IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No. 2, R.K. Puram, New Delhi – 110 066.
Principal Bench, New Delhi

COURT NO. IV

DATE OF HEARING : 18/12/2018.
DATE OF DECISION: 18/12/2018.

Service Tax Appeal No. 52307 of 2016

[Arising out of the Order-in-Appeal No. BHO-EXCUS-002-APP-415-15-16 dated 16/03/2016 passed by The Commissioner (Appeals – I), Customs, Central Excise & Service Tax, Raipur.]

M/s Ultratech Cement Limited — Appellant

Versus

CCE & ST, Bilaspur — Respondent

Appearance

Shri Narender Singhvi, Advocate – for the appellant.

Shri Vivek Pandey, Authorized Representative (DR) – for the Respondent.

CORAM: **Hon'ble Shri C.L. Mahar, Member (Technical)**
Hon'ble Ms. Rachna Gupta, Member (Judicial)

Final Order No. 53510/2018 Dated : 18/12/2018

Per. C.L. Mahar :-

The brief facts of the matter are that the appellant are manufacturer of cement. The appellant have got 168 BCNA (type) wagons manufactured and same were given by them to Ministry of Railways on lease basis. The first lot of 42 wagons was supplied to Indian Railways on 18/09/1996 and last batch of

42 BCNA wagons were handed over to Railways on 31/05/1997 as per the contract entered by them for Indian Railways vide their contract dated 27/04/1998. As per the contract the appellant were raising invoices on the Indian Railways on quarterly basis against which the appellant received rent/lease charges from the Indian Railways.

2. The supply of tangible goods service came into tax net from 16/05/2008 and thereafter the department entertained a view that since the invoices are being raised for leasing of the wagons on regular basis and payment is also being received against such leasing and, therefore, the wagons which have already been given on lease basis to Indian Railways are classifiable under supply of tangible goods on and after 16/05/2008. On the basis of above, a show cause notice demanding service tax of Rs. 11,01,292/- came to be issued on 19th June, 2012 covering the period from May 2008 to 31/03/2012, the penal provision under Section 77 and 78 were also invoked. The matter has been adjudicated and the above-mentioned amount of the service tax has been confirmed by the Original Adjudicating Authority and same has also been endorsed by Commissioner (Appeals) vide his impugned order dated 16/03/2016. The appellant are before us against the above-mentioned impugned order-in-appeal.

3. We have heard both the sides and we find that the matter is no longer res-integra as it has already been decided in the appellant’s own case vide this Tribunal’s decision order No.

ST/A/52465/2017 dated 15/03/2017 with the citation **2017 (4) TMI 1176 – CESTAT – NEW DELHI**. The relevant extract of the above order is reproduced here below :-

> "3. The learned 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.
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> (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.
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> 4. The learned 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".

4. Since the facts of this matter are similar to the one cited above, we follow the same and hold that the order-in-appeal is without any merit and same is set aside. The appeal is allowed.

(Operative part of the order pronounced in the open court.)

(Rachna Gupta)
Member (Judicial)

(C.L. Mahar)
Member (Technical)

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