



Dimensions – 81st Edition

Judgment under Pre-GST era

Commissioner of Service Tax, Ahmedabad v. M/s Adani Gas Ltd.¹

Issue for Consideration

Whether charges collected for supply of pipes and measuring equipment to the customers are liable to Service tax under the category of supply of tangible goods service (“SOTG service”).

Discussion

- The Respondent is engaged in the business of distributing natural gas - compressed natural gas (“CNG”) and piped natural gas (“PNG”) to industrial, commercial and domestic customers.
- The Respondent enters into a Gas Sales Agreement (“GSA”) with its customers for supply of gas. The Respondent has installed an equipment named ‘SKID’ at the customer’s premises to facilitate the distribution of PNG. The SKID regulates the supply of PNG being distributed and records the quantity of PNG consumed for billing purposes. The Respondent is also engaged in

providing a taxable service falling under the category of “transport of goods through pipeline”.

- During the course of an audit, it was observed that the Respondent received income under the head gas connection charges (“GC charges”) for supply of pipes, measuring equipment etc. while providing new gas connection to the customers. The ownership of the SKID was retained by the Respondent and the customer did not have any control or legal rights over it. Furthermore, Value Added Tax (“VAT”) was not collected from the customers on the GC charges.
- Thereafter, a Show Cause Notice (“SCN”) was issued to the Respondent demanding Service tax on the GC charges under the category of SOTG service. The demand was confirmed by the authorities observing that although the SKID was supplied, installed and maintained at customer premises, the ownership vested with the Respondent and there is no transfer of right or effective control. Furthermore, “use” does not mean that the recipient must personally and physically use the equipment all the time. It is the customer who is using the SKID to ensure effective and

¹ 2020-VIL-27-SC-ST



accurate billing despite the lack of technical expertise in operating it.

- The Respondent filed an appeal against the order before the Hon'ble Tribunal. The Tribunal allowed the appeal observing that the SKID is used by the Respondent and not the customer.
- Thereafter, the Appellant filed an appeal before the Hon'ble Supreme Court against the order of Tribunal on the following grounds:
 - SKID is installed by the Respondent at cost to the customer. Ownership and possession of SKID is not transferred to the customer. SKID is installed, maintained and repaired by the Respondent and the cost is borne by the customer. SKID ensures benefit to the customer as it is used for verifying the correctness of the billing quantity.
 - Although the GC charges are claimed to be refundable, the quantum of refund varies from buyer to buyer and the data produced by the Respondent indicates that in several cases full refund has not been made.
 - Circular no. 334/1/2008-TRU dated February 29, 2008 clarifies that transactions that enable usage of goods without transferring the right to use are a service and not a sale under the Article 366(29A)(d) of the Constitution of India. Furthermore, since VAT is not collected by the Respondent, the transaction must be treated as a service.
 - The SKID is used not only by the Respondent but also by the customer and hence the finding of the Tribunal that the SKID is used only by the Respondent is contrary to the terms of the GSA.
- The Respondents, on the other hand, contended as follows:
 - GSA is an agreement for sale and purchase of PNG and its terms provide contractual rights to the customer, including right to verify and dispute the bill raised and seek arbitration. The

rights of the customer under the GSA are independent from the use of SKID.

- Under the terms of GSA, ownership continues to vest with the Respondent at all times and the customer is not entitled to adjust, modify or maintain the SKID. Furthermore, the customer neither has any possessory right nor the right to lease or sub-let the SKID.
 - The purpose of SKID is to measure the quantity of gas supplied and no service is provided to customer via the SKID.
 - GC charges collected are in the nature of interest free security deposits which must be refunded in part or full depending on duration of the contract.
 - There is neither transfer of right to use nor any element of service involved. The SKID is installed by the Respondent as seller of gas and is not used by the customer.
- The Hon'ble Supreme Court observed as follows:
 - The Court relied upon its decision in the case of *Bharat Sanchar Nigam Limited and another v. Union of India and others*² which provided relevant attributes for assessing whether a transaction constitutes transfer of right to use any goods.
 - Section 65(105)(zzzzj) in the Finance Act, 1994, was introduced with the intention of taxing the use of goods by the customer belonging to the service provider without transfer of right of possession and effective control. This provision creates an element of taxation over a service as opposed to a 'deemed sale' under Article 366(29A)(d) of the Constitution. This has been clarified by circular no. 334/1/2008-TRU dated February 29, 2008.
 - The crucial ingredient for a transaction to be taxed under section 65(105)(zzzzj) of the Finance Act, 1994 is SOTG for use by another without transferring the right to possession and effective control. There is an element of service which is the foundation for the levy of tax.

² 2006 (3) SCC (1)



- The GSA is an agreement between the Respondent and its customer for regulating the terms on which gas is sold by the Respondent. The SKID is installed for measurement and recording of volume and pressure of gas delivered at the delivery point and for the safe operation of the customer’s facilities. On perusal of the GSA and the submissions by the parties the Court observed that there is no transfer of ownership or possession of the pipelines or SKID by the Respondent to its customer.
- Furthermore, the pipelines are part of “Seller’s facilities” under the agreement and are constructed and maintained by the Respondent at the cost of the customer. Thus, the ingredient of not transferring the ownership, possession and effective control of goods under section 65(105)(zzzzj) of the Finance Act, 1994 is satisfied.
- The customer has an interest in the SKID to ensure the accuracy of billing and regulation of supply and the Respondent is interested in ensuring that it receives the payment for the gas supplied.
- The expression “use” does not have a fixed meaning. The use of an article may or may not result in a visible change in its form or substance. The Court observed that physical operation is not the only feature of use and technical expertise over the SKID is not a prerequisite for determining the ability of the customer to use the SKID. The expression “use” signifies the application of the goods for the purpose for which they have been supplied under the terms of a contract.
- The utility of the SKID lies in its ability to regulate the supply and achieve an accurate verification. This ensures benefit to both the Respondent as well as the customer. The Respondent is concerned with the precise quantification of the gas which is supplied, and the customer is interested in ensuring the safety of its facilities and that the billing is based on the correct quantity. Hence, the observation of the Tribunal that the SKID is **only for** the benefit of Respondent is not correct.
- Section 65(105)(zzzzj) of the Finance Act, 1994 applies in a situation where the use of the goods by a person is not accompanied by control and possession. ‘Use’ in the context of SKID postulates the **utilisation of the equipment for the purpose of fulfilling the contract**. Section 65(105)(zzzzj) of the Finance Act, 1994 does **not** require **exclusivity** of use. The SKID equipment is an intrinsic element of the service which is provided by the Respondent. The Court held that the supply of SKID by the Respondent was for use by the customers and is taxable under section 65(105)(zzzzj) of the Finance Act, 1994.
- Refund of charges collected by the Respondent were dependent on the usage by the customers. The percentage of refund varied from customer to customer and the remaining amount was retained by the Respondent. Also, the Respondent failed to provide any deposit receipts for its domestic customers and hence the Court rejected the argument of the Respondent that the charges collected constitute a refundable security deposit.
- The Court held that the Appellants were correct in concluding that the customer is as interested as the Respondent in ensuring and verifying the correct quantity of gas supplied. Also, the SKID has the role of regulating pressure and ensuring the safety of supply of gas which is an essential aspect of ‘use’ by the customer.
- The SKID equipment fulfils the description in section 65(105)(zzzzj) of the Finance Act, 1994 of a taxable service in relation to “tangible goods” where the recipient of the service has used (without possession or effective control) the goods.



Judgment

The appeal was allowed by setting aside the judgment of the Hon'ble Tribunal and restoring the order passed by the Adjudicating Authority.

Dhruva Comments:

The Larger Bench judgment provides a wider interpretation to the term 'use' which need not be restricted to the exclusivity of the service recipient. Hence, any pending litigation involving taxability of any transaction under the SOTG service should be revisited considering the interpretation to the term 'use' deployed by the Hon'ble Supreme Court. The ruling would equally be relevant while examining similar transactions under negative list and GST regime.

Press Release

Import details in GSTR-2A and introduction of GSTR-2B

- The Government has issued press releases dated August 29, 2020 to explain the changes made in GSTR-2A and the introduction of GSTR-2B. The key highlights of the same are as follows:

GSTR-2A

- Two new tables have been introduced in GSTR-2A to display the details of goods imported from overseas and inward supplies from SEZ units / SEZ developers. The present data upload has been done on trial basis to seek feedback from taxpayers.
- At present, the system will display the data upto August 6, 2020, and will not include the import information for bill of entries filed at non-computerized ports (non-EDI ports) and imports made through courier services / post office. The taxpayer can share their feedback through raising a ticket on the self-service portal (<https://selfservice.gstsystem.in/>).

GSTR-2B

- GSTR-2B has been introduced on trial basis **for the month of July 2020** which would be an auto-drafted input tax credit statement, generated for every registered person on the basis of the information furnished by its suppliers in their respective GSTR-1, GSTR-5 (non-resident taxable person) and GSTR-6 (input service distributor).
- The statement would be made available for each month, on the 12th day of the succeeding month, to help in reduction in time taken for preparing returns, minimising errors, assist reconciliation and simplify compliance relating to filing of returns. The taxpayers can provide their feedback on the self-service portal (<https://selfservice.gstsystem.in/>).

Dhruva Comments:

The new tables inserted in GSTR-2A and the introduction of GSTR-2B will be of great help to the taxpayers to ensure accuracy and minimise effort in availment of input tax credit.

Notification under GST

Extension of time limit for Anti-profiteering compliances

- The Government had issued notification no. 35/2020-Central tax dated April 3, 2020 ("said notification") whereby the timelines for undertaking various compliances under the law was extended.
- The Government has now inserted a new proviso to the said notification vide notification no. 65/2020-Central Tax dated September 1, 2020 to state that any time limit for completion or undertaking compliance of any action by any authority as specified or notified under section 171 of the CGST Act, 2017 (Anti-profiteering), falling between March 20, 2020 and November 29, 2020 and if the completion or compliance of action has not been done, then the time limit in such cases shall be extended to November 30, 2020.





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