

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**R/SPECIAL CIVIL APPLICATION NO. 5656 of 2019****FOR APPROVAL AND SIGNATURE:****HONOURABLE MR.JUSTICE J.B.PARDIWALA Sd/-**
and**HONOURABLE MR.JUSTICE A.C. RAO Sd/-**

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	

M H KHANUSIYA

Versus

STATE OF GUJARAT

Appearance:

MR UCHIT N SHETH(7336) for the Petitioner(s) No. 1

MS MAITHILI MEHTA, AGP (1) for the Respondent(s) No. 1,2

CORAM: HONOURABLE MR.JUSTICE J.B.PARDIWALA
and
HONOURABLE MR.JUSTICE A.C. RAO**Date : 21/08/2019****ORAL JUDGMENT**
(PER : HONOURABLE MR.JUSTICE A.C. RAO)

1.00. **RULE**, returnable forthwith. Ms.Maithili Mehta, learned AGP waives the service of notice of rule for and on behalf of the respondents. In the facts and circumstances of the case and with the consent of the learned advocates appearing for the respective parties, present petition is taken up for final hearing today.

2.00. In this petition, the petitioner has prayed for an appropriate writ, order and/or direction to quash and set aside levy of Entry Tax (hereinafter referred to as "VAT" for short) at the rate of 12.5% on the import / sale of Excavators within the State of Gujarat during the year 2006-07. The petitioner has also prayed for an appropriate writ, order and/or direction to quash and set aside the consequential orders passed by the appropriate authorities to levy Entry Tax at the rate of 12.5% on sale of Excavators by the petitioner within the State of Gujarat.

3.00. Facts leading to the present Special Civil Application, in nutshell are as under :-

3.01. M.H. Khansusiya - petitioner herein is a works contractor engaged in construction of road.

3.02. That the petitioner is duly registered under the Gujarat Value Added Tax Act, 2003 (hereinafter referred to as "the VAT Act". That on sale of Excavators within the State of Gujarat, the State Government levies entry tax on import / entry of Excavators into the State of Gujarat under the

provisions of the Gujarat Tax on Entry of Specified Goods into the Local Areas Act, 2001 (hereinafter referred to as “Entry Tax Act”). That the entry tax has been levied at the rate of 12.5% under Entry 1 of Schedule to the entry Tax Act. That the appropriate authority has, therefore, while framing the Assessment Orders has levied entry tax at the rate of 12.5% on the import / entry of the Excavators into the State of Gujarat. That penalty has also been imposed at the rate of 200% under section 17(1) of the Entry Tax Act.

3.03. It is the case on behalf of the petitioner that to levy entry tax on import / entry of Excavators into the State of Gujarat at the rate of 12.5% is unconstitutional, illegal and contrary to the objects and purpose for which Entry Tax Act has been enacted and therefore, the petitioner has preferred the present Special Civil Application challenging levy of entry tax on import / entry on Excavators into the State of Gujarat at the rate of 12.5% treating the same as “motor vehicles” and/or at the rate at which the entry tax is being levied with respect to motor vehicles.

4.00. Mr.Uchit Sheth, learned advocate has appeared on behalf of the petitioner and Ms.Maithili Mehta, learned Assistant Government Pleader has appeared on behalf of the respondents – State of Gujarat and Entry Tax officer.

5.00. Mr.Uchit Sheth, learned advocate appearing on behalf of the petitioner has vehemently submitted that levy of Entry Tax on the Excavators at the rate of 12.5% by considering them and/or treating them at par with “motor vehicles” under Entry 1 of the Schedule to the Entry Tax Act, is

absolutely illegal, unconstitutional and contrary to the scheme and object and purpose of the Entry Tax Act and also contrary to the legislative intention of enacting Entry Tax Act.

5.01. Mr.Uchit Sheth, learned advocate appearing on behalf of the petitioner has further submitted that in the speech and Statement by the Finance Minister and Object and Reasons of the Entry Tax Act and the purpose of incorporating Entry Tax Act was to prevent loss of Sales Tax revenue due to diversion of trade as a result of lower Sales Tax rates in other States as compared to State of Gujarat. It is submitted that entry tax was thus sought to be levied on import of goods from outside the State at the applicable rate of sales tax in the State of Gujarat.

5.02. Mr.Uchit Sheth, learned advocate appearing on behalf of the petitioner has further submitted that the legislative history of the Entry Tax Act as well as the amendments to the Entry Tax Act made from time to time show that a clear nexus is maintained between the Entry Tax rates and the applicable rates to the goods under the Sales Tax Act / VAT Act.

5.03. Mr.Uchit Sheth, learned advocate appearing on behalf of the petitioner has further submitted that only those motor vehicles which were falling under Entry 128(1) of the Sales Tax Act attracting 12% Sales Tax rate and which attracted 12.5% VAT rate from 1/4/2006 to 31/3/2008, which now attract 15% tax rate under the VAT Act are covered under Entry 1 of the Schedule to the Entry Tax Act.

5.04. Mr.Uchit Sheth, learned advocate appearing on behalf of the petitioner has further submitted that Excavators were always covered by a separate entry under the Sales Tax Act as well as under the VAT Act for which the applicable rate of tax under the Sales Tax Act was 8% and the applicable rate of tax under the VAT Act during the period in question is 4%. It is submitted that thus, levy of Entry Tax at the rate of 12.5% on Excavators by considering them as motor vehicles under the Entry Tax Act is dehors the objects and scheme of the Entry Tax Act and contrary to the legislative intention, bad and illegal.

5.05. Mr.Uchit Sheth, learned advocate appearing on behalf of the petitioner has further submitted that in the original Schedule to the Entry Tax Act, there was specific column containing reference to the relevant entry in the Gujarat Sales Tax Act, 1969 (hereinafter referred to as "the Sales Tax Act"). It is submitted that in respect of the first entry relating to motor vehicles, reference was made to Entry 128 of Schedule IIA to the Sales Tax Act and maximum rate of Entry Tax was stipulated at 12% which was equal to the rate applicable to motor vehicles classifiable under Entry 128 of Schedule IIA of the Sales Tax Act. It is submitted that at that time there was a separate entry for "earth moving equipment" which included "Excavators" contained in Entry 98A of Schedule IIA to the Sales Tax Act for which the applicable rate of Sales Tax was 8%. It is submitted that thus, the Excavators were never sought to be included in the Schedule of specified goods contained in the Entry Tax Act. Thereafter when the Sales Tax was replaced by the VAT Tax Act, 2003 and consequential change was made in the Entry Tax Act w.e.f.

1/4/2006. It is submitted that since there was no specific entry for motor vehicles under the VAT Act, reference to Schedule entry of Sales tax Act was removed in the new Schedule. Motor Vehicles which were falling under Entry 128 of the Sales Tax Act would now fall under residuary entry 87 of Schedule II of the VAT Act for which the stipulated rate of tax was 12.5%. It is submitted that therefore, maximum rate of Entry Tax for motor vehicle was correspondingly revised from 12% to 12.5%. While the specific entry for motor vehicles under the Sales Tax Act was dropped under the VAT Act, the specific entry for Excavators was retained in Entry 35 of the Notification issued under section 5(2) of the VAT Act and for which the rate of tax was 4%. This was so held by this Court in the case of **State of Gujarat Versus Yanmaman Automac Pvt. Ltd.**, reported in **(2016) 93 VST 423 (Gujarat)**. It is submitted that thus, the amendment of the Entry Tax Act w.e.f. 1/4/2006 was only consequential to replacement of the Sales Tax Act by the VAT Act and only those motor vehicles were sought to be taxed under the Entry Tax Act which were earlier classifiable under Entry 128 of Schedule IIA to the Sales Tax Act and later on under residuary Entry 87 of Schedule II of the VAT Act attracting local rate of 12.5%.

5.06. Mr.Uchit Sheth, learned advocate appearing on behalf of the petitioner has further submitted that thereafter, additional tax was introduced under section 7(1A) of the VAT Act w.e.f. 1/4/2008. It is submitted that in so far as the goods covered under residuary entry 87 of Schedule-II of the VAT Act are concerned, the rate of additional tax was 2.5%. Thus, the effective rate of VAT on such goods was 15%. Correspondingly the Schedule to the Entry Tax Act was amended. It is

submitted that in the Statement of Object and reasons of amending Act it was again noted that the purpose of the Entry Tax Act was not to levy additional tax but to provide “level playing field” between the goods entering into the local areas from any place outside the State and the goods manufactured or produced in the State. It is submitted that it was further noted that the entry tax rates are having direct linkage with the VAT rates on the same goods and hence change in the VAT rates necessitated change in the Entry Tax Act. Thereafter it was observed that to obviate the need to maintain the Entry Tax Act consequent to change in the VAT rates it was considered necessary to revise the maximum rates of tax on specified goods as mentioned in the Schedule.

5.07. Mr.Uchit Sheth, learned advocate appearing on behalf of the petitioner has further submitted that maximum rate of Entry Tax in respect of motor vehicles was revised to 20% while the notification rate at which the Entry Tax was actually payable was revised to 15% i.e. again equal to the applicable rate of VAT to motor vehicles covered under residuary entry 87 of Schedule II to the VAT Act.

5.08. Mr.Uchit Sheth, learned advocate appearing on behalf of the petitioner has further submitted that thereafter from 1/4/2016 new Schedule entries were introduced under the VAT Act for “Luxury Cars, luxury SUVs and luxury two wheelers” (Entry 49C of Schedule-II of the VAT Act) and for “motor vehicles” (except school buses, college buses, passenger buses and goods carrier trucks sold to companies, firms” (Entry 80A of Schedule II of the VAT Act) for which the rate of tax was stipulated at 17.5%+2.5% additional tax.

Correspondingly the rate notification under the Entry Tax was also amended and the entry tax rates in respect of such goods was revised to 20%. It is submitted that in this very notification a new entry was introduced for e-commerce transactions wherein the rate stipulated was at such rate including the rate of additional tax applicable under the Gujarat Value Added Tax Act, 2003 on sale or purchase of such goods.

5.09. Mr.Uchit Sheth, learned advocate appearing on behalf of the petitioner has further submitted that the entire legislative history of the Entry Tax Act as well as object and reasons behind the introduction as well as amendments of the Entry Tax Act establish that Entry Tax was always sought to be levied at the rates prescribed for such goods under the Sales Tax Act / VAT Act. It is submitted that, in other words, there is a nexus between the entry tax rates and local sales tax / VAT rates on similar goods. It is submitted that thus only those motor vehicles which were covered under Entry 128 of Schedule-IIA to the Sales Tax Act and which are now covered under residuary Entry 87 of Schedule-II to the VAT Act which attracted 12.5% tax from 1/4/2006 and which now attract 15% tax under the VAT Act would be covered under the entry of motor vehicles under the Entry Tax Act.

5.10. Mr.Uchit Sheth, learned advocate appearing on behalf of the petitioner has further submitted that the levy of entry tax at the rate of 12.5% on Excavators by treating them as falling under Entry for motor vehicles even though Excavators have always been covered by separate entry under the Sales Tax Act and the VAT Act and for which rate of tax

during the relevant period under the VAT Act was 4%, is dehors the entire scheme of the Entry Tax Act as countenanced by the legislative history as well as objects of the Entry Tax Act.

5.11. Mr.Uchit Sheth, learned advocate appearing on behalf of the petitioner has further submitted that the levy of entry tax at the rate of 12.5% on Excavators by considering them as motor vehicles even though the rate of tax for Excavators under the VAT Act was 4% is clearly violating Article 304(a) of the Constitution of India.

5.12. Mr.Uchit Sheth, learned advocate appearing on behalf of the petitioner has further submitted that Article 304(a) of the Constitution of India provides that the Legislature of a State may by law impose on goods imported from other States or Union territories any tax to which similar goods manufactured or produced in that State are subject, so however, not to discriminate between goods so imported and goods so manufactured or produced. It is submitted that when the constitutional validity of the Entry Tax Was challenged before this Court in the case of **Eagle Corporation Vs. State of Gujarat**, reported in **(2007) 6 VST 56 (Guj.)** inter-alia on the ground that it is violative of Article 304(a) of the Constitution of India, this Court upheld the constitutional validity of the Entry Tax Act by holding that there would not be any discrimination as contemplated under Article 304(a) of the Constitution of India since the rate of entry tax would always be equal to the rate of applicable Sales Tax in the State of Gujarat. It is submitted that it was further held that the provisions of the Entry Tax Act and the Sales Tax Act were to

be read together. It is submitted that in fact example of motor vehicles itself was cited to show that the ultimate tax burden on motor vehicles produced within the State as well as motor vehicles imported from outside the State would be 12%. It is submitted that entry tax is levied at the rate of 12.5% on Excavators even though the local VAT rate on Excavators was 4%, such levy demolishes the levy basis on which the constitutional validity of the Entry Tax Act was upheld.

5.13. Mr.Uchit Sheth, learned advocate appearing on behalf of the petitioner has further submitted that Nine Hon'ble Judges Bench of the Hon'ble Supreme Court in the recent decision in the case of **Jindal Stainless Ltd. Vs. State of Haryana**, rendered in **Civil Appeal No.3453 of 2002** and other connected matters has held that while Tax may not be a barrier to free trade and commerce under Article 301 of the Constitution of India, the power to levy tax on goods imported from outside the State is subject to the restrictions and conditions of Article 304(a) of the Constitution of India. It is submitted that in other words, Tax can be imposed on entry of goods from outside the State only if there is no discrimination between goods imported from outside the State and similar goods manufactured in the State. It is submitted that thus, levy of entry tax on Excavators at the rate of 12.5%, even though the local VAT rate was 4%, would be violation of Article 304(a) of the Constitution of India even as per the law laid down by the Hon'ble Supreme Court in the case of *Jindal Stainless Ltd. (supra)*.

5.14. Mr.Uchit Sheth, learned advocate appearing on behalf of the petitioner has also relied upon the decision of

this Court in the case of **Tractors and Farm Equipment Ltd. Versus State of Gujarat, Special Civil Application Nos.1560 and 3797 of 2016 dated 16/12/2016** in support of his submissions.

5.15. Mr.Uchit Sheth, learned advocate appearing on behalf of the petitioner has further submitted that the levy of entry tax at the rate of 12.5% on Excavators, even though local VAT rate on Excavators was 5%, is contrary to Statement of the State Government through learned Advocate General before this Court in the case of Eagle Corporation Pvt. Ltd. (supra). It is submitted that in the said case, the State of Gujarat through the learned Advocate General had specifically submitted before this Court that levy of Entry Tax would never exceed the sales tax rate on similar goods in the State. It is submitted that therefore, levy of Entry Tax at the rate of 12.5% on Excavators even though the local VAT rate on tractors is undisputedly 4% during the relevant period, is contrary to the statement of the State Government before this Court on the basis of which the constitutional validity of Entry Tax Act was upheld. It is submitted that therefore, levy of Entry Tax at the rate of 12.5% treating as “motor vehicles” or considering at par with “motor vehicles” is absolutely illegal and in violation of Article 304(a) of the Constitution of India.

Making above submissions, and relying upon above decisions, it is requested to quash and set aside the impugned orders passed under the Entry Tax Act levying Entry Tax on Excavators at the rate of 12.5% as being without jurisdiction, illegal, contrary to the provisions of the Scheme and legislative intent of the Entry Tax Act and violative of Article 304(a) of the

Constitution of India.

6.00. This petition is opposed by Ms.Maithili Mehta, learned AGP appearing on behalf of the respondents – State and another.

7.00. Ms.Maithili Mehta, learned AGP appearing on behalf of the State has vehemently submitted that the contention of the petitioner that the “Excavators” is not a “motor vehicle”, does not hold good in light of the definition of term “motor vehicle” as provided under section 2(44) read with section 2(28) of the Motor Vehicles Act, 1988.

7.01. Ms.Maithili Mehta, learned AGP appearing on behalf of the State has also relied upon the decision of the Hon’ble Supreme Court in the case of **Natvar Parikh and Company Vs. State of Karnataka**, reported in **2005(7) SCC 364** as well as decision of the Division Bench of this Court in the case of **Reliance Entries Ltd. Vs. State of Gujarat**, rendered in **Special Civil Application No.11848 of 2005**, in support of her submission that “Excavators” is a “motor vehicle” and therefore, on entry / import of Excavators in the State of Gujarat Entry Tax is leviable at 12.5%.

7.02. Ms.Maithili Mehta, learned AGP appearing on behalf of the State has further submitted that even otherwise by levy of 12.5% Entry Tax on entry / import of Excavators in the State of Gujarat, petitioner is not likely to be affected. It is submitted that by way of Rule 15(7) read with section 11 of the Gujarat Value Added Tax Act, the petitioner can claim refund by way of Input Tax Credit i.e. whatever the amount of tax paid, such as

Entry Tax etc. It is submitted that thus, the petitioner would not be affected in any manner.

By making above submissions, it is requested to dismiss this petition.

8.00. Heard the learned advocates appearing on behalf of the respective parties at length.

8.01. At the outset, it is required to be noted that in this petition, the respective has challenged levy of entry tax at the rate of 12.5% on entry / import of Excavators into the State of Gujarat, inter-alia on the grounds that the same is discriminatory, in violation of Article 304(a) of the Constitution of India and contrary to the objects and purpose of enactment of Entry Tax Act under which Entry Tax is levied.

8.02. While considering the challenge to the levy of Entry Tax on Excavators at the rate of 12.5%, legislative intent of Entry Tax Act and the Statement and Objects of the Entry Tax Act are required to be considered. The Statement and objects of the Entry Tax Act and Preamble of the Entry Tax Act as elaborately dealt with and considered by the Division Bench in the case of Eagle Corporation Pvt. Ltd. (supra), are as under :-

***“Statement of Objects and Reasons
(Bill No.36 of 2001):***

This Bill seeks to introduce the entry tax on the specified goods with a view to giving effect to the proposal contained in the Budget Speech of the Finance Minister in the Legislative Assembly on

the 26th July, 2001.

During the recent past, it has been observed that due to the difference in the rate of sales tax between the State of Gujarat and neighbouring States, diversion of trade has taken place and in some cases sales tax payments are avoided or evaded by various methods. This results in the loss of sales tax revenue legitimately due to the State of Gujarat. With a view to compensating such loss of sales tax revenue, it is considered necessary to levy a tax on entry of certain specified goods purchased outside the State and brought into the local areas of the State of Gujarat for use, consumption or sale therein.

PREAMBLE

AN ACT

(First published, after having received the assent of the Governor in the Gujarat Government Gazette on 31st August 2001) to provide for levy of a tax in the State of Gujarat on the entry of certain goods into a local area of the State from any place outside the State, but not outside the territory of the Union of India for consumption, use or sale therein and for the matters connected therewith or incidental thereto."

Thus, the statement and objects of the Entry Tax Act make it clear that due to the difference in the rate of Sales Tax applicable to the State of Gujarat and that to neighbouring States, diversion of trade has taken place and cases sales tax payments are avoided or evaded by various methods, in some cases resulting in the loss of sales tax revenue legitimately due to the State of Gujarat and with a view to compensating such loss of sales tax revenue, it was considered necessary to levy a

tax on entry of certain specified goods purchased / manufactured outside the State and brought into the local areas of the State of Gujarat.

8.03. Before this High Court in the case of Eagle Corporation Pvt. Ltd (supra) constitutional validity of the Entry Tax Act was challenged and after considering the Statement and Objects of the Entry Tax, Preamble and the relevant provisions of the Act, while upholding the constitutional validity of the Entry Tax Act, the Division Bench of this Court in the case of Eagle Corporation Pvt. Ltd. (supra) in paragraph Nos.22 to 26 has observed and held as under :-

“22. It is the contention on behalf of the petitioner that the levy of Entry Tax is only on importer of specified goods from other States into a local area in the State of Gujarat and the same is discriminatory as there is no such tax on local dealers bringing specified goods from one local area to another local area in the State. It is further submitted that there is a clear discrimination between importers and local dealers and therefore it violates Article 304(a) of the Constitution. It is also the contention on behalf of the petitioner that it might be that as the entry tax is levied on an importer in Gujarat he is liable to pay the same, while the seller in another State enjoys sales-tax exemption which could deprive the importer of the exemption. It is his further contention that the discrimination is required to be considered qua each Act/tax differently and the payment of sales-tax cannot be considered at par or equated with payment of Entry Tax. At this stage, the Statement and Objects of the Act and the Preamble thereon are required to be considered. It appears from the Statement of

Objects that, due to the difference in the rate of sales-tax applicable to the State of Gujarat and the neighbouring States, diversion of trade has taken place and in some cases sales-tax payments are affected or evaded by various methods and the same results in the loss of revenue legitimately due to the State of Gujarat, and with a view to compensate such loss of sales-tax revenue, it is considered necessary to levy a tax on entry of certain *specified goods* produced/manufactured outside the State and brought into the local areas of the State of Gujarat. Section 4 provides for reduction of tax liability and the Entry Tax is reduced to the extent of the amount of tax paid, if any, under the law relating to sales-tax as may be in force in any other State or Union Territory and/or by an importer who had purchased the specified goods in another State and/or reduced to the extent of amount of tax paid if any under the Central Sales Tax, 1956. Considering the Schedule appended thereto that the rate of Entry Tax provided for each specified goods is maximum upto 12%. Thus, considering the provisions of the Act, if the rate of sales-tax on specified goods in the State of Gujarat is 12 per cent and rate of sales-tax payable by the importer in a particular State is 4%, and if an importer in fact pays sales-tax and/or central sales-tax at the rate of 4%, then, in that case, while importing the specified goods into the State of Gujarat/local area, such an importer is required to pay the entry tax at the rate of 8%. It is required to be noted that, so far as the liability of sales-tax on local person is concerned, it is 12 per cent. Thus, when an importer who has paid 4% of sales-tax in a particular State while importing the goods in the State of Gujarat is required to pay Entry Tax at 8 per cent which puts such importer at par with the local persons. Thus, when there is no discrimination at all in

view of juxtapose effect of the two Acts, levy of entry-tax would be non-discriminatory. It is also required to be noted that, as per Section 12 of the Act, no tax shall be levied and/or collected in respect of the motor vehicles mentioned at Serial No.1 in the Schedule, if such motor vehicles are registered in any other State or Union Territory of India under the Motor Vehicles Act for a period exceeding 15 months before their entry into the local area of the State. It is, thus, evident from the above that, if a person has genuinely purchased a motor vehicle for use in another State and subsequently for some reason if he is required to bring the said motor vehicle into the State of Gujarat after 15 months, then such a person is not required to pay the entry tax. Thus, on a fair reading of the provisions of the Act and the object of levy of Entry Tax, it cannot be said that such a levy is discriminatory between the importer of the specified goods from other States into a local area in the State of Gujarat, and the local dealers bringing specified goods from one local area into another local area in the State. The local dealers, bringing specified goods from one local area to another local area in the State, are, otherwise, paying the sales-tax at 12%. Thus, as stated hereinabove, on payment of Entry Tax by the importer, after deduction of sales-tax and/or C.S.T. already paid in another State, such an importer would be put at par with the local dealers. Thus, in sum and substance, the importers as well as the local dealers would be paying the tax at 12% in all. It can, therefore, be said that, on the contrary, the vice of discrimination would stand removed by payment of Entry Tax by an importer of specified goods. If the importer is not required to pay Tax on Entry he would stand on better footing because on one side the local person would be required to pay Sales Tax while the

importer would be paying 4% tax in other State, which would be discriminatory qua the local person. Not only that, such low tax would persuade local people to import specified goods from another State which shall adversely affect the local production. It is at this point we must see that in the name of free flow of trade the local economy of a State can't be sacrificed. The contention, therefore, on behalf of the petitioner, that the discrimination is required to be considered qua each Act and the tax separately, has no substance at all. Considering the provisions of the Act and the objects for which the Act is enacted, one is required to see whether there is any discrimination qua goods imported and payment of sales-tax/tax thereon, and as stated hereinabove, on payment of Entry Tax fixed as aforesaid and considering the reduction as mentioned in Section 4 of the Act, an importer would be at par with a local dealer. In view of the clear position obtained in the case, the contention on behalf of the petitioner, that levy of entry tax is discriminatory, is required to be rejected. It is also to be noted at this stage that as per Section 304(a) discrimination is required to be considered between goods so imported and goods so manufactured or produced. It is undisputed that on payment of Entry Tax as a reduced liability does not put the importer at a position worse in comparison to local producer, dealer or manufacturer. If no Entry Tax is levied then the importer would steal a march over the local person and he would be in a dominating position to the extent of the Tax difference.

23. Now, on perusal of plethora of provisions of the Act, it is evident that they are aimed at achieving level-playing field so as to obviate any chance of discrimination. When there is a reduction in

the effective rate of sales-tax under the Gujarat Sales-Tax Act, automatically there will be corresponding reduction in the maximum rate of Entry Tax prescribed in the Schedule so that the goods brought from outside the State are not discriminated against the goods being manufactured within the State, from the point of view of ultimate burden of tax.

24. Coming to another contention raised on behalf of the petitioner that in a particular State there might be exemption from payment of sales-tax and now while bringing the specified goods into State of Gujarat an importer will be required to pay the Entry Tax and to that extent an importer would be at a disadvantageous position, it is required to be noted, first of all, that there is no such foundation and/or pleading in the petition. The validity of an Act is required to be considered on an appropriate pleading and is not required to be considered on hypothesis.

25. So far as the next contention on behalf of the petitioner that two Clauses of Article 304 of the Constitution are conjunctive and not in the alternative and therefore even if the levy of tax is found to be non-discriminatory, in that case also the conditions imposed under Article 304(b) of the Constitution are also required to be complied with inasmuch as before levy of the said tax previous sanction of the President is required, is concerned, such a contention is required to be rejected outright. The provisions of Article 304(a) and 304(b) are to be construed and interpreted separately. If levy of a tax is found to be non-discriminatory between the goods so imported and the goods so manufactured or produced, in that case the conditions imposed under Article 304(b) of the Constitution are not required to be complied with.

If it is found that levy of tax is discriminatory between the goods so imported and the goods so manufactured or produced in a local area, then in such a case, on proof that imposition of such levy is in the public interest even if it is found to be 'discriminatory', the same will be valid if the same is imposed after obtaining previous sanction of the President. Thus, on fair reading of the provisions of Article 304(a) and 304(b), if the levy of tax is found to be non-discriminatory, in that case, previous sanction of the President is not required. If the contention on behalf of the petitioner is accepted, then there is no purpose in enacting Article 304(a) and 304(b) separately. If the argument is correct then what is mentioned in Article 304(b) could have been mentioned in Article 304(a) itself and both would not have been worded separately. Under the circumstances, the contention on behalf of the petitioner, that even if the levy of tax is found to be non-discriminatory in that case too it is to be established that the same is in the public interest and that it requires previous sanction of the President, cannot be accepted.

26. As stated hereinabove, the learned counsel appearing on behalf of the petitioner has mainly relied upon the recent decision of the Hon'ble Supreme Court in the case of *Jindal Stainless (supra)*. However, it is required to be noted that the decision of the Hon'ble Supreme Court in the case of *Jindal Stainless (supra)* is with regard to tax being compensatory in nature dealing with Article 301 of the Constitution of India. As stated above, considering the recent decision, the State Government has given up their stand that levy of entry tax is compensatory in nature and is compensatory tax. Therefore, the decision relied upon by the learned counsel appearing on

behalf of the petitioner would not be of any assistance to the petitioner. On the contrary, the constitutional validity of similar provisions relating to levy of Entry Tax being Maharashtra Tax on Entry of Motor Vehicles Into Local Areas Act, 1987 with the same objects and reasons has been upheld by the Hon'ble Supreme Court in the case of *Shaktikumar M. Sancheti And Another Vs. State of Maharashtra And Others*,[supra]. The learned counsel appearing on behalf of the petitioner has tried to submit that the constitutional validity of the said Act has been upheld on another ground. However, it is required to be noted that this Court is bound by the decision of the Hon'ble Supreme Court and it is not in dispute that similar provisions of the Act and the levy of Entry Tax have been upheld by the Hon'ble Supreme Court in the aforesaid Judgment. Under the circumstances, this Court cannot take a different view and is bound by the decision of the Hon'ble Supreme Court."

Thus, in the aforesaid decision, the Division Bench of this Court upheld the vires of Entry Tax Act by observing that if the rate of sales tax on specified goods in the State of Gujarat is 12% and rate of sales tax payable by the importer in a particular state is 4% and if the importer in fact pays sales-tax and/or central sales-tax at the rate of 4%, then, in that case, while importing the specified goods into the State of Gujarat/local area, such an importer is required to pay the entry tax at the rate of 8%. The Division Bench has also further observed that, thus, an importer who has paid 4% of sales-tax in a particular State while importing the goods in the State of Gujarat is required to pay Entry Tax at 8% which puts such importer at par with the local persons and thus when there is no discrimination at all in view of juxtapose effect of

the two Acts, levy of entry-tax would be non-discriminatory.

8.04. While holding that the levy of Entry Tax Act is not in violation of Article 304(a) of the Constitution of India, it is observed by the Division Bench of this Court that as per Article 304(a) of the Constitution of India, discrimination is required to be considered between the goods so imported and the goods so manufactured or produced. It has been further observed that on payment of Entry Tax as a reduced liability does not put the importer at a position worse in comparison to local producer, dealer or manufacturer. It has been further observed that if no Entry Tax is levied then the importer would still march over the local person and he would be in a dominating position to the extent of the Tax difference. The Division Bench has also further observed that the provisions of the Entry Tax Act are aimed at achieving level playing field so as to obviate any chance of discrimination. It is further observed that when there is a reduction in the effective rate of sales tax under the Gujarat Sales Tax Act, there will be automatic corresponding reduction in the maximum rate of entry tax prescribed in the schedule, so that the goods brought from outside the State are not discriminated against the goods manufactured within the State, from the point of view of ultimate burden of tax.

8.05. In the recent judgement, Nine Hon'ble Judges Bench of the Hon'ble Supreme Court in the case of Jindal Stainless Ltd. (supra) while considering the applicability / effect of Article 304(a) of the Constitution of India, has observed and held that, State legislation cannot in the matter of levying taxes discriminate between the goods imported from the

other States and those manufactured or produced within the State, while levying such a tax. It is further observed and held that the effect of Article 304(a), therefore, is that while levy of taxes on goods imported from others States and Union territories is clearly recognised as constitutionally permissible, the exercise of such power is subject to the two restrictive conditions i.e. (1) Tax on import of goods from others States would be justified only if similar goods manufactured or produced in the state are taxed and (2) State Legislation cannot in the matter of levying taxes discriminate between the goods imported from the other States and those manufactured or produced within the State. It is further observed that, that does not however detract from the proposition that levy of taxes on goods imported from other States is constitutionally permissible so long as the State legislatures abide by the limitations placed on the exercise of that power.

8.06. In concluding para 807, it is held by the Hon'ble Supreme Court that only such taxes which are discriminatory in nature are prohibited by Article 304(a) of the Constitution of India.

8.07. Considering the law laid down by the Hon'ble Supreme Court in the aforesaid decision in the case of Jindal Stainless Ltd. (supra) and observations made by the Division Bench of this Court in the case of Eagle Corporation Pvt. Ltd. (supra) as well as in the case of Tractors and Farm Equipment Ltd. (supra) and considering the Statement and Objects of enactment and/or levy of Entry Tax under the Entry Tax Act, controversy in the present case i.e. levy of Entry Tax on

Excavators at the rate of 12.5% is required to be considered.

8.08. It is required to be noted and as averred by the petitioner, rate of Value Added Tax on Excavators in the State of Gujarat was 4%. Therefore, if on entry / import of the Excavators from the aforesaid States into the State of Gujarat and sale of Excavators in the State of Gujarat, if the petitioner are liable to pay entry tax at 12.5%, in that case, the same would be discriminatory and directly in violation of Article 304(a) of the Constitution of India and the same shall be contrary to the scheme and object and purpose of introducing Entry Tax under the Entry Tax Act. If the importer like the petitioner are required to pay entry tax higher than VAT levied on sale of goods in the State of Gujarat, in that case, such importers would be at a disadvantageous position and there shall not be "level playing field" which was the aim / goal for introducing the entry tax under the Entry Tax Act. Therefore, any levy of tax beyond the VAT required to be paid by the local dealer, shall be discriminatory and directly in violation of Article 304(a) of the Constitution of India.

8.09. The aforesaid question is also required to be considered from another angle. In the present case entry tax at the rate of 12.5% on Excavators is levied considering them as "motor vehicles" under Entry 1 of the Schedule to the Entry Tax Act. However, it is required to be noted that right from the beginning, the rate of Entry Tax had direct connection with the rate of sales tax under the Sales Tax Act. In the original Schedule to the Entry Tax Act, there was specific column containing reference to the relevant entry in the Gujarat Sales Tax Act. In respect of the first entry relating

to motor vehicles, reference was made to Entry 128 of Schedule-IIA to the Sales Tax Act and maximum rate of entry tax was stipulated at 12% which was equal to the rate applicable to motor vehicles classifiable under Entry 128 of Schedule IIA of the Sales Tax Act. At that time there was a separate entry for earth moving equipment which included Excavators, contained in Entry 98A of Schedule IIA to the Sales Tax Act for which the applicable rate of sales tax was 8%. Thus, the Excavators were never sought to be included in the Schedule of specified goods contained in the Entry Tax Act. Thereafter when the Sales Tax was replaced by the VAT Tax Act, consequential change was made in the Entry Tax Act w.e.f. 1/4/2006. Since there was no specific entry for motor vehicles under the VAT Act, reference to Schedule entry of Sales tax Act was removed in the new Schedule. Motor Vehicles which were falling under Entry 128 of the Sales Tax Act would now fall under residuary entry 87 of Schedule II of the VAT Act for which the stipulated rate of tax was 12.5%. Therefore, maximum rate of entry tax for motor vehicle was correspondingly revised from 12% to 12.5%. While the specific entry for motor vehicles under the Sales Tax Act was dropped under the VAT Act, the specific entry for Excavators was retained in Entry 35 of Notification issued under section 5(2) of the VAT Act, which included machinery used in the execution of works contract, for which the rate of tax was 4%. Thus, the amendment of the entry Tax Act w.e.f. 1/4/2006 was only consequential to replacement of the Sales Tax Act by the VAT Act and only those motor vehicles were sought to be taxed under the entry Tax Act which were earlier classifiable under Entry 128 of Schedule-IIA to the sales Tax Act and later on under residuary Entry 87 of Schedule-II of the VAT Act

attracting local rate of 12.5%. That thereafter, additional tax was introduced under section 7(1A) of the VAT Act w.e.f. 1/4/2008. In so far as the goods covered under residuary entry 87 of Schedule-II of the VAT Act are concerned, the rate of additional tax was 2.5%. Thus, the effective rate of VAT on such goods was 15%. Correspondingly the Schedule to the Entry Tax Act was amended. It is to be noted that in the Statement of Objects and reasons of amending Act it was again noted that the purpose of the Entry Tax Act was not to levy additional tax but to provide “level playing field” between the goods entering into the local areas from any place outside the State and the goods manufactured or produced in the State. It was further noted that the entry tax rates are having direct linkage with the VAT rates on the same goods and hence change in the VAT rates necessitated change in the Entry Tax Act. Thereafter it was observed that to obviate the need to maintain the Entry Tax Act consequent to change in the VAT rates it was considered necessary to revise the maximum rates of tax on specified goods as mentioned in the Schedule.

8.10. Thus, the entire legislative history of the Entry Tax Act as well as object and reasons behind the introduction as well as amendments of the Entry Tax Act establish that Entry Tax was always sought to be levied at the rates prescribed for such goods under the Sales Tax Act / VAT Act. In other words, there is a nexus between the Entry Tax rates and local Sales Tax / VAT rates on similar goods. Thus, only those motor vehicles which were covered under Entry 128 of Schedule-IIA to the Sales Tax Act and which are now covered under residuary Entry 87 of Schedule-II to the VAT Act which attract

15% tax under the VAT Act would be covered under the entry of motor vehicles under the Entry Tax Act. Levy of entry tax at the rate of 12.5% on Excavators by treating them as falling under Entry for motor vehicles even though Excavators have always been covered by separate entry under the Sales Tax Act and the VAT Act during the relevant period and for which rate of tax under the VAT Act is 4%, therefore is dehors the scheme of the Entry Tax Act as countenanced by the legislative history as well as objects of the Entry Tax Act.

8.11. Now, so far as submission on behalf of the State that levy of 12.5% entry tax on Excavators, the petitioner is not likely to be affected as the petitioner shall be entitled to now Input Tax Credit under Rule 15(7) read with section 11 of the VAT Act and therefore, not to strike down levy of entry tax at the rate of 12.5% treating them as motor vehicles is concerned, on the aforesaid ground, levy, if any, found to be illegal, cannot sustain. Once levy itself is held to be illegal, unconstitutional and/or contrary to the objects and purpose of Entry Tax Act, there is no question of first to pay such a tax and thereafter to get refund by way of Input Tax Credit. Why should importers be forced to first pay Entry Tax which otherwise is illegal and/or discriminatory and thereafter to go for refund by way of input Tax Credit.

9.00. In view of the above and for the reasons stated above, both these petitions succeed. Levy of Entry Tax at the rate of 12.5% treating Excavators as “motor vehicles” and/or at par with the “motor vehicles” is hereby held to be illegal, discriminatory, violative of Article 304(a) of the Constitution of India and against the object and purpose of the levy of Entry

Tax under the Entry Tax Act. It is held that the respondents – State cannot levy / charge Entry Tax on Excavators beyond Value Added Tax under the VAT Act i.e. beyond 4%. On holding so, necessary consequences shall follow. Rule is made absolute to the aforesaid extent in each of the petitions. In the facts and circumstances of the case, there shall be no order as to costs.

**Sd/-
(J. B. PARDIWALA, J)
Sd/-
(A. C. RAO, J)**

RAFIK

