

IN THE HIGH COURT OF ORISSA AT CUTTACK

STREV Nos. 289 and 290 of 2008

M/s. Indian Metals & Ferro Alloys Ltd. Petitioner

-versus-

State of Orissa Opposite Party

Appeared in this Case:

For Petitioner Mr. Ch. Satyajit Mishra, Advocate

For Opposite Party Mr. Sidharth Shankar Padhy,
Additional Standing Counsel

**CORAM:
THE CHIEF JUSTICE
JUSTICE R. K. PATTANAIAK**

**JUDGMENT
10.05.2022**

Dr. S. Muralidhar, CJ.

1. STREV No.290 of 2008 is taken up by a separate notice.
2. These revision petitions by the Assessee arise out of an order dated 17th September 2007, passed by the Orissa Sales Tax Tribunal ('Tribunal') in S.A. Nos.1416 and 1415 of 2000-01. By the said impugned order, the Tribunal reversed the order passed by the learned Assistant Commissioner of Sales Tax (ACST) Koraput Range, dated 21st January 2000, allowing the Assessee's appeals for the years 1990-91 and 1991-92. Those appeals in turn were directed against the assessment order dated 31st March 1994, passed by the Sales Tax Officer (STO) for the year 1990-91 and 1991-92, treating

the hire charges collected by the Assessee for letting out on lease its aircraft would amount to sales and the amenable to the sales tax under the Orissa Sales Tax Act, 1947 ('OST Act').

3. While admitting the revision petition on 15th May 2008, the following questions were framed for consideration by this Court:

“1) Whether under the facts and circumstances of the case the Division Bench of the Tribunal having not disputed the finding of the facts reached by the Assistant Commissioner is correct in law in holding that the receipts for rendering Air Transport Services will come under the definition of “Sale” as provided U/s 2 (g) (iv) of the O.S.T. Act?

2) Whether under the facts and circumstances of the case the Division Bench of the Tribunal is correct in law in distinguishing the order of the Full Bench of the Tribunal on the same set of facts and circumstances without assigning any reason?”

4. This Court has heard the submissions of Mr. Satyajit Mishra, learned counsel appearing for the Petitioner and Mr. Sidharth Shankar Padhy, learned Additional Standing Counsel for the Department.

5. The actual transaction involves the Petitioner offering Air Transport Services to the Central Government Agencies and some corporate clients and raising invoices towards reimbursement of the cost of operation.

6. It is pointed out by learned counsel for the Petitioner that the Director General of Civil Aviation, while issuing permit to the

Petitioner operate the aircrafts incorporated certain conditions. One such condition is Clause (xii) which reads as under:

“(xii) The right, granted under this permit to operate air-transport services other than scheduled air-transport service is for the benefit of the person named in the permit, whom shall not transfer or assign the same in any manner including a contract of hire whether oral or in writing whereby the hirer of his aircraft becomes or is made the real operator of the services.”

7. In other words, there is a prohibition under the permit on the Petitioner transferring or assigning in any manner, including a contract of hire whether oral or in writing. In effect, it is the Assessee who has to remain the “real operator of the services”

8. In the assessment order passed by the STO, Koraput Circle, it was noted that for the years 1990-91 and 1991-92, the Assessee-Dealer had raised bills amounted to Rs.1,55,500/- towards hire charges of their aircrafts. But this was not reflected on the sales turnover. Terming this as a transfer of the right to use of the aircraft, the STO treated as is a deemed sale and held that the hire charges received in the sum of Rs.1,55,500/- would be amenable to sales tax at 16%.

9. When the matter travelled to the ACST by way of appeal by the Assessee, the said appeal was allowed by the order dated 21st January 2000. The ACST noted that the Assessee had not entered into any written contract with the hirers for transfer of right to use the aircraft. At no point of time, possession of the aircraft was transferred to the hirers, since the control of the aircraft always remained with the Pilot employed by the Assessee. The cost of the

fuel, the salary of the Pilot during course of the flying, had been borne by the Assessee. As per the conditions of the statutory permit, the Assessee always bore the risk, statutory obligations and responsibility while operating the aircraft. Accordingly, it was held that this would not constitute sale within the meaning of Section 2 (g) (iv) of the OST Act. In other words, it did not amount to a transfer of right to use for any purpose.

10. It must be noted at this stage that there is a Full Bench decision of the Tribunal rendered on 31st December, 1999 in the Assessee's own case where it was held that the charges received by the Assessee from those hiring the services of the aircrafts did not amount to a sale under Section-2(g)(iv) of the OST Act.

11. However, the Tribunal has in the impugned order sought to distinguish the above judgment of its Full Bench by relying on the decision of the Supreme Court of India in *20th Century Finance Corporation Ltd. v. State of Maharashtra (2000) 119 STC 182 (SC)*. The Tribunal has in the impugned order held that the since the Full Bench of the Tribunal when it decided the issue on 31st December 1999, did not have the benefit of the above judgment of the Supreme Court in *20th Century Finance Corporation Ltd. (supra)* it decided the issue in favour of the Assessee.

12. Mr. Mishra, learned counsel appearing for the Petitioner points out that the issue decided in *20th Century Finance Corporation Ltd.* was mainly regarding the situs of sale and not whether the transaction of lease of aircraft or other machinery would be a deemed sale. He referred to the subsequent decision of the Supreme Court of India in *Bharat Sanchar Nigam Limited v. Union of*

India (2006) 145 STC 91 (SC) where the decision in ***20th Century Finance Corporation Ltd.*** was further explained.

13. The above submissions have been considered. The Court proceeds to first discuss the decision of the Supreme Court in ***20th Century Finance Corporation Ltd. v. State of Maharashtra*** (*supra*). It involved the following two questions:

“(a) What are the limitations under power of the State to levy tax on the transactions of transfer of right to use any goods? and;

(b) Where is the situs of the taxable event on the transfer of right to use goods under Article 366(29A)(d) of the Constitution of India?

14. In answering the said questions, the Supreme Court reached the following conclusion:

“35. As a result of the aforesaid discussion our conclusions are these:

(a) The State in exercise of power under Entry 54 of List II read with Article 366 (29A) (d) are not competent to levy sales tax on the transfer of right to use goods, which is a deemed sale, if such sale takes place outside the State or is a sale in the course of inter-State trade or commerce or is a sale in the course of import or export.

(b) 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.

(c) Where the goods are available for the transfer of right to use the taxable event on the transfer of

right to use any goods is on the transfer which results in right to use and the situs of sale would be the place where the contract is executed and not where the goods are located for use.

(d) In cases where goods are not in existence or where there is an oral or implied transfer of the right to use goods, such transactions may be effected by the delivery of the goods. In such cases the taxable event would be on the delivery of goods.

(e) The transaction of transfer of right to use goods cannot be termed as contract of bailment as it is deemed sale within the meaning of legal fiction engrafted in Clause (29A) (d) of Article 366 of the Constitution wherein the location or delivery of goods to put to use is immaterial.”

15. In first place, it must be noted that the Supreme Court had no occasion to consider a transaction of the present nature, viz., offering air taxi services by collecting charges. Secondly, the Supreme Court was not dealing with a situation where there was no actual delivery of possession of the goods or article as in this case, where there is no transfer of the possession of the aircraft to the temporary user of such aircraft.

16. The above decision in *20th Century Finance Corporation* has been further explained by the Supreme Court in *Bharat Sanchar Nigam Limited vs. Union of India* (*supra*). There the question considered was whether the transaction involved in providing mobile phone connections was amenable to sales tax? Answering that question in the negative, the Supreme Court explained the decision of this Constitution Bench in *20th Century Finance Corporation Ltd.* as under:

“73. With respect, the decision in *20th Century Finance Corporation Limited v. State of Maharashtra*, cannot be cited as authority for the proposition that delivery of possession of the goods is not a necessary concomitant for completing a transaction of sale for the purposes of Article 366 (29A) (d) of the Constitution. In that decision the Court had to determine where the taxable event for the purposes of sales tax took place in the context of Sub-clause (d) of Article 366 (29A). Some States had levied tax on the transfer of the right to use goods on the location of goods at the time of their use irrespective of the place where the agreement for such transfer of right to use such goods was made. Other States levied tax upon delivery of the goods in the State pursuant to agreements of transfer while some other States levied tax on deemed sales on the premise that the agreement for transfer of the right to use had been executed within that State (vide paragraph 2 of the judgment as reported). This Court upheld the third view namely merely that the transfer of the right to use took place where the agreements were executed. In these circumstances the Court said that: सत्यमेव जयते

"No authority of this Court has been shown on behalf of respondents that there would be no completed transfer of right to use goods unless the goods are delivered. Thus, the delivery of goods cannot constitute a basis for levy of tax on the transfer of right to use any goods. We are, therefore, of the view that where the goods are in existence, the taxable event on the transfer of the right to use goods occurs when a contract is executed between the lessor and the lessee and situs of sale of such a deemed sale would be the place where the contract in respect thereof is executed. Thus, where goods to be transferred are available and a written contract, is executed between the parties, it is at that point situs of taxable event on the transfer of right to use goods

would occur and situs of sale of such a transaction would be the place where the contract is executed

(Emphasis ours).

74. In determining the situs of the transfer of the right to use the goods, the Court did not say that delivery of the goods was inessential for the purposes of completing the transfer of the right to use. The emphasized portions in the quoted passage evidences that the goods must be available when the transfer of the right to use the goods take place. The Court also recognized that for oral contracts the situs of the transfer may be where the goods are delivered (see para 26 of the judgment)

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.”

17. In the concurring opinion in the same decision, i.e. ***Bharat Sanchar Nigam Limited vs. Union of India*** (*supra*) it was explained by A.R. Lakshmanan, J. as under:

“96. 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 licenses 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.”

18. Applying the above parameters to discern whether in the present case the transaction in question is a sale, it is seen that in the present case there is no actual transfer of the possession of the aircraft in question to the user of the aircraft. The aircraft is at all times in control of the Pilot who is an employee of the Assessee. Even the maintenance of the aircraft is undertaken by the Assessee as are the statutory compliances in terms of the permit granted to the Assessee. Therefore, there is no real transfer of the right to use the aircraft in the manner as envisaged in *20th Century Finance Corporation Limited* (*supra*) and as explained in the subsequent decision in *Bharat Sanchar Nigam Limited v. Union of India* (*supra*).

19. In the considered view of the Court, the Tribunal erred in not following the binding precedent of the Full Bench of the Tribunal in the Assessee's own case and in seeking to distinguish it on the basis of the decision of the Supreme Court in *20th Century Finance*

Corporation Limited (*supra*). Consequently, the questions framed by this Court are answered in favour of the Assessee and against the Department by holding that:

(i) Rendering of the Air Transport Services by the Assessee will not tantamount to 'Sale' as envisaged by Section 2(g)(iv) of the OST Act and that

(ii) the Tribunal was in error in distinguishing the earlier Full Bench decision of the Tribunal in the Assessee's own case.

20. The impugned order of the Tribunal to the above extent as well as the corresponding assessment order of the STO are hereby set aside and the order of the ACST is restored to file.

21. The revision petitions are disposed of in the above terms.

(**S. Muralidhar**)
Chief Justice

(**R. K. Pattanaik**)
Judge

S. Behera