

Read : 1. Application dt.06.02.2015 by M/s. Venus Petrochemicals (Bombay) Pvt. Ltd.
Heard : Shri D. B. Avhad [Advocate].

PROCEEDINGS

(under section 56(1) (e) of the Maharashtra Value Added Tax Act, 2002)

No.DDQ-11/2015/Adm-6/2/B- 3

Mumbai, dt. 17/11/2015

M/s. Venus Petrochemicals (Bombay) Pvt. Ltd. seek determination of the following question - *Whether VAT is leviable on transportation charges/services when -*

- (1) Sales are ex-refinery
- (2) Freight is a post sale separate service and billed separately
- (3) All incidental expenses are borne by the buyer

02. FACTS AND CONTENTION

The application is reproduced verbatim thus -

"We, Venus Petrochemicals (Bombay) Pvt. Ltd. having registered office at 27, 1st floor, Minerva Compound, Sewree Koliwada Road, Sewree (E), Mumbai-400015 and Administration office at 401403, Zafryn Chambers, Sewree Bunder Road, Sewree (E), Mumbai-400015 herewith seek clarification from your office regarding the above stated disputed question.

The relevant details regarding the issue are as follows:

- *We are registered under MVAT Act, 2002 as a dealer and our VAT TIN is 27420000396V.*
- *We are distributors of Bharat Petroleum Corporation Limited (BPCL).*
- *All the supplies procured from BPCL are ex-BPCL refinery i.e. EX-MI (Main installation) which is further sold to our customers, Ex refinery.*
- *Most of our customers take the material in their own nominated transport.*
- *We also have our transport division which is registered with Central Board of Excise and Customs as Goods Transport Agency. The transport division owns as well as hires tankers which independently carry out the transport service for which billing is also done separately, charging transportation charges along with service tax at different locations. The freight is thus a post sale event. The service tax collected is regularly paid to the government treasury. The copy of registration certificate, service tax paid challan and service tax return is enclosed for your reference.*
- *Our sales is ex-refinery and all incidental expenses like Octroi, Insurance and the arrangement and charges of transport are borne by the buyer, our sales ends ex-refinery only and freight is a post sale separate service.*

So, in these circumstances, our transportation services are not a part of sales and hence should not come under the scope of MVAT. The copy of relevant judgment is also enclosed for your reference. (Decision in M/s. Prakash Retail Pvt. Ltd. v. Deputy Commissioner of Commercial Tax (Audit), Udupi and others[2014 68 VST 392 (Kar.)])

We would like to inform you that in the definition of sale price it is provided that the amount charged separately for freight is not to be included in the sale price. Ours is ex-refinery and the freight charges are received as a reimbursement and hence cannot form part of sale price.

Further, we would also like to bring into your notice that since 2005 to 2010, our assessments are done and transportation services/charges have not been considered for MVAT. In FY 2007-08, scrutiny was done by business audit unit only and it is a part of the order that all the delivery terms are EX-BPCL and hence the same are not taxable. But, in FY 2011-12, the issue is again brought to light as the assessing officer wants to consider transportation services under the scope of MVAT.

In the light of the same, please clarify on the subject to remove ambiguity."

03. HEARING

Shri D. B. Avhad [Advocate] attended the hearing. A detailed written submission is tendered by the applicant. The applicant's attention was invited to the decision of the Hon. Maharashtra Sales Tax Tribunal (MSTT) in Haldyn Glass Works Pvt. Ltd. v. The State of Maharashtra (17 MTJ 214) as well as to a recent determination order in the case of M/s. VED



PMC Limited (No. DDQ 11/2010/Adm-3/38/ B-1 dt.07.08.2014). In response, it was stated thus -

1. Firstly, VED PMC is an *ex parte* DDQ.
2. No case law is cited in the DDQ which the present applicant is citing.
3. The facts of VED PMC are different as after paying the transportation charges while dispatching the goods, seller subsequently issued Debit Notes.
4. In VED PMC, transportation was arranged by VED PMC and the agreement provided that transportation charges may be paid by VED PMC or purchaser.
5. No case law of Hon. Supreme Court or Hon. High Court or Hon. Tribunal is differentiated or followed in the determination order. There is no mention of even the ratios in the determination order.
6. The Hon. Bombay High Court has held that settled law shall not be unsettled. Since beginning of the business, receipts of transport division of the applicant were never included in sale price.
7. The applicant insisted that a fresh bill be allowed to be submitted. Hence, the applicant was asked to submit a copy of the quotation for the fresh sale bill he is submitting. The reason for submitting the fresh sale bill was given thus - the sale bill submitted with original application is of a purchase, not from Refinery but from other party. In that case, the applicant is the middle purchaser. If at all freight is to be taxed then in that case, it would be included in the case of DMK Petrotraders.

The applicant's attention was invited to certain quotations raised by the applicant wherein the applicant is citing a price which shows a break-up of rate, VAT, freight etc. It is shown therein that VAT is being charged on sale price and not on transport. However, as per the case of Haldyn (cited supra) as cited to the applicant, the quotation gives an idea as to at what rate (including the transport) the goods will be available to the purchaser. To this, it was argued thus - *Facts in the case of Haldyn (cited supra) are totally different. The applicant has neither raised debit notes for freight nor charged any freight in the invoice. In a quotation, just transport rate per litre is quoted, purchaser is free to arrange any other transport than the applicant.*

The submission given during hearing, as reproduced verbatim, states thus -

"Brief facts:-

The applicant Venus Petro P. Ltd. is authorized agent (buyer) and reseller in petroleum products of Bharat Petroleum Corporation Ltd (for short BPCL). The applicant has executed signed written agreement with BPCL for terms of purchases from BPCL. The applicant is also running a transport division of tankers. This division provides transport services to buyers of applicant and also other customers all over India. The purpose of keeping transport division is to prevent exploitation of purchasers by private transporters in case of buyers seeking urgent deliveries and part deliveries. The vendees of the applicant purchase the goods at EX-BPCL refinery at the fixed priced. This fixed price is excluding transport, insurance and octroi and other incidental expenses etc. While placing the order for goods, buyers has to arrange their own transport or it may be pre-arranged tanker from private transport or may have been prearranged from applicant's fleet by directly approaching the transport division without any knowledge of sale division. It is mandatory to issue indent for loading from refinery. Unless indent is issued, tanker's entry is not allowed inside refinery. Tankers registered with refinery are only allowed inside the refinery. Sale is complete once tanker comes out of refinery gate. Then applicant's role in this transaction comes to an end in all respect. The prices are fixed EX BPCL refinery which does not include transport, insurance Octroi and any incidental expenses etc. Applicant's vendee can either arrange their own transport or hire the tanker of the applicant's transport division.

The agreement with BPCL is annexed herewith and marked "A".

Sale invoice is annexed herewith and marked "B".

It is the case of the applicant that they are charging transport charges separately from transport division located and run from separate address and therefore claiming exemption from Vat on receipt of transport division. Applicant does not charge transport charges at all while selling the goods. If vendees chooses to engage tanker from applicants transport division, they contact transport division, fix the freight charges and pay for that independently of sales Transport division pays service tax on the receipt of transport charges.

The transport invoice of transport division is annexed herewith and marked "C".

Applicant is registered under finance Act, 1994 for service tax and paying service tax regularly on receipts

of transport division.

The return of service tax is annexed herewith and marked as "D".

On these facts, applicant applies to know:

a. Whether receipts of transport division for transport of goods of applicant of M/s. Venus Petro P. Ltd, are part of and includable in "sale price as defined u/s 2(25) of the Maharashtra Value Added Tax Act 2002?

Contention of the applicant:

Section 2(25) of the VAT Act defines sales price as under:

(25) sale price means the amount of valuable consideration paid or payable to a dealer for any sale made including any sum charged for anything done by the seller in respect of the goods at the time of or before delivery thereof, other than the cost of insurance for transit or of installation, when such cost is separately charged. "

The definition itself is self speaking to say that if insurance etc. to be excluded, if separately charged. The applicant has not even charged freight at all. There is catena of judgments, where in similar circumstances, higher forum of judiciary has held that transport charges collected separately in the invoice does not form part of sale price, applicant case is much stronger as he has not collected transport charges at all but they are the separate income of transport division.

Following judgment are the concrete precedents, ratio of which is applicable to applicant's case

In the case of Commissioner of Sales Tax Vs M/s Kolsite Industries Hon. Bombay High Court allowed exclusion the separately collected insurance charges and transport charges in the invoice holding that it does not form apart of sales price. Court observed that Loading charges and the insurance charges are shown separately. The aforesaid terms in the documents clearly reveal that the delivery of the goods was to be effected by the respondent to the buyers ex-works and the respondent had not taken any risk upon themselves qua the goods up on delivery.

The judgment is annexed herewith and marked as Exhibit "E"

In the case of commissioner of sales tax vs Sarshadi Lal Enterprises (P) Ltd Allahabad High Court held that if freight is charged separately, it is not a part of sale price. Judgment is annexed herewith and marked as Exhibit "F"

In the case of State of Karnataka V. Bangalore soft drinks P Ltd. Hon. Supreme court conformed the judgment of high court and conformed the exclusion of freight charges collected separately from "sale price" Hon'ble supreme court's (with High court Judgment) judgment is annexed and marked as Exhibit "G"

In the case of Commissioner of Sales Tax, Maharashtra State, Bombay V. Ballarpur Industries Ltd. [1995] 99 STC 101 (Bom) Hon Bombay High Court followed the precedent set by Hon'ble S C in the case of .Hyderabad Asbestos Cement Products Ltd. case [1969] 24 STC 487 (SC) and allowed the exclusion of freight from "sale price" It is noteworthy here that in the case of M/s Ballarpur industries, appellant has collected sale tax on freight charges which was initially part of sales price but subsequently amount equal to freight charges returned to purchaser. When sale tax department contended that M/s Ballarpur industries has collected tax on freight, Hon'ble Bombay High Court observed in para 13

"...However, before parting with the case, we deem it expedient to observe that our attention was drawn by the learned counsel for the Revenue Mr.Presswala to the fact that sales tax has been collected by the assessee in the present case on the value of the goods without deducting the freight, which according to him was an indicator that freight was intended to be a part of the sale price. We have considered the above submission. We, however, do not find any merit in the same. It appears that similar argument advanced on behalf of the Revenue in Hyderabad Asbestos Cement Products Ltd.[1969]24 STC 487 was repelled by the Supreme Court. It was observed:.....the form in which the invoice is made out is not determinative of the contract between the company and its customers. If, apprehending that it may have to pay sales tax on the freight, the company collected sales tax on the freight, the true nature of the contract between the company and the purchasers cannot on that account be altered.....the State cannot seek to levy tax on railway freight if it is not made a part of the price." From this precedent of Bombay High court, it is clyster clear that, if expenses of freight are borne by purchaser and are separately charges, then it will not form part of sale price. "

The judgment is annexed and marked as "H"

At the cost of repetition, applicant submit that we have not collected any freight at all. "

The judgment of Hon'ble supreme court in M/s Hyderabad Asbestos Cement Products Ltd. case [1969] 24 STC 487 (SC) is annexed and marked "I".

This view was again reiterated by Hon'ble Bombay high court in the case Commissioner of Sales Tax, Maharashtra State, Mumbai V. Kolsite Industries (Supra) [2013] 61 VST 23 (Bom) . The case of Ballarpur industries {Supra} was also followed in this case and excluded separately collected insurance and transport charges from sale price.

While deciding the issue, Larger bench of Hon'ble tribunal in the case of M/s Parle Products Ltd. V. State



of Maharashtra [2012] 1 MTJ (UNRP) 1156, referred the precedents of Hon Supreme Court in the case of Hyderabad asbestos and Bangalore soft drinks P Ltd (supra) soft drinks observed in para 44. "As such, having regard to the facts and circumstances of the present case, particularly an agreement entered in to between the appellant and the wholesaler and between the appellant and transport company, the invoices etc., we have no hesitation to hold that the cost of freight initially incurred by the appellant for and on behalf of the whole seller and which have been reimbursed subsequently do not form part of the "sale price" and hence it is not eligible to sales tax. We are fully in concurrence with the view taken by this Tribunal while deciding Second Appeal Nos. 935, 936 and 937 of 1993 decided on 9.7.1995. With due respect, we do not incline to endorse the view taken by the Bench of this Tribunal in Second Appeal No. 1553 of 1993 decided on 11.4.1997. It is, therefore, needless to say that the appeal will have to be allowed and the order of revision will have to be set aside".

The judgment is annexed and marked as Exhibit "J"

Hon'ble Tribunal in the case of M/S. Thyssen Krupp Industries Pvt. Ltd. v. State of Maharashtra [2010] 44 MTJ 216 held the same view and allowed the transport charges to be excluded from sale price. Tribunal held that though transport charges are separately collected, seller acted as agent of the buyer and excluded the transport charges from sale price.

The judgment is annexed and marked "K"

The most recent precedent on this issue is the case of M/s Prakash Retail Pvt. Ltd. Vs. Deputy Commissioner of Commercial Tax (Audit), Udupi and others Karnataka State Forest Industries Corporation Ltd [2014] 68 VST 392 (Kar.). In this case facts as stated in the judgment are: "The petitioner is engaged in trading of house hold articles, electrical and electronic goods etc., manufactured by other companies. The petitioners have produced the price lists issued by the manufacturers. A perusal of these price lists specifies that the prices are exclusive of installation charges. Further the invoices raised by the petitioners specifies that the prices of goods are ex-showroom price. It further specifies that transfer of title in goods takes place at the place of seller. Therefore, the sale price of the goods at the ex-showroom price attracts sales tax. Subsequent to the transfer of title in the goods at the place of seller they act as agents of customers for transportation of goods and to installation purpose. Therefore the transportation charges and the installation charges do not become the part of sale price of the goods." In this case thus installation and transport charges are collected separately as a agent of the purchaser.

Hon'ble Karnataka high court considered all the precedents of various high court and Supreme Court agreed with petitioners and held that seller is acting as agent of the buyers and therefore amount of transport and installation cannot be subjected to sale tax. The judgment is annexed and marked "L"

Applicant further submits that another fact in this proceeding, shall be noted here that, sales tax and service tax are mutually exclusive. One transaction cannot be both sales and service. The receipt of transport division are post sales receipts and therefore do not part of sale price as defined in Vat Act. Once goods are measured and filled in the tanker, all expenses of transport, octroi, insurance etc. are borne by buyer and therefore can't form a part of sales price. Therefore On the receipts of transport division, applicant is paying service tax.

To Summery the grounds of applicant is as under:

- a. Applicant is reseller in goods of BPCL. Goods purchased and sold at BPCL facility
- b. Applicant does not collect any freight, insurance charges in sales invoice, from his vendees.
- c. Buyers take delivery at Ex-BPCL facility and transport goods at their own risk and expenses.
- d. If buyer voluntarily chooses to hire tanker from applicant's transport division, he approaches them and deals with transport division independently.
- e. Applicant's contention is in consonance with ratio laid down by Hon. Bombay H.C and Hon. Supreme court. Those judgments are annexed with this written submission.
- f. Applicant pays service tax on all receipts of Transport division as per the provisions of Finance Act, 1994 r/w rules.

Applicant therefore prays that Hon'ble Commissioner be pleased to hold that receipts of transport division of applicant are not a part of sale price and hence not taxable at Value added Tax."



04. OBSERVATIONS

I have gone through the facts of the case. The issue to decide is whether the transport charges received by the applicant form a part of the sale price. It has been contended that the sales are ex-refinery and freight is a post-sale separate service and further that the freight charges are received as a reimbursement and hence cannot form part of sale price. The issue calls for visiting the

definition of 'sale price' under the Maharashtra Value Added Tax Act, 2002 (MVAT Act, 2002).

The definition of 'sale price' under clause 25 of section 2 of the Act is thus -

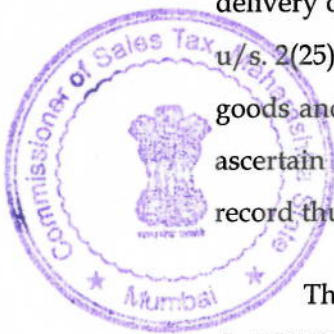
"sale price" means the amount of valuable consideration paid or payable to a dealer for any sale made including any sum charged for anything done by the seller in respect of the goods at the time of or before delivery thereof, other than the cost of insurance for transit or of installation, when such cost is separately charged.

Explanation I.— *The amount of duties levied or leviable on goods under the Central Excise Act, 1944 (1 of 1944) or the Customs Act, 1962 (52 of 1962) or the Bombay Prohibition Act, 1949 (Bom. 25 of 1949), shall be deemed to be part of the sale price of such goods, whether such duties are paid or payable by or on behalf of, the seller or the purchaser or any other person.*

Explanation II.— *Sale price shall not include tax paid or payable to a seller in respect of such sale.*

Explanation III.— *Sale price shall include the amount received by the seller by way of deposit, whether refundable or not, which has been received whether by way of a separate agreement or not, in connection with or incidental or ancillary to, the said sale of goods;*

It can be seen that the definition provides that sale price is the amount of valuable consideration paid or payable for any sale. The definition further provides that sale price also includes *any sum charged for anything done by the seller in respect of the goods at the time of or before delivery thereof*. The definition excludes the *cost of insurance for transit or of installation* from sale price *when such cost is separately charged*. In the present case, the applicant has produced bills which show that he has separately shown the amount charged as transport cost. Thus, the exclusion which applies only to *cost of insurance for transit or of installation* when separately charged cannot be extended to cover cost towards transport/freight. Therefore, the argument of the applicant that freight when separately charged stands excluded is not appropriate as nothing could be read beyond the express provisions. The words '*any sum charged for anything done by the seller in respect of the goods at the time of or before delivery thereof*' would cover all sums till the delivery of the goods to the buyer. The applicant has contended that the definition of 'sale price' u/s. 2(25) includes therein all the sums in respect of goods at the time of or before delivery of the goods and therefore transport charges received post sale are not includible in the sale price. To ascertain the claims with regard to the available provisions, I would look at the documents on record thus -



The bill given along with the application was of invoice no.FO/204 (sr. no.2194) dt.06.09.2012 and was for sale of Furnace oil to Naprod Life Sciences Pvt. Ltd. wherein the supplier to the applicant was DMK Petrotraders and Carrier Pvt. Ltd. The applicant has also given an invoice no.49 of the same date which is raised by the Transport Division of the applicant company. Now during hearing, the applicant has given a fresh invoice no.MT/917 of dt.18.09.2012 showing sale to Shri Mahabir Dyg & Ptg Mills P. Ltd. and a separate invoice no.149 of the same date issued by the Transport Division on the same purchaser i.e Shri Mahabir Dyg & Ptg Mills P. Ltd. The two invoices show that the applicant is charging for the transport charges

separately under its Division separate from the Sale Division. The applicant has also given a copy of a Quotation for MTO w.e.f 06.09.2012. As mentioned above, the core issue to decide is whether transport charges form a part of the sale price. The documents in this regard point thus -

Quotation dt.06.09.2012

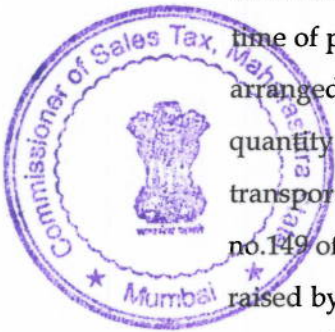
Price : Ex-BPCL Mumbai

Rate : 63.73 per ltr + 12.5% VAT = 71.70 Per Ltr - .20 DISC=71.50 PER LTR

TRANSPORT : 450 PER KL OR NOMINATED BY YOU

Insurance : Yours Responsibility

The above terms show that the seller i.e the applicant is quoting the rate per litre of the commodity. The quotation also shows the charges towards transport. It is seen that the applicant has kept open the option of transport. The buyer may arrange his transport or ask the seller to do the needful. However, when the buyer opts to allow the seller to transport the goods, the seller is quick to quote his rate. What the above terms indicate is that wherever the buyer opts to allow the seller to transport the goods, the buyer is aware at what rate the transport would be arranged and thereby, the total cost at which the goods would reach at his place. Thus, whenever the buyer opts to allow the seller to deliver the goods to him, he is aware of the total cost at which he would be getting the delivery of the purchased goods from the seller. This total cost includes the basic cost, Excise, VAT and the transport charges. The information as comes out from the above quotation is that the buyer is aware of the charges that would be charged by the applicant for the delivery of the goods to him when he is placing the order with the seller. However, this information as seen from the quotation contradicts the written submission of the applicant which says that the Transport Division operates independently - *"While placing the order for goods, buyers has to arrange their own transport or it may be pre-arranged tanker from private transport or may have been prearranged from applicant's fleet by directly approaching the transport division without any knowledge of sale division"*. Though the Transport Division may have issued the invoice, at the time of placing of the order, the buyer is made aware of the cost at which the transport would be arranged. In the case of the present invoice no.MT/917 of dt.18.09.2012 for sale of MTO, the quantity sold is 3000 KL. Accordingly, as per Quotation for MTO w.e.f 06.09.2012, the rate of transport is 450 PER KL (as highlighted above), the applicant has tendered a separate invoice no.149 of the same date issued by the Transport Division for Rs.1350/- (450 x 3). Thus, the receipt raised by the Transport Department is as per the quotation which was made known to the applicant at the time of placing the order. This contradicts the statement in the submission of the applicant to the effect that *"if vendees chooses to engage tanker from applicants transport division, they contact transport division, fix the freight charges and pay for that independently of sales"*. We have seen that the buyer is aware of the amount at which the goods would be available to him when the transport is arranged by the seller. All this would mean that the buyer's purchase is completed or his transaction with the seller is complete when he receives the delivery of the goods. Therefore, as per the definition of 'sale price', *'any sum charged for anything done by the seller in respect of*



the goods at the time of or before delivery thereof' would form the part of 'sale price'. The buyer is aware of the things done to the goods i.e arrangement of the delivery of the goods to his doorstep and sale is completed when he receives the goods at the cost decided between the two. The transport is necessary to complete the 'sale' and hence, all sums charged before delivery would form a part of the 'sale price'. Thus, the activities and the amounts charged before completion of the sale with a view to complete the sale would form a part of 'sale price'. *Alongwith the basic cost and the other components, the transport charges, in the instant transaction, form the amount of valuable consideration paid or payable to the applicant-seller for the sale made to his purchaser. It is the sum charged for putting the goods for delivery (....anything done by the seller.....) to the buyer.* Though, a single bill is presented for determination, going by the set of facts, it should not be wrong to infer that wherever the applicant has raised a transport bill, the same is in pursuance of a prior agreement between the seller and the buyer to sell the goods with delivery of the goods at the doorstep of the buyer. The setting of a separate Transport Division or the separate billing would not alter the truth as coming from the facts and the documents. The MVAT Act, 2002 has a clear definition of 'sale price' and a just interpretation of the intention of the legislature would mean that the cost towards transport would form a part of the 'sale price'. In *Hindustan Sugar Mills v. State of Rajasthan & Ors.* [1978 SCC (4) 271], the Hon. Supreme Court has very unambiguously laid down that where the cost of freight is part of the price, it would fall within the first part of the definition which is *'any sum charged for anything done by the dealer in respect of the goods at the time of or before the delivery thereof'*. Though the clause under interpretation was - *"any sum charged for anything done by the dealer in respect of the goods at the time of or before the delivery thereof other than the cost of freight or delivery or the cost of installation in case where such cost is separately charged."*, the interpretation in respect of the underlined part in terms of freight was very categorically spelled out.

During hearing, the applicant's attention was also invited to certain other quotations as raised by the applicant, the details of which could also be seen thus :

Quotation dt.30/08/07 - Mineral Turpentine (BPCL Make)

Price : Ex-BPCL Mumbai
 Our Selling Rate : 33.48 Per Ltr + 12.5% VAT = 37.67 Per Ltr + 0.35 Per Ltr Freight Extra = 38.02 Per Ltr
 Insurance : Yours Responsibility

Quotation dt.12/09/07 - Mineral Turpentine (BPCL Make)

Price : Ex-BPCL Mumbai
 Our Selling Rate : 33.01 Per Ltr + 12.5% VAT = 37.14 Per Ltr + 0.35 Per Ltr Freight Extra = 37.49 Per Ltr
 Insurance : Yours Responsibility

Quotation dt.31/03/07 - Mineral Turpentine (BPCL Make)

Price : Ex-BPCL Mumbai
 Our Selling Rate : 31.65 Per Ltr + 12.5% VAT = 35.61 Per Ltr In your Container
 Insurance : Yours Responsibility
 Statutory Requirement : Solvent Control Order 2007 License

Quotation dt.12/10/07 - Mineral Turpentine (BPCL Make)

Price : Ex-BPCL Mumbai
 Our Selling Rate : 34.63 Per Ltr + 12.5% VAT = 38.96 Per Ltr + 0.35 Per Ltr Freight Extra = 39.31 Per Ltr
 Insurance : Yours Responsibility



Quotation dt.09/10/07 - Furnace Oil (BPCL Make)

Price : Ex-BPCL Sewree

Our Selling Rate Ex-BPCL Sewree : 20.74 Per Kg + 12.5% VAT = 23.33 Per Kg + Freight Extra.

Inclusive of Excise Duty. Excise Duty as per BPCL Invoice. Duty Paid Material.

Purchase Cost Net of Modvat is 17.426 Per Kg + 12.5% VAT + Freight.

(20.74 Per Kg --- 3.314 Per Kg = 17.426 Per Kg)

Excise Duty from BPCL Sewree on 29/09/07 is 3.314 Per Kg. Duty Paid Material.

Co. Full Rate w.e.f 16/09/07 - 22.46 Per Kg + 12.5% VAT = 25.27 Per Kg

BPCL Full Rate 25.27 Per Kg

--- Our Selling Rate BPCL Sewree 23.33 Per Kg

Total Discount Given 1.94 Per Kg

Freight

: 3500/- Extra for 10 KL Tanker

Insurance

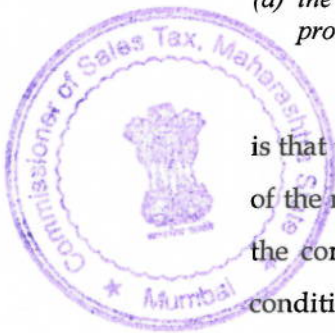
: Yours Responsibility

It can be seen that in all the quotations mentioned above, except the one dt.31/03/07, to receive the goods at his door-step, the buyer is aware of the total cost that he would have to pay to the applicant seller. In the quotation dt.31/03/07, no amount for freight has been quoted as there the transport is through the buyer's container. One point also to be noted is that in this case where buyer is himself arranging for the transport, there is one additional and important 'CONDITION' in the quotation and which is "Statutory Requirement : Solvent Control Order 2007 License". This requirement is to ensure compliance of a significant clause in the agreement between the applicant, as a purchaser, and his seller i.e Bharat Petroleum Corporation Limited (BPCL). There's a Memorandum of Understanding (MOU) for supply of POL products executed between and the applicant and BPCL. The relevant clause therein reads thus -

4. CONDITION OF SALE OF POL

The paramount condition of this MOU is that :

(a) the BUYER should possess with him at any given time valid storage/explosive license for all the products being purchased from the SELLER and other valid licenses to deal in the product as per law.



The above condition and its adherence invites attention to an important point and which is that the applicant as a purchaser from BPCL has at all times to ensure that there is no violation of the recitals of the MOU. In cases where the applicant is not delivering the goods to the buyer, the compliance of this condition by the applicant calls for prime attention and caution. This condition also shows that wherever the delivery of the goods would be by the seller, he is aware that he would be transporting the goods with the paramount condition being taken care of. The condition in the quotation also shows that there is initial agreement between the applicant seller and his purchaser as to the total cost which includes the cost of transportation as the buyer seeks to know the cost at which the goods would be delivered to his place. There is one more thing and which is that in the written submission, the applicant states thus - "While placing the order for goods, buyers has to arrange their own transport or it may be pre-arranged tanker from private transport or may have been prearranged from applicant's fleet by directly approaching the transport division without

any knowledge of sale division. it is mandatory to issue indent for loading from refinery. Unless indent is issued, tanker's entry is not allowed inside refinery. Tankers registered with refinery are only allowed inside the refinery." Thus when the buyer opts for his transport, the applicant is aware of the same right from the beginning. This knowledge becomes necessary as if the buyer is not opting for the seller's transport, the tanker of the buyer would have to be registered with BPCL for loading the goods. And this explains the reason why the quotation in case of buyer not opting for transport does not refer to the freight rate but refers to the statutory condition. So wherever buyer wishes delivery to be given at his door, the applicant quotes the rate for delivery and in other cases where transport is to be arranged by the buyer, the freight rate is not mentioned but attention to the important condition of statutory compliance is highlighted. In other words, at the time of placing of the order, the seller is aware that he would have to deliver the goods to the buyer to complete the sale and the buyer is aware that for a certain amount, he would receive the goods at his doorstep.

The above circumstances make me reiterate that the separate billing and further the separate Divisions do not mean that the transport charge or the freight is a 'post-sale' charge. It is a part and parcel of the amount of valuable consideration for the sale to the buyer. It is very much a sum charged for delivery of the goods to the buyer by the seller. And in all above state of affairs, it is very conspicuously noted that the applicant-seller has taken refuge of the clause **"Price : Ex-BPCL Mumbai"** to put forth the contention that the amount towards transport charges do not form a part of 'sale price'. It has to be vehemently stated that the said clause can never serve as "the" pointer to determining the 'sale price' in such circumstances where both the seller and buyer have agreed upon the cost at which the seller would sell the goods to the buyer with delivery at the doorstep of the buyer. Thus, the conditions of the agreement and the attending facts have to be seen to form any opinion. The clause "Ex-BPCL" in the present set of facts, I am afraid, is nothing but a misnomer. And with such set of facts of prior agreement about the cost which includes the transport charges for delivery of the goods, the applicant comes up with a submission that *"if vendees chooses to engage tanker from applicants transport division, they contact transport division, fix the freight charges....."*. Needless to mention that I have based my inferences on the facts as coming out from the documents and the actual state of things than the contradictory statements made by the applicant or the insistence on interpretation as per the clause **"Price : Ex-BPCL Mumbai"**. At this juncture in view of the facts in the present case and the inferences therefrom, it would be apt to refer herein to a decision, and the observations therein, of the Hon. Maharashtra Sales Tax Tribunal (MSTT) in the case of *Haldyn Glass Works Pvt. Ltd. v. The State of Maharashtra* (17 MTJ 214). The Hon. MSTT in interpretation of the same definition of 'sale price' as in the present proceedings, on the facts mentioned below, observed as under :



Facts

The sales are effected to various parties wherein the transport is arranged by the appellant. The appellant charges the value of goods separately and thereafter prepares a Debit Note in order to recover incidental expenses i.e collecting charges, freight charges, interest, Stamp duty, Bank charges & Discount. It was the contention that what has been recovered subsequently in form of debit notes, constitutes 'something done' after the sale was effected and, therefore, not includible in sale price.

Held

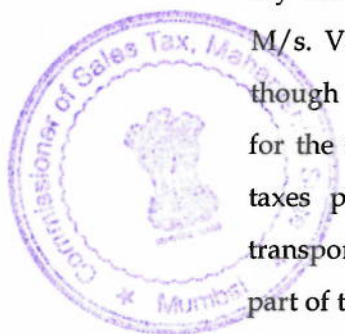
"In this regard it was argued by the revenue that charges do not appear to be actual expenses incurred by the appellant. On the other hand, charges are recovered on the some basis of fixation of Said Price. For example charges are fixed for 1000 pieces. Sale price is also with reference to thousand pieces. Thus, it is very clear that the amount received under the Debit Notes is nothing but the sale price of the goods sold. It has not been established that what is received is actual amount of expenses incurred.

13. A copy of purchase order is found on page 9 of compilation produced by the revenue. The bill is numbered 59391/12 dated 12.8.1992. In the column 'quantity' you find "30,000 numbers". In the column 'price' you find "Rs.850/- for 1000 numbers". Under the heading 'particulars' you find "excise duty at 35 per cent ad valorem, special excise duty at 5 per cent on basic excise duty, taxes at 4 per cent and handling and service charges Rs.80/- for 1000 numbers". Thereafter, the total of this purchase order is made. It, therefore, appears that price is fixed in advance. In other words, the purchaser knows what he is supposed to purchase and at what cost and the seller also knows the same. This will clearly indicate that all the incidental expenses incurred by the seller are carried out before the delivery of the goods. The mention of delivery 'X-factory' is clearly an eye-wash

.....
The billing alongwith the terms and conditions on the reverse of the sale bill are nothing but a contrivance adopted by the appellant in order to by-pass taxation on the extra element of dispatch, handling of the goods, etc.. We have no doubt in our mind that these activities take place before the sale is complete in terms of section 2(29) of the Bombay Act."

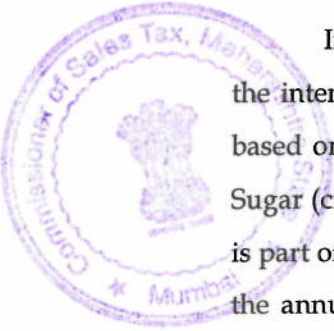
The conclusions in the above case are that the price being fixed in advance, the plea of delivery being 'ex-factory' was clearly an eye wash. In the present case the fact that the price as well as freight per liter is fixed in advance and the buyer knows the amount that he has to pay. The delivery of goods is in terms of the prior agreement between the seller and the buyer and the 'sale' could not be said to be complete without the delivery of the goods. The separate billing does not mean that it is a separate incidence after sale. The decision of the Hon. MSTT fortifies my inferences as based on the facts before me. Even in a recent determination order in the case of M/s. VED PMC Limited (cited supra), it was observed by the then Hon. Commissioner that though the annual purchase order mentioned the delivery to be ex-factory, the purchase order for the transaction fixed the consideration for the transaction and this included the price plus taxes plus transportation charges. Therefore, it was held that even though the cost of transportation was not mentioned in the bill and was separately charged, the same would form part of the sale price as it forms a part of the consideration for the sale of the goods. I cite the two cases as above to bring home the point that whenever the cost of the goods has been fixed at a prior stage and when such cost includes a sum which calls for delivery of the goods to the buyer, the amounts representing such sums form a part of the 'sale price'.

During hearing, the applicant had sought to argue against reliance on the above cases. But I am aware that the decision in each case would depend on the facts of each case and there could be no straight-jacket formula. Before the sale is complete, both the seller and the buyer are



aware of the cost involved in the transaction of making available the goods at the doorstep of the purchaser. The quotation stipulates the amount per KL towards the basic price and the freight and thereby, ensures that the seller is aware of the obligations to be performed thereunder. The sale is complete only when the obligations are fulfilled. Though the quotation specifies the price to be "EX-BPCL", a different intention is brought out when the cost of freight is also stipulated therein. Even though the cost of transportation is not mentioned in the bill and is separately charged, the same is included in the sale price as it forms a part of the consideration for the sale of the goods. *This is in keeping with the principle laid down by the Hon. Supreme Court that where the cost of freight is part of the price, it would fall within the first part of the definition.* I have to observe that the treatment of the applicant by raising an invoice for value of the goods and taxes and a separate invoice for transport charges only is an attempt to give a different colour to the transaction. *The charges on account of freight when seen in the light of the facts of the present case represent a pre-delivery event and the same is in consequence of a bargain or an understanding reached between the seller and the buyer as to the cost of the goods. It has an inextricable link to the consideration flowing from the transaction and, therefore, would inevitably form a part of the sale price.* We have seen above that the ratio in Haldyn Glass Works Pvt. Ltd. (cited supra) would apply to the facts in the present case. There are a catena of decisions dwelling on what forms a part of sale price. All the decisions unanimously place adherence on the following -

- a. *Facts of each case i.e terms and conditions, agreements, invoicing*
- b. *Behaviour of the seller and the purchaser*
- c. *Intention as comes out from a perusal of the facts*
- d. *Interpretation based on facts and intention*



In view of all above, I have to observe that despite mention of the price being "EX-BPCL", the intention is truly represented by the quotation which gives the knowledge of the total cost based on which there is arrangement by the seller to deliver goods to the buyer. In Hindustan Sugar (cited supra), the Hon. Supreme Court has clearly laid down that where the cost of freight is part of the price, it would fall within the first part of the definition. In the present case, though the annual purchase order mentions the delivery to be ex-factory, the purchase order for the transaction under consideration fixes the consideration for the transaction and this includes the price plus taxes plus transportation charges. Therefore, even though the cost of transportation is not mentioned in the bill and is separately charged, the same would form part of the sale price as it forms a part of the consideration for the sale of the goods evidenced by the invoice presented for determination. The circumstances in the present case are such that all the documents point to fixing of a price before hand and at this price, the buyer would get the delivery of the goods at this doorstep. Therefore, mere raising of a separate invoice for transport charges does not mean

that the transport charges do not form a part of the 'sale price'. In view of all above, I determine that the amount charged under separate invoice no.149 issued by the Transport Division of the same date as the sale bill dt.18.09.2012 forms a part of the 'sale price' in the transaction between the applicant seller and his purchaser i.e Shri Mahabir Dyg & Ptg Mills P. Ltd. The receipts of the transport division for transport of goods are part of and includable in "sale price" as defined u/s 2(25) of the Maharashtra Value Added Tax Act 2002.

05. Having seen thus, I would deal with each of the various case laws and arguments as relied upon in support of the contention that the transport charges do not form a part of the 'sale price' thus :

i. The case laws on which reliance has been placed are thus :

- a. In M/s. Prakash Retail Pvt. Ltd. v. Deputy Commissioner of Commercial Tax (Audit), Udupi and others (68 VST 392). Here the price lists specified that the prices are exclusive of installation charges. Subsequent to the transfer of title in the goods at the place of seller they act as agents of customers for transportation of goods and to installation purpose.
- b. In Commissioner of Sales Tax v. M/s Kolsite Industries (61 VST 23), the issue was insurance charges and not transport charges.
- c. In Commissioner of Trade Tax v. Sarshadi Lal Enterprises (P.) Ltd (Trade Tax Revision No.821 of 1994 decided on dt.14.05.2004), the Tribunal had recorded a finding that freight is not a part of taxable turnover as it was charged separately.
- d. In State of Karnataka v. Bangalore Soft drinks (P.) Ltd. (Civil Appeal No.7499 of 1995 dt.23.09.1998), the Hon. Supreme court observed that the facts, as set down in the order of the Tribunal, did not warrant its conclusion that the agreement between the respondent and its wholesalers was a sham in so far as it related to the option regarding transportation of the respondent's products.
- e. In Commissioner of Sales Tax, Maharashtra State, Bombay v. Ballarpur Industries Ltd. (99 STC 101), the conditions were such that the prices mentioned in the price lists were for delivery f.o.r. destination station, but as per practice in vogue the seller was to continue to deduct the railway freight in the invoices. Railway receipts were on the basis of 'freight to pay and it was the responsibility of the distributors to pay railway freight at the destination. Allowance for the incidence of railway freight was however made in the invoices.
- f. In M/s Hyderabad Asbestos Cement Products Ltd. (24 STC 487), the purchasers clearly to pay railway freight which was deducted from the invoice made out by the company. The company received the catalogue rate less the railway freight as price of the goods sold. The Hon. Court observed that under the terms of the contract there is no obligation on the company to pay the freight, and under the terms of the contract the price received by the company for sale of goods is the invoice amount less the freight.
- g. In Commissioner of Sales Tax, Maharashtra State, Mumbai v. Kolsite Industries (61 VST 23), the issue was insurance charges and not transport charges.
- h. In M/s Parle Products Ltd. v. The State of Maharashtra (Appeal No.153 of 1998, Rectification Application No.88 of 2001 decided on dt.31.05.2003), as per the terms and conditions, the actual freight from factory premises of the company to the



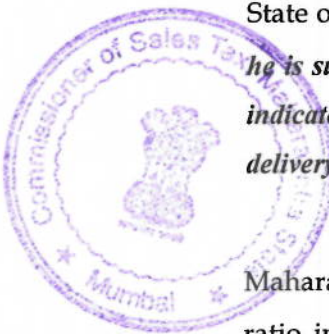
destination was to be paid by the company on behalf of the wholesaler and reimbursed by the wholesaler to the company.

- i. In M/s. Thyssen Krupp Industries Pvt. Ltd. v. State of Maharashtra (2010 44 MTJ 216), the condition was that the seller shall be responsible for packing and forwarding, loading ex-works place of manufacturer and transportation of the machinery and equipment at the instance and on behalf of the purchaser to the site.

It can be seen that the facts in all the above cases are not the same as the case before me in these proceedings. The peculiar points of the present case such as the quotations showing the per Ltr rate, the transport rate per Ltr, the compliance of statutory condition, the total cost of the product being known, etc. It has not come out in any of the case laws that the buyers were aware of the total cost at which the goods would be made available to the customer. I do not dispute any of the ratios laid down in any of the decisions as cited by the applicant. If the transportation charges do not form the part of valuable consideration and are not the charges for anything done by the seller at the time of or before delivery, they would certainly not form the part of the 'sale price'. But such are not the circumstances in the instant case. Here, we have seen that the buyer is aware of the cost at which the seller has agreed to deliver the goods at his doorstep. It forms a part of the valuable consideration and is an amount for delivery to be given by the seller so as to complete the sale. The separate billing would not mean that the transportation charges are not a part of the sale price. In view of the same, reliance on case laws would not be of any help to the applicant. The facts and circumstances in each case would determine whether the transport or any other charges form a part of sale price or not. The ratios laid down by the Hon. Courts cannot be applied unless identical set of facts exist. The inferences as made by me on the basis of the facts in the present case are buttressed by the decision of the Hon. MSTT in Haldyn Glass Works Pvt. Ltd. v. The State of Maharashtra (cited supra) wherein it was observed that *the purchaser knows what he is supposed to purchase and at what cost and the seller also knows the same which clearly indicates that all the incidental expenses incurred by the seller are carried out before the delivery of the goods.*

With regard to reliance on the case of M/s. Parle Products Limited v. State of Maharashtra (cited supra), I have to state that the Hon. MSTT therein expressly stated the ratio in M/s. Haldyn Glass Works Pvt. Ltd. (supra), the case law which supports my inferences in the present proceedings. The Hon. MSTT sought to distinguish the aforementioned two cases thus :

"It may be noted that in the case of M/s. Haldyn Glass Works Pvt. Ltd. (supra) the price has been found fixed in advance. The purchaser was knowing what he was supposed to purchase at what cost. The seller also knows the same. It is also very clear from the invoices or bills that all the incidental expenses incurred by the seller are carried out before the delivery of the goods. On that background it was held that the billing alongwith the terms and conditions on the reverse of



the Sale Bill are nothing but contrivance adopted by the Appellant in order to bypass taxation on the extra element of despatch, handing of the goods etc. In the case before us, there is clear-cut Agreement that the cost of freight is to be borne by the Wholesaler and, therefore, the Wholesaler or the dealer has to reimburse the same if the arrangement of transportation is made by the Appellant."

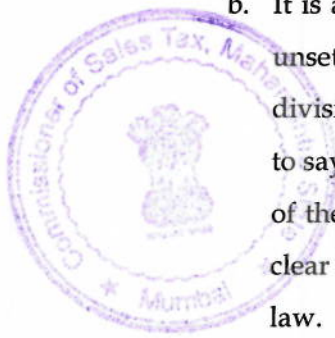
What can be seen from the above observations in M/s. Parle Products Limited v. State of Maharashtra (cited supra) is that the Hon. MSTT was consistent with the view that wherever the price was fixed in advance with the purchaser and the seller agreeing at the cost at which the goods would land at the doorstep of the purchaser, the amounts so charged would form the part of the 'sale price'.

ii. The other arguments as put forth are :

a. It is argued that since 2005 to 2010, assessments are done and transportation services/charges have not been considered for MVAT. With regard to this argument of the applicant, I have to state that the peculiar circumstances of the case point out that incorrect interpretation has been done by the applicant. *A wrong cannot be allowed to perpetuate.* In these proceedings, I am called upon to interpret the provision as appears in the statute. The inference as seen from a perusal of the facts is that the transport charges collected, though separately, do form a part of 'sale price'. In such a situation, the treatment in previous years would not alter the interpretation. No considerations external to the provision in the statute that I am called to interpret upon can be had. An interpretation is not based on factors external to the concerned provision in the statute. It is always with regard to the words and the provision as appearing in the statute. Therefore, I am not convinced by the argument.

b. It is argued that the Hon. Bombay High Court has held that settled law shall not be unsettled and further that since beginning of the business, receipts of transport division of the applicant were never included in sale price. With regard to this, I have to say that the behavior of the applicant not to consider the transport charges as a part of the sale price is no law. In fact, it is an incorrect interpretation being made despite clear facts and provisions. Therefore, there arises no issue of unsettling any settled law.

c. It is argued that sales tax and service tax are mutually exclusive. And further that one transaction cannot be both sales and service. It is submitted that the receipt of transport division are post sales receipts on which applicant is paying service tax and therefore do not form part of sale price as defined in the VAT Act. In this regard, I have to state that merely because the applicant is paying Service Tax does not mean that the said transaction would not be amenable to Sales Tax. Both are distinct

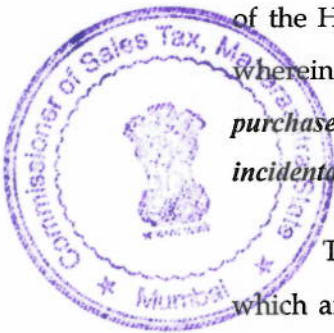


statutes and the incidence of levy of tax is different in both the statutes. Sales tax is attracted on the incidence of 'sale' and chargeable on the 'sale price'. The MVAT Act,2002 has clearly defined as to what would form the 'sale price'. And we have seen above that the transport charges in the present proceedings fit very well within the definition of the 'sale price'. When the statute sanctions the constitution or composition of the 'sale price', there could not be a case that the said composition should be disturbed in view of levy thereupon under some other statute. When the given facts satisfy the composition as defined, not to consider, rather disregard the same would render the provision redundant. I am faced with interpretation of the provision of 'sale price' under the MVAT Act,2002 and I find that the transportation charges in the instant case form a part of the 'sale price'. Therefore, the provisions under the MVAT Act,2002 empower amenability to tax thereon.

In view of all above, it can be seen that none of the arguments or case laws relied upon by the applicant would make me observe anything contrary to that as determined above. In fact, I take help of the judgment cited by the applicant. The Hon. Supreme Court in M/s Hyderabad Asbestos Cement Products Ltd. (cited supra) has categorically observed that *the form in which the invoice is made out is not determinative of the contract between the company and its customers*. The same applies herein too. The mere mention of the words "EX-BPCL" is not the sole determinative factor to ascertain the quantum of 'sale price'. We have seen above that the quotation though mentioning the price as "EX-BPCL", the buyer and seller agree at the price at which the goods would land at the doorstep of the buyer and accordingly the transaction of 'sale' is completed when delivery of the goods is given to the buyer. And my view stands supported by the decision of the Hon. MSTT in Haldyn Glass Works Pvt. Ltd. v. The State of Maharashtra (cited supra) wherein it was observed that *price is fixed in advance, the purchaser knows what he is supposed to purchase and at what cost and the seller also knows the same which clearly indicates that all the incidental expenses incurred by the seller are carried out before the delivery of the goods*.

Thus, the sale price of the impugned transaction would include the transport charges which are an essential part of the consideration and represent the sums charged for anything done by the applicant in respect of the goods at the time of or before delivery thereof. Thus, in the case of the impugned transaction, the amount of freight, etc. being incurred at the time of or before delivery of the goods would form part of the 'sale price' and thereby liable for levy of Sales Tax.

06. In view of the detailed deliberations, it is determined thus -



ORDER

(under section 56(1) (e) of the Maharashtra Value Added Tax Act, 2002)

No.DDQ-11/2015/Adm-6/2/B-3

Mumbai, dt. 17/11/2015

For reasons as discussed in the body of the order, it is herewith determined that the amount of Rs.1350/- as charged in the invoice no.149 of dt.18.09.2012 is a part of the 'sale price' and would be amenable to the levy of tax under the Maharashtra Value Added Tax Act, 2002.



(RAJIV JALOTA)

COMMISSIONER OF SALES TAX,
MAHARASHTRA STATE, MUMBAI