

(1968) 12 BOM CK 0013

In the Bombay High Court

Case No : Sales Tax Reference No's. 39, 40 and 41 of 1968 in S.T.R. Application No's. 61, 62 and 63 of 1967 and Special Civil Application No. 2642 of 1967

Sun-n-sand Hotel Private Ltd.

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 02-12-1968

Acts Referred:

Bombay Sales Tax Act, 1959 — Section 2(29)

Citation : (1969) 23 STC 507

Hon'ble Judges : N.L. Abhyankar, J;D.P. Madon, J

Bench : Division Bench

Judgement

Abhyankar, J.—This order will dispose of all the three Sales Tax References and the Special Civil Application under Articles 226 and 227 of the Constitution arising out of the same matter.

2. The references are at the instance of the assessee called the Sun-N- Sand Hotel The assessee is a hotelier and runs a well reputed hotel called the Sun-N- Sand Hotel at Juhu Beach in Bombay. The hotel has both a boarding and a lodging establishment. The customers who enter the hotel are informed of the charges they have to pay for lodging with different amenities and boarding according to their taste. They are also informed that service charges of 10 per cent, of the tariff and sales tax at five paise per rupee will also have to be paid.

3. For the three periods for which we are concerned in the Sales Tax References, viz., (1) from 1st April, 1961 to 14th December, 1962, in the first period, (2) from 15th December, 1962 to 31st March, 1963, in the second period and (3) from 1st April 1963 to 31st March, 1964, in the third period, the Sales Tax Officer while computing the gross turnover for the periods in question included service charges recovered by the assessee from the customers. The Sales Tax Officer rejected the contention of the assessee for deduction of these amounts or their exclusion on the ground that they were service charges for services rendered by

the staff, and the proceeds of which, according to the assessee, did not represent a part of the sale price but were recovered for payment to the staff and for covering partly the breakages.

4. The Tribunal having rejected similar contentions in second appeal, the assessee made an application for referring the questions arising to the High Court and wanted three questions to be referred as follows :-

"(1) Whether on the facts and under the circumstances of the case, the service charges constitute or can be included in "sale price" as defined in section 2(29) of the Bombay Sales Tax Act, 1959 ?

(2) Whether the Tribunal misdirected itself in law in holding (a) the price is what a customer pays, or (b) that because service charges have no independent existence and because they are wedded together with the sale they constitute sale price, and (c) that because the payment is not involuntary or optional, it constitutes the sale price ?

(3) Whether the State Legislature is competent to define "sale price" in section 2(29) of the Bombay Sales Tax Act, 1959, as including "all sums charged for anything done by the dealer in respect of the goods at the time of or before delivery thereof" in view of entry No. 54 in the State List of Schedule VII of the Constitution of India ?"

Ultimately, however, the counsel appearing for the assessee agreed that question No. (1) would be the only question which may be referred to the High Court, and accordingly that is the only question which is referred to this Court in all these references.

5. Inasmuch as the third question, which raised the constitutional validity of the provisions of section 2(29) of the Bombay Sales Tax Act, 1959, was raised and could not have been referred by the Tribunal, the assessee has filed Special Civil Application No. 2642 of 1967, principally to challenge the validity of the definition of the term "sale price" in section 2(29) of the said Act. That Special Civil Application is also fixed for hearing along with these Sales Tax References and was argued, and is being decided in this order.

6. According to the assessee, they are required to charge the service charges on account of certain directives given to them by the Department of Tourism of the Government of India. A communication from that Department has been produced along with the petition and according to this communication, the assessee is expected to adhere to certain conditions in the running of its establishment. Among other conditions it was suggested that the service charges, if any, levied on the hotel bills will be disbursed in full to the staff concerned subject to the normal deductions for breakages, losses, etc. Acceptance of this condition is in the interest of the assessee inasmuch as such acceptance makes recognition of the establishment eligible for the Department's assistance in various problems connected with hotels including import licences for essential goods, foreign

exchange for tourist publicity and travel promotion abroad. The hotel was expected to maintain a certain minimum standard and observe proper business ethics such as nearing a fair deal to tourists, travel agencies, etc.; and with a view to be eligible for these concessions and recognition the assessee is required to charge 10 per cent over and above the tariff to their customers which, according to the assessee, is entirely utilised in providing certain amenities for its staff.

7. The assessee has reproduced the terms of settlement arrived at between the assessee and the Secretary of the Bombay Labour Union representing the service personnel employed by the assessee. Under the terms of this settlement, the management agreed to distribute among its workers 85 per cent of the 10 per cent, service charges collected by the management the balance of 15 per cent is to be utilised for recovering cost of breakages, etc. There are other terms of the settlement with which we are not concerned. It may be mentioned that this settlement followed a demand for distribution of these service charges made by the Union on behalf of the workers employed in this establishment.

8. According to the petitioner, i.e., the assessee, what is charged is over and above the tariff for any article supplied in the hotel nothing goes to the employer as a sale price; for all that according to the assessee, is used for providing different amenities to the employees as per the agreement and the 15 per cent goes for covering the cost of breakages of crockery, etc. The contention, therefore, is that recovery of this 10 per cent over and above the tariff rates charged is not, on a proper interpretation of the definition of the term "sale price" in section 2(29) of the Bombay Sales Tax Act, 1959, the price for sale of goods supplied or sold in this hotel.

9. This contention has not found favour with the authorities at any stage. The Tribunal in disposing of the appeal has observed that there is a clear difference between charging what are called service charges and the tips which are demanded and sometimes paid by the customers in such establishment. In the case of service charges, the customers have no option but to pay these charges when demanded by the assessee, irrespective of the fact whether the employees were serviceable or had rendered useful service. Inasmuch as in the case of demand for tips, it is entirely a voluntary payment and the customer may or may not pay a tip to the particular servant who attends on him according as he is satisfied with the service of that particular employee or not. The Tribunal has also pointed out that the service charges of 10 per cent for the services rendered are for the execution of the order that is placed by the customer. In other words, the service charges are entirely dependent on the food consumed by the customer after placing an order. It is because there is a sale of the food ordered by the customer that the service charges are collected; it is because the price of the food and service charges are inseparably wedded together that it is not possible to view one without the other. In other words, service charges had no independent existence of their own. So far as the customer is concerned and for

all practical purposes, the price of the food ordered by the customer is what he pays therefor. If the customer is required to pay what is stated as tariff plus 10 per cent over and above that tariff, then the price, so far as the customer is concerned, for the food supplied and served to him in the establishment will be the total amount of the bill that is charged including the so-called service charges. The Tribunal has also held that it is not possible for the customer to enter into the contract only for doing service in the manner in which the service charges are sought to be interpreted apart from the food which is supplied. It is not as if one can take one's food from outside and order it to be served in the hotel for which any charge will be payable. There is no choice to a customer whether to pay the service charges or not to pay the service charges, distinguishing it thus from a demand by way of a tip made by an individual servant.

10. We are unable to accept the contention of the petitioner that what is charged to the customer in the hotel by the assessee inclusive of 10 per cent by way of service charges is really not the "sale price" for the goods which are offered and consumed by the customer in the establishment. Once it is found that there is no option to the customer whether to pay or not to pay the service charges at the rate of 10 per cent over and above the tariff, we find it difficult to dissociate this part of the bill from the total contract which a customer enters into with the assessee when ordering any food. A specimen of the tariff card, which is presented to the customer as soon as he enters the hotel and which in effect is the agreement between the customer and the assessee, shows that in all cases service charges of 10 per cent on the tariff pins sales tax at 5 paise per rupee are to be paid by the customer. It is, therefore, contended on behalf of the department that really there is no difference between the liability so far as the customer is concerned to pay the amount of sales tax and the amount of service charges at 10 per cent over the tariff; in either case there is no option to the customer. It cannot be disputed that the amount which is recovered as sales tax from the customer is properly added to the tariff in determining the sale price of the goods purchased. If sales tax can be properly included in determining the sale price, it is difficult to see why the addition of 10 per cent, of the tariff by way of service charges should be on a different footing, and should not be considered as properly included in determining the sale price.

11. The contention of the assessee, that it merely acts as if it were a channel or conduit through which the benefits flow from the collection of this amount for the purpose of distribution to its employees, cannot be accepted. For one thing there is no direct nexus between the whole body of employees to whom the benefits go and the customer who is served by an employee. In the case of a tip, it is a direct payment for satisfactory service rendered by a particular employee who serves the customer. For aught one knows, the customer may not know the number of employees in the establishment, their grades or salaries, and what services they actually render. If the charges were only for the services rendered to the customer, the matter would be on a different footing. Here the services

rendered are rendered by the totality of employees in the establishment; some of them may be in the kitchen and some of them may be at other places. In other words, they may be employed in the task with which the customer is not directly concerned at all. It will, therefore, be seen that what is charged as service charges and required to be paid by the customer is in effect an addition to the price which he has to pay and is properly to be considered as sale price of the food ordered by him in that establishment. It is true that the kind of service of a particular establishment may be of a particularly attractive order. The furniture may be good, the servants may be well dressed, there may be an accompaniment of music or a door-show and many other amenities. But all this goes in determining the tariff at which the catering establishment caters to the needs of its customers, and admittedly is not separately charged for. It may be that the same kind of food served outside, say on the footpath, may be charged much less than when it is ordered and served in a posh establishment like the one which the assessee amenities. But all the same, it is the price of food that the customer has to pay for the luxury or the benefit of having delivered the articles of food in a nice place, in comfort and to the delightful accompaniment of music or such other entertainment. We fail to see, therefore, what difference does it make so far as the customer is concerned, whether the addition to his bill is named as service charges or simply as 10 per cent addition to the tariff. As it is not possible or permissible to separate the two charges as charges merely for the services and when mere services are not available for payment, the Tribunal seems to be right in coming to the conclusion that service charges are inseparably mixed up with the total amount or price that is charged to the customer for the food that is supplied to him.

12. In this connection reference was made to a decision of the Supreme Court in. *The State of Orissa v. Utkal Distributors (P.) Ltd.* 1966 17 S.T.C. 320. In that case arising under the Orissa Sales Tax Act, 1947, the assessee was a controlled stock-holder of iron and steel under the Iron and Steel Control Order, 1956. As such controlled stock-holder, the assessee in that case was not entitled to charge a price higher than that fixed by the Government of India. In fact under condition No. 4(ii) of the Notification dated 18th October, 1958, it was provided that the customer shall pay to the controlled stock-holder the Central sales tax incurred by the controlled stock- holder in obtaining the material and also pay such additional Central sales tax, if any, incurred on the sale to the customer. The question was whether the addition of the sales tax in the bill payable by the customer under the notification can be properly included in arriving at the sale price of the iron or steel sold by the controlled stock- holder. The Court ultimately held that the Central sales tax paid by the assessee at the time of purchase and realised from the customers under the provisions of the notification did not form part of the sale price paid by the customers to the assessee, as the valuable consideration for the sale of iron or steel was only the price fixed by the Government. In other words, the sale price having been fixed by the Government under the statute, anything that was paid over and above that sale price, which

was a controlled price, by way of sales tax could not be properly included in the sale price of the iron and steel which was a controlled article.

13. We do not see how the principle of this decision is of any assistance to the assessee in this cast. It is not as if the sale price of food or articles supplied in the hotel has been statutorily fixed. It is all a matter of agreement between the customers and the assessee; accordingly when the assessee tells the customer the moment he (the customer) enters the hotel, that for the purposes of goods supplied, the customer will have to pay not only the tariff rates which are fixed but also over and above it 10 per cent, by way of service charges, the sale price quoted must include service charges. We have already observed that so far as the customer is concerned, he has to note by virtue of the tariff card that he has to pay the tariff rates plus 10 per cent, as service charges plus 5 paise as sales tax per rupee; and all this is part of the contract or agreement between the customer and the assessee in respect of the price the customer has to pay for the food that is supplied to him. In other words, all this constitutes and goes into the formulation or fixation of the price for the goods supplied, and, therefore, it must be treated as "sale price" within the meaning of section 2(29) of the Bombay Sales Tax Act, 1959.

14. More apposite perhaps would be the decision of the Supreme Court in *The Tata Iron & Steel Co. Ltd. v. The State of Bihar* [1958] 9 S.T.C. 267. At pages 284 and 285 their Lordships deal with this question, which was point No. 5, and observe as follows :

"Re. Point No. 5: The argument on this point is that sales tax is an indirect tax on the consumer. The idea is that the seller will pass it on to his purchasers and collect it from them. If that is the nature of the sales tax then, urges the learned Attorney-General, it cannot be imposed retrospectively after the sale transaction has been concluded by the passing of title from the seller to the buyer, for it cannot, at that stage, be passed on to the purchaser. According to him, the seller collects the sales tax from the purchaser on the occasion of the sale. Once that time goes past, the seller loses the chance of realising it from the purchaser and if it cannot be realised from the purchaser, it cannot be called sales tax. In our judgment this argument is not sound. From the point of view of the economist and as an economic theory, sales tax may be an indirect tax on the consumers, but legally it need not be so. Under the 1947 Act the primary liability to pay the sales tax, so far as the State is concerned, is on the seller. Indeed before the amendment of the 1947 Act by the amending Act the sellers had no authority to collect the sales tax as such from the purchaser. The seller could undoubtedly have put up the price so as to include the sales tax, which he would have to pay but he could not realise any sales tax as such from the purchaser. That circumstance could not prevent the sales tax imposed on the seller to be any the less sales tax on the sale of goods. The circumstance that the 1947 Act, after the amendment, permitted the seller who was a registered dealer to collect the sales tax as a tax from the purchaser does not do away with the primary liability of the

seller to pay the sales tax. This is further made clear by the fact that the registered dealer need not, if he so pleases or chooses, collect the tax from the purchaser and sometimes by reason of competition with other registered dealers he may find it profitable to sell his goods and to retain his old customers even at the sacrifice of the sales tax. This also makes it clear that the sales tax need not be passed on to the purchasers and this fact does not alter the real nature of the tax which, by the express provisions of the law, is cast upon the seller. The buyer is under no liability to pay sales tax in addition to the agreed sale price unless the contract specifically provides otherwise. See *Love v. Norman Wright (Builders) Ltd.* [1944] 1 K.B. 484. If that be the true view of sales tax, then the Bihar Legislature acting within its own legislative field had the powers of a sovereign legislature and could make its law prospectively as well as retrospectively. We do not think that there is any substance in this contention either"

This principle has been followed in a later decision of the Supreme Court in the case of *Messrs George Oakes (Private) Ltd. v. The State of Madras and Orissa* [1961] 12 S.T.C. 476. The matter was put concisely in the following observation :

"These observations show that when the seller passes on the tax and the buyer agrees to pay sales tax in addition to the price, the tax is really part of the entire consideration and the distinction between the two amounts - tax and price - loses all significance from the point of view of legislative competence"

15. If we may say so, with respect, in the instant case when the customer agrees to pay what is known as 10 per cent by way of service charges and 5 paise per rupee by way of sales tax, what the customer agrees to pay is the totality of these charges and which must enter in determining what the sale price paid by the customer is. So far as the customer is concerned, it makes no difference to him that he has in fact to make payment of sales tax payable by the dealer or that 10 per cent by way of service charges or that the service charges will ultimately be destined for payment to servants or for the benefit of the employees of the caterer. The fact that part of the amount is utilised towards meeting the obligations of the employer in providing amenities to the employees, in our opinion, is hardly relevant in determining whether that charge or that extra payment demanded of the customer is or is not properly liable to be included in determining the sale price. In fact, that is the obligation of the employer vis-à-vis the employees under the contract or the settlement. Even if nothing were to be paid to the employees, the customer will still be required to pay 10 per cent, over and above by way of service charges. Thus the fact that part of the amount goes for the benefit of the employees under the agreement between the employer and the employees can hardly be of any relevance in determining the nature of the payment and whether it could be properly included in determining the sale price of the goods supplied.

16. In view of the conclusion which we have arrived at that the 10 per cent of the service charges charged to the customers are properly included in the sale price, the objection raised about the constitutional validity of the definition of the expression "sale price" u/s 2(29) of the Bombay Sales Tax Act, 1959, which is raised in the Special Civil Application, does not survive. If these charges are properly included in the sale price as price of the goods offered or sold in the hotel then there is no question of the price being charged for something being done in respect of the goods. As the answer to the question raised is in the affirmative, in our opinion it is not necessary, nor it has been argued at the Bar, to determine the constitutional validity of section 2(29) of the Bombay Sales Tax Act on the ground whether the Legislature was competent to impose a tax or some charge for anything done by a dealer in respect of the goods.

17. The result is that the references are answered in favour of the department. The assessee will pay costs in each case. The Special Civil Application No. 2642 of 1967 fails and is also dismissed with costs. Deposit not to be refunded.

18. References answered accordingly.

19. Application dismissed.