
(1975) 11 DEL CK 0003

In the Delhi High Court

Case No : Civil Writ Appeal No. 242 of 1974

East India Hotels Ltd.

APPELLANT

Vs

Additional Commissioner, Sales Tax

RESPONDENT

Date of Decision : 21-11-1975

Acts Referred:

Citation : (1976) ILR Delhi 225 : (1976) 38 STC 249

Hon'ble Judges : Prakash Narain, J

Bench : Single Bench

Advocate : V.S. Desai, Lalit Bhasin, C.V. Francis, A.C. Chawla, Randhir Chawla, M.C. Bhandare and W. Singh, for the Appellant;

Judgement

Prakash Narain, J.

(1) This petition under Articles 226 and 227 of the Constitution of India is directed against a notice dated February 2, 1974 issued to the petitioner by the Additional Commissioner, Sales Tax, New Delhi intimating to the petitioner that the assessment order in respect of the petitioner in respect of the assessment year 1967-68 is proposed to be revised u/s 20(3) of the Bengal Finance (Sales Tax) Act, 1941 as extended to the Union Territory of Delhi, hereinafter referred to as the Act, in exercise of suo motu powers of revision. The petitioner has been further called upon by the same notice to show cause why the assessments as indicated in the said notice be not revised. The petitioner challenges the jurisdiction of the Additional Commissioner to issue the said notice and legality thereof.

(2) The petitioner is a Company registered under the Companies Act and, inter alia, is engaged in the business of running hotels. One of the hotels run by it is the Oberoi Inter-Continental Hotel in New Delhi, hereinafter referred to as the Hotel. For the purposes of the Act the Hotel is registered as a "dealer".

(3) The Hotel in the course of its business has five specific activities, namely, (a) provide boarding and lodging on consolidated charges to guests with no rebate

being given if meals are not taken; (b) provide purely lodging to guests who have to pay separately for meals; (c) running of five restaurants which serve meals and drinks; (d) running of three Bars and (e) arranging banquets, parties, receptions etc. in rooms specially meant for such functions with or without serving of refreshments, a consolidated charge being made per head or otherwise for the -function organized with no separate charge for refreshments served, described as "banquet charges".

(4) Apart from the aforesaid five activities the Hotel also runs a cafeteria in the basement where subsidised refreshments are made available to its employees at no profit no loss basis. The Hotel also offers and gives trade discounts to its regular customers in pursuance of agreement entered into with them.

(5) For the assessment year 1967-68 the petitioner filed returns as required by the provisions of the Act and deposited sales tax due from it according to those returns. The competent Sales Tax Officer finalised the assessment by an order dated March 25, 1972. Apart from levying penalty for late filing of returns he passed a detailed order and dealt with each activity of the Hotel. He placed reliance in his assessment order on the final order passed in revision in respect of the assessment year 1966-67 and finalised the assessment in that way. He allowed certain deductions and disallowed some others. Aggrieved by the order the Hotel preferred an appeal. By an order dated August 18, 1972 the Assistant Commissioner Sales Tax, New Delhi dismissed the appeal and confirmed the assessment order. A further revision filed by the assessed is pending. In the meantime the impugned notice has been issued, as noticed earlier, by the Additional Commissioner u/s 20(3) of the Act.

(6) According to the impugned notice the assessment that is sought to be revised is in respect of (a) discount allowed to special customers, (b) 15 per cent deduction allowed from banquet sales, (c) the nontaxing of receipts from sales in the cafeteria, (d) the quantum of the amount added back in respect of the sales of the cafeteria, and (e) the quantum of the addition to taxable turn over on account of purchases of raw materials used in the preparation of meals served to guests who are provided board and lodging on a consolidated charge in the Hotel.

(7) In the assessment year 1966-67 the Financial Commissioner in his order in revision had fixed the scope of liability for tax in respect of banquet charges, restaurant charges and cafeteria sales. He had also held that some of the food articles etc. purchased on certificate "C" by the Hotel was also used in the cafeteria and directed add back of Rs. 1,000 in this count. The Sales Tax Officer for the assessment year 1967-68 following this decision passed orders in respect of the banquet charges, restaurant charges and cafeteria sales. For the first time for the year 1967-68 the Hotel had also claimed deduction in respect of cash discounts given to regular customers. This was also dealt with by the Sales Tax Officer. The appeal that was preferred by the Hotel was only in respect of restaurant charges and banquet charges. As noticed earlier this appeal was dismissed and a revision against that order is pending. In the meanwhile the

impugned notice has been issued for suo motu revision of the order of assessment by the Sales Tax Officer.

(8) Section 20(3) of the Act reads as under :

"(3) Subject to such rules as may be prescribed and for reason to be recorded in writing, the Commissioner upon application or of his own motion may revise any assessment made or order passed under this Act or the rules there under by a person appointed u/s 3 to assist him, and subject as aforesaid, the Chief Commissioner may, in like manner, revise any order passed by the Commissioner."

(9) The first contention on behalf of the petitioner is that so far as the banquet charges are concerned the order of the assessing authority has merged in the order of the Assistant Commissioner, the appellate authority, and inasmuch as the order of the Assistant Commissioner is not revisable u/s 20(3) the impugned notice vis-a-vis the banquet charges is without jurisdiction. The Commissioner, it is urged, is not seeking to revise the appellate order but the original assessment order by the Sales Tax Officer and this is not permissible in law.

(10) I have already noticed earlier that the appeal related to the restaurant and the banquet charges only. The entire assessment order was not the subject matter of appeal. It is only that part of the assessment order which has been dealt with in the appellate order which will merge in the appellate order. With respect to the other aspects of assessment there would be no merger. In other words the entire order of assessment made by the Sales Tax Officer does not merge in the appellate order but only to the extent adjudicated upon in appeal. This proposition is now the settled law as was held by the Supreme Court in the State of Madras v. Madurai Mills Co. Limited 1967 S.T.C. 144 (1).

(11) With regard to the banquet charges or sales the Sales Tax Officer in his assessment order held that deductions are allowed to the extent of 15 per cent of the total receipts under the head "banquet sales". The appellate order noticed that these sales concerned the receptions etc. for which a consolidated bill was prepared and a consolidated charge was made for holding the function including the serving of refreshments. The contention of the petitioner that tax could not be charged on any portion of the alleged sales because the bill represented charges for facilities of special accommodation and other services whereas the refreshments provided was only incidental and there was no provision for refund if refreshment was not taken by the participants at a function. Relying on the order in revision in respect of the assessment year 1966-67 the appellate authority rejected the contention and upheld the order of the Sales Tax Officer allowing a deduction of only 15 per cent. Thus the order of the Sales Tax Officer merged into the appellate order and the original assessment order ceases to be operative was held by the Supreme Court in Commissioner of Income Tax, Bombay Vs. Amritlal Bhogilal and Co., if an appeal is provided against an order passed by a tribunal, the decision of the appellate authority is the operative

decision in law. If the appellate authority modifies or reverses the decision of the tribunal, it is obvious that it is the appellate decision that is effective and can be enforced. In law the position would be just the same even if the appellate decision merely confirms the decision of the tribunal. As a result of the confirmation or affirmance of the decision of the tribunal by the appellate authority the original decision merges in the appellate decision and it is the appellate decision alone which subsists and is operative and capable of enforcement. In my view this rule could be attracted here also.

(12) The question that now arises is that whether the impugned notice of the Additional Commissioner is competent or is without jurisdiction.

(13) The impugned notice vis-a-vis banquet sales speaks of the assessment order by the assessing authority and not of the appellate authority. Inasmuch as there is now no assessment order vis-a-vis banquet sales the impugned notice in this behalf must be held to be without jurisdiction and illegal. The Commissioner cannot revise something which does not subsist. It is not said in the impugned notice that he seeks to revise the appellate order, although u/s 20(3) he had the power to revise the assessment made or any other order passed under the Act. The impugned notice is, accordingly quashed in respect of the banquet sales.

(14) I now come to the question of cafeteria sales mentioned in the impugned notice as to whether this aspect is within the competence of the Commissioner to enter into suo motu revision. As noticed earlier the impugned notice states that the said sales have not been assessed in accordance with law and they appear to be sales taxable under the Act. The assessing authority following the decision in revision of the assessment made for the year 1966-67 had held that the cafeteria sales were not taxable and it only added back certain amounts representing the cost of purchase of raw-materials made by the Hotel but used in the cafeteria. By the impugned notice it seems that prima facie the Commissioner is of the view that the entire turnover from the cafeteria attracts the incidence of sales tax.

(15) It has been urged on behalf of the petitioner that the Hotel cannot be said to be a "dealer" in respect of the cafeteria activity. It is admitted in the department orders that there is no profit motive in sales effected in the cafeteria. Whether this activity of providing refreshment to staff on subsidised rates on no profit no loss basis can be termed business activity is the moot point. Business activity has not been defined in the Act. Therefore, the ordinary meaning of this term as used in the commercial world should be taken to ascertain its meaning.

(16) "DEALER" has been defined u/s 2(c) of the Act. That Section reads as under :

" DEALER" means any person who carries on the business of selling goods in the Union Territory of Delhi and includes the Government."

IN *Indian Iron & Steel Co. Ltd. v. Member, Board of Revenue*, (1971) 27 S.T.C. 373 a Bench of Calcutta High Court construing the term "dealer" held that a

person cannot be a "dealer" under the Act unless he carries on the business of selling goods in a commercial sense. In other words, activity of a commercial character must be clearly established before a person can be brought into the net of taxation under the Act. If an employer sells without any profit-motive certain commodities of daily use to the employees to provide them with social amenities it cannot be said that the employer is carrying on business with a commercial motive.

THE Madras High Court in *Gannon Dunkerley & Co. v. State of Madras*, (1954) 5 S.T.C. 216 while construing the relevant provision of Madras General Sales Tax Act, 1939 observed that the word "business" employed in the definition of "dealer" is used in the sense of buying or selling goods with a view to earn profit.

IN a decision reported in *Tata Iron and Steel Co. Ltd. Vs. State of Orissa*, the Orissa High Court took a somewhat different view.

(17) On behalf of the petitioner it is urged that unless there is a profit motive the sales in cafeteria would not convert the Hotel "into a "dealer" vis-a-vis cafeteria activity, Mr. Bhandare, appearing for the respondent contends otherwise and submits that in view of then- being a conflict of judicial opinion there was nothing wrong in the Commissioner issuing the impugned notice and taking any particular view that he may after hearing the petitioner. This contention on behalf of the respondent runs counter to what is pleaded in paragraph 11 of the affidavit filed by way of return. It seems the Department is firmly of the view that not only the quantum of add back amount but the liability for payment of tax or the incidence of tax is attracted. In my view looking at the definition of "dealer" in Section 2(c) the Hotel cannot be regarded as a "dealer" qua the cafeteria activity on the admitted fact that there was no profit motive in effecting sales in cafeteria to employees of the Hotel on subsidised rates. Therefore, unless qua this activity the Hotel is a "dealer" there will be no jurisdiction in the respondents to serve the impugned notice.

(18) With regard to the cash discounts mentioned in the impugned notice it is admitted by the petitioner that bills are sent to special customers periodically, in which a 15 or 20 per cent discount is given on the sale of refreshments to these persons. It is urged that the turnover from such sales would be less by the amount represented by the discount. Referring to the definition of "sale" in Section 2(g) and "sale price" in Section 2(h) of the Act it is contended that the sale price is the one which is ultimately shown in the bill sent to the special customers. This is somewhat of a moot point. Whether the turnover which is taxable is to be computed on the basis of the original bills prepared or the consolidated bill preferred to the customer, is a question which has to be decided on enunciation of the law. This aspect can perhaps be better decided if a reference is made to the High Court and not by way of a writ petition. There is no inherent lack of jurisdiction or patent illegality on the face of the record in the respondents taking a particular view. I, Therefore, hold that the impugned notice is not invalid vis-a-vis the revision sought to be made qua the cash discount.

(19) Coming now to the contention that the revision in respect of amounts ordered to be added back on items other than cafeteria activity I again find that the calculation of the quantum to be added back is certainly revisable. The add back was on a best judgment basis. It may or may not be contrary to law but the working of the quantum is certainly which is open to review. The Department in the earliest assessment year vide the order of the Financial Commissioner in revision may have taken a particular view but then as assessment for each year is a fresh assessment I find nothing wrong in the Commissioner issuing a notice for suo motu revision regarding the quantum. It is urged by the petitioner that as the add back was on best judgment basis there is no patent error on the face of it to warrant revision. I cannot agree.

(20) Mr. Bhandare urges that all the points raised in the writ petition could have been raised in reply to the show cause notice and, in any case, even the plea of lack of jurisdiction must first be raised before the authority concerned.

IN *Gandhinagar Motor Transport Society v. State of Bombay*, (1953) BL R 922 it was held that before a question of jurisdiction of a tribunal is raised before the High Court on a petition for a writ under article 226 of the Constitution of India, objection to jurisdiction must be taken before the tribunal whose order is being challenged. This cannot be accepted as a universal rule. Where the objection is to the basic jurisdiction of a tribunal either on question of law or on consideration of jurisdictional acts the objection to jurisdiction can always be raised by way of writ petition. It is only a rule of not exercising discretion where a person has submitted to the jurisdiction of the tribunal without questioning its jurisdiction which has prompted court to make observations as in the above Bombay case. Where, however, before submitting to the jurisdiction of the tribunal a party comes under Article 226 of the Constitution challenging the jurisdiction of the tribunal or challenging the very right of the tribunal to initiate proceedings, judicial review is competent.

The Act no doubt provides for alternative remedy of appeal and revision or a question of law being referred to the High Court but where the very initiation of an enquiry is incompetent in law this High Court is not powerless to interfere at the very initial stage.

(21) Some of the activities of a person may be included in the definition of "dealer" while others may not. Where incidence of tax is sought to be attracted in respect of an activity for which a person cannot be called a "dealer" the starting of proceedings under the Act would be wholly without jurisdiction and can be struck down. The Supreme Court in *State of Tamil Nadu v. Thirumagal Mills Ltd.*, (1972) 29 S.T.C. 290 approved of the above principle.

(22) Accordingly, I quash the impugned notice vis-a-vis the revision sought to be made for "banquet charges" and "cafeteria sales" but uphold the same vis-a-vis the rest of the items mentioned in the impugned notice. The rule is made absolute in the terms mentioned above and discharged vis-a-vis the items in

respect of which I have held the notice to be valid.

(23) In view of the fact that there is partial success of both the parties, I make no order as to costs.