सत्यमेव जयते

आयुक्त का कार्यालय) ,अपीलस(
Office of the Commissioner,
केंद्रीय जीएसटी, अहमदाबाद आयुक्तालय
Central GST, Appeal Commissionerate-Ahmedabad
जीएसटी भवन, राजस्व मार्ग, अम्बावाड़ी अहमदाबाद ३८००१५.
CGST Bhavan,Revenue Marg,Ambawadi,Ahmedabad-380015
. ☎ :079-26305065 टेलेफैक्स :079 26305136 –
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DIN-20201164SW0000021246

स्पीड पोस्ट

क फाइल संख्या : File No : V2(ST)8/GNR/Appeals/2020-21/16321 TO 16375

ख अपील आदेश संख्या Order-In-Appeal Nos. **AHM-EXCUS-003-APP-38/20-21**
दिनाँक Date : **28.10.2020** जारी करने की तारीख Date of Issue 24/11/2020

आयुक्त (अपील) द्वारा पारित
Passed by **Shri Akhilesh Kumar**, Commissioner (Appeals)

ग Arising out of Order-in-Original No. **04/DC-DK/CGST/2019-20** दिनाँक: **11.03.2020**, issued by Assistant/Deputy Commissioner(P), Central GST & Central Excise, Gandhinagar Commisssionerate, Gandhinagar

ध अपीलकर्ता का नाम एवं पता Name & Address of the **Appellant** / Respondent

M/s Harisiddh Transport Company,
G/12, Shivam Complex, Opposite-Janpath Hotel,
Becharaji Road,
Mehssana-384002.

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।

Any person aggrieved by this Order-In-Appeal 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 अतत नीचे बताए गए मामलों के बारे में पूवोक्त धारा की उप–धारा के प्रथम परन्तुक के अंतर्गत पुनरीक्षण आवेदन अधीन 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 चाहें 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.

(क) 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।

(A) 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.

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

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

अंतिम उत्पादन की उत्पादन शुल्क के भुगतान के लिए जो डयूटी 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।

(c) 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 अपीलः–
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1944 की धारा 35–बी/35–इ के अंतर्गतः–

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

(क) 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 2nd माला, बहुमाली भवन ,असरवा ,गिरधरनागर,अहमदाबाद –380004

(a) To the west regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at 2nd floor,Bahumali Bhawan,Asarwa,Girdhar Nagar, Ahmedabad : 380004. in case of appeals other than as mentioned in para-2(i) (a) above.

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 a court fee stamp of Rs.6.50 paise 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 उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट), के प्रति अपीलो के मामले में कर्तव्य मांग (Demand) एवं दंड (Penalty) का 10% पूर्व जमा करना अनिवार्य है। हालांकि, अधिकतम पूर्व जमा 10 करोड़ रुपए है ।(Section 35 F of the Central Excise Act, 1944, Section 83 & Section 86 of the Finance Act 1994)

केन्द्रीय उत्पाद शुल्क और सेवा कर के अंतर्गत, शामिल होगा "कर्तव्य की मांग"(Duty Demanded) -

(i) *(Section)* खंड 11D के तहत निर्धारित राशि;
(ii) लिया गलत सेनवैट क्रेडिट की राशि;
(iii) सेनवैट क्रेडिट नियमों के नियम 6 के तहत देय राशि.

⇨ यह पूर्व जमा 'लंबित अपील' में पहले पूर्व जमा की तुलना में, अपील' दाखिल करने के लिए पूर्व शर्त बना दिया गया है

For an appeal to be filed before the CESTAT, 10% of the Duty & Penalty confirmed by the Appellate Commissioner would have to be pre-deposited, provided that the pre-deposit amount shall not exceed Rs.10 Crores. It may be noted that the pre-deposit is a mandatory condition for filing appeal before CESTAT. (Section 35 C (2A) and 35 F of the Central Excise Act, 1944, Section 83 & Section 86 of the Finance Act, 1994)

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.

इस 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।

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."

ORDER IN APPEAL

The present appeal has been filed by M/s Harisiddh Transport Company, G/12, Shivam Complex, OppositeJanpath Hotel, Becharaji Road, Mehsana*[here-in-after referred to as the 'appellant']*, against Order-in-Original No. 04/DC-DK/CGST/2019-20 dated 11.03.2020 (hereinafter referred to as "*impugned order*") passed by the Deputy Commissioner (P), Central GST & Central Excise, Gandhinagar Commissionerate (hereinafter referred to as the "*adjudicating authority*").

2. The facts of the case, in brief, are that the appellant isengaged in supply of tankers to M/s Oil and Natural Gas Corporation Limited, Mehsana(for short-ONGC) for their use under contract/ agreement for inter-location transfer of crude oil/ hot oil/ emulsion/ effluent/ operation water/brine/ mud etc. from installations to oil filed sites/work site of ONGC and vice versa on the basis of fixed monthly charges. As it appeared that the service provided by the appellant was covered under the service category of "Supply of Tangible Goods" as defined under erstwhile Section 65(105)(zzzzj) of the Finance Act,1994, the department has issued three SCNs dated 08.10.2015 for the period 2010-11 to 2013-14, dated 29.02.2016 for the period 2014-15 and dated 28.03.2018 for the period 2015-16 to the appellant demanding service tax alongwith interest and also proposing imposition of penalty.

2.1. For the subsequent period from 01.04.2016 to 30.06.2017, it was observed that the appellant continued to recover "Hiring Charges" in the name of transportation chargesfrom M/s ONGC for providing tankers as per specifications and conditions of M/s ONGC. It was observed by the department that the amount of "Hiring Charges" recovered by the appellant was to be considered as consideration for providing services under category other than the services specified in Negative List under Section 66D of the Finance Act, 1994 (the Act) and it should not be considered as other than "Goods Transportation Service" and exemption under Notification No. 26/2012 – ST dated 01.07.2012 should be denied to them. Accordingly, a periodical Show Cause Notice (hereinafter referred to as '*SCN*') under Section 73(1A) of the Finance Act,1994 was issued to the appellant for classifying the service under the service category of "Supply of Tangible Goods" Service as defined under erstwhile Section 65(105)(zzzzj) of the Finance Act,1994; for demanding service tax amounting to Rs.15,21,573/- for the period from April-2016 to June-2017 fornon-payment/short payment of service tax under the proviso to sub-section (1) of Section 73 of the

Finance Act,1994 alongwith interest under Section 75 of the Act and also proposing imposition of penaltyunder Section 76 and 77(2) of the Act ibid.

2.2. The said SCN was adjudicated by the Adjudicating Authority vide the impugned order wherein all the allegations were confirmed against the appellant and order was made for recovery of non/short payment of service tax with interest and also imposed penalty of Rs.1,63,026/- under Section 76 of the Act and Rs.10,000/- under Section 77(2) of the Act.

3. Being aggrieved by the impugned order dated 11.03.2020, the appellant has filed the instant appeal on the grounds:

- that the adjudicating authority has not considered the submissions made by them;
- that the adjudicating authority has not gone through the agreement/contract entered into by them with M/s ONGC and not discussed the same;
- that as per the agreement/contract, M/s ONGC has undertaken to discharge service tax liability under GTA service;
- 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 contains all the details of vehicle, distance travelled, name of user, place and signature of user;
- that the tax liability was correctly paid by ONGC under GTA service which has not been disputed by the department and the same cannot be subjected to tax again from them under a different category;
- that as per Section 65 (105)(zzzzj) of the act, 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.
- 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;
- that they rely on the orders passed by the Hon'ble Commissioner (A), Ahmedabad who vide OIA No. AHM-EXCUS-003-APP-031-19-20

dated01.10.2019 in their own case for earlier period on same issue, wherein Hon'ble Commissioner (A) allowed the appeal filed by them and discussed the agreement/contract in detail and concluded that the service provided by them is not supply of tangible goods and held 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".

- they rely upon various judgments in support of their defence;
- 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 case was held on 29.09.2020. Shri M.H.Raval, Consultant, appeared for the hearing. He reiterated the submission made in appeal memorandum.

4.1. He also submitted additional submissions dated 29/30.09.2020 wherein he relied on the decision of Hon'ble Commissioner (A), Ahmedabad vide OIA No. AHM-EXCUS-003-APP-031-19-20 dated 01.10.2019 in their favour in their own case for earlier period. He also relied on the following judgements:

(i) Hon'ble High Court of Gauhatiin the case of M/s Brahmaputra Valley Construction & Suppliers Vs ONGC Ltd – 2018 (14) G.S.T.L. 355(Gau),

(ii) Hon'ble CESTAT, Delhi in the case of Commissioner of Service Tax, Delhi vs ITD ITD-Chem Joint Venture- 2019 (24) G.S.T.L. 568(Tri.Del.),

(iii) Hon'ble CESTAT in the case of M/s GPL Polymers vs Commissioner (Audit) GST, Cus. & C.Ex, Kanpur 2019 (27) G.S.T.K.395 (Tri. All), and

(iv) Hon'ble CESTAT in the case of M/s Satish Crane Services vs Commissioner ofC.Ex, Cus. &S.T, Mysore

5. I have carefully gone through the facts of the case and submission made by the appellant in their appeal memorandum as well as additional submission made by them vide letter dated 29/30.09.2020. The issue to be decided in this appeal is as to whether the consideration received by the appellant during the period from April-2016 to June-2017 is taxable under the service category "Supply of Tangible Goods" or under "Goods Transport Agency" service; and whether the service tax confirmed with interest and penalty imposed by the adjudicating authority is correct or otherwise.

6. It is observed that the appellant were issued SCNs on the issue for different periods as per details given below:

Sl. No.	Show Cause Notice and Date	Period	Amount (in Rs.)
1.	F. No. V.ST/15-64/ Dem./ OA/ 2015-16 Dated 08.10.2015	04/2010 to 03/2014	98,59,803/-
2.	F. No. V.ST/15-163/ Dem. /OA/ 2015-16 Dated 29.02.2016	04/2014 to 03/2015	34,34,390/-
3.	V.ST/11A-33/Harsiddh/2017-18 Dated 28.03.2018	04/2015 to 03/2016	31,09,549/-

The SCNs at Sl. Nos. 1 and 2 were adjudicated by the Additional Commissioner, Central Excise, Ahmedabad – III vide Order-in-Original No. AHM-STX-003-ADC-AJS-064-065-16-17 dated 30.07.2017 wherein he confirmed the demand for short payment amounting to Rs. 53,68,905/- for the period October 2013 to March, 2015 along with interest and imposed penalty of Rs. 5,36,800/- under Section 76 of the Finance Act, 1994 and Rs. 10,000/- each under Section 77 (2) of the Act. He also dropped the demand for short payment amounting to Rs. 79,25,288/- for period April, 2010 to September 2013 and refrained from imposing penalty under Section 78 and 77 (1) (c) of the Act.

6.1. The SCN at Sl. No. 3 was adjudicated by the Assistant Commissioner, Central GST and Central Excise, Mehsana Division, Gandhinagar vide Order-in-Original No. 15/AC/ST/MEH/18-19 dated 30.03.2019 wherein he confirmed the demand for short payment amounting to Rs. 31,09,549/- for the period April 2015 to March, 2016 along with interest and imposed penalty of Rs. 3,10,955/- under Section 76 of the Finance Act, 1994, Rs. 10,000/- under Section 77 (2) and Rs. 20,000/- under Section 70 of the Act.

6.2. The department as well as the appellant preferred appeal against the orders of adjudicating authority in respect of SCNs at Sl. No. 1 and 2 before the Commissioner (Appeals), Ahmedabad who vide Order-in-Appeal No. AHM-EXCUS-003-APP-0168-169-17-18 dated 17.01.2018 allowed the appeal in favour of the department and rejected the appeal of the appellant.

6.3. The appellant has preferred appeal against the orders of the adjudicating authority in respect of SCN at Sl. No. 3 before theCommissioner (Appeals), Ahmedabad who vide Order-in-Appeal No. AHM-EXCUS-003-APP-031-19-20 dated 01.10.2019 allowed the appeal in favour of the appellant by dropping the demand confirmed in the order.

7. It is observed that the instant appeal is in respect of SCN issued under Section 73(1A) of the Finance Act, 1994 for the period April-2016 to June-2017 making reference to earlier Show Cause Notices dated 08.10.2015, dated 29.02.2016 and dated 28.03.2018, on same grounds relied upon in earlier SCN. It is also observed that the demand pertains to Negative List Regime i.e. for period after 01.07.2012.

7.1. It is observed that in the Pre-Negative List Regime before 01.07.2012, erstwhile Section 65 (105) (zzzzj) of the Finance Act, 1994 defined "Supply of Tangible Goods Services" as under:

> *"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."*

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

> *"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 Finance Act, 1994 defines Goods Transport Agency Service, as under:

> *"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."*

7.2. In the Negative List Regime, Section 66 D(p) of the Finance Act, 1994 while enumerating services under Negative List has excluded services by way of transportation of goods by road except the services of a goods transport agency (GTA) and a courier agency from the list. Hence, transportation of goods by road by the GTAcontinued to be a taxable service. Besides that, Section 66 E of the Finance Act, 1994 containing Declared Service under clause (f) included "transfer of goods by way of hiring, leasing, licensing or in any such manner without transfer of right to use such goods" within its ambit.

7.3. I find that during the relevant period the services in question can be taxed under Supply of Tangible Goods Service when they fall with in ambit of definition of Declared Service contained under Section 66E (f) of the Finance Act, 1994. The crucial factor in this definition is that transfer of goods should be without transfer of right to use.

8. I find that the adjudicating authority has in Para 33 of the impugned order come to a conclusion that in the present case neither the possession nor the effective control is parted with by the said assessee thus satisfying both the essential criteria of the right to use. The situation is analogous to chartering of aircraft. He has considered clarification given in CBEC Circular Dy. No. 20/Comm (ST)/2009 dated 02.09.2009 that where the crew is also provided by the owners of aircraft as in a wet lease of aircraft effective control is not transferred. However, it is observed that the adjudicating authority has not given any details of analysis of the agreement and as to how it is comparable to the situation of wet lease of aircraft. Hence, the conclusion arrived by him lacks factual support.

9. It is observed from the case records that the appellant used to supply tankers to ONGC for their use in inter-location transportation of various goods belonging to the ONGC, on the basis of monthly fixed charges under a contract/agreement andwere not directly involved in any activity of ONGC in their site. The contract entered by them is for supply of tankers for transportation of Crude Oil/hot oil/emulsion/effluent/ operational water/brine/mud etc. from installations of ONGC 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. Hence, it is observed that the tankers supplied by the appellant are in possession and effective control of ONGC and entirely being used as per direction and specification of ONGC without interference of the owner of the tankers. It is apparent that the right of use of the tankers has been transferred to the ONGC.

10. It is further observed that the Commissioner (Appeals), Ahmedabad while deciding the issue of the appellant for the earlier period from April, 2015 to March, 2016 has gone in to the contract entered by the appellant with the ONGC. He has in Para 9of the Order – in – Appeal No. AHM-EXCUS-003-APP-031-19-20 dated 01.10.2019 analyzed the contract and has come to conclusion that the appellants were

not having the rights to use the tankers and that the possession and effective control was with ONGC. He has accordingly allowed the appeal in favour of the appellant and concluded that the service provided by them is not supply of tangible goods and held that the activity under consideration is more specifically covered under the category "Goods Transport Agency Service". I find that the adjudicating authority has not given any finding on the observation of the Commissioner (Appeal) and that he has passed the impugned order in violation of judicial discipline.

10.1. I find that the Commissioner (Appeals) has relied upon the orders of 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 similar situation to arrive at the conclusion that the appellant had no control and possession over the tankers as well as had no right to use the tankers as per their specification.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 Clause 2.1 work is mentioned as the work for which the cranes were hired; (e) shows that the cranes are at the disposal of the ONGC and per day hire charges are paid for all days, except maintenance days;* ***services of staff and maintenance are incidental to the hiring (f) 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."*

10.2. The Commissioner (Appeals) has also relied upon the 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 thefacts 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."*

10.3. He has also relied upon decisions of the Hon'ble Tribunal, Allahabad 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 ibid- 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."*

11. It is also observed that the Commissioner (Appeals) has in the appeal pertaining to the earlier period of the appellant also examined the issue of classification of service under Goods Transport Agency Service. He has observed that 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. On perusal of the consignment note – cum- log book submitted by the appellant, he has given a finding that they mentioned contract number, suppliers name, recipient name, Vehicle No. and other details viz., date and time, mileage covered, place visited, purpose of visit 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.'*

He has observed that the appellant has supplied tankers to ONGC, who carried out the activity by using the said tanker as per their requirement of transporting of goods owned 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. Accordingly, he has concluded 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. There is nothing on record to contradict this finding given by the Commissioner (Appeals).

12. It is observed that the demand in the present case has been made under Section 73(1A) of the Finance Act, 1994 for the period April-2016 to June-2017on same grounds relied upon in earlier SCN. The demand for earlier period, i.e. for the period from April-2015 to March-2016 has been decided by the Commissioner (Appeals), Ahmedabad in favour of the appellant vide Order-In-Appeal No. AHM-EXCUS-003-APP-031-19-20 dated 01.10.2019. There is no change in legal provision as per Show Cause Notices dated 08.10.2015, 29.02.2016 and 28.03.2018 and in the present SCN. The adjudicating authority has not given any finding either. Hence, the findings of the Commissioner (Appeals), Ahmedabad based on the analysis of contracts in question and relying on judicial pronouncements of Hon'ble High Court as well as of the Hon'ble Tribunal has binding precedence and has to be followed in the instant case as well.

13. From the discussion made above, 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'.

14. Accordingly, I set aside the impugned order and allow the appeal filed by the appellant. The appeal stands disposed of in above terms.

28 October, 2020

(Akhilesh Kumar)
Commissioner (Appeals)
Ahmedabad
28/10 /2020

Attested

(Anilkumar P.)
Superintendent (Appeals)
CGST, Ahmedabad

By R.P.A.D/SPEED POST

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2. The Commissioner, CGST, Gandhinagar.
3. The Asstt/Dy Commissioner, CGST,Gandhinagar.
4. The Addl./Joint Commissioner, System-CGST, Gandhinagar.
5. Guard File.
6. P.A. File.