

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**WRIT PETITION NO. 4552 OF 2015
WITH
WRIT PETITION NO. 4553 OF 2015
WITH
WRIT PETITION NO. 4554 OF 2015
WITH
WRIT PETITION NO. 4555 OF 2015**

M/s. Raj Shipping	}	
17, Banaji Mansion	}	
Banaji Street,	}	
Fort, Mumbai – 400 023	}	Petitioner

versus

1. The State of Maharashtra	}
Through the Government Pleader	}
High Court, Mumbai	}
	}
2. The Commissioner of Sales Tax	}
having his office at 3B-7, 3 rd floor,	}
Old Vikrikar Bhavan, Mazgaon,	}
Mumbai 400 010	}
	}
3. Joint Commissioner of Sales Tax	}
Investigation Branch – B	}
Old Vikrikar Bhavan, Mazgaon,	}
Mumbai – 400 010	}
	}
4. Assistant Commissioner of	}
Sales Tax	}
MUM – INV – D – 39,	}
Investigation Branch – B,	}
D-8, 2 nd floor, Old Building,	}
Vikrikar Bhavan, Mazgaon,	}
Mumbai – 400 010	}
	}
5. Smt. Ashalata D. Rajput	}
Currently incumbent in the Office	}
of Respondent No. 4 under the	}

provisions of Maharashtra Value	}	
Added Tax Act, 2002	}	Respondents

WITH
WRIT PETITION NO. 5798 OF 2015
WITH
WRIT PETITION NO. 5799 OF 2015

M/s. Bhambani Shipping Ltd.	}	
A company incorporated under	}	
Meera Hari Niwas, 205-206,	}	
SVP Nagar, Versova,	}	
Andheri (West), Mumbai – 400 053	}	Petitioner

versus

1. The State of Maharashtra	}	
Through the Government Pleader	}	
High Court, Mumbai	}	
	}	
2. The Commissioner of Sales Tax	}	
having his office at 3B-7, 3 rd floor,	}	
Old Vikrikar Bhavan, Mazgaon,	}	
Mumbai 400 010	}	
	}	
3. Joint Commissioner of Sales Tax	}	
Investigation Branch – B	}	
Old Vikrikar Bhavan, Mazgaon,	}	
Mumbai – 400 010	}	
	}	
4. Assistant Commissioner of	}	
Sales Tax	}	
MUM – INV – D – 39,	}	
Investigation Division – B, Mumbai	}	
	}	
5. Smt. Ashalata D. Rajput	}	
Currently incumbent in the Office	}	
of Respondent No. 4 under the	}	
provisions of Maharashtra Value	}	
Added Tax Act, 2002	}	Respondents

Mr. V. Sridharan - senior counsel with Mr. Prakash Shah, Mr. Puneeth Ganapathy, Mr. Rahul Thakar and Mr. Jas Sanghavi i/b M/s. PDS Legal for the Petitioners.

Mr. V. A. Sonpal - Special Counsel with Mr. A.I. Patel, AGP and Mr. Pravin G. Sawant, AGP for Respondent Nos. 1 to 4.

**CORAM :- S. C. DHARMADHIKARI &
G. S. KULKARNI, JJ.**

RESERVED ON :- JULY 15, 2015

PRONOUNCED ON :- OCTOBER 19, 2015

JUDGMENT :- [Per S. C. Dharmadhikari, J.]

Rule. Respondents waive service. By consent, Rule is made returnable forthwith.

2) The question involved in these Writ Petitions is whether the sales made and subject matter of the order of assessment in the first Petition are within the State of Maharashtra so as to be taxable under the Maharashtra Value Added Tax Act, 2002 (for short “the MVAT Act”) and therefore the action of the Respondents treating it as such can be said to be ex-facie illegal. Since the point involved and summed up above is common to all the Petitions, for the purpose of the present Judgment, we take the facts from Writ Petition No. 4552 of 2015. It is undisputed that since the controversy involved in these Writ Petitions is similar, common arguments have been canvassed. Hence, we dispose of all the Writ Petitions by this common Judgment.

3) The facts in Writ Petition No. 4552 of 2015 are as under:-

The Petitioner is registered dealer under the provisions of the MVAT Act and the Central Sales Tax Act, 1956 (for short “the CST Act”) for the purpose of discharging its VAT liability and is holding valid TIN 27420008932V/C. The Petitioner has regularly filed its VAT returns for the Financial years 2007-08 till date. The Petitioner has duly discharged its tax liability under the MVAT Act and CST Act as per the original returns filed by the Petitioner.

4) The Petitioner submits that it has already filed Writ Petition No. 4057 of 2015 in this Court challenging the legality and validity of recovery notices issued by Respondent No. 4 to the bankers and debtors of the petitioner on account of alleged tax liability on sales of motor spirits by the Petitioner during the years 2007-08 to 2014-15. The Court, vide order dated 21st April, 2015 has directed the parties to maintain status quo.

5) Respondent No. 4 has also issued recovery notices in Form 318 dated 17th April, 2015 to Respondent Nos. 6 to 10 for the purpose of recovery of alleged tax liability. Also, subsequent to the above High Court order dated 21st April, 2015, the Petitioner has received assessment order for the period 2007-08 on 30th April, 2015 which has been claimed to be passed by Respondent No. 4 on 30th March, 2015.

6) The Petitioner is engaged in the business which is commonly known as “Bunker Supplies”. Bunker supplies mainly consist of supply of petroleum products such as High Speed Diesel Oil (HSD), Light Diesel Oil (LDO), and Furnace Oil (FO) to various incoming and outgoing vessels within or beyond the port limits of Mumbai Port.

7) The shipping vessel places an enquiry for required quantity of HSD with the Petitioner. Pursuant to the enquiry made by the customer, the Petitioner gives a quote for their supplies. On approval of quote, the shipping vessel places a Purchase order/nomination with the Petitioner for the required quantity and the name of the vessel to which the supplies are to be made.

8) On receipt of the purchase order/nomination from the shipping vessel, the Petitioner in turn places a back to back purchase order/nomination of the same quantity on any of the Oil Marketing Companies such as M/s. Indian Oil Company Ltd., M/s. Bharat Petroleum Corporation Limited, etc. to be sold to the vessel nominated in the purchase order. On receipt of the purchase order/nomination by the Oil Marketing Company, the Oil Marketing Company informs their appointed Custom House Agent (CHA) to prepare a shipping bill to effect the supplies. In the shipping bill filed under the provisions of

Customs Act, 1962, the supply of HSD to the nominated vessel is cleared as “Ship Stores” as the said HSD is for the consumption by the vessel.

9) Once the shipping bill is ready, the Oil Marketing Company loads the required quantity of HSD into tank lorries which then come to the barge loading point at Mallet Bunder along with the invoice copy of the Oil Marketing Company.

10) The sister concern of the Petitioner owns self propelled barges having large cargo tanks (below deck) ranking from 40 thousand liters (40KL) to 200 thousand liters (200KL). The barges have pumps fitted on it with a flow meter in order to pump out the HSD to the vessel. These barges are similar to petrol pumps where petrol is sold to the regular customers.

11) At the Mallet Bunder, the HSD supplied by the Oil Marketing Company is decanted into the cargo tanks of the barges owned by the Petitioner. The entire activity of decanting is done under the supervision of a Customs Officer.

12) After taking delivery of the HSD from the Oil Marketing Company, the barges sail to the anchorage point of the nominated vessel.

13) After reaching the anchorage point of the nominated vessel, the HSD is pumped out of the barge into the fuel tank or bunker of the nominated vessel. Once the supply is complete, master or the authorised officer of the vessel acknowledges the receipt of the ordered quantity of HSD on the Bunker Delivery Note (BDN) and the shipping bill.

14) The barges go beyond 1.5 nautical miles from the base line to deliver the HSD to the vessels anchored therein.

15) After the delivery of the HSD to the nominated vessel is complete, the Petitioner raises an invoice on the shipping line, based on the BDN.

16) There is no dispute about the fact that the bunker supplies made by the Petitioner to the shipping lines are for their own consumption and use. This is further fortified by the fact that the said bunker supplies are cleared under the Customs Act, 1962 under a *bona fide* shipping bill for supply of ship stores.

17) The Petitioner has regularly filed returns and paid taxes under the MVAT Act and complied with all the provisions of MVAT Act. The Petitioner has discharged the tax liability due under the MVAT Act

after claiming available exemptions under the Act read with the notifications issued under the MVAT Act.

18) The Respondent No. 1 has issued Notification No.VAT.1506/ CR-135-B/ Taxation-1 dated 30.11.2006 in terms of Section 41(4)(b) of the MVAT Act, 2002 exempting the sales of motor spirit made at the retail outlet. Accordingly, the Petitioner has claimed exemption from payment of MVAT on sale of HSD. For the purpose of clarification, it is mentioned that HSD is notified as “motor spirit” vide Notification No.VAT.1506/CR-135/Taxation – 1 dated 30.11.2006 for the purpose of Explanation to Sub-section (4) of Section 41 of the MVAT Act, 2002.

19) Hence, while filing the returns, the Petitioner had claimed the turnover of sales pertaining to sale of HSD as exempted turnover and not paid MVAT on the said turnover.

20) However, the Deputy Commissioner of Sales Tax, Investigation – Division-B, Mazgaon, Mumbai conducted a search at the registered premises of the Petitioner from 17th December 2014 to 31st December 2014 under Section 64 of the MVAT Act, 2002. The investigation team had seized all the documents and books of account of the Petitioner for a continuous period of 17 days for the purpose of conducting their investigations. This despite the Petitioner co-operating

in every manner as to production of details and information.

21) During the investigation, the investigating officers alleged that the Petitioner had wrongly claimed the exemption on the sales of HSD under the said Notification and coerced the petitioner to file revised returns for the period from financial year 2007-08 till date admitting the additional tax liability. The officers alleged an estimated additional tax liability to the tune of Rs. 23.36 crores on account of VAT on HSD sold by the Petitioner to its various customers. They also imposed interest u/s 30(2) and u/s 30(4) of the MVAT Act, 2002. The investigating officers had alleged that under the MVAT Act, 2002 the sale of HSD made by the Petitioner shall not be covered under the exemption Notification No. VAT.1506/ CR-135-B/ Taxation-1 dated 30.11.2006.

22) Due to immense coercion by the officers acting under the authority of Respondent Nos. 1-3 and particularly, by Respondent No. 4, Petitioner further revised their returns on 24th, 25th and 30th December 2014 for the following periods listed below.

Sr. No.	Period	Date of Revision	Revised Under Section	Remarks
1	2007-2008	24/12/2014	20 (4) (c)	Under Protest
2	2008-2009	30/12/2014	20 (4) (b)	Under Protest
3	2009-2010	24/12/2014	20 (4) (b)	Under

				Protest
4	2010-2011	24/12/2014	20 (4) (b)	Under Protest
5	2011-2012	25/12/2014	20 (4) (b)	Under Protest
6	2012-2013	30/12/2014	20 (4) (c)	Under Protest
7	2013-2014	30/12/2014	20 (4) (a)	Under Protest
8	April 2014 – September 2014	30/12/2014	20 (4) (a)	Under Protest

23) It is to be noted that even in the remarks column of the revised returns filed by the petitioner, the petitioner has categorically mentioned that the said returns are being filed “under protest”.

24) After filing the revised returns, the petitioner once again, vide letter dated 31st December 2014, had made known to the officers that the Petitioner has filed the revised returns under protest and made a payment of Rs. 1,00,00,000/- under protest to prove their *bona fides*. Under no circumstances, the Petitioner has accepted the additional liability of tax shown under the revised returns which have been filed under coercion.

25) Despite the Petitioner informing the investigation officers that the revised returns have been filed under protest without admitting the alleged additional liability, the Respondent No. 4 issued Notice in Form 213 under Section 20 of the MVAT Act demanding the additional tax liability shown as payable to the State Government in the revised

returns filed under protest.

26) On closing of the investigation, the Petitioner was further coerced to make up the payment of the balance amount of additional tax liability without passing any assessment order as required under the law. Since the petitioner could not pay the large amount of sums as allegedly determined by the investigation team, the investigating officers issued recovery notice in Form 318 u/s 33(1) of the MVAT Act, 2002 in respect of bank accounts of the petitioner in Kotak Mahindra Bank Ltd. and Citibank NA. vide order dated 5th February 2015. It is important to note that out of the two Banks accounts, the account with Kotak Mahindra Bank Ltd. is a Cash Credit Account (Overdraft Account). However, even after considering the said details, the investigating officer had issued notice in respect of the Overdraft account with Kotak Mahindra Bank.

27) Since, the attachments made by the officers were disrupting the day to day business of the Petitioner, the Petitioner met the investigating officers and asked them to lift the attachment. Further, at the insistence of the investigating officers, the Petitioner pleaded for lifting of attachment and asked to give installment system to make payment of the alleged additional tax liability. Subsequent to this the investigating officers revoked the notices of recovery in respect of Kotak

Mahindra Bank account of the Petitioner.

28) Despite there not being any confirmed assessment order against the Petitioner for the alleged dues, the Petitioner, on 11th February 2015, paid an amount of Rs. 2,50,00,000 and requested the department to release the bank accounts vide their letter dated 11th February 2015. The Department then subsequently released one of the Bank Account of the Petitioner.

29) On receipt of the above submission of the Petitioner dated 11th February 2015, the Petitioner received an installment order dated 4th March 2015 to pay the balance, alleged tax dues. Again the Petitioner received the Form 318 for Kotak Mahindra Bank Account for the period April – September 2014.

30) Again the petitioner paid a sum of Rs. 2,00,00,000 on 10th March 2015 to show its good conduct and cooperation. They also requested to lift the above attachment for Kotak Mahindra Bank Account. The investigating officers then revoked their notice of recovery in respect of Kotak Mahindra Bank Account on 18th March 2015.

31) Aggrieved by the attachment of bank accounts, the Petitioner thereafter wrote letters dated 30th March 2015 and 4th April

2015 addressed to Respondent No. 4 and Respondent No. 3, respectively stating that the moneys collected from the Petitioner were under protest and were to be lawfully refunded to the Petitioner. The Petitioner further demanded that the impugned recovery notices be lifted forthwith. The Petitioner also made detailed submissions as to how it was exempt and not liable for the demand being alleged by Respondent No. 3. The Petitioner also apprised the respondent of the fact that the limitation period for passing an assessment order for the financial years 2008-09 and 2009-10 had already expired and the latter would be time barred as per law. Therefore, the Petitioner was entitled to the refund, since it has not admitted any liability, as evidenced by its original and re-revised returns.

32) The Petitioner has once again received the notice of recovery in Form 318 issued to Citi Bank – A/c. No. 0840567-117 and one its debtors M/s. Bharti Shipyard Pvt. Ltd. for the recovery of alleged tax dues for the period from April, 2011 to September, 2014.

33) The Petitioner has further received the copies of notices of recovery in Form 318 dated 17th April 2015 issued to its debtors, namely, M/s. Afcons Infrastructure Limited, M/s Epsom Shipping Private Limited, M/s Essar Offshore Subsea Limited, M/s GOL Offshore Limited and M/s Seven Islands Shipping Limited for the recovery of

alleged tax dues for the period from April, 2011 to September, 2014.

34) In response to the above allegations and issue of recovery notices by the Respondent No. 4, the petitioner filed Writ Petition No.4057 of 2015 before the Hon'ble High Court of Bombay challenging the legality and validity of the recovery notices issued to the debtors and bankers of the petitioner in order to recover the alleged tax dues as stated above. The petition has been filed on the grounds that first, the recovery notices impugned therein were passed without assessment; second, that the sales of High Speed Diesel are covered under the purview of the abovementioned Notification No. VAT.1506/ CR-135-B/ Taxation-1 dated 30.11.2006; third, the sale transactions of the Petitioner are not within the territorial jurisdiction of the State of Maharashtra.

35) Further with respect to the aforementioned Writ Petition, the Hon'ble High Court of Bombay has passed the order dated 21st April 2015 directing the parties to maintain the status quo. Subsequently, the Respondent No. 4 served the Petitioners with Assessment Order No.ASO/MUM/-INV-D-039/1415/7443308 for the period 2007-08 under section 23(4) of the MVAT Act which was received by the petitioner on 30 April 2015. The Assessment Order also imposed

interest under section 30(3) of the MVAT Act and penalty u/s 29(3) of the MVAT Act, 2002 which has resulted in the tax dues to the tune of Rs.1,27,50,383. The said order has been claimed to be passed by the Respondent No. 4 on 30th March 2015. The same order was served on the petitioner on 30th April 2015.

36) In view of the above, the Petitioner is forced and constrained to file the present Writ Petition against the said assessment order dated 30th March 2015 as being arbitrary, un-reasonable and in violation of Articles 14 and 19(1)(g) of the Constitution of India.

37) Mr. Sridharan, learned Senior Counsel appearing for the Petitioner has divided his submissions into three parts.

38) Firstly, our attention is invited to the grounds in the Writ Petition, particularly under the head that the assessment order which is claimed to have been made is illegal, arbitrary and without jurisdiction. It is submitted that the subject order has been claimed to be passed by the fourth Respondent on 30th March, 2015, but the same was served on the Petitioner on 30th April, 2015. Mr. Sridharan submits that there is undue haste in passing this assessment order and principles of natural justice have been totally violated. For assessing a party like the Petitioner to tax and in terms of the applicable law, a notice in prescribed form is to be issued and indicating that the returns of the

Petitioner, filed under the Act, namely, MVAT Act would be taken up for assessment on the date and time fixed in the notice. At both stages, namely in issuing the notice and thereafter during assessment, the principles of natural justice have to be followed. A reasonable opportunity has to be given to the Petitioner and parties like it to make submissions and place relevant documents and materials.

39) Therefore, it is submitted that the impugned assessment order cannot be sustained because it is contrary to the requirement prescribed under section 23 of the MVAT Act. The assessment order is therefore illegal and it is arbitrary as well, as the principles of natural justice have been contravened. The impugned order therefore must be quashed and set aside on this ground alone.

40) It is also submitted that this order is barred by limitation. In that regard our attention is invited to grounds at page 23 under this head. It is submitted that if the assessment order has not been made within the time prescribed by law, then, that cannot be passed. Our attention is invited to the fact that there was a prior Writ Petition being Writ Petition No. 4057 of 2015 and the record of which would indicate that the assessment order has not been passed on 30th March, 2015 but it is ante-dated. In these circumstances, such an order cannot be sustained. From grounds at page 23 to 27, these submissions are culled

out.

41) The next part of his submissions is on the footing that the impugned transactions of the Petitioner are exempt from Sale Tax under Notification No. VAT/1506/CR-135-B/Taxation-1. Our attention is invited to the said Notification in great details and it is submitted that the Petitioners are not liable to pay any additional tax as alleged by the Respondents on account of sales of high speed diesel at retail outlet. The Petitioner has rightly claimed exemption under clause (b) of section 41(4) for sales of high speed diesel read with the above Notification dated 30th November, 2006. The contention of the investigating officers under the MVAT Act, each sale is liable to tax at every stage is ex-facie erroneous and without any legal basis. Section 41(4) granting exemption to sales of motor spirits at retail outlets was introduced by Maharashtra Act No. 32 of 2006 with retrospective effect from 1st April, 2005 with an intention to levy VAT on sale of motor spirit at a single stage. Reliance is placed on the statement of objects and reasons for the amendment of section 41. Therefore, read with the substantive provision, the statement of objects and reasons so also the Notification in question, it is apparent that there is an exemption with regard to sales at retail outlets of motor spirit. This exemption is subject to the conditions set out in this Notification all of which have been fulfilled by

the Petitioner. For this reason as well, it is submitted that sales of high speed diesel were always taxed as a single point levy under the erstwhile Bombay Sales of Motor Spirit Taxation Act, 1958. If the Petitioner is retail trader within the meaning of that Act and there is nothing contrary thereto in the MVAT Act, then, it would be apparent that the Petitioners are not liable to pay tax.

42) The third part of Mr. Sridharan's submissions concern the legality of the levy.

43) Elaborating this submission and in great details, Mr.Sridharan was at pains to submit that The State legislature of Maharashtra has consciously chosen to confine the levy under MVAT Act only to sale made within the State of Maharashtra.

43.1) Sections 2(24) and 2(28) of the Maharashtra Value Added Tax Act read as follows:

“(24) "sale" means a sale of goods made within the State for cash or deferred payment or other valuable consideration, but does not include a mortgage, hypothecation, charge or pledge; and the words "sell", "buy" and "purchase", with all their grammatical variations and cognate expressions, shall be construed accordingly...

...

(28) "the State" means the State of Maharashtra;”
(emphasis supplied)

43.2) The Charging section, i.e. Section 6 seeks to levy tax on the turnover of sales (sales to be defined as sales made within Maharashtra):

“6. Levy of Sales tax on the goods specified in the schedules

1. There shall be levied a sales tax on the turnover of sales of goods specified in column (2) in the Schedule B, C, D or, as the case may be E, at the rates set out against each of them in column (3) of the respective schedule.
2. Notwithstanding anything contained in sub-section (1) there shall be levied a sales tax, in addition to the sales tax leviable under sub-section (1), on the sales of any motor spirits specified in Schedule D at such rate per litre, if any, as may be set out from time to time against each of the motor spirits, in column (3) of the said Schedule.”

43.3) Therefore, under the MVAT Act the State legislature has chosen to confine the levy only to sale within the State of Maharashtra, whatever the said expression may mean.

43.4) Relevant portion of Section 8 provides as follows:

“8. Certain transactions not liable to tax

(1) Nothing in this Act or the rules or the notifications shall be deemed to impose or authorize the imposition of a tax ...on any sale or purchase of any goods, where such sale or purchase takes place,-

(a) (i) outside the State ;

...

and the provisions of this Act and the said rules and notifications shall be read and construed accordingly.

Explanation. - For the purpose of this section, whether a sale or purchase takes place-

(i) outside the State

...

shall be determined in accordance with the principles specified in sections xxx , 4 and xxx of the Central Sales Tax Act, 1956 (74 of 1956);...” (Emphasis Supplied)

43.5) Thus, Section 8 further clarifies that no sale taking place outside the State of Maharashtra (as per definition given in Section 4 of CST Act, 1956) would be liable to tax under the MVAT Act.

43.6) Assuming, without admitting that the State of Maharashtra has the necessary competence to tax sale transactions taking place outside its territory, Sections 2(24) and 2(28) of the MVAT Act, 2002 clearly do not provide for any such artificial extension. Therefore the MVAT Act only applies to the ordinary territorial limits of the State of Maharashtra.

44) Under common law, realm of a country does not extend to the territorial waters.

44.1) Under Common Law, the realm of a State (to be understood as 'Country' or a 'Nation-State') extends only upto the low water mark. This is so clarified in the commentary 'Law relating to waters' by Coulson and Forbes, chapter titled '*Of the Sea and Rights Therein*' vide the 6th Edition of the book. The relevant portions of the commentary are extracted and reproduced hereinbelow:

"The high seas include the whole of the seas beyond the low water mark and outside the body of a country. The realm of England only extends to low water mark, and all beyond is the high seas (Page 1__ of the commentary)

(Pg.2, Compilation Vol – IV)

.....

The results of the authorities seems to be briefly as follows:-

1. *The realm of England where it abuts upon the open sea only extends to low water; all beyond is the high sea.*
2. *For the distance of three miles, and in some cases more, international law has conceded an extension of dominion over the seas washing the shores.*
3. *This concession is evidenced by treaty or by long usage.*
4. *In no case can the concession extend the realm of England so as to make the conceded portion liable to the common law, or to vest the soil of the bed in the crown. This must be done by the act of the Legislature.” (Emphasis Supplied)*

(Page 12_ of the commentary)

(Pg.13, Compilation Vol – IV)

44.2) Halisbury’s Laws of England in the chapter on ‘*The Sea and the Seashore*’ in paragraph 31 in Volume 100 of the 5th Edition, inter alia,, states as under:

“ At common law, ‘high seas’ includes the whole of the sea below low-water mark where great ships can go except for such parts of the sea as are within the body of a country, for the realm of England only extends to the low-water mark, and all beyond is the high seas...” (Emphasis supplied)

44.3) Both the aforesaid treatises refer to and rely on R V. Keyn (1876) 2 Ex D 63, CCR, wherein Sir R Philimore held (at Page 67) that the country extends to low water mark where the high seas began.

45) Decision of US Federal Supreme Court in United States Vs State of California – (1947) (332) US 19:

45.1) The judgment of the Supreme Court of United States in United States vs. State of California (1947) 332 US 19 dealt with claim of the State of California that a belt extending to three English miles from low water mark lies within the original boundaries of the State of California. The Federal Government of the United States opposed such an assertion by the State of California. The United States Supreme Court decided this case in favour of the (United States and against State of California), summarizing its conclusion as follows : (Pgs. 7-8 of Compilation – Vol. V)

“None of the foregoing cases, nor others which we have decided are sufficient to...declare that California owns or has paramount rights in or power over the three-mile belt under the ocean. The question of who owned the bed of the sea only became of great potential importance at the beginning of this century when oil was discovered there. As a consequence of this discovery, California passed an Act in 1921 authorizing the granting of permits to California residents to prospect for oil and gas on blocks of land off its coast under the ocean. This state statute and others which followed it, together with the leasing practices under them, have precipitated this extremely important controversy, and more pointedly raised this state-federal conflict for the first time. Now that the question is here, we decide for the reasons we have stated that California is not the owner of the three-mile marginal belt along its coast, and that the federal government rather than the state has paramount rights in and power over that belt, an incident to which is full dominion over the resources of the soil under that water area, including oil.”

(Emphasis Supplied)

46) Decision of the Canadian Supreme Court reported as 1967

SCR 792:

46.1) The decision of the Supreme Court of Canada ‘In the matter of a Reference by the Governor General in Council concerning the ownership of and Jurisdiction over offshore mineral rights as set out in Order in Council’ [1967] SCR 792 specifically dealt with the question whether the state of British Columbia (part of Canada) had any legislative competence over the territorial waters abutting British Columbia and became a part of it after its union with Canada. The relevant portions of the judgment are extracted and reproduced below: (Pgs. 14, 20-21 & 27-28 of Compilation Volume - V)

“...The Governor in council referred the following questions to this court for hearing and consideration:

1. In respect of the lands, including the mineral and other natural resources, of the sea bed and subsoil seaward from the ordinary low water mark on the coast of the mainland and the several islands of British Columbia... to the outer limit of the territorial sea of Canada, as defined in the Territorial Sea and Fishing Zones Act, as between Canada and British Columbia,
 - (a)...
 - (b)...
 - (c) Has Canada or British Columbia legislative jurisdiction in relation to the said lands?

...

The British North America Act, 1871 makes provision in s. 2 for the establishment by the Parliament of Canada of new provinces. By s. 3, it provides for the alteration of the limits of the provinces...

There has never been any alteration of the limits of the Province of British Columbia pursuant to this Section

and there is no provision for extending the limits in any other way.

...

We have to take it, therefore, that even after the enactment of the Territorial Waters Jurisdiction Act, the majority opinion in *Reg v. Keyn* that the territory of England ends at low water mark was undisturbed.

...

To express our conclusion up to this point, we adopt the summary in *Coulson & Forbes on Waters and Land Drainage*, 6th Edn., 1952 at p.12:

1. *The realm of England where it abuts upon the open sea only extends to low water; all beyond is the high sea.*
2. *For the distance of three miles, and in some cases more, international law has conceded an extension of dominion over the seas washing the shores.*
3. *This concession is evidenced by treaty or by long usage.*
4. *In no case can the concession extend the realm of England so as to make the conceded portion liable to the common law, or to vest the soil of the bed in the crown. This must be done by the act of the Legislature.” (Emphasis Supplied)*

...

It is Canada which is recognized by international law as having rights in the territorial sea adjacent to the Province of British Columbia.

...

The sovereign state which has the property in the bed of the territorial sea adjacent to British Columbia is Canada. At no time has British Columbia, either as a colony or a province has property in these lands. It is the sovereign state of Canada that has the rights, as between Canada and British Columbia to explore and exploit these lands and Canada has the exclusive legislative jurisdiction in respect of them either under s. 91 (1) (a) of the British North America Act or under the residual power in S. 91. British Columbia has no legislative jurisdiction since the lands in question are outside its boundaries.

...

We answer Questions ... and 1(c) in favor of Canada.”

46.2) The Supreme Court of Canada thus held that the

territorial waters (referred to as ‘lands including seabed, seaward from the low water mark’) were not within the legislative competence of the province of British Columbia for the following reasons:

- i. The Parliament of Canada had not altered or extended the boundaries of British Columbia under its statutory powers.
- ii. The territorial waters were an extension of sovereignty based on international law, and therefore only Canada was recognized as per international law to have any powers over such area.
- iii. The ordinary territorial limit only extends to the low water mark.

46.3) The same reasoning would squarely apply in determining the boundary of a state in India. As per Article 3 of the Constitution, Parliament may extend or alter the limits of a state. No such action has been taken by Parliament with respect to the territorial waters. Further only India has any recognition in international law, as having the necessary sovereignty over the territorial waters.

46.4) In the present cases, Petitioners is not submitting that the legislature of the State of Maharashtra is not competent to levy the sales tax on sale within territorial waters. The above two decisions are relied upon for the sole purpose of submitting that territorial waters cannot be considered as being part of any province of a nation.

46.5) The present petitions do not raise a challenge to the competence of the State of Maharashtra to enact a law relating to levy tax on sale of goods in territorial waters. Since the Act has chosen to confine itself for a levy of tax on 'a sale within the State of Maharashtra', territorial waters not being a part of the State of Maharashtra, the MVAT Act, 2002 will not apply to sales made in territorial waters.

47) Under International Law, sovereignty of India extends to territorial waters:

47.1) In *Gramophone Co. Ltd. Vs UOI* (1984) 2 SCC 534, (pgs. 37-59 of Compilation Vol – VI) the Hon'ble Supreme Court has held in para 3, 5 and 32 that International Law becomes part of body of law of the Courts by theory of incorporation, without necessity of any separate legislation. Therefore, principle of international law sovereignty of India would extent to territorial waters ipso facto applies.

47.2) In this case, the territorial waters find statutory sanction under the Territorial Waters, Continental Shelf, Exclusive Economic Zone and other Maritime Zones Act, 1976 made by Parliament. Therein, vide Section 3 of this Act, sovereignty of India extends to the territorial waters, which currently is 12 nautical miles.

48) In International Law, it is a nation-state or a country alone that has any identity:

48.1) The Convention on the Rights and Duties of States 1934 signed at Montevideo, which is considered to be one of the earliest representatives of the international law on the subject of statehood.

48.2) Article 1 and 2 of the convention clearly provides that it is the nation-state or country (referred in that context as 'state') which is a sole person in the eyes of international law.

48.3) The relevant extract of the same is as follows:

“ ARTICLE 1

The state as a person of international law should possess the following qualifications: a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with the other states.

ARTICLE 2

The federal state shall constitute a sole person in the eyes of international law.” (Emphasis Supplied)

48.4) Most learned authorities on international law such as in 1 Lassa Oppenheim, *International Law: A Treatise* (Hersch Lauterpacht 8th ed. 1955) consider the principles enumerated in this Convention as form of codification of the customary international law on this issue.

48.5) The term “State” as used by authorities in and authors on international law refer to the country or nation or state as whole and not to that of its constituent units.

49) Constituent assembly debates with respect to territorial waters and Article 297:

49.1) Dr. B. R Ambedkar as Chairman of Constituent Assembly, in the above debates referred to the decision of the United States Supreme Court in United States of America vs. State of California (cited supra). The relevant portions of the Dr. B. R Ambedkar’s answering the question as to the ownership and control of territorial waters is extracted and reproduced hereinbelow (Pgs. 39-40, Compilation Vol-IV).

“ In the United States, as my honourable Friend, Shri Alladi Krishnaswami Ayyar said, there has been a question as to whether the territorial waters belong the United States Government or whether they belong to the several States, because you know under the American Constitution, the Central Government gets only such powers as have been expressly given to them. Therefore, in the United States it is a moot question as yet, I think, whether territorial waters belong to the States or the Centre. We thought that this is such an important matter that we ought not to leave it either to speculation or future litigation or to future claims, that we ought right now to settle this question, and therefore this article is introduced. Ordinarily it is always understood that the territorial limits of a State are not confine to the actual physical territory but extend beyond that for three miles in the sea. That is a general proposition which has been accepted by International law. Now the fear is – I do not

want to hide this fact – that if certain maritime State such as, for instance Cochin, Tranvancore or Cutch came into the Indian Union, unless there was specific provision in the Constitution such as the one we are trying to introduce, it would still be open to them to say: “Our accession gives jurisdiction to the Central Government over the physical territory of the original States; but our territory which includes territorial waters is free from the jurisdiction not only on the physical territory, but also on territorial waters, which according to the International Law and according to our original status before accession belong to us.” We therefore want to state expressly in the constitution that when any Maritime State joins Indian Union, the territorial waters of that Maritime State will go to the Central Government. This kind of question shall never be subject to any kind of dispute or adjudication. That is the reason why we want to make this provision in article 271-A...”
(Emphasis supplied)

49.2) Thus, it cannot be disputed that the territorial waters vest with the Union alone and no State can assert its right or ownership over the same. This question has been elaborately answered by Dr. B. R Ambedkar in the constituent assembly debates referred to above. Therefore, the Petitioners submits that the territorial waters abutting the State of Maharashtra cannot be said to be a part of the territory of the State of Maharashtra.

50) Under the Constitution of India and in particular in view of Article 366(30) the ‘territorial waters’ belong to the Union of India and cannot be construed to be part of the territory of any State – They will be part of unspecified union territory:

50.1) Article 1 of the Constitution of India provides for the Name and territory of the Union. Article 1 of the Constitution is extracted and reproduced below:

*“1. Name and territory of the Union
 (1) India, that is Bharat, shall be a Union of States
 (2) The States and the territories thereof shall be as specified in the First Schedule
 (3) The territory of India shall comprise-
 (a) The territories of the States
 (b) The Union Territories specified in the First Schedule
 (c) such other territories as may be acquired ”*
 (Emphasis Supplied)

50.2) Further, Article 366(30) defines a ‘Union territory’ (as introduced by Seventh Constitution Amendment Act, 1956) as follows:

“Union territory means any Union territory specified in the First Schedule and includes any other territory comprised within the territory of India but not specified in that Schedule.” (Emphasis Supplied)

50.3) Article 1 makes it clear that the territories of States are conclusively fixed as provided in the First Schedule to the Constitution. Similarly, union territories are as specified in First Schedule. Further, the territory of India is not limited to the territories of the respective states but also includes union territories and other territories as may be acquired.

50.4) The territorial waters of India which undoubtedly form part of India have not been included as part of any state or union territory specified in the first schedule.

50.5) Therefore, Article 366(30), makes it amply clear that since ‘territorial waters’ is a part of territory of India, but not belonging to any specified state or union territory in the first schedule, it will be an unspecified ‘union territory’ in itself.

50.6) Article 297 further clarifies and reiterates the position that the territorial waters vest with the Union Article 297 of the Constitution is extracted and reproduced below for ready reference.

“297. Things of value within territorial waters on continental shelf and resources of the exclusive economic zone to vest in the Union.

(1) All lands, minerals and other things of value underlying the ocean within the territorial waters, or the continental shelf, or the exclusive economic zone, of India shall vest in the Union and be held to be for the purposes of the Union.

(2) All other resources of the exclusive economic zone of India shall also vest in the Union and be held for the purposes of the Union

(3) The limits of the territorial waters, the continental shelf, the exclusive economic zone, and other maritime zones, of India shall be such as may be specified, from time to time, by or under any law made by Parliament” (Emphasis Supplied)

50.7) The Territorial Waters, Continental Shelf, Exclusive Economic Zone and other Maritime Zones Act, 1976 vide Section 3 thereof provides that the sovereignty of India has always extended to territorial waters, sea bed and subsoil underlying air space over such waters. The section is extracted and reproduced below:

“3. Sovereignty over, and limits of, territorial waters

(1) The sovereignty of India extends and has always extended to the territorial waters of India (hereinafter referred to as territorial waters) and to be seabed and subsoil underlying, and the air space over, such waters.

(2) The limit of the territorial waters is the line every point of which is at a distance of twelve nautical miles from the nearest point of the appropriate baseline...”

51) Definition of General Clauses Act, 1897 and Bombay General Clause Act also establish the same position vide Section 3(62A):

51.1) In the General Clauses Act, 1897 the term ‘State has been defined under Section 3(58) as follows:

“State – As respects any period before the commencement of the Constitution (Seventh Amendment) Act, 1956 shall mean a Part A State, a Part B State or a Part C State, and as respects any period after such commencement, shall mean a State specified in the First Schedule to the Constitution and shall include a Union Territory.”

51.2) Further, the term ‘Union Territory’ has been defined in the Section 3 (62A) General Clauses Act, 1897 as follows:

“Union territory – shall mean any Union territory specified in the First Schedule to the Constitution and shall include any other territory comprised within the territory of Indian but not specified in the Schedule.”

51.3) The definition of ‘State of Maharashtra’ as provided in Section 3 (46AA) of the Maharashtra General Clauses Act, 1904 is reproduced below.

“[(46AA) State of Maharashtra shall mean the territories which on the 1st day of May 1960 are known as the State of

Maharashtra under Section 3 of the Maharashtra Reorganisation Act, 1960;]”

51.4) Thus, a combined reading of all the above provisions makes it clear that the territory of the State of Maharashtra will extend only upto the low water mark of its boundaries as specified in the First Schedule to the Constitution of India, and nothing more.

52) Alternatively and without prejudice to the above contentions, it is urged that:-

52.1) Under Section 4 of Sale of Goods Act, 1930, term ‘contract of sale’ covers a completed sale involving transfer of property as well as an agreement to sell.

52.2) It is true both in Central Sales Tax Act, 1956 particularly Section 3 thereof. In the MVAT Act, the term ‘sale’ in certain contexts can include an agreement to sell. But, ultimately, sales tax is leviable only in a transaction of completed sale involving transfer of property in goods. This position is settled by following judgments:

1) *Sales Tax Officer vs. Budh Prakash Jai Prakash*, reported in 1955 2 SCR 243.

2) *Tata Iron & Steel Co. Ltd. vs. S.R. Sarkar* reported in 1961 (1) SCR 379.

53) This contention is amplified by Mr. Sridharan by urging

that taxable event is a completed sale, absent any special definition of situs of sale in the relevant sale tax statute, sale takes place where property in the goods passes. Mr. Sridharan, in that regard, places reliance upon Judgment of the Hon'ble Supreme Court in the case of *Popatlal Shah vs. the State of Madras* reported in (1953) 4 STC 188. He read out several portions of this Judgment and to eventually urge that ordinary meaning of the expression 'sale within a State' absent any special definition of a situs of a sale, will only be the state in which property passes. Mr. Sridharan then invited our attention to sections 3, 4 and 5 of the Central Sales Tax Act, 1956 and submitted that:-

53.1) Section 4(2(b)) of the CST Act, 1956 makes certain deviations from the exact terms of Section 23 of the Sale of Goods Act, 1930.

53.2) Section 23 of the Act provides as follows:

*“23. Sale of unascertained goods and appropriation.—
(1)Where there is a contract for the sale of unascertained or future goods by description and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be express or implied, and may be given either before or after the appropriation is made.” (Emphasis Supplied)*

53.3) The requirements of ‘unconditionally appropriated’, and ‘deliverable state’ are done away with in Section 4 of CST

Act, 1956. The rest of Section 4(2(b)) of the CST Act, 1956 is in pari materia with Section 23 of the Sale of Goods Act, 1930.

53.4) Section 19(3) of Sale of goods Act, 1930 is to effect that Rules contained in Section 20 to Section 24 relating to passing of property are subject to intention of the parties to the contrary. Evidently, this portion of law of Sale of goods Act, 1930 is also not relevant for Section 4(2)(b) of CST Act, 1956. Therefore, if in a given case, there is appropriation, but without passing of property under the sale of Goods Act, 1930 due to contrary intention of parties, such appropriation would be relevant and material for purpose of Section 4(2)(b) of CST Act, 1956, though not for purpose of Section 23 of Sale of Goods Act, 1930.

54) Mr. Sridharan submits that the present case will be a case of future goods or unascertained goods and in that regard, reliance is placed upon the definition of the term 'future goods' appearing in section 2 clause (6) of the Sale of Goods Act, 1930. It is his submission that the Petitioners only purchased the goods from their suppliers like Indian Oil to be sold only after receipt of purchase orders from its customers like various shipping lines. Therefore, at the time of making of the contract of sale with Petitioners' customers, such goods would

clearly constitute future goods. Mr. Sridharan relied upon treatises such as 'Atiyah's Sale of Goods', 12th Edition, 'Benjamin on Sale of Goods', 2nd Edition for the purpose of explaining to us the meaning of the terms 'unascertained goods'. In the Petitioner's case, it is customers purchase order which indicates or states 18 metric tonne of high speed oil. Therefore, it is clear that the goods sold by the Petitioners squarely fall within the ambit of unascertained goods. Therefore, section 4(2)(b) of the Central Sales Tax Act, 1956 alone will be applicable in determining the situs of sale of such goods and not section 4(2)(a).

55) Then argument is that appropriation of goods is always a question of law and for that also the above works and treatises so also 'Chitty's Law of Contract' Volume II is relied upon heavily by Mr.Sridharan. He sums up his arguments on this point as follows:-

55.1) Section 22 of the Sale of Goods Act, 1930 similarly states that where the seller is bound to weigh or measure the goods, the property in the same does not pass until such measurement or weighment is completed. As stated in Atiyah (supra) and Benjamin (supra), the same principle will be equally applicable in relation to sale of unascertained or future goods.

55.2) Therefore, for purposes of Section 4(2)(b) of CST Act, 1956 appropriation in case of unascertained goods can be

said to have taken place when all of the following aspects are satisfied:

5. The goods are first ascertained by the seller. This will constitute mere setting apart of the goods and not an act of appropriation.
6. The goods are appropriated to effect a passing in property.
7. Where the last important obligation of the seller like self transportation by seller to customer's premises. (as in *Carlos (supra)*), is performed.
8. Where the seller is bound to measure/weigh the goods in question, when such obligation is performed.

56) Both Atiyah and Benjamin, refer to Section 18(2) of English Sale Of Goods Act, 1893, being delivery of specific or ascertained goods, to a common courier, as a statutory illustration of appropriation. Similar provision is contained in Section 23(2) of Indian Sale of Goods Act, 1930.

57) Delivery to common courier has to be distinguished from a case like the present case. In the present case, it is part of sellers obligation to transport the goods to place in the sea where the vessel is waiting/anchored pump/unload the fuel into customers vessel, and weighment all under customer supervision

58) This constitutes the most important and final obligation of the Petitioners. Further, the Petitioners is bound to weigh the quantity of motor spirit loaded on to a customer's vessel, and as stated in both Atiyah (supra) and Benjamin (supra), no property will pass in the motor spirits, unless such weighment is completed.

59) Therefore, in the present case, 'appropriation' can only be said to have occurred in the transactions of the Petitioners, when the Petitioners transports the goods to customers location, delivers the required quantity of motor spirit, after weighing of the same by customer. That takes place in the territorial waters, which are outside the State of Maharashtra. Therefore, the goods are not within the State when they are appropriated to the contract of sale under Section 4(2(b)) of the CST Act, 1956.

60) Mr. Sridharan finally contended that in the present case, the sales made by the Petitioners only take place upon delivery to the customers' vessels in the territorial waters. Further, the goods are not appropriated within the state of Maharashtra. In any case, the Petitioners contend that impugned sales made at the most, constitute

inter-State sale and hence are not taxable under the MVAT Act. The final limb of the arguments of Mr. Sridharan is that in any case, the Petitioners' transactions are squarely covered by Exemption Notification issued under section 41(4) of the MVAT Act.

61) Mr. Sridharan further submitted that:-

61.1) It is submitted, that tax on sale of motor spirits in the State of Maharashtra has always been a single point levy. In pursuance of the same, the Petitioners is covered by the notifications issued under Section 41(4) of the Maharashtra Value Added Tax Act 2002

61.2) Section 41, sub-section (4) of the MVAT Act, 2002 states as follows:

“41. Exemption and refund:-

...

(4) Subject to such conditions as it may impose, the State Government may, by notification in the Official Gazette, provide for exemption from the payment of full or part of the tax payable,—

(a) on the sales of motor spirits and petroleum products made by an oil company to another oil company;

(b) on sales at retail outlets of motor spirits, other than aviation turbine fuel and aviation gasoline.

...

Explanation.—For the purposes of this sub-section, motor spirits and petroleum products shall mean such products as the State Government may, notify from time to time, in the Official Gazette.”

61.3) In exercise of this power contained in Section 41(4) above, Respondent No. 1 issued Notification No. VAT-1505/C.R.

135/Taxation-1 dated 30th November 2006. The relevant portion of the notification has been extracted below:-

In exercise of the powers conferred by the Explanation to sub-section (4) of Section 41 of the Maharashtra Value Added Tax Act 2002 (Mah. IX of 2005) and in supersession of the Government Notification Finance Department No. VAT 1505/CR-124/Taxation -1 dated the 1st April 2005, the Government of Maharashtra hereby with effect from 1st December 2006 notifies the following products to be the motor spirit and petroleum products for the purposes of the sub-section :-

<i>Product</i>	<i>(Central Excise Tariff Code No.</i>
<i>1. High Speed Diesel Oil</i>	<i>2710</i>
<i>2. Aviation Turbine Fuel</i>	<i>2710</i>
<i>3. [...]</i>	

61.4) The Respondents No. 1 further issued the following notification titled as Notification No. VAT-1506/CR-135-B/Taxation -1 dated 30th November 2006 as extracted below:

In exercise of the powers conferred by the Explanation to sub-section (4) of Section 41 of the Maharashtra Value Added Tax Act 2002 (Mah. IX of 2005), Government of Maharashtra hereby with effect from 1st April 2005 exempts from payment of whole tax, the class or classes of sales specified in column 2 of the schedule.

SCHEDULE

Class or Classes of Sales	Conditions
1. Sales at retail outlet of motor spirits other than ATF and aviation gasoline	1. The sale should not be made to any oil company mentioned in the notification issued for the purposes of Clause (a) of Sub Section (4) Section 41. 2. The retail outlet should not be owned by any oil company. 3. The selling dealer shall not claim set-off under any rule in respect of the corresponding purchases of motor spirits. 4. For the removal of doubts it is hereby declared that the exemption accorded by this notification will be available only if the retail outlet has made the corresponding purchases of motor spirits from registered dealers and the said registered dealers have paid tax under the

61.5) In the present case, neither is the sale made to an oil company, nor is the outlet owned by an oil company. Therefore, the products sold by the Petitioners, i.e. High Speed Diesel are exempted from payment of VAT by virtue of the above-mentioned notifications, provided they are in the nature of retail sale.

61.6) It is to be noted that motor spirits have traditionally been taxed separately, however subject to a 'single point levy', as done previously under the erstwhile Bombay Sales of Motor Spirit Taxation Act 1958. The relevant charging section 5 of the erstwhile act, provided as follows:

“5(1) There shall be levied and collected a tax on the sale or purchases of motor spirit at such stage, as may be prescribed. Provided that such tax shall not be levied on any sale or purchase at more than one stage.” (Emphasis Supplied)

61.7) The following rule of the erstwhile Bombay Sale of Motor Spirit Taxation Rules 1958 further effected the abovementioned provision:

Rule 15. Liability of Trader to Pay Tax

- 1) *Subject to the provisions of sub-rules (2) & (3) every trader shall pay tax at the relevant date specified in rule 14 on the sales or purchases of motor spirit effected by him during each calendar month.*
- 2) *(a) No tax shall be payable by a trader not being a company mentioned in clause (b) on sales made by him of motor spirit—*
 - (ii) which was purchased by him after the commencement of the Act from a trader holding or deemed to be holding a license under the Act or before such commencement from a trader who was liable to pay tax in respect of the sale of such motor spirit to the first mentioned trader under the Bombay Sales of Motor Spirit Taxation Act 1946, or the Bombay Sales of Motor Spirit Taxation Act 1946 as extended to the Kutch Area of the State of Bombay and*
 - (iii) which has not been processed or altered by him in any manner whether by admixture or otherwise after such purchase.*

61.8) It is submitted, that the Respondent No.1 has also treated the tax on sale of motor spirits to be a single point tax at the hands of the oil companies and not liable to be taxed twice particularly, at the hands of a retailer. In fact, the Budget Speech of Hon'ble Finance Minister of the Government of Maharashtra Shri Jayant Patil dated 22.03.2002 reported in (2002) 25 MTJ (Amendments, Notifications & Circulars) 177, 183 clarifies this in the following terms:

“34. Motor Spirits

*Motor Spirits are presently taxed under a different Act and **all the tax is paid by Oil Companies.** [.....]”*

61.9) The scheme of taxation of motor spirits consciously kept the same during the introduction of the multi-point value added tax regime as is evident from the Budget Speech of Hon’ble Finance Minister of the Government of Maharashtra Shri Jayant Patil dated 21.03.2005 reported in (2005) 31 MTJ (Amendments, Notifications & Circulars) 169, 170 as extracted below:

*“The 4 percent rate of tax will apply to important Industrial Raw Materials and some items of daily consumption. Precious metals, precious and semi-precious stones, pearls and jewelry thereof will be taxed at the rate of 1 percent. **The tax rate on liquor and Motor Spirits will remain unchanged.** All other commodities will be taxed at the standard rate of 12.5 per cent.”*

61.10) Thereafter, in the year 2006, it ultimately led to the Government of Maharashtra seeking to amend the original Section 41(4) by way of Maharashtra Tax Laws (Levy, Amendment and Validation) Ordinance 2006 dated 20th June 2006. The intent of the Respondent 1 can be inferred from the Statement and Objects of the said Ordinance as reported in (2006) 34 MTJ 181,200, 202 for the amendment of Section 41(4) relating to the Motor Spirits is extracted below:

V. The Maharashtra Value Added Tax Act 2002 is being amended

(i).....

(ii).....

(viii) **to clarify that tax on Motor Spirits will be collected at a single stage.**

61.11) The Hon'ble Supreme Court in the case of **Commissioner of Income Tax v Venkateswara Hatcheries P. Ltd.** (1999) 3 SCC 632 rendered the decision based on the parliamentary history and placed reliance on the Budget Speech of the Finance Minister. The relevant paragraph of the judgment is as follows:

'11. In the year 1967, through the Finance Act No. 2, the words beginning from word 'which to 1967' were omitted. Thus exemption from income-tax was allowed beyond the year 1967. In the year 1975, it was felt that the exemption from income-tax on income from poultry business is capable of being abused by unscrupulous people by showing income which would otherwise be chargeable to tax, as exempt income. It was in this background that the mischief was sought to be remedied by omitting Section 10(27) of the Act and re-enacting Section 80JJ providing restricted exemption to thirty three and on one third percent of gross total income from livestock breeding, poultry and dairy farming. This is also evident from the Budget Speech of the then Finance Minister in the Parliament which runs as under:

"At present income from livestock breeding and poultry and dairy farming is exempt from Income tax. This exemption is prone to abuse by showing income which would otherwise be chargeable to tax as exempt income. I accordingly propose to restrict the exemption to Rs. 10,000 in a year."

61.12) Clearly as can be seen, the Hon'ble Court placed reliance on the speeches of the Finance Minister in Parliament to interpret the scope of the various provisions in the Income Tax Act 1961.

61.13) Therefore, based on all the above mentioned authorities it

is submitted that Respondent No. 1 has always treated and intended to treat taxation on motor spirits as a single stage tax taxable at the hands of the oil companies and not the retailers.

61.14) This system has continued even after the enactment and adoption of the multi-point tax VAT regime and hence the appropriate exemption on retail sale of motor spirit under the Maharashtra VAT Act 2002 has been provided.

62) Reliance placed on the meaning of Retail Sale in the Petroleum Control Order 1999 by the Respondents is unjustified and illegal:

62.1) It is submitted that the in the impugned order the Respondent have sought to deny the benefit of the Notification No. VAT-1505/C.R. 135/Taxation-1 dated 30th November 2006 based on the definition of the term “retail sale” in the Petroleum Control Order 16th April, 1999.

62.2) The said definition defines the term retail sale as

2.(i) *“Retail sale” means sale of petroleum products not exceeding 2500 litres to any one customer at a time*

62.03) The Respondent has denied the Petitioners the benefit of the Notification because as has been stated in the facts, the quantities of petroleum products supplied by the Petitioners are

always higher than the 2500 litres specified in the above Order.

62.4) It is submitted that the basic and fundamental meaning of a retail sale is if the goods sold are sold for the ultimate consumption of the buyer. In the present case, the Petitioners, buy a specified quantity of HSD from specific Oil Companies and makes the supply to the ships of various customer at specified locations at sea. There is no generic buying of HSD that is undertaken by the Petitioners and neither is the HSD further sold by the customers of the Petitioners. Thus it is submitted that the transactions of the Petitioners in this case, satisfies the basic meaning of the term retail sales.

62.5) The Petroleum Control Order 1999 has been issued in exercise of the powers conferred by Section 3 of the Essential Commodities Act, 1955, (10 of 1955), in Order to regulate production, storage and supply of petroleum products in the interest of sustaining public life, economy and protecting consumers interest. It has certainly not been issued for the purposes of levying or exempting the sales of petroleum products under the Maharashtra VAT Act 2002. Moreover, the Order of 1999 is one that is issued under a Central legislation by the Central Government whereas the Notification No. VAT-1506/CR-

135-B/Taxation -1 dated 30th November 2006 along with Notification No. VAT-1505/C.R. 135/Taxation-1 dated 30th November 2006 is one issued by the Respondent under the Maharashtra VAT Act 2002 a state legislation.

62.6) Therefore, it is submitted by the Petitioners that reliance cannot be placed on the meaning of the term retail in the Petroleum Control Order 1999, for the purpose of deciding the availability of exemption under the Maharashtra VAT Act, 2002. In ordinary terms, since the sales made by the Petitioners are made for consumption by its customers, these would constitute retail sales, and the Petitioners barge would therefore constitute retail outlets for the purpose of the notifications. The impugned orders in denying the benefit of the notifications are therefore bad in law and run contrary to the decisions and settled principles of interpretation applied by the Hon'ble Supreme Court. The impugned assessment orders must therefore be set aside.

63) Mr. Sridharan has relied upon the following Judgments:-

(i) *The Great Eastern Shipping Company Ltd. vs. State of Karnataka*, **ILR 2004 KAR 3750**.

(ii) *Pride Foramer vs. Union of India*, **2002 (148) ELT 19 (Bom.)**

(iii) *Deputy Commissioner of Commercial Taxes, Madras Division*

vs. Davar and Co., (1963) 14 STC 904 (Mad).

*(iv) United States of America vs. California 332 U. S. 19 (1947)
(US Supreme Court)*

*(v) In the matter of a reference by the Governor General in
Council Concerning Ownership and Jurisdiction over Reference to
Offshore Mineral Rights (1967) S. C. R. 792 (Supreme Court of
Canada)*

64) In addition, Mr. Sridharan has also given his comments on the decisions that were likely to be relied upon by the Respondents. We would advert to his comments a little later.

65) Turning now to the arguments on behalf of the Respondents, it is submitted by Mr. Sonpal-learned Special Counsel that the facts as set out in the Petition by the Petitioners are that they received orders for fixed quantity of high speed diesel. Upon receipt of such orders, in turn, the Petitioners approached the oil companies and placed their orders in order to meet and satisfy the commitments. The oil company prepared the shipping bills and invoices and the same are raised on the Petitioners. Thereafter, the oil company puts the required quantity of high speed diesel on the tank lorry and the tank lorry, along with the shipping bills and invoices proceeds towards the port. After the port formalities are complete, the high speed diesel/the required quantity is delivered to the barges from tank lorry. The barges proceed to the place where the ship is stationed and delivers the required quantity of high speed diesel. However, what is pertinent to note is that

the Petitioner claims exemption from their liability to sales tax in regular returns. The Enforcement Department finds that the exemption is not available since the sale is not in retail outlet. That is how the assessment order has been passed levying and recovering the sale tax at applicable rates, but after allowing set off.

66) As far as the first contention that the assessment order is pre-dated or back-dated is concerned, Mr. Sonpal submits that there is no merit in the same. However, if the Petitioners are inclined to raise these issues and which are mixed questions of fact and law, they have an alternate and equally efficacious remedy of an Appeal to challenge the assessment order. They can very well raise these objections and this Court should not therefore go into the same.

67) As far as the contention of the Petitioners that the sale in this case is in the territorial waters and not within the state of Maharashtra, Mr. Sonpal, placing heavy reliance upon the Judgment of the High Court of Karnataka in the case of Grate Eastern Shipping Company Limited vs. State of Karnataka and Ors., urges that the issue of chargeability of tax is legal. In the present context irrespective of the claim that the territorial water is part of or abutting State of Maharashtra or not, the issue of chargeability is independent of where the delivery is given. In other words, even if the goods are ultimately

delivered to buyer in territorial waters, the chargeability is independent of location of delivery and not based on the location of delivery.

68) Firstly, the Karnataka High Court in case of *Great Eastern Shipping Company* (supra) based on sales tax laws only has decided the issue that the territorial water is part of abutting State of Karnataka and therefore the issue is no more *res integra*. Moreover, the said judgment is before the Hon'ble Supreme Court by way of SLP which is now converted to Civil Appeal and is pending consideration of the Apex Court. In view of that there is no propriety in taking a different view till the Apex Court decides the issue.

69) Secondly, the Article 1 of Constitution of India states that the India shall be Union of States. It is not in dispute that State also includes Union Territories (General Clauses Act). Thus, there is no existence of any territory apart from the States. Hence, what belongs to Union essentially belongs to the States. Hence, territorial waters are part of the States. The principles of mutuality applies with full force. Constituents of Union are nothing but Union in that sense. As in the Fisheries Laws, the State has made a deemed provision for treating territorial waters as part of State not because unless it is so clarified the issue can be raked up by the parties. This inclusion is not even held to be ultra vires or challenged by the Union.

70) Thirdly, the provisions of section 4 of the Central Sales Tax Act, 1956 are relevant for considering the issue of whether the sale is exigible to tax or not. Little history of enactment of the Central Sales Tax Act, 1956 particularly section 4 requires to be noted.

71) Prior to the above enactment various States used to levy taxes on the basis of the place of business or place of agreement or place of location of delivery etc. and hence, multiple taxation used to prevail for one transaction. Consequently, Article 286 Explanation I provided that the tax will be levied only by the State in which delivery is given. However, the same was not workable and as per suggestions of Law Commission (M. C. Setalvad), Constitutional sixth amendment, deleted *Explanation I* and replaced Article 286(2) and (3) with new clauses 286(2) and (3) which empowered legislature to formulate principles for determining the sale within a State and outside the State. Consequently, the section Central Sales Tax Act, 1956 was enacted. Section 4 of the CST Act provided principles for determining the sale within a State and outside the State. The other principles in Sale of Goods Act, 1930 or Transfer of Property Act for the sale within a State and outside the State have therefore no application including the principles of point when the transfer of property occurs notwithstanding contract or customs to the contrary. If the principles of the section 4 of

the CST Act are applied to the facts of the case, irrespective of the delivery having been given in the territorial waters or irrespective of the contract or custom or usage to the contrary, or whether territorial waters form part of Maharashtra or not, and even assuming while not admitting that territorial waters are not part of Maharashtra, the sale in the present case is exigible to sales tax and there can be no other legal conclusion. This is elaborately explained in the ensuing paragraphs.

72) It is irrelevant when the property passes in the goods to the buyer or situs thereof for attracting tax liability. The issue of taxability of transaction is strictly governed by the provisions of statute and in the present case by the provisions of section 4 of the CST Act. In the present case, while placing order to the oil company, the goods are in bulk with oil companies and from where required quantity is to be separated and delivered. So the goods at the time of entering into contract that is to say placing order by the Petitioner and acceptance of the said order by the oil company, to execute the contract or placing indent to the storage tank to deliver the HSD from stock may be by way of written delivery order, constitutes acceptance of the order and thus concluded contract comes in existence at the time when the oil company acts upon order to execute the same. Now section 4(1) and (2)(a) provides for the principles of determining when a sale is said to be taken inside a State. Sub section 2 of section 4 is in two parts. First

part deals with ascertained goods and in case of such goods it will be within the State if the goods were within the State at the time when contract is made. We are really not concerned with it. The present goods, it is argued by the Petitioner, are unascertained goods. Be that as it may, the goods when are unascertained, as per clause (b) if the goods are within the State, at the time of appropriation to the contract, it shall be deemed to have taken place within the State. In the present case, the goods are appropriated of its quantity and loaded on the tanker trucks. Invoice in the name of the Petitioner is prepared and shipping bill is drawn. It is this time when the goods are appropriated, that the goods are within the State that is in the oil company's precincts and premises. There is no and cannot be dispute about this proposition. At the time of filling the tanker trucks of required quantity that the sale is deemed to have taken within State. This sale is complete and irreversible. Any rejection by the buyer and return thereof is governed by principles of goods return and the dealer is entitled to get deduction thereof of such goods returned from tax liability. The appropriation does not take place at any time after the goods are loaded on tanker trucks. Reference to section 23(2) of the Sale of Goods Act, 1930 is relevant which provides that the delivery of goods to the transporter is the time of appropriation. Thus, to state that the appropriation is made at the time when barges unload the HSD on ship is not in accordance

with law.

73) Once the sale is within a State it is outside all other States. Once the present sale is within Maharashtra, as explained above, it is outside all other States.

74) All sales are required to be within the State for taxing by that State. Exports sales, inter-State sales and local sale are all within the State. But, for Article 286 and 269 item 92A of List I of Schedule VII, and section 8 of MVAT Act, those first two sales are not capable of being taxed by the State of Maharashtra. Once the sale is within the State of Maharashtra and no embargo is attracted of Article 286 and 269 item 92A of List I of VIIth Schedule, and section 8 of MVAT Act, the sale is exigible to tax. This position is well explained in the Judgment of this Court in the case of Gerogopolus vs. SOM and by Apex Court in Onkarlal Nandlal's case.

75) The Petitioner has all through out claimed exemption under Notification and now cannot be allowed to take a stand that the sale is in territorial waters which is not part of Maharashtra and beyond taxing powers for that reason.

76) So far as the applicability of exemption Notification is concerned, least to say is that the Notification is not at all applicable to

the transactions of the Petitioner. The Notification is issued for exemption of sale from taxation when high speed diesel is sold from retail outlet. To say that high speed diesel is sold from retail outlet cannot be said to be same as saying sold in retail. The argument that Notification should mean to apply to the sale in retail in any manner is misplaced. High speed diesel is not only used in filling as fuel but having multiple industrial, commercial and domestic uses, such as in house generators of electricity, in boilers, humidifiers, etc. It is only when sold from retail outlet that is to say filling stations, that sale is exempted. Retail outlet is not defined in MVAT Act but defined in two statutory texts as annexed in the compilation separately filed. Looking at the definition in those statutory texts and applying common parlance test which is applicable in context of taxing statute it is clear what is meant by retail outlet is nothing but filling stations. The photographs of the filling station in the compilation titled common parlance materials, the position is more than clear what is meant by retail outlet. There are no retail outlets other than filling stations. Other transactions are not through retail outlet. It is similar to shop when consumer purchase for self consumption in vehicles. The Notification cannot be extended to mean applicable to all retail sales irrespective of the channel through which it is sold such as supply to ships through barges. Section 41 of the MVAA Act as amended in 2006 empowered the Government to

exempt the petroleum products. The power is exercised only in respect of sales through retail outlet and proper meaning must be given to words in the Notification and cannot be made applicable to all retail sales. It is trite that exemption Notification must be strictly construed. There is no scope for enlarging the scope beyond the words used in it. No casus ommissus can be provided when words used are clear and unambiguous. When Government has chosen to exempt only those sales which are through retail outlet, it cannot be justified to reach any thing beyond what is provided in Notification to enlarge the scope. On these submissions, it is submitted by the Revenue that the Petition be dismissed.

77) For properly dealing with the rival contentions, it would be appropriate to note the basic facts.

78) At the cost of repetition, what we find is that the order of assessment refers to the name of the dealer, namely the Petitioner Raj Shipping Agency and also points out as to how assessment proceedings were initiated in order to ensure that in the return furnished by the dealer in respect of the financial year 2007-08, turnover of sales and purchases are properly admitted. Deductions are correctly claimed, tax has been calculated at the proper rates, set off has been correctly claimed and the deemed tax in respect of the said period has been

admitted to be payable and has been paid is the correct position or assertion. If the position is otherwise, then, appropriate corrective action was contemplated.

79) The partner of the Petitioner M/s. Raj Shipping Agency attended the hearing on certain dates and what has been found by the Assessing Officer is that the returns filed by the dealer are not correct, complete and the dealer has erred in calculating taxable turnover. That part of order from the paper book at page 54 reads as under:-

“.....

Total Tax payable comes at Rs.178627469/-. Dealer has paid tax at Rs.13707390/- set-off is allowed at Rs.169617594/-. Interest u/s 30(3) for late payment is levied at Rs.8635243/-.

I am of the opinion that, returns filed by the dealer are not correct complete and self-consistent as, dealer has erred in calculating taxable turnover. Thus, this act of the dealer is resulted in evasion of tax due to him. Hence, said act of the dealer is squarely covered under the ambit of provisions u/s 29(3) of MVAT Act, 2002, as the dealer has concealed the particulars and has knowingly furnished inaccurate particulars of above said transaction liable to tax.

I have reason to believe that; dealer has knowingly furnished inaccurate particulars of above said transaction liable to tax and thereby evaded the tax. Hence the dealer is liable to impose penalty as per the provisions of section 29(3) of MVAT Act, 2002. Therefore, penalty u/s. 29(3) of MVAT Act, 2002 is imposed at Rs.8807655/-. (equal to excess amount payable found after visit) after giving opportunity of being heard.

Finally assessment order resulted in demand of Rs.12750383/- on account of tax, interest and penalty.

Issue demand notice of Rs.12750383/- along with certified copy of assessment order.”

80) The principal argument of Mr. Sridharan needs to be considered in the light of some of the documents on record. Exhibit A-12 is the invoice. M/s. Indian Oil Corporation has raised the invoice and has stated that the consignee is the present Petitioner. The other details and to be found in that invoice as also another challan-cum-invoice are that there is a indent which is raised based on which the product high speed diesel and in the quantity mentioned in Kilo Liters has been loaded by IBP, Wadala and Raj Shipping Agency is shown as the customer. Below the same name, the name of vessel Maratha-Classic-Ratnagiri is written. The delivery location is IBP Company Limited, Wadala. In the additional affidavit, that is filed, the Petitioner states that it is engaged in the business, namely, Bunker Supplies. Bunker supplies mainly consist of supply of petroleum products such as high speed diesel oil (HSD), light diesel oil (LDO) and furnace oil (FO) to various incoming and outgoing vessels within or beyond the port limits of Mumbai Port. These outgoing vessels, to which the supplies are made, are located beyond approximately 1.5-5 nautical miles from the coast of Mumbai and are anchored in various anchorage points within the territorial waters of the Union of India, off the coast of Maharashtra. It is stated that the outgoing shipping vessel places an inquiry for the required quantity of HSD with the Petitioner. Pursuant to the inquiry made by the customer, the Petitioner gave a quote for

their supplies. In many cases, the Petitioner enters into a formal agreement with their customers for the purchase of HSD. At page 86 of the paper book is one of the illustrative copy of such an agreement. Pages 86 to 89 of the paper book read as under:-

“Leighton Contractors,
(India) Pvt. Ltd.
302-303, Wineser Building,
3rd floor, C.S.T. Road,
Vidhyanagari Marg,
Kalina, Santacruz (E),
Mumbai – 400 008,
India,
T: 91-22-67190000
F: +91-22-67190199

October 21, 2008

Our Ref: L0333/October OE/10182/12.4.1.2/TSH/...

Raj Shipping Agencies
Banaji Mansion, 17, Banaji Street,
Fort, Mumbai – 400 023

Tel: 91 22 2288 4720/21
Fax: 91 22 2287 3986
Email: rajship@vsnl.com

Kind Attn: Mr. Pervez Mehta

Dear Sir,

Pipeline Replacement Project – II for ONGC
Subcontract 10182/PRP2/SC018 – Bunkering Services – Supply
of Fuel Oil
Notice of Award

We refer to your proposal dated April 18, 2008 sent via email and subsequent discussions and clarifications you had with Mr. Albert Jacob (Sr. Manager Operation & Logistics) and Mr. Ajay Goenka (General Manager – Contract).

We Leighton Contractors (India) Pvt. Ltd. (hereinafter called Leighton) are pleased to award the Bunkering Service – Supply of Fuel Oil contract for the Pipelines Replacement Project-II, for Oil and Natural Gas Corporation Limited to Raj Shipping

Agencies (hereinafter referred to as Raj Shipping).

The Pipelines Replacement Project-II (hereinafter referred to as the Project) is for Oil and natural Gas Corporation Limited (hereinafter referred to as ONGC). The Contract between Leighton and ONGC is referred to as the Main Contract ref. No. MR/OW/MM/PRP-2/15/2007, signed by Leighton and ONGC on 14th April, 2008. The Main Contract covers 208km of pipelines in 39 segments over 3 seasons/years, (From 2009 till 2011) and this award relates to that full scope of work.

Whereas a Contract between Leighton and Raj Shipping is being prepared to formalise the final details, the broad basis of our Notice of Award to you are as follows:

SCOPE OF SERVICES:

The scope of services shall include providing bunkering services for the Project.

PRICE

In consideration for the complete, due and proper performance of the Contract by Raj Shipping Leighton agrees to pay Raj Shipping as follows:

fuel Oil:

- a) Rate as per JOCL's rate as prevalent on the date of supply plus 2.5%
- b) Barging charges at P&V channel is at lumpsum INR 41,400/- upto 180 KL thereafter INR 230/- per KL.
- c) Barging charges at BFL (6 NM from Prongs Lighthouse/ 12 NM from P&V channel) is at lumpsum INR 74,700/- upto 180 KL thereafter INR 415/- per KL.
- d) Barging charges at outer BFL (25 NM from P&V channel) is at lumpsum INR 180,000/- upto 180 KL thereafter INR 1000/- per KL.
- e) Barging charges at MUMBAI HIGH (90-120 NM from P&V channel) is at lumpsum INR 418,500/- upto 270 KL thereafter INR 1550/- per KL.

All the rates quoted above are firm and fixed for period up to 30th June, 2011

PAYMENT TERMS:

All payments shall be made within 30 days from the date of receipt of valid invoice by Leighton.

All remittance charges levied by Raj Shipping bank shall be borne by Raj Shipping.

TAXES

The prices quoted above are inclusive of all taxes and duties. Service tax/VAT as applicable shall be paid by Leighton.

DATE OF AWARD

April 22, 2008

SCHEDULE AND MILESTONES DATES

The schedule for the services required shall be intimated to Raj Shipping as and when required.

INSURANCES

Raj Shipping shall be responsible for all insurances for personnel and equipments required to perform the said scope of work.

GENERAL

- a) Leighton requires Raj Shipping agrees to enter into a formal contract agreement as per mutually agreed terms and conditions.
- b) Leighton shall raise a Formal Purchase Order for every requirement. However, in case of any Urgent requirement an email confirmation by nominated representative could be sent, which would be followed by Formal PO.
- c) Supply will be made at the location indicated in the Purchase Order (email request), and at the date/time requested for.
- d) In the event of any delays, we reserve our right to order an other alternative source at your risk and cost.
- e) Leighton reserves the right to reject any supply if Raj Shipping fails to meet the delivery schedule or the supply is of

inferior quality.

f) All PPE for Raj Shipping personnel shall be provided by Raj Shipping.

TERMINATION

Leighton may at its sole discretion cancel this NOA and all or any portion of the intended contract agreement with or without cause at any time by giving written Notice of Cancellation to Raj Shipping. Termination by Leighton shall not constitute a breach of this NOA nor entitle Raj Shipping to any damage or claims except as expressly provided under this Article.

Raj Shipping shall receive as compensation that portion of the amount due on the work performed up to the date of termination subject to prior approval. The amount due for the work performed shall be the amount which Raj Shipping can demonstrate to Leighton that Raj Shipping has spent for the work performed to date, but in no event shall Leighton pay for any anticipated profits or loss of earnings or opportunities. Raj Shipping shall pay to Leighton the difference of any payments made to Raj Shipping which exceeds the amount due prior to termination. Raj Shipping shall allow Leighton to audit and or review sufficient records, accounts, receipts, invoices and other related documents so that Leighton may satisfy itself that the amount due to Raj Shipping is accurate and reasonable.

BINDING PROVISIONS

This notice of Award "NOA" is intended to create a legally binding agreement, therefore, until such time as the format Agreement is executed this NOA signed by the duly authorized representatives of Leighton and Raj Shipping and the referenced documents, shall constitute a binding and enforceable agreement between the parties. When a formal agreement is executed, the terms and conditions thereof will govern retrospectively any Work carried out by Raj Shipping pursuant to this NOA. Any monies paid to Raj Shipping in respect of the Services performed pursuant to this NOA shall form part of the Price under Agreement.

We wish you a very happy and healthy association between Leighton and Raj Shipping for the duration of this exciting and major Project and welcome you on board as part of our team.

Kindly acknowledge acceptance of this award by signing below and returning for our records.

Yours faithfully,

On behalf of
Leighton Contractors (India) Pvt. Ltd.

Senthil Kumar Kanmegam
Sr. Project Manager – PRP II

Cc. Russell Waugh, Nigel Butl..., Alay Goenka.

We Raj Shipping Agencies hereby confirm our agreement with
and acceptance of the contents of this Notice of Award.

Signed, on behalf of Raj Shipping Agencies,

Signature: _____

Name: PARVEZ ADI MEHTA

Title: PARTNER

Date: 31.10.2008 ”

81) Thus, pursuant to such agreement or an approval of a quote by the customer, the shipping vessel places a purchase order/nomination with the Petitioner for the required quantity and the name of the vessel to which the supplies are to be made. The illustrative copy of the purchase order/nomination is also at page 90 of the paper book. It is on receipt of the purchase order/nomination from the shipping vessel that the Petitioner, in turn, places a purchase order on any of the oil marketing companies such as M/s. Indian Oil Company Limited, M/s. Bharat Petroleum Corporation Limited etc. Thereafter, the further documents are prepared, including the shipping bill and once they are ready, the oil marketing company loads the required

quantity of high speed diesel in the tank lorries, which then come to the barge loading point at Mallet Bunder along with the invoice copy of the oil marketing company.

82) The sister concern of the Petitioner owns self-propelled barges having large cargo tanks (below deck) ranging from 40 thousand liters (40KL) to 200 thousand liters (200KL). The barges have pumps fitted on them with a flow meter in order to pump out the HSD to the vessel. These are similar to petrol pumps where petrol is sold to the regular customers. At the Mallet Bunder, the HSD supplied by the oil marketing company is decanted into the cargo tanks of the barges owned by the Petitioner. The entire activity of decanting is done under the supervision of a Customs Officer. After taking delivery of the HSD from the oil marketing company, the barges sail to the anchorage point of the nominated vessel.

83) Paras 12 to 15 at pages 82 and 83 of the paper book read as under:-

“12. After reaching the anchorage point of the nominated vessel, the HSD is pumped out of the barge into the fuel tank or bunker of the nominated vessel. Once the supply is complete, the Master or the Authorized Officer of the vessel acknowledges the receipt of the ordered quantity of HSD on the Bunker Delivery Note (BDN) and the Shipping Bill. An illustrative copy of the Bunker Delivery Note (BDN) duly acknowledged by the officer of the vessel is marked and annexed as Exhibit “7”.

13. The barges go beyond 1.5-4 Nautical Miles from the base

line of the coast of Mumbai to deliver the HSD to the vessels anchored therein, in the territorial waters of the Union of India.

14. After the delivery of the HSD to the nominated vessel is complete, the Petitioner raises an invoice on the shipping line based on the BDN. An illustrative copy of the invoice raised by the Petitioner is marked and annexed as Exhibit “8”. The Petitioner invoices the shipping line for the quantity of HSD actually delivered, along with charges for transportation and hiring of the barge belonging to its sister concern companies. These may be way of a lumpsum rate/KL previously agreed to by the Petitioner or the charges for sale of HSD and transportation may be indicated separately in the invoice.

15) The sister concern of the Petitioner separately charges the Petitioner company for the hire of the barge by the Petitioner company for the purpose of the supplies to be made to various customers. An illustrative copy of a credit note issued by the Petitioner in favour of its sister concern is marked and annexed as Exhibit “9”.

84) It is on this basis the Petitioner raised these arguments and rely upon the payment of Sales Tax made by them to the relevant oil marketing companies at the rate applicable for sale of motor spirits, which are to be consumed outside the limits of the Municipal Corporation of Mumbai.

85) We do not see on what basis can the Petitioner therefore assert that the sales made by the Petitioner are within the territorial waters of India and accordingly not sales liable to tax within Maharashtra.

86) In this context, the definitions of the terms “business” appearing in section 2(4), “dealer” appearing in section 2(8), “non-

resident dealer” appearing in section 2(16), “petroleum products” appearing in section 2(17A), “place of business” appearing in section 2(18) and “sales” appearing in section 2(24) of the Maharashtra Value Added Tax Act, 2002 read as under:-

“2(4) “business” includes, -

- (a) any service;
- (b) any trade, commerce or manufacture;
- (c) any adventure or concern in the nature of service, trade, commerce or manufacture, whether or not the engagement in such service, trade, commerce, manufacture, adventure or concern is which a motive to make gain or profit and whether or not any gain or profit accrues from such service, trade, commerce, manufacture, adventure or concern.

Explanation. - for the purpose of this clause -

(i) the activity of raising of man-made forest or rearing of seedlings or plants shall be deemed to be business;

(ii) any transaction of sale or purchase of capital assets pertaining to such service, trade, commerce, manufacture, adventure or concern shall be deemed to be a transaction comprised in business;

(iii) sale or purchase of any goods, the price of which would be credited or, as the case may be, debited to the profit and loss account of the business under the double entry system of accounting shall be deemed to be transactions comprised in business;

(iv) any transaction in connection with the commencement or closure of business shall be deemed to be a transaction comprised in business;

2(8) “dealer” means any person who, for the purposes of or consequential to his engagement in or, in connection with or incidental to or in the course of, his business buys or sells, goods in the State whether for commission, remuneration or otherwise and includes, -

- (a) a factor, broker, commission agent, del-credere agent or any other mercantile agent, by whatever name called, who for the purposes of or consequential to his engagement in or in connection with or incidental to or in the course of the business, buys or sells any goods on behalf of any principal or principals whether disclosed or not;

(b) an auctioneer who sells or auctions goods whether acting as an agent or otherwise or, who organises the sale of goods or conducts the auction of goods whether or not he has the authority to sell the goods of the belonging to any principal whether disclosed or not and whether the offer of the intending purchaser is accepted by him or by the principal or a nominee of the principal;

(c) a non-resident dealer of as the case may be, an agent, residing in the State of a non-resident dealer, who buys or sells goods in the State for the purposes of or consequential to his engagement in or in connection with or incidental to or in the course of, the business;

(d) any society, club or other association of persons which buys goods from, or sells goods to, its members;

Explanation. - For the purposes of this clause, each of the following persons, bodies and entities who sell any goods whether by auction or otherwise, directly or through an agent for cash, or for deferred payment, or for any other valuable consideration, shall, notwithstanding anything contained in clause (4) or any other provision of this Act, be deemed to be a dealer, namely:-

(i) Customs Department of the Government of India administering the Customs Act, 1962; (52 of 1962)

(ii) Departments of Union Government and any Department of any State Government;

(iii) Local authorities;

(iv) Port Trusts;

(iv-a) Public Charitable Trust;

(v) Railway Administration as defined under the Indian Railways Act, 1989 (24 of 1989) and Konkan Railway Corporation Limited;

(vi) Incorporated or unincorporated societies, clubs or other associations of persons;

(vii) Insurance and Financial Corporations, institutions or companies and Banks included in the Second Schedule to the Reserve Bank of India Act, 1934; (II of 1934)

(viii) Maharashtra State Road Transport Corporation constituted under the Road Transport Corporation Act, 1950; (LXIV of 1950)

(ix) Shipping and construction companies, Air Transport Companies, Airlines and advertising agencies;

(x) any other corporation, company, body or authority owned or constituted by, or subject to administrative control, of the Central Government, any State Government or any local authority:

Exception I. - An agriculturist who sells exclusively agricultural produce grown on land cultivated by him personally, shall not be

deemed to be a dealer within the meaning of this clause.

Exception II. - an educational institution carrying on the activity of manufacturing, buying or selling goods, in the performance of its functions for achieving its objects, shall not be deemed to be a dealer within the meaning of this clause.

Exception III. - A transporter holding permit for transport vehicles (including cranes) granted under the Motor Vehicles Act, 1988 (59 of 1988), which are used or adopted to be used for hire or reward shall not be deemed to be a dealer within the meaning of this clause in respect of sale or purchase of such transport vehicles or parts, components or accessories thereof.

2(16) “non-resident dealer” means a dealer who effects purchases or sales of any goods in the State, but who has no fixed place of business in the State;

2(17A) “petroleum products” means, -

- (a) Superior Kerosene Oil (SKO);
- (b) Liquefied Petroleum Gas (LPG);
- (c) Furnace Oil (FO);
- (d) Light Diesel Oil (LDO);
- (e) Raw Naptha or Naptha;
- (f) Low Sulphur Heavy Stock,

and any other product as the State Government may, from time to time, notify in the Official Gazette,

2(18) “place of business” includes a warehouse, godown or other place where a dealer stores his goods and any place where the dealer keeps his books of accounts;

2(24) “sale” means a sale of goods made within the State for cash or deferred payment or other valuable consideration, but does not include a mortgage, hypothecation, charge or pledge; and the words “sell”, “buy” and “purchase”, with all their grammatical variations and cognate expressions, shall be construed accordingly;

Explanation. - for the purpose of this clause, -

(a) a sale within the State includes a sale determined to be inside the State in accordance with the principles formulated in section 4 of the Central Sales Tax Act, 1956 (74 of 1956);

(b) (i) the transfer of property in any goods, otherwise than in pursuance of a contract, for cash, deferred payment or other valuable consideration;

(ii) *the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract including, an agreement for carrying out for cash, deferred payment or other valuable consideration, the building, construction, manufacture, processing, fabrication, erection, installation, fitting out, improvement, modification, repair or commissioning of any movable or immovable property;*

(iii) *a delivery of goods on hire-purchase or any system of payment by instalments;*

(iv) *the transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;*

(v) *the supply of goods by any association or body of persons incorporated or not, to a member thereof for cash, deferred payment or other valuable consideration;*

(vi) *the supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (whether or not intoxicating), where such supply or service is made or given for cash, deferred payment or other valuable consideration;”*

87) A perusal of these definitions together with the section 1(2) would denote as to how the Maharashtra Value Added Tax Act extends to the whole of Maharashtra. It is an Act to consolidate and amend the laws relating to the levy and collection of tax on the sale or purchase of certain goods in the State of Maharashtra.

88) Therefore, it would not be proper to proceed on any assumptions straightaway. One cannot presume that merely because the tax in this case is sought to be levied, assessed and collected from the Petitioner that it is out of the purview of the MVAT Act. All the sections noted above will have to be read together and harmoniously with other provisions of the MVAT Act to find out as to whether the sale

in this case could be said to be within the State of Maharashtra. For the purpose of a decision on this aspect, we would have to also consider as to whether the sale has necessarily taken place within territorial waters as claimed. The assumption on the part of the Petitioner is that the sale has taken place outside the State of Maharashtra and in territorial waters which are international in character.

89) Every act in a transaction of the present nature and referred extensively by us hereinabove would have to be viewed so as to determine when and from where the sale has taken place. A combined reading of the above definitions together with the charging sections in Chapter II would demonstrate as to how the levy is attracted and imposed. A splitting up or picking and choosing one part of the transaction will not be of any assistance. A holistic view has to be taken.

90) In that regard, we find that there are several steps which form part of the transaction undertaken by the Petitioners. Firstly, the Petitioners themselves are registered as dealers under the MVAT Act. Secondly, there is an indent/order placed on the Petitioners by the shipping lines and which order was placed by email/fax or electronically but at a “place of business” in Mumbai. This term has a definite legal meaning. It is defined in an inclusive manner. It includes

a warehouse, godown or other place where a dealer stores his goods and any place where the dealer keeps his books of accounts. In the instant case, place of business of the Petitioner is Mumbai. He has dealt with the goods in Mumbai and which are defined to mean every kind of movable property. In the present enactment, the term “goods” as also “petroleum products” have been defined separately. It is not the case of the Petitioner that these definitions cannot be read together or that petroleum products would not be goods. The term “motor spirit” is also defined and it would include one of the Petitioners' product, namely, high speed diesel [see section 2(15A)] whereas the word “Petroleum products” is defined in section 2(17)(A) of the MVAT Act. If the Petitioner is a person who for the purposes of its business buys or sells goods in the State, then, it cannot escape the tax. The only question is whether the above business is in the State. The Petitioner cannot and does not dispute that Sales Tax is leviable on the sale of motor spirit, which the goods are in question. In other words, sections 3, 4 and 6 together with its sub-sections signify the tax on HSD. That the Petitioner in the alternative urges that the sale in this case is outside the State and within the meaning of Chapter II of the Central Sales Tax Act, 1956 and further alternatively pleads that it is exempted from MVAT would denote as to how the levy is understood. It is only the transaction or deal with the shipping lines and undertaken by the

Petitioner is claimed as not occurring within the State. That is because the HSD is supplied by barges to the ships or vessels located beyond 1 or 1.5 nautical miles in the high seas that it is urged that so long as the barge carrying the HSD does not reach the vessel, unload the same, obtains a certificate from the Master of the vessel, that there is no sale and in any event all this takes place in the high seas, therefore, it is not a sale within the State of Maharashtra. The further contention is that MVAT Act cannot apply to territorial waters for they are international boundaries and controlled by the Union. This and the earlier submission proceeds on the footing that the sale in this case has no connection or nexus with the State of Maharashtra, we would understand it that way.

91) In this case we find that the high speed diesel, a petroleum product, is the subject matter of the transaction. The petitioner placed an order on the oil companies within the State to supply a fixed quantity of this petroleum product to the petitioner so as to enable the petitioner to fulfill its contractual obligation. That contractual obligation is of bunker supplies undertaken and in this case with the party M/s. Leighton Contractors (India) Private Limited, an illustrative copy of the agreement and the contents of which we have reproduced hereinabove would show that these orders are placed from a business

address at Kalina, Santacruz (East), Mumbai. This private limited company addressed the communication reproduced above and awarding the bunker service supply of fuel oil contract on Raj Shipping Agency (the petitioner). The bunker service (supply of fuel oil) is a contract awarded to the petitioner so as to enable M/s. Leighton Contractors in turn to fulfill its commitment to the Oil and Natural Gas Corporation Limited, particularly in relation to the pipe-line replacement project – II. It is in that regard and bearing in mind such contracts that we must find out as to whether the Maharashtra Value Added Tax Act would apply. Merely because the high speed diesel oil is carried in barges by the petitioners for being supplied to or discharged into a vessel at high seas would it necessarily mean that the sale was in territorial waters? That the sale is in territorial waters and which belongs to the Union is the argument. We find it difficult to accept it and in the given facts and circumstances.

92) In that regard, we find that there is ample material in law so as to assume that the MVAT Act will apply or will take within its import such a sale.

93) We must at once clarify that the principle which the Courts are required to apply is that every legislation is presumed to be territorial in its operation. The parliament or the State Legislature

cannot be presumed to have exceeded their territorial powers. As has been throughout clarified that in the case of sales tax, it is not necessary that the sale or purchase should take place within the territorial limits of the State in the sense that all the ingredients of sale like the agreement to sell, the passing of title, delivery of goods etc. should have a territorial connection. Broadly speaking, local activity of buying or selling carried out in the State in relation to local goods should be sufficient basis to sustain the taxing power of the State, provided of course, such activity ultimately resulted in a concluded sale or purchase to be taxed. This principle has been enunciated in the decision reported in the case of *The State of Bombay & Anr. v. The United Motors (India) Limited & Ors.*, AIR 1953, SC, 252. The majority in this case held as under :

*“(9) Before considering whether the appellant State has made a law imposing, or authorising the imposition of a tax on sales or purchases of goods in disregard of constitutional restrictions on its legislative power in that behalf, it is necessary to ascertain the scope of such power and the nature and extent of the restrictions placed upon it by Art. 286. The power is conferred by Art. 246(3) read with Entry 54 of List II of sch-7 to the Constitution. The Legislature of any State has, under these provisions, the exclusive power to make laws “for such State or any part thereof” with respect to “taxes on the sale or purchase of goods other than newspapers”. The expression “for such State or any part thereof” cannot, in our view, be taken to import into Entry 54 the restriction that the sale or purchase referred to must take place within the territory of that State. All that it means is that the laws which a State is empowered to make must be for the purposes of that State. As pointed out by the Privy Council in the *Wallace Brothers and Co. Ltd. v. Commr. Of Income-Tax Bombay*, A. I. R. 1948 P. C. 118(B) in dealing with the*

competency of the Indian Legislature to impose tax on the income arising abroad to a non-resident foreign company, the constitutional validity of the relevant statutory provisions did not turn on the possession by the legislature of extra-territorial powers but on the existence of a sufficient territorial connection between the taxing State and what it seeks to tax. In the case of sales-tax it is not necessary that the sale or purchase should take place within the territorial limits of the State in the sense that all the ingredients of a sale like the agreement to sell, the passing of title, delivery of the goods, etc., should have a territorial connection with the State. Broadly speaking, local activities of buying or selling carried on in the State in relation to local goods would be a sufficient basis to sustain the taxing power of the State, provided of course, such activities ultimately resulted in a concluded sale or purchase to be taxed.”

94) Expanding this principle further and in applying what is popularly known as the nexus theory to sales tax legislation in the case of *Tata Iron & Steel Company vs. State of Bihar*, AIR 1958, SC 452, the Hon'ble Supreme Court held that although the tax was on a completed sale, one or more of the several ingredients constituting the sale could furnish the connection between the taxing statute and the sale. Existence of the goods within the State at the time of contract of sale and in the case of sale by the producer or manufacturer, the production or manufacture of goods in the State were held to be sufficient nexus to sustain the legislation impugned. In the case of *Tikaram & Sons v. Commissioner of Sales Tax* reported in AIR 1968 SC 1286, this is what is held by the Hon'ble Supreme Court :

“5. We proceed to consider the next, and more important question, arising in these appeals, namely, whether the deeming provision contained in Section 2(h) Explanation II (ii) of the Act

was ultra vires the Government of India Act, 1935. It was argued by Mr. Chagla that the doctrine of nexus was not applicable to sales-tax legislation, because such legislation was concerned with the tax on the transaction of sale, that is to say, a completed sale and to break up a sale into its component parts and to take one or more such parts and to apply the theory to it would mean that the State would be entitled to impose tax on one or more of the ingredients of constituent elements of the transaction of sale which by itself will not amount to a sale. An identical question has been the subject-matter of consideration by this Court in *The Tata Iron and Steel Co. Ltd. v. The State of Bihar*, 1958 SCR 1355= (AIR 1958 SC 452). It was held in that case that the provisions of Section 4(1) read with Section 2(g) second proviso, of the Bihar Sales Tax Act, 1947 as amended by the Bihar Sales Tax Amendment Act, 1949 were within the legislative competence of the Provincial Legislature of Bihar. The second proviso added by the amending Act did not extend the meaning of the expression "sale" so as to include a contract of sale: what it actually did was to lay down certain circumstances in which a sale, although completed elsewhere, was to be deemed to have taken place in Bihar. The circumstances mentioned in the proviso to Section 2 (g) of the Bihar State Sales Tax Act, namely, the presence of the goods in Bihar at the date of the agreement of sale or their production or manufacture there must be held to constitute a sufficient nexus between the taxing Province and the sale wherever that might take place. It is manifest that a transaction of sale is a composite transaction and consists of legal ingredients like agreement of sale, passing of title and delivery of goods but it is not necessary for the purpose of legislative jurisdiction that all legal ingredients of sale or even the transfer of title should have taken place inside the Province. It is sufficient if there is a proper territorial nexus or connection between the taxing authority and the transaction sought to be taxed. The fact that the goods are manufactured in the Province constitutes a real and pertinent nexus or connection which confers jurisdiction upon the Provincial Legislature to impose the tax. In dealing with the question whether the production or manufacture of goods constituted a sufficient nexus to the subject-matter of taxation. S.R. Das C. J. observed as follows:-

"For the purpose of the present case it is sufficient to state that in a sale of goods the goods must of necessity play an important part, for it is the goods in which, as a result of the sale, the property will pass. In our view the presence of the goods at the date of the agreement for sale in the taxing State or the production or manufacture in that State of goods the property wherein eventually passed as a result of the sale wherever that might have taken place constituted a sufficient

nexus between the taxing State and the sale. In the first case the goods are actually within the State at the date of the agreement for sale and the property in those goods will generally pass within the State when they are ascertained by appropriation by the seller with the assent of the purchaser and delivered to the purchaser or his agent. Even if the property in those goods passes outside the State the ultimate sale relates to those very goods. In the second case the goods, wherein the title passes eventually outside the State, are produced or manufactured in Bihar and the sale wherever that takes place is by the same person who produced or manufactured the same in Bihar. The producer or manufacturer gets his sale price in respect of goods which were in Bihar at the date when the important event of agreement for sale was made or which were produced or manufactured in Bihar. These are relevant facts on which the State could well fasten its tax.”

The principle of this decision was reiterated by this Court in a subsequent case - *Bharat Sugar Mills Ltd. v State of Bihar*, (1960) 11 STC 793 = (AIR 1961 SC 1183). In 1958 SCR 1355 = (AIR 1958 SC 452) the course of dealing between the manufacturers and the purchasers was described as follows:-

“The intending purchaser has to apply for a permit to the Iron and Steel Controller at Calcutta, who forwards the requisition to the Chief Sales Officer of the assessee working in Calcutta. The Chief Sales Officer thereafter makes a 'works order' and forward it to Jamshedpur. The 'works order' mentions the complete specification of the goods required. After the receipt of the 'works order' the Jamshedpur factory initiates a 'rolling' or 'manufacturing' programme. After the goods are manufactured, the Jamshedpur factory sends the invoice to the Controller of Accounts who prepares the forwarding notes, and on the basis of these forwarding notes, railway receipts are prepared. The goods are loaded in the wagons at Jamshedpur and despatched to various stations, but the consignee in the railway receipt is the assessee itself and the freight also is paid by the assessee. The railway receipts are sent either to the branch offices or the assessee or to its bankers, and after the purchaser pays the amount of consideration, the railway receipt is delivered to him. These facts are admitted and the correctness of these facts are not disputed by the State of Bihar”

In our opinion, the ratio of this decision applies to the present case and it must be accordingly held that Explanation II to section 2(h) of the Act is not ultra vires as being outside the legislative competence of the State of Uttar Pradesh.”

95) If we apply this principle to the facts and circumstances of the present case, we do not have any hesitation in concluding that it is the goods which have been produced or manufactured or refined by the oil companies and which are drawn from their storage tanks in fixed quantity that are supplied on demand to the Petitioner. The manufacturers as also the refineries are very much within the State of Maharashtra viz. at Mumbai. The Petitioners are at Mumbai. Meaning thereby, their place of business is at Mumbai. It is from that place that the Petitioner requests the oil companies to supply to it the high speed diesel. It is received by the Petitioner from the oil companies at Mumbai. It may be that the Petitioner treats this as a contract on which they paid the sales tax as a component of the price. However, it is that very high speed diesel and supplied to the Petitioner at Mumbai which is carried from Mumbai in furtherance of a contract with parties like M/s. Leighton, which contract is also placed and finalised from Mumbai, through the barges of the Petitioner to the vessels of M/s Leighton and which may be stationed in territorial waters. However, Leighton comes in the picture, as have been stated by them, for the purpose of fulfilling a contractual obligation of M/s. ONGC. It is for that obligation to be discharged that they have deployed the vessels. It is these vessels which require the bunker supplies and which supplies

are met by the Petitioner. The subject matter of the contract with M/s. Leighton is this high speed diesel or motor spirit which is taken and carried from Mumbai. Therefore, there is sufficient territorial nexus for the Maharashtra Value Added Tax Act to apply and to be invoked to the later sale by the Petitioner of the same goods to M/s. Leighton and other entities similarly placed. We do not see how the Petitioner can escape compliance with this legislation and by contending that the contract of M/s. Leighton being a distinct contract, the sale taking place in territorial waters that the sales tax legislation or the VAT legislation of the Maharashtra State would be applicable. Its applicability has to be tested by applying the above principles and particularly the nexus theory. After having found sufficient territorial connection, namely, between the back to back transaction and the taxing authority that we are not in a position to agree with Mr. Sridharan that MVAT Act is inapplicable.

96) Mr. Sridharan has relied upon the principles relating to extension of the State's boundaries to the territorial waters. Prior thereto, he has also relied upon section 8 of the MVAT Act but that in our opinion refers to certain transactions to which MVAT Act will not apply and which may fall within the purview of the Central Sales Tax Act 1956. It is clear that it refers to section 4 of the Central Sales Tax

Act,1956.

97) As far as the State boundaries are concerned, our attention has been invited to several works and commentaries extensively dealing with this aspect. We would not be required to refer to these commentaries, particularly relating to territorial waters by Coulson & Forbes, in the view that we have taken. Once we have made a reference to the theory of nexus and which is applicable to Sales Tax legislation as held by the Hon'ble Supreme Court, then, strictly speaking the works and commentaries need not be referred.

98) Equally, the principle that the country extends to its low water mark where the high seas begin is another principle which need not be referred in details for the simple reason that it can have no application to the facts and circumstances of the present case. For the afore -indicated reasons, we have found that the very goods and which have been transported by the Petitioners via barges and to the vessels stationed in the territorial waters according to it have been obtained within the State of Maharashtra. We have found that substantial part of the transaction and from the stage of acquisition of these goods, paying for them, receiving an indent or order from the shipping lines and further communications have all taken place in Mumbai within the

State of Maharashtra. It is these very goods, namely, high speed diesel oil which have been filled in and loaded on to the Petitioners barges at Mallet Bunder Mumbai. These are thus the acts within the State of Maharashtra. It is in these circumstances that we have applied this theory and once it is found to be so applicable, then, where the boundaries of the State end and in relation to waters, what could be the limitation thereof are all matters which need not be considered by us. For this reason, we do not make any further reference to the decision of the US Federal Court in *United States vs. State of California 1947 (332) US 19* as also the decision of the Canadian Supreme Court reported as 1967 SCR 792. While it may be true that some of these decisions may make a reference to the taxing power of the State but having found that the ambit and scope of taxing power can be interpreted with the aid of nexus theory and that can be invoked that we do not deem it fit and proper to dwell on this aspect any further.

99) It is also then not necessary to make a reference to the judgment of the Hon'ble Supreme Court in the case of *Gramophone Company Limited vs. Union of India 1984 (2) SCC 534*. We are also not required then to refer to the principles of international law, particularly as to how a State or a country has been identified.

100) For the aforesaid reasons, we also need not refer to the

Constituent Assembly debates with reference to the territorial waters and Article 297 of the Constitution of India or Article 366(30) of the Indian Constitution.

101) For the very same reasons the definition of the term “State” as appearing in General Clauses Act, 1897 and the Bombay General Clauses Act, 1904 also need not be referred.

102) As far as the Division Bench judgment in the case of Commissioner of Customs (Preventive) Mumbai vs. Noble Asset Company Limited (supra) our Court was required to decide whether a Commissioner vested with territorial jurisdiction over the Districts of Raigad, Navi Mumbai and Colaba would be in a position to deal with the violations of the Customs Act committed by a drilling rig in the exclusive economic zone in the continental shelf. It is in that context and finding that the States within India would not be able to reach these zones and it is only the Sovereign, namely, the Central Government which would be in a position to deal with it. We do not think that we are required to decide any such controversy. Once we have held that the Assessing Officer could have taken note of the Petitioner's transaction and probed and investigated it further so as to bring it to tax also by applying the nexus theory, then, this decision need not detain us.

103) We also then need not go into cases relating to Fisheries vis-a-vis jurisdiction of coastal States and the Petitioners attempt to distinguish the judgment of Madras High Court in the case of *AMSSVM & Co. vs. The State of Madras* reported in *AIR 1954 Madras 291*. Thereafter, Mr. Sridharan laid special emphasis on the applicability of section 4 of the CST Act.

104) Before we refer to the arguments on section 4 of the CST Act, we would like to make a reference to the decisions relied upon by Mr. Sonpal. Mr. Sonpal has placed heavy reliance on the judgment of the Karnataka High Court in the case of *Great Eastern Shipping Company Limited vs. State of Karnataka* reported in *ILR 2004 Karnataka, 3750*.

105) In that decision the Karnataka High Court was concerned with the appeal by the original Petitioners against the judgment and order by a single Judge of that Court passed in Writ Petition No.4971 of 1999. The appellant was a public limited company and owned a tug (Towing vessel). It entered into a Charter Party Agreement with New Mangalore Port Trust (for short “NMPT”) wherein it was agreed to make available the services of the said tug for the purposes mentioned

in the said agreement along with the master and other personnel of the appellant-company. That was for a period of six months. The Assistant Commissioner of Commercial Taxes issued a notice directing the appellant-company to register itself as a dealer under the provisions of the Karnataka Sales Tax Act, 1957. That was on the ground that the service charges payable by the NMPT to the appellant under the agreement attracted tax under section 5-C of the KST Act. The appellant negated this claim on the ground that there was no transfer of right to use the goods by it to NMPT. The possession and custody of the tug in question, even after the agreement was entered into, continued with the appellant. However, this reply was not found to be convincing and the Assistant Commissioner proceeded to inform the appellant that since it has failed to register itself as a dealer that would be taken to be a violation of the Act and for which appropriate steps, including prosecution, would be initiated. It is aggrieved by such action that the Writ Petition was filed and in which a declaration was claimed that the provisions of the KST Act do not extend to the territorial waters of India situate adjacent to the landmass to the State of Karnataka and, therefore, the appellant is not liable to get itself registered under section 10 of the KST Act and also not liable to tax on the hire charges received from the NMPT. The learned single Judge took the view that the tug in question was in the State of Karnataka, though in territorial waters

which forms the territory of the State, the question as to whether there was transfer of right to use the tug being one of fact the same has to be decided on the basis of the evidence produced by the parties before the second respondent and the same cannot be considered in the Writ Petition. That is how the Writ Petition was dismissed and the appeal was filed.

106) The rival contentions have been noted extensively and thereafter, in paragraph 5 question No.1 was framed and which is whether the use of tug on the territorial waters would amount to use of the tug within the State of Karnataka. From paragraph 6 onwards the Court considered these contentions and relying on the Madras High Court judgment and several works of eminent authors and judgments of other courts outside India, concluded that the sweep of the power of the Union, particularly in relation to territorial waters, sea-bed and subsoil underlying and air space over such waters cannot be understood to limit the territorial jurisdiction of a State in respect of territorial waters lying adjacent to the land.

107) We are of the considered view that it is not necessary to decide such wider questions as are posed by the Karnataka High Court and answer them. For the purpose of our judgment and having reached

our conclusions on the theory of nexus or applying the principle of territorial nexus we do not deem it necessary to answer the larger questions or enter into wider debate. Therefore, we would not pursue the line of reasoning in the Karnataka High Court judgment to consider whether the conclusions reached by the said High Court are to be agreed with or otherwise. We leave such questions as are posed by the Karnataka High Court for being decided in an appropriate case.

108) It is now time to note the contentions on the applicability of section 4 of the CST Act, 1956. Here as well, we have noted the contentions of both sides. Mr. Sridharan in his oral submissions as also in the written submissions and additional written submissions emphasised that even if by virtue of section 4 of the CST Act, a sale is treated as having taken place inside the State, the State cannot tax it under the State's Sales Tax Act, if the same transaction satisfies section 3 of the CST Act, 1956. A very great emphasis has been laid on several judgments of the Hon'ble Supreme Court by inviting our attention to the Sales of Goods Act, 1930.

109) Mr. Sridharan, however, has not disputed the fact that for the purposes of determining the applicability of the two provisions viz. sections 3 and 4 of the CST Act, it will have to be determined firstly

whether a sale or purchase of goods in the present case has taken place in the course of Inter-State trade or commerce. Section 3 of the CST Act falling in Chapter II deals with this aspect and enacts a deeming fiction. For that deeming fiction to apply there are two conditions and which are set out in clauses (a) and (b) of section 3 and there are explanations. It is thus upon fulfillment of these conditions and as set out that it could be said to be a sale in the course of Inter-State trade or commerce.

110) Section 4 sub-section (1) opens with the words “Subject to the provisions contained in Section 3”. Section 4 deals with a situation and when is a sale or purchase of goods said to take place outside a State. Therefore, it is subject to section 3 and when a sale or purchase of goods is determined in accordance with sub-section (2) of section 4 to take place inside a State, such sale or purchase shall be deemed to have taken place outside all other States. By sub-section (2) a sale or purchase of goods shall be deemed to take place inside a State if the goods are within the State in the case of specific or ascertained goods, at the time the contract of sale is made and in the case of unascertained or future goods, at the time of their appropriation to the contract of sale by the seller or by the buyer, whether assent of the other party is prior or subsequent to such appropriation. Here also there is an explanation.

111) If we were to determine the applicability of the provisions referred above we would have to go into the factual aspects and in great details. Concededly, in proceedings under the Bombay Sales Tax Act, 1959 (for short “BST Act”) particularly of the nature of appeal, the issue of BST Act not being applicable to sales covered by Chapter II to CST Act, 1956, can be raised and considered. It is not as if the Petitioners are remediless. They can rely upon the provisions and satisfy the authorities that since the sale attracts the provisions of the CST Act, 1956, particularly chapter II thereof, the same would not fall within the purview of the relevant provisions of the BST Act, 1959. On the particular sale, therefore, no tax under the BST Act is leviable and recoverable. Such contentions and by projecting the relevant and necessary facts can be raised by the Petitioners and in the event they are not favourably considered or satisfactorily dealt with, they have remedies open and further of carrying the matters in higher forums or courts. Thus, no prejudice is being caused by relegating the Petitioners to these remedies. More so, when these remedies are efficacious. Further, these being mixed questions of law and fact and concerning particular sales, the transactions and dealings between parties to the petition as also others that the writ jurisdiction is not the forum to decide or adjudicate such controversy. Therefore, we would not express

any opinion on the rival contentions based on the judgments and legal provisions and leave the parties to raise them in the pending proceedings or the proceedings to be initiated and instituted but before the forums under the BST Act, 1959.

112) Similarly, with regard to the other contentions of Mr. Sridharan on the goods, namely, the petroleum products in question enjoying an exemption and the Petitioners having satisfied all the pre conditions, they are entitled to such exemptions are concerned, they are also capable of being raised, dealt with and considered in proceedings under the BST Act. While challenging the assessment orders, it would be open for the Petitioners to raise the contentions of applicability of the CST Act and equally in the alternative and without prejudice that assuming those contentions are turned down and the BST Act is applicable and attracted, still the particular goods are exempt from tax. The construction and interpretation of the exemption Notification relied upon is an issue which can always be gone into and decided in the proceedings under the Act. Thus, on both counts, namely, whether jurisdictional facts or pre conditions attracting the levy are satisfied and even if these are satisfied and the levy is attracted, the particular goods are exempt from such levy, the matters can be resolved by the forums under the Act. In the absence of any favourable adjudication, there are always the higher courts available to the Petitioners. Therefore,

without expressing any opinion on the rival contentions as far as the exemption Notification is concerned, we would leave the Petitioners to pursue their remedies under the Act.

113) As a result of the above discussion and having dealt with all the contentions raised before us, we are of the opinion that no relief can be granted to the Petitioners in these petitions. Rule in each of these petitions is discharged, but without any order as to costs.

114) After the judgment was pronounced, Mr. Shah learned counsel for the petitioners submits that the petitioners be given some time to file appeals. They would prepare the appeals and file them within three weeks from today. We accept this statement. A further request is made that no coercive measures be initiated for this period of three weeks so that the petitioners will file their appeals, make applications for dispensation and waiver of the condition of pre-deposit. In the light of this request made we direct that for a period of three weeks no coercive measures be taken to recover the amounts. In the event the appeals are filed before the First Appellate Authority, the First Appellate Authority shall sympathetically consider the request of the petitioners to dispense with the condition of deposit of full amount considering that a substantial part or portion of the sum demanded has been deposited.

G.S. KULKARNI, J.

S.C. DHARMADHIKARI, J.