
(2011) 04 MAD CK 0136
In the Madras High Court
Case No : Writ Petition 19356 of 2001

M. Suganthi

APPELLANT

Vs

The Assistant Commissioner of Central Excise, Pollachi
Division

RESPONDENT

Date of Decision : 12-04-2011

Acts Referred:

Central Motor Vehicles Rules, 1989 — Rule 128
Finance Act, 1994 — Section 65, 65(51), 65(77), 65(78), 66(3)
Motor Vehicles Act, 1988 — Section 2(40), 2(43), 2(7), 72(2), 74

Citation : (2011) 23 STR 7 : (2011) 31 STT 537 : (2011) 40 VST 433

Hon'ble Judges : T.S. Sivagnanam, J

Bench : Single Bench

Advocate : M. Krishanappan, for the Appellant; S. Udayakumar, Senior Standing Counsel, for the Respondent

Final Decision : Allowed

Judgement

T.S. Sivagnanam, J.—This order disposes of these writ petitions in which a common question arises as to whether the Petitioner, a stage

carriage operator having a spare bus permit is liable to be brought under the tax net for payment of service tax in respect of such spare bus.

2. The facts which are necessary for the disposal of writ petitions are that the Petitioners are stage carriage operators having been issued permits

by the Regional Transport Authority, Pollachi. All the Petitioners have a spare bus permit to be operated in the place of the route bus in case of

break down or for special occasion. The Respondent issued a notice directing the Petitioner to register themselves under the provision of the

Finance Act, 1994, for payment of service tax on the ground that they are tour operators coming under the definition of Section 65(78) of Finance

Act, 1994, (Act 32 of 94). It appears that the Petitioners and other such notice's challenged the action of the Department by filing writ petitions

before this Court. The writ petitions were heard by a Hon''ble Division Bench of this Court and such of those writ petitions filed by stage carriage

operators and rent-a-car-scheme operators were dismissed by the Hon''ble Division Bench by its judgment in The Secretary Federation of Bus

Operators Association of Tamil Nadu v. Union of India 2001 2 MLJ 590. The Hon''ble Division Bench in paragraph 36 of the judgment dealt with

the arguments advanced by the persons holding spare bus permit. At this stage, it is relevant to note the direction issued by the Hon''ble Division

Bench which is as follows:

36. At this that, all the learned Counsel pointed out that the Petitioners'' spare buses may not be the ""tourist vehicles"" within the meaning of Section

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 Section 2(43) of the Motor Vehicles Act read with Rule 128 of the rules framed there under 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 are 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 u/s 2(43) of the Motor Vehicle 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 Section 65(51) and the other allied Sections like Section 66(3), etc.

3. It appears that after the order passed by the Hon''ble Division Bench, representations were submitted by the individual operators having spare

bus permits as well as the Pollachi District Bus owners Association requesting the Respondent to abide by the decision of the Hon''ble Division

Bench and not to demand any service tax from operators holding spare bus permits. The Petitioners also submitted representations to the

Respondents to the same effect.

4. The Respondent during 2001 issued notice to the Petitioners calling upon them to register themselves under the provisions of the Finance Act

and pay Service Tax. The Petitioner submitted that their reply to the notice stating that they are not liable to pay Service Tax as they are not Tourist

Operators. In their reply, the Petitioners specifically sought for an opportunity of personal hearing. The Respondent after referring to the reply given

by the Petitioners without affording a personal hearing, by separate and identical orders all dated 27.09.2001, rejected the contention raised by the

Petitioners and directed them to register and pay Service Tax. Challenging the said orders, the Petitioners are before this Court by way of these

writ petitions.

5. Mr. M. Krishanappan, learned Senior counsel appearing for the Petitioners, submit that the impugned orders are in violation of the principles of

the natural justice as the Respondent did not afford an opportunity of personal hearing inspire of the same being specifically sought for by the

Petitioners in their reply to the show cause notices. The learned Senior counsel would further submit that the impugned order is based on surmises

and conjectures. Further that the spare bus owned by the Petitioners is also a stage carriage and different from the Tourist vehicle, the spare bus

has a seating capacity of $57+2$ with seating arrangement on the right hand side $3 \times 11 = 33$ seats, rear side $6 \times 1 = 6$ seats, left side facing forward

$2 \times 9 = 18$ seats and in all 57 seats plus two drivers, whereas in a Tourist vehicle the seating arrangement will be 2×2 with more space between

two seats with a maximum of 36 seats. The spare bus will have one entrance and one exist, whereas in a Tourist bus there will be only one

entrance. Therefore, it is contended that a spare bus cannot be treated as a Tourist vehicle for the purposes of the Finance Act and therefore, the

impugned orders are without jurisdiction.

6. Mr. S. Udayakumar, learned Senior Standing counsel for the Respondent would submit that the order impugned in the writ petitions are

appeasable orders and if the Petitioners are aggrieved, they should have preferred an appeal to the Appellate Authority without resorting to filing

the writ petitions. The learned Counsel placed reliance on a decision of the Karnataka High Court in Smt. L.V. Sankeshwar v. Superintendent of

Central Excise (2007) 6 VST 10 (Karn) which decision was affirmed by Division Bench of the Karnataka High Court in Suresh Kumar Sharma v.

Union of India (2007) 6 VST 28 (Karn).

7. I have carefully considered the submissions on either side and perused the materials available on record.

8. The learned Senior Standing counsel appearing for the Respondent questioned the maintainability of the writ petitions on the ground of

availability of efficacious alternative remedy of appeal before the statutory Appellate Authority. It is to be noted that the primary ground on which

the order impugned has been questioned is on the ground of violation of principles of natural justice and if the same is established, the existence of

an alternate remedy is not an absolute bar for entertaining the writ petitions filed raising such contention. Further more, the writ petitions were

admitted during 2001 and been pending for nearly 10 years and despite service of notice, no counter affidavit has been filed by the Respondent

and at this stage, it would be harsh to direct the Petitioners to avail the alternate appellate remedy. Therefore, I propose to consider the contention

raised by the parties on merits.

9. The case on hand relates to the notices issued for the period 1998, which were initially questioned before this Court in a batch of writ petitions

and in respect of spare bus permit holders, the matter was relegated to the authorities, after which the impugned orders were passed. Therefore,

the validity of the impugned orders is being tested based on the old Section 65 of the Finance Act as it stood prior to its amendment in 1998 and

2004.

10. As noticed above, the Hon"ble Division Bench of this Court in the case of The Secretary Federation of Bus operators Association of Tamil

Nadu, (supra) considered the validity of the notices issued to tour operators with a request to register themselves and follow the provisions of the

Finance Act, 1994, and the rules framed there under with effect from 01.04.2000. The Petitioners before the Hon"ble Division Bench which

include the Petitioners herein were stage carriage operators owning spare buses covered under spare bus permits issued as per Section 72(2)(xvii)

of the Motor Vehicles Act, 1998, contract carriage operators, owning vehicles covered u/s 74 of the Motor Vehicles Act, 1988, and owners of

maxi cabs or taxies having permits u/s 74 of the Motor Vehicles Act, 1998. Before the Hon''ble Division Bench the spare bus permit holders

contended that spare buses are not tourist vehicles within the meaning Section 2(43) of the Motor Vehicles Act, and therefore, not liable to pay

Service Tax. The Hon''ble Division Bench observed, if vehicles owned by the Petitioners are not tourist vehicles within the meaning of Section

2(43) of the Motor Vehicles Act, read with Rule 128 of the Rules framed there under, such Petitioners would not be required to register under the

Finance Act. The fair stand taken by the learned Senior Standing counsel for the Department in the said batch of cases, accepting the said position

was recorded by the Hon''ble Division Bench. However, the Department took a stand that such objection should be raised before the concerned

authority, who will decide whether the Petitioner''s vehicle is a tourist vehicle as contemplated u/s 2(43) of the Motor Vehicles Act, which is a sine

qua non for the application of the Finance Act.

11. It was further observed that if they are not tourist vehicles the provision of the Finance Act would not apply more particularly, the provisions of

Section 65(51) and the other allied Sections like Section 66(3) etc. Thus, the resultant position being, the Respondent was required to consider the

specific aspect as to whether the Petitioners'' vehicles are covered under the definition of Tourist vehicle as defined u/s 2(43) of the Motor Vehicles

Act, which states that a Tourist vehicle means a contract carriage construed or adopted and equipped or maintained in accordance with such

specification as may be prescribed in this behalf and such prescription is contained in Rule 128 of the Central Motor Vehicles Rules 1989. In

respect of the Petitioners herein, a specific stand was taken that a spare bus is only a stage carriage as defined u/s 2(40) of the Motor Vehicles Act

1988, to mean a motor vehicle constructed or adapted to carry more than six passengers excluding the driver for hire or reward at separate fares

paid by or for individual passengers, either for the whole journey or for stages of the journey. Further, it is contended that a spare bus is covered

by a permit issued u/s 72(2)(xvii), which is a vehicle kept, as a reserve by the Petitioner to maintain the operation and to provide for special

occasion and therefore, they are not liable to be brought within tax net for payment of Service Tax.

12. However, the Respondent appears to have not considered this specific issue raised by the Petitioners in their reply to the show cause notice, though, there was a direction to the said effect in the judgment of the Hon"ble Division Bench as referred supra. Infact, the Respondent in the impugned order accepts that the provision of Section 65(77) of the Finance Act is not attracted in the Petitioners' case, but yet, on a mere conjecture came to a conclusion that the Petitioner has obtained or obtaining special Tourist permit is covered u/s 65 of the Finance Act, 1994. At this stage, it should be pointed out that the Respondent, exercising power under a fiscal statute, while passing an order bringing the Petitioner under the Tax net is required to render a specific finding as to how the Petitioner is liable to pay the tax and the same cannot be on surmises and conjectures. The Respondent cannot ignore the definition of "stage carriage", "tourist vehicle" as defined under the Motor Vehicles Act, since the provision of the Finance Act, 1994, refers to the meaning of the terms "tourist vehicle" and "tour operator" as defined under the Motor Vehicles Act, 1988. Therefore, the Respondent has to necessarily examine the aspect as to whether the provision of the Finance Act, 1994, are attracted to the case of the Petitioners vis-à-vis, the definition of "stage carriage" and "tour vehicle" as contained in the Motor Vehicles Act, 1988. From the definition of Section 2(40) of the Motor Vehicles Act, it is clear that carriages running under the public transport system fall under the category of stage carriage, since the passengers have a right to board or alight from such carriages according to their choice and convenience and such passengers individually pay the fares for the journey and such stage carriages do not fall under the definition of tourist vehicle u/s 2(43) of the Motor Vehicles Act.

13. The Hon"ble Division Bench granted liberty to the notice's having spare bus permits to agitate their contentions before the authority as it was observed that reserve vehicles under stage carriage permit, which are capable of being used as contract carriages under special permits may be covered within the definition of tour operators. Therefore, this factual question is required to be decided on a case to case basis as to whether the reserve vehicle or spare bus is capable of being used as a contract carriage as defined u/s 2(7) of the Motor Vehicles Act, on obtaining special

permit and the authority concerned cannot bring the notices under the tax net on the presumption that he may obtain a special tourist permit under

the Motor Vehicles Act. The Respondent while deciding the case of the Petitioners has lost sight of this vital fact.

14. The show cause notice issued to the Petitioner in W.P. No. 19358 of 2001 has been filed in the typed set of papers. It is seen that the notice is

bereft of particulars and the only reason assigned in the show cause notice for calling upon the Petitioners to obtain registration certification u/s 69

of the Finance Act, 1994, is on account of dismissal of the writ petitions by the Hon"ble Division Bench. Thus, it is clear that the Respondent lost

sight of the purport and intent of the opportunity granted to the notices by the Hon"ble Division Bench while relegating the matter back to the

assessing authority. Therefore, this Court has no hesitation to hold that the show cause notice issued to the Petitioner is not a notice which was

contemplated by the Hon"ble Division Bench in paragraph 36 of its Judgment. The appropriate procedure would have been to call upon the

Petitioners, who are holders of spare bus permits to establish before the assessing authority that such spare buses issued with spare bus permits

were infect tourist vehicles within the meaning of Section 2(43) of the Act and as to why they should not be made liable for payment of Service

Tax. If such a notice was issued to the Petitioners, it would be open to the Petitioners to explain and substantiate their case that their spare bus

covered by a spare bus permit u/s 72(2)(xvii) of the Motor Vehicles Act is not a tourist vehicle within the meaning of Section 2(43) of the Motor

Vehicles Act. The Hon"ble Division Bench thought fit to grant such liberty to the holders of spare bus permit to substantiate that their reserve

vehicle under the stage carriage permit was not capable of being used as a contract carriage under special permit or was not used as a contract

carriage by availing a special permit. It cannot be disputed that the essential ingredients of a contract carriage, among other things, it carries

passenger for hire or reward, it is engaged in contracts whether expressed or implied for use of such vehicle as a whole, the contract to be entered

into by the person with the permit holder, the agreed consideration payable on time basis or one point to another, and the vehicle should not stop

to pick up or set down passengers not included in the contract anywhere during the journey and it includes a maxi cab or a motor cab.

15. In Smt. L.V. Sankashwar's case, referred supra, the Petitioners were contract carriage bus operators and tourist taxi operators, who challenged the levy of Service Tax on them, under the category of "tour operator". They contended that they are not providing any service except renting out the vehicle or carrying the passengers in their vehicles to a particular destination and not liable to pay Service Tax on the gross bill raised by them towards the charges for hiring or renting the taxies or towards carrying the passengers and that they were subject to payment of Service Tax, without even identifying this service element in it. The Karnataka High Court held that there could not be any dispute that the vehicles involved in those cases, where contract carriages as defined u/s 2(7) of the Motor Vehicles Act, 1988, and all the vehicles in the said case, were issued with tourist permits and the assesses were offering the services of contract carriage from one destination to another on certain conditions and the passengers have to become parties to the contract after knowing fully well that the entire bus is going to one common destination as one unit. The Karnataka High Court also took note of the Division Bench judgment in the case of Secretary Federation of Bus Operators Association of Tamil Nadu (supra). Ultimately, the Karnataka High Court held that there is no substance in the grounds alleged by the Petitioners therein challenging the levy of Service Tax on the taxable service rendered by the tour operators and contract carriage operators and dismissed the writ petition. It is seen that the Karnataka High Court elaborately considered the question involving the levy of Service Tax on Tour operators, but the question which falls consideration in the case of the Petitioners herein in these writ petitions are as to whether the Petitioners who are stage carriage operators issued with spare bus permit u/s 72(2)(xvii) of the Motor Vehicle Act, 1988, and such spare buses could be treated as tourist vehicles u/s 2(43) of the Act to mean a contract carriage and capable of being used as such and therefore, made liable to pay Service Tax. In view of this specific question raised in these cases, on facts the decision of the Karnataka High Court does not lend much support to the contention raised by the learned Senior Standing counsel appearing for the Respondent.

16. The learned Senior standing counsel placed reliance on the judgment of this Court, delivered by his Lordship Mr. Justice P. Sathasivam as he

then was in *Sri Pandyan Travels v. Commissioner of Central Excise Chennai-II* 2004 (1) 163 ELT 409 (Madras). The Petitioner in the said writ

petition was a contract carriage operator and after the dismissal of the writ petition by the Hon"ble Division Bench in *Secretary Federation of Bus*

Operators Association of Tamil Nadu, notice was issued to the Petitioner as to whether their vehicle are tourist vehicle as contemplated u/s 2(43)

of the Act. This Court by relying on the decision of the Hon"ble Division Bench dismissed the writ petition as contract carriage vehicle are also

covered under Service Tax and since Petitioner therein is covered under the definition of tour operator, they are liable to register and pay Service

Tax. Since the facts in the said case, are entirely different in as much as the Petitioner therein was a contract carriage operator, the case was

squarely covered by the Division Bench Judgment. As noticed above, the case of the Petitioners herein are couched on a different set of facts and

the decision of this Court may not be applicable to the facts and circumstances of the present cases.

17. For all the above reasons, this Court is of the firm view that the impugned order is vitiated as the initiation of the proceedings itself was vitiated

as the show cause notice was bad in law in not taking into consideration the purport and intent of the direction issued by the Hon"ble Division

Bench in paragraph 36 of the judgment in *The Secretary Federation of Bus Operators Association of Tamil Nadu*, supra, and consequently, the

subsequent action/proceedings are also vitiated and the impugned orders are also bad in law.

18. In the result, the writ petitions are allowed and the impugned orders are set aside. However, liberty is granted to the Respondent to issue fresh

show cause notice, in the light of the observation made in this order, if they are so advised to do so. In the event of show cause notice being issued

afresh, it is needless to state that the Petitioners shall be entitled to submit their reply and they shall be afforded an opportunity of personal hearing

before a decision is taken by the Respondent on such fresh proceedings. No costs. Connected miscellaneous petitions are closed.