

**CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL
BANGALORE**

REGIONAL BENCH COURT No.2

Service Tax Appeal No.21041 of 2019

[Arising out of the Order-in-Original No.BLR-NORTH-COMM-01/2019-20 dated
13.05.2019 passed by the Commissioner of Central Tax, Bengaluru.]

M/s. Lufthansa Technik Services India Pvt. Ltd.,
13th Floor, RMZ Galleria,
Ambedkar Colony Yelahanka,
Bengaluru Urban,
Karnataka – 560 064

.....Appellant

VERSUS

**Commissioner of Central Tax,
CGST Commissionerate-
Bangalore North**
No.59, Ground Floor, HMT Bhawan,
Bellary Road, Bengaluru Urban,
Karnataka – 560 032

.....Respondent

Appearance:

Mr. Harish Bindumadhavan, Advocate for Appellant

Mr. P. Saravana Perumal, Authorized Representative for Respondent

Coram:

Hon'ble Mr. P.A. Augustian, Member (Judicial)

Hon'ble Mr. Pallela Nageswara Rao, Member (Technical)

Final Order No. 21793 of 2024

Date of Hearing: 30.04.2024

Date of Decision: 29.10.2024

Per: P.A. Augustian

This appeal is filed against Order-in-Original No.BLR-NORTH-COMM-01/2019-20 dated 13.05.2019 passed by the Commissioner of Central Tax, Bengaluru. The show cause notice (SCN) was issued on 13.04.2017 for the extended period October 2011 to September 2016 for demand of service tax of Rs. 7,31,83,914/- along with interest and

imposed penalties under section 78 and section 77 of the finance Act, 1994.

2. The issue in the present appeal is whether the Aircraft components supplied as per the 'home base agreements' executed by the Appellant with Airlines are classifiable under 'supply of tangible goods' under section 65(105)(zzzzj) for the period before 01.07.2012 and under 'taxable services' under Section 65B(44) read with section 65(51) or declared services under Section 66E(f) of the Finance Act, 1994 for period post 01.07.2012 or the transactions are in the nature of transfer of right to use which is a deemed sale under Article 366(29A)(d) of the Constitution of India and not liable to service tax.

3. The brief facts of the case are Appellant is registered under various categories of service tax and on scrutiny of the records for the period from October 2011 to September 2016, the Audit team observed that the Appellant had received income under the head 'lease income' and further observed that they had entered into 'home base lease' agreements with different Airlines in India for providing the right to use the home base components for a consideration as contracted in the respective agreements and the appellant had raised invoices for the home based lease for handing over the home based components to M/s. GoAir Airlines and other Airlines. Since such consideration received was shown as 'lease income' in the appellant's balance sheet, department alleging that the activity is falling under the category of 'supply of tangible goods' services under Section 65(105)(zzzzj) of the Finance Act, 1994 for the period up to 30.06.2012 and from 01.07.2012 as provision of taxable service within the meaning assigned under Section 65B(44) read with section 65B(51) of the Finance Act, 1994, proceedings were initiated. Thereafter, Adjudication authority had confirmed the demand with interest and also imposed penalties under section 77 and section 78 of the Finance Act, 1994. Aggrieved by said order present appeal is filed by the appellant before the Tribunal.

4. The learned counsel during the hearing submitted that the impugned order has sought to classify the Appellant's transactions as "Taxable Service" under Section 65B (51) and "Declared Service" under

Section 66E of the Act as amended w.e.f. 01.07.2012. In this regard, the following definitions are relevant:

For the period after 01.07.2012:

"SECTION 65B.Interpretations. In this Chapter, unless the context otherwise requires, -

(44) "service" means any activity carried out by a person for another for consideration, and includes a declared service, but shall not include -

(a) an activity which constitutes merely, -

(i) a transfer of title in goods or immovable property, by way of sale, gift or in any other manner; or

(ii) such transfer, delivery or supply of any goods which is deemed to be a sale within the meaning of clause (29A) of article 366 of the Constitution; or

(iii) a transaction in money or actionable claim;

(51) "taxable service" means any service on which service tax is leviable under section 66B;

SECTION 66E. 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;"

5. The learned counsel further submitted that on perusal of the above definition, "service" specifically excludes "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". Further, the 'Declared Service' under Section 66E (f) also excludes leasing in a manner which involves transfer of right to use such goods. Therefore, it is clear the Appellant's transactions are in the nature of transfer of right to use and are "Deemed Sale" under Article 366 (29A)(d) of the Constitution of India and the same cannot be classified under "taxable

service" under Section 65B (51) or as 'Declared Service' under Section 66E (f) of the Finance Act, 1994.

6. The Learned Counsel further submits that; the components supplied by the Appellant are leased by the Appellant and it forms a part of the aircraft and its internal engine and mechanism; the Appellant transferred the right to use of these 'home based components' to Airline customers; once the Appellant delivers possession of these components the customers are free to use home based components in any air station of their preference; the limited condition imposed in the contract is that the customer cannot further incumber or sell the 'home based components'; and on termination of the agreement, possession of the home based components has to be handed over by the respective Airlines to the Appellant; further, after delivery of the possession, Appellant does not have/incur any responsibility or liability with respect to these components.

7. The learned counsel also drew our attention to the salient features/clauses of the Home Base Agreements executed between Appellant and M/s. Jet Airways, M/s. Quick Jet, M/s Go Air, as under;

- a. The Appellant executes Home Base Agreements with Airline Customers,
- b. Airline Customer provide a requisition list of Home Base Components that they need. On the basis of such request, the Appellant imports these Home Base Components from its parent company Lufthansa Technik AG, Germany, into India and leases the same to the airlines.

The Relevant Clause 3.1. of Home Base Agreement between Appellant and M/s. Quick Jet is as under;

"3.1 LTSI hereby agrees that LTSI shall give Customer the right to use, the Home Base Components as described in Annex: Home Base Components hereto, upon purchase of such Home Base Components from Lufthansa Technik and upon satisfaction of the conditions precedent set out in Article 2.1 above....."

c. The Customs Duty for such import is passed on to the Airline Customer by LTSI.

d. The Appellant transfers the right to use these Home Base Components to the Airline Customer once the Appellant delivers possession of these components.

The Relevant Clause 3.1. of Home Base Agreement between Appellant and M/s. Quick Jet reads as under;

"Provision of Home Base Components

3.1 LTSI agrees that LTSI shall give Customer the right to use the Home Base Components as described in Annex: Home Base Components hereto...

Customer's right to use the Home Base Components shall become effective upon LTSI handing over possession thereof to Customer as aforesaid.

.....

3.3 LTSI shall provide Customer with the right to use the Home Base Components for period of 6 years from the Effective Date ("Term")...."

e. The Airline Customers are free to use the Home Base Components in any air station of their preference:

Relevant Clause 5.1.3. of Home Base Agreement between Appellant and M/s. Quickjet.

"5.1.3 The Customer shall be entitled to ship/store the Home Base Components to any of its line stations for its own use but shall not be entitled to and shall not under any circumstances whatsoever, sell, lease, hypothecate, create a charge or interest in or encumbrance on, loan or otherwise transfer in any manner whatsoever any Home Base Component to a third party"

f. The transfer of right to use the Home Base Component is limited right and the Airline Customer cannot further encumber or sell the Home Base Component.

g. Upon termination of the agreement, possession of the Home Base Components is to be handed over by the Airline to the Appellant.

The *Relevant Clause 3.3. Home Base Agreement between Appellant and M/s. QuickJet;*

"3.3.....Immediately upon the expiry of the Term or earlier termination of this Agreement in terms of Article 10 hereunder, Customer shall hand over possession of the Home Base Components listed in Annex:..... Such Components shall be either the same or fully interchangeable Home Base Components which are airworthy, operational and free from defects."

h. After the delivery of possession, the Appellant does not incur any responsibility or liabilities with respect to these components:

Relevant Clause 5.1.3. of Home Base Agreement between Appellant and M/s. Jet Airways reads as under;

"3.2 Upon LTSI giving JET the right to use the Home Base Components, JET shall assume full and complete control, custody and possession thereof and LTSI shall incur or be deemed to incur any further responsibility or obligation in respect thereof, save and except as specified under this Agreement, during the Term of this Agreement."

i. In case of any damage or wear and tear which requires the component to be replaced the Airline Customer shall bear the expenses for replacement:

The Relevant Clause 5.1.5 Home Base Agreement between Appellant and M/s. QuickJet;

"5.1.5 Customer Shall be liable for any damage beyond repair plus or destruction of the home base components. In such case

customer shall pay to LTSI the OEM's Official Published Catalog List Price of the Home Base Components which have been damaged beyond repair, lost or destroyed plus a handling charge as set forth...."

8. The Learned counsel submits that the above transaction is an import in the course of a sale under Section 5 (2) of Central Sales Tax Act, 1956 and no service tax or VAT is leviable in the instant case. The Respondent issued SCN dated 13.04.2017 alleging that the above transaction falls within the definition of "Supply of Tangible Goods" under Section 65 (105) (zzzzj) of the Finance Act, 1994 up to 30.06.2012 and thereafter "Taxable Service" under Section 65B (44) read with section 65B (51) of the Finance Act, 1994. The Respondent, on erroneous consideration of facts and misapplication of law, had confirmed the entire demand in the impugned Order.

9. The Learned Counsel also drew our attention to the different clauses of the Home Base Agreements where the right to use the 'home based components' is vested with the customer and the customer is liable to hand over the possession of such home based components which will be returned shall be either the same or fully interchangeable home based components which are airworthy, operational and free from defects. The learned counsel also draws our attention to Para 8 of the Show Cause Notice No. 38/2017 dated 13.04.2017, where it is alleged that the Appellant enjoys a number of rights over the assets even after transferring the same to their customer on lease and as per the obligation of Airlines which appear in the home base agreement, the Airlines is supposed to keep all home based components within its home base and should be stored in accordance with all relevant Regulations issued by the Appellant but shall not be entitled to and shall not under any circumstances whatsoever sell, lease, hypothecate or create a charge on these components. The learned counsel submits that the above said conditions are very common, and it doesn't give any rights or control over the goods till they are in the custody of the customer.

10. The learned counsel also submitted that the allegation in the show cause notice (SCN) is that the Airlines have mere physical custody of

the lease asset during the period of tenure and has right only to extent of using of the equipment for day-to-day operations is factually incorrect, also the findings that the Appellant have transferred merely the physical possession of the goods and have retained the legal rights of usage and control and the said finding is also factually incorrect, as evident from the contract entered by the Appellant, the right is transferred to the clients during the period of lease deed and Appellant have no control over the goods during the lease period. The learned counsel also draws our attention to the definition of 'supply of tangible goods' service and service under Section 65B(44), declared service under Section 66E with effect from 01.07.2012. The Learned Counsel further relied on the judgment of Hon'ble Supreme Court in the matter of **Bharat Sanchar Nigam Limited and another Vs. Union of India and Others reported in (2006) 3 SCC 1**, where it is held that;

"74. In determining the situs of the transfer of the right to use the goods, the Court did not say that delivery of the goods was inessential for the purposes of completing the transfer of the right to use. The emphasised portions in the quoted passage evidences that the goods must be available when the transfer of the right to use the goods takes place. The Court also recognised that for oral contracts the situs of the transfer may be where the goods are delivered (see para 26 of the judgment).

75. In our opinion, the essence of the right under Article 366(29-A) (d) is that it relates to user of goods. It may be that the actual delivery of the goods is not necessary for effecting the transfer of the right to use the goods but the goods must be available at the time of transfer, must be deliverable and delivered at some stage. It is assumed, at the time of execution of any agreement to transfer the right to use, that the goods are available and deliverable. If the goods, or what is claimed to be goods by the respondents, are not deliverable at all by the service providers to the subscribers, the question of the right to use those goods, would not arise.

.....

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 licences 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."*

11. Thus, following the law laid down by the Hon'ble Apex Court, the transaction carried out by the Appellant with the customer is a deemed sale and it is not a service as alleged. Further the issue was considered by the Apex Court in the matter of **M/s. Adani Gas Ltd in Civil Appeal No. 2633/2020** and as per the judgment dated 28.08.2020 wherein, it is held that:-

"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.

There is an element of service which is the foundation for the levy of the tax."

12. The Learned Counsel submits that in the instant case, the conditions stipulated in (i) to (v) are not satisfied. In relation to conditions (i) to (iii) above, the Appellant does not provide any service to the Airline Customer in relation to the Home Base Components. In relation to condition (iv) and (v) above, the Appellant delivers the possession and hands over the control of the Home Base Components to the Airline Customer. Therefore, this condition is not satisfied for the Appellant's transaction to be classified as a 'supply of tangible goods'.

13. The learned counsel further submitted that considering the facts and circumstances of the case, invoking the extended period of limitation is also unsustainable. The Department came to know about the activities way back in 2004 and in similar cases, respondent had issued show cause notice (SCN) for the financial year 2005-2006 to May 2007 alleging that these lease agreements were liable to service tax under 'banking and other financial services' as per Section 65(105) (zm) of the Finance Act, 1994. The issue was ultimately decided in favour of the Appellant by Tribunal in the matter of **CST Delhi Vs. M/s. Lufthansa Techniques Services Pvt Ltd (2013 (31) STR 730 (T)** and thereafter for the period from October 2007 to March 2009, another show cause notice (SCN) was issued on 23.04.2009 alleging that these agreements were liable to service tax under 'banking and other financial

services' as per Section 65(105)(zm) and these proceedings were also dropped vide Order-in-Original dated 23.02.2016. Thereafter, after the introduction of 'supply of tangible goods' service with effect from 16.05.2008 the Respondent opted to issue show cause notice (SCN) alleging that the lease agreements are liable to service tax under "supply of tangible goods" service. Thus, the Respondent is changing the classification from time to time, considering the contradictory stand taken by the Department on the very same issue, suppression of facts cannot be alleged to invoke the extended period of limitation.

14. The learned counsel also draws our attention to the **Circular No. 334/1/2008/TRU dated 29.02.2008**, where it is specifically stated that;

"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."

15. The learned counsel also relied on the judgment of the Hon'ble Supreme Court in the matter of **M/s. Great Eastern Shipping in Civil Appeal No. 3383/2004** where it is held that:-

"33. When we peruse the various terms and conditions of the Charter Party Agreement (Annexure I), clause 1 provides that the contractors "let" and the charterer "hire" the goods vessel for six months. The expression 'let' has been used, and the vessel most significantly during the charter period has been placed at the "disposal" of the charterers and under their control in every respect. The charterers have been given the right to use all outfits, equipment, and appliances on board the vessel at the time of the delivery, including the whole reach, burthen, and deck capacity. Thus, in our considered opinion, merely by providing the staff, insurance, indemnity, and other responsibilities of bearing officials costs. Effective control for the entire period of six months has been given to the charterers. It is a case of transfer of right to use the vessel for which certain expenses and staff are to be provided by the contractor, which is not sufficient to make out that the control and possession of the vehicle are with the contractor. The possession and control are clearly with the charterer. As in essence, it has to be seen from a conjoint reading of various conditions whether there is a transfer of right to use the vessel. In our considered opinion there is not even an iota of doubt that under the charter agreement coupled with the instructions to tenderers, general conditions and special conditions for the contract as specified in the tender documents and charter-party clauses, there is a transfer of right to use the vessel for the purposes specified in the agreement.

34. To constitute a transaction for the transfer of right to use of goods, essential is, goods must be available for delivery. In the instant case, the vessel was available for delivery and in fact, had been delivered. There is no dispute as to the vessel and the

charterer has a legal right to use the goods, and the permission / licence has been made available to the charterer to the exclusion of the contractor. Thus, there is complete transfer of the right to use. It cannot be said that the agreement and the conditions subject to which it has been made, is not a transfer of right to use the goods, during the period of six months, the contractor has no right to give the vessel for use to anyone else. Thus, in view of the provisions inserted in Article 366(29A)(d), section 5C, and definition of 'sale' in section 2 of the KST Act, there is no room for doubt that there is a transfer of right to use the vessel."

16. The learned counsel also relied on the decision of the Hon'ble Apex Court in the matter of **State of Andhra Pradesh Vs. Rastriya Inspat Nigam (AIR 2002 SC 1305)** and **CC Vs. M/s. Quick Heal Technology Ltd (2022 SCC Online SC 976)** and submits that the principle governing transfer of right to use under Article 366(29-A)(d) of the Constitution is settled in the above matter and the transaction carried out by the appellant is not falling under the category of 'supply of tangible goods' service as alleged. As held by Hon'ble Apex Court in the matter of M/s. Quick Heal Technology, the contract has to be read as a whole and not by selecting few conditions in the contract. As regards operating lease agreement is not service subject to service tax, the learned counsel relied on the decision in the matter of **M/s. ALD Automotive Pvt., Ltd. Vs. CC, CGST Central Excise, Mumbai [2024 (3) TMI 562 (Tri. Mumbai)]**.

17. The learned Authorized Representative (AR) for the Revenue reiterated the finding in the impugned order. Regarding the past demand against the Appellant, it is submitted that even if the demand was made under the category of 'banking and another financial services' and the demand was set aside by the Tribunal prior to introduction of the classification of 'supply of tangible goods' service w.e.f.16.05.2008 under section 65(105)(zzzzj), the Department is not estopped from making fresh demand when specific service category is introduced with effect from 16.05.2008. Thus, the above said contention is unsustainable. As regards the classification, the learned AR drew our

attention to the definition of 'supply of tangible goods' service prior to 01.07.2012 and also taxable service post 01.07.2012, wherein as per Section 65(44) read with 65B(51), service means any activity carried out by a person for another for a consideration and it includes declared service under section 65E (f) which reads, "transfer of goods by way of hiring, leasing, licensing or in any such manner without transfer of right to use such goods;" and the exemptions contained in Section 65B are not applicable in Appellant's case. Considering the same, it is a service and liable to be subjected to service tax prior to the period 01.07.2012 and post 01.07.2019 i.e., prior to post negative list of service tax regime as held by the Adjudication authority.

18. Heard both sides and perused the records.

19. We find that as per section 65B(44) "service" means any activity carried out by a person for another for consideration, and includes a declared service, but shall not include-a transfer of title of goods or immovable property by way of sale, gift or any other manner or such transfer, deliver or supply of goods which is deemed to be a sale within the meaning of Clause 29A(d) of the Article 366 of the Constitution or transaction in money or actionable claim. Further, declared service is defined under section 65E(f) reads as "transfer of goods by way of hiring, leasing, licensing or in any such manner without transfer of right to use such goods;" However, in Appellant's case the goods were transferred to the customer and as per the conditions of the agreements, Appellant retained the control over the goods by incorporating different clauses in the contracts entered by the Appellant with the respective Airlines. Therefore, the transaction carried out by the Appellant cannot be considered as sale of goods. Further, there is no evidence produced by the Appellant that they have paid applicable VAT to confirm the sale of the goods as falling under the category of sale. Moreover, on perusal of records it is evident that the remuneration received for the supply of the home based components for use from the respective Airlines is only a nominal amount compared to the import price of the goods. Also considering this fact, the transaction carried out by the Appellant with the respective airlines cannot be considered as

classifiable under the category of sale, to claim exemption of their activity from levy of service tax.

20. As regards invoking the extended period of limitation, the law is well settled that in the absence of any fraud or collusion or misstatement of fact or willful suppression of facts with an intent to evade tax, the extended period cannot be invoked. Moreover, the issue was brought to the notice of the Department way back in 2004 and the demand was dropped only due to demand made under different categories of service and the proper classification of service was brought out under the service tax regime only with the effect from 16.05.2008 onwards. Thus, invoking extended period of limitation and imposing penalty are unsustainable.

21. In view of the above discussion the demand for the extended period is liable to be set aside and penalty imposed under section 78 of the Finance Act, 1994 is also liable to be set aside. However, the demand for the normal period is liable to be confirmed.

22. Accordingly, the impugned order confirming the demand by invoking extended period is set aside and demand for the normal period is confirmed. Further, penalties imposed as per the impugned order are also set aside.

23. In the result the Appeal is partially allowed in the above terms.

(Order Pronounced in Open court on 29.10.2024.)

(P.A. Augustian)
Member (Judicial)

(Pullela Nageswara Rao)
Member (Technical)

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