

**CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
CHANDIGARH**

REGIONAL BENCH - COURT NO. I

Service Tax Appeal No. 99 of 2016 -[DB]

(Arising out of Order-in-Original No. 7/GDL/Commissioner/FBD-II/ST/2015-16 dated 27.11.2015 passed by the Commissioner of Central Excise and Service Tax, Faridabad)

M/s Lindstrom Service India Private Limited

.....Appellant

133-A, DLF Industrial Area,
Phase-I, Faridabad
Haryana-121004

VERSUS

Commissioner of Central Excise & Service Tax,

.....Respondent

Block-C, New CGO Complex,
NH-IV, NIT Faridabad
Haryana-121001

APPEARANCE:

Shri B K Singh, Advocate for the Appellant

Shri G M Sharma, Authorised Representative for the Respondent

**CORAM: HON'BLE MR. ASHOK JINDAL, MEMBER (JUDICIAL)
HON'BLE MR. BIJAY KUMAR, MEMBER (TECHNICAL)**

FINAL ORDER NO. 60716 of 2019

**DATE OF HEARING: 22.05.2019
DATE OF DECISION: 02.08.2019**

PER BIJAY KUMAR:

1. This appeal is filed against the Order-in-Original No. 07/GDL/COMMR./FBD-2/ST/2015-16 dated 27/11/2015 passed by the Commissioner of Central Excise and Service Tax, Faridabad-II. A demand of Rs. 92,22,321/- of service tax, for period from 2010-11 to 2014-15 up to October, 2014 has been confirmed along with equal amount of penalty and applicable interest and also a penalty of Rs. 10,000/- under the provisions of Finance Act, 1994(hereinafter

referred to as 'Act') under Section 73,78,75,77 (1) (a) of the Act *ibid*. The demand was confirmed as per the proposal contained in the demand/ show cause notice dated 11/02/2015.

2. Brief facts of the case required for disposal of the appeal, are that the appellants are holding service registration under the Act, for providing/ receiving various services under the provisions of the Act. Acting on the intelligence that the appellant was not paying the applicable service tax in terms of the Act for providing of work-wear to their clients on rental basis in terms of agreements, a visit of the departmental officer was made on 03/11/2014. During the visit statement of Shri Syed Asif, Raja the accountant of the appellant was recorded and also various documents, including agreements for providing work-wear to the clients on the rental basis were resumed. The two such agreements, namely, with M/s Mother Diary Fruits and Vegetables Private Limited and M/s Ecocat (India) Private Limited were also provided by the appellant. Further a statement of Shri Manas Kumar, Business Unit Manager of the appellant was also recorded under Section 14 of the Central Excise Act as made applicable to the service tax matter vide Section 83 of the Finance Act. On scrutiny of document submitted by the appellant and submissions made and deposition made by Shri Syed Ali Raja and Shri Manas Kumar, Department concluded that the service provided by the appellant is covered under the category of service of 'supply of tangible goods' classifiable under Section 65 (105) (zzzzj) of the Act prior to 01/07/2012 and thereafter under Section 65 (b) (44) read with Section 69 (f) of the Act. In the impugned order, it was, therefore, held that the activity involves supply of tangible goods, without

transferring the right of effective control, which amounted to providing of taxable service for their clients that period prior to 01/07/2012 being activity of supplying of tangible goods as defined under Section 65 (105) (zzzzj) of the Act and after 01/07/2012 under the definition of service, as per the Section 65 (b) (44) of Finance Act read with Section 67 (e) (f) of the Act, *ibid*.

3. Ld. Advocate on behalf of the appellant submits as under;

3.1 That the appellant is a subsidiary of M/S Lindstrom, Netherlands and is engaged in leasing work-wear to their clients on the conditions mentioned in the Agreements with their clients. Two of the agreements are enclosed as Representative Agreement.

3.2 The salient features of the agreement with Mother Dairy are;

- (i) That the appellant undertook to deliver, wash and service work-wear to the clients. Each worker will be provided with the work-wear of his size which will be measured by the appellant.
- (ii) The appellant would own the work-wear and will have exclusive right to wash and service the same.
- (iii) If the delivery is delayed or defective, the same shall be compensated by Lindstrom.
- (iv) The work-wear shall be collected by the customer once a week for being sent to Lindstrom for servicing.
- (v) If the work-wear cannot be leased because of wear and tear, it will be returned to Lindstrom but the customer shall pay the price as per the price list (depreciated price).

If the work-wear is to be replaced by the customer, the same is to be redeemed at agreed upon price.

- (vi) The leasing fee and other charges are based on the current price of the work-wear.
- (vii) If the Customer withdraws from the contract at any time, he shall pay to Lindstrom the invoicing value of the termination period.
- (viii) Retail Price will increase every year by 10%.
- (ix) Service Fee of the Garment included in the price.
- (x) VAT is being charged on the rental charges. (see invoice)

There are separate provisions for pricing of replacement and valuation of redemption price. These conditions have been briefly noted at internal page 2 of the impugned SCN.

3.3 Similar Provisions are for in the agreement with M/S ECOCAT INDIA.

3.4 In paragraph 4 of the SCN issued to M/S Lindstrom, it has been inferred that M/S Lindstrom is providing various services including exclusive right for washing and service the work-wear. In Para 5 of the SCN, after discussing the definition of Supply of Tangible Goods Service as incorporated in Section 65(105)(zzzzj) before the introduction of Negative List, it was alleged that the services provided by the appellant was taxable under the aforementioned provision of the Finance Act, 1994. In the SCN, the essential features of the decision of the apex court in the case of **Bharat Sanchar Nigam Vs UOI reported in 2006 (2) STR 161 (SC)** was also discussed to allege that the transaction was not covered under supply of tangible Goods.

3.5 For the period after 01/07/2012 that is after the introduction of Negative List of Services, it was alleged that the identified service was neither covered by the Negative List nor by the Mega exemption notification. It was further alleged that Section 65B(44) defines Service to include a declared service. The activity is well covered under clause (f) of Section 66E of the Act, 1994 and hence taxable.

3.6 It was also alleged that the appellant was carrying out several services for the customer and hence that will be considered as bundle of services, it will be considered as provision of single service having highest rate of Tax under Section 65F(3)(b). They also invoked the larger period for demanding the Tax. The Adjudicating Authority (hereinafter also referred to as Commissioner) formulated 8 issues to be decided by him a in Para 7.1 of the impugned Order at internal page 11 of the Order-in-Original. For examining the issue whether the right to use the impugned goods was transferred to the customer was basic issues which was required for deciding whether the service is "supply of Tangible Goods" covered under Section 65(105)(zzzzj) or alternatively can it be considered a deemed sale under sub-clause 29A of Article 366 of the Constitution and hence not a service. Other questions will be relevant only when the above issues are decided against the appellant.

4. The Commissioner based his conclusion on the above issues on following reasoning:

- (i) In Para 8.2 at internal page 14 of the OIO, the commissioner observes that the dispute is whether the

transaction entered into between the appellant and the customer is transferring the right to use by the appellant or allowing the customer to use the work-wear. He referred to the decision of Hon'ble Supreme Court in the case of Bharat Sanchar Nigam (supra) to reason out that for a transaction to be considered as "deemed sale", both possession and control are to be transferred to the Customer. Referring to the decision of Hon'ble High Court of Allahabad in the case of Commissioner Trade Tax vs Jamuna Prasad Jaiswal reported in (2008) 013 VST 0403 he inferred that if the owner of the goods have the effective control over the same, merely handing over the goods cannot be considered as Deemed sale. In Deemed sale, all rights except the ownership right is to be transferred. By referring to the advertisement on the website of the appellant, the Commissioner inferred that the appellant retains the exclusive right to wash and service the work-wear.

- (ii) In Para 8.5 of the impugned Order, the Commissioner observes that the appellant is providing not merely renting of work-wear by way of transferring right to use but a complete wear solution that includes designing the work wear, washing and maintaining it, repairing it when necessary, storing providing locker service, delivering clean and maintained clothing on weekly basis. The appellant provides a bundle of services and right of effective control remains with the appellant.

- (iii) He, therefore concluded that it is not an activity of transfer of right to use the goods, particularly as there was no transfer of effective control.
- (iv) In Para 8.6 of the Order, he observes that the transaction between the appellant and customer does not fulfil the ingredients enumerated in BSNL and Rashtriya Ispat Nigam case.
- (v) He, therefore, held that the activity undertaken by the appellant was taxable service for both the periods i.e. prior to 1/07/2012 as activity of supplying Tangible Goods as defined under Section 65(105)(zzzzj) of the Act and after 01/07/2012, under the definition of service defined under Section 65B(44) read with section 66E(f) of the Act. (Para 9 of the OIO at internal page 22)

He allowed the CENVAT Credit on the input/input service. He also allowed benefit of Notification 6/2005 dated 01/03/2005 for exemption from duty if the total service provided was less than Rs. 10 lakhs for the year 2010-2011. He also allowed the Cum-Tax benefit. He therefore confirmed the reduced demand of Rs. 92,22,321/- imposed a penalty of the same amount under section 98 of the Act and a penalty of Rs. 10,000/0 under section 77(1)(a) *ibid*.

5. Ld. Advocate pleaded that the appellant had fulfilled all the conditions enumerated by Justice Lakshmanan in para 91 of the Judgement in the case of *Bharat Sanchar Nigam (supra)*

"91. *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."

6. It was submitted that the appellant has fulfilled all the conditions as enumerated in the aforementioned criteria laid down in the BSNL case.

- **The first condition** that is there must be goods available for delivery. It is submitted that it is admitted fact that the appellant were delivering the work-wear the client customers. The work-wear was available with the appellant for delivery. Therefore they had fulfilled condition (a).
- **The second condition** is that *there must be a consensus ad idem as to the identity of the goods*. It is submitted that the agreement was very clear on this issue. The work-wear for each employee was to be prepared after taking their measurement and as per the specification given by the customer. Unless the identity of the garments is identified qua the workmen, the transaction will not be complete. Therefore, this condition is also fulfilled.
- **Third condition is that** *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;* it was submitted that the work-wear is specifically prepared for the employees of a particular establishment. The appellant is required to give delivery as per specification provided by the clients customer. Once the garments are delivered, it

is for the customer to satisfy any legal requirements which may be demanded by any authority. The appellant has no obligation to fulfil any compliance except the size of the garment. Any other compliance has to be undertaken by the customer without any interference by the appellant. For example, if the user is a hospital and they, by law, require to use only white dress, it is for the customer to ensure that. The appellant is neither responsible nor required to fulfil the said condition. It is entirely for the customer to ensure that. There is no covenant in the agreement which binds the appellant to ensure compliance of any requirement of law other than what is mentioned in the Agreement. Thus, this condition is also fulfilled.

- **The fourth condition** is 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 the right to use" and not merely a licence to use the goods;* it is submitted that once the garment is delivered to the Customer, he has absolute right to use the same. There are certain activities post or pre delivery which are to be carried out by the appellant only. These activities are for proper upkeep of the garments and beneficial to the customer. These are enumerated in the Agreement itself. As is evident from the agreement, the work-wear is customized qua the requirement of the employees of the Customers, it cannot be used by any

other customer. The work-wear cannot be taken over by the appellant from the customer except for washing/repairing etc. The appellant cannot supply the same work-wear to any other customer. Therefore, the customer has exclusive right to enjoy the benefit of the product to the exclusion of all other.

- **The fifth condition** is that 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.

It is submitted that all the work-wear remain under exclusive control of the customer and the owner has no right to take back the same. The customer is double empowered as they have right to get replacement if any of the garment is defective.

7. The aforesaid explanation makes it very clear that the agreement with the customers is in conformity with the conditions carved out by Justice Lakshmanan in the case of Bharat Sanchar Nigam (Supra) for arriving at a conclusion that the agreement is for Transfer of Right to use of a commodity to the exclusion of others. It is further submitted that the aforesaid narration is for arriving at a conclusion whether a particular transaction is "Deemed Sale" under Article 366 (29A)(d) of the constitution which reads as under;

Tax on sale or purchase of goods includes a tax on the transfer of right to use any goods for any purpose (whether or not for any specified period) for cash, deferred payment or other valuable consideration.

Once a transaction is considered to be sale, the same cannot be considered as Service. It is submitted that one of the evidences for

considering a transaction sale is whether the person entering into the transaction has paid VAT on the transaction. It is submitted that the appellant has paid VAT on all transaction with their customers as is evident from the invoices issued to them. Representative invoices are submitted in Paper Book.

8. It is submitted that once it is decided that the transaction is a transaction of sale, then no other argument is required for claiming that the transaction is not a transaction of Supply of Tangible Goods under section 65(105)(zzzzj) of the Finance Act, 1994. The said section is worded as below:

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 the right of possession and effective control of such machinery, equipment or appliances.

9. It is submitted that the appellant has made it very clear that this case not only the right of possession of garment was transferred but also it was under the effective control of the Customer/clients. They could use the garment as per their own free will. The supplier had not imposed any restriction on use of the garment. As the appellant remained the owner of the goods, it was his responsibility to take care of the goods, lest it does not last its normal life, which would have resulted in additional burden on the appellant by way of replacement or repair as stipulated in the Agreement. Thus, the appellant transaction is not covered by the aforesaid definition of service.
10. There are other legal arguments including the one that the said section will apply to only machinery, equipment and appliances. It is submitted that although the first part of the entry is *Tangible goods*

including machinery, equipment, and appliances; in the later part it is *only effective control of such machinery, equipment or appliances*. The normal interpretation will be that this entry is only for machinery, equipment and appliance and therefore this entry did not cover Garments. Hence, service tax on renting of garments cannot be imposed as Tangible goods.

11. It is also submitted that the identical issue in their own case came up for adjudication by the two commissioners (Belapur and Vadodara) and other one before Commissioner(Appeals) Hyderabad who have held that the renting of garment by the appellants in was not liable to Service Tax. Copy of the decision of Commissioner (Belapur) and Commissioner (Appeals), Hyderabad were also enclosed. It is further pleaded that the Order of Commissioner (Belapur) was accepted by the Revenue and no appeal was filed. Thus, the Revenue cannot treat the activities of renting of work-wear as service in case of appellant.
12. Lastly, it was submitted that, in any case department itself has a view which is favourable to the appellant, and in such a circumstances, the larger period of limitation is not invokable and also penalty not imposable on the appellant.
13. That, the only reason given by the Commissioner in the impugned Order is that the appellant reserved the right to repair and wash the work-wear and thus effective control is not transferred. Thus will not be treated as deemed sale but only service. According to him, the right to wash and maintain the work-wear having retained by the

appellant resulted in to Customer having no effective control over the work-wear.

14. It is also submitted that the Commissioner has not explained as to how the retaining the right of washing the cloth and maintaining them took away the right of control over the goods from the Customer. It is further submitted that the Hon'ble Tribunal in the case of **GIMMCO LTD. Versus COMMISSIONER OF C. EX. & S.T., NAGPUR reported in 2017 (48) STR 476 (Tr.-Mum)** has quoted with approval the gist of decision of the Hon'ble High Court of Andhra Pradesh in the case of G.S. Lamba (The original Order of GS LAMBA has been submitted at the time of hearing) in Para 5.4 as below:

5.4 *The Hon'ble High Court observed that the essential requirement of a transaction for transfer of the right to use goods are :*

- (1) it is not the transfer of the property in goods, but it is right to use property in goods;*
- (2) Article 366(29A)(d) read with the latter part of the Clause (29A) which uses the words, "and such transfer, delivery or supply" would show 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;*
- (3) in the transaction for the transfer of the right to use goods, delivery of goods is not condition precedent, but the delivery may be one of the elements of the transaction;*
- (4) 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;***
- (5) the approvals, concessions, licences and permits in relation to goods would also be available to user of the goods, even if such licences or permits are in the name of transferor of the goods; and*
- (6) during the period of contract exclusive right to use goods along with permits, licences, etc., vests with the lessee.*

(Emphasis supplied)

Applying these principles and in particular clause (4) above, sending the goods for washing or for repair will not imply that the work-wear was not under effective Control of the Customer. In fact observation of the Tribunal in Para 5.2 makes it very clear. The Tribunal observes.

"Revenue's contention is based on the clauses in the agreement relating to restrictions of use by the lessee, provision of skilled operator by the lessor and maintenance and repairs of the equipment by the lessor. Merely because restrictions are placed on the lessee, it cannot be said that there is no right to use by the lessee. Such a view of the revenue does not appear to be tenable when we read carefully the provisions of the agreement."

Examining the terms of the contract, the Hon'ble High Court held that the transaction involved was a transfer of right to use Transit Mixers and not transport service and the petitioners had transferred the 'right to use goods' to Grasim.

If ratio of the above decision is applied to the facts of the present case, the transaction involved herein is "transfer of right to use" which is a deemed sale and not "supply of tangible goods for use" service

15. It was also submitted in the contract with the customers, there is a provision for payment of VAT on the Transaction and the appellant had submitted representative copies of invoice and Return of Vat also to prove that they had been paying VAT on all such Transaction.
16. Accordingly he prayed for setting aside the impugned order and allowing the present appeal.
17. Ld. AR on behalf of the Department, however, reiterates finding of the impugned order and states that the Commissioner by elaborate

order has held that in the case at hand the appellant has effective control over the equipment supplied by them as no other person is allowed to wash the work-wear and maintenance is also mandatorily required to be done by the appellant. The work-wear supplied to their various customers in terms of agreement remains under the effective control of appellant, and therefore, the question of treating the contract as deemed sale, as claimed by the Id. Advocate is not appropriate and correct. He hence prays for upholding the impugned order in appeal.

18. We have heard Ld. Advocate for the appellant and Ld. DR for Revenue and also perused the appeal records.

19. The appellant is engaged in providing work-wear solution to the various industrial customers in terms of various agreements where there is transfer of effective control to the client. For the better appreciation the issue involved, it will be appropriated to extract the relevant provisions of the agreement entered by the appellant with their customers. A perusal of the agreement which has been placed on appeal record between the appellant and Mother Diary Fruits and Vegetables indicates that the agreement is for;

- Supply of work-wear on rental basis as per the requirement of customers;
- Selection and fitting of individualise work-wear dying of garments as per the requirements;
- Period of washing of the garments (that is includes removal of hazardous material etc.,)
- Transportation of the garments

20. The agreement has the terms conditions with the customers for the lease the work-wear from the appellant and the appellant owns the lease product, will have exclusive right to wash the work-wear and also the Noticee shall have exclusive right to serve the work-wear.
21. The relevant paragraph of other agreement entered between the appellant M/s Eco Cat (India) Private Limited also reads as under;

Object of agreement:

Ecocat (India) Pvt. Ltd. shall lease from Lindstrom Services India Pvt. Ltd. the work-wear and Lindstrom engaged in delivering, washing and servicing the work-wear and taking care of the required replacement of the work-wear in accordance with their purpose of use. Lindstrom owns the leased products and shall have the exclusive right to wash and service them.

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➤ Servicing Packing and transportation of the work-wears:

Lindstrom shall place the packing and transport equipment needed for the deliveries at the disposal of the customer and the customer shall use the equipment only for such as purpose.

Work-wear to a named collection point in accordance with the schedule agreed; Lindstrom shall collect the work-wears for servicing once a weak. The work-wears shall be inspected and repaired in connection with their servicing; In case of any non-conformance with the agreed quality after the servicing of the work-wear, Lindstrom shall replace the work-wear.

- Measurement changes, logos and name tags:
- Measurement changes and other changes shall be separately agreed upon.
- The work-wear can under a separate agreement be provided with logos and name tags. The sewing work of the work-wears is made by Lindstrom and charged at the process valid at any given time.

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22. Ld. Adjudicating Authority has treated this to be a pure service relying on the conditions of the agreement and also various other information available on the website of the appellant.

23. It was held that the work-wear always in the control of appellant and hence there is no transfer of effective control by the appellant hence out of the purview of the deemed sale as per the Article 366 (29A)(d) of the Constitution of India. It is necessary to have transfer of right to use involving both transfer of possession and also effective control of the goods by the user of the goods. The transaction for allowing another person to use the goods without giving legal right of possession cannot be treated as deemed sale of the goods, and thus has to be treated as service only. It is also the contention of the Department that after introduction of the negative list based tax regime, the activity of the supply of goods without transfer of right liable to tax by virtue of Section 66E (f) of Finance Act. On the other hand, we find that Ld. Advocate as relied upon the Hon'ble Supreme

Court's decision in case of **Bharat Sanchar Nigam vs. Union of India**, wherein it is held under;

91. 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 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.

92. In my opinion, none of these attributes are present in the relationship between a telecom service provider and a consumer of such services. On the contrary, the transaction is a transaction of rendition of service.

24. It is the contention of the Ld. Advocate that simply retaining the right to wash and maintain work-wear for the clients would not make it as if the effective control on these goods has been retained by the appellant. We are in agreement with the contention made by Ld. Advocate as the same as got approval from Hon'ble Supreme Court in BSNL case(supra). We also find that the similar issue come up for consideration before this Hon'ble Tribunal in case of **Gimmco Limited vs. Commissioner of Central Excise and Service Tax, Nagpur [2017 (48) STR 476 (Tri.- Mum)]**. The issue involved in that case was regarding the renting of earth moving equipments to various

Customers by the M/s Gimmco Limited and based on the clauses in the agreement, there was restriction of use by the lessee as skilled workers to operate the equipment was being provided by the lessor and maintenance and repair of the equipments were also by the lessor in para 5.1, 5.3, 5.4 and 5.6 of the order it has been held that there is no service involved in this case relying on yet another decision of Hon'ble High Court of Andhra Pradesh in case of M/s G S Lamba. The paragraph 4 which is relevant is reproduced as below;

"4. The Petitioners' counsel contends that five eventualities to infer the transfer of the right to use goods are not completely present in the transaction between the Petitioners and Grasim. He would urge that the Tribunal was wrong in relying on Clauses (A), (B) and (D) of the contract in concluding that the Petitioners had transferred the right to use Transit Mixers to Grasim. According to him, these clauses would not lead to any such conclusion and that there was no intention to create exclusive right to use the vehicles by Grasim. The clause for providing dedicated fleet of vehicles with Grasim's logo "Birla Concrete" being painted on them is no indication that the intention was to transfer the right to use Transit Mixers. The RMC is a product with short shelf life and its marketability depends on the quality. So as to assure the product quality to end-user, it was agreed to paint the brand name on the vehicles. The same, however, does not lead to an inference that there is consensus ad idem; and that the Petitioners should keep ready the dedicated fleet of eight vehicles to be used by Grasim. In the absence of transfer of possession and effective control, Section 5-E of the Act is inapplicable. Lastly it is urged that the Tribunal was in error in not recording findings on all the issues raised by the Petitioners. The Counsel relied on various precedents to which a reference would be made at the appropriate place."

25. From the perusal of these judgments, it is evidently clear that the some of the activities of regarding the maintenance and washing of work-wear rented to the clients, by the appellants will not mean that effect control as been retained by the appellant. Further, we have also

considered the criteria laid down by the Apex Court in case of BSNL, (supra) regarding transfer of effective control in terms of the provisions of Section 366 (29A)(d) of the Indian Constitution.

Further, we also find that Apex court in case of Rashtya Ispat Nigam Limited has explained the similar issue as well;

"5.4 The Apex Court in case of Rashtya Ispat Nigam Limited has explained the issue in lucid language. "The essence of transfer is passage of control over the economic benefits of property which results in terminating rights and other relations in one entity and creating them in another. While construing the word "transfer" due regard must be had to the thing to be transferred. A transfer of the right to use the goods necessarily involves delivery of possession by the transferor to the transferee. Delivery of possession of a thing must be distinguished from its custody. It is not uncommon to find the transferee of goods in possession while transferor is having custody. When a taxi cab is hired under "rent-a-car" scheme, and a cab is provided, usually driver accompanies the cab; there the driver will have the custody of the car though the hirer will have the possession and effective control of the cab. This may be construed with the case when a taxi car is hired for going from one place to another. There the driver will have both the custody as well as possession; what is provided is service on hire. In the former case, there was effective control of the hirer (transferee) on the cab whereas in the latter case it is lacking. We may have many examples to indicate this differences." If we equate the observations of the Court and the activities of the noticee, it would be seen that the 'possession' and 'custody' of the work-wear always lies with the user. Once the work-wear/clothing is 'delivered/

handed over to a particular user, it is up to the user how to put the same to use as per his choice. There remains no 'control' of the noticee over the user so as to restrict or compel a user to use the articles of clothing in a particular manner. This proves that the 'possession' and 'custody' of goods practically remains with the user."

26. Accordingly, we find that in the instant case, in terms of agreement work-wear rented out always remains within the exclusive possession of their clients and nobody else can use the those work-wear at the same time and hence effective control to lie with the user/clients. The appellant, therefore, does not have control over the use of the work-wear. Thus the activity is not in the nature of 'service' under the Finance Act in both during the period prior to negative list regime and thereafter as held in the impugned order. The order under challenge is, therefore, not sustainable.
27. In view of above the impugned order is set aside and appeal is allowed.

(Order pronounced on 02/08/2019)

(BIJAY KUMAR)
MEMBER (TECHNICAL)

(ASHOK JINDAL)
MEMBER (JUDICIAL)