

HIGH COURT OF TRIPURA
AGARTALA

WP(C) 565 OF 2021

M/S Maharaja Gas Agency, having its office at Airport Road,
Usha Bazar, Agartala, West Tripura,
Represented by its Proprietor, namely,
Sri Shiba Prasad Datta, son of Late Haripada Datta, resident of
Village-Battala, Ronaldsay Road, opposite to
State Co-operative Bank, PO-Agartala, PS-West Agartala,
Sub-division-Agartala, District-West Tripura, PIN-799001.

....Petitioner.

Vrs.

1. The State of Tripura, represented by the Commissioner & Secretary,
Commissionerate of Taxes & Excise, Government of Tripura,
Having his office at Secretariat Building, PO-Kunjaban, PS-New Capital
Complex, District-West Tripura, PIN-799006.
2. The Commissioner & Secretary, Commissionerate of Taxes & Excise,
Government of Tripura, having his office at Secretariat Building,
PO-Kunjaban, PS-New Capital Complex, District-West Tripura,
PIN-799006.
3. The Superintendent of State Tax, Charge-IV, Government of Tripura,
Having his office at Agartala, West Tripura.

....Respondents.

For the petitioner (s) : Mr. Somik Deb, Sr. Advocate.
Ms. N. Gupta, Advocate.

For the respondent (s) : Mr. K. De, Addl. G.A.

Argument heard and : **21.12.2022**
judgment delivered on

Whether fit for : Yes/ No
reporting

**HON'BLE THE CHIEF JUSTICE (ACTING)
HON'BLE MR.JUSTICE ARINDAM LODH**

JUDGMENT & ORDER(ORAL)

[T.Amarnath Goud, ACJ]

By filing the present writ petition, the petitioner has prayed for the following reliefs:

(i) Issue Rule, calling upon the respondents and each one of them, to show cause as to why a Writ of Certiorari and/or in the nature thereof, shall not be issued, for transmitting the records, lying with the respondents, for rendering substantive and conscionable justice to the petitioner, and for quashing/setting aside the impugned Order of Assessment dated 31.03.2021 & the impugned Demand Notices, each dated 31.03.2021 (Annexures-4 & 5 respectively supra);

(ii) Issue Rule, calling upon the respondents and each one of them, to show cause as to why a Writ of Mandamus and/or in the nature thereof, shall not be issued, mandating/commending them, to forthwith revoke/rescind the impugned Order of Assessment dated 31.03.2021 & the impugned Demand Notices, each dated 31.03.2021 (Annexures-4 & 5 respectively supra), and thereupon, relieve the petitioner from taxable liability;

(iii) Issue Rule, calling upon the respondents and each one of them, to show cause as to why a Writ of Prohibition and/or in the nature thereof, shall not be issued, for restraining/prohibiting the respondents, from acting in any manner, in furtherance of the impugned Order of Assessment dated 31.03.2021 & the impugned Demand Notices, each dated 31.03.2021 (Annexures-4 & 5 respectively supra);

(iv) In the Ad-interim, and thereafter, on hearing the parties, in the Interim, an Order, in terms of Prayer (iii) supra;

(v) Call for the records, appertaining to this writ petition;

(vi) After hearing the parties, be pleased to make the Rule absolute in terms of (i) to (ii) above;

(vii) Costs of and incidental to this proceeding;

(viii) Any other Relief(s) as to this Hon'ble High Court may deem fit and proper;

2. Brief facts of the case are that the petitioner is carrying the business of distribution of Liquid Petroleum Gas (LPG, for short) as well as transportation of LPG and LPG cylinders. On participation in a tender, invited by the Indian Oil Corporation Limited (IOCL, for short), he was successful in the bid for grant of licenses for transportation of LPG and LPG cylinders for various destinations. The IOCL had issued three separate work orders for transportation of LPG and LPG cylinders for different places in the following manner:-

(i) Work order dated 29.05.2015 from Haldia Plant, situated at West Bengal to North Guwahati Bottling Plant, situated at Assam.

(ii) Work order dated 08.06.2015 from North Guwahati Plant, Noonmati Plant & Sarpara Plant, Assam to Bishalgarh Bottling Plant, Bishalgarh, Tripura.

(iii) Work order dated 18.04.2016 from Bishalgarh Bottling Plant Tripura to various distribution points situated at Tripura.

The petitioner and the authorised representative of IOCL had entered into an agreement in respect of execution of those work orders and the same were executed at Guwahati, Assam. Accordingly, under that agreement/contract, the petitioner started to transport the LPG and LPG cylinders on requisition placed by the receiving destinations of the IOCL.

But, during the process of execution of those work orders, the Superintendent of State Tax, Charge-IV, Government of Tripura, the respondent no.3, herein, initiated an assessment proceeding, under Section 31 of the Tripura Value Added Tax Act,2004, (TVAT Act, for short) against the petitioner and passed an Order of Assessment dated 31.03.2021 levying with a liability to pay tax of Rs.6,79,666/- and Rs.7,70,059.12/- to the petitioner for the Assessment Years 2015-2016 & 2016-2017 respectively; and in furtherance thereof, the respondent No.3 had also issued two demand notices, dated 31.03.2021, for payment of the aforesaid amounts as value added tax, interest and penalty.

The petitioner by filing the instant writ petition has prayed for setting aside/quashing the aforesaid Order of Assessment dated 31.03.2021 and also the two demand notices dated 31.03.2021.

3. Heard Mr. Somik Deb, learned senior counsel assisted by Ms. N. Gupta, learned counsel appearing for the petitioner as well as Mr. K. De, learned Addl. G.A. appearing for the State-respondents.

4. Mr. Somik Deb, learned senior counsel at the outset submits that the respective Work Orders as well as the agreement would reveal that there was 'no transfer of right to use goods' by the petitioner as in case of a written contract, constituting a transfer of used goods, the *situs* of sale would be the place where the property in goods passes, i.e. where the written agreement, transferring the right to use is executed. Mr. Deb,

learned Sr. counsel also contends that in the instant case, the written agreements were executed in Guwahati, Assam, and therefore, the *situs* of the sale would be at Guwahati, Assam and hence, the taxing authorities in Tripura would have no jurisdiction whatsoever, to levy any tax, in connection with such agreement.

4.1 Mr. Deb, learned sr. counsel in support of his submission, has placed reliance on the following case laws:

- (i) *Indian Oil Corporation Ltd. Vrs. Commissioner of Taxes, Assam & Ors., [2009] 22 VST 70 (Gauhati);*
- (ii) *Commissioner, VAT, Trade and Taxes Department Vrs. International Travel House Ltd., [(2009)] 25 VST 653 (Delhi);*
- (iii) *Commissioner of Sales Tax, Maharashtra State, Mumbai Vrs. General Cranes, [2015] 82 VST 560 (Bom);*
- (iv) *20th Century Finance Corpn. Ltd. & Anr. Vrs. State of Maharashtra , 2000 (119) STC-182; (2000) 6 SCC 12.*

4.2 The Gauhati High Court in the case of *Indian Oil Corporation Ltd.(supra)* had an occasion to consider a similar provision under the Assam General Sales Tax Act. *In the said case, the petitioner-company, which was engaged in the business of sale and supply of petroleum products inside as well as outside the State of Assam, had hired trucks for delivery of petroleum to its dealers and in the course of its business, it entered into agreement with contractors as regards hiring of trucks/tankers. Notice was issued to the petitioner directing to deduct tax under section 27(a) of the Assam General Sales Tax Act on payment of hire charges to the contractors who were owners of the vehicles hired by the*

petitioner-company. The petitioner was also issued subsequent communication and also show cause notice. The petitioner approached the Assam High Court challenging the jurisdiction to issue notice. The petition was resisted on the ground that act of hiring vehicles by the petitioner-company amounted to transfer of the right to constitute the lease and, therefore, not eligible to tax under the Act. It was contended that the transfer of right to use the vehicle constitute "sale" within the definition of the ambit of "sale" as embodied in section 2(33) of the Assam Act. After considering the various judgments of the Apex Court, the Division Bench observed that:

"It is, therefore, clear that in order to constitute a transfer of right to use goods, there must be parting with the possession of the goods for the limited period of its use in favour of the lessee by the lessor. The effective control of the goods must not remain with the owner, but must stand transferred to the lessee for the use by the latter at his will and it is this transfer of the effective control of the goods, which attracts sales tax."

4.3 In the case of **Commissioner, VAT, Trade and Taxes Department (supra)**, a Division Bench of Delhi High Court held that-

"8. We take up firstly the second contention of the parties viz. whether the transaction in question is one of services or of sale of goods. Further, if the transaction in question contains both the components of a sale of goods and services also, whether such a transaction can only be taxed as a service or can also be taxed as a sale of goods. The related aspect which will also come in, is, if the contract is not severable as per the intention of the parties because separate values have not been fixed for the purposes of sale of goods and for sale of services; whether such a non-severable contract can be split up for taxing the sale of goods or even if it is not split up can the whole value of the contract be taken as the value of the sale of goods."

4.4 In the aforesaid judgment, the Division Bench also at Para 9

(ii) held that-

“9.(ii) Except the specific contracts so provided under Article 366(29-A) no other contracts can be artificially severed to tax the sale element with respect to goods as comprised in such composite contracts. Therefore, where the contracts are composite contracts, including therein both aspects of sale of goods and services, such contracts which are other than those specified in Article 366(29-A) (b) and (f), then such other contracts not falling within such sub-clauses of Article 366(29-A) cannot be split up taxing the sale element in the goods component thereof and which was only possible if the parties had in mind or intended that separate rights arising out of sale of goods and if there was no such intention then there is no sale of goods, even if such a contract could be disintegrated. {See paras, 91(C) in VST; Paras 44,45,88, 92(C) of SCC}.”

4.5 In the case of ***Commissioner of Sales Tax, Maharashtra State, Mumbai (supra)***, a Division Bench of Bombay High Court at Para 6 has dealt with the definition of term “dealer” and the term “sale” which are as follows:

“6. For appreciating the rival controversy, it will be necessary to refer to the definition of term 'dealer' as per Section 2(4) of the Lease Act.

"dealer" means any person who whether for commission, remuneration or otherwise transfer the right to use any goods for any purpose (whether or not for a specified period) cash, deferred payment or other valuable consideration and includes the State Government or the Central Government which so transfers the right to use goods and also society, club or Association of persons which so transfers the right to use such goods to its members.

7. The term 'Sale' is defined under section 2(10) of the Lease Act as under:

"Sale" means the transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash deferred payment or any other valuable consideration and the word 'Sell' with

all its grammatical varieties and cognate expressions shall be construed accordingly."

4.6 In the said judgment i.e. *Commissioner of Sales Tax (supra)*, at Para 12, the Bombay High Court referring to the decision in *Bharat Sanchar Nigam Ltd. Vrs. Union of India* reported in [2006] 3 VST 95(SC) has observed thus:

"12. In the judgment, it has been held that to constitute a transaction for the transfer of the right to use the goods, it is necessary that there must be a consensus ad idem as to the identity of the goods. It is further necessary that the transferee should have a legal right to use the goods, all legal consequences of such use including any permissions or licences required therefor should be available to the transferee and for the period during which the transferee has such legal right, it has to be and to the exclusion of the transferor. The Apex Court held that this is concomitant to the licence to use the goods. The another condition that has been laid down is that having transferred the right to use the goods period for which it is to be transferred, the owner cannot again transfer the same rights to others. It would thus be seen that unless all the requirements are transferred, the transaction will not come within the meaning of "Transfer of the rights to use any goods".

5. At this juncture, we may now, refer Section 4 of the Tripura Value Added Tax Act, 2004 (for short, the Act, 2004) which reads thus:

4. Tax on deemed sales. - (1) Notwithstanding anything contained elsewhere in this Act, any transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract shall be deemed to be a sale of those goods by the person making the transfer and shall liable to be taxed at the rate specified in the Schedule:

Provided that in respect of any such transfer, only so much value of the goods involved in the works contract which has actually been paid to the dealer during the period, shall be taken into account for determining the turnover for the period.

Explanation. - For the purpose of this section, "Property in goods" shall mean the aggregate of the goods for which amounts have been received or receivable by a dealer during such period as valuable

consideration, whether or not such amount has been separately shown in the works contract. The amount as received or receivable shall include the value of such goods purchased, manufactured, processed, or procured otherwise by the dealer, and the cost of freight or delivery as may be incurred by such dealer for carrying such goods to the place where these are used in execution of such works contract, but shall not include such portion of the aforesaid amounts as may be prescribed.

(2) Tax on transfer of the right to use any goods- Notwithstanding anything contained elsewhere in this Act, any transfer of the right to use any goods for any purpose (whether or not for a specified period) shall be taxable at the rate as specified in the Schedule.”

6. It is also necessary to refer the definition of the word “Dealer” and “Sale” under the Act, 2004.

Sub-section (8) of Section 2 of the Act, 2004 defines the definition of word “Dealer” which reads thus:

“(8) "Dealer" means any person who carries on the business of buying, selling, supplying for commission, remuneration or other valuable consideration, and includes-

(a) an industrial, commercial, banking, or trading undertaking whether or not of the Central Government or any of the State Governments or a local authority;

(b) an advertising concern or agency;

(c) a casual trader;

(d) a company, firm, club, association, society, trust, or cooperative society, whether incorporated or un-incorporated, which carries on such business;

(e) a commission agent, a broker, a del credere agent, any auctioneer or any other mercantile agent by whatever name called, who carries on the business of buying, selling, supplying or distributing goods on behalf of any principal;

(f) an agent of a non-resident dealer or a local branch of a firm or company or association situated outside the State;

(g) a person who sells goods produced by him by manufacture or agriculture or otherwise;

(h) a person engaged in the business of transfer otherwise than in pursuance of a contract of property in any goods or cash, deferred payment or other valuable consideration;

- (i) a person engaged in the business of transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract;*
- (j) a person engaged in the business of delivery of goods on hire purchase or any other system of payment by instalments;*
- (k) a person engaged in the business of transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or commission or remuneration or any other valuable consideration;*
- (l) a department of the Central Government or any State Government or a Local Authority by name of any Panchayat, Municipality, Development Authority, Cantonment Board or any autonomous or statutory body including a Port Trust and the like, which, whether or not in the course of business, buys, sells, supplies or distributes goods, directly or otherwise, for cash, or for deferred payment, or for commission, remuneration, or other valuable consideration;*
- (m) a Hindu Undivided Family or any other system of joint family which carries on business.”*

7. Sub-section (25) of Section 2 defines the word “Sale” which reads thus-

“(25) [(i)] "Sale" with all its grammatical variations and cognate expressions means every transfer of the property in goods (other than by way of a mortgage, hypothecation, charge or pledge) by one person to another in the course of trade or business for cash or for deferred payment or other valuable consideration, and includes -

- a) transfer otherwise than in pursuance of a contract of property in any goods for cash, deferred payment or other valuable consideration;*
- b) transfer of property in goods (whether as goods or in some other form) involved in execution of a works contract;*
- c) delivery of any goods on hire purchase or any other system of payment by instalments;*
- d) 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;*

and such transfer, delivery or supply of any goods shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply and purchase of those goods by the person to whom such transfer, delivery or supply is made, but does not include a mortgage, hypothecation, charge or pledge.”

8. On behalf of the respondents, it is the assertion of Mr. K. De, learned Addl. G.A. that from the terms and conditions of the agreement entered into by and between the petitioner and the authorized representative of IOCL, the IOCL has the overall control over the vehicle carrying LPG GAS and LPG cylinder, though the driver and crew members are provided by the petitioner/dealer. Hence, the State of Tripura has jurisdiction to levy tax, in connection with such agreements. In support of his submission, learned Addl. G.A. has placed reliance upon a decision of the Gauhati High Court in *Dipak Nath Vrs. Oil & Natural Gas Corporation Ltd. & Ors.*, reported in (2010) 2 GLR 496.

9. After hearing learned Mr. K. De, learned Addl. G.A. appearing for the respondents herein, we are not inclined to appreciate his submission and the judgment cited by him as the said judgment is in clear distinction with the facts of the present case.

10. This court finds force in the argument of Mr. Deb, learned senior counsel on the point that respondents have no jurisdiction and there is no transfer/sale and further the situs of sale. The judgments cited above are relevant to the facts of the case and they are settled on the issue which has fallen to the consideration of this court. This court is of the considered opinion that the owner of the cylinder is IOCL. The transport/supply does not fall within the ambit of transfer of goods as defined in "sale". Further,

when transaction has taken place in Assam, the respondent authorities cannot have any jurisdiction over Interstate.

11. Having considered the facts and circumstances of the case and the rival submissions of learned counsels appearing for the parties, we are of the considered view that the impugned Assessment Order dated 31.03.2021 and consequently, the two demand notices dated 31.03.2021 issued by the respondent no.3 are liable to be set aside and quashed on the point of jurisdiction and also with regard to the right to sale of goods and further with regard to the place of execution of the contract since the situs of the sale which has been executed at Guwahati, the State of Tripura has no jurisdiction in so far as levying of tax by the respondents upon the petitioner.

12. Accordingly, the impugned Assessment Order dated 31.03.2021 and the demand notices dated 31.03.2021 are hereby set aside and quashed.

13. The instant writ petition, accordingly, stands allowed and disposed.

JUDGE

CHIEF JUSTICE (ACTING)