

**2014 (2) ECS (83) (HC - Chhattisgarh)**

**In the High Court of Chhattisgarh at Bilaspur**

**M/s. HOTEL EAST PARK & ANOTHER**

**VS**

**UNION OF INDIA & OTHERS.**

**Date of decision: 06.05.2014**

Writ Petition (T) No. 95 of 2013

Writ Petition under Article 226 of the Constitution of India

Appearance:

Shri Shashank Dubey, Senior Advocate with

Shri AnandMohan Tiwari, Advocate

For the petitioners.

Smt. Fouzia Mirza, Assistant Solicitor General

Shri Maneesh Sharma, Advocate

Shri UNS Deo, Government Advocate

For the respondent

**CORAM**

Hon'ble Shri Yatindra Singh, C.J.

Hon'ble Shri Prashant Kumar Mishra, J.

**The objects and reasons as well as historical background of Article 366 (29A) (f) of the Constitution show that the intention behind substituting this sub-article was to separate the value of sale of food and drinks from the service part. It was neither the intention that the service part should be subsumed in the definition of sale nor interpretation of Article 366(29A) (f) leads to this conclusion. (Para 23)**

**Article 366 (29A)(f) separates sale of food and drinks from service part but difficult part is how much is the service part and how much is the sale part. This is explained under rule 2C of the Rules, read with notification dated 20.06.2012 (the Notification). (Para 33)**

**Rule 2C of the Rules clarifies that in case of a restaurant, service is presumed to be 40% of the bill value and in case of out door catering, it is presumed to be 60% of the bill value. It shows that the value of the food is taken to be 60% of the bill in the case of restaurant and 40% of the bill in case of catering service. (Para 37)**

**In our opinion, section 66E (i) of the Finance Act, 1994 [Statutory Provisions Relating to Service Tax] is valid. (Para 44)**

## ORDER

1. The main point involved in this writ petition relates to the validity of section 66E(i) of the Finance Act, 1994 [Statutory Provisions Relating to Service Tax] (the 1994-Act).

### THE FACTS

2. M/s. Hotel East Park (the Petitioner) is a well known hotel of Bilaspur. It has normal facilities provided in a hotel including an air-conditioned, restaurant and a bar. They cater not only to the persons staying in the hotel but to the outsiders as well.
3. The Central Excise Department (the Department) charges service tax of 40% on the bill value of the food and drinks. This is done in view of section 66E (i) of the 1994-Act read with rule 2C of the Service Tax (Determination of Value) Rules, 2006 (the Rules).
4. The Petitioner has filed this writ petition challenging the vires of section 66E(i) of 1994-Act.

### POINTS FOR DETERMINATION

5. We have heard counsel for the parties. The following points arise for determination in the case:
  - (i) Whether any service tax can be charged on a sale of an item or vice versa;
  - (ii) Whether in view of Article 366 (29A)(f) service is subsumed in sale of food and drinks;
  - (iii) Whether section 66E(i) of the 1994-Act is violative of Article 366 (29A)(f) of the Constitution.

#### **1 st POINT: NO SERVICE TAX ON SALE AND VICE VERSA**

6. In our country, sales tax laws were enacted for the first time in pursuance of the Government of India Act, 1935. Subsequently, when the constitution came into force, it had two entries in the VII Schedule that were relevant for the tax on sale and purchase: one was entry 92 of List-I (Union-List) and the other was entry 54 of List-III (State-List).
7. Constitution (Sixth Amendment) Act, 1956 inserted entry No. 92A in List-I and also substituted entry 54. At present, these entries are as follows:

#### **List-I**

92. Taxes on the sale or purchase of newspapers and on advertisements published therein.

92A. Taxes on the sale or purchase of goods other than newspapers, where such sale or purchase takes place in the course of inter-State trade or commerce.

### List-II

54. Taxes on the sale or purchase of goods other than newspapers, subject to the provisions of entry 92A of List-I.

8. A tax on the sale or purchase of goods other than the newspapers is within the domain of State. The Parliament has no legislative competence to enact a law or to impose tax on such a sale or purchase of items.
9. The value added tax is a tax on the sale and purchase of the goods. It is within the legislative competence of the State. The Value Added Tax Act, 2005 (the VAT-Act) has been enacted in pursuance of entry 54 of List-II (State-List).
10. The Parliament has legislative competence to impose a tax on the sale and purchase of the newspapers only and not on other goods sold within a State. It does not have legislative competence to impose tax on sale of food and drinks sold within a State.
11. There is no entry in any list under which the service tax can be imposed. Entry 97 of List-I is residuary entry. It is as follows:

97. Any other matter not enumerated in List -II or List-III including any tax not mentioned in either of those Lists.

The 1994-Act imposing service tax has been enacted by the Parliament under this residuary entry.

12. It is clear that:
  - A tax on the sale and purchase of food and drinks within a State is in exclusive domain of the State. The Parliament cannot impose a tax upon the same. Similarly, there is no entry in List II or List III under which service tax can be imposed. There is no legislative competence with the States to impose a tax on any service;
  - The Parliament cannot impose tax on sale and purchase within a State (except on newspapers). Similarly State cannot tax a service.

### 2 nd & 3 rd POINTS: SECTION 6 6 E (i) INTRA VIRES

13. The counsel for the Petitioner relies upon K. Damodarsamy Naidu & Bros. v. State of T.N. & Others {(2000) 1 SCC 521} (the Damodarsamy case) and submits that:

- In view of Article 366(29A)(f) of the Constitution, the service element in serving food and drinks in a restaurant is subsumed in the sale;
  - The sale of food and the drinks inside the restaurant is deemed to be the sale within the meaning of Article 366(29A)(f) of the Constitution of India;
  - The Parliament has no legislative competence to enact a law to tax sale of food and drinks.
14. Article 366 of the Constitution is titled as 'Definitions'. Its sub-article (29A) was inserted by 46th Amendment. Article 366(29A) of the Constitution is titled as 'tax on the sale or purchase of goods'. The relevant part of article 366 is as follows:

Article 366. In this Constitution, unless the context otherwise requires, the following expressions have the meanings hereby respectively assigned to them, that is to say-

...

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

(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. In order to understand its implication it is necessary to see its historical background in which it was inserted.

### **Historical Background**

15. It was thought that the court would give wider meaning to entry 92, 92-A of List-I and entry 54 of List-II. However, they were interpreted narrowly.
16. In the State of Himachal Pradesh Vs. M/s Associated Hotels of India Limited [A.I.R. 1972 S.C. 1131] (the Associated-Hotel case), the Supreme Court held that the supply of food to a person staying in the hotel is part of service. It was extended in Northern India Caterers (India) Ltd. v. Lt. Governor of Delhi [AIR 1980 SC 674: (1980) 2 SCC 163] (the Northern Caterers case).
17. In Northern-Caterers case, the supply of food in a high class restaurant was held to be a part of the service.
18. The result of the aforesaid decisions was that no sales tax could be charged on sale of food and drinks to the person staying in a hotel or in a high class restaurant as it was held to be a part of service.
19. A review petition was filed in the Northern-Caterers case but it was

dismissed. This order is reported in Northern India Caterers (India) Ltd. v. Lt. Governor of Delhi AIR 1980 SC 674: (1980) 2 SCC 163.

20. The government referred the matter to the Law Commission of India, which considered it in its Sixty-First Report and recommended for certain amendments. Thereafter, sub-article 29A was inserted in the Article 366.
21. The entire idea of inserting of Article 366(29A)(f) was to bifurcate sale of the food or drinks from the service part as interpreted by the Supreme Court, that is to say that by amending the Constitution, the supply of food or drinks to a person in a hotel or in a restaurant has been bifurcated into two parts, namely, service part and sale of goods. This is also clear from the wordings of Article 366(29A)(f) of the Constitution.
22. The difficulties and the reasons for inserting Article 366 (29A) have been succinctly pointed out in the statements of objects and reasons of the 46th Amendment. The relevant part of the same is mentioned in Appendix -I .
23. The objects and reasons as well as historical background of Article 366 (29A) (f) of the Constitution show that the intention behind substituting this sub-article was to separate the value of sale of food and drinks from the service part. It was neither the intention that the service part should be subsumed in the definition of sale nor interpretation of Article 366(29A) (f) leads to this conclusion.
24. The relevant part of Article 366(29A)(f) of the Constitution, is as follows:  

‘tax on the sale or purchase of goods’ includes a tax on the supply, by way of or as part of any service... of... food... for human consumption... where such supply or service, is for cash ...’

This itself shows that the sales tax is on supply of food or on drinks only and not on the service part thereof.
25. The issue involved in the Damodarsamy case related to power of the State to levy tax on the food or drinks. The court after referring to insertion of article 366 (29A) held that by reason of that amendment, the States were entitled to levy tax on the supply of food and drinks. This case is not relevant on the question whether the Parliament can impose service tax on the service element of the sale or not.
26. The case of T.N.Kalyan Mandapan Assn. v. Union of India & Others {AIR 2004 SC 3757: (2004) 5 SCC 632} (the Kalyan-Mandapan case) is relevant to the case in hand. In this case, the validity of sections 6, 67(o) of the Finance Act, 1994 and Rule 2(1)(d)(ix) of the Service Tax Rules, 1994 have been upheld. The court says, ‘In regard to the

submission made on Article 366 (29-A)(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 include the supply of 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 are 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.' This is also clear from the 1994-Act.

27. Section 66E is titled as Declared Services. The relevant part of the same is as follows:

'66E. Declared services.—The following shall constitute declared services,

Namely: — (i) Service portion in an activity wherein goods, being food or any other article of human consumption or any drink (whether or not intoxicating) is supplied in any manner as a part of the activity.'
28. Section 65B (44) of the 1994-Act defines the word 'service'. The relevant part of the same is as follows:

'(44) "Service" means any activity carried out by a person for another for consideration, and includes a declared service, but shall not include —

(a) an activity which constitutes merely, —

...

(ii) such transfer, delivery or supply of goods which is deemed to be a sale within the meaning of clause (29A) of article 366 of the Constitution;'
29. Section 65B(44)(ii) of the 1994-Act shows that supply of goods that is deemed to be sale under Article 366(29A) is not included in service.
30. We are afraid, Article 366(29A)(f) of the Constitution does not indicate that the service part is subsumed in the sale of the food; it rather separates sale of food and drinks from service.
31. Section 65B (44) as well Section 66E(i) only charges service tax on the service part and not on the sale part. It indicates that the sale of the food has been taken out from the service part as was interpreted by the Supreme Court in the Associated-Hotel case and the Northern-Caterers case.

32. In our opinion, section 66E(i) of Chapter-5 of the relating to service tax of the Finance Act, 1994 [Statutory Provisions Relating to Service Tax] is intra vires the Constitution.

### RECOMMENDATIONS

33. Article 366 (29A)(f) separates sale of food and drinks from service part but difficult part is how much is the service part and how much is the sale part. This is explained under rule 2C of the Rules, read with notification dated 20.06.2012 (the Notification).
34. Section 93 is titled as 'Power to grant exemption from service'. It empowers the Central Government exempt whole or part of the service tax in public interest. The Notification has been issued in pursuance of the power conferred under this section.
35. The Notification exempt, the taxable services from whole of the service tax leviable upon them. Clause 19 of the Notification is as follows:
- '19. Services provided in relation to serving of food or beverages by a restaurant, eating joint or a mess, other than those having (I) the facility of air-conditioning or central air-heating in any part of the establishment, at any time during the year, and (ii) a licence to serve alcoholic beverages.'
36. Clause 19 of the Notification exempts the service tax in serving food or beverages by the restaurants other than the air-conditioned restaurant or having licence to serve alcoholic beverages ei service tax is levied only in those restaurants that have air-conditioning or licence to serve alcoholic beverages.
37. Rule 2C of the Rules clarifies that in case of a restaurant, service is presumed to be 40% of the bill value and in case of out door catering, it is presumed to be 60% of the bill value. It shows that the value of the food is taken to be 60% of the bill in the case of restaurant and 40% of the bill in case of catering service.

### Difficulties

38. We have some reservations about the rule in quantifying fixed sum towards service and its functioning in the restaurant, and with the tax authorities under the VAT-Act.
39. Sale tax is being charged under the VAT-Act and is known as VAT. Generally, the hotel and restaurant owners charge service tax on 40% or 60% of the bill amount and charge VAT on the bill amount. The 40% or 60% over which service tax has been charged, cannot be subject to VAT. One does not know why they do it but it is possible that this might be resorted to, as the Commercial Tax authorities

might be taking the value of the food and drinks to be the bill value. This is not proper.

40. As we have already held that no VAT can be charged over the amount meant for service. It will be open to the Petitioner to object the same before the VAT authorities. However, there should be coordination between the State and the Central Government authorities. The amount over which service tax has been charged should not be subject to VAT.
41. There is no provision in the VAT-Act to bifurcate the amount. The State Government will do well to frame such rules to this effect. These rules may be in conformity with the bifurcation as provided under the 1994-Act or ensure that the Commercial Tax authorities do not charge VAT on that part of the value of the food and drink on which the service tax is being assessed.
42. The restaurant and caterer are also normally charging VAT on the bill value. This is not proper. They may charge service tax on 40% or 60% as the case may be of the bill value and charge VAT at the rate of 60% or 40% of the bill value, but not on the entire bill value.
43. The State Government will be well advised to issue a clarification/direction in this regard and will ensure that the consumers are not unnecessarily doubly taxed over the same amount.

## CONCLUSION

44. In our opinion, section 66E (i) of the Finance Act, 1994 [Statutory Provisions Relating to Service Tax] is valid.
45. The writ petition is dismissed with the observations mentioned under heading 'RECOMMENDATIONS'.

**CHIEF JUSTICE**

**JUDGE**

## APPENDIX -I

The relevant part of objects and reasons for enacting 46 th Constitutional amendment is as follows:

'As a result of these decisions, a transaction, in order to be subject to the levy of sales tax under entry 92A of the Union List or entry 54 of the State List, should have the following ingredients, namely, parties competent to contract, mutual assent and transfer of property in goods from one of the parties to the contract to the other party thereto for a price.

This position has resulted in scope for avoidance of tax in various ways... In the [State of Himachal Pradesh Vs. M/s Associated Hotels of India Limited] (A.I.R. 1972 S.C. 1131) [the Associated-Hotel case], the Supreme Court held that there is no sale involved in the supply of food or drink by a hotelier to a person lodged in the hotel.



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. Vs. Lt. Governor of Delhi (A.I.R. 1978 S.C. 1591) [the Northern-Caterers case]. 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 visitor to the restaurant is charged for the meal as a whole or according to each dish separately. 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). The definition would specifically include within the scope of that expression tax on-

(vi) the supply, by way of or as part of any service, of food or any drink for cash, deferred payment or other valuable consideration...'