(1988) 03 OHC CK 0003

In the Orissa High Court

Case No : O.J.C. No''s. 489, 490, 789, 790 and 1793 of 1986

Delhi Bar and Restaurant and Another — APPELLANT

Vs

State of Orissa and Others — RESPONDENT

Date of Decision : 11-03-1988

Acts Referred:
Orissa Sales Tax Act, 1947 — Section 12(4)

Citation : (1988) 70 STC 347

Hon'ble Judges : H.L. Agrawal, C.J;K.P. Mohapatra, J

Bench : Division Bench

Advocate : A.K. Ray, for the Appellant; A.B. Misra, S.C. (C.T.) and S. Mohapatra, A.S.C. (C.T.), for the Respondent

Final Decision : Allowed

Judgement

K.P. Mohapatra, J.—In all these writ petitions common questions of law and fact arise, and so they are disposed of by this judgment.

2. Petitioner, Delhi Bar & Restaurant sells food, eatables, ice-creams, chocolates, fruit juices and other beverages. It was assessed to sales tax u/s 12(4) of the Orissa Sales Tax Act (hereinafter referred to as "the Act") for the years 1981-82, 1982-83 and 1983-84. Similarly, petitioner, M/s. Standard Restaurant selling food, eatables and beverages, was assessed to sales tax u/s 12(4) of the Act for the years 1980-81 and 1981-82. According to the assessing officer, the petitioners were liable to pay sales tax on the sale of food and drinks in view of the decision in Northern India Caterers (India) Ltd. Vs. Lt. Governor of Delhi, .

3. Learned counsel, appearing for the petitioners, urged that in view of the Constitution (46th Amendment) Act, 1982, turnover of sale of food and beverages was not exigible to sales tax. Therefore, the impugned orders of assessment are liable to be quashed.

4. These cases are covered by the decision of this Court, rendered by the Honourable the Chief Justice and myself, in O.J.C. Nos. 661, 662 and 658 of

1985 and O.J.C. Nos. 374, 626 and 627 of 1986, Sagarika Hotel v. Union of India [1988] 70 STC 269 decided on 22nd February, 1988, in which we held as follows :

In the review decision of the Northern India Caterers case [1980] 46 STC 212 (SC) it was held as follows :

...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.

Although the above declaration of law was made on 21st December, 1979, this legal proposition must be deemed to be always in existence. Law was stated in unambiguous terms that where the sale of food happens to be the dominant object in a hotel, then the transaction would be exigible to sales tax. In a recent decision of our own Bench in O.J.C. Nos. 1631 and 1632 of 1980, Piplani Sweets v. Sales Tax Officer [1988] 70 STC 153 (disposed of on 3rd February, 1988), it was held that where the dominant object was service and not sale, sales tax could not be assessed on the composite turnover, but where the dominant object is sale of food, eatables, beverages and drinks even to customers in packets and parcels, then sales tax is exigible. In all these cases in hand, the Sales Tax Officers were obsessed with the definition of ''sale'' in the 46th Amendment of the Constitution of India with regard to tax on the sale or purchase of goods which included food or any other article for human consumption or any drink, whether or not intoxicant. They did not examine the accounts in the light of the principle laid down in the review decision of the Northern India Caterers (India) Ltd. Vs. Lt. Governor of Delhi, nor found out whether the dominant object was service or sale and as to whether the petitioners sold food packets and parcels to outsiders. It is, therefore, necessary that the cases be remanded for fresh examination of accounts of the petitioners.

5. The facts of these cases being entirely identical with the facts of the decision in Sagarika Hotel [1988] 70 STC 269 (Ori) I direct remand of these cases for fresh examination of accounts of the petitioners. The assessing officer on remand will make attempts to ascertain as to whether the dominant object of the petitioners was "service" or "sale". If they did not sell food, eatables, beverages and drinks in packets and parcels they shall not be liable for sales tax on the turnover for the years under assessment. But, if on the other hand it will be found that they effected packet and parcel sales to outsiders and the sale turnover could be bifurcated on being charged by bills, on the ratio of the decision, such turnover shall be exigible to sales tax.

6. In the result, the writ petitions are allowed and the assessment orders are hereby quashed. The cases are remanded to the Sales Tax Officer for

reassessment according to law in the light of the observations made above. In the circumstances of the cases, there shall be no order as to costs.

H.L. Agrawal, C.J.

7. I agree.

