

IN THE HIGH COURT OF JUDICATURE AT MADRAS

<i>Date of Reserving the Order</i>	<i>Date of Pronouncing the Order</i>
20.10.2017	06.11.2017

CORAM

The Hon'ble Mr.Justice T.S.Sivagnanam

W.P.No. 13799 of 2004

H.U. Saleem,
M/s Royal Travels,
43, Thomas Arul Street (West)
Karaikal.

... Petitioner

Vs.

The Superintendent of Central Excise,
Range II,
No.4, Shah Garden,
Bharathiar Road,
Karaikal – 609 605.

... Respondent

Prayer: Petition filed under Article 226 of the Constitution of India to issue Writ of Certiorarified to call for the records of the respondent herein, made in O.C.No.466 of 2004, dated 15.04.2004 and to quash the same.

For Petitioner : Mr.M.Palani

For Respondent : M/s.Hema Murali Krishnan,
Senior Standing Counsel
for Income Tax

ORDER

Heard Mr. M. Palani, the learned counsel appearing for the petitioner and M/s.Hema Murali Krishnan, the learned Standing Counsel for the respondent.

2. The petitioner is a contract carriage operator in Karaikal, and he was issued a contract carriage permit, by way of transfer from one D.P. Karumbal on 17.08.2000. The petitioner has been operating his vehicle, bearing Registration No.PY02/B 7677, as a contract carriage in the Union Territory of Pondicherry. During 1994, service tax was levied on various services, and the Act was amended during 1996, enlarging the scope, and in 1997, tour operators were also brought into the Service Tax NET. In this regard, the Central Excise Commissionerate issued a Circular No.19, which provides for the tour operators to register themselves under the Act for payment of Service Tax.

3. The petitioner's case is that, none of the conditions stipulated in the Circular are satisfied insofar as the petitioner is concerned, and therefore, the question of applicability of service tax to the petitioner's vehicle does not arise. While so, the respondent issued a notice, calling upon the petitioner to register himself with the respondent as a tour operator within the meaning of

Section 65 (52) of the Finance Act, 1994. This notice, dated 21.11.2003 was challenged by the petitioner and one other person by name C.Mahendran, in W.P.Nos.1358 and 1359 of 2004, which were disposed of, by order, dated 30.01.2004, issuing certain directions, after which, the petitioner submitted detailed explanation, and the respondent has passed the impugned order, dated 15.04.2004 directing the petitioner to register himself with the Department as a Tourist Operator and pay service tax.

4. The petitioner's contention is that, the impugned order has been passed in gross violation of the direction issued by the Court, in W.P.Nos.1358 and 1359 of 2004. The respondent failed to see that the petitioner is holding only a contract carriage permit within the meaning of Section 2(7) of the Motor Vehicles Act, 1988 and the same does not satisfy the requirements of Section 2 (43) of the Act and Rule 85 (A) (7) of Central Motor Vehicles Rules, which defines "Tourist Vehicle". Therefore, the petitioner's vehicle, which is a contract carriage does not satisfy the ingredients of tourists vehicle, and the demand made by the respondent is illegal.

5. It is the further case of the petitioner that, the *sine-qua-non* for attracting the levy under the Finance Act is a “Tourist Vehicle” as contemplated under Sections 65 (51) and (52), and the petitioner's vehicle does not come within the purview of the said sub-sections, and therefore, the impugned demand is illegal. Referring to the decision of the Hon'ble Division of this Court, in the case of **(The Secretary, Federation Bus Operators Association vs. Union of India)** reported in **(2002) 5 C.T.C. 547**, it is submitted that, the Hon'ble Division Bench mentioned a rider, in para No.36, which clearly supports the stand taken by the petitioner, and this rider, in para No.36, will clearly apply to the petitioner, and consequently, the impugned order has to be set aside.

6. The learned Senior Standing Counsel for the Revenue submitted that the issue involved in this Writ Petition is covered by a decision of this Court, in the case of **(Shi. Pandyan Travels vs. The Commissioner of Central Excise)** reported in **(2004) Vol.163 ELT 409 (Madras)**. Further, it is submitted that the reliance placed on para No.36 of the decision of the Hon'ble Division Bench, in the **Secretary Federation of Bus Operators' case** (supra) is incorrect, as the decision is clearly in favour of the Revenue and against the Petitioner/Assessee and the petitioner has to necessarily

register himself with the respondent under the provisions of the Finance Act.

7. In **The Secretary Federation of Bus Operators' case** (supra), three categories of Writ Petitions were heard, viz., (i) Petitioners, who were Stage Carriage Operators, owning a spare bus, covered by spare bus permit. (ii) Petitioners, who were Contract Carriage Operators and (iii) Petitioners, who were the owners of Maxi-cabs or Taxi. The challenge in the batch of cases was to the notices issued by the Officers of the Central Excise Department, treating the noticees as Tour Operators, and requesting them to register themselves under the Finance Act. The petitioners contended that, they come within the purview of the Finance Act, 1994, imposing the service tax, vide Section 66 read with Section 65 (38) and (52), and the notices are without jurisdiction. The aforementioned three categories of cases were separately dealt with. The order, with regard to Contract Carriage Operators is from para No. 39 to para No. 44, and it would be beneficial to refer to the said paragraphs, which are quoted herein below:-

"39. We are now concerned with the second category of petitioners, viz. Petitioners who are "contract carriage operators", owning the vehicles covered under Sec. 74 of the Motor Vehicles Act, 1988.

40. The only contention raised by Mr. Gopalan is akin to what she had raised in respect of the “State Carriage Operators”, i.e. The permit granted under Sec. 74 of the Motor Vehicles Act for contract carriage operators would not attract the provisions of Sec. 65(52) of the Finance Act unless it is a “tourist permit”.

41. We have already rejected that argument holding that a permit contemplated under Sec. 65(52) of the Finance Act need not necessarily be a “tourist permit”. We have also clarified therein that the only condition is that the vehicle should be a “tourist vehicle” under Sec. 2(43) of the Motor Vehicles Act; it should be used by the concerned tour operator for the purposes of a “tour” and the said “tourist vehicle” should have been covered by any permit granted under the Motor Vehicles Act and/or the Rules framed thereunder. We do not see as to how the cases of the holders of contract carriage permits would be in any manner different from the holders of the stage carriage permits and the owners of the spare buses thereunder. The same rationale would apply even to the contract carriage vehicles covered by the permit under Sec. 74 of the Motor Vehicles Act. In fact, most of the petitioners, who are having the contract carriage, are having the permits under Sec. 88(9) of the Motor Vehicles Act read with Sec. 82, which are nothing but “tourist permits”, issued for the purpose of promoting the tourism and obviously issued to the tourist vehicles as contemplated under that section. Therefore, there will be no question of entertaining their objections and they will straight away be covered under

Sec. 65(52) of the Finance Act. Such petitions, where the permits are under Sec.88(9) of the Motor Vehicles Act, would be straight away liable to be dismissed and are dismissed as such.

42. Even if the petitioners' permits are only under Sec.74 of the Motor Vehicles Act for contract carriage, that would not save the petitioners because what is required is not a "tourist permit" but a "user of a tourist vehicle" by the tour operator in his business and further such "tourist vehicle" should have been covered under a permit granted under the Motor Vehicles Act and/or the rules framed thereunder. There would be, therefore, no question of treating the holders of the permits under Sec.74 of the Act for the contract carriage in any different manner.

43. No other point was argued before us in respect of "contract carriage operators".

44. We would have ordinarily disposed of these petitions here with the rider as mentioned in paragraph 36 supra. However, the challenge of "legislative competence" was raised in the connected category of "rent-a-cab scheme operators", which can be made applicable to the present situation. Therefore, we would pass the final orders only after considering those challenges".

8. In the aforesaid decision, the Hon'ble Division Bench pointed out that, they do not see as to how the cases of holders of contract carriage permits would be, in any manner, different from the holders of the stage

carriage permits and the owners of the spare buses thereunder, and that, the same rationale would apply even to the contract carriage vehicles covered by the permit under Section 74 of the Motor Vehicles Act. It was further pointed out that, some of the petitioners, in the batch of cases, are having permits under Section 88 (9) read with Section 82 of the Motor Vehicles Act, which are nothing but tourist permits, issued for the purposes of promoting Tourism, and obviously, issued to the Tourist Vehicles as contemplated under the said Section. Therefore, it was observed that, 'there will be no question of entertaining their objections and they will straightaway be covered under Section 65 (52) of the Finance Act.

9. Further, it was pointed out that by the Hon'ble Division Bench that, under Section 74 of the Motor Vehicles Act, for contract carriage permits, which are issued would not save the petitioners, because, what is required is not a "tourist permit", but a "user of a tourist vehicle", by the tour operator, and such tourist vehicles should have been covered under a permit granted under the Motor Vehicles Act, and therefore, there would be no question of treating the holders of permits issued under Section 74 of the Motor Vehicles Act for the contract carriage in any different manner. In para No.44, there is an observation to the effect that the Hon'ble Division

Bench would have rightly disposed of the Writ Petitions with rider, as mentioned in para.36 of the order.

10. The sheet anchor of the petitioner's contention is by referring to para No.36, which is quoted herein below:-

"36.At this stage, all the learned counsel pointed out that the petitioners' spare buses may not be the "tourist vehicles" within the meaning of Sec.2(43) of the Motor Vehicles Act and, therefore, they are not liable. Indeed, if the vehicles owned by the petitioners are not the "tourist vehicles" within the meaning of Sec.2(43) of the Motor Vehicles Act read with Rule 128 of the rules framed thereunder then, such petitioners would not be required to be registered under the Finance Act. The learned senior counsel for the Department very fairly accepted this position. However, he pointed out that it would be for the petitioners to raise their objections before the concerned authorities under the Finance Act and their objections would be decided upon. Therefore, the petitioners were permitted to raise the objections before the concerned authorities issuing the notices and the authorities will decide as to whether the petitioners' vehicles are the "tourist vehicles" as contemplated under Sec. 2(43) of the Motor Vehicles Act, which is *sine qua non* for the application of the Finance Act. Needless to mention that if they are not the "tourist vehicles", the provisions of the Finance Act would not apply and more

particularly the provisions of Sec.65(51) and the other allied sections like Sec.66(3), etc.,".

11. On a reading of the above paragraph, I am of the clear view that the interpretation sought to be given to the observations of the Court does not, in any manner, advance the case of the petitioner. In the said paragraph, the rider is based on the contention, which was placed by the learned Senior Standing Counsel for the Department, wherein, he stated that, if objections are raised before the concerned Authority, their objections would be decided, and the petitioners therein are permitted to raise their objections before the concerned Authorities, and the Authorities will decide, whether the petitioners vehicles are "Tourists Vehicle", as contemplated under Section 2 (43) of the Motor Vehicles Act, and if they are not falling under the category of tourist vehicles, provisions of the Finance Act would not apply, more particularly, the provisions of the Section 65 (51) and the other allied Sections, like Sections 66 (3) etc.

12. Thus, in terms of the observations made by the Hon'ble Division Bench, in the above referred case, if objection is raised by a contract carriage permit holder, stating that, he is not undertaking any tour, in respect of tourist vehicle contemplated under Section 2 (43) of the Motor Vehicles Act

read with Rule 85 (A) (7) and 128 of the Central Motor Vehicle Rules, then, the concerned Assessing Authority is bound to consider the same, as a rider, has been provided in the decision of the Hon'ble Division Bench (referred supra). Though this rider, as contained in para No.36, which is under the Chapter dealing with Stage Carriage Operators, still, while dealing with the Contract Carriage Operators, the Hon'ble Division Bench has pointed out that the rider would equally applicable to the Contract Carriage Permit holders as well. The petitioner, in terms of the opportunity granted and the directions issued by this Court, has raised objections, specifically stating that, he is not undertaking any tour in respect of tourist vehicle. The respondent, while passing the impugned order, merely referred to the decision of the Hon'ble Division Bench in the **Secretary Federation of Bus Operators' case** (supra). However, in the said decision, the Hon'ble Division Bench granted liberty to the Contract Carriage Operators to raise their objections.

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13. It is no doubt true that, in para No.41, there is an observation that, the rationale applicable to Stage Carriage Permits would equally apply to Contract Carriage vehicles covered by the permit under Section 74 of the Motor Vehicles Act. Though such is the observation in para No.41 of the

decision, in para No.44, the rider mentioned in para No. 36 has been extended to Contract Carriage Operators cases as well.

14. Thus, the respondent was bound to consider the specific plea raised by the petitioner that, he is not a tour operator, undertaking tour in respect of a tourist vehicle, as contemplated under Section 2 (43) of the Act read with Section Rule 85 (A) (7) of the Motor Vehicles Act and Rule 128 of the Central Motor Vehicle Rules. However, this aspect has not been considered by the respondent, while passing the impugned order, and to ascertain this factual position, the matter has to be remanded to the respondent for fresh consideration.

15. Accordingly, this Writ Petition is allowed, and the impugned order is set aside and the matter is remanded to the respondent for fresh consideration. The respondent is directed to consider the petitioner's representation, dated 16.02.2004, and specifically decide the issue, even though the petitioner has been issued a permit under Section 74 of the Motor Vehicles Act for contract carriage; and whether or not, it is a tourist vehicle within the meaning of Section 2 (43) of the Motor Vehicles Act read with Rule 128 of the Central Motor Vehicle Rules, which has been held to be *sine*

qua non for the application of the Finance Act.

16. The respondent shall take note of the observations of the Hon'ble Division Bench in para No.36 of the decision in the case of **(The Secretary, Federation Bus Operators Association vs. Union of India)** reported in **(2002) 5 C.T.C. 547**, wherein, it has been held that, if they are not tourist vehicle operators, the provisions of Finance Act would not apply. The respondent is directed to afford an opportunity of personal hearing to the authorized representative of the petitioner and take a decision on merits and in accordance with law as expeditiously as possible. No costs.

06.11.2017

sd/msm

Index:Yes/No

Speaking Order/Non Speaking Order

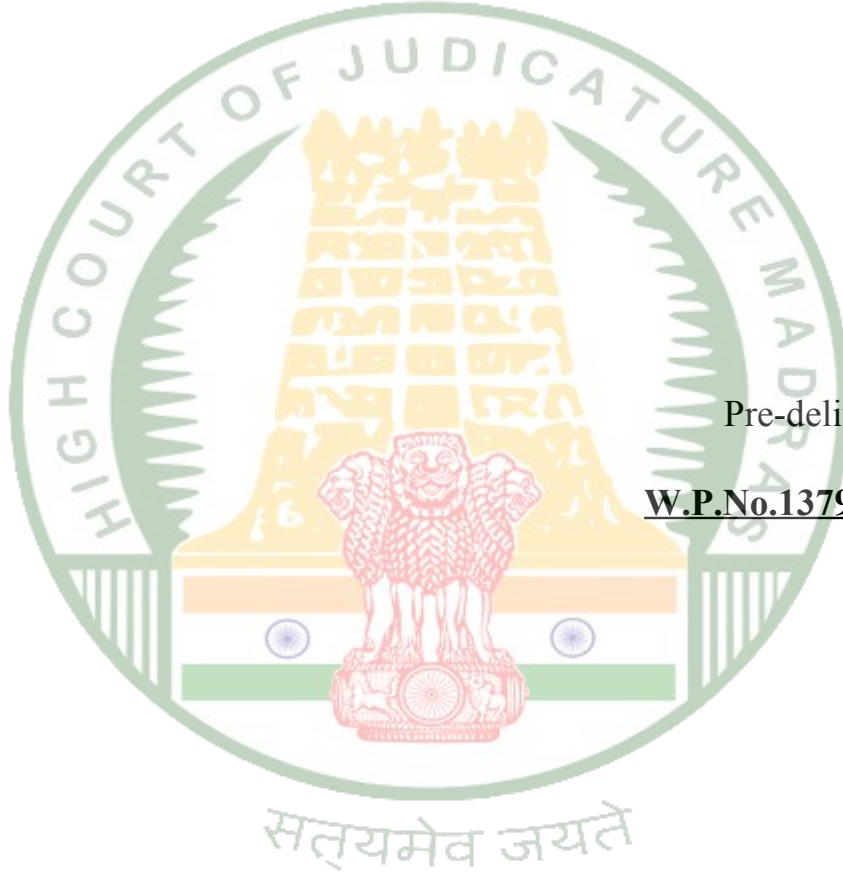
To

The Superintendent of Central Excise,
Range II, No.4, Shah Garden,
Bharathiar Road,
Karaikal – 609 605.

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T.S.Sivagnanam, J.,

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Pre-delivery order
in
W.P.No.13799 of 2004

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