

OD-2

IN THE HIGH COURT AT CALCUTTA
SPECIAL JURISDICTION [CENTRAL EXCISE]
ORIGINAL SIDE

CEXA/12/2025
IA NO: GA/1/2025, GA/2/2025

COMMISSIONER OF SERVICE TAX II KOLKATA
VS
M/S COMPUTER EXCHANGE PRIVATE LIMITED

: C O R A M :

THE HON'BLE THE CHIEF JUSTICE T.S SIVAGNANAM
-A N D-
HON'BLE JUSTICE CHAITALI CHATTERJEE (DAS)

Heard On : 19.6.2025

Judgment On : 19.6.2025

Appearance :
Mr. Uday Shankar Bhattacharyya, Adv.
Mr. Kaustuv Kanti Maiti, Adv.
...for appellant.

Mr. Ankit Kanodia, Adv.
Ms. Megha Agarwal, Adv.
...for respondent.

T.S SIVAGNANAM, CJ. :

1. This appeal has been filed by the Central Excise Department challenging the order passed by the Customs, Central Excise and Service Tax Appellate Tribunal, East Zonal Bench, Kolkata (the Tribunal) in Excise Appeal No.75602/2017 dated 6.6.2024.

2. The revenue has raised the following substantial questions of law for consideration.

- “a. Whether the service provided by the respondent is an act of ‘Supply of Tangible Goods Services’ when the effective control of the supplied equipment was with the respondent as mentioned in the agreement executed between the respondent and their customers ?*
- b. Whether the service provided by the respondent as supply of ‘Tangible Goods Service’ when there is an activity of supply of tangible goods for use by its customer and the said tangible goods have been supplied by the respondent to its customer without transferring right of possession and effective control of such tangible goods ?*
- c. Whether the learned Tribunal erred in holding that the effective control of the equipment is with the service recipient though the agreement contains that the effective control of the supplied equipment was with the respondent ?*
- d. Whether the transfer of right to use of the equipment by the respondent to its customer on rental basis for limited purpose comes within the purview of supply of tangible goods for use as per provision of Section 65(105)(zzzzj) of the Finance Act, 1994 ?*
- e. Whether the payment of VAT on rentals of the equipment is a deemed sale within the meaning of Article 366(219A) of the Constitution of India ?*
- f. Whether the learned Tribunal is erred in passing the impugned order dated 06.06.2024 by not considering the principles laid down by the Hon’ble Supreme Court reported in 2006(12) STR 161 (SC) in the case of BSNL vs. Union of India since permission of the respondent would have to be taken by its customers for*

removal/shifting of the equipment from location to another and no alteration or modification addition, or deletion of the equipment could be made without the permission of the respondent and the customer/hirer could not engage its or outside engineers to attend the equipment without prior permission of the respondent?”

3. We have heard Mr. Uday Shankar Bhattacharyya, learned senior standing counsel for the appellant/department and Mr. Ankit Kanodia, learned counsel for the respondents.

4. The learned Tribunal by the impugned order rightly allowed the assessee's appeal and set aside the order passed by the Commissioner of Service Tax-II, Kolkata by order-in-original no.112/COMMR/ST-II/KOL/2016-17 dated 20.1.2017. The appellant issued show cause notice dated 7.10.2016 proposing that an amount of service tax, education cess and SHE cess totaling to Rs.2,69,68,866/- leviable on taxable service namely, 'supply of tangible goods service' during the period from 2011-12 to 2014-15 shall not be recovered from the assessee under the provision to section 73(1) of the Finance Act; why appropriate interest on the due amount of service tax and education cess shall not be demanded under section 75 of the Act; why an amount of CENVAT credit to the tune of Rs.62,329/- wrongly taken and utilised by the assessee during the relevant period should not be recovered along with appropriate interest under Rule 14 of the CENVAT Credit Rules, 2004 read with Section 75 and proviso to Section 73(1) of the Finance Act; why penalty under section 77 of the Act should not be imposed for contravention of

Sections 67, 68, 69 and 70 of the Act; and why penalty under section 76 of the Act shall not be imposed upon them for nonpayment of service tax by resorting to willful suppression of facts with an intent to evade payment of service tax as mentioned above. Among the above issues the demand for CENVAT credit to the tune of Rs.62,329/- has been dropped by the adjudicating authority and, therefore, we are not required to go into such aspect.

5. According to the department that the assessee has not registered themselves for providing 'supply of tangible goods' services as provided by them and they have not shown the received amount against the said service in the ST-3 return and did not pay service tax thereon during the period April, 2011 to March, 2015. The department referred to Section 65(105)(zzzzj) of the Finance Act, 1994 and after referring to the decision of the Hon'ble Supreme Court in Bharat Sanchar Nigam Ltd. vs. Union of India, 2006 [2] STR 161 [SC] proceeded to examine the terms and conditions of the agreement entered into between the assessee and their clients. In the show cause notice it was alleged that the assessee are providing server, computers, printers, computer peripherals, etc. to different clients on hire without transferring right to use of such tangible goods as they have restricted removal/shifting of the equipment from one location to another. According to the department such restricted right to use the equipment can never be construed as 'transfer of right to use'. Furthermore, the maintenance and repairing of the said computers and accessories are being carried out either by the assessee or by their approved agent. Thus, it was alleged that the assessee are effectively retaining control

over the said computers and accessories and such transaction cannot be termed as 'deemed sale' but are more appropriately classified as 'supply of tangible goods' services. In the show cause notice the extended period of limitation was invoked alleging that all acts of omission and commission committed by the assessee was with the sole intention to evade payment of service tax, education cess and SHE cess and, therefore, proviso to Section 73(1) of the Act is invoked and the show cause notice issued within such extended period. The assessee in their reply dated 10.11.2016 contested the demand of service tax and other charges as well as the act of invoking the extended period as also the proposal to impose penalty. They contended that they are engaged in the business of information technology goods, for rental, purchase and sale and it includes a retail store for sale of computers and other IT peripherals as well as supply of equipment on hire basis to various customers along with the right to use such equipment to such clients of the assessee. They also provided repair and maintenance service in the form of AMCs and other service contracts. It was stated that with respect to business of rental of equipments entered into by the assessee with their clients, since the right to use of the equipment was transferred to the clients along with physical possession of the goods, the assessee classified the same as 'deemed sale' of goods under Article 336(29A) of the Constitution of India and in respect of the said transaction Value Added Tax (VAT) was levied and has been fully paid on all such transactions during the period under consideration namely, 2011-12 to 2014-15. Further, the assessee submitted that it has also paid

service tax on AMC contract and other services rendered by them, such as, installation of equipment and ancillary services in relation to the service of rental of information technology equipments. The assessee to demonstrate as to the nature of transaction between themselves and their clients produced a certified copy of the agreement and the e-mails. By referring to the terms and conditions of the agreement the assessee submitted that the amount collected as rental charges suffered VAT as the same tantamount to transfer of right to use the goods wherein the assessee transfers the right to use and effective control over the equipment to its clients and thereby attracting the provision 'deemed sale' as envisaged under Article 336(29A) of the Constitution of India. Further, it was stated that in terms of the agreement effective right to use and control of the equipment was transferred to the clients of the assessee, it paid state VAT/GST as applicable and, as such, the revenue did not suffer service tax, be deemed to sale under the Constitution of India. The assessee referred to the decision of the Hon'ble Supreme Court in Bharat Sanchar Nigam Limited [supra] and in paragraph 91 of the judgment where the Hon'ble Supreme Court has laid down the conditions/attributes to constitute transfer of right to use the goods. The assessee also referred to the letter of the Ministry dated 29.2.2008 and contended that based on such instruction, in assessee's case since the entire amount of rental charges has suffered VAT that does not arise any question of payment of service tax on the same account. Several decisions of the learned Tribunal were referred to as well as the ruling given by the authority for advance ruling. With regard to invoking the extended period of

limitation the assessee submitted that the extended period cannot be invoked since there was no fraud, collusion or any willful mistake or suppression of fact or contravention of any of the provisions of the Act or the rules made thereunder with intent to evade payment of tax. Furthermore, the assessee contended that it had regularly filed its service tax return and other statutory records before all the authorities there had been no scrutiny of records by the department and the VAT authorities also accepted the payment made by the noticees regarding the transaction as being the cess.

6. In support of their contention, reliance was placed on the decision of the Hon'ble Supreme Court in *Lakshmi Engg. Works Vs. CCE*, reported in 1989 (44) ELT 353 and *Pushpam Pharmaceuticals Company vs. CCE*, reported in 1995 (75) ELT 721 SC. The assessee also contested the proposal for levy of interest under Section 75 of the Act and also the penalty under Sections 77 and 78 of the Act by contending that penalty under Section 78 can be imposed only under the exceptional limitation scenario marked fraud, collusion, willful misstatement, suppression of facts, or contravention of any of the provisions of the Act or the Rules made thereunder with the intent to evade payment of service tax. It was contended that none of these conditions were satisfied and therefore the proposal to impose the proposed penalty under Section 78 is bad in law. In support of their contention, reliance was placed on the decision of the Hon'ble Supreme Court in the case of *Hindustan Steel Ltd. vs. State of Orissa*, 1978(2) E.L.T 159 (SC). The adjudicating authority after referring to the

relevant conditions in the agreement entered into between the assessee and their clients held that the assessee was providing equipments to different clients on hire without transferring right to use such tangible goods and they merely rented out computers, printers, computer peripherals and accessories at a specific location and such restriction to use the equipment can never be construed a transfer of right. Further, it was held that the maintenance and repairing of the computers during the period of rent and supply of accessories were being made either by the assessee or by their approved agent and such legal authority normally falls upon a person who holds the right of possession of the equipment and such equipments being under the effective control and possession with the supplier assessee. Thus, the authority came to the conclusion that the assessee has retained the effective control of the equipment supplied to the customers all along during the entire period of the agreement and the customers were making use of the equipments under the effective control of the assessee who exercised its right over the equipment during the entire period when the agreement was in existence. The adjudicating authority referred to the decision of the Hon'ble Supreme Court in BSNL and held that the tests/conditions laid down therein do not stand fulfilled in the case of the assessee. Several other decisions of the learned Tribunal were also referred to and the contentions raised by the assessee were rejected and the proposal to levy service tax as made in the show-cause notice was affirmed. The objection raised by the assessee with regard to invoking the extended period of limitation

was also rejected and ultimately the entire proposal made under the show-cause notice was confirmed.

7. This order was put to challenge before the learned Tribunal by the assessee and the assessee has been successful and aggrieved by the same the Department is on appeal before us.

8. In the preceding paragraph we have mentioned upon the salient features of the agreement entered into between the assessee and their clients. In order to better appreciate the factual position, the salient features of the agreement are quoted hereinbelow :-

"1. The owner is engaged in the business of providing desktop, server, printers and computer peripherals etc (herein after referred to as Equipments) on hire.

2. That the hirer undertakes:

a) To use the equipments with due care and diligence,

b) To inform and take written permission of Owners for removal/shifting of the equipment from one location to another location.

c) To preserve and not to deface or alter or remove/replace the Logo or any other device/indication of the Computer Exchange's Pvt. Ltd. ownership of the equipment.

d) To allow during business hours of the Owner's representatives to enter their (Hirer) premises/office and inspect the equipments

physically and or otherwise on receipt of 24 hours prior notice to this effect from them.

e) Not to mortgage, transfer, pledge, assign or otherwise encumber the equipment(s) or any part thereof. The Hirer hereby acknowledges that the equipment(s) is/a is/are and shall at all times remain the sole and exclusive property of Computer Exchange Pvt. Ltd. and the Hirer shall have no right or title over the equipment other than user for their own lawful purposes.

f) Not to make any alteration, modification, addition or deletion to the equipment without prior written permission from Owner.

g) Hirer will not engage it's or outside engineers to attend to the equipments without prior permission of the Owner."

9. To decide the correctness of the decision taken by the learned Tribunal, we have to bear the factual position in mind and apply the same to the tests laid down by the Hon'ble Supreme Court in BSNL and examine whether the transaction done by the assessee was for the transfer of right to use the goods.

Para 91 of the judgment of the Hon'ble Supreme Court in BSNL is as follows :-

"91.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 permission or licenses required there for 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."

10. The first two attributes to be fulfilled is that there must be goods for delivery. These tests stand satisfied and is not in dispute. The next attributes is that there must be consensus/ad idem as to the identity of the goods. Department has not raised any objection. Therefore, this attribute also stands satisfied. The third attribute is that the transferee should have a legal right to use the goods – secondly, all legal consequences for such use including permission of license required therefor should be available to the transferee.

Admittedly, the computers, printers, servers, computer peripherals and other equipments are hired by the assessee to their clients and they are installed in the premises of their clients and the equipments are also customized to suit the requirement of their clients. Pursuant to the agreement between the parties, the transferee namely, clients of the assessee, have a legal right to use the good. What is prevented under the agreement is only shifting of the equipment from the location where it is installed to any other location, that too, with the prior permission of the assessee. Therefore, this condition cannot be construed to mean that the clients of the assessee do not have a legal right to use the goods. Therefore, in our opinion, attribute (c) also stands satisfied in the assessee's case.

11. The next attributes to be fulfilled is that for the period during the transferee such legal right, it has to be to the exclusion of the transferor. It cannot be disputed by the Department that after the assessee has entered into an agreement with its client namely, transferee, during the period when the agreement is in force, the assessee, namely, the transferor, has no right to transfer very same goods in favour of their client. Therefore, the transfer of such legal right in favour of the clients/transferee to the exclusion of the right of the assessee, the transferor to transfer such right in favour of the third party during the subsistence of the agreement. Therefore, attribute (d) also stands satisfied in the assessee's case.

12. The last attribute to be fulfilled is that when the assessee transferred right to use the goods during the period for which it has to be transferred, the owner cannot again transfer the same rights to the others. The terms of the agreement makes it clear that the transferor namely, the assessee, cannot transfer the equipment to third parties during the period when the agreement is in force. In fact, the Department has not disputed this position and not made any allegation in the show-cause notice in this regard. Therefore, all the attributes as laid down by the Hon'ble Supreme Court in the BSNL to constitute a transaction for the transfer of right to use the goods stands fulfilled in the assessee's case.

13. Having steered clear on this issue, the next issue to be considered is whether the extended period of limitation could have been invoked. The Hon'ble Supreme Court while dealing with such issue has pointed out that the concept of suppression amounts to that which one is legal to state but one intentionally or deliberately or consciously does not state. In other words, the terms were mainly to deliberately omit to state certain things and it was held that the extended period of limitation is inapplicable in the absence of suppression of facts and hence absence of an intent to evade payment of duty. In *Uniworth Textiles Ltd. Vs. Commissioner of Central Excise, Raipur*, reported in 2013 (288) *ELT 161 (SC)*, it was held that every non-payment/non-levy of duty does not attract extended period. There must be deliberate default. The conclusion that mere non-payment of duty is not equal to collusion or willful misstatement or suppression of facts is untenable. Furthermore, it was held that the act

contemplated a positive action which buttresses the negative intention of willful default. Furthermore, the section contemplates two situations, namely, inadvertent non-payment and deliberate default and that the word 'willful default' introduces a mental element and hence requires looking into the mind of the assessee by gauging its actions which is an indication of one's state of mind. Further, the show cause notice may not clearly bring out act of omission of the assessee leading to invocation of the extended period of limitation. The burden to justify invocation of the extended period lies with the Department and the assessee cannot be asked to provide his bona fide when prima facie acted in a bona fide manner.

14. We have carefully perused the allegations made in the show cause notice and there is no mention of a deliberate intention to suppress the facts with an intent to avoid payment of tax. The assessee has time and again contended that they have a service tax registration in respect of the contracts which they enter into with their clients for providing annual maintenance etc. in relation to the hiring of the equipments to the clients. It is not disputed that the assessee has been filing their service tax returns promptly and the entire service tax liability has been paid. Therefore, the Department was aware of the nature of the transaction done by the assessee and it can hardly be stated that there was willful suppression of facts done by the assessee with the intention to evade payment of duty. Therefore, the Department could not have invoked the extended period of limitation. Thus, having decided both the issues in favour of the assessee, the question of levy of penalty or interest could not arise.

15. In the light of the above discussions, we are of considered view that the learned Tribunal was justified in allowing the assessee's appeal and setting aside the order of adjudication.

16. For all the above reasons, the appeal fails and is dismissed and the substantial questions of law as suggested are answered against the revenue.

17. The stay application, IA NO: GA/2/2025, also stands dismissed.

(T.S. SIVAGNANAM, C.J.)

I agree.

(CHAITALI CHATTERJEE (DAS), J.)