

Read - Application dt.19.07.2011 by Larsen & Toubro Limited - Scomi Engg. Bhd. Consortium  
Heard - Shri Parind Mehta [C.A.] & Shri Dilip Dixit [STP] attended the hearing.

## PROCEEDINGS

(u/s. 56 (1) (e) of the Maharashtra Value Added Tax Act, 2002)

No. DDQ 11/2011/Adm-3/20/ B- 4

Mumbai, dt. 5/11/2015

An application is received from Larsen & Toubro Limited - Scomi Engg. Bhd. Consortium, situated at Mumbai Monorail Project, Near Wadala Truck Terminus, Next to Anik Best Depot, Wadala (E), Mumbai-400031, requesting determination of the following question :-

*"Whether the rolling stocks imported pursuant to the contract with MMRDA and supplied in the course of execution of the mono rail project constitutes a transaction in the course of import u/s. 5(2) of the Central Sales Tax Act, 1956 and not liable to tax u/s.8(1) of the Maharashtra Value Added Tax Act, 2002?"*

### 02. SUBMISSION

The facts as stated in the application are thus -

1. "M/s Larsen & Toubro Limited-Scomi Engg. Bhd. Consortium (LTSE), the applicant is a registered dealer both under MVAT (Registration No. 27870728473V dt.9 September 2009) and under Central Sales Tax Act (Registration No. 27870728473C dt.9 September 2009).
  2. The Mumbai Metropolitan Regional Development Authority ("MMRDA/Employer") invited pre-qualification applications on ("Request for Qualification") from entities interested to bid for the design, development, construction, commissioning, operation and maintenance of a monorail system on turnkey basis in Mumbai Metropolitan Region ("the project").
  3. The applicant is an unincorporated consortium between Larsen & Toubro Ltd. (L&T) and Scomi Engineering Berhad (SEB) that was formed to jointly submit technical and financial bids in response to the aforesaid Request for Qualification.
  4. On 25 January 2008, L&T and SEB as a consortium jointly submitted an application in compliance with the Employer's Request for Qualification and have received notification via letter dated 17 March 2008 (ref. No. T/MRTS/IMPLN/MONORAIL/PQ/2008) that the L&T and SEB consortium has been pre-qualified for the participation in the bid stage.
  5. MMRDA issued a Request for Proposal ("RFP") on 9 May 2008, inviting bids for the following works:  
Design, Development, Construction, Commissioning, Operation and Maintenance of Monorail System in the following Corridor in Mumbai Metropolitan Region, on Turnkey basis:-
    - a) Gadge Maharaj Chowk (Jacob Circle) to Wadala Corridor approx (11 km). fully elevated;
    - b) Wadala to Chembur to Mahul Corridor approx (9 km). fully elevated.
  6. The applicant submitted its response to the RFP on 14 July, 2008, which included the technical and financial proposals for executing the works. The proposal submitted by the consortium envisaged manufacture and import of, amongst others, rolling stock from Malaysia.
  7. Following evaluation of the bids, MMRDA awarded to the applicant, the letter of acceptance dated 7 November 2008, accepting the technical and commercial proposal of the applicant, in terms of the RFP submitted by them.
  8. Accordingly, the contract between MMRDA and LTSE (hereinafter referred to as the 'MMRDA - LTSE contract') was entered on 9 January 2009 wherein MMRDA awarded to LTSE, the contract for planning, design, development, construction/manufacture/supply, testing and commissioning of the monorail system in the following two sections (including the operation and maintenance for a period of 3 years from the date of start of commercial operations)
    - Sant Gadge Maharaj Chowk - Wadala : Section - 1
    - Wadala - Chembur railway station : Section -2
- The contract was awarded for a total project value of Rs.2460 crore plus an additional Rs179.20 crores for operation and maintenance for 3 years. Following documents were made to form part of such contract:
- Letter of acceptance of Bid dated 7 November 2008
  - The Bid containing Technical and Financial Proposal submitted by LTSE
  - Pricing document/payment schedule
  - Outline specifications
  - Employers requirements
  - Notice inviting bid and instructions to bidders- Request for proposal (Volumes 1 - 5)
  - Special conditions of contract
  - General conditions of contract
  - Bid drawings
  - Clarifications and addendums, if any issued to the Tender document
  - Clarificaitonos given by Consortium



9. For the purpose of execution of the project, the applicant (consortium) in terms of the bid, placed a contract on SEB (Contract between LTSE and SEB dated 29 March 2010, hereinafter referred to as 'LTSE-SEB Contract') for a value of Rs 741.84 crore for the design and supply of certain goods i.e. rolling stock, signaling equipments, switches equipments and depot equipments from outside India. Upon import of these goods, the consortium would supply the same in the course of execution of work contract for MMRDA.
10. Since the current application is in respect of the taxability of rolling stock supplied by LTSE to MMRDA (under the MMRDA – LTSE contract dated 9 January 2000) after LTSE imports the same from SEB in terms of the bid and LTSE – SEB contract dt.29 March 2010, for the sake of brevity, the transaction mechanics to effect the import and supply of such rolling stock is explained below:
- LTSE submitted the bid dated 14 July 2008 wherein the rolling stock was to be manufactured and supplied from Malaysia.
  - MMRDA awarded the contract dated 9 January 2009 to LTSE.
  - LTSE placed a contract dated 29 March 2010 on SEB (Malaysia) for design and supply of rolling stock;
  - The designs prepared by SEB were submitted by LTSE to MMRDA for its approval. MMRDA provided its approval vide letter dated 26 October 2009.
  - Based on the approved design, prototype of the rolling stock was manufactured in Malaysia. The officials of MMRDA visited Malaysia for inspection of the prototype and thereafter provided their acceptance vide letter dated 11 September 2010.
  - The rolling stock was manufactured at Malaysia based on the approval/acceptance of MMRDA.
  - SEB dispatched the Rolling Stock from Malaysia to India under the shipping documents of SEB with the destination being the Wadala yard of MMRDA.
  - The goods are cleared by LTSE under its Import-Export Code (IEC code) claiming benefit of concessional rate of custom duty under Project Import Scheme against the essentiality certificate issued by MMRDA.
  - LTSE supplied the goods to MMRDA to India in pursuance of the MMRDA-LTSE contract dated 9 January 2009.
11. LTSE imported a set of rolling stocks (Comprising of 4 cars and accessories) pursuant to the contract. The sequence of events are as follows:
- The rolling stock was inspected by MMRDA's representative at Malaysia, on 16 December 2010.
  - Invoice no.22 dated 23 February 2011 raised by SEB on LTSE for supply of the said goods, mentioning that the said goods are being supplied for the Mumbai Monorail Project. The said invoice also gives reference to the LTSE – SEB contract dated 29 March 2010, MMRDA – LTSE contract dated 9 January 2010 and essentiality certificate dated 18 August 2010 issued by MMRDA.
  - SEB dispatched the rolling stock from Malaysia under its Packing List dated 25 February 2011. The packing list contains the dimensions, quantity, weight etc of rolling stock and also identifies LTSE as consignee.
  - The said goods were loaded at Port Klang, Malaysia on 28 February 2011 under BL No. SE 2110103, for destination at the Port of Nhava Sheva, India. The Bill of Lading identifies the shipper as SEB (exporter) and the consignee as LTSE.
  - Certificate of Origin reference No.KL/2011 no.010401 dated 9 March 2011 certifying that the said goods were produced or processed in Malaysia for exports to India.
  - The goods were cleared by LTSE under Bill of Entry NO.3323181 dated 26 April 2011 under the project import scheme as per the essentiality certificate of MMRDA specifying that the said goods are for supply for the Mumbai Monorail Project.
  - The rolling stocks were moved to the site from the port under delivery challans no.1651 to 1659 all dated 28 April 2011. The said rolling stocks were received and inspected at site on 6 May 2011.
  - Octroi was paid vice receipt No. 6960114 dated 30 April 2011 issued by the Municipal Corporation of Greater Mumbai for the entry of said goods in the local municipal area.
  - LTSE raised its invoices on MMRDA in accordance with the payment schedules which are as follows:

SL. No.	LTSE Invoice No.	LTSE Invoice date	Invoice Amount (Rs. In lacs)	Amount Pertaining to RST (Rs. In lacs)
1.	RA 2	29 March 2010	3126.73	344.40
2.	RA 19	25 February, 2011	2192.45	526.93
3.	RA 20	29 March 2011	5641.53	526.93
4.	RA 21	5 April, 2011	5489.47	383.57
5.	RA 22	25 May 2011	7612.65	1949.52
Total (1)				3731.36
Add: Amount to be billed (2)				118.54
Total (1 + 2)				3849.90

12. The applicant believes that in respect of the transaction described above, it is entitled to the benefit in terms of Section 8(1) of the MVAT Act read with Section 5(2) of the Central Sales Tax Act 1956 and hence not liable to VAT on the rolling stock on the ground that sale of such rolling stock has occasioned the import of such rolling stock into India.

Summary of grounds considered by the applicant for claiming the benefit of Section 8 of the MVAT Act read with Section 5(2) of the Central Sales Tax Act 1956 :

1. On perusal of the MMRDA – LTSE contract dt.9 January 2009 along with the contract documents mentioned in



Clause 2 of the MMRDA – LTSE contract, it is evident that rolling stock were intended to be manufactured outside India and then imported from outside India (i.e. from Malaysia) for supplies to MMRDA in the course of the execution of the contract. It is therefore evident that the contract between MMRDA and the Applicant has occasioned the import of such goods into India. We place reliance on the following references to the contract documents:

Document Reference	Page Reference	Relevant extract of clause
Appendix 9 – attachment to Technical Package (Schedule of Components Manufactured Offshore)	Item No.4 (Refer page No.611 of attached Contract)	Rolling stock has been included in the list of items to be manufactured offshore.
Appendix 5 to the Technical proposal. Section B2 (Rolling Stock)	Section B2 (Rolling stock) Clause B.2.1.1 (Refer page no.186 of attached Contract)	Reference has been clearly made about the rolling stock design and production at Scomi's rail manufacturing facility in Rawang, Malaysia
Section E.3 of the Technical proposal (Development Phase Management Plan)	Clause E.3.5.3 (Country of origin for procured services, equipment and material) (Refer page no.465 of attached Contract)	Reference has been made to Rolling Stock design, manufacture, assembly in Malaysia and installation and commission in India.
Sr. No. 35 of Technical package (laying down Project Management Plan)	Sr. No. 6 (organization) Project Manager (rolling stock), clause 5 (Refer page No.687 of attached Contract)	It has been Stated that rolling stock will be transported from manufacturing site to high seas and then to port and last to depot.
Sr. No.35 of Technical package (laying down Project Management Plan)	Sr. No. 6 (organization) Project Manager (rolling stock), clause 4, (Refer page no.687 of Contract.)	It has been stated that the monorail prototype will be inspected and approved by the client (MMRDA) and on approval/endorsement by MMRDA will such manufacture commence for the rest of the stock of the trains.
Volume 5 of RFP – Pricing Document and Payment Schedule	Cost Center A-8-2 page 14 and 15 of volume 5 (Refer page no.1317 of Contract)	The payment for each train is released by MMRDA only after a Notice of No Objection is received from MMRDA's representative. It is clearly stated that such notice is given by MMRDA's representative after satisfactorily completion of all finished train, for prototype manufactured as well as for balance manufactured train.
Letter dated 8 August 2008 wherein LTSE responded to queries raised by MMRDA	Section B.2, Page 13, Question 14.2 (Refer page no.35 of Contract)	In this clause it has been responded by LTSE that the commercial proposal is based on Completely built units manufactured in Malaysia factory.
Letter dated 8 August 2008 wherein LTSE responded to queries raised by MMRDA	Section B.2, Page 13, Question 14.2 (Refer page no.35 of Contract)	Reference has been made to Scomi's Rolling stock factory in Malaysia.

2. On perusal of the LTSE – SEB contract dated 29 March 2010, it is evident that the Applicant had placed a back to back order on SEB (which is a member of the consortium) for supply of certain goods (which includes rolling stock) from outside India to the Applicant in India. This contract is clearly linked to MMRDA – LTSE Contract entered between MMRDA and the applicant for planning, design, development, construction, manufacture, supply, testing etc. of Monorail system in Mumbai Metropolitan region.

The contract placed by the Applicant on SEB in terms of Attachment 2 of the LTSE – SEB order clearly mentioned that SEB would supply the goods to the Applicant as per the technical specifications outlined in the Main contract dated 29 March 2010 between MMRDA and the Applicant. It is thus evident that the rolling stock being imported by the Applicant from SEB are tailor-made and customized as per the technical specifications mentioned in the MMRDA-LTSE contract, and therefore, such rolling stock is being imported for the specific purpose of the Mumbai Monorail project only.

It is also evident that SEB (as a supplier as well as member of consortium) is very well aware of the fact that such goods are being manufactured in accordance with the technical specifications given by MMRDA to the applicant for the Mumbai Monorail project and is also aware that the said goods would eventually be used for the Mumbai Monorail project, the end customer of the Applicant being MMRDA.

- On perusal of the essentiality certificate and the letter from customs department for registration of the contract under the Project Import Scheme, it is evident that rolling stock has been certified by MMRDA as an item essential for the completion of the Mumbai Monorail Project. The import of rolling stock being made by LTSE is in pursuance of such essentiality certificate and the contract registered with the Customs Department under the Project Import Scheme, on which concessional rate of customs duty is being paid. Therefore, it is clear that the rolling stock was imported specifically for the Mumbai Monorail project of MMRDA and is in terms of specific requirements of MMRDA that the rolling stock should be supplied by way of imports made into India.
- On perusal of the transportation documents and invoices highlighted in Para 13 of Annexure I, it is evident that the import was made for the purpose of ultimate supply of goods to MMRDA for the Mumbai Mono Rail Project. All the documents issued by SEB on LTSE clearly specifies that the said goods were supplied for the Mumbai Monorail Project and also gives reference to the LTSE – SEB contract dated 29 March 2010, MMRDA- LTSE contract dated 9 January 2010 and the essentiality certificate dated 18 August 2010 issued by MMRDA.

5. The applicant thus believes that from reading of all the contracts, orders and documents, it is clear:

- that under the contract between MMRDA and the Applicant, the applicant had undertaken to import the rolling



stock manufactured in Malaysia and then supply the same to MMRDA in the course of execution of its contract with MMRDA.

- that there is a clear nexus of the rolling stock being supplied by Applicant to MMRDA and the rolling stock being imported by applicant from SEB (member of the consortium).
  - that the rolling stock being imported by the applicant from SEB is tailor-made and customized as per the technical specifications mentioned by MMRDA to the Applicant and is imported only after the acceptance of the design and prototype by MMRDA, and therefore, such rolling stock is being imported for the specific purpose of the Mumbai Monorail Project only.
  - that SEB is very well aware of the fact that such goods are being manufactured in accordance with the technical specifications and design approved by MMRDA for the Mumbai Monorail project and is also aware that the said goods would eventually be used for the Mumbai Monorail Project, the end customer of the Applicant being MMRDA.
  - that rolling stock has been certified by MMRDA as an item essential for the completion of the Mumbai Monorail project.
  - that the import of rolling stock being made by LTSE is in pursuance of the essentiality certificate issued by MMRDA and the contract registered with the Customs Department under the Project Import Scheme, on which concessional rate of customs duty is being paid.
  - that the import of rolling stock is specifically for the Mumbai Monorail project for the purpose of ultimate supply of goods to MMRDA and is in terms of specific requirements that the rolling stock should be supplied by way of imports made into India. It is also inspected by MMRDA prior to its dispatch.
  - that the above facts were very well known to all the parties (i.e. MMRDA, LTSE as well as SEB), through express provisions in the contracts.
6. The Applicant thus believes that it is evident that the contract between MMRDA and the Applicant has occasioned the import of rolling stock into India and hence, it can claim the benefit of Section 8(1) of the MVAT Act read with Section 5(2) of the Central Sales Tax Act, 1956 and hence is not liable to pay VAT on the rolling stock being supplied by it to MMRDA."

### 03. HEARING

The case was taken up for hearing on dt.10.09.2014 when Sh. Parind Mehta (CA) and Sh. Dilip Dixit (STP) attended the hearing. It was submitted thus -

1. There are 2 agreements concerning the impugned transaction -
  - a. L & T Scomi and MMRDA - By this agreement, the contract as detailed out in the application was awarded to the Consortium for a price of 2460cr. The following clauses in the agreement were highlighted to establish the inextricable nexus between the import of the Rolling Stock by the Consortium and the contract between MMRDA and the Consortium :  
work apportionment, designs, inspection & payment schedule and list of items to be manufactured offshore.
  - b. L & T and Scomi - By this agreement, L & T has entered into a agreement with Scomi for supply of Rolling Stock. The clauses from this agreement which are sought to be highlighted are -
    - a. Mention of the main contract with MMRDA
    - b. Scomi agreeing to supply the goods as per the technical specifications detailed out in the main contract.
    - c. Details of the responsibility of Scomi with regard to dispatch of rolling stock including MMRDA NOC.
2. The Rolling Stock was supplied by Scomi and invoices were raised on the Consortium on dt.23.02.2011.
3. The applicant was asked regarding assessment status. It was informed that the notice is received only in respect of the period 2009-10. The bills raised by Consortium on MMRDA are from 2009-10.
4. The applicant was asked regarding the Determination Order in the case of Mazgaon Dock Limited (No.DDQ-11-2008 /Adm-3/40 /B-3 dt.13.9.2010) and its applicability to the present case. To this, it was submitted that -
  - In the present set of agreements between MMRDA and the Consortium, privity is expressly provided between MMRDA & Scomi such that Scomi is responsible to MMRDA for the Mumbai Monorail Project and this would include not only the manufacture and dispatch of the rolling stock but also the supply by the Consortium to MMRDA.
  - It is claimed that there are 2 phases of the transaction - one is the supply by Scomi to Consortium and the other is the consequential supply by the Consortium to MMRDA and this second transaction is claimed to be covered by section 5(2) of the CST Act in its first limb- Consortium sale to MMRDA has occasioned the import.



A written submission dt.10.09.2014 was given in the matter. The contention as made therein, and which has not been made in the earlier submission, is reproduced thus -

*"A. Background and Statement of facts*

3. Larsen & Toubro Ltd. (L&T) is having expertise and credentials in Civil Work whereas Scomi Engineering Berhad (based in Malaysia) has experience in manufacture of goods like Rolling Stock, designing, installing and integrating the Mono rail system.

Since the Project involved both aspects (i.e. supply of various goods, Civil works, designing the system, implementation etc), the technical capabilities of which were not available with one company, both L&T and Scomi Engineering Berhad (SEB) came together to jointly submit technical and financial bids in response to the aforesaid Request for Qualification.

10. At this stage, it is important to note that the contract was awarded by MMRDA, jointly, to both L&T and SEB, so that both the parties could execute their respective scope of work. It is also to be noted that both L&T and SEB have come together, thus forming an unincorporated consortium to execute the project i.e., no separate incorporated entity was created to execute the project.

11. Although the consortium has obtained a separate VAT registration, however, the consortium is not a separate incorporated entity. Effectively, the consortium is nothing but a conduit, and the contract has effectively been entered into between MMRDA, L&T and SEB.

12 The applicant divided their respective scope of work in accordance with the bid submitted by them, and accordingly, the portion of the work related to the SEB was recorded in the 'LTSE-SEB Contract' dated 29 March 2010 for a value of Rs 741.84 Crore for the design and supply of certain goods i.e. Rolling stock, signalling equipment, switches equipment and depot equipment from outside India.

These goods were to be manufactured by SEB in Malaysia in terms of the bid and contract with MMRDA.

*B. Application for DDQ-Contracts between the parties*

13. The current application filed on 25 July 2011 is in respect of the taxability of rolling stock supplied to MMRDA under the Contract.

The contracting pattern to affect the import and supply of rolling stock is explained below in brief:

i. The Applicant had, while submitting the bid itself (bid dated 14 July 2008), specified that the rolling stock was to be manufactured in Malaysia.

ii. MMRDA – LTSE Contract:

- The MMRDA – LTSE Contract clearly captures the fact that rolling stock is to be manufactured outside India (in Malaysia) and then imported into India by SEB for supplies to MMRDA, clearly evidencing that the contract between MMRDA and the applicant has occasioned the import of such goods into India.

• The following Paras in the MMRDA-LTSE Contract should be referred:

Document Reference	Page Reference	Relevant extract of clause
Appendix 9 – attachment to Technical Package (Schedule of Components Manufactured Offshore)	Item No.4 (Refer page No.611 of attached Contract)	Rolling stock has been included in the list of items to be manufactured offshore.
Appendix 5 to the Technical proposal. Section B2 (Rolling Stock)	Section B2 (Rolling stock) Clause B.2.1.1 (Refer page no.186 of attached Contract)	Reference has been clearly made about the rolling stock design and production at Scomi's rail manufacturing facility in Rawang, Malaysia
Section E.3 of the Technical proposal (Development Phase Management Plan)	Clause E.3.5.3 (Country of origin for procured services, equipment and material) (Refer page no.465 of attached Contract)	Reference has been made to Rolling Stock design, manufacture, assembly in Malaysia and installation and commission in India.
Sr. No. 35 of Technical package (laying down Project Management Plan)	Sr. No. 6 (organization) Project Manager (rolling stock), clause 5 (Refer page No.687 of attached Contract)	It has been Stated that rolling stock will be transported from manufacturing site to high seas and then to port and last to depot.
Sr. No.35 of Technical package (laying down Project Management Plan)	Sr. No. 6 (organization) Project Manager (rolling stock), clause 4, (Refer page no.687 of Contract.)	It has been stated that the monorail prototype will be inspected and approved by the client (MMRDA) and on approval/endorsement by MMRDA will such manufacture commence for the rest of the stock of the trains.
Volume 5 of RFP – Pricing Document and Payment Schedule	Cost Center A-8-2 page 14 and 15 of volume 5 (Refer page no.1317 of Contract)	The payment for each train is released by MMRDA only after a Notice of No Objection is received from MMRDA's representative. It is clearly stated that such notice is given by MMRDA's representative after satisfactorily completion of all finished train, for prototype manufactured as well as for balance manufactured train.

iii. LTSE-SEB Contract:

- The Applicant placed a back to back order on SEB (which is a member of the consortium) for supply of rolling stock from outside India to the Applicant in India. In this contract, clear reference to MMRDA-LTSE contract was given.
- The LTSE-SEB agreement provides, at point B of the recitals that ;



"The Contractor has entered into a contract with the Mumbai Metropolitan Region Development Authority ("Employer") dated 9th day of January 2009 ("the Main Contract") to provide the Planning Design, Development, Construction, Manufacture, Supply, Testing and Commissioning including Operation and Maintenance of Monorail System in Mumbai Metropolitan Region, Mumbai (the "Project"). The Main Contract and Consortium Agreement together referred to as the "Agreements".

- In furtherance of this, the LTSE-SEB agreement also defined the agreement, as well as the technical specifications required, through linking with the main MMRDA- LTSE agreement. This is clear in the "Supplier's Scope of Work", which forms Attachment No.2 to the LTSE-SEB Agreement, and which states that:

**"B. Supply of Goods**

Supplier had read and understood the requirement of the Main Contract and agreed to supply the following goods as per the technical specifications outlined in the Main Contract in terms of the Supply Agreement dated 29th March, 2010 of which this Attachment No.2 is part:

- The LTSE-SEB agreement also provides for the "Notice of No objection" to be received only from the Employer (MMRDA), in order to obtain the satisfactory completion of work. This is given as follows:

**"B3. Rolling Stock**

Supplier shall complete preliminary and definitive design works, detail specification, supporting drawing documents for Rolling stock system. Similarly to complete preliminary design and definitive design for mock - up car and complete the mock - up at contractor's factory.

Supplier to complete the manufacturing of total 15 trains and transport it to depot site in Mumbai. Satisfactory factory inspection certificate, Marine and Transit insurance for above trains shall cover this scope and enable receipt of.

To obtain the "Notice of No objection" or "Notice of No objection subject to comments" from the Employers for preliminary and definitive design for Rolling stock and certificate of satisfactory completion of formation of train.

Therefore, the final approval of 'no-objection' in the LTSE-SEB supplier agreement was completely controlled by the MMRDA, who was stated as the main Employer in the agreement.

- The rolling stock imported from SEB are tailor-made and customized as per the technical specifications mentioned in the MMRDA-LTSE contract, and therefore, such rolling stock is being imported for the specific purpose of the Mumbai Monorail project only.

**C. Application for DDQ – Chronology of the Transaction:**

14. The transaction mechanics to effect the import and supply of such rolling stock is explained below:

Date	Transactions
14 July 2008	LTSE submitted the bid dated 14 July 2008. In the Bid itself, it was clearly stated that the rolling stock would be manufactured and supplied from Malaysia by SEB. The technical details and configuration of such Rolling stock was also laid down in detail.
9 January 2009	MMRDA awarded the contract dated 9 January 2009 to LTSE
29 March 2010	LTSE-SEB contract was entered on 29 March 2010 for design and supply of rolling stock. Letter of Intent (LOI) entered on 12 March 2009
26 October 2009	The designs prepared by SEB were submitted by LTSE to MMRDA for its approval. MMRDA provided its approval vide letter dated 26 October 2009.
12 June 2010 and 18 August 2010	MMRDA had issued essentiality certificate for the purpose of import of goods under the Project Import Scheme of The Customs Act, 1962. In the said essentiality certificates, it was clearly recognized that there are no facilities for monorail coaches in India, and that the Rolling Stock would be imported for the purpose of Mumbai Monorail project. On the basis of such essentiality certificate, application was made to the customs department for registration of the contract under the Project Import Scheme.
11 September 2010	Based on the approved design, prototype of the rolling stock was manufactured in Malaysia. The officials of MMRDA visited Malaysia for inspection of the prototype and thereafter provided their acceptance vide letter dated 11 September 2010.
30 September 2010	The Commissioner of Customs issued a letter dated 30 September 2010, confirming that the contract has been registered under the Project Import Scheme.

Basis the above approvals, the rolling stock was manufactured at Malaysia based on the approval/acceptance of MMRDA. SEB dispatched the Rolling Stock from Malaysia to India under the shipping documents of SEB with the destination being the Wadala yard of MMRDA.

LTSE supplied the goods to MMRDA in India in pursuance of the MMRDA-LTSE contract dated 9 January 2009. The goods are cleared by LTSE under its Import-Export Code (IEC code) claiming benefit of concessional rate of custom duty under Project Import Scheme against the essentiality certificate issued by MMRDA.

15. LTSE imported a set of rolling stocks (comprising of 4 cars and accessories) pursuant to the contract. The sequence of events are as follows:

Date	Transactions
Same as per the course of events detailed in point 11 of the submission as made in the application	

16. LTSE raised its invoices on MMRDA in accordance with the payment schedules which are as follows:

SL.No.	LTSE Invoice No.	LTSE Invoice date	Amount (Rs. In lacs)	Amount (Rs. In lacs)
A. Invoices issued prior to submission of DDQ				
Same as per the course of events detailed in point 11 of the submission as made in the application				
Total (A)				3731.36



<i>B. Invoices issued post submission of DDQ</i>				
1.	RA 33	28 September, 2012	2220.01	20.46
2.	RA 34	31 October, 2012	2902.84	30.69
3.	RA 35	7 December, 2012	3623.08	67.39
Total (B)				118.54
Grand Total (A+B)				3849.90

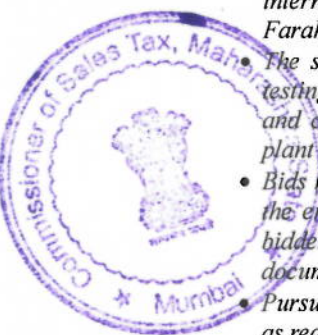
#### **D Submissions**

19. Thus, on a conjoint reading of section 8 of the MVAT Act, 2002 along with Section 5(2) of the Central Sales Tax Act, 1956, following types of sale transactions constitute as "sale in the course of import of goods into India", and hence is exempted from payment of VAT:
- "sale occasioning imports" as per the first limb of section 5(2) of the CST Act, 1956; if the sale or purchase occasions such import.
- OR
- "High Sea Sale" as per the second limb of section 5(2) of the CST Act, 1956; if the sale or purchase is effected by a transfer of documents of title to goods before the goods have crossed the customs frontiers of India.
20. In the given case, the applicant submits that the exemption from VAT should be applicable as the transaction qualifies as a "sale occasioning import", since
- The goods have moved from the foreign port to India in pursuance of an existing sale contract.
  - The sale transaction in India has occasioned/necessitated import of goods from outside India
  - There is a clear nexus and an inextricable link between the two transactions (i.e. import of goods, and the sale in India).
21. The applicant submits that the VAT exemption (as a "sale occasioning import") should be available in light of the following undeniable facts:
- a) There is a clear and inextricable link between MMRDA-LTSE contract and LTSE-SEB contract, as evident from the facts mentioned above.
  - b) LTSE is nothing but an unincorporated consortium, i.e. a conduit of which SEB is a consortium member. SEB itself was a party to the Bid, jointly with L&T and they had won the Bid, in pursuance of which, the contract was awarded by the MMRDA to L&T and SEB Consortium.
  - c) In the Bid itself, it was mentioned that the Rolling Stock would be manufactured and imported from Malaysia. The contract between the importer (LTSE) and the Indian customer (MMRDA) provides for import of goods from an identified foreign exporter (SEB).
  - d) The foreign exporter (SEB), being itself a party of the Bid and the contract with MMRDA, is clearly well aware of the ultimate customer (i.e. MMRDA) for whom the goods are being imported.
  - e) The import of rolling stock is effected as a direct result and for the purpose of the concerned supply of rolling stock to MMRDA for the Mumbai Mono Rail Project.
  - f) The goods are being manufactured as per the technical specifications provided by MMRDA, and is being dispatched after it is physically verified by MMRDA at SEB's manufacturing facility in Malaysia. There is no possibility of the goods being diverted for any other purpose.
  - g) The Rolling Stock supplied was specifically made to the technical specifications required by the MMRDA in the MMRDA-LTSE agreement. This equipment was then tested and approved by the engineers of the MMRDA at SEB's manufacturing facility in Malaysia, before import into India.
  - h) The movement of goods from Malaysia to India is ascribed to a composite well integrated transaction consisting of two transactions dovetailing into each other.
  - i) There is a clear privity of contract between the foreign supplier (SEB) and the Indian buyer (MMRDA), because the SEB itself is a party to the Contract awarded by MMRDA to L&T and SEB consortium.
  - j) The foreign supplier i.e. SEB was always aware of the end-user for whom the equipment was being manufactured, supplied and imported.
  - k) An essentiality certificate was issued by the MMRDA with respect to the Rolling stock and Customs exemption under Project Import scheme was availed in respect of such goods on the basis of such essentiality certificate.
  - l) The equipment supplied by SEB was not of a kind that could commonly be used as consumer goods, or in fact be used by anyone else for any other purpose. The Applicant submits that it is a fact that the rolling stock supplied by them was used solely and exclusively for the Mumbai Monorail Project. In fact, there is no other Monorail project currently in India where these goods could be used.
  - m) On the basis of the above, the Applicant reiterates that the two contracts are completely integrated, and there is an inextricable link that exists, linking the entire chain. The Appellant therefore submits that the transaction of supply of Rolling Stock by LTSE to MMRDA clearly qualifies as a 'sale occasioning import' and is in accordance with the principles laid down by various courts in the decisions referred above.
22. In support of the above, the applicant places reliance on the following decisions:
- Dy. Commr. of Agricultural Income Tax v. Indian Explosives Ltd. (1985) 60 STC 310
  - K.G. Khosla vs. Deputy Commissioner of Commercial Taxes [(1966) 17 STC 473 (SC)]
  - Embee Corporation vs. State of Maharashtra [1990] 078 STC 0311
  - Indure Limited vs. Commissioner of Commercial Taxes, West Bengal and others [2002] 0125-STC-0145
  - Ben Grom Nilgiri Plantations Co V Sales Tax Officer (1964) 15 STC 753.
23. The Applicant further submits that their case is squarely covered by the decision of the Delhi High Court in the case of [ABB Limited v. Commissioner, Delhi Value Added Tax [(2012) VIL 83 Del.].





- In this case, the appellant was involved in the manufacture and sale of engineering goods for the Delhi Metro Project. While the appellant had imported certain goods for the same, the DMRC dictated the specifications, had control over the quality of goods to be procured and supplied, and dictated that the packaging contained markings that the goods were for the project.
- In addition, the goods provided were specialised and complex, and not capable of being diverted to other customers.
- The Delhi High Court ruled in favour of the appellant and allowed the benefit of "sale occasioning import" to supplies made by the Appellant to DMRC.
- The Hon'ble Court held at paragraph 27 that :  
 "In the present case, there can be no manner of doubt that there was a live and conceivable link between the sale and movement of goods; DMRC was aware that the goods were to be sourced from the appellant's factories, which were outside Delhi. The reference to specific locations, in the list issued by DMRC, in respect of particular equipments, which were integral to the contract, establishes that movement of those goods was clearly in the contemplation of the parties. Moreover, as noticed earlier, the goods were custom made. The only conclusion that could reasonably have been drawn was that the character of the transaction was that of inter-state sale, necessitating movement. Specific instructions, or allusions in the contract, or lack of such facts, can hardly be decisive; the intention of the contract, as gleaned from the document compels the court to draw the conclusion that inter-state sales were involved in the present case, as to attract Section 3 of the Central Sales Tax Act. "
- Moreover, the Hon'ble Court examined the parameters in the given case which satisfied the conditions for "sale occasioning import", which were held to be:  
 "In the present case, the various conditions in the contract and other related covenants between DMRC and the appellant amply bear out that:  
 (1) Specifications were spelt out by DMRC;  
 (2) Suppliers of the goods were approved by the DMRC;  
 (3) Pre-inspection of goods was mandated;  
 (4) The goods were custom made, for use by DMRC in its project.  
 (5) Excise duty and Customs duty exemptions were given, specifically to the goods, because of a perceived public interest, and its need by DMRC;  
 (6) The Project Authority Certificate issued by DMRC the name of the subcontractors as well as the equipment/goods to be supplied by them were expressly stipulated;  
 (7) DMRC issued a certificate certifying its approval of foreign suppliers located in Italy, Germany, Korea, etc. from whom the goods were to be procured.  
 (8) Packed goods were especially marked as meant for DMRC's use in its project. "
- 24. The Applicant further submits the decision of the Supreme Court in the case of Indure Limited and Anr. V. Commercial Tax Officer and Ors. (2010) 34 VST 509 (SC) is also applicable in their case.
- In this case Tenders were invited by National Thermal Power Corporation (N.T.P.C.) for submitting bids by way of international Competitive Bidding, popularly known as Global tender for Ash Handling Plant Package for its Farakka Super Thermal Power Project, Stage-II.
- The scope of work involved in such package included designing and engineering, manufacture, inspection and testing at suppliers works, packing, transportation to site, unloading, storage and handling at site, erection, testing and commissioning of complete Ash Handling Plant for 2 x 500 MW Steam Generating Units (for short "the plant").
- Bids made by bidders were to cover whole of the work as abovementioned. Bid made by any person not covering the entire scope of work was liable to be treated as incomplete and could be rejected on that ground only. The bidder was required to quote a lump sum price in its proposal for the entire scope of work covered under the bid documents.
- Pursuant to issuance of notice to invite tender, the Appellant submitted its bid furnishing therein all the information as required by the aforesaid notice and also indicated its bid price inclusive of foreign expenditure.
- N.T.P.C awarded two contracts, (i) Supply contract and (ii) Erection Contract, to the company for performing the work of erection of aforesaid plant on Turnkey Basis. Even though, two contracts were entered into between the parties but in nutshell it was only one contract for the simple reason that N.T.P.C kept a right with it with regard to cross fall breach clause meaning thereby that default in one contract would tantamount to default in another and whole contract was liable to be cancelled.
- Term of Contract Agreement contemplated that the Appellant guaranteed to the N.T.P.C that the equipment package under the contract shall meet the ratings and performance parameters, as stipulated in the Technical Specifications (Volume-II) and in the event of any deficiencies found in the requisite performance figures, N.T.P.C may at its option reject the equipment package and recover the payment already made or alternatively accept it on the terms and conditions and subject to levy of the liquidated damages in terms of contract.
- It was further decided that project would need certain imported items to be used exclusively for the plant, the Appellant had written a letter to N.T.P.C inviting its attention, with regard to clause 4.5.2 of the Letter of Award, giving details of the items to be imported for the said project. As many as twelve different type of components were sought to be imported for completion of the project.
- MS Pipe to be imported from M/s. Daewoo Corporation, South Korea, was one of the items shown in the list prepared by the Company which was subsequently presented to N.T.P.C.





- The Appellant, thereafter, submitted an application before DGTD, Import Export Directorate, New Delhi for Special Imprest Import License against Turnkey contract for supply of complete Ash Handling System to N.T.P.C's Farakka Super Thermal Power Project (2x500 MW).
  - Special Import License was granted to the Appellant for importing MS Pipes of various diameters upto 500 MB with different wall thickness together with other components to be imported for usage in the said plant.
  - MS Pipes were then imported from outside India (South Korea) and were sold to N.T.P.C According to Appellant, such sales were covered under Section 5(2) of the Central sales Tax Act, 1956 (hereinafter shall be referred as 'Act') and had been exempted from imposition of Sales Tax under section 5(2)(a)(v) of the Bengal Finance (Sales Tax) Act, 1941 (for short 'BFST Act').
  - While examining the same, the Hon'ble Court stated that  
"In the case in hand, it is to be noted that the import had occasioned only on account of the covenant entered into between the Company and NTPC and the imported pipes were used exclusively for erection and commissioning of the plant."
  - The Hon'ble Court also went on to state that  
"Conversely, in order that the sale should be one in the course of import it must occasion the import and to occasion the import there must be integral connection or inextricable link between the first sale following the import and the actual import provided by an obligation to import arising from statute, contract or mutual understanding or nature of the transaction which links the sale to import which cannot, without committing a breach of statute or contract or mutual understanding, be snapped (sic snapped) ."
  - Thus in the above case The Hon'ble Court held that the Appellant was entitled to claim benefit of Section 5(2) of the Act.
  - The Applicant submit that the facts and circumstances of their case is completely and squarely covered by the aforesaid decision, and hence, the VAT exemption should be available to the suppliers made by the Applicant to MMRDA, as such sale should be regarded as a "sale occasioning import".
25. Without prejudice to the submissions made above, the Applicant further submits that a privity of contract between the ultimate purchaser (MMRDA) and the overseas exporter (SEB) is clearly established:
- The Applicant further submits that the overseas exporter (i.e. SEB) is itself a member of the consortium (i.e. LTSE) who is supplying goods to the MMRDA. Further, the overseas exporter (i.e. SEB) is having a direct privity of contract with the ultimate purchaser i.e. MMRDA.
  - The applicant makes following submissions to support the above:
    - i. At the outset, the Applicant submits that as stated before, LTSE is a consortium that was formed by L&T and SEB (the overseas exporter), expressly for the purpose of bidding for the Mumbai Monorail Monorail Project. The overseas exporter (i.e SEB) is itself a party to the contract that was awarded by MMRDA to the consortium comprising of both L&T and SEB.
    - ii. The contract between MMRDA and LTSE agreement expressly states at paragraph 2 of the recitals that :  
(2) Consortium comprising:
      - a) M/s Larsen & Tubro Limited, a company registered and existing under the laws of Companies Act, 1956 in India....
      - b) M/s Scomi Engineering Bhd, a company incorporated in Malaysia under the Companies Act, 1956....
 Who each of you shall be jointly and severally responsible to the Employer under the contract for the Mumbai Monorail Project as per the conditions agreed by the Employer..."
    - iii. The Applicant submits that it is clear from the above, that the parties would be individually jointly and severally responsible to the MMRDA.
  - It is therefore submitted that by virtue of the above clause, the MMRDA would clearly have a right to sue against SEB (the overseas exporter). Therefore, the Applicant submits that a privity of contract between MMRDA, LTSE and SEB is clearly established, and that MMRDA could pursue any claims against SEB individually.
  - This also establishes the privity of contract as laid down in Mazgaon Dock Ltd. (No.DDQ-11-2008/Adm-3/40/B-3).
26. The applicant therefore believes that it is clear that the MMRDA – LTSE contract has occasioned the import of goods (i.e. Rolling stock) into India, with the intention of ultimate supply to the MMRDA.  
Thus, the applicant submits that it is eligible to claim the benefit of Section 8(1) of the MVAT Act, read with Section 5(2) of the Central Sales Tax Act, 1956, and is therefore not liable to pay VAT on the rolling stock which has been supplied to the MMRDA."

A submission dt.22.09.2014, on the issues as below, tendered after hearing, states thus -

"A) the implications of the Supreme Court judgment in the case of *The State of Maharashtra Vs. Ms Embee Corporation* dated 21<sup>st</sup> August 1997 [1997] 078 STC 0311.

**I. Doctrine of Privity:**

The privity of contract is the simple principle that a stranger to a contract (i.e. a person who is not one of the contracting parties) cannot sue for breach of contract. This is so even if the stranger be a beneficiary of the contract. This doctrine is not to be found as an enacted provision either under the Indian Contract Act or under the English Contract Act.

The principle of the privity has been developed by the judges from the interpretation of Contract Law. In India, the doctrine has been explained by the Supreme Court in the case of *M.C. Chacko Vs State Bank of Travancore* [1970 AIR 500]..



2. Use of Privity by the Supreme Court in cases involving Import/Export:

The Supreme Court has decided numerous cases involving imports and exports. However, the Court has not used the doctrine of privity to decide each and every case. There are several judgments where the claim has been allowed although in facts of the case there was obviously no privity between the foreign exporter and the ultimate Indian customer. Two example are the Supreme Court judgments in the case of Dy. Commr. of Agricultural Income Tax v. Indian Explosives Ltd. (1985) 60 STC 310 and the judgment in the case of Indure Limited vs. Commissioner of Commercial Taxes, West Bengal and others [2002] 0125-STC-0145.

On the other hand, there are certainly a handful of cases where the Supreme Court has employed the doctrine of privity in order to decide the claim. This only goes to establish that the doctrine of privity is to be employed only when the circumstances of the case so warrant. It is not, however, a doctrine of universal applicability.

Two of the more well known cases where the Court has employed the doctrine of privity are Md Serajuddin Vs State of Orissa [36 STC 136] and K. Gopinath Nair Vs State of Kerala [(1997) 15 MTJ 520]. These judgments have been explained by another Bench of the Supreme Court. The State of Maharashtra Vs Ms Embee Corporation dated 21st August 1997 [1997] 107 STC 196 (SC).

3. The Embee Corporation judgment:

This again was a case involving import where there was no privity of contract between the foreign exporter and the ultimate Indian customer. The claim of the intermediate seller that the second sale was in the course of import was allowed by the Supreme Court.

Both of the privity judgments viz. Serajuddin and Gopinath Nair were cited before the Court. The Court explained the Serajuddin case as follows:

"Similarly the decision of this Court in the case of Md. Serajuddin is not applicable to the present case as in that case it was found that the appellant in the said case sold the goods directly to the corporation who entered into a contract with a foreign buyer and it was found that the immediate cause of export was the contract between the foreign buyer who was the importer and the corporation who was the exporter. Such sales were described as back to back contracts. This decision rested on the peculiar facts of the case". [Emphasis added]

Again as to the Gopinath Nair case, The Court stated that –

"In the said case, on facts, it was found that on account of sale to CCI by the foreign exporter, raw cashew nuts were imported into India. The importer being the CCI and not the local user, this Court held that principles evolved by it in para 12 of the judgment were not applicable to that case. We do not, therefore, find that this decision is helpful to the appellant's case" [Emphasis added]

Thus both the leading cases on privity were cited before the Court. The Court considered the cases and found that the application of the principle of privity rested on the "peculiar facts" and "and on facts" of these cases. The Court did not apply the doctrine of privity to decide the Embee Corporation case.

4. A Recent Bombay High Court judgment:

The Bombay High Court has recently decided the case of Ms Exide Industries Ltd. Vs The State of Maharashtra [W.P. No. 12025 of 2012, dated the 4<sup>th</sup> August 2014]. Admittedly, the claim of the petitioner in that case was under section 5(3) of the Central Sales Tax Act, 1956.

Nevertheless, the High Court decided the case by establishing an inextricable link between the purchaser and the first Indian seller [Please refer para 24, 26, 31, 34 and 36 of the judgment].

The Supreme Court judgment in the K. Gopinath Nair was also noticed by the High Court [Para 33]. After reviewing the facts and the cases cited above it, the High Court has decided the case by holding that there was an inextricable link between the two transactions in that case.

The High Court did not find it apposite in the facts of the case to employ the doctrine of privity.

5. Privity in the present case:

Without prejudice to the above submission, it may be once again stated that the applicants have established that in view of the explicit terms of the contract, there is privity of contract between the foreign exporter and the ultimate Indian customer.

B) In our specific case, given the fact that the parties i.e. L&T and SEB have a joint and several liability towards MMRDA, in case of any dispute, against whom does the MMRDA has right to take action?

In this regard, we submit that under the agreement, MMRDA has rights against both L&T and SEB since L&T and SEB are jointly and severally responsible. In order to enforce its contractual rights, MMRDA can take action against L&T and/or SEB or both (Larsen & Toubro Limited-Scomi Engineering Bhd Consortium) at its discretion."

#### 04. OBSERVATIONS

I have gone through the facts of the case. As can be seen, an exhaustive submission has been sought to be made by the applicant. The issue as comes out from the submission made is that the applicant, a consortium comprising 2 members, namely between Larsen & Toubro Limited (L&T) and Scomi Engineering Bhd (SEB), has been awarded a certain contract, a portion of which has been sub-contracted. Incidentally, this sub-contract has been awarded by the



consortium to one of the consortium members. The contract herein is "Design, Development, Construction, Commissioning, Operation and Maintenance of Monorail System". It includes supply of Rolling Stock (car trains) to Mumbai Metropolitan Region Development Authority (MMRDA). The applicant consortium has sub-contracted this portion of supply of Rolling Stock to it's member, namely SEB which is situated at Malaysia. This entails movement of goods from a place outside the Union of India. This import of the applicant consortium to fulfill its contract with MMRDA is being pursued in these proceedings as being a transaction in the course of import. With this understanding, I begin by enlisting the events as have taken place :

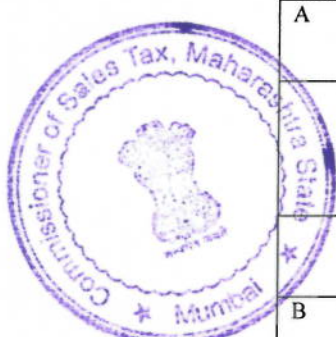
### 1. Consortium Agreement

An agreement is entered into on dt.04.06.2008 at Mumbai, India between L&T and SEB to form a Consortium by the name "L&T-SEB Consortium" (LTSEB) to cause a bid to be submitted on behalf of the Consortium for -

*"Design, Development, Construction, Commissioning, Operation and Maintenance of Monorail System in the following Corridor in Mumbai Metropolitan Region, on Turnkey basis:-*

- a) Gadge Maharaj Chowk (Jacob Circle) to Wadala Corridor approx (11 km), Fully elevated;
- b) Wadala to Chembur to Mahul Corridor approx (9 km), Fully elevated."

2. By Letter of Acceptance of dt.07.11.2008, MMRDA conveyed LTSEB Consortium that their bid dated 15/07/2008 for implementation of the monorail system from Sant Gadge Maharaj Chowk - Wadala - Chembur is accepted at the negotiated cost of Rs. 2,460 Crores without taxes. The break up of negotiated cost as given therein is thus -



Sr.No.	Description of Work	Original Offer	Negotiated Offer
A	Lump sum amount quoted by you for design, development, construction, manufacturing, supply, testing and commissioning of the Monorail system		
	Corridor I - Sant Gadge Maharaj Chowk – Wadala Depot Station (including Depot at Wadala for both section.)	Rs. 1782 crores	Rs. 1476 crores
	Corridor II - Wadala Depot Station – Chembur Railway Station	Rs. 1188 crores	Rs. 984 crores.
	TOTAL	Rs. 2970 crores (Inclusive of all Taxes and duties except service tax).	Rs. 2460 crores (Exclusive of all Taxes, duties and service tax).
B	Lump Sum amount for Operation and Maintenance of the Monorail System for each year of the operation after commissioning of the system.*		
	Year 1	Rs. 48,44,28,000/-	Rs. 48,44,28,000/-
	Year 2	Rs. 59,15,84,700/-	Rs. 59,15,84,700/-
	Year 3	Rs. 71,60,64,300/-	Rs. 71,60,64,300/-

\*The payment for Operation and Maintenance of the Monorail System for year 1, year 2 and year 3 shall be made at Rs. 2564, Rs. 3131 and Rs. 3790 per trip of a 4 car train for year 1, 2 and 3 respectively.

### 3. Contract Agreement

A Contract Agreement is made on dt.09.01.2009 between -

- (1) Mumbai Metropolitan Region Development Authority - the "Employer" and
- (2) Consortium comprising :
  - a) M/s Larsen & Toubro Limited - "Contractor(s)"
  - b) M/s Scomi Engineering Bhd - "Contractor(s)"

The Agreement states that the Contractor(s) has established a Consortium in accordance



1. Sant Gadge Maharaj Chowk – Wadala: Section - 1
2. Wadala - Chembur Railway Station: Section - 2

#### 4. Agreement for Supply of Goods

- *For operational reasons, the Contractor decided to issue Subcontracts to its members and such other persons as would be mutually decided, in respect of their Scope of Work as identified under the Consortium Agreement and in furtherance of such decision has issued Letters of Intent (LOI).*
- *In consideration of the terms and conditions of this Supply Agreement, and in confirmation of the said LOI, the Contractor hereby appoints the Supplier, and the Supplier hereby agrees to undertake and to perform certain portion of the Project as set out in the Attachment No. 2 of this Supply Agreement ("the Scope of Work"), where the Supplier performing all functions, bearing all risks, and receiving all rewards, as would occur to the Contractor in undertaking the Project for the Employer in respect of the Scope of Work set out in Attachment No. 2 hereto.*

### Supplier's Scope of work

- Scope of work	Compensation (INR)
<p><b>B. Supply of Goods</b>  Supplier had read and understood the requirement of the Main Contract and agreed to supply the following goods as per the technical specifications outlined in the Main Contract in terms of the Supply Agreement dated 29<sup>th</sup> March, 2010 of which this Attachment No.2 is a part:</p> <p><b>B1. Depot Equipments</b>  SEB shall complete preliminary and definitive design works, detail specification, supporting drawing documents and obtain No objection for Procurement of equipment for heavy maintenance and stabling area section. And to procure bogie drop pit and tools for maintenance vehicle.  To obtain the "Notice of No objection" or "Notice of No objection subject to comments" from the Employers for design, procurement of equipment for heavy maintenance and stabling area section. And for design and procure of bogie drop pit and tools for maintenance vehicle.</p> <p><b>B2. Signaling System</b>  Supplier shall complete preliminary and definitive design works, detail specification, supporting drawing documents for signaling and other sub system. Procure and delivery of signaling equipment and other subsystem equipment.  To obtain the Notice of "Notice of No objection" or "Notice of No objection subject to comments" from the Employer's for design and procurement of signaling system and other subsystems.</p> <p><b>B3. Rolling Stock</b>  Supplier shall complete preliminary and definitive design works, detail specification, supporting drawing documents for Rolling stock system. Similarly to complete preliminary design and definitive design for mock-up car and complete the mock-up at contractor's factory.  Supplier to complete the manufacturing of total 15 trains and transport it to depot site in Mumbai. Satisfactory factory inspection certificate, Marine and Transit insurance for above trains shall cover in this scope and enable receipt of.  To obtain the "Notice of No objection" or "Notice of No objection subject to comments" from the Employer's for preliminary and definitive design for Rolling stock and certificate of satisfactory completion of formation of train.</p>	<p>24,50,16,000</p> <p>90,03,60,000</p> <p>627,30,00,000</p>
<b>Total Consideration</b>	<b>741,83,76,000</b>
<b>Amount INR Seven Hundred Forty One Crores Eighty Three Lakhs Seventy Six Thousand only.</b>	



- Supplier's Payment Milestones For SEB (Goods)

<b>SCOPE OF WORK - GOODS</b>				
<b>SCOPE</b>	<b>SUB-SCOPE</b>	<b>TYPE</b>	<b>COST CENTRE</b>	<b>AMOUNT (INR CR)</b>
Depot Equipments	Preliminary Design	GOODS	A-4-1-1	51,660,000
	Definitive Design	GOODS	A-4-1-2	51,660,000
	Procurement of Depot Equipments	GOODS	A-4-5-1-1-1, A-4-5-1-1-2, A-4-5-1-1-5, A-4-5-1-1-6	1,41,696,000
Signalling Systems and Switches	Preliminary Design and Layout Plans for Signaling System	GOODS	A-6-1-1-1 & A-6-1-2-1	95,940,000
	Preliminary Design and Layout Plans for Other Subsystems	GOODS	A-6-1-1-3 & A-6-1-2-3	14,760,000
	Definitive Design and Layout Plans for Signaling System	GOODS	A-6-2-1-1 & A-6-2-2-1	191,880,000
	Definitive Design and Layout Plans for Other Subsystems	GOODS	A-6-2-1-3 & A-6-2-2-3	29,520,000
	Delivery of Signaling Equipments and other Subsystems	GOODS	A-6-3-1-1 & A-6-3-1-2	568,260,000
Rolling Stock	Preliminary Design Submission	GOODS	A-8-1-1	147,600,000
	Definitive Design Submission	GOODS	A-8-1-2	369,000,000
	Mockup at Contractor's Factory	GOODS	A-8-1-3	221,400,000
	Manufacturing of Rolling Stocks	GOODS	A-8-2	1,476,000,000
	Transportation and Delivery	GOODS	A-8-3	4,059,000,000
<b>TOTAL SUM TO BE AWARDED</b>				<b>7,418,376,000</b>

5. Import of Rolling Stock and bill raised on LTSEB Consortium

The bill presented in these proceedings is invoice no.22 dt.23.02.2011 raised by SEB on LTSEB Consortium for supply of Rolling Stock [Train no.3 (4 cars and accessories)] mentioning that the said goods are being supplied for the Mumbai Monorail Project. The CIF value mentioned against the aforesaid description of goods is Rs.38,49,90,000/- out of which amount of Rs.3,44,40,000/- shown as 'invoiced at design stage vide invoice no. 2 and dated 23/10/2009'. Hence, the bill stands drawn for an amount of Rs.35,05,50,000/-. The bill also mentions the consignee as 'LTSEB Consortium A/c MMRDA'. There is a 'Note' on the bill to the effect thus - "No VAT is payable as sale has occasioned import". It is further mentioned that the goods are moving pursuant to the contract between the Consortium and Scmi and reference is made to the agreement between the Consortium and MMRDA and the essentiality certificate issued by MMRDA towards imports.

6. Invoices raised on MMRDA

The invoices raised by the applicant consortium on MMRDA are structured in two parts - for L&T portion and for Scmi portion. In each part, charges are shown on account of two events - towards Works Contract Services rendered and towards material supply, both during a particular month period. The invoices raised are as follows :

SL. No.	LTSE Invoice No.	LTSE Invoice date	Invoice Amount (Rs. In lacs)	Amount Pertaining to RST (Rs. In lacs)
1.	RA 2	29 March 2010	3126.73	344.40
2.	RA 19	25 February, 2011	2192.45	526.93
3.	RA 20	29 March 2011	5641.53	526.93
4.	RA 21	5 April, 2011	5489.47	383.57
5.	RA 22	25 May 2011	7612.65	1949.52
6.	RA 33	28 September, 2012	2220.01	20.46
7.	RA 34	31 October, 2012	2902.84	30.69
8.	RA 35	7 December, 2012	3623.08	67.39
Total				3849.90

An invoice could be explained thus - Tax Invoice No.MONORAIL/LTSE/TI/1112/05/22



dt.24.05.2011 (period 26.03.2011 to 25.04.2011) is raised for an amount of Rs.76,12,65,176/- out of which amount towards Rolling Stock is mentioned in the application as Rs.1949.52 lacs. The bifurcation of this amount can be had from the Annexure alongwith the bill -

	Description	Amount Invoiced (PART RA -22)	Material Amount	Remarks
	A8 Billed in R22 (Rolling Stock)	194951925	194951925	
A-8-2-2-1-3	Document for Shipment to Indian Port.	26346600	26346600	Sales occasioning import
A-8-2-2-1-4	Transit Insurance from Port in India to Depot Site.	8782200	8782200	Sales occasioning import
A-8-3-2-1-1	Transportation of Cars to Port in Mumbai.	38357550	38357550	Sales occasioning import
A-8-3-2-1-2	Receipt of Cars from Port to Depot in Mumbai	121465575	121465575	Sales occasioning import

In view of the facts as at above, the applicant submits that the supplies made to MMRDA after import from SEB do not fall within the provisions of the MVAT Act,2002. It is claimed that the supply of Rolling Stock to MMRDA is a transaction in the course of import u/s. 5(2) of the Central Sales Tax Act, 1956. Though the present proceedings are under the provisions of section 56 of the MVAT Act,2002, I have to examine the possibility of coverage of the impugned transaction under the aforesaid sub-section of the CST Act so as to be able to determine whether the same could not be said to be falling under the provisions of the MVAT Act,2002. The sub-section (2) of section 5 of the CST Act reads thus :

*"A sale or purchase of goods shall be deemed to take place in the course of the import of the goods into the territory of India only if the sale or purchase either occasions such import or is effected by a transfer of documents of title to the goods before the goods have crossed the customs frontiers of India."*

What the above section says is that a sale or purchase shall be deemed to take place in the course of the import of the goods into the territory of India only if -

a. the sale or purchase either occasions such import

OR

the sale or purchase is effected by a transfer of documents of title to the goods before the goods have crossed the customs frontiers of India.

The principles regarding 'sale in the course of import' have been laid down by the Hon. Supreme Court in K. Gopinathan Nair And Others, Appellants V. State Of Kerala (1997 105 STC 580 SC) thus :

*"(1) The sale or the purchase, as the case may be, must actually take place.*

*(2) Such sale or purchase in India must itself occasion such import, and not vice versa i.e. import should not occasion such sale.*

*(3) The goods must have entered the import stream when they are subjected to sale or purchase.*

*(4) The import of the concerned goods must be effected as a direct result of the concerned sale or purchase transaction.*

*(5) The course of import can be taken to have continued till the imported goods reach the local users only if the import has commenced through the agreement between foreign exporter and an intermediary who does*





not act on his own in the transaction with the foreign exporter and who in his turn does not sell as principal the imported goods to the local users.

(6) There must be either a single sale which itself causes the import or is in the progress or process of import or through there may appear to be two sale transactions they are so integrally enter-connected that they almost resemble one transaction so that the movement of goods from a foreign country to India can be ascribed to such a composite well integrated transaction consisting of two transactions dovetailing into each other.

(7) A sale or purchase can be treated to be in the course of import if there is a direct privity of contract between the Indian importer and the foreign exporter and the intermediary through which such import is effected merely acts as an agent or a contractor for and on behalf of Indian importer.

(8) The transaction in substance must be such that the canalising agency or the intermediary agency through which the imports are effected into India so as to reach the ultimate local users appears only as a mere name lender through whom it is the local importer-cum-local user who masquerades."

The above principles as laid down by the Hon. Supreme Court are not disputed or struck down by any later judgment of the very Court. With a fair understanding of the issue and the provisions, I have to ascertain whether the aforesaid principles are found satisfied with in the present facts of the case. The applicant has contended that the impugned transaction falls in the first limb of the aforesaid sub-section i.e the sale or purchase either occasions such import. To put it in the words of the applicant, the sale to MMRDA by the applicant has occasioned the import from SEB. Let me therefore examine the correctness of the claim put forth by the applicant.

The first limb of the above sub-section says that the purchase should occasion the import. The applicant does not dispute that there are two transactions - one is the import purchase from SEB by the applicant and the other is the sale by the applicant to MMRDA. The first thing which I notice is that Rolling Stock worth Rs.38,49,90,000/- were dispatched from Malaysia under Bill of Lading No.SE2110103 dt.28.02.2011. The Bill of Entry No.3323181 dt.26.04.2011 mentions 'Bill of entry for EXBOND'. Customs Duty thereon has been paid on dt.28.04.2011 and thereafter the goods have been transported to the Consortium address at Wadala. The bill raised by SEB on LTSEB Consortium evidencing this purchase transaction is of dt.23.02.2011. This bill mentions that an earlier invoice dt.23.10.2009 has been raised at the design stage for an amount of Rs.3,44,40,000/- and therefore, the bill through which the impugned goods were dispatched to India has been raised for an amount of Rs.35,05,50,000/-. The value of the Rolling Stock along with the design charges as billed on the applicant is Rs.38,49,90,000/-. Now the applicant has raised bills on MMRDA for the aforesaid amount at different intervals thus -

LTSE Invoice No.	LTSE Invoice date	Invoice Amount (Rs. In lacs)	Amount Pertaining to RST (Rs. In lacs)
RA 2	29 March 2010	3126.73	344.40
RA 19	25 February, 2011	2192.45	526.93
RA 20	29 March 2011	5641.53	526.93
RA 21	5 April, 2011	5489.47	383.57
RA 22	25 May 2011	7612.65	1949.52
RA 33	28 September, 2012	2220.01	20.46
RA 34	31 October, 2012	2902.84	30.69
RA 35	7 December, 2012	3623.08	67.39
		Total	3849.90



The first bill raised by MMRDA of Rs.344.40 lacs can be correlated with the mention of bill raised for design charges for Rs.3,44,40,000/-. Thus, it is seen that the trains reached India in the year 2011. However, the supply of Rolling Stock by the Consortium was not immediately billed to MMRDA. It is informed that there are other imports of Rolling Stock also which have been subsequently billed to MMRDA. For the import of Rolling Stock under consideration in the present proceedings, it is seen that the bills evidencing supply to MMRDA by the Consortium were raised through a series of invoices which scattered on to the end of the next calendar year. The applicant contends that in the two set of transactions of sale and purchase, the sale to MMRDA has occasioned the import which in other words means that the sale to MMRDA has happened first and the import was the latter of the transaction in the set of the two events.

I would come to the next point and which is - *whether the imported goods were handed over as it is by the applicant to MMRDA?* Even before embarking on a study of the events, I am of the opinion that a possibility thereof appears dim. This is for the obvious reasons that the contract awarded by MMRDA did not involve only supply of Rolling Stocks. The Rolling Stocks were part of a project which involved planning, design, development, construction/manufacturing/supply, testing and commissioning of the Monorail system. After import of the goods, as I can envisage, there would have to be numerous further work thereon so as to term the Rolling Stock as compartments or bogies of the monorail. The works could be varied such as coupling and linking of the cars, installing the circuitry, the connectivity for light, installation of other systems, fitting of other parts, internal adjustments to the concerned route on which they would be operating, signaling adjustments, testing, etc. I would see if the documents throw any light on the above -

In the Technical Package, in point A3 about 'Transportation System', sub clause A.3.1 is about 'Rolling Stock'. It mentions about the colour schemes, material from which the train bodies, train chassis, the flooring would be made. The physical dimensions such as length, width, height, seating capacity, seat width, standing area, etc. of the end car, intermediate car is specified. Then Section B.2 is about 'Rolling Stock'. It specifies the beam dimensions, horizontal/vertical track curvature, kinematic envelope, power supply, vehicle interior, interior panels, passenger doors, bogie, wheel and suspension etc. Then there is a section about the composition of the Rolling stock maintenance team, rolling stock consumables and maintenance intervals (change intervals), etc. The documents give an idea of the train composition. However, it is also mentioned that the dimensions given are only recommendatory in nature. As regards 'Car body', it is also stated that an alternative material to aluminium will be acceptable if it satisfies the requirement of safety, durability & integrity.

A chart showing the proposed activities as presented by the Consortium states thus -





Section 1-

Section 1- Gadge Maharaj Chowk (Jacob Circle) to Wadala Section approx. (11km)				
Item	Activity Name	Start date from NTP Wk)	Duration (Wk)	End Date from NTP
57	Rolling Stock			
58	Fabrication & Testing in factory	19	100	120
59	Delivery of First Lot Vehicles	106	0	
60	Start of Testing and Commissioning of 1 <sup>st</sup> set of Rolling Stock	114	0	
61	Delivery of Complete Rolling Stock	106	18	104
62	Delivery of Last set of Rolling Stock		0	124
63	Testing & Commissioning			
64	Start of Integrated Testing & Commissioning & Trial Run	118	0	
65	Integrated Testing & Commissioning	118	12	130
66	Final Commissioning of the System for Commercial Operation		0	130
67	Safety Certification for Commercial Operation		0	130
68	Start of Commercial Operation	130	0	

Section 2-

Section 1- Wadala to Jijamata Nagar to Chembur Railway Station Section approx. (8km)				
Item	Activity Name	Start date from NTP (Wk)	Duration (Wk)	End Date from NTP
72	Rolling Stock			
73	Fabrication & Testing in factory	18	70	88
74	Delivery of First Lot of Rolling Stock	82	0	
75	Start of Testing and Commissioning of 1 <sup>st</sup> set of Rolling Stock	90	0	
76	Delivery of Complete Rolling Stock	82	18	100
77	Delivery of Last set of Rolling Stock		0	100
78	Testing & Commissioning			
79	Start of Integrated Testing & Commissioning & Trial Run	94	0	
80	Integrated Testing & Commissioning	94	10	104
81	Final Commissioning of the System for Commercial Operation		0	104
82	Safety Certification for Commercial Operation		0	104
83	Start of Commercial Operation		0	104

The aforesaid fortifies my view that there was work to be done on the Rolling Stock after import into India. MMRDA had not awarded a contract of merely importing goods. The goods would qualify the needs of MMRDA only after the successful testing in India and which was not possible without significant and critical work to be performed thereon in India. In "Project Implementation schedule and Contract Key Dates", the details with regard to Rolling Stock are thus -

Activity	Key Date from the Date of Commencement of Work
<b>Corridor - 1</b>	
Delivery of 1 <sup>st</sup> set of Rolling Stock	82 Weeks
Start Testing of Rolling Stock	90 Weeks
<b>Corridor - 2</b>	
Delivery of 1 <sup>st</sup> set of Rolling Stock	106 Weeks
Start Testing of Rolling Stock	114 Weeks
Delivery of the last set of Rolling Stock	124 Weeks

A look at the payment stages as elaborated in the documents also brings out the work to be done after the goods have been transported to India -



COST CENTRE A-8 ROLLING SYOCK		
Cost Centre/ Sub-Cost Centre	DESCRIPTION	Apportioned Payment (% of Sub- System "A-8")
A-8	ROLLING STOCK	30%
A-8-1	Preliminaries and General Requirements and Design of Rolling Stock	10%
A-8-2	Manufacture, Factory Testing, Inspection, Marine Insurance and Shipping and transit Insurance upto Depot Site	20%
A-8-3	Transportation of manufactured trains including handling charges to depot and all other incidental costs, receipt of cars in depot, formation of trains, satisfactory completion of tests and running of train in the depot.	55%
A-8-4	Testing and Commissioning of Trains on the Section	15%
	TOTAL	100%
Sub- Cost Centre/ Sub-Heads	WORK DESCRIPTION	Apportioned Payment (%)
A-8-1	<b>PRELIMINARIES AND GENERAL REQUIREMENTS AND DESIGN OF ROLLING STOCK AND PROVISION OF MOCKUPS</b>	10%
	Obtain the "Notice of No Objection" or "Notice of No Objection subject to..." from the Employer's Representative for:	
A-8-1-1	.Preliminary Design Submission and Specifications	20%
	. Pre-Final Design Submission	
A-8-1-2	.Final Design Sumission	50%
	.Final Design Document Delivery	
A-8-1-3	Mock Up at Contractor's Factory	30%
		100%
A-8-2	<b>MANUFACTURE</b>	20%
	Obtain the " Notice of No Objection " or "Notice of No Objection Subject to---" from the Employer's Representative after:	
	Issue of Inspection Certificate on satisfactory completion of all Factory Tests;	
	Marine Insurance	
	Documents for shipment to Indian Port;	
	Transit insurance from Port in India to Depot Site in Mumbai	
A-8-2-1	Prototype Manufactured Train and testing.	15%
A-8-2-2	Obtain as the for balance manufactured tram	85%
		100%
A-8-3	<b>TRANSPORATION, DELIVERY AND TESTING OF MANUFACTURED TRAINS</b>	55%
	Obtain the " Notice of No Objection " or "Notice of No Objection Subject to---" from the Employer's Representative after:	
	• Transportation of cars to Depot in Mumbai;	
	• Receipt of cars in the Depot in Mumbai;	
	• Formation of train , obtaining certificate of satisfactory completion of functional tests and running of train in the Depot	
	For:	
A-8-3-1	Prototype Manufactured Train.	10%
A-8-3-2	Balanced manufactured trains	90%
		100%
A-8-4	<b>TESTING AND COMMISSIONING OF TRAINS</b>	15%
	Obtain the " Notice of No Objection " or "Notice of No Objection Subject to---" from the Employer's Representative of:	
A-8-4-1	Instrumentation tests, Oscillation trials and Sanction of Safety Certification Authority of Test results for the First Prototype Train.	15%
A-8-4-2	Completion of Testing and Commissioning in the Depot and on the section in conjunction with Designated Contractors for the balance trains;	85%
		100%
	<b>TOTAL</b>	<b>100%</b>
NOTE:	The progressive payment shall be released proportionate to the length/quantum of work done as certified by the Employer/ Employer's Representative.	

Thus, it can be seen that there are works to be done even after the goods have been transported to India like testing, commissioning, etc. In view thereof, I am not acceptable to the contention of the applicant that the supply of the impugned goods to MMRDA are a case of sale in the course of import. I also find a clause to the effect that the 'Taking Over of the System' by



the Employer i.e MMRDA is only after the operation and maintenance of the system has been carried out as per the requirements of MMRDA.

***Taking over of the System***

*Except as stated else where in the Contract, the System shall be considered to be taken over by the Employer when*

- i. The Operation & Maintenance of the System has been carried out as per the Employers Requirements - Operation & Maintenance, for the period as defined in the Contract and / or any extension thereof; and*
- ii. The criteria as stated in the Appendix 19 of the Employer's Requirement is satisfied and*
- iii. Taking Over Certificate has been issued by the Employer / Employer's Representative*

*The Contractor may apply by notice to the Employer / Employer's Representative for issue of the Completion Certificate / Taking-Over Certificate as the case may be).....*

In such a case where the Employer has not taken over the System, will it be possible for the Contractor to claim delivery or supply of the goods to MMRDA? The point about the Contractor i.e the Consortium taking care of the System till the Taking Over by MMRDA may also be seen :

***Contractor's Care of the Works / System***

*The Contractor shall take full responsibility for the care of the Works / System, Plant, Rolling Stock & Material, and Goods, Employer's Equipment etc. from the Commencement Date until the Taking-Over Certificate is issued (or is deemed to be issued under Sub-Clause 10.1 [Completion Certificate / Taking Over of the System] for the System, when responsibility for the care of the System shall pass on to the Employer. If a Taking-Over Certificate is issued (or is so deemed to be issued) for any Section of the System, responsibility for the care of the Section shall then pass to the Employer.*

*After responsibility has accordingly passed on to the Employer, the Contractor shall take responsibility for the care of any work/ system, which is outstanding on the date stated in a Taking-over Certificate, until this outstanding work / system /sub-system has been completed.*

Thus, it can be seen that the responsibility passes on to the Employer only after taking over of the System. And the System is taken over only after it is properly functioning as per the requirements of the Employer. And to make the Rolling Stock functioning obviously involved doing substantial work on the Rolling Stock after they have been imported into India. There is also a clause in the agreements which translates that the Employer i.e MMRDA would be responsible for the goods only after a certain date which is termed as the Risk transfer date. This means that the goods are not transferred or supplied to MMRDA immediately after arrival in the country but after needful work thereon has been carried out.

The above are not the only points. I find, from a perusal of the documents, that nowhere the contract between the consortium stipulates that the goods have to be specifically imported from SEB. I have also come across this clause -

***Transportation of Rolling stock:***

*Coaches may be imported or manufactured locally by suitable tie-ups. Transfer of Technology (ToT) is preferred to the extent possible. The transportation of coaches from manufacturer's premises/port to the Depot of the system may be by road using special trailers or rail-road combination. Suitable unloading facilities will have to be organized in car shed area.*

*The technical/performance specification given for rolling stock above are indicative of the basic requirements. The bidders can optimize the design of the rolling stock keeping in view generally the above parameters so that the projected traffic could be handled efficiently and safely. Any Deviations due to optimization shall have to be highlighted clearly along with the reasons and with their financial implications for the consideration of the Employer.*

What the above clause shows is that the Contractor has a say in deciding the Supplier and it is not a case that MMRDA decides as to who the Supplier would be. It is specifically mentioned that the coaches may be imported or manufactured locally. *This adds to my above observations that there is no express pronouncement anywhere that the Rolling Stock would have to be procured from none other than SEB.* MMRDA having a say about the specifications of the Rolling Stock or checking with the details of the Supplier does not mean that there is a direct



relation between the Supplier and MMRDA. And it also, cannot be interpreted to mean that the Consortium was acting as an agent of MMRDA. In fact, the above clause goes on to prove that the Consortium acted in a capacity of Principal in the transaction it entered into with the Supplier and not in the capacity as an agent of MMRDA.

The impugned transaction of import is between the Consortium and SEB and the link ends on delivery of the goods to the Consortium. If we peruse the clause about 'Compensation' in the Supply agreement, it is stated thus -

- *The Contractor shall pay the Supplier in respect of the Scope of Work completed by the Supplier in accordance with the Attachment No. 2 of this Supply Agreement as per the milestones stated therein. Payment shall be made by the Contractor on receipt by Contractor of the corresponding payment from the Employer net of all withholding taxes deducted by the employer and the contractor.*

The above clause states that payments to the Consortium would be made as per the milestones. It means that the role of Consortium was not restricted to just importing of the Rolling Stock but there were other activities to be performed after the goods reach India and are made to function or operate. The goods as imported from Malaysia were not handed over in the same form in which they were imported but there were certain jobs to be done to the imported goods. It interpretes to mean that the supply to MMRDA involved a series of jobs to be done by the applicant after importing the goods.

There is also a clause in the Supply agreement which says that -

*Notwithstanding anything contained to the contrary in this Supply Agreement, termination of this Supply Agreement for any reason shall not terminate the Consortium Agreement or affect the terms thereof in any manner whatsoever.*

Thus, it can be seen that it is not the case that the two transactions are interdependent. The Supply agreement will not affect the contract awarded to the Consortium. From a list of the documents forming part of the Contract awarded by MMRDA, it is seen that clarifications given by the Consortium, other documents tendered by the Consortium, etc. form a thereof but the agreement for the supply of goods does not form a part of the Contract documents. To put it elaborately, it translates that the transaction of import is not inextricably linked with the contract awarded to the Consortium. The Rolling Stock could have been procured from elsewhere too. There was no hard and fast rule that the Rolling Stock had to be procured from SEB only. Further there are also clauses to the effect that MMRDA does not have a say in the Supply Agreement that will be entered into by the Consortium. These are -

**'SubContracting'**

- *The Supplier shall not subcontract the whole of the Supplier's obligations under this Supply Agreement to any third parties without the prior written consent of the Contractor, which consent shall not be unreasonably withheld. However, subject to the restrictions imposed in the Agreements, Supplier shall have the right to subcontract its obligations under this Supply Agreement or any portion thereof to its affiliates or any portion thereof to any third parties.*
- *In the event of the Supplier subcontracting, the Supplier shall be responsible for the acts or defaults of any of its subcontractors, agents or employees, or suppliers as if they were the acts or defaults of the Supplier.*

**'Assignment'**

*The Supplier shall not be entitled to assign the whole or any part of the Scope of Work without the prior written consent of the Contractor.*

The above clauses say that there cannot be any link established between MMRDA and the



supplier. The clauses are significant when I find that an argument of 'privity of contract' is made in support of the claim of 'sale in the course of import'. It is additionally contended that the certification by MMRDA goes on to prove that the transaction of purchase from Malaysia is a sale in the course of import to MMRDA. I have read the letter dt.02.06.2010 issued by the Joint Metropolitan Commissioner. It clearly states that the project is awarded to the Consortium. It also states that it has received a proposal for issuance of a Certificate for duty concession for project import under Customs Notifications. It is certified that the goods are essentially required for setting up the Monorail System. In the letter dt.18.08.2010, it is mentioned that MMRDA is the competent authority for project import endorsement in respect of imports by the consortium. These letters do not prove that there is privity of contract between MMRDA and the Supplier. The applicant has relied on the statement in the contract between the Consortium and MMRDA to drive home the point that there is privity of contract between MMRDA and the Supplier - "*Who each of which shall be jointly and severally responsible to the Employer under the Contract for the Mumbai Monorail Project as per conditions agreed by the Employer*". In the present case, though the Supplier is one of the Consortium members, the agreement for supply of goods is made by the Consortium with one of it's members and there is no direct agreement between the supplier and MMRDA. In a TABLE showing queries raised by MMRDA and response to the same from the consortium, one of the queries and response is thus -

<p>To judge the capability of the proposed supplier of rolling stock (M/s SCOMI), the following details are required</p> <p>a) Supplies made in last 5 years along with details of orders nos. and name of customers</p> <p>b) Maximum number of car manufactured in a year</p> <p>c) Manufacturing plan to meet the requirement of the key dates for the said project.</p>	<p>(A) Scomi has supplied the KL Monorail system to Kuala Lumpur Monorail System (KLMS) in 2003. The system comprised 12 X 2-car trains, 11 stations over a 8.6 km double track.</p> <p>(B) Scomi's annual car manufacturing capacity is 150 cars.</p> <p>(C) Scomi's manufacturing facilities comprise a 120,000 ft<sup>2</sup> factory together with a one kilometer test track. A brand new 150,000 ft<sup>2</sup> manufacturing facility is currently under construction and due to be completed by 2008.</p>
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SEB is a member of the consortium, even then one finds that the Employer i.e MMRDA had checked about its credentials with the Consortium. However, merely because the subcontractor i.e SEB is approved by MMRDA, it doesn't mean that there is privity of contract between MMRDA and the Supplier i.e SEB. The fact remains that SEB in the capacity of a supplier is responsible to the consortium and not to MMRDA. This equation would not change even if the Supplier was not a member of the Consortium. As a member of the consortium, it is not denied that SEB would be responsible to MMRDA. But this responsibility would be as a member of the Consortium towards the contract awarded by MMRDA and would also include defaults in supplies including supplies of Rolling Stock. However, in capacity as a Supplier, SEB's relationship with MMRDA would not be governed by the Contract awarded by MMRDA. The aforesaid clause on which the applicant seeks to place reliance defines the relationship of the Consortium with MMRDA. To drag another party under the embrace of the said clause simply because the said party happens to be a member of the Consortium is a case of questioning the sanctity of the Supply agreement. Both the agreements have commitments which arise from



exclusive responsibilities cast thereunder. The terms of the Supply agreement determine the responsibility of the Supplier. As mentioned earlier, the agreement for the supply of goods does not form a part of the Contract documents. In the event of a default or defect in the Supplies, MMRDA would be catching hold of the Consortium and not the Supplier. This fact is evident from the clauses as follows :

**Clauses in the "General Conditions of Contract"**

*'Joint and Several Liability'*

*"If the Contractor constitutes (under applicable Laws) a Joint Venture / Consortium or other unincorporated grouping of two or more entities:*

- (a) these entities shall be deemed to be jointly and severally liable to the Employer for the performance of the Contract;*
- (b) these entities shall notify the Employer of their leader who shall have authority to bind the Contractor and each of these entities; and*
- (c) the Contractor shall not alter its composition or legal status without the prior consent of the Employer*

The above clause echoes the statement reproduced above and as is relied upon by the applicant. There's a clause about 'Subcontractors' - *The Contractor shall be responsible for the acts or defaults of any Subcontractor, his agents or employees, as if they were the acts or defaults of the Contractor.* This clause shows that the Contractor would be held liable for acts and omissions under the Contract. Further, if the Contractor fails to comply with the "Project Implementation schedule and Key Dates", the delay damages are payable by the Contractor and which happens to be the Consortium.

There is also a clause about 'Nominated Subcontractors' which reads thus -

*Nominated Subcontractors*

*In this Sub-Clause, "nominated Subcontractor" means a Subcontractor whom the Employer, under Clause 13 [Variations and Adjustments], instructs the Contractor to employ as a Subcontractor. The Contractor shall not be under any obligation to employ a nominated Subcontractor against whom the Contractor raises reasonable objection by notice to the Employer as soon as practicable, with supporting particulars.*

What the above clause shows that the Contractor would not be under any compulsion to appoint a sub-contractor as approved by MMRDA. MMRDA seeking to know the credentials of the Supplier cannot translate to mean that there is privity of contract between MMRDA and the Supplier. The following clause also shows that even if the work is sub-contracted, the Contractor is not absolved of his responsibility

*Force Majeure Affecting Subcontractor*

*If any Subcontractor is entitled under any contract or agreement relating to the System to relief from force majeure on terms additional to or broader than those specified in this Clause, such additional to or broader force majeure events or circumstances shall not excuse the Contractor's non-performance or entitle him to relief under this Clause.*

Further, it is also seen that the responsibility of insurance till the date of issue of the Taking-Over Certificate for the System lies with the Contractor which is the Consortium. The General Conditions of Contract specifically say that the wording "Insuring Party" means, "Contractor". It specifically provides thus -

*"If the insuring Party fails to effect and keep in force any of the insurances it is required to effect and maintain under the Contract, or fails to provide satisfactory evidence and copies of policies in accordance with this Sub-clause, the Employer/Employer's representative may (at its option and without prejudice to any other right or remedy) effect insurance for the relevant coverage and pay the premiums due. The insuring party shall pay the amount of these premiums to the Employer, and the Contract Price shall be adjusted accordingly."*

What the above shows is that the Contractor i.e the Consortium is liable for the damages. It proves that by acting as an insuring party, the Consortium acts on a Principal to Principal basis with the Supplier. It does not act as an agent of MMRDA. And therefore, no contract of agency or



the role of the Consortium as a 'canalising agency or an intermediary agency' can be made out.

There is also a clause in a document about 'Sub-Contractor's/Vendor's Warranty' (one of the Schedules to the 'Special Conditions of Contract'), which states thus -

*"The Sub-contractor undertakes to indemnify the Employer against each and every liability which the Employer may have to any person whatsoever and against any claims, demands, proceedings, loss, damages, costs and expenses sustained, incurred or payable by the Employer provided that the Sub-Contractor shall have no greater liability to the Employer by virtue of this Warranty than the liability of the Contractor to the Employer under the Contract in so far as and to the extent that the same has arisen by reason of any breach by the Sub-contractor of his obligations under the Sub-contract."*

The above clause affirms that the Sub-contractor's liability is restricted to the obligations arising from the sub-contract which in the present transaction translates to SEB's liability being governed by the Supply agreement only and not by the Contract between MMRDA and the consortium. Therefore, the interpretation of the clause in the said Contract about both the members being liable should be restricted to the obligations arising out of the said Contract only and cannot be said to embrace the Supply agreement as well. The Hon. Madras High Court in *Blue Star Ltd. vs State of Tamil Nadu* (1984 56 STC 172) had in consideration of a number of judgments on the impugned issue held thus -

*"From the foregoing precedents, we find, two principles are well settled : (1) Where two sales are involved in the integrated transactions resulting in the import, section 5(2) of the Central Sales Tax Act will never be attracted and (2) Unless the intermediary who actually imports, is held to be the agent of either the actual users or the foreign seller, there can be no privity of contract between the actual users and the foreign seller. In either case, it is not possible to hold that the sale or purchase occasioned the import."*

The Hon. Apex court had also observed thus -

*"This provision was subject to judicial interpretations and it is therefore useful to take note of the principles laid down therein. It is in Coffee Board v. Joint Commercial Tax Officer [1970] 25 STC 528 (SC); [1970] 3 SCR 147 that the Supreme Court laid down the ratio thus :*

*"The phrase 'sale in the course of export' comprises in itself three essentials : (i) that there must be a sale, (ii) that goods must actually be exported, and (iii) the sale must be a part and parcel of the export. Therefore either the sale must take place when the goods are already in the process of being exported which is established by their having already crossed the customs frontiers, or the sale must occasion the export. The word 'occasion' is used as a verb and means 'to cause' or 'to be the immediate cause of'. Read in this way the sale which is to be regarded as exempt is a sale which causes the export to take place or is the immediate cause of the export. The export results from the sale and is bound up with it. The word 'course' in the expression 'in the course of' means 'progress or process of', or shortly 'during'. The phrase expanded with this meaning reads 'in the progress or process of export' or 'during export'. Therefore the export from India to a foreign destination must be established and the sale must be a link in the same export for which the sale is held. To establish export a person exporting and a person importing are necessary elements and the course of export is between them. **Introduction of a third party dealing independently with the seller on the one hand and with the importer on the other breaks the link between the two, for then there are two sales one to the intermediary and the other to the importer. The first sale is not in the course of export for the export begins from the intermediary and ends with the importer.**"*

*.....*  
*The above principle was reiterated by the Supreme Court in Binani Brothers (P.) Ltd. v. Union of India [1974] 33 STC 254 (SC) ..... "*

Thus, it can be seen that the Hon. Courts have held that a third party acting independently between the exporter and the importer breaks the link and in such a case, the transaction cannot be said to be one as in the case of a sale in the course of an import. In the present case, as seen from all the documents, one can surely say that the Consortium is not an



agent of MMRDA. The Supply agreement is a case of Principal to Principal transaction and the Consortium does not, in any capacity, as the agent of MMRDA.

An overview of all the provisions of the impugned agreements reveals that the transaction of import of Rolling Stock cannot be said to be in the course of the import as none of the principles as laid down by the Hon. Supreme Court are satisfied herein :

- *The goods must have entered the import stream when they are subjected to sale or purchase.*  
Such is not the case in the present transaction.
- *The course of import can be taken to have continued till the imported goods reach the local users only if the import has commenced through the agreement between foreign exporter and an intermediary who does not act on his own in the transaction with the foreign exporter and who in his turn does not sell as principal the imported goods to the local users.*

As observed above, the Consortium does not act as an intermediary. But the transaction between MMRDA and Consortium or the one between Consortium and SEB is entered on principal to principal basis.

- *There must be either a single sale which itself causes the import or is in the progress or process of import or through there may appear to be two sale transactions they are so integrally enter-connected that they almost resemble one transaction so that the movement of goods from a foreign country to India can be ascribed to such a composite well integrated transaction consisting of two transactions dovetailing into each other.*

Such is not the case. I have pointed above that there is no specific condition in the contract which lays down that the Rolling Stock should be imported or further that it should be imported from SEB only. Mere checking of credentials of the sub-contractor or declaring the specifications does not translate into awarding a contract through the agreement between MMRDA and the Consortium. The fact that a separate Supply agreement has been entered into despite the supplier being a member of the Consortium goes on to say that the two agreements and the transactions encapsulated therein are not integrated ones. Had they been so integrated, the need for a separate agreement for supply with one of the Consortium members would not have arisen.

- *A sale or purchase can be treated to be in the course of import if there is a direct privity of contract between the Indian importer and the foreign exporter and the intermediary through which such import is effected merely acts as an agent or a contractor for and on behalf of Indian importer.*

As observed earlier, there is no privity of contract between MMRDA and SEB when we see the transaction in terms of the Supply agreement. The clause about joint and several liability in the Contract between MMRDA and the Consortium should not mislead. The said clause governs the relations of MMRDA with the Consortium members for the contract awarded by MMRDA.



- *The transaction in substance must be such that the canalising agency or the intermediary agency through which the imports are effected into India so as to reach the ultimate local users appears only as mere name lender through whom it is the local importer-cum-local user who masquerades.*

We have seen above that such is not the case. The Consortium does not act as a mere canalizing agency. It acts in a capacity as a Contractor on principal to principal basis. The fact that a separate supply agreement is effected between the two members of the Consortium to give effect to a portion of the obligation imposed upon in a contract awarded by MMRDA to both the parties in their joint capacity as Contractors clearly outlines the roles that each of the parties play. There are two separate contracts and they give rise to obligations as arising thereunder. Also, we have seen above that MMRDA will be holding the Consortium and its members liable for damages and delays in terms of the performance as guaranteed under the contract between MMRDA and the Consortium. SEB under the Supply agreement is liable to the Consortium and not to MMRDA.

In the present set of facts, it is seen that the movement of goods took place in pursuance of the contract by the Consortium with SEB. However, it does not mean that the same is a 'sale in the course of import'. The facts that MMRDA was aware of the foreign supplier or that the goods were as per specifications of MMRDA would not alter the nature of the transaction. The sale was effected after the goods had reached India and after the goods had been imported. It is a local sale. Therefore, the sale to MMRDA cannot be treated as one having been made in the course of import.

The applicant has relied on a few case laws. But each case law is peculiar to the facts of the said case. Hence, I have based my observations on the principles which determine when it could be said to be a case of 'sale in the course of import'. As observed earlier, the principles in K. Gopinathan Nair And Others (cited supra) are undisputed till date. In view thereof, I refrain from entering into any discussion on the similarities or differences of the facts in these case laws as compared to the facts as available in the instant case. Further, as regards the point of the goods being exclusively for use by MMRDA and therefore, no diversion thereof, I find that the Hon. Andhra Pradesh High Court in The Minerals And Metals Trading Corporation of India Ltd. V. The State of Andhra Pradesh (1989 72 STC 29) has observed thus - "*The circumstance that the goods are not liable to be diverted by the purchaser may not be conclusive as in Coffee Board v. Joint Commercial Tax Officer [1970] 25 STC 528 (SC); AIR 1971 SC 870.*". In view thereof, arguments on the point should rest. I follow the observations of the Hon. Apex court in Coffee Board (cited supra) that *each case will depend on its own facts*. My conclusions as at above on the facts of the impugned transaction stand reiterated.

The instant transaction is not a sale in the course of import. The sale is by the applicant Consortium to MMRDA and both the parties are located in the state of Maharashtra. The



transaction, therefore, is a local 'sale' under the provisions of the MVAT Act, 2002.

05. In view of the detailed deliberations as above, it is determined thus -

### ORDER

(u/s. 56 (1) (e) of the Maharashtra Value Added Tax Act, 2002)

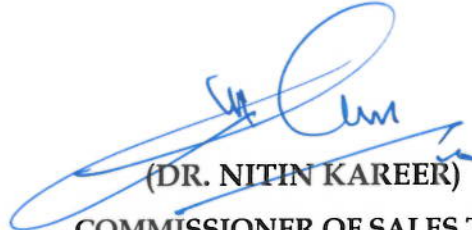
No. DDQ 11/2011/Adm-3/20/ B- 4

Mumbai, dt. 5/1/2015



*It is herewith determination that the import of rolling stocks and supply to MMRDA in the course of execution of the mono rail project does not constitutes a transaction in the course of import u/s. 5(2) of the Central Sales Tax Act, 1956.*

• *It is a local 'sale' liable to tax under the provisions of the Maharashtra Value Added Tax Act, 2002.*

  
(DR. NITIN KAREER)

COMMISSIONER OF SALES TAX,  
MAHARASHTRA STATE, MUMBAI