

- Read:** 1. Application dated 30-06-2008 by M/s. Wings Travels.
 2. Application dated 30-06-2008 by M/s. Sai Anand Travels Pvt. Ltd.
 3. Determination order in the case of M/s. Wings Travels and M/s. Sai Anand Travels Pvt. Ltd. No.DDQ-11-2008/Adm-3/29/B-1 Mumbai dt.11.04.2011
 No.DDQ-11-2008/Adm-3/30
 4. Hon. Maharashtra Sales Tax Tribunal order dt.01.07.2012 in VAT Appeal No.98 and 99 of 2011 in the case of M/s. Wings Travels and M/s. Sai Anand Travels Pvt. Ltd., respectively.
Heard: 1. Sh. S. A. Gundecha, Advocate and Sh. Nitin Shah, Advocate for M/s. Wings Travels
 2. None for M/s. Sai Anand Travels Pvt. Ltd.

PROCEEDINGS

(under section 56(1) (e) and (2) of the Maharashtra Value Added Tax Act, 2002)

No.DDQ-11-2014/Adm-6/Remand/11 / B-2
 No.DDQ-11-2014/Adm-6/Remand/25

Mumbai, dt. 31/03/2017

A common determination order No.DDQ-11-2008/Adm-3/29/B-1 Mumbai dt.11.04.2011
 No.DDQ-11-2008/Adm-3/30

was passed in the case of the two applicants' M/s. Wings Travels and M/s. Sai Anand Travels Pvt. Ltd. determining as follows :

- Question (I): Whether the applicants are dealers for the purpose of Section 2(8) of the MVAT Act, 2002?*
Answer: The applicant is a dealer within the meaning of section 2(8) of the Maharashtra Value Added Tax Act, 2002
Question (II): Whether the activity of the applicant is a 'sale' within the meaning of Section 2(24) of the Act?
Answer: Held affirmative.

The prayer for prospective effect to the determination order was rejected. An appeal against the determination order was preferred before the Hon. Maharashtra Sales Tax Tribunal (Hon. MSTT) by both the applicants'. The same was decided through order dt.01.07.2012 in VAT Appeal No.98 and 99 of 2011 whereby the aforesaid determination order was set aside and the applications were remanded to the Commissioner for deciding questions afresh on the basis of relevant material and following the principles of natural justice. The present proceedings, therefore, are in pursuance of the aforesaid order of the Hon. MSTT.

02. A hearing in the matter was scheduled on various dates since 2015. The hearing finally took place on dt.24.02.2016. Only the applicant M/s. Wings Travels attended through their representatives Sh. S. A. Gundecha, Advocate and Sh. Nitin Shah, Advocate. None attended nor any communication was received from the other applicant namely M/s. Sai Anand Travels Pvt. Ltd. The submission as made by Sh. S. A. Gundecha, Advocate and Sh. Nitin Shah, Advocate during the hearing as scheduled in view of the directions of the Hon. MSTT is thus -

- At the outset, they were enquired with as to whether the agreement of 2007, with regard to which the determination questions are posed, is in existence and whether the applicant has been assessed for the period of 2008-09. It was informed that the dealer has not been assessed and the applicant has not obtained registration under the MVAT Act, 2002.
- As regards the merits of the case, it was submitted thus:
 - Attention was invited to Exception III to section 2(8) of the definition of 'dealer' as per which a transporter who holds permit for transport vehicles as per Motor Vehicles Act and which vehicles are used for hire or reward shall not be deemed to be a dealer within the meaning of the clause 2(8) in respect of sale or purchase of such transport vehicles or parts, components or accessories thereof.

- About the transaction, it is contended that the same is not a transfer of the right to use the vehicles. The agreement is for rendering transport services.
- The vehicles are owned or procured, maintained, repaired, operational costs (fuel), insurance borne by the applicant. The applicant holds the transport permit in respect of the vehicles owned by it and no permit is transferred to the client NTrance. In case of procured vehicles also, permit continues to be in the name of the owner and not transferred to NTrance. In case of procured vehicles, even the right to use cannot be transferred by the applicant as the applicant is not the owner of the vehicle and the entire agreement is thus a 'Service' considering the constitutional provisions.
- Case laws were reiterated and additional case laws were submitted.
- A request for prospective effect was made.

03. EARLIER DETERMINATION ORDER

To appreciate the applicants' contention in the matter, it would be necessary to look at the applicant's contention and a decision thereon as given in the earlier determination order thus:

"02. FACTS OF THE CASE

(A) M/s. Wings Travels

The applicant M/s. Wings Travels is a Partnership Firm, registered as per the provision of the Indian Partnership Act, 1932 and are carrying on business from the office situated at Survey No.111/1, Plot No.34, Ranakpur Darshan, New Alandi road, Opp. Hotel Landmark, Yerawada, Pune-411006, seeking determination on whether they are dealers for the purpose of Section 2(8) of the Maharashtra Value Added Tax Act, 2002 and whether the provisions of transport services by them to NTrance as per the agreement dt.1st December, 2007 as evidenced by Invoice No.015/WT/NT/20082009 dt.31.5.2008 is a 'sale' within the meaning of Section 2(24) of the Act?

(B) M/s.Sai Anand Travels Pvt. Ltd.

The applicant M/s. Sai Anand Travels Pvt.Ltd. is a company, registered as per the provisions of the Companies Act 1956, and are carrying on business from the office situated at Office No. 104, Ganraj Market, Gate No.2, Market Yard Pune 411 037. The applicant posed the same question for determination as are made by the applicant M/s. Wings Travels.

The applicants M/s. Wings Travels & M/s.Sai Anand Travels Pvt. Ltd. have filed applications under Section 56 of the MVAT Act for the determination of the following questions which are reproduced here as under:

"(I) whether the applicants are dealers for the purpose of Section 2(8) of the MVAT Act, 2002?

(II) Whether the transaction evidenced by Invoice No.015/WT/NT/20082009 dt.31.5.2008 is a 'sale' within the meaning of Section 2(24) of the Act?"

03. DOCUMENTS SUBMITTED

- Authority letter.
- Copy of Transport Agreement entered into on 25th day of May, 2007 between the applicant and N-Trance Customer Services Pvt. Ltd.
- Copy of Invoice No.015/WT/NT/2008-09, dt.31.5.2008 raised by the applicant upon NTrance Customer Services Pvt. Ltd.
- Copy of Certificate of Registration under Section 69 of the Finance Act, 1994 (32 of 1994) issued by the Dy. Commissioner (Service Tax Cell), Central Excise Pune III Commissionerate.
- Chalan of fees paid for the purpose of determination application.

04. CONTENTIONS

It is stated by the Ld. Advocate that since a common issue is involved in both the matter on identical facts and circumstances of the case a common representation was made and the same may be applied, mutatis mutandis in both cases. Accordingly, let me make it clear that for the sake of brevity and to avoid repetition that the submission made through application dt.30.6.2008 by M/s. Wings Travels is summarized below-

M/s. Wings Travels is a Partnership Firm, registered as per the provision of the Indian Partnership Act, 1932 and carrying on business from the office situated at Survey No.111/1, Plot No.34, Ranakpur Darshan, New Alandi road, Opp. Hotel Landmark, Yerwada, Pune-411006. The applicant is engaged in the business of rendering 'transport services' to various persons, mainly companies developing software or engaged in the business of rendering 'transport services' (BPO). The applicant owns several motor vehicles, which are registered as motorcabs/maxicabs as per the provisions of the Motor Vehicles Act, 1988. For these vehicles, they hold permit issued as per the provisions of Section 66 of the Motor Vehicles Act and these vehicles are used as 'contract carriages/tourist vehicles' by the applicant. Whenever any person needs transport services, for arranging transport for himself or his employees or agents, the services of the applicant are requisitioned and after commercial discussions, they enter into an agreement for providing transport services. These services are provided by using the vehicles owned by the applicant or arranged by him. A copy of the transport agreement dt.25th May 2007 executed by and between NTrance Customer Services Pvt. Ltd., 4th Floor, Wing A & B, Cybercity, Magarpatta, Hadapsar, Pune-411 028 is provided

It is stated that from the annexure to the said agreement, it would be observed that N-Trance desires to have transport facility for its employees and they agreed to provide services, as and when required, for transportation of employees of N-Trance between the specified locations on the terms and conditions contained in the said Agreement. As per the agreed arrangement, the applicant rendered transport services during the period from 26th April 2008 to

25th May 2008 for transportation of employees of N-trance. A copy of the invoice raised by the applicant in respect of hire charges/consideration for providing services to N-trance.

It is stated that in respect of vehicles to be used for providing the transport service, the cost of fuel, maintenance, insurance and taxes was and is to be borne by the applicant. The driver operating the motor vehicle was and is the employee of the applicant and the agreed consideration depends on the type of vehicle, time spent and kilometers for which the transportation is arranged. It is argued that at no point of time the possession or control of the vehicle is parted by him and while rendering the services, the vehicle continued to be owned by the applicant, possessed by him and remained under their control and custody through his employee.

The applicant is registered as an assessee as per the provisions of the Finance Act, 1994 imposing tax on services rendered. A copy of the Registration Certificate obtained by them as per the provisions of the Finance Act, 1994 is produced. The applicant is liable for payment of tax - Service Tax - the consideration received. It is stated that it could be observed from the invoice that Service Tax at the rate of 12.36% of the value of the services (after considering the abatement) has been charged by the applicant and paid to the Government of India.

Recently, the Officers of the Investigation Wing of the Department from Mumbai visited the place and raised queries regarding their activities and consideration received by the applicant. In view of these circumstances, the following question arises, as to whether they can be treated as 'dealers' for the purpose of Section 2(8) of the Maharashtra Value Added Tax Act, 2002 and whether the provisions of transport services by them to 'N-Trance' as per the agreement dt.1st December, 2007 as evidenced by Invoice No.015/WT/NT/20082009 dt.31.5.2008 is 'a sale' within the meaning of Section 2(24) of the Act?

SUBMISSIONS OF WINGS TRAVELS (ALSO APPLICABLE TO SAI ANAND)

The Applicant is a partnership firm owning various vehicles, including the motor vehicles used for transportation of employees of the Client.

- These motor vehicles are owned by the Applicant, registered in the name of the Applicant as an owner, as per the provisions of the Motor Vehicles Act, 1988.
- The applicant is issued permits, as per the provisions of the Motor Vehicles Act, to use these motor vehicles as "contract carriage", subject to compliance of the terms and conditions contained in these Permits.
- The applicant employs drivers to drive these vehicles.
- The vehicles are maintained at the cost of the applicant by the applicant or the maintenance is arranged by the Applicant.
- The entire fuel arrangement and fuel cost is to be made/borne by the applicant.
- These vehicles are insured, as per the requirement of the Motor Vehicles Act, including for third party risks, by the applicant and the applicant is the beneficiary of such insurance cover. The cost of insurance premium is also the cost of the Applicant.
- The motor vehicles remain in the control and the custody of the applicant or through its drivers, being servants, through the period of use, after the use and are parked at the place arranged by the Applicant.
- As the drivers are the employees of the Applicant all statutory compliances about payment of wages, social security benefits like ESI and Provident Fund are the responsibility of the Applicant, which the Applicant complies with as per the applicable law, scheme and regulations.

Contractual Arrangement:-

- The transaction of "rendering transport services" to the Client and Client's employees/agents is as per the "Transport Agreement dated 25th May, 2007".
- The important terms and conditions agreed between the parties are -
 - The Client proposes to avail of transportation services (Ref :- Recital C).
 - The Applicant undertakes to take all necessary measures to ensure that the transportation services rendered are of high quality standards (Ref. Clause 2).
 - The Client agrees to make payment of charges in consideration of the Applicant providing services (Ref :- Clause 3.1).
 - The consideration is treated as fare/hire charges (Ref. Clause 3.3).
 - The Applicant is responsible for procuring all licenses, approvals and maintaining them in force (Ref. Clause 4.1).
 - The Applicant is responsible for carrying out repairs, painting, upholstery work etc. (Ref. Clause 4.2).
 - Services to be rendered by the Applicant to the designated employees of the Client so as to pick-up and door drop them while attending duties of the Client (Ref. Clause 2).
 - Insurance to be arranged by the Applicant (Ref. Clause 4.4).
 - Applicant to indemnify the Client for any injury suffered or loss suffered and arising out of accidents (Ref :- Clause 4.7).
 - Applicant responsible for compliance of ESI, Provident Fund and other statutory benefits to be provided to the drivers (Ref :- Clause 4.6).
 - In case of non-availability of vehicle, alternate arrangement to be made by the Applicant and in case of Applicant's failure the user of services can hire other vehicle and recover the charges from the Applicant (Ref. Clause 4.9).
 - Client not liable for any loss, cost or damage occurring to the Applicant and arising out of Agreement or provisions of services by the Applicant to the Client (Ref. Clause 4.12).
- Consideration agreed on type of vehicle, kilometer running, use - days and hours and manner of use also agreed such as three pick-ups and drops or two pick-ups and drops (Ref. :- Annexure 1 to the agreement).
- Supervisors to be stationed at the designated places to organize the transport services to the Client's employees (Ref :- Annexure 1 to the agreement).
- The vehicles shall be operated by the Applicant's employees at Applicant's cost (Ref :- Annexure 1 to the agreement).

It is stated that if the entire contract/agreement dated 25th May, 2007 is considered as a whole, the Parties (the Applicant and the Client) agreed on provisions of transportation services by the Applicant to the Client and no particular vehicle is given on hire with possession and control to the Client. The possession and control of the vehicles remain with the Applicant throughout the period of services, i.e. Employees of the Client being picked up from his/her



residence or dropped at his/her residence only. The Driver/employees of the Applicant is in control of the vehicle and of behaviour of the passengers and in command of the vehicle. In particular vehicle of the type agreed as "Indicab" "Tempo Traveler" any vehicle can be used for pick up and drop and no particular vehicle having a particular engine number, chassis number or registration number is attached to the Client. The obligation of the Applicant is to make transportation arrangement by use of a particular type of vehicle at the agreed time for the agreed purpose of picking up and dropping employees. The vehicle used for picking up a particular employee can be used for other purposes (may be to render services to other clients) till the employee of the Client is dropped after working hours. The entire operational cost, availability of licenses, permits, responsibility of accident, maintenance and upkeep is with the Applicant and the Client is not connected with the same. The statutory permissions like registration, permit etc., not transferred to the Client but continues to be with the Applicant.

Considering these aspects, it is argued that the transaction does not amount to transfer of right to use the vehicle, particularly as (a) no particular vehicle is given to the client for use and (b) the vehicles are the goods used for rendering services by the Applicant and right to use these goods not transferred to the Client. The vehicles are used by the Client through its employee, viz. Driver, and not by the Client. Thus the transaction covered by the agreement and invoices cannot be treated as transfer of right to use the motor vehicles but is an agreement/transaction of rendering transport services. The Applicant is registered and liable to pay and has made payment of Service Tax, being a person rendering services of use of cabs to the Client.

Case Laws cited by the applicant:-

The Applicant relies on the following decisions of the Courts in support of the propositions mentioned briefly against each of the decision:-

1. (1997) 67 STC 199 (Calcutta) – Bank of India Vs. Commercial Tax Officer, Central Section, Calcutta and Others – A complex transaction, involving several aspects of services, cannot be treated as "transfer of right to use any goods" and thus not liable for payment of Sales Tax (Ref :- Page No. 15).
2. (1988) 70 STC 215 (Andhra Pradesh) – State Bank of India and Others Vs. State of Andhra Pradesh – Only cases where there is a transfer of right to use the goods and such goods are delivered to the person concerned covered by the type of sale – transfer of right to use any goods for any purpose. Mere license to use goods without securing possession does not invite this tax (Ref :- Page No. 35).
3. (1990) 77 STC 182 (Andhra Pradesh) – Rashtriya Ispat Nigam Ltd., Vs. Commercial Tax Officer, Company Circle, Visakhapatnam – Transfer of a right is an event which has a double aspect. It is the acquisition of right by the transferee and loss of it by the transferor. Transfer of right to use goods necessarily involves delivery of possession by the transferor to the transferee. Delivery of possession of a thing must be distinct from its custody Agreement to be read as a whole to decide the nature of transaction (Ref :- Page No. 45).
4. (1990) 77 STC 470 (West Bengal Tax Tribunal) – Modern Decorators Vs. Commercial Tax Officer, Maniktola and Others – Use of material for erection of pandal – service of complex nature rendered by the dealer to its customer. The position might have been different if the decorator (dealer) let out the different articles to the customer and the customer erects the pandal with his own men and labour – earlier transaction not transfer of right to use – latter transaction transfer of right to use (Ref :- Page No. 56).
5. (1991) 83 STC 325 (Orissa) – Krushna Chandra Behera and Another Vs. State of Orissa and Others – Transfer of right is a species of bailment – when owner is required to surrender subsisting permits granted in his favour immediately after the commencement of agreement to the corporation and corporation provides the conductor of bus, then and then only the transaction can be regarded as right to transfer use the bus and not otherwise (Ref :- Page No. 69).
6. (1998) 108 STC 234 (Patna) – Rungta Projects Limited and Another Vs. State of Bihar and Others – In case of hiring there must be delivery of goods from one person to another person, on payment of hire charges (Ref. Page No. 104). Even in case of hire, delivery of goods is a condition precedent. The transfer of right to use goods therefore necessarily involves delivery of possession by the transferor to the transferee (Ref :- Page No. 105).
7. (1998) 108 STC 410 (Kerala) – Deputy Commissioner of Sales Tax (Law), Board of Revenue (Taxes), Ennakulam Vs. Bobby Rubber Industries – Right to use a thing to be distinguished from the permissive right to use (Ref :- Page No. 117). When right to use is transferred, then only transaction attracts tax on sale.
8. (1999) 113 STC 317 (Supreme Court) – Aggarwal Brothers Vs. State of Haryana and Another – As the possession of shuttering material was transferred by the assessee to their customer during the construction of building, the transaction is a deemed sale being transfer of right to use the goods (Ref :- Page No. 124).
9. (2001) 124 STC 426 (Karnataka) – Lakshmi Audio Visual Inc., and Another Vs. Assistant Commissioner of Commercial Taxes and Another – If the transaction is one of leasing/hiring/letting simpliciter under which the possession of goods is to be given to the customer, then it would be on transfer of right to use the goods. But if the customer entrusts to the assessee the work of achieving certain desired result and such effort of the assessee involves use of the goods belonging to the assessee and rendering of several other services and the goods used by the assessee to achieve the desired results continues in effective and general control of the assessee, then the transaction will not be a transfer of right to use the goods falling with the existing definition of sale (Ref :- Page No. 135 and 136).
10. (2002) 126 STC 114 (Supreme Court) – State of Andhra Pradesh and Another Vs. Rashtriya Ispat Nigam Ltd – by this judgment the Hon'ble Supreme Court of India has upheld the decision mentioned in Sr. No. 3 above.
11. (2004) 135 STC 107 (Kerala) – Alpha Clays Vs. State of Kerala – In order to transfer right to use of goods there must be parting with possession of the goods for limited period in favour of the lessee (Ref :- Page No. 154). When excavators are operated by a person engaged by the dealer and operational expenses are incurred by the dealer, no transfer of right to use.
12. (2006) 146 STC 91 (Supreme Court) – Bharat Sanchar Nigam Ltd., and Another Vs. Union of India and Others – to constitute a transaction as a transfer of right to use the goods, the transaction must have the following attributes (a) goods available for delivery, (b) unity of minds between the parties about the identity of goods ©
13. transferee should have legal right to use the goods such as permissions and licenses required, (d) period during which transferee has actual legal rights such rights are in exclusion of the transferor, (e) having transferred the right to use the goods, during the period of transfer the transferor (owner) cannot again transfer the same right to others (Ref :- Page No. 216).

14. (2008) 13 VST 403 (Allahabad) – Commissioner, Trade Tax, U.P., Lucknow Vs. Jamuna Prasad Jaiswal – When driver is employed by the owner of the truck, the owner of the truck to abide by all laws relating to motor vehicles and such vehicle used for transport of goods – no transfer of right to use (Ref:- Page No. 232).
15. (2008) 13 VST 412 (Allahabad) – Commissioner, Trade Tax, U.P., Lucknow Vs. Prince Tourists Bus Service – When driver and conductor are appointed by the dealer, custody of the bus is with the dealer – then such transaction cannot be regarded as transfer of right to use the bus (Ref:- Page No. 237).
16. (2009) 22 VST 70 (Gauhati) – Indian Oil Corporation Ltd., Vs. Commissioner of Taxes, Assam and Others – When different vehicle can be put in operation no transfer of right to use vehicle is said to have taken place (Ref:- Page No. 263). Intention of the parties, mode of use and several other surrounding and relevant aspects have to be considered to give conclusion whether or not under a particular contract there is right to transfer any goods (Ref:- Page No. 264).
17. Transfer of right to use goods implies that full liberty is vested in the transferee to have the right to use the goods to the exclusion of all others, including the owner of the goods (Ref:- Page No. 264).
18. (2009) 22 VST 136 (Gauhati) – R.P. Kakoti Vs. Oil & Natural Gas Commission and Others – This tax is not a tax on “right to use any goods” or on “use of any goods” it is rather a tax on “transfer of right to use any goods”. Thus unless and until the incidence of transfer of right to use goods in a given case is present, the transaction would not become a sale (Ref:- Page No. 275).
There has to be intention to transfer a right to use the goods and effective custody and control must be transferred to the transferee (Ref:- Page No. 279).
19. (2009) 25 VST 653 (Delhi) – Commissioner, VAT, Trade and Taxes Department Vs. International Travel House Ltd – A composite contract, including both aspects of sale of goods and services, cannot be split up taxing the sale element unless such contract is of the type referred in Article 366(29-A)(b) and (f) (Ref:- Page No. 299).
When there is no transfer of legal right to use the goods, viz. Permission and license, the transaction cannot be treated as transfer of right to use the goods (Ref:- Page No. 304).

04. HEARING

The cases were fixed for hearing on 2.3.2010. Sh. S. A. Gundecha, Advocate & Sh. Nitin Shah, Advocate, attended for hearing in respect of both the matters lying with this office. They made the following arguments.

- The applicants give vehicles on hire to BPO's for transport of BPO employees.
- They produced an agreement evidencing the transaction.
- The vehicles are given for specific pickups/drops. The drivers are employed by the applicant.
- It is the contention that there is no lease of the vehicles; as possession/control is not transferred to the BPO's. The applicants retain the control/possession. They have cited judgments in support of their contention reference whereof has taken elsewhere in this order. They argued that the judgments cited by them are squarely applicable in the cases under determination. They have referred to definition of sale under section 2(24) and definition of dealer under section 2(8) of the MVAT Act and argued that the applicants are not a dealer within the meaning of the said sections qua the activity carried on by the applicants. They have also prayed that in case, the decision is not held in favor of the applicants, the applicants may be given prospective effect.

05. OBSERVATIONS

In these determination applications I have to decide the issues whether the applicants who rendered transport services to BPOs is a 'dealer' under the provisions of section 2(8) of the MVAT Act or not as also the consideration received by them would be a 'sales proceeds' within the meaning of section 2(24) of the MVAT Act or not.

The term "Dealer" is defined in Section 2(8) of the MVAT Act and the same reads as under:-
"Dealer" means any person who, for the purpose of or consequential to his engagement in or, in connection with or incidental to or in the course of, his business buys or sells, goods in the State whether for commission, remuneration or otherwise and includes, a factor, broker, commission agent, del credere agent or any other mercantile agent, by whatever name called, who for the purpose of or consequential to his engagement in or in connection with or incidental to or in the course of the business, buys or sells any goods on behalf of any principal or principals whether disclosed or not;
an auctioneer, who sells or auctions goods whether acting as an agent or otherwise, or who organizes the sale of goods or conducts the auction of goods whether or not he has the authority to sell the goods belonging to any principal whether disclosed or not and whether the offer of the intending purchaser is accepted by him or by the principal or a nominee of the principal;
a non-resident dealer, or as the case may be, an agent, residing in the State of a non-resident dealer, who buys or sells goods in the State for the purpose of or consequential to his engagement in or in connection with or incidental to or in the course of, the business;
any society, club or other association of persons which buys goods from or sells goods to, its members.
Explanation.- For the purpose of this clause, each of the following person, bodies and entities who [sells any goods] whether by auction or otherwise, directly or through an agent for cash, or for deferred payment, or for any other valuable consideration, shall, notwithstanding anything contained in clause (4) or any other provision of this Act, be deemed to be a dealer, namely:-
Customs Department of the Government of India administering the Customs Act, 1962 (52 of 1962);
Departments of Union Government and any Department of any State Government;
Local Authorities;
Port Trusts;

[(iv-a)] Public Charitable Trusts;

Railway Administration as defined under the Indian Railways Act, 1989 (24 of 1989) and Konkan Railway Corporation Limited;
Incorporated or unincorporated societies, clubs or other associations of persons;
Insurance and Financial Corporations, institutions or companies and Banks included in the second Schedule to the Reserve Bank of India Act, 1934 (II of 1934);
Maharashtra State Road Transport Corporation constituted under the Road Transport Corporation Act, 1950 (LXIV of 1950);
Shipping and construction companies, Air transport companies, Airlines and advertising agencies,
any other corporation, company, body or authority owned or constituted by, or subject to administrative control, of the Central Government, any State Government or any local authority.

Exception I.- An agriculturist who sells exclusively agricultural produce grown on land cultivated by him personally, shall not be deemed to be a dealer within the meaning of this clause.

Exception II.- An educational institution carrying on the activity of manufacturing, buying or selling goods, in the performance of its functions for achieving its objects, shall not be deemed to be a dealer within the meaning of this clause.

Exception III.- A transporter holding permit for transport vehicles (including cranes) granted under the Motor vehicles Act, 1988, which are used or adopted to be used for hire or reward shall not be deemed to be a dealer within the meaning of this clause in respect of sale or purchase of such transport vehicles or parts, components or accessories thereof.

Section 2(4), "Business" includes-

(a) any service.

(b) Any Trade, Commerce or manufacture.

(c) Any adventure or concern in the nature of service, trade, commerce or manufacture".

"Section 2(24) 'Sale' means a sale of goods made within the State for cash or deferred payment or other valuable consideration but does not include a mortgage, hypothecation, charge or pledge, and the words "sell", "buy" and "purchase" with all their grammatical variation and cognate expressions, shall be construed accordingly".

The applicant has sought to determine the question whether they are dealers within the meaning of section 2(8) of the MVAT Act and whether the providing of transport service to M/s. N-trance as per the agreement dt. 1.12.2007 as evidenced by invoice No. 015/WT/NT/2008-2009/ dt. 31.05.2008 is a sale within the meaning of section 2(24) of the Act.

A) VISIT TO APPLICANTS' PLACE OF BUSINESS

The applicant has stated in his application that the officers of the investigation wing of the department had visited their place of business and raised the queries regarding their activities. Sample files of the Enforcement Branch in this case were perused, which reveals that the applicant entered into contracts with a number of BPOs etc. for providing the facility of transport. It is prima facie felt that it will not be lawful and correct to decide whether the applicant is a dealer or not from one single agreement and therefore to understand the business of the applicant a visit was paid to the place of business of the applicant. At the time of visit it was given to understand that

a. For the year 2008-2009 the applicant has provided the facility for transportation to various 101 customers (BPOs).

b. The applicant has hired 3233 motor vehicles from various vehicles owners.

c. The applicant owns 187 motor vehicles.

d. The applicant has given list of 363 Drivers who were on the pay roll of the applicant during 2008-2009.

e. Both, vehicles owned by the applicant and hired vehicles are used in the vehicle in leasing business.

f. Applicant has provided the facility of providing transportation to there 101 BPOs on a regular yearly contract.

g. The applicant provided

a) Copy of the Auditors Report and the Audited Balance Sheet and Profit & Loss Accounts for the year 2008-2009.

b) Copy of summary statement of ledger account of petrol pumps with transactions.

c) Copies of Sale bills

d) Summary of major vendors with amount paid or payable.

e) Summary of customers billing for the year 2008-2009.

f) Sample copies of vendors bills

g) Sample copies of duty slips

h) Sample copies of log sheets

i) Sample copies of Customer Agreements.

The applicants' contention is that as per the terms and conditions of the agreement, all expenses, namely fuel, maintenance, insurance, payment to the drivers, etc. would be borne by the lessor (applicant). It will be pertinent to see that decisions cited by the applicant gives an idea as to on what considerations does the applicant feel that the transaction undertaken by him is not a transfer of right to use. The decisions and the points therein are cited.

1. Complex transactions, involving several aspects of service, cannot be treated as 'transfer of right to use any goods (67 STC 199, 25 VST 653).

2. Intention to transfer a right to use the goods and effective custody and control must be transferred. (22VST 136, 77 STC 470, 108 STC 234).

3. Ownership of goods requires to be surrendered in favor of the lessee (83 STC 325).

4. Goods available for delivery, unity of minds between the parties about identity of goods during the period of transfer owner cannot again transfer the same right to others (146 STC 91).

5. When driver and conductor are appointed by the leaser custody of the bus is with the dealer (13 VST 412).

To decide the issue, in hand it is, therefore, necessary to ascertain:

1. Whether there is transfer of Effective Control over the goods.

2. Whether the custody is given over to the transferee.

3. Whether the goods are available for delivery.

4. Whether ownership of goods could be transferred simultaneously to other any other lessee.

5. Aspect theory in complex transaction etc.

Firstly, it is pertinent to mention that in the case laws cited by the applicant, the lessors themselves were the owner of the goods in that transaction. In the case in hand, the applicant in as many as 3233 number of vehicles is not the owner of the vehicles. The ratios of lease- hold vehicles and own vehicles used in the business are 94.53: 5.47. The ratio is derived on the basis of vehicles used in the business. What is gathered from the above analysis that the main business of the applicant is to lease the vehicles which are not owned by the applicant. This is one of the major differences in facts of the case before the various courts and the case in hand.

In the case of Bharat Sanchar Nigam Ltd. vs. Union of India (36) 3 VST 95 Hon'ble Supreme Court has observed that "The modern legislature makes laws to govern a society, which is fast moving. It is aware of the changing concept of the emerging times. The law adopts itself to social, economic, political, and scientific and other revolutionary change." Interpretation must keep space with changing concepts and values and should undergo adjustment to meet the requirement of the developing economy and the fast changing social conditions. In the case in hand the applicant has provided vehicles which are mainly owned by a third party. Thus in this changing scenario, it will be pertinent to see the effective control over the goods, possession of goods and custody of goods.

In the case in hand, the applicant has agreed to providing facility of transport to various 101 clients. For this act, he has used approximately 3420 motor vehicles out of which 187 vehicles are owned by the applicant and other 3233 vehicles are used in the contract which is owned by third party. The applicant has not entered into any written contract with these owners of the vehicles. It is accepted by the applicant that some of the owners themselves drive the vehicles and some of the drivers have been paid by the owners. It is also revealed from the records provided by the applicant that about 363 drivers are on the regular pay roll of the applicant. In many cases court held that giving effective control to lessee is necessary to say that the transaction is a taxable lease transaction. However, whether effective control has been transferred or not always remain a question of fact and terms of the contract in each case would determine whether there had been a transfer of right to use or not.

Here I am dealing with transactions of motor vehicles. Under Motor vehicle Act, sec. 109(1) chapter VII provides that 'Every motor vehicle shall be so constructed and so maintained as to be at all time under the effective control of the person driving the vehicle.'

In this regard, it would be relevant to refer to a judgement in the case of Rajasthan State Road Transport Corporation, 1997 (007) SCC 481, where, while deciding the case of compensation, Supreme Court has observed that notwithstanding the fact that the driver would continue to be on the pay roll of the owner, he has to act under the instructions, control and command of the conductor and other officers and the effective control is transferred to hirer. The relevant part of the decision is reproduced here under:

"16. The admitted facts unmistakably show that the vehicle in question was in possession and under the actual control of RSRTC for the purpose of running on the specified route and was being used for carrying, on hire, passengers by the RSRTC. The driver, was to carry out instructions, orders and directions of the conductor and other officers of the RSRTC for operation of the bus on the route specified by the RSRTC.

17. The definition of owner under Section 2(19) of the Act is not exhaustive. It has, therefore to be construed, in a wider sense, in the facts and circumstances of a given case. The expression owner must include, in a given case, the person who has the actual possession and control of the vehicle and under whose directions and commands the driver is obliged to operate the bus. To confine the meaning of 'owner' to the registered owner only would in a case where the vehicle is in the actual possession and control of the hirer, not be proper for the purpose of fastening of liability in case of an accident. The liability of the "owner" is vicarious for the tort committed by its employee during the course of his employment and it would be a question of fact in each case as to on whom can vicarious liability be fastened in the case of an accident. In this case, Shri Sanjay Kumar, the owner of the bus could not ply the bus on the particular route for which he had no permit and he in fact was not plying the bus on that route. The services of the driver were transferred along with complete 'control' to RSRTC, under whose directions, instructions and command the driver was to ply or not to ply the ill-fated bus on the fateful day. The passengers were being carried by RSRTC on receiving fare from them. Shri Sanjay Kumar was, therefore, not concerned with the passengers travelling in that bus on the particular route on payment of fare to RSRTC. Driver of the bus, even though an employee of the owner, was at the relevant time performing his duties under the order and command of the conductor of RSRTC for operation of the bus. So far as the passengers of the, ill-fated bus are concerned, their privity of contract was only with the RSRTC to whom they had paid the fare for travelling in that bus and their safety, therefore, became the responsibility of the RSRTC while travelling in the bus. They had no privity of contract with Shri Sanjay Kumar, the owner of the bus at all. Had it been a case only of transfer of services of the driver and not of transfer of control of the driver from the owner to RSRTC, the matter may have been somewhat different. But on facts in this case and in view of conditions 4 to 7 of the agreement (supra), the RSRTC must be held to be vicariously liable for the tort committed by the driver while plying the bus under contract of the RSRTC. The general proposition of law and the presumption arising therefrom that an employer, that is the person who has the right to hire and fire the employee, is generally responsible vicariously for the tort committed by the Concerned employee during the course of his employment and within the scope of his authority, is a rebuttable presumption. If the original employer is able to establish that when the servant was lent, the effective control over him was also transferred to the hirer, the original owner can avoid his liability and the temporary employer or the hirer, as the case may be, must be held vicariously liable for the tort committed by the concerned employee in the course of his employment while under the command and control of the hirer notwithstanding the fact that the driver would continue to be on the pay roll of the original owner. The proposition based on the general principle as noticed above is adequately rebutted in this case not only on the basis of the evidence led by the parties but also on the basis of conditions 6 and 7 (supra), which go to show that the owner had not merely transferred the services of the driver to the RSRTC but actual control and the driver was to act under the instructions, control and command of the conductor and other officers of the RSRTC" (emphasis provided)

In light of the above position of the law to determine the effective control over the vehicle it is required to see whether the driver is under the effective control of the hirer or of the owner. I have reproduced the clauses and the terms of the contract earlier. The applicant has submitted few sample copies of the agreement entered with

1. Accenture Service Pvt. Ltd.
2. Venture (India) Pvt. Ltd.
3. American Home Mortgage Service India Pvt. Ltd. (AHMSI)
4. N- Trance
5. Spanco Respondez BPO Pvt. Ltd

B) EFFECTIVE CONTROL OVER THE VEHICLE :-

(I) As per clause 1(4) of the Annexure -A of the agreement dt 27.5.2008 between Accenture Services Pvt. Ltd. of Mumbai and Wings Travels (applicant)

1(4) "Service provider should deploy supervisors (on 24/7 basis) who should be available at all times at Accenture premises to co-ordinate the movement of vehicles as per the instructions of Transport Management."

1(5) Service provider should ensure that the route given by Accenture shall be strictly adhered to by his employees and that there shall be no deviation whatsoever from the same, with out prior written consent of the Accenture transport department."

1(6) Adherence to the timings intimated by Accenture from time to time.

1(7) Service provider shall ensure that there is no unauthorized use of the vehicles other than according to the schedule provided by Accenture.

(II) The agreement between Ventura (India) Pvt. Ltd. and Wings Travels dt.1.2.2008 the relevant clause is as annexure-1 -A-18 are as under.

"To Provide transport services for all employees in all shifts in time as directed by Ventura Transport team on 24X7X365 days basis including all festivals/holidays/bands/emergencysituations like floods etc without compromising on service levels. Only exceptions to these situations are Natural calamity or acts of God of unprecedented magnitude"

(III) The agreement between American Home Mortgage Service India Pvt. Ltd. (AHMSI)

7.2 "The Service Provider shall at all times follow and adhere to the route informed to be followed by the Authorized representative of AHMSI. All distances under this Agreement shall be calculated in kilometers."

Annexure A- Scope of work:

"D - service provider should deploy supervisors (on 24/7 basis) who should be available at all time at AHMSI premises to co-ordinate the movement of vehicles as per the instructions of transport management.

E - Service provider shall ensure that the route given by AHMSI shall be strictly adened to by his employees and that there shall be no deviation whatsoever, from the same, without prior written consent of AHMSI'S transport department.

G - Service Provider shall ensure that there is no unauthorized use of the vehicles other than according to the schedule and instructions provided by AHMSI. (carrying of any personal other than AHMSI Associates, Guests and Contractors is prohibited.)

I- Service Provider shall work with AHMSI's duly authorised representative to set up a system of management reporting with the intent to provide reports of defined management

- information, within 1 week of the end of each month, that details the :
- the number of vehicles being operated within the month, including the age/mileage of each vehicle.
 - the distance traveled during the month for each vehicle
 - the charged incurred by each vehicle/route
 - a list of drivers employed by the Service Provider, identifying each new driver utilized during the month.

- The Service Provider shall ensure that drop register is duly filed and shall after completion of ever drop shall apart from their supervisor, report to AHMSI supervisor as per the reporting requirements duly intimated in writing by AHMSI.

- The Service Provider shall at the end of completion of each drop and pick up shall take a signoff from AHMSI's supervisor. The service provider shall ensure that drop registered is duly filed and shall after completion of every drop shall apart from their supervisor, report to AHMSI supervisor as per the reporting requirements duly intimated in writing by AHMSI.

(IV) Spanco Responder BPO Pvt. Ltd.

Clause 3 Reporting

"Transporter will maintain a Supervisor/Driver at SPANCO Premises n a 24 X 7 basis at no extra cost such Driver/Supervisor shall report to the nominated official Admin Department of SPANCO and submit its daily work report as per the schedule as decided by SPANCO from time to time and assigned to Transporter.

It is revealed from the above clause/terms of the agreement and such similar clause/terms that the drivers of the vehicles even though employees of the owner, were at the relevant time performing his duties under the order and command of the BPOs. The general proposition of law and the presumption arising therein is that an employer, i.e the person who has the right to hire and fire the employee, generally establishes the effective control over him. The clauses show that the owner has not merely transferred the services of the drivers to the BPOs but actual control and the drivers were to act under the instructions and command of the officers of the BPOs. The drivers could not deviate from the route. Thus even though the drivers were on the regular pay roll of the owner, the effective control over them was also transferred to the hirer.

In the case in hand, once a vehicle is given to the hirer the owner does not exercise any control over it. The driver may still be the employee of the owner of the vehicle but he has to drive it as per the directions of the officer in charge of the BPOs. Except for legal ownership, for all intent and purposes, the registered owner of the vehicle loses entire control over the vehicle. He has no say as whether the vehicle should be driven at a given point of time or not. He cannot ask the driver not to drive a vehicle on a bad road. He or driver could not possibly say that the vehicle would not be driven in the night. In light of the above position of the agreed terms, the BPOs (the hirers) have the effective control over the vehicles for the relevant time. In the 'Annexure 1' of the agreement between Ventura (India) and the applicant, which gives the description of the services the applicant is to "Prepare route chart and a roster on a daily basis and weekly basis as directed by Ventura Transport team". Thus, the route chart is strictly supervised and updated as per client's requirements. In the agreement between 'Spanco' and the applicant the following is seen:

3. Reporting:

Transporter will maintain a supervisor / Driver at SPANCO premises on a 24 X 7 basis, at no extra cost to Spanco. Such Driver / Supervisor shall report to the nominated official of Admin Department of SPANCO and submit its Daily work report as per the schedule as decided by SPANCO from time to time and assigned to Transporter

Also, the same agreement, the clause© says that, "Transporter shall provide the services for 24 hrs* 365 days of the year as per the schedule ,timings and points provide by SPANCO." Thus, all the necessary factors- no. of vehicles, the routes, schedules are strictly monitored by the clients and the applicants have to ply their vehicles as per this schedule.

C) CUSTODY AND POSSESSION OF THE VEHICLES:

To see whether the custody and possession have been transferred or not it will be relevant to refer to the relevant clauses/terms of the agreement between the applicant and the BPOs. The relevant terms/clause of the agreements are reproduced as under.

i) Agreement between 'ACCENTURE' and the applicant

Term 5 of the Annexure

"21. All the vehicles deployed for Accenture requirements should be dedicated vehicles and should be parked at Accenture facility during off-duty.

6. Driver/Supervisor Compliance:

Any non-compliance by the driver in meeting in service standards listed below, though not limited to will result in a penalty of INR100 for every non-compliance reported by the compliance team.

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SERVICE LEVEL AGREEMENT

7. Service provider shall ensure that there is no unauthorized use of the vehicles other than according to the schedule provided by Accenture.

ii) Agreement between American Home Mortgage India Pvt. Ltd. and Wings Travels

Clause 4.12 "During the period of contract and without prior written permission or direction from AHMSI'S representative, the vehicles dedicated to provide transport services to AHMSI shall not be used for any other commercial or personal purposes by the service provide and when not in use shall be parked at AHMSI'S location unless intimated in writing to AHMSI.

Annexure A : Scope of Work

The scope of work shall include but not be limited to providing comprehensive & effective transport services for all employees of AHMSI both through door-to-door and/or point-to-point (designated locations) pick and drop services as per the transport plan provided by AHMSI through completely 100% dedicated vehicles. The Service Provider shall abide by and follow all written instructions issued by the authorized representative of AHMSI with regard to increase and decrease in number of vehicles deployed to provide services under this Agreement, shift/move the vehicles from air-conditioned to non air-conditioned, change in the schedule for pick and drop and also for any other transport service requirement as may be required by AHMSI including but limited to the vehicles dedicated for providing services to AHMSI. The Vehicle so deployed by the service provider for performing the transport services shall be made available for service for 24 x 7 x 365 days, if the vehicles are deployed on 24 hrs basis. In case the vehicles are deployed on 12 hrs. basis the same shall be made available for 12 x 7 x 365 days, however the vehicles shall be parked at AHMSI

Vehicles – service requirements - service level

"J : All the vehicles deployed for AHMSI requirements should be dedicated vehicles and should be parked at AHMSI facility during off-duty, unless exempt or approved to be taken out in writing by AHMSI."

From the clauses/terms of the agreement it is revealed that the BPOs have custody and possession over the vehicles for the relevant time. The vehicles are described as 'dedicated vehicles' which suggest that they are dedicated for the purpose of a certain task. The vehicles even during the off duty have to be parked at the location of the hirer. Therefore, the possession remains with the hirer even when he is not using the vehicle. Thus, the important ingredients of lease i.e. custody and possession is satisfied.

The applicant has contended that the same vehicles are used for pick-up and drops for more than one BPOs on a given day or a period of time and has argued that possession, custody of vehicle is never transferred to these BPOs. To have a correct idea about the said contention "Daily Duty Slips" and "Log Sheets" are brought on the record. The applicant has submitted duty slips and log sheets for 1st July and 2nd July 2010. Relevant part of the same is reproduced here in under.

here in under.

Date	Vehicle No.		Driver Name	
01.07.2010	MH-12-FZ-0207		Sambhaji	
Time	Start km.	Close km.	Total km.	Sign.
4.00 am	17633	17692	59	Sd/-
2.00 am	17692	17781	89	Sd/-
8.00 am	17781	17823	42	Sd/-
10.00 am	17823	17895	72	Sd/-
12.30 pm	17895	17953	58	Sd/-
2.00 pm	17953	17991	38	Sd/-
4.30 pm	17991	18048	57	Sd/-
5.00 pm	18048	18082	37	Sd/-
-	18185	18207	22	Sd/-

Date	Vehicle No.		Driver Name	
02.07.2010	MH-12-FZ-0207		Sambhaji	
Time	Start km.	Close km.	Total km.	Sign.
-	18207	18265	58	Sd/-
-	18265	18356	91	Sd/-
-	18356	18424	68	Sd/-
-	18424	18496	72	Sd/-
-	18496	18554	58	Sd/-
12.30 pm	18554	18593	39	Sd/-
2.00 pm	18593	18615	22	Sd/-
2.30 pm	18615	18662	42	Sd/-
4.30 pm	18662	18695	33	Sd/-
6.30 pm	18695	18747	52	Sd/-
7.00 pm	18747	18820	73	Sd/-
12.30 am	18820	18868	48	Sd/-
-	18868	18936	68	Sd/-
-	18936	19027	91	Sd/-
-	19027	19042	15	Sd/-
-	19042	19055	13	Sd/-
-	19055	19135	42	Sd/-
-	19135	19178	43	Sd/-

Date	Vehicle No.		Driver Name	
03.07.2010	MH-12-FZ-0207		Sambhaji	
Time	Start km.	Close km.	Total km.	Sign.
-	18868	18936	68	Sd/-
-	18936	19027	91	Sd/-
-	19027	19042	15	Sd/-
-	19042	19055	13	Sd/-
-	19055	19135	42	Sd/-
-	19135	19178	43	Sd/-

A similar noting is noticed on the duty slip of vehicle no. MH-12-FZ-1251 on dt. 1.7.2010 and 2.7.2010. It is observed from the above noting that

- The vehicle, where it terminates the traveling on 1.7.2010, starts from that point on subsequent day.
- The vehicle seems to have been in use for a single BPO as the kms are continuous.
- The travelled km seems to have been endorsed by the employees of the BPO [4.26, 4.27 AHMSI] (8.9 Spanco)

Thus, it is revealed that if the vehicle is used for more than one BPOs, then there has to have some distance in kms which is required to be traveled by that vehicle to reach the other BPO. Obviously, the starting mileage will have to be different from that of the closing kms of the other BPO which is not so, and thus it can be deduced that a particular vehicle is used only for a particular single BPO.

D) THE TERMS AND CLAUSES REGARDING USE OF PARTICULAR VEHICLE.

(I) AS PER AGREEMENT WITH ACCENTURE

"Annexure A"

1. Service level

2 "Term service Provider shall provide a maintenance schedule to Accenture and ensure that the vehicles are maintained as per the schedule. All the vehicles shall be clean, neat and presentable at all times and Accenture will provide facilities at the office locations defined in Annexur D or allow the vehicle to be driven to the appropriate facilities to enable the Service Provider to comply with his requirement.

3. Each vehicle shall be provided with the appropriate number of drivers to comply with Working Time Directives and enable the vehicle to be operated 24 hours/day and 7 days per week (24/7).

5. Service Provider shall ensure that the route given by Accenture shall be strictly adhered to by his employees, and that there shall be no deviation whatsoever, from the same, without prior written consent of the Accenture transport department

7. Service Provider shall ensure that there is no unauthorized use of the vehicles other than according to the schedule provided by Accenture.

5. Cab Compliance

Cab service standards

17. All vehicles shall be inspected and approved by Accenture before deployment

21. All the vehicles deployed for Accenture requirements should be dedicated vehicles and should be parked at Accenture facility during off-duty, during off duty.

(II) AS PER AGREEMENT WITH AHMSI

Annexure A - Scope of work - The Vehicle so deployed by the service provider for performing the transport services shall be made available for service for 24 x 7 x 365 days, if the vehicles are deployed on 24 hrs basis. In case the vehicles are deployed on 12 hrs basis the same shall be made available for 12 x 7 x 365 days, however the vehicles shall be parked at AHMSI

J. All the vehicles deployed for AHMSI requirements should be dedicated vehicles and should be parked at AHMSI facility during off-duty, unless exempt or approved to be taken out in writing by AHMSI.

It is revealed from these clauses/terms that 'the applicant- Wings Travels' provides vehicles on 24 X 7 days and the vehicles are dedicated vehicles which proves that vehicles are deployed for a single BPO and are not used for more than one BPO.

E) OTHER ARGUMENTS and case laws

Sub clause (IV) of clause of explanation to sub section 24 of section 2 of the MVAT Act provides for the transfer of the right to use any goods for any purpose (whether or not for a specific period) for cash, deferred payment or other valuable consideration shall deemed to be a sale. Section 6 of the MVAT Act provides to levy sales tax on the turnover of sale of goods. Thus, provision of section 6 discloses that the sine qua non for exigibility, is the transfer of the right to use any goods. The transfer of the right to use the goods, which may be by way of leasing, letting or hiring, involves the transfer permitting the transferee (lessee/hirer) to use his goods. The applicant has referred to certain judgements in this case. I will come to the discussion late but prior to it I shall also independently refer to certain judgments on 'lease' and as to what the courts should constitute a 'lease'. I will now refer to a few decisions to understand as to when there is a transfer of right to use and when there is not.

In Aggarwal Brothers' case AIR 1999SC2868 : 113 STC 317, the Supreme Court held that transfer of possession of shuttering material by the assessee to its customers for use during the construction of buildings was "transfer of right to use goods" as the customer was in effective control of the shuttering material during the period it remained in his possession.

In Rashtriya Ispat Nigam Ltd. vs. Commercial Tax Officer, Company circle, Vishakhapatnam 77 STC 182, the distinction between delivery of possession and mere custody without possession was brought out by the Andhra Pradesh High court by giving of example of hiring a taxi cab simpliciter (that is hiring a taxi to go from one place to other) and hiring a taxi cab under a rent-a-car scheme with a chauffeur. The Andhra Pradesh High court held as follows: "The essence of transfer is passage of control over the economic benefits of property which results in terminating rights and other relations in one entity and creating them in another. While construing the word 'transfer' due regard must be had to the thing to be transferred. A transfer of the right to use goods necessarily involved delivery of possession by the transferor to the transferee. Delivery of possession of a thing must be distinguished from its custody. It is not uncommon to find the transferee of goods in possession while transferor is having custody. When a taxi cab is hired under 'rent-a-car' scheme, a cab is provided, usually driver accompanies the cab, there the driver will have the custody of the car though the hirer will have the possession and effective control of the cab. This may be contrasted with the case when a taxi car is hired for going from one place to another. There the driver will have both the custody as well as the possession; what is provided is service on hire. In the former case, there was effective control of the hirer (transferee) on the cab. Whereas in the latter case it is lacking. We have many examples to indicate this difference."

Thus, it is enunciated by the Supreme Court that in a 'rent-a-car' scheme there is clearly a case of possession/control lying with the buyer to which make the transaction a transaction of 'lease'. In the present case, as seen from the agreements, the vehicles are dedicated vehicles dedicated to the pick up & drop of the BPO employees. The driver merely has custody but no possession & control.

In the case of Lakhmi Audio Visual Inc. Anr., (2001) 124 STC 426 (1car), the Hon'ble High Court of Karnataka has clarified the position of effective and general control of the goods by following illustration.

"Illustration:

(i) A customer engages a carrier (transport operator) to transport one consignment (a full lorry load) from place A to B, for an agreed consideration which is called freight charges or lorry hire. The carrier sends its lorry to the customer's depot, picks up the consignment and proceeds to the destination for delivery of the consignment. The lorry is used exclusively for the customer's

consignment from the time of loading, to the time of unloading at destination. Can it be said that right to use of the lorry has been transferred by the carrier to the customer? The answer is obviously in the negative, as there is no transfer of the "use of the lorry" for the following reasons: (i) The lorry is never in the control, let alone effective control of the customer; (ii) the carrier decides how, when and where the lorry moves to the destination, and continues to be in effective control of the lorry; (iii) the carrier can at any point (of time or place) transfer the consignment in the lorry to another lorry; or the carrier may unload the consignment en-route in any of his godowns, to be picked up later by some other lorry assigned by the carrier for further transportation and delivery at destination.

(ii) On the other hand, let us consider the case of a customer (say a factory) entering into a contract with the transport operator, under which the transport operator has to provide a lorry to the customer, between the hours 8.00 a.m. to 8.00 p.m. at the customer's factory for its use, at a fixed hire per day or hire per km subject to an assured minimum, for a period of one month or one week or even one day; and under the contract, the transport operator is responsible for making repairs apart from providing a driver to drive the lorry and filling the vehicle with diesel for running the lorry. The transaction involves an identified vehicle belonging to the transport operator being delivered to the customer and the customer is given the exclusive and effective control of the vehicle to be used in any manner as it deems fit; and during the period when the lorry is with the customer, the transport operator has no control over it. The transport operator renders no other service to the customer. Therefore, the transaction involves transfer of right to use the lorry and thus be a deemed sale."

Thus, in the above judgment, the Karnataka High Court has clearly brought out as to what is the essential difference between a 'lease' and a 'mere service'. In illustration 'A' the customer 'has no control' over the lorry. Once he makes a contract with the transport operator, it is the transport operator who decides as to when & now the loading/unloading is to be done. The customer had no intention of having a vehicle - his only concern was the loading of his goods. However, in illustration 'B' the agreement is specific. The transport operator has to make available his services to the customer for a specific period to the exclusion of others. Thus it is held as a 'lease'. The issue in hand clearly falls under illustration 'B'.

In *Krushna Chandra Behera vs. State of Orissa* (1991) 83 STC 325 (Ori), the assessee had given its bus on hire to Orissa State Road Transport Corporation. The assessee provided the driver and was also responsible for carrying out the repairs to the bus. The assessee was also bound by orders and directions of the corporation in regard to journey, operation timings, routes, halt age etc. The driver provided by the assessee had to follow the directions, orders and instructions of the authorised officials of the corporation. The Orissa High Court held that as the effective and general control of the bus had passed on to the customer (Orissa State Road Transport Corporation) and the customer was in possession, as distinguished from mere custody, the transaction was a transfer of the right to use the goods and therefore a deemed sale.

Earlier I have reproduced the terms/clauses of the agreements entered into with few of the BPO's (hirer) which shows that the driver of the vehicles were bound by the orders and direction of the hirers in regard to journey, operation timings, routes, halt age etc. The drivers provided by the applicant had to follow the directions, orders and instructions of the authorised officials of the hirers. If the driver is found disobedient or otherwise misbehaves with other staff or officials of the hirers, the owner has to replace him. Though the owner has to provide a driver and has to carry out necessary repairs, there is acquisition of possession, effective control of the vehicle by the BPO's (hirers) and the owner hands over the possession. Thus, transfer of possession and effective control are satisfied and consequently there is transfer of the right to use the same.

In order to constitute a transfer of right to use goods, there must be parting with the possession of the goods for the limited period of its use in favour of the lessee by the lessor. The effective control of the goods must not remain with the owner, but must stand transferred to the lessee for the use by the latter at his will and it is this transfer of effective control of goods, which attracts sales tax (*Alpha Clays vs. State of Kerala* 2004(2) KLT 235)

In *Rashtriya Ispat Nigam Ltd. reported in* (1990) 77 STC 182, Divisional Bench of the Andhra Pradesh High Court held that the transfer of the right to use goods necessarily involves delivery of possession by the transferor to the transferee, but the delivery of possession must be distinct from its custody and that mere transfer of possession does not amount to delivery in the context of the transfer of right to use goods. On the facts of the case in *Rashtriya Ispat Nigam Ltd.*, it was held by the Divisional Bench that although the possession of the machinery was given to the transferee, yet the effective custody and control of the machinery having remained with the transferor, such transaction would not amount to transfer of the right to use goods. This decision of the Divisional Bench was upheld by the Supreme Court in *State of Andhra Pradesh V. Rashtriya Ispat Nigam Ltd.* AIR 2002 SC 1305: [2002] 126 STC 114

The Supreme Court judgment in the case of *Rashtriya Ispat Nigam Ltd.* after minutely going through the clauses of the agreement observed that the contractor to whom the machinery was hired by the petitioner's company was entitled to use the machinery for the purpose of execution of the work of the petitioner himself. In this case, RINL had allotted different parts of project work to contractor and to facilitate the execution of work by the contractor with the use of specific machinery. RINL had under-taken to supply the machinery to the contractors for the purpose of being used for the execution of the contracted work. The court observed that as the contractor had to use the machinery for the work of RINL there is no transfer of right to use as the effective control of the machinery was that of the RINL. The contractor was not free to use the same in other works. Such is not the case in the present applicant. We have seen that the vehicles in the devoted to the work of the hirer and thus satisfies the conditions of transfer of right to use goods. In RINL the machinery was used to undertake the work of RINL itself and therefore the machinery had to stay on the premises of RINL due to which the court concluded that there was no leasing from RINL to its contractors.

In the case of *Tripura Bus Syndicate* 122 STC 175, the Gauhati High Court held that the vehicles under the control and plied in accordance with the direction and instructions of election authority as per the election schedule and for transportation of election officials, election materials, ballot of boxes etc. from the office of the returning officer to the respective polling booths, the right to use the vehicles stood transferred from their owner/operators to the election

authority. The facts of the case in hand are similar- in the present case vehicles are plied as per the direction of the hirer and are under the effective control & custody of the hirer.

A constitutional Bench of the apex court in 20th Century Finance Ltd. (2000) 6SCC 12 : [2000] 119 STC 182, while dwelling on the controversy as regards the competence of the State Legislature to levy sales tax under clause (29A)(d) of Article 366 of the constitution of India on the transfer of right to use any goods held that on a plain construction of sub-clause (d) of clause (29A), the taxable event is the transfer of right to use the goods regardless of when or whether the same are delivered for use. It held that the existence of the goods was essential so that they may be used and that a contract in respect thereof is executed. The locus of deemed sale is the place where the right to use them is transferred and that the situs of goods is of no relevance. It ruled that Article 366(29A)(d) envisages levy of tax on the transfer of the right to use goods and not on the use thereof.

The above view found reiteration in Bharat Sanchar Nigam Ltd. (2006) 145 STC 91 : [2006] 3 SCC 1, wherein the apex court in clearest terms expounded that actual delivery of the goods was not necessary for effecting the transfer of right to use the same but those must be available and deliverable at the time of transfer and delivered at same stage. In BSNL's judgment their lordship Justice Laxmanan in his part judgment, has categorically quoted the essentials attributes of a transaction to constitute the transfer of right to use the goods in para 98, which is reproduced hereunder : (Para98 in STC)

"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 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 consequents of such use including any permission or license 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 license to use the goods
- (e) having transferred the right to use the goods during the period for which it is to be transferred, the owner cannot again transfer the same right to others."

All of the above attributes are present in the instant case. (I) The vehicles are available and identified by the parties. (I have discussed the issue with reference to the evidence on the record in the earlier part of the order.) (II) the permit in respect of a particular contract carriage, vehicle registration book, insurance details etc are made available to the transferee. (III) the effective control over the vehicles are transferred to the hirer. (IV) Right to use the goods during the specific purpose was never transferred to others by the owner of the vehicle.

In sum, the transactions thus constitute a transfer of right to use goods and the transaction between the applicants and their customer is a 'lease' transaction. Therefore, the applicant also qua, the transaction of sale is a 'dealer' under the provision of the Maharashtra Value Added Tax Act, 2002 Act.

In the foregoing paras, I have examined the issue in context of wherein the owners of the goods have lent the goods. In the case in hand, there is an additional aspect in that the applicant had leased approximately 94% of the vehicles which were not owned by him. During the period the applicant M/s. Wings Travels had hired 3233 vehicles from his various vendors. The applicant has paid hire charges during the F.Y. 08-09 at Rs. 42,52,25,071.45 to his various vendors (figure arrived from Balance Sheet of the applicant). As per the list provided by the applicant, during visit of this office officials 48 vendors (lessee of the applicant) have been paid lease charges more than Rs. 5 lacs ie. these vendors of the applicant have crossed the threshold limits for registration under the MVAT Act for the F.Y. 08-09.

It is seen from the available documents that the vehicles under lease are provided with drivers or the owner of vehicle is himself the driver. The applicant has leased there cars to BPO's. Thus it is the intention of both owner of the vehicles and the applicant that the applicant is free to use the vehicles in any manner as per his sole will and even if the applicant enters with the contract with any third person the owner of the vehicle has no say whatsoever in respect of subsequent transaction. Thus the owners have surrendered their control and the applicant has acquired effective control over the vehicles by his act, intention and did. As such in this unique way, that the owner of the vehicles have transferred the right to use the vehicle to the applicant. The first lessor i.e. Vendor of the applicant though have crossed threshold limit are not registered under MVAT Act qua the sale being transfer of right to use the vehicles.

It is noticed from the documents submitted by the applicant in this context that

- a. the vehicle owners have leased their vehicles for a particular period of time.
- b. the vehicle owners are either self drivers or have provided their vehicles with drivers. This can be observed from the facts that the applicant has hired as many as 3233 vehicles and only 363 drivers are on the regular payroll of the applicant and from the perusal of the expenses in the balance sheet, there are no expenses on account of Drivers hire charges other than salary paid to drivers.
- c. the vehicles are hired at Km. basis and minimum guarantee amount for a given period is assured.
- d. the petrol expenses are either borne by the owner of the vehicle or is reimbursed from payment due to them.
- e. there is no express written agreement between the applicant and his vendors (vehicle owners) except 'Wings Travels Vendor Registration Sheet'.
- f. the major business of the applicant is 2nd leasing of the vehicles,

What I intend to high light is that in all the cases which were before the various courts, the owner himself had leased his goods. In the instant case the first lessee has hired the vehicles with an intention to lease the same to the third party. The first lessor of the vehicles has the knowledge of the business of the present applicant. It is a growing trend in the travel industry to hire vehicles from individual or group of individuals, assure them a fixed amount for a fixed period and sub lease the said vehicle to the actual customer. The individuals in this business owing one or two vehicles may not cross the threshold limit to fall under the ambit of taxation. However, the bigwigs of the travel

industry who hire thousands of vehicles from a large number of individuals intend to evade taxes by clothing their lease transactions under the garb of 'service' by placing one sample agreement and bill which may or may not be sufficient to establish the prepositions laid down by the courts.

F) Reimbursement of cost of Petrol/Diesel/Fuel -whether sale? And whether the applicant is a dealer qua the activity of sale of Petrol/Diesel/Fuel to the owner of vehicles used in the transaction of providing transport to the BPOs'

The applicant has shown purchases of Petrol/Diesel/Fuel from M/s Yesh Petrol pump, M/s Roshni Services, M/s Goregaon Petrol Suppliers, M/s Vikroli Automobiles, M/s Mehrofo Traders, M/s B.P.Coco, M/s Bahwadkar Auto Services, M/s Imperial Petrol and M/s H.P. (pump) at Rs.16,85,33,145/- It reveals from the vendor billings that the applicant first pays the cost of Petrol, etc. and subsequently adjust the same from the bills payable to the owners of the vehicle for use of the vehicles to provide transport facility to the BPO's. It seems that the applicant, in the year 2008-09, has reimbursed the cost on account of Petrol, etc. at Rs.15,54,03,231/-(168533145-13129914)

The point at issue is whether the supply of petrol, etc. by the applicant to the owners of the vehicle through these petrol pumps and subsequently deducting the cost of the same from the bills payable to its vendors on account of use of the vehicles is a 'sale' within the meaning of Section 2(24) of the Maharashtra Value Added Tax Act, 2002.

In the case of *Rashtriya Ispat Nigam Ltd. V State of Andhra Pradesh* reported in 102 STC 454, wherein the court has held that the supply of material by the petitioner company to the various contractors on condition of price of the material to be deducted or adjusted from bills payable to the contractors for the work done, would constitute sale of the goods supplied to the contractor. The cement and steel were supplied to the contractor to ensure quality of the material which would go into construction work entrusted to the contractor.

In another case, the High Court of Karnataka while deciding the case of *State of Karnataka V Narrain Mines Ltd* (presently called *Sesa-Goa Ltd*) [2009] 19 VST 535 (Karn) has given a similar decision. The facts are as follows:

The respondent is a Company registered under the Companies Act, 1956, engaged in mining and sale of Iron Ore within the State of Karnataka. Mining activity of the respondent company are basically within the Chithradurga District. It is assessed under the Karnataka Sales Tax Act and has been periodically submitting its returns.

3. The assessment under KST Act for the year 1997-98, 1998-99, 1999-2000 and 2000-01 were reopened under Section 12-A of the Act by the Assessing Officer. He did so having noticed that the respondent company had engaged contractors for mining operation and during the course of such operation necessarily several vehicles were utilised by the contractors. The obligation of the respondent and the contractors has been recorded under a term of contract. Several terms and conditions and covenants have been agreed upon, inter alia, between them.

4. One of the covenants in the agreement dated 01-04-1997 binding parties is that the respondent would supply diesel for consumption by the contractors during the use of the vehicles for mining operations. Supply of diesel is subject to payment of costs of the diesel by the consumer, namely, contractors. Such amount quantified will be deducted from and out of the amount payable by the respondent - company to the contractors for the mining operation conducted by it. The interim return covered by the Taxation Department reveal certain aspects indicating evasion of tax."

The High Court decided that the supply of diesel is a 'sale'. It observed "

16. It is pertinent to note that the costs of the diesel so supplied is recoverable from the contractors from out of the amount payable to the contractors for the work contract. In other words, supply of diesel is not for the vehicle and machines owned by the respondent but owned by the contractors in the mining operations for which the contract has been entered into. When the costs of the diesel is recoverable and does not form part of any incentive to the contract, the property, i.e., diesel, undoubtedly passes on to the contractor and they are consumers. The definition of 'sale' as incorporated in the Sales Tax Act, undoubtedly, signifies that with it is grammatical variation and cognate expression sale means every transfer of the property in goods other than by way of goods mortgaged, hypothecated or pledged by one person to another in the course of trade or business for cash or for 'deferred payment' or other valuable consideration and includes:

- i. a transfer otherwise than in pursuance of a contract of property in any goods for cash, deferred payment or other valuable consideration;
- ii. a transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract;
- iii. a delivery of goods on hire purchase or any system of payment by instalments;
- iv. 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.

17. Factual aspects admitted by the respondent establishes supply of diesel for value. Though the payment is not necessarily be paid by the contractor immediately on such supply but the value of the diesel being recoverable from the amount payable to the contractors by the respondent, has to be considered as supply of diesel for deferred payment. We have, therefore, no hesitation in recording that the supply of diesel by the respondent to the contractors is a 'sale' within the meaning of Sub-section (1) of Section 2 of the Act. Such an arrangement obviously may be for avoiding loss of time in procurement of diesel or avoidance of extra costs for acquisition by the contractors. The accrual benefit to the contractors may be a prompting factor to bind the respondent to supply diesel. But as far as respondent is concerned, in normal course it was not obliged to supply diesel but for the fact that it wanted smooth sailing of mining operations. Having thus held that the transaction comes within the ambit of the word sale, ..."

Thus it can be seen that the facts of the present case and the fact of Narrain's case are identical and is a ratio decidendi. Thus, the transaction of supply of Petrol, etc to its vendors and subsequently recovered the cost of the same from bills payable to them is a 'sale' and the applicant is a dealer qua this activity also.

7. PROSPECTIVE EFFECT:

The applicant has requested for prospective effect to the determination order, if it is held that the applicant is a dealer within the meaning of section 2(8) of the Maharashtra Value Added Tax Act, 2002 and the activity of providing transport facility to the hirers of motor vehicle is treated as 'sale' within the meaning of section 2(24) of the Maharashtra Value Added Tax Act, 2002.

It is observed that the activity of the applicant of providing transports to the 'BPOs' is a 'sale'. It is true that in some decisions of the court it is held that certain transactions of right to use goods may not fall under 'sale'. But the courts have categorically laid down that the intention to transfer a right to use the goods and effective control and custody must be transferred by the lessor to the lessee so as to constitute a deemed sale. The question, whether effective

control has been transferred or not, always remains a question of fact and terms of the contract, in each case. I have elaborately discussed that in the present case right to use goods have been transferred. I have also discussed that the transactions between the applicant and the vendors of the applicant (the owner of the vehicles) is also a sale. The applicant is also aware that whether a 'transaction' is a lease or not depends on the peculiar facts of the case. Also, he has entered into agreements with a number of BPOs and the agreements are not identical across all of them. I have come to the conclusion after reading 4 agreements and these agreements are not uniform. Therefore, it is fallacious to believe that one is not a 'dealer' on the basis of a lone transaction. Also, in such cases, therefore the ratios or decisions of Courts do not become applicable automatically. Moreover, in lease transactions, the tendency to first dispute the transaction and then request for protection of liability has to be checked. To have a proper check on such attitudes, I am of the considered view that no protection of liability be given in such cases.

The prayer of the applicant for prospective effect to the determination order is, therefore, rejected.

In view of the deliberations held above, the order is passed as

04. OBSERVATIONS

After having seen the circumstances and the reasoning of the determination order passed earlier in the applicants' case, I would now proceed to decide the issue in terms of the directions of the Hon. MSTT to consider the relevant material with regard to which the questions have been posed. Though the hearing in the matter was held on dt.24.02.2016, the applicant had failed to provide the needful information as was asked for during the hearing. A written reply in the matter, though expressing inadequacy to furnish the details, was finally received on dt.17.11.2016. In view thereof, I proceed thus :

05. M/S. WINGS TRAVELS

The applicant has submitted an agreement titled "Transport Agreement" made on dt.25.05.2007 between NTrance Customer Services Private Limited and Wings Travels. The relevant clauses from this agreement could be seen :



AGREEMENT

WHEREAS

- A. NTrance is inter alia engaged in the business of Business Process Outsourcing activities and proposes to provide transport facilities to its employees between NTrance office in Pune at 4th Floor, Wing A & B, Cyber city I, Magarpatta City, Hadapsar, Pune - 411 028 (hereinafter referred to as "Office") and other locations (hereinafter referred to as "Locations", as per mutually decided between parties.
- B. WINGS are desirous of providing transport solutions to third parties including corporates.
- C. NTrance has agreed to appoint WINGS to provide such transportation services to its Employees, and WINGS has expressed its willingness to act as transport provider, on the terms and conditions hereinafter appearing.

• Clause-1. Definitions and Interpretation

"Term" means the period commencing from the date of this Agreement to May 25th, 2008 or such earlier date on which the Agreement is terminated in accordance with clause 5 below. This Agreement shall expire automatically upon the expiry of the said period, unless extended for such further period, and on such terms and conditions, as may be mutually agreed to in writing between the Parties.

• Clause-2. Scope of Services

This Agreement governs the understanding between NTrance and WINGS hereto in relation to WINGS providing vehicles for the transportation of employees of NTrance between Office and Locations as specified by NTrance as per terms and condition mentioned hereunder and in more detail in Annexure 1. WINGS hereby undertakes that it shall take all necessary measures to ensure that the services rendered by it are of a high qualitative standard and that all quality specifications or functionality parameters as specified in Annexure 1 or communicated by NTrance to the WINGS from time to time are fulfilled to the reasonable satisfaction of NTrance.

• Clause-3. Payment terms

- 3.1 In consideration of WINGS providing services to NTrance as defined in Clause 2 above, NTrance shall pay charges to WINGS at the rates specified in Para B of Annexure 1 to this Agreement. The sum shall be payable as per timelines mentioned in Annexure 1. The sum payable, as mentioned in this clause does not include reimbursement of expenses and the cantonment of toll tax which will be billed at actual, provided all supporting for such expenses are provided along with the invoices.
- 3.2 The rates as per Clause 3.1 above shall be inclusive of all taxes and levies on vehicles that are currently in force or that may be imposed by the Municipality, R.T.O. and/or any other Government of Semi Government or quasi Government Authorities; and third party insurance. In case any service tax is payable on the above amounts, the same shall be borne by NTrance.
- 3.3 During the tenure of this Agreement, WINGS shall not be entitled to any upward revision in fares/hire charges (or any escalation in fuel costs) unless mutually agreed in writing by NTrance and WINGS. Up to 5% variation in the diesel price,

there will be no change in the rates. For variations more than 5% of the existing diesel prices the rate will change by Rs.0.066/- per Km for Indicab, and Rs.0.10/- per Km for a Tempo Traveller for every rupee change from the existing diesel prices. The existing diesel rate is Rs.35.10/-.

3.4 WINGS shall raise its invoice on a monthly basis. The payment towards Invoice should be made within fifteen (15) days from the date of receiving the invoice by NTrance.

• **Clause-4. Representation, Warranties and Indemnities**

4.1 WINGS represents that it shall obtain, pay and maintain all licenses and approvals required under the Motor Vehicles Act, 1939, appended thereto or under any other applicable laws, rules for the time being in force, or which may be enforced during the currency of this Agreement, to act as a transporter of persons in Pune.

4.2 WINGS agrees that the vehicles shall be subject to NTrance periodic inspection for conformity with the above conditions and WINGS shall at its own cost carry out the necessary repairs, painting, upholstery work, etc. as may be suggested by NTrance from time to time to make the vehicle appear neat, clean and roadworthy conditions. However, nothing herein contained shall impose any liability on NTrance as regards the conditions or use of the said Vehicle.

4.3 WINGS shall ensure that the Vehicle Log Book is maintained for every Vehicle stating therein day-to-day Schedule of the Vehicle. WINGS to obtain the name and signature of all employees who are given door pick up and door drop. This should be maintained carefully and shall be made available to the authorized person of NTrance for inspection and verification as and when demanded.

4.4 WINGS shall insure the vehicle comprehensively at its own cost with a reputed Insurance Company. The insurance cover shall also include the third party, riot and passenger risk (per person) of the employees of NTrance. Any person other than a bonafide employee of NTrance using the services would do so at his/her own risk and WINGS is not bound to allow them to travel in the vehicle.

4.5 WINGS shall keep NTrance fully indemnified at all times, from and against any claims, losses, costs and charges arising out of personal injury or death caused by reason of negligence or by any reason whatever on the part of WINGS or its agents and/or employees. In the event of a third party claim, WINGS shall be solely responsible to meet the same and shall keep NTrance indemnified at all times against all such claims, costs, charges and expenses arising out of such third party claims. WINGS shall ensure that the Vehicle is not over loaded beyond the authorized seating capacity.

4.6 WINGS shall be responsible for all costs and liabilities pertaining to ESIC, Provident Fund and other Statutory benefits to be provided to its employees and shall indemnify and hold NTrance harmless against any claims, losses or penalty for any non-compliance by WINGS or its sub-contractor on its behalf. If in any case WINGS fails to pay statutory dues or registration charges under statutory acts, NTrance has right to deduct the statutory dues from payments due to WINGS and pay the same on behalf of WINGS.

4.7 NTrance shall not be, in any way, be responsible or liable to make good the damages or pay compensate either to WINGS or its employees in the event of the Vehicle and/or the employees of WINGS meeting with any accident resulting in any loss either to WINGS or its employees.

4.8 Unless otherwise expressly agreed to herein, neither Party shall be liable to the other Party for any indirect, incidental or consequential loss, loss of profit, damage, expense or cost arising out of performance of its obligations under this Agreement.

4.9 In case of non-availability of the vehicle on any day for any reason whatsoever, WINGS shall be liable to provide to NTrance an alternative Vehicle, at no extra cost to NTrance. If WINGS fails to make available the Vehicles on time, NTrance shall get reimbursement from WINGS for taxi fare or auto fare on actual basis incurred by the employees of NTrance while commuting between office and residence.

4.10 WINGS shall not be liable to NTrance or the Employees in case of any change in the route due to any temporary restrictions by R.T.O. or the local police. WINGS shall however endeavor to reach the employees to their destination as per the agreed time schedule.

4.11 During the course of transportation, the employees shall be responsible to take care of their personal property and WINGS will not be liable for any loss or damage to any property of the employees.

• **Clause-5. Termination**

5.1 Either Party may terminate this Agreement in case the other party has committed a breach of any of the terms of this Agreement and has not cured such breach within a period of fifteen (15) days from the date of the receipt of the notice from the aggrieved party requesting it to so cure such breach.

ANNEXURE 1

A) Overview:

This Annexure sets out the Services that Wings Travels ("WINGS") shall provide to NTrance Customer Services Private Limited ("NTrance"). This Annexure is executed as part of the Agreement between WINGS and NTrance dated 26th May, 2007 (the Agreement), the terms and conditions of which apply to this Annexure except where stated otherwise.

B) Payment Terms and Timelines for Vehicles employed with NTrance:

In consideration of WINGS providing services to NTrance as defined in Clause 2 of the Agreement. NTrance shall pay the following charges to WINGS:

Sr. No.	Type of Vehicle	KM Running	Days & Hours	Miscellaneous	Package (Rs.)	Extra Mileage Rs/KM
1	Indicab	4500	6 days week (Mon-Sat)	3 pick ups and drops	28900	6.00
2	Indicab	3500	6 days week (Mon-Sat)	2 pick ups and drops	23000	6.00
3	Tempo Traveller (14/17 Seater)	-	6 days week (Mon-Sat)	One pick and One drop only	22250	-
4	Tempo Traveller (14/17 Seater)	-	6 days week (Mon-Sat)	Two pick and Two drop only	40000	-
5	Tavera Non AC	4500	6 days week (Mon-Sat)	3 pick ups and drops	52000	-
6	Tavera Non AC	3500	6 days week (Mon-Sat)	2 pick ups and drops	38000	10.00
					33000	10.00

C) Services to be provided:

WINGS shall provide vehicles for the transportation of employees of NTrance for six (06) days a week between Office and Locations as communicated by NTrance to WINGS in writing from time to time. WINGS shall cause the service to be provided as per schedules, which shall be intimated on an ongoing basis. Wherever possible at least 2 days notice will be given for change in schedule, however, all efforts to be taken to ensure that the services are provided at a shorter notice of less than 2 days.

WINGS hereby undertake that it shall take all necessary measures to ensure that the services rendered by it are of a high qualitative standard and that all quality specifications or functionality parameters detailed below are fulfilled to the reasonable satisfaction of NTrance.

• **Conditions for Supervisors and/or Chauffeurs**

Conditions for Drivers (All the under mentioned requirements shall be fulfilled before employing the driver for our fleet.)

- a) All drivers will be issued with a photo ID by their respective fleet owners.
- b) The following documents will be submitted to NTrance;
 - i. Driver's personal details incl. Finger prints.
 - ii. Driver's background check duly attested.
 - iii. Drivers License
 - iv. Drivers Tourist permit license
 - v. Affidavit from Notary regarding his character.
- c) The drivers need to have a good knowledge of the city roads and routes.
- d) The drivers must notify NTrance transport desk about all kind of abnormal incidents (accidents/vehicle breakdown/late reporting) while plying the vehicles during the contract tenure.
- e) The drivers need to be polite and well mannered while communicating with all NTrance staff.
- f) The drivers should be wearing uniforms and be neat in appearance.
- g) Drivers need to ensure that there is "No Smoking" allowed inside the vehicles at all times.
- h) Drivers need to ensure that all passengers wear the seat belts.
- i) Drivers need to observe the speed limits as mentioned by the company.

• Conditions for Supervisors

- a) The supervisor's need to be in uniform and have a good knowledge of the city roads & routes.
- b) The supervisor's are responsible for the effective routing of vehicles & clubbing of the staff as per their schedule in order to ensure smooth operations.
- c) The supervisor's will be the point of contact between the NTrance and the chauffeurs.
- d) The supervisor's must notify the NTrance about all kind of abnormal incidents (accidents/vehicle breakdown/late reporting) while plying the vehicles during the temporary contract tenure.
- e) The supervisor's need to be polite & well mannered while communicating with all the NTrance staff apart from being neat in appearance.
- f) Supervisor's need to ensure that there is "No Smoking" allowed inside the Fleet at all times.
- g) The supervisor's need to be well educated about the fleet strength, availability of chauffeurs in their respective shift and should not hesitate to share the same information to the NTrance at any given point.
- h) The supervisor's needs to submit a copy of log sheets of all the vehicles after ensuring their accuracy at the end of each shift and notify the discrepancies if any to the NTrance.

• Specifications for Vehicles

Vehicles provided to NTrance as per Clause 3(b), shall meet the following specifications:

- a) Should be in accordance with the instructions of RTO as per the Motor Vehicles Act, which are prescribed in the permit & fitness certificates.
- b) Should have front & rear seat belts, all in a working condition.
- c) Should have the NTrance logo and Cab numbers on the front & rear windscreen for easy identification.
- d) Should have the valid documents, as mandated by all applicable regulations, at all times.
 - i. Vehicle Registration
 - ii. Vehicle Insurance
 - iii. Tourist permit license
 - iv. Drivers License
 - v. Drivers Tourist permit license
- e) One set of all these valid documents should be given to NTrance for records.
- f) The vehicle should have the following:
 - i. Fire extinguisher (shall be routinely checked for expiry dates and working order)
 - ii. Mobile phone (NTrance shall not in anyway be responsible for charges of cell phone, loss of such handsets or its misuse. Vendor shall bear the charges of the handset.)
 - iii. First aid box/medical kit (shall be routinely checked for expiry dates and working order)
 - iv. Torch
 - v. Umbrella
 - vi. Tool Box
- g) Vendor shall bear all the expenses on diesel, petrol/oil, repairs, replacement of the part/parts, and maintenance of the vehicle including any other incidental expenses thereto.
- h) The Vehicle shall be operated by vendor's own employees at vendor's cost.

The bill raised by Wings Travels i.e., the applicant has the details thus -

Sr. No.	Description	Qty	Rate	Amount (Rs)
1)	Amount receivable for transport services provided during the period 26.04.08 to 25.05.08 as per agreement dt. 25.05.07 /instructions dated 25.05.07	1.00	28000.00	28000.00
	Number of Vehicles : 1			
	Kilometers :			
	Model : Three pick up / three drop			
	(detailed calculations attached).			
	Service Tax @ 12.36% of assessable value of Rs.			
	as per Notification No. Finance Act 2007.			1344.00
	Service Tax Amount		@ 1%	13.44
	Education Cess.		@ 2%	26.88
	Higher & Secondary Education Cess.			1384.32
	Total Service Tax.		Total	29384.32
			Round off	-0.32
			G. Total	29384.00

Now, it is the contention of the applicant that it is rendering transport services and the definition of dealer under the Maharashtra Value Added Tax Act, 2002 (MVAT Act, 2002) excludes from its scope, a transporter. The definition of 'dealer' as contained in section 2(8) of the MVAT Act, 2002 needs, therefore, to be seen thus :

"dealer" means any person who, for the purposes of or consequential to his engagement in or, in connection with or incidental to or in the course of, his business buys or sells, goods in the State whether for commission, remuneration or otherwise and includes,-

- (a) a factor, broker, commission agent, del-credere agent or any other mercantile agent, by whatever name called, who for the purposes of or consequential to his engagement in or in connection with or incidental to or in the course of the business, buys or sells any goods on behalf of any principal or principals whether disclosed or not;
- (b) an auctioneer who sells or auctions goods whether acting as an agent or otherwise or, who organises the sale of goods or conducts the auction of goods whether or not he has the authority to sell the goods] belonging to any principal whether disclosed or not and whether the offer of the intending purchaser is accepted by him or by the principal or a nominee of the principal;
- (c) a non resident dealer or as the case may be, an agent, residing in the State of a non-resident dealer, who buys or sells goods in the State for the purposes of or consequential to his engagement in or in connection with or incidental to or in the course of, the business;
- (d) any society, club or other association of persons which buys goods from, or sells goods to, its members;

Explanation.— For the purposes of this clause, each of the following persons, bodies and entities who sell any goods whether by auction or otherwise, directly or through an agent for cash, or for deferred payment, or for any other valuable consideration shall, notwithstanding anything contained in clause (4) or any other provision of this Act, be deemed to be a dealer, namely:-

- (i) Customs Department of the Government of India administering the Customs Act, 1962 (52 of 1962);
- (ii) Departments of Union Government and any Department of any State Government;
- (iii) Local authorities;
- (iv) Port Trusts;
- (iv-a) Public Charitable Trust;
- (v) Railway Administration as defined under the Indian Railways Act, 1989 (24 of 1989) and Konkan Railway Corporation Limited;
- (vi) Incorporated or unincorporated societies, clubs or other associations of persons;
- (vii) Insurance and Financial Corporations, institutions or companies and Banks included in the Second Schedule to the Reserve Bank of India Act 1934 (11 of 1934);
- (viii) Maharashtra State Road Transport Corporation constituted under the Road Transport Corporation Act, 1950 (LXIV of 1950);
- (ix) Shipping and construction companies, Air Transport Companies, Airlines and Advertising Agencies;
- (x) any other corporation, company, body or authority owned or constituted by, or subject to administrative control, of the Central Government, any State Government or any local authority;

Exception I.— An agriculturist who sells exclusively agricultural produce grown on land cultivated by him personally, shall not be deemed to be a dealer within the meaning of this clause.

Exception II.— An educational institution carrying on the activity of manufacturing, buying or selling goods, in the performance of its functions for achieving its objects, shall not be deemed to be a dealer within the meaning of this clause.

Exception III.— A transporter holding permit for transport vehicles (including cranes) granted under the Motor Vehicles Act, 1988 (5 of 1988), which are used or adopted to be used for hire or reward shall not be deemed to be a dealer within the meaning of this clause in respect of sale or purchase of such transport vehicles or parts, components or accessories thereof.

It can be seen that of the three Exceptions to the definition of 'dealer', the third one is in respect of a transporter as described therein. Thus, the Exception III is about a transporter who satisfies the following :

- a. **The transporter should be holding a permit.**
- b. **The permit should be -**
 - granted under the Motor Vehicles Act, 1988 (5 of 1988).
 - for transport vehicles (including cranes).
- c. **These transport vehicles (including cranes) are used or adopted to be used for hire or reward.**

If the above conditions are satisfied then such transporter shall not be deemed to be a dealer in respect of - **Sale or purchase of such transport vehicles or parts, components or accessories thereof.**

I find that a very similar Exception III was found in the definition of 'dealer' under the Bombay Sales Tax Act, 1959 (BST Act), too. The Exception III was added and deemed to have been added to the definition of 'dealer' under the BST Act w.e.f 16-08-1985 by the Maharashtra Tax Laws (Levy and Amendment) Act No. XXI of 1998 dt.11.08.1998.

The date from which the Exception III was added to the definition of 'dealer' needs to be understood. By clause 29A inserted in Article 366 of the Constitution of India by the Constitution (Forty-sixth Amendment) Act, 1982, the expression 'tax on the sale or purchase of goods' used in entry 54 in list II in the Seventh Schedule to the Constitution was defined so as to include inter alia 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'. Under the mechanism provided by the BST Act, the State Government had the power to levy tax on sale or purchase of goods. The State Government decided to levy 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' by enacting a separate law by the name 'Maharashtra Sales Tax on the Transfer of the Right to use any Goods for any Purpose Act, 1985' (Lease Act) instead of making provision in respect thereof in the BST Act. The Act received the assent of the Governor on dt.12.08.1985 and was first published in Maharashtra Government Gazette on dt.14.08.1985. It came into force on dt.01.10.1986.

The Central Budget of 1997-98 proposed to extend further the service tax levy to goods transportation by roads under the category of "Goods Transport Operator". By amending the definition of "person responsible for collecting of service tax" in the Service Tax Rules with regard to services provided by the goods transport operator, a person responsible was said to be the client or the customer of the goods transporter. The liability to pay the service tax was shifted to the person who hires the service of transporter. There was a country-wide strike by the transporters.

When the issue went to the Hon. Supreme Court, the Hon. Supreme Court in the case of M/s. Laghu Udyog Bharati V/s Union of India [1999 (112) E.L.T. 365 (S.C.)] held that the provisions of Rule (2(d) (xvii)), insofar as it makes persons other than the goods transport operator as being responsible for collecting the service tax, are ultra vires the Act itself.

It is during this period that the Exception III was added in the BST Act. We have seen above that it was added by the amendment of 1998 and was deemed to have been added to the definition of 'dealer' under the BST Act w.e.f 16-08-1985. Now, the Lease Act was published in Maharashtra Government Gazette on dt.14.08.1985. It needs to be appreciated that the Exception III was not inserted in the Lease Act but was inserted in the BST Act from the time the Lease Act came into existence. What this conveys is that transporters effecting a transfer of the right to use goods or leasing of vehicles were not protected from the levy under the Lease Act. However, transporters effecting a sale or purchase of the transport vehicles were protected from the levy under the BST Act. Thus, incidence of 'deemed sale' attracted a tax whereas incidence of 'sale' didn't attract tax.

With the introduction of the MVAT Act, 2002, the Lease Act was repealed. Instead of having a separate enactment for levy of tax on the transfer of the right to use goods, the incidence of tax under the repealed Lease Act was incorporated in the MVAT Act, 2002. Lease, works contract, etc. were included as 'deemed sale' for the purposes of the MVAT Act, 2002. Now, the Exceptions as

found in the BST Act under the definition of 'dealer' were carried over to the MVAT Act, 2002. Hence, it needs to be understood and appreciated that the 'sale or purchase of such transport vehicles or parts, components or accessories thereof' is not to be taken in the context of the 'deemed sale' of leasing, works contract, etc.

I would refer herein to the recent decision of the Hon. Bombay High Court in a common order dt.07.02.2017 in the case of Messrs. Buthello & Sons (VAT Appeal No. 33 of 2016) and Buthello Travels (VAT Appeal No. 37 of 2016) versus The Commissioner of Sales Tax, Maharashtra. The issue herein was as to whether the buses given on hire by the appellants' to the PMT is a sale within the meaning of section 2(24) of the MVAT Act, 2002. After holding that the appellants' transactions were a 'sale' ('deemed sale') within the meaning of section 2(24) of MVAT Act, 2002 read with its explanation (b)(iv) [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], the Hon. Bombay High Court observed thus with regard to the claim put forth of coverage under the very Exception III that I have deliberated upon above -

"This is not a case of a sale of transport vehicle or purchase thereof nor a case of sale of parts, components or accessories of such transport vehicles or purchase thereof. This is a case where the legislature has made the transfer of the right to use any goods for any purpose a deemed sale."

From the above, it can be seen that even the Hon. Bombay High Court has held that the

Exception III does not apply to deemed sales.

Coming back to the present case, we see that the applicant is claiming that the above Exception is applicable to his case and therefore, the plea that the applicant does not come under the purview of the MVAT Act, 2002. An obvious inference of this claim is that the applicant admits to the circumstances, conditions and consequences mentioned in the Exception III. Further it is to be noted that the purpose of an Exception clause is to exclude certain things from the main clause which otherwise inevitably befalls therein. Though governing a different subject, I would refer to the decision of the Hon. Supreme Court in Project Officer, IRDP And Ors. v. P. D. Chacko (2010-(006)-SCC-0637-SC) to explain the scope of an Exception clause thus -

*"Exception clause, is normally, part of the enacting section, unlike a proviso which follows an enacting part. Crawford's interpretation of Laws (1989) page 128, speaks of exception as follows :-
"The exception, however, operates to affirm the operation, of the Statute to all cases not excepted and excludes all other exceptions; that is, it exempts something which would otherwise fall within the general words of the Statute".
It is trite law that an exception clause has to be strictly interpreted and cannot be assumed but be proved. Exception clause is always subject to the rule of construction and in case of doubt, it must befriend the general provision and disfavour the exception. If any category of person claims exception from the operation of the statute it must establish that it comes within the exception."*

Another thing that strikes me is that all through the submission as made before me, and as made in the earlier proceedings, which has been reproduced in great detail in the first determination order, the applicant is claiming that the transaction is a 'service' and not a 'sale'. We also find that the applicant is seeking protection under the Exception III. But this Exception III under which protection is being sought covers a 'sale' which is sought to be excluded from the scope of the Act! The Exception clause covers a transporter when he is effecting a "sale or purchase

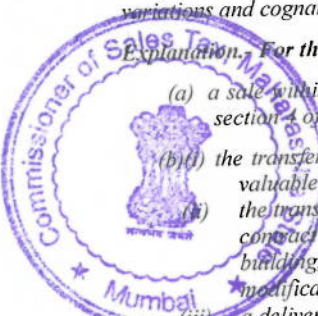
of such transport vehicles or parts, components or accessories thereof". Therefore, when the applicant is claiming coverage under the Exception clause, it can be inferred as well as can be seen to have been expressly admitted by the applicant -

- that he is a transporter having transport vehicles;
 - that the transport vehicles are used or adopted to be used for hire or reward;
- AND (MOST IMPORTANTLY)**
- that he is effecting a sale or purchase of such transport vehicles or parts, components or accessories thereof.

Even if the situation presents inferences as at above, I would ascertain the position on the basis of the facts before me. The thing which is certain is that the applicant is a transporter of transport vehicles. So it needs to be ascertained whether the *Exception III* becomes applicable to the applicant. And more importantly, it would first have to be seen whether the applicant effects a *sale or purchase of such transport vehicles or parts, components or accessories thereof*. Hence, I would start by ascertaining whether the transaction is a 'sale or purchase'. Now, the applicant has tendered no purchase bill. However, a receipt is tendered as being issued by the applicant for the amount received for rendering 'transport services'. Hence, I have only an invoice which is issued to acknowledge the receipt of consideration for allowing the use of the transport vehicles. Now, the definition of 'sale' under section 2 (24) of the MVAT Act, 2002 reads thus -

"sale" means a sale of goods made within the State for cash or deferred payment or other valuable consideration but does not include a mortgage, hypothecation, charge or pledge; and the words 'sell', 'buy' and 'purchase', with all their grammatical variations and cognate expressions, shall be construed accordingly;

Explanation.- For the purposes of this clause,-

- 
- (a) a sale within the State includes a sale determined to be inside the State in accordance with the principles formulated in section 4 of the Central Sales Tax Act, 1956 (74 of 1956);
 - (b)(i) the transfer of property in any goods, otherwise than in pursuance of a contract, for cash, deferred payment or other valuable consideration;
 - (ii) the transfer of property in goods (whether as goods or in some other form) involved in the execution of a 13[14[works contract including], an agreement for carrying out for cash, deferred payment or other valuable consideration, the building, construction, manufacture, processing, fabrication, erection, installation, fitting out, improvement, modification, repair or commissioning of any movable or immovable property;]
 - (iii) a delivery of goods on hire-purchase or any system of payment by instalments;
 - (iv) 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;
 - (v) the supply of goods by any association or body of persons incorporated or not, to a member thereof for cash, deferred payment or other valuable consideration;
 - (vi) 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 made or given for cash, deferred payment or other valuable consideration;

shall be deemed to be a sale."

As observed earlier, we see from the above definition that sale' under the MVAT Act, 2002 covers a 'deemed sale', too. The impugned transaction involves movable goods which are vehicles. There is consideration flowing in the transaction between the applicant and NTrance. A look at the consideration reveals that it is not for a transaction that involves an outright sale of the vehicles to NTrance but it is for an arrangement such that for a specified period, NTrance gets to use the vehicles, the movable goods. On an overview of the above definition, it is *prima-facie* felt that the nearest clause under which the impugned transaction could be said to fall is sub-clause (iv) of clause (b) of the *Explanation* to the definition of 'sale' under the MVAT Act, 2002. As the definition

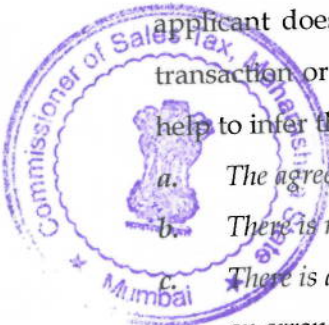
reveals, the situations under clause (b) are deemed to be a 'sale' for the purposes of the MVAT Act, 2002. Hence, at this juncture, I would have to comment that the Exception III would not afford protection in the instant case as the same involves circumstances not akin to a 'sale' but to a 'deemed sale'. This is since I have observed in the preceding paras that the word 'sale' as used in the Exception III to the definition of 'dealer' under the MVAT Act, 2002 would not apply to a 'deemed sale'. Let me reproduce the said clause again thus -

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;

The above description reveals that the same provides not for the use but for the transfer of the 'right to use'. Such transfer may or may not be for a specified period but the same is for cash, deferred payment or other valuable consideration. From a look at the various clauses of the impugned agreement, it is for me now to determine as to whether the transaction envisages a transfer of the right to use the vehicles. I proceed thus :

- *The Agreement governs the understanding between NTrance and WINGS in relation to WINGS providing vehicles for the transportation of employees of NTrance between Office and Locations as specified by NTrance as per terms and condition.*

The above clause reveals that there is an agreement to provide vehicles to transport persons from locations as decided by NTrance. NTrance would decide the route and the manner in which the vehicles would ply. This is the first stage where we see that having entered into an agreement with NTrance, the vehicles would be under the control of NTrance even though the vehicles belong to the applicant or, as the case may be, are provided by the applicant. The applicant does not have any say in the way the vehicles would be used by NTrance. The transaction or the arrangement when seen in the light of sub-clause (iv) of clause (b) would help to infer thus :

- 
- a. *The agreement does not permanently transfer the vehicles to NTrance.*
 - b. *There is no outright sale of the vehicles to NTrance.*
 - c. *There is an arrangement such that the applicant makes available the vehicles for NTrance. This is an arrangement for a temporary time period.*
 - d. *The applicant has informed that they make available either own vehicles or vehicles procured from others to NTrance.*
 - e. *During the time, the vehicles are at the services of NTrance, NTrance has control over the vehicles.*
- *WINGS hereby undertakes that it shall take all necessary measures to ensure that the services rendered by it are of a high qualitative standard and that all quality specifications or functionality parameters as specified in Annexure I or communicated by NTrance to the WINGS from time to time are fulfilled to the reasonable satisfaction of NTrance.*

The above reveals that NTrance would from time to time issue such instructions or directions which are to be satisfactorily fulfilled by the applicant. The clause again goes to show the control of NTrance over the use of the vehicles.

- *In consideration of WINGS providing services to NTrance as defined in Clause 2 above, NTrance*

shall pay charges to WINGS at the rates specified in Para B of Annexure 1 to this Agreement. The sum shall be payable as per timelines mentioned in Annexure 1. The sum payable, as mentioned in this clause does not include reimbursement of expenses and the cantonment of toll tax which will be billed at actual, provided all supporting for such expenses are provided along with the invoices.

The above clause reveals that the consideration flowing is purely for the use of the vehicles which have been given to NTrance. The fact that other expenses such as toll, etc. would be charged separately shows that the consideration flowing is not a composite one. The other charges would be billed 'at actual' and would be reimbursed by NTrance only if supporting documents therefor are shown and verified by NTrance. The consideration for the vehicles is fixed and is billed accordingly. This fact helps to determine the 'sale price' for the transaction through which the applicant has transferred to NTrance, the right to use the goods i.e. the vehicles.

- *During the tenure of this Agreement, WINGS shall not be entitled to any upward revision in fares/hire charges (or any escalation in fuel costs) unless mutually agreed in writing by NTrance and WINGS. Up to 5% variation in the diesel price, there will be no change in the rates. For variations more than 5% of the existing diesel prices the rate will change by Rs.0.066/- per Km for Indicab, and Rs.0.10/- per Km for a Tempo Traveller for every rupee change from the existing diesel prices. The existing diesel rate isd Rs.35.10/-.*

The above clause reveals that no matter the cost of providing the vehicles to NTrance escalates, the applicant would have to continue with the contract. Thus, this clause also establishes that the control lies with NTrance.



- *WINGS agrees that the vehicles shall be subject to NTrance periodic inspection for conformity with the above conditions and*

The above clause again is about the fact that the control lies with NTrance:

WINGS shall ensure that the Vehicle Log Book is maintained for every Vehicle stating therein day-to-day Schedule of the Vehicle. WINGS to obtain the name and signature of all employees who are given door pick up and door drop. This should be maintained carefully and shall be made available to the authorized person of NTrance for inspection and verification as and when demanded.

The above clause reveals that a dedicated vehicle is made available for NTrance and further, that NTrance has control over its movement.

- *In case of non-availability of the vehicle on any day for any reason whatsoever, WINGS shall be liable to provide to NTrance an alternative Vehicle, at no extra cost to NTrance. If WINGS fails to make available the Vehicles on time, NTrance shall get reimbursement from WINGS for taxi fare or auto fare on actual basis incurred by the employees of NTrance while commuting between office and residence.*

The above clause reveals that in absence of a vehicle being made available for NTrance, the applicant is responsible to provide an alternate vehicle or taxi/auto fare would have to be reimbursed. This clause establishes that the terms of the contract are such that the applicant is liable and responsible to provide dedicated vehicles.

- *WINGS shall cause the service to be provided as per schedules, which shall be intimated on an ongoing basis.*

The above clause reveals that the vehicles are to be provided on an ongoing basis.

- *Conditions for Supervisors and/or Chauffeurs
Conditions for Drivers (All the under mentioned requirements shall be fulfilled before employing the*

driver for our fleet.)

- a) All drivers will be issued with a photo ID by their respective fleet owners.
- b) The following documents will be submitted to NTrance;
 - i. Driver's personal details incl. Finger prints.
 - ii. Driver's background check duly attested.
 - iii. Drivers License
 - iv. Drivers Tourist permit license
 - v. Affidavit from Notary regarding his character.
- c) The drivers need to have a good knowledge of the city roads and routes.
- d) The drivers must notify NTrance transport desk about all kind of abnormal incidents (accidents/vehicle breakdown/late reporting) while plying the vehicles during the contract tenure.
- e) The drivers need to be polite and well mannered while communicating with all NTrance staff.
- f) The drivers should be wearing uniforms and be neat in appearance.
- g) Drivers need to ensure that there is "No Smoking" allowed inside the vehicles at all times.
- h) Drivers need to ensure that all passengers wear the seat belts.
- i) Drivers need to observe the speed limits as mentioned by the company.

Conditions for Supervisors

- a) The supervisor's need to be in uniform and have a good knowledge of the city roads & routes.
- b) The supervisor's are responsible for the effective routing of vehicles & clubbing of the staff as per their schedule in order to ensure smooth operations.
- c) The supervisor's will be the point of contact between the NTrance and the chauffeurs.
- d) The supervisor's must notify the NTrance about all kind of abnormal incidents (accidents/vehicle breakdown/late reporting) while plying the vehicles during the temporary contract tenure.
- e) The supervisor's need to be polite & well mannered while communicating with all the NTrance staff apart from being neat in appearance.
- f) Supervisor's need to ensure that there is "No Smoking" allowed inside the Fleet at all times.
- g) The supervisor's need to be well educated about the fleet strength, availability of chauffeurs in their respective shift and should not hesitate to share the same information to the NTrance at any given point.
- h) The supervisor's needs to submit a copy of log sheets of all the vehicles after ensuring their accuracy at the end of each shift and notify the discrepancies if any to the NTrance.

The above clause shows that NTrance is having control in the decision making for the staff to be employed for driving the vehicles.

Should have the NTrance logo and Cab numbers on the front & rear windscreen for easy identification.

The above clause shows that the vehicles while being used for NTrance are suitably adapted to be identified as vehicles of NTrance. The vehicles with the NTrance logo goes on to show the representation to the public and how they would identify such vehicles as being of NTrance.

All the above clauses show that the applicant has made available dedicated vehicles to NTrance. We have seen the definition of sale which includes a deemed sale. One of the deemed sales is 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; A look at all above shows that the aforesaid 'deemed sale' clause founds satisfied in the present case thus :

- The applicant has not sold the vehicles on outright basis to NTrance but has allowed NTrance, the use thereof.
- This use is possible when the applicant has transferred his right to use the vehicles to NTrance, owing to which NTrance is able to use the vehicles.
- The above arrangement is in terms of the classic case of vehicle leasing wherein there isn't a transfer of ownership such that the licences, permits, etc. are not transferred in the name of the lessee. There is a

frequency of these transactions and therefore, for each transaction effected, one doesn't find the lessee becoming the owner of the vehicles by way of transfer of the permits, licences in the name of the lessee. Such transactions are for a temporary period and, further to that, due to the frequency thereof, there arises no occasion to effect a transfer of permits, licenses, etc. in the name of the lessee. One finds that such transfer of permits, licenses, etc. is effected only when there is an absolute sale of the vehicles. However, in cases as of the present type, there's an arrangement for a temporary period wherein dedicated vehicles are made available to the lessee. In the present case, the right to use the NTrance logo is an example of a temporary right to use. There is control (clauses reproduced hereinabove) and possession, too.

Now, the applicant was asked to give evidence about the log books of the vehicles given to NTrance. To this, it was informed by letter dt.17.11.2016 that the log book details would not be available as the business has been discontinued and further to that, even in the normal course, log books are not preserved once the bill is raised on the client. It was argued that the inference about the transaction should be had from the agreement entered into with NTrance. With regard to these arguments, I have to submit that I have already made my observations and these are based on the agreement ONLY. And it is felt that, had the log books been available, there could have been no inferences different from the ones as had by predecessor that :



- i. "The vehicle, where it terminates the traveling on 1.7.2010, starts from that point on subsequent day.
- ii. The vehicle seems to have been in use for a single BPO as the kms are continuous.
- iii. The travelled km seems to have been endorsed by the employees of the BPO [4.26, 4.27 AHMSI] (8.9 Spanco). Thus, it is revealed that if the vehicle is used for more than one BPOs, then there has to have some distance in kms which is required to be traveled by that vehicle to reach the other BPO. Obviously, the starting mileage will have to be different from that of the closing kms of the other BPO which is not so, and thus it can be deduced that a particular vehicle is used only for a particular single BPO."

I have reproduced hereinabove, the invoice in the present agreement. Since the invoice mentions the words 'detailed calculations attached', the applicant was asked by letters dt.13.05.2016, dt.27.06.2016 and dt.24.10.2016 to submit the detailed calculations sheet referred to in the invoice submitted for determination as being attached to the invoice. However, the applicant has expressed inability to reproduce the same as the same pertains to a very old period. On dt.15.11.2016, the representatives of the applicant attended and stated that the calculation details can be had from the ANNEXURE 1 of the agreement itself. By submission dt.14.03.2016 about owned and other vehicles, it is informed that when the vehicle is owned by person other than Wings Travels, the said vehicle and driver are deployed by the owner for rendering services to the applicant's client and the physical possession and control over the vehicle continue to be with the owner, in the same manner as in the case of the applicant owned vehicles. It is further informed that the Transport Permits continue to be in the name of the vehicle owner and are not transferred either to Wings Travels or to the client to whom the transport services are provided.

Now with facts such that the agreement bringing out an inference that the impugned transaction is of leasing of vehicles, I would come to the claim that the applicant is not a 'dealer' under the MVAT Act, 2002 by virtue of Exception III to the definition of 'dealer'. At the cost of

repetition, let me reproduce the same herein again thus -

Exception III.— A transporter holding permit for transport vehicles (including cranes) granted under the Motor Vehicles Act, 1988 (5 of 1988), which are used or adopted to be used for hire or reward shall not be deemed to be a dealer within the meaning of this clause in respect of sale or purchase of such transport vehicles or parts, components or accessories thereof.

Now, we have seen earlier that Exception III is not to be considered to interpret the 'deemed sales'. I have observed earlier that the present transaction fits more perfectly into the deemed sale clause in the definition of 'sale' and which is 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*. In view thereof, the cover of Exception III cannot be available to the applicant to escape from being a 'dealer' for the purposes of the MVAT Act, 2002.

Despite the situation being so, I would look at the argument that the word 'sale' as appearing in the Exception III covers 'sale' as well as 'deemed sale'. Before so deliberating, we have the following facts to consider -

- i. The applicant has a permit for a motor vehicle which is used for carrying passengers as is seen from the words "carrying passengers" against the words "Usage/Purpose" as found in the Form of the Permit.
- ii. The applicant has informed by letter dt.14.03.2016 that to render services, the applicant used to deploy owned vehicles as well as vehicles owned by others.
- iii. In case of vehicles owned by others, the Transport Permits continue to be in the name of the vehicle owner and are not transferred either to Wings Travels or to the client to whom the transport services are provided.

iv. The applicant has informed that log book details would not be available.

Now, we have seen that to get covered under the above Exception III, a transporter has to satisfy certain conditions which have been reproduced earlier thus -

- a. *The transporter should be holding a permit.*
- b. *The permit should be -*
 - *granted under the Motor Vehicles Act, 1988 (5 of 1988).*
 - *for transport vehicles (including cranes).*
- c. *These transport vehicles (including cranes) are used or adopted to be used for hire or reward.*
- d. *If the above conditions are satisfied then such transporter shall not be deemed to be a dealer in respect of the sale or purchase of such transport vehicles or parts, components or accessories thereof.*

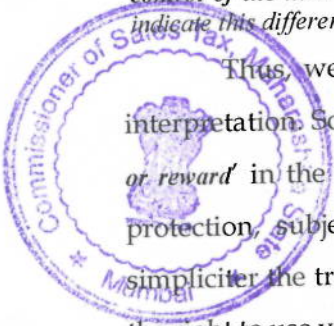
It can be seen from the above that one of the conditions is that *the transporter should be holding a permit*. When the applicant would be using vehicles owned by others, this condition would not be satisfied. In view thereof, in situations where the applicant would not be holding a permit, there arises no occasion to look at the other conditions or to even discuss about the coverage under the Exception III. In such cases, the Exception III would not be applicable and hence, the applicant would be a 'dealer' for the purposes of the MVAT Act, 2002 for the transaction of transfer of the right to use the motor vehicles.

Having said as above, I have to be quick to reiterate that the Exception III was never brought in to cover transactions of the present type. The non-existence of such an Exception in the Lease Act bears a torch to what I say. Despite being sale or purchase transactions as falling in the

definition of 'sale' under the BST Act, the sale or purchase of transport vehicles or parts, components or accessories thereof as carried out by the transporters were accorded an exemption from the applicability of the BST Act, subject of course to the conditions as found in the Exception.

The words 'sale or purchase of such transport vehicles.....' could not have covered transactions of leasing of vehicles. Though the Exception III was inserted retrospectively in the BST Act w.e.f 16-08-1985, the same was brought in the year 1998. By then, the Lease Act was a well settled piece of legislation. I say this as in the case law in Rashtriya Ispat Nigam Ltd. vs. Commercial Tax Officer, Company circle, Vishakhapatnam decided on dt.15.12.1989 (77 STC 182), the Hon. Andhra Pradesh High Court had cited an example of hiring a taxi cab simpliciter and hiring a taxi cab under a rent-a-car scheme with a chauffeur thus :

"The essence of transfer is passage of control over the economic benefits of property which results in terminating lights and other relations in one entity and creating them in another. While construing the word 'transfer' due regard must be had to the thing to be transferred. A transfer of the right to use goods necessarily involved delivery of possession by the transferor to the transferee. Delivery of possession of a thing must be distinguished from its custody. It is not uncommon to find the transferee of goods in possession while transferor is having custody. When a taxi cab is hired under 'rent-a-car' scheme, a cab is provided, usually driver accompanies the cab, there the driver will have the custody of the car though the hirer will have the possession and effective control of the cab. This may be contrasted with the case when a taxi car is hired for going from one place to another. There the driver will have both the custody as well as the possession; what is provided is service on hire. In the former case, there was effective control of the hirer (transferee) on the cab. Whereas in the latter case it is lacking. We have many examples to indicate this difference."



Thus, we see that the concept of leasing of vehicles had reached the Hon. Courts for interpretation. So the condition of 'transport vehicles (including cranes) used or adopted to be used for hire or reward' in the Exception III was inserted under the BST Act, and not the Lease Act, to give protection, subject to conditions, to the transporters when they are selling or purchasing, simpliciter the transport vehicles and not when they are entering into transactions for transfer of the right to use vehicles for hire or reward. The event sought to be protected is the sale or purchase of the transport vehicles and not the event of transfer of the right to use the vehicles. If we see the present transaction in the light of the above case then we find that by way of a detailed agreement, an arrangement is scheduled such that the applicant is duty bound to provide use of dedicated vehicles to the client. The vehicles could have been procured on a daily basis. But the point that an agreement is entered into with a single provider for a specified period should not be without a reason. The present transaction is in essence a transfer of the right to use the vehicles for a specified period for a consideration.

Having seen thus, I would now look at the arguments in favour of the contention that the applicant is not a 'dealer' for the purposes of the MVAT Act, 2002.

- The agreement is for rendering transport services.

With regard to this argument, we have seen above that the transaction is for transfer of the right to use the vehicles and the MVAT Act, 2002 is well empowered to levy a tax on this incidence.

- The vehicles are owned or procured, maintained, repaired, operational costs (fuel), insurance borne by

the applicant. The applicant holds the transport permit in respect of the vehicles owned by it and no permit is transferred to the client NTrance. In case of procured vehicles also, permit continues to be in the name of the owner and not transferred to NTrance. In case of procured vehicles, even the right to use cannot be transferred by the applicant as the applicant is not the owner of the vehicle and the entire agreement is thus a 'Service' considering the constitutional provisions.

With regard to this argument, I would like to invite attention to the decision of the Hon. Andhra Pradesh High Court in G. S. Lamba & Sons (43 VST 323) thus :

"At this stage, the following principles to the extent relevant may be summed up :

- (a) 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 (29A) 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.
- (b) 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.
- (c) There are clear distinguishing features between ordinary sales and deemed sales.
- (d) article 366(29A)(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 goods contemplated in sub-clause (d) of clause (29A) cannot be equated with that category of bailment where goods are left with the bailee to be used by him for hire.
- (e) In the case of article 366(29A)(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.
- (f) The levy of tax under article 366(29A)(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.
- (g) 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.
- (h) 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 identity of the goods is shown the transaction is exigible to tax.
- (i) The locus of the deemed sale, by transfer of the right to use goods, is the place where the relevant right to use goods is transferred. The place where the goods are situated or where the goods are delivered or used is not relevant.

We have culled out the principles to be applied to determine the nature of the transaction which, according to the Revenue, falls within the ambit of article 366(29A)(d). These principles govern the situation here as well. Though we do not feel compelled to refer to all the cited judgments in detail, and add to the length of this judgment, we are inclined to summarise these cases in a tabular column below. Before that we propose to begin by making a reference to a passage from Scrutton which lucidly distinguishes the lease (involving transfer of the right to use) and licence in the context of charterparties. Referring to *Sandeman v. Scurr* [1866] LR 2 QB. 86, *Baumvoll v. Gilchrist & Co.* [1892] 1 QB. 253 and *Sea and Land Securities v. William Dickinson and Co. Ltd.* [1942] 2 KB 65 the learned author classifies charterparties by demise in the following manner :

Charterparties may be categorized according to whether or not they amount to a demise or lease of the ship.

A charter by demise operates as a lease of the ship itself, to which the services of the master and crew may nor may not be superadded. The charter becomes for the time the owner of the vessel; the master and crew become to all intents his servants, and through them the possession of the ship is in him. A charter by way of demise may be for time or for a particular voyage. In modern times, however, charters by way of demise are invariably expressed to be for a period of time.

Under a charter not by demise, on the other hand, the ship owner agrees with the charterer to render services by his master and crew to carry the goods which are put on board his ship by or on behalf of the charterer. In this case, notwithstanding the temporary right of the charterer to have his goods loaded and conveyed in the vessel, the ownership and also the possession of the ship remain in the original owner through the master and crew, who continue to be his servants. Although the master, by agreement between the owner and charterer, may acquire authority to sign bills of lading on behalf of, and may be obliged to accept voyage instructions from, the latter, he nevertheless remains in all other respects the servant of the owner.

Whether or not the charter amounts to a demise must turn on the particular terms of the charter. 'The question depends, where other things are not in the way, upon this : whether the owner has by the charter, where there is a charter, parted

with the whole possession and control of the ship, and to this extent, that he has given to the charterer a power and right independent of him, and without reference to him to do what he pleases with regard to the captain, the crew, and the management and employment of the ship. That has been called a letting or demise of the ship. The right expression is that it is a parting with the whole possession and control of the ship.'

Time charters almost always contain expression such as 'letting', 'hiring', 'hire', 'delivery' and 'redelivery', which are really apt only in charters by demise. These expressions serve to distinguish such charters from voyage charters, but they do not in themselves characterize such charters as charters by demise. Indeed many time charters expressly provide that the charter should not be construed as a demise of the vessel.

We may now tabulate various precedents in the following statement : Statement of judicial decisions -

Sl. No.	Citation	Goods and nature of transaction	Finding of the court
1.	Bank of India v. Commercial Tax Officer [1987] 67 STC 199 (Cal)	Bank lockers-hiring of bank lockers fixed and/or attached to the walls and embedded in the floors of strong room specially built for the purpose. The bank collects rent.	The transaction is not merely transfer of the right to use goods, but involved rendering various services along with a limited right to use the locker. The lease of bank lockers did not come within the meaning of "sale" by transfer of the right to use.
2.	State Bank of India v. State of Andhra Pradesh [1988] 70 STC 215 (AP)	-do-	Bank lockers embedded in the floor are not "goods" for the purpose of the APGST Act. There is no transfer of the right to use and it is only licence to use the goods without securing possession. The contract is one of bailment and the essential requirement of delivery in a "sale" is lacking in hiring of bank locker.
3.	Rashtriya Ispat Nigam Ltd. v. Commercial Tax Officer [1990] 77 STC 182 (AP)	Sophisticated imported machinery like cranes, docers, dumpers and compressors in the construction of steel plant.	Providing machinery to the contractor in connection with the execution of the work does not amount to transfer of the right to use the machinery. (NB : Affirmed in RINL-II)
4.	Modern Decorators v. Commercial Tax Officer [1990] 77 STC 470 (WBTT)	Constructing pandals, barricades, rostrums on land, road, building rooftop. Material elongs to decorators. After providing these and collecting rent, they were removed and taken away. They were not handed over to the customers.	The goods are not transferred. The customer has no right to use the materials necessary for the construction of pandals. The erection of pandals by the decorator is not "sale", but tables, chairs, etc., let out to customers are "goods" within the meaning of "sale" assessable to tax.
5.	Krushna Chandra Behera v. State of Orissa [1991] 83 STC 325 (Orissa)	Buses - bus hired out to State Transport Corpn. The contractor disintitled from using the vehicle covered by the agreement in any route. The bus was to be run for Corporation as per the agreement and directions of an officer.	The transaction is a "sale" within the extended meaning of the word. Providing of the driver by the owner notwithstanding there was a transfer of the right to use bus for consideration, and effective control, general control and possession of the bus vested in the Corporation.
6.	Harbans Lal v. State of Haryana [1993] 88 STC 357 (P&H)	Tents, kanats, crockery, utensils, furniture, shuttering material, gas cylinders and buses - These are given on hire to third parties. The authorities levied the sales tax on the hire amount under Haryana Act.	The terms of the contract determine whether or not there is transfer of the right to use goods. Delivery of possession of goods is essential ingredient. If erected tents are given to customers, it will not be "goods" and any transfer of the right to use shall be exercisable to sales tax. The transfer of chairs, tables, crockery would be deemed sale. Hiring of shuttering material to builders/contractors amounts to transfer of the right to use goods. The supplying of purified acetylene gas cylinders to customers is transfer of the right to use goods. The hiring of buses for transportation of personnel of the company with effective or general control with the transferee amounts to transfer of the right to use goods.
7.	Aggarwal Brothers v. State of Haryana [1999] 113 STC 317 (SC); [1999] 9 SCC 317; AIR 1999 SC 2868 :	Shuttering material - business is to hire of shuttering to builders and contractors who use in the construction of building. Rejecting the challenge to the provision to levy sales tax, High Court of Punjab and Haryana found that possession was transferred for use that customers were in effective control during the contract	The Supreme Court affirmed the High Court's view in Harbans Lal. It was held that the owners transferred the shuttering for consideration for use in the construction of buildings and that the requirements of a deemed sale are satisfied.

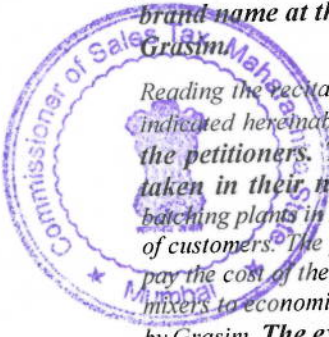
		period and hence transactions fell within the ambit of the transfer of the right to use shuttering material.	
8.	20th Century Finance Corpn. Ltd. v. State of Maharashtra [2000] 119 STC 182 (SC); [2000] 6 SCC 12	Lease of machinery/equipment under master agreement. The lease financier placed purchase orders with manufacturers and delivers them to the lessees. The value of the equipment is disbursed by the financier. On executing supplementary lease deed forming part of master lease agreement, the machinery is allowed to be used. Sales tax was levied on the financier by the State where the equipment was located.	State cannot impose tax on inter-State trade/commerce transactions of the right to use any goods. State is precluded from making law to impose tax on transactions that take place outside the State, in the course of import/export. The delivery of goods is not a condition precedent, but is one of the elements of the transfer of the right to use
9.	Lakshmi Audio Visual Inc. v. Assistant Commissioner of Commercial Taxes [2001] 124 STC 426 (Karn)	Audio visual and multi media equipments - As per the requirement of customer AV services are provided by transporting equipment at the venue. The operation is supervised by the owner. After completion of the programme, AV system is dismantled and carried back to owner's stores Department.	The lease of the hire or letting with possession and effective and general control is given to the customer with choice of selecting the manner, time and nature of use and enjoyment, it is transfer of the right to use goods. But if the work is entrusted to the contractor for achieving desired results and such work also involves use of the goods, it will not be deemed sale within the meaning of the transfer of the right to use goods.
10.	Bharat Sanchar Nigam Ltd. v. Union of India [2006] 3 VST 95 (SC); [2006] 145 STC 91 (SC); [2006] 3 SCC 1	Mobile telephone connections - BSNL and such other service providers - Telephone service connections. The infrastructure/appliances exchanges through which electro magnetic/radio waves carrying signals are controlled by the service provider.	Goods do not include electro magnetic waves or radio frequencies for the purpose of Art.366 (29-A)(d). The goods in telecommunications are limited to the handsets supplied by mobile service provider. In composite contract of service and sale, the sale element is liable to the State tax. The attributes that qualify transaction for the transfer of right to use the goods are availability of goods for delivery, consensus ad idem about identity of goods. Legal right of transferee to use goods along with permissions or licences for such use, exclusive use by the transferee and owners' dissent to transfer again to others during the period of contract.
11.	Indian Oil Corporation Ltd. v. Commissioner of Taxes, Assam [2009] 322 VST 70 (Gauhati)	Petroleum trucks/tankers - IOC hires these for delivering petroleum products to dealers paying hire charges - the insurance, fuel, maintenance and expenses for drivers and cleaners have to be borne by owner of the tankers.	The learned single Judge held that there is no transfer of the right to use goods for the reason that there was only agreement for paying hire charges that the contractor retained possession and effective control of vehicle and that even though the vehicles were identified, there is a provision for substitution of vehicles.
12.	Dipak Nath v. Oil and Natural Gas Corporation Ltd. [2010] 31 VST 337 (Gauhati)	Trucks, trailers, tankers and cranes - the owner makes available these to ONGC under contracts in writing - the owner is paid operational charges as agreed to during the period of contract - ONGC also deducts tax at source under Assam Sales Tax Act.	The Division Bench held that the goods are made available 24 hours a day throughout the duration of the contract, and method and manner of using the goods decided by ONGC, there is transfer of the right to use the goods, even though the staff remained under his control. (NB. The decision in IOC v. Commr., was impliedly overruled)

From the judicial decisions, the settled essential requirement of a transaction for transfer of the right to use goods are: (i) it is not the transfer of the property in goods, but it is the right to use property in goods; (ii) article 366(29A)(d) read with the latter part of clause (29A) which uses the words, "and such transfer, delivery or supply. ..." would show that the tax is not on the delivery of the goods used, but on the transfer of the right to use goods regardless of when or whether the goods are delivered for use subject to the condition that the goods should be in existence for use; (iii) in the transaction for the transfer of the right to use goods, delivery of goods is not a condition precedent, but the delivery of goods may be one of the elements of the transaction; (iv) the effective or general control does not mean always physical control and, even if the manner, method, modalities and the time of the use of goods is decided by the lessee or the customer, it would be under the effective or general control over the goods; and (v) the approvals, concessions, licences and permits in relation to goods would also be available to the user of goods, even if such licences or permits are in the name of owner (transferor) of the goods, and (vi) during the period of contract exclusive right to use goods along with permits, licences, etc., vests in the lessee.

.....
Though the phrase "offer services to take care of transporting solution needs" is used the real purpose, as can be seen from the second part, is to enable Grasim to have the right to use the transit mixers. The agreement requires the petitioners to provide drivers to be dressed in uniform, and all of them are to obey the lawful instructions issued by Grasim. Further RMC has to be delivered by these drivers in transit mixers only at the time and places as instructed by the officials of Grasim, and the petitioners have no right to carry RMC wherever and whenever they like. Thus the full control on the method, manner and time of using the transit mixers, owned by the petitioners vests absolutely in Grasim.

Clauses A to E and L deal with the second aspect of the agreement. Under these, the petitioners agreed to provide five dedicated fleet of five transit mixers 24/7, i.e., twenty-four hours every day of the week as per the instructions of Grasim for transporting RMC during the period from October 1, 2002 to March 31, 2006 (42 months). These dedicated vehicles are to be painted in a particular style and colour which has to be re-painted once in six months. For any third party, during these 42 months, the goods as visible in use would create an immediate impression that they belong to Grasim. No reasonable man would even think that the transit mixers, being used for transporting RMC of Grasim, belong to the petitioners and they are only being used to meet the transportation needs of Grasim.

The third aspect deals with the petitioners indemnifying Grasim, paying all taxes for permits, insurance, etc., the rent/lease amount payable by Grasim, the dispute resolution mechanism and the mutual rights of the parties to modify the agreement. Standing alone all of them by themselves have no meaning. They are clauses intended for working out the contract which is essentially for the petitioners placing the transit mixers painted with brand name at the disposal of Grasim for a period of 42 months for transporting RMC manufactured by Grasim.



Reading the recitals and various clauses, indeed there is a transfer of the right to use transit mixers. All the tests as indicated hereinabove exist in the contract between the petitioners and Grasim. **The vehicles are maintained by the petitioners. They appoint the drivers and fix their roster. The licences, permits and insurances are taken in their names by the petitioners, which they themselves renew.** The transit mixers go to Grasim's batching plants in Miyapur and Nacharam, where they are loaded with RMC and then proceed to the construction sites of customers. The product carried is manufactured by Grasim, which is delivered to the customers and the customers pay the cost of the RMC to Grasim and the petitioners nowhere figure in the process of putting the property in transit mixers to economic use. The entire use in the property in goods is to be exclusively utilised for a period of 42 months by Grasim. **The existence of goods is identified and the transit mixers operate and are used for the business of Grasim. Therefore, conclusively it leads to the only conclusion that the petitioners had transferred the right to use goods to Grasim."**

The above judgment helps me to see that many conditions from the agreement of the applicant with NTrance, as is before me, are found in the above decision of the Hon. Andhra Pradesh High Court and based on such conditions, the transaction therein was held to be one for the transfer of the right to use. In the present case also, the vehicles are to have the NTrance logo on the front & rear windscreen for easy identification. Thus, *the goods as visible in use would create an immediate impression that they belong to NTrance. No reasonable man would even think that the vehicles, being used for transporting employees of NTrance, belong to Wings Travels*

In view of the above case law, the argument of the applicant stands answered.

OTHER ARGUMENTS

[A] During hearing, the applicant had invited attention to the various provisions under the Motor Vehicles Act to argue that the licenses under the said Act are not transferred to NTrance and further that in the case of owned or other vehicles, NTrance does not become the owner of the vehicles. With regard to this, I would invite attention to the definition of 'owner' as appearing in the Motor Vehicles Act, 1988.

(30) "owner" means a person in whose name a motor vehicle stands registered and where such person is a minor, the guardian of such minor, and in relation to a motor vehicle which is the subject of a hire-purchase, agreement, or an agreement of lease or an agreement of hypothecation, the person in possession of the vehicle under that agreement ;

It can be seen that the Motor Vehicles Act has also taken care of arrangements such as leasing of vehicles and suitably provided that in such circumstances, the person in possession of the vehicle would be the owner. Therefore, the attempt to invite attention to the provision about transfer of permits and the arguments that the permits or licenses have not been transferred do not hold good. Section 66 of the Motor Vehicles Act, 1988 cannot be put across to point that there is no transfer of permit in the name of NTrance. The said section reads thus -

No owner of a motor vehicle shall use or permit the use of the vehicle as a transport vehicle in any public place whether or not such vehicle is actually carrying any passengers or goods save in accordance with the conditions of a permit granted or countersigned by a Regional or State Transport Authority or any prescribed authority authorising him the use of the vehicle in that place in the manner in which the vehicle is being used :

If we look at the provision under the Rent a Cab Scheme, 1989, it requires that - "No person shall engage himself in the business of renting a motor cab under this scheme without licence." What the provision requires is that the person who is renting (lessor) is to obtain the license and not the person to whom a cab is to be rented (lessee).

If we peruse the Form 46 which is given by the applicant, it is seen that the same is a Form prescribed for a Permit for the transportation of passengers called as P. Co. T. for tourist vehicle permit. One of the details asked to be filled in this is "Usage/Purpose" against which it is mentioned "Carrying passenger". States such as Maharashtra, Andhra Pradesh, Goa, etc. are mentioned against the details to be filled against "The route or routes of the Area/State/Union Territories for which permit is valid".

Even the Hon. Andhra Pradesh High Court in the above case has observed the following to be the settled essential requirement of a transaction for transfer of the right to use goods :

".....and (v) the approvals, concessions, licences and permits in relation to goods would also be available to the user of goods, even if such licences or permits are in the name of owner (transferor) of the goods, and (vi) during the period of contract exclusive right to use goods along with permits, licences, etc., vests in the lessee....."

In view of the above, it is sufficient that the vehicles are plying under a valid permit for transporting the passengers within a permitted route/boundaries. It is not necessary that to allow NTrance the right to use the vehicles, the permits are to be transferred in the name of NTrance. And it is therefore that one finds the following clause in the agreement :

• **Specifications for Vehicles**

Vehicles provided to NTrance as per Clause 3(b), shall meet the following specifications:

d) **Should have the valid documents, as mandated by all applicable regulations, at all times.**

- i. Vehicle Registration
- ii. Vehicle Insurance
- iii. Tourist permit license
- iv. Drivers License
- v. Drivers Tourist permit license

e) **One set of all these valid documents should be given to NTrance for records.**

• **Conditions for Supervisors**

1. The supervisor's need to be in uniform and have a good knowledge of the city roads & routes.
2. The supervisor's are responsible for the effective routing of vehicles & chubbing of the staff as per their schedule in order to ensure smooth operations.
3. The supervisor's will be the point of contact between the NTrance and the chauffeurs.

The issue is clear by the decision of the Hon. Court as cited above and applies to the owned

vehicles as well as vehicles of other owners as made available to NTrance. In case of owned vehicles, it is seen that the applicant has obtained registration under the Service Tax Act under the taxable service of 'Rent-a-cab'. On the very issue of 'rent-a-cab', I have reproduced hereinabove and would again refer to the observations of the Hon. Andhra Pradesh High Court, way back in the year 1989, in Rashtriya Ispat Nigam Ltd. (cited supra) thus:

"Delivery of possession of a thing must be distinguished from its custody. It is not uncommon to find the transferee of goods in possession while transferor is having custody. When a taxi cab is hired under 'rent-a-car' scheme, a cab is provided, usually driver accompanies the cab, there the driver will have the custody of the car though the hirer will have the possession and effective control of the cab. This may be contrasted with the case when a taxi car is hired for going from one place to another. There the driver will have both the custody as well as the possession; what is provided is service on hire. In the former case, there was effective control of the hirer (transferee) on the cab. Whereas in the latter case it is lacking."

[B] I would now refer to the argument that the words "shall be deemed to be a sale." as appearing in the definition of sale under section 2(24) have been deleted by the amendment of 2005 and with those word having been deleted, there cannot be any 'deemed sale' under the MVAT Act, 2002 and therefore no case of 'transfer of the right to use'. Now, it is seen that the deemed sales were included in the definition of 'sale' by way of an 'Explanation' clause. Let me reproduce the definition herein again to explain the incorrectness of the argument of the applicant thus -



"(24) 'sale' means a sale of goods made within the State for cash or deferred payment or other valuable consideration but does not include a mortgage, hypothecation, charge or pledge; and the words 'sell', 'buy' and 'purchase', with all their grammatical variations and cognate expressions, shall be construed accordingly;

- This portion of the definition was not amended and the whole para makes a complete and meaningful reading.

Explanation.- For the purposes of this clause,-

- This portion of the definition would not make any meaning unless read with the matter which follows thereafter.

(a) *a sale within the State includes a sale determined to be inside the State in accordance with the principles formulated in section 4 of the Central Sales Tax Act, 1956 (74 of 1956);*

- This portion of the definition was not amended and the whole thing makes a complete and meaningful reading like this - *"For the purposes of this clause, a sale within the State includes a sale determined to be inside the State in accordance with the principles formulated in section 4 of the Central Sales Tax Act, 1956 (74 of 1956)."*

(b)(i) *the transfer of property in any goods, otherwise than in pursuance of a contract, for cash, deferred payment or other valuable consideration;*

- This portion (b) consists of seven points (i to vii).

- This portion (point (i)) if read as comprising of only the above point would not make a complete and meaningful sentence as can be seen thus - *For the purposes of this clause, the transfer of property in any goods, otherwise than in pursuance of a contract, for cash, deferred payment or other valuable consideration"*

- This above portion would make sense ONLY when the words "shall be deemed to be a sale" as appearing at the end of the seven points are read with the point thus - *For the purposes of this clause, the transfer of property in any goods, otherwise than in pursuance of a contract, for cash, deferred payment or other valuable consideration shall be deemed to be a sale"*

(ii) the transfer of property in goods (whether as goods or in some other form) involved in the execution of a 13[14[works contract including], an agreement for carrying out for cash, deferred payment or other valuable consideration, the building, construction, manufacture, processing, fabrication, erection, installation, fitting out, improvement, modification, repair or commissioning of any movable or immovable property;]

- This portion would have to be read applying the same interpretation as for point b (i).
- The same interpretation would be true for points iii to vii of the portion (b).

shall be deemed to be a sale."

- This portion comprising the words "*shall be deemed to be a sale*" as appearing at the end of the seven points do not make any meaning unless they are read in the manner as shown for reading of point (i) above.

Now, by amendment dt.31.03.2005 which was made effective from 1.4.2005, the sub-clause (vii) was deleted. The words of the amendment were -

"3. In section 2 of the principal Act,-

(1).....

.....

(5) in clause (24), in the Explanation, in sub-clause (b), paragraph (vii) shall be deleted;

(6)....."

Thus, it can be seen that the point (vii) referred to as "para" in the amendment was sought to be deleted. We have seen above that the words "*shall be deemed to be a sale*" as appearing at the end of the seven points are to be read for each of the points or paras (i) to (vii). These words cannot be taken to be attached to the point or para (vii) ONLY and therefore, when para or point (vii) is deleted, the same also to be treated as deleted. To say that the words "*shall be deemed to be a sale*" are to be read as contained in para (vii) only would mean that the legislature had contained 6 inconsistent and 1 consistent points thus -

- For the purposes of this clause, the transfer of property in any goods, otherwise than in pursuance of a contract, for cash, deferred payment or other valuable consideration" ----- **Does this make any meaning?**
- For the purposes of this clause, the transfer of property in goods (whether as goods or in some other form) involved in the execution of a 13[14[works contract including], an agreement for carrying out for cash, deferred payment or other valuable consideration, the building, construction, manufacture, processing, fabrication, erection, installation, fitting out, improvement, modification, repair or commissioning of any movable or immovable property" ----- **Does this make any meaning?**
- For the purposes of this clause, a delivery of goods on hire-purchase or any system of payment by instalments" ----- **Does this make any meaning?**
- For the purposes of this clause, 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" ----- **Does this make any meaning?**
- For the purposes of this clause, the supply of goods by any association or body of persons incorporated or not, to a member thereof for cash, deferred payment or other valuable consideration" ----- **Does this make any meaning?**
- For the purposes of this clause, 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 made or given for cash, deferred payment or other valuable consideration" ----- **Does this make any meaning?**
- For the purposes of this clause, every disposal of goods referred to in the Explanation to clause (8) for cash, deferred payment or other valuable consideration shall be deemed to be a sale." ----- **ONLY this makes meaning?**

We have seen above that the points or paras do not make any meaning unless they aren't read with the words "*shall be deemed to be a sale*" in each of the paras or points. In view thereof, the argument as made is factually incorrect.

[C] The applicant had referred to the provisions of Income Tax and Service Tax Act. In view of the clear position as found in the agreements before me, I am not inclined to discuss these.

[D] As regards reliance on the decisions of the Hon. Bombay High Court in General Cranes (82 VST 560) and Hari Durga Travels (2015 DLT 225), I have to state that the facts of each case has to be seen. Further, the decision of the Hon. Andhra Pradesh High Court in G. S. Lamba (cited supra) was not before both the Hon. Courts. We have seen above that the Hon. Andhra Pradesh High Court after referring to a number of decisions on the very issue had culled out the principles to be followed in matters of 'transfer of right to use' which I would reproduce again for immediate reference thus –

"(i) it is not the transfer of the property in goods, but it is the right to use property in goods;

(ii) article 366(29A)(d) read with the latter part of clause (29A) which uses the words, "and such transfer, delivery or supply. ..." would show that the tax is not on the delivery of the goods used, but on the transfer of the right to use goods regardless of when or whether the goods are delivered for use subject to the condition that the goods should be in existence for use;

(iii) in the transaction for the transfer of the right to use goods, delivery of goods is not a condition precedent, but the delivery of goods may be one of the elements of the transaction;

(iv) the effective or general control does not mean always physical control and, even if the manner, method, modalities and the time of the use of goods is decided by the lessee or the customer, it would be under the effective or general control over the goods; and

(v) of the approvals, concessions, licences and permits in relation to goods would also be available to the user of goods, even if such licences or permits are in the name of owner (transferor) of the goods, and

(vi) during the period of contract exclusive right to use goods along with permits, licences, etc., vests in the lessee."

It can be seen from the above that the Hon. Court has observed that licences and permits in relation to goods would also be available to the user of goods, even if such licences or permits are in the name of owner (transferor) of the goods. The appointment of drivers or maintenance of the leased goods by the lessor do not give any adverse inferences when it is seen that the situation is one involving the transfer of the right to use.

It would also be useful to refer herein to the observations of the Hon. Gauhati High Court in Dipak Nath v. Oil and Natural Gas Corporation Ltd. And Others [31 VST 337] thus –

"Under clause 8.1 of the contract agreement though the contractor is required to provide employees for operation of the crane such employees are to work as directed by the ONGC. Under clause 8.7 of the contract agreement day-to-day operations are to be performed as per instructions given to the contractor's representatives by the authorized representatives of the ONGC. Under clause 9.10 of the contract agreement the contractor is to arrange the fuel lubricants and other consumable at all times. Under clause 9.14 the stuff of the contractor engaged in the operation of the crane is required to maintain the log books provided by the ONGC and have the same signed at the required intervals by the authorized officer of the ONGC.

The above analysis of the relevant provisions of the contract agreement between the parties indicates the clear dominion and control of ONGC over the crane during the entire period of operation of the contract once a crane is placed at the disposal of the ONGC under the contract. The crane is to be deployed at worksites as per the discretion of the ONGC and though the normal period of deployment is 10 hours in a day, such deployment at the discretion of the ONGC may be for any period beyond the normally contemplated 10 hours. Though the cranes are operated by the crew provided by the contractor such crew while operating a crane is under the effective control of the ONGC and its authorities. Therefore, under the contract though the normal operational time is 10 hours in a day, the ONGC is entitled to deploy the cranes, if required, for the entire period of 24 hours to perform duties, the kind of which and the locations whereof is to be decided by the ONGC. The mere fact that after the operation of the crane is over on any given day the crane may come back to the owner/contractor will hardly be material to decide as to who has dominion over the crane inasmuch as the crane can be recalled for duty by the ONGC at any time. Under the contract the crane is to be operated for 26 days in a month and the remaining four days are to be treated as maintenance off days.

The above features of the contract, in our considered view, makes it abundantly clear that it is the ONGC and not the contractor who has exclusive control and dominion over the crane during the subsistence of the contract, though, during the aforesaid period, at times, physical possession of the crane may come back to the contractor. Such temporary physical possession of the contractor, according to us, would hardly be relevant as under the contract the

ONGC is vested with the authority to requisition the crane for operational purposes at any time. Besides, such temporary possession of the crane by the contractor does not mitigate against the transfer of the right to use the crane which event, as already indicated on the authority of the decision of the apex court in 20th Century Finance Corpn. Ltd. [2000] 119 STC 182 (SC); [2000] 6 SCC 12, constitutes the taxable event under article 366(29A)(d) of the Constitution.

..... The terms of such contracts also require the tankers/trailers to be deployed for at least 26 days in a month and though the normal working hours are from 8 a.m. to 8 p.m. (12 hours), the above timings are, however, subject to change and the tankers/trailers could be put to work beyond the specified hours at the sole discretion of the ONGC. The terms of payments are stipulated in the contract agreements on the basis of the normal working hours and the minimum 26 days of operation in a month. However, the rates are subject to revision for any extra deployment that may be made at any time on any working day at the discretion of the ONGC. The terms of the contract also do not visualize any operation of the tankers/trailers by the owners thereof at any point of time during the period of the contract. In fact, the non-availability of the tankers/trailers on any given day for deployment in connection with the operational requirements of the ONGC entails payment of penalty and liability for damages on the contractor.

..... The above core terms of the contract being vital for determination of the question of control of the vehicles after the same are hired, the conclusion that can reasonably be reached with regard to the transfer of right to use, necessarily, has to be the same, i.e., that by virtue of the contract agreement in question a transfer of the right to use the goods covered by the contract has been contemplated and in the absence of any contrary material had that been affected by and between the parties."

It can be seen from the above case that the terms of the agreement before me such as working of the vehicles on shift basis from Monday to Saturday, the failure to make available the vehicles on time, etc. have been dealt with by the Hon. Court. To just reiterate a few observations—

- Though the cranes are operated by the crew provided by the contractor such crew while operating a crane is under the effective control of the ONGC and its authorities.
- The mere fact that after the operation of the crane is over on any given day the crane may come back to the owner/contractor will hardly be material to decide as to who has dominion over the crane inasmuch as the crane can be recalled for duty by the ONGC at any time.

The terms of the contract also do not visualize any operation of the tankers/trailers by the owners thereof at any point of time during the period of the contract. In fact, the non-availability of the tankers/trailers on any given day for deployment in connection with the operational requirements of the ONGC entails payment of penalty and liability for damages on the contractor.

In yet another case of the Hon. Andhra Pradesh High Court in Jasper Aqua Exports Private Limited v. State of Andhra Pradesh (37 VST 481 AP), the Hon. Court very categorically observed about reliance on precedents thus –

"We have also perused the decision of this court in Rashtriya Ispat Nigam Ltd. [1990] 77 STC 182 (AP), which is confirmed by the Supreme Court in State of Andhra Pradesh v. Rashtriya Ispat Nigam Ltd. [2002] 126 STC 114; [2002] 3 SCC 314; AIR 2002 SC 1305 as well as Bharat Sanchar Nigam Ltd. v. Union of India [2006] 3 VST 95 (SC); [2006] 145 STC 91 (SC); [2006] 3 SCC 1. Before turning to the core issue, we may observe that the decision of a co-ordinate Bench or the Supreme Court is not binding as such. What is binding is the law laid down in the precedent and the ratio that can be culled out from the decisions cited. A decision is an authority for what it decides and to say that a decision of the superior court has universal application irrespective of the discernible and drastically deviating factual background is to disrespect the precedent itself. A case involving a mixed question of fact and law, as in this case; whether there is a transfer of property in the refrigerated vehicles of the petitioner to another concern, as defined in article 366(29A)(d) of the Constitution of India and section 5E(a) of the Act is always a question, for first appreciating and considering the taxable event and the applicability of the law. If the first thing is absent, there is no question of applying 5E [Tax on the amount realized in respect of any right to use goods] of the Act. But, if on questioning the taxes, the attending circumstances and the contract of sale, it is reasonably possible to infer that there is indeed transfer of right to use the refrigerated vehicles by the petitioner. The decided cases, though of guidance, may not govern the case on hand."

About merits of the case, the observations on an issue similar to the present issue were –

"Reading the relevant statutory provisions, it becomes clear that the moment the petitioner sends its trucks to others for transporting the latter's goods to destinations of the latter's choice, the same amounts to transfer of the right to use the trucks, and would be sufficient to infer a taxable event under section 5E of the Act notwithstanding other incidental minor aspects of the contracts. The mere fact that the petitioner retains control over the driver, or that they pay insurance charges for the trucks, is of no consequence. In that view of the matter, we do not find any error in the

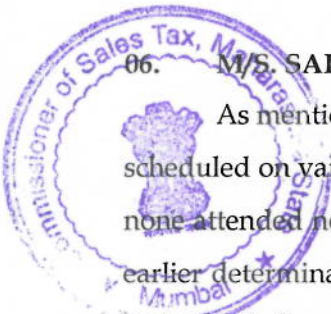
orders of the learned Tribunal, because the Tribunal correctly relied on way-bills and other relevant documents produced by the petitioner and came to the correct conclusion."

Thus, it can be seen that even in the above case, it has been observed that the control over the driver by the lessor or the payment of insurance charges would not alter a transaction if the same is in the nature of transfer of right to use vehicles.

It needs to be observed herein that each decision stands on the facts as found therein. After elaborate reasoning as found above, I am convinced that the impugned transaction involves a transfer of the right to use. In addition to the observations in the present proceedings, I would stand by the decisions relied on in the earlier determination order by my predecessor.

An overview of all above makes me summarize my observations thus -

1. *A perusal of the agreement governing the transaction in question makes me observe that there is effective control and possession which makes the transaction as being one for the transfer of the right to use vehicles.*
2. *The Exception III to the definition of 'dealer' under the MVAT Act, 2002 does not apply to 'deemed sales'.*



06. M/s. SAI ANAND TRAVELS PVT. LTD.

As mentioned earlier, a hearing in pursuance of the Hon. MSTT decision in the matter was scheduled on various dates since 2015. The hearing finally took place on dt. 24.02.2016. However, none attended nor any communication is received from M/s. Sai Anand Travels Pvt. Ltd. In the earlier determination proceedings, Sh. S. A. Gundecha, Advocate and Sh. Nitin Shah, Advocate had attended on behalf of both the present applicants' and it was categorically stated that since a common issue is involved in both the matters, on identical facts and circumstances of the case, a common representation was made and the same may be applied, mutatis mutandis in both cases. However, in the present proceedings, they represent M/s. Wings Travels only. In the circumstances, the say of M/s. Sai Anand Travels Pvt. Ltd. would not be available to take note of. In view thereof, though there is a common issue involved but in the absence of any attendance or representation, I would not be in a position to pass any order, pursuant to the directions of the Hon. MSTT, in the case of M/s. Sai Anand Travels Pvt. Ltd.

07. PROSPECTIVE EFFECT

[A] WINGS TRAVELS

The applicant has prayed for prospective effect. A prayer for prospective effect is to be appreciated in the light of many factors. To name a few would be such as the applicable provisions, any anomaly surrounding their interpretation, any statutory mis-guidance, etc. On the issue of prospective effect, the Hon. Bombay High Court in the decision in *Lalbaugcha Raja Sarwajanik Ganeshotsav Mandal v. The State of Maharashtra* (MVXA Tax Appeal No. 10 of 2015

in VAT Appeal No. 178 of 2014, dt.28.07.2015), while confirming the determination order of the then Commissioner, has observed thus :

"10. On plain reading of both the sub-sections (1) and (2) of Section 56, it is apparent that the Commissioner may direct that the determination shall not affect the liability under the MVAT Act of the applicant or if the circumstances so warrant, of any other persona similarly situated, as respects any sale or purchase effected prior to a determination. Therefore, this is not a mandate but a discretionary power vested in the Commissioner. This discretionary power has to be exercised and while exercising it, the Commissioner, has to be guided by certain inbuilt checks and safeguards. He cannot in the garb of giving relief of the nature contemplated by sub-section (2) totally wipe out the liability of any and every dealer.

11. The Commissioner is expected to exercise this discretionary power so as not to defeat the law or render its provisions meaningless or redundant. The power must be exercised bearing in mind the facts and circumstances in each case. No general rule can be laid down. The exercise of this discretionary power must be bona fide and reasonable so also subserving the larger public interest. The highest officer in the hierarchy is chosen by the legislature as there is a presumption that this executive functionary will exercise the discretion in genuine and bona fide cases. He must be satisfied that there is a real need and the circumstances warrant exercise of the same. The power being wide the satisfaction must be backed by cogent and strong reasons which can be tested in a Court of law.

12. The words are of wide amplitude and if the Commissioner exercises the discretion injudiciously or arbitrarily and contrary to the object and purpose sought to be achieved by the enactment itself, his exercise of the discretionary power is always capable of being questioned. Therefore, when the Commissioner finds that there was never a disputed question to be determined and the law is very clear and free of doubt, equally its applicability, then, refusal by the Commissioner to exercise the discretion is rightly upheld by the Tribunal. Just as the Commissioner was obliged to assign reasons for not exercising his discretionary power equally the Tribunal was in upholding his order. The Tribunal in paragraph 22 of its order found that the entire process was utilized so as to delay compliance with the mandate of the Act. The Tribunal has also found that the Commissioner refused to grant relief holding that there is no ambiguity in the provisions and there is no scope, for any doubt arising out of the provisions and relevant for the purpose of the determination. The reasons that are assigned by the Commissioner for refusing to give prospective effect to his determination order, have not been found to be suffering from any error of law apparent on the face of the record or perversity warranting interference in the appellate jurisdiction of the Tribunal."

As observed by the Hon. High Court, the requests for prospective effect are inevitably weighed on the basis of the factors as have been mentioned above. We have seen that the present issue originates from the position as found in the Lease Act which was applicable for the periods prior to 2005. The incidence of tax on the transfer of the right to use as was found in the Lease Act was absorbed in the MVAT Act, 2002. We have seen that a numerous case laws of the Hon. Courts have settled the issue. Further the argument that the MVAT Act, 2002 does not have a provision to tap 'deemed sales' has been shown hereinafter by me as being based on ill-formed surmises. And if the arguments were to be true, so many cases as have been decided as falling under deemed sale would just be negated. As regards merits of the case, I have, with elaborate reasoning, discussed the clauses of the agreements and the inferences arriving therefrom. I have also discussed the reliance of the applicant on the Exception III to the definition of 'dealer' and the same stems from an apprehension that the transactions of the nature as the present one are covered under the MVAT Act, 2002 and therefore, refuge is sought under the Exception.

Besides the above, I am in agreement with the observations of the then Commissioner on the issue of prospective effect as may be reproduced herein again for immediate reference -

"It is observed that the activity of the applicant of providing transports to the 'BPOs' is a 'sale'. It is true that in some decisions of the court it is held that certain transactions of right to use goods may not fall under 'sale'. But the courts have categorically laid down that the intention to transfer a right to use the goods and effective control and custody must be transferred by the lessor to the lessee so as to constitute a deemed sale. The question, whether effective control has been transferred or not, always remains a question of fact and terms of the contract, in each case. I have elaborately discussed that in the present case right to use goods have been transferred. I have also discussed that the transactions between the applicant and the vendors of the applicant (the owner of the vehicles) is also a sale. The applicant is also

aware that whether a 'transaction' is a lease or not depends on the peculiar facts of the case. Also, he has entered into agreements with a number of BPOs and the agreements are not identical across all of them. I have come to the conclusion after reading 4 agreements and these agreements are not uniform. Therefore, it is fallacious to believe that one is not a 'dealer' on the basis of a lone transaction. Also, in such cases, therefore the ratios or decisions of Courts do not become applicable automatically. Moreover, in lease transactions, the tendency to first dispute the transaction and then request for protection of liability has to be checked. To have a proper check on such attitudes, I am of the considered view that no protection of liability be given in such cases."

In view of all the discussion held hereinabove, I do not find any valid reason to favourably consider the request for prospective effect.

[B] M/S. SAI ANAND TRAVELS PVT. LTD.

There being no decision on merits, there arises no occasion to deliberate on the issue of prospective effect.

08. In view of the detailed deliberations, I pass an order thus -

ORDER

(under section 56(1) (e) and (2) of the Maharashtra Value Added Tax Act, 2002)

No.DDQ-11-2014/Adm-6/ Remand/11 18-2
No.DDQ-11-2014/Adm-6/Remand/25

Mumbai, dt. 31/03/2017

For reasons as discussed in the body of the order, it is determined thus -

PARTICULARS	WINGS TRAVELS	SAI ANAND TRAVELS PVT. LTD.
Question (I)		
Whether the applicants' are dealers for the purpose of section 2(8) of the MVAT Act, 2002?	The applicant is a 'dealer' within the meaning of section 2(8) of the Maharashtra Value Added Tax Act, 2002.	None attended so no determination could be had in the matter.
Question (II)		
Whether the activity of the applicants, as represented by the transactions presented for determination, is a 'sale' within the meaning of section 2(24) of the Act?	Held in the affirmative.	- do -
Prospective effect	The request for prospective effect is rejected.	There being no decision on merits, there is no decision on the issue of prospective effect.


(RAJIV JALOTA)

COMMISSIONER OF SALES TAX,
MAHARASHTRA STATE, MUMBAI