(2008) 07 OHC CK 0044

In the Orissa High Court

State of Orissa APPELLANT

Vs

Athiti Bihar Restaurant RESPONDENT

Date of Decision : 31-07-2008

Acts Referred:
Constitution of India, 1950 — Article 366

Citation : (2008) 106 CLT 669 : (2008) 2 OLR 639 Supp : (2009) 25 VST 87

Hon'ble Judges : B.S. Chauhan, C.J;B.N. Mahapatra, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

B.N. Mahapatra, J.—The question of law as has been referred to by the Learned Sales Tax Tribunal to this Court for opinion is as follows:

Whether on the facts and in the circumstances of the case, when the dominant object of the transactions effected by the assessee is sale, Tribunal is correct in law to allow benefit of exemption available u/s 6(2) of the Constitution (Forty-sixth Amendment) Act, 1982 in respect of sales of food stuffs to the Customers for consumption inside the hotel on the ground that no tax has been collected on such sales?

2. The facts of the case, in short, are that the dealer in the present case is an unregistered dealer and during the relevant period he was running a restaurant. The assessing officer and both the first and second Appellate authorities held that the dominant object of the transactions effected inside the restaurant run by the dealer was ''sale''. Learned Tribunal held that the dealer being all unregistered dealer has not collected any tax on such sales. The periods involved in this case are for the financial years 1980-81 and 1981-82 and the assessment has been made u/s 12(5) of the OST Act. However, the Learned Tribunal keeping in view the decision of the Hon''ble Orissa High Court in the case of Piplani Sweets v. Sales Tax Officer (1988) 70 STC 153 (Ori), held that the dominant object of the transactions in the restaurant being sale the dealer was liable to

pay tax, but he would get exemption of tax on the transactions of sale of foods, eatables effected by him to customers for consumption inside the restaurant for the period from 7.9.1978 to 2.2.1983 in view of the provisions of Section 6(2) of the Constitution (Forty-sixth) Amendment Act, 1982 as the dealer had not collected any tax on such sales.

3. This Tax Revision has been filed at the instance of Revenue. Learned Counsel appearing for the Revenue submits that since the dominant object of the transaction in the restaurant is held to be ''sale'' by the assessing officer and both by the first and second Appellate authorities, the Tribunal is not justified to annul the assessment.

4. The Constitution of India (Forty-sixth) Amendment Act, 1992 (hereinafter referred to as "Amendment Act") came into force on 2nd February, 1983. By Section 4 of the Amendment Act, clause (29A) was inserted in Article 366 of the Constitution and it reads as follows:

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

XX XX XX XX (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 during (whether or not intoxicating), where such supply or service, is for cash, deferred payment or other valuable consideration....

Section 6 of the Amendment Act deals with validation and exemption. Section 6(1)(a) of the Amendment Act prescribed that wherever the expression-

tax on the sale or purchase of goods'' occurs in any of the provisions of the Constitution, and for purposes of any law passed or made or purporting to have been passed or made, before the commencement of the amending Act, in pursuance of any such provision shall be deemed always to have included, 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 during (whether or not intoxicating) for cash, deferred payment or other valuable consideration.

Under Section 6(1)(b) certain transactions were validated. While nullifying the effect of the decisions of the Apex Court, to save the restaurant, lodgings, eating-house, etc., from levy of sales tax for the interregnum, as the law in this regard was in fluid and uncertain state on account of the decisions of the Apex Court, exemption has been granted u/s 6(2) of the Amendment Act.

5. It is now necessary to know what is contemplated in Section 6(2) of the Amendment Act. Section 6(2)(a) reads as follows;

6(2)(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;

Section 6(2)(a) provides for exemption from 7th September, 1978 till 2nd February, 1983, when the amending Act came into force. The requirements of Section 6(2) are:

(a) that tax had not been collected on supply of articles of food; and

(b) that such collection was not made on the ground that no such tax could have been levied or collected.

6. A Full Bench of this Court in Sri Prabhudayal Agarwalla v. Orissa Sales Tax Tribunal and Ors (1993) 88 STC 473, relying upon the view expressed by the Hon''ble Supreme Court in the case of Shri Krishna Enterprises and Others Vs. State of Andhra Pradesh and Others, , held that on the basis of the Constitution of India (Forty-sixth Amendment) Act, 1982, the Orissa Sales Tax Act was amended and the amended provisions came into force on 7th April, 1984 with the provisions corresponding to those contained in the Constitution (Forty-sixth Amendment) Act, 1982. The effect of the said amendment, therefore, is that the benefit contemplated by the Forty-sixth Amendment was extended up to the date of the State Legislation, i.e., 7th April, 1984.

Subsequently, the Hon''ble Supreme Court in the case of K. Damodarsamy Naidu & bros. v. State of Tamil Nadu and Anr. (2000) 117 STC 116, further held as follows:

Section 6 of the Constitution of India (Forty-sixth Amendment) Act, 1982, providing for retrospective validation of sales tax levied prior to February 2, 1983, on the supply of food and drinks will apply only if the State law had contained a provision entitling the State to levy a tax on the supply of food and drink. Parliament, when exercising the power to amend the Constitution under article 366, cannot and does not amend State Acts. Section 6, therefore, validates retrospectively the Sells Tax Acts of those States which had therefore made provision for the levy of sales tax on the supply of food and drink. The levy of sales tax on the supply of food and drink prior to February 2, 1983, in the States of Maharashtra and Uttar Pradesh, where there was no such provision in the respective Sales Tax Acts, is bad in law.

7. In the present case, Learned Tribunal has categorically held that the dealer was an unregistered dealer during the years 1980-81 and 1981-82 and had not collected any sales tax on the transaction of sale of food and eatables from the customers inside the restaurant. Here the assessment years in question were 1980-81 and 1981-82 and on the basis of the Constitution Amendment Act, the Orissa Act was amended and the amended provisions came into force on 7th April, 1984. Thus the benefit contemplated by the Forty-sixth Amendment of the Constitution is extended up to the date of the State Legislation.

8. In view of the above settled position of law, the question of law is answered against the Revenue and in favour of the assessee. Accordingly, the Tax Revision

petition is dismissed.

B.S. Chauhan, C.J.

9. I agree.

