2020 INSC 513

Reportable

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

Civil Appeal No. 2633 of 2020

Commissioner of Service Tax, Ahmedabad ...Appellant

Versus

M/s Adani Gas Ltd. ...Respondent

J U D G M E N T

Dr. Dhananjaya Y. Chandrachud, J

1 This appeal arises from a judgment and order of the Customs, Excise, & Service Tax Appellate Tribunal,[1] West Zonal Bench at Ahmedabad in Service dated 5 April 2019. The Tribunal has, in exercise of its appellate jurisdiction, reversed the 30 March 2011 decision of the Commissioner of Service Tax, Ahmedabad[2] and set aside the demand for payment of service tax on the charges collected by the respondent for supply of pipes and measuring

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[1] "Tribunal"
[2] "Adjudicating Authority"

equipment to its customers under Section 65(105)(zzzzj) of the Finance Act, 1994. This appeal rests on the interpretation and applicability of the provisions of Section 65(105)(zzzzj) of the Finance Act, 1994.

2 The respondent is in the business of distributing natural gas - Compressed Natural Gas[3] and Piped Natural Gas[4] - to industrial, commercial, and domestic consumers. Among other purposes, industrial consumers use PNG for manufacturing operations. Domestic and commercial consumers use PNG for cooking, power supply and air-conditioning. In order to facilitate the distribution of PNG to industrial, commercial and domestic consumers through pipes, the respondent installs an equipment described as 'SKID' at their customers' sites. The SKID equipment consists of isolation valves, filters, regulators and electronic meters. The equipment regulates the supply of PNG being distributed and records the quantity of PNG consumed by the customer, which is then used for billing purposes. The respondent enters into an agreement – the Gas Sales Agreement[5] - with consumers to whom gas is supplied by it.

3 The manufacture of CNG falls under Chapter Sub-Heading 27112900 of the Central Excise Tariff Act, 1985. The respondent is also engaged in providing the taxable service falling under the category of "transport of goods through pipeline", as defined in Section 65(105)(zzz) of the Finance Act, 1994. During the course of an audit by the officers of Central Excise, Ahmedabad-I during January

[3] "CNG"
[4] "PNG"
[5] "GSA"

2009, it was noticed that the respondent had received income under the head of "gas connection charges" from its industrial, commercial, and domestic customers. From the GSA and the invoices, it was found that charges were collected for the "supply of pipes, measuring equipment etc." while providing new gas connections to customers. The ownership of the equipment is not with the customer but is retained by the respondent. The customer does not have control or any legal rights over the equipment. Value Added Tax was also not paid on these charges collected from the customers. A Notice to Show Cause[6] was issued to the respondent on 13 October 2009 stating that the transactions undertaken by them are covered under the category of "supply of tangible goods service", under Section 65(105)(zzzzj) of Finance Act, 1994 which was introduced by Notification No.18/2008- S.T. dated 10 May 2008, with effect from 16 May 2008. The Show Cause Notice required the respondent to pay service tax with effect from 16 May 2008 on the gas connection charges recovered for the period from 16 May 2008 to 31 March 2009. Three similar notices were issued to the respondent for subsequent periods. The first notice indicated that the respondent had received gas connection charges amounting to Rs. 23,37,51,903/- on which service tax and cess amounting to Rs. 2,83,46,411/- had not been deposited. The respondent was called upon to show cause why service tax should not be demanded together with interest and penalties under Sections 76, 77 and 78 of the Finance Act, 1994.

[6] "Show Cause Notice"

4 In their reply to the Show Cause Notice, the respondent stated that:

(i) PNG is distributed through pipes to industrial, commercial and domestic customers. The SKID equipment is installed at the customers' sites to regulate the supply of PNG distributed and record the quantity of PNG consumed for billing purposes;

(ii) The GSA is entered into with the customer. The 'SKID' consists of isolation valves, filters, regulators and electronic meters;

(iii) The equipment is installed at the location of the customer without the transfer of ownership and possession; and the respondent retains the right to use the equipment;

(iv) The arrangement between the respondent and its customer provides for the supply of gas, for which measurement equipment (the SKID equipment), is installed at the cost of customers at their premises for the purpose of billing;

(v) The equipment is used by the respondent for its own purposes and the customer does not use the measurement equipment;

(vi) Under the GSA, the right to adjust, clean, handle, replace, maintain, remove or modify the equipment is conferred upon the respondent. The equipment is used by the respondent and the customer does not buy or use the equipment;

(vii) Under the GSA, the respondent has a right of entry at all hours to the measurement equipment to a pipeline upto all consumption points and gas consuming facilities inside the buyer's premises;

(viii) The equipment is used only for metering and billing so as to not invite any dispute or objection from the customers; and

(ix) The amount which is collected from the customer is in the form of an interest-free security deposit, for the purpose of ensuring safe-keeping of the measurement equipment as is required by Attachment 3 to Schedule A of the Petroleum and Natural Gas Regulatory Board (Determination of Network Tariff for City or Local Gas Distribution Networks and Compression Charge for CNG) Regulations 2008[7]. This deposit is to be returned at the time of discontinuing or terminating the connection and between 25 to 100 per cent of the charges were refunded by the respondent in the year 2008-09.

The respondent thus contended that they were not liable to pay service tax and consequently the demand for tax interest and penalty was not sustainable.

5 The Show Cause Notice was adjudicated by an order dated 30 March 2011 of the Adjudicating Authority. Confirming the demand, the Adjudicating Authority noted that the demand in the Show Cause Notice was not under the category of "transport of goods by pipeline or other conduit services" under Section 65(105)(zzz) on the charges recovered from the supply of gas, but for supplying measurement equipment at the time of providing a new gas connection to a customer, under the category of "supply of tangible goods services" under Section 65(105)(zzzzj). The Adjudicating Authority held that "…there is a definite element of service involved in this transaction." The Adjudicating Authority held that the respondent is not only a seller engaged in the sale of gas to the customer

[7] "PNGRB Network Tariff Regulations 2008", published vide notification dated 19 March 2008.

but also a service provider who supplies, installs and maintains measurement equipment at the customers' premises. The customer, in this view, is a purchaser of gas and a service recipient for the supply, installation and maintenance of measurement equipment. The fact that (i) ownership of the measurement equipment vests with the respondent; and (ii) there is no transfer of the right of possession and effective control is undisputed, thereby satisfying two of the required ingredients for Section 65(105)(zzzzj). Noting that the purpose of the measurement equipment is to ensure effective and accurate billing, the Adjudicating Authority held that the expression 'use' is attracted and it is the customer who must be held to be in use of the equipment, regardless of the customer lacking technical expertise in handling the measurement equipment. This conclusion was based on the following reasoning:

> "The expression "use" does not mean that the recipient has to personally and physically use the equipment all the time. It broadly refers to the direct or indirect use whether personally or through anybody else and meant to serve the intended purpose of the goods. The contention of the said noticee that they use the "Measurement Equipment" which are installed for their own benefits and purposes is misplaced. **Accuracy in billing is as much a concern of the buyer of gas as is of the seller and hence, he gets it installed at his own cost and therefore working of the "Measurement Equipment" is verified periodically by the buyer as well as the seller as agreed by both in the Agreement."** (**emphasis supplied**).

6 The order also noted that the entirety of the gas connection charges collected at the time of installing the connection are not refunded at the time of discontinuation or termination. The Adjudicating Authority allowed the respondent to claim the benefit of cum-tax value and reduced the demand for

service tax from Rs. 2,83,46,411/- to Rs. 2,52,73,526/-. Penalties were imposed under Sections 77 and 78 of the Finance Act 1994.

7 The respondent assailed the order of adjudication before the Tribunal. By its judgment dated 05 April 2019, the Tribunal allowed the appeal filed by the respondent. The Tribunal observed that the SKID equipment is installed by the respondent at the customers' site and at the cost of the customer without the transfer of ownership and possession. However, the crucial issue which required analysis was whether the SKID equipment is for the use of the customer. Adverting to the GSA which is entered into between the respondent and its customers, the Tribunal held:

> " … the appellant supplies natural gas through pipes to the Industrial, Commercial or Domestic customers and for this purpose installs an equipment called "SKID" at the customer's site to regulate the supply of natural gas supplied through pipes and to record the quantity consumed by the customers for the purpose of billing. The gas pipeline from the nearest distribution point is laid and maintained by appellant at the cost of the customer and the measuring equipment is also supplied, installed and maintained by the appellant at the cost of the customer. **The terms of the agreement leave no manner of doubt that the purpose of the equipment is to measure the amount of gas supplied to the customer for the purpose of billing. They are, therefore, for the use of the appellant and are not for use by the customers.** The finding to the contrary recorded by the Adjudicating Authority is, therefore, not correct." **(emphasis supplied)**

8 The Tribunal held that the metering equipment is installed for measuring the amount of gas supplied to the customer for the purpose of billing; hence the use of the equipment is by the respondent and not by the customer.

9 The decision of the Tribunal has been assailed on behalf of the revenue/appellant in the appeals. Mr. Sanjay Jain, Additional Solicitor General of India, submitted that the GSA which is a 'take or pay agreement' demonstrates that:

(i) The SKID equipment is installed by the respondent at the cost of the buyer;

(ii) Neither ownership nor possession of the equipment is transferred to the buyer;

(iii) The measurement equipment is installed, maintained and repaired by the respondent at the cost of the buyer;

(iv) Mere technical expertise on part of the respondent to operate the equipment does not preclude the usage by the buyer;

(v) The buyer is as much concerned about the accuracy of the billing as the supplier of gas. The measurement equipment enures to the benefit of the buyer for the purpose of verifying the correctness of the charges levied based on the quantity of gas consumed;

(vi) Though the gas connection charges which are initially recovered are claimed to be refundable, the quantum of refunds may vary from buyer to buyer and the data which was produced by the respondent indicates that in several cases full refunds have not been made; and

(vii) The CBEC circular No. 334/1/2008-TRU dated 29 February 2008 has clarified that transactions that enable usage of goods without transferring the right to use, are in the nature of a service under Section 65(105)(zzzzj) and not sale under Article 366(29-A)(d) of the

Constitution of India. Since the respondent has not paid VAT for the charges collected on supply of pipelines and the measurement equipment, this transaction must be treated as a service.

10 The ASG submitted that the use of the SKID equipment is not merely by the respondent as the seller of gas but by the buyer as well for the purpose of verifying the accuracy of billing. The decision of the Tribunal was faulted on the ground that its finding - that the use of the equipment is by the seller - is contrary to the terms of the GSA.

11 Opposing these submissions Mr Vikram Nankani, learned Senior Counsel appearing on behalf of the respondent, submitted that:

(i) The GSA is an agreement for the sale and purchase of goods, namely, PNG;

(ii) The terms of the GSA provide contractual rights to the buyer, including the right to verify and dispute the bill raised by the supplier and to seek arbitration;

(iii) The rights of a buyer of gas under the GSA must be kept distinct from the use of the SKID equipment and the essential issue in the present case is whether the equipment is installed for the use of the buyer;

(iv) Under the terms of the GSA, ownership continues to vests with the respondent at all times and the buyer of gas is not entitled to adjust,

modify or maintain the equipment. The buyer has no possessory right nor can they lease or sub-let the equipment;

(v) The purpose of the measurement equipment in a gas supply contract is to measure the quantity of gas supplied to the buyer of gas. However, the buyer gets no service out of the equipment;

(vi) In determining the issue in appeal, it is necessary to isolate the rights conferred by the GSA on the buyer of gas from the issue as to whether the buyer has the use of the SKID equipment. The SKID equipment is a technical device and the buyer has no right to use the equipment; and this inability to use the equipment by the customer would not be within the scope of the taxing provision, which must be construed strictly;

(vii) Amounts collected under the head of "gas connection charges" are mainly in the nature of interest-free security deposits, which are required to be refunded in part, or in full, depending on the duration of the contract which determines depreciation. They are not collected as a consideration for providing a service; and under Article 366(29-A)(d), a tax on the sale or purchase of goods includes a tax on the transfer of the right to use goods for any purpose, without necessarily transferring the title. Section 65(105)(zzzzj) was introduced with the intention of capturing services which were technically not 'sales' and were escaping the net of VAT. In the present case, there is no transfer of the right to use the equipment nor is there any element of service in the supply of the metering

equipment. The equipment is installed by the respondent as a seller of gas and is not used by the buyer.

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 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;
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> 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 and another** v. **Union of India and others**[8] ("**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;

[8] 2006 (3) SCC (1).

> 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 the supplier to the recipient of the goods. Recently, this Court in **Great Eastern Shipping Company Limited.** v. **State of Karnataka and others**[9] 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

[9] 2020 (3) SCC 354.

> 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
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> 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 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.[10] This Court, in **Association of Leasing and Financial Service Companies** v. **Union of India**,[11] 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

[10] **All India Federation of Tax Practitioners** v. **Union of India**, (2007) 7 SCC 527, para 4.
[11] (2011) 2 SCC 352.

> 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 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.**
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> 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 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**."
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> (**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**"),[12] 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.**[13] 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

[12] (2009) 4 AIR Bom R 775.
[13] 2010 (14) SCC 438.

at an appropriate stage".[14] We note however, the analysis of Section 65(105)(zzzzj) of the Bombay High Court, where the High Court observed:

> "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;

[14] 2010 (14) SCC 438, para 7.

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

(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 A GSA entered into by the respondent on 17 November 2008 with one of its buyers (Polymer Industries) has been adverted to by the contesting parties as a representative sample. Under the terms of the GSA, the respondent as the seller agrees to sell and tender for delivery at the 'Delivery Point', gas in the quantities, times and at the prices determined in accordance with it. Clause 2.1 stipulates that:

> "2.1. The Seller agrees to sell and tender for delivery at the Delivery Point, and the Buyer agrees to purchase and receive at the Delivery Point and pay for Gas in quantities at the times and at the prices determined in accordance with, and subject to the terms and conditions of this Agreement."

The expression 'Delivery Point' is defined thus:

> " "Delivery Point" means the flange or weld or agreed mark at the downstream of the isolation valve located immediately outside the Buyer's premise as identified in Schedule 2."

Clause 5.1 requires the seller to deliver gas to the buyer at the Delivery Point. The seller is required to set up a gas pipeline to the metering station of the buyer from the nearest distribution mains at the cost of the buyer:

> "5.1. The seller shall deliver the Gas to the Buyer at the Delivery Point in accordance with the terms of this Agreement. **Gas pipeline to the Buyer's metering station from nearest distribution mains would be constructed and maintained by the Seller at the Buyer's cost."**
>
> (**emphasis supplied**)

Clause 5.3 states that the 'Measurement Equipment' is to be supplied, installed and maintained by the seller at the cost of the buyer:

> "5.3. **The Measurement Equipment shall be supplied, installed and maintained by the Seller at the Buyer's cost. Ownership of equipment will rest with AEL** [*respondent herein*] **forever.** Buyer shall provide free of cost adequate land and power connection in its premise for the installation of Measurement Equipment. Buyer shall pay for providing gas pipeline connection including pipeline from distribution mains upto the measurement equipment; and measurement equipment to its unit as per the proposal submitted by the Seller."
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> (**emphasis supplied)**

Clause 5.4 provides that:

> "5.4. **Gas pipeline from nearest Distribution Mains to the Measurement equipment shall be constructed and maintained by the Seller at Buyer's cost.** The Buyer agrees to let the Seller or his authorised representative to supply, construct, install commission and maintain the supply pipeline from main distribution line upto the Measurement Equipment and Measurement Equipment in its premises.
>
> (**emphasis supplied)**

The Buyer's Facilities and Seller's Facilities are defined to include the measurement equipment and pipelines and have been defined as follows:

> " "Buyers Facilities" means plant, machinery, measurement equipment and other equipment from the Delivery Point onwards necessary to receive Gas under this Agreement."

> " "Seller's Facilities" means the Seller's pipelines, gas plants, machinery, Measurement Equipment, other metering facilities and other equipment necessary for flow control and the processing, compression, measuring and testing of Gas to enable delivery of Gas to the Buyer at the Delivery Point."

Further, the expression 'Measurement Equipment' is defined as follows:

> " "Measurement equipment" means such main and subsidiary meter, including apparatus, mains and pipes, as the Seller considers necessary for the measurement and recording of the volume in SCM and pressure in Kg/cm^2 of Gas delivered at the Delivery Point and for the safe operation of the Buyer's Facilities."

Ownership of the measurement equipment continues to vest with the respondent as per clause 5.3. The buyer is required to provide land and a power connection, free of cost at its premises. The buyer has to pay for providing a gas pipeline connection from the distribution mains up to the measurement equipment.

Gas is transported from the 'Measurement Equipment' by means of a pipeline provided by the buyer as stipulated in Clause 5.5:

> "5.5. Gas will be transported from the Measurement equipment by means of a pipeline provided by the Buyer as per the specifications and applicable standards provided by the Seller and the same shall be maintained by the Buyer. The Seller reserves the right to supply other Buyer's before the upstream range of measurement equipment installed at its premises."

Clause 5.6 clarifies that the buyer has no right to adjust, clean, handle, replace, maintain, remove or modify the measurement equipment:

> "5.6. The Buyer shall not have the right to adjust, clean, handler, replace, maintain, remove or modify in any manner measurement equipment at any time during the currency of the Contract."

Under clause 5.7 the buyer cannot lease, sublet or sell the measurement equipment:

> "5.7. The Buyer under no circumstances shall sublet/lease/sell/create a charge over part or whole of measurement equipment at any given time."

Clause 5.10 provides that the seller has the right of entry to the measurement equipment:

> "5.10. The Seller or his authorized representative shall have right of entry at all hours to the Measurement Equipment, route of pipeline upto all consumption points and gas consuming facilities inside the Buyer's premises."

Under clause 7.1, 'title and risk' in the gas passes from the seller to the buyer at the Delivery Point. Clause 8.1 defines the expression 'Daily Contract Quantity'[15]. Clause 9.2 of the agreement deals with measurement and calibration:

> "9.2 Measurement and Calibration
>
> 9.2.1 Quantity of Gas supplied under this Agreement shall be measured at the Delivery Point in SCM. The measurement shall include all corrections in installation practices recommended for accurate metering of Gas by the American Gas Association (AGA) Gas Measurement Committee report No. 3,7 and 8.
>
> **9.2.2 The Measurement Equipment shall be supplied, installed, owned and maintained by the Seller at the Buyer's cost.**
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> 9.2.3 Working of the Measurement Equipment shall be verified periodically by the Parties.

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[15] "8.1. Daily Contract Quantity

(a) "Daily Contract Quantity" or "DCQ" shall be equal to 100 SCM per day having approximately Gross Calorific Value (GCV) of 9000 Kcal/scm.

(b) Provided further, if on any Day, the Buyer requires Gas in excess of Daily Contract Quantity, the seller may supply the same subject to availability of gas with Seller and Seller's Operational Flexibility.

(c) Supplier subject to the operational flexibility and availability of the gas supply the Daily Contract Quantity however the Seller shall have the freedom to curtail, stop or interrupt the gas supply with prior notice to the Buyer.

9.2.4 **If the Buyer has any doubt as to the accuracy of the Measurement Equipment, it shall communicate the same to the Seller in writing and request the Seller to either check or re-calibrate the Measurement Equipment**. The Seller shall undertake such check/re-calibration of the Measurement Equipment within fourteen (14) days of receipt of such request. The cost of conducting the checks/re-calibration shall be borne by the Buyer.

9.2.5 If the seller has any doubt about the proper working of the Measurement Equipment, it may immediately check the meter in presence of the Buyer's representative. In case it is established that the existing Measurement Equipment is not working satisfactorily, the same shall be replaced at the Buyer's cost.

9.2.6 If on carrying out the check/re-calibration of the Measurement Equipment as aforesaid it is discovered that either the percentage of inaccuracy exceed – 2% (Two per cent) or that the Measurement Equipment is out of service, the following procedure in order of priority, whichever is feasible for arriving at the computation of quantity of Gas during the period between the last calibration and the present, shall be followed:

(a) by correcting the error if the percentage of error is ascertainable by calibration, tests or mathematical calculation; or

(b) by estimating the volume of Gas delivered by comparison with deliveries during the period under similar conditions when the Measurement Equipment was registering accurately.

9.2.7 If at the time of carrying out the check of the Measurement Equipment as above, it is discovered that the error in the readings of the Measurement Equipment exceeds- 2.0% the Measurement Equipment shall be re-calibrated at Buyer's cost.

9.2.8 Notwithstanding anything contained in this Agreement, pending the result of any check/re-calibration, the Buyer shall not withhold payments to the Seller under this Agreement on this account. However, the Buyer shall be entitled to lodge his claim for refunds/adjustments, if any, depending upon the final results of such check/re-calibration within a period of fourteen (14) days of such check/re-

calibration. Such claim, if found correct by the Seller, shall be adjusted against the subsequent invoice(s) of supply of Gas.

9.2.9 Pending the resolution of any dispute, the Seller shall produce the invoices on the basis of self-verification." (**emphasis supplied**)

The provisions for billing and payment are contained in clause 12. The relevant portion is extracted below:

"12. Billing and Payment

12.1 Following the end of the Fortnight, the Seller shall render to the Buyer a statement including the following details for each Day of the previous Fortnight (hereinafter referred to as the "Fortnightly Invoice"), which shall show in respect of the previous Fortnight, along with the details of calculations:

(i) the DCQ for each Day of that Fortnight in SCM;

(ii) the aggregate quantity of Gas delivered by the Seller in such Fortnight, in SCM and Gross Calorific Value for the same;

(iii) the Weighted Average Gross Calorific Value (GCV) of such Gas taken by the Buyer in such fortnight;

(iv) the amount payable by the Buyer to the Seller for the quantifies of the Gas delivered during the Fortnight equal to quantities of Gas delivered by the Seller in SCM/Kcal as determined in (ii) above multiplied by Contract Price prevailing for the Fortnight.

12.2 The Buyer shall within seven (7) days of the receipt of the fortnightly invoice from the seller, pay to the seller the amount mentioned in such invoice in the manner to be specified by the Seller.

12.3. The Buyer agrees that, notwithstanding any dispute in relation to any amount invoiced, it shall not be withhold payment in accordance with the provisions of this Section 12 of any amounts. After making full payment of such invoice, the Buyer shall lodge the claims with the Seller giving full particulars within a period of fourteen (14) Days from the date of making payment, and if such claims are found correct, the Seller shall adjust the same against the next invoice. It is further agreed that no interest will be payable by

> the Seller on any such amount adjusted in the subsequent invoices."

Under clause 13, security for payment in the form of a cash deposit is required to be maintained by the buyer equivalent to the DCQ[16] multiplied by thirty and by the contract price. If the seller draws upon the payment security, the buyer has to make good the amount withdrawn.

Clause 14 of the Agreement further provides for the representations and warranties of the buyer and seller. Clause 14.3 reads as follows:

> "14.3 Buyer's Warranties and Undertakings
>
> The Buyer warrants and undertakes to the Seller that throughout the term of this Agreement:
>
> a) the Buyer's Facilities will be technically and operationally compatible with the Seller's Facilities at the Delivery Point and fit for purpose for off take of gas from the Delivery Point;
>
> b) the Buyer's Facilities will be maintained in good working order and condition and so operated as to be compatible with the fulfilment of the obligations of the Buyer under this Agreement;…"

Under the above clause 14.3, the buyer warrants to maintain the "Buyer's Facilities", which includes the 'measurement equipment', in good working order and condition and technically and operationally compatible with the Seller's Facilities.

Under clause 16.4, if the buyer fails (otherwise than as a consequence of *force majeure* or the seller's default) to take fifty per cent or more of the cumulative DCQ over 45 consecutive days, the seller is entitled to terminate the agreement.

[16] "Daily Contract Quality"

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 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 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 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 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".[20] 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

[17] Section 65(105)(zzzzb), Finance Act, 1994.
[18] Section 65(105)(zzz-z), Finance Act, 1994.
[19] Section 65(105)(zzzzr), Finance Act, 1994.
[20] Circular D.O.F. No.334/1/2008-TRU, dated 29 February, 2008.

achieve an accurate verification of 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 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**[21] ("**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.

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[21] 2016 (41) STR (444) (Tri-Mum).

31 Another aspect of the matter which requires to be set out is the contention of the respondent that the gas connection charges are **mainly** in the nature of a refundable security deposit which is returned to the customers in the event of the connection being discontinued or terminated, depending on their usage, and are not payment for a service provided by the respondent.

32 In the Show Cause Notice, the appellant stated that based on an assessment of gas sale agreements and invoices, it found that the "gas connection charges" were collected for "supply of pipes and measurement equipment etc.". The appellant also noted that the respondent had not issued any deposit receipt for these charges nor had it mentioned that these charges are a refundable amount in the invoices issued.

33 The respondent, in their reply dated 29 December 2009, stated that the purpose of the collection of these charges was for safe-keeping of the meter by the customers and the expense towards charges incurred on disconnection, if the customer disconnects immediately after installation. The respondent stated that according to the company policy, with respect to commercial and industrial consumers, an amount for installation of equipment was collected depending on the pressure of the gas and the size of the SKID equipment. Although these are reflected as gas connection income, they are (according to the respondent) mainly in the nature of refundable security deposits. In support of their argument for industrial and commercial consumers, the respondent provided a copy of an "internal note dated 13 July 2007" and a list of industrial customers to whom the

gas connection charges have been refunded. The internal note is extracted below:

> "Today we are supplying gas to more than 200 Industrial customers at Ahmedabad & Vadodara. We are collecting Gas Connection Charge upfront from the customers before commencing gas supplies based on the customer load profile (provided by customer).
>
> Many of our customers have future expansion after commissioning of the unit which is not covered in existing meter connection. Further, few of the customers have also requested for termination of the GSAs due to various issues. **In such cases, following amount shall be deducted from the Gas Connection Charges and balance shall be refundable.**
>
> (1) Upgradation of Load:
> In this case the percentage of amount to be deducted shall be as follows: -

Period from Commencement	% of Amount to be deducted	
	Earlier	New Revised
Upto 1 Year	10%	20%
Between 1st Year to 2nd Year	25%	50%
Between 2nd Year to 3rd Year	50%	75%
Between 3rd Year to 4th Year	75%	100%

> (2) Terminating of Agreement:
> In this case the percentage of amount to be deducted shall be as follows:

Period from Commencement	% of Amount to be deducted	
	Earlier	New Revised
Upto 1 Year	10%	25%
Between 1st Year to 2nd Year	85%	50%
Between 2nd Year to 3rd Year	95%	75%

Between 3rd Year to 4th Year	95%	100%

(**emphasis supplied**)

The tabulation of the refund given to the industrial customers of the respondent for 2008-09 is as follows:

Name of Customer	Connection Charges collected (Rs.)	Amount Refunded against Connection Charges (Rs.)	% Refunded
J.B. Industries	289,000.00	216,729.00	75%
Maruti Metal Industries	46,700.000	11,675.00	25%
Bodal Chemicals Ltd. (Unit-IV)	600,000.00	150,000.00	25%
Jay Chemical Industries Ltd. (Unit-II)	636,000.000	133,750.00	25%
Vikas Polymers	6,500.00	6,500.00	100%
Ashish Fetro Met Pvt. Ltd.	470,000.00	352,500.00	75%
Ishan Dyes & Chemicals Ltd.	960,000.00	240,000.00	25%
Bipin Metal Ir. Justices	47,000.00	47,000.00	100%
Ronuk Dyes & Chemicals	470,000.000	235,000.00	50%
Shiram Tubes Pvt. Ltd.	437,500.00	109,375.00	25%
Bombay Barrel Supply Company	98,000.00	73,500.00	75%
Shalini Apparels Pvt. Ltd.	260,000.00	260,000.00	100%
Gayato Dyestuff	47,000.00	47,000.00	100%

34 The above data indicates that, contrary to the assertion of the respondent that the amount collected as gas connection charges is refunded at the time of discontinuation of the connection, the percentage which has been refunded to the

industrial customers has varied from case to case ranging from 25 per cent to 100 per cent. The Adjudicating Authority observed:

> "…the gas connection charges are refunded, based on the number of years of gas supply, when the gas connection contract is discontinued. This clearly evidences that gas connection charges in most of the cases are not refunded completely. The said noticee not only earns interest on the gas connection charges but also earns income by retaining some portion of the gas connection charges at the time of discontinuance of the contract. This is a very strange kind of security deposit which is not only devoid of interest but also on maturity the principal amount gets reduced. Moreover, in reality it may never be refunded if the gas connection is not discontinued. I have also seen the "Internal Note dated 13.7.2007" submitted by the said noticee along with his written submission as "Annexure-A" and I find that the amount to be deducted is 100% when there is "upgradation of load" or "termination of agreement" between 3rd year to 4th year. This clearly establishes that the liability of the said noticee to refund the said "Gas Connection Charges" is only upto a period of three years, after that no amount is to be refunded and it eventually becomes income of the said noticee. Moreover, till the time the said amount is partially refunded it remains with the said noticee who is at liberty of using the same in whatever manner he wants to. I have seen the Annexure-B annexed with the written submission dated 4.1.2010 and find that the gas connection charges are refunded to only 13 customers during the year 2008-09. This indicates that effectively, the gas connection charges once recovered from the customers remain with the said noticee and in cases where it is refunded then also some amount is retained by the said notice."

35 With respect to the domestic consumers, the respondent, in their reply to the Show Cause Notice, argued that under the PNGRB Network Tariff Regulations 2008, entities such as the respondent are required to collect refundable interest-free security deposits towards safe-keeping of the meter and are to be refunded in full to the domestic PNG customer in case of a disconnection. The respondent argued that the PNGRB Network Tariff

Regulations 2008 further provide that the amount collected as interest-free refundable security deposit is to exist as a liability in their books of account. In support of their contention, the respondent provided their Annual Report for the financial year 2008-09 which depicts the performance in terms of income and profitability. An extract of the report is provided below:

Performance Highlights:

During the year under review, your Company has shown resilience in the times of global economic show down and has shown impressive performance in terms of Income and Profitability, which is summarized as under;

(Rs. In Lacs)

Particulars	2008-09	2007-08
CNG sales	13893.91	10670.00
PNG sales	16544.24	11971.78
Transportation Income	320.76	534.04
Gas Connection Charges	1395.96	1454.80
Oil & Lubricant sales	-	0.62
Other Income	351.23	687.51
Total Income	32506.09	25318.72
Total Expenditure	30928.10	22998.22
Prior Period Adjustment	2.51	7.70
Profit / (Loss) Before Tax	1575.48	2312.81
Provision for Tax	975.57	561.91
Profit/ (Loss) After Tax	599.91	1750.90

Notes ;

1) The Company had received hedging income of rs. 560 lacs in 2007-08 in 2008-09 no such extraordinary income has been received in the current year.
2) Until now the Company was treating the entire amount received from domestic gas connections as income. However, in line with the PNGRB guidelines, the Company has treated an amount of Ts. 5,000/- per domestic customer as Refundable interest free Security Deposit this amount to Rs. 883.34 Lacs.

36 The above report provides that the respondent has treated an amount of Rs. 5000/- per domestic consumer as refundable interest-free security deposit amounting to Rs. 883.34 lacs. In assessing these rival contentions, the Adjudicating Authority held that:

> "…I find that the attempt of the said notice to align the Finance Act, 1994, with the Petroleum and Natural Gas Regulatory Board Regulations 2008, to determine the taxability of a taxable event is not acceptable and goes in vain. Taxability of a service is governed under Section 65(105) of the Finance Act, 1994 and is not determined under any other Act or Regulations, unless and until the same is specifically provided in the definition given under Section 65(105) of the Finance Act, 1994. The taxability of a service is also not determined by the manner in which the Books of Accounts are maintained…."

37 We find ourselves in agreement with the findings of the Adjudicating Authority. The extent of the refund of gas connection charges collected from industrial, commercial and domestic consumers by the respondent depends on their usage. From the internal note dated 13 July 2007 and the tabulation of customers provided above, it is evident that the percentage of funds refunded varies from customer to customer, while the remaining amount is retained by the respondent. In any case, as regards the domestic customers, no deposit receipts have been provided and instead, the respondent has relied on the tabulation of the refund of deposit to industrial consumers to support their contention. Thus, the argument of the respondent that these gas connection charges collected from industrial, commercial and domestic consumers constitute a refundable security deposit is rejected.

38 Thus construed, we are of the view that the Adjudicating Authority was correct in concluding that the buyer of gas is as interested as the seller in ensuring and verifying the correct quantity of the gas supplied through the instrumentality of the measurement equipment and the pipelines. Additionally, the role of regulating pressure and ensuring the safety of supply of gas performed by the measurement equipment is an essential aspect for the 'use' of the consumer. The SKID equipment fulfils the description in Section 65(105)(zzzzj) of a taxable service: service in relation "tangible goods" where the recipient of the service has use (without possession or effective control) of the goods.

39 For the above reasons, we are of the view that the Tribunal was in error in interfering with the findings and order of the Adjudicating Authority. The judgment of the Tribunal shall accordingly stand set aside. The order of the Adjudicating Authority is restored. The appeal is allowed in the above terms.

40 Pending application(s), if any, stands disposed of.

…………………………………...........................J.
[Dr. Dhananjaya Y Chandrachud]

…………………………………...........................J.
[Indu Malhotra]

…………………………………...........................J.
[K M Joseph]

New Delhi;
August 28, 2020.