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W.A. No.1323 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 19.02.2025

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THE HONOURABLE MR.K.R.SHRIRAM, CHIEF JUSTICE
AND
THE HONOURABLE MR.JUSTICE MOHAMMED SHAFFIQ

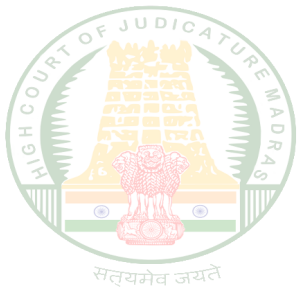
W.A.No.1323 of 2022
and C.M.P. No.1305 of 2022

Anandcine Service Pvt. Ltd,
[Earlier was known as Anand Cine Service (Partnership Firm)]
Represented by its Director Mrs.A.Padma Manohar,
No.3, Sarangapani Street,
T.Nagar, Chennai-600 017. ...Appellant/ Petitioner

Vs.

Commissioner of Service Tax-II,
Office of the Commissioner of Service Tax-II,
2054-1, II Avenue, Newry Towers,
Anna Nagar, Chennai-600 040. ... Respondent/ Respondent

Prayer: Appeal filed under Clause 15 of the Letters Patent against the
Original Order dated 16.12.2019 passed by the learned Single Judge in
W.P.No.23611 of 2017.



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W.A. No.1323 of 2022

For Appellant : Mr. Joseph Prabakar
For Respondent : Mr. A.P. Srinivas
Standing Counsel

JUDGMENT
(Delivered by the Hon'ble Chief Justice)

Appellant is a supplier of cine equipments, gensets, cranes, etc., to be used in film shooting. These equipments are operated by experts in their respective fields engaged by the hirers and the role of appellant is restricted to hiring out these equipments. According to appellant, the place and use of the equipments is in the production of cinematographic films using the hirer's technicians.

2. Appellant had obtained a service tax registration and was allotted Registration No. AAFA4996KST001. Appellant had classified the services provided by it under supply of tangible goods services and paid service tax on the services.

3. The department, on verification of records of the assessee, found

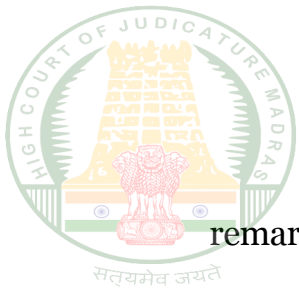


W.A. No.1323 of 2022

that no service tax had been paid and no service tax returns were filed for the period from April, 2010 onwards in respect of the supply of the said services. It is alleged by the department that, on examination and verification of records, it was noticed that the service tax not paid on the amounts received by appellant from its clients during the period from August, 2010 to December, 2010 was approximately Rs.90,39,826/-. For the period January, 2011 to September, 2011, the total service tax not paid on the amounts received was approximately Rs.1,33,32,190/-. It is alleged that on being pointed out by the department, appellant paid the entire service tax amount, except Rs.1,87,313/-. Appellant also paid proportionate interest of Rs.26,75,499/-.

4. However, from January, 2011, appellant had stopped paying service tax on the ground that the nature of activity provided by appellant attracts Value Added Tax (VAT) and, hence, service tax was not applicable.

5. In response to the letter received from the department, appellant, vide its letter dated 23.07.2014, furnished details of the amounts billed and received for the period from October, 2010 to March, 2014 and also made a



W.A. No.1323 of 2022

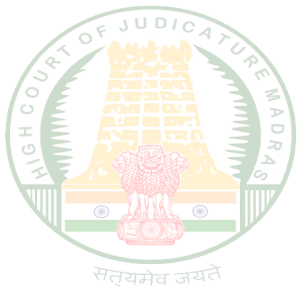
remark that for the period January, 2011 to March, 2014, service tax was not applicable as appellant had filed VAT returns. Further, appellant by a letter dated 20.03.2015 stated that the activity of renting out of cinematographic equipments undertaken by appellant would fall under “right to use” under the sales tax Law and the said activity is thus construed as “deemed sale” under the sales tax Law, as the assessee transfers both possession and control of its equipments to its customers. Hence, service tax was not leviable. The assessee also made available a copy of an agreement dated 22.06.2011 entered into by assessee and one Chennai Cinema Private Limited for hiring of cinematographic equipments.

6. The department thereafter issued appellant a show cause notice dated 15.10.2015 read with corrigendum dated 12.01.2016 calling upon appellant to show cause as to why:

“a) an amount of Rs. 2,25,59,829/- being the service tax, Education Cess and Secondary & Higher Education Cess payable on the payments received during the period from August 2010 to September 2011, should not be demanded under proviso to Section 73(1) of the Finance Act, 1994.

b) an amount of Rs. 2,23,72,016/- already paid by the assessee against the demand made in (a) above should not be appropriated.

c) interest should not be recovered in respect of the demand made in (a) above under Section 75 of the Finance Act, 1994.



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W.A. No.1323 of 2022

d) an amount of Rs.26,75,499/- already paid by the assessee towards the demand made in (c) above which is for the delayed service tax payment of Rs.2,23,72,016/- indicated in (b) above, should not be appropriated.

e) an amount of Rs.13,24,47,421/- being the service tax payable in respect of services billed by the assessee during the period from January 2011 to March 2014, should not be demanded under proviso to Section 73(1) of the Finance Act, 1994.

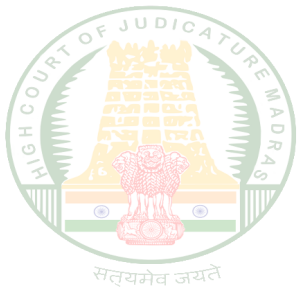
f) an amount of Rs.4,53,47,222/- being the service tax payable in respect of 'trade receivable' as on 01.10.2011 in respect of billing made prior to 01.01.2011 should not be demanded.

g) interest should not be recovered in respect of the demands made in (e) and (f) above under Section 75 of the Finance Act, 1994.

h) Penalty should not be imposed on the assessee for non-filing of Service Tax returns for the period from April 2010 to March 2014, under Section 77 of the Finance Act, 1994; and

i) Penalty should not be imposed on the assessee in respect of demand made in (a), (e) and (f) above, under Section 78(1) of the Finance Act, 1994.”

7. Subsequent to the above, a statement of Demand No.29/2016-C(ST-II) dated 15.04.2016 was issued to appellant for the further period from April, 2014 to December, 2015 demanding an amount of Rs.5,73,43,165/- under Section 73(1) of the Finance Act, 1994, with interest under Section 75 and penalty under Sections 76(1) and 77 of the Finance Act, 1994, respectively.



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8. Appellant replied to the show cause notice vide letter dated 19.01.2016 read with another letter dated 31.05.2016. Appellant reiterated the stand that its role is limited to mere hiring out cinematographic equipment such as cameras, lenses, generators, cranes, etc., which are then operated by experts engaged by the customers. Appellant stated that its customers take delivery of the equipment and use it in the shooting of films, using their own technicians. Appellant further stated that there is no jurisdiction to levy service tax, as the activity is squarely covered under VAT as "deemed sale" transaction, and also the demand is time barred, since notice was issued and Order-in-Original was issued on the same for the previous period. In short, appellant's case was that no amount was payable for the period referred in the show cause notice and whatever amount was paid was also to be refunded.

9. A personal hearing was given and thereafter an Order-in-Original dated 27.03.2017 came to be passed: (a) confirming a demand of Rs.2,25,59,829/-, being service tax, education cess and secondary and higher education cess payable for the period August, 2010 to September, 2011 under proviso to Section 73(1) of the Finance Act, 1994, (b) An



amount of Rs.2,23,72,016/- that was paid by appellant against the said

demand was appropriated, etc. The operative portion of the order reads as

under:

“a) I confirm the demand of Rs.2,25,59,829/- (Rupees Two Crore Twenty Five Lakh Fifty Nine Thousand Eight Hundred and Twenty Nine only) being the service tax, education cess and Secondary & Higher Education Cess payable on the payments received during the period from August 2010 to September 2011, as detailed in Annexure to the show cause notice, under proviso to Section 73(1) of the Finance Act, 1994.

b) I appropriate an amount of Rs.2,23,72,010/- (Rupees Two Crore Twenty Three Lakh Seventy Two Lakh Sixteen only) paid by the assessee against the demand confirmed in (a) above

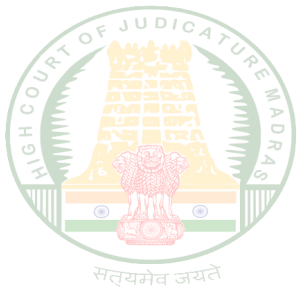
c) I order that the assessee shall pay interest under Section 75 of the Finance Act, 1994 in respect of demand confirmed at S. No. (a) above from the due date till the date of actual payment

d) I appropriate an amount of Rs.26,75,499/- (Rupees Twenty Six Lakh Seventy Five Thousand Four Hundred and Ninety Nine only) paid by the assessee towards the demand made in (c) above which is for the delayed service tax payment of Rs.2,23,72,016/- indicated in (b) above.

e) I confirm the demand of Rs.13,24,47,421/- (Rupees Thirteen Crore Twenty Four Lakh Forty Seven Thousand Four Hundred and Twenty One only) being the service tax payable in respect of services billed by the assessee during the period from January 2011 to March 2014, as detailed in Annexure-II to the SCN, under proviso to Section 73(1) of the Finance Act, 1994.

f) I confirm the demand of Rs.4,53,47,222/- (Rupees Four Crore Fifty Three Lakh Forty Seven Thousand Two Hundred and Twenty Two only) being the service tax payable in respect of 'trade receivable' as on 01.10.2011 in respect of billing made prior to 01.01.2011.

g) I order that the assessee shall pay interest under Section 75 of the Finance Act, 1994 in respect of demand confirmed at S. No. (e) and (f) above, from the due date till the date of actual payment.



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W.A. No.1323 of 2022

h) I impose a penalty of Rs.10,000/- (Rupees Ten Thousand only) on the assessee for non-filing of Service Tax returns for the period from April 2010 to March 2014, under Section 77(2) of the Finance Act, 1994; and

i) I impose a penalty of Rs.20,03,54,472/- (Rupees Twenty Crore Three Lakh Fifty four Thousand Four Hundred and Seventy Two only) on the assessee in respect of demand made in (a), (e) & (f) above, under Section 78(1) of the Finance Act, 1994. This penalty amount shall however be reduced to 25% of the Service Tax demanded, if the Service Tax and the interest are paid by the assessee along with the reduced penalty within 30 days from date of receipt of this order in terms of second proviso to Section 78(1) of the Finance Act.

Statement of Demand No.29/2016 dated 16.04.2016:

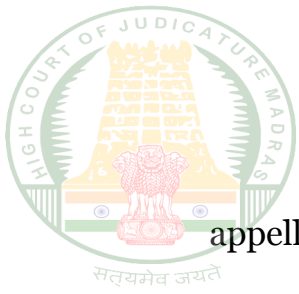
a) I confirm the demand of Rs.5,73,43,165/- (Rupees Five Crore Seventy Three Lakh Forty Three Thousand One Hundred and Sixty Five only) being the Service Tax, Education Cess and Secondary & Higher Education Cess and Swatch Bharat Cess not paid for the period from April 2014 to December 2015, as detailed in Annexure to the Statement of Demand, under Section 73(1) of the Finance Act, 1994.

b) I order that the assessee shall pay interest under Section 75 of the Finance Act, 1994 in respect of demand confirmed at S. No. (a) above from the due date till the date of actual payment.

c) I impose a penalty of Rs.55,00,000/- (Rupees Fifty Five Lakh only) on the assessee under Section 76(1) of the Finance Act, 1994.

d) I impose a penalty of Rs.10000/- (Rupees Ten Thousand only) on the assessee under Section 77(2) of the Finance Act, 1994.”

10. Impugning this order, a petition was filed under Article 226 of the Constitution of India to issue a writ of certiorari to quash the order in original dated 27.03.2017. The petition came to be dismissed directing the



W.A. No.1323 of 2022

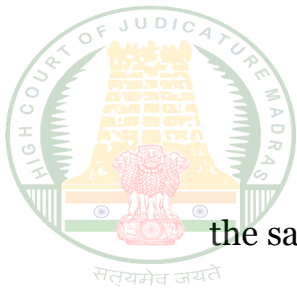
appellant to file an appeal before the Customs, Excise and Service Tax Appellate Tribunal, Chennai. Against this order, the appeal has been preferred.

11. Generally, this Court would not have interfered but for the fact that the jurisdiction itself has been questioned. Having considered the impugned order, the Court felt that the adjudicating authority has gone entirely on a tangent without applying the law to the factual position.

12. The matter at hand can be split into two parts. The first part for the period August 2010 to June 2012 when the Finance Act had a positive list; and the second part for the period 1st July, 2012 to 31st December, 2015 when the Finance Act provided for a negative list.

13. For the second part, that is for the period from 1st July, 2012 to 31st December, 2015, Mr.Srinivas, in fairness, agreed that the judgment of the Bombay High Court in ***Nayana Premji Savala vs. Union of India***¹ would squarely apply to the facts of this case. Paragraphs 10, 13 to 31 of

¹ 2022 (66) GSTL 417 (Bom.)



the said judgment read as under:

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“10. Mr. Adik also submitted that Section 65 (105)(zzzzj) of Finance Act, 1994 provides taxable service in relation to supply of tangible goods would mean 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, equipment and appliances. Therefore, transaction between the company (in liquidation) and the lessee would be a taxable service in relation to supply of tangible goods and since there is no transfer of ownership, there also cannot be any sale/deemed sale and hence, the relationship between the company (in liquidation) and lessee would fall under the definition of taxable service and service tax was payable.

...

13. Having considered the submissions of Mr. Shah and Mr. Adik and the agreement between the company (in liquidation) and the lessee, copy whereof is annexed to the petition, we are satisfied that the relationship between the company (in liquidation) and the lessee cannot fall under the definition of taxable service under Section 65 (105)(zzzzj) of Finance Act, 1994. Section 65 (105)(zzzzj) will apply only where a service is provided in relation to supply of tangible goods without transferring right of possession and effective control, whereas factually in this case, there has been transfer of right of possession and effective control on the containers.

14. The following provisions in the lease agreement dated 1st April 2011 are relevant:

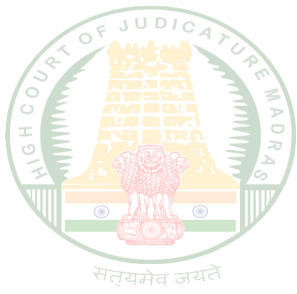
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2.3. The Lessee shall have no rights to the Equipment other than as Lessee and the Lessee shall not do or persist or cause to be done any matter or thing whereby the rights of the Lessor in respect of the Equipment are or may be prejudiced.

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4.1. During the Term:

(a) xxxxxxxxxxxxxxxxxxxx



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W.A. No.1323 of 2022

(b) *The Lessee shall be liable for any loss, theft or destruction of, or damage to the Equipment, howsoever caused subject to the limits on liability set out in clause 5.7; and*

(c) *The Lessee shall keep the Equipment serviced, maintained, appropriately stored and in the same state of repair and condition as such assets are in on delivery (allowing for fair wear and tear) and as required to ensure that the Equipment complies with all statutory requirements from time to time relating to the use, operation or possession of the Equipment and shall repair or replace any lost, stolen or worn out Equipment parts. All replacement Equipment and parts shall be subject to this Agreement.*

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4.3. Lessee is permitted to sublease the equipment to third parties. Deemed approval is thereby granted for the hire and re-hire of goods to companies and for the locations listed in Schedule 4 as may be amended from time to time.

Prior written approval will be required by the Lessee for hiring the units to third parties that are not covered in Schedule 4.

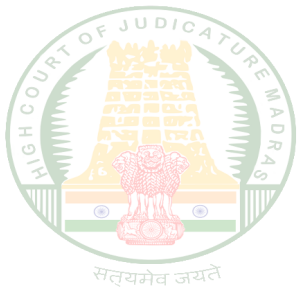
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4.5. The Lessee shall obtain and keep in full force and effect throughout the Term, at no cost to the Lessor, all permissions, licenses and other authorisations which may at any time be required in connection with the possession or use of the Equipment and/or any premises in which the same are located.

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4.8. The Lessee acknowledges and accepts that the Lessor is under no obligation to, and will not conduct any inspection of the Equipment before, on or after delivery thereof.

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W.A. No.1323 of 2022

5.1. The Lessee shall (subject to Clauses 5.6 and 5.7) keep the Lessor indemnified in full against all costs, expenses, damages and losses (whether direct or indirect), including any interest, fines, legal and other professional fees and expenses awarded against or incurred or paid by the Lessor as a result of or in connection with any claim made against Lessor by a third party arising out of, or in connection with this Agreement to the extent that such claim arises out of the breach, negligent performance or failure or delay in performance of the Agreement by the Lessee, its employees, agents or subcontractors.

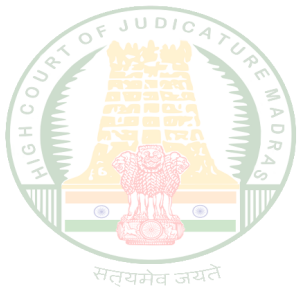
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6.1. All risk of loss of or damage to the Equipment shall pass immediately from the Lessor to the Lessee on the Commencement Date or on delivery under clause 6.3 as the case may be.

6.2. The Lessee acknowledges that execution of this Agreement shall be conclusive evidence that the Lessee shall have taken delivery of and unconditionally accepted the Equipment on 1st day of April 2011 listed in Schedule I for the purpose of this Agreement and found it to be complete, in good working order, of satisfactory quality, fit for the purpose for which it is required and acceptable in every respect. The equipment listed in Schedule I has been delivered to the Lessee in India with all costs paid.

6.3. Delivery of further Equipment shall occur on acceptance by the Lessee (hereby appointed as agent for the Lessor to accept such delivery) at the place of delivery designated by the Lessee, the Lessee having satisfied itself that any further Equipment is complete, in good working order, of satisfactory quality, fit for the required purpose and acceptable in every respect.

6.4. Following each further delivery of Equipment, the Lessee shall deliver to the Lessor a certificate of acceptance (in the form set out in Schedule 3 hereto) setting out the details of such further Equipment and this shall be conclusive evidence of the Lessee's acceptance of such Equipment.



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W.A. No.1323 of 2022

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8.1. On the expiry of the Term the Lessee shall, at risk and expense of the Lessee, return the Equipment to the Lessor in good working condition (excepting reasonable wear and tear) and fit for its purpose to Kakinada or to such address as mutually agreeable, free and clear of all liens.

(emphasis supplied)

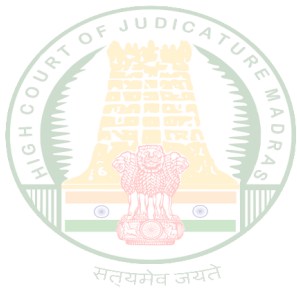
The lease agreement, therefore, provides that the lessee would keep possession of the identified containers, the lessee will have legal right to use the containers, the lessee would have the liberty to even sub-lease the containers to third parties who have been approved in the agreement, it is the lessee's obligation to obtain and keep in full force at no cost to the company (in liquidation) all permissions, licenses, authorisations and repair or replace any lost or stolen or worn out containers and all risk of loss or damage to the containers shall pass immediately from the company (in liquidation) to the lessee on delivery. The lease agreement also provides that on the expiry of the term of the lease, the lessee shall, at its risk and expense, return the containers to the company (in liquidation). Therefore, there are goods available for delivery, the identity of the containers is identified, the lessee has legal right to use the containers are also available and consequently all legal consequences of such use including any permissions or licences required therefor is the responsibility of the lessee for the period during which the lessee has the legal right. The company (in liquidation) cannot hand over those containers to anyone else and the right to use the containers during the period of lease is effectively transferred.

15. Section 65B (44) of the Finance Act, 1994 reads as under:

(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) xxxxxxxxxxxxxxxxxxxx



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W.A. No.1323 of 2022

(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

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16. Clause (29A) of Article 366 of the Constitution of India reads as under:

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

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(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;

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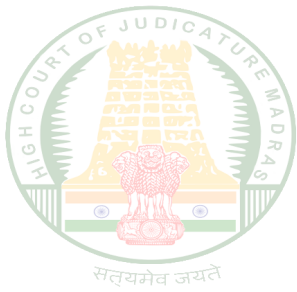
(f) xxxxxxxxxxxxxxxxxxxx and such transfer, delivery or supply of any goods shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply and a purchase of those goods by the person to whom such transfer, delivery or supply is made.

17. Section 2(24), 2(28) and Section 3 of the MVAT Act read as under:

2(24). "sale" means a sale of goods made within the State for cash or deferred payment or other valuable consideration but does not include a mortgage, hypothecation, charge or pledge; and the words "sell", "buy" and "purchase", with all their grammatical variations and cognate expressions, shall be construed accordingly;

Explanation.—For the purposes of this clause,-

(a) a sale within the State includes a sale determined to be inside the State in accordance with the principles formulated in section 4 of the Central Sales Tax Act, 1956 (74 of 1956);



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W.A. No.1323 of 2022

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

(ii) the transfer of property in goods (whether as goods or in some other form) involved in the execution of a [works contract including], an agreement for carrying out for cash, deferred payment or other valuable consideration, the building, construction, manufacture, processing, fabrication, erection, installation, fitting out, improvement, modification, repair or commissioning of any movable or immovable property;

(iii) a delivery of goods on hire-purchase or any system of payment by installments;

(iv) 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;

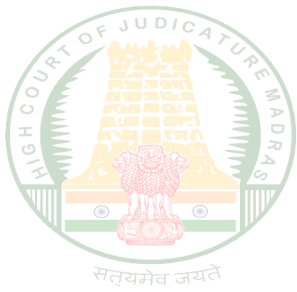
(v) the supply of goods by any association or body of persons incorporated or not, to a member thereof for cash, deferred payment or other valuable consideration;

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

(28). "the State" means the State of Maharashtra.

3. Incidence of Tax:-

(1) Every dealer, who, immediately before the appointed day, holds a valid or effective certificate of registration or licence under any of the earlier laws or, who is liable to pay tax under any of the earlier laws, in the year ending immediately before the appointed day shall, if his turnover of sales or purchases has, in the said year under any of such earlier laws, exceeded rupees five lakh, or, as the case may be, who was an importer in the said year and his



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W.A. No.1323 of 2022

turnover of sales or purchases in the said year had exceeded rupees one lakh, be liable to pay tax, with effect from the appointed day, in accordance with the provisions of this Act, till his certificate or licence is duly cancelled under this Act.

Explanation.—For the purposes of this sub-section, the expressions—turnover of sales,—turnover of purchases and—importer shall have the respective meanings assigned to them under the relevant earlier laws.

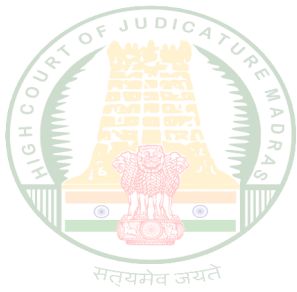
(2) A dealer to whom sub-section (1) does not apply and whose turnover, [of all sales] made, during the year commencing on the appointed day or any year subsequent thereto, first exceeds the relevant limit, specified in subsection (4), shall, until such liability ceases under subsection (3), be liable to pay tax under this Act with effect from the 1st day of April of the said respective year:

Provided that, a dealer shall not be liable to pay tax in respect of [such sales] as take place during the period commencing on the 1st day of April of the said respective year upto the time when his turnover of sales, as computed from the 1st day of April of the said respective year, does not exceed the relevant limit applicable to him under sub-section (4).

(3) Every dealer who has become liable to pay tax under this Act, shall continue to be so liable until his registration is duly cancelled; and upon such cancellation his liability to pay tax, other than tax already levied or leviable, shall remain ceased until his turnover of sales again first exceeds the relevant limit specified in sub-section (4) or, as the case may be, until he becomes liable to pay tax under sub-sections (8) or (9).

(4) For the purposes of this section, the limits of [turnover of sales] shall be as follows:—

(a) Limit of turnover of sales Rs. 1,00,000.—in the case of a dealer, who is an importer, and the value of taxable goods sold or purchased by him during the year is not less than Rs. 10,000.



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W.A. No.1323 of 2022

(b) Limit of turnover of sales Rs. 5,00,000.-in any other case, where the value of taxable goods sold or purchased by him during the year is not less than Rs. 10,000.

(5) For the purpose of calculating the limit of [turnover of sales] for liability to tax,-

(a) except as otherwise expressly provided, the turnover of all sales shall be taken, whether such sales are of taxable goods or not;

(b) the turnover of sales shall include all sales made by the dealer on his own account, and also on behalf of his principals whether disclosed or not;

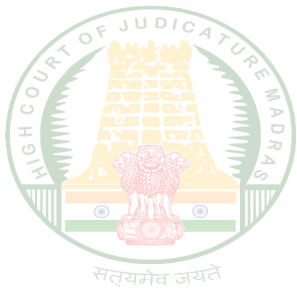
(c) in the case of an auctioneer, in addition to the turnover of sales, if any, referred to in clauses (a) and (b), the turnover of sales shall also include the price of the goods auctioned by him for his principal, whether the offer of the intending purchaser is accepted by him or by the principal or a nominee of the principal, if the price of such goods is received by him on behalf of his principal;

(d) in the case of an agent of a non-resident dealer, in addition to the turnover of sales, if any, referred to in clause (a), (b) or (c), the [turnover of sales] shall also include the sales of the non-resident dealer effected in the State.

(6) Notwithstanding anything contained in any contract or any law for the time being in force, but subject to the provisions of this Act, any person covered by sub-clause (a), (b) or (c) of clause (8) of section 2 shall be liable to pay tax under this Act, whether, or not the principal is a dealer and whether, or not such principal is liable to pay tax under this Act and whether or not the principals are disclosed.

*(7) [***]*

(8) Where a dealer liable to pay tax under this Act is succeeded in the business by any person in the manner described in clause (a) of sub-section (1) or sub-section (4) of section 44, then such person shall, notwithstanding



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W.A. No.1323 of 2022

anything contained in this section, be liable to pay tax on the sales or purchases of goods effected by him on and after the date of such succession and accordingly nothing contained in the proviso to sub-section (2) shall apply to him in any year.

(9) Any person who is not liable to pay tax under the foregoing, provisions of this section but has been voluntarily registered under the provisions of this Act shall be liable to pay tax from the date of effect of the certificate of registration duly granted to him and accordingly nothing contained in the proviso to subsection (2) shall apply to him in any year.

18. It is now well settled that in terms of Article 366(29A)(d) of the Constitution of India, transfer of right to use the goods is a deemed sale of goods and subject to Sales Tax/VAT.

19. Section 2(24) of the MVAT Act, defines "sale" to mean "sale" of goods and also includes 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.

A harmonious reading of Section 2(24), 2(28) read with Section 3 of the MVAT Act, it is clear that VAT under the MVAT Act is applicable on "transfer of right to use" goods within the State of Maharashtra.

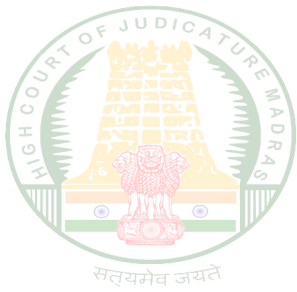
20. The Hon'ble Supreme Court of India, in Bharat Sanchar Nigam Limited [2006 (3) SCC 1 = 2006 (2) STR 161 (S.C.)], expounded as to what would constitute transfer of right to use and held as under:

"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



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W.A. No.1323 of 2022

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.

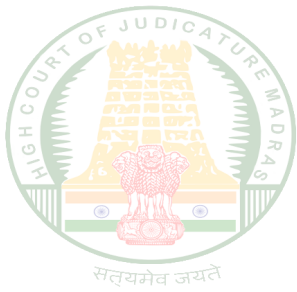
All the aforesaid attributes outlined by the Hon'ble Apex Court in BSNL (Supra) are available in the transaction undertaken by the Company (in liquidation) in terms of the agreement dated 1st April 2011.

21. There shall be a deemed sale where there is a 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. Here from the documents, and in particular the clauses reproduced in paragraph 14 above, it is quite clear that there has been a transfer of the right to use the containers for valuable consideration. Clause (29A) of Article 366 of the Constitution does not distinguish between an owner or a lessor of the goods. Only requirement is there should be a transfer of the right to use the goods for valuable consideration. Factually there has been and, as Mr. Adik fairly agreed, there is no evidence to the contrary, except surmises.

22. Further, service tax is applicable on provision of services and for this purpose, 'service' has been defined under Section 65B(44) of the Finance Act, 1994. Additionally, a 'declared service' is defined under Section 66E(f) of the Finance Act, 1994 to include the following:

transfer of goods by way of hiring, leasing, licensing or in any such manner without transfer of right to use such goods;

23. "Transfer of right to use goods" is excluded from the definition of 'service' as well as 'declared service' and hence, the same is not subject to service tax. Therefore, it is clear that a transfer of goods which does not involve a transfer of right to use, would be in the nature of a declared service and would be subject to service tax.



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W.A. No.1323 of 2022

Thus, only those cases where there is no transfer of right to use goods involved in a transfer of goods, service tax would be applicable.

24. Admittedly, the company (in liquidation) had provided the containers to the lessee on lease basis and recovered lease rental on which appropriate VAT at the rate of 12.5% was paid by the company (in liquidation).

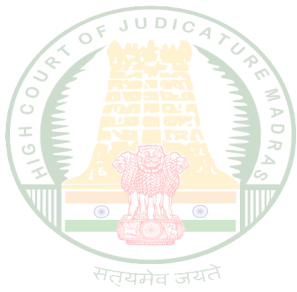
25. Upon representations received, the Central Government vide Circular No.198/08/2016-SERVICE TAX, dated 17th August 2016 clarified that in terms of sub-clause (d) of clause (29A) of Article 366 of the Constitution of India, the transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration is 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.

Further, referring to the ruling passed by the Hon'ble Apex Court in BSNL (Supra), it was clarified as under:

"2. The matter has been examined. I am directed to draw your attention to the fact that in any given case involving hiring, leasing or licensing of goods, it is essential to determine whether, in terms of the contract, there is a transfer of the right to use the goods. Further, the Supreme Court in the case of Bharat Sanchar Nigam Limited vs. Union of India, reported in MANU/SC/1091/2006 : 2006 (2) STR 161 SC, had laid down the following criteria to determine whether a transaction involves transfer of the right to use goods.

26. In fact even the Customs Excise Service Tax Appellate Tribunal (CESTAT) in Subhas Light House Vs. The Commissioner of Service Tax¹ relied upon the aforesaid circular to hold that service tax is not leviable upon the supply of gensets as the same tantamount to a deemed sale.

27. In paragraph 13 of the impugned order, respondent no. 3 has referred to the Circular No.198/08/2016-Service Tax dated 17th August 2016 issued by the Central Board of Indirect Taxes and Customs (CBIC) and admits it has been issued to clarify the applicability of service tax in case of transfer of goods by way of



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W.A. No.1323 of 2022

hiring, leasing, licensing or any such manner without transfer of right to use and the criteria to determine whether the transaction involves transfer of right to use goods. Respondent no. 3 has also referred to BSNL (Supra) where the Apex Court has outlined the pre-requisites for an activity to qualify as a transfer of right to use goods. Respondent no. 3 does not elaborate why these were not applicable to the facts of the case at hand. Respondent No. 3 has proceeded on the incorrect presumption that the company (in liquidation) was not the owner of the containers and hence cannot again transfer the same right to others. The activities outlined by the Apex Court, in our view, squarely applies to the case of the company (in liquidation).

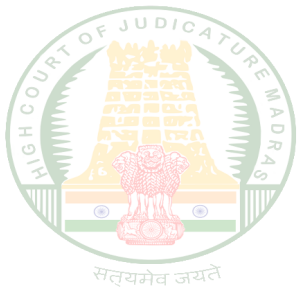
28. In the present case, it is not in dispute that the company (in liquidation) had given the containers to the lessee on rental basis and possession and control was always with the lessee and the sole ground on which the demand is confirmed is that the company (in liquidation) was not owner of the containers.

29. For a transaction to be deemed sale there is no requirement of transfer of ownership and once it is not disputed that the containers are given on lease and possession and control is transferred, it is a deemed sale within the meaning of Article 336(29A)(d) of the Constitution of India and outside the purview of Finance Act, 1994.

The singular distinction between an absolute transfer of goods and a transfer of right to use goods is that in case of the former, the transfer is absolute including passage of title, whereas in the case of the later, excluding passage of title, all other rights would ensue to the benefit of the user of the goods.

The Hon'ble Supreme Court in Aggarwal Brothers Vs. State of Haryana [1999 (9) SCC 182] has held on facts that the possession of the shuttering material was transferred by the assessee to their customers for use during the construction of the building and the effective control over the tangible goods during that period remain in the possession of the transferee. Vide paragraph 6, it was held that the transfer of the goods for consideration to the builder for his use in construction would result in deemed sale.

30. Moreover, it is settled law that sale of goods and services are mutually exclusive and both VAT and service tax cannot be levied on the same transaction. It is an admitted fact that the company (in liquidation) has paid VAT and deposited the same with the concerned department on the entire consideration received for



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W.A. No.1323 of 2022

leasing equipment on which service tax is sought to be imposed once again by respondent no. 3.

In the matter of Imagic Creative Private Limited [Civil Appeal No.252 of 2008] [2008 (9) STR 337 (SC)], the Hon'ble Apex Court held that the service tax and sales tax are mutually exclusive. The relevant excerpt of the said judgment is reproduced hereinbelow for ready reference:

"28. Payments of service tax as also the VAT are mutually exclusive. Therefore, they should be held to be applicable having regard to the respective parameters of service tax and the sales tax as envisaged in a composite contract as contradistinguished from an indivisible contract. It may consist of different elements providing for attracting different nature of levy. It is, therefore, difficult to hold that in a case of this nature, sales tax would be payable on the value of the entire contract; irrespective of the element of service provided. The approach of the assessing authority, to us, thus, appears to be correct."

(emphasis supplied)

31. Further, it will be apposite to refer to an order dated 6th January 2022 in the matter of Commissioner of Service Tax-V, Mumbai Vs. M/s. UFO Moviez India Ltd. MANU/SCOR/02981/2022 : 2002-VIL-07-SC-ST where the Apex Court has observed that where VAT liability has been discharged during the relevant period, the question of claiming service tax thereof does not arise."

Therefore, no service tax will be leviable for the period 1st July, 2012 to 31st December, 2015.

14. Before we consider the position for August, 2010 to June, 2012, it would be useful to reproduce the relevant provisions from the Finance Act, 1994. The charging section is Section 66 and what is taxable service is in



Section 65(105) of the Finance Act, 1994. Clause zzzzj applies to the case at hand. The said provisions, namely Sections 66 and Section 65(105)(zzzzj) of Finance Act, 1994, read as under:

“66. Charge of service tax – There shall be levied a tax (hereinafter referred to as the service tax) at the rate of twelve per cent. of the value of taxable services referred to in sub-clauses ... (zzzzj) ... of clause (105) of section 65 and collected in such manner as may be prescribed.”

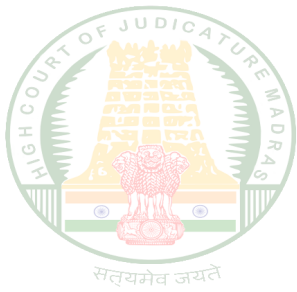
“65.(105)(zzzzj): “taxable service” means any service provided or to be provided - to any person, by any other person in relation to supply of tangible goods including machinery, equipment and appliances for use, without transferring right of possession and effective control of such machinery, equipment and appliances;”

15. The Supreme Court in **BSNL v. Union of India**² expounded as to what would constitute transfer of right to use and held as under:

“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*

² (2006) 3 SCC 1



period for which it is to be transferred, the owner cannot again transfer the same rights to others.”

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16. Let us examine whether the agreement between appellant and the hirer, Chennai Cinema Private Limited, has these attributes outlined. The provisions of the agreement have been quoted in the Order-in-Original and we reproduce the same here:

“The owner agrees to give on hire and the hirer agrees to take on hire the items of cinematographic equipments which are mentioned in the schedule hereunder for a total period of 75 days as scheduled by the hirer, starting from 1 July 2011 ... The said equipments would be delivered by the owner to the hirer at locations specified.

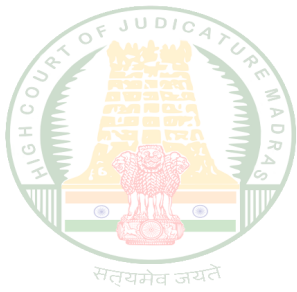
He will maintain the said cinematographic equipments in good condition, subject to normal wear and tear. If any damage is done to any of the said items of cinematographic equipments, he will make it good by carrying out repairs through the owner and he will pay the repair charges to the owner separately. However, the liability on of the cost of the bulbs.

If any of the said items is stolen or otherwise lost or destroyed or damaged beyond repairs, the hirer will pay the price thereof as per the owner's catalogue of prices then prevailing or in force irrespective of whether the hirer is responsible or not for such loss, destruction or damage....

He will allow the owner or his authorized agent to inspect the said cinematographic equipments as and when required on any day but such inspection shall not be for more than once in a month.

He will not part with possession other person. of the cinematographic equipments or ar any item in favour of any other person.

He will not sell, hypothecate or pledge the said cinematographic equipments or any item thereof and will have the equipments insured at its full value at its own costs.



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W.A. No.1323 of 2022

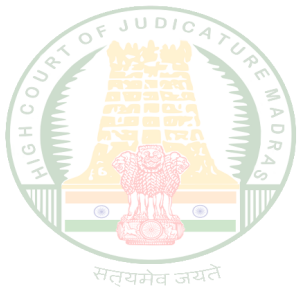
The hirer agrees that he will not inter-mingle the lenses and other equipments and mount the same on equipments owned by others which may be used by hirer for his production.

The owner is not liable for any defects in the said cinematographic equipments or a and the hirer has taken inspection thereof and is satisfied with the condition thereof. any item thereof

The owner as part of the package as provided for power generators which shall be used only to operate the equipments supplied by the hirer and shall, not be used for any other purposes

The hirer will not do any act or omit to do any act by which the right of the owner to the said cinematographic equipments will be prejudiced.”

17. Under Section 66 of the Finance Act, 1994, there shall be levied a tax at the rate of 12% of the value of the taxable services referred to in sub-clause (zzzzj) of clause (105) of Section 65 of the Finance Act, 1994. The “taxable service” means 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. Therefore, where right of possession and effective control is transferred, then it will not be a taxable service. Consequently, if it is not a taxable service, then certainly service tax is not leviable under Section 66 of the Finance Act, 1994.



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18. From the terms of the agreement reproduced above, it is quite clear that there is not only a transfer of right of possession, but also effective control. The order-in-original has proceeded on an erroneous interpretation of the provisions of this agreement that possession and effective control has not been transferred to the hirer. We do not agree with this conclusion of the adjudicating authority. According to us, it is clear from the agreement that the equipments have been supplied for hire and possession and effective control has been transferred to the hirer.

19. The clauses in the agreement, reproduced above, make it clear that the possession and effective control has been transferred. If it is not so, why will the owner reserve a right to inspect the equipments as and when required. If the possession and effective control is still with the owner, he would not need the hirers' permission to inspect. If effective possession and control has not been transferred, why the hirer has to make it known to the owner regarding loss or destruction or damage, after such loss or damage occurs. If possession and effective control has not been transferred and it is still with the owner, why will the hirer give an undertaking not to part with



possession or undertake not to sell, hypothecate or pledge the equipments and have the equipments insured at its full value at his own cost. If possession and effective control is still with the owner or has not been transferred to the hirer, why would the hirer make a statement that he has taken inspection of the goods and he is satisfied with the condition thereof and the owner shall not be liable for any defects.

20. The attributes outlined by the Apex Court in *BSNL v. Union of India* (supra) at para 97 thereof are available in the transaction undertaken by the appellant with the hirer, Chennai Cinema Private Limited, as evidenced by the clauses quoted above.

21. In fact, the adjudicating authority has in its findings accepted the legal position that for levy of VAT under sales tax law, it is not necessary that the possession of goods must be transferred and that if the person has been provided with effective control of the goods, it would tantamount to transfer of right to use the goods and service tax is not chargeable. Since in the case at hand possession and effective control of the goods has been transferred to the hirer, it will amount to transfer of right to use goods and



W.A. No.1323 of 2022

service tax is not chargeable.

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22. To reiterate, there shall be a deemed sale where there is 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. From the documents and particularly from the clauses reproduced above, it is quite clear that there has been a transfer of the right to use equipments for valuable consideration. Even in clause 29A of Article 366 of the Constitution of India, the only requirement is there should be transfer of the rights to use the goods for valuable consideration. Factually, there has been.

23. In the circumstances, the order-in-original cannot be sustained, as it was without jurisdiction. The same is quashed and set-aside.

24. Mr. Joseph Prabakar states that he is entitled to refund of amounts paid. Appellant may apply for refund and the authorities shall consider the same in accordance with law and dispose the application. Certainly, as the matter was *sub judice*, the question of raising any ground of limitation on



W.A. No.1323 of 2022

the refund application would not arise.

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The appeal is disposed of. There shall be no order as to costs.

Consequently, interim application stands closed.

(K.R.SHRIRAM, C.J.)

(MOHAMMED SHAFFIQ, J.)

19.02.2025

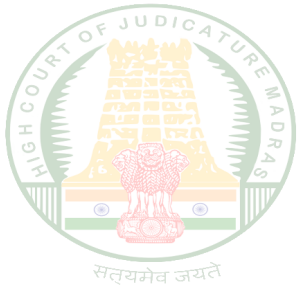
Index : Yes

NC : Yes

sasi/ mka

To:

Commissioner of Service Tax-II,
Office of the Commissioner of Service Tax-II,
2054-1, II Avenue, Newry Towers,
Anna Nagar, Chennai-600 040.



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W.A. No.1323 of 2022

THE HON'BLE CHIEF JUSTICE
AND
MOHAMMED SHAFFIQ.J.

(sasi)

W.A.No.1323 of 2022

19.02.2025