CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI

REGIONAL BENCH - COURT NO. I

Service Tax Appeal No. 86575 of 2018

(Arising out of Order-in-Original No. 17-19/COMMR/(Dr.KNR)/CGST&CEX/MC/2017 dated 11.12.2017 passed by the Commissioner, CGST & Central Excise, Mumbai Central)

Greatship (India) Ltd. .... **Appellants**
Indiabulls Finance Centre, Tower 3, 23rd Floor,
Senapati Bapat Marg, Elphinstone Road (West),
Mumbai – 400 013

Versus

Commissioner, CGST & Central Excise, Mumbai Central .... **Respondent**
GST Bhavan, 115, Maharshi Karve Road,
Opp. Churchgate Station, Mumbai – 400 020

Appearance:

Shri V. Sridharan a/w Shri Vinay Jain, Advocates for the Appellants
Shri Badhe Piyush Barasu, Authorized Representative for the Respondent

CORAM:

HON'BLE MR. S.K. MOHANTY, MEMBER (JUDICIAL)
HON'BLE MR. M.M. PARTHIBAN, MEMBER (TECHNICAL)

FINAL ORDER NO. A/85462/2024

Date of Hearing: 06.11.2023
Date of Decision: 03.05.2024

Per: M.M. Parthiban

This appeal has been filed by M/s Greatship (India) Limited, Indiabulls Finance Centre, Tower 3, 23rd Floor, Senapati Bapat Marg, Elphinstone Road (West), Mumbai-400 013 (herein after, referred to, in short as 'the appellants'), assailing Order-in-Original No. 17-19/COMMR/ (Dr.KNR)/CGST & CEX/MC/2017 dated 11.12.2017 (herein after, referred to as 'the impugned order') passed by the Commissioner, CGST & Central Excise, Mumbai Central, Mumbai.

2.1. Briefly stated, the facts of the case are that the appellants herein is engaged in providing services in relation to offshore energy exploration and production, mining services etc. For providing taxable services, the appellants got themselves registered with jurisdictional Service Tax

Commissionerate under the Finance Act, 1994. The appellants had entered into contracts with Oil and Natural Gas Commission (ONGC) for providing offshore drilling service; further in context with providing such services, the appellants have obtained the rigs on 'Bare boat charter' basis from its subsidiary company M/s Greatship Global Energy Services Pte. Limited, Singapore (GGES). The rigs were delivered to the appellants at a place outside India and the period of hire of such rigs start from the moment these were delivered to the appellants, and they have also paid hire charges for the period when the rigs were not in India. Some of these rigs during its operation under the ONGC contract were positioned in the continental shelf/Exclusive Economic Zone on the basis of their co-ordinates. The details of the rigs which were hired by the appellants were as follows:

S. No.	Name of Rig	Date of contract	Contract period	Place of delivery	Date of delivery	Date of entry into India
1	Great drill - Chetna	25.02.2009	11.03.2009 to 08.04.2012	Singapore	11.03.2009	19.03.2009
2	Great drill - Chitra	09.10.2009	19.10.2009 to 31.10.2014	Singapore	19.10.2009	29.10.2009
3	Great drill - Chaaya	04.01.2012	17.01.2013 to 19.06.2017	UAE	17.01.2013	01.02.2013
4	Great drill - Chaaru	20.02.2014	02.03.2015 to 19.06.2017	UAE	02.03.2015	25.03.2013

All the agreements entered by the appellants with GGES are standard BIMCO BARECON 2001 contracts for buyer of bareboat charter of the rigs, with minor changes to suit the requirement of the contracting parties. The appellants did not pay service tax on the hire charges paid to GGES on the ground that there is a transfer of right to use the rigs to the appellants.

2.2 During EA-2000 audit of the records of the appellants for the period 2009-2010 to 2011-2012, the Department had placed certain objections on non-payment of service tax under reverse charge mechanism in respect of 'Supply of Tangible Goods for Use' (STGU) services availed by the appellants from their overseas subsidiary company i.e., GGES; and for non-payment of service tax under reverse charge mechanism on 'Business Support Services' (BSS) provided by overseas vendors pertaining to agency representation, crew handling, husbandry, co-ordination, transportation, communication, weather forecast, global positioning, personnel support services etc. and for non-payment of service tax under reverse charge mechanism on 'Consulting

Engineering Service' availed from overseas service providers. Accordingly, show cause proceedings were initiated by the department, demanding service tax on the following:-

(a) services availed/ received from overseas subsidiary company GGES by classifying it as taxable services of STGU under clause 105(zzzzj) of Section 65 of Finance Act, 1994 for the period 2008-09 to 2012-13;

(b) services availed/received from overseas vendors viz. M/s Inchcape Shipping Services (UK) Ltd., M/s Maritima International S.A. De C.V., and M/s Asha Agencies Ltd., by classifying it as taxable services of BSS under clause 105(zzzzq) of Section 65 of Finance Act, 1994 for the period 2008-09 to 2011-12;

(c) services availed/received from overseas vendors by classifying it as taxable services of BSS under clause 105(zzzzq) of Section 65 of Finance Act, 1994 for the period 2009-10 to 2011-12; and

(d) services availed/received from overseas vendors by classifying it as taxable services of Consulting engineering services under clause 105(g) of Section 65 of Finance Act, 1994 for the period 2008-09 to 2011-12.

The demands were raised by invoking extended period under proviso to Section 73(1) ibid, besides proposing for recovery of interest and penalties by issue of Show Cause Notice (SCN) dated 15.10.2013. Further, periodical show cause cum demand notices dated 09.04.2015 and 07.12.2015 were also issued for recovery of service tax covering the period 2013-14 and 2014-15. These SCNs was adjudicated by the learned Commissioner and were culminated into the issue of impugned order dated 11.12.2017. In the impugned order, the original authority has confirmed the adjudged demands as proposed in the show cause notices demanding service tax. Besides confirmation of the said service tax demands, the original authority had also ordered for recovery of interest and imposed penalties under Section 76 and 78 of the Finance Act, 1994. Further, the original authority has also issued a corrigendum dated 27.03.2018, for modifying the amount demanded for recovery in the SCN dated 15.10.2013 for the period 2009-10 to 2011-12 and for dropping part of the demand and modifying the mandatory penalty under Section 78 ibid.

2.3. Being aggrieved against the impugned order dated 11.12.2017, the appellants have filed this appeal before the Tribunal.

3.1 Learned Advocate representing for the appellants stated that they are engaged in providing services in relation to offshore energy exploration and production. The appellants have entered into contracts with ONGC for providing offshore drilling service. For providing such services, the appellants obtained rigs on Bareboat Charter basis from its parent company M/s. Greatship Global Energy Services Pte. Ltd., Singapore. The rigs are delivered to the appellants at a place outside India as detailed in the written submission given by them. The hire period started from the moment the goods are delivered to the appellants. Further, the rig Chetna was in the Continental Shelf/ Exclusive Economic Zone even during the operation of the ONGC contract. The co-ordinates of the rigs are provided by him, as under:

Number	From	Date	To (Drilling location)	Date	Latitude	Longitude
Rig move 1	Diu Island offload location	19-Mar-09	C-23-I	27-Mar-09	20° 32' 18.43" N	72° 08' 53.83" E
Rig move 2	C-23-I	16-Dec-09	B-9-E	25-Dec-09	20° 03' 40.62" N	71° 09' 11.40" E
Rig move 3	B-9-E	05-May-10	C-23-IA	15-May-10	20° 32' 18.43" N	72° 08' 52.95" E

3.2 All the agreements are standard BIMCO BARECON 2001 contracts for Bareboat charter of the rigs (subject to minor changes to suit the requirement of parties). The salient features of the agreements for Bareboat Charter were explained by him in submitting a Sample copy of contract dated 09.10.2009 as a part of the appeal paper books submitted by them.

> Transfer of Possession and Control: During the charter period, the possession and control of the rig is transferred to the appellants and the rig is at complete disposal of the appellants. *[Clause 10(a)(i) of agreement]*
>
> Quite Possession of Charterer: The Owner shall do nothing to interrupt the Charterer-appellants' quite possession of the rig and shall not cause any third party to interrupt the said quite possession. [*Clause 12(b) of agreement]*
>
> Operation of the Rig: The appellants shall at their own expense and by their own procurement man, victual, navigate, operate, supply, fuel and repair the rig during the charter period. *[Clause 10(b) of agreement]*
>
> Maintenance and Repairs: It is the appellants' responsibility to maintain the rig, its machinery, boilers, appurtenance and spare parts in efficient operating condition.*[Clause 10(a)(i) of agreement]*
>
> Insurance: During the charter period, the rig shall be kept insured by the appellants at their expense against hull and machinery, war and protection and any other risk. [*Clause 13(a) of agreement]*
>
> Flag and name of Rig: During the Charter period, the appellants have the liberty to paint the rig in its own colour and fly its own house flag. The appellants also have the liberty to change the name and flag of the rig during the charter period (with the approval of the owners which shall not be unreasonably withheld). [*Clause 10(d) of agreement]*

3.3 The appellants have not paid service tax on the hire charges paid to GGES on the ground that there is a transfer of right to use the rig to the appellants. The department has alleged that GGES has provided supply of tangible goods service without transfer of right to use goods. Total demand raised on this account is Rs. 2,47,89,57,397/-. The department has further raised demands on various foreign currency payments made by the appellants under the below categories:

Business Support Services: Payments made in foreign currency to foreign vendors namely M/s. Inchcape Shipping Services (UK) LTD., M/s. Maritima International S.A.De C.V, M/s. Asha Agencies Ltd., etc. towards agency fees for arrangement for ships husbandry, crew change services, crew medical services, etc. Total demand on this account is Rs. 20,84,884/-

Business Support Services: Payments made in foreign currency to foreign vendors namely M/s. Furgo Survey (Middle East) Ltd., M/s. Fugro Seastar AS, Norway and M/s. Stratos, Canada pertaining to Differential Global Positioning System, Marine weather forecasting Service, Satellite communication services etc. It is for understanding wind and wave conditions which help in deciding the route, speed etc. of the rigs for the voyage. Such payments are towards services received while the appellants' rigs are stationed outside India or sailing in open seas. Total demand on this account is Rs. 17,63,818/-. The appellants have paid Rs. 17,72,741/- under protest.

Consulting Engineering Services: Payment made to Mr. Balbir Singh Negi, employee of the appellants. He was entitled to Sick Leaves/Medical Benefits as were available to other employees of the appellants. His functions include monitoring the progress report of the project, ensure that survey, inspection and test happens on time, ensure that construction is in compliance with the approved drawing. Total demand on this account is Rs. 36,09,092/-. The appellants have paid Rs. 8,06,809/- under protest.

3.4 The learned Commissioner has relied on the following clauses in the agreement to arrive at a finding that there is no transfer of right to use goods in their case:

(i) the agreements empowered GGES to inspect the logbooks of the rigs and to survey the rigs;

(ii) the agreement provides that the charterers should keep the rig in a state of good repair and efficient operating condition;

(iii) the agreements prevented the appellants from providing any lien on the rigs;

(iv) agreements required the appellants to hang a notice depicting the ownership of the rigs;

(v) the masters, officers and crew of the rig will be the employee of the charterer;

(vi) vide the MOU, the appellants are required to use the rigs to only provide services to ONGC with express permission from owners;

(vii) there existed clauses in the agreements pertaining to repossession in case of termination of agreement.

However, the appellants have provided various grounds which have not been considered by original authority and, therefore, pleaded that the above service tax demands are not sustainable and their appeals be allowed.

3.5 In support of their stand, learned Advocate had relied upon the following decisions of the Tribunal and the judgement of Hon'ble Supreme Court, in the respective cases mentioned below:

(i) *International Seaport Dredging Ltd. Vs. Commissioner of S.T.,* – 2018 (12) G.S.T.L. 185 (Tri. – Chennai)

(ii) *Universal Dredging and Reclamation Corporation Ltd., Vs. Commissioner of CGST & C.E.,* - 2020 (6) TMI 619 – CESTAT CHENNAI

(iii) *Petronet LNG Ltd. Vs. Commissioner of Service Tax* - 2016 (46) S.T.R. 513 – (Tri. Del.)

(iv) *British India Steam Navigation Co. Ltd. Vs. Shanmugha vilas Cashew Industries* - 1990 (48) E.L.T. 481 (S.C.)

4.1. Learned Authorised Representative for Revenue submits that the activity of the appellants is covered under the taxable category of 'Supply of Goods for Tangible Goods for Use' (STGU) services, 'Business Support Service' (BSS) and 'Consulting Engineer Services', as discussed in detail in the impugned order. He submitted that in respect of consulting engineer's services there are specific assignment letters evidencing the relationship of independent contractor for providing the services to appellants. The Business Support services provided by the overseas vendors were required for operational purposes for conducting successful voyage of the vessel of the appellants. The various clauses of the agreement entered into by the appellants with overseas rig supplier, as discussed by the learned Commissioner prove that the services of 'Supply of Tangible Goods for Use' is attracted with levy of service tax and the appellants are liable to pay the same.

4.2 In view of the above submissions made by him, the Learned AR by reiterating the findings made in the impugned order, had stated that the appellants are liable to pay service tax as determined in the impugned order.

5. Heard both sides and perused the records of the case. We have also considered the additional written submissions given in the form of paper books by learned Advocate for the appellants as well as Authorised Representative for the Revenue.

6. Brief issues for consideration in the present case before us are the following:

(i) whether the activity of hiring of rigs on charter basis, by the appellants from GGES, would amount to service of Supply of Tangible Goods for Use (STGU) and consequently are the appellants liable to pay service tax under Reverse Charge Mechanism (RCM) basis;

(ii) whether the appellants are liable to pay service tax on RCM basis, in respect of various services availed from overseas vendors under the taxable category of 'Business Support Services' (BSS) and 'Consultancy Engineering Service'; and

(iii) whether confirmation of demand in the impugned order dated 11.12.2017 for short payment of service tax along with interest by invoking extended period of limitation, and subsequent periodical demands along with imposition of penalties is sustainable.

The disputed period of the transactions relate to the financial years 2008-2009 to 2013-2014, 2013-2014 and 2014-2015. Thus, the disputed period covered both pre-negative list regime i.e., prior to 01.07.2012 and post negative list regime i.e. after 01.07.2015 upto 31.03.2015.

7. In order to address the above issues comprehensively, we would like to refer the relevant legal provisions contained in the Finance Act, 1994, during both pre and post negative list period, as follows:

"Definitions.
Section 65. *In this Chapter, unless the context otherwise requires,—*

(19) *"**business auxiliary service**" means any service in relation to*
(i) promotion or marketing or sale of goods produced or provided by or belonging to the client; or
(ii) promotion or marketing of service provided by the client; or
(iii) any customer care service provided on behalf of the client; or
(iv) procurement of goods or services, which are inputs for the client; or

Explanation.—For the removal of doubts, it is hereby declared that for the purposes of this sub-clause, "inputs" means all goods or services intended for use by the client;
(v) production or processing of goods for, or on behalf of, the client;
(vi) provision of service on behalf of the client; or
(vii) a service incidental or auxiliary to any activity specified in sub-clauses (i) to (vi), such as billing, issue or collection or recovery of cheques, payments, maintenance of accounts and remittance, inventory management, evaluation or development of prospective customer or vendor, public relation services, management or supervision,
and includes services as a commission agent, but does not include any activity that amounts to manufacture of excisable goods.

Explanation.—For the removal of doubts, it is hereby declared that for the purposes of this sub-clause,

(a) "commission agent" means any person who acts on behalf of another person and causes sale or purchase of goods, or provision or receipt of services, for a consideration, and includes any person who, while acting on behalf of another person—
(i) deals with goods or services or documents of title to such goods or services; or
(ii) collects payment of sale price of such goods or services; or
(iii) guarantees for collection or payment for such goods or services; or
(iv) undertakes any activities relating to such sale or purchase of such goods or services;

(b) "excisable goods" has the meaning assigned to it in clause (d) of section 2 of the Central Excise Act, 1944 (1 of 1944);
(c) "manufacture" has the meaning assigned to it in clause (f) of section 2 of the Central Excise Act, 1944 (1 of 1944).

***(31)** "**consulting engineer**" means any professionally qualified engineer or anybody corporate or any other firm who, either directly or indirectly, renders any advice, consultancy or technical assistance in any manner to any person in one or more disciplines of engineering;*

***Section 65(105).**"taxable service" means any service provided or to be provided,—*

(g) to any person, by a consulting engineer in relation to advice, consultancy or technical assistance in any manner in one or more disciplines of engineering including the discipline of computer hardware engineering;

Explanation.— For the purposes of this sub-clause, it is hereby declared that services provided by a consulting engineer in relation to advice, consultancy or technical assistance in the disciplines of both computer hardware engineering and computer software engineering shall also be classifiable under this sub-clause;

(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;

(zzzzq) to any person, by any other person, through a business entity or otherwise, under a contract for promotion or marketing of a brand of goods, service, event or endorsement of name, including a trade name, logo or house mark of a business entity by appearing in advertisement and promotional event or carrying out any promotional activity for such goods, service or event;

Charge of service tax on services received from outside India.

66A. (1) Where any service specified in clause (*105*) of section 65 is,—

(*a*) provided or to be provided by a person who has established a business or has a fixed establishment from which the service is provided or to be provided or has his permanent address or usual place of residence, in a country other than India, and

(*b*) received by a person (hereinafter referred to as the recipient) who has his place of business, fixed establishment, permanent address or usual place of residence, in India,

such service shall, for the purposes of this section, be the taxable service, and such taxable service shall be treated as if the recipient had himself provided the service in India, and accordingly all the provisions of this Chapter shall apply:

Provided that where the recipient of the service is an individual and such service received by him is otherwise than for the purpose of use in any business or commerce, the provisions of this sub-section shall not apply:

Provided further that where the provider of the service has his business establishment both in that country and elsewhere, the country, where the establishment of the provider of service directly concerned with the provision of service is located, shall be treated as the country from which the service is provided or to be provided.

(2) Where a person is carrying on a business through a permanent establishment in India and through another permanent establishment in a country other than India, such permanent establishments shall be treated as separate persons for the purposes of this section.

Explanation 1.—A person carrying on a business through a branch or agency in any country shall be treated as having a business establishment in that country.

Explanation 2.—Usual place of residence, in relation to a body corporate, means the place where it is incorporated or otherwise legally constituted.]

[1](3) The provisions of this section shall not apply with effect from such date as the Central Government may, by notification, appoint.

1 Inserted with effect from 01.06.2012

Post 2012 (w.e.f. 01.07.2012):

65B(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;

(b) a provision of service by an employee to the employer in the course of or in relation to his employment;

(c) fees taken in any Court or tribunal established under any law for the time being in force.

Explanation 1.— For the removal of doubts, it is hereby declared that nothing contained in this clause shall apply to,—

(A) the functions performed by the Members of Parliament, Members of State Legislative, Members of Panchayats, Members of Municipalities and Members of other local authorities who receive any consideration in

performing the functions of that office as such member; or

(B) the duties performed by any person who holds any post in pursuance of the provisions of the Constitution in that capacity; or

(C) the duties performed by any person as a Chairperson or a Member or a Director in a body established by the Central Government or State Governments or local authority and who is not deemed as an employee before the commencement of this section.

Declared services.
66E. *The following shall constitute declared services, namely:—*

(a) renting of immovable property;

xx xx xx xx

(f) transfer of goods by way of hiring, leasing, licensing or in any such manner without transfer of right to use such goods;…."

8.1 The above legal provisions as it existed for the period prior to 01.07.2012, the taxable entry for levy of service tax on Supply of Tangible Goods for Use (STGU) services was specific in terms of Section 65(105)(zzzzj) ibid, which provided for levy of service tax on supply of tangible goods for use without transfer of right of possession and effective control. Further, for the period post 01.07.2012, the services was comprehensively covered under the interpretation or meaning given to the phrase 'service' under Section 65B(44) ibid which had 'inclusion' clause and 'exclusion' clause. The 'declared service' provided under Section 66E was covered under the scope of service tax levy under the inclusion clause; however, certain activities which are outside the scope of service tax levy were excluded by providing for specific exceptions by listing out the same under the said Section 65B(44) ibid. In the present context of the case, the said term 'service', *inter alia*, excluded a supply or transfer which is deemed to be a sale within the meaning of clause (29A) of Article 366 of the Constitution of India.

8.2 From the plain reading of above legal provisions, for the period prior to 01.07.2012, it transpires that in order to categorize a particular activity as a 'service' and to charge service tax thereon, it should be covered under the specific category of taxable services as per defined scope of coverage under tax net, inasmuch as each of the taxable services are defined separately under clause (105) of Section 65 of the Finance Act, 1994. We find that services provided in relation to supply of tangible goods (STGU), without transferring right of possession and effective control of said tangible goods is defined under section 65(105)(zzzzj) ibid. STGU services was one of the seven services that were being separately defined as taxable services in the

Union Budget for the year 2008-09, which was introduced through Finance Bill, 2008 with effect from 16.05.2008. Specifying a service separately as a taxable service though does not necessarily mean or suggest that services falling within the scope of newly specified service were not earlier classifiable under any one of the existing taxable services, and in order to charge the taxable services under one or other category, the provisions of classification of services has to be applied. Further, the scope and coverage of a taxable service are to be determined strictly in accordance with the language of the relevant statutory provision existing during the material period. Thus in terms of the definition of taxable services under clause (zzzzj) of Section 65(105), the essential elements to be satisfied by an activity to quality as STGU services are that it should firstly involve supply of tangible goods and secondly, there shall be no transfer of right of possession and effective control of the tangible goods from one person to other person.

8.3. Further, the Education guide on Taxation of Services dated 20.06.2012 issued by the department in clarifying to the filed formations and the trade, the meaning of transfer of right to use goods were explained as follows. The relevant paragraph is extracted hereunder:

> *"6.6 <u>Transfer of goods by way of hiring, leasing, licensing or any such manner without transfer of right to use such goods</u>*
>
> *6.6.1 What is the meaning and scope of the phrase 'transfer of right to use such goods'*
>
> *Transfer of right to use goods is a well recognized constitutional and legal concept. Every transfer of goods on lease, license or hiring basis does not result in transfer of right to use goods. Transfer of right of goods' involves transfer of possession and effective control over such goods in terms of the judgment of the Supreme Court in the case of State of Andhra Pradesh v. Rashtriya lspat Nigam Ltd [Judgment dated 6/2/2002 in Civil Appeal no. 31 of 1991]. Transfer of custody along with permission to use or enjoy such goods, per se, does not lead to transfer of possession and effective control.*
>
> *The test laid down by the Supreme Court in the case of Bharat Sanchar Nigam Limited v. Union of India [2006 (2) STR 161 (SC)] to determine whether a transaction involves transfer of right to use goods, which has been followed by the Supreme Court and various High Courts, is as follows:*
>
> *(i) There must be goods available for delivery;*
>
> *(ii)There must be a consensus ad idem as to the identity of the goods;*
>
> *(iii) The transferee should have legal right to use the goods - consequently all legal consequences of such use including any permissions or licenses required therefore should be available to the transferee;*
>
> *(iv)For the period during which the transferee has such legal right, it has to he the exclusion to the transferor - this is the necessary concomitant of the*

plain language of the statute, viz., a 'transfer of the right to use' and not merely a license to use the goods;

(v)Having transferred, the owner cannot again transfer the same right to others.

Whether a transaction amounts to transfer of right or not cannot be determined with reference to a particular word or clause in the agreement. The agreement has to be read as a whole, to determine the nature of the transaction."

Thus, it is clear from the above clarification issued by the department that transfer of right to use goods involving transfer of effective control and possession is to be determined in terms of the test laid down in the judgement of the Hon'ble Supreme Court which could be fulfilled by reading the agreement(s) entered into between the parties in a comprehensive manner in order to decide about the exigibility of service tax.

8.4 On perusal of the records of the case, it transpires the appellants had entered into an agreement for chartering of the rigs/vessels from the ship/vessel owners i.e., GGES as per standard contract of Baltic and International Maritime Council (BIMCO). The BIMCO agreement provides for various terms and conditions for which the parties to contract have to enter into agreement. Further, on the subject of ship/vessel hiring/lease and its management, we find that ship owners and ship hirers operate in a myriad of different laws and customs. At the level of international maritime law, there are four basic acts/conventions regulating shipping trade. United Nations Convention on the Law of the Sea (UNCLOS), signed on 10th December 1982, effective as of 16th November 1994, to which India is a signatory, provides the core element of international legislation for maritime industry. The other important international conventions that are required to be complied with by the shipping industry are International Convention for the Prevention of Pollution (MARPOL) covering prevention of pollution of the marine environment by ships due to either operational or accidental causes; International Convention and Code on Standards of Training, Certification and Watch keeping for Seafarers (STCW), International Management Code for the Safe Operation of Ships and for Pollution prevention (ISM Code). In order to ensure compliance with various legal requirements of international maritime law, the ship owners first and foremost, generally enter into a contractual relationship with terms agreed between them and with ship hirers, by adopting the standard agreements. BIMCO in their efforts to complement the global regulatory regime developed by the International Maritime Organization (IMO) have created standard contracts and clauses that address the commercial and practical implications of global regulations on charter parties and other shipping contracts that allocate obligations, responsibilities and liabilities fairly. Considering the complexity involved in hiring of the vessel and the need for proper documentation of the vessel by ship hirers, BIMCO has also brought out separate agreement BARECON. These standard BIMCO agreements, including the charter contracts i.e., BARECON enjoy worldwide acceptance and have also been recognized by courts across the globe. Keeping in with the global standards, in India too these contracts have gained acceptance.

8.5 BARECON 2001 is one such model agreement covering various aspects such as details of vessel and parties to contract, charter period, hire charges, delivery, possession, re-delivery and re-possession, inspection, maintenance, insurance and other commercial arrangements. The relevant edition of such contract/ agreement is BARECON 2001 and the latest edition of such contract is BARECON 2017. The advantages of such contract is that all potential specifics of ship hiring are included in this form, thus, allowing the contracting parties to shape a unique business relationship between the Owner and the hirer. The main structure of the BARECON 2001 Contract is as follows:

Structure of the BIMCO standard ship/vessel hiring on bare charter agreement BARECON 2001	
Part -I	Standard information concerning parties to the agreement containing 46 specific details in boxes, for ease of tick mark as 'Yes' 'No' 'Applicable, then short details' or 'Not applicable' etc.
Part -II	Agreement with 31 standard clauses plus additional clauses:
Clause 1	Definitions
Clause 2, 33	Charter period with additional clause 33
Clause 3	Delivery
Clause 4, 32	Time for delivery with additional clause 32
Clause 8	Inspection
Clause 10	Maintenance and Operation
Clause 11	Hire
Clause 12	Mortgage
Clause 13	Insurance and Repairs
Clause 15, 29	Redelivery, Repossession
Part-III	Provisions for new building vessels only (optional clauses)
Part-IV	Hire purchase agreement (optional clauses)

From the above contractual arrangements, it can be inferred that in order to comply with various legal compliance requirements over various countries in the delivery, possession, voyage and during the period of hiring of the ship, for the upkeep of the ship including maintenance, repairs and employing the crew, commercial, operational and technical management, re-possession of the ship etc., the Ship owner have entered into contractual arrangement with a Ship hirer, who conducts the same functions as the former used to perform, on the basis of the standard BIMCO contract provisions and upon payment of hiring charges. Thus, prima facie, the above contract entered by the appellants with ship owners GGES clearly show that during the period of hire, the appellants are in possession and control of the rigs.

8.6 We also find that certain specific clauses of the agreement provide the contractual relationship between the ship owner and the ship hirer in clear terms.

> *"2. Chater period*
>
> *In consideration of the hire detailed in Box 22, the Owners have agreed to let and the charterers have agreed to hire the Vessel for the period stated in Box 21.*
>
> *3. Delivery*
>
> *(a). The vessel shall be delivered by the Owners and taken over by the Charterers at the port or place indicated in Box 13 in such ready sea berth as the Charterers may direct… or*
>
> *2. Time and Place of delivery (Part-III) applicable for newly built vessel:)*
> *(a) subject to the vessel having completed the acceptance trials in accordance with the building contract and specification to the satisfaction of the Charterers, the Owners shall give and the Charterers shall take delivery of the vessel afloat when ready for delivery and properly documented at the Builders Yard…*
>
> *32. Time of Delivery (additional clause)*
> *The vessel shall be delivered at the place stated in Box 13, not later than the date stated in Box 14, after successful completion of the Third party inspection by an independent Inspector nominated and paid for by the Charterers. The Vessel shall comply in full to technical specifications attached at Schedule-I. The Vessel shall be delivered by the Owner to the Charterer along with... as per clients published technical specifications.*
>
> *10. Maintenance and Operation*
>
> *(a)(i) Maintenance and Repairs: During the Charter period the Vessel shall be in the full possession and at the absolute disposal for all purposes of the Charterers and under their complete control in every respect….*
>
> *(b) Operation of the Vessel: The Charterers shall at their own expense and by their procurement man, victual, navigate, operate, supply, fuel and whenever required, repair the Vessel during the charter period and they shall pay all charges and expenses of every kind and nature…The Master, officers and crew of the Vessel shall be the servants of the Charterers for all purposes whatsoever, even if for any reason appointed by the Owners.*
>
> *Charterers shall comply with the regulations regarding officers and crew managing in force in the country of the vessels flag or any other applicable law.*
>
> *(d) Flag and Name of Vessel: During the Charter Period, the Charterers shall have the liberty to pain the Vessel in their own colours, install and display their funnel insignia and fly their own house flag...*
>
> *11. Hire*
> *(a) The Charterers shall pay hire due to the Owners punctually in accordance with terms of the Charter in respect of which time shall be of the essence…*
>
> *12. Mortgage:*
>
> *(b)…. The Owner shall do nothing to interrupt the Charterer's quiet enjoyment of the Vessel for the Charter period and shall not cause any third party to interrupt Charterer's said quiet enjoyment provided always that the Charterer shall have fully complied with all its obligations under this Charter….*

<u>13. Insurance</u>

(a) During the Charter Period the Vessel shall be kept insured by the Charterers at their expense against hull and machinery, war and Protection and Indemnity risks and such other risks which may be required by the Client to whom the Vessel is given on charter."

By careful reading of the above clauses of the agreement entered into by the appellants with GGES in the present case, we find that the appellants have taken the rig on bareboat hire basis from GGES. The essence of contract is as under:

(i) The effective control and possession of the rig is transferred to the appellants. The owner shall not do anything to interfere with the quite enjoyment of the appellants.

(ii) The master and crew for operating the rig/Vessel are appointed by the appellants themselves.

(iii) The appellants are free to operate and navigate the rig as per its desire.

(iv) The appellants have the liberty to paint the rig in its own colour and fly its own house flag.

(v) The appellants are responsible for the repairs, maintenance and insurance of the rigs.

(vi) The appellants are also required to comply with all the applicable safety and labour laws in relation to the rig and its crew.

(vii) The appellants and not GGES will be responsible for the loss/damage to the rig and subsequent liabilities to third parties.

8.7 Thus, in our considered view, the facts of the case and the agreement entered into by the appellants in the present case clearly brings out that the appellants are in possession and control of the rigs during the charter period. We also find that for the chartering of rigs from the overseas entity-GGES, the appellants had paid/remitted hiring charges/charter fees in foreign exchange. However, by use of such vessels when the appellants had rendered any service to ONGC or other clients in India, they had duly discharged service tax liability thereon, as applicable, by paying service tax under the category of mining service in terms of the agreements entered with the clients, and filed a periodical ST-3 returns. In case of these drilling rigs (owned by foreign vessel owners) when the payment was made in convertible foreign exchange, the appellants had treated the same as not liable to service tax and accordingly did not pay any service tax.

8.8 From the impugned order, it is seen that learned Commissioner had relied upon the following clauses of the agreement to come to the conclusion that the activities of the appellants involve STGU services. We have also analyzed these on the basis of the facts of the case and the agreement entered by the appellants as below:

Right to inspect/ survey Clause – This Clause allows GGES to inspect the rigs and the ship's/rig's logs to ascertain the condition of the rig. It is found that the clause related to inspection of rig, but does not prove that GGES had control or possession of the rig in any way. The inspection rights of the owner (GGES) are limited and subject to prior approval of ONGC and the appellants. It is clearly stated that such inspection rights can be exercised on a best endeavor basis and without any interference with the commercial operation of the rigs in the agreement. Thus, in our considered view such inspection right of the owner cannot cause the off-hire of the rig. This actually proves that GGES has transferred possession and control and therefore, needs a clause for providing necessary arrangement for inspection of rigs, in case of need by the owner.

Repair Clause – In our view, this clause in fact reinforces the fact that the possession and control of the rig is with the appellants and therefore it is obligatory of the appellants to keep the rig in good repair and efficient condition and repair it as and when required.

Prohibition to create lien - As regards the prohibition to create, incur or permit to impose any lien on the rigs, it is found that this clause is inserted to safeguard the interests of GGES in the rigs. However, we find that the prohibition to incur any lien over the rigs does not interfere with the quiet possession or control of the rigs while they are chartered by the appellants for their use.

Notice depicting ownership – We find that as the ownership of the rigs remains with the GGES, there is a requirement to depict a notice of ownership of the ship/rig, but we find that it does not interfere with the possession and control of the ship/rig by the appellants. We find that this arrangement is not violative of transfer of right to use goods to the appellants.

Master being the employee of the appellants - Clause 10(b) provides that the Master, officers and crew of the Rig shall be the servants of the Charterers i.e. the appellants, for all purposes whatsoever, even if for any reason appointed by GGES. Factually, it has been submitted by the appellants that no GGES personnel have been appointed as a crew on board the rigs. Thus we find that this clause, would only reinstate and reaffirm the contention of the appellants that the possession and effective control of the rigs during the bareboat charter period would be always with them.

Rig to be used only for ONGC – It is an admitted fact that the appellants are not the owner of the rig but only has possession and control of it. The ultimate client for whom the rigs are used could provide the details as to how and for what purpose the rigs can be used. This does not have the effect to retaining the possession and control of the rigs by the client ONGC. It is further noticed that ONGC had imposed special conditions on the bidders that an express permission to use the rigs from the owner (GGES) of the rigs is required. As this is a mandatory condition in order to be able to qualify for the bid to provide the services to ONGC by the appellants, it was mandatory for the appellants to seek prior express permission from GGES regarding the availability of rigs and for the same reason the said clause was included in the contract. Thus, in our considered view, the restrictions put on use by ONGC or clients, will not interfere with the possession and control of the rigs by the appellants.

Repossession - The clause on repossession has been has been understood by the learned Commissioner to arrive at the conclusion that right to repossess the rigs gives GGES the effective control of the rigs. The bareboat charter agreement does not envisage a situation whereby GGES can arbitrarily repossess the rig. The repossession is possible only in case of termination of the agreement which include events like non-payment of hire charges or any other breach of the contract like non-compliance or failure to maintain the rig etc. Further, this clause in fact supports the submission of the appellants that they are in possession of the rig during the continuance of the agreement and therefore, in our view the clause provides for repossession of rig without disturbing the arrangement for charter hire.

In view of the above analysis, we do not find convincing that the impugned order had made out any legal grounds for sustaining the adjudged demands confirmed by the learned Commissioner in the impugned order.

8.9 Further, we find that the taxable service under the category of Supply of Tangible Goods for Use (STGU) was introduced with effect from 16.05.2008. At the time of bringing this service under the service tax net, the Ministry of Finance in its instructions vide D.O.F. No. 334/1/2008-TRU dated 29.02.2008 had explained about the scope of the service tax levy on STGU as follows:

"4.4 SUPPLY OF TANGIBLE GOODS FOR USE:
4.4.1 Transfer of the right to use any goods is leviable to sales tax / VAT as deemed sale of goods [Article 366(29A)(d) of the Constitution of India]. Transfer of right to use involves transfer of both possession and control of the goods to the user of the goods.

4.4.2 Excavators, wheel loaders, dump trucks, crawler carriers, compaction equipment, cranes, etc., offshore construction vessels & barges, geo-technical vessels, tug and barge flotillas, rigs and high value machineries are supplied for use, with no legal right of possession and effective control. Transaction of allowing another person to use the goods, without giving legal right of possession and effective control, not being treated as sale of goods, is treated as service.

4.4.3 Proposal is to levy service tax on such services provided in relation to supply of tangible goods, including machinery, equipment and appliances, for use, with no legal right of possession or effective control. Supply of tangible goods for use and leviable to VAT / sales tax as deemed sale of goods, is not covered under the scope of the proposed service. Whether a transaction involves transfer of possession and control

> *is a question of facts and is to be decided based on the terms of the contract and other material facts. This could be ascertainable from the fact whether or not VAT is payable or paid."*

The above instructions clearly provide that such levy under STGU is only in respect of transactions of allowing another person to use the goods, without giving legal right of possession and effective control, by treating the same as service. In the present case before us, the factual matrix indicate that the rigs are used to provide the further services to M/s ONGC or other clients of the appellants. Further, in no manner the rigs are used by GGES themselves without taking permission from the appellants, to call the transaction as supply of tangible goods. Hence, on the facts of the case and on the detailed examination of the services provided by the appellants as above, we do not find it feasible to categorise the same as 'Supply of Tangible Goods for use' in order to subject the transaction for levy of service tax under Section 65 (105) (zzzzj) ibid. In view of the above conclusions arrived on the basis of factual records, we are unable to sustain the adjudged demands confirmed by the learned Commissioner in the impugned order on account of service tax payable as held by him for the taxable category 'Supply of Tangible Goods for Use' (STGU).

9.1 It has also been submitted by the learned Advocate for the appellants that in the trade parlance the contract in respect of providing rigs on hire is known as a 'charter party'; that a charter party can be of two types, namely, 'charter by demise' and 'charter not by demise'. In 'charter by demise', the ship-owner surrenders the possession and control of the rig to the charterer i.e., the person/entity who takes the rig on charter from the ship-owner. The charterer is given the rights and obligations of the ship-owner vis-a-vis the rig during the period of charter hire. In other words, a charter by demise is one wherein, in return for payment of hire, the possession of the chartered ship is given to the charterer. The charterer provides the crew and pays all running costs and undertakes the responsibility of the ship owner to those, whose goods are carried or to all activities carried on with the rig. Hence, he vehemently argued against the confirmation of the service tax demands in the impugned order.

9.2 In this regard, we find that the issue has already been decided by the Hon'ble Supreme Court in the case of *British India Steam Navigation Co. Ltd. Vs. Shanmugha Vilas Cashew Industries* (supra) wherein the meaning of the phrase 'charter parties by way of demise' has been explained in the context of Indian Carriage of Goods by Sea Act, 1925, and the relevant paragraph in the said judgement is extracted and given

> *"44. Charterparties by way of demise, says Halsbury, at para 403, are of two kinds : "(1) charter without master or crew, or "bareboat charter", where the hull is the subject matter of the charterparty, and (2) charter with master and crew, under which the ship passes to the charterer in a state fit for the purposes of mercantile adventure. In both cases <u>the charterer becomes for the time being the owner of the ship; the master and crew are, or become to all intents and purposes, his employees, and through them the possession of the ship is in him. The owner, on the other hand, has divested himself of all control either over the ship or over the master and crew, his sole right being to receive the stipulated hire and to take back the ship when the charterparty comes to an end.</u> During the currency of the charterparty, therefore, the owner is under no liability to third persons whose goods may have been conveyed upon the demised ship or who may have done work or supplied stores for her, and those persons must look only to the charterer who has taken his place."*
>
> *…*
>
> *Whether a charterparty operates as a demise or not depends on the stipulations of the charterparty. The principal test is whether the master is the employee of the owner or of the charterer."*

In India, while consolidating the laws and generally amending the laws relating to merchant shipping, the Merchant Shipping Act, 1958 had been enacted to foster the development and ensure the efficient maintenance of an Indian mercantile marine in a manner best suited to serve the national interests and for that purpose to establish a National Shipping Board who will provide for the registration, certification, safety, security of Indian ships and also for the engagement and discharge of seamen, their wages and welfare, working conditions etc. Further, we find that in order to consolidate the laws relating to admiralty jurisdiction, legal proceedings in connection with vessels, their arrest, detention, sale and other matters connected therewith or incidental thereon the Government had brought out the Admiralty (Jurisdiction and Settlement of Maritime Claims) Act, 2017. Section 96 of the Merchant Shipping Act, 1958 provide for engagement of seamen only by a ship owner or his agent. The relevant section is extracted below:

> *"96. Supply or engagement of seamen in contravention of Act prohibited.—*
>
> *(1) A person shall not engage or supply a seaman to be entered on board any ship in India unless that person is the owner, master or mate of the ship, or is the agent of the owner or is bona fide the servant and in the constant employ of the owner, or is a director of a seaman's employment office, or a shipping master.*
>
> *(2) A person shall not employ for the purpose of engaging or supplying a seaman to be entered on board any ship in India, any persons unless that person is the owner, master or mate of the ship, or is the agent of the owner*

or is bona fide the servant and in the constant employ of the owner, or is a director of a seamen's employment office, or a shipping master.

(3) A person shall not receive or accept to be entered on board any ship any seaman, if that person knows that the seaman has been engaged or supplied in contravention of this section or section 95."

From the above international conventions, BIMCO standard contracts and the provisions of Merchant Shipping Act, it is clear that the arrangement of contract between the ship owner and ship hirer, is a well-accepted commercial arrangement in the maritime trade. Supply of sea crew by the ship hirer on his own or as an agent on behalf of the ship owner is also recognized by the Merchant Shipping Act, 1958. This does not any way restrict the possession and actual control of the rigs by the appellants, as they had engaged the crew and other operational requirements for the activities of using the rigs for mining purpose.

9.3 We find that the Co-ordinate Bench of this Tribunal had dealt with the similar issue in the case of International Seaport Dredging Ltd., (supra) by holding that the service tax demands confirmed under the category of 'supply of tangible goods services' (STGU) is not legally sustainable as there is a transfer of right of possession and effective control of the vessel/dredger to the appellants. The relevant paragraphs of the said order are extracted below:

"8. *The first major point for consideration is the service tax liability of the appellant on reverse charge basis in respect of vessels and dredgers chartered by them from foreign owners. The tax liability was sought to be upheld on reverse charge basis under the category of 'Supply of Tangible Goods Service'. The tax entry relevant is as below :-*

"Section 65(105)(zzzzj) of the Finance Act, 1994 defines "supply of tangible goods services" as follows :-

"any services 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. *The whole dispute can be narrowed down to the interpretation of exclusion clause in the above entry. In other words, services in relation of supply of tangible goods for use, without transferring right of possession and effective control shall be liable to service tax. The appellant's case is that they have right of possession and effective control of the vessels/dredgers. In this connection, we have perused the Bareboat Charter, a copy of which was submitted by the Ld. Counsel. The charter talks about delivery of vessel to be taken over by the appellant at the designated place. After due survey and inventory, the vessel is to be delivered to the appellant. At the time of delivery the appellant shall pay for all the bunkers, lubricating oils and water. Clause 9 of the Charter states that the vessel shall during the charter period be in full possession and at the absolute control for all purposes of the charterers and under their complete control in every respect. The charterers shall maintain the vessel, her machinery, boilers, appurtenances and spare parts in a good state of repair in efficient operating conditions and in accordance with good commercial maintenance practice.*

10. *The appellants (charterers) are required to establish and maintain financial security or responsibilities in respect of oil or other policy damages as required by any Government, municipality etc. Clause 9(b) states that the dredgers shall at their own expenses and by their programme man, virtual, navigate, operate, supply fuel and repair the vessels whenever required during the Charter Period and they shall pay all charges and expenses of every account and nature whatsoever incidental to their usage and operation of the vessel under this charter, including foreign general municipality and/or taxes. It is the responsibility of the charterer to comply with all the regulations regarding officers and crew of the vessel as per the applicable law.*

11. *Clause 10(a) stipulates payment terms for charter. The appellants are to pay an agreed lump sum amount per calendar month till the vessel is redelivered by them to the owners. Clause 12(a) stipulates that the vessel shall be kept by the charterers at their expense against marine, war and protection and indemnity risks in such form as the owner shall in writing approve. Clause 14 talks about redelivery of the chartered vessel. On expiry of charter period, charterer shall redeliver the vessel at safe and ice-free port or place as per the approval.*

12. *On careful consideration of the terms of the above Bareboat Charter, we are of the considered view that in the present case, vessels/dredgers were transferred to the appellant with right of possession and effective control of such vessels/dredgers. The exclusion for tax liability as provided in the tax entry for supply of tangible goods is applicable to the present case.*

13. *We have also examined various decisions of the Tribunal and Apex Court relied upon by the appellant as well as Revenue. We note that the facts of the case as appreciated in the present dispute are to be applied to the legal principle laid down in these decisions.*

14. *Black's Dictionary (Tenth Edition) defines Bareboat Charter as below :-*

"Bareboat Charter - A charter under which the ship owner surrenders possession and control of the vessel to the charterer, who then succeeds to many of the shipowner's rights and obligations. The charterer, who provides the personnel, insurance and other materials necessary to operate the vessel, is known either as a demise charterer or as an owner pro hac vice. Also termed demise charter; demise charterparty; bareboat charterparty.

The 'demise' or 'bareboat' charter is conceptually the easiest to understand. The charterer takes possession and operates the ship during the period of the charter as though the vessel belonged to the charterer. The bareboat charter is thus analogous to the driver who leases a car for a specified period or a tenant who rents a house for a term of years. The charterer provides the vessel's master and crew (much as the lessee-driver personally drives the car) and pays, the operating expenses (much as the lessee-driver buys the gasoline. "David W. Robertson, Steven F. Friedell & Michael F. Sturley, Admiralty and Maritime Law in the United States 371 - 72 (2002)."

As against above, time charter is defined as a charter for a specified period under which the ship owner continues to manage and control the vessel but the charterer designates the port of call and the cargo to be carried.

15. *We note that an identical dispute with reference to the very same tax entry came up before the Tribunal in Petronet LNG Ltd. v. Commissioner of Service Tax, New Delhi - 2013- TIOL-1700-CESTAT = 2016 (46) S.T.R. 513 Tribunal. The Tribunal elaborately examined the terms of charter agreement and various decisions of High Courts and Apex Court before arriving at the conclusion that the charter agreement, both long term and short term, conform to all substantive ingredients as would constitute the transactions as transfer of right to use goods. Therefore, the transactions fall within the exclusionary clause of Section 65(105)(zzzzj) of the Act, consequently outside the purview of taxable service. The Tribunal extensively referred to the following decisions :-*

a. Avatar Singh and Others - (2002) 7 SCC 419,

b. H.L.S. Asia Ltd. - (2003) 132 STC 217 (Guwahati), *c. Bharat Sanchar Nigam Ltd. - 2006-TIOL-15-SC-CT-LB = 2006 (2) S.T.R. 161 (S.C.),*

d. Rashtriya Ispat Nigam Ltd. v. Commercial Tax Officer - (1990) 77 STC 182 AP,

e. G.S. Lamba & Co. v. State of Andhra Pradesh - 2012-TIOL-49-HC-AP = 2015 (324) E.L.T. 316 (A.P.).

f. Great Eastern Shipping Company Ltd. v. State of Karnataka - (2004) 136 STC 519 (Kar.).

***16.** We note that the analysis of the Tribunal in the above said decisions in Petronet LNG (supra) is focussed on the terms "transferring right of possession and effective control". In the said case, the Revenue submitted that the Manager, Master and crew of the bunkers are employees of the owner and were paid overtime etc. by the owner. The owner is required to maintain the tanker for wear and tear and also expenses of stores, spares, water, survey, overhauling etc. Examining the said contention of the Revenue, the Tribunal held that the said activities on the part of the owner does not take away the right of possession and effective control of the hirer. Agreement should be considered as a whole and mere employment of the personnel does not derogative from the reality of transfer of possession to and effective control by the assessee over the tanker for their use.*

***17.** We note that the analysis and reasoning adopted by the Tribunal in Petronet LNG are squarely applicable to the present dispute. In fact, in the present case, Manager, Master and crew of the vessel and are actually under control and employment of the appellants. The maintenance of the vessel for wear and tear and also expenses for lubricating, spare parts, water etc. are in fact met by the appellant only. This is not the case in the case of Petronet LNG (supra). Even then the Tribunal in the said case held that reading the charter agreement as a whole, it is clear that there is a transfer of right of possession and effective control of the vessel with the assessee.*

***18.** We note that the adjudicating authority observed that there is no legal transfer of right of possession or effective control of the vessels by the appellant. We note that such observation is contrary to the facts as revealed from the terms of charter agreement. It is relevant to note here that the transaction is not a sale simplicitor. But a transaction where there is transfer of right of possession and effective control of the goods transferred are considered as deemed sale. The clarification issued by the Board on 29-10-2008 explaining the scope of the present tax entry is relevant in this regard. It is clarified that transaction of allowing another person to use the goods without giving the legal right of possession and effective control, not being treated as sale of goods, is treated as service. As elaborately analysed above, in the present case, there is a transfer of possession and effective control of the vessels to the appellant under the various clauses of the charter agreement which clearly brings out that the appellant is having legal right of possession and effective control of the vessel.*

***19.** We note that the restriction of use of vessel only for dredging operation and bar of sub-leasing without consent of the owner, area of operation of the vessel as stipulated by the owner is considered as restrictions which will make the arrangement as not amounting to transferring right of possession and effective control to the appellant. We are not in agreement with such inference. As noted already, there is no sale of vessel in the present transaction. The owner of the vessel continues to be the owner. It is necessary and legally permissible for the owner to put certain restrictions and obligations on the part of the appellant who uses the supplied vessel for the intended purposes. This by itself will not make the exclusion clause for tax inapplicable.*

***20.** Examining the scope of transfer of right to use, the Hon'ble Karnataka High Court in Great Eastern Shipping Company Ltd. (supra) held that when the vessel during the charter period was for all purposes at the disposal of the charterer and under their control in every respect including maintenance, spare parts, efficient operation, fulfilment of legal clarification etc., the same should be considered as transfer of right to use.*

***21.** The Tribunal in Reliance Industries Ltd. - 2016 (45) STR 341 (Tri.-Mum.) examined this issue as one of the disputes. Relying on the Circular dated 29-2-*

2008, of the Board and the decision of the Tribunal in Petronet LNG (supra.)., the Tribunal held that there is no supply of tangible goods in the said arrangement, which is under Bareboat Charter. Reference was made to Section 115(v)(a) and Section 197(1) of Income-tax Act, 1961.

22. *The Hon'ble Supreme Court in British India Steam Navigation Co. Ltd. v. Shanmughavilas Cashew Industries and Others reported in (1990) 3 SCC 481 held that a charter party has to be construed so as to give effect, as far as possible to the intention of the parties as expressed in the contract. The Supreme Court was examining the implication of Bill of Lading in the said case.*

23. *On a careful consideration of Bareboat Charter, involved in the present case, findings of the impugned order and the submissions of the appellant, we have arrived at the conclusion that in the present case there is a transfer of right of possession and effective control of the vessel/dredger to the appellant. This arrangement is outside the purview of service tax liability under a 'supply of tangible goods services'."*

9.4 We further find that this Tribunal had dealt with the similar issue in the case of Universal Dredging and Reclamation Corporation Ltd., (supra) for the same issue during the post-negative list period, wherein it was held that the activities charter hire of the vessel is nothing but transfer of right to use the goods and does not fall within the 'declared services' as alleged by the department. The relevant paragraphs of the said order are extracted below:

"6. *The period involved is from November, 2015 to January, 2016. For the period prior to 1-7-2012 when the classification of services were in existence, similar issue has been decided by the Tribunal in the case of International Seaport Dredging Ltd. (supra) and Petronet LNG Ltd. (supra). There has been sweeping amendment to the Finance Act, 1994 w.e.f. 1-7-2012. Thus our endeavour would be to examine whether the legal analysis of the 'transfer of right to use goods' made in the decisions cited above would be applicable post 2012 after the introduction of the definition of 'service' and also [Section] 66E mentioning the 'declared services'.*

*"**Declared services***

66E. *The following shall constitute declared services, namely :-*

(a) renting of immovable property

(b) construction of a complex, building, civil structure or a part thereof, including a complex or building intended for sale to a buyer, wholly or partly, except where the entire consideration is received after issuance of completion certificate by the competent authority.

Explanation - For the purposes of this clause, -

(I) the expression "competent authority" means the Government or any authority authorised to issue completion certificate under any law for the time being in force and in case of non-requirement of such certificate from such authority, from any of the following, namely :-

(A) architect registered with the Council of Architecture constituted under Architects Act, 1972 (20 of 1972); or

(B) chartered engineer registered with the Institution of Engineers (India); or

(C) licensed surveyor of the respective local body of the city or town or village or development or planning authority;

(II) the expression "construction" includes additions, alterations, replacements or remodelling of any existing civil structure;

(c) temporary transferor permitting the use or enjoyment of any intellectual property right;

(d) development, design, programming, customisation, adaptation, upgradation, enhancement, implement of information technology software;

(e) agreeing to the obligation to refrain from an act, or to tolerate an act or a situation or to do an act

(f) transfer of goods by way of hiring, leasing, licensing or in any such manner without transfer of right to use such goods;"

(g) activities in relation to delivery of goods on hire purchase or any system of payment by instalments;

(h) service portion in the execution of a works contract;

(i) service portion in an activity wherein goods, being food or any other article of human consumption or any drink (whether or not intoxicating) is supplied in any manner as a part of the activity;

From the above, it can be seen that as per sub-clause (f) transfer of goods by way of hiring, leasing or licensing or in any similar manner would be a taxable service. However, if the transfer involves right to use the goods, it would be outside the purview of taxability. The definition of "services" introduced w.e.f. 1-7-2012 in Section 65B(44) is also worth of reproducing which is as under :

"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;

(b) A provision of service by an employee to the employer in the course of or in relation to his employment;

(c) fees taken in any Court or Tribunal established under any law for the time being in force.

7. In the present case, the question is whether the transfer of goods is by way of hiring of the vessel simpliciter or whether it involves transfer of right to use the vessel. For a transaction to be transfer of right to use the goods, there should be transfer of possession as well as transfer of effective control. In the present case, the department has mainly relied upon clause (6) of the agreement, to contend that there is no transfer of possession as well as effective control. Clause (6) and its various sub-clauses is reproduced as under :

"6. Maintenance and operations

(A) The Lessee shall maintain the Vessel, her machinery, appurtenances and spare parts in a good state of repair, in efficient operating condition and in accordance with good maintenance practice and shall keep the Vessel with unexpired classification of its class and with other required certificates in force at all times. Owner shall be responsible for delivering the necessary spares till boarder of India.

The Lessee shall take immediate steps to have the necessary repairs done with a reasonable time failing which the Lessor shall have the right of withdrawing the Vessel from the service of the Lessee without noting any protest and without prejudice to any claim the Lessor may otherwise have on the Lessee under this Charter.

(B) During the Charter period as indicated in box [6], the Vessel shall retain her present name and flag as indicated in box [4]. The Lessee will make no structural changes to the vessel.

(C) The Vessel shall be delivered by the Lessor without any crew.

(D) Except as otherwise provided in this Charter Party, the Lessee shall pay all charges and expenses of every kind and nature whatsoever incidental to the use and operation of the Vessel under this Charter Party.

(E) The lessee shall be responsible for the importation and exportation of the Vessel in India in the name of the Lessee.

(F) The Lessee will be responsible for all applicable and relevant permits and/or licenses necessary to deploy the vessel and its activities in India."

The above clause which relates to maintenance and operation states that, it is the responsibility of the appellant to maintain the vessel in proper condition. Undisputedly the operations are fully under the control of the appellant. The appellant has obtained necessary license to use the vessel for dredging. This license is location specific. During the charter period the vessel can be used only in this location (port). The entire *crew and staff is of the appellant. All this would go to show that the appellant has entire control for operating the vessel during charter period.*

8. *It is stated in this clause that if the appellant does not maintain the vessel by doing necessary repairs, the owner/lessor will have the right to withdraw the vessel from the service of the appellant. The question is whether such restriction is an indication that there is no transfer of effective control of the vessel. The Ld. Consultant has explained that such a clause giving right to the owner/lessor to withdraw the vessel is only to protect the interest of the owner on the vessel. It also has to be noted that such right to withdraw the vessel comes into play only when there is a breach in the clause of the agreement to do the necessary repairs of the vessel. During the charter period, the appellant has full fledged right to use the vessel by abiding to the conditions in the agreement to the exclusion of the lessor/owner of the vessel. It goes without saying that when there right is given to operate the vessel it also casts a responsibility to maintain the vessel in proper and good condition. Similar conditions were analyzed by the Tribunal in the case of Petronet LNG Ltd. v. CST New Delhi - 2016 (46) S.T.R. 513 (Tri. - Del.) and also International Seaport Dredging Ltd. - 2018 (3) TMI 633-CESTAT CHENNAI = 2018 (12) G.S.T.L 185 (Tri. - Chennai). In International Seaport Dredging (supra), the Tribunal in the said case after analysing the clause stipulating for repair and maintenance of the vessel and other relevant clauses observed as under :*

> *"17. We note that the analysis and reasoning adopted by the Tribunal in Petronet LNG are squarely applicable to the present dispute. In fact, in the present case, Manager, Master and crew of the vessel and are actually under control and employment of the appellants. The maintenance of the vessel for wear and tear and also expenses for lubricating, spare parts, water etc. are in fact met by the appellant only. This is not the case in the case of Petronet LNG (supra). Even then the Tribunal in the said case held that reading the charter agreement as a whole, it is clear that there is a transfer of right of possession and effective control of the vessel with the assessee.*
>
> *18. We note that the adjudicating authority observed that there is no legal transfer of right of possession or effective control of the vessels by the appellant. We note that such observation is contrary to the facts as revealed from the terms of charter agreement. It is relevant to note here that the transaction is not a sale simpliciter. But a transaction where there is transfer of right of possession and effective control of the goods transferred are considered as deemed sale. The clarification issued by the Board on 29-10-2008 explaining the scope of the present tax entry is relevant in this regard. It is clarified that transaction of allowing another person to use the goods without giving the legal right of possession and effective control, not being treated as sale of goods, is treated as service. As elaborately analysed above, in the present case, there is a transfer of possession and effective control of the vessels to the appellant under the various clauses of the charter agreement which clearly brings out that the appellant is having legal right of possession and effective control of the vessel."*

In the above decision, the Tribunal had referred to the decision of Hon'ble High Court of Karnataka in Great Eastern Shipping Co. Ltd. v. State of Karnataka - 2004 (136) STC 519 (Kar.). The Hon'ble High Court held that the transaction was a deemed sale and is subject to levy of sales tax. Against this decision, an appeal was preferred by the assessee before the Hon'ble Apex Court as Civil Appeal No. 3383 of 2004 [2020 (32) G.S.T.L. 3 (S.C.)]. It's noticed that the same was disposed vide decision dated 4-12-2019 wherein the decision of the Hon'ble High Court of Karnataka was upheld. Merely because there is a right given to the owner/lessor to withdraw the vessel in case they cause breach of the condition to do repairs of the vessel, cannot be a ground to infer that there is no transfer of effective control of the vessel. Even though discussions in these decisions pertain to the period prior to 1-7-2012, the facts being identical the legal principles for understanding whether a transaction is transfer of right to use goods are the same. This is evident from the TRU Circular dated 16-3-2012 and the Service Tax Education Guide dated 20-6-2012 issued by CBEC. The Board has relied on the decision rendered by Apex Court in BSNL Ltd. v. UOI - 2006 (20) S.T.R. 16 (S.C.). The meaning and scope of the phrase 'transfer of right to use goods' is clarified as a transaction which involves transfer of possession and effective control over such goods. A fleeting look on the definition of "Supply of Tangible Goods Service" under Section 65(105)(zzzzj) of the Finance Act, 1994 as it stood then clarifies why these decisions can also be made applicable for the period after 1-7-2012. The definition of "Supply of Tangible Goods Service" is as under :

> *"any services 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 of possession and effective control of such machinery, equipment and appliances"

9. *Prior to 1-7-2012 when the transaction did not involve transfer of possession and effective control, the activity would be taxable under 'Supply of Tangible Goods Services'. The test for determining whether a transaction is a transfer of right to use goods has always remained the same.*

10. *The department in their Education Guide has followed the decision of the Hon'ble Supreme Court in BSNL (supra) to lay down the test to determine as to whether the activity is transfer of right to use the goods. The Ld. Consultant has put forward submissions in tabular column (para 2.7 above) to substantiate that the agreement satisfies all the conditions laid down by the Apex Court decision. The issue mainly revolves around conditions 3, 4 & 5 elaborated in para 2.7 above. In the present case, as per clause 6F, the appellant has taken license for carrying out dredging. During the stay of the vessel in India the vessel can be used only as per the license which is to carry out dredging activity at the port. As per Clause 6F of the agreement, the third test thus stands satisfied. The fourth test is that the transfer of such right has to be to the exclusion of the transferor. As already discussed, except for a mere condition that the lessor would be able to withdraw the vessel in case of breach of agreement to do necessary repairs and maintenance, there is nothing to show in the agreement that the lessor retains the control over the vessel. The appellant has absolute discretion to use the vessel for dredging during the charter period. Such enjoyment of the vessel cannot be interrupted by the lessor unless there is a breach to do the repairs of the vessel. Further, this condition is subject to condition No. 16 which is the clause for pre-termination of the agreement. If there is breach on the side of the appellant to do periodical maintenance which may give rise to a right to the lessor to withdraw the vessel, then lessor has to abide by Clause 16 (Pre-termination notice) to put an end to agreement and then withdraw the vessel. Appellant thus enjoys full right to exclusion of others. During the period, neither the owner can use the vessel nor can the owner transfer the right to use of the vessel to another person. We have no hesitation to hold that the appellant enjoys right to use the vessel to the exclusion of the owner.*

11. *Another finding in the impugned order is that since the appellant retained the registration and the flag of the vessel, there is no transfer of effective control over the vessel. The vessel is registered in Luxembourg. It may not be practical to change the registration of the vessel in each case of charter agreement. In the present case, there is no change in ownership. If that be the case, it would be a sales simpliciter. Change of Registration and change of flag is necessary only when there is change in ownership.*

12. *From the discussions made above, we are of the considered opinion that the transaction in the present case is identical to the transaction analysed by the Tribunal in the case of International Seaport Dredging (supra) as well as Petronet LNG Ltd. (supra). The transaction is nothing but transfer of right to use the goods and does not fall within the 'declared services' as alleged by department. The demand therefore cannot sustain. The issue on merits is found in favour of appellant."*

10.1 In respect of payments made by the appellants to foreign vendors, namely M/s. Inchcape Shipping Services (UK) LTD., M/s. Maritima International S.A.De C.V, M/s. Asha Agencies Ltd., M/s. Furgo Survey (Middle East) Ltd, M/s. Fugro Seastar AS, Norway and M/s. Stratos, Canada, etc., according to the impugned order is in the nature of personnel support services, communication, weather forecasts etc., and is an operational or administrative support to the appellants. Hence, the impugned order had confirmed the service tax demands on the ground that the appellants are liable to service tax on reverse charge basis under 'Business Support Services'. It is an undisputed fact on record that the appellants have made such payments to the aforesaid foreign vendors in relation to the rigs, and that while the rigs are stationed outside India for provision of export of service. Further, the nature of services, received by the appellants are agency services for arranging ship husbandry services, crew change services, etc., In this regard, we would like to refer to the definition of 'Business Support Service" in terms of Section 65(104c) of the Finance Act, 1994 and the definition of the taxable service is provided in 65(105)(zzzq) ibid. For the convenience of immediate reference, the said definitions are reproduced below:

> *"Section 65(104c) "support services of business or commerce" means services provided in relation to business or commerce and includes evaluation of prospective customer, telemarketing, processing of purchase orders and fulfilment services, information and tracking of delivery schedules, managing distribution and logistics, customer relationship management services, accounting and processing of transaction, operational assistance for marketing, formulation of customer service and pricing policies, infrastructure support services and other transaction processing.*
> *Explanation: For the purpose of this clause, the expression "infrastructural support services" includes providing office along with office utilities, lounge, reception with competent personnel to handle messages, secretarial services, internet and telecom facilities, panty and security;.*
>
> *Section 65(105)(zzzq) - "Taxable service" means any service provided or to be provided to any person, by any other person, in relation to support services of business or commerce, in any manner;"*

Plain reading of the above definition of business support service it transpires that the activities are divided into two parts i.e. the "means" part and the "includes" part. The "means" part covers any service in relation to business or commerce within its sweep. However, the "includes" part of the definition specifies services such as telemarketing, distribution, logistics etc. We further find that Ministry of Finance, Tax Research Unit, in its instructions to the field formations in explaining the budgetary changes vide Letter No. D.O.F No. 334/4/2006-TRU, had clarified as under:

> *"Business Support Service was brought within the service tax net with effect from 01.05.2006,*
>
> *"Business entities outsource a number of services for use in business or commerce. These services include transaction processing, routine administration or accountancy, customer relationship management and tele-marketing. There are also business entities which provide infrastructural support such as providing instant offices alongwith secretarial assistance known as "Business Centre Services". It is proposed to tax all such outsourced services. If these services are provided on behalf of a person, they are already taxed under Business Auxiliary Service. Definition of support services of business or commerce gives indicative list of outsourced services."*

The above definition enumerates those services which are in relation to marketing and sales of the goods. Admittedly, the foreign vendors of the appellants have not undertaken any activity of marketing of the goods belonging to the appellants nor have the foreign vendors undertaken any activity for promotion of sale of the goods belonging to the appellants. Therefore, the services rendered by the foreign vendors cannot be brought under the scope of "business support service" for charging service tax on RCM basis on the appellants.

10.2 The appellants had also submitted as an alternate argument that the payments made to the aforementioned foreign entities could be classifiable under the Steamer Agent services as any service in correction with the ship's husbandry or dispatch including the rendering of administrative work related thereto is covered under the definition provided under Section 65(100) ibid. Under such situation also they submitted that the aforesaid services on account of the legal provisions under Rule 3(ii) of the Taxation of Services (Provided from Outside India and Received in India) Rules, 2006 stands outside the scope of the service tax levy.

10.3 We find that the legal provisions under Rule 3(ii) of the Taxation of Services (Provided from Outside India and Received in India) Rules, 2006 covers services which are performance specific. Therefore, these services would qualify as import of service into India, only if the services are fully or partly performed in India. Rule 3(ii) of said Rules is reproduced as under:

> *"3. Taxable services provided from outside India and received in India.- Subject to section 66A of the Act, the taxable services provided from outside India and received in India shall, in relation to taxable services,-*
>
> *xx xx xx xx*
>
> *(ii) specified in sub-clauses (a), (f), (h), (i), (j), (l), (n), (o), (w), (z), (zb), (zc), (zi), (zj), (zn), (zo), (zq), (zr), (zt), (zu), (zv),(zw), (zz), (zza), (zzc), (zzd), (zzf), (zzg), (zzi), (zzl), (zzm), (zzo), (zzt), (zzv), (zzw), (zzx), (zzy), (zzzd), (zzze), (zzzf),(zzzzg), (zzzzh), (zzzzi), (zzzzk), (zzzzl) and (zzzzo) of clause (105) of section 65 of the Act, be such services as are performed in India:*
>
> *Provided that where such taxable service is partly performed in India, it shall be treated as performed in India and the value of such taxable service shall be determined under section 67 of the Act and the rules made thereunder :*
>
> *Provided further that where the taxable services referred to in sub-clauses (zzg), (zzh) and (zzi) of clause (105) of section 65 of the Act, are provided in relation to any goods or material or any immovable property, as the case may*

be, situated in India at the time of provision of service, through internet or an electronic network including a computer network or any other means, then such taxable service, whether or not performed in India, shall be treated as the taxable service performed in India;."

In the present case, admittedly, the aforesaid services are provided and received by the appellants outside India and therefore, the Rule 3(ii) of the Import of Service Rules, 2006 are not attracted. Since the aforesaid services were entirely performed abroad, the same would not qualify as import of service in terms of Taxation of Services (Provided from Outside India and Received in India) Rules, 2006. Thus, we find that the confirmation of the service tax demands on the above grounds is not legally sustainable.

11.1 On the issue of service tax demands confirmed in the impugned order in respect of payments made to Mr. Balbir Singh Negi, the appellants have submitted that Shri Balbir Singh Negi was their employee; and his functions included monitoring the progress report of the project, ensure that survey, inspection and test happens on time, ensure that construction is in compliance with the approved drawing. Further, it was claimed by the appellants that he was on their payroll and was paid monthly salary during the period of his employment; he was eligible for earned leave and sick leave; he was issued Form No. 16 for deduction of TDS under Section 192 of the Income Tax Act, 1961. Further, the appellants stated that he had to report to and work under the direction of the Group Head – New Building or any other senior officer of the appellants; he was not allowed to work for any other person and he had to perform such duties as the appellants may direct. Thus, his services cannot be said to be falling under the taxable category of 'Consulting engineers service'.

11.2 From the facts on record, the BARECON agreement entered in respect of 'Great drill – Chetna', 'Great drill – Chitra' specifically provide that rigs are under construction for which the GGES had entered into separate agreement with ship builder M/s Keppel Fels Yard, Singapore. However, in the agreement entered by the appellants and GGES, a specific clause had been incorporated for ensuring that the rigs are suitable for the use of appellants and that they would conduct inspection by independent experts/inspector and pay for the same. The additional clause 32 in the contract provide as follows:

> *<u>32. Time of Delivery (additional clause)</u>*
> *The vessel shall be delivered at the place stated in Box 13, not later than the date stated in Box 14, after successful completion of the Third party inspection by an independent Inspector nominated and paid for by the Charterers. The Vessel shall comply in full to technical specifications attached at Schedule-I. The Vessel shall be delivered by the Owner to the Charterer along with... as per clients published technical specifications.*

Further, the learned Commissioner after examining the various documents produced by the appellants including the assignment letters, had given a specific finding that the consulting engineers were engaged on assignment basis for a specific period and on payment of monthly fee; it is also specified in the said assignment letters that the relationship created would be that of an independent contractor and that the engineer would not have any authority to act as agent for company of its employees. From the above findings, we find that it is not in dispute that the services of expert engineer were taken in relation to the rigs, for supervision/monitoring of appellants rigs being constructed at foreign ship yards, either at its construction stage or in ensuring compliance with the requirements of the client i.e., ONGC. Further, collection of income tax on the charges paid for such consulting services as a part of compliance requirement under the Income Tax Act, 1961 does not either enable him as 'employee' by that act alone, or absolve from the requirement of payment of service tax on reverse charge basis. Further, even though the services of consulting engineer would have visited physically abroad at the ship building yard site, the said services were actually consumed by the appellants in India and the monitoring or reporting was directly to the appellants in India. Hence, in this case, the liability of the service tax to be paid under Section 65(105) (g) of the Finance Act, 1994 as confirmed by the learned Commissioner is sustained.

12. In view of detailed discussion and our findings recorded in paragraphs 11.1 and 11.2 above, the service tax demands for Rs.36,09,092/- (Rupees Thirty Six Lakhs Nine Thousand and Ninety Two only) under sub-clause (g) of clause (105) of Section 65 of the Finance Act, 1994 along with interest and imposition of equivalent amount of penalty under Section 78 ibid, along with appropriation of part of the amount paid by the appellants, in the impugned order is proper and accordingly, we uphold the same.

13. In view of the above analysis of the legal provisions and on the basis of the orders passed by the Tribunal and the judgement of the Hon'ble Supreme Court, we find that the impugned order dated 11.12.2017 with regard to confirmation of adjudged service tax demands on 'Supply of Goods for Tangible Goods for Use' (STGU) services and on 'Business Support Service' (BSS), along with interest and penalties on the above demands are not sustainable.

14. In the result, the impugned order sustains only to the extent as discussed in paragraph 12 above. The appeal filed by the appellants is disposed of accordingly.

(Pronounced in open court on 03.05.2024)

(S.K. Mohanty)
Member (Judicial)

(M.M. Parthiban)
Member (Technical)

Sinha