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2024 INSC 27

Reportable

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.3548 OF 2017

M/s. K.P. Mozika **... Appellant**

versus

Oil and Natural Gas Corporation Ltd. & Ors. **... Respondents**

with

Civil Appeal No.4658 of 2013

Civil Appeal No.4657 of 2013

Civil Appeal No.383 of 2013

Civil Appeal No.3580 of 2017

Civil Appeal No.8714 of 2012

Civil Appeal No.8705 of 2012

Civil Appeal No.8710 of 2012

Civil Appeal No.9291 of 2012

Civil Appeal No.8715 of 2012

Civil Appeal No.3579 of 2017

Civil Appeal No.3578 of 2017

Civil Appeal No.4659 of 2013

Civil Appeal No.4661 of 2013

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Civil Appeal No.4660 of 2013

Civil Appeal No.3573 of 2017

Civil Appeal No.3575 of 2017

Civil Appeal No.3574 of 2017

Civil Appeal No.3577 of 2017

Civil Appeal No.3576 of 2017

Civil Appeal No.4662 of 2013

Civil Appeal No.3549 of 2017

Civil Appeal No.3557 of 2017

Civil Appeal No.7954 of 2012

Civil Appeal No.8693 of 2012

Civil Appeal No.3554 of 2017

Civil Appeal No.3556 of 2017

Civil Appeal No.3553 of 2017

Civil Appeal No.3555 of 2017

Civil Appeal No.3565 of 2017

Civil Appeal No.3551 of 2017

Civil Appeal No.3552 of 2017

Civil Appeal No.3558 of 2017

Civil Appeal No.3559 of 2017

Civil Appeal Nos.3566-3569 of 2017

Civil Appeal No.3572 of 2017

Civil Appeal No.3561 of 2017

Civil Appeal No.3562 of 2017

Civil Appeal No.3564 of 2017

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Civil Appeal No.3563 of 2017

Civil Appeal No.3570 of 2017

Civil Appeal No.3571 of 2017

Civil Appeal No.3560 of 2017

and

Civil Appeal No.3550 of 2017

J U D G M E N T

ABHAY S. OKA, J.

FACTUAL ASPECTS

1. This group of appeals concerns the liability to pay tax under the Assam General Sales Tax Act, 1993 (for short, 'the Sales Tax Act') and the Assam Value Added Tax Act, 2003 (for short, 'the VAT Act'), respectively. In some cases, in this group of appeals, the assessees have, under a contract, agreed to provide different categories of motor vehicles, such as trucks, trailers, tankers, buses, scrapping winch chassis, and cranes, to the Oil and Natural Gas Corporation Limited (for short, 'ONGC'). There are other cases where Indian Oil Corporation Limited (for short, 'IOCL') has entered into agreements with transporters to provide tank trucks to deliver its petroleum products.

2. These cases have been clubbed together as similar questions of law and fact arise. Broadly, the question is whether, by hiring these motor vehicles/cranes, there is a transfer of the right to use any goods. If there is a transfer of

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the right to use the goods, it will amount to a sale in terms of Clause 29A(d) of Article 366 of the Constitution of India. In short, if the transactions do not fall in the definition of 'Sale' in Clause 29A(d), the same may not attract tax under the Sales Tax Act or the VAT Act. As a result, there will be other questions about whether the transactions will amount to service, thereby attracting liability to pay service tax.

3. We are referring to the facts in Civil Appeal No. 3548 of 2017 and Civil Appeal No. 383 of 2013 for convenience. The judgment dated 25th November 2009 subject matter of challenge in Civil Appeal no.3548 of 2017 is the main judgment. Most of the other impugned judgments directly or indirectly rely upon the said judgments. There are different impugned judgments and orders passed on 24th July 2012, 25th November 2009, 9th December 2009, 29th June 2010 and 25th August 2010. Civil Appeal no.3548 of 2017 arises from the impugned judgment dated 25th November 2009 passed by a Division Bench of the Gauhati High Court in a writ appeal. In this case, the agreement is of 13th April 2006, by which the appellant agreed to provide services of truck-mounted hydraulic cranes with crew, etc., to ONGC for carrying out its various operations. The appellant had to approach the High Court on the threat given by ONGC to deduct tax at source under the VAT Act in respect of the services provided by the appellant. Similar petitions were filed before the learned Single Judge of the Gauhati High Court. The learned Single Judge dismissed the petitions by holding that the contract

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was for the transfer of the right to use the goods and, therefore, there is a liability under the VAT Act and the Sales Tax Act. The learned Single Judge also passed orders in similar writ petitions disposing of the same in terms of the order dated 19th December 2006. Therefore, the appellants filed writ appeals before the Division Bench. By the impugned judgment dated 25th November 2009, the Division Bench dismissed the writ appeals by holding that under the agreements in question, there was a transfer of the right to use the goods covered by the contract.

SUBMISSIONS OF THE LEARNED COUNSEL APPEARING FOR THE APPELLANTS IN CIVIL APPEAL NO.3548 OF 2017 AND OTHER CONNECTED CASES

4. In Civil Appeal no.3548 of 2017 and other connected matters, i.e. Civil Appeal no.7954 of 2012, Civil Appeal no.8715 of 2012, Civil Appeal no.9291 of 2012, Civil Appeal no.3549 of 2017, Civil Appeal no.3550 of 2017, Civil Appeal no.3551 of 2017, Civil Appeal no.3552 of 2017, Civil Appeal no.3553 of 2017, Civil Appeal no.3555 of 2017, Civil Appeal no.3558 of 2017, Civil Appeal no.3559 of 2017, Civil Appeal no.3564 of 2017, Civil Appeal no.3565 of 2017, Civil Appeal nos.3566-3569 of 2017, Civil Appeal no.3570 of 2017 and Civil Appeal no.3571 of 2017, the learned counsel appearing for the appellants pointed out that the taxes on sale of goods and advertisements were covered by Entry 48 in List-II of the Seventh Schedule to the Government of India Act, 1935. Under the Seventh Schedule to the Constitution of India, Entry 92A of List-I confers power on the Government of India

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to impose taxes on the sale of goods. Similar legislative powers were vested in the State under Entry 54 of List-II of levy of taxes on the sale or purchase of goods other than newspapers, subject to the provisions of Entry 92-A of List-I. On the interpretation of the sale of goods covered by Entry 54 of List-II, the learned counsel relied upon several decisions of this Court in the cases of ***Sales Tax Officer, Pilibhit v. Budh Prakash Jai Prakash***[1], ***The State of Madras v. Gannon Dunkerley & Co.***[2], and ***M/s. K.L. Johar & Co. v. The Deputy Commercial Tax Officer, Coimbatore III***[3]***.*** The learned counsel also pointed out the provisions of Clause 29A, added by way of the 46th Amendment Act 1982 to Article 366 of the Constitution of India. He pointed out that in the present group of appeals, we are concerned with sub-clause (d) of Clause 29A of Article 366 of the Constitution of India, which provides that the tax on the sale and purchase of goods includes 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. He pointed out that by this amendment to the Constitution of India, by way of legal fiction, six cases of transactions were treated as deemed sale of goods. Therefore, 'deemed sale' must be read in every provision wherever the phrase 'tax on sale and purchase of goods' appears. He pointed out the decisions that cover the contingencies covered by sub-clauses (a) to (f) of Clause 29A of Article 366 of the Constitution of India. As far

1 AIR 1954 SC 459
2 AIR 1958 SC 560
3 AIR 1965 SC 1082

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as sub-clause (d) is concerned, he relied upon the decision of the High Court of Madras in the case of ***A. V. Meiyappan v. Commissioner of Commercial Taxes, Board of Revenue, Madras & Anr.***[4].

5. Coming to the Sales Tax Act, the learned counsel pointed out that the same was repealed by virtue of Section 107 of the VAT Act. He submitted that the VAT Act is in conformity with the 46th Amendment to the Constitution of India. He also pointed out the view taken by the High Court of Tripura in the judgments and orders dated 3rd November 2014 and 29th February 2016, wherein the said High Court, after analysing the similar contract, came to the conclusion that the said transaction did not involve any transfer of right to use.

6. He pointed out that the question will be whether the transactions subject matter of these appeals constitute deemed sales within the meaning of Section 2(43)(iv) of the VAT Act with effect from 1st May 2005. He submitted that if the said provisions of the VAT Act are not applicable, the transactions will be subject to service tax under Section 65(105)(zzzzj) of the Finance Act, 1994 (for short, 'the Finance Act'). On facts, he pointed out that the agreement subject matter of Civil Appeal nos.3566-3569 of 2017 specifically provided that the transactions in question would not be by way of lease or transfer of right to use the vehicle/equipment.

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4 (1967) 20 STC 115 (Madras)

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7. He mainly relied upon the concurring view of the Hon'ble Dr.Justice AR Lakshmanan in the case of ***Bharat Sanchar Nigam Limited & Anr. v. Union of India & Ors.***[5] He relied upon what is held in paragraph 97 of the said decision. He submitted that the five tests laid down therein can be called the *Panchratna* Test. His submission is that at no point was the complete and exclusive dominion of cranes, and other vehicles passed on to ONGC in view of the express terms of the contracts in question. He pointed out that in the present case, the employees on cranes worked for the contractor and not for ONGC. The contractor appoints those who work on cranes and not ONGC. The responsibility of repair and maintenance, including alternative arrangements, is of the contractor, not ONGC. The contractor is obliged to make arrangements at his own cost for shelter, food, night stay and other requirements of the employees working on the cranes. He pointed out that as per the terms of the agreement, the contractor and ONGC are not responsible for providing secured parking to the cranes in the sense that even if the cranes are parked at the site of ONGC, the same are at the risk of the contractor. More importantly, the contractor is liable for a claim for compensation that may arise due to injury to any third party by reason of the use of the cranes. The contractor is mandated to fully indemnify ONGC against any consequence under law arising from any accident caused by the cranes to the equipment/property/personnel of ONGC. He submitted that

5 (2006) 3 SCC 1

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in the facts of the case, sub-clauses (c), (d) and (e) of the Panchratna test are not fulfilled.

8. He relied upon a decision of this Court in the case of ***The State of A.P. & Anr. v. Rashtriya Ispat Nigam Limited.***[6] By inviting the attention of this Court to the decision in the case of ***Great Eastern Shipping Company Limited v. State of Karnataka & Ors.***[7]***,*** he submitted that in the facts of the case before this Court, the 'Tug' which was the subject matter of the contract was made available to the port twenty-four hours a day throughout the contract period. The contract provided that during the contract period, the tug will be available with the port for all purposes and under control in every respect. He also referred to this Court's decision in ***Commissioner of Service Tax, Delhi v. Quick Heal Technologies Limited***[8]***.*** In the said case, this Court observed that the transaction was of software sale, and once it is accepted that the software put in a compact disk is goods, there cannot be any service element in the transaction. He submitted that by accepting the contentions raised by him, consequential directions will have to be issued to settle the account of the contractors.

Submissions in Civil Appeal No. 383 of 2013

9. The learned senior counsel appearing for the appellant in Civil Appeal No. 383 of 2013 has also made detailed

6 (2002) 3 SCC 314
7 (2020) 3 SCC 354
8 2022 SCC Online SC 976

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submissions. He relied upon the standard contract executed between the appellants–Indian Oil Corporation Limited (IOCL), and the transporters operating tank trucks to deliver petroleum products at specified rates. He pointed out that the Superintendent of Tax issued notice to the appellants (IOCL) to deduct sales tax while paying hiring charges to the contractors on the footing that by hiring the tank trucks, there is a transfer of the right to use goods and, therefore, the transaction is of sale covered by Clause 29A of Article 366 of the Constitution of India. In the writ petition filed by the appellants, the learned Single Judge took the view that the transactions do not constitute transfer of right to use goods. In the writ appeals preferred by the respondent, the Division Bench interfered. The learned senior counsel submitted that the expression 'transfer of right to use any goods' has been the subject matter of several decisions of this Court. He urged that mere execution of a contract without passing the domain of the goods does not result in the transfer of the right to use any goods, and therefore, it will not be a 'deemed sale'. He also relied on this Court's decisions in the cases of ***BSNL***[5] and ***Rashtriya Ispat Nigam Limited***[6]. He submitted that the test consistently applied by this Court is that there can be a transfer of the right to use goods provided that there is a parting with possession of goods for the limited period of its use. During the said period, the effective control of goods must be transferred. By relying upon several clauses of the agreements, he submitted that there is no transfer of the right to use the tank trucks under the contract. He pointed out

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that the effective control over the vehicles remains with the transporter and is never transferred to the appellants. Relying upon the decision of Allahabad High Court in the case of ***Ahuja Goods Agency & Anr. v. State of Uttar Pradesh & Ors.***[9]. He submitted that there is a consistent judicial opinion that hiring vehicles does not amount to a transfer of effective control and possession.

10. He submitted that a transaction can be subject to either service or sales tax, and the said transaction cannot be subjected to both taxing statutes. He relied upon a decision of this Court in the case of ***Imagic Creative (P) Ltd. v. Commissioner of Commercial Taxes & Ors.***[10]

11. Therefore, he relied upon the decision of this Court in the case of ***Gannon Dunkerley & Co***[2]. He pointed out why the Law Commission suggested an amendment to the Constitution of India by incorporating clause 29A under Article 366. He submitted that under clause 29A of Article 366, it is provided that the transfer, delivery, or supply of goods shall be deemed to be a sale of those goods by the person making the transfer, delivery, or supply. He relied upon the decision in the case of ***BSNL***[5]. He submitted that whether the contract falls in one category or the other is to be decided by finding out the substance of the contract. He also pointed out the decision of this Court in the case of ***Rashtriya Ispat Nigam Ltd.***[6] for dealing with the issue of

9 (1997) 106 STC 540 = 1997 SCC online All 1381
10 (2008) 2 SCC 614

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effective control. He heavily relied upon the opinion of the Hon'ble Dr. Justice A.R. Laxmanan in the case of ***BSNL***[5].

12. The learned senior counsel relied upon several clauses in the agreement executed by the appellant. He submitted that after 2003, the transaction was liable to service tax.

13. The learned counsel appearing for the appellants in Civil Appeal nos.8714, 8710, 8705, 8693, and 3573-3579 of 2017 submitted that the contract of providing SCB trailers to ONGC was a contract of service and not of transfer of right to use goods in view of the terms of the contract in question. He invited the attention of this Court to several clauses in the contract. Therefore, the learned counsel urged that the specific terms of the contract indicate that it was a service contract and was not a sale.

Submissions by the State of Assam

14. The learned counsel appearing for the State of Assam relied upon a decision of this Court in the case of ***20th Century Finance Corporation Ltd. & Anr. v. State of Maharashtra***[11]**.** He submitted that the contracts entered into by ONGC will have to be read as a whole. He relied upon the test of effective control found in this Court's decision in the case of ***Rashtriya Ispat Nigam Limited***[6]. He urged that it is not lawful to split the "transfer of right to use goods" into "sale and service" for the purposes of taxation. He relied upon a decision of this Court in the case of ***BSNL***[5]. His

11 (2000) 6 SCC 12

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submission is that the transaction covered by the contract of hiring cranes presupposes that there is a transfer of the right to use the cranes. Therefore, the provisions regarding making available staff, maintenance, etc., are irrelevant. He urged that the actual delivery of goods is not necessary for effecting the transfer which are deliverable and are actually delivered at some stage. He submitted that if the tests laid down in the case of ***BSNL***[5] by the Hon'ble Dr. Justice AR Laxmanan are applied, it will establish that what was transferred was the right to use the goods. He submitted that as regards all the contracts subject matter of this group of appeals, such as contracts for hiring cranes, water tankers and trailers, the suppliers have transferred exclusive control and dominion over the goods to the hirer during the subsistence of the contracts.

15. In the case of ***Gannon Dunkerley & Co***[2], this Court has reiterated that in the case of composite contracts, the States did not have the power to severe sale and service components and impose tax only on sales. The learned counsel also invited our attention to the statement of objects and reasons of the Constitution (46th Amendment) Bill, 1981. He pointed out the statement of objects and reasons mentioned therein. He submitted that the contracts in the present cases clearly show that during the contract period, complete control and dominion over the cranes, trucks and trailers is given to the hirer. It is irrelevant that the cranes, trucks, etc., come back to the contractor after the contract period. He submitted that

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the concept of 'deemed sale' under sub-clause (d) of Clause 29A of Article 366 of the Constitution of India comes into operation even if there is no legal transfer of ownership of the vehicles followed by its delivery. He pointed out that deemed sale is not a sale of the goods, but it is of the right to use the goods. Even if there is actually no sale of cranes, tankers or trailers in terms of the Sale of Goods Act, there is a deemed sale as the terms of the contracts read as a whole show that there was an intention on the part of the parties to transfer the right to use the said goods. He pointed out that this Court, in the case of ***Aggarwal Brothers v. State of Haryana & Anr.***[12] **,** reiterated that the provisions are for transferring the right to use the goods and not the transfer of goods. He submitted that the test of effective control is satisfied in this case.

16. Inviting our attention to Section 65(105)(zzzzj) of the Finance Act, the learned counsel submitted that the said provisions exclude those transactions in which there is a transfer of possession and effective control.

17. The learned counsel invited our attention to the various clauses in the contract subject matter of Civil Appeal No. 3548 of 2017. The learned counsel, relying upon what is held in paragraph 51(iv) of the decision of this Court in the case of ***Quick Heal Technologies Ltd.***[8], submitted that when we talk about effective control, it does not mean physical control.

12 (1999) 9 SCC 182

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He reiterated that the return of physical possession of the trailers, trucks, and cranes has no relevance.

Submissions of the Union of India

18. The learned Additional Solicitor General appearing on behalf of the Union of India contended that the transactions subject matter of this group of appeals are essentially in the nature of rendering service, thereby attracting service tax. He submitted that the VAT Act and the Sales Tax Act will have no application, and the transactions will attract service tax. Therefore, the submission is that no interference is called for.

CONSIDERATION OF SUBMISSIONS

19. We have carefully considered the submissions canvassed across the Bar. Entry 48 of List–II of the Seventh Schedule to the Government of India Act, 1935 provided for "taxes on sale of goods and on advertisement". In the case of ***Gannon Dunkerley & Co***[2], which is a landmark judgment, this Court dealt with the interpretation of Entry 48 of List–II of the Seventh Schedule to the Government of India Act, 1935 and Entry 54 of List-II of the Seventh Schedule to the Constitution of India which provided for "taxes on sale of goods". This Court held that the expression "sale of goods" has a well-recognised legal import. It was held that the expression "sale of goods" will have to be given the same meaning as defined in the Sale of Goods Act. The same view was reiterated in the case of ***K.L.Johar & Co. v. Deputy***

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Commercial Tax Officer, Coimbatore III[13]***.*** Thus, the State legislature was empowered to levy tax on the sale of goods provided there was a sale within the meaning of the Sale of Goods Act. A necessary ingredient of the sale of goods is the transfer of property in the goods subject matter of sale from the seller to the buyer. The essential ingredient of such a sale is handing over possession of the goods and transferring the property in the goods to the buyer. Under Entry 92A of List-I of the Seventh Schedule to the Constitution of India, even the Central legislature is empowered to levy tax on the sale and purchase of goods other than newspapers where such sale or purchase occurs during the course of inter-state trade or commerce.

20. Thereafter, the 46th Amendment to the Constitution of India was made. By the said amendment, Clause 29A was added to Article 366 with effect from 2nd February 1983. Clause 29A reads thus:

> "**(29A) "tax on the sale or purchase of goods" includes—**
>
> (a) a tax on the transfer, otherwise than in pursuance of a contract, of property in any goods for cash, deferred payment or other valuable consideration;
>
> (b) a tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract;

13 AIR 1965 SC 1082

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> (c) a tax on the delivery of goods on hire-purchase or any system of payment by instalments;
>
> (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) a tax on the supply of goods by any unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration;
>
> (f) a tax on the supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (whether or not intoxicating), where such supply or service, is for cash, deferred payment or other valuable consideration, 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."
>
> (underline supplied)

In this case, we are concerned with sub-clause (d) of Clause 29A. Sub-clause (d) essentially defines "tax on the sale or purchase of goods". Sub-clause (d) provides that tax on the sale or purchase of goods includes a tax on the transfer of the right to use any goods for any purpose. We will have to interpret the statutory provisions in the light of sub-clause (d)

of Clause 29A of Article 366. The amendment came into force on 2nd February 1983.

21. Before we interpret sub-clause (d) of Clause 29A, it is necessary to refer to the provisions of the Sales Tax Act. In the said Act, the definition of "sale" required the transfer of property in goods by any person by cash, deferred payment, or other valuable consideration. The VAT Act came into force with effect from 28th April 2005. The VAT Act repealed the Sales Tax Act. The VAT Act is in conformity with the 46th Amendment to the Constitution of India, particularly Clause 29A of Article 366. The definition of "sale" in sub-section (43) of Section 2 of the VAT Act is very exhaustive which is in terms of Clause 29A of Article 366 of the Constitution of India. Clause (iv) of sub-section (43) of Section 2 of the VAT Act contains an inclusive definition of "sale", which includes, "a 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".

22. In the present group of appeals, broadly, we are dealing with the following categories of cases:

a. Agreements for hiring cranes;

b. Agreements for hiring trucks;

c. Agreements for hiring of buses;

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d. Agreements for transportation of petroleum products by vehicles;

e. Agreements for hiring trailers;

f. Agreements for hiring water tankers; and

g. Agreements for hiring of scrapping winch chassis.

23. The impugned judgment and order subject matter of challenge in Civil Appeal no.3548 of 2017 decides a group of 20 cases wherein the agreements were for providing/hiring cranes to ONGC and agreements pertaining to water tankers and trailers. The said judgment was against the assessee.

24. Civil Appeal no.383 of 2013 arises from the contract between the transport agencies and the appellant–IOCL, for transporting petroleum products by vehicles. The impugned judgment and order is of 24th July 2012. Civil Appeal No. 3548 of 2017 has been preferred by the assessee. The same is the case with Civil Appeal No. 383 of 2013. Civil Appeal No. 3580 of 2017 has been preferred by the Union of India. Civil Appeal no.4657 of 2013 is preferred by the assessee for challenging the judgment and order dated 24th July 2012. By the said judgment, again, a group of cases were decided by the Gauhati High Court. Even the said cases were decided against the assessee on the basis of the decision, which is the subject matter of challenge in Civil Appeal No. 3548 of 2017.

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25. Civil Appeal no.3580 of 2017 is in the nature of a cross-appeal preferred by the Union of India against the judgment, which is the subject matter of challenge in Civil Appeal 4657 of 2013. This was a case of a contract for the supply of trailers. In this case, the contention raised by the Union of India is that the transaction does not amount to a sale within the meaning of the VAT Act and that the agreement is of rendering service.

26. The entire controversy revolves around the question of whether the transactions reflected from the agreements subject matter of these appeals amount to a sale within the meaning of sub-clause (d) of Clause 29A of Article 366 of the Constitution of India and, consequently, whether it is a "sale" within the meaning of clause (iv) of sub-section (43) of Section 2 of the VAT Act. The definition of "sale" under the Sales Tax Act, in sub-section (33) of Section 2, incorporates the requirement of transfer of property in goods.

27. Now, we come to the interpretation of sub-clause (d) of Clause 29A of Article 366. As pointed out earlier, the States had legislative competence for enacting a law regarding imposing a tax on the sale of goods as per Entry 54 of List-II. Followed by the decision of this Court in the case of ***Gannon Dunkerley & Co***[2], there are several decisions wherein the view taken was that though there were transactions which resembled sale, the tax could not be levied on the same as there was no sale of goods within the meaning of the Sale of

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Goods Act. The sale of goods contemplated under Entry 54 of List-II was consistently interpreted as a sale in terms of the Sale of Goods Act.

28. Clause 29A of Article 366 was inserted on 2nd February 1983, thereby introducing the concept of "deemed sale". We are concerned with sub-clause (d) of Clause 29A, which we have reproduced earlier. As noted earlier, the condition for applicability of the sale of goods under the Sale of Goods Act is that apart from the transfer of possession of the goods, there must be a transfer of the property in goods to the buyer. However, sub-clause (d) of Clause 29A refers not to the transfer of property in the goods to the buyer but to the transfer of the right to use any goods for any purpose for consideration as mentioned in sub-clause (d) of Clause 29A. The transfer of the right to use any goods can be for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration. Only because a person is allowed to use certain goods of the owner, *per se*, there is no transfer of the right to use any goods. The transaction can be either of transfer of right to use the goods or granting mere permission to use the goods without transfer of the right to use the goods.

29. This Court has interpreted sub-clause (d) of Clause 29A in various decisions. The first important decision on this aspect is a decision of the Constitution Bench in the case of ***20th Century Finance Corporation Ltd.***[11]. This was a case where the appellant had entered into a master-lease

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agreement with the lessee. The lessee was a party that desired to take equipment for use on hire. Under the agreement, the appellant agreed to give diverse machinery/equipment listed in the schedule to the master-lease agreement. The master-lease agreement provided that the appellants would place the orders for individual equipment on the request made by the lessee, and the equipment to be leased would be dispatched by the manufacturer or supplier concerned to the location specified in the lease agreement. At the instance of the lessee, the appellant used to place purchase orders to the suppliers or manufacturers for the supply of individual items or equipment. After the equipment was delivered and put to use, the lessee used to execute supplementary lease schedules acknowledging the receipt of the leased equipment. Such supplementary lease agreements used to form an integral part of the master-lease agreements. The controversy arose because some States started levying tax merely because the goods were found to be located in their States at the time of executing the master contract. The States where the goods were delivered started levying taxes on the said goods. In particular, the challenge was to the validity of legislations of various States on the ground that one transaction of transfer of the right to use goods was subjected to tax in different States. In the facts of the case, the issue considered by the Constitution Bench was "Where is the situs of the taxable event on the transfer of right to use goods under Article 366(29-A)(d) of the Constitution." In paragraph 27 of the

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aforesaid decision, the Constitution Bench held that the levy of tax in accordance with Clause 29A(d) is not on the use of goods but on the transfer of the right to use goods. In other words, it was held that the right to use goods accrues only because of the transfer of the right to use goods. It was held that the transfer is *sine qua non* for the right to use any goods. It was held that if the goods are available, the transfer of the right to use goods occurs when the contract for the goods is executed. In other words, if the goods are available, irrespective of whether the goods are delivered and the written agreement is entered into between the parties, a taxable event on such a deemed sale would be executing a contract to transfer the right to use goods. However, when there is no written agreement but an oral or implied transfer of the right to use goods, it may be effected by the delivery of goods. Only in such cases the taxable event would be the delivery of goods. In this context, in paragraph 28, the Constitution Bench held that it cannot be said that there would be no complete transfer of the right to use goods unless the goods are delivered. When the goods are in existence, the taxable event for the transfer of the right to use goods occurs when a contract is executed between the lessor and the lessee, and the situs of sale of such a deemed sale would be where the agreement in respect thereof is executed.

30. There is another decision of this Court in the case of ***BSNL***[5]. This case was decided by a bench of three Hon'ble Judges of this Court. The question decided in this case was

about the nature of the transaction by which mobile phone connections were provided. The question was whether it was a sale of goods that would attract sales tax or a service that would attract service tax under Entry 97 of List-I of the Seventh Schedule to the Constitution of India. There were several issues, including an issue of whether there is any transfer of the right to use any goods by providing access to telephone connection by the telephone service provider to the subscriber. Another issue was whether a transaction of providing a telephone connection was a sale, which is an inter-state sale. There were separate but concurring judgments delivered. Justice Ruma Pal authored the leading judgment for herself and Justice Dalveer Bhandari. In this decision, reference was made to the decision in the case of ***Gannon Dunkerley & Co.***[2]. It was held that even after Clause 29A of Article 366 was introduced, the meaning of the word "goods" was not altered. It was held that even after Clause 29A was introduced, the ingredients of the sale of goods continue to have the same definition as discussed in the case of ***Gannon Dunkerley & Co.***[2]. It was held that the transactions which are mutant sales are limited to Clause 29A of Article 366. However, all the transactions must qualify as sales within the meaning of the Sales Tax Act to levy sales tax. In paragraph 74, the decision in the case of ***20th Century Finance Corporation Ltd.***[11] was interpreted. In paragraphs 74 and 75 of the judgment in the case of ***BSNL***[5], Justice Ruma Pal observed thus:-

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> "**74**. 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 emphasised portions in the quoted passage evidences that the goods must be available when the transfer of the right to use the goods takes place. The Court also recognised that for oral contracts the situs of the transfer may be where the goods are delivered (see para 26 of the judgment).
>
> **75.** In our opinion, the essence of the right under Article 366(29-A)(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."
>
> (underline supplied)

Thus, this Court held that to attract sub-clause (d) of Clause 29A of Article 366, the goods must be available at the time of transfer, must be deliverable and delivered at some stage. If the goods are not deliverable at all by the service provider to the subscriber, the question of the right to use those goods would not arise.

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31. What is relevant in the case of ***BSNL***[5] is the concurring view taken by Dr. AR Laxmanan, J. In paragraph 97, Dr. AR Laxmanan, J held thus:

> "**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 therefor 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."
>
> (underline supplied)

32. The view taken by Dr AR Laxmanan, J has been consistently followed thereafter by this Court in various decisions. In the case of ***Great Eastern Shipping Company Limited***[7]**,** paragraph 97 of the view expressed by Dr. AR

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Laxmanan, J was quoted with approval. A Bench of three Hon'ble Judges of this Court in the case of ***Commissioner of Service Tax, Ahmedabad v. Adani Gas Limited***[14] quoted paragraph 97 of the view expressed by Dr AR Laxmanan, J with approval. In fact, in paragraph 17, the Bench observed that the tests laid down in paragraph 97 of the decision in the case of ***BSNL***[5] have been applied to determine whether the transaction involved the transfer of the right to use any goods under sub-clause (d) of Clause 29A of Article 366 of the Constitution of India.

33. In the case of ***Quick Heal Technologies Ltd.***[8], in paragraph 46, the tests laid down by Dr. AR Laxmanan, J have been quoted with approval. In paragraph 53 of the said decision, this Court held thus:

> "**53.** The following principles to the extent relevant may be summed up:
>
> **53.1.** The Constitution (Forty-sixth Amendment) Act intends to rope in various economic activities by enlarging the scope of "tax on sale or purchase of goods" so that it may include within its scope, the transfer, delivery or supply of goods that may take place under any of the transactions referred to in sub-clauses (*a*) to (*f*) of clause (29-A) of Article 366. The works contracts, hire purchase contracts, supply of food for human consumption, supply of goods by association and clubs, contract for transfer of the right to use any goods are some such economic activities.

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53.2. The transfer of the right to use goods, as distinct from the transfer of goods, is yet another economic activity intended to be exigible to State tax.

53.3. There are clear distinguishing features between ordinary sales and deemed sales.

53.4. Article 366(29-A)(*d*) of the Constitution implies tax not on the delivery of the goods for use, but implies tax on the transfer of the right to use goods. The transfer of the right to use the goods contemplated in sub-clause (*d*) of clause (29-A) cannot be equated with that category of bailment where goods are left with the bailee to be used by him for hire.

53.5. In the case of Article 366(29-A)(*d*) the goods are not required to be left with the transferee. All that is required is that there is a transfer of the right to use goods. In such a case taxable event occurs regardless of when or whether the goods are delivered for use. What is required is that the goods should be in existence so that they may be used.

53.6. The levy of tax under Article 366(29-A)(*d*) is not on the use of goods. It is on the transfer of the right to use goods which accrues only on account of the transfer of the right. In other words, the right to use goods arises only on the transfer of such right to use goods.

53.7. The transfer of right is the *sine qua non* for the right to use any goods, and such transfer takes place when the contract is executed under which the right is vested in the lessee.

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> **53.8.** The agreement or the contract between the parties would determine the nature of the contract. Such agreement has to be read as a whole to determine the nature of the transaction. If the consensus ad idem as to the identity of the good is shown the transaction is exigible to tax.
>
> **53.9.** The locus of the deemed sale, by transfer of the right to use goods, is the place where the relevant right to use the goods is transferred. The place where the goods are situated or where the goods are delivered or used is not relevant."

Thus, to decide the controversy involved in this group of appeals, the contract between the parties will have to be tested on the touchstone of the five tests laid down by Dr AR Laxmanan, J in the case of ***BSNL***[5]. Thus, the contract will be covered by sub-clause (d) of Clause 29A of Article 366, provided all the five conditions laid down are fulfilled. This Court has made a distinction between transferring the right to use and merely a license to use goods. In every case where 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.

34. In Civil Appeal no.3548 of 2017, in the impugned judgment, the Division Bench of the High Court proceeded on the footing that the terms and conditions of the agreement, by which cranes were supplied to ONGC, were more or less similar. In paragraph 12 of the impugned judgment, the

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Division Bench has also dealt with the contracts of supply of water tankers and trailers. Thus, the contracts, as far as the supply of cranes is concerned, are almost identical. It is stated that the contract subject matter of challenge in Civil Appeal nos.3566-3569 of 2017 is slightly different. Therefore, by way of illustration, firstly, we are referring to the terms and conditions of the contract dated 13th April 2006, which is the subject matter of challenge in Civil Appeal no.3548 of 2017. Some of the relevant clauses and features of the said agreement are as follows:

a. Clause 2 regarding scope of work/contract, reads thus:

> "**2. Scope of Work/Contract:**
>
> **1.**The services of the manned (Driver/Operator/Slinger/Khalasi etc. as the case may be) Crane (type of vehicle/equipment to be given) as per the technical specifications given herein or a vehicle/equipment of equivalent technical specifications and acceptable to ONGC, along with the necessary accessories, with valid permits/licenses, insurance etc. Sufficient fuel, in well maintained condition and fulfilling other pre-requisites, should be available for performing the duties as advised by ONGC, at the appointed time and place, throughout the contract period, <u>not by way of lease or transfer or rights, for use of the vehicle/equipment, by the contractor to ONGC.</u>
>
> **2.** .. .."
>
> (underline supplied)

Thus, the contract itself provides that there is no transfer of the right to use the crane/equipment;

b. The other salient features are :

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i. The specifications of cranes and other equipment are provided in clause 3.1. Clause 3.3 provides that apart from the cranes, the contract shall provide a necessary number of slings, hooks, dunnage material and other material for loading and unloading. The specific material is mentioned in the said clause;

ii. Though in clause 6.2, the registration number of two cranes has been mentioned, what is important here is clause 5.2. It provides that even if a particular crane or its documents have been approved by ONGC, when a crane is defective, another crane of similar specifications must be offered as a replacement by the contractor. Therefore, the contract does not remain confined only to the two cranes described in clause 6.2, but the contractor has an obligation to replace the cranes;

iii. The operational staff, such as driver, crane operator, rigor-slinger, khalasi, cleaner, etc. as specifically mentioned in clause 8.17 and 8.18 shall be provided by the contractor. The crew must operate the cranes with requisite safety accessories, such as safety shoes, gloves, safety helmets, etc. The contractor shall provide these safety accessories at his own cost and shall be replaced by him from time to time;

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iv. The contractor shall make arrangements at his own cost for shelter, food, night-stay and other requirements of the staff near the site of operation;

v. The normal working hours on the cranes shall be from 7 to 10 hours with a break of half an hour. These timings shall be subject to change. There shall be four days' maintenance off for the cranes;

vi. The contractor must make adequate and proper arrangements for fuel, lubricants and other consumables, etc., in relation to the cranes and other items. The contractor shall look after the repair and maintenance of the cranes;

vii. The contractor shall ensure that the cranes comply with the requirements of the Motor Vehicles Act, 1988 and the rules and regulations framed thereunder. Similarly, the crew members must be legally competent and hold valid licences;

viii. The contractor will be solely responsible and shall keep ONGC indemnified against any consequence under any law arising from any accident caused to the equipment/property/personnel engaged in the contract. Even for damage or injury to any third party due to the operation of cranes, the contractor will be responsible. The contractor shall safeguard his interest through comprehensive insurance at his own cost, and the

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ONGC shall not be liable to pay any amount towards the insurance;

ix. It will be the contractor's responsibility to arrange parking of the cranes at selected places. However, the contractor shall be responsible for providing the cranes at the requisite site at the requisite time;

x. The insurance taken by the contractor shall cover all the risks of whatsoever nature to any third party, any equipment/property/personnel of the contractor and damage to the property or personnel of ONGC;

xi. It will be the responsibility of the contractor to register himself under the Contract Labour (Regulation and Abolition) Act, 1970; and

xii. It is provided that after using cranes for a specific period, as mentioned in the contract, the contractor has to park the cranes on the sites provided by ONGC at the risk of the contractor.

35. On a conjoint reading of the aforesaid terms of the contract, it is apparent that the contractor has an option of replacing the cranes in case one of the cranes was not working properly. Only the contractor is liable to take care of the legal consequences of using the cranes. The contractor must maintain the cranes, and it is for the contractor to pay

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for consumables like fuel, oil, etc. Even the cranes must be moved and operated by the crew members appointed by the contractor. Moreover, in case of any mishap or accident in connection with the cranes or connection with the use of the cranes or as a consequence thereof, the entire liability will be of the contractor and not of the ONGC. Thus, in short, the contract is for providing the service of cranes to ONGC. The reason is that the transferee (ONGC) is not required to face legal consequences for using the cranes supplied by the contractor. Therefore, the tests laid down in clauses (c) and (d) of paragraph 97 of the decision of Dr AR Laxmanan, J are not fulfilled in this case. Moreover, on a conjoint reading of the aforesaid clauses, it appears that the use of the cranes provided by the contractor to ONGC will be by way of only a permissive use. Though the cranes are used for carrying out the work as suggested by ONGC, the entire control over the cranes is retained by the contractor, inasmuch as it is the contractor who provides crew members for operating the cranes, it is the contractor who has to pay for fuel, oil, etc. and for maintenance of any loss or damage to the equipment of the contractor, staff of the contractor, any third party and staff and property of ONGC. Therefore, we find that as regards the contract to provide cranes, the finding of the High Court that there was a transfer of the right to use cranes was not correct as the transactions do not satisfy all the five tests referred to above.

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36. We have also carefully perused the terms and conditions of the contract subject matter of challenge in Civil Appeal nos.3566-3569 of 2017. The contract concerns hiring services of ten truck-mounted all-terrain hydraulic cranes with the crew. In this case, like the other contracts, Clause 2 provides that the supply of equipment will not be by way of lease or transfer or right to use the equipment. All the other clauses are practically the same. Even in this case, also, the reasons which are recorded earlier will squarely apply. The contracts do not reflect the intention on the part of the contractor to transfer the right to use the goods.

37. Now, we come to Civil Appeal No. 4657 of 2013 and Civil Appeal no.3580 of 2017. In this case, the contract is of 20th November 2008 by and between the ONGC and M/s.Ali Brothers. The contract is for hiring a 20-metre-ton trailer. The salient features of the said contract are as under:

- **a.** Even in this contract, the entire manpower was to be provided by the Contractor;

- **b.** The contractor was required to indemnify ONGC from all the actions, proceedings, claims, demands, and liabilities arising out of or in the course of or caused by the execution of work under the contract;

- **c.** The driver must be appointed by the employer having a valid professional driving license with three years of experience;

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d. The contractor must register himself under the Contract Labour (Regulation and Abolition) Act, 1970;

e. The trailer shall be available for 26 days in a calendar month. The normal working hours will be 12 hours;

f. The contractor shall make his own arrangements for parking all the trailers after duty hours;

g. The contractor shall be responsible for the loss of the material provided by ONGC during transportation. In case of any accident or damage while the trailer is on ONGC duty, there shall be no liability of any nature incurred by the ONGC;

h. The contractor must take insurance of trailers covering all the risks and liabilities, which will cover unlimited third-party claims and the claims under the Workmen's Compensation Act, 1923, made by the workmen.

38. Looking at these clauses, it is obvious that the contractor fully controls the trailers during the contract period, and therefore, again, this is a case of a license granted to ONGC to use the trailer, and the right to use the trailer is not transferred to ONGC. Hence, test (c) out of the five tests is not fulfilled in this case.

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39. Now, we come to Civil Appeal no.383 of 2013. In this case, the contract was for operating tank trucks to deliver petroleum products at specified rates. The salient features of the contract are as under:

a. The contractors shall operate the tank trucks;

b. IOCL will have the right to requisition a further number of tank trucks in addition to what is provided in the contract;

c. IOCL did not guarantee any minimum turnover, whether daily, monthly or annually, during the contract period and therefore, the contractor will not be entitled to take ideal charges or minimum charges from IOCL;

d. The entire operational cost, including salary and other emoluments of drivers, cleaners, cost of fuel and lubricating oil, maintenance and repairs of the tank trucks, road tax and other taxes, and insurance shall be borne by the Contractor;

e. The contractor will be liable to any loss or damage caused to the IOCL, its employees or any third party resulting from fire, leakage, negligence, explosion, accident or any other cause in operating the said tank trucks at the time of loading and unloading and during transit;

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f. The personnel of IOCL will do the loading of the tank trucks at the depot with the help of the driver and the cleaner, but the unloading will be the responsibility of the contractor;

g. The complete responsibility for delivering the correct quality and quantity of the products at the destination will be of the contractor;

h. The contractor will keep the tank trucks in serviceable condition. In the event that a tank truck is not serviceable, the contractor shall be bound to effect supplies to outstation in drums by using stake trucks;

i. The contractor shall remain fully responsible to IOCL for custody of the product, its quantity and quality;

j. If the contractor fails to place its tank trucks at the depots of IOCL, it will be the contractor's responsibility to engage tank trucks from outside.

40. On a conjoint reading of the clauses mentioned above, it is apparent that there is no intention to transfer the use of any particular tank truck in favour of ONGC. The contract is to provide tank trucks for the transportation of goods. Once the tank trucks provided by the contractor are loaded with goods, the entire responsibility of their safe transit, including avoiding contamination, delivery, and unloading at the

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destination, is of the contractor. The test (c) is not satisfied in this case. Therefore, it is impossible to conclude that there is a transfer of the right to use tank trucks in favour of IOCL. Essentially, it is a contract to provide the service of transporting the goods using tank trucks to IOCL. Therefore, even in this case, all the five tests laid down by Dr AR Laxmanan, J are not fulfilled.

41. Now, at this stage, we may refer to Section 65(105)(zzzzj) of the Finance Act, which was brought into force with effect from 16th May 2008. Section 65(105)(zzzzj) reads thus:

> **"Section 65. Definitions – .. ..**
>
> (1) .. ..
>
> . .. .
>
> (105) "Taxable service" means any service provided or to be provided –
>
> (a) .. ..
>
> . .. .
>
> (zzzzj) 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."

It provides that "taxable service" means any service provided to any person by any other person in relation to the supply of tangible goods, including machinery, equipment and

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appliances for use without transferring the right of possession and effective control of such machinery, equipment and appliances.

42. Essentially, the transfer of the right to use will involve not only possession, which may be granted at some stage (after execution of the contract), but also the control of the goods by the user. 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. Whenever there is no such control on the goods vested in the person to whom the supply is made, the transaction will be of rendering service within the meaning of Section 65(105)(zzzzj) of the Finance Act after the said provision came into force.

CONCLUSION

43. To conclude, all the appeals preferred by the assessees will have to be allowed.

44. Accordingly, we allow all the appeals of the assessees by holding that the contracts are not covered by the relevant provisions of the Sales Tax Act and of the VAT Act, as the contracts do not provide for the transfer of the right to use the goods made available to the person who is allowed to use the same. Civil Appeal no.3580 of 2017 preferred by the Union of India is disposed of in view of the earlier findings with the liberty to the Union of India to initiate proceedings, if any, for recovery of service tax in accordance with law.

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45. There will be no order as to costs.

…………………………J.
(Abhay S. Oka)

…………………………J.
(Rajesh Bindal)

New Delhi;
January 9, 2024.