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IN THE HIGH COURT OF DELHI AT NEW DELHI

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S.T. Appeal No.1 of 2010

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Decision Delivered On:19th November, 2010.

COMMISSIONER VAT

. . . Appellant

through :

Mr. H.L. Taneja, Advocate

VERSUS

INDIA INTERNATIONAL CENTRE

. . . Respondent

through:

Mr. Balram Sangal, Advocates

CORAM :-

HON'BLE MR. JUSTICE A.K. SIKRI

HON'BLE MR. JUSTICE SURESH KAIT

1. Whether Reporters of Local newspapers may be allowed to see the Judgment?
2. To be referred to the Reporter or not?
3. Whether the Judgment should be reported in the Digest?

A.K. SIKRI, J. (ORAL)

1. **CM No.2319 of 2010**

This is an application for condonation of delay in filing instant appeal. The delay in filing the present appeal is explained in the following manner:

The appellant/Department is aggrieved by the orders dated 16.10.2008 passed by the Appellate Tribunal, Value Added Tax, Delhi. It is stated that the copy of the said order was received on 22.12.2008. At that time, it was not very clear as to whether against such an order, appeal for tax revision under Section 81 of Delhi Value Added Tax Act (hereinafter referred to as 'DVAT Act') is maintainable or whether reference application under Section 45(1) of the Delhi Sales Tax Act (hereinafter referred to as 'DST

Act') is to be sought or statutory appeal is maintainable. Faced with such a situation, the appellant invoked both the remedies. On the one hand, appeal was filed in the Court under Section 81 of the DVAT Act and at the same time, reference application was also filed before the VAT Tribunal, Delhi (hereinafter referred to as 'the Tribunal') on the other hand. The appeal filed in the Court was registered as S.T. Appeal 7 of 2009. When that appeal came up for hearing on 18.04.2009, under the *bona fide* impression that more appropriate remedy was the reference application which had already been filed before the Tribunal the appellant withdrew the said appeal. The said appeal was accordingly dismissed as withdrawn on that day.

2. While the reference was pending, issue as to whether reference is maintainable or appeal is maintainable came up for consideration before this Court in other proceedings and vide orders dated 19.08.2009, this Court in the case of ***Shiv Shakti Kirana Kendra Vs. Commissioner, VAT*** decided the issue by holding that the proper remedy was to file the appeal under Section 81 of DVAT Act and not a reference application under Section 45 (1) of the DST Act. The appellant moved an application under Section 151 of the Code of Civil Procedure in S.T. Appeal No.7 of 2009 for recall of the orders dated 18.04.2009. In that application, the orders were passed by this Court on 27.11.2009 permitting the appellant to file a fresh appeal. The said order is reproduced below:

“The present applications have been filed in the wake of the Judgment in Shiv Shakti Kirana Kendra vs. Commissioner, VAT, passed on August, 19, 2009. The Division Bench has held that an Appeal under Section 81 of the Delhi VAT Act was maintainable, we need not explain or specify on that issue since it is fully clarified in the Judgment.

Rather than recall the orders which noted submission of learned Counsel for the Department, that a Reference alone was maintainable under Section 45 of the Delhi Sales Act, 1975, we think it appropriate to permit the Department to file fresh Appeals under Section 81 of the Delhi VAT Act. We expect that if the question of delay in filing the appeal is raised by the Assessee/Respondent, the Appellate Court will take due notice of the filing of the previous Appeals, and that the Department had been duly diligent in prosecuting its interest.

Applications are allowed in the above terms.”

3. Armed with the aforesaid orders, the appellant filed the present appeal and it is the submission of the applicant that the delay be condoned, as sufficient cause has been shown inasmuch as the appeal was initially filed within the period of limitation, but the same was withdrawn in the circumstances as explained above. It is also argued that in any case the applicant showed its diligence and took whatever steps possible in the given circumstances, viz., it moved application for revival of the earlier appeal. However, since the Court was of the opinion that fresh appeal be filed, the present appeal is preferred.
4. Mr. H.L. Taneja, learned counsel appearing for the applicant/appellant, also laid down great stress on the orders dated 27.11.2009 passed in the earlier appeal wherein it is argued that a clear indication is given in the said order that while deciding the application for condonation of delay, the Court will take due

notice of the filing of the previous appeals and the specific observations of the Court is that the Department had been duly diligent in prosecuting its interest.

5. Mr. Balram Sangal, learned counsel appearing for the respondent, on the other hand, has opposed the application for the condonation of delay primarily on the ground that the second appeal challenging the same order would not be maintained on the application of principle laid down under Rule-I Order 23 of the Code of Civil Procedure when the first appeal was withdrawn by the appellant itself and while withdrawing the said appeal, liberty to file a fresh appeal was not obtained. He has submitted that though the provisions of CPC are not strictly applicable, but the principle laid down in Rule-I Order 23 of the CPC would be applicable to such proceedings, as that is the principle based on public policy. In support of his submission, Mr. Sangal has referred to the judgment of the Supreme Court in the case of ***Sarguja Transport Services Vs. State Transport Tribunal, Gwalior and Others*** [AIR 1987 SC 88] where the Court held that the provision contained in Rule – I Order 23, CPC would be applicable to writ proceedings.
6. While there is no doubt about the proposition of law advanced by the learned counsel for the respondent predicated on the provisions of Rule –I Order 23 of the CPC, in peculiar facts of the present case, we are of the opinion that the said provision would not apply. As already pointed out above, the appellant had

preferred the appeal well in time under Section 81 of DVAT Act against the impugned orders of the Tribunal. It cannot be disputed that at the relevant time, the law on the issue as to whether the proper remedy is to file the appeal or it is the reference under the DST Act, which would be competent, was in an initial stage. In these circumstances, the appellant rather showed more than due diligence by invoking both the remedies, as it was not clear as to which is the appropriate remedy. If the appeal was withdrawn on 18.04.2009, it was under the *bona fide* plea that the reference application was the appropriate remedy. The position in law became clear when the judgment was pronounced by this Court in the case of ***Shiv Shakti Kirana Kendra (supra)*** on 19.08.2009. The fallout of the said judgment was that the reference application under Section 45(1) of the DST Act was not maintainable. In these circumstances, the appellant had no option but to withdraw the said reference. Therefore the other steps, in the given circumstances, which the appellant was required to take was to seek revival of the appeal filed earlier, which was withdrawn under the aforesaid circumstances. The appellant, in fact, did take that step as well. It could have been easier for the appellant had the orders been passed in that application preferred by the appellant seeking restoration of the appeal filed earlier. However, this Court in its discretion chose not to adopt that course of action, but directed to file fresh appeal. It is trite law that nobody can be prejudiced because of the act of the Court. Moreover, when a specific permission/liberty is given in the earlier appeal filed by the appellant, *albeit*, on the later date

on application for revival of that appeal, under the given circumstances, it can separately be read as liberty given by the Court while withdrawing the application by the appellant. When the matter is examined in this perspective, we are of the opinion that the conditions stipulated in Rule – I Order 23, CPC are duly met.

7. In these circumstances, prayer made in this application is allowed and the delay in filing the appeal is condoned.

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8. We have heard the learned counsel for both the parties in this appeal, which is preferred against the orders of the Appellate Tribunal, Value Added Tax in respect of assessment year 1997-98. The questions of law, which are proposed, are as under:

- “(i) Whether on the facts and in view of the judgment of the Hon’ble Supreme Court in (2000) 117 STC 1 = (2000) 1 SCC 521, the service charges of ₹44,45,994 collected separately by the respondent in its cash-memos issued in its restaurant/Coffee House are taxable under the Act of 1975?
- (ii) Whether on the facts and the position in law under the Delhi Sales Tax Act of 1975 sales of mineral water and aerated drinks effected by the respondent in its restaurant/Coffee House during the year 1997-98 were exigible to tax @ 7% or 10%?”

9. The aforesaid questions arise in the following factual backdrop;

The respondent assessee is a society registered under the Societies Registration Act, 1860. It has been given exemption under Section 12A of the Income Tax Act (hereinafter referred to

as 'the Act') and thus, treated as 'charitable institution'. It caters to the needs of its members. The respondent is also a registered dealer of Ward No.98. Apart from other services provided by the respondent centre to its members, it is also maintaining a Coffee House and a restaurant, which is being used by its members. In the assessment year in question, the Assessing Officer (AO) noticed that in the vouchers/bills raised and issued by the respondent to its members in the said coffee house and restaurant, 'service charges' are being charged from them. The AO further noticed that those service charges were not added in the bills for the purpose of payment of sales tax. The AO was of the view that the said component of service charges has also to be included for payment of sales tax. He, thus, passed the assessment order raising tax payment of ₹7,22,458 against the respondent. The respondent preferred appeal before the first Appellate Authority, which was dismissed vide orders dated 03.02.2003. Feeling aggrieved by these orders, the respondent approached the Appellate Tribunal, Value Added Tax in which it had succeeded.

10. The explanation given by the respondent assessee before the AO, which was reiterated before the Tribunal was that the aforesaid service charges did not belong to the assessee. These service charges were in the nature of tips calculated for and on behalf of the employees working with the assessee/centre. The entire service charges in the form of tips are pooled and distributed amongst the employees of the centre. This plea of the respondent

assessee has been accepted by the Tribunal and on that basis demand of payment is quashed.

11. Mr. Taneja, learned counsel for the appellant submits that the aforesaid view of the Tribunal is clearly erroneous. He submits that from the very fact, that the nomenclature used for these charges is stated as service charges, it would be exigible to tax. During the course of arguments, learned counsel also drew our attention to the definition of the terms “sale price” and “turn over” as provided in the Delhi Sales Tax Act, 1975, which are as under:

“(a) “Sale Price” means the amount payable to dealer as consideration for the sale of any goods, less any sum allowed as cash discount according to the practice normally prevailing in trade, but inclusive of any sum charged for anything done by the dealer in respect to 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 case where such cost is separately charged.

(b) “Turnover” means the aggregate of the amounts of sale price receivable, or if a dealer so elects, actually received by the dealer, in respect of any sale of goods, made during any prescribed period in any year after deducting the amount of sale price, if any, refunded by the dealer to a purchaser in respect of any goods purchased and returned by the purchaser within the prescribed period.”

12. Relying upon some of the judgments of the Supreme Court and High Courts, Mr. Taneja argued that the expression “sale price” would mean the amount payable to the dealer as consideration for the sale of any goods and the concept of real price or actual price retainable by the dealer is irrelevant. The judgments on which the

reliance in support of this proposition is placed by the learned counsel are as under:

- (i) ***K. Damodarasamy Naidu & Bros. Etc. v. The State of Tamil Nadu & Anr. Etc.*** [(2000) 117 STC 1] wherein it is held that the supply of food and drink can be by way of service or as part of a service or it can be in any other manner whatsoever. The words “in any other manner whatsoever” are of wide scope. The types of services rendered as mentioned in this judgment are not exhaustive. What is further held in this judgment is that the price that a customer pays for the supply of food cannot be split up.
- (ii) ***Hindusthan Sugar Mills v. State of Rajasthan and Ors.*** [(1979) 43 STC 13], the Apex Court held that the expression “Sale Price” meant the amount payable to a dealer as consideration for the sale of any goods and, the concept of real price or actual price retainable by the dealer is irrelevant. Indubitably, service charges are also collected by the respondent.
- (iii) ***Central Wines v. Special Commercial Tax Officer*** [AIR 1987 SC 611].

- (iv) ***Sun-n-sand Hotel Private Ltd. v. The State of Maharashtra*** [(1969) 23 STC 507] (Bombay High Court).
- (v) ***Hotel Ashoka v. The State of Tamil Nadu*** [(1977) 40 STC 347] by Madras High Court.
- (vi) ***The Kedarnath Jute Mfg. Co. Ltd. v. The Commissioner of Income Tax, (Central), Calcutta*** [(1971) 82 ITR 363] where the Supreme Court held, *inter alia*, whether the assessee is entitled to a particular deduction or not will depend on the provision of law relating thereto and not on the view which the assessee might take of his rights; nor can the existence or absence of entries in his books of accounts be decisive or conclusive in the matter.

13. Mr. Sangal, learned counsel for the assessee, on the other hand, submitted that the aforesaid judgments would not apply in the given circumstances. He has produced the copy of the Agreement signed by the management of the centre/assessee with its employees, which reveals that the said agreement was entered into to enable the centre to collect the service charges in the form of tips on behalf of the employees which in turn is to be distributed amongst the employees. On this basis, he submitted that the assessee is only a trusty on the said amount collected from the members using the services in the restaurant/coffee house of the

centre. This is not the result of the services provided by the centre to its members and therefore, cannot be a component of sale price. He also drew distinction between 'services' and 'service charges'. Based on this distinction, his submission was that in a hotel or restaurant supply of food, etc. are 'services' and the levy of tax on composite charges of boarding and lodging being services, price of food and services could not be ascertained and split up. According to him, that was the basis for the decision in the judgments cited by the learned counsel for the appellant. On the contrary, submitted the learned counsel, in the case of respondent centre, 'service charges' are separately over and above the price of food and hence the 'service charges' are distinct and different than 'services'. He has also produced copies of some the bills/vouchers raised in the aforesaid manner, which demonstrate that after giving the description of items consumed by a member while availing the services in restaurant/coffee house, total thereof is added and sales tax is charged thereupon. It is thereafter only that the service charges are added. He also heavily relied upon the reason given by the Tribunal making the aforesaid distinction between 'services' and 'service charges'.

14. We have given our due consideration to the respective submissions and have also gone through the same. In our opinion, the view taken by the Tribunal is without blemish and does not call for any interference. No doubt, the proposition of law that whatever is charged from the customers becomes the sale price and therefore, the dealer is liable to pay sales tax thereon is

unquestionable but at the same time it cannot be treated as absolute principle of law, which is to be applied in all circumstances, irrespective of the nature of the charge. In the present case, the first thing that needs to be highlighted is that the centre provides services to its members only. No doubt, these members can bring their guests occasionally, which is also subject to some limitations as provided in the rules and regulations. Secondly, the nature of amount charged under the bill is required to be seen in the aforesaid scenario. To give an example, suppose for a renovation of its coffee house/restaurant or any other part of the building, etc., the decision is taken by the management (which of course is comprised of its members itself) to charge and collect a sum of ₹50 from each member every time he/she utilizes the services in the restaurant or in the coffee house. Such an amount if calculated in the bill can never be termed as sale price because the amount, so charged, partakes the character of 'donation'. It is in this perspective one has to examine as to what is the nature of the aforesaid 'service charge'. As mentioned above, this amount does not belong to the respondent centre. Normally, what happens is that whatever services in a restaurant or club are utilized by a member, a member may give tip to the waiter/employee voluntarily. This may be given in cash to such an employee by a person utilizing service while making payment of bill. In these circumstances, naturally component of that tip would not be reflected in the bill. However, in order to ensure that there is no heart burning in a situation where some of the employees are luckier enough as compared to another collecting more tips

than the other, the employees may decide that all these tips be pooled so that the same are distributed among them equally. In order to facilitate this move on the part of the employees, management comes to their aid by collecting those tips on behalf of these employees. In these circumstances, we find force in the submission of Mr. Sangal that the respondent assessee is naturally a trusty who collects the amount on behalf of the employees and then distributes the same amongst them. Of course, the agreement shows that 15% of amount so collected was appropriated towards brokage in the crockery. The reason as explained by the learned counsel is that generally because of the brokage in the crockery due to the fault of a particular employee, his account is used to be debited with the amount of damage as well as of the said brokage. Even that is taken care of by the aforesaid modalities provided in the agreement whereby the essence of which is that all the employees are treated jointly liable for reimbursement of the said brokage. In these circumstances, we find that the Tribunal rightly distinguished the judgments cited before it, which were cited before us as well. Since we are in agreement with the reason given by the Tribunal dealing with those judgments, it would make our task easier by referring to the discussion contained in the orders of the Tribunal, which runs as under:

“13. We have while appreciating the rival contentions of the Ld. Counsels of both the parties and have also carefully examined the records and also gone through the Law cited by both the parties. Here, at the outset, we may opine that we tend to agree with the contention of the Ld. Counsel for the Appellant that there is clear distinction between

‘services’ and ‘service charges’. We find that the Hon’ble Supreme Court of India in the case of K. Damodarswamy had held that supply of food etc. in a hotel or restaurant are ‘services’ and the levy of tax on composite charges of boarding and lodging being services price of food and services could not be ascertained and split. Up. But in the case in hand, tax on ‘service charges’ charged separately in the cash memos over and above the price of food and snacks makes the case different in any manner. Further as regards the judgments in the cases reported as 73 STC 317, 139 STC 434, 65 STC 48 relied upon by Respondent are concerned we are of the view that these are different as they deal with the transportation and delivery charges, and as such are distinguishable and consequently do not in any manner advance the case of the revenue. So far the applicability of the Sun-N-Sand and Hotel Ashoka judgments relied upon by the Respondent are concerned we are informed by Shri Balram Sangal during the course of arguments and not refuted by the Respondent as well that to it is only the members of the society or their guests who are entertained and allowed to enjoy the facilities like that of coffee house and restaurant maintained by the Society. And its members, after enrolment, who time and again come to the coffee house and restaurant are already well aware that service charges are being charged from them in the Coffee House and Restaurant whereas in the case of Sun-N-Sand and Hotel Ashoka cases (SUPRA), the customers who came to the hotel to stay were informed at the time of their arrival at the hotel that they will be subjected to levy of service charges separately in addition to the hotel charges. Thus we find that these judgments of Sun-N-Sand and Hotel Ashoka are distinguishable and as such are not applicable to the facts and circumstances of the instant case.

14. Further, we also find great deal of force in the contention of the appellant which obviously goes in their favour through for the assessment order passed by the Ld. Assessing Authority for the A.Y. 1996-97 tax was levied on the Service Charges as in this case yet the appeal of the dealer was allowed by the First Appellate Authority who remanded the case and that in remand assessment order no tax was charged on service charges and that similarly that no such tax was also levied while making assessment for the years 1998-99, 1999-2000 as well. It obviously shows that the Department agreed with the view of the Dy. Commissioner, that service charges are not liable to be taxed in the case of the appellant dealer. The Department too did not an appeal against the order passed by the Deputy Commissioner. Under these circumstances in the absence of any reasonable explanation by the Respondents, we are of the considered view that for the year 1997-98 i.e. Assessment Year in question too, that service charges collected by the appellant dealer are not liable to be included in the sale price of the appellant dealer.....”

15. We, thus, answer the question of law No.1 in favour of the assessee respondent centre and against the Revenue.
16. Insofar as second question is concerned, the only dispute is as to whether mineral water and aerated drinks would attract tax @ 7% or 10%. It is not in dispute that as per the provisions of law, sales tax payable on the aforesaid accommodation is 7%. However, the only contention raised by the learned counsel for the Revenue is that this issue was pleaded before the first appellate authority and therefore, could not be taken before the Tribunal for the first time. Such a plea is required to be rejected. When under the law, the revenue collected tax on the sale of aforesaid goods @ 7%, it does not lie in the mouth of the Department to take such hyper-technical plea and try to charge more tax than what is legitimately due to it under the law. Even otherwise, the question was purely a legal question and therefore could be raised for the first time even before the Tribunal. Therefore, the second issue is also decided against the Revenue and in favour of the assessee respondent.
17. Mr. Taneja, however, argues that the case would be covered by entry 29 of Schedule-I, Delhi Sales Tax Act, 1975 which gives the nomenclature of "aerated drinks" and, therefore, the tax payable is 10%. However, Mr. Sangal has drawn out attention to the impugned order of the Tribunal and submits that the issue did not relate to "aerated water". He submitted that there is a settled distinction between the 'aerated water' on the one hand and the

‘aerated drinks’ on the other hand. He has also drawn out attention to the Notification dated 11.4.1996 vide which Schedule –I was amended by adding certain entries after item no. 26. Item No. 37 reads as under:-

“squash, juices, syrups and aerated water when showed in a packet containing”

He thus points out that there is a specific entry of aerated water and this entry attracts tax @ 7 %. We do not find any merit in the contention of Mr. Taneja.

18. This appeal is accordingly dismissed. However, there shall be no orders as to costs.

(A.K. SIKRI)
JUDGE

(SURESH KAIT)
JUDGE

NOVEMBER 19, 2010
pmc