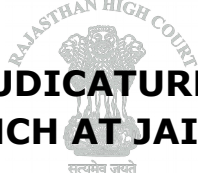


**HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR**



S.B. Sales Tax Revision / Reference No. 132/2020

Assistant Commercial Taxes Officer, Anti- Evasion-Iii, Ward -I,
Rajasthan, Jaipur.

----Petitioner

Versus

M/s Agarwal Carriers And Lifters, 70, Kishan Nagar, Janpath,
Shyam Nagar, Jaipur.

----Respondent

Connected With

S.B. Sales Tax Revision / Reference No. 36/2020

Assistant Commercial Taxes Officer, Ward-Iii ,anti-Evasion ,circle-
Ii ,jaipur

----Petitioner

Versus

M/s Aditya Break Down Service, 5 Transport Nagar ,jaipur

----Respondent

S.B. Sales Tax Revision / Reference No. 37/2020

Assistant Commercial Taxes Officer, Ward -Iii ,anti -Evasion
,circle-Ii ,jaipur

----Petitioner

Versus

M/s Aditya Break Down Service, 5 Transport Nagar ,jaipur

----Respondent

S.B. Sales Tax Revision / Reference No. 39/2020

Assistant Commercial Taxes Officer, Ward-Iii ,anti-Evasion ,circle-
Ii ,jaipur

----Petitioner

Versus

M/s Aditya Break Down Service, 5 Transport Nagar , Jaipur

----Respondent

S.B. Sales Tax Revision / Reference No. 40/2020

Assistant Commercial Taxes Officer, Anti -Evasion ,circle-Ii ,ward
-Iii ,raj .jaipur



----Petitioner

Versus

M/s Aditya Break Down Service, 5 Transport Nagar ,jaipur

----Respondent

S.B. Sales Tax Revision / Reference No. 41/2020

Assistant Commercial Taxes Officer, Anti -Evasion ,circle -Ii
,ward-Iii ,raj .jaipur

----Petitioner

Versus

M/s Aditya Break Down Service, 5 Transport Nagar ,jaipur

----Respondent

S.B. Sales Tax Revision / Reference No. 44/2020

Assistant Commercial Taxes Officer, Ward-Iii , Anti -Evasion
,circle-Ii,jaipur

----Petitioner

Versus

M/s Aditya Break Down Service, 5 Transport Nagar ,jaipur

----Respondent

S.B. Sales Tax Revision / Reference No. 45/2020

Assistant Commercial Taxes Officer, Ward-Iii ,anti-Evasion ,circle-Ii
,jaipur

----Petitioner

Versus

M/s Aditya Break Down Service, 5 Transport Nagar ,jaipur

----Respondent

S.B. Sales Tax Revision / Reference No. 46/2020

Assistant Commercial Taxes Officer, Ward-Iii ,anti- Evasion ,
Circle -Ii ,jaipur

----Petitioner

Versus

M/s Aditya Break Down Service, 5 Transport Nagar ,jaipur

----Respondent

S.B. Sales Tax Revision / Reference No. 47/2020

Assistant Commercial Taxes Officer, Anti -Evasion ,circle -Ii ,ward

-Iii ,raj . Jaipur

----Petitioner

Versus

M/s Aditya Break Down Service, 5 Transport Nagar ,jaipur

----Respondent

S.B. Sales Tax Revision / Reference No. 48/2020

Assistant Commercial Taxes Officer, Anti-Evasion, Circle-Ii, Ward-Iii, Raj. Jaipur

----Petitioner

Versus

M/s Aditya Break Down Service, 5, Transport Nagar, Jaipur

----Respondent

S.B. Sales Tax Revision / Reference No. 49/2020

Assistant Commercial Taxes Officer, A Ward-Iii, Anti-Evasion, Circle-Ii, Raj. Jaipur

----Petitioner

Versus

M/s Aditya Break Down Service, 5, Transport Nagar, Jaipur

----Respondent

S.B. Sales Tax Revision / Reference No. 50/2020

Assistant Commercial Taxes Officer, Anti-Evasion, Circle-Ii, Ward-Iii, Raj. Jaipur

----Petitioner

Versus

M/s Aditya Break Down Service, 5, Transport Nagar, Jaipur

----Respondent

S.B. Sales Tax Revision / Reference No. 68/2020

Assistant Commercial Taxes Officer, Ward-Iii, Anti-Evasion, Circle-Ii, Raj. Jaipur

----Petitioner

Versus

M/s Aditya Break Down Service, 5, Transport Nagar, Jaipur

----Respondent

S.B. Sales Tax Revision / Reference No. 78/2020

Assistant Commercial Taxes Officer, Ward-Iii, Anti-Evasion,
Circle-Ii, Jaipur

----Petitioner

Versus

M/s Aditya Break Down Service, 5 Transport Nagar, Jaipur

----Respondent

S.B. Sales Tax Revision / Reference No. 93/2020

Assistant Commercial Taxes Officer, Ward-Iii ,anti-Evasion ,circle-
Ii ,jaipur

----Petitioner

Versus

M/s Aditya Break Down Service, 5 Transport Nagar , Jaipur

----Respondent

S.B. Sales Tax Revision / Reference No. 131/2020

Assistant Commercial Taxes Officer, Anti-Evasion-Iii, Ward-I,
Rajasthan, Jaipur.

----Petitioner

Versus

M/s Agarwal Carriers And Lifters, 70, Kishan Nagar, Janpath,
Shyam Nagar, Jaipur.

----Respondent

S.B. Sales Tax Revision / Reference No. 133/2020

Assistant Commercial Taxes Officer, Anti-Evasion-Iii, Ward-I,
Rajasthan, Jaipur

----Petitioner

Versus

M/s Agarwal Carriers And Lifters, 70, Kishan Nagar, Janpath,
Shyam Nagar, Jaipur.

----Respondent

S.B. Sales Tax Revision / Reference No. 134/2020

Assistant Commercial Taxes Officer, Anti-Evasion-Iii, Ward-I,
Rajasthan, Jaipur.

----Petitioner

Versus

M/s Agarwal Carriers And Lifters, 70, Kishan Nagar, Janpath,

Shyam Nagar, Jaipur.

-----Respondent

S.B. Sales Tax Revision / Reference No. 135/2020

Assistant Commercial Taxes Officer, Anti-Evasion-Iii, Ward-I,
Rajasthan, Jaipur.

-----Petitioner

Versus

M/s Agarwal Carriers And Lifters, 70, Kishan Nagar, Janpath,
Shyam Nagar, Jaipur.

-----Respondent

S.B. Sales Tax Revision / Reference No. 136/2020

Assistant Commercial Taxes Officer, Anti-Evasion-Iii, Ward-I,
Rajasthan, Jaipur.

-----Petitioner

Versus

M/s Agarwal Carriers And Lifters, 70, Kishan Nagar, Janpath,
Shyam Nagar, Jaipur.

-----Respondent

S.B. Sales Tax Revision / Reference No. 137/2020

Assistant Commercial Taxes Officer, Anti-Evasion-Iii, Ward-I,
Rajasthan, Jaipur

-----Petitioner

Versus

M/s Agarwal Carriers And Lifters, 70, Kishan Nagar, Janpath,
Shyam Nagar, Jaipur

-----Respondent

S.B. Sales Tax Revision / Reference No. 138/2020

Assistant Commercial Taxes Officer, Anti-Evasion-Iii, Ward-I,
Rajasthan, Jaipur.

-----Petitioner

Versus

M/s Agarwal Carriers And Lifters, 70, Kishan Nagar, Janpath,
Shyam Nagar, Jaipur.

-----Respondent

S.B. Sales Tax Revision / Reference No. 139/2020

Assistant Commercial Taxes Officer, Anti-Evasion-Iii, Ward-I,
Rajasthan, Jaipur.

----Petitioner

Versus

M/s Agarwal Carriers And Lifters, 70, Kishan Nagar, Janpath,
Shyam Nagar, Jaipur.

----Respondent

S.B. Sales Tax Revision / Reference No. 141/2020

Assistant Commercial Taxes Officer, Anti-Evasion-Iii, Ward-I,
Rajasthan, Jaipur.

----Petitioner

Versus

M/s Agarwal Carriers And Lifters, 70, Kishan Nagar, Janpath,
Shyam Nagar, Jaipur

----Respondent

For Petitioner(s)	:	Mr. Punit Singhvi with Mr. Akshay Singh
For Respondent(s)	:	Mr. Alkesh Sharma with Mr. Ayush Sharma Mr. Himanshu Morwal Mr. Mukesh Bhardwaj Mr. Dinesh Kumar

HON'BLE MR. JUSTICE SAMEER JAIN

Order

Reportable

Reserved on **06/02/2023**

Pronounced on **13/04/2023**

1. With the consent of the parties, the revision petitions
were admitted on the following question of law:-

*"Whether in the facts and circumstances of the
case of Rajasthan Tax Board was justified in
law in holding that the crane services given by
the assessee to the Govt./Private institution
will not fall within the ambit of Section 2(36)
(iv) of the RVAT Act-2003 and will not fall*

within the ambit of transfer of right to use goods?"

2. At the outset, it is pertinent to note that notice(s) in the instant matter were issued vide order dated 30.06.2020. Thereafter, as per order-sheet dated 29.07.2020, service upon the respondent was reflected to be complete. Accordingly, the matter is being taken up for final disposal.

3. Considering the fact that the revision petitions involve common facts as well as questions of law, STR Nos. 36/2020 and 132/2020 titled as Assistant Commercial Taxes Officer vs. M/s Aditya Break Down Service and Assistant Commercial Taxes Officer vs. M/s Agarwal Carriers and Lifters respectively, are being taken up as the lead cases/files.

4. Learned counsel for the petitioners has submitted that the matter pertains to the assessment years, 2006/2007 to 2010/2011. A survey was conducted at the premises of the respondent on 22.11.2011. The Assessing Officer found that the respondent-assessee indulged in providing crane services to various customers, inadvertently giving them the right to use and therefore, transferring goods from one person to another i.e. a transfer of right to use goods for any purpose for valuable consideration and assessment. Therefore, the same ought to have been deemed a 'sale' in terms of Article 366(29A) of the Constitution of India and the definition of 'sale' under Section 2(35)(iv) of The Rajasthan Value Added Tax Act, 2003. The relevant provision is reproduced hereinunder:-

"Section 2(35): "sale" with all its grammatical variations and cognate expressions means every transfer of property in goods by one person to

another for cash, deferred payment or other valuable consideration and includes, (iv) a transfer of the right to use goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration."

5. In this regard, it was submitted by the learned counsel for the petitioner that the aforementioned sale had not been disclosed/shown by the respondent-assessee and therefore, in such circumstances, the Assessing Officer imposed tax, interest and penalty upon the respondent-assessee vide Assessment Order dated 16.12.2011. Thereafter, aggrieved by the said order, the assessee preferred an appeal. The Appellate Authority, vide order dated 06.07.2012, upheld the levy of tax with regard to the Transport Department. Whereas, for the other stakeholders/parties, the matter was remanded back to the Assessing Authority for certain verification(s) subject to the directions contained in the order dated 06.07.2012. Subsequently, in compliance of the order(s) of the Appellate Authority qua the remand and the direction(s) contained therein, the Assessment Officer passed an order dated 24.06.2014, in favour of the Revenue. Further aggrieved, the respondent-assessee preferred an appeal before the Appellate Authority, whereby vide order dated 27.08.2015, the same was decided in favour of the respondent-assessee.

6. Against the order dated 27.08.2015, the Revenue preferred appeal before the Rajasthan Tax Board. However, vide impugned order dated 30.09.2019, the aforementioned appeal preferred by the Revenue was dismissed and the issue was adjudicated in favour of the respondent-assessee. As a result, the

Revenue has approached this Court by way of the present Sales Tax Revision, on the following question of law:-

"Whether in the facts and circumstances of the case of Rajasthan Tax Board was justified in law in holding that the crane services given by the assessee to the Govt./Private institution will not fall within the ambit of Section 2(36)(iv) of the RVAT Act-2003 and will not fall within the ambit of transfer of right to use goods?"

7. It was submitted by the learned counsel for the Revenue that the impugned order passed by the Rajasthan Tax Board is bad-in-law and perverse to the settled position of the law, as the learned Tax Board, did not apply its own mind in consonance with the relevant documents highlighting the correct legal position qua the connotations of a 'sale', as provided under The Rajasthan Value Added Tax Act, 2003 (hereinafter, Act of 2003). In this regard, he relied upon Section 2(35)(iv) of the Act of 2003 and submitted that tax has to be charged in all circumstances encapsulating the transfer of right to use goods, as the definition of 'sale' as provided under Section 2(35)(iv) is in consonance with Article 366(29A) of the Constitution of India. Furthermore, learned counsel also submitted that as per the established facts and circumstances of the case, it is demonstrated that the assessee was involved in giving the cranes for the purpose of using the same, for monetary consideration, as contemplated under Section 2(35)(iv) of the Act of 2003 and accordingly, in this regard, the Assessing Officer has given detailed findings both the times i.e. in the first round as well as in the remand order. Lastly, it was also submitted that for a fix period of

time, the crane services were absolutely under the control and disposal of the Transport Department and other private institutions/bodies, as given to by the respondent-assessee. Therefore, the learned Tax Board's holding is without any cogent and legally sustainable justification.

8. In this regard, learned counsel for the Revenue placed reliance upon the Apex Court judgment in **(2020) 3 SCC 354** titled as **Great Eastern Shipping Company Ltd. vs. State of Karnataka & Ors.** In the said judgment, it was held that to constitute transfer of the right to use goods, the following conditions have to be satisfied, namely:

- (a) availability of goods for delivery,
- (b) legal right of transferee to use the goods, and
- (c) availability of such legal right to the exclusion of the transferor for the duration of such right.

9. Relying upon the said judgment, it was submitted by learned counsel for the Revenue that in the facts and circumstances of the present case, it was categorically held by the Assessing Authority that the respondent-assessee had supplied the crane to the Transport Department along with a driver as well as a helper, for a duration of 12 hours. It was further observed by the Assessing Authority that for the said duration, the crane was in the custody of the Transport Department and was used as per their directions only, exclusive of any interference of the respondent-assessee. Moreover, the crane was even supplied by the respondent-assessee at the desired place of the concerned Transport Department. Therefore, without any stretch of imagination, it can be certainly said that the control and right to

use the crane vested exclusively with the Transport Department only. Accordingly, it was argued that the necessary conditions as laid down by the Apex Court in **Great Eastern Shipping Company Ltd (Supra)** for constituting the transfer of the right to use goods are duly met out in the facts and circumstances of the instant case.

10. Learned counsel further placed reliance upon condition Nos.17 and 28, as enumerated in the contract entered between the respondent-assessee and the Transport Department. They are reproduced herein-under:-

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'krZ la[;k %& 28

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In light of the stipulations as prescribed under the aforementioned conditions, learned counsel submitted that there was a transfer of control for the use of the crane from the respondent-assessee to the Transport Department. As a result, it was conclusively argued by the learned counsel for the Revenue that the control and the right to use the goods deliverable i.e. crane, lay exclusively with the Transport Department. Therefore, in light of the arguments raised herein-above and relying upon the judgment of **Great Eastern Shipping Company Ltd (Supra)**, it was argued that the Appellate Authority and the Tax Board committed a great error in not constituting the said transfer of the right to use the goods as a 'sale' as provided under Section 2(35)(iv) of the Act of 2003 read with Article 366(29A) of the Constitution of India.

11. *Per contra*, learned counsel for the respondent-assessee has vehemently opposed the contentions as raised by the Revenue and has submitted that the contract as entered

between the respondent-assessee and the Transport Department does not constitute a 'sale' as provided under the law and therefore, the order of the learned Tax Board does not call for any interference of this Court. In support of his contentions, learned counsel for the respondent-assessee has relied upon a plethora of judgments, including those reported in **Rasthriya Ispat Nigam Ltd. Vs. Commerical Taxes Officer, Company Circle, Visakhapatnam: (1990) 77 STC 182 (A.P.), State of Andra Pradesh & Anr. Vs. Rasthriya Ispat Nigam Ltd.:(2002) 126 STC 114 (S.C.), Tripura Bus Syndicate Vs. State of Tripura & Ors.:(1997) 105 STC 409 (Gauhati), Ahuja Goods Agency and Anr. Vs. State of Uttar Pradesh & Ors.:(1997) 106 STC 540 (All.), Rungta Projects Limited & Ors. Vs. State of Bihar & Ors.:(1998) 108 STC 234 (Pat.), Saumya Mining Pvt. Ltd. Vs. Commissioner of Taxes, Assam & Ors.:(2006) 146 STC 343 (Gauhati), Commissioner, Trade Tax, U.P., Luknow Vs. Regional Manager, U.P.S.R.T.C., Azamgarh:(2008) 16 VST 226 (All.), Commissioner, Trade Tax, U.P., Lucknow Vs. Nand Transport Co.:(2208) 16 VST 381 (all.), Mohd. Wasim Khan Vs. Commissioner of Trade Tax:(2009) 20 VST 196 (all.) and R.P. Kakoti Vs. Oil & Natural Gas Commission & Ors.:(2009) 22 VST 136 (Gauhati).**

12. Learned counsel for the respondent has also relied upon the judgment of the Apex Court in **Bharat Sanchar Nigam Ltd. & Anr. vs. Union of India & Ors.: (2006) 145 STC 91 (S.C.)** and **Commissioner, VAT, Trade and Taxes Department vs. International Travel House Limited: (2009) 25 VST 653 (Delhi)**. While placing reliance upon the said judgments, learned

counsel has submitted that Condition Nos. 17 and 28, as mentioned herein-above, categorically reflect that in terms of the contract dated 13.10.2008, the contract was entered between the respondent-assessee and the Transport Department, for the sole purpose of hiring and leasing the crane, whereby, the delivery of crane and functions relating thereto were within the control of the respondent-assessee. Furthermore, upon an analysis of Condition Nos. 17 and 28, it was argued that the respondent-assessee had the contractual obligation to supply the driver and helper alongside the crane. Moreover, any duties qua the repair and maintenance of the cranes so delivered, were to be undertaken by the respondent-assessee as well, during the tenure of the contract. Moreover, the respondent-assessee also had the additional duty to maintain a log book qua the usage of the said crane. Therefore, without any stretch of imagination, it cannot be said that the Transport Department had the right to use the services of the crane, exclusive of the control of the respondent-assessee. Hence, after relying upon the terms and conditions of the contract, particularly Condition Nos. 17 and 28, the learned Tax Board had rightly adjudicated the questions of fact in favour of the respondent-assessee.

13. In order to substantiate upon their submissions qua the effective control and possession of the cranes with the respondent-assessee itself, learned counsel submitted that the Tax Board had held that the consumer of the service i.e. Transport Department, just wanted to consume/ utilize the desired services of loading, unloading, lifting and shifting with the help of the cranes. There was no reference in the contract, either direct or

otherwise, to deal with the cranes in a specified manner by the consumer-Transport Department. Rather, the contract only included specific stipulations qua the performance of certain specific services with regards to the cranes. Therefore, it cannot be held that the control and possession of the crane was specified with the consumer-Transport Department, as the main instrumentalities, including the driver and helper were provided by the respondent-assessee. Additionally, the duties of re-fueling petrol, maintenance of log book, reparation and maintenance of the cranes etc. lay on the respondent-assessee as well.

14. In light of the submissions made herein-above, it was argued that the judgments, as cited by the learned counsel for the Revenue, are not applicable to the facts and circumstances of the present case. At the risk of repetition, it was conclusively submitted that there was no exclusive control and possession on part of the consumer-Transport Department. The contract between the parties was in the nature of a service contract, wherein the consumer-Transport Department could utilize the services of the crane for its intended purposes. It was argued that the said observation had also been duly noted by the learned Tax Board as well as the Appellate Authority in the impugned order(s). In this regard, it was also submitted that considering the fact that the contract pertained to providing services, the due amount of service tax was also paid by the respondent-assessee with the concerned authorities. Therefore, in the facts and circumstances of the instant matter, the subject of levy of tax pertains to the powers under the Union List. Accordingly, the crane services provided by the respondent-assessee do not constitute sale as

provided under Section 2(35)(iv) of the Act of 2003. Hence, the order of the learned Tax Board does not call for any interference of this Court.

15. Heard the arguments advanced by the learned counsel for the parties, scanned the record of the case and perused the judgments cited at Bar.

16. At the outset, it is observed that vide impugned order dated 30.09.2019, the learned Tax Board has duly analysed the contract dated 13.10.2008 and has given a categoric and unequivocal finding that the said contract was a contract of service and not of sale. The consumer i.e. Transport Department had demanded the services of loading, unloading, lifting and shifting, by way of the crane, from the respondent-assessee. Furthermore, in terms of the said contract, no specifications were incorporated as to highlight and warrant the exclusive control of the consumer-Transport Department over the said cranes in question. In this regard, even a cursory glance over Condition Nos. 17 and 28 of the contract dated 13.10.2008 reflect that it was the contractual obligation of the respondent-assessee to provide a driver and helper along with the crane. Moreover, even the responsibility qua the repair-work and maintenance of the cranes so delivered, was to be undertaken by the respondent-assessee itself. In addition to the said tasks, the respondent-assessee was also required to maintain a log book qua the usage of the crane and the incidental tasks that came therewith. Furthermore, the crane as provided to the consumer-Transport Department, could also be interchanged/exchanged at any point in time during the sustenance of the contract. Therefore, without an iota of doubt, it

could be said that the consumer-Transport Department did not enjoy the exclusive control and possession of the crane, for the reasons mentioned herein-above. Accordingly, the contract dated 13.10.2008, did not give rise to a transfer of the right to use goods as stipulated under Section 2(35)(iv) of the Act of 2003 read with Article 366(29A) of the Constitution of India. It is also noteworthy that as the contract dated 13.10.2008 was essentially a contract of service, the respondent-assessee had duly paid the amount of service tax leviable upon them. Therefore, in the facts and circumstances of the instant matter, the crane services provided by the respondent-assessee do not constitute sale as provided under Section 2(35)(iv) of the Act of 2003.

17. The reliance placed by the learned counsel for the respondent-assessee on the judgment of the Apex Court in **Bharat Sanchar Nigam Ltd. (Supra)** is noteworthy for the efficacious adjudication of the instant petition. The relevant extract(s) from the said judgment are reproduced herein-under:

"45. Of all the different kinds of composite transactions the drafters of the 46th Amendment chose three specific situations, a works contract, a hire purchase contract and a catering contract to bring within the fiction of a deemed sale. Of these three, the first and third involve a kind of service and sale at the same time. Apart from these two cases where splitting of the service and supply has been Constitutionally permitted in clauses (b) and (g) of Clause 29A of Article 366, there is no other service which has been permitted to be so split. For example the clauses of Article 366(29A) do not cover hospital services. Therefore, if during the treatment of a patient in a hospital, he or she is given a pill, can the sales tax authorities tax the transaction as a sale? Doctors, lawyers and other professionals render service in the course of which can it be said that there

is a sale of goods when a doctor writes out and hands over a prescription or a lawyer drafts a document and delivers it to his/her client? Strictly speaking with the payment of fees, consideration does pass from the patient or client to the doctor or lawyer for the documents in both cases.

46. The reason why these services do not involve a sale for the purposes of Entry 54 of List II is, as we see it, for reasons ultimately attributable to the principles enunciated in Gannon Dunkerley's case, namely, **if there is an instrument of contract which may be composite in form in any case other than the exceptions in Article 366(29A), unless the transaction in truth represents two distinct and separate contracts and is discernible as such, then the State would not have the power to separate the agreement to sell from the agreement to render service, and impose tax on the sale.** The test therefore for composite contracts other than those mentioned in Article 366(29A) continues to be-did the parties have in mind or intend separate rights arising out of the sale of goods. If there was no such intention there is no sale even if the contract could be disintegrated. **The test for deciding whether a contract falls into one category or the other is to as what is 'the substance of the contract. We will, for the want of a better phrase, call this the dominant nature test.**

98. 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.

18. It is observed that the test to decide whether a contract falls into one category or the other is to ascertain what is the "substance of the contract". By applying the said test, one can discern the dominant nature of the contract and thereafter, analyze the tax leviable upon the transactions arising from the same. Hence, before levying tax on a transaction, one must look at the predominant nature of the contract. Accordingly, in terms of the said test, if we were to scrutinize a transaction/contract to deem the same to be a contract for sale under Section 2(35)(iv) of the Act of 2003, the following attributes would stand as indispensable characteristics, as held by the Apex Court in **Great Eastern Shipping Company Ltd (Supra)** namely; availability of the goods for delivery, the corresponding right/ legal right of transferee to use the said goods and availability of such legal right to the exclusion of transferor for the duration of such right. However, in the case at hand, it is clear that the contract dated 13.10.2008 was a contract of service and not sale, as the consumer i.e. Transport Department had demanded the specific services of loading, unloading, lifting and shifting, by way of the said contract. It cannot be said that consumer had the exclusive right to use the crane or that the said crane was under the control and possession of the consumer, as is illustrated by the fact that the conditions in the contract provided for the respondent- assessee to undertake the care and maintenance of the cranes

during the sustenance of the contract and also supply the services of a driver and helper alongside the crane. Therefore, inadvertently, keeping the control and possession within the realms of the respondent-assessee.

19. Accordingly, upon a consideration of the nature of the tasks outlined by the contract dated 13.10.2008 qua the services to be performed/undertaken during the operation of the agreement and upon further considering the fact that that the learned Tax Board vide impugned order dated 30.09.2019 has furnished a categoric and unequivocal finding that the said contract was a contract of service and not of sale and the fact that the respondent-assessee has duly paid the service tax as leviable upon the said transaction, this Court is of the view that the crane services provided by the respondent-assessee do not constitute sale as provided under Section 2(35)(iv) of the Act of 2003 and hence, the order of the learned Tax Board does not call for any interference of this Court.

20. At the risk of repetition, it is imperative to note that the effective control of the crane, even while the same was in the use of the consumer for the tasks so contracted for, was that of the respondent-assessee. The consumer-Transport Department was not free to make use of the crane for the works other than those contracted for with the respondent-assessee or even take the said crane out from a specific area during the period of the contract when the crane was in his use. Therefore, the control and possession of the crane, as evidenced by the requirements imposed under Condition Nos. 17 and 28, lay with the respondent-assessee only. Hence, there were no mitigating circumstances

warranting the contract dated 13.10.2008 to encapsulate a sale as provided under Section 2(35)(iv) of the Act of 2003 read with Article 366(29A) of the Constitution of India. Lastly, the reliance placed by the learned counsel for the Revenue on the judgment of the Apex Court in **Great Eastern Shipping Company Ltd (Supra)** is distinguishable in the facts and circumstances of the instant case, especially on account of the stipulations incorporated under Condition Nos. 17 and 28 of the contract dated 13.10.2008.

21. Accordingly, this court is of the view that present revision petitions call for no interference of this Court. The question of law, as formulated above, is answered in favour of the respondent-assessee and against the Revenue.

22. In light of the above, the Sales Tax Revisions are dismissed. Pending applications, if any, also stand disposed of.

(SAMEER JAIN),J