
(2006) 04 AHC CK 0034

In the Allahabad High Court

Case No : Trade Tax Revision No's. 142, 144, 145 and 146 of 1998

Mohd. Wasim Khan

APPELLANT

Vs

Commissioner, Trade Tax

RESPONDENT

Date of Decision : 26-04-2006

Acts Referred:

Constitution of India, 1950 — Article 366, 366(29A)

Uttar Pradesh Trade Tax Act, 1948 — Section 11, 11(8), 3A, 3AAA, 3D

Citation : (2009) 20 VST 196

Hon'ble Judges : Rajes Kumar, J

Bench : Single Bench

Advocate : Kunwar Saksena, for the Appellant; V.K. Pandey and S.C., for the Respondent

Final Decision : Allowed

Judgement

Rajes Kumar, J.—Present for revisions u/s 11 of U.P. Trade Tax Act (hereinafter referred to as "Act") are directed against the order of Tribunal dated 3rd July. 1998 relating to the assessment years, 1987-88, 1988-89 and 1989-90.

2. Brief facts of the case are that the applicant is a owner of buses and have entered into a contract with Indian Fanners Fertiliser Cooperative Limited. Phoolpur, Allahabad, M/S Bharat Pump and Compressors Limited, Naini, Allahabad and the General Electric Company of India Limited, Naini, Allahabad for providing the buses for the transportation of their employees from their place of residence to the factory to and fro. In pursuance of the contract, buses were provided and hire charges were received as per contract. Assessing authority levied the tax on the hire charges received from the aforesaid companies u/s 3-F of the Act towards transfer of right to use the buses. Orders of the assessing authority have been continued in first appeals. Applicant filed second appeals before the Tribunal. Tribunal by the impugned order allowed the appeals in part. Tribunal has reduced the turnover but upheld the orders of the assessing authority levying the tax of the hire charges u/s 3-F of the Act.

3. Heard learned Counsel for the parties.

4. Learned Counsel for the applicant submitted that the buses were provided to IFFCO, BPCL and GEC, companies for transportation of their employees from their residence to the factory and from factory to their residence. He submitted that the effective control over the vehicles have never been passed on to the aforesaid three companies and always remained with the applicant. He submitted that the driver and other employees of the vehicles were of the applicant; Road permit was in the name of the applicant; diesel and other maintenance expenses were borne by the applicant; Prices were fixed with reference to the kilometer; applicant had to take the insurance for the vehicles and the workmen. It was also agreed that in case of failure to provide the vehicle every day, the applicant would be liable for penalty and the earnest money would be forfeited. On these facts, it is submitted that the possession of the vehicles were never given to the aforesaid companies and the effective control over the vehicles were always remained with the applicant. He submitted that for the levy of tax u/s 3-F of the Act under the transfer of right to use the goods, the transfer of possession is *sin qua non*. In support of his contention he relied upon the decision of the Apex Court in the case of *State of Andhra Pradesh and Another Vs. Rashtriya Ispat Nigam Ltd.*, Division Bench decision of this Court in the case of *Ahuja Goods Agency v. State of A.P.* reported in 1997 NTN (11) 484, *Commissioner of Trade Tax v. Jamuna Prakash Jaiswal* reported in 2005 NTN (28) 156, *Commissioner of Trade Tax v. S/S Sunil Agrawal* reported in 2006 NTN (29) 98 and the latest judgment of the Apex Court in the case of *Bharat Sanchar Nigam Ltd and Anr. v. Union of India* in Writ Petition (Civil) No. 183 of 2003 decided on 2nd March, 2006.

5. Learned Standing Counsel submitted that under the agreement after providing the vehicles each day, the vehicles had gone under the control of the aforesaid three companies and the movement of the vehicles was fully controlled and governed by the companies. He submitted that during the period, the vehicles were engaged for the transportation of their employees from one place to another place, the vehicles were in effective control of the companies and the applicant was completely lost the control over the vehicles, thus, on the facts of the case, there was a transfer of right to use the vehicles in favour of the companies and hire charges received for such transfer was liable to tax u/s 3-F of the Act.

6. Having heard the learned Counsel for the parties, I have perused the order of the Tribunal and the authorities below.

7. It is useful to refer the terms of the contract of IFFCO, BPCL and GEC.

INDIAN FARMERS FERTILISER CO-OPERATIVE LTD.

"Ref: 72/0000/821-C

M/S Mohd. Waseem Khan, 3, Mission Road, Allahabad.

LETTER OF INTENT

Sub: Hiring of 50/52 Seater Bus.

Ref: Your quotation No. Nil dated 10.3.1987 and Subsequent discussion dated 6.4.1987

Dear Sirs,

With reference to the above we are pleased to inform you that your offer has been accepted on the following terms & conditions:

- 1) You will place at the disposal of IFFCO three 50/52 seater buses Model 1987. This will be used and will run as per the directives of representative of IFFCO. Generally, the vehicle will run between IFFCO and Allahabad, but sometimes it may be required to go outside Allahabad.
- 2) You will ensure availability of drivers, spare tyres, tools and other necessary items and ensure that the vehicle is available for use everyday.
- 3) This contract will be valid for a period of one year with effect from 1.7.1987.
- 4) Performance guarantee in the form of Demand Draft/Bank Guarantee for 5% of the total contract value as per proforma Invoice will be submitted by you failing which the same would be recovered from your first running bill. This deposit will be non-interest bearing and would be returned after satisfactory completion of the contract.
- 5) The vehicle will have foam seats and fitted with seat covers and curtains of good quality and the same must be maintained. Seat must be of 4" foam and back must be of height of 3" thick foam.
- 6) Payment shall be paid on the following rates:
 - (a) Lump-sum rate for first 2500 km in any month Rs. 15,000/-
 - (b) Rate for distance beyond 2500 km in any month Rs. 2.20 per km.
- 7) The above rates will remain firm for the duration of contract irrespective of any increase in the prices of tyres, spare parts or any other connected items.
- 8) In the event of upward revision in the prices of diesel by Government, compensation on the basis of consumption of one litre diesel covering a distance of four km will be payable extra with effect from 10.3.1987.
- 9) The entire running and maintenance cost including diesel, payment of salary and overtime allowance to drivers, insurance, taxes, permits extra will be borne by you.
- 10) Toll tax at Shastri Bridge will be entirely borne by IFFCO.
- 11) Payment will be made on the basis of actual use of vehicle. No compensation will be allowed in the event of vehicle running lesser distance than estimated.

12) IFFCO reserves the right to terminate the contract without assigning any reason whatsoever. In the event of such termination you will not be entitled any compensation from IFFCO.

13) The driver and conductor of the vehicle will be responsible if any unauthorized persons are found boarding/traveling in the vehicle.

14) The vehicle will be accepted and supervised by our authorized representative from time to time. The suggestion offered by our representative shall be implemented by the owner of the vehicle.

15) The contractor will have to take insurance covered from their workmen and vehicle to cover the risk of accident/death and payment of compensation as per rules.

16) In case you fail to place your vehicle within the stipulated period, IFFCO will forfeit your earnest money deposits without prejudice to any other rights.

Please sign and return two copies of this letter of intent as token of acceptance. Formal contract will be issued shortly wherein all other terms & conditions will be incorporated.

Yours faithfully, For Indian Farmers Fertiliser Coop. Ltd. (V.K. GROVER)
MATERIALS MANAGER.

M/s BHARAT PUMP AND COMPRESSORS LTD.

WHEREAS Sri Mohd. Waseem Khan, S/O Sri Mohd. Ibrahim Khan, resident of 3, Mission Road, Allahabad (hereinafter called Transporter) has offered to run a Minibus for transporting the employees/Customers of Bharat Pumps & Compressors Ltd., (A Govt. of India Enterprise) with its registered office at Naini, Allahabad from Allahabad City to Bharat Pumps & Compressors Ltd and back as and when required including out of station journeys and whereas M/S Bharat Pumps & Compressors Ltd., have agreed to engage of Minibus of the said transporter on the following terms and conditions.

1. That the transporter will run a Minibus No. CIE-35 (Tata 407-1986 model) in good running condition for transporting the employees/Customers of Bharat Pumps & Compressors Ltd from Allahabad City to Bharat Pumps & Compressors Ltd., and back as and when required including out of station journeys. That in case of the above Minibus being out of order, the transporter shall provide an alternative/substitute Minibus after due approval of such Minibus by the company for such period as the Company thinks reasonable.

2. That the Minibus will be operated for Company's duties round the clock as per the timings fixed from time to time from various places in Allahabad city to Bharat Pumps & Compressors Ltd., Naini, and back including out of station journeys.

3. That the Minibus will pickup/drop Company's employees/Customers from

different places/pickup points and routes as and when required including out of station journeys.

4. That the Minibus must be duly insured under Motor Vehicle Act to cover the passengers traveling,

5. That in consideration of the above services to be rendered by the transporter M/S Bharat Pumps & Compressors Ltd, shall pay the hire charges for local as well as out of station journeys on the rates as written hereunder payable monthly after rendering actual services:

(a) that a minimum run of 4500 kms in a month Rs. 10,000/- will be paid in normal conditions.

(b) Beyond 4500 kms run in a month, the rates would be Rs. 1.55 per km.

In case of any rise in the rates of fuel by any govt. notification below 20 n.p. will not be entertained and above 20 n.p. the extra cost above 20 n.p. will be paid to the transporter based on actual consumption of fuel per month to be calculated on 10 kms per litre basis. The present rate of diesel is Rs. 3.90 per litre.

6. That in case for any reason, whatsoever, the transporter fails to provide the said Minibus and/or is unable to transport the employees/Customers of Bharat Pumps & Compressors Ltd., on any day/trip, as the case may be, in addition to proportionate recovery of hire charges, he shall have to pay by way of liquidated damage a sum equal to double the hire charges for that day/trip.

7. That the Minibus will run on all the days of the month including company's holidays/weekly off days also, except for twice in a month, the vehicle can be released for Maintenance purpose on advance notice on weekly off days only.

8. That this agreement and contract to run the Minibus as mentioned above shall remain in force for period of 24 calendar months commencing from 16th January, 1987. The Company may extend the period of contract, if mutually agreed upon to on the same terms and conditions or on such other terms and conditions as may be necessary.

9. That this agreement can be terminated by either party on giving 30 (thirty) days notice to this effect. However, in case of failure to provide properly and timely service as required, BPC reserve the right to terminate the contract immediately without assigning any reason or notice period and the transporter will not be entitled to claim any damages or compensation from BPC.

10. That the contractor will have to deposit Security money of Rs. 3,000/- (Rupees three thousand) only before operating the Minibus in the Company and after award of contract.

11. In case of any breach of contract by the transporter, BPC shall be entitled to forfeit in their favour the security deposit for that particular Minibus, without prejudice to the rights of M/S Bharat Pumps & Compressors Ltd., to take legal

recourse for the said breach in the matter as deemed it.

12. That the responsibility of keeping the Minibus in good running condition as also to bear the cost of fuel etc. including the salary and wages of the staff employed by the transporter for running of this Minibus, would exclusively be of the transporter and Bharat Pumps & Compressors Ltd., will in no way be responsible to pay any part of such expenditure as mentioned hereinbefore.

13. That the transporter shall obtain the route permit etc for running this Minibus and M/S Bharat Pumps & Compressors Ltd., shall in no way be responsible for obtaining such permit etc. payment of taxes such as passenger tax, surcharge, Insurance charges, to concerned authorities will be the liability of the contractor and Bharat Pumps & Compressors Ltd., will in no way be responsible to pay any part of such taxes. The contractor will have to produce the above documents, as and when required by the authorized officer of Bharat Pumps & Compressors Ltd.

14. That while the said Minibus in run for the transport of the employees/ Customers of Bharat Pumps & Compressors Ltd., the transporter shall not allow any other person to travel in the Minibus nor shall, carry any goods or loads of any such person excepting that of the employees/Customers of Bharat Pumps & Compressors Ltd.

15. That the transporter will arrange at his own cost for the parking and garaging of the Minibus at Allahabad city or any other place the transporter may like to garage and keep the Minibus. But on the outward journey to the factory site of Bharat Pumps & Compressors Ltd., the Minibus will be allowed to be parked inside the factory or at the Company's Guest House in city as the case may be for fulfillment of this contract.

16. That the transporter undertakes to run the minibus with punctuality so that the duties entrusted shall not be delayed or disrupted.

17. That Bharat Pumps & Compressors Ltd., shall not be liable for wear and tear, maintenance or loss or damage to the Minibus while in use of while garaged or parked.

18. That a logbook shall be provided by the Company to the Driver of the Minibus, who has to record all the journeys performed by the said Minibus in the logbook and obtain the signatures of concerned traveling officials as indicated to him.

19. That the transporter will keep and send the Driver Driving the Minibus in a proper uniform.

20. That in the event of any question or dispute arising under these conditions of contract or in connection with this contract the same shall be decided in arbitration by the Managing Director of BPC or any officer, nominated by the Managing Director, and his decision shall be final and binding on the parties.

Both the parties have clearly understood the terms and conditions of this

agreement as mentioned hereinabove from paragraph 1 to 20 and in witness where of both the parties have put their hands to this agreement of this day the 11th January, 1987, one thousand and nine hundred eighty-seven at Naini, Allahabad.

for and on behalf of Transporter for and on behalf of Sd/- Sd/- (MOHD. WASEEM KHAN) (Mahmood Fazal) TRANSPORTER Chief of Personnel.

THE GENERAL ELECTRIC COMPANY OF INDIA LIMITED.

Ref: A-15. 5.6.1988. Mohd. Wasim Khan 31, Mission Road, Allahabad.

Dear Sir,

Sub: Hiring of your 35 Seater 608 Tata Bus (New) for transporting our employees.

With reference to your verbal request for hiring your 608 Tata new Bus (35 Seater) directly for transporting our employees and our subsequent negotiations, we confirm having agreed to hire your Bus on following mutually agreed terms and conditions:

1. You will give us on hire your 608 Tata Bus (new) 35 seater capacity for transporting our employees between our factory at Naini and their residences at various points in Jhunsi- Nibi-Sahson Bazar in three shifts "A", "G" and "B" i.e. to bring the employees at 6.00 AM, 8.00 AM and 2.30 PM and leave at 2,40 PM., 4.40 PM and 11.10 PM respectively on all working days.
2. You will provide the necessary driving staff, two drivers in the Bus, for satisfactory running of the vehicle as per route and time schedule laid down by us and amended from time to time. The payment of Salary and Overtime allowance to Drivers, Insurance, Taxes, Permits, etc. will be yours responsibility and will be borne by you.
3. Your vehicle will pick up and drop the company's employees from various pick up points so fixed by the company and amended as considered expedient.
4. Names of the driving staff detailed with the vehicles would be approved by the company. In case of any valid complaints against drivers you will change them immediately. The driving staff shall possess valid driving licence and other papers as statutorily required.
5. You will ensure that your drivers shall not allow any other persons to travel in the vehicle, other than those authorized by the Company. While running, the vehicle shall not be detained at any unauthorized place and would be parked during the day at the factory main gate and during the night at a mutually agreed place as concurred by the Company.
6. You will ensure strict punctuality in the running time of the vehicle as laid down by the company so that the traveling employees are not delayed while coming to/returning from their duties from Naini works.

7. Your vehicle shall be running on all working days of the month and shall be given a day off on all Wednesdays. On these off days you may get the vehicle serviced/maintained as required and repairs attended to, if any. The vehicle should always be in a satisfactory state of use.

8. In exceptional circumstances your vehicle may be detained beyond the laid down shift timings or asked for on weekly off days any other essential duty. It will be used for a short-while on 15th August and 26th January every year. In such cases you will be paid Rs. 10/- per hour extra as overtime.

9. If for any reason the vehicle fails to perform duty as specified above, you will make immediate alternative arrangements to perform the duties. However, if you fail to transport the Company employees to and from the works as per shifts specified above, except for reasons beyond your control, a compensation in lieu of such default shall be payable by you to the company as follows:

(a) for late arrival of Bus:

(i) 10 minutes to 30 minutes - Rs. 100/- per shift. (ii) Beyond 30 minutes - Rs. 300/- " (b) For failure to provide Bus any day/shift due to whatever reason.

(i) Rs. 500/- per day for the first day.

(ii) Rs. 750/- for the second and subsequent days.

Such deductions will be adjusted from your Bills at the time of payment of each Bill.

However, continuous absence for more than four days will entail cancellation of contract without notice and with forfeiture of Earnest Money Deposit. The Vehicle shall not be used for personal use without express permission from the Company in writing.

10. This contract for transporting the employees of the Company shall be for a period of three years from 1st May, 1988 and renewal on further three year basis can be considered at mutually agreeable terms at the end of each three year period.

11. The agreement may be terminated by either party by giving one month's notice in writing. However, in case of negligence, misbehaviour, misconduct on the part of driving staff or if the vehicle is found to be detrimental to the interest of the Company or its employees, the Company will have the exclusive right to terminate the contract without giving any notice or compensation and company's decision will be final in this matter.

12. The vehicle when not transporting shift employees to and fro Naini works may be used on any other duty in the interest of the Company's work.

13. Necessary repairs, replacement of essential parts and timely maintenance including the use of mobil oil, lubricants etc. will be carried out by you with a view to keep the vehicle always in good working condition.

14. All taxes, Government dues or other obligatory levies imposed by the authorized agencies shall be paid by you directly from your own account. Any liability arising in the course of the running of the vehicle during the contractual period shall be entirely borne by you.

15. It will be your responsibility to pay any damages/compensation to anybody arising out of the negligence of the driver while transporting the employees to and fro Naini works.

16. In consideration of the above terms and conditions of the contract, the G.E.C. of India Ltd., Naini would pay you Rs. 6,000/- (Rs. Six thousand only) per month as hiring charges for the use of your vehicle. No escalation or any other charges would be payable to you during the currency of this contract.

17. Diesel shall be provided by the Company for the use of the vehicle and will be adjusted in your account at 7 km/Litre of diesel for 8000 km, for kms exceeding 8000 kms you will be paid & Rs. 1.75/km, For this purpose you would maintain a vehicle log book showing all details of duties performed daily. This is to be produced for check and scrutiny daily.

18. The Bills for the services rendered during the month shall be paid within 10 days of its receipt in the Accounts Department.

19. You are required to pay security deposit amounting Rs. 2000/-(Rupees Two Thousand only) in cash or by Demand Draft, before 10.6.1988. This security deposit shall be refunded to you after satisfactory termination of the contract. This deposit will not bear any interest.

20. The names of passengers authorized to travel, with details of picking points and pick up timings have been already made know to you.

Please sign the duplicate copy of this letter by way of your confirmation and acceptance of the terms and conditions stipulated above.

Thanking you,

Yours faithfully, For The G.E.C. Of INDIA LIMITED (G.C. MEHROTRA) CHIEF ADMINISTRATIVE MANAGER

8. Section 3-F of the Act reads as follows.

Section 3-F. Rate of tax on the right to use any goods or goods involved in the execution of a works contract.

Notwithstanding anything contained in Section 3-A, or Section 3-AAA or Section 3-D, the turnover relating to the business of transfer of the right to use any goods for any purpose or of transfer of the property in goods involved in the execution of a works contract shall be determined in the manner prescribed and shall be liable to tax at such rate not exceeding fifteen percent, as the State Government may, by notification, declare, and different rates may be declared for different goods or different classes of dealers.

9. Similar question came up for consideration in *Kando Transport and Ors. v. S.T.O. Assessment Unit, Barbil and Ors.* (1992) 43 STL 67 Orissa. In this case also the petitioner entered into a contract with M/s Minerals & Metals Trading Corporation of India Ltd. For transportation work including loading, unloading and stacking. The contention of the transporter was that there was no transaction of sale and that the contract was for purely labour and service. The department however, contended that "hire charges" received by the transporter come within the definition of "sale price". Considering the enlarged definition of "sale" in view of the Constitutional amendment, the Orissa High Court held as follows:

In order to decide whether a transaction is of "sale", the determinative factor is whether transfer of right of user is involved. By way of illustration we may indicate that if "A" allows his vehicle to be used by "B" for a consideration, and the vehicle is placed at the control, custody and possession of "B" it may be a case of transfer of the right to use the vehicle for any purpose. Where, however, the control, custody, and possession over the vehicle remains with "A", notwithstanding the fact that certain amounts were received as hire charges, no transfer of the right to use is involved.

10. In *Rashtriya Ispat Nigam Ltd. Vs. Commercial Tax Officer, Company Circle, Visakhapatnam*, the petitioner which owned the Visakhapatnam Steel Project, for the purpose of the steel project, allotted different parts of the project work to contractors. To facilitate the execution of work by the contractors with the use of sophisticated machinery, the petitioner had 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 a provisional assessment in view of the enlarged definition of "sale". Then the Andhra Pradesh High Court held that under the agreement, the effective control of the machinery, even while the machinery was in the use of the contractor, was that of petitioner company. The contractor was not free to make use of the same for other works or move it out during the period the machinery was in his use. Therefore, the contractor was entitled to make use of the machinery for purpose of execution of the works of the petitioner and there was no transfer of the right to use it as such in favour of the contractor. This is how the court held that the hire charges collected by the petitioner from the contractors were not exigible to sales tax. To come to this conclusion, the Andhra Pradesh High Court relied on *Corpus Juris Secundum*, Vol. 87 page 892 which emphasised that the essence of transfer is passage of control over the economic benefits of property which results in terminating rights and over relations in one entity and creating them in another. While construing the word "transfer" due regard must be had to the thing to be transferred. A transfer of the right to use the goods necessarily involves delivery of possession by the transferor to the transferee. Delivery of possession of a thing must be distinguished from its custody. It is not uncommon to find the transferee of goods in possession while transferor is having custody.

11. Against the aforesaid decision of the Andhra Pradesh High Court, the State of Andhra Pradesh filed SLP before the Apex Court in the case of State of Andhra Pradesh and Another Vs. Rashtriya Ispat Nigam Ltd., Apex Court had affirmed the order of the Andhra Pradesh High Court and held as follows.

The High Court after scrutiny and close examination of the clauses contained in the agreement and looking to the agreement as a whole, in order to determine the nature of the transaction, concluded that the transactions between the respondent and contractor 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.

12. A similar question came up for consideration before the Division Bench of this Court in the case of Ahuja Goods Agency and Anr. v. State of U.P. and Ors. reported in 1997 NTN (11) 484. Petitioner received transportation charges from a distillery in connection with the transportation of Indian made foreign liquor from the distillery to various Government bonded warehouses. Question for consideration was whether the transportation charges was liable to tax u/s 3-F of the Act. The contention of the petitioner was that the transportation charges were paid for service under the agreement and there was no transfer of right to use the vehicle. The Division Bench examined the agreement and held that the truck to be used for carrying the goods will continue to remain in the custody of the drivers employed by the owners of the trucks. The distillery could have used the vehicle only for the purpose specified goods and not for any other purposes. The transit risk was of the petitioner and not of the distillery. It was the duty of the transporter to abide by all the laws relating to the motor vehicle and the excise. From these factors, it is manifest that there was no transfer of possession even of the vehicle, which were being used for carrying the goods. On these facts Division Bench held that in the absence of transfer of possession of vehicle there was no transfer of right to use the goods and the provisions of Section 3-F of the Act shall not be applicable.

13. In Writ Petition (Civil) No. 183 of 2003, Bharat Sanchar Nigam Ltd. and Anr.

v. Union of India and Ors. decided on 02.03.2006, the Larger Bench of Apex Court considered the scope of transfer of right to use the goods. Hon''ble Justice Ruma Pal. J. in her judgment has considered the decision of the Apex Court in the case of State of Uttar Pradesh and Another Vs. Union of India (UOI) and Another, the observations of the Constitution Bench of the Apex Court in the case of 20th Century Finance Corpn. Ltd. and Another Vs. State of Maharashtra, and other decisions of the Apex court and held as follows:

In the State of U.P. v. Union of India (supra) it was also held:"Handing over of possession is not sine qua non of completing the transfer of the right to use any goods, as was held by a Constitution Bench of this Court in 20th Century Finance Corpn. Ltd. and Another Vs. State of Maharashtra, Once DoT connects the telephone line of the assigned number of the subscriber to the area exchange, access to other telephones is established. There cannot be denial of the fact that giving such an access would complete the transfer of the right to use the goods.

With respect, the decision in 20th Century Finance Corporation Limited v. State of Maharashtra, cannot be cited as authority for the proposition that delivery of possession of the goods is not a necessary concomitant for completing a transaction of sale for the purposes of Article 366(29A)(d) of the Constitution. In that decision the Court had to determine where the taxable event for the purposes of sales tax took place in the context of Sub-clause (d) of Article 366(29A). Some States had levied tax on the transfer of the right to use goods on the location of goods at the time of their use irrespective of the place where the agreement for such transfer of right to use such goods was made. Other States levied tax upon delivery of the goods in the State pursuant to agreements of transfer while some other States levied tax on deemed sales on the premise that the agreement for transfer of the right to use had been executed within that State (vide paragraph 2 of the judgment as reported). This Court upheld the third view namely merely that the transfer of the right to use took place where the agreements were executed. In these circumstances the Court said that:

No authority of this Court has been shown on behalf of respondents that there would be no completed transfer of right to use goods unless the goods are delivered. Thus, the delivery of goods cannot constitute a basis for levy of tax on the transfer of right to use any goods. We are, therefore, of the view that where the goods are in existence, the taxable event on the transfer of the right to use goods occurs when a contract is executed between the lessor and the lessee and situs of sale of such a deemed sale would be the place where the contract in respect thereof is executed. Thus, where goods to be transferred are available and a written contract, is executed between the parties, it is at that point situs of taxable event on the transfer of right to use goods would occur and situs of sale of such a transaction would be the place where the contract is executed.

(emphasis ours)

In determining the situs of the transfer of the right to use the goods, the Court

did not say that delivery of the goods was inessential for the purposes of completing the transfer of the right to use. The emphasized portions in the quoted passage evidences that the goods must be available when the transfer of the right to use the goods take place. The Court also recognized that for oral contracts the situs of the transfer may be where the goods are delivered (see para 26 of the judgment).

In our opinion, the essence of the right under Article 366(29A)(d) is that it relates to user of goods. It may be that the actual delivery of the goods is not necessary for effecting the transfer of the right to use the goods but the goods must be available at the time of transfer must be deliverable and delivered at some stage. It is assumed, at the time of execution of any agreement to transfer the right to use, that the goods are available and deliverable. If the goods, or what is claimed to be goods by the respondents, are not deliverable at all by the service providers to the subscribers, the question of the right to use those goods, would not arise.

In *State of Andhra Pradesh and Anr. v. Rastriya Ispat Nigam Ltd.* (2003) 3 SCC 214, it was claimed by the Sales Tax Authorities that the transaction by which the owner of certain machinery had made them available to the contractors was a sale. The Court rejected the submission saying that:

the transaction did not involve transfer of right to use the machinery in favour of contractors. The effective control of the machinery even while the machinery was in use of the contractor was that of the respondent Company; the contractor was not free to make use of the machinery for the works other than the project work of the respondent or.

But in the case of *Aggarwal Brothers Vs. State of Haryana and Another*, when the assessee had hired shuttering to favour of contractors to use it in the course of construction of buildings it was found that possession of the shuttering materials was transferred by the assessee to the customers for their use and therefore, there was a deemed sale within the meaning of Sub-clause (d) of Clause 29-A of Article 366. What is noteworthy is that in both the cases there were goods in existence which were delivered to the contractors for their use. In one case there was no intention to transfer the right to use while in the other there was.

But if there are no deliverable goods in existence as in this case, there is no transfer of user at all. Providing access or telephone connection does not put the subscriber in possession of the electromagnetic waves any more than a toll collector puts a road or bridge into the possession of the toll payer by lifting a toll gate. Of course the toll payer will use the road or bridge in one sense. But the distinction with a sale of goods is that the user would be of the thing or goods delivered. The delivery may not be simultaneous with the transfer of the right to use. But the goods must be in existence and deliverable when the right is sought to be transferred.

Therefore whether goods are incorporeal or corporeal, tangible or intangible,

they must be deliverable. To the extent that the decision in *State of U.P. v. Union of India* held otherwise, it was, in our humble opinion erroneous.

14. In the same case Hon"ble Dr. A.R. Lakshamanan, J. held as follows:

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 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 to the transferor this is the necessary concomitant of the plain language of the statute viz. a "transfer of the right to use" and not merely a licence to use the goods;
- e. Having transferred the right to use the goods during the period for which it is to be transferred, the owner cannot again transfer the same rights to others.

15. Thus, in the light of the ratio laid down by the Apex Court, on the terms of the agreement-referred hereinabove, it has to be examined whether there was transfer of right to use the vehicles. No doubt, vehicles were available at a deliverable stage, but the question is whether they have been delivered at any state. Whether transferee had got a legal right to use the vehicles - consequently all legal consequences of such use including any permission or license required therefore was available to the transferee and for the period during which the transferee has such legal right there was a complete exclusion of legal rights to use by the transferor, or mere license to use the vehicles was given and not the full control or physical possession of the vehicles.

16. On the terms of the agreements, in my opinion, the present case does not come within the purview of transfer of right to use the goods for following reasons:

17. The agreement was for providing buses for the transportation of the employees of the companies from one place to another place; Drivers, spare tyres, tools and all other necessary items were of the applicant; Diesel and other running expenses, insurance, taxes, permit etc., were borne by the applicant; Payment was to be made on the basis of the actual use of the vehicles; Drivers and Conductors of the vehicles were held responsible if any unauthorized persons were found boarding/traveling in the vehicles; The applicant had to take the insurance cover for their workmen and vehicles have to cover the risk of accident/death and the payment of compensation as per Rules; In case of failure to provide the vehicle, the applicant was liable for penal action; The payment was on kilometer basis. The aforesaid terms of the contract clearly shows the

effective control over the vehicles were always remain with the applicant and have never been passed on to the Companies. All the legal consequences arising from the use of the vehicle were the responsibility of the applicant. At no point of time, there was a complete exclusion of legal rights to use such vehicles by the transferor. Thus, the present case on the aforesaid facts does not fall under the transfer of right to use the goods, in view of the law laid down by the Apex Court in the aforesaid cases.

18. For the reasons stated above, the order of the Tribunal is liable to be set aside.

19. In the result, all the revisions are allowed. The order of the Tribunal is set aside. Tribunal is directed to pass appropriate order u/s 11(8) of the Act. However, there shall be no order as to cost.