any goods shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply and a purchase of those goods by the person to whom such transfer, delivery or supply is made;"

10. In terms of Section 6 of the amending Act of enactments for levy of sales tax

on the supply, by way of or as part of any service or goods being food and other articles for human consumption were also validated notwithstanding any judgment, decree or order of any Court to the contrary. What is significant is that in terms of Section 6 of the amending Act, levy or collection made in accordance with any such pre-existing law was deemed always to have been validly made and no refund based on any order made by any Court, authority or Tribunal was permissible if such tax had already been collected. This is evident from Section 6(1), (2) & (3) of the amendment Act which reads as under:

"6. Validation and exemption.-(1) For the purposes of every provision of the Constitution in which the expression "tax on the sale or purchase of goods" occurs, and for the purposes of any law passed or made, or purporting to have been passed or made, before the commencement of this Act, in pursuance of any such provision,-

(a) the said expression shall be deemed to include, and shall be deemed always to have included, a tax (hereafter in this section referred to as the aforesaid tax) on the supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article or human consumption or any drink (whether or not intoxicating) for cash, deferred payment or other valuable consideration; and

(b) every transaction by way of supply of the nature referred to in clause (a) made before such commencement shall be deemed to be, and shall be deemed always to have been a transaction by way of sale, with respect to which the person making such supply is the seller and the person to whom such supply is made, is the purchaser,

and notwithstanding any judgment, decree or order of any court, tribunal or authority, no law which was passed or made before such commencement and which imposed or authorised the imposition of, or purported to impose or authorise the imposition of, the aforesaid tax shall be deemed to be invalid or ever to have been invalid on the ground merely that the Legislature or other authority passing or making such law did not have competence to pass or make such law, and accordingly:-

(i) all the aforesaid taxes levied or collected or purporting to have been levied or collected under any such law before the commencement of this Act shall be deemed always to have been validly levied or collected in accordance with law;

(ii) no suit or other proceedings shall be maintained or continued in any court or before any tribunal or authority for the refund of, and no enforcement shall be made by any court, tribunal or authority of any decree or order directing the refund of, any such aforesaid tax which has been collected;

(iii) recoveries shall be made in accordance with the provisions of such law of all amounts which would have been collected there under as such aforesaid tax if this section had been in force at all material times.

11. A plain reading of the above makes it clear that any levy or collection of sales tax made on the basis of a law that was pre-existing on the date of the amendment cannot be said to be invalid merely because such levy or collection related to a transaction which did not constitute a sale of goods before The Constitution (Forty-sixth Amendment) Act, 1982. The widened meaning given to the expression "tax on the sale or purchase of goods have been made applicable retrospective any levy or collection of tax would be deemed to be valid on the touchstone of the said widened meaning and no refund of the amount collected can be claimed even if an order to that effect had been made by the authority competent to do so. There is, in fact, a clear bar to continuance and the maintainability of any suit and proceedings in any Court or before any Tribunal or authority for the refund of any such amount and against enforcement of any such refund of tax already collected.

12. Mr. Chawla, counsel for the petitioner, however, argued that the question of validating the levy or collection of tax under the Act could arise only after the Act authorised any such levy or collection. According to him, if the Act did not authorise any such levy or collection, there was no question of validating the same. The result, according to him, was that the amount of tax deposited by the petitioner could not be retained by the State on the strength of the validation which the amendment purported to grant.

13. There is, in our view, no merit in that submission. The question whether the Delhi Sales Tax Act envisaged levy of tax on the sale of cooked food and drinks supplied in a hotel and restaurant is no longer rest integra having been answered in the affirmative by the Supreme Court in *East India Hotels Ltd. and Anr. v. Union of India and Anr.*, 121 STC 47. The Apex Court had, in that case, an occasion to examine whether the levy of sales tax on the sale of foodstuffs in restaurants situate in the hotels of the appellant-company in that case was a sale exigible to tax under the Delhi Sales Tax Act. On an interpretation of the provisions of the Act, particularly, Section 2(f) which defines the terms "goods" and Section 2(l) which defines the expression "sale", the Court held that food and drinks served for consumption in a hotel and restaurants is a sale within the meaning of the Act hence taxable. The following passage from the decision is apposite:

"From a reading of Section 2(e), it is clear that, though it is an inclusive definition and not an exhaustive one, even in case of the supplies made by a club or an association to its members, whether or not in the course of business, the club or association is regarded as a dealer. According to Section 2(g), all movable properties, materials, articles or commodities are goods. Therefore, food in a restaurant has necessarily to be regarded as goods. According to Section 2(l), transfer of property in goods by one person to another would amount to sale. With cooked food or food which is supplied in a restaurant falling within the definition of the word "goods" in Section 2(g), transfer of property in the same would amount to sale as provided by Section 2(l). These definitions have to be

read along with Sections 3 and 4. Section 4(1)(c) clearly shows that in respect of food or drink served for consumption in a hotel or restaurant or part thereof, the same would be regarded as a sale and taxable turnover in respect thereto would be taxed."

14. The levy and collection of sales tax from the petitioner was, in the light of the view taken by the Supreme Court, in the above decision, envisaged under the Act no matter such levy and collection may have been in the absence of The Constitution (Forty-sixth Amendment) Act, 1982 legally impermissible having regard to the pronouncement of the Apex Court in case of Northern India Caterers (India) Ltd. (supra). Suffice it to say that the provisions of the amending Act not only validate the levy and collection of the tax under the Act but also the provisions of the Act in so far as levy and collection of tax on the sale of food in hotel and restaurants is concerned. In addition the amending Act forbids the refund of any amount collected on the basis of the enactment as it stood prior to the introduction of the amendment Act. It follows that the prayer of the petitioner for refund of the amount is maintainable neither before the respondents nor even before this Court.

15. Independent of the provisions of the The Constitution (Forty-sixth Amendment) Act, 1982 also the petitioner's claim for refund is untenable having regard to the fact that the petitioner has passed on the burden of the tax to the consumer and any refund in its favor would result in unjust enrichment. The Supreme Court has, in a number of cases, declined refunds in similar situations. We may in this regard refer to the decision of their Lordships in Entry Tax Officer, Bangalore v. Chandanmal Champalal & Co., 95 SCT 5, where their Lordships have referred to the earlier decisions on the subject and observed:

"At the same time, we find it not possible to agree with the Karnataka High Court insofar as it directed refund of the amount, which may be found to have been paid in excess of the legal liability, to the respondents. Any such direction would amount to unjust enrichment of the respondents who are merely dealers and have passed on the burden to the purchasers/consumers. The dealers themselves have not suffered any loss. They merely passed on the liability. In such cases, this Court has been refusing to refund the tax "See State of Madhya Pradesh Vs. Vyankatlal and Another, and Amar Nath Om Prakash and Others Vs. State of Punjab and Others,

An identical question was considered by a Division Bench of this Court comprising J.S.Verma and A.S. Anand, JJ., in Indian Oil Corporation Vs. Municipal Corporation, Jullundhar and others, with respect to entry tax itself. After holding that the levy of duty was not justified in law, the Bench dealt with the question of refund in paragraph 23 in the following words :

"23. Before parting with the appeal, we would however, like to take note of the submission made on behalf of the Municipal Corporation with regard to the question of refund of the octroi duty, already deposited by the appellant. The

question of refund, in our opinion, does not arise. The IOC has collected the octroi duty from its dealer and agents, who have in turn passed on the burden to the consumer. Thus, having collected the octroi duty, there is no equity in favor of the IOC to claim a refund of the same. Learned counsel for the appellant also conceded that the question of refund, in the facts and circumstances of the case, does not arise and we, Therefore, hold that the appellant shall not be entitled to any refund of the octroi duty already deposited by the appellant with the Municipal Corporation.

We are in respectful agreement with the above principle. In this case also, it is not brought to our notice that the respondents have alleged and/or established that they have not passed on the duty to the purchasers/consumers. The normal presumption is that they have done so. If they say otherwise, it is for them to allege and establish the same. In the absence of any such allegation and proof, the direction of refund is not called for."

16. In the result, this writ petition fails and is hereby dismissed but in the circumstances without any order s to costs.