

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL  
NEW DELHI**

PRINCIPAL BENCH - COURT NO. 1

**Service Tax Appeal No. 51218 of 2017**

(Arising out of Order-in-Original No. 08/PC/ST/BPL-ST/2017 dated 24.04.2017 passed by the Principal Commissioner of Customs, Central Excise & Service Tax, Bhopal)

**M/s. Bhopal Municipal Corporation** .....Appellant  
Harshwardhan Complex, Mata Mandir,  
Bhopal

VERSUS

**The Principal Commissioner of Customs,  
Central Excise & Service Tax, Bhopal** .....Respondent

**WITH**

**Service Tax Appeal No. 51217 of 2017**

(Arising out of Order-in-Original No. 08/PC/ST/BPL-ST/2017 dated 24.04.2017 passed by the Principal Commissioner of Customs, Central Excise & Service Tax, Bhopal)

**M/s. Bhopal City Link Limited** .....Appellant  
ISBT Premises, B-Wing, 2<sup>nd</sup> Floor,  
Dr. Ambedkar Marg, Bhopal (M.P)

VERSUS

**The Principal Commissioner of Customs,  
Central Excise & Service Tax, Bhopal** .....Respondent

**APPEARANCE:**

Mr. Anil Mishra, Advocate for the Appellant  
Mr. Rajeev Kapoor, Authorized Representative of the Department

**CORAM : HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT  
HON'BLE MS. HEMAMBIKA R. PRIYA, MEMBER (TECHNICAL)**

**Date of Hearing/Decision: 06.07.2023**

**FINAL ORDER NO. 50931-50932/2023**

**JUSTICE DILIP GUPTA**

**Service Tax Appeal No. 51218 of 2017** has been filed by M/s. Bhopal Municipal Corporation<sup>1</sup> to assail the order dated April 24, 2017 passed by the Principal Commissioner, Customs, Central Excise & Service Tax, Bhopal<sup>2</sup> adjudicating the show cause notice issued to the appellant as also to M/s. Bhopal City Link Limited<sup>3</sup>. As regards of demand proposed against the appellant, the impugned order confirms the demand with penalty and interest and as regard to the demand proposed against the Regulator, the order imposes a penalty of Rs.10,000/- under section 77 of the Finance Act, 1994<sup>4</sup>.

2. **Service Tax Appeal No. 51217 of 2018** has been filed by M/s. Bhopal City Link Limited to assail the aforesaid order dated April 24, 2017 passed by the Principal Commissioner imposing a penalty of Rs.10,000/- upon it.

3. It transpires from the records that the under Jawaharlal Nehru National Urban Renewal Mission, financial assistance was granted to the appellant out of which the appellant purchased 225 buses. The appellant authorized the Regulator for providing organized and safe public transport in the city. The Regulator issued a tender notice for appointment of a private bus operator for bus operation in Bhopal. M/s. Capital Roadways Pvt. Ltd,

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1. the Corporation  
2. the Principal Commissioner  
3. the Regulator  
4. the Finance Act

Bhopal and M/s Prasanna Purple Mobility Solutions Pvt. Ltd. were ultimately selected and agreements were entered into by the appellant with both the private operators.

4. It is stated by learned counsel for the appellant that both the agreements are identical. It is, therefore, considered appropriate to refer to the agreement dated September 28, 2013 entered into between the appellant and M/s. Capital Roadways Pvt Ltd<sup>5</sup>. The relevant portions of the agreement are reproduced below:

### **"3. TERM**

- 3.1. The Term of the Bus Service will be for a time period commencing from the Appointed Date and extending till the expiry of 8 (Eight) years from Appointed Date or in the event the Bus Operators Agreement is terminated earlier in accordance with the provisions of the Bus Operators Agreement, the Term shall come to an end on the Termination Date.
- 3.2. There shall be no automatic renewal of the Agreement after expiration of the Term. However, both Parties may mutually decide to renew the Agreement for another Term of 2 (Two) years on such terms and conditions as the Parties may agree at such time.
- 3.3. However, it is clarified that solely in case of expiration of the Term of this Agreement, ownership of Buses shall be transferred from BCLL to the Operator after the completion of the Term of the Bus Service at a residual value equivalent to 20% of the original cost of the buses at the end of 8 years or 10% of the original cost of the buses at the end of 10 years. All costs relating to such transfer shall be solely borne by the Operator.

### **4. COMMENCEMENT OF OPERATION OF BUSES**

- 4.1. The Buses shall be procured by BCLL and whose possession will be handed over by BCLL to the Operator pursuant to and in accordance with the terms of this Agreement. The Buses shall meet the technical standards and specifications stipulated in Schedule 4. The order for all the buses has been placed and 150 no. out of total 225 no. of sanctioned Buses are operational on 8 different approved routes of Bhopal City. The remaining buses 55 no. of 900 mm and 20 no. of A.C. 400 mm floor height buses are being delivered to BMC/BCLL & the same shall be handed over to the successful bidder

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### **5. the Operator**

subject to the deposition of the requisite Adjustable Security Deposits and the performance guarantee.

- 4.2. The Operator shall ensure that the Bus Service is in operation from the Commercial Operations Date, unless otherwise agreed in writing by BCLL, and subject to BCLL obtaining the required Applicable Clearances and Bus Permits.
- 4.3 All Buses that are procured shall be registered in the name of BCLL or its nominee and at no time during the term of the Agreement shall any right, title, or interest over these Buses pass over to the Operator. The Operator shall merely get the right to use such Buses for the sole purpose of implementation of this Project and the Operator will have no other right whatsoever, unless otherwise agreed in writing in advance by BCLL.
- 4.4. During the term of the Agreement, the Operator shall not use the Buses for any purpose other than the Bus Service without the prior written permission of BCLL.

Xxx xxx xxxx

## **7. ROLE, RESPONSIBILITIES AND OBLIGATIONS OF THE OPERATOR & BCLL**

- 7.1 The Operator' shall role, responsibilities and obligations relating to the Project are provided herein below:
  - i. The Operator shall take possession of the Buses for the purposes of operating and maintaining the Bus Service and adhere to requirements for the implementation of the Project as provided in this Agreement.
 

xxx xxx xxx
  - ix. The Operator shall ensure that the Buses and Project Facilities are maintained in clean, safe and reliable condition during the Term of the Agreement.
 

xxx xxx xxx
  - xiii. It is agreed and understood by the Parties that BCLL shall enter into an annual maintenance contract with the manufacturer for the Buses within 30 days of the Appointed Date in respect of all the Buses in the Fleet, at its cost and expense and maintain it throughout the Term. The terms and conditions of the annual maintenance agreement are provided in Schedule 8 of this Agreement. It is clarified that Regulator will have the right to immediately seek upon entering into annual maintenance agreement entire reimbursement from the Operator relating to the cost of such annual maintenance as provided in this Agreement. The Operator shall ensure that it complies with the terms and conditions of the annual maintenance agreement as provided in Schedule 8 of this Agreement and makes available Buses and its personnel in timely manner so that Buses are maintained to the satisfaction of BCLL. BMC/ BCLL can however terminate the AMC at any point of time in case of any unforeseen circumstances.
  - xiv. The Operator undertakes to provide any and all equipment, fuel, consumable, machine or material that is required for the

uninterrupted and continuous operation management and maintenance of the Bus Service and the implementation of the Project, other than the equipment, spare parts or supplies covered under the annual maintenance contracts as provided in the previous sub clause 5.1 xiii herein above. For this purpose, BCLL may permit designated space to be used within the Bus Depot as a garage and other maintenance facilities by the Operator to ensure maintenance and repair of the Buses. It is clarified that all the costs including costs relating to the equipment, material and consumables shall be solely borne by the Private Bus Operator and the said facility will exclusively be used for the maintenance of the Buses being operated by the Private Bus Operator under this Agreement.

- xv. The Operator shall ensure that the Bus Service is operated and maintained so as to comply with the Service Standards. The Operator will be required to ensure that the Buses are maintained in a road worthy condition that would ensure safe operation of the Buses on the roads at all times. Also the Operator shall ensure that the operation and running of Buses is uninterrupted, continuous and is not suspended or stopped in any manner (except as permitted under the terms and conditions of the Bus Operators Agreement).
- xvi. The Operator shall ensure that the employees, workmen, personnel and staff who are employed (including sub-contractors) for the purposes of the implementation of the Project have the necessary qualifications and credentials, as per BCLL's requirements and as per Applicable Laws. The Operator shall be solely and exclusively responsible for all such employees, workmen, personnel and staff employed (including sub-contractors) for the purposes of implementing the Project. The Operator shall ensure that all personnel and staff are under constant supervision so as to provide the Bus Service in a safe manner to the public. It is clarified, that the Operator shall only be able to appoint sub-contractor provided the Operator has obtained prior written approval of BCLL, in this regard.
- xviii. The Operator shall enforce a dress and appearance code approved by BCLL in writing. The same dress code shall remain valid for a period of 2 years. The Operator shall provide at its own cost and expense uniforms and shall ensure that clean uniforms shall be worn by drivers, conductors and any other personnel and staff employed (including sub-contractors) at all times when they are on duty and doing any act in relation to providing the Bus Service under this Agreement.

## **8. Routes & Frequency of Buses**

- 8.1 Exclusive Rights of operation of buses on the said routes shall be given to the operator after the expiry of earlier agreement of the bus operations.
- 8.2 The Operator shall ensure that the Buses are operated on the said Routes and at the stipulated frequency in accordance with the specified Service Standards and Schedule of

Operation. It is clarified that BCLL shall determine the Routes and frequency of Buses on particular Routes.”

5. It will also be appropriate to refer to clause 2.9 of the agreement which refers to Hypothecation of buses and it is as follows:

“2.9 **Hypothecation of Buses:-** In spite of the fact that the buses are owned by BMC/BCLL, if the operator desires to, the Company may, at its sole discretion permit the Operator to obtain a loan from the bank. However, the amount of loan obtained by the operator through hypothecation of buses shall not exceed 30% of the bus cost and BCLL/BMC may, at its sole discretion, enter into a tripartite agreement/Hypothecation Deed having the financier/bank, the operator and the company as the parties, or the bank and the Company as parties as the case may be for obtaining the finance/loan. The terms and conditions of the hypothecation deed or tripartite agreement shall be decided by the management of the company. The Operator shall not add, alter modify and/or change any terms and conditions of hypothecation deed and loan agreement among operator (and/or) Bank/financer and (/or) BMC/BCLL without prior approval of Commissioner, BMC/MD BCLL.”

6. The contention of the appellant is that in view of the aforesaid terms of the agreement entered between the appellant and the operator, no service tax would be leviable on the appellant for the period upto June 30, 2012 or even thereafter, for the reason that the agreement seeks to transfer the right of possession and effective control as also the right to use to the operator.

7. However, a show cause notice dated April 22, 2016 was issued to the appellant and also to the Regulator, proposing to levy service tax for the reason that the amount of upfront fee received by the appellant from the operator would be towards a service, as the appellant had only transferred the right to use the buses but possession and effective control remained with the appellant.

8. The appellant as also the Regulator filed detailed replies to the show cause notice contending that service tax could not have been levied.

9. The aforesaid contention of the appellant that the right of possession and effective control and the right to use had been transferred by the appellant to the operator was rejected by the Principal Commissioner in the order impugned and the observations are as following:

"32. Thus on going through the same it is undisputed fact that the Party no.1 procured buses under JNURRM and engaged the Party No. 2 for operation of public transport through these buses in Bhopal City. The Party No. 2 issued tender under Public Private partnership model which resulted in appointing private bus operators i.e. M/s Prasanna Purple Mobility Solutions Pvt. Ltd. Pune and M/s Capital Roadways Pvt. Ltd, Bhopal. Further, the Party No. 1 supplied the buses to the private bus operators and received an amount against this supply as 'Upfront fee' or 'Adjustable security deposit. **In the instant case, the Party No.1 has transferred only right to use of buses whereas possession and effective control remains with them as the Buses are Registered with Regional Transport Office in the name of the Commissioner, BMC. Said rights are given only after the deposition of 'Upfront fee'/ Adjustable Security Deposit' by the operator.**"

**(emphasis supplied)**

10. Shri Anil Mishra, learned counsel appearing for the appellant contended that the Principal Commissioner committed an error in holding that under the agreement the appellant had not transferred the right of possession and effective control which continued to remain with the appellant. In this connection, learned counsel placed the agreement as also the certain decisions to which reference shall be made at the appropriate stage.

11. Shri Rajeev Kapoor, learned authorized representative appearing for the department, however, supported the impugned

order and contended that it does not call for any interference in this appeal.

12. The submissions advanced by the learned counsel for the appellant and the learned authorized representative appearing for the department have been considered.

13. It needs to be noted that the period involved in the show cause notice dated April 22, 2016 is from 2010-11 to 2014-15.

14. The issue that arises for consideration is as to whether the supply of buses to the operator would amount to 'supply of tangible goods for use'<sup>6</sup> 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 buses provided by the appellant to the operators would amount to supply of STGU/transfer of good for hire service, as the effective control over the buses remained with the appellant.

15. 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.

16. 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"

17. 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."

18. 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;**"

19. 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.

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 that 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. It would be useful to examine decisions involving this issue.

26. In **G.S. Lamba & Sons, Mr. Gurusharan Singh Lamba and others vs. State of Andhra Pradesh**<sup>7</sup> 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.

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

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**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)**

27. In **Petronet LNG Ltd. vs. Commissioner of Service Tax, New Delhi<sup>8</sup>**, 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.**

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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)

28. In **Gimmco Ltd vs. Commissioner of Central Excise and**

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8. 2016 (46) S.T.R. 513 (Tri.-Del.)

**Service Tax, Nagpur**<sup>9</sup> 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)**

29. In **Dipak Nath vs. Oil and Natural Gas Corporation Ltd.**

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**9. 2017 (48) STR 476 (Tri.-Mum.)**

**and others**<sup>10</sup> , 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

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**10. 2009 (11) TMI 834-Gauhati High Court**

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 20<sup>th</sup> Century Finance Corpn. Ltd. (supra), constitutes the taxable event under article 366(29A)(d) of the Constitution.”

**(emphasis supplied)**

30. 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 purview 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.

31. It will also be useful to refer a recent decision of the Supreme Court in **Commissioner of Service Tax, Delhi vs. Quick Heal Technologies Limited**<sup>11</sup>. After referring to the decisions of the Supreme Court in **Tata Consultancy Services vs. State of Andhra Pradesh**<sup>12</sup>, **Bharat Sanchar Nigam Limited** and other decisions, the Supreme Court observed as follows:

"51. The following principles to the extent relevant may be summed up:

(a) The Constitution (Forty-sixth) Amendment Act intends to rope in various economic activities by enlarging the scope of "tax on sale or purchase of goods" so that it may include within its scope, the transfer, delivery or supply of goods that may take place under any of the transactions referred to in sub-clauses (a) to (1 of Clause (29A) of Article 366. The works contracts, hire purchase contracts, supply of food for human consumption, supply of goods by association and clubs, contract for transfer of the right to use any goods are some such economic activities.

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

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

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

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

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

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**11. Civil Appeal No. 5167 of 2022 decided on: 05.08.2022**  
**12. (2005) 1 SCC 308**

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

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

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

52. From the judicial decisions, the settled essential requirement of a transaction for the transfer of the right to use the goods are:

(i) it is not the transfer of the property in goods, but it is the right to use the property in goods;

(ii) Article 366(29A)(d) read with the latter part of the clause

(29A) which uses the words, "and such transfer, delivery or supply"... would indicate 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 the 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;

(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, licenses, etc., vests in the lessee."

32. A perusal of the agreements entered into by the appellant with the Operator will reveal that the buses had to be procured by the Regulator and the possession of the buses was to be handed over by the Regulator to the Operator in accordance with the terms of the agreement. The Operator had the right to use the

buses for the purpose of implementation of project. The role, responsibilities and obligations of the Regulator and the Operator are contained in clause 7 of the agreement. It provides that the Operator shall take possession of the buses for the purpose of operating and maintaining the bus service. The Operator has to ensure that buses are maintained in clean, safe and reliable condition during the term of the agreement. The Operator has to provide all equipments, fuel consumable, machine or material that is required for uninterrupted and continuous operation, management and maintenance of the bus service. All costs, including cost relating to the equipment, material and consumable goods have to be borne by the Operator. The Operator has to ensure that the buses are maintained in the road-worthy condition that would ensure safe operation of the buses and also ensure uninterrupted continuous service. The Operator has to ensure that the employees, workmen, personnel and staff employed for the purposes of the implementation of the project have the necessary qualification and shall be solely and exclusively responsible for all such employees. The Operator has to enforce a dress and appearance code and provide at his own cost coats, uniforms and shall ensure that only clean uniforms are worn by drivers, conductors and any other personnel and staff employed at all times when they are on duty. The Operator has also to ensure that all personnel and staff are under constant supervision to enable a safe bus service to the public.

33. Merely because the Operator can obtain loan through hypothecation to the extent of 30% of the bus cost would not

mean that the Operator would not have affective control or possession of the buses. Similarly, if after the expiration of the term provided in the agreement, ownership of buses is transferred to the Operator at a residual value equivalent to certain percentage of the original cost of the buses would not mean that the Operator does not have the possession and effective control over the buses during the subsistence of the agreement.

34. It is more than apparent from the aforesaid clauses of the agreement that the agreement seeks to transfer the right of possession and effective control as also the right to use the buses upon the Operator. Thus, the transaction contemplated in the agreement between the appellant and the operator would qualify as a transfer of right to use the buses with effective control and possession.

35. Thus, for all the reasons stated above, it is more than apparent that the supply of buses to the Operators 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 order passed by the Principal Commissioner, therefore, cannot be sustained.

36. In view of the aforesaid, it would not be necessary to examine the other contentions raised by the learned counsel for the appellant that it was the private operators that were required to discharge service tax liability under the reverse charge mechanism or that the extended period of limitation, could not have been invoked.

37. The impugned order dated April 24, 2017, passed by the Principal Commissioner, therefore, cannot be sustained and is set aside. Service Tax Appeal No. 51218 of 2017 and Service Tax Appeal No. 51217 of 2017 are, accordingly, allowed.

**(JUSTICE DILIP GUPTA)  
PRESIDENT**

**(HEMAMBIKA R. PRIYA)  
MEMBER (TECHNICAL)**

Archana