



IN THE HIGH COURT OF MADHYA PRADESH
AT INDORE
BEFORE

HON'BLE SHRI JUSTICE VIVEK RUSIA

&

HON'BLE SHRI JUSTICE GAJENDRA SINGH

ON THE 28th OF APRIL, 2025

WRIT PETITION No. 372 of 2005

M/S PRAKASH ALSPHALTINGS

Versus

COMMERCIAL TAX OFFICER AND OTHERS

WITH

WRIT PETITION No. 373 of 2005

M/S PRAKASH ALSPHALTINGS

Versus

COMMISSIONER TAX OFFICER AND OTHERS

WRIT PETITION No. 2179 of 2005

M/S PRAKASH

Versus

COMMERCIAL TAX OFFICER AND OTHERS

AND

WRIT PETITION No. 2180 of 2005

M/S PRAKASH

Versus

COMMERCIAL TAX OFFICER AND OTHERS

Appearance:

Shri Manoj Munshi, learned Senior Counsel assisted by Ms. Mahak Guru on behalf of Shri Lucky Jain, learned counsel for the petitioner.

Shri Amit Agrawal, learned Senior Counsel assisted by Shri Arjun Agrawal, learned counsel for the respondent / MPSITC.



Shri Bhuwan Gautam, learned Government Advocate for the respondents / State.

Heard on : 01st May, 2025

Delivered on : 14th May, 2025

O R D E R

Per : Justice Vivek Rusia

Since the controversies involved in the above cases are between the same parties, with the joint request of the parties, they are analogously heard and decided by this common order.

By way of these petitions filed under Article 226 of the Constitution of India, the petitioner has called into question the legality of assessment and revisional orders passed under the Madhya Pradesh Commercial Tax Act, 1994 treating its Build – Operate – Transfer (in short 'the BOT' scheme as works contracts and holding them liable to pay the commercial as well as entry tax. The challenge is on the ground that there was no actual sale or no transfer of property or goods during the relevant assessment years, and that there was no taxable turnover or business activity until the commencement of toll collection, which only started from 07.06.2001. These writ petitions relate to the assessment years 2000-2001.

FACTS OF THE CASE

02. The petitioner is a company engaged in the business of infrastructure development and in particular related to the construction and maintenance of roads and highways under the BOT scheme.

2.1. In the year 2000, the petitioner was awarded two separate infrastructure contracts by the State Authorities. The first project was granted by the Public Works Department (PWD), Katni Division,



under Agreement No. 6/DL/2000-2001 vide Work Order dated 08.05.2000 for the construction of the Katni Bypass (Pureni–Khirehni) road having a length of 7.6 km. The second project was awarded by the Madhya Pradesh State Industrial Development Corporation (MPSIDC) vide letter dated 13.11.2000 for the development and maintenance of a 27 km road between Mhow and Ghatabillod.

2.2. Both contracts were under the BOT scheme, wherein the petitioner was to construct, operate and maintain the above two roads using its financial resources, with an authority to collect toll for a fixed concession period i.e. 3941 days for the Katni project and 3351 days for the Mhow-Ghatabillod project to recover its investment and expenditures. As per the terms of the concessional agreements, the completed road with the facility was to be transferred back to the respective authority at the end of the concession period without any payment or any further claim.

2.3. According to the petitioner, construction work on both projects was commenced during the financial year of 2000- 2001, but as on 31.03.2001, the construction work was ongoing and had not been completed. The completion certificate was issued later on, i.e. on 07.06.2001, only after which toll collection began, hence, no revenue from toll was earned during the Assessment Year 2000 – 2001. Despite this, the Commercial Tax Department initiated proceedings under the Madhya Pradesh Vanijyik Kar Adhiniyam, 1994, and the Madhya Pradesh Sthaniya Kshetra Me Mal Ke Pravesh Par Kar Adhiniyam, 1976, treating the BOT contracts executed by the petitioner as taxable "works contracts". The assessing officer held



W.P. No.372 of 2005 & three other

that during the execution of the road projects, there was a transfer of property in goods involved in the execution of the contract, which constituted a deemed sale and held that the petitioner is liable for commercial tax and entry tax.

2.4. In **W.P. No. 373 of 2005** and **W.P. No. 2180 of 2005**, the assessment under challenge is related to commercial tax; the petitioner was subjected to assessment under the provisions of the Madhya Pradesh Vanijyik Kar Adhiniyam, 1994, for the assessment years 2000–01 and 2001–02. For the year 2000–01, the commercial tax officer, Indore, vide order dated 12.02.2004, treated the purchase and use of construction materials for its ongoing BOT projects as involving deemed sales. In the absence of any recorded sale or transfer of property in goods, the assessing authority estimated a turnover of Rs. 4,79,57,042/- applying profit margins of 10% on intra-State and 20% on inter-State purchases. On this basis, commercial tax of Rs. 8, 16,637/- was imposed along with a penalty of an equivalent amount. The revision of the petitioner against the said assessment order was rejected by the Additional Commissioner of Commercial Tax, Indore, vide order dated 12.10.2004. For the subsequent year 2001–02, a similar assessment order dated 21.12.2004 was passed on the same reasoning and methodology, which was likewise upheld in revision by order dated 07.04.2005.

2.5. In **W.P. No. 372/2005** and **W.P. No. 2179/2005**, the assessment under challenge is related to entry tax; the petitioner was assessed under the Madhya Pradesh Sthaniya Kshetra Me Mal Ke Pravesh Par Kar Adhiniyam, 1976, for both assessment years. For the year 2000–01, the assessing authority by order dated 12.02.2004



determined that the petitioner had brought goods worth Rs. 4,36,40,514/- into the local area for use in its construction projects and after allowing permissible deductions, the taxable quantum was computed at Rs. 3,18,96,884/- on which Entry Tax of Rs. 3,30,502/- was levied. Against this liability, the petitioner had already deposited Rs. 2,74,300/-, resulting in a balance demand of Rs. 1,10,892/-. This assessment was confirmed in revision by the Additional Commissioner vide order dated 12.10.2004. For the subsequent year 2001-02, the Entry Tax assessment followed the same reasoning, which was also confirmed and upheld in revision by order dated 07.04.2005. Hence, present writ petitions are before this Court for the refund of tax with interest as per law.

SUBMISSIONS OF PETITIONER'S COUNSEL

03. Learned Senior Counsel for the petitioner submitted that the assessments in question are liable to be set aside both in respect of the levy of Commercial Tax and Entry Tax, as the same are based on erroneous assumptions of law and fact. Learned Senior Counsel submitted that the petitioner undertook construction of road projects under the Build-Operate-Transfer (BOT) model for which the entire cost of construction and maintenance was borne by the petitioner, with the only consideration being the right to collect toll from users of the completed road. Learned Senior Counsel submitted that since there was neither contract for sale or supply of goods to the State nor any transfer of property in goods for consideration which are essential requirement to attract provisions of tax under the **Madhya Pradesh Commercial Tax Act, 1994 or Entry Tax Act, 1976** and since the toll collected constituted only user fees paid by third parties



and not consideration paid by the State Government thus the concept of works contract or sale is not attracted.

3.1. Learned Senior Counsel further argued that the registration of the petitioner under the **Madhya Pradesh Commercial Tax Act, 1994** was necessitated solely by the statutory requirement under **Section 5(5) (a)** read with **Sections 22 and 23** which was required due to its purchase of construction materials exceeding the statutory threshold limit. However, such registration cannot be interpreted as constituting an admission or acknowledgement of any taxable sale transaction. Learned Senior Counsel argued that essential elements of "sale" as defined under **Section 2(t) of the Act**, particularly the transfer of property in goods for consideration, are entirely absent in the present case. Learned Senior Counsel submitted that neither was there any transfer of goods nor any receipt of consideration as contemplated under **Section 2(u) of the Act** and also there was no turnover or taxable turnover as defined under **Sections 2(z) and 2(w) of the Act** making the assessments fundamentally erroneous and unsustainable.

3.2. Shri Munshi, learned Senior Counsel, submitted that the assessing authorities have arbitrarily computed taxable turnover by presuming a sale value based on the purchases of materials by the petitioner and by applying speculative margins for profit and expenses. Learned Senior Counsel submitted that the method adopted by the Assessing Officer runs contrary to statutory requirements, which mandate actual or tangible evidence of transfer or sale transactions.

3.3. Learned Senior Counsel submitted that **Clause 19 of the Special Conditions of the Concession Agreements** explicitly stipulates that any liability arising out of Sales Tax, Stamp Duty or similar levies



due to transfer of property if any shall be borne exclusively by the respondent authority concerned and therefore even on assuming without admitting any liability towards such taxes the same stands indemnified by the respondents themselves under the contractual provisions.

3.4. Learned Senior Counsel on the aspect of entry tax placed reliance upon Section 3 of the Madhya Pradesh Sthaniya Kshetra Me Mal Ke Pravesh Par Kar Adhiniyam, 1976, submitting that entry tax liability arises only when goods are brought into a local area in the course of business. Learned Senior Counsel categorically submitted that during the financial year 2000–01 and the relevant period of 2001–02, no business had commenced, and as such, the toll collection activities began only after issuance of the completion certificate on 07.06.2001. Thus, the goods used for construction were brought into the local area at the pre-business commencement stage and thereby fell entirely outside the purview of entry tax.

3.5. Learned counsel submitted that the audited balance sheets of the petitioner also reflect that all goods used in the course of project construction were classified under "capital work in progress" and there was no resale or market transaction of such goods. As such, no element of commerce or business was involved in the inward movement of goods to attract the provisions of the Entry Tax Act. Reliance is placed on this court order in ***Samta Foods Limited v/s Assistant Commissioner of Commercial Tax (Writ Petition No.436 of 2005)***.

3.6. Learned Senior Counsel finally argued that the petitioner is not disputing that in the BOT project the the petitioner is not liable to pay commercial and entry tax, but they are liable to pay after completion of the concessional period. Learned Senior Counsel submitted that the



petitioner may be subjected to these two taxes after completion of work and the concessional period, but not in every financial year, as during this period, there was no sale or purchase.

3.7. Learned Senior Counsel, thus, prayed for quashment of the impugned commercial tax and entry tax assessments and revisional orders. In support of the aforesaid contentions, reliance has been placed upon several judgments delivered by this Court in the cases of *Perfect Pottery Corporation Limited v/s Commercial Sales tax (MCC No.123 of 1986, NTPC Limited v/s State of Madhya Pradesh (Writ Petition No.2024 of 2008), Maihar Cemet v/s Assistant Commissioner of Sales Tax reported in 1985 (60) STC 210; Makson Nutrition Food Private Limited v/s Assistant Commissioner (Writ Petition No.8475 of 2015) and Surya Roshani Limited v/s The State of Madhya Pradesh (Writ Petition No. 743 of 2011.*

SUBMISSIONS OF STATE'S COUNSEL

04. Learned Government Advocate for the respondent / State submitted that the impugned assessment and revision orders have been passed in accordance with law and are fully justified both on facts and legal principles. It has been submitted that the activities undertaken by the petitioner under the Build-Operate-Transfer (BOT) model squarely fall within the definition of “works contract” of the **Madhya Pradesh Vanijyik Kar Adhiniyam, 1994** and also attract the deemed sale provision under **Article 366(29A)(b) of the Constitution of India**. Learned Government Advocate submitted that the petitioner had executed infrastructure works involving supply and incorporation of goods in the course of construction of roads, which amounts to transfer



of property in goods for valuable consideration and is accordingly liable to Commercial Tax.

4.1. Learned Government Advocate further submitted that the BOT model does not alter the taxable character of the transaction, and the fact that the State has not made a direct monetary payment is immaterial, as the right to collect toll from users for a specified concession period constitutes deferred consideration. Learned counsel submitted that the petitioner was under a contractual obligation to deliver completed infrastructure works, and the completed facility ultimately vests with the State after the concession period, and thus, there is a clear transfer of property in goods involved in the execution of a works contract. Learned Government Advocate submitted that the assessment was made by applying standard methods of computation based on the cost of goods purchased and utilised by the petitioner in the course of execution of the project, with a reasonable addition made towards profit and incidental charges as per departmental norms and following all statutory norms.

4.2. Learned Government Advocate argued with respect to Entry Tax that since the petitioner being a registered dealer had brought goods such as cement, steel, bitumen and other construction materials into the local area in large quantities and that the entry of such goods was clearly in the course of business as contemplated under **Section 3 of the Madhya Pradesh Entry Tax Act, 1976** thus he was liable to pay entry tax.

4.3. Learned Government Advocate submitted that the petitioner had embarked on a commercial venture by entering into concession agreements for infrastructure development with the objective of earning



toll revenue, and therefore, the activity amounts to business within the extended definition under the Entry Tax Act. Learned Government Advocate submitted that the point of commencement of toll collection is not the determining factor of the commencement of business, and so long as the entry of goods is linked to an ongoing commercial purpose the tax is lawfully attracted.

4.4. Learned Government Advocate submitted that the petitioner has not disputed the fact of purchase and entry of goods during the relevant assessment years and the classification of the project as capital work-in-progress or the absence of declared turnover cannot defeat the statutory charge under the taxing enactments. Learned counsel submitted that the assessments have been made after examining the returns, books of account and materials on record and do not suffer from any procedural or legal infirmity.

4.5. Finally, the learned Government Advocate submitted that the impugned assessments and penalty orders are valid and sustainable in law and prayed that the writ petitions be dismissed.

APPRECIATION & CONCLUSION

05. Learned Tax Consultant, who appeared on behalf of the petitioner before the Assessing Authority argued only one ground that in case of works contract, the ownership of the land on which the road is to be constructed, remains with the Government, but in BOT, the ownership is temporarily transferred to the contractor for construction of road and said land would be reverted to the Government after completion of construction and concessional period without payment of any consideration. In case, the contractor being an owner invests any amount or material that would not come within



the purview of commercial tax or entry tax.

06. The aforesaid submission was rightly rejected by the Assessing Authority. There is no such transfer of ownership or deemed ownership in favour of the contractor during the construction of the road and during the concessional period under the BOT scheme. The Government always remains the owner of the land both in works contracts or in BOT, and only possession is given to the contractor to construct the road and recover the cost of construction from the public or passengers by way of toll. As held by the Division Bench of this Court in the case of *Ashoka Infraways Private Limited v/s The State of Madhya Pradesh & Others (Writ Petitions No.2883 of 2008)*, apart from the Government, no one has the authority to collect the toll or service charges from any person. If that authority has been given to the contractor in the BOT scheme, instead of making direct payment for the construction of the road, there would be no escape from the tax liability on the contractor.

07. During the arguments, Shri Munshi, learned Senior Counsel submitted that after the judgment passed by this Court in case of *Ashoka Infraways (supra)*, the petitioner is not disputing that no commercial or entry tax is liable to be paid by the respondent in BOT, but such tax is liable to be paid only after completion of the work and not during the construction period when there is no sale or purchase of materials with the Government. Admittedly, these arguments were not raised before the Assessing Authority as well as Appellate Authority.

08. Shri Manoj Munshi, learned Senior Counsel has also argued that the work contract was issued to the petitioner on 08.05.2000 and



on 07.06.2001, the completion certificate was issued. In the balance sheet, the petitioner showed that the work was not completed as a capital work was in progress, hence, there is no liability of tax contract under the BOT project. It is further submitted that during the Assessment Year – 2000 – 01, the business was not commenced by the petitioner with respect to these two projects and also there was no transfer of property or goods as evident from the balance-sheet as there is no sale as provided under Section 2(u) and there is no turnover under Section 2(z) and taxable turn over under Section 2(w) of the Act of 1994. The Assessing Authority has not considered this fact and passed the order of assessment.

09. According to the petitioner, the tax has been assessed vide order dated 12.02.2004 on amount of sale of Rs.4,59,57,042/- on the basis of purchase of materials or goods used for the purpose of construction of road by adding 10% in the total local purchase and 20% in the inter-state purchase towards profit and other expenses. Since there was no sale in the books of account of the petitioner as the petitioner did not receive any consideration for such alleged sale, the tax on the basis of assumption has wrongly been imposed.

10. Section 2(r) of the M.P. Commercial Tax Act, 1994 (in short 'the Act of 1994') defines the '**raw material**' which means an article used as an ingredient in any manufactured goods, or an article consumed in the process of manufacture and includes fuels and lubricants required for the process of manufacture. For the purpose of construction of a road, the raw material would be cement, concrete, tar, sand, crushed stone, etc., which shall also include diesel used as fuel in D.G. sets for the generation of electricity for running the plant



and machinery.

11. Section 2(t) of the Act of 1994 defines 'sale' means a transfer of property in goods for cash or deferred payment or for other valuable consideration. In a works contract, the contractor, while constructing a road submits a running bill to the Government and the Government pays the bill from time to time, but under BOT scheme, the contractor does not submit bills to the Government instead invests its own money in the purchase of raw materials to construct the road. In lieu of payment of running bills, the Government gives authority to the contractor to recover the cost of construction by collecting a toll during the concessional period. Therefore, instead of payment in cash, there is a provision in the BOT for deferred payment or other valuable consideration. As per this definition, there is a payment of the contractor by way of toll on a deferred period i.e. concessional period. Section 2(t)(ii) says that a transfer or property in goods, whether as goods or in some other form, is involved in the execution of a works contract. Construction of a road, no doubt, is a works contract, but instead of adopting the procedure applicable in a normal works contract, new methodology has been adopted i.e. build, operate and transfer. By way of agreement between the Government and the contractor, it is agreed that the Government shall provide a place or land for the construction of the road, the contractor will invest its money for the construction of the road and thereafter, recover by way of toll. The Government, instead of making payment directly for the construction of the road, gives the right to the contractor to recover the costs by way of toll during the concessional period.

12. As discussed above, as per the BOT scheme, the payment to



the petitioner for the work done was deferred by way of toll after completion of the concessional period, which doesn't mean that there was no sale during the Assessment Year 2000 – 01. As per the scheme of the commercial tax and entry tax, the tax is liable to be paid every year. Only the mode of payment was deferred, which has not been explained in the definition of 'sale' in Section 2(t)(i) & 2(t)(ii) of the Act of 1994. Section 2(t)(vi) also clarifies that sale, with its grammatical variations and cognate expressions, means that a transfer of right to use any goods for any purpose (for a certain period) for cash, deferred payment, or other valuable consideration will also be treated as a sale.

13. In the case of *Bharat Aluminium v/s The Commissioner of Sales Tax reported in 1996 (29) VKN 91 MP*, this Court held that for exchange of one item for another item is a sale. As per Rule 33 of the M.P. Commercial Tax Rules, 1995 (in short 'the Rules of 1995') also, the dealer shall specify in the return its turnover, the details of the sale/purchase for other than money consideration. The Assessing Officer shall fix the value of consideration in money for the purpose of determining the taxable turnover. For ready reference, Rule 33 is reproduced below:-

"33.Returns relating to consideration other than money consideration

Every dealer who has bought or sold goods for valuable consideration other than money shall separately specify in the return of turnover, which he is required to submit under these rules, the quantity of goods so bought or sold and the description in sufficient detail of the valuable consideration for which the goods were bought or sold. The assessing authority shall fix the value of such consideration in money for the purpose of determining the turnover and assessment of the tax payable under the Act."

14. In the present case, the petitioner, being a dealer, purchased



materials for construction of the road and he was liable to specify in the return of turnover, which is required to be submitted under this rule i.e. quantity of goods so bought or sold and its description like details of valuable consideration. The Assessing Authority, thereafter, shall fix the value of consideration in money for the purpose of determining the turnover and assessment of the tax payable under the Act. Therefore, even at the time of relevant assessment year, the money was not paid to the petitioner by the Government, but value of such consideration in money for the purpose of determining the turnover can be fixed by the Assessing Authority because it is a case of deferred payment by State by giving right to recover by way of toll.

15. As per Rule 37 of the Rules of 1995, every dealer by whom the tax is payable under the Act shall pay the tax quarterly and shall furnish an annual return under Rule 19. As observed by the revisional authority in the order, the petitioner has not raised any objection in respect of the assessment of tax by the Assessing Authority. Therefore, even under the works contract under the BOT scheme, the annual return can be submitted by the contractor, and the contractor does not need to wait till the conclusion of the concessional period to pay the commercial and entry taxes.

16. Admittedly, the petitioner is a dealer then certainly liable to pay taxes by filing a return on the goods purchased and brought into the State in execution of the works contract. The words 'project' and 'project cost' are defined in Clauses W3 and W4 of the agreement. According to the project, it shall mean survey, investigation, studies, design, construction, reconstruction, improvement, strengthening and



repair. All the work related to the maintenance of the road, renewal of surface, bridge, tunnel, culvert, etc. and the cost offered to invest by the entrepreneur for completion of the aforesaid project shall be a project cost. As per clause 4.1, the land for the construction of the bypass road will be handed over on a license basis to the contractor for the concessional period, and this will not amount to the transfer of ownership or lease of the land. Clause 6 made it clear that the entrepreneur will have to make their own arrangements for procuring the material required for work.

17. The Government's right was absolutely reserved to take over the facility at any time after completion of the work, even during the concessional period, and in such circumstances, the entrepreneur shall be eligible for compensation for the unrecovered amount along with the interest. No permanent structure, except the toll collection booth, site office, etc. shall be permitted to be constructed by the entrepreneur. As discussed above, the period of collection of the toll upon construction of the Dewas By-pass road was fixed for a fixed concession period, i.e. 3941 days for the Katni project and 3351 days for the Mhow – Ghatabillod project, by taking into consideration all the costs and expenses incurred in the construction work. The petitioner was required to make all arrangements for the money for construction of the bypass road, the petitioner was given the right to collect the toll after completion of the construction of the road for which period as above was fixed after considering the total cost of construction of the project and its recovery by way of collection of tolls. After the expiry of the said period, the petitioner shall not have any claim on the road as well as on a toll.



18. It is a settled law that no person has a right to collect a toll or any tax from private persons for using the road. The State Government gave the right to collect the tolls to the petitioner from the vehicles passing through the road for a definite period to recover only the cost of construction, i.e. the sale amount or the contract value. The contract amount is liable to be paid to the contractor as a deferred payment by authorising him to recover the toll tax, and except for this, there is no difference in the work done under the BOT scheme and in the normal works contract. This issue has been considered in detail by the Full Bench of this Court in the matter of ***Viva Highways v/s Madhya Pradesh Road Development Authority reported in 2017 (2) M.P.L.J. 681*** in which it has been held that the works contract means an agreement must be in writing, it must be executed of any work related to the construction, repair or maintenance of any building, superstructure or other amenities mentioned in the definition. Any agreement, by whatever name it is called, if it falls within the meaning of a definition of works contract as per the definition of 1983, must be treated as a works contract.

19. Therefore, in view of the above, the petitioner is misconstruing the terms of the agreement and the construction of Dewas bypass road on BOT basis that it does not amount to execution of works contract, the petitioner executed the works contract on the land belonging to the State Government and recovered the construction and maintenance cost by way of toll with due permission from the State Government, it is nothing but a deferred payment by a mode of recovery of toll. The land on which roads were constructed by the petitioner remained in the ownership



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of the State. Hence, we do not find any substance in these writ
petitions.

20. Accordingly, Writ Petition No.372 of 2002 as well as Writ
Petition Nos.373 of 2005, 2179 of 2005 & 2180 of 2005, being
devoid of merit and substance, are hereby **dismissed**.

21. Let singed copy of this order be kept in W.P. No.372 of 2005
and photocopy of the same be kept in the connected writ petitions.

(VIVEK RUSIA)
J U D G E

(GAJENDRA SINGH)
J U D G E

Ravi