

**F. No. 137/54/2016-Service Tax-Part-II**  
**Government of India**  
**Ministry of Finance**  
**Department of Revenue**  
**Central Board of Excise and Customs**  
**Service Tax Wing**  
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New Delhi, the 17<sup>th</sup> August, 2016

To,

All Principal Chief Commissioners / Chief Commissioners of Central Excise/Service Tax  
Principal Directors General/ Director General of Goods and Service Tax/ Central Excise  
Intelligence/ Systems and Data Management/ Audit/ Tax Payer Services/ Performance  
Management  
Chief Commissioner AR CESTAT  
All Principal Commissioners/Commissioners of Central Excise/Service Tax  
All Principal Additional Directors General/ Additional Directors General Audit

Madam/Sir

Subject: Service tax liability in case of hiring of goods without the transfer of the right to use goods.

In terms of sub-clause (d) of clause (29 A) of Article 366 of the Constitution of India, 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 is deemed to be a sale of those goods by the person making the transfer, delivery or supply and a purchase of those goods by the person to whom such transfer, delivery or supply is made. It follows that such transactions will be liable for Sales Tax/Value Added Tax. In terms of section 66E(f) of the Finance Act, 1994, transfer of goods by way of hiring, leasing, licensing or in any such manner without transfer of right to use such goods is a "declared service" and hence liable to service tax. In this regard some representations have been received.

2. The matter has been examined. I am directed to draw your attention to the fact that in any given case involving hiring, leasing or licensing of goods, it is essential to determine whether, in terms of the contract, there is a transfer of the right to use the goods. Further, the Supreme Court in the case of Bharat Sanchar Nigam Limited vs Union of India, reported in 2006(2) STR 161 SC, had laid down the following criteria to determine whether a transaction involves transfer of the right to use goods, namely,-

- a. There must be goods available for delivery;
- b. There must be a consensus *ad idem* as to the identity of the goods;

- c. The transferee should have a legal right to use the goods – consequently all legal consequences of such use, including any permissions or licenses required therefor should be available to the transferee;
- d. For the period during which the transferee has such legal right, it has to be to the exclusion to the transferor this is the necessary concomitant of the plain language of the statute – viz. a “transfer of the right” to use and not merely a licence to use the goods;
- e. Having transferred the right to use the goods during the period for which it is to be transferred, the owner cannot again transfer the same right to others.

3.1 This criteria must invariably be followed and applied to cases involving hiring, leasing or licensing of goods. The terms of the contract must be studied carefully vis- a- vis the criteria laid down by the Supreme Court in order to determine whether service tax liability will arise in a given case. It is not possible to either give an exhaustive list of illustrations or judgements on this issue. Cases decided under the Sales Tax /VAT legislations have to be considered against the background of those particular legislative provisions and terms of contract in that case.

3.2 The following case law may also be referred to. These should not be applied mechanically but their applicability to the facts of a given case, the terms of the contract in the given case and the criteria laid down by the Supreme Court should be examined carefully.

3.2.1 Commissioner VAT vs International Travel House Ltd – Delhi High Court judgement dated 8-9-2009 in ST Appeal 10/2009

3.2.2 Rashtriya Ispat Nigam Limited vs Commercial Tax Officer reported in 1990( 77) STC 182 and State of Andhra Pradesh vs Rashtriya Ispat Nigam Limited reported in 2002 ( 126) STC 114

3.2.3 State Bank of India vs State of Andhra Pradesh reported in 1988 ( 70) STC 215 A.P

3.2.4 Ahuja Goods Agency vs State of Uttar Pradesh reported in 1997 (106) STC 540

3.2.5 Lakshmi AV Inc vs Assistant Commercial Tax Officer reported in 2001(124) STC 426 Karnataka

3.2.6 G. S Lamba and Sons vs State of Andhra Pradesh reported in 2015(324) ELT 316 A.P

4.1 There will also be cases involving either a financial lease or an operating lease. The former generally involves a transfer of the asset and also the risks and rewards incident to the ownership of that asset. This transfer of the risks and rewards is also recognised in accounting standards. It is generally for a long term period which covers the major portion of the life of the asset and at the end of the lease period, usually the lessee has an option to purchase the asset. The lessee bears the cost of repairs and maintenance and risk of obsolescence also rests with him. In contrast, an operating lease does not involve the transfer of the risks and rewards associated with that asset to the lessee. It is for a short term period and at the end of the lease period the lessee does not have an option to purchase the asset. The cost of repairs, maintenance and obsolescence rests with the lessor.

4.2 Similarly in the aircraft industry there are “dry leases” and “wet leases”. Generally speaking, “wet leases” may involve short term provision of an aircraft along with crew, maintenance and insurance while the lessee bears other operating expenses. In contrast, a “dry lease” is for a relatively longer term and involves the provision of an aircraft only without crew.

4.3 The above two situations have been elaborated only to explain and emphasize the diverse nature of such transactions. There can be variations and in some cases, a combination.

5. In all these cases, no *a priori* generalisations or assumptions about service tax liability should be made and the terms of the contract should be examined carefully, against the backdrop of the criteria laid down by the Supreme Court in the Bharat Sanchar Nigam Limited case as well as other judicial pronouncements.

Yours faithfully

  
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