(2014) 08 P&H CK 0047

In the Punjab And Haryana At Chandigarh

Case No : Civil Writ Petition No. 9566 of 2001 (O and M)

Odean Restaurant APPELLANT

Vs

The State of Punjab and Others RESPONDENT

Date of Decision : 04-08-2014

Acts Referred:

- Constitution of India, 1950 — Article 226 227 366
- Punjab General Sales Tax (Amendment and Validation) Act, 1987 — Section 4(2) 4(2)(a)
- Punjab General Sales Tax Act, 1948 — Section 2(h) 21 22(1) 4(2) 4(2)(a)

Citation : (2015) 179 PLR 603

Hon'ble Judges : Ajay Kumar Mittal, J;Fateh Deep Singh, J

Bench : Division Bench

Advocate : K.L. Goyal, Senior Advocate and Naveen Rattan, Advocate for the Appellant; Piyush Kant Jain, Additional Advocate General, Advocate for the Respondent;

Judgement

Ajay Kumar Mittal, J.

1. In this petition filed under Articles 226/227 of the Constitution of India, the petitioner has prayed for issuance of a writ of certiorari for quashing the orders dated 29.5.1992 (Annexure P-5) passed by respondent No. 3 and dated 30.3.1994 (Annexure P-6) passed by respondent No. 2. The facts, in brief, necessary for adjudication of the instant appeal as narrated therein are that the petitioner is a partnership firm running a restaurant at Amritsar. The petitioner was registered as a dealer under the Punjab General Sales Tax Act, 1948 (hereinafter referred to as "1948 Act") with registration No. AMR/556 during the year 1985-86. It claimed exemption from payment of tax under the 1948 Act for the receipts on account of meals served to the customers in view of the judgments of the Hon''ble Supreme Court in Northern India Caterers (India) Ltd. Vs. Lt. Governor of Delhi, and State of Himachal Pradesh and others v. Associated Hotels India Ltd., (1972) 29 S.T.C. 474 wherein it was observed that the transactions in question are not ''sales'' as defined in Section 2(h) of the

1948 Act. The Parliament by way of 46th Amendment, inserted Clause (29-A) in Article 366 defining the term ''sale''. It came into force w.e.f. 2.2.1983 and the States were empowered to impose tax on the transactions relating to meals served to the customers in the restaurants as ''sales''. The State of Punjab vide notification dated 13.4.1987 (Annexure P-2) amended the 1948 Act by enacting Punjab General Sales Tax (Amendment and Validation) Act, 1987 (in short "the Act") and changed the definition of sale given in Section 2(h) therein. Vide Section 4(2)(a) of the amending Act, it was provided that no tax shall be payable for the period upto the date on which the amended Act had come into force if the dealer had not collected any tax from the customers. The assessing authority vide order dated 5.5.1989 (Annexure P-4) framed the assessment of the dealer for the year 1985-86 declaring the transactions as not liable to payment of tax as no tax had been collected by the dealer from the customers. Therefore, in view of the Section 4(2)(a) of the amended Act, the assessing authority had not levied any tax despite the amendment of the 1948 Act. Respondent No. 3 initiated suo motu revisional proceedings on the ground that even after the amendment of the Act, the dealer was liable to pay tax and vide order dated 29.5.1992 (Annexure P-5) not only assessed the tax amounting to Rs. 56,237/- but also levied interest to the tune of Rs. 69,688/- on the dealer. Feeling aggrieved, the dealer filed revision before the Tribunal. The Tribunal vide order dated 30.3.1994 (Annexure P-6) upheld the order of respondent No. 3 and dismissed the revision holding that the onus to prove that the tax was not collected from the dealer was upon him which he had foiled to do. Aggrieved by the order dated 30.3.1994 (Annexure P-6), the dealer filed reference under Section 22(1) of the Act for referring certain questions of law to this Court for opinion. During the pendency of the reference application, the dealer moved rectification application regarding interest. However, the Tribunal vide order dated 3.11.1998 (Annexure P-8) dismissed the said application being time barred. The Tribunal vide ex-parte order dated 30.9.1999 (Annexure P-9) dismissed the reference application. Thereafter, the dealer filed restoration application for recalling the order dated 30.9.1999 (Annexure P-9). The Tribunal vide order dated 19.10.2000 (Annexure P-10) dismissed the said application. Hence, the present writ petition.

2. Upon notice of motion having been issued, written statement was filed by respondents No. 1 and 3. It was pleaded therein that the petitioner was charging tax and depositing the same. The revisional authority took up the case of the petitioner and after examination of the record, the petitioner was assessed under Section 21 of the 1948 Act and an additional demand of Rs. 1,25,925/- was created because the petitioner had failed to discharge its onus to show that as to why it stopped charging tax when there was no change in the law between 1983 to 1985. It was further pleaded that the order of the revisional authority was upheld by the Tribunal and the reference application as well as rectification application regarding interest filed by the petitioner were also dismissed by the Tribunal. The other averments made in the writ petition were denied and a prayer for dismissal of the same was made.

3. The averments made in the written statement were controverted and that of the writ petition were reiterated by the petitioner by filing replication.

4. Learned counsel for the petitioner submitted that the Parliament by 46th Constitutional Amendment had sought to bring within the tax net the restaurants and the food etc. sold by them w.e.f. 2.2.1983. However, the State Legislature by virtue of the Amendment Act made effective from 3.3.1987 had levied sales tax on the food articles sold by the restaurants. However, by virtue of Section 4(2)(a) of the amended Act, it was stipulated that the dealer-restaurant owners shall not be liable to pay tax where the said tax has not been collected on supply on the ground that no such tax could have been levied or collected at that time. It was urged that the Assessing Officer in the order had categorically recorded a finding that after perusal of the books of account produced by the dealer, it was noticed that no tax was collected during the year under assessment. Reference was also made to the letter dated 21.5.1985, Annexure P-1, whereby the petitioner had surrendered registration certificate w.e.f. 21.5.1985. It was argued that the revisional authority and the Tribunal had without any material recorded a finding that the assessee had failed to show that no tax was collected which was not borne out from the record. The levy of interest was also challenged in view of judgment of the Hon''ble Apex Court in J.K. Synthetics Ltd. v. Commercial Taxes Officer, 94 S.T.C. 422 (S.C.).

5. On the other hand, learned State counsel supported the orders passed by the revisional authority and the Tribunal.

6. After hearing learned counsel for the parties, we find substance in the submission of learned counsel for the petitioner. It would be advantageous to refer to Section 4(2) of the Act amended Act which reads thus:--

"4(2) 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 the Punjab General Sales Tax (Amendment) Act, 1987 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 (by whatever name called), has been made at any time on or after the 4th day of January, 1972, and before such commencement and the aforesaid tax has not been collected on such supply on the ground that no such tax have been levied or collected at that time:

Provided that the burden of providing 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."

7. Section 4(2) of the amended Act specifically provides that before the

commencement of the Punjab General Sales Tax (Amendment) Act, 1987, the dealer-restaurant owner was not liable to pay tax on the supply of goods where no such tax had been collected on such supply by him on the ground that no such tax could have been levied or collected at that time. In other words, for the period prior thereto, liability could only be fastened where the dealer had collected the tax. The Assessing Officer on the basis of material and after examining the books of account had recorded a categorical finding that no tax was collected during the assessment year in question. This fact was corroborated by the petitioner with reference to letter dated 21.5.1985 (Annexure P-1) where the dealer had surrendered the registration certificate w.e.f. 21.5.1985. The onus upon the dealer had, thus, been discharged. The findings recorded by the revisional authority and the Tribunal to the contrary are not borne out from the record and, thus, cannot legally be sustained.

8. In view of the above, no liability could be fastened on the petitioner for the period in question. As a necessary corollary, the levy of interest is also unsustainable. Writ petition stands disposed of in the aforesaid terms.

