

(1985) 01 MAD CK 0015

In the Madras High Court

Case No : Writ Petition No's. 7, 1586, 1591, 1636, 2079, 2356, 2702, 5510, 5718, 5782, 5834, 6035, 6036, 6384, 6497, 7038, 7067 and 7079 of 1981, 6479 of 1982, 2348 and 8196 of 1983 and 256 of 1985

Sangu Chakra Hotels Private Limited

APPELLANT

Vs

The State of Tamil Nadu

RESPONDENT

Date of Decision : 21-01-1985

Acts Referred:

Tamil Nadu General Sales Tax Act, 1959 — Section 17(1), 3, 3(1), 3(2), 32(1)

Citation : (1985) 60 STC 125

Hon'ble Judges : M.N. Chandurkar, C.J;T. Sathiadev, J

Bench : Division Bench

Advocate : R. Krishnamoorthy, General, K.S. Bakthavatsalam, Additional Government Pleader, for the Respondent

Judgement

Chandurkar, C.J.—All the above-mentioned petitions have been filed by hotel owners challenging the constitutional validity of item 150 in

First Schedule to the Tamil Nadu General Sales Tax Act, 1959, (hereinafter referred to as the Act) and the demand for sales tax on the basis that

they are liable to pay sales tax on articles of food and drink supplied by them to the customers in their hotels u/s 3(2) read with item 150 in the

First Schedule to the Act.

2. Writ Petition No. 256 of 1985 is filed by the Tamil Nadu Hotels Association represented by its President. The State Government has filed its

counter in all the other petitions but was not able to file the counter in W.P. No. 256 of 1985, but having regard to the fact that the questions

involved in all these petitions were purely questions of law, we have heard Mr. Ramachandran who appeared on behalf of the petitioner, along with

the counsel who appeared in the several petitions mentioned above. It is not now in dispute that the several petitioners in these writ petitions run

either hotels and restaurants where rooms are let out to the guests and articles of food are served in the restaurants. By way of illustration, we may

refer to the facts in Writ Petition No. 7038 of 1981. It is filed by M/s. Hotel Aristo, No. 2, Dindigul Road, Tiruchirapalli. The petitioner has alleged

that the rooms in the hotel are let out to the guests and besides arrangement for tea, lunch and dinner parties which are organised by outsiders,

there is also a restaurant which is fully furnished with sophisticated furniture to cater to the comforts of the customers who are served by

uniformed servers. The restaurant is run to cater to the needs of the resident lodgers who are served with food-stuffs, edibles and beverages of

their choice. It is stated that the articles of food and drink which are served to the resident lodgers are meant for consumption only inside the

premises and the unconsumed portions are not carried away by them.

3. The petitioner received a notice dated 22nd July, 1981 from the Commercial Tax Officer, Tiruchirapalli informing the petitioner that it is liable to

pay tax on sales of food-stuffs from 13th June, 1981. The petitioner replied stating that the petitioner's hotel was not a three, four or five star hotel

and as such did not fall under item 150 of the First Schedule to the Act. Item 150 was amended with effect from 4th of October, 1980 to read as

follows :

Articles of food and drink, sold to customers in three star, four star and five star hotels, as recognised by Tourism Department, Government of

India, whether such articles are meant to be consumed in the premises or outside.

A further amendment was made in item 150 with effect from 12th June, 1981 by which, in the place of the item above-mentioned, the following

item was substituted :

Articles of food and drink other than those specified elsewhere in this schedule, sold to customers in hotels classified or approved by the

Government of India, Department of Tourism.

The validity of this entry and the power of the tax authorities to recover sales tax from the owners of hotels who, according to the tax authorities

satisfy the description in item 150, that is challenged in these petitions.

4. Before going into the challenge made in all these petitions, it is necessary to refer briefly to the history relating to the levy of sales tax on sales of articles of food in the hotels and restaurants. It may be pointed out that the power to tax the sale or purchase of goods is vested in the State

Government by virtue of entry 54 in List II of the Seventh Schedule to the Constitution of India. Entry 54, after the Constitution (Sixth

Amendment) Act in 1956 reads as follows :

54. Taxes on the sale or purchase of goods other than newspapers, subject to the provisions of entry 92A of List I.

The validity of sales tax on supply of meals by hoteliers to the resident guests levied under the Punjab General Sales Tax Act came up for

consideration before the Supreme Court in *The State of Punjab Vs. Associated Hotels of India Ltd.*, . It is common knowledge that the Supreme

Court in that decision held that supply of meals by hotelier to the resident guests is not sale of food liable to sales tax. The Supreme Court held that

such a transaction is essentially one and indivisible, namely, one of receiving a customer in the hotel to stay, and that even if the transaction is to be

disintegrated, there is no question of the supply of meals during such stay constituting a separate contract of sale, since no intention on the part of

the parties to sell and purchase food-stuffs supplied during meal-times can be realistically spelt out. The Supreme Court observed as follows :

The transaction essentially is one of service by the hotelier in the performance of which meals are served as part of and incidental to that service,

such amenities being regarded as essential in all well conducted modern hotels. The bill prepared by the hotelier is one and indivisible, not being

capable by approximation of being split up into one for residence and the other for meals. No doubt, such a bill would be prepared after

consideration of the costs of meals, but that would be so for all the other amenities given to the customers. For example, when the customer uses a

fan in the room allotted to him, there is surely no sale of electricity, nor a hire of the fan. Such amenities, including that of meals, are part and parcel

of service which is in reality the transaction between the parties.

The question once again came up for consideration before the Supreme Court in connection with the provision in the Bengal Finance (Sales Tax)

Act of 1941 as applied to the Union Territory of Delhi in the Northern India

Caterers (India) Ltd. Vs. Lt. Governor of Delhi, . The Supreme Court

referred with approval to the decision in The State of Punjab Vs. Associated Hotels of India Ltd., and applied the principles enunciated in that

case to the case of hotels. The Supreme Court observed as follows, after referring to the decision in The State of Punjab Vs. Associated Hotels of

India Ltd., :

The Court pointed out that the supply of meals was essentially in the nature of a service provided to them and could not be identified as a

transaction of sale. The Court declined to accept the proposition that the Revenue was entitled to split up the transaction into two parts, one of

service and the other of sale of food-stuffs. If that be true in respect of hotels, a similar approach seems to be called for on principle in the case of

restaurants. No reason has been shown to us for preferring any other. The classical legal view being that a number of services are concomitantly

provided by way of hospitality, the supply of meals must be regarded as ministering to a bodily want or to the satisfaction of a human need

The Supreme Court also held in the same case that whether a charge is imposed for the meal as a whole or according to the dishes separately

ordered, the service of meals to casual visitors in a restaurant located in a hotel in which lodging and meals are provided on ""inclusive terms"" to

residents is not taxable as a sale.

5. The Delhi Administration had sought a review of this decision. The review application, however, came to be dismissed and the judgment is

reported in Northern India Caterers (India) Ltd. Vs. Lt. Governor of Delhi, . While disposing of the review application certain observations have

been made by the learned Judges which were the foundation for the arguments before us by the learned Advocate-General. Two of the learned

Judges who had rendered the earlier decision posed a question :

What were the considerations on which this Court held that the transaction was not a sale ?

Answering this question, it was observed :

The Court said, and this was emphasised in no small degree, that the supply and service of food to a customer to be eaten in the restaurant was

not a sale for the reason that he was merely entitled to eat the food served to him and not to remove and carry away the unconsumed portion of

the food. Had that amounted to a sale, the unconsumed portion would have belonged to the customer to take away and dispose of as he pleased.

Besides, the Court noted, there were other amenities and services of considerable materiality which were also provided.

The two learned Judges noted the apprehensions of other States who had also appeared in the review petitions : ""That the benefit of the judgment

of this Court will be invoked by restaurant-owners in those cases also where there is a sale of food and title passes to the customers."" Finding such

an apprehension baseless, the learned Judges observed as follows :

It seems to us that having regard to the facts upon which our judgment rests - undisputed as they have remained throughout the different stages of

the litigation - and the considerations which they attract, no such apprehension can be reasonably entertained. Indeed, we have no hesitation in

saying 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.

6. The third learned Judge Krishna Iyer, J., who concurred with the decision that the review petition should be dismissed, however, made certain

observations in paragraph 17 in which he observed :

The substance of the transaction, the dominant object, the life-style and other telling factors must determine whether the apparent vendor did sell

the goods or only supply a package of services. Was there a right to take away any eatable served, whether it be bad manners to do so or not ? In

the case we have, the decision went on the ground that such right was absent. In cases where such a negative is not made out by the dealer - and

in India, by and large, the practice does not prohibit carrying home - exigibility is not repelled.

7. After this review application, expressly with the object of overcoming the view taken by the Supreme Court, an amendment of the Constitution

was made by the Constitution (Forty-sixth Amendment) Act, 1982. The substantive amendment was made by amending article 366 of the

Constitution by the introduction of clause (29A). Article 366 of the Constitution is an article giving definitions of several terms which appear in the

Constitution. By the addition of clause (29A), an inclusive definition was given of the phrase "tax on the sale or purchase of goods". In so far as is

material for the purpose of these petitions, the amendment reads as follows :

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

(a)

(b)

(c)

(d)

(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.

This amendment came into effect on 3rd February, 1983. In the objects and reasons for the amendment, the necessity for the amendment was

stated in the following terms :

..... a new problem has arisen as a result of the decision of the Supreme Court in Northern India Caterers (India) Ltd. Vs. Lt. Governor of Delhi,

. States have been proceeding on the basis that the The State of Punjab Vs. Associated Hotels of India Ltd., was applicable only to supply of food

or drink by a hotelier to a person lodged in the hotel and that tax was leviable on the sale of food-stuffs by a restaurant. But over-ruling the

decision of the Delhi High Court, the Supreme Court has held in the above case 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 different whether the visitor to the restaurant is charged for the meal as a

whole or according to each dish separately.

It was stated that the Constitution was sought to be suitably amended to include in article 366 a definition of "tax on the sale or purchase of goods

by inserting a new clause (29A).

8. By the same Constitution Amendment Act, a provision for validation and exemption was made in section 6 of the Amending Act. This is by itself

a substantive provision and it gave retrospective effect to the definition of "tax on the sale or purchase of goods". It is unnecessary to reproduce the

entire provision but it is to be noted that an express provision was made thus :

... notwithstanding any judgment, decree or order of any court, tribunal or authority, on 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 this

Act shall be deemed always to have been validly levied or collected in accordance with law;

(ii) no suit or other proceeding shall be maintained or continued in any court or before any tribunal or authority for the refund of, and no

enforcement shall be made by any court, tribunal or authority of any decree or order directing the refund of, any such aforesaid tax which has been

collected;

(iii) recoveries shall 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.

While sub-section (1) of section 6 of the Constitution Amendment Act validated all the enactments which would otherwise have been invalid in

view of the Supreme Court decision referred to above, a provision with regard to exemption from payment of sales tax in cases where such sales

tax was not recovered by the hoteliers was made in sub-section (2) of section 6. This sub-section reads as follows :

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.

By enacting section 6, the Parliament took care to see that if sales tax has not been recovered in view of the two decision of the Supreme Court,

then the hoteliers need not be unnecessarily burdened by requiring the to pay sales tax.

9. The overall effect of the Constitution Amendment Act is that the amended definition of ""tax on the sale or purchase of goods"" has been given an

extended meaning with a view to validate all sales tax legislation, which purported to levy sales tax on articles of food supplied in hotels to

customers and in such of the cases where such recovery was not made, those sales have been exempted from sales tax. The further effect is that all

such legislation has been given retrospective validity. However, we are not in these cases concerned with the implementation of section 6 of the

Amending Act.

10. Though it was stated before us by some of the counsel that it would be difficult now to canvass any question of legislative competence of a

State Legislature of levy sales tax on transactions which fall within the extended definition of ""tax on the sale or purchase of goods"" after 2nd of

February, 1983 the question of legislative competence of the State Legislature to levy tax as provided by entry 150 was argued before us by Mr.

Sivanandam who appears in Writ Petition No. 2348 of 1983. The question of legislative competence has also been argued before us by Mr.

Ramachandran.

11. What has, however, been canvassed before us is primarily the invalidity of the entry 150 on the ground that it violated the guarantee of equality

under article 14 of the Constitution of India. The learned Advocate-General has categorized the transactions involving supply of food into two

categories. One category is where food and drinks are supplied purely by way of sale and the other category is where food and drinks are

supplied by way of service. According to the learned Advocate-General there cannot be any doubt that in the case of a transaction where a sale

simpliciter is made of food and drink that would be exigible to tax and it is only when the transaction is such that there is an element of service that

it may not be exigible to tax during the relevant period.

12. It is common knowledge that in the case of a restaurant simpliciter, a person may either go to a restaurant merely for the purpose of buying

articles of food and taking them home in a parcel, or he may go to the restaurant with the avowed object of ordering out articles of food for the

purpose of consumption in the restaurant itself. The question as to whether any service is involved or not, if at all it arises, it will arise only in the

second class of cases. In the first category of cases where articles of food are sold across the counter it is a sale, pure and simple, like any other

commodity in any other shop with no element of service involved. If at all any service is involved, it is in no way different from the service involved

in an ordinary transaction of sale of any other goods which are sold across the counter. It is difficult to see how such a transaction which is purely

of sale and purchase of articles of food can be outside the taxing power of the State Legislature having regard to entry 54 of List II of the Seventh

Schedule to the Constitution. The real difficulty arises only when we deal with the question of legislative competence of the State Legislature to levy

sales tax on the supply of goods, which according to the Supreme Court, is a part of service. The question of legislative competence will now have

to be determined with reference to the amendment in the Constitution. When the original entry 54 in List II of the Seventh Schedule to the

Constitution contemplated that a State Legislature could validly enact a law of

levying tax on the sale or purchase of goods, a tax levied on the supply of articles of food as a part of service was found to be invalid because in such a transaction, there is no sale. The Parliament, however, has now given an inclusive definition of "tax on the sale or purchase of goods" intended to undo the effect of the Supreme Court decisions and it will now be permissible for the State Legislature to levy sales tax where there is supply of goods, being food or any other article for human consumption or any drink, even though it is by way of or as part of any supply or in any other manner whatsoever. In view of this specific expansion of the meaning by the constitutional amendment, we do not see how any objection can be raised that the supply of foods which were a part of service and which were originally found to be not taxable under the Sales Tax Act by the Supreme Court, cannot even now be taxed by proper legislative enactment. Section 6, as already pointed out, validates all such legislations, which would otherwise have become invalid, with retrospective effect. Therefore, if item 150 in the First Schedule read with section 3(2) of the Act is now valid and had no other infirmity, tax on sale of article of food as a part or by way of service in a hotel or restaurant would be clearly taxable retrospectively.

13. The more substantial question which, however, arises in these petitions is, whether there is any infirmity in item 150. Section 3 of the Act which

is the charging section provides in sub-section (2) as follows :

Notwithstanding anything contained in sub-section (1) in the case of goods mentioned in the First Schedule, the tax under this act shall be payable

by a dealer, at the rate and only at the point specified therein on the turnover in each year relating to such goods whatever be the quantum of

turnover in that year.

Entry 150 has to be read with section 3(2) and reading so, the effect is that a State Legislature has provided that notwithstanding anything

contained in sub-section (1) in the case of articles of food and drinks other than those specified elsewhere in the First Schedule, sold to customers

in hotels classified or approved by the Department of Tourism, Government of India, the tax under this Act shall be payable by a dealer at the rate

and only at the point specified therein on the turnover in each year relating to such goods, whatever be the quantum of turnover in that year. The

real effect of reading section 3(2) with item 150 is that the liability to pay sales tax arises only in respect of hotels classified or approved by the

Department of Tourism, Government of India. The argument of the learned counsel for the petitioners is that, when hotels classified or approved by

the Department of Tourism of the Government of India have been singled out for the levy of sales tax, this amounts to a hostile treatment and

therefore, the petitioners can justifiably complain of the violation of the guarantee provided in article 14 of the Constitution. The argument is that so

far as the object of the Sales Tax Act is concerned, there is no rational basis for classifying only hotels classified or approved by the Department of

Tourism, Government of India, into a class by itself, and that the basis has no relation with the object of the Act. It is pointed out that there were

other hotels which are not classified or approved by the Department of Tourism, Government of India, and which are carrying on the same

business as the petitioners and the sale of food-stuffs in those hotels is not subjected to taxation. Mr. Kannan has argued that the Legislature seems

to have decided to tax sales with reference to the situs of the sale, which has nothing to do with the object of the Act. This argument is adopted by

Mr. S. V. Subramaniam. Mr. Ramachandran contended that the classification made by the Legislature is solely on the basis of some facilities which

are available to the hotels by virtue of being classified or approved by the Tourism Department of the Government of India and that circumstances

has no relation with the object of the Act. This argument is also adopted by Mr. Sivanandam, Mrs. Nalini Chidambaram and Mr. Narayanan. The

learned Advocate-General has, however, tried to justify the classification on the ground that hotels which are approved by the Department of

Tourism, Government of India, have some special features. According to the learned Advocate-General, the hotels classified and approved by the

Tourism Department have special facilities for preparing food, they employ expensive cooks, tourists are served by bearers wearing livery and that

the customers who come to such hotels can afford to pay a higher price. The argument appears to be that in such hotels only, such customs

prevails. In addition to these distinguishing features, our attention has been invited to what according to the State Government are additional

advantages which the hotels that are approved by the Department of Tourism, Government of India, get by virtue of such approval. It is stated that

the approved hotels become eligible to various fiscal reliefs and benefits apart from getting priority consideration from various concerned

authorities. It is said that these hotels get world-wide publicity in tourists' literature published by the Department of Tourism distributed by the

Government of India in India and abroad. These hotels are also eligible for foreign exchange for their import of essential equipments and

provisions, and get assistance for their advertising, publicity and promotion under the Hotel Incentives Quota Scheme. These incentives consist of

assistance of finance, assistance in the procurement of building materials, grant of foreign exchange for publicity and import of essential articles, etc.

It is stated that certain tax reliefs are given under sections 80J and 80HH of the Indian Income Tax Act. They are also entitled to a special

depreciation u/s 32(1)(v) of the Income Tax Act. Therefore, according to the learned Advocate-General, such hotels are a class by themselves

and they stand on a different footing and it was not necessary to treat them alike as other hotels. The classification, it is said, was a reasonable one.

The learned Advocate-General further contended that the State has a wide discretion in the selection of persons or goods which may be taxed and

therefore if the State has chosen only such of the hotels as have been recognised and approved by the Department of Tourism, Government of

India, in so far as sales tax is concerned, such classification cannot be said to be violative under article 14 of the Constitution of India. We have

also been shown some guidelines laid down by the Department of Tourism with regard to the classification of hotels in terms of Stars, i.e., 5-Star,

4-Star, 3-Star, etc. At this stage, we may point out that while introducing item 150 in the First Schedule to the said Act, the State Government also

issued a Notification being G.O.Ms. No. 1001 dated 6th October, 1980 by which all sales other than those specified in item 150 of the First

Schedule to the Act have been exempted in respect of tax payable by any dealer under the said Act on the sale of food and drinks in any hotel or

restaurant. This exemption has been granted in exercise of the powers u/s 17(1) of the Act. The effect of the exemption is that while hotels and

restaurants which did not fall under item 150 would have become liable to pay sales tax under the substantive provision in section 3(2) have now

been totally exempted from sales tax with the consequence only hotels which have been specified in item 150 have alone been singled out for

payment of sales tax.

14. It is now well-settled that a taxation law is not entitled to claim immunity from the equality clause in the Constitution of India (see *Khandige*

Sham Bhat v. Agricultural Income Tax Officer, Kasaragod AIR 1963 SC 591). It is also well established that whenever the State makes any

classification and groups together certain persons or things for being dealt with differently as compared with other similar persons or things, then it

is for the State to satisfy the Court that the classification is a valid classification. The tests with reference to which the validity of the classification

made by a State are to be taxed are also now well-settled. The classic observations of the Constitutional Bench of seven Judge of the Supreme

Court in *Budhan Choudhry and Others Vs. The State of Bihar*, have been oft-quoted and followed. The observations are :

It is now well established that while article 14 forbids class legislation, it does not forbid reasonable classification for the purposes of legislation. In

order, however, to pass the test of permissible classification two conditions must be fulfilled, namely, (i) that the classification must be founded on

an intelligible differentia which distinguishes persons or things that are grouped together from other left out of the group and (ii) that this differentia

must have a rational relation to the object sought to be achieved by the statute in question. The classification may be founded on different bases;

namely, geographical, or according to objects or occupations or the like. What is necessary is that there must be a nexus between the basis of

classification and the object of the Act under consideration. It is also well established by the decisions of this Court that article 14 condemns

discrimination not only by a substantive law but also by a law of procedure.

The approach to be adopted while dealing with the problem of discrimination is stated in the following words by Hidayatullah, J. (as he then was),

in *S.C. Prashar, Income Tax Officer, Market Ward, Bombay and Another Vs. Vasantsen Dwarkadas and Others*, :

Before dealing with contentions raised we find it necessary to say a few words about the manner in which the problem of discrimination should be

approached. One must first find out the object of the impugned provision and compare it with the topic of legislation and then try to discover if

there is a connection between the two and a reasonable basis of making a

difference between different classes of persons affected by the law, in keeping with the topic of legislation and the object of the enactment. A difference which is aimless, arbitrary or unreasonable and which is unconnected with the object in view must remain a discrimination and incapable of being upheld. In all cases in which laws were struck down under article 14 this was the approach. It is hardly necessary to refer to the previous cases because each provision to be tested, must be tested in its own setting and no two cases can be alike.

There is no dispute that hotels have now been classified by the State Legislature into (1) hotels which are approved by the Department of Tourism, Government of India, and (2) hotels which are not approved by the Department of Tourism. At this stage it has to be noted that it is not obligatory

for the owner of a hotel to get the approval of the Department of Tourism for the purpose of its business. It is entirely a matter of choice of the

hotel owner to seek the approval of the Department of Tourism. Nothing prevents the owner of the most posh hotel from running it without getting

an approval of the Department of Tourism, but at the same time it is true that if the hotel is approved by the Department of Tourism, Government

of India, certain benefits follow from such approval. These benefits have been referred to earlier and we have no reason to doubt the statement

made on behalf of the Government that hotels which are approved by the Department of Tourism may have such approval as one of the causes of

having a larger number of customers. The question which therefore arises is, whether there is any nexus between the basis of the classification into

hotels approved by the Department of Tourism and those not so approved and the object of the Act. The object of the Act is to levy sales tax on

the sale or purchase of goods in the State of Tamil Nadu. There is nothing in the counter-affidavit which discloses as to how the sale of articles of

food and drink in a hotel classified and approved by the Department of Tourism is in any way different for the purposes and object of the Act from

the sale of similar articles of food and drink in other hotels which are not so classified or approved. There is also nothing to show as to how the

basis of classification has any nexus with the purposes of the Act, namely, levy of sales tax. It has to be remembered that the Department of

Tourism referred to is of the Government of India and it is not the case of the

State Government that any additional facilities or advantages are given to these hotels by the State Government as a result of approval by the Department of Tourism. The recognition by the Department of Tourism of the Government of India has nothing to do with the purpose or the object of the Sales Tax Act of the State Legislature. An argument was advanced that these are hotels to which customers who can afford to pay higher price for articles of food, go. That, in our opinion, is hardly relevant for the purposes of the Sales Tax Act. Similarly the circumstance that food is prepared under special conditions by expensive cooks and the service of food is efficient has not even the remotest connection with liability to pay sales tax. As a matter of fact, we were at pains to find out whether there is any trace of any nexus between the basis of the classification and the object of the Act. In fact there could be none, because the classification is based on something done by the Government of India in its Tourism Department and we are not able to find as to how merely because some hotels have been approved by the Department of Tourism they could be made liable to sales tax. We are, therefore, unable to find any valid basis for classification having a nexus with the object of the sales tax enabling the State to levy sales tax as contemplated by the entry in item 150.

15. The learned Advocate-General while justifying the different treatment meted out to hotels which are approved by the Tourism Department has referred us to certain decisions of the Supreme Court which, in our view, are wholly inapplicable to the facts of these cases. In *East India Tobacco Co. Vs. State of Andhra Pradesh*, , the question was whether virginia tobacco could be treated differently from country tobacco so that virginia tobacco could be treated as a class by itself and a tax could be imposed on the sale of virginia tobacco while exempting country tobacco. The Supreme Court held that taxation law must also pass the test of article 14 but in deciding whether a taxation law is discriminatory or not it is necessary to bear in mind that the State has a wide discretion in selecting the persons or objects it will tax, and that a statute is not open to attack on the ground that it taxes some persons or objects and not others and that it is only when within the range of its selection the law operates unequally and that cannot be justified on the basis of any valid classification that

it would be violative of article 14 of the Constitution of India. It is important to point out that, on the facts in that case, it was found that virginia tobacco has features which distinguish it from country tobacco and the obvious result of this must be that virginia tobacco was a separate category of tobacco as distinguished from country tobacco. This distinction followed not from the fact that there was only one kind of tobacco but because there were intrinsically certain qualities in virginia tobacco which distinguish it from other kinds of tobacco. Reference was also made to a decision of Supreme Court in Orient Weaving Mills (P) Ltd. Vs. The Union of India (UOI), in which the question was whether textiles brought out by power-looms could be exempted from payment of excise duty. The Supreme Court while reiterating the principle that it is always open to the State to tax certain classes of goods and not to tax others, and the Legislature was the best Judge to decide as to the incidence of taxation as also to the amount of tax to be levied in respect of different classes of goods, and that the classification was made by the State between goods produced in big establishments and similar goods produced by small power-loom weavers in the mofussil who are usually ignorant, illiterate and poor and suffer from handicaps to which big establishments are not subject. The argument of the learned Advocate-General is that cotton fabrics produced by the mills and cotton fabrics produced by power-loom owners were both cotton fabrics and yet cotton fabrics produced by power-loom owners were exempted from excise duty which is found to be permissible. By an analogy it was contended that there are two categories of hotels, one approved by the Department of Tourism and the other which did not either get or take the approval of the Department of Tourism and hence it will be open to the State Legislature to choose any one of those two categories for the purpose of sales tax. In our view the analogy is hardly applicable in the instant case. The tax in question in Orient Weaving Mills (P) Ltd. Vs. The Union of India (UOI), was excise duty which is a tax on the manufacture of goods and if different manufactures are grouped together by virtue of certain differences which are inherent both in the kind of the produce as well as in their character, in such a case, the exemption in respect of one kind of production of cotton fabrics was justified and especially in respect of whom the State had a duty to

promote their industry which is a cottage industry, having regard to the directive principles of the State Policy in article 43 of the Constitution. We

fail to see how that decision can be of any assistance to the State Government. In the instant case, as we have already pointed out, there is hardly

any basis on which a valid classification can be made. There is also no nexus between the basis of the classification and the object of the Act.

Reference was also made by the learned Advocate-General to a decision in *Murthy Match Works and Others Vs. The Asstt. Collector of Central*

Excise, and Another, . That was once again a case of excise duty. The match industry in Shivakashi was of two categories, the mechanised sector

and the non-mechanised sector. Later, however, there was a fourfold categorisation A, B, C and D on basis of quantity, turn-off and other

germane for the purpose of excise tariff. B class comprised factories whose annual output exceeded 500 million match sticks but not 4,000 million

match sticks. C class comprised factories whose annual output exceeded 50 million match sticks, but did not exceed 500 million match sticks. D

class comprised factories whose annual output did not exceed 50 million match sticks. By notification issued by the Central Government under

rule 6(1) of the Central Excise Rules, 1955 B and C categories were treated equally and the grievance of the petitioners before the Supreme Court

who were C category manufacturers, was that clubbing together with the far stronger B type manufacturers was virtually condemning them to

gradual extinction. The Supreme Court found that though the financial resources, the capacity to command a market on their own without

depending on intermediaries, etc., marked off the B category from the C category, experience gathered subsequently disclosed certain evils which

the State took note of and endeavoured to set right. The Supreme Court, therefore, held that the pertinent principle of differentiation which was

visibly linked to productive process, had been adopted in the board classification of power-users and manual manufacturers, and this basis could

not be said to be unreal. It was held that the failure to mini-classify between the large and small sections of manual match manufacturers could not

be challenged in a Court of law, that being a policy decision of the Government, depending on pragmatic wisdom playing on imponderable forces

at work. This decision will, therefore, show that the clubbing together of the original B and C groups was found to be justified because the basis on

which differentiation was made was found to have a nexus to the purpose of the Taxation Act.

16. Two other decisions which were relied on by the learned Advocate-General were in the context of upholding the validity of the additional sales

tax imposed by the State Legislature. These decisions do not seem to be of much assistance because the nature of the challenge in those cases was

that the additional tax was not a tax on the sale of goods but was a tax on the income of the dealer. The first decision is in *S. Kodar Vs. State of*

Kerala, in which it was held that the additional tax levied under the Tamil Nadu Additional Sales Tax Act (14 of 1970) was really a tax on the sale

of goods and not on the income of a dealer. The other decision is in *K. M. Mohamed Abdul Khader Firm v. State of Tamil Nadu* [1985] 58 STC

(12) where a similar Act which amended the Additional Sales Tax Act, 1970 by providing for a different method of computation of the additional

sales tax leviable under that Act by linking the rate of levy to the taxable turnover instead of to the amount of basic tax assessed under the Tamil

Nadu General Sales Tax Act, 1959 was held to have not introduced a new tax. It was held that the adoption of a slab system whereby different

rates of additional sales tax depending upon the quantum of turnover of different dealers is not alien to the concept of sales tax and such adoption

was not discriminatory and did not violate article 14 of the Constitution of India. Both these decisions do not become relevant for the purpose of

the controversy in these cases.

17. We may refer to a decision of this Court in *A.R. Krishna Iyer and Another Vs. The State of Madras and Another*, where the question was

whether higher tax on dealers in food and drink in certain cases was violative of article 14 of the Constitution of India. The relevant provision in that

case was section 3(1)(b) of the Madras General Sales Tax Act (Act 9 of 1939). That section reads as follows :

Section 3. (1) Subject to the provisions of this Act, -

(a) Every dealer shall pay for each year a tax on his total turnover for such year; and

(b) the tax shall be calculated at the rate of three pies for every rupee in such turnover :

Provided that if and to the extent to which such turnover relates to articles of

food and drink sold in a hotel, boarding house or restaurant, the tax shall be calculated at the rate of four and a half pies for every rupee, if the turnover relating to those articles is not less than twenty-five thousand rupees.

The Division Bench found that the proviso to section 3(1)(b) contains a classification consisting of (i) a group of dealers in articles of food and

drink who are marked off from the general group of dealers; (ii) among the dealers in articles of food and drink a further division is made and

dealers in such articles sold in a hotel, boarding house or restaurant are marked off from the other dealers in such articles of food and drink; (iii)

there is a further division among the dealers in articles of food and drink sold in hotel, boarding house or restaurant (a) those with a total turnover

of Rs. 25,000 and more, (b) those with a turnover of less than Rs. 25,000. They also found that the effect of the proviso was that while under the

proviso the dealers were taxed at the higher rate of 4 1/2 pies in the rupee, the dealers who were covered expressly by section 3(1) were taxed

only at the rate of 3 pies. The Division Bench took the view that the distinction between the two classes of dealers in articles of food and drink with

an annual turnover Rs. 25,000 and more : i.e., (i) dealers in such articles of food and drink sold in hotels, boarding house and restaurants; (ii)

dealers in such articles of food and drink sold elsewhere, has no reasonable or just relation to the object of the Act which was to tax the turnover

of the sales of a dealer. Accordingly the Division Bench found that the proviso to section 3(1)(b) of the Act offended article 14 of the Constitution

and was therefore void and unenforceable against the petitioner.

18. Just as the classification made under the proviso in question in A.R. Krishna Iyer and Another Vs. The State of Madras and Another, was not

found to have had any reasonable basis, having a just and reasonable relation to the object of the Act; in the cases before us also was have not

been able to find any reasonable basis for the classification based on the place where the articles of food and drink are sold, having any reasonable

nexus with the object of the Sales Tax Act. Substantively the tax under item 150 of the First Schedule to the Act turns out ultimately to be a tax not

on the sale of articles of food, but a tax with reference to the persons who are the hotel owners who sell those goods by virtue of their having

obtained an approval from the Department of Tourism of the Government of India. We are, therefore, satisfied in the instant cases that the hotels which have been classified or approved by the Department of Tourism, Government of India have been given a hostile treatment in so far as they have been subjected to payment of sales tax in respect of articles of food and drink sold to customers in such hotels, while similar hoteliers selling similar articles of food and drink have been exempted from the provisions of the Sales Tax Act. Accordingly we must hold that any step to recover sales tax on the basis that the hotels who were approved by the Tourism Department of the Government of India are liable to sales tax on the footing that they have been approved by the Tourism Department will be violative of the constitutional protection under article 14 of the Constitution of India and will therefore be wholly illegal. We may however make it clear that all that we have said earlier relates to levy of sales tax for the period prior to 2nd of February, 1983. What is the position after the amendment of the Constitution by the Constitution (Forty-sixth Amendment) Act is not a matter which is relevant for our purpose having regard to the notices which have been challenged in these petitions.

19. In W.P. No. 7038 of 1981, the demand notice is dated 25th August, 1981 and calls upon the petitioner to file a return for the period beginning from 13th June, 1981. In view of the fact we have held that the entry in item 150 of the Act which the taxing authorities were invoking was not a valid entry, the notice is liable to be quashed. Mr. Kannan who appeared in this writ petition has also contended that as required by an order of stay passed by this Court, the petitioner has been recovering sales tax, but according to him, this was not recovered expressly as sales tax but by way of making a provision for contingent liability in case the petition fails. The learned counsel wanted to argue that having regard to the provisions of section 6 of the Constitution (Forty-sixth Amendment) Act, the petitioner not having recovered this amount by way of tax was not bound to pass it on to the State Government. This matter, however, does not fall within the scope of the petition before us. If and when the authorities take steps for the recovery of the amount which the petitioner has recovered from his customers, that controversy will have to be decided at that time.

20. In Writ Petition No. 2356 of 1981, it is stated that the hotel has not been approved by the Department of Tourism during the relevant period

6th October, 1980 to 31st March, 1981. The notice of demand dated 15th April, 1981 required the petitioner to file a return for the period 6th

October, 1980 to 31st March, 1981. The fact that the hotel has not secured the Star qualification by the Department of Tourism, Government of

India, has not been controverted before us. Apart from the ground that item 150 does not enable the tax authorities to recover sales tax from the

hotels mentioned therein, even otherwise, since the petitioner's hotel has not been even classified as a Star hotel by the Department of Tourism, the

notice was wholly uncalled for and illegal. That notice is liable to be quashed.

21. W.P. Nos. 5834, 6035, 6036 and 7038 of 1981 : These are petitions filed for the issue of mandamus against the enforcement of item 150.

W.P. Nos. 7, 1636 and 2079 of 1981 and 256 of 1985 : These are petitions filed for a writ of declaration questioning the validity of item 150.

W.P. Nos. 2702, 5510, 5782, 6384, 6497 and 7067 of 1981 : These are petitions filed against issue of notice calling for submission of returns.

W.P. Nos. 1586 and 1591 of 1981 are against provisional assessments, W.P. No. 6479 of 1982 is against the order of assessment and W.P. No.

8196 of 1983 is against the order of the Tribunal.

W.P. Nos. 2356 and 7079 of 1981 and 2348 of 1983 : These are petitions filed against the issue of pre-assessment notice based on item 150.

W.P. No. 5718 of 1981 : This petition is filed to quash G.O.Ms. No. 660, Commercial Taxes and Religious Endowments, dated 12th June, 1981

in and by which the present item 150 was incorporated in the First Schedule to the Act.

22. Hence in the light of what had been held above, all these writ petitions are allowed. The effect of our decision is that the State Government and

the tax authorities will not be entitled to take any steps for the recovery of sales tax on the footing that the hotels who have been approved by the

Tourism Department of the Government of India are liable to pay sales tax under item 150 of the First Schedule to the Act. We make no order as

to costs in these petitions.

23. Mr. K. S. Bakthavatsalam, the learned Additional Government Pleader asks for leave to appeal to the Supreme Court against our judgment.

He also brought to our notice that the validity of item 150 in the First Schedule to the Act is already the subject-matter of a writ petition which is

pending in the Supreme Court in W.P. No. 1299 of 1981. In view of the fact that an identical matter is pending in the Supreme Court, it will not be

proper forus to reject the leave asked for. Accordingly we grant a certificate under article 134A that the case involves a substantial question of law

of genera importance as required by article 133(1) of the Constitution of India.