IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
<u>CHENNAI</u>

REGIONAL BENCH – COURT NO. III

Service Tax Appeal No. 40792 of 2015

(Arising out of Order-in-Original Nos. 8,9&10/2015 dated 02.01.2015 passed by Commissioner of Service Tax, Newry Towers, No. 2054-I, II Avenue, Anna Nagar, Chennai – 600 040)

M/s. Caravel Logistics Pvt. Ltd. **...Appellant**
No. 484, Pantheon Plaza,
Pantheon Road, Egmore,
Chennai – 600 008.

Versus

Commissioner of GST and Central Excise **...Respondent**
Newry Towers, No. 2054-I,
II Avenue, Anna Nagar,
Chennai – 600 040.

<u>APPEARANCE:</u>

For the Appellant : Mr. Karthick Sundaram, Advocate
For the Respondent : Mr. Harendra Singh Pal, Authorised Representative

<u>CORAM:</u>

HON'BLE MS. SULEKHA BEEVI C.S., MEMBER (JUDICIAL)
HON'BLE MR. VASA SESHAGIRI RAO, MEMBER (TECHNICAL)

<u>FINAL ORDER No. 40844 / 2024</u>

DATE OF HEARING : 02.07.2024
DATE OF DECISION: 11.07.2024

Order :- Per Ms. SULEKHA BEEVI C.S.

Brief facts are that the appellant is engaged in providing services *viz.,* Custom House Agent Service, Clearing & Forwarding Agency Service, Transport of Goods through Waterways, Business Auxiliary Service and

Transport of Goods by Road. They are registered with the Service Tax Department.

1.2 During the course of audit of accounts by the Internal Audit Section of the Service Tax Commissionerate, Chennai, it was noted that the appellant had taken containers on lease from foreign companies which are in turn used by the appellant to transport cargo for import as well as export. The appellant paid lease rent charges in foreign currency to the service providers located abroad. It appeared to the Department that the containers were leased by the overseas service providers only for use by the appellant and the appellant has no right of possession or effective control of the containers. The appellant is thus liable to pay service tax under the category of 'Supply of Tangible Goods Services' on the lease rent charges paid by them from 16.05.2008 onwards, on reverse charge basis.

1.3 Show Cause Notice dated 08.01.2013 was issued to the appellant demanding service tax along with interest on the lease rentals paid by the appellant during the period from 16.05.2008 to 31.03.2012. The Statement of Demand No. 113/2014 dated 09.05.2014 was issued for the period from April 2012 to June 2012, as well as, another Show Cause Notice No. 214/2014 dated 01.09.2014 was issued for the period July 2012 to March 2013, on the very same allegations and proposing to demand service tax under 'Supply of Tangible Goods Services' along with interest and also for imposing penalties. After due process of law, the Original Authority adjudicated all the Show Cause Notices together and held that the activity would be classifiable under the category of Supply of Tangible Goods Services. The demand for the period from 16.05.2008 to 31.03.2013, April 2012 to June 2012 and July 2012 to March 2013 was confirmed with interest and penalties. Aggrieved by such order, the appellant is now before the Tribunal.

2.1 The Ld. Counsel Shri Karthick Sundaram appeared and argued for the appellant. It is submitted that the impugned order has held that the activity of leasing containers by the foreign company to the appellant amounts to service under Supply of Tangible Goods Service for the period prior to 01.07.2012 and under Section 65(B)44 for the period w.e.f. 01.07.2012. The Ld. Counsel referred to the definition of 'Supply of Tangible Goods Services' under Section 65(105)(zzzzj)which reads 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 right of possession and effective control of such machinery, equipment and appliances"*

2.2 It is submitted that only if the supply is without transferring the right to possession and effective control of such machinery, equipment and appliances, the activity would fall under the definition of 'Supply of Tangible Goods Services'. In the present case, the activity of leasing the containers would fall under transfer of right to use of goods / deemed sale and therefore is not chargeable to service tax. The 'transfer of right to use 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. For the period w.e.f. 01.07.2012 also, the definition of 'Service' excludes deemed sale which falls within the meaning of Article 366 (29A) of the Constitution of India. As per Section 66E(f) of the Finance Act, 1994, transfer of goods by leasing without transfer of right to use such goods is a deemed service. In the present case, the appellant is given right to use the goods, and therefore, it does not fall under Section 65B(44) or Section 66E(f) of the Finance Act, 1994. Since, the possession as well as effective control is transferred to the appellant, the activity will not fall under Section 65(105)(zzzzj) of the Finance Act, 1994.

2.3 It is submitted that the Hon'ble Supreme Court in the case of *Bharath Sanchar Nigam Ltd. Vs. Union of India [2006 (3) VST 95]* has set out a five-fold test for examining whether the transaction is a 'transfer of right to use goods'. On an application of the test laid down to the facts of the present case, it would be clear that the activity is a transfer of right to use the containers given to the appellant and is not an activity of Supply of Tangible Goods or lease falling under Section 66E(f). The Ld. Counsel compared the points of analysis in the *BSNL* case *(supra)* with that of the present case which is as under:-

BSNL Test	Present Case
There must be goods available for delivery	The containers are available for delivery on the date of the lease.
There must be a consensus ad idem as to the identity of the goods	There is consensus ad idem as to identity of containers as each container containers a unique serial number for identification.
The transferee should have a legal right to use the goods-consequently all legal consequences of such use including any permissions or licenses required therefor should be available to the transferee	The Appellant has a legal right to use the container and all permissions/licensees are available to the transferee.
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;	For the period of lease, the Appellant has the legal right to use the containers to the exclusion of the transferor. No other person can use such containers.
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."	Having transferred the right to use the containers during the period, the lessor cannot transfer the same rights to others. The containers can be used only by the lessee/Appellant during the lease period.

2.4 It is asserted by the Ld. Counsel that in the present case, the possession is handed over to the appellant and the appellant enjoys right over the container to the exclusion of the lessor.

2.5 The Agreements entered by the appellant with the lessor (foreign company) was also furnished. Para 4 of the Agreement stipulates the delivery locations. It states that the containers shall be delivered from any of the lessor depots as and when available. Para 6 states about Cost and Repairs. It states that cost of repairs if any incurred is on the appellant subject to any optional arrangement with lessor whereby lessor is responsible for cost of repair. Para 8 provides for Exclusion and Warranties. It states that the appellant (lessee) shall have quiet possession as against any person claiming under or through lessor. This would show that the appellant is able to use the container during the period of lease to the exclusion of the lessor. Para 13 talks about the Insurance. It states that the appellant who is the lessee is to obtain the insurance and incur expenses for the same. It is submitted that all these conditions would show that the complete possession and effective control has been handed over to the appellant.

2.6 The Adjudicating Authority has rejected the plea of the appellant that the activity amounts to 'transfer of right to use of goods' by relying upon the conditions in the agreement which says that the container should not be used for storage or transportation of hazardous substances, *etc.* It is thus assumed by the Adjudicating Authority that transport can be only of cargo which is agreed by the lessor. There is no such condition in the agreement that the lessor has any right to decide the cargo which is to be carried in the container. Only for safety and compliance of regional law, the Agreement stipulates that the appellant should not carry hazardous substances in the container.

2.7 The Ld. Counsel relied upon the decision in the case of *Lindstrom Services (P) Ltd. Vs. Commissioner of GST [2020 SCC ONLINE CESTAT 4542]* to submit that in the said case, the Tribunal had analysed whether the transaction of work wear rental would fall under the category of Supply of Tangible Goods Service. After analysing the conditions of Agreement, the Tribunal followed the decision passed by the Chandigarh Bench in the assessee's own case and set aside the demand. The Department filed an appeal before the Hon'ble Apex Court which was dismissed maintaining the decision of the Tribunal as reported in *[2023 (11) CENTAX (228) SC]*.

2.8 In the case of *Universal Dredging and Reclamation Corporation Ltd. Vs. Commissioner of CGST & Central Excise [2020 SCC ONLINE CESTAT 110]*, the Tribunal had occasion to analyse whether the hire of the chartered vessel for dredging activity would amount to declared service under Section 66E(f) of the Finance Act, 1994 w.e.f. 01.07.2012. In the said case, the vessels were taken by the assessee therein only on lease basis under a Bare Boat Charter Agreement. The vessels were imported by assessee as per the Agreement for use of dredging activity. Post completion of the project, the vessels / equipment were re-exported. After putting the facts to the five-fold test laid down by the Hon'ble Apex Court in the case of *BSNL (supra)*, the Tribunal held that the activity falls under transfer of right to use, and is not subject to levy service tax.

2.9 In a recent decision, the Delhi Bench of the Tribunal in the case of *SRF Ltd. Vs. Commissioner of LTU, New Delhi [2023 (109) GSTR 379]* held that no service tax is leviable under reverse charge mechanism when the transaction is a deemed sale. The assessee therein entered into contracts with foreign suppliers for obtaining ISO tankers on lease / rental basis which were used by the assessee for transportation of refrigerant gases by sea route. After analysing the Agreements, the Tribunal held that the possession and effective control over the ISO tankers during the entire period was transferred to the assessee and therefore the activity is not taxable under Supply of Tangible Goods Services.

2.10 Without prejudice to the above arguments, it is submitted that the entire transaction took outside India, and therefore no service tax can be levied. The Ld. Counsel argued on the ground of limitation also. The issue being interpretational in nature, the extended period cannot be invoked as the appellant was under *bonafide* belief that the activity is transfer of right to use and not subject to levy of service tax. For the same reasons, it is prayed that the penalties may be set aside. The Ld. Counsel prayed that the appeal may be allowed.

3.1 The Ld. Authorised Representative Shri Harendra Singh Pal appeared and argued for the Department. It is submitted that the arguments of the Ld. Counsel for the appellant that the activity is a transfer of right to use goods cannot be accepted. The Adjudicating Authority had analysed the Agreement and discussed as to whether the activity would fall under Supply of Tangible Goods Service. The basic features of the Agreement are as under:-

- Assessee has entered into contracts for lease of 'containers' with lessor who has in their disposal 'containers' to give under lease
- 'Containers' means the equipment, and any machinery supplied with the equipment
- Assessee has to take delivery of containers from the locations set forth by the lessor
- Assessee has to maintain the containers as per standards
- Cost of repairs if any incurred is on the assessee subject to any optional arrangement with lessor whereby lessor assumes responsibility for some portion of the cost of repair
- Assessee has to return the containers at 'Return locations' specified by the lessor
- Assessee requires prior written consent of lessor for making any modifications, improvements, etc in the container
- Assessee has to use each container so as to comply with all loading limitations, handling procedures and operating instructions, and to prevent excessive impact, unbalanced loading, and other hazardous conditions.
- Assessee should not use the Containers for storage or transportation of Hazardous Substances or other unsuitable contents which may corrode, oxidize, severely dent, puncture, contaminate, stain or otherwise damage the containers or be in contravention of any Environmental laws
- Assessee shall have no right to sublease the containers or assign its rights under the lease except with the prior written consent of lessor
- Assessee at their own cost has to maintain a comprehensive general liability insurance and the policies are to be endorsed noting the interest of the Lessor and any change in the insurance arrangement with respect to the containers are to be intimated to the lessor
- The containers are to be used for a minimum compulsory period and if returned early assessee is liable to pay increased rent

From the above, it can be seen that on lease,

- assessee has to take delivery of the containers from the 'Delivery locations' stipulated by the lessor and return them at the place stipulated by the lessor;
- use the container for transport of agreeable cargo;
- maintain the container during lease period; if lessor estimates any damage to the container as economically feasible has to undertake the repair of the same; if beyond repair has to pay the 'replacement value' agreed upon to the lessor and such payment is not deemed a

purchase of the relevant container; i.e., replacement of container is at the discretion of the lessor;

- has to maintain a comprehensive general liability insurance which is to regularly intimated to the lessor;
- cannot sub-lease at their will;
- cannot make any changes to the container as deemed fit by them without consent & prior approval of the lessor

3.2.1 It is submitted that the though the appellant takes delivery of the container, the appellant has to take delivery from the yard of the lessor as per the instructions given by the lessor. This would show that there is no transfer of possession.

3.2.2 The appellant is obliged to maintain a comprehensive general insurance as per clause 11 of the Agreement of which the value is determined by the lessor. Such insurance policies should be endorsed noting the interest of the lessor / owner / manager. The policy cannot be changed without prior notice to the lessor. This shows that obtaining the insurance and maintaining the insurance is pre-requisite for lease and the same indicates that the right of possession is not transferred.

3.2.3 During the use of containers in their business, the necessary permissions in complying with the customs procedures of various countries is on the appellant. Such compliance is in the course of business of the appellant and do not in any way establish that the appellant has effective control over the containers.

3.2.4 The appellant cannot sub-lease their containers without prior consent of the lessor or make any changes to the containers. So also, the containers can be used only for International Trade which all goes to establish that the lessor holds the possession and effective control even though the custody of the containers is given to the appellant on payment of rentals. The Ld. Authorised Representative asserted that the appellant holds custody of the containers and used them in their business and there is no transfer of right to use of such goods as there is no transfer of effective control or possession.

3.3 The decision in the case of *Commissioner of Service Tax, Ahmedabad Vs. Adani Gas Ltd. [Civil Appeal No. 2633 of 2020 dated 28.08.2020]* was relied by the Ld. Authorised Representative to argue that after examining the applicability of the tests rendered in the case of *BSNL (supra)*, the Hon'ble Apex Court held that the amounts collected for providing the SKID equipment by the assessee to domestic and commercial consumers who were using piped natural gas would fall under the category of Supply of Tangible Goods Services under Section 65(105)(zzzzj) of the Finance Act, 1994. It is prayed that the appeal may be dismissed.

4. Heard both sides.

5. The issue that arises for consideration is:-

i. whether the lease rentals paid by the appellant to the foreign company (Lessor) for hiring the containers is subject to levy of service tax under Supply of Tangible Goods Services under Section 65(105)(zzzzj) of the Finance Act, 1994 upto 30.06.2012.
ii. Whether the activity would fall under definition of Service as per Section 65B(44) for the period w.e.f. 01.07.2012.

6. The definition of Supply of Tangible Goods Services has already been noticed above. The argument put forward by the appellant is that the transaction is transfer of right to use goods / deemed sale and therefore is not subject to levy of service tax under Section 65(105)(zzzzj) upto 30.06.2012 or Section 65B(44) of the Finance Act, 1994 w.e.f. 01.07.2012. To examine as to whether the transaction constitutes transfer of right to use goods / deemed sale, the test laid down by the Hon'ble Apex Court in the case of *BSNL (supra)* is as under:-

> *"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 legal right to use the goods- consequently all legal consequences of such use including any permissions or licenses 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 stature-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. Our endeavour would be to analyse the Agreement as to whether the above attributes are present in the transaction. In the present case, the containers are delivered to the appellant by the lessor. The Ld. Authorised Representative appearing for the Department has argued that since the containers have to be taken delivery from the location as instructed from the lessor, it cannot be said that there is a transfer of possession of goods. The said argument does not find favour with us. When the containers are delivered to the appellant it constitutes transfer of possession of the goods by the lessor.

8. In the present case, there is meeting of minds *(consensus ad idem)* with regard to the identity of the goods as each container has identification number. The lessor and the lessee had agreed to lease a specific container / containers. The second test is also satisfied.

9. In the present case, the container is used by the appellant for transportation of cargo. It is for the appellant to take necessary Licenses from the Customs Authorities and also to register the container before the Customs. The appellant has legal right to use the container and has all permissions / licenses in their name for compliance with customs formalities as well as courier formalities. The agreement stipulates that hazardous goods should not transported. This condition has been interpreted by the

Department to hold that the lessor is allowed to decide what type of cargo is to be transported. This view is erroneous. The said condition is to maintain the safety of the container by the owner of the container. Since it is not outright sale and only deemed sale, the title still remains with the owner. Another condition pointed out by the Ld. Authorised Representative is that the container is to be used for international transportation. The Ld. Counsel has explained that the rules for coastal running of the vessel is different and only if the vessel is for international transportation, the appellant would be able to get necessary licence / permissions from Customs and other authorities. We find this explanation to be reasonable. We do not find any condition in the agreement allowing the lessor to decide the transportation of cargo.

10. The use of the container during period on lease is to be to the exclusion of the lessor. The appellant has full right to use the container during the lease period which is clear from Para 8 reads as under:-

"8. EXCLUSION OF WARRANTIES

ALL CONTAINERS ARE LEASED AS IS, AND LESSOR WARRANTS ONLY THAT THEY CORRESPOND WITH THE DESCRIPTION SET OUT IN THE SCHEDULE, AND THAT SO LONG AS NO EVENT OF DEFAULT HAS OCCURRED <u>LESSEE SHALL HAVE QUIET POSSESSION AS AGAINST ANY PERSON CLAIMING UNDER OR THROUGH LESSOR</u>, SAVE AS AFORESAID, NO CONDITION OR WARRANTY WHATSOEVER OF ANY KIND HAS BEEN OR IS GIVEN BY LESSOR IN RELATION TO THE CONTAINERS, AND ALL CONDITIONS AND WARRANTIES IN RELATION THERETO, WHETHER EXPRESSED OR IMPLIED, WHETHER STATUTORY, COLLATERAL HERETO OR OTHERWISE, WHETHER IN RELATION DO THE FITNESS OF THE CONTAINERS OR ANY ITEM THEREOF FOR ANY PARTICULAR PURPOSE, OR IN COMPLIANCE WITH ANY CONVENTION, STATUTE, REGULATION, ORDER OR OTHER PROVISION OF LAW OR STANDARD, OR WHETHER IN RELATION TO MERCHANTABILITY OR AS TO DESCRIPTION, STATE, QUALITY OR CONDITION OF THE CONTAINERS OR ANY TEM THEREOF AT DELIVERY OR AT ANY OTHER TIME, ARB HEREBY EXCLUDED AND EXTINGUISHED."

(emphasis supplied)

11. It is stated that the lessee (appellant) shall have quiet possession as against any person claiming under or through lessor. This establishes that the appellant has right to use the containers to the exclusion of the lessor. The fourth test is satisfied.

12. During the lease period, the goods can be used only by the appellant and the lessor cannot transfer the rights to any other person. On perusal of the agreement, it is seen that the lessor does not reserve any right to transfer the right to use to others, during the lease period. The fifth test is satisfied.

13. From the above, we find that the five-fold test put forward in the *BSNL (supra)* case stands satisfied. There is indeed transfer of possession as well as effective control of the containers to the appellant by the foreign supplier. In such circumstances, the activity cannot fall under Supply of Tangible Goods Services as defined under Section 65(105)(zzzzj). As the above five-fold test for transfer of right to use the goods being satisfied, the transaction has to be construed as a deemed sale. It cannot be a 'Service' as defined under 65B(44) of the Finance Act, 1994.

14. Our view is supported by the decision of the Tribunal in the case of *Lindstrom Services (P) Ltd. (supra)*. In the case of *Taneja Aerospace and Aviation Ltd. Vs. Commissioner of GST and Central Excise [2024 (17) CENTAX 335 (Tri. Mad.)]*, a similar issue was considered. It was held that the transaction of leasing of an aircraft from entity abroad does not fall under Supply of Tangible Goods Service as the aircraft is taken as lease agreement along with entire crew of aircraft by assessee. The relevant paragraphs of the decision in Taneja Aerospace and Aviation Ltd. *(supra)* reads as under:-

> *"11. The above would specify the nature of transactions to which tax for sale/purchase of goods would be attracted. Section 66E of the Finance Act, 1994 deals with the concept of declared services. Clause (f) to Section 66E states that 'transfer of goods by way of hiring, leasing, licensing or in any such manner without transfer or right to use such goods' is a declared service. It means a lease agreement 10 Service Tax Appeal No. 41366 of 2014 which does not have the character of transfer of right to use goods is taxable service. The Hon'ble Apex Court in the case of Bharat Sanchar Nigam Ltd. Vs UOI 2006 (2) STR 161 (SC) has laid down certain factors to test whether a transaction is a pure lease or a lease in the nature of right to use of goods (deemed sale). The Board vide circular dated 17.08.2016 has issued instructions adopting the same. Relevant part of Board circular reads as under :-*
>
> > *"2. The matter has been examined. I am directed to draw your attention to the fact that in any given case involving hiring, leasing or licensing of goods, it is essential to determine whether, in terms of the contract, there is a transfer of the right to use the goods. Further, the Supreme Court in the case of Bharat Sanchar Nigam Limited v. Union of India, reported in 2006 (2) S.T.R. 161 (S.C.), had laid down the following criteria to determine whether a transaction involves transfer of the right to use goods, namely, -*
> >
> > *a. There must be goods available for delivery;*
> >
> > *b. There must be a consensus ad idem as to the identity of the goods;*
> >
> > *c. The transferee should have a legal right to use the goods - consequently all legal consequences of such use, including any permissions or licenses required therefor should be available to the transferee;*
> >
> > *d. For the period during which the transferee has such legal right, it has to be to 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 right to others."*

3.1 This criteria must invariably be followed and applied to cases involving hiring, leasing or licensing of goods. The terms of the contract must be studied carefully vis-a-vis the criteria laid down by the Supreme Court in order to determine whether service tax liability will arise in a given case. It is not possible to either give an exhaustive list of illustrations or judgements on this issue. Cases decided under the Sales Tax/VAT legislations have to be considered against the background of those particular legislative provisions and terms of contract in that case."

12. The agreement reveals that the transfer of right to use goods involves transfer of possession and effective control over such goods. In the present case, the possession of the aircraft is transferred to the appellant who has taken delivery of the same. So also, the air craft is operated by the crew employed by the appellant. Appellant has to undertake maintenance and repair of the air craft and has to take insurance for the risk of loss etc. These would go to show that the effective control over such goods is also transferred to the appellant. On examination of the above, it can be seen that the transaction before us satisfies all the above criteria. The nature of the lease is therefore a transaction involving transfer of right to use goods and is not subject to levy of service tax.

13. The very same issue was decided by the Tribunal in the case of Blue Dart Aviation (supra). Relevant paragraph of the decision reads as under :

"8.1 Taking into account these aspects and also the other terms of agreement brought to our attention by the Ld. Sr. Advocate, in particular, the operation of the aircraft with the personnel of the appellant themselves, requirement of maintenance of aircraft by the appellants etc., we have no doubt in our mind that the lease agreement between EAT and the appellant is one wherein the right of possession and control of the aircraft has been bestowed on the appellant and not retained with the lessor. This being so, the ingredients of "Supply of Tangible Goods Service" requiring exigibility to service tax by the Finance Act, 1994 are not present in this transaction. In consequence, the monetary consideration paid by the appellants to EAT cannot be considered as value of "Supply of Tangible Goods Service" and tax demanded on the same as has been done in the impugned orders. "

14. In the above case, the period prior and after 01.07.2012 has been considered. Similarly, in the case of Heligo Charters Pvt. Ltd. (supra) the Tribunal had occasion to consider the demand of service tax on lease agreement of helicopter. In the said case, the assessee was responsible for maintenance of the helicopter as per the DGCA regulations by qualified engineers so as to keep the helicopters always in airworthy conditions and also engage experienced and licensed air crew for operating the helicopters. The department was of the view that legal right of possession and effective control over the helicopters during the lease period was not with the assessee. The demand was under BSS. Department was of the view that since helicopters are infrastructure for the assessee's business, the demand was made under 'Business Support Service'. After analysing the agreement, the Tribunal held that leasing of the helicopters involves transfer of right to use goods (deemed sale) and the demand of service tax cannot be sustained. Relevant paragraphs read as under :

"8. The Appellant are engaged in the business of providing helicopters on charter hire basis to their clients in Oil and Natural Gas industry in India, which, besides providing

helicopters to the client, also involves (i) maintenance of the helicopters during the period of charter hire as per the DGCAs regulations by qualified engineers engaged by them so as to keep the helicopters always in airworthy condition; (ii) employing qualified and licensed crew for operating the helicopters and (iii) operating the helicopters for providing air transportation for the clients personnel and cargo as per their requirement. There is no dispute about the taxability of these services being provided by the appellant to their clients in India and service tax is being paid by the Appellant by treating this activity as supply of tangible goods for use without transfer of right of possession and effective control, which during the period prior to 1.7.2012 was taxable under Section 65 (105) (zzzzj) of the Finance Act, 1994 and during period w.e.f. 1.7.2012 is taxable as a declared service under Section 66E of the Act. For providing this service to their clients in India, the Appellant have taken on lease two helicopters from the two foreign lessors ADA, Abu Dhabi and BLFIL, Ireland. Though in terms of Appellants lease agreement with ADA, the Appellant had option to hire flight and maintenance crew also from the lessor (ADA) along with the helicopter, there is no dispute that the Appellant have not exercised this option and from both the foreign lessors ADA, Abu Dhabi and BLFIL, Ireland, they have received helicopters without any operating or maintenance persons. In other words, both the helicopters have been taken by the Appellant from the foreign lessors on dry lease basis. The main point of dispute is as to whether this leasing of the helicopters by the Appellant on dry lease basis from ADA and BLFIL for use in their business is a taxable service (business support service) under Finance Act, 1994 or is deemed sale under Art 366 (29A)(d) of the Constitution of India and Section 5(2) read with Section 2(g) of the Central Sales Tax Act, 1956 and, hence, outside the purview of Service Tax. According to the Department, from the 'lease agreements', it is evident that this not a mere case of transfer of right to use, as the helicopters construe infrastructure of the Appellants area of business/commerce and, hence, the foreign lessors by supplying this infrastructure to the Appellant, have provided infrastructure support service to the Appellant, which is taxable as support services of business or commerce under Section 65 (105) (zzzq) read with sections 65(104c) of the Finance Act, 1994 during period prior to 1.7.2012 and as taxable service not covered by negative list during period w.e.f. 1.7.2012. It is on this basis, that the Commissioner, in the impugned order, has confirmed service tax demands totalling ₹ 18,84,25,686/- against the Appellant under Section 73(1) of the Act along with interest on it under Section 75 of the Act and imposed penalties totalling ₹ 6,34,01,884 (Rs.4,94,65,906/- + ₹ 1,38,95,978/- + ₹ 40,000/-) under Section 76/78 and 77 of the Act. The Appellants contention, on the other hand, is that since leasing of helicopters from the two overseas lessors involves transfer of right to use from the lessors to the Appellant during the period of lease and since this fact stands accepted by the Department, a fact which is clear from the Commissioners findings in Para 25 of the impugned order, these transactions are deemed sale under Art 366 (29A)(d) of the Constitution and Section 5(2) read with Section 2(g) of the Central Sales Tax Act, 1956 and, hence, these transactions, whether during the period prior to 1.7.2012 or thereafter, are outside the purview of Service Tax under Finance Act, 1994. Before coming to the question as to which of the two rival contentions is correct, it would be worthwhile to go through the legal provisions and the judgments of the Tribunal inthis regard.

…… ….

16. A transaction of supply of some tangible goods by a person to another person for some consideration which involved transfer of right of possession and effective control over the goods/transfer of right to use the goods could be subjected to Service Tax under any of taxable service in the Act during the period prior to 1.7.2012 when there was no definition of "Service" in the Finance Act, 1994 and only the Services defined in various clauses of Section 65(105) of the Act could be subjected to Service Tax. The clause (zzzzj) covered "supply of tangible goods for use without transfer of possession and effective control over the goods". In this regard, in case of Petronet LNG Ltd. Vs

Commissioner of Service Tax, New Delhi, decided by the Tribunal vide Final order No. 58076/2013 dated 24.10.2013 reported as 2013-TIOL1700-CESTAC-DEL, and which also pertains to the period prior to 01.7.2012, the Appellant had chartered three LNG carrier vessels from a consortium of owners located overseas under three time charter agreements. The relevant clauses of the time charter agreements were as under:

(i) All applicable licenses, permits, approvals, authorizations including Admiralty Publications etc., necessary for safe navigation and use of the LNG carrier vessels were to be provided by the owners to the Appellant (M/s Petronet LNG Ltd.).

(ii) Appointment of the Manager, Master and other crew of the vessels shall be made by the owners to the satisfaction of M/s Petronet LNG and these personnel on board the vessel shall work under the instructions of the Appellant.

(iii) Owners of the vessels were to pay the wages of the crew and also bear expenses for provisions, insurance of the vessel, cost of licenses, maintenance repair and overhead cost, dry docking cost etc.

(iv) The owners were to obtain and maintain marine and war risk insurance for the vessels with the Appellants name co-assured.

(v) Master and the crew operating the vessels were required to work under direct control and instructions of the Appellant and the Appellant was authorized to issue directions to the Master for transportation of LNG to any part of the World.

(vi) The Appellant would exercise control over the vessel through the Master, other officers and the crew. The Master shall follow the orders and directions issued by the Appellant for the purpose of filing bills of lading by signing the same.

(vii) The Appellant would control the Vessels by issuing appropriate instructions and sailing directions to the Master and the Master is required to maintain a log of the voyage which the Appellant and their agent may inspect as and when required.

The main point of dispute in this case was whether the Appellants time charter agreements with the consortium of owners with the above mentioned terms and conditions, represented supply of tangible goods (LNG Carrier Vessels) by the owners located abroad to the Appellant without transfer of right of possession and effective control and hence taxable under Section 65 (105) (zzzzj) of the Finance Act, 1994. The Department was of the view that these time charter agreements represented supply of tangible goods from the owners located abroad without transfer of right to use and hence the Appellant would be liable to pay Service Tax under reverse charge. The Tribunal in this case, in Para 13 of its judgment, held that supply of tangible goods involving transfer of right of possession and effective control of the goods is outside the purview of the taxable service defined under Section 65(105)(zzzzj), that such exclusion is consistent with the Constitutional limitation upon the legislative field of the Parliament, that post 46th Amendment to the Constitution and introduction of Article 366 (29A(d), transfer of right to use goods is a deemed sale falling within the purview of the legislative field of State Governments to tax the deemed sale as Sale and that power to tax what is adeemed sale as service is outside the legislative field of the Parliament. Thus the ratio of this judgment is that during period prior to 01.07.2012, when Service Tax was leviable only on certain services defined in various clauses of section 65(105) of the finance Act, 1994 and when Clause (zzzzj) of Section 65 (105) covered supply of tangible goods for use without transfer of right of possession and effective control a transaction of supply of tangible goods by a person to another person which involved transfer of right of possession and effective control, being a deemed sale under Article 366(29A)(d) of the Constitution, could not be taxed as "Service".

… …. ..

18. Thus, the key question to be decided in this case is as to whether the lease of helicopters by the Appellant from the two lessors located overseas involves transfer of right of possession and effective control over the goods/transfer of right to use the goods from the lessors to the lessee. We find that in this regard in the SCN dated 12.10.2012, Para 3 mentions the relevant terms and conditions of the Appellants lease agreement with M/s BLFIL, Ireland and Para 4 of the SCN mentions the relevant terms and conditions of the Appellants lease agreement with M/s ADA, Abu Dhabi. At the end of Para 4, the SCN states as under:

"It appears that legal right of possession and effective control over the helicopters is with M/s HCPL in terms of the above agreements"

Thus the SCN dated 12.10.2012 itself on the basis of the terms and conditions of the agreements, forms the tentative view that the Appellants lease agreements with foreign lessors involve transfer of right of effective possession and control over the helicopters to the Appellant during the period of lease. It is this view expressed in Para 4 of the SCN dated 12.10.2012which has been confirmed by the Commissioner in Para 25 of the impugned order giving the following findings:

"It is clear that legal right of possession and effective control over the helicopters is with M/s HCPL in terms of the above agreement."

15. In the case of *SRF Ltd. (supra),* the Tribunal considered the issue whether the contracts entered by the assessee with foreign suppliers for obtaining ISO tankers on lease would amount to Supply of Tangible Goods for the period upto 30.06.2012. The conditions of the Agreement noted in the said decision are almost similar to the Agreement in the present case. The relevant paragraphs read as under:-

"7. In order to appreciate the controversy raised in this appeal, it would be useful to reproduce the relevant clauses of the agreement executed between the appellant and the Tankspan Leasing Limited and they are as follows:

Agreement with Tankspan Leasing Limited

"7. INSPECTION AND TESTING (a) At any reasonable and from time to time, the Lessee shall permit the Lessor or it's authorised representatives to inspect any or all of the Containers available to the Lessor at any such address as may be mutually agreed.

(b) For the purpose of periodic inspection and testing of the Containers in accordance with the requirements of governmental authorities regulations and agreements concerning the transportation at hazardous materials, upon sixty (60) days prior written notice from Lessor, Lessee shall make any or all of the Containers available to Lessor with a certificate of cleanliness as specified in Clause 4 at a designated depot's as may be mutually agreed. In

the event that prior written notice is not received from Lessor, it is still Lessees responsibility, at all times, to ensure that the Containers comply with all statutory, national and international regulations. All costs relating to the cleaning, delivery and preparation of the Containers in readiness for inspection shall be borne by the Lessee. The Lessor shall be responsible for the cost of inspection and testing itself. If at such time any Container is found to be damaged or altered or requires cleaning, the cost of repair and/or cleaning shall be for the account of the Lessee. Should Lessee and Lessor agree that future periodic testing be conducted at the lessee's factory, free time per tank for such inspection will be 10 days for 2.5 year test and 15 days for 5 year test.

8. USE OF AND INDEMNIFICATION OF THE CONTAINERS. The Lessee will not use or permit any Container to be used for any purpose for which it is not designed or suitable and will ensure that the Containers are operated in a proper and skilful manner, specifically not to be used for the carriage of radioactive materials. The Lessee shall at its expense, comply with the International Maritime Dangerous Goods (IMDG) Code and any other relevant national, international or statutory regulations, laws, directives or conventions, including customs laws and regulations which affect the Containers, the Lease or their possession, ownership. transportation or operation; including, but not limited to, the International Convention for Safe Containers (CSC) and the Customs Convention on Containers 1956 or 1972 as the same may be In effect from time to time. The Lessee shall be liable for all duties, fees, charges, liens, encumbrances, fines, penalties or interest charged or Incurred for failure to comply.

9. AREAS OF USE The Lessee shall not use, or allow the use of, the Containers in hostile countries or in any area of hostilities or conflict (declared or not) or in any area specifically prohibited in writing by the Lessor to the Lessee or in any area which may load to the invalidation of the limit of coverage and of the insurance of the Containers.

10. MAINTENANCE, DAMAGE, LOSS OF DESTRUCTION (a) Except as otherwise provided in this Lease, the Lessee at it's own expense shall maintain the Containers in good condition and repair and shall be liable for all damage to and loss of any Container and make all necessary replacements of components and parts during the term of the Lease using parts and workmanship equal to, or greater than, the condition that the Containers were in at the commencement of the Lease. The Lessee shall make no changes or alterations to the Containers except with the written consent of the Lessor. The colour of The Containers, identification marks, the Lessors service mark and name or any other plates, marks or seats or writing applied to the Containers must not be removed, mutilated, obliterated or supplemented In any way without the prior written approval of the Lessor and the Lessee shall take all steps to prevent any other person doing any such act or riling. The Lessee shall keep such marks and colour in good condition and repair throughout the term of the Lease. xxxxxxxxx

xxxxxx

13. TAXES Lessee shall pay all taxes, fees, penalties and interest and other liens, charges or encumbrances which exist or which may be imposed during the term of the lease and levied on or in connection with or arising out of the operation, transportation, maintenance, storage, loading or other use or possession or ownership of the Containers until redelivered to Lessor, including, without limitation, withholding, deduction, income (excluding any taxes levied on Lessors net income in its country of domicile), taxes, duties and charges of any type, so that If, for any reason whatsoever, the Lessee is unable to make any payment without a deduction or withholding, It will pay such additional amount so that the et amount received by Lessor will equal the full amount Lessor would have received had such deduction or withholding not been made. xxxxxxxxxx

16. OWNERSHIP As between the Lessor and the Lessee, ownership of the Containers shall at all times remain with the Lessor. The Lessee shall have quiet pssession during the term of the Lease. Some of the containers on case to the Lessee may be owned by a third party and *leased by it to Lessor or managed on behalf of it by Lessor for subleasing to it's customers, including the Lessee.*

17. CUSTOMS AND EXCISE VAT The Lessee hereby confirms that the Containers leased under the terms of this Lease Agreement will be used only for the transport of freight outside the U.K., or to or from a place outside the U.K. On this understanding, rental payments are zero rated for purposes of VAT. Where appropriate, the Lessee shall keep records to account for its use, export or other disposal to the satisfaction of the Commissioners of Customs and Excise.

18. MISCELLANEOUS (a) Lessee may not assign or transfer its rights or responsibilities under this Lease Agreement to any other party without the prior written consent of Lessor. Lessee is responsible for complying with all terms and conditions of this lease, and paying all charges due under this lease, throughout the term of the Lease, even if a Container is used by a party other than the Lessee, with or without Lessee's or Lessors consent. The Lessor may grant a security interest in and may assign any or all of it's rights, title or interest in the Containers or the Lease, including it's right to receive payment hereunder.

Lessee shall not assign, mortgage, charge, pledge or otherwise encumber the Lease or the Containers in whole or in part."

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31. From the decisions referred to above, it clearly transpires that:

(i) Whether there is a transfer of right to use or not is a question of fact which has to determined in each case having regard to the terms of the contract under which there is a transfer of right to use;

(ii) If with the transfer of the right to use, possession and effective control is also transferred, the transaction falls outside the preview of service tax liability. However, when the effective control and possession is not transferred and it continues to remain with the person who has given the machinery on hire, it would not be open to the authority to levy service tax;

(iii) Mere fact that the persons are employed by the owner does not in any manner deter from the fact that the transaction constitutes a transfer of the right to use the tangible goods with possession and effective control; and

(iv) The fact that after the operation is over on any given day and the tangible goods come back to the owner is not a material fact for deciding who has the dominion over the tangible goods.

32. The impugned order notices that the appellant had taken the ISO containers on lease/rental basis and it had paid an amount of Rs. 4,60,67,566/- to the foreign supplier who did not have any office in India for supply of the containers. Condition No"s 9 and 18 of the Agreement, which have been reproduced above, have been misinterpreted by the Commissioner. No inference can be drawn from the aforesaid two clauses that the right of possession and effective control of the containers was not with the appellant merely because the containers had not been sold to the appellant. The Commissioner fell in error in not appreciating the difference between a „sale" and „a deemed sale" contemplated under article 366 (29A) of Constitution. In „a deemed sale" it is necessary to examine who has the *possession and effective control over the goods. Even the Circular dated 29.02.2008, on which reliance has been placed by the Commissioner, emphasises that in the case of "a deemed sale" under article 366 (29A) of Constitution, transfer of right to use involves both transfer of possession and control over the goods. The Commissioner also fell an error in holding that since sales tax/VAT was not paid by the appellant, it would not amount to „a deemed sale". The Commissioner failed to appreciate that since the transaction involved sale or purchase of goods in the course of import of goods into India, no sales tax/VAT was required to be paid even if the transaction qualified as „a deemed sale".*

33. It is more than apparent from the aforesaid discussion that the supply of ISO Tankers on lease/rental basis by foreign suppliers to the appellant would amount to a deemed sale under article 366 (29A) of Constitution as the appellant throughout had effective control and possession over the ISO Tankers. The order dated 29.07.2016 passed by the Commissioner, therefore, cannot be sustained.

34. In this view of the matter it would not be necessary to examine the contention raised by the appellant that the extended period of limitation could not have been invoked.

35. The impugned order dated 29.07.2016 passed by the Commissioner is, accordingly, set aside and Service Tax Appeal No. 52932 of 2016 is allowed."

16. The Tribunal in the case of *Universal Dredging and Reclamation Corporation Ltd. (supra)* had considered the issue for the period post 01.07.2012 also. After adverting to the declared services listed under Section 66E, the Tribunal observed that if the transfer is in the nature of deemed sale, it would be outside the purview of taxability under Finance Act, 1994. The relevant paragraphs read as under:-

"16. 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)arthitech 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;

17. 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.*

18. 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.*

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."

19. 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.

20. 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."

21. 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,<u>without transferring of possession and effective control of such machinery, equipment and appliances</u>"

22. Prior to1.7.2012 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.

23. 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 testthus 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.*

24. 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 Luxemberg. 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.

25. 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.

26. 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 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."

17. The Department has relied on the decision rendered in the case of *Adani Gas Ltd. (supra)*. In the case of Adani Gas Ltd., the Hon'ble Apex Court found that the fourth clause is not satisfied. The use of SKID was not

to the exclusion of the assessee. The facts of this case being different as discussed above, the said case is distinguishable.

18. On appreciation of facts and following the decisions above, we are of the considered opinion that as there is a transfer of possession and effective control of the goods, and the activity being transfer of right to use goods, the demand of service tax cannot sustain for the period upto 30.06.2012 and post 01.07.2012 also.

19. In the result, the impugned order is set aside. The appeal is allowed with consequential reliefs, if any, as per law.

(Order pronounced in open court on 11.07.2024)

Sd/-
(VASA SESHAGIRI RAO)
MEMBER (TECHNICAL)

Sd/-
(SULEKHA BEEVI C.S.)
MEMBER (JUDICIAL)

MK