CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH
CHENNAI

<table>
<tr><th>S.No.</th><th>Appeal No.</th><th>Appellant</th><th>Respondent</th></tr>
<tr><td>1.</td><td>ST/186/2011</td><td>Blue Dart Aviation Ltd.</td><td>Commissioner of Service Tax, Chennai</td></tr>
<tr><td colspan="4">Arising out of Order in Original No.22/2010 dt. 15.11.2010 passed by the Commissioner of Central Excise, Chennai-III</td></tr>
<tr><td>2.</td><td>ST/51/2012</td><td>Blue Dart Aviation Ltd.</td><td>Commissioner of Service Tax, Chennai</td></tr>
<tr><td colspan="4">Arising out of Order in Original No.26/2011 dt. 27.10.2011 passed by the Commissioner of Central Excise, Chennai-III</td></tr>
<tr><td>3.</td><td>ST/40420/2014</td><td>Blue Dart Aviation Ltd.</td><td>Commissioner of Service Tax, Chennai</td></tr>
<tr><td colspan="4">Arising out of Order in Original No.14/2013 (RST) 26.11.2013 passed by the Commissioner of Central Excise, Chennai-III</td></tr>
<tr><td>4.</td><td>ST/41146/2014</td><td>Blue Dart Aviation Ltd.</td><td>Commissioner of Service Tax, Chennai</td></tr>
<tr><td colspan="4">Arising out of Order in Original No.6/2014 (ST) dt. 25.2.2014 passed by the Commissioner of Central Excise, Chennai-III</td></tr>
<tr><td>5.</td><td>ST/41211/2016</td><td>Blue Dart Aviation Ltd.</td><td>Commissioner of Service Tax, Chennai-III</td></tr>
<tr><td>6.</td><td>ST/41212/2016</td><td>Blue Dart Aviation Ltd.</td><td>Commissioner of Service Tax, Chennai-III</td></tr>
<tr><td colspan="4">Arising out of Order in Original No.06 to 07/2014 -2015-16 dt. 29.02.2016 passed by the Commissioner of Service Tax, Chennai-III</td></tr>
<tr><td>7.</td><td>ST/41244/2018</td><td>Blue Dart Aviation Ltd.</td><td>CGST & Central Excise, Chennai</td></tr>
<tr><td>8.</td><td>ST/41245/2018</td><td>Blue Dart Aviation Ltd.</td><td>CGST & Central Excise, Chennai</td></tr>
<tr><td colspan="4">Arising out of Order in Original No.05 & 06/2018 dt. 26.02.2018 passed by the Commissioner of GST and Central Excise, Chennai South, Chennai</td></tr>
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Appearance :

Shri N. Venkatraman, Sr. Advocate
Shri Akil Suresh, Advocate
For the Appellant

Shri K. Veerabhadra Reddy, JC (AR)
For the Respondent

CORAM :

Hon'ble Shri Madhu Mohan Damodhar, Member (Technical)
Hon'ble Shri P. Dinesha, Member (Judicial)

Date of hearing / decision : 10.07.2018

FINAL ORDER No. 42278-42285 / 2018

Per Madhu Mohan Damodhar

The appellants are engaged in transportation of goods through Air. They are providing service mainly to their associate company, M/s.Blue Dart Express Ltd. (hereinafter referred to as BDL) for ferrying cargo and documents to different parts of the country. Appellants acquired on lease, aircraft from foreign company for transportation of cargo. The aircraft is operated by appellant with their own crew. Maintenance and repair of aircrafts is also done by the appellants. The department took the view that the foreign lessor has supplied tangible goods to appellants on lease; that lessor therefore rendered "Supply of Tangible Goods Service" as per section 65 (105) (zzzzj) of Finance Act, 1994; hence appellant as recipient of service are liable to pay service tax on reverse charge basis amounting to Rs.1,53,13,956/- for the period May 2008 to October 2008.

2.2 Appellants were paying service tax on maintenance or repair service, Online information and Database retrieval service on reverse charge basis as recipient of service on a value net of TDS amount.

Department took the view that for the purposes of payment of service tax under provisions of Section 66A read with Rule 2 (1) (d) (iv) of Service Tax Rules, 1994, appellants were liable to pay service tax of Rs.27,37,927/- on the TDS amount for the period October 2003 to September 2008.

2.3 It also appeared that appellants have wrongly taken credit in respect of excise duty paid on motor vehicles amounting to Rs.4,92,474/- . Accordingly a show cause notice dt. 22.06.2009 was issued to appellants, inter alia proposing demand of the said tax amount with interest thereon and also imposition of penalties under various provisions of law.

2.4. Another SCN dt. 12.04.2010 was issued proposing demand of service tax liability of Rs.4,61,47,535/- with interest thereon for the subsequent period November 2008 to September 2009 in respect of alleged "Supply of Tangible Goods Service" received by appellants with respect to lease of the aircraft from foreign lessor and imposition of penalties.

2.5. On the same issue, subsequent SCN dt. 14.09.2010 proposed demand of service tax liability of Rs.2,01,16,640/- with interest for the period July 2009 to September 2010 on supply of 'Tangible Goods Service'.

2.6 Yet another SCN dt. 29.08.2011 was issued on the very same issue, inter alia proposing demand of service tax liability of Rs.1,88,99,721/- with interest thereon and under “Supply of Tangible Goods Service” along with proposal to impose penalty.

2.7 In adjudication, proposals in the SCNs were confirmed with interest and penalties imposed against which orders, appellants have filed these appeals as per the following table :

Appeal No.	**Period**	**Tax Demand (INR)**	**Penalty demand**	**Category of services / Allegation**	**Whether limitation period invoked**
Appeal No.ST/186/2011	May 2008 to October 2008	1,53,13,956	Rs.200 per day or 2% of the service tax demand per month whichever is higher subject to maximum of service tax payable	Supply of tangible goods	Yes
	July 2005 to October 2008	-	Rs.2,71,106 under Section 78	Non inclusion of TDS in the value of consideration paid to the lessor of aircrafts	No
	Apr 2007 to Oct 2008	-	Rs.4,92,474 under Rule 15 (2) of the CENVAT Credit Rules, 2004	Wrongful availment of CENVAT Credit of Excise Duty paid on motor vehicle, under the CENVAT Credit Rules, 2004	No

Appeal No.	Period	Tax Demand (INR)	Penalty demand	Category of services / Allegation	Whether limitation period invoked
Appeal No.ST/26/2011	November 2008 to September 2009	4,61,47,535	Rs.200 per day or 2% of the service tax demand per month whichever is higher subject to maximum of service tax payable, under Section 76	Supply of tangible goods	No
	July 2009 to February 2010	2,01,16,640		Supply of tangible goods	No
Appeal No.ST/40420/2014	April 2010 to March 2011	1,88,99,721	Rs.200 per day or 2% of the service tax demand per month whichever is higher subject to maximum of service tax payable, under Section 76	Supply of tangible goods	No
Appeal No.ST/41146/2014	April 2011 to March 2012	7,10,77,525	Rs.200 per day or 2% of the service tax demand per month whichever is higher subject to maximum of service tax payable for period 1	Supply of tangible goods	No

			April 2011 to 7 April 2011, under Section 76		
		-	Rs.100 per day or 1% of the service tax demand per month whichever is higher subject to maximum of service tax payable for period 8 April 2011 to 31 March 2012, under Section 76	Supply of tangible goods	No
Appeal No.ST/41211-212/2016	April 2012 to March 2014	18,55,94,522	Rs.1.85 crores under Section 76 and Rs.10,000 under Section 77	Supply of tangible goods and declared services	No
Appeal No.41244/2018	April 2014 to September 2015	12,28,53,085	Rs.60 lakhs under Section 76	Transfer of goods by way of leasing without transfer of right to use such goods	No
Appeal No.41245/2018	October 2015 to June 2017	16,99,14,559	Rs.80 lakhs under Section 76	Transfer of goods by way of leasing without transfer of right to use such goods	No
		64,99,17,543			

3. When the matter came up for hearing, on behalf of the appellants, Ld. Sr. Advocate Shri N. Venkatraman, assisted by Shri Akhil Suresh, Advocate submitted copy of the lease agreement between DHL Aviation, Netherlands (lessor) and the appellant (lessee) in respect of the lease of aircraft. Ld. Sr. Advocate took us through the agreements to emphasize that as per para-5 of Article 3, the basic rent was required to be paid monthly in arrears. As per Article 5, the possession and control of the aircraft was at all times with the appellant as lessee. Appellant was also required to service, repair, maintain etc. the aircraft at their own cost. The agreement also required the appellant to cause aircrafts to be duly registered in India. As per Article 6, appellant was only required to replace all parts which have become unserviceable, louse lost, stolen etc. at their own cost and expenses. In these circumstances, as the effective possession and control of the aircraft was with the appellant at all times. The transaction could not have been brought within the fold of “Supply of Tangible Goods Service” performed by the foreign lessor.

3.2 Further, the scope of levy of service tax under the category of “Supply of Tangible Goods Service” has also been clarified by the Board in their Circular No.334/1/2008-TRU dt. 29.02.2008. It is clarified in para 4.4.3 of the said circular that proposal to levy service tax on such services provided is in relation to supply of tangible goods for use, with no legal right or possession or effective control.

3.3 Ld. Advocate placed reliance on the following case laws :

(1) *Power Mak Industries Vs CCE Hyderabad*
2018-TIOL-1352-CESTAT-HYD

(2) *GIMMCO Ltd. Vs CCE & ST Nagpur* –
2017 (48) STR 476 (Tri.-Mumbai)

(3) *Heligo Charters Pvt. Ltd. Vs CST Mumabi-VI*
2017-TIOL-2831-CESTAT-MUM.

4) *International Seaport Dredging Ltd. Vs CST Chennai*
Final Order No.40236-40238/2018 dt. 30.01.2018

3.4 With regard to demand in respect of cenvat credit of Rs.4,92,474/- taken in respect of motor cars, the appellants are not contesting the said demand. However, the appellants were under a belief that they were entitled to avail cenvat credit of vehicles other than motor cars. Only on that basis, the appellants mistakenly availed cenvat credit on trucks and haulers purchased by them. In fact during the same period, appellants had purchased three motor cars on which no cenvat credit was availed by them. There was no malafide intention on their part and hence imposed penalty under Section 78 is unjustified and it is prayed that the same may be set aside.

3.5 With respect to liability to pay service tax on TDS amount a demand of Rs.27,37,927/- has been confirmed. In this regard, the adjudicating authority concerned has accepted their plea in adjudication that actual liability works out only to Rs.2,71,106/- together with interest of Rs.41,886/- which is already paid up by them. However, the adjudicating authority has imposed penalty of Rs.2,71,106/- under Section 78 of the Act. It is contended that there was considerable confusion on the taxability in respect of inclusability of TDS amount in the value of taxable service. Appellant had not discharged tax liability of Rs.2,71,106/- only on the bonafide belief that the TDS amount is not required to be included in the value for assessment. For this reason, the imposition of penalty on that score is also not justified and may be set aside.

4.1 On the other hand, Ld. A.R supports the impugned order. He draws our attention to Article 5 of the lease agreement where it is mandated that "appellant" being lessee shall not sub-lease, assign or otherwise transfer or relinquish possession or control of any item of equipment or any part thereof without prior written consent of foreign lessor. This very clear condition laid down in the agreement indicates that the possession and control of the aircraft was at all times with the foreign lessor and not with the lessee. Hence all ingredients of "Supply of Tangible Goods Service" as defined in Finance Act, 1994 were satisfied. Adjudicating authorities in all these impugned orders have therefore correctly confirmed the said demands under this service.

4.2 Ld. A.R also draws our attention to para 11.5 of the impugned order dt. 15.11.2010 where the adjudicating authority has found that the aircraft is not owned by the lessor that originally belongs to Boeing Capital Corporation (BCC) who as the head lessor has given operational control and possession of the aircraft under a separate lease agreement dt.5.5.2002 to European Air Transport (EAT) for further use. Hence the ownership and title of the aircraft vests with the said BCC and not with the foreign lessor who have now leased their aircraft to the appellants. Therefore, it cannot be said that foreign lessor has vested possession and control to the appellant. He also draws our attention to paras 14 & 15 of the same impugned order wherein the adjudicating authority has correctly found that exclusion of TDS amounts from taxable income and utilization of ineligible cenvat credit on motor vehicles had been suppressed from the department with intent to evade demand of service tax liability and penalty under applicable provisions were very much imposable on the appellant.

5. Heard both sides and have gone through the facts of the case.

6. We intend to take up the issues one by one. The main bone of contention in all these appeals concerns demand under 'Supply of Tangible Goods Service' in respect of aircraft taken on lease by the appellants. The department has taken a stand that the terms of lease satisfies the requirements of "Supply of Tangible Goods Service" as defined in Section 65 (105) (zzzzj) of the Act. Ld. A.R has been at pains to draw our attention to the finding of the adjudicating authority that M/s. EAT who had supposedly leased the aircraft of the appellant were themselves a lessee and that they had leased same aircraft from Boeing Capital Corporation (BCC).

7. We have perused the lease agreement between BCC and EAT (available on page 132 of paper book) dt. 05.02.2002 - One used Boeing Model 757-236 Aircraft . No doubt, as per Article 5 (a), EAT shall not sublease, assign or otherwise transfer or relinquish possession or control etc. without prior consent of BCC. At the same time, it is also provided that if the EAT seeks consent from BCC for such a provision, such consent should not unreasonably be withheld or delayed provided that such sublease shall be expressly made subject and subordinate to the lease between BCC and EAT. Further, BCC have also been permitted to "wet lease" the aircraft in the ordinary course of EAT's business. Obviously, EAT was fully permitted and well within their rights to further lease the aircrafts to the appellant. Operating Lease agreement between EAT and the appellant dt. 27.02.2006 is for the same Boeing Model 756-236 Aircraft Sl.No. 24102. In fact, the very same conditions that were agreed upon between BCC and EAT have been reiterated in Article 5 of the agreement between EAT and the appellant.

8.1 Taking into account these aspects and also the other terms of agreement brought to our attention by the Ld. Sr.Advocate, in particular, the operation of the aircraft with the personnel of the appellant themselves, requirement of maintenance of aircraft by the appellants etc., we have no doubt in our mind that the lease agreement between EAT and the appellant is one wherein the right of possession and control of the aircraft has been bestowed on the appellant and not retained with the lessor. This being so, the ingredients of "Supply of Tangible Goods Service" requiring exigibility to service tax by the Finance Act, 1994 are not present in this transaction. In consequence, the monetary consideration paid by the appellants to EAT cannot be considered as value of "Supply of Tangible Goods Service" and tax demanded on the same as has been done in the impugned orders.

8.2 We also find that the case laws relied upon by the Ld. Advocate fully support his case. The Tribunal in *Power Mak Industries* -2018-TIOL-1352-CESAT-HYD, in which one of the Members here was also a party to the decision, held as under :

"6.1) Heard both sides and have gone through the facts. In our opinion, the controversy in these appeals is in a narrow compass, namely, whether the transaction entered into by the appellants with the hirers of DG sets would be in the nature of a transaction involving transfer of possession and control of goods to the users or is only one that allows the other users to use the goods without giving legal right of possession and effective control. If the transaction falls in the first category, that would be considered as deemed sale of goods and exigible to sales tax/VAT. However in case it is the latter, the transaction would then be treated as a service attracting levy of service tax under Finance Act, 1994.

6.2) Taxable service of supply of tangible goods serviceshas been defined under section 65(105)(zzzz) of the Finance Act, 1994 as 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. This service was introduced w.e.f. 16-05-2008. In the letter No. 334/1/2008 TRU, dated 29-02-2008, the CBEC while clarifying the changes in service tax proposed in Budget 2008-2009, in para 4.4 conveyed the following clarification to proposed new taxable service provided in relation to supply of tangible goods:

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 conveyed 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.

6.3) After 1.7.2012, consequent to change in service tax law, all services exempted any activity carried out by any person for consideration including a declared service, was made liable to service tax levy except certain activities which were specifically exempted or excluded from taxation. One such exclusion from service tax levy as per Section 65(B)(44) is 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 (29A) of Article 366 of the constitution or (iii) a transfer in money or actionable claim. At this stage, it will be useful to refresh ourselves with the said clause 29(A) of Article 366 of the Constitution which reads as follows:

(29A) tax on the sale or purchase of goods includes
(a) a tax on the transfer, otherwise than in pursuance of a contact, 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) invoked 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;
6.4) Thus, both before and after 01-07-2012, it can be reasonably concluded that supply of tangible goods inter-alia with the right to use then for any purpose and which transaction is deemed as a sale will attract only sales tax levy. However, where such supply does not extend to transfer of possession and effective control of overall goods, such a transaction would not become a deemed sale but a service. This is exactly what CBEC had clarified in their circular No. 334/1/2012-TRU, dated 16.03.2012, in para 2.5.8 as follows:
2.5.8 What is the meaning of transfer of the right to use any goods?
Transfer of right to use goods is a well recognized constitutional and legal concept. Every transfer of goods on lease, license or hiring basis does not result in transfer of right to use goods. Transfer of right of goodsinvolves transfer of possession and effective control over such goods. Transfer of goods without transfer of possession and effective control over goods would not be a sale but a service (such transfer has also been declared as a service under section 66F of the Act).
6.5) For the post 01-07-2012 scenario, CBEC issued compendium of circulars on 20-06-2012 under the title TAXATION OF SERVICES AN EDUCATION GUIDE. In para 6.6.1, the CBEC clarified that transfer of right of goodsinvolves transfer of possession and effective control over such goods and reproduced the following tests laid by Supreme Court in the case of Bharat Sanchar Nigam Limited vs. Union of India [2006(2)STR 161 (SC) to determine whether transaction involves transfer of right to use goods:

- There must be goods available for delivery;
- There must be a consensus ad idem as to the identity of the goods;
- The transferee should have legal right to use the goods consequently all legal consequences of such use including any permissions or licenses required therefore should be available to the transferee;
- 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 91 of the statute, viz., a transfer of the right to useand not merely a license to use the goods;
- Having transferred, the owner cannot again transfer the same right to others.

It was also advised that whether a 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.

In para 6.6.2, CBEC gave examples of transactions to clarify whether such transactions involve transfer of right to use or otherwise. However, it was also advised therein that the list was only illustrative of how Courts have interpreted terms and conditions of various types of contracts, to see if a transaction involves transfer of right to use goods. The CBEC also advised that the nature of each transaction has to be examined in totality keeping in view all the terms and conditions of an agreement relating to such transaction.

6.6) The take away from the combined reading of all the above reproduced legal provisions and the CBEC circular are that there cannot be one-size-fix-all method to determine whether a transaction is supply of tangible is deemed sale or service. On the other hand, each transaction having its own unique entities and conditions, will have to be critically examined and subject to various tests laid down by the Courts, in particular the tests laid down by the Honble Supreme Court in the landmark judgment of Bharat Sanchar Nigam Limited cited supra. This is precisely what we wish to proceed to do.

6.7) From a perusal of the various clauses of the agreements, the following conclusion emerge:

i) There was a minimum hire charge that has to be paid by the hirer per month, to be charged irrespective of the fact the machine is operated or kept on stand-by for 30 days or less in a month.

ii) The agreements laid down that APVAT @ 14.5% on such charges would be charged extra and as per section 4 (8) of APVAT Act.

iii) Certain safety measures were laid down by appellant to be provided or taken care of by the hirer at the time of installation of DG set and at the site operation. These include provision of concrete level flooring, minimum of three independent earth pits, supply of change over switch, provision of fire extinguishers at site, damages caused by mishandling be borne by hirer, not permitting unauthorised persons to run DG sets etc.

iv) With regard to ownership, it was laid out in the agreement that DG set is a sole property of the appellant, that transaction is purely on hire basis; that DG set is hired out to the hirer for his own use only and subletting is not allowed; DG set has to be returned in good condition to the owner upon termination of the agreement etc.

v) It was also clarified that lessee shall run/operate the DG set for his exclusive use, therefore lessor hereby transfers the right to use the said DG set subject to fulfilment of all terms and conditions laid down in the lease agreement.

vi) Total safety of machinery lay with lessee against any sabotage, misuse, damages, fire, accidents due to unauthorised operation/mishandling of the DG set by lessee personnel or outsider since DG set lies in the premises of the lessee.

vii) In some agreements, it was laid down that DG technician shall be provided by the lessor to assist the lessee.

6.8) It then appears to reason that the transaction between the appellants and the hirers involves transfer of right to use goods and satisfy the tests laid by the Honble Apex Court in the BSNL judgment. DG sets are available for delivery. There is definitely a consensus between lessor and the lessee as to the identity of the goods. The hirers very much have legal right to use the goods. In fact, the agreements clearly lay down that the lessee shall render/operate the DG set for his exclusive use and that lessor has transferred the right to use the DG set. It is also not in dispute that as long as goods are with the hirer, appellants do not have any legal right to use the goods themselves. It is also not in dispute that appellants have transferred the right only to one hirer at a time.

6.9) With this background, we are unable to fathom how the adjudicating authority has concluded that effective possession and control of the impugned DG sets remains with the appellants and not with the hirers. The authority has held that since hirer is not permitted to run the DG set in the absence of technician provided by the appellant, the hirer is not free to use the DG set and that this indicates control of the appellant over the DG set. He has also found fault with the condition that power should not be withdrawn more than 72% of 288 KV/ 500 Amps at 8 PF on standard load 40% - 60% etc. We find that these objections have been adequately countered by the appellants in the grounds of appeal clarifying that condition relates to the tolerance level of the equipments and deviation from it will result in break down of the equipment, accordingly, they prescribed a list of Dos and Donts by the manufacturer. Appellants have also clarified that DG technicians were provided by them in many cases as some of the hirers do not know how to technically operate the DG sets. We find merit in the counter argument of the appellants that DG technicians even if provided, the manner of operation of the DG set is only as per the instructions and requirements of the hirers and not on the directions of the appellants. In any case, no allegation has been put forth by the department that the number of hours of running the DG set and the manner of utilisation of such DG power generated, was decided only by the appellants and not by the hirers. Adjudicating authority has also pointed out that all consumables like HSD, lubrication oil only that recommended by the manufacturer is to be used, this indicates restrictions on the use of lubricating oil. On the other hand, appellants have pointed out that this clause is only the requirement stipulated by the manufacturer and if wrong oil is used it can damage DG set; that further the very fact that all consumables like HSD/lubricant oil have to be supplied by the hirer itself indicates that the hirers would use the equipments as per their own needs only and hence they have full control on the usage of the DG sets. Adjudicating authority has pointed out few other aspects of the agreements which, according to him, also prove that hirer does not have effective control. However, we find that these are only standard clauses on any lease agreements where hire charges are fixed, payment of freight by hirer, subletting of DG set is barred etc.

6.10) The agreements therefore only set out the terms of the hire and in no way put any shackles on the hirer for full enjoyment of the DG set hired by the hirers or for that matter, bring about less than complete transfer of possession and control. It is also noteworthy that the hirer pays hire charges and not service charges. We also find merit in the appellants contention that the deposit amount is also paid by the hirers, which is the practice only in cases of leasing contracts which are deemed sale transactions and not the cases where only service is provided or received.

6.11) We also find that the Advance Ruling Authority, Commercial Tax Department, Government of Andhra Pradesh in response to clarification sought by PMPL on whether the hiring of generators is covered by the clause levy of tax on transfer of right to use goods under APVAT or notvide an order dated 30-06-2006, had given the following ruling:

V. The issue has been examined with reference to the provisions of the APVAT Act and Rules and HSN Codes notified by Government vide G.O.Ms.No: 398, Revenue (CT.II) Department dated 31.03.2005 and G.O.Ms.No. 490, Revenue (CT-II), Dept. Dated 27.08.2005 and in G.O.Ms.No. 1615, Revenue (CT-II), Dept. Dated 31.08.2005 and the ruling is given as under:

VI. As per subsection (8) of Section 4 of APVAT Act, every VAT dealer who transfers the right to use goods taxable under the Act is liable to pay a tax for such goods at the rate specified in the schedules on the total amount realized or realizable on such transfer of right to use goods.

As seen from the agreement between the owner and the hirer clause (2) of Terms and conditions it is clearly mentioned that APGST @ 8% of the invoice amount will be charged extra as per Sec. 5E of APGST Act. VAT will be applicable w.e.f. 1.4.2005. Any other taxes or levies imposed by any of the State or Central authorities will be to the hirers account with retrospective effect.

Further in the preamble of the agreement, it is clearly mentioned that the Lesser (owner) is carrying on the business of leasing of power generators. Hence it is evident that the owner (Lessor) is in the agreement to collect tax as applicable from the hirer.

The ruling is that the transaction falls under the purview of sub-section (8) of Section 4 of APVAT Act. The consideration received for transfer of right to use goods is liable to tax at the rate specified to the goods in the schedules to the Act.

It is also not the case of the department that the appellants are not discharging sales tax/VAT on the transactions. In fact the impugned order concedes that appellants have already paid VAT under APVAT Act on the entire hiring charges. Further, the adjudicating authority has refrained from imposing penalty under the Finance Act, 1994 on the grounds that appellants were paying VAT under the APVAT Act on the very same transaction.

6.12) Viewed in this light, we are of the considered opinion that the impugned transaction involving supply of DG sets on hire basis to various hirers is nothing but supply of tangible goods with transfer of both possession and control of the goods to the users of the goods. These transactions have been ruled as deemed sale of goods for the purpose of APVAT Act by the concerned Advance Ruling Authority. Appellants have also been discharging VAT on the hire charges under APVAT Act. Hence, this is the case of supply of tangible goods for use, with legal right of possession and effective control vesting with the hirer, required to be treated as deemed sale of goods, hence cannot be considered as supply of tangible goods for use of service for the purposes of Section 65(105) (zzzz) of the Finance Act, 1994 for the period upto 01-07-2012 or as taxable service for the purpose of Section 65B (44) of the Finance Act, 1994 after 01-07-2012.

7) In arriving at these conclusions, we draw sustenance from the ratio of the following case laws of higher Appellate Forums:

i) In the case of *Bharat Sanchar Nigam Ltd [2006(2)STR 161 (SC),* which has also been referred to by CBEC in the TAXATION OF SERVICES AN EDUCATION GUIDE, para 6.6. As already discussed, Honble Apex Court had laid down certain tests to determine whether the transaction involves transfer of right to use goods which aspect has already been analysed supra. These tests have already been applied by us in para 6.8 and we found that the transactions of appellant are very much in the nature of a transfer to the hirer of the right to use the goods with full possession and control, rendering the transaction as deemed sale with liability to discharge sales tax only.

ii) In the case of *G.S. Lamba & Sons vs. State of Andhra Pradesh [2015(324) ELT 316 (A.P),* the Honble High Court of Andhra Pradesh, which is the jurisdictional High Court for this Forum, the issue therein concern the liability of sales tax on the assessee who had provided Transit Mixers to the manufacturers of ready mix concrete, 24 hours and every day of the week as instructed by manufacturer while considering the issue, the Honble High Court held as follows:

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 (29-A)(d) read with the latter part of the clause (29-A) 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.

iii) The ratio laid down in the G.S. Lamba case has been followed by the Tribunal in the case of GIMMCO Ltd. vs. CCE&ST, Nagpur [2017(48)S.T.R 476 (Tri.-Mumbai), where, in a case involving dispute on liability to service tax on renting of earth moving equipments to various customers, the Tribunal inter-alia held 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 cannot 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 Hirers 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 GMMCO 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 Ministers 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.

6. In view of the foregoing, we are of the considered view that the assessees 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. 16.05.2008. Now coming to the Revenues appeal, we find that the Ld. Commissioner dropped the demand for the period prior to 16.05.2008 mainly on the ground that the service is of Supply of tangible goods for use which came into effect on 16.05.2008, 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 Ld. Commissioner for dropping of demand does not exist and not relevant. Though the Ld. Commissioner in a passing reference mentioned in the impugned order that the service prior to 16.05.2008 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 16.05.2008 needs reconsideration."

8.3. Following the ratio laid down in the decision and judgements cited and discussed supra, we are of the considered opinion that the demand of service tax under 'Supply of Tangible Goods Service' in the impugned orders cannot sustain and will have to be set aside which we hereby do.

9. The further two disputes relate to imposition of penalties in respect of non-inclusion of TDS amount in taxable value and wrong availment of cenvat credit on motor vehicles. We find that the appellants have been crying hoarse even at the stage of adjudication proceedings that these infractions have occurred only due to bonafide belief that TDS was not required to be added in assessable value and that credit availed on trucks and haulers, as opposed to motor vehicles, was in order. In any case,

appellants have paid up the tax liabilities of Rs.4,92,474/- and Rs.2,71,106/- respectively with interest liabilities also thereto. We are therefore convinced that there is no malafide in these inadvertencies by the appellants. Hence while not interfering with these tax demands, we hold that imposition of penalties in all these tax demands are therefore an overkill and requires to be set aside, which we hereby do.

10. Appeals allowed on above terms with consequential benefits, if any, as per law.

(operative part of the order pronounced in court)

(P. Dinesha)
Member (Judicial)

(Madhu Mohan Damodhar)
Member (Technical)

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