

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

REGIONAL BENCH - COURT No. I
E-HEARING

Service Tax Appeal No.70218 of 2018

(Arising out of Order-in-Original No.15/Commissioner/ST/Noida/2017-18 dated 27/12/2017 passed by Commissioner of Central Goods & Service Tax, Noida)

M/s Sahara Sanchaar Ltd.,

.....Appellant

(C-2,3,4, Sahara India Complex,
Sector-11, Noida-201301)

VERSUS

Commissioner of Central Excise &

CGST, Noida

....Respondent

(Commissionerate, Noida)

APPEARANCE:

Shri S.S. Gupta, Chartered Accountant for the Appellant

Shri A.K. Choudhary, Authorised Representative for the Respondent

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

FINAL ORDER NO. 70554/2024

DATE OF HEARING : 02 May, 2024
DATE OF PRONOUNCEMENT : 30 August, 2024

SANJIV SRIVASTAVA:

This appeal is directed against the Order In Original No. 15/COMMR./ST/NOIDA/2017-18 DATED 27.12.2017 of the Commissioner, Central Goods & Services Tax, Noida. By the impugned order following has been held:

"ORDER

- (i) I hereby confirm the demand of the service tax amounting to Rs. 3,19,54,030/- (Rupees Three Crores Nineteen Lakhs Fifty Four Thousand and Thirty Only) under Section 73(1) of the Finance Act,1994

- (ii) I confirm the demand of due interest on the amount of tax confirmed above under Section 75 of the Finance Act, 1994.
- (iii) I impose penalty of Rs. 31,95,403/-(Rupees Thirty One Lakhs Ninety Five Thousand and Four Hundred Three Only) upon the party under Section 76 of the Finance Act, 1994 on the amount of tax confirmed at (i) above,
- (iv) I further impose a total penalty of Rs.20,000/- (Rupees Twenty Thousand Only) upon the party 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 party were evading service tax payment on supply of the tangible goods services, the premises of the appellant were searched.

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 having uplinking facility of T.V Programs to their sister concern namely M/s Sahara India Commercial Corporation Limited (herein after referred to as "the SICCL"). The proceedings were detailed in Panchnama dated 20.3.2015 recorded on the spot.

In her statement recorded on 20.03.2015 on the spot, Smt. Santosh Khandelwal, the Cost accountant as well as company secretary stated that the party is engaged in the business of leasing earth station and related equipment to its sister concern namely the SICCL. They were also engaged in contracts with cable operators for carriage fees but that activity has been terminated w.e.f. April,2012 and that they have paid the applicable service tax on activities of carriage fees but they were not paying the service tax on leasing of earth station and related equipment.

2.3 After completion of investigations in the matter, show cause notice dated 19.08.2015 was issued for the period 2009-10 to 2013-14 to the appellant.

2.4 The show cause notice dated 19.08.2015 has been adjudicated as per the Order-in-Original

No.14/Commissioner/ST/Noida/2016-17 dated 09/02/2017. The appeal filed by the appellant has been disposed of by this bench vide Final Order No 70011/2024 dated 03.01.2024

2.5 The proceedings emanate from the Show Cause Notice No 02/Commissioner/ST/Noida/2017-18 dated 12.04.2017 whereby appellant has been called to show cause as to why for the period 2014-15 to 2015-16:

- i) Service tax, amounting to Rs. 3,19,54,030/- (Rupees Three Crores Nineteen Lakhs Fifty Four Thousand and Thirty 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 76 of the said Act for the non-payment/deposit of the above said service tax amount. (iv) Penalty under Section 77 (1) (a) & 77(2) of the said Act should not be imposed upon them for not incorporating taxable value of 'Supply of tangible goods services' in their ST-3 returns and for not incorporating the taxable service in their service tax registration during the period in question.

2.6. This show cause notice has been adjudicated as per the impugned order. Aggrieved appellant have filed this appeal.

3.1 We have heard Shri S S Gupta, Chartered Accountant for the appellant and Shri A K Choudhary Authorized Representative for the revenue.

3.2 Arguing for the appellant learned chartered Accountant sought to distinguish the present case from the case decided by this bench vide Final Order No 7011/2024 and submitted as follows:

- The ratio of earlier Order No 7011/2024 for the earlier period should not be applied due to new submissions being made.

- Meaning of transfer of right to use as interpreted has been interpreted by various authorities in following cases:
 - 20th Century Finance Corporation Ltd. [2000 (5) TMI 980 (SC)]
 - Rashtriya Ispat Nigam [1990 (77) STC 182]
 - G S Lamba & Sons [2015 (324) ELT 316 (AP)]
- Criteria specified by the Hon'ble Supreme Court in case of Bharat Sanhar Nigam Limited [2006 (2) STR 161 (SC)] are fulfilled.
- Decision of Hon'ble Supreme Court in case of Adani Gas Limited [2020 (40) GSTL 145 (SC)] is not applicable.
- Vat has been paid and therefore no service tax payable.
 - Narayan Premji Savala [2022 (66) GSTL 417 (Bom)]
 - Imagic Creative Pvt Ltd [2008 (9) STR 337 (SC)]
 - Rajeshwari Colour Lab [2020 935) GSTL 75 (Mad)]
 - Essar Telecom Infrastructure (P) Ltd. [2012 (275) ELT 167 (Kar)]
 - Express Engineers & Spares Pvt Ltd. [2022 (64) GSTL 112 (T-All)]
- Benefit of Cum duty to be extended.
- Penalty under Section 76 could not have been imposed as the issue involved is one of interpretation.
 - Uniflex Cables Ltd. [2011 (271) ELT 161 (SC)]
 - Continental Foundation Jt venture [2007 (216) ELT 177 (SC)]

3.3 By additional submissions filed vide letter dated 06.05.2024, it was stressed that Right to use is transferred and thereby will not fall under Section 66 E (f) of the Finance Act, 1994 and thus no service tax is payable.

3.4 Learned authorized representative reiterates 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:

5.0 I have gone through the show cause notice as well as submissions made by the party at the time of personal hearing, defence reply and other case records 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. 3,19,54,030/- 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) Whether penalties under Section 76 of the Finance Act, 1994 are liable to be imposed in the case on the party or not; and*
- iv) 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:-

Leasing Out Earth Station And Related Equipment To M/s SICCL

5.1 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 the 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 i.e. 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).*

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 remained 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 owned 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.

5.2 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,.

5.3 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 supply of tangible goods; (b) supply shall be for use by the recipient; and (c) supply shall be effected "without" transferring right of possession and effective control of such 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.

5.4 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 the following judicial 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) Ms G S Lamba & Sons-2012-TIOL-49-HC-AP-CT*

5.5 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*

5.6.1 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 and appliances;"

I observe that with effect from 01.07.2012, 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 a 'declared service'

5.6.2 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 his 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 Rashtriyaspat Nigam Limited vs Commercial Tax Officer reported in 1990(77) STC 182 and State of Andhra Pradesh vs Rashtriyaspat Nigam Limited reported in 2002 (126) STC 114

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

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

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

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

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

short term period and at the end of the lease period the lessee does not have an option to purchase the asset. The cost of repairs, maintenance and obsolescence rests with the lessor.

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

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

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

5.6.3 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 Hon'ble 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 31st 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, I 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, 1944 read with Section 66E(f) of the Act, *ibid*, thereafter. As regards the issue whether right to possession and effective control of equipment leased out stand 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 equipment. 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 use including any permissions or licenses required therefor should be such 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-à-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 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).*

5.6.4 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 Ms. 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. 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 as

"3. The High Court after scrutiny and close examination of the clauses contained in the agreement and looking to the agreement as a whole, order to determine the nature of S 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, 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, particular, looking to clauses 1, 5, 7, 13 and 14, it In 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 estopped from contending otherwise in regard to was 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."

5.6.5 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 is subject to the VAT under state laws need not necessarily be levied to Central Law viz the service tax or vice versa. I 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, I perceive it as both disjointed and disconnected as one is subject to state jurisdiction while other is the matter covered under the Union List subject to 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. court pronouncement relied have gone through the various and quoted by the party IN their defence but 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.

5.6.6 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 that the allegations in the SCN are based on the terms of various clauses which have been reproduced, and are narration of the facts of the 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.

5.6.7. The party has contended that the demand for the period up to March 2015 is hit by limitation, but, they have not given any reason therefore. In this regard, I find that the no portion of the demand is barred by limitation as the show cause notice has been issued well within the time limit prescribed under Section 73 of the Finance Act, 1994.

5.6.8 Another contention of the party on the issue is that even if demand is upheld the service tax should be calculated on the cum tax value. In this regard I find that the contention of the party is not acceptable as the party was aware that the department has disputed the tax liability and has demanded the

tax on the services rendered for the earlier period; as the party should have recovered the due service tax from the customers as the liability had been raised by the department. As the party deliberately did not recover the tax from the customers, they are supposed to bear the same at their own and the benefit of cum tax value cannot be extended in the facts and circumstances of the case. Moreover, the said party has not adduced any evidence so as to, even remotely, suggest that the gross amount paid was inclusive of service tax and accordingly, the contention of the party fails to hold ground on statutory terms also In this regard, reliance is placed upon the ratio of pronouncement made in the following cases : (i) CCE, Aurangabad Vs Rudra Galaxy Channel Ltd. [2015(38)STR445 (Trib- Mumbai)] : Held :: "Valuation (Service Tax) - Cum tax value - Cum tax benefit not extendable in absence of documentary evidence to show consideration received inclusive of Service Tax"; and (ii) Shakti Motors Vs Commissioner of Service Tax, Ahmedabad [2008(12)STR710(Trib-Ahmd)] :: Held :: "Valuation (Service tax) - Cum-tax value - Plea of treatment of amount received as cum-tax to scale down the quantum of demand In terms of Section 67(2) of Finance Act, 1994 if invoice specifically not says that gross amount charged includes Service tax, it cannot be treated as cum-service tax price - Cum-tax benefit not extendable in absence of evidence to show that invoice prepared in this manner - Section 67 ibid."

5.6.9 Accordingly hold that the service tax amounting to Rs.3,19,54,030/- for rendering "supply of the tangible goods services" as discussed in the foregoing para, is demandable from the party under Section 73(1) of the Finance Act along with the interest under Section 75 of the Finance Act, 1994.

Penalty under Section 76 of the Finance Act 1994

5.7 As regards the penalty under Section 76 of the Finance Act, 1994 the party has submitted that the same is not imposable as they were under bonafide belief that transaction involved transfer of right to use the goods and hence chargeable

to the VAT, and that the issue involved interpretation of statute. They have placed reliance on the following case laws

Bharat Petroleum 2002 (48) RLT 979 (CEGAT-MUM)

Uniflex Cables Ltd 2011 (271) ELT 161 (SC)

Sonar Wires Pvt. Ltd. Vs. CCEx. 1996 (87) ELT 439 (T)

Synthetics & Chemicals Ltd. 1997 (89) ELT 793 (T)

Man Industries Corporation 1996 (88) ELT 178 (T)

Sports & Leisure Apparel Ltd. CCE., Noida 2005 (180) ELT 429

Aquamall Water Solutions Ltd. 2003 (153) ELT 428

Blue Cross Laboratories Ltd. vide order no. A/1529/C-IV/SMB/2007

On the issue, I find that the present case relates to the demand of the service tax on the supply of tangible goods service. I observe that such service of supply of goods was brought in tax net w.e.f. 16.05.2008 and the party was fully aware about the facts of applicability of the service tax on such service as Shri Hardeep Singh, the Head- Finance & Accounts of the party in his statement dated 26.03.2015, inter alia, stated 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. I observe that the party never disclosed the facts regarding providing such services to the jurisdictional Service Tax authorities in any statutory periodical returns or through any other communication. find that the issue was brought to the notice of the department 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 Therefore, I see no

ground to accept that they acted in a bonafide manner and the issue involved interpretation of law. Had it been so they would have consulted the department before taking a decision on the taxability of the services rendered. I further find that the applicable service tax on supply of tangible goods services has not been paid to the government exchequer by the party and they had contravened various service tax provisions as alleged by not discharging their due service tax liabilities. Therefore, I find no reasonable cause not to impose penalty under the provisions of Section 76 of the Finance Act, 1994. Thus I hold that they are liable for penal action under Section 76 of the Finance Act 1994 Further, the cases relied by the party do not squarely apply to the present facts and circumstances as this is the second show cause notice on the issue and the party has still not been paying the due service tax on the services rendered Further, in this regard would like to place reliance in the Case of Collector of Central Excise Calcutta VS M/s Alnoori Tobacco Products 2004 (170) ELT 135 (S.C.) decided by the Hon'ble Supreme Court of India, wherein it was held that 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. The relevant paras of the said case are reproduced below for sake of reference

"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 In London Graving Dock Co. Ltd. J-Horton (1951 AC 737 at p. 761), Lord Mac Dermot observed - 'The matter cannot, of course, be settled merely by treating the ipsissima verba of Willes, J as though they were part of an Act of Parliament and applying the rules of interpretation appropriate thereto. This is not to detract from the great weight to be given to the language actually used by that most distinguished judge.'

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."

Penalty under Section 77 of the said Act.

5.8 Having held the demand for non-payment of service tax on supply of tangible goods sustainable on the party, I hold that the penalty under Section 77 (1)(a) of the said Act is imposable on the party for not incorporating the taxable service in their service tax registration during the period from April 2014 to March 2016 in contravention of Section 69 of the Finance Act, 1994. Further, I hold that the penalty under Section 77(2) of the said Act is also imposable on the party for not incorporating taxable value of Supply of tangible goods services' in their ST-3 returns resulting in contravention of provisions of Section 70 read with Rule 7(c) of the Finance Act, 1994.

5.9 As regards their contention for invoking the Section 80 of the Act for waiver of find that it is their contention that they had a reasonable cause for penalty, discharging the VAT liability As I have already discussed and found, that no substantive cause has been brought on record by the party for the non-payment of service tax on the impugned services. The contention that they have paid the VAT on such activities to the state authority also can not absolve them from the liability of the service tax under the Finance Act, 1994. Moreover, the party during these proceedings have also not admitted to their liability of the service tax on the issue during these proceedings, therefore, I

do not hold it as a fit case of invoking the provisions of the Section 80 of the Finance Act, 1994. Further, the party in their defence reply have relied upon various orders/ judicial pronouncements passed in this regard. have gone - through these cases and find that facts & circumstances of those cases are different from this case, therefore the ratio of the decisions of those cases are not applicable in this case. On the other hand, place reliance upon the pronouncement made in the case of Bellary City Cable Vs CCE, Beigaum [2015 (39) STR 687 (Trib-Bang.)] wherein it was, interalia, held that : "the intention behind introduction of provisions of Section 80 of Finance Act, 1994 was to ensure assessee failing to pay tax to make payment with interest and lenient view can be taken as regards penalty in cases of lack of knowledge and reasonable cause".

4.3 We find that facts and issues involved in the present caase are on all fours identical to case decided by us vide Final Order No 7011/2024. The Chartered accountant appearing for the appellant strenuously sought to distinguish the said order by stating that thesid decision is not based on the amended provisions. However we do not find any merits in the said submission as the perod involved in the said case was upto 31.03.2014, and the Finance Act, 1994 was amended to introduce new taxation regime with effect from 01.07.2014.

4.4 On the merits of the case we have observed as follows:

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/cm² 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, liable 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*

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 :-

- (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 1st Say of April' 2009 and will be valid for a period of 60 months i.. upto 31st 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

(ii) 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)(zzzt) 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 ius 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.

4.5 The matter for the period after 01.07.2012 has been considered by us in para 4.10 of the above order and the amended provisions have been taken into account. Thus we do not find any merits in the submissions made by the appellant on the merits of the case.

4.6 Appellant has raised the issue of allowing cum tax benefit in the present appeal and the same was raised also before the adjudicating authority. Impugned order has proceeded to deny the said benefit while computing the demand against the appellant. We are not in agreement with the approach adopted.

It is now settled position in law that benefit of cum tax benefit should have been allowed while computing the taxable value and the tax payable. For limited purpose of computing the tax demand after allowing the cum tax benefit to the appellant matter is remitted back to the original authority.

4.7 We also do not find any merits in the submissions made by the appellant in respect of the penalties imposed under Section 76 and 77 of the Finance Act, 1994. The penalties under these Sections are not the penalties under section 78 which were to be imposed for various offences which required a guilty mind or intent to evade payment of tax. The penalties under these section are for failure to comply with the legal obligations. Hon'ble Supreme Court has in case of Gujarat Travancore Agency [1989 (42) E.L.T. 350 (S.C.)] observed as follows:

"4. Learned Counsel for the assessee has addressed an exhaustive argument before us on the question whether a penalty imposed under Section 271(1)(a) of the Act involves the element of mens rea and in support of his submission that it does he has placed before us several cases decided by this Court and the High Courts in order to demonstrate that the proceedings by way of penalty under Section 271(1)(a) of the Act are quasi criminal in nature and that, therefore, the element of mens rea is a mandatory requirement before a penalty can be imposed under Section 271(1)(a). We are relieved of the necessity of referring to all those decisions. Indeed, many of them were considered by the High Court and are referred to in the judgment under appeal. It is sufficient for us to refer to Section 271(1)(a), which provides that a penalty may be imposed if the Income Tax Officer is satisfied that any person has without reasonable cause failed to furnish the return of total income, and to Section 276C which provides that if a person wilfully fails to furnish in due time the return of income required under Section 139(1), he shall be punishable with rigorous imprisonment for a term which may extend to one year or with fine. It is clear that in the former

case what it intended is a civil obligation while in the latter what is imposed is a criminal sentence. There can be no dispute that having regard to the provisions of Section 276C, which speaks of wilful failure on the part of the defaulter and taking into consideration the nature of the penalty, which is punitive, no sentence can be imposed under that provision unless the element of mens rea is established. In most cases of criminal liability, the intention of the Legislature is that the penalty should serve as a deterrent. The creation of an offence by Statute proceeds on the assumption that society suffers injury by and the act or omission of the defaulter and that a deterrent must be imposed to discourage the repetition of the offence. In the case of a proceeding under Section 271(1)(a), however, it seems that the intention of the legislature is to emphasise the fact of loss of Revenue and to provide a remedy for such loss, although no doubt an element of coercion is present in the penalty. In this connection the terms in which the penalty falls to be measured is significant. Unless there is something in the language of the statute indicating the need to establish the element of mens rea it is generally sufficient to prove that a default in complying with the statute has occurred. In our opinion, there is nothing in Section 271(1)(a) which requires that mens rea must be proved before penalty can be levied under that provision. We are supported by the statement in Corpus Juris Secundum Volume 85, page 580, Paragraph 1023 :

"A penalty imposed for a tax delinquency is a civil obligation, remedial and coercive in its nature, and is far different from the penalty for a crime or a fine or forfeiture provided as punishment for the violation of criminal or penal laws."

5. *Accordingly, we hold that the element of mens rea was not required to be proved in the proceedings taken by the Income Tax Officer under Section 271(1)(a) of the Income-tax Act against the assessee for the assessment years 1965-66 and 1966-67."*

4.8 As we uphold the demand of Service Tax, demand for interest under Section 75 follows.

5.1 Appeal partly allowed and matter remanded to original authority as per para 4.6.

(Pronounced in open court on- 30 August, 2024)

(P.K. CHOUDHARY)
MEMBER (JUDICIAL)

(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

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