

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL  
ALLAHABAD**

REGIONAL BENCH - COURT NO.I

**Service Tax Appeal No.70300 of 2017**

(Arising out of Order-in-Original No.14/Commissioner/ST/Noida/2016-17  
dated 09/02/2017 passed by Commissioner of Service Tax, Noida)

**M/s Sahara Sanchaar Limited,**  
(C-2,3,4, Sahara India Complex,  
Sector-11, Noida-201301)

**.....Appellant**

*VERSUS*

**Commissioner of Service Tax, Noida**

**....Respondent**

(Commissionerate, Noida)

**APPEARANCE:**

Shri Mehul Jivani, Chartered Accountant for the Appellant

Shri Manish Raj, Authorised Representative for the Respondent

**CORAM: HON'BLE MR. P.K. CHOUDHARY, MEMBER (JUDICIAL)  
HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)**

**FINAL ORDER NO.70011/2024**

DATE OF HEARING : 03 October, 2023  
DATE OF PRONOUNCEMENT : 03 January, 2024

**SANJIV SRIVASTAVA:**

This appeal is directed against order in original No 14/Commissioner/ Service Tax/ NOIDA/ 201617 dated 09.02 2017 of the Commissioner Service tax NOIDA. By the impugned order following has been held:

**"ORDER**

- (i) *I hereby confirm the demand of the service tax amounting to Rs.9,00,01,588/- (Rupees Nine Crores One Thousand Five Hundred Eighty Eight only) as raised in the show cause notice invoking the proviso to Section 73(1) of the Finance Act, 1994 and order M/s. Sahara Sanchaar Limited, C-2,3,4, Sahara India Complex,*

*Sector-11, Noida to pay the same in terms of provisions under Section 73(2) of the Act, ibid*

- (ii) I further impose a penalty of Rs.9,00,01,588/- (Rupees Nine Crores One Thousand Five Hundred Eighty Eight only) under Section 78 of the Finance Act, 1994 upon M/s. Sahara Sanchaar Limited, C-2,3,4, Sahara India Complex, Sector-11, Noida*
- (iii) I also disallow the CENVAT credit of Rs.2,27,05,076/- (Rupees Two Crores Twenty Seven Lakhs Five Thousand and Seventy Six only) as proposed in the show cause notice under Rule 14 of the CENVAT Credit Rules, 2004 read with the proviso to Section 73(1) of the Act, ibid, and order M/s. Sahara Sanchaar Limited, C-2,3,4, Sahara India Complex, Sector-11, Noida to pay the same along with interest under Rule 14 of the CENVAT Credit Rules, 2004 read with Section 73(2) of the Finance Act, 1994*
- (iv) I further impose a penalty of Rs. 2,27,05,076/- (Rs. Two Crores Twenty Seven Lakhs Five Thousand and Seventy Six only) under Rule 15(3) of the CENVAT Credit Rules, 2004 read with Section 78 of the Finance Act, 1994 on M/s. Sahara Sanchaar Limited, C-2,3,4, Sahara India Complex, Sector-11, Noida.*
- (v) I also order to recover the interest under Section 75 of the Finance Act, 1994 from M/s. Sahara Sanchaar Limited, C-2, 3, 4, Sahara India Complex, Sector-11, Noida on the confirmed demand amounts as per sl. (i) & (iii) above*
- (vi) I further impose a total penalty of Rs. 10,000/- (Rupees Ten Thousand Only) on M/s. Sahara Sanchaar Limited, C-2,3,4, Sahara India Complex, Sector-11, Noida under Section 77(1)(a) and Section 77(2) of the Finance Act, 1994*

*The above adjudged dues should be paid forthwith by the party."*

2.1 Acting on the intelligence that the Appellant was evading service tax payment on supply of the tangible goods services, the business premises of the appellant was visited/ searched on 20.3.2015.

2.2 During the course of search proceedings, it was noticed that the party has leased out earth station and other equipment and related infrastructure to have up linking facility of T.V Programs to their sister concern namely M/s Sahara India Commercial Corporation Limited (herein after referred to as "the SICCL". Statement of Ms Santosh Khandelwal, the Cost accountant and company secretary was recorded on the spot.

2.3 After scrutiny of the agreements and other related documents and after making necessary enquiries it was observed that appellant has shown income from lease rent of Rs.82.62 Crores as per the balance sheet and profit/loss account statement of the party for the financial years 2009-10, 2010-11, 2011-12, 2012-13 and 2013-14. On this income appellant was required to pay service under the category of "Supply of Tangible Goods Services". Thus appellant evaded payment of service tax as indicated in the table below:

| Financial Year | Revenue from lease rent | Rate of Service Tax | Service Tax payable |
|----------------|-------------------------|---------------------|---------------------|
| 2009-10        | 35,34,09,423            | 10.30%              | 3,64,01,171         |
| 2010-11        | 11,67,81,184            | 10.30%              | 1,20,28,462         |
| 2011-12        | 11,82,38, 189           | 10.30%              | 1,21,78,533         |
| 2012-13        | 11,82,38, 189           | 12.36%              | 1,46,14,240         |
| 2013-14        | 11,95,72,665            | 12.36%              | 1,47,79,181         |
| Total          | 82,62,39,650            |                     | 9,00,01,588         |

It was observed that the appellant had knowingly evaded payment of the service tax on rental income/ lease income of earth station and related equipment. They have in their ST-3 returns for financial year 2009-10 and for subsequent periods till March 2014, never shown the income receipt from leasing of earth station and related equipment This modus operandi has

come to the notice of the department only at the time of visit of premises of the party

2.4 It was also observed that appellant had availed the CENVAT credit of input services for providing their output service namely the "Business Auxiliary Services". On scrutiny of the Input Service Credit ledger of the party for the financial years 2009-10, 2010-11, 2011-12, 2012-13 and 2013-14, it was observed that the party have availed the service tax credit on following input services-

- a) Space Segment Charges for KU band / C band;
- b) Vehicle Maintenance charges;
- c) Freight & Cartage for matrix video board;
- d) Training Service & Installation, integration, commissioning & handholding;
- e) Insurance charges/ Insurance premium of equipment;
- f) Chartered flight hiring charges

In the opinion of revenue these services would not qualify as input service as defined by Rule 2 (I) of the Cenvat Credit Rules, 2004 for the Business Auxiliary Services provided by the Appellant. Thus they availed the inadmissible input service credit during the years from 2009-10 to 2013-14 contravening the provisions of Rule 3 of the CENVAT Credit Rules, 2004. Further, the details of the input service credit and the related documents were never produced by the party and the instant case of wrong availment of the CENVAT credit came to the notice of the department only during the visit of premises of the party on 20.03 2015 by the officers of the Anti- Evasion branch of the Commissionerate. Thus, the party was found to have suppressed the vital facts from the department with the intent to avail the CENVAT credit to wrongly / evade the service tax payments and accordingly the extended period of limitation as provided under the proviso to Section 73 (1) of the Finance Act, 1994, was found to be invokable.

2.5 A show cause notice dated 19.08.2015 was issued to the appellant asking them to show cause as to why:

- (i) *Service tax, amounting to Rs.9,00,01,588/- (Rupees Nine Crores One Thousand Five Hundred and Eighty Eight only) should not be demanded & recovered from them in terms of proviso to Section 73(1) of the said Act.*
- (ii) *Interest at appropriate rate should not be recovered from them under section 75 of the said Act for not depositing the above said service tax in prescribed time period.*
- (iii) *Penalty should not be imposed upon them under section 78 of the said Act for suppressing the taxable value and contravention of the provisions of Section 68 of the said Act read with Rule 6 of the Service Tax Rules, 2002*
- (iv) *Penalty under Section 77 (1) (a) of the said Act should not be imposed upon them for non-incorporating taxable service in their service tax registration within prescribed time under Section 69 of the said Act read with Rule 4 of the Service Tax Rules, 1994*
- (v) *Penalty under section 77(2) of the said Act, should not be imposed upon them for non-incorporating taxable value of 'supply of tangible goods services' in their ST-3 return during the period from April, 2009 to March, 2014*
- (vi) *Inadmissible input service credit of Rs.2,27,05,076/- availed during period 2009- 10 to 2013-14 should not be demanded and recovered from them under Rule 14 of the CENVAT Credit Rules, 2004 read with proviso to Section 73(1) of the said Act.*
- (vii) *Interest at appropriate rate should not be recovered from them under Rule 14 of the CENVAT Credit Rules, 2004 read with Section 75 of the said Act*
- (viii) *Penalty should not be imposed upon them under Rule 15 (3) of the CENVAT Credit Rules, 2004 read with Section 78 of the said Act for wrong availment of input service credit, as detailed at S No. (vi)*

2.6 This show cause notice has been adjudicated as per the impugned order referred in para 1, above. Aggrieved appellants have filed this appeal.

3.1 We have heard Shri Mehul Jiwani, Chartered Accountant for the Appellant and Shri Manish Raj, Authorized representative for the revenue.

3.2 Arguing for the appellant learned Chartered Accountant submitted:-

- Right to use goods is not covered the net of service tax. As is evident from the agreement between appellant and M/s SICC that appellant has given complete control & possession of the assets to M/s SICC."Right to Use" is thus transferred
- The effective control of the assets is purely in the hands of lessee, as the lessee is at his liberty to use the equipments hired by him. It is seen from the agreements that there is no dispute as to the fact that the goods are in the possession of the lessee and is being used by him for the intended purpose without any interference or hurdle from the appellant. Therefore, it is submitted that the transaction of appellant does not satisfy the condition of "without transferring right of possession and the effective control of such machinery, equipment and appliances. "Hence the activity does not fall under the definition of "Supply of tangible goods for use". Reliance is placed on the following decisions:
  - Compucom Software Ltd. [2019 (25) G.S.T.L 75 (Tri.)]
  - G.S. Lamba & Sons. [2015 (324) E.L.T. 316 (A.P.)]
  - Gimmco Ltd. [2017 (48) S.T.R. 476 (Tri. - Mumbai)]
  - Inox Air Products Ltd. [2014 (10) TMI 566 - CESTAT BANGALORE]
  - Arkay Logistics Ltd [2023(8) TMI 1237 CESTAT AHMEDABAD]

- UFO Moviez India Ltd. [2018 (11) G.S.T.L. 391 (TRI. - MUMBAI)] affirmed by the Hon'ble Supreme Court as reported at [2022 (61) G.S.T.L. 4 (S.C.)]
  - Petronet LNG Ltd. [2013(11) TMI 1011-CESTAT NEW DELHI]
  - SRF Ltd. (Chemical Business) [2023 TMI (1) 150 CESTAT NEW DELHI]
  - Bharat Sanchar Nigam Ltd. 2006 (2) S.T.R. 161 (S.C.)
- Payment of Vat is determinative factor for deciding the transfer of right to use and thereby If VAT is paid by the appellant, then no service tax is leviable. Reliance placed on
- The TRU Circular D.O.F. No. 334/1/2008-TRU dated 29.02.2008
  - Circular dated 23-8-2007 issued by the Department that clarifies that the payment of VAT/Sales Tax on a transaction has to be treated as sales of goods and levy of service tax on such transaction would not arise.
  - Nayana Premji Savala [2022 (66) G.S.T.L. 417 (BOM.)]
  - Imagic Creative Pvt. Ltd. [2008 (9) S.T.R. 337 (S.C.)]
  - Rajeswari Colour Lab. [2020 (35) G.S.T.L. 75 (MAD.)]
  - Essar Telecom Infrastructure (P.) Ltd. [2012 (275) E.L.T. 167 (KAR.)]
  - Express Engineers & Spares Pvt. Ltd. [2022 (64) G.S.T.L 112 (TRI. ALL.)]
- On the identical issue the Hon'ble Apex Court while upholding the Tribunal Mumbai's order reported at 2018 (11) G.S.T.L. 391 (Tri. - Mumbai) in the case of COMMISSIONER OF SERVICE TAX-V, MUMBAI Versus UFO MOVIEZ INDIA LTD reported at 2022 (61) G.S.T.L. 4 (S.C.) given the following observation:

*2. In the facts of the present case as it is not disputed that the respondent had regularly paid amount towards VAT liability in respect of the subject goods during the relevant period, the question of claiming service tax thereon does not arise.*

- The show cause notice in para 6.1 enumerates various clauses of the agreement to substantiate that control has not been transferred to M/s SICCL. The same alleges that appellant
  - shall be the owner of the assets (Clause 2)
  - responsible for payment of insurance and Licence Fees which substantiate that control has not been transferred. (Clause 5).
  - shall charge compensation in case of any damage (Clause 7).
  - shall have right to inspect all the assets through their Engineers/authorized representatives at any time to ensure the condition of the assets(Clause 8).
  - lessee shall not be entitled to sub-let to any one, wholly or partially, any part of the assets without the prior consent of the appellant. (Clause 9).
- The said allegations are not sustainable on account of the following reasons:
  - When `right to use' gets transferred only the effective control and possession gets transferred to the lessee. The ownership does not get transferred. If the ownership also gets transferred, then it will amount to sale and there should be no difference between 'sale' and `right to use'. Thus, allegation in the SCN will not be sustainable.
  - As far as insurance and license is concerned, as appellant is owner of the assets and iicense is in the name of the appellant in the name of the owner and not in the name of lessee and therefore, insurance cover and license fees has been taken/paid by the appellant and not by the lessee. It is submitted that

same is more of responsibility and does not affect in any way with possession or control of the assets. In the following cases, wherein insurance or license fees were paid by the lessor and court has held that same is not relevant factor to determine the transfer of right to use:

- M/s G S Lamba & Sons 2012-TIOL-49-HC-AP-CT
  - PETRONET LNG LTD. 2013(11) TMI 1011-CESTAT NEW DELHI
  - UFO MOVIEZ INDIA LTD. 2018 (11) G.S.T.L. 391 (TRI. - MUMBAI) as upheld by the supreme court in UFO MOVIEZ INDIA LTD. 2022 (61) G.S.T.L. 4 (S.C.)
- As per clause 7 of the agreement, M/s SICCL will be liable to pay compensation to the appellant in case of any damages to the asset. This shows that the possession has been transferred. If the possession would not have been transferred, the liability for any damage would be on the supplier i.e. the appellant in the present case.
  - Clause 8 states that appellant shall have right to inspect asset by the engineers at any time. It is submitted that if the effective control and possession is with the appellant then there is no need to have a clause in the agreement empowering the appellant to have right to inspect the assets given on lease
  - Clause 9 relating to sub-let there is no per se restrictions on sub-leasing as lessee can sub-let with prior consent of the appellant. The restriction is not an absolute one. Lessee can sub-let with the consent of the appellant. This clause does not affect the control or possession of the lessee over the appellant. Reliance placed on Nayana Premji Savala [2022 (66) G.S.T.L. 417 (BOM.)].

- None of the clause as referred by the SCN above effects the control or possession of the leased equipments.
- It has been alleged in Para 6.2 that as per certification dated 26.06.2014 by Transport Department of Uttar Pradesh, the Van remains with the control of the appellant. It can be seen from these certificates that nowhere in details are given regarding control or possession of the Van. Hence the allegation made in the Show Cause Notice is factually incorrect.
- Observations made in the OIO are not sustainable.
- The issue is revenue neutral. The assets has been leased out to the sister concern i.e. group companies of the appellant. They are paying service tax under broadcasting service and thereby even if service tax would have been paid then same would have been available as credit to them. Thus, entire situation is revenue neutral and thereby demand should not be made. Reliance on Coca-cola India Pvt. Ltd. [2007 (213) ELT 490 (SC)].
- Benefit of Cum-duty to be extended. The Appellant has not charged the service tax on lease rental and has in fact paid VAT. The explanation 2 to section 67 provides for the cum-duty benefit. Reliance is also placed on the following decisions:
  - Maruti Udyog [2002 (141) ELT 003 (SC)]
  - Advantage Media Consultant [2008 (10) S.T.R. 449 (Tri. Kolkata)] affirmed by the Supreme Court as reported at [2009 (14) S.T.R. J49 (S.C.)].
- It is submitted that appellant has not availed cenvat credit for the period 2013-14 all. It is evident from the ST-3 return for the period 2013-14 that appellant has not at availed credit. It is further submitted that appellant has already reversed the cenvat credit of Rs. 62,82,638/- for the period 2012-13.
- At the outset it is submitted that demand for the entire period cannot sustain as there was no allegation of violation of statutory provisions in the Show Cause Notice.

The appellant relies upon the judgment of Brindavan Beverages (P) Limited 2007 (213) E.L.T. 487 (S.C.) and M/s Federation of Indian Chambers Of Commerce And Industry 2014-TIOL-701-CESTAT-DEL and Tiger Security Services 2009 (14) S.T.R. 747 (Tri. Chennai).

- The aforesaid credit has been denied on the ground that there is no nexus with the business auxiliary services.
- M/s SICC has a unit "Sahara India TV Network". The said unit is engaged in broadcasting "Sahara" channel on television. M/s SICC earns income by way sale of advertisement time slot on this channel. M/s SICC appointed the appellant to outsourced their all activities relating to distribution i.e. for broadcasting its channel through network of cable operators. M/s SICC and the appellant entered into distribution agreement for the same - copy of agreement is already attached as appellant The appellant received a fixed mark-up over and above the price paid to the cable operators for the said activity on which the appellant paid service tax under the category of Business Auxiliary Services (BAS). The said activity has been stopped from April 2012. Hence, tax has been paid during the period 2009-10 to 2011-12. Accordingly, credit has also been taken only for the period upto March 2012 as detailed below:

| Particulars                     | Year      |           |           | Total Amount |
|---------------------------------|-----------|-----------|-----------|--------------|
|                                 | 2009-10   | 2010-11   | 2011-12   |              |
| Space Segment Charges           |           |           |           |              |
| Training service & Installation | 11,91,795 | 33,05,792 | 43,11,150 | 88,08,737    |
| Freight & Cartage               |           | 3,00,000  |           | 3,00,000     |
| Vehicle maintenance             |           | 404       |           | 404          |
| Chartered Flight Hiring         |           | 177       |           | 177          |
| Insurance Charges               |           |           | 16,80,000 | 16,80,000    |
| Internal Audit Fee              |           |           | 6,12,267  | 6,12,267     |
| TOTAL                           |           |           | 3000      | 3000         |
| Space Segment Charges           | 11,91,795 | 36,06,373 | 66,06,417 | 1,14,04,585  |

- In order to determine the nexus of the input service with the provision of output service of the appellant it is important to understand the nature of each input service. All the input services on which the credit is sought to be denied on the ground that the same is not in relation to provision of output service can be explained and these input service is clearly relating to output services
- Aforesaid services are used for business purpose. In view of decisions as follows the credit should not have been denied.
  - Reliance Industries Ltd [2022 (380) E.L.T. 457 (Tri. - LB)]
  - COCA-COLA INDIA PVT. LTD. 2009 (15) STR 657 (BOM).
- The demand pertains to the period April 2009 to March 2014 whereas the show cause notice is received in August 2015. Thus, the demand for the period upto September 2013 is hit by limitation. The show cause notice proposes to invoke the extended period of limitation by alleging suppression of facts. The extended period of limitation under section 73(1) can only be invoked in the case of fraud, suppression of facts, etc. with an intention to evade duty. As the appellant was under a bonafide belief that transaction involves transfer of right to use goods and hence chargeable to VAT & accordingly VAT was discharged by the appellant. Appellant is rightly eligible for the alleged Cenvat credit as same was used for business purpose. There was no malafide intention on the part of the appellant in discharging VAT liability & in taking such credit. The matter relates to interpretation of the term 'right to use' & definition of 'input services' appearing under Rule 2(1) of the Cenvat Credit Rules. the Tribunal has held that when the issue relates to interpretation of the statute, extended period of limitation should not be invoked. Reliance is placed on the decision in case of

Continental Foundation Jt. Venture [2007 (216) E.L.T. 177 (S.C.)].

- The appellant had no malafide intention in treating the transaction as involving transfer of right to use the goods & in claiming the Cenvat credit on various input services & had bonafide belief that they are eligible for the same. Hence, penalty u/s 78 must not be levied.

3.3 Arguing for the revenue learned authorized representative reiterated the findings recorded in the impugned order.

4.1 We have considered the impugned order along with the submissions made in appeal and during the course of arguments.

4.2 Impugned order records following findings for holding against the appellants-

*"I find the issues to be decided in this case are that as to whether:-*

- i) the leasing out of earth station and related equipment to M/S SICCL would qualify as taxable service under the "Supply of Tangible goods services" or not;*
- ii) the demand of service tax amounting to Rs.9,00,01,588/- is liable to be recovered from the party on the above taxable service along with interest under Section 73(1) read with Section 75 of the Finance Act, 1994;*
- iii) the CENVAT credit of Rs 2,27,05,076/- is liable to be disallowed and recovered from the party along with interest under Rule 14 of the CCR, 2004 read with Section 73(1) read with Section 75 of the Act, ibid or not;*
- iv) Whether penalties under Section 78 of the Finance Act, 1994 and Rule 15 (3) of the CCR, 2004 are liable to be imposed in the case on the party under Section 78 of the Finance Act or not; and*

- v) Whether penalties under Section 77(1)(a) and Section 77(2) of the Finance Act, 1994 are imposable in this case.

Accordingly, I take up the issues to be decided serial item-wise:-

**6.1. Leasing Out Earth Station And Related Equipment To M/S SICCL**

It has been alleged in the show cause notice that during the course of search proceedings carried out by the officers of Anti-Evasion branch of Central Excise & Service Tax, Noida of accounts of the party for the years 2010-2011 to 2011-2012, it was noticed that the party i.e. M/s Sahara Sanchaar Limited has leased out Earth Stations and other equipment and related infrastructure to have a linking facility of TV programs to their sister concern i.e. M/s Sahar India Commercial Corporation Ltd (i.e. M/S SICCL). During search proceedings, the agreement dated 01.04.2009 between the party and M/s SICCL was obtained on the spot. Further, on going through the clauses of the lease agreement dated 01.04.2009 (as amended further on 15.10.2010), it was, inter alia, observed that –

- (a) The party /i.e. M/s. Sahara Sanchaar Limited shall be the owner of the assets. (Clause 2).
- (b) The party ie. M/s. Sahara Sanchaar Limited shall be responsible to make or get adequate insurance cover for the assets given on lease to the second party (Clause2).
- (c) The party i.e. M/s. Sahara Sanchaar Limited shall bear the entire license fees etc. to be paid to Govt. authorities in respect of usage of such assets (Clause 5)
- (d) The party i.e. M/s. Sahara Sanchaar Limited shall charge compensation in case of any damage (Clause 7)
- (e) The party ie. M/S Sahara Sanchaar Limited shall have right to inspect all the assets through their

*Engineers authorized representatives at any time to ensure the condition of the assets (Clause 8).*

- (f) *That the second party shall not be entitled to sub-let to any one, wholly or partially, any part of the assets without the prior consent of the first party (Clause 9).*

*Here, it is pertinent to mention that the first party and second party in the said agreement are M/s. Sahara Sanchaar Ltd. and M/s. Sahara India Commercial Corporation Ltd. respectively. On perusal of these clauses and the definition of "Supply of Tangible Goods Services", it was found that the said agreement fulfilled the condition of taxable service by way of supply of tangible goods including machinery equipment and appliances for use (earth station and related equipment in instant case), without transferring right of possession and effective control of such machinery equipment and appliances. Further, at the time of visit of the premises of the party on 20.03.2015, the copy of registration certificate of the utility van, which was a part of the equipment leased out to M/s. SICCL, was in the name of M/s. Sahara Sanchaar Limited at the time of registration on 29.12.2008 and remains under the control of M/s. SICCL as on that date, as shown in the fitness certification issued by the Transport Department of Uttar Pradesh on 26.06.2014. Thus, it was deduced that the party owns their properties which are part of the leased out equipment and thus, the legal right of possession and effective control was still in the hands of the party i.e. M/s. Sahara Sanchaar Limited. Accordingly, the party was found to be liable to pay service tax on lease income/ rental income received by them during the period 2009-10 to 2013- 14.*

*6.2 I observe that on being specifically asked about it, Smt. Santosh Khandelwal, Cost accountant and Company Secretary, in her statement dated 20.03.2015, submitted that they had given the legal right of possession and effective control to the lessee but she was unable to explain it in the*

*light of agreement dated 01.04.2009. Further, Shri Hardeep Singh, Head-Finance & Accounts of the party, in his statement, recorded on 26.03.2015, stated that they have taken the view of their legal advisor on the incidence of the service tax on lease rent and they were advised by their advisors that the incidence of service tax is not applicable on them, but he failed to specifically explain how the service tax was not applicable on them. Accordingly, M/s. Sahara Sanchaar Limited, C-2,3,4, Sahara India Complex, Sector-11, Noida were issued show cause notice thereby demanding the Service tax, amounting to Rs.9,00,01,588/-, along with interest and proposing penalty under Section 78 of the Finance Act,1994.*

*6.3 I observe that the party in their defence has questioned the whole gambit of "Right to Use under the supply of the tangible goods services and have negated the investigation and allegation in the SCN by claiming the transaction between them and Ms SICCL as deemed sale. They have built their case on the following plinth that:-*

- 1. Right to Use is transferred*
- 2. Payment of VAT has been made against the supply of goods*
- 3. On account of rebuttal to the allegations made in the show cause notice*

*The party has analyzed the taxability of service of supply of tangible goods under Section 65(10)(zzzzj) of the Finance Act,1994 by stating that (a) there shall be shall supply of tangible goods (b) supply shall be for use by the recipient, and (c) supply control of such effected without" transferring right Of possession and effective machinery, equipment and appliances. Thereafter, the party has argued about the effective possession by relying the decision given in the case of Supdt. And Remembrancer of Legal Affairs West Bengal Vs Anil Kumar Bhunja and Ors. (1979)4SCC 274, wherein the court explained that "Possession" implies a right and a fact*

*the right to enjoy annexed to the right of property and the fact of the real intention If involves power of control and intent to control., The party further stated that the same is in consonance with clause 6 & 7 of the said agreement as the Clause 6 stated that the maintenance charges incurred for the use of assets shall be borne by M/s SICCL and no part of such maintenance charges shall be borne by the party and Clause 7 stated that if by an act of God or human being the assets are damaged, destroyed or lost partially or wholly, M/s. SICCL would be bound to pay compensation and damages to the party which showed that the possession has been transferred. In support of their contention, the party has relied upon the Hon'ble Supreme Court in the case of 20th Century Finance Corporation and Anr. Vs State of Maharashtra (2000) 6.SCC.12 where it has been held that the levy of (sales) tax is not on the use of goods but on the transfer of the right to use goods. They also relied upon the following judgements:*

- *M/s GMMCO Ltd.2012(31)STR 675 (Tri-Mumbai)*
- *M/s Inox Air Products Ltd. 2014 (10) TMI 566-CESTAT Bangalore*
- *Krushan Chandra Behera and Another Vs State of Orissa and Others 1991(83)STC 325 (Orissa)*

*Thereafter, the party have stated that Clause 2 & Clause 3 of the said agreement show that the 'right to use' has been transferred to the lessee*

*6.4 I also observe that the party forwarded their arguments by stating that VAT has been paid by them, and hence, no service tax is leviable in terms of Circular No 334/1/2008-TRU dated 29.2.2008 They further stated that they had been discharging the VAT liabilities on such transaction which was evident from the VAT challans and has not been disputed even in the show cause notice. They further submitted that the levy of service tax under supply of tangible goods service is alternate in nature and subordinate to the levy of VAT. Thus, if the VAT is paid by them, the service tax on the same*

*cannot be levied. They also quoted the relevant portion of the TRU's circular. They also stated that it is well settled position that the service tax is not leviable on the item on which the sales tax has been collected as there is mutual exclusivity and cited pronouncements in their support:*

- Bharat Sanchar Nigam Ltd. 2006(2)STR.161(S.C.)*
- Imagic Creative Pvt Ltd 2008(9) S.T.T.337(S.C)*
- Idea Mobile Communications Ltd. 2006-TIOL 857-CESTAT -BANG*
- Essar Telecom Infrastructure P. Ltd V Union Of India 2012 (25) STR-16 (Kar)*
- M/s G S Lamba & Sons-2012-TIOL-49-HC-AP-CT*

*6.5 I further observe that in their defence, they also rebutted the allegations made in the show cause notice as regard to various clauses of the agreement that*

- (a) As per clause 2 of the agreement, they shall pay the owner of the asset. Hence this clause does not, in any way, mean that the 'right to use is not being transferred to the lessee.*
- (b) The insurance company issues insurance policy only in the name of the owner and not in the name of lessee and therefore, insurance cover has been taken by them and not by the lessee.*
- (c) The license fee of Rs.56,85,000/-appx. for an year, is to be paid to Govt authorities for operating the earth station. The said department (like insurance company), only recognizes the owner of the asset and not the lessee of the asset Hence, the license fee is to be paid by them.*
- (d) As per clause 7 of the agreement, M/s SICC will be liable to pay compensation to them in case of any damages to the asset. This shows that the possession has been transferred.*
- (e) It is mentioned in clause 8 that assessee shall have right to inspect asset by the engineers at any time. It is*

*submitted that if the effective control and possession is with them then there is no need to have a clause in the agreement empowering the assessee to have right to inspect the assets given on lease.*

- (f) *The 'right to use' has been transferred to the lessee i.e. M/s SICC for its own use i.e. for the purpose of broadcasting its own TV Channel. The price at which the lease has been fixed is determined on the basis of use of the asset by the lessee. In order to ensure that the lessee does not sublet it further and start earning profit by merely becoming intermediary, this restriction is generally available in all lease agreements. This ensures that the price at which the lesser has leased the asset is not exploited by the lessee. Hence specific clause has been inserted in the agreement of prior consent before sub-letting. This clause does not affect the control or possession of the lessee over the assessee.*

*6.6.1 Thus, it becomes pertinent that the "Supply of Tangible Goods Services" is required to be examined in terms of taxability, coverage & scope as provided in the Finance Act & the various service tax laws. As per Section 65(105)(zzzzj) of the Finance Act, 1994-*

*"Taxable Service" means any service provided or to be provided to any person, by any other person in relation to supply of tangible goods including machinery, equipment and appliances for use without transferring right of possession and effective control of such machinery, equipment appliances,"*

*I observe that with effect from 1.07.2012, Section 66B of the Finance Act, 1994 provided that there shall be levied a tax (hereinafter referred to as the service tax) at the rate of twelve per cent, on the value of all services other than those specified in the negative list, provided or agreed to be provided in a taxable territory by one person to another and collected in such manner as may be prescribed. Further under 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, has been termed as declared service'*

*6.6.2 Further, the CBEC has clarified vide M.F.(D.R) letter F.No. 198/08/2016 dated 17.8.2016 on the service tax liability in case of hiring of goods without the transfer of the right to use goods. It is clarified as under:*

*"In terms of sub-clause (d) of clause (29A) 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 Rashtriyalspat Nigam Limited VS Commercial Tax Officer reported in 1990( 77) STC 182 and State of Andhra Pradesh VS Rashtriyalspat 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 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 recognized 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. Similarly in the aircraft industry there are "dry leases" and "wet leases". Generally*

*4.2 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 "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 generalizations 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”*

*6.6.3 On perusal of the aforesaid CBEC circular vis-à-vis the definition of taxable services, the intention of the statute is made clear regarding the essential ingredients that will distinct the transfer of right to use from sales. The Supreme Court in the case of Bharat Sanchar Nigam Limited vs Union of India, reported in 2006(2) STR 161 SC, has 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.*

*Thus it is construed that important attribute constituting transfer of right to use goods as deemed sale is that there should be transfer of effective control and possession of goods. If the owner retains effective control over the equipment, it should construe as not transfer of right to use. Further a mere contract of hiring without transfer of control, may be a contract of bailment and not a contract for transfer of right to use goods. In the above stated factors, the said*

*agreement between the party and M/s SICCL and other relevant case records are required to be thoroughly and critically analysed. I observe that in the balance sheet, income from the impugned activity has been booked in the profit and loss account. In this regard, in the notes to financial statements for the year ending 31<sup>st</sup> March 2014 under the head 'Significant Accounting Policies', the following declaration has been made:*

***"1.04 OPERATING LEASE- WHERE ASSETS ARE GIVEN ON LEASE***

*Leases in which the company does not transfer substantially all the risk and benefits of ownerships are classified as operating lease. Assets subject to operating are included in the fixed assets. Income on an operating lease is recognised in the statement of Profit and Loss Accounts over the lease period.*

*Thus, it is apparent that it is undisputed fact that the issue involved in the present case is not concerning the financial leasing which has been distinguished by the Hon'ble Supreme Court in the case of Association of Leasing & Financial Service Companies vs Union of India, as reported in 2010(20)S.T R.417(SC) as under:*

*"21. . .....That, in substance a finance lease, unlike an operating lease, is a financial loan (assistance/facility) by the lessor to the lessee. That, in the bailment termed "hire" the bailee receives both possession of the chattel and the right to use it in return for remuneration. On the other hand, equipment leasing is long term financing which helps the borrower to raise funds without outright payment in the first instance. Here the "interest" element cannot be compared to consideration for lease/hire which is in the nature of remuneration (consideration) for hire. Thus, financing as an activity or business of NBFCs is different and distinct from operating lease/hire-purchase agreements in the classical sense. The elements of the*

*finance lease or loan transaction are quite different from those in equipment leasing/hire-purchase agreements between owner (lessor) and the hirer (lessee). There are two independent transactions and what the impugned tax seeks to do is to tax the financial facilities extended to its customers by the NBFCs under Section 66 of the 1994 Act (as amended) as they come under "banking and other financial services" under Section 65(12) of the said Act. "The finance lease" and "the hire-purchase finance" thus squarely come under the expression "financial leasing services" in Section 65(12) of the Finance Act, 1994 (as amended)."*

*Thus, on perusal of the above judgement, I observe that 'operational lease is purely a service activity where substantial risk and ownership of the equipment remains with the lessor (i.e. owner of the equipment). However, observe that service in relation to supply of tangible goods where the right of possession and effective control of such machinery, equipment and appliances stands transferred by the service provider to the receiver of such service, has been kept out of the purview of the scope of taxable service under Section 65(105)(zzzzj) of the Finance Act, 1994 (as applicable upto 30.06.2012) and under Section 66B of the Finance Act, 1994 read with Section 66E(f) of the Act, ibid. As regards the issue whether right to possession and effective control of equipment leased out stands transferred in this case, I find that earth station is installed in the premises of the party and it is also a fact on record that necessary license for possessing and operating the said telecast/broadcast/transmission equipment is in the name of the party and not in the name of lessee. I observe that the party in the entire defence submission has only tried to interpret the terms and conditions of lease agreement dated 01.04.2009 in their favour without bringing any substantial material to support their stand like the terms of license issued to them by the respective ministry/department of the government so as to examine*

*whether lessee was merely acting as an operator of the leased equipment or was having right to possession and effective control during the period of lease for his own independent use. I also observe that clause 2 of the said agreement although mentions that the second party (lessee) shall enjoy the exclusive right to use the assets So installed but at the same time it mentions that the lessee shall not claim ownership Further it is also provided in the said clause that the said right to use can be extended by the first party (i.e. the party) to any third party after obtaining consent of the second party which clearly shows that the lessee was not having an exclusive right over the use of such equipments. Contrary to this, the lessee did not have such rights for further sub-leasing. This clearly implies that the party was always having its right to extend lease of such rights to use to any third party even during the period of lease with the lessee (i.e M/s SICCL). Thus, it is seen that such transfer of right to use in the present case was not in accordance with the principles laid down by the Hon'ble Supreme Court in the case of Bharat Sanchar Nigam Ltd. Vs UOI, as reported in 2006(2) S.T.R. 161(SC), wherein, one of the principles laid down clearly states that 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 right to use" and not merely a license to use the goods I further observe that the Hon'ble Supreme Court in the case of Bharat Sanchar Nigam Ltd. (supra) also laid down the principle that the transferee should have 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. I find that contrary to this principle, allegation in the present case is that license/permission in the present case is in the name of the party which has not been refuted by the party in their defence submissions by bringing on records the terms of license/permission issued in the case for having the*

*possession/operation of impugned leased equipment, Thus, I find that the impugned show cause notice quite conspicuously and unequivocally has left no stone unturned in scrutinizing the said agreement, The investigation has indeed kept its focus on various clauses of the said agreement and has got into the insight of each of the clauses Vis-a-vis the taxability under the service tax provision Since, the said agreement IS critical in defining the taxability the investigation draws inference on the said agreement and for better understanding, the plain and conspicuous meaning of the various clauses of the said agreement is as under-*

- (a) The party i.e. M/s. Sahara Sanchaar Limited shall be the owner of the assets and right to use of the assets can be extended by them to the any third party (Clause 2).*
- (b) The party ie. M/s. Sahara Sanchaar Limited shall be responsible to make or get adequate insurance cover for the assets given on lease to the second party (Clause2).*
- (c) The party i.e. M/s. Sahara Sanchaar Limited shall bear the entire license fees etc to be paid to Govt. authorities in respect of usage of such assets (Clause 5)*
- (d) The party i.e. M/s. Sahara Sanchaar Limited shall charge compensation in case of any damage (Clause 7)*
- (e) The party i.e. M/s. Sahara Sanchaar Limited shall have right to inspect all the assets through their Engineers / authorized representatives at any time to ensure the condition of the assets (Clause 8)*
- (f) That the second party shall not be entitled to sub-let to any one, wholly or partially, any part of the assets without the prior consent of the first party (Clause 9).*

*6.6.4 Thus, I have no iota of doubt that the said agreement does not transfer the right to use tangible goods with effective possession and control to the lessee i.e M/s SICCL. Thus, I am of the view that the same is taxable service chargeable to the service tax in terms of the provisions of Section 65(105)(zzzzj) read with Section 66, 66B and Section 66E(f)*

*of the Finance Act, 1994, as applicable during the relevant period. I find judicial support to the above in the case upheld by the Hon'ble Supreme Court of India in the case of State Of Andhra Pradesh & Anr vs M/s Rashtriya Ispat Nigam Ltd on 6 March, 2002, as reported in 2013(31) S.T.R. 513(SC), wherein it has been observed/held as under-*

*"3. The High Court after scrutiny and close examination of the clauses contained in the agreement and looking to the agreement as a whole, in order to determine the nature of the transaction, concluded that the transactions between the respondent and contractors did not involve transfer of right to use the machinery in favour of the contractors and in the absence of satisfying the essential requirement of Section 5-E of the Act, ie, transfer of right to use machinery, the hire charges collected by the respondent from the contractors were not exigible to sales tax. On a careful reading and analysis of the various clauses contained in the agreement and, in particular, looking to clauses 1, 5, 7, 13 and 14, it becomes clear that the transaction did not involve transfer of right to use the machinery in favour of contractors The High Court was right in arriving at such a conclusion. In the impugned order, it is stated, and rightly so in our opinion, that the effective control of the machinery even while the machinery was in use of the contractor was that of the respondent company, the contractor was not free to make use of the machinery for the works other than the project work of the respondent or move it out during the period the machinery was in his use, the condition that the contractor would be responsible for the custody of the machinery while it was on the site did not militate against respondent's possession and control of the machinery It may also be noticed that even the Appellate Deputy Commissioner, Kakinada in the order dated 15.11.1999 in regard to assessment years 1986-87 and 1987-88 held that under the terms and conditions of the agreement, there was no transfer of right to use the machinery in favour of the contractor Although it cannot be said that the appellant*

*was estopped from contending otherwise in regard to assessment year 1988-89, it is an additional factor and circumstance, which supports the stand of the respondent*

*4. In our view, no fault can be found with the order under challenge in the light of what is stated above this appeal has no merit. Consequently it is dismissed directing the parties to bear their respective costs."*

*I also find support from the decision of the Hon'ble Karnataka High Court in the case of Indus Towers Ltd. Vs Deputy Comm. of Commercial Taxes, Bangalore, as reported in 2012(285)ELT.003(Bang.) wherein it has been held that "Transaction is not within the ambit of Article 366(29-A)(d) of Constitution of India - Mobile operators did not get possession and effective control of passive infrastructure, and there was no physical delivery of same - Mobile operators only used services provided by service provider, and their access to the infrastructure did not amount to its possession or right to use goods - Mobile operator were merely provided access to the infrastructure, and that did not amount to service provider losing control over the infrastructure, and especially so as mobile operators could not transfer it during period of contract to a third party - Right of mobile operators was personal right to do something on the passive infrastructure belonging to service provider, it did not amount to creation of interest therein, and was only in nature of licence as defined under Section 52 of Easements Act, 1882 - In that view, there was no sale or deemed sale as defined under Section 2(29)(d) of Karnataka Value Added Tax Act, 2003, to attract levy of tax under it."*

*6.6.5 Further I observe that the party in their submissions has built their defence by treating the supply of tangible goods as deemed sales thereby depositing the VAT. I am not inclined to agree with the party's contention as it is nowhere stated in statute that one activity if subject to the VAT under state laws need not necessarily be levied to Central Law viz the service*

*tax Or vice versa also notice that both the VAT and service tax are in quintessence are not envisioned to complement one another that is to say that they are both mutually exclusive. Rather, perceive it as both disjointed and disconnected as one is subject to state jurisdiction while the matter covered under the Union List subject to other Central Government jurisdiction. I also notice that every case is different from the other case as the facts and circumstances are different and moreover when there is very thin line to demarcate one activity from other, the terms of agreement plays pivotal role in defining the taxability of an event. I have gone through the various court pronouncement relied and quoted by the party in their defence but I do not find any relevance as the investigation and the allegations of the SCN are water tight. The terms and conditions of the said agreement clearly state the nature of transaction of the supply of tangible goods without transferring the rights to use and the same cannot be construed as sales (deemed sales). The Hon'ble Supreme Court in the case of Idea Mobile Communication Ltd. Vs CCE Cochin [2011 (23)STR 433(S.C.)] held that "It also cannot be disputed that even if sales tax is wrongly remitted and paid that would not absolve them from the responsibility of payment of service tax, if otherwise there IS a liability to pay the same. If the article is not susceptible to tax under the Sales Tax Act, the amount of tax paid by the assessee could be refunded as the case may be or, the assessee has to follow the law as may be applicable. But we cannot accept a position in law that even if tax is wrongly remitted that would absolve the parties from paying the service tax if the same is otherwise found payable and a liability accrues on the assessee." Thus, I find that plea of the party that they are not liable to pay the service tax for the reason that they have paid the VAT, is, therefore, not tenable.*

*6.6.6 I also notice that the party in their defence has gone on to rebut the allegation In the SCN vis-à-vis the said agreement. I find the party's contention as a mere after*

*thought and a desperate attempt to keep away them from the service tax net. The fact of the case is the allegation in the SCN regarding the terms of various clauses has been reproduced which are narration of the facts of matter. The party has shown its inability to circumvent the clause and thus giving strength to the revenue case as the activity spell out of said agreement drives home one and only point that the party has not transferred right to use the tangible goods and thus activity would be covered under the ambit of service tax quite rightly, as alleged in the SCN.*

### **6.7 Irregular availment of the CENVAT credit**

*6.7.1 It is alleged in the SCN that the party has availed the CENVAT credit of input services for providing their output service namely "Business Auxiliary Services". On scrutiny of Input Service Credit ledger of the party for the financial year 2009-10, 2010-11, 2011-12, 2012-13 and 2013-14, it was observed that the party has availed service tax credit on following input services-*

- a) Space Segment Charges for KU banc / C band*
- b) Vehicle Maintenance charges*
- c) Freight & Cartage for matrix video board:*
- d) Training Service & Installation, integration commissioning & handholding*
- e) Insurance charges Insurance premium of equipment;*
- f) Chartered flight hiring charges*

*It has been alleged that these expenses do not appear to be in relation to providing their output service 'Business Auxiliary Services' and therefore, they (the party) have availed the inadmissible input service credit during the years from 2009-10 to 2013-14 contravening the provisions of Rule 3 of the CENVAT Credit Rules, 2004 observe that the party in their defence has stated that the department proposes to the CENVAT credit without relying on the definition Of 'input service which deny was prevalent during the relevant period. They relied upon the following judgments:*

- *Tiger Security Services 2009 (14) S.T.R. 747 (Tn. - Chennai)*
- *M/s Federation of Indian Chambers Of Commerce And Industry 2014-TIOL-701- CESTAT-DEL*
- *Renuka Prasad 2014 (35) S.T.R. 698 (Cal.)*

6.7.2. *The party further stated that the services on which credit has been taken are in relation to providing their output service and hence credit must be allowed. The nature of activity carried out by them is that M/s SICCL has a unit "Sahara India TV Network which is engaged in broadcasting "Sahara" channel on television and earns income by way sale of advertisement time slot on this channel. M/s SICCL appointed them for broadcasting its channel through network of cable operators and they in turn entered into an agreement with the cable operators. They received fixed mark-up, over and price paid to the cable operators and for the said activity on which they paid the service tax under the category of Business Auxiliary Services (BAS). The said activity has been stopped from April 2012. Hence, tax has been paid during the period 2009-10 to 2011-12. Accordingly, credit has also been taken only for the period upto March 2012. The nature of services on which credit has been taken are in relation with the provision of output service i.e. the BAS services.*

6.7.3 *I observe that the basic tenets on which the CENVAT credit has been allowed is to negate the cascading effect of incidence of duty/tax double taxation. Further the law makers have put this rationale in framing the CENVAT credit rules but at the same time has provided for the safeguard against any misuse of the facility. The CENVAT credit rules clearly provide for the availing of credit on the input services which should not only be co-relatable with the output service having definite nexus but also be its input service only. For the better understanding of the issue, it is imperative that the various provisions of the service tax be revisited. The relevant portion of the definition of 'input service' as Rule 2(1) of the CENVAT Credit Rules, 2004 is as under-*

*"input service means any service-*

- (i) used by a provider of taxable service for providing an output service or*
- (ii) used by the manufacturer.....*

*and includes services used in relation to modernization, renovation or repairs of a factor(y), premises of provider of output service or an office relating to such factory or premises, advertising or sales promotion, market research, storage upto the place of removal, procurement of inputs, accounting, auditing, financing, recruitment and quality control, coaching and training, computer networking, credit rating, share registry, security, business exhibition, legal services, inward transportation of inputs or capital goods and outward transportation upto the place of removal; but excluded services-*

*A. ....*

*B. ....*

*C. such as those provided in relation to outdoor catering., beauty treatment, health senices, cosmetic and plastic surgery, membership of a club, health and fitness centre, life insurance, health insurance and travel benefit extended to employees on vacation such as Leave or Home Travel Concession, when such services are used primarily for personal use or consumption of any employee"*

*Rule 3(1) of the CCR which determined the eligibility of credit (as it stood during the relevant period) is reproduced as under:*

*"(1) A manufacturer or producer of final products or a provider of taxable service shall be allowed to take credit (hereinafter referred to as the CENVAT credit) of –*

*(i) ....*

*(ii)....*

*(iii) ...*

- (iv) ..
  - (v)
  - (vi)
  - (vii)
  - (viii)
  - (ix) *the service tax leviable under section 66 of the Finance Act,*
  - (x) *the Education Cess on taxable services leviable under section 91 read with section 95 of the Finance (No. 2) Act, 2004 (23 of 2004); and*
  - (xa) *the Secondary and Higher Education Cess on taxable services leviable under section 136 read with section 140 of the Finance Act, 2007 (22 of 2007).*
- and*
- (xi) ....
  - paid on-*
  - (i) -----
  - (ii) *any input service received by the manufacturer of final product or by the provider of output services on or after the 10th day of September, 2004"*

*On perusal of the above statutory provisions, I observe that a plain reading of above definition of 'input service' read with Rule 3 of the CENVAT Credit Rules, 2004 clearly means that credit of the service tax paid only on the input service can only be availed when the same is either used by the manufacturer, whether directly or indirectly, in or In relation to the manufacture of final products and clearance of final products upto the place of removal or when the same is used by the output service provider for providing an output service.*

*6.7.4 I find that the party was rendering the BAS services for marketing of their group company M/s SICCL'S business with the cable operators and receiving mark up for rendering of the services. The party in their defence, has gone into length to describe whole gamut of services rendered vis a vis input services. I do not find anything in support of the part's*

*contention which renders their input services viz- Space Segment Charges for KU band/ C band; Vehicle & Maintenance charges; Freight Cartage for matrix video board; Training Service & Installation integration, commissioning & handholding; Insurance charges/ Insurance premium of equipment as co-relatable with the output services. But the big picture looms ahead that their outward service is not the broadcasting services rather their outward services is culmination of mark up fees or commission amount received which as the BAS services. I find no reason to disagree with the allegation of SCN. Accordingly it can be safely deduced that there are no provisions in the service tax wherein the credit of service tax paid on input services credit having no nexus with the output service can be safely allowed. In line with the above findings, I do not find any strength in the material facts or the argument put forth by the party in support of their contention and I find the charges in the impugned SCN are in consonance with the service tax provisions/ rules regarding the ambit and the scope of definition of the services rendered by the party. I uphold the allegations of the Show Cause Notice and maintain that the party has availed irregular CENVAT credit and hold the same recoverable from them.*

*6.7.5. The case laws cited by the party do not hold good, as the decisions have been passed in different perspective with different facts and circumstances, inasmuch as the decisions cited delve into different issue. In the case of Tiger Security Services (supra), the Hon'ble Tribunal allowed the appeal filed by the assessee because of defective show cause notice holding that invocation of wrong provisions is a fundamental flaw vitiating entire proceedings. Further, the issue before the Hon'ble Tribunal in the case of Federation of India Chambers of Commerce and Industry (supra) as relied upon by the party was related to demand of the service tax under the category of services provided by 'club and association' and not related to demand of the CENVAT credit involving nexus between*

*input and output service. Further, the party has cited the decision of the 'Hon'ble High Court of Calcutta in the case of Renuka Prasad vs Commissioner of Central Excise, Bolpur (supra) without referring the grounds as to how such decision is applicable to the present facts and circumstances inasmuch as I find that all the allegations against the party have been clearly spelt out in the show cause notice in the instant case. The party has neither cited any instance of either wrong invocation of the provision in the SCN or any ambiguity in the allegations made against them. In this regard , I place reliance on the judgment of the Hon'ble Supreme Court in the case of CCE Vs. Alnoori Tobacco Products reported at 2004 (170) ELT 0135 (S.C.), wherein it has been held that "11. Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed Observations of Courts are neither to be read as Euclid's theorems nor as provisions of the statute and that too taken out of their context. These observations must be read in the context in which they appear to have been stated. Judgments of Courts are not to be construed as statutes. To interpret words, phrases and provisions of a statute, it may become necessary for judges to embark into lengthy discussions but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgments. They interpret words of statutes, their words are not to be interpreted as statutes....."*

*"13 Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases. Disposal of cases by blindly placing reliance on a decision is not proper.*

*14. The following words of Lord Denning in the matter of applying precedents have become locus classicus:*

*Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect, in deciding*

*such cases, one should avoid the temptation to decide cases (as said by Cordozo) by matching the colour of one case against the colour of another. To decide therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive.*

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*Precedent should be followed only so far as it marks the path of justice, but you must cut the dead wood and trim off the side branches else you will find yourself lost in thickets and branches. My plea is to keep the path to justice clear of obstructions which could impede it."*

### **6.8. Recovery under the proviso to Section 73(1) of the Finance Act, 1994**

6.8.1. *The party has contended that the demand for the period up to September 2013 is hit by limitation in as much as they were under bonafide belief that transaction involves transfer of right to use the goods and hence chargeable to the VAT and that they were rightly eligible to avail the CENVAT credit; and that there was no malafide intention on their part in discharging VAT liability and in taking such credit. I observe that the party has placed reliance on the decisions of the Hon'ble Supreme Court in the cases of; Cosmic Dye Chemical vs Collector of C.Ex. Bombay [1995(75)ELT721(SC)] CCE vs Chemphar Drug and Liniments [1989(40)ELT (SC)] Pushpam Pharmaceuticals Company vs CCE, Bombay [1995(78)ELT 401(SC)] I observe that the party has also taken a plea that matter relates to interpretation of the term 'right to use' & definition of 'input service' appearing in Rule 2(1) of the CENVAT Credit Rules, 2004 and referred to the Tribunal's decisions in the cases of Shervani Indus. Syndicate [2009(14)STR 486(T)] and ITW India Ltd. [2009(14)STR 826(T)].*

6.8.2. *I find that in the present case relates to the demand of the service tax on the supply of tangible goods service and irregular availment of the CENVAT credit for the period 2009-*

10 to 2013-14 observe that such service of supply of goods was brought in tax applicability net of w.e.f. the 16.05.2008 and the party was fully aware about the facts of applicability of the service tax on such services as Shri Hardeep Singh, the the Head- Of Accounts of the party in his statement dated 26. 03. 2015, inter alia, stated Finance that they had taken the View of their legal advisor on the aforesaid lease agreement and incidence of service tax on transaction under such agreement who had advised that incidence of service tax was not applicable under such transaction under the agreement. The said contention of Shri Hardeep Singh acting On behalf of the party appears to be an afterthought as no such copy of legal opinion has been brought on record during either these proceedings Or earlier. observe that the party never disclosed the tacts regarding providing such services to the jurisdictional Service Tax authorities in any statutory periodical return or through any other communication. - find that the issue was brought to the notice of the party on a specific intelligence and when the officers of Anti-evasion branch of the jurisdictional Central Excise Commissionerate searched their premises and resumed the relevant records. observe that photocopies of some sample VAT payment challans have been submitted by the party without giving any co-relation of the same with the relevant tax invoices raised by them and returns filed with the State VAT authorities. As such, the contention that they had discharged the VAT on such activities during the relevant period is not also verifiable. As such, I am convinced that non-payment of service tax on the supply of goods service and the wrong availment of service tax credit would have gone undetected, had it not been detected by the officers of Anti-evasion as mentioned in the brief facts of the case, therefore, I hold this as a fit case of evasion of service tax and irregular availment of the CENVAT credit by the party with the deliberate intent of non-declaration and suppression of vital information. Accordingly, the invoking of extended period under the proviso to Section 73(1) of the said Act in the case

*before me is fully justified. Accordingly, the charge of suppression is convincingly established against them. In the circumstances, I am of the view that payment of the VAT to the state authorities can not absolve them from the charge of the service tax under the Finance Act, 1994 and willful suppression and mis-declaration of vital information. I find that the SCN has been issued on 19.08.2015 covering the period 2009-10, 2010-11, 2011-12, 2012-13 and 2013-14 by invoking the proviso to the Section 73(1) of the Finance Act, 1994 and it was issued well within the time limit. Hence, there is no delay or anomaly as alleged by the party.*

*6.8.3 The cases relied by the party do not squarely apply to the present facts and circumstances. Reliance is placed on the judgment of Hon'ble CESTAT in the case of Rajasthan State Beverage Corporation Limited (2013 (032) S.T.R. 329 (Tri.)) wherein it was held that:-*

*"Despite the clear obligation enjoined by the unambiguous provisions of the Act the appellant neither obtained registration as a taxable service provider nor filed periodical returns nor remitted Service Tax as mandated by the provisions of the Act. The tax evasion by the appellant came to notice of revenue only when intelligence officers of the Anti-Evasion Wing came upon information of the activities of the appellant ....*

*The requisite information was provided by the appellant to revenue in bits and pieces. In these totality of circumstances, the conclusion by revenue that there was willful suppression of relevant material with a view to evade liability to tax cannot be faulted nor considered inconsistent with the statutory prescription that justify invocation of the extended period of limitation."*

*The ratio of this Judgment is squarely applicable to this case. Therefore, I hold that the show cause notice is correctly issued to them by invoking extended period under the proviso of the Section 73(1) of the Finance Act, 1994 and that the Service*

*Tax demanded and irregular CENVAT availed as alleged is recoverable from them under the proviso to the Section 73 (1) Finance Act, 1994. Hence, provisions related to the extended period are rightly applicable in the instant case and demand is not barred by limitation. Accordingly, it is held that*

*(i) the service tax amounting to Rs.9,00,01,588/- for rendering "supply of the tangible goods services" as discussed in forgoing para, is demandable from the party under Section 73(1) of the Finance Act Invoking the proviso to said sub-section (1) of Section 73 ibid along with the interest under Section 75 of the Finance Act, 1994*

*(ii) the party has wrongly taken the CENVAT credit amounting to Rs. 2,27,05,076/- for the period 2009-10 to 2013-14 in contravention of rule 3 of the CENVAT Credit Rules 2004 and the same is liable to be disallowed and recovered from them under rule 14 of the CCR read proviso to Section 73(1) of the Act, ibid, along with interest under Rule 15 of the CENVAT Credit Rules, 2004 read with the Section 75 of the Act. ibid.*

*6.8.4 I also observe that the party has made another contention that if the tax is payable on the supply of tangible goods service, they would be eligible for the CENVAT credit of Rs. 2,27,05,076/-. I observe that the demand of service tax has been raised invoking the extended period of limitation under the proviso to Section 73(1) of the Finance Act, 1994 as there exist sufficient grounds, as discussed hereinabove, for invoking the said proviso. I, therefore, do not find it a fit case to allow the benefit of the CENVAT credit as sought by the party. On the merits of the contention, I observe that the party as sought allowing credit of input service credit on Space Segment Charges for KU band / C band, Vehicle Maintenance charges, Freight & Cartage for matrix video board, Training Service & Installation, integration, commissioning & handholding; Insurance charges / Insurance premium of equipment, and Chartered flight hiring charges. On perusal of the facts brought on record, I find that the party has not*

*brought complete schedule/detail of the equipment leased out along with relatable inputs service bills/invoices SO as to co-relate the input services with the output services 1.e. supply of tangible goods services" provided by them. also observe that as per clause 3 of the lease agreement dated 01.04.2009, M/s. SICCL was under obligation to maintain all the assets given to them on lease and to keep them in good and working condition for which they were allowed to carry out minor internal and external repairs at their own cost. As such, claim of the CENVAT credit on Vehicle Maintenance Charges, if the same were leased out, appears to be contrary to the contention of party for allowing the CENVAT Credit. In view of the foregoing, I reject the contention of party to allow the CENVAT credit in the case."*

4.3 Interpreting the definition of "Supply of Tangible Goods" as per Section 65 (105) (zzzzj) of the Finance Act, 1994 as inserted by Finance Act, 2008 vis a vis the Article 366 (29A) of the Constitution of India and after taking note of decisions rendered on the subject, Hon'ble Supreme Court has in the case of Adani Gas Ltd [2020 (40) GSTL 145 (SC)] while setting aside the order of tribunal reported at [2019 (28) ELT 238 (Tri Ahmd)] Hon'ble Supreme Court has observed as follows:

*"12. The question that arises for our consideration is whether Section 65(105)(zzzzj) of the Finance Act, 1994 is applicable in the present case, that is, whether the supply of pipes and measurement equipment (SKID equipment), charged under the head of "gas connection charges" by the respondent to its industrial, commercial and domestic consumers, amounts to supply of tangible goods for their use. While assessing the merits of the rival submissions, it is necessary to interpret the provisions of Section 65(105)(zzzzj).*

*13. Section 65(105)(zzzzj) of the Finance Act, 1994 provides for taxability of supply of tangible goods for use,*

*without transferring right of possession and effective control over such goods, as a 'taxable service'. Section 65(105)(zzzzj) of the Finance Act, 1994 reads as follows :*

*"65(105) "taxable service" means any service provided or to be provided -*

*xx        xx        xx*

*(zzzzj) to any person, by any other person in relation to supply of tangible goods including machinery, equipment and appliances for use, without transferring right of possession and effective control of such machinery, equipment and appliances."*

*14. Section 65(105)(zzzzj) of the Finance Act, 1994 was introduced by Notification No. 18/2008-S.T. with effect from 16 May, 2008. Section 65(105)(zzzzj) levies a service tax on the use of tangible goods. On the other hand, the transfer of the right to use any goods is treated as a 'deemed sale' and is subject to sales tax under Article 366(29-A)(d) of the Constitution of India. It is necessary to distinguish the applicability of these two provisions. Article 366(29A)(d), provides :*

*"366(29A) tax on the sale or purchase of goods includes -*

*xx        xx        xx*

*(d) a tax on the transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;*

*xx        xx        xx*

*and such transfer, delivery or supply of any goods shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply and a purchase of those*

*goods by the person to whom such transfer, delivery or supply is made."*

15. *The applicability of Article 366(29A)(d) was discussed in a decision of this Court in Bharat Sanchar Nigam Limited and Another v. Union of India and Others [2006 (3) SCC (1) = 2006 (2) S.T.R. 161 (S.C.)] ("BSNL"). In BSNL, the Court held that the purpose of Article 366(29A)(d) was to levy tax on those transactions where there was a "transfer of the right to use any goods" to the purchaser, instead of passing the title or ownership of the goods. Thus, by a fiction of law, these transactions were now treated as 'sale'. Elucidating on the "transfer of the right to use any goods", Dr. A.R. Lakshmanan, J. in a concurring opinion held :*

*"97. To constitute a transaction for the transfer of the right to use the goods, the transaction must have the following attributes :*

- (a) there must be goods available for delivery;*
- (b) there must be a consensus ad idem as to the identity of the goods;*
- (c) the transferee should have a legal right to use the goods - consequently all legal consequences of such use including any permissions or licenses required therefore should be available to the transferee;*
- (d) for the period during which the transferee has such legal right, it has to be the exclusion to the transferor; this is the necessary concomitant of the plain language of the statute viz. a "transfer of the right to use" and not merely a licence to use the goods;*
- (e) having transferred the right to use the goods during the period for which it is to be transferred, the owner cannot again transfer the same rights to others."*  
*(emphasis supplied)*

16. *The test laid down in BSNL has been applied by courts to determine whether a transaction involves the "transfer of the right to use any goods" under Article 366(29A)(d). In doing so, the Courts have analysed the terms of the agreement underlying the transaction to ascertain whether effective control and possession has been transferred by the supplier to the recipient of the goods. Recently, this Court in Great Eastern Shipping Company Limited v. State of Karnataka and Others [2020 (3) SCC 354 = 2020 (32) G.S.T.L. 3 (S.C.)] considered whether the transfer of a vessel under a charter party agreement was a 'deemed sale', subject to sales tax. The Court, after analysing the terms of the charter party agreement, held :*

*"43. We are not turning our decision upon the terms used like 'let', 'hire', 'delivery' and 'redelivery' but on the other essential terms of the Charter Party Agreement entered in the instant case which clearly makes out that there is a transfer of exclusive right to use the vessel which is a deemed sale and is liable to tax under the KST Act. In the instant case, full control of the vessel had been given to the charterer to use exclusively for six months, and delivery had also been made. The use by charterer exclusively for six months makes it out that it is definitely a contract of transfer of right to use the vessel with which we are concerned in the instant matter, and that is a deemed sale as specified in Article 366(29A)(d). On the basis of the abovementioned decision, it was urged that all Charter Party Agreements are service agreements. The submission cannot be accepted, as there is no general/invariable rule/law in this regard. It depends upon the terms and conditions of the charter party when it is to be treated as only for service and when it is the transfer of right to use.*

xx            xx            xx

*54. When we consider the charter party in question in the context of applicable law, particularly in view of the constitutional provisions of Article 366(29A)(d), we find that there is transfer of right to use tangible goods, which is determinative of deemed sale as per the Constitution of India and provisions of section 5C reflecting the said intendment. We are of the considered opinion that there is transfer of right to use exclusively given to charterer for six months, and the vessel has been kept under the exclusive control. The charterer qualifies the test laid down by this court in BSNL (supra).” (emphasis supplied)*

*17. Therefore, sales tax is levied in pursuance of Article 366(29A)(d) on transactions which resemble a sale in substance as they result in a transfer of the right to use in goods, instead of the transfer of title in goods. The Finance Act, 1994, deriving authority from the residuary Entry 97 of the Union List, enabled the Central Government to levy tax on services. ‘Service tax’ was introduced as a response to the advancement of the contemporary world where an indirect tax was necessary to capture consumption of services, which are economically similar to consumption of goods, inasmuch as they both satisfy human needs [All India Federation of Tax Practitioners v. Union of India, (2007) 7 SCC 527, para 4 = 2007 (7) S.T.R. 625 (S.C.)]. This Court, in Association of Leasing and Financial Service Companies v. Union of India, [(2011) 2 SCC 352 = 2010 (20) S.T.R. 417 (S.C.)] had noted :*

*“38...Today with technological advancement there is a very thin line which divides a “sale” from “service”. That, applying the principle of equivalence, there is no difference between production or manufacture of saleable goods and production of marketable/saleable services in the form of an activity undertaken by the service provider for consideration, which correspondingly stands consumed by*

*the service receiver. It is this principle of equivalence which is inbuilt into the concept of service tax under the Finance Act, 1994. That service tax is, therefore, a tax on an activity. That, service tax is a value added tax. The value addition is on account of the activity which provides value addition...Thus, service tax is imposed every time service is rendered to the customer/client...Thus, the taxable event in each exercise/activity undertaken by the service provider and each time service tax gets attracted.” (emphasis supplied)*

*18. The introduction of Section 65(105)(zzzzj) in the Finance Act, 1994, was with the intention of taxing such activities that enable the customer’s use of the service provider’s goods without transfer of the right of possession and effective control. This provision creates an element of taxation over a service, as opposed to a ‘deemed sale’ under Article 366(29A)(d). For the purpose of clarification, the Department of Revenue issued a Circular, D.O.F. No. 334/1/2008-TRU, dated 29 February, 2008. The said circular clarified the applicability of Section 65(105)(zzzzj) vis-a-vis Article 366(29A)(d). The relevant portions of the circular are as follows :*

#### **"4.4 SUPPLY OF TANGIBLE GOODS FOR USE :**

*4.4.1 Transfer of the right to use any goods is leviable to sales tax/VAT as deemed sale of goods [Article 366(29A)(d) of the Constitution of India], Transfer of right to use involves transfer of both possession and control of the goods to the user of the goods.*

*4.4.2 Excavators, wheel loaders, dump trucks, crawler carriers, compaction equipment, cranes, etc., offshore construction vessels & barges, geo-technical vessels, tug and barge flotillas, rigs and high value machineries are supplied for use, with no legal right of possession and*

*effective control. Transaction of allowing another person to use the goods, without giving legal right of possession and effective control, not being treated as sale of goods, is treated as service.*

*4.4.3 Proposal is to levy service tax on such services provided in relation to supply of tangible goods, including machinery, equipment and appliances, for use, with no legal right of possession or effective control. Supply of tangible goods for use and leviable to VAT/sales tax as deemed sale of goods, is not covered under the scope of the proposed service. Whether a transaction involves transfer of possession and control is a question of facts and is to be decided based on the terms of the contract and other material facts. This could be ascertainable from the fact whether or not VAT is payable or paid.” (emphasis supplied)*

*19. The above circular clarified that Section 65(105)(zzzzj) is applicable only to those transactions where there is a supply of tangible goods for use, without the transfer of possession or effective control to the recipient. This aspect has been interpreted by various Courts and Tribunals. In the Bombay High Court decision in Indian National Shipowners’ Association and Anr. v. Union of India and Others (“Shipowners”) [(2009) 4 AIR Bom R 775 = 2009 (14) S.T.R. 289 (Bom.)], the petitioners were engaged in providing services to major exploration and production operators by supplying their various vessels including offshore drilling rigs, offshore support vessels, harbour tugs, and construction barges. The question before the Bombay High Court was whether, prior to the introduction of Section 65(105)(zzzzj) in 2008, the petitioner could be taxed on its services in relation to mining of mineral, oil, or gas under Section 65(105)(zzzy). In the present matter, we are not concerned with the merits of Shipowners’, which was affirmed on appeal by this Court in Union of India v. Indian*

*National Shipowners' Association and Anr. [2010 (14) SCC 438 = 2011 (21) S.T.R. 3 (S.C.)]. This Court explicitly restricted itself to the interpretation of Section 65(105)(zzz) while leaving the other observations on interpretation of the law, "open to be considered at length at an appropriate stage" [2010 (14) SCC 438, para 7]. We note however, the analysis of Section 65(105)(zzzzj) of the Bombay High Court, where the High Court observed :*

*"38. Entry (zzzzj) is entirely a new entry. Whereas Entry (zzzy) covers services provided to any person in relation to mining of mineral, oil or gas, services covered by Entry (zzzzj) can be identified by the presence of two characteristics namely (a) supply of tangible goods including machinery, equipment and appliances for use, (b) there is no transfer of right of possession and effective control of such machinery, equipment and appliances. According to the members of the 1st petitioner, they supply offshore support vessels to carry out jobs like anchor handling, towing of vessels, supply to rig or platform, diving support, fire fighting etc. Their marine construction barges support offshore construction, provide accommodation, crane support and stoppage area on main deck or equipment. Their harbour tugs are deployed for piloting big vessels in and out of the harbour and for husbanding main fleet. They give vessels on time charter basis to oil and gas producers to carry out offshore exploration and production activities. The right of possession and effective control of such machinery, equipment and appliances is not parted with. [...]" (emphasis supplied)*

*20. The taxable service is defined as a service which is provided or which is to be provided by any person to another "in relation to supply of tangible goods". The provision indicates that the goods may include machinery, equipment or appliances. The crucial ingredient of the definition is that the supply of tangible goods is for the use*

*of another, without transferring the right of possession and effective control "of such machinery, equipment and appliances". Hence, in order to attract the definition of a taxable service under sub-clause (zzzzj), the ingredients that have to be fulfilled are :*

- (i) The provision of a service;*
- (ii) The service is provided by a person to another person;*
- (iii) The service is provided in relation to the supply of tangible goods, including machinery, equipment and appliances;*
- (iv) There is no transfer of the right of possession;*
- (v) Effective control over the goods continues to be with the service provider; and*
- (vi) The goods are supplied for use by the recipient of the service.*

*21. A GSA entered into by the respondent on 17 November, 2008 with one of its buyers (Polymer Industries) has been adverted to by the contesting parties as a representative sample. Under the terms of the GSA, the respondent as the seller agrees to sell and tender for delivery at the 'Delivery Point', gas in the quantities, times and at the prices determined in accordance with it. Clause 2.1 stipulates that :*

*"2.1 .....*

*Clause 5.1 requires the seller to deliver gas to the buyer at the Delivery Point. The seller is required to set up a gas pipeline to the metering station of the buyer from the nearest distribution mains at the cost of the buyer :*

*"5.1 The seller shall deliver the Gas to the Buyer at the Delivery Point in accordance with the terms of this Agreement. Gas pipeline to the Buyer's metering station from nearest distribution mains would be constructed and*

*maintained by the Seller at the Buyer's cost."*  
(emphasis supplied)

*Clause 5.3 states that the 'Measurement Equipment' is to be supplied, installed and maintained by the seller at the cost of the buyer :*

*"5.3 The Measurement Equipment shall be supplied, installed and maintained by the Seller at the Buyer's cost. Ownership of equipment will rest with AEL [respondent herein] forever. Buyer shall provide free of cost adequate land and power connection in its premise for the installation of Measurement Equipment. Buyer shall pay for providing gas pipeline connection including pipeline from distribution mains upto the measurement equipment; and measurement equipment to its unit as per the proposal submitted by the Seller."*  
(emphasis supplied)

*Clause 5.4 provides that :*

*"5.4 Gas pipeline from nearest Distribution Mains to the Measurement equipment shall be constructed and maintained by the Seller at Buyer's cost. The Buyer agrees to let the Seller or his authorised representative to supply, construct, install commission and maintain the supply pipeline from main distribution line upto the Measurement Equipment and Measurement Equipment in its premises.*  
(emphasis supplied)

*The Buyer's Facilities and Seller's Facilities are defined to include the measurement equipment and pipelines and have been defined as follows :*

*" "Buyers Facilities" means plant, machinery, measurement equipment and other equipment from the Delivery Point onwards necessary to receive Gas under this Agreement."*

*" "Seller's Facilities" means the Seller's pipelines, gas plants, machinery, Measurement Equipment, other metering facilities and other equipment necessary for flow control and the processing, compression, measuring and testing of Gas to enable delivery of Gas to the Buyer at the Delivery Point."*

*Further, the expression 'Measurement Equipment' is defined as follows :*

*" "Measurement equipment" means such main and subsidiary meter, including apparatus, mains and pipes, as the Seller considers necessary for the measurement and recording of the volume in SCM and pressure in Kg/cm<sup>2</sup> of Gas delivered at the Delivery Point and for the safe operation of the Buyer's Facilities."*

*Ownership of the measurement equipment continues to vest with the respondent as per clause 5.3. The buyer is required to provide land and a power connection, free of cost at its premises. The buyer has to pay for providing a gas pipeline connection from the distribution mains up to the measurement equipment.*

*Gas is transported from the 'Measurement Equipment' by means of a pipeline provided by the buyer as stipulated in Clause 5.5 :*

*"5.5 ....."*

*Clause 5.6 clarifies that the buyer has no right to adjust, clean, handle, replace, maintain, remove or modify the measurement equipment :*

*"5.6 The Buyer shall not have the right to adjust, clean, handle, replace, maintain, remove or modify in any manner measurement equipment at any time during the currency of the Contract."*

*Under clause 5.7 the buyer cannot lease, sublet or sell the measurement equipment :*

***"5.7 The Buyer under no circumstances shall sublet/lease/sell/create a charge over part or whole of measurement equipment at any given time."***

*Clause 5.10 provides that the seller has the right of entry to the measurement equipment :*

***"5.10 The Seller or his authorized representative shall have right of entry at all hours to the Measurement Equipment, route of pipeline upto all consumption points and gas consuming facilities inside the Buyer's premises."***

*Under clause 7.1, 'title and risk' in the gas passes from the seller to the buyer at the Delivery Point. Clause 8.1 defines the expression 'Daily Contract Quantity'. Clause 9.2 of the agreement deals with measurement and calibration :*

#### ***"9.2 Measurement and Calibration***

***9.2.1 Quantity of Gas supplied under this Agreement shall be measured at the Delivery Point in SCM. The measurement shall include all corrections in installation practices recommended for accurate metering of Gas by the American Gas Association (AGA) Gas Measurement Committee report No. 3, 7 and 8.***

***9.2.2 The Measurement Equipment shall be supplied, installed, owned and maintained by the Seller at the Buyer's cost.***

***9.2.3 Working of the Measurement Equipment shall be verified periodically by the Parties.***

***9.2.4 .....***

***9.2.5 .....***

9.2.6 .....

9.2.8 *Notwithstanding anything contained in this Agreement, pending the result of any check/re-calibration, the Buyer shall not withhold payments to the Seller under this Agreement on this account. However, the Buyer shall be entitled to lodge his claim for refunds/adjustments, if any, depending upon the final results of such check/re-calibration within a period of fourteen (14) days of such check/re-calibration. Such claim, if found correct by the Seller, shall be adjusted against the subsequent invoice(s) of supply of Gas.*

9.2.9 *Pending the resolution of any dispute, the Seller shall produce the invoices on the basis of self-verification.” (emphasis supplied)*

*The provisions for billing and payment are contained in clause 12. The relevant portion is extracted below :*

*“12. Billing and Payment*

*12.1 Following the end of the Fortnight, the Seller shall render to the Buyer a statement including the following details for each Day of the previous Fortnight (hereinafter referred to as the “Fortnightly Invoice”), which shall show in respect of the previous Fortnight, along with the details of calculations :*

- (i) the DCQ for each Day of that Fortnight in SCM;*
- (ii) the aggregate quantity of Gas delivered by the Seller in such Fortnight, in SCM and Gross Calorific Value for the same;*
- (iii) the Weighted Average Gross Calorific Value (GCV) of such Gas taken by the Buyer in such fortnight;*

*(iv) the amount payable by the Buyer to the Seller for the quantifies of the Gas delivered during the Fortnight equal to quantities of Gas delivered by the Seller in SCM/Kcal as determined in (ii) above multiplied by Contract Price prevailing for the Fortnight.*

*12.2 The Buyer shall within seven (7) days of the receipt of the fortnightly invoice from the seller, pay to the seller the amount mentioned in such invoice in the manner to be specified by the Seller.*

*12.3 The Buyer agrees that, notwithstanding any dispute in relation to any amount invoiced, it shall not be withheld payment in accordance with the provisions of this Section 12 of any amounts. After making full payment of such invoice, the Buyer shall lodge the claims with the Seller giving full particulars within a period of fourteen (14) days from the date of making payment, and if such claims are found correct, the Seller shall adjust the same against the next invoice. It is further agreed that no interest will be payable by the Seller on any such amount adjusted in the subsequent invoices."*

*Under clause 13, security for payment in the form of a cash deposit is required to be maintained by the buyer equivalent to the DCQ ["Daily Contract Quality"] multiplied by thirty and by the contract price. If the seller draws upon the payment security, the buyer has to make good the amount withdrawn.*

*Clause 14 of the Agreement further provides for the representations and warranties of the buyer and seller. Clause 14.3 reads as follows :*

*"14.3 Buyer's Warranties and Undertakings*

*The Buyer warrants and undertakes to the Seller that throughout the term of this Agreement :*

(a) *the Buyer's Facilities will be technically and operationally compatible with the Seller's Facilities at the Delivery Point and fit for purpose for off take of gas from the Delivery Point;*

(b) *the Buyer's Facilities will be maintained in good working order and condition and so operated as to be compatible with the fulfilment of the obligations of the Buyer under this Agreement;..."*

*Under the above clause 14.3, the buyer warrants to maintain the "Buyer's Facilities", which includes the 'measurement equipment', in good working order and condition and technically and operationally compatible with the Seller's Facilities.*

*Under clause 16.4, if the buyer fails (otherwise than as a consequence of force majeure or the seller's default) to take fifty per cent or more of the cumulative DCQ over 45 consecutive days, the seller is entitled to terminate the agreement.*

22. ....

**23. At the outset, it is clear from the provisions of the agreement, and it has been admitted by both the parties, that there is no transfer of ownership or possession of the pipelines or the measurement equipment (SKID equipment) by the respondent to its customers. Clause 5.3 of the agreement specifically provides that the 'Measurement Equipment' is to be supplied, installed and maintained by the seller at the cost of the buyer and that the ownership of the equipment will rest with the respondent forever. Clause 5.6 further clarifies that the buyer has no right to adjust, clean, handle, replace, maintain, remove or modify the measurement equipment. Clause 5.10 guarantees**

***that the seller shall have the right of entry at all hours to the Measurement Equipment and associated apparatus at the Buyer's premises. The pipelines are also part of the "Seller's Facilities" under the agreement and are constructed and maintained by the respondent at the cost of the customer. Thus, the ingredient of not transferring the ownership, possession or effective control of the goods under Section 65(105)(zzzzj) is satisfied.***

24. *The crux of the dispute is whether the supply of tangible goods - the SKID equipment - is for the use of the purchaser. In determining as to whether the provisions of Section 65(105)(zzzzj) are attracted, it is necessary to distinguish between the rights and obligations of the respondent (as the seller of gas) and of their purchasers, from the issue of whether the measurement equipment (SKID equipment) is supplied for the use of the purchaser of gas, without transferring the right of possession and effective control.*

25. *The purchaser of gas has an interest in ensuring the accuracy of billing and regulation of supply. The respondent is interested in ensuring that it receives payment for the quantity of gas which is contracted to be supplied to the purchaser. The 'SKID' consists of regulators, valves, filters and the metering equipment. The SKID equipment regulates and records supply. Under the terms of the GSA, the obligation of the seller is to deliver gas to the buyer at the Delivery Point. The gas pipeline from the nearest distribution main to the buyers' metering station is constructed and maintained by the seller at the cost of the buyer. The measurement equipment is supplied, installed and maintained by the seller at the cost of the buyer, in spite of ownership of the equipment resting with the respondent as the seller. The measurement equipment is installed and maintained*

*exclusively by the seller. Clause 5.6 indicates that the buyer has no right to adjust, clean, handle, replace, maintain, remove or modify it in any manner. Clause 5.10 guarantees the seller's access to the Measurement Equipment at the buyer's premises at all hours. Ownership, control and possession of the measurement equipment is with the respondent. The measurement equipment comprises not only of electronic meters that are useful for determining the quantity of gas supplied to the purchaser at the Delivery Point, but also of isolation valves, filters and regulators that are crucial for regulating the pressure of gas and ensuring safe operation of the buyer's facilities. In order to maintain the sanctity of the equipment, the agreement casts the exclusive responsibility to install and maintain it on the respondent as the seller. The terms of the GSA would indicate that the quantity of gas supplied is to be measured at the Delivery Point. For this purpose, the measurement equipment is supplied, installed, owned and maintained by the seller at the cost of the buyer. The working of the measurement equipment is verified periodically by the parties to the agreement. If the buyer doubts its accuracy, this has to be communicated in writing to the seller, who alone is entitled to test, re-calibrate, remove or modify it. Similarly, if the seller has any doubt about the proper working of the measurement equipment it is entitled to check the meter in the presence of the representatives of the buyer. If according to the seller, the existing measurement equipment is not working satisfactorily it would be replaced at the cost of the buyer. These provisions indicate that the supply, installation and maintenance of the measurement equipment is exclusively carried out by the seller. The buyer has contractual remedies against the seller in terms of the GSA. These remedies to the buyer as a purchaser of gas are distinct from the issue as to*

*whether the equipment for which gas connection charges are recovered is used by the buyer.*

*26. Under Section 65(105)(zzzzj), the taxable service is provided or to be provided in relation to the supply of tangible goods for the use of another, without transferring the right of possession and effective control. The expression "use" has been defined in Black's Law Dictionary :*

*"Use, n. Act of employing everything, or state of being employed; application, as the use of a pen, or his machines are in use. Also the fact of being used or employed habitually; usage, as, the wear and tear resulting from ordinary use. Berry-Kofron Dental Laboratory Co. v. Smith, 345 Mo. 922, 137 S.W. 2d 452, 454, 455, 456. The purpose served; a purpose, object or end for useful or advantageous nature. Brown v. Kennedy, Ohio Appellant. 49 N.E. 2d 417, 418. To put or bring into action or service; to employ for or apply to a given purpose. Beggs v. Texas Dept. of Mental Health and Mental Retardation, Tex. Civ. App., 496 S.W.2d 252, 254. To avail oneself of; to employ; to utilize; to carry out a purpose or action by means of; to put into action or service, especially to attain an end. State v. Howard, 221 Kan. 51, 557 P. 2d 1280, 1281.*

*Non-technical sense. The "use" of a thing means that one is to enjoy, hold, occupy or have some manner of benefit thereof. Use also means usefulness, utility, advantage, productive of benefit."*

*27. The expression "use" does not have a fixed meaning. The content of the expression must be based on the context in which the expression is adopted. The use of an article may or may not result in a visible change in its form or substance. Moreover, the nature of use is conditioned*

*by the kind of article which is put to use. Section 65(105) of the Finance Act, 1994 envisages myriad interpretations of the expression "use", in a variety of services such as telecommunication [Section 65(105)(zzzzb), Finance Act, 1994], renting of immovable property [Section 65(105)(zzz-z), Finance Act, 1994], and services related to art, entertainment, and marriage [Section 65(105)(zzzzr), Finance Act, 1994]. In the case of some articles, use may be signified by a physical operation of the article by the person who uses it. In such a case, actual physical use is what is meant by the supply of the goods for the use of another. In the case of others, the nature of the goods supplied impacts the character of the use to which the goods can be put. As an illustration, Section 65(105)(zzzze) of the Finance Act, 1994, seeks to tax services related to information technology and interprets the "right to use" to include the "right to reproduce, distribute, sell, etc. [Circular D.O.F. No. 334/1/2008-TRU, dated 29 February, 2008]". This understanding of "use" differs from the supply of tangible goods under Section 65(105)(zzzzj) at hand, where effective control or possession is not ceded. Thus, physical operation is not the only or invariable feature of use. As a corollary to the same, technical expertise over the goods in question is not a sine qua non for determining the ability of the consumer to use the goods. Therefore, the expression "use" also signifies the application of the goods for the purpose for which they have been supplied under the terms of a contract.*

*28. The terms of the GSA indicate that the supply, installation, maintenance and repair of the measurement equipment is exclusively entrusted to the respondent as the seller. These provisions have been incorporated in the GSA to ensure that a buyer does not calibrate or tinker with the equipment. It is an incident of ownership and*

*control being vested with the respondent. The purpose of the SKID equipment and its utility, lie in its ability to regulate the supply and achieve an accurate verification of that which is supplied; in the present case the supply of goods by the respondent to its buyers. This enures to the benefit of the seller and the buyer. The seller is concerned with the precise quantification of the gas which is supplied to the buyer. The buyer has an interest in ensuring the safety of its facilities and that the billing is based on the correct quantity of gas supplied and delivered under the GSA. To postulate, as did the Tribunal, that the measurement equipment is only for the benefit of the seller in measuring the quantity of the gas supplied would not be correct. The GSA is an agreement reflecting mutual rights and obligations between the seller and the purchaser. Both have a vital interest in ensuring the correct recording of the quantity of gas supplied. Additionally, delivery of gas in a safe and regulated manner, enabled by the SKID equipment, is an essential component of the GSA. The SKID equipment subserves the contractual rights of both the seller and the purchaser of gas. Indeed, without the SKID equipment there would be no gas supply agreement. In fact, in the GSA, the buyer has also provided a warranty to ensure that the "Buyer's Facilities" remain technically and operationally compatible with the "Seller's Facilities", both of which include the 'measurement equipment'. This warranty would not have been provided if the measurement equipment was not of 'use' to the buyer. The equipment is thus a vital ingredient of the agreement towards protecting the mutual rights of the parties and in ensuring the fulfilment of their reciprocal obligations as seller and buyer in regulating the supply of gas. As an incident of regulating supply, it determines the correct quantity of gas that is supplied. The obligation to supply, install and maintain the equipment is cast upon the seller as an incident of control and possession being with*

*the seller. Section 65(105)(zzzzj) applies precisely in a situation where the use of the goods by a person is not accompanied by control and possession. 'Use' in the context of SKID equipment postulates the utilization of the equipment for the purpose of fulfilling the purpose of the contract. Section 65(105)(zzzzj) does not require exclusivity of use. The SKID equipment is an intrinsic element of the service which is provided by the respondent, acting pursuant to the GSA, as a supplier of natural gas to its buyers."*

4.4 Again in the case of Quick Heal Technologies Ltd. [2022 (63) G.S.T.L. 385 (S.C.)] Hon'ble Supreme Court observed as follows:

*"41. The Transfer of Right to use goods for case, deferred payment or value consideration is considered as deemed sale under sub-clause (d) of Article 366(29A) of the Constitution of India. Right to use of tangible goods and services has also been brought under the service tax net by the Finance Act, 2008, with effect from 16-5-2008 vide Notification No. 18/2008-S.T., dated 10-5-2008 whereby taxable service has been defined under Section 65(105)(zzzzj) of the Act, 1994 to mean as :-*

*"Any services provided or to be provided, to any person, by any other person in relation to supply of tangible goods including machinery, equipment and appliances for use, without transferring right of possession and effective control of such machinery, equipment and appliances.*

#### **Position of law**

42. *Tata Consultancy Services (supra) was a case in which the specific issue of computer software packages was considered as is the concern in the present case also. There was, however, a distinction drawn insofar as the 'uncanned software' and 'canned software' alternatively termed as 'unbranded' and 'branded' is concerned. The distinction is in*

*that a 'canned software' contains programmes which can be used as such by any person purchasing it, while an 'uncanned software' is one prepared for a particular purchaser's requirements by tweaking the original software to adapt to the specific requirements of a particular entity. While a 'canned software' could be sold over the shelf, an 'uncanned software' is programmed to specific and particular needs and requirements. This Court held that in India the test to determine whether a property is "goods", for the purpose of sales tax, is not confined to whether the goods are tangible or intangible or incorporeal. The correct test would be to determine whether an item is capable of abstraction, consumption and use and whether it can be transmitted, transferred, delivered, stored, possessed, etc. It was held that both in the case of 'canned' and 'uncanned' software all these are possible (sic para 16). Associated Cement Companies Ltd. v. Commissioner of Customs, (2001) 4 SCC 593 = 2001 (128) E.L.T. 21 (S.C.), was heavily relied on by this Court. It was held :-*

*"27. In our view, the term "goods" as used in Article 366(12) of the Constitution and as defined under the said Act is very wide and includes all types of movable properties, whether those properties be tangible or intangible. We are in complete agreement with the observations made by this Court in Associated Cement Companies Ltd. A software program may consist of various commands which enable the computer to perform a designated task. The copyright in that program may remain with the originator of the program. But the moment copies are made and marketed, it becomes goods, which are susceptible to sales tax. Even intellectual property, once it is put on to a media, whether it be in the form of books or canvas (in case of painting) or computer discs or cassettes, and marketed would become "goods". We see no difference between a sale of a software program on a CD/floppy disc from a sale of music on a cassette/CD or a*

*sale of a film on a video cassette/CD. In all such cases, the intellectual property has been incorporated on a media for purposes of transfer. Sale is not just of the media which by itself has very little value. The software and the media cannot be split up. What the buyer purchases and pays for is not the disc or the CD. As in the case of paintings or books or music or films the buyer is purchasing the intellectual property and not the media i.e. the paper or cassette or disc or CD. Thus a transaction/sale of computer software is clearly a sale of "goods" within the meaning of the term as defined in the said Act. The term "all materials, articles and commodities" includes both tangible and intangible/incorporeal property which is capable of abstraction, consumption and use and which can be transmitted, transferred, delivered, stored, possessed, etc. The software programs have all these attributes".*

28. At this stage it must be mentioned that Mr. Sorabjee had pointed out that the High Court has, in the impugned judgment, held as follows :

*"... In our view a correct statement would be that all intellectual properties may not be 'goods' and therefore branded software with which we are concerned here cannot be said to fall outside the purview of 'goods' merely because it is intellectual property; so far as 'unbranded software' is concerned, it is undoubtedly intellectual property but may perhaps be outside the ambit of 'goods'."*  
(Emphasis supplied)

29. Mr. Sorabjee submitted that the High Court correctly held that unbranded software was "undoubtedly intellectual property". Mr. Sorabjee submitted that the High Court fell in error in making a distinction between branded and unbranded software and erred in holding that branded software was "goods". We are in agreement with Mr. Sorabjee when he contends that there is no distinction

*between branded and unbranded software. However, we find no error in the High Court holding that branded software is goods. In both cases, the software is capable of being abstracted, consumed and use. In both cases the software can be transmitted, transferred, delivered, stored, possessed, etc. Thus even unbranded software, when it is marketed/sold, may be goods. We, however, are not dealing with this aspect and express no opinion thereon because in case of unbranded software other questions like situs of contract of sale and/or whether the contract is a service contract may arise”.*

43. *Associated Cement Companies Ltd. (supra) considered the question whether the drawings, designs, etc. relating to machinery or industrial technology were goods, leviable to duty of customs on their transaction value at the time of import. It was argued that the transfer of technology or know-how though valuable was intangible. The technology when transmitted to India on some media does not get converted from an intangible thing to tangible thing or chattel and that in a contract by supply of services there is no sale of goods, was the argument. Reading Section 2(22) of the Customs Act, 1962 which defines the word “goods”, including clause (c) “baggage” and clause (e) “any other kind of moveable property”, it was held that any moveable article brought into India by a passenger as part of his baggage can make him liable to pay customs duty as per the Customs Tariff Act, 1975. Any media whether in the form of books or computer disks or cassettes which contain information technology or ideas would necessarily be regarded as “goods” under the aforesaid provisions of the Customs Act, these items being moveable goods, covered by Section 2(22)(e) of the Customs Act. What was transferred was technical advice on information technology. But the moment the information or advice is put on a media, whether paper or diskettes or any other thing, the supply is of a chattel. It is in respect of*

*the drawings, designs, etc. which are received that payment is made to the foreign collaborators. The question whether the papers or diskettes etc. containing advice and/or information are goods for the purpose of the Customs Act was answered in the affirmative. This Court clearly held that "the intellectual property when put on a media would be regarded as an article on the total value of which customs duty is payable". "When technical material is supplied whether in the form of drawings or manuals the same are goods liable to customs duty on the transaction value in respect thereof". It was concluded so in paragraph 46 :*

*'46. The concept that it is only chattel sold as chattel, which can be regarded as goods, has no role to play in the present statutory scheme as we have already observed that the word "goods" as defined under the Customs Act has an inclusive definition taking within its ambit any moveable property. The list of goods as prescribed by the law are different items mentioned in various chapters under the Customs Tariff Act, 1997 or 1999. Some of these items are clearly items containing intellectual property like designs, plans, etc.'. (Underlining by us for emphasis)*

*44. We may also refer to and rely upon a decision of this Court in the case of 20th Century Finance Corpn. Ltd. v. State of Maharashtra, reported in (2000) 6 SCC 12. In this decision, this Court considered the incorporation of clause (d) of Clause (29A) of Article 366 of the Constitution referred to above. It is apt to quote the following relevant portion from the judgment :-*

*"26... The various sub-clauses of clause (29A) of Article 366 permit the imposition of tax thus : sub-clause (a) on transfer of property in goods; sub-clause (b) on transfer of property in goods; sub-clause (c) on delivery of goods; sub-clause (d) on transfer of the right to use goods; sub-clause (e) on supply of goods; and sub-clause (f) on supply of services.*

*The words and such transfer, delivery or supply. In the latter portion of clause (29A), therefore, refer to the words transfer, delivery and supply, as applicable, used in the various sub-clauses. Thus, the transfer of goods will be a deemed sale in the cases of sub-clauses (a) and (b), the delivery of goods will be a deemed sale in case of sub-clause (c), the supply of goods and services respectively will be deemed sales in the cases of sub-clauses (e) and (f) and the transfer of the right to use any goods will be a deemed sale in the case of sub-clause (d). Clause (29A) cannot, in our view, be read as implying that the tax under sub-clause (d) is to be imposed not on the transfer of the right to use goods but on the delivery of the goods for use. Nor, in our view, can a transfer of the right to use goods in sub-clause (d) of clause (29A) be equated with the third sort of bailment referred to in Bailment by Palmer, 1979 edition, page 88. The third sort referred to there is when goods are left with the bailee to be used by him for hire, which implies the transfer of the goods to the bailee. In the case of sub-clause (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 the goods. In our view, therefore, on a plain construction of sub-clause (d) of Clause (29A), the taxable event is the transfer of the right to use the goods 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. And further contract in respect thereof is also required to be executed. Given that, the locus of the deemed sale is the place where the right to use the goods is transferred. Where the goods are when the right to use them is transferred is of no relevance to the locus of the deemed sale. Also of no relevance to the deemed sale is where the goods are delivered for use pursuant to the transfer of the right to use them, though it may be that in the case of an oral or implied transfer of the right to use goods, it is effected by the delivery of the goods.”*

45. While holding that in a contract for the transfer of the right to use goods, the taxable event would be the execution of the contract for delivery of the goods, it was observed :-

"27. Article 366(29A)(d) further shows that levy of tax is not on use of goods but on the transfer of the right to use goods. The right to use goods accrues only on account of the transfer of right. In other words, right to use arises only on the transfer of such a right and unless there is transfer of right, the right to use does not arise. Therefore, it is the transfer which is sine qua non for the right to use any goods. If the goods are available, the transfer of the right to use takes place when the contract in respect thereof is executed. As soon as the contract is executed, the right is vested in the lessee. Thus, the situs of taxable event of such a tax would be the transfer which legally transfers the right to use goods. In other words, if the goods are available irrespective of the fact where the goods are located and a written contract is entered into between the parties, the taxable event on such a deemed sale would be the execution of the contract for the transfer of right to use goods. But in case of an oral or implied transfer of the right to use goods it may be effected by the delivery of the goods." (Emphasis Supplied)

46. In BSNL (supra) this Court took the view that a telephone service is nothing but a "service". However, the nature of the transaction involved in providing the telephone connection may be a composite contract of "service" and "sale". There may be a transfer of right to use the "goods" as defined in the providing of access or telephone connection by the telephone service provider to a subscriber. Justice Ruma Pal, speaking for the Bench in her separate judgment, took the view that a subscriber to a telephone service could not reasonably be taken to have intended to purchase or obtain any right to use electromagnetic waves or radio frequencies when a telephone connection is given. Nor does the subscriber intend to use any portion of the wiring, the cable,

*the satellite, the telephone exchange, etc. At the most, the concept of the sale in a subscriber's mind would be limited to the handset that might have been purchased for the purposes of getting a telephone connection. As far as the subscriber is concerned, no right to the use of any other goods, incorporeal or corporeal, is given to him with the telephone connection. In such circumstances, it was held that the electromagnetic waves or radio frequencies are not "goods" within the meaning of the words "either in Article 366(12) or for the purpose of Article 366(29A)(b)". Emphasis was laid on the fact, whether there are any deliverable goods or not. If there are no deliverable goods in existence, like the one in BSNL (supra), there is no transfer of user under Article 366(29A)(b) at all.*

*47. Justice Dr. A.R. Lakshmanan, in his separate but concurring judgment, highlighted the following attributes in para 97 of the judgment to constitute a transaction for the transfer of right to use the goods :-*

*"97.   xx                                   xx                                   xx*

- (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 the exclusion to the transferor - this is the necessary concomitant of the plain language of the statute viz. a "transfer of the right to use" and not merely a licence to use the goods;*
- (e)       Having transferred the right to use the goods during the period for which it is to be transferred, the owner cannot again transfer the same rights to others."*

48. In the case of BSNL (*supra*), His Lordship noticed that none of the aforesaid attributes were present in the relationship between the telecom service provider and a consumer of such services.

49. His Lordship thereafter in para 117 of the judgment referred to the Sale of Goods Act, 1930. We quote para 117 as under :-

"117. Sale of Goods Act, comprehends two elements, one is a sale and the other is delivery of goods. 20th Century Finance Corporation Limited v. State of Maharashtra, 2000 (6) SCC 12 at p. 44, para 35 ruled that

"35. (c) where the goods are available for the transfer of right to use the taxable event on the transfer of right to use any goods is on the transfer which results in right to use and the situs of sale would be the place where the contract is executed and not where the goods are located for use.

(d) In cases where goods are not in existence or where there is an oral or implied transfer of the right to use goods, such transactions may be effected by the delivery of the goods. In such cases the taxable event would be on the delivery of goods."

50. Ultimately, His Lordship took the view that as no goods' elements were involved, the transaction was purely one of service as there was no transfer of right to use the goods at all.

51. 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 the 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 the 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 the goods is transferred. The place where the goods are situated or where the goods are delivered or used is not relevant.*

*52. From the judicial decisions, the settled essential requirement of a transaction for the transfer of the right to use the goods are :*

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

*(ii) Article 366(29A)(d) read with the latter part of the clause (29A) which uses the words, "and such transfer, delivery or supply"... would indicate 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 the 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;*

*(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, licenses, etc., vests in the lessee."*

4.5 From the above decisions it is evident that in terms of the definition as per Section 65 (105) (zzzzj) of the Finance Act, 1994, the taxable service is in respect of supply of goods for use by one person to another person without transferring the ownership, control and possession of the goods to the other person. Before we further proceed in the matter what is necessary is to take the note of the appellant and the parties involved in the transactions undertaken by the appellant. It is the submission of the appellant M/s SICC has a unit "Sahara India TV Network (SITV)", engaged in broadcasting "Sahara" channel on TV. SICC earns income by way of sale of time slots for advertisement on this channel. Appellant has been outsourced all the activities by SICC relating to distribution i.e., for broadcasting its channel through network of cable operators.

4.6 Appellant had entered into agreement dated 01.04.2009 with SICC (which was resumed during the search of their premises. The relevant clauses of the said agreement as noted in the Show Cause Notice are reproduced below-

*"Whereas the first party (M/s Sahara Sanchaar Limited) has established Earth Station' at Sahara India Complex, C-2,3,4, Sector-11, Noida and is acquiring other equipment and related infrastructure (hereinafter called 'Assets') to have up linking facility of T.V. Programmes.*

*And whereas M/s Sahara India Commercial Corporation Limited has approached M/s Sahara Sanchar Limited for hiring the assets on lease for their business purposes*

*And whereas the first party has agreed to grant lease of the assets to second party for its business purpose exclusively*

*Now, this lease agreement witnesses as follows-*

- 1. That the first party (M/S Sahara Sanchar Limited) shall charge yearly lease @20% plus taxes (as applicable) per annum on the total cost of lease out assets (as given in schedule-1 and forming part of these lease agreement)*

*from the Second party from 1st day of April 2009 and lease rent on further new additions to lease out assets shall be charged @ 30% by the first party from the first day of the following month in which such assets arrive at site and are installed.*

- 2. That the second party shall enjoy the exclusive right to use the assets so installed and shall not claim ownership on it anytime. **However, the right to use the assets can be extended to any third party by the first party after obtaining consent of the second party.***
- 3. That the second party shall be responsible to maintain all the assets given on lease and to keep them in good and working condition for which it may carry out minor internal and external repairs of the assets as many be required in day to day activities at its own cost but for any major repairs, the second party shall take prior consent of the first party.*
- 4. That the first party shall be responsible to make or get adequate insurance cover for the assets given on lease to second party.*
- 5. That the first party shall bear the entire license fees etc. to be paid to Govt authorities in respect of usage of such assets.*
- 6. That the maintenance charges, whatever, which may be incurred for the use of the assets given on lease, shall be borne by the second party only and no part of such maintenance charges shall be defrayed by the first party, subject to clause 4.*
- 7. That if by any act of God or human being the assets are damaged, destroyed or lost, partially or wholly, the second party is bound to pay compensation and damages to the first party and the first party shall be only judge to decide compensation and damages for the same. However, it shall not exceed the original cost of the assets so destroyed, damaged or lost after taking into consideration the insurance claim, if any receivable.*

8. *That the first party shall have right to inspect all the assets given on lease to the second party by the Engineers/ Authorised representative at any time in order to ensure the condition of the assets so given on lease and its proper utilization.*
9. *That the second party shall not be entitled to sub-let to any one, wholly or partially, any part of assets without the prior consent of the first party.*
10. *That in case of any dispute, the first party and second party shall settle the same mutually and if no decisions is reached, the matter shall be referred to Arbitrators(s), appointed by both the parties whose award shall be final and binding on both parties.*
11. *That this agreement to ,lease for giving assets on lease to the Second Party by the First Party shalkl come in to Opeartion from the 1<sup>st</sup> Say of April' 2009 and will be valid for a period of 60 months i.. upto 31<sup>st</sup> march' 204. However, this may be renewed further on the mutually agreed terms and conditions by both the parties.*
12. *12. Payment would be made on half yearly basis.*

This agreement was amended on 15.10.2010. The amended agreement was made effective from 01.04.2010 and was valid till expiry of the original agreement i.e. till 31 03.2014. The amendment was as under-

*"Whereas, the parties have mutually agreed to amend / make a few changes to the said agreement. Now, as per the agreed amendment/changes, SANCHAR shall charge annual Lease Fee 15% plus taxes (as applicable) per annum on the 40% of the total Asset Value of the equipments & lease rent on further new additions to Leased out assets shall be charged @15% by the First party from the first day of the following month in which such asset arrived at site & are installed.*

*Taxes: TDS as applicable shall be deducted at source from the Payments.*

*Payment terms: Lease rent shall accrue annually at the end of each financial year against appropriate invoice and its verification by SAHARA."*

4.5 From the above agreement dated 01.04.2009 as amended by agreement dated 15.10.2010 it is evident that:

- a) The Appellant shall be the owner of the assets. Appellant extends only the right to use assets to the lessee and reserves the right that the same right can be extended to third party by the appellant with consent of lessee.(Clause 2)
- b) Appellant shall be responsible to make or get adequate insurance cover for the assets given on lease to the second party. (Clause 4).
- c) Appellant shall bear the entire license fees etc. to be paid to Govt. authorities in respect of usage of such assets (Clause 5)
- d) The maintenance charges for the operation of assets will be borne by the lessee subject to the provisions of clause 4.
- e) Appellant shall charge compensation in case of any damage (Clause 7).
- f) Appellant shall have right to inspect all the assets through their Engineers/ authorized representatives at any time to ensure the condition of the assets (Clause 8).
- g) That the second party shall not be entitled to sub-let to any one, wholly or partially, any part of the assets without the prior consent of the first party (Clause 9).

4.6 On perusal of these clauses and the definition of "Supply of Tangible Goods Services", it is evident that the instant agreement fulfils the condition of taxable service by way of supply of tangible goods including machinery, equipment and appliances for use (earth station and related equipment in the instant case), without transferring right of possession and effective control of such machinery, equipment and appliances. The registration certificate of the utility van, which was a part of

the equipment leased out, was registered in the name of appellant on 29.12.2008 and remains under their control, as shown in the fitness certificate issued by the Transport Department of Uttar Pradesh on 26.06.2014. The above referred clauses of the agreement and the registration certificate makes it evident that the assets continued to be owned and possessed by the appellant by applying the test as laid down by the Hon'ble Apex Court in the decision of Adani Gas Ltd, supra,

4.7 Smt. Santosh Khandelwal, the cost accountant and company secretary with the Appellant, in her statement dated 20.03.2015, and submitted that they had given the legal right of possession and effective control to the lessee but she was unable to explain it in the light of agreement dated 01.04.2009. In his statement, recorded on 26.03.2015, Shri Hardeep Singh, Chartered Accountant and Head of Accounts of Appellant explaining the above referred clauses stated as follows:

*That they have taken the view of their legal advisor on incidence of service tax on lease rent and they were advised by their advisors that incidence of the service tax is not applicable on them.*

*Clause 2- Since, the second party is enjoying right to use and they are having the possession and effective control on such assets therefore, incidence of service atx does not arise there.*

*Clause 4- To the best of my knowledge insurance can be procured from the insurance company by the owner of assets therefore first party has to aquire insurance cover for such assets.*

*Clause 5 – To the best of my knowledge License fee is payable by the first party as such license has been issued to the first party.*

*Clause 8- This clause simply gives a right to lessor to verify the physical presence of the assets which is a*

*standard clause generally prevailed in all lease agreements.*

*Clause 9- There is no subletting of such equipments and this clause prevents second party to do any sub-letting of such assets.*

4.8 Interestingly in the present case the appellant as per the clause 2 of the agreement has only transferred the right to use the assets and have reserved the right with themselves to give the right to third person also with the consent of the lessee. Thus though appellant has permitted the use of the assets by the lessee they by reserving such right with themselves could not have been said to have transferred the effective control and possession on the said assets to lessee. The transfer of right to use the assets is not at the demise of the right of the appellant to transfer the same right to third party. In case of *Association Of Leasing & Financial Service Companies [2010 (20) S.T.R. 417 (S.C.)]* Hon'ble Supreme Court observed:

21. ....That, in substance a finance lease, unlike an operating lease, is a financial loan (assistance/facility) by the lessor to the lessee. That, in the bailment termed "hire" the bailee receives both possession of the chattel and the right to use it in return for remuneration. On the other hand, equipment leasing is long term financing which helps the borrower to raise funds without outright payment in the first instance. Here the "interest" element cannot be compared to consideration for lease/hire which is in the nature of remuneration (consideration) for hire. Thus, financing as an activity or business of NBFCs is different and distinct from operating lease/hire-purchase agreements in the classical sense. The elements of the finance lease or loan transaction are quite different from those in equipment leasing/hire-purchase agreements between owner (lessor) and the hirer (lessee). There are two independent transactions and what the impugned tax seeks to do is to tax the financial facilities extended to its

*customers by the NBFCs under Section 66 of the 1994 Act (as amended) as they come under "banking and other financial services" under Section 65(12) of the said Act. "The finance lease" and "the hire-purchase finance" thus squarely come under the expression "financial leasing services" in Section 65(12) of the Finance Act, 1994 (as amended)."*

In case of Rashtriya Ispat Nigam Ltd. [2013 (31) S.T.R. 513 (S.C.)]

*2. The respondent is owning Visakhapatnam Steel project. For the purpose of steel project, it allotted different works to contractors. The respondent undertook to supply sophisticated machinery to the contractors for the purpose of being used in execution of the contracted works and received charges for the same. The appellant made provisional assessment levying tax on hire charges under Section 5E of the Act. The respondent filed writ petition seeking declaration that the tax levied, exercising power under Section 5E of the Act on the hire charges collected during the period 1988-89, was illegal and unconstitutional. The appellant filed a counter affidavit in the writ petition contending that the respondent was lending highly sophisticated and valuable imported machinery to the contractors engaged in the execution of the project work on specified hire charges; the machinery was given in the possession of the contractor and he was responsible for any loss or damage to it and in view of the terms and conditions contained in the agreement, there was transfer of property in goods for use and on the amounts collected by the respondent as charges for lending machinery attracted tax liability under Section 5E of the Act.*

*3. The High Court after scrutiny and close examination of the clauses contained in the agreement and looking to the agreement as a whole, in order to determine the nature of*

*the transaction, concluded that the transactions between the respondent and contractors did not involve transfer of right to use the machinery in favour of the contractors and in the absence of satisfying the essential requirement of Section 5E of the Act, i.e., transfer of right to use machinery, the hire charges collected by the respondent from the contractors were not exigible to sales tax. On a careful reading and analysis of the various clauses contained in the agreement and, in particular, looking to clauses 1, 5, 7, 13 and 14, it becomes clear that the transaction did not involve transfer of right to use the machinery in favour of contractors. The High Court was right in arriving at such a conclusion. **In the impugned order, it is stated, and rightly so in our opinion, that the effective control of the machinery even while the machinery was in use of the contractor was that of the respondent company; the contractor was not free to make use of the machinery for the works other than the project work of the respondent or move it out during the period the 'machinery was in his use; the condition that the contractor would be responsible for the custody of the machinery while it was on the site did not militate against respondent's possession and control of the machinery.** It may also be noticed that even the Appellate Deputy Commissioner, Kakinada in the order dated 15-11-1999 in regard to assessment years 1986-87 and 1987-88 held that under the terms and conditions of the agreement, there was no transfer of right to use the machinery in favour of the contractor. Although it cannot be said that the appellant was estopped from contending otherwise in regard to assessment year 1988-89, it is an additional factor and circumstance, which supports the stand of the respondent.*

4.9 In view of the above discussions and decisions we do not find any merits in the submissions of the appellant that they entered into agreement with the lessee, whereby the effective

ownership control and possession was also transferred to the lessee. From the terms of agreement and stipulations as per the above decision we are of the view that the assets were made available to the lessee for use without transferring the effective control and possession over the said assets to the lessee and hence the service tax under the category of "Supply of Tangible Goods Services" has been rightly demanded from them.

4.10 From 01.07.2012 the scheme of taxation of services was changed and a negative list of services were defined which were kept outside the scheme of taxation. The service were defined as per clause 65B(44) as follows:

*"service" means any activity carried out by a person for another for consideration, and includes a declared service, but shall not include—*

*(a) an activity which constitutes merely,—*

- (i) a transfer of title in goods or immovable property, by way of sale, gift or in any other manner; or*
- (ii) such transfer, delivery or supply of any goods which is deemed to be a sale within the meaning of clause (29A) of article 366 of the Constitution; or*
- (iii) a transaction in money or actionable claim;"*

Section 66E defines the Declared Services stating as follows:

*"Declared services. — The following shall constitute declared services, namely:—*

*"(f) transfer of goods by way of hiring, leasing, licensing or in any such manner without transfer of right to use such goods;"*

Article 366 (29A) (d) of the constitution of India reads as follows:

*"(29A) "tax on the sale or purchase of goods" includes—*

*(d) a tax on the transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;”*

It is the claim of appellant that they are covered by the exclusion clause of the definition of service. We have in earlier held that in terms of the terms of the agreement entered between the appellant with their lessee there is no transfer of right to use, but the assets have been provided for use against a “lease amount” agreed. It is settled law that if there was transfer of the right to use, then it would have been at the demise of the same right to to the appellant. It is not the case here as is evident from the clause 2 of the agreement dated 01.04.2009. In case of the AGS Entertainment [2013 (32) STR 129 (Mad)] Hon’ble Madras High Court has held as follows:

*“35. Article 366(29A) no doubt served to extend the meaning of the word “sale”. The taxable event under Article 366(29A) is the transfer of right to use the goods regardless of whether the goods are delivered for use. Levy of tax is not on use of goods, but on the transfer of the right to use the goods. Article 366(29A) of the Constitution permits tax on “sale of goods” and within its ambit, “transfer of right to use the goods”. While completing transfer or right to use any goods (where the original owner relinquishes his copyright) may be considered as “sale of goods”, “temporary transfer of right” or “a mere transfer of right to use or enjoy copyright for specified purpose(s)”, is certainly a “service” provided by the person, who is the holder of copyright. As held by the Supreme Court in B.S.N.L. Case [(2006) 3 SCC 1 = 2006 (2) S.T.R. 161 (S.C.)], it is a nature of transaction that will determine the taxability in each case.*

*36. In 20th Century Finance Corporation Limited v. State of Maharashtra, (2000) 6 SCC 12 = (2000) 119 STC 182 (SC), the Hon’ble Supreme Court laid down the principles for determining the situs of lease sale transaction. The Hon’ble Supreme Court has held that the situs of lease sale*

*lies in the State where the agreement is executed if the goods are available for delivery. The Hon'ble Supreme Court further held that if the goods are not available for delivery or there is no written agreement, then the sale will be deemed to have taken place in the State where the delivery is given. While so holding, the Hon'ble Supreme Court elaborated upon the scope of Article 366 Clause (29A) and observing that the taxable event under Article 366(29A) is the transfer of right to use the goods and elaborately considering the scope of Article 366(29A), the Hon'ble Supreme Court held as under :*

*"26. Next question that arises for consideration is, where is the taxable event on the transfer of the right to use any goods. Article 366(29A)(d) empowers the State Legislature to enact law imposing sales tax on the transfer of the right to use goods. The various sub-clauses of clause (29A) of Article 366 permit the imposition of tax thus : sub-clause (a) on transfer of property in goods; sub-clause (b) on transfer of property in goods; sub-clause (c) on delivery of goods; sub-clause (d) on transfer of the right to use goods; sub-clause (e) on supply of goods; and sub-clause (f) on supply of services. The words "and such transfer, delivery or supply ..." in the latter portion of clause (29A), therefore, refer to the words transfer, delivery and supply, as applicable, used in the various sub-clauses. ....*

*In our view, therefore, on a plain construction of sub-clause (d) of clause (29A), the taxable event is the transfer of the right to use the goods 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. ....*

*27. Article 366(29A)(d) further shows that levy of tax is not on use of goods but on the transfer of the right to use goods. The right to use goods accrues only on account of the transfer of right. In other words, right to use arises*

*only on the transfer of such a right and unless there is transfer of right, the right to use does not arise. Therefore, it is the transfer which is sine qua non for the right to use any goods. If the goods are available, the transfer of the right to use takes place when the contract in respect thereof is executed. As soon as the contract is executed, the right is vested in the lessee. Thus, the situs of taxable event of such a tax would be the transfer which legally transfers the right to use goods. In other words, if the goods are available irrespective of the fact where the goods are located and a written contract is entered into between the parties, the taxable event on such a deemed sale would be the execution of the contract for the transfer of right to use goods. But in case of an oral or implied transfer of the right to use goods it may be effected by the delivery of the goods."*

*37. Section 65(105)(zzzzt) seeks to tax viz., "temporary transfer or permitting the use or enjoyment" of copyright which is a service provided by the producer/distributor/exhibitor. Service Tax is a levy not on the "transfer of right to use the goods" as described under Article 366(29A) sub-clause (d); but on the temporary transfer" or "permitting the use or enjoyment" of the copyright as defined under the Copyright Act, 1957. In the case of Sales Tax Act, there would be "transfer of right to use the goods". Whereas under the Service Tax Act what is levied is temporary transfer/enjoyment of the goods. The pith and substance of both enactments are totally different. "Temporary transfer" or "permitting the use or enjoyment of the copyright" is not within the State's exclusive power under Entry 54 of List II. Therefore, there is no merit in the contention that the taxable event provided under Section 65(105)(zzzzt) is covered by Article 366(29A)."*

Thus to claim the benefit of exclusion clause appellant has to show that transfer of right to use the goods was not in nature of transfer of right to use in absolute manner in the said goods and was just not the case of supply of goods for use. What is the crux of levy under the scheme of service tax under this category is that goods have been supplied for use without transferring the property or rights in the goods. In the present case we are convinced that the appellant had supplied the goods for use by the lessee against a lease rent without transferring any right in the goods to the lessee. Hence for the period post 01.07.2012 also the services rendered by the appellant were taxable under this category.

4.11 Appellant has during the entire period of dispute not paid applicable service tax on such activity i.e. lease rent, carried out by them was not deposited to the government exchequer, with the intent to evade payment of the service tax. They have also not incorporated the details of the incomes earned on this account in their ST-3 returns thus suppressed the facts from the department. These facts came to the knowledge of the department only at the time of visit/search of the premises of the appellant and after making investigations in this respect. Thus appellant have had deliberately suppressed the facts from the department with the intent to escape the service tax payments. Thus, the proviso to Section 73 (1) of the said Act for invoking the extended period of time was found to be applicable in the instant issue along with the penalty under Section 78 of the said Act for suppressing the facts.

4.12 The impugned order seeks to deny CENVAT Credit to tune of Rs 2,27,05,076/- availed by them in respect of the input services received by them. Appellant have contended that these services are used by them for providing the output services. The detail of the input services and their usage is as claimed by the appellant is as follows:

- a) Space Segment Charges for KU band/C band

Space segment charges are internet bandwidth charges will be used in distribution of the content of the SITV to the cable operators. This is relating to Outside Broadcasting Vans for electronic programs from a mobile remote broadcast television studio. These vans are leased out to M/s SICC (which is maintained through its division Sahara India TV Network) and are part of the agreement of lease

b) Freight & Cartage for matrix video board

This expense is directly related to service of distribution as with the help of it any kind of failure in the distribution can be easily accessed.

c) Training Service & installation, integration, commissioning & handholding

This amount is related to the equipments purchased which were leased out to M/S SICC (which is maintained through its division Sahara India TV Network).

d) Insurance Charges/Insurance premium of equipment

This is related to insurance charges/premium paid towards equipments which were leased out to M/s SICC (which is maintained through its division Sahara India TV Network).

e) Chartered flight hiring charges

This is again related to our distribution business as senior officials have to travel to finalize the agreements related to the distribution service provided by the appellant.

From the above it is evident that appellant has claimed credit of input services at 'a', 'b', 'c', 'd' which were use by them in providing the assets leased out by them to SICC. In our view appellant was fully aware of taxability of such transactions and have thorough out taken the CENVAT Credit in respect of these inputs services. The act of taking the credit respect of these input without payment of service tax on the output services clearly show the intention of the party to evade payment of service tax in respect of the lease amount recovered by them

from SICC by suppressing the facts of lease from the department. As we have held that these output services are taxable under the category of "Supply of Tangible Goods Services" we hold that CENVAT Credit in respect of these four input services namely, Space Segment Charges, Training Service & Installation, Freight & Cartage, Vehicle Maintenance, Insurance Charges and Internal Audit fee will be admissible to the appellant. However are not in position to admit the claim of the appellant towards "Chartered Flight hiring" as admissible credit. Nothing has been stated by the appellant as to how this service was used for providing the output services provided by them. We uphold the impugned order to the extent of denying the credit to the tune of Rs 16,80,000/- in respect of these services.

4.13 On the issue of the invocation of extended period of limitation we have already observed that the same is invokable in the present case as the appellant was suppressing the facts with intent to evade payment of service tax. In case of Bombay Dyeing & Mfg Co Pvt Ltd [1999 (113) ELT 331 (T)] following has been held:

*"9. Where this situation prevails, the assessee who is in the knowledge that the inputs so received are less than those shown in the covering documents, it is for him to voluntarily take the less credit. Where the assessee is in such knowledge and where the department have no knowledge of the situation, the department can allege suppression of facts. Weighment sheets are not the documents prescribed in the legislature. The assessee was working under the self removal procedure and therefore, there is no reason or cause for the jurisdictional officer to know about the existence of the weighment sheets and the shortages in the weighment of inputs that they indicated. In this situation, we do not see any reason to agree with the submission on limitation."*

In case of Tech Mahindra [2015 (38) STR 1200 (T)] has held as follows:

*"6.4 As regards the contention raised by the appellant that the appellant in their annual balance sheets provided the relevant information, we have perused the balance sheets and the balance sheets do not reflect the payments made for the various transactions separately. It only gives the gross amount of the expenditure incurred, in terms of foreign currency. From that information it cannot be gathered, for what purpose the expenditure was incurred, whether it was for a taxable service or otherwise. Therefore, unless the details of the expenditure incurred are given, it is not possible to make any conclusion one way or the other. It is on record that the appellant had not provided copy of the agreement to the department in respect of the services received from abroad and these were provided only in 2010 when the investigation commenced. Further, the exact details of the payments made in respect of the marketing promotion activities were given to the department for the first time only in January, 2011 vide letters dated 5-1-2011 and 7-1-2011. The show cause notice has been issued on 20-4-2011 and, therefore, it cannot be said that the show cause notice is barred by limitation of time."*

In the case of *Mehta & Co.* 2011 (264) E.L.T. 481 (S.C.) Hon'ble Apex Court held as follows :

*"The cause of action, i.e., date of knowledge could be attributed to the appellant in the year 1997 when in compliance of the memo issued by the appellant and also the summons issued; the hotel furnished its reply setting out the details of the work done by the appellant amounting to Rs. 991.66 lakhs and at that stage only the department came to know that the work order was to carry out the job for furniture also. A bare perusal of the records shows that the aforesaid reply was sent by the respondent on receipt of a letter issued by the Commissioner of Central Excise on 27-2-1997. If the period of limitation of*

*five years is computed from the aforesaid date, the show cause notice having been issued on 15-5-2000, the demand made was clearly within the period of limitation as prescribed, which is five years."*

*In our considered view, the ratio of the aforesaid decision squarely applies to the facts of the present case. Since the copy of the agreement and relevant information were provided to the department only in 2011 the show cause notice issued in April, 2011 is clearly within the period of limitation and therefore, the demands confirmed as above for the period on or after 18-4-2006 cannot be said to be time-barred at all."*

Thus we do not find any merits in the submissions of the appellant that extended period should not have been invoked for making this demand. The issue of limitation has to be considered on the facts of case in hand and the conduct of the assessee/appellant. There cannot be application of the decisions in determining the issue of limitation on the basis of the law laid down therein ignoring the facts of case in hand. We do not find that decisions relied upon by the appellants will advance their case any further in the facts of present case.

4.14 Thus in view of the discussions as above we summarize our findings in respect of the demands made in table below:

| S No | Particular     | Demand as per OIO     | Demand Upheld        |
|------|----------------|-----------------------|----------------------|
| 1    | Demand of SOTG | 9,00,01,588/-         | 9,00,01,588/-        |
| 2    | CENVAT Credit  | 2,27,05,076/-         | 16,80,000/-          |
|      | <b>Total</b>   | <b>11,27,06,664/-</b> | <b>9,16,81,588/-</b> |

4.15 Issue in respect of interest has been settled by the Bombay High Court in case of Padmashree V V Patil SSK [2007 (215) ELT 23 (Bom)] wherein it has been held:-

*"12. Learned Counsel Shri Kolte has also placed reliance upon the tail piece of Explanation (2) to sub-section (2B) reading "but for this sub-section". According to him, "but"*

*is a conjunction used to indicate the intention of those who use it to limit or restrain the sense or effect of something, which had before been said. He has obtained this meaning from Law Lexicon by P. Ramnatha Aiyar. In order to examine the submission by learned Counsel as to whether this terminal part of Explanation (2) gives the explanation so much strength as to mean that the party, which has utilised the facility of sub-section (2B) of payment of short duty as ascertained by the assessee himself, is not liable to pay the interest as u/s. 11AB, we have tried to search for the meaning of phrase "but for". As per Concise Oxford Dictionary, 11th Edition, "but for" means "except for", "if it were not for". In view of these meanings obtained from the Law Lexicon and the Oxford Dictionary attached to the word "but" and to the phrase "but for", the Advocate pleaded that it should be interpreted that had sub-section (2B) not been in existence or rather the facility to pay the short duty was not available, the party would have been required to pay interest u/s. 11AB and if the facility is available, on compliance of the same, the party would not be liable to pay interest.*

*Taking into consideration that the tail piece relied upon by learned Counsel is included in the Explanation to particular sub-section (2B), we are unable to accept the interpretation as tried to be attributed by the learned Counsel for one simple reason that an explanation ought to be therefor the purpose of explaining the main provision, it cannot nullify the effect of main provision. If Explanation (2) interprets as attempted by learned Counsel due to the phrase with which it ends "but for this sub-section", the explanation will have to be ignored being in conflict with sub-section (2B), which it explains. However, the meaning of this clause "but for this sub-section" can be enlightened when we refer to Section 11AB (1), we have reproduced two portions of this provision (in parts) in the earlier part of this judgment and for the sake of convenience, now we*

*are quoting entire sub-section (1) of Section 11AB, which reads :*

*"11AB. Interest on delayed payment of duty. - (1) where any duty of excise has not been levied or paid or has been short levied or short paid or erroneously refunded, the person, who is liable to pay duty as determined under sub-section (2), or has paid the duty under sub-section (2B) of Section 11A, shall in addition to duty be liable to pay interest at such rate, not below 10% ....from the first date of the month succeeding the month in which the duty ought to have been paid under this Act or from the date of such erroneous refund as the case may be, but for the provisions contained in sub-section (2) or sub-section (2B) of Section 11A, till the date of payment of such duty."*

*Thus, why the clause "but for" is used, is evident from the tail piece of Section 11AB(1). Ordinarily, the interest is payable till payment of short duty as adjudicated, but in view of sub-section (2B), which gives liberty to the party to pay the short duty even before determination or without determination by the officer of Central Excise, the interest would stop to run to the extent of amount deposited by self ascertainment and on the date such amount is so deposited.*

*If the tail piece of Explanation (2) was to be so strong as to nullify the effect of sub-section (2B), Section 11AB would not have incorporated within it the clause "or has paid the duty under sub-section (2B)". Reading Section 11AB together with Section 11A (2B) and Explanation (2), we are unable to accede to the interpretation tried to be attributed by Advocate Shri A.P. Kolte to Explanation in question.*

*13. For all these reasons discussed, we are unable to agree with the proposition that interest u/s. 11AB is also not chargeable in case the short duty or unpaid duty is*

*deposited with the Government before issuance of show cause notice."*

4.16 On the penalties imposed under section 78 we would observe that as we have held appellant to be guilty of suppression with intent to evade payment of tax, penalty under Section 78 needs to be imposed mandatorily as has been held by Hon'ble Supreme Court in case of Rajasthan Spinning and Weaving Mills Ltd. [2009 (238) ELT 3 (SC)];-

**"14.** *Sub-section 1A of Section 11A provides that in case the person in default to whom the notice is given under the proviso to sub-section 1 makes payment of duty in full or in part as may be accepted by him, together with interest under Section 11AB and penalty equal to 25% of the accepted amount of duty within thirty days of the date of receipt of notice then the proceeding against him would be deemed to be conclusive (without prejudice to the provisions of Sections 9, 9A and 9AA) as provided in the proviso to sub-section 2 of Section 11A. Sub-section 1A and the proviso to sub-section 2 were inserted with effect from July 13, 2006 and, therefore, have no application to the periods relevant to the two appeals.*

**15.** *Sub-section 2B of Section 11A provides that in case the person in default makes payment of the escaped amount of duty before the service of notice then the Revenue will not give him the notice under sub-section 1. This, perhaps, is the basis of the common though erroneous view that no penalty would be leviable if the escaped amount of duty is paid before the service of notice. It, however, overlooks the two explanations qualifying the main provision. Explanation 1 makes it clear that the payment would, nevertheless, be subject to imposition of interest under Section 11AB. Explanation 2 makes it further clear that in case the escape of duty is intentional and by reason of deception the main provision of sub section 2B will have no application.*

**16.** *The other provision with which we are concerned in this case is Section 11AC relating to penalty. It is as follows :*

**[11AC. Penalty for short-levy or non-levy of duty in certain cases.-** *where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reasons of fraud, collusion or any wilful mis-statement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty, the person who is liable to pay duty as determined under sub-section (2) of section 11A, shall also be liable to pay a penalty equal to the duty so determined :*

*[Provided that where such duty as determined under sub-section (2) of section 11A, and the interest payable thereon under section 11AB, is paid within thirty days from the date of communication of the order of the Central Excise Officer determining such duty, the amount of penalty liable to be paid by such person under this section shall be twenty-five per cent of the duty so determined :*

*Provided further that the benefit of reduced penalty under the first proviso shall be available if the amount of penalty so determined has also been paid within the period of thirty days referred to in that proviso :*

*Provided also that where the duty determined to be payable is reduced or increased by the Commissioner (Appeals), the Appellate Tribunal or, as the case may be, the court, then, for the purpose of this section, the duty as reduced or increased, as the case may be, shall be taken into account :*

*Provided also that in case where the duty determined to be payable is increased by the Commissioner (Appeals), the Appellate Tribunal or, as the case may be, the court, then, the benefit of reduced penalty under the first proviso shall be available, if the amount of duty so increased, the*

*interest payable thereon and twenty-five per cent of the consequential increase of penalty have also been paid within thirty days of the communication of the order by which such increase in the duty takes effect -*

*Explanation. - For the removal of doubts, it is hereby declared that -*

*(1) the provisions of this section shall also apply to cases in which the order determining the duty under sub-section (2) of section 11A relates to notices issued prior to the date on which the Finance Act, 2000 receives the assent of the President;*

*(1) any amount paid to the credit of the Central Government prior to the date of communication of the order referred to in the first proviso or the fourth proviso shall be adjusted against the total amount due from such person.]*

**17.** *The main body of Section 11AC lays down the conditions and circumstances that would attract penalty and the various provisos enumerate the conditions, subject to which and the extent to which the penalty may be reduced.*

**18.** *One cannot fail to notice that both the proviso to sub-section 1 of Section 11A and Section 11AC use the same expressions : "...by reasons of fraud, collusion or any wilful mis-statement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty,...". In other words the conditions that would extend the normal period of one year to five years would also attract the imposition of penalty. It, therefore, follows that if the notice under Section 11A(1) states that the escaped duty was the result of any conscious and deliberate wrong doing and in the order passed under Section 11A(2) there is a legally tenable finding to that effect then the provision of Section 11AC would also get attracted. The converse of*

*this, equally true, is that in the absence of such an allegation in the notice the period for which the escaped duty may be reclaimed would be confined to one year and in the absence of such a finding in the order passed under Section 11A(2) there would be no application of the penalty provision in Section 11AC of the Act. On behalf of the assesseees it was also submitted that Sections 11A and 11AC not only operate in different fields but the two provisions are also separated by time. The penalty provision of Section 11AC would come into play only after an order is passed under Section 11A(2) with the finding that the escaped duty was the result of deception by the assessee by adopting a means as indicated in Section 11AC.*

**19.** *From the aforesaid discussion it is clear that penalty under Section 11AC, as the word suggests, is punishment for an act of deliberate deception by the assessee with the intent to evade duty by adopting any of the means mentioned in the section."*

While upholding the penalties imposed under Section 78, we limit the same to the amounts confirmed by us in this order.

4.17 We also do not find any merits in the submissions made by the appellant in respect of the penalties imposed upon them under Section 77 (1)(a) & (2) of Finance Act, 1994.

5.1 Appeal is partly allowed to the extent indicated in para 4.14 and 4.16 above.

(Pronounced in open court on-03/01/2024)

Sd/-  
**(P.K. CHOUDHARY)**  
**MEMBER (JUDICIAL)**

Sd/-  
**(SANJIV SRIVASTAVA)**  
**MEMBER (TECHNICAL)**