

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 27.02.2020

PRONOUNCED ON : 09.03.2020

CORAM

THE HONOURABLE MR.JUSTICE C.SARAVANAN

W.P.Nos.7383 of 2012, 27868 and 28117 of 2014
and W.M.P.Nos.1 to 3 of 2012 and 1, 1 of 2014

W.P.No.7383 of 2012 and
W.M.P.Nos.1 to 3 of 2012

Hindustan Oil Exploration Company Ltd.,
(Rep.by its Managing Director
Manish Maheswari)
" Lakshmi Chambers"
192 St.Mary's Road,
Alwarpet Chennai 600 018 ... Petitioner

vs.

1.The Assistant Commissioner (CT),
Mandaveli Assessment Circle,
46, Greenways Road,
Chennai 600 028.

2.The State of Tamilnadu
(Represented byt its Secretary)
Commercial Taxes & Registration
B1 Department,
Fort St.George, Chennai 600 009.

3.Chennai Petroleum Corporation Ltd.,
Manali, Chennai 600 068. ... Respondents

PRAYER : Writ Petition is filed under Article 226 of the Constitution of India, to issue a writ of Mandamus, to direct the first respondent to forbear from recovering sales tax on the sale of crude oil effected by the petitioners to the nominee of the Government of India, namely, Chennai Petroleum Corporation Ltd., the third respondent, in terms of the Crude Oil Sales Agreement dated 26.09.2003, in respect of which tax liability under Serial No.41 of Part B of the first Schedule to the Tamil Nadu Value Added Tax Act, 2006 has discharged by the third respondent.

For Petitioners: Mr. N.Prasad
For R1 & R2 : Mr.Mohammed Shaffiq
Spl.Govt.Pleader (Tax) Asst. By
Mr.ANR.Jayaprathap
Govt.Advocate.

For R3 : Mr.Joseph Prabakar

W.P.Nos.27868 & 28117 of 2014 and
M.P.Nos.1, 1 of 2014

Chennai Petroleum Corporation Limited,
Represented by S.Ramakrishnan,
Deputy General Manager (Finance),
Manali, Chennai 600068. . Petitioner in both W.Ps.

vs.

- 1.The Deputy Commissioner (C-T) III,
Large Tax Payers Unit,
5th Floor, Dugar Towers,
Marshall Road,
Chennai 600 008.
- 2.The Assistant Commissioner (CT),
Mandaveli Assessment Circle,
46, Greenways Road,
Chennai 600 028.
- 3.Deputy Commissioner (CT),
Enforcement (East),
PAPJM Buildings, Greams Road,
Chennai 600 006.
- 4.Hindustan Oil Exploration Company Limited
Lakshmi Chambers,
192, St.Marys Road, Alwarpet,
Chennai 18.
- 5.Hardy Exploration & Production (India) Inc
Westminister Building,
108, Dr.R.K.Salai, Mylapore,
Chennai 600 004.
- 6.The Assistant Commissioner (CT),
Ice House Assessment Circle,
46, Greenways Road,
Chennai 600 028.
- 7.The State of Tamilnadu
(Represented byt its Secretary)
Commercial Taxes & Registration
B1 Department,
Fort St.George, Chennai 600 009.

.. Respondents in
both W.Ps.

PRAYER in W.P.Nos.27868 & 28117 of 2014: Writ Petitions are filed under Article 226 of the Constitution of India, to issue a writ of Certiorari, to call for the records of the third respondent in Notice dated 11.09.2014 in W.P.No.27868 of 2014 and 05.09.2014 in W.P.No.28117 of 2014 issued in TIN 33491560843 in VAT Audit Serial No.1/2011-12 dated 12.12.2011 in Proceedings No.ADC/(SMR)/60/2011 dated 09.12.2011 issued by the third respondent and to quash the same.

For Petitioner : Mr.Joseph Prabakar
(in both W.Ps.)
For R1 to R3 : Mr.Mohammed Shaffiq
Spl.Govt.Pleader(Tax)Asst. By
(In both W.Ps.) Mr.ANR.Jayaprathap
Govt.Advocate.
For R4, R6 & R7 : Mr. N.Prasad
(in both W.Ps.)
For R5 : Mr.Thriyambak J.Kannan
(in both W.Ps.)

C O M M O N O R D E R

By this common order all the three writ petitions are being disposed.

2. In these writ petitions, these two writ petitioners have challenged notices issued to them to recover Value Added Tax under the provisions of the Tamil Nadu VAT Act, 2006 on the supply of petroleum crude.

3. In W.P.No.27868 of 2014 and W.P.No. 28117 of 2014 M/S. Chennai Petroleum Corporation Ltd. has challenged notices dated 11.9.2014 and 5.9.2014 proposing a demand of purchase tax under Section 12 of the Tamil Nadu VAT Act, 2006 on the supply of crude petroleum oil by a consortium of four crude oil exploration companies for the period between January 2007 to March 2010 and April 2010 to March 2012 respectively.

4. In W.P.No.7383 of 2012, one of the crude exploration oil company namely Hindustan Oil Exploration Company Ltd to forbear the 1st respondent Asst. Commissioner (Commercial Taxes) from recovering sales-tax on the petroleum crude oil supplied to M/S.Chennai Petroleum Corporation Ltd., the writ petitioner in W.P.No.27868 of 2014 and W.P.No. 28117 of 2014.

5. Hindustan Oil Exploration Co Ltd has been issued with 5 different notices dated 8.3.2012 to recover tax on the proportionate quantity of crude oil supplied to Chennai Petroleum Corporation Limited and on sale of worn out machinery, parts and consumables sold but not disclosed resulting in evasion of tax.

6. The facts of the case are that on 30.12.94, a Production Sharing Agreement was signed between the Government of India, Oil and Natural Gas Corporation Limited, Vaalco Energy Incorporated, Hindustan Oil Exploration Co Ltd and Tata Petrodyne Private Limited for exploring and producing crude petroleum from the seabed. Under the agreement all taxes were to be borne by the Government of India. Chennai Petroleum Corporation Limited by the Government of India to refine the crude oil.

7. Thus, a Crude Oil Sale Agreement dated 26.9.2003 was signed between the Chennai Petroleum Corporation Ltd and four crude oil producing companies with M/s. Hardy Exploration And Production (India) Inc. as the consortium leader.

8. Under clause 10.2 of the agreement, Chennai Petroleum Corporation Ltd. undertook the responsibility of payment of all taxes, duties, dues and charges which were necessary to, or payable in respect of the buying, taking, transporting and landing of crude oil from and downstream of the delivery point including, but not limited to sales-tax and for filing necessary returns with the statutory authorities in accordance with the applicable laws, rules or regulation. In the event that any such sum in respect thereof tax were paid by the seller in accordance with the applicable laws, same shall be reimbursed by the buyer namely Chennai Petroleum Corporation Ltd within 10 days of presentation of a duly substantiated debit note in accordance with clause 9.8 of the said agreement.

9. It is the case of the respective petitioners that the exploration and supply of petroleum crude oil has taken place outside the State of Tamil Nadu and in the Exclusive Economic Zone of India as defined in the Territorial Waters, Continental Shelf, Exclusive Economic Zone and Other Maritime Zones Act, 1976 and therefore no VAT can be levied.

10. Heard the learned counsel for the respective petitioner and the respondents. On behalf of M/s. Chennai Petroleum Corporation Ltd it was submitted that all the minerals on the seabed belong to the Union of India. The four companies were merely required to explore and supply petroleum crude oil to the Union of India or its nominee and the petitioner being a nominee of the Union of India, merely received crude oil though the agreements use the expression "sale".

11. A reference was made to Article 285 and Article 297 of the Constitution of India. It is submitted that under Article 285, both Union and the State are exempted from payment of tax. It is further submitted that under Article 297 of the Constitution of India things of value within the territorial waters or continental shelf and resources of exclusive economic zone vest with the Union of India and

therefore the concept of sale was incompatible.

12. It is further submitted that in any event the sale had taken place outside the State of Tamil Nadu and therefore the respondents have no jurisdiction to levy and demand Value Added Tax.

13. It is submitted that under the Crude Sales Agreement for the Sale and Purchase of Crude Oil the custody, transfer and delivery of crude oil was made on ship to ship transfer basis from the FSO to the off take Vessel in the development area and the transfer of custody, title, risk and delivery and to the crude oil shall take place at the delivery point

14. It is submitted that the expression delivery point also has been defined in the agreement to mean the upstream face of the flanges connecting the export of course from the FSO to the flanges on board of the Offtake vessel. The expression FSO under the agreement means the seller's storage tankers in which crude oil is temporarily stored prior to delivery to the buyer.

15. The learned counsel for Chennai Petroleum Corporation Ltd drew my attention to the decision of the Bombay High Court in Commissioner of Sales-Tax Versus Pure Helium (India) Ltd. (2012) 49 VST 14 when it was held that exclusive economic zone does not constitute part of the territory of India and that movement of goods from the State of Maharashtra to Mumbai High did not constitute a movement from one State to another State as Mumbai High does not form part of any State in the Union of India.

16. A reference was also made to a decision of the Division Bench of Gujarat High Court in Larsen and Toubro Ltd Versus Union of India 2011 V IL 46 Gujarat wherein it was held that the sale of goods that took place at Mumbai High for which the goods moved from Hazira, West Bengal to Mumbai High did not get covered within the expression "movement of goods from one state to another" under section 3 (a) of CST, 1956.

17. The learned counsel for the petitioner also alternatively submitted that tax if any has been paid by the petitioner by book adjustment as purchase tax was revenue neutral as tax that is payable by the petitioner if any was available by way of Input Tax Credit under Section 12 (2) of the Tamil Nadu VAT Act, 2006.

18. On behalf of the other petitioner in W.P.No.7383 of 2012 (Hindustan Oil Exploration Company Ltd) it is submitted that The Production Sharing Agreement dated 30.12.1994 was signed under the aegis of Article 299 of the Constitution of India. The crude oil cannot be delivered to any 3rd party but only to Union of India and in this case it has been delivered to the nominee i.e. M/s.Chennai Petroleum Corporation which is

also public sector undertaking.

19. It is further submitted that in terms of Article 286 (1) of the Constitution of India, no State can impose or authorise imposition of a tax on the sale or purchase of goods where such sale or purchase takes place (a) outside the state or (b) in the course of import of the goods into or export of the goods outside the territory of India.

20. It is further submitted that under Section 4 of the CST Act, 1956, the sale or purchase is deemed to have taken place inside the state in case of a certain goods which are within the state and in case of an 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 its appropriation.

21. It is further submitted that the above restriction has been reflected in Explanation V to Section 2 (33) of the Tamil Nadu VAT Act, 1956.

22. It is further submitted that M/s. Hardy Exploration and Production India Inc also undertook to pay tax and file returns for and on behalf of the consortium. Therefore, it was not open for the respondents to issue notices to be petitioner namely Hindustan Oil Exploration Company Ltd.

23. It is further submitted that Chennai Petroleum Corporation Ltd undertook to pay the tax liability and had paid the same and therefore it was not open for the respondent to also call upon the petitioner to pay tax.

24. It is further submitted that the State has discriminated in as much as show cause notices have been issued only to Hindustan Oil Exploration Company Ltd and not to the other crude oil-producing companies which were also signatory to be agreements referred to supra.

25. Alternatively, it is submitted that the Court can direct the 1st respondent to decide the issue preliminary objection of the petitioner regarding exigibility in terms of the decision of the Honourable Supreme Court in Vodafone International Holdings BV versus Union of India 2012 (6) SCC 757.

26. It is submitted that if there was no tax payable it cannot be taxed on the basis of estoppel or any equitable doctrine as equity has no place in tax law. He drew attention to the decision in CIT vs. MVRP. Firm Maur (1965)1SCC 815. The Court there held a particular income is either exigible to tax under the taxing statute or it is not. If not, the 1st respondent has no power to tax. It is therefore submitted that merely because the Chennai Petroleum Corporation Ltd had paid tax by itself could not mean that the transaction was taxable.

27. On behalf of the revenue it was contended that the present writ petitioner is liable to be dismissed inasmuch as the petitioner have challenged only the notice and therefore it was for the respective petitioners to participate in the adjudicatory mechanism under the Act.

28. It is further submitted that the fact that Chennai Petroleum Corporation Ltd (Petitioner in W.P.No.27868 of 2014/W.P.No.28117 of 2014) had also filed returns and undertaken to pay purchase tax by way of book adjustment itself shows that the sale had taken place within the State of Tamil Nadu but it had wrongly debited the tax by making a book entry and adjustment to make it seem as if tax was paid without actually paying tax.

29. In this connection reference was made to the following cases on behalf of the revenue:-

- i) Karya Palak Engineer, CPWD, Bikaner V.Rajasthan Taxation Board, Ajmer and Others (2004) 7 SCC 195
- ii) Zunaid Enterprises and Others v. State of Madhya Pradesh and Others (2012) 4 SCC 211
- iii) Union of India v. Bajaj Tempo Ltd. And Others (1998) 9SCC 281
- iv) Trade Tax Officer, Saharanpur v. Royal Trading Co. (2005) 11 SCC 518
- v) Union of India v. Hindustan Development Corpn. Ltd., (1998) 9 SCC 576
- vi) Commissioner of Central Excise, Haldia v. Krishna Wax (P) Ltd. 2019 SCC Online SC 1470
- vii) Bellary Steels and Alloys Ltd. Vs. Deputy Commissioner, Commercial Taxes (Assessments and Others(2009)17 SCC 547
- viii) Commissioner of Commercial Taxes, Thiruvananthapuram, Kerala V. K.T.C.Automobiles (2016) 4 SCC 82

30. I have considered the arguments advanced on behalf of the petitioners and the respondents. Petroleum products are liable to pay tax under Entry 41, Part B to the 1st Schedule being declared goods within the meaning of Section 14 of the CST Act, 1956. Therefore, if the sale had taken place within the state, it would be liable to tax under Section 3 of the Tamil Nadu VAT Act, 2006. There is no doubt there was sale between the petitioners and other co-explorers of petroleum crude oil under the "Crude Oil Sale Agreement" dated 26.9.2003 for the Sale and Purchase of Crude Oil.

31. Whether the sale had taken place within the State of

Tamil nadu or not and whether the liability to pay tax would be on the seller and on the buyer under section 3 of the Tamil Nadu VAT Act, 2006 would require determination by the Assessing Officer. There is no mechanism provided for payment of tax on the recipient of good on reverse charge basis under the Tamil Nadu VAT Act, 2006 except in the case of works contract under the Rules made thereunder. An agreement cannot shift the burden of tax on the buyer.

32. In fact, as per clause 10.1 of the Crude Oil Sale Agreement 26.9.2003, the sellers are responsible for payment of all taxes and duties which are necessary to, or payable in respect of the production and delivery of crude oil upstream of the Delivery Point.

33. As per clause 10.2, the buyer namely Chennai Petroleum Corporation Ltd was merely responsible making for provision at its cost of all permits, authorities and approvals and for payment of all taxes, duties, dues and charges which are necessary to, or payable in respect of the buying, taking, transporting and landing of Crude Oil and downstream of the delivery point including, but not limited to sales tax and filing of necessary returns to statutory authorities in accordance with applicable laws, rules or regulations.

34. In the event of any such sum in respect thereof which were paid by the seller in accordance with applicable law, same was to be reimbursed to the buyer-within 10 days of the presentation of a duly substantiated debit note in accordance with clause 9.8 of the said agreement.

35. Thus, it would not be correct to infer that the liability to pay tax can be shifted to the buyer namely Chennai Petroleum Corporation Ltd. However, Chennai Petroleum Corporation Ltd had agreed to pay tax from and on behalf of the suppliers. Each of the oil-producing companies where liable to pay proportionate tax on the crude oil explored and sold to Chennai Petroleum Corporation Ltd provided. However, tax is payable only if the sale had taken place within the State of Tamil Nadu. Whether or not the delivery of crude oil from the development area to the delivery point fell within the territorial jurisdiction of the State of Tamil Nadu or outside is a question of fact which require to be determined before the respondent.

36. Therefore, as the case involves disputed questions of fact based on the agreements signed between the parties, I am of the view that the present writ petitions are liable to be dismissed. The Asst. Commissioner/ Deputy Commissioner (CT) as the case may be who is the assessing officer is therefore required to pass appropriate orders based on the available records. Further, in the case of Hindustan Oil Exploration Company Ltd. there are other issues as well.

37. As per Section 12 of the Tamil Nadu VAT Act, 2006 every dealer of any goods who (in the course of his business) purchases goods from a registered dealer or from any other person for sale or purchase which is liable to tax under the Act and if no tax is payable by that registered dealer is liable to pay tax on the sale of such goods is liable to pay tax under 4 specified circumstances therein.

38. Issue as to whether the buyer namely Chennai Petroleum Corporation Ltd was required to pay purchase tax in terms of Section 12 of the Tamil Nadu VAT Act, 2006 also would require determination on facts of the case. These disputed questions of fact cannot be determined in a writ proceeding.

39. Issue as to whether the agreement can be construed and understood as having given the sellers a right to not to pay value added tax so as to attract Section 12 of the Tamil Nadu VAT Act, 2006 also in the hands of CPC would require a proper determination on facts by the assessing officer.

40. Therefore, I am of the view that the present writ petitions are liable to be dismissed. Both the petitioners were directed to file their reply with the assessing officer within a period of 30 days from date of receipt of copy of this order. All the issues are left open to be decided by the assessing officer. The assessing officer shall pass appropriate orders within a period of three months from the date of receipt of copy of this order. Needless to state, the petitioner shall be heard.

41 Writ petitions stand disposed with the above observation. Consequently, connected miscellaneous petitions are closed. No cost.

Sd/-

Assistant Registrar (CS-III)

//True Copy//

Sub Assistant Registrar

kkd
To

- 1.The Assistant Commissioner (CT),
Mandaveli Assessment Circle,
46, Greenways Road,
Chennai 600 028.
- 2.The State of Tamilnadu
(Represented byt its Secretary)
Commercial Taxes & Registration
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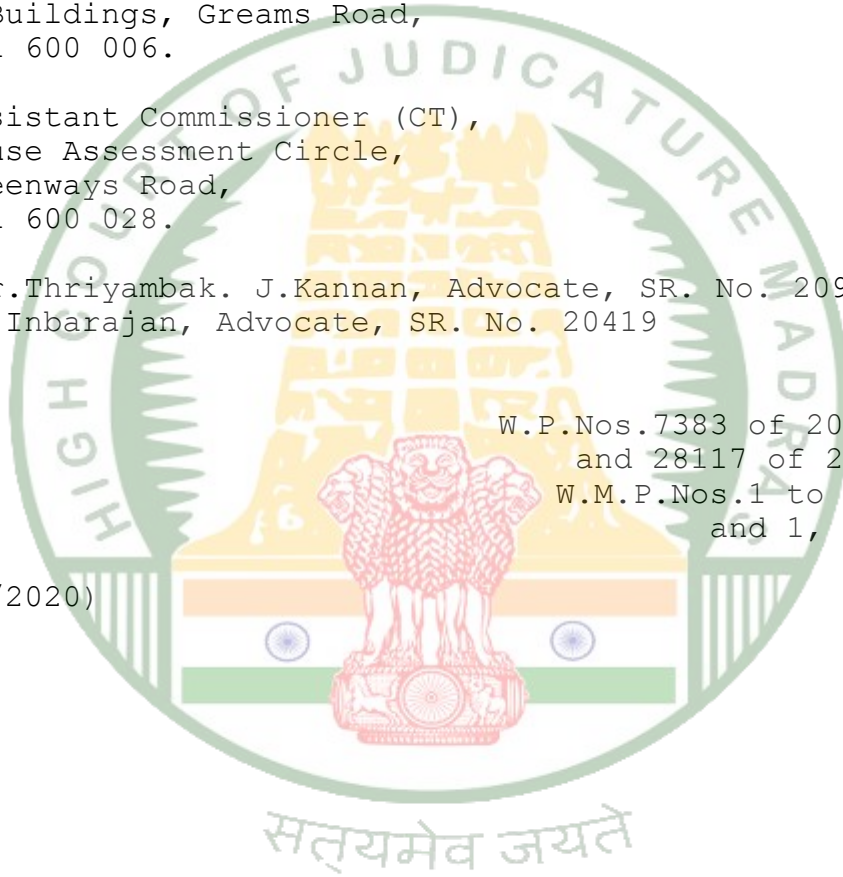
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6.The Assistant Commissioner (CT),
Ice House Assessment Circle,
46, Greenways Road,
Chennai 600 028.

+1cc to Mr.Thriyambak. J.Kannan, Advocate, SR. No. 20989
+1cc to N.Inbarajan, Advocate, SR. No. 20419

W.P.Nos.7383 of 2012, 27868
and 28117 of 2014 and
W.M.P.Nos.1 to 3 of 2012
and 1, 1 of 2014

PP(CO)
RMP(17/07/2020)



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