

**Customs, Excise & Service Tax Appellate Tribunal
West Zonal Bench at Ahmedabad**

REGIONAL BENCH- COURT NO. 3

Service Tax Appeal No. 12312 of 2014 - DB

(Arising out of OIO-SUR-EXCUS-001-COM-122-13-14 dated 28/02/2014 passed by Commissioner of Central Excise, Customs and Service Tax-SURAT-I)

Arkay Logistics Ltd

.....Appellant

Sereos Centre, Plot No.6&7 Gidc Bhatpore opposite Ongc Gate No 1
Surat Hazira Road
Surat, Gujarat

VERSUS

C.C.E. & S.T.-SURAT-I

.....Respondent

New Building...Opp. Gandhi Baug,
Chowk Bazar,
Surat, Gujarat - 395001

WITH

- **Service Tax Appeal No. 13408 of 2014 - Arkay Logistics Ltd**
- **Service Tax Appeal No. 10477 of 2016 - Arkay Logistics Ltd**
- **Service Tax Appeal No. 10320 of 2021 - Arkay Logistics Ltd**

APPEARANCE:

Shri Ramnath Prabhu, Advocate for the Appellant

Shri Tara Prakash, Deputy Commissioner (AR) for the Respondent

**CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR
HON'BLE MEMBER (TECHNICAL), MR. C.L. MAHAR**

Final Order No. A/11798, 11799-11801/2023

DATE OF HEARING: 11.07.2023
DATE OF DECISION: 25.08.2023

RAMESH NAIR

These appeals are filed by the Appellant against the respective following orders. The details of the appeals are as follows:

Appeal No.	Order-In-Original	Order- In- Appeal	Period of Dispute	Demand
ST/12312/2014	OIO No. SUR-EXCUS-001-COM-122-13-14 dtd. 28.02.2014		2010-11 & 2011-2012	1,71,20,209/-, Interest and Penalty

ST/13408/2014	OIO No. SUR-EXCUS-001-COM-021-14-15 dtd. 07.07.2014		2012-2013	1,65,40,161/- , Interest and Penalty
ST/10477/2016	OIO No. SUR-EXCUS-002-COM-019-15-16 dtd. 08.12.2015		2013-12014	75,64,558/-, Interest and Penalty
ST/10320/2021	OIO No. SRT/DIV-IV/ADJ-51/2018 dtd. 28.02.2018	OIA No. CCESA-SRT(Appeal) PS-182/2020-21 dtd. 26.02.2021	2014-2015	24,59,150/-, Interest and Penalty

Since the issue involved in all these appeals is common, we are taking up all these appeals for common disposal.

1.2 The common facts of four of these appeal are that the appellant is engaged in the providing cargo handling services, port handling services, business auxiliary services etc. During the course of audit, it was noticed that the appellant has shown in the balance sheet for the period 2010-11 to 2011-12, chartered hiring income where no service tax has been paid. On being asked the reason for nonpayment of service tax, the appellant stated that they have not paid service tax where the control and possession has been given to the charterer. Further appellant stated that they had provided the vehicles and vessels on bare charter to the charterer and as per the terms of the hiring the equipment were under the control and possession of the charterer/ hirer. Auditors observed that appellant was engaged in providing services in category Supply of Tangible Goods Services. The Finance Act, 2008 has introduced a new taxable service Supply of Tangible Goods service for levy of service tax w.e.f. 16.05.2008 vide Notification No. 18/2008-ST dated 10.05.2008. The gross amount charged or total consideration received for supply of tangible goods by the service provider shall be chargeable to service tax. Accordingly, four show cause notices, dated 27-08-2013, 11-03-2014, 13-03-2015 and 07-03-2016 were issued to the appellant for the period 2010-11 to 2014-15 demanding Service Tax on hire income. The said notices were adjudicated vide above impugned respective orders and learned Commissioner confirmed Service Tax demands along with interest thereon and also imposed penalties under the Finance Act, 1994. Aggrieved of the same the appellant is before us.

2. The Learned Counsel Shri Ramnath Prabhu appearing on behalf of appellant submits that appellant during the year 2010-11 to 2014-15 had given vehicles on charter basis to M/s Essar Steel India Ltd. and for the period 2011-12 to 2013-14 has chartered vessels under bareboat charter agreement to Arkey Holding Ltd., Hazira and Arkey Sea Logistics Ltd., Hazira. Under the agreements, the effective control and possession of the vehicles and vessels are transferred by the appellant to the Transferee's/ Charterers, and consequently, the transaction being a 'deemed sale' the appellant has discharged appropriate VAT on transfer of right to use the said goods.

2.1 He further submits that Charter of vessel/vehicle attracts levy of VAT under Gujarat VAT Act, 2003 as the same is a 'deemed sale' under sub-clause (d) of Section 2(23) thereof, as per which '*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*'. Thus it is very clear the 'transfer of right to use' involving a transfer of effective control & possession is a 'deemed sale' and is subject to VAT under the Gujarat Value Added Tax Act, 2003.

2.2 He also submits that the VAT audit report for accounts verified and audited by the specified Authority under Section 63 of Gujarat Value Added Tax Act, 2003 clearly shows that VAT has been paid on vehicles and vessels under the category of transfer of right to use goods. The TRU Circular D.O.F. No. 334/1/2008-TRU dated 29.02.2008 has clarified that where there is a transfer of possession and control to the service recipient, then it is a deemed sale and not liable to service tax. It was further clarified that payment of VAT is the relevant criterion that establish transfer of effective control and possession in a transaction. Since the transaction in its case suffered the element of VAT, no, service tax is payable thereon.

2.3 He also submits that in terms of the bareboat charter agreement that appellant has entered with the charterer /transferee in the BIMCO format, it does not have effective control the right of possession of the vessels given to hire. The complete custody of the vessels will be with the lessee/ charterer/ transferee during the tenure of the lease and the lessee will be wholly liable for all the damages caused to vessels. The Charterer is required to confirm with all the rules and regulation associated with the operating of the vessels. The charterer is required to maintain the vessels in proper conditions and charterer shall be responsible for the maintenance and repairs of the vessels, and shall

bear the expenses of the master, crew, driver, fuel and any other expenses that may accrue during the lease period.

2.4 He further submits that insofar as the vehicles are concerned, the same was given under charter basis to M/s ESIL, who use the same for transportation between its hypermarkets and customers. The effective control and possession of these vehicles have been transferred to M/s ESIL, and this fact clearly comes out from the clauses of the contract. He produced the copy of agreement.

2.5 Further, he placed reliance on the following decisions:-

- Great Eastern Shipping Company Ltd. Vs. State of Karnataka, 2020 (32)GSTL 3 (SC)
- International Seaport Dredging Ltd. Vs. CST, 2018 (12)GSTL 185 (Tri. – Chennai)
- Bharat Sanchar Nigam Ltd. Vs. Union of India – 2006(2)STR 161 (SC)
- Statish Kumar & Co. Vs. CCE -2019(22)GSTL 269 (Tri. –Mumbai)
- Kalpataru Power Transmission Ltd. Vs. CCE, 2023 (69)GSTL 54(Tri. Ahmd)
- Aims Pharma Pvt. Ltd. Vs. CCE & ST, Vadodara-I - MANU-CS/0085/2019
- Quippo Energy Pvt. Ltd. Vs. CCE & ST, Ahmedabad - MANU/CS/0332/2022
- Gimmco Ltd. Vs. CCE -2017(48)STR 476 (Tri-Mum.)
- Compucom Software Ltd. Vs. CCE 2019 (25) GSTL 75 (Tri. –Del.)
- Century Cement Vs. CCE, 2019 (2) TMI 1034 –CESTAT, New Delhi
- Ultratech Cement Ltd. Vs. CCE, 2019 (1) TMI 377 –CESTAT, New Delhi
- Power Mak Industries Vs. CCE & ST, Hyderabad –I – MANU/CH/0007/2018.
- Lindstorm Services India Pvt. Ltd. Vs. S.T. Vadodra –I- MANU/CS/0029/2023

2.6 He also argued that Ld. Commissioner erred in its findings that wages to crew was paid by the Appellant during the period 2011-12. However the appellant in its reply to show cause notice has explained that during the year 2010-11, the vessels were in time charter basis and accordingly, it had incurred crew wages. Some of the crew wages accounted during the year 2011-12 were actually relating to the year 2010-11 when the vessels were on time charter basis. The invoices raised by SVS Marine Services Pvt. Ltd. on 01.04.2011 clearly show in the description that the crew was supplied either during the

quarter Jan 2011 to March 2011 or for the month of March 2011 (i.e. during 2010-11) and the invoices for such supply of crew was issued on 01.04.2011. Without appreciating the above fact, which is clearly borne out of the invoices, the Ld. Commissioner has incorrectly concluded that the Appellant has incurred crew wages during the 2011-12 and hence, transaction is liable for service tax under Supply of Tangible Goods. The invoices relating to 2010-2011 but accounted during 2011-12 since the same were issued by the supplier of crew during 2011-12. He produced the copies of invoices.

2.7 He also submits that from the clauses of the agreement for supply of vehicles and vessels, it clearly comes out that insurance, expenses towards repair and maintenance of the vehicle/vessels is borne by the lessee and not the appellant.

2.8 He further submits that the finding of impugned order regarding the trading restrictions, that under the Maritime Regulation in India the vessel is assigned as trading limits. Also, the Insurance companies specify the area only up to which they will cover the maritime claims. The stipulation of trading restriction is also reckoned in the classification issued by the Ministry of Finance vide F.No. 354/63/2008 as 18.06.2008. Therefore, restrictions under the law with regard to navigating the vessels in war zones, carrying explosives etc., or allowing movement only on west coast etc. cannot be reason to hold that there is no transfer of effective control and possession.

2.9 He also submits that Ld. Commissioner has drawn incorrect inference from the fact that as per the agreement dated 01.06.2010 between Essar Logistics Ltd. & M/s Essar Steel Ltd., the term of payment is based on per month per vehicle or on pro rata to the number of days of usage which according to him means that the effective control was still with the appellant. However, both under time charter basis where the effective control and possession remains with the vessel/ vehicle owner as well as bareboat charter basis, where the same gets transferred to the charterer, payment is made for the period of usage only. This facts therefore by itself does not establish that the effective control remains with the owner of the vehicle.

3. Shri Shri Tara Prakash, Deputy Commissioner (AR) appearing on behalf of revenue opposed the contention of the Ld. Counsel and reiterated the findings of impugned orders.

4. We have heard both sides and perused the appeal records.

4.1 We find that the major point for consideration is the service tax liability of the appellant in respect of Vehicles and vessels chartered by them to M/s Essar Steel India Ltd., Arkay Holdings Ltd. and Arkay Sea Logistics Ltd. The service tax demand was confirmed 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".

4.2 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 language of Section ibid makes it abundantly clear that for transfer of right to use the goods, ownership is not mandatorily or necessarily required. The revenue's case is that appellant have right of possession and effective control of the vessels/vehicles. Further in this regard, we refer to C.B.E. & C. Circular No. 334/1/2008-TRU, dated 29-2-2008, which gives certain clarifications with reference to the "service of supply of tangible goods for use". Para 4.4. of the said circular is given below :-

"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."

4.3 The Circular clarified that wherever supply of tangible goods for use involves transfer of both possession and control it is deemed sale leviable to VAT/Sales Tax, then the said activity would not be liable to Service Tax under 'supply of tangible goods for use service'. The circular mentions, that if the item/instrument has been supplied for use but without any legal right of its possession and effective control, then the use of the item is to be treated as 'service' and not the 'sale' and in that case Service Tax will be liable to be paid under the category of 'supply of tangible goods for use service'.

4.4 In the light of above observations, we note that wherever transaction involves transfer of possession and effective control of the goods, then it is a 'sale' and the activity will not be subjected to Service Tax; and where possession and effective control has not been transferred, then, the transaction will be covered in the category of 'service of supply of tangible goods for use'. Thus, the subject transactions are to be verified with the relevant contracts/agreements, then only it can be determined whether there is a 'service' or a 'sale'. In this connection, we have perused the agreement with M/s Essar Steel India Ltd. and Bareboat Charter agreement entered with Charterers in the BIMCO format copy which was submitted by the Ld. Counsel. We are reproducing the few relevant clauses of the Bareboat Charter agreement as under : -

"Clause 10(a) (1)

" Maintenance and Repairs- During the Charter Period the vessel shall be in the full possession and the absolute disposal for all purposes of the Charterers and under the complete control in every respect:

Clause 10(b)

"Operation of the vessel- the Charterers shall at their own expenses and by their own procurement man, victual, navigation, operate, supply fuel and

whenever required repairs the vessels during the charter period and they shall pay all charges and expenses of every kind and nature whatsoever incidental to their use and operation of the vessel under the this charter, including annual flag State fees and any foreign general municipality and/or state taxes. The master officers and crew of the vessel shall be the servants of the charterers for all purpose whatsoever even if for any reason appointment by the owners. Charterers shall comply with the regulations regarding officers and crew in force in the country of the vessels flag or any other applicable law."

4.5 The above clause 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. In view of it is clear that during the charter period of vessels the right of possession of vessels and effective control have been transferred to service recipient, therefore the service does not fall under the "Supply of Tangible Goods Service".

4.6 We also gone through the vehicle hire agreement entered between Appellant and M/s Eassr Steel India Ltd. The following fact comes out from the clause 2 of the said agreement/ contracts-

- (1) M/s ESIL is responsible for risk of loss or damage to the vehicles;
- (2) At the end of the lease period, ESIL will be obligated to return the vehicles to the appellant in the same condition in which it was received, except for normal wear and tear;
- (3) ESIL shall maintain the vehicles in good repair and operating condition.
- (4) The return of vehicles will be at ESIL's expense;
- (5) The Appellant shall not be held responsible for failure of the vehicles to performs after initial acceptance and it will be the responsibility of ESIL to repair and correct the problem;
- (6) Liability for injury, disability and death of workers and other persons caused by operating, handling or transporting the equipment during the term is the obligation of ESIL and hold the appellant harmless against any such liability.
- (7) During the term of this rental ESTL shall pay all taxes, assessments and license and registration fees on the equipment.

The above terms of agreement itself clearly show that right of possession and effective control of the vehicles was given by the Appellant to its customer.

4.7 We find that 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 obligations etc., the same should be considered as transfer of right to use.

4.8 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

4.9 On careful consideration of the terms of the above Bareboat Charter agreement and Agreement with M/s Essar Steel India Ltd. (M/s ESIL), we are of the considered view that in the present case, vessels/vehicles were transferred to the customers with right of possession and effective control of such vessels/vehicles. We further noticed that transfer of right to use the goods which is a deemed sale as per Article 366(29A) of the Constitution of India read provisions of Gujarat Value Added Tax Act, 2003. In the present matter on the disputed transaction appellant has discharged the VAT liability considering the same as 'deemed sale' under the provisions of Gujarat Value Added Tax Act, 2003, hence no service tax can be demanded on the said transaction.

4.10 We also find that similar issue is settled by the Tribunal in the case of *Praveen Engineering Works* 2014 (33) S.T.R. 719 and *Bhima SSK* — 2015 (39) S.T.R. 440, *Kinetic Communications Ltd. v. Commissioner* — 2017 (3) G.S.T.L. 319 (Tribunal), *Paul Merchants Limited v. Commissioner* - 2013 (29) S.T.R. 257 (Tri.-Del.) and *M/s. Gap International Sourcing (India) Pvt. Ltd. v. CST* - 2014-TIOL-465-CESTAT-Del. = 2015 (37) S.T.R. 757 (Tribunal).

4.11 On the identical issue the Hon'ble Apex Court while upholding the Tribunal Mumbai's order reported at 2018 (11) G.S.T.L. 391 (Tri. - Mumbai) in the case of *COMMISSIONER OF SERVICE TAX-V, MUMBAI Versus UFO MOVIEZ INDIA LTD* reported at 2022 (61) G.S.T.L. 4 (S.C.) given the following observation :-

"Delay condoned.

2. *In the facts of the present case as it is not disputed that the respondent had regularly paid amount towards VAT liability in respect*

of the subject goods during the relevant period, the question of claiming service tax thereon does not arise.

3. *Accordingly, in the facts of the present case, the civil appeal is dismissed.*

4. *Pending applications stand disposed of.”*

4.12 In the present case also since the appellant have admittedly paid the VAT to the state VAT department, following the above observation of the Apex Court, the transaction is not liable to service tax under the category of “Supply of tangible goods for use” service.

5. In view of our above discussions and findings, the impugned orders are not sustainable, accordingly the impugned orders are set aside and all the appeals are allowed with consequential relief, as per law.

(Pronounced in the open court on 25.08.2023)

RAMESH NAIR
MEMBER (JUDICIAL)

C.L. MAHAR
MEMBER (TECHNICAL)