IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
EASTERN ZONAL BENCH : KOLKATA

REGIONAL BENCH – COURT NO. 1

Service Tax Appeal No. 71460 of 2013

(Arising out of Order-in-Original No. CCE/BBSR-II/S.Tax/No.11/Commissioner/2013 dated 23.09.2013 passed by the Commissioner, Central Excise, Customs & Service Tax, Bhubaneswar-II, Central Revenue Building, Rajaswa Vihar, Bhubaneswar – 751 007, Odisha)

M/s. Rungta Sons Private Limited **: Appellant**
AT/PO: Barbil, District: Keonjhar,Odisha

VERSUS

Commissioner, Central Excise, Customs and Service Tax **: Respondent**
Central Revenue Building, Rajaswa Vihar,
Bhubaneswar – 751 007, Odisha

APPEARANCE:

Shri Kartik Kurmy, Advocate
Ms. Ritika Kurmy, Advocate
For the Appellant

Shri S.S. Chattopadhyay, Authorized Representative
For the Respondent

CORAM:

HON'BLE SHRI ASHOK JINDAL, MEMBER (JUDICIAL)
HON'BLE SHRI K. ANPAZHAKAN, MEMBER (TECHNICAL)

FINAL ORDER NO. 76485 / 2024

DATE OF HEARING: 18.07.2024

DATE OF DECISION: 31.07.2024

ORDER:[PER SHRI K. ANPAZHAKAN]

The present appeal has been filed against the impugned Order-in-Original No. CCE/BBSR-II/S.Tax/No.11/Commissioner/2013 dated 23.09.2013 passed by the Ld. Commissioner of Central Excise, Customs and Service Tax, Bhubaneswar-II Commissionerate, wherein the Ld. Commissioner has confirmed the demand of Service

Tax of Rs.1,32,58,527/- (including Cess) under the category of 'supply of tangible goods service' as defined under Section 65(105)(zzzzj) of the Finance Act, 1994, for the period from 2008-09 to 2009-10 by invoking the extended period of limitation.

2. The facts of the case are that M/s. Rungta Sons Private Limited, AT/PO: Barbil, District: Keonjhar, Odisha (the 'Appellant') are engaged in mining and sale of Iron Ore / Iron Ore Fines. The appellant entered into an Agreement dated 21.02.2007 with the Indian Railways for investment in 6 numbers of 'Railway Rakes' of BOXN Wagons under the Wagon Investment Scheme (hereinafter referred to as 'WIS').

3. The contracts executed by the appellant contained two types of activities:

(i) The first contract in the Agreement dated 21-02-2007 is between the Indian Railways and the appellant for supply of 6 nos. of Railway Rakes under "Wagon Investment Scheme". For the investment made, the appellant is entitled to get the following considerations:

(a) 10% freight rebate on 6 Guaranteed Rakes for use in transportation of goods by the Appellant and

(b) two Bonus Rakes without freight rebate for transportation of goods by the Appellant.

(ii) The second contract in the Agreement is between the Appellant and their private clients whom the Appellant allow to use the benefit of the 6 Guaranteed Rakes and 2 Bonus Rakes. In this contract, the appellant collects the 10% of freight (Rebate Component) from the clients and sometimes, premium is also charged by the Appellant from their clients.

3.1. The instant Service Tax demand is on the second contract.

4. A perusal of the conditions stipulated in the Agreement dated 21.02.2007 indicates that the wagons supplied by the appellant are under the control and possession of the Indian Railways for a period of ten years, while the ownership vests with the investor (appellant herein) during the period of this ten years. After ten years, the ownership is transferred to Indian Railways. The rakes supplied by the appellant to the Indian Railways were used by the Indian Railways for transportation of goods as per their requirement. The appellant has no role in the deployment of the rakes/wagons. Once the rakes are supplied by the appellant to the Indian Railways, the same rakes were never supplied back to the appellant. The rakes allowed (i.e., six guaranteed rakes and two bonus rakes) to the appellant by the Indian Railways may be used by the appellant for transportation of their own goods or they can allow their clients to transport the goods belonged to the clients' against payment of freight directly to the Indian Railways. When the appellant uses the rakes for their own transportation purposes, there is no liability for Service Tax. However, when the appellant allows the clients to use those rakes for transportation of goods by Rail and the clients pay freight directly to the Indian Railways, by availing a rebate of 10% in terms of clauses 2.5 and 5.1 of the Agreement dated

21.02.2007, the appellant recovers the rebate claimed from the clients by raising 'Debit notes'.

4.1. Thus, after allowing the clients to use the rakes for transportation of their goods, the appellant raises 'Debit notes' for recovery of freight rebate of 10% which the clients received from the Indian Railways. Sometimes, the appellant also charges a "Premium" i.e., extra over the rebate received on the freight. All such receipts are accounted by the appellant under the accounting head of "Wagon Facilitation Charges". In the instant case, these "Wagon Facilitation Charges" received by the appellant during the period from 2008-09 to 2009-10 have been considered as 'consideration' received for the purpose of rendering of "supply of tangible goods" service, by the Revenue.

4.2. Accordingly, a Show Cause Notice dated 23.07.2012 was issued to the appellant demanding Service Tax of Rs.1,32,58,527/- (including cess) on the 'Wagon Facilitation Charges' of Rs.11,18,52,966/- received during the period from 2008-09 to 2009-10, under the category of 'supply of tangible goods service'.

5. The said Notice was adjudicated by the Ld. Commissioner vide the impugned order wherein the demand of Service Tax raised in the Notice has been confirmed along with interest. He also imposed equal amount of tax as penalty. Aggrieved against the impugned order, the appellant has filed this appeal.

6. The appellant submits that the rakes / wagons supplied by them to the Indian Railways were under the effective control and possession of the Indian Railways for a period of ten years; the Indian Railways were not issuing the same rakes to the appellant. The

appellant submits that they have been given six nos. of guaranteed rakes for use in transportation of goods with freight rebate of 10%; two nos. of bonus rakes without freight rebate were also given to them. The appellant submits that the wagons supplied by them to Indian Railways would fall within the ambit of "supply of tangible goods service" as defined under Section 65(105)(zzzzj) of the Finance Act, 1994, only when the effective control and possession of these rakes are retained by them. In this case, the effective control and possession of those rakes were always with the Indian Railways. Thus, the activities undertaken by them in this case would not fall within the definition of "supply of tangible goods service" as defined under Section 65(105)(zzzzj) of the Finance Act, 1994.

6.1. The submissions made by appellant are summarized as under: -

(i) As per the Agreement dated 21.02.2007, the Railway Wagon/Rakes were at all times in the exclusive physical control and possession of Indian Railways.

(ii) During the material period the possession and control over the Railway Rakes/Wagon were never with the Appellant and hence, the Appellant could not have supplied the Railway Wagons for use to their clients to attract the levy under the "supply of tangible goods services" giving rise to a taxable event.

(iii) When the control and possession of the Railway Rakes were with the Indian Railway, question of Supply of Tangible Goods Service by the Appellant for use to their clients does not arise.

(iv) Further, the wagon/rakes were allotted by the Indian Railways to the Appellant under the Agreement from the "common pool" and it was not the same rakes/wagons supplied by the Appellant to the Indian Railways; hence, the question of ownership, effective control and possession does arise.

(v)The Ld. Commissioner failed to appreciate that for provision of "supply of tangible goods service" under Section 65(105)(zzzzj), the "effective control" and "possession" of the Railway Wagons must be with the Appellant, which was vested with the Indian Railways under the Agreement for a period of 10 years.

(vi) The levy under Section 65(105)(zzzzj) is attracted only in case the tangible goods are used by the service provider for providing taxable services where the control and possession in such tangible goods remains with such service provider, which is completely missing in the instant case.

(vii) It is submitted that in construing a fiscal statue and in determining the liability, one must have regard to strict letter of law and not merely to the spirit of the statute or the substance of the law. The court must look squarely at the words of the statute and interpret them. It must interpret a taxing statute in the light of what is clearly expressed. In support of this contention, the Appellant relies on the decision in the case of *Smt. Tarulata Shyam Vs. CIT reported in (1977) 3 SCC 305 [Para 35].*

(viii) In the case of *CST Vs. Adani Gas Ltd. [2020] 81 GSTR-1 (SC)]* it is held by the Hon'ble Supreme Court that for attracting the levy under Section 65(105)(zzzzj)[Para 20, 28]

a. The effective control over the goods must continue with the service provider and;

b. the tangible goods is the intrinsic element of service which must be provided to the service recipient for use.

(ix) The Ld. Addl. Commissioner while dealing with identical fact situation in respect of their group companies in the case of M/s Feegrade & Co. P. Ltd. and Others vide adjudication Order dated 28-12-2012 bearing no. CCE/BBSR-II/S.Tax/No.25/Additional Commissioner/2012, following Circular No. 334/1/2008-TRU dated 29-02-2008, constitutional provisions under Article 366(29A)(d) read with Entry 54 of Union list, Section 65(105)(zzzzj) of the Act, judgment of the Hon'ble Apex court in the case of *Rastriya Ispat Nigam Ltd., Vs. CTO reported in (1990) 77 STC 182*, has set aside the demand, which has been accepted by the Department and hence the decision attained finality.

(x) In the instant case there is only one taxable service involved i.e. "Transport of Goods by Rail Services" as defined under Sec 65(105)(zzzp) which is provided by the Indian Railways to the Appellant, which service Appellant in turn allows its clients to use. The Appellant is not providing any "supply of tangible goods services" to their clients.

(xi) The Appellant further submits that the Central Government vide Notification No. 33/2009-ST dated 01-09-2009 has exempted services falling under Section 65(105)(zzzp) by Government owned Railways.

(xii) The railway rakes made available to the Appellant under the contract were meant for transportations of goods by rail upon payment of freight, hence the said rakes were used by railways for providing taxable services under the category of "Transports of Goods by Rail Services" defined under Section 65(105)(zzzp).

(xiii) The Appellant instead of utilizing the services taxable under the category of "Transportation of Goods by Rail Services" provided by the Indian Railway, allows their client to use the said "Transport of Goods by Rail Services" and the client in lieu thereof pays the railway freight to the Indian Railways directly. The clients, while paying the freight, avail freight rebate of 10% in terms of Clause 2.5 and Clause 5.1 of the Agreement dated 21.02.2007, which the Appellant recovered from the client by raising "Debit Notes".

(xiv) It is further submitted that the "freight rebate" or "premium over freight" received by the Appellant are not 'consideration' for supply of tangible goods within the meaning of Section 67.

(xv) The "freight rebate" or "premium", which is in the nature of beneficial interest flowing from the Agreement with the Indian Railways, which is accounted for in their books under the account head "Wagon Facilitation Charges", cannot be classified as 'consideration' received towards rendering of "supply of tangible goods services".

(xvi) Merely because the amount is accounted for under the Account Head "Wagon Facilitation Charges", it would not make it taxable under the category of "supply of tangible goods services". In the case of *Sundaram Finance Ltd. Vs. Asst. Commissioner of Income Tax reported in (2012) 10 SCC 430*, it was held by the Hon'ble Supreme Court that the taxing authorities are bound to determine the legal character of the transaction and the substance over form must be considered in determining the legal character of the transaction. Accordingly, it is submitted that taxing the amount of freight rebate/premium under the category of "supply of tangible goods services" as defined under Section 65(105)(zzzzj) is wholly illegal and without arbitrary of law.

(xvii) Under the Central Excise Tariff Act, 1975 and also under the Customs Tariff Act, 1985, "Railway Wagons/rakes" are not treated as "machinery, equipment and "appliances" falling under Chapter 84/85 but are treated separately under Chapter 86. Hence, for this reason also, the supply of railway wagons/rakes cannot be classified under Section 65(105)(zzzzj).

(xviii) The entire demand is barred by normal period of limitation; imposition of penalty is unwarranted in the facts and circumstances of the case. The dispute in the instant case relates to the period from 2008-09 to 2009-10 whereas the impugned Show Cause Notice was issued on dated 23-07-2012. The instant proceeding is initiated on the basis of Audit of Books of Accounts and scrutiny of Profit & Loss A/c. [Schedule XV (Other Income)] of the Appellant. No fresh material is brought by the Department to allege any suppression of facts. Hence, the entire demand is barred by normal period of limitation of one year.

(xix) In the case of *CCE Vs. Hindustan Cables Ltd. reported in 2022 (382) ELT 188 (Cal)* it is held by the Hon'ble Calcutta High Court that when the entire allegation is framed on the basis of accounts of the assessee and no new material is brought on record by the Department, extended period of limitation cannot be invoked.

(xx) The dispute relates to pure interpretation of statute and the ingredients visualized under proviso to Section 73(1) is completely absent.

(xxi) In the case of *International Merchandising Company, LLC, Vs. CST, reported in 2022 (12) TMI 556 SC*, the Hon'ble Supreme Court has held that when the dispute relates to pure interpretation of statute neither extended period of limitation can be invoked nor can penalty be imposed.

(xxii) The Appellant further submits that while dealing with the identical case in the matter of their sister concern M/s Feegrade Company Pvt. Ltd. the Ld. Addl. Commissioner vide Order-in-Original dated 28-12-2012 has dropped the demand under the category of "supply of tangible goods service", which has been accepted by the Department. The fact *per se* indicates that the Department itself is not clear about the classification of the impugned service.

(xxiii) In the case of *CCE Vs. Karnataka Agro Chemicals reported in 2008 (227) ELT 12(SC),* the Hon'ble Supreme Court has held that when there is divergence of opinion even within the Department, extended period of limitation cannot be invoked. Similar views have been expressed in the case of *UgamChand Bhandari Vs. CCE reported in 2004(167) ELT 491 (SC).*

6.2. The appellant further submits that the issue is no longer *res integra* as the Tribunal, Mumbai Bench in the case of *M/s. Rashtriya Chemicals & Fertilisers Ltd. v. Commissioner of Central Excise & Service Tax (LTU), Mumbai [Interim Order No. 04 of 2024 dated 15.03.2024 in Service Tax Appeal No. 86284 of 2015 – CESTAT, Mumbai]* has decided the issue in favour of the appellant.

6.3. Accordingly, the appellant prayed for setting aside the demands confirmed against them in the impugned order.

7. The Ld. Departmental Representative appearing for the Revenue submits that the appellant has invested in the WIS and they were getting six nos. of rakes, with 10% freight rebate, and two nos. of bonus rakes, without rebate; the ownership of these rakes remained with the appellant for ten years and it is transferred to the Indian Railways after the period of ten years. Thus, it is argued that for the ten-year period when the ownership remains with the appellant, they had effective control over the rakes. Accordingly, he submits that the appellant has rendered 'Supply of Tangible Goods Service' liable for

service tax and the impugned order has rightly confirmed the demand under the said category.

7.1. Regarding the decision of the Tribunal in the case of *M/s. Rashtriya Chemicals & Fertilisers Ltd. (supra)* cited by the appellant, he submits that the facts and circumstances of that case are distinguishable from that of the present one inasmuch as in the said case, the wagons were leased to the Indian Railways and the assessee was also receiving leasing charges directly from the Indian Railways; however, in the present case, the appellant are giving the right to use the rakes / wagons received by them from India Railways, to other clients and receiving consideration in the form of 10% rebate and/or premium charges from the clients. Thus, it is his submission that the facts and circumstances of the present case is different from the case-law relied upon by the appellant and hence not applicable to the instant case.

7.2. Accordingly, the Ld. Departmental Representative prayed for rejecting the appeal filed by the appellant.

8. Heard both sides and perused the appeal documents.

9. We observe that the appellant has entered into an Agreement dated 21.02.2007 with Indian Railways and invested in 6 numbers of 'Railway Rakes' of BOXN Wagons, under the Wagon Investment Scheme (WIS). In lieu of this investment and supply of six wagons to India railways, the appellant was guaranteed six rakes with 10% freight rebate and two bonus rakes, without freight rebate, for transportation of their goods. When the appellant uses these rakes

for transportation of goods by themselves, there is no issue of rendering any service. When the appellant could not use these rakes for themselves and allowed their clients to use the rakes for transportation of goods by Rail and received 10% rebate or the premium charges, by way of debit notes from their clients, the Department considered that the appellant has rendered 'Supply of Tangible Goods Service'. Accordingly, the amount of Rs.11,18,52,966/- received by the appellant through 'debit notes' from their clients for the period from 2008-09 to 2009-10 has been considered by the department as consideration for rendering the taxable services under the category of 'Supply of Tangible Goods Service'. Thus, it is to be examined whether the activity of allowing their clients to use the rakes given to them by Railways for transportation of goods, would amount to rendering of the taxable service namely, "supply of tangible goods". For the sake of ready reference, the definition of "supply of tangible goods" service under Section 65(105)(zzzzj) of the Finance Act, 1994 is reproduced below: -

> *"65. Definition. -*
>
> *In this Chapter, unless the context otherwise requires,*
>
> *(105) (zzzzj) "taxable service" means any service 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."*

9.1. Thus, we observe that the basic requirement to consider the activity of supply of wagons to Railways, under the category of "supply of tangible goods service" is the effective control and possession of those rakes should be with the appellant. To examine whether the appellant has effective control and possession of the wagons after supplying the same to Indian Railways, it is required to examine the main terms and conditions of the Agreement executed by the appellant. Some of the terms and conditions e to the issue on hand as provided in the Agreement dated 21.02.2007, are summarized herein below: -

(i) the investor would purchase wagon from authorized vendors of railways [Clause 1 & Clause 2.3],

(ii) the investor would supply the Wagons to Indian Railways for a fixed term generally of 10 years [Clause 2.7],

(iii) After the expiry of 10 years, the "ownership" in the railway wagon/rakes would stand transferred to the Indian Railways [Clause 5.6],

(iv) the wagon supplied under the WIS will merge and operate in the general pool wagon of Indian Railway [Clause 4.1],

(v) The Indian Railways would decide the manner, method andmodality of use of the wagons without any interference by theAppellant [Clause 4.1],

(vi) The Indian Railway will be at liberty to make necessary modification/changes on the wagon. [Clause 10.0],

(vii) Maintenance of wagon/Rakes will be borne by Indian Railway for maintenance of the wagons/Rakes, Indian Railway will not collect any charges from the Appellant [Clause 9.0],

(viii) If wagons get condemned as a result of accident for no fault of the Appellant, the benefit of freight rebate/guaranteed rakes/Bonus Rakes will continue to be available to theAppellant [Clause 11.0],

(ix) the investor/Appellant is entitled to six nos. of guaranteed rakes per month with freight rebate of 10% for 10 years [Clauses 2.5, 5.0, 5.1, 5.2],

(x) the investor/Appellant will get two nos. of bonus rakes per months in addition to normal rakes without any freight rebate [Clause 5.4],

(xi) In case the investor/Appellant is not able to use the monthly guaranteed/bonus rakes allotted to them, it shall lapse [Clause 7.4],

(xii) As per the conditions of the agreement the Appellant is not entitled to any lease rental or hire charges from Indian Railways [Clause 5.5].

9.2. A perusal of the above clauses of the Agreement clearly reveals that the appellant has no control over the railway rakes supplied by them to the Indian Railways. Once the rakes are handed over to the Indian Railways, the Indian Railway are free to use the said rakes for any of their clients.The appellant was never getting the same rakes for transportation of goods by Rail for themselves or for their clients. Hence, we observe that the effective control and possession of the said rakes was not with the appellant once the rakes / wagons were handed over to the Indian Railways. The appellant has been utilizing the rakes allotted by Indian Railways (six nos. of guaranteed rakes and two nos. of bonus rakes) for transportation of their own goods. In such cases, there was no payment received and no services rendered. However, on some occasions, the appellant allowed other clients to use such rakes for transportation of the clients' goods. We observe that when the appellant allowed the clients to use the rakes, they have no say in the allotment of the rakes. Railways can allot any rakes to the clients. The services received by the clients from Indian Railways is 'Transportation of goods by Rail' service. There was no supply of tangible goods service involved..

9.3. We observe that while confirming the demand of service tax under the category of 'Supply of tangible Goods Service' in the impugned order, the Ld. adjudicating authority has given his findings as under:

> *"4.8 I find, the scrutiny of P&L Accounts revealed that 'Wagon Facilitation Charges' appearing in the P & L account were collected by the Noticee by raising the debit notes on the customers. Examination of debit notes shows that this charge has two components viz. Freight Rebate' and 'Premium'. It appears that when the Noticee was not in need of any rakes, they authorized their customers to use them for a consideration which comprised of freight rebate This rebate represents amounts which would have otherwise claimed by them from the Railways, if they used the rakes themselves and sometimes a premium. Thus they were able to utilize the surplus capacity of their entitlement guaranteed under the WIS agreement. As per the agreement the Noticee are the owners of the wagons and the ownership would be transferred to Indian Railways after 10 years of the agreement.*
>
> *4.9 Perusal of the debit notes raised by the Noticee for collection of wagon facilitation charges reveal that no VAT has been charged on*

the transactions. It also appears that no VAT has been paid on the amount charged by the Noticee from the customers. Also as per the agreement, the ownership of the wagons vested with the Noticee during the material period, which they have supplied to their customers. It appears that the railways placed the wagons with the Noticee customers under its advice/direction. This is only possible when they have the right of possession and control of the wagons. Thus all elements of the service appear to be satisfied in the instant case for classification of the transaction under Supply of Tangible Goods Service. As admitted by the noticee that their clients who transport the goods in the said rakes pay the freight directly to the Indian Railways and thus in respect of six rakes the said clients/customers initially avail freight rebate of 10%. The Noticee thereupon raises their Debit Notes on their clients for refunding/transferring the benefit of freight rebate availed by the client which accrued to them in accordance with Clause 2.5 and Clause 5.2 of the agreement dated 21.2.2007. The Noticee sometimes collects some additional amount from their clients over and above freight rebate for transfer of their beneficial interest which they call "Premium" and the same was accounted for under the A/c head "Wagon facilitation Charges". The amounts so received by the Noticee as wagon facilitation charges comprising of freight rebate and premium are the consideration received for having supplied the wagons to their customers, which is the value of taxable service provided.”

9.4. We observe that the ld. adjudicating authority has considered the rebate collected by the appellant from the client as 'consideration' received towards rendering of 'supply of tangible goods service'. We observe that the appellant has been collecting the freight rebate of 10% from the clients, in terms of clauses 2.5 and 5.1 of the Agreement dated

21.02.2007, by raising 'debit notes'. For the sake of ready reference, the provisions of the said Clauses of the Agreement are reproduced below:

> *"**(2.5 FREIGHT REBATE)***
>
> *The Railway Administration shall give freight rebate @10% on the normal tariff rates to the investor as may be notified by the Central Government from time to time.*
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> ***(5.0 BENEFITS ADMISSIBLE TO INVESTOR)***
>
> ***(5.1)** For investment made in every BG rake with maintenance spares, investors will be assured of supply of a guaranteed number of rakes every month as follows:*
>
> ***(5.2 Category BOXN-HS Wagons)***
>
> *Freight rebate of 10% shall be granted for 10 years and guaranteed supply of wagons at the rate of 6 rakes per month.*
>
> ***(5.3)** The guaranteed supply under wagon Investment Scheme(WIS) will be in addition to normal supply of rakes to such investors (supply during the previous financial year shall be reckoned as normal supply)*
>
> ***(5.4)** In addition to the above, a guaranteed supply of two bonus rakes will be made without freight concession to those opting for the Engine on Load Scheme(EOL).*
>
> ***(5.5)** No lease charges shall be payable under WIS."*

9.5. From the Clauses referred to above, we observe that this amount is not collected by the appellant from their clients towards rendering of any service in the nature of supply of tangible goods service. At the maximum, it can be considered that the rakes supplied by the appellant have been utilized by the appellant for "Transportation of Goods By Rail Services" and the consideration received by the appellant is towards this service. However, we observe that there is no demand of Service Tax under the said category in the impugned order. The impugned order demands Service Tax from the appellant only under the category of "supply of tangible goods" service on the ground that effective control and possession of the rakes / wagons supplied are with the appellant and they have the ownership of the rakes for a ten-year period. From the Clauses of the Agreement reproduced above, we observe that possession and effective control of the wagons. When the control and possession of the Railway Rakes were with the Indian Railway, question of Supply of Tangible Goods Service by the Appellant for use to their clients does not arise. Further, we observe that the wagon/rakes were allotted by the Indian Railways to the Appellant under the Agreement from the "common pool" and it was not the same rakes/wagons supplied by the Appellant to the Indian Railways. Accordingly, we hold that the activity under taken by the appellant in the instant case cannot be considered as taxable service under the category of "supply of tangible goods services".

10. The appellant submitted that the issue is no longer res integra as the Tribunal, Mumbai in the case of *M/s. Rashtriya Chemicals & Fertilisers Ltd. v. Commissioner of Central Excise & Service Tax (LTU), Mumbai [Interim Order No. 04 of 2024 dated 15.03.2024 in Service Tax Appeal No. 86284 of 2015 – CESTAT, Mumbai]* has decided the issue in favour of the appellant. The appellant submitted that on similar terms and conditions of the Agreement, the activity undertaken was not held as not liable for service tax under the category of 'Supply of Tangible Goods Service'. In support of this view, the appellant cited the paragraphs 22 and 23 of the said decision which are reproduced below for ready reference: -

> *"22. The aforesaid terms of the Agreement leave no manner of doubt that the appellant does not retain possession and effective control over the wagons, once the wagons have been leased out to the Railways. It Is to be noted that during the lease period, the wagons are in the exclusive use of the Railways for the reason that it is the Railways that determine the movement of the wagons from one place to the other. The Railways have a legal right to use the wagon. The appellant has no control over the movement of the wagons nor can the appellant lease out the wagons to any other department. The appellant is entitled only to a guarantee clearance of 98,618 MT of fertilizer per month for a period of 20 years. Merely because the appellant has a right under the Agreement for clearance of 98,618 MT of fertilizers would not mean that the appellant is in possession or effective control of the wagons. It is not even necessary for the Railways to provide the same wagons leased by the appellant for clearance of fertilizers by the appellant and any wagon can be provided by the Railways to the appellant. Though*

the appellant may have been the owner of the wagons leased out, but the appellant is required to pay the freight charges at the normal tariff rate. The maintenance charges undertaken by the Railways have not to be paid by the appellant, but if the Railways carry out any modifications, other than minor modifications, on the leased wagons, charges would be paid by the appellant. However, this additional cost will also qualify for the lease charges for the remaining period of the contract. Any minor modification of the wagons shall be carried out by the Railways at its own cost.

23. The reference order, as noticed above, makes reference to some documents explaining the Liberalized Wagon Investment Scheme, 2008 and Freight Marketing Circular of 2019 for the purpose of determining whether the supply of wagons to Railways would be a supply of tangible goods service but neither the show cause notice nor the impugned order make reference to the said documents. In fact, the show cause notice and the order passed by the Commissioner have placed reliance only on the relevant clauses of the Agreement dated 12.06.2009, which alone was required to be examined for determining whether the lease of the wagons by the appellant to the Railways would be a taxable service under section 65(105)(zzzzj) of the Finance Act. It is this Agreement that was referred to in the show cause notice to allege that the lease of wagons by the appellant to the Railways would amount to supply of tangible goods and it is this Agreement which has also been considered by the Commissioner to arrive at a conclusion that the appellant provided supply of tangible goods service to the Railways."

10.1. The Ld. Authorized Representative for the Revenue submitted that the facts and circumstances of the in the case of *M/s. Rashtriya Chemicals & Fertilisers Ltd. v. Commissioner of Central Excise & Service Tax (LTU), Mumbai (supra)* referred by the appellant are different from the facts and terms and conditions of the present case on hand and hence the case-law relied upon by the appellant is not applicable to the instant case. We have gone through the terms and conditions of the Agreement in the instant case and the case cited by the appellant referred supra. We observe that the terms and conditions in both the cases are more or less same. The main difference between the Agreements is that in the case of *Rashtriya Chemicals & Fertilisers Ltd. (supra)* cited by the appellant, the wagons were leased to the Indian Railways and the appellant was receiving leasing charges directly from the Indian Railways, however in the present case, the appellant was getting a rebate of 10% in the freight while using the rakes for transportation of goods by Rail. In both the agreements, once the wagons are handed over to Railways, they are in the exclusive use of the Railways for the reason that it is the Railways that determine the movement of the wagons from one place to the other. The Railways have a legal right to use the wagon. The appellant has no control over the movement of the wagons nor can the appellant has the right to allot the same wagons to any other persons. The appellant has been given the right to use the rakes / wagons given by India Railways, which they are free to use the way they want. They can either use the rakes/wagons for themselves or allot to other clients. For the invests made by them they receive the consideration in the form of 10% rebate on the freight which they can avail themselves while transporting the goods of their own or collect from the clients to whom they allot the right to use the rakes. We observe that in both the circumstances there is no service rendered relating to 'supply of tangible goods' as held by the Tribunal in the case of *Rashtriya Chemicals & Fertilisers Ltd. (supra).* Even when the appellant collects any premium charges from the clients, it can be related to the transfer of their right for transportation of goods by rail and not related to 'supply of tangible goods service'.

10.2. We observe that in the case *Rashtriya Chemicals & Fertilisers Ltd. (supra),* after analysing the agreement, which is almost similar to the agreement in the present case on hand, the Tribunal held that leasing out the wagons to Railways would not fall under the category of taxable service of ' Supply of Tangible goods'. The relevant extract from the decision of Tribunal, Mumbai are reproduced below: -

> *"45. The basic terms and conditions contained in the Agreement in the matter of MSPL and in a matter of the appellant are almost identical. As in the case of the Agreement executed between the appellant and the Railways, the Agreement entered into between MSPL and the Railways also mentions that the Railways took on lease 60 wagons from MSPL subject to the terms and conditions stipulated in the Agreement; the lease charges under the Agreement which was for a period of 20 years were required to be paid by the Railways to the appellant at the rate of Rs. 40/- per thousand per quarter for the primary period of 10 years and at the rate of Rs. 10/- per year for the secondary lease period of 10 years; the freight charges were required to be paid by MSPL to the Railways at the normal tariff rate of the Railways; the Railways were required to provide a guaranteed clearance of 11 rakes per month for a period of 20 years; no maintenance charges were to be levied for the maintenance undertaken by the Railways; the Railways were, however, at liberty to*

make necessary modifications on the leased wagons at the cost of MSPL, but this additional cost would also qualify for lease charges for the remaining period of the Agreement; and minor modifications carried out by the Railways would be charged to the revenue expenditure of the Railways and would be carried out at the cost of the Railways.

46. On an analysis of the aforesaid terms of the Agreement between MSPL and the Railways, the Tribunal recorded a categorical finding that the right of possession and effective control of the wagons was with the Railways and not with MSPL. The Tribunal also recorded a categorical finding that the transaction entered into between MSPL and the Railways constituted a deemed sale under article 366(29A) of the Constitution and MSPL also paid VAT to the State Government. The Tribunal also noticed that the Ministry of Railways had also clarified in the letter dated 11.06.2014 that this would be a deemed sale which would attract VAT and no service tax would be payable.

47. The Civil Appeal filed by the department before the Supreme Court, which is reported in 2023 (69) G.S.T.L. 225 (S.C.) [MSPL Ltd.], was dismissed by the Supreme Court and the decision is reproduced below:

> *"Delay condoned.*
>
> *2. Having gone through the impugned judgment and order(s) passed by the Customs, Excise & Service Tax Appellate Tribunal (CESTAT), it cannot be said that the Tribunal had committed any error which calls for interference by this Court. In fact, we are in complete agreement with the view taken by the Tribunal.*
>
> *3. All these Appeals deserve to be dismissed and are, accordingly, dismissed."*

48. It is seen that the Supreme Court clearly held that it was in complete agreement with the view taken by the Tribunal. Thus, the views expressed by the Tribunal on the issue can be taken to be the views of the Supreme Court. In this view of the matter, when in a similar Agreement executed between MSPL and the Railways, a categorical finding has been recorded that during the lease

> *period the possession and effective control of the wagons was with the Railways, the reference would have to be answered in this manner.*
>
> *49. The inevitable conclusion that flows from the aforesaid discussion is that the wagons which were given on lease by the appellant to the Railways on terms and conditions set out in the Agreement dated 12.06.2009 were in the possession and effective control of the Railways.*
>
> *50. As noticed above, the show cause notice dated 02.04.2012 calls upon the appellant to show cause as to why service tax should not be demanded from the appellant with interest and penalty in view of the terms and the conditions contained in the Agreement dated 12.06.2009 entered into between the appellant and the Railways. The Schemes referred to in the reference order have not been relied upon in the show cause notice nor the order passed by the Commissioner makes any reference to them. The show cause notice and the order of the Commissioner refer to the aforesaid Agreement dated 12.06.2009 entered into between the appellant and the Railways only. Thus, what has to be determined is whether the appellant had transferred the right of possession and effective control to the Railways in terms of the conditions set out in the Agreement dated 12.06.2009 when providing wagons on lease to the Railways.*
>
> *51. In view of the aforesaid, the answer to the reference is as follows:*
>
>> *"The The lease of wagons by the appellant to the Railways in terms of the Agreement dated 12.06.2009 transfers the right of possession and effective control of the wagons to the Railways and, therefore, cannot be subjected to levy of service tax under section 65(105)(zzzzj) of the Finance Act."*

10.3. Thus, we observe that the Terms and Conditions of the case-law referred to by the appellant differ from the facts of the present case on hand, only on the mode of payment; in the case of *M/s. Rashtriya Chemicals & Fertilisers Ltd. (supra)*, the impugned goods were leased to the Indian Railways and the appellant was receiving the leased amount in lieu of giving the wagons to the Indian Railways. In the present case, the appellant is receiving a consideration in the form six rakes with 10% freight rebate and two rakes without rebate. However, we observe that the mode of payment would not distinguish the nature of service rendered by the appellant to Indian Railways. In both the Agreements the wagons are handed over to Indian Railways and the supplier of wagons has no control over the wagons / rakes once the same are handed over to the Indian Railways. In the present case on hand, we observe that even for their own use, the appellant do not get the same wagons supplied by them. They have to use the wagons allotted to them by the Railways. When the appellant are not in a position to use the wagons / rakes, they allot the same to their clients and get the rebate from the clients by means of raising debit notes. We observe that this is a separate transaction which has nothing to do with the wagons / rakes supplied by the appellant to the Indian Railways. In this case, the appellant has the facility to use the rakes allotted to them by the Indian Railways, which they have given to other clients. The said clients use the rakes allotted to them by the Railways for the purpose of Transportation of Goods By Rail Services. Once the right to use the wagons are transferred to the clients, the appellant has no role in allotment of wagons to the clients. Thus, we observe that in this transaction, there is no supply of tangible goods service involved. It can only be claimed that the rakes given by the appellant to their clients are used for 'Transportation of Goods By Rail Services', but there is no demand of Service Tax raised under this category.

10.4. We observe that the impugned order has confirmed the demand under the category of 'supply of tangible goods service' on the allegation that the appellant have the effective control and possession of the rakes supplied by them to the Indian Railways. In view of the discussions in the foregoing paras, we observe that the appellant did not have the effective control and possession of the rakes supplied by them to the Indian Railways and hence, they have not rendered any supply of tangible goods service to this effect. We observe that the ratio of the decision in the case of *M/s. Rashtriya Chemicals & Fertilisers Ltd. (supra)* is squarely applicable to this case and by following the said ratio, we hold that the demand of Service Tax confirmed in the impugned order under the category of 'supply of tangible goods service' is not sustainable. Since the demand itself is not sustainable, the question of demanding any interest and imposing any penalties does not arise.

11. The appellant also contested the demand confirmed in the impugned order on the ground of limitation. They contended that the entire demand is barred by normal period of limitation. Accordingly, they contended that the demand confirmed is not sustainable. Also, there is no suppression of fact with intention to evade the tax established in this case and hence imposition of penalty is not warranted in the facts and circumstances of the case. We observe that the dispute in the instant case relates to the period from 2008-09 to 2009-10 whereas the impugned Show Cause Notice was issued on dated 23-07-2012. The instant proceeding is initiated on the basis of Audit of Books of Accounts and scrutiny of Profit & Loss A/c. [Schedule XV (Other Income)] of the

Appellant. No fresh material is brought by the Department to allege any suppression of facts with intention to evade the tax. Accordingly, we hold that the entire demand is barred by normal period of limitation of one year and hence the demands confirmed in the impugned order are liable to be set aside on the ground of limitation also.

12. In view of the above discussion, we set aside the demands confirmed in the impugned order on merits as well as on limitation and allow the appeal filed by the appellant.

(Order pronounced in the open court on **31.07.2024**)

Sd/-
(ASHOK JINDAL)
MEMBER (JUDICIAL)

Sd/-
(K. ANPAZHAKAN)
MEMBER (TECHNICAL)

Sdd