(1995) 12 MP CK 0011

Madhya Pradesh High Court (Indore Bench)

Case No: Miscellaneous Civil Case No''s. 365, 366, 367 and 446 of 1986

Commissioner of Sales Tax	APPELLANT
Vs	
Hukumchand Mills Ltd.	RESPONDENT

Date of Decision: Dec. 19, 1995

Acts Referred:

- Factories Act, 1948 - Section 46
- Madhya Pradesh General Sales Tax Act, 1958 - Section 2

Citation: (1995) ILR (MP) 538 : (1996) 1 MPJR 83 : (1996) 41 MPLJ 585 : (1996) MPLJ 585

Hon'ble Judges: A.K. Mathur, Acting C.J.; S.B. Sakrikar, J; A.R. Tiwari, J

Bench: Full Bench

Advocate: S. Kulshreshtha, A.A.G, for the Appellant; P.M. Chaudhary, for the Respondent

Judgement

@JUDGMENTTAG-ORDER

A.R. Tiwari, J.

To tax or not to tax is the question. On applications of the Commissioner of Sales Tax, Madhya Pradesh u/s 44(1) of the Madhya Pradesh General Sales Tax Act, 1958 (for short "the Act"), the Board of Revenue operating as a Tribunal under the Act, has referred the under noted common question of law, arising out of its common order dated 17-4-1982 passed in Appeals, Nos. 37, 49, 50 and 231/PBR/1981 and order dated 20-12-1985 passed in Appeal No. 63/PBR/1985 preferred by the assessee for the Assessment Years of 1974, 1975, 1976 and 1978, in these four cases which are heard analogously and are being disposed of by this common order :-

"Whether in the facts and circumstances of this case, the Board of Revenue, acting as a Tribunal under the M.P. General Sales Tax Act, was justified in holding that the canteen sales were not exigible to tax.

Initially, these cases were laid before the Division Bench of this Court where it was pointed out that two Division Bench decisions reported in (1987) 20 VK.N. 351,

Commissioner of Sales Tax, M.P. v. Hukumchand Mills Ltd., Indore decided on 4-9-1987 and in (1989) 3 Tax Law Decisions 106, Commissioner of Sales Tax, M.P. v. Gwalior Rayon Silk Mfg. Co. Ltd., Nagda decided on 21-11-1988 are in conflict. On that fulcrum the Division Bench ordered on 12-4-1989 to place these cases before Larger Bench. This is how these cases were listed before us.

Factual matrix is in narrow compass and is without conundrum. The non-applicant/assessee is a Textile Mill. It is incorporated under the Companies Act and carries on the business of manufacture and sale of cloth and yarn. It has a Canteen for its workers located in the premises of the Mill. Food stuff is served in this Canteen to its workers. It was assessed to Sales Tax for Assessment Years 1974, 1975, 1976 and 1978. The Additional Assistant Commissioner of Sales Tax, Indore being Assessing Authority, held the Canteen Sales as exigible to Sales Tax (annexures-''B'' and ''B/1'' to ''B/3''). First Appeals, preferred u/s 38(1) of the Act before Appellate Deputy Commissioner of Sales Tax, proved to be vainful (annexures ''C and ''C/1'' to ''C/3''). The contention, that the assessee was under legal obligation to maintain the Canteen in terms of Section 46 of the Factories Act, 1948 and was providing only service, not sale, to its employees on non-profit basis as a welfare activity and thus was not liable to pay Sales Tax on canteen sales, was not accepted. The assessee, undaunted by unsuccess, then filed second appeals u/s 38(2) of the Act before the Tribunal which were registered as Nos. 37, 49, 50 and 231/PBR/1981 and 63/PBR/1985. These appeals succeeded on the question of canteen sales (Annexure-''D'') Dissatisfied, the Commissioner of Sales Tax resorted to Section 44(1) of the Act and filed applications, registered as Nos. 60-PBR/82, 61-PBR/82, 62-PBR/82 and 6-PBR/86 against orders dated 17-4-1982 and 20-12-1985 rendered in aforesaid appeals and secured the references. These references were registered in this Court for our opinion.

We have heard Shri S. Kulshrestha, learned Addl. Adv. General for the applicant/revenue and Shri P. M. Choudhary, learned counsel for the non-applicant/assessee. Shri Kulshrestha submitted that the non-applicant cannot have general immunity in case of Canteen Sales. Shri Choudhary on the other hand submitted that the Canteen Sales in discharge of obligation u/s 46 of the Factories Act, 1948 were not effected in the course of business and thus were not exigible to tax. The Division Bench of this Court, following (1987) 20 VKN 351 : (1988) 68 STC 378 (supra) has held in case of Bharat Heavy Electricals Ltd., Bhopal that the Canteen Sales in such circumstances are not exigible to tax. (M.C.C. No. 689 of 1986 decided on 28-7-1995).

Earlier, the question in case of this assessee for the Assessment Year of 1977 was similarly referred to this Court albeit in a little different expression as noted below :-

"Whether in the facts and circumstances of the case, the Board of Revenue was justified in holding that Canteen Sales are not exigible to tax as dominant object in running the Canteen is welfare of the employees and not carrying on business in

sale of food article."

The answer to this question was recorded in the affirmative i.e. against the Revenue. That decision is reported in 20 V.K.N. 351 (supra). In recording this answer, the Court considered the impact of Section 46 of the Factories Act, 1948 and Rules 77, 77-A, 78, 79, 80 and 82 of the M.P. Factories Rules, 1962 and concluded that the dominant object of running the Canteen was to render service, not to sell food, as a welfare measure enjoined by the Factories Act and Factories Rules on price of food fixed under Rule 80 on non-profit basis and as such Canteen Sales were not exigible to Sales Tax. In a later decision in the case of Gwalior Rayon Silk (supra), the Court considered Section 2(bb) of the Act, inserted vide Act No. 16 of 1965 with effect from 15-4-1965, which defined business as an activity with or without a motive to make a gain or profit, and held that Canteen Sales, even when shown to be on non-profit basis, fell within definition of business and were thus exigible after 15-4-1965. Two Bench decisions thus spoke differently. One ruled non-taxability and the other ruled taxability after introduction of Section 2(bb) of the Act after 15-4-1965. Section 2(bb)(i) is reproduced below :-

"(i) any trade, commerce, manufacture or any adventure or concern in the nature of trade, commerce or manufacture, whether or not such, trade commerce, manufacture, adventure or concern is carried on with a motive to make gain or profit and whether or not any gain or profit accrues from such trade, commerce, manufacture, adventure or concern and irrespective of volume, frequency, continuity or regularity of such trade, commerce, manufacture, adventure or concern; and"

It is significant to note that Section 2(bb) of the Act, inserted effective from 15-4-1965 was not placed for consideration in 20 V.K.N. 351, though decided on 4-9-1987 and this earlier decision was not cited in later case of 3 T.L.D. 106 (supra), though decided on 29-11-1988. What was laid down in later decision was that in view of Section 2(bb), which made the motive of profit irrelevant, Canteen Sales, which were held immune from taxability the linchpin of non-profit motive, did become inescapable exigible to tax after insertion of this provision.

We notice that definition of "Sale" has its own width. Section 2(n) of the Act substituted vide Act, No. 32 of 1984 with effect from 1-7-1984 is wide enough to include supply, by way or part of any service in any other manner whatsoever, of goods being food or any other article for human consumption or any drink. Section 2(n)(v) is extracted below :-

"(v) a supply, by way of or as part of any service 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."

We find that this Section 2(n), substituted from 1-7-1984 is also not considered in the aforesaid two Division Bench decisions. The Apex Court in case of Hyderabad Asbestos Cement (24 S.T.C. 487) held, while considering the term "business", that it was not correct to hold that there was no business with a motive to make profit, when such a motive has been expressly declared unnecessary by the Legislature. For the purpose of A. P. General Sales Tax Act, supply of food and drinks to the workmen in the Canteen maintained by the Company in pursuance of Factories Act is held to constitute business. In (1981) V.K.N. 134, CST v. Bhopal Sugar Industries Ltd., Sehore it is ruled that Section 2(bb) has widened the concept of business. In our view the question still is relatable to object.

The concept of dominant object has been highlighted since 1978. By order on review petition in case of Northern India Caterers (India) Ltd. Vs. Lt. Governor of Delhi, it was laid down by the Supreme Court that where dominant object was of sale of food and rendering of services was merely incidental, the transaction would undoubtedly be exigible to Sales Tax. The authorities were required to ascertain facts and determine upon those facts whether a sale of the food supplied was intended. The core question thus was of object and intention. The Supreme Court considered the aforesaid decision in Northern India Caterers (India) Ltd. Vs. Lt. Governor of Delhi, and order on review petition Northern India Caterers (India) Ltd. Vs. Lt. Governor of Delhi, in case of State of Karnataka By The Commissioner of Commercial Taxes Vs. Udipikrishna Bhavan, and directed to make fresh assessment in conformity with the guidelines contained in the order of review petition as cited above. The Supreme Court again made reference to the aforesaid two decisions 1978 Tax L.R. 2316 and 1980 Tax L.R. 1657 and directed Sales Tax Officer concerned, in Commissioner of Sales Tax Vs. M/s. Northern Railway Catering Department, U.P., CST v. Northern Railway Catering Depot, U. P. to hold the assessment proceedings afresh in accordance with law. The dominant object thus called the tune and portrayed the characteristic feature.

The counsel for the assessee submitted that same dominant object, although not stated in the question referred, as was in the case for Assessment Year of 1977, continued also during the years in question and that the Tribunal rightly held in favour of the assessee in conformity with the guidelines laid down by the Apex Court in the above stated case. This contention, resting on factual foundation, is not disputed. The submission in opposition centred round the impact of Section 2(bb) as held in the case of Gwalior Rayon (supra).

In our view, the question needs attention from different angle as well. Section 2(d) of the Act defines "dealer" as meaning any person who carries on business of buying, selling, supplying or distributing goods. Section 2(bb), as inserted, defines "business" as including any trade, commerce, manufacture, or any adventure or concern in the nature of trade, commerce or manufacture. Section 2(r), as substituted effective from 1-10-1978 vide Act No. 25 of 1978, defining "Taxable

Turnover" speaks of dealer''s turnover. The question is whether the Company (occupier) maintaining canteen under legal obligation in terms of Section 46 of the Factories Act, 1948 and running it via a Canteen Managing Committee consisting of equal number of persons nominated by the occupier and elected by the workers under Rule 82 on price fixed under Rule 80 of the M.P. Factories Rules, 1962 as a welfare measure indicated in Chapter V of the Factories Act, 1948 carrying insignia of "WELFARE" can be called a "dealer" in this regard and whether such a welfare measure, obligated by law, can be termed "business" so as to become dealer''s turnover as envisaged by Section 2(r) of the Act which defined taxable turnover? Logically, the Supreme Court reiterated again and again that "in every case it would be for the taxing authorities to ascertain the facts in making an assessment under the relevant Sales Tax Law and to determine upon those facts whether a sale of the food supplied is intended" Northern India Caterers (India) Ltd. Vs. Lt. Governor of Delhi,

If sale is not intended and dominant object is to render service in compliance with the legal mandate, the occupier would not be dealer indulging in such a business. Section 2(bb) of the Act is concerned with trade, commerce, manufacture or any adventure or concern of that nature. If intention is not of sale of food, the transaction would not be liable to be called as trade, commerce, manufacture or any adventure or concern of that nature and thus would not be business. The occupier would then not be a dealer and Canteen Sales, in such setting, cannot be called as dealer''s turnover. Hence it depends on appreciation of facts. In this view of the matter, Section 2(bb) of the Act alone could not be construed as clinching the issue in favour of the Revenue and against the assessee. That being so, we are unable to endorse the view contained in later decision.

In the instant cases, Tribunal did not find that dominant object was of sale of food and rendering of services was merely incidental. It was thus not held that sale of the food supplied was intended.

In Nixon v. Fitzgerald 457 U.S. 731 (1982), Justice Powell, delivering the opinion of the Court, quoted the recommendation of Alexander Butterfield, White House aide, about Fitzgerald, a top-notch cost-expert, that we should let him bleed, for a while at least". Our surge of an urge to be just ever runs to destroy Butterfield''s view and survives to see that no one bleeds unmeritedly even for ephemeral duration. Justice to all, and injustice to none, is our high aim. In that exercise, it falls on us to say between assessee and assessor as to who is right and who is wrong. This is the prime object of such references. The Court thus does not assibilate but performs the duty of bestowing assiduity on the issues presented and projected before it. Article 265 of the Constitution of India begins with mighty "no" and mandates that ''No tax shall be levied or collected except by authority of law". And law must be without flaw. So taxation is not to operate as vexation and the dealer must know as to how to ''deal''. If the goods are disposed of as tax-free as a result of supposed

exemption, can the disposer be lugged in proceedings requiring it to suffer tax from his pocket after long gap? There is no material to show that the assessee passed on the burden to receivers of food-stuff.

It is in the area of legislative ambiguities, yet not receding, that Courts have to fill gaps, clear doubts and mitigate hardships. In the words of Judge learned Hand, spoken in Cabell v. Markhan (1945) 148 F 2 d 737, 739, we get enough light to locate correct path :-

"It is one of surest indexes of a mature and developed jurisprudence.....to remember that statutes always have some purpose or object to accomplish whose sympathetic and imaginative discovery is the surest guide to their meaning."

Material questions then are whether or not (a) dominant object is to sell food or serve food; (b) service part is merely incidental; (c) occupier of Canteen is dealer in this activity; and (d) Canteen sales are in the nature of business.

Law is luculent. What is required to be ascertained is whether or not assessee is dealer and whether Canteen Sales are in the nature of business. Tribunal negatived the submissions in oppugnation and held in favour of the assessee. The assessee is dealer in cloth, not of food stuff through Canteen in the face of dominant object of service.

In State of Punjab Vs. Assessing Authority, Chandigarh, State of Punjab v. Assessing Authority, the Supreme Court reversed the judgment of Punjab and Haryana in Civil Appeal No. 1419 (NT) of 1975, decided on 9-11-1990, and following the decision in case of Government Medical Stores, : AIR 1986 SC 1902, Govt. Medical Store, Depot Karnal v. State of Haryana - reversing the decision reported in AIR 1972 P&H 287, held that Hospitality Organisation, Punjab, a department of State Govt. running Canteens without profit motive was not a dealer in terms of Section 2(d) of Punjab General Sales Tax Act (46 of 1948) and thus was not liable to be assessed to tax under that Act.

In view of the factual matrix and legal position, we hold that the decision in (1989) 3 T.L.D. 106 (supra) does not lay down correct law and deserves to be overruled. We do so and answer the question in the affirmative i.e. against the Revenue and in favour of the assessee with clarificatory note that in each case non-taxability or otherwise shall inevitably depend on appreciation of facts.

These Reference Applications are disposed of accordingly with no order as to costs. Counsel fee on each side for each case is, however, fixed at Rs. 750-00, if certified.

A copy of this order shall be sent to the Tribunal under the seal of the Court and Signature of the Registrar in terms of Section 44(5) of the Act.

This order shall be retained in Misc. Civil Case No. 365 of 1986 and its copy each shall be placed in the record of the connected cases.

The omega, so far as these cases are concerned, has been said. Yet a word more seems necessary. In a surge of an urge to avoid occasions of legal acrobates and to inspire all concerned to shun and spurn litigative proclivity it seems proper to draw the attention of the State Government to consider propriety or necessity of invocation of Sections 10 and 12 of the Act in such cases on proper application, to be prescribed from those obligated or obsessed to run or manage Canteens as social or welfare measure. It is apt to say that Millon in a letter in 1666 wrote - "Ubi bene, ibipatria" (our country is wherever we are well off)". In a welfare State, it should then be the high aim of any Government to ensure that country men are well off and not forced to be lugged in avoidable litigation. After all, there should be freedom from verticity and taxation and vexation should be made to live as distant neighbours. So much for the day. This is one way of encouraging concept of tax-abiding, rather than tax-avoiding, attitude.

Let a copy of this order be forwarded to the Chief Secretary of the State Government of Madhya Pradesh.