



Supply of vehicles on 'hire basis' is not a deemed sale but a service

***K.P. Mozika v. Oil and Natural Gas Corporation Ltd. & Ors*¹**

The Supreme Court declared the law that supply of vehicles on hire basis without 'transfer of effective control' cannot be referred as 'transfer of right to use goods' so as to be construed as a 'sale' under Article 366(29A)(d) of Constitution of India, hence cannot be taxed under the Sales Tax Statute or VAT Act. However it was observed that the said activity tantamount to supply of service.

Facts of the case:

- The Petitioner, under a contract, had agreed to provide different categories of motor vehicles, such as trucks, trailers, tankers, buses, cranes etc. to the Oil and Natural Gas Corporation Limited ('ONGC') and Indian Oil Corporation Limited ('IOCL').
- Petitioner approached the Gauhati High Court owing to the threat by ONGC to deduct tax at source under the Assam VAT Act, in respect of the supply provided by the Petitioner-dealer. The High Court dismissed the petitions by holding that the contract was for transfer of the right to use the goods and thus liable for tax under the VAT and the Sales Tax Act.

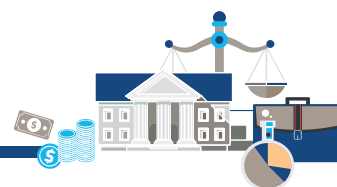
- The question for consideration before the Supreme Court ('the Court') was whether the transaction constitute deemed sales within the meaning of Section 2(43)(iv) of the VAT Act and Article 366(29A)(d) of Constitution of India or will it be subject to service tax under Section 65(105)(zzzzj) of the Finance Act, 1994.

Discussion and Findings

- The Court emphasised that the contract for supply of vehicles on hire basis is a 'deemed sale' as per the Article 366(29A)(d) of the Constitution of India provided all five conditions laid down in the case of ***Bharat Sanchar Nigam Limited & Anr. v. Union of India & Ors.***² are fulfilled; these are:
 - (i) Availability of goods for delivery
 - (ii) consensus ad idem as to the identity of goods
 - (iii) transferee should have legal right to use goods
 - (iv) the right to use of goods by transferee has to be in exclusion to the transferor
 - (v) owner cannot again transfer the same right to others.
- The Court discussed the distinction between transferring the right to use goods and mere providing license to use goods. In every case where

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²(2006) 3 SCC 1



the owner of the goods permits another person to use goods, the transaction need not be of the transfer of the right to use the goods. It can be simply a license to use the goods, which may not amount to the transfer of the right to use.

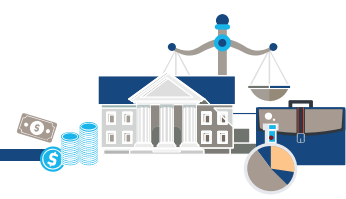
- Perusing the scope of work contract with ONGC and IOCL, the Court analysed that the contract itself provides there is no transfer of the right to use the vehicle. Moreover, owing to the multiple liabilities of the contractor (Petitioner) with respect to the vehicles and manpower supplied by it besides, the contract failed to fulfil the test in clauses (iii) and (iv) of the law laid down in the case of BSNL (Supra).
- Though the vehicles are used for carrying out the work as suggested by ONGC/IOCL, the entire control over the vehicles is retained by the contractor (Petitioner) and therefore it was not a case of transfer of the right to use goods.
- The Court observed and held that the transfer of the right to use will involve not only possession, but also the control of the goods. When the substantial control remains with the contractor and is not handed over to the user, there is no transfer of the right to use the vehicles, cranes, tankers, etc.

Judgement

- The Supreme Court held that there is no transfer of the right to use the vehicles, rather it amounts to supply of services.
- Allowing the appeals, the Court granted liberty to the Revenue (UOI) "to initiate proceedings, if any, for recovery of service tax in accordance with law"

Dhruva Comments

It's a well settled law that without transfer of substantial control to the recipient, the transaction fails to enthrall 'transfer of right to use'. The issue has plagued the Pre GST era and surfaced in various situation and sectors. This ruling, affirming the law laid down in BSNL's case will help resolve the pending litigation. In the GST regime the question is no longer consequential since the tax rate is fairly uniform.





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