CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD

REGIONAL BENCH - COURT NO.I

Service Tax Appeal No.70626 of 2019

(Arising out of Order-in-Appeal No.GZB/EXCUS/000/APPL-MRT/53/2019-20 dated 22/05/2019 passed by Commissioner (Appeals) CGST, Meerut)

Commissioner, Central Goods & Service Tax, Ghaziabad **.....Appellant**
(CGO Complex-II, Kamla Nehru Nagar,
Ghaziabad (U.P)-201002)

VERSUS

Express Engineers And Spares Pvt. Ltd, **....Respondent**
(A-18, Rampuri, Surya Nagar, Ghaziabad (U.P)-201011)

APPEARANCE:

Shri Manish Raj, Authorized Representative for the Appellant
Shri Atul Gupta, Advocate for the Respondent

CORAM: **HON'BLE MR. P.K. CHOUDHARY, MEMBER (JUDICIAL)**
HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

FINAL ORDER NO.-70494/2024

DATE OF HEARING : 31.07.2024
DATE OF DECISION : 31.07.2024

P. K. CHOUDHARY:

The present appeal has been filed by the Revenue assailing the Order-In-Appeal dated 22.05.2019 passed by the Commissioner (Appeals) CGST, Meerut.

2. In the present case the Show Cause Notice[1] dated 03.11.2017 was issued for the period April 2015 to June 2017 on the ground that the Respondent was engaged in the business of Renting of Diesel Generator (DG) Sets and the Department entertained a view that the hiring of the DG sets were 'Supply of Tangible Goods Service' which is leviable to Service Tax under Section (105)(zzzzj) of the Finance Act,1994.

---

[1] SCN

3. We find that for the preceding period, the SCN dated 11.04.2016 was issued for the period 2011-12 to 2014-15. This SCN was confirmed vide Order-In-Original dated 28.02.2017 and the appeal filed by the Appellant before the Commissioner (Appeals) was dismissed vide order dated 19.02.2018. Subsequently the matter travelled up to the Tribunal and the Tribunal in Service Tax Appeal No.70537 & 70592 of 2018 vide Final Order No.70004-70005/2022 dated 22.01.2022 set aside the orders of the Lower Authorities and allowed the appeal filed by the Appellant-Assessee. We further observe that in the Order-In-Original dated 30.03.2018 impugned in the appeal before us in Para 1.4, the SCN dated 11.04.2016 and the Order-In-Original dated 28.02.2017 has been relied upon and the Adjudicating Authority proceeded on the basis of the earlier Order-In-Original dated 28.02.2017 to pass the Order-In-Original dated 30.03.2018 and confirmed the demand as proposed in the SCN. Since the earlier adjudication order dated 28.02.2017 and Order-In-Appeal dated 19.02.2018 have been set aside by the Tribunal, the impugned Order-in-Original dated 30.03.2018 cannot be sustained. Further, we find that the learned Commissioner (Appeals) has passed a well reasoned and detailed order which cannot be faulted with. Relevant Paragraphs of the Order-In-Appeal is reproduced below:-

> *"6. I have carefully gone through the facts and records of the case and submissions made by the Appellant. The demand confirmed in the present case is for the period 2015-16 to 2017-18. I find that the definition of the taxable service with reference to supply of tangible goods' was substituted, post implementation of negative list based service tax regime w.e.f 01.07.2012, vide Section 66E (f) of the Act, 1994, and was included in the list of the Declared Services and was defined as 'transfer of goods by way of hiring, leasing, licensing or in any such manner without transfer of right to use such goods to be a declared service. Further, under Article 366(29A) of the Constitution of India, Transfer of right to use goods' was deemed to be a sale, and hence not taxable. Consequent to the 46th amendment, Article 366 (29A) (d) of the Constitution of India provided that-*
>
> *"tax on sale or purchase of goods" includes "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".*

The aforesaid constitutional provisions have been the subject matter of interpretation by various Courts. The Hon'ble Apex Court in the case of M/s Bharat Sanchar Nigam Ltd. Vs UOI [2006 (2) STR 161 (SC)] discussed the different aspects involved in such transaction and came to the conclusion that to constitute a transaction for "transfer of right for use the goods", the transaction must have following attributes:

a. There must be goods available for delivery,
b. There must be a consensus ad idem as to the identity of goods;
C The transferee should have a legal right to use the goods-consequently all legal consequences of such use including any permission or licenses 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 that is the necessary concomitant of the plain language of the statute- viz. a "transfer of the right to use and not merely a license to use the goods;
e. Having transferred the right to use the goods during the period for which it is to be transferred, the owner cannot transfer the same rights to others.

*There was nothing on record to suggest that the subject goods given on rentals during the impugned period were accompanied by any operator or authorized person to operate or monitor the same at the customer's premises. Scrutiny of tax invoices submitted by the Appellant reveals that right to use has been transferred to the customer as in the tax invoices, it has been mentioned that the risk and responsibility of the Appellant ceases when the goods leave his premises, Further scrutiny of the said tax invoices also reveals that the Appellant had paid VAT on rental income. The criterion of whether VAT was payable or paid, as provided in the Circular No. 334/1/2008-TRU, dated 29.02.2008 issued regarding 'supply of tangible goods' was, therefore, satisfied. As the VAT was paid by the Appellant, 'the transfer of goods by way of hiring, leasing, licensing or in any such manner with transfer of right to use such goods made by the Appellant' was, therefore, a deemed sale of goods and was not navered * under the scope of proposed taxable service because all the attributes as enlisted in the Hon'ble Supreme Court's Judgement in the case of Bharat Sanchar Nigam Limited supra were satisfied. The demand of the service tax was therefore misconstrued and legally not sustainable.*

7. In view of the above discussion and findings the impugned Order-in-Original No. 15/AC/Div.-VII/GZB/2017-18 dated 30.03.2018 is set aside, and the appeal No. 39-ST/APPL-MRT/GZB/2018-19 dated 25/6/2018, filed by M/s. Express Engineers & Spares (P) Ltd., A-18, Rampuri, Surya Nagar, Ghaziabad is allowed."

4. The relevant paragraphs of the Tribunal's order in the Appellant's own case are also reproduced below:-

"35. The main contention of the Department is that the Appellant was responsible for loading, unloading, installation, commissioning, repair and maintenance of the diesel generator sets and the Appellant was also providing an operator for running the diesel generator sets.

36. The transportation and installation of diesel generator sets at the site of the customers cannot lead to a conclusion that the Appellant was rendering STGU service. The Agreement itself provides that the Appellant would be responsible for providing diesel generator sets to the customers. It was, therefore, imperative for the Appellant to ensure that the diesel generator sets were transported and installed at the site of the customer.

37. Though, the Appellant may be providing operators to the customer, but these operators were working entirely under the direction and control of the customers and the Appellant had no control over them. Thus, so long as the effective control over the diesel generator sets remained with the customers, the mere providing of operators who were also under the direction and control of the customers, would not mean that the transaction was not that of sale. This view finds support from the judgments of the Gauhati High Court in ***Dipak Nath*** *and of the Andhra Pradesh High Court in* ***G.S. Lamba****.*

38. The finding in the impugned order that since the Appellant was responsible for the maintenance and repair of the diesel generator

sets, the Appellant has retained effective control, cannot also be sustained because once the control and possession of the diesel generator sets was transferred to the customers, mere maintenance or repair work will not change the nature of the transaction. This is clear from the decisions of the Gauhati High Court in ***Dipak Nath*** *and of the Tribunal in* ***Petronet LNG Ltd.***

39. What also needs to be noticed is that payment of VAT is also a factor which needs to be taken into consideration while determining whether the transaction is that of sale. The clarification issued by the Department in TRU dated 29.02.2008 supports this view. The relevant portion of the Circular is reproduced below:

> *"Payment of VAT on supply goods is also a factor to determine whether the transaction is that of sale. In this regard, reliance has been placed on the clarification issued by the Department on February 29, 2008, wherein the taxable category of STGU was clarified and its distinction with deemed sale under sales tax was brought out. The relevant portion of the said clarification is reproduced 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 of right to use involves transfer of both possession and control of the goods. 4.4.2 Excavators, wheel loaders, dump trucks, crawler carriers, companion equipment, cranes etc. offshore construction vessels & barges, geo-technical vessels, tug and barge flotillas, rigs and high value machineries 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 appliance, for use, with legal right of possession or effective control.* ***Supply of tangible goods for use is 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 VAT is payable or paid."*

(emphasis supplied)

40. Reference also needs to be made to another Circular dated 23.08.2007 issued by the Department that clarifies that the payment of VAT/Sales Tax on a transaction has to be treated as sales of goods and levy of service tax on such transaction would not arise. The relevant portion of the Circular reproduced below:

Reference Code	**Issue**	**Clarification**
(1)	**(2)**	**(3)**
036.03/ 23-8-07	Whether spare parts sold by a service station during the servicing of vehicles is liable to payment of service tax? Whether exemption can be claimed on the cost of consumables that get consumed during the course of providing service?	Service station during the servicing of vehicles is liable to payment of service tax? Whether exemption can be claimed on the cost of consumables that get consumed during the course of providing service? **Service tax is not leviable on a transaction treated as sale of goods and subjected to levy of sales tax/VAT.** Whether a given transaction between the service station and the customer is a sale or not, is to be determined taking into account the real nature and material facts of the transaction. **Payment of VAT/sales tax on a transaction indicates that the said transaction is treated as sale of goods.**

(emphasis supplied)

41. Thus, for all the reasons stated above, it is more than apparent that the supply of diesel generator sets to the customers would not amount to STGU service for the period from 01.04.2011 to 30.06.2012, or a declared service from 01.07.2012 to 2014-15. The orders passed by the Commissioner (Appeals), therefore, cannot be sustained.

42. In this view of the matter it would not be necessary to examine the contention raised by the Appellant that the extended period of limitation could not have been invoked.

43. The impugned orders dated 19.02.2018 passed by the Commissioner (Appeals) are, accordingly, set aside and Service Tax Appeal No. 70537 of 2018 and Service Tax Appeal No. 70592 of 2018 are allowed."

5. In view of the above discussions we do not find any infirmity in the impugned order and accordingly the same is upheld. The appeal filed by the Department being devoid of any merits is dismissed.

(Operative part of the order is pronounced in open court)

(P. K. CHOUDHARY)
MEMBER (JUDICIAL)

(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

Nihal