

**CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH, ALLAHBAD
COURT NO.I**

Service Tax Appeal No.51916 of 2014 (DB)

[Arising out of Order-in-Appeal No.GZBEXCUS000APP-203-13-14 dated 03.01.2014 passed by the Commissioner (Appeals), Customs, Excise & Service Tax, Ghaziabad (U.P.)] Central Goods & Service Tax, Dehradun]

M/s. Dabur Reserach Foundation

22, Site-IV, Industrial Area, Sahibabad,
Ghaziabad.

Appellant

VERSUS

**Commissioner of Central Excise & Service
Tax,**
Ghaziabad.

Respondent

APPEARANCE:

Shri B.L. Narasimhan, Advocate for the appellant.

Shri Anupam Kumar Tewari, Authorised Representative for the respondent.

CORAM:

HON'BLE SHRI ANIL CHOUDHARY, MEMBER (JUDICIAL)

HON'BLE SHRI P. ANJANI KUMAR, MEMBER (TECHNICAL)

FINAL ORDER NO.70236/2021

DATE OF HEARING/DECISION:06.08.2021

ANIL CHOUDHARY:

The appellant is a non-profit making organisation registered under Section 25 of the Companies Act, 1956. During the relevant time, the appellant was approved by the Department of Science and Technology and providing 'Integrated Research Solutions' in Pre-Clinical Biology to National and International Pharmaceutical, chemical and Biotechnology companies. The appellant was registered with the Service Tax Department under 'Scientific and Technical Consultancy Service' vide Registration No.AAATD2653GST001. The appellant was also registered with the Sales Tax Department.

2. The appellant entered into an asset licensing agreement dated 19.05.2009 with M/s. Fresenius Kabi Oncology Limited (FKOL).

3. During the relevant period, the appellant had received Rs.3,13,00,000/- from FKOL towards license fee under the abovementioned agreement. On the said payments received by the appellant from FKOL, (being towards deemed sale), the appellant had already paid sales tax (VAT), as applicable under the Uttar Pradesh Value Added Tax Act and assessed accordingly.

4. The appellant's records were audited by the audit party of the Central Excise Commissionerate, Ghaziabad on 01.11.2010 and 18.11.2010, wherein during the course of audit, the department observed vide DAR No177/2010-11 dated 15.02.2011, that the appellant had received payments against the service - 'supply of tangible goods' under the agreement entered into with FKOL.

5. Subsequently, correspondence took place between the appellant and the Department by which information regarding the transaction was sought by the Department and provided by the Appellant.

6. Thereafter, the Department issued a show cause notice bearing no.25/JC/ST/GZB/102/2011-12 dated 28.03.2012, proposing demand of Rs.29,22,847/- and the appellant contested and filed its reply dated 12.03.2013.

7. The Joint Commissioner confirmed the allegation and demand made in the show cause notice vide order-in-original dated 30.03.2013. Equal amount of penalty was also imposed under Section 78, plus Rs.10,000/- under Section 77.

8. Thereafter, the appeal was filed by the applicant against the order dated 30.03.2013 before the Commissioner (Appeals), who upheld the Order-in-Original vide impugned Order-in-Appeal.

9. Being aggrieved, the appellant is before this Tribunal.

10. Ld. Counsel urges as under:-

10.1 It is urged that the taxable service with reference to 'supply of tangible goods' has been defined under Section 65(105)(zzzz) of the Finance Act, 1994 and reads as under:-

"Taxable service means any service provided to any person, by any 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."

(emp. Supplied)

10.2 The scope of service was clarified by the Government vide D.O.F. No.334/1/2008-TRU dated 29.02.2008 as under:-

"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.

(emp. Supplied)

10.3 It is further urged that the Appellant discharged VAT on the transaction and the VAT authorities already concluded the assessment proceedings in respect of the same transaction, considering the transaction **as the** transfer of right to use goods. Therefore, in terms of the above referred Circular, the same transaction is not taxable under the Service tax. Further reliance is placed on the decision of this Tribunal in the matter of M/s. Rockwell Automation India (P) Ltd. vs. CCE, Ghaziabad passed vide Final Order No.70660-70662/2019 dated 25.03.2019 in which held as follows:

"6. Having considered the submissions from both the sides and on perusal of record we note that it was submitted before the original authority that the said consideration on which Service Tax was demanded was subjected to sales tax and original authority has not relied upon any evidence to establish that the said contention was unfounded. Further we have also perused the invoices which were available on record which clearly indicated that the entire transactions in such invoices was subjected to sales tax. We therefore are of the opinion that the impugned orders are not sustainable. We therefore set aside the impugned orders and allow all the three appeals."

(emp.supplied)

10.4 It is further urged that consequent upon the 46th amendment, Article 366(29A)(d) of the Constitution of India defines tax on sale or purchase of goods includes a tax on the *transfer of right to use any goods for any purpose* for cash, deferred payment or other valuable consideration.

10.5 The aforementioned constitutional provisions have been the subject matter of interpretation by various courts. The Apex Court in the case of Bharat Sanchar Nigam Ltd v. UOI [2006 (2) STR 161. (SC)] has discussed the different aspect involved in such transaction and came to the conclusion that to constitute a transaction for "transfer of right to use the goods" the transaction must have the following attributes:

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

10.6 The Commissioner (Appeals) concluded in paragraph 5.11 of his order that in the case of the Appellant, the above condition of (d) and

(e) are not satisfied, on the basis of finding given in paragraph 5.10 and 5.11 as follows:

5.10 I observe that in the instant case the custody of the said imported assets were given to FKOL as they were granted exclusive license to use the goods but they were not having possession and effective control of these assets and neither were they free to make use of said assets in the manner and purpose, other than as specified in the said agreement nor they were free to allow/ assign sub-license these assets for use by others. M/s. FKOL was also not free to remove these assets from the premise of the Appellant. The clause 2.7 of the agreement said that even during the term of agreement the appellant can sell its right or interest in the said assets. This agreement only allows FKOL to use the laboratory infrastructure developed by the appellant over a period of time, by importing and installing Plant & Machinery and Laboratory equipments for a specific purpose of oncological research without transferring possession and control. Thus, while FKOL had access to infrastructure in question, the appellant did not lose control over the said infrastructure, which is evident from the close reading of the terms of the contract signed by FKOL and the appellant. Thus I find it is not a case of mere naming of the agreement as 'Assets licensing Agreement' as contended by the appellant but the document is intentionally named license agreement as required by law.

5.11 The appellant's contention of payment of VAT/sales tax considering the transaction as deemed sale is also not correct in view of the Constitution Bench judgement of the Apex Court in 20th century Finance Corporation Ltd. & Another v. State of Maharashtra, wherein it has been held that where goods to be transferred are available and a written contract is executed between the parties, it is at that point situs of taxable event on the transfer of right to use goods would occur and situs of sale of such transaction would be the place where the contract is executed. In the instant case. the contract was executed in Delhi on 19.05.2009 and receivable consideration was Rs. 853 Lacs, so the situs of sale was Delhi and they should have accordingly paid VAT on Rs. 853 Lacs considering the same as interstate sale, but the appellant paid VAT/Commercial Tax only on Rs. 1,11,96,172/- in 2009-10 and that too in the state of U.P.

10.7 The appellant urges, the above finding establishes that the goods were exclusively given for use to the customer of the Appellant, and they were free to use the goods. The agreement provides that even if the Appellant transfers title of the goods, the right of the Customer will be protected. Clause 2.7 of the Agreements read as follows:

"In the event that DRF decides to sell its rights, title or interest in the imported assets during the term or the extended term, DRF shall take prior consent from FKOL and further ensure that the rights of KFOL under this agreement are preserved and are not prejudicially affected."

10.8 It is further urged that the above clause establishes that during the subsistence of the Agreement, the right of the customer

cannot be again assigned by the Appellant to anyone else. Therefore, the finding and the conclusions are incorrect factually.

10.9 It is further urged, the Appellant transferred the Right to use the goods to the customer and the *title* of the goods was not transferred. The transfer of the Right to use the goods amounted to 'deemed sale' whereas transfer of title amounts to sale. Even after the transfer of right to use the goods, the Appellant continued to be the owner of the goods, therefore, the customer of the Appellant cannot get an absolute right to use the goods in any manner or for any purpose. The transfer of right to use goods, always provides the manner and purpose for which the goods maybe used.

10.10 Further, with the transfer of right to use goods, the transferee does not acquire the title of the goods, therefore, such transferee may not be allowed to assign or sublicense the goods to others.

10.11 Further, the reliance placed by the Commissioner(Appeals) on the decision in the matter of Indus Tower Ltd. [2012 (285) E.L.T. 3 (kar.)] was wrong, because in that case the facts were different: it was noted as follows:

"What is permitted under the contract is, a permission in the nature of a licence to have access to the passive infrastructure and permission to keep the equipments of the mobile operator in the pre-fabricated shelter with permission to have ingress and egress only to the authorised representatives of the mobile operator".

10.12 Whereas in the present case, the customer was having right to use the goods for the purpose of doing research as contemplated under the Agreement.

10.13 It is also submitted that since the transaction was only a deemed sale, therefore, the sales tax was paid as and when consideration for such a transaction of right to use was received. In such cases, sales tax is not paid at the time of agreement to transfer the right to use goods.

10.14 The finding regarding discrepancy in payment received and payment of VAT under paragraph 5.8 is factually incorrect, as the court below have not taken into account the amount of additional VAT paid (which was payable in addition to normal applicable VAT). The amount of the transaction was INR 1,11,96,172.25 plus VAT amount INR 4,47,846.89 (@4%) plus additional VAT INR 55,980.75 (@0.5%) Totalling to INR 1,17,00,000/.

10.15 In the light of the above submissions, it is urged that the findings in the Impugned Orders are not sustainable. Thus, the Impugned Orders are liable to be set aside.

11. The Id. Counsel prays for allowing their appeal with consequential benefits.

12. Ld. Departmental Representative relies on the impugned order.

13. Having considered the rival contentions, we find that Id. Commissioner (Appeals) has observed that in the instant case the custody of the assets was given to FKOL, as they were granted Exclusive Licence to use the goods, but they had no possession and effective control of the goods and neither were free to make use of the said assets in the manner and purpose other than as specified in the said agreement. Nor FKOL were free to allow /assign or licence the goods for use by others. Further, FKOL was not free to remove these assets from the premises of the appellant. Further observed as per Clause 2.7 of the agreement, that during the terms of the agreement the appellant can sell its right or interest on the said assets. This agreement only allows FKOL to use the laboratory infrastructure developed by the appellant for a specific purpose of oncological research, without transferring the possession or control. Thus, while FKOL had access to infrastructure in question, the appellant did not lose control over the said infrastructure, which is evident from the written terms of the contract between the parties. It was further held by the Commissioner (Appeals) that the contention of the appellant as regards the payment of VAT/Sales Tax considering the transaction as deemed sale, is also not conclusive for exclusion from the purview of service tax. Further, observed that where the goods to be transferred are available and a written contract is executed between the parties, it is the point of situs or taxable event on the transfer of right to use the goods would occur, and situs of sale of such transaction would be the place, where the contract is executed.

14. From the aforementioned facts on record by the court below, we are satisfied that the exclusive possession with right to use the goods was given by the appellant to M/s. FKOL, who were free to use the goods. We further find from the Clause 2.7 of the agreement, which provides that even if the appellant decides to sell or transfer its right, title or interest in the goods during the term or the extended term for right to use granted, the appellant shall take prior consent from FKOL and further ensure that right to use of FKOL under the agreement are not disturbed/preserved and their interest is not prejudicially effected. Thus, evidently, the appellant had granted exclusive right to use without disturbance or encumbrance to their clients – FKOL and accordingly, we hold that they have rightly paid the Sales Tax/VAT on transfer of right to use the goods, to their customers, which is a transaction of deemed sale. Accordingly, we hold that service tax is not attracted.

15. Accordingly, in view of our aforementioned observations, we allow the appeal and set aside the impugned order with consequential benefits to the appellants, in accordance with law.

(Operative part of the order pronounced in open Court).

(ANIL CHOUDHARY)
MEMBER (JUDICIAL)

(P. ANJANI KUMAR)
MEMBER (TECHNICAL)

