IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,

WEST BLOCK NO.2, R.K. PURAM, NEW DELHI-110066

BENCH-DB

COURT –III

Service Tax Appeal No.ST/60018/2013-ST [DB]

[Arising out of Order-in-Appeal No.122 (ST/RPR-I/2013 dated 15.07.2013 passed by the Commissioner (Appeals-I), Customs & Central Excise, Raipur]

M/s.Ultratech Cement Ltd. …Appellant

Vs.

C.C.E. & S.T., Raipur … Respondent

Present for the Appellant : Mr.B.L.Narasimhan, Advocate
Present for the Respondent: Mr.Ranjan Khanna, D.R.

Coram: HON'BLE MR. S.K. MOHANTY, MEMBER (JUDICIAL)
HON'BLE MR. B.RAVICHANDRAN, MEMBER (TECHNICAL)

Date of Hearing/decision: 15/03/2017

FINAL ORDER NO. 52465/2017

PER: B.RAVICHANDRAN

The appellant is aggrieved by the order dated 15.07.2013 of Commissioner (Appeals-I), Raipur. The appellants got manufactured 60 Railway Wagons and supplied the same to the Railways in terms of agreement dated 14.03.1996. The present dispute relates to the liability of the appellant for service tax under the category of supply of tangible goods in terms of Section 65 (105) (zzzzj) of the Finance Act, 1994.

2. The period involved is 2008-09 and 2009-10. The Original authority confirmed the liability of the appellant to an amount of Rs.6,61,748/- and imposed equal amount of penalty under Section 78 alongwith penalty under Section 77.

3. The ld. Counsel appearing for the appellant contested the finding mainly on two grounds:-

(a) The supply of wagons to Railways by the appellant will not fall under the taxable service of "supply of tangible goods". The wagons are supplied to Railways, who control and manage the said wagons. The finding of the original authority that effective control of the wagons is not a criteria to decide the tax liability, is legally untenable. The terms of agreement clearly stipulate that the Railways will have full and effective control of the wagons including the right to maintain and modify the said wagons.

(b) Admittedly, the supply of tangible goods, wagons, happened in 1996 in terms of the agreement of March, 1996. The tax entry was introduced in the Finance Act, 1994, only in the year 2008. As such, there can be no tax liability on the activity of supply of tangible goods which happened much earlier, before the introduction of tax liability. The agreement as well as the act of supply of tangible goods occurred much before the tax liability arose. He relied on the decision of the Tribunal in Petronet

LNG Ltd. vs. CST, New Delhi - 2013 – TIOL -1700 – CESTAT- Delhi.

4. The ld. A.R. reiterated the findings of the Original Authority and submitted that the contract envisages termination and re-possession of the supplied goods. He also submitted that in the goods of such nature, for operational reasons, the Railways will have control. This does not take away the tax liability of the appellant. He also stated that there is nothing in the agreement referring to party's liability to pay sales tax/ VAT on such supply.

5. We have heard both the sides and perused appeal records.

6. Admittedly, the appellant supplied wagons in terms of agreement dated March, 1996. The agreement and the supply of wagon were much prior to the tax entry introduced in 2008. The tax entry talks about supply of tangible goods. When such supply has occurred when there was no tax liability, there is no question of service tax payment on the same. In this connection, we refer to the decision of the Tribunal in Petronet LNG Ltd. (supra). The relevant portion of the finding is as follows:-

> *"In the above circumstances, for reasons [apart from our conclusion that the transactions in relation to all the three tankers (covered by long-term and short-term charters) fall within the exclusionary clause of Section 65(105)(zzzzj)], the periodical payments remitted by the assessee in relation to the long term charters of "Disha" and "Raahi" are in relation to the supply of these tangible goods, as a one time event which occurred prior to*

> *introduction of this taxable service w.e.f. 16-5-2008 and are therefore not leviable to Service Tax. We hold accordingly."*

7. As such, on this ground alone, the impugned order is not sustainable. We also note that the scope of tax entry, even otherwise, does not apply to the nature of transaction under consideration. It is an admitted fact that the effective control of the supplied wagons are with Railways. We are not in agreement with the findings of the Original Authority that in a case like this effective control is not relevant to decide the tax liability. The statutory definition very clearly stipulates that supply of tangible goods should be without transferring right of possession and effective control. In this case, we note, the right of position and effective control is with the Railways and as such, the tax entry has no application for the present transaction.

8. In view of the above discussion and findings, we hold that the impugned order is not sustainable and accordingly, set aside the same. The appeal is allowed.

[Dictated and pronounced in the open Court]

(B. RAVICHANDRAN) **MEMBER (TECHNICAL)**	**(S.K. MOHANTY)** **MEMBER (JUDICIAL)**

Anita