केंद्रीय कर आयुक्त (अपील)

O/O THE COMMISSIONER (APPEALS), CENTRAL TAX,

सत्यमेव जयते

केंद्रीय कर भवन,
सातवीं मंजिल, पोलिटेकनिक के पास,
आम्बावाडी, अहमदाबाद-380015

7th Floor, GST Building,
Near Polytechnic,
Ambavadi, Ahmedabad-380015

☎: 079-26305065

टेलेफैक्स : 079 - 26305136

रजिस्टर्ड डाक ए.डी. द्वारा

क फाइल संख्या : File No : V2(ST)/74/A-II/2017-18
Stay Appl.No. NA/2017-18

732 to 737

ख अपील आदेश संख्या Order-In-Appeal Nos. **AHM-EXCUS-001-APP-272-2017-18**
दिनाँक Date : **25-01-2018** जारी करने की तारीख Date of Issue 6/2/2018

श्री उमा शंकर आयुक्त (अपील) द्वारा पारित
Passed by Shri. Uma Shanker, Commissioner (Appeals)

ग Arising out of Order-in-Original No. **SD-02/05/AC/2017-18** दिनाँक: **28/04/2017** issued by Assistant Commissioner, Central Tax, Ahmedabad-South

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

M/s R.K.Cement Services India Pvt.Ltd.
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 a 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 पूर्वोक्त धारा की 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 प्रक्रिया 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.

(b) 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।

... 2 ...

(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।

(b) 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।

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

अंतिम उत्पादन की उत्पादन शुल्क के भुगतान के लिए जो ड्यूटी 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।

(d) Credit of any duty allowed to be utilized towards payment of excise duty on final products under the provisions of this Act or the Rules made there under and such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec.109 of the Finance (No.2) Act, 1998.

(1) केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001 के नियम 9 के अंतर्गत विनिर्दिष्ट प्रपत्र संख्या इए–8 में दो प्रतियों में, प्रेषित आदेश के प्रति आदेश प्रेषित 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 ओ–20, न्यू मैन्टल हांस्पिटल कम्पाउण्ड, मेघाणी नगर, अहमदाबाद–38C016

(a) To the west regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at O-20, New Metal Hospital Compound, Meghani Nagar, Ahmedabad : 380 016. in case of appeals other than as mentioned in para-2(i) (a) above.

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.

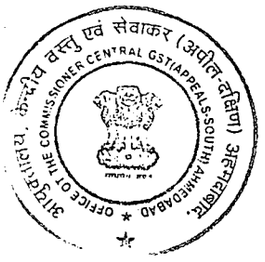
⇨ यह पूर्व जमा 'लंबित अपील' में पहले पूर्व जमा की तुलना में, अपील' दाखिल करने के लिए पूर्व शर्त बना दिया गया है .

For an appeal to be filed before the CESTAT, 10% of the Duty & Penalty confirmed by the Appellate Commissioner would have to be pre-deposited, provided that the pre-deposit amount shall not exceed Rs.10 Crores. It may be noted that the pre-deposit is a mandatory condition for filing appeal before CESTAT. (Section 35 C (2A) and 35 F of the Central Excise Act, 1944, Section 83 & Section 86 of the Finance Act, 1994)

Under Central Excise and Service Tax, "Duty demanded" shall include:
(i) amount determined under Section 11 D;
(ii) amount of erroneous Cenvat Credit taken;
(iii) amount payable under Rule 6 of the Cenvat Credit Rules.

इस 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. R.K. Cement Services (India) Pvt. Ltd., E-3, Nikumbh Complex, Behind Maradia Plaza, C.G. Road, Ahmedabad (STR No. AAACR5075PST001) *(hereinafter referred to as 'appellants assessee')* have filed the present appeals against the Order-in-Original number SD-02/05/AC/2017-18 dated 28.04.2017 *(hereinafter referred to as 'impugned orders')* passed by the Asst. Commissioner, Service Tax, Div-II, Ahmedabad *(hereinafter referred to as 'adjudicating authority')*.

2. The facts of the case, in brief are that appellant is are providing taxable services under the categories of '*Clearing & Forwarding Agent Services*', and '*Supply of Tangible Goods services*', as def ned under section 65(105)(j) and section 65(105)(zzzzj). had entered into agreement with M/s. ACC Concrete Limited [*M/s ACC for brevity*] as a 'Goods Transport Agency' for transport of Ready Mix Concrete (RMC). As per the agreement, the said assessee was to provide Transit Mixers (TMs) with TM supervisor, driver etc. for transportation of ready mix concrete from the plant of M/s. ACC to their customers at the sites on payment of freight on monthly basis. It thus appeared that the service provided by the said assessee falls under the category of '*supply of tangible goods*'. As per agreements, M/s. ACC was paying service tax on reverse charge mechanism under Rule 2(1)(d)(v) considering the same under GTA service and hence the said assessee was not paying any service tax on the income shown in their books of accounts. Accordingly, M/s. ACC was discharging service tax under GTA Service by availing 75% abatement in terms of Notification No.13/2008-ST dated 01.03.2008. However, in view of the aforesaid discussions, the services provided by the assessee to M/s ACC do not fall under GTA but covered under supply of tangible goods service, and hence the said assessee is liable to pay service tax on the services provided by them to M/s. ACC. Since the liability of payment of service tax lies with the assessee, the service tax paid by M/s. ACC by considering the services under GTA cannot be considered for calculation of service tax to be recovered from the said assessee in terms of provision laid down under Section 73.

3. Therefore, SCN issued for years 2008-09 to 2012-13 for recovery of Rs. 89,77,938/-was confirmed by Commissioner service tax, Ahmedabad vide OIO No. AHM-SVTAX-000-COM-19-15-16 dated 10.02.2016. Demand of Rs. 1,56,293/- for period 2015-16 has been confirmed vide impugned OIO U/S 73(1) with imposition of penalty of Rs. 15,629/- u/s 76 r/w section 78B and penalty of Rs. 10,000/- u/s 77(2).

4. Being aggrieved with the impugned order, the appellants preferred an appeal on 25.05.2017 before the Commissioner (Appeals-II), Ahmadabad wherein it is contended by appellant assessee that they have not provided taxable service under the category of supply of tangible goods; that the trucks provided for transportation of goods by road are not machinery, equipment and appliances as defined for the said taxable service; that M/s. ACC is a public limited company which will discharge service tax liability as recipient of service; that the freight is payable as per the agreement based on per cubic meter per km of RMC transported; that only if the right of possession and effective control is not transferred, the services rendered would be classified under the category of 'supply of tangible goods'; that the two conditions of (i) right of possession of goods should not be transferred, and (ii) effective control of goods should not be transferred, are required to be cumulatively fulfilled for classification of the service under the said category; that in the present case, both the possession of goods as well as effective control are with M/s. ACC; and that the ratio of decisions in re *GSLamba and Sons - (2011) 43 VVST 323 and Petronet LNG Limited - 2013-TIOL-1700-CESTAT-DEL are squarely applicable in their case;* that M/s. ACC has to be considered as consignor and the person to whom RMC was transported is to be considered as consignee; that the said assessee would be responsible for the goods while transporting the same is mentioned in the agreement entered into between the assessee; that all the ingredients of GTA service has been fulfilled by them and hence their service would rightly cover under GTA service; that delivery challan issued in their case is to be considered as consignment note as it contains all the ingredients required; that as per rule 2(1)(d)(V) of Service Tax Rules, 1994 M/s. ACC has availed transport service and hence they would pay service tax;

5. Personal hearing in the case was granted on 14.11.2017. Shree Madhu Jain, Advocate appeared before me and reiterated the grounds of appeal.

DISUSSION AND FINDINGS

6. I have carefully gone through the facts of the case on records, grounds of appeal in the Appeal Memorandum and oral/written submissions made by the appellants, evidences produced at the time of personal hearing.

7 Question to be decided classification of service provided by appellant assessee as to whether it is "GTA" as claimed by appellant or *'Supply of Tangible Goods services'*, as defined under section 65(105)(j) and section 65(105)(zzzzj) as alleged by department.

8. As per Section 65 (105)(zzzzj), taxable service (*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. The above definition has become defunct with the advent of comprehensive levy of service tax based on negative list which was introduced with effect from 01.07.2012. Section 65B(44) defines the word "*service*" for the period subsequent to 01.07.2012 and reads as [*underlined for emphasis*]:-

> *"(44) "service" means any activity carried out by a person for another for consideration, and includes a declared service, but shall not include—*
>
> *(a) an activity which constitutes merely,--*
> *(i) a transfer of title in goods or immovable property, by way of sale, gift or in any other manner; or*
> *(ii) such transfer, delivery or supply of any goods which is deemed to be a sale within the meaning of clause (29A) of article 366 of the Constitution, or*
> *(iii) a transaction in money or actionable claim;*
> *(b) a provision of service by an employee to the employer in the course of or in relation to his employment;*
> *(c) fees taken in any Court or tribunal established under any law for the time being in force. "*

9. From above definition it is clear that, service include`s declared service as specified under section 66E. According to clause (f) of the said section 66E, declared service include *'transfer of goods by way of hiring, leasing, licensing or in any such manner without transfer of right to use such goods;"*

11. It is clear that service tax would be leviable in case such supply, hiring or leasing takes place without transferring the right of possession and effective

control to use such TMs. Now question of law is whether or not, the said appellant assessee, had actually transferred the right of possession and effective control to use such TMs (Transit Mixtures) to M/s. ACC,

12 I have examined the said contract. The preamble of the contract reveals that M/s. ACC is a manufacturer and supplier of RMC and mortar and requires its products to be transported from its batching plants to its customers for which they have created and developed a system for the delivery of RMC, and under the said contract, the said assessee wanted to obtain the right to operate part of such system on the terms and conditions specified therein. The said assessee is stated to be the owner of the truck chassis and concrete mixer drum (TM) which he contracts to M/s. ACC to enable transportation of RMC on behalf of M/s. ACC to their customers. Para-3 of the contract covers the nature of relationship between the parties, according to which the said assessee would be an independent contractor who discharges his obligations at an arms length basis, and their drivers or representatives would not be considered as the representative or agent of M/s. ACC. The obligations of M/s ACC are set out as providing initial training to the employees or substitutes of the said assessee and to permit them to operate the business in accordance with the contract. These basic conditions determine the identity of the said assessee as an independent contractor who has been given the right to operate part of a system evolved by M/s. ACC for providing the TMs along with its driver/operator for carriage of RMC on behalf of M/s. ACC. These facts evidently indicate that the TMs or its drivers/operators or any other persons or services rendered by the said assessee do not get assimilated into the identity of M/s. ACC at any point of time. This is further substantiated from the indemnity clause of the contract according to which the said assessee is solely responsible for all sorts of risks, loss or damages that may arise during the provision of contract. They are also responsible for comprehensive insurance for the TMs and would singularly deal with all claims, suits, liabilities, actions, damages to property or life, and M/s. ACC is not at all responsible for even ensuring compliance of such insurance or liabilities clauses by the said assessee.

13 Further, as per the contract, the said assessee is fully responsible for the maintenance of TMs at their expenses and in proper road worthy condition, which are also to be equipped with mobile phones, reverse horns, painting the name of M/s. ACC, etc. The said assessee is also required to give at least 48 hours notice to M/s. ACC before any intended withdrawal of TMs from the

service. As per the compliance clause, the said assessee has been specifically vested with the responsibility to comply with Motor Transport Act in the conduct of the business, pay salaries and wages as per Minimum Wages Act, Labour Acts and all other applicable laws, bye-laws and regulations of a governmental nature applicable to the business or its conduct. Para-8 of the contract specifies that while the said assessee is liable for hassle free maintenance of TMs, except in unforeseen circumstances, they are not allowed to carry out any such maintenance work within the premises of M/s. ACC. These conditions of the contract leaves no scope for doubt that M/s. ACC is in no way concerned with the custody or control of such TMs. Again, Para-7 of the contract refers to a vehicle tracking system which would be supplied by M/s. ACC while the said assessee would preserve such equipment in good order and condition with only the reasonable wear and tear, and the said assessee would return the same on demand by M/s. ACC. I am of the view that this particular clause relating to GPS tracking system makes it abundantly clear that the system as well as the TMs which carry the same are with the custody and control of the said assessee, which they would even be liable to return on demand by M/s. ACC.

14. I find that M/s. ACC agrees to pay service tax as required for GTA services. Accordingly, the said assessee was required to provide M/s. ACC with an invoice/bill/consignment note as per the provisions of Service Tax Rules, 1994 read with Cenvat Credit Rules, 2004 in respect of such taxable service, and follow the rules and procedures as laid down in the said rules from time to time. A harmonious reading of this para leaves no scope for doubt that the said assessee is liable for compliance of all tax laws including service tax, except for a misnomer that service involved is GTA service, and hence service tax is payable on GTA services on reverse charge mechanism with its consequent exclusion from the contract value. Even in this case, the said assessee has agreed to indemnify M/s. ACC against future liability towards tax, penalty, interest, etc.

15. The entire contracts relates to operation and maintenance of TMs by the said assessee on behalf of M/s. ACC. Similarly, availability clause of TMs specifies that the said assessee to make available the TMs 24 hours each day in a month; that any breakdown should be brought to the notice of M/s. ACC;. These clauses reveal that the custody and control of TMs always remain with the said assessee.

16. The operating manual which form part of the annexures to the main contract binds the said assessee to transport products from the plant of M/s. ACC to such destination as they may direct from time to time; that the said assessee will check and ensure that proper documents are given to them for each load of RMC before its transportation from the plant of M/s. ACC; that the said assessee would make every effort to maximize the volume of products transported by them; that they would not divert the TM from one plant to another without consent by M/s. ACC; that the said assessee would ensure that no water or any other substance is added to the RMC carried by them as any such addition would result in serious consequences and the said assessee will be liable for any damages in this regard; that the said assessee would not use the TMs for any other parties other than those specified under the contract; that they would also take all steps to ensure speedy delivery of RMC in case the TMs break down enroute, and any damage to the RMC due to such delay will be indemnified by the said assessee; and that the TMs will be used by the said assessee in a skillful and proper manner safely. These conditions of the contract also indicates that the said assessee has never transferred the actual custody or control of the TMs to M/s. ACC.

17. Notwithstanding the above facts, I find that the present case appropriately falls under the category as 'supply of tangible service' due to the nature of the contract. In this case, the contract acts as a composite one which includes several aspects of the business activities as discussed above. The guiding nature of the composite contract, as emerges from the preamble referred supra, is that the said assessee has obtained the right to operate part of a system evolved by M/s. ACC for the delivery of RMC and has expended substantial, time, money and efforts in the implementation of such system. To be a part of such system, the said assessee has to undertake a large number of activities as discussed in the foregoing paras and transportation/carriage of RMC is only one component of such activities. As per the principles of interpretation of specified descriptions of services as provided under section 66F, reference to the main service shall not include reference to a service which is used for providing main service. Thus, I hold that the main service, by the very nature of the composite contract, is 'supply of tangible goods service' and reference to the same cannot be restricted to 'GTA service' which is used to provide such main service.

18 I find that the question of applicability or otherwise of VAT/Sales Tax on such lease charges is not the subject matter of this proceedings. Further,

the definition of taxable service as provided under section 65 (105)(zzzzj) of the Finance Act, 1994 does not specifically provide that where VAT has been paid, service tax will not be attracted. I further find that para 4.4.3 of the Board's Instructions F.No.334/1/2008-TRU dated 29.02.2008 states that whether a transaction involves transfer of possession and control is a question of fact which is to be decided based on the terms of the contract and other material facts.

19. It is, thus, explicitly clear that in the present case of contracting TMs, effective control is not parted with by the said assessee, and the right of possession, effective control and periodical as well as accidental maintenance of the TMs always rest in the hands of the said assessee. Had it been a case of transfer of effective control, such conditions would not have been agreed upon at the time of entering into the contract. The CBEC's clarification dated 29.02.2008 clearly mentions that transfer of right to use any goods is leviable to sales tax/VAT as deemed sale of goods. Transfer of right to use involves transfer of both possession and control of the goods to the user of the goods. It further clarifies that 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. In the present case, I find no reason or inputs on records even to presume that the said assessee has actually transferred the right of possession or effective control to use the TMs to their clients. Thus, it satisfies both the essential criteria of the definition of taxable service of "supply of tangible goods services" under Section 65 (105)(zzzzj) of the Finance Act, 1994. Since the statute as it exists with effect from 01.07.2012 does not make material difference in the condition regarding transfer of right of possession or effective control to use the goods are concerned and the provisions as it existed before or after 01.07.2012 are *pari materia*, and hence the above position would also stand good for the purpose of section 65B(44) read with section 66E(f). Thus, I hold that the supply of tangible goods in the present case has been made without transferring the right of possession and effective control of such goods which is nothing but a taxable service for the entire period covered in the present SCNs, and hence leviable to service tax at the appropriate rate.

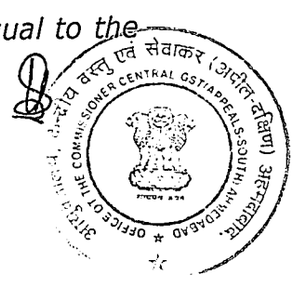
20. In view of the above, I find that all the essential ingredients of the taxable service of "supply of tangible goods services" as defined under

Section 65 (105)(zzzzj) and "service" as covered under section 65B(44) read with section 66E(f) of the Finance Act, 1994 are fully satisfied. In this regard, I place reliance on the judgment in the case of *Indian National Ship Owner's Association v. Union of India (2009) 14 STR 289 (Bombay),* wherein, it is held that providing vessels on time charter basis without giving effective control was covered under Section 65(105)(zzzzj) of the Act. The decisions in the case of *GS Lamba & Sons and Birla Ready Mix (both supra)* are also applicable in the case. The facts and circumstances of case laws cited by the said assessee are different from that of the present case, hence not applicable for the instant case.

21. In view of the above discussions, I hold that the amount of Rs. 10,77,882/- received by the said assessee from their clients during the years 2015-16 towards 'truck operating income' as detailed in the subject SCN as discussed supra, is the taxable value under the category of "supply of tangible goods services" as "service" as defined under section 65B(44) read with section 66E(f) for the period with effect from 01.07.2012, and therefore service tax amounting to Rs. 1,56,293/- on the said taxable value, as discussed in the subject SCN, is recoverable from them under proviso to Section 73(1) of the Finance Act, 1994 along with interest under Section 75 ibid.

22. As regards their arguments for cum-tax benefits, I find from records that the contracts clearly specify that the contract charges charged by the said assessee are exclusive of service tax and hence the aforesaid taxable value cannot be considered as cum-tax value. I place reliance on the decision of *M/s Shakti Motors reported at 2008(12) STR 710(Tri. Ahmd.)* wherein, it has been observed as under:

> *"I am unable to agree with the advocate that the amount realized has to be treated as cum-tax value in view of the provision of Section 67(2) of Finance Act, 1994, which is reproduced below for ready reference:-*
>
> > *"Section 67(2). Where the gross amount charged by a service provider, for the service provided or to be provided is inclusive of service tax payable, the value of such taxable service shall be such amount as, with the addition of tax payable, is equal to the gross amount charged".*



In terms of the above provision if the invoice does not specifically say that the gross amount charged includes service tax, it cannot be treated as cum-service tax price. Therefore, in the absence of any evidence to show that invoices had indeed been prepared in this manner, cum-tax value benefit cannot be extended."

23. They have also argued that the case will be revenue neutral and they would be eligible for Cenvat credit of inputs, input services, fuel, consumable, etc. if liable to pay service tax under 'supply of tangible goods service". In this regard, I find that their claim cannot be accepted. There is a mechanism in the Cenvat credit Rules, 2004 to avail credit of service tax suffered on the input or input services, but the said assessee has not complied with the same. All the procedures prescribed under the Cenvat Credit Rules, 2004 need to be complied if anybody intends to avail Cenvat credit of service tax suffered in their inputs or input service otherwise the mechanism devised by the Government to avoid double taxation will collapse. For the same reasons, I do not accept their claim for revenue neutrality. Another argument was that TMs are motor vehicles which cannot be considered as tangible goods. I do not find any merit on their argument as the statute does not differentiate motor vehicles from the purview of tangible goods, and the list given in the definition as plant, machinery, equipment etc. is only inclusive and not exhaustive.

24. I find that deliberate defiance of law have rendered themselves liable for penalty as provided under section 77(1). With regard to the proposal to impose penalty under Section 76 of the Finance Act, 1994, I find that as discussed above the said assessee failed to pay service tax on the contract charges received from their clients under the category of "supply of tangible goods service", which rendered them liable for penalty under Section 76 of the said Act. I agree with the adjudicating authority in imposing penalty under section 77(1) and under Section 76 of the Finance Act, 1994 and also with the recovery of said service tax with interest u/s 75.

25. In view of above, appeal filed by the appellants is rejected and impugned OIO is upheld.

26. अपीलकर्ता द्वारा दर्ज की गई अपीलो का निपटारा उपरोक्त तरीके से किया जाता है।

26. The appeals filed by the appellant stard disposed off in above terms.

(उमा शंकर)

केन्द्रीय कर आयुक्त (अपील्स)

ATTESTED

(R.R. PATEL)

SUPERINTENDENT (APPEAL),

CENTRAL TAX, AHMEDABAD

To,

M/s. R.K. Cement Services (India) Pvt. Ltd.,
E-3, Nikumbh Complex,
Behind Maradia Plaza,
C.G. Road, Ahmedabad

Copy to:

1) The Chief Commissioner, Central Tax, Ahmedabad South .
2) The Commissioner Central Tax, CGST,Ahmedabad South.
3) The Additional Commissioner, Central Tax , Ahmedabad
4) The Asst. Commissioner, Central Tax, Div-VI, Ahmedabad South
5) The Asst. Commissioner(System), Hq, Ahmedabad South.
6) Guard File.
7) P.A. File.