SUPREME COURT OF INDIA

The East India Hotels Ltd.

Vs

Union of India

15.11.2000

(B.N. Kirpal, N. Santosh Hegde and Doraiswamy Raju, JJ.)

Civil Appeal No. 5086 of 1989.

JUDGMENT

B.N. Kirpal, J. - This appeal by way of special leave arises from assessment order in respect of the year 1982-83 passed by the Sales Tax Officer, Delhi, subjecting to tax sales made by the appellants in the restaurants owned by them which are situated in the appellant's hotels.

2. In the appeal which was filed, the two grounds which were taken were firstly challenge to the 46th Amendment to the Constitution whereby definition of expression `sale of goods' was amended and the second ground taken was that on a correct interpretation of the Delhi Sales Tax Act, 1975, the sales made in the restaurants could not be taxed.

3. Mr. Gopal Subramaniam, learned senior counsel for the appellants, has not argued or urged the first contention with relation to the challenge to the 46th Amendment. His contention is that on a correct interpretation of the provisions of the Delhi Sales Tax Act, 1975 and Section 2(1) in particular, there is no sale in a restaurant in a hotel and, therefore, no sales tax could be levied. He submits that after the 46th Amendment it was open to the legislature to amend the law and bring it in line with the said Amendment to the Constitution which permitted such transactions being subjected to sales tax where food is supplied in a restaurant. Relying upon the decision of this Court in ***Northern India Caterers (India) Ltd. v. Lt. Governor of Delhi, 1978(4) SCC 36***, he contends that meals which are served by a hotel in a restaurant to non-residents does not constitute sale of foodstuffs and, therefore, no sales tax could be levied.

4. The sheet-anchor of Mr. Subramanium's submission is this decision of Northern India Caterers' case. That was a case where this court was concerned with the assessment proceedings in respect of the assessment years 1957-58 and 1958-59. It was contended by the appellant therein that this Court in an earlier decision in ***The State of Punjab v. M/s. Associated Hotels of India Ltd., 1972(1) SCC 472***, had held that no sales tax was leviable in respect of the food which was supplied by a hotel to its residents. Applying the same principle, this Court in Northern India Caterers' case referred to the definition of the word `sale' in Section 2(g) of the Bengal Finance (Sales Tax) Act, 1941, as extended to Delhi, and observed that when a hotel serves food to a non-resident it does not amount to sale.

5. Mr. Subramanium submits that what was held in Northern India Caterers' case was reiterated by

the Court in the review judgment reported as ***Northern India Caterers (India) Ltd. v. Lt. Governor of Delhi, 1980(2) SCC 167***.

6. In the present case, we are not concerned with the provisions of the Bengal Finance (Sales Tax) Act, 1941, as extended to Delhi. What is applicable in the present case are the provisions of the Delhi Sales Tax Act, 1975 (for short "the 1975 Act"). Keeping in mind the provisions of Article 246(4) of the Constitution which enabled the Parliament to enact laws with regard to Delhi even on matters relating to subjects enumerated in List II as well as List I and which entitled an artificial definition being given to the word `sale' or so as to entitle the imposition of sales tax on the transfer of the materials or goods in the execution thereof, we find that on a correct interpretation of the 1975 Act the ratio of the decision of this Court in Northern India Caterers' case would not be applicable.

7. Section 2(e) defines `dealer', Section 2(g) goods and Section 2(1) `sale'. The said provisions are as follows :

"2(e) "dealer means any person who carries on business of selling goods in Delhi and includes -

(i) the Central Government or a State Government carrying on such business;

(ii) an incorporated society (including a co-operative society), club or association which sells or supplies goods, whether or not in the course of business, to its members for cash or for deferred payment or for commission, remuneration or other valuable consideration;

(iii) a manager, factor, broker, commission agent, delcredere agent or any mercantile agent, by whatever name called, and whether of the same description as hereinbefore mentioned or not, who sells goods belonging to any principal whether disclosed or not; and

(iv) an auctioneer who sell or auctions goods belonging to any principal, whether disclosed or not and whether the offer of the intending purchaser is accepted by him or by the principal or a nominee of the principal;"

"2(g) "goods" includes all materials, articles, commodities and all other kinds of movable property, but does not include newspapers, actionable claims, stocks, shares, securities or money;"

(i) a transfer of goods on hire-purchase or other system of payment by instalments, but does not include a mortgage or hypothecation of or a charge or pledge on, goods;

(ii) supply of goods by a society (including a co-operative society), club, firm or any association to its members for cash or for deferred payment, or for commission, remuneration or other valuable consideration, whether or not in the course of business; and

(iii) transfer of goods by an auctioneer referred to in sub-clause (iv) of clause (e);"

8. Section 3 is the charging Section according to which every dealer whose turnover during the year immediately preceding the commencement of the year exceeds taxable turnover becomes liable to pay sales tax. Section 4 stipulates the rate of tax and the same reads as under :

"4. Rate of tax. - (1) The tax payable by a dealer under this Act shall be levied -

(a) in the case of taxable turnover in respect of the goods specified in the First Schedule, at the rate of twelve paise in the rupee;

(b) in the case of taxable turnover in respect of the goods specified in the Second Schedule, at such rate not exceeding four paise in the rupee as the Lieutenant Governor may, from time to time, by notification in the Official Gazette, determine;

(c) in the case of taxable turnover in respect of any food or drink served for consumption in a hotel or restaurant or part thereof, with which a cabaret, floor show or similar entertainment is provided therein, at the rate of forty paise in the rupee;

(cc) in the case of taxable turnover in respect of goods specified in Fourth Schedule, at the rate of twenty paise in the rupee;

(ccc) in case of taxable turnover in respect of Liquor (foreign liquor and India Mde Foreign Liquor) and narcotics (Bhaang), at the rate of twenty paise in the rupees;

(d) in the case of taxable turnover in respect of any other goods, at the rate of eight paise in the rupee;

Provided that the lieutenant Governor may, by notification in the Official Gazette, add to or omit from, or otherwise amend, the First Schedule, the Second Schedule or the Fourth Schedule, either retrospectively or prospectively, and thereupon the First Schedule or the Second Schedule or, as the case may be, the fourth Schedule shall be deemed to be amended accordingly;

Provided also that in respect of any goods or class of goods if the Lieutenant Governor is of the opinion that it is expedient in the interest of the general public so to do, he may by notification in the Official Gazette, direct that the tax in respect of the taxable turnover of such goods or class of goods shall, subject to such conditions as may be specified, be levied at such modified rate not exceeding the rate applicable under this section, as may be specified in the notification.

(2) For the purposes of this Act, "taxable turnover" means that part of a dealer's turnover during the prescribed period in any year which remains after deducting therefrom, -

(a) his turnover during that period on -

(i) sale of goods, the point of sale at which such goods shall be taxable is specified by the Lieutenant Governor under section 5 and in respect of which due tax is shown to the satisfaction of the Commissioner to have been paid;

(ii) sale of goods declared tax-free under section 7;

(iii) sale of goods not liable to tax under section 8;

(iv) sale of goods which are proved to the satisfaction of the Commissioner to have been purchased within a period of twelve months prior to the date of registration of the dealer and subjected to tax under the Bengal Finance (Sales Tax) Act, 1941 (7 of 1941), as it was then in force, or under this Act;

(v) sale to a registered dealer -

(A) of goods of the class or classes specified in the certificate of registration of such dealer, as being intended for use by him as raw materials in the manufacture in Delhi of any goods, other than goods specified in the Third Schedule or newspapers, -

(1) for sale by him inside Delhi; or

(2) for sale by him in the course of inter-State trade or commerce, being a sale occasioning, or effected by transfer of documents of title to such goods during the movement of such goods for Delhi; or

(3) for sale by him in the course of export outside India being a sale occasioning the movement of such goods from Delhi, or a sale effected by transfer of documents of title to such goods effected during the movement of such goods from Delhi, to place outside India and after the goods have crossed the customs frontiers of India; or

(B) of goods of the class or classes specified in the certificate of registration of such dealer as being intended for resale by him in Delhi, or for sale by him in the course of inter-State trade or commerce or in the course of export outside India in the manner specified in sub-item (2) or sub-item (3) of item (A), as the case may be; and

(C) of containers or other materials, used for the packing of goods, of the class or classes specified in the certificate of registration of such dealer, other than goods specified in the third Schedule, intended for sale or resale;

(vi) such other sales as are exempt from payment of tax under section 66 or as may be prescribed;

Provided that no deduction in respect of any sale referred to in sub-clause (iv) shall be allowed unless the goods, in respect of which education is claimed, are proved to have been sold by the dealer within a period of twelve months from the date of his registration and the claim for such deduction is included in the return required to be furnished by the dealer in respect of the said sale;

Provided further that no deduction in respect of any sale referred to in sub-clause (V) shall be allowed unless a true declaration duly filled and signed by the registered dealer to whom the goods are sold and containing the prescribed particulars in the prescribed form obtainable from the prescribed authority is furnished in the prescribed manner and within the prescribed time, by the dealer who sells the goods;

Provided also that where any goods are purchased by a registered dealer for any of the purposes mentioned in sub-clause (v) but are not so utilised by him. The price of the goods so purchased shall be allowed to be deducted from the turnover of the selling dealer but shall be included in the taxable turnover of the purchasing dealer; and

(b) the tax collected by the dealer under this Act as such and shown separately in cash memoranda or bills, as the case may be."

9. From a reading of Section 2(e), it is clear that, though it is an inclusive definition and not an exhaustive one, even in case of the supplies made by a club or an association to its members, whether or not in the course of business, the club or association is regarded as a dealer. According to Section 2(g), all movable properties, materials, articles or commodities are goods. Therefore, food in a restaurant has necessarily to be regarded as goods. According to Section 2(1), transfer of

property in goods by one person to another would amount to sale. With cooked food or food which is supplied in a restaurant falling within the definition of the word `goods' in Section 2(g), transfer of property in the same would amount to sale as provided by Section 2(1). These definitions have to be read along with Sections 3 and 4. Section 4(1)(c) clearly shows that in respect of food or drink served for consumption in a hotel or restaurant or a part thereof, the same would be regarded as a sale and taxable turnover in respect thereto would be taxed.

10. It was contended by Mr. Subramanium that Section 4(1)(c) is only relatable to hotels or restaurants where there is cabaret or floor show or similar entertainment and this cannot lead one to the conclusion that in the case of restaurants other than those which fall under this category when the customer takes food the same can be regarded as a sale to him. We are unable to agree with this submission. If the contention of Mr. Subramanium is correct, namely, that in a restaurant no sale at all takes place to a customer, by relying upon Northern India Caterers' case, then the question of any tax being levied in respect of food or drink supplied in a hotel or restaurant in which there is a cabaret would not arise. In other words, Section 4(1)(c) would become otiose. This obviously cannot be so. An Act has to be read as a whole, the different provisions have to harmonised and the effect has to be given to all of them. Reading the said provisions together, it is clear that food and drink would fall within the definition of `goods' under Section 2(g). There would be a transfer of property in the same by a hotelier in favour of the customer and in this respect it will be useful to refer to an observation by this Court in ***The State of Punjab v. M/s. Associated Hotels of India Ltd., 1972(1) SCC 472*** when at page 478 it was observed as follows :

"..... No doubt, the customer, during his stay, during his stay, consumes a number of food-stuffs. it may be possible to say that the property in those food-stuffs passes from the hotelier to the customer at least to the extent of the food-stuffs consumed by him. Even if that be so, mere transfer of property, as aforesaid, is not conclusive and does not render the event of such supply and consumption a sale, since there is no intention to sell and purchase."

11. In Associated Hotels' case, this Court was dealing with a situation where the hotel was receiving guests and providing them with all the amenities along with food and the bill which was tendered to the guests was all inclusive. In other words, whether the customer staying at the hotel consumed the food supplied to it or not, made no difference and the composite price or amount had to be paid by him. The Court made it clear that it was not dealing with a case where food was being supplied by a restaurant to a customer against payment of various items of food which he consumed but the Court was concerned with a situation where a composite amount was being charged by the hotel supplying all the facilities including food in a restaurant. The observations of the Constitution Bench in Associated Hotels' case referred to hereinabove clearly show that property in foodstuff passes from the hotelier to the customer at least to the extent of foodstuff consumed. Section 2(1) clearly provides that sale would mean any transfer of property in goods by one person to another.

12. In the present case, when a customer goes to a restaurant and orders food and in respect of which he pays the price indicated therein and the said food items are supplied to him, it would clearly be a case of transfer of property in goods to the customer. Whether the customer eats the entire or part of the dish or chooses not to eat at all would make no difference if he pays for the dishes supplied. The moment the dish is supplied and sale price paid, it would amount to a sale.

13. In Northern India Caterers' case, this Court did not have occasion to consider either the definition of `dealer' or a provision similar to Section 4 which exists in the 1975 Act. the observations of this Court in Northern India Caterers' case can, therefore, be of no assistance to the

appellants. It is clear that in a case like this if the food or drink is supplied in a hotel or restaurant where there is a cabaret, floor show or similar entertainment, the rate of tax would be under Section 4(1)(c) and where there is no such cabaret, floor show or similar entertainment the rate of tax would be the one stipulated in Section 4(1)(d).

14. For the aforesaid reasons, we see no merit in this appeal. The same is, accordingly, dismissed with costs.