

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE
TRIBUNAL,
SOUTH ZONAL BENCH, CHENNAI
COURT HALL No. III**

SERVICE TAX APPEAL No. 41366 OF 2014

(Arising out of Order-in-Original No.03/2014(ST) dt. 27.03.2014 passed by Commissioner of Central Excise, Chennai III Commissionerate, 26/1, Mahatma Gandhi Road, Nungambakkam, Chennai-600 034)

M/s.Taneja Aerospace and Aviation Ltd. Appellant

Belagondapalli Village, Thally Road,
Denkanikottai Taluka, Dist. Krishnagiri,
Tamil Nadu-635 114

Versus

The Commissioner of GST & Central Excise ...Respondent

Chennai Outer Commissionerate,
Newery Towers, No.2054, I Block, II Avenue,
12th Main Road,
Anna Nagar,
Chennai 600 040.

APPEARANCE :

Mr. S. Durairaj, Advocate
For the Appellant

Ms. M. Ambe, Deputy Commissioner (A.R)
For the Respondent

CORAM :

**HON'BLE MS. SULEKHA BEEVI C.S., MEMBER (JUDICIAL)
HON'BLE MR. VASA SESHAGIRI RAO, MEMBER (TECHNICAL)**

**DATE OF HEARING : 14.08.2023
DATE OF DECISION :13.02.2024**

FINAL ORDER No.40155/2024

ORDER : Per Ms. SULEKHA BEEVI, C.S.

Brief facts are that appellant M/s.Taneja Aerospace and Aviation Ltd. are holders of central excise registration for the manufacture of light weight air craft and its parts. They have registered for providing

services in the nature of Business Auxiliary Service, Maintenance and Repair service, Commercial Training or Coaching service, Technical Inspection and Certification Agency service. On scrutiny of the records of the appellant, it was noticed by the department that the appellant had entered into a lease agreement with the foreign company namely M/s. Cessna Financial Corporation, Kansas, USA on 11.12.2007 to acquire CESSNA make air craft on lease, based on the conditions agreed between them. The air craft was leased for a term of 120 months commencing from the date of delivery and the appellant had to pay monthly rental payments in accordance with the agreement. It was noted that as per the lease agreement, the air craft has to be returned to the lessor on termination of lease and the appellant has only operational control. The ownership and title has not been transferred to the appellant who has been permitted only to use the air craft on payment of monthly rent. The department was of the view that since there was no transfer of possession and effective control of the air craft to the appellant, the activity attracts levy of service tax under "Supply of Tangible Goods service". A show cause notice dt. 02.08.2013 was issued for the period May 2008 to January 2013 proposing to demand service tax under the category of "Supply of Tangible Goods service" along with interest and for imposing penalties. After due process of law, the original authority confirmed the demand along with interest and imposed penalty under Section 77, 78 of the Finance Act,

1994. Aggrieved by such order, the appellant is now before the Tribunal.

2. Ld. Counsel Sri S. Durairaj appeared and argued for the appellant. It is submitted by the learned counsel that the demand cannot sustain for the reason that the show cause notice does not invoke the correct provisions of law. Section 65 (105) (zzzzj) which defines "Supply of Tangible Goods Service" is applicable only for the period upto 30.06.2012. After such date, the Finance Act, 1994 has been amended and the classification of services has been discarded. With effect from 01.07.2012, as per Section 65B (44) a definition was introduced for 'service'. Further, w.e.f 01.07.2012, the transactions of nature of transfer of goods by way of leasing without transfer of right to use goods is a 'declared service' under Section 66E(f). However, in the show cause notice, the provisions pertaining to the negative list regime (after 01.07.2012) has not been invoked at all. Both the show cause notice and impugned order has not considered the provisions of Section 65B (44) read with Section 66E (f). It is also argued by the learned counsel that show cause notice is deficient with regard to details of the allegations as to how the demand has been raised. In cases of lease, where the transaction is in the nature of right to use goods it is a deemed sale and levy of service tax is excluded. The Hon'ble Apex Court in the case of *Bharat Sanchar Nigam Ltd. (BSNL) Vs Union of India* – 2006 (2) STR 161 (SC) has laid down certain factors

to determine whether a transaction involves transfer of right to use goods. This was affirmed by the Board as per clarification circular No.198/8/2016-ST dt. 17.08.2016. These factors have not been considered in the SCN and the impugned order. The Ld. Counsel asserted that from perusal of the agreement itself, it can be seen that the transaction is in the nature of right to use goods and would not attract levy of service tax under "Supply of Tangible Goods Service". The demand cannot sustain as the SCN itself is deficient and bereft of details.

3. Ld. Counsel submitted that from 2008-09 onwards, the appellant started providing air craft chartering service and they have paid service tax for such services. For chartering service, they acquired an air craft on dry lease basis from US. The appellant is liable to pay rent on monthly basis. It is alleged that being a lease without transfer of possession and effective control and as the lessor is a non-resident who does not have an office in India, the appellant, being the service recipient has to pay service tax under reverse charge mechanism on the rentals paid to lessor. The department has proceeded to demand service tax alleging that there is no transfer of ownership and title and that the appellant does not have any effective control over the air craft. The terms of the agreement were adverted to by the learned counsel to argue that the demand has been confirmed on misconception of facts and law. It is the appellant who has to take the insurance risk for

loss, obtain license and registration, pay duties and taxes, do regular repairs and maintenance of air craft, inspection and overhaul of air craft engines, employ all the crew of the air craft etc. The lease is a dry lease which involves supply of air craft without crew. Thus the lease in effect is a transfer of right to use goods. The adjudicating authority has wrongly concluded that the activities carried out by the appellant do not confer any special right of possession, title and effective control of leased air craft.

4. The Ld. Counsel submitted that the issue is no more *res integra* in view of the decision of the Tribunal in the case of *Blue Dart Aviation Ltd. Vs CST Chennai* – 2018 (9) TMI 1721-CESTAT CHENNAI and in the case of *Heligo Charters Pvt. Ltd. VS CST Mumbai* – 2017 (8) TMI 637-CESTAT MUMBAI.

5. Ld. Counsel argued on the ground of limitation also. It is submitted that the appellant has not suppressed any facts and there was no intention to evade payment of service tax. Being a Public Limited Company all the transactions are duly reflected in their audited financial statements. The issue is purely interpretational in nature which has been decided in favour of the assessee in many cases. Therefore, the penalties cannot be imposed and extended period cannot be invoked.

6. The Ld. A.R Sri M. Ambe appeared for the Department and supported the findings in the impugned order. It is submitted by the Ld A.R that there is only temporary use of the air craft by appellant and is also paying monthly rentals. Merely because the crew was not supplied along with air craft, it cannot be said that the transaction does not fall within the ambit of "Supply of Tangible Goods Service". Ld. A.R prayed that the appeal may be dismissed.

7. Heard both sides.

8. The issue is whether the appellant is liable to pay service tax under "Supply of Tangible Goods Service" for the period May 2008 to January 2013. For better appreciation, the definition of "Supply of Tangible Goods Service" under Section 65 (105) (zzzzj) as it stood prior to 01.07.2012 is reproduced as under :

"taxable event is providing service to any person, by any other person in relation to supply of tangible goods including machinery, equipment and appliances for use, without transferring right of possession and effective control of such machinery, equipment and appliances".

9. The adjudicating authority has held that there is no transfer of possession and effective control of the air craft to the appellant and therefore would fall within the definition. To analyse this aspect, the relevant provisions of the agreement is examined and reproduced as under :

"7. INSURANCE.

(a) Hull and Liability Insurance. LESSEE shall, at LESSEE's expense, secure and maintain in effect throughout the term of this Lease, as a minimum, hull and liability insurance coverage ("Hull and Liability Insurance") on the Aircraft as follows :

(i) Bodily Injury and Death Liability (including Passengers) and Property Damage Liability ("Liability Insurance")
\$25,000,000.00 Single Limit

(ii) Hull insurance ("Hull Insurance") shall be in an amount at all times that is not less than the Stipulated Loss Value at the beginning of each policy period as determined by reference to Annex C to this Lease.

(iii) All Hull and Liability Insurance shall be written in the name of OWNER and LESSEE shall name OWNER a sole loss payee and as an additional insured and shall provide for at least thirty (30) days prior written notice to OWNER of any modification or cancellation. Hull Insurance shall be all risk ground and flight, include a breach of warranty endorsement in favor of OWNER and provide coverage for foreign object damage and war and confiscation risk. All Hull and Liability Insurance shall be written by insurance companies and with terms (including, without limitation, maximum deductibles) acceptable to OWNER and shall provide for all claims and proceeds to be payable exclusively in U.S. Dollars."

.. ...

9. ISIGNIA. LESSEE may affix to the Aircraft any proper insignia designed by LESSEE to indicate the same is being used in the business of LESSEE. At the expiration or termination of this Lease, LESSEE agrees at its expense to remove any insignia, sign or lettering and to restore the paint of the Aircraft so as to put it as nearly as possible in the same condition as it was on the Delivery Date. Failure of LESSEE to so remove such insignia, sign or lettering shall make LESSEE liable to OWNER for the cost of such removal, which cost LESSEE agrees to pay to OWNER upon demand. Any such insignia, sign or lettering while the aircraft is registered in India shall be as per the guidelines issued under Aircraft Rules, 1937 or by the DGCA."

10. From the agreement, it is seen that it is a dry lease agreement and the crew is not supplied along with the air craft. The aircraft is

delivered to appellant and is in the lawful possession of appellant. The entire staff / crew of the air craft is employed by the appellant and the air craft is also operated as per the registrations and licenses applied and issued to the appellant. It cannot be then said that the possession and effective control is not transferred to the appellant. Thus for the period prior to 01.07.2012, the transaction does not fall within the definition of 'Supply of Tangible Goods'. After 01.07.2012, changes have been effected in the service tax law and all services falling under 'declared service' (66B) is subject to levy of service tax. Under sub-section (44) of Section 65B *'an activity which constitutes merely (i) a transfer of the title in goods or immovable property, by way of sale, gift or any other manner or such transfer, delivery or supply of any goods which is deemed to be a sale within the meaning of clause (29A) of Article 36 of the Constitution or (ii) a transaction in money or actionable claim'* is outside the purview of levy of service. The analysis of the definition of 'service' will show that transfer, delivery/supply of goods which is deemed to be 'sale' within meaning of clause (29A) of Article 366 of the Constitution is outside the ambit of the definition. Clause (29A) of Article 366 of the Constitution of India defines the 'deemed sale' as under :

(29A) "tax on the sale or purchase of good " includes-

(a) a tax on the transfer otherwise than in pursuance of a contract, of property in any goods for cash, deferred payment or other valuable consideration;

(b) a tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract;

(c) a tax on the delivery of goods on hire-purchase or any system of payment by instalments;

(d) a tax on the transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;

(e) a tax on the supply of goods by any unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration;

(f) a tax on the supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (whether or not intoxicating), where such supply or service, is for cash, deferred payment or other valuable consideration,

and such transfer, delivery or supply of any goods shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply and a purchase of those goods by the person to whom such transfer, delivery or supply is made."

11. The above would specify the nature of transactions to which tax for sale/purchase of goods would be attracted. Section 66E of the Finance Act, 1994 deals with the concept of declared services. Clause (f) to Section 66E states that 'transfer of goods by way of hiring, leasing, licensing or in any such manner without transfer or right to use such goods' is a declared service. It means a lease agreement

which does not have the character of transfer of right to use goods is taxable service. The Hon'ble Apex Court in the case of *Bharat Sanchar Nigam Ltd. Vs UOI 2006 (2) STR 161 (SC)* has laid down certain factors to test whether a transaction is a pure lease or a lease in the nature of right to use of goods (deemed sale). The Board vide circular dated 17.08.2016 has issued instructions adopting the same. Relevant part of Board circular reads as under :

"2. The matter has been examined. I am directed to draw your attention to the fact that in any given case involving hiring, leasing or licensing of goods, it is essential to determine whether, in terms of the contract, there is a transfer of the right to use the goods. Further, the Supreme Court in the case of *Bharat Sanchar Nigam Limited v. Union of India*, reported in [2006 \(2\) S.T.R. 161](#) (S.C.), had laid down the following criteria to determine whether a transaction involves transfer of the right to use goods, namely, -

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

3.1 This criteria must invariably be followed and applied to cases involving hiring, leasing or licensing of goods. The terms of the contract must be studied carefully vis-a-vis the criteria laid down by the Supreme Court in order to determine whether service tax liability will arise in a given case. It is not possible to either give an exhaustive list of illustrations or judgements on this

issue. Cases decided under the Sales Tax/VAT legislations have to be considered against the background of those particular legislative provisions and terms of contract in that case.”

12. The agreement reveals that the transfer of right to use goods involves transfer of possession and effective control over such goods. In the present case, the possession of the aircraft is transferred to the appellant who has taken delivery of the same. So also, the air craft is operated by the crew employed by the appellant. Appellant has to undertake maintenance and repair of the air craft and has to take insurance for the risk of loss etc. These would go to show that the effective control over such goods is also transferred to the appellant. On examination of the above, it can be seen that the transaction before us satisfies all the above criteria. The nature of the lease is therefore a transaction involving transfer of right to use goods and is not subject to levy of service tax.

13. The very same issue was decided by the Tribunal in the case of *Blue Dart Aviation* (supra). Relevant paragraph of the decision reads as under :

“8.1 Taking into account these aspects and also the other terms of agreement brought to our attention by the Ld. Sr. Advocate, in particular, the operation of the aircraft with the personnel of the appellant themselves, requirement of maintenance of aircraft by the appellants etc., we have no doubt in our mind that the lease agreement between EAT and the appellant is one wherein the right of possession and control of the aircraft has been bestowed on the appellant and not retained with the lessor. This being so,

the ingredients of “Supply of Tangible Goods Service” requiring exigibility to service tax by the Finance Act, 1994 are not present in this transaction. In consequence, the monetary consideration paid by the appellants to EAT cannot be considered as value of “Supply of Tangible Goods Service” and tax demanded on the same as has been done in the impugned orders.

14. In the above case, the period prior and after 01.07.2012 has been considered. Similarly, in the case of *Heligo Charters Pvt. Ltd.* (supra) the Tribunal had occasion to consider the demand of service tax on lease agreement of helicopter. In the said case, the assessee was responsible for maintenance of the helicopter as per the DGCA regulations by qualified engineers so as to keep the helicopters always in airworthy conditions and also engage experienced and licensed air crew for operating the helicopters. The department was of the view that legal right of possession and effective control over the helicopters during the lease period was not with the assessee. The demand was under BSS. Department was of the view that since helicopters are infrastructure for the assessee’s business, the demand was made under ‘Business Support Service’. After analysing the agreement, the Tribunal held that leasing of the helicopters involves transfer of right to use goods (deemed sale) and the demand of service tax cannot be sustained. Relevant paragraphs read as under :

“8. The Appellant are engaged in the business of providing helicopters on charterhire basis to their clients in Oil and Natural Gas industry in India, which, besides providing helicopters to the client, also involves (i) maintenance of the helicopters during the period of charter hire as per the DGCAs regulations by

qualified engineers engaged by them so as to keep the helicopters always in airworthy condition; (ii) employing qualified and licensed crew for operating the helicopters and (iii) operating the helicopters for providing air transportation for the clients personnel and cargo as per their requirement. There is no dispute about the taxability of these services being provided by the appellant to their clients in India and service tax is being paid by the Appellant by treating this activity as supply of tangible goods for use without transfer of right of possession and effective control, which during the period prior to 1.7.2012 was taxable under Section 65 (105) (zzzzj) of the Finance Act, 1994 and during period w.e.f. 1.7.2012 is taxable as a declared service under Section 66E of the Act. For providing this service to their clients in India, the Appellant have taken on lease two helicopters from the two foreign lessors ADA, Abu Dhabi and BLFIL, Ireland. Though in terms of Appellants lease agreement with ADA, the Appellant had option to hire flight and maintenance crew also from the lessor (ADA) along with the helicopter, there is no dispute that the Appellant have not exercised this option and from both the foreign lessors ADA, Abu Dhabi and BLFIL, Ireland, they have received helicopters without any operating or maintenance persons. In other words, both the helicopters have been taken by the Appellant from the foreign lessors on dry lease basis. The main point of dispute is as to whether this leasing of the helicopters by the Appellant on dry lease basis from ADA and BLFIL for use in their business is a taxable service (business support service) under Finance Act, 1994 or is deemed sale under Art 366 (29A)(d) of the Constitution of India and Section 5(2) read with Section 2(g) of the Central Sales Tax Act, 1956 and, hence, outside the purview of Service Tax. According to the Department, from the 'lease agreements', it is evident that this not a mere case of transfer of right to use, as the helicopters construe infrastructure of the Appellants area of business/commerce and, hence, the foreign lessors by supplying this infrastructure to the Appellant, have provided infrastructure support service to the Appellant, which is taxable as support services of business or commerce under Section 65 (105) (zzzzq) read with sections 65(104c) of the Finance Act, 1994 during period prior to 1.7.2012 and as taxable service not covered by negative list during period w.e.f. 1.7.2012. It is on this basis, that the Commissioner, in the impugned order, has confirmed service tax demands totaling ₹ 18,84,25,686/- against the Appellant under Section 73(1) of the Act along with interest on it under Section 75 of the Act and imposed penalties totaling ₹ 6,34,01,884 (Rs.4,94,65,906/- + ₹ 1,38,95,978/- + ₹ 40,000/-) under Section 76/78 and 77 of the Act. The Appellants contention, on the other hand, is that since leasing of helicopters from the two overseas lessors involves transfer of right to use

from the lessors to the Appellant during the period of lease and since this fact stands accepted by the Department, a fact which is clear from the Commissioners findings in Para 25 of the impugned order, these transactions are deemed sale under Art 366 (29A)(d) of the Constitution and Section 5(2) read with Section 2(g) of the Central Sales Tax Act, 1956 and, hence, these transactions, whether during the period prior to 1.7.2012 or thereafter, are outside the purview of Service Tax under Finance Act, 1994. Before coming to the question as to which of the two rival contentions is correct, it would be worthwhile to go through the legal provisions and the judgments of the Tribunal in this regard.

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16. A transaction of supply of some tangible goods by a person to another person for some consideration which involved transfer of right of possession and effective control over the goods/transfer of right to use the goods could be subjected to Service Tax under any of taxable service in the Act during the period prior to 1.7.2012 when there was no definition of "Service" in the Finance Act, 1994 and only the Services defined in various clauses of Section 65(105) of the Act could be subjected to Service Tax. The clause (zzzzj) covered "supply of tangible goods for use without transfer of possession and effective control over the goods". In this regard, in case of **Petronet LNG Ltd. Vs Commissioner of Service Tax, New Delhi**, decided by the Tribunal vide Final order No. 58076/2013 dated 24.10.2013 reported as **2013-TIOL-1700-CESTAC-DEL**, and which also pertains to the period prior to 01.7.2012, the Appellant had chartered three LNG carrier vessels from a consortium of owners located overseas under three time charter agreements. The relevant clauses of the time charter agreements were as under:

- (i) *All applicable licenses, permits, approvals, authorizations including Admiralty Publications etc., necessary for safe navigation and use of the LNG carrier vessels were to be provided by the owners to the Appellant (M/s Petronet LNG Ltd.).*
- (ii) *Appointment of the Manager, Master and other crew of the vessels shall be made by the owners to the satisfaction of M/s Petronet LNG and these personnel on board the vessel shall work under the instructions of the Appellant.*
- (iii) *Owners of the vessels were to pay the wages of the crew and also bear expenses for provisions, insurance of the vessel, cost of licenses,*

maintenance repair and overhead cost, dry docking cost etc.

(iv) The owners were to obtain and maintain marine and war risk insurance for the vessels with the Appellants name co-assured.

(v) Master and the crew operating the vessels were required to work under direct control and instructions of the Appellant and the Appellant was authorized to issue directions to the Master for transportation of LNG to any part of the World.

(vi) The Appellant would exercise control over the vessel through the Master, other officers and the crew. The Master shall follow the orders and directions issued by the Appellant for the purpose of filing bills of lading by signing the same.

(vii) The Appellant would control the Vessels by issuing appropriate instructions and sailing directions to the Master and the Master is required to maintain a log of the voyage which the Appellant and their agent may inspect as and when required.

The main point of dispute in this case was whether the Appellants time charter agreements with the consortium of owners with the above mentioned terms and conditions, represented supply of tangible goods (LNG Carrier Vessels) by the owners located abroad to the Appellant without transfer of right of possession and effective control and hence taxable under Section 65 (105) (zzzzj) of the Finance Act, 1994. The Department was of the view that these time charter agreements represented supply of tangible goods from the owners located abroad without transfer of right to use and hence the Appellant would be liable to pay Service Tax under reverse charge. The Tribunal in this case, in Para 13 of its judgment, held that supply of tangible goods involving transfer of right of possession and effective control of the goods is outside the purview of the taxable service defined under Section 65 (105) (zzzzj), that such exclusion is consistent with the Constitutional limitation upon the legislative field of the Parliament, that post 46th Amendment to the Constitution and introduction of Article 366 (29A(d)), transfer of right to use goods is a deemed sale falling within the purview of the legislative field of State Governments to tax the deemed sale as Sale and that power to tax what is a deemed sale as service is outside the legislative field of the Parliament. Thus the ratio of this judgment is that during period prior to 01.07.2012, when Service Tax was leviable only on certain services defined in various clauses of section 65(105)

of the finance Act, 1994 and when Clause (zzzzj) of Section 65 (105) covered supply of tangible goods for use without transfer of right of possession and effective control a transaction of supply of tangible goods by a person to another person which involved transfer of right of possession and effective control, being a deemed sale under Article 366(29A)(d) of the Constitution, could not be taxed as "Service".

... ..

18. Thus, the key question to be decided in this case is as to whether the lease of helicopters by the Appellant from the two lessors located overseas involves transfer of right of possession and effective control over the goods/transfer of right to use the goods from the lessors to the lessee. We find that in this regard in the SCN dated 12.10.2012, Para 3 mentions the relevant terms and conditions of the Appellants lease agreement with M/s BLFIL, Ireland and Para 4 of the SCN mentions the relevant terms and conditions of the Appellants lease agreement with M/s ADA, Abu Dhabi. At the end of Para 4, the SCN states as under:

"It appears that legal right of possession and effective control over the helicopters is with M/s HCPL in terms of the above agreements"

Thus the SCN dated 12.10.2012 itself on the basis of the terms and conditions of the agreements, forms the tentative view that the Appellants lease agreements with foreign lessors involve transfer of right of effective possession and control over the helicopters to the Appellant during the period of lease. It is this view expressed in Para 4 of the SCN dated 12.10.2012 which has been confirmed by the Commissioner in Para 25 of the impugned order giving the following findings:

"It is clear that legal right of possession and effective control over the helicopters is with M/s HCPL in terms of the above agreement."

15. After appreciating the facts and following the decisions (supra), we are of the view that the demand cannot sustain and requires to be set aside, which we hereby do. Appeal is allowed with consequential relief, if any.

(Pronounced in court on 13.02.2024)

sd/-

(VASA SESHAGIRI RAO)
Member (Technical)

sd/-

(SULEKHA BEEVI C.S.)
Member (Judicial)

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