IN THE HIGH COURT OF UTTARAKHAND AT NAINITAL

Central Excise Appeal No. 1 of 2011

Commissioner, Customs & Central Excise. ……. Appellant

Versus

Sachin Malhotra. ...……. Respondent

Central Excise Appeal No. 2 of 2011

Commissioner, Customs & Central Excise. ……. Appellant

Versus

Raj Kumar Taneja. ...……. Respondent

&

Central Excise Appeal No. 3 of 2011

Commissioner, Customs & Central Excise. ……. Appellant

Versus

M/s Shiva Travels. ...……. Respondent

Mr. Shobhit Saharia, Advocate for the appellant.
Mr. Pulak Raj Mullick, Advocate for the respondents.

JUDGMENT

Coram: Hon'ble K.M. Joseph, C.J.
Hon'ble V.K. Bist, J.

Dated: 6th August, 2014

K.M. JOSEPH, C.J. (Oral)

Since common questions arise in these appeals, we are disposing of these matters by the following common judgment.

2. These appeals are filed under Section 35G of the Central Excise Act, 1944. The following is the substantial question of law, which is projected in the appeals:

> "Under Finance Act, 1994 as amended, the requirement of operators to be registered under Section 75 of the Motor Vehicles

> Act, 1988 in order to make them eligible as 'Rent-a-cab' operator scheme has been dispensed with, with effect from 16.10.98 by Finance Act, 1998. Consequently, whether the person engaged in the business of renting cabs, irrespective of the number of vehicles held by him (even if he does not own and has instead rented even a single cab) is not covered under the definition of Rent-a-Cab operator scheme, and not liable to pay Service Tax?"

3. The impugned order is passed by the Customs, Excise and Service Tax Appellate Tribunal (hereinafter referred to as the "Tribunal"). By the same, the Tribunal has taken the view that, for imposing service tax within the meaning of Section 65(105)(o) of the Service Tax Act, the hirer must have possession of the vehicle in question. It has also found that, as far as the respondents / assessees are concerned, they had intimated the Department about their activities in the year 2000, itself, and it is noted further that the show-cause notices were issued beyond the normal period of limitation. The matter has been remitted to be re-done on the basis of the observations / principles, which were laid down and subject to the proceedings being found within limitation.

4. Section 65(105) defines "taxable service" as any service provided or to be provided:

> (o) to any person, by a rent-a-cab scheme operator in relation to the renting of a cab.

5. Section 65(91) defines "rent-a-cab scheme operator" as meaning a person engaged in the business of renting of cabs. The proceedings were taken under the Finance Act against the respondents / assessees on the basis that they were operating rent-a-cab schemes and they were not paying the service tax due as per law. It is against the orders passed by the statutory authorities, the matters reached the Tribunal. The Tribunal has taken the view as we have already noted. The Tribunal has maintained a distinction between a mere contract of hire and a contract of renting of cabs. The reasoning of the Tribunal is that, under the Motor Vehicles Act, 1988, Section 75 provides for renting of a cab scheme. According to it, in the case of renting of a cab, the possession is

transferred to the hirer; he would have control over the vehicle; and, unless there is possession and control, rent-a-cab scheme would not be attracted. Consequently, even under the provisions relating to service tax, if there is mere hiring and there is no renting, a person would not be accessible to tax, as contemplated in the amendment in the Finance Act, 1994.

6. The learned counsel for the revenue would point out that the Tribunal has been in error in not noting that, essentially, there is no distinction between "hiring" and "renting". According to him, the important element is the consideration of what is "taxable service". He would, further, contend that the Court may not overlook the words "in relation to". According to him, it has the effect of widening the scope of the activities, which are sought to be taxed. No doubt, the learned counsel for the appellant would submit that no reliance can be placed on the provisions of the Motor Vehicles Act, 1988 in interpreting the provisions contained in the Finance Act. The learned counsel for the revenue would also submit that, in these cases, factually, the respondents / assessees entered into contracts with public sector organizations and the nature of the transactions make it clear that it partakes element of a rent-a-cab scheme and the vehicles were being offered to the organizations, which were using them. Firstly, he drew our attention to the judgment of a learned Single Judge of the Madras High Court in the decision in the case of **Commissioner of Income Tax vs. Madan and Company,** reported in **(2002) 174 CTR (Madras) 172.** In the said case, the learned Single Judge of the Madras High Court was dealing with the case under the Income Tax Act. The assessee claimed benefit of higher depreciation. Higher depreciation was provided under the Income Tax Act in respect of a person, who is in the business of hiring. It was in the said factual and legal context that the Court, *inter alia,* held as follows:

> "1. The Revenue contends that when the owner of the lorry leases it to another for an agreed rental for a specific period, the owner cannot claim the higher rate of depreciation provided in Appendix 1, entry III(2)(ii), under the sub-heading "Machinery and

plant", the appendix being the Appendix to the Income-tax Rules. That entry reads as under :

"Motor buses, motor lorries and motor taxies used in a business of running them on hire."

2. Owners of vehicles who used it for their own purposes are allowed to claim depreciation at the normal rates. Owners of vehicles mentioned in the entry when they allow it to be used for a price are allowed to obtain a higher rate of depreciation. The distinction is based upon the fact that a person who obtains the temporary right to use of the vehicle on payment of a charge price is likely to, by the nature of his user, such user being for the purpose of the hirer and not the owner, depreciate the value of the vehicle faster.

3. All such vehicles, which are so used, are likely to undergo a little more rough use than vehicles owned by and used for the personal purposes of the owner. It is in recognition of that fact of the depreciation occurring at a faster rate for such vehicles that the law provides for the higher rate of depreciation.

4. The fact that the assessee here chose to lease out the vehicle does not on that score disentitle the assessee to claim the benefit of the higher depreciation. The lease of the vehicle enables the lessee to have possession of the vehicle, and have the right to use the vehicle as the lessee wishes, subject to the terms of any contract between the parties. The lessee during the period of user is also likely to have to maintain the vehicle subject to the terms of the contract between the parties. For having the benefit of the user of the vehicle, the lessee is required to pay a price which is the lease amount, whether called rent or hire charges. The terminology used for describing the payment makes no difference in substance. What is paid is an amount in consideration of the right obtained from the owner to have the use of the vehicle for the benefit of the lessee for the stated period, and, or the stated purpose, whether or not by employing his own drivers, and whether or not also undertaking to maintain the vehicle during the period of the lease or hire. The word "hire" used in this entry is only meant to denote that the use of the vehicle is not by the owner himself for his own purposes, but it is given to another for use for a limited period of that other for a consideration. For the purpose of this entry there is no qualitative difference between lease of the vehicle for a specified period for consideration and letting the vehicle on hire for short duration on payment of hire charges.

5. The Tribunal, in our view, has rightly held that when the owner-assessee leased out the motor lorries owned by the assessee, and received consideration therefor in the form of lease rentals, the assessee was using those vehicles in the business of running them on hire and was, therefore, entitled to the higher rate of depreciation. The question referred for the assessment year 1991-92

> "Whether the Tribunal was right in law in granting higher depreciation to trucks as falling under entry III(2)(ii) of Appendix I to the Income-tax Rules?"

is, therefore, answered in favour of the assessee, and against the Revenue."

7. It is also necessary to bear in mind that the context, in which the Court held so, is clearly provided by what is stated in paragraph 3, i.e. all such vehicles, which are so used, are likely to undergo a little more rough use than the vehicles owned by and used for the personal purposes of the owner. It is in recognition of that fact of depreciation occurring at a faster rate for such vehicles that the law provides for the higher rate of depreciation. We also must bear in mind that the Madras High Court was not called upon to decide the precise issue, which we are called upon to decide, namely, whether there is a distinction between rent-a-cab scheme and a case of sheer hiring of the vehicle and we are of the view, therefore, that the reliance placed by the learned counsel for the revenue on the said judgment is misplaced. He also pointed out that the said judgment has been followed by the Madras High Court in the judgment rendered in the case of **CIT vs. South India Viscose Ltd.**, reported in **(2005) 272 ITR 115 (Madras)**. For the reasons, which we have already given above, we would think that the principles laid down in the said case cannot be applied to the facts of this case.

8. Next, the learned counsel for the revenue drew our attention to the judgment of the Madras High Court rendered in the case of **Secy. Federn. of Bus-operators Assn. of T.N. vs. Union of India**, reported in **2001 (134) ELT 618**. No doubt, it is a case, which arose under the aegis of the service tax law. Petitioners, as noted in paragraph 3, were classified by the court as follows:

> "3. The petitioners in these petitions can be classified in the following categories:
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> (I) Petitioners who are "Stage Carriage Operators" owning a "spare bus" covered under a "spare bus permit" as per Section 72(2)(xvii) of the Motor Vehicles Act, 1988.

(II) Petitioners who are “Contract Carriage Operators”, owning the vehicles covered under Section 74 of the Motor Vehicles Act, 1988.

(III) Petitioners who are the owners of the “Maxi Cabs or Taxis” and having a permit under Section 74 of the Motor Vehicles Act, 1988.”

9. We may, now, turn to the paragraphs, which the learned counsel for the revenue invited our attention to. They are as follows:

“45. We will now consider the writ petitions in case of the persons or organisations that are “motor cab owners” or “maxi cab operators”.

48. There can be no doubt that such motor cabs or maxi cabs are plied as "contract carriages" and/or under Section 88(9) of the Motor Vehicles Act read with Rules 82 to 85 of the Motor Vehicles Act. It would, therefore, be clear that the moment a vehicle which carries the permit as a "motor cab" or "maxi cab" is rented by a person, who is engaged in the business of renting cabs, such person who is so engaged in the business of renting cabs would be in the tax dragnet of service tax.

53. We have already pointed out that the scope of amended provision, which is as per Section 65(38), has been widened by deleting the requirement of holding a licence under Rent-a-Cab Scheme, 1989. Under the amended provision any person engaged in business of renting of cabs becomes a rent-a-cab scheme operator.

53. We have, therefore, no hesitation in holding that if the petitioners are plying the motor cabs or maxi cabs and the services are provided by them to any person in relation to the renting of the cabs, such service becomes a "taxable service" and, therefore, comes within the ambit of Section 66(3) of the Finance Act. In view of these provisions, it is not at all necessary to rely exclusively on Section 65(50), (51) and (52) which deal with the services offered by the "tour operators". That subject is entirely distinct and separate from the subject of the services provided by a rent-a-cab scheme operator though relevant as we have already shown in paragraph 50 while dealing with the petitions of "tour operators". We have already pointed out that the only requirement is the user by a person of the "tourist vehicles" for the "tour" and being engaged in that business. We have no doubts that a cab-owner who engages in that business for the purposes of renting a cab could also be held to be a "tour operator" and would be covered under Section 65(50), (51) and (52) of the Finance Act.

54. We have, therefore, no hesitation in holding that if the petitioners are plying the maxi cabs or motor cabs and giving the services in relation to the renting of a motor cab or maxi cab then, they would be in the tax-net and cannot complain that they are not covered by the Finance Act.

> 55. As it is, majority of the petitioners are having the "tourist permits" under Section 88(9) of the Motor Vehicles Act read with Rules 82 to 85 of the rules framed thereunder. Such persons can never contend that the Act is not applicable to them but, even others who are simply engaged in the business of renting the cabs would come in the tax net.
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> 58. Mr. V. Prakash, learned Counsel appeared for the petitioners in W.P. No. 14724 of 2000, which has been filed by sixty-nine petitioners, all of who deal in "taxi business". Some of them have purchased the cabs or have leased them under the hire purchase scheme. The business of these persons is of leasing the cabs to the tourist taxi suppliers. All of them were brought into the service tax-net, with effect from 16-7-1997 and 1-9-1997 respectively under Notifications of Government of India No. 27/97 dated 11-7-1997 and 37/97, dated 22-8-1997 respectively. Their further case is that the services rendered by them were under exemption from 1-3-1999 to 31-3-2000 under Notification No. 3/99, dated 28-2-1999. It is their case that since the said exemption has not been extended beyond 31-3-2000, the respondents have started demanding the compliance of the service tax requirements from the petitioners.
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> 60. The learned Counsel, on the basis of the representations sent by the Chennai Tourist Taxi Operators Association, which are annexed in the writ petition, very haltingly tried to contend that there had to be a "tourist permit" in case of "motor cab" or "maxi cab" owners and since there was no "tourist permit", they could not be held to be "tour operators" as contemplated under Section 65(52) of the Finance Act. We have already shown earlier that, in fact, the permit of the petitioners would be "tourist permit" and even otherwise it will not be necessary to have a "tourist permit" if the petitioners or any one of them is engaged in the business of renting the cab. That by itself is a "service" covered under the Finance Act."

10. We are of the clear view that this decision will not assist the appellant. This is for the reason that the question, which arises for our consideration in these cases, did not specifically arise before the court therein. We are not concerned here with the question as to whether the absence of a licence or a tourist permit will be fatal to the acceptance of the case of the revenue. Here, we are concerned with the question as to the distinction between a simple contract of hiring and a vehicle which is taken under rent-a-cab scheme.

11. Next, he also drew our attention to the judgment of the Karnataka High Court rendered in the case of **Smt. L. V. Sankeshwar, Proprietrix,**

Vijayanand Travels vs. Superintendent of Central Excise, Range-A, reported in **(2006) 206 CTR 274**. In fact, this is a case, which related to liability to service tax of tour operators, which was sought to be imposed by virtue of the Finance Act, 1997 w.e.f. 1st September, 1997. He drew our attention to the following paragraphs 4 & 14:

> "4. Learned Counsel for the petitioners argued that as the petitioners are not providing any service except renting out the vehicle or carrying the passengers in their vehicles to the particular destination, they are 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. According to them, the gross amount charged by the petitioners on the customers is subjected to service tax without even identifying the service element in it. The entire transaction value is taxed as service even though there is no service element involved in it. In other words, measure of tax is used to determine the nature of tax and there is no machinery provision to identify the exact value of service and charge tax on such aspect of service. Hence, in the absence of machinery provision to identify the exact value of the service rendered, the imposition of service tax on the gross amount charged by the petitioners is bad in the eye of law. The petitioners further questioned the competency of the Parliament to enact the Service Tax Law by referring to entries-54 and 56 of List-II of the VII Schedule of the Constitution. According to the petitioners, as levy of tax in question is traceable to entry 54, 56 and 60 of VII Schedule of List-II of the Constitution r/w. Article 366(29A)(d) of the Constitution, the levy of service tax by the Parliament is bad in the eye of law and that therefore, the Parliament has no jurisdiction to enact the impugned provisions.
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> 14. It is no doubt true that if there is any transfer of right to use any goods for any purpose for cash or deferred payment or valuable consideration, such aspect of transfer shall be treated as sale or purchase of goods and consequently, tax can be levied by the State Government. But in the case on hand, there is no transfer of right to use any goods in whatsoever manner, inasmuch as, the passengers have got no right to use the vehicle as if the said vehicle belongs to them even for a temporary period. In case if there are two or more independent passengers who have hired the taxi or contract carriage bus as the case may be, it cannot be said that each of the passengers have got right to use the taxi or contract carriage bus as their own and according to their will and wish. The permission granted to them will be only limited to travel from one point to another point by paying consideration. Every inch of the vehicle belongs to the permit holder or owner of the contract carriage or the taxi. The vehicle will be driven by a person engaged/employed by the owner or organisation. At the most, the said event can be regarded as a license or permission given to the

> passengers to use the vehicle on payment of consideration and the entire control or domain of the vehicle is always with the petitioners i.e., the owners of the vehicles or permit holders..."

12. We would think that the observations contained in the said paragraphs, which have been referred to by the learned counsel for the revenue, far from assisting him in advancing his case, may detract him from his line of reasoning. In particular, we notice in paragraph 15 of the very same judgment, the Court has held as follows:

> "15. The service aspect in respect of 'tour operators' has clearly distinguishable feature from renting the cab. The Phrase 'in relation to' used in the definition in the taxable service has to be construed widely. The Apex Court in the case of Doypack Systems Pvt. Ltd., v. Union of India and Ors. reported in : 1988(36)ELT201(SC) , while dealing with similar situation has observed thus: The expressions 'pertaining to', 'in relation to' and 'arising out of' used in the deeming provision, are used in the expansive sense. The expression 'arising out of' has been used in the sense that it comprises purchase of shares and lands from income arising out of the Kanpur Undertaking. The words 'Pertaining to' and 'in relation to' have the same wide meaning and have been used interchangeably for among other reasons which may include avoidance of repetition of the same phrase in the same clause or sentence, a method followed in good drafting. The word 'pertain' is synonymous with the word 'relate'. The term 'relate' is also defined as meaning to bring into association or connection with. The expression 'in relation to' (so also 'pertaining to'), is a very broad expression which presupposes another subject matter. These are words of comprehensiveness which might have both a direct significance as well as an indirect significance depending on the context. The phrase 'in relation to' the tour means 'in the aid of tour' also. Therefore, if any service is rendered in relation to or in the aid of tour is liable to be taxed. The taxable service is therefore not only means mere providing of car, taxies, contract carriages on a temporary basis but it would also include other facilities supplied in relation to tour as a whole."

13. Learned counsel for the appellant also drew our attention to the judgment of the Punjab & Haryana High Court rendered in the case of **Commissioner of Central Excise, Chandigarh vs. Kuldeep Singh Gill,** reported in **(2010) 18 STR 708.** No doubt, that judgment related to a case, where the court had raised the following question of law:

> "5(B) Whether the Ld. Tribunal is correct in holding that there was no renting out of cabs as the vehicles continued to be with the operator and moreover when the Rent a Cab Scheme Operator Services under the Finance Act, 1994 does not require ownership of the vehicle?"

14. No doubt, the court took the view that the services were taxable. We will deal with this judgment in greater detail as we proceed with the judgment.

15. Per contra, the learned counsel for the respondents / assessees would support the order. In fact, it is submitted by him that the possession continued with the assessees.

16. What is sought to be taxed under the provisions, which we have adverted to in this judgment, is service, which is rendered in relation to renting of cabs. Under Section 65(91) of the Service Tax Act, "rent-a-cab scheme operator" has been defined as a person, who is engaged in the renting of cabs. The words "in relation to", undoubtedly, do have the effect of expanding the scope of taxation. With this proposition, we can have no quarrel. But, this cannot detract from our enquiring into as to what is the transaction, which is actually brought to tax. We are constrained to pose this question and answer this question as what is sought to be taxed is the service in relation to the renting of cabs. So, the most important and crucial element, which we must bear in mind, is, whether there is a business of renting of cabs. Unless there is renting of cabs, there is no question of further enquiring as to the services, which may be rendered therein. In other words, any service, which may be rendered and which does not relate to renting of cabs, would be irrelevant for our consideration. When we consider the matter in the said light, we have no doubt in our minds that the Tribunal has, in this case, correctly propounded the principle that, unless the control of the vehicle is made over to the hirer and he is given possession for howsoever short a period, which the contract contemplates, to deal with the vehicle, no doubt subject to the other terms of the contract; there would be no renting. A

perusal of Section 75 of the Motor Vehicles Act, 1988 would also fortify us in the view that we have taken. Section 75 reads as follows:

> "**75. Scheme for renting of motor cabs.** - (1) the central government may by notification in the official Gazette, make a scheme for the purpose of regulating the business of renting of motor cabs or motor cycles to persons desiring to drive either by themselves or through drivers, motor cabs or motor cycles for their own use and for matters connected therewith.
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> (2) A scheme made under sub-section (1) may provide for all or any of the following matters, namely;-
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> (a) licensing of operators under the scheme including grant, renewal and revocation of such licences;
> (b) form of application and form of licences and the particulars to be contained therein;
> (c) fee to be paid with the application for such licences;
> (d) the authorities to which the application shall be made;
> (e) condition subject to which such licences may be granted, renewed or revoked;
> (f) appeals against orders of refusal to grant or renew such licences and appeals against orders revoking such licences;
> (g) conditions subject to which motorcabs may be rented;
> (h) maintenance of records and inspection of such records;
> (i) such other matters as may be necessary to carry out the purpose of this section."

17. In terms of Section 75, a scheme has been framed by the Government, which is called Rent A Cab Scheme, 1989. It contemplates the licensing of the operator; the making of an application for the licence; the grant of the licence; and the duration of the licence. We noticed, no doubt, that Clause 9 contemplates collection of hire charges. It also provides for the duties and responsibilities of the hirers of motor cabs in Clause 10, which we consider to be relevant, and we, therefore, extract the same as under:

> "**10. Duties and responsibilities of hirers of motor cabs.** - (1) It shall be the duty of every hirer, to keep the holder of the licence informed of his movements from time to time.
>
> (2) If an individual or company has hired the vehicles as a leader of the tourist party, it shall be the duty of such leader of the party to keep the holder of the licence informed of the movement of each vehicle, from time to time.

> (3) If a hirer so desires, he may engage a person possessing a valid driving licence to drive the vehicle so hired during the period of the hire agreement."

18. A perusal of Clause 10 would re-enforce us in the view that we are taking that, under the rent-a-cab scheme, the hirer is endowed with the freedom to take the vehicle, wherever he wishes, and he is only obliged to keep the holder of the licence informed of his movements from time to time. When a person chooses to hire a car, which is offered on the strength of a permit issued by the Motor Vehicles Department, then the owner of the vehicle, who may or may not be the driver, will offer his service while retaining the control and possession of the vehicle with himself. The customer is merely enabled to make use of the vehicle by travelling in the vehicle. In the case of a passenger, he is expected to pay the metered charges, which is usually collected on the basis of the number of kilometers travelled. These are all matters, which are regulated by the Government. Unlike the said scenario, in the case of a rent-a-cab scheme, as is clear from the very fundamental principle underlying the scheme, it is to give the hirer the freedom to use the vehicle as he pleases, which, undoubtedly, implies that he must have possession and control over the vehicle. This is the fundamental distinction between rent-a-cab and a pure case of hiring. No doubt, the learned counsel for the appellant may be correct in saying that, in the case of rent-a-cab also, there is hiring in the general sense. As we have already noted, the word "hire" is used even in the rent-a-cab scheme. But, what is of fundamental importance and constitutes the distinguishing feature between "rent-a-cab" and "hiring" is that, in the case of "hiring", undoubtedly, the owner of the vehicle retains control and possession; he either drives the vehicle himself or employs somebody else to drive the vehicle; and the customer merely makes use of the vehicle by travelling in the vehicle on the basis of a contract that he will pay the requisite hire charges for the period he uses the vehicle. Unlike the same, in the case of rent-a-cab, as is provided in the Motor Vehicles Act, the person is enabled to take the vehicle with him wherever he pleases, subject, no doubt, to the terms of the contract between the parties and he uses the vehicle as his own subject to his paying the rent.

Though both, rent and hire, may, in a different context, have the same connotation; in the context of rent-a-cab scheme and hiring, we are of the view that they signify two different transactions. What the lawgiver has chosen fit to tax by way of imposition of service tax is only transaction relating to business of renting of cabs. It is also pertinent to bear in mind that, in the case of hiring, the hirer may refuse to provide the service to the prospective customer. We cannot accept the argument of the learned counsel for the appellant that the Court must ignore the provisions of Section 75 of the Motor Vehicles Act. We are of the view that, when the lawgiver introduced this new source of taxation, it must be treated as having been aware of the distinct concept of renting a cab for which there is provision in the Central Legislation, namely, Section 75 of the Motor Vehicles Act and also a scheme stood framed as early as in 1989. We are, therefore, of the view that, unless there is control, which is passed to the hirer under the rent-a-cab scheme, there cannot be a taxable transaction under Section 65(105)(o), read with Section 65(91) of the Service Tax Act.

19. We are, therefore, unable to subscribe to the view taken by the Punjab & Haryana High Court (supra), which is relied on by the learned counsel for the appellant. We would think that the said court has not considered the aspects, which we would think were absolutely relevant in arriving at a conclusion.

20. In such circumstances, we are of the view that the impugned orders are liable to be confirmed. Consequently, the question of law posed before us is answered against the appellant and the appeals will stand dismissed.

(V.K. Bist, J.)
06.08.2014

(K.M. Joseph, C. J.)
06.08.2014

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