CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, WEST ZONAL BENCH : AHMEDABAD

REGIONAL BENCH - COURT NO. 3

SERVICE TAX Appeal No. 13593 of 2014-DB

[Arising out of Order-in-Original/Appeal No RAJ-EXCUS-000-COM-13-14-15 dated 21.08.2014 passed by Commissioner of Central Excise, CUSTOMS (Adjudication)-RAJKOT]

Welspun Steel Limited **.... Appellant**
Survey No. 650, Welspun City,
Varsamedi, Taluka : Anjar, KUTCH,
GUJARAT -370110

VERSUS

Commissioner of Central Excise & ST, Rajkot **.... Respondent**
Central Excise Bhavan, Race Course Ring Road,
Income Tax Office, Rajkot, Gujarat -360001

WITH

SERVICE TAX Appeal No. 10908 of 2019-DB

[Arising out of Order-in-Original/Appeal No KCH-EXCUS-000-APP-028-2019 dated 20.02.2019 passed by Commissioner (Appeals) Commissioner of Central Excise, Customs and Service Tax-RAJKOT]

Welspun Steel Limited **.... Appellant**
Survey No. 650, Welspun City,
Varsamedi, Taluka : Anjar, KUTCH,
GUJARAT -370110

VERSUS

C.C.E. & ST, Kutch (Gandhidham) **.... Respondent**
Central Excise & Service Tax Commissionerate,
Central Excise Bhavan Plot No. 82, Sector 8,
Gandhidham (Kutch) Gujarat

AND

SERVICE TAX Appeal No. 10909 of 2019-DB

[Arising out of Order-in-Original/Appeal No KCH-EXCUS-000-APP-028-2019 dated 20.02.2019 passed by Commissioner (Appeals) Commissioner of Central Excise, Customs and Service Tax-RAJKOT]

Welspun Steel Limited **.... Appellant**
Survey No. 650, Welspun City,
Varsamedi, Taluka : Anjar, KUTCH,
GUJARAT -370110

VERSUS

C.C.E. & ST, Kutch (Gandhidham) **.... Respondent**
Central Excise & Service Tax Commissionerate,
Central Excise Bhavan Plot No. 82, Sector 8,
Gandhidham (Kutch) Gujarat

APPEARANCE :

Shri Hardik Modh, Advocate, for the Appellant
Shri Tara Prakash, Deputy Commissioner (AR) for the Respondent

CORAM: HON'BLE MR. RAMESH NAIR, MEMBER (JUDICIAL)
HON'BLE MR. C.L. MAHAR, MEMBER (TECHNICAL)

DATE OF HEARING : 03.07.2024
DATE OF DECISION: 30.09.2024

FINAL ORDER NO. 12243-12245/2024

C.L. MAHAR :

The common facts in all the three appeals are that the appellant was engaged in leasing of Diesel Generator Sets to lessees on the basis of lease agreement by which the monthly lease charges were recovered by the appellant. The appellant has not paid any service tax on the amount of lease amount recovered from the lessee under the category of "Supply of Tangible Goods service" since May 2008. The department has entertained a view that the appellant have evaded service tax amounting to Rs. 1,67,93,120/- and therefore a show cause notice dated 07.10.2013 came to be issued which was adjudicated by the impugned order-in-original dated 21.08.2014 whereunder service tax amounting to Rs. 1,67,93,120/- has been confirmed under Section 73(1) of Finance Act, 1994 and equal amount of penalty has also been imposed under Section 78 of the Finance Act, 1994. Interest on the demanded service tax has also been confirmed. The show cause notices for demanding service tax for the subsequent periods were also issued and confirmed by the Adjudicating Authority and the appellant has reached to this Tribunal and therefore the same are being taken together as stated in initial of this paragraph.

2. The basic contention of the department for demanding service under the category of Supply of Tangible Goods service is that while providing Diesel Generator Sets on lease basis, the appellant has not transferred the right of possession and effective control on the Diesel Generator Sets and therefore, the appellant should have paid the service tax under the category of Supply of Tangible Goods service.

3. Shri Hardik Modh, learned Counsel appearing for the appellant has contended that appellant have transferred the right of possession and

effective control during the use of the Diesel Generator Sets to the lessee and applicable VAT was paid on such transaction and therefore, the transaction of leasing of Diesel Generator Sets is considered as deemed sale. Therefore, as per law the same is not liable to service tax. The appellant has relied upon various decisions in support of his case holding that the lessees were responsible for maintaining and operating and incurring operating cost of the Diesel Generator Sets during the tenure of the lease period. The appellant has no responsibility for operation and maintenance of Diesel Generator Sets from the date of handing over of Diesel Generator Sets to the lessees and it was the lessees responsibility for operation and maintenance. The learned advocate has submitted that the Hon'ble Apex Court in the case of *BSNL& Ors vs. UoI & Ors – 2023 (8) TMI 1237 CESTAT AHMEDABAD* has provided certain guidelines for interpreting the transaction same is transfer of goods/ deemed sale or purely a supply of tangible goods. The guidelines which have been provided by the Hon'ble Apex Court are as follows:-

> "(a) There must be goods available for delivery;
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> (b) There must be a consensus ad idem as to the identity of the goods;
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> (c) The transferee should have a legal right to use the goods consequently all legal consequences of such use including any permissions or licenses required therefore 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."

The learned advocate has also contended that Adjudicating Authority have not appreciated the fact that appellant has paid VAT on the transactions

between them and the lessee for the period 2012-13 onwards and for the period prior to 2012-13 it was submitted that appellant was availing benefit under VAT incentive scheme of Gujarat State in terms of which the appellant has enjoyed the following benefits:-

(i) As per the scheme, the assessee shall be availing refund on input tax paid on purchase of input within Gujarat State and;
(ii) The appellant shall be allowed remittance of VAT with respect to sale of goods.

3.1 The learned advocate has also relied upon the CBEC Circular No. 334/1/2008-TRU dated 29.02.2008 which has clarified that service tax is not liable to be paid, if VAT has been paid on the transactions. The learned advocate has produced the relevant text of the CBEC Circular dated 29.02.2008 which reads as under:-

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

3.2 The learned advocate has also argued that the matter is no longer res-integra as in various matter, this Tribunal has held that wherever the assessee has paid VAT on leasing of any tangible goods, the liability of paying the service tax does not arise. The learned advocate relied upon the decisions in the case of *Technical Dying Services Pvt. Limited vs. CCE&ST – 2024 (1) TMI 452* and in the case of *Jeevanjyot Motors vs. CCE&ST* Final Order No. 11565/2023.

4. We have also heard Shri Tara Prakash, learned Deputy Commissioner (AR) appearing for the Revenue who has reiterated the findings given in the impugned orders.

5. After hearing both the sides we find that the above three appeals covers the following matters of the appellant :-

Appeal No.	**Period involved**	**Name of the Lessee**	**Service tax**	**Penalty under Section 78**
ST/13593/ 2014	May 2008 to March 2013	Welspun India Limited	1,67,93,120/-	1,67,93,120/-
ST/10908/ 2019	2013-14	Welspun Captive Power Generation Limited	19,32,205/-	1,93,220/-
ST/10909/ 2019	2015-16 to 2017-18 (Upto June 2017)	Welspun Steel Limited	15,77,340/-	1,57,734/-

6. Before proceeding further it will be appropriate to have a glance at the definition of Supply of Tangible Goods service provided under clause (zzzzj) of Section 65 (105) of the Finance Act, 1994 which reads as follows:-

> "(105) "taxable service" means any service provided or to be provided,- (zzzzj) 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;"

It is apparent from the reading of above definition that for an act to fall under the 'Supply of Tangible Goods service' the element of not transferring the right of possession of the goods and effective control of the goods should have to be fulfilled. We find that in the present matter, the appellant have paid VAT on all the lease agreements which have been entered for supply of Diesel Generator Sets to various lessees. The agreements which have been entered into by the appellant have clearly provided that the lessees shall bear all the maintenance and operating cost of the Diesel Generator Sets during the term of lease. The other clauses of the agreement also point out the fact that lessees have the right of possession and effective control on the Diesel Generator Sets which is evidenced by the agreement which have been shown to us by the learned advocate. We find that the identical issue has been considered and settled by this Tribunal in various decisions. This Tribunal in the case of Technical Dying Service Pvt. Limited vs. CCE&ST,

Vadodara-ii reported at 2024 (1) TMI 453- CESTAT Ahmedabad has held as follows:-

> **"4.** We have carefully considered the submission made by both sides and perused the records. We find that as per the undisputed fact of the *case* that the appellants have given their dehumidifier equipment and also erected, installed and commissioned at the service recipient's factory. As per the module one which is under dispute in the present *case* the appellants have erected & installed the de-humidifier and thereafter the complete possession and control of the machine was given to the customer during the entire renting period. Thus, the possession and effective control was transferred to their customers during the entire renting period. The activity can be classified under supply of tangible goods for use service under Section 65 (105) (zzzzj) of Finance Act, 1994 which reads as under:-
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> > *"(zzzzj) supply of tangible goods services" means any services 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."*
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> **4.1** From the plain reading of the above definition it can be seen that the services can be classified under supply of tangible goods for use service only when right to possession and effective control of the equipment is not transferred to the service recipient. In the present *case* as per arrangement between the appellant and the service recipient, since after giving the equipment on hire to the service recipient, the right to possession and effective control is with the service recipient who possessed the equipment and operated the same with their own employee. It is also undisputed fact that the appellants have discharged the VAT considering the same as deemed sale under Article 366 (29A) of Constitution of India. Therefore, the hiring of equipment under this fact cannot be classified as supply of tangible goods for use service in terms of Section 65 (105) (zzzj) of Finance Act, 1994. This issue has been considered time and again in various cases. In the most relevant *case* i.e. UFO Moviez India Limited (Supra), the tribunal has passed the order as under:-
>
> > *"6. We find that the first demand of service tax is on lease rentals collected by the appellant from the theatre owner. The appellant is receiving film in analogue format from the distributors/producers and converting into compressed encrypted digital format for which they are charging digitalization fee from the distributors/producers and are also discharging service tax on the same. The distributors on the other hand are entering into agreements with the theatre owners for exhibition of movies. The agreement between the distributors and theatre owners are based on number of shows. The distributor also enters into a content distribution agreement with the appellant to deliver the digital content in movie theaters and to monitor the number of shows exhibited. The appellant track the number of show with the help of smart card inserted into the DCE as part of the service to distributors. The theatre owner in order to receive the digital content and exhibit cinema require Digital Cinema Equipments which are either owned by them or are taken on lease by them. The appellant has leased such equipments to some of the theaters. The appellant in order to fulfil contract with the distributors are inserting smart cards to monitor the number of shows in such DCE. They are also collecting registration fee from theaters for conducting feasibility study which is reimbursement of expenses. The demand against them is on lease of DCE equipments given to the theatre owners on the ground that since the effective control and possession of such equipments has remained with the appellant, hence the services are of "supply of tangible goods for use". We*

find that the adjudicating authority has held that since as per contract the equipment will remain sole property of equipment provider and he shall bear the cost of normal wear and tear and repairs it is clear that the legal right and effective controls rests with the appellant. We find that except the above findings the Commissioner has not dwelled upon any of the submission and facts made by the appellant. The terms and condition of the agreement are its essence and is deciding factor for determination of nature of contract/agreement. The findings of the impugned order nowhere leads to the conclusion on the basis of this vital aspect. The appellant before the adjudicating authority and in their appeal memo has made submission on clause of agreements i.e. in terms of Clause 1B of the agreement the equipment is delivered to the theatre owner; in terms of Clause 1D the Theatre owner would put a person well versed with handling of equipment; Clause 5J where the theatre owner is required to get all permissions for installation of DCE; Clause 5K as per which the theatre owner shall be responsible for all injuries, losses and damages cause to the equipment and shall also indemnify the appellant against any loss or damage arising to or in connection with the equipment for the reason other than normal wear or tear; Clause 16A as per which the appellant has transferred the right to use of DCE exclusively to the theatre owner and the theatre owner shall have effective control of the DCE and shall be free to make its own use for theatrical exhibition purpose at its sole discretion. The Ld. Senior Counsel appearing on behalf of appellant has argued by citing case laws that agreement should be read as a whole and not few clauses in isolation to decide the nature of service.

6.1 Further the fact that 600 theatres had exhibited the IPL matches and none of the content was provided by appellant. None of these submissions has been taken into account while passing the impugned order. We also find that in addition the appellant had made various other submissions which do not find mention in order and are discussed in later part of this order. The appellant has contended that the DCE equipments could be operated on standalone basis by the Theatre owner for screening of any content which the theatre owner would procure. The appellant had no say in all such actions of the theatre owner. The role of smart card was limited to keeping track of shows to be played and deducting credit which is available on the smart card for running of shows. It was installed on the direction of the distributors who had entered into agreement with the theatre owners for exhibiting their movie and the appellant had no connection with the theatre owner in respect of such smart card. Thus the smart card were not an instrument to control the operation of DCE on behalf of appellant or has no bearing on the agreement between the theatre owner and appellant in case of leasing of DCE Equipments. As far as insurance of the DCE equipment is concerned the Appellant were owners of the equipments and the nature of leasing agreement does not change for the reason that the insurance was done by the appellant. For bringing any service under the category of "supply of tangible goods service" in terms of Section 65(105)(zzzj) it is imperative to see that such service is in respect of services towards supply of tangible goods for use "without transferring right of possession and effective control". In the present case once the DCE were transferred to theatre owner the appellant had no control over running of such equipments which are to be operated by the persons employed/deputed by the theatre owner. The theatre owner had contractual control over such equipments which was in their possession. All these factors are to be taken into consideration while determining the nature of service. It is observed that the appellant has been paying VAT on such leasing of DCE since year' 2006. Further the fact remains that in 2008 they approached the authority for determination of disputed question which ruled that the services are liable for VAT. The adjudicating authority has not given any findings on this

aspect when brought before him. We also find that DOF No. 334/1/2008-TRU, dated 29-2-2008 Circular in Para 4.4 also states that "Supply of tangible goods for use and leviable to VAT/Sales tax as deemed sale of goods, is not covered under the scope of the proposed service. Whether a transaction involves transfer of possession and control is a question of facts and is to be decided based on the terms of the contract and other material facts. This could be ascertainable from the fact whether or not VAT is payable or paid". It is not in dispute that the appellant were paying VAT since 2006 and the services of "supply of tangible goods" came into service tax net later. The subject DOF was issued before the enactment and intended that the "proposed service" would not include the transaction on which VAT is "Payable or paid". The theaters are free to choose which movie to be displayed, the number of shows, the timing of shows, weather to play a movie or not and also have operational control over equipment. From these facts, it prima facie appears that the theatre were having absolute authority to run the Cinema Equipments as per their liking with no right of the appellant to interfere or to be forced by the appellant to run the Equipments as per their directions or control. The appellant has also relied upon the order of Tripura HC in case of Bharti Telemedia Ltd. v. The State of Tripura - 2015-TIOL-2983-HC-TRIPURA relating to identical situation and the Ld. Senior Counsel has argued that the ratio of said judgment would squarely applicable to the case.

6.2 We also find that the appellant had regularly been filing their returns and even the department from time to time had initiated enquiry with the appellant which was properly responded. The DGCEI also investigated the issue in 2008-2009 and after response by the appellant vide their letter dated 17-6-2009 no further action was taken which shows that even the revenue appears to have satisfied regarding non-applicability of tax on activities of the appellant. Further it is also not in dispute that the appellant had been paying VAT even before the levy of service tax which is being demanded in the instant case. Even the circular issued in 2008 referred above clearly states that VAT and Service Tax are mutually exclusive. Considering all above factors it appears there is no suppression of fact on appellant's part. It is also observed that the appellant obtained DDQ (Determination of Disputed Question) dated 26-6-2008 from Commissioner of Sales Tax, who held that lease rental is liable for VAT. The appellant accordingly was discharging the VAT liability even before the taxability on 'Supply of Tangible goods for use'. With the above undisputed facts. We are of the clear view that there is no suppression of facts with intent to evade payment of Service Tax on lease rentals on DCE, on the part of the appellant. Therefore we hold that the demand for extended period is clearly time-barred.

6.3 As regard demand of service tax on merit for the normal period, we observed in our above discussions that various vital facts and submissions of the appellant were not properly verified by the adjudicating authority, therefore we remand the case relating to lease rentals and registration fees for the normal period with direction to adjudicating authority to verify whether the contentions made by the appellants are correct with regard to the theatre owners having freedom to choose movie, number of shows, timing of shows, to determine whether to play a movie or not and have operational control of the equipment through their own men or not. Also to verify weather play out of IPL matches or local advertisements have happened in the past and pass a speaking order after giving an opportunity of being heard. The appellant is at liberty to make all submissions before the adjudicating authority.

6.4 With regard to CENVAT credit on capital goods we find that it is not disputed that the appellant and theatre owner had joint partnership agreement to exhibit the advertisement and the proceeds were to be shared in the ratio of 75 : 25 or

as the case may be. The advertisers were into agreement with the appellant for such advertisement. Further we find that as per Rule 2(a) of Cenvat Credit Rules, 2004 specified capital goods used for providing output service would be eligible for credit. In this case the capital goods are specified capital goods and has been used for providing the output services of the appellant namely content delivery services and sale of space for advertisement service. It is not in dispute that equipments are used for providing the output services of the appellant. We also find that there was no contract or agreement between the theatre owners and the persons whose advertisements were exhibited in cinema theaters. Only the appellant had an agreement with such persons to exhibit the advertisements. Thus there is no ground to hold that the appellant were providing any business supports service to theater owner. The DCE equipment at the most can be said to have been jointly used by the appellant and the theater owner to provide the services of Sale of Space for Advertisement. The DCE Equipment being specified capital goods as defined under Rule 2(a) and having been used for providing output service are eligible for availment of credit. In terms of Rule 3(1) of Cenvat Credit Rules and proviso to Rule 3(5) it transpires that the credit is available even if the capital goods are removed outside the premises of the provider of output service for providing the output service. As regard submission of Ld. AR that while removing capital goods to theatre, the appellant was supposed to reverse the Cenvat credit as said capital goods was purportedly sold to Cinema theatres. In this regard we find that though the DCE was deemed sold to Cinema Theatre but ultimate ownership of DCE remains with the appellant. The DCE admittedly used for exhibiting advertisement. The appellant paid service tax on service of sale of space for advertisement which was provided through the said DCE. It therefore leaves no doubt that credit on capital goods is available even if they are removed outside from the premises of the appellant for providing output service. We are therefore of the view that there is no ground for denial of Cenvat credit on capital goods to the appellant.

6.5 We also find that while invoking extended period for demand of Cenvat credit on DCE, in Para 33 of the Order-in-Original, adjudicating authority has admitted that the appellants have disclosed Cenvat credit on capital goods in the return, despite recording this, he has given adverse finding on limitation. Considering the fact that appellants have been paying VAT from 2006 that too at higher rate than the service tax rate, even before SOTGU Services became taxable service, no mala fide can be attributed to invoke extended period for denying Cenvat credit. Placing reliance on Dalmia Cements case of the Madras High Court and in view of our above observations, we are of the view that Cenvat credit on Digital Cinema Equipment has to be allowed, independent of taxability on lease Rentals of DCE. Accordingly we set aside the demand of Cenvat credit on Digital Cinema Equipment on merit as well as on limitation.

7. As a result, we pass following order.

(i) Demand of Cenvat credit and consequential interest and penalty commensurate to said demand on capital goods i.e. Digital Cinema Equipments is set aside on merit as well as on limitation.

(ii) The matter relating to demand of service tax for normal period on lease rentals of Digital Cinema Equipments is remanded for reconsideration, on merit to the adjudicating authority. The demand of service tax on lease rentals and corresponding interest and penalty for the extended period is set aside being time-bar.

8. The appeal is disposed of in the above terms."

4.1 The above decision of the Tribunal has been approved by the Hon'ble Supreme Court wherein the Hon'ble Apex Court has given the following observation:

> *"2. In the facts of the present case as it is not disputed that the respondent had regularly paid amount towards VAT liability in respect of the subject goods during the relevant period, the question of claiming service tax thereon does not arise.*
>
> *3. Accordingly, in the facts of the present case, the civil appeal is dismissed.*
>
> *4. Pending applications stand disposed of."*

4.2 From the above decision which is on the identical fact, the Hon'ble Supreme Court has given the observation that where the VAT is paid no service tax can be demanded. Other decisions cited by the Learned Counsel support their *case*.

5. Accordingly, the impugned orders are set aside. Appeals are allowed with consequential relief, if any, in accordance with law.**"**

7. Following the above decision wherein the facts are akin to the one which is under consideration here, we hold that the VAT has been paid by the appellant on the supply of Diesel Generator Sets and therefore, service tax is not liable to be paid under Supply of Tangible Goods service. We therefore find no merit in the impugned orders-in-original, we set-aside the same. Appeals are accordingly, allowed.

(Pronounced in the open court on 30.09.2024*)*

(Ramesh Nair)
Member (Judicial)

(C L Mahar)
Member (Technical)

KL