

(1990) 08 BOM CK 0078
In the Bombay High Court
Case No : Sales Tax Reference No. 72 of 1979

Yogi Restaurant

APPELLANT

Vs

Commissioner of Sales Tax

RESPONDENT

Date of Decision : 03-08-1990

Acts Referred:

Bombay Sales Tax Act, 1959 — Section 2(13), 2(28), 2(30), 61
Central Sales Tax Act, 1956 — Section 4(2)

Citation : (1990) 08 BOM CK 0078

Hon'ble Judges : V.A. Mohta, J;H.D. Patel, J

Bench : Division Bench

Advocate : V.G. Bhonsule and V.V. Udhoji, for the Appellant; B.P. Jaiswal, for the Respondent

Judgement

V.A. Mohta, J.—This reference u/s 61 of the Bombay Sales Tax Act, 1959 (for short "the Act") is made by the Sales Tax Tribunal at the instance of the assessee to answer the following question :

"Whether in the facts and circumstances of this case the Tribunal was correct in holding that the applicant was liable to pay tax in respect of the amount recovered by it from the customers for serving food to the customers in the restaurant ?"

2. The applicant runs a restaurant in the name and style of "Yogi Restaurant" at Nagpur where food-stuff and drinks are served. For the period from April 1, 1971 to March 31, 1972 the applicant was assessed for sales tax on the turnover of sales of these articles in the restaurant. One of the contentions raised by the applicant was that it was charging a minimum floor charge of Rs. 10 per person for the cabaret show in night time and these charges should be treated as entertainment charges and should be deducted from the total turnover. On consideration of various factual aspects, the said deduction was not allowed. The tax assessed was Rs. 5,353.53. The applicant preferred first appeal before the Assistant Commissioner of Sales Tax, but without any success. It also preferred a

second appeal before the Sales Tax Tribunal, but that too without any success. The applicant applied for reference on the basis of the Supreme Court decision in the case of Northern India Caterers (India) Ltd. v. Lt. Governor of Delhi [1978] 42 STC 386 in which a view has been taken that meals served in the restaurant to non-residents for lump sum or according to dishes separately ordered were not liable to sales tax, since the levy was beyond legislative competence of the State Legislature in view of entry 54, List II of the Seventh Schedule of the Constitution, Though this point was not urged before the Tribunal in second appeal, the applicant has been allowed, since an arguable point of law arises on undisputed facts.

3. Northern India Caterers (India) Ltd. Vs. Lt. Governor of Delhi, was preceded by two decisions of the Supreme Court (i) State of Madras v. Gannon Dunkerley & Co. (Madras) Ltd. [1958] 9 STC 353 and (ii) State of Himachal Pradesh v. Associated Hotels of India Ltd. [1972] 29 STC 474 interpreting the words "taxes on the sale or purchase of goods" in entry 54 in List II as not including taxes on works contract or service of supply of food-stuff, etc., in the hotel. The above three decisions led to the making of the Constitution (Forty-sixth Amendment) Act, 1982, which received the assent of the President on February 2, 1983, on which day it came into force. By this amendment, in article 366 of the Constitution following clause (29A) was inserted after clause (29).

""tax on the sale or purchase of goods" includes -

(a) - (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."

By section 6, which is a provision relating to validation and exemption, retrospective effect is given to the above constitutional amendment. Thus one of the plain objects of the above constitutional amendment was to remove retrospectively the existing defect of want of legislative competence on the part of the State Legislature to levy sales tax on supply of food-stuff, etc., in the hotel, restaurant, etc., and to validate such taxes and so also the recoveries of tax made thereunder.

4. As a consequence of the above constitutional amendment, the Act was amended by the Maharashtra Act No. 24 of 1985 which received assent of the Governor on August 16, 1985. The term "sale" is redefined by adding an explanation which reads thus :

"Explanation. - For the purposes of this clause, -

(a) a sale within the State includes a sale determined to be inside the State in accordance with the principles formulated in sub-section (2) of section 4 of the Central Sales Tax Act, 1956.

(b) (i) every disposal of goods referred to in the explanation to clause (11);

(ii) a delivery of goods on hire-purchase or any system of payment by instalments;

(iii) 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 made or given on or after the 2nd day of February, 1983 for cash, deferred payment or other valuable consideration;

Shall be deemed to be a sale."

Section 8 of the above Amending Act is a provision relating to validation and saving, by which it has been given retrospective effect in certain matters.

5. Learned counsel for the applicant strongly relying on the ratio of the decision of the Madras High Court in *Sree Annapoorna v. State of Tamil Nadu* [1986] 63 STC 18 has contended that since the above deeming definition of the term "sale" refers only to the period after February 2, 1983, it cannot validate levy in the instant case which is for the earlier period. We are unable to accept the above submission. The constitutional amendment enlarged the scope of entry 54 in list II and conferred in the matter legislative competence to the State Legislature which was found absent by the Supreme court. The net result is that the State Legislatures were authorised to make laws imposing such levy and collection of tax. Hence for future levy, making or amending of law was necessary because section 6 of the Constitutional Amendment only intended to validate the past levy and collection, if any. Such amendment in the State laws for the past was not necessary in case the State law already permitted such levy. A close examination of the scheme of the Act will reveal that such a provision existed in the Act not only during the material period, but since the very inception.

6. Section 2(28) of the Act gives the definition of the term "sale" section 2(13) of the term "goods" and section 2(30) of the term "Schedule". Schedules "A" to "E" inter alia contain the list of goods and the rates at which sales tax is imposed. Schedule "A" contains list of goods, which are exempt from sales tax. Item 22 in Schedule "E" is a residuary item. At the material time item 14 of Schedule "A" read thus :

"14. Cooked food excluding ice-cream and kulfi, and non-alcoholic drinks other than those containing ice-cream served at one time at a price of not more than two rupees per person, for consumption at or outside any eating house, restaurant, hotel, refreshment room or boarding establishment which is not a

shop or establishment conducted primarily for the sale of sweetmeats, confectionery, cakes, biscuits or pastries."

We may mention that before September 1, 1971, the words "one rupee and fifty naye paise" existed in place words "two rupees". This difference has no bearing on the issue involved in this reference. What is material is that the concept of levy of sales tax on cooked food and drinks served for consumption at the restaurant already existed in the Act at the material time and before February 2, 1983, when the constitutional amendment was made.

7. We may mention that even under the Bombay Sales Tax Act, 1946, there existed a concept of levy of sales tax on food served and supplied in hotel or restaurant and this has been judicially noticed and interpreted by this Court in the case of Commissioner of Sales Tax v. Lala Lajpatrai Hotel [1975] 35 STC 368.

8. Close examination of the case of Sree Annapoorna v. State of Tamil Nadu [1986] 63 STC 18 (Mad.) would reveal that its ratio will have no application in the instant case for several reasons including mainly that it dealt with the provisions of the Tamil Nadu General Sales Tax Act in which concept of imposition of such levy did not exist before February 2, 1983.

9. Rightly the respondent-State has placed reliance on a decision of Andhra Pradesh High Court in the case of Amba Bhavani v. Government of Andhra Pradesh [1986] 63 STC 40 which dealt with the provisions of the Andhra Pradesh General Sales Tax Act in the context of constitutional amendment. In the above case it is held that since the Andhra Pradesh Sales Tax Act contained a provision for levying such tax prior to February 2, 1983, any fresh amendment in the said Act for validating levy and recovery of tax for the period prior to February 2, 1983, was not at all necessary.

10. Reliance was also places on behalf of the applicant on the case of Rambagh Hotels Pvt. Ltd. Vs. Commercial Taxes Officer, relating to the Rajasthan Sales Tax Act, 1954, which also did not have any provision for levy of sales tax on food-stuff served in restaurants and hotels before February 2, 1983. For the reasons already indicated, the ratio of that decision will have no application to a case under the Act where such levy and recovery was permissible even before February 2, 1983.

11. We may mention that our attention was invited by the learned counsel for the applicant to various amendments made form time to time in the Tamil Nadu General Sales Tax Act. The Andhra Pradesh General Sales Tax Act and the Rajasthan Sales Tax Act, 1954, but detailed reference to all amendments in not necessary. We have already noticed the material difference between these State Acts.

12. To conclude, we answer the question in the affirmative. No order as to costs.

13. Reference answered in the affirmative.