The Principal Commissioner Of Central ... vs Raghunandan G on 30 January, 2024

Service Tax Appeal Nos. 20227 & 20263/2020, 20976/2019

CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL
1st Floor, WTC Building, FKCCI Complex, K. G. Road,
BANGLORE-560009

REGIONAL BENCH, COURT No. 2

Service Tax Appeal No. 20227 Of 2020

[Arising out of the Order-in-Original No. 06/2019 dated 20.11.2019 passed by Commissioner of Central Tax, Bengaluru.]

Shri APRAMEYA RADHAKRISHNA
320 1st Cross, 3rd Main,
2nd phase, 6th Block,
Banashankari 3rd Stage,
Bangalore -560 098
Karnataka .....Appellant

VERSUS

COMMISSIONER OF CENTRAL TAX,
BMTC Building,
Banshankari II Stage,
Bengaluru - 560 070
Karnataka .....Respondent

AND Service Tax Appeal No 20263 Of 2020 [Arising out of the Order-in-Original No. 06/2019 dated 20.11.2019 passed by Commissioner of Central Tax, Bengaluru.] COMMISSIONER OF CENTRAL TAX, BMTC Building, Banshankari II Stage, Bengaluru - 560 070 Karnataka ....Appellant VERSUS Shri APRAMEYA RADHAKRISHNA 320 1st Cross, 3rd Main, 2nd phase, 6th Block, Banashankari 3rd Stage, Bangalore -560 098 Karnataka ....Respondent Service Tax Appeal Nos. 20227 & 20263/2020, 20976/2019 AND Service Tax Appeal No 20976 Of 2019 [Arising out of the Order-in-Original No. 31/2019 dated 30.05.2019 passed by Commissioner of Central Tax, Bengaluru.] COMMISSIONER OF CENTRAL TAX, BMTC Building, Old Airport Road, Domlur, Bengaluru - 560 071 Karnataka ....Appellant VERSUS Shri RAGHUNANDAN.G. Villa No.74 Adarsh Palm Retreat Outer Ring Road Near Rmz Eco World, Devarabisanahalli Bellandur Post, Bengaluru - 560 103 Karnataka ....Respondent Appearance:

Mr. Rinku. P., Advocate for Appellant Mr. Sandeep Sachideva, Advocate for Appellant Mr. P. Saravana Perumal, AR for Respondent Coram:

Hon'ble Mr. P. A. Augustian, Member (Judicial) Hon'ble Mr. Pullela Nageswara Rao, Member (Technical) FINAL ORDER NOS. 20077 - 20079 /2024 Date of Hearing: 07.12.2023 Date of Decision: 30.01.2024 Per P. A. AUGUSTIAN:

The issue in the present appeal is whether sale of equity shares of an ongoing concern can be subjected to service tax even when no Service Tax Appeal Nos. 20227 & 20263/2020, 20976/2019 consideration is received towards non-compete and non-solicit condition in the agreement for transfer of equity shares.

2. The brief facts of the case are that the Appellant in Appeal No. ST/20227/2020 Shri Aprameya Radhakrishna and Respondent in Appeal No. ST/20976/2019 Shri Raghunandan G. were co-founders of M/s.

Serendipity Infolabs Pvt. Ltd. (M/s SILP) operating under trade name 'Taxi for Sure (TFS)'. M/s SILP have entered into an agreement with M/s. ANI Technologies Pvt. Ltd. operating under trade name 'Ola' for transfer of personal holding of the shares to M/s. ANI Technologies Pvt. Ltd. on 02.03.2015. The very purpose of the agreement is for the sale of shares of 'TFS' by shareholders of M/s. SILP. Alleging evasion of service tax, proceedings were initiated against the Appellants on the ground that Appellants were required under the share purchase agreement not to compete with M/s ANI Technologies Pvt. Ltd. which would amount to rendering taxable service. In response to the allegation, Appellants submitted that the amount received by them is towards the sale of equity share of M/s. SILP and no consideration is received towards the Non-compete and Non-solicit part of the agreement. In the absence of any consideration, there is no service tax liability. Moreover, it is transfer of an ongoing concern and it is exempted from the service tax as per Notification No. 25/2012-Service Tax dated 20.06.2012. However, a SCN was issued on 07.09.2018 proposing demand of service tax along with applicable interest and penalty in respect of Non-compete and Non-solicit agreement. The Appellants submitted detailed submissions, however the Adjudicating authority held that the buyout of M/s SILP by 'Ola Cabs' is to eliminate the competition, hence, the dominant character of the agreement is Service Tax Appeal Nos. 20227 & 20263/2020, 20976/2019 Non-compete and Non-solicitation. Regarding consideration, it is held that it is an independent agreement and the consideration for sale of the share mentioned in Share Purchase Agreement is sufficient and adequate to cover the Non-compete agreement, which is assessed as 80% of the amount received towards the transaction. Further, to invoke the extended period of limitation, the Adjudicating authority held that payment of service tax after initiation of the investigation proceedings would amount to suppression of facts. Thus, vide the impugned Order- in-Original No. 6/2019 dated 20.11.2019, adjudicating authority considered an amount of Rs. 110,59,06,934/- being 80% of Rs. 138,23,83,668/- as consideration for non-compete and no-solicit condition and confirmed service tax demand of Rs. 13,66,90,097/- with applicable interest and also imposed equal amount of penalty under Section 78 of the Finance Act, 1994. In addition to that, penalty of Rs. 20,000/- was imposed under Section 77(1)(a) and Section 77(2) of the Finance Act, 1994. Aggrieved by the said order, Appellant Shri Aprameya Radhakrishna filed Appeal No. ST/20227/2020.

Department has also filed an Appeal ST/20263/2020 contending that the entire transaction value should have been considered for demanding duty.

3. In the meantime, on same set of facts, proceeding was initiated against Shri. Raghu Nandan. G. A Show Cause Notice was issued and Adjudication authority vide impugned Order-in-Original No. 31/2019 dated 30.05.2019 dropped the proceedings initiated against Shri. Raghu Nandan G. Aggrieved by said Order, an Appeal No. ST/20976/2019 was filed by the Department. Cross objections were filed by Respondent Shri. Raghu Nandan. G against the Appeal ST/20976/2019 and is numbered as ST/CR/20886/2019.

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4. Since issue involved in all the Appeals are common, appeals were taken up together for hearing and disposal. Learned Counsel for the Appellant in Appeal No. ST/20227/2020 drew our attention to the Mega Exemption Notification No.25/2012-Service Tax dated 20.06.2012 issued by Ministry of Finance, where it is stated that "Services by way of transfer of a going concern, as a whole or an independent part thereof is exempted from taxable service". Thus, the impugned order is prime facie illegal and unsustainable. Learned Counsel for the Appellant further submitted that there is no consideration attributed for the discharge of obligation and due to that reason also, no service tax can be levied. The learned Counsel further submits that from the definition of Section 65(B)(44) of the Act, the ingredients for service must include any activity, for a consideration and it should have been carried out by one person for another. Without any specific consideration, no demand can be made. Learned Counsel also drew our attention to the definition of Declared Service.

Section 65B (22) of the Act, is reproduced herein below:

> "declared service" means any activity carried out by a person for another for consideration and declared as such under Section 66E".
>
> "Section 66E. Declared Services- The following shall constitute declared services, namely:-
>
> (e) agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act.

5. Learned Counsel also drew our attention to clause 2 of the Non-compete and Non-solicit agreement, which were considered as Service Tax Appeal Nos. 20227 & 20263/2020, 20976/2019 service by Adjudication authority to conclude the agreement under declared service.

> "The Grantors hereby acknowledge that the Purchase Price paid by the Grantee under the Share Purchase Agreement to them is sufficient and adequate consideration for the covenant undertaken by them under this Agreement. It is clarified that if any Tax (other than Income Tax) becomes payable in respect of any portion of the Purchase Price Paid by the Grantee to the Grantors under the Share Purchase Agreement as a

> direct result of the covenants undertaken by them under the Agreement, the same shall be borne entirely by the Grantee with no recourse to the Grantors"

6. Learned Counsel also draws our attention to clause 4 of the Schedule 13, which was considered by adjudication authority as Non-compete and Non-solicit clause for confirming the demand.

> "Indemnity: Clause 4 of Schedule 13 of the Agreement 4.1 Each of the Grantors shall absolutely and unconditionally on a several basis, indemnify and hold the Grantee harmless from and against, and shall pay to the Grantee the full amount of any loss, claim, damage, liability or expense (including without limitation attorney's fees and other dispute resolution costs) (collectively "Damages") resulting to the Grantee, directly from:
>
> 4.1.1 breach or inaccuracy of any representation and warranties made by it in this Agreement.
>
> 4.1.2 breach by any Grantor of any of the covenants, terms or obligations set out in this Agreement.
>
> 4.2 The maximum aggregate liability of each of the Grantors under this Clause 4 shall not exceed, and shall be capped at the Service Tax Appeal Nos. 20227 & 20263/2020, 20976/2019 Purchase price paid to such Grantor under the Share Purchase Agreement.

7. Learned Counsel further submits that the terms of contract cannot be read in isolation and to support their contentions, they have relied on the ratio decisions in the following cases:-

> i. Universal Medicare Pvt Ltd Vs. C.C.E & S.T, Daman (2019 (3) TMI 166-CESTAT Ahmedabad ii. Swastik Household and Industrial Products (P) Ltd Vs. Income Tax Officer (1998 (25) ITD 479 (Mum) iii. Ishikawajma Harima Heavy Industries Ltd Vs. Director of Income Tax, Mumbai (2007 (3) SCC 481) iv. Reliance Industries Ltd Vs. State of Uttar Pradesh (2012 (194) ECR 293 (Allahabad) v. Super Poly Fabriks Ltd Vs. Commissioner of Central Excise, Punjab (2008 (217) CTR (SC) 107) vi. Vodafone International Holdings Vs Union of India (2012 (1) JT SC 410)

8. As regards the issue related to tenability of non-compete clause, the Learned Counsel relied on the decision of Hon'ble High Court of Mumbai in the matter of Assistant Commissioner of Income Tax Vs. Asea Brown Boveri Ltd., reported in 2007 (110) TTJ (Mum) 502 and submits that there are no such separate services intended to be received and no consideration assigned for the indemnity clause as alleged by the Respondent to demand service tax.

9. Learned Counsel further submits that determination of dominant character of an agreement is essential to demand tax. Learned Counsel Service Tax Appeal Nos. 20227 & 20263/2020, 20976/2019 drew our attention to the judgment of Hon'ble Supreme Court in the matter of M/s

Bharat Sanchar Nigam Ltd (2006 (2) STR 161 (SC)).

> "41. Gannon Dunkerley survived the 46th Constitutional Amendment in two respects. First with regard to the definition of 'sale' for the purposes of the Constitution in general and for the purposes of Entry 54 of List II in particular except to the extent that the clauses in Art. 366(29A) operate. By introducing separate categories of 'deemed sales', the meaning of the word 'goods' was not altered. Thus the definitions of the composite elements of a sale such as intention of the parties, goods, delivery etc. would continue to be defined according to known legal connotations. This does not mean that the content of the concepts remain static. Courts must move with the times. But the 46th Amendment does not give a licence for example to assume that a transaction is a sale and then to look around for what could be the goods. The word "goods" has not been altered by the 46th Amendment. That ingredient of a sale continues to have the same definition. The second respect in which Gannon Dunkerley has survived is with reference to the dominant nature test to be applied to a composite transaction not covered by Article 366(29A). Transactions which are mutant sales are limited to the clauses of Article 366(29A). All other transactions would have to qualify as sales within the meaning of Sales of Goods Act, 1930 for the purpose of levy of sales tax."

10. Learned Counsel for the Appellant also drew our attention to the Larger Bench decision in the matter of Commissioner of Central Tax, Chennai Vs. M/s Repco Home Finance (2020 (42) G.S.T.L 104 (Tri. Larger Bench) "21. It is, thus, clear that where service tax is chargeable on any taxable service with reference to its value, then such value Service Tax Appeal Nos. 20227 & 20263/2020, 20976/2019 shall be determined in the manner provided for in (i), (ii) or

(iii) of sub-section (1) of Section 67. What needs to be noted is that each of these refer to "where the provision of service is for a consideration", whether it be in the form of money, or not wholly or partly consisting of money, or where it is not ascertainable. In either of the cases, there has to be a "consideration" for the provision of such service. Explanation to sub-section (1) of Section 67 defines "consideration" to include any amount that is payable for the taxable services provided or to be provided, or any reimbursable expenditure, or any amount retained by the lottery distributor or selling agent. It is clear from the aforesaid definition of "consideration" that only an amount that is payable for the taxable service will be considered as "consideration". This apart, what is important to note is that the term "consideration" is couched in an "inclusive" definition.

22. A Larger Bench of the Tribunal in Bhayana Builders (P) Ltd. v. Commissioner of Service Tax [2013 (32) S.T.R. 49 (Tri.

- LB)] observed that "implicit in the legal architecture is the concept that any consideration whether monetary or otherwise, should have flown or should flow from the service recipient to the service provider and should accrue to the benefit of the latter." In the said decision, the Larger Bench made reference to the concept of "consideration", as was expounded in the decision pertaining to Australian GST Rules, wherein a categorical distinction was made between "conditions" to a

contract and "consideration". It has been prescribed under the Service Tax Appeal Nos. 20227 & 20263/2020, 20976/2019 said GST Rules that certain "conditions" contained in the contract cannot be seen in the light of "consideration" for the contract and merely because the service recipient has to fulfil such conditions would not mean that this value would form part of the value of the taxable services that are provided.

23. The Hon'ble Supreme Court in Commissioner of Service Tax Vs. M/s. Bhayana Builders [2018 (2) TMI 1325 = 2018 (10) G.S.T.L. 118 (S.C.)], while deciding the appeal filed by the Department against the aforesaid decision of the Tribunal, also explained the scope of Section 67 of the Act, both before and after the amendment, in the following words :

> "The amount charged should be for "for such service provided", Section 67 clearly indicates that the gross amount charged by the service provider has to be for the service provided. Therefore, it is not any amount charged which can become the basis of value on which service tax becomes payable but the amount charged has to be necessarily a consideration for the service provided which is taxable under the Act. By using the words "for such service provided" the Act has provided for a nexus between the amount charged and the service provided. Therefore, any amount charged which has no nexus with the taxable service and is not a consideration for the service provided does not become part of the value which is taxable under Section 67. The cost of free supply goods provided by the service recipient to the service provider is neither an amount "charged" by the service provider nor can it be regarded as a consideration for the service provided by the Service Tax Appeal Nos. 20227 & 20263/2020, 20976/2019 service provider. In fact, it has no nexus whatsoever with the taxable services for which value is sought to be determined."

24. The aforesaid view was reiterated by the Supreme Court in Union of India Vs. Intercontinental Consultants and Technocrafts [2018 (10) G.S.T.L. 401 (S.C.)] and it was observed that:

> "23. Obviously, this Section refers to service tax, i.e., in respect of those services which are taxable and specifically referred to in various sub-clauses of Section 65. Further, it also specifically mentions that the service tax will be @ 12% of the "value of taxable services". Thus, service tax is reference to the value of service. As a necessary corollary, it is the value of the services which are actually rendered, the value whereof is to be ascertained for the purpose of calculating the service tax payable thereupon.
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> 24. In this hue, the expression "such" occurring in Section 67 of the Act assumes importance. In other words, valuation of taxable services for charging service tax, the authorities are to find what is the gross amount charged for providing "such" taxable services. As a fortiori, any other amount which is calculated not for providing such taxable service cannot a part of that valuation as that amount is not calculated for providing such "taxable service". That according to us is the plain meaning which is to be attached to Section 67 (unamended, i.e., prior to May 1, 2006) or after its

> amendment, with effect from, May 1, 2006. Once this interpretation is to be given to Section 67, it hardly Service Tax Appeal Nos. 20227 & 20263/2020, 20976/2019 needs to be emphasised that Rule 5 of the Rules went much beyond the mandate of Section 67. We, therefore, find that High Court was right in interpreting Sections 66 and 67 to say that in the valuation of taxable service, the value of taxable service shall be the gross amount charged by the service provider "for such service" and the valuation of tax service cannot be anything more or less than the consideration paid as quid pro qua for rendering such a service.

25. This position did not change even in the amended Section 67 which was inserted on May 1, 2006. Sub-section (4) of Section 67 empowers the rule making authority to lay down the manner in which value of taxable service is to be determined. However, Section 67(4) is expressly made subject to the provisions of sub-section (1). Mandate of sub-section (1) of Section 67 is manifest, as noted above, viz., the service tax is to be paid only on the services actually provided by the service provider."

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27. What follows from the aforesaid decisions is that "consideration" must flow from the service recipient to the service provider and should accrue to the benefit of the service provider and that the amount charged has necessarily to be a consideration for the taxable service provided under the Act. It should also be remembered that there is marked distinction between "conditions to a contract" and "considerations for the contract". A service Service Tax Appeal Nos. 20227 & 20263/2020, 20976/2019 recipient may be required to fulfil certain conditions contained in the contract but that would not necessarily mean that this value would form part of the value of taxable services that are provided.

11. Learned Counsel also draw our attention to the judgment in the matter of M/s Bhai Mumbai Trust (2019 (31) GSTL 193 (Mum) "55. In the present case, royalty is paid towards damages of compensation of securing any future determination of compensation or damages for a prima facie violation of the Plaintiff's legal right in the Suit Premises. The Prima facie finding is that the Defendant has no semblance of right to be in occupation of the Suit Premises. The permission granted to the Defendant to remain in possession subject to payment of royalty is an order to balance the equities of the case. The basis of this payment is the alleged illegal occupation or trespass by the Defendant. Such payment lacks the necessary quality of reciprocity to make it a 'supply'. Hence no GST is payable.

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57. However, where no reciprocal relationship exists, and the plaintiff alleges violation of a legal right and seeks damages or compensation from a Court to make good the said violation (in closest possible monetary terms) it cannot be said that a 'supply' has taken place.

58. The Learned Amicus Curiae correctly submits that enforceable reciprocal obligations are essential to a supply. The supply doctrine does not contemplate or encompass a wrongful unilateral act or any resulting payment of damages. For example, Service Tax Appeal Nos. 20227 & 20263/2020, 20976/2019 in a money suit where the plaintiff seeks a money decree for unpaid consideration for letting out the premises to the defendant, the reciprocity of the enforceable obligations is present. The plaintiff in such a situation has permitted the defendant to occupy the premises for consideration which is not paid. The monies are payable as consideration towards an earlier taxable supply. However, in a suit, where the cause of action involves illegal occupation of immovable property or trespass (either by a party who was never authorised to occupy the premises or by a party whose authorization to occupy the premises is determined) the plaintiff's claim is one in damages."

12. Learned Counsel also drew our attention to the communication made by the Appellant on 29.09.2016 to the investigating agency regarding Non-taxable/Non-compete agreement and submitted that the Appellants had entered into share purchase agreement for sale of shares. Different Schedules including Schedule for Non-compete is a part and parcel of the share purchase agreement. Moreover, Department has selectively proceeded against the Appellants only and no proceedings were initiated against other shareholders, who had entered into such sale and transfer of share of 'TFS'. As regards the issue related to tenability of non-compete clause, the Learned Counsel relied on the decision of Hon'ble High Court of Mumbai in the matter of Assistant Commissioner of Income Tax Vs. Asea Brown Boveri Ltd., reported in 2007 (110) TTJ (Mum) 502. Thus, there is no such separate services intended to be received and no consideration assigned for the indemnity clause as alleged by the Respondent to demand service tax.

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13. Learned Counsel also drew our attention to the Income Tax returns filed by the Appellants and the assessment order issued by Deputy Commissioner of Income Tax assessing the income under Capital gain and other sources. Learned Counsel also drew our attention to the Circular No. 178/10/2022 dated 03.08.2022, wherein Ministry of Finance issued clarification regarding demand of GST against the service under agreeing to an obligation to refrain from act or tolerate an act or a situation or do an act and drew our attention to certain excerpts of such cases under service tax, GST demands. Relevant para of the Circular is produced below:-

> "7. There has to be express or implied agreement; oral or written, to do or abstain from doing something against payment of consideration for doing or abstaining from such act, for a taxable supply to exist. An agreement to do an act or abstain from doing an act or tolerate an act or a situation cannot be imagined or presumed to exist just because there is a flow of money from one party to another. Unless there is an express or implied promise by the recipient of money to agree to do or abstain from doing something in return for the money paid to him, it cannot be assumed that such payment was for doing an act or for refraining from an act or for tolerating an act or a situation. Payments such as liquidated damage for breach of contract, penalties under the mining act for excess stock found with the mining company, forfeiture of

salary or payment of amount as per the employment bond for leaving the employment before the minimum agreed period, penalty for cheque dishonor, etc., are not a consideration for tolerating an act or situation.

Service Tax Appeal Nos. 20227 & 20263/2020, 20976/2019 There are rather amounts recovered for not tolerating an act or situation and to deter such acts; such amounts are for preventing breach of contract or non-performance and are thus mere "events" in a contract. Further such amounts do not constitute payment (or consideration) for tolerating an act, because there cannot be any contract: (a) for breach thereof, or (b) for holding more stock than permitted under the mining contract, or (c) for leaving the employment before the agreed minimum period of

(d) for doing something leading to the dishonor of the cheque. As has already being stated, unless payment has been made for an independent activity of tolerating an act under an independent arrangement entered into for such activity of tolerating an act, such payments will not constitute 'consideration' and hence such activities do not constitute "supply" within the meaning of the Act.

14. Learned Authorised Representative (AR) for the Revenue drew our attention to the finding of the Adjudicating authority and submits that the Non-compete and Non-solicit condition contained in the agreement amount to Declared Services, since there is an obligation to refrain from an act or to tolerate an act from a situation or to do an act. Further submits that buy out of 'TFS' by 'Ola Cabs' was basically for eliminating the competition and expanding their space. Thus, the dominant character of the agreement has to be seen from this aspect. Learned AR also drew our attention to the Circular No. 178/10/2022 dated 03.08.2022 and submits that the key in such cases is to consider, whether the impugned payments constitute consideration for another Service Tax Appeal Nos. 20227 & 20263/2020, 20976/2019 independent contract envisaging tolerating an act or situation or refraining from doing any act or a situation or simply doing an act. 5

15. Learned AR also relied on the decision of the Tribunal in the mater of M/s Godrej Consumer Products (2014 (305) E.L.T 61) "6.4 The next issue for consideration is whether the non-compete fee of Rs. 34 Crore paid by PGG to GSL can be included in the assessable value of toilet soaps manufactured by GSL. As per the Non-Competition Agreement dated 16.12.1992 among GSL, PGFE and PGG, at the request of PGFE and PGG, from the date of physical transfer of the business of marketing, distribution and the sale of Toilet Soaps to PGG, GSL shall not undertake as a commercial activity, anywhere in the specified territory, the distribution, marketing or sale of Toilet Soaps. The non-compete agreement, trademark agreement and the manufacturing agreement are an integral part of the JVA as can be seen from clauses 2.1, 2.6 and 9.1 (A). All these agreements are co-terminus with the JVA. One does not exist without the other. In view of this factual position, these agreements cannot be viewed separately or as existing independently. The manufacturing agreement would not have been entered into without the non- compete agreement or the trademark agreement. Therefore, the consideration paid under any one of the agreements cannot be viewed as a separate transaction in itself and has a bearing on the entire transaction. The very fact that when the JVA was terminated in 1996, all the 3 agreements also ceased to operate/exist is a clear pointer

to the fact of inseparability of these agreements. If that be so, the consideration paid by PGG to Service Tax Appeal Nos. 20227 & 20263/2020, 20976/2019 GSL under the non-compete agreement and through G&B to GSL under the trademark agreement should have a definite bearing on the price paid by PGG to GSL under the manufacturing agreement and the pricing formula adopted therein. It is in this factual matrix, the applicability of Rule 5 of the Central Excise Valuation Rules, 1975 has to be considered. The said rule, as we have seen, provides for including additional consideration received from the buyer, whether directly or indirectly, by the assessee in the assessable value of the goods sold/supplied."

16. Learned AR also relied on the judgment of the Hon'ble Supreme Court in the case of M/s Bharat Sanchar Nigam Ltd., reported in 2006 (2) S.T.R 161 (SC) and submitted that in the composite contract of service and sale, it is possible for the State to tax sale elements provided therein as describable sale and only to the extent related to such sale. Also relied on the decision of Tribunal in the matter of M/s Jamna Auto Industries reported in 2017 (5) G.S.T.L 410 (Tri.-Del), M/s Tata Global Beverage 2015 (40) S.T.R 909.

17. Regarding Department Appeal having Appeal No. ST/20976/2019, Learned AR submits that for breach of Non-compete or Non solicit agreement, liability is upto 100% of Rs. 138,23,83,668/- on the part of notice and for breach of clause of the condition of sale share, Notional liability is 20% of Rs. 138,23,83,668/-. Considering the same, Adjudication authority ought to have considered the consideration equivalent to Rs. 138,23,83,668/- and not to Rs.110,59,06,934/- being 80% of Rs.138,23,83,668/- received by the Appellant Shri. Aprameya Radhakrishna from M/s ANI Technologies as consideration for the Service Tax Appeal Nos. 20227 & 20263/2020, 20976/2019 service and to confirm demand terms of Section 67(1) with interest and penalty equal amount under Section 78 of the Finance Act, 1994.

18. Since the issue in the all the appeals are common, all the appeals are taken up together for hearing.

19. Heard both sides and perused the records.

20. The Adjudication authority in the impugned order categorically admits that "From the facts it is seen that M/s SILP entered into a Business Transfer Agreement (BTA) dated 02.03.2015 with Ola' for transfer of personal holding of the shares". The Adjudicating authority further observed that; as per the BTA, M/s SILP were to transfer all the specified employees (most of the employees); all the customers of the company; and the existing hardware/infrastructure. Apart from that M/s SILP were also to fulfil the major conditions and obligations like (1) Seller Operation Warranties (2) Promoter Warranties (3) Performance Guarantee for two years (4) Non-Compete and Non-Solicitation Restrictions by the company, etc. From the above finding of the adjudication authority, it is an admitted fact that the business transfer carried out by the Appellant is related to an ongoing concern and as per the Mega Exemption vide Notification No. 25/2012-Service Tax dated 20.06.2012 "Service by way of transfer of a going concern is fully exempted from all of the service tax leviable thereon. From the evidences on record, no finding can be made that substantial portion of the agreement refers to the conditions/obligations to be followed by M/s SILP like

non-compete clauses, performance guarantee for two years etc., since they have not received any consideration as held by the Adjudicating authority. Even on merit, terms and conditions in the agreement entered by M/s SILP and 'Ola' are general in nature and Service Tax Appeal Nos. 20227 & 20263/2020, 20976/2019 considering the indemnity clause, there is no consideration involved in the present agreement to quantify the service element in the above said agreement. As held by Hon'ble Apex Court in the matter of M/s Ishikawajma Harima Heavy Industries (supra), in construing a contract, the terms and conditions thereof are to be read as a whole. A contract must be construed keeping in view the intention of the parties. No doubt, the applicability of the tax laws would depend upon the nature of the contract, but the same should not be construed keeping in view the taxing provisions. Similarly, as observed by the Tribunal in the matter of M/s Universal Medicare (supra), an agreement has to be interpreted as per the language and intention of the parties to such agreement. Once an ongoing concern is transferred along with assets and liabilities by paying huge amount, it is just obvious that if such non- compete clause is not present, the transferor could immediately start the same business. Hence, such clause is normal in transfer of business and the condition of non-compete clause cannot be separated from the contract concluded between the parties to bring the transaction under the ambit of service tax by denying the benefit of Notification No.25/2012-Service tax. Moreover, Ministry of Finance vide Circular No. 178/10/2022 dated 03.08.2022 clarified that under service tax, GST demand, unless payment has been made for an independent activity of tolerating an act under an independent arrangement entered into for such activity of tolerating an act, such payments will not constitute 'consideration' and hence such activities do not constitute "supply" within the meaning of the Act.

21. Considering the above, Appeal No. ST/20227/2020 is allowed and the impugned Order-in-Original No. 6/2019 dated 20.11.2019 is set Service Tax Appeal Nos. 20227 & 20263/2020, 20976/2019 aside. Since the entire tax liability is set aside, interest and penalty imposed on Appellants in Appeal Nos. ST/20227/2020 is also set aside with consequential relief, if any, in accordance with law. In the facts and circumstances of the case and in view of the discussions above Appeal No. ST/20976/2019 and Appeal no. ST/20263/2020 filed by Revenue are dismissed.

(Order pronounced in open court on 30.01.2024) (P. A. Augustian) Member (Judicial) (Pullela Nageswara Rao) Member (Technical) Ganesh