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 .
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DIN-20210264SW0000333DAD

स्पीड पोस्ट

क फाइल संख्या : File No : GAPPL/COM/STP/162/2020-APPEAL

ख अपील आदेश संख्या Order-In-Appeal Nos. **AHM-EXCUS-002-APP-51/2020-21**
दिनाँक Date : **29.01.2021** जारी करने की तारीख Date of Issue : **19.02.2021**

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

ग Arising out of Order-in-Original No. **04/ADC/2020-21/MLM** दिनाँक: **29.06.2020**, passed by Additional Commissioner, Central GST & Central Excise, Ahmedabad-North

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

Appellant- M/s Adi Enterprises, 3-Sigma Corporate House, Near Radhika Party Plot, Pakwan Sindhu Bhavan Road, Ahmedabad

Respondent- The Additional Commissioner, CGST & Central Excise, Ahmedabad North, Ahmedabad

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 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 ज़मा '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

This appeal has been filed by M/s. Adi Enterprises, 3-Sigma Corporate House, Near Radhika Party Plot, Pakwan Sindhu Bhavan Road, Ahmedabad (Registered/previous address:-Ground Floor, Heritge Tower, Ashram Road, Ushmanpura Ahmedbad), holding Registration No. AANFA3259QST001 (Pre-GST) with Service Tax-Ahmedabad Commissionerate, under the category of "Business Auxiliary service" and w.e.f. 01.07.2012 as "Service other than negative list" & "Goods Transport Agency Service" (henceforth referred as "*appellant*") against the Order-In-Original No. 04/ADC/2020-21/MLM dated 29.06.2020 (henceforth referred as "*impugned order*") passed by the Additional Commissioner, Central GST & CX, Ahmedabad-North (henceforth referred as *"adjudicating authority*").

2. The fact of the case, in brief, are that, based on an intelligence that M/s. Adi Enterprises, Ahmedabad are not discharging their service tax liability on renting income, search was conducted at their office premises on 23.08.2016 and documents were withdrawn by the officers of Director General of Goods and Service Tax Intelligence 'DGGGSTI' (Erstwhile, Director General of Central Excise Intelligence-'DGCEI'), Ahmedabad. During investigation, it was revealed that during the period from 01.04.2012 to 31.03.2016, the appellant provided service of supply of tangible goods viz plant and machinery alongwith accessories and fixtures/declared service to M/s. Arvind Ltd as they leased their machinery along with accessories and fixtures and received an amount of Rs.15,22,30,000/- as lease charges on which no service tax were paid. On conclusion of investigation, a show cause notice dated 30.10.2017 was issued to the appellant for categorizing said service of leasing their machinery along with accessories and fixtures provided by them under "Supply of Tangible Goods Service" /Declared Service and demanding Service Tax amount of Rs.1,93,60,893/- under provisions to Section 73(1) of the Finance Act, 1994 alongwith interest under Section 75 of the Act. It was also proposed to impose penalty under Section 77 and 78 of the said Act. The SCN dated 30.10.2017 was decided under the impugned order confirming tax along with interest and penalty.

3. Being aggrieved by the impugned order dated 29.06.2019, the appellant have filed the instant appeals on the ground that:

- that the matter is directly covered by the decision of Commissioner, CGST, Ahmedabad-North in OIO No.AHM-EXCUS-002-COMMR-23-2019-20 dated 04.02.2020;
- that assessment under the service tax is territorial jurisdiction and there cannot be multiplicity of officers and that the Director General of Goods and Service Tax Intelligence is not authorized to issue show cause notice;
- that at para 19 of the impugned order, the finding is ex facie erroneous;
- that only one clause regarding cost of repair/maintenance cannot be the basis for decision ignoring other clauses of the agreement;
- that machineries were given on lease do not require license to use. However, the impugned authority observed 'license to use' which is faulty;
- that the observation that service tax rate is higher and hence the appellant intentionally choose payment of VAT has no basis as liability of VAT was rightly discharged;
- that there is glaring omission in consideration of declared service and education guide para 2.7.1, 2.7.2 and 2.7.3.
- that Circular dated 17.08.2016 which is relied upon by the impugned authority was issued after the period in notice. (to check)

3.1 They further argued that for considering a transaction whether under right to use goods or as deemed sale, the agreement satisfies the test laid down by Hon'ble Apex court in case of BSNL v/s UOI 2006(2) STR 161(SC). In this context, they argued as under:

Sr. No	Test in BSNL case	Relevant clause in agreement	Argument of the appellant
1	There must be goods available for delivery	Preamble clause 1 read with first schedule describes machinery and its delivery as pr clause 1	This clause demonstrate that there has been delivery of goods
2	There must be consensus ad idem as to the identity of the goods	Preamble clause 1 readwith first schedule describes machinery.	Agreement is for specified and pre-identified machines
3	The transferee should have legal right to use the goods-consequently all legal consequences of such use including any permissions or licenses required therefore should be available to the transferee	Clause 3(ii),4(b)	Lessee is old and established running composite textile mills. It has all permissions required to manufacture and process fabrics. No separate/special permission required to operate machinery
4	For the period during	Clause 4(b)	Once the rent is paid, as per

	which the transferee has such legal right, it has to be the exclusion to the transferor.		the said clause the lessee will have right to hold and possess without disturbance from lessor.
5	Having transferred, the owner cannot again transfer the same right to others.	Clause 5	Specific right not to terminate agreement and restriction on transfer.

3.2. It is further argued that Circular dated 17.08.2016 which is relied upon by the impugned authority is partly reproduced and other paras of the same are ignored and circular is not applied correctly; that right to take insurance is equated with permission or license requirement for use. However, it is obvious that insurance is neither permission nor a right for use of the machinery, it is only a safety measures to cover the risk, both the parties had insurable interest. The appellant as owner, had taken insurance which does not in any way call for any hindrance in right to use for M/s. Arvind. The appellant relied on decision of Tribunal in case of Gimmco Ltd -2017 (48) STR -47. They referred para 5.6 of circular dated 17.08.2016 and stated that it pertains to difference between financial lease and operating lease and stated that it is not the case that the present lease is a financial lease which was taxable from 2001 onwards. They also relied upon Tribunal's decision in case of Compucom Software Ltd reported in 2019(2) TMI 262 and decision of Tribunal in case of Century Pulp and Paper reported in 2019 2 TMI 491. It is further argued that demand is barred by limitation; that in the fact of the present case there was no intention to evade tax as on examination the appellant found that VAT was payable and not service tax.

5. Personal hearing in the matter was held on 18.12.2020 through virtual mode. Shri Shridev J Vyas, Advocate, appeared on behalf of the appellant for hearing and re-iterated the submissions made in the appeal memorandum. He also submitted Order-In-Original No. AHM-EXUS-002-COMMR-23/019-20 dated 04.02.2020 passed by the Commissioner, CGST & C.Ex, Ahmedabad-North in support of their claim.

4. I have carefully gone through the facts of the case on records, grounds of appeal in the Appeal Memorandum as well as oral and written submissions made at the time of personal hearing. I find that the issue requiring determination in this case is whether the transactions in respect of leasing the machinery along with accessories and fixtures falls under "Supply of Tangible Goods Service" as defined under erstwhile Section 65 (10) (zzzzj) of the Finance Act, as amended, for the period upto 30.06.2012 and w.e.f. 01.07.2012 under Declared service in view of the provisions of Section 66E of the

Finance Act, 1994 or otherwise and if so demand of service tax confirmed invoking extended period is legally sustainable or not.

5. Ii is observed from the case records that the appellant leased the machinery in question i.e. airjet looms for weaving of fabrics from yarn to M/s. Arvind Limited on monthly rental basis in terms of **agreement dated 10.12.2010** and booked the income earned from such transaction under the head "Lease Rent Income" in their books of accounts. As per the opinion of the appellant such transaction is a deemed sale attracting VAT whereas per the SCN issued by the 'DGGGSTI' (Erstwhile,'DGCEI') and decision under impugned order, said transaction are chargeable to Service Tax under the category "Supply of Tangible Goods Service" as defined under erstwhile Section 65 (105) (zzzzj) of the Finance Act for the period upto 30.06.2012 and under Declared Service in view of the provisions of Section 66E of the Finance Act,1994 than after.

6. As per Section 65(105)(zzzzj) of Finance Act, 1994, taxable service of 'supply of tangible goods 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. After introduction of negative list regime with effect from 01.07.2012, the transfer of goods by way of hiring, leasing, licensing or in any such manner without transfer of right to use goods was covered under Section 66E(f) of the Finance Act, 1994 as a declared service.

6.1 Further, Clause 29A of Article 366 of the Constitution of India, reads as :

"(a) a tax on the transfer, otherwise than in pursuance of a contact, of property in any goods for cash, deferred payment or other valuable consideration;
(b) a tax on the transfer of property in goods (whether as goods or in some other form) invoked in the execution of a works contract;
(c) a tax on the delivery of goods on hire purchase or any system of payment by installments;
(d) a tax on the transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;
(e) a tax on the supply of goods by any unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration;
(f) a tax on the supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (whether or not intoxicating), where such supply or service, is for cash, deferred payment or other valuable consideration, and such transfer, delivery or supply of any goods shall be deemed to be a sale of those goods by

the person making the transfer, delivery or supply and a purchase of those goods by the person to whom such transfer, delivery or supply is made"

6.2 In terms of clause (d) above, for a transaction to qualify as deemed sale leviable to state sales tax/VAT, the condition namely, "the transfer of right to use any goods for any purpose", is required to be fulfilled. And if in a transaction the 'right to use' is not transferred then such transaction cannot be classified as 'deemed sale'. The Hon'ble Supreme Court of India in the case of BSNL vs. Union of India [2006 (2) STR 161 SC] has held that a transaction involves transfer of right to use goods, in case it fulfills the following criteria:

- There must be goods available for delivery;
- There must be consensus ad idem as to the identity of the goods;
- Transferee should have legal right to use the goods;
- Such right should be to the exclusion of the transferor i.e. it should not be merely license to use the goods, and
- During the period of transfer, owner cannot again transfer the same right to others

It is noteworthy that in transfer of right to use goods all the rights except the ownership rights are transferred by the lessor to the lessee. This implies that the lessee will be free to use the subject goods in the manner and way he deems fit. There cannot be any restriction on the lessee so far as use of the leased out goods is in reckon. If this condition is fulfilled then the said transaction will be eligible for being considered as 'deemed sale'.

6.3 Thus, it is observed that both before and after 01-07-2012, the supply of tangible goods, inter-alia, with the right to use them for any purpose and such transaction is deemed as a sale and will attract only sales tax levy. However, where such supply does not extend to transfer of possession and effective control of overall goods, such a transaction would not become a deemed sale but a service and same has been clarified by CBEC vide Circular No. 334/1/2012-TRU, dated 16.03.2012, in para 2.5.8 which is as under:

"2.5.8 What is the meaning of transfer of the right to use any goods_?
Transfer of right to use goods is a well recognized constitutional and legal concept. Every transfer of goods on lease, license or hiring basis does not result in transfer of right to use goods. Transfer of right of goods involves transfer of possession and effective control over such goods. Transfer of goods without transfer of possession and effective control over goods would not be a sale but a service (such transfer has also been declared as a service under section 66F of the Act). "

7. I further observed that the Govt. of India, Min. of Finance, Department of Revenue vide their letter F. No. 334/1/2008-TRU dated 29.02.2008 have shown their intention to levy service tax on such transactions under the category of Supply of Tangible Goods for use as given in Section 4.4 of the said letter, which is as under :

"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."

From the above, it is observed that the said service was duly notified/defined vide Notification No. 18/2008-ST dated 10.05.2008 under Section 65(105)(zzzzj) as "Supply of Tangible Goods Services". The same was further defined under declared services under Section 65B of the Finance Act, 1994 w.e.f 01.07.2012. Thus, it has been clarified that in terms of Article 366 (29A) (d), transfer of right to use involves transfer of both possession and control of the goods to the user of the goods and in such a case, the transaction shall be subject to levy of sales tax/VAT.

8. It is further observed that the Board vide Circular No. 198/8/2016-ST dated 17.08.2016 has categorically stated 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. In the present case, there is legal agreement between the lessor and the lessee for lease of the subject goods. The relevant terms and conditions of the agreement dated **10.12.2010** and their implications in respect of the right given for the use of the machinery are discussed herein below:

8.1 Clause 3 (iii) of the agreement dated 10.12.2010 is reproduced below:

"Not to assign, transfer, sublet or underlet or part with the possession the 'Said Machinery' or any part thereof without the previous consent in writing of the Lessor being obtained, which consent shall not be unreasonably withheld by the Lessor."

It is observed from the above condition that it limits the use of machinery by the Lessee in as much as lessee is not allowed to sublet or underlet the machinery. The Lessee is also neither allowed to transfer the said machinery nor assign the said machinery to someone else except with the written consent from the Lessor. This very clearly proves that the Lessee does not have all the rights to the machinery.

In a similar situation, Hon'ble Apex Court in the case of Bharat Sanchar Nigam Ltd, supra, has observed that Clause 9 clearly interdicts the licensee provided that licensee will not assign or transfer his rights in any manner whatsoever under the licence to third party. It is impossible to contend that the right to use goods, assuming without conceding that they are goods, which are essential for the rendition of service can never be a transaction or transfer of right to use goods. Nor can the contract between subscribers and licensee viz. service provider be interpreted as involving transfer of right to use goods

8.2. Further, Clause 3(ii) of the agreements dated 10.12.2010 is reproduced below:

"To use the 'Said Machinery' for weaving of fabrics from the yarns of the Lessee and for any other industrial purposes permitted in law"

From the above clause, it is clear that the Lessor does not intent to allow the Lessee to use the said machinery in any other manner except for being specifically mentioned in above clause. Thus, the Lessee cannot manufacture fabric or yarn on job work basis also as there is specific condition that the machine could be used to manufacture fabric and yarn out of the yarn and fibers of the Lessee. The lessee could not have used the machinery the way he deemed fit but the manner of use of machinery was confined to the conditions laid down in **clause 3(ii) and 3(iii) of the agreements o**nly. Had such restrictions been not imposed on the lessee, which is a pre-condition for a supply to be considered as deemed sale, the lessee would have used the said textiles machineries at their own will and for any purpose. In the instant case, the necessary conditions of using the said machinery are not fulfilled.

8.3. Further, in the case of Mahyco Monsanto Biotech (India) Pvt.Ltd vs. UOI (2016 (44) STR 161 (Bom.), the Hon'ble High Court has held that the fact that the agreement between Subway and its franchise is limited to the precise period of time stipulated in the agreement is vital aspect of the agreement which cannot be brushed aside. At the end of the period of the agreement, or before in case there was any breach of its terms, the rights of the lessee would also end. There are set terms provided by the agreement which have to be followed. A breach of these would result in termination of the agreement. Thus, there is no passage of any kind of control or exclusively to franchisees. In fact, this agreement is a classic example of permissive use. It can be nothing else.

> *"In our opinion, the most fundamental aspect of permissive use of goods is that at the end of the period for which the use is granted, the goods must be returned to the transferor. Let us consider this in the context of a car hire service, a book library service, Amazon Kindle Unlimited and ITunes Radio. When a car is taken on hire, a fee is paid and the car can be used for a certain period of time. During this time, the person renting the car can only use it. He cannot part with it and certainly cannot destroy it. Once the period of hire comes to an end, the car must be returned to the transferor. Therefore, the effective control over the car remains with the transferor"*

8.4. Thus, the fact that the lessee in the present case did not have unqualified right to sub-lease, transfer the leased machinery on its own, without the consent of the lessor (the assessee) and the lessee did not have the right to use the machinery the way they liked, indicated that lessee merely had the licence of 'permissive use' of the machinery without having rights to use the machinery.

9.1. The moot question to be decided is whether there is a 'transfer' of effective control within the meaning of Article 366(29A)(d). The essence of a 'transfer' is the divesting of a right or goods from transferor and the Investing of the same in the transferee. In this context, the relevant terms and conditions of the agreement dated 10.12.2010 and along with their implications in respect of effective control over the said machineries are discussed herein below:

9.2. Clause 4(d) and (e) of the agreement is reproduced below:

> *"(d)Normally Lessor shall carry out the undertaking repair maintenance of the said Machinery. However, in exceptional cases it shall permit and allow the Lessee to maintain and repair the said Machinery for the beneficial enjoyment and continuous use of the said Machinery by the Lessee"*
>
> *(e) The lessor shall insure the 'said machinery' through out the term of the lease"*

9.3. From the above clauses of the agreement, it is amply clear that the lessee does not even have the rights for maintenance and repairs of the subject machinery. The lessor is responsible for all the repair and maintenance of the machinery as the lessor holds the rights for maintenance and repairs of the machinery. Moreover, throughout the term of lease, the responsibility to insure the machinery was that of the lessor, not of the lessee.

9.4. It is observed that, in case of State of Andhra Pradesh vs. Rashtriya Ispat Nigam Limited, in the Appeal (civil) 31 of 1991, (2003) 3 SCC 214) Hon'ble Supreme Court, vide judgment dated 06.03.2002 observed that for the purpose of steel project, RINL allotted different works to contractors. They undertook to supply sophisticated machinery to the contractors for the purpose of being used in execution of the contracted works and received charges for the same. The High Court after scrutiny and close examination of the clauses contained in the agreement and looking to the agreement as a whole, in order to determine the nature of the transaction, concluded that the transactions between the appellant and contractors did not involve transfer of right to use the machinery in favour of the contractors and in the absence of satisfying the essential requirement of Section 5E of the Act, i.e. transfer of right to use the machinery, the hire charges collected by the appellant from the contractors were not exigible to sales tax. The Apex Court observed that "the High Court was right in arriving at such a conclusion.

9.5. Further, in the case of Carzonrent (India) Pvt Limited Vs. Commissioner of Service Tax, Delhi-I (2017(50) STR 172 (Tri-Del.) where similar issue of levy of service tax on leased vehicle (a machinery) was under consideration, the Tribunal has observed that:

> *" We note that relying on the decision of the Hon'ble Punjab & Haryana High Court in the case of Aditya Cement- 2009 (14) STR. P&H, the original authority recorded that as the premium for insurance is paid by the appellant, they have effective control of the insured vehicles. Further, the appellants also paid the maintenance and repair charges of the vehicles. Even, workshop in which the vehicle has to be serviced is decided by the appellant. On careful consideration of the terms of the agreement, which were elaborately discussed in the impugned order, we note that the clients were never became owners of the cabs. They can use the cabs as long as they are paying rent to the appellant for such usage. The clients do not possess full effective control of the cabs, which are leased to them by the noticees. As recorded by the original authority, the appellants do not fulfill the attributes as laid down by the Hon'ble Supreme Court to determine and conclude the transaction to be a 'deemed sale' . As such, we find that the appellants failed to sustain legally their plea regarding*

non-applicability of the provisions of service tax to the transactions of renting of motor cabs and on such consideration received."

10. Inview of the above, I find that Hon'ble Courts/Tribunal had consistently held that for a transaction to qualify as a transfer of the right to use goods, 'effective control' must be transferred to the transferee. In the instant case, in light of conditions prescribed under clause 4(d) and (e) of the Lease Agreement, it cannot be concluded that the lessor has transferred effective control over the leased machinery to the lessee.

11. The appellant has relied on the Order-in-Original issued by the Commissioner CGST & Central Excise, Ahmedabad North on similar matter in case of M/s Adi Texfab LLP. I have gone through the said order and it is observed that, after referring to the budget speech by the Hon'ble Finance Minister, the adjudicating authority in the said order dated 04.02.2020 has drawn rather legally untenable conclusion that to decide as to whether any transaction will be subject to levy of service tax or not shall not be decided by interpreting the elaborate definition of the impugned service 'supply of tangible goods service/declared service provided under Section 65 (105) (zzzzj)/66E(f) of the Finance Act, 1994 but by deciding whether the transaction is subject to VAT or not. I find that the said conclusion drawn by the adjudicating authority is erroneous as it will render the definition of impugned service provided under the Finance Act, 1994 infructuous against the settled law. Therefore, I do not agree with the view taken by the above authority in the matter for the reasons discussed hereinabove.

12. I have gone through the various judgments cited by the appellant in support of their claim. However, the facts of said judgments having diverse back ground which are distinguishable from the present matter and hence the same are not squarely applicable. Also I do not agree with the views taken by the above authorities in the matter for the reasons discussed in the foregoing paras.

13. From the above, I find that the 'rights to use the machinery' has not been passed on by the lessor (the appellant) to the lessee (Arvind Limited) and accordingly, the transactions was taxable service falling under the category of 'Supply of Tangible Goods Service' defined under Section 65 (105) (zzzzx) of Finance Act, 1994 (upto 30.06.2012) and with effect from 01.07.2012, as 'Declared Service" under Section 66E(f) of Finance Act, 1994.

14. Looking into the facts and circumstances of the instant case and as discussed hereinabove, I find that the adjudicating authority has correctly confirmed the demand of service tax on above said taxable service alongwith interest and penalty. Thus, I do not find any reason to interfere with the impugned order passed by the adjudicating authority. Accordingly, I uphold the impugned order and reject the appeal filed by the appellant.

15. 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.

29th January, 2021.

(Akhilesh Kumar)
Commissioner, CGST (Appeals)
Date: . .2021

Attested

(Atul B Amin)
Superintendent (Appeals)
CGST, Ahmedabad

By R.P.A.D.

To,
M/s. Adi Enterprises,
3-Sigma Corporate House, Near Radhika Party Plot,
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Copy to:

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