Madras Refineries Ltd. Vs. Assistant Commissioner and ors.

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Court : Chennai

Decided On : Jan-22-2010

Reported in : (2010)28VST417(Mad)

Judge : K.K. Sasidharan, J.

Acts : Central Sales Tax Act, 1956 - Sections 2, 5(2) and 9(2A); ;Tamil Nadu General Sales Tax Act, 1959 - Sections 2, 12 and 12(5); ;Essential Commodities Act, 1955; ;Petroleum Act, 1934 - Section 4; ;Income Tax Act - Sections 10(2) and 54; ;Sale of Goods Act - Section 2(10); ;Petroleum Products (Supply and Distribution) Order, 1972; ;Dock-Workers (Regulation of Employment) Order, 1947; ;Constitution of India - Articles 12, 226, 286, 286(1) and 366

Appeal No. : W.P. Nos. 9356 and 9357 of 1998

Appellant : Madras Refineries Ltd.

Respondent : Assistant Commissioner and ors.

Advocate for Def. : Haja Nazirudeen, Special Government Pleader (Taxes),; M. Ravindran, Additional Solicitor General, for

Advocate for Pet/Ap. : R.L. Ramani, Sr. Counsel for Chandran, Karuppiah and; Ramani, Advs.

Judgement :
ORDER

K.K. Sasidharan, J.

1. The dispute relating to the taxability of the transaction regarding import of crude oil and the related loan transactions by a public sector organization as per the directions of the Oil Co-ordination Committee is the issue involved in this writ petition.

W. P. No. 9356 of 1998

2. W. P. No. 9356 of 1998 is directed against the proceedings of the Assistant Commissioner, Central Assessment Circle IV, Chennai, in CST 2087/92-93 dated March 30, 1998, levying sales tax on the loan transaction involving the petitioner-company and the other oil companies. Since the very assessment order impugned in this writ petition has been set aside subsequently by remitting the matter to the original authority, the said writ petition has become infructuous. Therefore, it is the substantive writ petition in W. P. No. 9357 of 1998 which alone survives for adjudication.

W. P. No. 9357 of 1998

3. The petitioner seeks a writ of prohibition to prohibit the first respondent from imposing sales tax in respect of loan transactions effected by it on the basis of the instructions of the Oil Co-ordination Committee constituted by the Government of India.

Background facts

4. The petitioner is a Government of India undertaking established for the purpose of carrying on business of refining of crude petroleum oil and manufacturing and marketing of petroleum products.

5. The Government of India with a view to coordinate import and allocation of crude oil, formulated a scheme to be implemented by the Oil Co-ordination Committee, Mumbai. The Oil Co-ordination Committee, the fourth respondent in the writ petition, formulated a scheme whereby and whereunder, the Indian Oil Corporation, Mumbai, the fifth respondent herein was appointed as a canalizing

agent. The scheme primarily consists of the imported oil being loaned from one oil company to another under the auspices of the Oil Co-ordination Committee and Indian Oil Corporation. As per the scheme, crude oil that is imported into the country is apportioned between various refineries which includes the petitioner, Cochin Refineries Limited, Hindustan Petroleum Corporation Ltd., Indian Oil Corporation Ltd. and Bharat Petroleum Corporation Ltd. The scheme was conceived by the Oil Co-ordination Committee and the entire procedure regarding the import and lending the same to the oil companies in proportionate to the orders were devised meticulously with a view to keep the petroleum prices uniform throughout the country.

6. The scheme provides that all imports of crude oil into the country should be in the account name of M/s. Indian Oil Corporation Ltd. The bill of lading will be prepared in the name of the individual oil companies indicating the principal account of Indian Oil Corporation. The consignment of crude oil would be received by the importing company or it will be allocated to any other oil company subject to the allocations made by the Oil Co-ordination Committee from time to time. Some times, it would so happen that the entire cargo would be allotted to the bill of lading holder or in part to the bill of lading holder with the remainder being allotted to some other oil company or in the alternative the entire cargo may at times be allocated to any other oil company as per the direction of the Oil Co-ordination Committee. After such import, the bill of lading company has to pay the f. o. b. value in Indian currency to the canalizing agent, viz., the Indian Oil Corporation Ltd. within thirty days from the bill of lading and the said period is known as the 'due date'. In the event the cargo was received in part or in full, by or allocated to an oil company other than the bill of lading holder, the said oil company would be required to deposit with the bill of lading holder company an amount equivalent to the value of cargo received by them. This transaction partakes of the character of a loan of crude oil against a security deposit from the bill of lading holder to the actual receiver/allottee of the crude oil. The cargo so received by the allottee oil company is thereafter returned to the bill of lading holder once a fresh cargo of crude oil is imported with the bill of lading in their name. Therefore, in case the oil corporation takes crude oil on loan from a bill of lading holder, such quantity has to be returned to the bill of lading company from whom the oil was taken on loan

basis. When there was such a return, the security deposit made by the allottee oil company would be returned back to them by the bill of lading holder company. The import and the allocation of imported crude oil would be monitored by the Oil Co-ordination Committee at its monthly meeting. The Oil Co-ordination Committee at its meeting would nominate the oil tanker and the quantity of oil that has to be imported into the country. Thereafter, one of the oil companies would be nominated the bill of lading holder company and the quantum of oil imported would be allocated to either the bill of lading holder company in full or in part with the other part being allocated to some other oil company. The instructions in that regard would be issued by the Indian Oil Corporation Ltd., in view of their position as the canalizing agent.

7. The transaction was considered as a loan transaction at all points of time. The sales tax authorities in all the other States exempted the transaction as it was only a loan transaction. But a different interpretation was given to the transaction by the sales tax authorities in the State of Tamil Nadu.

8. While matters stood thus, the first respondent as per the assessment order dated March 30, 1990, overruled the objection filed by the petitioner against imposition of tax on loan transaction and passed an assessment order on March 30, 1990. The petitioner has filed an appeal against the said assessment order. According to the petitioner, the first respondent has no jurisdiction to assess the transaction as sale and as such, filed this writ petition to prohibit the authorities from proceeding with the assessment in respect of loan transaction.

The defence

9. The first respondent filed a counter in answer to the contentions raised in the affidavit filed in support of the writ petition. The attack was mainly on the ground of availability of alternative remedy. The principal contentions raised in the counter-affidavit of the first respondent read thus:

(a) The petitioner is an assessee on the file of the Central Assessment Circle IV, at Chennai. During the assessment year 1992-93, the assessing officer passed an order of assessment on March 30, 1998 by treating the alleged crude oil loan transactions of the petitioners, totalling Rs. 14,08,90,30,185 as inter-State taxable sales not covered by C forms, and levied tax at eight per cent and penalty at 150 per cent under Section 9(2A) of the Central Sales Tax Act, 1956 read with Section 12(5)(iii) of the TNGST Act, 1959.

(b) The petitioner has filed the instant writ petitions during July 1998. However, even before initiating the writ proceedings they have filed a statutory appeal on April 30, 1998 itself before the Deputy Commissioner (CT), Appeals. The appellate authority as per order dated March 30, 2000, remanded the matter to the first respondent for fresh consideration and to decide the taxability of the loan transactions.

(c) Since the petitioner has already availed of the alternative remedy provided under statute, W. P. No. 9356 of 1998 is not maintainable. Since the assessment order has already been set aside and the matter was remanded to the assessing authority, the very writ petition in W. P. No. 9356 of 1998 has become infructuous.

(d) There is no case made out for a writ of prohibition. The assessment order has already been set aside to consider the taxability of the loan transaction afresh.

(e) The first respondent as per proceedings dated February 1, 2009, called upon the petitioner to furnish documents for the purpose of deciding the matter afresh as per the direction of the appellate authority. The said notice was challenged in W. P. No. 11301 of 2008. The writ petition was disposed of as per order dated April 30, 2008 whereby and whereunder, the assessing authority was permitted to go ahead with the assessment proceedings and to pass final orders, but not to give effect to the same pending appeals.

Supporting counter-affidavits

M/s. Hindustan Petroleum Corporation Ltd.

10. The sixth respondent, M/s. Hindustan Petroleum Corporation Ltd., in their detailed counter demonstrated that the transaction was nothing but a loan transaction outside the purview of local sales tax or Central sales tax. The material averments in the counter-affidavit would read thus:

(a) The Central Government was empowered to direct oil marketing companies to supply one or more petroleum products at any place in India as per the provision of the Essential Commodities Act, 1955, which also gives power to the Government of India to regulate the import and supply of petroleum products.

(b) The Government of India constituted the Oil Co-ordination Committee as a wing of the Ministry of Petroleum and Chemicals to regulate the price, supply and distribution of petroleum products. The Government Order was published in the gazette on July 14, 1975.

(c) The scheme evolved by the Oil Co-ordination Committee provides for appointing M/s. Indian Oil Corporation as canalizing agent. However, the power to allocate petroleum products as well as its re-allocation vested only with the Oil Co-ordination Committee. The said committee in its meeting would assess the requirement of the concerned oil company and allocate crude oil. The procedure was evolved also on account of the fact that the allocation of crude oil may not necessarily correlate to the actual requirement, due to delay in shipment, or force majeure or unforeseen circumstances. Therefore, the Oil Co-ordination Committee evolved this procedure for diversion of crude from one refinery to another and for its return from the allottee refinery to another as a loan transaction and for its return of loan from the allottee refinery to the lending refinery. Allotments and diversions by way of loan were made by the Oil Co-ordination Committee exercising statutory power.

(d) Every month, a crude slate meeting would take place at the office of the Oil Co-ordination Committee, Bombay. In the crude slate meeting, the total requirement of crude for each and every refinery for the ensuing month would be ascertained after taking into account the stock of crude with each refinery at the beginning of the month and production for that month. Most of the crude requirement of the country is procured under term contract entered into by the Government of India on Government to Government basis. The rest of the crude requirement of the country is procured on spot purchase basis. Under the term contract basis, crude is uniformly supplied by the foreign supplier to various refineries located in India as decided by the Oil Co-ordination Committee at the crude slate meetings.

(e) The Oil Co-ordination Committee would enter into an agreement called 'Contract of Affreightment' (COA) with the Shipping Corporation of India under which all the oil tankers of the Shipping Corporation of India would be chartered by the Oil Co-ordination Committee. The freight and demurrage rates for all the oil tankers also would be worked out by the Oil Co-ordination Committee and it would be communicated to the refineries. Upon payment of the freight and demurrage charges by the respective refineries as part of the crude cost, the same would be reimbursed by the Oil Co-ordination Committee to the respective refineries.

(f) The Indian Oil Corporation was nominated by the Government of India for procurement of crude on behalf of all the other public sector oil companies in India. Accordingly, IOC places purchase order with State oil marketing companies of the respective countries with whom term contracts have been entered into by the Government of India. In respect of spot purchases, tenders would be floated by Indian Oil Corporation and based on the lowest tenders, orders would be placed for purchase of crude. Tankers belonging to the Shipping Corporation of India would be sent to different foreign load ports of the countries to whom purchase orders have been placed by the Indian Oil Corporation on the loading dates specified in consultation with the foreign supplier. The bill of lading would be prepared in the names of various oil companies including Indian Oil Corporation at the load port as per the decisions taken in the monthly crude slate meeting for different oil companies as bill of lading holder. However, the invoices would be made only on Indian Oil Corporation. The names of the bill of lading holder would be advised by Indian Oil Corporation Shipping Department to the foreign supplier immediately after the crude slate meeting conducted by the Oil Co-ordination Committee. On the basis of the decision taken in the crude slate meeting, individual oil companies would arrange for provisional insurance cover for the crude for which they are nominated as bill of lading holder.

(g) Once the tanker is loaded at foreign load port, details with regard to quantity, supplier's name, load port, grade, etc., would be received by Indian Oil Corporation Shipping Department from the foreign supplier. Indian Oil Corporation in turn would forward the above details to the bill of lading holder company or to the bill of lading holder and the crude receiving companies in case crude was shared by more than one company besides the bill of lading holder as per the allocations made at the crude slate meeting. There are cases where the entire crude load was received by another oil company instead of the bill of lading holder in which case the oil tanker would not touch the bill of lading holder port at all. This would still be treated as loan from the bill of lading holder to the receiving company.

(h) The Oil Co-ordination Committee has formulated the scheme in such a way that the transactions would be adjusted subsequently whenever fresh allotment was made to a particular oil company. Therefore, the transaction was devised only in public interest and there was no allotment of sale in the said transaction warranting imposition of local as well as Central sales tax.

Views of the Government of India

11. The Government of India through the Ministry of Petroleum and Natural Gas filed a detailed counter-affidavit indicating the reasons for creating a body in the name and style of 'Oil Co-ordination Committee' and the nature of transactions relating to import of crude oil.

12. The counter-affidavit reads thus:

(a) The Oil Co-ordination Committee was constituted by the Government of India as per resolution dated July 14, 1975. Consequent to the dismantling of the Administered Pricing Mechanism (APM), the Oil Co-ordination Committee has been wound up by the Government with effect from April 1, 2002 vide Government of India Gazette notification dated February 28, 2002.

(b) Government of India considered the interim report filed by the Oil Prices Committee. The said committee recommended that an Oil Co-ordination Committee should be set up for administering the pool account, to decide on allocation of crude oil and monthly production patterns and to coordinate transportation arrangements for crude oil imports and coastal movements. The report was accepted by the Government and as per resolution dated July 14, 1975, Oil Co-ordination Committee was constituted.

(c) The Oil Co-ordination Committee was a prominent mechanism consisting of the Secretary to the Government, Ministry of Petroleum, a representative of the Ministry of Finance (Department of Expenditure), Chairman, Indian Oil Corporation, Chairman and Managing Director, HPCL, Chief Executives of Burmah Shell, Caltex, MRL, CRL, IBP and AOC and with the Joint Secretary, Department of Petroleum as Member Secretary. The Secretariat would have the full time services of the experts of refineries, marketing and distribution, including transportation. The oil pool account was meant to maintain uniform ex-storage selling price of petroleum products at all refinery locations in the country. The Petroleum Products (Supply and Distribution) Order, 1972 and the Essential Commodities Act empowered the Central Government to issue appropriate directions in respect of supply of petroleum products throughout India.

(d) Indian Oil Corporation Ltd. was appointed as canalizing agent to import crude oil and to effect the allocation as per the decision taken by the Oil Co-ordination Committee. The Oil Co-ordination Committee as per its decision taken on October 16, 1979 and April 3, 1980, had set down the procedure to be followed for loan transactions of crude oil between the oil companies. It was only the Oil Co-ordination Committee which allocated crude oil. It was provided that the value itself would be subject to adjustment in the Crude Oil Price Equalization Account (COPE) which was part of the overall oil pool account.

(e) The mechanism and procedure for loan transactions of crude oil ensured that crude oil loan adjustments among oil companies took place on quantity to quantity basis irrespective of the value or the type of crude oil given or taken on loan basis. The principal accounts were (i) crude oil received on loan account and its return, and (ii) an account for security deposit and operation of a pool account. Variations in values, including differential in f. o. b. and freight, were adjusted as per the norms in the Crude Oil Price Equalization Account (COPE) and C&F; pool account, respectively, maintained by the Oil Co-ordination Committee.

(f) The transactions were neither 'sale' within the meaning of local Sales Tax Act nor an 'inter-State sale' within the meaning of the Central Sales Tax Act. The allocations were made beyond the customs barrier and there was no occasion for the vessels to touch the Tamil Nadu port so as to tax the transaction, treating it as a local sale or a sale in the course of inter-State trade.

(g) Individual oil companies had no say in these transactions and the loan transactions were in vogue for nearly two decades up to March 1998. Oil companies acted only as per the direction of the Oil Co-ordination Committee. The main purpose underlying the Co-ordination of the import of crude oil was to take advantage of the price and to conserve precious foreign exchange reserve of the country. The entire chain of transactions under the crude oil loan transaction scheme as a whole, was only to preserve and maintain uniform price for petroleum products and to save considerable foreign exchange. No other State in the country was imposing tax on loan transaction except the State of Tamil Nadu.

Submissions

13. The learned senior counsel for the petitioner made submissions extensively with facts and figures to justify the contention that the transaction was nothing but barter or loan transaction and there was no element of sale. The principal contentions are as follows:

(i) The petitioner is a Government owned corporation and is a 'State' within the meaning of Article 12 of the Constitution of India. The administered pricing mechanism was performed only by the Government of India and the petitioner has no role in any of the decisions. It was only the Indian Oil Corporation who acted as the canalizing agent and the allocation was made only by the Oil Co-ordination Committee. The petitioner was acting only as per the direction of the Oil Co-ordination Committee. The allocation of crude oil was decided by the Oil Co-ordination Committee and in case the petitioner was appointed as the bill of lading company, they were bound to import crude oil, and to give on loan basis to another company as per the direction of the Oil Co-ordination Committee. Therefore, the petitioner has no choice in the matter.

(ii) The transaction in question was only a loan transaction. There was no element of sale. The petitioner never took delivery of the crude oil for the purpose of lending the same to another oil company on the basis of the allocation and re-allocation made by the Oil Co-ordination Committee. As per the guideline issued by the Oil Co-ordination Committee, each allotted oil company would receive the allotted quantity of oil from the tanker upon clearance by payment of relevant customs duties, wharfage, etc., effected by the respective oil companies at their respective ports by surrendering the bill of entry available with them. At times it may so happen that the ship would have delivered crude to the co-allottee company, even before the petitioner-company, as the bill of lading holder company, which loans the crude, took delivery of the crude. Therefore, there was no question of treating the transaction as a sale in the State of Tamil Nadu.

(iii) The sale is also not liable under the Central sales tax, treating it as an inter-State sale. The allocation and re-allocation by way of loan transactions were all done and materialized beyond the customs barrier and as such, there was no element of inter-State sale.

14. The learned senior counsel appearing for respondents Nos. 5 to 8 supported the case of the petitioner. According to the learned senior counsel, both under common law and statute law, to constitute a transaction of sale there should be an agreement, express or implied, relating to goods to be completed by passing of title in those goods. The transaction in question has no characteristics of a sale and in fact, it was a simple loan transaction between two oil companies and that too as per the direction of the statutory body appointed by the Government of India.

15. The transaction was not between two private companies. It was only the Oil Co-ordination Committee who decides at all point of time to allocate and re-allocate the crude oil to the oil refineries. Therefore, it was not possible for one refinery to give crude oil to another refinery. The individual oil refineries have no say in the matter and they were acting only as per the dictate of the Oil Co-ordination Committee. Therefore, there was no question of one company entering into a sale transaction with another company with respect to crude oil.

16. The sale invoices issued by various suppliers of crude oil clearly indicate the way in which the allocation and re-allocation were made by the Oil Co-ordination Committee. The invoice also shows the cancellation of previous allocation and the

factum of re-allocation made to a different refinery. Therefore, at no point of time, the ship with the crude oil entered the customs barrier so as to treat the same as one under the local sales tax or under the Central sales tax. The transactions happened in high seas and at times even before the ship leaves the port of origin.

17. The learned senior counsel took me through various documents to substantiate the contention that the transaction was purely a loan transaction not subject to local as well as Central sales tax.

18. The learned Additional Solicitor General made extensive submissions explaining the constitution of the Oil Co-ordination Committee and the procedure adopted for allocation as well as re-allocation of crude oil. The learned Additional Solicitor General would submit that the Government took a conscious decision in the interest of general public to procure crude oil by a particular machinery so as to ensure uniform distribution of petroleum products throughout India. The Government was of the view that in case orders were placed for import of crude oil on bulk basis, it would reduce the freight charges. This also enabled the Government to make a bargain for best price. Therefore, larger public interest was behind the decision taken by the Government for evolving the petroleum price mechanism. The learned Additional Solicitor General also made detailed submissions with regard to the working of the system and according to him, the transaction was considered only as a loan transaction by all the States in the Territory of India and it was only in the State of Tamil Nadu, the assessing authority, without ascertaining the real nature of the transaction, attempted to assess it as a sale transaction.

19. The learned Special Government Pleader (Taxes) challenged the very maintainability of the writ petition. He would contend thus:

(i) The first respondent was exercising statutory functions as assessing authority under the Tamil Nadu General Sales Tax Act as well as under the Central Sales Tax Act, and as such, he was having jurisdiction to consider the assessment and to decide the nature of transaction. Therefore, the question of granting a writ of prohibition does not arise.

(ii) The petitioner has got an appeal remedy by way of filing an appeal in case the original authority negatives the plea regarding the nature of transaction. Therefore, the writ petition is clearly not maintainable.

(iii) The petitioner has suppressed the fact that they have already filed a writ petition before this Court in W. P. No. 11301 of 2008 wherein the learned judge was pleased to direct the assessing authority to go ahead with the assessment proceedings. In such circumstances, it was not proper on their part to prosecute this writ petition.

(iv) The assessment order challenged in W. P. No. 9356 of 1998 was set aside on appeal and the original authority was directed to decide the matter afresh. Therefore, it was open to the petitioner to produce all the documents before the assessing authority to substantiate their contention that the transaction was not sale.

Subsequent events

20. When these two writ petitions came up for hearing before this Court on July 2, 2008, the learned judge found that the dispute was essentially between the State Government and the Central Government through the statutory corporation and as such, the matter has to be placed before the High Power Committee to arrive at an amicable solution. The learned judge also found that in similar circumstances, Division Bench of Kerala High Court as per order in W. A. Nos. 1557, 1637, 1395 and 1734 of 2002, directed the Cabinet Secretary of the Government of India to constitute a committee to work out a solution between the Government organizations. Accordingly, the learned judge passed the following order:

5. The present case is more similar to the direction issued by the Kerala High Court. While this Court is not hesitant to decide the legal issues involved in these writ petitions, in view of the fact that all the respondents including the petitioner are all various statutory corporations and wings of the Government, this Court is of the view that the subject-matter of the writ petitions should be first discussed in the meeting convened by the parties to the dispute and then depending upon the consensus or difference arrived at such meeting, this Court shall finally dispose of

the matter.

6. In that view of the matter, this Court hereby directs the Cabinet Secretary of the Government of India to convene a meeting of the Secretary of the Ministry of Petroleum, Secretary of Ministry of Finance as well as the Chief Executive Officers of various Oil Corporations and also to send an invitation to the State Government of Tamil Nadu represented by the Secretary to the Government, CT & RE Department and discuss the issue focused in the writ petitions and take a decision on this matter. The deliberations of the said committee including, if any final decision is taken or difference recorded should be submitted in the form of report to this Court, within a period of eight weeks from the date of receipt of a copy of this order.

21. In accordance with the directions of this Court, the Cabinet Secretary convened a meeting of all the oil companies and the Government. The first meeting was held on July 29, 2008, The State of Tamil Nadu was represented by the Secretary, Commercial Taxes and Religious Endowments. The meeting was attended by the Secretary (Co-ordination), Cabinet Secretariat, Director of Petroleum and Natural Gas and other higher officials of the Ministry of Petroleum and Natural Gas, Cabinet Secretary as well as Additional Legal Adviser, Department of Legal Affairs. The Petroleum Corporations were represented by their managing director as well as officers in the level of general manager. In the said meeting, the Secretary to the Government, Commercial Taxes and Religious Endowments, Government of Tamil Nadu, submitted his views that the transaction was essentially a sale in view of the presence of essential ingredients for a sale like (i) a buyer and a seller; (ii) a commodity or goods; (iii) transfer of property in the good from the buyer to the seller under a contract; (iv) price or money as consideration for the transfer under a contract of sale or purchase. The Cabinet Secretary was of the view that the arrangement was essentially one of barter and it was not a sale. It was unanimously decided that the matter should be looked into afresh by the Commercial Taxes Department and to decide as to whether the transaction was one of sale or barter. The representatives of the petitioner-company were asked to approach the Commercial Tax Department with documents to substantiate their contention that the transaction was only a loan

and not sale.

22. Subsequently a meeting was held in the chambers of the Secretary, Commercial Taxes and Religious Endowments on August 7, 2008 as a follow up action. The said meeting was attended by the Secretary and other officials of the Department of Commercial Tax as well as the representatives of the oil companies. It was decided to constitute a technical team of six officers three from the Commercial Taxes Department and the three from the Chennai Petroleum Corporation Ltd., to scrutinize the records relating to the transaction of oil which are said to be available with the Corporation and which were not produced earlier. The technical team were directed to scrutinize the records within ten days commencing from August 18, 2008.

23. The petitioner as per their letter dated August 21, 2008, produced the required documents before the technical team. The further details sought for by the technical team were furnished subsequently as per correspondence dated September 11, 2008 and October 7, 2008.

24. The Cabinet Secretary convened second meeting on October 10, 2008 at New Delhi. The said meeting was attended by the Secretary to the Government, Commercial Tax Department, Chennai and other officials of the Ministry of Petroleum and Natural Gas, Ministry of Legal Affairs as well as higher officials representing the oil companies. The committee took note of the constitution of the scrutinizing committee and the documents produced by the petitioner before the said committee. In the said meeting, the Secretary to the Government, Commercial Tax Department, Government of Tamil Nadu submitted that the transaction needs further critical examination by the Department and as such, the Department requires some more time to finalize its reconsidered view about the nature of transactions. Accordingly, the matter was adjourned so as to enable the Government of Tamil Nadu to look into the matter.

25. The Cabinet Secretary convened a third meeting on November 20, 2008. The meeting was attended by the Secretary to the Government, Commercial Tax Department, Government of Tamil Nadu and the officials of the Petroleum Corporation besides the Secretary and other officials of the Ministry of Petroleum

and natural gas and other higher officials of the Cabinet Secretariat. The meeting discussed the matter once again and ultimately the committee observed that there was no consensus among the parties as to whether the disputed transactions were loan or sale and as to whether endorsement of the bill of lading was necessary to claim exemption from levy of tax under Section 5(2) of the Central Sales Tax Act and non-endorsement vitiated the legality of the transactions. Therefore, the parties were requested to inform the High Court so as to proceed further to decide the writ petition on the merits. Accordingly, the writ petition was taken up for hearing.

Discussion

26. The petitioner is a public sector oil refinery. Respondents Nos. 5 to 9 are also engaged in refining petroleum products as well as in the distribution of petroleum products throughout the territory of India. Petroleum is an essential commodity. The prices of all other commodities directly relate to the price of petroleum products. Any increase in the cost of petroleum would naturally increase the cost of other products. Therefore, the Government enacted the Petroleum Act, 1934 to consolidate and amend the law relating to the import, transport, storage, production, refining and blending of petroleum. Section 4 of the Act empowers the Government to frame rules for the purpose of regulating the import and distribution of petroleum products. Section 4(b) of the Petroleum Act, 1934 enables the Central Government to regulate the import of petroleum.

27. The Government of India constituted a committee known Oil Prices Committee as per resolution dated March 16, 1974 under the Chairmanship of Dr. K.S. Krishnaswamy, Executive Director, Reserve Bank of India, Bombay. The committee was asked to study the pricing policy of petroleum products and related matters and to recommend general principles of pricing policy of petroleum products and other connected matters. The committee conducted an extensive study of the petroleum market and submitted their detailed report. The Government of India considered the report submitted by the expert committee and passed a resolution on July 14, 1975, the main points of which read thus:

(i) The price of indigenous crude oil should be based on the long run social marginal cost of crude.

(ii) The refinery should be the primary pricing points and the prices at upcountry depots or installations should be determined on the basis of the prices at the nearest refinery plus the cost of transportation by the cheapest means of transport.

(iii) The Oil Co-ordination Committee should be set up to administer the pool account for the purpose of deciding the allocation of crude oil and monthly production patterns and coordinating transportation arrangements for crude oil imports and coastal movements. The Oil Co-ordination Committee will consist of a Secretary, Department of Petroleum, a representative of the Ministry of Finance (Department of Expenditure), Chairman, I.O.C., Chairman and Managing Director, HPCL, Chief Executives of Burmah Shell, Caltex, MRL, CRL, IBP and AOC and with the Joint Secretary, Department of Petroleum as Member Secretary.

(iv) The secretariat of the committee should have the full time services of the experts of refineries, marketing and distribution, including transportation. In view of the complexity and number of pool accounts to be administered, there should be a full-fledged wing for accounts/finance.

28. In accordance with the decision taken by the Government of India, as per resolution dated July 14, 1975, the Oil Co-ordination Committee was constituted.

Procedure for loan transactions

29. The Oil Co-ordination Committee followed a procedure known as 'procedure for loan transactions of crude oil between the oil companies'. The salient features of the loan transactions of crude oil read thus:

(i) When a full parcel of crude is loaned by one company to another, the receiving company will have to account for the full parcel against the bill of lading. The loaning company should advise the receiving company the full details as per the bill of lading. The receiving company should escalate the receipted quantity by 0.5 per cent and the remaining quantity as compared to the bill of lading quantity should be claimed from the carrier.

(ii) When a part of cargo is received as loan from one company by another company against the bill of lading for the full parcel, the company receiving loan parcel should advise the actual receipted quantity as per their outturn to the last port of call and would apportion the net loss on the basis of the total receipt as per the outturns. The loss to be claimed on the carrier by the final port of discharge will be arrived at by escalating the outturns by 0.5 per cent and deducting this quantity from the bill of lading quantity.

(iii) When loans are effected from parcels having more than one bill of lading, the receipted outturn quantities should be advised to the last port of call and the net ocean loss in excess of 0.5 per cent would be arrived at by the last port of call on the basis of advices received from the earlier party of call will put up the claim on the carrier for the net loss.

(iv) The f. o. b. value as per the bill of lading rounded off to the nearest 1000 should be deposited by the receiving company with the company in whose name the bill of lading stands, one day before the due date of payment. All relevant details in this regard should be provided by the loaning company.

(v) The company in whose name the bill of lading stands should insure for the cargo for the complete voyage. The receiving company should deposit the freight rounded off to the nearest 100 at the COA rate applicable to each port of discharge as per bill of lading within three days from the date of discharge. Penalty duty for ocean loss in excess of permissible limit would be the responsibility of the carriers.

(vi) The companies concerned should settle loan/repayments between themselves on the lines suggested in the scheme. Any differentials in the f. o. b. and freight should be adjusted in the Crude Oil Price Equalization Account (COPE) accounts as per the norms and C & F pool account, respectively.

(vii) The practice of issuing separate memorandum of agreement for each loan transaction is considered avoidable and only a request letter need be issued by the companies requiring loan to the loaning company. The terms and conditions for such loans will be as per the procedure prescribed by the Oil Co-ordination

Committee.

30. The Ministry of Petroleum, Chemicals and Fertilizers on the basis of industry meeting held between March 2 and 4, 1981, advised the recipient oil companies to deposit the equivalent rupee amount of dollar f. o. b. cost of crude with the bill of lading holding company on the due date of remittance by the bill of lading holding company by means of a bank transfer using the State Bank of India exchange rate prior to three days in advance of the date of payment applicable to the derived bill of lading quantity. On repayment of the loan quantity either in full or part, the loan repaying company shall receive back the proportionate f. o. b. deposit from the loaning company which was paid to them when the loan transaction took place. The deposit shall be returned on the loan repaying company on the date of their remittance to their supplies by bank transfers.

31. The Oil Co-ordination Committee was monitoring the entire crude oil import. The various documents produced by the petitioner in the typed set of papers show the continuous monitoring by the Oil Co-ordination Committee. The pending stock position at different refineries was taken into consideration for the purpose of allotment and re-allotment. To take an illustration, the minutes of the meeting of Oil Co-ordination Committee dated April 29, 1987 show that the allocation made to some of the oil companies was cancelled and it was re-allocated to other oil companies depending upon their requirement.

32. The core issue to be decided in this matter is as to whether the subject transaction was a loan transaction or a 'sale' within the meaning of Section 2(n) of the Tamil Nadu General Sales Tax Act and Section 2(g) of the Central Sales Tax Act, 1956.

33. Section 2(n) of the Tamil Nadu General Sales Tax Act defines 'sale' thus:

'sale' with all its grammatical variations and cognate expressions means every transfer of the property in goods (other than by way of a mortgage, hypothecation, charge or pledge) by one person to another in the course of business for cash, deferred payment or other valuable consideration and includes:

(i) a transfer, otherwise than in pursuance of a contract, of property in any goods for cash, deferred payment or other valuable consideration;

(ii) a transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract;

(iii) a delivery of goods on hire-purchase or any system of payment by instalments;

(iv) a transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;

(v) a supply of goods by any unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration;

(vi) a supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (whether or not intoxicating) where such supply or service is for cash, deferred payment or other valuable consideration,

and such transfer, delivery or supply of any goods shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply and a purchase of those goods by the person to whom such transfer, delivery or supply is made.

34. Section 2(g) of the Central Sales Tax Act defines 'sale' thus:

'sale' with its grammatical variations and cognate expressions, means any transfer of property in goods by one person to another for cash or deferred payment or for any other valuable consideration, and includes:

(i) a transfer otherwise than in pursuance of a contract, of property in any goods for cash, deferred payment or other valuable consideration;

(ii) a transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract;

(iii) a delivery of goods on hire-purchase or any system of payment by instalments;

(iv) a transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;

(v) a supply of goods by any un-incorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration;

(vi) a supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (whether or not intoxicating), where such supply or service, is for cash, deferred payment or other valuable consideration,

but does not include a mortgage or hypothecation of or a charge or pledge on goods.

35. The definition of 'sale' under the Tamil Nadu General Sales Tax Act shows that for a transaction to attract or suffer tax under the Act, the transaction should fulfil the following criteria:

(i) buyer and a seller;

(ii) commodity or goods;

(iii) transfer of property in the goods from the buyer to the seller under a contract;

(iv) price or money as consideration for the transfer under a contract of sale or purchase.

36. The question is as to whether the loan transaction contains any of the above elements of sale.

37. In order to consider the issue as to whether the transaction was one of barter or sale, it is necessary to consider the nature of import involved in the matter.

38. The Government of India constituted the Oil Co-ordination Committee for the purpose of administering the pool account, to decide the allocation of crude oil; monthly production patterns; coordinating transport arrangements for crude oil imports and coastal movements. The Central Government was within their

statutory powers to constitute a statutory committee to monitor the import of crude oil and allocation of the same between the oil refineries. The Central Government was committed to maintain uniform ex-storage selling price of petroleum products at all refinery locations in the country. In case the individual oil refineries were permitted to import crude oil into India, there would be no uniform price in India with respect to the petroleum products. The price of petroleum products sold by a particular company would depend upon the actual price incurred by it for procurement of crude oil and to refine the same for the purpose of distribution. The individual import of crude oil by individual oil companies would also result in unequal distribution of petroleum products. It would so happen that one oil company would be in possession of excess stock and on the other hand, another oil company situated in a less distant place would be short of petroleum products. All these vital factors were taken note of by the Government of India and it was only in the said background, the Oil Co-ordination Committee was constituted and that too after an in-depth study of the matter by the expert committee.

39. The Oil Co-ordination Committee appointed M/s. Indian Oil Corporation Ltd. as the canalizing agent. The said corporation was expected to assess the requirements of different refineries during the monthly crude slate meetings. The allotment would be made by the Oil Co-ordination Committee by taking note of the refinery stock and crude oil afloat and the subsequent allotment would be made based on the purchases made under the term contract or spot market purchase with overseas market. Since allocations of crude oil to individual refineries may not necessarily correlate with the actual requirement due to delay in shipment, or force majeure or unforeseen circumstances, diversion of crude oil from one refinery to another refinery was necessitated. In order to regulate these transactions by way of lending from one refinery to another as a loan transaction, and for return of loan from the loanee refinery to the lending refinery, a scheme called 'loan transactions of crude oil' was evolved by the Oil Co-ordination Committee. The allotment of crude oil and loan transactions were administered by none other than the Oil Co-ordination Committee. The Oil Co-ordination Committee adopted a prescribed procedure to operate the loan transaction and for continuous monitoring.

40. The individual oil refineries have no independent role in the matter of allocation or re-allocation of crude oil. The quantity to be imported has to be only decided by the Oil Co-ordination Committee. It was only the process of import which would be done by the Indian Oil Corporation, viz., the canalizing agent. In the crude slate meeting convened in the office of the Oil Co-ordination Committee at Bombay every month, the total requirement of crude for each and every refinery for the ensuing month would be ascertained after taking into account the stock of crude with each refinery at the beginning of the month and production for that month. Most of the crude requirement of the country would be procured under term contracts entered into by the Government of India on Government to Government basis. It was only the rest of the crude that would be procured on spot purchase basis. Under term contract basis, crude was uniformly supplied by the foreign supplier to various refineries located in India as decided by the Oil Co-ordination Committee at the crude slate meetings. The agreement in this respect with the Shipping Corporation of India would be entered into by the Oil Co-ordination Committee and this contract is known as contract of affreightment. It was only in pursuance of this contract, the Oil Coordination Committee charters the oil tankers of the Shipping Corporation of India. The freight and demurrage rates for the oil tankers were worked out by the Oil Co-ordination Committee and communicated to all the refineries. Upon payment of the freight and demurrage charges by the respective refineries as part of the crude cost, the same was reimbursed by the Oil Co-ordination Committee to the respective refineries.

41. As a canalizing agent, Indian Oil Corporation was placing purchase orders with the State oil marketing companies of the respective countries with whom term contracts had been entered into by the Government of India. So far as spot purchases are concerned, tenders were floated by Indian Oil Corporation and based on the lowest tenders, orders were placed for purchase of crude. Once tenders were finalized, tankers owned by the Shipping Corporation of India were sent to different foreign load ports of the countries to whom purchase orders had been placed by the Indian Oil Corporation in consultation with the foreign supplier. The bill of lading would be prepared in the name of the concerned oil companies to whom crude oil was allotted by Oil Co-ordination Committee at its monthly crude slate meeting. Invoices were made only on Indian Oil Corporation by showing the

bill of lading company also in the invoice. It was only the Indian Oil Corporation's Shipping Department which advises the foreign supplier about the names of the bill of lading holder, immediately after the crude slate meeting conducted by the Oil Co-ordination Committee.

42. The procedure adopted by the Oil Co-ordination Committee further shows that once the tanker was loaded at the foreign load port, details with regard to quantity, supplier's name, load port, grade, etc., were sent to the Indian Oil Corporation's Shipping Department from the foreign supplier. Indian Oil Corporation in turn advises the above details to the bill of lading holder company or to the bill of lading holder and the crude receiving companies where the crude was shared by more than one company besides bill of lading holder, as per the allocations made by the Oil Co-ordination Committee. It was open to the Oil Co-ordination Committee to change the allocation or to revise the same. In case the Oil Co-ordination Committee was of the view that there should be re-allocation of crude oil, in such cases, in respect of the bill of lading holder, the crude oil would be re-located to another refining company and in which event, the oil tanker would not even touch the port of discharge of the bill of lading holder. This transaction would be treated as loan to the receiving company. The details furnished in the counter-affidavit filed on behalf of Government of India also show that the very same oil tanker which discharged the crude at the port of the bill of lading holder company would not call at the port of the other receiving company but instead, the quantity allocated to the other receiving company would be transshipped to some other oil tankers in the mid sea which discharged the crude to the receiving company. The quantity so discharged would also be treated as loan from the bill of lading holder to the receiving company.

43. The modalities adopted by the Oil Co-ordination Committee in respect of the crude oil issued on loan account shows that it was a transparent procedure. The salient features of the crude loan account are the following:

(i) Before the arrival of the tanker at port, the receiving company (either bill of lading holder or other than bill of lading holder) used to get the delivery order from the shipping company for the quantity to be received as per the earlier allocation at the crude slate meeting of the Oil Co-ordination Committee. The shipping company would file import manifest with customs for the quantity to be delivered. On the basis of the delivery order received from the Shipping Corporation of India and the import manifest filed by the Shipping Corporation of India, the clearing agent of the individual oil companies used to file the bill of entry with customs and import applications with port authorities for the quantity to be delivered from the concerned tanker. Customs duty and wharfage amount were paid by the receiving company at the respective ports on the import manifested quantity. If the tanker discharged the entire crude at one disport, then the tanker sailed for the next load port for loading future cargo. If the tanker discharge was only a part crude cargo, then it would sail for the next disport to discharge the balance crude as decided at the crude slate meeting. The crude oil receiving company used to prepare the crude intake certificate with the help of the professional surveyor, on completion of discharge from the tanker, which was counter-signed by the Central excise authorities and the shore receipt quantity was advised by the receiving company to the bill of lading holder company. Crude oil received by oil companies other than the bill of lading holder oil company was treated as loan from the bill of lading holder to the other oil companies. The bill of lading company would be given thirty days of credit period in respect of crude transactions. The bill of lading holder has to settle the entire crude oil cost in Indian rupees to the Indian Oil Corporation in whose favour the foreign supplier has to state the entire crude cost. The Indian Oil Corporation would in turn settle the crude cost in US dollars to the foreign supplier on the date mentioned in the invoice. The freight has to be paid only by the bill of lading holder on completion of discharge and on receipt from the Shipping Corporation of India. Since the transaction involves huge financial implications, the bill of lading holder would take security deposits towards f. o. b. and freight cost from the receiving companies in respect of the quantity loaned by them. The value of the crude given on loan would be shown in the books of the bill of lading holder as 'crude oil issued on loan account' and corresponding security deposits given would be shown as 'deposits received from other oil companies'.

(ii) The crude given on loan would not form part of the crude oil stock in the books of the bill of lading holder. In the books of the receiving company, the value of the crude oil received on loan would be shown as 'crude oil received on loan account' and corresponding security deposits given would be shown as 'deposits with other oil companies'. When the other oil company was nominated as bill of lading holder and the earlier bill of lading holder nominated as the receiving company, the crude received on loan was either fully or partly returned, depending on the quantity allocated. Similarly, depending upon the quantity of the crude returned, the security deposit amount earlier made would be returned by the first bill of lading holder.

(iii) The crude oil loan adjustments were floated for more than one reason. It ensures that crude oil loan adjustments among oil company take place on quantity to quantity basis irrespective of the value or the type of the crude oil given or taken on loan basis. Variations in values, including differential in f. o. b. and freight were adjusted as per the norms in the Crude Oil Price Equalization Account (COPE) and C&F; pool account, respectively, maintained by the Oil Co-ordination Committee. In case the company returning crude oil incurred higher cost of purchase on acquiring the quantity, that company was required to make a claim on the COPE account for the differential value.

44. The crude oil issued on loan accounts appears to have more than one advantage. In case the bill of lading company gives a certain percentage of concession to another oil refinery by charging at a particular price and while returning the said quantity, the cost of import of the crude oil by the loanee refinery was more, it would increase the cost of the crude oil. Because of this loan transaction, it would enable the company returning the crude oil to claim the differential value from the Oil Co-ordination Committee by making a claim on the crude oil. Therefore, there would be no gain or loss for any of the oil companies.

45. The companies involved in all these transactions are public limited companies. The transactions are fair and transparent. The system of loan transactions was not introduced by the individual oil companies, including the petitioner. It was a system evolved by the Government of India through a statutory body constituted as early as in the year 1975. The system was in practice not only in the State of Tamil Nadu but also in all other States in the Territory of India. Administered pricing mechanism was in vogue till April 1, 2002. Therefore, between July 14, 1975 and

February 28, 2002, the import of crude oil was monitored only by the Oil Co-ordination Committee.

What is the nature of this transaction

46. The books of account produced by the petitioner did not disclose the transaction as sale or purchase. It was so because the quantity alone was the matter and it was not the price or type of crude oil.

47. The shifting of place in the transaction by way of allocation and re-allocation was made only by the Oil Co-ordination Committee constituted by the Government of India. Shifting of place was not under the contract of sale. There was no money factor in the transaction. It was an occasional movement on the basis of the allocation and re-allocation made by the Oil Co-ordination Committee on account of the exigencies of maintaining refinery stocks.

48. When the deposit was taken by the bill of lading company and crude oil was received by the borrower company, it was not purchase in the hands of the borrowing company.

49. There was no question of local sale in the matter. Allocation and re-allocations were made by the Oil Co-ordination Committee and it would be effected even before the ship enters the territorial waters of India and in any case, it would be concluded before the ship enters the customs barrier.

50. The transaction would not fall under the term 'sale' within the purview of the Tamil Nadu General Sales Tax Act or under the Central Sales Tax Act. The loan received by the borrower company would at the most only be a purchase in the course of import. The crude oil delivered either by way of fresh loan or settlement of earlier loan was by direct shipment from overseas countries into the refineries. Even if the transactions were considered as one of purchase by the loanee company, it could only be in the course of import as the documents of title and the bill of entry were entered into by the bill of lading company. The products were delivered directly by oceangoing vessels into the refineries of the bill of lading company and the documents like bill of lading were transferred under Section 5(2)

of the Central Sales Tax Act, 1956. In such event, there would be no sale or purchase within the State of Tamil Nadu.

51. When the crude was returned to settle a loan or was delivered on loan, there was also a direct shipment from an overseas port of shipment to the receiving refinery transferring documents. Even in such cases, the transaction was by way of movement from an overseas port into the discharging port in any part of the country not even touching the Territory of Tamil Nadu.

52. In case the oil refinery situated in the State of Tamil Nadu delivered crude oil by repayment of loan to another oil company situated in another State by shipment, even then it was not a sale and by no stretch of imagination, it could be treated as a sale in the State of Tamil Nadu.

53. When the oil refinery at Chennai receives crude oil after this particular discharge at ports in other States, still there would be no purchase by the refinery situated in Tamil Nadu under the Tamil Nadu General Sales Tax Act, 1959.

54. The Sales Tax Department appears to have taken the crude oil deposit account maintained by the petitioner and figures containing crude oil loan deposit account as sales and purchases.

55. The documents as found in the typed set of papers as well as the pleadings clearly show that the transit directions were given when the vessels were afloat for discharging the crude oil to refineries outside the State of Tamil Nadu.

56. There was no question of sale of imported crude oil by the petitioner. In fact, it was not possible for the petitioner to import crude oil at their instance. The system of uniform import was introduced by the Government on account of multiple reasons. The Government found that in case individual orders for small quantities were placed, there would be no scope for bargaining by the individual oil refineries. It would also involve higher transportation cost. In case orders were placed by a canalizing agent for larger quantity, they would be in a position to bargain for a better price. Similarly, transportation cost also would be considerably reduced. The Central Government in their earnest efforts to maintain uniformity in

the price of petroleum products evolved this unique scheme. There was also another advantage for this system as some ports in India like the port of Haldia and Cochin have no storage facility for storing such huge quantity of crude oil. Therefore, by way of monitored allocation, the demand of oil refineries in those places were also met.

57. The petitioner or the other oil corporations have no option in this transaction. It was not possible for the oil corporations to engage in the sale or purchase of crude oil. The petitioner by giving loan of crude oil on deposit and by receiving crude deposit, was acting only as a post office. In fact, the role of a bill of lading holder in the matter of granting loan was only as an agent of the Oil Co-ordination Committee. Import was always made in the name of Indian Oil Corporation, being the canalizing agent.

Authorities on the point

58. In Minerals and Metals Trading Corporation of India Ltd. v. Sales Tax Officer [1998] 111 STC 434, the issue before the Supreme Court was the import made by the appellant-corporation as a canalizing agent for and on behalf of Steel Authority of India Limited as the actual user.

59. Minerals and Metals Trading Corporation of India Ltd. : [1998] 111 STC 434 (SC) was functioning as a canalizing agent for import and export of minerals and metals. SAIL requested MMTC on 31 March, 1991 to register the import of 15,000 m.t. of tin mill black plate coils for production of electrolytic tin plates. SAIL opened a letter of credit directly in favour of the exporter. SAIL was shown as the consignee. On August 2, 1991, MMTC placed a purchase order with the foreign company for and on behalf of SAIL. MMTC then wrote to SAIL enclosing a copy of its purchase order and informed about the delivery of material by high seas by endorsement and transfer of shipping documents in favour of SAIL. It was also informed that SAIL has to make arrangements for clearing the cargo, including arrangements for clearance thereof from customs and that the responsibility for payment of import duties, port charges and other expenses subsequent to sale on high seas also would be on SAIL's account. Subsequently, the appellant forwarded the documents with due endorsement thereon to SAIL to get the goods cleared.

The vessel arrived at Paradeep port on November 11, 1991 and the bill of entry in respect of the said coils was submitted and processed by SAIL. The Sales Tax Officer levied sales tax and rejected the plea made by MMTC that the sale was in the course of import covered by Section 5(2) of the Central Sales Tax Act, 1956. The matter was challenged before the High Court. However, the High Court dismissed the writ petition. The Supreme Court allowed the appeal filed by MMTC and set aside the assessment order. While deciding the issue the Supreme Court placed reliance on an earlier decision of the Supreme Court in J.V. Gokal & Co. (Private) Ltd. v. Assistant Collector of Sales Tax (Inspection) [1960] 11 STC 186 wherein it was held that in the commercial world a bill of lading represents the goods and the transfer of it operates as the transfer of goods and the delivery of the bill of lading while goods are afloat w