(2002) 12 KL CK 0054

In the High Court Of Kerala

Case No : T.R.C. No''s. 412, 457, 458 and 460 of 2000

State of Kerala	APPELLANT
Vs	
Taj Garden Retreat	RESPONDENT

Date of Decision : 20-12-2002

Acts Referred:

Foreign Liquor Rules, 1982 — Rule 13(3)
Kerala General Sales Tax Act, 1963 — Section 5B, 9

Citation : (2004) 138 STC 112

Hon'ble Judges : P.R. Raman, J;G. Sivarajan, J

Bench : Division Bench

Advocate : Georgekutty Mathew, Government Pleader, for the Appellant; Antony Dominic, A.K. Jayasankar Nambiar and Anil D. Nair, for the Respondent

Final Decision : Dismissed

Judgement

P.R. Raman, J.—These tax revision cases are filed by the State of Kerala represented by the Deputy Commissioner of Law, Commercial Taxes, Ernakulam against the order of the Appellate Tribunal. T.R.C. No. 412 of 2000 relates to the assessment year 1993-94, T.R.C. No. 457 relates to the assessment year 1996-97, T.R.C. No. 458 relates to the assessment year 1994-95 and T.R.C. No. 460 relates to the assessment year 1995-96 respectively. The Appellate Tribunal disposed of the matter by a common judgment rendered in the above four cases. The respondent-assessee is a new hotel started at Kumarakom. For all these years in question the assessee had only a beer parlour licence issued in form No.F.L.13 under the Foreign Liquor Rules, 1982. The assessee was not a star hotel and also did not have a bar licence (F.L.3) during these years. Only subsequently with effect from April 1, 1998 the assessee has got a star status and obtained F.L.3 licence. Hence, during the period in question the assessee had only F.L.13 licence and that does not mean as a star hotel. The question arises for consideration is as to whether the assessee could be assessed to tax treating as a bar attached hotel.

2. The assessee obtained a license and paid licence fee as contemplated u/s 5B of the Kerala General Sales Tax Act, 1963. According to the assessee, it is not a bar attached hotel or a star hotel and hence the cooked food manufactured and supplied by it is not assessable to tax, as it is exempted as per entry 12 of the Third Schedule to the Kerala General Sales Tax Act read with Section 9 of the said Act. The assessee filed an annual return disclosing their total turnover and claiming exemption. The assessing officer accepted the return filed by the assessee and allowed the exemption claimed finding that there is no taxable turnover for the assessment years in question. Subsequently, the Deputy Commissioner of Commercial Taxes, Kottayam by his order dated October 23, 1999 suo motu revised the assessment for the years from 1993-94 to 1996-97 taking the view that beer is classified under entries 53 and 54 of the First Schedule to the Kerala General Sales Tax Act, 1963 and thus fall within the status of a bar attached hotel for the purpose of levy of tax under the Kerala General Sales Tax Act. According to him, cooked food including beverages not falling entries 53 and 54 of the First Schedule to Kerala General Sales Tax Act served in bar attached hotels are classified under entry 40 of the First Schedule to Kerala General Sales Tax Act and liable to tax 8 per cent at the point of first sale in the State. Accordingly, a proposal was made to set aside the assessment orders and notice was issued. After hearing the objections, the said proposal was confirmed by the aforesaid order. The assessee subsequently contended in their objection that the Taj Garden Retreat Hotel was started with six rooms in the year 1993 and that the hotel was not a Star Hotel nor a Bar license was given; but only obtained a licence for a beer and wine parlour which was given to Kerala Tourism Development Corporation and joint sector hotels. This hotel has a Government of Kerala participation and hence they were given a beer parlour licence. According to the assessee, this is not a bar licence and they could not sell any Indian made foreign liquor, brandy, whisky, etc., which are sold in bar hotel. It was their contention that the hotel was not a bar attached hotel and hence it was not liable for payment of tax under entry 40 of the First Schedule. However, after April 1, 1998 the assessee has obtained a bar licence and remitting such tax in terms of the entry 40 of the First Schedule. The revisional authority found that the assessee was holding only a beer parlour licence during the relevant period. It is also found that the assessee sold beer in their hotel during the relevant period. But, according to him, beer is an Indian made foreign liquor for the purpose of levy of sales tax by virtue of the explanatory note to entry 53 of the First Schedule to the Kerala General Sales Tax Act as it stood at the relevant time. In this view, he held that the assessee-hotel is a "bar attached hotel" for the purpose of levy of tax under the Kerala General Sales Tax Act. Accordingly, the assessment orders were set aside and the case was remanded to the assessing authority for being redone according to law.

3. The assessee appealed to the Sales Tax Appellate Tribunal. The Tribunal in the order dated May 22, 2000 disposing of the four appeals, T.A.Nos.339, 340, 341 and 342 of 1999 held that the licence fee paid by the assessee u/s 5B to cover

liability for sale of cooked food and beverages accepted by the assessing officer is in strict compliance of the statutory provision. The Tribunal also found that the beer licence in favour of the assessee has no relevance so far as the liability to tax on cooked food and beverages under item 40 of the First Schedule is concerned. A bar licence (F.L.3) to sell very variety of liquor is a necessary pre-requisite to call a hotel "bar attached". Since the assessee had obtained F.L.3 licence only with effect from April 1, 1998 the assessee cannot be treated as a bar attached hotel prior to April 1, 1998. The Tribunal also found after going through the licence F.L.3 issued under the Foreign Liquor Rules, 1982 that the said licence alone provides for sale of every kind of foreign liquor which can be sold to residents in the hotels and to guests or to casual visitors eating in the hotel and that this is the only licence for sale of liquor in a hotel or restaurant. In the result, the appeals were allowed and the order of the Deputy Commissioner is set aside. Challenging the finding of the Tribunal and the decision rendered thereon, these revisions have been filed.

4. We have heard the learned Government Pleader and the learned counsel for the assessee. The short question that arise for consideration is as to whether the assessee-hotel is a "bar attached hotel" within the meaning of entry 40 of the First Schedule to the Kerala General Sales Tax Act, 1963 as it stood at the relevant point of time. Item 40 of the First Schedule to the Kerala General Sales Tax Act, 1963 is given hereunder :

--- Sl. Description of goods Point of levy Rate of No tax per cent --- 1 2 3 4 --- 40. Cooked food including bev- At the point of 6 eragcs not falling under en- first sale in the tries 53 and 54 of this State by a dealer Schedule sold or served in who is liable to bar attached hotels and/or tax u/s 5. star hotels/restaurants. ---

5. Serial No. 40 was substituted by Act 23 of 1999 with effect from April 1, 1999 and the present entry corresponding to Serial No. 40 is entry 46 after the amendment, which reads as follows :

--- Sl. Description of goods Point of levy Rate of No tax per cent --- 1 2 3 4 --- 46. Cooked food, including bev- At the point of first 8 erages not falling under sale in the State by entry 60 of this Schedule, a dealer who is sold or served in bar liable to tax under attached hotels and/or star Section 5. hotels. ---

Explanation : "Bar attached Hotel" for the purpose of this entry shall mean a hotel or restaurant which is licenced under the Foreign Liquor Rules to serve foreign liquor falling under entry in serial number 60 of this Schedule.

6. Serial No. 60 reads as follows :

-- Sl. Description of goods Point of levy Rate of No tax per cent -- 1 2 3 4 -- 60. Foreign liquor :- At the point of sale by the 60 Kerala State Beverages (i) Beer and wine (Manufacturing and Marketing) Corporation Limited and at the point of first sale in the State by a dealer who is liable to tax u/s 5 except where the sale is to the Kerala State Beverages (Manufacturing and Marketing) Corporation Limited. --

7. Thus, by explanation with effect from April 1, 1999 the bar attached hotel was given wider meaning to include a hotel which is licenced under the Foreign Liquor Rules to serve beer and wine under Serial No. 60. As this explanation was added by an amendment by Act 23 of 1999 which was not expressly given any retrospective effect, we have to consider as to how the word "Bar attached Hotel" has to be understood as it stood prior to the explanation inserted by Act 23 of 1999. In the absence of any definition we have to understand the term as to what is the popular meaning and also as to how the term is understood having due regard to the provisions contained in the Abkari Act and Rules thereunder, under which licence issued for such purpose.

8. The Kerala Abkari Act and Rules provided for granting of licence for various purposes. What is relevant here is only the Foreign Liquor Rules. It is not disputed that the assessee was issued only F.L.13 licence under the Foreign Liquor Rules, 1982. Rule 13 of the Foreign Liquor Rules, 1982 provides for grant of licence. The F.L.13 licence shall be issued by the Excise Commissioner exclusively to the Kerala State Beverages (Manufacturing and Marketing) Corporation Limited and the Kerala Tourism Development Corporation Limited for running Pub-Beer Parlours in selected centers on payment of an annual rental of Rs. 5,000 each. However, this licence shall also be issued by the Excise Commissioner to Joint Sector Hotels involving the Kerala Tourism Development Corporation Limited on payment of an annual rental of Rs. 5,000 each. These licensees may procure Pub-Beer directly from the Breweries.

9. Thus it can be seen that the assessee being a joint sector undertaking with the Kerala Tourism Development Corporation, a licence was issued as contemplated under Rule 13(3) of the Foreign Liquor Rules. However, Rule 13(3) provides for grant of licence to Hotel (Restaurant), the relevant portion of which reads as follows:-

"13(3) Foreign Liquor 3 Star Hotel (Restaurant) Licence.--Licence in this Form may be issued by the Excise Commissioner under orders of Government in the interests of promotion of tourism in the State to Hotels or Restaurants conforming to the standard of Two Star and higher classifications, owned or run by the Kerala Tourism Development Corporation Limited (KTDC) and Indian Tourism Development Corporation Limited (ITDC) and also to hotels having rating of (Three Stars and higher classifications, Heritage and Resort hotel as well as classified restaurants) where the privilege of sale of foreign liquor in such Hotels or Restaurant, has been purchased on payment of an annual rental of (Rs. 12,00,000 only). But no such licence shall be issued to Hotels, or Restaurants which are located within 200 meters from an educational institution, temple, church, mosque or burial ground. (However, the distance restrictions will not be applied to the bar licences now in force for hotels of 3 Star and higher classification). (Those hotels other than private one having rating of Four Stars and above will also be exempted from the distance restrictions in conducting bars, in the interest of promotion of tourism in the State. In the case of private hotels of the above category no such licence shall be issued for conducting bars if they are located within 50 meters only from any educational institutions, temples, churches, mosques, burial grounds or scheduled caste/scheduled tribe colonies). The existing licensees who do not maintain Two Star standards will be allowed time up to June 30, 1992 to upgrade their standards to Two Star. Their licence will be renewed till that date. Failure to upgrade the standard of those hotels would lead to cancellation of licence and forfeiture of rental paid by them. Licensees shall have no claim for compensation. (The applicant shall produce from the Abkari Workers'' Welfare Fund Inspector a certificate of the effect that he has remitted before the date of application for the licence/ renewal of licence, the arrears of contributions, if any, payable up to 31st day of December of the preceding year).

The question whether a hotel or restaurant conforms to the standard of Two Star Hotel shall be determined in accordance with the specifications for classification of Star Hotels issued by the Department of Tourism and in case of doubt or dispute, the decision of the Excise Commissioner shall be final.

The cost of liquor shall be billed along with the cost of meals. The cost of liquor shall be shown separately in the bill and the duplicate copies thereof shall be retained for inspection by the Officers of the Excise Department."

10. From the above it can be seen that the licence is issued to a hotel or restaurant in form No. 3. Two Star Hotel has to satisfy the specification for classification of Star Hotels issued by the Department of Tourism and there are restrictions imposed regarding the distance to be maintained by Star Hotels from educational institutions, temples, churches etc. It is by virtue of this licence that the licensee is enabled to serve or supply foreign liquor in Star Hotels.

11. It has to be remembered that the assessee has been issued a licence u/s 5B of the Kerala General Sales Tax Act and the same is not cancelled and that the assessee has not collected any tax as it was issued only a licence u/s 5B on the premise that the assessee is not liable to pay any tax ; but only licence fee. The Foreign Liquor Rules under the Abkari Act clearly shows that F.L.3 licence is given

to a hotel/restaurant, and the licensee has to comply with the various conditions and restrictions imposed by the rule including the rule relating to distance. Whereas F.L.13 licence is not issued to all the hotels ; but only to the joint sector hotels with Kerala Tourism Development Corporation and there are no other restrictions as the one imposed to F.L.3 licensee. It is not possible to view that F.L.13 licence issued for conducting a beer parlour is to be understood as a "Bar attached Hotel". The imposition of tax on cooked food items in the Bar attached Hotel was challenged as violative of Article 14 of the Constitution of India in a batch of writ petitions filed before this Court. Dealing with the same this Court in Hotel Elite v. State of Kerala [1988] 69 STC 119 ; (1987) 2 KLT 959 upheld the imposition of tax on cooked food items in a bar attached hotel. In this connection, the State filed a counter-affidavit. This Court has referred to the counter-affidavit filed by the State in that case which reads as follows :

"The State in its counter-affidavit has denied the charge of discrimination and has given its reasons for imposing a tax on bar attached hotels and hotels above the grade of two stars. It is stated that hotels graded above two stars are ordinarily required to have a bar though the condition is relaxable in the case of vegetarian hotels. Bar licences are issued only if the hotels and restaurants conform to the requirements of Rule 13(3) of the Foreign Liquor Rules, 1982. These Rules require hotels and restaurants to conform to the star grade. It is also averred that hotels above the grade of two stars and bar attached hotels cater mainly to a wealthier section of the people who can afford to spend more......."

(emphasis Here italicised supplied).

12. The Supreme Court also in Kerala Hotel and Restaurant Association and others Vs. State of Kerala and others, the view expressed by this Court in Hotel Elite''s case [1988] 69 STC 119. (1987) 2 KLT 959. The Tribunal has also referred to the fact that in F.L.3 licence the heading of the licence itself is "hotel (restaurant) licence" and that the licence provides for sale of every kind of foreign liquor which can be sold to residents in the hotels and to guests or to casual visitors eating in the hotel and that this is the only licence for retail sale of liquor in a hotel or restaurant. The assessee in this case was issued F.L.3 licence with effect from April 1, 1998. On the basis of the afore-mentioned discussion, we have necessarily to hold that the assessee, who was issued only F.L.13 licence during the relevant period in question, cannot be classified as "Bar attached Hotel" and hence, the order of the Deputy Commissioner in revision taking a contrary view is not valid or justifiable.

In the circumstances, we confirm the view expressed by the Tribunal and dismiss these revisions.

