

BEFORE THE APPELLATE TRIBUNAL, VALUE ADDED TAX, DELHI
Sh. Narinder Kumar, Member (J)

Appeal Nos.: 108-115/ATVAT/13

Date of Judgment: 06/10/2022

M/s. Pawan Hans Helicopters Ltd.,
C-14, Sector-1, Noida-201301 (U.P)

..... Appellant

v.

Commissioner of Trade & Taxes, Delhi.

..... Respondent

CA representing the Appellant : Sh. A. K. Batra.

Counsel representing the Respondent : Sh. P. Tara.

JUDGMENT

1. By way of above captioned eight appeals, dealer, an enterprise of Government of India, has challenged order dated 07-02-2013, passed by learned Special Commissioner-III-learned OHA, thereby disposing of eight objections filed by the said dealer-assessee.
2. The eight objections were filed challenging default assessment of tax, interest and the assessment of penalties framed by learned VATO-Ward 107 (Special Zone).

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The assessments pertaining to tax and interest were framed u/s 9(2) of Central Sales Tax Act (hereinafter refer^{red to} as CST Act) and also u/s 32 of Delhi Value Added Tax Act (herein after refer^{red to} as DVAT Act). Assessments of penalties were framed u/s 9(2) of CST Act and also u/s 33 of DVAT Act.

3. As per table available in the impugned order, objections pertained to the following tax periods and the following disputed amount(s):

S. No.	Objection No.	Tax Period	Nature of objection	Disputed amount
01.	198/Obj/SZ/Spl.CTT-III	2006-07	DA of tax & interest u/s 9(2) of CST Act	Rs. 36,08,45,644/-
02.	199/Obj/SZ/Spl.CTT-III	2006-07	Penalty u/s 9(2) of CST Act	Rs. 45,81,17,078/-
03.	200/Obj/SZ/Spl.CTT-III	2007-08	DA of tax & interest u/s 9(2) of CST Act	Rs.38,46,41,718/-
04.	201/Obj/SZ/Spl.CTT-III	2007-08	Penalty u/s 9(2) of CST Act	Rs. 40,00,68,154/-
05.	202/Obj/SZ/Spl.CTT-III	2008-09	DA of tax & interest u/s 9(2) of CST Act	Rs. 48,88,80,168/-
06.	203/Obj/SZ/Spl.CTT-III	2008-09	Penalty u/s 9(2) of CST Act	Rs.36,47,53,519/-
07.	204/Obj/SZ/Spl.CTT	2009-	DA of tax	Rs.52,56,09,289/-



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	-III	10	& interest u/s 9(2) of CST Act	
08.	205/Obj/SZ/Spl.CTT -III	2009- 10	Penalty u/s 9(2) of CST Act	Rs. 20,97,96,660/-

4. Default assessment of tax and interest u/s 9(2) of CST Act, pertaining to tax period **Annual 2006-07** was framed on 09-03-2011 due to the following reasons:-

“This has been noticed that M/s Pawan Hans Helicopters Ltd. has been providing its helicopters to various agencies including State Governments and these transactions are found covered u/s 2(g)(iv) of the CST Act, 1956, being transfer of the right to use the goods. As per profit & Loss Account for the year ended 31-03-2007 given in the Balance Sheet as at 31-03-2007 the company has earned income of Rs. 1,83,24,68,313/- in the year 2006-07 on account of helicopter hire charges. This amount is being taxed @12.5%. Detailed reasons for taxation are attached with this order.

The dealer is hereby directed to pay tax of an amount of Rs. 360845644/- (Thirty six crore eight lacs forty five thousand six hundred forty four only).”

5. Default assessment of tax and interest u/s 9(2) of CST Act, pertaining to tax period **Annual 2007-08** was framed on 09-03-2011 due to the following reasons:-

“This has been noticed that M/s Pawan Hans Helicopters Ltd. has been providing its helicopters to various agencies including State Governments and these transactions are found covered u/s 2(g)(iv) of the CST Act, 1956, being transfer of the right to use the goods. As per profit & Loss Account for the year ended 31-03-2009 given in the Annual Report 2008-09 the company has



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earned income of Rs. 2,16,19,90,026/- in the year 2007-08 on account of helicopter hire charges. This amount is being taxed @12.5%. Detailed reasons for taxation are attached with this order.

The dealer is hereby directed to pay tax of an amount of Rs. 38,46,41,718/- (Thirty eight core forty six lacs forty one thousand seven hundred eighteen only)."

6. Default assessment of tax and interest u/s 9(2) of CST Act, pertain to tax period **Annual 2008-09** was framed on 09-03-2011 due to the following reasons:-

"This has been noticed that M/s Pawan Hans Helicopters Ltd. has been providing its helicopters to various agencies including State Governments and these transactions are found covered u/s 2(g)(iv) of the CST Act, 1956, being transfer of the right to use the goods. As per profit & Loss Account for the year ended 31-03-2009 given in the Annual Report 2008-09 he company has earned income of Rs. 3,07,16,08,587/- in the year 2008-09 on account of helicopter hire charges. This amount is being taxed @12.5%. Detailed reasons for taxation are attached with this order.

The dealer is hereby directed to pay tax of an amount of Rs. 48,88,80,168/- (Forty eight crore eighty eight lacs eighty thousand one hundred sixty eight only)."

7. Default assessment of tax and interest u/s 9(2) of CST Act, pertain to tax period **Annual 2009-10** was framed on 09-03-2011 due to the following reasons:-

"This has been noticed that M/s Pawan Hans Helicopters Ltd. has been providing its helicopters to various agencies including State Governments and these transactions are found covered u/s 2(g)(iv) of the CST Act, 1956, being transfer of the right to use the goods. As per profit & Loss Account for the year ended 31-03-2010 given



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in the Balance Sheet as at 31-03-2010 the company has earned income of Rs. 3,72,97,18,406/- in the year 2009-10 on account of helicopter hire charges. This amount is being taxed @12.5%. Detailed reasons for taxation are attached with this order. The dealer is hereby directed to pay tax of an amount of Rs. 52,56,09,289/- (Fifty two crore fifty six lacs nine thousand two hundred eighty nine only)."

8. As already mentioned above, separate assessments of penalties were framed by learned Assessing Authority as depicted in the table given above.
9. Feeling aggrieved by the impugned assessments of tax, interest and penalties of 25-05-2011 dealer filed objections u/s 74(1) of DVAT Act.
10. Learned OHA upheld all the assessments pertaining to tax, interest and penalties by observing in the manner as:-

"Further, in terms of clause 13.3 of an Agreement of the objector made by him with one of his Charterers also reads as "however, the charterer shall indemnify and keep harmless the Lessor and shall assume the risk of and be solely responsible for any and all damages to the helicopter, associated and: allied equipments, tools, supplies, spare parts, materials and all other properly furnished by the Lessor or caused by the gross negligence of the Charterer, its employees, agents of sub-contractors". This too clearly and unequivocally goes to suggest and prove beyond any doubt that the helicopters, crew and others related goods etc. were placed by the objector at the disposal of the Lessees/Charterers making the transaction to clearly fall within the ambit of deemed sale by way of transfer of right to use the goods i.e. the helicopters in this case.

Simultaneously, from the case record and the documents placed on file, it also transpires and come up that many rights and obligations of the parties are linked with the possession of the



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goods. One of the most important effects is that "Risks" prima facie passes with the property; is to say, that the goods are at the risk of party in whose possession the property is. The objector has claimed that effective control and possession of the helicopters during the entire term of agreement remains with the objector and the grounds taken by him for this contention are that (i) clients are required to provide written requisitions on daily basis, (ii) objector was providing experienced IFR and licensed pilots for the helicopters, (iii) possession of helicopters remain with the licensed staff and crew of the objector, (iv) determining the routes and suitability of flying and landing was the prerogative of the objector and (v) the objector alone was bearing the cost of fuel but in this connection, mentioning of the following terms/clauses of such an Agreement of the objector entered into by him with his Charterer is found to be much important:

- 3.4 The charterer shall provide to the lessor a manifest containing the number, names and weights of the passengers, Cargo weight on the Board and the estimated time of departure/arrival of the flight from which it is clear that by providing the manifest, the lessee was not giving any requisition for hiring of helicopters for that day but was only intimating thereby the Schedule decided by the lessee for that particular day/sortie. The said manifest was only a sort of direction about the scheduled arrival/departure of helicopter for a particular sortie. The information about the details of the passengers was provided as per the safety manual of the helicopters based on its load-lift capacity. Here, it is important to mention and point out that the objector company was not in any position to decline the directions of the lessee.
- 3.1 The lessor shall during the term of lease provide the helicopter for exclusive use of the Charterer and its authorized person in accordance with the agreement. Pawan Hans Helicopters would position one helicopter at Port Blair. The helicopter would be made available exclusively to the lessee and if so required by the lessee; the helicopter could be utilized for other appropriate/suitable tasks within the Andaman & Nicobar Islands and other adjoining areas.
- 3.2 The lessor shall be allowed to ground the helicopter for maintenance for four days per month. The lessor shall give notice



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- to the lessee of any scheduled payment to be carried out for the helicopter at-least for 7 days or 10 flying hours in advance.
- 9a wherever required the lessee shall provide suitable helipads with necessary equipments and facilities like fire fighting, fuel, adequate communication etc. The lessee shall pay for and provide accommodation, transport and meals for the lessor personnel whenever they are required to stay out overnight of the base.
- 9.2 Security of helicopters and helipads, security checking of passenger's baggage and cargo is to be arranged by lessee on all locations.
- 9.4 The lessee shall provide necessary security for helicopters, crew and fuel at the main base and the other locations.

Therefore, as seen, the above clauses in themselves make it clear that the possession and effective control of the helicopters remain with the lessees and the pilots and crews provided by the objector were for the purpose of facilitating the flying of the helicopters including determining of the route and suitability of flying and landing conditions and that once the helicopter has been made available at the base, the lessees as per their absolute will and option were entitled to use the helicopter in the way the manner intended to by them the pilot and the crew were answerable to the lessees liable to follow their direction rather than those of the objector and that the objector was to be paid on monthly/hourly basis irrespective of the fact whether the Agencies used the helicopters during that month or kept them unutilized or grounded.

Further, it is also seen that the Andaman & Nicobar Islands Administration used the helicopter for commercial purpose and had notified the Schedules of flights and fares in respect of helicopters to various islands which itself proves that the administration was using the helicopters as per their will and the objector had no interference except for technical suggestions on safety grounds."

While disposing of objections, learned OHA relied on decisions in **Rashtriya Ispat Nigam Ltd. v. Commercial Tax Officer,**



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Company 1990 77 STC 182 AP, by Hon'ble High Court of Andhra Pradesh; **BSNL v. Union of India** (2006) 145 STC 191 (SC) and **Laxmi Auto Visual Inc. v. Asstt. Commissioner of Commercial Tax (Karnataka)**, (complete citation not mentioned).

Ultimately, learned OHA concluded as under:-

"Therefore, on going through this entire all the above, the undersigned also finds himself of the considered opinion that because had rented out the helicopters to his clients/customers for continuously long periods, control over and the security etc. of the helicopters and their crew rested with these clients/customers, base/helipads etc. for the operation and landing etc. of these helicopters were to be arranged and provided for by the clients/customers, other personnel and fuel etc. as discerned from the terms of the Agreements above, for the helicopters were to be supplied by the lessees clearly, go to show and establish beyond doubt that though, the ownership of the helicopters rested with the objector, yet, possession and effective control over the helicopters and their operation was entirely with the clients/customers of the objector. It is a different thing that crew of the helicopters were to be of the objector and it could be because of the reason that for operating and flying of the helicopters, some specialized, experienced and licensed hands were essentially required and this mere fact of supplying the crew by the objector did not establish beyond doubt that the effective control over the helicopters was that of the objector and not that of his clients/customers. Moreover, the judgments of higher Courts cited and relied upon by the objector in support of



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his case support the case of the Revenue rather than the case of the objector.

Therefore, in the entirety of the facts and circumstances of the case and the detailed discussion made above, the irresistible conclusion arrived at by the undersigned is that there is no force and substance in the arguments of the objector and orders of default assessments framed by the VATO of Special Zone are found to be absolutely in accordance with the provisions of law. Hence, the objections of the objector are rejected and the orders of default assessments of tax, interest and penalties issued by the VATO of the Special Zone are upheld. Ordered Accordingly."

11. Hence, these appeals.
12. Arguments heard. File perused.

Whether the impugned assessment is a non-speaking assessment?

13. One of the contentions raised by learned CA for the appellant is that assessments framed by Assessing Authority are non-speaking orders, where neither there is reference to any of the agreements nor any reason has been given for framing of the assessments, and as such the matter needs to be remanded to VATO-Assessing Authority for fresh assessments.

Learned CA has also referred to the impugned order passed by learned OHA and pointed out that objections raised by the objector have nowhere been discussed as regards the turnover

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pertaining to transactions arising out of agreements between dealer-appellant and non-government entities, and as such the impugned order also deserves to be set aside in respect of the said turnovers from non-government entities.

14. A perusal of the default assessment of tax and interest would reveal that the Assessing Authority has given reasons for levy of tax and interest. Worksheets are also annexed to the notice of default assessments to give details of levy of tax and interest.

On going through the impugned order, it can safely be said that learned OHA discussed the objections raised by the dealer, having regard to agreements between dealer-appellant and State Governments/UTs, taking into consideration by way of sample two agreements i.e. between the dealer-appellant and Punjab Government and the other between the dealer-appellant and Andaman & Nicobar Administration, particularly while dealing with the issue of transfer of right to use the goods i.e. helicopter(s).

Learned OHA also took in-to consideration some of the decisions passed by Hon'ble Courts. Therefore, I do not find any merit in the above said contention raised on behalf of the appellant that the impugned assessments and the impugned order are non-speaking orders, so far as disposal of objections as regards transfer of right to use helicopters on the basis of agreements



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between dealer-appellant and State Governments/^{& others}UTs /are concerned.

15. This brings us to the next main contentions on the point of Transfer of Right to Use the Goods which is a deemed sale as per section 2(zc)(vi) of DVAT Act.

Effective Control and Possession of Helicopters

15. Learned CA for the dealer-appellant has contended that in none of the ~~three~~ agreements referred to above, effective control and possession of the Helicopter(s) of the dealer-appellant was transferred to the other party-lessee(s).

On this point, learned CA has referred to some of the following terms and conditions of the contract between dealer-appellant and Andaman and Nicobar Island Administration:

Clause 3.1, 3.2, 3.3, 3.4, 3.6, 3.8 and 3.9;
Clause 9.2;
Clause 10, 10.1, 10.2, 10.7, and 10.8.1;
Clause 15.2.

Learned CA also referred to the following terms and conditions of the agreement between dealer-appellant and Punjab Government:

Clause 3.1, 3.2, 3.3, 3.7, 3.8 and 3.9;
Clause 4.1;



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Clause 5.1, 5.2 and 5.3.2;

Clause 6.1;

Clause 9.3 and 9.4;

Clause 10.1 and 10.2;

The contention raised on behalf of the appellant is that in view of the terms and conditions of the agreements, referred to above, it can safely be said that this is not a case of transfer of effective control and possession of the Helicopter(s) with the lessee(s)/charter(s) and rather this is a case where only the appellant had control of the Helicopter(s), and consequently this being not a case of transfer of right to use, the said transactions i.e. subject matter of the assessments, were not exigible to VAT.

In support of his contention on the point of effective control and possession, learned CA has referred to following decisions:

1. **State of Andhra Pradesh v. Rashtriya Ispat Nigam Ltd.**, 2013 (31) S.T.R. 513 (S.C.);
2. **Hari Durga Travels v. Commissioner of Trade & Taxes**, Delhi 2015-TIOL-1300-HC-DEL-VAT;
3. **Transocean Offshore, International Ventures Limited, v. Union of India**, 2017 (4) TMI 578;
4. **Commissioner, VAT, Trade and Taxes Department v. International Travel House Ltd.**, 2009 (9) TMI 879;
5. **Bharat Sanchar Nigam Ltd. & ANR v. Union of India & Ors**, 2006-TIOL-15-SC-CT-LB;
6. **Imagic Creative Pvt. Ltd. v. Commissioner of Commercial Taxes**, 2008 (9) S.T.R. 337 (S.C.);

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7. **Commissioner of Service Tax, Delhi v. Medical Product Service**, 2017 (9)TMI 710;
8. **LSG Sky Chefs (India) Pvt. Ltd. v. Commissioner of S.T.**, Bangalore, 2009 (15) S.T.R. 545 (Tri.- Bang.);
9. **Mohd. Wasim Khan v. Commissioner of Trade & Taxes**, 2006(4) TMI 489.

Learned CA for the appellant has urged that the impugned assessments framed by Learned Assessing Authority and the impugned order passed by Learned OHA deserve to be set aside.

Contentions on behalf of Revenue

16. On the point of taxability in case of transfer of right to use the goods, learned counsel of the revenue has submitted that in the agreements entered into between the appellant and the other parties-lessees, dealer-assessee has been correctly and legally held liable to pay tax on hire charges received by them on account of transfer of the right to use the goods i.e. the helicopters.

On this point, learned counsel for Revenue has, for example *referred to* certain terms of three contracts i.e. one with Punjab Government, the second with Ministry of Home Affairs, and the third with Andaman & Nicobar Administration.

Reference has been made by way of sample agreement qua all other agreements made available to this Appellate Tribunal, while



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submitting that terms and conditions of all these agreements and the agreements which have not been produced, are almost same. This submission has not been disputed by learned CA for the appellant.

While referring to lease agreement dt.11.05.2000 between the dealer and appellant-Ministry of Home Affairs, Learned Counsel for the Revenue has submitted that as per this agreement main base for the helicopter, was to be at Delhi.

Reference has also been made to clauses 3.1, clause 5.3.2, clause 6, clause 7, clause 8, clause 9, clause 13.

Counsel for the Revenue has also referred to the attributes which are required to be established in order to constitute a transaction of transfer of right to use the goods, being taxable as held in BSNL and Ors vs. Union of India and Ors., 2006 3 VST 95 SC).

Learned counsel for the Revenue has referred to significant clauses of the agreement between the dealer-appellant and the lessee(s) and contended that when it was specifically stipulated in the agreements that the Helicopter(s) would be made specifically available to the lessee and its authorized agency and if so required by the lessee, could be utilised for other appropriate/special tasks within the State and related adjoining

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areas, it can safely be said that decision making power regarding use of the Helicopter(s) was with the lessee(s).

Ultimately, it has been contended on behalf of the Revenue that appellant was not in effective control and possession with the Helicopter(s), and rather the effective control and possession thereof was with lessee(s), and as such the assessments have been rightly framed and also rightly upheld by Learned OHA.

Discussion

17. As noticed above, admittedly the dealer-appellant did not submit before learned OHA all the agreements arrived at between the dealer-appellant and the other party, and only two agreements appear to have been submitted before learned OHA which were between the dealer-appellant and Andaman & Nicobar Island Administration & between the dealer-appellant and Government of Punjab.

In the impugned order, there is no reference to any other agreement arrived at between the dealer-appellant and any government or non-government entity/individual.

Remaining agreements were also required to be produced by the dealer-assessee before learned OHA for the purpose of complete



adjudication of the matter in dispute, so far as the remaining agreements are concerned.

It may be mentioned here that before this Appellate Tribunal, initially a paper book containing copies of following agreements only was submitted on behalf of the appellant:

1. between dealer-appellant and Ministry of Home Affairs;
2. between dealer-appellant and UT of Lakshadweep and
3. between dealer-appellant and Government of Arunachal Pradesh.

Subsequently, copies of following agreements were also made available on behalf of the appellant:

1. Contract between appellant and Sikkim Government;
2. Contract between appellant and Gujarat Government;
3. Contract between appellant and Bihar Government;
4. Contract between appellant and Amarnath ji Shrine Board;
5. Contract between appellant and Mata Vaishno Devi Shrine Board;
6. Contract between appellant and ONGC;
7. Contract between appellant and NHPC;
8. Contract between appellant and Oil India; and
9. Contract between appellant and R.K. Marble Pvt. Ltd.

18. In the course of arguments, learned CA for appellant submitted that terms and conditions of all the agreements referred to above, including those with Government of Punjab and Andaman & Nicobar Island Administration are almost same and that the matter in dispute be disposed of keeping in view the terms and conditions of the agreements produced here, mainly, between



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dealer-appellant and Government of Punjab, Andaman & Nicobar Island Administration and Ministry of Home Affairs.

By way of example, Learned CA for the appellant has referred to the terms and conditions of the agreements available in the agreement between appellant and Andaman & Nicobar Island Administration and submitted that the same be treated as a sample agreement.

Learned counsel for the Revenue referred to the agreement between appellant and M.H.A as well and in reply learned CA for the appellant also referred to its terms also.

In the given situation, the issue regarding transfer of right to use Helicopter is being decided keeping in view the terms and conditions of the agreements made available to this Appellate Tribunal.

These clauses read as under:

- "3.1 Lessor shall during the term of Lease provide the helicopter for exclusive use of the Charterer and its authorized persons/authorized agencies such as CRPF, BSF, ITBP, IB, DGP, J&K etc. in accordance with this Agreement. The helicopter will be under the control of IG (BSF), Jammu/Srinagar, who will be the deciding and coordinating authority in case more than one agency requisitions the helicopter at the same time. Further, regarding use of the helicopter by various authorised agencies, guidelines of



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Department of J&K Affairs shall be followed. Pawan Hans would position one helicopter at Jammu/Srinagar and carry out its operations. The helicopter would be made exclusively available to the Lessee and its authorised agencies and if so required by the Lessee, could be utilized for other appropriate/suitable tasks within the state and related adjoining areas."

5.3.2 The Lessor will carry out all its maintenance, repair, overhaul or service activities during such times other than the timings of an operational day so that the flying activities during the days, other than ground time as specified in Article 5.3.1 is not hampered and jeopardized.

The Lessor shall give notice to the Lessee of any scheduled maintenance to be carried out on the helicopter at lease 7 days or 10 flying hours in advance."

Lessor's Personnel

"The Lessee Representative may by written notice request the removal of any of the Lessor's personnel for any misconduct committed by them at any time during Lease Agreement and upon receipt of such notice the Lessor shall hold an inquiry and it is found that any employee has misconducted himself, remove and replace such person.

The Lessor's personnel shall be employee/representative of the Lessor for all purposes and intents."

Clause 7 of the lease agreement reads as under:

"Base

The Lessee has nominated JAMMU/SRINAGAR as the base for the helicopter. The Base may be changed by the Charterer giving not less than 30 days prior notice to the Lessor whereupon the Lessor shall station the Helicopter



and provide the Equipment, Personnel, spare parts and tools etc. at the new Base as may be required for the operation of the helicopter.”

Clause 8 of the lease agreement reads as follows:

“Operational Day

The helicopter and its crew shall be available and fully operational for use by the Lessee during an operational day. The Lessee’s Representative may vary from time to time the commencing and ending times of the operational day of the helicopter by giving Lessor written notice of atleast 24 hours before the operational Day commence.”

Clause 9 of the lease agreement reads as under:

Provision of Services & Fuel

“At all locations :

- (a) The Lessee shall provide for, if required, passengers weighing and check-in and security arrangements at all locations. At places where facilities are not available through AAI/IAF, the Lessee shall arrange security for the helipad and the helicopter.
- (b) Wherever required the Lessee shall provide to the extent possible, suitable helipads with necessary equipment and facilities like fire fighting, adequate communication, wind direction indicators, security and other facilities required for operations of the helicopter to/from helipads wherever the said facilities are not available through Airport Authority of India Ltd./any other agency.
- (c) The Lessee shall arrange for communication of latest meteorological information to the helicopter at helipads

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where such information is not available through AAI/IAF or Met. Department.”

Clause 13 of the lease agreement reads as under:

“13. Indemnity

- 13.1 The Lessor shall indemnify and hold harmless the Lessee from and against all claims, costs, demands, actions, including legal fees and costs, howsoever, arising out of the use of the Helicopter (including damage or loss of helicopter and air carrier's third party liability) during the period herein mentioned.
- 13.2 The Lessee shall indemnify and hold harmless the Lessor, its employee agents and representatives from or against all claims, costs including legal fee and costs, howsoever, arising out of the services to be performed by the helicopter under this agreement.
- 13.3 The Lessor shall indemnify the Lessee against all losses or damages and expenses arising from any claim for patent, infringement asserted against the Lessee based upon design, construction or use of the helicopter, equipment and materials furnished.”

Decision in Hari Durga Travels's case-Does this decision help the appellant?

19. 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

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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.

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.

Therein, Hon'ble High Court took into consideration the following 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

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goods" by the authorities below. In this view, we need not even go into the question of severability or liability towards service tax."

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 shown for security

20. It is significant to note that the agreements arrived at between the appellant and ^{various} ~~the same~~ lessees, named above were agreements of special kind, the reason being that these were entered into keeping in view the security concerns and the sensitivity of the matter.

Herein, clause 18 of the lease agreement reads as under:

"18. Security

The Lessee shall be responsible for the security of the helicopter, parking/operating area at **Port Blair** as well as on the other locations, its passengers, baggage (both registered & hand baggage) cargo, mail etc. and shall abide by the following:

- a) At airports where scheduled civil flights operate, the passengers and crew of the helicopter should

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- undergo body frisking and hand baggage check as that of the passengers of Indian Airlines and other airlines.
- b) At airports not served by I.A./other airlines, frisking and hand baggage checking of the passengers shall be done by the local police on intimation by the Charterer to the Suptd. of Police/Senior most Police Officer/Station House Officer of the area.
 - c) The registered baggage of the passenger, if any, should be identified by the passengers and it must also be checked by the Charterer. Likewise, physical check of the cargo/unaccompanied baggage before loading shall also be the responsibility of the Charterer. In case the Charterer is unable to do a physical check, a cooling-off period of 36 hours should be observed.
 - d) Under no circumstances, the Charterer shall carry arms, ammunition, explosives or any inflammable material in the helicopter. The Charterer shall not originate any helicopter service from any of the aerodrome/helipad without complying with the above."

Clause 17 of the lease agreement reads as under:

"17. Confidentiality

- 17.1 The Lessor acknowledges that all material and information provided to it in connection with the services and all knowledge gained in connection with this Agreement and the performance hereof is confidential, disclosure of which to or use by a third party would be damaging to the business of the Charterer. The Lessor agrees to hold such material information and knowledge

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in strictest confidence and not to divulge to a third party and such material information or knowledge.

17.2 It is specifically agreed between the parties that terms and provision of the agreement will be treated as strictly confidential and neither party will divulge or leak out the same to any third party without obtaining a prior written consent of the other party.

17.3 This clause shall survive discharge or termination of this Agreement. " ✓

21. Same clause 17 regarding confidentiality also finds mention in the agreement between Appellant and Punjab Government, other governments and certain non-govt. entities.

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.

Use of goods – helicopters by owner or anyone else during period of agreements

22. Herein, there are specific terms in many of the agreements that the helicopters were to be operated to the exclusion of the dealer-appellant and exclusion of any other person. From the terms contained in some of the agreements, it can safely be inferred that



the helicopters were to be operated to the exclusion of the dealer – appellant and exclusion of any other person.

Specific terms available in one of the agreements read as under:

“3.1 Lessor shall during the term of Lease provide the helicopter for exclusive use of the Charterer and its authorized persons/authorized agencies such as CRPF, BSF, ITBP, IB, DGP, J&K etc. in accordance with this Agreement. The helicopter will be under the control of IG (BSF), Jammu/Srinagar, who will be the deciding and coordinating authority in case more than one agency requisitions the helicopter at the same time. Further, regarding use of the helicopter by various authorised agencies, guidelines of Department of J&K Affairs shall be followed. Pawan Hans would position one helicopter at Jammu/Srinagar and carry out its operations. The helicopter would be made exclusively available to the Lessee and its authorised agencies and if so required by the Lessee, could be utilized for other appropriate/suitable tasks within the state and related adjoining areas.”

7. Base

The Lessee has nominated JAMMU/SRINAGAR as the base for the helicopter. The Base may be changed by the Charterer giving not less than 30 days prior notice to the Lessor whereupon the Lessor shall station the Helicopter and provide the Equipment, Personnel, spare parts and tools etc. at the new Base as may be required for the operation of the helicopter.”

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8. **Operational Day**

The helicopter and its crew shall be available and fully operational for use by the Lessee during an operational day. The Lessee's Representative may vary from time to time the commencing and ending times of the operational day of the helicopter by giving Lessor written notice of at least 24 hours before the operational Day commence.

9. **Provision of Services & Fuel**

At all locations :

- (a) The Lessee shall provide for, if required, passengers weighing and check-in and security arrangements at all locations. At places where facilities are not available through AAI/IAF, the Lessee shall arrange security for the helipad and the helicopter.
- (b) Wherever required the Lessee shall provide to the extent possible, suitable helipads with necessary equipment and facilities like fire fighting, adequate communication, wind direction indicators, security and other facilities required for operations of the helicopter to/from helipads wherever the said facilities are not available through Airport Authority of India Ltd./any other agency.
- (c) The Lessee shall arrange for communication of latest meteorological information to the helicopter at helipads where such information is not available through AAI/IAF or Met. Department."



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 be operated to the exclusion of the owner-appellant and any other person.

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

23. 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 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 agreements, it can safely be said that effective control of the helicopter(s) as a result of the agreements was with the lessee(s) and not with dealer-appellant.



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International Travel House Ltd.'s case is distinguishable on facts

24. 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 of no 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 licenses 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.

Herein, special kind of agreements were arrived at between the parties keeping in view the sensitivity and the security concerns. In International Travel's case neither any security concern was involved nor there was any such term in the agreement. In one of the agreements i.e. of R. K. Marble Pvt. Ltd., even though there was no specific term having regard to the sensitivity and the

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security concerns, but keeping in view the fact that in case of use of helicopter, both these factors were impliedly involved.

25. At the cost of repetition, significant to note that specific helicopter was to be operated and specific base was agreed upon between the parties. This special feature of the agreements is a significant factor which distinguishes the case from the facts of International Travel Pvt. Ltd.'s case.

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

Period of Lease – Its Significance

26. Admittedly, all the agreements were arrived at between the dealer-appellant and the other party for sufficient length of period like one year or more than one year. During this period, the helicopter(s) was / were to remain at the specific base.
27. 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,

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- 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 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).

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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, so far as the three agreements are concerned.

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 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."

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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.

- 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.

28. Herein, another significant aspect to be taken note of is that use of the helicopter(s) by the lessees was subject to the approval of Director General of Civil Aviation and as such the factum of its use by the particular lessee, in the particular area and for the particular period was always within the notice of the Director General.

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29. **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.

30. **In M/s Aggarwal Brothers vs. State of Haryana and Another**, (1999) 113 STC 317 (SC), relied upon by learned counsel for the Revenue, 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, held that the requirements of a deemed sale within the meaning of Section 2(1) of Haryana General Sales Tax Act were satisfied.



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On the same point, on behalf of the Revenue, reference has been made to decision in **HSL Asia Ltd. v. State of Assam and others**, (2007) 8 VST 314 (Gau). Therein, the appellant entered into a contract with OIL for carrying out wire-line logging and perforation activities consisting of electronic/seismic scanning of subterranean strata and rock formation in the oil fields by utilizing its own high-tech equipment and the services of its highly technically qualified and experienced personnel.

The covenant therein required 24 hours service demonstrated in no uncertain terms that the equipments were to remain engaged for OIL's services and not liable to be either removed from their location(s) or engaged for other works. Therefore, it was held that absolute authority of OIL in the use of equipment was established and as such the transaction in question involved transfer of right to use the equipment, plants and machinery under the lease within the meaning of Section 2(33)(4) of Assam General Sales Tax Act.

Decision in **M/s Onaway Engineering Private Ltd. vs. State of A.P.**, (2006) 146 STC 634 (AP), has also been relied upon by learned counsel for Revenue.

As per facts, the petitioner operated a crane in the year 1985-86 for rendering services to Hindustan Shipyard Limited (HSL). It entered into an agreement with HSL on September 11, 1985

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under which it was to be paid Rs. 4,35,000 per month which was inclusive of fuel, lubricants, operation and maintenance of cranes at the HSL.

During the year 1985-86, the petitioner received Rs. 47,85,000 towards charges for operating the crane. Of this amount, Rs. 39,15,000 represented the receipts after July 1, 1985.

The Commercial Tax Officer assessed the petitioner on the basis of the receipts under section 5-E of the Andhra Pradesh General Sales Tax Act, 1957 as amounts received in respect of transfer of the right to use goods.

On appeal, the Appellate Deputy Commissioner held that the transaction was exigible to tax under section 5-E of the Act, but that the expenses incurred for the operations could not be taxed as taxable rentals for goods. He remanded the matter to the assessing authority for quantifying the relief.

On appeal before the Sales Tax Appellate Tribunal, the Tribunal dismissed the appeal.

On a revision petition, it was held that going by the provisions of the agreement, the crane was in effect transferred for the purposes of rendering service to HSL; that the period of hire was twelve months; that the rent was fixed at Rs. 4.35 lakhs per month and it was termed as hire charges; that the provisions of the agreement,



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if read together, left no room for doubt that the crane was given on hire and possession was transferred for its utilisation by HSL. Accordingly, the order passed by the Sales Tax Tribunal was upheld.

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, and therefore, upheld the order passed by the Tribunal.

31. In **Krushna Chandra Behera and Another v. State of Orissa and Others**, (1991) 83 STC 325 (Ori), it was observed by the Hon'ble Court that bailment requires delivery of the goods to the bailee. It is only upon delivery of the goods that the bailee becomes legally possessed of such goods and the hirer or the bailee becomes entitled to enjoy the use of the goods upon periodic payment or other valuable consideration to the bailer. Since the substance of the right is the enjoyment of the goods, the same is completed only upon the delivery of the goods. Hon'ble Court explained that only after acquiring possession of the goods hired out, the transferee begins to exercise the right to use the same.

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Hon'ble Court further observed that the test for determining whether a man is in possession of anything is whether he is in general control of it; that it is the acquisition of a right by the transferee and loss of it by the transferor.

Therein, the petitioners hired out their bus to the Orissa State Road Transport Corporation, under a contract under which the owner had to abide by all orders and directions of the General Manager of the Corporation or any office authorised by him in this behalf in regard to the starting station of the journey, operation, haltage, destination, timing and routes, issued from time to time; the owner could not use the vehicle covered by the agreement in any route except in accordance with the orders and direction issued bet he corporation under the agreement; that though the driver was provided by the owner he was answerable to the corporation.

The question before Hon'ble Court was:

“Whether the agreement represented a transfer of the right to use goods within the extended definition of sale in section 2(g) of the Orissa Sales Tax Act, 1947.”

Hon'ble Court held that for all practical purposes the effective control or general control of the vehicle under the agreement rested with the Corporation. There possession of the bus was with

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the Corporation and loss of possession by the owner. Consequently there was transfer of the right to use the bus, and it was a case of sale within the extended meaning of the term in section 2(g) of the Orissa Sales Tax Act, 1947.

32. In the case titled as **Peerless Shipping and Oil Field Services Ltd. and Another v. State of Assam and Others (and other cases)**, (2007) 8 VST 330 (Gau), the question before the Hon'ble Court was:

"Whether hiring services of crane, oil tanker, light motor vehicles, etc., rendered by the petitioners to OIL/ONGC fell within the category of transfer of right to use goods within the meaning of the Assam General Sales Tax Act, 1993 and the Assam Value Added Tax Act, 2003 thereby attracting liability to pay tax to the State Government authorising deduction of tax at source from the bills of the petitioners."

Hon'ble Court held that the contract in question had been made in respect of specific movable property at the deliverable stage and those goods had been delivered to OIL/ONGC in terms of the contracts. It was clear from the terms of the contract that once the machinery/vehicles were placed at the disposal of OIL/ONGC the owner lost effective control over them. It was the absolute will and discretion of the transferee as to how or in what manner those were to be used. The transferee was found not entitled to use the goods in any manner otherwise than as provided for in the contract and certain fixed charges were to be paid to the



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petitioners even for the period when no work was provided. The relevant clauses of the agreement specifically provided that in the event of violation of such clauses the transferor would be liable to penalties as provided therein. The jural relationship that existed by virtue of entertaining the said contracts between the parties incurred certain statutory liabilities upon the parties. The terms of the contract thus disclosed that the transaction in question amounted to transfer of right to use goods within the meaning of clauses (10) and (15) of section 2 of the Assam General Sales Tax Act, 1993 and the Assam Value Added Tax Act, 2003.

Hon'ble Court held accordingly that the petitioners' liability under the Acts could not be denied.

33. In Mohd. Wasim Khan case (supra), Hon'ble Allahabad High Court held that the terms of the contract clearly revealed that effective control over the vehicles always remained with the applicant and never passed on to the companies. Hon'ble Court was of the opinion that the case did not come within the purview of transfer of right to use the goods for the following reasons:

"The agreement was for providing buses for transportation of the employees of the companies from one place to another place; drivers, spare tyres, tools and all other necessary items were of the applicant; Diesel and other running expenses, insurance, taxes, permit, etc., were borne by the applicant; payment was to be made on the basis of the actual use of the vehicles; Drivers and conductors of the vehicles were held



responsible if any unauthorised persons were found boarding/travelling in the vehicles. The applicant had to take the insurance cover for their workmen and vehicles to cover the risk of accident/death and the payment of compensation as per rules. In case of failure to provide the vehicle, the applicant was liable for penal action; the payment was on kilometre basis.”

34. In Transocean Offshore’s case (supra), one of the questions that arose for consideration before the Hon’ble High Court of Andhra Pradesh was as to whether there was a transfer of right to use in terms of section 4(8) of Andhra Pradesh VAT Act 2005.

Transocean Drilling Services (India) Private Limited who was the contractor and the petitioner herein, who was the sub-contractor. The sub-contractor was to deploy on charter hire basis, a jack up drilling rig and requisite personnel for operating the drilling unit and for carrying out offshore drilling operations. The petitioner was the owner of the drilling unit and having adequate and necessary personnel for performing such operations.

Hon’ble High Court, while referring to the terms contained in some of the clauses of the agreement observed that the equipment and technical personnel provided by the petitioner were on charter hire, where the complete control was retained by the petitioner; that all responsibilities were placed only upon the petitioner by the main contractor himself. Hon’ble High Court also relied on the decisions in International Travel House Ltd.

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case and Hari Durga Travel's case decided by our own Hon'ble High Court.

In view of observations made 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.

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.

35. In view of the above discussion, it is observed that 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.
36. 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,

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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 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.

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Conclusion

37. As a result, it is held that this is a case of transfer of legal right to use the goods by the appellant to the lessees 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)(vi) of DVAT Act.

In view of the above discussion, the settled law and applying the same to the facts of the present case, it is held that in the agreements, the intention of the parties was to transfer right of use of the goods-helicopter(s)-by the appellant to the other party (lessee) and that the dealer-appellant actually and legally transferred right to use the goods to them.

Consequently, as regards the agreements executed, there is no merit in the appeals regards levy of tax and interest u/s 32 of DVAT Act, which are held to have been rightly upheld by the learned OHA vide impugned order.

Jurisdiction of Revenue for framing of assessment

38. In the course of arguments, reference was made to an affidavit as regards the place(s) of execution of the agreement between the

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dealer-assessment and the lessee(s), to contend that in view of this affidavit it can safely be said that the Department of Trade & Taxes at Delhi had jurisdiction to frame assessments and levy VAT only with respect to transactions which took place within Delhi or originated in Delhi and not beyond Delhi.

39. When it was pointed out to Learned CA for the appellant that the affidavit is an unattested affidavit and that no reliance can be placed on such an affidavit, learned CA did not rely on this affidavit and rather referred to the following decisions:

- (i) **20th Century Finance Corporation Ltd & Another v. State of Maharashtra**, (2000) 119 STC 182 (SC);
- (ii) **Goa Carbon Ltd. v. Commissioner of Trade & Taxes**, 2008 (2) TMI 603-SC; and
- (iii) **Srei International Finance Limited vs. State of Orrissa and Ors.**, MANU/OR/0212/2018 and
- (iv) **Dominos Pizza Overseas Franchisy v. State of U.P. and Another**, 2017-TIOL-641-HC-ALL-VAT.

40. In 20th Century's case (supra), Hon'ble Apex Court held that the right to use goods accrues only on account of the transfer of right. If the goods are available, the transfer of the right to use takes place when the contract in respect thereof is executed. As soon as the contract is executed, the right is vested in the lessee. Thus, the

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situs of taxable event of such a tax would be the transfer which legally transfers the right to use goods.

Hon'ble Apex Court held therein that the appropriate Legislature by creating legal fiction can fix situs of sale. In the absence of any such legal fiction the situs of sale in case of the transaction of transfer of right to use any goods would be the place where the property in goods passes, i.e. where the written agreement transferring the right to use is executed.

In Goa Carbon Ltd's case (supra), reliance was placed on decision in 20th century's case (supra).

41. In Srei International Finance Limited's case, decided by Hon'ble High Court of Orissa, it was observed that in case of inter-state lease, the place where the transfer of right to use is effected or where the property passes is immaterial and further that since the transfer of right to use was effected by the two agreements executed in Calcutta the same could not also be subjected to tax in the State of Orissa.

In **Dominos Pizza Overseas Franchisy's** case, Hon'ble High Court of Allahabad held that the agreement could be said to become a concluded contract and executed when it was communicated to a offer or at Noida wherefrom offer was made and consequently there was no merit in the contention raised that taxing authority in U.P had no jurisdiction.

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42. On this point, Learned Counsel for the Revenue has referred to Clause 11.3 of the three agreements i.e. between dealer-appellant and Andaman & Nicobar administration; dealer-appellant and Punjab Government; and dealer-appellant and Ministry of Home Affairs, and contended that in view of the agreements between the parties regarding payments to be made by the lessee to the lessor-appellant at New Delhi, intention of the parties that New Delhi was the situs for the purpose of levy of tax, can safely be inferred *in respect of all agreements.*
43. Further, it has been submitted on behalf of the Revenue that this is not a case of the dealer-appellant that it was registered anywhere other than Delhi, and further that its head office being in Delhi, Government of NCT of Delhi had the jurisdiction to frame assessment for the purpose of VAT.
44. In this regard, reference has also been made to Clause 15.2 of each of the three agreements referred to above.
45. One of the submissions made on behalf of the Revenue is that as per case of the dealer-appellant itself, it has deposited service tax at New Delhi, and that even on this ground it can safely be said that Trade & Taxes Department of Delhi has the jurisdiction to frame assessments and demand VAT as regards the turnover.
46. Reference has also been made to provisions of Section 2(a) of DVAV Act which defines "appropriate State" to submit that

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Department of Trade & Taxes Department, Delhi is the appropriate State for levy of tax on such turnover.

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47. Ultimately, on behalf of the Revenue, it has been submitted that even if dealer-appellant deposited service tax, the dealer-appellant was not exempted from payment of VAT, and was rather liable to pay/deposit VAT in view of settled law. In support of this contention, reference has been made to the following two decisions:

1. M/s. 20th Century Finance Corpn. Ltd., and Anr. v. State of Maharashtra, (2000) 119 STC 182 (SC);
2. M/s. BSNL and Anr. v. Union of India and Ors., (2006) 3 VST 95 (SC).

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47. Indisputably, in these matters offer(s) was/were made by the lessee(s) and same was/were accepted by the dealer-appellant at Delhi. In the given situation, Department of Trade & Taxes, Delhi had the jurisdiction to frame assessments qua the turnover pertaining to transfer of right to use the helicopter(s). Therefore, there is no merit in the contention raised on behalf of appellant that the said department at Delhi had no jurisdiction to frame assessments in respect of the turnover pertaining to other States.

48. Indisputably, before this Appellate Tribunal, dealer-appellant is stated to have produced one paper book also containing one affidavit dated 10/10/2012 and signed by Sh. Sanjiv Agrawal,



company signatory of the appellant, but the same is an un-attested affidavit.

In the course of arguments, learned CA for the appellant submitted that duly attested affidavit can also be taken by this Appellate Tribunal on record.

There is merit in the objection raised by learned counsel for the Revenue that when no care was taken on behalf of the appellant to submit duly attested affidavit before this Appellate Tribunal during pendency of these appeals since long, and no application seeking permission to place on record such an affidavit was filed, the appellant cannot be permitted to place attested affidavit on record at this stage.

No Previous Assessments on such turnover

49. Learned CA for the appellant has contended that in none of the previous tax periods or tax periods subsequent to the tax periods of 2006-07, 2007-08, 2008-09 and 2009-10, the Department of Trade & Taxes levied VAT on the dealer-appellant on any such turnover, and as such the impugned assessments deserves to be set aside.

Learned counsel for the Revenue has contended that in suchlike tax matters, bar referred to by Learned CA for the appellant, does not apply. ✓



Learned Counsel for the Revenue has rightly contended that every tax period is different tax period and the assessment is framed keeping in view peculiar facts and circumstances of each case, while applying legal provisions of the statute, and as such opinion expressed in one matter may differ by one Assessing Authority may differ from the opinion expressed in the other matter by the other Assessing Authority.

Claim of appellant as regards Taxable Service

50. Case of the dealer-appellant is that as per terms of the agreement executed by the dealer- appellant with other dealers, hiring of helicopters is covered by the meaning “Taxable Service” as defined under Section 65 (105)(zzzzj) of the Finance Act, 2004 and does not fall in the definition of “Sale” as per section 2 (1) (zc)(vi) of the VAT Act, 2004.

Further, as per case of the appellant, Revenue has levied tax, interest and penalty simply on the ground that after the delivery of the helicopters lessee gained absolute possession and control of goods which resultantly led to inference that there is “transfer of right to use goods” and that the activities of the appellant are covered by the definition of “sale”. As per submission of learned CA, impugned assessment has been framed illegally and as such deserves to be set aside.

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Reference was also made to the decision in **M/s. G.S. Iamba and Sons v. State of Andhra Pradesh** decided by the Hon'ble High Court at Andhra Pradesh. In particular reference was made to para 45 of the judgement, which read as under:

"45 Reading the recitals and various clauses, indeed there is a transfer of the right to the use Transit Mixers. All the rests as indicated hereinabove exist in the contract between the petitioners and Grasim. The vehicles are maintained by the petitioners. They appoint the drivers and fix their roster. The licences, permits and insurances and taken in their names by the petitioners, which they themselves renew. The Transit Mixers go to Grasim's batching plants in Miyapur and Nacharam, where they are loaded with RMC and then proceed to the construction sites of customers. The product carried is manufactured by Grasim's, which is delivered to the customers, and the customers pay the cost of the RMC to Grasim and the petitioners nowhere figure in the process of putting the property in Transit Mixers to economic use. The entire use in the property in goods is to be exclusively utilized for a period of 42 months by Grasim. The existence of goods is identified and the Transit Mixers operate and are used for the business of Grasim. Therefore, conclusively it leads to the only conclusion that the petitioners had transferred the right to use goods to Rasim. For these reasons, we are not able to countenance any of the submissions made by the petitioner's counsel."

On the point of eligibility of the transactions to service tax, learned CA has referred to the following decisions:

1. **Global Vectra Helicorp Ltd. v. CST, Mumbai, 2016 (42) S.T.R. 118;**

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2. **Reliance Industries Ltd. v. CCE & ST, LTU, Mumbai, 2014** (36) S.T.R. 820 (Tri. - Mumbai);
3. **Shipping Corporation of India Ltd. v. CCE & ST, Mumbai, 2014** (33) S.T.R. 552 (Tri. - Mumbai); and
4. **Indian National Shipowners' Association v. Union of India, 2009** (14) S.T.R. 289 (Bom.).

In support of his contention, learned CA has also referred to copy of circular no. **334/1/2008-TRU** dated 29.02.2008 issued by Central Government, and also to the definition of "taxable service" as available under the head "**Supply of Tangible Goods for Use Services**"- Section 65(105) (zzzzj) of Finance Act, 1994.

51. As noticed ^{above} ~~about~~ Learned OHA has observed ^{in the} ~~that~~ impugned order ^{- that -} transactions, subject-matter of assessment and appeals, fall within ambit of "sale", thereby attracting levy of tax.

In para 6 of the impugned order, Learned OHA referred to the conclusion arrived at by the Assessing Authority that even if in the agreement there was no mention of word "delivery", it was observed from the agreement that after the helicopters were placed at the disposal of the customers by the positioning of the helicopter at the base identified by both the parties, it was absolute will and discretion of the customer as to how and in what manner the helicopters were to be used. Ld. OHA also took into consideration the observation made by the Assessing

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Authority that effective control of the hired/rented helicopter was of the customer i.e the government, and not that of the objector.

52. In Imagic Creative Pvt. Ltd's case, Hon'ble Apex Court observed that payment of service tax as also the VAT are mutually exclusive and therefore they should be held to be applicable having regard to the respective parameters of service tax and sales tax, as envisaged in a composite contract as contradistinguished from an indivisible contract.

As further observed, it may consist of different elements providing for attracting different nature of levy. Therefore, Hon'ble Apex court observed that it is difficult to hold that in a case of this nature (the case of Imagic Creative Pvt. Ltd), sales tax would be payable on the value of the entire contract, irrespective of the element of service provided.

Therein, appellant was admittedly a service provider. Hon'ble Court observed that when the appellant provided service, it was assessable to a tax known as service tax. In their returns, appellant had made three categorical divisions in regard to tax liabilities i.e. service tax, tax under Kerala Sales Tax Act on first sale; tax on resale of the goods, when certain items were outsourced.

53. In M/s Medical Product Service's case (supra), the respondent was supplier of medical equipments to various hospitals. It was

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also engaged in providing services as erection, commissioning, installation service, management, maintenance or repair services and business auxiliary service. Department found that respondent was not paying service tax on value of taxable service provided to customers.

Hon'ble CESAT, New Delhi observed that in respect of works contract service, main aim of Finance Act, 1994 was to levy the service tax only in respect of value of service comprised in the works contract. As further observed, VAT is required to be paid as per the State Government statute, in respect of cases where goods are sold as part of works contract. Hon'ble Tribunal further observed that in the composite contracts, since VAT had been paid on the full contract value, there was no discernible value of service and consequently no service tax was liable to be paid.

54. In LSG Sky Chefs' case (supra), Hon'ble Tribunal, Bangalore observed that therein appellants had already discharged the service tax liability on the amount collected by excluding the cost of the food items supplied and also certain other payments incurred on behalf of the Airlines and which were reimbursed, and as such there was no justification for invocation of longer period and also imposition of penalty.

Hon'ble Tribunal further observed that once the appellant were to pay sales tax on a portion of the value of the contract, then,



simultaneously, there could be no demand of service tax on them, they being mutually exclusive.

55. In **Global Vectra Helicopter Ltd. v. Commissioner of S.T., Mumbai-II**, 2016 (42) S.T.R. 118 (Tri.-Mumbai), Hon'ble CESTAT, Mumbai held that the services rendered by the appellant in charter hire of helicopters to various corporates for offshore operation was classifiable under "Supply of Tangible Goods for Use of Service", and accordingly, upheld the demand of service tax under the said category along with interest thereon.

Therein, the issue involved was classification of services provided by the appellant to its client. The appellant owned several helicopters; it had a Non Scheduled Operators Permit issued by the Directorate General of Civil Aviation (DGCA) and was engaged in providing services of transportation of the personnel of the clients to and from their offshore installations.

The appellant classified the services provided under the category of "Transport of Passengers by Air Service" and paid service tax.

Therein, the contention of the department was that the services were in the nature of supply of tangible goods for use of service taxable w.e.f. 16/05/2008. The contention was based on the ground that for a service to be classified under "Supply of Tangible Goods for Use of Service (SOTG)". Transfer/supply is

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not relevant and it is the use of tangible goods which is of essence.

In para 4.10, it was observed as under:

“4.10 in the present case, the payment terms entail a fixed monthly charge plus a variable component based on per hour of flying time. The contract between the appellant and ONGC provides for billing of a minimum of 100 hours per month during the period of the contract. The fixed component again is explained by the peculiarities of the aviation industry. There are significant costs associated with parking, routine operational maintenance, maintaining adequate complement of flying crew as well as cabin crew, etc. The clients of the appellant require assured availability of the helicopters for the transportation of their personnel. Hence, the payment terms are a combination of fixed and variable charges. The fact that there is a variable component related to actual flying hours only proves that the flying and operation of the helicopters is done by the appellant. The contractual terms, read holistically, clearly establish that the obligation of the appellant does not end by simply ensuring availability of a helicopter. The appellant is obliged to transport personnel of the client as and when required, and has to fulfil all the obligations and responsibilities as an NSOP air transport service provider. In this regard, reliance is placed on the stay order passed by the Tribunal in the case of **Mesco Airlines Ltd. v. CST, New Delhi** [2013 (3) TMI 522 - CESTAT, New Delhi].”

Accordingly, it was observed that the appellant was responsible for flight and cabin crew, maintaining safety manuals, undertaking statutory and other maintenance, repair of the

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helicopters; the helicopters were flown against the NSOP of appellant.

In view of the above, Hon'ble Court was of the view that it stood established that the obligation of appellant was to provide services to passengers.

56. In reply on the basis of instructions contained in order no. 20/Comm ST/2009 dated 09/02/2009, learned counsel for the Revenue has rightly submitted that Central Board of Excise and Customs clearly observed in this document/order/instruction that w.e.f. 16/05/2008, in case of service provided to any person by any other person in relation to supply of tangible goods including machinery, equipment and appliances for use, where no right of possession and effective control of such machinery, equipments and appliances is transferred, such service would be taxable service u/s 65 (105)(zzzzj).

As herein the dealer-appellant transferred right of possession and effective control of the Helicopter(s) to the lessees, this order/instruction dated 09/02/2009 does not come to the aid of the dealer-appellant.

Penalty

57. As noticed above, assessments of penalties were framed u/s 9(2) of CST Act and also u/s 33 of DVAT Act.



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58. While challenging the assessments of penalties, on behalf of the appellant it has been submitted that since interpretation of law point as regards assessment of tax was involved, Revenue should not have levied any penalty. Further, it has been submitted that this is not a case of malafide intention, which is a pre-requisite for levy of penalty. Imposition of penalty is not automatic, as further submitted. In support of these submissions, reliance has been placed on the following decisions:

1. **M/s Mesco Airlines Ltd. v. Commissioner of Service Tax, New Delhi** 2018-TIOL-1761-CESTAT-DEL;
2. **Global Vectra Helicorp Ltd. v. Commissioner of Service Tax, Mumbai-II**, 2015 (2) TMI 974 - CESTAT Mumbai (LB);
3. **EIH Limited v. C.C.E., Delhi-I**, 2018 (9) TMI 921-CESTAT New Delhi;
4. **The Surat Municipal Corporation v. Commissioner of Central Excise & Customs**, 2016-TIOL-2152-HC-AHM-ST;
5. **Markfed Refined Oil & Allied Indus v. Commr. of Central Excise, Jalandhar**, 2008-TIOL-2864-CESTAT-DEL;
6. **Jayshri Impex v. Commissioner of CUS. & C. Ex., Rajkot**, 2007 (7) TMI 27-CESTAT, Ahmedabad.

59. In the alternative, contention raised on behalf of the appellant, while challenging assessments of penalties is that appellant being a public sector undertaking, even if it be assumed for the sake of arguments that it was a case of mistake on the part of the officers of the PSU, in not having paid VAT, Revenue should not ^{have} ~~be~~ ✓



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levied penalty. In support of this submission, reliance has been placed on the following decisions:

1. **Kandla Port Trust v. Commissioner of Central Excise & S.T., Rajkot**, 2019 (24) G.S.T.L. 422 (Tri. -Ahmd.);
2. **Karad Nagar Parishad v. Commissioner of C. EX. & S.T., Kolhapur**, 2019 (20) G.S.T.L. 288 (Tri. - Mumbai);
3. **U.P. State Food & Essential Commodities Corpn. Ltd. v. Commr. of C. EX., Lucknow**, 2019 (31) G.S.T.L. 97 (Tri. - All.);
4. **Indian Institute of Technology (IIT) v. Commr. of S.T.-II, Mumbai**, 2016 (42) S.T.R. 406 (Tri.-Mumbai);
5. **Gadkari Rangayatan v. Commissioner of Service Tax, Mumbai-II**, 2014 (36) S.T.R. 155 (Tri.-Mumbai);
6. **Mangalore Refinery and Petrochemicals Ltd. v. Commr. of C. EX. & Central Tax, Mangalore Commissionerate**, 2021 (52) G.S.T.L. 606 (Tri. -Bang.).

In Kandla Port Trust's case (supra), Hon'ble learned Member of CESTAT observed that most of the issues in dispute were either contentious or decided in favour of the appellant, and accordingly invocation of extended period or imposition of penalty u/s 78 of the Act was found without merit.

In **Karad Nagar Parishad v. Commissioner of C. EX. & S.T., Kolhapur**, 2019 (20) G.S.T.L. 288 (Tri.- Mumbai), Hon'ble learned Member of CESTAT observed that appellant therein was a Government Municipal Corporation and not an individual and it could not be imagined that the Government itself^{was} involved in

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suppression of fact with intent to evade service tax. In absence of malafide intention, the Hon'ble Tribunal set aside the assessment regarding penalty.

60. While challenging the assessments imposing penalty, learned CA has contended that the dealer-appellant being a public undertaking and one of the enterprises of the Government of India, it cannot be said that it is a case of deliberate defiance or involvement of any fraud. Therefore, learned CA has urged that the assessment of penalty deserves to be set aside.
61. On the other hand, Learned Counsel for the Revenue has rightly submitted that in case appellant had any doubt regarding levy/payment of VAT, PSU-appellant could seek determination order from the Commissioner, but no such step was taken.

It has also been rightly submitted that this is not a case only of mistake on the part of the PSU. But, at the same time, it cannot be said to be a case of malafide intention on the part of the dealer-appellant, particularly when it is said to have deposited service tax.

Proviso to Section 86 of DVAT Act, at the relevant time provided as under:

"Provided further that the penalty imposed under this section can be remitted where a person is able to prove existence of a reasonable cause for the act or omission



giving rise to penalty during objection proceedings under section 74 of this Act.”

In the given facts and circumstances, when the dealer-appellant, a Government of India Enterprise, had no mala fide intention in not paying VAT and keeping in view the above said proviso as applicable, at the relevant time, this Appellate Tribunal finds that this is a fit case where the amount of penalty deserves to be set aside. It is ordered accordingly.

Result


62. As a result of the above findings, the appeals challenging assessments of tax and interest are dismissed whereas the appeals challenging assessments of penalty are allowed.
63. File be consigned to the record room. 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: 06/10/2022



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(Narinder Kumar)
Member (Judicial)

Appeal Nos.: 108-115/ATVAT/13