(1989) 12 KAR CK 0010

In the Karnataka High Court

Case No : STRP No. 60/85

M/s. Jaganmohan Coffee Club APPELLANT

Vs

State of Karnataka RESPONDENT

Date of Decision : 13-12-1989

Acts Referred:

Constitution (Forty-Sixth Amendment) Act, 1982 — Section 6(2)(A)

Citation : (1990) 34 KarLJ 65

Hon'ble Judges : S. Rajendra Babu, J;K. Shivashankar Bhat, J

Judgement

Shivashankar Bhat, J.-The petitioner is a hotelier. Consequent on the Judgment of the Supreme Court in Northern India Caterers India Ltd., case, he (petitioner) went on filing revised returns for the period from 7-9-1978 to 31-10-1978. The Dealer petitioner raised a plea that the turnover relating to the sale of Drinks and Food were not eligible to tax in view of the aforesaid decision. However, this plea was not accepted by the assessing authority and the said view of the assessing authority was affirmed by the Appellate Authority as well as by the Appellate Tribunal. Before the Appellate Tribunal, the petitioner relied on the provisions of the 46th Amendment of the Constitution and in particular Section 6(2) of the said Constitution Amendment Act, which reads as follows:

"Notwithstanding anything contained in sub-section (1), any supply of the nature referred to therein shall be exempt from the aforesaid tax.

(a) where such supply has been made, by any restaurant or eating house (by whatever name called), at any time on or after the 7th day of September, 1978, and before the commencement of this Act and the aforesaid tax has not been collected on such supply on the ground that no such tax could have been levied or collected at that time; or (b) where such supply, not being any such supply by any restaurant or eating house (whatever name called), has been made at any time on or after the 4th day of January 1972, and before the commencement of this Act and the aforesaid tax has not been collected on such supply or the ground that no such tax could have been levied or collected at that time.

Provided that the burden of proving that the aforesaid tax was not collected on any supply of the nature referred to in clause (a) or, as the case, may be, clause (b), shall be on the person claiming the exemption under this sub-section."

2. This plea was not accepted by the Tribunal. One of the reasons given by the Tribunal is that, where the dealer was unable to prove that the price charged for the sale was not exclusive of tax element it has to be inferred that the sale price was inclusive of tax. If the dealer is able to prove that the sale price which he charged prior to 7-9-1978 was inclusive of tax element, and it was reduced in the sale price he charged from 7-9-1978 or thereafter under the bonafide belief that he was not liable to pay tax only, then, the dealer was entitled to the benefit.

3. The Judicial Member has given his reasons as:

"The appellant has filed a memo in this Tribunal that in any event benefit of the 46th Amendment to the Constitution should be given and the transactions from 7-9-1978 to 31-10-1978 exempted from tax. The appellant has stated that no tax had been collected during that period. We find that there is no evidence of the appellant having collected tax separately at any time, and that being so, it is impossible to hold that tax was not collected in the belief that tax was not leviable. It is difficult and dangerous to entertain such a plea at so late a stage. The appellant must have included the tax in the cost of food supplied at all times both before and after 46th Amendment to the Constitution, and so cannot contend that only after the Supreme Court''s decision tax was not collected. Therefore, we are of the opinion that the appellant is not entitled to any benefit under the 46th Amendment to the Constitution of India."

4. Before proceeding further, it is necessary to note the basis on which a dealer may claim the benefit of Section 6(2)(a). In the aforesaid decision, the Supreme Court held that the sale of food and drinks by a hotelier as services cannot be included under the taxable turnover under the provisions of the Sales Tax Act. The decision was rendered on 7th September, 1978. Thereafter the Constitution was amended enlarging the concept of sale (or clarifying the said concept) so as to include sale of food and drink. This amendment had a certain retrospectivity. But, if a dealer, by virtue of the Supreme Court decision did not collect sales-tax from his customers, the Parliament thought it proper that such a Dealer shall not be burdened with the liability to pay the tax, between the dates of the Supreme Court Judgment and the date of the Constitutional Amendment. In this background, the aforesaid provision was enacted. Section 6(2)(a) provides that the tax for the period subsequent to 7th September, 1978 till the commencement of the Amendment Act, shall not be levied from a dealer if such a dealer had not infact collected, on supply of food and drinks, sales tax on the ground that no tax could have been levied or collected at the time. In other words, if a dealer proceeded on the assumption that the sales made by him was not liable to sales tax and therefore, did not collect the same from the customers, Section 6(2)(a) freed him from the liability. But to avail of the benefit of this provision, the dealer has to establish two facts, viz., (1) The Dealer did not collect the tax: (2) He did

not collect the tax because he was under the impression that such a tax could not have been levied or collected. Both aspects are essentially facts. No where we find any such assertion by the dealer here, stating that he did not collect the tax on the ground that such a tax could not have been levied or collected. The dealer has been claiming non-liability to the tax by virtue of the decision of the Supreme Court as a matter of law; but the law stood altered retrospectively by virtue of the Amendment Act referred above. As pointed out earlier, purpose of Section 6(2)(a) of the said Amendment Act is to remove the difficulty caused by the retrospectivity given to the Amendment Act. The Dealer, having failed to plead and prove the basic facts to attract Section 6(2)(a), he is not entitled to the relief sought for by him.

Consequently, this Revision Petition is dismissed.

Petition dismissed.