IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED: 24/4/2018
C O R A M
THE HON'BLE MR.JUSTICE S.MANIKUMAR
AND
THE HON'BLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

Tax Case No.105 of 2018

Tvl. Hotel Shrilekha Intercontinental
564 Anna Salai
Chennai 18. ... Petitioner

Vs

The Commercial Tax Officer
T.Nagar (North) Assessment Circle
Chennai. ... Respondent

Petition filed under Section 38 of the TNGST Act, 1959, to revise the order of the Sales Tax Appellate Tribunal (Additional Bench), Chennai, passed in T.A.No.1029 of 1999, dated 25/2/2002 against the order of Appellate Assistant Commissioner (CT)-III, Chennai 108, dt.5.2.99 in a.No.AP110/95; and arising out of the assessment order of Commerical Tax Officer, T.Nagar, East, Assessment circle, dt.26.2.93 in TNGST 137852/91-92

For petitioner ... Mr.V.Sirkanth

O R D E R

(Order of the Court was made by S.MANIKUMAR, J)

Instant Tax Case (Revision) is filed against the order of the Tamil Nadu Sales Tax Appellate Tribunal (Additional Bench), Chennai, dated 25/2/2002, made in T.A.No.1029 of 1999.

2. Facts as deduced from the material on record are that Tvl. Hotel Shrilekha Intercontinental, was finally assessed on a total and taxable turnover of Rs.89,80,528/- and Rs.70,71,441/-, respectively, for the assessment year 1991 - 92. The assessing officer has levied penalty of Rs.1,25,924/-, under Section 12 (5) (ii) of the Act. Aggrieved against the order of the Commercial Tax Officer, T.Nagar (East) Assessment Circle, appellant filed Appeal No.110 of 1995, on the file of the Appellate Assistant Commissioner (CT) - III, Chennai. Vide order, dated 5/2/1999, the Appellate Assistant Commissioner (CT) - III, Chennai, ordered as hereunder:-

> "5. I heard the arguments from both sides and perused the connected records. Though the appellants had contended that their writ petition in W.P.No.7531 of 1993 and petition for stay in W.M.P.No.11875 of 1993,

on 19/4/1993, questioning the validity of G.O.P.532 dated 5/9/1990 were admitted by the High Court of Chennai, they had not filed any orders in this regard at the time of hearing of the appeal. I find that the Assessing Officer had adopted the book figures only and passed orders as per the existing law. As no stay order from any competent authority against the levy of tax or proceeding further in the case was produced by the appellants, I find no reason to interfere with the assessment made by the Assessing Officer at 5% on the turnover of Rs.61,36,871/- but to confirm the same and this part of the appeal is dismissed.

Levy of penalty under Section 12 (5) (iii): I find that the Assessing Officer had arrived at the figures from the books of accounts and the statement filed at the time of assessment and no penalty is leviable as per the decision of the High Court of Chennai, in the case of Srinivasa Iyengar & Sons reported in 89 STC 349. I therefore, delete the penalty of Rs.11,796/- levied under Section 12(5) (iii) and allow this part of the appeal.

6. In the end, the appeal is partly dismissed and partly allowed."

3. Being aggrieved, M/s.Hotel Shrilekha Inter Continental Limited, before the Tamil Nadu Sales Tax Appellate Tribunal (Additional Bench), Chennai, filed Appeal No.110/95 dated 5/2/1999 and A.P.No.22/95, dated 29/12/1998, relating to the assessment years 1991 - 92 and 1992 - 93, respectively, under the Tamil Nadu General Sales Tax Act, 1959.

4. Vide order, dated 25/2/2002, the Tamil Nadu Sales Tax Appellate Tribunal (Additional Bench), Chennai, ordered as hereunder:-

"6. The point for decision is Whether the orders of the Appellate Assistant Commissioner are liable to be set aside or not?"

7. Point: We find that these appeals related to same dealer of food and drinks during the year 1991 - 92 and 1992 - 93 and levied penalty under Section 12 (5) of the Tamil Nadu General Sales Tax Act, 1959. On appeal, the Appellate Assistant Commissioner has confirmed the assessment on the sales turnover of food and drinks and set aside the levy of penalty. Not accepting the orders of the Appellate Assistant Commissioner, the appellant/dealer preferred two

appeals and the State has preferred the Cross-Appeal disputing the deletion of penalty. Thus, there are the following two issues:-

(1). Levy of tax on the sale of food and drinks.
(2). Levy of penalty.

Issue No.1. The sale of food and drinks are held to be taxable where the dominant object of an earing house or a restaurant sale of food and drinks. After the 46th amendment to the constitution, the position is very clear and the Courts have taken a consistent view. Since the service charges have not been reported separately and in fact the service charges cannot be segregated from the sale of food and drinks the entire turnover has been held taxable for the year 1991 - 92 and 1992 - 93. In such circumstances, we do not find any reason to interfere with the orders of the Appellate Assistant Commissioner and accordingly, the appeals are dismissed.

Issue No.2: The Appellate Assistant Commissioner has set aside the levy of penalty under Section 12 (5) (ii) of the Tamil Nadu General Sales Tax Act, 1959. Infact, the dealers have filed revised return and have paid the taxes due thereon. As per the decision of the Hon'ble Tamil Nadu Taxation Special Tribunal in the case of Yogeswaran, Ganesh Engineering Works in T.C(R) No.641 of 2001, dated 29/1/2002, penalty cannot be levied in such circumstances. In view of this we do not find any reason to interfere with the well decided orders of the Appellate Assistant Commissioner.

8. In fine, the appeals in T.A.No.1029 of 1999 and 1030 of 1999 and the State Appeal in S.T.A.No.803 of 2000 stands dismissed."

5. Being aggrieved, instant Tax Case Revision has been filed.

6. Mr.V.Srikanth, learned counsel appearing for the petitioner submitted that the proceedings of the Sales Tax Tribunal, dismissing the appeal, without giving any detailed reasoning to the various contentions raised in the grounds of appeal and in the written submissions is invalid and illegal, unjustified on facts and law.

7. He further submitted that the Sales Tax Tribunal ought to have granted second sales exemption on the sales of food and drinks, as per the principles stated by the Supreme

Court, in 2000 (7) SCC 39, since as per the Apex Court, there is no question of manufacture or production activity involved while preparing foodstuff.

8. Placing reliance on a decision the Hon'ble Supreme Court in K.DAMODARASAMY NAIDU & BROS Vs. STATE OF TAMIL NADU AND ANOTHER {2000 (117) STC 1 (SC), learned counsel appearing for the respondent submitted that the writ petition has to be dismissed, as the above said decision is in favour of the revenue. Relevant portions of the abovesaid judgment are extracted hereunder:-

> "Once the definition of 'sale' in Section 2 (n) of the Tamil Nadu General Sales Tax Act, 1959, was amended by the Tamil Nadu General Sales Tax (Fourth Amendment) Act, 1984, to include "a 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...." and the definition of "dealer" in Section 2 (g) was similarly expanded, the supply of food and drink fell within the purview of the charging section, Section 3, and became exigible to tax thereunder. The tax is on the supply of food and drink and it is not of relevance that the supply is by way of a service or as part of a service. The price that the customer pays for the supply of food in a restaurant cannot be split up between what was charged for food and what was charged for service. The subject of the levy is the supply of the food by the restaurant owner to the customer, though it may be a part of the service that he renders by providing good furniture, furnishing and fixtures, linen crockery and cutlery, music, a dance floor show.
>
> Section 6 of the Constitution of India (Forty-sixth Amendment) Act, 1982, providing for retrospective validation of sales tax levied prior to February 2, 1983, on the supply of food and drinks will apply only if the State law had contained a provision entitling the State to levy a lax on the supply of food and drink. Parliament, when exercising the power to amend the Constitution under Article 366, cannot and does not amend State Acts. Section 6, therefore, validates retrospectively the Sales Tax Acts of those States which had theretofore made provision for the levy of sales tax on the supply of food and drink. The levy of sales tax on the supply of food and drink prior to February 2,

1983, in the States of Maharashtra and Uttar Pradesh, where there was no such provision in the respective Sales Tax Acts, is bad in law.

In the case of residential hotels which provide lodging and boarding, determination of the element relating to supply of food and drink from the composite charges, ought not to be left to be determined by the assessing authorities. Since it is impossible, in practical terms, for the sales tax authorities to make assessments upon the basis of the facts relevant to each individual customer in each individual hotel, the State of Maharashtra had to promulgate rules to indicate how to treat the composite charges for lodging and boarding so as to eliminate substantial differences in the approach of the sales tax officers and resulting arbitrariness.

9. Upon considering the material on record, we are of the view that K.DAMODARASAMY NAIDU's case is squarely applicable to the facts on hand. Hence, following the said decision, Tax Case Revision Petition is dismissed. No costs.

mvs.

Sd/-
Assistant Registrar(CS II)

//True Copy//

Sub Assistant Registrar

To
1. The Sales Tax Appellate Tribunal (Additional Bench), Chennai
2. The Commercial Tax Officer
T.Nagar (North) Assessment Circle
Chennai.

3. The Commercial Tax Officer
T.Nagar (East) Assessment Circle
Chennai.

4.The Appellate Assistant Commissioner(CT) IIII
Chennai 108.

+1cc to Special Government Pleader sR.No.30953

KAN(CO)
sM:18.5.2018