

IN THE CUSTOMS, EXCISE & SERVICE TAX  
APPELLATE TRIBUNAL,  
WEST BLOCK NO.2, R.K. PURAM, NEW DELHI-110066

BENCH-DB

COURT -IV

**Service Tax Misc. Application No.ST/Misc./51225/2018-**  
**ST [DB] in**

**Service Tax Appeal No. ST/51892/2017-ST [DB]**

[Arising out of Order-in-Appeal No.BHO-EXCUS-002-APP-163-17-18  
dated 30.08.2017 passed by Commissioner (Appeals), Raipur]

**M/s. Century Cement**

**...Appellant**

**Vs.**

**CCE, Raipur**

**... Respondent**

Present for the Appellant : Mr.Sanjay Grover, Advocate

Present for the Respondent: Mr.G.R. Singh, D.R.

**Coram: HON'BLE MR. C.L. MAHAR, MEMBER (TECHNICAL)**  
**HON'BLE MRS. RACHNA GUPTA, MEMBER (JUDICIAL)**

**Date of Hearing/Decision: 20.12.2018**

**FINAL ORDER NO. 53535 /2018**

**PER: RACHNA GUPTA**

Miscellaneous Application for early hearing of the appeal heard. Keeping in view that the issue involved herein is mentioned to be a covered issue and also the Id. Advocate is ready to submit final arguments on appeal today itself. The request for early hearing is hereby accepted.

2. After hearing the arguments, appeal is disposed as follows:-

The appellant herein is engaged in manufacture of cement and clinker. They are also availing Cenvat Credit on input services for making payment of Central Excise duty on the clearances of their final product. During the course of audit of appellants record for the period February, 2013 to December, 2013, the Department observed that the appellant have leased their wagons to Indian Railways on rental basis. But no Service Tax liability has been discharged on the amount so received by the appellant. Despite that the service rendered by the appellant falls under the category of supply of tangible goods service. Resultantly, a show cause notice No.925 dated 09.07.2015 was served upon the appellant proposing the recovery of Service Tax of Rs.10,04,879/- for rendering the aforesaid service for the period 2010-11 to 2014-15. The interest at prescribed rate on the said amount and the respective penalties under Section 76, 77 and 78 of the Service Tax Act, 1994 were also proposed.

2.1 This proposal was initially confirmed vide Order-in-Original No.060 dated 30<sup>th</sup> September, 2016. Except that penalty under Section 76 of the Act was not imposed upon, as the penalty of the same amount was imposed under Section 78 of the Finance Act. Being aggrieved, Appeal was preferred. Commissioner (Appeals) vide the order under challenge bearing No.002 – 163 dated 30<sup>th</sup> August, 2017 had uphold the

confirmation of the demand by rejecting the appeal. Resultantly, the appellant is before this Tribunal.

3. We have heard Shri Sanjay Grover, Id. Advocate for the appellant and Shri G.R. Singh, Id. D.R. for the Department.

4. It is submitted on behalf of the appellant that the matter is fully covered by the decision of this Tribunal in the case of **Petronet LNG Ltd. vs. Commissioner, Service Tax reported in 2016 (46) STR 513 (Tri. – Del.)**. It is further submitted that otherwise also the taxable event for the levy of tax on supply of tangible goods is the date on which the goods were actually supplied. The appellant herein has supplied 125 Railway Wagons to Indian Railways by virtue of an agreement dated 22<sup>nd</sup> September, 1999 but, supply was affected in the year 1997 itself. The service of supply of tangible goods came into Service Tax net only on 16<sup>th</sup> May, 2008. Hence, the demand confirmed by the Adjudicating Authorities below is absolutely not sustainable. Order is prayed to be set aside. The appeal is prayed to be allowed.

5. Per-contra, Id. D.R. has justified the order under challenge. Emphasis is laid on the findings as mentioned in para 8 thereof, wherein the transaction in hand is denied to be a deemed sale for the fact that no VAT has been paid in the impugned transaction. Appeal is accordingly, prayed to be dismissed.

6. After hearing both the parties and perusing the entire record, we foremost, reproduce the definition of supply of tangible goods service as defined under Section 65 (105) zzzzj of Finance Act, 1994 as follows:-

*On 16.05.2008, sub-clause (zzzzj) of Section 65 (105) was introduced, which reads as under:-*

*"(105) "taxable service" provided or to be provided, -- (zzzzj) 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:"*

*On 01.07.2017 Section 65B was inserted in the Service Tax provisions. Clause (44) of Section 65B provides as follows:-*

*"(44) "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:"*

The bare perusal makes it clear that for being taxable under the alleged category of supply of tangible goods, two conditions have necessarily to be fulfilled at the time when goods are supplied:

- (1) Right of possession being delivered should not have been transferred.
- (2) The effective control should not have been handed over.

Also that the transfer of right to use the goods, delivery or supply of any goods, which is deemed to be sale within the meaning of clause 29 A of Article 366 of the Constitution of India shall not amount to be a service.

7. Now coming to the facts of the present case, since appellant was using railways for most of the clearances of its final product i.e. cement and clinker, the appellant opted for the said scheme introduced by Railway in the year 1992 i.e. "Own Your Wagon Scheme". In accordance of the scheme, irrespective the ownership of wagons could vest in the producers, but wagons were to be placed at the disposal of Railways. Not only this, those were to be merged in general pool of Railways. Also responsibility of day-to-day operation and maintenance would be that of Railways. Based on the said scheme, appellant entered into an agreement with the Railways on 22<sup>nd</sup> February, 1999 in respect of 125 wagons, which were to be leased to Railways for a period of 20 years.

First rack of 42 wagons thereof was commencing from 20<sup>th</sup> January, 1997. The perusal of the agreement shows that the rolling stock for the purpose of said lease agreement was 125 BCNA wagons and that the lease period shall had to be reckoned from the commencement date, the 10<sup>th</sup> day of receipt of last Wagon of the rack by the Railways from the appellant.

8. Perusal of these facts makes is abundantly clear that not only the right of possession but the effective control upon railway wagons was meant to be transferred from the appellant to the Railways. Resultantly, the transaction herein comes out of the ambit of the supply of tangible goods service. The order under challenge has absolutely been silent qua this aspect. Commissioner has jumped-over upon clause 29 A of Article 366 of the Constitution denying the impugned transaction to be a deemed sale and has confirmed the liability under the supply of tangible goods service. The observation of Commissioner is held to have been restricted to the definition of service only without applying the definition of specific service under which the demand has been confirmed.

9. The issue otherwise is no more *res integra* as has been taken up and decided by this Tribunal itself in the case of **Petronet LNG (supra)** wherein Tribunal observed as follows:-

*"On a true and fair construction of the several provisions of the long term charter agreements, including in particular clause 15, the conclusion is inescapable that the taxable event occurs on the entering into the agreement followed by delivery of the tankers and not on day-to-day basis as contended by the Revenue. The stipulation as to payment of daily hire charges is only a commercial term relating to computation of the hire charges payable by the assessee to the owners. These clauses do not legitimize the inference that supply occurs on each day the tankers are used.*

*The Supreme Court in **20th Century Finance Corporation and Anr.** (supra) clarifies that where goods are available, the transfer of the right to use takes place when the contract in respect thereof is executed; since the contract is executed, the right is vested in the lessee; and the situs of the taxable event of such tax (Sales Tax or VAT, as the case may be) would be the transfer, which legally transfers the rights to use goods.*

10. In subsequent decision, this Tribunal in the case of appellant themselves vide Final Order No.ST/A/50506 dated 1<sup>st</sup> February 2018 has set aside the similar demand based on the ratio laid down in **Petronet LNG** case. Keeping in view the said entire discussion, the order under challenge is held to have not appreciated the entire facts and circumstances and has ignored the relevant legal provisions, as such, is not sustainable. The same is hereby order to be set aside. Appeal stands allowed.

[Operative part pronounced in the open Court]

**(C.L. MAHAR)**  
**MEMBER (TECHNICAL)**

**(RACHNA GUPTA)**  
**MEMBER (JUDICIAL)**

Anita