
(1984) 02 OHC CK 0019
In the Orissa High Court
Case No : S.J.C. No"s. 64 and 65 of 1978

Hindustan Steel Limited

APPELLANT

Vs

State of Orissa

RESPONDENT

Date of Decision : 13-02-1984

Acts Referred:

Citation : (1984) 57 CLT 374 : (1984) 1 OLR 575 : (1985) 59 STC 107

Hon'ble Judges : J.K. Mohanty, J;B.N. Misra, J

Bench : Division Bench

Advocate : R. Mohanty, U.K. Misra, S.C. Lal and A. Agarwalla, for the Appellant;
Standing Counsel (S. T.), for the Respondent

Judgement

B.N. Misra, J.—At the instance of the assessee, the Member, Sales Tax Tribunal has referred the following question u/s 24 (1) of the Orissa Sales Tax Act, 1947 (hereinafter referred to as the "Act") for determination of this Court:

"Whether on the facts and in circumstances of the case, sales in the workers' canteen were liable to be included in the gross and taxable turnovers of the assessee during the year 1968-69 for the purpose of assessment of sales tax ?"

2. These references relate to the assessment for the year 1968-69. The assessee, M/s. Hindustan Steel Limited, Rourkela, is a registered dealer carrying on business in the manufacture and sale of steel and other products. In course of assessment for the year 1968-69, the assessing officer included Rs. 7, 94, 167. 81 being the sale proceeds of the workers' canteen, Rs. 4.05, 226. 38 being the sale proceeds of unserviceable materials of the A. C. A. Stores, Rs. 36, 778. 89 being the sale proceeds of the Rourkela Guest House and Rs. 18, 223.71 being the sale proceeds of horticultural products in the gross and taxable turnovers of the assessee as these sales had not been reflected in the returns submitted by the assessee. Accordingly, the assessing officer advanced additional tax demand of Rs. 56,226.31. The assessee preferred an appeal before the Assistant Commissioner of Sales Tax. At the hearing of the first appeal, the assessee did

not press its objection with regard to inclusion of the gross sale turnover of the sale proceeds of the Rourkela Guest House and horticultural products. It confined its objection to the remaining two items of sale and urged that it did not carry on any business in running the canteen for the welfare of the employees and that sale of unserviceable materials was also not its business. The first appellate authority held that the gross sale turnover of the workers' canteen was not exigible to tax as running of the workers' canteen was a welfare activity of the assessee, but the gross sale turnover of unserviceable materials had been rightly included in the gross and taxable turnovers as the assessee carried on business in unserviceable materials and collected sales tax from the purchasing dealers. Accordingly, the first appellate authority reduced the additional tax demand to Rs. 16,517.91. Against this order of the first appellate authority the Department filed an appeal before the Tribunal challenging the finding of the first appellate authority that running of the workers' canteen by the assessee was not its business. The assessee also filed an appeal challenging the finding that the assessee was carrying on business in unserviceable materials. The two appeals were heard analogously and disposed of by the Tribunal by its order dated 30. 11. 77. On consideration, the Tribunal inter alia held that the gross turnovers of the workers' canteen and of unserviceable materials were both exigible to tax. Thereafter, the assessee filed two reference applications u/s 24 (1) of the Act before the Tribunal praying for reference of the following three questions of law to this Court for its opinion:

"(a) Whether in the facts and circumstances of the case sale in the workers' canteen is liable to be included in the gross turnover and taxable turnover of the applicant?

(b) Whether in view of the facts and circumstances of the case the sale in A. C. A. Stores is to be included in the gross and taxable turnovers ? and

(c) Whether in the facts and circumstances of the case, retrospective operation of Act 18 of 1974 offends provision of Article 19 (1) (f) and (2) of the Constitution ?"

The two reference applications were heard analogously and the question of law already noted above has been referred to this Court for its opinion.

3. On the question whether the assessee carried on business in running a workers' canteen, the Tribunal followed a decision of this Court reported in 35 S. T. C. 195 (Tata Iron & Steel Co. v. State of Orissa) and a decision of the Supreme Court reported in 31 S. T. C. 428 (State of Tamil Nadu v. Burmah Shell Oil Storage and Distribution Co. of India Ltd. and another) and held that the gross sale turnover of the workers' canteen was exigible to tax. Learned counsel appearing for the assessee does not challenge the correctness of this finding of the Tribunal. However, it is urged that before the assessee is held liable to pay tax in respect of sales in the workers' canteen the taxing authority must ascertain and determine that in respect of the food supplied in the canteen the

substance of the transaction as evidenced by its dominant object is sale of food, the rendering of services being merely incidental. In support of this contention, learned counsel relies on the following decisions of the Supreme Court- In AIR 1978 SC 1591 (M/s. Northern India Caterers (India) v. Lt. Governor of Delhi), the Supreme Court held:

"It has already been noticed that in regard to hotels this Court has in Associated Hotels of India Limited (AIR 1972 SC 1131) (Supra) 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 foodstuffs. 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 *Elects B. Merrill*, [(1915) BLRA 481] (Supra) appears to be as much applicable to restaurants in India as it does elsewhere. It has not been proved that any different view should be taken, either at common law, in usage or under statute.

It was urged for the respondent that in Associated Hotels of India Ltd. (AIR 1972 SC 1131) (Supra) this Court drew a distinction between the case of meals supplied to a resident in a hotel and those served to a customer in a restaurant. We are unable to find any proposition of law laid down by the Court there which could lead to that inference. We may point out that in the view which appeals to us we find ourselves unable to agree with the observations to the contrary made by the Punjab High Court in *Associated Hotels of India Ltd., Simla v. Excise and Taxation Officer, Simla*, AIR 1966 Punjab 449 and by the Delhi High Court in *Municipal Corporation of Delhi v. Laxmi Narain Tandon*, AIR 1970 Delhi 224 (FB).

In the result, we hold that the service of meals to visitors in the restaurant of the appellant is not taxable under the Bengal Finance (Sales Tax) Act, 1941, as extended to the Union Territory of Delhi, and this is so whether a charge is imposed for the meal or (Sic.) a whole or according to the dishes separately ordered."

Petitions for review filed against the aforesaid judgment came to be considered by the Supreme Court in AIR 1980 SC 674 [M/s. Northern India Caterers (India) Ltd. v. Lt. Governor of Delhi]. The Supreme Court dismissed the review petitions and inter alia observed:

" It appears from the submissions now made that the respondent as well as other States are apprehensive that the benefit of the judgment of this Court will be invoked by restaurant-owners in those cases also where there is a sale of food

and title passes to the customers. It seems to us that having regard to the facts upon which our judgment rests-undisputed as they have remained throughout the different stages of the litigation-and the considerations which they attract, no such apprehension can be reasonably entertained. Indeed, we have no hesitation in saying 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."

Whether food and drinks served to the visitors in a hotel is a part of social service or a sale again came up for consideration before the Supreme Court in AIR 1981 SC 1751 (State of Karnataka v. Udupikrishna Bhavan) and it was held:

".....The finding of the Appellate Tribunal, as summarised by the High Court, on which its decision rests is:

"The assessee runs a hotel wherein food and drinks are served to the visitors."

We do not think that this finding only is sufficient to Justify the conclusion reached by the Tribunal and the High Court-It appears that the attention of the High Court was drawn to the judgment of this Court disposing of a review petition in the Northern India Caterer's case (1980) 2 SCR 650: (AIR 1980 SC 674). The following extract from that judgment to which the High Court itself has referred is relevant (at p. 679 of AIR):

"Indeed, we have no hesitation in saying 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 would be for the taxing authorities to ascertain the facts when making as assessment under the relevant sales tax law and to determine upon those facts whether a sale of the food supplied is intended."

Clearly therefore the only finding recorded in this case that the assessee runs a hotel wherein food and drinks are served to the visitors is not sufficient."

4. In the present case, as observed by the Tribunal in para-9 of its appellate judgment, since November, 1960, the assessee has been running a workers' canteen where food, drinks, snacks, tea, coffee etc., are sold. In view of the authoritative decisions of the Supreme Court referred to above, in the present case it was incumbent on the taxing authority to ascertain and determine whether supply of food, drinks, snacks, tea, coffee etc., in the workers' canteen was a part of rendering of service or whether the substance of the transaction, evidenced by its dominant object, was sale of food and the rendering of services

was merely incidental. This important aspect of the law has not at all been considered by the Tribunal and without a finding on the point it would not be possible to determine the liability of the assessee under the Act in respect of the sales in the workers canteen.

5. Our answer to the question, therefore, would be:

"On the facts and in the circumstances of the case, sales in the workers" canteen would be liable to be included in the gross and taxable turnovers of the assessee during the year 1968-69 for the purpose of assessment of sales tax only if it is established upon the facts that the substance of the transaction in the supply of food, drinks, snacks, tea, coffee etc., in the workers, canteen, evidenced by its dominant object, is a sale of food and the rendering of services is merely incidental."

The Tribunal shall now dispose of the case according to law keeping in view the guidelines appearing in the judgments of the Supreme Court referred to above and the decision of this Court herein contained. There would be no order as to costs.

J.K. Mohanty, J.

6. I agree.