

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 13.07.2017

CORAM

THE HONOURABLE Mr. JUSTICE T.S.SIVAGNANAM

W.P.No.17728 of 2017
and
W.M.P.No.19243 of 2017

SHV Energy Private Limited,
Represented by
Alpha Centre, 7th Floor,
No.150 & 151, North Usman Road,
T.Nagar, Chennai. ... Petitioner

...Vs...

1. The State of Tamil Nadu,
Represented by its Secretary,
Chennai.
2. The Commissioner of Commercial Taxes,
Large Tax Payer Unit,
5th Floor, Dugar Towers,
Marshall Road,
Chennai-600 008.
3. The Deputy Commissioner
(Commercial Tax)-IV,
Large Tax Payer Unit,
5th Floor, Dugar Towers,
Marshall Road,
Chennai - 600 008. .. Respondents

Prayer: Writ Petition filed under Article 226 of the Constitution of India, praying to issue a Writ of Certiorari Mandamus to call for the records for the records pertaining to the impugned order TIN/33551522107/2015-2016 dated 05.06.2017 and after going into validity and legality thereof to quash the same and the consequentially to direct the third respondent to Tax demand raised against the Petitioner.

For Petitioner : Mr.Prakash Shah

For Respondents: Mr.K.Venkatesh,
Government Advocate.

O R D E R

Heard Mr.Prakash Shah, learned counsel appearing for the petitioner and Mr.K.Venkatesh, learned Government Advocate for the respondent. With the consent on either side, the writ petition itself is taken up for disposal.

2.The petitioner has filed this writ petition challenging the assessment order passed by the third respondent dated 05.06.2017 for the assessment year 2015-2016 under the provisions of the Tamil Nadu Value Added Tax Act, 2006 (TNVAT Act), insofar as it demands VAT on terminalling services provided to Bharat Petroleum Corporation Limited (BPCL). The petitioner has set up LPG storage and distribution facility at Tuticorin Port for storage of LPG imported into India by it. The petitioner provided the service of terminalling and storage of LPG to some of its customers. The facility created by the petitioner consist of fully refrigerated storage tank having capacity of 8,500 MTs at a distance of about 4 kilometers from the jetty. The petitioner has laid pipeline of about 4 kilometers to transfer the LPG from the vessel to the storage tank and installed necessary equipment for connecting the pipeline to the Vessel to transfer the LPG from the Vessel to the storage tank through the pipeline. The petitioner had entered into an agreement dated 26.12.2003 with BPCL for providing non-exclusive terminal and storage to BPCL for a period of two years for the LPG by the BPCL at the said port on payment of terminalling charges and other terms and conditions contained therein.

3.The said agreement is stated to have been extended from time to time. The petitioner charges for the aforesaid services at the rate of Rs.719 per MT' and has paid the service tax on such terminal handling services provided to BPCL. The Petitioner had filed its audit report dated 21.12.2015 in Form WW for the year 2015-2016 under Section 63A of the TNVAT Act. Pursuant to the filing of the audit report, the third respondent vide notice dated 01.02.2017 directed the petitioner to file documentary evidence in addition to the audit report for certain specific transactions for the purpose of assessment. The petitioner submitted their reply giving necessary details and documentary evidences as sought by the third respondent vide their reply dated 23.05.2017. The petitioner submitted further details on the services provided to BPCL and explained that there is no transfer of right to use the said facility to BPCL. The petitioner also supported their stand by submitting the diagram of the storage tank and terminal operations. Further, the petitioner stated that they are not liable to pay VAT and

that they have discharged service tax on such service rendered to BPCL and on the same transaction both the service tax and VAT cannot be charged.

4.The third respondent while completing the assessment by order dated 05.06.2017 has held that the petitioner are transferring the right of using their storage facility to BPCL for storing LPG at the Tuticorin Port for a monetary consideration of Rs.719 per MT of LPG handled by them which amounts to transfer of right to use the goods and even if the storage facility is fixed on land, it is not a fixed asset like land/building/space but a gadget for intake of LPG from ship, storage, dosing of Ethyl Mercaptan and and loading to tank truck. Thus, the third respondent concluded that the amount of network provided by the petitioner requires periodical maintenance with necessary replacement of spaces/consumables which will carry ITC after the advent of TNVAT Act with effect from 01.01.2017. Ultimately, the third respondent held that as the faculty of terminating service/storage facilities do not find place anywhere in the schedule apprehended to the TNVAT Act, the rate of tax applicable on such receipts shall be reckoned for goods falling under entry No.69 to part C of the First Schedule to the TNVAT Act taxable @ 14.5% and accordingly demanded tax for the said assessment year. Though there are other issues which are dealt with in the impugned assessment order, the petitioner has questioned the levy of tax on the terminalling services.

5.The petitioner's first and foremost contention is that the same transaction cannot be taxed under the Finance Act for service tax and VAT. Further, it is contended that there is no transfer of right to use the goods and the contract between the petitioner and the BPCL is a non-exclusive contract and the installation and facility is used by the petitioner for themselves, for BPCL as well as IOC and the observation of the Assessing Officer that there is a transfer of right in using the goods is an incorrect finding. Further, it is submitted that under Section 65(102) of the Finance Act, "storage and warehousing" has been defined to include storage and warehousing services for goods including liquids and gases but does not include any services provided for storage of agricultural produce or any service provided by a cold storage. Taking note of this definition, the Central Board has issued a circular in Circular: B11/1/2002-TRU dated 01.08.2002 and in annexure therein, it specifically dealt with storage and warehousing. It is submitted that as per Clause (87), "storage and warehousing" includes storage and warehousing services for goods including liquids and gases. Therefore, it is submitted that the finding rendered by the third respondent in the impugned order is not sustainable.

6. Reliance was placed on the decision of the Hon'ble Supreme Court in the case of Bharat Sanchar Nigam Ltd vs. Union of India reported in 2006 (2) STR 161 (SC) in which after taking note of the decision in the case of 20th Century Finance Corporation Limited vs. State of Maharashtra reported in (2000) 6 SCC 12, the Hon'ble Supreme Court pointed that in determining the situs of the transfer of the right to use the goods, the Court did not say that delivery of the goods was inessential for the purpose of completing the transfer of the right to use. Further, it was pointed out that the essence of the right under Article 366(29A) (d) is that it relates to user of goods. It may be that the actual delivery of the goods is not necessary for effecting the transfer of the right to use the goods but the goods must be available at the time of transfer must be deliverable and delivered at some stage. It is assumed, at the time of execution of any agreement to transfer the right to use, that the goods are available and deliverable. If the goods or what is claimed to be goods by the respondents are not deliverable at all by the service providers to the subscribers, the question of the right to use those goods, would not arise. Further, it was pointed out that if there are deliverable goods in existence, there is no transfer of user at all. Thus, by relying upon the circular and the decision in the case of Bharat Sanchar Nigam Ltd., it is submitted that the case of the petitioner, there is no deliverable goods in existence.

7. Reliance was also placed on the decision of the Delhi High Court in the case of Commissioner, VAT, Trade and Taxes Department vs. International Travel House Ltd. reported in 2009 25 VST 653 (Del), wherein it was pointed after referring to the decision in the case of Bharat Sanchar Nigam Ltd., that except the specific contracts so provided under Article 366(29A) no other contracts can be artificially severed to tax the sale element with respect to the goods as comprised in such composite contract. Therefore, it is submitted that on thorough misconception of the legal position, the impugned assessment has been made.

8. The learned Government Advocate would vehemently contend that the Assessing Officer has made a in-depth study of the terms and conditions of the agreement and has come to a clear conclusion that transferring the right of using the storage facility to BPCL will amount to transfer of right to use the goods and therefore, the impugned order is perfectly legal and valid and if the petitioner is aggrieved, the petitioner should file an appeal before the Appellate Authority.

9. After elaborately hearing the learned counsels for the parties and perusing the materials placed on record, this Court is of the view that the third respondent has failed to address

the important aspect raised by the petitioner by contending that they having discharged the service tax liability, they cannot be directed to pay VAT for the same transaction. This important aspect should have been dealt with by the third respondent while completing the assessment. In fact such a stand was also raised by the petitioner during the course of personal hearing which has been recorded in the minutes of the personal hearing held on 25.05.2017 at 2.00 p.m. Thus, the question would be as to whether the petitioner could be made to suffer two levies, namely, sales tax and service tax.

10. One more important aspect is that the third respondent should have been taken note of with regard to the definition of "storage and warehousing" as defined under the Finance Act under Section 65(102). While doing so, it may be necessary to peruse the circular issued by the Central Board dated 01.08.2002. It appears that the circular was not placed before the Assessing Officer. Nevertheless, the circular throws light as to what would be includable in "storage and warehousing" and it states that service for goods including the liquids and gases would fall within the storage and warehousing. Above all, the legal principle should be taken note of by the third respondent, that is to say that except specific contracts so provided under Article 366(29A), no other contracts can be artificially severed to tax the sale element with respect to the goods as compromised in such composite contracts. The non-exclusivity of the agreement between the petitioner and the BPCL is also a relevant factor which the third respondent has not considered. Furthermore, the installation which have been erected by the petitioner are fixed to the ground and the photographs produced would show that it consists of pipes and cylinders and prima facie, this Court is of the view that the finding rendered by the third respondent that it is not a fixed asset like land/building/space appears to be an incorrect finding. Thus, for all the above reasons this Court is of the considered view that the assessment under the said head requires to be re-done taking note of the legal position, circular issue by the Central Board, factual matrix and the non-exclusivity of the agreement between the petitioner and the BPCL and that the petitioner cannot be made to suffer by two levies, namely, sales tax and service tax.

11. For the above reasons, the impugned assessment under the head of terminalling service provided to BPCL is set aside and the writ petition is allowed and the matter is remanded to the third respondent to re-do the assessment on the said head by taking note of the observations made in this order.

12. Accordingly, the Writ Petition is allowed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

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To

1. The Secretary, State of Tamil Nadu,
Chennai.
 2. The Commissioner of Commercial Taxes,
Large Tax Payer Unit,
5th Floor, Dugar Towers, Marshall Road,
Chennai-600 008.
 3. The Deputy Commissioner(Commercial Tax)-IV,
Large Tax Payer Unit,
5th Floor, Dugar Towers, Marshall Road,
Chennai - 600 008.
- + 1 cc to Special Government Pleader SR.49136
+ 1 cc to Mr.S. Jaikumar, Advocate SR.48745

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