

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD**

REGIONAL BENCH - COURT NO. 1

Service Tax Appeal No. 70537 of 2018

(Arising out of Order-in-Appeal No. 10-11-GBN-EXST-APP-17-18 dated 19-02-2018 passed by the Commissioner (Appeals), Central Goods & Service Tax Commissionerate, Ghaziabad)

**M/s Express Engineers & Spares
Pvt. Ltd.**

A-18, Rampuri, Surya Nagar,
Ghaziabad (U.P)

....Appellant

VERSUS

**Commissioner, Central Goods &
Service Tax, Ghaziabad**

CGO Complex-II, Kamla Nehru Nagar,
Ghaziabad (U.P)

....Respondent

AND

Service Tax Appeal No. 70592 of 2018

(Arising out of Order-in-Appeal No. 10-11-GBN-EXST-APP-17-18 dated 19-02-2018 passed by the Commissioner (Appeals), Central Goods & Service Tax Commissionerate, Ghaziabad)

Sh. Naresh Kumar Gupta (Director)

M/s Express Engineers & Spares Pvt. Ltd.
A-18, Rampurti, Surya Nagar,
Ghaziabad (U.P)

....Appellant

VERSUS

**The Commissioner, Central Tax,
GST & Central Excise, Meerut**

Opp. Chaudhary Charan Singh University,
Mangal Pandey Nagar, Meerut

....Respondent

APPEARANCE:

Shri B.L. Narasimhan, Shri Kunal Aggarwal & Ms. Shagun Arora, Advocates
for the Appellant

Shri B.K. Jain, Authorized Representative of the Department

CORAM:

HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT

HON'BLE MR. P.V.SUBBA RAO, MEMBER (TECHNICAL)

Date of Hearing: October 11, 2021

Date of Decision: January 11, 2022

FINAL ORDER NO. 70004-70005/2022**JUSTICE DILIP GUPTA:**

Service Tax Appeal No. 70537 of 2018 has been filed by M/s Express Engineers and Spares Private Limited¹ to assail the order dated February 19, 2018 passed by the Commissioner (Appeals) dismissing Appeal for the reason that there was no infirmity in the order dated February 28, 2017 passed by the Additional Commissioner, Central Excise and Service Tax, Ghaziabad² confirming the demand of service tax under section 73 (1) of the Finance Act, 1994³ with interest under section 75 of Finance Act and penalty under section 78 of the Finance Act.

2. **Service Tax Appeal No. 70592 of 2018** has been filed by the Director of M/s Express Engineers & Spares Pvt. Ltd. to assail the aforesaid order dated February 19, 2018 passed by the Commissioner (Appeals) that has confirmed order passed by the Additional Commissioner imposing a penalty of Rs. 1 lakh upon the Director under section 78A of the Finance Act.

3. The Appellant supplies diesel generators to customers on hire basis. The issue involved in the Appeals is whether the Appellant renders 'supply of tangible goods for use⁴ service, which is leviable to service tax under section 65(105)(zzzzj) of the Finance Act for the period upto June 30, 2012 and under section 66E(f) of the Finance Act for the period from July 01, 2012 till 2014-2015.

-
1. the Appellant
 2. the Additional Commissioner
 3. the Finance Act
 4. STGU

4. A show cause notice dated April 11, 2016 was issued to the Appellant proposing to recover service tax for the period 2011-12 to 2014-15 with interest and penalties.

5. The Additional Commissioner confirmed the demand by order dated February 28, 2017 and the Appeal filed by the Appellant before the Commissioner (Appeals) was dismissed by order dated February 19, 2018. The reasons given by the Commissioner (Appeals) are as follows:

- (a) As per the work orders, the Appellant was responsible for loading, transportation, unloading, erection, installation and commissioning, operation, maintenance and repair of diesel generator sets. The Appellant also provided operator/technician to operate the diesel generators sets in many cases. All this meant that possession and effective control of the diesel generators sets remained with the Appellant;
- (b) All the three ingredients namely, that service should be provided in relation to supply of tangible goods, supply is without transferring right of possession and effective control of goods and service is provided by any person to any other person for it to be taxable under section 65(105)(zzzzj) of the Finance Act were satisfied;
- (c) The Appellant is paying VAT/Sales Tax on the hiring charges of diesel generator sets and is it being assessed by the concerned authorities. However, section 65(105)(zzzzj) of the Finance Act does not specifically provide that where VAT has been paid, service tax will not be leviable; and
- (d) As the Appellant had mis-represented facts with intension to evade payment of service tax, the extended period of limitation was invocable and interest and penalties were also imposable.

6. To appreciate the issue involved in the Appeals, it would be pertinent to refer to the nature of the transaction between the Appellant and its customers.

7. It has been described by the Appellant that specific equipments for specific duration for hire are agreed upon between the Appellant and its customer before the equipments are delivered to the premises of the customer. The Appellant receives a fixed amount on monthly basis, which is based on the maximum number of hours specified in the work order. If the equipments are operated beyond the maximum working hours per month, overtime charges are recovered on pro-rata basis. All statutory Regulations concerning the deployment of diesel generator sets and its operation are required to be complied with by the customer. If the customer specifically requires operator(s), they are provided by the Appellant with the equipment. The customer is responsible for issuing directions to the operator regarding the operation of the equipment. During the period of hire, the Appellant does not have any control over the equipment and the effective control over the use of the equipment vests with the customer as the customer draws plans and issues instructions to the operator for operating the diesel generator sets according to the work requirement. Infact, the operator neither uses the equipment as per his own accord nor can the Appellant issue any directions to the operator pertaining to the operation of the equipment. The operator acts as per the directions given by the customer and the method, manner and duration of use of the equipment is as per the discretion of the customer. There is no minimum or maximum number of hours that the machine can be operated as the duration of use of the equipment is entirely at the

discretion of the customer. In some cases, the responsibility for maintenance of diesel generator sets is on the Appellant. The diesel/ fuel and lubricant required to run the diesel generator sets is to be provided by the customer. The Appellant cannot demobilize the equipment without the approval of the customer and the equipments cannot leave or enter the premises of the customer without a gate pass issued by the customer.

8. The Commissioner (Appeals) relied upon the work order dated May 03, 2011 issued by Niho Construction Ltd., the work order dated May 30, 2011 issued by Jubilant Clinsys Ltd., and the work order dated October 18, 2011 issued by MGF Estates Managements Private Limited. Since the terms of the work orders are more or less the same, it will be useful to refer to the relevant clauses of the work order dated May 03, 2011 issued by Niho Construction Ltd. It is as follows:

KVA	Quantity	Rate	Amount	Description
500	1	80000/-	Eighty thousand only	Monthly charges for silent Diesel Generator set.

Terms & Condition

Tax Type	Vat @5%.Extra
Payment Terms	Monthly hire charges payable in advance.
Running Hour's	Max. 245 hours per Diesel Generator Set per month. Extra running hours, will be charged on pro rata basis.
Freight	Two way espenses to be paid by us at actual. If hiring period is 3 months or above, return expenses are borne by you.
Loading/Unloading	In your scope at your end. At our end borne by us
Diesel	On our scope
Lube Oil	To be provided by us (VALVCLINE MAKE ONLY) after every 250 hours or part thereof as per actual consumption. 1st fill will be provided by you.
Changeover Switch & Cables	To be provided by us. You shall provide cable upto your Diesel Generator Set Control Panel

Load	1 Amp/KVA At 0.8 P.F.
Civil Work	If required for proper installation & commissioning of DG Set, will be in our scope
Earthing	Proper Earthing to be provided by us for safety
Operation & maintenance	On your account
Operator	Operator's lodging to be provided by us
Statutory Permission	If required, to be obtained by us
Dispute	Any dispute shall be subject to jurisdiction of Delhi only
Security	Adequate security to be provided by us
Hiring Period Remark	Minimum hiring period 3 months

9. The Commissioner (Appeals) did not agree with the contentions of the Appellant and held that possession and effective control of the diesel generator sets remained with the Appellant. According to the Commissioner (Appeals), the terms of the contract determine whether the transaction involves transfer of possession and control. After referring to the three contracts, the Commissioner observed as follows:-

“5.10. **In view of the above, it is explicitly clear that in the present case effective control is not parted with by the appellant.** The Diesel Generators sets given on hire by the appellant to their clients are for a specific period. Thereafter, if the contract is not renewed, the same are brought back by the assessee. All the maintenance work, minor / major breakdowns etc. are being looked after by the appellant and in some cases the appellant has provided a technician to manage the routine maintenance of the generator by deputing him to the clients’ premises. **It is thus evident that the right of control and effective maintenance of the Diesel Generators sets always rests in the hand of the appellant. Had it been a case of transfer of effective control, such conditions would not have been agreed upon at the time of entering**

into the contract. The CBEC's clarification dated 29-02-2008 clearly mentions that transfer of right to use any goods is leviable to sales tax / VAT as deemed sale of goods. **Transfer of right to use involves transfer of both possession and control of the goods to the user of the goods.** It further clarifies that 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. **In the case before me there is no dispute to the fact that the said assessee has not transferred the right of possession. Thus it satisfies both the essential criteria of the definition of taxable service of "Supply of tangible goods services" under Section 65 (105)(zzzj) of the Finance Act, 1994.** The situation is analogous to the chartering of aircraft. I place reliance on the CBEC Circular Dy.No 20/Comm (ST)2009 dated 9.2.2009 wherein it has been clarified that where the crew is also provided by the owners of the aircraft as in a wet lease of aircraft effective control is not transferred. Thus supply of tangible goods is without transferring right of possession and effective control of said goods."

(emphasis supplied)

10. Shri B. L. Narasimhan, learned counsel appearing for the Appellant made the following submissions.

- (i) Supply of diesel generator sets to customers does not amount to STGU service. During the period when the diesel generator sets were in the possession of the customers, the legal right to use the diesel generator sets was only with such customers, to the exclusion of the Appellant, as the Appellant could not pass the same right to any other person. In this connection, learned Counsel placed reliance on the following decisions:

- a) **Rashtriya Ispat Nigam Ltd. vs. Commercial Tax Officer, Company Circle, Vishakhapatnam⁵** affirmed by the Supreme Court in **State of Andhra Pradesh and Another vs. Rashtriya Ispat Nigam Ltd⁶**;
- b) **M/s G S Lamba & Sons Mr Gurusharan Singh Lamba and others vs. State of Andhra Pradesh⁷**;
- c) **Petronet LNG Ltd. vs. Commissioner of Service Tax, New Delhi⁸**;
- d) **Gimmco Limited vs. Commissioner of Central Excise and Service Tax, Nagpur⁹**;
- e) **Dipak Nath vs. Oil and Natural Gas Corporation Ltd. and others¹⁰** and;
- f) **M/s GE Power Service India Pvt. Ltd. vs. Principal Commissioner of Service Tax Delhi-I¹¹**;

- (ii) The transportation and installation of the diesel generator sets at the site of the customers site cannot be made a basis to conclude that the Appellant rendered STGU service;
- (iii) Even though the Appellant provided operators to the customers, such operators were working only under the direction and control of the customers. The Appellant had no control over these operators. Hence, so long as the effective control over the diesel generator sets remained with the customers, mere providing operators, who are also under the direction and control of the customers, would not

5. 1989 (12) TMI 325- Andhra Pradesh High Court
 6. 2002 (3) TMI 705 -Supreme Court
 7. 2012-TIOL-49-HC-AP-CT
 8. 2016 (46) S.T.R 513 (Tri. - Del.)
 9. 2017 (48) STR 476 (Tri.- Mum.)
 10. 2009 (11) TMI 834- Gauhati High Court
 11. 2021-TIOL-75-CESTAT-DEL

take the transaction out of the scope of a deemed sale. In this connection, reliance has been placed on the decisions rendered in **Gimmco Limited, G S Lamba and Dipak Nath;**

- (iv) The impugned order holds that the Appellant is responsible for maintenance and repair of the diesel generator sets. Once control and possession has been transferred to the customers, extension of any maintenance or repair work would not change the nature of the transaction. In this connection, reliance has been placed on the decisions rendered in **Petronet LNG, Dipak Nath, Gimmco and M/s Lindstrom Service India Private Limited vs. Commissioner of Central Excise & Service Tax¹²;**
- (v) Payment of VAT on supply of goods is also a factor to determine whether the transaction is that of sale. In this connection, reliance has been placed on the clarification issued by the Department in TRU dated February 29, 2008, wherein the taxable category of STGU was clarified and its distinction with deemed sale under sales tax was brought out. Reliance has also been placed on a Circular dated August 23, 2007, which clarifies that payment of VAT/Sales tax on a transaction indicates that the transaction is treated as sale of goods and service tax is not leviable on such transactions;

- (vi) The Appellant did not suppress any fact, much less with an intention to evade payment of service tax, and so the extended period of limitation could not have been invoked. The demand for the period from April 01, 2011 to March 31, 2014 is, therefore, liable to be set aside for this reason alone; and
- (vii) For the same reason, no interest could be recovered, nor penalties could be imposed on the Appellant.

11. Shri B.K. Jain, learned authorised representative appearing for the Department, however submitted:

- (i) The Appellant provided diesel generator sets on hire basis to customers for consideration. The case covers the period from 2011-12 to 2014-15. STGU service was taxable from 01.04.2011 to 30.06.2012 under section 65(105)(zzzzj) of the Finance Act. It was also considered a declared service from 01.07.2012 to 2014-15 under section 66E(f) of the Finance Act. The Appellant has accepted that there is a transfer or supply of tangible goods and such transfer is by way of hire. However, the Appellant asserts that the right to use such goods has also been transferred to the customers and, therefore, it is not liable to pay service tax. The various work orders/agreements submitted by the Appellant, show that the Appellant, in many cases, was responsible for loading, transportation, unloading, erection, installation &

commissioning, operation, maintenance and repair of diesel generator sets. The Appellant also provided operators/technicians to operate the sets in many cases. All this means that possession and effective control of the sets remained with the Appellant;

- (ii) The diesel generator sets given on hire are for a specific period. If the contract is not renewed, the same is brought back by the Appellant. All the maintenance work, minor/major breakdowns etc., are looked after by the Appellant and in some cases, the Appellant also provides technician for routine maintenance of diesel generator set. Thus, the right of control and effective maintenance of sets is always with the Appellant;
- (iii) Receiving hiring charges is not sale of goods and even if the Appellant had paid State VAT on any transaction, it cannot be said that the service tax authority cannot demand service tax. In this connection reliance has been placed on the decision of the Supreme Court in **Bharat Sanchar Nigam Ltd. vs. Union of India**¹³;
- (iv) The Appellant mis-represented facts and disguised it as a case of transfer of goods by way of hiring with the transfer of right of possession and effective control to the customer, whereas the possession and effective control of the goods was not transferred to

13. 2006 (2) STR 161 (SC)

the customers and the same remained with the Appellant, which is the core ingredient to levy service tax on the transaction under hiring service. To support the contention reliance has been placed on the following decisions:

(a) Indian National Shipowners' Association vs. Union of India¹⁴;

(b) Reliance Industries Ltd. vs. Commissioner of C.Ex. & S.T., LTU, Mumbai¹⁵.

12. The submissions advanced by the learned counsel for the Appellant and the learned authorised representative appearing for the Department have been considered.

13. The issue that arises for consideration is as to whether the supply of diesel generator sets to customers would amount to STGU service. The demand has been confirmed under the category of STGU service for the period 01.04.2011 to 30.06.2012 under section 65(105)(zzzzj) of the Finance Act and as a declared service involving "transfer of goods by way of hiring, leasing, licensing, or in any such manner without transfer of right to use such goods" under section 66E(f) of the Finance Act for the period 01.07.2012 to 31.03.2015. The impugned order has held that the diesel generator sets provided by the Appellant to its customers would amount to supply of STGU/transfer of good for hire service, as the effective control over the diesel generator sets remained with the Appellant.

14. 2009 (14) STR 289 (Bom.)

15. 2014 (36) STR 820 (Tri. – Mumbai)

14. To appreciate, whether service tax can be levied on the transaction, it would be necessary to analyse the relevant statutory provisions as they existed prior to 01.07.2012 and after 01.07.2012.

15. It needs to be noted that section 65B(44) of the Finance Act defines 'service' to mean:

"65B (44) "service" means any activity carried out by a person for another for consideration, and includes a declared service, but shall not include-

(a) an activity which constitutes merely,-

- (i) a transfer of title in goods or immovable property, by way of sale, gift or in any other manner; or
- (ii) such transfer, delivery or supply of any goods which is deemed to be a sale within the meaning of clause (294) of article 366 of the Constitution; or
- (iii) a transaction in money or actionable claim"

16. Section 65(105)(zzzzj) of the Finance Act, which would be relevant for the period prior to 01.07.2012, under which the demand under STGU has been confirmed is as follows:

"65. Definition. –

In this Chapter, unless the context otherwise requires,

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

(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 appliance."

17. For the period post 01.07.2012, the demand has been confirmed under section 66E of the Finance Act. Section 66E(f) of the Finance Act was inserted with the effect from 01.07.2012 and sub-section (f) of section 66E is as follows:

"66E. The following shall constitute declared services, namely:-

(f) transfer of goods by way of hiring, leasing, licensing or in any such manner **without transfer of right to use such goods;"**

18. Thus, what has to be seen for a transaction to be taxable as a service, is:

- i. There must be a transfer or supply of goods;
- ii. The transfer must be by way of hire or lease or license for using the goods; and
- iii. The right of possession and effective control over such goods must not have passed on to the transferee.

19. The nature of transaction between the Appellant and its customers have elaborately been described in paragraph 7 of this Order. It clearly transpires that the Appellant was providing the diesel generator sets to its customers on hire basis. The first two conditions, therefore, stand satisfied. The disputes, in the present appeal, centers around the third condition, which is as to whether the transaction between the Appellant and its customers would involve the transfer of right of possession and effective control or a transfer of right to use. This is because a transaction where right of possession of the goods together with effective control over such goods is transferred it would tantamount to a deemed sale, which would be beyond the purview of service tax.

20. In this connection, it would be pertinent to refer to Entry 54 of List II of the Seventh Schedule to the Constitution. It empowers State to levy tax on sales and purchase of goods. The relevant Entry is reproduced below:

"54. Taxes on the sale or purchase of goods other than newspaper, subject to the provisions of Entry 92 A of List I"

21. The forty-sixth amendment to the Constitution, extended the meaning of **“sale or purchase of goods”** by giving an inclusive definition of the phrase **“tax on the sale or purchase of goods”** under article 366(29A) of the Constitution. The same is reproduced below:

“366(29A) “tax on the sale or purchase of goods” includes-

(a) a tax on 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 works contract;

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

(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)

(f)”

(emphasis supplied)

22. It would be seen from the aforesaid that the Constitution empowers the State to levy Sales Tax/VAT on transactions in the nature of transfer of right to use goods, which were earlier not exigible to sales tax as such transactions were not covered by the definition of “sale” as given in the Sales of Goods Act, 1930.

23. It needs to be remembered that the term “transfer of right to use goods” has neither been defined in the Constitution nor in any of the State VAT Acts or Central Sales Tax Act. The said phrase was interpreted by the Supreme Court in **Bharat Sanchar Nigam Ltd.**, wherein the Supreme Court laid down five attributes for a transaction

to constitute a “transfer of right to use goods”. In this connection paragraph 91 of the judgment is reproduced below:

“91. To constitute a transaction for the transfer of the right to use the good, the transaction must have the following attributes:

- a. There must be goods available for delivery;
- b. There must be consensus ad idem as to the identity of the 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 of 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 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 again transfer the same rights to others.”

(emphasis supplied)

24. It can safely be said that under Sales Tax, there is transfer of possession and effective control in goods, while there is no such transfer of possession and effective control under service tax.

25. In the present case, the nature of the transaction between the Appellant and the customers, as is clear from the contract, reveals that:

- (i)** Specific equipments for specific duration for hire were agreed upon between the Appellant and the customers;
- (ii)** The Appellant received a fixed monthly amount based on maximum number of hours specified in the work order;

- (iii)** If the equipment was operated beyond the maximum working hours per month, overtime charges were recovered on pro-rata basis;
- (iv)** All Statutory Regulations were required to be complied with by the customers;
- (v)** If the customer required an operator, it was provided by the Appellant with the equipment;
- (vi)** The customer was responsible for issuing directions to the operator regarding the operation of the equipment;
- (vii)** The Appellant did not have any control over the equipment and the effective control was with the customer. This is because the customer drew plans and issued instructions to the operator for operating the diesel generator sets according to the work requirement ;
- (viii)** There was no minimum and maximum number of hours prescribed for operation of the machine and the duration of use of the equipment was entirely at the discretion of the customer;
- (ix)** In some cases the responsibility of maintenance of diesel generator sets was on the Appellant;
- (x)** The diesel/fuel and lubricant required to run the diesel generator sets was to be provided by the customers; and

(xi) The equipments could not leave or enter the premises of the customers without a pass issued by the customers.

26. Thus, the transaction between the Appellant and the customers would qualify as a transfer of right to use goods with the control and possession over the diesel generator sets passing on to the customers.

27. The Andhra Pradesh High Court in **Rashtriya Ispat Nigam Ltd.** observed that whether there is a transfer of right to use or not is a question of fact which has to be determined in each case having regard to the terms of the contract under which there is transfer of right to use and in this connection, observed as follows:

“Whether there is a transfer of the right to use or not is a question of fact which has to be determined in each case having regard to the terms of the contract under which there is said to be a transfer of the right to use. In the instant case, the petitioner - Rashtriya Ispat Nigam Limited owning Visakhapatnam Steel Project, for the purpose of the steel project allotted different works of the project to contractors. To facilitate the execution of work by the contractors with the use of sophisticated machinery, the petitioner has undertaken to supply the machinery to the contractors for the purpose of being used in the execution of the contracted works of the petitioner and received charges for the same. The respondents made provisional assessment levying tax on the hire charges under section 5-E of the Act. In this writ petition, the petitioner prays for a declaration that the tax levied by the 1st respondent in purported exercise of power under section 5-E of the Act on the hire charges collected during the period 1988-89, is illegal and unconstitutional. The respondents filed a counter-affidavit in support of the levy stating that the validity of A.P. Amendment Act (18 of 1985) which introduced section 5-E of the Act was upheld by the High Court of Andhra Pradesh in *Padmaja Commercial Corporation v. Commercial Tax Officer* [1987] 66 STC 26; (1987) 4 APSTJ 26. It is further

stated that the provisional assessment under section 15 of the Act has been made every month on account of submission of incorrect monthly returns claiming wrong exemption. **The petitioner, it is stated, is lending highly sophisticated and valuable imported machinery to the contractors engaged by the petitioner for the purpose of construction of steel project.** The machinery like cranes, docers, dumfors, road rollers, compressors, etc., are lent by the petitioner to the contractors for the use in the execution of project work for which hire charges at specified rate are being collected by it. **The machinery is given in the possession of the contractor and he is responsible for any loss or damage to it. The contractor has got every right to use it in his work at his discretion. It is further stated that in view of these clear terms and conditions there is transfer of property in goods for use, for a specific purpose and for a specified period for money consideration.** The amounts charges by the petitioner attracts tax liability under section 5-E of the A.P. General Sales Tax Act, 1957.

Sri P. Venkatarama Reddy, the learned counsel for the petitioner, submits that under the terms and conditions of the contract, the contractor is provided with the facility of using the machinery if the same is available with the petitioner and there is no transfer of the right to use the machinery and for this purpose he relies on clauses 1, 5, 7, 13, and 14 of the contract to show that there is no transfer; while the learned Government Pleader submits that clauses 10 and 12 clearly show that there is a transfer of right and, therefore, tax is validity levied. In our view, 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. **From a close reading of all the clauses in the agreement, it appears to us that the contractor is entitled to make use of the machinery for purposes of execution of the work of the petitioner and there is no transfer of right to use as such in favour of the contractor. We have reached this conclusion because the effective control of the machinery even while the machinery is in the use of the contractor is that of the petitioner-company. The contractor is not free to make**

use of the same for other works or move it out during the period the machinery is in his use. The condition that he will be responsible for the custody of the machinery while the machinery is on the site does not militate against the petitioners' possession and control of the machinery. For these reasons, we are of the opinion that the transaction does not involve transfer of the right to use the machinery in favour of the contractor. As the fundamental requirement of section 5-E is absent, the hire charges collected by the petitioner from the contractor are not exigible to sales tax."

(emphasis supplied)

28. The appeal filed by the Department against the decision of the Andhra Pradesh High Court was dismissed by the Supreme Court and the decision is **State of Andhra Pradesh and another vs. Rashtriya Ispat Nigam Ltd.**¹⁶. The relevant portion of the decision is reproduced below:

"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 clauses 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

16. 2002 (3) TMI 705 – Supreme Court

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)

29. It transpires from the aforesaid two decisions in **Rashtriya Ispat Nigam Ltd.** rendered by the Andhra Pradesh High Court and the Supreme Court that it is in view of the terms of the contract under which there was a transfer of the right to use that it was held that since the effective control of the machinery, even while the machinery was in the use of the contractor, was that of the company that had given the machinery on hire Sales Tax could not have been charged from the Appellant under the provisions of the State Sales Tax Act.

30. In **G.S. Lamba**, the issue that arose before the Andhra Pradesh High Court was whether the contract with M/s. Grasim Industries Limited for transporting the Ready Mix Concrete was for transfer of the right to use Transit Mixers and the following principles were summarised:

"40. **That brings us to the construction of the agreement between the parties which indisputably came into force on 01.10.2002. 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.

42. In addition to the above clauses, we have thoroughly perused and analysed the agreement between the petitioners and 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."

(emphasis supplied)

31. In **Petronet LNG Ltd.**, the Tribunal observed as follows:

"**25.** The issue that therefore falls for our consideration is whether the transactions involving the two long-term charters and one short-term charter (of the vessels Disha, Rahi and Trinity Glory, respectively) amount to a transfer of the right of possession and effective control of these vessels for use by the assessee from the owners thereof. **If the transactions establish a transfer of the right to use possession and effective control, the transactions fall outside the purview of the enumerated taxable service.**

29. ***** In the adjudication order the analysis of law and consideration of the relevant facts of the transaction occurs only in paragraph 37.3, in relation to taxability of the transaction, under Section 65(105)(zzzzj). **Further the mere fact that the Manager, Master, personnel and other crew are employed by the owner does not in any manner derogate from the fact that the transaction constitutes transfer of the right to use the tangible goods, including possession and effective control of the tankers.** This is so since there are several other clauses in the agreements between the parties (referred in para 10 supra), which disclose that the personnel on board the tankers function and operate strictly in terms of detailed instructions, guidelines and directives issued or to be issued by the assessee in terms of the authority of the assessee to do so, under the agreements. The personnel and crew must also be replaced by the owners on valid complaint about their misbehaviour lodged by the assessee. **On a true and fair analysis of the several**

clauses of the charter - agreements, considered as a whole, mere employment of the personnel and crew by owners does not derogate from the reality of transfer of possession to and effective control by the assessee over the tankers, for the use of these tangible goods."

(emphasis supplied)

32. In **Gimmco Ltd.**, the Tribunal observed as follows:

"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."

(emphasis supplied)

33. In **Dipak Nath**, the Gauhati High Court observed as follows:

"The above analysis of the relevant provisions of the contract agreement between the parties indicate the clear dominion and control of ONGC over the crane during the entire period of operation of the contract once a crane is placed at the disposal of the ONGC under the contract. The crane is to be deployed at worksites as per the discretion of the ONGC and though the normal period of deployment is 10 hours in a day, such deployment at the discretion of the ONGC may be for any period beyond the normally contemplated 10 hours. The deployment of the crane in oil field operations as well as other hazardous situations is at the sole discretion of the ONGC. Though the cranes are operated by the crew provided by the contractor such crew while operating a crane is under the effective control of the ONGC and its authorities. Therefore, under the contract though the normal operational time is 10 hours in a day, the ONGC is entitled to deploy the cranes, if required, to the entire period of 24 hours to perform duties the kind of which and the locations whereof is to be decided by the ONGC. **The mere fact that after the operation of the crane is over on any given day the crane may come back to the owner/contractor will hardly be material to decide as to who has dominion over the crane inasmuch as the crane can be recalled for duty by the ONGC at any time.** Under the contract the crane is to be operated for 26 days in a month and the remaining four days are to be treated as maintenance off days. Though the crane is not operational on the maintenance off days, yet, 50% of the operational charges is paid by the ONGC for the maintenance off days and the terms of the contract make it clear that even on the off days the crane can be called for operation by the ONGC at its sole discretion.

The above features of the contract, in our considered view, makes it abundantly clear that it is the ONGC and not the contractor who has exclusive control and dominion over the crane during the subsistence of the contract, though, during the aforesaid period, at times,

physical possession of the crane may come back to the contractor. Such temporary physical possession of the contractor, according to us, would hardly be relevant as under the contract the ONGC is vested with the authority to requisition the crane for operational purposes at any time. Besides, such temporary possession of the crane by the contractor does not mitigate against the transfer of the right to use the crane which event, as already indicated on the authority of the decision of the Apex Court in 20th Century Finance Corpn. Ltd. (supra), constitutes the taxable event under article 366(29A)(d) of the Constitution.”

(emphasis supplied)

34. From the decisions referred to above, it clearly transpires that;

- (i)** Whether there is a transfer of right to use or not is a question of fact which has to be determined in each case having regard to the terms of the contract under which there is a transfer of right to use;
- (ii)** If with the transfer of the right to use, possession and effective control is also transferred, the transaction falls outside the preview of service tax liability. However, when the effective control and possession is not transferred and it continues to remain with the person who has given the machinery on hire, it would not be open to the authority to levy service tax;
- (iii)** Mere fact that the persons are employed by the owner does not in any manner deter from the fact that the transaction constitutes a transfer of the right to use the tangible goods with possession and effective control; and

- (iv) The fact that after the operation is over on any given day and the tangible goods come back to the owner is not a material fact for deciding who has the dominion over the tangible goods.

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.

ST/70537 & 70592 of 2018

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.

(Order Pronounced on **11.01.2022**)

(JUSTICE DILIP GUPTA)
PRESIDENT

(P.V. SUBBA RAO)
MEMBER (TECHNICAL)

Rekha/Shreya/JB