CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH - COURT NO. 1

SERVICE TAX APPEAL NO. 52932 OF 2016

(Arising out of Order-in-Original No. Commissioner/LTU(AUDIT)/02/2016 dated 29.07.2016 under C. No. LTU/SRF/ST/ADJ/440/2015/2974 passed by the Commissioner LTU (AUDIT), New Delhi)

M/s SRF LTD. (Chemical Business) **...Appellant**
G-1-22, RIICO Industrial Area,
Bindayaka, Jaipur

VERSUS

Commissioner LTU, New Delhi **...Respondent**

APPEARANCE:

Shri B.L. Narasimhan & Ms. Shagun Arora, Advocate for the Appellant
Shri Ravi Kapoor, Authorized Representative of the Department

CORAM: **HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT**
HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)

Date of Hearing: 15.12.2022
Date of Decision: 03.01.2023

FINAL ORDER NO. 50001/2023

JUSTICE DILIP GUPTA:

M/s SRF Ltd. (Chemical Business)[1] seeks to assail the order dated 29.07.2016 passed by the Commissioner LTU (Audit), New Delhi[2], confirming the demand of service tax with interest and penalty for the reason that the appellant had received 'supply of tangible goods for use'[3] service from foreign suppliers, for which service tax was to be paid by the appellant under reverse charge mechanism.

2. The appellant is engaged in the manufacture of refrigerant gases and other chemicals. During the relevant period from

---

1. **the appellant**
2. **the Commissioner**
3. **STGU**

16.05.2008 to 30.06.2012, the appellant entered into contracts with foreign suppliers for obtaining ISO tankers on lease/ rental basis, which were used by the appellant for transportation of refrigerant gases via sea route. The appellant claims that during the lease period, it had effective control and possession over the ISO tankers and so the entire transaction would qualify as a 'deemed sale' under article 366(29A) of the Constitution, as a result of which no service tax liability would arise.

3. However, a show cause notice dated 29.05.2013 was issued to the appellant alleging that the appellant had received services in the nature of STGU from the foreign suppliers, which would be taxable under section 65(105)(zzzzj) of the Finance Act, 1994[4] and leviable to service tax at the hand of the appellant in terms of section 66A of the Finance Act read with rule 2(1)(d)(iv) of the Service Tax Rules, 1994[5] and rule 3(iii)(c) of the Taxation of Services (Provided from Outside India and Received in India) Rules, 2006[6].

4. The appellant filed a reply to the show cause notice but the Commissioner, by an order dated 29.07.2016, confirmed the demand of service tax. The Commissioner noted the following facts before determining the issues.

> "11.6 **I find that there is no dispute to the fact that the noticee has taken the ISO Container on lease/rental basis and amount of Rs.4,60,67,566/- has been paid by them to foreign based supplier, who is not having office in India for supply of containers.** I have perused the copies of sample contract supplied by the noticee.

---

4. the Finance Act
5. 1994 Rules
6. 2006 Service Rules

> Noticee has emphasized on various condition laid down in the Lessor Contract related to maintenance of the containers, transportation of goods, use of containers by the lessee and the noticee's responsibility for the declaration and payment of duties and taxes concerning the circulation of merchandise."
>
> **(emphasis supplied)**

5. After referring to clauses 9 and 18 of the lease agreement executed between the appellant and Tankspan Leasing Limited, the Commissioner observed:

> "11.9 **From the above, it can be concluded that though the containers were given to the noticee for operation and use of the containers for the transportation of refrigerant gases, but right of possession and effective control of the containers was never shifted to noticee as the containers were never sold to them.**
>
> 11.10 Further, attention is invited to instruction issued by CBEC under letter F.No.334/1/2008-TRU dated 29.02.2008, issued by JS(TRU) of the Govt. of India Ministry of Finance, Dept of Revenue (TRU) which states-
>
> > "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."
>
> **The above clarification by Board clearly mention that transfer of right to use any goods is leviable to sales tax/ VAT as deemed sale. Hence, the transaction leading to allowing another person to use the goods, without giving legal right of**

possession and effective control, not being treated as sale of good, is to be treated as "service".”

(emphasis supplied)

6. The Commissioner, therefore, confirmed the demand of service tax with interest and penalty.

7. In order to appreciate the controversy raised in this appeal, it would be useful to reproduce the relevant clauses of the agreement executed between the appellant and the Tankspan Leasing Limited and they are as follows:

Agreement with Tankspan Leasing Limited

“7. INSPECTION AND TESTING

(a) At any reasonable and from time to time, the Lessee shall permit the Lessor or it's authorised representatives to inspect any or all of the Containers available to the Lessor at any such address as may be mutually agreed.

(b) For the purpose of periodic inspection and testing of the Containers in accordance with the requirements of governmental authorities regulations and agreements concerning the transportation at hazardous materials, upon sixty (60) days prior written notice from Lessor, Lessee shall make any or all of the Containers available to Lessor with a certificate of cleanliness as specified in Clause 4 at a designated depot's as may be mutually agreed. In the event that prior written notice is not received from Lessor, it is still Lessees responsibility, at all times, to ensure that the Containers comply with all statutory, national and international regulations. **All costs relating to the cleaning, delivery and preparation of the Containers in readiness for inspection shall be borne by the Lessee.** The Lessor shall be responsible for the cost of inspection and testing itself. If at such time any Container is found to be damaged or altered or requires cleaning, the cost of repair and/or cleaning shall be for the account of the Lessee. Should Lessee and Lessor agree that future

periodic testing be conducted at the lessee's factory, free time per tank for such inspection will be 10 days for 2.5 year test and 15 days for 5 year test.

8. USE OF AND INDEMNIFICATION OF THE CONTAINERS.

The Lessee will not use or permit any Container to be used for any purpose for which it is not designed or suitable and will ensure that the Containers are operated in a proper and skilful manner, specifically not to be used for the carriage of radioactive materials. **The Lessee shall at its expense, comply with the International Maritime Dangerous Goods (IMDG) Code and any other relevant national, international or statutory regulations, laws, directives or conventions, including customs laws and regulations which affect the Containers, the Lease or their possession, ownership. transportation or operation; including, but not limited to, the International Convention for Safe Containers (CSC) and the Customs Convention on Containers 1956 or 1972 as the same may be In effect from time to time.**

The Lessee shall be liable for all duties, fees, charges, liens, encumbrances, fines, penalties or interest charged or Incurred for failure to comply.

9. AREAS OF USE

The Lessee shall not use, or allow the use of, the Containers in hostile countries or in any area of hostilities or conflict (declared or not) or in any area specifically prohibited in writing by the Lessor to the Lessee or in any area which may load to the invalidation of the limit of coverage and of the insurance of the Containers.

10. MAINTENANCE, DAMAGE, LOSS OF DESTRUCTION

(a) Except as otherwise provided in this Lease, the Lessee at it's own expense shall maintain the Containers in good condition and repair and shall be liable for all damage to and loss of any Container and

make all necessary replacements of components and parts during the term of the Lease using parts and workmanship equal to, or greater than, the condition that the Containers were in at the commencement of the Lease. The Lessee shall make no changes or alterations to the Containers except with the written consent of the Lessor. The colour of The Containers, identification marks, the Lessors service mark and name or any other plates, marks or seats or writing applied to the Containers must not be removed, mutilated, obliterated or supplemented In any way without the prior written approval of the Lessor and the Lessee shall take all steps to prevent any other person doing any such act or riling. The Lessee shall keep such marks and colour in good condition and repair throughout the term of the Lease.

xxxxxxxxx

13. TAXES

Lessee shall pay all taxes, fees, penalties and interest and other liens, charges or encumbrances which exist or which may be imposed during the term of the lease and levied on or in connection with or arising out of the operation, transportation, maintenance, storage, loading or other use or possession or ownership of the Containers until redelivered to Lessor, including, without limitation, withholding, deduction, income (excluding any taxes levied on Lessors net income in its country of domicile), taxes, duties and charges of any type, so that If, for any reason whatsoever, the Lessee is unable to make any payment without a deduction or withholding, It will pay such additional amount so that the et amount received by Lessor will equal the full amount Lessor would have received had such deduction or withholding not been made.

xxxxxxxxxx

16. OWNERSHIP

As between the Lessor and the Lessee, ownership of the Containers shall at all times remain with the Lessor. **The Lessee shall have quiet pssession during the term of the Lease.** Some of the containers on case to

the Lessee may be owned by a third party and leased by it to Lessor or managed on behalf of it by Lessor for subleasing to it's customers, including the Lessee.

17. CUSTOMS AND EXCISE VAT

The Lessee hereby confirms that the Containers leased under the terms of this Lease Agreement will be used only for the transport of freight outside the U.K., or to or from a place outside the U.K. On this understanding, rental payments are zero rated for purposes of VAT. Where appropriate, the Lessee shall keep records to account for its use, export or other disposal to the satisfaction of the Commissioners of Customs and Excise.

18. MISCELLANEOUS

(a) **Lessee may not assign or transfer its rights or responsibilities under this Lease Agreement to any other party without the prior written consent of Lessor.** Lessee is responsible for complying with all terms and conditions of this lease, and paying all charges due under this lease, throughout the term of the Lease, even if a Container is used by a party other than the Lessee, with or without Lessee's or Lessors consent. The Lessor may grant a security interest in and may assign any or all of it's rights, title or interest in the Containers or the Lease, including it's right to receive payment hereunder.

Lessee shall not assign, mortgage, charge, pledge or otherwise encumber the Lease or the Containers in whole or in part."

(emphasis supplied)

8. Shri B.L. Narasimhan, learned counsel appearing for the appellant assisted by Ms. Shagun Arora made the following submissions.

i. ISO tankers procured from foreign suppliers do not amount to import of STGU service;

ii. From a combined reading of the service tax provisions as also the provisions governing sale of goods, it can be interpreted that under Sales Tax, there is transfer of possession and effective control in goods, while there is no such transfer of possession and effective control under service tax;

iii. Given the terms between the appellant and the foreign suppliers, it can be seen that the ISO Tankers are being used by the appellant to the exclusion of any other party, and that the appellant is not only in possession of the tankers, but also in control, to the extent of usage as also maintenance and upkeep. In this connection reliance has been placed on the decisions of the Tribunal in **Petronet LNG Limited** vs. **Commissioner of Service Tax, New Delhi**[7] and **International Seaport Dredging Limited** vs. **Commissioner of Service Tax, Chennai**[8];

iv. The extended period of limitation could not have been invoked in the facts and circumstances of the order;

v. The appellant is eligible for cum-tax benefit under section 67(2) of the Finance Act; and

vi. No penalty could be imposed and the appellant is also entitled to waiver of penalty under section 80 of the Finance Act.

---

7. 2016 (46) STR 513 (Tribunal-Delhi)
8. 2018 (12) GSTL 185 (Tribunal –Chennai)

9. Shri Rakesh Kapoor, learned authorized representative for the Department, however, supported the impugned order and submitted that since effective control and possession over goods had not been passed to the appellant and no sales tax/VAT was discharged on the ISO Tankers, the transaction would amount to import of STGU service.

10. The submissions advanced by the learned counsel for the appellant and the learned authorized representative appearing for the Department have been considered.

11. The issue that arises for consideration is as to whether the supply ISO Tankers on lease to the appellant by foreign suppliers would amount to STGU service.

12. The demand has been confirmed under the category of STGU service for the period 01.04.2011 to 30.06.2012 under section 65(105)(zzzzj) of the Finance Act. The impugned order has held that the ISO Tankers provided by the foreign suppliers to the appellant would amount to supply of STGU/transfer of good for hire service, as the effective control and possession over the tankers remained with the foreign suppliers.

13. To appreciate, whether service tax can be levied on the transaction, it would be necessary to analyze the relevant statutory provisions as they existed prior to 01.07.2012.

14. Section 65(105)(zzzzj) of the Finance Act, which would be relevant for the period prior to 01.07.2012, under which the demand under STGU has been confirmed is as follows:

> "65. Definition. –
> In this Chapter, unless the context otherwise requires,

> **(105)** "taxable service" means any service provided or to be provided, -
> **(zzzzj)** to any person, by any other person in relation to supply of tangible goods including machinery, equipment and appliances for use, without transferring right of possession and effective control of such machinery, equipment and appliance."

15. Thus, what has to be seen for a transaction to be taxable as a service, is:

- **i.** There must be a transfer or supply of goods;
- **ii.** The transfer must be by way of hire or lease or license for using the goods; and
- **iii.** The right of possession and effective control over such goods must not have passed on to the transferee.

16. The nature of transaction between the foreign suppliers has been elaborately described. It clearly transpires that the foreign suppliers were providing on lease ISO Tankers to the appellant on payment basis. The first two conditions, therefore, stand satisfied. The dispute, in the present appeal, centers around the third condition, which is as to whether the transaction between the appellant and the foreign buyer would involve the transfer of right of possession and effective control or a transfer of right to use. This is because a transaction where right of possession of the goods together with effective control over such goods is transferred it would tantamount to a deemed sale, which would be beyond the purview of service tax.

17. In this connection, it would be pertinent to refer to Entry 54 of List II of the Seventh Schedule to the Constitution. It empowers

State to levy tax on sales and purchase of goods. The relevant Entry is reproduced below:

> "**54.** Taxes on the sale or purchase of goods other than newspaper, subject to the provisions of Entry 92 A of List I"

18. The forty-sixth amendment to the Constitution, extended the meaning of **"sale or purchase of goods"** by giving an inclusive definition of the phrase **"tax on the sale or purchase of goods"** under article 366(29A) of the Constitution. The same is reproduced below:

> **"366(29A)** "tax on the sale or purchase of goods" includes-
> (a) a tax on transfer, otherwise that in pursuance of a contract, of property in any goods for cash, deferred payment or other valuable consideration;
> (b) a tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of works contract;
> (c) a tax on the delivery of goods on hire purchase or any system of payment of installments;
> **(d) a tax on the transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;**
> (e) ……
> (f) ……"
>
> **(emphasis supplied)**

19. It would be seen from the aforesaid that the Constitution empowers the State to levy Sales Tax/VAT on transactions in the nature of transfer of right to use goods, which were earlier not exigible to sales tax as such transactions were not covered by the definition of "sale" as given in the Sales of Goods Act, 1930.

20. It needs to be remembered that the term "transfer of right to use goods" has neither been defined in the Constitution nor in any of the State VAT Acts or Central Sales Tax Act. The said phrase was interpreted by the Supreme Court in **Bharat Sanchar Nigam Ltd.** vs. **Union of India**[9], wherein the Supreme Court laid down five attributes for a transaction to constitute a "transfer of right to use goods". In this connection paragraph 91 of the judgment is reproduced below:

> **"91. To constitute a transaction for the transfer of the right to use the good, the transaction must have the following attributes:**
>
> a. There must be goods available for delivery;
>
> b. There must be consensus ad idem as to the identity of the goods;
>
> c. The transferee should have a legal right to use the goods consequently all legal consequences of such use including any permission or licenses required therefore should be available to the transferee;
>
> d. For the period during which the transferee has such legal right, it has to be the exclusion of 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;
>
> e. Having transferred the right to use the goods during the period for which it is to be transferred, the owner cannot again transfer the same rights to others."
>
> **(emphasis supplied)**

21. It can safely be said that under Sales Tax, there is transfer of possession and effective control in goods, while there is no such transfer of possession and effective control under service tax.

---

9. 2006 (2) STR 161 (SC)

22. In the present case, the nature of transaction between the appellant and the foreign supplier for obtaining ISO Tankers on lease/rental basis reveals that:

(i) The appellant had received ISO Tankers from its foreign suppliers on payment basis and during the period when the ISO Tankers were in the possession of the appellant, the legal right to use the ISO Tankers lay with the appellant to the exclusion of any other person;

(ii) Further, the foreign suppliers could not pass the same right to any other person;

(iii) Though the ownership of the containers was with the foreign suppliers but the appellant was not only in possession of the tankers, but also in control, to the extent of usage as also maintenance and upkeep;

(iv) As for the payment of sales tax/VAT no tax could be imposed by the State on a transaction involving sales and purchase of goods in the course of imports of goods into India. This is clear from clause 17 of the Agreement. Hence, non-payment of sales tax/VAT was inconsequential; and

(v) The responsibilities with respect to maintenance, repair, testing, insurance was on the appellant. The appellant has to make all necessary replacements of components and parts during the term of the lease.

23. Thus, the transaction between the appellant and the foreign buyer would qualify as a transfer of right to use goods with the control and possession over the ISO Tanker passing on to the appellant.

24. The Andhra Pradesh High Court in **Rashtriya Ispat Nigam Ltd.** vs. **Commercial Tax Officer, Company Circle, Vishakhapatnam**[10] observed that whether there is a transfer of right to use or not is a question of fact which has to be determined in each case having regard to the terms of the contract under which there is transfer of right to use and in this connection, observed as follows:

> **"Whether there is a transfer of the right to use or not is a question of fact which has to be determined in each case having regard to the terms of the contract under which there is said to be a transfer of the right to use. In the instant case, the petitioner - Rashtriya Ispat Nigam Limited owning Visakhapatnam Steel Project, for the purpose of the steel project allotted different works of the project to contractors.** To facilitate the execution of work by the contractors with the use of sophisticated machinery**, the petitioner has undertaken to supply the machinery to the contractors for the purpose of being used in the execution of the contracted works of the petitioner and received charges for the same.** The respondents made provisional assessment levying tax on the hire charges under section 5-E of the Act. In this writ petition, the petitioner prays for a declaration that the tax levied by the 1st respondent in purported exercise of power under section 5-E of the Act on the hire charges collected during the period 1988-89, is illegal and unconstitutional. The respondents filed a counter-affidavit in support of the levy stating that the validity of A.P. Amendment Act (18 of 1985) which introduced section 5-E of the Act was upheld by the High Court of Andhra Pradesh in Padmaja Commercial Corporation v. Commercial Tax Officer [1987] 66 STC 26; (1987) 4 APSTJ 26. It is further stated that the provisional assessment under section 15 of the Act has

---

10. 1989 (12) TMI 325-Andhra Pradesh High Court

been made every month on account of submission of incorrect monthly returns claiming wrong exemption. **The petitioner, it is stated, is lending highly sophisticated and valuable imported machinery to the contractors engaged by the petitioner for the purpose of construction of steel project.** The machinery like cranes, docers, dumfors, road rollers, compressors, etc., are lent by the petitioner to the contractors for the use in the execution of project wok for which hire charges at specified rate are being collected by it. **The machinery is given in the possession of the contractor and he is responsible for any loss or damage to it. The contractor has got every right to use it in his work at his discretion. It is further stated that in view of these clear terms and conditions there is transfer of property in goods for use, for a specific purpose and for a specified period for money consideration.** The amounts charges by the petitioner attracts tax liability under section 5-E of the A.P. General Sales Tax Act, 1957.

Sri P. Venkatarama Reddy, the learned counsel for the petitioner, submits that under the terms and conditions of the contract, the contractor is provided with the facility of using the machinery if the same is available with the petitioner and there is no transfer of the right to use the machinery and for this purpose he relies on clauses 1, 5, 7, 13, and 14 of the contract to show that there is no transfer; while the learned Government Pleader submits that clauses 10 and 12 clearly show that there is a transfer of right and, therefore, tax is validity levied. In our view, whether the 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. **From a close reading of all the clauses in the agreement, it appears to us that the contractor in entitled to make use of the machinery for purposes of execution of the work of the petitioner and there is no transfer of right**

> **to use as such in favour of the contractor. We have reached this conclusion because the effective control of the machinery even while the machinery is in the use of the contractor is that of the petitioner-company. The contractor is not free to make use of the same for other works or move it out during the period the machinery is in his use. The condition that he will be responsible for the custody of the machinery while the machinery is on the site does not militate against the petitioners' possession and control of the machinery. For these reasons, we are of the opinion that the transaction does not involve transfer of the right to use the machinery in favour of the contractor.** As the fundamental requirement of section 5-E is absent, the hire charges collected by the petitioner from the contractor are not exigible to sales tax."
>
> **(emphasis supplied)**

25. The appeal filed by the Department against the decision of the Andhra Pradesh High Court was dismissed by the Supreme Court and the decision is **State of Andhra Pradesh and another** vs. **Rashtriya Ispat Nigam Ltd**[11]. The relevant portion of the decision is reproduced below:

> "**The High Court after scrutiny and close examination of the clauses contained in the agreement and looking to the agreement as a whole, in order to determine the nature of the transaction, concluded that the transactions between the respondent and contractors did not involve transfer of right to use the machinery in favour of the contractors and in the absence of satisfying the essential requirement of Section 5-E of the Act, i.e., transfer of right to use machinery, the hire charges collected by the respondent from the contractors were not exigible to sales tax.** On a careful reading and

---

11. 2002 (3) TMI 705- Supreme Court

> analysis of the various clauses contained in the agreement and, in particular, looking to clauses 1, 5, 7, 13 and 14, it becomes clear that the transaction did not involve transfer of right to use the machinery in favour of contractors. The High Court was right in arriving at such a conclusion. **In the impugned order, it is stated, and rightly so in our opinion, that the effective control of the machinery even while the machinery was in use of the contractor was that of the respondent company; the contractor was not free to make use of the machinery for the works other than the project work of the respondent or move it out during the period the machinery was in his use;** the condition that the contractor would be responsible for the custody of the machinery while it was on the site did not militate against respondent's possession and control of the machinery."
>
> **(emphasis supplied)**

26. It transpires from the aforesaid two decisions in **Rashtriya Ispat Nigam Ltd.** rendered by the Andhra Pradesh High Court and the Supreme Court that it was because of the terms of contract under which there was a transfer of the right to use that it was held that since the effective control of the machinery, even while the machinery was in the use of the contractor, was that of the company that had given the machinery on hire, Sales Tax could not have been charged from the appellant therein under the provisions of the State Sales Tax Act.

27. In **G.S. Lamba & Sons Mr. Gurushanran Singh Lamba and others** vs. **State of Andhra Pradesh**[12], the issue that arose before the Andhra Pradesh High Court was whether the contract with M/s. Grasim Industries Limited for transporting the Ready Mix Concrete

---

12. 2012-TIOL-49-HC-AP-CT

was for transfer of the right to use Transit Mixers and the following principles were summarised:

> "40. **That brings us to the construction of the agreement between the parties which indisputably came into force on 01.10.2002. The intention of the parties as noticed supra has to be understood by reading the entire agreement; reading a word here or a clause there is not sufficient.** Grasim was looking for a transporter to take care of the transporting need of their RMC plants in Hyderabad. The petitioners, who are owners of Transit Mixers, were looking for advancing their business interest in Hyderabad. The latter approached the former offering their Transit Mixers to take care of all transporting solution needs. These essentially form part of the recitals. **The Habendum of the agreement speaks of the petitioners providing a dedicated fleet of five Transit Mixers painted in a particular style and colour as well as brand name of 'Grasim' to transport RMC, on 24 hours basis every day of the week as instructed by the lessee, failure of which will attract penalties. The staff of the petitioners were required to obey the instructions issued by Grasim, and they should use safety equipment like helmets. These Transit Mixers cannot move or carry RMC to the work sites as per their convenience but are to be used as per the delivery schedule given by Grasim.** The counsel also does not dispute that the agreement between the parties speaks of a dedicated fleet of vehicles to be made available on 24/7 basis duly painted in a particular style and colour, and staff being under the instructions of Grasim alone. It is, however, submitted that the parties agreed for five dedicated vehicles as RMC needs to be transported immediately after it is manufactured in the batching plant, and the manufacturer cannot identify and negotiate with the transporter for carrying the products every time an order is placed. Therefore, such a clause was included in the agreement to ensure there is no delay in delivering the product to the customers. He also

submits that making available the vehicles through out the day or painting them with brand name of Grasim is required keeping in view the possible hurdles in logistics, and to ensure customer satisfaction of getting the required branded RMC. According to him, these clauses by themselves do not warrant an inference of transfer of the right to use Transit Mixers.

****

42. **In addition to the above clauses, we have thoroughly perused and analysed the agreement between the petitioners and Grasim.**

****

45. **Reading the recitals and various clauses, indeed there is a transfer of the right to use Transit Mixers.** All the tests as indicated hereinabove exist in the contract between the petitioners and Grasim. **The vehicles are maintained by the petitioners. They appoint the drivers and fix their roster. The licences, permits and insurances are taken in their names by the petitioners, which they themselves renew. The Transit Mixers go to Grasim's batching plants in Miyapur and Nacharam, where they are loaded with RMC and then proceed to the construction sites of customers. The product carried is manufactured by Grasim, which is delivered to the customers and the customers pay the cost of the RMC to Grasim and the petitioners nowhere figure in the process of putting the property in Transit Mixers to economic use.** The entire use in the property in goods is to be exclusively utilised for a period of 42 months by Grasim. The existence of goods is identified and the Transit Mixers operate and are used for the business of Grasim. **Therefore, conclusively it leads to the only conclusion that the petitioners had transferred the right to use goods to Grasim.** For these reasons, we are not able to countenance any of the submissions made by the petitioners' counsel."

(emphasis supplied)

28. In **Petronet LNG Ltd.**, the Tribunal observed as follows:

"**25**. The issue that therefore falls for our consideration is whether the transactions involving the two long-term charters and one short-term charter (of the vessels Disha, Rahi and Trinity Glory, respectively) amount to a transfer of the right of possession and effective control of these vessels for use by the assessee from the owners thereof. **If the transactions establish a transfer of the right to use possession and effective control, the transactions fall outside the purview of the enumerated taxable service.**

xxxxxxx

29. xxxxxx In the adjudication order the analysis of law and consideration of the relevant facts of the transaction occurs only in paragraph 37.3, in relation to taxability of the transaction, under Section 65(105)(zzzzj). **Further the mere fact that the Manager, Master, personnel and other crew are employed by the owner does not in any manner derogate from the fact that the transaction constitutes transfer of the right to use the tangible goods, including possession and effective control of the tankers.** This is so since there are several other clauses in the agreements between the parties (referred in para 10 supra), which disclose that the personnel on board the tankers function and operate strictly in terms of detailed instructions, guidelines and directives issued or to be issued by the assessee in terms of the authority of the assessee to do so, under the agreements. The personnel and crew must also be replaced by the owners on valid compliant about their misbehaviour lodged by the assessee. **On a true and fair analysis of the several clauses of the charter - agreements, considered as a whole, mere employment of the personnel and crew by owners does not derogate from the reality of transfer of possession to and effective control by the assessee over the tankers, for the use of these tangible goods."**

(emphasis supplied)

29. In **Gimmco Ltd.** vs. **Commissioner of Central Excise and Service Tax, Nagpur**[13], the Tribunal observed as follows:

> "5.2 Revenue's contention is based on the clauses in the agreement relating to restrictions of use by the lessee, provision of skilled operator by the lessor and maintenance and repairs of the equipment by the lessor. **Merely because restrictions are placed on the lessee, it can not be said that there is no right to use by the lessee.** Such a view of the revenue does not appear to be tenable when we read carefully the provisions of the agreement. Cl. 13 of the agreement provides for Hirer's Covenants. As per Cl. 13.1, the hirer will use the equipment only for the purpose it is hired and shall not misuse or abuse the equipment. Similarly in Cl. 13.3, it is provided that the hirer will ensure the safe custody of the equipment by providing necessary security, parking bay, etc., and will be responsible for any loss or damage or destruction. Cl. 13.5 provides that the hirer shall be solely responsible and liable to handle any dispute entered with any third party in relation to the use and operation of the equipment. Further Cl. 14 dealing with title and ownership specifically provides that "equipment is offered by GIMMCO Ltd. only on 'rights to use' basis". Cl. 15 relating to damages provides for compensation to be paid by the hirer to the assessee in case of damage to the equipment during the period of use. **These responsibilities cast on the hirer clearly show that the right of possession and effective control of the equipment rest with the hirer; otherwise the hirer cannot be held responsible for misuse/abuse, safe custody/security, liability to settle disputes with third parties in relation to use etc.** Further Cl. 4.3 of the agreement provides for charging of VAT at 12.5% on the monthly invoice value which shall be payable by the hirer. These terms and conditions stipulated in the agreement, lead to the conclusion that the transaction envisaged in the agreement is one of "transfer of right to use" which is a

---

13. 2017 (48) S.T.R. 476 (Tri.-Mum.)

deemed sale under Section 2(24) of the Maharashtra Value Added Tax Act, 2002. The Finance Minister's speech and the budget instructions issued by the C.B.E. & C. also clarify that if VAT is payable on the transaction, then service tax levy is not attracted."

(emphasis supplied)

30. In **Dipak Nath** vs. **Oil and Natural Gas Corporation Ltd. and others**[14], the Gauhati High Court observed as follows:

"**The above analysis of the relevant provisions of the contract agreement between the parties indicate the clear dominion and control of ONGC over the crane during the entire period of operation of the contract once a crane is placed at the disposal of the ONGC under the contract.** The crane is to be deployed at worksites as per the discretion of the ONGC and though the normal period of deployment is 10 hours in a day, such deployment at the discretion of the ONGC may be for any period beyond the normally contemplated 10 hours. The deployment of the crane in oil field operations as well as other hazardous situations is at the sole discretion of the ONGC. Though the cranes are operated by the crew provided by the contractor such crew while operating a crane is under the effective control of the ONGC and its authorities. Therefore, under the contract though the normal operational time is 10 hours in a day, the ONGC is entitled to deploy the cranes, if required, to the entire period of 24 hours to perform duties the kind of which and the locations whereof is to be decided by the ONGC. **The mere fact that after the operation of the crane is over on any given day the crane may come back to the owner/contractor will hardly be material to decide as to who has dominion over the crane inasmuch as the crane can be recalled for duty by the ONGC at any time.** Under the contract the crane is to be operated for 26 days in a month and the remaining four days are to be treated as maintenance off days. Though the crane is not

---

14. 2009 (11) TMI 834-Guahati High Court

operational on the maintenance off days, yet, 50% of the operational charges is paid by the ONGC for the maintenance off days and the terms of the contract make it clear that even on the off days the crane can be called for operation by the ONGC at its sole discretion.

The above features of the contract, in our considered view, makes it abundantly clear that it is the ONGC and not the contractor who has exclusive control and dominion over the crane during the subsistence of the contract, though, during the aforesaid period, at times, physical possession of the crane may come back to the contractor. Such temporary physical possession of the contractor, according to us, would hardly be relevant as under the contract the ONGC is vested with the authority to requisition the crane for operational purposes at any time. Besides, such temporary possession of the crane by the contractor does not mitigate against the transfer of the right to use the crane which event, as already indicated on the authority of the decision of the Apex Court in 20th Century Finance Corpn. Ltd. (supra), constitutes the taxable event under article 366(29A)(d) of the Constitution."

(emphasis supplied)

31. From the decisions referred to above, it clearly transpires that:

(i) Whether there is a transfer of right to use or not is a question of fact which has to determined in each case having regard to the terms of the contract under which there is a transfer of right to use;

(ii) If with the transfer of the right to use, possession and effective control is also transferred, the transaction falls outside the preview of service tax liability. However, when the effective control and possession is not transferred and it continues to remain with the person who has given the

machinery on hire, it would not be open to the authority to levy service tax;

(iii) Mere fact that the persons are employed by the owner does not in any manner deter from the fact that the transaction constitutes a transfer of the right to use the tangible goods with possession and effective control; and

(iv) The fact that after the operation is over on any given day and the tangible goods come back to the owner is not a material fact for deciding who has the dominion over the tangible goods.

32. The impugned order notices that the appellant had taken the ISO containers on lease/rental basis and it had paid an amount of Rs. 4,60,67,566/- to the foreign supplier who did not have any office in India for supply of the containers. Condition No's 9 and 18 of the Agreement, which have been reproduced above, have been mis-interpreted by the Commissioner. No inference can be drawn from the aforesaid two clauses that the right of possession and effective control of the containers was not with the appellant merely because the containers had not been sold to the appellant. The Commissioner fell in error in not appreciating the difference between a 'sale' and 'a deemed sale' contemplated under article 366 (29A) of Constitution. In 'a deemed sale' it is necessary to examine who has the possession and effective control over the goods. Even the Circular dated 29.02.2008, on which reliance has been placed by the Commissioner, emphasises that in the case of 'a deemed sale' under article 366 (29A) of Constitution, transfer of right to use involves both transfer of possession and control over the goods. The Commissioner also fell an error in holding that since sales tax/VAT was not paid by the

appellant, it would not amount to 'a deemed sale'. The Commissioner failed to appreciate that since the translation involved sale or purchase of goods in the course of import of goods into India, no sales tax/VAT was required to be paid even if the transaction qualified as 'a deemed sale'.

33. It is more than apparent from the aforesaid discussion that the supply of ISO Tankers on lease/rental basis by foreign suppliers to the appellant would amount to a deemed sale under article 366 (29A) of Constitution as the appellant throughout had effective control and possession over the ISO Tankers. The order dated 29.07.2016 passed by the Commissioner, therefore, cannot be sustained.

34. In this view of the matter it would not be necessary to examine the contention raised by the appellant that the extended period of limitation could not have been invoked.

35. The impugned order dated 29.07.2016 passed by the Commissioner is, accordingly, set aside and Service Tax Appeal No. 52932 of 2016 is allowed.

(Order pronounced in the open Court on **03.01.2023**)

(JUSTICE DILIP GUPTA)
PRESIDENT

(P.V. SUBBA RAO)
MEMBER (TECHNICAL)

Rekha/Shreya/JB