TRANS ASIA HOTELS LTD.
v.
COMMISSIONER-GENERAL OF INLAND REVENUE AND ANOTHER

COURT OF APPEAL
JAYASINGHE, J., (P/CA) AND
EDIRISURIYA, J.
CA NO. 235/99
OCTOBER 25, 2001 AND
MARCH 11 AND
AUGUST 08, 2002

Turn Over Tax Act, No. 69 of 1981, sections 2 and 5 (1) – Should turnover tax be paid on the service charge?

The petitoners collected from the customers a sum of 20% in excess of the amount payable by the customers. This levy was in respect of the service charge and government tax.

It was contended that amounts received by the collector of the turnover tax from the petitioner customers do not fall within the meaning of "Turn over" as defined in section 5 (1).

Held :

(1) When the petitioner sells food and beverages it enters into a transaction of sale with the petitioner customers. If the petitioner in that transaction receives money, that money received from the transaction entered into in respect of that business can without doubt be classified as the turnover; it is irrelevant what component goes to constitute the total, which the customer was called upon to pay the petitioner.

(2) Turnover tax is payable on what is received or recoverable.

(3) The petitioner is not an agent of the state for the collection of Government tax. Transferring the turn over tax to the customer is totally illegal.

(4) Turnover tax is payable by the petitioner on the turnover of the petitioner in respect of its hotel business.

APPLICATION for a writ of *certiorari.*

K. N. Choksy, PC with *N. R. Sivendra* for petitioner.

Farzana Jameel, Senior State Counsel for 1st respondent.

Cur. adv. vult.

December 13, 2002

JAYASINGHE, J. (P/CA)

By letter dated 20. 11. 1997 X6 the 2nd respondent wrote to the petitioner that – 01

(i) The petitoner has paid Turn Over Tax on nett sales whereas the Turn Over Tax should have been paid on the gross income received or receivable by the hotel;

(ii) The Turn Over Tax has not been paid on the service charge collected on the bills issued to the customers,

and called for submissions from the petitioner. Consequently, there has been lengthy correspondence and interviews on the above matter between the petitioner and the 2nd respondent and by X15 the 2nd respondent rejected the Turn Over Tax returns submitted by the petitioner and informed the petitioner that additional assessments will be issued as per detailed figures set out therein. Thereafter, the Deputy Commissioner of the 1st respondent department issued notices of assessment dated 14. 08. 1998 marked X17A to X17O and assessment dated 14. 02. 1999 marked X17P. 20

The present application is to set aside the said assessments X17A to X17O and X17P and for other reliefs prayed for in the petition.

It is the submission of the learned President's Counsel that the amounts received by the collection of the Turn Over Tax from the petitioner's customers does not fall within the meaning of *turn over* as defined in section 5 (i) of the Turn Over Tax Act, No. 69 of 1981.

Section 5 (i) provides that –

> "For the purposes of this Act turn over in relation to any business means the total amount received or receivable from transactions entered into in respect of that business or for the services performed in carrying on that business and includes . . ."

The learned President's Counsel raised the issue whether *"can it be reasonably said that when the petitioner collected the turn over tax from its customers and paid the same to the department, that sum of money collected as tax was received or receivable from transactions entered into with its customers in respect of the petitioner's said hotel business or that it was received or receivable for services performed in carrying on that business".*

He submitted that the proper interpretation of section 5 (i) as also its intent is to make payments received from customers for such services performed by such customers – *"the turn over of a business".* That in other words it is the value of the work performed and goods supplied to a customer. Therefore, the Turn Over Tax collected from the customer must necessarily be excluded from the turn over received or receivable. The learned President's Counsel in support of his argument sought to draw an analogy from section 2 of the Act.

Section 2 provides that –

> *". . . that there shall be charged from every person who*
>
> *(a) carries on any business in Sri Lanka or*

(b) renders services outside Sri Lanka for which payment is made from Sri Lanka.

A tax in respect of the turn over made by that person from that business . . ."

Mr. Choksy, PC, accordingly submitted that the words *"that business"* in both section 2 and section 5 (i) must be given a meaning that is consistent with the intention of the legislature. He submitted that *"that business"* of the petitioner is the business of the hotelier who operates a five-star hotel. That all income earned by the petitioner *"from that business"* or *"in respect of that business"* or in carrying on that business of the hotel is the *turn over* in respect of which this tax is charged under the Act. The learned President's Counsel went on to submit that collection of the tax from the customer and remitting it to the department does not make the tax so collected turn over within the meaning of section 5 (1) read with section 2. That the tax collected from the petitioner's customers was not paid by them for the transaction entered into with or for the services rendered by the petitioner in carrying on its hotel business. The learned President's Counsel submitted that what the respondents are seeking to do is to impose *"a tax on tax"* which is a form of double taxation which the respondents are not entitled to levy.

The learned senior state counsel submitted that admittedly the petitioners collected from the customers a sum of 20% in excess of the amount payable by the customers. This levy was in respect of the service charge and government tax. This is evidenced by X13A, X13B and X13C. The learned senior state counsel submitted that the contention of the petitioner that it was unreasonable for the respondents to tax what the petitioner collected on behalf of the respondents as government tax is untenable in that what was levied by the petitioner on the customers was the total turn over which is liable for tax. That the petitioner was never mandated to act as a collecting agent for the respondents. She further submitted that the

petitioner in carrying on of its hotel business, received certain sums of money as government tax and service charge and that these monies were received by the petitioner in the course of its business. The learned senior state counsel submitted the only question for determination is whether the petitioner sent its return of Turn Over Tax in respect of the total turn over received from its customers in respect of its business or did it fail to reckon the 20% it received under the heading service charge and government tax in bills submitted to its customers. She submitted that the turn over is determined on what is received or receivable from transactions entered into in respect of that business.

According to section 5 of the Act "turn over" means that total amount received or receivable from two sources, namely,

1. transactions entered into in respect of that business or

2. for services performed in carrying on that business and includes what is set out therein.

The petitioner obviously cannot come within both limbs of section 5.

The petitioner is a hotelier providing room accommodation and food and beverages and other allied services to its customers at the hotel.

The learned President's Counsel during the hearing submitted that he was not seeking to come within the classification of a manufacturer.

It seems to me that when the petitioner sells food and beverages (*vide* 13A-C) it enters into a transaction of sale with the petitioner's customers. If the petitioner in that transaction receives money, that money received from the transaction entered into in respect of that business can without doubt be classified as the turn over. It is irrelevant what components go to constitute the total which the customer was called upon to pay the petitioner. If the petitioner did not send its returns of Turn Over Tax in respect of the total turn over it received

from the transactions entered into in respect of its hotel business of supplying food and beverages to the customers then the petitioner was acting in violation of section 5. The Turn Over Tax is on what is received or receivable. There is no statutory duty cast on the petitioner to collect government tax. The petitioner was not an agent 120
of government for the collection of the government tax. It must also be mentioned that the Turn Over Tax is payable by the petitioner on the turn over of the petitioner in respect of its hotel business. The petitioner is not empowered to recover it from the customer which according to the Act is the responsibility of the petitioner to pay. Transferring the Turn Over Tax to the customer is totally illegal. The argument that there was a tax on tax must therefore fail.

Application for relief is refused with costs fixed at Rs. 25,000.

EDIRISURIYA, J. – I agree.

Application dismissed.