CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI

REGIONAL BENCH - COURT NO. 01

Service Tax Miscellaneous Application No. 85759 Of 2022
(on behalf of Appellant)

Service Tax Miscellaneous Application No. 85305 Of 2023
Service Tax Miscellaneous Application No. 85306 Of 2023
(on behalf of Respondent-Department)

In

Service Tax Appeal No. 86958 of 2017

(Arising out of Order-in-Original No. 31-32/ST/COMMR/2016 dated 27.12.2016 passed by Commissioner of Central Excise, Customs & Service Tax, Aurangabad)

M/s Dish TV India Ltd **..... Appellant**
Bunglow No 9 Near Osmanpura Police Station, Pratap Nagar, Aurangabad-431005.

VERSUS

Commissioner of Central Excise & service Tax-Aurangabad **..... Respondent**
N-5, Town Center CIDCO,
Aurangabad-431003

WITH

Service Tax Miscellaneous Application No. 85758 Of 2022
(on behalf of Appellant)

Service Tax Miscellaneous Application No. 85303 Of 2023
Service Tax Miscellaneous Application No. 85304 Of 2023
(on behalf of Respondent-Department)

In

Service Tax Appeal No. 86706 of 2019

(Arising out of Order-in-Original No. 50/ST/COMMR/2018-19 dated 08.03.2019 passed by Commissioner Central Goods & Service Tax & Central Excise, Aurangabad)

M/s Dish TV India Ltd
Bunglow No 9, Pratapnagar, Near Osmanpura Police Station, Pratap Nagar, Aurangabad-431005. **..... Appellant**

VERSUS

Commissioner of Central Excise & Service Tax-Aurangabad **..... Respondent**
N-5, Town Center CIDCO,
Aurangabad-431003.

Appearance:

Shri A. R. Madhav Rao, Mukunda Rao Angara, Tushar Joshi and Ms. Soumya Panda, Advocates for the Appellants

Shri S. K. Mathur, Shri C. Dhanasekaran, Special Counsels and Shri Manoj Kumar Rajak, Commissioner, CGST & Central Excise, Aurangabad for the Respondent

CORAM:

HON'BLE MR. S.K. MOHANTY, MEMBER (JUDICIAL)
HON'BLE MR. M. M. PARTHIBAN, MEMBER (TECHNICAL)

FINAL ORDER NO. A/86150-86151/2023

Date of Hearing: 21.04.2023
Date of Decision: 24.07.2023

PER : S. K. MOHANTY

Both the applicants/appellants and Revenue have filed the following miscellaneous applications in context with the captioned appeals before the Tribunal:-

Application No.	Appeal No.	Filed by	Subject
ST/MISC/85759/2022	ST/86958/2017	Appellant	Applications filed under Rule 10 of CESTAT (Procedure) Rules for consideration of the additional grounds
ST/MISC/85305/2023	ST/86958/2017	Department	Objection by the Department on additional grounds filed by the appellant in misc. application No. ST/MISC/85759/2022
ST/MISC/85306/2023	ST/86958/2017	Department	ROM against Interim Order No. 6-7/2023 dated 11.04.2023 passed by CESTAT.
ST/MISC/85758/2022	ST/86706/2019	Appellant	Applications filed under Rule 10 of CESTAT (Procedure) Rules for consideration of the additional grounds
ST/MISC/85303/2023	ST/86706/2019	Department	ROM against Misc. Order No. M/85219-85220/2023 dated 06.04.2023 passed by CESTAT
ST/MISC/85304/2023	ST/86706/2019	Department	Objection by the Department on additional grounds filed by the appellant in misc. application No. ST/MISC/85758/2022

1.1 The miscellaneous applications No. ST/MISC/85758/2022 and ST/MISC/85759/2022 were taken up for hearing on 06.04.2023. The issue concerning consideration of additional grounds was heard at length by the Bench on 06.04.2023 in presence of both sides. However, at the conclusion of hearing, learned Special Counsel engaged by Revenue has specifically raised the points regarding change in the cause title filed by the applicants/appellants. Accordingly, the matter regarding consideration of

additional grounds together with the appeals was adjourned to 11.04.2023. The miscellaneous order No. M/85219-85220/2023 dated 06.04.2023 was passed in the open court and a copy of the said order was also issued DASTI. On 11.04.2023, the matter was heard and upon perusal of the case records, the Bench vide Interim Order No. 6-7/2023 dated 11.04.2023 has observed *inter alia*, that copy of the miscellaneous applications filed by the applicants/appellants concerning change of name in the cause title and consideration of additional grounds were duly served on the representative of Revenue. On the wrong submissions made by Revenue regarding non-service of the said applications, the Bench has expressed displeasure and accordingly, directed the concerned Commissioner of CGST & Central Excise, Aurangabad to be present in person in the Court on 20.04.2023 to explain as to why, the observations recorded vide paragraph 4 in the Order dated 11.04.2023 should not be considered as interference in the working of the Tribunal with an intent to disrupt the proceedings, that were heard extensively on 03.04.2023 and 06.04.2023.

1.2 Against the Interim Order No. 6-7/2023 dated 11.04.2023 (supra) passed by the Tribunal, Revenue has filed the ROM application, seeking rectification of mistake therein. Subsequently, vide letter dated 28.04.2023, Revenue has prayed for withdrawing the said ROM application. The prayer made by the Revenue is considered and accordingly, miscellaneous application No. ST/MISC/85306/2023 is dismissed as withdrawn. Though, Revenue has not filed any application for withdrawing the miscellaneous application No. ST/MISC/85303/2023, but the same cannot be considered at this juncture inasmuch as the Miscellaneous Order No. M/85219-85220/2023 dated 06.04.2023 was subsequently merged with the order dated 11.04.2023, which has already been dismissed as withdrawn as recorded above.

1.3 On careful examination of the applications filed by the applicants/ appellants for consideration of the additional grounds vis-à-vis the case records, we find that the averments made therein justify the case for consideration of such additional grounds and accordingly, we take up those additional grounds as part and parcel of the appeal memorandum for consideration and disposal of the appeals. Therefore, the objections raised by the Revenue for non-consideration of additional grounds in the miscellaneous application Nos. ST/MISC/85304/2023 and ST/MISC/85305/ 2023 are without any basis or substance and accordingly are dismissed.

1.4 In view of above discussions, the miscellaneous applications filed by both the applicants/appellants and Revenue are disposed of and the appeals are taken up for hearing and for a decision on merits.

2. Before proceeding further on merits, we would like to record the following observations for appreciation by the authorities with regard to the judicial decorum and appropriate participation by Revenue officers in disposal of the appeals before the Tribunal.

2.1 During the course of hearing of appeals, the Commissioner of CGST and Central Excise, Aurangabad who desired long adjournment of the hearing and had been required, for the express purpose of justifying such action, to present himself and did so submitting that-

(i) the Commissionerate had not been served with the miscellaneous application(s) filed by the appellant assessee;

(ii) the department is preparing to file objections to the additional grounds, which were filed by the appellant assessee;

(iii) change of special counsel handling the case proposed for representing the issues in favour of the department.

2.2 We take note of the facts that upon verification of the case records, the Registry had reported that the additional grounds filed by the appellants vide Misc. Applications MISC/ST/85758 of 2022 and MISC/ST/85759 of 2022 on 02.08.2022 had been duly received under acknowledgement by the Office of the Authorised Representative, CESTAT, Mumbai on 08.08.2022. Therefore, we fail to appreciate the present stand of the Commissioner that, despite the filing of additional grounds having been known to the department for over nine months', he and, presumably the department, through him insist that they have been kept in ignorance of such miscellaneous applications filed by the applicants/appellants, even as the matter was heard on two occasions during April, 2023. We also fail to understand, as to how the department, at this juncture, is seeking adjournment on this ground, and, that too, not covered by the procedure prescribed for disposal of miscellaneous applications by the Tribunal under Rule 23 of the Customs, Excise & Service Tax Appellate Tribunal (Procedures) Rules, 1982. Further, the Commissioner of CGST and Central Excise, Aurangabad could not logically justify the request at this stage of proceedings when the entire case has been argued by both sides, and heard at length, for change of the special counsel to represent their case. In this

context, the Hon'ble Supreme Court in the case of *Tamil Nadu Electricity Board and Another Vs. N.Raju Reddiar and Another, reported in (1997) 9 Supreme Court Cases 736* have deprecated the manner in which the Advocate-on-Record initially presented the case was subsequently replaced with another Advocate-on-Record to take up the case before the Hon'ble Court, without obtaining the consent of the earlier Counsel.

2.3 We are also surprised to note that a senior officer at the level of Commissioner in the Indirect tax department, dealing with tax payers falling under his jurisdiction is not aware, even after four and half years of the change of name of the appellants, pursuant to the Order dated 27.07.2017, passed by the learned National Company Law Tribunal in CSP No.462 of 2017, in approving the scheme of Amalgamation. It is further intriguing that the said Commissioner heading the Aurangabad Commissionerate, feigned ignorance of the above facts, when more specifically, in the impugned order dated 08.03.2019 at para 2.2.2 had specifically recorded that the noticee i.e., M/s Videocon D2H Limited is now merged into Dish TV India Limited. Thus, we fail to understand how the same Authority, though he is a different officer posted subsequently, can take a view contrary to the views expressed by his predecessor, even as he claims ignorance.

2.4 Thus, it is apparent that, in seeking unnecessary adjournments, without any reasonable or valid grounds by Revenue, there is ulterior motive and purpose in obstructing the very process of justice delivery by the Judicial forum. Therefore, the action on the part of the Commissioner of CGST and Central Excise, Aurangabad is highly inappropriate.

2.5 Further, we are also unable to understand the intent of the Commissioner of CGST and Central Excise, Aurangabad in his letter F. No. TC(P)97/2017 dated 06.04.2023, addressed to the Principal Commissioner (AR), CESTAT, Mumbai, in suggesting that the department's strategy is to refer the matter to the larger Bench. We are unable to appreciate the basis under which the Commissioner of CGST and Central Excise, Aurangabad can contemplate directing the decision of this Tribunal in a particular manner and the legal authority supporting reference of dispute by the Tribunal to Larger Bench before any order has been pronounced on this case. The department's option of recourse to appropriate legal remedy, if outcome is not agreeable to them, is unfettered. However, this casual attitude on the part of senior officer at the level of Commissioner is

required to be viewed seriously by the Government; as such action hinders the process of justice delivery system.

2.6. In view of the above discussions, we are of the considered opinion that the matter should be examined by the authorities, supervising the departmental officers concerned for taking appropriate action, as deemed fit and proper, for ensuring appropriate presentation in the case matters before the Judicial forum, duly supported with the documentary and other evidences.

3. These appeals have been filed by the appellants against the Order-in-Original No.31-32/ST/COMMR/2016 dated 27.12.2016 and Order-in-Original No.50/ST/Commr./Adj/2018-19 dated 08.03.2019 (for short, referred to as 'the impugned orders'), passed by the learned Commissioner of Central Excise, Customs & Service Tax, Aurangabad.

4. Briefly stated, the facts of the case are that the appellants are primarily engaged in broadcasting services through Direct To Home (DTH) satellite television, a taxable service as per the definition under the Finance Act, 1994. For providing such taxable service, the appellants got themselves centrally registered with jurisdictional Service Tax Commissionerate, Aurangabad. The appellants have been granted with a license under Section 4 of the Indian Telegraph Act, 1885 and the Indian Wireless Telegraphy Act, 1933 by the Central Government to operate DTH platform and provide DTH services. For the provision of DTH services, the appellants install certain equipment at the customer's premises which are known as Direct to Home Customer Premise Equipment (DTH CPE). This DTH CPE consists of Set Top Box (STB) along with its remote control, smartcard and Outdoor Dwelling Unit (ODU) kit including dish antenna, other components and accessories to enable reception of DTH services.

4.1 On noticing that for providing broadcasting services to their customers, the appellants are purchasing STBs and installing the same at the customers' premises on rental basis under an agreement, the jurisdictional Range Officer, had called for certain details and the same were submitted by the appellants under the cover of their letter dated 11.01.2011. The appellants were of the view that service tax was not payable, since they are paying VAT on the amount realized from the customers in lieu of set-top box charges or satellite box usage charges, claiming the same as 'deemed sale'. However, the department interpreted

that in case of STBs, only the physical possession is with the customer, but the monitoring, sending and usage of signals are vested with the appellants and under their supervision, signals are being transmitted to the site of customers. Hence, the Department treated such modus operandi, as a case of transfer of right to use the STBs, without involving transfer of possession or effective control of the goods and thus, concluded that the transactions should be subjected to levy of service tax as an indispensable part of the broadcasting services. Accordingly, show cause proceedings were initiated by the department, which culminated into the impugned orders dated 27.12.2016 and 08.03.2019. In respect of the order dated 27.12.2016, the original authority has demanded service tax amounting to Rs.69,44,67,147/- as proposed for recovery in the SCN No. 10-ST/COMM/N/14-15 dated 13.06.2014. The said order also confirmed the service tax demand of Rs.26,62,29,645/- as proposed in the SCN No. 119/ST/COMM/2015 dated 15.10.2015. Besides confirmation of the said service tax demands, the original authority has also ordered for recovery of interest and imposed penalties under Section 77 and 78 of the Finance Act, 1994. In the impugned order dated 08.03.2019, the original authority has confirmed service tax demand of Rs. Rs.31,42,78,670/- with interest and also imposed penalty under Section 76 *ibid*, as proposed for recovery in the SCN No. 13/ST/COMMR/2018 dated 18.04.2018.

4.2 Being aggrieved with the impugned orders dated 27.12.2016 and 08.03.2019, the appellants have preferred these two appeals before the Tribunal.

5.1 Shri A.R. Madhav Rao, learned Advocate appearing for the appellants submitted that by invoking the extended period of limitation, the SCN dated 13.06.2014 was issued under the *proviso* to Section 73 *ibid*. He further stated that the extended period of limitation was not capable of being invoked, as the proceedings arose due to an audit objection and on the basis of details submitted by the appellants. Hence, he stated that it is not the case of Revenue that they were not aware of the activities undertaken by the appellants during the disputed period in providing the STBs on lease rental basis to the customers. He further submitted that there was no contumacious conduct on the part of the appellants to evade payment of service tax inasmuch as during the disputed period, an amount of Rs.101.60 Crores was paid as VAT on the amount collected as Lease Rentals of STBs,

as against the service tax demand of Rs. 96.06 Crores confirmed in the adjudication orders passed by the department.

5.2 Learned Advocate further submitted that during the entire period of dispute, the appellants have collected VAT on the amount realized from the customers towards supply of STBs, treating the transaction as deemed sale, under the provisions of the Article 366 (29A)(d) of the Constitution of India. Thus, he submitted that service tax liability cannot be fastened on the appellants on the rental charges of STBs. He further submitted that in respect of installation and activation of the STBs, the appellants had duly discharged the service tax liability on the charges claimed from the customers.

5.3 Learned Advocate has stated that STBs are to be regarded as movable goods namely, chattels supplied to the subscribers for their use in seeking the channels in the privacy of their homes, which they want to, and thus, the subscribers operate the STBs to view and also apply for various channels, movies on demands etc. Thus, he submitted that the levy of service tax on the services provided by the appellants can only be under the taxable category of 'Supply of Tangible Goods for Use' (STGU), without transferring the Right to Use, both prior to 2012 and thereafter. In this context, the learned Advocate has relied on the Circular Nos. 334/1/2008 – TRU, dated 29.02.2008 and 198/8/2016 S.T., dated 17.08.2016 issued by the Central Board of Excise & Customs (CBEC), to state that if VAT has been paid into the state exchequer, considering the nature of activity as deemed sale, then there is no question of levying service tax on the same activity, considering either as a service under the taxable category of 'Broadcasting Service' or 'STGU Service'. Further, learned Advocate has also referred to the "Taxation of Services: An Education Guide", issued by CBEC on 20.06.2012, to contend that the activities specified as declared services in Section 66E *ibid*, do not encroach upon the area of deemed sale and that the services for the purpose of levy of service tax exclude the services, which are considered to be deemed sale, in terms of Article 366(29A) of the Constitution. Learned Advocate also stated that levy of Service Tax and VAT are mutually exclusive, and for that purpose, has relied upon the judgement delivered by the Hon'ble Supreme Court, in the case of *Imagic Creative -Vs.- Commissioner of Commercial Taxes – (2008) 2 SCC 614 and BSNL -Vs.- Union of India – 2006 (2) STR 161 (S.C.)*.

5.4 By placing reliance on the judgment of the Hon'ble Tripura High Court in the case of *Bharti Telemedia –Vs-. State of Tripura, reported in 2015 SCC Online Tripura 177*, learned Advocate has stated that since the effective control over the STBs are with the customers, the transaction would appropriately be taxed under the State legislation as deemed sale and cannot be termed as a service, for the purpose of levy of service tax thereon. Further, he has also relied upon the judgment, in the case of *Commissioner of Service Tax –Vs.- Adani Gas Limited - 2020 (40) GSTL 145*, to strengthen the case of the appellant that in the eventuality, when both the subscriber as also the assessee used the STBs, STGU services are only attracted, which is a specified service, under the service tax statute even prior to the period 2012 and specifically as a declared service after such period. Thus, the learned Advocate has contended that the department's classification of service under the taxable category of 'Broadcasting' will not hold good and accordingly, the adjudged demands are liable to be set aside.

5.5 In countering the order passed by the Tribunal in the case of UCN Cabled Networks Pvt. Ltd. Vs. Commissioner of C. Ex. – 2016 (45) STR 565 (Tri.), as relied upon by the learned adjudicating authority, learned Advocate submitted that the said order has been passed *sub-silentio* on the various arguments, now being canvassed and that it is also not known to the parties in the present appeal, as to whether, VAT liability had been discharged by the concerned assessee in that decided case or not, not taken into consideration the definition of 'Service' under Section 65B (44) *ibid*, which excludes from its purview any transaction which amounts to sale under Article 366 (29A), i.e., 'deemed sale', under the Constitution of India. He also claimed that the set-top boxes and the consideration in the form of rental charges cannot be subsumed, as if it is a consideration for the broadcasting services, when the understanding between the subscribers and the Appellant is that the consideration of rental is for transfer of right to use of the set-top boxes.

5.6 In respect of the Appeal No.ST/86706/2019, learned Advocate submitted that VAT was being paid on the total rental amount received in a particular year and that the rental amounts were spread over seven years on a pro-rata basis. He further submitted that from 01.04.2015, no rentals were being collected and there were jural relationship of access charges on which service tax was paid by the appellants. He also submitted that the

past rentals received by the appellants are being charged to the profit & loss account as income from 01.04.2015 onwards, from the pool of current liabilities of past years, in a pro-rated manner. However, he submitted that the learned adjudicating authority has discredited the books of accounts maintained by the appellants, which resulted in confirmation of the tax demand for the second time, which is nothing but duplication of the demand, for which there is no specific provision contained in the statue book for effecting such recovery.

5.7 In view of the above submissions made on merits, on time bar and on duplication of demand, learned Advocate prayed that the appeals may be allowed with consequential relief to the appellants.

6. On the other hand, Shri S.K. Mathur, learned Advocate and Special Counsel engaged by Revenue, while reiterating the findings of the impugned orders had stated that the appellant had received consideration i.e., rental/usage charges for installation of STBs at the Customer's premises for providing Broadcast services and hence these are required to be included in the taxable value of service for payment of service tax. It is claimed by Revenue that the appellant's view that service tax was not payable since they were paying VAT on the amount realized from its customers in lieu of set-top boxes charges or satellite box usage charges, being a deemed sale, is incorrect. In support of this, they relied on the letter dated 04.08.2011 of the appellant wherein they have mentioned that in the case of STB, only physical possession is with the Customers, however, the monitoring, sending and usage of signals are vested with the appellants.

6.1. Further, learned Special Counsel stated that mere supply of STB without activation is of no use and the service cannot be provided without the use/application of STB. Therefore, the appellant is liable to pay service tax on the value of STBs also because, the amount received by the appellant from its subscribers towards the STBs would form part of the taxable value for the levy of service tax in relation to the activation charges, which were undeniably in the nature of service. He also pleaded that the dominant intent of the transaction clearly show that it is to provide services and not to sell any goods. Thus, he claimed that service tax is payable on supply of STBs.

6.2 Further, the learned Special Counsel pointed out that the appellant is misrepresenting the service rendered by them by claiming that the

classification of the rental consideration if taxed to service tax both pre and post-2012 can only be under STGU Service, as it is contrary to the facts of the case. He states that STB is an indispensable part of broadcasting service provided by the appellant to its subscribers. The transaction is to provide service and not sell STBs and STBs are only used for providing the service and do not have a value of their own. The broadcasting Service provided by the appellant was liable to pay service tax both before 01.07.2012 and thereafter, upon introduction of the Negative list scheme.

6.3 Learned Special Counsel Shri C. Dhanasekaran, appearing on behalf of the Revenue has stated that the appellants cannot provide broadcasting services to their customers without STBs, as the signals are transmitted and displayed on the customer's television with the help of STBs; that the STB is an indispensable part of the broadcasting services provided by the appellants to their subscribers, and as such, are leviable to service tax. In support of his view point, he has placed reliance on the decision of the Tribunal in the case of *UCN Cable Network Pvt. Ltd. Vs. Commissioner of C. Ex. & Customs., Nagpur 2016 (45) S.T.R. 565 (Tri.-Mumbai).* He further relied upon the judgments of the Hon'ble Apex Court in *Idea Mobile Communications Ltd.,* (supra) and the order of the Tribunal in *Aggarwal Colour Advance Photo system V.s Commissioner of Central Excise, Bhopal 2011 (23) S.T.R.608 (Tri.-LB),* to support the points that the entire value of STBs including rent, installation charges and activation charges should be subjected to levy of service tax.

6.4 In view of the above submissions made and on the basis of the findings in the impugned orders, the learned Special Counsels prayed that the appeals filed by the appellants may not be entertained.

7. Heard learned Advocates for the appellants, learned Special Counsels engaged by Revenue and examined the case records, including the written notes on arguments placed by both sides, during the course of hearing of these appeals.

8. On perusal of the case records, we find that the following issues arise for consideration by the Tribunal for disposal of the appeals filed by the appellants:

(i) what is the essence of services under the category of 'broadcasting' and 'STGU', both under the un-amended

definition of 'taxable service' (effective up to 30.06.2012) and 'service' under Negative List regime (w.e.f. 01.07.2012)?

(a) For the period pre-2012, Supply of Tangible Goods for Use (STGU) are covered as a taxable service, under Section 65 (105) (zzzzj) of the Finance Act, 1994. Such taxable service has been defined to mean, the service 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. Similarly, the phrase 'broadcasting' has also been defined in sub-section (15) read with clause 105 (zk) of Section 65 of the Act of 1994. The definition in respect of such taxable service provided in the statute book is extracted hereunder:

> "*Sec.65 (15) "broadcasting" has the meaning assigned to it in clause (c) of section 2 of the Prasar Bharti (Broadcasting Corporation of India) Act, 1990 (25 of 1990) and also includes programme selection, scheduling or presentation of sound or visual matter on a radio or a television channel that is intended for public listening or viewing, as the case may be; and in the case of a broadcasting agency or organisation, having its head office situated in any place outside India, includes the activity of selling of time slots or obtaining sponsorships for broadcasting of any programme or collecting the broadcasting charges or permitting the rights to receive any form of communication like sign, signal, writing, picture, image and sounds of all kinds by transmission of electro-magnetic waves through space or through cables, direct to home signals or by any other means to cable operator including multisystem operator or any other person on behalf of the said agency or organisation, by its branch office or subsidiary or representative in India or any agent appointed in India or by any person who acts on its behalf in any manner;*"

(b) On plain reading of the above statutory provisions, we find that the services connected with 'broadcasting' can be categorized under these different groups:

(i) programme selection, scheduling or presentation of sound or visual matter;

(ii) activity of selling of time slots or obtaining sponsorships for broadcasting of any programme;

(iii) permitting the rights to receive any form of communication like sign, signal, writing, picture, image and sounds of all kinds by transmission

> of electro-magnetic waves through space or through cables, direct to home signals or by any other means,

which are to be received by general public/subscribers as a part of viewing television channels.

(c) On examination of the case records, we find that in providing DTH television channels for viewing by the subscribers, the appellants are providing transmission of signals, sounds, images, pictures etc. of various channels such as, pay channels, free to air channels or other bouquet of channels direct to the subscribers. This is definitely covered under the category (i) and/or (iii) of the broadcasting services explained above. However, we find that the provision of STBs is outside the scope and ambit of any of the above said three groups, in order to fall within the ambit of 'broadcasting service'.

(d) For the period prior to 2012, Section 65A *ibid*, mandates that the classification must be done under the head, which is most applicable and that which provides the most specific description as against a sub-clause providing a mere general description. To exemplify, we may take the reference of "port service", defined under heading 65 (105)(zzl) *ibid*, to rope in all the services involved thereunder. As per the definition clause, all port services be it loading, unloading of cargo, warfare, stevedoring, light vessel uses etc., should fall under the omnibus category of 'port services', as long as the host of services are provided within the port area. However, in respect of broadcasting service, no such exalted status has been conferred in respect of that service, by a similar provision as in regard to port service. Thus, it is highly improper on the part of the adjudicating authority to conclude that the services provided by the appellants are to be fitted into the taxable category of 'broadcasting service', ignoring the statutory provisions, backed by the well laid principles of law that the activities would be categorized as 'deemed sale', which attract payment of VAT and not as a taxable service, for levy of service tax thereon.

(e) In fact, to the contrary, post 2012, Section 66F(1) *ibid*, has categorically laid down that the principal service does not cover services under that head used for providing such principal service, unless otherwise specified. There is no such specification provided anywhere in the statute book that 'broadcasting services' would include within its ambit, all services

used to provide the broadcasting services. It is also relevant to note that post - 2012, there is no separate specified head of broadcasting service, under which the learned adjudicating authority has classified supply of STBs as a part of such taxable service. Thus, we are of the considered view that supply of STBs, conferring the right to use the same by the subscriber, would not fall either under broadcasting service or under STGU for levy of service tax thereon. Rather, the activity of such supply, would more appropriately be considered as a deemed sale and recognizing such aspect, the appellants had rightly discharged the VAT liability thereon and also adoption of such modus operandi had been accepted all along by the jurisdictional VAT authorities, while finalizing the tax assessments.

(f) For the period post-2012, the category of services hitherto defined under the erstwhile regime were merged under a common phrase i.e., 'service', which was brought into effect from 01.07.2012. Under the new provisions, known as Negative List regime, the phrase 'service' was defined in Section 66E (f) ibid, assigning the meaning of STGU services as 'transfer of goods by way of hiring, leasing, licensing or in any such manner without transfer of right to use such goods', would be considered as a declared service. In the present case, since the right to use the STBs was given by the appellants to their subscribers, we have to consider the circumstances, under which the right to use is being transferred to the buyer. This particular aspect has been dealt with by the Hon'ble Supreme Court in Civil Appeal No. 5167 of 2022, in the case of *Commissioner of Service Tax, Delhi Vs. Quick Heal Technologies Limited – 2022 (063) G.S.T.L. 0385 (S.C.)*. The relevant paragraph in the said judgement is extracted herein below:

> ***"51.*** *The following principles to the extent relevant may be summed up:-*
>
> *(a) The Constitution (Forty-sixth) Amendment Act intends to rope in various economic activities by enlarging the scope of "tax on sale or purchase of goods" so that it may include within its scope, the transfer, delivery or supply of goods that may take place under any of the transactions referred to in sub-clauses (a) to (f) of Clause (29A) of Article 366. The works contracts, hire purchase contracts, supply of food for human consumption, supply of goods by association and clubs, contract for transfer of the right to use any goods are some such economic activities.*
>
> *(b) The transfer of the right to use goods, as distinct from the transfer of goods, is yet another economic activity intended to be exigible to State tax.*

(c) There are clear distinguishing features between ordinary sales and deemed sales.

(d) Article 366(29A)(d) of the Constitution implies tax not on the delivery of the goods for use, but implies tax on the transfer of the right to use goods. The transfer of the right to use the goods contemplated in sub-clause (d) of clause (29A) cannot be equated with that category of bailment where goods are left with the bailee to be used by him for hire.

(e) In the case of Article 366(29A)(d) the goods are not required to be left with the transferee. All that is required is that there is a transfer of the right to use goods. In such a case taxable event occurs regardless of when or whether the goods are delivered for use. What is required is that the goods should be in existence so that they may be used.

(f) The levy of tax under Article 366(29A)(d) is not on the use of goods. It is on the transfer of the right to use goods which accrues only on account of the transfer of the right. In other words, the right to use goods arises only on the transfer of such right to use goods.

(g) The transfer of right is the sine qua non for the right to use any goods, and such transfer takes place when the contract is executed under which the right is vested in the lessee.

(h) The agreement or the contract between the parties would determine the nature of the contract. Such agreement has to be read as a whole to determine the nature of the transaction. If the consensus ad idem as to the identity of the goods is shown the transaction is exigible to tax.

*(i) The locus of the deemed sale, by transfer of the right to use goods, is the place where the relevant right to use the goods is transferred. The place where the goods are situated or where the goods are delivered or used is not relevant**.”***

(g) Further, the phrase ‘right to use the goods’ and transfer of the same has also been dealt with by the Hon’ble High Court of Tripura, in the case Bharti Telemedia Ltd. and Ors. (supra), the relevant paragraph in the said judgement is extracted below:

“29. One of the most important elements of determining whether the right to use goods has been transferred or not is by ascertaining who has effective control over the goods. As far as STBs are concerned they are in total control of the customer. Under his effective control the STBs are installed in the house of the customer. He can use the STB when he wants to. He can use the STB to view whichever channel he wants to view. He may or may not use the STB. The company does not even have the power of entering the premises of the customer. Most importantly as per the terms of the agreement, the companies are responsible for the functioning of the STBs only for a period

of 6(six) months. The warranty is valid only for six months and thereafter there is no warranty. Therefore, if STB of a customer is spoiled after six months he will have to pay for repair or replacement of the same. We are of the considered view that this amounts to transfer of the right to use goods."

(h) It is not the case of Revenue that the appellants had retained the effective control over the STBs supplied to their buyers. Since, the effective control of the STB was with the buyer/subscriber to operate and to view the channels to his own choice, the transaction between the appellants and the buyer/subscriber cannot fall within the ambit of STGU for levy of service tax and would be considered as a deemed sale, attracting payment of VAT. In this context, the CBEC in the circular dated 29.02.2008, has also accepted the legal provision and clarified that if VAT has been paid on a transaction, there is no question of levy of service tax under the STGU services.

(ii) what is nature of activity undertaken by the appellants in supply/provision of Set top Boxes (STBs) to their customers/ subscribers?

(a) In order to appreciate the various issues referred above in respect of STBs, we would like to refer the background for introduction of Conditional Access System, various legal provisions concerning the telecommunication broadcasting and cable services, Direct to Home (DTH) services under the statute governing Telecom policy, relevant rules & regulations, orders issued by the Telecom Regulatory Authority of India (TRAI) as well as under the Finance Act, 1994 for determining the levy of tax on the services and the relevant rules and regulations framed thereunder.

(b) It is seen that prior to the introduction of DTH services, the only source of distribution of TV Channels was through cable. To have an alternative to Cable and provide better services to the consumers, the Government of India rolled out the DTH License in the Year 2003 subsequent to which, DTH License was issued to eligible persons including the appellants who are one of such DTH license holder and DTH service provider to the subscribers. In India, DTH service was a recent entrant as compared to cable transmission. It has certain technical advantages over cable operations. DTH is an addressable system and covers the entire country. The authority to issue DTH license vests with the Government of India, Ministry of Information & Broadcasting.

(c) Earlier, the Government had legislated the Cable Television Networks (Regulation) Act, 1995 in order to regulate the cable television networks in the country and to protect the interest of the consumers. The need for provision of STBs arose from the statutory requirements brought out by the Government under the said Act, by inserting a new Section 4A of Act of 1995 (supra), which envisaged "Transmission of programmes through addressable system" [popularly referred to as Conditional Access System (CAS)] to be implemented with effect from a specified date. In simple words, the introduction of this change made it obligatory for every cable operator to transmit or re-transmit programmes of any channel in an encrypted form through a digital addressable system.

(d) Similarly, in respect of DTH services, in terms of Direct to Home Broadcasting Services (Standards of Quality of Service and Redressal of Grievances) Regulations, 2007 issued by TRAI placed a legal obligation on the part of every DTH operator to give on non-discriminatory basis, the direct to home service to every person making request for the same, subject to technical and operational feasibility. The meaning of the term DTH service and DTH Customer Premises Equipment (DTH CPE) have been given in the said Regulations, 2007 (*ibid*), which are extracted below:

> *'2(h) "direct to home service" means distribution of multi channel TV programmes by using a satellite system by providing TV signals directly to subscriber's premises without passing through an intermediary such as cable operator or any other distributor of TV channels;*
>
> *2(f) "Direct to Home Customer Premises Equipment" means the components and accessories installed at the premises of the subscriber to enable the reception of a direct to home service and includes Direct to Home Set Top Box, the remote control for set top box and the dish antenna;'*

(e) The phrase "digital addressable system" in the above context means, an electronic device (which includes hardware and its associated software) or more than one electronic device put in an integrated system through which signals of cable television/DTH network can be sent in encrypted form, which can be decoded by the device or devices, having an activated Conditional Access System at the premises of the subscriber within the limits of authorisation made, through the 'Conditional Access System' and the

'subscriber management system', on the explicit choice and request of such subscriber.

(f) We find from the plain reading of the above statutory provisions that every DTH operator is required to provide STBs to their subscribers in order to provide DTH service, inasmuch as STB is a necessary equipment to receive the DTH signals sent in encrypted form, to be received through the dish antenna, and which can be decoded and displayed on the television of the subscriber. From the above, we thus come to the conclusion that STB is a part of Customer Premises Equipment which is necessary for providing DTH service to a subscriber. It may be seen that STB is used as an equipment, being part of CPE, and that whenever the television channels are viewed by a subscriber, the said STB along with antenna are used for receiving and decoding the signals as a part of conditional access system. In other words, the broadcasting of signals by the appellants for viewing television channels are distinct by themselves from the STBs and other equipment. Thus, we conclude that the nature of activity undertaken by the DTH operator in providing STB to a subscriber, is provision of an equipment, which is one-time activity, and it is not a part of DTH service in providing television channels for viewing by the subscriber.

(iii) whether provision of STBs by the appellants to the subscribers would amount to rendition of service?

On reading of Regulation 10 of the DTH Regulations (supra), it would transpire that a subscriber may or may not pay for his subscription charges. However, as a provider of DTH service, the appellants herein are entitled, even when no broadcasting signals go to the subscriber, to collect lease rental amounts for such period when the STBs remain with the subscriber. Hence, it can be concluded that the subscriber had control over the STBs during the time when he pays for the lease rental for the same and he can exercise the right of control by viewing free to air channels like Doordarshan etc., even if does not able to view the other channels for non-payment of requisite charges. Thus, we have no hesitation, but to conclude that supply of STBs by the appellants is not a service, rather it is a deemed sale, leviable to VAT under the State legislature, inasmuch as the right to use of STB has not been retained by the appellants and the same was transferred to the subscriber for viewing the channels etc. according to his own choice and will.

(iv) whether the charges collected by the appellants for STBs are amenable for levy of service tax under any other taxable category?

(a) From the records of the case, it is seen that the charges collected by the appellants in respect of providing STBs are on rental basis. The learned Advocate for the appellants argues that they are rightly paid the VAT on supply of STBs considering it as deemed sale.

(b) We find that supply of STB on rental basis is a deemed sale in terms of Article 366(29A) of the Constitution, and thus, such transactions *per se* are not amenable to charge of service tax, for the reason that the right to use the STBs has not been retained by the appellants and same has been provided or transferred to the subscribers for viewing the broadcast channels according to their choice.

(c) As regards supply of STBs on rental basis, the Revenue has alleged that these are part of broadcasting services and amenable for levy of service tax on the charges collected as rent. The AR and the Special Counsel have placed their support for the above stand on the basis that (i) the ownership of the goods rests with the appellants broadcaster (ii) STBs are being used by the appellants for providing DTH television services (iii) Rentals collected periodically are nothing but part of charges for broadcasting service, as the STBs are enhancing the quality of services as held in the case UCN cables (supra). Hence, they claim that STB shall be subject to levy of service tax as "supply of tangible goods for use with no legal right of possession or control".

(d) We have examined each of the claims made by the Revenue in detail in the following paragraphs. Revenue strongly relies upon the Hon'ble Supreme Court's Judgment in the case of *Idea Mobile Communication Ltd. (supra),* wherein it has been held that consideration for SIM Card would be more relevant to service tax and not amount to sale of goods. On reading of the said judgement, it transpires that the Hon'ble Court have proceeded on the basis that the charges for SIM Card were activation charges and the SIM was relevant to service and would not be goods in the manner understood in common parlance for levy of VAT thereon. However, in the present case, the STBs are being transferred for consideration and on the activation charges, installation charges and subscription charges for the broadcasting contents, service tax is being paid by the appellants. Therefore, the ratio of the above

judgement relied upon by Revenue cannot be applied to decide the case differently.

(e) Further, Revenue also relies upon the order of the Co-ordinate Bench of the Tribunal, in the case of UCN Cable Network P. Ltd. (supra). We find that the identical issue involved in the present case has been dealt with by the Hon'ble Tripura High Court in the case of Bharti Telemedia Ltd., (supra), wherein it has been held that it is the subscriber who used to have control over the STBs.

(f) We find that the said judgement was delivered by Hon'ble Tripura High Court prior to the order passed by the Tribunal in UCN Cable Network (supra). Since, the judgement of Hon'ble High Court was not brought to the notice of the Tribunal, there was no occasion to deal with the issue and the principles decided therein. Hence, the ratio of the order of Tribunal in UCN Cables (supra) cannot be applied to the facts and circumstances of the present case.

(g) We made it clear in the above paragraphs that supply of STBs cannot be categorized as a taxable service under the definition of 'broadcasting'. Even considering the same as a taxable service under the category of STGU, the same cannot meet the requirement of levy of service tax in the case of the appellants inasmuch as the right to use the STBs were transferred by the appellants to the subscribers. In other words, if the right to use and control of the STBs retained by the appellants, the same would fall under the purview of STGU for levy and payment of service tax under that category of service. These aspects have been adequately dealt with in the Circulars and Educational Guide issued by CBEC (referred supra). Such guidelines were issued by the Board by considering the Budget Speech delivered by the Finance Minister in the floor of the Parliament, which is to the effect that right to use the goods, would be subjected to levy of service tax, in cases where VAT is not payable on such goods.

(h) Revenue has relied upon the order passed by the Larger Bench of the Tribunal in the case of *Aggarwal Colour Advance Photo system* (supra), wherein it has been held that material used for photography is to be considered as a service. We find that the issue decided by the Larger Bench was the subject matter in dispute before the Hon'ble Madya Pradesh High Court in the Central Excise Appeal No.1 of 2013. The Hon'ble Court had framed the substantial question of Law, "*whether, while providing*

photography service whether the use of the paper upon which an image is printed using certain consumables and chemicals, being incidental to the provision of service, amount to sale of goods in terms of Article 366(29A)(b) of the Constitution and whether value of photography service shall be determined in isolation of cost of such goods?". The said question was answered affirmatively in favour of the appellant therein, holding that the value of photographic paper being leviable to sales tax under works contract service, by considering it as deemed sale, the said consumables cannot be included in the value of photography service for the purpose of imposition of service tax. Similarly, an identical issue regarding deemed sale vis-à-vis service has also been discussed by the Hon'ble Supreme Court in the case of Safety Retreading Co. (P) Ltd. Vs. Commissioner of C. Ex., Salem – reported in 2017 (48) S.T.R. 97 (S.C.). The relevant paragraph in the said judgement is extracted herein below:

> *"10. The exigibility of the component of the gross turnover of the assessee to service tax in respect of which the assessee had paid taxes under the local Act whereunder it was registered as a Works Contractor, would no longer be in doubt in view of the clear provisions of Section 67 of the Finance Act, 1994, as amended, which deals with the valuation of taxable services for charging service tax and specifically excludes the costs of parts or other material, if any, sold (deemed sale) to the customer while providing maintenance or repair service. This, in fact, is what is provided by the Notification dated 20th June, 2003 and CBEC Circular dated 7th April, 2004, extracted above, subject, however, to the condition that adequate and satisfactory proof in this regard is forthcoming from the assessee. On the very face of the language used in Section 67 of the Finance Act, 1994 we cannot subscribe to the view held by the Majority in the Page 9 9 appellate Tribunal that in a contract of the kind under consideration there is no sale or deemed sale of the parts or other materials used in the execution of the contract of repairs and maintenance. The finding of the appellate Tribunal that it is the entire of the gross value of the service rendered that is liable to service tax, in our considered view, does not lay down the correct proposition of law which, according to us, is that an assessee is liable to pay tax only on the service component which under the State Act has been quantified at 30%."*

In view of the authoritative judgements delivered by the Hon'ble Supreme Court and the Hon'ble Madya Pradesh High Court (Supra) in

overruling the Larger Bench decision (supra) cited by Revenue, we do not find any force in the Revenue's relying on such order as proper and valid.

9. The Appeal being No. ST/86706/2019 was filed by the appellants against the impugned order dated 08.03.2019, wherein the learned adjudicating authority had confirmed the adjudged demands for the period from 01.04.2015 to 31.03.2017. The appellants have assailed the impugned order on the ground that the present demand is a duplication one, as the amount has already been considered in the other adjudication order dated 27.12.2016. Further, the appellants have also contended in the appeal that the amount received by them as lease rentals is on account of deemed sale and not service and accordingly, not chargeable to service tax. Since, the issue in both the impugned orders is identical, this order passed by the Bench will have equal force in respect of both the appeals filed by the appellants.

10. In view of the foregoing discussions and analysis, we do not find any merits in the impugned orders, in so far as the adjudged demands were confirmed on the appellants. Therefore, by setting aside the impugned orders, the appeals are allowed in favour of the appellants.

(Order pronounced in the open court on 24.07.2023)

(S.K. Mohanty)
Member (Judicial)

(M.M. Parthiban)
Member (Technical)

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