IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH, CHENNAI

ST/41062 & 41063/2013

(Arising out of Order-in-Original No. 7 & 8/2013 dated 1.2.2013 passed by the Commissioner of Central Excise, Chennai – IV)

M/s. Real Image Technologies Pvt. Ltd. Appellant

Vs.

Commissioner of Central Excise, Salem Respondent

Appearance

Shri C.Saravanan, Advocate for the Appellant
Shri K.P. Muralidharan, AC (AR) for the Respondent

CORAM

Hon'ble Ms. Sulekha Beevi C.S., Member (Judicial)
Hon'ble Shri Madhu Mohan Damodhar, Member (Technical)

Date of Hearing / Decision: **14.12.2017**

Final Order Nos. 43368 - 43369/2017

Per Bench

The appellants are aggrieved by the demand of service tax under the head 'Supply of Tangible Goods' as well as the credit disallowed on input services.

2. The appellants are engaged in various services such as Advertising, Online Information, Video Tape Production, Sound Recording Service etc. The appellant owns "Qube Digital" video format used for recording and playback of video. They import digital projectors and components and manufacturer Servers in

their factory premises and remove the same on payment of excise duty for installation in theatres. The Digital Projector Systems are provided to theatre owners either on sale basis or on right to use basis. They canvass with the film producers to release their film in Qube digital format. The original analog film is digitized i.e. Mastering. From the master copy, virtual print is made depending upon the requirement of the film producer. The appellant charge for Mastering and Virtual Prints from the film producer and pays service tax on the same under Video Tape Production Service. The virtual prints are uploaded by the personnel in the Qube servers located in the theatres where the film producer desires to release the film. The Virtual Print can also be directly uploaded through satellite from the servers located in the appellant's premises to the servers located in the theatres. The appellant had 1099 theatres in their fold through India during the year 2009 - 10. The appellant provided Digital Projectors and Servers with Qube Digital Technology to the theatre owners on "Right to Use" basis through an agreement called Letter of Undertaking (LOU). In terms of this LOU, the theatre owners have to pay a non-refundable deposit and also pay "Per Show Fee" and in addition the appellant will also have exclusive right of 20 minutes advertising time for every show. The appellant was charging an advance of Rs.30,000/-towards "Per Show Fee" which is adjusted periodically depending upon the usage of the equipment. It was further noticed that the appellant also provides projectors and servers with refundable deposit to prominent theatres depending upon business expediency wherein they charge "Per Show Fee" from such theatres. The appellants were not discharging service tax on the income accounted as "Right to Use" fee collected as non-refundable deposit as well as Per Show Fee. The department entertained a view that such activities were covered under section 65(105)(zzzz) of Finance Act, 1994 under "Supply of Tangible Goods". Another issue noticed by the department was that the appellant had availed credit on various input services which were ineligible. A show cause notice was issued on the above allegation proposing recovery of service tax along with interest and also for imposing penalties. The appellant inter alia contended that the activities do not fall within the ambit of Supply of Tangible Goods and that in any case, they are discharging VAT on the right to use fee collected by them. On adjudication, the original authority confirmed the tax demands on both counts along with interest and also imposed penalties. Hence this appeal.

3. On behalf of the appellant, ld. counsel Shri C.Saravanan started his arguments by adverting to the definition of Supply of Tangible Goods services. He submitted that as per section65(105)(zzzzj), the activities would become supply of tangible goods when the right to use the equipment is

transferred without transferring right of possession and effective control of such machinery. That appellant had transferred possession and also effective control of the said equipment. Therefore, the transfer of the right to use the equipment will not attract the levy of service tax under supply of tangible goods services. It is also argued by him that the appellant is discharging VAT on the said activity and the transfer of goods is defined under Article 306(29A)(d) of the Constitution, which deals with deemed sale. Since the appellant have discharged VAT on the said services, and VAT and Service Tax being mutually exclusive, the appellant cannot be called upon to pay service tax on the very same amount collected from their customers. To support his argument, he relied upon the decision of the Hon'ble High Court of Andhra Pradesh in the case of G.S. Lamba & Sons Vs. State of Andhra Pradesh – 2015 (325) ELT 316 (AP). The ld. counsel submitted that the department is relying upon clauses 7, 11, 15 and 22 of the agreement /LOU to contend that the appellant has not transferred effective control to the customers. The Hon'ble High Court of Andhra Pradesh in the above said decision had considered the issue what is effective and general transfer of effective control. It was observed that transfer of effective control does not necessarily require physical transfer of control when the lease / letting out is given with the choice to the customer for selecting the manner and time and nature of use

Customs, Excise & Service Tax Appellate Tribunal and enjoyment, it is transfer of the right to use goods. The ld. counsel also produced documents of the proceedings before the Commercial Tax Officer and also the proceedings before the Deputy Commissioner (Appeals) in respect of the demand of VAT on the right to use they collected from the customers. In appeal, the Deputy Commissioner (Appeals) had held that the user fee collected by the appellant is subject to levy of VAT, therefore the demand of service tax on the same under the category of Supply of Tangible Goods is not sustainable.

4. With regard to the issue of disallowance of credit on input services, the ld. counsel submitted that the disputed input services relate to club or association services, travel insurance, group mediclaim insurance and personal accident insurance, directors and officers liability insurance, employees deposit linked insurance etc. He submitted that all these services have been availed prior to 1.4.2011 when the definition of input service under Rule 2(l) of CENVAT Credit Rules, 2004, had a wider ambit and included in its scope all activities relating to business. However, in respect of club services, ld. counsel was fair enough to concede that the service tax paid on the said services is not eligible as the these are not availed for the purpose of the business of the company.

5. The ld. AR Shri K.P. Muralidharan reiterated the findings in the impugned order. He adverted to clause 11 of the agreement and argued that the appellant has not transferred

the effective control of the equipment and therefore are liable to pay service tax under Supply of Tangible Goods. The salient features of LOU as has been stressed by the ld. AR is as follows:-

1. Real Image Media Technologies Pvt. LTD. (RIMT) shall supply and install on a right-to-use basis, the equipments viz., QCP, 3-Chip DLP Projectors and Anamorphic Lens at the Theatre along with the required connections (Clause I)

2. RIMT will carry ort pre-installation check and post installation, RIMT shall provide basic training to operators at the Theatre, on operation and system reset procedures for facilitating routine operation of the Equipment by the Theatre personnel (Clauses 2 & 3)

3. All maintenance work relating to the Equipment shall only be carried out by authorized engineers of RIMT/its service providers. Clause 4 of the Letter of Undertaking specifically states that the Theatre Owner shall ensure that his/its personnel/employees do not open, tamper with or remove or dismantle the Equipment

4. In consideration of the supply, installation and maintenance of the Equipment at the Theatre, the Theatre owner shall pay RIMT a refundable deposit of Rupees One lakh in addition to recurring per-show fee of Rs. 250/- per screen for the digital film content screened at the theatre through the Equipment (Clause7)

5. Clause 14 of the Letter of Undertaking states that if the Theatre Owner decides to lease, sell or effectively cede management control of the Theatre owner shall immediately return the Equipment installed by RIMT at the Theatre to RIMT.

6. Clause 16 states that the Theatre owner agrees that a suitable non-tamperable label will be pasted on the equipment stating "This Equipment is/are the property of Real Image Media Technologies Pvt. Ltd"

7. In case the equipments are confiscated by any statutory authorities, the Theatre Owner shall indemnify RIMT for the loss arising out of such confiscation (Clause17)

8. Clause 18 states that RIMT will provide adequate technical support on a timely basis, provide software upgrades to QCT

9. CLAUSES 19 (C) and 20 of the Letter of Undertaking state thAT on termination of the Agreement, the Theatre owner shall return the Equipment to RIMT

6. Ld. AR contended that the above aspects would show that the customers / theatre owners do not have right of possession over the equipment as it has never become the property of the theatre owners at any point of time. The appellant can take repossession of the goods. Therefore, the supply of the goods is without transfer of right of possession. As regards effective control, the above clauses in the agreement would show that the appellant who is the owner of the Digital Projector System, supplies, installs and maintains the equipment for use only for a limited purpose by the theatre owners subject to the terms and conditions of the agreement. Only if the customer agrees to the terms and conditions they are given the right to use. The customer cannot rectify errors and cannot sell the equipment to another person. This makes it clear that the right of effective control is also not transferred by the appellant. That the activities would thus fall well within the ambit of supply of tangible goods and the demand raised is legal and proper.

7. Heard both sides.

8.1 The issue that comes up for appellate decision is whether the activities of supply of equipment would fall within the ambit of supply of tangible goods or not. In the present case, the appellants contend that the transaction would not fall within the supply of tangible goods for the reason that the appellant has transferred possession as well as effective control of the equipment.

8.2 The definition of supply of tangible goods is as follows:-

> "Taxable services 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 the effective control of such machinery, equipment and appliances"

From the above definition, when there is supply of use of equipment without transferring right of possession and effective control of the equipment, the same would fall within the category of supply of tangible goods service. The department contends that the theatre owners do not have any right of possession of the equipment and that the appellants have not transferred the right of possession. That since the appellant has retained certain rights and also put down conditions that the theatre owners shall ensure that the appliances connected to the VSAT remains switched on all times that is 24 hours a day in order to enable the appellant to have access to the QCP would amount to retaining the effective control over the equipment. In the decision of G.S. Lamba & Sons Vs. State of Andhra Pradesh (supra), the Hon'ble High Court has summarized the meaning and transfer of possession as well as retaining effective control over machinery. The relevant portion of the decision is as under:-

> "30. From the judicial decisions, the settled essential requirement of a transaction for transfer of the right to use goods are : (i) it is not the transfer of the property in goods, but it is the right to use 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 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; (iii) in the transaction for the transfer of the right to use goods, delivery of 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; and (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, licences etc., vests in the lessee.."

8.3 Following the said decision, we are of the view that the activity carried out by the appellant, involving supply of tangible goods for use, since such supply also involves transfer of right of possession and effective control of such goods, the said activity would not fall under "supply of tangible goods" service. Moreover, the appellant has furnished documents which show that the said user fee collected is assessed under the VAT Act. The levy of VAT and service tax being mutually exclusive, the demand is not sustainable on this ground also. The demand raised and related penalties will therefore require to be set aside which we hereby do.

9. The second issue in the appeal is regarding disallowance of credit on input services. Various input services which were disallowed are detailed above. The ld. counsel has fairly conceded that the appellants are not eligible for the credit

availed on the club services. The demand made on this count is therefore maintained. The other impugned services are all availed by the appellants prior to 1.4.2011. The definition of input services during the impugned period had a wide ambit as it included all the activities relating to business. There are various decisions of the Tribunal as well as the High Courts which have held the above activities to be eligible for credit. Therefore, we hold that the disallowance of credit on the impugned services except club services are eligible for credit. The related penalties imposed in this issue are also set aside in consequence.

10. In the result, the impugned order is modified to the extent of setting aside the demand and imposition of penalties in respect of supply of tangible goods service and also setting aside the demand and imposition of penalties in respect of credit availed on input services other than club services. The appeals are disposed of in the above terms, with consequential relief, if any.

(Operative portion of the order was pronounced in open court)

Sulekha Beevi

(Madhu Mohan Damodhar)
Member (Technical)

(Sulekha Beevi C.S.)
Member (Judicial)

Rex

Customs, Excise & Service Tax Appellate Tribunal

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सहायक पंजीकार / Assistant Registrar
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