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

REGIONAL BENCH – COURT NO. 1

Service Tax Appeal No. 75804 of 2025

(Arising out of Order-in-Appeal No. 624/HWH/ST/2024-25 dated 28.01.2025 passed by the Commissioner of C.G.S.T. and C.X., Kolkata Appeals-II, 3rd & 4th Floor, Bamboo Villa, 169, A.J.C. Bose Road, Kolkata – 700 014)

M/s. Mithun Samanta **: Appellant**
Vill. & P.O.: - Nowpala, Bagnan,
Howrah – 711 303

VERSUS

Commissioner of C.G.S.T. and Central Excise **: Respondent**
Howrah Commissionerate

APPEARANCE:

Shri Aditya Dutta, Advocate, for the Appellant

Shri S.K. Singh, Authorized Representative for the Respondent

CORAM:

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

FINAL ORDER NO. 76623 / 2025

DATE OF HEARING / DECISION: 24.06.2025

ORDER:

The present appeal has been filed by M/s. Mithun Samanta, Vill. & P.O.: Nowpala, Bagnan, Howrah – 711 303 (hereinafter referred to as the "appellant") against the Order-in-Appeal No. 624/HWH/ST/2024-25 dated 28.01.2025 passed by the Commissioner of C.G.S.T. and C.X., Kolkata Appeals-II, 3rd & 4th Floor, Bamboo Villa, 169, A.J.C. Bose Road, Kolkata – 700 014.

2. The facts of the case are that the appellant is a proprietorship concern engaged in the business of supply of machines such as JCB, Hydra, Excavator, etc., to different clients. While supplying the said machines to clients, both effective possession and control of these machines were transferred to the respective clients and appropriate VAT has been charged on the said bills. The appellant considered the said activity as 'deemed sale' as per clause 29A of Article 366 of the Constitution of India and thus, did not pay Service Tax thereon.

3. A Show Cause Notice dated 22.04.2022 was issued to the appellant, to demand Service Tax for the periods 2015-16, 2016-17 and 2017-18 (up to June, 2017) wherein an amount of Rs.48,23,360/- (inclusive of cess) has been demanded, along with interest; penalties were also proposed.

4. Thereafter, on adjudication, the ld. adjudicating authority vide the Order-in-Original dated 04.10.2023 has confirmed the entire demand of Service Tax, along with interest, besides imposition of an equal amount as penalty under Section 78(1) of the Finance Act, 1994. He also imposed a penalty of Rs.10,000/- under Section 77 of the Act.

4.1. The appellant challenged the above adjudication order before the Ld. Commissioner (Appeals), who vide the impugned Order-in-Appeal dated 28.01.2025 has rejected their appeal and thereby upheld the order passed by the ld. adjudicating authority.

4.2. Aggrieved by the impugned order, the appellant has filed this appeal.

5. The Ld. Counsel appearing on behalf of the appellant submits that the Commercial Taxes and State Tax Department, Government of West Bengal has issued a Final Assessment Order dated 28.11.2024 under Section 46 of the WBVAT Act, 2003 pertaining to the period 01st April, 2017 to 30th June, 2017. He submits that in the said order, it has been inter alia observed that the dealer has supplied excavator/pocalin machines to various concerns for excavation works against hire basis which is 'deemed sales' under Section 2, Clause 39(c) (sale by way of transferring the right to use) under the WBVAT Act. In view of this, the Ld. Counsel for the appellant contends that they have paid VAT on the said activity of supply of equipment and therefore, no Service Tax is payable by them on the said activity.

6. On the other hand, the Ld. Authorized Representative of the Revenue reiterated the findings in the impugned order.

7. Heard both sides and perused the appeal records.

8. I find that in this case, the appellant has engaged in supply of equipment viz. JCB, Hydra, Excavator, etc., to various clients. It is observed that the West Bengal Commercial Taxes & State Tax Department has considered the above activity undertaken by the appellant to be 'deemed sale' and collected applicable VAT on the said activity. Thus, I am of the view that no Service Tax is payable by the appellant on the said activity as VAT has already been paid by the appellant.

8.1. In this regard, I find that a similar view has been expressed by the Tribunal, Chennai in the case of *M/s. Sai Infraaequipments Pvt. Ltd. v. Commissioner of G.S.T. & Central Excise, Salem & ors. [Final Order No. 41329-41330 of 2024 dated 21.10.2024 in Service Tax Appeal No. 40484 of 2015 & ors. – CESTAT, Chennai],* wherein it was observed as under: -

> *"10. The second issue is with regard to leasing of JCBs, which the appellants had treated the same as a 'deemed sale' within the meaning of Article 366 (29A) of Constitution of India which attracted State VAT as "Transfer of right to use goods" and it is not disputed by the Revenue that the appellant had indeed remitted the applicable VAT and the transaction involving leasing of the JCBs. Without accepting the same, the Revenue proposed and confirmed the demand under service tax, which has been questioned before us.*
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> *11. We find that the very same issue has been addressed to by the Hon'ble Apex Court in the case of Imagic Creative Pvt. Ltd. Vs. Commissioner of Commercial Taxes 2008 (9) STR 337 (SC) wherein it has been held that once the VAT liability is discharged, service tax cannot be demanded since VAT and service tax are mutually exclusive. In view of binding decision of the Hon'ble Apex Court, we are of the view that the demand of service tax on the leasing of JCB is also not sustainable and hence the impugned orders to this extent also cannot sustain. We are satisfied that the appellants succeed on merits and hence we do not propose to give any finding on the invocation of extended period."*

9. In view of the above discussion and by relying on the decision cited supra, I hold that the activity undertaken by the appellant has to be construed as 'deemed sale' and hence, no Service Tax is payable by the appellant on the said activity.

9.1. Consequently, the demand of Service Tax confirmed in the impugned order is set aside. As the demand of Service Tax does not survive, the question of demanding interest or imposing penalties thereon does not arise.

10. In the result, the appeal is allowed, with consequential relief, if any.

(Dictated and pronounced in the open court)

Sd/-

(K. ANPAZHAKAN)
MEMBER (TECHNICAL)

Sdd