IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 09.12.2016

CORAM

THE HONOURABLE Mr.JUSTICE RAJIV SHAKDHER

W.P.No.43119 of 2016
and W.M.P.Nos.36949 & 36950 of 2016

M/s.Parameshwari Blue Metals,
Rep. by its Proprietor-M.Palanisamy,
Arumaikaran Thottam,
Pallavarayanpalayam,
No.63, Velampalayam [Po],
Mangalam [via] 641 663.
Coimbatore District. ... Petitioner

Vs

Commercial Tax Officer,
Palladam Circle,
Palladam,
Coimbatore District. ... Respondent

Writ petition filed under Article 226 of the Constitution of India praying for a Writ of Certiorari calling for records on the file of the respondent in its impugned proceedings made in TIN.No.33326243854/2010-11 [Order of assessment of tax under Section 8 of the Tamil Nadu Tax on Entry of Motor Vehicles into Local Areas Ordinance, 1990] dated 20.08.2015 and quash the same.

For Petitioner : Ms.R.Hemalatha

For Respondent : Mr.S.Kanmani Annamalai,
Additional Govt. Pleader

O R D E R

W.M.P.No.36949 of 2016
[Dispense with petition]
in W.P.No.43119 of 2016

1. Allowed, subject to just exceptions.

W.P.No.43119 of 2016 and W.M.P.No.36950 of 2016

2. Issue notice. Mr.S.Kanmani Annamalai, learned Additional Government Pleader, accepts notice on behalf of the respondent.

2.1. Learned counsel for the respondent says, that he does not wish to file a reply and that, he would argue the matter, based on the record.

3. By way of the present writ petition, the petitioner challenges the order dated 20.08.2015, whereby, the petitioner has been asked to pay tax and penalty, in the sum of Rs.8,18,324/-. The petitioner has assailed the said order, on the ground that, no entry tax can be levied on the subject vehicle, operated by the petitioner, which is a JCB Excavator [Model/Chasis No.1773222, Engine No.84063380].

3.1. It is the contention of the learned counsel for the petitioner that the charging Section, which is, Section 3 of the Tamil Nadu Tax on Entry of Motor Vehicles into Local Areas Act, 1990 (in short "the 1990 Act") would get triggered, only if, the subject vehicle is liable for registration, under the Motor Vehicle Act, 1998 (in short "the 1988 Act").

3.2. Section 3 of the 1990 Act, reads as follows:

> "3. Levy of tax – [1] Subject to the provisions of this Act, there shall be levied and collected a tax on the entry of any motor vehicles into any local area for use or sale therein which is liable for registration, or for the assignment of a new registration mark, in the State under the Motor Vehicles Act, 1988 [Central Act No.59 of 1988]. The rate of tax shall be at such rate or rates, not exceeding twenty per cent, as may be fixed by the Government, by notification, on the purchase value of the motor vehicles:
>
> Provided that in respect of any motor vehicle which was registered in any Union Territory or any other State under the law relating to motor vehicle:--
>
> [a] before the 10th September 1996, no tax shall be levied and collected, if the owner of such vehicle applies for the assignment of a new registration mark in the State after a period of fifteen months from the date of its registration;
>
> [b] on or after 10th September, 1996, no tax shall be levied and collected, if the owner of such vehicle applies for the assignment of a new registration mark in this State after a period of eighteen months from the date of its registration.
>
> Explanation - For the purpose of this proviso, the expression 'law relating to motor vehicle' means the Motor Vehicles Act, 1939 or the Motor Vehicles Act, 1988, as the case may be.

> [2] The tax shall be payable by an importer in such manner and within such time as may be prescribed."

3.3. Furthermore, in support of her stand, learned counsel for the petitioner, has drawn my attention, to Section 2(28) of the 1998 Act. The said Sub Section is extracted hereafter, for the sake of convenience.

> "(28) "motor vehicle" or "vehicle" means any mechanically propelled vehicle adapted for use upon roads whether the power of propulsion is transmitted thereto from an external or internal source and includes a chassis to which a body has not been attached and a trailer; but does not include a vehicle running upon fixed rails or a vehicle of a special type adapted for use only in a factory or in any other enclosed premises or a vehicle having less than four wheels fitted with engine capacity of not exceeding 4 [twenty-five cubic centimeters] ;"

3.4. Based on the provisions of Section 2(28) of the 1998 Act, learned counsel for the petitioner, argues that the subject vehicle is not a motor vehicle, which is liable to registration, under the provisions of the 1998 Act. Therefore, it is the contention of the learned counsel for the petitioner that no entry tax is leviable on vehicles, which cannot be registered, under the 1998 Act.

3.5. To buttress her submission, learned counsel for the petitioner, relies upon a Division Bench Judgment of this Court, rendered in RDS Projects Ltd. Vs Commercial Tax Officer, Chennai reported in (2007)8 VST 574 (Mad).

4. I had put to the learned counsel for the respondent, as to whether, the petitioner's case would be covered by the judgment of the Division Bench and that, as to whether, prior to issuance of the impugned order, the ratio of the judgment, in the case of RDS was taken into account, by the concerned Assessing Officer.

5. Counsel appearing for the respondent says that, in view of the ratio of the judgment in RDS case, vehicles, such as, JCB, Excavators which ordinarily do not ply on roads, would not come, within the purview of the 1990 Act.

6. It is, however, the contention of the learned counsel for the respondent, that much would depend upon, a physical examination of the subject vehicle. Thus, in other words, learned counsel for the respondent says that, if, upon physical examination of the subject vehicle, it is concluded that it is a

JCB Excavator, as contended by the petitioner, then, surely the case would be covered, by the decision, rendered by this Court in RDS.

7. A perusal of the impugned order, would show that the aspect relating to, whether or not the subject vehicle would be chargeable to Entry Tax, has not been taken into account. This aspect of the matter is critical and therefore, could not have been ignored by the Assessing Officer.

7.1. I may only note, that the impugned order proceeds, on the basis that the JCB Excavator is a motor vehicle, as per provisions of Section 2(i) of the 1990 Act. For this purpose, the Assessing Officer has relied upon the judgment of the Supreme Court in Bose Abraham Vs State of Kerala (2001) 121 STC 614.

7.2. To be noted, the Division Bench of this Court in the RDS case has considered the ratio of the judgment of the Supreme Court in Bose Abraham's case and thereafter, made the following observations:

> "The learned Special Government Pleader (Taxes), on the other hand, submitted that a reading of the definition of "motor vehicle" would clearly show that there is no requirement as per the definition that a motor vehicle should have inflated tyres. The learned Special Government Pleader submitted that the question as to whether the excavator is moving on chain or has inflated tyres is of no consequence since such vehicle is also a motor vehicle adapted for use on public roads. He placed reliance on the decision of the apex court in Bose Abraham v. State of Kerala [2001] 121 STC 614.
>
> The short question that falls for our consideration is whether an excavator not running on inflated tyres, but on iron chain plates such as a caterpillar vehicle or a military tank would be a motor vehicle coming within the meaning of section 2 (28) of the Motor Vehicles Act, 1988 read with section 2(i) of the Tamil Nadu Tax on Entry of Motor Vehicles Act, 1990 and is, therefore, liable to tax under section 3 of the Tamil Nadu Tax on Entry of Motor Vehicles Act, 1990.
>
> The term "vehicle" has been defined in section 2 (i) of the Tamil Nadu Tax on Entry of Motor Vehicles Act, 1990 as follows:

> “Motor vehicle' means a motor vehicle as defined in clause (28) of section 2 of the Motor Vehicles Act, 1988."

Thus, it could be seen that the State Legislature has adopted the definition of "motor vehicle" as defined under sub-section (28) of section 2 of the Motor Vehicles Act, 1988, which reads as follows :

> "Motor vehicle' or 'vehicle' means any mechanically propelled vehicle adapted for use upon roads, whether the power of propulsion is transmitted thereto from an external or internal source and includes a Supreme Today With All High Courts Page 2 of 3 chassis to which a body has not been attached and a trailer; but does not include a vehicle running upon fixed rails or a vehicle of a special type adapted for use only in a factory or in any other enclosed premises or a vehicle having less than four wheels fitted with engine capacity not exceeding (twenty five cubic centimetres)."

The scope of sub-section (28) of section 2 of the Motor Vehicles Act, 1988 was considered by the Supreme Court in Bolani Ores' case AIR 1975 SC 17, wherein the court observed as follows :

> "The question would then arise, are dumpers, rockers and tractors suitable or fit for use on roads ? It is not denied, that these vehicles are on pneumatic wheels and can be moved about from place to place with mechanical power. The word 'vehicle' itself connotes that it is a contrivance which moves. A vehicle which merely moves from one place to another need not necessarily be a motor vehicle within the meaning of section 2(28) of the Act. It may move on iron flats made into a chain such as a caterpillar vehicle or a military tank. Both move from one place to another but are not suitable for use on roads. It is not that they cannot move on the roads but that they are not adapted, made fit or suitable for use on roads. They would, if used, dig and damage the roads." (emphasis supplied)

Reference may also be made to the decision of the apex court in Central Coal Fields Ltd. v. State of Orissa AIR 1992 SC 1371, wherein the apex court held as follows :

"... Pictures of various types of dumpers have also been sent to us which indicate prominently one factor that these dumpers run on tyres, in marked contrast to chain plates like caterpillars or military tanks. By the use of rubber tyres it is evident that they have been adapted for use on roads, which means they are suitable for being used on public roads." (emphasis supplied)

The above decisions would categorically show that the apex Court has made a distinction between vehicles fitted with chain plates like caterpillars and military tanks and others. The excavator referred to in Bose Abraham's case [2001] 121 STC 614 (SC) was a motor vehicle fitted with inflated tyres and not chain plates like caterpillars or military tanks. The excavator in question in the present case is mounted on iron plates made into chain such as caterpillar vehicles or military tanks. Such an excavator is used for excavating the earth and loading in lorries and it cannot be used upon public roads, since the roads would get damaged by the chains. The excavator moves around only in work sites and it is not suitable or adapted for use in public roads. This position is also confirmed by the physical verification carried out by the respondent, as seen from his report extracted above. The Kerala High Court in the case of Intelligence Officer, Squad No. IV, Kozhikode v. Ray Constructions Ltd. [2006] 147 STC 438 while considering a similar issue has held that the excavators in question having regard to its distinguishing features from the other excavators has to be held as not "motor vehicle" falling under the definition of the term defined under section 2(28) of the Motor Vehicles Act, 1988 and therefore, not liable for entry tax. It is relevant to note that the Volvo excavators purchased by the petitioner which is the subject-matter of levy of entry tax are exactly similar to the excavators which were the subject-matter in the above referred reported decision of the Kerala High Court.

Under the circumstances, the impugned show cause notice cannot be sustained and it is hereby set aside. The writ appeal is disposed of accordingly. No costs. Consequently, M.P.No.1 of 2006 is closed."

[emphasis is mine]

8. Accordingly, the impugned order is quashed, with a direction to the Assessing Officer, to recommence the proceedings, if necessary, against the petitioner, only after a physical examination of the subject vehicle. If, upon a

physical examination of the subject vehicle, the Assessing Officer comes to the conclusion that the subject vehicle is a JCB Excavator, which moves on chains and is not adapted for use on road, as contended before me, then, the Assessing Officer will proceed, in accordance with the ratio of the judgment rendered in the RDS case, and thereafter pass appropriate orders in the matter.

9. With the aforesaid directions, the Writ Petition and pending Miscellaneous Petition are closed.

10. There shall, however, be no order as to costs.

Sd/-
Asst.Registrar (CS VII)

/true copy/

Sub Asst. Registrar

gya

To

The Commercial Tax Officer,
Palladam Circle,
Palladam,
Coimbatore District.

1 cc to M/s.R. Hemalatha, Advocate, Sr. 72529
1 cc to Special Government Pleader, Sr. 72683

W.P.Nos.43119 of 2016
and
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KJ (CO)
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