सत्यमेव जयते

केंद्रीय कर आयुक्त (अपील)

O/O THE COMMISSIONER (APPEALS), CENTRAL TAX,

वस्तु एवं सेवा कर भवन,
सातवीं मंजिल,पॉलिटेकनिक के पास,
आम्बावाडी, अहमदाबाद-380015

GST Building ,7th Floor,,
Near Polytechnic,
Ambavadi, Ahmedabad-
380015

☎: 079-26305065

टेलेफैक्स : 079 - 26305136

क फाइल संख्या :File No : **V2/26/GNR/2019-20**/12479 TO 12482

ख अपील आदेश संख्या :Order-In-Appeal No.: **AHM-EXCUS-003-APP-031-19-20**

दिनॉक Date : **30-09-2019** जारी करने की तारीख Date of Issue: 01/10/2019

आयुक्त (अपील) द्वारा पारित

Passed by Commissioner (Appeals) Ahmedabad

ग **अपर** आयुक्त, केन्द्रीय उत्पाद शुल्क, अहमदाबाद-III आयुक्तालय द्वारा जारी मूल आदेश **: 15/AC/ST/MEH/2018-19** दिनॉक : **30-03-2019** से सृजित

Arising out of Order-in-Original: **15/AC/ST/MEH/2018-19**, Date: **30-03-2019** Issued by: Assistant Commissioner,CGST, Div: Mehsana, Gandhinagar Commissionerate, Ahmedabad.

ध अपीलकर्ता एवं प्रतिवादी का नाम एवं पता

Name & Address of the **Appellant** & Respondent

M/s. Harishiddh Transport Company

कोई व्यक्ति इस अपील आदेश से असंतोष अनुभव करता है तो वह इस आदेश के प्रति यथास्थिति नीचे बताए गए सक्षम अधिकारी को अपील या पुनरीक्षण आवेदन प्रस्तुत कर सकता है।

I. Any person aggrieved by this Order-In-Appeal issued under the Central Excise Act 1944, may file an appeal or revision application, as the one may be against such order, to the appropriate authority in the following way :

\भारत सरकार का पुनरीक्षण आवेदन :

Revision application to Government of India :

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1994 की धारा अंतर्गत नीचे बताए गए मामलों के बारे में पूवोक्त धारा को उप–धारा के प्रथम परन्तुक के अंतर्गत पुनरीक्षण आवेदन अवर सचिव, भारत सरकार, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, संसद मार्ग, नई दिल्ली : 110001 को की जानी चाहिए।

(i) A revision application lies to the Under Secretary, to the Govt. of India, Revision Application Unit Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi - 110 001 under Section 35EE of the CEA 1944 in respect of the following case, governed by first proviso to sub-section (1) of Section-35 ibid :

(ii) यदि माल की हानि के मामले में जब ऐसी हानि कारखाने से किसी भण्डागार या अन्य कारखाने में या किसी भण्डागार से दूसरे भण्डागार में माल ले जाते हुए मार्ग में, या किसी भण्डागार या भण्डार में चाहे वह किसी कारखाने में या किसी भण्डागार में हो माल की प्रकिया के दौरान हुई हो।

(ii) In case of any loss of goods where the loss occur in transit from a factory to a warehouse or to another factory or from one warehouse to another during the course of processing of the goods in a warehouse or in storage whether in a factory or in a warehouse.

(ख) भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित माल पर या माल के विनिर्माण में उपयोग शुल्क कच्चे माल पर उत्पादन शुल्क के रिबेट के मामलें में जो भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित है।

(b) In case of rebate of duty of excise on goods exported to any country or territory outside India of on excisable material used in the manufacture of the goods which are exported to any country or territory outside India.

(ग) यदि शुल्क का भुगतान किए बिना भारत के बाहर (नेपाल या भूटान को) निर्यात किया गया माल हो।

(c) In case of goods exported outside India export to Nepal or Bhutan, without payment of duty.

ध अंतिम उत्पादन की उत्पादन शुल्क के भुगतान के लिए जो ड्यूटी केडिट मान्य की गई है और ऐसे आदेश जो इस धारा एवं नियम के मुताबिक आयुक्त, अपील के द्वारा पारित वो समय पर या बाद में वित्त अधिनियम (नं.2) 1998 धारा 109 द्वारा नियुक्त किए गए हो।

(d) Credit of any duty allowed to be utilized towards payment of excise duty on final products under the provisions of this Act or the Rules made there under and such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec.109 of the Finance (No.2) Act, 1998.

(1) केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001 के नियम 9 के अंतर्गत विनिर्दिष्ट प्रपत्र संख्या इए–8 में दो प्रतियों में, प्रेषित आदेश के प्रति आदेश प्रेषित दिनाँक से तीन मास के भीतर मूल–आदेश एवं अपील आदेश की दो–दो प्रतियों के साथ उचित आवेदन किया जाना चाहिए। उसके साथ खाता इ. का मुख्यशीर्ष के अंतर्गत धारा 35–इ में निर्धारित फी के भुगतान के सबूत के साथ टीआर–6 चालान की प्रति भी होनी चाहिए।

The above application shall be made in duplicate in Form No. EA-8 as specified under Rule, 9 of Central Excise (Appeals) Rules, 2001 within 3 months from the date on which the order sought to be appealed against is communicated and shall be accompanied by two copies each of the OIO and Order-In-Appeal. It should also be accompanied by a copy of TR-6 Challan evidencing payment of prescribed fee as prescribed under Section 35-EE of CEA, 1944, under Major Head of Account.

(2) रिविजन आवेदन के साथ जहाँ संलग्न रकम एक लाख रूपये या उससे कम हो तो रूपये 200/– फीस भुगतान की जाए और जहाँ संलग्न रकम एक लाख से ज्यादा हो तो 1000/– की फीस भुगतान की जाए।

The revision application shall be accompanied by a fee of Rs.200/- where the amount involved is Rupees One Lac or less and Rs.1,000/- where the amount involved is more than Rupees One Lac.

सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपील:–

Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1944 की धारा 35– ण्0बी/35–इ के अंतर्गत:–

Under Section 35B/ 35E of CEA, 1944 an appeal lies to :-

उक्तलिखित परिच्छेद 2 (1) क में बताए अनुसार के अलावा की अपील, अपीलो के मामले में सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, अहमदाबाद में **दूसरा मंजिल, बहूमाली भवन, असारवा, अहमदाबाद, गुजरात** 380016

To the west regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at 2nd floor, Bahumali Bhavan, Asarwa, Ahmedabad-380016 in case of appeals other than as mentioned in para-2(i) (a) above.

(2) केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001 की धारा 6 के अंतर्गत प्रपत्र इ.ए–3 में निर्धारित किए अनुसार अपीलीय न्यायाधिकरणें की गई अपील के विरूद्व अपील किए गए आदेश की चार प्रतियाँ सहित जहाँ उत्पाद शुल्क की मांग, ब्याज की मांग ओर लगाया गया जुर्माना रूपए 5 लाख या उससे कम है वहां रूपए 1000/– फीस भेजनी होगी। जहाँ उत्पाद शुल्क की मांग, ब्याज की मांग ओर लगाया गया जुर्माना रूपए 5 लाख या 50 लाख तक हो तो रूपए 5000/– फीस भेजनी होगी। जहाँ उत्पाद शुल्क की मांग, ब्याज की मांग ओर लगाया गया जुर्माना रूपए 50 लाख या उससे ज्यादा है वहां रूपए 10000/– फीस भेजनी होगी। की फीस सहायक रजिस्टार के नाम से रेखाकित बैंक ड्राफ्ट के रूप मे संबंध की जाये। यह ड्राफ्ट उस स्थान के किसी नामित सार्वजनिक क्षेत्र के बैंक की शाखा का हो

The appeal to the Appellate Tribunal shall be filed in quadruplicate in form EA-3 as prescribed under Rule 6 of Central Excise(Appeal) Rules, 2001 and shall be accompanied against (one which at least should be accompanied by a fee of Rs.1,000/-, Rs.5,000/- and Rs.10,000/- where amount of duty / penalty / demand / refund is upto 5 Lac, 5 Lac to 50 Lac and above 50 Lac respectively in the form of crossed bank draft in favour of Asstt. Registar of a branch of any nominate public sector bank of the place where the bench of any nominate public sector bank of the place where the bench of the Tribunal is situated

(3) यदि इस आदेश में कई मूल आदेशों का समावेश होता है तो प्रत्येक मूल ओदश के लिए फीस का भुगतान उपर्युक्त ढंग से किया जाना चाहिए इस तथ्य के होते हुए भी कि लिखा पढी कार्य से बचने के लिए यथास्थिति अपीलीय न्यायाधिकरण को एक अपील या केन्द्रीय सरकार को एक आवेदन किया जाता हैं।

In case of the order covers a number of order-in-Original, fee for each O.I.O. should be paid in the aforesaid manner not withstanding the fact that the one appeal to the Appellant Tribunal or the one application to the Central Govt. As the case may be, is filled to avoid scriptoria work if excising Rs. 1 lacs fee of Rs.100/- for each.

(4) न्यायालय शुल्क अधिनियम 1970 यथा संशोधित की अनुसूचि–1 के अंतर्गत निर्धारित किए अनुसार उक्त आवेदन या मूल आदेश यथास्थिति निर्णयन प्राधिकारी के आदेश में से प्रत्येक की एक प्रति पर रू.6.50 पैसे का न्यायालय शुल्क टिकट लगा होना चाहिए।

One copy of application or O.I.O. as the case may be, and the order of the adjournment authority shall beer a court fee stamp of Rs.6.50 paisa as prescribed under scheduled-I item of the court fee Act, 1975 as amended.

(5) इन ओर संबंधित मामलों को नियंत्रण करने वाले नियमों की ओर भी ध्यान आकर्षित किया जाता है जो सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्याविधि) नियम, 1982 में निहित है।

Attention in invited to the rules covering these and other related matter contended in the Customs, Excise & Service Tax Appellate Tribunal (Procedure) Rules, 1982.

(6) **सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय प्राधिकरण (सीस्तेत) के प्रति अपीलों के मामलों में केन्द्रीय उत्पाद शुल्क अधिनियम, १९४४ की धारा ३५फ के अंतर्गत वित्तीय(संख्या-२) अधिनियम २०१४(२०१४ की संख्या २५) दिनांक: ०६.०८.२०१४ जो की वित्तीय अधिनियम, १९९४ की धारा ८३ के अंतर्गत सेवाकर को भी लागू की गई है, द्वारा निश्चित की गई पूर्व-राशि जमा करना अनिवार्य है, बशर्ते कि इस धारा के अंतर्गत जमा की जाने वाली अपेक्षित देय राशि दस करोड़ रूपए से अधिक न हो**

केन्द्रीय उत्पाद शुल्क एवं सेवाकर के अंतर्गत " माँग किए गए शुल्क " में निम्न शामिल है

(i) **धारा 11 डी के अंतर्गत निर्धारित रकम**

(ii) **सेनवैट जमा की ली गई गलत राशि**

(iii) **सेनवैट जमा नियमावली के नियम 6 के अंतर्गत देय रकम**

→ आगे बशर्ते यह कि इस धारा के प्रावधान वित्तीय (सं. 2) अधिनियम, 2014 के आरम्भ से पूर्व किसी अपीलीय प्राधिकारी के समक्ष विचाराधीन स्थगन अर्ज़ी एवं अपील को लागू नहीं होगे।

For an appeal to be filed before the CESTAT, it is mandatory to pre-deposit an amount specified under the Finance (No. 2) Act, 2014 (No. 25 of 2014) dated 06.08.2014, under section 35F of the Central Excise Act, 1944 which is also made applicable to Service Tax under section 83 of the Finance Act, 1994 provided the amount of pre-deposit payable would be subject to ceiling of Rs. Ten Crores,
Under Central Excise and Service Tax, "Duty demanded" shall include:

(i) amount determined under Section 11 D;
(ii) amount of erroneous Cenvat Credit taken;
(iii) amount payable under Rule 6 of the Cenvat Credit Rules.

→Provided further that the provisions of this Section shall not apply to the stay application and appeals pending before any appellate authority prior to the commencement of the Finance (No.2) Act, 2014.

(6)(i) **इस आदेश के प्रति अपील प्राधिकरण के समक्ष जहाँ शुल्क अथवा शुल्क या दण्ड विवादित हो तो माँग किए गए शुल्क के 10% भुगतान पर और जहाँ केवल दण्ड विवादित हो तब दण्ड के 10% भुगतान पर की जा सकती है।**

(6)(i) In view of above, an appeal against this order shall lie before the Tribunal on payment of 10% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute."

II. Any person aggrieved by an Order-in-Appeal issued under the Central Goods and Services Tax Act, 2017/Integrated Goods and Services Tax Act, 2017/Goods and Services Tax (Compensation to States) Act, 2017, may file an appeal before the appropriate authority.

ORDER-IN-APPEAL

M/s Harishiddh Transport Company, G/12, Shivam Complex, Opp.Janpath Hotel, Becharaji Road, Mehsana (hereinafter referred to as 'the appellant) has filed an appeal against the Order-in-Original No.15/AC/ST/MEH/18-19 dated 30.03.2019 ('the impugned order') passed by the Assistant Commissioner, CGST, Mehsana Division, Gandhinagar Commissioneate ('the adjudicating authority').

2. The facts in brief are that the appellant is engaged in supply of tankers to M/s Oil and Natural Gas Corporation Limited (for short-ONGC) for their use under a contract/ agreement for inter-location transportation of brine/ crude oil/ effluent/ emulsion/ mud/ operational water etc. of ONGC, Mehsana Asset on the basis of fixed monthly charges. As it appeared that the service provided by the appellant got covered under the "Supply of Tangible Goods" Service, show cause notices, pertaining to the period up to 31.03.2015 were issued to the jurisdictional officers to the appellant for non-payment of service tax for classifying the service under the service category of "Supply of Tangible Goods"; demand of service tax short paid; and imposition of penalties which was later on adjudicated. As the appellant has continued the practice of non-payment of service tax, a show cause notice dated 28.03.2018, covering the period from 01.04.2015 to 31.03.2016 was also issued by the Assistant Commissioner, CGST for [i] total consideration of Rs.2,97,56,598/- received towards providing service for the relevant period to be considered as value for the purpose of payment of service tax for 'supply of tangible goods service''; [ii] recovery of service e tax amounting to Rs.31,09,549/- with interest; [iii] and imposition of penalty under Section 70, 76, 77(2) of the Finance Act, 1994 (the Act). The adjudicating authority has confirmed all the allegations and ordered for recovery of short payment of service tax with interest and imposed penalty of Rs.3,10,955/- under Section 76 of the Act; Rs.10,000/- under Section 72(2) of the Act; and Rs.20,000/- under Section 70 of the Act for non-filing of ST-3 return for the period of October 2015 to March 2016.

3. Being aggrieved with the impugned order, the appellant has filed the present appeal on the grounds that they were providing vehicles to ONGC and they used the vehicle for transporting goods and paid service tax as a recipient of service under GTA; that the definition of GTA means any person who provides service in relation to transport of goods by road and issued consignment note by whatever named called; that they had issued log book cum bills and it is to be treated as consignment note; that the said documents contains all the details of vehicle, distance travelled, name of user, place and signature of user; that as the tax liability was correctly paid by ONGC, the same cannot be subjected to tax again in the hands of appellant under a different category; that there are two conditions to be satisfied for classifying the service under supply of tangible goods- first is right of possession of goods should not be transferred and second effective control of goods should not be transferred; that in the instant case although right of possession of oil tankers was not transferred, yet effective control of tankers were transferred to ONGC. It is further contended that non-payment of

VAT cannot be a ground for confirming the demand under supply of tangible goods service; that the issue is arising out of interpretation of the provisions of law. They further contended that no penalties are imposable when they acted on the bonafide belief that they were not liable to pay service tax.

4. Personal hearing in the matter was held on 21.08.2019. Shri M.H.Ravel, Consultant appeared on behalf of the appellant and reiterated the submissions advanced in the grounds of appeals. He further submitted an additional submissions dated 21.08.2019. In the written submission, the Ld. Consultant relies on the decision of Hon'ble CESTAT in the case of M/s ITD ITD-CHEM Joint Venture -2019 (24) GSTL-568.

5. I have carefully gone through the case records and submission made by the appellant. The issue to be decided in the instant appeal is as to whether the consideration received by the appellant during the relevant period is taxable under the service "Supply of Tangible Goods" as per provisions of Section 65 (105) (zzzzj) of the Finance Act, 1994, or under "Goods Transport Agency" service as defined under Section 65(105)(zzp) of the Finance Act, 1994; and whether the service tax confirmed with interest and penalty imposed by the adjudicating authority is correct or otherwise.

6. I find that the issue involved in the matter is as to whether the supply of tankers to ONGC for their use under a contract/ agreement for inter-location transportation on the basis of fixed monthly charges is classifiable under the service category of "supply of tangible goods" or "Goods Transport Agency". Therefore, the dispute is regarding categorization of activity of the appellant for service tax liability. I find that on the demand made on account of 'Supply of Tangible Goods Service', the appellant submitted that what they provided was only GTA Service and recipients ONGC paid the Service Tax under GTA service under Reverse Charge Mechanism.

7. I find that before introduction of negative list w.e.f 01.07.2012, Section 65 (105) (zzzzj) of the Act defines "Supply of Tangible Goods Services" as follows:

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

Section 65(105)(zzp) of the Act, *ibid*, defines taxable service under "Goods Transport Agency, as follows:

> *"taxable service means" any service provided or to be provided to any person, by a goods transport agency, in relation to transport of goods by road in a goods carriage.*

Section 65(50b) of the Act, defines Goods Transport Agency Service, as follows:

> *"Goods Transport Agency" means any person who provides service in relation to transport of goods by road and issues consignment note, by whatever name called."*

8. I find that the adjudicating authority has considered the income received by the appellant towards the service rendered for the disputed period under "Supply of Tangible Goods". I find that the entry No.(zzzzj) of Section 65 (105) of the Act *ibid* referred above is a new entry inserted vide Finance Act 2008 with effect from 16.05.2008. To fall within the definition of taxable service of "Supply of Tangible Goods" referred above, mainly two conditions are required to be satisfied - (i) there should be a supply of tangible goods for use; (ii) there should not be any transfer of right of possession and effective control of such goods. Once these two conditions are satisfied, the provisions of the said entry will be attracted. To fall within the statute viz. Section 65(50b), which defines the "Good Transport Agency" and taxability on such service under clause of Section 65(105)(zzp) of the Act *ibid*, there should be a service in relation to transport of goods by road coupled with issue of consignment notes.

9. In the instant case, I find that that the appellant used to supply tankers to ONGC for use in inter-location transportation of various goods of ONGC, on the basis of monthly fixed charges under a contract/agreement. I have perused the copy of agreement/contract. The agreement/contract show following details relevant to this case:

1.3 Site – Shall mean the place in which the operations/services are to be carried out or places approved by the ONGC for the purpose of the Contract together with any other places designated in the contract as forming part of the site.

1.4 Corporations site Representative/Engineer- Shall mean the persons or persons appointed by ONGC from time to time to act on its behalf at the site for overall co-ordination, supervision and project management at site.

B. Scope of Work- These tanker(s) are required for transpiration of Crude Oil/hot oil/emulsion/effluent/operational water/brine/mud etc from installations to oil field sites/work sites/installations or vice versa and for any other purpose for transportation and may also be required to perform outstation duties.

-The contractor shall depute one driver and one conductor on each tanker who shall wear neat and clean dress i.e pant and shirt. The driver and conductor so deputed by the contractor on each Tanker should be rotated in shift pattern if required, conforming the working hours as per labour law. .....The driver should have minimum 3 years of valid driving license endorsed for HMV/HGV. If on any occasion it is found that the contractor has engaged a driver with less than 3 years of valid driving license, a penalty of Rs.500/- shall be levied and in event of repetition the penalty will be Rs.1000/-.

-The Contractor shall be required to be maintained the Log Book in triplicate for the tankers provided by the as per the format provided at the time of ward of work. The contractor shall ensure proper recording of the entries by the authorized officer/user of the ONGC/user daily.

- One of the ONGC's representatives shall be entitled to travel in the tanker, if necessary as and when the transaction is undertaken.

- The contractor shall ensure that no unauthorized man or material is lifted in the tankers deputed for ONGC's duty.

6.0 Inspection.

-Before the commencement of the work under this contract, the contractor shall place the tanker(s) for inspection at least 10 days before the commencement of the work along with all documents.. ONGC reverse the right to reject any of the vehicles if the condition is not found satisfactory of the service of ONGC.

8.0 Mode of payment.

-The milometer of tanker(s) should be accurate and not tampered with, failing which the kilometers assessed by the certifying officer of ONGC shall on be paid in case of fixed points. Joint surveyed kilometer shall only be paid.

-The contractor shall maintain log sheets as per the format provided at the time of award of work in triplicate. ..

-The contractor shall submit monthly bills in triplicate along with the copy of the log sheets. This shall be scrutinized and checked I/V PMS.

Schedule of Rate.

-A. Monthly hire charge per tanker with 2000 HM run per month – Rs.46455/-

-B. Extra charges per extra KM beyond 2000 KM/month/tanker - Rs. 8.47

-If average KM run is less than 2000 KM per tanker (regular basis) then an amount shall be deducted for less KM at the rate mentioned at B.

10. On careful perusal of the terms of agreement/contract, I find that the appellant is not directly involved in any activity of ONGC in the site mentioned in the contract. The contract is basically for supply of tankers for transportation of Crude Oil/hot oil/emulsion/effluent/operational water/brine/mud etc from installations to oil field sites/work sites/installations or vice versa and for any other purpose for transportation and may also be required to perform outstation duties. The payment is made on monthly basis but as per rate fixed per kilometer basis. In other words, the payment is being made not on the basis of rent of tankers but on the basis of utilization of tankers. The scope of work merely mentions that the appellant has to provide tankers with drivers and conductors to enable ONGC to operate in their site as per their specification. The deployment of drivers and helpers are part of agreement of hiring the vehicles. In such incidental situation, it cannot be said that the appellant is having all right to use tankers and the possession and effective control are with them during the hired period. Looking in to the agreement/contract, the tankers supplied by the appellant are entirely being used as per direction and specification of ONGC without interference of the owner of the tankers. The various other clauses of the agreement/contract

with reference to inspection and removal of tankers also indicate that the tankers are at ONGC disposal and the appellant not involved in any activity.

11. I find that similar view has been taken by the Hon'ble High Court of Gauhati in the case of M/s Brahmaputra Valley Construction & Suppliers V/s ONGC Ltd [2018 (14) G.S.T.L. 355 (Gau.)]. In the said decision, the Hon'ble Court has held that:

> ***22.*** *A perusal of the above terms shows that (a) the contract is for hiring of the cranes for carrying out the operations of the ONGC; (b) the scope of work is mentioned to specify the operation in connection with which the cranes are hired; (c) the work is not to be executed by the contractor but by the ONGC itself; (d) the contractor is to provide cranes on hire in connection with the said work. It appears to have been wrongly assumed that the contractor is to execute the work mentioned in the heading of Scope of work. It is clear from the recital that the scope of work is mentioned as the work for which the cranes were hired; (e) Clause 2.1 shows that the cranes are at the disposal of the ONGC and per day hire charges are paid for all days, except maintenance days;* ***(f) services of staff and maintenance are incidental to the hiring of the cranes.*** *Liability to the third party is on account of the fact that in spite of hiring of the cranes by the ONGC, the employees operating the cranes are provided by the assessee. In Mersey Docks and Harbour Board v. Coggins & Griffiths (Liverpool) Ltd. and McFarlane, [1946] 2 All E.R. 345 and in Bhoomidas v. Port of Singapore Authority, [1978 1 All ER 956, it has been held that even if a ship is hired, responsibility for damage to a third party is not of the hirer but of the owner as it is the owner who controlled the manner and working of the employees; (g)* ***it is the ONGC alone which is entitled to exclusively use the cranes and not the assessee.***
>
> ***23.*** *On totality of above factors, we, conclude that the transaction clearly involved transaction of right to use."*

Therefore, by following the ratio of the above judgment of Hon'ble High Court of Gauhati and looking into the scope work, mode of payment and other clause narrated in the agreement/contract in the instant case, it is apparent that the appellant have no control over the personnel deployed by them for the operation being carried out by ONGC.

12. In view of above discussion, I find that the activity carried out by the appellant does not covered within the definition of "supply of tangible goods" as the appellant have no control , possession of tankers and no right to use the tankers as per their specification. ONGC, the recipient of the tanker, have all the control possession and right to use the tankers. In this regard, I rely on decision of the Hon'ble Tribunal, Delhi in the case of Commissioner of Service Tax, Delhi V/s ITD ITD CHEM JOINT VENTURE [2019 (24) GSTL 568-Tri Del]. Para 5 of the said decisions reads as under:

> ***"5.*** *We have considered the facts and heard both sides. It is seen that in similar circumstances, CESTAT in the case of Petronet LNG Ltd. (supra) held as under :*
>
> *"The transactions in issue amount to transfer of the right to use tangible goods, with possession and effective control of such goods, in favour of the assessee by owners of the tankers. These transactions fall within the ambit of the exclusionary clause of*

Section 65(105)(zzzzj) of the Act and are therefore immune to the liability to service tax."

Further, recently, the Hon'ble Tribunal, Allahabad has pronounced a judgment on similar issue in the case of M/s GPL Polyfils [2019 (27) GSTL 395], wherein it has been held that the right of possession, effective control and supervision lies with recipient of Machine supplied by appellant and accordingly, said supply not covered under supply of tangible goods. The Hon'ble Tribunal further held that mere non-payment of VAT would not make supply taxable, there being no such stipulation in definition of services iibid- while payment of VAT may be conclusive of deemed sale, its non- payment does not necessarily lead to contrary conclusion. Relevant para is reproduced below:

4. As regards the supply of Bailing Press Machine to a third party person, we note that the Lower Authorities have referred to the various clauses of the agreement establishing that the right of possession shall rest with the user who would be having overall supervision and effective control of the machines. In terms of the definition of "Supply of Tangible Goods", the activity would not be considered as taxable services if the right of possession and effective control of the machine is transferred to the recipient of the machines. The payment or nonpayment of VAT is not one of the requisite condition of the definition of Supply of Tangible Goods. It is settled law that no condition Service Tax Appeal No.70840 of 2018-CU[DB] 5 or requirement, which is not a part of the definition can be introduced by the adjudicator. No doubt the payment of VAT would establish the transaction to be a deemed sale and thus not covered by the definition but nonpayment by itself does not lead to the contrary, especially when it stands established from the agreement entered between the parties that the supply was alongwith possession and effective control of the machines. As such, we find no reasons to confirm the service tax demand of Rs.74,469/- confirmed for the period 2010-11. Accordingly the same is set aside alongwith setting aside of penalty."

13. In view of above discussion and by following the decisions the Hon'ble High Court of Gauhati, Hon'ble Tribunal Delhi and Allahabad, supra, I find that the activity in dispute in the instant case is not falling within the ambit of "Supply of Tangible Goods".

14. Further, in the instant case, the appellant has contended that the service tax has been paid by ONGC under the category of 'Goods Transport Agency Service' under reverse charge mechanism. The appellant has further argued that they issued log book cum bills which contains all the details of transportation. As per Section 65 (50b) of the Finance Act, 'Transport Agency Service *means any person who provides service in relation to transport of goods by road and issues consignment note, by whatever name called."* Further, Section 65 B (26) of the Finance Act also interprets 'Goods Transport Agency' as the same meaning. In this case, the appellant has submitted copy of 'consignment note cum log book' maintained by them during the course of tankers operated in the site of ONGC. On perusal of the said consignment note cum log book, I find that they mentioned contract number, suppliers name, recipient name, Vehicle No. and other details viz., date and time, milage covered, place visited, purpose of visite and signature of user and driver. The explanation regarding consignment note mentioned under Rule 4B of Service Tax Rules, 2004 is as under:

'Explanation - For the purposes of this rule and the second proviso to rule 4A, "consignment note" means a document, issued by a goods transport agency against the receipt of goods for the purpose of transport of goods by road in a goods carriage, which is serially numbered, and contains the name of the consignor and consignee, registration number of the goods carriage in which the goods are transported, details of the goods transported, details of the place of origin and destination, person liable for paying service tax whether consignor, consignee or the goods transport agency.'

In the instant case, as observed above, the appellant has supplied tankers to ONGC and

ONGC carried out the activity by using the said tanker as per their requirement of transporting of goods own by them. However, the appellant maintained documents i.e consignment note cum log book for transporting of goods, by mentioning all required details therein, as per agreement/contract. In the circumstances, I am of the opinion that the convey note i.e consignment note cum log book maintained by the appellant can be termed as consignment note as per explanation under Rule 4 B of Service Tax Rules.

15. Further, on going through the various services before the introduction of negative list concept (which has done away with positive list), it would be seen that there is no pattern or mutual exclusivity in the scope of various services. In Customs and Central Excise Tariff the classification of the goods is based on highly scientific pattern. In case of Service Tax, however, various services were brought into the tax net from 1994 onwards on *ad hoc* basis. There is no pattern in the order the services were brought under the tax net. Descriptions of the services are not mutually exclusive. Some of the services are very specific and precise while some are wide in scope. This is the reason that recourse needs to be taken to Section 65A for classifying particular services at a particular point of time. As per Section 65A of the Finance Act, if a service is classifiable under two or more sub-clauses of clause (105) of Section 65, *Classification shall be effected to the sub-clause which provides the most specific description to sub-clauses providing a more general description.* Further, I find that the mode of payment made to the appellant by the ONGC for the activity in question is on monthly basis as per distance travelled. In other words, the payment is based on actual kilo meter travelled by the vehicle. This indicates that the payment discharged by ONGC to the appellant is not based per tanker hired or tanker used per hour. In this context also, it is evident that the appellant is not providing 'supply of tangible goods' but Goods transport Agency service'.

16. From the above discussion, I find that the activity under consideration is more specifically covered under the category "Goods Transport Agency Service", as the activity does not fall within ambit of 'supply of tangible goods'.

17. In this backdrop, I set aside the impugned order and allow the appeal filed by the appellant. The appeal stands disposed of accordingly.

30/9/19

(Gopi Nath)
Commissioner (Appeals)
Date : .09.2019

Attested

1/10/19

(Mohanan V.V)
Superintendent (Appeals)
Central GST, Ahmedabad

R.P.A.D

To
M/s Harishiddh Transport Company,
G/12, Shivam Complex, Opp.Janpath Hotel,
Becharaji Road, Mehsana

Copy to:-

1. The Chief Commissioner, CGST & ST Zone, Ahmedabad.
2. The Commissioner, CGST, Gandhinagar
3. The Addl./Joint Commissioner, (Systems), CGST, Gandhinagar
4. The Dy. / Asstt. Commissioner, CGST, Mehsana Division.
5. Guard file.
6. P.A.