(1990) 03 RAJ CK 0022

In the Rajasthan High Court

Case No : Civil Writ Petition No. 3595 of 1988

Rambagh Hotels Pvt. Ltd. APPELLANT

Vs

Commercial Taxes Officer RESPONDENT

Date of Decision : 02-03-1990

Acts Referred:

Constitution of India, 1950 — Article 366, 366(29A)
Rajasthan Sales Tax (Amendment) Act, 1956 — Section 23B
Rajasthan Sales Tax Act, 1954 — Section 2, 23B

Citation : (1990) 78 STC 35

Hon'ble Judges : M.B. Sharma, J

Bench : Single Bench

Advocate : S.M. Mehta, for the Appellant; G.S. Bapna, for the Respondent

Final Decision : Partly Allowed

Judgement

M. B. Sharma, J.—In the present writ petition the question is as to which of the two views, (i) the definition of "sale" as given in Section 2(o) of the Rajasthan Sales Tax Act, 1954 (for short, "the Act") as existed on the day the Forty-sixth Constitutional Amendment Act came into force, stands amended by virtue of the aforesaid Constitutional Amendment, or (ii) it was necessary to change the definition of "sale" as aforesaid to bring it in conformity with Clause (29A) of Article 466 of the Constitution of India as inserted by the aforesaid Forty-sixth Constitutional Amendment ?

2. The petitioner Rambagh Hotels Pvt. Ltd., Jaipur (for short, "the company") carries on business of a hotelier and the mode of charging bills from its customers is all inclusive of the various services rendered to them, i.e., food and drinks and other amenities, etc. Sales tax laws are enacted under entry 92A of the Union List (List I) and entry 54 of the State List (List II). The Act so far as this State is concerned was enacted by virtue of the powers vested in the State Legislature under entry 54 of the State List (List II) which was and is "taxes on the sale or purchase of goods other than newspapers, subject to the provisions

of entry 92A of List I". In the Act the definition of "sale" as given in Section 2(o) of the Act prior to April 1, 1987, when it was substituted by Act No. 7 of 1987 was as under :

" ''Sale'', with all its grammatical variations and cognate expressions, means any transfer of property in goods for cash or for deferred payment or for any other valuable consideration, and includes a transfer of property in goods on hire purchase or other system of payment by instalments, but does not include a mortgage or, hypothecation of or a charge or pledge on goods and the word ''purchase'' or ''buy'' shall be construed accordingly ;"

In The State of Madras Vs. Gannon Dunkerley and Co., (Madras) Ltd., the Supreme Court held that the expression "sale of goods" as used in the entries in the Seventh Schedule to the Constitution has the same meaning as in the Sale of Goods Act, 1930. That decision related to works contracts. On the basis of that decision and by a series of subsequent decisions, the Supreme Court has held various other transactions which resemble, in substance, transactions by way of sales, to be not liable to sales tax. In the case of The State of Punjab Vs. Associated Hotels of India Ltd., the Supreme Court held that there is sale involved in the supply of food or drink by a hotelier to a person lodged in the hotel. After the decision of the Supreme Court in the aforesaid case of The State of Punjab Vs. Associated Hotels of India Ltd., the sales tax authorities of various States were taking a view that the aforesaid case is applicable to the supply of food or drink by a hotelier to a person lodged in the hotel. In the case of Northern India Caterers (India) Ltd. Vs. Lt. Governor of Delhi, , the Supreme Court, overruling the decision of the Delhi High Court, has held that service of meals whether in a hotel or restaurant does not constitute a sale of food for the purpose of levy of sales tax but must be regarded as the rendering of a service in the satisfaction of a human need or ministering to the bodily want of human beings. 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 view of the aforesaid decisions the necessity was felt to amend the Constitution to include a new Clause (29A) in Article 466 of the Constitution of India. The Constitution (Forty-sixth Amendment) Act, 1982, was passed by the Parliament and it received the assent of the President on February 2, 1983, and published in the Gazette of India, Extraordinary No. 5, Part II, Section 1, dated February 3, 1983, pages 1 to 4. So far as the present controversy is concerned, Clause (29A) (f) is relevant which reads as under :

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

(a) to (e)......

(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, and such transfer, delivery or supply of any goods shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply and a purchase of those goods by the person to whom such transfer, delivery or supply is made."

Sub-section (1) of Section 6 of the aforesaid Forty-sixth Constitutional Amendment Act which is in respect of "validation and exemption" provides that for the purposes of every provision of the Constitution in which the expression "tax on the sale or purchase of goods" occurs, and for the purposes of any law passed or made, or purporting to have been passed or made, before the commencement of that Act, in pursuance of any such provision (a) the said expression shall be deemed to include, and shall be deemed always to have included a tax (hereinafter in this section referred to as "the aforesaid 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) for cash, deferred payment or other valuable consideration ; and it also provides in Clause (b) that every transaction by way of supply of the nature referred to in Clause (a) made before such commencement shall be deemed to be and shall be deemed always to have been, a transaction by way of sale, with respect to which the person making such supply is the seller and the person to whom such supply is made, is the purchaser. It also provides that notwithstanding any judgment, decree or order of any court, tribunal or authority, no law which was passed or made before such commencement and which imposed or authorised the imposition of, or purported to impose or authorise the imposition of, the aforesaid tax shall be deemed to be invalid or ever to have been invalid on the ground merely that the Legislature or other authority passing or making such law did not have competence to pass or make such law, and accordingly (i) all the aforesaid taxes levied or collected or purporting to have been levied or collected under any such law before the commencement of that Act shall be deemed always to have been validly levied or collected in accordance with law. It also permits the recoveries to be made in accordance with the provisions of such law of all amounts which would have been collected thereunder as such aforesaid tax if this section had been in force at all material times.

3. After the aforesaid Forty-sixth Constitutional Amendment received the assent of the President, it appears that the definition of "sale" was substituted by Act No. 7 of 1987 with effect from April 1, 1987, which reads as under :

"''Sale'' with all its grammatical variations and cognate expressions, means every transfer of property in goods (other than by way of mortgage, hypothecation, charge or pledge) by one person to another in the course of business for cash, or deferred payment or other valuable consideration and includes--

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

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

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

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

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

(vi) a 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 intoxication), where such supply is for cash, deferred payment or other valuable consideration--

and such transfer, delivery or supply shall be deemed to be a sale and the word ''purchase'' or ''buy'' shall be construed accordingly ;

Explanation I.--The transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract shall be deemed to take place within the State of Rajasthan if the goods are within the State at the time of their appropriation or application or use for the execution of the works contract irrespective of the place where the agreement for such works is made or from where the goods are transferred or delivered for use in the works contract.

Explanation II.--Where the work under a works contract is spread over many States including the State of Rajasthan, the proportionate work done within the State of Rajasthan shall be deemed to be the sale under this clause irrespective of the place of agreement for the works or the point of movement of goods involved in the execution of that works contract."

4. I will now discuss as to which of the two views referred to in the beginning of this order is the correct view. The contention of the learned counsel for the petitioner is that by the Forty-sixth Amendment, Clause (29A) was inserted in Article 466 of the Constitution and the amendment as aforesaid contained in the aforesaid Clause (29A) as well as by Section 6 of the Forty-sixth Constitutional Amendment Act only enabled the State Legislature to legislate in respect of sales tax on any article of food or drink, if it includes part of any service. The amendment did not mean that the definition of "sale" as given in Section 2(o) of the Act stood automatically amended and it was necessary that the definition of "sale" should have been amended and could be amended by the State Legislature to bring in conformity with Clause (29A) of Article 466 of the Constitution of India as inserted by the Forty-sixth Constitutional Amendment. In support of his contention, learned counsel for the petitioner has placed reliance on Hotel Dwaraka, Hyderabad Vs. The Union of India and Others, Sree Annapoorna and Another Vs. The State of Tamil Nadu and Another, and Padmaja Commercial Corporation Vs. Commercial Tax Officer, Vijayawada and Others, In

the case of Hotel Dwaraka, Hyderabad Vs. The Union of India and Others, it was held that the aforesaid Forty-sixth Constitutional Amendment does not authorise imposition and collection of tax in future without amending State law. It was further held that the amendment of definitions of "sale" and "turnover" in A. P. Sale Tax Act was necessary to levy tax. The court said that it does not authorise imposition and collection of tax on the supply of food-stuffs from February 2, 1983, on which date the Amendment Act came into force, but confers legislative competence on the State Legislature so to do and merely validates the collection and recovery of tax by removing the invalidity in the existing law subject to the exemption granted under Sub-section (2) of Section 6. In the case of Sree Annapoorna and Another Vs. The State of Tamil Nadu and Another, it was held that later part of Sub-section (1) of Section 6 of the Constitution (Forty-sixth Amendment) Act, 1982, only validated the law which was passed or made before the commencement of the said Act, which imposed or authorised the imposition or purported to impose or authorise the imposition of a tax on food and drinks supplied in a hotel or restaurant and if the law thus made, though would have been ultra vires on the ground of legislative competence, the defect or want of competence was removed by the validation provision. But if the law which was in force at the relevant date did not expressly impose or authorise the imposition of a tax on the supply of food and drinks in a hotel or restaurant, the Constitution (Forty-sixth Amendment) Act did not amend that law including in it a tax on the sale of food and drinks in a hotel or restaurant. The amendment only expanded the legislative entry and conferred legislative competence in respect of a matter when the State Legislature was found not competent. The Act did not have the effect of altering the definition of "sale" in the various State legislations. The result of the Act was that if any State sales tax law had included any transaction of works contract, hire-purchase, supply of food and drinks in a hotel or transfer for consideration of controlled commodities in the definition of "sale", then such a provision, though lacked legislative competence at the time when it was enacted, stood validated by the Constitution (Forty-sixth Amendment) Act so that the levy and collection of tax under these provisions would become legally valid. In the case of Padmaja Commercial Corporation Vs. Commercial Tax Officer, Vijayawada and Others, the court was dealing with the transaction relating to works contract, included in the definition of "sale" by insertion of Clause (29A) of Article 466 of the Constitution of India with effect from February 2, 1983. In that case, the definitions of "sale", "dealer" and "turnover" in the A.P. Sales Tax Act were amended with effect from July 1, 1985, by the State Legislature and it was held that levy of sales tax on transactions relating to works contract subsequent to July 1, 1985, was valid but not prior to it.

5. A review of the aforesaid decisions will show that all the courts have taken a view that mere insertion of Clause (29A) in Article 466 of the Constitution of India and Section 6 of the Forty-sixth Constitutional Amendment Act, does not automatically amend the definition of "sale" as given in various Sales Tax Acts of the States and it was necessary that there must be an amendment in the

definition of "sale". A view has already been taken that by the aforesaid amendment the State Legislature became competent under entry 54 of the State List to legislate to provide levy of tax on the supply by way of or as a 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.

6. In my opinion, the correct view appears to be that by Clause (29A) of Article 466 of the Constitution of India inserted by the Forty-sixth Constitutional Amendment which received the assent of the President on February 3, 1983, the definition of "sale" as given in Section 2(o) of the Act does not stand amended and unless by the said definition, tax on the supply, by way of or as a 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, could be levied, the assessing authority could not have levied tax on the aforesaid sale. Therefore, because in the definition of "sale" as aforesaid, tax could not have been levied, there is no question of validation u/s 6 of the Forty-sixth Constitutional Amendment Act arises. Even the definition of "turnover" as contained in Section 2(t) of the Act was amended by the Rajasthan Act No. 7 of 1987, with effect from April 1, 1987. Thus, in my opinion in between the period from February 3, 1983, when the Forty-sixth Constitutional Amendment received the assent of the President to April 1, 1987, when the definition of "sale" in Section 2(o) of the Act was amended for bringing it in conformity with Clause (29A)(f) of Article 466 of the Constitution of India and only on the basis of Forty-sixth Amendment Act as aforesaid, the sales tax could not be charged and was without authority of law on the supply of food or any other article for human consumption in case any element of service in hotel or restaurant was included in it (sic). It is so because a bare reading of definition of "sale" as given in Section 2(o) of the Act prior to its amendment by Act No. 7 of 1987, with effect from April 1, 1987, will show that it did not provide levy of tax on the supply.

7. It appears that in the present case the dispute relates to the period for assessment year, 1983-84 (July 1, 1982 to June 30, 1983) and as many as four quarterly returns were filed by the petitioner and in last two, the sales tax was also paid. The sales tax was to the extent of Rs. 35,434 as sales tax and the petitioner has claimed the refund of the aforesaid amount. u/s 23-B of the Act even if the amount is deposited or paid by any person, but such amount or any part thereof is subsequently found to be not payable by such person, a refund of such amount or any part thereof can be claimed only by the person from whom such person or dealer had actually realised such amount whether by way of tax or otherwise and the period of limitation provided in the proviso to Sub-section (1) of Section 23 shall apply to the aforesaid claim. Therefore, there being no definite material on record as to whether for the aforesaid period the petitioner

had in fact charged the sales tax from the customers or not, no final order can be passed as to whether tax deposited by the petitioner should be refunded to them or they are not entitled for the refund. Therefore, it will be proper if a direction is given to the assessing authority to make an enquiry as lo whether sales tax has been collected for the aforesaid period or not and in case the result of the enquiry is that the sales tax was not collected and the petitioners have paid from their own source, the petitioner shall be entitled for the refund. If the result of the enquiry will be that the petitioners had recovered the sales tax from the customers then the petitioners shall not be entitled for the refund thereof.

8. Consequently, I hereby partly allow the writ petition and it is held that from February 3, 1983, when the Forty-sixth Constitutional Amendment came into force till March 31, 1987, i.e., the definition of "sale" u/s 2(o) of the Act was amended with effect from April 1, 1987, the supply by way of or as a 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, was not included and therefore, no sales tax was payable thereon under the provisions of the Act. So far as the refund is concerned, it will be in accordance with the observations made in the preceding para. Costs made easy.

