सत्यमेव जयते

आयुक्त का कार्यालय
Office of the Commissioner
केंद्रीय जीएसटी, अपील अहमदाबाद आयुक्तालय
Central GST, Appeals Ahmedabad Commissionerate
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| (क) | फ़ाइल संख्या / File No. | GAPPL/COM/STP/3845/2023 / 3320-26 |
| (ख) | अपील आदेश संख्याऔर दिनांक / Order-In -Appeal and date | AHM-EXCUS-002-APP-253/23-24 and 26.02.2024 |
| (ग) | पारित किया गया / Passed By | श्री ज्ञानचंद जैन, आयुक्त (अपील)<br>Shri Gyan Chand Jain, Commissioner (Appeals) |
| (घ) | जारी करने की दिनांक / Date of Issue | 05.03.2024 |
| (ङ) | Arising out of Order-In-Original No. 128/ADC/MR/2022-23 dated 10.2.2023 passed by The Additional Commissioner, CGST & Central Excise, Ahmedabad North | |
| (च) | अपीलकर्ता का नाम और पता / Name and Address of the Appellant | Hriday Logistics<br>Shiv Shakti Nagar, Opp. Shyamal Park Nikol<br>Naroda Roading<br>Ahmedabad - 382330 |

**कोई व्यक्ति इस अपील-आदेश से असंतोष अनुभव करता है तो वह इस आदेश के प्रति यथास्थिति नीचे बताए गए सक्षम अधिकारी को अपील अथवा पुनरीक्षण आवेदन प्रस्तुत कर सकता है, जैसा कि ऐसे आदेश के विरुद्ध हो 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 :-

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 : -

(क) यदि माल की हानि के मामले में जब ऐसी हानिकार खाने 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 मे 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 मामलें में जो भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित है।

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.

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

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

(घ) 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।

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.

(2) 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 भीतरमूल-आदेश एवं अपील आदेश की दो-दो प्रतियों के साथ उचित आवेदन किया जाना चाहिए। उसके साथ खाता इ का मुख्य शीर्ष 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.

(3) रिविजन आवेदन के साथ जहाँ संलग्न रकम एक लाख रूपये या उससे कम होतो रूपये 200/- फीस भुगतान की जाए और जहाँ संलग्नरकम 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 सेवा कर 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 :-

(2) उक्तलिखित परिच्छेद 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।

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

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 संषोधित की अनुसूची -1 के अंतर्गत निर्धारित किए अनुसार उक्त आवेदन या मूलआदेश यथास्थिति निर्णयन प्राधिकारी के आदेश में से प्रत्येक की एक प्रतिपर 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) एके प्रति अपीलो के मामले में कर्तव्यमांग (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 सेवाकर के अंतर्गत, शामिल होगा कर्तव्य की मांग (Duty Demanded)।

(34) खंड (Section) 11D के तहत निर्धारित राशि;
(35) लिया गलत सेनवैट क्रेडिट की राशिय;
(36) सेनवैट क्रेडिट नियमों के नियम 6 के तहत देय राशि।

यह पूर्व जमा ' लंबित अपील' में पहले पूर्व जमा की तुलना मेंए 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:

(xxxiv) amount determined under Section 11 D;
(xxxv) amount of erroneous Cenvat Credit taken;
(xxxvi) amount payable under Rule 6 of the Cenvat Credit Rules.

(6) (i) 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

M/s. Hriday Logistics, Shiv Shakti Nagar, Opposite Shyamal Park, Nikol Naroda Road, Ahmedabad- 382330 (hereinafter referred to as '*the appellant*') have filed the present appeal against the Order-in-Original No. 128/ADC/MR/2022-23 dated 13.02.2023 (in short '*impugned order*'), passed by the Additional Commissioner, Central GST, Ahmedabad North, Ahmedabad (hereinafter referred to as '*the adjudicating authority*'). The appellant wasproviding fleet of services and providing logistic support. They were holding centralized registration No. AAIFH9135MSD001 under "Transportation of Goods by Road/Goods Transport Agency (GTA)".

**2.** Based on the intelligence gathered by DGCEI, AZU, it was observed that the appellant has entered an agreement dated 01.10.2015 and 01.10.2017 with M/s. Fine Tech Corporation Pvt. Ltd. ('M/s. FCPL' for brevity), Mumbai. They have provided transportation services, using ambient and refrigerated vehicles deployed by the appellant at M/s. FCPL on the terms and conditions mentioned therein.The relevant terms and conditions and clauses of the agreements indicatethat the appellant had to mobilize andmakeavailable fully operational, Reefer and Ambient trucks, manned by drivers andsupervisor, on long term basis and by usingthese trucks, to provide service of transportation to M/s FCPL(not to the consignors or consignees). The truckssodeployed by the appellant for provision of service to M/s FCPL are manned bythedrivers and supervisor made,available by the appellant under the same contractand the vehicles remain under possession and effective control of the appellant. Thus, theservices are provided without parting with the rightof possession and effective control of such trucks. From the analysis of the clauses, it was clear that M/s. FCPL did not even have the rights for maintenance and repairs of the subject vehicles and the appellant was responsible for repair and maintenance of all vehicles. Moreover, as per the terms of the contract, the responsibility to insure the vehicle was also on the appellant and not on M/s. FCPL.

**2.1** Statement of Shri Hitesh Rameshbahi Oza, Authorized Signatory of the appellant was recorded on 20.01.2021, wherein he admitted that the appellant are engaged in deployment/mobilisation of fleet by way of giving reefer/ambient vehicles,to M/sFCPL and the risk and rewards incidental to ownership of the vehicles have always stayed with the appellant and the same has never been transferred to M/s FCPL; that they hadnot issued any LRs/consignment notes in respectof the goodsbeingtransported and the LRs were issued by M/s FCPL.

**2.3** Thus, from the scrutiny of the agreements, General Terms of the conditions, and its relevant clauses, statements of Shri Hitesh Rameshbhai Oza dated 20.01.2021, reveal that the appellant has provided the declared service of "transfer ofgoods by way of hiring, leasing, licensing or in any such manner without transfer of right to use such goods" as defined under Sub-Section (22) of Section 65 read with Clause (f) ofSection 66E of Finance Act; 1994 to M/sFCPL, Mumbai by way of supplying a fleet of vehicles forthe purpose of transportation of various goods for which they charged andcollected consideration in monetary forms from them. From the combined readingof provisionof Section 66D, Section 65B(44), Section 65B(51) and clause (f) of Section 66E, it appeared thattheservices provided by the appellant to M/s. FCPL does not fall under negative list as defined in Section 66D(p)(i)A of Finance Act, 1994, hence the said services were

'taxable services'- and they were liable to pay appropriate service taxleviable onthe consideration received from M/s. FCPL. The appellant charged and received gross amount of Rs.4,93,44,390/- in respect of the services provided by them from Oct, 2015 to June, 2017, on which they were liable to pay service tax amount of Rs.73,20,196/-. However, the appellant never declared the actual value of such taxable service in their ST-3 return and never intimated the department about their actual nature of services so provided to M/s. FCPL.

**2.4** A Show Cause Notice (SCN) No. DGCI/AZU/36-03/2021-22 dated 09.04.2021was therefore issued to the appellant proposing recovery of service tax amount of Rs.73,20,196/- not paid on the value of income received during the periodfrom Oct, 2015 to June, 2017, along with interest under Section 73(1) and Section 75 of the Finance Act, 1994, respectively. Imposition of penalty under Section 77(1) (b) and Section 78 of the Finance Act, 1994 was also proposed.

**3.** The said SCN was adjudicated vide the impugned order, wherein the service tax demand of Rs.73,20,196/-was confirmed alongwith interest. Penalty of Rs. 10,000/-was imposed under Section 77(1)(b) &penalty of Rs.73,20,196/-was also imposed under Section 78.

**4.** Being aggrieved with the impugned order passed by the adjudicating authority, the appellant have preferred the present appeal, on the grounds elaborated below;

- If one reads the clause for scope of service, key performance index, terms of rate, operationalrules, insurance and warranties, it categorically says that the appellant have totransport the goods in vehicles whether owned by them or not. The collectivereading of these terms categorically suggests and indicates that the Appellant isengaged in the transport of goods in vehicles and delivers at the locations of the clients of FCPL. At all places, the risk of a transporter is on the Appellant. The main purpose of the provision of service is the transportation ofgoods in trucks, and the intention of the receiver and provider of services is thesafe and timely transportation of goods and not the other way.

- If a person is transporting goods by road, there is no stipulation whether goods are transported on his own account or not or for his own client or another person's client; thatthe vehicle or mode of transport is owned by a service provider or not, that the prices should be determined in particular or prescribed manners, that mode of transport should not be under any sort of supervision of the receiver of services; that the route for transport must be determined by the truck operator only. Similarly, if goods are transported belonging to any person under any person's directions or supervision has no impact on taxability. The adjudicating authority could not have ignored that in every big company, for timely, cost effective and safe transportation of goods by road, there are certain clauses in the transport service contract which are near to the terms. In the case of transportation of milk products or petrol or other transportation activity, more stringent norms like availability of trucks, stringent supervision of service receiver, route determination, etc., similar to the agreement, may be incorporated. In that

case, the characteristics of service provisions are not changed but remain as Transportation of goods by road.

- The Adjudicating Authority has mis-interpreted the agreement by readingthe clauses separately, which leads to taxability under the different clauses.A supply which comprises a single supply from an economic point andreceivers' point of view should not be put to tax by dissecting the agreementclauses, and the ancillary event, activity or function should not be madeprincipal activity and tax the entire transaction under different category. In thestatute for a particular activity, specific services orprovisions are prescribed orare mentioned or classified then the provision ofservice and agreement has to be read in thatcontext and not taxing in another category by dissecting and interpreting each clausearbitrarily. In the present case, in different paragraphs of the Notice, the allegations wereframed on the basis ofreading each clause ofthe agreement separately, and theprincipal aim of the activities was totally ignored.

- The Adjudicating Authority has brushed aside the specific plea raised by theAppellant while considering the case that in the case of 'rent a cab operator'which gives his car on a monthly rental basis to any receiver of services, be it acompany or government, he charges fixed amount + per KM charges. Theterms of rare, maintenance, insurance availability of cars etc., are similar to theactivities undertaken by the Appellant, then also the same is taxed under theRent a cab scheme and not the alleged category declared services "transfer ofgoods by way of hiring, leasing, licensing or in any such manner withouttransfer of right to use such goods. Reliance placed in the case of Gujrat Chemical Port Terminal Co. Ltd. V CCE & C2.

- To levy under Section 66E (f), there must be a transfer of goods; the transfer must be by way of hiring, leasing, licensing or in any such good; such transfer should not amount to the transfer of right to use such goods. The basic requirement for taxability under this clause is that there must be a transfer of goods by way of hire, leasing, licensing etc., and there should not be a transfer of the right to use the goods. In the present case, nowhere in the notice is it alleged and proved that the particular goods are transferred to the receiver of services in this particular mode. In the absence of such facts, a demand under the said provision could not have been invoked.

- That the Adjudicating Authority erred in considering the facts of the case that the fleet (trucks) were owned/possessed by the Appellant, whereas the fleets were supplied by the client of the FCPL to manage the transport of goods in an efficient manner. When the trucks/fleets were not owned by the Appellant, there was no question of supply of tangible goods to anyone. The goods, which are not of the appellant, no question of supply the same under the category of Section 65 (105) (zzzzj) arises or declared services under Section 66E (f) of the Finance Act, 1994.

- That the Adjudicating Authority has erred in treating the activity in question as the supply of tangible goods and services, but as a matter of fact, there was no

supply of tangible goods for use by the service recipient. The Appellant has transported the goods at the places designated by FCPL. The FCPL, in turn, issues consignment notes to their clients; in this entire chain of activity, ingredients of the category of supply of tangible goods are not satisfied. The Fleet/Trucks were operated and run by the Appellant and delivered the goods under the agreement, but the said Trucks/Fleets were never directly used by FCPL. Hence, the basic premise of the demand itself is not tenable, and therefore, the impugned order deserves to be quashed and set aside.

- That the adjudicating authority has erred in confirming the liability on the ground that the Appellant has provided the Loading and Unloading service to FCPL, but not gone into the nature of the activities done by the Appellant. As a matter of fact, the Appellant never provided such services; the amount under the head of loading and unloading was shown in the books of accounts because the appellant had classified breakdown charges, which are recovered when the trucks were breakdown on the highway, and at that time, unloading and loadinghas to be done, since it's additional work, the Appellant had to do, they charged the same under GTA service only.

- The adjudicating authority has ignored Notification No. 1/2009-ST Dated 5.01.2009 which exempts the services of appellant till June, 2012 and for the period thereafter it is exempted vide mega notification No.25/2012- ST dated 20.06.2012. He also erred in not following the clarification/guidelines issued by Circular No. 198/8/2016- ST Dated 17.08.2016, whereby the Board 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. Further, the Board has relied upon the case law of Bharat Sanchar Nigam Limited Vs. Union of India reported in 2006 *(2)* ST.R 161 (S.C.), and discuss the ratio laid down in the context of the hiring, leasing or licensing of goods. The Board has recorded the criteria laid down by the Hon'ble Apex Court to determine a transaction involves transfer of the right to use the goods. The service provided by the Appellant to FCPL is providing a transportation as truck operator, but the FCPL has no right to use the trucks, nor the goods, because the goods have been delivered to the client of FCPL Further, there is no consequence, including permission or licenses, which are available to the FCPL, and therefore, the terms of the agreement do not satisfy the definition of Supply of tangible goods and also do not confirm the exclusion of criteria laid down by the Hon'ble Apex Court.

- Larger period can be invoked when there was any intention to evade tax by fraud, misstatements, suppression etc., In the present case, the period involved is October 2015 to June 2017, whereas the show cause notice was issued on 22.04.2022, hence, it is clear that the entire period involved in the present case is time barred.

- When the demand is not sustainable question of recovering the interest does not arise.

- Penalty under Section 78 was imposed without giving specific findings hence the order is a non-speaking order.

- Adjudicating Authority has erred in confirming penalty under sub-section (1)(b) of Section 77 for having failed to keep, maintain or retain books of account and other documents as required in accordance with the provision of Act and Rules, but there is no findings as to which documents were not maintained or which books of accounts are not maintained by the appellant. Therefore, penalty of Rs. 10,000/- is not justified.

**5.** Personal hearing in the appeal matter was held on 29.12.2023. Shri Dhaval K. Shah, Advocate appeared on behalf of the appellant for personal hearing. He reiterated the grounds of appeal and requested to allow their appeal.

**6.** 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 issue to be decided in the present appeal is whether the impugned order passed by the adjudicating authority, confirming the demand of **Rs.73,20,196/-** against the appellant along with interest and penalty, in the facts and circumstance of the case is legal and proper or otherwise. The demand pertains to the period **October,2015 to June, 2017.**

**6.1** The entire demand has been raised on the issue of classification. The adjudicating authority has held that the services rendered by the appellant is classifiable under service of '***transfer of goods by way of hiring, leasing, licensing or in any such manner without transfer of right to use such goods***' defined under Section 66E(f) of the F.A., 1994. Whereas, the appellant is contesting the above classification and have strongly advocated the classification under '*Transportation of Goods by Road*'.

**6.2** Section 66E related to Declared services has been inserted vide Notification No. 19/2012-ST dated 5-6-2012 w.e.f. 1st day of July, 2012. Definition of 'service' contained in clause (44) of section 65B of the Act states that 'service' includes a declared service. The phrase 'declared service' is also defined in the said section as an activity carried out by a person for another for consideration and specified in Section 66E of the Act. Nine activities have been specified in Section 66E out of which"*transfer of goods by way of hiring, leasing, licensing or any such manner without transfer of right to use such goods*"is one amongst them.

**6.3** 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 in terms of the judgment of the Supreme Court in the case of State of Andhra Pradesh vs Rashtriya Ispat Nigam Ltd [Judgment dated 6/2/2002 in Civil Appeal no. 31 of 1991]. Transfer of custody along with permission to use or enjoy such goods, per se, does not lead to transfer of possession and effective control. The test laid down by the Supreme Court in the case of Bharat Sanchar Nigam Limited vs Union of India [2006(2)STR161(SC)] to determine whether a transaction involves transfer of right to use goods, which has been followed by the Supreme Court and various High Courts, is as follows:

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 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;*
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 91 of the statute, viz., a 'transfer of the right to use' and not merely a license to use the goods;*
e) *Having transferred, the owner cannot again transfer the same right to others. Whether a transaction amounts to transfer of right or not cannot be determined with reference to a particular word or clause in the agreement. The agreement has to be read as a whole, to determine the nature of the transaction*

**6.4** Further the CBIC vide Circular No. 198/08/2016-ST dated 17.08.2016, also clarified that incases 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 recognized 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.

**6.5** In the instant case, from the nature of the contract, it is observed that the appellant (i.e. the Truck Operator) has provided thetransportation services to M/s. FCPL, using ambient and refrigerated vehicles deployed by the appellant. The contract was for a period of two years. The consideration was in the form of transportation rates inclusive of all cost of the truck operator(direct, indirect and incidental to transportation and operation of business including way side expenses, unloading & loading charges during transportation). Payment was made based on the number of vehicles engaged by the truck operator. M/s. FCPL was not responsible for any loss or damage done to truck or manpower while on the work or parked. The truck operator shall ensure availability of vehicle with complete supervision to manage the fleet for the purpose of providing transportation service; they shall ensure safe transportation and delivery of goods and for en-route pilferages; they shall ensure on-time maintenance of vehicles; all the maintenance shall be planned only on lean days of week; cost of insuring the goods during transit shall be recovered from truck operator. Further, the agreement also mentions that the transportation of goods by road service shall not be delivering/giving any transfer of right to use of vehicles to M/s. FCPL.

**6.6** From the above contract agreement, it is also clear thattheservices are provided without parting with the rightof possession and effective control of the trucks. M/s. FCPL did not even have the rights for maintenance and repairs of the subject vehicles, even the responsibility to insure the vehicle was on the appellant and not on M/s. FCPL.

Transfer of a right to use goods implies that full liberty is vested in the transferee tohave the right to use goods to the exclusion of all other including the owner of goods.In the present case, the contract itself provides that the services are provided without parting with the right of possession and effective control of the trucks. Thus, when the appellant retains the substantial control and does not hand it over to M/s. FCPL, there is no transfer of the right to use the vehicles. Hence, whenever there is no such control on the goods vested in the person to whom the supply is made, such transaction will constitute as 'declared service'given in clause (f) of Section 66Eof the Finance Act.

**6.7** However, the appellant has claimed that they have rendered Goods Transport Agency service as were engaged in the transport of goods in vehicles and delivered it at the locations of the clients of FCPL. At all places, the risk of transportation was on them and the intention of the receiver and provider of services is the safe and timely transportation of goods and not the other way. They claim that in 'rent a cab operator' service the service provider gives his car on a monthly rental basis to any receiver of services, be it a company or government and charges fixed amount + per KM charges. The terms of rate, maintenance, insurance availability of cars etc., are similar to the activities undertaken by the appellant, then also the same is taxed under the Rent a cab scheme and not the alleged category declared services "transfer of goods by way of hiring, leasing, licensing or in any such manner without transfer of right to use such goods". I find that after the negative list regime, there is no classification as 'rent a cab service'. If an activity is covered under the scope of definition of 'service' which includes 'declared services' then such activity shall be taxable. In the Rent-a-Cab service, the right to use is not transferred as the car owner retains the permissions and licenses relating to the cab. As the possession and effective control remains with the owner such service is, therefore covered in the declared list entry. Similarly, in the present case as the services are provided without parting with the right of possession and effective control of the trucks, the said activity shall be covered under declared list.

**6.8** Th appellant further contended that the Adjudicating Authority erred in considering the facts of the case that the fleet (trucks) were owned/possessed by the appellant, whereas the fleets were supplied by the client of the FCPL to manage the transport of goods in an efficient manner. When the trucks/fleets were not owned by the appellant, there was no question of supply of tangible goods to anyone. The goods, which are not of the appellant, no question of supply the same under the category of Section 65 (105) (zzzzj) arises or declared services under Section 66E (f) of the Finance Act, 1994. They submitted Certificate of Registration issued by RTO in the name of Reliance Retail which proves that the trucks/vehicles were actually owned by Reliance and not by the appellant. Under transfer of goods by way of hiring, leasing, licensing or any such manner without transfer of right to use such goods, there is no pre-condition that the goods should be owned by the service provider. In the case of Rent-a-cab services the owner leases the car to ABC who further sub-lease it to XYZ and such services after negative list regime s covered under declared services. Similarly, though the trucks/fleets were not owned by the appellant, they could be given on hire, lease, licensing without transferring the right to use such goods.

**6.9** Further, they claim that theyactually transported the goods at the places

designated by FCPL and M/s. FCPL, in turn, issued consignment notes to their clients; that the Fleet/Trucks were operated and run by them and delivered the goods under the agreement, but the said Trucks/Fleets were never directly used by FCPL. They also provided the loading and unloading service to FCPL, which in the books of account was classified as breakdown charges, which are recovered when the trucks were breakdown on the highway, and hence unloading and loadinghas to be done, for which they chargedthe same under GTA service only.They contended that the adjudicating authority has ignored Notification No. 1/2009-ST Dated 5.01.2009 which exempts the services of appellant till June, 2012 and for the period thereafter exempted vide mega Notification No.25/2012- ST dated 20.06.2012. I find that as per the contract the appellant has charged in the form of transportation rates inclusive of all cost of the truck operator (direct, indirect and incidental to transportation and operation of business including way side expenses, unloading & loading charges during transportation). Transportation charges was derived as per total running during the month i.e. Fixed Cost + Total Variable Cost+ Unloading charges – Deductions & penalty applicable due to transit delay, shortage/damages on transit & non-availability/ non-reporting, in transit temperature losses beyond specified limit); Variable cost was derived on total KM running during the month as agreed upon. Whereas in the transportation service the charges are collected based on the distance and weight of the goods. In GTAservice the service provider issues a consignment note. Whereas the Transporters who are the truck owners are kept outside the purview of taxability as they do not issue consignment notes. In the instant case, the appellant themselves have claimed that they are not owner of the vehicles/fleet hence they shall remain outside the purview of Transporter / Transportation services. The appellant in the instant case has raised invoices on vehicle-wise attendance and Vehicle-wise trip/KM. Thus, I find that the argument put forth by the appellant that they were rendering service of transportation of goods by road is not acceptable. Once it is proved that the appellant was not rendering transportation service, they shall not be eligible for the exclusion claimed under Section 66D(p)(i) of the F.A., 1994 which exempts only the transporters who owns the vehicle and who are not issuing consignment notes. Relevant text is reproduced below;-

*SECTION [66D. **Negative list of services**. — The negative list shall comprise of the following services, namely :—*

*(a) to (o) XXXXX*

*(p) the services by way of transportation of goods—*

*(i) by road except the services of—*

*(A) a goods transportation agency; or*

**7.** In view of the above discussion and findings, I find that the services provided by the appellant is covered under declared service of "*transfer of goods by way of hiring, leasing, licensing or any such manner without transfer of right to use such goods*", defined under clause (f) of Section 66E and therefore the appellant shall not be eligible for the exemption claimed under Section 66D(p)(i) of the F.A., 1994. Hence, the service tax demand of Rs.73,20,196/- is legally sustainable. When the demand sustains there is no escape from the interest liability and the same is also recoverable.

**8.** The appellant deliberately suppressed the actual nature of service rendered and mi-declared the services as transportation service to avail the benefit of inadmissible exemption claimed. This act thereby led to suppression of the value of taxable service and such non-payment of service tax undoubtedly brings out the willful mis-statement and fraud with intent to evade payment of service tax. Hence, the extended period of limitation has been rightly invoked. If any of the circumstances referred to in Section 73(1) are established, the person liable to pay tax would also be liable to pay a penalty equal to the tax so determined above. Therefore, the appellant is also liable for penalty of Rs.73,20,196/- imposed under Section 78.

**9.** As regards, the penalty of Rs.10,000/- imposed each under Section 77 (1)(b) is concerned; I find the same was imposed as the appellant failed to keep, maintain or retain books of accounts and other documents as per the provisions of the law. Hence, penalty under section 77(1)(b) is also sustainable.

**10.** In view of the above discussion, the impugned order is upheld.

**11.** 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.

(ज्ञानचंद जैन)
आयुक्त (अपील्स)
Date: 26.02.2024

Attested

Superintendent (Appeals)
CGST, Ahmedabad

**By RPAD/SPEED POST**

To,
M/s. Hriday Logistics, - **Appellant**
Shiv Shakti Nagar,
Opposite Shyamal Park,
Nikol Naroda Road, Ahmedabad- 382330

The Additional Commissioner - **Respondent**
CGST, Ahmedabad North,
Ahmedabad.

**Copy to:**

1. The Principal Chief Commissioner, Central GST, Ahmedabad Zone.
2. The Commissioner, CGST, Ahmedabad North.
3. The Assistant Commissioner (System), CGST, Appeals, Ahmedabad. (For uploading the OIA)
4. Guard File.