

(1988) 02 OHC CK 0008

In the Orissa High Court

Case No : Original Jurisdiction Case No's. 1631 and 1632 of 1980

Piplani Sweets

APPELLANT

Vs

Sales Tax Officer and Another

RESPONDENT

Date of Decision : 03-02-1988

Acts Referred:

Constitution of India, 1950 — Article 366

Citation : (1988) 70 STC 153

Hon'ble Judges : H.L. Agrawal, C.J.; K.P. Mohapatra, J

Bench : Division Bench

Advocate : B. Agarwal, for the Appellant; The Standing Counsel (C.T.) and the Additional Standing Counsel (C.T.), for the Respondent

Judgement

H.L. Agrawal, C.J.—These two writ applications in which the petitioner is the same and the questions are identical were heard together and are being disposed of herewith.

2. The petitioner runs a restaurant wherein it serves meals and tiffin to its guests providing proper seating and other necessary arrangements for their reasonable comforts. The question that falls for consideration in this case is as to whether the sale, or, for that matter, the supply of foodstuffs and other eatables by the petitioner-restaurant to its customers was a "sale" within the meaning of the Orissa Sales Tax Act ("Act" for short) and thus exigible to tax or it was only a part of the "service" outside the mischief of the definition, before its amendment by Act No. 13 of 1984.

3. The petitioner was assessed to sales tax for the periods 1971-72 to 1974-75 by the Sales Tax Officer, Sambalpur II Circle. The assessment orders were ultimately annulled by the Sales Tax Tribunal following the decision of the Supreme Court in Northern India Caterers' case [1978] 42 STC 386. Accordingly, the petitioner stopped filing returns for the subsequent periods. The Sales Tax Officer, however, issued notice to the petitioner under Sections 12(2) and 12(4) of the Act and completed assessment for the years 1977-78 and 1978-79 by

raising demands of Rs. 8,655 and Rs. 9,082.50 respectively under the Act and Rs. 259.65 and Rs. 272.49 respectively under the O. A. S. T. Rules (as per annexure 2 series to each of the writ applications). Some penalties were also imposed by him for non-filing of the returns vide his orders in annexure 1 series to each of the writ applications. O. J. C. No. 1631 of 1980 relates to the assessment year 1977-78 and O. J. C. No. 1632 of 1980 relates to 1978-79. The petitioner has challenged the assessment orders on the ground that they were contrary to the principles laid down by the Supreme Court in the aforesaid authority.

4. It would appear from the assessment orders that spot inquiries were made by the officers of the Revenue in the afternoon of 15th May, 1980 and 17th May, 1980 incognito. They took their tiffin in the restaurant and also purchased certain eatables (biri badas) for home. On this and some other materials, the Sales Tax Officer has recorded the finding that the dominant object of the dealer was to sell the sweets and other eatables prepared by it and not "service". No separate charge was taken for the sale of the food articles to the customers who consumed the food in the restaurant itself and the provisions like furniture and music were incidental to attract the customers.

5. In the 12th paragraph of the writ applications, the petitioner has taken a stand that in the transactions of the petitioner, there is no element of sale but purely service. In support of this submission the petitioner has also filed the photographs of the premises showing the customers sitting in the restaurant and eating the tiffins, thus to emphasise that the customers visiting the restaurant were guests and served with the articles for their consumption in the restaurant itself. It is on this basis that the petitioner wants to assail the assessment orders and apply the ratio of the Supreme Court cases.

6. In the counter-affidavit filed on behalf of the opposite parties, it has been asserted that the petitioner runs business of sale of tiffin, sweets and other food items. The claim of any provision for accommodation has also been denied. It has been asserted that the customers who purchase the eatables may consume it there, for which sitting arrangement is provided, or carry the same home. Thus, the transaction of the petitioner was "sale", pure and simple.

7. It is not necessary to advert to the other contentions raised in the writ petitions and the replies in the counter-affidavit for the present purpose. The meaning of "restaurant" in common parlance as well as that given in the dictionary is "a place where meals may be had" and that of "hotel" "a house for accommodation of strangers". In other words, restaurant is only a place where foodstuffs are sold or supplied for price to the customers.

8. The first case in point of importance and relevant for the purposes of this case is *The State of Punjab Vs. Associated Hotels of India Ltd.*, . The respondent-company in that case carried on business as hoteliers and conducted several hotels including "Cecil Hotel" at Simla. Besides conducting hotels, it also carried

on restaurant business. As a part of its business as hoteliers, the company received guests to whom besides furnishing lodging, they also served various amenities, including meals, and the bill tendered to the guest was all-inclusive, i.e., a fixed amount for the stay in the hotel and all other amenities. To the question as to whether the company was liable to pay sales tax under the Punjab General Sales Tax Act, 1948 in respect of the meals served to the guests in the hotel coming for stay, it was held that the transaction was essentially one and indivisible, namely, one of receiving a customer in the hotel to stay. It was essentially one of service by the hotelier in the performance of which, and as part of the amenities incidental to the service, the hotelier served meals at stated hours. The Revenue, therefore, was not entitled to split up the transaction into two parts, one of service and the other of sale of foodstuffs and also to split up the bills charged by the hotelier as consisting of charges both for lodging and foodstuffs served to him, with a view to bring the latter under the Act.

Again, in the Northern India Caterers" case [1978] 42 STC 386 the Supreme Court approved its earlier view and further held that there was no distinction between a case of meals supplied to a resident in a hotel and those served to customers in restaurants and that service of meals whether in a hotel or a restaurant did not constitute a sale of food for the purpose of levy of sales tax, but must be regarded as rendering of service in the satisfaction of a human need or ministering to a bodily want. The Supreme Court further observed that it would not make any difference whether the visitor to the restaurant is charged for the meal as a whole or according to each dish separately. In the review petition filed to review the judgment in the above case, the decision of which is reported in [1980] 45 STC 212 [Northern India Caterers (India) Ltd. v. Lt. Governor of Delhi], the Supreme Court held that apart from the fact that the supply of meals must be regarded as ministering the bodily want of human beings, there was no right to the customers to take away any eatables served and that also was relevant in determining that it was not a sale. I may usefully quote the observations of the Supreme Court:

...that where food is supplied in an eating-house or restaurant, and it is established upon the facts that the substance "of the transaction, evidenced by its dominant object, is a sale of food and the rendering of services is merely incidental, the transaction would undoubtedly be exigible to sales tax. In every case it will be for the taxing authority to ascertain the facts when making an assessment under the relevant sales tax law and to determine upon those facts whether a sale of the food supplied is intended.

9. In order to overcome the difficulties created by the aforesaid and some other decisions in the way of the State Governments to levy sales tax and nullify their effect, the Constitution (Forty-sixth Amendment) Act, 1982 was enacted which was assented to by the President on 2nd February, 1983. By Section 4 of the (amending) Act, Article 366 of the Constitution was amended by inserting Clause (29-A). Sub-clause (f) of this newly added clause, relevant for our purpose,

reads as follows :

(29-A) "tax on the sale or purchase of goods" includes-

* * * (f) a tax on the supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (whether or not intoxicating), where such supply or service, is for cash, deferred payment or other valuable consideration,

* * *

Section 6(2) of the amending Act also contains a provision for exemption in these words:

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 (by 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 on 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.

to save the restaurants, eating-houses, etc., from levy of sales tax for the interregnum, i.e., from 4th January, 1972, the date of the decision in *The State of Punjab Vs. Associated Hotels of India Ltd.*, and 7th September, 1978, the date of the decision in *Northern India Caterers (India) Ltd. Vs. Lt. Governor of Delhi*, until the passing of the amendment to the Constitution when the law in this regard remained in a fluid and uncertain state on account of these decisions of the highest Court.

10. Before the Orissa Act was amended after the constitutional amendment aforesaid, the definition of "sale" u/s 2(g) read as follows :

"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.

Perhaps, under this general definition of "sale", the petitioner had been assessed for the earlier periods, namely, 1971-72 to 1974-75, as stated earlier, by the

Sales Tax Officer, as in various other States. Clause (g) was substituted by the Orissa Sales Tax (Amendment) Act, 1984, making it much more comprehensive and Sub-clause (vi), in the line of Clause (29-A)(f) of the Constitution (Forty-sixth Amendment) Act was also provided in the definition reading as follows :

"Sale" means with all its grammatical variations and cognate expression, any transfer of property in goods for cash or deferred payment or other valuable consideration and includes,-

(i) transfer, otherwise than in pursuance of a contract of property in any goods for cash, deferred payment or other valuable consideration;

(ii) transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract;

(iii) delivery of goods on hire-purchase or any system of payment by instalments;

(iv) transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;

(v) supply of goods by any unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration;

(vi) supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (whether or not intoxicating), where such supply or service, is for cash, 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.

The definition of "dealer" in Section 2(c) was also amended subsequently by the Orissa Sales Tax (Amendment) Act, 1987. Section 2(c)(ix) of the amended Act, which is in the line of Sub-clause (vi) of "sale" is as follows :

a person who supplies by way of or as part of any service or in any other manner, goods, being food or any other article for human consumption or any drink (whether or not intoxicant), whether such supply or service is for cash, deferred payment or other valuable consideration.

Both these amending provisions having been simply "substituted", must be deemed to be obviously prospective. The non obstante saving provision u/s 6 of the Constitution (Forty-sixth Amendment) Act purports to validate the imposition or the authority to impose sales tax even before the commencement of the amendment under any State law on the ground of legislative incompetence and similarly also saved the taxes levied or collected under such laws except in the conditional circumstances enumerated in Section 2(c)(ix) of the Act and Section 6(2) of the Constitution (Forty-sixth Amendment) Act, just noted above.

The effect of the amendment fell for consideration before the Andhra Pradesh High Court in the case of Hotel Dwaraka, Hyderabad Vs. The Union of India and

Others, and the following observations were made :

The Amendment Act by the expansion of the legislative entry has merely conferred legislative competence in respect of a matter the State Legislature was found not competent to legislate. Now the Amendment Act enables the State Legislature to enact the law imposing tax on foodstuffs supplied or served to customers. Without an amendment to Section 2(1) (n) and (s) of the Sales Tax Act relating to the definitions of "sale" and "turnover" respectively, there will be no law providing for levy and collection of tax. It is not disputed that several States have amended their respective Sales Tax Acts after the Constitution (Forty-sixth Amendment) Act, 1982 amending the definitions of "sale" and "turnover" (vide Act No. 28 of 1984 of the Tamil Nadu Government and Act No. 23 of 1983 of the Karnataka Government)...

On a close reading of Section 6 and the marginal note, we are clearly of the opinion that the section is only intended to validate transactions already made and levy and collection of tax on transactions by way of sale of foodstuffs and beverages and does not authorise imposition and collection of tax in future and such a levy and collection can only be done after the amendment of the State law by the legislature. The provisional assessment orders for 1983-84 are accordingly quashed.

11. However, on the facts and in the circumstances of the present case, it does not appear necessary to dwell any further on the effect of the amendment either of the Constitution or the State Act.

In Northern India Caterers" case [1980] 45 STC 212 the Supreme Court in unambiguous terms has observed that where the sale of food happens to be the dominant object in the case of an eating-house or a restaurant, then the transaction would be undoubtedly exigible to sales tax. This observation was made on 21st December, 1979 much before the 46th amendment of the Constitution. Although this declaration of law was made by the Supreme Court in late December, 1979, the legal position must be deemed to be there in existence all through, particularly when the The State of Punjab Vs. Associated Hotels of India Ltd., and the Northern India Caterers (India) Ltd. Vs. Lt. Governor of Delhi, cases were of star hotels primarily concerned with providing lodging to their customers.

We have seen that on verification made by some officers of the Revenue, they had noticed that the petitioner was also selling eatables for human consumption outside the restaurant. Obviously, for such transactions and sales, by any stretch of imagination, the petitioner cannot claim any protection either from observations made in any decision or the constitutional amendment. The saving clause will give the petitioner exemption with respect to the sales to the customers consuming eatables in the restaurant itself.

12. I would accordingly hold that the petitioner cannot escape its liability to pay sales tax for sales to the customers which were meant for consumption outside

the restaurant. But at the same time it would not be liable for the sale and supply of eatable materials to its customers in the premises of the restaurant itself. The petitioner has thus made out a case for some relief to the extent indicated above. As the matter has to be investigated and the accounts of the petitioner scrutinised in the light of the above observation, the matter has got to go back to the assessing authority.

13. In the result, the writ applications succeed in part and the assessment orders are hereby quashed. The matter is remitted back to the assessing authority (O. P. No. 1) for reassessment in the light of the observations made above.

14. In the circumstances of the case, I shall make no order as to costs.

K.P. Mohapatra, J.

15. I agree.