**(2024) 11 CESTAT CK 0013**

**Customs, Excise And Service Tax Appellate, New Delhi**

**Case No:** Service Tax Appeal No. 52898 of 2018

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| M/s Tripti Alcobrew Pvt. Ltd | | APPELLANT |
| | Vs | |
| Commissioner of Central Excise & CGST | | RESPONDENT |

**Date of Decision:** Nov. 12, 2024

**Acts Referred:**

- Finance Act, 1994 - Section 65(105)(zzzz), 73(1), 75, 78
- Madhya Pradesh Value Added Tax Act, 2002 - Section 2(m), 2(u), 15
- A.P. General Sales Tax Act, 1957 - Section 5E
- Maharashtra Value Added Tax Act, 2002 - Section 2(24)

**Hon'ble Judges:** Dilip Gupta, President (J); P. V. Subba Rao, Member (T)

**Bench:** Division Bench

**Advocate:** Kamal Sawhaney, Akansha Wadhwani, Deepak Thakur, Manoj Kumar

**Final Decision:** Allowed

**Judgement**

Dilip Gupta, J

M/s. Tripti Alcobrew Pvt. Ltd., the appellant has sought the quashing of the order dated 27.04.2018 passed by the Commissioner adjudicating three

show cause notices dated 11.10.2013, 10.09.2014 and 01.04.2016 covering the period from 2008-2009 to 2015-2016. The Commissioner has confirmed

the demand of service tax with interest and penalty.

2. A Lease Deed dated 14.03.2008, the Lease Deed was executed between the appellant and Skol Breweries Limited, Skol for renting of land,

building, plant and machinery by the appellant to Skol. The appellant discharged service tax liability on the consideration received under the head

â€œrenting of immovable propertyâ€ services.

3. A License Agreement was also executed between the appellant and Skol on 30.01.2008, the License Agreement whereby the appellant endorsed

the brewery license in favour of Skol. This License Agreement was renewed from time to time and a License Agreement dated 01.03.2014 was

executed between the appellant and Sab Miller India Limited, Sab Miller (earlier known as Skol). The appellant treated the execution of the License

Agreement to be a â€œdeemed saleâ€ under article 366(29A)(d) of the Constitution and paid VAT.

4. The department believed that the amount paid to the appellant under the License Agreements dated 30.01.2008 and 01.03.2014 should be included

in the assessable value of â€œrenting of immovable property serviceâ€ because without the license endorsement the plant and machinery leased to the

appellant could not have been put to use by Skol for brewing beer.

5. Accordingly, a show cause notice dated 11.10.2013 was issued to the appellant. The appellant has been referred to as â€œTALâ€ in the show

cause notice. The relevant portion of the show cause notice is reproduced below:

â€œ18. As discussed above on the basis of details/information gathered during the search operation and documentary evidences submitted

during the investigation by TAL, the Service Tax liability on the TAL have been worked out. TAL have received Rs. 18,93,66,667/- as License

endorsement fees from SKOL which has been accounted for as Lease rental income by TAL in their books of account and as 'rent' by SKOL

in their Balance sheet. The License endorsement fees are being charged by TAL for assigning the privilege of running the brewing facility

obtained on lease by SKOL and without the endorsement /sublicense of the brewing license the immovable property i.e. the plant and

machinery cannot be put to use by SKOL for the purpose of brewing beer. Thus the services rendered by TAL by way of endorsement of the

brewery license is covered under the definition of taxable service as provided in Section 65 (105)(zzzz) of the Finance Act 1994. Thus it

appears the entire amount of Rs 18,93,66,667 received by TAL during the period April 2008 to Jan 2013 as license endorsement fees is

liable to service tax under the renting of immoveable property services on which the service tax liability works out to Rs 2,02,15,467/-

(Service Tax Rs 1,96,26,667 + Ed Cess 3,92,533/- + Ed Cess Rs 1,96,267/-).

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18.2 The above facts revealed that the TAL had neither submitted the correct ST-3 returns showing the above taxable amount nor deposited

the Service Tax on the taxable amount representing the amount received from the SKOL as License endorsement fees. It appears that TAL

had deliberately suppressed their receipts against License endorsement fees and have also sought to mislead the investigation by claiming

that the said receipts are not related to renting of the immoveable property while both TAL the service provider and SKOL the recipient of

service have accounted for the amount paid as license endorsement fees as Rent in their Balance sheets. It therefore appears from the

foregoing that the noticee has resorted to fraud, willful mis-statement, and suppression of facts with intent to evade payment of service tax.

M/s TAL have thus suppressed the taxable value to the tune of Rs. 18,93,66,667/- from the Service Tax department and evaded the Service

Tax amounting to Rs 2,02,15,467/-(Service Tax Rs1,96,26,667 + Ed Cess 3,92,533/- + Ed Cess Rs 1,96,267/-)i n respect of taxable services

rendered by them for the period 01.04.2008 to 31.01.2013 by contravening the provisions of the Finance Act, 1994 and Rules made

thereunder. Thus, the service tax not paid by TAL on the value of taxable services suppressed by them is recoverable from them by invoking

the extended period under proviso to Sub-section(1) of Section 73 of the Finance Act 1994 along with interest at the appropriate rate as per

Section 75 of the Finance Act 1994.â€

(emphasis supplied)

6. The appellant filed a reply to the show cause notice and denied allegations made therein.

7. The Commissioner, by the impugned order dated 27.04.2018, confirmed the demand proposed in the show cause notice with interest and penalty.

The appellant has been referred to as â€œTALâ€ in the order. The relevant portions of the order are reproduced below:

â€œ18.3.2 ******** In the instant case, M/s SKOL has taken the plant, machinery and premises of M/s TAL, situated at Village Mahtoli,

Banmore along- with the brewing license on rent for the purpose of brewing beers of their own brand. The License to manufacture/brew the

alcoholic beverage in the said premises has been issued by the M.P State Excise Deptt. to TAL. M/s SKOL is not having the requisite License

to brew beer at the rented premises. Hence, SKOL can manufacture liquor after getting the factory premises, only when the License issued

by the State Excise Deptt, is leased to them by TAL. It is established that without getting the factory as well as the brewing license, SKOL

would not have been able to put to use the plant, machinery and premises of TAL taken on lease for the purpose of brewing beer. Thus, the

leasing of factory along- with the brewing License agreement entered into between SKOL and TAL is the natural completion of the process

of giving the premises on rent by TAL to SKOL .Here, it is also pertinent to note that the condition laid down in para 3.1 of the ""lease deed

cast obligation on the 'lessor' to take all necessary steps to apply for and procure a valid endorsement/sub-licensing of the brewery license

in favour of the â€˜lesseeâ€™ which shows that these two are not independent agreements.

In view of the above facts and arrangements, it can be safely concluded that the â€˜License agreementâ€™ entered into between both the

parties is only the natural completion or validation of the lease deed and renting of the factory along-with the brewing license is an integral

part of the 'renting of immovable property services' rendered by TAL to SKOL for the purpose of furtherance of their business of brewing

beer. Hence, the amount paid by SKOL to TAL against the 'sub-leasing of license is includible in the 'rental incomeâ€™ and by not

including the same in taxable value, the party has short-paid service tax.â€

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18.3.4. It has also been the partyâ€™s contention that the transfer of license tantamount to â€˜saleâ€™.*****

As evident from the facts of the case and conditions laid down in the agreements, it is clear that leasing of the license in the instant case is

also subject to certain restrictions and TAL have not only sub-leased the license, they have also provided a bunch of services along-with it, as

discussed above. Hence, in view of the above ruling, no â€˜saleâ€™ has taken place in the present case and the party was not liable to pay

VAT on it.*****

The above verdicts, although, given in respect of other taxable services, define the scope of term â€˜saleâ€™ and applicability of

â€˜VATâ€™ sale in the light of the said judgments. I have reached to the conclusion that the sub-leasing of the license by TAL to SKOL was

not â€˜saleâ€™ and would not attract VAT/sales tax.

18.4. In view of the above discussion, I find that the party was liable to include their receipts, against the â€˜License agreementâ€™, in the

taxable value of â€˜rental incomeâ€™ and the party was liable to pay service tax on the same. By not including it, in the taxable value,

during the period April, 2008 to June, 2016, the party has short-paid service tax (including cesses) amounting to Rs. 4,57,12,389/- as

detailed above. Said amount of service tax is recoverable form them.â€

(emphasis supplied)

8. It is this order dated 27.04.2018 passed by the Commissioner that has been assailed in this appeal.

9. Shri Kamal Sawhaney, learned counsel for the appellant assisted by Ms. Akansha Wadhwani and Shri Deepak Thakur made the following

submissions:

(i) The License Agreements dated 30.01.2008 and 01.03.2014, by which the appellant endorsed the brewery license issued in its name to Skol/Sab

Miller, is a deemed sale under article 366(29A)(d) of the Constitution and, therefore, service tax could not have been demanded on the amount

received by the appellant. To support this contention, various clauses of the License Agreements have been placed which clauses shall be referred to

at the appropriate stage;

(ii) The License Agreements clearly indicate that the license was endorsed in favor Skol/Sab Miller free from any interference or hindrance. This also

indicates that it was a deemed sale. To support this contention, reliance has been placed on the decisions of the Tribunal in Commissioner of Service

Tax, Delhi-II vs. M/s Future Brands, Service Tax Appeal No. 53304 of 2015 decided on 08.09.2022 and M/s Dish TV India Ltd. vs. Commissioner of

Central Excise & Service Tax-Aurangabad, Service Tax Appeal No. 86958 of 2017 decided on 24.07.2023;

(iii) As the appellant had discharged VAT liability, service tax liability could not be fastened on the appellant and in this connection, reliance has been

placed on the decision of the Supreme Court in Imagic Creative Pvt. Ltd. vs. Commissioner of Commercial Taxes, 2008 (9) S.T.R. 337 (S.C.);

(iv) The department cannot misconstrue a contract in order to levy tax. In this connection, reliance has been placed on the judgment of the Supreme

Court in Ishikawajma-Harima Heavy Industries Ltd. vs. Director of Income Tax, Mumbai, (2007) 3 Supreme Court Cases 481 and in Commissioner

of Income Tax, Andhra Pradesh vs. Motors & General Stores (P) Ltd., AIR 1968 SC 200 Reliance has also been placed on the decision of the Kerala

High Court in Abbott Healthcare Pvt. Ltd. vs. Commissioner of Commerical Tax, Thrissur, 2020 (34) G.S.T.L. 579 (Ker.); and

(v) The extended period of limitation could not have been invoked in the facts and circumstances of the case. In this connection, reliance has been

placed on the decision of the Tribunal in M/s GD Goenka Private Limited vs. The Commissioner of Central Goods and Services Tax, Delhi South,

Service Tax Appeal No. 51787 of 2022 decided on 21.08.2023.

10. Shri Manoj Kumar, learned authorized representative appearing for the department, however, supported the impugned order and made the

following submissions:

(i) The License Agreement is an integral part of the â€œLease Agreementâ€ and has been bifurcated with the sole intention of evading payment of

service tax;

(ii) Merely because VAT was paid by the appellant does not mean that service tax cannot be levied, if in law, the appellant had rendered service; and

(iii) The transfer of license does not amount to a â€œdeemed saleâ€ under article 366(29A)(d) of the Constitution; and

(iv) The extended period of limitation was correctly invoked in the facts and circumstances of the case.

11. The submissions advanced by the learned counsel for the appellant and the learned authorized appearing for the department have been considered.

12. The issue that arises for consideration in this appeal is as to whether a â€œdeemed saleâ€ under article 366(29A)(d) of the Constitution had taken

placed under the License Agreement.

13. As noticed above, a Lease Deed was executed between the appellant and Skol for renting of land, building plant and machinery by the appellant to

Skol. The appellant has been described as the â€œLessorâ€ and the Skol has been described as the â€œLesseeâ€ in the said Lease Deed. The

relevant clauses of the Lease Deed are reproduced below:

â€œA. The Lessor is in lawful possession and has a clear, absolute unrestricted registered title and ownership rights with respect to wall

compounded plot of land bearing Survey Numbers 1285, 1311, 1309, 1315, 1312, 1306, 1317, 1301 and 1303 admeasuring approximately

10.925 Hectares situated at MEHTOLI, Manmore, Morena District, Madhya Pradesh (hereinafter referred as ""Demised Land"") as per

detailed map in Schedule A, inclusive of Buildings (hereinafter referred to as ""Premised Building"", described in Schedule B annexed to this

Lease Deed. (Demised Land and Demised Building are collectively referred to as ""Demised Premises"").

B. The Lessor is also the absolute owner and is in possession of certain plant, machinery and equipment situate at the Demised Premises and

listed at Schedule C to this Lease Deed (hereinafter referred as â€œDemised Equipmentâ€).

C. The Lessee is desirous of taking the Demised Premises and the Demised Equipment (collectively referred to as â€œDemised Propertyâ€)

on lease and the Lessor has agreed to give the Demised Property on lease, on rent and on the terms and conditions contained in this Lease

Deed.

NOW THIS LEASE DEED WITNESSTH AS UNDER:

1. TERMS OF THE LEASE

In consideration of the annual Rent (defined below), the Lessor demises unto the Lessee, the Demised Property, by way of lease for an initial

period of 34 months commencing from the date of execution of the Lease Deed (hereinafter referred to as the â€œTermâ€), unless otherwise

mutually agreed in writing.

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2. RENT

2.1 In consideration for executing this Lease Deed, the Lessee shall pay to the Lessor an annual rent of INR 1,80,00,00 ( One Crore Eightly

Lakhs) (â€œRentâ€) during the Term, subject to deduction of taxes. If TDS is deductible, TDS Certificate will be provided by the Lessee to

the Lessor within a period of 30 days. In addition to the annual Rent, the Lessee will also be liable for payment of Service Tax any other

Taxes as may be applicable in future.

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3. Brewery License

3.1 Lessor shall take all necessary steps to apply for and endeavour to procure a valid endorsements/sub licensing of the Brewery License

in favour of Lessee for purposes of the Lessee in the lease deed (the â€œExcise Endorsementâ€). Lessor undertakes to procure the Excise

Endorsement no later than 3 months from the date of this Agreement. In vent it is not done within the said period or extended period as may

be mutually agreed by the Parties, the parties will revert back to the earlier system but on the financial terms as stipulated in this

agreement.â€

(emphasis supplied)

14. It also transpires that a License Agreement dated 30.01.2008 was executed between the appellant and Skol. This License Agreement was

renewed from time to time and ultimately a License Agreement dated 01.03.2014 was executed between the appellant and Sab Miller (the name of

Skol was changed to Sab Miller). The appellant has been referred to as â€œTriptiâ€ in the Agreement. The relevant clauses of the said License

Agreement dated 01.03.2014 are reproduced below:

â€œA. Tripti has a license to work a brewery which has been sub-licensed to SABMiller. The current licensing agreement between the

Parties is valied till 31st January, 2014. Both the Parties intend to renew the agreement for the period from 1st February 2014 to 31st

March 2018.

B. Tripti has represented to SABMiller that it will procure the necessary approvals from the relevant governmental authorities for a valid

endorsement or sub-license of the Brewery License in favour of SABMiller such that SABMiller can brew and manufacture beer utilizing the

Brewery License and the capacity permitted therein from time to time (â€œProposed Transactionâ€).

C. Parties have agreed to record the terms and conditions of this arrangement in this Agreement.

Accordingly, in consideration of the foregoing and other consideration, the sufficiency and adequacy of which is hereby acknowledged, and

intending to be legally bound hereby, the Parties agree as follows:

1. Tripti shall take all necessary steps to apply for and procure a valid endorsements licensing of the Brewery License in favour of

SABMiller for purposes of the Proposed Transaction (the â€œExcise Endorsementâ€). Tripti undertakes to procure the Excise Endorsement

no later than 3 months from the date of this Agreement.

2. Subject to Tripti complying with its obligations under Clause 1 above and procuring the Excise Endorsement within the period set out in

Clause 1 above, in consideration of the endorsement/sub license of the Brewery License in favour of SABMiller and in consideration of the

mutual covenants and undertakings set out herein and the rights granted to SABMiller herein, SABMiller shall be liable to pay Tripti Rs.

4,67,00,000/- (Rupees Four Crore Sixty Seven Lacs only) per annum (the

â€œConsiderationâ€).

3. SABMiller shall be entitled to use the Brewery License for a period of 4 years from 1st February, 2014 or the date of the Excise

Endorsement (â€œTermâ€), whichever earlier or such other period as may be mutually agreed between the Parties.

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5.2 The Brewery License is free from any charges, encumbrances, liens or third party rights.

5.3 Tripti hereby confirms that SABMiller shall be entitled to utilize the Brewery License and the permitted capacity there under from time

to time during the entire Term free from any interference, objections, claims, interruption, encumbrances or demand whatsoever by Tripti

and, or, any government authority or any person lawfully or equitably claiming by, of from under or, in trust for Tripti and, or, any

government authority (subject however to compliance by SABMiller of the conditions of the Brewery License).

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5.5 SABMiller shall enjoy the freedom to utilize the Brewery License and operate on the basis thereof during the entire Term without any

hindrance, obstruction or limitation from Tripti.

5.6 Tripti agrees to indemnify, defend and hold SABMiller harmless from and against any and all actions, causes of actions, claims,

demands, costs, liabilities, expenses and damages arising out of or in connection with any claim that would constitute a breach of any of

warranties and/ or obligations set out herein, relating to the period prior to the commencement of the License Agreement dated 30th

January, 2008.

5.7 The Promoters shall not do or cause to be done any act that will result in breach of this Agreement or the Lease Deed and shall cause the

Company to perform all its obligations hereunder. The obligations of the Promoters and the Company under this Agreement shall be joint

and several.

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6. This Agreement shall terminate only in accordance with the following provisions:

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6.2 This Agreement shall be co-terminus with the lease deed executed on even date between the Parties (the â€œLease Deedâ€) and shall

automatically terminate upon the termination of the said Lease Deed, unless otherwise mutually agreed in writing.

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7. The promoters who hold 100% of the issued and paid up share capital of Tripti hereby grant the option and right of first refusal to

SABMiller to acquire upto the entire equity share capital of Tripti at the end of the Term, upon the terms and conditions mutually agreed

between the Parties. Further, at any time during the Term, if the Promoters want to sell their shareholding in Tripti to any third person or

Tripti proposes to induct any third person as a new shareholder or investor through a fresh issuance of share capital or convertible

instruments or otherwise, including any competitor of SABMiller the first right of refusal to purchase/acquire such shares/convertible

instruments on the same terms and conditions as offered by any such third person. It is however clarified that the right of first refusal

provided herein by the Promoters shall not apply to any sale transfer transmission of shares interse between the family members and/or

lineal ascendants/ descendants of the Promoter family (or the Dinshaw F. Bapuna Family).â€

(emphasis supplied)

15. According to the appellant, the License Agreement is a â€œdeemed saleâ€ under article 366(29A)(d) of the Constitution and, therefore, no service

tax can be levied on the consideration received by the appellant under the License Agreement. The appellant also contends that the amount of

consideration received by the appellant under this License Agreement from Skol/Sab Miller cannot be clubbed with the consideration received by the

appellant under the Lease Deed and be subjected to service tax under the head â€œrenting of immovable propertyâ€ service.

16. The contention of the department is that â€œdeemed saleâ€ had not taken place under the License Agreement and the consideration received by

the appellant under the License Agreement has been correctly clubbed with the consideration received under the Lease Deed for the purposes levy of

service tax.

17. The Commissioner, in the impugned order, noticed that Skol had taken the plant and machinery of the appellant on rent for the purpose of brewing

beer. Skol did not have the requisite license to brew beer at the rented premises and it could manufacture beer only when there was an endorsement

in the License in favour of Skol. The Commissioner, therefore, concluded that:

â€œthe â€˜License agreementâ€™ entered into between both the parties is only the natural completion or validation of the lease deed and

renting of the factory along-with the brewing license is an integral part of the â€˜renting of immovable property servicesâ€™ rendered by

TAL to SKOL for the purpose of furtherance of their business of brewing beer.â€

(emphasis supplied)

18. It is for this reason that the Commissioner held that the amount paid by Skol/Sab Miller to the appellant under the License Agreement would be

includable in the rental income and by not including it, the appellant short paid service tax.

19. The contention of the appellant that the License Agreement is â€œa deemed saleâ€ under article 366(29A)(d) of the Constitution was repelled by

the Commissioner for the reason that:

â€œfrom the facts of the case and conditions laid down in the agreements, it is clear that leasing of the license in the instant case is also

subject to certain restrictions and TAL have not only sub-leased the license, they have also provided a bunch of services along-with it, as

discussed above. Hence, in view of the above ruling, no â€˜saleâ€™ has taken place in the present case and the party was not liable to pay

VAT on it.â€

(emphasis supplied)

20. To appreciate the issue that has been raised in this appeal, it would be pertinent to refer to Entry 54 of List II of the Seventh Schedule to the

Constitution. It empowers State to levy tax on sales and purchase of goods. The relevant Entry is reproduced below:

â€œ54. Taxes on the sale or purchase of goods other than newspaper, subject to the provisions of Entry 92 A of List Iâ€

21. The forty-sixth amendment to the Constitution extended the meaning of â€œsale or purchase of goodsâ€ by giving an inclusive definition to the

phrase â€œtax on the sale or purchase of goodsâ€ under article 366(29A) of the Constitution. The said amendment is reproduced below:

â€œ366(29A) â€œtax on the sale or purchase of goodsâ€ includes-

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

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

contract;

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

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

other valuable consideration;

(e) â€¦â€¦â€¦

(f)â€¦â€¦â€¦.â€

(emphasis supplied)

22. It would be seen from the aforesaid that the Constitution empowers the State to levy Sales Tax/VAT on transactions in the nature of transfer of

right to use goods, which were earlier not exigible to sales tax as such transactions were not covered under the definition of â€œsaleâ€ as given in the

Sale of Goods Act, 1930.

23. â€œGoodsâ€ have been defined under section 2(m) of the Madhya Pradesh Value Added Tax Act, 2002, the MP Value Added Tax Act in the

following manner:

â€œ2(m) Goods means all kinds of movable property including computer software but excluding actionable claims, newspapers, stocks,

shares, securities or Government stamps and includes all materials, articles and commodities, whether or not to be used in the construction,

fitting out improvement or repair of movable or immovable property, and also includes all growing crops, grass, trees, plants and things

attached to, or forming part of the land which are agreed to be severed before the sale or under the contract of sale;â€

24. â€œSaleâ€ has been defined in section 2(u) of the MP Value Added Tax Act in the following manner:

â€œ2(u) Sale with all its grammatical variations and cognate expressions means any transfer of property in goods for cash or deferred

payment or for other valuable consideration and includes,-

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

consideration;

(ii) a transfer of property in goods whether as goods or in some other form, involved in the execution of works contract;

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

(iv) a supply of goods by any unincorporated association or body of persons to a member thereof for cash, deferred payment or other

valuable consideration;

(v) a supply, by way of or as part of any service or in any other manner whatsoever, of goods being food or any other article for human

consumption or any drink (whether or not intoxicating) where such supply or service is for cash, deferred payment or other valuable

consideration;

(vi) a transfer of the right to use any goods including leasing thereof for any purpose (whether or not for a specified period) for cash,

deferred payment or other valuable consideration, and such transfer, delivery or supply of any goods shall be deemed to be a sale of those

goods by the person making the transfer, delivery or supply and purchase of those goods by the person to whom such transfer, delivery or

supply is made, but does not include a mortgage, hypothecation, charge or pledge;

Explaination *****â€

25. Schedule II of the MP Value Added Tax Act gives the description of goods and amongst others it includes all intangible goods like copyright,

patent and rep license.

26. It can safely be said that under the Sales Tax Act, there is transfer of possession and effective control in goods, while there is no such transfer of

possession and effective control under service tax.

27. It needs to be remembered that the term â€œtransfer of right to use goodsâ€ has neither been defined in the Constitution nor in any of the State

VAT Acts or Central Sales Tax Act, 1956. The said phrase was interpreted by the Supreme Court in Bharat Sanchar Nigam Ltd. vs. Union of India,

2006 (2) STR 161 (sc), wherein the Supreme Court laid down five attributes for a transaction to constitute a â€œtransfer of right to use goodsâ€. In

this connection paragraph 91 of the judgment of the Supreme Court is reproduced below:

â€œ91. To constitute a transaction for the transfer of the right to use the good, the transaction must have the following attributes:

a. There must be goods available for delivery;

b. There must be 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 permission or

licenses required therefore should be available to the transferee;

d. For the period during which the transferee has such legal right, it has to be the exclusion of the transferor this is the necessary

concomitant of the plain language of the statue- - viz. a â€˜transfer of the right to useâ€™ and not merely a license 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.â€

(emphasis supplied)

28. The Supreme Court in Commissioner of Service Tax, Delhi Vs. Quick Heal Techonologies Limited, (2023) 5 Supreme Court Cases 469 summed

up the principles relating to a â€œdeemed saleâ€ in the following manner:

â€œ53.1. 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.

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.

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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.

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, licenses, etc. vests in the lessee.â€

(emphasis supplied)

29. The Andhra Pradesh High Court in Rashtriya Ispat Nigam Ltd. vs. Commercial Tax Officer, Company Circle, Vishakhapatnam, 1989 (12) TMI

325- Andhra Pradesh High Court observed that whether there is a transfer of right to use or not is a question of fact which has to be determined in

each case having regard to the terms of the contract under which there is transfer of right to use and in this connection, observed as follows:

â€œWhether there is a transfer of the right to use or not is a question of fact which has to be determined in each case having regard to the

terms of the contract under which there is said to be a transfer of the right to use. In the instant case, the petitioner - Rashtriya Ispat Nigam

Limited owning Visakhapatnam Steel Project, for the purpose of the steel project allotted different works of the project to contractors. To

facilitate the execution of work by the contractors with the use of sophisticated machinery, the petitioner has undertaken to supply the

machinery to the contractors for the purpose of being used in the execution of the contracted works of the petitioner and received charges

for the same. The respondents made provisional assessment levying tax on the hire charges under section 5-E of the Act. In this writ petition,

the petitioner prays for a declaration that the tax levied by the 1st respondent in purported exercise of power under section 5-E of the Act

on the hire charges collected during the period 1988-89, is illegal and unconstitutional. The respondents filed a counter-affidavit in support

of the levy stating that the validity of A.P. Amendment Act (18 of 1985) which introduced section 5-E of the Act was upheld by the High

Court of Andhra Pradesh in Padmaja Commercial Corporation v. Commercial Tax Officer [1987] 66 STC 26; (1987) 4 APSTJ 26. It is

further stated that the provisional assessment under section 15 of the Act has been made every month on account of submission of incorrect

monthly returns claiming wrong exemption. The petitioner, it is stated, is lending highly sophisticated and valuable imported machinery to

the contractors engaged by the petitioner for the purpose of construction of steel project. The machinery like cranes, docers, dumfors, road

rollers, compressors, etc., are lent by the petitioner to the contractors for the use in the execution of project wok for which hire charges at

specified rate are being collected by it. The machinery is given in the possession of the contractor and he is responsible for any loss or

damage to it. The contractor has got every right to use it in his work at his discrection. It is further stated that in view of these clear terms

and conditions there is transfer of property in goods for use, for a specific purpose and for a specified period for money consideration. The

amounts charges by the petitioner attracts tax liability under section 5-E of the A.P. General Sales Tax Act, 1957.

Sri P. Venkatarama Reddy, the learned counsel for the petitioner, submits that under the terms and conditions of the contract, the contractor

is provided with the facility of using the machinery if the same is available with the petitioner and there is no transfer of the right to use the

machinery and for this purpose he relies on clauses 1, 5, 7, 13, and 14 of the contract to show that there is no transfer; while the learned

Government Pleader submits that clauses 10 and 12 clearly show that there is a transfer of right and, therefore, tax is validity levied. In our

view, whether the transaction amounts to transfer of right or not cannot be determined with reference to a particular word or clause in the

agreement. The agreement has to be read as a whole, to determine the nature of the transaction. From a close reading of all the clauses in

the agreement, it appears to us that the contractor in entitled to make use of the machinery for purposes of execution of the work of the

petitioner and there is no transfer of right to use as such in favour of the contractor. We have reached this conclusion because the effective

control of the machinery even while the machinery is in the use of the contractor is that of the petitioner-company. The contractor is not free

to make use of the same for other works or move it out during the period the machinery is in his use. The condition that he will be

responsible for the custody of the machinery while the machinery is on the site does not militate against the petitioners' possession and

control of the machinery. For these reasons, we are of the opinion that the transaction does not involve transfer of the right to use the

machinery in favour of the contractor. As the fundamental requirement of section 5-E is absent, the hire charges collected by the petitioner

from the contractor are not exigible to sales tax.â€

(emphasis supplied)

30. The appeal filed by the Department against the decision of the Andhra Pradesh High Court was dismissed by the Supreme Court (State of Andhra

Pradesh and another vs. Rashtriya Ispat Nigam Ltd, 2002 (3) TMI 705- Supreme Court). The relevant portion of the decision of the Supreme Court is

reproduced below:

â€œThe High Court after scrutiny and close examination of the clauses contained in the agreement and looking to the agreement as a

whole, in order to determine the nature of the transaction, concluded that the transactions between the respondent and contractors did not

involve transfer of right to use the machinery in favour of the contractors and in the absence of satisfying the essential requirement of

Section 5-E of the Act, i.e., transfer of right to use machinery, the hire charges collected by the respondent from the contractors were not

exigible to sales tax. On a careful reading and analysis of the various clauses contained in the agreement and, in particular, looking to

clauses 1, 5, 7, 13 and 14, it becomes clear that the transaction did not involve 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 respondent's possession and control of the machinery.â€

(emphasis supplied)

31. It transpires from the aforesaid two decisions in Rashtriya Ispat Nigam Ltd. rendered by the Andhra Pradesh High Court and the Supreme Court

that it was because of the terms of contract under which there was a transfer of the right to use that it was held that since the effective control of the

machinery, even while the machinery was in the use of the contractor, was that of the company that had given the machinery on hire, sales tax could

not have been charged from the appellant therein under the provisions of the State Sales Tax Act.

32. In G.S. Lamba & Sons and others vs. State of Andhra Pradesh, 2012-TIOL-49-HC-AP-CT, the issue that arose before the Andhra Pradesh High

Court was whether the contract with M/s. Grasim Industries Limited for transporting the Ready Mix Concrete was for transfer of the right to use

Transit Mixers and the following principles were summarised:

â€œ40. That brings us to the construction of the agreement between the parties which indisputably came into force on 01.10.2002. The

intention of the parties as noticed supra has to be understood by reading the entire agreement; reading a word here or a clause there is not

sufficient. Grasim was looking for a transporter to take care of the transporting need of their RMC plants in Hyderabad. The petitioners,

who are owners of Transit Mixers, were looking for advancing their business interest in Hyderabad. The latter approached the former

offering their Transit Mixers to take care of all transporting solution needs. These essentially form part of the recitals. The Habendum of the

agreement speaks of the petitioners providing a dedicated fleet of five Transit Mixers painted in a particular style and colour as well as

brand name of â€œGrasim‟ to transport RMC, on 24 hours basis every day of the week as instructed by the lessee, failure of which will

attract penalties. The staff of the petitioners were required to obey the instructions issued by Grasim, and they should use safety equipment

like helmets. These Transit Mixers cannot move or carry RMC to the work sites as per their convenience but are to be used as per the

delivery schedule given by Grasim. The counsel also does not dispute that the agreement between the parties speaks of a dedicated fleet of

vehicles to be made available on 24/7 basis duly painted in a particular style and colour, and staff being under the instructions of Grasim

alone. It is, however, submitted that the parties agreed for five dedicated vehicles as RMC needs to be transported immediately after it is

manufactured in the batching plant, and the manufacturer cannot identify and negotiate with the transporter for carrying the products

every time an order is placed. Therefore, such a clause was included in the agreement to ensure there is no delay in delivering the product

to the customers. He also submits that making available the vehicles through out the day or painting them with brand name of Grasim is

required keeping in view the possible hurdles in logistics, and to ensure customer satisfaction of getting the required branded RMC.

According to him, these clauses by themselves do not warrant an inference of transfer of the right to use Transit Mixers.

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42. In addition to the above clauses, we have thoroughly perused and analysed the agreement between the petitioners and Grasim.

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45. Reading the recitals and various clauses, indeed there is a transfer of the right to use Transit Mixers. All the tests as indicated

hereinabove exist in the contract between the petitioners and Grasim. The vehicles are maintained by the petitioners. They appoint the

drivers and fix their roster. The licences, permits and insurances are taken in their names by the petitioners, which they themselves renew.

The Transit Mixers go to Grasim‟s batching plants in Miyapur and Nacharam, where they are loaded with RMC and then proceed to the

construction sites of customers. The product carried is manufactured by Grasim, which is delivered to the customers and the customers pay

the cost of the RMC to Grasim and the petitioners nowhere figure in the process of putting the property in Transit Mixers to economic use.

The entire use in the property in goods is to be exclusively utilised for a period of 42 months by Grasim. The existence of goods is identified

and the Transit Mixers operate and are used for the business of Grasim. Therefore, conclusively it leads to the only conclusion that the

petitioners had transferred the right to use goods to Grasim. For these reasons, we are not able to countenance any of the submissions

made by the petitionersâ€™ counsel.â€

(emphasis supplied)

33. In Petronet LNG Ltd. vs. Commissioner of Service Tax, New Delhi, 2016 (46) STR 513 (Tri.-Delhi), the Tribunal observed as follows:

â€œ25. The issue that therefore falls for our consideration is whether the transactions involving the two long-term charters and one short-

term charter (of the vessels Disha, Rahi and Trinity Glory, respectively) amount to a transfer of the right of possession and effective control

of these vessels for use by the assessee from the owners thereof. If the transactions establish a transfer of the right to use possession and

effective control, the transactions fall outside the purview of the enumerated taxable service.

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29. ***** In the adjudication order the analysis of law and consideration of the relevant facts of the transaction occurs only in paragraph

37.3, in relation to taxability of the transaction, under Section 65(105)(zzzzj). Further the mere fact that the Manager, Master, personnel

and other crew are employed by the owner does not in any manner derogate from the fact that the transaction constitutes transfer of the

right to use the tangible goods, including possession and effective control of the tankers. This is so since there are several other clauses in

the agreements between the parties (referred in para 10 supra), which disclose that the personnel on board the tankers function and

operate strictly in terms of detailed instructions, guidelines and directives issued or to be issued by the assessee in terms of the authority of

the assessee to do so, under the agreements. The personnel and crew must also be replaced by the owners on valid compliant about their

misbehaviour lodged by the assessee. On a true and fair analysis of the several clauses of the charter - agreements, considered as a whole,

mere employment of the personnel and crew by owners does not derogate from the reality of transfer of possession to and effective control by

the assessee over the tankers, for the use of these tangible goods.â€

(emphasis supplied)

34. In Gimmco Ltd. vs. Commissioner of Central Excise and Service Tax, Nagpur, 2017 (48) S.T.R. 476 (Tri.- Mum.), the Tribunal observed as

follows:

â€œ5.2 Revenueâ€™s contention is based on the clauses in the agreement relating to restrictions of use by the lessee, provision of skilled

operator by the lessor and maintenance and repairs of the equipment by the lessor. Merely because restrictions are placed on the lessee, it

can not be said that there is no right to use by the lessee. Such a view of the revenue does not appear to be tenable when we read carefully

the provisions of the agreement. Cl. 13 of the agreement provides for Hirerâ€™s Covenants. As per Cl. 13.1, the hirer will use the

equipment only for the purpose it is hired and shall not misuse or abuse the equipment. Similarly in Cl. 13.3, it is provided that the hirer will

ensure the safe custody of the equipment by providing necessary security, parking bay, etc., and will be responsible for any loss or damage

or destruction. Cl. 13.5 provides that the hirer shall be solely responsible and liable to handle any dispute entered with any third party in

relation to the use and operation of the equipment. Further Cl. 14 dealing with title and ownership specifically provides that â€œequipment

is offered by GIMMCO Ltd. only on â€œrights to use‟ basisâ€. Cl. 15 relating to damages provides for compensation to be paid by the

hirer to the assessee in case of damage to the equipment during the period of use. These responsibilities cast on the hirer clearly show that

the right of possession and effective control of the equipment rest with the hirer; otherwise the hirer cannot be held responsible for

misuse/abuse, safe custody/security, liability to settle disputes with third parties in relation to use etc. Further Cl. 4.3 of the agreement

provides for charging of VAT at 12.5% on the monthly invoice value which shall be payable by the hirer. These terms and conditions

stipulated in the agreement, lead to the conclusion that the transaction envisaged in the agreement is one of â€œtransfer of right to useâ€

which is a deemed sale under Section 2(24) of the Maharashtra Value Added Tax Act, 2002. The Finance Ministerâ€™s speech and the

budget instructions issued by the C.B.E. & C. also clarify that if VAT is payable on the transaction, then service tax levy is not attracted.â€

(emphasis supplied)

35. In Dipak Nath vs. Oil and Natural Gas Corporation Ltd. and others, 2009 (11) TMI 834- Guahati High Court, the Gauhati High Court observed as

follows:

â€œThe above analysis of the relevant provisions of the contract agreement between the parties indicate the clear dominion and control of

ONGC over the crane during the entire period of operation of the contract once a crane is placed at the disposal of the ONGC under the

contract. The crane is to be deployed at worksites as per the discretion of the ONGC and though the normal period of deployment is 10

hours in a day, such deployment at the discretion of the ONGC may be for any period beyond the normally contemplated 10 hours. The

deployment of the crane in oil field operations as well as other hazardous situations is at the sole discretion of the ONGC. Though the

cranes are operated by the crew provided by the contractor such crew while operating a crane is under the effective control of the ONGC

and its authorities. Therefore, under the contract though the normal operational time is 10 hours in a day, the ONGC is entitled to deploy

the cranes, if required, to the entire period of 24 hours to perform duties the kind of which and the locations whereof is to be decided by the

ONGC. The mere fact that after the operation of the crane is over on any given day the crane may come back to the owner/contractor will

hardly be material to decide as to who has dominion over the crane inasmuch as the crane can be recalled for duty by the ONGC at any

time. Under the contract the crane is to be operated for 26 days in a month and the remaining four days are to be treated as maintenance

off days. Though the crane is not operational on the maintenance off days, yet, 50% of the operational charges is paid by the ONGC for the

maintenance off days and the terms of the contract make it clear that even on the off days the crane can be called for operation by the

ONGC at its sole discretion.

The above features of the contract, in our considered view, makes it abundantly clear that it is the ONGC and not the contractor who has

exclusive control and dominion over the crane during the subsistence of the contract, though, during the aforesaid period, at times, physical

possession of the crane may come back to the contractor. Such temporary physical possession of the contractor, according to us, would

hardly be relevant as under the contract the ONGC is vested with the authority to requisition the crane for operational purposes at any time.

Besides, such temporary possession of the crane by the contractor does not mitigate against the transfer of the right to use the crane which

event, as already indicated on the authority of the decision of the Apex Court in 20th Century Finance Corpn. Ltd. (supra), constitutes the

taxable event under article 366(29A)(d) of the Constitution.â€

(emphasis supplied)

36. From the decisions referred to above, it clearly transpires that:

(i) Whether there is a transfer of right to use or not is a question of fact which has to determined in each case having regard to the terms of the

contract under which there is a transfer of right to use;

(ii) If with the transfer of the right to use, possession and effective control is also transferred, the transaction falls outside the preview of service tax

liability. However, when the effective control and possession is not transferred and it continues to remain with the person who has transferred the

right, it would not be open to the authority to levy service tax;

(iii) Mere fact that the persons are employed by the owner does not in any manner deter from the fact that the transaction constitutes a transfer of the

right to use the tangible goods with possession and effective control; and

(iv) The fact that after the operation is over on any given day and the tangible goods come back to the owner is not a material fact for deciding who

has the dominion over the tangible goods.

37. The terms of the License Agreement have, therefore, to be examined in order to determine whether there was a transfer of right to use goods

with control and possession.

38. In the present case, the nature of transaction between the appellant and Skol/Sab Miller under the License Agreement reveals that:

(i) The appellant was issued a brewery license. It endorsed the brewery license in favour of Skol/Sab Miller so that they can brew and manufacture

beer utilizing the brewery and the capacity permitted from time to time to the appellant;

(ii) Skol/Sab Miller, in consideration of the rights granted to them, would have pay to the appellant a certain amount of money per annum;

(iii) Skol/Sab Miller became entitled to use the brewery license and the permitted capacity from time to time during the entire term free from any

interference, objections, claims, interruptions, encumbrances or demand whatsoever by the appellant for a period of 4 years;

(iv) The brewery license is free from any charges, encumbrances, liens or third party rights;

(v) Sab Miller shall enjoy the freedom to utilize the brewery license and operate on the basis of thereof during the entire term without any hindrance,

obstruction or limitation from the appellant;

(vi) The appellant agreed to indemnify, defend and hold Skol/Sab Miller harmless from and against any and all actions, causes of actions, claims,

demands, costs, liabilities, expenses and damages arising out of or in connection with any claim that would constitute a breach of any of warranties

and/or obligations, relating to the period prior to the commencement of the License Agreement dated 30th January, 2008; and

(vii) The promoters shall not do or cause to be done any act that will result in breach of the License Agreement.

39. It is, therefore, clear from the aforesaid terms of the License Agreement that it is not merely the use of the License that has been transferred to

Skol/Sab Miller by the appellant. What has been transferred by the appellant is the right to use the License. As can be seen from the Agreement,

Skol/Sab Miller have been transferred the right to use the brewery license and the permitted capcity for a period of 4 years free from any charges,

encumbrances, liens or third party rights. Skol/Sab Miller shall also enjoy the freedom to utilize the brewery license and operate during the entire term

without any hindrance, obstruction or limitation from the appellant. In fact, the appellant also agreed to indemnify, defend and hold Skol/Sab Miller

harmless from any actions, causes of actions, claims, demands, costs, liabilities, expenses and damages arising out of or in connection with any claim

that would constitute a breach of any of warranties and/ or obligations, relating to the period prior to the commencement of the License Agreement

dated 30.01.2008. The agreement also provides that the promoters shall not do or cause to be done any act that will result in breach of the License

Agreement. The appellant does not, with the transfer of the right to use by Skol/Sab Miller, have any right to itself use the brewery license. There is,

therefore, no manner of doubt that a â€œdeemed saleâ€ under article 366(29A)(d) of the Constitution had taken place when the appellant granted the

right to use the License to Skol/Sab Miller. The findings to the contrary recorded by the Commissioner cannot be sustained.

40. The Commissioner placed much emphasis on the Lease Deed executed between the appellant and Skol for renting of land, building, plant and

machinery and in particular to clause 3 which provides that the appellant shall procure a valid endorsement/sub-license of the brewery license in

favour of Skol. According to the Commissioner, the License Agreement that was subsequently executed was only to complete or validate the Lease

Deed and, therefore, renting of the factory along with the brewery license is an integral part of the â€œrenting of immovable propertyâ€ services. The

two documents, namely, the Lease Deed and the License Agreement have to be separately examined and merely because there is a recital in the

Lease Deed that the appellant shall procure a valid endorsement/sub-license of the brewery license in favour of Skol does not mean that the

subsequently executed License Agreement becomes an integral part of the Lease Deed.

41. The contention of the appellant that a deemed sale had taken place has also been repelled by the Commissioner for the reason that leasing of

brewery license was subject to certain restrictions. Only a bald statement had been made. In fact, the terms of the License Agreement give complete

freedom to Skol/Sab Miller to operate the brewery and the License Agreement does not cause any hindrance.

42. A finding had also been recorded by the Commissioner that no â€œsaleâ€ had taken place. The contention of the appellant was that a â€œdeemed

saleâ€ contemplated under article 366(29A)(d) of the Constitution had taken place. There is a marked difference between â€œsaleâ€ and â€œa

deemed saleâ€ as was pointed out by the Supreme Court in Quick Heal Technologies.

43. As noticed above, a deemed sale had taken place when the appellant transferred the right to use the brewery license issued to the appellant in

favour of Skol/Sab Miller on execution of the License Agreement. The consideration received by the appellant on the execution of the License

Agreement cannot, therefore, be subjected to service tax nor can such consideration be clubbed with the consideration received by the appellant under

the Lease Deed so as to be subjected to service tax under â€œrenting of immovable propertyâ€ service.

44. The impugned order dated 27.04.2018 passed by the Commissioner adjudicating the three show cause notices, therefore, deserves to be set aside.

45. It will, therefore, not be necessary to examine the contention of the learned counsel for the appellant that the extended period of limitation

contemplated under the proviso to section 73(1) of the Finance Act could not have been invoked.

46. The impugned dated 27.04.2018 passed by the Commissioner is, accordingly, set aside and the appeal is allowed with consequential(s) relief, if

any.

(Order Pronounced on 12.11.2024)