

केन्द्रीय कर आयुक्त (अपील)		
O/O THE COMMISSIONER (APPEALS) CENTRAL TAX,		
7 th Floor, Central Excise Building, Near Polytechnic, Ambavadi, Ahmedabad-380015.		
आम्बावाडी, अहमदाबाद-380015		
079-26305065		टेलिफैक्स : 079 - 26305136

रजिस्टर डाक ए.डी.द्वारा

क फाइल संख्या (File No.): V2(ST)25/A-II/2017-18 / 10026 to 10030
 ख अपील आदेश संख्या (Order-In-Appeal No.): AHM-EXCUS-002-APP-124-17-18
 दिनांक (Date): 27-10-2017, जारी करने की तारीख (Date of issue): 22-11-17
 श्री उमा शंकर, आयुक्त (अपील-II) द्वारा पारित
 Passed by Shri Uma Shanker, Commissioner (Appeals)

ग _____ आयुक्त, केन्द्रीय उत्पाद शुल्क, (मंडल-VI), अहमदाबाद, आयुक्तालय द्वारा जारी
 मूल आदेश सं----- दिनांक -----से सृजित
 Arising out of Order-In-Original No. SD-06/14/AC/Ingersoll Rand/16-17 Dated:
 02.02.2017 issued by: Assistant Commr STC(Div-VI), Ahmedabad.

घ अपीलकर्ता/प्रतिवादी का नाम एवम पता (Name & Address of the Appellant/Respondent)

M/s Ingersoll Rand (India) Ltd

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 an 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) (क) (i) केन्द्रीय उत्पाद शुल्क अधिनियम 1994 की धरा अतल नीचे बताए गए मामलों के बारे में पूर्वोक्त धारा को उप-धारा के प्रथम परंतुक 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।

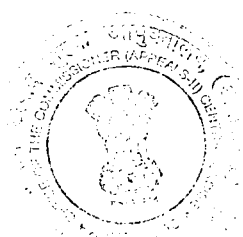
A revision application lies to the Under Secretary, to the Government of India, Revision Application Unit, Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi-110001, under Section 35EE of the CEA 1944 in respect of the following case, governed by first proviso to sub-section (1) of Section-35 ibid:

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

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 मामले में जो भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित है।

Cont...2



- (c) 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 ड्यूटी क्रेडिट 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 हों।

- (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 दिनांक 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 रुपये या उससे कम हो तो रुपये 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 :-

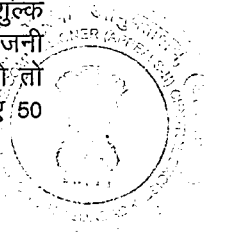
- (क) वर्गीकरण मूल्यांकन से संबंधित सभी मामले सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण की विशेष पीठिका वेस्ट ब्लॉक नं. 3. आर. के. पुरम, नई दिल्ली को एवं

- (a) the special bench of Custom, Excise & Service Tax Appellate Tribunal of West Block No.2, R.K. Puram, New Delhi-1 in all matters relating to classification valuation and.

- (ख) उक्तलिखित परिच्छेद 2 (1) क में बताए अनुसार के अलावा की अपील, अपीलों के मामले में सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, अहमदाबाद में ओ-20, न्यू मैटल हास्पिटल कम्पाउण्ड, मेघानी नगर, अहमदाबाद-380016.

- (b) To the west regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at O-20, New Metal Hospital Compound, Meghani Nagar, Ahmedabad : 380 016. 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 इए-3 में निर्धारित किए अनुसार अपीलीय न्यायाधिकरणों की गई अपील के विरुद्ध 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 हों 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



रेखांकित बैंक ड्राफ्ट के रूप में संबंध की जाये। यह ड्राफ्ट उस स्थान के किसी नामित सार्वजनिक क्षेत्र के बैंक की शाखा का हो जहाँ उक्त न्यायाधिकरण की पीठ स्थित है।

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. Registrar 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 आदेश 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 है।

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 Appellate 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 अनुसूची-1 के अंतर्गत निर्धारित किए अनुसार उक्त आवेदन या मूल आदेश यथास्थिति निर्णयन प्राधिकारी के आदेश में से प्रत्येक की एक प्रति पर रु.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 is 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 अपील 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।

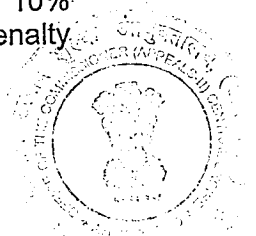
For an appeal to be filed before the CESTAT, 10% of the Duty & Penalty confirmed by the Appellate Commissioner would have to be pre-deposited. It may be noted that the pre-deposit is a mandatory condition for filing appeal before CESTAT. (Section 35 C (2A) and 35 F of the Central Excise Act, 1944, Section 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 सन्दर्भ में इस आदेश के प्रति अपील प्राधिकरण के समक्ष जहाँ शुल्क अथवा शुल्क या दण्ड विवादित हो तो मांग 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

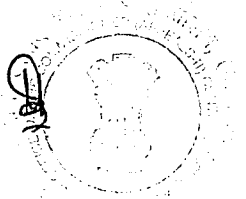
M/s Ingersoll Rand (India) Ltd, Plot No.21-30, GIDC Estate, Naroda, Ahmedabad 382 330 (henceforth, "*appellant*") has filed the present appeal against the Order-in-Original No.SD-06/14/AC/Ingersoll Rand/16-17 dated 02.02.2017 (henceforth, "*impugned order*") passed by the Assistant Commissioner, Service Tax, Division-VI, Ahmedabad (henceforth, "*adjudicating authority*").

2. To state briefly, facts of the case are that the appellant, a manufacturer of air compressors, were providing air compressors on rental/ lease basis to their customers as per rental agreements between two parties. On the amount collected under rental agreements, the appellant was discharging VAT/CST considering the activity as a deemed sale. According to revenue, right to possession and effective control remained with the appellant, the activity of renting of air compressions attracted service tax as it was transfer of goods by way hiring or leasing or licencing without transfer of right to use the goods, a situation covered under section 66E(f) of the Finance Act, 1994. A service tax demand of Rs.27,86,664/- was therefore raised for the period 21.08.2012 to 11.03.2016 vide show cause notice dated 01.08.2016 and it was confirmed in the impugned order along with interest. Penalties were also imposed under sections 77 and 78 of the Finance Act, 1994. Being aggrieved with the impugned order, the appellant has preferred this appeal.

3. The main grounds of appeal, in brief, are as follows-

3.1 Appellant submits that 'service' as defined under section 65B(44) of the Finance Act, 1994, shall not include 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; that to levy service tax on a transaction as supply of tangible goods for use under section 66E(f), the one of the conditions to be met is that the supply is without transfer of right to use the goods, as right to use goods is leviable to VAT/ CST as deemed sale in terms of relevant VAT laws.

3.2 Appellant explains that the term 'right to use' has not been defined, however, this term has been interpreted in various judgments of various courts, including Supreme Court of India. Appellant cites the Andhra Pradesh High Court's decision in the case of Rashtriya Ispat Nigam Ltd v. Commercial Tax Officer [1990 (77) STC 182] which was confirmed by Hon'ble Supreme Court [2002(126) STC 114]; Another decision of Andhra Pradesh High Court in the case of G S Lamba & Sons, Secunderabad & Others v. State of Andhra Pradesh [2011(52) APSTJ 191]; Supreme Court's decision in the case of BSNL v. Union of India [2006(145) STC 91(SC)]; Gauhati High Court's decision in the case of HLS Asia Ltd v. State of Assam & Others



[2003(132) STC 217(Gauhati)]. Appellant goes on to analyse the decisions and states that in order to determine that a transaction amounts to a 'transfer of right to use goods', there should be transfer; such transfer should result in terminating rights in one party and creating them in another; the transfer should necessarily involve delivery of possession by the transferor; the transfer should be of effective control of goods distinct from mere custody of goods; and there must be consensus ad idem between the parties. Appellant thereafter submits that perusal of all the terms of the rental agreements entered between the appellant and customers makes it clear that all conditions are satisfied and transactions involve transfer of right to use goods.

3.3 Appellant submits that when two ingredients in a transaction are fulfilled, i.e., there is transfer of right to use goods and VAT is paid by the assessee, then such activity would be treated as deemed sale and would be outside the scope of definition of 'service' under section 65B(44) of the Finance Act, 1994. Appellant states that VAT is discharged on the amount received under the lease agreement entered between the parties and service tax cannot be imposed on transactions which are leviable to VAT. Appellant argues that demanding service tax on the turnover on which VAT is already paid by the appellant will amount to double taxation.

3.4 Appellant has also argued the case on the grounds of revenue neutrality and cum tax valuation. Also, as per appellant, there is no suppression of facts since department was aware of the facts, hence extended period cannot be invoked. Appellant has also given submissions with regard to penalties imposed.

4. In the personal hearing held on 4.10.2017, Ms Madhu Jain, Advocate represented the appellant and reiterated the grounds of appeal. She made additional written submissions and explained the case laws applicable.

5. I have carefully gone through the appeal. The dispute is on taxability of renting income earned by the appellant from renting of air compressors. The adjudicating authority has confirmed the demand of service tax on the renting income treating the same as consideration against *transfer of goods by way of hiring, leasing, licensing or in any such manner without transfer of right to use such goods*- a declared service under section 66E(f) of the Finance Act, 1994 - ,whereas, appellant contends that the transactions involved transfer of right to use the goods and hence out of the scope of 'service' defined under section 65B(44) of the Finance Act, 1994.

5.1 The supply of tangible goods for use, without transfer of right to use, was brought under the tax net with effect from 16.5.2008 under section 65(105)(zzzzj)

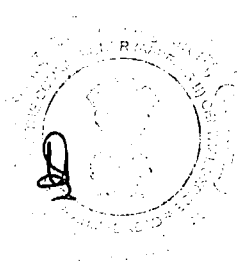


of the Finance Act, 1994 and after introduction of negative list from 1.7.2012, it became a 'declared service' under section 66E(f) of the Finance Act, 1994. Thus, taxability of supply of air compressors on rent cannot be in dispute unless the supply of transfer of air compressors involved transfer of 'right to use' also, as in that case it would amount to deemed sale and hence out of purview of 'service' defined under section 65B(44) of the Finance Act, 1994. The core of the matter, therefore, is whether renting of air compressors involved transfer of right to use them or not.

5.2 The transfer of right to use involves transfer of both possession and control of the goods to the user of the goods, as clarified in Board's Instruction Letter No.334/1/2008-TRU dated 29.2.2008. It was further explained in this letter that 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; that this could be ascertainable from the fact whether or not VAT is payable or paid; that supply of tangible goods for use and leviable to VAT/ sales tax as deemed sale of goods is not covered under the scope of supply of tangible goods for use service.

5.3 As submitted by the appellant, the issue has been dealt with in great details by various courts and such preceding decisions contain guiding principles to decide whether in a particular transaction right to use was transferred or not. As an apt illustration, Hon'ble High Court in the case of Rashtriya Ispat Nigam Ltd v. Commercial Tax Officer has described how a taxi cab when hired under rent a cab scheme is different from a taxi car hired for going from one place to another. Hon'ble Court explains that in rent a cab scheme, a cab is provided and usually a driver accompanies the cab; there driver will have custody of the car though the hirer will have the possession and effective control of the cab. In contrast, when a taxi car is hired for going from one place to another, the driver will have both the custody as well as the possession and what is provided is service on hire. In the former case there was effective control of the hirer (transferee) on the cab whereas in the later case it is lacking.

5.4 The dispute therefore boils down to the interpretation of the agreements entered into by the appellant with his customers. As an example, I have examined a Rental Agreement dated 31.8.2015 with M/s Hanung Toys & Textiles Ltd. Clause 1 of this agreement says that Lessee at his own cost shall keep the equipment in good condition and will assume the entire risk of loss or damage to the equipment, and injury or death to persons from any cause arising under the agreement. Clause 2 is related with inspection, installation and removal of the equipment and according to it, Lessee is responsible for unloading, rigging, installation, piping, disconnection.



Clause 5 mandates that Lessee shall report and pay to the appropriate authority any and all licence fees, registration fees, assessments, charges and taxes. Clause 8 clarifies that any alteration or modification with respect of the equipment so as to comply with any applicable law or rule or regulation shall be at the expense of Lessee. As per Clause 12, Lessee shall procure and maintain at all times the necessary insurance required under law where such equipment is used or operated. Further, Lessee at his own expense shall maintain all risk insurance coverage on the equipment.

5.4.1 Thus, it is responsibility of the Lessee/ customer to undertake and bear cost of unloading, installation, disconnection, etc.; to indemnify the appellant against any loss or damages arising to or in connection with the equipment; to comply with statutory requirements relating to use of the equipment; to ensure safety of the equipment, etc. The appellant has supplied goods to the customers for their use, the goods are for the customers' exclusive use for the period of agreement, operation of goods is carried out by the customers, all statutory requirements are to be complied by the customers.


5.4.2 All this, in my view, suggests transfer of possession as well as effective control of the equipment (air compressors) and supply of equipment is not for the purpose of giving service without parting with the effective control of the equipment. The supply of goods in the present case therefore is accompanied with transfer of right to use the goods and in such a situation, I hold that disputed transactions are not covered under section 66E(f) of the Finance Act, 1994, and consequently, out of purview of service tax.

5.5 Accordingly, I find that the appellant is not liable to pay any service tax and further, since there is no service tax payable, the question of payment of interest or imposition of penalties does not arise.

6. The impugned order is set aside and appeal is allowed.

7. अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।

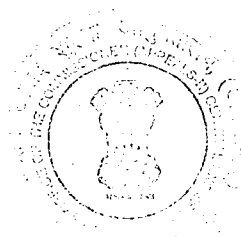
The appeal filed by the appellant stands disposed of in above terms.



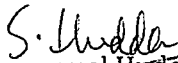
(उमा शंकर)

केन्द्रीय कर आयुक्त (अपील्स)

Date:



Attested


(Sanwamal Hudda)
Superintendent
Central Tax (Appeals)
Ahmedabad

By R.P.A.D.

To,
M/s Ingersoll Rand (India) Ltd,
Plot No.21-30, GIDC Estate, Naroda,
Ahmedabad 382 330

Copy to:

1. The Chief Commissioner of Central Tax, Ahmedabad Zone.
2. The Commissioner of Central Tax, Ahmedabad - North.
3. The Additional Commissioner, Central Tax (System), Ahmedabad South.
4. The Asstt./Deputy Commissioner, Central Tax, Division-I, Ahmedabad- North.
- ✓ 5. Guard File.
6. P.A.

