

DEEMED SALE & SUPPLY OF TANGIBLE GOODS FOR USE

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Deemed Sale

- Article 366(29A) (d) of Constitution:

“tax on the sale or purchase of goods includes 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”

- Constitution (Forty-sixth Amendment) Act, 1982

- Circular No. 334/1/2008-TRU dated 29.02.2008:

“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 to the user of the goods.”

- Has become ‘deemed service’ under GST Law (Schedule II 5(f) CGST Act)

Rashtriya Ispat Nigam Ltd. v. Commercial Tax Officer

[1990]77STC 182(AP)

Facts:

- Petitioner owns Visakhapatnam Steel Project. For the purpose of the project, it allotted different works to contractors .
- In order to facilitate work, petitioner supplied machinery to contractors and received hire charges for same
- Issue: scope of exigibility of sales tax under section 5-E of the Andhra Pradesh General Sales Tax Act, 1957 on the hire charges collected.
["5-E -Tax on the amount realised in respect of any right to use goods."
- Deemed Sale is the basis of exigibility of tax under section 5-E]

“transfer of possession and effect control”

- "The transfer of a right is an event which has a double aspect. It is the acquisition of a right by the transferee, and loss of it by the transferor. The vestitive fact, if considered with reference to the transferee is a derivative title, while from the point of view of the transferor it is an alienative fact."

---(Salmond on Jurisprudence - Twelfth Edition at pages 332 and 333.)

The Great Eastern Shipping Co. Ltd. v. State of Karnataka and Ors.

2019 SCC OnLine SC 1547

Facts:

- Great Easter Shipping Co. owns a tug. It entered into a Charter party Agreement with New Mangalore Port Trust in 1998.
- Agreed to make available the services of tug, for the purposes provided in the agreement along with the master and other personnel of the Company to the Port trust for 6 months.

Issue:

- Whether the Time Charter Agreement in question amounts to transfer of right to Use Goods (Deemed Sale) and whether Sales tax is leviable under section 5C of the Karnataka Sales Tax Act 1957?

Held:

- *“The submission that all charter party agreements are service agreements cannot be accepted as there is no general invariable rule/ law in this regard. It depends upon the terms and conditions of the charter party agreement” (Para 43)*
- *“In a charterparty by demise, it may be charter without master or crew or bareboat charter, and another may be a charter with master and crew under which ship passes to the charterer for the purposes of mercantile adventure. As held in this case, full control has been given, and use is exclusively for the charterer. He has the right to use the space and burden. The discussion in Halsbury's Laws of England, 4th Edn., Vol. 43, also makes it clear that at each and every charterparty need not be a service contract to provide services only.” (Para 52)*
- *“we hold that the Charter Party Agreement tantamount to a deemed sale as there was a transfer of right to use the vessel as provided in Article 366 (29A) (d) read with Section 5C or Section 2 (j) of the KST Act. Thus, the transaction is liable to be taxed by the concerned authorities in the State of Karnataka.”*

In Corpus Juris Secundum "transfer" is defined as:

- “The common use of the word 'transfer' is to denote the passing of title in property, or an interest therein, from one person to another, and in this sense the term means that the owner of property delivers it to another person with the intent of passing the rights which he had in it to the latter.
- *The essence of transfer is passage of control over the economic benefits of property which results in terminating rights and other relations in one entity and creating them in another.*
- *While construing the word "transfer" due regard must be had to the thing to be transferred. A transfer of the right to use the goods necessarily involves delivery of possession by the transferor to the transferee.*
- *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.”*

Held:

- *“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”*

BSNL vs. UoI [2006 (2) STR 161 (SC)]

Test of ‘transfer of right to Use any Good’

- 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 of the statute, viz., a ‘transfer of the right to use’ and not merely a license to use the goods;
- Having transferred, the owner cannot again transfer the same right to others
- 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.

Held:

- *“75. In our opinion, the essence of the right under Article 366(29A)(d) is that it relates to user of goods. It may be that the actual delivery of the goods is not necessary for effecting the transfer of the right to use the goods but the goods must be available at the time of transfer, must be deliverable and delivered at some stage.*
- *It is assumed, at the time of execution of any agreement to transfer the right to use, that the goods are available and deliverable. If the goods, or what is claimed to be goods by the respondents, are not deliverable at all by the service providers to the subscribers, the question of the right to use those goods, would not arise.”*

Supply of Tangible Goods for Use (STGU)

- Section 65 (105) (zzzzj), Finance Act

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

- Taxable Service in respect of STGU- introduced in the Finance Act 2008- Notification No.18/2008- S.T. dated 10 May 2008 w.e.f 16 May 2008
- Dept's Interpretation as per Circular dated 29.02.2008:
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.
- 3 conditions have to be satisfied

Commissioner of Service Tax, Ahmedabad Vs. M/s Adani Gas Ltd [AIR2020SC4404]

Basic conditions to be a taxable service under STGU:

- (i) The provision of a service;
- (ii) The service is provided by a person to another person;
- (iii) The service is provided in relation to the supply of tangible goods, including machinery, equipment and appliances;
- (iv) There is no transfer of the right of possession;
- (v) Effective control over the goods continues to be with the service provider; and
- (vi) The goods are supplied for use by the recipient of the service.

Commissioner of Service Tax, Ahmedabad Vs. M/s Adani Gas Ltd (Contd..)

Facts:-

- Period of Dispute- 16 May 2008 to 31 March 2009.
- Respondent is in the business of distributing natural gas to industrial, commercial, and domestic consumers.
- The respondent installs an equipment described as 'SKID' at their customers' sites to facilitate the distribution of PNG to consumers through pipe
- The equipment regulates the supply of PNG being distributed and records the quantity of PNG consumed by the customer, which is then used for billing purposes
- The respondent enters into an agreement – the Gas Sales Agreement (GSA) - with consumers to whom gas is supplied by it
- Respondent had received income under the head of “gas connection charges” from its customers.
- From the GSA and the invoices, it was found that charges were collected for the “supply of pipes, measuring equipment etc.” while providing new gas connections to customers.
- SCN was issued to the respondent - transaction undertaken is “supply of tangible goods service”.

Commissioner of Service Tax, Ahmedabad Vs. M/s Adani Gas Ltd (Contd..)

“Use”

Dr. Dhananjaya Y. Chandrachud, J

- *“In the case of some articles, **use** may be signified by a physical operation of the article by the person who uses it. In such a case, actual physical use is what is meant by the supply of the goods for the use of another.*
- *In the case of others, the nature of the goods supplied impacts the character of the use to which the goods can be put. Thus, physical operation is not the only or invariable feature of use. As a corollary to the same, technical expertise over the goods in question is not a sine qua non for determining the ability of the consumer to use the good. Therefore, the expression “use” also signifies the application of the goods for the purpose for which they have been supplied under the terms of a contract.”*

Commissioner of Service Tax, Ahmedabad Vs. M/s Adani Gas Ltd (Contd..)

Held:

- “The SKID equipment fulfils the description in Section 65(105)(zzzzj) of a taxable service: service in relation to “tangible goods” where the recipient of the service has use (without possession or effective control) of the goods.” -STGU

Analysis:

- Was there a delivery of right of possession?
 - Adani collected “refundable interest-free security deposits towards safe-keeping of the meter” from the customers
 - Customer was responsible for the safe custody of the meter. So ‘Possession’ was with the Customer. But the “right of possession” remained with Adani as the effective control was with Adani.
 - Seventh Condition - Custody

4. “Possession”

- Avtar Singh v. State of Punjab

- ✓ *“The word 'possession' no doubt has different shades of meaning and it is quite elastic in its connotation. Possession and ownership need not always go together but the minimum requisite element which has to be satisfied is **custody or control** over the goods “*
- Supdt. and Remembrancer of Legal Affairs, West Bengal v. Anil Kumar Bhunja
- ✓ *“Possession” is a polymorphous term which may have different meanings in different contexts.*
- ✓ *“Possession”, implies a right and a fact the right to enjoy annexed to the right of property and the fact of the real intention. It involves power of control and intent to control.*

Scope of ‘Supply of Tangible Goods for Use’ service

Circular No. 334/1/2008-TRU dated 29.02.2008]

- “Excavators, wheel loaders, dump trucks, crawler carriers, compaction equipment, cranes, etc., offshore construction vessels & barges, geo-technical vessels, tug and barge flotillas, rigs and high value 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.
- Proposal is to levy service tax on such services provided in relation to supply of tangible goods, including machinery, equipment and appliances, for use, with no legal right of possession or effective control.
- Supply of tangible goods for use and leviable to VAT / sales tax as deemed sale of goods, is not covered under the scope of the proposed service.
- Whether a transaction involves transfer of possession and control is a question of facts and is to be decided based on the terms of the contract and other material facts. This could be ascertainable from the fact whether or not VAT is payable or paid.”

The Finance Act 1994

Section 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 (29A) of article 366 of the Constitution;

Section 66E. Declared services. — 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;

Notifn No. 11/2017-Central Tax (Rate) GST dated 28.06.2017

--as amended upto 16th October, 2020

- **Entry 8 - Heading 9964** (Passenger transport services)

(v) Transport of passengers by air, with or without accompanied belongings, in other than economy class.

Rate – 6% + 6%

- **Entry 10 - Heading 9966** (Rental services of transport vehicles with operators)

(iii) Rental services of transport vehicles with operators (other than motor vehicles to carry passengers and Time charter of vessels for transport of goods.)

Rate- 9%

- **Entry 15 - Heading 9971** (Financial and related services)

(ii) 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

(iii) Any transfer of right in goods or of undivided share in goods without the transfer of title thereof.

Rate of (ii) and (iii) : Same rate of central tax as on supply of like goods involving transfer of title in goods

- **Entry 17 - Heading 9973**

(Leasing or rental services without operator)

(iii) 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.

(iv) Any transfer of right in goods or of undivided share in goods without the transfer of title thereof.

Rate of (iii) and (iv): Same rate of central tax as on supply of like goods involving transfer of title in goods (Aircrafts-2.5% + 2.5%)

(vi) Leasing of motor vehicles purchased and leased prior to 1st July 2017

Rate- 65 % of the rate of central tax as applicable on supply of like goods involving transfer of title in goods.

Note:- Nothing contained in this entry shall apply on or after 1st July, 2020.

CGST Act 2017

Schedule II

- **Entry 1(b):** any transfer of right in goods or of undivided share in goods without the transfer of title thereof, is a supply of services;

---- Covered under Heading 9971 (iii) and Heading 9973(iv) of Notif No. 11/2017-Central Tax (Rate) GST dated 28.06.2017

- **Entry 5.** Supply of services : The following shall be treated as supply of services, namely:—
(f): **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.

----Covered under Heading 9971 (ii) and Heading 9973(iii) of Notif No. 11/2017-Central Tax (Rate) GST dated 28.06.2017

Global Vectra Helicorp Ltd. V Commissioner of Service Tax, Mumbai
(2015)86VST279(CESTAT-Mum):

- Para 5.2: *“There is no dispute that helicopters were mobilized/delivered by the appellant to their clients without transferring the right of possession and effective control for use by the clients. Therefore, the services rendered by the appellant to their clients in respect of charter-hire of helicopters would come under the purview of supply of tangible goods for use as defined in section 65(105)(zzzzj) of the Finance Act, 1994.”*
- Held: services rendered in respect of charter hire of helicopters would come under the purview of supply of tangible goods for use

Lakshmi Audio Visual Inc v. Assist Commissioner of Commercial Taxes

[2001]124STC 426(Kar)

Issue: 'Transfer of right to use such goods' (Deemed Sale) ?

- *"The transfer of the right to use the goods, which may be by way of leasing, letting or hiring, involves the transferor permitting the transferee (lessee/hirer) to use his goods.*
- *To constitute such transfer, there should be delivery of possession of the goods by the transferor to the transferee, that is transfer of the effective and general control of the goods with the right to use the goods, as distinct from a mere custody of the goods, from the transferor to the transferee. But, such transfer need not be a "legal transfer of the goods" nor have all trappings of a "lease".*
- *The question whether there is such transfer or not is essentially a question of fact which has to be determined with reference to the terms of the contract governing the transfer of the right to use goods.*
- *The nomenclature of the agreement may not be relevant. Even if the agreement used the title "License agreement" but the terms provide for transfer of effective control to the customer, then the transaction will be a transfer of the right to use the goods and thus a deemed sale"*