आयुक्त (अपील) का कार्यालय,
Office of the Commissioner (Appeal),
केंद्रीय जीएसटी, अपील आयुक्तालय, अहमदाबाद
Central GST, Appeal Commissionerate, Ahmedabad
जीएसटी भवन, राजस्व मार्ग, अम्बावाड़ी अहमदाबाद ३८००१५.
CGST Bhavan, Revenue Marg, Ambawadi, Ahmedabad 380015
07926305065- टेलेफैक्स07926305136

DIN: 20221264SW0000777F67

स्पीड पोस्ट

क फाइल संख्या : File No : GAPPL/COM/STP/806/2022-APPEAL/6513-18

ख अपील आदेश संख्या Order-In-Appeal Nos. **AHM-EXCUS-002-APP-95/2022-23**
दिनाँक Date : **28-12-2022** जारी करने की तारीख Date of Issue 28.12.2022

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

ग Arising out of Order-in-Original No. **MP/34/Dem/AC/2021-22/HNM** दिनाँक: **15.02.2022**, issued by Deputy/Assistant Commissioner, Division-II, CGST, Ahmedabad-North

ध अपीलकर्ता का नाम एवं पता Name & Address

1. Appellant

   M/s Arvind Ltd.,
   Naroda Road, Ahmedabad-380025

2. Respondent
   The Assistant Commissioner, CGST,Division-II, Ahmedabad North , 3rd Floor,Sahjanand Arcade,Opp. Helmet Circle, Memnagar, Ahmedabad – 52.

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 को 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 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.

(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 अपील:–
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

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

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 notwithstanding 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.

(7) 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 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. Arvind Ltd., Naroda Road, Ahmedabad-380025 [*previously known as M/s. Amol Dicalite Ltd*] (hereinafter referred to as "the appellant"), against Order–in–Original No. MP/34/Dem/AC/2021-22/HNM dated 15.02.2022 (hereinafter referred to as "the impugned order") passed by the Assistant Commissioner, Central GST and Central Excise, Division-II (Naroda Road), Ahmedabad North (hereinafter referred to as the "adjudicating authority").

2. The facts of the case, in brief, are that during the course of audit done by the departmental officers and on verification of the financial records of M/s. Amol Dicalite Ltd, it was observed that they were providing various taxable services and were holding Service Tax Registration No. AABCA2807KST001. They had supplied Machinery (Looms, Winding machines) on lease rent to M/s. Arvind Ltd. under lease agreements dated 13.12.2005, 11.08.2009 & 06.07.2010. M/s. Amol Dicalite Ltd provided machinery for use, without transferring the right of possession and effective control of such machinery, hence, the said activity appeared to be taxable under the category of 'Supply of Tangible Goods' services defined under Section 65(105)(zzzzj) of the Finance Act, 1994, which was taxable with effect from 16.05.2008.

2.1 Thereafter, from 01.07.2012, the said activity appears to fall under the purview of 'service' as defined under Section 65B and was also being covered within the scope of 'Declared Service' defined under Section 66E (f) was made taxable under Section 66B read with Section 66D of the F.A, 1994.

2.2 Based on above audit observations, following SCNs were issued to the appellant.

Sr. no.	SCN No. & Date	Issued by	Period	Amount (in Rs)
01	STC/4-84/O&A/2013-14 dated 17.04.2014	Commissioner, Service Tax, Ahmedabad	01/10/2008 to 30/09/2013	3,01,10,744/-
02	STC/4-20/O&A/2015-16 dated 04.09.2015	Principal Commissioner, Service Tax, Ahmedabad	01/10/2013 to 30/09/2014	54,80,548/-
03	STC/4-16/O&A/2016-17 dated 29.07.2016	Principal Commissioner, Service Tax, Ahmedabad	01/10/2014 to 30/09/2015	53,91,373/-
04		Joint Commissioner Service Tax, Ahmedabad	01/10/2015 to 30.09.2016	61,09,155/-

2.3 As the appellant continued with the above practice, a periodical Show Cause Notice (SCN) No. V.WSO6/SCN-15/Amd/2018-19 dated 12.04.2019 was issued to the appellant under Section 73(1A) of the F.A., 1994, for the period covering October, 2016 to June, 2017 (wrongly mentioned as March). The notice proposed to consider the lease rent amount of Rs.3,13,29,000/- received as taxable value under "Supply of Tangible goods service' and proposed service tax demand of Rs.46,90,350/- alongwith interest under Section 73(1) and 75 respectively. It also proposed penalty under Section 76, Section 77(2) and under Section 78 of the Finance Act, 1994.

2.4 The said SCN dated 12.04.2019 was adjudicated vide the impugned order, wherein the demand of service tax proposed in the SCN was confirmed alongwith interest. Penalty of Rs.46,90,350/- was imposed under Section 76 alongwith penalty of Rs.10,000/-

under Section 77 of the F.A., 1994. However, penalty u/s 78 was not imposed by the adjudicating authority.

2.5 Subsequently, under the Business Sale Deed dated 08.11.2019, M/s. Arvind Ltd took over the entire leasing division of M/s. Amol Dicalite Ltd. and subsequently, M/s. Arvind Ltd, therefore, is now legally responsible for all the existing and contingent liabilities of M/s. Amol Dicalite Ltd. Consequently, the present appeal has been filed by M/s. Arvind Ltd *(referred as appellant)*.

3. Being aggrieved with the impugned order passed by the adjudicating authority in the instant case, the appellant has preferred the present appeal on the grounds elaborated below:-

- The machinery is given on lease and as there is no sale, the possession and control of the machinery is on the lessee who uses the machinery. As per the agreement, the right of possession and use is granted to the lessee and there is no transfer of ownership as the lessee cannot sell, transfer or otherwise deal with the machinery except for using the same. Controlling and possessing the machinery is the aspect separate and distinct from right to sell, assign, transfer etc. The agreement clearly states that the right of possession and use is granted and there is no transfer of ownership. The fact that the repairing cost was borne by the appellant does not mean that the possession was not given to the lessee.

- As regards the demand from July, 2012, the definition of 'service' under Section 65B (44), clearly excludes the activities which constitute transfer or supply of goods which is deemed to be the sale within the meaning of Article 366(29A) of the Constitution. This fact is also clarified at Para 2.7.3 of the Education Guide. Even in the definition and scope of service defined under Section 65(105) (zzzzj), there was not much legal change in post or pre-2012 period. The copy of invoices raised are also enclosed which prove that VAT has been paid. Thus, any transaction which is liable to sales tax would not be liable to service tax.

- The demand is barred by limitation as the notice for the period covering October, 2016 to June, 2017 was issued on 12.04.2019. The earlier notices show that the matter was in the knowledge of the department hence, suppression cannot be alleged however, this argument was totally ignored by the adjudicating authority. The appellant had been filing the returns in time hence intent to evade tax is also not established. Shri Naishad Desai, Manager (A/c & Finance) in his statement dated 19.11.2010, recorded before DGCEI had stated that the appellant were not discharging service tax on the machinery supplied on lease as they were paying lease tax on it. Even though the fact was known to DGCEI, no demand was raised on the issue, which confirms that no tax is payable

- When the demand is barred by limitation and in the absence of suppression, penalty under Section 78 cannot be imposed.

- Penalty under Section 77 is also not imposable when there is no liability to pay tax or obtain registration as the appellant is already registered. Similarly, interest is also not recoverable in the absence of any demand.

4. Personal hearing in the matter was held on 12.12.2022. Shri S. J. Vyas, Advocate, appeared on behalf of the appellant. He re-reiterated the submissions made in appeal memorandum.

5. I have carefully gone through the facts of the case, the impugned order passed by the adjudicating authority, submissions made by the appellant in the appeal memorandum as well as during personal hearing. The issue to be decided in the present appeal is whether renting of looms and winding machines by the appellant in the instant case is falling under the scope and definition of 'service' defined under Section 65B of the F.A., 1994 and whether the activity is a 'declared service' defined under Section 66E(f) of the F.A., 1994 w.e.f. 01.07.2012 ? The demand notice covers period from October, 2016 to June, 2017.

5.1 Before going into the merits of the case, I will first examine the issue of limitation. The appellants have claimed that the notice covering period from October, 2016 to June, 2017 was issued on 12.04.2019, hence, was hit by limitation. As earlier notices issued on the same issue establish that the matter was in the knowledge of the department, therefore, they claim suppression cannot be alleged.

5.2 In terms of Section 73(1) of the F.A, 1994, extended period can be invoked only in the cases where ingredients of fraud, collection, mis-statement or suppression of facts etc with intent to evade tax, is present. In terms of Section 73(1A) of the F. A. 1994, notwithstanding anything contained in sub-section (1) (*except the period of [thirty months] of serving the notice for recovery of service tax*), the Central Excise Officer may serve, subsequent to any notice or notices served under that sub-section, a statement, containing the details of service tax not levied or paid or short levied or short paid or erroneously refunded for the subsequent period, on the person chargeable to service tax, then, service of such statement shall be deemed to be service of notice on such person, subject to the condition that the grounds relied upon for the subsequent period are same as are mentioned in the earlier notices.

5.3 I find that the present SCN is periodical in nature and is issued under Section 73(1A) of the F.A., 1994. The period covered is October, 2016 to June, 2017 and the SCN was issued on 12.04.2019. In terms of Section 73(1A), the relevant date for issuing periodical SCNs is thirty months (made effective from 14.05.2016) which shall be counted from the date of filing of periodical returns, where such return is filed, and where no returns is filed, due date of filing such return, shall be considered to count the relevant date. The due date for filing the ST-3 from October, 2016 to March, 2017 was 25thApril, 2017, which was subsequently extended to 30.04.2017, vide CBIC Order No.01/2017 dated 25.04.2017. So, the thirty months is to be counted from the due date of filing (30.04.2017). Hence, the SCN should have been issued on or before 30th October, 2019. The appellant have claimed that they have been filing timely returns, but they have not provided the actual date of ST-3 filed for the period from October, 2016 to March, 2017. Thus, in the absence of actual date of filing of ST-3 returns, I find that considering the due date of filing the return, the demand is issued well within the period of limitation, which ends on 30th October, 2019. Thus, I find that the argument that the demand notice is time barred is not legally sustainable.

6. Coming to the issue, whether renting of looms and winding machines by the appellant is covered under the scope of 'service' defined under Section 65B of the Finance Act, 1994 or not, it is observed that the period involved is from October, 2016 to June, 2017. The adjudicating authority has upheld the demand of Rs.46,90,350/- by recording the findings that clause 3(iii), 3(viii) & 4(c) of the lease agreement clearly establish that the ownership as well as effective control of the machinery lies with the appellant and just the right to use the machinery was transferred that too with stringent conditions. As regards the VAT payment made by the appellant, he observed that the payment of VAT for deemed sale of goods does not seems to be incorporated in the agreement, which means that the same has been resorted to afterwards just to avoid payment of service tax by projecting the transaction as sale. In support of his argument he also relied on Board's letter No.334/1/2008-TRU dated 29.02.2008, as well as the decisions of Hon'ble High Court of Mumbai passed in the case of Indian National Ship Owners Association as reported at -2009(14) STR 289 (Bom) and Hon'ble Supreme Court's judgment passed in the case of M/s. Adani Gas Ltd as reported at 2020 (40) G.S.T.L. 145 (S.C.).

6.1 It is observed that the demand on the same issue, covering earlier period 01.10.2014 to 30.09.2015, was adjudicated vide O-I-O No.AHM-SVTAX-000-ADC-40-2016-17, wherein the demand was confirmed. In the appeal filed by the appellant before the Commissioner (A), Ahmedabad, the matter was decided against the appellant, wherein the then Commissioner (A) at Para 6 of the said O-I-A, had held that though the goods have been given on lease rent, the 'right to use' of said goods transferred was with limitation, in terms of the condition prescribed at para-3(ii) of the Agreement dated 13.12.2005. The agreement puts restriction to use said machinery for yarn processing and weaving fabrics from the yarns of the Lessee only. As complete or absolute or full right to use is not transferred to Lessee, the right to use is not transferred absolutely, lease rent received from the Lessee is, thus, liable to service tax in terms of Section 66E(f)ibid. He also held that the mere payment of VAT does not qualify transaction to be 'sale' within the meaning defined in Article 366(26A)(d) of the Constitution of India. It is mandatory to see whether 'right to use' is also transferred absolutely alongwith the goods. When the right to use is not transferred absolutely or transferred with some condition alongwith the goods then, it does not qualify for 'sale', it is not liable to VAT and as such plea of the appellant is not tenable.

6.2 I find that the above decision is squarely applicable to the instant case as the issue covered is identical and is for subsequent period of demand. Moreover, the appellant have failed to produce any decision contradicting the said findings of Commissioner (A) on the issue for the period October, 2014 to September, 2015. As the issue in the present appeal is identical and covers subsequent period from October, 2016 to June, 2017, I find that similar provisions shall apply. The term 'service' under Section 65B (44) excludes '*such transfer, delivery or supply of any goods which is deemed to be a sale within the meaning of clause (29A) of Article 366 of the Constitution.* Similarly, clause (f) of Section 66E specifies that ***"transfer of goods by way of hiring, leasing, licensing or in any such manner without transfer of right to use such goods;"*** shall constitute declared service. Therefore, any activity carried out by a person for another for consideration, including a declared service, unless specified in the negative list, is a taxable service under Section 65B.

6.3 Further, I find that Board vide Circular No.198/8/2016-Service Tax dated 17.08.2016, on the issue of service tax liability in case of hiring of goods without the transfer of the right to use goods has clarified that in any given case involving hiring, leasing or licensing of goods, it is essential to determine whether, in terms of the contract, there is a transfer of the right to use the goods. To determine whether a transaction involves transfer of the right to use goods the Hon'ble Supreme Court has laid down certain criteria. Relevant text of Board's above circular is reproduced for reference.

"Further, the Supreme Court in the case of Bharat Sanchar Nigam Limited v. Union of India, reported in 2006 (2) S.T.R. 161 (S.C.), had laid down the following criteria to determine whether a transaction involves transfer of the right to use goods, namely, -

a. There must be goods available for delivery;

b. There must be a consensus ad idem as to the identity of the goods;

c. The transferee should have a legal right to use the goods - consequently all legal consequences of such use, including any permissions or licenses required thereof should be available to the transferee;

d. For the period during which the transferee has such legal right, it has to be to the exclusion to the transferor this is the necessary concomitant of the plain language of the statute - viz. a "transfer of the right" to use and not merely a licence to use the goods;

e. Having transferred the right to use the goods during the period for which it is to be transferred, the owner cannot again transfer the same right to others.

XXXXX

4.1** There will also be cases involving either a financial lease or an operating lease. The former generally involves a transfer of the asset and also the risks and rewards incident to the ownership of that asset. This transfer of the risks and rewards is also recognised in accounting standards. It is generally for a long term period which covers the major portion of the life of the asset and at the end of the lease period, usually the lessee has an option to purchase the asset.* ***The lessee bears the cost of repairs and maintenance and risk of obsolescence also rests with him. In contrast, an operating lease does not involve the transfer of the risks and rewards associated with that asset to the lessee. It is for a short term period and at the end of the lease period the lessee does not have an option to purchase the asset. The cost of repairs, maintenance and obsolescence rests with the lessor."

(Emphasis supplied)

6.4 In the present appeal, M/s. Amol Dicalite Ltd. (Lessor) had entered into an agreement with M/s. Arvind Ltd. (Lessee) to lease the looms and windings machines. From the agreements, it is noticed that the lease agreement is for use of the said machinery by Lessee on rent agreed upon. The Lessor is absolutely seized and possessed of or otherwise well and sufficiently entitled to all machinery and all other fixtures and fittings and other apparatus and equipments. During the lease period, the lessee shall pay TDS/Service tax, Lease Tax or any other tax, levy, cess, if applicable. The Lessor shall have full power and absolute authority to grant and demise the machinery. The Lessor shall undertake repair & maintenance of the machinery and only in exceptional cases, it shall permit and allow the lessee to maintain and repair the machinery for continuous use. The

Lessor shall insure the machinery throughout the term of lease. The Lessor shall inform the Lessee prior to transfer of legal rights and interest or the sale of the machinery. The Lessee cannot claim from Lessor any damage or loss arising out of or on account of the plant and appurtenances of the Lessor.

6.5 Thus, from the terms of the agreement supra, it is evident that the goods / machineries were supplied to Lessee on lease but without transfer of right to use, as the Lessor reserved the right to undertake repair, maintenance of the machinery and to insure the machinery throughout the term of lease. The Lessee cannot claim from Lessor any damage or loss arising out of or on account of the plant and appurtenances of the Lessor. The machinery shall be used for yarn processing and weaving of fabrics from the yarns of the Lessee. The Lessor shall have full power and absolute authority to grant and demise the said machinery. The Lessor intends to transfer the legal rights and interests in any manner or sell the said machinery after the tenure of the indenture. All these clauses clearly establish that the machinery was transferred by the appellant to the lessee without transferring the absolute right to use the machinery. Further, all the legal consequences of such use, including any permissions or licences required thereof are not available to the Lessee. Hence, the transaction in question does not fulfil the criteria laid down by the Hon'ble Supreme Court of India in the Bharat Sanchar Nigam Ltd case supra.

6.6 Transaction of allowing another person to use the goods, without giving legal right of possession and effective control, is not treated as sale of goods, but treated as service. Levy of service tax is on the services provided in relation to supply of tangible goods, including machinery, equipment and appliances, for use, with no legal right of possession or effective control. Article 366(29A)(d) also provides that levy of tax is not on use of goods, but on the transfer of the right to use goods. When there is no transfer of absolute right or legal right, sale or deemed sale cannot be established. VAT cannot be levied on a transaction of 'transfer of right to use of goods' when the transfer of possession and control of the said goods has not taken place. Mere license to use the goods does not constitute the transfer of rights to use. The legal right to use goods accrues only on account of the transfer of rights else it is merely a license to use.

6.7 Thus, in terms of clause (f) of Section 66E, transfer of goods by way of hiring, leasing, licencing "without transfer of right to use such goods" shall be covered under declared service. Where there is no transfer of right to use goods, it shall not be considered "deemed sale" and would not be subjected to VAT or Sales Tax. Thus, such transactions are not excluded from the definition of "service". So, the transfer of right to use involves transfer of both possession and control of goods to the user of the goods.

6.8 Both the appellant and the adjudicating authority have relied on Board's Circular No.334/1/2008-TRU dated 29.02.2008. The Board, I find, had clarified that the supply of tangible goods for use and leviable to VAT as 'deemed sale' is not covered under the scope of service. The text is reproduced below.

*4.4 **Supply of tangible goods for use :***

*4.4.1 **Transfer of the right to use any goods is leviable to sales tax / VAT as deemed sale of goods [Article 366(29A)(d) of the Constitution of India]. Transfer of right to use involves transfer of both possession and control of the goods to the user of the goods.***

4.4.2 Excavators, wheel loaders, dump trucks, crawler carriers, compaction equipment, cranes, etc., offshore construction vessels & barges, geo-technical vessels, tug and barge flotillas, rigs and high value machineries are supplied for use, with no legal right of possession and effective control. ***Transaction of allowing another person to use the goods, without giving legal right of possession and effective control, not being treated as sale of goods, is treated as service.***

4.4.3 Proposal is to levy service tax on such services provided in relation to supply of tangible goods, including machinery, equipment and appliances, for use, with no legal right of possession or effective control: ***Supply of tangible goods for use and leviable to VAT/sales tax as deemed sale of goods, is not covered under the scope of the proposed service.*** *Whether a transaction involves transfer of possession and control is a question of facts and is to be decided based on the terms of the contract and other material facts. This could be ascertainable from the fact whether or not VAT is payable or paid.*

6.9 Further, the appellant have also emphasized that the lessee is liable to pay sales tax on such transaction, hence, not covered under the definition of service. I find that as per the agreement, the Lessee shall bear all the existing and future taxes including TDS, Sales Taxes, Value Added Taxes, Service Tax etc as are applicable against the use of said machineries. I find that this is a general clause which anticipates that any liability of Sales Tax, VAT including Service tax applicable, against the use of machinery shall be paid by the Lessee. However, whether the VAT was actually paid is not forthcoming from records as the appellant has not produced any invoice evidencing the payment of VAT made by the Lessee, though in their Appeal Memorandum they have stated to have submitted the same. But, on going through the appeal paper, neither such document was found submitted before me nor was the same produced before the adjudicating authority. In the absence of such documentary evidence, the supply of machineries on lease cannot be treated as deemed sale of goods. Para 2.7.2 of the Education Guide also clarifies that deemed sales do not involve transfer of title in goods like transfer of goods on hire-purchase or transfer of right to use goods.

7. Thus, in light of above discussion and applying the ratio of Board's Circular dated 17.08.2016 and the decision of Commissioner (A) passed in the earlier demand, I find that the appellant have failed to establish that the renting of looms and winding machines supplied by them to lessee was without transfer of right to use. So long as, the right to use is not transferred, such transactions are not leviable to VAT by considering deemed sale of goods. I, therefore, find that the demand for the period from October, 2016 to June, 2017, is legally sustainable on merits.

8. Further, the appellant have claimed that penalty under Section 78 is not imposable when there is no suppression. I find that the adjudicating authority has dropped the penalty proposed under Section 78 of the F.A., 1944. Thus, the appellant's above argument appears to be bereft of any merit.

9. As regards, the penalty imposed under Section 77, I find the adjudicating authority has imposed a penalty of Rs.10,000/- for failure to assess and pay service tax within the stipulated time period prescribed under Section 68 of the Finance Act, 1994 read with Rule 6 of the Service Tax Rules, 1994. In terms of Rule 6 of the Service Tax, Rules 1994, the appellant was required to pay service tax by 5th/6th of following month, which they failed to pay. I, therefore, do not find any reason to interfere with the findings of the adjudicating authority. The penalty is therefore sustainable on merits.

10. When the demand sustains there is no escape from interest. The same is, therefore, also recoverable under Section 75 of the F.A., 1994. Appellant by failing to pay service tax on the taxable service are liable to pay the tax alongwith applicable rate of interest.

11. Accordingly, the impugned order is upheld and the appeal filed by the appellant stands rejected.

अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।
The appeal filed by the appellant stands disposed off in above terms.

(Akhilesh Kumar)
Commissioner (Appeals)
Date: 12.2022

Attested

(Rekha A. Nair)
Superintendent (Appeals)
CGST, Ahmedabad

By RPAD/SPEED POST

To,
M/s. Arvind Ltd.,
Naroda Road,
Ahmedabad-380025

- **Appellant**

The Assistant Commissioner,
CGST, Division-II (Naroda Road),
Ahmedabad North

- **Respondent**

Copy to:

1. The Chief Commissioner, Central GST, Ahmedabad Zone.
2. The Commissioner, CGST, Ahmedabad North.
3. The Assistant Commissioner (H.Q. System), CGST, Ahmedabad North. (For uploading the OIA)
4. Guard File.
5. The Superintendent (System), CGST, Appeals, Ahmedabad for uploading the OIA on the website.