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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ W.P.(C) 2960/2017, CM APPL. 13014/2024 (Stay), CM APPL.
16769/2024 (Amendment of Pet.), CM APPL. 25578/2024
INDIAN COMPRESSORS LTD Petitioner
Through: Mr. R.K. Sanghi, Adv.

versus

UNION OF INDIA & ORS. Respondents
Through: Mr. Kavindra Gill, SPC for
UOI
Mr. Satyakam, ASC
Mr. Raghav Sharma, Mr.
Jaskirat Singh, Adv. for R-5.
Mr. Harpreet Singh, SSC with
Ms. Suhani Mathur & Mr. Jatin
Kumar, Advs.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE RAVINDER DUDEJA

% **ORDER**
04.11.2024

1. The dispute in this writ petition pertains to the liability to pay service tax in respect of activities carried out by the petitioner during the period 2008-09 to 2014-15. The Show Cause Notices ["SCNs"] dated 24 July 2013, 15 May 2014, 05 May 2015 and 18 April 2016 seek to demand service tax for the period 2008-09 to 2014-15 treating them to be the 'supply of tangible goods' under Section 65(105)(zzzzj) the Finance Act, 1994 ["Act"].



2. The SCNs were adjudicated vide impugned order dated 28 November 2016 passed by respondent no. 2.

3. The petitioner entered into a Leasing Agreement for the supply of compressors with various companies such as Indraprastha Gas Ltd. [“**IGL**”] and M/s. Mahanagar Gas Ltd. [“**MGL**”] etc. for compression of natural gas at their outlets.

4. It has been submitted by learned counsel for the petitioner that Service Tax authorities have, contrary to the provisions of Section 65(105)(zzzzj) of the Act, held that the transactions are subject to service tax levy. It has been contended that with the handing over the possession of the equipment, effective control ceased with the petitioner and therefore, the transaction was subject to local/state service tax levy. It has been further submitted that vide order dated 20 February 2010 passed by the Deputy Commissioner of Sales Tax, the petitioner was held liable to pay Sales Tax/VAT. The petitioner has been regularly paying Sales Tax/VAT since 2005 and has also filed Annual Returns with the Sales Tax Department from time to time. It is submitted that since the petitioner is discharging appropriate Sales Tax/VAT under the respective state laws of Delhi and Maharashtra and in view of the Circular dated 29 February 2008, he is not liable to pay service tax.

5. It has also been submitted by learned counsel that the agreements executed between the petitioner and its customers involve the transfer of the right to use, right to possess and effective control. It was further submitted that the petitioner company does not retain any control or usage of compressors during the tenure of the Agreement and the petitioner’s customers can use and exploit the benefit of



compressors in whatever manner they want. Moreover, during the tenure of the Agreement, the petitioner is not entitled to transfer/sell the compressors to any other person.

6. Per contra, learned counsel for respondent no. 2 has argued that the activity in question is clearly exigible to service tax. It is submitted that the activity of the petitioner falls within the ambit of 'supply of tangible goods services' as under Section 65(105)(zzzzj) of the Act and as per which, where the services are provided in relation to 'supply of tangible goods' without right of transfer or possession and effective control of the goods so supplied, the said service would be liable to service tax. It has been stated that the services rendered by the petitioner to its customers fulfil the essential criteria to be taxable under the category of 'supply of tangible goods', since the petitioner is supplying the goods to its service receivers without giving the right of possession. Further, since the petitioner is operating the equipment, the effective control remains with the petitioner.

7. The service provided in relation to the 'supply of tangible goods', without transferring the right of possession and effective control of the said tangible goods was brought under service tax w.e.f. 16 May 2008, as per amendment in the Act with the insertion of Section 65(105)(zzzzj). As per provision contained in Section 65(105)(zzzzj) of the Act, the services provided must be 'in relation to' the 'supply of tangible goods' and 'without transferring the right of possession and effective control' of such machinery, equipment and appliances. Thus, for any service to be brought under this provision, the said service has to be in respect of tangible goods, wherein the right of possession and effective control remains with the provider of



the service.

8. Admittedly, the petitioner has entered into six agreements/contracts with (i) Gujrat Adani Energy Ltd. [“GAEL”]; (ii) Gas Authority of India Ltd. [“GAIL”]; (iii) Green Gas Ltd. (iv) IGL (v) MGL (vi) Bharat Heavy Electrical Ltd. [“BHEL”]. The question as to whether the activities undertaken by the petitioner with its customers are exigible to the service tax depends upon the intention of the parties, which can be discerned from the terms of reference given in the contracts.

9. The relevant portion of the scope of work in respect of all the six wet leasing contracts has been reproduced in paragraph 68 of the order of the Commissioner dated 28 November 2016, which is reproduced below:

“(i) Gujarat Adani Energy Ltd. (GAEL)

"Wet leasing of booster Compressors"

"...we are pleased to award you the Work Order for Wet Leasing of 2 nos. of booster compressors with 2 nos. of dispensers as per the agreements terms and conditions jointly signed by GAEL and ICM authorized signatory.

2. Contractor's Scope of work: -

- *Delivery of booster along with dispenser at M/s Neelu Motors & Mitesh near APMC CNG refueling stations.*
- *The supplier shall bear the transportation cost & octroi incurred from the suppliers end to the said destination.*
- *The supplier shall install and commission the booster compressor & dispense at his cost.*
- *The operation and maintenance of compressor as well as dispensers shall be carried out by the supplier at his cost*
- *The supplier has to ensure the availability of booster compressor for operation as per the international practices and work like a prudent and reasonable operator.*



- *Labour cost of Installation of tubing shall be borne by the supplier*
- *All electrical termination work to be done by the supplier at his cost*
- *The contractor shall manage and arrange spare parts and consumables required for O&M of booster compressor and dispenser on their cost.*

...

1. *Terms of payment. On submission of invoice duly approved by the officer-in-charge.*

(Gas Authority of India Ltd. (GAIL))

"Wet Lease of 3 (three) Nos of CNG Daughter Booster Compressors in Baroda for Gail.

...we (GAIL) are pleased to issue this firm Purchase Order on you (hereinafter referred us "Lessor") for wet leasing compressors for Blue Sky Project of GATL in the following terms & conditions:-

1.0 Brief Scope of Work

- a. Under Wet lease, supply, Installation and commissioning of 3 (three) nos. of CNG Compressors including supply and installation of the relevant equipment such as capacitor Bank, MCB, UPS etc. and supply of all types of cables and laying for commissioning of outlet at the proposed locations in Baroda.*
- b. Operation & maintenance of the CNG Compressors at lessor's own cost.*
- c. To provide adequate no. of qualified, skilled and trained engineers and technical manpower to operate and maintain the CNG Compressors and also to take necessary precautions to ensure safety of the system.*
- d. To carry out the regular preventive maintenance of CNG compressors installed as per the schedule.*
- e. All high pressure components such as pressure vessels, cylinders, tubes etc. shall be periodically tested and all pressure gauges, switches, relief valves, gas detectors etc. installed on CNG Compressors shall be periodically calibrated as per the norms by the lessor at his own cost. ...*



5.0 Taxes, Duties & levies

The unit rates indicated in enclosed Annexure-I are inclusive of all taxes & duties ***including Service Tax @ 8%*** [emphasis supplied], GAIL shall deduct Income tax at source.

8.0 Payment Terms

The lessor shall raise bills to GAIL on monthly basis and payment to the lessor shall be made within 15 days of receipt of bills. The monthly billing shall be made as per average derived slab.

For the certification of monthly bills, the lessor shall also submit a separate statement giving the station wise log book on breakdowns, non-availability of equipments for that month. This statement shall be duly signed by the SIC.

...

(iii) Green Gas Ltd.

Repeat Order for Wet leasing of 01 No of Daughter Booster Compressor for CNG & City Gas Distribution Project at Lucknow of M/s Green Gas Limited.

...the major salient terms & conditions are stated below:-

1. Price basis : Monthly wet lease basis for items to be supplied at site
2. Taxes & Duties : Included in your [ICL] scope. No statutory variation shall be admissible.
3. Price Break-up : As per enclosed Annexure-I
-
6. Payment terms : The lessor shall raise bills to GGL on monthly basis and the payment to lessor shall be made within 15 days of receipt of bills. The monthly billing shall be made as per monthly average derived slab.

(iv) Indraprastha Gas Ltd.

"Wet leasing of variable Suction Pressure Hydraulic Booster (Compressor) at CNG installation in NCR of Delhi"

Scope of work:-



(i) *You (ICL) shall supply install & Commission the booster compressor on hiring basis at the designated CNG Stations. [Emphasis supplied].*

(ii) *Operation and Maintenance: You [ICL] shall be responsible for operation & maintenance including replacement of spares and any other requirement to run the compressor. However, electrical power shall be provided and the running cost of the same shall be borne by IGL.*

(iii) *No. of Booster compressors: 18 Nos*

Terms of payment: -

100% payment on monthly basis on certification by Engineer-In-Charge on hiring of booster compressors.

....

SCHEDULE OF RATES

<i>Item No</i>	<i>Service Description</i>	<i>Net Price</i>
00010	<i>Hiring of Boosters Compressor</i>	<i>20,736,000.00INR</i>

(v) Mahanagar Gas Ltd.

"Wet leasing Contract of Daughter Booster Stations (Mahaveer, Wadibunder and Royal Auto Bhendibazar)"

Scope of work- The scope of work outlines minimum requirement for wet leasing of CNG equipments such as compressors, etc required for online CNG stations.

1. *The lessor shall provide suitable CNG equipments and accessories for CNG dispensing facility at wet leased CNG outlets...Anik Depot (Compressors), Modern Auto Services (Compressors, Dispensers & Stationary Cascades), Gujarat Service Center (Compressors, Dispensers & Stationary Cascades).*

2. *Each online station shall consist of an online CNG compressor with priority panel, storage cascade of adequate capacity and 3 dual hose dispensers. In the event of demand exceeding the installed capacity of an outlet, the lessor shall upgrade the compressor and dispensing capacity at the outlet at his own cost. Payment for wet leased services will be based on applicable rate on the total sale of that outlet.*

3. *The lessor shall operate and maintain the outlets. He shall*



ensure that adequate quantity of spares parts/consumable are stocked for smooth and normal operation of CNG station. All repairs and maintenance will be carried out by the lessor at his own cost.

4. The lessor shall provide adequate no of qualified, skilled and trained engineers and technical manpower to operate and maintain the outlet on round the clock basis. The lessor shall ensure that the staff deployed at the outlet takes all precautions to ensure safety of the system since CNG is a very high pressure and flammable gas. The lessor shall also make his own arrangements for providing sitting place for the operator at the proposed site at his own risk and expense. The manpower deployed by the lessor should be adequately trained in the fire fighting...

7. The lessor shall ensure that all the equipments supplied under wet lease are in good operating condition.....

11. The lessor shall maintain proper record of compressors operating parameters, energy meter reading and hourly gas sale through each dispensing point...

13. The lessor shall bear and pay lease tax and/or any other taxes, duties or levies as applicable from time to time and will keep MGL informed in respect of payment of said taxes, duties and levies.....

Billing and Payment: The lessor shall raise bills to MGL on monthly basis and the payment to the lessor shall be made within 15 days of receipt of bills from lessor.

(vi) Bharat Heavy Electricals Limited (Central Foundry Forge Plant, Hardwar-249403)

"...Lease agreement for setting up compressed air generating unit on "BOOM" basis ie. Built, Own, Operate & Maintain basis to feed compressed air to various shops of CFFP/BHEL/Haridwar on lease rent basis for a minimum period of 60 calendar months from the date of start of Compressed Air Supply. General Specification:-



11.2	Services	11.2.1. The services will be provided for the NCL's staff working at the BHEL site. Proof of PFMS/Service Tax deposit to be submitted prior to raising bill/invoice.
12	12.1. Indian Compressor Ltd. (M/s NCL) is scope of work	- Supply, installation, commissioning, Operation & Maintenance of compressors. - Maintenance of assembly for hot oil. Replenished when consumable at OPA's site for avoiding any waiting time in cost of any failure. - Supply and commissioning. - BHEL will not accept any other facility due to any accident/operation loss to M/s NCL's property. However, Insurance/claims. Any facility of BHEL arising due to M/s NCL's loss shall be provided/allowed being limited by the M/s BHEL to be recoverable from M/s NCL. Accordingly, M/s NCL will indemnify the Company.
14	14.1. Operator for M/s NCL	- The operator is an expert and an Engineer shall be provided for maintenance on each hour. M/s NCL will ensure availability of compressor on all 24x7 days without any interruption. - Non-availability of compressor on any occasion will be treated as non-performance of contract. - M/s NCL will maintain one individual amongst available staff to act as site in charge to co-ordinate operational problem like lubrication, hot oil, Power pressure, non-availability of operation, CSEF Supply, etc. Also for operating staff on Sunday/Holidays, Organizing operating Equipment etc. Keeping attendance record of M/s NCL's staff at BHEL, etc.
15	Insurance	M/s NCL shall without limiting it to its employer obligations and responsibilities procure and maintain an insurance required by applicable laws, rules and regulations at M/s NCL's cost.

10. Having gone through the aforesaid terms and conditions of the contracts, we find that the petitioner supplied the goods viz. compressors, boosters etc. and other related equipment and necessary manpower to operate and maintain the said equipment for the service receivers. The terms and conditions reveal that the petitioner retained possession and exercised effective control and management over such compressors etc. supplied to their customers.

11. The services rendered by the petitioner therefore fulfil the criteria to be taxable under the category of 'supply of tangible goods', since the equipment was supplied by the petitioner to the service receivers while retaining control over the equipment and without



handing over the possession to the service receivers. In this regard, the Commissioner observed as under:

“70. (a) On carefully sifting through the said agreements I find that aforesaid agreements are of wet leasing of CNG Compressors package or Daughter Booster Compressor or Suction Pressure Hydraulic Booster or Compressed Air Generating Unit and Dispensers & other related equipments. The scope of work delineated in. the above contracts show that the Noticee will not only supply, install & Commission the required number of booster compressors on hiring basis at the designated CNG Stations but they are also responsible for operation & maintenance including replacement of spares and any other requirement to run the compressor. Further, to operate and maintain the CNG Compressors it is the responsibility of the Noticee to provide adequate number of skilled and trained engineers including technical support manpower to ensure seamless operation of the outlets/machines/on! inc stations or daughter booster stations as the case may be. Thus, the Noticee was in possession and has exercised effective control over such compressors etc supplied to their customers. Therefore, there is no iota of doubt that the wet lease agreements for leasing the compressors and other equipments is a service falling under the taxable category of Supply of Tangible Goods Service. Transfer of right to use any goods is leviable to Sales Tax/VAT as deemed Sale of goods. Transfer of right to use involves transfer of both possession and control of goods to the user of goods. However, in the instant case, going through the various provisions of the agreement, it is evident that there is no transfer of right to use as features of command, domination, regulation etc. is very much in the hands of the noticee. Thus effectively, if the lessee has been provided with control of use of goods it will tantamount to transfer of right to use of goods and service tax will not be chargeable. However, in this case there is a transaction of another person to use the goods without giving legal right of. possession and effective control and hence has to be treated as service.”

12. Clause 4.4 of the Central Board of Excise & Customs, New Delhi's [**“Board”**] Circular DOF No. 334/1/2008-TRU dated 29 February 2008 is reproduced below:

“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 user of the goods.

4.4.2 Excavators, wheel loaders, dump trucks, crawler carriers.



compaction equipment, cranes, etc., offshore construction vessels & charges, 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.

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.”

13. It is manifest from Clause 4.4.3 that whether or not a particular transaction involves the transfer of possession and control is a question of fact and is to be decided based on the terms of the contract and other material facts. On the basis of the terms and conditions of the contracts, as culled out above, we have found that the activities undertaken by the petitioner fall within the definition of ‘supply of tangible goods services’ and are not a ‘deemed sale’. The petitioner may be depositing the sales tax by the orders of the Commissioner but the said order is not subject matter of challenge before us. The Board has clarified that a transaction allowing another person to use goods without giving the legal right of possession and effective control, not being a sale of goods is treated as a service and therefore the service provided by the petitioner is chargeable to service tax irrespective of payment of VAT/Sales Tax. In this regard, the Commissioner in paragraph 70(b) of the impugned order observed as under:

“(b) I find the aforesaid Circular specifically emphasizes that a particular transaction is a deemed sale or a service is a question of fact and to be decided contingent upon the terms of the contract. I have already examined, in extensor, the terms of reference of the



aforesaid contracts which clearly show that these are for Supply of Tangible Goods Service and do not come within the four corners of deemed sale. Therefore, paying of sales tax by them, suo moto does not make the said contracts to be the contracts involving deemed sale. Consequently, the reliance placed on the aforesaid circular and the laws cited in their favour are not applicable to this case. Accordingly, above plea of the Noticee having no force stands rejected.”

14. Our conclusion as recorded above would stand fortified by the reasons which we assign hereinafter. It is pertinent to note at the outset that Section 65B(44)(a) of the Act defines ‘service’ in the following terms:

“(44) “service” means any activity carried out by a person for another for consideration, and includes a declared service, but shall not include—

(a) an activity which constitutes merely,—

(i) a transfer of title in goods or immovable property, by way of sale, gift or in any other manner; or

(ii) such transfer, delivery or supply of any goods which is deemed to be a sale within the meaning of clause (29-A) of Article 366 of the Constitution; or...”

15. As is manifest from a reading of clause (ii) of Section 65B(44)(a), a taxable service would include the transfer, delivery or supply of any goods except where such transfer, delivery or supply be liable to be viewed as a deemed sale by virtue of Article 366(29-A) of the Constitution. It is this definition which informs Section 65(105)(zzzzj) and which brings to tax taxable services provided by a person to another and relating to ‘supply of tangible goods’ without transferring a right of possession and effective control of such machinery, equipment and appliances.

16. As would be evident from a reading of clause (zzzzj), the latter part of that provision excludes from its ambit ‘deemed sales’ as defined by Article 366(29-A) of the Constitution and which also includes a transfer of a ‘right to use’ goods. That provision reads as



follows:

“(366)(29A) 'tax on the sale or purchase of goods' includes,—

(a) to (c). ..

(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 ;

...

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.”

17. The ‘right to use’ and which is spoken of an Article 366(29-A) has been lucidly explained by the Supreme Court in **BSNL vs. Union of India**¹, and where Dr. A.R. Lakshmanan J. in a concurring opinion identified the ingredients of a ‘right to use’ as being the following:

“97. To constitute a transaction for the transfer of the right to use the goods, the transaction must have the following attributes:

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

17. The case of the writ petitioner essentially proceeded on the basis that since the fifth respondent, the Maharashtra Sales Tax Authority had already subjected the transactions in question to a tax treating

¹ (2006) 3 SCC 1



them to be deemed sales and involving a transfer of a 'right to use', no service tax could have been levied. It was in the aforesaid context that the petitioner appears to have placed reliance on the judgment of the Supreme Court in **Gujarat Ambuja Cements Ltd. vs. Union of India**² as well as of the Customs Excise and Service Tax Appellate Tribunal ["CESTAT"] in **Sobha Developers Ltd vs. CCE & ST**³.

19. However, from a reading of the order impugned before us, the following position emerges. After taking into account, the various contractual stipulations which governed the wet lease, the respondents in terms of the SCNs' had come to the tentative conclusion that since no 'right to use' had been transferred, the subject contracts would fall within the dragnet of Section 65(105)(zzzzj).

20. This becomes evident from a reading of paragraph 9 of the impugned order and which is reproduced hereinbelow:

"9. In view of the above terms and conditions of the contracts , the Show Cause inferred that the Noticee entered into contracts with various companies/parties which, in nature, were of wet leasing of CNG Compressors package or Daughter Booster Compressor or Suction Pressure Hydraulic Booster or Compressed Air Generating Unit and Dispensers & other related equipments. The Noticee was solely responsible for supply, installation, maintenance and proper functioning of compressors package in order to compress the gas at specified sites on 24x7 basis. The tangible goods remained under the effective control of the Noticee. Thus, the services being rendered in terms of the contracts / agreements are squarely covered and classifiable under the ambit of Service Tax under 'Supply of Tangible Goods Services'."

21. It is also pertinent to note that the petitioner had taken the stand that the terms of the agreement which it had entered into with parties to which the equipment was supplied, embodied and exhibited the legal right of effective control and possession being transferred. The

² (2005) 4 SCC 214

³ [2010] 24 STT 425



respondents in terms of their letter dated 26 December 2012, however, had questioned the stand as taken, observing that there was no transfer of effective control and possession. While responding to the aforesaid communication, the petitioner had in terms of a statement made by their representative, and which is also taken note of in the impugned order, asserted that it provides the equipment in question on the basis of the wet lease contract and upon expiry of the contract of closure of an outlet, the compressors are shifted to other outlets. While dealing with the aforementioned contention, and the challenge which was raised, the respondents have ultimately come to hold against the writ petitioners since according to them, none of the contracts could be read or construed as comprising a transfer of a 'right to use'.

22. The interplay between Article 366(29-A) and the provisions of the Act was succinctly explained by the Supreme Court in a recent decision rendered in **Commissioner of Service Tax vs. Adani Gas Ltd.**⁴ *Adani Gas* was a decision which was directly concerned with Section 65(105)(zzzzj). While ruling upon the scope and ambit of that provision as contained in the Act, the Supreme Court rendered the following pertinent observations:

“16. The test laid down in *Bharat Sanchar Nigam Ltd.** has been applied by courts to determine whether a transaction involves the "transfer of the right to use any goods" under article 366(29A)(d). In doing so, the courts have analysed the terms of the agreement underlying the transaction to ascertain whether effective control and possession has been transferred by the supplier to the recipient of the goods. Recently, this court in *Great Eastern Shipping Co. Ltd. v. State of Karnataka*** considered whether the transfer of a vessel under a charter party agreement was a "deemed sale", subject to sales tax. The court, after analysing the terms of the charter party agreement, held*** :

"43. We are not turning our decision upon the terms used

⁴ 2020 SCC OnLine SC 682



like 'let', 'hire', 'delivery' and 'redelivery' but on the other essential terms of the Charter Party Agreement entered in the instant case which clearly makes out that there is a transfer of exclusive right to use the vessel which is a deemed sale and is liable to tax under the KST Act. In the instant case, full control of the vessel had been given to the charterer to use exclusively for six months, and delivery had also been made. The use by charterer exclusively for six months makes it out that it is definitely a contract of transfer of right to use the vessel with which we are concerned in the instant matter, and that is a deemed sale as specified in article 366(29A)(d). On the basis of the abovementioned decision, it was urged that all Charter Party Agreements are service agreements. The submission cannot be accepted, as there is no general/invariable rule/law in this regard. It depends upon the terms and conditions of the charter-party when it is to be treated as only for service and when it is the transfer of right to use.

.. .

54. When we consider the charter-party in question in the context of applicable law, particularly in view of the constitutional provisions of article 366(29A)(d), we find that there is transfer of right to use tangible goods, which is determinative of deemed sale as per the Constitution of India and provisions of section 5C reflecting the said intendment. We are of the considered opinion that there is transfer of right to use exclusively given to charterer for six months, and the vessel has been kept under the exclusive control. The charterer qualifies the test laid down by this court in *Bharat Sanchar Nigam Ltd.**" (emphasis supplied)

17. Therefore, sales tax is levied in pursuance of article 366(29A)(d) on transactions which resemble a sale in substance as they result in a transfer of the right to use in goods, instead of the transfer of title in goods. The Finance Act, 1994, deriving authority from the residuary entry 97 of the Union List, enabled the Central Government to levy tax on services. "Service tax" was introduced as a response to the advancement of the contemporary world where an indirect tax was necessary to capture consumption of services, which are economically similar to consumption of goods, in as much as they both satisfy human needs.** This court, in *Association of Leasing and Financial Services Companies v. Union of India**** had noted# :

"38.. .. Today with technological advancement there is a very thin line which divides a 'sale' from 'service'. That, applying the principle of equivalence, there is no difference between production or manufacture of saleable goods and production of marketable/saleable services in the form of an activity undertaken by the service provider for consideration, which correspondingly stands consumed by



the service receiver. It is this principle of equivalence which is inbuilt into the concept of service tax under the Finance Act, 1994. That service tax is, therefore, a tax on an activity. That, service tax is a value added tax. The value addition is on account of the activity which provides value addition.. . Thus, service tax is imposed every time service is rendered to the customer/client,. .. Thus, the taxable event is each exercise/activity undertaken by the service provider and each time service tax gets attracted." (emphasis supplied)

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). For the purpose of clarification, the Department of Revenue issued a Circular, D.O. F. No. 334/1/2008-TRU, dated February 29, 2008. The said circular clarified the applicability of section 65(105)(zzzzj) vis-a-vis article 366(29A)(d). The relevant portions of the circular are as follows :

"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 user of the goods.

4.4.2 Excavators, wheel loaders, dump trucks, crawler carriers, compaction equipment, cranes, etc., offshore construction vessels and 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.

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." (emphasis supplied)

19. The above circular clarified that section 65(105)(zzzzj) is applicable only to those transactions where there is a supply of



tangible goods for use, without the transfer of possession or effective control to the recipient. This aspect has been interpreted by various courts and tribunals. In the Bombay High Court decision in Indian National Shipowners' Association v. Union of India ("Shipowners")*, the petitioners were engaged in providing services to major exploration and production operators by supplying their various vessels including offshore drilling rigs, offshore support vessels, harbour tugs, and construction barges. The question before the Bombay High Court was whether, prior to the introduction of section 65(105)(zzzzj) in 2008, the petitioner could be taxed on its services in relation to mining of mineral, oil, or gas under section 65(105)(zzzy). In the present matter, we are not concerned with the merits of Shipowners'*, which was affirmed on appeal by this court in Union of India v. Indian National Shipowners' Association**. This court explicitly restricted itself to the interpretation of section 65(105)(zzz) while leaving the other observations on interpretation of the law, "open to be considered at length at an appropriate stage".*** We note however, the analysis of section 65(105)(zzzzj) of the Bombay High Court, where the High Court observed# :

"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 first petitioner, they supply offshore support vessels to carry out jobs like anchor handling, towing of vessels, supply to rig 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)

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.
- There is an element of service which is the foundation for the levy of the tax.

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24. The crux of the dispute is whether the supply of tangible goods—the SKID equipment—is for the use of the purchaser. In determining as to whether the provisions of section 65(105)(zzzzj) are attracted, it is necessary to distinguish between the rights and obligations of the respondent (as the seller of gas) and of their purchasers, from the issue of whether the measurement equipment (SKID equipment) is supplied for the use of the purchaser of gas, without transferring the right of possession and effective control.

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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. The expression "use" has been defined in Black's Law Dictionary :

"Use, n. Act of employing everything, or state of being employed ; application, as the use of a pen, or his machines are in use. Also the fact of being used or employed habitually ; usage, as, the wear and tear resulting from ordinary use. *Berry-Kofron Dental Laboratory Co. v. Smith*, 345 Mo. 922, 137 S.W. 2d 452, 454, 455, 456. The purpose served ; a purpose, object or end for useful or advantageous nature. *Brown v. Kennedy*, Ohio Appellant. 49 N.E.2d 417, 418. To put or bring into action or service ; to employ for or apply to a given purpose. *Beggs v. Texas Dept. of Mental Health and Mental Retardation*, Tex. Civ. App., 496 S.W.2d 252, 254. To avail oneself of ; to employ ; to utilize ; to carry out a purpose or action by means of ; to put into action or service, especially to attain an end. *State v. Howard*, 221 Kan. 51, 557 P.2d 1280, 1281.

Non-technical sense. The 'use' of a thing means that one is to enjoy, hold, occupy or have some manner of benefit thereof. Use also means usefulness, utility, advantage, productive of benefit."

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,* renting of immovable property,** and services related to art, entertainment, and marriage.*** 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".# 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 good. 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. These provisions have been incorporated in the GSA to ensure that a buyer does not calibrate or tinker with the equipment. It is an incident of ownership and control being vested with the respondent. The purpose of the SKID equipment and its utility, lie in its ability to regulate the supply and achieve an accurate verification of that which is supplied ; in the present case the supply of goods by the respondent to its buyers. This enures to the benefit of the seller and the buyer. The seller is concerned with the precise quantification of the gas which is supplied to the buyer. The buyer has an interest in ensuring the safety of its facilities and that the billing is based on the correct quantity of gas supplied and delivered under the GSA. To postulate, as did the Tribunal, that the measurement equipment is only for the benefit of the seller in measuring the quantity of the gas supplied would not be correct. The GSA is an agreement reflecting mutual rights and obligations between the seller and the purchaser. Both have a vital interest in ensuring the correct recording of the quantity of gas supplied. Additionally, delivery of gas in a safe and regulated manner, enabled by the SKID equipment, is an essential component of the GSA. The SKID equipment subserves the contractual rights of both the seller and the purchaser of gas. Indeed, without the SKID equipment there would be no gas supply agreement. In fact, in the GSA, the buyer has also provided a warranty to ensure that the "buyer's facilities" remain technically and operationally compatible with the "seller's facilities", both of which include the "measurement



equipment". This warranty would not have been provided if the measurement equipment was not of "use" to the buyer. The equipment is thus a vital ingredient of the agreement towards protecting the mutual rights of the parties and in ensuring the fulfilment of their reciprocal obligations as seller and buyer in regulating the supply of gas. As an incident of regulating supply, it determines the correct quantity of gas that is supplied. The obligation to supply, install and maintain the equipment is cast upon the seller as an incident of control and possession being with the seller. 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.

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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.

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38. Thus construed, we are of the view that the adjudicating authority was correct in concluding that the buyer of gas is as interested as the seller in ensuring and verifying the correct quantity of the gas supplied through the instrumentality of the measurement equipment and the pipelines. Additionally, the role of regulating pressure and ensuring the safety of supply of gas performed by the measurement equipment is an essential aspect for the "use" of the consumer. The SKID equipment fulfils the description in section 65(105)(zzzzj) of a taxable service : service in relation "tangible goods" where the recipient of the service has use (without possession or effective control) of the goods."

23. It is thus apparent that it is only 'deemed sales' as contemplated under Article 366(29-A) of the Constitution, which stands exorcised from Section 65(105)(zzzzj). Tested on the factors which had been identified by the Supreme Court in *BSNL*, and relevant for the purposes of evaluating whether a 'right to use' had been transferred, it becomes apparent that no dominion or control over the equipment stood transferred by the writ petitioner. The equipment remained under the regulation and control of the petitioner and was also to be



worked upon by personnel deployed by it. It is these factors which appear to have weighed upon the respondent while holding that the transactions would be exigible to tax under Section 65(105)(zzzzj).

24. Tested on the principles as propounded by the Supreme Court in *Adani Gas*, we find that the ultimate conclusions which the respondent has arrived at on the question of 'right to use' are clearly unexceptionable. While the petitioner would be correct in its submission that a transaction which falls within the ambit of Article 366(29-A) cannot be subjected to a levy of service tax, the said contention itself proceeds and rests on whether a transaction was validly taxed under a sales tax statute on the basis of it being and amounting to a 'deemed sale'.

25. Since in the present case, the authorities administering the service tax legislation have come to the firm conclusion that there was no transfer of 'right to use', and which conclusion clearly does not merit any interference, the mere fact that the petitioner had discharged a purported liability arising under a sales tax legislation or based upon a misinterpretation of the contractual covenants by the fifth respondent would not absolve it of the liability which attaches in terms of Section 65(105)(zzzzj).

26. In view of the above, we do not find any merit in the challenge raised to the SCNs as well as the impugned order dated 28 November 2016.



27. The writ petition is accordingly dismissed along with pending applications.

YASHWANT VARMA, J.

RAVINDER DUDEJA, J.

NOVEMBER 04, 2024
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