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**CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
CHENNAI**

Regional Bench – Court No. III

Service Tax Appeal No.42229 of 2018

(Arising out of Order-in-Original No.MDU-ST-COM-06-2018 dt.29.06.2018 passed by the Commissioner of CGST & Central Excise, Madurai)

M/s. Universal Dredging and Reclamation Corporation Ltd. : **Appellant**

190A, New Colony
Tuticorin 628 003.

VERSUS

The Commissioner of CGST & Central Excise : **Respondent**

Central Revenue Buildings,
Bibikulam
Madurai 625 002.

APPEARANCE:

Shri K. Sivarajan, Consultant
For the Appellant

Ms. Sridevi T., JC (AR)
For the Respondent

**CORAM : HON'BLE MS. SULEKHA BEEVI C.S., MEMBER (JUDICIAL)
HON'BLE MR. P. VENKATA SUBBA RAO, MEMBER(TECHNICAL)**

FINAL ORDER NO. 40778 / 2020

DATE OF HEARING: 29.10.2019

DATE OF PRONOUNCEMENT: **24.06.2020**

PER: SULEKHA BEEVI C.S.

Brief facts of the case are that the appellants were awarded dredging activity in the dock basin of Tuticorin Port by M/s.VOC Port Trust, Tuticorin. To carry out such dredging activity, they entered

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into agreement with M/s.Codralux S.A., Luxemburg on 17.07.2015 and hired the charter vessel i.e. Cutter Suction Dredger for dredging activity. Referring to various clauses in the agreement, the department was of the view that the appellants are liable to pay service tax under reverse charge mechanism on the consideration paid to foreign company for hiring the vessel, being a 'declared service' under Section 66E (f) of the Finance Act, 1994 w.e.f. 1.7.2012. Show cause notice dated 07.12.2017 was issued proposing to demand the service tax for the period November 2015 to January 2016. After due process of law, the original authority confirmed the demands along with interest and also imposed penalties. Aggrieved by such order, the appellant is now before the Tribunal.

2.1 The Ld. Consultant, Shri K. Sivarajan appeared and argued on behalf of the appellant. His arguments are summarized as under :

2.2 The appellant was awarded a contract for dredging the dock basin in front of North Cargo Berth-II of Tuticorin Port by M/s.VOC Port Trust, Tuticorin. The appellant then set up project office in Tuticorin for the limited purpose of undertaking the contract with the port. To carry out the activities as per the contract of doing dredging, the appellant entered into charter agreement dt. 17.07.2015 with M/s. M/s.Codralux S.A., Luxemburg (LESSOR) for vessel i.e. J.F.J. DeNul - Cutter Suction Dredger. The appellant also hired other equipments / vessels for the completion of the project.

2.3 The vessels were taken by the appellant only on lease basis under a Bare Boat Charter Agreement (unmanned vessels). In shipping industry, bare boat charter represents an arrangement for leasing of vessels without any crew and involves giving up the possession of vessel by the owner. The vessels were imported by appellant as per the agreement for use in dredging activity. Post completion of the project, the vessels / equipments imported were re-exported.

2.4 During the course of audit conducted in September 2016, the officers of the department observed that the appellant had imported charter vessel on hire from owners located outside India and they raised the issue of taxability for chartering / hiring these vessels. The appellants submitted a detailed write up in support of their contentions vide letter dt. 29.12.2016 and 20.02.2017. The said contentions put forward by the appellants were not accepted and show cause notice dt. 07.12.2017 was issued alleging that the consideration paid by the appellant to the lessor is a leasing transaction which is a declared service under Section 66E (f) of the Finance Act, 1994 as amended in 2012 and that it is not a transfer of right to use goods as contended by the appellants. The appellant were thus asked to pay up service tax under reverse charge mechanism on the consideration paid to the lessor for the period November 2015 to January 2016.

2.5 In the reply to SCN appellant had referred to the key clauses in the agreement that these clauses in the agreement would satisfy the

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test laid down by the Hon'ble Apex Court in the case of *BSNL Vs UOI* - 2006 (2) STR 161 (SC) as to whether a transaction is right to use goods / deemed sale. The Ld. Consultant pointed out that the TRU circular D.O.F. No.334/1/2012-TRU New Delhi dt.16.03.2012 has given clarification in paras 2.5.7, 2.5.8 as to what are 'deemed sales' and also the meaning of 'transfer of right to use any goods'.

2.6 In the Taxation of Services and Education Guide issued by the CBEC dt. 20.06.2012, which is after the major amendments wherein declared services was introduced, the Board has clarified the meaning and scope of the phrase "transfer of right to use goods". The clarification in this Education Guide is again based on the decision of the Hon'ble Apex Court in *BSNL Vs UOI* - 2006-TIOL-15-SC-CT-LB = 2006 (2) STR 161 (SC) The test laid down by the Board relying upon *BSNL* case of the Hon'ble Supreme Court is as follows :

1. There must be goods available for delivery;
2. There must be a consensus ad idem as to the identity of the goods;
3. The transferee should have 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;
4. For the period during which the transferee has such legal right, it has to be the exclusion to the transferor – this is the necessary concomitant of the plain language of the statute, viz., a 'transfer of the right to use' and not merely a license to use the goods;
5. Having transferred the owner cannot again transfer the same right to others.

2.7 The Ld.Consultant adverted to the various clauses in the charter agreement and compared the same with the test laid down in

the *BSNL* judgment / Education Guide issued by department to explain that clauses in the agreement would satisfy the conditions laid down in *BSNL* judgment to hold that transaction is nothing but a transfer of right to use goods and not transfer of goods by way of hiring, leasing, licensing or any such manner. His submissions in regard to clause in the charter agreement is as under :

Sl.No.	Test in <i>BSNL</i> case	Relevant Clause in Charter Agreement	Appellant argument
1)	There must be goods available for delivery	Clause 1: Delivery <i>"The lessor hires to the lessee and the lessee accepts the vessel together with the entire equipment outfit, appliances and spare parts."</i> <i>The Vessel shall be delivered by the Lessor at the place and time indicated in box (8)</i>	The said clause clearly demonstrates that there has been delivery of goods.
2)	There must be a consensus ad idem as to the identity of the goods	Box 4 of the Preamble of Charter Agreement – Particulars of Vessel <i>Name :</i> <i>Type :</i> <i>Class :</i> <i>Official No.:</i> <i>Call Sign :</i>	All the charter agreements are for specified or pre-identified vessels. This could be evident from Box 4 of the Preamble to the Charter Agreement which provide the details of the vessel imported.

		<i>Flag :</i>	
3)	The transferee should have 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.	Clause 6 E & F; Maintenance and Operation Clause 6E "The lessee shall be responsible for the importation and exportation of the vessel in India in the name of the lessee" Clause 6F "The lessee will be responsible for all applicable and relevant permits and/or licenses necessary to deploy the vessel and its activities in India"	UDRC has obtained Specific Period License ("SPL") from the Director General, Shipping under the Ministry of Shipping for the usage of vessel during the period of stay in India. The vessel cannot be used unless license is issued. Only upon receipt of Special period license the vessel can be converted to coastal run to work in inland waters. SPL is issued by the Directorate General of Shipping under the Ministry of Shipping for the usage of vessel during the period of stay in India. The vessels cannot be used unless such license is issued. The SPL requires the importer to mention the area of use and to facilitate the same, the area of use was mentioned as 'Port of Tuticorin' in the SPL. Thus, it clearly demonstrates that the legal right vests with UDRC as specific legal permissions have been obtained by UDRC.
4)	For the period during which the transferee has such legal right, it has to be the exclusion to the transferor	Clause 6A& 6C; Maintenance and Operation Clause 6A <i>"The lessee shall maintain the vessel, her machinery, appurtenances and</i>	With regard to Charter of the vessels, the said clause clearly provides that the legal right (or control) of goods has been transferred to lessee (UDRC); The goods have been delivered by lessor to

		<i>spare parts in a good state of repair, in efficient operating condition and in accordance with good maintenance practice and shall keep the Vessel with unexpired classification of its class with other required certificates in force at all times."</i> Clause 6C <i>"The vessel shall be delivered by the lessor without any crew"</i>	UDRC The goods have been delivered without any crew- i.e. it has to be manned by UDRC. The said clause demonstrates that the effective custody and control is transferred to UDRC. During the lease period, the vessels have to be maintained by UDRC- the said clause also demonstrates that the control over vessel has been passed over to UDRC during the lease period.
5)	Having transferred, the owner cannot again transfer the same right to others.	No clause in agreement which provides the rights/option of lessor to transfer the rights to any other person.	Considering the nature of arrangement and the fact that vessel is being imported under a <u>specific license for a specified project</u> in India, there is no scope for the lessor to transfer the same rights to others and the lease should be construed as to the exclusion of others. During the period of the charter, the vessel was in exclusive possession and control of UDRC;

2.8 The Commissioner has mainly relied upon clause 6A, 6B and 6E of the Charter Agreement titled "Maintenance and operations". It is alleged that as per these clauses, the lessor is given the right of withdrawing the vessel from the lessee, in case, the lessee

(appellant) does not take steps to do the necessary repairs of vessel. This condition that the lessor shall have the right of withdrawing the vessel from the appellant has been considered by the department to conclude that there is no transfer of possession or effective control of the vessel to the appellant. Ld. Consultant submitted that this clause only stipulates that the appellant / lessee is responsible to do repairs of the vessel and also to keep the vessel in good and fit condition. The lessee has been given the right to withdraw the vessel only in case timely repair and maintenance is not done which is a condition to safeguard the interest of the owner / lessor in order to prevent the vessel from losing its value due to not effecting the repairs required.

2.9 The said clause is seen in most of the charter agreements. Merely because the lessor is given a right to withdraw the vessel in case repairs are not done does not indicate that the appellant has not been given possession or effective control of the vessel. The very same clause has been considered by the Tribunal in the case of *International Seaport Dredging Ltd.* - 2018 (3) TMI 633-CESTAT Chennai [2018 (12) GSTL 185 (Tri-Chennai)] wherein it was held that the transaction would be that of transfer of right to use goods and not an activity falling under 'Supply of Tangible Goods Service'. Though the said decision was rendered prior to 2012, the definition of 'service' which has been introduced w.e.f. 01.07.2012 excludes deemed sale. To further support his argument, the Ld. Consultant relied upon the decision in the case of *Heligo Charters Pvt. Ltd. Vs*

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CST Mumbai - 2017-TIOL-2831-CESTAT-MUM and the case of *Petronet LNG Ltd. Vs CST* - 2013-TIOL-1700-CESTAT-DEL.

3.0 Clause 6B in the agreement is another clause relied by the department to hold that the transaction is not a transfer of right to use goods and is discussed in para 8.10.4 of the impugned order. Clause 6B, reads as follows :

“During the charter period, as indicated in Box (6), the vessel shall retain her present name and flag as indicated in Box (4). The Lessee will make no structural changes to the vessel”

Department is of the view that this indicates the lessor’s dominance over the vessel which proves that effective control over the vessel during the period of lease is with the lessor. It is submitted by the Ld. Consultant that merely because certain restrictions are placed, it cannot be said that the appellant does not have effective control over the vessel. The vessel is registered in Luxembourg and retains the said flag. Not being a sale there is no transfer of ownership.

3.1 The Ld. Consultant countered the discussions made in the impugned order as stated above with regard to relevant clauses in the agreement. Arguments were also advanced on the ground of revenue-neutrality as well as the invocation of extended period of limitation. It is submitted by him that the demand has been made under reverse charge mechanism. Even if the appellant had paid the service tax they would be eligible for availing credit during the disputed period. The entire situation being revenue-neutral, the

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demand made invoking extended period cannot sustain. To support this argument, he relied on the decision in the case of *Jay Yuhshin Ltd. Vs CCE New Delhi -2020* (119) ELT 718 (Tri.-LB). It is also argued by him that the issue is interpretational one and therefore the invocation of extended period cannot sustain; that the department has not adduced any evidence to show that the appellant has suppressed facts with intention to evade payment of service tax. All the figures were properly accounted and reflected in the financial statements and ledgers of the appellant; that the appellant has not suppressed any facts with intention to evade payment of service tax and therefore the demand is barred by limitation.

4. Ld. A.R Ms. Sridevi T. appeared and argued for the department. She supported the findings in the impugned order. Referring to the finding in para 8.3.2 of the impugned order, she submitted that as per clause (3) of the agreement, the vessel shall be redelivered to the lessor in good condition after the charter period. During the charter period, vessel shall be kept insured by the lessor. All these would go to show that the transaction is nothing but transfer of goods by way of hiring. The Commissioner has rightly discussed that every transfer of goods on lease, licence or hiring basis does not result in transfer of right to use the goods. Only if there is transfer of possession and transfer of effective control over such goods, it can be said that the transaction involves a transfer of right to use the goods. In the present case, the possession and effective control have not

been transferred and remains with the lessor. Only the use of goods are permitted to the appellant while control remained with the owner of the goods. There is no transfer of ownership. It is evident from Clause 6A that the effective control has not been transferred to the appellant. Clause 6A gives lessor all rights to withdraw the vessel from the service of the appellant in case appellant does not do necessary repairs and maintenance of the vessel. This right to withdraw the vessel during the charter period clearly indicates that effective control has not been transferred to the appellant. Further, during the charter period, the vessel has to retain her present name and flag. Thus the lessee does not get any right to change the name or flag of the vessel. This stipulation in the agreement also shows that there is no sale of the vehicle and it is merely supply to use the vehicle. Ld.A.R however fairly conceded that although the stipulations in Clause (9) of the agreement with regard to insurance was alleged to be one of the reasons in the SCN to observe that effective control has not been transferred to the appellant, in the impugned order, the said ground has not been considered by the Commissioner to hold that the transaction is not transfer of right to use the goods. But Clause 6A to F would clearly prove that possession and effective control has not been transferred. The decisions relied by the consultant for the appellants are relating to the period prior to 2012. After 1.7.2012, 'service' has been defined under Section 65B (44) of the Finance Act, 1994. The classification of services

have been given away with and unless the activity falls outside the purview of Negative list it would be taxable. Section 66E enumerates the 'declared services'. Sub-clause (f) of 66E states that transfer of goods by way of hiring, leasing, licensing to use such goods would be a declared service. In the present case, the transfer of goods is by way of hiring and is not a transfer of right to use the goods. On merits the confirmation of demand is proper. The appellant did not discharge service tax on the consideration paid to the foreign lessor. The conditions in the charter agreement is very clear and the claim of appellant that they entertained a bonafide belief that the transaction was only transfer of right to use the goods is nothing but their intention to evade payment of service tax. Merely because the appellants would be eligible for credit if they paid service tax cannot be a ground to hold that they are not guilty of evading tax. She prayed that there are no grounds to interfere with the impugned order.

5. Heard both sides.

6. The period involved is from November 2015 to January 2016. For the period prior to 1.7.2012 when the classification of services were in existence, similar issue has been decided by the Tribunal in the case of *International Seaport Dredging Ltd.* (supra) and *Petronet LNG Ltd.* (supra). There has been sweeping amendment to the Finance Act, 1994 w.e.f. 1.7.2012. Thus our

endeavour would be to examine whether the legal analysis of the 'transfer of right to use goods' made in the decisions cited above would be applicable post 2012 after the introduction of the definition of 'service' and also 66E mentioning the 'declared services'.

“Declared services

66E. The following shall constitute declared services, namely:-

- (a) renting of immovable property
- (b) construction of a complex, building, civil structure or a part thereof, including a complex or building intended for sale to a buyer, wholly or partly, except where the entire consideration is received after issuance of completion certificate by the competent authority.

Explanation — For the purposes of this clause, —

- (I) the expression “competent authority” means the Government or any authority authorised to issue completion certificate under any law for the time being in force and in case of non-requirement of such certificate from such authority, from any of the following, namely:-
 - (A) architect registered with the Council of Architecture constituted under Architects Act, 1972 (20 of 1972); or
 - (B) chartered engineer registered with the Institution of Engineers (India); or
 - (C) licensed surveyor of the respective local body of the city or town or village or development or planning authority;
- (II) the expression “construction” includes additions, alterations, replacements or remodelling of any existing civil structure;
- (c) temporary transferor permitting the use or enjoyment of any intellectual property right;
- (d) development, design, programming, customisation, adaptation, upgradation, enhancement, implement of information technology software;
- (e) agreeing to the obligation to refrain from an act, or to tolerate an act or a situation or to do an act

- (f) **transfer of goods by way of hiring, leasing, licensing or in any such manner without transfer of right to use such goods;”**
- (g) activities in relation to delivery of goods on hire purchase or any system of payment by instalments;
- (h) service portion in the execution of a works contract;
- (i) service portion in an activity wherein goods, being food or any other article of human consumption or any drink (whether or not intoxicating) is supplied in any manner as a part of the activity;

From the above, it can be seen that as per sub-clause (f) transfer of goods by way of hiring, leasing or licensing or in any similar manner would be a taxable service. However, if the transfer involves right to use the goods, it would be outside the purview of taxability. The definition of “services” introduced w.e.f. 1.7.2012 in Section 65B (44) is also worth of reproducing which is as under :

“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 (29A) of article 366 of the Constitution;** or
 - (iii) 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.

7. In the present case, the question is whether the transfer of goods is by way of hiring of the vessel simplicitor or whether it

involves transfer of right to use the vessel. For a transaction to be transfer of right to use the goods, there should be transfer of possession as well as transfer of effective control. In the present case, the department has mainly relied upon clause (6) of the agreement, to contend that there is no transfer of possession as well as effective control. Clause (6) and its various sub clauses is reproduced as under :

"6. Maintenance and operations

- A. The Lessee shall maintain the Vessel, her machinery, appurtenances and spare parts in a good state of repair, in efficient operating condition and in accordance with good maintenance practice and shall keep the Vessel with unexpired classification of its class and with other required certificates in force at all times. Owner shall be responsible for delivering the necessary spares till boarder of India.*

The Lessee shall take immediate steps to have the necessary repairs done with a reasonable time failing which the Lessor shall have the right of withdrawing the Vessel from the service of the Lessee without noting any protest and without prejudice to any claim the Lessor may otherwise have on the Lessee under this Charter.

- B. During the Charter period as indicated in box [6], the Vessel shall retain her present name and flag as indicated in box [4]. The Lessee will make no structural changes to the vessel.*
- C. The Vessel shall be delivered by the Lessor without any crew.*
- D. Except as otherwise provided in this Charter Party, the Lessee shall pay all charges and expenses of every kind and nature whatsoever incidental to the use and operation of the Vessel under this Charter Party.*

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E. The lessee shall be responsible for the importation and exportation of the Vessel in India in the name of the Lessee.

F. The Lessee will be responsible for all applicable and relevant permits and/or licenses necessary to deploy the vessel and its activities in India.”

The above clause which relates to maintenance and operation states that, it is the responsibility of the appellant to maintain the vessel in proper condition. Undisputedly the operations are fully under the control of the appellant. The appellant has obtained necessary license to use the vessel for dredging. This license is location specific. During the charter period the vessel can be used only in this location (port). The entire crew and staff is of the appellant. All this would go to show that the appellant has entire control for operating the vessel during charter period.

8. It is stated in this clause that if the appellant does not maintain the vessel by doing necessary repairs, the owner / lessor will have the right to withdraw the vessel from the service of the appellant. The question is whether such restriction is an indication that there is no transfer of effective control of the vessel. The Ld. Consultant has explained that such a clause giving right to the owner / lessor to withdraw the vessel is only to protect the interest of the owner on the vessel. It also has to be noted that such right to withdraw the vessel comes into play only when there is a breach in the clause of the agreement to do the necessary repairs of the vessel. During the charter period, the appellant has full fledged right to use the vessel by abiding to the conditions in

the agreement to the exclusion of the lessor / owner of the vessel.

It goes without saying that when there right is given to operate the vessel it also casts a responsibility to maintain the vessel in proper and good condition. Similar conditions were analyzed by the Tribunal in the case of *Petronet LNG Ltd. Vs CST New Delhi* - 2016 (46) STR 513 (Tri-Del) and also *International Seaport Dredging Ltd.* - 2018 (3) TMI 633-CESTAT CHENNAI = 2018 (12) G.S.T.L 185 (Tri.-Chennai). In *International Seaport Dredging* (supra), the Tribunal in the said case after analysing the clause stipulating for repair and maintenance of the vessel and other relevant clauses observed as under :

"17. We note that the analysis and reasoning adopted by the Tribunal in *Petronet LNG* are squarely applicable to the present dispute. In fact, in the present case, Manager, Master and crew of the vessel and are actually under control and employment of the appellants. The maintenance of the vessel for wear and tear and also expenses for lubricating, spare parts, water etc. are in fact met by the appellant only. This is not the case in the case of *Petronet LNG* (supra). Even then the Tribunal in the said case held that reading the charter agreement as a whole, it is clear that there is a transfer of right of possession and effective control of the vessel with the assessee.

18. We note that the adjudicating authority observed that there is no legal transfer of right of possession or effective control of the vessels by the appellant. We note that such observation is contrary to the facts as revealed from the terms of charter agreement. It is relevant to note here that the transaction is not a sale simplicitor. But a transaction where there is transfer of right of possession and effective control of the goods transferred are considered as deemed sale. The clarification issued by the Board on 29-10-2008 explaining the scope of the present tax entry is relevant in this regard. It is clarified that transaction of allowing another person to use the goods without giving the legal right of possession and effective control, not being treated as sale of goods, is treated as service. As elaborately analysed above, in the present case, there is a transfer of possession and effective control of the vessels to the appellant under the various clauses of the charter agreement which clearly brings out that the appellant is having legal right of possession and effective control of the vessel."

In the above decision, the Tribunal had referred to the decision of Hon'ble High Court of Karnataka in *Great Eastern Shipping Co. Ltd. Vs State of Karnataka* – 2004 (136) STC 519 (Kara). The Hon'ble High Court held that the transaction was a deemed sale and is subject to levy of sales tax. Against this decision, an appeal was preferred by the assessee before the Hon'ble Apex Court as Civil Appeal No.3383 of 2004. It is noticed that the same was disposed vide decision dt.04.12.2019 wherein the decision of the Hon'ble High Court of Karnataka was upheld. Merely because there is a right given to the owner / lessor to withdraw the vessel in case they cause breach of the condition to do repairs of the vessel, cannot be a ground to infer that there is no transfer of effective control of the vessel. Even though discussions in these decisions pertain to the period prior to 1.7.2012, the facts being identical the legal principles for understanding whether a transaction is transfer of right to use goods are the same. This is evident from the TRU Circular dt. 16.3.2012 and the Service Tax Education Guide dated 20.6.2012 issued by CBEC. The Board has relied on the decision rendered by Apex Court in *BSNL Ltd. Vs UOI* 2006 (20 STR 16 (SC)). The meaning and scope of the phrase 'transfer of right to use goods' is clarified as a transaction which involves transfer of possession and effective control over such goods. A fleeting look on the definition of "Supply of Tangible Goods Service" under Section 65 (105) (zzzzj) of the Finance Act,1994 as it stood then clarifies why these decisions can also be

made applicable for the period after 1.7.2012. The definition of "Supply of Tangible Goods Service" is as under :

"any services 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 of possession and effective control of such machinery, equipment and appliances"

9. Prior to 1.7.2012 when the transaction did not involve transfer of possession and effective control, the activity would be taxable under 'Supply of Tangible Goods Services'. The test for determining whether a transaction is a transfer of right to use goods has always remained the same.

10. The department in their Education Guide has followed the decision of the Hon'ble Supreme Court in *BSNL* (supra) to lay down the test to determine as to whether the activity is transfer of right to use the goods. The Ld.Consultant has put forward submissions in tabular column (para 2.7 above) to substantiate that the agreement satisfies all the conditions laid down by the Apex Court decision. The issue mainly revolves around conditions 3, 4 & 5 elaborated in para 2.7 above. In the present case, as per clause 6F, the appellant has taken license for carrying out dredging. During the stay of the vessel in India the vessel can be used only as per the license which is to carry out dredging activity at the port. As per Clause 6F of the agreement, the third test

thus stands satisfied. The fourth test is that the transfer of such right has to be to the exclusion of the transferor. As already discussed, except for a mere condition that the lessor would be able to withdraw the vessel in case of breach of agreement to do necessary repairs and maintenance, there is nothing to show in the agreement that the lessor retains the control over the vessel. The appellant has absolute discretion to use the vessel for dredging during the charter period. Such enjoyment of the vessel cannot be interrupted by the lessor unless there is a breach to do the repairs of the vessel. Further, this condition is subject to condition No.16 which is the clause for pretermination of the agreement. If there is breach on the side of the appellant to do periodical maintenance which may give rise to a right to the lessor to withdraw the vessel, then lessor has to abide by Clause 16 (Pre-termination notice) to put an end to agreement and then withdraw the vessel. Appellant thus enjoys full right to exclusion of others. During the period, neither the owner can use the vessel nor can the owner transfer the right to use of the vessel to another person. We have no hesitation to hold that the appellant enjoys right to use the vessel to the exclusion of the owner.

11. Another finding in the impugned order is that since the appellant retained the registration and the flag of the vessel, there is no transfer of effective control over the vessel. The vessel is registered in Luxembourg. It may not be practical to change the registration of the vessel in each case of charter agreement. In

the present case, there is no change in ownership. If that be the case, it would be a sales simplicitor. Change of Registration and change of flag is necessary only when there is change in ownership.

12. From the discussions made above, we are of the considered opinion that the transaction in the present case is identical to the transaction analysed by the Tribunal in the case of *International Seaport Dredging* (supra) as well as *Petronet LNG Ltd.* (supra). The transaction is nothing but transfer of right to use the goods and does not fall within the 'declared services' as alleged by department. The Demand therefore cannot sustain. The issue on merits is found in favour of appellant.

13. The Ld. Consultant has also advanced arguments on the ground of limitation. Show cause notice is dated 07.12.2017 and issued for the period November 2015 to January 2016. Undisputedly, the demand has been raised on reverse charge basis and the appellant would be eligible for credit, if they paid the service tax. Thus it is a revenue-neutral situation. The Larger Bench of the Tribunal in the case of *Jay Yuhshin Ltd. Vs CCE New Delhi* (supra) has held that extended period cannot be invoked when the situation is of revenue-neutral one. Further the issue is also interpretational one. Moreover, the department has not been able to establish any positive act on the part of the appellant that they have suppressed facts with intention to evade payment of service tax. Taking note of these facts, we are of the considered

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opinion that the demand raised for the extended period cannot sustain. Appellant succeeds on the issue of limitation also. Impugned order is set aside. Appeal is allowed with consequential relief, if any, as per law.

(Order pronounced in chambers on **24.06.2020**)

Sd/-

**(SULEKHA BEEVI C.S.)
MEMBER (JUDICIAL)**

Sd/-

**(P. VENKATA SUBBA RAO)
MEMBER (TECHNICAL)**