

**Customs, Excise & Service Tax Appellate Tribunal
West Zonal Bench At Ahmedabad**

REGIONAL BENCH- COURT NO. 3

Service Tax Appeal No. 10731 of 2015-DB

(Arising out of OIO-AHM-SVTAX-000-COM-028-14-15 Dated-19.03.2015 passed by
Commissioner of Service Tax-Ahmedabad)

Amol Dicalite Ltd.

301, Akshay, 53, Shrimali Society,
Navrangpura, Ahmedabad,
Gujarat

.....Appellant

VERSUS

C.S.T. -Ahmedabad

7th Floor, Central Excise Bhawan, Nr. Polytechnic
Central Excise Bhavan, Ambawadi,
Ahmedabad, Gujarat-380015

.....Respondent

WITH

Service Tax Appeal No. 11937 of 2015-DB

(Arising out of OIO-AHM-SVTAX-000-COM-005-15-16 Dated-29.10.2015 passed by
Commissioner (Appeals-II)-Ahmedabad)

Amol Dicalite Ltd.

301, Akshay, 53, Shrimali Society,
Navrangpura, Ahmedabad,
Gujarat

.....Appellant

VERSUS

C.S.T. -Ahmedabad

7th Floor, Central Excise Bhawan, Nr. Polytechnic
Central Excise Bhavan, Ambawadi,
Ahmedabad, Gujarat-380015

.....Respondent

APPEARANCE:

Shri S.J. Vyas, Advocate appeared for the Appellant
Shri Rajesh Nathan, Assistant Commissioner, (Authorized Representative)
appeared for the Respondent

**CORAM: HON'BLE MR. RAMESH NAIR (JUDICIAL)
 HON'BLE MR. RAJU, MEMBER (TECHNICAL)**

FINAL ORDER NO. 12521-12522 /2024

DATE OF HEARING:17.10.2024

DATE OF DECISION:25.10.2024

RAMESH NAIR

The brief facts of the case are that during the course of audit of records of the appellant by the department it was noticed that they had supplied machinery on lease rent to M/s. Arvind Ltd under lease agreements dated 13.12.2005, 11.08.2009 and 06.07.2010 but fail to pay the service tax under the category of supply of tangible goods for use service. Hence, show cause notice No.STC/4-20/O&A/2015-16 dated 04.09.2015 was issued for recovery of service tax along with interest and penalty. The show cause notices was adjudicated vide Orders-In-Original No. AHM-SVTAX-000-COM-005-15-16 dated

29.10.2015 wherein demand of service tax was confirmed along with interest and penalty. Being aggrieved by the said order the appellant filed the present appeals.

2. Shri S J Vyas, Learned Counsel appearing on behalf of the appellant, at the outset, submits that the case is squarely covered by this Tribunal's decision in the appellant's own case vide Final Order No. 12197-12199/2024 dated 26.09.2024.

3. Shri Rajesh Nathan, Learned Assistant Commissioner (Authorised Representative) appearing on behalf of the Revenue, reiterates findings of the impugned order.

4. We have carefully considered the submissions made by both the sides and perused the records. We find that identical issue in the same set of facts in the appellant's own case has been decided by this Tribunal vide order No. A/12197-12199/2024 dated 26.09.2024, wherein this Tribunal has passed the following order:

"4. We have carefully considered the submission made by both sides and perused the records. We find that the Assessee have rented out the textile machineries to M/s. Arvind Ltd for manufacture of textile products. The department's case is that leasing of machineries to M/s. Arvind Ltd is classifiable under supply of tangible goods for use service. For the ease of reference the definition of the said category reads as under:-

"65(105) "taxable service" means any service provided or to be provided

xx xx xx

(zzzzj) to any person, by any other person in relation to supply of tangible goods including machinery, equipment and appliances for use, without transferring right of possession and effective control of such machinery, equipment and appliances."

4.1 From the plain reading of the above definition, to bring a lease agreement under ambit of service tax under the category of supply of tangible goods for use service it is necessary that during the lease period the right to possession and effective control must be with the lessor and if the right to possession and effective control is transferred to the lessee then such lease will not be covered under the category of supply of tangible goods for use service. To ascertain whether right to possession and effective control has been passed on to the lessee or remains with the lessor, it is necessary to go through the terms of the agreement. Extract of the relevant conditions of the lease agreement dated 11.08.2009 are as below:-

THIS INDENTURE OF LEASE made at AHMEDABAD this 11th Day of AUGUST, Two Thousand and Nine

By and Between

Amol Dicalite Limited, a company incorporated under the Companies Act, 1956 and having its Registered Office at 301, "Akshay",53, Shrimali Society,Navrangpura, Ahmedabad- 380009 (hereinafter referred to as " The Lessor" which expression shall unless the same be repugnant to the context or meaning thereof be deemed to mean and include its successors in titles and assigns) of the One Part

and

ARVIND LIMITED , a Company incorporated under the Indian Companies Act, 1913 and having its Registered Office at Naroda Road, Ahmedabad – 380025 (hereinafter referred to as " the Lessee" which expression shall unless the same be repugnant to the context or meaning thereof be deemed to mean and include its successors in titles and assigns) of the Other Part.

WHEREAS:-

1. The Lessor is absolutely seized and possessed of or otherwise well and sufficiently entitled to all machinery and all other fixtures and fitting, and other apparatus and equipments in or upon and permanently attached and embedded to the said machinery, more particularly described in the First Schedule hereunder (hereinafter collectively referred to as "the Said Machinery".
2. The Lessor has agreed at the request of the Lessee to lease and demise unto the Lessee the "Said Machinery" described in the First Schedule hereunder written for a period of 8 (Eight) years on the terms and conditions hereinafter contained, yielding and paying therefore the monthly rents and as reserved herein.

NOW THIS INDENTUR WITNESSTH AND IT IS HEREBY AGREED IT IS HEREBY AHREED AND DECLARED BY AND BETWEEN TE PATYIES HERETO AS UNDER:-

1.
2.
3. The lessee in the intent that the obligations may continue throughout the term hereby granted do hereby covenant with the Lessor as follows:
 - i) During the said terms of 8 years, to pay without any deduction to the lessor the rent, herein reserved by the date and in the manner aforesaid. Provided, however, the TDS as per the provision contained under, the Income Act Tax, 1961 and/or Service Tax Act, Lessee Tax or any other Tax levy, cess, if applicable, in respect this present, same shall be the responsibility of the lessee.
 - ii) To use the "Said Machinery" for yarn processing and weaving of fabrics from the yarns of the Lessee and for any other industrial purposes permitted in Law.
 - iii) To make, maintain and keep in repair all machinery, erections, equipments, apparatus attached to the "Said Machinery", and at all time during the continuance of this demise to observe and conform to all such rules, regulations and by-laws relating theretofore the time being in force and at all times during the continuance of these present at their own expenses to execute or cause to be executed all such works as are or ay under or in pursuance of the statutory provisions, orders, rules or bye-laws e directed or required to be executed upon or in respect of the "Said Machinery" or other works in connection therewith.

4.2 From the reading of the agreement in particular the above terms, it is clear that right to possession and effective control of machineries have been transferred to the lessee M/s. Arvind Ltd. Moreover since the right to possession has been transferred, the transaction is of deemed sale in terms of Article 366 (29A) of the Constitution of India and the Assessee are admittedly paying the said VAT. Therefore, this fact also reinforces the contention of the Assessee that right to possession and effective control have been transferred to the lessee M/s. Arvind Ltd. Therefore, The transaction is of deemed sale and not of supply of tangible goods for use service. Hence, the same is not liable for service tax. Under the same set of facts, this Tribunal has considered the issue in various judgments.

4.3 In the case of Gujarat Gas Ltd (Supra). This Tribunal once again considering the same view in the case of Gimmco Ltd passed the following order :-

4. We have carefully considered the submission made by both sides and perused the records. We find that to decide whether the leasing of tangible goods falls under the category of supply of tangible goods for use service and liable to service tax or otherwise it is important to read the agreement between the lessor and lessee. In the present case agreement dated 07.09.2005 between the appellant M/s. Gujarat Agrochem Ltd was entered into, the relevant clauses of the said agreement are reproduced below:-

"2.2. The Parties agree that the main governing principles of the lease pursuant to this Agreement are:

(a) All along the absolute and unencumbered ownership of the Equipment shall remain with Lessor. Nothing stated herein shall be construed to be a transfer to Lessee of any ownership right or title in the Equipment, or even a right to Lessee to demand such transfer.

(b) At the completion of the Term, or in the event of earlier termination of this Agreement (as the case may be), the possession of the Equipment shall revert to Lessor.

(c) Lessor retains the right to re-possess and remove the Equipment from the Location forthwith in the event of any default of any obligations by Lessee. During the Term, the Lessee shall hold the Equipment in trust, under its supervision and care, without prejudice to any of the ownership rights of the Lessor.

(d) All along, the Lessee shall have the beneficial possession of the Equipment pursuant to this Agreement subject to the over-riding principle set out in Clause 2.2(a) and (c) above.

3.3 Lessor grants the Lessee the non-transferable exclusive right to use the Equipment as a part of its Captive Plant.”

4.1 From the above relevant clauses, it is clear that during the lease period the right to possession and effective control is completely with the lessee and not with the lessor (appellant). It is also not disputed that the said transaction is the deemed sale in terms of Article 366 29 (A) of Constitution of India which is liable to State VAT. In the present case also the appellant considering the transaction as deemed sale discharged the VAT liability to the state Government. Therefore, the transaction which is a domain of VAT department, the same cannot be liable to service tax. In the identical facts, the issue has been considered in various judgments wherein the following orders were passed.

- (i) In the case of G.S. Lamba & Sons Vs. State of Andhra Pradesh Hon’ble Andhra Pradesh has passed the following order:

“6. The two issues that spring up from the background facts and the rival submissions are : Whether the petitioners’ contract is for transfer of the right to use Transit Mixers to M/s. Grasim Industries Limited for transporting the RMC? And whether the State Sales Tax Appellate Tribunal has committed any error warranting interference under Section 22(1) of the Andhra Pradesh General Sales Tax Act, 1957?

Revisional jurisdiction under APGST Act

7. We will first deal with second issue. The petitioners would contend that the exercise of jurisdiction under Section 20(2) of the Act is barred when two views are equally possible and one of which is accepted by the original authority. This argument is sought to be sustained relying on Malabar Industrial Co. Ltd. v. Commissioner of Income Tax - (1989) 73 STC 370 : (1989) 2 SCC 645 (para 32), CIT v. Arvind Jewellers - 259 ITR 502 (Guj.), Commissioner of Income Tax v. Greenworld Corporation - (2009) 314 ITR 81 (SC) and Commissioner of Income Tax v. Associated Food Products and Popular Bread Factory - (2006) 280 ITR 377 (MP). These judicial decisions were rendered in the context of Section 263(1) of the Income Tax Act, 1961, not with reference to the language of Section 20(1) of the APGST Act. The scope of revisional jurisdiction under these provisions is also different. Therefore we are afraid the decisions under Section 263(1) of the Income Tax Act would not be applicable here. For comparison, we may quote Sections 20(1) & (2) of the APGST Act and Section 263(1) of the Income Tax Act in the following table.

Section 20 of the APGST Act	Section 263 of the Income-tax Act
20. Revision by Commissioner of the Commercial Taxes and other prescribed authorities : (1) The Commissioner of Commercial Taxes may suo motu call for and examine the record of any order passed or proceeding recorded by any authority, officer or person subordinate to it, under the provisions of this Act, including sub-section (2) of this section and if such order or proceeding recorded is prejudicial to the interests of revenue, may make such enquiry, or cause such enquiry to be made and subject to the provisions of this Act, may initiate proceedings to revise, modify or set aside such order in reference thereto as it thinks fit. (2) Powers of the nature referred to in sub-section (1) may also be exercised by the Additional Commissioner, Joint Commissioner, Deputy Commissioner, Assistant Commissioner and the Commercial Tax Officer in the case of orders passed or proceedings recorded by authorities, officers or persons	263. Revision of orders prejudicial to revenue (1) The Commissioner may call for and examine the record of any proceeding under this Act, and if he considers that any order passed therein by the Assessing Officer is erroneous in so far as it is prejudicial to the interests of the revenue, he may, after giving the assessee an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, pass such order thereon as the circumstances of the case justify, including an order enhancing or modifying the assessment, or canceling the assessment and directing a fresh assessment. (Explanation and sub-sections (2) and (3) are omitted.)

subordinate to them.	
(Sub-sections 2-A, 3, 5 and 6 are omitted.)	

(emphasis supplied)

8. The power under Section 263(1) of the Income-tax Act conferred on the Commissioner is exercisable only when an order passed by the assessing officer, “is erroneous insofar as it is prejudicial to the interest of the revenue”. In *Malabar Industrial Co., Ltd.*, the Supreme Court held that, “the Commissioner of Income Tax has to be satisfied of twin conditions, namely, (i) the order of the assessing officer sought to be revised is erroneous; and (ii) it is prejudicial to the interests of the revenue (and) if one of them is absent - if the order of the Income Tax Officer is erroneous but is not prejudicial to the revenue or if it is not erroneous but is prejudicial to the revenue - recourse cannot be had to Section 263(1) of the Act”. On the other hand, Section 20(1) of the Act confers suo motu power on the Commissioner of Commercial Taxes and other prescribed authorities to call for the record and modify or set aside the order of any assessing authority, “if such order or proceeding recorded is prejudicial to the interests of revenue”. Thus, it would be enough to have recourse to Section 20(1) of the Act if any assessment order or proceeding is prejudicial to the revenue. This construction under the APGST Act may have certain exceptions with which we are not concerned here. We are well supported by two decisions of this Court in *B.S. Parikh & Co. v. Commr. of C.T.* - (2001) 122 STC 236 (AP) and *M/s. GMM Co. Ltd. v. State of A.P.* - T. Rev. C. No. 3 of 2010, dated 11-11-2010.

9. It is axiomatic that the machinery provisions of a taxing statute have to be interpreted in such a manner that they are workable (*Commissioner of Income-tax, Central Calcutta v. National Taj Traders* - AIR 1980 SC 485 and *J.K. Synthetics Limited v. Commercial Taxes Officer* - AIR 1994 SC 2393 : (1994) 94 STC 422). It does not, however, mean that the interpreter can interpolate something not intended by the legislature, by supplying *causis omissus* (*Illachi Devi v. Jain Society, Protection of Orphans India* - (2003) 8 SCC 414 : AIR 2003 SC 3397 and *Sankar Ram & Co. v. Kasi Naicker* - (2003) 11 SC 699 : AIR 2003 SC 4156). If the plea of the petitioners is accepted, we have to read Section 20(1) of the APGST Act as empowering revision, only when an order of assessing officer/appellate authority is erroneous in so far as it is prejudicial to the interest of revenue. This is plainly not permissible.

10. The impugned order of the Tribunal is also attacked on the ground that the Tribunal erred in not recording a finding on the issue raised. This cannot be a ground for us to exercise revisional jurisdiction under Section 22(1) of the Act. As rightly pointed out by the Special Counsel for Commercial Taxes, the submissions were noted in the order. The learned Tribunal considered the core issue and, having found that the agreement is a contract for the transfer of the right to use Transit Mixers, dismissed the appeals. We fail to understand as to how the impugned order can be put to challenge only on the ground that a finding is not recorded on one of the issues raised by the assessee before the Tribunal.

Transportation service or Transfer of the right to use Transit Mixers?

11. The petitioners allege that the contract with Grasim is for transportation service. They deny that it is for the transfer of the right to use the goods. Transit Mixers are indisputably goods as defined in Section 2(h) of the Act. Section 2(n) defines “sales” to mean transfer of the property in goods for cash in the course of trade or business and includes mortgage, hypothecation, pledge or charge on goods. This definition has eight Explanations. Fourth of them was inserted by Andhra Pradesh Act No. 18 of 1985 with effect from 2-2-1983. It is to the effect that “a transfer of the right to use any goods for any purpose” shall be deemed to be sale. When is the right to use goods said to have been transferred? To appreciate this, a brief journey into the past relating to tax on sale of goods under Entry 54 of List II of the Seventh Schedule to the Constitution of India may be necessary.

12. The Sale of Goods Act, 1930 defined “sale” as a contract of sale of goods whereby the seller transfers or agrees to transfer the property in goods to a buyer for price. “Goods” means ‘every kind of movable property other than actionable claims and money and includes stock and shares, growing crops, grass and things attached or form part of the land which are agreed to be severed before sale or under the contract of sale’. In the pre-constitution era, for the purpose of sales tax law, the expression “sale of goods” was construed as having the same meaning as in the Sales of Goods Act. Firmly established in *State of Madras v. Gannon Dunkerley & Co. (Madras) Limited* - (1958) 9 STC 353 : AIR 1958 SC 560, this view influenced the sales tax law enormously. In *New India Sugar Mills Limited v. CST* - (1963) 14 STC 316 : AIR 1963 SC 1207, the Supreme Court held that the transfer of controlled commodities pursuant to a Central Government Order is not a sale as defined in the Sale of Goods Act. In *K.L. Johar and Co. v. CTO* - AIR 1965 SC 1082, it was held that the transfer of goods on hire purchase or any system

of payment by instalments does not amount to sale, and in *A.V. Meiyappan v. CCT* - (1967) 20 STC 115 (Madras), the Madras High Court held that the lease of cinematograph films is not a sale. In *CTO v. Young Men’s Indian Association (Regd.)* - (1970) 1 SCC 462, it was held that supply of goods by any incorporated association or a body of persons to a Member of the association is not sale and in *State of Punjab v. Associated Hotels of India Limited* - (1972) 29 STC 474 : (1972) 1 SCC 472 and *Northern India Caterers (India) Limited v. Lt. Governor of Delhi* - (1978) 4 SCC 36, it was held that service of meals in a hotel or restaurant does not constitute sale of food for the purpose of levy of sales tax and must be regarded as rendering service in the satisfaction of human need. So as to tackle these issues, which effected the State’s revenue (by depriving tax on such type of sales), the matter was referred to the Law Commission of India.

13. In their Sixty First Report, the Law Commission of India dealt with specific transactions like transfer of control commodities, supply of food in hotels, transfer of goods on hire purchase and the works contracts. In Chapter 1-E the Law Commission made pertinent observations, which compel excerption.

CHAPTER 1-E

SOME GENERAL OBSERVATIONS AS TO TAXATION ON SALE

I-E General observations as to “sale”

(1) So far, we have dealt with specific transactions. A few general observations may now be made.

A sale of goods requires an agreement to transfer title in goods for money, followed by the actual passing of such title as a result of the agreement. The broad concept, thus, requires (i) an agreement to transfer title, (ii) in goods, (iii) for money and (iv) passing of title as a result of the agreement. Most of the problems that have arisen as to the taxability of various transactions are due to the fact that one (or more) of the ingredients mentioned above are missing from the transaction. This will be clear if the ingredient and its antithesis are represented as in the following chart, which also mentions the situation where the antithesis exists.

Ingredient	Antithesis
(i) Agreement to transfer title	Title passing without agreement, or no transfer of title.
(ii) In goods	Title passing under the agreement but not for goods. Illustrative situation - Works contracts (No agreement to transfer the very goods which come into existence).
(iii) For money	Title passing for value other than money. Illustrative situation - Barter.
(iv) Passing of title as a result of the agreement	Title does not pass because there is only an agreement (or some prior step), and no complete sale. Illustrative situations - (a) Hire-purchase (b) Consignment transfer.

2. The basic defect in the present scheme is that a very limited type of economic activity is taxable by the States, -- and other economic activities are not taxable, except by way of excise duties or indirectly by way of stamp duties. This leaves room for loopholes and gaps. It would appear that some day, it will be desirable to consider the possibility of devising a tax which will embrace all transactions which are regarded as adding value or which are entered into with that object.

14. The Law Commission of India submitted the report on 21-5-1974. Accepting its recommendations, the Government of India proposed to amend the Constitution to include in Article 366, a definition of ‘tax on the sale or purchase of goods’ by inserting a new Clause (29A) and to insert a new Entry 92-A in the Union List in the Seventh Schedule and to amend Articles 269(1) and 286(3) of the Constitution of India to be in consonance with the other proposed amendments. As a result, the Constitution (Forty-sixth Amendment) Act, 1982 was enacted which was published in the Gazette on 2-2-1983. Consequently this led to States amending their sales tax laws to enlarge the ambit and width of “sale of goods” for levy of tax. Due to this, a wide variety of economic activities, which were hitherto not considered as sale of goods, came within the fold of

State laws. Indeed, as observed by the Law Commission of India, the underlying theme was to devise a tax, which will embrace all transactions which are regarded as adding value or which is entered into with that object. This is reflected in the new definition in Article 366 (29A), which reads as under.

366. Definitions

(29A) “tax on the sale or purchase of goods” includes —

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

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

(c) a tax on the delivery of goods on hire purchase or any system of payment by instalments;

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

(e) a tax on the supply of goods by any unincorporated association or body of persons to a member thereof for cash, deferred payment

or other valuable consideration;

(f) a tax on the supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink whether or not intoxicating), where such supply or service, is 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.

15. The expression ‘tax on sale or purchase of goods’ is an inclusive definition. It must receive a wide and expansive meaning. The latter part of clause (29A) contemplates that ‘such transfer, delivery or supply of any goods shall be deemed to be a sale of those goods’. The sub-clauses (a) and (b) use “transfer”; sub-clause (c) uses “delivery”; sub-clause (d) uses “transfer of the right to use goods”, and sub-clauses (e) and (f) use “supply” of goods while defining deemed sale. Thus under the sub-clause (d) there would be deemed sale if the right to use goods is transferred even though delivery is not an essential part of such transfer of the right to use goods. In other words, the moment the right to use goods is transferred, the taxable event happens. When would such transfer of the right to use goods de facto comes within the gravitational field of the species of deemed sale? A score of High Court decisions and half a dozen Supreme Court decisions, notwithstanding, this question remains an unavoidable vexed question. We may, therefore give a brief analysis of the judicial decisions on Article 366(29A)(d) of the Constitution which is the basis for Section 5E of the APGST Act as well as similar provisions in other States’ laws.

16. In *Builders Association of India v. Union of India* - (1989) 73 STC 370 : (1989) 2 SCC 645, the validity of the Constitution (Forty-sixth Amendment) Act was upheld. But the Apex Court ruled that the States’ power to levy tax on the goods involved in a works contract is subject to the restrictions in Article 286. Article 366(29A) was elucidated by the Constitution Bench as below :

It refers to a tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract. The emphasis is on the transfer of property in goods (whether as goods or in some other form). The latter part of clause (29A) of Article 366 of the Constitution makes the position very clear. While referring to the transfer, delivery or supply of any goods that takes place as per sub-clauses (a) to (f) of clause (29A), the latter part of clause (29A) says that “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 The object of the new definition introduced in clause (29A) of Article 366 of the Constitution is, therefore, to enlarge the scope of ‘tax on sale or purchase of goods’ wherever it occurs in the Constitution so that it may include within its scope the transfer, delivery or supply of goods that may take place under any of the transactions referred to in sub-clauses (a) to (f) thereof wherever such transfer, delivery or supply becomes subject to levy of sales tax.

(emphasis supplied)

17. Inspired by the Forty-sixth Amendment, like many States, Andhra Pradesh also enacted a provision on similar lines being Section 5-E of the Act. It is appropriate to read it here.

5E. Tax on the amount realized in respect of any right to use goods. - Every dealer who transfers the right to use any goods for any purpose, whatsoever, whether or not for a specified period, to any lessee or licensee for cash, deferred payment or other valuable consideration, in the course of his business shall, on the total amount realized or realizable by him by way of payment in cash or otherwise on such transfer or transfers of the right to use such goods from the lessee or licensee, pay a tax at the rate of five paise in every rupee of the aggregate of such amount realized or realizable by him during the year :

Provided that no such tax shall be levied if the total turnover of the dealer including such aggregate is less than Rs. 1,00,000.

18. The challenge to the above provision failed before this Court in *Padmaja Commercial Corporation v. Commercial Tax Officer* - (1987) 66 STC 26 : (1987) 4 APSTJ 26.

19. In all probability, for the first time, the scope of above provision fell for consideration before the Division Bench in *Rashtriya Ispat Nigam Limited v. CTO* - (1990) 77 STC 182 (AP) (RINL-I) comprising Jeevan Reddy and Syed Shah Mohammad Quadri, JJ (as they then were). In certain civil works by contractors, RINL provided special machinery like cranes, docers, dumpers, road rollers, compressors etc., for hire charges. The plea was that there was no transfer of the right to use in favour of the contractor. Reliance was placed on the agreement between RINL and the contractor. Whether the transaction amounts to transfer of the right or not cannot be determined with reference to a particular word or clause in the agreement. The agreement has to be read as a whole to determine the nature of transaction. This Court noticed that the contract did not create exclusivity of use, and the contractor was entitled to use the machinery only for executing the work entrusted. Therefore, it was held that the fundamental requirements of Section 5-E are not satisfied.

20. In *I.T.C. Classic Finance & Services v. CCT* - (1995) 97 STC 330 (AP) : (1995) 20 APSTJ 150 the assessee, a finance company, was in the business of hiring out machinery, plant and equipment for rent. After purchasing the goods of required specifications, the manufacturer was advised to consign them directly to the customer on hire under an agreement of lease of the equipment for a period of sixty months or more. As these goods were moved out of the State during the course of interstate trade, in their sales tax return for the year 1988-89, the assessee claimed exemption on the ground that the transaction was not excisable to tax under Section 5-E of the Act. The original authority rejected the contention. The assessee was successful before the Appellate Deputy Commissioner. However, the Commissioner following the judgment of the Bombay High Court in *20th Century Finance Corporation Limited v. State of Maharashtra* - (1989) 75 STC 217 (Bom.) in suo motu revision, set aside the appellate order restoring the original assessment order. The assessee then filed special appeal before this Court inter alia contending that deemed sales cannot be distinguished from ordinary sales for the purpose of taxation under the Act, and that, the taxable event of delivering the goods having occurred in the State of Tamil Nadu, the same is not excisable under Section 5-E of the Act. Relying on *Builders Association and Gannon Dunkerly and Co. v. State of Rajasthan* - (1993) 1 SCC 364 : (1993) 88 STC 204 the contention was accepted observing thus.

In the determination of the inter-State character of a sale, the situs is immaterial. When goods are entrusted to a common carrier for delivery, it amounts to delivery to the consignee and when it takes place outside the State, the fact that subsequently the goods have reached the State where the tax is sought to be imposed, cannot be a ground for determining the tax liability. The decision of the Bombay High Court in *20th Century Finance Corporation Limited*, (1989) 75 STC 217, proceeds on the footing that a transfer of the right to use is different from sale without considering the fiction introduced by clause (29A) of Article 266 of the Constitution. The principle that where a State law while defining the expression "sale" makes the situs a relevant consideration for the purpose of determining a deemed sale, the same cannot bring within its ambit inter-State sales or sales in the course of import and export was again emphasized by the Supreme Court in *Builders Association of India v. State of Karnataka*, (1993) 88 STC 248 : AIR 1993 SC 991.

21. In order to get over the above dicta, by A.P. Act No. 22 of 1995, Section 5-E was substituted, which reads as under.

5-E. Tax on the amount realized in respect of any right to use goods :
Notwithstanding anything contained in this Act;-

(a) Every dealer who transfers the right to use any goods for any purpose, whatsoever, whether or not for a specified period, to any lessee or licensee for cash, deferred payment or other valuable consideration, in the course of his business shall, on the total amount realized or realizable by him by way of payment in cash or otherwise on such transfer or transfers of the right to use such goods from the lessee or licensee, pay a tax at the rate of eight paise on every rupee of the aggregate of such amount realized or realizable by him during the year.

(b) the transfer of right to use any such goods entered into by any dealer, shall be deemed to have taken place in this State whenever the goods are used within the State, irrespective of the place where the agreement whether written or oral for such transfer of right is made.

Provided that no such tax shall be levied if the total turnover of the dealer including such aggregate is less than Rs. two lakhs.

22. The decision in *ITC Classic Finance* went in appeal to the Supreme Court. The appeal was heard along with other similar appeals (*20th Century Finance Corporation Limited v. State of Maharashtra* - (2000) 6 SCC 12 : (2000) 119 STC 182 (SC)) by a Constitution Bench of the Supreme Court which inter alia considered the import of sub-clause (d) of clause (29A) of Article 366 of Constitution, and the constitutional validity of Section 5-E of the APGST Act and similar provisions in Haryana, Maharashtra, Rajasthan, Uttar Pradesh and Tamil Nadu Acts. By majority of 3:2, Section 5-E(b) was held to be in excess of the legislative power of the State under Entry 54 of List II of the Seventh Schedule to the Constitution. But to save it from being unconstitutional, the Court read down holding that it would not be applicable to the transaction of the transfer of the right to use goods if such deemed sale is (i) an outside sale; (ii) sale in the course of import or export of the goods; and (iii) an inter-State sale. The decision of this Court in *ITC Classic Finance* was affirmed, and the *Bombay* decision in *20th Century Finance* was overruled. It is apt to quote the following relevant portion from the Judgment.

The various sub-clauses of clause (29A) of Article 366 permit the imposition of tax thus: sub-clause (a) on transfer of property in goods; sub-clause (b) on transfer of property in goods; sub-clause (c) on delivery of goods; sub-clause (d) on transfer of the right to use goods; sub-clause (e) on supply of goods; and sub-clause (f) on supply of services. The words “and such transfer, delivery or supply ...” in the latter portion of clause (29A), therefore, refer to the words transfer, delivery and supply, as applicable, used in the various sub-clauses. Thus, the transfer of goods will be a deemed sale in the cases of sub-clauses (a) and (b), the delivery of goods will be a deemed sale in case of sub-clause (c), the supply of goods and services respectively will be deemed sales in the cases of sub-clauses (e) and (f) and the transfer of the right to use any goods will be a deemed sale in the case of sub-clause (d). Clause (29A) cannot, in our view, be read as implying that the tax under sub-clause (d) is to be imposed not on the transfer of the right to use goods but on the delivery of the goods for use. Nor, in our view, can a transfer of the right to use goods in sub-clause (d) of clause (29A) be equated with the third sort of bailment referred to in *Bailment by Palmer*, 1979 Edn., p. 88. The third sort referred to there is when goods are left with the bailee to be used by him for hire, which implies the transfer of the goods to the bailee. In the case of sub-clause (d), the goods are not required to be left with the transferee. All that is required is that there is a transfer of the right to use the goods. In our view, therefore, on a plain construction of sub-clause (d) of clause (29A), the taxable event is the transfer of the right to use the goods regardless of when or whether the goods are delivered for use. What is required is that the goods should be in existence so that they may be used. And further contract in respect thereof is also required to be executed. Given that, the locus of the deemed sale is the place where the right to use the goods is transferred. Where the goods are when the right to use them is transferred is of no relevance to the locus of the deemed sale. Also of no relevance to the deemed sale is where the goods are delivered for use pursuant to the transfer of the right to use them, though it may be that in the case of an oral or implied transfer of the right to use goods, it is effected by the delivery of the goods.

(emphasis supplied)

23. While holding that, in a contract for the transfer of the right to use goods, the taxable event would be the execution of the contract for delivery of the goods, it was observed.

Article 366(29A)(d) further shows that levy of tax is not on use of goods but on the transfer of the right to use goods. The right to use goods accrues only on account of the transfer of right. In other words, right to use arises only on the transfer of such a right and unless there is transfer of right, the right to use does not arise. Therefore, it is the transfer which is sine qua non for the right to use any goods. If the goods are available, the transfer of the right to use takes place when the contract in respect thereof is executed. As soon as the contract is executed, the right is vested in the lessee. Thus, the situs of taxable event of such a tax would be the transfer which legally transfers the right to use goods. In other words, if the goods are available irrespective of the fact where the goods

are located and a written contract is entered into between the parties, the taxable event on such a deemed sale would be the execution of the contract for the transfer of right to use goods. But in case of an oral or implied transfer of the right to use goods it may be effected by the delivery of the goods.

(emphasis supplied)

24. In *State of Andhra Pradesh v. Rashtriya Ispat Nigam Limited* - (2002) 3 SCC 314 : AIR 2002 SC 1305 : (2002) 126 STC 114 (SC) = [2013 \(31\) S.T.R. 513](#) (S.C.), the decision of the High Court in RINL-I was affirmed by the Apex Court holding that so as to attract levy of tax under Section 5-E, the essential requirements of the transfer of the right to use must be shown to exist and collection of mere hire charges is not excisable to sales tax. The relevant observations are as under.

The High Court after scrutiny and close examination of the clauses contained in the agreement and looking to the agreement as a whole, in order to determine the nature of the transaction, concluded that the transactions between the respondent and contractors did not involve transfer of right to use the machinery in favour of the contractors and in the absence of satisfying the essential requirement of Section 5-E of the Act, i.e., transfer of right to use machinery, the hire charges collected by the respondent from the contractors were not exigible to sales tax. On a careful reading and analysis of the various clauses contained in the agreement and, in particular, looking to Clause 1, 5, 7, 13 and 14, it becomes clear that the transaction did not involve transfer of right to use the machinery in favour of contractors. The High Court was right in arriving at such a conclusion. In the impugned order, it is stated, and rightly so in our opinion, that the effective control of the machinery even while the machinery was in use of the contractor was that of the respondent company; the contractor was not free to make use of the machinery for the works other than the project work of the respondent or move it out during the period the machinery was in his use; the condition that the contractor would be responsible for the custody of the machinery while it was on the site did not militate against respondent's possession and control of the machinery.

(emphasis supplied)

25. In *Bharat Sanchar Nigam Limited v. Union of India* - [2006 \(2\) S.T.R. 161](#) (S.C.), the principal question was regarding the nature of transaction by which mobile phone connections are enjoyed. In an earlier decision marked as *State of Uttar Pradesh v. Union of India* - [2004 \(170\) E.L.T. 385](#) (S.C.) = [2006 \(3\) S.T.R. 98](#) (S.C.), a two Judge Bench took the view that transferring the right to use the telephone instrument/apparatus, fell within Section 2(h) of the Uttar Pradesh Trade Tax Act, which defined "sale" to include the transfer of the right to use goods. Doubting the correctness, the matter went before a three Judge Bench. In the lead opinion, as well as in concurring opinion, it was held that though giving a telephone connection would be a transfer of the right to use the goods, there cannot be transfer of the right to use in the case of telephone service. "Providing the use of electro magnetic waves are neither abstracted nor are they consumed in the sense they are not extinguished by their user". In the lead opinion, it was held that whether there is a transfer of the right to use goods, would depend ultimately upon the intention of the parties, to be determined with reference to the contract between the parties. In the concurring opinion, following attributes to constitute the transfer of the right to use goods were pointed out; (a) there must be goods available for delivery; (b) there must be a consensus ad idem as to the identity of the goods; and (c) the transferee should have a legal right to use the goods - consequently all legal consequences of such use including any permission or licences required therefore should be available to the transferee; (d) for the period during which the transferee has such legal right, it has to be the exclusion to the transferor - this is the necessary concomitant of the plain language of the statute viz., a "transfer of the right to use" and not merely a licence to use the goods; and (e) having transferred the right to use the goods during the period for which it is to be transferred, the owner cannot again transfer the same rights to others.

26. At this stage, the following principles to the extent relevant may be summed up.

(a) The Constitution (Forty-sixth) Amendment Act intends to rope in various economic activities by enlarging the scope of "tax on sale or purchase of goods" so that it may include within its scope, the transfer, delivery or supply of goods that may take place under any of the transactions referred to in sub-clauses (a) to (f) of Clause (29A) of Article 366. The works contracts, hire purchase contracts, supply of food for human consumption, supply of goods by association and clubs, contract for transfer of the right to use any goods are some such economic activities.

(b) The transfer of the right to use goods, as distinct from the transfer of goods, is yet another economic activity intended to be exigible to State tax.

(c) There are clear distinguishing features between ordinary sales and deemed sales.

(d) Article 366(29A)(d) of the Constitution implies tax not on the delivery of the goods for use, but implies tax on the transfer of the right to use goods. The transfer of the right to use goods contemplated in sub-clause (d) of clause (29A) cannot be equated with that category of bailment where goods are left with the bailee to be used by him for hire.

(e) In the case of Article 366(29A)(d) the goods are not required to be left with the transferee. All that is required is that there is a transfer of the right to use goods. In such a case taxable event occurs regardless of when or whether the goods are delivered for use. What is required is that the goods should be in existence so that they may be used.

(f) The levy of tax under Article 366(29A)(d) is not on the use of goods. It is on the transfer of the right to use goods which accrues only on account of the transfer of the right. In other words, the right to use goods arises only on the transfer of such right to use goods.

(g) The transfer of right is the sine qua non for the right to use any goods, and such transfer takes place when the contract is executed under which the right is vested in the lessee.

(h) The agreement or the contract between the parties would determine the nature of the transaction. Such agreement has to be read as a whole to determine the nature of the transaction. If the consensus ad idem as to identity of the good is shown the transaction is exigible to tax.

(i) The locus of the deemed sale, by transfer of the right to use goods, is the place where the relevant right to use goods is transferred. The place where the goods are situated or where the goods are delivered or used is not relevant.

27. To buttress the argument that the essential requisites of the transaction of the transfer of the right to use goods are absent, the counsel relies on *Sandeman v. Scurr* - (1866) L.R.2 QB. 86, *The Omoa Coal and Iron Company v Huntley* - (1877) 2 Company Pleas Division 464, *Baumvoll v. Gilchrest* - (1892) 1 QB. 253 and *Sea and Land Securities v. William Dickinson Company* - (1942) 2 KB 65 as well as passage from '*Scrutton on Charterparties and Bills of Lading*' (Twenty-first edn., by Stewart C. Boyd CBE Q.C.). He has also invited attention of this Court to the decisions of the Supreme Court in 20th Century, *BSNL, RINL-I and RINL-II*, and decisions of various High Courts in *Ahuja Goods Agency v. State of Uttar Pradesh* - (1997) 106 STC 540 (All.), *Lakshmi Audio Visual Inc v. Assistant Commissioner of Commercial Taxes* - (2001) 124 STC 426 (Kar.), *Commissioner, VAT, Trade and Taxes Department v. International Travel House Limited* - 2009-10 DST J-77 (Del.), *State of Orissa v. Dredging Corporation of India Limited* - 25 VST 522 (Ori.) and *Indian Oil Corporation v. Commissioner of Taxes* - 22 VST 70 (Gau.).

28. The Special Counsel for CT relies on the contract between the petitioners and Grasim, and the observations made by this Court in *RINL-I* as well as *BSNL*, to refute the petitioners' case. He also brought to our notice an unreported Judgment of this Division Bench in *Jasper Aqua (P) Limited v. State of Andhra Pradesh* (T.R.C. No. 270 of 2010, dated 3-11-2010). He also pointed out that the Judgment of the learned single Judge in *Indian Oil Corporation* was expressly disapproved in *Deepak Nath v. ONGC* - (2010) 31 VST 337.

29. We have culled out the principles to be applied to determine the nature of the transaction which, according to the revenue, falls within the ambit of Article 366(29A)(d). These principles govern the situation here as well. Though we do not feel compelled to refer to all the cited Judgments in detail, and add to the length of this Judgment, we are inclined to summarise these cases in a tabular column below. Before that we propose to begin by making a reference to a passage from *Scrutton* which lucidly distinguishes the lease (involving transfer of the right to use) and licence in the context of charter parties. Referring to *Sandeman*, *Baumvoll* and *Sea and Land Securities* the learned author classifies charterparties by demise in the following manner.

CHARTERPARTIES may be categorized according to whether or not they amount to a demise or lease of the ship.

A charter by demise operates as a lease of the ship itself, to which the services of the master and crew may nor may not be superadded. The charter becomes for the time the owner of the vessel; the master and crew become to all intents his servants, and through them the possession of the ship is in him. A charter by way of demise may be for time or for a particular voyage. In modern times, however, charters by way of demise are invariably expressed to be for a period of time.

Under a charter not by demise, on the other hand, the ship owner agrees with the charterer to render services by his master and crew to carry the goods which are put on board his ship by or on behalf of the charterer. In this case, notwithstanding the temporary right of the charterer to have his goods loaded and conveyed in the vessel, the ownership

and also the possession of the ship remain in the original owner through the master and crew, who continue to be his servants. Although the master, by agreement between the owner and charterer, may acquire authority to sign bills of lading on behalf of, and may be obliged to accept voyage instructions from, the latter, he nevertheless remains in all other respects the servant of the owner.

Whether or not the charter amounts to a demise must turn on the particular terms of the charter. “The question depends, where other things are not in the way, upon this: whether the owner has by the charter, where there is a charter, parted with the whole possession and control of the ship, and to this extent, that he has given to the charterer a power and right independent of him, and without reference to him to do what he pleases with regard to the captain, the crew, and the management and employment of the ship. That has been called a letting or demise of the ship. The right expression is that it is a parting with the whole possession and control of the ship.

Time charters almost always contain expression such as “letting”, “hiring”, “hire”, “delivery” and “redelivery”, which are really apt only in charters by demise. These expressions serve to distinguish such charters from voyage charters, but they do not in themselves characterize such charters as charters by demise. Indeed many time charters expressly provide that the charter should not be construed as a demise of the vessel.

(emphasis supplied)

We may now tabulate various precedents in the following statement.

Statement of Judicial Decisions

Sl. No.	Citation	Goods and nature of transaction	Finding of the Court
1.	(1997) 67 STC 199 (Cal) (Bank of India v. CTO)	Bank lockers - Hiring of bank lockers fixed and/or attached to the walls and embedded in the floors of strong room specially built for the purpose. The bank collects rent.	The transaction is not merely transfer of the right to use goods, but involved rendering various services along with a limited right to use the locker. The lease of bank lockers did not come within the meaning of “sale” by transfer of the right to use.
2.	(1988) 70 STC 215 (AP) (SBI v. SoAP)	- do -	Bank lockers embedded in the floor are not “goods” for the purpose of the APGST Act. There is no transfer of right to use and it is only licence to use the goods without securing possession. The contract is one of bailment and the essential requirement of delivery in a “sale” is lacking in hiring of bank locker.
3.	(1990) 77 STC 182 (AP) (RINL v. CTO)	Sophisticated imported machinery like cranes, docers, dumfors and compressors in the construction of steel plant.	Providing machinery to the contractor in connection with the execution of the work does not amount to transfer of right to use the machinery.

			(NB: Affirmed in RINL-II)
4.	(1990) 77 STC 470 (WBTT) (Modern Decorators v. CTO)	Constructing pandals, barricades, rostrums on land, road, building roof top. Material belongs to decorators. After providing these and collecting rent, they were removed and taken away. They were not handed over to the customers.	The goods are not transferred. The customer has no right to use the materials necessary for the construction of pandals. The erection of pandals by the decorator is not "sale", but tables, chairs etc., let out to customers are "goods" within the meaning of "sale" assessable to tax.
5.	(1991) 83 STC 325 (Ori.) (K.C. Behera v. SoOrissa)	Buses - Bus hired out to State Transport Corpn. The contract disentitled from using the vehicle covered by the agreement in any route. The bus was to be run for Corpn. as per the agreement and directions of an officer.	The transaction is a "sale" within the extended meaning of the word. Providing of the driver by the owner notwithstanding there was a transfer of the right to use bus for consideration, and effective control, general control and possession of the bus vested in the Corporation.
6.	(1993) 88 STC 357 (P&H) (Harbans Lal v. SoHaryana)	Tents, kanats, crockery, utensils, furniture, shuttering material, gas cylinders and buses - These are given on hire to third parties. The authorities levied the sales tax on the hire amount under Haryana Act.	The terms of the contract determine whether or not there is transfer of right to use goods. Delivery of possession of goods is essential ingredient. If erected tents are given to customers, it will not be "goods" and any transfer of right to use shall be exercisable to sales tax. The transfer of chairs, tables, crockery would be deemed sale. Hiring of shuttering material to builders/contractors amounts to transfer of the right to use goods. The supplying of purified acetylene gas cylinders to customers is transfer of the right to use goods. The hiring of buses for transportation of personnel of the company with effective or general

			<i>control with the transferee amounts to transfer of the right to use goods.</i>
7.	<i>(1999) 9 SCC 317 : AIR 1999 SC 2868 : (1999) 113 STC 317 (SC) (Aggarwal Bros v. S. Har)</i>	<i>Shuttering material - Business is to hire of shuttering to builders and contractors who use in the construction of building. Rejecting the challenge to the provision to levy sales tax, High Court of Punjab and Haryana found that possession was transferred for use that customers were in effective control during the contract period and hence transactions fell within the ambit of the transfer of the right to use shuttering material.</i>	<i>The Supreme Court affirmed the High Court's view in Harbans Lal. It was held that the owners transferred the shuttering for consideration for use in the construction of buildings and that the requirements of a deemed sale are satisfied.</i>
8.	<i>(2000) 6 SCC 12 : (2000) 119 STC 182 (SC) (20th Cent. Fin. v SoMah)</i>	<i>Lease of machinery/ equipment under master agreement. The lease financier placed purchase orders with manufacturers and delivers them to the lessees. The value of the equipment is disbursed by the financier. On executing supplementary lease deed forming part of master lease agreement, the machinery is allowed to be used. Sales tax was levied on the financier by the State where the equipment was located.</i>	<i>State cannot impose tax on inter-State trade/commerce transactions of the right to use any goods. State is precluded from making law to impose tax on transactions that take place outside the State, in the course of import/export. The delivery of goods is not a condition precedent, but is one of the elements of the transfer of the right to use.</i>

9.	(2001) 124 STC 426 (Kar.) Lakshmi AV Inc v. Asst. Commr. of CT)	Audi visual and multi media equipments - As per the requirement of customer AV services are provided by transporting equipment at the venue. The operation is supervised by the owner. After completion of the programme, AV system is dismantled and carried back to owner's stores department.	The lease of the hire or letting with possession and effective and general control is given to the customer with choice of selecting the manner, time and nature of use and enjoyment, it is transfer of the right to use goods. But if the work is entrusted to the contractor for achieving desired results and such work also involves use of the goods, it will not be deemed sale within the meaning of the transfer of the right to use goods.
10.	(2006) 6 SCC 1 : (2006) 145 STC 91 (SC) (BSNL v. UoI)	Mobile telephone connections - BSNL and such other service providers - Telephone service connections. The infrastructure/appliances exchanges through which electro magnetic/radio waves carrying signals are controlled by the service provider.	Goods do not include electro magnetic waves or radio frequencies for the purpose of Art. 366(29A)(d). The goods in telecommunications are limited to the handsets supplied by mobile service provider. In composite contract of service and sale, the sale element is liable to the State tax. The attributes that qualify transaction for the transfer of right to use the goods are availability of goods for delivery, consensus ad idem about identity of goods. Legal right of transferee to use goods along with permissions or licences for such use, exclusive use by the transferee and owners disentitlement to transfer again to others during the period of contract.
11.	(2009) 22 VST 70 (Gau.) (IOC v. Commr., of Taxes)	Petroleum Trucks/ Tankers - IOC hires these for delivering petroleum products to dealers paying hire charges - the insurance, fuel,	The learned single Judge held that there is no transfer of the right to use goods for the reason that there was only agreement for paying hire charges that the contractor retained

		<i>maintenance and expenses for drivers and cleaners have to be borne by owner of the Tankers</i>	<i>possession and effective control of vehicle and that even though the vehicles were identified, there is a provision for substitution of vehicles.</i>
12.	<i>(2010) 31 VST 337 (Gau.) (Deepak Nath v. ONGC)</i>	<i>Trucks, Trailers, Tankers and Cranes - the owner makes available these to ONGC under contracts in writing - the owner is paid operational charges as agreed to during the period of contract - ONGC also deducts tax at source under Assam Sales Tax Act.</i>	<i>The Division bench held that the goods are made available 24 hours a day through out the duration of the contract, and method and manner of using the goods decided by ONGC, there is transfer of the right to use the goods, even though the staff remained under his control. (NB. The decision in IOC v. Commr., was impliedly overruled)</i>

30. From the judicial decisions, the settled essential requirement of a transaction for transfer of the right to use goods are : (i) it is not the transfer of the property in goods, but it is the right to use property in goods; (ii) Article 366(29A)(d) read with the latter part of the clause (29A) which uses the words, “and such transfer, delivery or supply”... would show that the tax is not on the delivery of the goods used, but on the transfer of the right to use goods regardless of when or whether the goods are delivered for use subject to the condition that the goods should be in existence for use; (iii) in the transaction for the transfer of the right to use goods, delivery of goods is not a condition precedent, but the delivery of goods may be one of the elements of the transaction; (iv) the effective or general control does not mean always physical control and, even if the manner, method, modalities and the time of the use of goods is decided by the lessee or the customer, it would be under the effective or general control over the goods; and (v) the approvals, concessions, licences and permits in relation to goods would also be available to the user of goods, even if such licences or permits are in the name of owner (transferor) of the goods, and (vi) during the period of contract exclusive right to use goods along with permits, licences etc., vests in the lessee.

31. The counsel also brought to our notice the decisions in Ahuja Goods Agency, Commissioner, Trade Taxes, Uttar Pradesh v. Jamna Prasod Jaiswal - (2008) 13 VST 403 (All.), R.P. Kakoty v. ONGC - (2009) 22 VST 136 and International Travel House Limited. We, however, do not feel it necessary to refer to these as they involve similar questions. As has been held in a number of precedents, the nature of transaction and the issue whether the contract is for the transfer of the right to use the goods or for providing service depends on the intention of the parties to be determined on a construction of the contract.

32. At this stage, we need to visit the principles of interpretation of contracts. In Dr. K. Subbaiah v. C.N. Krishnamacharyulu - Appeal Suit No. 151 of 1991 and batch, dated 29-12-2010, one of us (VVSR, J) after referring to the seven rules of interpretation of deeds from ODGERS’ ‘Construction of Deeds and Statutes’ (1967 5th edn., by Gerals Dworkin - 1st Indian Reprint 1996), and seventeen rules of interpretation treatised in Herbert Broom’s Legal Maxims, (1939, 10th edn. by R.H. Kersley), deduced four principles of interpretation of documents, which are as follows.

33. The first principle is to construe the document as a whole. It is common in Courts that the scope of rights and obligations and limitations thereto created under a document are in issue. Unless a document is thoroughly scrutinized and read as a whole, it would not be possible to know the intention of the parties with regard to all these aspects. Quihaeret in litera haeret in cortice [He who considers merely the letter of an instrument goes but skin-deep into its meaning. The intention and parties of the document is more relevant than words used in the document] and Contemporanea expositio est optima et fortissima in lege [The best and surest mode of construing an instrument is to read it in the sense which would have been applied when it was drawn up] very lucidly explain this principle.

34. The second principle is to understand the meaning of a document or a part of it from the document itself. The legal maxims relevant to this are *Quoties in verbis nulla est ambiguitas, ibi nulla expositio contra verba fienda est* [In the absence of ambiguity, no exposition shall be made which is opposed to the express words of the instrument] and *Verba generalia restringuntur ad habilitatem rei vel personae* [General words may be aptly restrained according to the matter or person to which they relate]. In addition to these, the legal maxims *Ex antecedentibus et consequentibus fit optima interpretatio* [A passage is best interpreted by reference to what precedes and what follows it], *Noscitur a sociis* [The meaning of a doubtful word may be ascertained by reference to the meaning of words associated with it], *Certum est quod certum redid potest* [That is sufficiently certain which can be made certain], *Utile per inutile non vitiatur* [Surplusage does not vitiate that which in other respects is good and valid], *Expressio unius est exclusio alterius* [The express mention of one thing implies the exclusion of another], *Verba relata hoc maxime operantur per referentiam ut in eis inesse videntur* [Words to which reference is made in an instrument have the same operation as if they were inserted in the clause referring to them] and *Ad proximum antecedens fiat relatio, nisi impediatur sententia* [Relative words refer to the next antecedent, unless by such construction the meaning of the sentence would be impaired] furnish subsidiary rules while discovering the intention of the parties.

35. The third principle is to give literal meaning to the words used in a document. There are five legal maxims relating to this principle. The legal maxim *ut res magis valeat quam pereat* [A liberal construction should be put upon written instruments, so as to uphold them, if possible, and carry into effect the intention of the parties] means that statute must be read always in such a manner that it would not lead to absurdity and make the instrument workable. Literal meaning depends on the circumstances of the parties and technical legal terms will always be given their legal meaning. When the language is very clear, the interpreter is precluded from supplying the words or reading something depending on the oral evidence. But as postulated by the maxim *Ambiguitas verborum latens verificatione suppletur nam quod ex facto oritur ambiguum verificatione facti tollitur* [Latent ambiguity may be explained by evidence; for an ambiguity which arises by proof of an extrinsic fact may be removed in like manner], latent ambiguity may be explained by evidence because the ambiguity often arises by proof of an intrinsic fact, which may be removed in like manner. Sections 91 to 95 of the Indian Evidence Act, 1872 incorporate this principle.

36. The fourth principle is that in the event of the intrinsic incongruities and inconsistencies flowing from the words and language used in the document, "the intention would prevail over the words used." The intention of the parties has to be determined from the attending circumstances leading to the transaction. This principle is an exception to the first three principles. If the language used in the document is very clear, while determining the nature of the document, nature of rights and obligations flowing from the document cannot be inferred by resorting to the fourth principle.

37. In *Delta International Ltd. v. Shyam Sundar Ganeriwalla* - (1999) 4 SCC 545 : AIR 1999 SC 2607 and *Ramdev Food Products (P) Ltd. v. Arvindbhai Rambhai Patel* - (2006) 8 SCC 726, the Supreme Court quoted with approval the following principles of construction of contracts from 'Interpretation of Contracts' by Kim Lewison, Q.C. as follows.

"1.03 For the purpose of the construction of contracts, the intention of the parties is the meaning of the words they have used. There is no intention independent of that meaning.

6.09 Where the words of a contract are capable of two meanings, one of which is lawful and the other unlawful, the former construction should be preferred.

Sir Edward Coke [Co. Litt. 42a] expressed the proposition thus :

'It is a general rule, that whensoever the words of a deed, or of one of the parties without deed, may have a double intendment and the one standeth with law and right, and the other is wrongful and against law, the intendment that standeth with law shall be taken.'

In more modern times that statement was approved by the Privy Council in *Rodger v. Comptoir D'Escompte de Paris*, (1869) LR 2 PC 393 : 16 ER 618, in which Sir Joseph Napier, delivering the advice of the Board said :

'The rule that words shall be construed most strongly against him who uses them gives place to a higher rule; higher because it has a moral element, that the construction shall not be such as to work a wrong.'

Similarly, in *Fausset v. Carpenter*, (1831) 2 Dow & CI 232 : 6 ER 715, the House of Lords accepted the submission of counsel that the court :

‘... in judging of the design and object of a deed, will not presume that a party executing the deed meant to do and did what he was wrong in doing, when a construction may be put on the instrument perfectly consistent with his doing only what he had a right to do.’

However, the question of construction should not be approached with a leaning in one direction or another. Thus although the law frowns upon covenants in restraint of trade, nevertheless such a covenant should not be approached on the basis that it is *prima facie* illegal. ‘You are to construe the contract, and then see whether it is legal.’

38. On the sidelines, a ‘not so insignificant’ issue is raised by the Special Counsel. The agreement which is part of the record does not contain the day or date and the place of execution of the contract by the parties. From this, Revenue would like the Court to draw an inference that the agreement is not genuine; it is created post transaction to avoid tax, and it is an attempt to project the case that there is no transfer of the right to use transit mixers. It is axiomatic that a document or deed of contract is an instrument written on parchment or paper, ordinarily complying with ten things viz., (i) writing; (ii) on parchment or paper; (iii) date and parties; (iv) recitals; (v) operative part; (vi) exceptions and reservations; (vii) general words; (viii) Habendum [(i) The clause usually following the granting part of the deed which defines the extent of the ownership in the thing granted to be held by the grantee. “The purpose of the Habendum is to limit the estate so that the general implication of the estate which by construction of law passeth in the premises is by the Habendum controlled and qualified (Advanced Law Lexicon by P. Ramanatha Aiyar 3rd edition reprint 2007)]

(ii) The part of a deed or conveyance which states the estate or quantity of interest to be granted e.g., the term of a lease (The New Oxford Dictionary of English Fourth Impression 2002)]; (ix) covenants; and (x) signing and sealing.

39. There is no dispute that the agreement between the petitioners and Grasim satisfies all conditionalities except that it does not contain the date and place of execution. Does it render it ineffective and unenforceable? We are afraid the answer cannot be in abstract or simplistic. If the agreement contains sufficient indication with regard to the grant and creation of rights and obligations with reference to such grant for the specified period therein, it would be sufficient to bind the parties to the agreement. The mere absence of date and place does not militate against the parties nor can they escape regulation by the applicable statute. It is also a well settled rule of interpretation that even in the absence of a formal agreement, a contract can be inferred from the pre and post contract correspondence between the parties. In this case, clause (L) gives sufficient indication when it says that, “the agreement will come into force from 1-10-2002 and remain in effect till 31-3-2006, with liberty to parties to terminate the contract by giving three months notice in writing to the other party”. The reading of the agreement does not anywhere indicate that it was entered into between the parties elsewhere than at Secunderabad. The first page of the agreement in its footnote contains the address of the Marketing Department of Grasim sufficient enough to conclude that it was entered into between the parties at Secunderabad. Even otherwise it is fairly well settled that the transfer of the right to use goods can be effected even under an oral agreement. Hence, submission of the special counsel is rejected.

40. That brings us to the construction of the agreement between the parties which indisputably came into force on 1-10-2002. The intention of the parties as noticed supra has to be understood by reading the entire agreement; reading a word here or a clause there is not sufficient. Grasim was looking for a transporter to take care of the transporting need of their RMC plants in Hyderabad. The petitioners, who are owners of Transit Mixers, were looking for advancing their business interest in Hyderabad. The latter approached the former offering their Transit Mixers to take care of all transporting solution needs. These essentially form part of the recitals. The Habendum of the agreement speaks of the petitioners providing a dedicated fleet of five Transit Mixers painted in a particular style and colour as well as brand name of ‘Grasim’ to transport RMC, on 24 hours basis every day of the week as instructed by the lessee, failure of which will attract penalties. The staff of the petitioners were required to obey the instructions issued by Grasim, and they should use safety equipment like helmets. These Transit Mixers cannot move or carry RMC to the work sites as per their convenience but are to be used as per the delivery schedule given by Grasim. The counsel also does not dispute that the agreement between the parties speaks of a dedicated fleet of vehicles to be made available on 24/7 basis duly painted in a particular style and colour, and staff being under the instructions of Grasim alone. It is, however, submitted that the parties agreed for five dedicated vehicles as RMC needs to be transported immediately after it is manufactured in the batching plant, and the manufacturer cannot identify and negotiate with the transporter for carrying the products every time an order is placed. Therefore, such a clause was included in the agreement to ensure there is no delay in delivering the product to the customers. He also submits that making available the vehicles through out the day or painting them with brand name of Grasim is required keeping in view the possible hurdles in logistics, and to ensure customer satisfaction of getting the required branded RMC. According to him, these clauses by themselves do not warrant an inference of transfer of the right to use Transit Mixers.

41. As mentioned *supra*, whether the transaction amounts to transfer of right or not cannot be determined with reference to a particular word or clause in the agreement. The agreement has to be read as a whole to determine the nature of the transaction (RINL-I). We may, for ready reference extract important clauses from the agreement.

A. That the Second party will maintain and provide a dedicated fleet of 5 vehicles to transport the produce of the First party from their plant to the various customers in the cities of Hyderabad. The number of vehicles required to be dedicated for the use will be subject to change and the parties will mutually agree to the new fleet size. This number shall not change unless otherwise indicated by the First party and agreed to by the Second party and the remaining terms and conditions of this agreement will remain unaffected by this change.

B. That the Second party will ensure that adequate number of vehicles are made available on a 24/7 basis i.e., 24 hours and everyday of the weeks as per the instructions of the officials of the First party. If the Second party fails to provide the vehicles as desired it shall attract penalties as prescribed later in this document. The First party agrees that the Second party will require upto 2 days a month for the maintenance and upkeep of the vehicles and will, therefore, allow 2 days a month for this activity and will not demand any penalty for these days.

C. That the Second party will be solely responsible for ensuring that the produce of the First party reach the destination in time and as per the agreed schedule. No delay on any account will be acceptable and the Second party must ensure safe delivery of the produce.

D. That the produce of the First party has a strong Brand Equity in the market and they would like the vehicles to be painted in a particular style and color. The Second party has agreed to get the same done at their cost and have also assured the First party that they shall paint the vehicles every six months.

E. That the Second party has also agreed that the drivers will be suitably dressed in a uniform at all times and the uniform would be neat and clean. The drivers will be qualified and licensed and will not consume any intoxicating substance while on job-whether at the plant or at the site of the customers of the First party. The staff of the Second party engaged in providing services to the First party will also ensure that they obey all the lawful instructions of the officials of the First party and conform to the norms of decency while interacting. All the personnel of the Second party will carry identification cards with them at all times.

F. Omitted

G. Omitted

H. That the Second party will obtain proper receipts from the customers of the First party after the goods are delivered and also submit reports to the First party in the formats supplied by the First party at the required intervals.

I. Omitted

J. Omitted

K. Omitted

L. That this agreement will come into force from the 1st October 2002 and remain in effect till 31st March 2006. However, the parties will be at liberty to terminate this contract at any time by giving three months notice in writing to the other party. The First party will be at liberty to terminate this agreement at any time if the Second party violates any of the terms of the agreement or if the quality of the services provided it not to its satisfaction. The decision of the First party as to the quality will be final.

M. That the Second party will indemnify the First party against statutory claim being made by any authority on the First party for an act of omission or commission by the Second party.

(emphasis supplied)

42. In addition to the above clauses, we have thoroughly perused and analysed the agreement between the petitioners and Grasim. With reference to the intention, the purpose and the rights/obligations created under the said agreement, we may divide the same into three parts. The recitals form the first part, which deals with the intention. Admitting that the petitioners are in possession of a fleet of Transit Mixers used for carrying RMC, and further admitting that Grasim was looking for a transporter of RMC, the

recitals reveal that both the parties entered into an agreement for transporting RMC by using the vehicles owned by the petitioners. Though the phrase 'offer services to take care of transporting solution needs' is used the real purpose, as can be seen from the second part, is to enable Grasim to have the right to use the Transit Mixers. The agreement requires the petitioners to provide drivers to be dressed in uniform, and all of them are to obey the lawful instructions issued by Grasim. Further RMC has to be delivered by these drivers in Transit Mixers only at the time and places as instructed by the officials of Grasim, and the petitioners have no right to carry RMC wherever and whenever they like. Thus the full control on the method, manner and time of using the Transit Mixers, owned by the petitioners vests absolutely in Grasim.

43. Clauses A to E and L deal with the second aspect of the agreement. Under these, the petitioners agreed to provide five dedicated fleet of five Transit Mixers 24/7 i.e., twenty-four hours every day of the week as per the instructions of Grasim for transporting RMC during the period from 1-10-2002 to 31-3-2006 (42 months). These dedicated vehicles are to be painted in a particular style and colour which has to be re-painted once in six months. For any third party, during these 42 months, the goods as visible in use would create an immediate impression that they belong to Grasim. No reasonable man would even think that the Transit Mixers, being used for transporting RMC of Grasim, belong to the petitioners and they are only being used to meet the transportation needs of Grasim.

44. The third aspect deals with the petitioners indemnifying Grasim, paying all taxes for permits, insurance etc., the rent/lease amount payable by Grasim, the dispute resolution mechanism and the mutual rights of the parties to modify the agreement. Standing alone all of them by themselves have no meaning. They are clauses intended for working out the contract which is essentially for the petitioners placing the Transit Mixers painted with brand name at the disposal of Grasim for a period of 42 months for transporting RMC manufactured by Grasim.

45. Reading the recitals and various clauses, indeed there is a transfer of the right to use Transit Mixers. All the tests as indicated hereinabove exist in the contract between the petitioners and Grasim. The vehicles are maintained by the petitioners. They appoint the drivers and fix their roster. The licences, permits and insurances are taken in their names by the petitioners, which they themselves renew. The Transit Mixers go to Grasim's batching plants in Miyapur and Nacharam, where they are loaded with RMC and then proceed to the construction sites of customers. The product carried is manufactured by Grasim, which is delivered to the customers and the customers pay the cost of the RMC to Grasim and the petitioners nowhere figure in the process of putting the property in Transit Mixers to economic use. The entire use in the property in goods is to be exclusively utilised for a period of 42 months by Grasim. The existence of goods is identified and the Transit Mixers operate and are used for the business of Grasim. Therefore, conclusively it leads to the only conclusion that the petitioners had transferred the right to use goods to Grasim. For these reasons, we are not able to countenance any of the submissions made by the petitioners' counsel.

46. In the result, for the above reasons, these revision cases fail and are, accordingly, dismissed with costs.

(ii) In the case of Aims Pharma Pvt. Ltd. this Tribunal has passed the following order:

"4. Heard both sides and perused the records. We find that the issue to be considered by us is that whether the supply of cylinders is a deemed sale in terms of Article 366 (29A) of constitution as 'deemed sale' or it falls under definition of 'supply of tangible goods for use' under the Finance Act, 1994. The definition of the alleged services needs to be gone through which is reproduced below:

The definition of 'supply of tangible goods' as per the provision of section 65 (105)(zzzzj) of the Finance Act, 1994-

"taxable services" means any service provided or to be provided to any person by any other person in relation to supply of tangible goods including machinery equipments and appliances for use without transferring right of possession and effective control of such machinery, equipments and appliances".

From the above definition, it is clear that for the supply of tangible goods is for use by other person but without transferring right of possession and effective control, then only such supply shall classify under the taxable services of supply of tangible goods\service. Now it is to be seen that whether the supply of cylinders are with or without transferring right of possession and effective control for which a Memorandum of Association needs to be perused. The relevant clauses of the MOU are reproduced below:

Aims Pharma Pvt. Ltd.

Head Office : Old Padra Road, Vadodara-390 020.
Tel. : 91-265-3132 39 Fax : 91-265-33 94 16

**Memorandum of Understanding**

This Memorandum of Understanding (MOU) is made at Vadodara on this the 1st day of April 2009.

BETWEEN

M/s Aims Pharma Pvt Ltd, a Company limited by shares and incorporated under the provision of Companies Act, 1956, having its Registered Office at Aims House, Old Padra Road, Vadodara-390010 Gujarat, hereinafter referred to as 'THE LESSOR' (which expression shall unless repugnant to the context or meaning thereof include its successors, representatives, heirs, successors and assigns) of the One Part.

AND

M/s Aims Industries Ltd, a Company limited by shares and incorporated under the provision of Companies Act, 1956, having its Registered Office at Besides GEB Sub Station, Padra Jambuser Highway, At & Post Gavasad, Ta. Padra, Dist. Vadodara, Gujarat. Hereinafter referred to as 'THE LESSEE'.

AND WHEREAS the Lessor has in possession of Gas Cylinders (Here in after referred as The said Asset) & agreed with the Lessee to grant to the Lessee, under the terms of this Lease Deed, Gas Cylinders with all fittings, Valves Etc.. The lessee has agreed to take on lease the same, subject to the covenants, conditions and stipulations, hereinafter in these presents expressed and contained.

1. That the Lessor hereby demises unto the Lessee all Gas Cylinder for a period of 12 months commencing from 01/04/2009. The Lessee paying therefore unto the Lessor during the said period, a monthly rent as provided herein below to the Lessor in respect of the Gas Cylinders payable in advance by the 7th day of each and every month during the said term

2. THE LESSEE HEREBY COVENANTS WITH THE LESSOR AS FOLLOWS :-

i) The Lessee shall pay to the Lessor rent as per Annexure I, commencing from 01/04/2009.

That the Lessee had deposited a sum of Rs. 79,11,479/- (Rupees Seventy Nine Lakh Eleven Thousand Four Hundred Seventy Nine Only), with the Lessor at the time of signing of this MOU, as interest free refundable Security Deposit, which shall be refunded by the Lessor to the Lessee by pay order/Cheque payable at Vadodara at the time of handing over the actual physical possession of all Gas Cylinders by the Lessee to the Lessor. In case the Lessor fails to refund the security at the time of handing over all the Gas Cylinders by the Lessee, then the

Lessor shall pay Interest @12% p.a. on net refundable security only for number of days during which the lessor defaults in refunding the security (net).

ii) The Lessee shall not use the Gas Cylinders for any illegal or immoral purpose or use it so as to not to cause any fraud to any Individual or Legal / statutory Body. The Lessee will also ensure all registration to use Gas Cylinders will be in full force all time during this MOU period.

iii) The Lessee will do repair at its own cost for any damage, leakage of Valves, etc. to the said Gas Cylinders caused by any act or default on the part of the Lessee, its servants, agents or visitors or otherwise by any reason whatsoever or by reasons of any breach of the Lessee's covenants herein contained. The Lessee will operate all cylinders at his own cost including any man-power etc. without any interruption on the part of Lessor, at all time during period of this MOU.

iv) Maintenance responsibility: The Lessee shall make repairs, including leakage, Maintenance etc. arising in the course of normal use and those incidents to damage arising from negligence for misuse on the part of the Lessee at its own cost/expenses belonging to the Lessor.

3. THE LESSOR HEREBY CONVENIENT COVENANTS WITH THE LESSEE AS FOLLOWS: -

i) The Lessor has full right and absolute authority to grant the lease of said Gas Cylinders as owner/possessor thereof.

ii) That the Lessee paying the rent hereby reserved and observing and performing the several covenants and stipulations hereinbefore on its part contained shall peacefully hold and enjoy the said Gas Cylinders during the said term without any disturbances and/or interruption by the Lessor or any person lawfully claiming under the Lessor

iii) That if the Lessor at any time during the period of this lease or extended period thereof, as hereinafter mentioned,

4. PROVIDED AND IT IS HEREBY AGREED BY AND BETWEEN THE LESSOR AND THE LESSEE AS FOLLOWS: -

i) That any notice required to be served upon the lessee shall be deemed to be served upon by registered A.D. post/renowned courier agency or left at the Demised Premises and duly acknowledged by the Lessee.

ii) That any notice which may be required to be served upon the Lessor shall be deemed to be sufficiently served and given if delivered to it by registered A.D. post/renowned courier agency or left at the address given in the Deed or change intimated to Lessee and duly acknowledged by the Lessee.

iii) The Courts at Vadodara shall have exclusive jurisdiction to try all suits or proceedings, matters or things in connection with the extended MOU.

4.1 As per sub clause (ii) of main clause 3, the lessee paying the rent, reserved and observing and performing the several covenants of the MOU on its part contained shall peacefully hold gas cylinders without any disturbance by the lesser or any person.

4.2 As per sub clause (ii) of main clause 2, the lessee will have to ensure all registration to use the gas cylinders will be in full force of time during the MOU period. As per sub clause (iii) of main clause 2, the repair and operation of the cylinders has to be carried out by the

lessee without any interruption on the part of the lesser during the period of MOU. As per sub clause (iv), maintenance responsibility is with the lessee.

4.3 As per the above terms of the MOU, it is absolutely clear that after giving the cylinders on lease during the entire period of MOU, the effective right of possession, the effective control is with the lessee and not with the appellant. As per the definition of 'supply of tangible goods', the supply will fall under the taxable services only when right to possession and effective control is not transferred. Therefore, supply of tangible goods on lease basis with transfer of right to possession and effective control will go out of ambit of taxable services. Moreover this transaction is undisputedly liable to VAT as the appellant are paying the VAT as per the provision of the State Government VAT Act, the board in the DOF letter dated 29/02/2008 (supra), in para 4.4, clarified as below:

4.4 Supply of tangible goods for use:

4.4.1 Transfer of the right to use any goods is leviable to sales tax/VAT as deemed sale of goods (Article 366(29A)(d) of the Constitution of India]. Transfer to right to use involves transfer of both possession and control of the goods to the user of the goods.

4.4.2 Excavators, wheel loaders, dump trucks, crawler carriers, compaction equipment, cranes, etc., offshore construction vessels & barges, geo-technical vessels, tug and barge flotillas, rigs and high value machinery are supplied for use, with no legal right of possession and effective control. Transaction of allowing another person to use the goods, without giving legal right of possession and effective control, not being treated as sale of goods, is treated as service.

4.4.3 Proposal is to levy service tax on such services provided in relation to supply of tangible goods, including machinery, equipment and appliances, for use, with no legal right of possession or effective control. Supply of tangible goods for use and leviable to VAT/sales tax as deemed sale of goods, is not covered under the scope of the proposed service. Whether a transaction involves transfer of possession and control is a question of facts and is to be decided based on the terms of the contract and other material facts. This could be ascertainable from the fact whether or not VAT is payable or paid.

As per the above clarification, transfer of the right to use any goods is leviable to sales tax/VAT as deemed sale of the goods when transfer of right to use involves transfer to both possession and control of the goods to the user of the goods. In the present case also, transfer of right to use is clearly with transfer of both possession and control of goods to the lessee, accordingly the transaction is clearly of deemed sale of goods in terms of Article 366 (29A)(d) of the Constitution of India. Since the entire value of the transaction is liable to Sales Tax as per the above provision the same would not again leviable to Service Tax under the head of "supply of tangible goods". On the similar issue this Tribunal passed a judgment in the case of Gimmco Ltd. by relying on the Andhra Pradesh High Court judgment in the case of GS Lamba (supra). In Gimmco Ltd. following finding was given:

5. We have carefully considered the submissions made by both sides and perused the records.

5.1 Section 65(105)(zzzzj) defines the taxable service in respect of supply of tangible goods for use as follows :-

"Taxable service" means any service provided or to be provided to any person, by any other person in relation to supply of tangible goods including machinery, equipment and appliances for use, without transferring right of possession and effective control of such machinery, equipment and appliances."

While the assessee contends that what they have transferred is right to use which is a deemed sale, the Revenue's contention is that the right of possession and effective control remained with the assessee and hence, the transaction has to be treated as service.

5.2 Revenue's contention is based on the clauses in the agreement relating to restrictions of use by the lessee, provision of skilled operator by the lessor and maintenance and repairs of the equipment by the lessor. Merely because restrictions are placed on the lessee, it can not be said that there is no right to use by the lessee. Such a view of the revenue does not appear to be tenable when we read carefully the provisions of the agreement. Cl. 13 of the agreement provides for Hirer's Covenants. As per Cl. 13.1, the hirer will use the equipment only for the purpose it is hired and shall not misuse or abuse the equipment. Similarly in Cl. 13.3, it is provided that the hirer will ensure the safe custody of the equipment by providing necessary security, parking bay, etc., and will be responsible for any loss or damage or destruction. Cl. 13.5 provides that the hirer shall be solely responsible and liable to handle any dispute entered with any third party in relation to the use and operation of the equipment. Further Cl. 14 dealing with title and ownership

specifically provides that “equipment is offered by GIMMCO Ltd. only on ‘rights to use’ basis”. Cl. 15 relating to damages provides for compensation to be paid by the hirer to the assessee in case of damage to the equipment during the period of use. These responsibilities cast on the hirer clearly show that the right of possession and effective control of the equipment rest with the hirer; otherwise the hirer cannot be held responsible for misuse/abuse, safe custody/security, liability to settle disputes with third parties in relation to use etc. Further Cl. 4.3 of the agreement provides for charging of VAT at 12.5% on the monthly invoice value which shall be payable by the hirer. These terms and conditions stipulated in the agreement, lead to the conclusion that the transaction envisaged in the agreement is one of “transfer of right to use” which is a deemed sale under Section 2(24) of the Maharashtra Value Added Tax Act, 2002. The Finance Minister’s speech and the budget instructions issued by the C.B.E. & C. also clarify that if VAT is payable on the transaction, then service tax levy is not attracted.

5.3 A similar issue arose for consideration before the Hon’ble High Court of Andhra Pradesh in the G.S. Lamba case cited supra. The petitioners therein entered into a contract with M/s. Grasim, manufacturer of ready mix concrete (RMC) for providing transportation service for shipping RMC by hiring specially designed Transit Mixers. Under the contracts, the transit mixers are never transferred and effective control over running and using of these vehicles, as well as disciplinary control over the drivers, always remained with petitioners. It was petitioner’s responsibility to obtain route permits, to take the risk or loss of transportation, to decide the shifts for the drivers and vehicles, to maintain and upkeep the vehicles in good condition. The petitioners contention was that the contract was for transport service and not the transfer of the right to use the goods.

5.4 The Hon’ble High Court observed that the essential requirement of a transaction for transfer of the right to use goods are :

- (1) it is not the transfer of the property in goods, but it is right to use property in goods;
- (2) Article 366(29A)(d) read with the latter part of the Clause (29A) which uses the words, “and such transfer, delivery or supply” would show that the tax is not on the delivery of the goods used, but on the transfer of the right to use goods regardless of when or whether the goods are delivered for use subject to the condition that the goods should be in existence for use;
- (3) in the transaction for the transfer of the right to use goods, delivery of goods is not condition precedent, but the delivery may be one of the elements of the transaction;
- (4) the effective or general control does not mean always physical control and even if the manner, method, modalities and the time of the use of goods is decided by the lessee or the customer, it would be under the effective or general control over the goods;
- (5) the approvals, concessions, licences and permits in relation to goods would also be available to user of the goods, even if such licences or permits are in the name of transferor of the goods; and
- (6) during the period of contract exclusive right to use goods along with permits, licences, etc., vests with the lessee.

Applying these principles and examining the terms of the contract, the Hon’ble High Court held that the transaction involved was a transfer of right to use Transit Mixers and not transport service and the petitioners had transferred the ‘right to use goods’ to Grasim. If we apply the ratio of the above decision to the facts of the present case, the transaction involved herein is “transfer of right to use” which is a deemed sale and not “supply of tangible goods for use” service.

6. In view of the foregoing, we are of the considered view that the assessee’s activity of giving various equipments on hire does not fall under the category of “Supply of tangible goods for use”, hence the same is not liable to service tax w.e.f. 16-5-2008. Now coming to the Revenue’s appeal, we find that the Id. Commissioner dropped the demand for the period prior to 16-5-2008 mainly on the ground that the service is of “Supply of tangible goods for use” which came into effect on 16-5-2008, therefore prior to that date the service was not taxable. However, we, in our above findings, held that the service in question is not the service of “Supply of tangible goods for use”. In this position the main ground of the Id. Commissioner for dropping of demand does not exist and not relevant. Though the Id. Commissioner in a passing reference mentioned in the impugned order that the service prior to 16-5-2008 does not fall under the “Business Auxiliary Service” but not given the detailed findings. Therefore when the main ground for dropping of demand does not exist. The issue relates to demand prior to the period 16-5-2008 needs reconsideration.

7. As per our above findings, we pass following order :

1. Assessee's Appeal No. ST/654/2012 is allowed.

2. Revenue's Appeal No. ST/712/2011 is allowed by way of remand to the original adjudicating authority passing a fresh order only in respect of the demand for the period prior to 16-5-2008. All other issues related thereto are kept open.

3. Cross objection No. ST/CO/45/2012 stands disposed of.

5. As per the above judgment, being on similar facts and the legal issue, this tribunal has observed that the services would not fall under the category of 'tangible goods for use'. Similar issue has been settled in various judgments as cited by the Ld. Counsel. Considering the facts of the present case, and various judgments on the issue, we are of the view that the transaction of the appellant of leasing of gas cylinders to the group company does not fall under 'supply of tangible goods' services. Accordingly, demand raised under the said category is not sustainable. Hence, the impugned order is set aside. Appeal is allowed."

(iii) In the case of GIMMCO Ltd. Mumbai Tribunal has passed the following decision:

"5. We have carefully considered the submissions made by both sides and perused the records.

5.1 Section 65(105)(zzzzj) defines the taxable service in respect of supply of tangible goods for use as follows :-

"Taxable service" means any service provided or to be provided to any person, by any other person in relation to supply of tangible goods including machinery, equipment and appliances for use, without transferring right of possession and effective control of such machinery, equipment and appliances."

While the assessee contends that what they have transferred is right to use which is a deemed sale, the Revenue's contention is that the right of possession and effective control remained with the assessee and hence, the transaction has to be treated as service.

5.2 Revenue's contention is based on the clauses in the agreement relating to restrictions of use by the lessee, provision of skilled operator by the lessor and maintenance and repairs of the equipment by the lessor. Merely because restrictions are placed on the lessee, it can not be said that there is no right to use by the lessee. Such a view of the revenue does not appear to be tenable when we read carefully the provisions of the agreement. Cl. 13 of the agreement provides for Hirer's Covenants. As per Cl. 13.1, the hirer will use the equipment only for the purpose it is hired and shall not misuse or abuse the equipment. Similarly in Cl. 13.3, it is provided that the hirer will ensure the safe custody of the equipment by providing necessary security, parking bay, etc., and will be responsible for any loss or damage or destruction. Cl. 13.5 provides that the hirer shall be solely responsible and liable to handle any dispute entered with any third party in relation to the use and operation of the equipment. Further Cl. 14 dealing with title and ownership specifically provides that "equipment is offered by GIMMCO Ltd. only on 'rights to use' basis". Cl. 15 relating to damages provides for compensation to be paid by the hirer to the assessee in case of damage to the equipment during the period of use. These responsibilities cast on the hirer clearly show that the right of possession and effective control of the equipment rest with the hirer; otherwise the hirer cannot be held responsible for misuse/abuse, safe custody/security, liability to settle disputes with third parties in relation to use etc. Further Cl. 4.3 of the agreement provides for charging of VAT at 12.5% on the monthly invoice value which shall be payable by the hirer. These terms and conditions stipulated in the agreement, lead to the conclusion that the transaction envisaged in the agreement is one of "transfer of right to use" which is a deemed sale under Section 2(24) of the Maharashtra Value Added Tax Act, 2002. The Finance Minister's speech and the budget instructions issued by the C.B.E. & C. also clarify that if VAT is payable on the transaction, then service tax levy is not attracted.

5.3 A similar issue arose for consideration before the Hon'ble High Court of Andhra Pradesh in the G.S. Lamba case cited supra. The petitioners therein entered into a contract with M/s. Grasim, manufacturer of ready mix concrete (RMC) for providing transportation service for shipping RMC by hiring specially designed Transit Mixers. Under the contracts, the transit mixers are never transferred and effective control over running and using of these vehicles, as well as disciplinary control over the drivers, always remained with petitioners. It was petitioner's responsibility to obtain route permits, to take the risk or loss of transportation, to decide the shifts for the drivers and vehicles, to maintain and upkeep the vehicles in good condition. The petitioners contention was that the contract was for transport service and not the transfer of the right to use the goods.

5.4 The Hon'ble High Court observed that the essential requirement of a transaction for transfer of the right to use goods are :

- (1) *it is not the transfer of the property in goods, but it is right to use property in goods;*
- (2) *Article 366(29A)(d) read with the latter part of the Clause (29A) which uses the words, “and such transfer, delivery or supply” would show that the tax is not on the delivery of the goods used, but on the transfer of the right to use goods regardless of when or whether the goods are delivered for use subject to the condition that the goods should be in existence for use;*
- (3) *in the transaction for the transfer of the right to use goods, delivery of goods is not condition precedent, but the delivery may be one of the elements of the transaction;*
- (4) *the effective or general control does not mean always physical control and even if the manner, method, modalities and the time of the use of goods is decided by the lessee or the customer, it would be under the effective or general control over the goods;*
- (5) *the approvals, concessions, licences and permits in relation to goods would also be available to user of the goods, even if such licences or permits are in the name of transferor of the goods; and*
- (6) *during the period of contract exclusive right to use goods along with permits, licences, etc., vests with the lessee.*

Applying these principles and examining the terms of the contract, the Hon'ble High Court held that the transaction involved was a transfer of right to use Transit Mixers and not transport service and the petitioners had transferred the 'right to use goods' to Grasim. If we apply the ratio of the above decision to the facts of the present case, the transaction involved herein is “transfer of right to use” which is a deemed sale and not “supply of tangible goods for use” service.

6. *In view of the foregoing, we are of the considered view that the assessee's activity of giving various equipments on hire does not fall under the category of “Supply of tangible goods for use”, hence the same is not liable to service tax w.e.f. 16-5-2008. Now coming to the Revenue's appeal, we find that the Id. Commissioner dropped the demand for the period prior to 16-5-2008 mainly on the ground that the service is of “Supply of tangible goods for use” which came into effect on 16-5-2008, therefore prior to that date the service was not taxable. However, we, in our above findings, held that the service in question is not the service of “Supply of tangible goods for use”. In this position the main ground of the Id. Commissioner for dropping of demand does not exist and not relevant. Though the Id. Commissioner in a passing reference mentioned in the impugned order that the service prior to 16-5-2008 does not fall under the “Business Auxiliary Service” but not given the detailed findings. Therefore when the main ground for dropping of demand does not exist. The issue relates to demand prior to the period 16-5-2008 needs reconsideration.*

7. *As per our above findings, we pass following order :*

1. *Assessee's Appeal No. ST/654/2012 is allowed.*
2. *Revenue's Appeal No. ST/712/2011 is allowed by way of remand to the original adjudicating authority passing a fresh order only in respect of the demand for the period prior to 16-5-2008. All other issues related thereto are kept open.*
3. *Cross objection No. ST/CO/45/2012 stands disposed of.*

4.2 *From the above it can be seen that under the identical set of facts it was viewed that the right of possession and effective control has been transferred particularly considering the fact that the lessor have paid the VAT considering the transaction as deemed sale in terms of Article 366 29 (A) of the Constitution of India. Since the same facts and issue involved in the present case, the ratio of above judgments are directly applicable in the present case also. Accordingly, we are of the considered view that the demand of service tax under tangible goods for use service in the present case is not sustainable.*

5. *Hence, the impugned order is set aside. Appeal is allowed.”*

4.4 *Similar view was taken by CESTAT Mumbai in the case of UFO Moviez India Ltd-2018 (11) G.S.T.L. 391 (Tri.-Mumbai) wherein on the basis of the fact that the transaction was of deemed sale in terms of Article 336 (29) A it was held that the activity same is not classifiable as service of supply of tangible goods for use. This decision was upheld by the Hon'ble Supreme Court by dismissing the Revenue's Civil appeal reported at 2022 (61) G.S.T.L. 4 (S.C.) wherein the following observation was made by the Apex Court:-*

“[Order]. - Delay condoned.

- 2. *In the facts of the present case as it is not disputed that the respondent had regularly paid amount towards VAT liability in respect of the subject goods during the relevant period, the question of claiming service tax thereon does not arise.*
- 3. *Accordingly, in the facts of the present case, the civil appeal is dismissed.*
- 4. *Pending applications stand disposed of."*
- 4.5 *Considering the facts of the present case, comparing with the facts of the above judgments and the principal of law laid down in the above judgments, we are of the view that the ratio of the above judgments are directly applicable in the present case.*
- 5. *Accordingly, the impugned orders are set aside. Appeals filed by Assessee are allowed and appeal filed by Revenue is dismissed."*

From the above decision in the appellant’s own case, the issue is no longer res-integra. Accordingly, the impugned orders are set aside and appeals are allowed in favour of the appellant.

(Order pronounced in the open court on 25.10.2024)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)

Neha