



2024-01115705-10



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

% **Judgment reserved on: 30 September 2024**
Judgment pronounced on: 19 December, 2024

+ **ST.APPL. 1/2023 & CM APPL. 1317/2023 (Interim Relief)**

**M/S PAWAN HANS LIMITED (FORMERLY KNOWN AS
PAWAN HANS HELICOPTERS LIMITED)Appellant**

Through: **Mr. Tarun Gulati, Sr. Adv. with
Mr. Rajat Bose, Mr. Ankit
Sachdeva and Ms. Shohini
Bhattacharya, Advs.**

versus

COMMISSIONER OF TRADE AND TAXESRespondent

Through: **Mr. Rajeev Aggarwal, ASC
alongwith Mr. Shubham Goel
and Mr. Mayank Kamra,
Advocates.**

CORAM:

HON'BLE MR. JUSTICE YASHWANT VARMA

HON'BLE MR. JUSTICE RAVINDER DUDEJA

J U D G M E N T

YASHWANT VARMA, J.

1. The present appeal instituted under Section 81 of the **Delhi Value Added Tax Act, 2004**¹ impugns a judgment passed by the **Value Added Tax Appellate Tribunal**² dated 06 October 2022 in terms of which appeals preferred in relation to **Financial Years**³ 2006-07 to 2009-10 have come to be dismissed.

2. The principal question which stood raised before the Tribunal was whether the supply of helicopters by the appellants to the

¹ DVAT Act

² Tribunal

³ FYs

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Andaman and Nicobar Islands Administration⁴ constituted a “transfer of a right to use” and thus exigible to tax under Section 2(g)(vi) of the **Central Sales Tax Act, 1956**⁵ and Section 2(zc)(vi) of the DVAT Act.

3. The appellants had contended that the agreement dated 11 February 2003, and which constituted the repository of the bargain between the parties did not involve a “transfer of a right to use”. The appellants would urge us to hold that tested on the principles underlying Article 366(29A)(d) of the Constitution, the tax authorities as well as the Tribunal have clearly erred in holding to the contrary.

4. For the purposes of examining the challenge which stands raised, we at the outset, take note of the following two questions of law on which the appeal came to be admitted on 12 January 2023:

“a) Whether as per terms of agreements executed by the Appellant with its customers, hiring of helicopters is covered under the meaning of "Sale" under Section 2(g)(iv) CST Act?

b) Whether in the facts and circumstances of the case, the hon'ble Tribunal has erred in coming to the conclusion that the Appellant has transferred the effective control and possession and right to use the helicopters to its customer so as to consider the activity as "Deemed Sale"?”

5. The agreement dated 11 February 2003 takes note of the appellant, described as the Lessor therein, as being the owner of a fleet of helicopters and engaged in the business of providing helicopter support services to customers by leasing those helicopters. The A & N Administration was described in that agreement to be the “Charterer” or Lessee. For the purposes of evaluating the challenge which stands

⁴ A & N Administration

⁵ CST Act

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raised, we propose to take note of the following salient covenants which formed part of that agreement.

6. Clause 1.1(a) defined the word 'Base' in the following terms:

"Base" mean "PORT BLAIR". The helicopter will be based at PORT BLAIR and its crew including maintenance facilities will be stationed there."

7. Clause 1.1(d) defined the 'Area of Operation' to mean the Andaman and Nicobar Islands and related areas, as follows:

"Area of Operation" means Andaman & Nicobar Islands and related areas."

8. The expressions 'Fixed Monthly Charges' and 'Flying Charges' were defined by sub-clauses (f) and (g) as under:

"f) "Fixed Monthly Charges" would mean the amounts set out in Clause-10.1.

g) "Flying Charges" would mean the amounts set out in Clause-10.2."

9. Clause 1.1(i) defined the word 'Helicopter' as it appeared in different sections of the agreement in the following terms:

"Helicopter" means the Dauphin SA 365N or equivalent helicopter certified by the DGCA."

10. Clause 1.1(m) provided a definition for the word 'Service' occurring in different parts of the agreement to mean the service carried out by the Lessor/appellant and its personnel under the agreement. The subject of 'Service' was regulated by Clause 3 and which read as follows:

"3. SERVICE

3.1 The Lessor shall during the term of Lease provide the helicopter for exclusive use of the Charterer and its authorized persons in accordance with this Agreement. Pawan Hans would position one Dauphin helicopter at Port Blair and carry out its operations. The helicopter would be made exclusively available to the Lessee and if

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so required by the Lessee, could be utilized for other appropriate/ suitable tasks within the A&N Islands and related adjoining areas.

3.2 The Lessee may requisition flights as required from time to time and Lessor shall provide flights in accordance with such schedules. Lessor's obligations and responsibilities to provide flights shall be limited to the flights as per the programme for the day. Notwithstanding the foregoing, the Lessor shall in an emergency endeavor to provide a flight or flights not later than two hour after the receipt of information thereof, from the Lessor's Representative unless there are any operational or regulatory limitations prohibiting or preventing such a flight which shall be intimated by the Lessor to the Lessee.

3.3 The Lessor shall provide experienced IFR, licensed pilots for operations and qualified & experienced maintenance crew for servicing of the helicopter in order to maintain the helicopter for operational use during the currency of this agreement

3.4 The Charterer shall (before departure of a flight) provide to the Lessor a Manifest containing the number, names & weights of the passengers, cargo weight on board and the estimated time of departure/ arrival of the flight.

NOTWITHSTANDING the foregoing it shall be the Lessor's sole to determine the acceptable load/passengers before each flight and upon such determination the Lessor may vary the proposed load/ passengers to be carried by the helicopter.

3.5 The Lessor shall carry out the services and perform all the obligations under this Agreement with due diligence and care and in a competent, skillful and professional manner.

3.6 Before any proposed flight it shall be the Lessor's responsibility to determine the route and the suitability of the flying and landing conditions and upon any such determination and after consultation and agreement with the Lessee's Representative, which shall not be unreasonably withheld, the Lessor may vary the proposed route or postpone or cancel the proposed flight.

3.7 If a helicopter becomes total loss or a constructive total loss, the Lessor shall use its best endeavour to replace at its expense the helicopter with an identical helicopter or a helicopter acceptable to the Charterer within 14 days of the loss failing which the Lessee may terminate this Agreement. All charges payable under this Agreement in respect of the lost Helicopter shall cease after the date of loss until the Lessor replaces it by a fully operational helicopter at the said Base.

3.8 The Lessor shall obtain the necessary Non Scheduled Operator's Permit to operate the Helicopter and shall ensure that the helicopter is properly licensed and complies with all laws, rules, regulations,



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orders, standards and schedules governing aircraft in Non-Scheduled category of the Director General of Civil Aviation, India and is flown and operated in compliance with the laws in force, and shall bear and pay all amounts or charges levied by the Airport Authority such as air navigational charges, landing charges and parking and housing charges etc. Passenger Service Fee and Inland Air Travel Tax, however, if applicable, will be paid by the Lessee.”

11. Apart from the significant prefatory parts of the agreement noticed above, it explained the scope of the contract to essentially be the providing of helicopter support services and the equipment itself being described to be a Dauphin SA 365N or an “equivalent helicopter”, Clause 3.1 placed the appellant under the obligation of providing the helicopter for the exclusive use of the Charterer. This obligation was explained to require the appellant to position one Dauphin helicopter at Port Blair and the said aircraft being made available exclusively for the use of the Lessee.

12. Clause 3.2 of the agreement broadly set out the obligations of the Lessor and recognised its principal responsibility being to provision for flights as per the programme that may be curated for the day. The aircraft was to be operated by licensed pilots and maintenance crew to be provided by the appellant and which is duly recorded in Clause 3.3. In terms of Clause 3.4, it was the appellant’s responsibility to determine the acceptable pay load as well as the number of passengers that may be permitted on each flight.

13. By virtue of Clause 3.7, the agreement provisioned for a contingency where a helicopter may become a “total loss” or a “constructive total loss” and in which situation, the lessor was to replace the equipment at its expense with an identical helicopter or a helicopter acceptable to the Charterer within 14 days of such loss.

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Clause 3.8 then clarified that the liability with respect to expenses and responsibilities with regard to licensing requirements permits and compliances would be of the appellant.

14. We also deem it apposite to extract 4.2, 5.1, 5.2 and 5.3.2 of the agreement hereinbelow:

“4.2 The Lessor may make additions or deletions to the equipment or make modifications to the helicopter as deemed fit and proper from time to time for its operational use.

XXXX

XXXX

XXXX

5.1 The Lessor shall make available the helicopter to the Lessee for operations maximum upto 90 hours per month or 1000 hours per year during the term of lease Agreement.

5.2 The Lessor shall in order to carry out the helicopter operations safely and efficiently and to make the helicopter available to Lessee in terms of Clause 5.1 properly maintain, repair, overhaul and service the helicopter in accordance with published airworthiness standards and shall provide at the Base adequate spare parts and tools for the purpose.

XXXX

XXXX

XXXX

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 or jeopardized.

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

The helicopter shall be considered operational if it is available within two hours of the scheduled time of the programme for a sortie. Programme for the day for subsequent sorties for the helicopter shall be adjusted accordingly consequent to a delayed sortie.”

15. The appellant was also, in terms of that agreement, entitled to make additions or deletions to the equipment as also make modifications to the helicopter itself as deemed fit and proper for its operational use as per Clause 4.2. Clause 5.1 required the appellant to

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make available the helicopter to the lessee for operations up to a maximum of 90 hours per month or 1,000 hours per year during the term of the agreement. The contract, as per Clause 5.3.2, also placed upon the appellant the duty to undertake requisite maintenance, repair, overhaul and service activities while ensuring, however, that the flying activities planned for the days, were not hampered or jeopardized.

16. The subject of charges was regulated by Clauses 10.1 and 10.2 and which read thus:

“10. CHARGES

In consideration of the Lessor carrying out the services, the Lessee shall, in respect of the helicopter pay to the Lessor during the term of the Lease Agreement the following charges:

10.1 FIXED MONTHLY CHARGES

Fixed Monthly Charges per month and prorata thereof to the nearest half day for part of a month and the period during which the helicopter is in active service in accordance with this Agreement as follows: -

(i) Fixed Monthly Charges : Rs. 28.25 lacs per helicopter

Plus

(ii) Additional overhead charges : Rs. 2.00 lacs per month

No charges shall be payable for grounding in excess of allowable days subject to adjustment of accumulated days, if any, allowed to the Lessor as per Clause 5.3.1.

10. 2 Hourly Flying Charges

The Lessee shall pay to Lessor the corresponding flying charges per hour and prorata thereof to the nearest 5 (Five) minutes to the flying hours of the helicopter as per the following rates:

(i) Hourly Flying Charges Rs.29,250/- per hour upto 90 hrs flying per month

(ii) Hourly Flying Charges beyond 90 hrs. flying per month will be increased by 30% over Rs.29,250/- per hour mentioned above.

In case fuel is provided by the Lessee at its cost, then in that case a deduction of Rs.6388/- per hour (ATF consumption: 338 Ltrs/hr@Rs 18 90 per litre) would be given on the Hourly Flying Charges mentioned above.”



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17. Clause 13 of the agreement embodied the indemnity clause and is extracted hereunder: -

“13. INDEMINITY

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.”

18. The appellant was also in terms of the agreement required to ensure that the helicopter was duly insured at its expense during the tenure of the contract. It was in the backdrop of the aforesaid contractual stipulations that the appellant appears to have urged that the leasing of the helicopters did not contemplate or evidence the “transfer of a right to use”.

19. In the course of assessment, the appellant had submitted objections in respect of the default assessment notices which came to be issued. From the details which have been taken note of by the Tribunal, the notices of default assessment of tax and interest under Section 9(2) of the CST Act for FYs 2006-07 to 2009-10 came to be framed on 09 March 2011. The principal reason underlying those assessments is noticed by the Tribunal in paragraph 4 of its order which is reproduced hereinbelow:

“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



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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)."

Similar were the notices which were framed for the subsequent periods.

20. The authority under the DVAT Act also proceeded to reject the objections taken holding that the terms of the agreement were liable to be acknowledged as constituting a "transfer of a right to use". This becomes evident from a reading of paragraph 10 of the order of the Tribunal which is extracted hereinbelow:

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 ie. 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 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)



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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 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.



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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**, 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



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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 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.""

21. Proceeding then to deal with the questions touching upon the merits of the dispute, the Tribunal framed the first issue to be of effective control and possession. After noticing the rival submissions which were addressed, the Tribunal held as follows:

"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.



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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 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;
- Contract between appellant and Mata Vaishno Devi Shrine Board;
6. Contract between appellant and ONGC;
7. Contract between appellant and NIIPC,
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 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.



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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.”

22. The Tribunal thereafter proceeded to notice the various decisions which appear to have been cited for its consideration and took note of what it chose to describe as the special features of the agreement in question. It, in this regard, firstly took into consideration Clauses 17 and 18 which principally dealt with confidentiality and security. Upon construing those clauses, it proceeded to hold that the judgment of our Court in **Hari Durga Travels vs. CTT**⁶ was clearly distinguishable. This becomes evident from a reading of paragraph 21 of the order impugned before us:

“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.”

23. The Tribunal also appears to have taken into consideration what it construed to be the exclusive use of the helicopter during the period of the lease agreement as being yet another significant factor for distinguishing the judgment in *Hari Durga Travels* as well as the decision of Supreme Court in **State of A.P. vs. Rashtriya Ispat Nigam Ltd.**⁷ which had been cited for its consideration. This becomes apparent from a reading of paragraph 23 and where it held that the essence of transfer is “*passage of control over the economic benefits of property*”

⁶ 2015 SCC OnLine Del 9442

⁷ (2002) 3 SCC 314

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and which may result in the termination of rights in one entity and a corresponding creation of rights in another. It thus came to the conclusion that effective control of the helicopter was handed over to the lessees and ceased to be with the appellants. This becomes evident from a reading of paragraph 23 of the order impugned:

“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.”

24. The Tribunal also appears to have been swayed by the period of the lease and the fact that it had continued to bind and regulate the obligations of parties for a sufficient length of time. It also took note of the fact that during the currency of the lease, the helicopter was to remain stationed at a specified base. It further bore in consideration that all approvals were to be obtained from the **Director General of Civil Aviation**⁸ by the appellant for the Charterer's use of the helicopter.

25. As we peruse the impugned order further, it becomes apparent that the Tribunal has thereafter proceeded to evaluate a host of judgments which were cited by respective sides and essentially sought to ascribe and assign reasons as to why those were either distinguishable or did not apply to the facts which obtained in the

⁸ DGCA
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present matter.

26. Its conclusions ultimately appear in paragraph 37 and which is extracted hereinbelow:

“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 De 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.”

27. Insofar as other aspects including those pertaining to service tax are concerned, since none of those issues were urged before us, we do not propose to notice the various conclusions which have come to be rendered by the Tribunal on those aspects. This more so since, in our considered opinion, those issues are clearly unrelated to the principal issue of a “transfer of a right to use”.

28. However, and before we proceed to notice the rival submissions which were addressed, we do at the outset deem it apposite to observe that the clauses pertaining to confidentiality and security can hardly be construed or acknowledged to be issues of moment insofar as the question of a “transfer of a right to use” is concerned. We find ourselves unable to appreciate how a confidentiality or security clause could have any bearing on the issue of taxability and whether the agreement constituted a transfer of a right to use as contemplated under *ST.APPL. 1/2023*

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Article 366(29A)(d) of the Constitution.

29. Leading submissions on behalf of the appellant, Mr. Gulati, learned senior counsel took us back to the legislative history preceding the introduction of the Forty-Sixth Amendment to the Constitution and to the celebrated case of the Supreme Court in **State of Madras vs. Gannon Dunkerley & Co. (Madras) Ltd.**⁹, and which had held that composite contracts were not liable to be viewed or held assessable to tax since they did not comprise a sale of goods. *Gannon Dunkerley* had essentially come to be rendered in the backdrop of Entry 48 in List II of the Seventh Schedule, as existing under the Government of India Act, 1935 and which had employed the expression ‘sale of goods’. In *Gannon Dunkerley*, the Supreme Court had essentially held that it would be the concept of sale as generally understood and which would necessarily have to be comprised of the three essential components of an agreement to transfer, supported by consideration and an actual transfer of title and goods which would govern. The Supreme Court thus had held that absent one of the aforementioned three essential elements being found to form part of the contract, the law would not envisage a sale having occurred. The States thus stood deprived of the right to levy a tax on a transfer of goods in the course of a works contract, taxation of hire purchase transactions as well as transfer of controlled commodities. It was these complexities faced by various Provincial Governments, Mr. Gulati explained, which led to a reference being made to the Law Commission of India.

30. It was the recommendations ultimately formulated by the Law

⁹ 1958 SCC OnLine SC 100
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Commission which led to the insertion of clause (29A) in Article 366 of the Constitution. According to Mr. Gulati the scope and the meaning to be ascribed to the phrase “transfer of right to use” is no longer res integra and stands authoritatively settled by the Supreme Court in **BSNL vs. Union of India**¹⁰. Mr. Gulati submitted that the decision in *BSNL* had identified the five principal attributes which must be found to imbue a transaction in order for it to be held that there had been a transfer of a ‘right to use’. Mr. Gulati submitted that tested on the aforesaid principles, it would be apparent that none of the clauses of the agreement could possibly be construed as embodying a transfer of a right to use.

31. In order to buttress the aforementioned submission, Mr. Gulati firstly took us through the decision of the Supreme Court in *BSNL* and more particularly to the following passages of that decision:

“41. Sub-clause (a) covers a situation where the consensual element is lacking. This normally takes place in an involuntary sale. Sub-clause (b) covers cases relating to works contracts. This was the particular fact situation which the Court was faced with in *Gannon Dunkerley [State of Madras v. Gannon Dunkerley & Co. (Madras) Ltd., (1958) 9 STC 353 : AIR 1958 SC 560 : 1959 SCR 379]* and which the Court had held was not a sale. The effect in law of a transfer of property in goods involved in the execution of the works contract was by this amendment deemed to be a sale. To that extent the decision in *Gannon Dunkerley [State of Madras v. Gannon Dunkerley & Co. (Madras) Ltd., (1958) 9 STC 353 : AIR 1958 SC 560 : 1959 SCR 379]* was directly overcome. Sub-clause (c) deals with hire-purchase where the title to the goods is not transferred. Yet by fiction of law, it is treated as a sale. Similarly the title to the goods under sub-clause (d) remains with the transferor who only transfers the right to use the goods to the purchaser. In other words, contrary to *A.V. Meiyappan decision [(1967) 20 STC 115 (Mad)]* a lease of a negative print of a picture would be a sale. Sub-clause (e) covers cases which in law may not have amounted to sale because

¹⁰ (2006) 3 SCC 1
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the member of an incorporated association would have in a sense begun as both the supplier and the recipient of the supply of goods. Now such transactions are deemed sales. Sub-clause (f) pertains to contracts which had been held not to amount to sale in *State of Punjab v. Associated Hotels of India Ltd.* [(1972) 1 SCC 472 : (1972) 29 STC 474] That decision has by this clause been effectively legislatively invalidated.

42. All the sub-clauses of Article 366(29-A) serve to bring transactions where one or more of the essential ingredients of a sale as defined in the Sale of Goods Act, 1930 are absent, within the ambit of purchase and sales for the purposes of levy of sales tax. To this extent only is the principle enunciated in *Gannon Dunkerley Ltd.* [*State of Madras v. Gannon Dunkerley & Co. (Madras) Ltd.*, (1958) 9 STC 353 : AIR 1958 SC 560 : 1959 SCR 379] (*sic* modified). The amendment especially allows specific composite contracts viz. works contracts [sub-clause (b)]; hire-purchase contracts [sub-clause (c)], catering contracts [sub-clause (e)] by legal fiction to be divisible contracts where the sale element could be isolated and be subjected to sales tax.

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44. Of all the different kinds of composite transactions the drafters of the Forty-sixth Amendment chose three specific situations, a works contract, a hire-purchase contract and a catering contract to bring them within the fiction of a deemed sale. Of these three, the first and third involve a kind of service and sale at the same time. Apart from these two cases where splitting of the service and supply has been constitutionally permitted in sub-clauses (b) and (f) of clause (29-A) of Article 366, there is no other service which has been permitted to be so split. For example, the sub-clauses of Article 366(29-A) do not cover hospital services. Therefore, if during the treatment of a patient in a hospital, he or she is given a pill, can the Sales Tax Authorities tax the transaction as a sale? Doctors, lawyers and other professionals render service in the course of which can it be said that there is a sale of goods when a doctor writes out and hands over a prescription or a lawyer drafts a document and delivers it to his/her client? Strictly speaking, with the payment of fees, consideration does pass from the patient or client to the doctor or lawyer for the documents in both cases.

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49. We agree. After the Forty-sixth Amendment, the sale element of those contracts which are covered by the six sub-clauses of clause (29-A) of Article 366 are separable and may be subjected to sales tax by the States under Entry 54 of List II and there is no question of the dominant nature test applying. Therefore when in 2005 *C.K. Jidheesh v. Union of India* [(2005) 13 SCC 37 : (2005) 8 Scale 784



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(2-Judge Bench)] held that the aforesaid observations in *Associated Cement* [(2001) 4 SCC 593] were merely obiter and that *Rainbow Colour Lab* [(2000) 2 SCC 385 (2-Judge Bench)] was still good law, it was not correct. It is necessary to note that *Associated Cement* [(2001) 4 SCC 593] did not say that in all cases of composite transactions the Forty-sixth Amendment would apply.”

32. Of equal significance are some of the observations and the enunciation of the legal position which came to be penned by Dr. A.R. Lakshmanan, J., in a concurring opinion and which is cited as often, if not more, as the one penned by the majority. Dr. A. R. Lakshmanan, J. succinctly explained in paragraph 97 as to when a transaction would amount to a “transfer of a right to use” in the following words.

“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 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.”

33. The pre-enacting history and the legislative amendments were thereafter noticed in the concurring opinion and from which the following passages lucidly explain the legal position:

“103. The Statement of Objects and Reasons for the Forty-sixth Amendment is, inter alia, as follows:

“2. By a series of subsequent decisions, the Supreme Court has, on the basis of the decision in *Gannon Dunkerley*



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case [*State of Madras v. Gannon Dunkerley & Co. (Madras) Ltd.*, (1958) 9 STC 353 : AIR 1958 SC 560 : 1959 SCR 379] held various other transactions which resemble, in substance, transactions by way of sales, to be not liable to sales tax. As a result of these decisions, a transaction, in order to be subject to the levy of sales tax under Entry 92-A of the Union List or Entry 54 of the State List, should have the following ingredients, namely, parties competent to contract, mutual assent and transfer of property in goods from one of the parties to the contract to the other party thereto for a price.

3. This position has resulted in scope for avoidance of tax in various ways. An example of this is the practice of inter-State consignment transfers i.e. transfer of goods from head office or a principal in one State to a branch or agent in another State or vice versa or transfer of goods on consignment account, to avoid the payment of sales tax on inter-State sales under the Central Sales Tax Act. While in the case of a works contract, if the contract treats the sale of materials separately from the cost of the labour, the sale of materials would be taxable but in the case of an indivisible works contract, it is not possible to levy sales tax on the transfer of property in the goods involved in the execution of such contract as it has been held that there is no sale of the materials as such and the property in them does not pass as movables.”

104. Parliament had to intervene as the power to levy tax on goods involved in works contract should appropriately be vested in the State Legislatures as was pointed out in *Gannon Dunkerley & Co. [State of Madras v. Gannon Dunkerley & Co. (Madras) Ltd.*, (1958) 9 STC 353 : AIR 1958 SC 560 : 1959 SCR 379] , the passages quoted hereinabove. There were five transactions in which, following the principles laid down in *Gannon Dunkerley & Co. [State of Madras v. Gannon Dunkerley & Co. (Madras) Ltd.*, (1958) 9 STC 353 : AIR 1958 SC 560 : 1959 SCR 379] relating to works contract, this Court ruled that those transactions are not exigible to sales tax under various State enactments. Parliament, therefore, in exercise of its constituent power, by the Forty-sixth Amendment, introduced Article 366(29-A). The Statement of Objects and Reasons has fully set out the circumstances under which the Forty-sixth Amendment was necessitated.

105. The amendment introduced fiction by which six instances of transactions were treated as deemed sale of goods and that the said definition as to deemed sales will have to be read in every provision of the Constitution wherever the phrase “tax on sale or purchase of goods” occurs. This definition changed the law declared in the ruling



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in *Gannon Dunkerley & Co. [State of Madras v. Gannon Dunkerley & Co. (Madras) Ltd., (1958) 9 STC 353 : AIR 1958 SC 560 : 1959 SCR 379]* only with regard to those transactions of deemed sales. In other respects, law declared by this Court is not neutralised. Each one of the sub-clauses of Article 366(29-A) introduced by the Forty-sixth Amendment was a result of ruling of this Court which was sought to be neutralised or modified. Sub-clause (a) is the outcome of *New India Sugar Mills Ltd. v. CST [(1963) 14 STC 316 : 1963 Supp (2) SCR 459]* and *Vishnu Agencies (P) Ltd. v. CTO [(1978) 1 SCC 520 : 1978 SCC (Tax) 31 : AIR 1978 SC 449]*. Sub-clause (b) is the result of *Gannon Dunkerley & Co. [State of Madras v. Gannon Dunkerley & Co. (Madras) Ltd., (1958) 9 STC 353 : AIR 1958 SC 560 : 1959 SCR 379]* Sub-clause (c) is the result of *K.L. Johar and Co. v. CTO [(1965) 2 SCR 112 : AIR 1965 SC 1082]*. Sub-clause (d) is consequent to *A.V. Meiyappan v. CCT [(1967) 20 STC 115 (Mad)]*. Sub-clause (e) is the result of *CTO v. Young Men's Indian Assn. (Regd.) [(1970) 1 SCC 462]*. Sub-clause (f) is the result of *Northern India Caterers (India) Ltd. v. Lt. Governor of Delhi [(1978) 4 SCC 36 : 1978 SCC (Tax) 198]* and *State of Punjab v. Associated Hotels of India Ltd. [(1972) 1 SCC 472 : (1972) 29 STC 474]*

106. In the background of the above, the history prevailing at the time of the Forty-sixth Amendment and pre-enacting history as seen in the Statement of Objects and Reasons, Article 366(29-A) has to be interpreted. Each fiction by which those six transactions which are not otherwise sales are deemed to be sales independently operates only in that sub-clause.”

34. The issue of a “transfer of a right to use” again arose for consideration of the Supreme Court in *Rashtriya Ispat Nigam*, which was yet another decision cited by Mr. Gulati for our consideration. The position in law with respect to deemed sales was succinctly explained by the Supreme Court in paragraph 4 of the report and which is reproduced hereinbelow:

“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

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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 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. It may also be noticed that even the Appellate Deputy Commissioner, Kakinada in the order dated 15-11-1999 in regard to Assessment Years 1986-87 and 1987-88 held that under the terms and conditions of the agreement, there was no transfer of right to use the machinery in favour of the contractor. Although it cannot be said that the appellant was estopped from contending otherwise in regard to Assessment Year 1988-89, it is an additional factor and circumstance, which supports the stand of the respondent.”

35. The sheet anchor of the challenge which the appellants raised was based on the decision of this Court in *Hari Durga Travels*. *Hari Durga Travels* was concerned with an agreement between the appellant and the Delhi Transport Corporation and in terms of which it had provided two deluxe busses on hire for being plied as per the requirements of the latter. The taxing authorities appear to have taken the position that the same would be exigible to tax in light of Section 2(zc)(vi) of the DVAT Act. Negating that contention, our Court in *Hari Durga Travels* after noticing the judgment of the Supreme Court in *BSNL* held as follows:

“25. A copy of the agreement dated January 19, 2005, initially for a period of five years (from January 20, 2005 to January 19, 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



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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 conform 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



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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.”

36. After noticing the relevant provisions of the agreement, the Court held:

“**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 Ltd. [2006] 3 VST 95 (S.C.); [2006] 145 STC 91 (S.C.); [2006] 282 ITR 273 (S.C.); (2006) 6 RC 276; (2006) 3 SCC 1 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 therefor 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 Andhra Pradesh v. Rashtriya Ispat Nigam Ltd. [2002] 126 STC 114 (S.C.); (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 [2009] 25 VST 653 (Delhi); (2009) 8 AD



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(Delhi) 13. 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 Ltd. [2006] 3 VST 95 (S.C.); [2006] 145 STC 91 (S.C.); [2006] 282 ITR 273 (S.C.); (2006) 6 RC 276; (2006) 3 SCC 1 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 Ltd. [2002] 126 STC 114 (S.C.); (2002) 3 SCC 214 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 [2009] 25 VST 653 (Delhi); (2009) 8 AD (Delhi) 13.

34. In our considered opinion, the Tribunal has fallen into error by declining to apply the ratio of International Travel House Ltd. [2009] 25 VST 653 (Delhi); (2009) 8 AD 13 (Delhi) 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



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stage.”

37. Yet another decision which Mr. Gulati commended for our consideration was that rendered by the Andhra Pradesh High Court in **Transocean Offshore, Intl. Ventures Ltd. vs. UOI**¹¹ and which too was a case dealing with the provision of off shore drilling equipment. We deem it apposite to take note of the following exposition of the legal position which stands reflected in paragraphs 42 to 47 and 49 of that judgment:

“42. From the above, it is clear that the petitioner was obliged to provide on charter hire basis (i) drilling rig, and (ii) operating personnel and also take up the responsibility of carrying out the operations. Therefore, there was never any transfer of the right to use, either in favour of the contractor (Transocean Drilling Services (India) Private Limited) or in favour of the operator (ONGC).

43. It must be pointed out at this juncture that the expression "charter hire" has significance in maritime or admiralty law. A charter is defined as a specific contract by which the owner of a ship lets the whole or part of the ship to another person for the conveyance of goods or passengers on a particular voyage or until the expiration of a specified time. In simple terms, "charter party" is the mere hiring of a ship.

44. Under the maritime law, charter parties are standardised and grouped into 3 main classifications, namely, (i) voyage charters, (ii) time charters, and (iii) demise or bare boat charters.

45. In a voyage charter, the ship is hired to carry a full cargo on a single voyage. In a time charter, the ship is hired for a fixed period of time. In a demise or bare boat charter, the charterer takes over complete control of the ship for a specific purpose or period of time. The difference between a voyage charter and time charter on the one hand and a demise/bare boat charter on the other is that under the first two categories, the ship remains under the control of the owner, as to manning and navigation. In the case of demise or bare boat charter, the control shifts to the charterer.

46. In the case on hand, the parties to the contract have used the expression "charter hire", only because of the fact that they were dealing with offshore drilling rigs. Articles 3.0, 4.0 and 9.2 of the agreement make it clear that the agreement between the parties does

¹¹ 2017 SCC OnLine Hyd 64
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not fall under the category of a charter similar to a demise or bare boat charter. The terms of the agreement makes it clear that the entire control with regard to manning, operating and navigating was retained by the petitioner herein. Once this is clear, it follows as a corollary that there was no transfer of the right to use.

47. As pointed out by the Supreme Court in *State of Andhra Pradesh v. Rashtriya Ispat Nigam Ltd.* [2002] 126 STC 114 (SC) ; (2002) 3 SCC 314, hire charges are taxable only when full possession and control is given to the hirer. If the owner retains effective control over the equipment, it is not transfer of the right to use.

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49. But the above tests are not exhaustive. As we have mentioned earlier, the equipment and technical personnel provided by the petitioner to the main contractor are on charter hire, where the complete control was retained by the petitioner. All responsibilities were placed only upon the petitioner by the main contractor himself. Therefore, even the tests adopted by the Delhi High Court in two successive decisions, one in *Commissioner, VAT, Trade and Taxes Department v. International Travel House Ltd.* [2009] 25 VST 653 (Delhi) and *Hari Durga Travels v. Commissioner of Trade and Taxes* [2015] 4 VST-OL 668 (Delhi) ; (2015) 51 GST 582, are satisfied in this case.”

38. It was thus submitted by Mr. Gulati that the terms and conditions as well as the various stipulations appearing and forming part of the agreement cannot possibly be interpreted as incorporating or evidencing a transfer of a right to use goods. This Mr. Gulati submitted becomes manifest from the following aspects which emerge upon a consideration of those contractual stipulations:

“(a) Neither the goods are identified nor there is any delivery of goods to a third party in the present case. Instead it is the Appellant who uses the goods to provide services to its customers.

(b) There is no consensus ad idem on the identity of the goods.

(c) There is no consensus ad idem for any particular helicopter that may be identified, and the Appellant is free to provide any helicopter, as per the agreed terms which meets the specification provided in the Agreement.

(d) It is not a disputed fact that all the licenses and regulatory compliances are in the name of the Appellant and such right is never transferred to the customer.



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(e) There is no transfer of any right to use any goods at all as the Appellant has merely agreed to provide services for a limited number of hours by the use of the helicopters. The helicopter remains in the possession and control of the Appellant who operates it for providing services to its client. Therefore, there is no exclusion of the transferor's rights as the Appellant uses it for the flights operated for the client and can use the helicopter for any other purpose beyond the hours for which the Helicopter is used for providing services to its client.

(f) The customer during the term of the agreement cannot direct the use of the helicopter at its free will, without the consent of the Appellant. The customer is obligated to take prior permissions from the Appellant and also act as per the directions given by the Appellant. It is only the Appellant who uses the Helicopter and the clients only instructs the Appellant on the flights it wants to undertake.

(g) The Appellant is under an obligation to provide the helicopters as per the hire schedule and program of the day provided by the customer. The customer is only concerned about the availability of helicopter. The Appellant is free to provide services of the helicopter to other customers when not in use by the A&N administration.

(h) The clauses of the Agreement in the present case clearly provide that the charterer/customer only pays monthly fixed charges and flying charges for availing services of hiring of helicopters. All other charges for maintenance, repair, compliances etc., including the fuel are borne by the Appellant. It has also been mentioned that in case, for whatever reason, the customer has to pay for fuel, the same will be reimbursed by the Appellant or reduced from the fixed charges. Therefore, the scope of the agreement is limited to provision of hiring services for consideration, only granting permissive use than delivery of helicopter.”

39. Controverting the aforementioned submissions Mr. Rajeev Aggarwal, learned counsel advanced the following arguments. Taking us through the salient provisions of the agreement, Mr. Aggarwal submitted that the same would clearly evidence the hiring of a particular helicopter for the exclusive use of the lessee for a period of five years. Mr. Aggarwal contended that the requirement of the helicopter being permanently positioned at Port Blair was yet another indication of the provisions relating to a “transfer of a right to use” under the CST Act as well as



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the DVAT Act being fulfilled. It was his submission that the agreement clearly specified that the helicopters would be placed in position exclusively for the use of the Charterer during the lease term and thus there being a complete transfer of the equipment and right of exclusive use in the hands of the lessee.

40. It was further submitted by Mr. Aggarwal that Clause 8.1 is yet another contractual stipulation which would have a bearing on the question of a “transfer of right to use” since it clearly placed the appellant under the obligation to ensure that the helicopter and its crew is available and fully operational for the Charterer’s use during an operational day. Clause 8.1 is extracted hereinbelow:

“8. OPERATIONAL DAY

8.1 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.”

41. Similar is the position, according to Mr. Aggarwal, which would emerge from a reading of Clauses 5.3.1 to 5.3.6 and which read as under:

“5.3.1 The Lessor shall be allowed to ground the helicopter for maintenance@ 4 days per month during the term of this Agreement. The said ground time for the entire period of the Agreement shall be credited to the Lessor's account at the commencement of this agreement and the Lessor shall be free to utilize such credited days at any time of the year. However, the helicopter shall not be physically grounded by the Lessor for more than 7 days at a stretch at one time & such long groundings shall not exceed two times during the term. Further, if the helicopter is grounded for maintenance for days more than the limits specified under this clause, the Lessee shall have discretion to deduct Fixed Monthly Charges on prorata basis for the entire number of days of grounding excluding allowable days of grounding under this clause.



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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 or jeopardized.

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

The helicopter shall be considered operational if it is available within two hours of the scheduled time of the programme for a sortie. Programme for the day for subsequent sorties for the helicopter shall be adjusted accordingly consequent to a delayed sortie.

5.3.3 If the helicopter is not available cumulatively for more than two hours and upto six hours except waiting for weather clearance in an operational day, it shall be deemed to be grounded for half a day and if it is not available for more than six hours in an operational day, it shall be deemed to be grounded for the full day.

5.3.4 Notwithstanding anything stated herein at least one hour would be allowed between two sorties from the main base for maintenance and atleast three hours would be allowed on return after an overnight halt away from the main base. However for computation of total delay during a day as per Clause 5.3.3 the time mentioned herein and any delay due to weather constraints shall be excluded.

5.3.5 If a helicopter is grounded for more than 7 consecutive operational days in any calender month, the Lessor shall on demand from Lessee endeavour to replace, subject to availability at its expense the helicopter with an identical helicopter acceptable to Lessee.

5.3.6 The Lessor shall notify to the Charterer immediately when a helicopter is grounded or when it is again fully operational and shall keep complete and accurate records of all groundings which the Lessee at its discretion may inspect at any reasonable time.”

42. The submission in essence was that effective control over the helicopter stood transferred to the Charterer and thus both Section 2(g)(vi) of the CST Act as well as Section 2(zc)(vi) of the DVAT Act having rightly been found to be applicable in the facts of the present case. In order to buttress his submissions, Mr. Aggarwal also placed reliance upon the decisions in **Great Eastern Shipping Co. Ltd. vs.**



State of Karnataka¹², Aggarwal Bros. vs. State of Haryana¹³ and CST vs. Quick Heal Technologies Ltd.¹⁴ However, we propose to deal with the applicability and significance of those judgments in the latter parts of this decision.

43. Before proceeding to evaluate the correctness of the rival submissions which were addressed, it would be appropriate to indicate the position which appears to emerge upon an evaluation of the various clauses of the agreement which were cited for our consideration. It must be noted at the outset that the mere stationing of the helicopter at a particular base, and in this case at Port Blair, would perhaps neither be decisive nor conclusive of the question which stands posited. We are not concerned with where the equipment may be based or stationed and which, in any case, would distract one from focusing on the primary question of a transfer of a right to use. While the appellant was undoubtedly required to fulfil the obligations attached to the charter, the principal question which arises for our consideration is whether the agreement entailed and embodied a transfer of a right to use.

44. The placement of the equipment for the exclusive use of the A & N Administration or the dedicated hours which were required to be adhered to would also not be determinative. The primordial question which would remain would be whether the possession and control of the helicopter stood transferred and placed in the hands of the Charterer to be used as thought fit. In order to satisfy the requirements of clause (d) of Article 366 (29A), one would have to be convinced that there

¹² (2020) 3 SCC 354

¹³ (1999) 9 SCC 182

¹⁴ (2023) 5 SCC 469

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was an actual transfer of the helicopter to the Charterer and effective control over that equipment being ceded to the A & N Administration. From the discussion which ensues, we are unconvinced that the agreement did result in such a transfer or conferral of complete control.

45. On a consideration of the contractual stipulations, it becomes apparent that while the appellant was obliged to place a helicopter or an equivalent model at the service of the A & N Administration, the right to operate and maintain remained with the appellant. The helicopter was to be maintained, flown and operated by the appellant. The appellant was required to ensure that the requirements of the A & N Administration were duly met. However, at no point of time was the helicopter placed in the hands of the latter to be operated as it thought fit. The pilot and crew who actually worked the helicopter were to be provided by the appellant. It was the appellant who was required to maintain the aircraft and keep it serviced and ready for operations at all times. The license and permissions mandated to be held continued to be in the name of the appellant and were never transferred or made over to the A & N Administration. The latter was not entitled to substitute crew or maintenance staff and who were to be those provided by the appellant. All costs towards maintenance and upkeep of the aircraft, as well as the salaries of the pilots and supportive crew, were to be met by the appellant.

46. Tested cumulatively it becomes evident that there was no transfer of dominion or control of the helicopter to the A & N Administration. This was essentially an agreement in terms of which the A & N Administration acquired an exclusive medium of transportation as



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opposed to an absolute right over an aircraft, helicopter or means of conveyance which could be said to be under its dedicated and undivided control.

47. The Tribunal, we find, had formulated the following test for the purpose of defining “transfer of right to use”:

“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.”

48. The Tribunal has thus understood the concept of “transfer of right to use” as involving a passage of control over economic benefits of property coupled with a termination of rights inhering in one of the parties and a corresponding creation in the hands of another. While we do not propose to render any comment on the aforementioned formulation, we for the time being proceed on the basis that the aforesaid quotation represents the correct test to be applied for the purposes of discerning a transfer of a right to use.

49. As per the Tribunal itself, there has to be a transfer of control over property and the said transfer must result in the rights in the property moving from one entity and being conferred on another. However, and as the Supreme Court succinctly explained in *BSNL*, the transfer of a right to use would be satisfied provided it entails the conferment of a legal right to use the goods and the same being to the exclusion of the transferor’s right to use.

50. We recently, in **Indian Compressors Ltd. vs. Union of India & Ors.**¹⁵, had an occasion to review the precedents rendered in the context of Article 366(29A)(d) and the transfer of a right to use which by way

¹⁵ W.P.(C) 2960/2017 dated 04 November 2024
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of a constitutional fiction came to be included within the concept of a sale of goods. We deem it apposite to extract the following passages from that decision:

“17. The ‘right to use’ and which is spoken of in Article 366(29-A) has been lucidly explained by the Supreme Court in **BSNL vs. Union of India**, and where Dr. A.R. Lakshmanan J. in a concurring opinion identified the ingredients of a ‘right to use’ as being the following:

“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 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.”

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22. The interplay between Article 366(29-A) and the provisions of the Act was succinctly explained by the Supreme Court in a recent decision rendered in **Commissioner of Service Tax vs. Adani Gas Ltd.** *Adani Gas* was a decision which was directly concerned with Section 65(105)(zzzzj). While ruling upon the scope and ambit of that provision as contained in the Act, the Supreme Court rendered the following pertinent observations:

“16. The test laid down in *Bharat Sanchar Nigam Ltd.** has been applied by courts to determine whether a transaction involves the “transfer of the right to use any goods” under article 366(29A)(d). In doing so, the courts have analysed the terms of the agreement underlying the transaction to ascertain whether effective control and possession has been transferred by the supplier to the recipient of the goods.



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Recently, this court in *Great Eastern Shipping Co. Ltd. v. State of Karnataka* considered whether the transfer of a vessel under a charter party agreement was a "deemed sale", subject to sales tax. The court, after analysing the terms of the charter party agreement, held:

"43. We are not turning our decision upon the terms used like 'let', 'hire', 'delivery' and 'redelivery' but on the other essential terms of the Charter Party Agreement entered in the instant case which clearly makes out that there is a transfer of exclusive right to use the vessel which is a deemed sale and is liable to tax under the KST Act. In the instant case, 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 makes it out that it is definitely a contract of transfer of right to use the vessel with which we are concerned in the instant matter, and that is a deemed sale as specified in article 366(29A)(d). On the basis of the abovementioned decision, it was urged that all Charter Party Agreements are service agreements. The submission cannot be accepted, as there is no general/invariable rule/law in this regard. It depends upon the terms and conditions of the charter-party when it is to be treated as only for service and when it is the transfer of right to use.

...

54. When we consider the charter-party in question in the context of applicable law, particularly in view of the constitutional provisions of article 366(29A)(d), we find that there is transfer of right to use tangible goods, which is determinative of deemed sale as per the Constitution of India and provisions of section 5C reflecting the said intendment. We are of the considered opinion that there is transfer of right to use exclusively given to charterer for six months, and the vessel has been kept under the exclusive control. The charterer qualifies the test laid down by this court in *Bharat Sanchar Nigam Ltd.*" (emphasis supplied)

17. Therefore, sales tax is levied in pursuance of article 366(29A)(d) on transactions which resemble a sale in substance as they result in a transfer of the right to use in goods, instead of the transfer of title in goods. The Finance Act, 1994, deriving authority from the residuary entry 97 of the Union List, enabled the Central Government to levy tax



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on services. "Service tax" was introduced as a response to the advancement of the contemporary world where an indirect tax was necessary to capture consumption of services, which are economically similar to consumption of goods, in as much as they both satisfy human needs.** This court, in Association of Leasing and Financial Services Companies v. Union of India had noted :

"38.. .. Today with technological advancement there is a very thin line which divides a 'sale' from 'service'. That, applying the principle of equivalence, there is no difference between production or manufacture of saleable goods and production of marketable/saleable services in the form of an activity undertaken by the service provider for consideration, which correspondingly stands consumed by the service receiver. It is this principle of equivalence which is inbuilt into the concept of service tax under the Finance Act, 1994. That service tax is, therefore, a tax on an activity. That, service tax is a value added tax. The value addition is on account of the activity which provides value addition.. . Thus, service tax is imposed every time service is rendered to the customer/client,. .. Thus, the taxable event is each exercise/activity undertaken by the service provider and each time service tax gets attracted." (emphasis supplied)

18. The introduction of section 65(105)(zzzzj) in the Finance Act, 1994, was with the intention of taxing such activities that enable the customer's use of the service provider's goods without transfer of the right of possession and effective control. This provision creates an element of taxation over a service, as opposed to a "deemed sale" under article 366(29A)(d). For the purpose of clarification, the Department of Revenue issued a Circular, D.O. F. No. 334/1/2008-TRU, dated February 29, 2008. The said circular clarified the applicability of section 65(105)(zzzzj) vis-a-vis article 366(29A)(d). The relevant portions of the circular are as follows :

"4.4 Supply of tangible goods for use :

4.4.1 Transfer of the right to use any goods is leviable to sales tax/ VAT as deemed sale of goods (article 366(29A)(d) of the Constitution of India). Transfer of right to use involves transfer of both possession and control of the goods to the user of the goods.



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4.4.2 Excavators, wheel loaders, dump trucks, crawler carriers, compaction equipment, cranes, etc., offshore construction vessels and barges, geo-technical vessels, tug and barge flotillas, rigs and high value machineries are supplied for use, with no legal right of possession and effective control. Transaction of allowing another person to use the goods, without giving legal right of possession and effective control, not being treated as sale of goods, is treated as service.

4.4.3 Proposal is to levy service tax on such services provided in relation to supply of tangible goods, including machinery, equipment and appliances, for use, with no legal right of possession or effective control. Supply of tangible goods for use and leviable to VAT/sales tax as deemed sale of goods, is not covered under the scope of the proposed service. Whether a transaction involves transfer of possession and control is a question of facts and is to be decided based on the terms of the contract and other material facts. This could be ascertainable from the fact whether or not VAT is payable or paid." (emphasis supplied)

19. The above circular clarified that section 65(105)(zzzzj) is applicable only to those transactions where there is a supply of tangible goods for use, without the transfer of possession or effective control to the recipient. This aspect has been interpreted by various courts and tribunals. In the Bombay High Court decision in Indian National Shipowners' Association v. Union of India ("Shipowners"), the petitioners were engaged in providing services to major exploration and production operators by supplying their various vessels including offshore drilling rigs, offshore support vessels, harbour tugs, and construction barges. The question before the Bombay High Court was whether, prior to the introduction of section 65(105)(zzzzj) in 2008, the petitioner could be taxed on its services in relation to mining of mineral, oil, or gas under section 65(105)(zzzy). In the present matter, we are not concerned with the merits of Shipowners', which was affirmed on appeal by this court in Union of India v. Indian National Shipowners' Association**. This court explicitly restricted itself to the interpretation of section 65(105)(zzz) while leaving the other observations on interpretation of the law, "open to be considered at length at an appropriate stage". We note



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however, the analysis of section 65(105)(zzzzj) of the Bombay High Court, where the High Court observed# :

"38. Entry (zzzzj) is entirely a new entry. Whereas entry (zzzy) covers services provided to any person in relation to mining of mineral, oil or gas, services covered by entry (zzzzj) can be identified by the presence of two characteristics, namely, (a) supply of tangible goods including machinery, equipment and appliances for use, (b) there is no transfer of right of possession and effective control of such machinery, equipment and appliances. According to the members of the first petitioner, they supply offshore support vessels to carry out jobs like anchor handling, towing of vessels, supply to rig or platform, diving support, fire fighting, etc. Their marine construction barges support offshore construction, provide accommodation, crane support and stoppage area on main deck or equipment. Their harbour tugs are deployed for piloting big vessels in and out of the harbour and for husbanding main fleet. They give vessels on time-charter basis to oil and gas producers to carry out offshore exploration and production activities. The right of possession and effective control of such machinery, equipment and appliances is not parted with.. ." (emphasis supplied)

20. The taxable service is defined as a service which is provided or which is to be provided by any person to another "in relation to supply of tangible goods". The provision indicates that the goods may include machinery, equipment or appliances. The crucial ingredient of the definition is that the supply of tangible goods is for the use of another, without transferring the right of possession and effective control "of such machinery, equipment and appliances". Hence, in order to attract the definition of a taxable service under sub-clause (zzzzj), the ingredients that have to be fulfilled are:

- (i) The provision of a service ;
- (ii) The service is provided by a person to another person ;
- (iii) The service is provided in relation to the supply of tangible goods, including machinery, equipment and appliances ;
- (iv) There is no transfer of the right of possession ;
- (v) Effective control over the goods continues to be with the service provider ; and



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(vi) The goods are supplied for use by the recipient of the service.

There is an element of service which is the foundation for the levy of the tax.

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24. The crux of the dispute is whether the supply of tangible goods—the SKID equipment—is for the use of the purchaser. In determining as to whether the provisions of section 65(105)(zzzzj) are attracted, it is necessary to distinguish between the rights and obligations of the respondent (as the seller of gas) and of their purchasers, from the issue of whether the measurement equipment (SKID equipment) is supplied for the use of the purchaser of gas, without transferring the right of possession and effective control.

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26. Under section 65(105)(zzzzj), the taxable service is provided or to be provided in relation to the supply of tangible goods for the use of another, without transferring the right of possession and effective control. The expression "use" has been defined in Black's Law Dictionary :

"Use, n. Act of employing everything, or state of being employed ; application, as the use of a pen, or his machines are in use. Also the fact of being used or employed habitually ; usage, as, the wear and tear resulting from ordinary use. *Berry-Kofron Dental Laboratory Co. v. Smith*, 345 Mo. 922, 137 S.W. 2d 452, 454, 455, 456. The purpose served ; a purpose, object or end for useful or advantageous nature. *Brown v. Kennedy*, Ohio Appellant. 49 N.E.2d 417, 418. To put or bring into action or service ; to employ for or apply to a given purpose. *Beggs v. Texas Dept. of Mental Health and Mental Retardation*, Tex. Civ. App., 496 S.W.2d 252, 254. To avail oneself of ; to employ ; to utilize ; to carry out a purpose or action by means of ; to put into action or service, especially to attain an end. *State v. Howard*, 221 Kan. 51, 557 P.2d 1280, 1281.

Non-technical sense. The 'use' of a thing means that one is to enjoy, hold, occupy or have some manner of benefit thereof. Use also means usefulness, utility, advantage, productive of benefit."

27. The expression "use" does not have a fixed meaning. The content of the expression must be based on the context in which the expression is adopted. The use of an article may or may not result in a visible change in its form or



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substance. Moreover, the nature of use is conditioned by the kind of article which is put to use. Section 65(105) of the Finance Act, 1994 envisages myriad interpretations of the expression "use", in a variety of services such as telecommunication, renting of immovable property, and services related to art, entertainment, and marriage. In the case of some articles, use may be signified by a physical operation of the article by the person who uses it. In such a case, actual physical use is what is meant by the supply of the goods for the use of another. In the case of others, the nature of the goods supplied impacts the character of the use to which the goods can be put. As an illustration, section 65(105)(zzzze) of the Finance Act, 1994, seeks to tax services related to information technology and interprets the "right to use" to include the "right to reproduce, distribute, sell, etc". This understanding of "use" differs from the supply of tangible goods under section 65(105)(zzzzj) at hand, where effective control or possession is not ceded. Thus, physical operation is not the only or invariable feature of use. As a corollary to the same, technical expertise over the goods in question is not a sine qua non for determining the ability of the consumer to use the good. Therefore, the expression "use" also signifies the application of the goods for the purpose for which they have been supplied under the terms of a contract.

28. The terms of the GSA indicate that the supply, installation, maintenance and repair of the measurement equipment is exclusively entrusted to the respondent as the seller. These provisions have been incorporated in the GSA to ensure that a buyer does not calibrate or tinker with the equipment. It is an incident of ownership and control being vested with the respondent. The purpose of the SKID equipment and its utility, lie in its ability to regulate the supply and achieve an accurate verification of that which is supplied ; in the present case the supply of goods by the respondent to its buyers. This enures to the benefit of the seller and the buyer. The seller is concerned with the precise quantification of the gas which is supplied to the buyer. The buyer has an interest in ensuring the safety of its facilities and that the billing is based on the correct quantity of gas supplied and delivered under the GSA. To postulate, as did the Tribunal, that the measurement equipment is only for the benefit of the seller in measuring the quantity of the gas supplied would not be correct. The GSA is an agreement reflecting mutual rights and obligations between the seller and the purchaser. Both have a vital interest in ensuring the



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correct recording of the quantity of gas supplied. Additionally, delivery of gas in a safe and regulated manner, enabled by the SKID equipment, is an essential component of the GSA. The SKID equipment subserves the contractual rights of both the seller and the purchaser of gas. Indeed, without the SKID equipment there would be no gas supply agreement. In fact, in the GSA, the buyer has also provided a warranty to ensure that the "buyer's facilities" remain technically and operationally compatible with the "seller's facilities", both of which include the "measurement equipment". This warranty would not have been provided if the measurement equipment was not of "use" to the buyer. The equipment is thus a vital ingredient of the agreement towards protecting the mutual rights of the parties and in ensuring the fulfilment of their reciprocal obligations as seller and buyer in regulating the supply of gas. As an incident of regulating supply, it determines the correct quantity of gas that is supplied. The obligation to supply, install and maintain the equipment is cast upon the seller as an incident of control and possession being with the seller. Section 65(105)(zzzzj) applies precisely in a situation where the use of the goods by a person is not accompanied by control and possession. "Use" in the context of SKID equipment postulates the utilization of the equipment for the purpose of fulfilling the purpose of the contract. Section 65(105)(zzzzj) does not require exclusivity of use. The SKID equipment is an intrinsic element of the service which is provided by the respondent, acting pursuant to the GSA, as a supplier of natural gas to its buyers.

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30. Thus, we are of the view that the supply of the pipelines and the measurement equipment (SKID equipment) by the respondent, was of use to the customers and is taxable under section 65(105)(zzzzj) of the Finance Act 1994.

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38. Thus construed, we are of the view that the adjudicating authority was correct in concluding that the buyer of gas is as interested as the seller in ensuring and verifying the correct quantity of the gas supplied through the instrumentality of the measurement equipment and the pipelines. Additionally, the role of regulating pressure and ensuring the safety of supply of gas performed by the measurement equipment is an essential aspect for the "use" of the consumer. The SKID equipment fulfils the description in section 65(105)(zzzzj) of a taxable service :



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service in relation "tangible goods" where the recipient of the service has use (without possession or effective control) of the goods."

23. It is thus apparent that it is only 'deemed sales' as contemplated under Article 366(29-A) of the Constitution, which stands excised from Section 65(105)(zzzzj). Tested on the factors which had been identified by the Supreme Court in *BSNL*, and relevant for the purposes of evaluating whether a 'right to use' had been transferred, it becomes apparent that no dominion or control over the equipment stood transferred by the writ petitioner. The equipment remained under the regulation and control of the petitioner and was also to be worked upon by personnel deployed by it. It is these factors which appear to have weighed upon the respondent while holding that the transactions would be exigible to tax under Section 65(105)(zzzzj)."

51. While doing so, we had an occasion to notice a decision of recent vintage rendered by the Supreme Court in **Commissioner of Service Tax vs. Adani Gas Ltd.**¹⁶ As the Supreme Court succinctly explained in *Adani Gas*, the key elements which are liable to be found to exist in order to qualify what is spoken of in Article 366(29A)(d), are a transfer of a right of possession as well as effective control being conferred upon the transferee. It is these precepts on the basis of which the contractual stipulations may now be examined.

52. The agreement in unequivocal terms defined the equipment to be the Dauphin SA 365N or equivalent helicopter. While it was admittedly stationed at Port Blair, no part of the agreement can possibly be construed as placement of that equipment exclusively in the hands of the A & N Administration. The identification of the equipment was in furtherance of the charter facility which was proposed to be extended by the appellant to that Administration.

53. While defining the scope of service, all that the agreement

¹⁶ 2020 SCC OnLine SC 682
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provided was that the helicopter would be exclusively available to the Charterer. Similarly, the Charterer was conferred the right to requisition such flights as may be required from time to time. However, the flight as well as the equipment was to be exclusively managed and regulated by the appellant and the flights were to be operated by personnel who were in their employment. There was no contractual relationship that existed between those operators and staff on the one hand and the A & N Administration on the other. Additionally, the obligation to keep the equipment insured was also one which stood placed upon the appellant. There was also no transfer of permits and licenses which were necessarily required in order to undertake the operations contemplated under the agreement. Those permits and licenses undisputedly remained in the hands of the appellant.

54. Of equal significance is the indemnity clause and which clearly militates against the A & N Administration being recognised as having acquired dominion over the goods or the goods being transferred to the exclusion of the appellants. It is these factors which convince us to hold that the facts that informed the contract between the appellant and the A & N Administration were akin to those which had fallen for examination in *Hari Durga Travels*.

55. The reliance which Mr. Aggarwal has placed on the decisions in *Great Eastern*, *Aggarwal Bros.* and *Quick Heal* is clearly misplaced when we bear in mind the following facts. Regard must be had to the fact that in *Great Eastern*, the Supreme Court had on facts held:

“32. The charter agreement also provides round the clock services throughout the contract period in Clause 3 at the disposal of the port. The contractor has to pay the expenses for the master and crew. As



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per Clause 5, the charterer has to provide whilst the vessel is on hire, fuel, lubricants, water, electricity, port charges, and anti-pollutants. As per Clause 7(a), the vessel shall be for all purposes at the disposal of the charterer and under the control of the contractor, and as provided in Clause 7(b) of the charter agreement, the charterer shall have the use of all outfits, equipment, and appliances. No doubt about it that insurance is the liability of the contractor. The indemnification also is the liability of the contractor under the agreement. The whole reach and burthen of a vessel, including lawful deck capacity, is at the disposal of the charterer, reserving proper and sufficient space for the vessel's masters, officers, etc. A performance guarantee has also to be submitted.

33. When we peruse the various terms and conditions of the charter party agreement (Annexure I), Clause 1 provides that the contractors “let” and the charterer “hire” the goods vessel for six months. The expression “let” has been used, and the vessel most significantly during the charter period has been placed at the “disposal” of the charterers and under their control in every respect. The charterers have been given the right to use all outfits, equipment, and appliances on board the vessel at the time of the delivery, including the whole reach, burthen, and deck capacity. Thus, in our considered opinion, merely by providing the staff, insurance, indemnity, and other responsibilities of bearing officials costs. Effective control for the entire period of six months has been given to the charterers. It is a case of transfer of right to use the vessel for which certain expenses and staff are to be provided by the contractor, which is not sufficient to make out that the control and possession of the vehicle are with the contractor. The possession and control are clearly with the charterer. As in essence, it has to be seen from a conjoint reading of various conditions whether there is a transfer of right to use the vessel. In our considered opinion there is not even an iota of doubt that under the charter agreement coupled with the instructions to tenderers, general conditions and special conditions for the contract as specified in the tender documents and charter party clauses, there is a transfer of right to use the vessel for the purposes specified in the agreement.”

56. The Supreme Court then proceeded to enunciate the contours of a transfer of right to use in the following terms:

“34. To constitute a transaction for the transfer of right to use of goods, essential is, goods must be available for delivery. In the instant case, the vessel was available for delivery and in fact, had been delivered. There is no dispute as to the vessel and the charterer has a legal right to use the goods, and the permission/licence has been made available to the charterer to the exclusion of the



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contractor. Thus, there is complete transfer of the right to use. It cannot be said that the agreement and the conditions subject to which it has been made, is not a transfer of right to use the goods, during the period of six months, the contractor has no right to give the vessel for use to anyone else. 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.

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37. The charter party agreement qualifies the test laid down by this Court. Applying the substance of the contract and the nominal nature test, the vessel was available when the agreement for the right to use the goods has taken place. The vessel was available at the time of transfer, deliverable, and delivered and was at the exclusive disposal for six months round the clock with the charterer port trust. The use of licence and permission was at the disposal of the charterer and to the exclusion of the contractor/transferor. It was not open to the contractor to permit the use of the vessel by any other person for any other purpose.”

57. As was found by the Supreme Court in *Great Eastern*, effective control over the vessel had been duly transferred in terms of the charter party agreement and it was the charterer which had exclusive control and use of the vessel. In *Great Eastern*, it was the charterer which was operating the vessel. That is a facet of that charter agreement which is significantly distinct and distinguishable from the agreement with which we are concerned. The Supreme Court had also significantly found that in terms of the charter party agreement, the use of all licences and permissions had also been made over and placed at the disposal of the charterer to the exclusion of the contractor.

58. Proceeding then to examine the decision in *Aggarwal Bros.*, we find that the assessee therein was dealing in shuttering material used in the course of construction of buildings. It was receiving hire charges in respect of the shuttering material. The Supreme Court on facts had found that the customers who had hired the shuttering material had

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complete and effective control over the same during the construction process. It was in the aforesaid backdrop that it held as follows:

“2. The assesseees (appellants) hire shuttering to builders and contractors who use it in the course of construction of buildings. The assesseees were served with notices under the Haryana General Sales Tax Act, 1973 (“the said Act”) requiring them to pay sales tax on such hire charges and assessment orders were then so made. The assessment order in the case of M/s DD Shuttering recorded that the assessee dealt in shuttering materials used in the construction of buildings and received hire charges from its various customers. The hire charges received by it were sales within the meaning of Section 2(l)(iv) of the said Act. The writ petitions were filed to quash these assessment orders and it was contended that the aforementioned provision of the said Act was unconstitutional. The High Court repelled the challenge to constitutionality. It found that the possession of the shuttering material was transferred by the assesseees to their customers for use during the construction of buildings. The customers were in effective control of the shuttering during the periods it remained in their possession. The transactions, therefore, fell within the amended definition of the word “sale” as there was a transfer of the right to use the shuttering.

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4. The language used in Section 2(j)(iv) and 2(l)(iv) of the said Act is the language used in Article 366(29-A)(d), Section 2(j) dealing with purchase and Section 2(l) with sale. The argument before us is, therefore, not an argument on the constitutionality of these provisions of the said Act but of their interpretation and the application thereof to the facts of the present case.

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6. Where there is a transfer of a right to use goods for consideration, the requirement of the above-mentioned provision of the said Act is satisfied and there is deemed to be a sale. In the instant case, the assesseees owned shuttering. They transferred the shuttering for consideration to builders and building contractors for use in the construction of buildings. There can, therefore, be no doubt that the requirements of a deemed sale within the meaning of the above-mentioned provision of the said Act are satisfied.”

59. As is manifest from the above, the Supreme Court in *Aggarwal Bros.* had on facts found that there was a complete transfer of shuttering for consideration and the same being exclusively placed in the hands of

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the hirer to be used and utilized as it thought fit.

60. *Quick Heal* was a decision where the assessee was engaged in the development of an antivirus software and which was being supplied along with a licence code to be accessed either online or replicated CDs/DVDs to customers in India. While dealing with the question of whether the said transaction would constitute and embody the transfer of a right to use, the Supreme Court firstly culled out the following principles that would govern and delineate the scope of Article 366(29A)(d):

“53. The following principles to the extent relevant may be summed up:

53.1. The Constitution (Forty-sixth Amendment) Act intends to rope in various economic activities by enlarging the scope of “tax on sale or purchase of goods” so that it may include within its scope, the transfer, delivery or supply of goods that may take place under any of the transactions referred to in sub-clauses (a) to (f) of clause (29-A) of Article 366. The works contracts, hire purchase contracts, supply of food for human consumption, supply of goods by association and clubs, contract for transfer of the right to use any goods are some such economic activities.

53.2. The transfer of the right to use goods, as distinct from the transfer of goods, is yet another economic activity intended to be exigible to State tax.

53.3. There are clear distinguishing features between ordinary sales and deemed sales.

53.4. Article 366(29-A)(d) of the Constitution implies tax not on the delivery of the goods for use, but implies tax on the transfer of the right to use goods. The transfer of the right to use the goods contemplated in sub-clause (d) of clause (29-A) cannot be equated with that category of bailment where goods are left with the bailee to be used by him for hire.

53.5. In the case of Article 366(29-A)(d) the goods are not required to be left with the transferee. All that is required is that there is a transfer of the right to use goods. In such a case taxable event occurs regardless of when or whether the goods are delivered for use. What is required is that the goods should be in existence so that they may be used.



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53.6. The levy of tax under Article 366(29-A)(d) is not on the use of goods. It is on the transfer of the right to use goods which accrues only on account of the transfer of the right. In other words, the right to use goods arises only on the transfer of such right to use goods.

53.7. The transfer of right is the *sine qua non* for the right to use any goods, and such transfer takes place when the contract is executed under which the right is vested in the lessee.

53.8. The agreement or the contract between the parties would determine the nature of the contract. Such agreement has to be read as a whole to determine the nature of the transaction. If the consensus ad idem as to the identity of the good is shown the transaction is exigible to tax.

53.9. The locus of the deemed sale, by transfer of the right to use goods, is the place where the relevant right to use the goods is transferred. The place where the goods are situated or where the goods are delivered or used is not relevant.”

61. As was succinctly explained, Article 366(29A)(d) is not concerned with delivery of goods for use but envisages the levy of a tax on the transfer of a right to use goods. It proceeded further to explain that clause (d) of Article 366(29A) cannot be placed in the same category as that of bailment where goods are left in the possession of the bailee solely for the purposes of use on a hire basis. Proceeding ahead, the Supreme Court also underlined the importance of a transfer and vesting of effective and general control. This becomes evident from a reading of paragraph 54 of the report and which is reproduced hereinbelow:

“**54.** From the judicial decisions, the settled essential requirement of a transaction for the transfer of the right to use the goods are:

54.1. It is not the transfer of the property in goods, but it is the right to use the property in goods.

54.2. Article 366(29-A)(d) read with the latter part of clause (29-A) which uses the words, “and such transfer, delivery or supply”... would indicate that the tax is not on the delivery of the goods used, but on the transfer of the right to use goods regardless of when or whether the goods are delivered for use subject to the condition that the goods should be in existence for use.



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54.3. In the transaction for the transfer of the right to use goods, delivery of the goods is not a condition precedent, but the delivery of goods may be one of the elements of the transaction.

54.4. The effective or general control does not mean always physical control and, even if the manner, method, modalities and the time of the use of goods is decided by the lessee or the customer, it would be under the effective or general control over the goods.

54.5. The approvals, concessions, licences and permits in relation to goods would also be available to the user of goods, even if such licences or permits are in the name of owner (transferor) of the goods.

54.6. During the period of contract exclusive right to use goods along with permits, licences, etc. vests in the lessee.”

62. Ultimately, on facts the Supreme Court in *Quick Heal* held as under:

“**57.** The sum and substance of the ratio of *BSNL* [*BSNL v. Union of India*, (2006) 3 SCC 1] as discernible is that the contract cannot be vivisected or split into two. Once a lump sum has been charged for the sale of CD (as in the case on hand) and sales tax has been paid thereon, the Revenue thereafter cannot levy service tax on the entire sale consideration once again on the ground that the updates are being provided. We are of the view that the artificial segregation of the transaction, as in the case on hand, into two parts is not tenable in law. It is, in substance, one transaction of sale of software and once it is accepted that the software put in the CD is “goods”, then there cannot be any separate service element in the transaction. We are saying so because even otherwise the user is put in possession and full control of the software. It amounts to “deemed sale” which would not attract service tax.”

63. We thus find ourselves unable to read any observation made or principle enunciated in *Quick Heal* which could be read or countenanced as buttressing the arguments of the respondents.

64. On an overall consideration of the above, we find ourselves unable to sustain the conclusions rendered by the Tribunal in the judgment impugned before us.

65. We, consequently, allow the instant appeals and answer question



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(a) in the negative and question (b) in the affirmative. We are of the firm opinion that the Tribunal had clearly erred in coming to the conclusion that the appellant had transferred effective control and possession and thus qualifying the precepts of a transfer of right to use goods as contemplated under Section 2(g)(vi) of the CST Act and Section 2(zc)(vi) of the DVAT Act.

66. The appeal is accordingly allowed. The impugned order of the Tribunal dated 06 October 2022 is, consequently, set aside.

YASHWANT VARMA, J.

RAVINDER DUDEJA, J.

DECEMBER 19, 2024/DR/RW