CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
<u>NEW DELHI</u>

PRINCIPAL BENCH – COURT NO. – IV

Service Tax Appeal No. 52212 of 2022

[Arising out of Order-in-Original No. 98/Commr/Delhi East/AP/2022 dated 26.07.2022 passed by the Commissioner of Central Tax: GST Delhi East: New Delhi]

M/s. Fresenius Medical Care India Pvt. Ltd. **...Appellant**
Ground Floor, SAS Tower,
Medicity Sector-38,
Gurgaon, Haryana - 122001

VERSUS

Commissioner of CGST – Delhi East **...Respondent**
C.R. Building, IP Estate,
East Delhi,
New Delhi - 110002

<u>APPEARANCE:</u>
Shri Deepak Thakur and Shri Rishabh Mishra, Advocate for the Appellant
Shri Rakesh Kumar, Authorized Representative for the Respondent

CORAM:
HON'BLE DR. RACHNA GUPTA, MEMBER (JUDICIAL)
HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)

DATE OF HEARING: 27.04.2026
DATE OF DECISION: **<u>24.08.2026</u>**

FINAL ORDER NO. <u>51399/2026</u>

<u>DR. RACHNA GUPTA</u>

M/s. Fresenius Medical Care India Pvt. Ltd., the appellant herein, was registered with the Service Tax Commissionerate for 'Legal Service', 'Rent-a-cab', 'Maintenance or Repair', Manpower Recruitment Service, Transport of Goods by Road, Sponsorship Servie.

1.1 During Audit of the records of the appellant conducted from 12 to 15 February 2018 for the period 2012-13 to 30th June 2017, it was observed that the appellant had not paid service tax on amounts received against the income head 'Rent from leased equipment'. It has been observed that the appellant were engaged in the business of trading of goods i.e. Dialysis equipment, consumables and others and also providing services of Comprehensive Maintenance Contract (CMC), Annual Maintenance Agreement (AMC) and leasing of equipment. The appellant was paying service tax on AMC and CMC, while they are not paying any service tax on leasing of equipment and considering the same as 'deemed sale' in terms of Article 366(29A) of the Constitution of India and subjected to VAT. However, the said service i.e. leasing of equipment appeared to the department to be a declared service and falls under clause (f) of Section 66E of the Finance Act,1994 which reads as "transfer of goods by way of hiring, leasing, licensing or in any such manner without transfer of right to use such goods". The same did not appear to be excluded from the definition of "service" as per Section 66B(44)(a)(ii) of the Finance Act, 1994.

1.2 Department alleged that the appellant had not only retained the ownership of equipments but had also not transferred possession and effective control of said equipment as terms of the agreement appear to indicate that the assessee was providing services only and there was no transfer of the right to use the equipments. The contract/agreement is alleged essentially to be a contract for services and cannot be called deemed sale of goods within the meaning of Article 366(29A) (d) of the Constitution.

1.3 Department also alleged that the appellant by doing so, had intentionally and willfully suppressed the facts of providing taxable services and collection of value of such taxable services from the department with intent to evade payment of service tax. They did not pay the service tax as applicable on such services and also did not declare the said services in their ST-3 returns. They were working under self-assessment and the onus to pay proper service tax is on them.

1.4 With these allegations, the Show Cause Notice bearing No.2/2017 dated 20.07.2018 was served upon the appellants after invoking the extended period of limitation. Service tax amounting to Rs.2,07,79,789/- was proposed to be recovered along with education cess of Rs.1,86,254/- and Swachh Bharat Cess of Rs.3,27,282/-. Interest at the appropriate rate and the proportionate penalties were also proposed. This proposals have been confirmed vide the impugned Order-in-Original bearing No. 98/2022 dated 26.07.2022. Being aggrieved, the appellant is before this Tribunal.

2. We have heard Shri Deepak Thakur and Shri Rishabh Mishra, learned Advocates for the appellant and Shri Rakesh Kumar, learned Authorized Representative for the department.

3. Learned counsel for the appellant submitted that the appellant is not pressing the preliminary objection with respect to jurisdiction while invoking Rule 5A of the Service Tax Rules, 1994. On merits of the appeal, it is submitted that the present transaction is a deemed sale as is evident from the agreement entered into by the appellant. It is submitted that Article 366(29A)(d) of the Constitution of India provides a deeming fiction to treat certain transactions to be a deemed sale which includes "transfer of the right to use goods". Therefore, transactions that involve transfer of

right to use goods are subject to VAT/CST in light of above provisions. However, in cases where there is no transfer of right to use goods, the transaction is not a deemed sale and hence, not subject to Sales Tax. In order to cover those transactions which were not liable to sales tax a transfer of right to use goods, Parliament introduced a new category of service i.e. 'supply of tangible goods' under the ambit of service tax with effect from May 16, 2008 by insertion of Secton 65(105)(zzzzj) in the Finance Act.

3.1 This was further clarified by TRU of CBEC vide M.F. (DR) Circular No. D.O.F. No. 334/1/2008-TRU dated February 29, 2008 that a transaction would be subject to service tax only in cases where the transaction was that of allowing another person to use the goods, without giving legal right of possession and effective control to such person. The Circular also mentioned that it was relevant to see whether VAT was payable/paid on the transaction. In 2012, negative list based service tax regime came into force w.e.f. 01.07.2012. Section 65B(44) of the amended Finance Act, 1994 contained the definition of "Service":

"Service means any activity carried out by a person for another for consideration, and includes a declared service, but shall not include-

(a) an activity which constitutes merely:-

(i) 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; or

(ii) 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."*

Hence, supply of any tangible goods by a person to another person for use, for some consideration, which involves transfer of right to use the goods, is outside the main definition of "Service" as given in Section 65B(44). However, the supply of tangible goods without transfer of right to use goods was declared to be a service in terms of Section 66E of the Finance Act.

3.2 Learned counsel further submitted that the CBEC vide its Circular No. 198/08/2016-Service Tax had provided that in order to distinguish transactions as sale of goods or supply of services, it is essential to determine whether, in terms of the contract, there is a transfer of the right to use the goods. The decision of Hon'ble Supreme Court in the case of **Bharat Sanchar Nigam Limited Vs. Union of India reported as 2006 (2) STR 61** is relied upon. It is mentioned that all conditions set out in the case of BSNL (supra) have been fulfilled by the appellant. The activity in question is wrongly held to be taxable service. The appellant could not enter the Fortis Hospital for inspection and maintenance of the leased equipment. This fact is sufficient to hold that the effective control was with the hospital.

3.3 It is additionally submitted that it is hospital's operators who had to run the leased equipments and appellant had no control over there whatsoever. Appellant has not imposed any restriction which remotely suggests that the usage of the equipment was being controlled by the appellant. The only condition imposed by the appellant (as evident by the agreement) is that the appellant has the right to inspect the equipment. During the tenure of the agreement hospital has exclusive right to use the equipment and the appellant cannot transfer the said goods to any other customers (appellant can assign his rights to its susidiearies). This Tribunal in number of judgments has held that merely because some restriction have been imposed by the lessor to ensure the safety of the equipment will not lead to the conclusion the effective control has not be transferred to the lessee. Further, the fact that insurance and maintenance responsibility lies with the appellant will not conclude the effective control and possession is not with the lessee. Reliance in this regard is placed on the judgment in the case of **M/s. Gainwell Commosales Pvt. Ltd. Vs. Commissioner of Customs and Central Excse and Service Tax, Ghaziabad reported as 2026 (4) TMI 1513 – CESTAT Allahabad.**

3.4 Learned counsel impressed upon that it is settled principle that mere responsibility for maintaining and repairing machines does not mean that transaction does not involve transfer of the right to use goods. Reliance is place on the following decisions:

(i) Great Eastern Shipping Company Ltd. Vs. State of Karnataka reported as 2020 (32) GSTL 3

(ii) Express Engineers and Spares Pvt. Ltd. Vs. Commissioner of CGST Ghaziabad, reported as 2022 (64) GSTL 112 (Tri.-All.)

(iii) Petronet LNG Ld. Vs. Commissioner of Service Tax, New Delhi, reported as 2016 (46) STR 513 (Tri.-Del.)

(iv) Gimmco Ltd. Vs. Commissioner of C.Ex. & S.T., Nagpur reported as 2017 (48) STR 476 (Tri-Bom)

(v) Krushna Chandra Behera Vs. State of Orissa reported as (1991) 83 STC 325 (Orissa)

(vi) G.S. Lamba and Sons Vs. State of Andhra Pradesh reported as (2011) 43 VST 323

(vii) Lindstorm Services India (P.) Ltd. Vs. Principal Commissioner of GST & Central Excise reported as (2021) 55 GSTL 170

With these submissions, the order under challenge/Order-in-Original is prayed to be set aside and appeal is prayed to be allowed.

4. Learned Departmental Representative on the other hand submitted that the department's case rests on the failure of the lease agreements to meet the criteria for a "deemed sale" as has been established by the Hon'ble Supreme Court in the case of **BSNL (supra).** Transfer of the right to use requires the transfer of possession and effective control. Mere custody with permission to use does not suffice to be deemed sale providing access to infrastructure (like mobile towers) does not constitute a "right to use" the goods. When a provider pays for insurance and maintenance, they do not fulfill the attributes of a "deemed sale".

To support his submissions, learned counsel has relied upon the following decisions:

(i) State of Andhra Pradesh Vs. Rashtriya Ispat Nigam Ltd. reported as 2002 089 AIR 1305-SC

(ii) Indus Tower Ltd. Vs. Deputy Commissioner of Commercial Tax, Bangalore reported as (2013) 29 taxmann.com 301 (Kar)

(iii) Carzonrent (India) Pvt. Ltd Vs. Commissioner of Service Tax, Delhi-I reported as (2017) (50) STR 772

4.1 It is further submitted that Payment of VAT does not exempt an activity from service tax if it qualifies as a "declared service" under Section 66E(f) due to lack of transferred effective control. Clauses regarding mandatory insurance, maintenance by the owner, and "per treatment" fees prove that "possession and effective control" remained with the appellant. Finally it is submitted that the appellant failed to declare these services in ST-3 returns and did not assess the correct tax, despite being under a self-assessment regime. This constitutes willful suppression to evade tax. Impressing upon no infirmity in the order under challenge, the appeal is prayed to be dismissed.

5. Having heard the rival contentions, perusing the entire records and the case law cited by both the parties, the controversy herein is observed to be:

> **"The appellant paid VAT on equipment leasing, categorizing it as a "deemed sale" under Article 366(29A) of the Constitution. The department contends**

these transactions as "Supply of Tangible Goods Services" (STG) under Section 66E(f) of the Finance Act, 1994, because there was no transfer of the right to use or effective control."

6. Foremost, we need to peruse both the provisions and even the definition of service w.e.f. 01.07.2012 (the period in dispute is Financial Year 2012-13 to June 2017). Transactions involving transfer of right to use goods are to be treated as sales by virtue of the deeming fiction created vide Article 366 (29A) of the Constitution of India. The said Article reads as under:

"(29A) "tax on the sale or purchase of goods" includes –

(a) ********

(b) ********

(c) ********

(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 make the transfer, delivery or supply and a purchase of those goods by the person to whom such transfer, delivery or supply is made."

The category of 'supply of tangible goods for use service' was brought under the ambit of service tax with effect from May 16, 2008 by insertion of Section 65(105)(zzzzj) in the Finance Act. The said Section defined the taxable service as under:

> *"Taxable service means any service provided or to be provided to any person, by any other person in relation to supply of tangible goods including machinery, equipment and appliances for use, without transferring right of possession and effective control of such machinery, equipment and appliances"*

Circular No. D.O.F. No. 334/1/2008-TRU dated February 29, 2008 clarified the scope of said taxable service as under:

> *"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*."

In 2012, when the service tax regime underwent a change, the category of supply of tangible goods for use was made a declared service. Reference in this regard is made to Section 66E of the Finance Act which read as under:

> *"Section 66E. Delcared services. – The following shall constitute declared services, namely:*
> *…*
> *(f) transfer of goods by way of hiring, leasing, licensing or in any such manner without transfer of right to use such goods"*

Hence, any transaction which involved the transfer of goods without transferring the right to use such goods, constitutes declared service under the provisions of the Finance Act.

It is relevant to note that in the Education Guide issued by the Central Board of Excise and Customs issued on 20 June 2012, it has been mentioned as under:

> *"It is thus evident that the activities specified as declared services in section 66E do not encroach upon the area of deemed sales. In fact most of the declared services has been specified with the intent of clarifying the distinction between deemed sales and activities related thereto which are outside the realm of deemed sales but qualify as a service."*

Hence, from the above, it is evident that the scope/ambit of deemed sales is different from that of the service of transfer of goods without transferring the right to use the goods followed by CBE Circular in 2016 (being Circular No. 198/08/2016-Service Tax dated 17.08.2016) to explain the applicability of service tax in case of transactions involving hiring of goods without the transfer of the right to use the goods. Therefore, it is held that sales tax is levied in pursuance of article 366(29A)(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, enable 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. 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 providers's goods without transfer of the right of possession and effective control. This provision create an element of taxation over a service, as opposed to a “deemed sale” under article 366(29A)(d). For the purpose of clarification, the department of Revenue issued a Circular, D.O.F. No. 334/1/2008-TRU, dated February 29, 2008.

Section 658(44)(a) of the Act defines 'service' in the following terms:

> *"(44) "service" means any activity carried out by a person for another for consideration, and Includes a declared service, but shall not include-*
> *(a) an activity which constitutes merely,-*
> *(i) a transfer of title in goods or immovable property, by way of sale, gift or in any other manner; or*
> *(ii) such transfer, delivery or supply of any goods which is deemed to be a sale within the meaning of clause (29-A) of Article 366 of the Constitution; or..."*

As is manifest from a reading of clause (II) of Section 65B(44)(a), a taxable service would Include the transfer, delivery or supply of any goods except where such transfer, delivery or supply be liable to be viewed as a deemed sale by virtue of Article 366(29-A) of the Constitution.

The ‘right to use’ and which is spoken of in Article 366(29-A) has been lucidly explained by the Supreme Court in **BSNL v. Union of India (2006) 3 SCC 1 = 2006 (2) S.T.R. 161 (S.C.),** and where Dr. A.R. Lakshmanan J. in a concurring opinion identified the ingredients of a 'right to use' as being the following:

> "*97. To constitute a transaction for the transfer of the right to use the goods, the transaction must have the following attributes:*
> *(a) there must be goods available for delivery;*
> *(b) there must be a consensus ad idem as to the identity of the goods;*

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

7. Reverting to the facts of the present case, we have first perused the agreement dated 23.03.2015 executed between appellant and the Fortis Hospital, Amritsar and observed following clauses:

7.1 Lease Fee per Treatment

In consideration of Fresenius providing or leasing the Equipment to FORTIS AMRITSAR upon and subject to the terms of this Agreement, FORTIS AMRITSAR shall, without need of demand, pay Fresenius a lease fee on a 'per treatment' basis (in aggregate, the "Lease Fee") plus applicable taxes in accordance with the rates and the payment term or cycle prescribed in Schedule B attached hereto and made an integral part of this Agreement. The determination of the 'per treatment' basis herein included will be in accordance with the method and procedure in this respect agreed upon between the parties hereto, or, in the absence of any such agreement, by Fresenius ascertaining, from time to time during the payment term or cycle provided in Schedule B, including from the meters in this respect provided in, on or attached to the Equipment, the number of such treatments, or the number of times that, or the amount of time for which, the Equipment has been used, which ascertainment at any time by Fresenius shall be final and binding on FORTIS AMRITSAR. If this Agreement is terminated by FORTIS AMRITSAR (for any reason whatsoever), prior to the expiration of the Lock-in Period, FORTIS AMRITSAR shall pay the minimum Lease Fee for the Lock-in Period, upon such termination.

7.2 Joint Administrative and Technical Committee

7.2.1 The parties agree that they shall, within a period of fifteen (15) days from the Effective Date, create a Joint Administrative and Technical Committee composed of [one (1) or two (2) representatives, as mutually agreed, from each party.

7.2.2 The Joint Administrative and Technical Committee shall be responsible to prepare written guidelines for the effective management, coordination and implementation of the provisions of this Agreement, including but not limited to:

-procedures to be observed and the documents that will be required in the payment of Lease Fee specified in clause 3 hereof;

-procedures to be observed and the documents that will be required in operating the Equipment; and

-Performance standards to be observed in operating the Haemodialysis Centre.

7.2.3 The guidelines so prepared by the Joint Administrative and Technical Committee in accordance with clause 4.2 shall be subject to the approval of the parties; it being expressly understood and agreed by FORTIS AMRITSAR that all such decisions relating to the approval of the guidelines shall be and remain subject to acceptance in this behalf by Fresenius, which acceptance may be denied or withheld in Fresenius's sole and absolute discretion. In the event parties are unable to reach mutual agreement as to the approval of such guidelines, the provisions of this Agreement, including any schedules attached hereto, shall prevail. In the event that any amendments are required to be carried out to this Agreement pursuant to any such approved guidelines, the parties agree to follow the procedure to amend this Agreement as set forth in Clause 11.5 below.

7.2.4 The guidelines accepted and approved by parties in accordance with clause 4.3, and any amendments to this Agreement carried out, as applicable, in terms of clause 11.5, shall be binding on the parties as well as their respective employees, directors, agents, representatives, personnel and other staff.

7.3 Other Obligations of Parties

7.3.1 Obligations of Fresenius

Fresenius shall provide, all at its own cost, the following:

(a) The Equipment listed in Schedule A hereof;

(b) User manuals/operations manual required to operate and maintain the Equipment;
(c) The maintenance and supply of necessary spare parts and materials for the Equipment;
(d) The insurance for the Equipment.

7.4 Installation of the Equipment

FORTIS AMRITSAR shall use the Equipment only within the premises of the Haemodialysis Centre and shall not remove the Equipment, nor cause the same to be removed, from such premises (including, without limitation, moving such Equipment to any of FORTIS AMRITSAR's future dialysis treatment capacity expansion or other facilities) ***without the prior written consent of Fresenius.***

7.5 Use of the Equipment

FORTIS AMRITSAR warrants that the Equipment shall be used in accordance with all the operation and maintenance specifications and instructions laid down by Fresenius or the manufacturer. FORTIS AMRITSAR shall permit only trained and qualified personnel to operate and, as and when necessary, to perform maintenance or repair-work on the Equipment..

7.6 Maintenance of the Equipment

During the subsistence of this Agreement, the expenses for spare parts and labour for the repair of the Equipment shall be borne by Fresenius, unless the equipment breakdown is caused due to the gross negligence, intentional misuse, mishandling or improper operation by any of the FORTIS AMRITSAR physicians / specialists, nurses, technicians and other paramedical staff.

7.7 Inspection by Fresenius

Fresenius shall, at any and all times during reasonable hours, with due intimation to FORTIS AMRITSAR, be entitled to enter the premises where the Equipment is located and to inspect and examine its state of repair as well as the manner of use thereof, in the presence of FORTIS AMRITSAR's authorized representatives should such authorized representatives of FORTIS AMRITSAR choose to be and remain present at and during such inspection or examination by Fresenius upon FORTIS AMRITSAR being given reasonable prior notice in this behalf by Fresenius.

8. Perusal of these clauses makes it clear beyond all doubts that condition (c) & (d) as laid down in **BSNL (supra)** case is not met with. The fact of mere permission of Fortis to appellant to enter his premises for inspection and maintenance of leased machinery is highly insufficient to hold the lease as deemed sale. The usage of leased machines throughout the lease period was subject to appellant's approval. Maintenance expenses were also to be borne by the appellant along with insurance expenses. The activity in question falls under the definition of service and declared service under Section 66E(e) of the Finance Act. Prior 2012 the activity was categorised as 'Supply of Tangible Goods under Secton 65 (105) (zzzzj) of the Act. Payment of VAT by the Fortis Hospital is also insufficient to alter the conclusion. We draw our support from decision of **Delhi High Court in the case of Indian Compressors Vs. Union of India (2025) 32 Centax 134 (Del.)**

9. With these observations, we find no infirmity in the order under challenge. Consequent thereto, appeal filed by the appellant is hereby dismissed.

[Order pronounced in the open court on **24.08.2026**]

(DR. RACHNA GUPTA)
MEMBER (JUDICIAL)

(P.V. SUBBA RAO)
MEMBER (TECHNICAL)

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