

Rajasthan Tax Board, Ajmer

M/s Hotel Hillock Pvt. Ltd.,
Mount Abu,
District-Sirohi ...Appellant

VERSUS

Assistant Commissioner,
Anti-Evasion, PaliRespondent

Assistant Commissioner,
Anti-Evasion, PaliAppellant

VERSUS

M/s Hotel Hillock Pvt. Ltd.,
Mount Abu,
District-Sirohi ...Respondent

1. Appeal No. 17/2016/Sirohi

2. Appeal No. 18/2016/Sirohi

3. Appeal No. 19/2016/Sirohi

4. Appeal No. 20/2016/Sirohi

5. Appeal No. 613/2016/Sirohi

6. Appeal No. 614/2016/Sirohi

7. Appeal No. 615/2016/Sirohi

8. Appeal No. 616/2016/Sirohi

L.B.

SHRI V. SRINIVAS, CHAIRMAN

SHRI MADAN LAL MALVIYA, MEMBER

SHRI OMKAR SINGH ASHIYA, MEMBER

Present :

Shri Rajendra Jain, FCA

for Assessee

Shri D.P. Ojha, DGA

Shri R.K. Ajmera, DGA

Shri Anil Pokharna, DGA

Shri Jameel Zai, DGA

Shri Ravindra Kumar, AC AE Pali

for Revenue

Shri V.C. Sogani,

Shri O.P. Dosaya,

Shri V.K. Garg,

Shri P.M. Chopra,

Shri Shyam Pareek,

Shri S.K. Asopa,

Advocates

Amicus Curie

Dated: 08/06/2018



 1



JUDGMENT

1. This larger bench has been constituted in light of the provisions as contained in Rule 31(4) the Rajasthan Value Added Tax Rules, 2006 (hereinafter called the '**RVAT Rules**') and Clause 7 (1) of the Rajasthan Tax Board Regulations, 2017 (hereinafter called the '**Regulations**') on a reference received from the learned Single Bench of the Rajasthan Tax Board relating to interpretation of Section 2(36) of the Rajasthan Value Added Tax, 2003 (hereinafter referred as the '**RVAT Act**'), as to whether the Service Tax charged on supply of food and beverages would form part of the sale price or not. Precisely, the following issue has been referred to this Larger Bench:-

"Whether the service tax on the supply of foods and drinks will be the part of the sale price or not and consequently the VAT will be leviable on the value of the food including the service tax or on the value of the food excluding the service tax."

2. While making reference to the Larger Bench, the learned Single Bench considered the facts in the Appeal No. 2399-2401/2012/Jodhpur: M/s Marudhar Hotel Pvt. Ltd. Vs Assistant Commissioner, order dated 25.07.2017, wherein it has been held that the service tax charged on the presumptive services rendered in the course of supply of food, shall not form part of the sale price as defined under section 2(36) of the RVAT Act.
3. Brief facts leading to the present appeals are that the business premises of the assessee was surveyed by ACTO II, Anti-Evasion, Pali on 02.09.2014 and found that assessee was collecting Service Tax as well as the VAT in the invoices of the food and beverages supplied to its customers. The said enquiry officer found that as per definition of the 'Sale Price', all the statutory levies and duties are included but the assessee did not charge the VAT on service tax component. Accordingly, a case was

31

2

14

framed for avoidance of tax and the matter was transferred to Assistant Commissioner, Anti-Evasion, Pali (hereinafter called the 'Assessing Officer' or 'AO'). The AO after duly hearing the assessee held that the service tax as charged in the invoices, shall form part of the sale price as defined u/s 2(36) of the Act and levied tax, interest and penalty on the deemed turnover relating to the service tax. Aggrieved of the assessment orders, the appellants filed the appeals before the appellate authority who upheld the levy of tax and interest but set aside the penalty. Aggrieved of the appellate orders, the assessee has filed these appeals against confirmation of the levy of tax and interest and the Department has preferred Appeals against setting aside of the penalty.

4. Learned authorized representative appearing for the assessee submits the Service Tax and the VAT are levied under different entries of the Constitution and service tax is not in domain of the State Governments, therefore, the State cannot levy VAT on the service tax as levied in the invoices for supply or sale of the food and beverages. It was also submitted that the Single Bench of the Rajasthan Tax Board in Appeal No. 2399/2012/Jodhpur M/s Marudhar Hotels Pvt. Ltd. V/s AC order dated 25.07.2017, has laid down the correct law and the same deserves to be confirmed. He submitted following judgments to support his argument:

- i. Hotel East Park and Anr. Vs Union of India & Ors. (2015) 49 GST 123 (Chhattisgarh HC)
- ii. Tamilnadu Kalyana Mandapam Assn Vs Union of India & Ors. (2004) 5 SCC 632
- iii. Imagic Creative (P) Ltd Vs CCT & Ors. (2008) 2 SCC 614
- iv. Association of Leasing and Financial Service Companies Vs Union of India (2011) 2 SCC 352
- v. M/s Valley Hotels and Resorts Vs CCT (2014) 74 VST 86 (Uttarakhand)
- vi. Indian Hotels and Restaurant Association Vs Union of India (2014) 71 VST 386 (Bombay)

3/

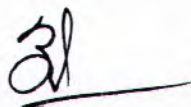
3

2/

vii. The Federation of Hotels Restaurant Association of India & Ors. Vs Union of India. (2016) 94 VST 500 (Delhi)

In light of the above, he submits that the State does not have powers to levy VAT on the service tax as charged on supply of food and beverages by restaurants and hotels.

5. Learned Deputy Government Advocate Shri D.P. Ojha submits that as per definition of the term 'sale price', all the statutory levies and duties are included in it, therefore, the service tax if charged in the invoice, shall constitute part of the sale price. Shri Jameel Zai, DGA submits that the powers of the States to levy tax on supply of food and beverages has emphatically been upheld by the Hon'ble Supreme Court, therefore, any statutory levy be it service tax or any other tax by whatever name called, shall form part of the sale price and hence taxable under the RVAT Act.
6. Apart from the learned authorized representative for the assessee and the learned Deputy Government Advocates, the *amicus curie* Shri V.C. Sogani, Shri O.P. Dosaya, Shri V.K. Pareek and Shri V.K. Garg, P.M. Chopra, Shyam Pareek and S.K. Asopa Advocates/Tax practitioners also appeared to assist the Court and made their submissions too. They were in unison to argue that the State does not have power to levy VAT on service tax component because the service tax as levied on services rendered by the assessee and the levy of tax on services is exclusive domain of the Union. They further argued that the constitutional arrangement as well as the various judicial pronouncements leaves no ambiguity regarding the issue at hand that the VAT cannot be levied on service tax.
7. We have carefully heard the learned counsel for the appellants, learned Deputy Government Advocates and the *amicus curies*, and also gone through the judgments of the Hon'ble Courts. The question for consideration before us relates to as to whether





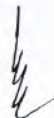


the service tax charged by the assessee in the invoices for supply of food and beverages would be treated as part of the sale price for the purpose of levy of VAT, or not ?

8. For this, we have to first look at the relevant provisions as enshrined in the Constitution as well as the State Tax Law.

Legal Background and Legislative History of the provisions relating to the 46th amendment to the Constitution:

9. Before the 46th amendment to the Constitution, several judgments by the Hon'ble Supreme Court had come and those negated powers of the States to levy tax on works contract as well as the food served in the hotels. In the case of State of Madras V/s Gannon Dunkerley : AIR 1958 SC 560, the Hon'ble Supreme Court held that where there is a contract involving sale of material and provisions of labour which could not be separated, it would not fall within the definition of sale goods since there was no supply of materials. It was held that the State Government would not have legislative competence to levy tax on such transaction.
10. Similarly, on the issue of supply of food and drinks in a hotel and levy of sales tax thereon, the Hon'ble Supreme Court in the case of State of Himachal Pradesh Vs Associated Hotels of India Ltd. (1972) 1 SCC 472, while considering a situation where hotels were providing to their guests both accommodation and food which was served at fixed hours without there being no separate charge for the food, held this to be a composite contract which could not be split up and taxed as one for sale of goods and another or service in the absence of any intention to separately sell the food. The transaction was, therefore, held to be outside the purview of the State sales tax.
11. The issue was re-visited by the Hon'ble Supreme Court in **Northern India Caterers (India) Ltd. v. Lt. Governor of Delhi**

 5

(1980) 2 SCC 163. The Supreme Court examined whether under the Bengal Finance Sales Tax Act, 1941 the supply of food in a restaurant was exigible to tax as a sale. The Supreme Court followed the earlier decision in State of Himachal Pradesh v. Associated Hotels of India Ltd. (supra) and held that the true essence of the transaction was service and did not involve a transfer of the general property in the food supplied. While disposing off the review petition in this case, the Hon'ble Supreme Court clarified that where food was supplied in an eating house or a restaurant and it is established upon the facts that the substance of the transaction, evidenced by its dominant object, was the sale of food and the rendering of services was merely incidental, the transactions would be exigible to sales tax.

12. To address the problem arisen out of the abovementioned judgments, the Constitution was amended through the Constitution (46th Amendment) Act, 1982. Looking into the above legal background it will be useful to peruse the Statement of Objection and Reasons (SOR) for the 46th Amendment. Para 8 & 9 of the said SOR are reproduced hereunder:

"8. Besides the above mentioned matters, a new problem has arisen as a result of the decision of the Supreme Court in Northern India Caterers (India) Ltd. v. Lt. Governor of Delhi (AIR 1978 SC 1591). States have been proceeding on the basis that the Associated Hotels of India case was applicable only to supply of food or drink by a hotelier to a person lodged in the hotel and that tax was leviable on the sale of foodstuffs by a restaurant. But over-ruling the decision of the Delhi High Court, the Supreme Court has held in the above case that service of meals whether in a hotel or restaurant does not constitute a sale of food for the purpose of levy of sales tax but must be regarded as the rendering of a service in the satisfaction of a human need or ministering to the bodily want of human beings. It would not make any difference whether the

31

6

115

visitor to the restaurant is charged for the meal as a whole or according to each dish separately.

9. It is, therefore, proposed to suitably amend the Constitution to include in article 366 a definition of "tax on the sale or purchase of goods" by inserting a new clause (29A)..."

13. Importantly, in para 13 of the SOR to the 46th Constitution (Amendment) Act, it has been mentioned that the "proposed amendments would help in the augmentation of the State revenues to a considerable extent." The focus was on ensuring that State sales tax was leviable on supply of food and drinks even where it was as a part of a composite catering contract, hitherto declined by the Hon'ble Supreme Court in the aforesaid judgments. This was the year 1982 and service tax was not thought of till a decade later. Therefore, it is difficult to imagine that Parliament had in 1982 at the time of the 46th Amendment, consciously decided if in future any portion of the composite contract of a catering contract would at all be amenable to levy of Union service tax or not.
14. By the Constitution (Forty-Sixth Amendment) Act, 1982, Clause (29A) was inserted in Article 366 and the same reads as under:

"(29A) "tax on the sale or purchase of goods" includes-

- (a) a tax on the transfer, otherwise than in pursuance of a contract, of property in any goods for cash, deferred payment or other valuable consideration;
- (b) a tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract;
- (c) a tax on the delivery of goods on hire-purchase or any system of payment by instalments;
- (d) a tax on the transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;
- (e) a tax on the supply of goods by any unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration;

31

7

Ab-s

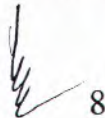
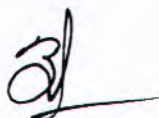
- (f) a tax on the supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (whether or not intoxicating), where such supply or service, is for cash, deferred payment or other valuable consideration;

and such transfer, delivery or supply of any goods shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply and a purchase of those goods by the person to whom such transfer, delivery or supply is made."

15. Consistent with the above provisions, the State legislature has incorporated similar definition in the statute enabling levy of tax on the sale of food and beverages. The relevant definition of the term 'sale' as given in Section 2(35) of the Rajasthan Value Added Tax Act, 2003, is reproduced hereunder:

"(35) "sale" with all its grammatical variations and cognate expressions means every transfer of property in goods by one person to another for cash, deferred payment or other valuable consideration and includes—

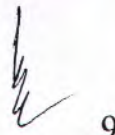

- (i) a transfer, otherwise than in pursuance of a contract, of property in goods for cash, deferred payment or other valuable consideration;
- (ii) a transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract;
- (iii) any delivery of goods on hire—purchase or other system of payment by instalments;
- (iv) a transfer of the right to use goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;
- (v) a supply of goods by an unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration; and
- (vi) 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 (whether or not intoxicating), where such supply is for cash, deferred payment or other valuable consideration, and such transfer, delivery or supply

 8

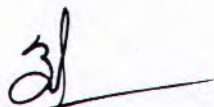
shall be deemed to be a sale and the word "purchase" or "buy" shall be construed accordingly;

Explanation.— Notwithstanding anything contained in this Act, where any goods are sold in packing, the packing material in such case shall be deemed to have been sold with the goods;"

16. The learned counsel for the assessee has referred several judgments and those are discussed here briefly. In the case of **Hotel East Park and Anr. Vs Union of India & Ors. (2015) 49 GST 123 (Chhattisgarh)**, the issue before the Hon'ble Chattisgarh High Court was: whether any service tax can be charged on a sale of food and drinks; whether the service is subsumed in sale of food and drinks in view of the Article 366 (29A)(f); and whether section 66E(i) of the Finance Act, 1994 is violative of Article 366 (29A)(f) of the Constitution.
17. In **Tamilnadu Kalyana Mandapam Assn. v. Union of India, (2004) 5 SCC 632** the Supreme Court was considering whether the imposition of service tax on the services rendered by the mandap-keepers was intra vires the Constitution.
18. In the case of **Imagic Creative Pvt. Ltd. (2008) 2 SCC 614**, the appellant was providing advertisement services and created original concept and design advertising material for their clients and design brochures, annual reports etc. the Hon'ble Supreme Court held that Payments of service tax as also the VAT are mutually exclusive. therefore, they should be held to be applicable having regard to the respective parameters of service tax and the sales tax as envisaged in a composite contract as contradistinguished from an indivisible contract. It may consist of different elements providing for attracting different nature of levy. It is, therefore, difficult to hold that in a case of this nature, sales tax would be payable on the value of the entire contract; irrespective of the element of service provided.



19. In **Association of Leasing & Financial Service Companies (2011) 2 SCC 352**, the Supreme Court has considered the scope of Article 366(29-A) of the Constitution of India and had formed an opinion that the first limb of the said Article says that the tax on sale or purchase of goods includes a tax on transactions specified in sub-clauses (a) to (f). It was also found that the said Article is brought in to expand the tax base which stood narrowed down because of certain judgments of the Court. The deemed sale is therefore brought into effect as a concept in the constitutional definition.
20. In the matter of **Valley Hotel and Resorts v. CCT (2014) 74 VST 86 (UKD)**, the Hon'ble Uttarakhand High Court has held that where element of service so declared and brought under the service tax vide Government of India notification dated 06.06.2012, no Value Added Tax can be imposed thereon.
21. In the case of **Indian Hotels and Restaurant Association Vs Union of India (2014) 71 VST 386 (Bombay)**, the issue for consideration of the Hon'ble Bombay High Court related to Restaurant service and the Petitioners challenged levy of service tax on restaurant service, by seeking to declare clause (zzzzv) of section 65(105) of the Finance Act, 2010 as ultra vires the Constitution of India. The Hon'ble Bombay High Court held that the tax on sale of goods involved in the said service can be levied, does not mean that the service tax cannot be levied on the service aspect of catering. With respect, this means that when a restaurant renders to any person a service, the tax on sale of goods involved in the said service can be levied. That does not mean that a service tax cannot be levied on the act of serving food at a restaurant. That is the tax in this case imposed by the Parliament. There could be a sale during the course of rendering of service at a restaurant and therefore, a sales tax could be imposed by the State Legislature. So long as there is no



prohibition against imposition of service tax on the services rendered, then it must be held that the Parliament is competent to impose a service tax in question.

22. In regard to the judgment in **Federation of Hotel & Restaurant Assn. of India (2016) 94 VST 500 (Delhi)**, it related to the constitutional validity of Section 65 (105) (zzzzv) of the Finance Act, 1994 whereby the provision to any person by a restaurant, by having the facility of air-conditioning in any part of its establishment serving food or beverage, including alcoholic beverages or both, in its premises was made amenable to service tax. Also under challenge was the constitutional validity of Section 65 (105) (zzzzw) of the Finance Act whereby the provision by a hotel, inn, guest house, club or camp-site by whatever name called to any provision, accommodation for a continuous period of less than three months was made amenable to service tax.
23. It is important to note that in many of the above judgments, the issue under challenge was the imposition of service tax on food and beverages items served in hotels and restaurants. The issue of levy of Sales Tax on these items was elaborately and exclusively dealt in by the Constitution Bench of the Hon'ble Supreme Court in the case of **M/s. K. Damodarasamy Naidu & Bros. Vs. The State of Tamil Nadu & Anr. [2000] 117 STC 1 (SC)** and the Hon'ble Supreme Court has categorically held that the state tax is leviable on the supply of food or drink and it is not of relevance that the supply is by way of a service or as part of a service and that restaurant owner must be taxed on full amount of the goods so supplied. It has been held that when the tax is on supply of food and drink, it is not of relevance that the supply is by way of service or as part of a service. The price that the customer pays for the supply of food in restaurant cannot be split up though it may be a part of the service that he renders.

31

11

26

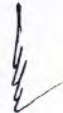
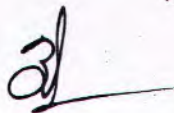
The Supreme Court has considered the impact of the words of sub-clause (f) of Clause (29A) of Article 366 in that judgment.

24. The relevant para of this judgments is reproduced hereunder:

"9. The provisions of Sub-clause (f) of Clause (29A) of Article 366 need to be analysed. Sub-clause (f) permits the States to impose a tax on the supply of food and drink. The supply can be by way of a service or as part of a service or it can be in any other manner whatsoever. The supply or service can be for cash or deferred payment or other valuable consideration. The words of Sub-clause (i) have found place in the Sales Tax Acts of most States and, as we have seen, they have been used in the said Tamil Nadu Act. The tax, therefore, is on the supply of food or drink and it is not of relevance that the supply is by way of a service or as part of a service. In our view, therefore, the price that the customer pays for the supply of food in a restaurant cannot be split up as suggested by learned Counsel. The supply of 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 and a floor show, is what is the subject of the levy. The patron of a fancy restaurant who orders a plate of cheese sandwiches whose price is shown to be Rs. 50 on the bill of fare knows very well that the innate cost of the bread, butter, mustard and cheese in the plate is very much less, but he orders it all the same. He pays Rs. 50 for its supply and it is on Rs. 50 that the restaurant owner must be taxed."

25. The Hon'ble Kerala High Court in the matter of **Kerala Classified Hotels and Resorts Association Vs. Union of India (2013) 64 VST 462 (Ker)** has followed the above mentioned judgment of the Constitution Bench of the Hon'ble Supreme Court and held as under:

"19. Therefore it can be seen from Article 366(29-A)(f) that service is also included in the sale of goods. If the constitution permits sale of goods during service as taxable necessarily Entry 54 has to be read, giving the meaning of sale of goods as stated in the Constitution. If read in that fashion, necessarily service forms part of sale of goods and State Government alone will have the legislative competence to enact the law imposing a tax on the service element forming part of sale of goods as well, which they have apparently imposed. I am supported to take



this view in the light of the Constitution Bench judgment in K. Damodarasamy Naidu (supra)."

26. On careful consideration and study with utmost respect, of the aforesaid judgments of the Hon'ble Supreme Court as well as various Hon'ble High Courts, we find that the judgment of the Constitution bench of the Hon'ble Supreme Court in the case of **K. Damodarasamy Naidu (supra)** and that of the Hon'ble Kerala High Court in the matter of **Kerala Classified Hotels and Resorts Association Vs. Union of India (supra)** have elaborately dealt the issue of taxation powers of the states on supply of the food and beverages in a restaurant or hotel, and that too in favour of the States. Since the present issue before us is only incidental or ancillary to the main issue, therefore, these two judgments are followed and relied upon by us.
27. So, after the judgment of **K. Damodarasamy Naidu & Bros (supra)**, this issue stands confirmed that the States are empowered to levy tax on whole consideration of food and beverages as served to its customers. Now the question before us to decide is, as to whether the service tax as charged in the invoices of food and beverages supplied by the assessee would form part of the sale price or not. In this regard, the definition of the term 'sale price' as given under Section 2(36) of the RVAT Act leaves no ambiguity, whatsoever, regarding inclusion of any statutory levy in the sale price. For ready reference the said definition is as under:

(36) "sale price" means the amount paid or payable to a dealer as consideration for the sale of any goods less any sum allowed by way of any kind of discount or rebate according to the practice normally prevailing in the trade, but inclusive of any statutory levy or any sum charged for anything done by the dealer in respect of the goods or services rendered at the time of or before the delivery thereof, except the tax imposed under this Act;

Explanation I. – In the case of a sale by hire purchase agreement, the prevailing market price of the goods on



the date on which such goods are delivered to the buyer under such agreement, shall be deemed to be the sale price of such goods;

Explanation II. – Cash or trade discount at the time of sale as evident from the invoice shall be excluded from the sale price but any ex post facto grant of discounts or incentives or rebates or rewards and the like shall not be excluded;

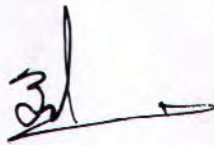
Explanation III. – Where according to the terms of a contract, the cost of freight and other expenses in respect of the transportation of goods are incurred by the dealer for or on behalf of the buyer, such cost of freight and other expenses shall not be included in the sale price, if charged separately in the invoice;"

28. Since the main issue relating to taxing of the service component in supply of food and beverages under the State law has been emphatically decided by the Hon'ble Supreme Court in favour of the States by the judgment in **K. Damodarasamy Naidu's case**, so that issue is no more *res-integra*. The issue at hand is essentially an incidental and ancillary to the main issue as decided in K. Damodarasamy Naidu's case, therefore, in light of the specific provision as contained in the definition of 'sale price' any statutory levy, which by natural corollary includes service tax as well, shall constitute a part of the sale price.
29. In light of the above discussion, we are of the considered view that since the VAT is leviable on whole value the food and beverages as supplied by the assessee and the definition of 'sale price' includes any statutory levy or any sum charged for anything done by the dealer in respect of the goods or services rendered at the time of or before the delivery thereof, except the tax imposed under the RVAT Act, therefore, the service tax as charged for supply of food and beverages, shall be covered under the definition of 'sale price' and resultantly exigible to VAT.

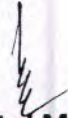


Findings

30. In light of the legal position as discussed and described above, the reference to the Larger Bench is answered as follows:
- i) the service tax as charged for supply of food and beverages shall constitute a part of the sale price and the Value Added Tax (VAT) is leviable on the value of the food and beverages including the service tax.
 - ii) Accordingly, it is held that decision of the learned Single Bench of the Tax Board in Appeal No. 2399-2401/2012/Jodhpur: M/s Marudhar Hotel Pvt. Ltd. Vs Assistant Commissioner, order dated 25.07.2017, has not laid down a correct law.
31. The question as referred by the learned Single Bench is answered as above and the appeals are sent back to the learned Single Bench with the above decision, for disposal of the same.
32. Order pronounced.



(Omkar Singh Ashiya)
Member



(Madan Lal Malviya)
Member



(V. Srinivas)
Chairman