CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

NEW DELHI

PRINCIPAL BENCH- COURT NO. I

Service Tax Appeal No. 50920 of 2018

(Arising out of Order-in-Original No. DLI SVTAX 002 COM 0291617 dated 02.12.2016 passed by the Commissioner of Service Tax, Delhi-II.)

M/s. B. Ghose & Co. Pvt. Ltd. **...Appellant**
19/1, Camac Street, Calcutta-700017

versus

The Commissioner of Service Tax, **...Respondent**
Delhi-II,
5th Floor, 14-15, Farm Bhawan,
Nehru Place, New Delhi-110019

APPEARANCE:

Shri Gurdeep Singh and Shri Anil Kumar, Advocates for the Appellant
Shri Manoj Kumar, Authorised Representative of the Department

CORAM:

HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MS. HEMAMBIKA R. PRIYA, MEMBER (TECHNICAL)

Date of Hearing/Decision: 28.01.2025

FINAL ORDER NO. 50259/2025

JUSTICE DILIP GUPTA

The order dated 28.11.2016 passed by the Commissioner of Service Tax, Delhi-II[1], adjudicating two show cause notices dated 18.4.2012 and 17.10.2012 has been assailed in this appeal that has been filed by M/s B. Ghose & Company Pvt. Ltd[2]. In respect of the first show cause notice issued to the appellant for the period 2006-2011, the Commissioner has confirmed the service tax demand of Rs. 2,82,98,156/- with interest and penalty after invoking the extended period of limitation under the proviso to section 73 (1) of the Finance

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1. the Commissioner
2. the appellant

Act, 1994[3]. In respect of second show cause notice dated 17.10.2012 issued to the appellant for the period 2011-12, the Commissioner has confirmed the demand of service tax amounting to Rs. 82,51,187/- with interest and penalty based on best judgment assessment under section 72 of the Finance Act.

2. The issue involved in this appeal hinges around the two agreements entered into between the appellant and Container Corporation of India Ltd[4]. The first agreement is for performing the work of terminal handling of containers at Inland Container Depot, Tughlakabad, New Delhi. The case of the department is that the appellant rendered "cargo handling" service, while the case of the appellant is that it rendered "supply of tangible goods" service. The second agreement is for cargo handling operation in relation to export and import cargo. The case of the appellant is that for handling export cargo, service tax is not leviable, while the case of the department is that no evidence was led by the appellant to substantiate that it had rendered "cargo handling" service for export cargo.

FIRST AGREEMENT

3. The appellant entered into an agreement dated 03.08.2007 with CONCOR for performing the work of terminal handling of containers at Inland Container Depot, Tughlakabad, New Delhi at the rates and conditions specified in the Schedule to the agreement. The Schedule of rates for container handling operation, as contained in Annexure-II to the agreement, are reproduced below:

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3. the Finance Act
4. CONCOR

Schedule Of Rates For Container Handling Operation AT ICD, Tughlakabad			
(RATE REACHSTACKER/MONTH)			
S. No.	**Item of Work**	**In Figures**	**In Words**
1.	Hiring of Two Loaded Reachstacker for round the Clock operation subject to condition of availability as laid in Chapter-5	Rs. 8,00,000/- (Per Reachstacker)	Rs. Eight Lakhs Only
2.	Hiring of One Empty Reachstacker for round the Clock Operation, as laid down in Chapter-V	Rs. 4,50,000/- (Per Reachstacker)	Rs. Four Lakhs Fifty Thousand Only
Notes: Rates quoted above are exclusive of Service Tax & applicable cess thereupon, if any.			

4. The terms and conditions are contained in Chapter V to the agreement. The relevant portions of the agreement are reproduced below:

> **"1. Preamble**
>
> 1.1 xxx xxx xxx. **The contractor to be appointed shall be the Terminal Operator contractor responsible for handling of containers at ICD, Tughlakabad as per the details given in Chapter IV on "Scope of Work"**.
>
> **DUTIES AND RESPONSIBILITIES OF CONTRACTOR**
>
> **9.1 The Terminal Operator must own or have at his disposal the requisite trained personnel for his contractual work and the requisite number of equipment like Reachstackers etc as described below**:
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> **9.2 The contractor shall provide adequate number of trained supervisors** (at least 3 supervisors and 1 overall in-charge per 8 hour shift), **handling equipment operators, drivers, helpers and other workers at all the desired operational points at ICD, Tughlakabad to ensure proper handling and timely movement of containers, including performance of incidental and general services, expeditiously and to the satisfaction of CONCOR officials.** The Terminal-in-charge shall have the final say in the matter. All staff to be deployed will

have to have police verification since the ICD is a bonded area.

9.3 The Terminal Operator shall provide, at his own cost, all workers and other employees with necessary tools, safety helmets, shoes, jackets, instruments, equipment, etc. for effective and efficient discharge of the work contemplated in the contract. Necessary inventory for consumables and certain critical components of handling equipment should also be provided by him at ICD, TKD so that the work is not hampered at the terminal.

9.4 The TO will be required to keep its workshop area in the premises neat and clean in all respects.

9.5 The contractor shall give his employees neat and clean uniforms for summer and winter seasons at no extra cost to CONCOR and ensure that all his employees wear laminated Photo-Identity Cards issued by him/CONCOR at contractor's cost. He shall also provide office equipment, communication equipment, etc., as prescribed by CONCOR from time to time for efficient execution of the work.

9.6 The official-in-charge of the ICD, shall be at liberty to object to and require the TO to remove forthwith from the premises any person employed by him if, in opinion of ICD incharge, such person misconducts himself, is incompetent or negligent in proper performance of his duties or whose employment is otherwise considered undesirable. The decision of incharge shall be unquestionable and final and the TO shall be under obligation, to replace such a person.

9.7 All workers and/or personnel employed by the TO shall be engaged by him as his own employees / workmen in all respects implied or expressed. It will be compulsory on the part of the TO to insure all his employees, permanent or temporary, against liabilities of accident, partial or full disability, death, etc. The TO shall indemnify CONCOR against liabilities arising out of the TO's obligations on this account.

11. SPECIFIC RESPONSIBILITIES FOR CONTAINER HANDLING

11.1 The TO shall exercise due care and take all precautions while handling containers to avoid any damage or loss to the container or cargo at any stage. TO shall be responsible for the safety of containers and cargo while they are in his custody. CONCOR shall be at liberty to take action under Paragraph 21 below i.e. Unsatisfactory Performance and forfeit the security deposit in terms of Para 5 above, if he fails in his responsibilities in looking after the containers and cargo in his custody.

11.2 T.O. shall also ensure proper closure of doors of the containers at the time of stacking/loading/shifting. He will also ensure to keep all the handling equipment at the nominated place after completion of work. In case of any failure to do so will attract penalty under clause 21 of unsatisfactory performance.

11.3 The contractor shall provide necessary modern equipment for communication of voice and data, as prescribed by CONCOR from time to time, to his supervisors and employees for ensuring efficiency of operations.

11.4 The TO will also maintain various records in computerised atmosphere and will provide reports to CONCOR in both soft and hard copy format as and when required.

11.5 The TO shall abide by all the rules, procedures, directions and instructions given by CONCOR officials, which are not inconsistent with the terms and conditions of the contract, for the efficient working of the terminal.

11.6 The TO shall not carry out any direct business dealing with any customer of CONCOR without prior approval of CONCOR. TO shall not receive, handle, any container/cargo within the terminal for any customer of CONCOR directly.

11.7 The actual requirement of equipment described in para 14 will depend upon the pattern

and volume of traffic and may vary from time to time. The TO will be required to position additional handling equipment, whenever necessary due to exigencies of traffic upon being notified to do so by CONCOR, within 2 months of the receipt of such notice.

11.8 CONCOR shall not pay any additional amount for any expenses which the TO may be required/ compelled to incur while crossing any gate, manned by Customs/CISF/Security agencies of any type.

11.9 CONCOR transports 'exim' containers in bonded state. It is responsible to the Customs for the safety of 'exim' cargo during transit and has to furnish a 'continuity bond' of an appropriate amount to the Customs. The contractor will be liable for the element of Customs duty also for any loss or damage to the cargo while the loaded container is in his custody.

11.10 ICD TKD has a local area network (LAN) for transfer and updation of data for maintaining and monitoring of container status on a real time basis. The contractor should be able to deploy suitable staff for data entry operation for the work carried out by the contractor, **if desired by CONCOR.**

11.11 The contractor shall be liable for all acts of commission or omission of his employees. He shall forthwith discharge any of his employee who is reported by CONCOR to be undisciplined or of poor moral character or incompetent or negligent.”

12. PROVISION OF HANDLING EQUIPMENT:

12.1 The Contractor shall ensure that he deploys the specified/required serviceable machinery and plant including handling equipment and equipment of good working condition and manufacturing year as detailed in para 14 below at the Container Terminal for execution of the proposed work and the handling equipments as required in para 14 should be owned/hired by him as noted thereby. The Contractor should also make necessary arrangements for stand by equipment against mechanical & other failures to ensure that the work does not suffer. The arrangements for servicing the equipment for dealing with breakdowns etc., should also be made by him.

12.2 In the event of a breakdown of the equipment required as per the contract, CONCOR will be free to hire equipment and at rates available in the market and deduct charges from the handling bill of the Contractor, if the Contractor is unable to arrange for repair of broken down equipment by a provision of a stand by in a reasonable time, which will be the sole discretion of the official in charge of the terminal. The official in charge of the terminal shall have the right to impose penalty as it may find suitable if the breakdown equipment is not restored in suitable time frame.

12.3 All equipment shall be in good fettle and capable of handling ISO containers in accordance with relevant ISO standards stipulated for container handling.

12.4 Contractor shall obtain the required licence for operation of the equipments from the authorities concerned and ensure that these are operated by experienced and qualified operators, as per requirement of the local transport and other authorities and law.

12.5 The Contractor shall make arrangements for positioning of adequate equipment and trained personnel before the commencement of operations as per the contract.

12.6 The Contractor shall pay (& bear) all levies, fees, taxes and charges etc. to the appropriate authorities and other bodies as required by them, under their rules for cranes/equipment etc., employees or workers engaged by him. No claim in this behalf shall be entertained by CONCOR.

12.7 No compensation will be paid for non use or detention of equipments.

12.8 Equipment deployed are not to be used for any other purpose without the written permission of the Terminal Incharge. Any violation on this account will attract a penalty of Rs.1000/- on each occasion.

12.9 The Contractor will be required to base equipments at TUGHLAKABAD and to start the work. The job orders for start of the work will be given by the Terminal Incharge.

13. DEPLOYMENT OF EQUIPMENTS:

13.1 The contractor shall ensure that he deploys 2 (two) Loaded Reach Stackers +01 (One) Empty Reach Stacker not older than 2002 model (year of manufacture) in good working condition. The bidder should provide evidence of having required equipments at his disposal either through ownership or hiring/leasing as mentioned in the para no.14. He must indicate the place of its current deployment as on the date of bid to enable CONCOR to ascertain the same. The contractor should also indicate arrangements for hiring/leasing of equipments, which are not owned by him. **The contractor should also make necessary arrangements for standby equipments against mechanical and other failures to ensure that the work does not suffer.** The arrangements for servicing the equipment dealing with breakdowns etc., should also be made by him. Contractor should also indicate in the tender documents as to how, where and within what time frame, the required Reach stackers will be positioned for operations at ICD.

13.2 Delivery Schedule: The delivery schedule will be as follows:

Two (2) Loaded Reach Stackers & One (01) Empty Reach Stacker should be made available fully operational simultaneously within 15 days from the date of execution of contract or the date stipulated by the Chief General Manager/Northern Region, whichever is later. During the first 120 days of the issue of LOI, all equipments may be hired. However, the tenderer must deploy his own reachstackers in fulfillment of the conditions of ownership stipulated in para 14.1 within 120 days of the issue of LOI. In case, the equipment is not fully operational within the days stipulated above, penalty in the form of Rs.15,000/-per day per reach stacker. CONCOR also reserves the right to cancel the contract altogether in case the equipments to be supplied have not been made available on time.

"15.3 Moves Per Hour:

The Reach stacker is expected to do a minimum of 12 (Twelve) moves per working hour. If the number of moves is less than the number of moves per hour mentioned above (calculated on a per shift basis after deduction of the cooling down time and time for any preventive maintenance/ exigency breakdown granted), then the availability of the Reach Stackers will be reduced proportionately for which penalty as laid down in para 15.2 above will be deductible from the bills, unless sufficient work has not been assigned in that shift, towards which the operations in charge of the shift will endorse the situation in his records, to be produced for verification by concerned accounts official for passing the bills. 'In case one machine has been able to perform at less than the stipulated moves per hour in a shift but this has been compensated by more than stipulated moves per hour by another machine in the same shift or even by same machine in a subsequent shift, the extra moves done can be adjusted against the shortfall in a particular machine as long as the overall average performance remains above stipulated moves per working hour per day.'

All arrangements for operations and maintenance inclusive of fuel and lubricants, operators, other requisite personnel, maintenance and repairs etc. shall be made by Contractor at his own cost."

(emphasis supplied)

SECOND AGREEMENT

5. The appellant also entered into an agreement dated 10.11.2003 with CONCOR for undertaking cargo handling operations at ICD, Tughlakabad. This agreement relates to performing work of loading/unloading of export/import cargo and its stuffing/de-stuffing from freight containers at the rates and under the conditions specified

in the Schedule to the agreement. The Schedule provides different rates for handling export cargo and import cargo.

FACTS

6. The appellant claims that while performing work of terminal handling of containers at ICD, Tughlakabad, it provided "supply of tangible goods"[5] service, which was made taxable under section 65(105)(zzzzj) of the Finance Act with effect from 16.05.2008 and it discharged service tax liable under this service head from 16.05.2008. According to the department, the appellant rendered "cargo handling" services, as defined under section 65(23) of the Finance Act and made taxable under section 65(105)(zr) of the Finance Act with effect from 16.05.2008 . The appellant contends that it did not discharge service tax on the handling of export cargo as this service is not taxable, but it discharged service tax on the handling of import cargo as it is taxable.

7. The first show cause notice dated 18.04.2012 was issued to the appellant for the period 2006 to 2011 alleging short payment of service tax. It mentions that during the course of audit, copy of the agreement dated 03.08.2007 was provided by the appellant when it was noticed that the appellant had not paid any service tax from 2006-07 to 16.05.2008 on the amount received by the appellant under the first agreement claiming it to be non-taxable upto 16.05.2008. It also mentions that with effect from 16.05.2008, the appellant paid service tax under "supply of tangible goods" services but it appeared from the agreement that the services provided by the appellant would be classifiable under "cargo handling" services, which

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service was taxable since 16.08.2002 but the appellant had not paid due service tax under this head. In respect of the second agreement, the show cause notice mentions that during the course of audit it was observed that the appellant claimed that it had not paid service tax for handling export cargo during the period 2006-07 to 2010-11 for the reason that it was not leviable to service tax, but no evidence was led by the appellant to substantiate this claim that the appellant handled export cargo and so it should be taken that service tax was leviable on the amount so received by the appellant. It, therefore, called upon the appellant to show cause why this amount should not be subjected to levy of service tax.

8. A second show cause notice dated 17.10.2012 was also issued to the appellant for the period 2011-12 calling upon the appellant to show cause why demand of service tax relating to the first agreement and the second agreement should not be confirmed for the reason mentioned in the first show cause notice. The show cause notice further alleges that the appellant did not comply with the letters and summons and as the only information available was regarding the amount billed by the appellant during the period 2006-07 to 2010-11, the value of taxable service provided by the appellant would be determined by "best judgment assessment" under section 72 of the Finance Act.

9. The appellant filed replies to the show cause notices and denied the allegations. The appellant pointed out that reach stackers were used by the appellant for lifting and placing containers and the amount that was received by the appellant was for hiring of reach stackers and not for handling cargo. The appellant, therefore,

provided supply of "tangible goods" service, which service became taxable from 16.05.2008, and the appellant discharged service tax liability for this service with effect from 16.05.2008. The appellant also pointed out that service tax was not payable on unloading and loading of export cargo and, therefore, the appellant did not pay any service tax as "export cargo" did not fall within the definition of "cargo handling" service. The appellant also pointed out that the extended period of limitation could not have been invoked in the facts and circumstances of the case.

10. The Commissioner did not accept the version of the appellant and confirmed the demand of service tax with penalty and interest.

11. In regard to the first agreement, the Commissioner observed as follows:

> **"12.4 On carefully sifting through the terms of reference given in the said contract dated 03.08.2007, I find that the CONCOR, inter-alia, manages and operates Inland Container Depot (ICD), Tughlakabad (TKD), and the contractor to be appointed shall be the Terminal Operator contractor responsible for handling of containers at ICD, TKD.** The Noticee being a terminal operator contractor is required to undertake handling operation of loading and unloading of containers at the location adjoining export/import/bonded warehouse/rail side/ import stacks/export stacks and new HMS yard. For carrying out the contractual work the Noticee is under obligation to have required number of equipment like reach stackers etc, and adequate trained number of personnel like supervisors, handling equipment operators, drivers, helpers and other workers at the operational points. In addition, a responsibility has been cast upon them to make alternate arrangement of the requisite equipment against sudden mechanical failure to ensure that the contractual work does not suffer, and if they are unable to make such

arrangement, CONCOR is free to arrange the same at its own. **Thus, services provided or to be provided by the Noticee under the said contract are in nature of cargo handling service rather than mere supply of tangible goods service.** Moreover, for classifying any service under "Supply of Tangible Goods Service', the ingredients to be satisfied are that the goods including machinery, equipment etc are supplied by the service provider to the service recipients for his use without giving him the legal right of possession and effective control of such items. **In this case, the Noticee not only using the reach stackers with trained driver for providing the services of handling of the containers but also they have to deploy other trained personnel like supervisors, handling equipment operators, helpers and other workers to effectuate the handling operations of the containers at operational points.** Thus, it is not the case of merely supplying the tangible goods i.e. reach stackers, along with driver to the CONCOR by the Noticee. Rather the Noticee is engaged in contractual work of handling of the containers at ICDs with wherewithal and logistics they have in their possession. **Therefore, I have no hesitation in holding that the contractual work for handling of the containers under the said contract appropriately falls under 'Cargo Handling Service' as they specifically deal with loading, unloading, stuffing and de-stuffing of cargo and lifting and placing containers etc. and not within the domain of 'Supply of Tangible Goods Service' as claimed by the Noticee.** Accordingly, I hold that the Noticee is liable to pay service tax under the Cargo Handling Service for the period covered by SCN-I & II."

(emphasis supplied)

12. In respect of the second agreement, the Commissioner recorded the following findings:

"13.1 The next issue for determination is that whether the income received from activity claiming to be from handling of export cargo without any supporting documents is exigible to tax. The SCN-I alleges that though the definition of Cargo Handling Service excludes activity relating to export cargo but the Noticee could not provide evidence thereof. Therefore, service tax demand of Rs.1,39,86,381/-for the period 2006-07 to 2010-11 has been raised against the Noticee. For subsequent period 2011-12, service tax demand of Rs.35,25,460/- has also been issued vide SCN-II dated 18.10.2012.

13.2 In this context, I find that the definition of Cargo Handling Service defined under erstwhile Section 65(23) of the Finance Act, 1994 excludes the activities of handling of export cargo. Factually the Noticee did not provide any evidence in course of audit for the amount received during the period 2006-07 to 2010-11 from the CONCOR evidencing that it was on account of services relating to handling of export cargo. The submissions made by the Noticee in this regard are noteworthy which are re-produced below:

> "We hired Reach stackers to CONCOR. Besides that, we stuffed and de-stuffed export and import cargo that landed in CONCOR's premises. **CONCOR refused to pay service tax on some stuffing and destuffing of cargo on the ground that these were export cargo whose handling was not leviable to service tax. So, we did not pay service tax on them. We paid service tax on the remaining amount which we received for stuffing and destuffing of cargo and which CONCOR paid us presumably on the ground that these were import cargo whose handling was leviable to service tax. That CONCOR did not pay service tax to us in many cases would be evident from the bills.** From the bills it would also be evident that these cases related to the handling of export cargo because there cannot be any other explanation for payment of service tax in some cases and non-payment of service tax in others. **Copies of some bills and payment schedules are attached.**

> During EA-2000 Audit, the Auditors asked us to produce a certificate from CONCOR to show that the amounts on which we did not pay service tax were received for handling export cargo. Unfortunately, CONCOR has not issued the desired certificate, despite repeated requests. **We are still trying to procure the certificate from CONCOR, and we will produce the same to you as soon as we get it".**

13.3 It is needless to state that any taxable service provided or to be provided is real time and intangible in nature. Therefore, the nature of provision of service can be ascertained based on the documentary evidences of the service providers like invoices, ledger and the the books of accounts maintained and audited by their statutory auditor. The above submissions insinuate that the Noticee was not at all aware as to what cargo (whether import cargo or export cargo), they had been handling to at the time of provision of service during the period in question let alone issuing the service wise invoices for such cargo handling services. That was probably the reason for not producing the relevant documents including the invoices at the time of audit and still the Noticee is beholden to CONCOR for such documents. **Therefore, few of the invoices now produced to buttess their case being not free from suspicion considering the peculiarity of the circumstances cannot be taken at its face due.** The Supreme Court in the case of **M/s Mysore Metal Industries Vs. CC, Bombay - 1988(36)ELT 369 (SC) has held that** burden to prove eligibility to exemption is on the claimant. Therefore, I am of the considered view that the Noticee has miserably failed in establishing that the said amount received by them from CONCOR are related to handling of export cargo. Accordingly, I hold that the Noticee is liable to pay service tax as demanded."

(emphasis supplied)

13. This appeal has been filed to assail this order dated 28.11.2016 passed by the Commissioner.

14. Shri Gurdeep Singh, learned counsel for the appellant assisted by Shri Anil Kumar made the following submissions:

(i) It is clear from the first agreement dated 03.08.2007 that the appellant provided "supply of tangible goods" service, which service became taxable under section 65(105)(zzzzj) of the Finance Act with effect from 16.05.2008 and the appellant discharged service tax liability under this service head;

(ii) The Commissioner committed an error in holding that the appellant provided "cargo handling" service as defined under section 65(23) of the Finance Act and made taxable under section 65(105) (zr) of the Finance Act;

(iii) In respect of the second agreement relating to cargo handling operations at ICD, Tughlakabad, no service tax is leviable on handling of export cargo. The appellant provided services relating to handling of both export cargo and import cargo and the appellant duly discharged service tax on the services relating to handling of import cargo. As no service tax was leviable on handling of export cargo, the appellant was justified in not discharging service tax liability on this service;

(iv) The Commissioner committed an error in holding that the appellant had not provided evidence to support its stand that it had provided services relating to handling of export cargo, for which it had not discharged service tax; and

(v) The extended period of limitation could not have been invoked in the facts and circumstance of the case.

15. Shri Manoj Kumar, learned authorized representative appearing for the department, supported the impugned order and made the following submissions:

(i) The Commissioner was justified in holding that in respect of the first agreement relating to performing work of terminal handling of containers, the appellant had provided "cargo handling" service and the submission of the appellant that "supply of tangible goods" service was provided is not correct;

(ii) The appellant failed to produce any evidence to substantiate that in respect of the second agreement that it provided services relating to handling of export cargo and, therefore, the Commissioner was justified in treating the service as taxable; and

(iii) The extended period of limitation was correctly invoked.

16. The submissions advanced by learned counsel for the appellant and the learned authorized representative appearing for the department have been considered.

First Agreement dated 03.08.2007-Terminal Handling

17. The issue that arises for consideration is as to whether the appellant had provided "supply of tangible goods" services or "cargo handing" services to CONCOR.

18. Section 65(105)(zzzzj) of the Finance Act provides that 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 effective control of such machinery, equipments and appliances would be taxable.

19. For the purpose of clarification, the Department of Revenue issued a Circular dated 29 February, 2008. The said Circular clarified the applicability of section 65(105)(zzzzj) vis-a-vis article 366(29A)(d) of the Constitution. The relevant portions of the Circular are as follows:

> "4.4 SUPPLY OF TANGIBLE GOODS FOR USE:
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> 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.
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> 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.**
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> 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."
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> (emphasis supplied)

20. It is not the case of the appellant or the department that the reach stackers were transferred by the appellant to CONCOR with a right of possession and effective control for in that case it would be a deemed sale. What the appellant contends is that it rendered "supply of tangible goods" services, while the department contends that the appellant rendered "cargo handling" services.

21. It would be appropriate to refer to the judgment of the Supreme Court in **Commissioner of Service Tax, Ahmedabad** vs. **Adani Gas Ltd.**[6] dealing with "supply of tangible goods" service. The Supreme Court interpreted the provisions of section 65(105)(zzzzj) of the Finance Act and observed:

> "12. **The question that arises for our consideration is whether Section 65(105)(zzzzj) of the Finance Act, 1994 is applicable in the present case, that is, whether the supply of pipes and measurement equipment (SKID equipment), charged under the head of "gas connection charges" by the respondent to its industrial, commercial and domestic consumers, amounts to supply of tangible goods for their use.** While assessing the merits of the rival submissions, it is

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necessary to interpret the provisions of Section 65(105)(zzzzj).

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18. **The introduction of Section 65(105)(zzzzj) in the Finance Act, 1994, was with the intention of taxing such activities that enable the customer's use of the service provider's goods without transfer of the right of possession and effective control.** This provision creates an element of taxation over a service, as opposed to a 'deemed sale' under Article 366(29A)(d).

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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.

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26. **Under Section 65(105)(zzzzj), the taxable service is provided or to be provided in relation to the supply of tangible goods for the use of**

another, without transferring the right of possession and effective control.

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27. **The expression "use" does not have a fixed meaning.** The content of the expression must be based on the context in which the expression is adopted. The use of an article may or may not result in a visible change in its form or substance. Moreover, the nature of use is conditioned by the kind of article which is put to use. Section 65(105) of the Finance Act, 1994 envisages myriad interpretations of the expression "use", in a variety of services such as telecommunication [Section 65(105)(zzzzb), Finance Act, 1994], renting of immovable property [Section 65(105)(zzz-z), Finance Act, 1994], and services related to art, entertainment, and marriage [Section 65(105)(zzzzr), Finance Act, 1994]. In the case of some articles, use may be signified by a physical operation of the article by the person who uses it. In such a case, actual physical use is what is meant by the supply of the goods for the use of another. In the case of others, the nature of the goods supplied impacts the character of the use to which the goods can be put. As an illustration, Section 65(105)(zzzze) of the Finance Act, 1994, seeks to tax services related to information technology and interprets the "right to use" to include the "right to reproduce, distribute, sell, etc. [Circular D.O.F. No. 334/1/2008-TRU, dated 29 February, 2008]". **This understanding** of "use" differs from the supply of tangible goods under Section 65(105)(zzzzj) at hand, where effective control or possession is not ceded. Thus, physical operation is not the only or invariable feature of use. As a corollary to the same, technical expertise over the goods in question is not a sine qua non for determining the ability of the consumer to use the goods. **Therefore, the expression "use" also signifies the application of the goods for the purpose for which they have been supplied under the terms of a contract.**

28. **The terms of the GSA indicate that the supply, installation, maintenance and repair of the measurement equipment is exclusively**

> **entrusted to the respondent as the seller.** xxxxxxxxxx. Section 65(105)(zzzzj) applies precisely in a situation where the use of the goods by a person is not accompanied by control and possession. 'Use' in the context of SKID equipment postulates the utilization of the equipment for the purpose of fulfilling the purpose of the contract. Section 65(105)(zzzzj) does not require exclusivity of use. The SKID equipment is an intrinsic element of the service which is provided by the respondent, acting pursuant to the GSA, as a supplier of natural gas to its buyers.
>
> xxxxxxxxx
>
> 30. **Thus, we are of the view that the supply of the pipelines and the measurement equipment (SKID equipment) by the respondent, was of use to the customers and is taxable under Section 65(105)(zzzzj) of the Finance Act, 1994.**"
>
> **(emphasis supplied)**

22. The judgment of the Bombay High Court in **Indian National Shipowners' Association and Anr.** vs. **Union of India and Others**[7] also examined the provisions of section 65(105)(zzzzj) of the Finance Act and this judgment was referred to by the Supreme Court in **Adani Gas**. The observations of the Bombay High Court are as follows:

> "38. Entry (zzzzj) is entirely a new entry. Whereas Entry (zzzy) covers services provided to any person in relation to mining of mineral, oil or gas, services covered by Entry (zzzzj) can be identified by the presence of two characteristics namely (a) supply of tangible goods including machinery, equipment and appliances for use, (b) there is no transfer of right of possession and effective control of such machinery, equipment and appliances. **According to the members of the 1st petitioner, they supply offshore support vessels to carry out jobs like anchor handling, towing of vessels, supply to rig**

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7. 2009 (14) S.T.R. 289 (Bom.)

> **or platform, diving support, fire fighting etc. Their marine construction barges support offshore construction, provide accommodation, crane support and stoppage area on main deck or equipment. Their harbour tugs are deployed for piloting big vessels in and out of the harbour and for husbanding main fleet. They give vessels on time charter basis to oil and gas producers to carry out offshore exploration and production activities. The right of possession and effective control of such machinery, equipment and appliances is not parted with. […]"**
>
> **(emphasis supplied)**

23. The first agreement, when considered in the light of the aforesaid judgment of the Supreme Court in **Adani Gas**, the judgment of the Bombay High Court in **Indian National Shipowners' Association** and the Circular dated 29.02.2008 of the Department of Revenue would leave no manner of doubt that the appellant rendered "supply of tangible goods" service and not "cargo handing" service.

24. The agreement, it is seen, is for performing the work of handling of containers at ICD, Tughlakabad at the rates and conditions specified in the Schedule annexed to the agreement. The rate Schedule clearly shows that an amount of Rs. 8 lakhs is to be paid to the appellant towards hiring of each of the two loaded reach stackers for round the clock operation, and Rs. 4.50 lakhs for hiring of one empty reach stacker for round the clock operation. It is, therefore, clear that CONCOR hired two loaded reach stackers and one empty reach stacker, for which the appellant was to receive consideration in terms of money. The rate schedule does not refer to handling of cargo at all and indeed could not have, as the agreement

is for providing reach stackers to CONCOR. The duties and responsibilities of the appellant contained in the agreement also leave no manner of doubt that the appellant was providing "tangible supply of goods" service to CONCOR. They provide that the appellant must have his own requisite trained personnel and requisite number of reach stackers for performance of the contract; have the necessary inventory for consumables and critical components required for handling the reach stacker; exercise due care and take all precautions while handling containers to avoid any damage or loss to the container; to ensure proper closure of doors of the containers at the time of stacking/loading/shifting; ensure deployment of specified serviceable machinery and plant for execution of the proposed work; ensure that two loaded reach stackers and one empty reach stacker are deployed in good working condition; and that the reach stackers should be able to carry out minimum of twelve moves per working hour taking which a penalty could be imposed upon the appellant. The aforesaid terms of the agreement clearly show that the appellant rendered "supply of tangible goods" service to CONCOR.

Second Agreement dated 10.11.2003 - Cargo Handling

25. The issue that arises for consideration in regard to the second agreement is as to whether the appellant was justified in not paying service tax for handling operations in respect of export cargo.

26. It is not in dispute that the Schedule to the agreement provides for different rates for handling import cargo and export cargo. The appellant contents that it paid service tax for handling of import cargo but did not pay service tax for handling of export cargo for the reason that this does not fall in the definition of cargo handling. The

Commissioner has not accepted the contention of the appellant for the reason that the appellant did not provide any evidence and, therefore, could not establish that the amount received by the appellant from CONCOR related to handling of export cargo. According to the appellant, CONCOR did not pay service tax to the appellant on handling of export cargo and the appellant also did not pay service tax, though it paid service tax for handing of import cargo.

27. Learned counsel for the appellant pointed out that the second agreement was executed on 10.11.2003 and was terminated on 18.08.2011. Learned counsel also placed reliance upon a certificate issued by a Chartered Accountant for each Financial Year bifurcating the amount received for handling import cargo and export cargo. Learned counsel also submitted that the extended period of limitation for confirming the demand in respect of the second agreement could not have been invoked as the appellant had not suppressed any material facts from the department, much less with an intention to evade payment of service tax.

28. Learned authorized representative appearing for the department, however, submitted that the Commissioner was justified in confirming the demand of service tax for the reason that the appellant failed to substantiate that the amount was received by the appellant was towards handling of export cargo. Learned authorized representative also submitted that the extended period of limitation was correctly invoked.

29. The submissions advanced by the learned counsel for the appellant and the learned authorized representative appearing for the department have been considered.

30. The Certificate of the Chartered Accountant placed by the learned counsel for the appellant is dated 06.10.2023 and, therefore, was not submitted by the appellant before the Commissioner. The said Certificate is reproduced below:

> M/s. B. Ghose & Co. Pvt. Ltd. ["Company"] was registered with the Service Tax Department [vide Registration No. AABCB1936CST001] under 'Cargo Handling Service' falling under Section 65(105)(zr) of the Finance Act, 1994.
>
> **That we have been specifically requested by the Company to verify the service tax payable/paid on handling of import and export of cargo during the period 2006-07 to 2011-12.**
>
> **In this regard, we have verified the Books of Accounts, Service Tax Returns, Invoices, agreement executed with Container Corporation of India Limited** [**"CONCOR"**] [i.e., Agreement for Acting as Contractor for Cargo Handling Operations at Inland Container Depot, Tughlakabad for Container Corporation of India Limited] [**"Agreement"**] dated **10.11.2003 and other relevant records, accounts and documents.**
>
> That on a perusal of these documents and the relevant provisions applicable during the concerned period, we hereby certify the following:
>
> (i) That the Company had duly paid service tax on handling of import cargo in view of the definition of "Cargo Handling Service" as provided under Section 65(23) of the Finance Act, 1994.; and
>
> **(ii) That the Company has not paid any service tax on handling export cargo as it is not liable to pay the same during**

the period 2006-07 to 2011-12, in view of the specific definition of 'Cargo Handling Service' as provided under Section 65(23) of the Finance Act, 1994.

(iii) **That the Amount shown in Exports is the amount received towards Handling of Export cargo and not amount billed.**

(iv) That due to inadvertent mistake export amount was missed in the returns of year 2011-12 and the company via letter dated 10.10.2012, Ref-C.No. DL-II/ST/R-XI/SCN/B. Ghose & Co./98/2012/1136 has shown the export amount to the Department.

We have also given the tabular presentation of the details of cargo handling services (both import and export), which is enclosed with this certificate and marked as Annexure - A.

This certificate has been issued at the specific request of the Company for the submitting before the Hon'ble CESTAT, New Delhi and is not meant for general circulation.

xxxxxxxxxx
Chartered Accountant

(emphasis supplied)

Anexure-A

Year	Particular for cargo handling services	Amount Received	Tax paid/payable
2006-07	Import	6,10,01,143.00	73,09,385.00
	Export	3,83,69,910.00	NIL
2007-08	Import	5,36,27,883.00	66,16,858.00
	Export	3,17,51,441.00	NIL
2008-09	Import	4,53,14,867.00	56,00,950.00
	Export	2,33,51,497.00	NIL
2009-10	Import	4,86,72,367.00	50,68,047.00
	Export	1,15,85,890.00	NIL
2010-11	Import	4,32,10,695.00	44,83,496.00
	Export	77,34,458.00	NIL
2011-12	Import	1,35,38,984.00	13,94,519.00
	Export	31,52,390.00	NIL

31. The aforesaid chart clearly bifurcates the amount received by the appellant for handling of import cargo as also export cargo. This apart, as can be seen from the second agreement also the charges to be paid to the appellant for handling of import cargo and export cargo are different.

32. It is, therefore, a fit case where the matter needs to be remanded to the adjudicating authority to examine the levy of service tax on handling of export cargo afresh after providing an opportunity to the appellant to substantiate what was contended by the appellant in reply to the show cause notice, namely that it had handled export cargo also. The appellant may provides such evidence to the adjudicating authority within a period of six weeks from today. The adjudicating authority shall examine the evidence, if submitted. The appellant may also substantiate its submission that the extended period of limitation could not have been invoked in so far as this service is concerned.

Conclusion

33. Thus, for the reasons stated above, the confirmation of demand of service tax on "cargo handling" service in respect to the first agreement is set aside. However, with respect to the service tax demand confirmed for handling of export cargo, the matter is remitted to the adjudicating authority to pass a fresh order in the light of the observations made above.

Order

34. The appeal is, accordingly, allowed in part. The order dated 28.11.2016 passed by the Commissioner confirming the demand of service tax on "cargo handling" service in respect of the first

agreement is set aside. The appellant is at liberty to substantiate its claim in regard to the second agreement by submitting evidence within six weeks. The demand proposed in the show cause notice for handling of export cargo shall be examined afresh by the Commissioner after submission of evidence, if any in the light of the observations made above.

(Order dictated in the Open Court)

(JUSTICE DILIP GUPTA)
PRESIDENT

(HEMAMBIKA R. PRIYA)
MEMBER (TECHNICAL)

Shenaj, Jyoti