IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 300 OF 2001

Union of India	}	Petitioner
versus		
State of Maharashtra	}	
and Ors.	}	Respondents

Mr. Suresh Kumar for the petitioner.

Ms. Jyoti Chavan – Assistant Government Pleader for respondent nos. 1 to 3.

CORAM :- S. C. DHARMADHIKARI &
PRAKASH. D. NAIK, JJ.

DATED :- APRIL 18, 2017

P.C. :-

1. By this writ petition under Article 226 of the Constitution of India, an interim order has been challenged by M/s. Western Railway Canteen/Catering Services.

2. The only contention and which has prevailed throughout is that the departmental catering service being a property of the Union of India through General Manager, Western Railway, it squarely falls within the exemption provision and particularly carved out by Article 285 of the Constitution of India. That exempts property of the Union from the State taxation.

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3. The next contention is that the definition of the term "dealer" would not include the Railway or the Union of India and any attempt which is now made by the amendment to include it is beyond the competence of the State legislature.

4. After having heard both sides, we do not think that these contentions should detain us. In Sales Tax Application No. 4 of 2002 decided on 14th August, 2003, a Division Bench of this court, speaking thorough the Hon'ble Mr. Justice V. C. Daga (as his Lordship then was) decided an identical controversy. After referring to the constitutional scheme as also the provisions of the Bombay Sales Tax Act, 1959, the court concluded that the Railways cannot argue on the above lines. The very contention has been negatived and in the following words:-

> "8. The applicant not being satisfied with the aforesaid judgment of the Tribunal chose to prefer reference application raising three questions for being referred to this Court for decision under section 61(1) of the BST Act. Those questions are reproduced hereinbelow for immediate reference:
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> (a) Whether on the facts and in the circumstances of case and on true and correct interpretation of section 2(11), the Tribunal is justified in law in holding that the applicant is a dealer within the meaning of section 2(11) of the Bombay Sales Tax Act, 1959 qua it's activities of catering service, provided to the travelling passengers?
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> (b) Whether on facts and circumstances of the case the Tribunal is justified in not granting any remission in interest levied under section 36(3) (a) and 36(3)(b) of the BST Act, 1959?

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(c) Whether on the facts & circumstances of the case Tribunal is justified in upholding levy of purchase Tax under section 13 of the BST Act, 1959?

9. The Tribunal for the reasons recorded in the judgment refused to make reference except a question relating to levy of purchase tax on the purchases made by the applicant. The applicant not being satisfied by the aforesaid order of the Tribunal dated 8th February, 2002 preferred the present application under section 61(2) of the BST Act contending therein that on reading the explanation to section 2(11) it is clear that the liability of the railway is restricted to the extent of disposal of scrap materials only and the catering unit of the applicant is not covered by levy of tax. In the present application the applicant claims that there is a question of law and the learned Tribunal be directed to refer this question.

10. The another question which the Tribunal refused to refer was regarding grant of remission in interest levied under section 36(3)(a) & 36(3)(b) of the BST Act, 1959. The applicant relying on the proviso to said section contends that in view of the Apex Court judgment in the case of State of Punjab v. Union of India, 1990(79) S.T.C. 437, the Railway Departmental Catering is immune from sales tax in view of Article 285(1) of the Constitution of India. The applicant further contends that this controversy is finally settled by the judgment of the Apex Court in the case of Collector of Customs v. State of West Bengal, 1999(113) S.T.C. 167; wherein it was held by the Apex Court that the benefit of Article 285(1) is not applicable to the transaction of sale of goods. Thus, according to the applicant, right from 27th April, 1970 to 30th July, 1998 i.e. till the decision of the Apex Court in the case of Collector of Customs v. State of West Bengal, (supra) liability to pay tax on catering was debateable, as such catering department has not collected any tax nor paid the same. The Catering Unit of the Central Railway carried a bona fide impression that such activities are not carried on commercial basis but a service to the travelling passengers. In this backdrop, the learned Counsel for the applicant contended that remission in interest though is a discretionary but the same has to be exercised judiciously with proper application of mind and proper judicious approach in a fair, just and reasonable manner. He contends that the Tribunal did not adopt this approach while refusing to grant remission in interest. He relied on

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the observations of the Apex Court in case of Hindustan Steel Ltd. v. State of Orissa, 1970(25) S.T.C. 211 in, support of his contention. He thus contended that remission in interest is also a question of law and the learned Tribunal be directed to refer the same to this Court for being decided in accordance with law on its own merits.

11. Per contra, learned Counsel for the respondents tried to support the order of the Tribunal and contended that in view of the judgment of the Apex Court referred to hereinabove, the issue sought to be raised is no longer open for debate. She, therefore, submits that the order of the Tribunal refusing to make reference to this Court is perfectly legal and valid. The applicant has no case on merits and, therefore, the application deserves to be dismissed with costs.

12. Having heard the parties at length, if one turns to the subsequent amendment made with effect from 1st April, 1989 by Maharashtra Act No. 9 of 1989 to the impugned explanation to section 2(11) of the BST Act, it is true that when this explanation was introduced on 16th August, 1985, the liability in respect of various organisations specified therein was debateable as to whether or not the sale of unclaimed or confiscated or unserviceable or scrap, surplus, old obsolete or discarded material or waste products was exigible to sales tax under the BST Act. However, subsequent to the aforesaid amendment of the Act, the words "including goods" were inserted after the words "any goods". The effect of this amendment is that the particular organisations specified in the explanation are deemed to be the dealers to the extent of sales of all the goods including the discarded or scrap materials. In view thereof, the applicant was held liable to pay tax on all its sales including the sales of foods effected by its catering unit. It is thus clear that looking to the findings recorded by the Tribunal in the aforesaid legal canvas, no legal question can be said to have arisen warranting reference to this Court."

5. Our attention is also invited and in all fairness to a judgment of the Hon'ble Supreme Court of India rendered in the case of *Kayra Palak Engineer, CPWD, Bikaner vs. Rajasthan*

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Taxation Board, Ajmer and Ors.[1]. The Central Public Works Department, relying upon the same constitutional provision, contended that the Rajasthan Sales Tax Act would not be applicable insofar as its activities are concerned and that it would not be a dealer within the scheme of that Act. The said contention was negatived by the Hon'ble Supreme Court of India in the following words:-

> "12. Having heard the learned counsel for the parties and having perused the judgment of the High Court and the relevant clause in the agreement between the appellant and their contractors concerned we are satisfied that the questions involved in these appeals are no more res-integra. This Court as far back as in the year 1963 in a presidential reference case under Sea Customs Act held:
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> > "The bar of Article 289 of the Constitution of India does not apply to indirect tax like Customs duty, Central Excise duty, Sales Tax etc."
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> 13. In the said case it was held that exemption of property from tax contemplated in Article 289 was confined to direct tax on property and not to the levy of indirect taxes. The ratio of the said judgment though delivered in context of Article 289, applies to the exemption in favour of the Union of India under Article 285 in all force.
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> 14. Judgment in Sea Customs Case [Sea Customs Act (1878), S. 20(2), Re. (1964) 3 SCR 787:AIR 1963 SC 1760 was followed by this Court in the case of New Delhi Municipal Council Vs. State of Punjab & Ors. 1997 (7) SCC 339, wherein this Court by majority judgment at para 148 held: (SSC p. 408)
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> > "148. It would be appropriate at this stage to notice the ratio of two judgments of this Court dealing with Article 289. In Sea Customs Act, Re. (1964) 3 SCR 787:AIR 1963 SC 1760 a Special Bench of nine learned Judges, by a majority, laid down the following propositions: (a) clause (1) of Article 289 provides for exemption of property and income of the States

1 **(2004) 7 SCC 195**

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> only from taxes imposed directly upon them; it has no application to indirect taxes like duties of excise and customs (b) duties of excise and customs are not taxes on property or income; they are taxes on manufacture/production of goods and on import/export of goods, as the case may be, and hence, outside the purview of clause (1) of Article 289."

15. In the case of Collector of Customs and Anr. Vs. State of West Bengal and Anr. 1999 (1) SCC 192 this Court dealt with the contention involving Article 285 directly. The question involved in that case pertained to the levy of Sales Tax on goods sold by the Collector of Customs and a challenge made to the decision of West Bengal Taxation Tribunal holding the appellant (Union of India) therein to be a dealer under the provision of the West Bengal Finance (Sales Tax) Act, 1941 was negatived by this Court holding thus: (SCC pp. 193-94, paras 2-5)

> "2. Only one contention is advanced before us by learned counsel on behalf of the appellants, and it is, that Article 285 of the Constitution debars the imposition of tax upon property belonging to the appellants.
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> 3. Reliance in this behalf is placed on the judgment of two learned Judges of this Court in State of Punjab v. Union of India [(1990) 79 STC 437 (SC)]. The Punjab High Court in that matter had answered the two questions before it in favour of the Union of India. The second question was whether no sales tax could be levied in view of the provisions of Article 285 of the Constitution on goods purchased by the Railways and sold by the Railways in their Catering Department. This Court said that at the time of their sale, the goods belonged to the Railways. The tax had been imposed on such sale. In view of the provisions of Article 285, such sale was immune from taxation under the State law.
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> 4. It would appear that no real arguments were advanced before this Court by the appellant-State and the judgment of this Court in Sea Customs Act (1878), S. 20(2), AIR 1963 SC 1760 (1964) 3 SCR 787 was not pointed out. In the Sea Customs Act case a nine-Judge Bench of this Court opined by a majority, that Article 285 envisaged immunity from direct

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> taxes and not from indirect taxes such as sales tax. With specific reference to sales tax, this Court said:
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> > "We may in this connection contrast sales tax which is also imposed with reference to goods sold, where the taxable event is the act of sale. Therefore, though both excise duty and sales tax are levied with reference to goods, the two are very different imposts; in one case the imposition is on the act of manufacture or production while in the other it is on the act of sale. In neither case therefore can it be said that the excise duty or sales tax is a tax directly on the goods for in that event they will really become the same tax."
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> 5. The decision in the Sea Customs Act case was considered by another nine-Judge Bench in the case of New Delhi Municipal Council v. State of Punjab and was affirmed."
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> 16. From the above judgment of this Court, it is clear that Union is not exempted from the levy of indirect tax under Article 285 of the Constitution. The above discussion also shows reliance placed on the judgment of this Court in the case of New Delhi Municipal Council (supra) by one of the learned counsel for the appellants is wholly misconceived and is opposed to his contention with reference to Article 285 of the Constitution."

6. As far as the second contention as well, the Hon'ble Supreme Court of India, referring to its earlier judgments, came to the conclusion that the Central Public Works Department can safely be termed as a dealer. That contention was considered in great details from para 17 onwards and by relying on two Hon'ble Supreme Court judgments delivered in the past, even that was negatived. The relevant paragraphs are reproduced hereinbelow:-

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"18. This Court had an occasion to deal with a similar clause where the Union of India entered into an agreement for the construction of certain works, wherein it agreed to supply materials such as Cement, Steel etc. (as is the case in hand) in the said case of M/s N.M. Goel & Co. Vs. Sales Tax Officer, Rajnandgaon and Anr. 1989 (1) SCC 335: 1989 SCC (Tax) 74 this Court held :-

> "In order to be sale taxable to duty, there should be an independent contract -- separate and distinct -- apart from passing of the property, where a party purchases or procures goods from the Government. Mere passing of property would not suffice. There must be sale of goods. The primary object of the bargain judged in its entirety must be viewed. In the instant case, Clause 10 is significant. Though in a transaction of this type there is no inherent sale but a sale inheres from the transaction. Clause 10 read in the proper light indicates that position. By use or consumption of materials in the work of construction, there was passing of the property in the goods to the assessee from the PWD. By appropriation and by the agreement, there was a sale as envisaged in terms of Clause 10 of the contract."

19. In the case of Rashtriya Ispat Nigam Ltd. Vs. State of A.P. 1998 (8) SCC 439 this Court relying on the said judgment of M/s N.M. Goel & Co. (supra) held: (SSC p.440 para 2)

> "For the purpose of performance, the contractor was bound to procure materials. But in order to ensure that quality materials are procured, the PWD undertook to supply such materials and stores as from time to time required by the contractor to be used for the purpose of performing the contract only. The value of such quantity of materials and stores so supplied was specified at a rate and got set off or deducted from any sum due or to become due thereafter to the contractor..."

20. An attempt to distinguish the judgment in 'Goyal's case on facts came to be rejected by this Court in the above case of Rashtriya Ispat Nigam Ltd.

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> 21. In the instant case also by the use or consumption of material supplied in the work of construction, there was passing of property and by virtue of receipt of value of such transferred property by way of adjustment in bills the consideration has also passed which in our opinion satisfies the definition of 'sale' in the local Sales Tax Act.
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> 22. In Cooch Behar Contractors Association Vs. State of West Bengal and Ors. (1996) 10 SCC 380 this Court followed the decision in M/s N.M. Goel & Co. (supra) and considering a similar clause as is found in the appeal before us this Court held that the goods supplied to the contractor by the contractee and price recovered from the contractor by way of adjustment of value of such goods was held to be a contractual transferred price which is liable to levy of Sales Tax. Therefore, we do not find any merit in the argument that even on facts that there was no sale in the transfer of materials supplied made by the appellant to its contractors.
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> 23. Consequently, even the argument that in terms of the language of the definition of the dealer under Section 2(14) of the Rajasthan Act appellants can not be a "dealer", will also have to be rejected."

7. We do not think, therefore, that both contentions need detain us. They are answered clearly in favour of the Revenue and against the petitioner. The writ petition is, therefore, dismissed. Rule is discharged. There would be no order as to costs.

(PRAKASH.D.NAIK, J.) **(S.C.DHARMADHIKARI, J.)**

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