

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 02.02.2021

CORAM

THE HON'BLE MR.JUSTICE C.SARAVANAN

W.P.Nos.14601 & 14602 of 2015

and

M.P.Nos.2 & 2 of 2015

(Through Video Conferencing)

M/s. United Freight Carriers Pvt. Ltd.,
rep. by its Manager,
No.6/49, Pallava Nagar,
Ranipet (SIPCOT) ... Petitioner
in both W.Ps.

Vs.

1.The State of Tamil Nadu,
Rep. by its Secretary,
Commercial Taxes Department,
Fort St. George, Chennai.

2.The Appellate Deputy Commissioner (CT),
Vellore.

3.The Assistant Commissioner (CT),
Ranipet (SIPCOT) Assessment Circle,
Ranipet.

4.The Union of India,
rep. by its Secretary,
Ministry of Finance,
North Block, New Delhi.

5.The Commissioner of Service Tax,
Service Tax Commissionerate,
Vizakpattinam.

6.M/s. Bharath Heavy Electricals Ltd.,
(A Government of India Undertaking)
Boiler Auxillaries Plant,
Ranipet - 632 406.

... Respondent
in both W.Ps.

Writ Petitions filed under Article 226 of the Constitution of India, to issue a Writ of Certiorari, to call for records of the impugned proceedings of the third respondent in Rc.B1/1418/2013 (2012-13) and Rc.B1/1418/2013 (2013-14) culminating in the orders dated 12.05.2014 and 16.02.2015 of the second respondent in A.P.Nos.205 & 204 of 2014 respectively and quash the same.

For Petitioner : Mr.A.Thiagarajan, Senior Counsel
for Mr.B.Raveendran in both W.Ps.

For R1 to R3 : Mr.M.Hariharan,
Additional Government Pleader in both W.Ps.

For R4 & R5 : M/s.R.Hemalatha,
Senior Standing Counsel in both W.Ps.

For R6 : Mr.Bhagavath Krishnan
for Mr.Srinath Sridevan in both W.Ps.

C O M M O N O R D E R

By this common order, both the Writ Petitions are being disposed of.

2. In these Writ Petitions, the petitioner has challenged the impugned common order dated 16.02.2015 passed by the second respondent Appellate Deputy Commissioner (CT), Vellore in A.P.Nos.204 & 205 of 2014. By the impugned orders, the respective appeals of the petitioner were dismissed by the second respondent. These appeals were filed against two separate assessment orders dated 12.05.2014 passed by the third respondent in Rc.B1/1418/2013 for the Assessment Years 2012-2013 and 2013-2014.

3. The petitioner a unregistered dealer under the provisions of the Tamil Nadu Value Added Tax Act, 2006 was issued with a notice by the third respondent Assistant Commissioner, Ranipet (SIPCOT) on 10.01.2014 for the Assessment Years 2012-2013 and 2013-2014.

4. In the notice, it is alleged that the petitioner was providing material handling object, namely, cranes to Bharath Heavy Electricals Limited (hereinafter referred to as BHEL for brevity), the sixth respondent herein, on "transfer of right to use" basis and therefore was liable to pay tax under Section 4 of the Tamil Nadu Value Added Tax Act, 2006. The petitioner replied to the same vide reply dated 23.01.2014. The petitioner

also enclosed the copies of the agreements signed with the sixth respondent BHEL. The said notice was culminated in two different assessment orders both dated 12.05.2014 of the third respondent for the Assessment Years 2012-2013 and 2013-2014 respectively.

5. These assessment orders were challenged before the second respondent Appellate Deputy Commissioner (CT), Vellore in A.P.Nos.204 and 205 of 2014. The second respondent Appellate Deputy Commissioner (CT) has upheld the demand confirming the assessment orders passed by the third respondent vide impugned common order dated 16.02.2015.

6. Assailing the impugned common orders, the learned counsel for the petitioner submits that the agreement dated 08.12.2011 signed between the petitioner and the BHEL was a contract of service for supply of tangible goods within the meaning of Section 65(105)(zzzzj) of the Finance Act, 1994 read with Section 66(E)(f) of the Finance Act, 2012. It is submitted that the issue is no longer res integra in the light of the decisions of the Hon'ble Supreme Court in State of Andhra Pradesh and Another Vs. Rashtriya Ispat Nigam Ltd., (2002) 126 STC 114 and in Aggarwal Brothers Vs. State of Haryana, (1999) 113 STC 317 (SC) : (1999) 9 SCC 182 and in Bharath Sanchar Nigam Limited and Another Vs. Union of India and Others, (2006) 145 STC 91 : (2006) 3 SCC 1.

7. The learned counsel for the petitioner submits that the issue is also covered in favour of the petitioner by the decision of the Division Bench of this Court in Aban Loyd Chiles Offshore Limited Vs. State of Tamil Nadu, (2012) 53 VST 89 (Mad). The learned counsel for the petitioner also drew my attention to the following Clauses from the agreement dated 07.12.2011 signed between the petitioner and the sixth respondent BHEL, which indicates that the sixth respondent BHEL had hired 10T Mobile Cranes numbering 11/12 on daily rental basis for material handling requirements for their factory premises. Attention was drawn to some of the Clauses from the agreement which reads as under :-

7. The working hours of operation will be from 08.00 Hrs to 16.30 Hrs, 16.30 Hrs to 01.00 A.M & 14.00 Hrs to 22.30 Hrs (Excluding Lunch Break of 30 Minutes). If necessary during exigencies, the cranes would be operated beyond the above period also on either side for which pro rata payment shall be made.

09. Crane crew, consisting of one operator and two riggers, shall be provided for each crane.

11. The crew worked in first shift shall not be engaged in the second shift.

16. However during such absence, contractor will be permitted to provide alternate crane in good working with prior permission of BHEL, in which case penalty as per the clause 15 will not be levied.

19. The contractor shall obtain pollution (exhaust emission under control) certificate from State Government authorities once in six months as per statutory norms.

22. It is the responsibility of the drivers to get filled all the columns in the trip register and got signed by the user. In case the loss of original trip register, BHEL reserves the right not to entertain the claim.

23. The drivers of the cranes should wear proper uniform and should have valid driving license during the contract period. The riggers should wear proper personal protective equipments like Hand gloves, Safety Shoes etc. for work execution without which they will not be permitted to work.

25. No crane shall be allowed to be parked inside BHEL premises after the stipulated working hours.

27. If the contractor is not able to provide the crane originally offered for a continuous period of 15 days, BHEL reserves the right to terminate the contract and to take appropriate action against the contractor, including forfeiture of security deposit.

28. Payment will be made based on the basis of actual working certified by the official in charge.

33. Service Tax registration number is to be submitted along with certificate for claiming any Service Tax from BHEL.

8. The learned counsel for the petitioner submits that there is no "transfer of right to use" as much as the effective control over the equipments lies with the petitioner and therefore, the question of levying tax on transfer of right to use under Section 4 of the Tamil Nadu Value Added Tax Act, 2006 did not arise.

9. Defending the impugned common order passed by the second respondent, the learned Additional Government Pleader appearing for the respondents drew my attention to Clause 15 of the Agreement which reads as under:-

15. During the contract period, if the contractor is not able to provide the required number of cranes on any day or part thereof, hire charges at prevalent market rate for such number of absent cranes will be recovered from the contractor. Recovery will be made at the rate of full day charges even for part of the days absence. In addition, a penalty of Rs.300/- will be deducted additionally for the absence.

10. The learned counsel further submits that similar matters have been decided by the Gauhati High Court in HSL Asia Ltd. Vs. State of Assam, (2007) 8 VST 314 and by the Andhra Pradesh High Court in ONA WAY Engg. P. Ltd. Vs. State of Andhra Pradesh, (2006) 146 STC 634 (AP).

11. He further placed reliance on the decision of the Division Bench of this Court in Tvl. M/s. Vitan Departmental Stores & Industries Limited Vs. The State of Tamil Nadu, rep. by the Joint Commissioner (CT), 2013 SCC OnLine Mad 3184 and draw my attention to the following passages:-

26. On a perusal of the above conditions, it is evidently clear that the petitioner has transferred the right to use VITAN system, the licensed right of their names, marks, systems, insignia, symbols and goodwill. The Hon'ble Supreme Court in the case of Tata Consultancy Services (supra) held that goods for the purpose of sales tax may be intangible and incorporeal. But to qualify as an actionable claim in terms of the definition contained in Section 3 of the Transfer of Property Act, it should be only a claim, and every claim is not an actionable claim but it must be a claim to a debt or to a beneficial interest in movable property and such

beneficial interest is not the movable property itself and may be existent, accruing, conditional, or contingent. The transaction done by the petitioner is not a claim nor it is a debt or a beneficial interest in the movable property but the right transferred by the petitioner is a transfer of a right in the trade mark, a trading style which are incorporeal rights and are intangible things and transfer of such incorporeal right is undoubtedly exigible to tax. Therefore, the decision of the Hon'ble Supreme Court in the case of Sunrise Associates (supra) does not lend any support to the case of the petitioner.

27. Similarly, the decision in the case of Yasha Overseas also which considered the judgment in Vikas Sales Corporation observed that the decision has not been over ruled by the decision of the Constitution Bench in Sunrise Associates and pointed out that DEPB has an intrinsic value that makes it a market commodity and therefore, DEPB like REP licence qualifies as 'goods' within the meaning of the sales tax laws and its sale is exigible to tax. We find that this decision is of no assistance to the case of the petitioner.

29. We have perused the conditions of the agreement, dated 27.09.2002 entered into by the petitioner from which we find that the petitioner has transferred their right to use their trade mark, good will, reputation exclusively to the franchisee in respect of a particular outlet and any misuse of such exclusively licensed right rendered, the franchisee open to action which meant to include the termination of agreement in terms of XIV of the said agreement. Therefore, it is a case where goods which are in the nature of intangible or incorporeal goods were available for delivery there were consensus adidem to the identity of such goods as the transferee has a legal right to use the goods and during the period when the agreement was in force, namely for a period of 10 years it was an exclusive right given to the transferee by the petitioner in respect of a particular store and consequently a transfer of right to use and not merely a licence to use the goods and during the period when the agreement was in force, the petitioner as the transferor could not transfer

such goods with particular reference to the exclusive right given in respect of a particular store to any other party. Thus, all the attributes to constitute transfer of right to use the goods have been fulfilled and therefore, we have no hesitation to hold that the tests laid down by the Hon'ble Supreme Court in BSNL's stands fully satisfied and the right given by the petitioner is undoubtedly a transfer of right to use incorporeal or intangible goods and therefore, exigible to sales-tax.

30. In S.P.S Jayam and Co., (supra), a Division Bench of this Court considered an identical question as in the case on hand. In the said decision, the assessee allowed an agency to use their trade mark and the receipts were shown in the books of accounts as royalty. In the original assessment, the turn over relating to the transaction was exempted accepting the claim that it was only royalty. Subsequently, the assessing authority took the view that the consideration was received for transfer of right to use the trade mark and hence, the same is taxable. Notice was issued to the assessee who failed to respond and the Assessing Authority proceeded on the basis that there was transfer in incorporeal goods which is taxable under the Sales Tax Act and passed orders revising the assessment. The assessee preferred appeal and the First Appellate Authority who accepted the case of the assessee and held that the reassessment was not proper. The Joint Commissioner, exercising suo motu revisional power held that transfer of trade mark is a sale of incorporeal goods for consideration and therefore, taxable under the TNGST Act. Aggrieved by such order, the assessee preferred an appeal before the State Taxation Tribunal which dismissed his appeal and the assessee filed a writ petition before this Court challenging the order of the Tribunal. It was contended before this Court that the agency was given a mere right to enjoy the trade mark for a period and the amount received was only towards royalty and hence, should have been exempted while calculating the turnover. The Revenue submitted that the transaction is a sale of incorporeal goods. The Division Bench after referring to various clauses in the agreement between the parties therein took note of the

decision of the Hon'ble Supreme Court in the cases of Rashtriya Ispat Nigam Ltd. v. Commercial Tax Officer, reported in 77 Sales Tax Cases 182; Vikas Sales Corporation v. Commissioner of Commercial Taxes, reported in 102 STC 106, Commissioner of Sales Tax v. Duke & Sons; Aggarwal Brothers v. State of Haryana, reported in 113 STC 317; 20th Century Finance Corporation Limited v. State of Maharashtra and held that the transfer was right to use and not a mere right to enjoy. It was pointed out that for transferring the right to use the trade mark, it is not necessary to hand over the trade mark to the transferee or give control or possession of the trade mark to him and it could be done merely by authorizing the transferee to use the same in the manner required by law and the right to use the trade mark could be transferred simultaneously to any number of persons. It was held that the assessee in the said case retained the liberty to use the mark in the event of the licensor started to manufacture the products equally it retained the liberty to grant licence to any other individual person or company to use the trade mark and such right being an intangible or incorporeal goods which can be merchandised by the registered owner and as pointed out by the Hon'ble Supreme Court the word 'goods' is defined in a very wide terms so as to bring in both the tangible and intangible objects and trade mark right is intangible goods which could be subject matter of transfer. The above decision would squarely apply to the case on hand. Since the petitioner has retained the liberty to use the trade mark at the same time, the transfer right to use the incorporeal right exclusively in favour of the transferee in respect of specified outlet for a definite period of time. Therefore, it is not a mere licence or transfer of mere right to enjoy but transfer of right to use intangible goods.

12. I have considered the argument advanced by the learned senior counsel for the petitioner, the learned senior standing counsel appearing for the fourth and fifth respondents, the learned Additional Government Pleader appearing for the first to third respondents and the learned counsel for the sixth respondent.

13. The facts are not in dispute. The petitioner has rendered service. It was supplying tangible goods, viz. 10T Mobile Cranes numbering 11/12 on daily rental basis. These material handling equipments were hired by the sixth respondent BHEL as per the agreement dated 07.12.2011. The terms of the agreement which has been extracted above indicate that the petitioner has not transferred the Mobile Cranes to the sixth respondent BHEL. On the other hand, the petitioner has provided its driver for operating the Cranes. It was under the supervision of the sixth respondent BHEL. The agreement further states that crew of the petitioner who worked during the first shift shall not be engaged in the second shift.

14. Under the agreement, the petitioner was merely required to supply required number of cranes for the purpose of material handling and for the purpose of loading/unloading. The facts that the lifts will be operated by the drivers of the petitioner and that the crane will not be parked inside the 6th respondent BHEL premises after the stipulated working hours make it clear that it is the petitioner who was in effective control of these material handling equipments / cranes. Further, the agreement also indicates that trip register should be maintained by the petitioner's driver and that in case the loss of original trip register, the sixth respondent BHEL should not entertain the claim of the petitioner. The agreement also stipulates that the service tax will be paid by the petitioner.

15. The fifth respondent Commissioner of Service Tax has also filed a counter affidavit, wherein, it has been reiterated that the petitioner was liable to pay service tax for the service rendered by it.

16. In *Bharath Sanchar Nigam Limited and Another Vs. Union of India and Others*, (2006) 145 STC 91 : (2006) 3 SCC 1, the Hon'ble Supreme Court has laid down the guidelines as to when there will be the "transfer of right to use". The paragraph 97 merely states the details as follows:-

- (a) there must be goods available for delivery;
- (b) there must be a consensus ad idem as to the identity of the goods;
- (c) the transferee should have a legal right to use the goods—consequently all legal consequences of such use including any permissions or licences required therefor should be available to the transferee;
- (d) for the period during which the transferee has such legal right, it has to be the exclusion to the transferor—this is the necessary concomitant of the plain language of the

statute viz. a "transfer of the right to use" and not merely a licence to use the goods;
(e) having transferred the right to use the goods during the period for which it is to be transferred, the owner cannot again transfer the same rights to others.

17. In *Rashtriya Ispat Nigam Limited Vs. Commercial Tax Officer, Company Circle, Visakhapatnam*, (1990) 77 STC 182 (AP), the the Andhra Pradesh High Court came to a conclusion that the transfer of right to use goods necessarily involves delivery of possession by the transferor to the transferee and transfer to effective control.

18. There is neither transfer of effective control nor transfer of possession over the material handling equipments / cranes in favour of the sixth respondent BHEL under the agreement. The test laid down in the decision of the Hon'ble Supreme Court as applied by the Division Bench of this Court in *Aban Loyd Chiles Offshore Limited* case referred to supra has not been satisfied to justify the demand. Therefore, there is no merits in the impugned orders passed by the second respondent. Accordingly, the impugned orders are quashed.

19. In the light the above, these Writ Petitions stand allowed with consequential relief. No cost.

Sd/-
Asst.Registrar (CS IX)

/true copy/

Sub Asst. Registrar

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To

1.The Secretary,
The State of Tamil Nadu,
Commercial Taxes Department,
Fort St. George, Chennai.

2.The Appellate Deputy Commissioner (CT),
Vellore.

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3.The Assistant Commissioner (CT),
Ranipet (SIPCOT) Assessment Circle,
Ranipet.

4.The Secretary
the Union of India
Ministry of Finance,
North Block, New Delhi.

5.The Commissioner of Service Tax,
Service Tax Commissionerate,
Vizakpattinam.

+1 cc to mr.B.Raveendran Advocate sr6167
+2 ccs to M/s.Srinath sridevan Advocate sr5597 & 5595
+2 ccs to Ms.R.Hemalatha Advocate sr5486

W.P.Nos.14601 & 14602 of 2015
and M.P.Nos.2 & 2 of 2015

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