

**THE AUTHORITY FOR ADVANCE RULINGS
(Central Excise, Customs & Service Tax)
New Delhi**

Present:

**Justice V.S.Sirpurkar (Chairman)
Shri S.S.Rana (Member)
Shri R.S.Shukla (Member)**

The 22nd day of January, 2016

**Ruling No. AAR/ST/02/2016
In
Application No. AAR/44/ST/15/2013**

Name and address of the applicant : M/s SICPA India Pvt. Ltd., New Delhi

Commissioners concerned : Commissioner of Service Tax.,
17-B, I.A.E.A. House, Mahatma Gandhi
Marg, I.P.Estate, New Delhi-110002

: Commissioner of Trade & Taxes,
Sales Tax Bhavan, I.P.Estate,
New Delhi-110002

: Govt. of NCT of Delhi, Through the
Principal Secretary, D/o Finance, 4th level,
'A'Wing, Delhi Sectt. I.P.Estate,
New Delhi-110002

Present for the Applicant : Shri B.L.Narasimhan, Advocate

Present for the Department : Shri Amresh Jain
Departmental Representative

: Shri M.L. Garg, Advocate
For NCT Delhi

Ruling

M/s SICPA India Pvt. Limited (hereinafter also referred to as 'applicant') is a Joint Venture Company. United Breweries Ltd. and Carlsberg India Private Limited (hereinafter also referred to as 'Customer') are companies registered under the

Companies Act, 1956. Excise Supply Chain Information Management System (ESCIMS) is an IT initiative of the Excise Department, Government of NCT of Delhi to automate and regulate liquor sales in Delhi. It is in this regard that applicant offers services for the provision of automated, online ID and 2D bar code printing system, labeling application system, aggregation system and dispatch system in accordance with ESCIMS standard operating procedures for distilleries, breweries and wineries. The applicant has in this regard entered into System Delivery Agreements with said customers to provide for a System comprising of a complete set of various machines/equipments which are installed and commissioned by the applicant as per ESCIMS. Pursuant to the above understanding, the System Delivery Agreement, dated 25th June, 2013 (hereinafter referred to as Agreements entered into between the customers and the applicant), applicant would supply and install the System for the printing of labels required to fulfill the statutory requirements. The said Agreement also includes the providing of services for the provision of automated, online ID and 2D bar code printing system, labeling application system, aggregation and dispatch system. Applicant is also required to impart training to the personnel of the Customer/United Breweries/Carlsberg India for the purposes of successful handling and operation of the System. Applicant is also responsible for the Preventive Maintenance of the System wherein the operative/routine maintenance is the responsibility is of the Customer. With regard to consideration for the agreed scope of work, applicant is required to get a consolidated sum based on per thousand labels printed using the System. Applicant is responsible for the granting to the breweries a revocable, non-exclusive and non-transferable right to use the System set up and installed by the applicant at the location of the breweries within the territory of India. Such System is to be used in relation to labeling of beer bottles, cans etc., with the desired bar codes under ESCIMS for the term which has been agreed with customers. Applicant further submits that the Customer has exclusive right to use of the System. After training by the applicant, staff of the breweries shall be in a position to operate the System on their own for the agreed purposes. In addition to the above, applicant shall also be responsible for preventive maintenance of the System, which shall include planned operations dedicated to minimize System breakdown by providing System maintenance at pre-defined intervals and also replacement of worn-out parts, cleaning up of System, etc. In addition to above, applicant shall also be responsible for its corrective maintenance which shall comprise of measures to maximize uptime by reducing faults in the System as well as provision of required spare parts to make the System good. Applicant shall also supply various Consumables in the form of blank labels and ink ribbons based on orders placed by the breweries.

2. The applicant has raised following questions for Advance Rulings and given its interpretation of said questions which are as under:-

Issue 1: What is the Service Tax liability with respect to the activity proposed to be undertaken by applicant under the Agreement dated 25th June 2013 entered into with United Breweries Ltd and Carlsberg India Pvt. Ltd.?

Applicant submits that the entire activity of applicant will not be taxable in terms of Section 66B of the Act as the activity undertaken by the applicant is a transfer of right to use goods wherein the effective control and possession of the subject System stands transferred to the Customer; that the applicant is also responsible for supply of consumables such as printing labels and ink ribbons required for the printing; that the entire contract indicates that the System shall at all the times during the tenancy of Agreement, would be under the control and possession of the Customer, who shall operate the same as per the agreed parameters; that the proposed transaction shall qualify as transfer of right to use the good and the same is excluded from the definition of a service under Section 65B(44) of the Finance Act, 1994.

Issue 2: Assuming that there is a Service Tax liability then how to classify the service as taxable service under Chapter V of the Finance Act, 1994?

Applicant submits that he is of the view that the contract includes supply element and services (if any) are only ancillary which are for the purpose of main contract, i.e., for the supply of System along with consumables, such as labels and ink ribbons; that if all such are considered as taxable, then the classification shall be under the "Other" category.

Issue 3: Assuming that the service is a taxable service then what is the valuation under Section 66B of the Finance Act, 1994?

Applicant submits that in the above case, they may be allowed to compute the service element in the composite consideration based on its records/books (and substantiated by Chartered Accountant/Cost Accountant) and such service value alone would be liable to Service Tax.

3. Revenue submits that in terms of the Agreement, the scope of the activity being undertaken by the applicant can be summed up as being that the applicant is responsible for the granting to the breweries a revocable, non exclusive and non-transferable right to use the System set up and installed by the applicant at the location of the breweries; that the System is to be used in relation to labeling of beer bottles, cans etc. with the desired bar codes under ESCIMS for the term which has been agreed with the customers; that the applicant shall provide the customer, the services of maintenance and repair and consumables as per agreement; that for transaction to be regarded as "transfer of right to use goods", the transfer has to be coupled with possession; that H'ble Andhra Pradesh High Court in the case of Rashtriya Ispat Nigam Ltd. Vs. CTO [1990 77 STC 182] held that since the effective control and possession was with the supplier, there is no transfer of right to use; that this decision of the Andhra Pradesh High Court was upheld by the H'ble Supreme Court subsequently

[2002] 126 STC 0114; that in the matter of Harbans Lal Vs. State of Haryana – [1993] 088 STC 0357 [Punjab and Haryana High Court], a view was taken that if pandal, is given to the customers for use only after having been erected, then it is not transfer of right to use goods. It is further, submitted by the Revenue that applying the ratio of the apex Court judgment in case of BSNL Vs UOI [2006] 3 STT 245, the activity of providing machinery and apparatus for provision of automated, online 1D and 2D bar code printing system, label application system, aggregation system and dispatch system for breweries in accordance with Excises Supply Chain Information Management System (ESCIMS) and other incidental activities such as maintenance and repair and supply of consumables is not transfer of right to use goods; that effective possession and control over the machinery and apparatus remains with the applicant. Further, Revenue submits that as per Hon'ble Supreme Court judgment in case of BSNL, all the five conditions are required to be fulfilled to treat a transaction as transfer of right to use. But as per terms of agreement of SICPA with the customer, effective possession and control over the machinery and apparatus remains with SICPA. SICPA has granted a license to use the machinery and apparatus to their customers.

4. Revenue submits that from perusal of clause 2.1.2 to the Agreement, it is clear that there is no exclusion of the transferor i.e. SICPA during the tenure of Agreement for providing System to their customers (an attribute to treat a transaction as transfer of right to use). As per Schedule 10 of the Agreement, SICPA shall provide to the customer raw material for printing labels, conduct routine maintenance of equipment, servicing of equipment and provide technicians. As per Schedule 8 to the Agreement, SICPA shall provide overall spare parts for the performance of the services, implement overall maintenance processes, ensure CRM, PRM, spare parts dispatch and KPI's as per SLA, ensure 2nd level support to local organization and ensure change requests are properly handled. As per Schedule 11 to the Agreement, it is specifically written that the customer has been given license to use the System. Further, Revenue states that as per Schedule 12 to the Agreement i.e., in the event of termination of the Agreement, license of the customer to use the System shall expire, meaning thereby that the customer does not have effective control of the goods / System. In view of the above, as the SICPA has not transferred the right to use their system to their customer but merely a license to use the System, the effective control of the System remains with SICPA. Further, the activity proposed to be undertaken by SICPA is liable to Service Tax under the provision of the Finance Act, 1994.

5. Applicant has submitted that vide above Agreements, the recipients namely; the breweries were transferred the right to use the machinery/apparatus on an exclusive basis wherein the effective control and possession of the same has been transferred to the recipient; that various clauses in the Agreement are illustrative of the fact that the operation and the routine maintenance arising from the operation of System is the responsibility of the recipient/customer.

6. Applicant submits that the clauses 2, 4.5.2 and 5 as also Schedule 11 to the Agreement are clear indicators that the effective control coupled with possession of the said System has been transferred to customer/recipient, who in turn will operate and maintain the machines for his own purposes; that the clauses in the agreement unambiguously provide that the machinery shall be operated and maintained by customer and nothing indicates that applicant has any control over the usage of machinery for the specified purposes; that the presence of its personnel at the customer's end is for the reason that the requisite goods are supplied within the time and any corrective/preventive maintenance required could be provided without a delay; that such personnel of applicant are not entrusted with the responsibility for the operation and maintenance of the System at any point of time; that the above is also supported by the fact there is no clause in the Agreement which indicates that the responsibility for operation and maintenance is that of applicant. It is also submitted by the applicant that the phrase grant of license to use the System on a "non-exclusive" in the agreement indicates that the applicant is reserving his right to allow the use of similar kind of license to other vendor (which exactly is happening as similar system is being given to customers such as Carlsberg and United Breweries Limited); that the scope of proposed activity broadly include supply of goods such as labels, ink ribbons etc which are required to be supplied to the customer; that the consideration for the entire activity is a single composite sum which includes supply of equipments for use along-with the supply of goods; that such activity of supply of goods cannot be regarded as transaction for service in as much as the definition of service as provided under Section 65B(44) of the Finance Act, 1994 excludes an activity of mere transfer of title in goods; that even though the consideration for the entire activity is composite even then the value attributable to the goods cannot be made a subject matter of Service Tax as levy itself does not covers transaction involving mere sale of goods.

7. Applicant re-iterates that in the subject Agreement(s), the scope of applicant is to set-up a System and supply of consumables along with ancillary support activities wherein the operation of the System will be done by the customer(s); that the customer shall have the uninterrupted right to use the System; that the agreement at various places clearly states that the operation and maintenance of the System shall be the responsibility of the customers and it is not provided anywhere that applicant shall have the right to interfere in the operation on the System; that the applicant is undertaking installation of the machines/apparatus at customer's premises and training of the staff of the customer(s) so as to enable them to carry out the operation on their own, which is an evidence that effective control and possession of machines / apparatus shall be with customer(s) and not with the applicant; that the Agreement nowhere provides that operation of machines/apparatus shall be the responsibility of the applicant, that the installation of System at customer(s) premises pursuant to which as a process and in terms of the Agreement that the customer shall complete global system tests, issue Milestone Achievement Certificate and Final Completion Certificate for its each location to the applicant and thereafter customer shall be responsible for operating the System; that the documentation needed to operate the System is also being provided by the applicant to the customer(s) as and when the machines/apparatus are installed; that this is just similar to any user guide which comes along-with any electronic equipment

along-with the sale package; that this again reflects that effective control and possession of the machines/apparatus is being transferred to the customer(s). Applicants re-iterate that the same machine/apparatus, however cannot be provided by the applicant to any other customer(or used by themselves) while it is in effective control and possession of a specific customer; that the reliance on Schedule 12 is totally misplaced in the rejoinder for the reason that the said schedule indicate that as a consequence of the termination of the contract/agreement, the license of the customer will expire automatically; that in such a case, the applicant would stop the supplies of raw material and consumables and hence make the system unusable; that such clause is nowhere indicative of the fact that the operation and control of such system for the period of use is with the applicant and it is only on the termination such measures would be resorted to seek back the possession of the system.

8. Relevant provisions of law with respect to the present issue are as under:-

9. Section 65B (44) of the Finance Act, 1994 defines the term '*service*' to mean any activity carried out by a person for another for consideration, including a declared service but shall not include-

(a) An activity which constitutes merely,-

- A transfer of title in goods or immovable property, by way of sale, gift or in any other manner; or
- Such transfer, delivery or supply of any goods which is deemed to be a sale within the meaning of clause (29A) of Article 366 of the Constitution;
- a transaction in money or actionable claim;

(b) a provision of service by an employee to the employer in the course of or in relation to his employment;

(c) fees taken in any Court or tribunal established under any law for the time being in force.

10. Section 66D of the Finance Act, 1994, enlists the services which would fall under the negative list. It may be noted that the services specified in the negative list would go out of the ambit of chargeability of service tax.

11. As per Section 66E of the Finance Act, 1994, certain specified activities would constitute declared service which inter-alia includes transfer of goods by way of hiring, leasing, licensing or in any such manner without transfer of right to use goods. Such declared services shall be taxable under the new regime.

12. Article 366 (29A) of the Constitution of India, 1949 reads as under;

Tax on the sale or purchase of goods includes

- (a) a tax on the transfer, otherwise than in pursuance of a contract, of property in any goods for cash, deferred payment or other valuable consideration;
- (b) a tax on the transfer of property in goods (whether as goods or in some other form) invoked in the execution of a works contract;
- (c) a tax on the delivery of goods on hire purchase or any system of payment by installments;

- (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;
- (e) a tax on the supply of goods by any unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration;
- (f) a tax on the supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (whether or not intoxicating), where such supply or service, is for cash, deferred payment or other valuable consideration, 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;

13. Hon'ble High Court of Andhra Pradesh in *Rashtriya Ispat Nigal Ltd. Vs Commercial Tax officer* 1990 77 STC 182 AP inter-alia observed that a transfer of the right to use the goods, as envisaged in Article 366 (29A) (d) of the Constitution of India, necessarily involves delivery of possession and effective control by the transferor to the transferee. Relevant paragraph of the judgment is reproduced as under;

In our view, whether the transaction amounts to transfer of right or not cannot be determined with reference to a particular word or clause in the agreement. The agreement has to be read as a whole, to determine the nature of the transaction. From a close reading of all the clauses in the agreement, it appears to us that the contractor is entitled to make use of the machinery for purposes of execution of the work of the petitioner and there is no transfer of right to use as such in favour of the contractor. We have reached this conclusion because the effective control of the machinery even while the machinery is in the use of the contractor is that of the petitioner-company. The contractor is not free to make use of the same for other works or move it out during the period the machinery is in his use. The condition that he will be responsible for the custody of the machinery while the machinery is on the site does not militate against the petitioners' possession and control of the machinery. For these reasons, we are of the opinion that the transaction does not involve transfer of the right to use the machinery in favour of the contractor. As the fundamental requirement of section 5-E is absent, the hire charges collected by the petitioner from the contractor are not exigible to sales tax.

14. Hon'ble Supreme Court in the case of *Bharat Sanchar Nigam Ltd. Vs Union of India* [2006] 145 STC 91 held that the goods in telecommunication are limited to the handsets supplied by the service provider. Hon'ble Justice A.R. Lakshmanan in his concurring judgment held that 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 license 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.*

15. It is noticed from the submissions made – both by the applicant and Revenue that the issue for determination is whether the transaction is that of transfer of right to use goods or not. Hon’ble High Court of Karnataka in the case of Indus Towers Ltd. Vs Deputy Commissioner of Commercial Taxes, Bangalore 2012 (285) ELT 3 (Kar) observed as under;

64. It is well settled that, whether the transaction amounts to transfer of right or not cannot be determined with reference to a particular word or clause in the agreement. The agreement has to be read as a whole to determine the nature of transfer.....

16. In view of above, it may be appropriate to examine the Agreement between the applicant and customer to ascertain whether the transaction in question qualifies as a transfer of right to use goods and consequently be outside the definition of service. Relevant extract of the Agreement are reproduced as under;

2. Scope of the Agreement

2.1 Grant of rights to use the System & provision of Services

2.1.2 Subject to the terms and conditions set out in this Agreement, SICPA hereby grants to the Customer a revocable, non-exclusive and non-transferable right to use the System in relation to the Product, during the Term, as further specified in Schedule 11 – License to Use and Intellectual Property hereto; and

2.1.3 SICPA shall also provide to the Customer the Services and Consumables as described in this Agreement.

they cannot be utilized by any other customer. Exclusive use of the System is further corroborated in Schedule 11 to the Agreement wherein it is inter-alia mentioned that the customer may only use the System at the site(s) and solely for its own internal business use. Therefore, the contention of the applicant that the words “non-exclusive” used in the Agreement is only with respect to “Intellectual Property” used in the System is tenable. Further exclusivity required to qualify as transfer of right to use the goods is with respect to goods, for which the transfer is taking place, which is being satisfied in this case.

18. Further, relevant extracts of the Agreement are as under;

4.5.2 SICPA shall:

X X X X X

II. Upon the completion of the Alpha Phase and from the Effective Date of the Agreement:

- (a) Develop, supply and install the System as per the requirements agreed or to be agreed between the Parties.*
- (b) Provide related documentation to the System and training to the personnel of the Customer on how to operate the System; and*
- (c) Provide service and maintenance (including the supply of spare parts) for the System as per Schedule 6 – Service Level Agreement.*

The Customer shall:

X X X X X

II Upon the completion of the Alpha Phase and from the Effective Date of the Agreement:

- (a) Provide all necessary information, support (including availability of line space and line modifications) and facilities required for the installation and implementation of the System and provision of Services including complying fully with the specifications for the Sites as prescribed by SICPA.*
- (b) Provide appropriate dedicated network cabling, electricity and compressed air within proximity of the System;*
- (c) Download and upload the necessary files and data from / to the ESCIMS system and in line with its specifications;*

(d) Operate the label Printing System, the Label Applications Systems, Aggregation System & Dispatching System in line with the ESCIMS guidelines and specifications; and

(e) Inform SICPA promptly of any issues related to the System.

5.1.1 Upon conclusion of the implementation of the System on each site and starting from the GO Live Date, Customer shall operate the System and SICPA shall provide preventive and corrective maintenance for the System in accordance with the standards and timescales provided in schedule 6 – Service Level Agreement”.

19. Clause 4.5.2(II) (d) and (e) of the Agreement, as mentioned above, states that the Customer, upon the completion of the Alpha phase and from the effective date of the Agreement, operate the label Printing System, label application system, aggregation system and Dispatching system in line with the ESCIMS guidelines and specifications and inform SICPA promptly of any issues related to the System. System, as per definitions in clause 1.1 of the Agreement shall mean 4 machines / Systems i.e., online 1D and 2D bar code printing system, label application system, aggregation system and dispatch system. All these 4 machines / Systems are to be operated by the Customer. Therefore, it has been made clear in clause 4.5.2 that the customer shall operate the System and inform SICPA any issue relating to the System. In case, the operation and control was with SICPA, there was no need to have said clause 4.5.2(II)(e) i.e., the customer shall inform SICPA of any issue related to the System. It has been further made clear by clause 5.1.1 to the Agreement that the customer shall operate the System. This fact is also contracted in Schedule 11 wherein it is inter-alia mentioned that the customer may only use the System at site(s) and solely for its internal business use.

20. Revenue submits that effective control of the System shall remain with the applicant, in view of Schedule 8 to the Agreement. Relevant extract of Schedule 8, as pointed out by the Revenue, is reproduced as under:

Schedule 8- Overall roles and Responsibilities

2. SICPA

SICPA shall at the operational level:-

(a) Install System as per requirements;

(b) Train operators on how to operate the system;

(c) Provide documentation needed to operate the system;

(d) Provide overall spare parts for the performance of the services;

- (e) Implement overall maintenance processes;*
- (f) Ensure CRM, PRM, spare parts dispatch and KPI's as per SOLR;*
- (g) Ensure 2nd level support to local organization; and*
- (h) Ensure change requests are properly handled.*

21. It is observed from contents (a) to (c) of Schedule 8 above that the applicant is required to install the System, train people to operate the System and provide documents for operation of the System. These factors do not indicate that the operation and control of the System is with the applicant. In-fact, training personnel of customer with regard to operation of the System and also providing them with its manual (documents), only shows that customer is made ready to take control of the System. Similarly, the Clause that SICPA shall provide overall spare parts for the performance of the service to the customer, by no stretch of imagination could be indicative of the fact that the same would vest operation and control on the applicant.

22. Revenue has stressed that as applicant would implement overall maintenance process, ensure CRM, PRM, spare parts dispatch and KPI's as per SLA, ensure 2nd level support to local organization and ensure change request are properly handled, it would show that operation and control of the System is with the applicant. Schedule 6 (2.2) to the Agreement inter-alia makes it clear that "Customer is in charge of the operation". Daily maintenance, as described in the said Schedule, is the maintenance required for normal day to day functioning of the System; Preventive maintenance (PRM) includes planned operations dedicated to minimize System breakdown by providing System maintenance at pre-defined intervals; Corrective maintenance (CRM) is to maximize uptime by reducing indicates impact on production due to malfunctions or fault in the System.

23. As far as maintenance of the System is concerned, Schedule 6 to the Agreement in unambiguous terms have mentioned that daily maintenance (CPM) shall be the responsibility of the customer, whereas preventive maintenance (PRM) and Corrective maintenance (CRM) shall be the responsibility of the applicant. It is observed that normal day to day maintenance of the System has to be carried out by the customer, whereas Preventive maintenance (PRM) and Corrective maintenance have not to be done on day to day basis. Further, level, purpose and responsibility of maintenance, as envisaged in para 2.1 of Schedule 6 to the Agreement, is reproduced below:

LEVEL	AT FACTORY	PURPOSE
0	Customer	-Operation (printing- Labelling- Aggregation- Dispatching- Rework) -Daily maintenance (CRM) -Basic troubleshooting, with on-call assistance if necessary -issue escalation to level 1 (SICPA service technician)
1	SICPA service technician, with support of local HQ	-incident resolution (CRM) -preventive maintenance (PRM) -Escaltion to level 2 (SICPA HQ Switzerland)
2	SICPA HQ Switzerland	-General support of level 1 and local HQ -Analyse/upgrade/Cheque Request

24. Table above reveals that the customer is responsible for the operational maintenance of all 4 sub-systems of main Systems i.e. printing, labelling, aggregation and dispatching, as also daily maintenance, whereas SICPA is to look after other than daily maintenance. In nut-shell, Schedule 6 to the Agreement makes it clear that operation and operational maintenance of the System is the responsibility of the customer.

25. Revenue has also relied upon Schedule 10 to the Agreement to state that the applicant has not transferred to the right to use their System to their customer and the effective control of the System remains with SICPA. Relevant extract, as mentioned by Revenue, is as under:

Schedule 10-Fees, ordering and payment (page 57 of the Agreement)

1. Fee: The customer will pay to SICPA the amount of INR 495.00 per1000 labels ordered for product units excluding applicable VAT and applicable tax.

The customer will pay to SICPA the amount of INR 990.00 per 1000 labels ordered for cases excluding applicable VAT and applicable tax.

The above fees shall include the cost of consumable (both 2D and 1D bar codes) printing, routine maintenance of equipment, servicing of equipment, technician fees etc.

26. Revenue has not explained as to how the cost of consumables etc. paid by the customer to the applicant as fees, would not transfer the right to use the System to the Customer and effective control will remain with SICPA/applicant. It is observed from perusal of scope of the Agreement that it also involves supply of consumables, which constitute a part of value/consideration. Further, transfer of right to use goods, shall not include service(s). In view of above, contention of Revenue is not tenable.

27. Revenue has raised another issue that in the event of expiration or termination of the Agreement for any reason, the license of the customer to use the System, as well as the sub-license to the customer, shall expire with immediate effect. Relevant extract of the Agreement is as under.

Schedule 12- Decommissioning

1 Consequences of termination

1.1 In the event of expiration or termination of this agreement for any reason whatsoever:

(a) the license of the customer to use the system, as well as the sub-license to the customer, shall expire with immediate effect and SICPA may render the system automatically unusable, unless a separate arrangement is made directly with the customer.

28. It is observed that on termination of Agreement, the goods are returned to the owner, consumables' supply stopped as also other assistance to the customer. Similarly, in the present case also, there is such a provision in the Agreement (Schedule 12). Therefore, the effect of termination of Agreement leads to revoking transfer of right to use goods/System. However, such termination does not indicate that there was no transfer of right to use goods and the effective control was not with the customer. On the contrary, it may indicate that before termination of Agreement, customer was in control of the System.

29. Revenue relied upon the judgment of Hon'ble Punjab and Haryana High Court in case of Harbans Lal vs. State of Haryana [1993] 088 STC 0357 wherein a view was

taken that if pandal is given to the customers for use only after having been erected, then it is not transfer of right to use goods. It is noticed that the Hon'ble High Court in this case observed that whether there is a transfer of the right of use the goods or not is essentially a question of fact which has to be determined in each case having regard to the terms of the contract under which there is said to be transfer of the right to use goods. In view of this observation of the Hon'ble High Court, the ratio of this judgment cannot be applied to the present case. Similarly, judgment of Hon'ble Delhi High Court in case of Hari Durga Travels vs. Commissioner of Trade & Taxes 220 (2015) DLT 225 cannot be made applicable to the case before us.

30. Revenue also raised an issue that as per Schedule 10, the Customer has been given license to use the System. Implication of this statement is that applicant has given the license to use the System and not right to use the System. It is observed from reading of said Agreement that the phrase "right to use" and "license to use" have been interchangeable used by the applicant, which is made clear from perusal of clause 2.1 and 2.1.2. Article 2.1 uses the phrase "Grants of right to use the System & provisions of Services". Clause 2.1.2 uses both types of phrases i.e. "right to use" and "license to use". In order to determine whether the subject transaction is "right to use" or "license to use", Agreement has to be examined in totality. It is reiterated that Hon'ble High Court of Karnataka in the case of Indus Towers Ltd. Vs Deputy Commissioner of Commercial Taxes, Bangalore 2012 (285) ELT 3 (Kar) inter-alia observed that whether the transaction amounts to transfer of right or not, cannot be determined with reference to a particular word or clause in the Agreement and has to be read as a whole to determine the nature of transfer. Therefore, in order to understand the meaning of the Agreement, one has to read the Agreement in totality and it is not appropriate to determine the meaning of the Agreement on the basis of a phrase used in the Agreement.

31. After examination of the Agreement, we have observed that the phrase "grant of license to use the System on a non-exclusive basis" (clause 2.1.2 to the Agreement) is used for the reason that the proprietary / intellectual property used in the System is utilized by the applicant in other similarly placed transaction with other customers. However, the use of System by the customer is on exclusive basis. Further, applicant is required to supply and install the System at the site of the customer, as also provide training and documentation with respect to the System. Customer is also required to operate the System and inform the applicant regarding issues related to the System (clause 4.5.2 and 5.1.1 to the Agreement). It is also mentioned in the Agreement that overall operation (Schedule 6 to the Agreement) and maintenance processes (clause 2 to the Agreement) shall be the responsibility of the customer. All these clauses amply

make it clear that possession and effecting control of the goods (System) will be with the customer.

32. In view of the above, we hold

“The activity proposed to be undertaken by applicant is not liable to Service Tax under the provisions of the Finance Act, 1994. In view of this, issues (b) and (c) i.e., classification and valuation of said service, become infructuous”.

Sd/-
(S.S.Rana)
Member(R)

Sd/-
(V.S.Sirpurkar)
Chairman

Sd/-
(R.S.Shukla)
Member(L)