
HLS Asia Ltd. Vs State of Assam and Others

None

Court: Gauhati High Court

Date of Decision: Nov. 10, 2006

Acts Referred:

Constitution of India, 1950 – Article 226, 366

Citation: (2007) 2 GLT 719 : (2007) 8 VST 314

Hon'ble Judges: Mutum B.K. Singh, J; Amitava Roy, J

Bench: Division Bench

Final Decision: Dismissed

Judgement

Amitava Roy, J.

The challenge to deduction of tax under the Assam General Sales Tax Act, 1993 (hereafter referred to as, "the Act") by

Oil India Limited, Duliajan (hereafter referred to as, "the OIL") from its bills for the services rendered under Contract No.

OIL/CCO/GEOL/GLOBAL/ 07/98 having failed, the writ petitioner, M/s HLS Asia Ltd., is in appeal.

2. We have heard Dr. Todi, Senior Advocate assisted by Ms. D. Das, Advocate for the appellant, Mr. S. N. Sharma, Senior Advocate for OIL

and Mr. D. Saikia, learned Standing Counsel, Finance Department, for the Revenue.

3. The appellant's pleaded version is that it is a public limited company registered under the Companies Act, 1956, engaged in contract business

with OIL and provides highly professional and technical services in connection with extraction of oil and is also engaged in wire-line logging

activities. It entered into a contract registered as above with OIL on September 10, 1999 for carrying out wire-line logging and perforation

activities consisting of electronic/seismic scanning of subterranean strata and rock formation in the oil fields by utilising its own high tech equipment.

In the process such equipment are to be released deep down into the subterranean region through drilled holes into the oil fields, which generate

electronic/seismic impulses to be processed through special software and recorded through magnetic tapes. These equipment are owned and used

by the company to be engaged for providing such services to OIL. In terms of the contract, the equipment remained in absolute possession of the

company and used by it to provide the required data and other professional services. The equipment were operated by utilising the services of

highly technically qualified and experienced personnel of the company. It has been categorically pleaded that the appellant-company used its own

equipment, which were never handed over to OIL as stipulated in clause 7.13 of the contract agreement. The contract further contained clause

7.14 whereunder OIL was to deduct sales tax from the contractor while making payments. According to the appellant, this provision was

unnecessary in view of the fact that no such tax was leviable considering the nature of the works to be rendered under the contract. However, in

terms thereof, OIL deducted sales tax under the Act from its bills. Its representation that as in the face of the definition of ""sale"", ""lease"" and

operating lease"" engrafted in Sections 2(3), 2(19) and 2(25), respectively, and the nature of the transaction visualised in the contract agreement

did not contemplate transfer of right to use any goods, no such tax was payable, having failed to elicit any positive response, the appellant

approached this Court for redress.

4. The respondent-OIL in its affidavit has questioned the bona fide of the appellant/writ petitioner contending that it had abided by clause 7.14 of

the contract by charging sales tax at 8.8 per cent over and above their bills for the hire charges of its equipment and tools which on such realisation

accordingly was paid to the Government during the entire period of the contract. While denying the assertion that the appellant-company was not

liable to pay tax under the Act, it has been contended that it having submitted itself to the stipulations in the contract agreement including clause

7.14 it was estopped from assailing the validity thereof. The maintainability of the writ petition has been assailed referring to the alternative remedy

by way of arbitration as per clause 13 of the general terms and conditions of the contract. Section 65A of the Act has also been referred to in this

regard. OIL has further contended that the proceedings involve disputed questions of facts for which invocation of this Court's jurisdiction under

Article 226 of the Constitution of India ought to be refused.

5. The learned single Judge on a survey of the various provisions of the contract agreement held the view that the equipment and tools to be

furnished by the contractor were to be exclusively used for the services of OIL and could not be utilised for any other purpose. The appellant-

company was required to provide 24 hours service to OIL by mobilising the crew and the equipment. The covenant for payment of monthly rental

charges on equipment also indicated that the wire-line logging and perforation activities were exclusively meant for OIL and that the appellant-

company had no right to use those in any manner other than the terms of the contract. It was held that the stipulations of the contract clearly

indicated that the appellant-company had entered into an agreement/arrangement whereunder the right to use of the equipment was transferred to

OIL on payment of rental charges.

6. Referring to Section 2(19) of the Act defining ""lease"" it was observed that the same did not envisage any arrangement requiring transfer of

possession of the goods involved to constitute the transfer of right thereof. It was recorded that once the right to use any goods is transferred by

one person to another for exclusive use it amounted to ""lease"" within the meaning of the Act. On facts it was noticed that the equipment supplied by

the appellant-company were required to be used for OIL only and not for any other purpose denoting thereby that the same were exclusively

meant for the use by OIL on payment of charges. The appellant-company having placed the equipment at the work site was not entitled to use the

same for any other purpose or withdraw the same at its sweet will. Not only the equipment were required to be pressed into service under the

supervision of the officers of OIL, the operation thereof was also subject to their inspection. The learned single Judge thus concluded that the terms

and conditions of the contract indicated implied possession of OIL over the equipment. Clause 7.14 was thus held to be in conformity with the

provisions of the Act, the transaction envisaged by the contract agreement being a ""sale"" within the meaning of Section 2(33) (iv) read with Section

2(19) thereof.

7. Dr. Todi has forcefully urged that no sale being involved in the activities comprehended in the contract agreement, tax under the Act was not

exactable from the appellant-company. He contended that to attract the applicability of Section 2(33) (iv), the use of the goods by the transferee to

the exclusion of the owner was indispensable. He sought to contend that the transfer of right to use any goods to be a deemed sale within the

meaning of the Act denotes alienation of all incidental rights of the owner to utilise the same sans the conveyance of title therein. Dr. Todi

maintained that as clause 7.13 of the contract agreement enjoined exclusive use of the appellant's equipment by it only in rendering the services, it

was apparent that no transfer of right of use thereof had been contemplated by the parties. The covenant permitting the officers of the OIL to

observe and inspect the operation of the equipment did not ipso facto signify such transfer and was incorporated to ensure that the same were not

placed elsewhere during the relevant period. Not only the appellant-company had an effective control over the equipment, OIL had no authority to

use the same in any manner it liked. According to the learned Senior Counsel, bearing in mind, the concept of extended sale introduced by Article

366(29A) of the Constitution of India and transited in Section 2(33) of the Act, conveyance of the proprietary right of use in the goods is an

essential pre-condition to constitute a transfer of right to use the same. There being no estoppel against statute, clause 7.14 is of no consequence,

he urged. The learned Senior Counsel endeavoured to impress upon this Court that the use of the appellant's equipment by OIL at best amounted

to a licence in its (OIL) favour which by no means could be construed to be a lease u/s 2(19) of the Act. Dr. Todi, to buttress his arguments,

placed reliance on the decisions of the apex court in State of Andhra Pradesh v. Rashtriya Ispat Nigam Ltd. [2002] 126 STC 114 AP and of the

Andhra Pradesh High Court in Rashtriya Ispat Nigam Ltd. Vs. Commercial Tax Officer, Company Circle, Visakhapatnam,

8. The learned Senior Counsel for OIL while reiterating its pleaded stand has argued that the appellant not having approached this Court with clean

hands, the appeal is liable to be dismissed in limine. The appellant-company having charged sales tax over and above their bills in terms of clause

7.14 of the contract and the said amount having been paid by OIL to the Government, the turn around after the period of the contract lacks bona

fide and, therefore, it is not entitled to any equitable consideration of this Court. The omission to pray for refund of the amount charged by it and

paid by OIL to the Government clearly demonstrates that the purpose of the belated challenge is extraneous and collateral. Referring to the clauses

of the contract agreement, the learned Senior Counsel urged that OIL having paid the customs duty on the import of the equipment by the

appellant-company, it had an obvious right to the exclusive use of the same and the plea to the contrary is fallacious. In any view of the matter the

appellant not having suffered by the deductions made, there is no cause of action for the purported grievance. The learned single Judge having

negated the challenge on an exhaustive analysis of the contractual provisions and correct interpretation of law, no interference is called for.

9. Mr. Saikia while endorsing the above, contended that the contract agreement proclaimed exclusive and effective control of OIL over the

appellant's equipment detailed for the works which constituted transfer of the right of use thereof as envisaged in Section 2(33) (iv) of the Act.

Having regard to the concept of ""extended sale"" visualised in the said legislation, delivery of possession of the goods was not an imperative

essentiality to bring the related transaction within the sweep of the above legal provision. It being evident from the clauses of the contract

agreement that the equipment involved had been detailed for the exclusive use of OIL, mere operation thereof by the technically qualified personnel

of the appellant-company did not militate against the transfer of the right of use thereof. Mr. Saikia urged that the stipulation of rental charges

payable to the appellant-company was clearly suggestive of the transfer of right to use the equipment in favour of OIL. He dismissed the distinction

between lease and licence sought to be projected. According to him, the decision of the apex court upholding the view in Rashtriya Ispat Nigam

Ltd. Vs. Commercial Tax Officer, Company Circle, Visakhapatnam, was distinguishable on facts. The learned Counsel placed reliance on the

following decisions of this Court in State of Tripura v. Tripura Bus Syndicate [2001] 122 STC 175 , Aggarwal Brothers Vs. State of Haryana and

Another, , 20th Century Finance Corpn. Ltd. and Another Vs. State of Maharashtra, , Bharat Sanchar Nigam Ltd. and Another Vs. Union of

India (UOI) and Others, , Sohan Lal Naraindas Vs. Laxmidas Raghunath Gadit, and Puran Singh Sahni Vs. Sundari Bhagwandas Kripalani (Smt)

and Others,

10. The contours of the controversy having thus been outlined, the contractual provisions may first be analysed, the same being of determinative

relevance. Having heard the parties at length we would prefer to dispose of the appeal on merits rather than dilating on the preliminary objections

of maintainability raised on behalf of OIL.

11. The agreement pertaining to the services involved was executed by and between the parties on September 10, 1999 whereunder the

appellant-company was required to render wire-line logging, perforation, data processing and interpretation services for the OIL's fields in the

States of Assam and Arunachal Pradesh. The contract was effective from July 16, 1999 and was to remain in force for a period of two years from

the date of commencement thereof as contemplated therein with an option to OIL to extend the same for a further period of one year at its

discretion on the same rates, terms and conditions. Provision for further extension of the contract was also envisaged if called for, on rates, terms

and conditions to be mutually agreed upon by the parties. Under clause 8.8 of Section I containing the general conditions of contract, levies and

duties, sales tax, octroi, etc., on purchases and sales made by the contractor except customs duty and Assam general sales tax were to be borne

by it. A provision for referring the dispute between the parties for settlement by arbitration was made in clause 13.1. Section II of the contract

enumerated in details the essential capabilities required for logging units, different heads of services to be rendered together with the particulars and

condition of the equipment to be applied and the covenants to be fulfilled by the contractor. Clause F(vii) of the said section stipulated that if any

tool or equipment malfunctioned except due to hole condition or negligence of OIL or its sub-contractors and could not be repaired at well-site or

base resulting in failure of the contractor to provide its requisite services, the tool or its equipment would be under zero fixed charges with effect

from the last date of successful logging operation with that tool or equipment until it was repaired or replaced within 24 hours and a surface check

or logging operation with that tool was performed to OIL's satisfaction. Under clause 1.1 of Section III of the contract, OIL reserved to itself the

right to depute more than one representative/engineer to act on its behalf for overall co-ordination and operational management at the location. Its

representatives were to have the authority to order any changes in the scope of work to the extent so authorised and notified by OIL in writing.

Such a representative was empowered to liaise with the contractor, monitor the progress of the works so as to ensure the timely completion

thereof. He was also to have the authority to oversee the execution of the jobs by the contractor and to ensure compliance with the provisions of

the contract. Under clause 1.2 of the said section, OIL's representatives were authorised to have free access to all the equipment of the contractor

during the operations and idle time for the purpose of observing/inspecting the operations performed by the contractor in order to assess whether

in OIL's opinion, the contractor was observing the provisions of the contract. Clause 2.1 required the contractor to deploy experienced personnel

for the services to be removed and replaced at its expenses if the persons or any one of them was considered undesirable in the opinion of OIL.

Under clause 7.7 under the caption ""Payment and Invoicing Procedure"", the contractor was required to raise two invoices every month-one for

minimum charges equivalent to monthly fixed charges for the equipment/tools/computer center plus monthly personnel charges under the contract

and the second for all balance amount(s) payable under the contract for the month. The fixed charges under clause 18.1. for equipment, etc.,

mobilised for the services were to be applicable from the date as certified by OIL's engineer to be in readiness to undertake the operation/services

up to the effective date of demobilisation/ termination. Clauses 7.13 and 7.14 having a vital bearing on the issues under the scrutiny deserve to be

extracted.

7.13 ... The equipment/tools to be furnished by the contractor under this contract is the contractor's property and shall always remain in the

possession of the contractor with the exclusive right to use of such equipment/tools by the contractor for providing services under this contract.

7.14 ... Company shall deduct five per cent AGST or as applicable from rental invoice of the contractor and accordingly the contractor should

include five per cent AGST or as applicable on rental component separately in their rental invoice which will be deducted by the company while

releasing payment against rental invoice and will deposit the same to Government Treasury.

The contractor shall duly comply with all the statutory requirement as envisaged in the said AGST Act. In the event of non-compliance with the

statutory requirement as per the AGST Act, consequences arising out of the same will be at the sole responsibility of the contractor. Before

claiming the payment against the final invoice, the contractor has to produce documentary evidence to the effect that they have duly complied with

the statutory requirements as per the AGST Act.

12. Whereas under clause 7.13, the equipment/tools to be furnished by the contractor were to remain its property in possession and were to be

used by it exclusively for providing services under the contract. In terms of clause 7.14 OIL was authorised to deduct five per cent tax or as

applicable from the rental invoices of the contractor for which the latter was required to include the same on the rental component separately in its

said invoice to be deducted by OIL while releasing the payment against rental invoices for depositing the same in Government Treasury. The said

clause further postulated that the contractor would comply with all statutory requirements as envisaged in the Act failing which it was to bear with

the consequences of such non-compliance. The contractor was required to produce documentary evidence of the compliance of the statutory

mandates before claiming payment against the final invoices. Clause 10.1 visualised assumption of liability by OIL for the loss or damage to the

contractor or sub-contractor in the hole below the kelly bushing except in cases of gross negligence on the part of the contractor or its sub-

contractors leading thereto. The contractor, as stipulated in clause 14.4, was obliged to furnish to OIL details of all equipment, duration of

deployment thereof, spares and consumables to be brought into India three weeks in advance of the date of shipment. OIL took upon itself the

obligation under clause 16.1. to pay all the Indian customs duty leviable in India on the contractor's items as specified therein. Under clause 17.2,

the contractor, following the award of the contract and mobilisation of the crew and equipment, was required to provide 24 hours service as and

when required. The anticipated total foreign exchange requirement to be borne by OIL was (a) US\$ 3.50 m for the first two years contract

duration and (b) US\$ 0.50 m for each 6 months extension or part thereof. In course of the arguments, this amount was claimed to have been

invested by OIL to facilitate import of the appellant's equipment for the services under the contract.

13. A cumulative reading of the above clauses, in our considered opinion, unequivocally proclaims an all-pervasive control of OIL over the

appellant's equipment deployed for the execution of the contract during its subsistence. Evidently, the equipment, tools and machinery detailed by

the contractor were owned by it, physical possession whereof was also permitted to be retained by it. Those were to be operated by its technically

qualified personnel. The contractor was to realise rental charges therefor. OIL thus had hired the contractor's equipment for charges to be borne

by it. This was in addition to the personnel services for operating the same and providing the data required. As against this, the contractor was

required to provide 24 hours service as demanded by OIL. The contractor was permitted to use the equipment/tools exclusively therefore under

clause 7.13 referred to hereinabove. OIL's representatives/engineers were empowered to effect overall coordination and management at the

location and could also order changes in the scope of work as desired by it. Not only were they guaranteed a free access to the equipment either

during the operation or idle time for the purpose of observing/inspecting the performance of the contractor and to determine as to whether the

same was in adherence to the provisions of the contract, the contractor's personnel handling the equipment were liable to be removed, if

considered undesirable in the opinion of OIL. The contractor was not entitled to the fixed charges for any tool or equipment for the period the

same was out of action except in cases where the same was due to the hole condition or the negligence of the company or its sub-contractors.

14. OIL had undertaken as alluded hereinabove the liability to pay the customs duty on the equipment, tools and machinery to be imported off

shore in the interest of the services to be rendered. In face of the above binding stipulations, the appellant-company thus was obliged to utilise its

equipment, tools and machinery wholly for the services under the contract and scrupulously in terms of the clauses thereof. Though the ownership

and the possession of such equipment remained with the appellant-company, it was denuded of its liberty and authority to handle the same as

desired by it. The operation and the utilisation thereof were to be in rigorous compliance with the contract subject to the superintendence and

inspection of OIL's representatives. The covenant requiring 24 hours service demonstrates in no uncertain terms that those equipment were to

remain engaged for OIL's services and not liable to be either removed from their location(s) or engaged for other works. Realisation of the rental

charges therefor, by the appellant-company and the payment of the customs duty by OIL therefore are suggestive of the charge the latter had

thereon during the period of the contract. Absolute authority of OIL in the use of the equipment is thus writ large. In all, the right to use the

equipment for the services to be rendered during the contractual period, according to us thus stood transferred to OIL though the ownership and

the physical possession thereof remained with the contractor within the meaning of Section 2(33) (iv) of the Act.

15. The Act is a legislation to amalgamate, consolidate and amend the laws relating to levy of tax concerning sale and purchase of goods in the

State of Assam. Section 2(33) defines ""sale"" to mean any transfer of property in goods for cash, deferred payment or other valuable consideration

and includes any transfer of the use of any goods under an operating lease. It being the focal point of the debate before us, it is considered

expedient to extract the relevant excerpt of the said definition.

2. (33) "sale" with all the grammatical variations and cognate expressions means any transfer of property in goods by any person for cash, deferred

payment or other valuable consideration, and includes-

(i) to (iii) ...

(iv) Any transfer of the use of any goods under an operating lease;

(v) to (vi) ...

16. The provisions defining of ""lease"" and ""operating lease"" are also set out hereunder for ready reference:

2. (19) "lease" means any agreement or arrangement whereby the right to use any goods for any purpose is transferred by one person to another

whether or not for a specified purpose for cash, deferred payment or other valuable consideration without the transfer of ownership and includes a

sub-lease but does not include any transfer on hire-purchase or any system of payment by instalments;

2. (25) "operating lease" means a lease other than a financial lease.

17. On a conjoint reading of the above, it is thus manifest that for sale u/s 2(33)(iv) of the Act, there ought to be a transfer of the right to use in any

goods by one person to another whether or not for a specified purpose for cash, deferred payment or other valuable consideration without the

transfer of ownership and would include a sub-lease but not a transfer on hire purchase or in a system of payment by instalments. The gravamen of

the transaction to constitute a sale u/s 2(33) (iv) is thus the transfer of the right to use any goods for any purpose and for a period specified or

otherwise for cash, deferred payment or other valuable consideration without the transfer of ownership. The transfer of right to use any goods for

valuable consideration therefore is the quintessence of the transaction to be construed to be a sale under the above provision making it exigible to

tax under the Act.

18. The words ""tax on the sale or purchase of goods"" appearing in the preamble of the Act have been provided an inclusive definition in Article

366(29A) of the Constitution of India by the Constitution (Forty-sixth Amendment) Act, 1982. The portion relevant for the present adjudication is

quoted hereinbelow:

366 (29A) ... Tax on the sale or purchase of goods" includes

(a) to (c) ...

(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) to (f) ...

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

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

19. A concept of deemed or extended sale has thus been introduced to broaden the tax base. A transaction of sale for the purposes of the Act,

therefore, comprehends transfer, delivery or supply of goods to any person for cash, deferred payment or other valuable considerations in various

eventualities detailed in Section 2(33). An expansive perception of sale has been statutorily recognised and prescribed. Any interpretation thereof

irrefutably has to be in conformity with the object of the legislation to effectuate the purposes thereof. A constricted and literal approach having the

potential of frustrating the legislative intendment logically has to be eschewed. The concept of sale under the Act, the root whereof lies in the

constitutional amendment referred to above must be permitted a full play, the underlying purpose of the extended connotation thereof being to

make it all comprehensive to include all conceivable transactions involving transfer, delivery and supply of goods as well as the transfer of right to

use of any goods under an operating lease. We are thus of the view that no exact analogy of a deemed sale conceptualised in the Act with a sale in

common parlance is permissible. The provisions of the Act, therefore, call for an interpretation to further the notion of deemed or expanded sale

visualised thereby. A brief survey of the authorities cited at the Bar would be essential at this stage.

20. In *Rashtriya Ispat Nigam Ltd. Vs. Commercial Tax Officer, Company Circle, Visakhapatnam*, the petitioner for the purpose of its steel project

allotted different works to contractors. To facilitate the execution of the works, the petitioner undertook to supply its machinery to the contractors

for the purpose of being used therefore for which it (petitioner) realised charges. The provisional assessment levying tax on the hire charges u/s 5-E

of the Andhra Pradesh General Sales Tax Act, 1957, was successfully challenged before the jurisdictional High Court. The statutory provision

involved required that every dealer transferring the right to use goods for any purpose whatsoever for a period specified or otherwise to any lessee

or licensee for cash, deferred payment or other valuable consideration in course of his business would be liable to pay tax at the prescribed rate on

the amount realised or realisable by him on such transfer. While observing that the terms of contract in each case would determine whether there

had been a transfer of the right to use or not, the same being a question of fact, the High Court concluded that on a close reading of all the contract

conditions it was obvious that the contractor was entitled make use of the machinery only for purposes of execution of the works of the petitioner

and that there was no transfer of right to use as such in favour of the contractor. The fact that the effective control of the machinery had remained

with contractor was taken note of in arriving at this conclusion.

21. This view was affirmed by the apex court in *State of Andhra Pradesh v. Rashtriya Ispat Nigam Ltd.* [2002] 126 STC 114 on the same

analogy of reasonings. The facts as obtained in the reported decision are distinguishable from those in hand. Whereas in the above case, the

petitioner-company, owner of the machinery had handed over the same to the contractor for the execution of its works, in the instant case, the

contractor had placed its equipment at the disposal of OIL for rendering the services envisaged under the contract. The appellant-company had

detailed its equipment, plants and machinery for the benefit of OIL against hire charges. The two eventualities are not identical. It is logical that the

petitioner in *State of Andhra Pradesh and Another Vs. Rashtriya Ispat Nigam Ltd.*, , having handed over the same to the contractor for the

operation thereof only for its works, no transfer in the right to use the same could be comprehended. Not only the situation is different in the

present case, the contractual provisions construed as a whole establish that the appellant's right to use the equipment involved had been transferred

for valuable consideration in favour of OIL within the meaning of Section 2(33) of the Act.

22. In Aggarwal Brothers Vs. State of Haryana and Another, the appellants used to supply shuttering to builders and contractors on hire to be

used in the construction of buildings. The hire charges were assessed to tax under the Haryana General Sales Tax Act, 1973. The challenge thereto

failed. Referring to the definition of "sale" provided in the Act envisioning transfer of the right to use of goods for any purpose for cash, deferred

payment or for other valuable consideration, the apex court repelled the contention that for a deemed sale under the said statute, there ought to be

a legal transfer of goods or that the transaction must be akin to a lease. It held, the transfer of the shuttering on hire charges to the builders and

building contractors on hire charges in the facts of the case constitutes a sale of goods for consideration. Nothing much turns on this decision as the

definition of "sale" in the legislation involved therein is not in pari materia with the one we are seized of.

23. A Constitution Bench of the apex court in 20th Century Finance Corpn. Ltd. and Another Vs. State of Maharashtra, while dwelling on the

controversy as regards the competence of the State Legislature to levy sales tax under Clause (29-A)(d) of Article 366 of the Constitution of India

on the transfer of right to use any goods held that on a plain construction of Sub-clause (d) of Clause (29A), the taxable event is the transfer of

right to use the goods regardless of when or whether the same are delivered for use. It held that the existence of the goods was essential so that

they may be used and that a contract in respect thereof is executed. The locus of deemed sale is the place where the right to use them is transferred

whether the goods are transferred and that the situs of the goods is of no relevance. It ruled that Article 366(29A)(d) envisages levy of tax on the

transfer of the right to use goods and not on the use thereof. The apex court was categorical in declaring that the delivery of goods cannot

constitute the basis for the levy of tax on the transfer of right to use the same.

24. The above view found reiteration in Bharat Sanchar Nigam Ltd. and Another Vs. Union of India (UOI) and Others, where the apex court in

clearest terms expounded that actual delivery of the goods was not necessary for effecting the transfer of right to use the same but those must be

available and deliverable at the time of transfer and delivered at some stage. In the supplementary judgment of honourable Laxmanan J., the

essential attributes of a transaction to constitute the transfer of right to use the goods were prescribed in para 97, which is quoted hereunder : (para

98 in STC)

97. To constitute a transaction for the transfer of the right to use the goods the transaction must have the following attributes:

(a) there must be goods available for delivery;

(b) there must be a consensus ad idem as to the identity of the goods;

(c) the transferee should have a legal right to use the goods- consequently all legal consequences of such use including any permissions or licences

required therefore should be available to the transferee;

(d) for the period during which the transferee has such legal right, it has to be the exclusion to the transferor-this is the necessary concomitant of the

plain language of the statute, viz., a "transfer of the right to use" and not merely a licence to use the goods;

(e) having transferred the right to use the goods during the period for which it is to be transferred, the owner cannot again transfer the same right to

others.

25. In *State of Tripura v. Tripura Bus Syndicate* [2001] 122 STC 175 (Gau) the respondent was a registered trade union of vehicle operators in

the State of Tripura. During the Parliamentary elections in 1989, a large number of vehicles belonging to the members of the respondent were

requisitioned by the concerned District Magistrate. A division Bench of this Court while noticing the contextual facts held that as during the period

of requisition, the vehicles had been under the control of the election authorities and were plied in accordance with their directions and instructions,

there was a transfer of the right of use of the vehicles by the owners/operators to the said authorities and hire charges having been realised therefor,

the transaction was a sale u/s 2(g) (ii) of the Tripura Sales Tax Act, 1976.

26. The judicially evolved principles to identify a transaction involving the transfer of right to use goods to be a sale under the Act clearly exclude

the indispensability of delivery of physical possession thereof as an essential pre-condition. The other ordained features of such a transaction are, in

our considered opinion, present in the instant case. The equipment, plants and machinery were available and identified by the parties. Under the

contract, OIL derived the legal right to use the goods having hired the same on payment of charges. Customs duty had also been paid by it on the

equipment imported by the contractor for executing the works. Under the stringent contractual terms, the contractor was bound to keep the

equipment engaged exclusively for the works. The fact that the same had been operated by its technically qualified personnel does not militate

against the element of exclusiveness in the use thereof for the services and benefit of OIL. During the subsistence of the contract, the appellant-

company was neither authorised nor permitted to transfer the equipment or detail the same for others. The parties consciously limited the tax

liability to the rental component only.

27. The provisions of the contract understandably have to be construed in the context of the service accorded to be rendered. The transfer of right

to use the equipments has to be perceived in the context of the nature, manner and extent of engagement thereof. The retention of physical

possession thereof by the appellant-company cannot be decisive. The parties entered into the contract understanding the implications of each and

every provision thereof, which according to us, demonstrate an obvious dominion and control of OIL over the equipment used by the appellant for

the execution of the works during the period of the contract. We, thus, have no hesitation to hold that the transaction in question involved transfer

of right to use the equipment, plants and machinery under the lease within the meaning of Section 2(33)(iv) of the Act.

28. On a careful reading of the judgment and order impugned before us, no error of fact or law is discernible. We find ourselves in agreement with

the conclusions recorded therein, however, for the reasons alluded hereinabove.

29. The appeal, being without any merit, is thus dismissed. No costs.