

201 **IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

2024:PHHC:052253-DB
CWP-1173-2022 (O&M)
Date of Decision: 18.04.2024.

M/s Sodexo India Services Private Ltd. ...Petitioner

Vs.

State of Haryana and others ...Respondents

**CORAM: HON'BLE MR. JUSTICE SANJEEV PRAKASH SHARMA
HON'BLE MRS. JUSTICE SUDEEPTI SHARMA**

Present Mr. Ishan Loomba, Advocate and
Mr. Arun Jain, Advocate for the petitioner.

SANJEEV PRAKASH SHARMA, J.(Oral)

1. The petitioner by way of this writ petition has assailed the notice dated 17.08.2021, whereby the assessment order dated 05.09.2016, was proposed to be revised.

2. Learned counsel submits that vide impugned notice the respondents have demanded VAT on the service tax component which the petitioner has separately paid being in catering business and the element of service has to be separately assessed and was paid independently on the VAT amount. Learned counsel has taken us to the tax invoice which the petitioner company had issued for a particular sale. Learned counsel has submitted that the issue is no more *res integra* in view of the judgment of the Hon'ble Supreme Court in the case of Tamil Nadu Kalyana Mandapam Assn. vs. Union of India 2006 (3) STR 260 (SC), which has also been followed by this Court in the case of M/s CAP 'N' Chops Caterers vs. State of Haryana,

GSTR No.1 of 2009, decided on 07.09.2010. Learned counsel submits that the revision notice deserves to be quashed as even in the second round, it mentions about the sale of fixed assets but neither gives the detail of sale fixed assets whose sale has not been discussed. Learned counsel has strenuously submitted that the case of M/s Redington India Limited, Panchkula, is a clarification of the State Government which goes contrary to the law laid down by the Hon'ble Apex Court in Tamil Nadu (supra). Learned counsel submits that once the petitioner's company has been separately charging VAT and service tax element has to be charged only upto 60% of the invoice value, there is no occasion to impose VAT on service tax.

3. Per contra, learned counsel appearing for the State has attempted to submit that service element has already been included by the petitioner himself in the invoice and that is why VAT was not demanded by the authorities and since the service component had not been included in the invoice while calculating tax then the tax treatment would have been on the lower side. Thus, this is a case where the petitioner has himself added the service tax element in the original value and, therefore, the said amount has to be paid to the State Government on the service tax.

4. We have considered the submissions.

5. The order of clarification issued by the Department of Excise and Taxation, in M/s Redington India Limited, was on the issue as to "whether VAT is applicable on the basic price of software/software license plus service tax or only on the basic price of software/software license". The department has considered the 'sale price' definition in terms of Section 2(zg) of the HVAT Act, 2003, which reads as under:-

“Sale Price” means the amount payable to a dealer as consideration for the sale of any goods, less any sum allowed at the time of sale as cash or trade discount according to the practice, normally prevailing in the trade, but inclusive of any such sum charged for anything done by the dealer in respect of the goods at the time of or before the delivery thereof and the expression ‘purchase price’ shall be construed accordingly.”

6. On conjoint reading of ‘sale price’ and ‘gross turnover’ the authorities reached at the conclusion that VAT charged would not form part of the sale price. Since, the liability to pay service charge is of the applicant and the applicant has received service tax from the purchaser as consideration for sale, therefore, the service tax would be the part of sale price and VAT would be applicable on the basic price plus service tax.

7. We find that the interpretation taken by the Principal Secretary to the Government of Haryana, is wholly erroneous for implementing and imposing of VAT. The authority would have to examine each case whether the work done is a sale separately from the service in cases relating to catering, where there is an element of sale relating to food etc., the VAT would be applicable. However, for the purpose of service tax where the catering provides the service for serving food etc., the VAT on the said element cannot be charged and as service tax @ 60% element is only required to be paid, the same cannot be included in the original sale for the purpose of claiming VAT. The Hon’ble Supreme Court in the case of Tamil Nadu’s case (supra) has held as under:-

42. As far as the above point is concerned, it is well settled that for the tax to amount to a tax on sale of goods, it must amount to

a sale according to the established concept of a sale in the law of contract or more precisely the Sale of Goods Act, 1930. Legislature cannot enlarge the definition of sale so as to bring within the ambit of taxation transactions, which could not be a sale in law. The following judgments and the principles laid down therein can be very well applied to the case on hand.

1. M/s. J.K. Jute Mills Co. Ltd. vs. The State of U.P. & Anr. [1962] 2 SCR 1;
2. M/s Gannon Dunkerley & Co. and Ors. vs. State of Rajasthan & Ors. 1993) 1 SCC 364;
3. The State of Madras vs. Ganon Dunkerley & Co. (Madras) Ltd. [1959] SCR 379;
4. The Sales Tax Officer, Pilibhit vs. M/s. Budh Prakash Jai Prakash [1955] 1 SCR 24
5. M/s George Oakes (P) Ltd. vs. State of Madras [1962] 2 SCR 570.

43. In regard to the submission made on Article 366(29A) (f), we are of the view that it does not provide to the contrary. It only permits the State to impose a tax on the supply of food and drink by whatever mode it may be made. It does not conceptually or otherwise includes the supply to services within the definition of sale and purchase of goods. This is particularly apparent from the following phrase contained in the said sub-article "such transfer, delivery or supply of any goods shall be deemed to be a sale of those goods." In other words, the operative words of the said sub-article is supply of goods and it is only supply of food and drinks and other articles for human consumption that is deemed to be a sale or purchase of goods.

44. The concept of catering admittedly includes the concept of rendering service. The fact that tax on the sale of the goods involved in the said service can be levied does not mean that a service tax cannot be levied on the service aspect of catering. Mr. Mohan Parasaran, learned senior counsel for the appellant submitted that the High Court before applying the aspect theory

laid down by this Court in the case of Federation of Hotel and Restaurant vs. Union of India & Ors. (supra) ought to have appreciated that in that matter Article 366 (29A) (f) of the Constitution was not considered which is of vital importance to the present matter and that the High Court ought to have differentiated the two matters. In reply, our attention was invited to paras 31 and 32 of the judgment of the High Court in which service aspect was distinguished from the supply aspect. In our view, reliance placed by the High Court on Federation of Hotel and Restaurant (supra) and, in particular, on the aspect theory is, therefore, apposite and should be upheld by this Court. In view of this, the contention of the appellant on this aspect is not well founded.

8. This Court in the case M/s Cap 'N' Chops Caterers (supra), where a similar issue was called for consideration, has held as under:-

“7. In T.N. Kalyana Mandapam Assn. v. Union of India and others, (2004) 5 SCC 632, it was observed that the sales tax could be levied only if there was sale, concept of which could not be enlarged by the legislature to include transactions which were not sales. By including transactions of supply of goods being food and other articles for human consumption in the concept of deemed sale, supply of service could not be deemed to have been covered in definition of "sale and purchase of goods." As against supply of service, only supply of goods is covered by sale. Catering includes rendering of service as well as sale of goods and on the service element service tax could be levied and sales tax could not be levied.

8. In view of above legal position, it has to be held that entire turnover from catering contract cannot be held to be taxable as sale of goods under Section 2 (l)(v) of the Act. The sale tax can be levied on the turnover of sale, after excluding the turnover attributable to service.”

9. Thus, we find that the issue is no more res integra and we follow the view already expressed by the Hon'ble Division Bench of this Court in relation to GSTR No.1 of 2009 decided on 07.09.2010 and held the action of the respondents in issuing show cause notice for revision of assessment, Annexure P/2 dated 17.08.2021, to be unjustified and based on wrongful interpretation of sale in relation to catering business. We also noticed that the clarification issued in M/s Renginton has failed to take notice of the judgment passed by this Court in the case of M/s Cap 'N' Chops Caterers (supra) and such interpretations may on whims and fancies without taking into consideration the law as settled by this Court and the amounts to overreaching the process of the Court and creates unnecessary litigation before this Court. The clarification is accordingly quashed, hence, set aside. Henceforth, the law already settled by this Hon'ble Court in the case of M/s Cap 'N' Chops Caterers (supra), shall apply to all such like matters. A circular in this regard is directed to be issued by the Principal Secretary, Excise and Taxation Department, Haryana, so that, no further litigation arises on this aspect. A copy of this order is directed to be sent to the Principal Secretary for necessary compliance.

10. All pending misc. application(s) also stand disposed of.

(SANJEEV PRAKASH SHARMA)
JUDGE

(SUDEEPTI SHARMA)
JUDGE

18.04.2024.

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1. Whether speaking/reasoned?	:	Yes
2. Whether reportable?	:	Yes