(1990) 08 BOM CK 0077

In the Bombay High Court

Case No : Sales Tax Reference No''s. 73 and 74 of 1979

Hotel Alankar APPELLANT

Vs

State of Maharashtra RESPONDENT

Date of Decision : 06-08-1990

Acts Referred:
Bombay Sales Tax Act, 1959 — Section 61(1)

Citation : (1990) 08 BOM CK 0077

Hon'ble Judges : V.A. Mohta, J;H.D. Patel, J

Bench : Division Bench

Advocate : V.G. Bhonsale and V.V. Udhoji, for the Appellant; B.P. Jaiswal, for the Respondent

Judgement

V.A. Mohta, J.—The following common question has been referred for recording answer at the instance of the assessee u/s 61(1) of the Bombay Sales Tax Act, 1959 ("the Act") in these two references :

"Whether beer containing less than 5 per cent of alcohol is covered by the scope of entry 1(2)(b) of Schedule D, Part II, as the entry stood during the relevant period in question ?"

2. The assessee, M/s. Hotel Alankar, serves, inter alia, beer in the hotel. It applied for registration under the Act on 22nd May, 1973. It was found to be liable for levy of sales tax with effect from 1st April, 1972. It was assessed for the period 1st April, 1972 to 30th March, 1973 and 1st April, 1973 to 21st May, 1973 as an unregistered dealer. During these periods the beer sold by it was held to be covered by the scope of entry 1(2)(b) of Schedule D, Part II of the Act, by the Sales Tax Officer, the Deputy Commissioner in first appeal and the Sales Tax Tribunal in the second appeal. According to the assessee, beer is mild liquor as defined under rule 3(6)(2)(d) of the Bombay Foreign Liquor Rules, 1953 ("the Rules") and since "mild liquor" was not then included in entry 1(2)(b) of Schedule D, Part II, it could be covered only by residuary entry 22 of Schedule E.

3. There can be no manner of doubt that residuary entry is attracted only in case no other entry is attracted. Entry 1(2)(b) of Schedule D, Part II, was changed from time to time :

(i) From 1st April, 1972 to 18th December, 1972, it read as under :

"Country liquor (that is, all liquor other than foreign liquor manufactured in India) and foreign liquor (that is, duty-paid potable foreign liquor brought into or manufactured in India including spirits, wines and fermented liquors)."

(ii) From 19th December, 1972 to 10th May, 1973, it read as under :

"Country liquor (that is, all liquor other than foreign liquor manufactured in India) and duty-paid potable foreign liquor brought into India including spirits, wines, and fermented liquors.

Foreign liquor (that is, duty-paid potable foreign liquor manufactured in India including spirits, wines and fermented liquors).

(a) Fermented liquors.

(b) Any other liquors."

(iii) From 11th May, 1973 onwards, it read as under :

"(1) Country liquor (that is, all liquor, other than country liquor to which entry 72 in Schedule C applies and other than foreign liquor manufactured in India) and duty-paid potable foreign liquor brought into India, including spirits, wines, fermented liquors and mild liquors.

(2) Foreign liquor (that is, duty-paid potable foreign liquor manufactured in India, including spirits, wines, fermented liquors and mild liquors).

(a) Fermented liquors and mild liquors.

(b) Any other liquor."

4. The term "foreign liquor" is not defined under the Act and both parties have rightly relied upon its definition given in rule 3(6) of the Rules. It reads as under :

"3. (6)(1) ''Foreign liquor'' means potable duty-paid foreign liquor of the following kinds, namely :

(i) spirits,

(ii) wines,

(iii) fermented liquors, and

(iv) mild liquors.

(2)(a) ''spirits'' means brandy, whisky, rum club cup, gin, liquors an milk punch;

(b) ''wines'' means champagne, moselle, burgundy, chainti, white wines, clarets, hocks, riesling, madeira, ginger wine, port-type, port, vermouth, sherry, wincarnis, vibrona, manola, buckfast tonic-wine and such other wines as the State Government may by notification in the Official Gazette specify being wines having alcoholic strength exceeding 5 per cent alcohol by volume (i.e., equivalent to 8.75 per cent of proof spirit).

[Explanation. - For the purpose of this item ''wincarnis'' means wincarnis prepared according to the following formulae, namely :

(c) ''fermented liquor'' means, ale, beer, milk, stout (porter), cider having alcoholic strength exceeding 5 per cent alcohol by volume (i.e., equivalent to 8.75 per cent of proof spirit and such other fermented liquors as the State Government may be notification in the Official Gazette specify;

(d) ''mild liquor'' means any foreign liquor having alcoholic strength not exceeding 5 per cent alcohol by volume (i.e., equivalent to 8.75 per cent of proof spirit)."

The beer sold by the assessee had, admittedly, alcoholic strength not exceeding 5 per cent, and therefore, it would fall under the definition of the term "mild liquor" given in rule 3(6)(2)(d) of the Rules. Beer having alcoholic strength exceeding 5 per cent falls within the definition of the term "fermented liquor" given in rule 3(6)(2)(c) of the Rules and "mild liquor" as well as "fermented liquor" are included in the general term "foreign liquor". We may mention that even for the period prior to 18th December, 1972, sales tax has been levied wrongly on the basis of application of the entry as is stood between 19th December, 1972 to 10th May, 1973 and was held to be covered by the term "any other liquor" under entry 1(2)(b) of Schedule D, part II of the Act.

5. Up to 10th May, 1973, the category of "mild liquor" has not been separately mentioned. Only because it is separately mentioned on or after 11th May, 1973, it cannot be held that the earlier two entries treated it as an independent item. It is true that in the bracket, "foreign liquor" is described as including spirits, wines and fermented liquor will have to be read only as illustrative items in view of the use of the word "including". Unless otherwise specified, the words "foreign liquor" would include all liquors mentioned in the definition including "mild liquor". Thus until mild liquop was specially carved out of "Foreign liquor", it fell within the term "foreign liquor" before 18th December, 1972 and in the term "any other liquors" for the period 19th December, 1972 to 10th May, 1973. Thus, the assessment made by the Tribunal was correct.

6. The question is therefore, answered in the affirmative. No costs.

7. Reference answered in the affirmative.

