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MOULIN ROUGE PVT. LTD.

v

THE COMMERCIAL TAX OFFICER AND ORS.

NOVEMBER 12, 1997

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[S.P. BHARUCHA AND SUHAS C. SEN, JJ.]

Sales Tax :

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Bengal Finance (Sales Tax) Act, 1941 :

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Sections 2(g) (iii) and 26A—Restaurant—Food and drinks served along with other services—Tax not charged separately from customers for food and drinks—No liability to pay sales tax on it—Commercial tax officer—Imposition of sales tax and penalty—Tribunal holding that appellant entitled to tax exemption from September 7, 1978 till the amendment of the Act—On appeal, held legislature has made a valid classification for the purpose of granting exemption—Appellant's case falls under clause (a) of sub-section (2) of section 26A of the Act—Thus entitled to exemption from 7th September, 1978 till the amendment of the Act.

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Clauses (a) and (b) of sub-section (2) of section 26A—Distinction made between restaurants and hotels by granting different period of exemption on sales tax—Reliance based on two different judgments of this Court—Validity of—Held, classification based on an intelligible and rational basis—Thus a valid classification.

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Constitution of India, 1950 : Bengal Finance (Sales Tax) Act, 1941—Section 26A—Held, not violative of Constitution.

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The appellant-company was running a restaurant which, apart from food and drinks, provided to its customers various services and amenities. The case of the appellants was that in view of the judgment in *Associated Hotels Ltd. decided on 4th January, 1972 it had no liability to pay or to collect any sales tax on the food and drinks supplied by it as these were not separately charged for but were included in the bills for various services and amenities provided to its customers. However, the Commercial Tax Officer passed an ex-parte, best judgment assessment imposing sales tax and penalty on the appellant. On failure to pay the sales tax as demanded, a certificate**

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case was started.

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In *Northern India** case decided on September 7, 1978 restaurants and eating houses were granted exemption from payment of sales tax on food served by them. Thus by the two judgments of this Court restaurants and hotels were exempted from payment of sales tax on the food and drinks served by them. To retrieve the situation arising out of the said judgments, amendments were made in Article 366 of the Constitution and sub-clause 29A was inserted in the definition of "tax on the sale or purchase of goods". Consequently the definition of "sale" in section 2(g)(iii) of the Bengal Finance (Sales Tax) Act, 1941 was amended and section 26A was inserted.

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The appellant approached the High Court alleging that it was not liable to pay sales tax on the food served to its customers. The High Court passed an order of injunction restraining the Sales Tax Officer from proceeding with the aforesaid certificate cases. On transfer, the Taxation Tribunal while dismissing the petition held that the appellant's case falls under clause (a) of sub-section (2) of section 26A of the Act and it was thus entitled to tax exemption from September 7, 1978 till the amendment of the Act. Being aggrieved by the order of Tribunal, the appellant has preferred the present appeal.

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The contention of the appellant was that section 26A of the Act has made an invidious and irrational distinction between supply of food by a restaurant in clause (a) and supply of food by any other body in clause (b) for grant of sales tax exemption.

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Dismissing the appeal, this Court

HELD : 1.1. The legislature has made a valid classification for the purpose of granting exemption to hotels and to restaurants from payment of sales tax for food supplied by them on the basis of the judgments of this Court. [130-A]

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**State of Punjab v. Association Hotels of India Ltd.*, [1972] 1 SCC 472 and *Northern India Caterers (India) Ltd., v. Lt. Governor of Delhi*, [1978] 4 SCC 36, referred to.

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1.2. Sale of foodstuffs by a restaurant to its customers was dealt with in the case of *Northern India Caterers (India) Ltd.* where the judgment was pronounced on September 7, 1978. The exemption in clause (a) of Section 26A (2) to the restaurants or the eating houses has been given from the date

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A of that judgment. When Section 26A validated the levy of tax with retrospective effect the legislature took care to ensure that the persons who had not collected tax on the basis of the aforesaid two decisions of this Court will not be burdened with tax with retrospective effect. Restaurants and eating houses were granted exemption from the date of the judgment in *Northern India Caterers (India) Ltd.* case i.e. September 7, 1978. Others were granted exemption on and from 4th January 1972 i.e. the date of the judgment in the case of *M/s Associated Hotels of India Ltd.* The classification has been based on an intelligible basis. There is no irrationality about it. The same principle may have been followed in both the judgments but the two judgments dealt with two different classes of assesseees. [129-C-F]

C 2. The question of constitutional validity of section 26A of the Bengal Finance (Sales Tax) Act, 1941 was not raised before the tribunal and cannot be agitated in appeal against the order of the tribunal. In any event the allegation that an invidious and irrational distinction has been made between a hotel and a restaurant is without any merit. [128-G; 129-A]

D 3. The retrospective operation of the Act is bound to affect many tax payers prejudicially in many different ways. But that will not make the provision unconstitutional. [129-G]

E CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2340 (NT) of 1992.

From the Judgment and Order dated 12.6.91 of the West Bengal Taxation Tribunal in Case No. RN 33(T) of 1990.

S.B. Sanyal and B.B. Singh for the Appellant.

F N. Santosh Hegde, J.R. Das, D.K. Singh and D. Krishnan for M/s. Sinha & Das for the Respondents.

The Judgment of the Court was delivered by

G **SEN, J.** The appellant, Moulin Rouge, is a company registered under the Indian Companies Act. Its business consists of running a restaurant at 20, Park Street, Calcutta-16. Apart from food and drink, it provides the customers with various services and amenities. The restaurant is air-conditioned. It provides upholstered cushioned seating, subdued lighting and also music. High class crockery and cutlery are provided. The restaurant also employs highly trained stewards who are well dressed. Personal and prompt individual attention is given to the customers. The customers cannot

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take away any food from the restaurant for home consumption. Even unused or unconsumed portions of food and drink are not allowed to be taken away by the customers. There is no sale of any food or foodstuff across the counter. A

This Court in the case of *State of Punjab v. Associated Hotels of India Ltd.*, [1972] 1 SCC 472 held that a transaction between a hotelier and a visitor to a hotel was essentially of service. As part of the amenities incidental to that service, meals are provided in the hotel at stated hours. The Revenue was not entitled to split up the bills of the hoteliers on the ground that the bills included not only charges for lodging but also charges for foodstuff with a view to bring the latter under the province of Punjab General Sales Tax Act. C It is to be noted that the case dealt with the question of levy of sales tax on supply of food by a hotel to its residents.

The case of the appellant is that, on legal advice, and on the basis of the aforesaid judgment it did not collect any sales tax for food and drinks provided by it to its customers. The appellant had no liability to pay or to collect any sales tax on the food and drinks supplied by it as these were not separately charged for but were included in the bills for various services and amenities provided by it to its customers. However, on 26.4.78, the Commercial Tax Officer passed an ex-parte, best judgment assessment in respect of the four quarters ending on 31.3.74, 31.3.75, 31.3.76 and 31.3.77 imposing sales tax and penalty on the appellant. Since the appellant failed to pay the tax demanded, a certificate case was started. The appellant's case is that it is not liable to pay sales tax on food and drink sold by it in its restaurant. The principles laid down in the case of *Associated Hotels* (supra) apply in full force to its case. D E

The question of levability of food sold by a restaurant to its customers directly came up for consideration in the case of *Northern India Caterers (India) Ltd. v. Lt. Governor of Delhi*, [1978] 4 SCC 36 decided on September 7, 1978. That was a case under Bengal Finance (Sales Tax) Act., 1941 as extended to the Union Territory of Delhi. The question was whether the service of meals to casual visitors in the restaurant was taxable as a sale - G (a) when the charges were lump sum per meal or (b) when they were calculated per dish. It was held that the Revenue was not entitled to split up the transaction into two parts, one of service and the other of sale of foodstuffs. An approach similar to the case of the hotels was adopted. It was explained that the classical legal view was that when a number of services were H

- A concomitantly provided by way of hospitality, the supply of meals must be regarded as ministering to a bodily want or to the satisfaction of a human need. What the customer paid for included more than the price of the food as such. It included all that entered into the conception of service. It did not contemplate the transfer of the general property in the food supplied as a factor to the service rendered. It was ultimately held that the service of meals to visitors in the restaurant of the appellant was not sale of food and was not taxable under the Bengal Finance (Sales Tax) Act, 1941. The position would be the same whether a charge was imposed for the meal as a whole or according to the dishes separately ordered.
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- C As a result of these two judgments, food served by a hotelier to its boarder or by a restaurant to its customer could not be subjected to sales tax. The Legislature tried to retrieve the situation for the States by passing the Constitution (Forty-sixth Amendment) Act, 1982 by which sub-clause 29A was inserted in the definition of "tax on the sale or purchase of goods" by amending Article 366 of the Constitution. As a result of this amendment, tax on sale or purchase of goods was given an expanded meaning to include 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.
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- E Following the insertion of clause 29A in Article 366 of the Constitution, the Bengal Finance (Sales Tax) Act, 1941 was amended. The definition of "sale" in Section 2(g) (iii) was amended to include, *inter alia*, any 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 was for cash, deferred payment or other valuable consideration, and such delivery, transfer or supply of any goods was deemed to be a sale of those goods by the person making the delivery, transfer or supply and a purchase of those goods by the person to whom such delivery, transfer or supply was made. Section 26A was also inserted into the Act.
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- G "26A. *Validation and exemption* - (1) For the purposes of this Act, every transaction by way of supply of the nature referred to in sub-clause (ii) of clause (g) of section 2 shall be deemed to be, and shall be deemed always to have been, a transaction by way of sale, with respect to which the person making such supply is the seller and the person to whom such supply is made, is the purchaser; and
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notwithstanding any judgment, decree or order of any court, tribunal or authority, no imposition of tax on any such transaction before the coming into force of section 3 of the West Bengal Taxation Laws (Second Amendment) Act, 1983, shall be deemed to be invalid or ever to have been invalid, and accordingly-

(i) all the aforesaid taxes levied or collected or purporting to have been levied or collected under this Act shall be deemed always to have been validly levied or collected in accordance with this Act;

(ii) no suit or other proceeding shall be maintained or continued in any court or before any tribunal or authority for the refund of, and no enforcement shall be made by any court, tribunal or authority of any decree or order directing the refund of, any such tax which has been collected;

(iii) recoveries shall be made in accordance with the provisions of this Act of all amounts which would have been collected thereunder as tax as aforesaid if this section had been in force at all material times.

(2) Notwithstanding anything contained in sub-section (1), any supply of the nature referred to therein shall be exempted from the aforesaid tax -

(a) where such supply has been made, by any restaurant or eating house (by whatever name called), at any time on or after the 7th day of September, 1978 and before the commencement of Section 3 of the West Bengal Taxation Laws (Second Amendment) Act, 1983 and the aforesaid tax has not been collected on such supply on the ground that no such tax could have been levied or collected at that time; or

(b) where such supply, not being any such supply by any restaurant or eating house (by whatever name called), has been made at any time on or after the 4th day of January, 1972 and before the commencement of section 3 of the West Bengal Taxation Laws (Second Amendment) Act, 1983 and the aforesaid tax has not been collected on such supply on the ground that no such tax could have been levied or collected at that time :

Provided that the burden of proving that the aforesaid tax was not collected on any supply of the nature referred to in clause (a) or, as the case may be, clause (b) shall lie on the person claiming the

A exemption under this sub-section.”

B On 24.8.81, the appellant moved a writ petition under Article 226 of the Constitution alleging that it was not liable to pay sales tax in view of the aforesaid judgment of the Supreme Court in *Nothern India Caterers (India) Ltd.* (supra). The High Court issued a rule nisi on the writ petition and passed an order of injunction restraining the Sales Tax Officer from proceeding with the aforesaid certificate cases. The writ petition was ultimately transferred to the West Bengal Taxation Tribunal. The Tribunal following its decision in the case of *Nimai Chandra Guin v. Commercial Tax Officer, Manicktola & Ors.*, 75 STC 322 dismissed the writ petition in view of the amended definition of C “sale” given in section 2(g) of the Bengal Finance (Sales Tax) Act with retrospective effect. It was, however, pointed out by the tribunal that the petitioner's case came in clause (a) of sub-section (2) of Section 26A of the Act. Therefore, the petitioner was entitled to tax exemption from September 7, 1978 till the coming into force of Section 3 of the West Bengal Taxation Laws (Second Amendment) Act, 1983. However, in order to take advantage D of this provision, the petitioner must prove that it did not collect sales tax during the period in question.

E Mr. Sanyal, on behalf of the appellant, has contended that section 26A of the Bengal Act has made an artificial distinction between supply of food by a restaurant in clause (a) and supply of food by any other body by whatever name called in clause (b). In clause (a) restaurant or an eating house has been exempted from tax for food supplied on or after the 7th September, 1978 and before the commencement of Section 3 of the West Bengal Taxation Laws (Second Amendment) Act, 1983 provided no tax had been collected by the restaurant or the eating house from its customers. Clause (b) grants a F similar exemption to food supplied by a body other than a restaurant or an eating house for a longer period of time i.e. on or after the 4th January, 1972 to the commencement of Section 3 of the West Bengal Taxation Laws (Second Amendment) Act, 1983. Mr. Sanyal contends that an invidious distinction has been made in the period of exemption for a restaurant under clause (a) and G a hotel under clause (b) of Section 26A(2). According to Mr. Sanyal, there is no rational basis for this distinction as the underlying principle behind these two decisions was the same.

H This contention of Mr. Sanyal must fail for two reasons. The question of constitutional validity of Section 26A was not raised before the tribunal and cannot be agitated in appeal against the order of the tribunal. In any

event the allegation that an invidious and irrational distinction has been made between a hotel and restaurant is without any merit. The judgment in the case of *M/s. Associated Hotels of India Ltd.*, (supra) was delivered on 4th January, 1972. After this judgment, sales tax could not be levied by the Revenue nor collected by the hotel on sale of foodstuff when such sale constituted part of the services rendered by it to its residents. Therefore, even though the levy was validated retrospectively by Sub-section (1) of Section 26A, exemption from payment of tax on such sales was given by clause (b) of Sub-section (2) of Section 26A from the date of that judgment to the date of the passing of the Amendment Act.

Sale of foodstuffs by a restaurant to its customers was dealt with in the case of *Northern India Caterers (India) Ltd.*, (supra) where the judgment was pronounced on September 7, 1978. The exemption in clause (a) of Section 26A (2) to the restaurants or the eating houses has been given from the date of that judgment. When Section 26A validated the levy of tax with retrospective effect the legislature took care to ensure that the persons who had not collected tax on the basis of the aforesaid two decisions of this Court will not be burdened with tax with retrospective effect. Since the two judgments were delivered on two different dates, two different periods of time were fixed for granting exemption to two different classes of sellers. Restaurants and eating houses were granted exemption from the date of the judgment in *Northern India Caterers (India) Ltd.*, case i.e. September 7, 1978. Others were granted exemption on and from 4th January, 1972 i.e. the date of the judgment in the case of *M/s Associated Hotels of India Ltd.* The classification has been based on an intelligible basis. There is no irrationality about it. The same principle may have been followed in both the judgments but the two judgments dealt with two different classes of assesseees.

Mr. Sanyal, however, contended that his client had stopped paying and collecting sales tax on foodstuff supplied to its customers on and from 4th January, 1972 relying upon the principle laid down in the case of *M/s Associated Hotels of India Ltd.* That may be so. But the *Associated Hotel's* case did not deal with sales made by a restaurant. The retrospective operation of the Act, is bound to affect many tax payers prejudicially in many different ways. But that will not make the provision unconstitutional. The legislature has decided to grant relief to two classes of tax payers from the burden of this retrospective levy of tax. For this purpose, it has drawn a justifiable distinction between hotels and restaurants and has decided to grant exemption to them from two separate dates based on two separate judgments of this Court.

A In our opinion, the legislature has made a valid classification for the purpose of granting exemption to hotels and to restaurants on the basis of the two dates of the aforesaid two judgments.

The case of the appellant is without any merit and is dismissed. The appellant must pay the costs of this appeal assessed at Rs. 1,700.

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S.V.K.I.

Appeal dismissed.