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**IN THE HIGH COURT OF DELHI AT NEW DELHI**

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**ST.REF. 1/2003**

Reserved on: December 7, 2015

Date of decision: December 14, 2015

M/S CITI BANK

..... Petitioner

Through: Mr. Rajesh Mahna with  
Mr. Ramanand Roy, Advocates.

Versus

COMMISSIONER OF SALES TAX

.... Respondent

Through: Mr. Satyakam, Additional  
Standing Counsel, GNCT of Delhi.

**CORAM:**

**JUSTICE S. MURALIDHAR**

**JUSTICE VIBHU BAKHRU**

**J U D G M E N T**

**14.12.2015**

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**Dr. S. Muralidhar, J.**

1. This is a reference made to this Court by the Appellate Tribunal Sales Tax, Delhi ('Tribunal') under Section 49 of the Delhi Sales Tax Act, 1975 ('DST Act') requiring it to answer the following questions of law:

(i) Whether in the facts and under the circumstances of the case, the findings of the Tribunal that the *ex parte* order dated 21<sup>st</sup> July 1998 passed by the Commissioner of Sales Tax was passed after reasonable and adequate opportunity is perverse?

(ii) Whether the Tribunal was correct in holding that the period of six months required by Section 49 of the Delhi Sales Tax Act read with Rule 42 is directory and therefore, the order of the Commissioner dated 21<sup>st</sup> July 1998 on the application

dated 15<sup>th</sup> October 1995 was valid in law?

(iii) Whether in the facts and under the circumstances of the case the Tribunal was correct in holding that the disposal of repossessed cars by the Appellant Bank constitutes a sale by the Bank?

(iv) Whether in the facts and under the circumstances of the case the Appellate Tribunal was correct in holding that the Appellant Bank which has disposed of cars repossessed from defaulting borrowers is a dealer within the meaning of Section 2 (e) read with Section 2 (c) of the Delhi Sales Tax Act?

(v) Whether in the facts and under the circumstances of the case the Tribunal was correct in holding that the activity of the banking carried on by the Appellant Bank amounts to business under Clause (i) of Section 2 (c) of the Delhi Sales Tax Act, 1975?

(vi) If the answer to Question No. 5 is yes, whether in the facts and under the circumstances of the case the Tribunal was correct in holding that the sale of the repossessed cars by the Appellant is incidental or ancillary or in connection with the Appellant's business.?

2. The background to the reference is set out in the statement of case drawn up by the Tribunal. The Appellant, M/s. Citi Bank ('Bank'), is a foreign company carrying on banking business in India by virtue of license granted under Section 22 of the Banking Regulation Act, 1949 ('BR Act'). It also makes advances for purchase of cars repayable in monthly instalments. The cars which are financed are hypothecated to the Bank as security. The possession of the cars continues with the borrowers. Upon default in repaying the loan instalments, the Bank has the right to repossess the car and bring it to sale in order to recover the outstanding amount.

3. A copy of the standard loan agreement entered into by the Bank with the borrower has been placed on record. It is described as an 'unattested loan-

cum-hypothecation-cum-guarantee agreement'. *Inter alia* Clause 2 (1) states that "borrower(s) by way of providing security to the Bank against the loan amount/overdraft facility undertake to hypothecate the vehicle for which/or against which loan amount/overdraft facility is being taken." Clause 2 (4) sets out the undertaking of the borrower(s) "to get the endorsement of hypothecation done in the registration certificate book from the concerned Road Transport Office." Clause 2 (5) states that "the hypothecation of the vehicle shall be first and exclusive charge against the bank dues." Clause 4 sets out 8 instances of 'event of default' and states that on the occurrence of the events, the Bank shall be entitled to demand immediate repayment of the loan, together with extra 2% or any other rate applicable at that time in terms of the bank policy on the principal amount outstanding. Clause 4 (9) states "the bank is entitled to take the repossession of the hypothecated vehicle whether the entire loan amount has been recalled or not, whenever in the absolute discretion of the Bank there is likelihood or due money not being paid and/or the vehicle is likely to be transferred to defeat the security and the due amounts of the Bank." Clause 4 (10) *inter alia* states that the authorized representative of the Bank "would be entitled to sell the vehicle by public auction or private treaty, without being liable for any loss, without prejudice to the Bank's rights and remedies to suit against the borrowers and to give proper receipts and effectual discharges to the purchaser thereof and to apply and amount with the Bank in or towards payment of such deficiency." Additionally the borrower executes "irrevocable power of attorney" at the time of availing of the loan, in favour of the Bank. *Inter alia* this document authorises the Bank "to take possession of the financed vehicle in case of default in terms of the loan agreement. Clause 10 thereof authorizes the Bank "to receive on consideration by sale, transfer, disposition of the said

car and to give proper receipt and valid and effectual discharge for the same.”

4. Pursuant to the aforementioned loan agreement and power of attorney, the Bank has, in the event of default by the borrower, been taking possession of the vehicles financed by it and bringing them to sale. The Bank filed an application under Section 49 of the DST Act on 15<sup>th</sup> September 1995 seeking determination of the following questions of law:

(1) Whether the disposal of repossessed car is sale as per the Sales Tax Act, 1956?

(2) Whether the Citi Bank N.A. is required to be registered under the Sales Tax Act?

(3) Whether the tax as sale of car is chargeable/payable or not?

5. By an order dated 21<sup>st</sup> July 1997 the Commissioner of Sales Tax, Delhi (‘CST’) decided the said questions after hearing submissions of the Bank as well as the Department. After referring to Section 2 (c) which defines the ‘business’ and 2 (e) of the DST Act which defines the ‘dealer’, the CST came to the conclusion that the questions should be answered in the affirmative and against the Bank. It was held that the repossession and disposal of the car by the Bank “is not ancillary and incidental to and in connection with its business of advance in loans but rather is in the course of the same and the sales of such vehicles are liable to tax under the Delhi Sales Tax in case the sale proceeds crosses the taxable quantum fixed under Section 23 (7) of the DST Act in any of the financial years.” The CST also ordered the concerned Assessing Authority to make necessary enquiries by calling upon the Bank to furnish requisite details of the sales made of the vehicles by the Bank in the above process and to assess the bank under Section 23 (6) of DST Act in case the sale proceeds were found

to have crossed the taxable limit in terms of Section 3 (7) of the DST Act in any of the financial years.

6. The above order of the CST was challenged by the Bank before the Tribunal, which by an order dated 28<sup>th</sup> May 2002 agreed with the CST that the Bank was carrying on the business of hypothecating and selling of cars and had adjusted such sale proceeds towards any outstanding amount. It was held that this being incidental, ancillary or in connection with the activity of banking, amounts to business under clause (i) of section 2(c) of the DST Act and therefore makes the Bank a dealer.

7. It is thereafter that the case was sent to this Court by way of present reference under Section 49 of DST Act.

8. This Court has heard the submissions of Mr. Rajesh Mahna, learned counsel for the Bank and Mr. Satyakam, learned Additional standing counsel for the Respondent.

9. At the outset it requires to be noted that of the six questions referred to this Court for its opinion, Mr. Mahna stated on instructions that he was not pressing Question Nos. 1 and 2 since in any event the Bank has been heard by both the Tribunal and the CST on the same issue.

10. Question No. 3 is the main question urged and it is whether the Tribunal was correct in holding that “disposal of repossessed cars by the Appellant Bank constitutes a sale by the Bank”. This is integrally linked to Questions 4 to 6, i.e. whether the Appellant is a 'dealer' within the meaning of Section 2 (e) read with Section 2 (c) of the DST Act; whether the activity of the banking carried on by the Appellant Bank is 'business' under Section 2 (c) (i) of the DST Act and if so whether the sale of the

repossessed cars by the Appellant is incidental or ancillary or in connection with its business?

11. Mr. Mahna referred to a large number of decisions in regard to the same question that arose under the local sales tax law of other States.

12. In *State of Tamil Nadu v. Board of Trustees of the Port of Madras (1999) 114 STC 520* the question that arose was whether the Port Trust was a dealer within the meaning of the Tamil Nadu General Sales Tax Act, 1959 ('TNGST Act') and whether the sale by it of the "unclaimed and unserviceable goods" could be subjected to sales tax. The Supreme Court held as under:

"42. From the above provisions, in our opinion, it is clear that the Port Trust is not involved in any activity of 'carrying on business' as has been clearly held in *Aminchand Pyarelal's case* [1976]1 SCR 721, and that unclaimed and unserviceable goods are sold in discharge of various statutory charges, items, etc., and the sales of these items are also an infinitesimal part of the Port Trust's main activities or services. No doubt, the sales of goods are in connection with, or incidental or ancillary to the main 'non-business' activities, but they cannot be treated as 'business' without any plea by the State of Tamil Nadu that the Port Trust had an independent intention to carry on business in the sale of unserviceable/unclaimed goods. That is not the case of the department in the show-cause notice. Further from the counter-affidavits filed in the High Court it is clear that it is not the case of the State that there is any separate intention on the part of the Port Trust, to carry on business in the unserviceable and unclaimed goods. Its contention has been that the main activities of the Port Trust amounted to 'carrying on business' and that these sales, even if they were incidental, fell within the meaning of the word 'business'. The argument fails in view of our finding that the main activity is not one amounting to 'carrying on business'."

13. In *Corporation Bank v. Government of Andhra Pradesh (2002) 125 STC 346 (AP)* the question that arose was whether the sales by the Bank of

gold ornaments pledged to it against security of loans was amenable to sales tax under the Andhra Pradesh General Sales Tax Act, 1957 ('APGST Act'). The Andhra Pradesh High Court referred to the decision of the Supreme Court in *State of Tamil Nadu v. Board of Trustees of the Port of Madras* (*supra*) and held as under:

“the transaction of selling the gold pledged is basically for the purpose of a banking activity and is for securing the bank's own advanced amounts. In view of the judgment of the Supreme Court the "sale" as defined in the Act is not mere transfer of property or goods by one person to another person, this could be "sale" for the purposes of sales tax if it is in the course of trade or business. Therefore, we are of the view that the transactions in question are not amenable to sales tax.”

14. In *Panacea Biotech Limited v. Commissioner of Trade and Taxes (2013) 59 VST 524 (Del)*, the Petitioner/Dealer, Panacea Biotech Limited ('PBL') was engaged in manufacture and sale of pharmaceutical products. It purchased cars for use by company employees and executives, for office purposes. At the time of purchase, the sales tax was paid on the cars by the dealer. After passage of time the dealer sought to replace them. These cars were then sold as used cars. The demand raised on PBL by the Sales Tax Officer under the Delhi Sales Tax Act, 1975 ('DST Act') as well as the Central Sales Tax Act, 1956 ('CST Act') was challenged by the Petitioner, first before the Joint Commissioner, and later before the Additional Commissioner (Appeals) who affirmed the above order. The High Court reversed the said orders and held that the main business of the dealer was manufacture and sales of pharmaceutical products and “the vehicles were used by it in the course of business.” In these circumstances, it was held that “the sale of used cars could not by any stretch of imagination be characterized as ‘ancillary’ or incidental to the business of a pharmaceutical company.” Accordingly, it was held that “the inclusion of

the sales transaction of the cars in question in the turnover of the dealer was unsustainable in law.”

15. The above cited decisions are distinguishable in their application to the facts on hand. The sale by a Bank of gold pledged with it, the possession of which is with the Bank, as in the case of **Corporation Bank** (*supra*) is different from the sale of vehicles hypothecated to the Bank and sold by it under an authorisation of the borrower. The Borrower retains possession of the vehicle. Secondly, there is distinction between the cars purchased and used by an Assessee for its own purpose (as in **Panacea Biotech** (*supra*)) and cars offered as security against loans which are then repossessed and sold to recover the outstanding dues. So too the situation where a Port Trust sells goods lying abandoned or unclaimed. In **Panacea Biotech Limited** (*supra*) the Assessee wanted to replace the cars which it had purchased for its employees and executives, for office purposes. Consequently, on the facts of the above case, the determination that sale of the car was not even incidental or ancillary to the main business of the Assessee.

16. However, as far as the present case is concerned, the facts are more or less similar to those in the case of **State Bank of India v. State of Odisha (2014) 74 VST 120 (Ori)**. There the State Bank of India (SBI) initiated action under Section 13 of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (‘SARFAESI Act’) for enforcing the security interest to realise the outstanding loan dues. The accounts of the borrowers had been classified as non-performing assets (‘NPA’). The movable assets of such borrowers were put to auction sale under Rule 6 of the Security Interest (Enforcement) Rules 2002 and the sale proceeds were appropriated to the

loan account of the borrowers. When the said sale was brought to tax by the Sales Tax Officer, SBI challenged the assessment order contending that it is not a 'dealer' under the Orissa Value Added Tax Act 2004 ('OVAT Act') and that there was no legal element of 'sale'. Reference has been made to the decision in ***State of Tamil Nadu v. Board of Trustees of the Port of Madras*** (*supra*) as well as ***Federal Bank Limited v. State of Kerala*** (2007) 6 VST 736 (SC). After analysing the provision of OVAT Act, it was held that the definition of 'dealer' under the OVAT Act did not exclude the bank when the bank is selling the goods as part of its business of banking. This was inconsonance with the decision of the Supreme Court in ***Federal Bank Limited*** (*supra*). Further the decision in ***Board of Trustees of the Port of Madras*** (*supra*) was distinguished and it was observed that "unlike activities of Port Trust, sale of pledged goods is in the course of banking business."

17. In ***Tata Motors Finance Limited, ICICI Bank Limited and Family Credit Limited v. Assistant Commissioner of Sales Tax*** (decision dated 8<sup>th</sup> October 2011 in W.P.T.T. Nos. 4 and 6 of 2011 and 24 of 2010) the Division Bench of the Calcutta High Court was considering the question whether the bank was a dealer within the meaning of Section 2 (11) of West Bengal Value Added Tax Act, 2003 ('WBVAT Act'). In that case, the bank had disposed of vehicles hypothecated to it for recovery of outstanding loans under the strength of irrevocable power of attorney obtained from the borrower. It was held that the Petitioners/Banks were 'dealers' under the wider meaning of that expression under Section 2 (11) of the WBVAT Act. The word 'dealer' included an 'agent' and since the bank had undertaken the sale on the strength of irrevocable power of attorney, it was also acting as an agent. It was noted that "they undertake the activity of selling the hypothecated vehicles for the purpose of realizing

the consideration which had already passed from them to the borrower. By selling the vehicles both the banking and non-banking financial companies realize their dues which naturally includes profits.”

18. Recently in the decision of *HDFC Bank Limited v. The State of Tamil Nadu 2015 VIL 372 (Mad)*, the Division Bench of the Madras High Court addressed the issue whether the Bank which had “sold thousands of repossessed vehicles from defaulting customers’ was a dealer within the meaning of Section 2 (15) of the Tamil Nadu Value Added Tax Act, 2006 (‘TNVAT Act’). In answering the question that in a hypothecation, the ownership of the hypothecated goods remains only with the borrower, the Court observed as under:

“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.”

19. Under the expanded definition of ‘dealer’ under Clause 2 (15) of TNVAT Act read with Explanation III thereof, any person who is disposing the goods by auction or otherwise is also deemed to be a dealer. Therefore, this did not require the seller must be in a position to itself pass on title in order to considered as a 'dealer' under Section 2 (15) of TNVAT Act. Further it was held that in view of the Explanation III, no distinction could be drawn between a statutory right of sale or a contractual right to bring a hypothecated property to sale.

20. Turning to the case on hand, the definition of ‘dealer’ under Section 2

(e) has both exhaustive part as well as inclusive part. In the exhaustive part it means that “any person who carries on business of selling goods” and in the inclusive part which includes “‘any mercantile agent’, by whatever name called”, who “sells goods belonging to any principal whether disclosed or not.” It also includes “an auctioneer who sells or auctions goods belonging to any principal, whether disclosed or not .....”

21. Going by the above broad definition, and in light of the law explained in the aforementioned cases, the Court has no difficulty in holding that the Petitioner Bank is indeed a ‘dealer’ within the meaning of Section 2 (e) read with Section 2 (c) of DST Act. The sale by the Bank of cars hypothecated to it or offered as security against loans advanced towards financing the purchase of the car is a 'sale' within the meaning of S. 2 (m) of the DST Act. Even if the borrower is the owner in possession of the car, the sale is made by the Bank on the strength of the letter of authorisation executed in its favour by the borrower. Questions No. 3 and 4 referred to this Court are answered accordingly.

22. The next question is whether the selling of vehicles hypothecated to it by the Petitioner/Bank constitutes business" within the meaning of Section 2 (c)(i) of DST Act. Again the word ‘business’ as defined is an inclusive one. It includes any trade, commerce or manufacture or any adventure or concern in the nature of trade, commerce or manufacture whether or not it is for gain or profit. It also includes “any transaction in connection with, or incidental or ancillary to, such trade, commerce, manufacture, adventure or concern.” It is not in dispute that the Petitioner-Bank was granted permission to sell goods/assets offered to it as security for the purposes of recovering the outstanding loans. Thus, the selling of the assets by way of auction or otherwise by a Bank to realise its dues and adjust it against the

outstanding loan indeed forms part of the permissible business activity of the Petitioner. In other words by undertaking the activity of sale of assets hypothecated to it by way of auction, the bank is not undertaking an impermissible activity within the four corners of the law. Question No. 5 was, therefore, correctly answered by the Tribunal in holding that the activity of the banking carried out by the Appellant bank amounts to business under Section 2 (c)(i) of the DST Act. As a corollary, in answer to Question No. 6, it is held that the Tribunal was correct in holding that sale of the repossessed cars by the Appellant bank is incidental or ancillary to its main banking business.

23. An attempt was made by Mr. Mahna to urge that the sale of motor vehicles is a first point sale in terms of Section 5 of DST Act read with the Schedule thereof. It is pointed out that with effect from 29<sup>th</sup> March 1996 the motor vehicle has been subsequently identified as the type of goods which qualify for a single point sale read with Section 5 which would be exempted from any further tax. It is accordingly submitted that even if the Petitioner-bank was held to be a dealer, the sale of motor vehicles by it which has already suffered first point sales tax cannot be subjected to any further sales tax.

24. Apart from the fact that this issue has not been urged by the Appellant Bank when its appeal was considered by the Tribunal, the Court finds that none of the questions urged for reference to this Court by the Bank include such an issue. In any event, as of date it appears that no demand as such has been raised against the Bank for any period prior to 29<sup>th</sup> March 1996. Therefore, a question that has not been raised in this appeal is not required to be considered by the Court.

25. With Questions (i) and (ii) not having been pressed, Questions (iii) to (vi) referred to this Court as set out in para 1 are answered thus:

26. Question (iii) is answered by holding that in the facts and circumstances of the case the Tribunal was correct in holding that the disposal of repossessed cars by the Bank constitutes a sale' under the DST Act..

27. Question (iv) is answered by holding that the Tribunal was correct in holding that the Bank which has disposed of the cars repossessed from defaulting borrowers is a dealer within the meaning of Section 2 (e) read with Section 2 (c) of the DST Act.

28. Question (v) is answered by holding that the activity of banking carried on by the Bank amounts to business under Clause (i) of Section 2 (c) of the DST Act.

29. Question (vi) is answered by holding that, in the facts and circumstances of the case, the Tribunal was correct in holding that the sale of the repossessed cars by the Appellant Bank is incidental or ancillary or in connection with the Appellant's business.

30. The reference is disposed of accordingly.

**S. MURALIDHAR, J**

**VIBHU BAKHRU, J**

**DECEMBER 14, 2015**

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