(1984) 11 BOM CK 0081

Bombay High Court

Case No: Sales Tax Reference No. 63 of 1978 in Reference Application No. 42 of 1973

Commissioner of Sales Tax		APPELLANT
	Vs	
Premier Automobiles Ltd.		RESPONDENT

Date of Decision: Nov. 6, 1984

Acts Referred:

- Bombay Sales Tax Act, 1959 - Section 2, 2(27), 61(1)
- Central Sales Tax Act, 1956 - Section 2, 9(2)

Citation: (1985) 59 STC 147

Hon'ble Judges: Sujata V. Manohar, J; M.H. Kania, J

Bench: Division Bench

Judgement

Kania, J.
This is a reference u/s 61(1) of the Bombay Sales Tax Act, 1959 read with section 9(2) of the Central Sales Tax Act, 1956 (referred to hereinafter as "the said Act"). The question referred to us for our determination is as follows :

"Whether the Tribunal was correct in law in holding that ''service pool charges'' recovered by the respondent-dealer from their distributors does not form a part and parcel of the sale price as defined u/s 2(h) of the Central Sales Tax Act, 1956 ?"

The facts giving rise to the reference are as follows : The respondent-company is a registered dealer under the Bombay Sales Tax Act, 1959 and under the said Act. The respondent was assessed by the Sales Tax Officer concerned for the period from 1st July, 1964 to 30th June, 1965 under the Bombay Sales Tax Act, 1959 as well as under the said Act, on May 7, 1969. On examination of the books of account of the respondent the Sales Tax Officer found that the respondent had collected "service pool charges" at the rate of Rs. 10 per vehicle from its distributors. These service pool charges were not included in the turnover shown by the respondent and no tax was paid by the respondent on these charges. The contention of the respondent was that these charges could not be included in the turnover of sales, as they were

not the consideration for the sale of the vehicles in question. These Sales Tax Officer found that these service pool charges were collected from distributors who had no opinion regarding the payment of these charges. If the distributors wanted to get delivery of the vehicle allotted to them, they had to pay the service pool charges. The Sales Tax Officer held that these service pool charges were liable to be included in the gross turnover and the taxable turnover of the respondent and he subjected them to tax at appropriate rate. These service pool charges were collected by the respondent on local sales as well as sales in the course of inter-State trade and commerce. Separate accounts were maintained for such charges collected on local sales and those collected on sales in the course of inter-State trade and commerce. Those collected on local sales were added to the turnover of the respondent under the Bombay Sales Tax Act and those collected on inter-State sales were added to the taxable turnover under the said Act, namely, the Central Sales Tax Act. There were orders of forfeiture and penalty, which were set aside by the Sales Tax Tribunal and with which we are not concerned. The order of the Sales Tax Officer was confirmed on appeal by the Assistant Commissioner. Against the order the respondent filed a second appeal before the Sales Tax Tribunal. The Tribunal set aside the orders of forfeiture and penalty, as aforesaid. As far as the service pool charges are concerned, it was contended by the Revenue before the Tribunal that they formed part of the sale price. The contention of the respondent-dealer was that the sole purpose of collecting these charges was to see that the reputation of the dealer as a manufacturer was properly maintained and to provide expert technical and mechanical assistance, when required, to the customers, after they had taken delivery of the cars. According to the respondents, these service pool charges were collected with a view to improve the standard of service afforded by the distributors to their customers. The purpose of these charges was to maintain the reputation of the cars manufactured by the respondent after they reached the doors of the respective customers thus resulting in maintaining proper good-will for the various products manufactured by the respondent. These contentions of the respondent were accepted by the Tribunal. We may at this stage refer to certain documents on record. We find that there is, on record, a letter dated March 27, 1965 addressed by the dealer to all its distributors wherein it has clarified the sales and service promotion pool programme pursuant to which the service pool charges were collected. This letter shows that the sales and service promotion pool was meant for financing the promotion of sales and service of the products of the respondent and with a view to do this it was intended that certain steps should be taken. The first step was the commissioning of mobile service vans for the maintenance and running expenditure of which certain amounts would be required. The second purpose was the training of fleet operation personnel. Other two purposes set out were minor. The said letter sets out that, in the event of discontinuance of this sales and service promotion pool scheme, the balance amount lying to the credit of this account, after providing for all expenditure and contingent liabilities was to be distributed amongst those of the respondent''s authorised dealers and contributors

as were on the list on the list on the date of discontinuance of the pool in proportion of their percentage of contribution to the pool. The next document is a prototype of a letter received by the respondent from its distributors confirming having received the aforesaid circular letter and accepting the proposal made by the respondent. There is further a letter addressed by the respondent dated June 5, 1959 to one of its distributors which shows, inter alia, that 50 per cent. of the expenses required for the service promotion programme were to be contributed by the respondent and the balance would have to be paid by the distributors. The said letter further makes it clear that it was in order to avoid the distributors having to pay large amounts at one time that their contributors were collected at the rate of Rs. 10 per vehicle sold to them and that amount was debited in their account as set out in the said letter. On these facts the Tribunal held that the service pool charges, which the respondent had been recovering from its distributors, could not be included in the definition of the term "sale price" either under the Bombay Sales Tax Act or under the said Act, viz., the Central Sales Tax Act, and that the purpose of the recovery of service pool charges was to maintain an expert fleet of mechanics who would be available to various consumers after they had obtained cars from the distributors. The Tribunal further held that these charges could not be described as "any sum charged for anything done by the dealer in respect of the goods at the time of or before delivery thereof". The Tribunal directed a reference to be made only in respect of the amounts collected as service pool charges for the aforesaid assessment period under the said Act.

2. The contention of Mr. Jetly, learned counsel for the applicant, the Commissioner of Sales Tax, before us is that these service pool charges were collected by the respondent from its distributors against the sale of its cars to the distributors. If the distributor concerned wanted the delivery of a car he had to pay the service pool charges, namely, Rs. 10 per car, and the distributors did not have any option as to whether they wanted the benefit of the aforementioned scheme on payment of the service pool charges of Rs. 10 per car. It was contended by Mr. Jetly that in view of this, the amount of the service pool charges per car should be included in the computation of the turnover of sales under the said Act. It was, on the other hand, contended by Mr. Phadkar that these service pool charges were really not a part of sale price of the car, but were paid paid for maintaining the service promotion pool in the benefit of which the distributors participated.

3. Before going into the merits of the respective contentions set out earlier, it will be useful to take note of the relevant provisions of the said Act. Sub-section (h) of section 2 of the said Act runs as follows :

""sale price'' means the amount payable to a dealer as consideration for the sale of any goods, less any sum allowed as cash discount according to the practice normally prevailing in the trade, but inclusive of any sum charged for anything done by the dealer in respect of the goods at the time of or before the delivery thereof other

than the cost of freight or delivery or the cost of installation in cases where such cost is separately charged."

From the aforesaid definition it is clear that, in the first place, to be included in the sale price the amount concerned must be payable to the dealer as consideration for the sale of any goods. The inclusive or extensive portion of the definition includes within the sale price any sum charged for anything done by the seller in respect of the goods sold at or before the time of delivery other than the costs for the things mentioned therein. In the present case, considering the facts on record, which are the same as the facts found by the Tribunal, it appears clear to us that the service pool charges collected by the respondent from its distributors were not a part of the consideration for the vehicle sold to the distributor at all. The correct position was that with a view to establish and maintain the service promotion pool and participate in the benefit provided thereunder the distributors had to pay certain amounts as their contributors, the balance amount required being contributed by the respondent-dealer. The collection of Rs. 10 per car was really a mode of collecting the contributions payable by the distributors and did not constitute the consideration for the sale of the cars at all. In this regard it is significant that the service promotion scheme and the manner in which it was to be paid for had been accepted by the distributors, as set out earlier. As far as the inclusive or the extensive portion of the definition of "sale price" is concerned, it has to be pointed out that the benefit of the service promotion scheme was available to the customers and to the distributors only after the cars had been delivered to the ultimate consumer or customers and hence the consideration for the benefit received under such scheme could not be in any way said to be related to or anything done in respect of the cars sold at or before the time of delivery. In our opinion, on a correct analysis of the aforementioned definition of "sale price" contained in section 2(h) of the Central Sales Tax Act, 1956 these service pool charges could not be included in the term "sale price" and the decision of the Tribunal is justified on the account.

4. We now proposed to come to certain cases which have been relied on before us. Mr. Jetly placed strong reliance on the decision of a Division Bench of this Court in Sun-N-Sand Hotel Private Limited v. State of Maharashtra [1969] 23 STC 507. The assessee in that case ran at the Juhu Beach in Bombay a hotel which had both a boarding and a lodging establishment. The customers who came to the hotel were informed of the charges they had to pay for lodging with different amenities and boarding according to their taste. They were also informed that they had to pay service charges at ten per cent. of the tariff and sales tax at five paise per rupee. The assessee objected to the inclusion of the service charges in its gross turnover on the ground that they did not represent part of the sale price but were recovered from the customers for payment to the employees and for covering partly the loss on account of breakages. The Tribunal found that the customers had no option but to pay the service charges which entirely depended on the food ordered and consumed by them. It was held by the Division Bench that on the facts and in the

circumstances of the case, the service charges constituted part of "sale price" as defined in section 2(29) of the Bombay Sales Tax Act, 1959 and could be included in the assessee''s gross turnover. It was pointed out by Mr. Jetly that, in material regards the definition of the term "sale price" contained in sub-section (29) of section 2 of the Bombay Sales Tax Act, 1959 is similar to the definition of the said term under the Sales Tax Act, 1956. It was pointed out by Mr. Jetly that, in the course of the judgment, the Division Bench has pointed out as follows :

"In order 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."

The Division Bench further held that the customers had no choice whether to pay the service charges or not as in the case of tips given by the customers. The Division Bench further observed as follows :

"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 floor-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."

In the first place, we find that this decision is not applicable to the facts of the case before us. As we have already pointed out, in our opinion, the service pool charges were collected by way of contributions from the distributors towards part of the expenses of sales and service promotion pool the benefit of which was to be shared by the customers and the distributors and charging the distributors at the rate of Rs. 10 per vehicle sold was only a mode of collecting the contribution payable by the distributor to the said pool. In the second place, as is clear from the decision of the Division Bench in the case of Sun-N-Sand Hotel [1969] 23 STC 507 , the service charges in the case related to service in respect of the food served by the assessee to its customers, which services were rendered at or before the time when the food was served to the customers, whereas in the present case the benefits of the sales and service promotion scheme were available to the customers and distributors, after the cars had already been delivered to the customers. Apart from this, we find that the authority of this decision has been seriously shaken by the decision of the Supreme Court in Northern India Caterers (India) Ltd. Vs. Lt. Governor of Delhi, . In that case the appellant ran a hotel in which lodging and meals were provided on "inclusive terms". Meals were served to non-residents also in the restaurant located in the hotel. In the assessment proceedings of the appellant under the Bengal Finance (Sales Tax) Act, 1941 as extended to the Union Territory of Delhi, for the years 1957-58 and 1958-59, the following two questions were referred for

determination to the High Court :

(1) Whether the supply of meals to residents, who paid a single all-inclusive charge for all services in the hotel, including board, was exigible to sales tax; and

(2) Whether the service of meals to casual visitors in the restaurant was taxable as a sale -

(i) when the charges were lump sum per meal, or

(ii) when they were calculated per dish ?

The Supreme Court answered all these questions in favour of the appellant-assessee. It was held that the service of meals to visitors in the restaurant of the appellant was not taxable under the Act and this was so whether a charge was imposed for the meal as a whole or according to the dishes separately ordered. The Supreme Court pointed out that the classical legal view being that a number of services are concomitantly provided by way of hospitality, the supply of meals must be regarded as ministering to a bodily want or to the satisfaction of a human need. The definition of the term "sale" under the Bengal Finance (Sales Tax) Act, 1941 shows that the said term was defined as "any transfer of property in goods for cash or deferred payment or other valuable consideration including a transfer of property in goods involved in the execution of a contract". The position of an inn-keeper under the English common law was analysed by the Supreme Court. It was observed by the Supreme Court that under the English common law the gain made by an inn-keeper was "not only by uttering of their commodities, but for the attendance of their servants, and for the furniture of their house, rooms and lodging for their guests". Under the English common law the keeper of an eating house or victualler was regarded fundamentally as providing sustenance to those who ordered food to eat in the premises. It was held that like the hotelier, a restaurateur provides many services in addition to the supply of food. He provides furniture and furnishings, linen, crockery and cutlery, and in the eating places of today he may add music and a specially provided area for floor dancing and in some cases a floor show. The decision of the Supreme Court shows that the position of a hotelier or restaurateur in India was the same as under the English common law and the supply of food or drink to customers by a hotelier or on a restaurateur did not partake of the character of a sale of goods. Observations have been cited by the Supreme Court from the decision in Electa B. Merrill v. James W. Hodson LRA 1915-B 481 that "the customer does not become the owner of the food set before him, or of that portion which is served for his use, or of that which finds a place on his plate or in side dishes set about it. No designated portion becomes his. He is privileged to eat, and that is all. The uneaten food is not his ..."

November 6, 1984.

On a perusal of the above decision of the Supreme Court it is clear that the decision given by the Division Bench of this Court in the case of Sun-N-Sand Hotel Private Limited [1969] 23 STC 507 would never have been given had the case of Northern India Caterers (India) Limited [1978] 42 STC 386 been decided by the Supreme Court earlier and the judgment therein pointed out to the Division Bench. Reasoning in the decision in the case of Northern India Caterers (India) Ltd. Vs. Lt. Governor of Delhi, runs counter to the reasoning accepted by the Division Bench of this Court in the aforesaid case. In view of this, the aforesaid decision of the Division Bench of this Court cannot be regarded any lodger as good law on the aforementioned questions.

5. The next decision to which reference was made was the decision of a Division Bench of the Madras High Court in Srinivasa Timber Depot v. Deputy Commercial Tax Officer, Choolai Division, Madras [1969] 23 STC 158. In that case it was held that the charges paid on a percentage basis by customers for picking out or selecting timber from the timber depots, described as lot cooly charges and shown separately in the bills, cannot form part of the turnover of the dealer. The question arose there in connection with the connotation of the term "turnover" in the Madras General Sales Tax Act, 1959. It was held that what could be legitimately brought to tax under that Act was the aggregation of the consideration for the transfer of property in the goods and the aforesaid service charges cannot be equated to the consideration for transfer of property in the goods. This decision supports the view which we have taken to some extent. But we may point out that that decision turns on its own facts and we do not rely on the reasoning in that decision for the view which we have taken.

6. Mr. Jetly referred us to the decision of a Division Bench of the Karnataka High Court in State of Karnataka v. Dada & Co. [1984] 55 STC 367, where it was held that the charity collections made by the assessee in that case were inextricably connected with the sales and were collected on the occasion of sales and should necessarily form part of the turnover also. The ratio of this case has no application to the case before us. Charity collections made by the assessee in that case in no way be compared to the collection of service pool charges in the case before us. It is obvious that when an amount is collected by way of charity commission from a purchaser, the purchaser does not share in the benefit which might be obtained out of the amount collected nor is the charity even made in his name. The only consideration for which the purchaser pays this amount is that he wants to buy the article in question.

7. Mr. Jetly next referred us to a decision of a Division Bench of the Kerala High Court in Thannirangad Service Co-operative Society Ltd. v. State of Kerala [1980] 46 STC 464. There the assessee - two co-operative societies - were appointed by the civil supplies department of the State Government as authorised agents for procuring paddy from agriculturists and selling it to the ratio shops in the State after after

getting it dehusked and converted into rice in rice mills. The assessees collected amounts by way of administrative surcharge and price equalisation charge from the purchasers (ration shop retail dealers) and included those amounts in the sale bills issued to the purchasers as part of the price of the goods sold. It was held that the amounts collected by the assessees from the purchasers by way of administrative surcharge and price equalisation charge formed part of the assessees'' turnover and therefore, were liable to tax as they would be included within the meaning of the expression "turnover" as defined in section 2(27) of the Kerala General Sales Tax Act, 1963. The facts in this case are also altogether different from the facts of the case before us and the decision is of no assistance to Mr. Jetly.

8. In the result, we answer questions referred to us in the affirmative and in favour of the respondent-assessee. The applicant to pay to the respondent the costs of the reference.