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: 20220964SW000000EFCE

स्पीड पोस्ट

क फाइल संख्या : File No : GAPPL/COM/CEXP/625/2021-APPEAL/3621-25

ख अपील आदेश संख्या Order-In-Appeal Nos. **AHM-EXCUS-002-APP-41/2022-23**
दिनाँक Date : **27-09-2022** जारी करने की तारीख Date of Issue 28.09.2022

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

ग Arising out of Order-in-Original No. **03/JC/D/TPD/2021-22/JS** दिनाँक: **27.05.2021**, issued by Joint Commissioner(In-situ),Division-IV, CGST, Ahmedabad-North

ध अपीलकर्ता का नाम एवं पता Name & Address

1. Appellant

   M/s Ashok Shuttering and Scaffolding,
   45, New Ahmedabad Industrial Estate,
   Opp. Vaibhav Auto, B/H H.P. Petrol Pump,
   Nr. Nova Petro chem, Opp. HOF Furniture,
   Changodar-Moraiya Road, Moraiya-382213

2. Respondent
   The Joint Commissioner(In-situ), CGST,Division-IV, Ahmedabad North , 2nd Floor, Gokuldham Arcade,Sarkhej-Sanand, Ahmedabad - 382210

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.

(I) 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 रूपय्रे 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 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 ज़मा 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. Ashok Shuttering and Scaffolding, 45, New Ahmedabad Industrial Estate, Opp. Vaibhav Auto, B/h. H.P. Petrol Pump, Nr. Nova Petro Chem, Opp. HOF Furniture, Changodar-Moraiya Road, Moraiya – 382213, Ahmedabad (hereinafter referred to as "the appellant") against Order-in-Original Number 03/JC/D/TPD/2021-22/JS dated 27.05.2021 issued on 28.05.2021 (hereinafter referred to as "the impugned order") passed by the Joint Commissioner (In-Situ), Central GST & Central Excise, Division IV, Ahmedabad North (hereinafter referred to as "the adjudicating authority").

2. Briefly stated, the facts of the case is that the appellant is holding PAN No. AAXFA4929R. On scrutiny of the data received from CBDT for the Financial Years 2014-15 & 2016-17, it was noticed that the appellant had earned an income of Rs. 90,99,517/- during the FY 2014-15 and an income of Rs. 1,08,95,677/- during the FY 2016-17, which was reflected under the heads "Sales / Gross Receipts from Services (Value from ITR)" by the Income Tax department. Accordingly, it appeared that the appellant had earned the said substantial income by way of providing taxable services but has neither obtained Service Tax registration nor paid the applicable service tax thereon. The appellant was called upon to submit copies of Balance Sheet, Profit & Loss accounts, Income Tax Returns, Form 26AS, for the said period, however, the appellant had not responded to the letters issued by the department.

2.1 Subsequently, the appellant was issued a Show Cause Notice No. V/27-40/Ashok Shuttering/2020-21/TPD/UR dated 23.09.2020 and corrigendum thereof dated 08.10.2020 demanding Service Tax amounting to Rs. 27,59,052/- for the period FY 2014-15 & FY 2016-17, under proviso to Sub-Section (1) of Section 73 of the Finance Act, 1994. The SCN also proposed recovery of interest and imposition of penalty. The Show Cause Notice was adjudicated vide the impugned order by the adjudicating authority and the demand of Service Tax amounting to Rs. 27,59,052/- was confirmed under proviso to Sub-Section (1) of Section 73 of the Finance Act, 1994 along with Interest under Section 75 of the Finance Act, 1994. Further (i) Penalty of Rs. 27,59,052/- was also imposed on the appellant under Section 78 of the Finance Act, 1994; (ii) Penalty was imposed on the appellant under Section 77(1)(a) of the Finance Act, 1994 for failure to obtain Service Tax Registration; and (iii) Penalty of Rs. 5,000/- was imposed on the appellant under Section 77(1)(c) of the Finance Act, 1994.

3. Being aggrieved with impugned order, the appellant have filed the present appeal under Section 85 of the Finance Act, 1994 on 06.08.2021 on the following grounds :

- The adjudicating authority has erred in Law while passing impugned order;
- The adjudicating authority has grievously erred in law in relying upon the borrowed satisfaction, without making any independent inquiry and data of the third party;

- The appellant was doing activity of renting of scaffolding and there is no transfer of ownership;
- The adjudicating authority has erred in law in not considering that the transactions involves the transfer of right to use the material for consideration. The transfer is nothing but transfer of right to use of goods and does not fall within the declared service;
- The adjudicating authority has erroneously considered and held that appellant had undertaken transactions of taxable services and effective control of such goods was not transferred to the service recipient;
- The adjudicating authority has wrongly arrived at the conclusion that transactions of supply of tangible goods made by the appellant;
- The adjudicating authority has ignored the fact that effective control of the goods during the period of hiring / renting remains with transferee, hence, there will no service tax liability and VAT is required to be paid on such transactions;
- They have placed reliance on the decision of Aggarwal Brothers vs. State of Haryana (1999) 113 STC 317 (SC), in the said decision, it is held that Giving shuttering on hire, if the goods, namely, shuttering are supplied to the builders for a specified period for the purposes of construction at a consideration; the transferee is in effective control of the shuttering during the period it remains in his possession i.e. during the construction and therefore, it falls within the definition of the extended definition of sale;
- The adjudicating authority has erred in law in imposing penalty on such disputed transaction and tax liability without there being any means rea, contumacious conduct and guilty mind on the part of the appellant. In absence of the same, initiating and imposing penalty is highly unwarranted and bad in law;
- The notice is time barred under the provisions of the Finance Act, 1994 as in their case they have disclosed and provided all the relevant details to the government authority i.e. Income Tax department as well as all the details of transactions of sales and purchase and income were shown truly and correctly in their books of account and thus there is no fraud, collusion or suppression of facts and accordingly the limitation of 5 years will not apply in their case.

4. Personal hearing in the case was held on 01.09.2022. Shri Varis Isani, Advocate, appeared on behalf of the appellant for personal hearing. He reiterated submission made in appeal memorandum.

5. I have carefully gone through the facts of the case, grounds of appeal, submissions made in the Appeal Memorandum and documents available on record. The dispute involved in the present appeal relates to the confirmation of demand for service tax on the income received by the appellant for hiring / renting of goods / Centering Material. The demand pertains to the period FY 2014-15 & FY 2016-17. The adjudicating authority had confirmed the demand considering the service provided by the appellant to be covered under the category of "Supply of Tangible Goods service", defined under Section 65(105)(zzzzj) of the Finance Act, 1994.

6. It is observed that the appellant is engaged in giving for use construction materials in the nature of centering the goods like plates, frames etc. The said materials are given on hire for rent with a right to use such goods by the transferee. It is observed that the SCN in the case was issued on the basis of data received from Income Tax department, which showed that the appellant had shown income from services during the period of dispute. The SCN has not proposed any category of service under which the income is liable to be taxed. The adjudicating authority, on examining the documents submitted by the appellant, held that the activity undertaken by the appellant were classifiable under the category of "Supply of Tangible goods for use", defined under Section 65(105)(zzzzj) of the Finance Act, 1994.

6.1 I find that in the present case, while confirming the demand, the adjudicating authority observed that entries like 'depreciation' and 'maintenance of such equipments' in the trial balance of the appellant established that the owner of such goods were none other than the appellant and, therefore, the adjudicating authority held that there is no ambiguity that right of possession and effective control of such goods was not transferred to the service recipient. On verification of sample invoice of the appellant, the adjudicating authority also observed that a term viz. 'Rent per Day' is used showing rent per equipment per day and, therefore, it was held that the equipments were given to the users on rental basis by the appellant and ownership of these equipments were not transferred to the users.

7. I also find that main contention of the appellant is that they had supplied the goods / Centering Material to the Civil Contractor during the period on hire basis and not only possession and custody of the goods stood transferred to the Civil Contractor but the effective control and right to use such goods also stood transferred to the Civil Contractor during the period of hire. Thus, in the instant case, transaction involves the transfer of the right to use any material involving transfer of both possession and control of such goods to the user of goods is transactions of deemed sales which is leviable to VAT.

8. I find that in the SCN in question, the demand has been raised for the period FY 2014-15 & FY 2016-17 based on the Income Tax Returns filed by the appellant. Except for the value of "Sales of Services under Sales / Gross Receipts from Services" provided by the Income Tax Department, no other cogent reason or justification is forthcoming from the SCN for raising the demand against the appellant. It is also not specified as to under which category of service the non-levy of service tax is alleged against the appellant. Merely because the appellant had reported receipts from services, the same cannot form the basis for arriving at the conclusion that the respondent was liable to pay service tax, which was not paid by them. In this regard, I find that CBIC had, vide Instruction dated 26.10.2021, directed that:

"It was further reiterated that demand notices may not be issued indiscriminately based on the difference between the ITR-TDS taxable value and the taxable value in Service Tax Returns.

3. It is once again reiterated that instructions of the Board to issue show cause notices based on the difference in ITR-TDS data and service tax returns only after proper verification of facts, may be followed diligently. Pr. Chief Commissioner /Chief Commissioner (s) may devise a suitable mechanism to monitor and prevent issue of indiscriminate show cause notices. Needless to mention that in all such cases where the notices have already been issued, adjudicating authorities are expected to pass a judicious order after proper appreciation of facts and submission of the noticee."

8.1 In the present case, I find that letters were issued to the appellant seeking details and documents, which were allegedly not submitted by them. However, without any further inquiry or investigation, the SCN has been issued only on the basis of details received from the Income Tax department, without even specifying the category of service in respect of which service tax is sought to be levied and collected. This, in my considered view, is not a proper ground for raising of demand of service tax. Therefore, on this very ground, the demand raised vide the impugned SCN is liable to be dropped.

8.2 A similar view has been taken by the Hon'ble High Court of Madras in the case of R.Ramdas Vs. Joint Commissioner of Central Excise, Puducherry - 2021 (44) GSTL 258 (Mad.). The relevant parts of the said judgment are reproduced below :

"7. It is a settled proposition of law that a show cause notice, is the foundation on which the demand is passed and therefore, it should not only be specific and must give full details regarding the proposal to demand, but the demand itself must be in conformity with the proposals made in the show cause notice and should not traverse beyond such proposals.

11. The very purpose of the show cause notice issued is to enable the recipient to raise objections, if any, to the proposals made and the concerned Authority are required to address such objections raised. This is the basis of the fundamental Principles of Natural Justice. In cases where the consequential demand traverses beyond the scope of the show cause notice, it would be deemed that no show cause notice has been given, for that particular demand for which a proposal has not been made.

12. Thus, as rightly pointed out by the Learned Counsel for the petitioner, the impugned adjudication order cannot be sustained, since it traverses beyond the scope of the show cause notice and is also vague and without any details. Accordingly, such an adjudication order without a proposal and made in pursuant of a vague show cause notice cannot be sustained."

It is further observed that the adjudicating authority while confirming service tax held that the activity undertaken by the appellant were classifiable under the category of "Supply

of Tangible goods for use" defined under Section 65(105)(zzzzj) of the Finance Act, 1994. However, I find that the provisions under Section 65(105) of the Finance Act, 1994 has been replaced by negative list based service tax regime vide Notification No. 20/2012-ST dated 05.06.2012, made applicable w.e.f. 01.07.2012. Hence, the adjudicating authority has confirmed the demand under the provisions prevalent before 01.07.2012, which are not in existence for the period of demand pertaining to FY 2014-15 & 2016-17. I find that on this count also the confirmation of demand by the adjudicating authority is not sustainable.

10. I find that with effect from 01.07.2012, there has been total shift in the service tax levy, from "specific service based taxation" to "negative list based taxation", that means, all the services, except those listed in negative list, shall be liable to service tax. Section 66B of the Finance Act, 1994 provides that there shall be levied a tax to be referred to as service tax on the value of all services, other than those services specified in the negative list, provided or agreed to be provided in the taxable territory by one person to another and collected in such a manner as may be prescribed. The 'negative list' is provided for in Section 66D of the Finance Act, 1994. Section 65B(44) of the Finance Act, 1994, as inserted w.e.f. 1 July, 2012, defines 'service' to mean any activity carried out by any person for another for consideration and includes a declared service but would not include certain services specified in clauses (a), (b) and (c). Declared services have been enumerated in Section 66E of the Finance Act, 1994. Sub-clause (f) of Section 66E of the Finance Act, 1994, which is relevant for the purposes of the activity involved in this case, is as follows:

> *"(f) transfer of goods by way of hiring, leasing, licensing or in any such manner without transfer of right to use such goods;"*

10.1 I also find that the Transfer of Right to use goods for cash, deferred payment or valuable consideration is considered as deemed sales under sub-clause (d) of Article 366(29A) of the Constitution of India. To determine whether the activity carried out by the appellant falls under deemed sales or declared service under Section 66E(f) of the Finance Act, 1994, I find it relevant to refer to the judgement of the Hon'ble Apex Court in the case of BSNL vs. UOI reported in 2006 (2) STR (161) (SC), wherein the following five key test has been given to decide the transaction is 'deemed sale' or otherwise:

> *"91. To constitute a transaction for the transfer of the right to use the goods the transaction must have the following attributes :*
>
> *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 therefor should be available to the transferee;*

d. For the period during which the transferee has such legal right, it has to be 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 rights to others."

10.2 I find that when centering material were handed over to customer for use by the appellant, it is natural that the appellant will not have control over its use; that transfer of goods involve transfer of possession and effective control of the goods. Thus, I find that in the present case in hand, the answer of the all the above five key attributes has gone in favour of the appellant and thus it can be said that the five essential ingredients as held by the Hon'ble Supreme Court have been fulfilled in the transactions of hiring / renting undertaken by the appellant and it is termed as 'deemed sale' and exigible to VAT.

10.3 I also find that in the present case, the goods had been leviable to VAT and the appellant had paid VAT, therefore, Supply of tangible goods for use and leviable to VAT / sales tax as deemed sale of goods, is not covered under the scope of declared service under Section 66E(f) of the Finance Act, 1994. The similar view has been taken by the Board in their DO letter F.No. 334/1/2008-TRU dated 29.02.2008, when the Supply of Tangible Goods service defined as taxable service. The relevant portion of the said letter are 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."

10.4 In view of the above, I find that the adjudicating authority has erred in arriving at the findings that as the appellant carried out maintenance of such equipments, as reflected in the trial balance of the appellant, it established that the owner of such goods were none other than the

appellant and in giving findings that a term viz. 'Rent per Day' is used showing rent per equipment per day and therefore, the equipments were given to the users on rental basis by the appellant and ownership of these equipments were not transferred to the users. In facts, I find that Transfer of a right to use goods implies that full liberty is vested in the transferee to have the right to use goods to the exclusion of all other, including the owner of goods during the rental / hire period. The appellant is free to get repairing / to carry out maintenance of their goods when the goods are not on rental. In the present case, the appellant also produced VAT returns to the adjudicating authority evidencing VAT paid by them on entire value. After careful examination of facts of the case as discussed supra, I am of the opinion that the service rendered by the appellant will not be covered under declared service under Section 66E(f) of the Act and the appellant cannot be held liable to discharge service tax on the income received from providing such services.

11. I also find that the appellant have also contended that the demand is barred by limitation. In this regard, I find that the demand pertains to F.Y. 2014- 15 & F.Y. 2016-17 and even by invoking the extended period of limitation, the SCN could have been issued by 25.10.2019 for demanding service tax for the first half of 2014-15. However, the SCN has been issued on 23.09.2020. Therefore, the demand in respect of the period from April, 2014 to September, 2014 is barred by limitation. In this regard, I also find that the adjudicating authority has not taken into consideration the time barred issue and confirmed the demand in toto. In my considered view, the demand on this count is also not sustainable for the period from April, 2014 to September, 2014, as the same is barred by limitation.

12. In view of above, I hold that the impugned order passed by the adjudicating authority confirming demand of Service Tax, in respect of renting / hiring income received by the appellant during the FY 2014-15 & FY 2016-17, is not legal and proper and deserve to be set aside on various counts as enumerated above. Accordingly, I set aside the impugned order and allow the appeal filed by the appellant.

13. अपील कर्ता 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.

(Akhilesh Kumar) 27th September 2022
Commissioner (Appeals)

Attested

(R. C. Maniyar)
Superintendent (Appeals),
CGST, Ahmedabad

Date : 27.09.2022

By RPAD / SPEED POST

To,

M/s. Ashok Shuttering and Scaffolding, — Appellant

45, New Ahmedabad Industrial Estate,

Opp. Vaibhav Auto, B/h. H.P. Petrol Pump,

Nr. Nova Petro Chem, Opp. HOF Furniture,

Changodar-Moraiya Road,

Moraiya – 382 213, Ahmedabad

The Joint Commissioner, — Respondent

CGST & Central Excise,

Division-IV, Ahmedabad North

Copy to :

1) The Principal Chief Commissioner, Central GST, Ahmedabad Zone
2) The Commissioner, CGST, Ahmedabad North
3) The Joint Commissioner, CGST, Division IV, Ahmedabad North
4) The Assistant Commissioner (HQ System), CGST, Ahmedabad North (for uploading the OIA)
5) ~~Guard File~~
6) PA file