

**IN THE CUSTOMS, EXCISE AND SERVICE TAX
APPELLATE TRIBUNAL, NEW DELHI
PRINCIPAL BENCH, COURT NO. I**

**Date of Hearing: 01.08.2018
Date of Decision: 04.02.2019**

Appeal No. ST/50019/2014-DB

[Arising out of Order-in-Original No. OIO-JAI-EXCUS-001-COM-057-13-14 dated 01/10/2013 passed by Commissioner of Central Excise-JAIPUR-I (Appeal)]

Compucom Software Ltd

Appellants

Vs.

C.C.E. & S.T.-Jaipur-i

Respondent

Appearance:

Shri Bipin Garg, Advocate for the Appellants

Shri Sanjay Jain, AR for the Respondent

CORAM:

Hon'ble Shri Anil Choudhary, Member (Judicial)

Hon'ble Shri C.L. Mahar, Member (Technical)

FINAL ORDER NO. 50167/2019

Per Anil Choudhary:

1. The appeal is against Order dated 1.10.2013 of Commissioner, Central Excise, Jaipur-I. The appellant is the holder of the service tax registration no. AAACG5818PST002 for provision of various services, i.e., Manpower Recruitment Agency, Renting of Immovable Property, Online Information and Data Base Access/Retrieval, Business Auxiliary Service, Franchisee Services and Commercial Training and Coaching service. The dispute in the present appeal relates to service tax liability under the category of 'Supply of Tangible Goods' service with reference to leasing by way of supply, installation, commissioning and maintenance of new computer system, peripherals and provision of one IT Assistant and consumables in 568 units under the Department of Education, Government of NCT, Delhi. The revenue

entertained a view that the appellant had provided services under the category of 'Supply of Tangible Goods' in terms of Section 65(105)(zzzzj) of Finance Act, 1994 and were held liable to pay service tax. The proceedings initiated vide show cause notice C no. V(H) Adj-I/ST/11/2012/729 dated 23.5.2012 culminated in the impugned order. The Adjudicating Authority concluded that the appellant was providing services under the category of 'Supply of Tangible Goods' and were liable to pay service tax. Service tax liability of Rs. 1,24,52,639/- was confirmed against the appellant. Equal penalty was imposed under Section 78 of Finance Act, 1994. Penalty was also imposed under Section 77 of Act *ibid*.

2. The learned Counsel for the appellant contested the impugned order on the ground that even though the ownership of computers still rested with the appellant, the legal right of possession and effective control was actually handed over to the Lessee. Therefore, said activity of supply and installation of the computers and accessories along with legal right of possession and effective control to Lessee was not covered under the category of 'Supply of Tangible Goods'.
3. Further, contesting the impugned order on limitation, *Id.* Counsel submitted that the activity was duly reflected in the appellant's annual reports/balance sheet and also on the Bombay Stock Exchange for the years 2008-09, 2009-10 and 2010-11. When the information was duly contained in public domain such as audit reports and balance sheet, the appellant could not be charged with suppression of facts and extended period of limitation was not available to the department for raising demand. In such a situation, suppression, willful mis-statement with intention to evade tax cannot be alleged by the department. Further, he also submitted that being

registered with the service tax department for payment of service tax and tax demand, if any, to be paid in respect of present dispute, could be offset by availment of credit under Cenvat Credit Rules, 2004. Hence there is no motive not to pay tax in this case.

4. Ld. AR contested the grounds of appeal. According to revenue, appellant is covered under the 'Supply of Tangible Goods' as the –

- i) Appellant had not sold but supplied computers etc. under the project. Ownership still remained with the appellant. Lease rent of equipment was paid by Lessee.
- ii) Claim for depreciation showed that the goods were still the property of the appellant and right of possession had not been transferred.
- iii) Payment was linked to satisfactory supply, installation and commissioning of the complete system and other infrastructure.
- iv) Statement of DGM admitting that company still remained the owner of goods so leased.
- v) Invoices show that no VAT or Sales Tax had been charged by appellant in respect of transaction.
- vi) Agreement provides for imposition of penalties in cases involving defective computer and during absence of IT Assistant.

5. We have heard both the sides and perused the appeal records.

6. Regarding ownership of the equipment, furniture etc. which was installed at sites, the pertinent facts for consideration are:

- a) Whether possession and effective control was actually transferred by appellant

b) Whether the present leasing activity falls outside the scope of Section 65(105)(zzzzj) of Finance Act, 1994

7. In this connection, a reference is required to be made to terms and conditions of the agreement. It is seen that clause 14 of agreement specifies that appellant shall not remove at their discretion/will any of the assets supplied and installed by the appellant, without the concurrence of the unit in-charges. On the other hand, the Lessee could direct the appellant to re-assign equipment from one place to another. As per clause 12(e), the Director of Education, Government of Delhi, could direct the appellant to transfer the computers and other hardware along with IT Assistant for implementation of the program from one unit to another site. Besides, the appellant has submitted a number of certificates issued by Principals and Vice-Principals of government schools in support of their claim that the hardware and computers supplied by the appellant was leased out with the right to possession and effective control. This way, the appellant is not permitted to lien, mortgage etc. any of the computers whose physical possession has already been given to Lessee. However, schools do have a right to move computers at will. Thus, Lessee had deep and pervasive control over the computers installed within their premises. We are of the opinion that the ownership having remained vested in the name of the appellant certainly cannot lead to drawing inference that the effective possession and control of equipment installed by appellant has already been passed on to respective schools. Further, after completion of the term of 49 months (contract period), the ownership would still lie with the appellant alone. Besides, the definition nowhere specifies that in order to ensure that the possession and effective control of computers has been passed on to the

Lessee, the ownership of the said equipment would also be passed on to the Lessee along with the computers. If such was the intention of the statute-makers, the provision relating to transfer of ownership would certainly have been inserted in the definition of the said category of service. While interpreting the statutory provisions, reliance has to be placed on the plain language of the statute and no word/phrase can be added or subtracted from the language of the statute.

8. The statute should be interpreted on its face, without adding, subtracting or omitting words therefrom, where the language is plain and unambiguous. The interpreting authority is not entitled to go behind the language employed in statute so as to add or supply omissions. In the case of *Commissioner of Customs (Import) Mumbai Vs. Dilip Kumar & Co.* [2018(361)ELT 577 (SC)], it was held:

"19. *The well-settled principle is that when the words in a statute are clear, plain and unambiguous and only one meaning can be inferred, the Courts are bound to give effect to the said meaning irrespective of consequences. If the words in the statute are plain and unambiguous, it becomes necessary to expound those words in their natural and ordinary sense. The words used declare the intention of the Legislature. In Kanai Lal Sur v. Paramnidhi Sadhukhan, AIR 1957 SC 907, it was held that if the words used are capable of one construction only then it would not be open to the Courts to adopt any other hypothetical construction on the ground that such construction is more consistent with the alleged object and policy of the Act.*

20. *In applying rule of plain meaning any hardship and inconvenience cannot be the basis to alter the meaning to the language employed by the legislation. This is especially so in fiscal statutes and penal statutes. Nevertheless, if the plain language results in absurdity, the Court is entitled to determine the meaning of the word in the context in which it is used keeping in view the legislative purpose [Assistant Commissioner, Gadag Sub-Division, Gadag v. MathapathiBasavannewwa, 1995 (6) SCC 355]. Not only that, if the plain construction leads to anomaly and absurdity, the Court having regard to the hardship and consequences that flow from such a provision can even explain the true intention of the legislation. Having observed general principles applicable to statutory interpretation, it is now time to consider rules of interpretation with respect to taxation."*

9. In view of the facts stated above coupled with the ratio of the judgment cited supra it would be inappropriate that the concept of import of "transfer of the ownership of the equipment to the Lessee to ensure that possession and effective control of the equipment has been passed on to the Lessee" into the definition of the category of services, viz., 'Supply of Tangible Goods'. The thrust of statute under reference is on the right of transfer to use the goods. During such handovers, ownership rights may not be transferred to the transferee, as in the case of outright sale of goods. But the important fact is that the possession and effective control of the equipment has been passed on to the Lessee. Since ownership continues to vest with the appellant, depreciation under the Income Tax Act has been rightly claimed by them. Both the equipment and the Assistant are bound by

directions and instructions issued by the Lessee covering every relevant aspect of their functional responsibilities and their services are terminable by the Lessee in case of misconduct. Therefore, exclusionary clause applies under the facts and circumstances of the present case.

10. Clause 1(a) of agreement stipulated that IT Assistant would work under the direct supervision and overall control of the Head of Unit and will do all computer-related works as desired by the Head of the Units. Thus, he is placed under direct command of site in-charge who is a representative of Lessee. Appointment of Assistant does not in any manner derogate from the fact that the transaction does not constitute 'Supply of Tangible Goods', including possession and effective control of computers. There are several other clauses in the agreement which disclose that the Assistant is to function and operate strictly in terms of detailed instruction, guidelines and directions issued or to be issued by the Lessee in terms of the authority of the Lessee to do so. The Assistant cannot take leave from work without prior sanction of the Head of Unit. Any absence mandates imposition of penalty. Revenue has nowhere proved that the Assistant would be working under the direction and control of the appellant. Both the equipment and the Assistant worked under the direct physical possession and effective control of the Lessee. Assistant was deployed for keeping leased assets in perfect working condition. No separate cost was charged for it. Such transfer was exclusively made to the Lessee and this way, appellant was dissuaded from transferring same right to any other person. This shows that possession and effective control had been passed to Lessee by the appellant. This fulfills requirements of exclusion clause and the liability of tax is offset.

11. Plain reading of the agreement, makes it clear that the appellant is supplying the computers to client in which absolute possession over the computers is with the Lessee. Besides, deputing an Assistant does not in any way dilute such absolute possession. The statute definition *ibid* is very clear to the effect that for tax liability, 'Supply of Tangible Goods' should be without transfer of right of possession and effective control of such computers. This clause in the contract cannot be considered to be in derogation of the taxation, which clearly amounts to transfer of right to use computers in favor of Lessee. We find that in the present case, the exclusion in the tax entry shall operate as the Lessee enjoyed full control on method, manner and time of using the computers. No restriction in respect of any of these factors was ever placed by the appellant. Immediate impression of any third party was that the computers belonged to the schools where these had been installed by the appellant. During the lease period, the appellant never used these computers for their own official or personal work/use with respect to taking outputs or providing any inputs except the standard software tools required to operate the computers. These computers were exclusively used by schools and Department of Education, Government of Delhi and not by the appellant. In fact, appellant had no control over the manner or duration of such usage of computers by schools or Director of Education. Possession and ownership need not go together always
12. Delivery of physical possession of computers is a *sine qua non* for executing contract and to qualify for transfer of right to use computers, such transfer was exclusively made to the Lessee. This way, appellant was dissuaded from transferring this right to others.
13. We find that Board Circular F. No. 334/1/2008-TRU, dated 29-2-2008,

while explaining the introduction of service of supply of Tangible Goods, state that :

4.4 Supply of tangible goods for use:

4.4.1. Transfer of the right to use any goods is leviable to sales tax/VAT as deemed sale of goods [Article 366(29A)(d) of the Constitution of India]. Transfer of right to use involves transfer of both possession and control of the goods to the use of the goods.

4.4.2 Excavators, wheel loaders, dump trucks, crawler carriers, compaction equipment, cranes, etc., offshore construction computerss& barges, geo-technical computerss, tug and barge floatillas, rigs and high value machineries supplied for use, with no legal right of possession and effective control. Transaction of allowing another person to use the goods, without giving legal right of possession and effective control, not being treated as sale of goods, is treated as service.

4.4.3 Proposal is to levy service tax on such services provided in relation to supply of tangible goods, including machinery, equipment and appliances, for use, with no legal right of possession or effective control. Supply of tangible goods for use and leviable to VAT/Sales tax as deemed sale of goods, is not covered under the scope of the proposed service. Whether a transaction involves transfer of possession and control is a question of facts and is to be decided based on the terms of the contract and other material facts. This could be ascertainable from the fact whether or not VAT is payable or paid.

14. As a matter of fact, neither the definition given under Section 65(105)(zzzzj) nor the clarification issued by CBEC vide Circular DOF no. 334/1/2008-TRU dated 29.2.2008 specifies or mandates that for not being covered under the service of 'Supply of Tangible Goods', the service provider must have paid VAT or Sales Tax on the amount received as consideration for hiring out and transferring the equipment such as computers, in the instant case. The language of Section ibid makes it abundantly clear that for transfer of right to use the goods, ownership is not mandatorily or necessarily required to be, as provided under the provisions of Income tax law. Section 65(105)(zzzzj) of the Act is clear and admits of no ambiguity.
15. As we have allowed the appeal on merits, we have the ground to limitation open.
16. In the light of discussions above, the case of revenue fails on merits itself as questions posed in para 6 above are answered in affirmative and in favor of appellant. In view of the above discussions, we find no reason to uphold the order passed by Commissioner. Accordingly, demand of tax and penalty are not sustainable and are set aside. The appeal is allowed.

(Order pronounced in the open court on 04/02/2019)

(C. L. Mahar)
Member (Technical)

(Anil Choudhary)
Member (Judicial)

Rekha