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**(2022) 02 CESTAT CK 0002**

**In the Customs, Excise And Service Tax Appellate Tribunal**

**Case No :** Service Tax Appeal No. 50176 Of 2019

**M/s Subhash Light House Vs Commissioner, Central Goods And Service Tax, Audit-II??**

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**Date of Decision :** 02-02-2022

**Acts Referred:**

Constitution of India, 1950 — Article 366(29A), 366(29A)(d)  
Finance Act, 1994 — Section 65B(44), 65(105)(zzzzj), 66E, 66E(f), 73(1)

**Citation :** (2022) 02 CESTAT CK 0002

**Hon'ble Judges :** Anil Choudhary, J;C.J. Mathew, Technical Member

**Bench :** Division Bench

**Final Decision :** Allowed

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**Judgement**

1. The present appeal is directed against the Order-in-Original No. 22/PP/COMMR./CGST/Subhash/2018-19 dated 23.10.2018 passed by the Ld. Commissioner, Central Goods & Services Tax (Audit-II) New Delhi.

2. Heard the parties.

3. Brief facts of the case are that the appellants are registered under the State Sales Tax/ VAT law as well as under the Service Tax provisions. They are engaged in business of supply of generator sets on rental basis to their clients. The supply was in the following manner:

(a) Fixed gensets- In this case the appellant fixed or installed the gen sets in the premises of the clients, and possession of such gen sets lies with the clients. In certain cases the appellant also provided operator to run the gensets who worked as per the instructions of the clients;

(b) Mobile gensets- In this case the clients require gensets for some specific events, or where clients required transportable/mobile gensets for short-term period. The appellant fixed the gensets on vehicles and supplied the same along with technicians / operators who run the gensets as per the instructions of the clients.

4. The appellant had contended that supply of gensets made by them, in both

the manners, was governed under the provisions of VAT or Sales Tax considering the same as 'deemed sales' and paid VAT/Sales Tax on the consideration charged by him, as the effective control and possession of gensets was with clients. Such supply of gensets was 'deemed sales' in terms of Article 366(29A) of the Constitution of India read with Sales Tax Laws, accordingly VAT/Sales Tax was paid on the consideration received by the appellant.

5. The department had demanded service tax on the entire consideration received by the appellant during the F.Y. 2011-12 to 2015-16, by issuance of show cause notice dated 31.08.2016, invoking the extended period of limitation.

6. In adjudication, the Ld. Commissioner has held - in respect of the supply of gensets where the appellant has installed generators at the place of clients, and no diesel etc. is provided by him, satisfied the test laid down by the Hon'ble Apex Court in the case of Bharat Sanchar Nigam Ltd. (BSNL) Vs Union of India 2006(2)STR 161 SC and by the Hon'ble High Court of Andhra Pradesh in the case of State of A.P. Vs Rashtriya Ispat Nigam Ltd. (RINL) (2002) 126 STC 114 (SC), since in such cases the transaction would not merely be a license to use the goods and rather there was transfer of right to use. Accordingly, it was held by the Ld. Commissioner that the appellant was entitled to deduction of turnover corresponding to such contracts, and the consideration against such contracts was not includible in the service tax liability on the assessee, as in such cases the transaction was that of deemed sale.

7. However, the Ld. Commissioner has not considered the supply of mobile/transportable gensets as deemed sale, and confirmed the service tax liability against such contracts or transactions on the ground that in most of the cases the appellant had provided gensets along with operator, who operated and carried out the repair/maintenances and under such supply, the effective possession and control of the machine was with the appellant. It has been held that the said activity was appropriately covered under the category of 'Supply of Tangible Goods Service' as defined under Section 65(105)(zzzzj) of the Finance Act, and was liable to service tax both under pre-negative list regime, as well as post-negative list regime, and such activity was out of the purview of Article 366 (29A) of the Constitution of India.

8. The issue involved in this appeal is - whether the supply of mobile gensets by the appellant during the F.Y. 2011-12 to 2015-16 for some specific events or where clients required transportable gensets (fixed on vehicle/ trolley) for short-term period, and supplied along with technicians / operators, who run the gensets as per the instructions of the clients, whether falls under the definition of 'deemed sale' in terms of the Article 366 (29A) of the Constitution of India, read with the Sales Tax Law.

9. It is seen that in terms of Section 65 (105) (zzzzj) of Finance Act, 1994 'Supply of Tangible Goods Service' is defined as under:

"Taxable Service" means any service provided or to be provided to any person,

by any other person in relation to supply of tangible goods including machinery, equipment and appliances for use, without transferring right of possession and effective control of such machinery, equipment and appliances”.

Service tax on the supply of tangible goods was introduced w.e.f. 16.05.2008 vide Notification No. 18/2008-S.T. dated 10.05.2008.

Further, w.e.f. 01.07.2012 in the negative list regime, the transfer of goods, by way of hiring, leasing, licensing or in any such manner without transfer of right to use such goods constituted the declared service, in terms of clause (f) of section 66E of the Finance Act, 1994.

In view of both (before 01.07.2012 and after) the above definitions, supply of tangible goods or transfer of goods without transferring the right of possession or by way of hiring, leasing, licensing or in any such manner without transfer of right to use such goods, were liable to service tax.

10. The Ld. SDR appearing on behalf of the revenue has strongly supported the impugned order passed by the Ld. Commissioner, and pleaded that the demand of service tax has rightly been confirmed and the penalties rightly imposed.

11. Shri Abhinav Kalra, Chartered Accountant appearing on behalf of the appellant has assailed the impugned Order passed by the Ld. Commissioner, inter alia on the ground(s)-

11.1 That the Adjudicating Authority has failed to note and appreciate the real nature of the activity undertaken by the appellant. In the present case appellant had transferred the right to use the D.G. sets to its clients, alongwith effective control & possession of the same. Therefore, arrangement made between the appellant and its clients for supply of D.G. sets is covered under 'deemed sale' in terms of the Article 366(29A) of the Constitution of India. Accordingly, such transaction is subject to VAT only and thus under no circumstances the same can attract levy of service tax. Reliance is placed on the ruling in CST, Delhi vs. ITD ITD Chem Joint Venture -2015 (1) TMI 1262-CESTAT, New Delhi.

11.2 For the period 01.04.2011 to 30.06.2012 the activity of the appellant i.e. supply of generators alongwith transfer of right to use and effective control & possession, cannot be covered under the taxable service. i.e. 'supply of tangible goods service' as defined under Section 65(105)(zzzzj) of Act as the same was specifically excluded from the definition of taxable service.

11.3 For the period 01.07.2012 to 31.01.2016, the activity of the appellant i.e. supply of generators alongwith transfer of right to use and effective control & possession cannot be covered under declared service as provided under Section 66E(f) of the Act. Further, the said activity has also been excluded from the definition of 'service' as defined under Section 65B(44) of the Act. Hence, service tax demand for the said period is also not sustainable and is liable to be set aside. That the appellant is paying VAT on the amount received from clients for supply of D.G. sets. Thus, imposition of service tax on the same transaction is

contrary to law as it is a settled law that VAT and service tax are mutually exclusive. Therefore, on a particularly transaction either VAT or service tax can be levied.

11.4 That in the impugned order while confirming the service tax demand on the higher charges, Id. Adjudicating Authority has wrongly included the amount of Rs. 18,000/- received against chit funds during the F.Y. 2014-15. Without prejudice to above, even if it is assumed that appellant is liable to pay service tax on the transaction in dispute, in that case, appellant would be entitled to avail cenvat credit on the excise duty paid on the generators. Without prejudice to above, extended period of limitation in terms of Section 73(1) of the Act cannot be invoked in the present case as the appellant has not suppressed any fact from the Department with intent to evade payment of service tax.

12. Having considered the rival contentions, we find that the issue involved in the instant case is whether the supply of mobile gensets by the appellant to his clients was a service / declared service in view of the Service Tax law, as held by the Id. Commissioner or the same is a sale or deemed sale in terms of the Article 366(29A)(d) of the Constitution of India, read with the Sales Tax law.

13. Article 366 (29A)(d) of the Constitution of India reads:

"Definition- In this Constitution, unless the context otherwise requires, the following expressions have, the meanings hereby respectively assigned to them, that is to say

(29A) tax on the sale or purchase of goods includes-

(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;"

(emphasis supplied)

14. In view of the Article 366(29A)(d) of the Constitution, 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, has to be considered as deemed sale or purchase of goods.

15. In the instant case it is observed that the appellant have supplied the mobile gensets to his clients for short periods along with technicians and fuel. It is the requirement of the client to use such gensets when there is no electricity or the electricity goes off or as desired by client, and the gensets are put to use to keep or ensure uninterrupted supply of electricity at the clients place/site.

15.1 Thus, the use of the gensets is purely on the requirement or order of the clients. It is not necessary that the gensets provided to the client is surely put to use or generate electricity for the period of time for which it is hired by the client, but the genset is dedicated/ delivered to the client and is under his effective control and possession. In view of such condition, the effective control of

the gensets is purely in the hands of the clients of the appellant, as the client is at his liberty to run or not to run the gensets hired by him for generation of electricity. In any case, he is liable to pay the hire or lease rent.

16. It is also seen that the Ld. Commissioner and the appellant have both relied upon the judgment of the Apex Court in the case of *Bharat Sanchar Nigam Ltd. Vs Union of India* [2006 (2) STR 161 SC]. In this case it has been held that to constitute a transaction for the transfer of right to use the goods, as deemed sale, the transaction must have the following criteria-

- 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 therefor should be available to the transferee;
- d. For the period during which the transferee has such legal right, it has to be to 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.

17. We find that all the above five criteria mentioned by the Apex Court in the said judgment are fulfilled, in favour of the appellant in the instant case. It is seen that the gensets are available for delivery to the clients; the gensets are supplied as per the agreement between the appellant and the clients; the clients have legal right to use such gensets as agreed upon between the appellant and the clients; and the appellant i.e. the owner cannot transfer the gensets to any other client during the period of agreement. Thus, we find that the criteria fixed by the Apex Court to constitute the right to use is with the client(s) of the appellant, even though the operator of the gensets and the fuel is supplied by the appellant.

18. The CBEC vide Circular No. 198/08/2016-SERVICE TAX, Dated: August 17, 2016 has provided that in order to distinguish such transactions as sale of goods or supply of services, it is essential to determine whether, in terms of the contract, there is a transfer of the right to use the goods. Since the supply of the gensets meets the criteria mentioned by the Apex Court, we consider the supply of gensets is sale of goods in terms of Article 266(29A) of the Constitution of India.

19. Moreover, we find that admittedly the appellant had duly discharged his liability under the VAT/Sales Tax law as per the VAT/ CST returns submitted in the paper book before this Court, and also it is an admitted fact in the order in original. Therefore, there remains no liability on the part of the appellant under

the Service Tax law.

20. In view of the aforementioned observations and findings, we allow the appeal filed by the appellant and set-aside the impugned Order passed by the Ld. Commissioner. Appellant shall be entitled to consequential relief as per law.

21. Under the facts & circumstances, it being an issue of interpretation and no case of concealment found, etc. is made out, accordingly, we hold that extended period of limitation is not available.

(Pronounced on 02.02.2022).