

(1970) 03 OHC CK 0009
In the Orissa High Court
Case No : S.J.Csz. No's. 40 to 54 of 1967

Oberoi Palm Beach Hotel (P.) Ltd.

APPELLANT

Vs

State of Orissa

RESPONDENT

Date of Decision : 24-03-1970

Acts Referred:

Orissa Sales Tax Act, 1947 — Section 2(g)

Citation : (1970) 26 STC 528

Hon'ble Judges : G.K. Misra, C.J.; S. Acharya, J

Bench : Division Bench

Advocate : D. Pal, for the Appellant; Standing Counsel (Sales Tax), for the Respondent

Judgement

G.K. Misra, C.J.—Two questions have been referred to this court for answer. They are :

(1) Whether on the facts and in the circumstances of the case, the assessee-company who makes one consolidated charge for providing their client with residential accommodations, services, linen, food etc. is liable to be assessed under the Orissa Sales Tax Act, 1947, on the supply of food to its residents.

(2) Whether on the facts and in the circumstances of the case, the supply of food by the company to its residents constitutes a sale of goods within the meaning of the Orissa Sales Tax Act and as such liable to be assessed under the said Act.

2. The facts on the basis of which the aforesaid two questions have been framed, as referred to in the reference order, are not disputed before us. The Oberoi Palm Beach Hotel at Gopalpur in the district of Ganjam is a registered dealer under the Orissa Sales Tax Act. It carries on the business of hotel-keeping. A composite charge for lodging and boarding is made from each boarder at Rs. 25 to Rs. 30 for a single room and Rs. 45 to Rs. 50 for a double room per day. This charge includes service of providing with residential accommodation, food, linen, hot and cold water etc. If a boarder fails to take his meals at the prescribed hours at the

prescribed place in the hotel he is not entitled to any rebate for the value of the food. He also cannot carry the food elsewhere. Neither he is permitted to transfer the food to somebody else. The assessee who is the hotelier claimed that the hotel was not selling or supplying food to such classes of boarders and as such there was no sale under the agreement and the supply of food as an integral part of the residential accommodation does not constitute sale. This contention was negatived right up to the Tribunal and accordingly the petitioner asked for a reference of the aforesaid two questions. In its appellate judgment the Tribunal seems to have been impressed with the force of the argument of the petitioner ; but it was rejected on the ground that Rule 90 of the Orissa Sales Tax Rules stood in the way and being a creature of the statute the Tribunal could not give any relief to the petitioner.

3. The sole question for consideration is whether supply of food to the aforesaid class of persons who do not enter into any separate agreement in respect of the supply of food would constitute "sale" within the meaning of that expression in the Orissa Sales Tax Act. "Sale" has been denned in Section 2(g). "Sale" means with all its grammatical variations and cognate expressions, any transfer of property in goods for cash or deferred payment or other valuable consideration, but does not include a mortgage, hypothecation, charge or pledge and the words "buy" and "purchase" shall be construed accordingly.

Thus, in order to constitute "sale" there must be transfer of property in goods which would always constitute movable property. The impugned agreement of the boarders with the hotelier, the terms of which have already been indicated, would show that there was no separate agreement for sale of food. Supply of food constituted an integral part of the agreement whereunder many other necessary services were also supplied. The value of food was not separately indicated in the agreement. The customer was not entitled to any rebate or reimbursement for non-user of the food at any time. He had not the right to transfer the food to some other place to be consumed by himself. He could not also gift away the food to somebody else. Thus the customer had no right to the food unless he took the same within the specified hour at the specified place. From the aforesaid agreement we cannot construe an independent and separate agreement indicating that there was a sale of food. The contract was indivisible.

4. Rule 90 of the "Orissa Sales Tax Rules does not stand in the way of the aforesaid construction. It runs thus ;

90. (1) A dealer who carries on business of running a hotel or a refreshment or any other establishment for selling or supplying meals, refreshments, drinks and such other articles or as the manufacturer of confectionery articles for retail sale shall pay, in lieu of the tax assessable on his taxable turnover under the provisions of the Act, a sum calculated at the rate of five naye paise in the rupee on a percentage of his annual turnover of sales as shown below :....

The rule is intra vires and not ultra vires. It refers to sale of meals, refreshments,

drinks and other articles when separately done. For instance, an outsider who does not propose to reside in the hotel can go in, take a particular lunch and pay the price separately. In such a case the price of the meals would be assessable to sales tax. The rule is therefore intra vires and does not militate against the construction given by us that under the impugned agreement supply of food is not assessable to sales tax.

5. Our view is also supported by a decision of a Single Judge of the Punjab High Court at Chandigarh in *Associated Hotels of India Ltd. v. The Excise and Taxation Officer, Simla* and Anr. [1966] 17 S.T.C. 555(sc). Exactly on identical facts his Lordship came to the conclusion that there was no separate agreement for sale and the supply of foodstuff constituting an integral part of an agreement of the aforesaid nature does not constitute sale. The judgment of the Single Judge was affirmed in appeal, in *State of Punjab and Anr. v. Associated Hotels of India Ltd.* [1967] 20 S.T.C. 1(sc).

6. On the aforesaid analysis we would answer the first question in the negative. The second question is irrelevant as the same concept is involved in the first question. We answer the second question in the negative.

7. In the result, the references are accepted ; but in the circumstances without costs. The dealer is entitled to the refund of the reference fees in all the cases.

S. Acharya, J.

I agree.