

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH
CHENNAI**

S.No.	Appeal No.	Appellant	Respondent
1.	ST/708/2010	Roots Auto Products Pvt. Ltd.	CCE Coimbatore
Arising out of Order-in-Appeal No.70/2010-ST dt. 06.08.2010 passed the by Commissioner of Customs, Central Excise & Service Tax (Appeals), Coimbatore			
2.	ST/444/2011	Roots Auto Products Pvt. Ltd.	CCE Coimbatore
Arising out of Order-in-Appeal No.CMB-CEX-000-APP-083-11 dt.28.04.2011 passed by the Commissioner of Customs, Central Excise & Service Tax (Appeals), Coimbatore			
3.	ST/41371/2013	Roots Auto Products Pvt. Ltd.	CCE Coimbatore
Arising out of Order-in-Appeal No.CMB-CEX-000-APP-095-13 dt.19.03.2013 passed by the Commissioner of Customs, Central Excise & Service Tax (Appeals), Coimbatore			
4.	ST/42135/2013	Roots Auto Products Pvt. Ltd.	CCE Coimbatore
Arising out of Order-in-Appeal No.CMB-CEX-000-APP-220-13 dt.23.07.2013 passed by the Commissioner of Customs, Central Excise & Service Tax (Appeals), Coimbatore			
5.	ST/42022/2015	Roots Auto Products Pvt. Ltd.	CCE Coimbatore
Arising out of Order-in-Appeal No.CMB-CEX-000-APP-107-15 dt.08.05.2015 passed by the Commissioner of Customs, Central Excise & Service Tax (Appeals), Coimbatore			

Appearance :

Shri Subash Chandran, Advocate
For the Appellant

Shri K.P. Muralidharan, AC (AR)
For the Respondent

CORAM :

Hon'ble Shri Madhu Mohan Damodhar, Member (Technical)
Hon'ble Shri P. Dinesha, Member (Judicial)

Date of hearing / decision : 13.06.2018

FINAL ORDER No. 41837-41841 / 2018

Per Madhu Mohan Damodhar

These appeals having been filed by the same appellant and relating to the very same activity, they are taken up together for common disposal.

2. The brief facts of the matter are that appellant had leased their various types of machines to Roots Casts (P) Ltd., Roots Polycraft and M/s.Roots Prevision Products Pvt. Ltd. by entering into lease deeds and received lease rents from lessees. The period of dispute involved in these appeals is March 2006 to March 2008, April 2008 to March 2009 and April 2009 and March 2010. Proceedings were initiated against the appellants proposing demand of service tax liability on this activity under 'Business Support Service' as per Section 65 (105) (zzzq) of the Finance Act, 1994. On adjudication, these proposals were upheld by the original authority, however on further appeal, the Commissioner (Appeals) while upholding the demand under Business Support Service for the period upto 15.05.2008, however for the remaining periods held that the activity would be taxable under supply of Tangible Goods Service as defined in Section 65 (zzzzj) of the Act. Hence Appeals ST/708/2010, ST/444/2011 and ST/41371/2013. [In the adjudication order dt. 30.03.2012 (ST/41371/2013) in respect of the period April 2009 till March 2010, the original authority appears to indicate that the demand has been confirmed under supply of

Tangible Goods Service]. For the periods April 2010 to March 2011 and April 2011 to June 2012, SCNs were issued to the appellants proposing demand of tax liability under supply of tangible goods service which was confirmed by the original adjudicating authority and on appeal upheld by the lower appellate authority vide the impugned orders. vide the corresponding impugned orders. Hence Appeals ST/42135/2013 ST/42022/2015.

2. Today when the matter came up for hearing, on behalf of the appellants Ld. Advocate, Shri Subash Chandran made oral and written submissions which can be broadly summarized as under :

i) The Commissioner (Appeals) in respect of appeals ST/444/2011 and ST/41371/2013 has gone beyond the scope of the SCN by holding that the activity is liable to be taxed under Supply of Tangible Goods Services. He relies upon the ratio laid down by the Hon'ble High Court of Bombay in *Indian National Shipowners' Association Vs UOI* - 2019 (14) STR 289 (Bom.), inter alia had clearly laid down that creation of new entry for Supply of Tangible Goods Service is not by amending earlier entry on Mining Service and not by carving out of Mining service. Ld. Advocate submits that the lower appellate authorities have therefore not taken the stand as they have done in these cases, that supply of Tangible goods service is one which has been carried out of erstwhile BSS.

ii) In any case, appellants have given up the machines only on lease deeds and had received least rents from the lessee concerned and had

also paid VAT on the amounts so received. Ld. Advocate submits that this averment had been made even before the adjudicating authorities. In support of his contention, he takes us to OIO No.83/2014 dt. 19.12.2014 relating to Appeal ST/42022/2015, wherein at para-16 thereof it has been indicated that appellants had submitted photocopies of their VAT returns.

iii) Ld. Advocate submits that in a number of Tribunal decisions it has been conclusively held that applicable VAT has been discharged treating the transaction a deemed sale and where effective right of possession and effective control had been transferred to the lessee. The activity should not be subjected to service tax levy under supply of Tangible Good Services. He relies upon the following decisions :

- 1) GIMMCO Ltd. Vs CCE & ST Nagpur – 2017 (48) STR 476 (Tri.-Mumbai)
- 2) CCE & ST Raipur Vs Chhattisgarh Earth Movers
2017 (6) GSTL 297 (Tri.-Del.)

iv) Ld. Advocate submits that for the subsequent period on the same issue, in their own case, the Commissioner (Appeals) Coimbatore vide Order No.274/2016 dt. 08.12.2016 had found that there is transfer of goods involved which is deemed sale in the leasing of the machineries made by the appellant and had held that the demand is not legally sustainable. La. Advocate submits that the said order has not been appealed against by the department.

3. On the other, Ld. A.R Shri K.P. Muralidharan supports the impugned orders.

4. Heard both sides. From the facts on record, it is abundantly clear that the nature of renting of the machineries caused through lease deeds was in the nature of deemed sale. It is also seen that it is the lessees and not the appellants had effective possession and control of such machineries leased. It is also not the case that the these activities were outsourced to the appellant on these machineries. On the other hand, manufacturing activity was got done with the help of these machineries only by the lessee at their own control and fancy and not on any direction or control of the appellants. This being so, the ingredients required for bringing the activity within the fold of supply of Tangible Goods Service for the purpose of Section 65 (105) (zzzzj) ibid are not satisfied. Renting has satisfied the requirements of “deemed sale”. This being so, in view of the activities will not fall either within the scope of Business Support Service for the earlier periods or for that matter, under the supply of Tangible Goods Service for subsequent periods. The case laws relied upon by the Ld. Advocate also support his contentions. The relevant portion of the decision in Chhattisgarh Earth Movers (supra) is reproduced for ready reference :-

4. We have heard both the sides and perused the appeal records. On plain reading of the agreement it is clear that the respondent is supplying machinery (JCB) for the client in which absolute possession over the machinery is with the client. Supplying operator does not in any way

dilute such absolute possession. Further, we also note that the respondent discharged applicable VAT treating the transaction as a deemed sale in terms of the said agreement. The statutory definition in terms of Section 65(105)(zzzzj) of the Finance Act, 1994 is very clear to the effect that for tax liability for the supply of tangible goods should be without transferring right of possession and effective control of such machinery. We find in the present case the exclusion in the tax entry will operate.”

In *GIMMCO Ltd.* (supra), the Tribunal inter alia held as under :

“5.4 The Hon’ble High Court observed that the essential requirement of a transaction for transfer of the right to use goods are :

(1) it is not the transfer of the property in goods, but it is right to use property in goods;

(2) Article 366(29A)(d) read with the latter part of the Clause (29A) which uses the words, “and such transfer, delivery or supply” would show that the tax is not on the delivery of the goods used, but on the transfer of the right to use goods regardless of when or whether the goods are delivered for use subject to the condition that the goods should be in existence for use;

(3) in the transaction for the transfer of the right to use goods, delivery of goods is not condition precedent, but the delivery may be one of the elements of the transaction;

(4) the effective or general control does not mean always physical control and even if the manner, method, modalities and the time of the use of goods is decided by the lessee or the customer, it would be under the effective or general control over the goods;

(5) the approvals, concessions, licences and permits in relation to goods would also be available to user of the goods, even if such licences or permits are in the name of transferor of the goods; and

(6) during the period of contract exclusive right to use goods along with permits, licences, etc., vests with the lessee.

Applying these principles and examining the terms of the contract, the Hon’ble High Court held that the transaction involved was a transfer of right to use Transit Mixers and not transport service and the petitioners had transferred the ‘right to use goods’ to Grasim. If we apply the ratio of the above decision to the facts of the present case, the transaction

involved herein is “transfer of right to use” which is a deemed sale and not “supply of tangible goods for use” service.

6. In view of the foregoing, we are of the considered view that the assessee’s activity of giving various equipments on hire does not fall under the category of “Supply of tangible goods for use”, hence the same is not liable to service tax w.e.f. 16-5-2008. Now coming to the Revenue’s appeal, we find that the Id. Commissioner dropped the demand for the period prior to 16-5-2008 mainly on the ground that the service is of “Supply of tangible goods for use” which came into effect on 16-5-2008, therefore prior to that date the service was not taxable. However, we, in our above findings, held that the service in question is not the service of “Supply of tangible goods for use”. In this position the main ground of the Id. Commissioner for dropping of demand does not exist and not relevant. Though the Id. Commissioner in a passing reference mentioned in the impugned order that the service prior to 16-5-2008 does not fall under the “Business Auxiliary Service” but not given the detailed findings. Therefore when the main ground for dropping of demand does not exist. The issue relates to demand prior to the period 16-5-2008 needs reconsideration.”

Viewed in this light, we have no hesitation in holding that the impugned orders related to all these appellants will not sustain and will have to be set aside, which we hereby do. All these appeals are therefore allowed with consequential benefits, if any, as per law.

(dictated and pronounced in court)

(P. Dinesha)
Member (Judicial)

(Madhu Mohan Damodhar)
Member (Technical)

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