
(2023) 08 BOM CK 0003

In the Bombay High Court

Case No : Maharashtra Value Added Tax Appeal No.8, 9, 11, 12, 13, 29, 30, 31
Of 2015, 15 Of 2016

Aurobindo Highway Services And Others

APPELLANT

Vs

State Of Maharashtra

RESPONDENT

Date of Decision : 01-08-2023

Acts Referred:

Maharashtra Value Added Tax Act, 2002 — Section 2(8), 2(12), 2(24), 2(24)(iv), 3, 6, 27

Assam General Sales Tax Act, 1993 — Section 2(33), 27(a)

Citation : (2023) 08 BOM CK 0003

Hon'ble Judges : K. R. Shriram, J; Firdosh P. Pooniwalla, J

Bench : Division Bench

Advocate : ??C.B. Thakar, V.A. Sonpal, Himanshu Takke, Uma Palsuledesai

Final Decision : Allowed/Disposed Of

Judgement

K.R. Shriram, J

1 These appeals filed under Section 27 of the Maharashtra Value Added Tax Act, 2002 (hereinafter referred to as "MVAT Act") impugn orders passed by the Maharashtra Sales Tax Tribunal (hereinafter referred to as "the Tribunal") by which appellants were held liable to pay MVAT. Each appellant received various demands.

For convenience, we are taking the facts in MVAT Appeal No.8 of 2015.

2 Appellant in MVAT Appeal No.8 of 2015, Aurobindo Highway Services (hereinafter referred to as "AHS"), is a sole proprietary business of one Jirankalgi. AHS runs a petrol pump and also owns tank trucks (hereinafter referred to as "Tankers"). The tankers were registered with the Regional Transport Authority (RTO) in the name of appellant. AHS also holds Goods Carriage Permit under the Motor Vehicles Act. AHS renders services to oil companies like Hindustan Petroleum Corporation Limited (hereinafter referred to

as "HPCL") by giving on hire these tankers. AHS has filed four appeals being MVXA/8/2015, MVXA/12/2015, MVXA/29/2015 and MVXA/15/2015 pertaining to Financial Year 2006-2007, 2008-2009, 2005-2006 and 2007-2008, respectively. MVXA/15/2015 filed by AHS is not listed but by consent is also taken up for final hearing. Facts are identical in as much as issue is the same and agreement was with HPCL on same terms and conditions. Also, common questions of law has been framed in MVXA/8/2015, MVXA/9/2015, MVXA/11/2015, MVXA/12/2015 and MVXA/13/2015.

3 HPCL had issued a notice inviting tender for transportation of bulk petroleum products (white oil) by road Ex Pakni Depot – Tender No.WZ/IND/MH/POL/BULK/2005-08. AHS had submitted a bid and by a work order dated 5th May 2006, AHS was awarded the contract for transportation of bulk petroleum products by road Ex Pakni Depot from the point at Pakni. The contract was from 1st September 2005 for a period of two years with a provision to extend by one more year as per the terms and conditions of the agreement at the sole discretion of HPCL. The rates applicable were (a) local delivery within 39 kms Return to Depot (hereinafter referred to as "RTD") Rs.90.77 per KL per KM, (b) outstation delivery beyond 39 kms RTD within State Rs.116.98 paise per KL per KM, (c) delivery to adjoining States Rs.116.98 paise per KL per KM and (d) delivery to other than adjoining States Rs.118.98 paise per KL per KM. Escalation on account of increase in retail price of high speed diesel (hereinafter referred to as "HSD") was also provided for. AHS was to provide and allot three tankers and also furnish security deposit of Rs.1 lakh per tanker subject to a maximum of Rs.5 lakhs. This was furnished. AHS was told to sign a contract on accepting the work order. AHS accepted the work order and signed an agreement dated 26th June 2006 with HPCL.

4 In all the appeals heard today it was this agreement dated 26th June 2006 and work order dated 5th May 2006, which were under consideration, though appellants in some appeals are different. Respondent has not raised any grievance and, therefore, we accept the statement of Mr. Thakar that all agreements and work orders for hire of tankers are identically worded and were with HPCL. It so appears even from the substantial questions of law framed as later reproduced.

5 AHS was assessed for the year 2006-2007 under the MVAT Act by the Sales Tax Officer, Refund Audit, Solapur (hereinafter referred to "STO"). The STO raised an issue that the receipts (revenue earned) towards oil transportation by use of tankers owned by appellant are towards "Transfer of Right to use goods" and hence, they are receipts from "Sale" under the MVAT Act. AHS replied denying that there was any transfer of right to use goods. AHS stated that there was no delivery of tankers nor possession has been parted with and the effective control was still with AHS. It was clarified that the receipts were towards transport services and not towards sale by way of transfer of right to use goods. In addition, it was also submitted that AHS was not a "dealer" in view of Exception

III in the definition of dealer in Section 2(8) of the MVAT Act because Exception III provides that a transporter holding permit for transport vehicles (including cranes) granted under the Motor Vehicles Act, 1988 which are used or adopted to be used for hire or reward shall not be deemed to be a dealer in respect of sale or purchase of such transport vehicles or parts, components or accessories thereof. AHS's submissions were rejected and the STO levied tax on the receipts.

6 Being aggrieved, AHS preferred an appeal before the Deputy Commissioner of Sales Tax, Solapur. The appeal was dismissed against which AHS preferred an appeal before the Maharashtra Sales Tax Tribunal at Mumbai (Tribunal). Four appeals were filed by AHS for Financial Year 2005-2006, 2006-2007, 2007-2008 and 2008-2009. The appeals of AHS were dismissed by the Tribunal vide Order dated 9th February 2015. The Tribunal confirmed the action of the STO and the First Appellate Authority. It is against this order of the Tribunal passed on 9th February 2015 the present appeal(s) have been filed. All other appeals were also dismissed based on this impugned order dated 9th February 2015.

7 On 25th August 2015 the following appeals were admitted and substantial questions of law were framed :

MAHARASHTRA VALUE ADDED TAX APPEAL NO.8 OF 2015

IN

VAT SECOND APPEAL NO.165 OF 2013

M/s Aurobindo Highway Services ... Appellant

v/s

The State of Maharashtra ... Respondent

WITH

MAHARASHTRA VALUE ADDED TAX APPEAL NO.9 OF 2015

IN

VAT SECOND APPEAL NO.152 OF 2013

Vaishnavi Highway Services ... Appellant

v/s

The State of Maharashtra ... Respondent

WITH

MAHARASHTRA VALUE ADDED TAX APPEAL NO.11 OF 2015

IN

VAT SECOND APPEAL NO.228 OF 2013

S.N. Bavi Highway Services ... Appellant

v/s

The State of Maharashtra ... Respondent

WITH

MAHARASHTRA VALUE ADDED TAX APPEAL NO.12 OF 2015

IN

VAT SECOND APPEAL NO.167 OF 2013

Aurobindo Highway Services ... Appellant

v/s

The State of Maharashtra ... Respondent

WITH

MAHARASHTRA VALUE ADDED TAX APPEAL NO.13 OF 2015

IN

VAT SECOND APPEAL NO.652 OF 2013

Bhagwat and Brothers ... Appellant

v/s

The State of Maharashtra ... Respondent

SUBSTANTIAL QUESTIONS OF LAW

1) On the facts and circumstances of the case whether Hon'ble Tribunal is justified in holding that the transportation job with the use of tank trucks as per agreement with HPCL dated 26.6.2006, amounts to transfer of right to use goods and hence covered by definition of 'sale' under MVAT Act 2002?

2) On the facts and circumstances of the case, when the Hon'ble Tribunal has held the transaction of use of tank trucks in the transportation job as sale by transfer of right to use goods whether Tribunal is justified in holding that Exception III to definition of 'dealer' in section 2(8) of the MVAT Act is not applicable to the appellant in respect of such transaction?

8 Section 3 of the MVAT Act provides for incidence of tax and it reads as under :

3. Incidence of Tax

(1) Every dealer who, immediately before the appointed day, holds a valid or effective certificate of registration or licence under any of the earlier laws or, who is liable to pay tax under any of the earlier laws, in the year ending immediately before the appointed day shall, if his turnover of sales or purchases has, in the

said year under any of such earlier laws, exceeded rupees [five lakh], or, as the case may be, who was an importer in the said year [and his turnover of sales or purchases the said year had] exceeded rupees one lakh, be liable to pay tax, with effect from the appointed day, in accordance with the provisions of the Act, till his certificate or licence is duly cancelled under this Act.

Explanation - For the purposes of this sub-section, the expressions "turnover of sales", "turnover of purchases" and "importer" shall have the respective meanings assigned to them under the relevant earlier laws.

(2) A dealer to whom sub-section (1) does not apply and whose [turnover either of all sales or, as the case may be, purchases] made, during the year commencing on the appointed day or any year subsequent thereto, first exceeds the relevant limit, specified in sub-section (4), shall, until such liability ceases under sub-section (3), be liable to pay tax under this Act with effect from the 1st day of April of the said respective year :

Provided that, a dealer shall not be liable to pay tax in respect of [such sales and purchases] as take place during the period commencing on the 1st day of April of the said respective year upto the time when his [turnover of sales or turnover of purchases], as computed from the 1st day of April of the said respective year, does not exceed the relevant limit applicable to him under sub-section (4).

(3) Every dealer who has become liable to pay tax under this Act, shall continue to be so liable until his registration is duly cancelled; and upon such cancellation his liability to pay tax, other than tax already levied or leviable, shall remain ceased until his [turnover of sales or turnover of purchases] again first exceeds the relevant limit specified in sub-section (4) or, as the case may be, until he becomes liable to pay tax under [sub-section] (8) or (9).

(4) For the purposes of this section, the limits of [turnover] shall be as follows :

(a) Limit of [turnover] Rs.1,00,000.

in the case of a dealer, who is an importer, and the value of taxable goods sold or purchased by him during the year is not less than Rs.10,000.

(b) [Limit of turnover Rs.[10,00,000] -

in any other case, where the value of taxable goods sold or purchased by him during the year is not less than Rs.10,000.

(5) For the purpose of calculating the limit of [turnover of sales] for liability to tax -

[(a) except as otherwise expressly provided, the turnover of all sales shall be taken, whether such sales are of taxable goods or not];

(b) the [turnover of sales] shall include all sales made by the dealer on his own account, and also on behalf of his principals whether disclosed or not;

(c) in the case of an auctioneer, in addition to the [turnover of sales], if any, referred to in clauses (a) and (b), the [turnover of sales] shall also include the price of the goods auctioned by him for his principal, whether the offer of the intending purchaser is accepted by him or by the principal or a nominee of the principal, if the price of such goods is received by him on behalf of his principal;

(d) in the case of an agent of a non-resident dealer, in addition to the [turnover of sales], if any, referred to in clause (a), (b) or (c), the [turnover of sales] shall also include the sales of the non-resident dealer effected in the State.

[(5A) For the purpose of calculating the limit of turnover of purchases for liability to tax, the turnover of purchases of the goods that are liable to purchase tax as specified in sections 6A and 6B shall be considered. The provisions of sub-section (5) in respect of sales shall apply mutatis mutandis.]

(6) Notwithstanding anything contained in any contract or any law for the time being in force, but subject to the provisions of this Act, any person covered by [sub-clause (a), (b) or (c)] of clause (8) of section 2 shall be liable to pay tax under this Act, whether or not the principal is a dealer and whether or not such principal is liable to pay tax under this Act and whether or not the principals are disclosed

(7) [xxxxxxxxxxxxx]

(8) Where a dealer liable to pay tax under this Act is succeeded in the business by any person in the manner described in clause

(a) of sub-section (1) or sub-section (4) of section 44, then such person shall, notwithstanding anything contained in this section, be liable to pay tax on the sales or purchases of goods effected by him on and after the date of such succession and accordingly nothing contained in the proviso to sub-section (2) shall apply to him in any year.

(9) Any person who is not liable to pay tax under the foregoing provisions of this section but has been voluntarily registered under the provisions of this Act shall be liable to pay tax from the date of effect of the certificate of registration duly granted to him and accordingly nothing contained in the proviso to sub-section (2) shall apply to him in any year.

Section 6 of the MVAT Act provides for levy of sales tax on the goods specified in the schedules and it reads as under :

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 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.

We were informed by the counsel that the subject matter of this appeal would be covered by Schedule E, the residual provision which provides for the rate of tax and the date of it coming into effect for goods not covered elsewhere for any of the other Schedules.

Sub-section (8) of Section 2 defines "dealer", sub-section (12) of Section 2 defines "goods", sub-section (24) of Section 2 defines "sale" and the same read as under :

Section 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 or a 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 or 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 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.

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Section 2(12) "goods means every kind of movable property not being newspapers, actionable claims, money, stocks, shares, securities or lottery tickets and includes livestock, growing crop, grass and trees and plants including the produce thereof including property in such goods attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale.

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Section 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 purposes 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 installments;

(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;

(vii) xxxxxxxxxxxxxx

9 It is respondent's case that there has been a sale within the meaning of Section 2(24) of the MVAT Act because there has been a sale of goods within the State and the Explanation (iv) below sub-section 24 of Section 2 provides 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. It is respondent's case that there has been a deemed sale by transfer of right to use the tankers by appellant to HPCL and, therefore, there was a sale of goods and the sales tax on the turnover of sale as per the Schedule E is attracted.

10 It is settled law that the answers to the substantial questions framed would depend essentially on the facts and circumstances of each case.

11 The deemed sale of transfer of right to use any goods for any purpose came up for consideration before the Apex Court in the case of Bharat Sanchar Nigam Ltd. and Anr. V/s. Union of India and Ors. (2006) 145 STC 91 (SC) In the said judgment, the Apex Court has, in paragraph 76, considered the judgment of State of Andhra Pradesh V/s. Rashtriya Ispat Nigam Limited 2 (2002) 3 SCC 314 and it reads as under :

76. In State of Andhra Pradesh vs. Rashtriya Ispat Nigam Ltd. (2002) 3 SCC 314, it was claimed by the sales tax authorities that the transaction by which the owner of certain machinery had made them available to the contractors was a sale. The Court rejected the submission saying that :

.... the transaction did not involve transfer of right to use the machinery in favour of contractors The effective control of the machinery even while the machinery was in use of the contractor was that of the respondent-company, the contractor was not free to make use of the machinery for the works other than the project work of the respondent..

12 In Bharat Sanchar Nigam Ltd. (Supra), the Apex Court, after considering various judgments, laid down as to what would constitute a transaction to come within the ambit of the transfer of the right to use the goods. Paragraph 98 thereof reads as under :

98. To constitute a transaction for the transfer of the right to use the goods, the transaction must have the following attributes :

- (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 to 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.

13 Therefore, the Apex Court 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, the transferee should have a legal right to use the goods and consequently 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 to the exclusion of the transferor. The Apex Court held that 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. Another condition was that 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. Thus, it could be seen that unless all these ingredients are available, the transaction will not come within the meaning of “transfer of the rights to use any goods”.

14 The Gauhati High Court in the case of Indian Oil Corporation Ltd. V/s. Commissioner of Taxes, Assam & Ors. (2009) 22 VST 70 (Gauhati) considered a similar provision under the Assam General Sales Tax Act. In the said case, petitioner IOCL, 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 entered into agreement with contractors as regards hiring of trucks/tankers. Notice was issued to IOCL 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 IOCL. IOCL was also issued subsequent communication and also show cause notice. IOCL approached the Assam High Court challenging the jurisdiction to issue notice. The State resisted the petition on the ground that act of hiring vehicles by IOCL amounted to transfer of the right to use the vehicles and, therefore, exigible 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 and, therefore, assessable to sales tax under the Act. After considering various judgments of the Apex Court, the Division Bench observed in paragraph 28 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.

After taking into consideration the various clauses of contract entered between the assessee and the owners of the vehicles, the Division Bench held that there was no transfer of right to use to make it taxable under the Act. The Court, therefore, found that show cause notice issued was without jurisdiction and as such, allowed the petition, setting aside the show cause notice.

15 This subject/issue also came up for consideration in the case of Commissioner, VAT, Trade and Taxes Department V/s. International Travel House Ltd. (2009) 25 VST 653 (Delhi) where Delhi High Court has considered as to whether the contract between respondent/assessee and M/s. NDPL for hiring of Maruti Omni cabs amounted to transfer of right to use any goods so as to come within the definition of “Sale” as provided under the Delhi Value Added Tax Act, 2004. After considering the terms and conditions of contract and considering the judgment of the Apex Court in the case of Bharat Sanchar Nigam Ltd. (Supra) the Hon'ble Court has observed thus :

12. That takes us to the question that whether the contract in question is at all a contract of sale of goods as envisaged in Article 366(29-A)(d) inasmuch as there is transfer of the right to use for whatever period by S.T. Appeal No. 10/2009 Page 14 the respondent to NDPL. In order to determine whether there is a transfer of the right to use goods so as to make contracts one of sale under Article 366(29-A)(d) on the point of law both the parties are unanimous that the test is of effective control and possession with respect to the goods. In this behalf, both the parties have relied upon the tests of sale as specified by Dr. A.R. Lakshmanan, J. Appearing in paragraph 97 of the BSNL's case which reads as under :

97. To constitute a transaction for the transfer of the right to use the goods, the transaction must have the following attributes :

- (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 therefore 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."

Sub-paras (b) and (c) of para 97 are important with reference to the facts of the case to determine as to whether or not there is a sale by virtue of transfer of right to use goods as envisaged in Article 366(29-A)(d). The S.T. Appeal No. 10/2009 Page 15 admitted position which emerges is that the transferee, namely NDPL, has not been made available the legal consequence of the legal right to use the goods viz. the permissions and licences with respect to the goods. In the present case, the permissions and licences with respect to the Cabs are not available to the transferee and remained in control and possession of the respondent. It is the Driver of the vehicle who keeps in his custody and control the permissions and licences with respect to the Maruti Omni Cabs or the said permissions and licences remained in possession of the respondent.

These are never transferred to M/s. NDPL. It, therefore, cannot be said that there is a sale of goods by transfer of right to use goods inasmuch a necessary ingredient of the sale being the transfer of right to use the goods is absent, namely, ingredient as stated in para 97(c) of the BSNL's case. The judgments which were cited during the course of arguments, namely, State of A.P. v. Rashtriya Ispat Nigam Ltd., (2002) 3 SCC 314 and Aggarwal Bros. V. State of Haryana, (1999) 9 SCC 182 have been duly explained by the Supreme Court in

BSNL's case. The crucial factor in this regard differentiating the two cases was the intention to transfer the right to use. Whereas in the case of Rashtriya Ispat Nigam Ltd., there was no intention to transfer the right to use, in the case of Aggarwal Bros. it was found that there was an intention to transfer the right to use. In the present case, the judgment of Aggarwal Bros. does S.T. Appeal No. 10/2009 Page 16 not help the appellant inasmuch as there is no intention to transfer the right to use the goods because the licences and permissions with respect to the goods, namely, the Maruti Omni Cabs remained always in the effective control and possession of the respondent and not NDPL.

It can thus be seen that in the said judgment, the Court took a view that since the permissions and licences with respect to the cabs are not available to the transferee and the cabs remained in control and possession of respondent/ assessee, there was no element of transfer of right to use the goods.

The Bombay High Court also considered this issue in The Commissioner of Sales Tax V/s. M/s. General Cranes Judgment dated 21.4.2015 in STR No.5 of 2009 in RA No.72 of 2005 (unreported).

16 Mr. Thakar submitted that the effective control and possession of the tankers was with AHS. The tankers were registered with RTO in the name of AHS, the permits and licenses including license to carry hazardous goods were in the name of AHS, the cost of running of tankers like salary of crew, taxes, fuel, repair etc. were responsibility of AHS, risk of carriage was on AHS, parking was at AHS's risk, no minimum billing was guaranteed, AHS had to give security deposit of Rs.1 lakh per tanker, HPCL could not sub-let and most importantly the intention to transfer the right to use was absent. Mr. Thakar said AHS only provided the services of the tanker with driver and cleaner for hire to HPCL.

17 Mr. Sonpal submitted that :

- (a) the goods provided to lessee must be in control of use by the lessee;
- (b) delivery is not a condition precedent to treat a transaction as transfer of right to use goods;
- (c) it is immaterial if the employees of the lessor are paid salaries by the lessor or the lessor pays for fuel for operating equipment or the lessor pays for getting the maintenance work done and it is immaterial if the lessor assumes physical possession of goods during the period of contract;
- (d) there can be no issue on the legal proposition as laid down by the three judgments mentioned above but the key to the matter is effective control as held in Rashtriya Ispat Nigam Limited (Supra). The effective control of the tankers was with HPCL and the owner was not free to make use of the tankers for the works other than the project work of respondent or for his own use. That would mean there was a deemed sale;
- (e) Bramhaputra Vally Construction and Suppliers V/s. ONGC, (2012) 53 VST 401

is clear on the proposition that where a party has effective control and dominion over the goods during the subsistence of the contract, though the physical possession may be with the owner, there will be a deemed transfer of right;

(f) In *Waltor Buthello of Mumbai V/s. The Commissioner of Sales Tax* Unreported judgment dated 7.2.2017 in MVA No.33 of 2016, where the facts were similar, the Bombay High Court had held that there was an effective transfer. Even in the case of *Waltor Buthello of Mumbai (Supra)*, the driver with uniform was to be provided by the lessor at his cost, the wages had to be paid by the lessor, the fuel and maintenance was to be provided by the lessor and the damages were to be borne by the lessor. The driver was obliged to follow instructions of the authorities of PMT (lessee). The agreement also provided that in no circumstances a hired bus will be diverted by contractor for personal use or gain of any other business and the lessor has to ply on the routes exclusively determined by the PMT. Still the Court held that the buses were deemed to be in effective control of PMT and hence, there was a deemed sale;

(g) *Twentieth Century Finance Corporation Limited and Anr. V/s. State of Maharashtra*(2000) 6 SCC 12 says handing over of physical possession is not required to decide transfer of right to use;

(h) In the case of *Deepak Nath V/s. ONGC* (2010) 31 VST 337 (Gauhati) , the Court concluded that the mere fact that after the operation of the crane is over on any given day the crane may come back to the owner/contractor will hardly be material to decide as to who has dominion over the crane. Temporary physical possession of the contractor, the Court held, would be hardly relevant;

(i) *G.S. Lamba and Sons V/s. State of Andhra Pradesh*(2011) 43 VST (AP) says to determine the nature of the transaction one has to consider the agreement and having considered the agreement between appellant and HPCL, there can be no doubt that there was a transfer of right to use;

(j) The following facts emerge from the agreement between appellant and HPCL :

(i) The tankers are identified by registration number and are attached to particular loading location.

(ii) Tankers are in exclusive use of Company for transportation of petroleum products to customers and other loading stations.

(iii) AHS is not entitled to use the tank truck contracted by oil company for any other product and would operate only for the oil company with whom the agreement is entered into.

(iv) AHS cannot assign the rights under the contract, title and interest in tankers during the period of agreement.

(v) The tankers are available to oil company at its call at all the times during the period of agreement.

(vi) The oil company has full authority to change the base loading location, resitment, as per oil company's own operational convenience/requirement for delivery of petroleum products.

(vii) Crew is under control of oil company as they have to follow the route approved by oil company and obey the instructions of delivery and collect cheques and return the documents to Company.

(k) The clauses in the agreement reveal that oil company is in exclusive possession and use of the tankers to transport its petroleum products and have full control over the tankers and crew for transportation and delivery of petroleum products to customers/other locations. The agreement in clear terms provides for transfer of right to use the trucks for transportation of petroleum products of oil company.

18 Let us examine what does the agreement dated 26th June 2006 and the work order/LOI dated 5th May 2006 between appellant and HPCL say. The agreement dated 26th June 2006 reads as under :

This agreement made 26th day of June 2006 between Hindustan Petroleum company registered under Indian Companies Act, 1913/1956 having registered office at 17, J. Tata Road, Mumbai hereinafter called "THE COMPANY" (which expression unless repugnant to the context shall include its successors and assigns) of the ONE PART and M/s. Aurobindo Highway Station a Proprietorship firm Private Limited / Limited Company having registered office / place of business at Takli (Dist. Solapur) hereinafter called "THE CARRIER" or Carrier (which expression shall be deemed to include legal heirs and executors of the present constituents in case of firm or official liquidator in case of Company) of the OTHER PART.

WHEREAS the company is engaged in refining Crude oil and storing, distributing and selling of the petroleum products and for this purpose require Tank Trucks for Road transportation of bulk petroleum products from their various storage points to customers / other storage points.

WHEREAS the Carrier is engaged in the business of operating

Tank Trucks and is interested in above transportation job of the Company.

Now therefore, it is agreed between the parties as follows :-

1. The Carrier will provide the Company with 3 no. of Tank Trucks for transporting petroleum products as per LOI/Work Order issued by the Oil Company. Carrier has certified that it is the owner and/or sufficiently entitled to operate these Tank Trucks throughout the Agreement period and these Tank Trucks are not under Agreement with any other party. Further, these Tank Trucks shall remain under exclusive use with the Company throughout the Contract period.

2(a). Each of the Tank Truck would be attached to a particular loading location /

storage point of the Company as per LOI/ Work Order issued by the Oil Company. The Tank Truck would be required to carry bulk petroleum products from the particular loading location (Pakani) to Company's Retail Outlets / Consumers / other storage points as would be instructed by the Company from time to time.

(b) In the event of resitement / change of loading location of the Company, Tank Trucks attached to the old loading location would get automatically attached to the resited / changed loading location and rate and other terms applicable to the old loading location shall apply to the new loading location.

(c) In case of exigency, Company would be entitled to utilise any Tank Truck attached to a particular loading location for bringing the petroleum products (bridging) from another loading location to the base loading location, where the Tank Truck is contracted. In such event, the rate as detailed in LOI / Work Order issued to the Carrier at the base loading location shall be applicable. In case of any disputes arising out of such movements, the terms and conditions including Arbitration Clause of this Agreement would be applicable.

(d) xxxxxxxxxxxxxxxxxxxx

(e) xxxxxxxxxxxxxxxxxxxx

(f) Company shall be free to engage one or more additional Carriers, either to run concurrently or separately, for transportation jobs from the same loading location.

3. Carrier will ensure that Tank Trucks listed in the LOI / Work Order are always :

(a) Maintained in sound mechanical conditions and having all the fittings up to the standards laid down by the Company from time to time.

(b) Meeting requirement of the Company as regards safety and operational norms, e.g., Company may require that Tank Trucks are painted in particular specifications, epicoated and / or chambers are cleaned periodically, additional declarations are made in Emergency Information Panel, colour code band, logos and advertisement of the specified Brand names as directed by Oil Company from time to time, etc. is painted, at the cost of Carrier. The Carrier will ensure that panels are provided on the Tank Truck for display of Oil Company Brands as specified by Oil Company on regular basis.

(c) Conform to the statutory regulations like Indian Petroleum Act, Petroleum Rules, Motor Vehicle Act etc. as applicable from time to time.

(d) Properly calibrated / stamped under the Weights & Measures Act. These shall be calibrated for single capacity up to maximum permitted under Motor Vehicles Act. Company would be entitled for insisting for calibration at Company's premises at the cost of Carrier.

(e) Have adequately trained Crew (driver and cleaner) for efficient operations.

The driving licence of the drivers should be endorsed for transportation of hazardous goods.

(f) Have the Crew wearing uniforms, safety shoes and safety helmets.

(g) Be equipped with sufficient number of rubber hoses having suitable couplings at both ends, bonding / earthing with heavy-duty crocodile clips and dip-rods duly certified by Weights & Measures Department.

(h) Covered by Insurance Policy.

The officials of the Company would be entitled to inspect at any time, the Tank Trucks and / or the documents of the Carrier / its crew is liable to carry under any statute / regulation or this Agreement. Further, Carrier shall submit to the Company certified true copies of calibration certificate and Explosive Licence and their renewals for every Tank Truck.

4(a) The Tank Trucks listed in the LOI / Work Order will be made available to the Company at all times during the Agreement period at the loading location.

(b) In case any of the Tank Trucks is not made available by the Carrier on any day, Company would be free to use the services of any other Tank Truck and recover the difference in transportation charges from the Carrier.

(c) In the event of breakdown or major repair of any of the Tank Truck, Company at its sole discretion, may accept any other Tank Truck of the Carrier for the period of break-down / major repair. Further, in the event Carrier request for the replacement of Tank Truck/s, Company at its sole discretion may accept the same.

(d) xxxxxxxxxxxxxxxxxxxx

5(a) Carrier will be responsible for all taxes, levies and other costs of running the Tank Trucks / transportation business, which shall also include -

i) Salary, wages and other benefits and claims of Crew of Tank Trucks and all members of carrier's staff;

ii) Payment of road tax, insurance and any other fees like permit, route fee etc., levied by statutory authorities;

iii) Cost of fuel, lubricants, tyres, repair etc;

iv) Calibration fees and other fee payable to Weights & Measures Department;

v) Compensation or any other benefit payable to Tank Truck Crew and it's other staff or third party under any statute or regulation both under regular working and arising from accident etc;

b) Carrier shall keep Company indemnified in respect of above. In case, Company is made liable to pay any part of above cost, the same shall be recovered from the Carrier. The Company shall not be obliged to contest any

claim made upon it for payment.

c) It is agreed that the Tank Trucks covered by this agreement shall operate at the sole risk of the Carrier. In no case, Company would be held responsible for any loss or damage done to / by the Tank Truck while on the Company's work or parked in their premises or anywhere else.

d) Carrier shall make their own arrangement for parking of their vehicle overnight and / or during holidays.

e) The Carrier shall comply with all statutory provisions relating to his trade / business / profession including his own employees or employees engaged by the Carrier and Oil Company shall not be responsible for his omission or commission.

6(a) xxxxxxxxxxxxxxxxxxxxx

(b) xxxxxxxxxxxxxxxxxxxxx

(c)(i) Octroi charges levied on the product would be reimbursed by the Company against production of original receipts.

(ii) Entry / Transit / Bridge / Toll (Pathkar) taxes paid by the Carrier for their Tank Trucks while transporting petroleum products under this Contract would be reimbursed by the Company on round-trip basis subject to production of original receipts for payment. Company's decision whether any charge is reimbursable or not would be final and binding on the Carrier.

(d) The transport charges payable under this Agreement are based on shortest route approved by the Company on the round trip basis (called RTKM). A list of current RTKMS applicable to storage points where subject Tank Trucks are based are available with concerned storage point. Company would, however, be entitled to revise these RTKMS from time to time, including retrospectively, which would be binding on the Carrier. Difference in transportation charges arising out of this revision will be recoverable / payable from the date of Agreement or effective date of such revision, whichever is later.

(e)

(f)

(g) The Company has not guaranteed any minimum billings / mileage or loads for any period whatsoever. Hence, Company will not be responsible for their inability in offering any load on any day or during any particular period and no idle charges etc. would be payable.

(h) The company will endeavor to arrange unloading of the Tank Trucks within reasonable time. However, no detention charges etc. are payable if, for any reason, such unloading is delayed at the receiving location.

7(a) The Carrier shall deposit a sum of Rs.50,000/- as Security Deposit for due fulfillment of terms of this Agreement. This sum shall not bear any interest.

Further, Company would accept bank guarantee of the balance amount (Rs.50000/- as DD and balance as Bank Guarantee) valid till 6 months after the expiry of the Agreement as part of Security Deposit.

(b)

8(a) The Carriers will be responsible for loading and discharging of the Tank Trucks. All the instructions of the Company with regard to the same would be binding on the Carrier.

(b) Only the Crew of the Tank Truck and authorized representative of the Carrier shall be allowed entry inside the Company's loading / unloading locations.

9(a) The Carrier shall be responsible for quantity and quality of the products received by him for transportation. Acknowledgment by any member of Crew of the Tank Truck or by any other authorized person of the Carrier by way of signing on the Challan or any other Dispatch Document would be sufficient proof of acceptance of product quantity and quality by the Carrier.

(b) The Carrier will comply with and give full cooperation to the Company in meeting the requirement of prevailing 'Marketing Discipline Guidelines - 2001' as applicable to them.

(c)

(i)

(a)

(b)

(c)

(ii)

(a)

(b) Carrier will allow representative of Company and the party, to whom the products are being sent, to travel with him.

(10) Carrier will be responsible for ensuring that :

(a)

(b)

(c)

(d)

(e) Any position tracking system (for eg. Global Tracking System) decided by the Company to track the movement of the Tank Truck will be unconditionally accepted by the Carrier and install the same in the Tank Truck. Cost of modification / modifications of fittings if any on TT will be borne by the Carrier.

Carrier shall be responsible for safety / maintenance of the equipment and in case the equipment is lost / damaged due to any reason, the carrier shall replace the same at their own cost.

(f)

(g)

(h)

(i)

(j)

(k) Wherever required by Company, collect cheques / draft / bank-slips etc. from the recipient after ensuring that remittances are correctly drawn.

(l)

(m)

11. In case any of the Tank trucks meets with an accident while it is loaded with Company's product, the Carrier shall :

(a) Arrange conveying of information to dispatch storage points as also nearest police station;

(b) Guard the Tank Truck and product till arrival of rescue agencies;

(c) Arrange another fit Tank Truck to salvage the product from Accident Tank Truck;

(d) Bring such transshipped / salvaged product to Dispatch Storage Point or other location as directed by the Company at Carrier's cost;

(e) Be responsible and liable for loss / claims as determined by the Company;

12(a) Carrier shall be responsible for any damage or loss caused to the Company's product or property by negligence or default of its crew, authorized representative or Tank Truck. This will also include confiscation of Company's product delivered to the Carriers by any statutory authorities.

(b)

13(a) The Carrier shall not be entitled to assign, subrogate, sublet or part with its right, title and interest under this Agreement for any reason whatsoever, or change the ownership of / their right of the Tank Trucks.

(b)

14

15

Notwithstanding anything to the contrary contained hereinabove, Company

reserves the right to terminate this Agreement forthwith upon or at any time after happening of any of the following :-

(a)

(b)

(c) If road permits or statutory licenses / permissions granted to Carrier / it's Tank Trucks by transport or any statutory authorities is cancelled or revoked.

(d)

(e)

(f)

(g)

(h)

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The work order dated 5th May 2006 provides :

AWARD OF CONTRACT : TRANSPORTION OF BULK PETROLEUM PRODUCTS (WHITE OIL) BY ROAD EX PAKNI DEPOT. TENDER NO.WZ/IND/MH/POL/BULK/2005-08.

This has reference to your response to the subject Tender. We are pleased to award the contract for transportation of bulk petroleum products by road Ex our storage point at Pakni.

CONTRACT PERIOD

This contract will be valid from 1.09.2005 for a period of 2 years, with a provision to extend by one more year, as per the terms and condition of the agreement, at the sole discretion of HPCL.

RATE SCHEDULE

The rates applicable w.ef. 1-9-2005 after providing escalation towards increase in RSP of HSD after 6-6-2005 (Due date of the tender) will be as follows :-

Sector

White Oil

Local delivery within 39 kms RTD In Rupees per KL

90.77

Outstation delivery beyond 39 kms RTD within state in Paise per KL per KM

116.98

Delivery to adjoining states in Paise per KL per KM

116.98

Delivery to other than adjoining states in Paise per KL per KM

118.98

Escalation on account of increase in RSP of HSD after 1-9-2005 will be granted to you from time to time as per the terms and conditions outlined in the Tender Document.

NUMBER OF TANK TRUCK/S ALLOCATED: 3 (THREE ONLY)

You are requested to submit xerox copy of RC Book, Explosive Licence, Calibration Certificate etc. and get original documents verified at Pune Retail Region for tank trucks offered by you. xxxxxxxxxxxxxxxx

SECURITY DEPOSIT

As per the terms and conditions of the contract you are required to furnish the security deposit as under :-

1. @Rs.100000/- per tank lorry subject to a maximum of Rs.5 lakhs.
2. Minimum Rs.50,000/- shall be paid in the form of Demand Draft drawn on any nationalised bank in favour of M/s. Hindustan Petroleum Corporation Limited and payable at Pune. Balance may be tendered in the form of Bank Guarantee strictly in specified proforma, valid upto 31-3-2009.
3. For existing dealers/distributors of the Corporation, the Security Deposit will be Rs.50000/- per contract irrespective of number of tank trucks offered.

xxxxxxxxxxxxxxxxxxxxxx

19 The agreement read with the work order therefore, indicates, inter alia, that :

- (i) HPCL was interested in hiring the tankers for transportation of its petroleum products;
- (ii) the cost of running the tankers like taxes, salary of staff, fuel and repair was responsibility of AHS;
- (iii) the risk of the carrier and transportation was on AHS;
- (iv) parking was to be done by AHS at his own risk;
- (v) the charges/hire were on trip basis and should be for shortest route;
- (vi) no minimum billing was guaranteed;

- (vii) AHS was to give deposit of Rs.1 lakh per tanker;
- (viii) AHS was responsible for quality and quantity and responsible for making good shortages;
- (ix) HPCL had no right of subletting;
- (x) the licenses and permits of the tankers are with AHS and not transferred to HPCL;
- (xi) AHS was in the business of operating tankers and was interested in the transportation job of HPCL to move bulk petroleum products;
- (xii) AHS was to operate these tankers;
- (xiii) the tankers were required by HPCL to carry bulk petroleum products from the particular loading location to HPCL's retail outlets;
- (xiv) AHS was to ensure that the tankers were always maintained in sound mechanical condition, meeting all safety requirements and operation norms as per the instructions of HPCL. This was required because AHS was carrying hazardous goods;
- (xv) AHS was to conform to the statutory regulations like Indian Petroleum Act, Petroleum Rules, Motor Vehicle Act as applicable from time to time;
- (xvi) AHS was to ensure that the tankers were properly calibrated/stamped under the Weights and Measures Act;
- (xvii) AHS shall have adequately trained crew (driver and cleaner) and the driving licence should be endorsed for transportation of hazardous goods;
- (xviii) AHS shall ensure the tankers are covered by insurance policy;
- (xix) the officials of HPCL would be entitled to inspect at any time the tankers or the documents of the tankers or the crew, which right need not be reserved if there was transfer of right to use the tankers for any purpose;
- (xx) HPCL would be free to use the services of any other tanker if AHS's tankers were not available and HPCL had the right to recover the difference in transportation charges from AHS;
- (xxi) in the case of breakdown or major repair of any of the tankers, AHS was to provide a replacement and failure to provide the replacement would invite action;
- (xxii) AHS was responsible for all taxes and levies and other costs of running the tankers/transportation business which would include salary, wages and other benefits and claims of crew of tankers, payment of road tax, insurance and any other fees like permit, route fee etc. levied by statutory authorities, cost of fuel, lubricants, tyres, repair etc., calibration fees and other fees payable to weights and measures department, compensation or any other benefit payable to tanker crew and its other staff or third party under any statute or regulation both under

regular working and arising from accident etc. and for this, AHS shall keep HPCL indemnified and if HPCL is made liable to pay the same to be recovered from AHS;

(xxiii) the tankers shall operate at the sole risk of AHS and in no case, HPCL will be responsible for any loss or damage done to/by the tankers while on HPCL's work or parked in their premises or anywhere else;

(xxiv) AHS was to make its own arrangement for parking of its vehicles overnight and/or during holidays;

(xxv) AHS was to comply with all statutory provisions relating to his trade/business/profession including his own employees or employees engaged by AHS and HPCL shall not be responsible for AHS's omission or commission;

(xxvi) octroi charges levied on the product would be reimbursed by HPCL against production of original receipts. So also entry/transit/bridge/toll etc. to be paid by AHS for the tankers while transporting HPCL's products and claim reimbursements;

(xxvii) AHS was to allow representative of HPCL and the party, to whom the products are being sent, to travel with him.

20 All these indicate that the effective control and possession was always with AHS. What was being provided to HPCL was only a transportation service on hire. The Tribunal instead of applying the law as laid down by the judgments in the case of Bharat Sanchar Nigam Ltd. (Supra), Indian Oil Corporation Ltd. (Supra), International Travel House Ltd. (Supra) and M/s. General Cranes (Supra) etc., has read the agreement in bits and pieces and referred to only certain clauses which were in place to ensure commitment for uninterrupted efficient transportation service. The Tribunal has referred to the clauses which provides that the tankers are not under agreement with any other party, AHS not to assign right in the tankers or the tankers should not be used for products other than oil of HPCL, HPCL has right to change the loading location etc. The Tribunal has failed to appreciate that these clauses referred to and provided for in the agreement with HPCL were only to ensure uninterrupted transportation services by AHS to HPCL. The right to use of tankers does not get transferred because of these clauses. The possession and effective control was always with AHS and HPCL had no right to direct AHS for any other work or any other area than agreed. There is no provision that HPCL could even sublet. The Tribunal has failed to appreciate that the services for the tankers were provided with man power and road tax, insurance, permit, salary and wages of staff, cost of fuel, lubricants, tyres, repair etc., were being paid by AHS. The agreement entered into between AHS and HPCL shows that not only possession but also effective control of the tankers remained with AHS and did not get transferred to HPCL. The agreement demonstrated that the intention of the parties was that AHS would carry the petroleum and petroleum products from one place to another and such carriage would ordinarily be in those vehicles, which had been accepted

by HPCL, but, in unavoidable circumstances, AHS may provide for alternative tankers. Thus, when the custody and effective control of the vehicles remained with AHS, it would be incorrect to contend that there was transfer of the right to use the vehicles. Further AHS has to bear the entire operational cost of the vehicle which included salary and other emoluments of the driver and cleaner, cost of fuel and lubricating oil, maintenance of vehicles, payment of road tax, insurance etc. It was also the responsibility of AHS to pay such fines as might be imposed for non compliance of any of the rules, which might be applicable to the carriage of petroleum and petroleum products by the tankers. The requirement that the tankers must conform to the design and fittings as might be specified by HPCL or that HPCL had right to change the loading station or tankers cannot be used for carrying other products than oil of HPCL could not be stretched to mean that the right to use the tankers would stand vested in HPCL and/or the effective custody and control of tankers would stand transferred to HPCL because of the fact that petroleum and petroleum products, being highly inflammable substances could be carried safely and securely only in vehicles with specified designs and fittings. AHS was also liable for contamination of the goods due to negligence of its staff and also if there was short delivery of substance at the destinations. AHS would be entitled to receive payment provided it operated the tankers in accordance with the requirement of HPCL as stipulated in the agreement on per KM basis. These provisions were demonstrative of the fact that AHS retained the possession and effective control of tankers. Merely because of the fact that certain clauses were provided in the agreement in view of the nature of the cargo to be carried and to ensure that the transportation of their products do not get disrupted, it did not necessarily mean that the right to use the tankers stood transferred in favour of HPCL by AHS, more so, when the agreement provided for substitution of the vehicles.

21 The judgments relied upon by Mr. Sonpal are of no assistance to him in as much as, as held in *Rashtriya Ispat Nigam Limited (Supra)* the effective control was with AHS. In *Bramhaputra Vally Construction and Suppliers (Supra)* also the Gauhati High Court has held that it is the features of the contract which are material and to be looked into. As regards *Waltor Buthello of Mumbai (Supra)*, the facts were entirely different in as much as in that case the buses were handed over by the contractor to PMT and the buses, which were handed over to PMT, were registered with the RTO, Pune in the name of PMT as a lessee. In that case, even the conductor of the bus was provided by PMT and not the owner of the bus. It was the conductor of PMT who was to collect the fare from the passengers. The contractor was also permitted to employ other surplus drivers employed with PMT where the post of drivers has become surplus on PMT's establishment. Those were the factors which weighed in the mind of the Court which is not the case in the appeal at hand. As regards *Twentieth Century Finance Corporation Limited and Anr. (Supra)* it only states that handing over the possession was not required but certainly it also states that the entire agreement has to be seen. *G.S. Lamba and Sons (Supra)* relied upon by Mr. Sonpal also was

a case where there was a lease which is not the case here.

22 In the circumstances, in our view, by no stretch of imagination can we hold that there was any transfer of right to use goods. Therefore, we answer the first substantial question in negative. The Tribunal was not justified in holding that the transportation job with the use of tank trucks (tankers) as per the agreement with HPCL dated 26th June 2006 amounted to transfer of right to use goods and hence, covered by definition of sale under the MVAT Act.

23 In view of our answer to substantial question no.1, we see no requirement to answer substantial question no.2.

24 Appeals allowed and accordingly stand disposed. In the facts and circumstances of the case, there will be no order as to costs.