

ST not leviable on supply of gensets for short period as it is amounts to deemed sales

The CESTAT, New Delhi in *M/S Subhash Light House v. Commissioner, Central Goods & Service [Service Tax Appeal No. 50176 of 2019 Tax, Audit-II dated February 02, 2022]* held that the gensets were made available for delivery to the clients as per the agreement between the assessee and the clients that gave clients legal right to use such gensets as agreed upon between the assessee and the clients; and the assessee cannot transfer the gensets to any other client during the period of agreement. Thus, the supply of gensets is to be considered as sale of goods in terms of Article 266(29A) of the Constitution of India and no Service tax is payable on the same.

Facts:

M/s Subhash Light House ("**the Appellant**") is engaged in the business of supply of generator sets on rental basis to their clients in two manners i.e., supplying fixed gensets to the clients and installing the same in the premises of the clients and the second where the clients require transportable mobile gensets for a shorter period such gensets were fixed in vehicles and which was under the provisions of VAT or Sales Tax considering the same as 'deemed sales' in terms of Article 366(29A) of the Constitution of India and VAT/Sales Tax was paid on the consideration received by the Appellant.

Further, the Commissioner of Central Goods and Services Tax ("**the Respondent**") issued a Show Cause Notice dated August 31, 2016 ("**the SCN**") demanding service tax on the entire consideration received by the Appellant during the Financial Year ("**F.Y.**") 2011-12 to 2015-16 invoking extended period of limitation.

The Respondents vide Order-in-Original dated October 23, 2018 ("**the Impugned Order**") held that the Appellant had installed generators at the place of clients, and no diesel etc. was provided by him, which cannot be the supply of mobile/ transportable gensets as deemed sale, and confirmed the Service tax liability against transactions on the ground that in most of the cases the Appellant had provided gensets 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. The entire activity falls under the definition of 'Supply of Tangible Goods Service' as defined under Section 65(105)(zzzzj) of the Finance Act, 1994 ("**the Finance Act**"), and was liable to Service tax and such activity was out of the purview of Article 366(29A) of the Constitution of India.

Issue:

Whether the supply of mobile gensets by the Appellant to his clients was a service / declared service as held by the Respondent or the same is a sale or deemed sale in terms of the Article 366(29A)(d) of the Constitution of India?

Held:

The CESTAT, New Delhi in ***Service Tax Appeal No. 50176 Of 2019 Tax, Audit-II dated February 02, 2022*** held as under:

- Analysed Article 366(29A)(d) of the Constitution of India and held that 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.
- Observed that the Appellant has supplied the mobile gensets to his clients for short periods along with technicians and fuel as per the requirement of the client to use such gensets to ensure uninterrupted supply of electricity at the clients place/site. The gensets were supplied purely on the requirement or order of the clients. It was not necessary that the gensets provided to the client was surely put to use or generate electricity for the period of time for which it was hired by the client, the genset was delivered to the client and was under effective control and possession of the client. In view of such condition, the client was at liberty to run or not to run the gensets hired by him for generation of electricity. In any case, he was liable to pay the hire or lease rent.
- Observed that the gensets were available for delivery to the clients as per the agreement between the Appellant and the clients that gave clients legal right to use such gensets as agreed upon between the Appellant and the clients; and the Appellant cannot transfer the gensets to any other client during the period of agreement. Thus, the criteria fixed by the Apex Court in ***Bharat Sanchar Nigam Ltd. (BSNL) v. Union of India [2006(2)STR 161 SC]*** 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.
- Noted that the CBEC vide ***Circular No. 198/08/2016-Service Tax, dated August 17, 2016*** has provided distinction between transactions as sale of goods or supply of services, where it clarified in such a situation 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 in above-mentioned case, the supply of gensets is to be considered as sale of goods in terms of Article 266(29A) of the Constitution of India.

- Set aside the Impugned order, observed that the Appellant had discharged his liabilities under the VAT/Sales Tax law as per the VAT/ CST, no liability was there on the part of the Appellant under the Service Tax law.
- Held that extended period of limitation is not available.

Relevant Provisions

Article 266 in The Constitution of India 1949

“Consolidated Funds and public accounts of India and of the States

(1) Subject to the provisions of Article 267 and to the provisions of this Chapter with respect to the assignment of the whole or part of the net proceeds of certain taxes and duties to States, all revenues received by the Government of India, all loans raised by that Government by the issue of treasury bills, loans or ways and means advances and all moneys received by that Government in repayment of loans shall form one consolidated fund to be entitled the Consolidated Fund of India, and all revenues received by the Government of a State, all loans raised by that Government by the issue of treasury bills, loans or ways and means advances and all moneys received by that Government in repayment of loans shall form one consolidated fund to be entitled the Consolidated Fund of the State

(2) All other public moneys received by or on behalf of the Government of India or the Government of a State shall be entitled to the public account of India or the public account of the State, as the case may be

(3) No moneys out of the Consolidated Fund of India or the Consolidated Fund of a State shall be appropriated except in accordance with law and for the purposes and in the manner provided in this Constitution”

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