IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 1614 OF 2010

Mercedes Benz India Private Limited. ... Petitioner.

V/s.

Union of India and others. ... Respondents.

V.Sridharan with Jas Sanghvi i/b.
PDS Legal for the petitioner.

R.B.Pardeshi for the respondents.

CORAM : V.C.DAGA AND K.K.TATED, JJ.

DATED : 17th March 2010.

JUDGMENT : (Per V.C.Daga, J.)

Rule returnable forthwith.

Mr.Pardeshi waives service for the respondents.

Heard finally by consent of parties.

2. This petition is directed against the order of the Tribunal dated 20th November, 2009 allowing appeal filed by the Revenue. The facts giving rise to the present petition are as under:

The Facts :

3. The petitioner is a Company duly incorporated under the Companies Act, 1956 and engaged in manufacture of motor vehicles and part thereof at its factory located at Chakan, Pune. The petitioner is selling the said vehicles to its dealers at the factory gate. The said vehicles are cleared on payment of central excise duty on transaction value at the factory gate. The dealer is free to engage his own transporter and carry the goods from the factory gate of the petitioner to his premises. However, in terms of dealer agreement, petitioner arranges for transportation/ transit insurance of behalf of the dealers and thereby undertakes to deliver the goods at the doorstep/ premises of the dealer. The said transportation charges referred to as Road Delivery Charges (RDC for short) are recovered from the dealers by showing the same in the sales invoices separately. The petitioner is paying Maharashtra Value Added Tax (VAT) as applicable on the RDC in the invoice for sales within the State.

4. Show cause notices came to be issued to the petitioner periodically alleging that the RDC are includible in the assessable value of the vehicles in terms of section 4(1)(b) of the Central excise Act, 1944 (Act for short) read with rule 5 of the Central Excise Valuation Rules, 2000 for the period from July, 2000 to April, 2005.

5. In reply, the case of the department was that charges collected on account of RDC from the dealers keep

on fluctuating; sometimes more than that actually incurred and sometimes less than actually incurred. Excess recovery of RDC is not includible in the assessable value of the vehicles. Accordingly, the above show cause notices proposing recovery of differential duty under section 11A(1) of the Act was required were replied by the petitioner.

6. The respondent No.2 passed order-in-original dated 17th February, 2003, inter alia; holding that RDC is not includible in the assessable value of the final product in as much as the sale takes place at the factory gate, since the place of removal is the factory gate and not the premises of the buyer, as such relying upon the decision of the Apex Court in the case of ***Escorts JCB Limited*** **v.** ***C.C.E.***, 2002 (146) ELT 31, respondent No.2 dropped the proceeding initiated against the petitioner under two show cause notices. The said order was not challenged by the Revenue as such attained finality.

7. However, despite the above order, again fresh show cause notices were issued for further period. On contest they culminated in the orders-in-original. The said orders were challenged by the petitioners before the Commissioner of Central Excise (Appeals), Pune without much success. Against the orders of the Commissioner (Appeals), petitioner preferred appeals before the Tribunal. The Tribunal vide its judgment and order dated 26th May, 2008 allowed all the appeals filed by the petitioner and rejected appeals filed by the Revenue. The

Tribunal followed the decision of the Apex Court in the case of ***Escorts JCB Limited*** (supra) and held that the RDC were not includible in the assessable value of the vehicles. The Revenue challenged the said order of the Tribunal before the Supreme Court. However appeal of the Revenue came to be dismissed on the ground of delay.

8. The respondent No.3 for the intervening period from May, 2005 to March 2007 had issued show cause notices to the petitioner, which again culminated in the order-in-original dated 19th December, 2007 whereunder demands of differential central excise duty were confirmed without imposing penalty.

9. The petitioner filed appeal against the said order before the Commissioner (Appeals), who was pleased to uphold the order-in-original and further went on to hold that the excess RDC would be includible in the assessable value of the vehicles.

10. Being aggrieved by the aforesaid order, petitioner filed appeal before the Tribunal. The Tribunal vide its order dated 20th November, 2009 chose not to follow the earlier order dated 26th May, 2008 passed in the case of petitioner itself dealing with the very same issue for earlier period and rejected the appeal filed by the petitioner on merits.

11. Being aggrieved by the said order, the petitioner has invoked writ jurisdiction of this Court under Article

226 of the Constitution of India, complaining breach of propriety on the part of the Tribunal by not referring the issue to a larger bench, which was mandatory as per law laid down by the Apex Court from time to time.

Submissions :

12. Mr.Sridharan, learned counsel appearing for the petitioner, without going into the merits of the issues involved, urged that the impugned order passed by the Tribunal is *ex facie* perverse and contrary to the judicial discipline laid down by Apex Court as well as by this Court from time to time. He brought to our notice earlier judgment of the Tribunal in the case of the petitioner itself reproduced at Exh.G; wherein the Tribunal has observed as under:

> 5. On hearing both sides, we find that the issue in dispute stands settled in favour of the appellants by the Apex Court s decision in the case of Escorts JCB Ltd vs Commissioner of Central Excise, Delhi II2002 (146) ELT 31 (SC) holding that the element of freight and transit insurance is not includible in the assessable value. The Supreme Court further held that ownership of goods have no relevance insofar as transit insurance of gods is concerned. In this view of the matter, the D.R. s reliance upon Clause VII of the Conditions of Sale to the effect that ownership of the goods is retained by the assessee does not come to the rescue of the Revenue as this has also been considered and held against the Revenue by the Apex Court. We also note that by the Order dated 17.2.2003, the Commissioner of Central Excise, Pune, has accepted the

> contention of the assessee that their factory gate has to be treated as the place of removal and hence such ....
>
> (emphasis supplied)

13. Mr.Sridharan brought to our notice that when another appeal filed by the present petitioner came up for consideration before the Tribunal, the aforesaid judgment was pressed into service to contend that the issue is squarely covered by the judgment of the Tribunal in the case of the petitioner itself delivered on 26th May, 2008. However, the Tribunal did not follow that judgment holding as under:

> a) We hold that we need not follow the decision of the Tribunal in Order No.A/463-470/08/C-I/EB, dt.26.05.98 in view of the fact that while the controversy was noted, the decision was that the elements of freight and transit insurance are not includible in the assessable value since place of removal was factory gate. This decision did not address the grievance of the Revenue and did not consider all the facts and did not lay down a clear ratio. Therefore, with due respect to the decision, we beg to differ and have considered the issue afresh.
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> (emphasis supplied)

14. Based on the above two judgments of the Tribunal running counter to each other, learned counsel for the petitioner pressed into service the serious consequences of

unsettling law resulting from the approach adopted by the Tribunal.

15. Mr.Pardeshi, learned counsel appearing for the Revenue tried to support the approach adopted by the Tribunal but could not take his submission to the logical end.

Consideration :

16. Having heard both parties, the substantive limb of the argument of the counsel for the petitioner relates to the manner in which the Tribunal disposed of the matter. It is urged that the decision of the co-ordinate bench has been disregarded and the same has been ignored. The grievance of the petitioner s counsel, in our opinion, is not wholly unjustified.

17. We are not happy to observe but constrained to say that one must remember that pursuit of the law, however glamorous it is, has its own limitation on the Bench. In a multi-judge court, the Judges are bound by precedents and procedure. They could use their discretion only when there is no declared principle to be found, no rule and no authority. The judicial decorum and legal propriety demand that where a learned single Judge or a Division Bench does not agree with the decision of a Bench of co-ordinate jurisdiction, the matter should be referred to a larger Bench. It is a subversion of judicial process not to follow this procedure. In our system of judicial review

which is a part of our Constitutional scheme, we hold it to be the duty of the judges of the courts and members of the tribunals to make the law more predictable. The question of law directly arising in the case should not be dealt with apologetic approaches. The law must be made more effective as a guide to behavior. It must be determined with reasons which carry convictions within the Courts, profession and public. Otherwise, the lawyers would be in a predicament and would not know how to advise their clients. Subordinate courts would find themselves in an embarrassing position to choose between the conflicting opinions. The general public would be in dilemma to obey or not to obey such law and it, ultimately, falls into disrepute. These are the observations made by the Apex Court in ***Sundarjas Kanyalal Bhathija*** **v.** ***Collector, Thane***, AIR 1990 SC 261.

18. The Apex Court also had an occasion to notice similar impropriety in the case of ***Lala Shri Bhagwan*** **v.** ***Ram Chand***, AIR 1965 SC 1767; wherein it was observed as under:

> It is hardly necessary to emphasize that considerations of judicial propriety and decorum require that if a learned single Judge hearing a matter is inclined to take the view that the earlier decisions of the High Court, whether of a Division Bench or of a single Judge, need to be reconsidered,l he should not embark upon that enquiry sitting as a single Judge, but should refer the matter to a Division bench or, in a proper case, place the relevant papers before the Chief Justice to enable him to

> constitute a larger Bench to examine the question. That is the proper and traditional way to deal with such matters and it is founded on healthy principles of judicial decorum and propriety. It is to be regretted that the learned single Judge departed from this traditional way in the present case and chose to examine the question himself.

The similar expressions are to be found in the case of ***Mahadeolal Kanodia v. The Administrator General of West Bengal***, AIR 1960 SC 936 (at p.941); wherein it is observed:

> We have noticed with some regret that when the earlier decision of two Judges of the same High Court in Deorajin s case, 58 Cal.WN 64: AIR 1954 Cal 119 was cited before the leaned Judges who heard the present appeal they took on themselves to say that the previous decision was wrong, instead of following the usual procedure in case of difference of opinion with an earlier decision, of referring no less than legal propriety form the basis of judicial procedure. If one thing is more necessary in law than any other thing, it is the quality of certainty. That quality would totally disappear if Judges of co-ordinate jurisdiction in a High Court start overruling one another s decision.

19. Having said so, the impugned view taken by the Tribunal by no means can be said to be correct approach. Needless to mention that if the Tribunal wanted to differ to the earlier view taken by the Tribunal in the identical set of facts, the judicial discipline required reference to the larger bench. One co-ordinate bench finding fault with

another co-ordinate bench is not a healthy way of dealing with the matters. In this view of the matter, we have no option but to set aside the impugned judgment passed by the Tribunal on 20th November, 2009 incorporated at Exh.A to the petition.

20. In the result, impugned judgment dated 20th November, 2009 is quashed and set aside. Appeal is restored to the file of the Tribunal with direction to hear and decide the same afresh by a reasoned order following principles of natural justice. If the Tribunal decides to take view contrary to the view holding the field, then in that event it is expected of the Tribunal to pass appropriate order leading to reference to a larger bench to resolve differences, if any.

21. We may make it clear that we have not examined the merits of the controversy involved as such we refrain from expressing any opinion on merits of the matter. All rival contentions are kept open.

22. Rule is made absolute in terms of this order with no order as to costs.

(K.K.TATED, J.) (V.C.DAGA J.)