

BEFORE DELHI VALUE ADDED TAX, APPELLATE TRIBUNAL DELHI

Sh. Narinder Kumar, Member (Judicial)

Appeals No. :615-616/ATVAT/2008

Appeal No. 605/ATVAT/2008

Date of Judgment: 22nd of July, 2022

M/s. Libra Bus Services Pvt. Ltd.,
1602, Pilli Kothi,
S.M. Mukherji Marg,
New Delhi.

.....Appellant

v.

Commissioner of Trade & Taxes, Delhi

.....Respondent

Representing the Appellant : Sh. A.K. Batra, CA.
Counsel representing the Revenue : Sh. P. Tara.

JUDGMENT

1. This common judgment is to dispose of all the above captioned 3 appeals, filed by the same dealer-assessee, as the same involve same question of law.

Appeal No.615-616/2008

2. Dealer-assessee-objector-appellant is in the business of providing vehicles on rental basis. It is alleged to have entered into agreements with Delhi Transport Corporation (hereinafter referred to as "DTC") for providing buses to the said



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Corporation as per terms and conditions specified therein on rental basis.

3. Vide order dated 18/04/2008, learned VATO (Special Zone) framed default assessment of tax and interest, u/s 32 of DVAT Act and levied tax @ 12.5%, relating to the tax period 2005-2006.

At the same time, learned VATO levied penalty of Rs. 1 lakh, due to the reason that the dealer had failed to get itself registered in time during the said period, and actually obtained registration w.e.f. 25/05/2007.

4. Feeling aggrieved by the said assessments, the dealer filed objections u/s 74(1) of DVAT Act. The objections came to be rejected while upholding the assessments made by Assessing Authority. Leaned OHA disposed of the objections while observing in the manner as:

“In my view, all the above said attributes are getting fulfilled in the transactions undertaken by the objector. The vehicles provided by the objector to clients were goods. When the vehicles were placed at the disposal of client, transfer of property in goods took place and the said transfer of property in goods (providing of vehicles to clients) was in lieu of valuable consideration. Thus all

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the three attributes get fulfilled in the transactions undertaken by the appellant.

Keeping in view the definition of 'goods' as contained in Section 2(m) of the DVAT Act, 2004 and above said observation of Hon'ble Supreme Court, it is abundantly clear that the vehicles provided by the appellant to their clients are definitely covered under the definition of the word 'goods' and hence the challenge of the objector is misplaced and the same is therefore repelled.

On perusal of the order of VATO, Special Zone and relevant clauses of the agreement entered into between the objector and the Delhi Transport Corporation and the case laws referred by the VATO in his order dated 15.4.2008, it is clear that the said agreement has been executed in Delhi and goods were in Delhi and the complete control, possession and supervision of the goods was handed over by the objector to the corporation in Delhi. A careful consideration of the agreement leaves no doubt that the taxable event occurred in Delhi and that the objector is effecting transfer of right to use goods and, is, therefore, liable to pay VAT under the provisions of DVAT Act, 2004.

As regard imposition of penalty of Rs. 1,00,000/- u/s 86(4) for getting late registration, it is observed that the objector had entered into agreement with DTC on 28.10.2004 and 18.1.2005 for providing buses on hire basis. The said activity was covered under the definition of sale as per provisions of Section 2(zc)(vi) of DVAT act, 2004. Accordingly, the objector was liable to get registration under the provisions of said Act w.e.f., 1.4.2005. It is



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a matter of record that the objector had applied for registration w.e.f., 25.5.07 i.e., late by more than two years and had thus become liable for imposition of penalty under section 86(4) of DVAT Act, 2004. Hence, the penalty imposed by the VATO is as per the provisions of Section 86(4) of DVAT Act, 2004.

I have gone through the objections filed by the dealer u/s 74(1) of the DVAT Act, the agreement entered into between the objector and the Delhi Transport Corporation, documents submitted in support of his claim and have also heard the arguments of the Counsel for the objector. The default assessment orders of tax & interest and penalty passed by VATO/SZ are detailed and well reasoned orders and are supported by judgements of High Courts and the Apex Court, which have been referred to and discussed in orders dated 15.04.2008 of VATO (SZ). The said orders are, therefore, valid and lawful. Hence, the default/penalty assessments made by VATO/SZ are upheld and the objections filed by M/s. Libra Bus Services Pvt. Ltd., in this regard are rejected. It is held accordingly.”

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5. Dealer – appellant has filed this appeal feeling aggrieved by order dated 06/10/2008 passed by Addl. Commissioner-I - Learned Objection Hearing Authority.



6. Vide impugned order, objections filed by the dealer under section 74 of DVAT Act have been rejected. Objections were

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filed against default assessments framed by Learned Assessing Authority. Default assessments were framed on 1/5/2008 under section 32 of DVAT Act, relating to the tax period 2006-07.

7. In the assessment order dated 01/5/2008, learned Assessing Authority observed in the manner as –

“The agreement dated 28/10/2004 states that the bus body shall be built according to the specifications prescribed by the corporation. The buses shall remain in the possession of the corporation and the owner (as per clause 20) is not authorized to withdraw the bus from operation without the prior and written consent of the Corporation and if for major repairs of the bus the owner will required the consent of the Corporation.

Clause 35 of the agreement leaves no doubt about the nature of transaction. In this clause, the owner has agreed that during idle time the bus shall be parked at the parking place of the Corporation and further the bus at all times shall remain under surveillance and security personnel of the Corporation. This clause further provides that maintenance and even minor repairs of the bus shall be carried out by the owner with the permission and under supervision of the Corporation and its security personnel. Even the owner has no right to make any other person travel in the bus except those allowed by the Corporation of the bus.....,

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In clause 31, the Corporation is at liberty to fix and change the route and timings of the operation of the bus at its sole discretion.....”

8. In the impugned order dated 6/10/2008, learned OHA observed in the manner as :

“I find that the clause with regard to the parking of the buses/vehicles at the parking space of the Corporation, clause relating to colour scheme of the buses, clause relating to at liberty to fix and change the route and timings of the operation of the bus at its sole discretion of corporation and clause relating to maintenance clearly indicates that control of the bus remains vested in the transferee for the duration specified in the agreement. Therefore, the contention of the objector that he has not transferred the control of the bus to the corporation is not acceptable.

3. In order to examine the contention of the objector that by agreeing to clause 26(ii) of the agreement he has not transferred the control of the vehicles, clause 26 (ii) is reproduced below :

“26.(ii) The owner shall not use the bus covered by this agreement for any other purpose at any time during the period of agreement.”

I find that clause 26(ii) clearly holds that the effective control of the vehicle remains vested in the transferee for the duration



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specified in the agreement. Therefore, the contention of the dealer that he has not transferred the control of the bus to the Corporation, is not acceptable.

In view of determination No. 178/CDVAT/2007/8 dated 15/01/2008 of the learned Commissioner, T&T, Govt. of NCT of Delhi in case of **M/s Sehgal Tourist** wherein the learned Commissioner has held that the crucial determinative aspect of right to use of goods is parting of the effective control, the objector is liable to pay VAT for right to use of the goods.

In order to examine the contention of the objector that his case is similar to that of **Rashtriya Ispat Nigam Ltd.**, it would be worthwhile to reproduce the relevant part of the judgment of the Hon'ble Supreme Court in the case of **Rashtriya Ispat Nigam Ltd. v. Commercial Tax Officer, Company Circle, Vishakhapatnam**, the Hon'ble High Court of Andhra Pradesh – 1990 77 STC 182 at page 186-187;

“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.



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. Delivery of possession of a thing must be distinguished from its custody. It is not uncommon to find the transferee of goods in possession while transferor is having custody.

When a taxicab is hired under "rent-a-cab" scheme, and a cab is provided, usually driver accompanies the cab; there the driver will have the custody of the car though the hirer will have the possession and effective control of the cab.

This may be contrasted with the case when a taxi car is hired for going from one place to another. There, the driver will have both custody as well as possession; what is provided is service on hire.

In the former case there was effective control of the hirer (transferee) on the cab whereas in the latter case it is lacking. We may have many examples to indicate this difference.

Whether there is a transfer or 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."



Perusal of various clauses of the agreement as quoted by the VATO in his order dated 1/5/2008 reveal that transferee is having

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effective control of the vehicle, therefore, in light of the judgment of the Hon'ble Supreme Court in the case of Rashtriya Ispat Ltd. described above the objector is liable to pay VAT under the DVAT Act, 2004 under the transfer of the right to use.

Hence, in view of the determination of the Id. Commissioner as mentioned above and law laid down by the Apex Court, I am of the considered view that the argument of the objector that he is not liable to pay VAT under the DVAT Act 2004, is not sustainable and therefore, objection filed by the objector is rejected. The order of the VATO Special Zone for levying tax under section 32 of the DVAT Act 2004 is upheld accordingly.”

9. Hence these appeals.
10. Arguments heard. File perused.
11. Learned CA for the dealer-appellant has contended that this is a case where effective control and possession of the buses of the dealer-appellant was never transferred to DTC, but learned Joint Commissioner has wrongly held otherwise in upholding the demands of tax, and as such the impugned assessments and the impugned order be set aside.

In support of his contention, learned CA has referred to the following decisions:

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Hari Durga Travels vs. Commissioner of Trade & Taxes, Delhi, 2015(5)TMI461 (Delhi)

Kunhayammed and Ors. vs. State of Kerala and Ors., (2000)245ITR360(S.C.)

Shiv Om Shipping Agency vs. Commissioner of Customs, Mumbai, 2012(284)E.L.T.703(Tri.-Mumbai)

Commissioner of Cus. (Import), Mumbai, vs. Tata Infotech Ltd. 2016 (335)E.L.T.487 (Tri.-Mumbai)

Commissioner, VAT, Trade and Taxes Department vs International Travel House Ltd (2009) 25VST 653 (Delhi);

Learned CA has submitted that in the decisions of **Hari Durga Travels** and **International Travel House Ltd.'s** cases (supra), facts were exactly the same, arising out of same terms and conditions of the agreements, but the Department and learned OHA erred in treating the transaction as that of sale of goods whereas the transaction was of service. The contention is that in view of the said decisions, the impugned order passed by the learned OHA deserves to be said aside.

12. So far as decision in **International Travel House Ltd.'s** case (supra) is concerned, Learned CA for appellant has submitted that therein it was observed that the transaction lacked all elements of sale as the licenses and permissions with respect to the goods remained always in effective control and possession of International Travel House Ltd., and not that of NDPL.



13. In **International Travel House Ltd.**'s case (supra) reference was made to the decision in **Bharat Sanchar Nigam Ltd. vs. Union of India**, (2006) 3 SCC 1.

In the former case, NDPL is stated to have hired Maruti Omni Cabs. It was held by our own Hon'ble High Court that hiring of cars in that case was to be treated as provision of service only, and no VAT was leviable, there being no transfer of right to use the goods.

While referring to decision in BSNL's case (supra) and applying the law, our own Hon'ble High Court observed in the manner as:

"The admitted position which emerges is that the transferee, namely NDPL, has not been made available the legal consequence of the legal right to use the goods viz. the permissions and licences with respect to the goods. In the present case, the permissions and licences with respect to the Cabs are not available to the transferee and remained in control and possession of the respondent. It is the Driver of the vehicle who keeps in his custody and control the permissions and licences with respect to the Maruti Omni Cabs or the said permissions and licences remained in possession of the respondent. These are never transferred to M/s. NDPL. It, therefore, cannot be said that there is a sale of goods by transfer of right to use goods inasmuch a necessary ingredient of the sale being the transfer of right to use



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the goods is absent, namely, ingredient as stated in para 97(c) of the BSNL's case. The judgments which were cited during the course of arguments, namely, State of A.P. v. Rashtriya Ispat Nigam Ltd. MANU/SC/0163/2002: (2002) 3 SCC 314 and Aggarwal Bros. v. State of Haryana MANU/SC/1091/1999: (1999) 9 SCC 182 have been duly explained by the Supreme Court in BSNL's case. The crucial factor in this regard differentiating the two cases was the intention to transfer the right to use. Whereas in the case of Rashtriya Ispat Nigam Ltd., there no intention to transfer the right to use, in the case of Aggarwal Bros. it was found that there was an intention to transfer the right to use. In the present case, the judgment of Aggarwal Bros. does not help the appellant inasmuch as there is no intention to transfer the right to use the goods because the licences and permissions with respect to the goods, namely, the Maruti Omni Cabs remained always in the effective control and possession of the respondent and not NDPL."

Consequently, the Hon'ble Judge held that the transactions in that case were not of sale of goods as envisaged in Article 366(29A)(d) of the Constitution of India and further that the composite contracts could not be split up by taking from it the value of the goods for the purpose of taxing the same under DVAT Act.

14. As to the meaning of expression "transfer of right to use the goods", adverting to decision in BSNL's case (supra), relied upon by learned counsel for the Revenue as well, particularly,



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paragraph 97 Hon'ble Mr. Justice, (Dr.) A.R. Lakshmanan, of Hon'ble Apex Court observed in the manner as:

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

- a. there must be goods available for delivery;
- b. there must be a 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 permissions or licences 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 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 licence 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.”

15. As noticed above, it depends upon facts of each case as to whether it is or is not a case of transfer of right to use the goods.



Let's find out if, on the basis of material available on record, the aforesaid attributes stand or do not stand proved in this matter.

Whether this is a case pertaining to goods available for delivery?

16. Admittedly, two agreements were executed whereby DTC took on hire specific Volvo Buses of the appellant for a specified period and for specified route.

As per agreement dated 28/10/04, bus bearing registration No. DL 1 PC 0786 which was to be operated / plied on Delhi – Lahore route for transporting passengers as per agreement signed on behalf of the Government of India and Government of Islamic Republic of Pakistan.

As per the other agreement dated 18/01/2005 two buses i.e one bearing Registration No. DL 1 PC 0787 and another DL 1 PC 0788 were to be operated on long distance interstate routes as per the approved scheme and provisions laid down in the agreement.

From the said agreements, it can safely be said that the same pertained to goods i.e. buses, which were available for delivery.



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In the course of arguments, no argument has been raised on behalf of the appellant that the buses were not available for delivery.

From the contents of the agreements, the first attribute mentioned above stands established.

Consensus *ad idem* as to the identity of goods :-

17. As noticed above, in the two agreements Registration number of each bus i.e. goods was specified. It has not been disputed by the appellant that both the parties i.e. dealer – appellant and DTC had consensus ad idem, as regards identity of the goods.

Transferee to have legal right to use the goods

Whether all legal consequences of use of the goods were available to the transferee?

18. This is the third attribute to consider a transaction of transfer of right to use goods as a transaction of sale.



On behalf of the appellant, the contention is that possession and effective control of the buses covered by the agreements remained with the owner-appellant, and as such it cannot be

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said that this is a case where the Corporation had the legal right to use the said buses.

Learned Counsel for the Revenue has pointed out that DTC had exclusive power and authority to ply and operate passenger transport bus on this route, and as regards the bus with specific registration number, on Delhi – Lahore route had approved schemes and provisions of the agreement between two countries, and as such only the Corporation had the legal right to use the said bus.

As regards the other two buses, with specific registration numbers specified in the other agreement, on Delhi-Katra route i.e. along interstate route, the Corporation had the ^{exclusive} legal right to use the said buses.

Counsel for the Revenue has also contended that not only possession of the buses was transferred by the appellant to the Corporation, the effective control as regards the said buses was with the Corporation. In this regard, counsel has referred to specific terms of the agreement dated 28/10/2004 in respect of Bus No. DL1PC 0786 i.e. clauses 1, 3, 20, 25, 26, 27, 29, 30, 35, & 37 between the parties.

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Almost similar clauses available in the agreement dated 18/1/2005, in respect of the other two buses No. DL1PC 0787 & DL1PC 0788 *have been relied upon.*

- No. 615/2008, relating to tax period 2005-2006 and*
19. Coming to the Appeal/*h* No. 605/2008, *h* pertaining to tax period *h* 2006-2007, *h* some of the relevant terms and conditions as contained in the agreements between the dealer-appellant and DTC read as under:

"1. The owner shall provide his/her New A.C. Delux bus (VOLVO) together with the driver on hire for being run on long Interstate routes with the following specifications:

- i) The bus shall be A.C. Delux having luxury 2x2 seats, heating system, CTV, DVD Music System, Ice Box, Clock, Roof luggage carrier/ spacious cabin, hat rack, pneumatic doors, ergonomically reclining seats, public address system etc.
- ii) The seating capacity of the bus shall be 41/45 seats.
- iii) The chassis and the Engine shall be new and be of the latest model in relation to the year of the agreement and shall conform to the specifications prescribed by M/s. Volvo India Pvt. Ltd.
- iv) The bus body shall be built according to the specifications prescribed by Corporation and at the Owners' own cost. He shall thereupon maintain all specifications during the operation of the agreement in consultation with M/s. Volvo India Pvt. Ltd.



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2. The bus provided by the owner shall have a HMV license driver in the employment of the owner. The salaries and emoluments and other service benefits of the driver shall be paid by the owner and shall be the responsibility of the owner alone. The driver's appointment by the owner shall conform to the requirements of the relevant statutes. All the formalities required related to the bus/driver/employee on this route shall be managed/borne by the owner.

4. (a) The driver provided by the Owner shall possess a valid HTV Driving license and P.S.V. Badge having at least 5 years past clear driving record of HTV. He shall wear proper uniform as prescribed by the Corporation from time to time. He shall scrupulously observe/follow the instructions issued by the Corporation. If and when the driver is found deficient in his behaviour or any other manner, the owner shall replace him immediately by another driver at the sole discretion of the Corporation. The driver shall be a bona fide employee of the owner to which an affidavit shall be given.

(b) The owner shall also provide backup driver, in case the original driver is unable to drive the bus.

7. The conductor of the Corporation of the bus is alone entitled to collect all fare and luggage charges etc. Neither the owner nor his driver shall have any claim to the fare and luggage charges or any amount so collected. Any other revenue accrued from operation (like advertising, telephone etc.) and shall also be credited to the Corporation and operator shall have no claim with respect of these.



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8. The owner shall keep his bus road-worthy in terms of Chapter-VII of the Motor Vehicles Act, 1988 and Rules made there under, as amended from time to time, by carrying out necessary maintenance and repairs at his own cost. At all times the bus must possess a Fitness Certificate/Pollution Control Certificate issued by appropriate authority. Further:

- i. The operator shall provide the bus in neat and clean and presentable condition for all trips.
- ii. The bus shall be provided with floor matting and headrest covers, which will be kept clean at all times.
- iii. The air-conditioner, heater and in house entertainment facilities shall be kept functional at all times and quality of air controlled as per passengers comfort.
- iv. The operator shall provide for loading and unloading of luggage of passengers at terminal point of the trips.
- v. The operator shall provide on board entertainment software.

11. The owner shall keep his bus duly insured under comprehensive insurance policy taken from any Public Limited Insurance Company specially disclosing the route to Insurance Company. All the MACT liabilities to crew, passengers, luggage and third party claims shall be covered under the insurance agreement.

12. It shall be the responsibility of the owner to produce the Driver/Bus in a Court of law and before the Police Authorities/Insurance Authorities whenever required in case of



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accident or any other contingency relating to Bus/driver or his employee.

13. The owner shall bear all the taxes in respect of regular MVI/Pollution etc./duties/levies as per Motor Vehicle Act. The passenger tax/Permit Fees/Toll Tax, City entry fees etc. if any will be borne by the Corporation.

14. The owner alone shall be liable for any claim arising from accident, damage, or loss caused during the operation of the bus. The Corporation shall not be liable to answer any such claims including claims made in connection with the injuries or loss of life sustained by passengers or any other road user. Besides, all torturous liability shall be borne by the owner or his insurance company.

17. The owner shall not withdraw the bus from operation without prior written consent of the Corporation.

26. (ii) The owner shall not use the bus covered by this agreement for any other purpose at any time during the period of agreement. .

27. The owner shall not transfer or otherwise alienate the vehicles during the period of agreement except with the prior written permission of the Corporation.

29. The Corporation is empowered to specify the colour of paint of the bus provided by the owner. The owner thereon shall act accordingly. He shall also be responsible to display literature as provided by the Corporation both inside and outside the bus.

37. The owners of the bus shall abide by the orders of the Corporation or any officer authorized by it by a special or general



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order in regard to operation of the bus from time to time. The Corporation shall decide the schedule for operation and route on which the bus will be utilized from time to time and the same shall be binding on the owner of the bus."

20. In respect of Bus No. DL1PC 0786, of Delhi - Lahore route clause 35 of the agreement specifically reads as under :

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"35. The owner shall keep the bus parked during its idle time at the parking place to be provided by the Corporation. The bus shall at all times remain under surveillance of security personnel. The maintenance and minor repair of the bus shall be carried out by the owner with the permission and under supervision of the corporation & security personnel."

21. In Hari Durga Travels case (supra), following substantial question of law was framed by the Hon'ble High Court:

"Whether the agreement between the appellant and Delhi Transport Corporation giving on hire two Deluxe buses for being plied as per requirement of the latter on the routes and as per schedule specified its transfer of right to use of goods so as to be liable to VAT under Section 2(zc)(vi) of DVAT Act."



In that case, buses belonging to the petitioner -Hari Durga Travels were given to DTC on hire basis and Revenue raised demand on the basis of transfer of right to use the goods.

22. As noticed above, Learned CA submitted that the clauses of the agreement entered into between Hari Durga Travels and DTC were almost identical to the clauses of agreement arrived at

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between the parties in the present litigation. But, learned counsel for the Revenue has submitted that said case is distinguishable on facts having regard to the terms of the agreements arrived at between the parties in the two cases.

Is Hari Durga Travel's case distinguishable on facts?

23. Answer is yes.

In Hari Durga Travel's case, the assessee was to provide on hire to DTC specified buses with driver for long routes of DTC. Some of the terms and conditions of the agreement in that case find mention in paras 25,26,27,28 and 29 of the judgment.

What the Hon'ble High Court took into consideration therein can be summarized as under:

- that the owner of the buses had the responsibility of any mishappening or any accident;
- that the owner committed to be the bus owner at all times;
- the registration and licenses were in favour of the owner and most importantly, the DTC had limited use of buses i.e. to ply them in scheduled routes in terms of contracts that possession of the buses always remained with the owner;
- that the registration certificate remains continue to be in control and possession of the owner;

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-that it remained responsible for maintenance, repair etc. and also under took to indemnify the other party against any claim for loss or it may be on account of operation.

In view of the above terms and conditions/ contents of the agreement and the observations made therein, Hon'ble High Court concluded that "the rights conferred on DTC did not result in the goods being delivered to DTC at any stage."

Some of the extracts of the said decision read as:

"....33. Rashtriya Ispat Nigam Limited (supra) spells out that where even access or physical control of machinery or such like goods are made over, such a transaction by itself would not be transfer of the right to use if effective control is maintained by the owner.

.....In the present case, the owner bears responsibility for any mis-happening or accident.

It commits to be the bus owner at all times; the registration and licenses are in its favour and most importantly, the DTC has limited use for these buses, i.e. to ply them (of course through driver provided by the owner) at the scheduled routes in terms of the contract.

In these circumstances, this Court is of the opinion that the Tribunal could not have distinguished the decision of the Division Bench of this Court in International Travel House (supra).

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34. the various terms of the contract, summarized above, make it vividly clear that the possession has always remained with the owner.

..... The owner cannot withdraw the buses unilaterally nor send them for repairs and nor can alienate their ownership in favour of a third party, except by incurring penalties.

Undoubtedly, it is the obligation of the registered owner to make the vehicles available, with their respective drivers, for being deployed on routes, and as per schedule, specified by DTC.

The registration certificate and the permits continue to be in the control and possession of the owner. It remains responsible for maintenance, repairs, etc. and also keeps the other party indemnified against any claim for loss or damage on account of operations.

The rights conferred on DTC by such contract, therefore, do not result in the goods (vehicles) being "delivered" to DTC at any stage.

36. Thus, the contract in question does not pass the muster of Article 366(29A)(d) as held in the case of Bharat Sanchar Nigam Ltd. (supra) so as to be treated as transfer of a right to use the goods or a deemed sale.

37. For the above reasons, the contention of the Revenue cannot be upheld. The transaction has been wrongly treated as "sale of goods" by the authorities below. In this view, we need not even go into the question of severability or liability towards service tax."



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As noticed above, therein, Hon'ble High Court held that the buses were given to DTC on hire basis; that the buses remained in effective control of the petitioner -Hari Durga Travels and that at each point of time the petitioner held itself to be the owner of the buses.

Special feature of the agreements-concern for security of passengers

24. Herein, it is significant to note that the agreements arrived at between the appellant and DTC were agreements of special kind.

Why special kind of agreements?

Because, these were entered into keeping in view the security concerns of the passengers and the sensitivity of the matter.

As per clause 35, noticed ^{in para 20} above, the owner was required to keep the bus parked during its idle time at the parking place to be provided by the Corporation. The bus was at all times required to remain[✓] under surveillance of security personnel. The maintenance and minor repair of the bus shall be carried out by the owner with the permission and ^{the} under supervision "of the Corporation & security personnel." ^{" "} ✓

Here, specific bus was to be operated on Delhi-Lahore Route and was required to be parked in the parking area of DTC. It was not to be taken away by the dealer-assessee-appellant to



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any other parking area, the reason being that security concerns not only of the bus but also those of the passengers were there.

In Hari Durga Travel's case neither any security concerns of the passengers were involved nor there was any such term in the agreement.

As regards other two buses to be operated on Delhi-Katra route, the route was long and interstate. Nothing has been pointed out on behalf of the appellant from the agreement that these buses could be taken away by the appellant to its own parking area or that security concerns were not involved because of the sensitivity of the long interstate route and the destinations and security of passengers who were to travel by these buses.

Again, in Hari Durga Travel's case neither any security concerns of the passengers were involved nor there was any such term in the agreement.

This special feature of the agreements is a significant factor which distinguishes the case from the facts of Hari Durga Travel's case.

25. As regards issuance of permits in respect of the said bus, the relevant clause reads as under:



“13. The agreement/protocol between Govt. of India and govt. Of Islamic Republic of Pakistan is valid upto Feb., 2009. But in case due to any unforeseen reasons and the reasons beyond the control

of the corporation, and if the operation of this bus/ route is discontinued, by the governments for any reason whatsoever, the Corporation shall not be liable to operate the bus on this route. The owner shall not have any type of claim in this regard against the Corporation. The permit issued by the competent authority to operate on this route will automatically stand terminated for his bus and permit shall be the property of the Corporation. The Corporation may use the bus on any long interstate route.

16. the owner shall bear all the taxes/duties/levies as per Motor Vehicle Act. The passenger tax/permit fees etc., if any, will be borne by the corporation.”

Use of vehicles by owner or anyone else during period of agreements

26. Herein, there were specific terms in the agreement that the 3 buses were to be operated upon to the exclusion of the dealer-appellant and exclusion of any other person. Same read as under:

“17. The owner shall not withdraw the bus from operation without prior written consent of the Corporation.

26. (ii) The owner shall not use the bus covered by this agreement for any other purpose at any time during the period of agreement. .

27. The owner shall not transfer or otherwise alienate the vehicles during the period of agreement except with the prior written permission of the Corporation.”



From the terms of the agreements as incorporated in the decision in Hari Durga Travels' case, it appears that there was no agreement that the bus was^{to}ply or to be operated upon to the exclusion of the said Travel Company and any other person.

This is another significant factor which distinguishes the case from the facts of Hari Durga Travel's case.

Permission and Licences

27. As regards permissions and licences, in case of registration, plying or driving of vehicles, same are generally and as per law, available with the owner of the vehicle and driver respectively, and same are non-transferable.

Furthermore, the words "consequently all legal consequences of such use including any permissions or licenses required therefore should be available to the transferee." which find reference in the attribute of transfer of right to use goods as per decision in BSNL's case, pertain to permissions/licences, if any, required to be obtained by the transferee. Such permissions or licences should be agreed to be available to the transferee as a legal consequence of such transfer of right to use goods, ^{a case where} in/~~any~~ there is any such requirement, and not in a case, where neither any such legal consequence for seeking of permission or licence, arises nor is required.

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Here, as per the agreement, the passenger tax/Permit fees etc. if any, was to be borne by the Corporation and the permit issued by the competent authority to operate on this route was to automatically stand terminated for the bus on Delhi-Lahore route and permit was to remain the property of the Corporation. Before having entered into these agreements. DTC had already the licence and approved schemes in terms of agreements between the two countries i.e. India and Pakistan, as regards the bus to be operated on this route i.e. Delhi-Lahore route.

As regards other two buses on Delhi-Katra long route and interstate route, as specified in the agreement, the buses were going to be plied and operated by DTC as per schemes already approved.

Here, as per the other agreement dated 18/01/2005, the passenger tax/Permit fees/Tool tax/Adda Tax, City entry fees etc. if any, were to be borne by the Corporation.

At the cost of repetition, the agreement between the parties in Hari Durga Travel's case was not based on any consideration of safety and security of passengers. That was a general agreement. Here are special kinds of agreements clearly distinguishable on facts.

28. As regards decision in **Rashtriya Ispat Nigam Limited** (supra), as referred to in Hari Durga Travel's case, Hon'ble High Court observed that in the former case Hon'ble Court was



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of the view that where even access or physical control of machinery or such like goods is made over, such a transaction by itself would not be transfer of the right to use, if effective control is maintained by the owner.

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.

Herein, from the above said terms and conditions contained in the contract, it can safely be said that effective control of the buses as a result of the agreement was with DTC and not with owner of the vehicles.

29. Another factor distinguishing the two cases is that this is not a case where it can be said that DTC had limited use of the buses.

So, it is held that in these matters, the intention of the parties was to transfer right of use of the buses to the DTC and that the owner actually and legally transferred right to use of the buses to the DTC.

In view of the above discussion and since the Hari Durga Travels's case is distinguishable on facts, same does not come to the aid of the dealer-appellant for the purposes of its application to the present matters.

30. As per copy of judgment made available, decision in Sehgal Tourists case (supra), was for the reasons mentioned in



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a case also distinguishable on facts
International Travel House Ltd.'s case. Therefore, in view of the above discussion, decision in Sehgal Tourists is also of no avail to the appellant.

International Travel House Ltd's case is distinguishable on facts

31. In International Travel House Ltd.'s case. (supra), Hon'ble High Court observed that whereas in the case of Rashtriya Ispat Nigam Ltd. case there was no intention to transfer the right to use, in the case of Aggarwal Bros., there was an intention to transfer the right to use. Hon'ble High Court further observed that the decision in Aggarwal Bros. case was not of help to the appellant i.e. Revenue in the International Travel House Ltd.'s, inasmuch as there was no intention to transfer the right to use the goods. While so distinguishing the two cases, it was observed that in International Travel's case licences and permissions with respect to the goods i.e. Omni Cabs remained always in the effective control and possession of the respondent i.e. International Travel, and not NDPL. While so arriving at the conclusion, Hon'ble Judge relied upon decision in BSNL's case.

Significant to note that decision in International Travel's case is distinguishable on facts.

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Herein, special kind of agreements were arrived at between the parties keeping in view the sensitivity and the security concerns of the passengers.

Special feature of the agreements-concern for security of passengers

32. In International Travel's case neither any security concerns of the passengers were involved nor there was any such term in the agreement.

Herein, registration number of the buses were specified in the agreements. In International Travel's case, from the terms available in para 11 of the agreement as reproduced in para 4 of the judgment, it does not appear that registration numbers of the cabs were specified in the agreement.

Significant to notice that herein, said specific bus to be operated on Delhi-Lahore Route was to be parked in the parking area of DTC. It was not to be taken away by the dealer-assessee-appellant to any other parking area, the reason being that security concerns not only of the bus but also those of the passengers were there.

As regards other two buses to be operated on Delhi-Katra route, the route was long and interstate. Nothing has been pointed out on behalf of the appellant from the agreement that these buses could be taken away by the appellant to its own parking area.



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Here, too, security concerns had been taken into consideration, because of the sensitivity of the long interstate route and the destination.

This special feature of the agreements is a significant factor which distinguishes the case from the facts of International Travel Pvt. Ltd.'s case.

Use of vehicles by owner or anyone else during period of agreements

33. In International Travel's case, there was no agreement that the cabs were ply or to be operated upon to the exclusion of the said Travel Company and any other person.

Herein, there were specific terms in the agreement that the 3 buses were to be operated upon to the exclusion of the dealer-appellant and exclusion of any other person. Same read as under:

“17. The owner shall not withdraw the bus from operation without prior written consent of the Corporation.

26. (ii) The owner shall not use the bus covered by this agreement for any other purpose at any time during the period of agreement.

27. The owner shall not transfer or otherwise alienate the vehicles during the period of agreement except with the prior written permission of the Corporation.”



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This is another significant factor which distinguishes the case from the facts of International Travel Pvt. Ltd.'s case.

Permission and Licences

34. As regards permissions and licences, in case of registration, plying or driving of vehicles, same are generally and as per law, available with the owner of the vehicle and driver respectively, and same are non-transferable.

Here, as per the agreement, in case of Delhi-Lahore Route bus, the passenger tax/Permit fees etc. if any, was to be borne by the Corporation and the permit issued by the competent authority to operate on this route was to automatically stand terminated and permit was to remain the property of the Corporation. Before having entered into these agreements. DTC had already the licence and approved schemes in terms of agreements between the two countries i.e. India and Pakistan, as regards the bus to be operated on this route i.e. Delhi-Lahore route.

As regards other two buses on Delhi-Katra long route and interstate route, as specified in the agreement, the buses were going to be plied and operated by DTC as per schemes already approved.

Here, as per the other agreement dated 18/01/2005, the passenger tax/Permit fees/Tool tax/Adda Tax, City entry fees etc. if any, were to be borne by the Corporation.



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At the cost of repetition, the agreement between the parties in International Travel House's case (supra) was not based on any consideration of safety and security of passengers. That was a general agreement. Here are special kinds of agreements clearly distinguishable on facts.

At the cost of repetition, the agreement between the parties in International Travel Pvt. Ltd's case was not based on any consideration of safety and security of passengers. That was a general agreement. There was no prohibition that the cabs were to be parked in the parking area specified by NDPL or that the driver of the owner could not take the cab away.

In view of the above discussion and since the International Travel Pvt. Ltd.'s case is distinguishable on facts, same does not come to the aid of the dealer-appellant for the purposes of its application to the present matters.

An argument for appellant- anticipating an argument from Revenue

35. Learned CA for appellant thought that Revenue could argue that the decision in Hari Durga Travel's case having been challenged by the Revenue before Hon'ble Apex Court, said decision was of no help to the appellant. So, he has cited three decisions in this regard to say that simply because decision by Hon'ble High Court has been challenged, same has full legal force until reversed by Hon'ble Apex Court.



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However, in the course of arguments, no such argument, ^{by LA-CA} expected from the Revenue, has been advanced on behalf of the Revenue. Therefore, no need to refer to the decisions cited on behalf of the appellant in this regard.

36. As regards submission on behalf of the dealer-appellant that settled law is ordinarily not to be departed from and rather all the lower authorities are bound by the settled law, there cannot be any submission or view to the contrary. However, in these matters, main thrust of counsel for the Revenue has been that these matters on hand are distinguishable on facts from the decisions cited on behalf of the appellant, and as such same do not aid the appellant.

✓ 37. When the decisions in International Travel Pvt. Ltd.'s case and Hari Durga Travel's case are distinguishable, ~~and~~ same are not applicable in the given facts of the present case and in view of the above discussion,

✓ 37. Decision in Moped India Ltd.,'s case (supra), pertained to proper interpretation of definition of 'related person' as per sub-section (4)(c) of Section 4 of CESA Act, 1944, and not relevant for the purposes of interpretation of the agreements between the appellant and DTC.

Decision in The Bhopal Sugar Industries Ltd.,'s case (supra), pertained to interpretation of agreement for determination of relationship of principal and agent and distinction between a



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contract of sale and a contract of agency, and where it was held that the owner consumed goods for its own purposes and not as a agent, and as such not relevant for the purposes of present appeals.

Decision in Super Poly Fabriks Ltd.'s case (supra) also did not involve any issue as regards transfer of right to use of goods or interpretation of provisions of agreement on the said point, and as such is not relevant for the purposes of present appeals.

38. In *Great Eastern Shipping Co. Ltd. v. State of Karnataka*, (2020) 3 SCC 354, Hon'ble Apex Court while interpreting the expression "transfer of right to use the goods " i.e. in respect of use of a vessel, in a VAT matter,

- a. during the period of six months,
- b. where the contractor had no right to give the vessel for use to anyone else,

observed that the vessel was available for delivery and in fact, had been delivered; that there was no dispute as to the vessel and the charterer had a legal right to use the goods, and the permission/licence had been made available to the charterer to the exclusion of the contractor.

So, Hon'ble Apex Court was of the view that there was complete transfer of the right to use and it could not be said that the agreement and the conditions subject to which it had been



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made, was not a transfer of right to use the goods, during the period of six months, the contractor had no right to give the vessel for use to anyone else.

Hon'ble Court was of the view that full control of the vessel had been given to the charterer to use exclusively for six months, and delivery had also been made. The use by charterer exclusively for six months made it out that it was definitely a contract of transfer of right to use the vessel and that was a deemed sale as specified in Article 366(29-A)(d).

Hon'ble Court held:

“Thus in view of the provisions inserted in Article 366(29-A)(d), Section 5-C, and definition of “sale” in Section 2 of the KST Act, there is no room for doubt that there is a transfer of right to use the vessel.”

Said decision is fully applicable to the given facts of the present matter.

Facts of case titled as *State of A.P. v. Rashtriya Ispat Nigam Ltd.* (2002) 3 SCC 314] as summarized in ***Great Eastern Shipping Co. Ltd.'s case*** read as :

“3. The respondent is owning Visakhapatnam Steel Project. For the purpose of the steel project, it allotted different works to contractors. The respondent undertook to supply sophisticated machinery to the contractors for the purpose of being used in the execution of the contracted works and received charges for the



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same. The appellant made a provisional assessment levying a tax on hire charges under Section 5-E of the Act.

The respondent filed a writ petition seeking a declaration that the tax levied, exercising power under Section 5-E of the Act on the hire charges collected during the period 1988-89, was illegal and unconstitutional. The appellant filed a counter-affidavit in the writ petition contending that the respondent was lending highly sophisticated and valuable imported machinery to the contractors engaged in the execution of the project work on specified hire charges; the machinery was given in possession of the contractor and he was responsible for any loss or damage to it and in view of the terms and conditions contained in the agreement, there was transfer of property in goods for use and on the amounts collected by the respondent as charges for lending machinery attracted tax liability under Section 5-E of the Act.

4. The High Court after scrutiny and close examination of the clauses contained in the agreement and looking to the agreement as a whole, in order to determine the nature of the transaction, concluded that the transactions between the respondent and contractors did not involve transfer of right to use the machinery in favour of the contractors and in the absence of satisfying the essential requirement of Section 5-E of the Act i.e. transfer of right to use machinery, the hire charges collected by the respondent from the contractors were not exigible to sales tax.

On a careful reading and analysis of the various clauses contained in the agreement and, in particular, looking to Clauses 1, 5, 7, 13 and 14, it becomes clear that the transaction did not involve a transfer of right to use the machinery in favour of contractors. The



High Court was right in arriving at such a conclusion. In the impugned order, it is stated, and rightly so in our opinion, that the effective control of the machinery even while the machinery was in use of the contractor was that of the respondent Company; the contractor was not free to make use of the machinery for the works other than the project work of the respondent or move it out during the period the machinery was in his use; the condition that the contractor would be responsible for the custody of the machinery while it was on the site did not militate against the respondent's possession and control of the machinery.

That was a case of transfer of right to use the machinery. The High Court held that there was no transfer of right to use the machinery in the absence of satisfying the essential requirement of Section 5-E of the Andhra Pradesh General Sales Tax Act, 1957.

Therein the effective control of the machinery even while it was in use of the contractor, was ^{held to be} that of the respondent Company due to the following reasons:

-the contractor was not free to make use of the machinery for the works other than the project work of the respondent or move it out during the period the machinery was in his use;

-the condition that the contractor was responsible for the custody of the machinery, did not militate against the Company's possession and control.



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-It was a case of hiring of the machinery for a specific purpose on specified hire charges. The charter party agreement is different in the present case.

39. **In Harbans Lal vs. State of Haryana**, (1993) 88 STC 357 (P&H), relied upon by learned counsel for the Revenue, where shuttering were supplied to builders for purposes of construction, it was observed by the Hon'ble High Court that shuttering were transferred to the transferee for a specified period for use with consideration and as such the transferee was in effective control of the shuttering during the period it remained in its possession.

In the same case, as regards transfer of possession of buses, Hon'ble High Court held that there was acquisition of the right by the transferee and loss of it by the transferor. Under the agreement, effective possession and control of the buses had passed to the customers. Accordingly, it was held to be a case of sale within the extended meaning of word "sale" inasmuch as there was a transfer of right to use the vehicle for valuable consideration and sales tax was exigible.

40. In **M/s Aggarwal Brothers vs. State of Haryana and Another**, (1999) 113 STC 317 (SC), relied upon by learned counsel for the ^{Revenue} ~~appellant~~, Hon'ble Apex Court observed that the assessee owned shuttering. They transferred the shuttering for consideration to builders and building contractors for use in the construction of buildings. Hon'ble Apex Court, therefore,



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held that the requirements of a deemed sale within the meaning of Section 2(1) of Haryana General Sales Tax Act were satisfied.

41. In **M/s Onaway Engineering Private Ltd. vs. State of A.P.**, (2006) 146 STC 634 (AP), also relied upon by learned counsel for Revenue, Hon'ble High Court of Andhra Pradesh found that the crane was in effect transferred for the purposes of rendering service to HSL; that the period of hire was given as twelve months; that the rent was fixed at Rs. 4.35 lakhs per month and it was termed as hire charges.

Hon'ble High Court, accordingly, held that crane was given on hire and the possession was transferred for its utilisation by the HSL and therefore, and accordingly, upheld the order passed by the Tribunal.

Transfer of right to use goods to the exclusion of transferor and all others

42. In view of observations by Hon'ble Judge in BSNL's case, as already noticed above, transfer of right to use the goods should be exclusion of the transferor and also to the exclusion of all others. So, this is one of the attributes to constitute a transaction for the transfer of right to use the goods as a transaction of sale.

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In suchlike matters, for the purposes of levy of tax on account of deemed sale, transfer would mean acquisition of the right by the transferee and loss of it by the transferor.

Herein, admittedly, registration numbers of the buses were specifically mentioned in the agreement. In other words, the goods were specified. As agreed between the parties, the owner could not withdraw the buses from operation without prior written consent of the Corporation. The owner could not use the buses covered by the agreement for any other purpose at any time during the period of agreement.

As further agreed between the parties, the owner had no right to transfer or otherwise alienate the vehicles during the period of agreement except with the prior written permission of the Corporation.

As regards bus No. DL1PC – 0786 to be operated on Delhi – Lahore Route, it was specifically agreed between the parties as under :

“35, the owner shall keep the bus parked during its idle time at the parking place to be provided by the Corporation. The bus shall at all times remains under surveillance of security personnel. The maintenance and minor repair of the bus shall be carried out by the owner with the permission and the under supervision of the corporation & security personnel.”



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In view of the above terms and conditions of the contract between the parties, it cannot be said that possession of vehicle No. DL1PC – 0786 remained with the owner. Rather, it can safely be said that the dealer – owner transferred the legal right to use the said bus No. DL1PC – 0786 to DTC not only to the exclusion of itself i.e. the transferor but also to the exclusion of all others.

Similarly, in view of the terms and conditions of the other contract 18/01/2005, it cannot be said that possession of vehicle No. DL1PC – 0787 and DL1PC 0788 remained with the owner. Rather, it can safely be said that the dealer – owner transferred the legal right to use the said bus No. DL1PC – 0787 and DL1PC 0788 to DTC not only to the exclusion of itself i.e. the transferor but also to the exclusion of all others.

43. As a result, it is held that this is a case of transfer of legal right to use the three vehicles by the owner to DTC to the exclusion of itself and all others, and the transaction have rightly been considered and declared to be a transactions of sale in view of the provision of section 2(zc) of DVAT Act.

Consequently, there is no merit in this appeals regards levy of tax and interest u/s 32 of DVAT Act, for the tax periods ²⁰⁰⁶⁻⁰⁷ ~~for~~ 2005-06, which also rightly came to be upheld by the learned OHA vide impugned order.

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Penalty

44. As regards levy of penalty u/s 33 of DVAT Act, assessment was framed by learned Assessing Authority on the ground that the dealer – appellant entered into agreement with DTC on 28/10/2004 and 18/01/2005 for providing buses on hire basis and the same being covered by the definition of sale, dealer was required to get registration w.e.f. 01/04/2005 but the objector applied for the same w.e.f. 25/05/2007, and as such, it became liable for payment of penalty.

On behalf of appellant, it has been submitted that it is a case of bona fide belief as the dealer believed that the transactions were not exigible to tax, and as such penalty deserves to be set side.

In this regard, reference has been made to the following decisions:

Anand Nishikawa Co. Ltd-Vs Commissioner of Central Excise, Meerut, reported in (2005)7 SCC 749,

M/s Hindustan Steel Ltd. Vs. State of Orissa, 1969-VIL-01-SC;

Orix Auto Infrastructure Services Ltd. Vs. Commissioner DVAT 2015-VIL-76-DEL; *and*

Tamil Nadu Housing Board Vs Collector of Central Excise, Madras, 1994 (74) E.L.T. 9 (S.C).



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45. I have gone through only the extracts of the decision in Anand Nishikawa Co. Ltd's case (supra) and Tamil Nadu's case (supra) as made available in the written submissions on behalf of the appellant. The first mention^{ed}/case pertained to levy of penalty due to suppression of facts. In the second mention case, it was observed that the assessee must be aware that the duty was leviable and the assessee must be deliberately avoiding payment of duty. Further it was observed that it is more stringent by use of word "intent".

Text of the other two decisions has not been made available.

Learned counsel has also mentioned in the written submissions only the title of the following cases, to submit that penalty cannot be imposed where legal interpretation of law is involved:

CCE, Jalandhar v. Sarup Tanneries Limited, 2005 (184) E.L.T. 217(Tri.-Del.) ;

CCE, Ghaziabad v. Explicit Trading & Marketing (P) Ltd.. 2004 (169) E.L.T. 205 (Tri.-Del.)

46. In the given facts and circumstances and the above discussion, it cannot be said that it was a case of bona fide on the part of the dealer that it could not get itself registered under the law. Ignorance of law is no excuse.



47. Present matter ^{of penalty-} pertains to the tax period w.e.f 2005-2006. New law i.e. DVAT Act, 2004 came into force during those days i.e. w.e.f. 01.04.2005. The dealer did not get itself registered within the stipulated period. However, it got itself registered even before the assessment was framed.

Even if it cannot be said that the dealer had no intent to commit breach of this requirement of law, keeping in view the mitigating factor noticed above, the amount of penalty deserves to be reduced. Same is hereby reduced to Rs. 5,000/- (Rupees five thousand) only. It is so ordered and accordingly, appeal No.616/2008 is partly allowed with the modification on the quantum of penalty.

48. As regards other two appeals No. 615/2008 & 605/2008 pertaining to levy of tax, finding no merit therein, the same are hereby dismissed.
49. File be consigned to the record room. Copy of judgment be placed in the appeal file No. 605/2008. Copy of the judgment be supplied to both the parties as per rules. One copy be sent to the concerned authority. Another copy be displayed on the concerned website.

Announced in open Court.

Date: 22/7/2022



Narinder Kumar
22/7/2022
(Narinder Kumar)
Member (Judicial)

Appeal No. 605/ATVAT/2008 / 5162-69

Appeal No. 605/ATVAT/2008

Dated: 27/07/2022

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|---|----------------|
| (1) VATO (Ward-) | (6) Dealer |
| (2) Second case file | (7) Guard File |
| (3) Govt. Counsel | (8) AC(L&J) |
| (4) Secretary (Sales Tax Bar Association) | |
| (5). PS to Member (J) for uploading the judgment on the portal of DVAT/GST, Delhi - through EDP branch. | |


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