

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.3247 OF 2022

Nayana Premji Savala)
Liquidator of Swire Oilfield Services India Private)
Limited, a company registered under the)
Companies Act, 1956, and having its office at 105,)
Mahinder Chambers, Waman Tukaram Patil Marg,)
Chembur, Mumbai – 400 071)Petitioners

V/s.

1. The Union of India through the Secretary,)
Ministry of Finance, Department of Revenue, North)
Block, New Delhi – 110 001)
2. The Commissioner of CGST & Central Excise,)
Navi Mumbai Commissionerate having his office at)
Satra Plaza, Palm Beach Road, Sector – 19D, Vashi,)
Navi Mumbai – 400 705)
3. The Assistant/Deputy Commissioner of CGST &)
Central Excise, Division-I, Navi Mumbai)
Commissionerate having its office at Satra Plaza,)
Palm Beach Road, Section – 19D, Vashi, Navi)
Mumbai – 400 705)
4. The State of Maharashtra through the)
Government Pleader High Court (AS), Mumbai –)
400 020)
5. The Commissioner of State Tax, Maharashtra)
State, 829, 8th Floor, Vikrikar Bhavan, Mazgaon,)
Mumbai – 400 010)Respondents

Mr. Prakash Shah a/w. Mr. Rajan Mishra i/b. PDS Legal for petitioner.
Mr. Karan Adik a/w. Ms. Ruju Thakker for respondent nos.1 to 3.
Mrs. S.D. Vyas, B Panel Counsel for State.

**CORAM : K. R. SHRIRAM &
A. S. DOCTOR, JJ.
DATED : 12th OCTOBER 2022**

ORAL JUDGMENT (PER K.R. SHRIRAM, J.) :

1 By consent of the parties, petition is taken up for hearing at the

admission stage since pleadings are completed. Rule. Rule made returnable forthwith.

2 Petitioner is impugning an order dated 31st January 2022 passed by respondent no.3 demanding service tax on a transaction, which according to petitioner was deemed sale under the Maharashtra Value Added Tax Act (MVAT Act) and admittedly on which VAT is levied and collected by respondent no.5.

3 Petitioner is the Liquidator of a company - Swire Oilfield Services India Private Limited [hereinafter referred to as the company (in liquidation)]. The company (in liquidation) was engaged in providing Cargo Carrying Units (CCU or containers) on rental basis to its customers. Admittedly, the containers were not owned by the company (in liquidation) but were taken on lease from one Monument Containers Limited, England (hereinafter referred to as Monument). The containers were used in the offshore exploration industry to transport and store all types of goods such as consumables, equipment, spares etc. that were required during the offshore exploration activity.

4 As per the lease agreement with Monument, the company (in liquidation) was permitted to give the containers on sub-lease to any party deemed fit and proper. Accordingly, the company (in liquidation) had, vide a lease agreement dated 1st April 2011, given on lease various

containers on hire for consideration to one CU Inspection India Private Limited (hereinafter referred to as the lessee). On the lease rental/hire earned by the company (in liquidation), admittedly, the company (in liquidation) discharged VAT at the rate of 12.5%.

5 Respondent no.3 during the course of verification of ITR/TDS data found that the company (in liquidation) had declared turnover of Rs.1,40,70,443/- to the Income Tax Department for FY 2015-2016 (AY 2016-2017). Respondent no.3 alleged that the company (in liquidation) did not pay service tax or obtain service tax registration even after crossing the threshold limit of Rs.10 lakhs and the fact of providing taxable services during FY 2015-2016 came to the notice of respondent no.3 only during the course of enquiry conducted by the department. Therefore, respondent no.3 came to a conclusion that the company (in liquidation) has failed to pay service tax and also failed to obtain service tax registration with the sole intent to evade due service tax on the taxable service provided by them and thereby suppressing those facts from the Service Tax Department. A notice dated 11th December 2020 accordingly came to be issued calling upon the company (in liquidation) to show cause as to why service tax amounting to Rs.20,40,215/- that was not paid by the company (in liquidation) during the period April 2015 to March 2016 plus interest plus penalty etc. be recovered.

6 Petitioner filed reply to the said show cause notice and petitioner's submissions were reproduced in the impugned order. Petitioner made it clear to respondent no.3 that the turnover as per the audited financials was only Rs.1,25,07,056/- and VAT paid was Rs.15,63,387/-. Copies of the income tax returns, Form 26AS, annual finance statements etc. were all provided to respondent no.3. One thing, therefore, is very clear that the turnover of the company (in liquidation) was only Rs.1,25,07,056/- and not Rs.1,40,70,443/-as alleged in the show cause notice. Petitioner explained to respondent no.3 that in terms of the agreement between the company (in liquidation) and the lessee, the containers were given on a "transfer of right to use" basis and there was transfer of possession and effective control of the containers to the exclusion of the transferor, i.e., the company (in liquidation). It was also brought to the notice of respondent no.3 that during the period of agreement petitioner could not simultaneously lease such containers to any other party and the lessee was responsible for the upkeep, maintenance and safety of such containers during the lease period and all risk and reward associated with the containers belonged to the lessee. Copy of the agreement was also submitted to respondent no.3.

7 According to petitioner, and as submitted to respondent no.3, the transfer of right to use goods was subject to levy of VAT. As per Article 366 (29A)(d) of the Constitution of India, tax on sale or purchase of goods

includes 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. Consequently, the definition of sale under the MVAT Act also includes such transfer of right to use goods for any purpose as a deemed sale transaction and accordingly is subject to VAT. The company (in liquidation) has accordingly discharged VAT on the transfer of right to use the containers to the lessee and undertaken necessary compliances under the MVAT Act.

8 Mr. Shah submitted that service tax is applicable on provisions of services and service has been defined under Section 65B(44) of the Finance Act, 1994, which excludes an activity which constitutes merely such transfer, delivery or supply of any goods which is deemed to be a sale within the meaning of clause (29A) of Article 366 of the Constitution. According to Mr. Shah, in the case at hand, the containers have been delivered to the lessee and the arrangement between petitioner and lessee is “deemed to be a sale” within the meaning of clause (29A) of Article 366 of the Constitution.

9 Mr. Adik for respondents basically reiterated what is stated in the impugned order. Mr. Adik further submitted that the admitted position is the company (in liquidation) was not the owner of the containers and, therefore, could not have effectively given control of or possession of the

containers to the lessee. Since the company (in liquidation) was not the rightful owner of the containers, it was not in a position to transfer effective control and right to use to the lessee. Mr. Adik also submitted that just because the company (in liquidation) was permitted to lease the containers to a third party, petitioner cannot claim to be owner of the containers.

We would add, petitioner has never stated that petitioner was the owner of the containers.

10 Mr. Adik also submitted that Section 65 (105)(zzzzj) of Finance Act, 1994 provides taxable service in relation to supply of tangible goods would mean any service provided or to be provided to any person, by any other person in relation to supply of tangible goods including machinery, equipment and appliances for use, without transferring right of possession and effective control of such machinery, equipment and appliances. Therefore, transaction between the company (in liquidation) and the lessee would be a taxable service in relation to supply of tangible goods and since there is no transfer of ownership, there also cannot be any sale/deemed sale and hence, the relationship between the company (in liquidation) and lessee would fall under the definition of taxable service and service tax was payable.

11 On two points, Mr. Adik, in fairness, conceded that respondent no.3 could not have, even assuming he was right, levied service tax on the VAT component. To that extent, the impugned order is erroneous. Secondly,

there is nothing to indicate that the company (in liquidation) did not transfer right to use to the lessee or did not transfer possession or effective control of such goods to the exclusion of the company (in liquidation) or the company (in liquidation) could simultaneously lease the containers to any other party. Mr. Adik submitted that, that was the interpretation by respondent no.3 of the agreement between the company (in liquidation) and lessee but when we asked Mr. Adik is there any evidence to show that what respondent no.3 has assumed was the intention of the parties, Mr. Adik in fairness submitted that there is no such evidence.

12 In the circumstances, in our view, respondent no.3 has proceeded purely on the basis of surmises and what he felt could have been the arrangement between the company (in liquidation) and the lessee. Moreover, as Mr. Shah pointed out, for the previous years respondent no.3 has accepted that no service tax was payable for the same agreement between the company (in liquidation) and the lessee. As submitted by Mr. Shah a notice similar to the one in this case had been issued but it was later withdrawn.

13 Having considered the submissions of Mr. Shah and Mr. Adik and the agreement between the company (in liquidation) and the lessee, copy whereof is annexed to the petition, we are satisfied that the relationship between the company (in liquidation) and the lessee cannot fall under the definition of taxable service under Section 65 (105)(zzzzj) of

Finance Act, 1994. Section 65 (105)(zzzzj) will apply only where a service is provided in relation to supply of tangible goods without transferring right of possession and effective control, whereas factually in this case, there has been transfer of right of possession and effective control on the containers.

14 The following provisions in the lease agreement dated 1st April 2011 are relevant :

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2.3. The Lessee shall have no rights to the Equipment other than as Lessee and the Lessee shall not do or persist or cause to be done any matter or thing whereby the rights of the Lessor in respect of the Equipment are or may be prejudiced.

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4.1. During the Term :

(a) XXXXXXXXXXXXXXXXXXXX

(b) The Lessee shall be liable for any loss, theft or destruction of, or damage to the Equipment, howsoever caused subject to the limits on liability set out in clause 5.7; and

(c) The Lessee shall keep the Equipment serviced, maintained, appropriately stored and in the same state of repair and condition as such assets are in on delivery (allowing for fair wear and tear) and as required to ensure that the Equipment complies with all statutory requirements from time to time relating to the use, operation or possession of the Equipment and shall repair or replace any lost, stolen or worn out Equipment parts. All replacement Equipment and parts shall be subject to this Agreement.

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4.3. Lessee is permitted to sublease the equipment to third parties. Deemed approval is thereby granted for the hire and re-hire of goods to companies and for the locations listed in Schedule 4 as may be amended from time to time.

Prior written approval will be required by the Lessee for hiring the units to third parties that are not covered in

Schedule 4.

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4.5. The Lessee shall obtain and keep in full force and effect throughout the Term, at no cost to the Lessor, all permissions, licenses and other authorisations which may at any time be required in connection with the possession or use of the Equipment and/or any premises in which the same are located.

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4.8. The Lessee acknowledges and accepts that the Lessor is under no obligation to, and will not conduct any inspection of the Equipment before, on or after delivery thereof.

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5.1. The Lessee shall (subject to Clauses 5.6 and 5.7) keep the Lessor indemnified in full against all costs, expenses, damages and losses (whether direct or indirect), including any interest, fines, legal and other professional fees and expenses awarded against or incurred or paid by the Lessor as a result of or in connection with any claim made against Lessor by a third party arising out of, or in connection with this Agreement to the extent that such claim arises out of the breach, negligent performance or failure or delay in performance of the Agreement by the Lessee, its employees, agents or subcontractors.

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6.1. All risk of loss of or damage to the Equipment shall pass immediately from the Lessor to the Lessee on the Commencement Date or on delivery under clause 6.3 as the case may be.

6.2. The Lessee acknowledges that execution of this Agreement shall be conclusive evidence that the Lessee shall have taken delivery of and unconditionally accepted the Equipment on 1st day of April 2011 listed in Schedule I for the purpose of this Agreement and found it to be complete, in good working order, of satisfactory quality, fit for the purpose for which it is required and acceptable in every respect. The equipment listed in Schedule I has been delivered to the Lessee in India with all costs paid.

6.3. Delivery of further Equipment shall occur on acceptance by the Lessee (hereby appointed as agent for the Lessor to accept such delivery) at the place of delivery designated by the Lessee, the Lessee having satisfied itself that any further Equipment is complete, in good working

order, of satisfactory quality, fit for the required purpose and acceptable in every respect.

6.4. Following each further delivery of Equipment, the Lessee shall deliver to the Lessor a certificate of acceptance (in the form set out in Schedule 3 hereto) setting out the details of such further Equipment and this shall be conclusive evidence of the Lessee's acceptance of such Equipment.

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8.1. On the expiry of the Term the Lessee shall, at risk and expense of the Lessee, return the Equipment to the Lessor in good working condition (excepting reasonable wear and tear) and fit for its purpose to Kakinada or to such address as mutually agreeable, free and clear of all liens.

(emphasis supplied)

The lease agreement, therefore, provides that the lessee would keep possession of the identified containers, the lessee will have legal right to use the containers, the lessee would have the liberty to even sub-lease the containers to third parties who have been approved in the agreement, it is the lessee's obligation to obtain and keep in full force at no cost to the company (in liquidation) all permissions, licenses, authorisations and repair or replace any lost or stolen or worn out containers and all risk of loss or damage to the containers shall pass immediately from the company (in liquidation) to the lessee on delivery. The lease agreement also provides that on the expiry of the term of the lease, the lessee shall, at its risk and expense, return the containers to the company (in liquidation). Therefore, there are goods available for delivery, the identity of the containers is identified, the lessee has legal right to use the containers are also available

and consequently all legal consequences of such use including any permissions or licences required therefor is the responsibility of the lessee for the period during which the lessee has the legal right. The company (in liquidation) cannot hand over those containers to anyone else and the right to use the containers during the period of lease is effectively transferred.

15 Section 65B (44) of the Finance Act, 1994 reads as under :

(44) "service" means any activity carried out by a person for another for consideration, and includes a declared service, but shall not include -

(a) an activity which constitutes merely, -

(i) xxxxxxxxxxxxxxxxxxxxxx

(ii) such transfer, delivery or supply of any goods which is deemed to be a sale within the meaning of clause (29-A) of Article 366 of the Constitution; or

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16 Clause (29A) of Article 366 of the Constitution of India reads as under :

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

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(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;

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(f) xxxxxxxxxxxxxxxxxxxxxx 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.

17 Section 2(24), 2(28) and Section 3 of the MVAT Act read as
under :

2(24). “sale” means a sale of goods made within the State for cash or deferred payment or other valuable consideration but does not include a mortgage, hypothecation, charge or pledge; and the words “sell”, “buy” and “purchase”, with all their grammatical variations and cognate expressions, shall be construed accordingly;

Explanation.— For the purposes of this clause, -

(a) a sale within the State includes a sale determined to be inside the State in accordance with the principles formulated in section 4 of the Central Sales Tax Act, 1956 (74 of 1956);

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

(ii) the transfer of property in goods (whether as goods or in some other form) involved in the execution of a [works contract including], an agreement for carrying out for cash, deferred payment or other valuable consideration, the building, construction, manufacture, processing, fabrication, erection, installation, fitting out, improvement, modification, repair or commissioning of any movable or immovable property;]

(iii) a delivery of goods on hire-purchase or any system of payment by installments;

(iv) 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;

(v) the supply of goods by any association or body of persons incorporated or not, to a member thereof for cash, deferred payment or other valuable consideration;

(vi) 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 made or given for cash, deferred payment or other valuable consideration.

(28). “the State” means the State of Maharashtra.

3. Incidence of Tax :-

(1) Every dealer, who, immediately before the appointed day, holds a valid or effective certificate of registration or licence under any of the earlier laws or, who is liable to pay tax under any of the earlier laws, in the year ending immediately before the appointed day shall, if his turnover of sales or purchases has, in the said year under any of such earlier laws, exceeded rupees [five lakh], or, as the case may be, who was an importer in the said year [and his turnover of sales or purchases in the said year had] exceeded rupees one lakh, be liable to pay tax, with effect from the appointed day, in accordance with the provisions of this Act, till his certificate or licence is duly cancelled under this Act.

Explanation.—For the purposes of this sub-section, the expressions —turnover of sales, —turnover of purchases and —importer shall have the respective meanings assigned to them under the relevant earlier laws.

(2) A dealer to whom sub-section (1) does not apply and whose turnover, [of all sales] made, during the year commencing on the appointed day or any year subsequent thereto, first exceeds the relevant limit, specified in sub-section (4), shall, until such liability ceases under sub-section (3), be liable to pay tax under this Act with effect from the 1st day of April of the said respective year :

*Provided that, a dealer shall not be liable to pay tax in respect of [such sales] as take place during the period commencing on the 1st day of April of the said respective year upto the time when his turnover of sales [***], as computed from the 1st day of April of the said respective year, does not exceed the relevant limit applicable to him under sub-section (4).*

*(3) Every dealer who has become liable to pay tax under this Act, shall continue to be so liable until his registration is duly cancelled; and upon such cancellation his liability to pay tax, other than tax already levied or leviable, shall remain ceased until his turnover of sales [***] again first exceeds the relevant limit specified in sub-section (4) or, as the case may be, until he becomes liable to pay tax under [sub-sections], (8) or (9).*

(4) For the purposes of this section, the limits of [turnover of sales] shall be as follows :-

(a) Limit of [turnover of sales] Rs. 1,00,000.— in the case of a dealer, who is an importer, and the value of taxable goods sold or purchased by him during the year is not less than Rs. 10,000.

(b) Limit of [turnover of sales] Rs. 5,00,000].— in any other case, where the value of taxable goods sold or purchased by him during the year is not less than Rs. 10,000.

(5) For the purpose of calculating the limit of [turnover of sales] for liability to tax,-

[(a) except as otherwise expressly provided, the turnover of all sales shall be taken, whether such sales are of taxable goods or not];

*(b) the [turnover of sales] shall include all sales [***] made by the dealer on his own account, and also on behalf of his principals whether disclosed or not;*

(c) in the case of an auctioneer, in addition to the [turnover of sales], if any, referred to in clauses (a) and (b), the [turnover of sales] shall also include the price of the goods auctioned by him for his principal, whether the offer of the intending purchaser is accepted by him or by the principal or a nominee of the principal, if the price of such goods is received by him on behalf of his principal;

*(d) in the case of an agent of a non-resident dealer, in addition to the [turnover of sales], if any, referred to in clause (a), (b) or (c), the [turnover of sales] shall also include the sales [***] of the non-resident dealer effected in the State.*

(6) Notwithstanding anything contained in any contract or any law for the time being in force, but subject to the provisions of this Act, any person covered by [sub-clause (a), (b) or (c)] of clause (8) of section 2 shall be liable to pay tax under this Act, whether, or not the principal is a dealer and whether, or not such principal is liable to pay tax under this Act and whether or not the principals are disclosed.

*(7) [***]*

(8) Where a dealer liable to pay tax under this Act is succeeded in the business by any person in the manner described in clause (a) of sub-section (1) or sub-section (4) of section 44, then such person shall, notwithstanding anything contained in this section, be liable to pay tax on the sales or purchases of goods effected by him on and after the date of such succession and accordingly nothing contained in the proviso to sub-section (2) shall apply to him in any year.

(9) Any person who is not liable to pay tax under the foregoing, provisions of this section but has been voluntarily registered under the provisions of this Act shall be liable to pay tax from the date of effect of the

certificate of registration duly granted to him and accordingly nothing contained in the proviso to sub-section (2) shall apply to him in any year.

18 It is now well settled that in terms of Article 366(29A)(d) of the Constitution of India, transfer of right to use the goods is a deemed sale of goods and subject to Sales Tax/VAT.

19 Section 2(24) of the MVAT Act, defines “sale” to mean “sale” of goods and also includes 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.

A harmonious reading of Section 2(24), 2(28) read with Section 3 of the MVAT Act, it is clear that VAT under the MVAT Act is applicable on “transfer of right to use” goods within the State of Maharashtra.

20 The Hon’ble Supreme Court of India, in ***Bharat Sanchar Nigam Limited¹***, expounded as to what would constitute transfer of right to use and held as under:

“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

1. 2006 (3) SCC 1

including any permissions or licences required therefor 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.

All the aforesaid attributes outlined by the Hon’ble Apex Court in *BSNL* (Supra) are available in the transaction undertaken by the Company (in liquidation) in terms of the agreement dated 1st April 2011.

21 There shall be a deemed sale where there is a 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. Here from the documents, and in particular the clauses reproduced in paragraph 14 above, it is quite clear that there has been a transfer of the right to use the containers for valuable consideration. Clause (29A) of Article 366 of the Constitution does not distinguish between an owner or a lessor of the goods. Only requirement is there should be a transfer of the right to use the goods for valuable consideration. Factually there has been and, as Mr. Adik fairly agreed, there is no evidence to the contrary, except surmises.

22 Further, service tax is applicable on provision of services and for this purpose, ‘service’ has been defined under Section 65B(44) of the

Finance Act, 1994. Additionally, a 'declared service' is defined under Section 66E(f) of the Finance Act, 1994 to include the following :

transfer of goods by way of hiring, leasing, licensing or in any such manner without transfer of right to use such goods;

23 “*Transfer of right to use goods*” is excluded from the definition of 'service' as well as 'declared service' and hence, the same is not subject to service tax. Therefore, it is clear that a transfer of goods which does not involve a transfer of right to use, would be in the nature of a declared service and would be subject to service tax. Thus, only those cases where there is no transfer of right to use goods involved in a transfer of goods, service tax would be applicable.

24 Admittedly, the company (in liquidation) had provided the containers to the lessee on lease basis and recovered lease rental on which appropriate VAT at the rate of 12.5% was paid by the company (in liquidation).

25 Upon representations received, the Central Government vide Circular No.198/08/2016-SERVICE TAX, dated 17th August 2016 clarified that in terms of sub-clause (d) of clause (29A) of Article 366 of the Constitution of India, 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 is 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.

Further, referring to the ruling passed by the Hon'ble Apex Court in *BSNL* (Supra), it was clarified as under:

“2. The matter has been examined. I am directed to draw your attention to the fact that in any given case involving hiring, leasing or licensing of goods, it is essential to determine whether, in terms of the contract, there is a transfer of the right to use the goods. Further, the Supreme Court in the case of Bharat Sanchar Nigam Limited vs Union of India, reported in 2006 (2) STR 161 SC, had laid down the following criteria to determine whether a transaction involves transfer of the right to use goods.

26 In fact even the Customs Excise Service Tax Appellate Tribunal (CESTAT) in *Subhas Light House V/s. The Commissioner of Service Tax*² relied upon the aforesaid circular to hold that service tax is not leviable upon the supply of gensets as the same tantamount to a deemed sale.

27 In paragraph 13 of the impugned order, respondent no.3 has referred to the Circular No.198/08/2016 – Service Tax dated 17th August 2016 issued by the Central Board of Indirect Taxes and Customs (CBIC) and admits it has been issued to clarify the applicability of service tax in case of transfer of goods by way of hiring, leasing, licensing or any such manner without transfer of right to use and the criteria to determine whether the transaction involves transfer of right to use goods. Respondent no.3 has also referred to *BSNL* (Supra) where the Apex Court has outlined the

2. Service Tax Appeal No.50176 of 2019

pre-requisites for an activity to qualify as a transfer of right to use goods. Respondent no.3 does not elaborate why these were not applicable to the facts of the case at hand. Respondent no.3 has proceeded on the incorrect presumption that the company (in liquidation) was not the owner of the containers and hence cannot again transfer the same right to others. The activities outlined by the Apex Court, in our view, squarely applies to the case of the company (in liquidation).

28 In the present case, it is not in dispute that the company (in liquidation) had given the containers to the lessee on rental basis and possession and control was always with the lessee and the sole ground on which the demand is confirmed is that the company (in liquidation) was not owner of the containers.

29 For a transaction to be deemed sale there is no requirement of transfer of ownership and once it is not disputed that the containers are given on lease and possession and control is transferred, it is a deemed sale within the meaning of Article 336(29A)(d) of the Constitution of India and outside the purview of Finance Act, 1994.

The singular distinction between an absolute transfer of goods and a transfer of right to use goods is that in case of the former, the transfer is absolute including passage of title, whereas in the case of the later, excluding passage of title, all other rights would ensue to the benefit of the user of the goods.

The Hon'ble Supreme Court in ***Aggarwal Brothers V/s. State of Haryana***³ has held on facts that the possession of the shuttering material was transferred by the assessee to their customers for use during the construction of the building and the effective control over the tangible goods during that period remain in the possession of the transferee. Vide paragraph 6, it was held that the transfer of the goods for consideration to the builder for his use in construction would result in deemed sale.

30 Moreover, it is settled law that sale of goods and services are mutually exclusive and both VAT and service tax cannot be levied on the same transaction. It is an admitted fact that the company (in liquidation) has paid VAT and deposited the same with the concerned department on the entire consideration received for leasing equipment on which service tax is sought to be imposed once again by respondent no.3.

In the matter of ***Imagic Creative Private Limited***⁴, the Hon'ble Apex Court held that the service tax and sales tax are mutually exclusive. The relevant excerpt of the said judgment is reproduced hereinbelow for ready reference:

“28. Payments of service tax as also the VAT are mutually exclusive. Therefore, they should be held to be applicable having regard to the respective parameters of service tax and the sales tax as envisaged in a composite contract as contradistinguished from an indivisible contract. It may consist of different elements providing for attracting different nature of levy. It is, therefore, difficult to hold that in a case of this nature, sales tax would be payable on the value of the entire contract; irrespective of the element

3. 1999 (9) SCC 182

4. Civil Appeal No. 252 OF 2008

of service provided. The approach of the assessing authority, to us, thus, appears to be correct.”

(emphasis supplied)

31 Further, it will be apposite to refer to an order dated 6th January 2022 in the matter of ***Commissioner of Service Tax-V, Mumbai V/s. M/s. UFO Moviez India Ltd.***⁵ where the Apex Court has observed that where VAT liability has been discharged during the relevant period, the question of claiming service tax thereof does not arise.

32 Moreover, respondent no.3 has committed gross error in computing the tax liability of the company (in liquidation). In paragraph 7 of the impugned order, respondent no.3 tabulates the turnover of the company (in liquidation) and applicable VAT as follows:

<i>Period</i>	<i>Turnover as per Audited Financials (Rs.)</i>	<i>Rate of VAT</i>	<i>VAT Paid (Rs.)</i>
2015-16	1,25,07,056/-	12.50%	15,63,387/-

Further in paragraph 10 of the impugned order, respondent no.3 has tabulated service tax liability of petitioner as follows:

<i>Period</i>	<i>Taxable Value (Rs.)</i>	<i>Rate of Service Tax (including Cess) %</i>	<i>Service Tax payable (including Cess) (Rs.)</i>
2015-16	1,40,70,443/-	14.50%	20,40,2015/-

5. 2002-VIL-07-SC-ST

The base figure of Rs.1,40,70,443/- taken by respondent no.3 in computing the service tax liability includes the value of VAT of Rs.15,63,387/- payable. Therefore, respondent no.3 has erred in taxing the tax component and arriving at the service tax liability of the company (in liquidation).

Further, in the impugned order there is no discussion as to how service tax is leviable on the VAT component paid. Mr. Adik also agreed that service tax is not leviable on the VAT component.

33 In the circumstances, the impugned order dated 31st January 2022 is hereby quashed and set aside. Rule made absolute in terms of prayer clause – (a), which reads as under :

(a) this Hon'ble Court be pleased to issue a writ of Certiorari or a writ in the nature of Certiorari under Article 226 of the Constitution of India, calling for the records pertaining to the impugned Order-in-Original No.21/AC/Dn-I/SKR/2021-22 dated 31.01.2022 passed by respondent no.3 and after going into the validity and legality thereof be pleased to quash and set aside the same.

34 Petition disposed. No order as to costs.

(A. S. DOCTOR, J.)

(K. R. SHRIRAM, J.)