
(1975) 12 OHC CK 0021

In the Orissa High Court

Case No : S.J.C. No. 101 of 1973 and S.J.C. No's. 33 and 34 of 1974

State of Orissa

APPELLANT

Vs

Hotel Rajmahal

RESPONDENT

Date of Decision : 04-12-1975

Acts Referred:

Orissa Sales Tax Act, 1947 — Section 12(8), 24(1)

Citation : (1976) 42 CLT 150 : (1976) 37 STC 232

Hon'ble Judges : R.N. Misra, J; N.K. Das, J

Bench : Division Bench

Advocate : N.N. Bhattacharya, for the Respondent

Judgement

R.N. Misra, J.—These are three references made u/s 24(1) of the Orissa Sales Tax Act (hereinafter referred to as the "Act") at the instance of the State of Orissa by the Additional Sales Tax Tribunal and the following common questions have been referred for opinion of the court:

(1) Whether, on the facts and in the circumstances of the case, the Member, Additional Sales Tax Tribunal, was right in holding that the foreign liquor business and hotel business are separate businesses from each other ?

(2) Whether, on the facts and in the circumstances of the case, the Member, Additional Sales Tax Tribunal, was right in excluding the turnover of foreign liquor business from the turnover of the dealer ?

2. The assessee is a partnership business of a hotel run in the name and style of Hotel Rajmahal at Bhubaneswar. It has three partners, namely, Sudhir, Sunil and Ashok, and the firm is a registered dealer under the Act. As shown in the statement of facts, the hotel serves meals, tea, tiffin and drinks. Foreign liquor is also sold open and served within the hotel premises to customers. As it appears one licence for foreign liquor has been issued in the name of a single partner.

The periods with which these applications are concerned are 1964-65, 1965-66

and 1966-67. Assessment for the last of these years has been made u/s 12(2) of the Act, while for the first two years, assessment has been completed u/s 12(8) of the Act. S. J. C. No. 101 of 1973 relates to last of these years, while S. J. C. Nos. 33 and 34 of 1974 are respectively for the years 1964-65 and 1965-66.

According to the assessee, the hotel business was run in the name and style of Rajmahal while the liquor business was run in the name and style of "Flora". The hotel belonged to the firm while the liquor business belonged to Sudhir alone. The Sales Tax Officer, however, came to find that the hotel and the liquor business was one and the assessee's stand that they were two separate businesses run in the same premises was negated. As assessments of the business of the assessee were completed by application of Rule 90 of the Orissa Sales Tax Rules, the turnover of both the businesses was put together for determining the quantum.

3. The Assistant Commissioner in appeal upheld the assessments. In further appeal to the Tribunal, it was found that the hotel business and the foreign liquor business had no unity in them and could not be treated as one and the same business. On that finding, it was further held that the two turnovers could not be clubbed together for the purposes of Rule 90.

4. The Sales Tax Officer referred to the evidence at length and also noticed the conduct of parties. Apart from the fact that liquor was being served in an open condition to customers within the hotel, the Sales Tax Officer had further found that one common account was maintained and the profit and loss statement of the business covered the turnover of the hotel as also of the liquor business. According to the Sales Tax Officer, nothing turned on the feature that the licensee was one partner. In fact, under the Excise law, a partnership firm cannot be a licensee. It has already been indicated by the Supreme Court that where a licence is granted to one partner and he admits others into the business, there is no illegality committed and public policy is in no way affected. This appears to have been done in the case. The reasoning given by the Tribunal to disturb the finding of both the forums below in regard to unity or separation of the two businesses is not at all cogent. In fact, Mr. Bhattacharya for the assessee conceded before us that in view of the common set of accounts and the other materials on record, it is difficult for him to support the finding reached by the Tribunal that the two businesses had no unity between them. In view of the concession which appears to be well-founded, without indulging in further discussion, we would hold on the first question referred to us in favour of the revenue, namely:

The Member, Additional Sales Tax Tribunal, was not right in holding that the foreign liquor business and hotel business are separate businesses from each other.

5. Rule 90 of the Orissa Sales Tax Rules makes provision for a special mode of assessment in certain cases. Since the assessment in this case is on the basis of

Rule 90, for convenience, we extract the rule:

(1) A dealer who carries on business of running a hotel or refreshment stall or any other establishment for selling or supplying meals, refreshments, drinks and such other articles or as the manufacturer of confectionery articles for retail sale shall pay, in lieu of the tax assessable on his taxable turnover under the provisions of the Act, a sum calculated at the rate of five naye paise in the rupee on a percentage of his annual turnover of sales as shown below:--

(a) 25 per cent, if the annual turnover of sales does not exceed Rs. 18,000;

(b) 40 per cent, if the annual turnover of sales exceeds Rs. 18,000, but does not exceed Rs. 36,000;

(c) 50 per cent, if the annual turnover of sales exceeds Rs. 36,000, but does not exceed Rs. 72,000;

(d) 60 per cent, if the annual turnover of sales exceeds Rs. 72,000. (2) ...

An analysis of this rule shows that the business of a hotel, the business of a refreshment stall or the business of any other establishment, once the business is of the type mentioned, shall be assessed under the special mode. According to the learned standing counsel, drinks in Sub-rule (1) cover sale of liquor as well. Assessee's counsel contends that sale of foreign liquor being a tax-free item could not have been contemplated to be covered by the general term of "drinks".

Section 6 of the Act empowers the State Government by notification to exempt from tax the sale of any goods or class of goods. In exercise of this power, Notification No. 33925-F dated 30th December, 1957, has been made. Serial No. 12 of this notification runs thus:

12. Country liquor including tari and puchwai, potable foreign liquor including medicated wines, excise opium (excluding preparations of opiums) ganja and bhang.

Sale of these items has been exempted from sales tax. Therefore, if sale of foreign liquor is not taxable, the special mode of assessment under Rule 90(1) cannot take the turnover of such sale of liquor into account for fixing the sales tax. We may illustrate our proposition: A hotel also sells liquor. For a year, the turnover of the hotel in respect of its hotel business (excluding sale of liquor) is Rs. 20,000. The turnover from liquor business for the said year works out at Rs. 60,000. If the two are to be taken together for finding out the tax to be imposed on the dealer, the annual turnover would work out at Rs. 80,000, and in view of Rule 90(1)(d) tax has to be imposed in 60 per cent thereof at the rate of five paise per rupee which would work out at Rs. 2,400. If the turnover of liquor be excluded, Clause (b) of the rule is applicable wherein 40 per cent of the turnover would be liable at the rate of five naye paise per rupee and the tax liability would work out to Rs. 400. Thus, if the turnover of sale of liquor is taken into account, the liability of the assessee goes up by Rs. 2,000. If sale of liquor is not taxable,

it cannot be made taxable by this process.

6. "Drinks" as such cannot cover liquor, even where drink is used as a substitute of liquor. Our answer to the second question, therefore, shall be:

On the facts and in the circumstances of the case, the Tribunal was right in excluding the turnover of foreign liquor business from the turnover of the dealer, though the reason for our conclusion is very different from what had been ascribed by the Tribunal.

It would follow that the assessee has to be assessed only on the turnover of the hotel business (excluding the turnover of sale of liquor) in terms of Rule 90(1) of the Orissa Sales Tax Rules. The assessee shall have his costs. Consolidated hearing fee is assessed at rupees one hundred and fifty.

N.K. Das, J.

I agree.