Planetcast Media Services Ltd vs Ce & Cgst Noida on 9 February, 2024

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD

REGIONAL BENCH - COURT NO.I

Service Tax Appeal No.55453 of 2013

(Arising out of Order-in-Original No.31/Commissioner/Noida/2012-13 dated 15/10/2012 passed by Commissioner of Customs, Central Excise & Service Tax, Noida)

M/s Planetcast Media Services Ltd., ...Appellant
(C-34, Sector-62, Noida-201307)

VERSUS

Commissioner of Central Excise, Noida ....Respondent
(C-56/42, Sector-62, Noida)

APPEARANCE:
Shri Atul Gupta, Advocate for the Appellant
Shri Sarweshwar T. Khairnar, Authorised Representative for the Respondent

CORAM: HON BLE MR. P.K. CHOUDHARY, MEMBER (JUDICIAL)
HON BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

FINAL ORDER NO.70059/2024

DATE OF HEARING : 10 October, 2023
DATE OF PRONOUNCEMENT : 09 February, 2024

SANJIV SRIVASTAVA:

This appeal is directed against Order-In-Original No.31/COMMISSIONER/ NOIDA/2012-13 dated 15.10.2012 of the Commissioner Central Excise Noida. By the impugned order following has been held:

"ORDER

1. I hereby confirm the demand of service tax amounting to Rs. 1,45,16,699/- (Rupees one crore forty five lacs sixteen thousand six hundred ninety nine only) under "Business

Support Service" for the period May, 2006 to March, 2011 and Rs. 2,73,33,587/-(Rupees two crore seventy three lacs thirty three thousand five hundred eighty seven only) under

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"supply of tangible goods service" for the period May, 2008 to March, 2011, as detailed in Annexure-A and Annexure-B to the show cause notice against M/s Essel Shyam Communications Ltd., C-34, Sector-62,Noida under section 73(1) of Finance Act, 1994. Since party has deposited Rs 25,00,000/- vide Cyber receipt dated 25.03.2010 under Business Support Service therefore I order for appropriation of the same against the said demand.

2. I order to recover the above said demand along with appropriate rate of interest as provided under section 75 of the Finance Act, 1994.

3. I also impose penalty of Rs. 4,18,50,286/- (Rupees Four crores eighteen lacs fifty thousand two hundred and eighty six only) upon M/s Essel Shyam Communications Ltd., C-34, Sector-62, Noida under section 77 & 78 of Finance Act, 1994."

2.1 The Appellant was registered with the Department under the category of Online Information and Data service, Maintenance or Repair Service, Erection, Commissioning and Installation service, Transport of Goods by Road Service, Telecommunication Service.

2.2 The Appellant is engaged in the business of providing satellite communication services as well as uplinking services under licences/ permissions from Government of India

2.3 Appellant is also providing DSNG Van, Antenna and some other satellite communication equipment to the customers. The appellant was paying service tax under the head "telecommunication service" wherever the possession and control of the equipment remained with the appellant. The appellant was paying Value Added Tax on the receipt of consideration against providing DSNG Van, Antenna and some other satellite communication equipment to the customers wherever possession and control of these equipment is passed over to the customers.

2.4 Acting on intelligence the officers of Anti-Evasion Branch, Central Excise, Noida visited the premises of appellant on

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23.03.2010. During the scrutiny of the records was found that appellant was

Collecting up-linking charges from various broadcasters for which they are liable to pay service tax under the head 'Business Support Service'.

They were providing machinery, equipments and

vehicles on rental basis for which they are liable to pay Service Tax under the category of "Supply of Tangible Goods Service"

2.5 Further investigations and enquiries made revealed that appellant has not paid service tax under "Business Support Service" amounting to Rs. 1,45,16,699/- and on "Supply of Tangible Goods" amounting to Rs. 2,73,33,587/- for the period May, 2006 to March, 2011.

2.6 Appellant were issued a show cause notice dated 18.10.2011 asking them to show cause as to why-

(a) Service Tax amounting to Rs. 1,45,16,699/- (Rs. 1,41,01,858/- Service Tax, Rs. 2,82,037/- Primary Education Cess and Rs. 1,32,804/- Secondary and Higher Education Cess) for the period from May 2006 to March 2011 towards "Business Support Service" and Service Tax amounting to Rs. 2,73,33,587/- (Rs. 2,65,37,463/- Service Tax, Rs. 5,30,749/- Primary Education Cess and Rs 2,65,375/- Secondary and Higher Education Cess) for the period May 2008 to March 2011 towards "Supply of tangible goods Service" should not be demanded & recovered from them under the proviso to Section 73 of the said Act by invoking extended period as provided therein; and the amount of Rs 25,00.000/- deposited towards Service Tax vide challan should not be appropriated

(b) Penalty should not be imposed for contravention of Rule 4,6 and 7 of the Service Tax Rules, 1994 read with Section 69, 68 and 70 of the Finance Act, 1994 and for suppression of facts with intention to evade payment of

service tax under Section 77 and 78 of the Finance Act, 1994; and

(c) Interest should not be charged from them under Section 75 of the said Act at the appropriate rate applicable during the relevant period

2.7 The show cause notice was adjudicated as per the impugned order referred in para 1 above. Aggrieved appellant has filed this appeal.

3.1 We have heard Shri Atul Gupta and Shri Prakhar Shukla, Advoactes for the appellant and Shri Sarweshwar T Khairnar, Authorized Representative for the revenue.

3.2 Arguing for the appellant learned counsels submit that:

No Service Tax is payable on uplinking facility under the head "Business Support Service" and for that matter "infrastructural support"

the activity of uplinking would not fall within the ambit of Business Support Service" as provided under Section 65

(104)(c) of the Act in as much as only the services as included in the 'means' clause or in the nature of such activities provided under the 'includes' clause could be termed as being activities in support of business activities and the principle of noscitur a sociis shall come into play and thus the word 'services' which is very wide in its scope would be restricted by the nature of the services enumerated in the 'includes' clause which is marketing or activities incidental or allied to marketing, therefore any such activity or service which per se is Greek and completely unrelated to such activities as enumerated under the 'means' & 'includes' clause would not be covered within its ambit.

issue is no more res integra also because in the matter of TV TODAY NETWORK PVT LTD 2019-TIOL-3733-CESTAT-DEL, it has been held by the Hon'ble Tribunal that the definition of BSS does not cover the activities to provide

uplinks and downlinks satellite beams at agreed and desired bandwidth.

The explanation to "infrastructural support services" as included within the definition of Business Support Services provides that the expression includes providing office along with office utilities, lounge, reception, with competent personnel to handle messages, secretarial services, internet and telecom facilities, pantry and security. Thus, the activity of uplinking is not to be treated as an "infrastructure" without justifying as to how the same would fall within the ambit of the services as enumerated under the "includes" clause of the explanation to "infrastructural support service"

the activity of uplinking would not fall under the list of services as provided under the "includes" clause by giving due regard to the principle of ejusdem generis.

Reliance is placed on the following decisions:

- o BSNL [2017-TIOL-2420-CESTAT-DEL]
- o R.D. KUTE & CO. [2017 (4) G.S.T.L. 89 (Tri. - Mumbai)]
- o Paradise Investments missioner [2017-TIOL-1842-CESTAT-DEL]
- o Air Liquide North India Pvt. Ltd. [(2017 (4) G.S.T.L. (230)]

No Service Tax is payable on the supply of DSNG vehicle on rent under the head "Supply of Tangible Goods Service"

- o Specific equipments for specific duration for hire were agreed upon between the Appellant and the customers;
- o The Appellant received a consideration as fixed in the contract;
- o All Statutory Regulations for operating the goods were required to be complied with by the customers;

- The Appellant did not have any control over the equipment and the effective control was with the customer;

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- The Appellant did not have any control over the equipment and the effective control was with the customer;
- The Customer shall ensure and undertake that the operation and handling of DGNS is done at all the time by its fully trained, qualified and experienced engineers following guidelines/ instruction and using complete care and caution. In case of any problem, the DSNG is not forcibly operated, the DSNG is used as per the direction for the purpose it is meant for the provide the optimum functionality and life from the DSNG

Thus, it is submitted that the transaction between the Appellant and the customers would qualify as a transfer of right to use goods with the control and possession over the diesel generator sets passing on to the customers

Reliance is placed on the following decisions

- Rashtriya Ispat Nigam Limited [(1990) 77 STC 182 (AP)] B.24

thus in cases where the right to use any good is transferred to the customers along with the right of possession and effective control then the same would not be covered within the ambit of taxable service "Supply of Tangible Goods Service" and hence no Service Tax would be leviable in such cases.

No suppression or misrepresentation of facts by the Appellant

- Merely non-payment of service tax does not amount to suppression of facts with intent to evade tax.
- appellant has been paying VAT in relation to the renting-out of DSNG Vehicle and as per the law set-out by the Hon'ble Supreme Court, service tax and VAT are mutually exclusive and no service tax is payable on the same transaction where VAT has been discharged thus the appellant could not be held liable for any suppression of facts with a view to evade payment of service tax where it was in the first place not even required to pay service tax.

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- no Service Tax has been paid on the activity of uplinking since the appellants were under a bonafide belief, that uplinking facility would not fall within the ambit of Business Support Service and hence failure to pay the same could not be imputed against the appellant so as to

impose penalty under Section 78 as the same involved an interpretation of complex legal provisions and thus, as observed in the case of NIRC Ltd. v. C.C.E. (2007 (209) ELT 22 (Tri.-Del.), the extended period of limitation would not be applicable in the present case. Reliance is also placed on the following decision to submit that extended period of limitation is not applicable:

Anand Nishikawa Co. Ltd. [2005 (188) E.L.T. 149 (S.C.)]

Cosmic Dye Chemical [1995 (75) E.L.T. 721 (S.C.)]

Uniworth Textiles [2013 (288) E.L.T. 161 (S.C.)]

Padmini Products [1989 (43) ELT 195 (SC)]

Chemphar Drugs & Liniments, 1989 (40) ELT 276 (SC)

penalty upon the appellant under Sections 77 & 78 of the Act since the appellant was always under a bonafide belief as that no service tax was payable.

3.3 Arguing for the revenue learned authorized representative re-iterates the findings recorded in the impugned order.

4.1 We have considered the impugned order along with the submissions made in appeal and during the course of arguments.

4.2 Impugned order records the findings as follows for confirming the demand against the appellant

"The party is providing satellite based communication services which is generally used by the Broadcasters. As per facts of the case, the party entered into agreements with M/s V & S Broadcasting Ltd. and M/s UTV Entertainment television Ltd. for providing uplinking services. On scrutiny of records and on basis o investigation it was found that such services provided by the party are covered under the definition of business

support service and the party has been alleged to have not paid service tax amounting to Rs. 1,45,16,699/- for the period May, 2006 to March 2011.

Similarly it has further been alleged that they are providing DSNG Van antenna and some other satellite communication equipments to the customers on rental basis. They are paying VAT on the possession and control of equipments with the customer and paying service tax when possessive and control of the equipment is with the company. Such service was noticed as covered under the head "supply of tangible goods service" and the party was alleged to have not paid service tax amounting to Rs. 2,73,33,587/- during the period May, 2008 to March, 2011.

The said non payments of service tax has been proposed recoverable under extended provision to section 73(1) of the Finance Act, 1994 as party did not disclose the fact to the department at their own because the said facts have come to notice only on investigation undertaken by the department. Accordingly. the recovery of payment of service tax has been proposed along with interest and penalty.

Party in their defence have submitted that they are only an uplinking agency and not providing any support or assistance to the nature envisaged under Business Support Service. Their activity can not be said as covered under the said service. In this regard they have invited attention to Board Circular issued vide letter F. No 334/4/2006 TRU dated 28.10.2006 and contended that no service tax is payable on the uplinking activities undertaken by them.

They have further submitted that they are providing DSNG Van, Antenaa and some other satellite communication equipments to the customers on rent. Wherever the possession and control of the equipments is with the company, they are paying service tax on the same and

whenever the possession & control is with the customer they are paying VAT on the same, They contended that their activity is not covered under the "supply of tangible goods service" so no service tax is payable on the same.

Now I take up these allegation for discussion issue wise:-

(i) uplinking services covered under Bussiness Support Services or not?

M/s ESCL have entered into an agreement with M/s V & S Broadcasting Ltd. and M/s U.T.V. Entertainment television Ltd. for providing the uplinking services. Perusal of these agreements reveal that ESCL is providing satellite based communication service which are generally used by Broadcasters and the same has been alleged to be covered under the definition of Business Support Service. I find that definition of Business Support Service needs to be examined vis-à-vis the agreements of the party entered into with M/s V & S Broadcasting Ltd. and M/s U.T.V Entertainment television Ltd. As per definition of "Support Service of Business or Commerce" under section 65(104) the relevant portion is reproduced below:

The definition of 'Support services of business or

commerce' under Section 65 (104) (c) reads

"Support services of business or commerce" means services provided in relation to business or commerce and includes evaluation of prospective customers, telemarketing, processing of purchase orders and fulfillment services, information and tracking of delivery schedules, managing distribution and logistics, customer relationship management of services, accounting and processing of transactions. operational assistance for marketing, formulation of customer service and pricing policies, infrastructural support services and other transaction processing.

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Further Section 65 (105) (zzzq) defines taxable service means 'any service provided or to be provided to any person by any other person in relation to support services of business or commerce in any manner'

The aforesaid definition of the taxable service clearly states that the services provided in relation to business or commerce, in any manner is covered in the category of Business Support Service.

In the instant case party is providing uplinking services to various TV channels/ broadcasters through teleport (uplinking hub) situated at Noida which is an essential service for them to broadcast their programmes. Therefore I am of the view that party is providing support services to the TV channels/ broadcasters and is therefore covered under the category of business support service. It is true that uplinking is not mentioned in the inclusion clause of the definition of business support service but it must be read with its detailed description which provides for an example list of services that would be covered under business support service.

The act provides for a definition of Business Support Services, within which it includes the term "infrastructural support services". Infrastructure Support Services follows as exemplification through further explained are For the purposes of this clause, the expression "infrastructural support services" includes providing office along with office utilities, lounge, reception, with competent personnel to handle messages, secretarial services, internet and telecom facilities, pantry and security.

The above explanation, which essentially describes a "Business Center Service", is by way of "inclusion" so as to denote that the same is an example of a service which can

be categorized as "infrastructural support services". It therefore follows that services similar to the above

example may fall within the scope of "infrastructural support services"

"Uplinking facility" is said to be an "infrastructure" and therefore by offering a service which allows a TV Channel to be viewed, it can be said that one is providing an "infrastructural support" to the business of TV Channels. In the instant case, the party is engaged in the business of providing uplinking services to various TV Channels through ESCL Teleport at Noida as evident from the agreements ESCL has with M/s V&S Broadcasting Ltd., Mumbai and M/s UTV Entertainment Television Ltd., Mumbai.

Party in their support have relied upon the CBEC circular No. 121/2/2010 dt 26.04.2010 On going through the said circular it is seen that the said circular is related to the collection of charges for detention of containers beyond pre holding period. therefore I am of the view that this circular is not applicable in their case Similarly contents of circular No. 109/3/2009 dt. 23.02.2009 is also not applicable in their case as the issue involved in the said circular is the activity of screening of films supplied by a film distributor and not the uplinking service. The party has also relied upon the circular No. B.11/1/2000 dt. 09.07.2001 and have contended that no service tax is payable on uplinking services. However on going through the said circular it is observed that this circular is related to Broadcasting services and not uplnking services. Furthermore it is evident from the said circular that service provided to a client. by a broadcasting agency or organization in relation to broadcasting in any manner is taxable under service tax Act. Therefore the said circular is also of no help to the party.

On the basis of above discussion I am of the considered view that the uplinking service provided by the party falls under the category of business support service chargeable

to service tax. Since the party has not paid service tax amounting to Rs. 1.45,16.699/- for the period May, 2006 to March, 2011 therefore the same is recoverable from them under section 73(1) of the Finance Act, 1994 along with appropriate rate of interest as provided under section

75 of the Finance Act, 1994.

Supply of tangible goods service:-

As per the definition of taxable service 'Supply of Tangible Goods' under Section 65(105)(zzzzj) of the Act, means "any service provided or to be provided to any person by any other person in relation to supply of tangible goods including machinery equipment and appliances for use, without transferring right of possession and effective control of such machinery, equipment or appliances.

As per the above definition the transfer of right to use any goods without giving transferee the legal right of possession or effective control is levied to service tax. The contention of ESCL that the possession and effective control of the equipments supplied by them is with the customers and therefore they are not charging service tax cannot be accepted as the copy of DSNG Vehicle Rental Agreement dated 30.03.06, alongwith addendum to the said agreement dated 15 07/2008, between M/s. Essel Shyam Communication Ltd. and M/s Media Content & Communication Services (India) Pvt. Ltd., submitted by the party vide letter dated 19.04.2011 clearly states at the para 4.1 of the said agreement as "Save as otherwise provided in this agreement, no right, ownership title or interest in the DSNG vehicle shall pass to the customer by virtue of these presents. The customer shall at no time contest or challenge the Companies sole and exclusive ownership right, title and interest in the DSNG vehicle."

In the light of the above facts it is evident that the supply of vehicles equipments by the said M/s. Essel Shyam

Communication Ltd. on rental basis to the customers is covered under service tax as no legal right of ownership and effective control is being transferred to the customers, as is evident from their agreement with M/s. Media Content & Communication Services (India) Pvt. Ltd. Therefore right of possession and control is also not being transferred as submitted by the party in their defence Party have argued that they are paying VAT when the equipments and other things are in the possession of the customers and are paying service tax when it is in their custody. But I find that VAN-Antenna & satellite equipments are given on rent and only possession of these items is changed during the period of rent. The ownership still remains with the party therefore mere change of possession is not sale For effecting a sale, ownership

should also be changed which is not in this case Therefore party's plea that no service tax is payable on the renting of equipments is not tenable at all and the service tax is leviable under the supply of tangible goods services. I find that on both the issues party has tried to deviate from the core issues involved in this case.

The details of the charges collected for providing the uplinking service and for supply of communication equipments on rental basis (on the services provided and payments received, where Service Tax is not paid by the party) were submitted by the party vide their letter dated 21.06.2011, 16.08.2011 and 17.08.2011. The Service Tax not paid on the Uplinking Services amounting to Rs. 1,45,16,699/- (Rs. 1 41.01.858/- Service Tax, Rs 2.82,037/- Primary Education Cess and Rs. 1,32,804/- Secondary and Higher Education Cess) from May 2006 to March 2011 and on the Supply of Tangible goods Services amounting to Rs. 2,73,33,587/-(Rs 2.65,37,463/- Service Tax, Rs. 5,30,749/- Primary Education Cess and Rs 2.65,375/- Secondary and Higher Education Cess) from May 2008 to March 2011 enclosed with this Notice as

Annexure- A for Service Tax not paid on Uplinking Services and as Annexure-B for Supply of Tangible Goods Services is recoverable from them.

Further ESCL is a registered service tax assessee and well aware of the service tax laws but they have neither obtained registration for the business support service and supply of tangible goods service provided by them nor they discharged the service tax liability on the said services and have also not filed the periodical returns for the same They never intimated the said facts to the departments at their own in any other manner with the sole intention of evading payment of service tax. The said facts were noticed by the department only on the basis of an investigation conducted by the department therefore I find that extended proviso to section 73 of the Finance Act, 1994 has rightly been invoked for the recovery of non paid service tax by the party for the period mentioned above.

I also find that party has violated the following sections and rules of the service tax.

(i) Rule 4 of the Service Tax Rules, 1994 read with Section 69 of the Finance Act 1994 by not obtaining the registration for aforementioned service namely Business Support Service' and Supply of tangible goods Service' and rendered

themselves liable to penalty under Section 77 of the Finance Act, 1994.

(ii) Rule 6 of the Service Tax Rules, 1994 read with Section 68 of the Finance Act 1994 by not discharging the service tax liability in the manner as prescribed in the provisions for aforementioned service namely ' Business Support Service' and Supply of tangible goods Service' liable to penalty under section 78 of Finance Act, 1994.

(iii) Rule 7 of the Service Tax Rules, 1994 read with Section 70 of the Finance Act 1994 by not furnishing the returns for aforementioned service namely 'Business Support Service' and rendered themselves liable to penalty under Section 77 of the Finance Act, 1994.

Party in their defence have relied upon the decision of the case of M/s Lakshmi Audio Visual Inc & A Vs AC commercial tax. I have gone through the facts of the case and find that facts & circumstances of that case was totally different from this case That case was based on section 5c of Karnataka tax Act, 1957 whereas the issue involved in this case is non-payment of service tax under Business Support service and supply of tangible goods service, therefore the ratio of the decision of M/s Audio visual Ink is not applicable in this case"

4.3 The issues involved in the present case are as follows:

i. Whether the service of providing up-linking facility will be taxable under the category of "Business Support Service"?
ii. Whether the services of supply of DSNG Van to its clients can be classified and subjected to service tax under the category of „Supply of Tangible Goods Service"?
iii. Whether the demand is barred by limitation?
iv. Whether the penalties imposed under Section 77 & 78 can be justified?

4.4 Whether the service of providing up-linking facility will be taxable under the category of "Business Support Service"?

Undisputedly the Appellant entered into agreement with M/s V & S Broadcasting Ltd. and M/s UTV Entertainment television Ltd, for providing the up-linking facilities to them for broadcasting/ telecasting their programmes through teleport (uplinking hub) situated at Noida. This is an essential service for broadcasters/ telecasters to

broadcast/ telecast their programmes. Commissioner has

in the impugned order reproduced the definition of the "Business Support Services", as per Finance Act, 1994, hence we do not reproduce the same again. From the facts as above, broadcasters/ telecasters have outsourced the activity of up-linking their programme contents to the appellant, by use of teleport available with them. Definitely the services provided by the appellant will fall under the category of "infrastructure support service".

4.5 As per section 65 (104) (c), "Business Support Services" has been defined by using the phrases „means and „includes . It is settled principle in law that the term "means" used in the definition clause signifies the definition to be exhaustive and the phrase "includes" widens the scope by specifying those activities which otherwise would not be covered by the first part of definition, using the phrase "means". Interpreting the definition of "Inputs" as per Rule 57A of erstwhile Central Excise Rules, 1944, a larger bench of tribunal has in the case of Union Carbide [1996 (86) E.L.T. 613 (Tribunal)]

"4. Resolution of the controversy in these appeals depends on the correct understanding of provisions of Rule 57A relating to Modvat Credit Scheme. The scheme enables manufacturers of specified final products to avail credit of specified duty paid on specified goods (referred to as "inputs") used in or in relation to the manufacture of the said final products and to utilise such credit towards payment of excise duty leviable on the final products under the Central Excises and Salt Act, 1944 (for short, the Act) or under any other Act as may be specified. The provision is subject to the provisions of the other Rules in the section and the conditions and restrictions that may be specified. Relevant portion of the Explanation to Rule 57A reads thus :

"Explanation :- For the purpose of this rule, "inputs" includes -

(a) xxx xxx xxx xxx

(b) xxx xxx xxx xxx

but does not include -

(i) machines, machinery, plant, equipment, apparatus,

tools or appliances used for producing or processing of any goods or for bringing about any change in any substance in or in relation to the manufacture of final products;

(ii) xxx xxx xxx xxx

(iii) xxx xxx xxx xxx

(iv) xxx xxx xxx xxx

(v) xxx xxx xxx xxx"
(Emphasis supplied)

13. The High Court of Calcutta in Singh Alloys & Steels Ltd. v. Assistant Collector of Central Excise - 1993 (66) E.L.T. 594 held that the two aforesaid decisions of the Tribunal were erroneous. Ramming mass and Dolopatch mix classified as miscellaneous chemical products under Chapter 38 Heading 3816.00 and Manganese peas (classified under Heading 28.20) are first charged into the furnace as fettling materials and to dissolve and seal the crevices in the refractory walls of the furnace to prevent leaking of the liquid metal from the furnace and to reduce the erosion of the refractory lining of the furnace and lose their identity and are consumed in the process. Some parts of these articles remain in the liquid metal and balance forms part of the residue or slug. The Court noticed the wider connotation of the phrase "in relation to" used in Rule 57A of the Rules. It was indicated that indisputedly ramming mass, dolopatch mix and manganese peas are "inputs" within the meaning of the Rule. The true question according to the Court is -

"are the items inputs at all in respect of steel ingots?" and if the question is answered in the affirmative, the next question is

"are the items within the excluded inputs?"

The Court held -

"Analysing the meaning of inputs as provided in the explanation it would appear that everything is an input if it is (i) manufactured and used within the factory of production or (ii) used in relation to the manufacture of the final products, and, (iii) paints and packaging material. The exceptions relate to items which would otherwise have come within the inclusive definition of inputs."
(Emphasis supplied)

and

"The subject of the legislature appears to me to be to exclude from the genus of inputs, the species mentioned in the excluded categories because otherwise a manufacturer would be entitled to claim Modvat in respect of such inputs repeatedly as these would not be inputs which would be consumed in the process of manufacture. This is clear from a scrutiny of the excluded items."

The Court further held that these inputs do not fall within dictionary meaning of "machine, machinery, instrument or appliance" and are chemicals used for the machinery. The Court held -

"It does not matter that the items are used in the machinery or for the purpose of the machinery. To repeat, the only relevant question is, are they used in or in relation to the manufacture of ingots." (Emphasis supplied)

It was further held that the Tribunal was in error in seeking limit the meaning of the word "inputs" to those items which go into the steel ingot completely overlooking the phrase "in relation to". This decision was followed by a larger Bench of the Tribunal in Collector of Central Excise v. A.B. Tools Ltd. - 1994 (71) E.L.T. 776 holding that ramming mass is an input and not part of machinery.

14. In Shri Ramakrishna Steel Industries Ltd. v. Collector of Central Excise - 1996 (82) E.L.T. 575, larger Bench, held that chemicals and resin used in making sand mould which is used to manufacture steel ingots, the final product, are inputs eligible for Modvat credit which could be utilised to pay duty on the final product. The Bench observed :

"The words "in relation to the manufacture" are intended to set at rest all doubts. Where raw material is actually used in the main stream of manufacture of final product, that is, actually used in the physical or chemical process of manufacture, it is certainly an input used in the manufacture of final product. The doubt may arise only in regard to use of some articles not in the main stream of manufacturing process but in another stream of manufacturing something which is to be used for rendering final product marketable or used otherwise in assisting the process of manufacture. Such doubt is set at rest by use of the words "used in relation to manufacture"."

It was held that sand mould is used "in relation to the manufacture" of final product, namely, steel castings. The larger Bench held that the view taken in Mukund Iron and Steel Works Ltd. v. Collector of Central Excise - 1990 (48) E.L.T. 552 (Tribunal) is not correct. Inevitably the same infirmity must attach to the decision in Collector of Central Excise v. Raipur Alloy Steels Ltd. - 1995 (78) E.L.T. 44 (Tribunal).

15. We may also refer to the decision of High Court of Madras in Ponds (India) Ltd. v. Collector of Central Excise - 1993 (63) E.L.T. 3. The appellant, manufacturer of cosmetics, used duty paid plastic granules to manufacture plastic containers and used the same as containers for the excisable final product, namely, cosmetics. The Court held that the cosmetic items are not marketable unless packed in containers which have to be treated as component part

of the final product and that wider connotation should be given to the words "goods used in or in relation to the manufacture" of final product. Plastic granules would be component parts of the final product. The Court also relied on some of the chapter notes.

16. Under Rule 57A, inputs are not only goods used in the manufacture of final products, but also goods used in relation to the manufacture of final products. The same language is used in exclusion [clause] (i) of the explanation to the Rule. The words "goods ..... used by him (dealer) in the manufacture or processing of goods" occurring in Section 8(3)(b) of the Central Sales Tax Act and Rule 13 of the Rules have been held by the Supreme Court to take in not only the process of production of goods but also all processes which are directly related to the actual production. The Court held that there was no warrant for limiting the meaning of the expression "in the manufacture of goods" (J.K.Cotton Spinning and Weaving Mills Co. Ltd. v. S.T.O. AIR 1965 S.C. 1310). The words "in relation to" occurring in Section 4(1) of the Swadeshi Cotton Mills Company Ltd. (Acquisition and Transfer of Undertakings) Act, 1956 have been held by the Supreme Court to be very broad expressions and to be of comprehensiveness which might have both a direct significance as well as an indirect significance depending on the context. These words have been held to be equivalent to or synonymous with "concerning with" and "pertaining to" [Doypack Systems (Pvt.) Ltd. v. Union of India - 1988 (36) E.L.T. 201]. The goods to be regarded as "Raw materials" need not necessarily and in all cases go into and be found in the final product.

17. There can be no doubt that the Rule-making authority incorporated the words "in relation to the manufacture" in Rule 57A to widen and expand the scope, meaning and content of the expression "inputs". Where the language is

clear and unambiguous, full effect must normally be given to such language. By no interpretive process, the deliberate design of the Rule-making authority can be frustrated nor words and expressions disregarded as otiose. The wide impact of the expression "used in relation to the manufacture" must be allowed its natural play. Raw materials (as commonly understood) are used in the mainstream of entire process of converting raw materials into finished products or any other process integrally connected with the ultimate production of finished products. What then is the purpose of incorporating the words "in relation to the manufacture" in Rule 57A? The purpose is certainly to widen further the scope, ambit and content of "inputs". The purpose is to widen the ambit so as to attract also goods which do not enter directly or indirectly into the finished product, but are used in any activity concerned with or pertaining to the manufacture of finished goods. The only direct decision of a High Court on this aspect is that of the High Court of Calcutta in Singh Alloy Steel Ltd. v. A.C. of C.E. - 1993 (66) E.L.T. 594. Goods which are not raw materials converted into finished products and which are charged into furnace as fettling materials to dissolve and seal the crevices in the refractory walls of the furnace and are consumed in the process have been held to be goods used "in relation" to the manufacture of finished goods. The High Court explained that the exclusion clauses of the Explanation to Rule 57A relate to items which would otherwise have come within the definition of inputs. This would mean that machine, machinery and other goods referred to in exclusion Clause (i) would, but for the exclusion fall, within the ambit of the expression "inputs" that is, "goods used in relation to the manufacture of finished products". The Court stated that it does not matter that the goods are used in the machinery or for the purpose of the machinery. In the absence of any contrary decision of the Supreme Court or any other High

Court, the Tribunal is required to follow this decision of the High Court of Calcutta. It would be an act of Judicial indiscipline and impropriety not to follow the only decision of a High Court on this aspect as suggested by the

Western Regional Bench in the order of reference reported in 1993 (68) E.L.T. 452. The contention of the assessee is supported by the decision of a larger Bench of the Tribunal in Joy Foam Pvt. Ltd. v. C.C.E., Madras - 1996 (63) ECR 630 (Tribunal), SRB holding that grease proof paper used in machine for manufacture of foam products is an eligible "input" under Rule 57A of the Rules.

23. The exemption notification which came up for consideration at the hands of the Supreme Court in Rohit Pulp and Paper Mills Ltd. v. Collector of Central Excise - 1990 (47) E.L.T. 491 excluded five kinds of paper from the benefit of the exemption. It was found that four out of the five varieties of paper belong to the category of Industrial paper. In the context, the Court held that the "noscitur a sociis" principle was applicable. The principle is that when two or more words which are susceptible of analogous meaning are coupled together they are understood to be used in their cognate sense. They take, as it were, their colour from each other, that is, the more general is restricted to a sense analogous to the less general. Associated words take their meaning from one another under this principle, according to which, the meaning of a doubtful word may be ascertained by reference to the meaning of words associated with it. When certain essential features or attributes are invariably associated with the words under consideration as understood in the popular and conventional sense, it is the colour of these attributes which is taken by the other words used in the definition though their normal import may be much wider. This, of course, is only a Rule of construction which has no place in a context where it is clear that wider words have been deliberately used to make the scope of the defined

word wider. The Rule of Ejusdem Generis is a specific application of the broader principle of the "noscitur a sociis" principle. Almost all the words used in the exclusion Clause (i) relate to full and complete assemblages which could be described as machine, machinery, apparatus, appliance, equipment, plant and tool. The common factor or thread is the "self contained and complete" nature of the goods comprehended by these words. Assuming there is any doubt about proper meaning of any of the words, it has to be understood in this sense, that is, as a complete unit and not as a part of it."

4.5 In case of Detergent India Ltd. [2015 (318) E.L.T. 559 (S.C.)], Hon ble Supreme Court observed as follows:

"12.When we come to the definition of "related person"

the legislature has used a well-known technique. It first employs the expression "means" and states that persons who are associated with the assessee so that they have a direct or indirect interest in the business of each other would get covered. The definition then goes on to use the expression "and includes" thereby indicating that the legislature intends to extend the definition to also include various persons that would not otherwise have so been included. These include a holding company, a subsidiary company, a relative and a distributor of the assessee and any sub-distributor of such distributor. The necessity for including holding and subsidiary companies as defined under the Companies Act, 1956 is to lift the corporate veil in order to get to the economic realities of the transaction.

23.We find it difficult to agree with some of the conclusions reached in the aforesaid paragraph. As has been stated by us above, "means" "and includes" is a legislative device by which the "includes" part brings by way of extension various persons, categories, or things which would not otherwise have been included in the "means" part. If this is so, obviously both parts cannot be

read conjunctively. What is in the "includes" part is relatable only to the subject that is to be defined and takes within its sweep persons, objects, or things which are not included in the first part. We have already pointed out that the reason for including holding and subsidiary companies in the "includes" part is so that the authorities may look behind the corporate veil. To say that the holding and subsidiary companies must in addition have a mutual interest in the business of each other is wholly incorrect. Further, the word "and" which joins the two parts of the definition is not rendered meaningless. It is necessary because it precedes the word "includes" and brings in to the definition clause persons, objects, or things that would not otherwise be included within the "means" part."

4.6 In the case of Heinz India Ltd. [2023 (385) ELT 162 (SC)], Hon ble Supreme Court observed as follows:

47. ..... Besides, "includes" has been construed as broadening the sweep of a provision, and at the same time restricting its amplitude to the meanings ascribed in the statute. This proposition was enunciated in Hamdard (Wakf) Laboratories (supra), where it was held that:

"34. When an interpretation clause uses the word "includes", it is prima facie extensive. When it uses the word "means and includes", it will afford an exhaustive

explanation to the meaning which for the purposes of the Act must invariably be attached to the word or expression."

The court, in Hamdard (Wakf) Laboratories relied on N.D.P. Namboodripad (Dead) by LRs. v. Union of India & Ors. 2007 (3) SCR 769:

"15. The word "includes" has different meanings in different contexts. Standard dictionaries assign more than one meaning to the word "include". Webster's Dictionary defines the word "include" as synonymous with "comprise" or "contain". Illustrated Oxford Dictionary defines the word

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"include" as: (i) comprise or reckon in as a part of a whole; (ii) treat or regard as so included. Collins Dictionary of English Language defines the word "includes" as: (i) to have as contents or part of the contents; be made up of or contain; (ii) to add as part of something else; put in as part of a set, group or a category; (iii) to contain as a secondary or minor ingredient or element. It is no doubt true that generally when the word "include" is used in a definition clause, it is used as a word of enlargement, that is to make the definition extensive and not restrictive. But the word "includes" is also used to connote a specific meaning, that is, as "means and includes" or "comprises" or "consists of."

48. The use of the term "includes" after talcum powder, followed by "medicated talcum powder" in this court's opinion can lead to only one inference, which is that the clear legislative intent was that all kinds of talcum powders, which contained medications (irrespective of the proportion, or at any rate, not containing predominant proportions) should necessarily be treated as cosmetics, falling under Entry 127. The pointed phraseology in fact concludes the issue, leaving no scope for the court to interpret the Entry as including any class of goods, other than such as Nycil prickly heat powder, which is a talcum powder that is also medicated. A salutary rule for fiscal legislation interpretation is that words used in the statute must be given their plain meaning. The court's function is not to give a strained and unnatural meaning to the provision. The intention of the legislature, manifested in plain words, must be accepted. In the decision of A.V. Fernandez v. State of Kerala 1957 (1) SCR 837, the Constitution Bench stated the principle of strict interpretation in construing a taxing statute, in the following manner:

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"[..] In construing fiscal statutes and in determining the liability of a subject to tax one must have regard to the strict letter of the law. If the revenue satisfies the court that the case falls strictly within the provisions of the law, the subject can be taxed. If, on the other hand, the case of not covered within the four corners of the provisions of the taxing statue, no tax can be imposed by inference or by analogy or by trying to probe into the intentions of the Legislature and by considering what was the substance of the matter.[..]"

49. In the present case, the clear legislative intent, of inserting a carefully worded entry, which was a "hybrid" one, i.e. describing an article that contained medicinal ingredients, as well as those used for cosmetics, and yet placing such a creature ("neither beast nor fowl" so to say) in the category of cosmetics, ruled out altogether any interpretive scope of classifying it as a medicinal preparation, or drug or medicine. Therefore, this court cannot fault the High Court for drawing the conclusion that it did.

50. ......

51. In a decision of this court, Oblum Electrical Industries Pvt. Ltd., Hyderabad v. Collector of Customs, Bombay 1997 Supp (3) SCR 68/1997 (94) E.L.T. 449 (S.C.)/1997 taxmann.com 507 (SC) the function of an explanation was stated to be thus:

"It is a well settled principle of statutory construction that the Explanation must be read so as to harmonise with and clear up any ambiguity in the main provision."

52. In Union of India (UOI) and Ors. v. Godfrey Philips India Ltd. 1985 Supp (3) SCR 123/1985 (22) E.L.T. 306 (S.C.)/1986 taxmann.com 508 (SC) this court had to deal with an explanation that expanded the meaning of "packing". The court observed that explanations are also used to widen terms:

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"[..] The Explanation to Section 4(4)(d)(i) provides an exclusive definition of the term "packing" and it includes not only outer packing but also what may be called inner packing. Ordinarily bobbin, pirl, spool, reel and warp beam on which yarn is wound would not be regarded as packing of such yarn, but they are brought within the definition of

"packing" by the Explanation. The Explanation thu
extends the meaning of the word "packing" to cover items
which would not ordinarily be regarded as forming part of
packing. The Explanation then proceeds to say that
"packing" means wrapper, container or any other thing in
which the excisable goods are wrapped or contained. It is
apparent from the wide language of the Explanation that
every kind of container in which it can be said that the
excisable goods are contained would be "packing" within
the meaning of the Explanation and this would necessarily
include a fortiori corrugated fibre board containers in which
the cigarettes are contained. When Bombay Tyre
International case was argued before us, it was at one
stage sought to be contended, though rather faintly, that it
is only the immediate packing in which the excisable goods
are contained, that is primary packing alone, which would
be liable to be regarded as "packing" within the meaning of
the Explanation. But this argument was given up when it
was pointed out that even secondary packing would be
within the terms of the Explanation, because such
secondary packing would also constitute a wrapper or a
container in which the excisable goods are wrapped or
contained. [..]"

4.7 Thus in view of the decisions as above we have to interpret the scope of definition of "Business Support Services", which has been defined as service provided by one person to another in relation to Business or Commerce. Undisputedly the clients of the appellant are engaged in business of telecasting/ broadcasting the programmes produced by them. Fo telecasting/ broadcasting they have entered in to contractual

agreement with the appellant for providing the facility of up-linking their programmes. The appellants provide the said services by use of teleport available with them. Undisputedly appellant provides the support service for the Business of their clients against the agreed charges for usage. The relevant excerpts from the up-linking Service Agreement, entered between the appellant with its clients are reproduced below:

Uplinking Service Agreement

This agreement ("Agreement") is made at New Delhi on this 21st day of June 2007.

Between

Essel Shyam Communication Limited, a company incorporated under the Companies Act, 1956 and having its registered office at C-138, Naraina Industrial Area

Phase 1 New Delhi 110028 and Corporate office at C-34, Sector 62, Electronic City Noida 201307, hereinafter referred to as „ESCL , which expression shall unless repugnant to the context or meaning thereof mean and include its successors in business and assigns of the First part.

And

V & S Broadcasting Limited, a company incorporated under the Companies Act, 1956 and having its registered office at Parijaat House , 1076, Dr E Moses Roaad, Worli Naka, Mumbai 400018 hereinafter referred to as „Customer , which expression shall unless repugnant to the context or meaning thereof mean and include its successors in business and permitted assigns of the Second part.

Whereas ESCL is engaged in the business of providing uplinking services under the License Agreement with the Ministry of Information & Broadcasting (MIB), Government of India, governed by the provisions of the Indian telegraph ACT, 1885 AND Indian Wireless telegraphy Act, 1933 as modified from time to time.

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And whereas ESCL has offered its service to the customer for up-linking of TV channel(s) to the Customer (details given in Annexure I) and the Customer is desirous of utilizing these services of ESCL for uplinking of its TV Channels.

And whereas at the request of the Customer, ESCL has agreed to provide uplinking of TV channel (s) of the Customer using ESCL Teleport (Uplinking Hub) at NOIDA on the terms and conditions mutually agreed upon as hereinafter appearing.

Now the this agreement witnesseth and the parties hereto agree as follows:

1. Definitions .....
2. Service/ obligations to e provided/ supported by ESCL. The services to be provided/ supported by ESCL are:

a) Subject to receipt of MIB approval/ permission, to provide uplinking of TV channel (s) (i.e. signals of audio, video and control signals including encryption keys of the Customer, on MCP Platform. The Customer has applied/ is about to apply seeking approval/ permission for uplinking of the said TV channel to the Ministry of Information & Broadcasting (hereinafter referred to as „MIB). The Customer will provide a copy of such approval/

permission to ESCL as and when the same is received by the Customer. ESCL agrees to provide to the Customer a copy of MIB license obtained by them to render services provided herein.

b) The scope of this agreement and performance of ESCL is confined to the uplinking of only such channel (s), which have been specifically approved/ permitted by the Ministry of Information & Broadcasting.

c) ESCL will demonstrate to the Customer, that its uplink system has been approved to transmit on the INSAT 4A satellite.

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d) In the event of failure of satellite, if ISRO provides with another capacity on different satellite, ESCL shall provide to the Customer, uplink of signal to that satellite.

e) In the event the Customer wants to use the services of optical fiber bandwidth provider for recording or live contribution to its transmission, ESCL will provide all support and will cooperate with the service providers engaged by the Customer and will provide rack space, conditioned power etc. In case the Customer engages ESCL to provide these services, the charges of these services shall be mutually agreed upon between the Parties.

f) ESCL will also cooperate for the DSNG/ OB feeds, especially where the Customer needs the signal to be downlinked at ESCL facility for recording or live contribution on payment of extra charges as mutually agreed between the parties.

g) ESCL shall also record the TV signal uplinked from the teleport anjd keep the same for 90 (ninety) days as per the MIB guidelines. The recording shall be provided to the Customer if so required by the Customer for whatsoever reasons and the tapes for which will be provided by the Customer.

3. Term of agreement ....
4. Termination .....
5. Terms of Service

5.1 Service Operation: ESCL will continue its uplinking Hub for the valid period of license & will endeavour sincerely to extend to the license for future period of operation. ESCL has represented and warranted to the Customer that its present license is valid upto 2nd September 2011 and a copy of the said license will be provided by ESCL to the Customer on or before signing of these presents. The Service is as defined in Annexure II. ESCL undertakes to keep its license valid during the subsistence of this agreement.

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ESCL or its authorized representative, upon reasonable prior notice, shall have the right to inspect the sites/ locations from where the programmes are sent to ESCL s uplinking Hub for uplinking. ESCL shall in particular but not limiting to have the access to lines, junctions, trunks, terminating interface, processing hardware, uplinking equipment and software etc. Simultaneously upon reasonable prior notice to ESCL, the Customer and its authorized representative will have right to inspect the uplink site of ESCL from where the signals of the Customers are sent.

5.2 ESCL shall setup and maintain the uplinking facility to meet Customer requirements and shall also provide to the Customer the details pertaining to the equipments used by ESCL to render services herein including but not limited to the size of the antenna, antenna gain, electronics chain etc.

5.3 In the event that ESCL sets up a Commercial Teleport in Mumbai, ESCL shall shift the Customers operations to Mumbai seamlessly.

5.4 ESCL shall endevour that its provisions the services is not and will not on ESCL s part constitute a breach of any applicable laws, rules and regulations imposed by any government and regulatory authorities in India.

5.5 Customers Obligations: To facilitate provision of the services by ESCL, Customer shall meet the following obligations:

a) ...

b) To produce copies of all such approvals to ESCL before commencement of service, and to show originals of such documents/ approvals to ESCL at any time ESCL may demand.

c) Customer shall endeavour that its utilization of the service is not and will not constitute a breach of any applicable laws, rules and regulations imposed by any governmental and regulatory authorities either

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in India or in the countries where the obligation hereunder will be performed by Customer including those governing the content of programming of any television transmission that is transmitted by Customer.

5.6 In the event that the Customer decides to setup its own Teleport and in case, ESCL sets up the said teleport and playout for the Customer before the expiry of this agreement, then foreclosure charges as detailed out in Clause 11 of this agreement, will not be due and payable by the Customer.

6 Prices:

6.1 ...

6.2 ...

6.3 The prices provided for in this agreement are exclusive of Service tax, value Added Tax, WPC/Spectrum charges or any other present or future taxes/ duties/ levies, which shall ,be payable by the Customer, extra at actual. Any impact on prices resulting from the future changes in government policy/ increase in such taxes/ duties/ levies etc. not covered above, affecting this agreement shall be solely borne by the Customer.

6.4 The services shall be chargeable from the date of actual launch of the TV Channel. Further, it is agreed between the parties hereto that the Customer shall be entitled to avail the services of ESCL, free of cost for the purpose of test signals for the period of 15 days extendable by another 15 days and the date of actual launch of TV Channel.

6.5 ....

7 Payment terms

8 Confidentiality.

9 Force Measure

10 Interruption of Service

10.1 Interruptions which are not attributable to the negligence or default (including complying with this

agreement) of the Customer subject to the exceptions provided in Clauses 10.3 or 10.4 will result in a refund of the Service Charges paid hereunder and calculated in accordance with the provisions of Clause 10.5 , with the erfund of such service charge being paid by ESCL to the Customer by a separate payment contemporaneously with the next monthly installment of the service charges to be paid by the Customer.

10.2 The length of any interruption shall be measured from the time and date of occurrence duly notified in writing by the coordinator/ customer certified nominee up to such time and date as ESCL determines is the time and date which the interruption has ended.

10.3 ESCL shall not be liable for any interruptions caused by: ....

10.4 ESCL shall not be liable if interruption is the result of or is attributable to the failure or non performance of the customer s satellite service provider regardless of who is operating or controlling the facilities or for reasons attributable to the Customer.

10.5 The refund in the Service Charge provided for in Clause 10.1 shall be calculated according to the following formula

i. Interruptions of 24 hours or less:

Length of Interruption	Refund
Less than 10 minutes	None
Over 10 minutes	100% of that day s Service Charge

The service charge for one day is calculated as being an amount equal to 1/365th of the annual rate of the Service Charge then applicable.

Two or more interruptions of 10 minutes or more, during any period up to but not exceeding three hours, shall be deemed to be a single interruption.

ii. Interruptions within a 24 hour period: Notwithstanding the above formula, not more than

one full days refund will be permitted for a continuous period of 24 Hours.

19 Entire Agreement: This contract governs the provisions of the Service to the Customer to the exclusion of all other written or verbal representations, statements, understandings, negotiations, proposals or agreements.

Annexure

SERVICE CHARGES

Charges for Uplinking From ESCL Teleport

S No	No of Channels (whether it being of the Customer or any of its associate group companies)	Monthly Uplink Charges (INR/ Month)
1	One Channel	3,50,000
2	Two Channel	6,00,000
3	Three Channel	8,00,000
4	Four Channel	10,00,000
5	Incremental charges for every Additional Channel after Channel 4.	2,50,000 per channel

Terms & Conditions.

1. ....
2. ....
3. Any taxes, duties, octroi, levies, VVPC/ Spectrum charges, microwave royalty charges, usage charges, leased line charges etc. or other applicable statutory/ other charges in relation to the uplinking services shall be paid by customer, extra at actual.
4. Uplinking license shall be obtained by the Customer from MIB.

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5. The charges quoted are only for use of Uplinking facility. The teleport facility will be the property of ESCL throughout the contract period.
6. ....

Commercial Terms and Conditions:

1. Price
   The prices quoted are exclusive of Service tax, WPC/Spectrum charges, leased line or fiber optic charges for backhaul or value Added Tax, which shall be payable by the Customer, extra at actual. Any promulgation of any future taxes, duty, levy or any other statutory charges shall be to the customer account, shall be solely borne by the Customer.
2. Placement of order: ....
3. Payment terms: .....
4. Advance Deposit: ....
5. ESCL Bankers: ....

SERVICE LEVELS

- Uplinking c/no to be maintained within +/- 5 db
- Facility up-time shall be 99.75%

(All tests to be carried out on a professional standard decoder, with the professional test and measurement equipment at ESCL Hub).

From the perusal of the above agreement it is evident that the Customer of the appellant has outsourced the activity of uplinking the programme feeds produced by them to the designated satellite, from the hub maintained and operated by the appellant (ESCL Hub). The appellant is charging service charges for the uplinking facilities provided by them. Appellant is required to maintain the desired service levels and provide the uninterrupted services. In case of outages/ interruptions appellant is penalized for the same. The service agreement also specifically provides that the service charges do not include any kind of taxes and levies, including the service tax. Clause 5.6

specifically provides for the situation whereby the Customer could set up his own teleport for uplinking the programme feeds. The above terms and conditions of the agreement establish beyond an iota of doubt that appellant was providing the services to the customer for uplinking the programme feeds, as outsourced services through the teleport hub available with them. The ESCL Hub is nothing but the infrastructural support provided by the appellant to its customer for uploading its programme feeds. Further as per Form 2 (teleports) Grant of Permission Agreement between Ministry of Information and Broadcasting Government of India and Appellant - To Establish, maintain and operate uplinking hub (teleport)dated 07.05.2010, -

4. Requirement to provide the teleport Station:

4.1 The permission holder shall be solely responsible for the installation, upkeep and operation of necessary equipment and systems of teleport including monitoring facilities required under it hereinafter. 4.2 The permission holder shall apply to WPC for Wireless Operational License within one month from date of signing of this agreement and shall comply with necessary requirements thereof.

13. Value added Services:

13.1 The uplinking hub (teleport) to be set up by the permission holder will be used for uplinking TV Channels only and it will not be used for other modes of communication including voice, fax and datea communication unless necessary permission for such value added services have been obtained from the competent authority.

14. Conformity to provisions of intersystem coordination agreement:

14.1 The permission holder shall ensure that the uplinking hub (teleports) operation conform to the provisions of Service Tax Appeal No.55453 of 2013 intersystem coordination agreement between INSAT and the satellite being used by the permission holder.

4.8 On the issue of uplinking facilities provided by the Appellant to their clients, Appellant relied upon the decision of the tribunal in case of TV Today Networks Pvt. Ltd. [2019 TIOL 3733 CESTAT Delhi]. We find that the tribunal has held as follows:

"10. From a perusal of the above stated statutory definitions it is seen that Business Support Service (BSS) covers in its ambit various activities including infrastructural

> support services. A perusal of the definition, as extracted above, would show that it does not cover the activities undertaken by the Appellant since it only uplinks and downlinks satellite beams at agreed and desired bandwidth provided by Intelsat and hence such an activity cannot be Infrastructural Support Services. It is also evident from the CBEC Circular dated 28.02.2006 that the Infrastructural Support Service covered under BSS is with reference to only those services which has been outsourced. The Department has presumed that the Appellant has outsourced their activity of uplinking and downlinking signal beams at agreed and desired bandwidth. The said view is not correct since the Appellant has not outsourced their activity of uplinking and downlinking contents to be received and broadcasted but has purchased the desired bandwidth as they do not possess a satellite of their own to beam such signals. The transaction, therefore, comes within the ambit of 'sale' and is clearly covered by the decision of the Karnataka High Court in Antrix Corporation(supra), wherein it has been held that the transaction of providing transponder is one of 'sale' as per Article 366(29)A of the Constitution, and therefore, not amenable to service tax Act under the Finance Act. It is, therefore, clear that the fixed satellite is for broadcasting or beaming of contents and is beyond the Service Tax Appeal No.55453 of 2013 scope of Infrastructural Support Service. The demand made in the impugned order is, therefore, not sustainable."

The said decision is clearly distinguishable as in the present case appellant is providing the facility of up-linking and down-linking of the signals to its client who have outsourced this essential activity to the appellant.

4.9 In case of R D Kute [2017 TIOL 2420 CESTAT Del] following was held:

> 6.We also take note that the definition of the taxable service in Section 65(104c) of Finance Act, 1994 broadly includes all activities that are, in the normal course of business, matters of internal processes of an entity. These relate primarily to the various functional aspects of the working of an organisation such as production management, sales management, financial management and marketing management and that, when these essential work of an organization is outsourced, the provider of outsourced service is liable to be taxed.

> 4.10 In case of Air Liquide Nitrogen [2017 (4) GSTL 230 (T-

del)] following has been held:

> "10. The appellants strongly pleaded that the scope of infrastructure support as mentioned under tax entry „business support service will not cover the present case. Reliance was placed on the explanation to state that the nature of activities are to be generally considered as infrastructural support service can be ascertained from such inclusive definition. These are mainly administrative and office related support. The type of activities like putting up and managing gas storage facility in industrial unit

> are not fitting into overall scope of the infrastructural support service as contemplated by the inclusive definition given in the explanation. We note that though the activities of the appellant, can be brought under very generic understanding of infrastructure support, when Service Tax Appeal No.55453 of 2013 examined with statutory scope as per explanation indicating nature of services which are to be brought under tax net than it would appear that the present activity will not get covered under the said tax entry. We also take note that in legal interpretation, there are situation where the word „includes in certain context be a word of limitation [South Gujarat Roofing Tiles Manufactures - 1977 (1) SCR 878]. In certain situations the nature of included items would not only partake of the character of the whole, but may be construed as clarificatory of the whole. In the present case even considering the explanation for infrastructural support service is only defined in an inclusive way, still it will not be incorrect to hold such inclusive definition will throw light upon what are all the nature of services which are sought to be taxed."

None of the above decisions support the case of the appellant or the merits of demand and are distinguishable. On examination of the terms of the contract between the appellant and their client it is clearly evident that appellant have provided the services which support the business activities of their client, by providing the uplinking facility from their teleport. Thus on merits these service would be classifiable under the category of business support services.

Whether the services of supply of DSNG Van to its clients can be classified and subjected to service tax under the category of „Supply of Tangible Goods Service"?

4.10 Commissioner has in his order relied upon clause 4.1 of the agreement entered between the appellant and its customer (M/s Media Content & Communication Services (India) Pvt Ltd.) to hold that these service are classifiable under the category of Supply of Tangible Goods Services. The text of the agreement for the provision of the DSNG vehicles is reproduced below:

> DSNG VEHICLE RENTAL AGREEMENT Service Tax Appeal No.55453 of 2013 THIS DSNG VEHICLE RENTAL AGREEMËNT (hereinafter referred to as Agreement) is executed at New Delhi on this 30 day of March, 2006 BETWEEN Essel Shyam Communication Limited, a Company incorporated under the Companies Act, 1956 and having its Registered Office at C-138, Naraina Industrial Area, Phase-l New Delhi and Corporate Office at C -34.Sector 62, Electronic City, Noida-201307 (hereinafter referred to as "Company"), which expression shall include its successors, authorised representatives and assigns) of the FIRST Part;

AND Media Content & Communications Services (India) Private Limited a Company registered under the Company Act 1956, having its registered office at STAR News Centre, Off Dr. E. Moses Road, Mahalaxmi, Mumbai 400 011, hereinafter referred to as the "Customer", which expression shall unless repugnant to the context or meaning thereof, mean and include its successors in business and permitted assigns of the OTHER PART hereinafter both collectively referred-to as "Parties" and individually as "Party"

AND WHEREAS the Customer is desirous of taking on rent the DSNG Vehicle (hereinafter referred to as "DSNG Vehicle") detailed in the Schedule I attached hereto and has requested the Company to give the said Vehicle on rent to be used for Live News/footage collection and point to point transmission, to which the Company has agreed thereto.

NOW THEREFORE, IT IS HEREBY AGREED as follows

1. DEFINITIONS In this Agreement, unless the context otherwise requires the following terms shall have the meaning ascribed to them herein below:

> Service Tax Appeal No.55453 of 2013 "Bandwidth Agreement" means agreement dated..... entered into by the parties herein for Ku Band satellite segment.
>
> "DSNG Vehicle" means the Vehicle detailed/described in the Schedule I to this Agreement.
>
> "Month" means an English calendar month;
>
> "Schedule" means a schedule to this Agreement;
>
> "Services Agreement" means agreement dated April 1, 2006 entered into by the Parties herein for services of the equipments in the DSNG Vehicle

2. CUSTOMER CONFIRMATION 2.1 The DSNG Vehicle shall be used strictly for the purpose of Live News / footage collection and point to point transmission only.

2.2 The Customer shall ensure and undertake that the operation-and handling of DSNG is done at all times by its fully trained, qualified and experienced engineers following guidelines / instructions and using complete care and caution; in case of any problem, the DSNG is not forcibly operated, the DSNG is used as per the direction for the purpose it is meant for to provide the optlmal functionality and life from the DSNG.

In case of any negligence, neglect or default (willful or otherwise) by the Customer or any of the representative resulting into malfunctioning, defect or damage to the DSNG the responsibility will be entirely of the Customer and any repair/ replacement charges shall be borne exclusively by the Customer.

2.3 Whether such default is wiful or result of negligence on part of the Customer and / or its representatives shall be mutually agreed upon by the Parties The Customer and the Company shall cooperate with each other as required, for troubleshooting and fault isolation Service Tax Appeal No.55453 of 2013 2.4 The Customer shall ensure that objectionable or obscene messages or communication, which are inconsistent with the established laws of the country are not carried on the network. The customer shall also ensure that the feed collected through the SNG / DSNG shall conform to Programme and Advertisement Codes. Nothing shall be considered as objectionable or

obscene unless proven in the competent court of Law 2.5 The Customer shall ensure that uplinking Is received only in closed user group. The Customer shall also ensure that the signal is downlinked only at the permitted teleport 2.6 The Customer shall ensure that uplinking from SNG / DSNG should be in SCPC mode only (only single feed can be uplinked from the SNG / DSNG at a time) 2.7 The Customer shall obtain the permission from Ministry of Information and Broadcasting for use of DSNG Vehicles 2.8 It shall be the Company's responsibility to obtain the frequency authorization of WPC, In the event the Customer decides to terminate the Service Agreement and Bandwidth Agreement with the Company, it shall become the Customer's responsibility to obtain frequency authorization of WPC and shall keep the same renewed yearly in time and also submit a copy of the same to the Company so that the same may be submitted to MIB as and when required 2.9 The Customer shall maintain a daily record of the location and the events which have been covered and uplinked by SNG / DSNG terminals. The event which have been uplinked and downlinked at their approved teleport and produce the same before the regulatory authorities or their authorized representative as and when required. 2.10 The Customer shall ensure that the uplinking in Ku-Band would be utilizing satellite space capacity provided by Department of Space and the SNG / DSNG will not be used for DTH operations, irectly or indirectly and there should be no turn around for broadcasting Service Tax Appeal No.55453 of 2013 2.11 The Customer shall ensure that the SNG / DSNG is not taken inside the premises of Defence Installations, protected and prohibited areas and into areas condoned off from security point of View.

2.12 The Company represents and confirrhs and the Customer agrees to as follows

(a) The DSNG Vehicle is in good order and working condition

(b) The Company is not the manufacturer or seller of the DSNG Vehicle and has only given on rent the DSNG Vehicle to the Customer. The Company has deployed in the DSNG vehicle various Electronic and other equipments from OEMs across the globè supported / back up by their respective specifications / warranty terms

3. COMPANY'S CONFIRMATION The company confirms that it has the requisite relevant permissions and authority to enter into this Agreement and there is no violation by Company of any applicable laws of the country

4. TITLE, IDENTIFICATION, OWNERSHIP OF DSNG VEHICLE 4.1 Save as otherwise provided in this Agreement, no right, ownership., title or interest in the DSNG Vehicle shall pass to the Customer by virtue of these presents. The Customer shall at no time contest or challenge the Company's sole and exclusive ownership right, title and intarast in the DSNG Vehicle 4.2 Customer shall not at any time assign, loan out, gift away, sub-let, pledge hypothecate, encumber or part with possession or otherwise deal with the DSNG Vehicle or the equipments nor shall create or allow to be created any lien on the same.

4.3 Upon expiry of the period or on earlier termination of this Agreement, the Customer shall at its own cost and expenses, forthwith deliver or cause to be delivered to the Service Tax Appeal No.55453 of 2013 Company the DSNG Vehicle, at such place and time as may be directed by the

Company, In good working order and condition (normal wear and tear excepted). 4.4 During the currency of this Agreement, the Customer shall hold the DSNG Vehicle in trust for and on behalf of the Company:

5 MAINTENANCE, ALTERATION OR ADDITION TO THE DSNG VEHICLE 5.1 The Customer shall, at its own expense/cost, operate and keep the DSNG Vehicle in good working condition. 5.2 The Customer shall not make any alteration, addition or improvement to the DSNG Vehicle or change the condition thereof without the prior consent of the Company in writing. Any, Improvements and modifications of any action or nature whatsoever, when made to the DSNG Vehicle by Customer (whether at its own cost or not with the approval of the Company) shall belong to the Company and be deemed to be part of the DSNG Vehicle. All additions done by the Customer to the DSNG Vehicle at its cost, shall be the property of the Customer to that extent and such addition shall NOT belong to the Company. 5.3 The Company shall not be responsible for repairs etc. in the following cases:

a. Plastic parts, if any, etc. b. Breakage / Malfunctioning due to negligence, mishandling, accident and malicious damage or willful default.

c. Any force majeure on account of any act of God

6. INSPECTION Upon receipt of 24 hours prior notice from the Company, the Customer shall permit the Company and all persons authorized by it at all reasonable times (immediately in case of any emergency) to Inspect, view and examine the state and condition of the DSNG Vehicle and for the purpose permit entry in the premises where the DSNG Vehicle is used, stored or lying.

Service Tax Appeal No.55453 of 2013

7. PAYMENT TERMS a. The Customer shall pay without default all charges as stipulated in Schedule II to this Agreement and any other amount becoming due under this Agreement, quarterly in advance 7 days before the commencement of the quarter (herein after referred to as "Due Date"). The Advance Deposit of two quarter charges shall be paid. at the time of the signing of the Agreement which shall be adjusted as and when the vans are commissioned and accepted by the Customer.

b. The Customer shall pay to the Company the Involce amount referred In the Invoice, on or before Due Date'by cheque or bank draft issued in favour of the Company, payable at New Delhi.

c. The Rental Charge is exclusive of Sales/Service Tax, WCT / Rental Tax, Octroi/ Entry Tax, road permit, Freight and any other statutory & other taxes or Government levies etc and these taxes shall be charged in addition to the charges, based on actuals i.e. all taxes relating to the services provided under this Agreement in respect of DSNG Vehicle shall be reimbursed by the Customer to the Company d. The Customer undertakes that all charges in respect of DSNG Vehicle including but not limited to a. road tax, registration etc b. Statutory / Local Taxes / Levis shall be borne by the Customer.

e. Any amount due under the Invoice and remaining unpaid after the Due Date shall bear interest at the rate of 1% per month for the period of default calculated from the date when payment became due till the day payment is made by the Customer.

f. The responsibility of DSNG Vehicle transportation from Noida to Customer's location will be of the Customer. Any road permit / forms required in this regard including the rental costs of permit / transportation will be the responsibility of the Customer Service Tax Appeal No.55453 of 2013 g. The provisions of this Clause shall survive the termination of this Agreement for so long as may be necessary to give effect to any outstanding payment obligation of the Customer.

8 INSURANCE In the event the Service Agreement is terminated with the Company, Customer shal be liable to reimburse the Company the premium / charges for the comprehensive insurance which is presently reflected in the Service Charges paid by the Customer to the Company under the Service Agreement and also ensure that the DSNG vehicle is delivered back to the company in good order and condition at the time of completion of the contract period. 9 TERM OF THE AGREEMENT This Agreement shall come into force from the date of this Agreement and shall continue to constitute a legal, valid and blinding obligation on the Parties for a period of 4 (Four) years from the date of commencement of services / charges. 9.2 The term of this Agreement may be renewed further on mutually acceptable terms 10 EVENTS OF DEFAULT 10.1 An event of default shall occur by the Customer hereunder, if the Customer:

a. Fails to pay any amount due under this Agreement within 30 days of the due date.

b. Fails to perform or observe any other covenant, conditions to be performed or observed by it hereunder and such failure or breach continues unremedied for a period of 14 days after written notice is sent to the Customer; or c. Without the Company's consent, alienates, parts with possession or sublets or encumbers or creates any lien on or endangers the DSNG Vehicle; or d. Shall commit an act of bankruptcy or become insolvent or bankrupt or make an assignment for the benefit of creditors, or consent to the appointment of a Trustee or Service Tax Appeal No.55453 of 2013 Receiver, or either shall be appointed for the Customer or for a substantial part of its property without its consent or bankruptcy, reorganization or insolvency proceedings shall be Instituted by or against the Customer, voluntary, or otherwise, or e. Does or suffers any act or thing or omits to do or suffer any act or thing whereby or in consequence of which the DSNG Vehicle may be or is likely to be endangered, attached or taken in execution under any legal process or by public authority; or f. Fails to obtain consEnts, licenses, approvals. permissions as are necessary and essential for the installation of the DSNG Vehicle as well as for the execution, enforceability and validity of this Agreement 10.2 An event of default shall occur by the Company, if the Company a. License to perform under this Agreement ls revoked or cancelled for any reasons;

b. Shall fail to perform its obligation under this Agreement;

c. Shall commit an act of bankruptcy or become insolvent or bankrupt or make an assignment for the benefit of creditors, or consent to the appointment of a Trustee or Receiver, or either shall be appointed for the Company or for a substantial part of its property without its consent or bankruptcy, reorganization or Insolvency proceedings shall be instituted by or against the Company, voluntary, or otherwise, or 11 TERMINATION 11.1 On termination of this Agreement by the Customer before the agreed period of the Agreement, the Customer shall pay to the Company an amount equal to the charges for the unexpired period of Agreement discounted at the Prime Lending Rate (PLR) of State Bank of India prevailing at the time of termination of Agreement. If the termination is the result of non-

Service Tax Appeal No.55453 of 2013 performance in terms of giving on rent the DSNG Vehicle by the Company, this clause shall not be applicable. 11.2 The Company shall have the option to terminate this Agreement forthwith if any payment due to Company from the Customer under this Agreement remalns outstanding beyond a period of 30 days from the due date However, it doesn't end the liablity of the Customer to make tho outstanding payment including the foreclosure charges mentioned in clause 11.1 supra. 11.3 In the event the Company defaults in terms of giving on rent the DSNG Vehicle then the Customer shall have the right to terminate the Agreement after the expiry of 14 days from the date notice is received by the Company to rectify such breach.

11.4 In the event the Company's License is revoked or cancelled resulting in the Company being ineligible o perform its obligations under this Agreement, the Agreement automatically shall stand cancelled from_ the date on which such revocation / cancellation becomes operational.

12 REMEDIES 12.1 On the-occurrence of any-of-the Events-of-Default-

pursuant-to-what is stated herein above in Clause 11.1 and 11.2:

> 12.1.1 The Company shall, without any notlce, be entitled to remove excluding any additions to equipment etc. that may have been done by the Customer after prior notification to the Company and repossess the DSNG Vehicle and for that purpose by itself, ts servants or agents enter upon any land, building or premises where the DSNG Vehicle is situated and detach and dismantle the same and it shall not be responsible for any damage which may be caused by any such detachment or removal of the DSNG Vehicle Service Tax Appeal No.55453 of 2013 12.1.2 The Customer shall relmburse to the Company the cost in repossessing the DSNG Vohicle in good working order and in enforcing its remedies howsoever occasioned. The parties hereto agree and recard that the amounts to be paid by the Customer to the Company as aforesaid have been bonafide and satisfactorily estimated to be the proper and reasonable amount that may be suffered by the Company as and by way of liquidated damages 12.2 On the occurrence of any of the Events of Default pursuant to what is stated herein above In Clause 11.3 and 11.4 - 12.2.1 The Company shall be paid on pro rata basis and any advance received by the Company shall be refunded within 7 days from the date of such termination failing which the Company shall be charged 1% interest per month on such amount from the date of payment till realization. 13

DISPUTE RESOLUTION All disputes arising directly under the express terms of this Agreement or grounds for termination thereof shall be resolved as follows:

13.1 The nominated representatives of both parties shall meet to attempt to resolve such disputes. If disputes cannot be resolved by the nominated representatives either party may make a written demand for formal dispute resolution/Arbitration which shall be in accordance with the provisions of the Arbitration and Conciliation Act, 1996 and the Venue of Arbitration shall be New Delhi. The parties shall endeavor that such disputes are settled within a period of two (2) months from the date of submission of such disputes to Arbitration. 13.2 The court of-Delhi shall have Jurisdiction for the purpose of implementation of any arbitral award given under this clause. Such award shall be final and binding on both Service Tax Appeal No.55453 of 2013 parties, and may be used as a basis for judgment thereon.

13.3 No party shall be entitled to commence or maintain any action In court of law upon any matter in dispute until such matter shall have been submitted and determined as herein provided 13.4 Pending submission to arbitration and thereafter until the Arbitrator publishes its award the parties shall, except in the event of termination, continuo to perform their obligations under this Agreement without prejudice to a final adjustment in accordance with the award 14 VARIATION This Agreement shall not be varied except by an agreement in writing signed by the parties to this Agreement.

15 CONFIDENTIALITY 15.1 All knowledge and information that either party may acquire as a result of the relationship between the parties concerning the manufacturing, sale practices and other technical information of either party and shall be treated as proprietary unless otherwise publicly available. No such knowledge or information is to be disclosed to or used by anyone without the prior written consent of the other party.

15.2 Except to the extent required to permit the Customer to carry out its obligations hereunder, the Customer shall neither disclose to any person, firm, partnership or corporation not use any technical information with respect to the Products or literature furnished by the Company hereunder.

16 WAIVER OF RIGHTS No delay or forbearance by either party in exercising any right, power, privilege, or remedy under this Agreement shall operate to impair or be constructed as a waiver of such right, power, privilege or remedy. For the avoidance of doubt any waiver by either party of the obligations of the other party shall be evidenced by an agreement in writing Service Tax Appeal No.55453 of 2013 signed by the parties Any single or partial exercise of any such right, power, privilege or remedy shall not preclude any others or further exercise thereof or the exercise of any other right, power, privilege or remedy. 17 FORCE MAJEURE Company shall not be liable for non-delivery, delay In delivery or installation, performance warranty obligations, or any other impairment of performance hereunder in whole or in part caused by the occurrence of any contingency beyond the control of the Company's suppliers,including but not limited to war (whether an actual declaration thereof is made or not) sabotage, insurrection. rebellion, riot or other act of civil disobedience, act of a public enemy, failure or delay in transportation (due to reasons

beyond its control), act or action of any Government or any agency or subdivision thereof, Including any act or action by way of any statute, sale guidelines / regulation, amendments to license granted to the Company, any other act or action whether judicial action, , fire, accident, explosion, epidemic, quarantine restrictions or flood, lightning, earthquaka or other Act of God, satellite / Transponder or related machinery failure where the Company has exercised due caution and care in the prevention thereof 18 NOTICES Any notice, invoice or other communication required or permitted under this Agreement shall be given in writing to the other party at that party's address specified hereunder. or as communicated in writing to the other party from time to time. Notices shall be deemed to have been given when personally delivered facsimile and acknowledged by the recipient or, if given by mail, properly addressed ithin ten(10) days after it is posted. The initial addresses and facsimile numbers for the parties are as follows To Company at ESSEL SHYAM COMMUNICATION LIMITED C-34, Sector 62, Electronic City Nolda, UP- 201307 Service Tax Appeal No.55453 of 2013 To Customer at: MEDIA CONTENT & COMMUNICATIONS SERVICES (INDIA) PRIVATE LIMITED STAR News Centre Off Dr. E. Moses Road Mahalaxmi, Mumbai 400 011 19 EFFECT OF ILLEGALITY If for any reason a provision of this Agreement or part thereof shall be illegal, invalid or unenforceable in any jurisdiction it shall be read down or severed to the extent necessary so that it may not-be so construed, The illegality, invalidity or non-enforceability of any provision, or part thereof, In any jurisdiction shall not affect the legality, validity or enforceability of any other provision, or of that provision in any other jurisdiction 20 EXCLUSION OF IMPLIED WARRANTIES This Agreement expressly excludes any warranty or condition by custom or otherwise or any oral representation by either party. Each of the parties acknowledges and confirms that it does not enter into this agreement on any warranty, condition, agreement or representation so excluded 21 FULL AND COMPLETE AGREEMENT This Agreement together with the Schedule shall constitute the full and complete Agreement between the parties hereto and all discussions and meetings held and correspondences exchanged between the Customer and Company in respect of this Agreement and any decision arrived at therein in the past and before the coming into force of this Agreement are hereby superseded by this Agreement and no reference of such discussions or meetings or past correspondence shall be entertained by either the Customer or Company.

22 INDEMNITY 22.1 Any fees, taxes or other charges legally payable by the Customer in relation to the possession and use of the DSNG Vehicle and which is paid by the Company in the event of the Customer's failure to pay shall at the Service Tax Appeal No.55453 of 2013 Company's option become immediately due from the Customer to Company.

22.2 Customer shall indemnify, defend and hold the Company harmless from claims. demands and causes of action asserted against the Company by any person (including without limitation, customers employees, Company's subcontractors and employees of such subcontractors or any third party) for personal injury or death or for loss of or damage, destruction, deterioration or diminishing In the value to DSNG Vehicle resulting from the indemnifier's negligence or willful misconduct hereunder, or on account of breach of representations, warranties or the terms herein.. Where personal injury, death or loss of or damage to property is the result of the joint negligence or willful misconduct of Customer and the Company, the indemnifier's duty of indemnification shall be in proportion to its allocable share of joint negligence or willful misconduct.

22.3 The Company hereby agrees to indemnify, defend and hold harmless the Customer from claims, demands and causes of action asserted against the Customer by any person (including without limitation, Company's employees, subcontractors and employees of such subcontractors or any third party) for personal injury or death or for loss of or damage, destruction, deterioration resulting from the Indemnifier's negligence or willful misconduct hereunder. Where personal injury, death or loss of or damage to property is the result of the joint negligence or willful misconduct of Company and the Customer. the Indemnifier's duty of indemnification shall be in proportion to its allocable share of joint negligence or willful misconduct.

22.4 The indemnities contained herein above shall survive the termination of this Agreement, In so far as they pertain to events/occurrences that transpired during the period of the lease and any renewals thereof Service Tax Appeal No.55453 of 2013 IN WITNESS WHEREOF the Parties hereto have caused this Agreement to be executed by their authorized representatives as on the date and year above written.

ADDENDUM TO DSNG VEHICLE RENTAL AGREEMENT This Addendum to DSNG Vehicle Rental Agreement ("Addendum Agreement") is executed at New Delhi on this 45 th day of July, 2008.

BETWEEN Essel Shyam Communication Limited, a Company registered under the Companies Act, 1956 having its and Registered Corporate Office at C- 138, Naraina Industrial Area, Phase-I New Delhi-110028 and Corporate Office at C-34, Sector 62, Electronic City Noida 201307 (U.P.), (hereinafter referred to as the "Company"), which expression shall include its successors in business and assigns) of the First Part;

AND Media Content & Communications Services (India) Private Limited, a Company registered under the Companies Act,1 95 having its registered Office at STAR News Centre, Off Dr E Moses Road, Mahalaxmi, Mumbai - 400 011, (hereinafter at referred to as "the Customer"), which expression shall include Its successors in business and permitted assigns) of the Second Part.

Hereinafter, both the Company and the Customer are collectively referred to as the "the Parties"

WHEREAS

1. The Company, at the request of the Customer, had entered Into DSNG Vehicle Rental Agreement ("Agrcement") dated 30*h March, 2006, with the Customer to provide 10 (Ten) nos. of DSNG Vehicles on rent for its approved/ permitted News/ Current affairs TV Channel uplinked from India for live News/ footage collection and point to point transmission.

2. Now the Customer has requested the Company to provide 1 (One) more DSNG Vehicle on rent, in addition to 10 (Ten) Service Tax Appeal No.55453 of 2013 nos. of DSNG Vehicles, to which the Company has agreed thereto

3. Both the Parties have mutually agreed to enter into this Addendum Agreement on the terms and conditions as mentioned hereinafter.

NOW THIS AADENDUM AGREEMENT WITNESSETH AND THE PARTIES HERETO AGREE AS FOLLOWS:

1. The Company hereby agrees to give on rent one additional DSNG Vehicle No.UP16T0348 (TATA 207 Standard) on an annual rental charges of Rs. 33,29,304/-

(Rupees Thirty Three Lakhs Twenty Nine Thousand Three Hundred and Four Only) for a period of 4 (four) years from the date of commencement of payment of charges. Hence, the total rental charges be and is hereby Increased from Rs. 3,32,93,040/- (Rupees Three' Crores Thirty Two Lakhs Ninety Three Thousand And Forty Only) to Rs. 3,66,22,344/- (Rupees Three Crores Sixty Six Lakhs Twenty Two Thousand Three Hundred and Forty Four Only) w.e.f. 15t July, 2008.

2. All other terms and conditions of the said Agreement shall remain same, unchanged & continue to be in full force and binding on the Parties accordingly.

4.11 Appellant has relied upon the clause 2.2, 7.4 and 7.6 of this agreement to argue that effective control and possession was transferred to the Customer by the Appellant and such transaction can been considered only as a deemed sale only, thus, the same was not susceptible to service tax. However on going through the agreement we do not find any merits in the said submission, for the reasons as stated below:

a. The agreement is titled the "DSNG vehicle Rental Agreement".

b. In the recitation clauses it is clearly stated that customer is desirous of taking these vehicles only on rent.

Service Tax Appeal No.55453 of 2013 c. Clause 2.12 clearly states that appellant confirms that the DSNG Vehicle is in good order and working condition and they are neither the manufacturer or seller of the DSNG Vehicle but are only providing these vehicles to customers on rent. Further the appellant has deployed in DSNG vehicle various electronic and other equipments from OEMs across the globe supported/ back up by their respective specifications/ warranty terms. d. Clause 4. "Title, Identification, Ownership of DSNG Vehicle reads as follows:

4.1 Save as otherwise provided in this Agreement, no right, ownership., title or interest in the DSNG Vehicle shall pass to the Customer by virtue of these presents. The Customer shall at no time contest or challenge the Company's sole and exclusive ownership right, title and interest in the DSNG Vehicle 4.2 Customer shall not at any time assign, loan out, gift away, sub-let, pledge hypothecate, encumber or part with possession or otherwise deal with the DSNG Vehicle or the equipments nor shall create or allow to be created any lien on the same.

> 4.3 Upon expiry of the period or on earlier termination of this Agreement, the Customer shall at its own cost and expenses, forthwith deliver or cause to be delivered to the Company the DSNG Vehicle, at such place and time as may be directed by the Company, In good working order and condition (normal wear and tear excepted).
>
> 4.4 During the currency of this Agreement, the Customer shall hold the DSNG Vehicle in trust for and on behalf of the Company:
>
> e. Clause 5.1 states that Customer shall be responsible for keeping the DSNG vehicles in good working condition and operate the same at their own cost. Clause 5.2 restricts the Customer from making ant any alterations etc., without prior consent of appellant and Clause 5.3 specifies the conditions in which the appellant shall not be responsible for repair etc., this clause when read with clause 2.2 makes the appellant responsible for undertaking repair and maintenance of the said Service Tax Appeal No.55453 of 2013 vehicles in all situations other that those specified. Appellant is in fact responsible for all repair and maintenance except in case where the same is on account of negligence of the Customer or its operators.
>
> f. Clause 6, empowers the appellant to undertake inspection with 24 hrs prior notice to the customer.

g. Clause 7.3 and 7.4 clearly stipulates that the rental charges are exclusive of sales/ service tax, wct/ rental tax, octroi/ entry tax, road permit, freight and other statutory & other taxes or government levies etc and these shall be charged in addition charges, based on actual.

h. Clause 9 provides that in the case of termination of agreement, Customer shall be liable to pay the appellant the premium/ charges for the comprehensive insurance which is reflected in the service charges paid by the customer to them. Customer has also to ensure that DSNG vehicle is delivered back to the company in good order and condition.

4.12 From the above we are clearly of the view that the agreement between the appellant and their customer is from the day one i.e. the day when it was entered into, was an agreement to provide these vehicles on rent to the appellant without transferring the effective control and possession of the vehicle to the customers. Hon ble Supreme Court has in case of Adani Gases Ltd. [2020 (40) GSTL 145 (SC)] held as follows:

> 12. The question that arises for our consideration is whether Section 65(105)(zzzzj) of the Finance Act, 1994 is applicable in the present case, that is, whether the supply of pipes and measurement equipment (SKID equipment), charged under the head of "gas connection charges" by the respondent to its industrial, commercial, and domestic consumers, amounts to supply of tangible goods for their use. While assessing the merits of the rival submissions, it is necessary to interpret the provisions of Section 65(105)(zzzzj).

> 13. Section 65(105)(zzzzj) of the Finance Act 1994 provides for taxability of supply of tangible goods for use, without transferring right of possession and effective Service Tax Appeal No.55453 of 2013 control over such goods, as a 'taxable service'. Section 65(105)(zzzzj) of the Finance Act, 1994 reads as follows:
>
> "65(105) "taxable service" means any service provided or to be provided-
>
> xx xx xx (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."

14. Section 65(105)(zzzzj) of the Finance Act 1994 was introduced by Notification No.18/2008-S.T. with effect from 16 May 2008. Section 65(105)(zzzzj) levies a service tax on the use of tangible goods. On the other hand, the transfer of the right to use any goods is treated as a 'deemed sale' and is subject to sales tax under Article 366(29-A)(d) of the Constitution of India. It is necessary to distinguish the applicability of these two provisions. Article 366(29-A)(d), provides:

> "(366)(29-A) tax on the sale or purchase of goods includes-

xx xx xx

(d) a tax on the transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;

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

15. The applicability of Article 366(29-A)(d) was discussed in a decision of this Court in Bharat Sanchar Nigam Limited Service Tax Appeal No.55453 of 2013 and another v. Union of India and others 2006 (3) SCC (1) ("BSNL"). In BSNL, the Court held that the purpose of Article 366(29-A)(d) was to levy tax on those transactions where there was a "transfer of the right to use any goods"

> to the purchaser, instead of passing the title or ownership of the goods. Thus, by a fiction of law, these transactions were now treated as 'sale'. Elucidating on the "transfer of the right to use any goods", Dr A R Lakshmanan J. in a concurring opinion held:
>
> "97. To constitute a transaction for the transfer of the right to use the goods, the transaction must have the following attributes:
>
> a. there must be goods available for delivery;

b. there must be a consensus ad idem as to the identity of the goods;

c. the transferee should have a legal right to use the goods- consequently all legal consequences of such use including any permissions or 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."

(emphasis supplied)

16. The test laid down in BSNL has been applied by courts to determine whether a transaction involves the "transfer of the right to use any goods" under Article 366(29-A)(d). In doing so, the courts have analysed the terms of the agreement underlying the transaction to ascertain whether effective control and possession has been transferred by Service Tax Appeal No.55453 of 2013 the supplier to the recipient of the goods. Recently, this Court in Great Eastern Shipping Company Limited. v. State of Karnataka and others 2020 (3) SCC 354 = 2019-TIOL- 524-SC-CT-LB considered whether the transfer of a vessel under a charter party agreement was a 'deemed sale', subject to sales tax. The Court, after analysing the terms of the charter party agreement, held:

"43. We are not turning our decision upon the terms used like 'let', 'hire', 'delivery' and 'redelivery' but on the other essential terms of the Charter Party Agreement entered in the instant case which clearly makes out that there is a transfer of exclusive right to use the vessel which is a deemed sale and is liable to tax under the KST Act. In the instant case, full control of the vessel had been given to the charterer to use exclusively for six months, and delivery had also been made. The use by charterer exclusively for six months makes it out that it is definitely a contract of transfer of right to use the vessel with which we are concerned in the instant matter, and that is a deemed sale as specified in Article 366(29A)(d). On the basis of the abovementioned decision, it was urged that all Charter Party Agreements are service agreements. The submission cannot be accepted, as there is no general/invariable rule/law in this regard. It depends upon the terms and conditions of the charterparty when it is to be treated as only for service and when it is the transfer of right to use.

xx xx xx

54. When we consider the charterparty in question in the context of applicable law, particularly in view of the constitutional provisions of Article 366(29A)(d), we find that there is transfer of right to use tangible goods, which is determinative of deemed

> sale as per the Constitution of India and provisions of section 5C reflecting the said intendment. We are of the considered opinion that there is Service Tax Appeal No.55453 of 2013 transfer of right to use exclusively given to charterer for six months, and the vessel has been kept under the exclusive control. The charterer qualifies the test laid down by this court in BSNL (supra)."

(emphasis supplied)

17. Therefore, sales tax is levied in pursuance of Article 366(29-A)(d) on transactions which resemble a sale in substance as they result in a transfer of the right to use in goods, instead of the transfer of title in goods. The Finance Act, 1994, deriving authority from the residuary Entry 97 of the Union List, enabled the Central Government to levy tax on services. 'Service tax' was introduced as a response to the advancement of the contemporary world where an indirect tax was necessary to capture consumption of services, which are economically similar to consumption of goods, in as much as they both satisfy human needs. All India Federation of Tax Practitioners v. Union of India, (2007) 7 SCC 527 = 2007-TIOL-149-SC-ST, para 4 This Court, in Association of Leasing and Financial Service Companies v. Union of India, (2011) 2 SCC 352 = 2010- TIOL-87-SC-ST-LB had noted:

> "38...Today with technological advancement there is a very thin line which divides a "sale" from "service". That, applying the principle of equivalence, there is no difference between production or manufacture of saleable goods and production of marketable/saleable services in the form of an activity undertaken by the service provider for consideration, which correspondingly stands consumed by the service receiver. It is this principle of equivalence which is inbuilt into the concept of service tax under the Finance Act, 1994. That service tax is, therefore, a tax on an activity. That, service tax is a value added tax. The value addition is on account of the activity which provides value addition...Thus, service tax is imposed every time service is rendered to the customer/client...Thus, the Service Tax Appeal No.55453 of 2013 taxable event is each exercise/activity undertaken by the service provider and each time service tax gets attracted."

(emphasis supplied)

18. The introduction of Section 65(105)(zzzzj) in the Finance Act, 1994, was with the intention of taxing such activities that enable the customer's use of the service provider's goods without transfer of the 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(29-A)(d). For the purpose of clarification, the Department of Revenue issued a Circular, D.O.F. No.334/1/2008-TRU, dated 29 February, 2008. The said circular clarified the applicability of Section 65(105)(zzzzj) vis-à-vis Article 366(29-A)(d). The relevant portions of the circular are as follows:

> "4.4 SUPPLY OF TANGIBLE GOODS FOR USE:

> 4.4.1 Transfer of the right to use any goods is leviable to sales tax/VAT as deemed sale of goods [Article 366(29A)(d) of the Constitution of India]. Transfer of right to use involves transfer of both possession and control of the goods to the user of the goods.
>
> 4.4.2 Excavators, wheel loaders, dump trucks, crawler carriers, compaction equipment, cranes, etc., offshore construction vessels & barges, geo-technical vessels, tug and barge flotillas, rigs and high value machineries are supplied for use, with no legal right of possession and effective control. Transaction of allowing another person to use the goods, without giving legal right of possession and effective control, not being treated as sale of goods, is treated as service.
>
> 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 Service Tax Appeal No.55453 of 2013 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."

(emphasis supplied)

19. The above circular clarified that Section 65(105)(zzzzj) is applicable only to those transactions where there is a supply of tangible goods for use, without the transfer of possession or effective control to the recipient. This aspect has been interpreted by various courts and tribunals. In the Bombay High Court decision in Indian National Shipowners' Association and Anr. v. Union of India and others ("Shipowners"), (2009) 4 AIR Bom R 775 = 2009- TIOL-150-HC-MUM-ST. the petitioners were engaged in providing services to major exploration and production operators by supplying their various vessels including offshore drilling rigs, offshore support vessels, harbour tugs, and construction barges. The question before the Bombay High Court was whether, prior to the introduction of Section 65(105)(zzzzj) in 2008, the petitioner could be taxed on its services in relation to mining of mineral, oil, or gas under Section 65(105)(zzzy). In the present matter, we are not concerned with the merits of Shipowners', which was affirmed on appeal by this Court in Union of India v. Indian National Shipowners' Association and Anr. 2010 (14) SCC 438 = 2011-TIOL-05-SC-ST. This Court explicitly restricted itself to the interpretation of Section 65(105)(zzz) while leaving the other observations on interpretation of the law, "open to be considered at length at an appropriate stage". 2010 (14) SCC 438 = 2011- TIOL-05-SC-ST, para 7. We note however, the analysis of Section 65(105)(zzzzj) of the Bombay High Court, where the High Court observed:

> Service Tax Appeal No.55453 of 2013 "38. Entry (zzzzj) is entirely a new entry. Whereas Entry (zzzy) covers services provided to any person in relation to mining of mineral, oil or gas, services covered by Entry (zzzzj) can be identified by the presence

of two characteristics namely (a) supply of tangible goods including machinery, equipment and appliances for use,

(b) there is no transfer of right of possession and effective control of such machinery, equipment and appliances.

According to the members of the 1st petitioner, they supply offshore support vessels to carry out jobs like anchor handling, towing of vessels, supply to rig or platform, diving support, fire fighting etc. Their marine construction barges support offshore construction, provide accommodation, crane support and stoppage area on main deck or equipment. Their harbour tugs are deployed for piloting big vessels in and out of the harbour and for husbanding main fleet. They give vessels on time charter basis to oil and gas producers to carry out offshore exploration and production activities. The right of possession and effective control of such machinery, equipment and appliances is not parted with. [...]"

(emphasis supplied)

20. The taxable service is defined as a service which is provided or which is to be provided by any person to another "in relation to supply of tangible goods". The provision indicates that the goods may include machinery, equipment or appliances. The crucial ingredient of the definition is that the supply of tangible goods is for the use of another, without transferring the right of possession and effective control "of such machinery, equipment and appliances". Hence, in order to attract the definition of a taxable service under sub-clause (zzzzj), the ingredients that have to be fulfilled are:

(i) The provision of a service;

(ii) The service is provided by a person to another person;

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(iii) The service is provided in relation to the supply of tangible goods, including machinery, equipment and appliances;

(iv) There is no transfer of the right of possession;

(v) Effective control over the goods continues to be with the service provider; and

(vi) The goods are supplied for use by the recipient of the service.

There is an element of service which is the foundation for the levy of the tax.

21. .....

22. The GSA is an agreement between the respondent and its purchaser for regulating the terms on which gas is sold by the respondent. The agreement is of a 'take or pay' genre. The buyer must lift the quantity contracted or pay for it. The agreement provides for the supply of gas at the Delivery Point through gas pipelines constructed from the distribution main to the measurement equipment. Further, both the seller and the buyer have provided warranties for maintaining the 'measurement equipment' in good working condition, in their respective capacities. The measurement equipment, as has been re-iterated by the respondent in the course of their arguments, is installed for the measurement and recording of the volume and pressure of the gas delivered at the Delivery Point and for the safe operation of the buyer's facilities.

23. At the outset, it is clear from the provisions of the agreement, and it has been admitted by both the parties, that there is no transfer of ownership or possession of the pipelines or the measurement equipment (SKID equipment equipment) by the respondent to its customers. Clause 5.3 of the agreement specifically provides that the 'Measurement Equipment' is to be supplied, installed and maintained by the seller at the cost of the buyer and that Service Tax Appeal No.55453 of 2013 the ownership of the equipment will rest with the respondent forever. Clause 5.6 further clarifies that the buyer has no right to adjust, clean, handle, replace, maintain, remove or modify the measurement equipment. Clause 5.10 guarantees that the seller shall have the right of entry at all hours to the Measurement Equipment and associated apparatus at the Buyer's premises. The pipelines are also part of the "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 or effective control of the goods under Section 65(105)(zzzzj) is satisfied.

24. The crux of the dispute is whether the supply of tangible goods - the SKID equipment - is for the use of the purchaser. In determining as to whether the provisions of Section 65(105)(zzzzj) are attracted, it is necessary to distinguish between the rights and obligations of the respondent (as the seller of gas) and of their purchasers, from the issue of whether the measurement equipment (SKID equipment) is supplied for the use of the purchaser of gas, without transferring the right of possession and effective control.

25. The purchaser of gas has an interest in ensuring the accuracy of billing and regulation of supply. The respondent is interested in ensuring that it receives payment for the quantity of gas which is contracted to be supplied to the purchaser. The 'SKID' consists of regulators, valves, filters and the metering equipment. The SKID equipment regulates and records supply. Under the terms of the GSA, the obligation of the seller is to deliver gas to the buyer at the Delivery Point. The gas pipeline from the nearest distribution main to the buyers' metering station is constructed and maintained by the seller at the cost of the buyer. The measurement equipment is Service Tax Appeal No.55453 of 2013 supplied, installed and maintained by the seller at the cost of the buyer, inspite of ownership of the equipment resting with the respondent as the seller. The measurement equipment is installed and maintained exclusively by the seller. Clause 5.6 indicates that the buyer has no right to adjust, clean, handle, replace, maintain, remove or modify it in any manner. Clause 5.10 guarantees the seller's access to the Measurement Equipment at the buyer's premises at all hours. Ownership, control and possession of the measurement equipment is with the respondent. The measurement equipment comprises not only of electronic meters that are useful for determining the quantity of

gas supplied to the purchaser at the Delivery Point, but also of isolation valves, filters and regulators that are crucial for regulating the pressure of gas and ensuring safe operation of the buyer's facilities. In order to maintain the sanctity of the equipment, the agreement casts the exclusive responsibility to install and maintain it on the respondent as the seller. The terms of the GSA would indicate that the quantity of gas supplied is to be measured at the Delivery Point. For this purpose, the measurement equipment is supplied, installed, owned and maintained by the seller at the cost of the buyer. The working of the measurement equipment is verified periodically by the parties to the agreement. If the buyer doubts its accuracy, this has to be communicated in writing to the seller, who alone is entitled to test, re- calibrate, remove or modify it. Similarly, if the seller has any doubt about the proper working of the measurement equipment it is entitled to check the meter in the presence of the representatives of the buyer. If according to the seller, the existing measurement equipment is not working satisfactorily it would be replaced at the cost of the buyer. These provisions indicate that the supply, installation and maintenance of the measurement equipment is exclusively carried out by the seller. The buyer has contractual Service Tax Appeal No.55453 of 2013 remedies against the seller in terms of the GSA. These remedies to the buyer as a purchaser of gas are distinct from the issue as to whether the equipment for which gas connection charges are recovered is used by the buyer.

26. Under Section 65(105)(zzzzj), the taxable service is provided or to be provided in relation to the supply of tangible goods for the use of another, without transferring the right of possession and effective control. The expression "use" has been defined in Black's Law Dictionary:

> "Use, n. Act of employing everything, or state of being employed; application, as the use of a pen, or his machines are in use. Also the fact of being used or employed habitually; usage, as, the wear and tear resulting from ordinary use. Berry-Kofron Dental Laboratory Co. v. Smith, 345 Mo. 922, 137 S.W. 2d 452, 454, 455, 456. The purpose served; a purpose, object or end for useful or advantageous nature. Brown v. Kennedy, Ohio Appellant. 49 N.E.2d 417, 418. To put or bring into action or service; to employ for or apply to a given purpose. Beggs v. Texas Dept. of Mental Health and Mental Retardation, Tex. Civ. App., 496 S.W.2d 252, 254. To avail oneself of; to employ; to utilize; to carry out a purpose or action by means of; to put into action or service, especially to attain an end. State v Howard, 221 Kan. 51, 557 P.2d 1280, 1281.
>
> Non-technical sense. The "use" of a thing means that one is to enjoy, hold, occupy or have some manner of benefit thereof. Use also means usefulness, utility, advantage, productive of benefit."

27. The expression "use" does not have a fixed meaning. The content of the expression must be based on the context in which the expression is adopted. The use of an article may or may not result in a visible change in its form or substance. Moreover, the nature of use is conditioned Service Tax Appeal No.55453 of 2013 by the kind of article which is put to use. Section 65(105) of the Finance Act, 1994 envisages myriad interpretations of the expression "use", in a variety of services such as telecommunication,17 renting of immovable property,18 and services related to art, entertainment, and marriage.19 In the case of some articles, use may be signified by a physical operation of the

article by the person who uses it. In such a case, actual physical use is what is meant by the supply of the goods for the use of another. In the case of others, the nature of the goods supplied impacts the character of the use to which the goods can be put. As an illustration, Section 65(105)(zzzze) of the Finance Act, 1994, seeks to tax services related to information technology and interprets the "right to use" to include the "right to reproduce, distribute, sell, etc". Circular D.O.F. No. 334/1/2008-TRU, dated 29 February, 2008. This understanding of "use" differs from the supply of tangible goods under Section 65(105)(zzzzj) at hand, where effective control or possession is not ceded. Thus, physical operation is not the only or invariable feature of use. As a corollary to the same, technical expertise over the goods in question is not a sine qua non for determining the ability of the consumer to use the good. Therefore, the expression "use" also signifies the application of the goods for the purpose for which they have been supplied under the terms of a contract.

28. The terms of the GSA indicate that the supply, installation, maintenance and repair of the measurement equipment is exclusively entrusted to the respondent as the seller. These provisions have been incorporated in the GSA to ensure that a buyer does not calibrate or tinker with the equipment. It is an incident of ownership and control being vested with the respondent. The purpose of the SKID equipment and its utility, lie in its ability to regulate the supply and achieve an accurate verification of Service Tax Appeal No.55453 of 2013 that which is supplied; in the present case the supply of goods by the respondent to its buyers. This enures to the benefit of the seller and the buyer. The seller is concerned with the precise quantification of the gas which is supplied to the buyer. The buyer has an interest in ensuring the safety of its facilities and that the billing is based on the correct quantity of gas supplied and delivered under the GSA. To postulate, as did the Tribunal, that the measurement equipment is only for the benefit of the seller in measuring the quantity of the gas supplied would not be correct. The GSA is an agreement reflecting mutual rights and obligations between the seller and the purchaser. Both have a vital interest in ensuring the correct recording of the quantity of gas supplied. Additionally, delivery of gas in a safe and regulated manner, enabled by the SKID equipment, is an essential component of the GSA. The SKID equipment subserves the contractual rights of both the seller and the purchaser of gas. Indeed, without the SKID equipment there would be no gas supply agreement. In fact, in the GSA, the buyer has also provided a warranty to ensure that the "Buyer's Facilities" remain technically and operationally compatible with the "Seller's Facilities", both of which include the 'measurement equipment'. This warranty would not have been provided if the measurement equipment was not of 'use' to the buyer. The equipment is thus a vital ingredient of the agreement towards protecting the mutual rights of the parties and in ensuring the fulfilment of their reciprocal obligations as seller and buyer in regulating the supply of gas. As an incident of regulating supply, it determines the correct quantity of gas that is supplied. The obligation to supply, install and maintain the equipment is cast upon the seller as an incident of control and possession being with the seller. Section 65(105)(zzzzj) applies precisely in a situation where the use of the goods by a person is not accompanied by control and possession. 'Use' in the Service Tax Appeal No.55453 of 2013 context of SKID equipment postulates the utilization of the equipment for the purpose of fulfilling the purpose of the contract. Section 65(105)(zzzzj) does not require exclusivity of use. The SKID equipment is an intrinsic element of the service which is provided by the respondent, acting pursuant to the GSA, as a supplier of natural gas to its buyers.

29. While interpreting the term 'use', the Tribunal in the impugned judgment has relied on its decision in the case of Meru Cab Company Pvt. Ltd. v. Commissioner of Central Excise, Mumbai 2016 (41) STR (444) (Tri-Mum) = 2015- TIOL-2408-CESTAT-MUM ("Meru Cab"). Meru Cab involved the transfer of a vehicle from a radio taxi operator to the driver, in turn to provide a service to the passengers. We find that the reliance placed on Meru Cab is misplaced as the factual context of the 'use' in the two cases is substantially different. In present matter, the agreement to supply gas, and the measurement equipment and pipelines only involves two parties - the respondent and the ultimate customer. Having said that, we are not expressing any opinion on the correctness of the decision in Meru Cab.

30. Thus, we are of the view that the supply of the pipelines and the measurement equipment (SKID equipment) by the respondent, was of use to the customers and is taxable under Section 65(105)(zzzzj) of the Finance Act 1994."

4.13 In view of the above we do not find any merits in the submissions made by the appellant in this respect and hold that the appellant has in fact provided the service under the taxable category of the Supply of Tangible Goods Services.

Whether the demand is barred by limitation 4.14 Commissioner has in the impugned order stated that the appellant are registered service tax assessee and are aware of the service tax law and procedures, by not obtaining the Service Tax Appeal No.55453 of 2013 registration in respect of these services, not paying the service tax and not filing any returns in respect of these service they have suppressed the facts form the department with the intent to evade payment of service. Hence he has invoked extended period of limitation as per proviso to Section 73 of the Finance Act, 1994. The issue before us is in respect of two services which are based on two separate contractual agreements. We take up the for discussion the issue on limitation in respect of these separately.

4.15 Uplinking facility from the teleport: In this case we find that issue involved is purely of interpretation of the terms of agreement vis a vis the provisions of the Act. On going through the terms of agreement which we had earlier reproduced and discussed we are of the view that appellant were entertaining a bonafide belief that these service would not be classifiable under any of the taxable categories. There is nothing in the agreement to show that appellant could not have entertained such a belief. Also we find that there has been dispute in respect of interpretation of the term "infrastructural support facility" used in the definition of Business Support Services. There are decisions which have held that the this term was restricted only to infrastructural support facilities, vis a vis the office maintenance facilities which have been out sourced. In view of the above it cannot be said that appellants could not have entertained such a belief. It is settled principle by various decisions that such a case cannot be the case of suppression with the intent to evade payment of service tax. In case of NRC Ltd [2007 (209) ELT 22 (T-Mum)] "3. In view of the fact that the issue involved interpretation of legal proceedings as to whether the appellant could be considered as clearing and forwarding agents, it can be safely concluded that the appellants were under bona fide belief that they are not covered by the definition of said services. It was under that belief that the appellant did not apply for Service Tax Registration and Service Tax Appeal No.55453 of 2013 followed the subsequent procedures. The Revenue has not placed any positive evidence record to

show that the appellant suppressed the information with an intention to evade payment of duty. As such, we are of the view that the demand is barred by limitation. "

> In view of the above decision, in our view extended period of limitation could not have been invoked for making this demand. As we have held that the service tax is payable is under this category thus the demand will be restricted only to the extent it has been made within the normal period of limitation. To re- determine the same the matter needs to remanded back to the original authority.

4.16 However in the case of the services classified under the category of "Supply of Tangible Goods Services", we find the agreement itself is titled "DSNG vehicle Rental Agreement", and is for supply of the DSNG vehicles on rent to the customer of appellant. We do not find anything in the agreement which would support any contrary interpretation. We also find that both the contracting party were from the date of entering into this agreement were aware that they were entering into the agreement for supply of these vehicles on rent without transfer effective control and possession of these vehicles to the customer. On going through the terms of the agreement we are not in position to subscribe to any other possible view except that the agreement for supply of DSNG vehicles on rent, was covered by the definition of Supply of Tangible Goods, as per Section 65 (105) (zzzzj) of the Finance Act, 1994. It is settled law that contract be interpreted in terms of the clauses stated in the contract and the manner in which the parties to contract understood it. In our view there is nothing to show that appellant could have entertained a bonafide belief or doubt in respect of this contract/ agreement. It is also not the case of the appellant that they consulted the departmental authorities or even informed about such an agreement at any time. It is case of suppression with intent to evade payment of duty. In case of Service Tax Appeal No.55453 of 2013 Van Shah Fragrances Pvt Ltd [2022-TIOL-903-CESTAT-KOL] Kolkatta Bench held as follows:

> "4.15 appellants have not been able to show any ground by which they could claim that they entertained a bona fide belief that goods manufactured and cleared by them were not subject to excise duty or attracted nil rate of duty or were exempt from payment of duty. It is settled law that the bona fide belief is not the blind belief and need to be established before that plea can be taken. In case of Bharat Bijlee Ltd [2014 (314) E.L.T. 74 (Tri. - Mumbai)] = 2014-TIOL-374-CESTAT-MUM tribunal has observed as follows:
>
> "5.15 The argument of the bona fide belief raised by the appellant does not seem to be convincing. If the appellant is claiming bona fide belief, it is for them to establish that they were entitled to hold such a belief based on interpretation of law as pronounced by any judicial fora. In the case before us we do not find any reason for entertaining such a belief nor any judicial pronouncement to hold such belief has been cited before us. Bona fide belief is not blind belief. In the case of Andhra Pradesh Electricity Board [1984 (16) E.L.T. 579 (Tri.)], this Tribunal held that bona fide belief does not mean blind belief or a self-opinionated belief. It would imply a belief which has been reached after a sincere attempt to understand the issue and examining it reasonably. Similarly, in the case of Inter Scape [2006 (198) E.L.T. 275 (Tri.)] this Tribunal held

that belief can be said to be bona fide only when it is formed after all reasonable consideration are taken into account. It is not the case of the appellant that they sought legal advice in the matter or were so advised by any one. On the contrary, we find that there are a number of judicial pronouncements which prohibited diversion of goods from one project to another and, therefore, the plea of bona fide belief does not sustain."

Service Tax Appeal No.55453 of 2013 Further in case of Bhushan Steel & Strips Ltd [2014 (310) ELT 918 (T-Mumbai)] = 2014-TIOL-1444-CESTAT-MUM tribunal again stated as follows:

"18.1 As regards the point that the appellant bonafidely believed that they were eligible for the benefit of the Cenvat credit, this contention is not tenable for the following reason. A belief can be said to be bona fide only when it is formed after all reasonable considerations are taken into account as held by this Tribunal in the case of Interscape v. Commissioner of Central Excise, Mumbai-I - 2006 (198) E.L.T. 275 (Tri.-Mum). In Winner Systems - 2005 (191) E.L.T. 1051 (Tri.-Mum), it was held that blind belief cannot be a substitute for bona fide belief. Applying the ratio of these decisions to the facts of the present case, as can be seen from the records, the appellant neither sought any legal opinion nor any clarification was sought from the department as to the availability of credit on the furnace oil used in the manufacture of electricity, which was wheeled out to the factory. Therefore, the argument of bona fide belief raised by the appellant is only an argument of convenience and not based on any conviction, whatsoever. The ratio of the Larger Bench could not have been applied to the facts of the present case inasmuch as the said decision applied to LSHS used in the manufacture of steam, which in turn, was used in the manufacture of various dutiable goods as well as exempted goods as also for generation of electricity. It is the settled position of law that the ratio of a decision can be applied only if the facts are identical. Even if the facts vary slightly, the said ratio cannot be applied as held by the Hon'ble Apex Court in the case of Alnoori Tobacco Ltd. [(2004) 6 SCC 186 = 2004 (170) E.L.T. 135 (S.C.)] = 2004-TIOL-85-SC-CX wherein it was held as follows :-

"Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the Service Tax Appeal No.55453 of 2013 fact situation of the decision on which reliance is placed. Observations of Courts are neither to be read as Euclid's theorems nor as provisions of the statute and that too taken out of their context. These observations must be read in the context in which they appear to have been stated. Judgments of Courts are not to be construed as statutes. To interpret words, phrases and provisions of a statute, it may become necessary for judges to embark into lengthy discussions but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgments. They interpret words of statutes; their words are not to be interpreted as statutes.

.....

> "There is always peril in treating the words of a speech or judgment as though they are words in a legislative enactment, and it is to be remembered that judicial utterances made in the setting of the facts of a particular case."

Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases. Disposal of cases by blindly placing reliance on a decision is not proper."

Therefore, the argument of the appellant that in view of the bona fide belief, extended time could not have been invoked falls flat."

Without any evidence to show how the appellants claim bona fide belief in the matter to the effect the goods manufactured by them do not attract any excise duty, the argument made in this regard cannot be accepted. Thus in absence of any such bona fide belief, the appellants reliance on the decision of the Hon'ble Apex Court in case of Continental Foundation and Nirlon Ltd. is farfetched."

Thus appellant cannot be extended the benefit as has been extended by us in the case of Business Support Service in Service Tax Appeal No.55453 of 2013 respect of these services, and demand made by invoking the extended period of limitation is upheld.

Whether the penalties imposed under Section 77 & 78 can be justified 4.17 Commissioner has in the impugned order imposed penalty equivalent to the tax evade in respect of both the service by invoking the provisions of Section 77 and 78. No separate penalty has been imposed under Section 77. Section 78 provides for imposition of penalty under equivalent to the tax evaded by resorting the suppression etc. with intent to evade payment of tax. In case of Rajasthan Spinning and Weaving Mills [2009 (238) ELT 3 (SC)], Hon ble Supreme Court has held as follows:

> "16. The other provision with which we are concerned in this case is section 11AC relating to penalty. It is as follows:
>
> [11AC. Penalty for short-levy or non-levy of duty in certain cases.- where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reasons of fraud, collusion or any wilful mis- statement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty, the person who is liable to pay duty as determined under sub- section (2) of section 11A, shall also be liable to pay a penalty equal to the duty so determined:
>
> [Provided that where such duty as determined under subsection (2) of section 11A, and the interest payable thereon under section 11AB, is paid within thirty days from the date of communication of the order of the Central Excise Officer determining such duty, the amount of penalty liable to be paid by such person under this section shall be twenty-five per cent of the duty so determined:

Provided further that the benefit of reduced penalty under the first proviso shall be available if the amount of penalty so determined has also been paid within the period of thirty days referred to in that proviso:

Service Tax Appeal No.55453 of 2013 Provided also that where the duty determined to be payable is reduced or increased by the Commissioner (Appeals), the Appellate Tribunal or, as the case may be, the court, then, for the purpose of this section, the duty as reduced or increased, as the case may be, shall be taken into account: Provided also that in case where the duty determined to be payable is increased by the Commissioner (Appeals), the Appellate Tribunal or, as the case may be, the court, then, the benefit of reduced penalty under the first proviso shall be available, if the amount of duty so increased, the interest payable thereon and twenty-five per cent of the consequential increase of penalty have also been paid within thirty days of the communication of the order by which such increase in the duty takes effect.

Explanation.- For the removal of doubts, it is hereby declared that-

(1) the provisions of this section shall also apply to cases in which the order determining the duty under sub-section (2) of section 11A relates to notices issued prior to the date on which the Finance Act, 2000 receives the assent of the President;

(1) any amount paid to the credit of the Central Government prior to the date of communication of the order referred to in the first proviso or the fourth proviso shall be adjusted against the total amount due from such person.]

17. The main body of sub-section 1 lays down the conditions and circumstances that would attract penalty and the various provisos enumerate the conditions, subject to which and the extent to which the penalty may be reduced.

18. One cannot fail to notice that both the proviso to sub section 1 of section 11A and section 11AC use the same Service Tax Appeal No.55453 of 2013 expressions: .by reasons of fraud, collusion or any wilful mis-statement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty, . In other words the conditions that would extend the normal period of one year to five years would also attract the imposition of penalty. It, therefore, follows that if the notice under section 11A (1) states that the escaped duty was the result of any conscious and deliberate wrong doing and in the order passed under section 11A (2) there is a legally tenable finding to that effect then the provision of section 11AC would also get attracted. The converse of this, equally true, is that in the absence of such an allegation in the notice the period for which the escaped duty may be reclaimed would be confined to one year and in the absence of such a finding in the order passed under section 11A (2) there would be no application of the penalty provision in section 11AC of the Act. On behalf of the assessees it was also submitted that sections 11A and 11AC not only operate in

> different fields but the two provisions are also separated by time. The penalty provision of section 11AC would come into play only after an order is passed under section 11A(2) with the finding that the escaped duty was the result of deception by the assessee by adopting a means as indicated in section 11AC.
>
> 19. From the aforesaid discussion it is clear that penalty under section 11AC, as the word suggests, is punishment for an act of deliberate deception by the assessee with the intent to evade duty by adopting any of the means mentioned in the section.
>
> 20. At this stage, we need to examine the recent decision of this Court in Dharamendra Textile (supra). In almost every case relating to penalty, the decision is referred to on behalf of the Revenue as if it laid down that in every Service Tax Appeal No.55453 of 2013 case of non-payment or short payment of duty the penalty clause would automatically get attracted and the authority had no discretion in the matter.

One of us (Aftab Alam,J.) was a party to the decision in Dharamendra Textile and we see no reason to understand or read that decision in that manner. In Dharamendra Textile the court framed the issues before it, in paragraph 2 of the decision, as follows:

> 2. A Division Bench of this Court has referred the controversy involved in these appeals to a larger Bench doubting the correctness of the view expressed in Dilip N. Shroff vs. Joint Commissioner of Income Tax, Mumbai & Anr. [2007 (8) SCALE 304]. The question which arises for determination in all these appeals is whether Section 11AC of the Central Excise Act, 1944 (in short the Act') inserted by Finance Act, 1996 with the intention of imposing mandatory penalty on persons who evaded payment of tax should be read to contain mens rea as an essential ingredient and whether there is a scope for levying penalty below the prescribed minimum. Before the Division Bench, stand of the revenue was that said section should be read as penalty for statutory offence and the authority imposing penalty has no discretion in the matter of imposition of penalty and the adjudicating authority in such cases was duty bound to impose penalty equal to the duties so determined. The assessee on the other hand referred to Section 271(1)(c) of the Income Tax Act, 1961 (in short the IT Act') taking the stand that Section 11AC of the Act is identically worded and in a given case it was open to the assessing officer not to impose any penalty. The Division Bench made reference to Rule 96ZQ and Rule 96ZO of the Central Excise Rules, 1944 (in short the Rules') and a decision of this Court in Chairman, SEBI vs. Shriram Mutual Fund & Anr.[2006(5) SCC 361] and was of the view that the basic scheme for imposition of penalty under section 271(1)(c) of IT Act, Section 11AC of the Act and Service Tax Appeal No.55453 of 2013 Rule 96ZQ(5) of the Rules is common. According to the Division Bench the correct position in law was laid down in Chairman, SEBI's case (supra) and not in Dilip Shroff's case (supra). Therefore, the matter was referred to a larger Bench.

After referring to a number of decisions on interpretation and construction of statutory provisions, in paragraphs 26 and 27 of the decision, the court observed and held as follows:

> 26. In Union Budget of 1996-97, Section 11AC of the Act was introduced. It has made the position clear that there is no scope for any discretion. In para 136 of the Union Budget reference has been made to the provision stating that the levy of penalty is a mandatory penalty. In the Notes on Clauses also the similar indication has been given.
>
> 27. Above being the position, the plea that the Rules 96ZQ and 96ZO have a concept of discretion inbuilt cannot be sustained. Dilip Shroff's case (supra) was not correctly decided but Chairman, SEBI's case (supra) has analysed the legal position in the correct perspectives. The reference is answered .
>
> 21. From the above, we fail to see how the decision in Dharamendra Textile can be said to hold that section 11AC would apply to every case of non-payment or short payment of duty regardless of the conditions expressly mentioned in the section for its application.
>
> 22. There is another very strong reason for holding that Dharamendra Textile could not have interpreted section 11AC in the manner as suggested because in that case that was not even the stand of the revenue. In paragraph 5 of the decision the court noted the submission made on behalf of the revenue as follows:
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> Service Tax Appeal No.55453 of 2013
>
> 5. Mr. Chandrashekharan, Additional Solicitor General submitted that in Rules 96ZQ and 96ZO there is no reference to any mens rea as in section 11AC where mens rea is prescribed statutorily. This is clear from the extended period of limitation permissible under Section 11A of the Act. It is in essence submitted that the penalty is for statutory offence. It is pointed out that the proviso to Section 11A deals with the time for initiation of action.

Section 11AC is only a mechanism for computation and the quantum of penalty. It is stated that the consequences of fraud etc. relate to the extended period of limitation and the onus is on the revenue to establish that the extended period of limitation is applicable. Once that hurdle is crossed by the revenue, the assessee is exposed to penalty and the quantum of penalty is fixed. It is pointed out that even if in some statues mens rea is specifically provided for, so is the limit or imposition of penalty, that is the maximum fixed or the quantum has to be between two limits fixed. In the cases at hand, there is no variable and, therefore, no discretion. It is pointed out that prior to insertion of Section 11AC, Rule 173Q was in vogue in which no mensrea was provided for. It only stated which he knows or has reason to believe . The said clause referred to wilful action. According to learned counsel what was inferentially provided in some respects in Rule 173Q, now stands explicitly provided in Section 11AC. Where the outer limit of penalty is fixed and the statute provides that it should not exceed a

particular limit, that itself indicates scope for discretion but that is not the case here.

23. The decision in Dharamendra Textile must, therefore, be understood to mean that though the application of section 11AC would depend upon the existence or otherwise of the conditions expressly stated in the section, once the section is applicable in a case the concerned authority would have no discretion in quantifying the Service Tax Appeal No.55453 of 2013 amount and penalty must be imposed equal to the duty determined under sub-section (2) of section 11A. That is what Dharamendra Textile decides."

4.18 As we held invocation of extended period of limitation in respect of the demand made under the category of Business Support Services, the penalty imposed under Section in respect of this demand cannot be sustained. However in respect of the demand under category of Supply of Tangible Goods Services by invoking extended period of limitation as per proviso to Section 73 (1), which we have upheld the penalty under Section 78 to that extent is upheld.

4.19 We also uphold the demand for interest in respect of demands upheld.

4.20 Thus we summarize our findings as follows:

> Appeal is partly allowed to the extent of setting aside the demand on the ground of limitation in respect of uplinking facilities provided from teleport of ESCL Shyam Communication Ltd under the category of business support services. Accordingly penalty under Section 78 to the extent of the this demand is also set aside. Matter is remanded back to the original authority for redetermination of the demand for the normal period.
>
> Appeal is dismissed to the extent it pertains to the demand made under the category of supply of tangible goods services.
>
> Penalty imposed under Section 78 to the extent it pertains to "Business Support Services" is set aside and penalties imposed under the said section to the extent it pertains to demand made under the category of supply of tangible goods services is upheld.
>
> Demand for interest under Section 75 is upheld.
>
> Service Tax Appeal No.55453 of 2013

5.1 Appeal is partly allowed as indicated in para 4.20 above.

(Pronounced in open court on-09 February, 2024) Sd/-

(P.K. CHOUDHARY) MEMBER (JUDICIAL) Sd/-

(SANJIV SRIVASTAVA) MEMBER (TECHNICAL) akp