
(2011) 05 KL CK 0201
In the High Court Of Kerala
Case No : S.T.A. No. 14 of 2008

M/s Muthoot Hotel and Tourism Ventures (P) Ltd.	APPELLANT
Vs	
State of Kerala	RESPONDENT

Date of Decision : 24-05-2011

Acts Referred:

Kerala General Sales Tax Act, 1963 — Section 3, 37, 40, 45A, 5(1)

Citation : (2011) 3 ILR (Ker) 655

Hon'ble Judges : C.N. Ramachandran Nair, J;B.P. Ray, J

Bench : Division Bench

Advocate : A.K. Jayasankar Nambiar and E.K. Nandakumar, for the Appellant;
Mohammed Rafeeq Government Pleader, for the Respondent

Final Decision : Dismissed

Judgement

C.N. Ramachandran Nair, J.—The appellant is a star hotel located at Thiruvananthapuram. It is also running a restaurant in the International Airport at Thiruvananthapuram. The Airport restaurant has only a limited kitchen facility and therefore cooked food is transported from the hotel and served in the restaurant. The Kerala General Sales Tax Act, 1963 (hereinafter referred to as the Act for short) provides for levy of tax on cooked food served in star hotels and bar hotels at 8%. So far as other hotels and restaurants are concerned, the provision contained in the Act is to collect licence fee based on the annual turnover of the hotel. The appellant has no dispute with regard to it's liability for tax at 8% on the sale of cooked food and beverages served in the star hotel. The contention raised by the appellant before the Sales Tax Authorities is that it has no liability to pay tax at 8% on the sales turnover of cooked food and beverages in the Airport restaurant as the same does not constitute part of the five star hotel run by it in the city. The appellant offered to pay licence fee u/s 5B of the Act treating the Airport restaurant as a separate and distinct unit. However the claim was turned down by the Assessing Officer, who levied penalty at double the amount of tax sought to be evaded in the 2nd half of the financial year 2001-02.

On a revision filed against the penalty levied u/s 45A of the Act, the Deputy Commissioner (CT) set aside the penalty holding that the appellant is liable to pay only licence fee for the sales turnover of cooked food and bevarages in the Airport restaurant. However the Commissioner of Commercial Taxes in exercise of suo motu revisional powers vested u/s 37 of the Act issued notice to the appellant and after overruling the objections, cancelled the order of the first revisional authority and restored the penalty, against which this appeal is filed u/s 40 of the Act.

2. We have heard learned counsel appearing for the appellant and learned Government Pleader for the respondent.

3. For easy reference the relevant charging Section and Entry 46 of the 1st Schedule to the Act are extracted hereunder:

5. Levy of tax on sale or purchase of goods.--(1) Every dealer (other than a casual trader or agent of a non-resident dealer) whose total turnover for a year is not less than (two lakh rupees) and every casual trader or agent of a nonresident, whatever be his total turnover for the year, shall pay tax on his taxable turnover for that year,

(i) in the case of goods specified in the First or Second Schedule, at the rates and only at the points specified against such goods in the said Schedules;

5B. Levy of license fee on cooked food.--Any dealer in cooked food, including beverages sold or served not falling under the entries against serial No.46 and 60 of the first schedule whose turnover in a year exceeds five lakh rupees, shall pay annual license fee at the rate of five hundred rupees for every one lakh rupees or part thereof in excess of five lakh rupees, in such manner as may be prescribed:

Provided that such dealer shall not be liable to pay tax under sub-sections (1) and (2) of Section 5 and u/s 5A.

Entry 46 of the First Schedule to the Act--8%

46. Cooked food, including beverages, not falling under entry 60 of this Schedule, sold or served in bar attached hotels and / or star hotels.

Explanation.--"Bar attached Hotel" for the purpose of this entry shall mean a hotel or restaurant which is licenced under the Foreign Liquor Rules to serve foreign liquor falling under entry in serial number 60 of this schedule.

4. Contentions raised by the learned counsel for the appellant is that the charging Section 5(1) read with the relevant charging Entry, namely Entry 46 of the 1st Schedule to the Act, provides for levy of tax at 8% on cooked food and beverages sold in star hotels or bar hotels and the said provision does not apply for service of food by star hotels outside the hotel premises. Learned Government Pleader on the other hand contended that since only star hotels are entitled to run hotel/restaurant in the Airport, the sale of cooked food and beverages by star hotels in the Airport also attracts tax under entry 46 of the 1st

Schedule to the Act.

5. On a careful consideration of the relevant entries above stated, we are unable to uphold the contention canvassed by the appellant that the liability to tax under Entry 46 is only when cooked food and beverages are sold by star hotels and Bar attached hotels within the hotel and not outside the hotel. Of course Entry 46 in the literal sense means that in order to attract tax at the Schedule rate, the cooked food and beverages should be served in Bar attached hotels or star hotels. Appellant is admittedly a star hotel which is paying tax under Entry 46 for the cooked food and beverages sold in the hotel and in the hotel premises i.e. in the lawn, in rooms or in any other premises of the hotel. The distinction drawn by the appellant is with regard to food cooked and prepared in the hotel and transported and sold in the Airport restaurant run by the appellant. In the first place, what we notice is that appellant does not have a separate registration under the KGST Act for the Airport restaurant which according to the appellant, is an independent and separate unit, no matter the food and beverages sold there are transported from appellant's hotel. The contention canvassed by the appellant is that tax at the Schedule rate applies only when star hotel or Bar hotel serves food in the hotel itself. The KGST Act provides for assessment of total turnover of the dealer which includes turnover of articles sold anywhere within the State. Appellant is free to cook and serve food in the hotel or act as caterers which involves transfer and supply of goods anywhere outside the hotel. If appellant's contention is accepted, then appellant's turnover has to be bifurcated between the turnover of cooked food and beverages sold within the hotel and those cooked in the hotel but transported and sold in other places. The contention of the appellant has to be appreciated with reference to the general scheme of levy of tax provided under the Act. When the entries in the Schedule are closely scrutinised, what is clear is that higher incidence of tax is on the luxurious and more expensive commodities, say for example, alcohol, bottled drinks, branded goods, cosmetics etc. In other words, tax is geared to the customer and richer the customer is, higher the incidence of tax is. Between the charging entry in the Schedule and Section 5B, the Legislature has drawn a distinction between class of customers who can afford to eat in Star hotels or Bar hotels where the food tariff is higher than ordinary restaurants. When tax is loaded on the goods, it is the customer who bears the tax and so much so, we cannot accept the contention of the appellant that there is a difference between the place of service of food i.e. within the star hotel and outside the hotel. The food cooked in Star hotel, whether served within the hotel, outside the hotel like the Airport restaurant or in the plane, served by caterers is high value food intended to cater to the richer class of the society. Admittedly restaurant facility provided in Airports is only to Star hotels which means that high quality food which is necessarily expensive, only is served in the Airport hotel. So much so, in our view, the objective of the charging entry is such that the words "sold in hotel" is to be understood to include sold by hotel. In other words, food cooked by Star hotels or Bar hotels wherever sold by the hotel, will attract tax under

Entry 46 of the First Schedule to the KGST Act. We, therefore, uphold the view taken by the Commissioner that for the sales in the Airport Restaurant appellant is liable to pay tax at the rate provided under Entry 46 of the First Schedule to the Act and is not entitled to pay tax under the compounding scheme provided u/s 5B which applies to ordinary hotels and restaurants not being Star hotels or Bar attached hotels.

6. Lastly, counsel for the appellant contended that the levy of penalty is not justified. We are in agreement with this contention because in the first place, the issue is not free from doubt until decided by this court and secondly, there was difference of opinion between the Deputy Commissioner and the Commissioner in the same matter. We, therefore, allow the appeal in part by setting aside the penalty, but on condition that the appellant will without any contest pay tax at the Schedule rate along with interest for the entire period, within a period of one month from date of receipt of copy of this judgment. The Assessing Officer is directed to complete appellant's assessments including the sales turnover in the Airport restaurant and raise demand of tax and interest and issue orders without any delay for the appellant to comply with the above direction. However, if the appellant does not remit tax and interest as above and proceeds to contest the liability in assessment, then penalty levied will stand restored and the appeal will be treated as dismissed.