parties are, however, left to bear their own costs as the points of law involved were not free from difficulty.

HARBANS SINGH, C.J.—I agree.

N.K.S.

APPELLATE CIVIL

Before Harbans Singh, C.J. and Bal Raj Tuli, J.

M/S. DELUX DHABA, AMBALA CANTT.,—*Petitioner.*

versus

STATE OF HARYANA, ETC.,—*Respondents.*

L.P.A. No. 50 of 1972.

September 11, 1972.

Punjab General Sales Tax Act (XLVI of 1948)—Schedule B, Entry 72—Dhaba and restaurant—Distinguishing features of—Stated—Establishment, if answering the description of a dhaba *or restaurant—Determination of—Whether a mixed question of law and fact—High Court—Whether has the jurisdiction to examine the decision of the Sales-tax authorities on the question—*Dhaba *also selling tea, biscuits and soft drinks—Whether exempt from sales-tax under Entry* 72.

Held, that there are certain distinguishing features between a *dhaba* and a restaurant. The food preparations which are served in a *dhaba* are such which are prepared according to the estimated number of customers visiting the place and preparations to suit each customer's taste are not prepared whereas in the restaurant the customer can walk in and order anything that he wants and if the restaurant can prepare that preparation or has it ready, it will be served. In *dhabas dal* is served free along with the sale of chapatis or rice. This is a peculiar characteristic of a *dhaba.* Another distinguishing feature is the type of service. In a restaurant, service is done by bearers wearing some kind of uniform whereas in the case of a *dhaba* ordinary urchins are employed for the purpose with no regard to the dress that they wear and it is generally seen at *dhabas* that small urchins serve the food with scanty clothing. In a *dhaba* the service is very quick, whereas in a restaurant the customer has to wait for the supply of the food to him for a good bit of time after having ordered the same. Another distinguishing feature is the way of billing and tipping. The *dhabawalas* go on recording what each customer has taken and then ask for the amount without issuing any cash memo or bill. A bill is invariably issued in a restaurant and is brought to the customer by the bearer in order to get a tip for himself. On the other hand, the payment

is invariably made to the owner of the *dhaba* at the place where he sits and no tip is paid to anybody. In a *dhaba*, a customer can see and order the food preparations which may be to his taste whereas in a restaurant he has first to order and then see what kind of preparation it is. In the case of a *dhaba*, it is really the food preparations which attract the customers whereas in the case of a restaurant it is the comfortable seating arrangement which attracts the customers. The quality of the food comes to be known after one has taken his seat in the restaurant whereas in a *dhaba* the quality of the food can be looked into before settling in a seat for taking meals. Restaurant is of a western origin and it has a western touch in it. Generally, there is one door for admittance into the restaurant which is otherwise a closed room or rooms and that door is kept shut by an automatic arrangement which is not the case in a *dhaba*.

Held, that when the Legislature does not define a *dhaba* or a restaurant and it has to be determined whether a particular establishment answers one description or the other, the emphasis has to be laid on such features which are exclusive to one or the other and not those which are common to both of them. It is not a question of fact alone but it is a mixed question of law and fact and, therefore, the High Court has the jurisdiction to decide whether the decision of the Sales Tax authorities holding a particular establishment to be a restaurant and not a *dhaba* is legally correct or not.

Held, that under Entry 72 of Schedule B of Punjab General Sales Tax Act, 1948, while granting exemption to Indian food, tea has not been included. Therefore, no exemption can be claimed with regard to the sale of tea, biscuits, coca cola and soft drinks. Where an establishment is not carrying on the business of *dhaba* exclusively, but also sells tea, biscuits and soft drinks, it is not entitled to claim exemption from sale tax under this entry. That exemption is available only to a *tandoorwala* or *dhabawala* who is doing no other business whatsoever.

Letters Patent Appeal under Clause X of the Letters Patent against the judgment of Hon'ble Mr. Justice R. S. Narula passed in Civil Writ No. 2620 of 1970 on 10th November, 1971.

H. L. Sibal, Senior Advocate with S. P. Goyal, and S. C. Sibal, Advocates, *for the petitioners.*

Naubat Singh, District Attorney, *for the respondents.*

JUDGMENT

Judgment of the Court was delivered by:—

TULI, J.—Two points of law have been argued in this appeal under clause 10 of the Letters Patent, namely (i) whether the

appellant—establishment is a *dhaba* and (ii) whether it is entitled to exemption with regard to the Indian food preparations under entry 72 in Schedule B to the Punjab General Sales Tax Act (46 of 1948) (hereinafter called the Act). ...

(2) The appellant, M/s. Deluxe Dhaba, was established in 1962 as a joint Hindu family business and is carried on by Chandu Ram and his three sons, Girdhari Lal, Som Nath and Madan Lal. On December 30, 1967, Sales Tax Inspector Mr. Narang, visited the appellant establishment and asked information about daily sales. The statement of Madan Lal was recorded wherein he stated that there were five servants to whom monthly wages amounting to Rs. 150 were being paid in addition to meals and tea, etc. The monthly rent of the premises wherein the *dhaba* was being run was Rs. 114. Meals were being provided to four persons on monthly basis at the rate of Rs. 40 per head and about 50 to 60 persons visited the shop daily for taking meals and tea both the time. The daily sales amounted to about Rs. 50. In addition thereto, the sale of tea and other refreshments amounted to Rs. 10.00 per day. No accounts were, however, being maintained. On April 4, 1968, the Assessing Authority issued a notice to the appellant in form S.T. 14 requiring it to appear before him on April 8, 1968, as he was satisfied on information which had come into his possession that the appellant was liable to pay tax under the Act in respect of the period from April 1, 1963, to March 31. 1968, that the appellant had wilfully failed to apply for registration under section 7 of the Act and it appeared to be necessary to make an assessment under sub-section (6) of section 11 of the Act in respect of the above-mentioned period and the subsequent periods. In reply to that notice, Madan Lal, appeared before the Assessing Authority and made a statement on April 22, 1968, wherein he mentioned the names of the servants and their monthly wages and stated that in addition to those servants he himself, his brother and his father also worked. There was seating capacity for 53 persons. Some cabins having call bells and electric fans were also provided. No accounts were being maintained and no cash memos were being issued. The daily sales amounted to about Rs. 50. All articles were being purchased in retail from the bazar and there was no account with any shopkeeper. Thereafter, the Assessing Authority seems to have made some local enquiries and passed an order, dated October 30, 1968, after affording an opportunity of hearing to the appellant, holding that the appellant was liable to pay sales tax

under the Act and necessary proceedings for assessment should be taken. That order was sent to the Assistant Excise and Taxation Officer, Ambala, for taking further proceedings. The Assistant Excise and Taxation Officer returned the case to the Assessing Authority to pass a specific order as to whether the appellant was a *dhaba* or a hotel or a restaurant. On that reference, the Assessing Authority passed the order that the appellant was a restaurant and not a *dhaba* and should be assessed as such. Thereafter, the Assistant Excise and Taxation Officer, acting as the Assessing Authority, issued a fresh notice on December 4, 1968, in form S.T. 14 to the appellant, describing it as M/s. Deluxe Hotel and Restaurant, in similar terms as the earlier one issued on April 4, 1968. The date fixed for hearing was December 16, 1968. On that date, five statements of Madan Lal were recorded and the order of assessment was passed holding that the appellant was a restaurant and not a *dhaba* and, therefore, not entitled to any exemption under entry 72 in Schedule B to the Act. This order related to the assessment year 1966-67. The gross turnover was determined as Rs. 75,000 and after allowing deductions of Rs. 1,000 under section 5(2)(a)(i) in respect of the sale of eggs and Rs. 4,188.67 under section 5(2)(b), the net taxable turnover was determined as Rs. 69,811.33, on which the tax was assessed at the rate of 6 per cent amounting to Rs. 4,188.68. A penalty of Rs. 1,000 was imposed under section 11(6) of the Act. Two appeals were filed by the appellant, one against the order of the Assessing Authority, dated October 30, 1968, and the other against the order, dated December 16, 1968, which were decided by the Deputy Excise and Taxation Commissioner (Appeals), Ambala, on September 29, 1969. The amount of daily sales estimated by the Assessing Authority at Rs. 300 was reduced to Rs. 200 and the date of liability to pay tax was determined as from August 10, 1966. The establishment of the appellant was held to be a restaurant and not a *dhaba*. The taxable turnover was thus reduced to Rs. 43,000 on which tax at the rate of 6 per cent, after allowing deduction under section 5(2)(b), was determined as Rs. 2,467.92. The amount of penalty was reduced from Rs. 1,000 to Rs. 500. Against the orders of the Deputy Excise and Taxation Commissioner, dated September 29, 1969, two appeals were filed before the Sales Tax Tribunal, Haryana, which were dismissed on April 22, 1970. The appellant then filed C.W. 2620 of 1970, challenging the various orders mentioned above. That writ petition was dismissed by the learned Single Judge on November 10, 1971, and the present appeal under clause 10 of the Letters Patent has been filed against that judgment.

(3) The learned counsel for the appellant has argued that even on the facts found by the Sales Tax authorities the appellant cannot be classed as a restaurant. The Assessing Authority in his order, dated October 30, 1968, referred to the various food preparations sold by the appellant daily. These included meat and meat with curry, chicken, *gurda kapura kaleji,* and the following vegetables:—

*Alu-matter, Paneer, Bhindi, Sag Palak, Bharta and Dal Urd, besides *chaptis* and rice. The rates of meat and vegetable preparations per plate have also been stated and it is mentioned that Dal is being given free. The seating arrangement is for 53 customers. There are 24 seats of sofa sets, 32 chairs in the cabins and about 12 chairs outside the premises. All the dining tables have sunmica tops. The establishment gives a very good look and is situate near the Ambala Cantt. Railway Station and the bus stand and thus attracts a very large number of customers. In the order, dated December 16, 1968, no other fact has been stated except that the appellant has also set up another counter where tea, cold drinks and biscuits etc., are served. Regular supplies of coca-cola are received and the sale of cold drinks, tea, etc., amounts to Rs. 30 per day. The Deputy Excise and Taxation Commissioner also did not give any other reason for classifying the establishment of the appellant as a restaurant and not a *dhaba.* On the basis of his visit to the appellant-establishment, he stated as under in his order, dated September 29, 1969:—

> "I myself have paid a visit several times to the business premises of the appellant and have found that the type of furniture and crockery provided to the customers leaves no shadow of doubt in my mind that the said establishment is certainly a restaurant and not a dhaba. Dhaba is meant for poorer section of the people where they are charged per chapati and Dal is generally given free of cost. In the present case the appellant charges per plate of meat, chicken, vegetables, rice etc. Seating arrangement provided at the premises is quite modern inasmuch as sofa sets, decent chairs, tables etc., have been laid. The proprietor of the restaurant has also constructed a few cabins for visitors who would like to have their meals in privacy. There are different kinds of meat preparations, viz., meat roasted, meat curry chicken, *gurda*

kapura, kaleji, etc., and the price charged ranges from Rs. 1.50 to Rs. 2.50 per plate. Similar is the case with vegetables and their price ranges from 0.50 to Re. 1 per plate. Considering all these facts, I am absolutely convinced that the establishment of the appellant is a restaurant and not a Dhaba as alleged and, therefore, no exemption can be granted to the appellant under serial No. 72 of Schedule B appended to the Act *ibid.*"

The learned Sales Tax Tribunal stated the following features of Tandoors/Loh/Dhaba—

"(1) Generally Tandoor or Chulha is situated in front of these establishments, whereas the same is located at back portion of restaurants.

(2) There is simple type of furniture in these establishments and there is no provision of cabins etc., for privacy.

(3) Meals served on Tandoor/Dhaba are of ordinary nature and are charged per chapati and are not ordinarily charged according to the diets whereas the restaurants charge according to diets.

(4) In Tandoor/Dhaba, one vegetable and one Dal is served free generally whereas every dish is charged in restaurant. Generally the proprietor of a Dhaba himself works either cooking or serving the same, but in restaurant it is not so. There are limited quality of dishes in Tandoor or Dhaba but there are variety of dishes in restaurant.

(5) There is no system of tip in these establishments whereas the same exists in restaurants"—

and held the appellant-establishment to be a restaurant by relying on the judgment of the Financial Commissioner in *M/s. Punjab Hotel* v. *Punjab State* (1).

The learned Single Judge expressed the opinion that—

"whether a particular place is a *dhaba* or a tandoor or not is a pure question of fact and this Court would not normally interfere with a finding on such an issue recorded after fair consideration of the relevant material available in a given case."

(1) R.O.R.M. 106 of 1962 by Financial Commissioner.

The learned Single Judge himself set out the following relevant considerations for determining the issue whether the establishment is a *dhaba* or a restaurant:—

"Firstly, the overall show and get up of the shop has to be taken into consideration;

Secondly, the arrangement of serving food, i.e., whether the customers are to sit on charpoys, or benches, or on stools, or in ordinary wooden chairs, or other ordinary furniture in the open or in a covered shed on the one hand; or whether they are provided with separate cabins fitted with electric call-bells, sunmica top tables and cushioned seats, on the other, is relevant;

Thirdly, the method of service, i.e., whether the vegetable or pulse is put in *katories* in a *thali* in which the chapatis are also heaped and the whole thing is passed on to the customer on the one hand, and service of different dishes in different plates and providing a separate plate for chapatis with spoons, etc., and each chapati or dish in addition being served on order also helps in the decision of the issue;

Fourthly, the kind of utensils in which the food is served, that is whether it is served in nickle-plated or other brass utensils or served in China crockery, or in stainless steel utensils also deserves consideration;

Fifthly, whether cooking arrangemnts are in front or in the rear may desreve consideration, but is not of decisive help as most of the modern restaurants these days believe in Barbecue service and have grills displayed to the public on which meat and chiken are roasted and served right under the eyes of the customer. Those restaurants do not become *dhabas* merely because of the cooking arrangements being visible to the customers;

Sixthly, service by the owner or by the servants does form one of the relevant criteria for determining the issue. Whereas in a *dhaba* normally the customer collects the food from

the seat or counter of *dhabawala*, food is always served on the individual table of the customer in a restaurant;

Seventhly, the seating capacity of an eating house is also relevant for determining the question in dispute. In a *dhaba* not more than eight or ten persons are usually found eating at one time. In a restaurant the seating capacity depends on the accommodation and furniture and usually large number of seats are provided;

Eighthly, the quantum of sale itself is not conclusive, but coupled wtih other things, it may assist in forming an opinion on this point."

The learned Judge, however, did not determine in the light of the criteria laid down by him whether the appellant is a *dhaba* or a restaurant on the ground that it was a pure question of fact for the Sales Tax authorities to determine, and the finding recorded by those authorities after fair consideration of the relevant material available on the record could not be interfered with by him.

(4) In our view, it is a mixed question of law and fact whether a particular establishment is a *dhaba* or a restaurant, for the reason that there are certain distinguishing features and certain common features between the two. It is on the basis of distinguishing features that it can be held that a particular establishment is a dhaba or a restaurant and not on the basis of common features. The distinguishing features have not at all been adverted to by any of the authorities under the Act, who dealt with the case at various stages. The learned Sales Tax Tribunal pointed out that in a *dhaba* the cooking place is in front, that is, in the open view of the customers and not in the back in a closed room. In a restaurant the kitchen, wherein cooking is done, is always out of the view of the customers. It is not disputed that in the case of the appellant the place for cooking is in front in the view of all the customers and, therefore, this distinguishing characteristic of a *dhaba* is present in the case of the appellant.

(5) The food preparatons which are served in a *dhaba* are such which are prepared according to the estimated number of customers visiting the place and preparations to suit each customer's taste are not prepared whereas in the restaurant the customer can walk in

and order anything that he wants and if the restaurant can prepare that preparation or has it ready, it will be served. It is the admitted case of the parties that in the case of the appellant certain meat preparations and vegetables are generally cooked every day and are served to the customers according to their orders. This characteristic being peculiar to the *dhabas* is found to exist in the case of the appellant. The mere fact that meat and vegetable preparations are more than one or two each is not of much consequence these days in view of the variety demanded by the customers. What is of importance is that the food preparations are such which are generally prepared by *dhabawalas*.

(6) In the appellant-establishment Dal is served free which clearly means that any customer can take the meals consisting of *chapatis* and Dal or rice and Dal and the charges will be made only for *chapatis* or for rice and not for Dal. If in addition thereto any vegetable or meat dish is desired, the customer can have it out of those which are available and pay for the same. This characteristic that Dal is served free in a *dhaba* was also referred to by the Deputy Excise and Taxation Commissioner as well as the Sales Tax Tribunal but they did not notice that this characteristic was present in the case of the appellant.

(7) Another distinguishing feature is the type of service. In a restaurant, service is done by bearers wearing some kind of uniform whereas in the case of a *dhaba* ordinary urchins are employed for the purpose with no regard to the dress that they wear and it is generally seen at the *dhabas* that small urchins serve the food with scanty clothing. In the present case, Madan Lal had stated that there were four such boys employed who were getting Rs. 25 per mensem each as their wages which clearly means that the service in the appellant's establishment is of the type which is genrally found in *dhabas* and not restaurants.

(8) The second consideration with regard to the mode of service is that in every restaurant when a customer takes his seat, the bearer takes the order and before he brings the eatables, he lays the table by putting a quarter plate, a fork, a knife and one or two spoons, whether they are to be used by the customer or not. No such cutlery is provided in the *dhaba*. If a customer desires, he is supplied with a spoon only.

(9) After a customer has eaten his food, he is supplied a finger-bowl by a restaurant for washing his hands. This finger-bowl contains warm water with a piece of lemon in it. Customers are also provided with napkins either of cloth or of paper where as at a *dhaba* the customer has to go to a *haman* fitted with a tap to wash his hands or to ask one of the servants to pour water on his hands outside so that he may wash the same and no napkin of any kind is provided.

(10) It is a matter of general experience that in almost every restaurant separate urinals for men and women are provided whereas no such facility exists in a *dhaba*.

(11) In a *dhaba*, the service is very quick. The moment the customer comes, he is asked as to what he wants and the food is supplied to him without delay whereas in a restaurant the customer has to wait for the supply of the food to him for a good bit of time after having ordered the same. It is, therefore, a matter of general experience that the customers have to sit or stay longer in a restaurant than in a *dhaba*.

(12) Another distinguishing feature is the way of billing and tipping. There is no evidence that the appellant-establishment issues any cash memos or its bearers get tips from the customers. The Assessing Authority collected three small chits containing the particulars of the dishes obtained by a customer and the price thereof. It is not, however, disclosed how these so-called cash memos were collected by the Assessing Authority. It may be that the Assessing Authority himself visited the establishment of the appellant and, while making the payment, asked the proprietor to make it in the form of a cash memo or he sent somebody to eat there and to ask for a bill. The general experience is that the *dhabawalas* go on recording what each customer has taken and then ask for the amount without issuing any cash memo or bill. A bill is invariably issued in a restaurant and is brought to the customer by the bearer in order to get a tip for himself. On the other hand, the payment is invariably made to the owner of the *dhaba* at the place where he sits and no tip is paid to anybody. No printed cash memos are alleged to have been used by the appellant at any time nor any practice of issuing bills to the customers generally has been proved. The Assessing Authority and the Deputy Excise and Taxation Commissioner visited

the appellant-establishment on various occasions but have not stated that the bearers wore any uniform or were ever tipped or regular cash memos, as are issued by restaurants, were ever issued by the appellant. According to this criterion also the appellant can only be classed as a *dhaba* and not as a restaurant.

(13) The Sales Tax Tribunal has mentioned that at the *dhaba* the proprietor or proprietors also work whereas it is not so in the case of a restaurant. This criterion is fulfilled by the appellant-establishment. It has been stated by Madan Lal, that he, his father, his brother and brother-in-law also work and serve the meals.

(14) The rates of food preparations per plate charged by the appellant are much less than those which are charged for the same preparations by the restaurants. The charges for a meat plate are Rs. 1.50 while for a chiken plate Rs. 2.50 are charged. In no restaurant are these preparations available at such rates according to the common knowledge. The Assessing Authority and the Deputy Excise and Taxation Commissioner could go to a restaurant in Ambala Cantt. to find out the difference between the rates charged by the appellant and the other restaurants. The rate chart for various preparations clearly shows that the appellant is a *dhaba* and not a restaurant.

(15) In a *dhaba*, a customer can see and order the food preparations which may be to his taste whereas in a restaurant he has first to order and then see what kind of preparation it is. In the case of a *dhaba*, it is really the food preparations which attract the customers whereas in the case of a restaurant it is the comfortable seating arrangement which attracts the customers. The quality of the food comes to be known after one has taken his seat in the restaurant whereas in a *dhaba* the quality of the food can be looked into before settling in a seat for taking meals.

(16) Restaurant is of western origin and it has a western touch in it. Generally, there is one door for admittance into the restaurant which is otherwise a closed room or rooms and that door is kept shut by an automatic arrangement which is not the case in a *dhaba*. The appellant-establishment consists of one big room in which some cabins have been provided while the rest of the place is open. There is no chaukidar standing on any door showing the way to the customers into the place for taking meals.

(17) The Assessing Authority and the Deputy Excise and Taxation Commissioner, who visited the establishment of the appellant and collected information, have not recorded anywhere that any sweet dish was served by the appellant to its customers. A sweet dish is very commonly served in restaurants according to the choice of the customers whereas no sweet dish is served by *dhaba-walas* except perhaps on the days of some festivals. According to this criterion, the appellant is a *dhaba* and not a restaurant.

(18) In our opinion, the departmental authorities have laid a great stress on the common features of a *dhaba* and a restaurant and have ignored the distinguishing features. A *dhaba* has to provide seating accommodation to its customers and the mere fact that, according to the present notions, better quality of crockery, utensils or furniture are used, the place is kept clean and provided with modern amenities of call-bell and fans because of the availability of electricity, will not convert a *dhaba* into a restaurant merely because in a restaurant the seating arrangement is clean and of better quality. Emphasis has been laid that there are some sofa sets and cabins provided for privacy with call-bells and electric fants. There is no prohibition for a poor man to be given this comfort and in a town like Ambala Cantt. it will probably be required of such establishments to keep themselves and their environments clean by municipal laws. The mere fact that the meals are served in plates and not in *thalis* and the customers are provided with spoons will not convert a *dhaba* into a restaurant. It is a matter of common knowledge that washing and cleaning of China plates or crockery made of clay are easier than those of *thalis* and *katories* made of brass, nickel or any other metal as were used by *dhabas* in olden times. These things are common to both. On the basis of such common features the appellant cannot be classified as a restaurant.

(19) The learned counsel for the respondents has relied on the judgmnt of their Lordships of the Supreme Court in *Syed Yakoob* v. *K. S. Radhakrishnan and others* (2), and submitted that the finding of fact arrived at by the Sales Tax authorities, that the appellant is a *dhaba* and not a restaurant cannot be interfered with by this Court because sufficiency or insufficiency of evidence to sustain that finding is to be adjudged by the fact-finding authority. There is no

(2) A.I.R. 1964 S.C. 477.

quarrel with this proposition but, as has been said above, the fact-finding authorities have not applied their mind to the distinguishing features between a restaurant and a *dhaba* and have only gone by the features which are common to both and on the basis of which that finding cannot be sustained. When the Legislature does not define a *dhaba* or a restaurant and it has to be determined whether a particular establishment answers one description or the other, the emphasis has to be laid down on such features which are exclusive to one or the other and not those which are common to both of them. It is for this reason that we are of the opinion that it is not a question of fact alone but it is a mixed question of law and fact and, therefore, this Court has the jurisdiction to decide whether the decision of the Sales Tax authorities holding the appellant to be a restaurant and not a *dhaba* is legally correct or not. Our determination of the point is, therefore, not barred by the dictum of their Lordships in *Syed Yakoob's case* (supra).

(20) For the reasons given above, we are of the opinion that the appellant-establishment is a *dhaba* and not a restaurant.

(21) The next question that arises is whether the appellant is entitled to exemption in respect of Indian food preparations under entry 72 in Schedule B to the Act. That entry reads as under:—

"72. Indian food preparations ordinarily prepared by Tandoorwalas and Dhabawalas.	When sold by the persons running Tandoors, Dhabas exclusively."

In the instant case, it has been admitted by Madan Lal, that apart from the Indian food preparations prepared by *tandoorwalas* and *dhabawalas*, the appellant-establishment sells tea, biscuits, eggs, coca-cola and other soft drinks from which the daily income is about Rs. 30. It has been stated by the Assessing Authority that there is a separate counter for this purpose. In section 4(5)(b) of the Act, the taxable quantum in relation to any dealer, who runs a Tandoor, Loh, Dhaba, hotel, restaurant, *halwai* shop, backery, or other similar establishment wherein Indian food preparations, including tea, are served, is mentioned as Rs. 25,000. While granting exemption to Indian food preparations under entry 72 *ibid* tea has not been included. Therefore, no exemption can be claimed with regard to the sale of tea, biscuits, coca-cola and soft drinks. It further leads to the conclusion that the appellant is not doing the

business of *tandoorwalas* or *dhabawalas* exclusively but is indulging in some other business also which is run by a tea stall or caterers of soft drinks. It is not the case of the appellant that tea or soft drinks are served to the customers with their meals according to their orders but it is admitted that tea with biscuits and eggs is served to customers who even do not take their meals at the appellant-establishment. Madan Lal, himself stated on December 16, 1968, that the sales from tea shop were between Rs. 25 to Rs. 30 per day whereas the income from the *dhaba* was Rs. 75 or Rs. 100 per day. From this statement, it is quite evident that the source of income of the appellant from the tea shop which is run in the same premises, is fairly moderate. It is to the extent of 25 to 30 per cent. Both the businesses are run together and not independently of each other. At the tea shop or counter, tea, biscuits, eggs, coca-cola and other soft drinks are served and it forms part of the appellant-establishment. It is stated by the Assessing Authority that ten crates of coca-cola were found lying in the premises of the appellant which shows the extent of the sale of soft drinks. In addition thereto, the appellant purchases 6 to 8 Kilograms of milk every day for the purposes of tea. It is no doubt true that the proprietors and servants working at the *dhaba* also take their tea, but the quantity of milk consumed every day in tea leads to the conclusion that atleast about 150 to 200 cups of tea are sold to customers every day. In view of these facts, it cannot be held that the appellant-establishment is carrying on the business of dhaba exclusively and, therefore, is not entitled to the exemption provided in entry 72 of Schedule B to the Act. That exemption is available only to a *tandoorwala* or *dhabawala* who is doing no other business whatsoever.

(22) The learned counsel for the appellant has argued that the sale of tea and soft drinks, etc., is ancillary to the business of the appellant as a *dhabawala*. We do not agree in view of the extent of that business as has been pointed out above. Apart from meal times, the appellant goes on serving tea, soft drinks, biscuits ,eggs etc., to the customers at all times which is certainly not a business carried on by a *tandoorwala* or *dhabawala*. The *tandoorwalas* or *dhabawalas* only sell meals at meal times and that is why they alone are allowed exemption with regard to the sale of Indian food preparations sold by them.

(23) In view of our decision on the second point, this appeal is dismissed but the parties are left to bear their own costs.

K. S. K.