BEFORE THE JUDICIAL MEMBER-I: ODISHA SALES TAX TRIBUNAL: CUTTACK.

S.A. No. 53(V) of 2014-15

(Arising out of the order of the ld. Add. CST (Appeal), South Zone, Berhampur, in Appeal Case No. AA(VAT)-31/2011-12, disposed of on dtd.30.11.2013)

P r e s e n t: **Shri S. Mohanty,**
1st Judicial Member

State of Odisha, represented by the Commissioner of Sales Tax, Odisha, Cuttack. ... Appellant

- V e r s u s -

M/s. Surya Machinery,
At:- Plot No.86, Budheswari Colony,
Bhubaneswar. ... Respondent

For the assessment period: 01.04.2005 to 30.04.2010

For the Appellant ... Mr. S.K. Pradhan, A.S.C.
For the Respondent ... Mr. K.C. Jena, A.R.

Date of hearing: 23.07.2019 **** Date of order: 23.07.2019

O R D E R

This appeal is preferred against the order of first appellate authority passed in an assessment u/s.42 of the Orissa Value Added Tax Act, 2004 (hereinafter referred to as, the OVAT Act) relating to the respondent-dealer covering tax period 01.04.2005 to 30.04.2010.

2. In short the fact giving rise to the present appeal may be stated as follows:-

On the basis of Audit Visit Report (in short, the AVR) with different allegations suggesting audit assessment, the Deputy Commissioner of Sales Tax, Bhubaneswar Circle, Bhubaneswar as

assessing authority assessed the dealer u/s.42 of the OVAT Act. The allegation as per AVR are as follows:-

(1) The dealer has not paid VAT on transportation charges separately charged on invoices amounting to Rs.31,000.00.

(2) The dealer has not reflected the sales of scrap in the periodical returns. Some tax had been collected by the STO, Investigation Unit, Bhubaneswar and the balance amount is to be collected.

(3) The dealer has collected hire charges of Rs.8,23,200.00 but has not paid VAT on the same.

(4) The dealer has collected Rs.17,29,974.00 towards repair and maintenance charges of machinery but has not reflected the same in the books of accounts. As per the AVR, the dealer is liable to pay tax on 20% of the said amount at the appropriate rates of 4% and 12.5%.

(5) The dealer has availed excess ITC of Rs.1,832.00.

In ultimate analysis, the assessing authority raised demand of balance due from the dealer at Rs.76,61,686.98. However, since the dealer was allowed ITC of Rs.31,73,534.64 and had deposited a sum of Rs.44,88,153.00, the dealer was assessed to nil.

3. When the matter stood thus, the dealer preferred appeal before the first appellate authority challenging the sustainability of the order of the assessing authority with a claim of refund. The first appellate authority vide impugned order, on recalculation of tax liability held that, the dealer is entitled to get refund of Rs.1,02,900.00. The findings in all the issues raised before the first appellate authority are accepted by the dealer, whereas Revenue has challenged the sustainability of the finding on question like, the hire charges against machinery given on rent is not covered under deemed sale as per Sec.2(45)(f) of the OVAT Act. The dealer has advanced cross objection in support of the impugned order.

4. The contention of the Revenue in this appeal is, whether the hire charges received against the machinery given to the contractor for use amounts to a transfer of the right to use for cash in the facts and circumstances of the present case. Admittedly, the dealer had collected hire charges of Rs.8,23,200.00 but has not paid VAT on the same. The dealer had given machineries on a rental basis to different parties. The machineries given on rent were run by the dealers own labour. After the agreement period with the parties is over when the machines were returned back to the dealer, the dealer had sold those machines. Such being the admitted facts, according to the Revenue, the hire charges received against the transfer of right to use as per the mode above amounts to deemed sale u/s.2(45)(f) of the OVAT Act.

Per contra, claim of the dealer is, at each point of time, possession and control over the machines were remained with the dealer, the machines were suffered with tax inside the State and on sale the dealer had paid VAT only. Thus, the hire charges collected does not comes under category of sale and even otherwise tax on hire charges amounts to double taxation.

5. Transfer of Right to use goods for cash, deferred payment or valuable consideration is considered as deemed sales under sub-clause (d) of Article 366(29A) of Constitution of India and also consequently under Punjab VAT Act and CST Act liable to VAT and CST respectively.

Right to use of tangible goods service has also been brought under service tax net by the Finance Act, 2008, w.e.f 16-05-2008 vide **notification No. 18/2008-ST, dated 10-05-2008**.whereby taxable service has been defined u/s 65(105)(zzzzj) of Finance Act, 1994 to mean as *"any services 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".

The settled law is that one transaction can be either a service or a sale hence both VAT and service tax cannot be levied on the same transaction. When Transfer of right to use is a deemed sales: The phrase "transfer of right to use" any goods for any purpose is of great significance to impose tax on it as deemed sales. It means in case of transfer of right to use goods all the rights except the ownership rights are transferred by the transferor to the transfree so as to enable him to use the goods at his own will to the exclusion of the transferor. The Hon'ble Supreme court in **BSNL vs Union of India (2006) 145 STC 91 (SC)** held as under:

To constitute a transaction for the transfer of right to use goods, 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 goods;

c. The transferee should have a legal right to use the goods- consequently all legal consequences of such use including any permissions or licenses required therefor should be available to the transferee;

d. For the period during which the transferee has such legal right, it has to be for the exclusion to the transferor this is the necessary concomitant of the plain language of the statue – viz. a "transfer of the right to use" and not merely a licence to use the goods;

e. Having transferred the right to use goods during the period for which it is to be transferred, the owner cannot again transfer the same rights to others.

The judicially evolved principles to identify a transaction involving the transfer of right to use goods to be a sale clearly exclude the indispensability of delivery of physical possession thereof an essential precondition. Similarly in **20th century Finance Corporation Limited v State of Maharashtra-** 2000 (6) SCC 12 at 44 ruled that-

> *"(c) Where the goods are available for the transfer of right to use the taxable event on the transfer of right to use any goods is on the transfer which results in right to use and the situs of sale would be the place where the contract is executed and not where the goods are located for use.*
> *(d) in cases where goods are not in existence or where there is an oral or implied transfer of the right to use goods, such transactions may be effected by the delivery of goods. In such cases the taxable event would be on the delivery of goods".*

The important attribute constituting Transfer of right to use goods as deemed sales is that there should be transfer of effective control and possession of the goods. If the owner retains effective control over the equipment, it is not a transfer of right to use. So the intention of the parties, mode of use and several other surrounding and relevant aspects have to be considered to come to the conclusion whether or not under a particular contract, there is transfer of right to use any goods. A mere contract of hiring, without transfer of control, may be a contract of bailment and not a contract for transfer of right to use goods. Transfer of a right to use goods implies that full liberty is vested in the transferee to have the right to use goods to the exclusion of all other including the owner of goods. In State of **A.P. vs. Rashtriya Ispat Nigm Limited (RIN) (2002) 126 STC 114(SC) Rashtriya Ispat Nigam Limited** allotted different works of the steel projects to contractors. To facilitate the execution of work by the contractor with the use of sophisticated machinery, RIN undertook to supply machinery to the contractor for the purpose of being used in the execution of the contracted work of the petitioner and received charges for the same.

The taxation authorities made assessment leving tax on the hire charges because the machinery was given in possession of the contractor and he was responsible for any loss or damage to it and, therefore, concluded that there was transfer of property of goods for use for a specified purpose and for a specified period for money consideration. The Hon'ble Court has held as follows:-

> *"In our view, whether the transaction amounts to transfer of right or not cannot be determined with reference to a particular word or clause in the agreement. To determine the nature of transaction, the agreement has to be read as a whole. From a close reading of all the clauses in the agreement, it appears to us that the contractor is entitled to make use of the machinery for purposes of execution of the work of the petitioner and there is no transfer of right to use as such in the favour of contractor because the effective control of the machinery even while the machinery is in 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 petitioner's possession and control of machinery. Therefore, the transaction does not involve transfer of the right to use the machinery in favour of the contractor."*

6. On application of settled principle as derived from the authoritative pronouncements time to time discussed above when it applied to the present case in hand, it can safely be said that, at no point of time the dealer had given scope to the persons to use the machines as they likes in their own way. The domain over the machineries given on rent all along. So, the hire charges does not fall under the ambit of Sec.2(45)(f) of the OVAT Act as claimed by the Revenue.

7. Needless to mention here that, learned first appellate authority has made a confusing observation by application of wrong provision such as Sec.2(46) of the OVAT Act to this issue but when the ultimate finding is correct, the impugned order cannot be interfered with, hence ordered.

The appeal is dismissed as of no merit.

Dictated & corrected by me,

Sd/-
(S. Mohanty)
1st Judicial Member

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