CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, SOUTH ZONAL BENCH, CHENNAI

COURT HALL No.III

SERVICE TAX APPEAL No.41666 of 2018

(Arising out of Order-in-Original No.05/2018(C)–ST dated 28.03.2018 passed by Commissioner of GST and Central Excise, Puducherry Commissionerate, 1, Goubert Avenue, Puducherry – 605 001.)

M/s.Oil and Natural Gas Corporation Ltd., **...Appellant**
Cauvery Asset,
Neravy, Karaikal,
Puducherry – 609604.

Versus

The Commissioner of GST& Central Excise **...Respondent**
Puducherry Commissionerate
1, Goubert Avenue,
Puducherry – 605 001.

APPEARANCE:

Shri. Sujit Ghosh, Advocate
Shri. Shubh Dixit, Advocate
For the Appellant

Shri Balasubramaniam, Special Counsel
For the Respondent

CORAM:

HON'BLE MS. SULEKHA BEEVI C.S., MEMBER (JUDICIAL)
HON'BLE MR. VASA SESHAGIRI RAO, MEMBER (TECHNICAL)

DATE OF HEARING: 06.09.2023

DATE OF DECISION: 09.01.2024

FINAL ORDER No.40034/2024

ORDER: Per Ms. SULEKHA BEEVI C.S.

Brief facts are that the appellant viz., M/s.Oil and Natural Gas Corporation, Karaikkal, is engaged in activities of exploration and production of crude oil and natural gas from various oil fields located in different areas of Nagapattinam, Cuddalur, Tiruvarur, Tanjore and Ramnad

Districts of Tamil Nadu. The appellant holds service tax registration for discharging service tax on various taxable services.

1.1 On gathering intelligence that the appellant has not paid the appropriate service tax on the amount of consideration, in the form of Royalty paid to Government of Tamil Nadu, for assignment of right to use for exploration and production of crude oil/natural gas, the officers of the Directorate General of Goods and Service Tax, Zonal Unit, Bangalore initiated investigation. Summons was issued to furnish documents and statements were recorded.

1.2 It appeared to the department that the natural resources are the properties of the State, which can either be utilized by the State for the welfare of the public or the rights over such resources, can be assigned to any person for a consideration. The consideration for assigning the right to use of natural resources (grant of license) is determined by taking into account terms of the contract, period of usage, quantum of benefits, etc. On perusal of the Petroleum Mining Lease issued by Government of Tamil Nadu, it appeared that Government has issued the Petroleum Mining Lease under Rule 5(i)(ii) read with Rule 12 of the Petroleum & Natural Gas Rules, 1959 for extraction of crude oil and natural gas in the allotted blocks as against the consideration which is paid or payable by appellant in the form or royalty, PEL/PML, dead rent and surface rent. Accordingly, M/s.ONGC, Karaikkal is paying royalty, PEL/PML, dead rent and surface rent to Government of Tamil Nadu, in lieu of consideration for assigning the rights to use oil blocks. M/s.ONGC, Karaikkal is also paying dead rent in the form of royalty in case where no production activities are being carried out in any allotted oil fields.

1.2.1. As per Section 65B (44) of the Finance Act, 1994, 'service' means any activity carried out by a person for another for a consideration including the declared services. In the negative list system, all services excluding those specified in the negative list will be subject to Service Tax. The services provided by the Government are contained in clause (a) of Section 66D which specifies that the services provided by government or local authority are non-taxable. From the above legal provision, it appeared that any activity which meets the characteristics of a "service" is taxable, unless specified in the Negative list. Till 31.3.2016, the services other than 'support services' provided by Government were in the negative list of services and hence, outside the scope of levy of Service Tax. However, with an amendment to Section 66D (a) (iv) of the Finance Act, 1994 with effect from 1.4.2016, 'any service' provided by Government or a local authority to business entities would attract Service Tax.

1.2.2. Thus, it appeared that assignment of right to use of oil fields (natural resources) provided by the Government of Tamil Nadu to M/s. ONGC Karaikal for exploration and production of crude oil and natural gas in lieu consideration is not covered under the Negative List of services under Section 66D of the Finance Act, 1994 and that assignment of right to use for exploration and production of crude oil and gas for consideration by the Government of Tamil Nadu is an act of 'service' as per Section 65B (44) of the Finance Act, 1994 and squarely covered under the phrase 'any service' used in the definition.

1.2.3. As per the Notification No.25/2012 dated 20.6.2012, as amended by Notification No.22/2016 ST dated April 13, 2016 (Sl.No.61) services by way of assignment of right to use of natural resources, where such

right to use was assigned by the government or local authority before 01.04.2016 is exempted from payment of Service Tax. The relevant entry in the said Notification is as follows:

"Sl.No.61 - Services provided by Government or a local authority by way of right to use any natural resource where such right to use was assigned by the Government or the local authority before the 1st April', 2016; Provided that the exemption shall apply only to Service Tax payable on one-time charge payable, in full upfront or in instalments, for assignment of right to use such natural resource.''

1.2.4. From the above, it appeared that the exemption has been given to services in respect of assignment of right to use natural resources which have been granted by the Government/Local Authority before 1.4.2016. However, the exemption is limited to one time charges (whether paid in full or in installments) for assignment of right to use such natural resource. In other words, the periodic charges/payments made by the business entities to Government or a local authority have been kept out of the exemption and thus, would be taxable. In the present case, M/s.ONGC, Karaikal are paying the royalty to the Government of Tamil Nadu on monthly basis depending upon the sale quantity of crude oil and gas produced from the oil fields allocated by the Government and hence the royalty payable by appellant on monthly basis is not exempted from payment of Service Tax.

1.2.5. As per Rule 2(1)(d) of Service Tax Rules, 1994 read with Notification 30/2012 ST dated 20.6.2012, in respect of taxable services notified under Section 68(2) of the Act, the service recipient is made liable

to pay Service Tax instead of service provider under reverse charge mechanism method. As per the said Notification, the Service Tax in respect of services provided by the Government or local authority except (i) Renting of Immovable Property Services, and (ii) Services specified in sub clauses (i), (ii) & (iii) of clause (a) of Section 66D of the Finance Act, 1994, if provided by Government to any business entity, the service recipient is liable to pay Service Tax. As narrated in the preceding paragraphs, the Government of Tamil Nadu has issued the license for exploration and production of hydrocarbons in the areas within the State of Tamil Nadu to M/s.ONGC Karaikal as against the consideration in the form of royalty and other charges. Thus, as a recipient of service, M/s.ONGC Karaikal is liable to pay Service Tax in respect of services viz, rights to use of natural resources for exploration and production of crude and oil provided by Government of Tamil Nadu under reverse charge mechanism.

1.3. The appellant had not discharged service tax on the royalty paid by them to the Government of Tamil Nadu during the period April 2016 to June 2017. Show Cause Notice dt.10.10.2017 was issued to the appellant proposing to demand the short paid service tax along with interest and for imposing penalties. After due process of law, the Original authority confirmed the demand of service tax along with interest and imposed penalties. Aggrieved, the appellant is now before the Tribunal. The operative part of the impugned order is extracted below:

"ORDER

(i) The assignment of right to use for exploration and production of crude oil and natural gas by the Government of Tamil Nadu to M/s. Oil & Natural Gas Corporation Limited, Cauvery Asset, Neravy, Karaikal-609604 is classifiable as 'service' under Section 65B (44) 'taxable service' under Section 65B (51) of the Finance Act, 1994;

(ii) I confirm the Service tax inclusive of Cess amounting to Rs.34,66,63,868/- (Rupees thirty-four crores sixty-six lakhs sixty-three thousand eight hundred and sixty-eight only) made on M/s. ONGC, payable by them during the period April, 2016 to June, 2017 under proviso to sub-Section (1) of Section 73 of the Finance Act, 1994;

(iii) I order that M/s.ONGC shall pay the interest at appropriate rates on the service tax amount demanded as in Sl No (ii) above under Section 75 of the Finance Act, 1994;

(iv) I impose penalty of Rs.1,50,00,000/- (Rupees one crore and fifty lakhs only) on them under Sec.76 of the Finance Act, 1994.

(v) I also impose penalty of Rs.10,000/- (Rupees Ten thousand only) for contravening various provisions of the Act and rules made hereunder Section 77(2) of the Finance Act, 1994; and

(vi) I refrain from imposing any penalty on them under Sec.78 of the Finance Act, 1994."

SUBMISSIONS OF PARTIES:

2. The Ld. Counsel Shri. Sujit Ghosh appeared and argued for the appellant. The oral and written arguments put forward are summarized as under:

2.1 The Adjudicating Authority has held that the Appellant is liable to pay Service Tax on a reverse charge basis for royalty amounts paid to the Government, pursuant to mining lease entered with the Appellant since grant of mining lease by the State Government falls squarely within the scope of 'service' under Section 65B (44) of the Finance Act, 1994 (hereinafter referred to as the 'Finance Act').

A. The amount of Royalty paid by the Appellant is not a consideration for any service, but an amount in the nature of tax.

2.2 It is submitted that service tax is leviable only where there is a service for a consideration. In the absence of consideration, charge of Service Tax cannot be fructified. It is the submission of the Appellant that there is no consideration involved in the present transactions in as much

as the Appellant has not paid any consideration to the Government to warrant provisions of the Finance Act to be triggered.

2.3. It is submitted that the Impugned Order at Para 19 erroneously states that royalty is a consideration for the license or the right to use the oil fields located in the State of Tamil Nadu for exploration and mining of crude oil and natural gas. It is submitted that the findings in the Impugned Order are based on an incorrect understanding of the law and thereby cannot be sustained.

Royalty is in the nature of Tax and is not a consideration.

2.4. It is submitted that upon a careful reading of the provisions of Oilfields (Regulation and Development) Act, 1948 [hereinafter referred to as the *'ORD Act'*], as well as the Constitution of India, it is evident that Royalty charged under the ORD Act falls squarely within the ambit of the term 'tax', thereby rendering the demand of Service Tax on an amount which is not a consideration, and is in the nature of tax, as illegal, and liable to be set aside. Something that qualifies as a tax can never be a consideration since both the terms have a distinct meaning in law. While tax is a statutory payment without any quid pro quo authorised under Article 265, consideration is a contractual payment signifying quid pro quo.

2.5. Taxation is defined under Article 366(28) of the Constitution of India which includes the imposition of any tax or impost, whether general, local, or special and 'tax' shall be construed accordingly. Further, the Hon'ble Supreme Court in the case of ***Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt AIR 1954 SC 282,*** has held that 'tax' is a compulsory

extraction of money by public authority for public purposes enforceable by law and is not payment for services rendered. Tax is levied on the basis of a statutory power endowed upon the public authority.

2.6. It is trite law that for a levy of tax to be valid, four essential components, namely (a) taxable event, (b) taxable person, (c) rate of tax and (d) measure of tax, ought to be present.

2.7 It is submitted that features of royalty charged under the Oilfields (Regulation and Development) Act, 1948 squarely falls within the ambit of tax for the following reasons:

(a) Royalty is a special impost under the ORD Act and therefore covered under the definition of 'tax' in Article 366(28) of the Constitution of India. The nomenclature of the impost being 'royalty' has no bearing upon the true nature of the levy, which is in the nature of tax.

(b) Payment of royalty is a compulsory extraction from the licensee under the statute after the license is granted under Section 6A of the ORD Act read with Rule 14 of the PNG Rules and not a consideration towards any service rendered by the State Government. The royalty collected is not for endowment of any special benefit or grant of any service.

(c) Section 6A of the ORD Act fulfils the essential components of taxation viz –

(i) Taxable Event - Grant of mining lease is a distinct taxable event.

(ii) Taxable Person - The licensee is the person liable to pay tax.

(iii) Measure of Tax - The quantum of royalty to be paid is a function of the quantity of oil extracted from the land.

(iv) Rate of Tax – the rate of royalty is determined under the schedules under the ORD Act and is changed by means of notifications as and when required.

(d) Report of the Ministry of Mines on Mineral Royalties also acknowledges that royalty is the payment of tax to the Government for the mineral right for the privilege granted by him for mining and producing/dispatching minerals.

(e) Petroleum Tax Guide 1999 issued by the Government also covers 'royalty' within the scope of tax along with other taxes such as income tax, customs duty etc.

2.8 Accordingly, on the basis of the above, it is submitted that the payment of royalty is in the nature of tax and not a consideration for any services, unlike as alluded to by the Impugned Order. Accordingly, any demand of service tax on the royalty paid to the State Government cannot be sustained.

The Ld. Adjudicating Authority erred in holding that royalty is not in the nature of tax.

2.9 It is submitted that the Ld. Adjudicating Authority in Para 26 of the Impugned Order has observed that royalty is not in the nature of tax in as much as an element of quid pro quo is ingrained in the transaction where the lessee promises to pay royalty for getting or enjoying the benefits from the properties leased out to the lessor. Further, the Ld. Adjudicating Authority observed that Section 6(2)(i) of the ORD Act provides that the Government has power to make rules for '*the collection of royalties, and the levy and collection of fees or taxes, in respect of mineral oils mined, quarried, excavated or collected*'. On this basis, the Ld. Adjudicating Authority concludes that if 'royalty' was in the nature of tax, then the term 'royalty' would have been subsumed in the word 'taxes' in Section 6(2)(i) of the ORD Act and the legislature would not have

referred to 'royalty' over and above the term 'tax' in Section 6(2)(i) of the ORD Act.

2.10 It is submitted that the Ld. Adjudicating Authority has erred in its findings with regards to the nature of royalty paid under the ORD Act in as much as the nomenclature of the levy has no bearing upon the nature of the levy. It is the pith and substance which determines the nature of the levy. Further, it is submitted that it is well settled that characteristics of 'Tax' in its wider sense includes all imposts.

2.11 Royalty on minerals extracted was also held to be an 'impost' in the nature of tax. [*Refer* ***Laddu Mal and Ors. v. State of Bihar AIR 1965 Pat 491.***

2.12 From the entries of Schedule VII, it is evident that various compulsory imposts of varying nomenclature (such as duty, revenue, toll, etc.) have been contemplated by the Constitution of India and the nomenclature adopted to denote such an impost has no bearing upon the true nature of such an impost, which is in the nature of tax.

2.13 Accordingly, it is submitted that the observations of the Ld. Adjudicating Authority are wholly contrary to the settled law and thereby cannot be sustained.

Without Prejudice, the Ld. Adjudicating Authority as well as this Ld. Tribunal is bound by the decision of India Cements v. State of Tamil Nadu AIR 1990 SC 85 wherein it was held that royalty is in the nature of tax.

2.14 It is submitted that the Impugned Order at Para 29 has relied upon various High Court decisions and held that right to receive royalty is a mineral right and cannot be considered as a tax. Further the Ld. Adjudicating Authority has placed reliance upon the decision of ***State of West Bengal v. Kesoram Industries Limited AIR 2005 SC 1646***

rendered by a 5-judge bench of the Hon'ble Supreme Court and held that royalty is not a tax but an amount which is paid under a contract of lease by a lessee to the lessor and is commensurate with the quantity of minerals extracted.

2.15 In that regard, it is submitted that the question whether royalty is a tax has been dealt by a 7-judge bench of the Hon'ble Supreme Court in the case of ***India Cements Ltd. v. State of Tamil Nadu AIR 1990 SC 85*** wherein it was held that royalty is a tax and the unit of charge of royalty is not only on land but also on labour, and capital. It was further observed in para 40 of the decision that if royalty is imposed by the Parliament, it could only be a tax and not only on land but also on labour and capital.

2.16 Pertinently, it is submitted that the majority opinion in the case of *Kesoram Industries Ltd (supra)* doubted the correctness of the decision of 7-judges in the case of *India Cements (supra)*. At para 56 of the decision in *Kesoram Industries (supra)*, the Hon'ble Supreme Court attributed the finding of the Hon'ble Court in *India Cements (supra)* qua royalty being in the nature of tax to a typographical error and 'stenographers devil' and thereby proceeds to depart from the law laid down by 7 judges in *India Cements (supra)*. Subsequently, the Hon'ble Supreme Court in the case of ***Mineral Area Development Authority and Ors. v. Steel Authority of India and Ors. (2011) 4 SCC 450*** referred the question of whether royalty is a tax to a bench of 9 judges. The said reference is pending adjudication before the Hon'ble Supreme Court of India. It is pertinent to note that there is no stay on the decision of *India Cements (supra)* during the pendency of the reference.

2.17 It is submitted that the reliance placed by the Ld. Adjudicating Authority on the decision of the Hon'ble Supreme Court in the case of *Kesoram Industries (supra)* rendered by 5 judges and ignoring the decision of the Hon'ble Supreme Court in India Cements (7 judges) is a complete breach of judicial discipline. This is so because all quasi-judicial authorities are bound by the decision of the bench which has the greatest strength. Accordingly, the Adjudicating Authority as well as this Tribunal is bound by the decision of *India Cements (supra)* which holds that royalty is in the nature of tax.

2.18 In fact, in a very recent decision rendered by the Hon'ble Supreme Court on 06.09.2023 by a division bench of Hon'ble Mr. Justice Vikram Nath and Hon'ble Mr. Justice Ahsanuddin Amanullah in the case of ***Union Territory of Ladakh v. Jammu and Kashmir National Conference and Anr. Civil Appeal No. 5707 of 2023 at para 35,*** it was held by the Hon'ble Supreme Court that courts shall decide matters on the basis of the law as it stands and not wait for the outcome of the review/reference. It is not open for Courts to refuse to follow any decision by stating that it has been doubted by a later co-ordinate Bench.

2.19 As such therefore, it is submitted that the decision of the Hon'ble Supreme Court in the case of *India Cements (*supra*)* wherein it is held that royalty is in the nature of tax is good law, and the same is binding on this Hon'ble Tribunal unless it is stayed or set aside. As such therefore, any reliance on the decision of the *Kesoram Industries (supra)* cannot be countenanced.

B. *Assuming without admitting that royalty is not in the nature of tax, even then, grant of license by the State Government is not a service provided by the State Government but a discharge of its regulatory functions and the royalty payments under the ORD Act are regulatory fees and not a consideration for a service.*

2.20 It is submitted that 'Service' is defined under Section 65B (44) of the Finance Act, 1994 to mean any activity carried out by a person for another for consideration and includes a declared service. Further, the term 'consideration' involves an element of contractual relationship wherein the person doing an activity does so at the desire of the person for whom the activity is done in exchange for a consideration. As such therefore, there ought to be an element of quid pro quo for an activity to fall within the ambit of 'service' under Section 65B (44) of the Finance Act and the amount paid for such service to be considered as a 'consideration'. As a corollary to the above, it is trite that any amount charged which has no nexus with the taxable service, cannot be considered as a consideration for the said services and no service tax can be levied on such an amount.

2.21 In that regard, it is submitted that 'royalty' is a statutory payment which ought to be made by the licensee. Further, as per Section 6A of the ORD Act, royalty ought to be paid on the quantum of the mineral oil extracted. Accordingly, royalty has no nexus with the grant of license to the Appellant. Furthermore, the rate of royalty is determined by the Schedule to the ORD Act [*Section 6A (1)]* (and revised from time to time by means of Notifications) and not on the basis of any contract between the State Government and the licensee (Appellant).

2.22 It is further submitted that grant of mining lease by the State Government is a regulatory function performed by the Government and cannot be considered as a service being provided to the Appellant. In that regard, attention is drawn to the preamble of the ORD Act, which prescribes that the ORD Act is an act to provide for the regulation of oilfields and for the development of mineral oil resources. Furthermore,

the mining lease is granted by the State Government pursuant to the powers enshrined in Article 246 read with Entry 23 of List II of Schedule VII of the Constitution of India. Entry 23 of List II provides for regulation of mines and mineral development subject to the provisions of List I with respect to regulation and development under the control of the State. As such therefore, the grant of mining lease under the ORD Act is squarely a regulatory function of the State Government and cannot be said to germinate any contractual relationship between the Appellant and the State Government. Accordingly, the amount of royalty paid to the State Government is a regulatory fee paid to the State Government.

2.23 It is further submitted that Article 110 and Article 199 of the Constitution of India makes a distinction between fee for services and fee for licenses. This by itself demonstrates that even under the Constitution both the two terms, i.e., fee for license and fee for services, are two distinct concepts. This aspect was brought out by the Hon'ble Supreme Court in ***Corporation of Calcutta and Anr v. Liberty Cinema AIR 1965 SC 1107***.

2.24 Licencing as a concept could be adopted by a State either to raise revenue or to regulate trade. The charges collected could further be regulatory in nature or compensatory in character. As such therefore, fees for licenses cannot ipso fact mean that it is a fee for services. Further, where the charges are regulatory in nature, the same do not inhere character of quid pro quo. Wherever the charges are compensatory, these are considered to be for services. The concept of service is absent in case of regulatory fees ***Vam Organic Chemicals Ltd. v. State of UP 1991 SCCOnLine All 687***. Further, in the ***State of Tripura v. Sudhir Ranjan Nath*** (1997) 3 SCC 665 *Para 14;* the Hon'ble

Supreme Court held that merely because license fee is paid does not necessarily mean that the same is for services. In ***Secunderabad Hyderabad Hotel Owners' Association and Ors. v. Hyderabad municipal Corporation, Hyderabad and Anr (1999) 2 SCC 274*** at para 9, it was held that in respect of licenses, the charge is as regulatory fee when there is no service. However, where the fees are compensatory in nature, it is a fee for services.

2.25 Accordingly, it is the submission of the Appellant that merely because payments are being made in the form of royalty for securing a license, *ipso facto* cannot be determinative of the same being a quid pro quo for the provision of service, unless the Respondent states and establish that these payments are compensatory in nature. It is the case of the Appellant that the Respondent has not been able to discharge its burden to establish that these payments are compensatory in nature. At best royalty can be considered as a regulatory fee, to regulate the business of mining of natural resources. Accordingly, the contention of the Ld. Adjudicating Authority that royalty is a consideration for a service being provided by the State Government cannot be sustained.

2.26 Further, assuming without admitting that there is a service element in addition to the regulatory function being performed by the Government, it is submitted that there is no machinery provision prescribed in the Finance Act which provides a mechanism for bifurcating the components towards regulatory fee, and fee which is compensatory in nature, so as to arrive at the assessable value on which service tax ought to be levied. It is trite law that in absence of a machinery for valuation of tax, no service tax can be imposed. [***Suresh Kumar Bansal v. Union of India 2016 (43) STR 3 (Del.)*** *para 48, 53 and 55*]. As

such therefore, no service tax can be levied on the royalty payments made by the Appellant to the State Government.

C. <u>The Ld. Adjudicating Authority has erred in holding that grant of mining lease by the State of Tamil Nadu under the ORD Act is a service of assignment of right to use natural resource.</u>

2.27 From a perusal of the Impugned Order, it is clear that the Ld. Adjudicating Authority has imposed service tax by holding that the grant of mining lease is an assignment of right to use oilfield, which is a taxable service under the Finance Act. Further this aspect of the transaction of assignment of right to use natural resource, appeared to be predicated on the fact that royalty is a consideration for the taxable service of assignment of right to use natural resource. A brief of the various findings of the Ld. Adjudicating Authority qua assignment of right to use natural resource is hereunder:

*(a)… it is seen that the natural resources are the properties of the State which can either by utilized by the State for the welfare of the public or the rights over such resources can be **assigned** to any person for a consideration. [Para 19 of the Impugned Order at Page no. 127 of the Appeal Memo]*

*(b)… 'The **assignment** of right to use for exploration and production of crude oil and gas for consideration by the Government of Tamil Nadu is an act of 'service' as per Section 65B(44) of the Finance Act and squarely covered under the phrase 'any service' used in the definition. Hence, the **assignment** of right to use of oil fields (natural resources) provided by the State of Tamil Nadu to M/s ONGC Karaikal for exploration and production of crude oil/Natural gas on a consideration is not covered under the Negative List of services under Section 66 of the Finance Act, 1994'. [Para 22 of the Impugned Order at Page no. 128-129 of the Appeal Memo].*

(c)… 'From the above, it is seen that the exemption has been given to services in respect of ***assignment*** *of right to use natural resources which have been granted by the Government/Local Authority before 1.4.2016. However, the exemption is limited to one-time charges (whether paid in full or in instalments) for* ***assignment*** *of right to use such natural resource. In other words, the periodic charges/payments made by the business entities to Government or a local authority have been kept out of the exemption and thus, would be taxable, In the instant case, M/s. ONGC Karaikal are paying the royalty to the Government of Tamil Nadu on monthly basis depending upon the sale quantity of crude oil and gas produced from the oil fields allocated by the Government and therefore the royalty payable on monthly basis is not exempted from payment of Service Tax . Since the* ***assignment*** *of rights to use oil fields located within the state of Tamil Nadu by the Government of Tamil Nadu to M/s. ONGC Karaikal is neither covered under the Negative List of Services nor covered under the exemption Notifications, the same squarely falls within "service" under Section 65B (44) and "Taxable Service" as per Section 658 (51) of the Finance Act, 1994 with affect from 01.4.2016. Further, Central Board of Excise and Customs (CBEC) vide Circular No. 192/02/2016-ST dated 13.04.2016 has clarified that Service Tax is applicable on the amount of royalty paid or payable to the Government for* ***assignment*** *of rights to use of natural resources'. [Para 23 of the Impugned Order at Page No. 129 of the Appeal Memo]*

(d)… 'I notice, that the activity of ***assignment*** *of right to use for exploration and production of crude oil and gas for consideration by the Government of Tamil Nadu do constitute a 'service' as per Section 65B (44) of the Finance Act, 1994 and service tax is sought*

to be demanded on such service in the subject notice.' [Para 25 of the Impugned Order at Page No. 129 of the Appeal Memo].

(e)*… 'Thus,* ***assignment*** *of rights over the properties for a certain amount of consideration in the name or royalty meets the characteristics of a consideration' [Para 27 of the Impugned Order at Page No. 131 and 132 of the Appeal Memo]*

2.28 On a bare perusal of the findings hereinabove, it is clear that the Ld. Adjudicating Authority is emphasising on the fact that the '**assignment** of right to use' for exploration and production of crude oil and gas for consideration by the Government of Tamil Nadu is an act of 'service'. Accordingly, if the Appellant is able to establish that the present transaction does not involve assignment of right to use natural resources, then the charge of tax will also fail. The grant of mining lease is not assignment of right as understood by law, for the following reasons.

2.29 It is submitted that in law the term 'assignment' is understood as a situation where the assignor parts with the whole property and the assignee stands, for all intents and purposes, in the place of an assignor. It is therefore distinct from a lease wherein one transfers or grants an interest less than its own, reserving to itself a reversion. This principle was laid down in ***Higgins v. Monckton, Civ 10829, decided on 20.10.1938*** which was taken cognisance of by the Madras High Court in ***Gladis Devavaram v. S. Subaiah 2011 4 LW 237***.

2.30 Further, in ***Burton v. Camden L.B.C. [2000] 2 AC 399,*** it was clearly held by the House of Lords as follows: –

'The word "assignment" is not a term of art. It denotes any conveyance, transfer, assurance or other disposition of property from one party to another. The essence of an assignment is that it operates to transfer its

subject-matter from the ownership of the assignor to that of the assignee. A lease is not an assignment, because it does not transfer any pre-existing property from the lessor to the lessee, but creates a new interest and vests it for the first time in the lessee. A purported assignment of the interest of one joint tenant to the other joint tenant does not constitute an assignment, because each of the joint tenants is already the owner of the whole. The so-called assignor has no separate interest of his own which is capable of being transferred to the other and which the other does not already own. None of this, of course, applies to a tenant in common, because he has a separate and distinct interest of his own which he can assign either to a third party or to his co-owner.'

2.31 Furthermore, the Hon'ble Andhra Pradesh High Court in ***Kondavati Naganna v. Matukumilli Satyanarayana and Anr AIR 1958 AP 711,*** *Para 6)* has clearly laid down that a lessee cannot be an assignee since lease is not an assignment of property.

2.32 In ***Hartman Ranch Co v. Associated Oil Co. L.A. 14980 decided on 26.11.1937*** the Supreme Court of California had held that where the transferor reserves the right of re-entry for breach of condition, he has a 'contingent reversionary interest' which prevents its transfer from operating as an assignment as a whole. Instead, a sublease arises.

2.33 From the conspectus of the above jurisprudence under Indian law and other jurisdictions, it is clear that in a transaction where reversionary interests are retained by the lessor, the transaction cannot be said to be that of assignment, for the reason that, an assignment assumes parting with the whole property without any reversionary interest.

2.34 From a perusal of Section 6(2)(e) and Section 11 of the ORDA, along with Rule 29, 32 and 31 of PNG Rules, it is clear that the Government continues to exercise control over the licensee and such control clearly goes to show that the Government has not parted with the whole property and the assignee does not stand, for all intent and purposes in the place of the assignor, such that this transaction can be treated as a transaction of 'assignment'. That apart, the aspect of retaining of reversionary interest by the Government is demonstrated in

view of Rule 17 of the PNG Rules in as much as the Appellant is not permitted to assign or transfer the mining lease granted by the State Government.

2.35 Furthermore, the Appellant is never the owner of any oil or natural gas that is extracted from the land allocated to the Appellant. The Government is the owner of any oil or natural gas that is extracted and has the right to regulate the distribution of such oil or natural gas. Moreover, the methodology of pricing, distribution and discounts are determined by the Government and the Appellant has no rights over it. Reliance in this regard is placed upon the decision of the Hon'ble Supreme Court in the case of ***Reliance Natural Resources Ltd v. Reliance Industries Limited Civil Appeal No. 4273 of 2010*** wherein the Court observed, in the context of the ORD Act and PNG Rules that natural gas after extraction continues to be the property of the government till the time it reaches the delivery point and therefore, the same cannot be sold without the express approval of the Union of India.

2.36 Accordingly, the Government never fully parts with the right in the land granted for oil exploration or the natural resources of that land so as to qualify as an assignment. Therefore, the grant of mining lease by the State Government cannot be an assignment of right to use natural resources, thereby rendering the findings of the Ld. Adjudicating Authority in the Impugned Order as *ipse dixit* and liable to be set aside.

D. Without prejudice to the above, even assuming that the grant of mining lease as an assignment of right to use oil fields, the taxable event for the levy of Service tax occurred prior to the introduction of the levy, thereby rendering the levy of service tax illegal and liable to be set aside.

2.37 It is submitted that the Negative list of services was introduced vide the Finance Act, 2012 wherein support services provided by the

Government or a local authority to business entities was a taxable service. Subsequently, vide the Finance Act, 2015, 'any service' provided by the Government or a local authority to business entities was made taxable with effect from 01.04.2016. As such therefore, the alleged service of assignment of rights to use oil fields is alleged to be made taxable under Section 66B only after 01.04.2016.

2.38 It is submitted that the rendering of the alleged services of assignment of right to use natural resources is a one-time event which actually takes place no sooner than the rights under the assignment arrangement is granted. Such point in time would be the date and time when the contractual arrangement is set into motion under which the rights are contractually made available. This would therefore be the date, i.e., the date of execution of lease agreement between the parties. For this purpose, reliance is placed on the decision of the Hon'ble Supreme Court in the case of ***20th Century Finance Corporation Ltd. v. State of Maharashtra (2000) 6 SCC 12***.

2.39 It is submitted that the mining leases were granted by the State of Tamil Nadu to the Appellant on 06.08.2009, which is well before the introduction of the levy on 01.04.2016. In other words, the taxable event occurred prior to the introduction of the levy.

2.40 It is trite law that if the taxable event has occurred prior to the introduction of the levy, no service tax can be levied merely because payment was made subsequent to the introduction of the levy. [*Refer* ***Petronet LNG Ltd. v Commissioner of Service Tax, New Delhi 2016 (46) STR 513 (Tri-Del)*** *para 36 and* ***Reliance Industries Ltd. v Comm. Of C. Ex and ST, LTU Mumbai 2016 (44) STR 82 (Tri-Mumbai)****, para 11 and* ***Vazir Sultan Tobacco Co. Ltd. v. CIT (1981)***

4 SCC 435. As such therefore, in as much as the taxable event of grant of mining lease has occurred on 06.08.2009 which is prior to the introduction of levy, no service tax can be levied on the royalty payments made by the Appellant to the State Government for the period of April 2016 to June 2017.

E. <u>The Ld. Adjudicating Authority has sought to create a charge of tax on the basis of a delegated legislation even when the substantive provisions of law do not levy service tax on royalty payments made for assignment of right which has occurred prior to the 01.04.2016.</u>

2.41 It is further submitted that upon a perusal of Para 23 of the Impugned Order, it is evident that the fulcrum of the demand raised in the Impugned Order is that the Appellant was making monthly payments to the Government of Tamil Nadu. The Ld. Adjudicating Authority concludes that since the Appellant was making monthly payments to the Government, the exemption under Entry 61 of Notification No. 25/2012 – Service Tax dated 20.07.2012 (as amended) shall be unavailable due to the exclusionary clause in the proviso which states that the exemption shall apply only to service tax payable on the one-time charge payable, in full or in instalments, for assignment of right to use such natural resource. On this basis, the Ld. Adjudicating Authority held that in as much as the Appellant has made periodic payments after the introduction of levy on 01.04.2016, such payments are exigible to service tax.

2.42 It is submitted that the Ld. Adjudicating Authority has levied service tax on the Appellant on the basis of the exclusionary clause in the exemption notification. The Ld. Adjudicating Authority has effectively attempted to create a charge of tax on the basis of a delegated legislation (i.e., Notification No. 25/2012 – Service Tax dated 20.07.2012), even

when the substantive provision does not levy service tax on taxable events prior to the introduction of levy on 01.04.2016.

2.43 It is submitted that it is trite law that an exemption notification cannot be relied upon to determine taxability. That is to say that if a transaction is excluded from the exemption notification cannot by implication become a taxable service. The question of exemption only arises when there is a liability. Unless there is a liability, the question of exemption does not arise. [***Commissioner of Customs, Kerala v. Larson & Toubro Ltd. 2015 (39) S.T.R. 913 (S.C.)*** *at para 44.]*

2.44 Accordingly, the Ld. Adjudicating authority erred in levying service tax on the royalty payments made to the State Government in as much as the taxable event has occurred prior to the introduction of the levy, thereby rendering the Impugned Order liable to be set aside. In any case, the attempt to create a charge of tax on the basis of an exemption notification cannot be countenanced.

F. ***Assuming without admitting that Royalty is not in the nature of tax, Central Government is not empowered to levy tax on mineral rights.***

2.45 It is submitted that taxation of mineral rights is the imminent domain of the State Government and accordingly, no service tax (which is a levy by the Central Government) can be levied on the royalty payments made to the State Government.

2.46 It is submitted that from a bare perusal of the Constitutional scheme, it is evident that the power of the State Government to levy tax on mineral rights emanates from Entry 50 of List II, which has no corresponding entry in List-I. Accordingly, it is only the State Government that has the power to levy taxes on mineral rights and the Central Government is prohibited from entering into this domain. Once a subject

matter is within the exclusive competence of the State Legislature, it represents a prohibited field for the Union.

2.47 The Ld. Counsel put forward arguments to set aside the penalties. It is submitted that being interpretational in nature, the appellant cannot be saddled with the guilt of intent to evade payment of service tax. The Ld. Counsel prayed that appeal may be allowed.

3. We have had the advantage of hearing the submissions made by the Ld. Special Counsel, Shri. Dr.S.Subramanian, IRS (Chief Commissioner-Retd) for the department. The written and oral submissions are summarized as under:

3.1 The contention of the Appellant is that the Royalty paid under the provisions of the Oil fields (Regulation & Development) Act 1948 (herein after referred as ORD Act) read with Petroleum & Natural gas Rules (herein after referred as PNG Rules) is a Tax and not a consideration for any services received by the Appellant. The appellant contends that the demand of Service Tax on Royalty paid to the State of Tamil Nadu by the Appellant cannot assume the nature of a consideration and Service Tax confirmed vide the impugned order has no basis and is liable to be set aside.

3.2 On perusal of para 19 of the impugned Order-in-Original it will become clear that the appellant is undertaking the exploration and mining activities in the licensed oil fields and are paying royalty, dead rent and surface rent as consideration for assigning the rights to use of oil blocks. In case of mining lease, the lessee needs to pay lease charges as mentioned in Rule 13(2) of Petroleum & Natural gas Rules, Surface rent

and also dead rent in the form of Royalty in case where no production activities are carried out in any allotted oil fields.

3.3 As per Section 65(B) (44) of the Finance Act, 1994, 'Service' means any activity carried out by a person for another for a consideration including the declared services and as per 65B (51) ibid, 'taxable service' means any service on which service Tax is leviable under Section 66B of the Act. From these legal provisions, any activity which meets the characteristics of a "service" is taxable unless specified in the Negative List or is otherwise exempted by a notification issued under Section 93 ibid. Till 31.3.2016, the services other than 'support services' provided by Government were in the Negative list and hence outside the scope of levy of Service tax. However, with an amendment to Section 66D(a)(iv) of the Finance Act, 1994, with effect from 1.4.2016, any service provided by Government or a local authority to business entities would attract Service tax other than those services specified under sub-clause (i) to (iii) ibid. In para 22 of the impugned Order-in-Original, the adjudicating authority has correctly observed that the assignment of right to use for exploration and production of crude oil and gas for consideration by the Government of Tamil Nadu is an act of 'service' as per Section 65B (44) of the Finance Act, 1994 and squarely covered under the phrase 'any service' used in the definition. Further, the right to use of oil fields (natural resources) provided by the Government of Tamil Nadu to M/s.ONGC, Karaikal for exploration and production of crude oil/natural gas on a consideration is not covered under the Negative List of services under Section 66D of the Finance Act, 1994.

3.4 In para 23 of the impugned order, the adjudicating authority has held that even prior to 1.4.2016, the exemption is limited to one time

charges (whether paid in full or in instalments) for assignment of right to use such natural resource. In other words, the periodic charges/payments made by the business entities to Government or a local authority have been kept out of the exemption and thus would be taxable. It was further observed that Central Board of Excise and Customs vide Circular No.192/02/2016-ST dated 13.4.2016 has clarified that Service Tax is applicable on the amount of royalty paid or payable to the Government for assignment of rights to use of natural resources.

3.5 As regards the contention of appellant that mining lease granted by the Government is only a sovereign function in terms of the constitutional/legislative framework and does not involve any quid pro quo and hence will not fall within the definition of 'service' as provided in Section 65B (44) of the Finance Act 1994, it is submitted that the adjudicating authority vide para 24 of the impugned order, relying on para 5 of the Circular dt.13.4.2016 issued by the Central Board of Excise and Customs has held that in the present case, the assignment of mining rights in terms of the provisions of ORD Act read with PNG Rules will fall within the ambit of the definition of service and therefore, the Appellant's argument does not merit consideration.

3.6 The adjudicating authority vide Para 27 of the impugned Order-in-Original has observed that the provision of the ORD act, 1948 regulates the operations and granting of licenses for exploration, development and mining of hydrocarbons including the payment of royalty in lieu of allocating the natural resources. It was further observed that ORD Act is a regulatory act and not a taxing statute like CGST Act, 2017, Income tax Act, 1961 etc., which is set out in the preamble of these enactments. As per the provisions of ORD Act, the Lessee needs to pay Government

Royalty, rent and any other amount for assigning the rights over such properties. Thus assignment of rights over the properties for a certain amount of consideration in the name of 'royalty' meets the characteristics of consideration. Further, as per section 2(d) of the Indian Contracts Act, 1872, consideration means *"when at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstain from doing, or promises to do or to abstain from doing something, such act or abstinence or promise is called a consideration for the promise".* Therefore, the Royalty paid to government in lieu of granting the right for exploration and production of crude oil and gas qualify as 'consideration' for the purpose of the Finance Act, 1994. It is submitted that merely because the Royalty is levied under the provisions of ORD Act, it cannot be presumed that it is a tax as it is imposed under the Central Act.

3.7 Further vide para 28 of the impugned order the Adjudicating authority has clarified that the phrases used in clause (i) of sub-rule (2) of Section 6 of the ORD Act are as follows:

> **"the collection of royalties and the levy and collection of fees or taxes, in respect of mineral oils mined, quarried, excavated or collected.**

3.8 The adjudicating authority has rightly held that **if the Act considered Royalty as 'taxes', the word 'royalty' should not have appeared in the said clause, alternatively, it would be merged in the word 'taxes'.** Thus, just because the Act under which Royalty is collected has provisions for charging, granting exemption and penalty by way of imprisonment, the Royalty payment cannot be equated to 'Tax' for the aforesaid reasons. Hence, royalty paid by the Appellants is not a 'tax'

and it is to be construed as a 'consideration' paid for deriving the benefits from the oil fields allocated by Government by way of lease agreements.

3.9 The Hon'ble Courts in the following cases have held that right to receive royalty is a mineral right and cannot be considered as tax.

Bherulal vs. State of Rajasthan & Anr; AIR 1956 Rajasthan 161-162;

Dr.S.S.Sharma & Anr. V.State of Pb & Ors., AIR 1969 Pb.79 at 84

Shaurashtra Cement & Chemicals India Ltd vs Union of India & Anr., AIR 1983 Orissa 210 and

Hingir Rampur Coal Company Limited vs. State of Orissa [1961 (2)3 CR 537].

3.10. The main contention of the appellant is that the decision of the Hon'ble Supreme Court in the case of India Cements (supra) wherein it was held that royalty is a tax was delivered by a seven member bench, whereas, *Kesoram Industries* judgement was given by a five member bench and that the judgement of seven member bench is to be followed by five member bench. It is submitted that now the issue has been referred to nine member bench in the *Mineral Area Development Authority vs. M/s. Steel Authority of India (2011) 4 SCC 450.* The seven member bench decision in India Cements case was reported in AIR 1990, whereas the five member decision in Kesoram Industries was reported in AIR 2005. In Kesoram Industries case, the five member bench of the Hon'ble Supreme Court has pointed out the error in the judgement rendered in the case of India Cement Ltd. The five member bench of the Hon'ble Supreme Court in the case of State of West Bengal vs. Kesoram Industries Limited and Others, has clearly held that there was an error in the judgement which is attributable either to a stenographer's devil or to sheer inadvertence.

3.11. In the Kesoram's case the error committed in the India Cements judgement was only pointed out after reading the entire portion of India Cements case. So it cannot be claimed that a new decision is taken in Kesoram's case by a five member bench than the one delivered in the India Cements case by seven member case. It is submitted that the contention of the assesse that now the issue has been referred to nine member bench and the India Cements decision and has not been stayed is not sustainable. Even the decision of Kesoram's case was also not stayed. **As Kesoram's decision clarified the decision rendered in India Cements case with legal and logical reasoning, the decision of Kesoram's case is binding being of recent origin. In the judgement, it is stated** "*We declare that even in India Cement it was not the finding of the Court that royalty is a tax. A statement caused by an apparent typographical or inadvertent error in a judgement of the Court should not be misunderstood as declaration of such law by the Court.*" **They have further held "***We feel constrained – rather duty-bound – to say so, lest the reading of the judgement containing such an error – just an error of one word – should continue to cause the likely embarrassment and have adverse effect on the subsequent judicial pronouncements which would follow India Cement Ltd.'s case''.* In view of the specific finding by the Hon'ble Supreme Court in the case of Kesoram that royalty is not tax, the contention raised by the appellant is not sustainable.

3.12. In this regard the adjudicating authority in para 31 of the impugned order has discussed in detail the legal position and arrived at a finding stating that the issue of payment of royalty and payment of service tax on such royalty was extensively dealt in the case of Udaipur

Chamber of Commerce and Industry vs. UOI reported in 2018 (8) G.S.T.L 170 (Raj) wherein the Hon'ble Court vide paras 20 to 23 held that the royalty paid by them to the State Government in terms of the provisions of Mining act, 1957 is in the nature of 'consideration' and had further held that the Notification 22/2016 dt. 13.4.2016 is not in conflict with the enabling Act, the Finance Act, 1994. The ratio in the case of Udaipur Chamber of Commerce & Industry would be therefore applicable. It is also submitted that by Constitution (Amendment) Act, 2003 a new entry "92 c" was inserted in the List I (union List) for "taxes on services". In view of the legal position and the circumstances of the case the contention of the applicant that levy of service tax on royalty cannot be imposed by the Central Government under entry 07 of List I is legally incorrect and not in accordance with the statute. Further in view of specific findings by the Hon'ble Supreme Court in the case of Kesoram Industries that royalty is not a tax, the other arguments of the applicant about entry no.53 of List I and entry No.50 of List II is not relevant for deciding whether service tax can be levied on royalty.

3.13. It is submitted that the appellant also tries to project royalty paid is equal to fees paid. If royalty is a fee, then there was no need for the legislature to mention and use separate words in clause (i) of sub-rule (2) of Section 6 of the ORD Act, which read as follows:

> "the collection of royalties and the levy and collection of fees or taxes, in respect of mineral oils mined, quarried, excavated or collected."

As the words royalties as well as fees are mentioned in the said Act, it must be legally construed that royalty is different from fees. Therefore, the contention of the appellant is against the provisions of law.

3.14. The adjudicating authority in para 22 of the Order-in-Original has examined the provisions of law and held that the assignment of right to use for exploration and production of crude oil and gas for consideration by the Government of Tamil Nadu is an act of 'service' as per Section 65B (44) of the Finance Act, 1994 and squarely covered under the phrase 'any service' used in the definition. Hence, the right to use of oil fields (natural resources) provided by the Government of Tamil Nadu to M/s.ONGC, Karaikal for exploration and production of crude oil/natural gas on a consideration is not covered under the Negative List of services under Section 66D of the Finance Act, 1994.

3.15. It is submitted that Service tax is an indirect tax and the same is not levied on value addition but on the value of consideration received for rendering such services. The payment of royalty is linked with the well-head price of crude and flat rate for Gas at the fixed rate. The mega exemption Notification No.25/2012 ST dated 20.6.2012 as amended by Notification No.22/2016 ST dated 13.4.2016 provides for exemption to service tax payable as on one time charges, in full upfront or in instalments, for assignment of right to use such natural resources for the period before 1.4.2016. So the one-time charge should be fixed which has to be paid as full upfront or in instalments. In the instant case, the royalty is on a fixed percentage of well head prices. So royalty varies from month to month. Hence the same cannot be equated with one time charges. The department has filed an appeal against the decision of Tribunal in the case of *Petonet LNG Ltd.,* (supra) relied by the appellant. The Hon'ble Supreme Court vacated the stay and also directed that the respondent refund the amount collected. Hence the issue has not reached finality. The case of *Reliance Industries Ltd.,* is also clearly distinguishable

as the same dealt the issue of introduction of new levy and when payment of service tax was received after the introduction of the new levy. In the case on hand, royalty is being paid as a percentage of well head prices which varies from time to time. Therefore, it is submitted that the case laws mentioned are not relevant to the issue.

3.16. It is submitted that the adjudicating authority vide para 34 of the impugned Order-in-Original has held that as per the amended notification 30/2012 ST dated 20.6.2012, in respect of the taxable services notified under Section 68(2) of the Finance Act, 1994, service recipient was made liable to pay service tax instead of service provider under reverse charge mechanism. In this case, the Government of Tamil Nadu had provided the license to explore the production of hydrocarbons in the areas within the State of Tamil Nadu to the Appellants for the consideration in the form of royalty and other charges and therefore as a recipient of service, the Appellant is liable to pay Service Tax in respect of the services, viz., rights to use of natural resources for exploration and production of crude oil, provided by the Government of Tamil Nadu under reverse charge mechanism with effect from 1.4.2016. Further, it is pertinent to note that the Hon'ble High Court of Bombay, in the case of *Bombay Bar Association and Anr vs Union of India and Ors,* (W.P.No.1927 of 2011 decided on 15.12.2014) has held that it is well settled that in matters of taxation, Courts permit greater latitude to pick and choose objects and rates for Taxation and Parliament/Legislature has a wide discretion with regard thereto. The State is allowed to pick and choose objects, persons, methods and even rates for taxation.

3.17. It is submitted that the adjudicating authority in para 32 of the impugned Order-in-Original has observed and clarified that 'Royalty' paid

in this case is not rent. Only amount received in the nature of rent in respect of immovable property are covered under declared service of Renting of Immovable Property Services and accordingly Service Tax is applicable on such amount. 'Renting' in common parlance means allowing, permitting or granting access to someone to have the use of a room or house or a property in return for payment. The Tamil Nadu Government has not leased the land per se, the leasing was given for exploring oil and gas available beneath the land, and therefore will not come under definition of 'renting'.

3.18. It is further submitted that it is pertinent to note the FAQ Governmental Services issued by the CBIC in the present GST regime, wherein under Question No.30 – explanation has been given to the applicability of GST under RCM for Royalty charges:

"Question 30: Whether an amount in the form of royalty or any other form paid/payable to the Government for assigning the rights to use of natural resources is taxable?

Answer: The Government provides license to various companies including Public Sector Undertakings for exploration of natural resources like oil, hydrocarbons, iron ore, manganese, etc. For having assigned the rights to use the natural resources, the license companies are required to pay consideration in the form of annual license fee, lease charges, royalty, etc. to the Government. ***The activity of assignment of rights to use natural resources is treated as supply of services and the licensee is required to pay tax on the amount of consideration paid in the form of royalty or any other form under reverse charge mechanism."***

3.19. The aforesaid principle of payment of tax under reverse charge has been adopted under the GST regime in line with the erstwhile service tax regime, wherein vide F.No.334/8/2016-TRU inter-alia in Sl.No.5, the

government has clarified that the consideration paid for provision of service by Government or a local authority is subject to Service Tax by a business entity located in the taxable territory.

3.20. The adjudicating authority vide Para 35 of the impugned Order-in-Original has held that as per Rule 7 of Point of Taxation Rules, 2011 (effective up to 13.4.2016) in respect of persons required to pay service tax as recipient of service, point of taxation shall be the date on which the payment is made. If the payment is not made within three months' from the date of invoice, point of taxation shall be the date immediately following the said period of three months'. The adjudicating authority has further observed that on verification of bills/payment documents, the entire Royalty payment of Rs.11,08,19,874/- was made towards due for the period April 2016 which was paid on 27.5.2016 and necessary endorsement has been made in all invoices to this effect. Therefore, the Service Tax levied is as per law and the appellant's contention is prayed to be rejected.

3.21. The Ld. Counsel for the appellant has argued that the grant of mining lease is a onetime event and Service Tax on the same can be imposed only after 1.4.2016. In this regard, it is submitted that the contention of the appellant lacks merit in as much as the adjudicating authority vide para 23 of the impugned order, has observed that even prior to 1.4.2016, the exemption is limited to one time charges (whether paid in full or in instalments) for assignment of right to use such natural resource. In other words, the periodic charges/payments made by business entities to Government or a local authority have been kept out of the exemption and thus would be taxable. The payment of royalty is linked with the well-head price of crude and flat rate for Gas at the fixed

rate. The mega exemption Notification No.25/2012-ST dated 20.6.2012 as amended by Notification No.22/2016-ST dated 13.4.2016 provides for exemption to service tax payable on one-time charge payable, in full upfront or in instalments, for assignment of right to use such natural resources for the period before 1.4.2016. So the onetime charge should be fixed which has to be paid in full time or in instalments. In the instant case, the royalty is on a fixed percentage of prices. So royalty varies from month to month. Hence the same cannot be equated with one time charges. The Ld. Special Counsel for the department prayed that the appeal may be dismissed.

4. The parties were heard on 6.9.2023, and the matter was reserved for orders. The parties were given the liberty to file written submissions. The department filed additional written submissions on 18.9.2023. The written submissions on behalf of appellant was filed on 03.10.2023.

5. The main issue for analysis is whether the demand of service tax on the Royalty paid by appellant to Government is sustainable or not.

5.1. The foremost contention raised by the Ld.Counsel for appellant is that Royalty is in the nature of tax and is not a consideration for services. The issue as to whether royalty is a tax, was considered by the Hon'ble Supreme Court in the case of *India Cement Ltd vs. State of Tamil Nadu 1990 AIR 85 (decided on 25.10.1989)* and held that royalty is a tax. The said decision is rendered by seven judges bench of the Hon'ble Supreme Court.

5.2. Later, in the case of *State of West Bengal vs Kesoram Industries Ltd & Ors. AIR 2005 S.C. 1646 (decided on 15.1.2004)* the decision rendered in the case of India Cement Ltd (Supra) was doubted. The Ld.

Special Counsel appearing for department has relied on this judgment rendered by five judges bench decision to argue that royalty is not a tax.

5.3. It is brought to our notice that the issue whether royalty by itself is a tax has now been referred to nine judges bench in the case of *Mineral Area Development (2011) 4 SCC 450,* the relevant part of this judgment dt. 30.3.2011 is as under:

"Before *concluding, we may clarify that normally the Bench of five learned judges in the case of doubt has to invite the attention of the Chief Justice and request for the matter being placed for hearing before a Bench of larger coram than the Bench whose decision has come up for consideration (see: Central Board of Dawoodi Bohra Community and Anr. Vs State of Maharastra and Anr. 2005 (2) SCC 673) However, in the present case, since prima facie, there appears to be some conflict between the decision of this court in State of West Bengal vs. Kesoram Industries Ltd & Ors (supra) which decision has been delivered by a Bench of five judges of this Court and the decision delivered by seven judge bench of this court in India Cement Ltd. & Ors vs. State of Tamil Nadu & Ors (supra) reference to the Bench of nine is requested. Office is directed to place the matter on the administrative side before the Chief Justice for appropriate orders."*

5.4. The Ld. Counsel for appellant has asserted that as the decision in the case of India Cements Ltd., is rendered by seven judges bench of the Hon'ble Apex Court, the said decision would prevail, as the reference is still pending.

5.5. In a recent decision, the Hon'ble Apex Court in the case of Rajnish Kumar Rai Vs UOI in SLP (Civil) No.20054/2003 dt. 6.9.2023, held that

judicial proprietary does not allow to ignore the decision laid by the Court even though referred to larger bench.

5.6. The Ld. Counsel for appellant has adverted to case of *Union Territory of Ladakh vs. Jammu and Kashmir National Conference and Anr., Civil Appeal No.5707 of 2023 decided on 6.9.2023,* where in it was held at para 35, by the Hon'ble Supreme Court that Courts shall decide matters on the basis of the law, as it stands and not wait for the outcome of the review/reference. It is not open for courts to refuse to follow any decision by stating that it has been doubted by a later Bench. The relevant para of the said decision is reproduced as under:

"We are seeing before us judgements and orders by High Courts not deciding cases on the ground that the leading judgement of this court on this subject is either referred to a larger Bench or a review petition relating thereto is pending. We have also come across examples of High Courts refusing deference to judgements of this Court on the score that a later Coordinate Bench has doubted its correctness. In this regard, we lay down the position in law. We make it absolutely clear that the High Courts will proceed to decide matters on the basis of the law as it stands. It is not open, unless specifically directed by this Court, to await an outcome of a reference or a review petition, as the case may be. It is also not open to a High Court to refuse to follow a judgement by stating that it has been doubted by a later Coordinate Bench. In any case, when faced with conflicting judgements by Benches of equal strength of this Court, it is the earlier one which is to be followed by the High Courts, as held by a 5-Judge Bench in National Insurance Company Limited vs Pranay Sethi, (2017) 16 SCC 680. The High Courts, of course, will do so with careful regard to the facts and circumstances of the case before it."

5.7. Although the reference of the issue as to whether royalty is a tax has been made on 30.3.2011, there has been no outcome yet. By judicial discipline, we, therefore have to follow the decision passed by the seven judges' bench in the case of India Cements Corporation Ltd (supra) to hold that royalty is a tax.

5.8. It requires to be mentioned at this juncture that the Hon'ble High Court of Rajasthan in the case of *Udaipur Chamber of Commerce and Industry vs UOI 2018 (8) GSTL 170 (Raj)* had considered the issue as to whether 'royalty' is a consideration for the mining lease and is subject to levy of service tax under RCM for the period after 13.4.2016. The issue was answered in the affirmative and in favour of the Revenue. In the said case, the Notification no.22/2016 dt.13.4.2016, was challenged before the Hon'ble High Court as being in conflict with the Finance Act, 1994. On perusal of the said judgement it can be seen that the Hon'ble High Court in the said case did not consider the issue, whether 'royalty' is a tax by itself and has not referred to the judgements in the case of India Cements Ltd or Kesoram Industries. Further, the judgement in the case of Udaipur Chamber of Commerce and Industry is stayed by the Hon'ble Apex Court.

5.9. In accordance with the view taken by the Hon'ble Apex Court in the case of India Cements Ltd., that royalty is a tax and not consideration for services, we find that the demand of service tax on royalty is not sustainable. As we hold this issue in favour of the appellant, the requirement for discussing other arguments put forward by both sides is of no relevance. However, for completeness, we proceed to discuss other rival contentions also.

5.10. To appreciate better, it would be beneficial to notice the relevant provisions of law. Section 65B (44) of the Finance Act, 1994 provides the definition of 'service' and reads as under:

*"**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) 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 received 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.

Explanation 2. - For the purposes of this Chapter, -

(a) an unincorporated association or a body of persons, as the case may be, and a member thereof shall be treated as distinct persons;

(b) an establishment of a person in the taxable territory and any of his other establishment in a non-taxable territory shall be treated as establishments of distinct person.

Explanation 3. - A person carrying on a business through a branch or agency or representational office in any territory shall be treated as having an establishment in that territory.

Explanation 4. - A person carrying on a business through a branch or agency or representational office in any territory shall be treated as having an establishment in that territory;

5.10.1. A major amendment was brought forth in the service tax law w.e.f. 1.7.2012 by introduction of the definition of 'service' as above and also by a negative list of services. Section 66 E speaks about declared services. Section 66 E is as under:

"Declared services. *- 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."

……..,,

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

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

(d) development, design, programming, customization, adaption, upgradation, enhancement, implementation 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;

(j) assignment by the Government of the right to use the radio-frequency spectrum and subsequent transfers thereof."

5.10.2. Again, invoking the powers under sub-section (1) of Section 93 of the Finance Act, 1994 and in supersession of Notification No.12/2012-ST dt.17.3.2012, the Notification no.25/2012-ST dt.20.6.2012 was issued which is often referred to as the Mega exemption notification. This Notification exempts certain taxable services from service tax. Later, the Notification no.22/2016-ST dt.13.4.2016, brought forth an amendment in the mega exemption Notification no.25/2012-ST by inserting sl.no.61.

5.11.3. The present SCN proposing to demand service tax has been issued by department pursuant to the introduction of sl.no.61 by Notification no.22/2016-ST dt.13.4.2016. The relevant part of notification reads as under:

"6. Invoking powers under sub-section (1) of Section 93 of the Act of 1994 and in supersession of Notification No. 12/2012-S.T., dated 17-3-2012, the Government of India issued and published a Notification No. 25/2012-S.T., dated 20-6-2012 exempting certain taxable services from service tax. By another Notification No. 22/2016-S.T., dated 13-4-2016, the Government of India on being satisfied that it would be necessary in public interest to further amend the notification dated 20-6-2012, brought certain amendments, relevant from that, is as follows: -

"Services provided by Government or a local authority by way of assignment of right to use any natural resource where such right to use was assigned by the Government or the local authority before the 1st April, 2016;

Provided that the exemption shall apply only to service tax payable on one-time charge payable, in full upfront or in instalments, for assignment of right to use such natural resource;"

6. According to department, the royalty paid by appellant is in the nature of consideration paid by appellant for assignment of right to use for exploration and production of crude oil/natural gas. That therefore the activity would fall within the definition of 'service' as per Section 65 B (44). The relevant part of the SCN reads as under:

"8. It appears that the natural resources are the properties of the State which can either be utilized by the State for the welfare of the public or the rights over such resources can be assigned to any person for a consideration. The consideration for assigning the right to use of natural resources (grant of license) is determined by taking into account terms of the contract, period of usage, quantum of benefits, etc. On perusal of the Petroleum Mining Lease issued by Government of Tamil Nadu, it appears that Government has issued the Petroleum Mining Lease under Rule 5 (i) (ii) read with Rule 12 of the Petroleum & Natural Gas Rules, 1959 for extraction of crude oil and natural gas in the assigned blocks as against the consideration which is paid or payable in the form or royalty, PEL/PML dead rent and surface rent. Accordingly, M/s. ONGC Karikkal is undertaking the exploration and mining activities in the licensed oil fields. Thus it appears that M/s. ONGC Karaikkal is paying royalty, PEL/PML, dead rent and surface rent in lieu of consideration for assigning the rights to use of oil blocks.

9. From the discussion in the preceding paragraphs, It appears that the Government of Tamil Nadu has granted the License or right to use the oil fields located in the territorial jurisdiction of Tamil Nadu to M/s. ONGC for exploration and mining of crude oil and natural gas against consideration which is payable in the form of royalty or dead rent, Mining Lease charges and Surface rent. Further, it appears M/s. ONGC Karaikal is also paying dead rent in the form or royalty in case where there is no production activities are being carried out in any allotted oi fields."

6.1 As per Sl.No.61 of the negative list, as introduced by notification 22/2016-ST w.e.f. 13.4.2016, the exemption is from payment of service tax for assignment of right to use natural resources granted before 1.4.2016. So also, if the charges are to be paid as one time, (in full or in

instalments) the exemption is applicable. It is the case of department that as the royalty is paid periodically, the exemption is not applicable.

6.2 Section 66D (a) (iv) of the Finance Act, 1994 as amended w.e.f. 13.4.2016 is as under:

" *(a) Services by Government or a Local authority excluding the following services to the extent they are not covered elsewhere ---*

(i) services by the Department of Posts by way of Speed post, Express parcel post, Life insurance and Agency services provided to a person other than Government;

(ii) services in relation to an aircraft or a vessel, inside or outside the precincts of a part or an airport

(iii) transport of goods or passengers; or

(iv) Any service, other than services covered under clauses (i) to (iii) above, provided to business entities."

6.3 From the above, any service provided by government/local authority to business entities; if it does not fall within clauses (i) to (iii) will not be covered by exemption of the negative list. The view of the department as per the SCN is that 'the assignment of right to use of oil fields' (natural resources) provided by the Government of Tamil Nadu to appellant is a 'service' under Section 65 B (44) and is outside the ambit of the negative list, w.e.f. 13.4.2016.

6.4 In the SCN, the demand of service tax is raised on the appellant under reverse charge basis. As per Rule 2(1) (d) of Service Tax Rules 1994, read with Notification no.30/2012-ST dt.20.6.2012, in respect of services provided by the government or local authority except for services of (i) renting of immovable property services and (ii) services specified in sub-clauses (i), (ii) and (iii) of Section 66D (a) of the Finance Act, 1994, the recipient of service is liable to pay the service tax. Thus the appellant

is called upon to pay the service tax, as a recipient of service tax under reverse charge basis.

6.5 Having adverted to the relevant provisions of law and the basis of the SCN for raising the demand of service tax, we now proceed to examine the remaining rival contentions. The Ld. Counsel for appellant has put forward contentions that royalty paid is not a consideration and that it is a statutory payment. The contention is that it is a fee and is not a consideration for services. As per Section 6A of the Oil fields (Regulation & Development) Act, 1948, royalty is to be paid on the quantum of mineral oil extracted. The rate of royalty is also determined by the Schedule given in the Act. It gets revised by issue of notifications. The Ld. Counsel has contended that there is no quid pro quo, as the amount of royalty paid is not based on the agreement/contract entered with the government and the appellant has no say or voice in fixing the amount of royalty that has to be paid. The Ld. Special Counsel, appearing for department has countered these arguments by submitting that royalty is paid for the activity of assignment of right to use natural resources. The Circular issued by Board No.192/2016 dt.13.4.2016 has also been adverted to by the department. The royalty is to be paid as per an enactment and not an agreement. It does not arise out of a contractual obligation, where both parties exercise and arrive at a consensus to fix the amount. It is more akin to a regulatory fee, as the Act itself is intended for Oil fields Regulation and Development. It can also be said to be a license fee for the right to extract the crude oil and natural gas. Even if a license fee or regulatory fee, if the fee levied is entirely regulatory in nature and does not involve any element of compensatory nature, such fee cannot be said to fall within the definition of consideration, for service.

In the present case, even though the liability to pay royalty is fixed by a statute, the royalty is paid on the basis of the quantity of oil/natural gas extracted. We, then have to say that 'royalty', in the present case, even if in the nature of regulatory fee or license fee contain a part which is compensatory nature. It thus acquires a hybrid nature. When regulatory part of the fee can be kept outside the purview of 'consideration', the compensatory part of the fee would have an element of quid pro quo, so as to fall within the purview of 'consideration' for service. The question then is how to carve out the element of compensatory part from the royalty paid. The Finance Act, 1994 does not provide for a mechanism to levy service tax on an amount which has the characters of both regulatory fee, as well as compensatory fee.

6.6 Let us proceed to examine whether the dominant part is regulatory or compensatory in nature. It requires to be mentioned that like any other taxing statute the ORD Act, 1948, has a charging provision (Section 6A) under which 'royalty' is levied. The said section reads as under:

"**6A.** Royalties in respect of mineral oils.- (1) The holders of a mining lease granted before the commencement of the Oilfields (Regulation and Development) Amendment Act, 1969 (39 of 1969) shall, notwithstanding anything contained in the instrument of lease or in any law in force at such commencement, pay royalty in respect of any mineral oil mined, quarried, excavated or collected by him from the leased area after such commencement, at the rate for the time being specified in the Schedule in respect of that mineral oil."

6.7 The Act also provides for penalties in case of contravention of the provision of Act/Rules (Section 9). The relevant part of the Petroleum & Natural Gas Rules, 1959, are extracted as under:

"13. Mining lease fees rent:

(1) The applicant for a lease shall, before the lease is granted to him: -

a. Deposit with the Central or State Government, as the case may be, as security, a sum Rupees one lac), for due observance of the terms and conditions of the lease;

b. Also deposit with the Central Government or the State Government as the case may be, for meeting the preliminary expenses such sum, not exceeding Rs.10,000 (Rupees ten thousand) Government or the State Government, with the approval of the Central Government, may determine;

(2) On the grant of a lease, the lessee –

(a) shall pay to the Central Government or the State Government, as the case may be, for every year a fixed yearly dead rent at the following rates: Rs.12.50 per hectare or part thereof for the first 100 sq.km. and Rs.25 per hectare or part thereof for area exceeding the first 100 sq.km. **provided that the lessee shall be liable to pay only the dead rent or the royalty, whichever is higher in amount but not both;**

(b) shall also pay to the State Government for the surface area of the land actually used by him for the purpose of the operations conducted under the lease, surface rent at such rate, not exceeding the land revenue and cess assessed or assessable on the land, as may be specified by the State Government with the approval of the Central Government.

17. Transfer or Assignment: The licensee or the lessee shall not assign or transfer his right, title and interest, in respect of the license or the lessee or in respect of the land or mineral underlying the ocean within the territorial waters or the continental shelf of India covered by such license or lease granted by the Central Government, without the consent in writing of the Central Government and in the case of land covered by a license or lease granted by the State Government, without the consent in writing of the Central Government being first obtained through the State Government.

32-A. Penalties:

(1) If the holder of a Petroleum Exploration License or Mining Lease or his transferee or assignee falls, without sufficient cause, to furnish the information or returns or acts in any manner in contravention of sub-rule (2) of rule 14, rule 19 and rule 24, or to allow any authorised person as provided in Rule 32 to enter into and inspect any oil well or gas well or any drilled hole or information well in the process of drilling, he shall be punishable with imprisonment for a term which may extend to six months or with fine which may extend to one thousand rupees or with both.

(2) Whoever, after having been convicted of any offence referred to in sub-rule (1), continues to commit such offence shall be punishable for each day after the date of the first conviction during which he continues so to offend, with fine which may extend to one hundred rupees”.

6.8 The liability to pay royalty is fixed by the enactment. The amount of Royalty to be paid is determined on the basis of the well head prices. The royalty to be paid differs periodically. In order to collect royalty, a method is provided by the Act. The payment on the basis of well head prices is a measure for collection of the royalty. The provisions contained in the ORD Act, 1948 read with P & NG Rules, 1959 enables us to draw a strong inference that royalty is more of a regulatory fee than compensatory. The amount of royalty to be paid though differs periodically, in our view the payment of royalty is a regulation of checking the over exploitation of the resources of our mother earth. Being dominantly in the nature of regulatory fee, royalty does not fit into the definition of consideration for services provided, as under the service tax law.

7. The SCN, as well as Impugned Order brings the activity within the definition of 'service' under Section 65B (44) being an assignment of right to use oil fields. The operative part of the impugned order, which has already been extracted above would show that the 'assignment of right to use' is considered by department by as the taxable service. The Ld. Counsel for appellant has argued that the grant of mining lease is not an assignment of right. Several decisions have been relied to submit that in an 'assignment' the right of one party is completely relinquished to another, and further that 'lease' is not an 'assignment'. On perusal of the document dt.6.8.2009, issued by the Government of Tamil Nadu, it is mentioned therein as a Mining Lease. The document does not use the words 'assignment of right to use of oil/natural gases'. The relevant part of the document reads as under:

"9. In the circumstances stated above, the Government of Tamil Nadu, after detailed examination, grant Petroleum Mining Lease to M/s.ONGC Ltd., for an extent of 2.3 sq.kms. in Kanchipuram block, Thiruvallur District for a period of 20 years from 3.4.2007 to 12.4.2007, under Rule 5(1) of PNG Rules 1959 (as amended from time to time) subject to terms and conditions mentioned in the Annexures 1 & 11 of this order."

8. The document is in the nature of 'Lease' and not 'assignment of right to use'. Further, Rule 17 prohibits transfer of assignment. The said Rule would bring out that the underlying nature of the document issued by the Government to appellant is 'lease' and not 'assignment'. A right created under a lease agreement is different from an 'assignment' of right to use'. Sl.No.61 of the Mega Exemption notification uses the words 'assignment of right to use'. It appears that the SCN and the impugned order has attempted to fit in the impugned activity into sl.no.61 of Mega exemption, as introduced by the amendment notification no.22/2016-ST dt.13.4.2016. This transition of the document from 'lease' to 'assignment' acquires significance for the reason that, if the document is to be construed as lease, the activity is likely to fall under 'Renting of Immovable Property Services.' In the case of renting of immovable property services, the liability to pay service tax is on forward charges basis, even if the services are provided by government to business entities. The document explicitly is a grant of mining lease. We find no reason to hold that it is an assignment of right to use of oil/natural gas. The activity impugned in the SCN is the 'assignment of right to use' which is not so as per the document issued by Government of Tamil Nadu to the appellant. The Ld. Special Counsel appearing for the department has argued that Royalty is not a 'tax' or a 'fee' as the ORD Act read with Rules uses the words 'Royalty' and 'fees'. The said Act and Rules also uses the

word 'rent' (dead rent, surface rent, etc..). Payment of rent is more common in the case of lease and not in the case of 'assignment'. The definition of 'renting' under the service tax law has already been noticed.

9. Again, at this juncture, the argument put forward by the Ld. Counsel that the department has sought to create a charge of tax on the basis of a delegated legislation, (i.e. on the basis of the Mega exemption notification 25/2012, as amended by notification 22/2016 dt.13.4.2016) acquires significance. The exemption notification issued under Section 93 of the Finance Act, 1994, exempts certain services from the levy of service tax. The present demand has been raised after the introduction of Sl.No.61 in the Negative list, which exempts the assignment of right to use any natural resource, if such assignment by government/local authority is prior to 1.4.2016. The proviso states that the said exemption is available on the service tax payable only on one time payment, in full upfront or in instalments. Thus it is an exemption from payment of service tax on services provided by government/local authority for assignment of right to use natural resources prior to 1.4.2016, subject to the proviso. The Ld. Special Counsel for department has argued that the activity of such assignment falls within the definition of 'service' as under Section 65B (44) introduced as early as w.e.f. 1.7.2012 itself. Though it is contended by department that the activity of 'grant of lease' for mining right falls within the definition of service under Section 65B (44), the demand is raised alleging that it falls within Sl.No.61 (introduced w.e.f 13.4.2016) and that the activity is an assignment of right to use natural resources.

10. In the case of Kiran Spinning Mills, Thane vs. CCE, Bombay II 1984(17) ELT 396 (Tri) the larger Bench of the Tribunal analysed the issue

as to whether an exemption notification can create duty liability. The Tribunal held that an exemption notification clearly is not a charging provision and it cannot be interpreted so as to create a duty liability where none existed under the tariff entry. In the case on hand, if we keep aside the Mega exemption notification and look for the charging provision, which is Section 66B, the same will lead us to Section 65B (44) which defines 'service'. Under this section, the activity would fall under 'Renting of Immovable Property Services.' It is to be pointed out that the law wherever required has used the word 'lease' and 'assignment' distinctly. *Section 65B (41) defines 'renting', "means allowing, permitting or granting access, entry, occupation, use or any such facility, wholly or partly, in an immovable property, with or without the transfer of possession or control of the said immovable property and includes letting, leasing, licensing or other similar arrangements, in respect of immovable property."* Again, under Section 66E (Declared Services) clause (j) speaks about service in the nature of 'assignment' by the government of the right to use the radio frequency spectrum and subsequent transfers thereof.

11. The department does not have a case, that the activity falls within lease and that the royalty paid is rent. This is because, if so, the liability to discharge service tax would be on the government (being the service provider). The demand raised is indeed on the basis of Sl.No.61 of the exemption notification. Para 15 of the SCN also would show that the demand has been raised on the basis that the royalty which is paid periodically is not exempted from service tax. The argument put forward by the Ld. Counsel that the liability is derived on the basis of an

exemption notification and not charging provision is not without substance.

12. From the discussions above, we hold that the demand of service tax cannot sustain and requires to be set aside. Ordered accordingly.

13. In the result, the impugned order is set aside. The appeal is allowed with consequential reliefs, if any.

(Pronounced in court on 09.01.2024)

(VASA SESHAGIRI RAO)
Member (Technical)

(SULEKHA BEEVI C.S.)
Member (Judicial)

PR