

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: April 16, 2015

Pronounced on: May 14, 2015

+ **ST.APPL. 62/2014**

HARI DURGA TRAVELS Petitioner
Through Mr. R K Kapoor, Ms. Kheyali Sarkar
and Ms. Anupriya Singh, Adv.

Versus

COMMISSIONER OF TRADE & TAXES, DELHI Respondent
Through Ms. Ruchi Sindhwani, sr. standing
counsel with Ms. Megha Bharara,
Adv.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE R.K. GAUBA

MR. JUSTICE R.K. GAUBA

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1. This appeal under Section 81 of Delhi Value Added Tax Act, 2004 (hereinafter referred to as “the DVAT Act”) assails the order dated 11.07.2014 passed by Appellate Tribunal, Value Added Tax, Delhi (hereinafter referred to as “the Tribunal”) in appeal Nos. 625-626/ATVAT/08-09. By the impugned order, the Tribunal upheld the findings and conclusions recorded by the Objection Hearing Authority (OHA) in its order dated 14.11.2008 rejecting the contentions of the appellant (hereafter referred to as “the Assessee”) and upholding the order

passed by the Value Added Tax Officer (VATO) holding the assessee liable for default assessment of tax under Section 32 of DVAT Act in sum of ₹12,96,749/-, also imposing penalty in sum of ₹1 Lac under Section 33 read with Section 86(4) of the DVAT Act for the assessment year 2005-06.

2. The following substantial question of law arises for consideration:-

“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.”

3. It is essential to take note at this stage of background facts.

4. The appellant is a partnership firm approved by the Government of India as a tourist operator engaged in the business of providing vehicles on rental basis. It stands registered (TIN No. 07550344859) for purposes of Value Added Tax (VAT) with the concerned authorities in Delhi. It had entered into agreements with Delhi Transport Corporation (DTC) in January, 2005 for providing buses to it on the terms and conditions mutually settled. It received an amount of ₹1,03,73,994/- from DTC on account of hire charges for running its buses under the said agreements during the period 2005-06.

5. Notice dated 12.02.2007 was issued and served on the appellant for audit for assessment year (AY) 2005-06 in respect of which the assessee submitted the requisite documents. The assessing authority (VATO) by its order dated 13.05.2008 imposed VAT on the said receipt under Section 32 of DVAT Act treating the transaction as deemed sale on account of transfer of right to use the goods thereby raising a demand of ₹12,96,749/- with 12.5% interest, in addition to the penalty of ₹1,00,000/- imposed for the

reason that it had failed to get itself registered under the provisions of DVAT Act w.e.f. 01.04.2005. As noted above, the challenge to the said order issued by the VATO before OHA, and the Tribunal, however, failed.

6. The controversy at hand revolves around the invocation of clause (zc)(vi) under Section 2(1) of DVAT Act defining the word “sale” for imposing VAT on the transaction of giving of two Volvo buses under the aforementioned agreements by the assessee unto DTC. The definition clause, to the extent relevant, may be extracted as under:-

“(zc) “sale” with its grammatical variations and cognate expression means any transfer of property in goods by one person to another for cash or for deferred payment or for other valuable consideration (not including a grant or subvention payment made by one government agency or department, whether of the central government or of any state government, to another) and includes-

X X X

(vi) transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;

X X X

and the words “sell”, “buy” and “purchase” wherever appearing with all their grammatical variations and cognate expressions, shall be construed accordingly.”

7. The provision has been enacted by the legislature with reference to Entry 54 in the State List (List II) of the 7th Schedule appended to the Constitution of India read with Article 366(29A). Whilst Entry 54 of the State List was substituted by the Constitution (Sixth) Amendment Act, 1956, clause (29A) was inserted in Article 366 by the Constitution (Forty-sixth) Amendment Act, 1982. Entry 54 gives unto the State legislature the

legislative competence on the subject of *“taxes on the sale or purchase of goods other than newspapers, subject to the provisions of entry 92A of List I.”* The entry 92A of the Union List (List-I), as excluded from the domain of the State legislation, pertains to *“taxes on the sale or purchase of goods other than newspapers, where such sale or purchase takes place in the course of inter-State trade or commerce.”*

8. Article 366(29A) reads as under:-

“(29A) “tax on the sale or purchase of goods” includes--

(a) a tax on the transfer, otherwise than in pursuance of a contract, of property in any goods for cash, deferred payment or other valuable consideration;

(b) a tax on the transfer of property in goods (whether as goods or in some other form) invoked in the execution of a works contract;

(c) a tax on the delivery of goods on hire purchase or any system of payment by installments;

(d) a tax on the transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;

(e) a tax on the supply of goods by any unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration;

(f) a tax on the supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (whether or not intoxicating), where such supply or service, is for cash, deferred payment or other valuable consideration,

and such transfer, delivery or supply of any goods shall be deemed to be a sale of those goods by the person making the

transfer, delivery or supply and a purchase of those goods by the person to whom such transfer, delivery or supply is made.”

9. Noticeably, we are concerned here with clause (d) of Article 366(29A).

10. The legal history of Article 366(29-A) has been noticed and commented upon by the Supreme Court in the case of *Bharat Sanchar Nigam Ltd. and Another v. Union of India and Others* (2006) 3 SCC 1. As noted in the said judgment, prior to the forty-sixth Amendment, composite contracts such as works-contract, hire-purchase contracts and catering contracts were not assessable as contracts for sale of goods. In an earlier decision [reported as *State of Madras v. Gannon Dunkerley & Co. (Madras) Ltd.* AIR 1958 SC 560], the State Government had sought to treat a contract, under which a contractor had agreed to set up a building, as “contract for sale” under the provisions of Madras General Sales Tax Act, 1939. The Supreme Court accepted the submission of the assessee that the expression “sale of goods” was a term of well-recognized legal import in the general law relating to sale of goods. It held that in order to be treated as a case of sale of goods, the transaction must involve three essential components viz. “(i) an agreement to transfer title, (ii) supported by consideration, and (iii) an actual transfer of title in the goods.”

11. It may be added here that the court was examining in that case the plea of the Revenue in light of entry 48 of List-II in 7th Schedule of the Government of India Act, 1935 which would correspond to the afore-quoted entry no. 54 of the State List in the 7th Schedule to the Constitution of India.

12. The court concluded as under:-

“46. To sum up, the expression ‘sale of goods’ in Entry 48 is a nomen juris, its essential ingredients being an agreement to sell movables for a price and property passing therein pursuant to that agreement. In a building contract which is, as in the present case, one, entire and indivisible – and that is its norm, there is no sale of goods, and it is not within the competence of the Provincial Legislature under Entry 48 to impose a tax on the supply of the materials used in such a contract treating it as a sale.”

13. As noted in *Bharat Sanchar Nigam Ltd.* (supra), clause 29A was added to Article 366 by the (Forty-sixth) Amendment pursuant, *inter alia*, to the recommendations of the Law Commission in its report submitted in 1974. The Constitutional Amendment, thus, introduced an expansive meaning to the expression “sale of goods” including within its ambit certain transactions which thus far would be beyond its purview mainly on account of the element of actual transfer of title of goods being absent. By legal fiction, transactions in the nature of those covered by clause (a) to (f) of Article 366(29A) are to be treated as “deemed sale” for purposes of levy of sales tax (since substituted by VAT), as observed in *Bharat Sanchar Nigam Ltd.* (supra) in cases “wherein the sale element could be isolated and be subjected to” such tax.

14. Noticeably, clause (vi) of the definition of the word “sale” provided under Section 2(1) (zc) of DVAT Act is more or less similarly worded as clause (d) of Article 366(29A), both quoted above. The focus is on the “transfer of the right to use ... goods” for valuable consideration (present or deferred) for any purpose, it being immaterial whether the transfer is for a specified period or not.

15. It was argued by the assessee that the contract may give rise to service tax liability but the imposition of VAT is illegal.

16. Service tax is a levy within the legislative competence of the Union. It was introduced, for the first time, by Chapter V of the Finance Act, 1994 and has continued to be enforced in terms of such legislation, though amended several times. By virtue of Section 68, read with Rule 6(1) of the Service Tax Rules, 1994 framed thereunder, every person providing “taxable service” to any person is liable to pay service tax, at the rates specified in Section 66, to the credit of the Central Government. In terms of Section 67 (as amended with effect from 01.05.2006 by Finance Act, 2006) in a case where the provision of service is “for a consideration in money” it is the gross amount charged by the service provider for such service which is the value of the service for purposes of calculating the levy of service tax.

17. Questions similar to those brought up here had arisen before the Supreme Court in the case of *Bharat Sanchar Nigam Ltd.* (supra), albeit in the context of telephone services provided by the assessee in that case. The Revenue had sought to subject the transaction involving telephone service to sales tax on the reasoning that it was covered by Article 366(29A)(d). The court held that a telephone service is nothing but a service though the nature of the transaction providing such service was a composite one with the elements both of service and sale wherein the sale part concerned the transfer of right to use the goods.

18. In the judgment authored by Hon’ble Ms. Justice Ruma Pal (for herself and Hon’ble Mr. Justice Dalveer Bhandari), the court ruled as under:-

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

(emphasis supplied)

19. In a separate, but concurring, judgment authored by Hon’ble Dr. Justice AR. Lakshmanan, it was observed thus:-

“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.”

(emphasis supplied)

20. The case reported as *Commissioner, VAT, Trade and Taxes Department v. International Travel House Ltd.* 2009 (8) AD (Delhi) 13 is a decision rendered by a division bench of this court against the backdrop of facts which are similar to those involved here. The assessee in that case had given to a private power distribution company (NDPL) certain Maruti Omni Cabs on hire. The VATO had imposed VAT on the consideration received by the assessee treating the transaction as transfer of goods (the cabs) for use for valuable consideration within the meaning of the expression “sale” under the afore-quoted provision. The Tribunal, in appeal, had upheld the contention of the assessee holding that the transaction involved provision of services only and not transfer of the right to use the goods.

21. Noting at length the terms and conditions of the contract whereunder the cabs had been provided, the court in the case of *International Travel House Ltd.*(supra) rejected the contentions (to the contrary) of the Revenue holding the transactions in question not in the nature of sale of goods as envisaged in Article 366(29A)(d) and additionally for the reason the composite contracts (with elements of both sale and service) could not be split up by taking from it the value of the goods for purposes of taxing the same under DVAT Act.

22. On the contention regarding deemed sale, the Court observed thus:-

“12 ...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..."

(emphasis supplied)

23. In the context of the view taken as to impermissibility of splitting up of the composite contract, the Court ruled as under:-

"11. ...since the contract in question is a composite contract of sale of goods and services, clearly, it is not permissible for the State Legislature by applying DVAT Act to tax composite contracts comprising of both goods and services. Not only the contracts cannot be artificially split up so as to enable the sale element to be taxed, further, the States cannot treat the contract as only a contract of sale of goods and tax the whole value of the transaction as a sale of goods. Since the parties have not intended the contract to be mutilated/severable inasmuch as no different values are specified in the subject contract towards goods value separately and the value of services separately, it is not permissible by the DVAT Act to impose sales tax on the whole transaction value because that would amount to the State to entrench upon the Union List and tax services by including the cost of such services in the value of the goods. Thus, the contract in question being a composite contract is to be treated as a contract for services and no sales tax can be imposed on the contracts in question..."

24. The Revenue places reliance on *Krushna Chandra Behera and Another v. State of Orissa and Others* 1991 83 STC 325, a decision rendered by High Court of Orissa involving similar transaction by Orissa State Road Corporation having taken a bus on hire under a contract from its owner. The contention of the Revenue therein that the case involved transfer of right to use goods and, thus, a deemed sale attracting levy of sales tax under the

local law was upheld. Taking into consideration the terms and conditions of the contract whereunder the bus had been given on hire, the Court found that, for all practical purposes, the effective or general control of the vehicle rested with the State Transport Corporation wherein the registered owner (the assessee) stood excluded from the right to use the vehicle covered under the agreement except in accordance with the orders and directions of the hirer.

25. A copy of the agreement dated 19.01.2005, initially for a period of five years (from 20.01.2015 to 19.01.2010) entered upon by the appellant (assessee) with DTC has been filed on record. It created an obligation on the assessee to provide on hire to DTC its “new AC Deluxe buses (Volvo) (specified buses bearing registration No. DL1PB 7420 and DL1PB 7421) together with the driver” for being run on “long inter-State routes” of DTC. The seating capacity and other specifications including the model of the vehicles (2004), body, colour of the exterior, etc. were spelt out in the contract in detail. It was stipulated that the drivers, employees (whole time) of the assessee (owner), must hold HTV licence with PSB badge having minimum five years’ experience and terms and conditions of his engagement must confirm to the prevalent laws.

26. While the bus-related responsibilities under the contract are to be borne by the owner (the assessee), it is the duty of DTC to provide a conductor. The contract stipulated discipline for the driver including with regard to the uniform prescribed by DTC, display of identity card, regularity in attendance, conduct, etc. holding accountable the owner, also making it liable to provide substitute driver in case of necessity. The owner is required by the contract to keep the buses roadworthy, in accordance with

the provisions of Motor Vehicles Act and Rules framed thereunder and, for such purposes, carry out the requisite maintenance and repairs at its own costs, such that the vehicle always carries a proper fitness certificate and pollution under control certificate. The owner ensures that the bus is duly insured, under comprehensive insurance policy; keeps DTC indemnified against all claims arising out of accidental damage or loss caused during the operations to third party or to the vehicles; and, also remains responsible for payment of fines/penalties for violation of traffic rules and for the driver to be produced in the court of law or before police authorities. The money collectible from the users in the form of passenger fare or luggage charges, besides charges levied for advertising, use of telephone, etc., is the revenue of DTC which also bears tax liability in the nature of passenger tax, permit fee, toll tax, *Adda* tax, city entry fee, etc.

27. The contract also stipulated that the owner shall be obliged to keep the bus in neat, clean and presentable condition and for purposes of upkeep, make the necessary arrangements with service centres/dealers/repair shops, etc. on the routes where they were deployed as per schedule decided upon by the DTC. In terms of the contract, it is the owner who would arrange fuel (on reimbursable basis), lubricant, tubes, spare parts, etc.

28. The consideration for the registered owner of the vehicle under the contract is hire charges as per ASRTU contract (subject to deduction of tax liability at source), payable against fortnightly billing cycles besides reimbursement of the cost of fuel, for calculating which detailed provisions are made including maintenance of a proper log book. Penalties and their rates are specified for defaults on the part of the registered owner or the driver and extent of their respective obligation.

29. The owner is obliged by the contractual terms to take prior permission before the vehicles are sent for repairs with obligation to indicate in advance the period of non-availability of the vehicles on such account. The owner is not entitled to “withdraw the bus from operation without prior written consent” of DTC nor can it use these vehicles “for any other purpose at any time”, nor “transfer or otherwise alienate (except with prior written permission of DTC) vehicles” during the period of agreement. It is under a general obligation to “abide by the orders” of DTC or an officer authorized by it.

30. The Tribunal rejected the objection of the assessee to levy of VAT setting out its reasons as under:-

“13. In the present case, in term of the clauses referred to above, it is crystal clear that the buses at all times remained in control and supervision as well as in possession of the DTC except that buses were hired or on lease out on consideration to the DTC by the appellant with chauffeur who has no control over the right of the lessee on buses except to drive the same in accordance with the directions of the conductors on bus who was person of the lessee. The ownerships of the buses no doubt always remained with the appellant but the right over the buses is transferred to the DTC during the period of agreement with consideration/hire charges which amount to sale as per definition of sale u/s 2(zc) of the DVAT Act ...”

“14 ...It is crystal clear that not only control and supervision of the buses during the hire period which is specified in the agreement remained with the DTC who was having possession of the buses and at all times which could not be interfered with the appellant except in case of when the bus because of other reasons could not be operated by the DTC. The reference made to the case law that it was a case of rendering service is not at all acceptable in view of definition of sale and ratio of the judgment as discussed above. The reference made to the case

of International Travel House Limited decided by this tribunal is of no avail to the appellant as certainly it was not a case of service but it was a case of transfer of right to use the goods/buses by the lessee exclusively without any interference by the appellant during the period of agreement...”

(emphasis supplied)

31. The Tribunal upheld the order imposing penalty recording the reasons as under:-

“16. The Act i.e. DVAT Act, 2004 came into existence w.e.f, 01.4.2005 and the appellant could not get himself registered though liable to be registered as on 01.04.2005 under the existing provisions of the Act, this Tribunal is of the considered view that such like appellants were liable to be registered earlier also for such like transaction and hence there existed no reasonable cause for the appellant for not getting themselves registered from the date of their liability of registration as upheld by this Tribunal as above, the orders as such suffers from no infirmity or illegality which resulted in passing the penalty orders notice u/s 33 of the DVAT Act of which constitutionality and virus has been upheld by Their Lordships in case of Sales Tax Bar Association (Regd.) Vs Govt. of NCT of Delhi & Ors. decided on 07.12.2012 in WP (C) No. 4236/2012 by Hon’ble Delhi High Court wherein Their Lordships held that no hearing is required in accordance with, the principle of natural justice as notice u/s 32 & 33 of the DVAT Act afford opportunity of being heard post of such notices. In the present case, nothing contrary has been placed or proved by the appellant in term of Sec. 78 of the DVAT Act to the effect that the burden of proving any matter in issue in proceedings under section 74 of this Act or before the Appellate Tribunal which relates to the liability to pay tax or any other amount under this Act shall lie on the person alleged to be liable to pay the amount.”

(emphasis supplied)

32. The Revenue's contention is that effective control was made over to the DTC. In support, it relies upon the various stipulations in the agreement such as - exclusive use of the bus on DTC routes; exclusive right to collect advertisement revenue by the DTC; the entire revenue being collected by DTC employees, i.e. its conductor; maintenance or repairs not at the choice of the owner but after approval of the DTC; restriction upon right to terminate the contract under pain of penalty. The discussion in *Bharat Sanchar Nigam Limited* (supra) both in the majority judgment (which no doubt stated that actual delivery of the goods is not necessary for effecting the transfer of the right to use the goods but the goods should be available at the time of transfer, must be deliverable and delivered at some stage) and the concurring opinion which specifically pin-pointed that "the transferee should have a legal right to use the goods - consequently all legal consequences of such use including any permission or licenses required therefore should be available to the transferee" - unmistakably are a pointer as to what in law constitutes a right to transfer the use of goods. The decision in *State of A.P. and Anr. v. Rastriya Ispat Nigam Limited* 2002 (3) SCC 214 which was in the context of machinery given on hire to the transferee, for a particular purpose, affords a close parallel to the facts of the present case. The Court underlined – after noticing that the machinery was given for producing particular goods and concluded, "...the transaction did not involve transfer of right to use the machinery in favour of contractors... 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."

33. This Court is unconvinced by the Revenue's submissions that the facts of the present case are distinguishable from those in *International Travel House (supra)*. That DTC has control over ticket collections or absolutely collects all the revenues or that bus maintenance and repair is subject to its prior approval, are *ipso facto* not decisive either by themselves or cumulatively in concluding that there was a transfer of the right to use the vehicles. Both the majority and concurring opinion in *Bharat Sanchar Nigam Limited (supra)* emphasize that the goods should be "ultimately delivered", for the transaction to constitute a "sale" within the extended meaning, defined by Article 366(29A) of the Constitution of India. *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 mishappening 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)*.

34. In our considered opinion, the Tribunal has fallen into error by declining to apply the ratio of *International Travel House Ltd. (supra)* and by concluding that the contract in question has resulted in transfer of the effective control and possession of the two vehicles (goods for purposes at hand) unto DTC. On the contrary, the various terms of the contract,

summarized above, make it vividly clear that the possession has always remained with the owner. 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 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. The goods are specified, the right to deploy them is conferred on the third party, but the custody of the goods is retained by the owner who remains responsible for keeping them fit for use in terms of the contractual obligations. 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.

35. The case of *Krushna Chandra Behera* (supra) is distinguishable on facts as, unlike there, here there is no vesting of possession to the exclusion of owner.

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.

38. In the result, the substantial question of law is answered in the negative against the Revenue. Consequently, the impugned order imposing tax liability and penalty is set aside.

39. The appeal stands allowed accordingly.

R.K.GAUBA
(JUDGE)

S. RAVINDRA BHAT
(JUDGE)

MAY 14, 2015
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