HIGH COURT OF MADHYA PRADESH : BENCH AT INDORE

D.B.: **HON'BLE MR. S. C. SHARMA AND**

HON'BLE MR. RAJEEV KUMAR DUBEY, JJ

WRIT PETITION No. 7171 / 2016

M/S. INSTAKART SERVICES PVT. LTD.,

Vs.

THE STATE OF MADHYA PRADESH
AND ANOTHER

* * * * *

O R D E R

(09/05/2017)

The petitioner before this Court has filed this present writ petition being aggrieved by the levy of entry tax on goods purchased by the end consumers through eCommerce Companies and imposition of onerous compliance requirement on the transporter delivering the goods who otherwise, as stated by the petitioner, are not responsible for tax compliance when undertaking similar transactions for a dealer. In this regard, the petitioner challenges (A) Section 12 of the MP Entry Tax Act; (B) Sec. 3-B of the MP Entry Tax Act substituted vide the Madhya Pradesh Sthaniya Kshetra Me Mal Ke Pravesh Par Kar (Sanshodhan)

Adhiniyam, 2016; (C) Notification No. F-A-3-46-2016-1-V(41) dated 28th September, 2016 and (D) Notification No. F-A-3-46-2016-1-V(43).

Facts of the case reveal that the petitioner is a private limited Company incorporated under the provisions of the Companies Act, 2013 and is engaged in the business of providing logistics services under the brand name 'E Kart Logistics' in India. It has been further stated that the petitioner Company has entered into an agreement with Flipkart Internet Pvt. Ltd., for providing logistic services to their sellers who are selling the goods through the portal Flipkart.com. It has been further stated that the petitioner Company is not only doing business with Flipkart.com but is offering similar services in respect of other products. The sellers listed on Flipkart.com are located in various geographical locations across India. It has been stated that once an order has been placed by the customer located in Madhya Pradesh on a particular seller, the goods corresponding to the said order are kept ready by the seller

and they are picked up by E-Kart Logistics for delivery to customers located in Madhya Pradesh and if the seller's raises invoice and CST is levied and the goods are handed over to E-Kart Logistics for delivery to customers in Madhya Pradesh. Petitioner has further stated that the petitioner's logistic services are not restricted only in respect of product sold through Flipkart.com and it offer similar services in respect of other products that are not sold via such eCommerce Company. It has been further stated that the petitioner Company has a delivery hub in the State of Madhya Pradesh under E-Kart Logistic and the hub acts as a sorting facility to sort the deliveries based on the area / fleet of delivery to the customers.

The contention of the petitioner is that by the impugned provisions in the Notifications the legislature seeks to target a specific stream of commerce viz., goods purchased by the end customers through eCommerce and charge the highest rate of entry tax in respect of said transactions when compared to either a transaction of

delivery of the same goods to a dealer in the course of his business or a transaction of procurement of the same goods for personal use by the end customer through means other than by way of online shopping or eCommerce. Petitioner has further stated that the transporter delivering the goods purchased through Online shopping or eCommerce are reposed with additional compliance responsibility. Such entities in the normal course of business undertake similar activities for a dealer whether or not responsible for an entry tax compliance. Thus, in short, the contention of the petitioner is that the respondents do not have the constitutional empowerment to issue impugned Notifications in view of the Constitution (One hundred and first amendment) Act, 2016. It has been further contended that issuance of – (A) Notification No. F-A-3-46-2016-1-V-(41) dated 28th September, 2016; (B) Notification No. F-A-3-46-2016-1-V-(42) dated 28th September 2016 and Notification No. F-A-3-16-2016-1-V(43) dated 28th September, 2016 are constitutionally impermissible after the

enactment of the Constitution (One hundred and first amendment) Act, 2016 brought into effect from 16th September 2016 vide Notification No. S.O. 2986 (E) dated 16th September, 2016 inasmuch as :

(i) Sec. 17 of the Constitution Amendment Act declares Entry 52 of List Ii of the Seventh Schedule to the of the Constitution of India under which the State Government derives its power to impose Entry Tax. Consequently, from 16th September, 2016 the respondents do not have the authority of law to impose a new levy of Entry Tax in respect of goods purchased through online shopping or eCommerce by an end customer;

(ii) As a transitional measure applicability of only existing provisions of law relating to taxes (that are repugnant to the provisions of the amended Constitution of India) were permitted to be continued vide Sec. 19 till either they were amended / repeated by the competent legislature or upon expiration of one year from 16th September 2016 whichever was earlier.

(iii) Sec. 19 read with Sec. 17, dis-empowers the State Government from imposing a new levy of Entry tax, be it on any new product or any new persons / class of persons while ensuring the status quo of the existing levy of Entry tax till they are amended / repealed or upon expiration of one year from the enactment of the Constitution Amendment Act, whichever was earlier. In this regard, the four essential components of a new levy are (a) character of imposition which prescribes the taxable event (b) person liable to pay the tax; (c) rate of tax (d) measure / value on which tax liability is to be computed. These components of tax have been recognised by the Hon'ble Supreme Court in Govind Saran Ganga Saran Vs. Commissioner of Sales Tax reported in 1985 Supp. SCC 205; Mathuram Vs. State of Madhya Pradesh reported in (1999) 8 SCC 667; Commissioner of Income Tax Vs. Infosys Technololgies reported in (2008) 2 SCC 272 and State of Rajasthan Vs. Rajasthan Chemists Association reported in AIR 2006 SC 2699.

It has been further contended that in the present case, the aforesaid four essential characters of tax viz., (i) character of imposition which prescribes the taxable event (introduced vide Notification No. 41/2016); (ii) person liable to pay the tax (introduced vide Notification No.41/2016 and 43/2016); (iii) rate of tax (introduced vide Notification No. 42/2016) have been introduced vide the impugned notifications. Therefore, the respondent has clearly introduced a new levy of tax vide the impugned Notifications (brought into force from 1/10/2016).

It has been further contended that as a consequence the new levy of entry tax on goods purchased by the end customers through eCommerce companies could not have been introduced vide the impugned Notifications after 16th September 2016 when the Constitution Amendment Act was brought into force.

It has been further contended that, as a combined reading of Sec. 17 and Sec. 19 of the Constitution Amendment Act disempowers the respondents from

imposing a new levy of entry tax vide the impugned Notifications. It has been further contended that the same are still born and invalid from inception. In furtherance of his submission the petitioner has relied on the decision by the Constitution bench of the Hon'ble Supreme Court in Deep Chand Vs. State of Uttar Pradesh reported in AIR 1959 SC 648 wherein inter alia it was held that any law enacted in violation of the specific prohibition in Article 13(2) of the Constitution of India is still born. The apex Court in the aforesaid case has held as under :

> There is a clear distinction between the two clauses. Under el. (1), a pre-Constitution law subsists except to the extent of its inconsistency with the provisions of Part III; whereas, no post-Constitution law can be made contravening the provisions of Part III, and therefore the law, to that extent, though made, is a nullity from its inception. If this clear distinction is borne in mind, much of the cloud raised is dispelled. When cl. (2) of Art. 13 says in clear and unambiguous terms that no State shall make any law which takes away or abridges the rights conferred by Part III, it will not avail the State to contend either that the clause does not embody a curtailment of the power to legislate or that it imposes only a check but not a prohibition. A constitutional prohibition against a State making certain laws cannot be whittled down by analogy or by drawing inspiration from decisions on the provisions of other Constitutions; nor can we appreciate the argument that the words " any law " in the second line of Art. 13(2) posits the survival of the law made in the teeth of such prohibition. It is said that a law can come into existence only when it is made and therefore any law made in contravention of that clause presupposes that the law made is not a nullity. This argument may be subtle but is

> not sound. The words " any law " in that clause can only mean an Act passed or made factually, notwithstanding the prohibition. The result of such contravention is stated in that clause. A plain reading of the clause indicates, without any reasonable doubt, that the prohibition goes to the root of the matter and limits the State's power to make law; the law made in spite of the prohibition is a still- born law.

The aforesaid view has been adopted by the Hon'ble Supreme Court in Mahendra Lal Jaini Vs. State of Uttar Pradesh reported in AIR 1963 SC 1019; Excel Wears Vs. Union of India reported in (1978) 4 SCC 224; Rakesh Vij Vs. Raminder Pal Singh reported in (2005) 8 SCC 504. Reliance has also been placed on the decision of the Hon'ble Supreme Court in the case of B. Shama Rao Vs. Union Territory of Pondicherry reported in AIR 1967 SC 1480 wherein it is held that a sales tax legislation was held to be still born in view of the excessive delegation of legisative powers by Pondicherry legislature to the Madras legislature.

Petitioner has further stated that in the light of the aforesaid, in view of the clear disempowerment (in Sec. 17 read with Sec. 19 of the Constitution Amendment Act) to introduce a new levy of entry tax, the impugned Notifications which provide for a new levy of entry tax in

respect of goods purchased through online shopping or eCommerce by an end customer are still born.

The contention of the petitioner is that the effect of the impugned Notifications is likely to run contrary to the explanation of the term local area provided by the Hon'ble Supreme Court.

Petitioner has further stated that in terms of the decision of Jindal Stainless Ltd., Vs. State of Haryana (C.A.No. 3453/2002 decided on 11/11/2016) the issue of state being treated as a local area was left open to be decided by the respective regular benches hearing the matter.

It has been further contended that as per the decision of the Supreme Court in Diamond Sugar Mills Ltd., Vs. State of Uttar Pradesh reported in AIR 1961 SC 652, in terms of Entry No.52 of the Constitution of India, a 'local area' is an area administered by a local body like a municipality, a district board and a union board, a panchayat or the like. A similar definition of 'local area' is provided in Sec. 2(d) of the Madhya Pradesh Sthaniya Kshetra Me Mal Ke Pravesh

Par Kar Adhiniyam, 1976 and a similar position had also been affirmed by the Hon'ble Andhra Pradesh High Court in Suresh Chand Sri Gopal Vs. Union of India reported in 1989 72 STC 241 A.P. The petitioner submits that the effect of the impugned Notifications was likely to run contrary to the aforesaid decisions. The petitioner has prayed for quashment of the impugned notification.

A reply has been filed in the matter and at the outset respondents have stated that the statute enacted by the Parliament or State Legislature cannot be declared unconstitutional in a casual manner. It has been further stated that Courts must be able to hold beyond any iota of doubt that violation of constitutional and statutory provisions is so glaring that legislative provision(s) under challenge cannot stand. Without flagrant violation of constitutional provisions, law made by Parliament or State Legislature cannot be declared bad. The Hon'ble Supreme Court in the case of **State of M. P. Vs. Rakesh Kohli and another** reported in **(2012) 6 SCC 312** from paragraph

No.16 to 19 has held that the constitutionality of statute or provision enacted by the State Legislature cannot be struck down only on the ground of arbitrary or irrational.

It has been further stated that State of M. P. in the year 1976 enacted a law called Madhya Pradesh Sthaniya Kshetra Me Mal Ke Pravesh Par Kar (Sansodhan) Adhiniyam, 1976 (hereinafter referred as "Adhiniyam of 1976"). Section 3 of the said Adhiniyam provides for special provision for collection of Entry Tax. The state / respondents *vide* notification dated 22/08/2016 amended the Section 3-B of the Act of 1976, which provides that if a person transporting goods fails to collect or after collecting fails to pay the tax as required under Sub Section 1 shall be held liable to pay tax and interest thereon.

The respondents have further stated that under the powers conferred by the Adhiniyam of 1976, which empowers the State to issue notifications, the impugned notifications have been issued.

The respondents further stated that under the power

conferred by virtue of Sub Section (2) of Section 3 of M. P. Entry Tax Act, 1976, the notified goods purchased through online shopping of e-commerce, for consumption, use or sale are subjected to payment of entry tax and further by virtue of powers conferred under Sub Section (1) of Section 12 of the said Act, the Entry Tax on the goods notified are payable at the rate of 6%.

The respondents have submitted that the notification / provision amended by the State Government which is well within Legislative competence are not discriminatory in any manner. It has been further stated that the burden of Entry Tax has not been levied upon the logistic company, they are only made the agency or has been made an agency for collecting tax which has been made applicable by amending the Section 3-B of the Adhiniyam of 1976 which is just, legal and proper. It has also been submitted by the State that actual incidence of Tax lies upon the person who has caused or effected the entry of goods.

The respondents have further stated that according to

Section 3 of Madhya Pradesh Entry Tax Act which talks about incidence of taxation; a tax is to be levied on the entry of goods into a local area in Madhya Pradesh for consumption, use or sale therein. Any person causing the entry of goods into a local area of Madhya Pradesh is liable to pay Entry Tax. It has been further argued that when purchasing is done through a dealer, who is registered with the Commercial Tax Department, is responsible for payment of Entry Tax. There was no provision to check purchasing through e-commerce earlier, however, after the enactment of the Madhya Pradesh Entry Tax (Amendment) Act, 2016, the State legislature has covered this aspect also and as in the process of e-commerce the end customer is causing the entry of goods into the local area of Madhya Pradesh and so is liable to pay Entry Tax. It has been further argued that Section 3(1) provides for Entry Tax on the dealer and Section 3(2) provides for levy of Entry Tax on the goods entering into the local area for consumption, use, sale or therein by any person. Under this power Entry Tax has been

imposed on the purchase made by the persons through e-commerce. Respondents have further contended that recently the Hon'ble Supreme Court in Civil Appeal No.3453/2002 decided on 11/11/2016 has held that the compensatory tax theory evolved in Automobile Transport case and subsequently modified in Jindal's case has no juristic basis and is therefore, rejected. Even the Hon'ble Supreme Court has also held that a Tax on entry of goods into a local area for use, sale or consumption therein is permissible although similar goods are not produced within the taxing state. The Hon'ble Supreme Court has also held that the States are well within their right to design their fiscal legislations to ensure that the tax burden on goods imported from other States and goods produced within the State fall equally and such measures if taken would not contravene Article 304 (a) of the Constitution.

The respondents have further stated that levy of higher tax rate for the persons purchasing through e-commerce is not the concern of petitioner. According to Section 3-B of

Madhya Pradesh Entry Tax (Amendment) Act, 2016, petitioner comes under the ambit of 'person transporting goods', is only responsible for collection and payment of collected entry tax to the authority. Petitioner is not liable to pay tax from his own pocket. Thus, petitioner holds no ground in questioning the higher tax rate for customers.

The respondents have further stated that the Commercial Tax Department through notification F-A-3-46-1-V (44) dated 30/09/2016 performing its executive function, exempted goods where the purchase order and invoice of goods were issued before 01/10/2016. This was done for preparing the adequate measures in the department for the implementation of the amended Act. As far as the reading of notification No.44/2016 along with Section 19 is concerned is of no consequence. All the notifications are issued under the statutory powers conferred to the executive under the Statute.

The respondents have further stated that no new levy of Entry Tax on transaction(s)/good(s) is being imposed by

the State Legislature after the Constitution Amendment Act dated 16/09/2016. The notifications issued do not impose any new liability on anyone, they just describe the procedure and detailed analysis of amended law of M. P. Entry Tax Act, which was brought into force on 22/08/2016 i.e. before the Constitution Amendment Act dated 16/09/2016.

The respondents have further stated that the case mentioned by the petitioner ie., **Emperor Vs. Abdul Hamid** reported in **AIR 1923 Part 1** is not applicable to the facts and circumstances of the case as the impugned notifications are only dealing with the procedural aspect and do not create any new right or duty.

The respondents have further stated that the grounds raised by the petitioner are baseless and without any foundation of the law. There is no point in saying that Article 265 of the Constitution of India is violated as the said article talks about authority of law. The respondents have stated that the petitioner has placed reliance upon the judgment delivered in the cases of **Collector Vs. Jayant**

Vitamins Ltd. reported in **1997 (96) ELT A162 (SC)**, **Somaiya Organics Vs. State of U. P.** reported in **2001 (130) ELT 3 SC** and **Commissioner of Trade Tax, U. P. Vs. S. S. Ayodhya Distillery** reported in **2009 (233) ELT 146 (SC)** and the aforesaid cases are not applicable in the facts and circumstances of the present case. The cases are in support of the violation of Article 265 but in the present case there is no violation of Article 265 of the Constitution of India.

The respondents have further stated that as per the settled law and interpretation of Article 14 it enumerates two tests for classification - (i) reasonableness, (ii) *intelligible differentia* and differentia must have a rational relation to the object sought to be achieved by the statute in question. As far as decision regarding *intelligible differentia* and nexus with the object of statute is concerned, the same is replied earlier that there is no *locus standi* of petitioner in the matter concerning the tax rate. Whether there was *intelligible differentia* or not is not of any concern in the

present petition. It has been further stated that the recent judgment delivered by the apex Court regarding Entry Tax clearly states that Entry Tax can rightfully be levied by the Government on different subjects. It has been further stated that most of the judgments relied upon by the petitioner are of no help to the petitioner.

The respondents have further stated that there is no violation of Article 14 of the Constitution of India due to the above mentioned reasons. Decisions of the apex Court in **Vikarant Cement Vs. State of M. P.** reported in **AIR 2015 SC 2397**, **State of Kerala Vs. Haji K. Kutty Naha** reported in **AIR 1969 SC 378** and of Patna High Court in **Instrakart Services Pvt. Ltd. Vs. State of Bihar** are totally inapplicable in the present petition.

The respondents have further stated that the petitioner by way of describing the situation and the circumstances is trying to create havoc and confusion before this Court and the present petitioner should be only concerned about the rights, duties and interests of the petitioner but again and

again the petitioner is repeating his concern over the interests and duties of the end customer about which the petitioner hold no *locus standi*. It has been further stated that the judgment relied upon by the petitioner in the case of Jindal Stainless Ltd. (supra) again only talks about the matter which has got nothing to do with the subject matter of the present case. It has been further contended that in the recent pronouncement of the Hon'ble Supreme Court in the case of Jindal's Stainless Steel dated 11/11/2016 it has been held that compensatory tax theory evolved in Automobile Transport case and subsequently modified has no juristic basis and is therefore, rejected. It is pertinent to mention here that the petitioner has utterly failed to make out a case to demonstrate that why the amended Act of the Madhya Pradesh Entry Tax (Amendment) Act, 2016 is contrary to Article 301 of the Constitution of India. The reasons stated by the petitioner are baseless and without any substance.

The respondents have further stated that the petitioner is unnecessarily referring to Article 286 of the Constitution

of India in this matter. The respondents are not taxing the purchase or sale of goods which are outside the State but on the goods which are entering into the local area of the Madhya Pradesh. It is settled law of the land that any person(s) causing the entry of goods into a local area would be subjected to entry tax. In the present case the same principle is followed.

The respondents have further stated that amendment in the Entry Tax Act of Madhya Pradesh and notifications issued in furtherance thereof are not *ultra vires* of the constitution but *intra vires* of the Constitution of India. It has been further stated that Article 300A of the Constitution of India is not applicable in the present case and the argument raised by the petitioner is same as of a person not paying income tax and saying that Income Tax violates Article 300A as the Income Tax deprives him from his lawful property. The respondents have prayed for dismissal of the Writ Petition.

Heard learned counsel for the parties at length and

perused the record.

The petitioner before this Court is a Company involved into providing logistic services to the sellers of the goods of certain other eCommerce Companies like Flipkart Internet Pvt. Ltd., etc etc., The petitioner Company is aggrieved by the levy of Entry Tax on the goods purchased by end consumers through eCommerce Companies and imposition of compliance requirement on delivering the goods to the end consumers. The petitioner Company has challenged constitutional validity of Sec. 3-B of M. P. Entry Tax Act substituted vide the Madhya Pradesh Sthaniya Kshetra Me Mal Ke Pravesh Par Kar (Sanshodhan) Adhiniyam, 2016. The statutory provision of which the constitutional validity is under challenge, is reproduced as under :

Madhya Pradesh Sthaniya Kshetra Me Mal Ke Pravesh Par Kar (Sanshodhan) Adhiniyam, 2016

[Received the assent of the Governor on the 20th August, 2016; assent first published in the "Madhya Pradesh Gazette (Extra-ordinary)", dated the 22nd August, 2016.]

An Act further to amend the Madhya Pradesh Sthaniya Kshetra Me Mal Ke Praversh Par Kar Adhiniyam, 1976.

Be it enacted by the Madhya Pradesh Legislature in the sixty-seventh year of the Republic of India as follows:

1. Short title and Commencement.

(1) This Act may be called the Madhya Pradesh Sthaniya Kshetra Me Mal Ke Pravesh Par Kar (Sanshodhan) Adhiniyam, 2016.
(2) It shall come into force from the date of its publication in the Madhya Pradesh Gazette.

2. Substitution of Section 3-B.

For Section 3-B of the principal Act, the following Section shall be substituted, namely:

"3-B: Special provision for collection of entry tax
(1) Notwithstanding anything to the contrary contained in this Act, the State Government may, by notification, specify the manner and appoint a competent authority or a person transporting goods to collect entry tax in respect of Indian made foreign liquor, beer and goods notified under sub-section (2) of Section 3 and to pay it to the State Government, on such terms and conditions as may be specified therein.
(2) If a person transporting goods fails to collect, or after collecting fails to pay, the whole or any part of the tax as required under sub-section (1), he shall be deemed to be liable to pay tax, in default in respect of such tax and shall be liable to pay, in addition to the tax, interest at the rate not exceeding 3 percent per month, as may be specified.

(3) The person transporting goods into the State of Madhya Pradesh from outside the State, pursuant to online shopping or e-commerce, shall obtain and carry with him a statement in such form as may be specified. If such person fails to comply with this requirement, any check post officer, any officer authorized under sub-section (5) of Section 57 of the Madhya Pradesh VAT Act, 2002 (No. 20 of 2002) or any officer authorized to make assessment of such person, may initiate proceedings for imposition of penalty under this section. If the penalty has been imposed under this section by a check post officer or by an officer authorized under sub-section (5) of Section 57 of the Madhya Pradesh VAT Act, 2002, on account of goods for which the person had not obtained or carried the specified statement, no penalty shall be imposed on

account of such goods during the course of assessment of such person:

Provided that if the person transporting goods has uploaded complete particulars of the statement, on the official web portal of the department before entering the State of Madhya Pradesh, he shall be deemed to have complied with the requirement of obtaining and carrying statement.

(4) The proceedings under sub-section (3) shall be initiate by the officer specified under sub-section (3), by issue of a notice for giving the person transporting the goods an opportunity of being heard. On hearing the person and after having held such enquiry as he may deem fit, if the authorized officer is not satisfied, he shall pass an order directing the person transporting the goods that he shall pay be way of penalty a sumwhich shall not be less than two times but shall not exceed 3 times of the tax payable on the goods for which he had not carried the statement.

(5) The assessment of every person transporting goods, shall be made separately for every financial year, by the officer, as authorized by the Commissioner. The provisions of assessment, recovery, appeal and revision of this Act shall mutatis mutandis apply to the person transporting goods.

Explanation : For the purpose to this section,-

(i) 'person transporting goods' means transporter, courier, agent or any other person transporting goods and besides the owner, includes manager, agent, dirver, employee of the owner, a person in-charge of a place of loading or unloading of goods or a person in-charge of a place of loading or unloading of goods or a person in-charge of a goods carrier carring such goods for dispatch to other places or gives delivery of any consignment of such goods to the consignee;

(ii) 'online shopping or e-commerce' means buying and selling of goods through internet or telephone."

The petitioner Company has also challenged

constitutional validity of Sec. 12 of the M. P. Entry Tax Act.

Sec. 12 of the M. P. Entry Tax Act, reads as under :

> **Sec. 12 : Rate at which entry tax to be charged on goods under Section 3(2)**
> **(1)** The entry tax payable under sub-section (2) of Section 3 shall be levied on the value of goods notified thereunder at such rate, not exceeding 20 per cent, as the State Government may, by notification, specify, and different rates may be specified for different goods. The entry tax shall be assessed and collected by such authority and in such manner as may be prescribed.
> **(2)** Appeal or revision against the order of the assessing authority under sub-section (1) shall lie to such authority, within such period and in such manner as may be prescribed.
> **(3)** The assessing authority, the appellate authority and the revising authority shall, for the purposes of this section, have the same powers as are exercisable by those authorities under this Act in respect of a dealer and the provisions of this Act relating to assessment, appeal and revision of a dealer shall apply in respect of a person to whom sub-section (1) applies.

The petitioner Company has also challenged Notification No. F-A-3-46-2016-1-V(41) dt. 28/9/2016 (Annexure P/2). Notification No. F-A-3-46-2016-1-V(41) dt. 28/9/2016 reads as under :

> Notification No. F-A-3-46-2016-1-V(41) dt. 28/9/2016.
> Persons and the goods notified for levy of entry tax on e-Commerce.
> In exercise of the powers conferred by sub-section (2) of Section 3 of the Madhya Pradesh Sthaniya Kshetra Me Mal Ke Pravesh Par Kar Adhiniyam, 1976 (No. 52 of 1976) (hereinafter referred to as the Entry tax Act), the State Government, hereby, notifies for the

purpose of the said sub-section;

(1) Persons bringing or causing to be brought into any local area within the State of Madhya Pradesh, the goods purchased through online shopping or e-Commerce, for consumption, use or sale therein.

(2) the goods specified in Schedule-II of the Entry tax Act, other than motor vehicles, on which entry tax is not leviable under sub-section (1) or Section 3 of the said Act.

This notification shall come into force from 1st October, 2016.

The petitioner Company has also challenged Notification No. F-A-3-46-2016-1-V(42) dt. 28/9/2016. Notification No. F-A-3-46-2016-1-V(42) dt. 28/9/2016 reads as under :

Notification No. F-A-3-46-2016-1-V(42) dt. 28/9/2016.

Entry Tax @ 6% payable on goods notified on e-Commerce.

In exercise of the powers conferred by sub-section (1) of Section 12 of the Madhya Pradesh Sthaniya Kshetra Me Mal Ke Pravesh Par Kar Adhiniyam, 1976 (No. 52 of 1976), the State Government, hereby, directs that entry tax under sub-section (2) of Section 3, shall be payable at the rate of 6 percent by the persons and in respect of the goods notified under sub-section (2) of Section 3 by this Department's Notification No. F-A-3-46-2016-1-V(41) dated 28th September 2016.

2. This Notification shall come into force from 1st October, 2016.

The petitioner Company has also challenged Notification No. F.A.3-46-2016-1-V(43) dt. 28/9/2016. Notification No. F.A.3-46-2016-1-V(43) dt. 28/9/2016 reads

as under :

No. F-A-3-46-2016-1-V-(43).-In exercise of the power conferred by sub-section (1) of Section 3-B of the Madhya Pradesh Sthaniya Kshetra Me Mal Ke Pravesh Par Kar Adhiniyam, 1976 (No. 52 of 1976), the State Government, hereby, appoints transporter, courier, agent or any other person bringing goods intoany local area within the State of Madhya Pradesh on behalf of the persons notified by this department's notification No. FA3-46-2016-1-V (41) dated 28-09-2016, as the "person transporting goods" to collect entry tax from such notified persons and to pay the collected entry tax to the State Government, in respect of the goods notified under sub-section (2) of Section 3 by the same notification, in the manner and subject to the terms and conditions specified below, namely:-

(1) (a) The person transporting goods shall apply for enrolment in Form-XVI, online through official web portal of the department in accordance with the instructions given in the web portal;

(b) The appropriate Commercial Tax Officer or any other officers authorized by the Commissioner (herein after referred as appropriate authority) shall, after being satisfied of the particulars given in the application, enrol the applicant and issue a certificate of enrolment in Form-XVII in accordance with the instructions given in the official web portal of the department;

(c) If the enrolled person transporting goods violates any of the terms and conditions of this notification, the appropriate authority may, after giving him an opportunity of being heard, cancel his certificate of enrolment.

(2) (a) The appropriate authority shall, on his own motion or on an application by the person transporting goods, after giving a proper opprtunity of being heard, pass an order to fix a security or additional security of the appropriate amount. The security or additional security shall be furnished in the from of cash deposit or Fixed Deposit of a scheduled bank.

(b) The appropriate authority may, on his own motion or on an application by the person transporting goods, reduce or enhance security of additional security

determined.

(c) The amount of security or additional security shall ordinarily be determined taking into account the entry tax payable on the goods to be brought in to local areas within the State of Madhya Pradesh in a period of one month by the person transporting goods.

(d) If any amount of enrty tax, interest or penalty payable by the person transporting goods remains unpaid after specified time limit, the security or additional security shall be liable to be forfeited for realization of the unpaid amount.

(3) The enrolled person transporting goods shall be eligible to bring goods into any local area within the State of Madhya Pradesh, to the extent, where the amount of entry tax payable on the goods being brought and the entry tax payable but not paid on the goods brought earlier, does not exceed the amount of security or additional security furnished.

(4) Every enrolled person transporting goods shall download a statement in Form XVIII in accordance with the instructions given in the official web portal of the department for the goods to be brought in to any local area within the State of Madhya Pradesh. The person transporting goods shall carry with him the statement.

(5) Every enrolled person transporting goods, before making entry of the goods into any local area within the State of Madhya Pradesh pursuant to online shopping or e-commerce, shall obtain the authorization from the person purchasing such goods and notified under section 3(2) of the Act, to collect the tax payable on such goods under the siad notification by such person, form him at the time of deliveryof such goods to him or any time before it, and to pay it in to Government treasury on his behalf. For every cosignment enterted by the enrolled person transporting goods into any local area within the State of Madhya Pradesh, it shall be presumed that such authorization has been obtained as per this provision.

(6) (a) Every enrolled person transporting goods shall deposit in to Government treasury entry tax payable on the goods brought by such enrolled person in a week beginning from Monday, within 3 days of the end of the week.

(b) Every enrolled person transporting goods shall download a statement in Form-XIX in accordance with

the instructions given in the official web portal of the department for the goods to be sent out of the local area of the State of Madhya Pradesh due to return of purchased goods by the notified persons. The person transporting goods shall carry with him the statement.

(c) Every enrolled person transporting goods shall furnish details of goods brought into any local area within the State of Madhya Pradesh and sent outside the local area of the State of Madhya Pradesh due to purchase return during a a calendar month in Form XX, in accordance with the instructions given in the official web portal of the department, within 7 days of the end of the month along with the proof of payment of entry tax. Where period of a week is spread over two calendar months, details shall be included in the calendar month in which payment of entry tax is made.

(d) If the amount of entry tax is not paid in the specified time limit, interest at the rate of 1.5 percenet per month for the first three month and thereafter at the rate of 2 percent per month shall be payable by the person transporting goods for the period of delayed payment.

(7) No entry tax shall be payable on the goods brought into any local area withing the State of Madhya Pradesh, if due to purchase return within 30 days of entry of such goods, the goods are sent out of the local area of the State of Madhya Pradesh. Tax already paid shall be refunded to the enrolled person transporting goods.

2. This notification shall come into force from 01-10-2016.

By order and in the name of the Governor of Madhya Pradesh,
S.D. RICHHARIA, Dy. Secy.

The petitioner Company has also challenged Notification No. F-A-3-46-2016-1-V(44) dated 30/9/2016. Notification No. F-A-3-46-2016-1-V(44) dated 30/9/2016 reads as under :

Notification No.F-A-3-46-2-16-1-V(44) dt. 30/9/2016.

Entry tax exemption to goods notified for eCommerce, if order placed and sale invoice issued before 1.10.16.

In exercise of the powers conferred by Section 10 of the Madhya Pradesh Sthaniya Kshetra me Mal Ke Pravesh Par Kar Adhiniyam, 1976 (No. 52 of 1976), the State Government, hereby, exempts in whole the class of goods specified in column (2) of the schedule below from payment of entry tax under the said Act, subject to the restrictions and conditions specified in column (3) of the said Schedule:

SCHEDULE

S.No.	Class of goods	Restrictions and conditions subject to which exemption is granted.
(1)	(2)	(3)
1.	Goods notified by this department's Notification No. F-A-3-46-2016-1-V(41) dated 28th Sept., 2016	1. When the goods specified in column (2) are brought or caused to be brought into a local area, purchased through online shopping or eCommerce by a person notified by this department's Notification No. F-A-3-46-2016-1-V(41) dated 28th September 2016. 2. Online/eCommerce purchase order for the said goods is placed by the said person and the sale invoice is issued by the seller of the said goods before the date on which this department's Notification No. F-A-3-46-2016-1-V(41) dated 28th September 2016 comes into force.

The other statutory provisions which are necessary for deciding the present Writ Petition as under :

Section 3 of the M. P. Entry Tax Act, 1976 reads under:

Sec. 3 : Incidence of taxation

(1) There shall be levied an entry tax,-

(a) on the entry in the course of business of a dealer of goods specified in Schedule - II, into each local area for consumption, use or sale therein; and

(b) on the entry in the course of business of a dealer of goods specified in Schedule - III into each local area for consumption or use of such goods but not for sale

therein;

and such tax shall be paid by every dealer liable to tax under the Vanijyik Kar Adhiniyam who has effected entry of such goods :

Provided that no tax under this sub-section shall be levied,-

(i) in respect of goods specified in Schedule - II other than the local goods, purchased from a registered dealer on which entry tax is payable or paid by the selling registered dealer;

(ii) in respect of goods specified in Schedule - II which after entry into a local area are sold outside the State or in the course of inter-State trade or commerce or in the course of export out of the territory of India;

(iii) in respect of goods specified in Schedule - III imported from outside the State for consumption or use but which have been disposed of in any other manner;

(iv) in respect of goods exempted from entry tax under Section 10;

and if tax on the entry of any goods specified in Schedule - II or Schedule - III effected during any period has been deposited by a dealer into the Government treasury and subsequent to such entry the goods are disposed of in the manner described in clause (ii) of this proviso, such dealer shall be entitled to a set off of the tax already paid by him in respect of such goods and such set off shall be adjusted towards the tax payable by him in such manner as may be prescribed :

Provided further that notwithstanding anything contained in this Act, where a dealer in the course of his business, purchases goods from a person or a dealer other than a registered dealer who has effected entry of such goods into a local area prior to such purchase, the entry tax shall be paid by the dealer who has purchased such goods.

Provided also that notwithstanding anything contained in this Act, where a dealer liable to pay tax under the Vanijyik Kar Adhiniyam in the course of his business into a local area, purchases goods specified in Schedule - III, other than goods which are local goods in relation to such local area, from another dealer of the same local area for consumption or use, the entry of such goods

shall be deemed to have been effected into such local area by the dealer who has purchased such goods for the aforesaid purpose and entry tax shall be paid by such dealer.

Provided also that in respect of packing material "sale" shall mean the sale of packing material as such and shall not include its sale along with the goods packed or contained therein.

(2) (a) There shall be levied an entry tax on the entry into any local area for consumption, use or sale therein,-

(i) [1][of such goods specified in Schedule II or Schedule III, other than motor vehicles, on which entry tax is not leviable under the provisions of sub-section (1); and]

(ii) by such persons or class of persons, [2][.....] as may in either case, be notified by the State Government and thereupon such tax shall be paid by such person or class of persons :

Provided that entry tax under this sub-section shall not be levied on the entry of such goods, if it is proved to the satisfaction of the assessing authority that such goods have already been subjected to entry tax or that the entry tax is liable to be paid by any other person or dealer under this Act.

(b) Copy of every such notification shall be laid on the table of the Legislative Assembly

(3) The entry tax levied under sub-section (1) and sub-section (2) shall be paid on the value such goods.

(4) No entry tax shall be payable on the goods specified in Schedule - I.

(5) The State Government may, by notification, amend Schedule - I, so as to include therein any goods not already specified therein and may, by a like notification, amend Schedule - II or Schedule - III to exclude therefrom the goods so included in Schedule - I and thereupon Schedule - II or Schedule - III, as the case may be, shall stand amended accordingly."

Section 12 of the M. P. Entry Tax Act, 1976 reads as under :

> **Sec. 12 : Rate at which entry tax to be charged on goods under Section 3(2)**
>
> **(1)** The entry tax payable under sub-section (2) of Section 3 shall be levied on the value of goods notified thereunder at such rate, not exceeding 20 per cent, as the State Government may, by notification, specify, and different rates may be specified for different goods. The entry tax shall be assessed and collected by such authority and in such manner as may be prescribed.
>
> **(2)** Appeal or revision against the order of the assessing authority under sub-section (1) shall lie to such authority, within such period and in such manner as may be prescribed.
>
> **(3)** The assessing authority, the appellate authority and the revising authority shall, for the purposes of this section, have the same powers as are exercisable by those authorities under this Act in respect of a dealer and the provisions of this Act relating to assessment, appeal and revision of a dealer shall apply in respect of a person to whom sub-section (1) applies.

The definition of "registered dealer" and the definition of "local area" reads as under :

"**registered dealer**" means dealer registered under the VAT Act.

"**local area**" means the area comprised within the limits of a local authority.

Facts and the statutes involved in the case reveal that the State of Madhya Pradesh in the year 1976 enacted a law called Madhya Pradesh Sthaniya Kshetra Me Mal Ke Pravesh Par Kar (Sanshodhan) Adhiniyam, 2016 and the

charging Section ie., Sec. 3 provides for special provision for collection of entry tax. The same was amended vide Notification dt. 22/8/2016 and Sec. 3-B has been brought on statute book which provides that if a person transporting goods fails to collect or after collecting fails to pay tax as required under sub-Sec. (1) shall be held liable to pay tax and interest thereon. The State Government is also jurisdictionally competent to issue Notifications under the Adhiniyam of 1976. The State Government has issued impugned Notifications for charging entry tax and the goods purchased through Online shopping of eCommerce, consumption, use or sale at the rate of 6%.

That by virtue of Sec. 3 of the Entry Tax Act, Entry Tax has to be levied on the entry of goods in the local area in Madhya Pradesh for consumption, use or sale therein. Any person causing entry of goods into the local area of Madhya Pradesh is liable to pay entry tax. When purchasing is done through a dealer who is registered with the Commercial Tax Department, he is responsible for payment

of entry tax. Earlier, in the past, prior to the amendment which is under challenge and prior to issuance of Notifications of which the constitutional validity is under challenge, there was no provision to check purchasing through eCommerce and, therefore, a need arose to amend the Act and to issue consequential Notifications.

In the instant case, it is not the petitioner who is liable to pay tax. The petitioner is only responsible for collecting and payment of tax to the Department. Not only this, in the present case, by no stretch of imagination, it can be said that entry tax is being imposed by the State Legislature after constitutional amendment dated 16/9/2016. The impugned Notifications do not impose any new liability on anyone. In fact, they just described the procedure and detailed analysis of amended law of the M. P. Entry Tax Act which was brought into force on 22/8/2016 ie., before the Constitutional amendment dated 16/9/2016. The petitioner has also not been able to establish before this Court violation of Article 265 of the Constitution of India nor

violation of Article 16 of the Constitution of India. As per the settled law, the State of Madhya Pradesh has rightly amended Entry Tax Act and as per the constitutional amendment after 16/9/2016, the State Government does not have the authority to enact law to impose new levy of entry tax. The impugned amendment has come into force prior to constitutional amendment which came into force on 16/9/2016.

It has been vehemently argued before this Court that the entire State of Madhya Pradesh cannot be treated as a local area. Various case law has been cited in support of this averment.

In the case of Jindal Stainless Ltd., and another Vs. State of Haryana and others (**Civil Appeal No. 3453/2002)**, decided by the Constitutional Bench of the Hon'ble Supreme Court, the issues whether the entire State can be treated as a 'local area' or not and whether entry tax can be levied on goods imported from outside the country or not, have been left open. Paragraph 140, 141, 142 and 143 of the judgment

dated 11/11/2016 reads as under :

> 140. In Malwa Bus Service (Private) Ltd. v. State of Punjab and others (1983) 3 SCC 237 this Court held that a difference in the rate of tax by itself cannot be considered to be discriminatory and offensive to the equality clause:
>
> "21. The next submission urged on behalf of the petitioners is based on Article 14 of the Constitution. It is contended by the petitioners that the Act by levying Rs 35,000 as the annual tax on a motor vehicle used as a stage carriage but only Rs 1500 per year on a motor vehicle used as a goods carrier suffers from the vice of hostile discrimination and is, therefore, liable to be struck down. There is no dispute that even a fiscal legislation is subject to Article 14 of the Constitution. But it is well settled that a legislature in order to tax some need not tax all. It can adopt a reasonable classification of persons and things in imposing tax liabilities. A law of taxation cannot be termed as being discriminatory because different rates of taxation are prescribed in respect of different items, provided it is possible to hold that the said items belong to distinct and separate groups and that there is a reasonable nexus between the classification and the object to be achieved by the imposition of different rates of taxation. The mere fact that a tax falls more heavily on certain goods or persons may not result in its invalidity. As observed by this Court in Khandige Sham Bhat v. Agricultural Income Tax Officer in respect of taxation laws, the power of legislature to classify goods, things or persons are necessarily wide and flexible so as to enable it to adjust its system of taxation in all proper and reasonable ways. The Courts lean more readily in favour of upholding the constitutionality of a taxing law in view of the complexities involved in the social and economic life of the community. It is one of the duties of a modern legislature to utilise the measures of taxation introduced by it for the purpose of achieving maximum social good and one has to trust the wisdom of the legislature in this regard. Unless the fiscal law in question is manifestly discriminatory the court should refrain from striking it down on the ground of

discrimination. These are some of the broad principles laid down by this Court in several of its decisions and it is unnecessary to burden this judgment with citations. Applying these principles it is seen that stage carriages which travel on an average about 260 kilometres every day on a specified route or routes with an almost assured quantum of traffic which invariably is overcrowded belong to a class distinct and separate from public carriers which carry goods on undefined routes. Moreover the public carriers may not be operating every day in the State. There are also other economic considerations which distinguish stage carriages and public carriers from each other. The amount of wear and tear caused to the roads by any class of motor vehicles may not always be a determining factor in classifying motor vehicles for purposes of taxation. The reasons given by this Court in G.K. Krishnan case for upholding the classification made between stage carriages and contract carriages both of which are engaged in carrying passengers are not relevant to the case of a classification made between stage carriages which carry passengers and public carriers which transport goods. The petitioners have not placed before the court sufficient material to hold that the impugned levy suffers from the vice of discrimination on the above ground."

141. Seen in the context of the above, we are inclined to accept the submission made on behalf of the State that so long as the intention behind the grant of exemption/adjustment/credit is to equalize the fall of the fiscal burden on the goods from within the State and those from outside the State such exemption or set off will not amount to hostile discrimination offensive to Article 304(a). Having said that, we leave open for examination by the regular benches hearing the matters whether the impugned enactment achieve the object of such equalization or lead to a situation that exposes goods from outside the state to suffer any disadvantage vis-a- vis those produced or manufactured in the taxing State.

142. We must, while parting, mention that learned counsel for the parties had attempted to raise certain other issues like whether the entire State can be treated

> as a local area and whether entry tax can be levied on goods imported from outside the country. We do not, however, consider it necessary in the present reference to address all those issues which are hereby left open to be decided by the regular bench hearing the matter.
>
> 143. With that observation the reference is answered. The Registry shall now place the matters before regular benches for an expeditious disposal of the same in the light of what has been observed by us above.

Therefore, the plea of the petitioners in the light of the aforesaid that the entire State cannot be treated as 'local area', is not tenable.

The Hon'ble Supreme Court in the case of State of Madhya Pradesh Vs. Rakesh Kohli and another reported in **(2012) 6 SCC 312**, in paragraph 16 to 19 has held as under :

> 16. The High Court has not given any reason as to why the provision contained in clause (d) was arbitrary, unreasonable or irrational. The basis of such conclusion is not discernible from the judgment. The High Court has not held that the provision was discriminatory. When the provision enacted by the State Legislature has not been found to be discriminatory, we are afraid that such enactment could not have been struck down on the ground that it was arbitrary or irrational.
>
> 17. That stamp duty is a tax and hardship is not relevant in interpreting fiscal statutes are well known principles. In Bengal Immunity Co. Ltd. v. State of Bihar and others[11], a seven-Judge Bench speaking through majority in paragraph 43 (at pg. 685) of the Report while dealing with hardship in the statutes stated as follows :
>
> "…….If there is any real hardship of the kind referred to, there is Parliament which is expressly invested with the power of lifting the ban under cl. (2) either wholly or to the extent it thinks fit to do. Why should the Court be called upon to discard the cardinal rule of interpretation

for mitigating a hardship, which after all may be entirely fanciful, when the Constitution itself has expressly provided for another authority more competent to evaluate the correct position to do the needful?"

18. In Commissioner of Income Tax, Madras v. R.SV. Sr. Arunachalam Chettiar[12], a three-Judge Bench of this Court, inter alia, observed in paragraph 13 (at pgs. 1220-21) of the Report, "equity is out of place in tax law; a particular income is either exigible to tax under the taxing statute or it is not."

19. In the Income Tax Officer, Tuticorin v. T.S. Devinatha Nadar etc.[13], this Court in paragraph 30 (at pg. 635) of the Report observed as follows :

"30. From the foregoing decisions it is clear that the consideration whether a levy is just or unjust, whether it is equitable or not, a consideration which appears to have greatly weighed with the majority, is wholly irrelevant in considering the validity of a levy. The courts have repeatedly observed that there is no equity in a tax. The observations of Lord Hatherley, L.C. in (1869) 4 Ch. A 735. "In fact we must look to the general scope and purview of the statute, and at the remedy sought to be applied, and consider what was the former state of the law, and what it was that the legislature contemplated," were made while construing, a non-taxing statute. The said rule has only a limited application in the interpretation of a taxing statute.

Further, as observed by that learned Judge in that very case the question in each case is "whether the legislature had sufficiently expressed its intention" on the point in issue." The court highlighted that the court could not concern itself with the intention of the Legislature when the language expressing such intention was plain and unambiguous.

The Hon'ble Supreme Court has held that the Constitutional validity of statute or provision enacted by the State Legislature cannot be struck down lightly. Courts are required to hold beyond any iota of doubt that the violation

of constitutional provisions was so glaring that the legislative provision under challenge, cannot stand. Sans flagrant violation of constitutional provisions, the law made by the Parliament or a State Legislature is not be declared bad.

In the present case, the petitioner Company delivers goods to the end user consumer, the goods are being brought from outside the State of Madhya Pradesh into the State of Madhya Pradesh and by virtue of the charging Section, as entry is being done in respect of the goods, the State legislature is competent to charge entry tax upon the entry of the goods into the local area. The notification issued after the Constitutional amendment are only in respect of the procedure, manner and method of charging the entry tax. They are procedural notifications and, therefore, as the amendment to the Entry Tax Act came into force prior to the Constitutional amendment, it can never be said to be *ultra vires* to the Constitution.

This Court is of the considered opinion that the

petitioners have not been able to make out any case for declaring the amendment and the subsequent Notifications issued by the State Government as *ultra vires* to the Constitution.

Resultantly, the present Writ Petition fails and is accordingly hereby dismissed.

(S. C. SHARMA)
J U D G E

(RAJEEV KUMAR DUBEY)
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