

In the High Court of Judicature at Madras

Dated : 12.8.2015

Coram :

The Honourable Mr.Justice V.RAMASUBRAMANIAN

and

The Honourable Mr.Justice T.MATHIVANAN

Tax Case (Revision) Nos.64 to 67 of 2015

HDFC Bank Limited, Chennai-4
rep.by its Deputy Manager (Legal)

...Petitioner in
all the revisions

Vs

The State of Tamilnadu, rep.by the
Deputy Commercial Tax Officer,
Chennai.

...Respondent in
all the revisions

REVISIONS under Section 60(1) of the Tamil Nadu Value Added Tax Act, 2006 against the common order dated 19.3.2015 made in T.A.Nos.15 to 18 of 2014 on the file of the Tamil Nadu Sales Tax Appellate Tribunal, Main Bench, Chennai.

For Petitioner : Mr.Joseph Markos, SC for Mr.C.Saravanan
For Respondent : Mr.A.N.R.Jayapratap, AGP (T)

COMMON ORDER

(Order of the Court was made by V.RAMASUBRAMANIAN,J)

These revisions are filed by the HDFC Bank Limited, under Section 60(1) of the Tamil Nadu Value Added Tax Act, 2006, questioning the

correctness of the orders of the Sales Tax Appellate Tribunal, holding the bank liable to pay sales tax.

2. Heard Mr. Joseph Markos, learned Senior Counsel appearing for the petitioner. Mr. A. N. R. Jayapratap, learned Additional Government Pleader (Taxes) takes notice for the respondent.

3. The appellant is a bank and it was assessed to tax under Section 22(2) of the Tamil Nadu Value Added Tax Act, 2006 for the assessment years from 2007-2008 to 2010-2011 by the Assessing Officer. Subsequently, it was noticed that the petitioner bank had sold thousands of repossessed vehicles from defaulting customers. On the ground that these sales were not reported in the returns and the necessary tax was not paid, the Assessing Officer resorted to revision of assessment under Section 27(1)(a) of the Act. 4.

Aggrieved by the orders of the Assessing Officer, the dealer preferred appeals before the First Appellate Authority respectively in A.P.Nos. 19, 18, 1 and 2 of 2012. The appeals having been dismissed by the First Appellate Authority, the petitioner filed further appeals in T.A.Nos. 15 to 18 of 2014 before the Tribunal. These appeals were dismissed by the Tribunal by a common order dated 19.3.2015. Aggrieved by the said order, the petitioner has come up with the above revisions under Section 60(1).

5. The main question of law that arises for consideration in these revisions is as to whether a bank, which holds hypothecation of vehicles in their favour, would be a dealer within the definition of the expression under Section 2(15) of the Act, merely because the bank seizes and repossesses

the hypothecated vehicle and brings it to sale through public auction.

6. As seen from the order of the Tribunal, the Tribunal took note of the definition of the expressions 'business', 'dealer' and 'sale' respectively under Sections 2(10), 2(15) and 2(33). The Tribunal also took note of Sections 6 and 8 of the Banking Regulation Act and came to the conclusion on the basis of the decision of the Supreme Court in ***Federal Bank Limited Vs. State of Kerala [2007 (6) VST 736 (SC)]*** that the bank would come within the meaning of the expression 'dealer' under Section 2(15). Consequently, the Tribunal dismissed the appeals.

7. Assailing the common order passed by the Tribunal, it is contended by Mr. Joseph Markos, learned Senior Counsel appearing for the bank that the petitioner would not come within the expression of the term 'dealer' under Section 2(15). According to the learned Senior Counsel, the bank does not really confiscate the hypothecated vehicle and bring it to sale. By securing necessary transfer forms in TM 29 and TM 30 and bringing the hypothecated vehicles to sale, a bank merely facilitates the sale of the hypothecated vehicles. Further according to the learned Senior Counsel, the sale by the bank of the hypothecated vehicles, was only in the capacity of being an agent of the owner of the vehicle. By itself, the bank is not competent to transfer title in the vehicle to the purchaser. Therefore, the learned Senior Counsel contends that the bank would not come within the definition of the expression 'dealer'.

8. In so far as the decision of the Supreme Court in *Federal Bank* is

concerned, the contention of the learned Senior Counsel is that a pledge stands on a completely different footing from hypothecation. In respect of a pledge, there is a statutory right conferred upon the pledgee under Section 176 of the Contract Act to sell. Therefore, the learned Senior Counsel submitted that the decision in *Federal Bank* would not apply to cases of this nature.

9. In support of the distinction that he drew with reference to the decision of the Supreme Court in *Federal Bank*, the learned Senior Counsel cited the decision of the Calcutta High Court in ***Tata Motors Finance Limited Vs. Commissioner of Sales Tax [W.P.T.T.No.6 of 2011 dated 8.10.2013]***. In the last paragraph of the said decision, the Calcutta High Court agreed with the distinction sought to be made between a pledge and the hypothecation. It is of course true that the Calcutta High Court decided the issue against the assessee on a different footing.

10. We have carefully considered the above submissions.

11. It is true that in a hypothecation, the ownership of the hypothecated goods remains only with the person creating the hypothecation. But, as observed by the Tribunal, a bank, which advances facilities for the purchase of a vehicle, enters into an agreement with the loanee. The hypothecation agreement invariably contains clauses empowering the bank to repossess the vehicle in the event of a default and also to bring the vehicle to sale through public auction or by private negotiation without even involving the owner of the vehicle.

12. As a matter of fact, until the Supreme Court came down heavily upon the arbitrary seizure and sale of hypothecated vehicles by the banks in ***ICICI Bank Limited Vs. Prakash Kaur [2007 (2) SCC 711]***, the banks were engaging the services of collection agents to seize the vehicles, repossess them and bring them to sale. Thereafter, the banks started making use of the arbitration clause and invariably, applications are filed under Section 9 of the Arbitration and Conciliation Act, 1996 seeking the appointment of advocate commissioners (instead of collection agents) to seize and repossess the vehicles.

13. Therefore, it is not as though the sale of the hypothecated vehicles is arranged by the banks and financial institutions for and on behalf of a willing vendor. These sales are in the nature of compulsory sales for the realization of debts due to the financial institutions. Hence, to say that the banks sell the hypothecated goods only as agents of the owners, may not be true completely.

14. In any case, Explanation III under Section 2(15) makes even the sale of goods by certain persons, as covered by the Act. Explanation III to Section 2(15) reads as follows :

(15) "dealer" means any person who carries on the business of buying, selling, supplying or distributing goods, directly or otherwise, whether for cash, or for deferred payment, or for commission, remuneration or other valuable consideration, and includes--

(i) a local authority, company, Hindu undivided family, firm or other association of persons which carries on such business;

(ii) a casual trader;

(iii) a factor, a broker, a commission agent or arhati, a del credere agent or an auctioneer, or any other mercantile agent by whatever name called, and whether of the same description as hereinbefore or not, who carries on the business of buying, selling, supplying or distributing goods on behalf of any principal, or through whom the goods are bought, sold, supplied or distributed;

(iv) every local branch of a firm or company situated outside the State;

(v) a person engaged in the business of transfer otherwise than in pursuance of a contract of property in any goods for cash, deferred payment or other valuable consideration;

(vi) a person engaged in the business of transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract;

(vii) a person engaged in the business of delivery of goods on hire purchase or any system of payment by instalments;

(viii) a person engaged in the business of 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;

(ix) a person engaged in the business of supplying 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.....

"Explanation III.- Each of the following persons or bodies who dispose of any goods including unclaimed or confiscated or unserviceable or scrap surplus, old or obsolete goods or discarded material or waste products whether by auction or otherwise directly or through an agent for cash or for deferred payment or for any other valuable consideration, notwithstanding anything contained in this Act, shall be deemed to be a dealer for the purposes of this Act to the extent of such disposals, namely:-

(i) Port Trust;

(ii) Municipal Corporations, Municipal Councils and other local authorities constituted under any law for the time being in force; Central Act 24 of 1989.

(iii) Railways administration as defined under the Railways Act, 1989;

(iv) Shipping, transport and construction companies;

(v) Air Transport Companies and Airlines; Central Act 59 of 1988.

(vi) Any person holding permit for the transport vehicles granted under the Motor Vehicles Act, 1988 which are used or adopted to be used for hire;

(vii) The Tamil Nadu State Road Transport Corporations; Central Act 52 of 1962.

(viii) Customs Department of the Government of India administering the Customs Act, 1962; Central Act II of 1934.

(ix) Insurance and Financial Corporations or Companies and Banks included in the Second Schedule to the Reserve Bank of India Act, 1934;

(x) Advertising agencies; and

(xi) Any other corporation, company, body or authority owned or set up by, or subject to administrative control of the Central Government or any State Government."

15. Under Clause (ix) of Explanation III, the insurance and financial corporations as well as the banks are deemed to be dealers, whenever they dispose of goods under certain contingencies. The contingencies indicated in Explanation III are :

- (i) disposal of unclaimed goods
- (ii) disposal of confiscated goods
- (iii) disposal of unserviceable goods
- (iv) disposal of scrap surplus, old or obsolete goods and
- (v) disposal of discarded materials or waste products.

16. All the above sales whether by way of auction or otherwise, directly or through an agent, either for cash or for deferred payment or for any other valuable consideration, are covered by Explanation III. In other words, Explanation III to Section 2(15) is so exhaustive.

17. The contention that the bank does not become the owner of the property and that but for the forms TM 29 and TM30 handed over by the owners, the banks cannot even sell the property, may be technically right. But, Explanation III includes even the disposal of goods that are unclaimed. In respect of unclaimed goods, the seller does not claim ownership. But, he exercises a right to dispose of the goods. If Explanation III covers the sale of even unclaimed goods, the contention that the seller must be in a position to pass on title, may not stand.

18. Yet another distinction sought to be made by the learned Senior Counsel for the petitioner is on the basis of the requirement to register a sale under the Motor Vehicles Act, 1988. In other words, his contention is that if the sale of a movable property cannot be complete merely by the issue of a receipt and handing over delivery, but it requires registration under a statute, the person selling could only be an authorised representative or agent of the owner, but cannot be termed as a dealer. If the person selling it is only an agent of the owner, he cannot be termed as a dealer.

19. However attractive the above contention is, we do not think that it can stand the test of Explanation III. What is made mandatory by certain

statutes like the Motor Vehicles Act, 1988, the Registration Act, 1902, etc., are only the registration of certain types of documents. The sale by itself is complete once the transaction is over. For the public to recognize or the courts to recognize such sales, registration is made mandatory in these sales. Explanation III covers all types of cases. Therefore, the said contention cannot be accepted. On the distinction sought to be drawn to the decision of the Supreme Court in *Federal Bank*, it should be pointed out that though the Supreme Court was concerned in that case with the exercise of a statutory right of sale, we do not think that the exercise of a contractual right to bring a hypothecated property to sale, could be excluded on that account. Explanation III covers even the sale of unclaimed goods. If sale of unclaimed goods can be included within the purview of Explanation III, the distinction sought to be drawn between a statutory right of sale and a contractual right of sale, cannot stand. Hence, we are of the considered view that the question of law has to be answered against the assessee.

20. Accordingly, the revision petitions are dismissed. No costs.

(V.R.S.J.) (T.M.J.)
12.8.2015

Index : Yes or No
Internet : Yes or No

V.RAMASUBRAMANIAN,J

AND

T.MATHIVANAN,J

RS

To

1.The Deputy Commercial Tax Officer, Chennai.

2.The Tamil Nadu Sales Tax Appellate Tribunal, Main Bench, Chennai.

T.C.(R).Nos.64 to 67 of 2015

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