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
☎ 26305065-079 : टेलेफैक्स26305136 - 079 :

स्पीड पोस्ट

क फाइल संख्या : File No : V2(ST)45/Ahd-South/2019-20/12867 To 12871

ख अपील आदेश संख्या Order-In-Appeal Nos. **AHM-EXCUS-001-APP-055-2019-20**
दिनाँक Date : **30-10-2019** जारी करने की तारीख Date of Issue 01/11/2019

श्री गोपीनाथ आयुक्त (अपील) द्वारा पारित
Passed by Shri **Gopi Nath**, Commissioner (Appeals)

ग Arising out of Order-in-Original No. **04/DC/Div-I/NT/2018-19** दिनाँक: **30.03.2019** , issued by Assistant Commissioner, Div-I, Central Tax, Ahmedabad-South

ध अपीलकर्ता का नाम एवं पता Name & Address of the Appellant / Respondent
Shiv Oilfield & Equipment Hiring 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 aggrieved by this Order-In-Appeal may file an appeal or revision application, as the one may be against such order, to the appropriate authority in the following way :

भारत सरकार का पुनरीक्षण आवेदन :

Revision application to Government of India :

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1994 की धारा अतत नीचे बताए गए मामलों के बारे में पूवोक्त धारा को उप–धारा के प्रथम परन्तुक के अंतर्गत पुनरीक्षण आवेदन अधीन सचिव, भारत सरकार, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, संसद मार्ग, नई दिल्ली : 110001 को की जानी चाहिए।

(i) A revision application lies to the Under Secretary, to the Govt. of India, Revision Application Unit Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi - 110 001 under Section 35EE of the CEA 1944 in respect of the following case, governed by first proviso to sub-section (1) of Section-35 ibid :

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

(ii) In case of any loss of goods where the loss occur in transit from a factory to a warehouse or to another factory or from one warehouse to another during the course of processing of the goods in a warehouse or in storage whether in a factory or in a warehouse.

(क) भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित माल पर या माल के विनिर्माण में उपयोग शुल्क कच्चे माल पर उत्पादन शुल्क के रिबेट के मामलें में जो भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित है।

(A) In case of rebate of duty of excise on goods exported to any country or territory outside India of on excisable material used in the manufacture of the goods which are exported to any country or territory outside India.

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

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

अंतिम उत्पादन की उत्पादन शुल्क के भुगतान के लिए जो डयूटी केडिट मान्य की गई है और ऐसे आदेश जो इस धारा एवं नियम के मुताबिक आयुक्त, अपील के द्वारा पारित वो समय पर या बाद में वित्त अधिनियम (नं.2) 1998 धारा 109 द्वारा नियुक्त किए गए हो।

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

(1) केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001 के नियम 9 के अंतर्गत विनिर्दिष्ट प्रपत्र संख्या इए–8 में दो प्रतियों में, प्रेषित आदेश के प्रति आदेश प्रेषित दिनाँक से तीन मास के भीतर मूल–आदेश एवं अपील आदेश की दो–दो प्रतियों के साथ उचित आवेदन किया जाना चाहिए। उसके साथ खाता इ. का मुख्यशीर्ष के अंतर्गत धारा 35–इ में निर्धारित फी के भुगतान के सबूत के साथ टीआर–6 चालान की प्रति भी होनी चाहिए।

The above application shall be made in duplicate in Form No. EA-8 as specified under Rule, 9 of Central Excise (Appeals) Rules, 2001 within 3 months from the date on which the order sought to be appealed against is communicated and shall be accompanied by two copies each of the OIO and Order-In-Appeal. It should also be accompanied by a copy of TR-6 Challan evidencing payment of prescribed fee as prescribed under Section 35-EE of CEA, 1944, under Major Head of Account.

(2) रिविजन आवेदन के साथ जहाँ संलग्न रकम एक लाख रूपये या उससे कम हो तो रूपये 200/– फीस भुगतान की जाए और जहाँ संलग्न रकम एक लाख से ज्यादा हो तो 1000/– की फीस भुगतान की जाए।

The revision application shall be accompanied by a fee of Rs.200/- where the amount involved is Rupees One Lac or less and Rs.1,000/- where the amount involved is more than Rupees One Lac.

सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपीलः–
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1944 की धारा 35–बी/35–इ के अंतर्गतः–

Under Section 35B/ 35E of CEA, 1944 an appeal lies to :-

(क) उक्तलिखित परिच्छेद 2 (1) क में बताए अनुसार के अलावा की अपील, अपीलो के मामले में सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, अहमदाबाद में 2nd माला, बहुमाली भवन ,असरवा ,गिरधरनागर,अहमदाबाद –380004

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

The appeal to the Appellate Tribunal shall be filed in quadruplicate in form EA-3 as prescribed under Rule 6 of Central Excise(Appeal) Rules, 2001 and shall be accompanied against (one which at least should be accompanied by a fee of Rs.1,000/-, Rs.5,000/- and Rs.10,000/- where amount of duty / penalty / demand / refund is upto 5 Lac, 5 Lac to 50 Lac and above 50 Lac respectively in the form of crossed bank draft in favour of Asstt. Registar of a branch of any nominate public sector bank of the place where the bench of any nominate public sector bank of the place where the bench of the Tribunal is situated.

(3) यदि इस आदेश में कई मूल आदेशों का समावेश होता है तो प्रत्येक मूल ओदश के लिए फीस का भुगतान उपर्युक्त ढंग से किया जाना चाहिए इस तथ्य के होते हुए भी कि लिखा पढी कार्य से बचने के लिए यथास्थिति अपीलीय न्यायाधिकरण को एक अपील या केन्द्रीय सरकार को एक आवेदन किया जाता हैं।

In case of the order covers a number of order-in-Original, fee for each O.I.O. should be paid in the aforesaid manner not withstanding the fact that the one appeal to the Appellant Tribunal or the one application to the Central Govt. As the case may be, is filled to avoid scriptoria work if excising Rs. 1 lacs fee of Rs.100/- for each.

(4) न्यायालय शुल्क अधिनियम 1970 यथा संशोधित की अनुसूचि–1 के अंतर्गत निर्धारित किए अनुसार उक्त आवेदन या मूल आदेश यथास्थिति निर्णयन प्राधिकारी के आदेश में से प्रत्येक की एक प्रति पर रू.6.50 पैसे का न्यायालय शुल्क टिकट लगा होना चाहिए।

One copy of application or O.I.O. as the case may be, and the order of the adjournment authority shall a court fee stamp of Rs.6.50 paise as prescribed under scheduled-I item of the court fee Act, 1975 as amended.

(5) इन ओर संबंधित मामलों को नियंत्रण करने वाले नियमों की ओर भी ध्यान आकर्षित किया जाता है जो सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्याविधि) नियम, 1982 में निहित है।

Attention in invited to the rules covering these and other related matter contended in the Customs, Excise & Service Tax Appellate Tribunal (Procedure) Rules, 1982.

(6) सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट), के प्रति अपीलो के मामले में कर्तव्य मांग (Demand) एवं दंड (Penalty) का 10% पूर्व जमा करना अनिवार्य है। हालांकि, अधिकतम पूर्व जमा 10 करोड़ रुपए है ।(Section 35 F of the Central Excise Act, 1944, Section 83 & Section 86 of the Finance Act, 1994)

केन्द्रीय उत्पाद शुल्क और सेवा कर के अंतर्गत, शामिल होगा "कर्तव्य की मांग"(Duty Demanded) -

(i) *(Section)* खंड 11D के तहत निर्धारित राशि;
(ii) लिया गलत सेनवैट क्रेडिट की राशि;
(iii) सेनवैट क्रेडिट नियमों के नियम 6 के तहत देय राशि.

⇨ **यह पूर्व 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 Shiv Oilfield & Equipment Hiring Private Ltd., 3, Rameshwar Row House, Near Ajay Tenament, Vastral Road, Ahmedabad (hereinafter referred to as 'the appellant) has filed an appeal against the Order-in-Original No.04/DC/Div-1/2018-19 dated 30.03.2019 ('the impugned order') passed by the Assistant Commissioner, CGST, Division-1, Ahmedabad-South Commissionerate ('adjudicating authority').

2. The facts in brief are that the appellant is engaged in supply of Load Carrying Vehicle to M/s Cairn India Limited (for short-CIL) for their use under a contract. During the course of audit of records of the appellant, it appeared that they were providing service viz [i] hiring of cranes of various capacities; and [ii] supply of load carrying vehicle on callout basis. On further verification, it appeared that the appellant considered the service of hiring of heavy lifting vehicles as "supply of tangible goods" and pay service tax; that in respect of hiring of transport of vehicle on callout basis, they considered as "GTA service" and not paying service tax leaving the recipient to pay service tax under Reverse Charge Mechanism. As it appeared that the service of hiring or vehicle on callout basis, provided by the appellant, got covered as "declared service under Section 66E(f) of the Finance Act , 1994 as "transfer of goods by way of hiring, leasing, licensing or in any such manner without transfer of right to use such goods", a show cause notice dated 10.07.2018 pertaining to the period of October 2013 to March 2017 was issued to them for payment of service tax of Rs.8,84,824/- with interest by denying the said service under GTA. The said notice also proposes for imposition of penalty under Section 78 of the Finance Act. The adjudicating authority has confirmed all the allegations and ordered for recovery of short payment of service tax with interest and imposed penalty of Rs.8,84,824/-

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3. Aggrieved with the impugned order, the appellant has filed the present appeal on the grounds that;

- The adjudicating authority erred in fact and in law that services of appellant is not falling under section 66(f) of Finance Act being transfer of goods by way of hiring, leasing, licensing or in any such manner without transfer of right to use such goods upon true construction of contract of transporting with transportation; the adjudicating authority has not appreciated the facts that they do merely execution of work of transportation and service tax which in the case of GTA is responsibility of contractor in terms of Rule 2(1)(d)(B) of Service Tax Rules and the contractor has also discharged the same under reverse charge mechanism.

- Transporting cost was paid to the appellant on kilometer basis and not on the basis of period of hire, lease, license or transfer and in consonance thereof the appellant borne cost of repairs, maintenance cost of driver and cost of regulatory compliance.

- The appellant has disclosed entire turnover and also specified exemption in return for GTA service tax return and hence not evaded or suppressed any fact; that no penalty is imposable as the liability of service tax arose due to interpretation of provisions of law.

4. Hearing in the matter was held on 11.09.2019. Shri Asutosh P Nanavati, Chartered Accountant appeared on behalf of the appellant and reiterated the submissions of appeal memo and also submitted additional submission dated 11.09.2019 for consideration.

5. I have carefully gone through the case records and submission made by the appellant. The issue to be decided in the instant appeal is as to whether the consideration received by the appellant towards hiring of transport of vehicle on callout basis supplied to M/s CIL is to be considered as "GTA service" as contended by the appellant or declared service under Section 66E(f) of the Finance Act , 1994 as "transfer of goods by way of hiring, leasing, licensing or in any such manner without transfer of right to use such goods.

6. I find that the issue involved in the matter is relating to short payment of service tax by the appellant as the department has considered the service of supply of load carrying vehicle on callout basis under declared service falling under Section 66(f) of Finance Act as "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 on the demand made on account of above definition under Section 66(f) of Finance Act , the appellant considered as GTA Service and recipient M/s CIL paid the Service Tax under GTA service under Reverse Charge Mechanism.

7. I find that before introduction of negative list w.e.f 01.07.2012, Section 65 (105) (zzzzj) of the Finance Act defines "Supply of Tangible Goods Services" as follows:

> *"Taxable 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."*

Section 65(105)(zzp) of the Finance Act, *ibid*, defines taxable service under "Goods Transport Agency, as follows:

> *"taxable service means" any service provided or to be provided to any person, by a goods transport agency, in relation to transport of goods by road in a goods carriage.*

Section 65(50b) of the Finance Act, defines Goods Transport Agency Service, as follows:

> *"Goods Transport Agency" means any person who provides service in relation to transport of goods by road and issues consignment note, by whatever name called."*

With effect from 01.07.2012 "Declared services" under Section 66E of Finance Act states that

the following shall constitute declared services, namely :—

(a) to (e)……

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

8. I find that the adjudicating authority has considered the income received by the appellant towards the service rendered by the appellant for the disputed period as declared services under section 66 E (f) of Finance Act i.e "transfer of goods by way of hiring, leasing, licensing in any such manner without transfer of right to use such goods and denied the classification as GTA. To fall within the definition of taxable service of "Supply of Tangible Goods" referred above, mainly two conditions are required to be satisfied - (i) there should be a supply of tangible goods for use; (ii) there should not be any transfer of right of possession and effective control of such goods. Once these two conditions are satisfied, the provisions of section 66 E (f) above will be attracted. To fall within the statute viz. Section 65(50b), which defines the "Good Transport Agency" and taxability on such service under clause of Section 65(105)(zzp) of the Finance Act *ibid*, there should be a service in relation to transport of goods by road coupled with issue of consignment notes.

9. In the instant case, I find that that the appellant used to supply various types of Load carrying vehicle to M/s CIL on callout basis for transportation as per terms and conditions prescribed in the agreement between the appellant and M/s CIL. I find that in para 4 of the impugned order, the adjudicating authority has given details of agreement/contract. He contended that as per agreement/contract, the appellant is technically bound by M/a CIL in terms of the compatibilities of the trucks and the competency of the manpower engaged with such trucks also in as much as they provide specified number of trucks with competent driver & helper etc. I further find that while deciding the case by denying the service under GTA, the adjudicating authority has referred clarification issued by the Board, vide circular No.198/08/2016-ST dated 17.08.2016, wherein, it has been 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 right to use the goods.

10. I find that the adjudicating authority has vehemently mentioned various terms and condition of contracts entered into by the appellant. However, he has not adduced any evidence to challenge submissions of the appellant that the vehicles in question were not a transporting vehicle under GTA. The adjudicating authority has reached the conclusion that "though the goods (trucks) are identified and are available for delivery, all responsibilities regarding maneuvering, maintenance, upkeep, providing drivers, terms regulating drivers, replenishment of trucks etc, are on the shoulders of the appellant. Thus, control of all vehicles

lies with the appellant only. Further, he contended that "right to possess" is quite different and has different meaning from the "possession"; that the agreement/s entered into by the appellant stipulate that they have given the right of use and possession to CIL. However, legal rights of possession of the trucks have not been transferred to CIL as can be derived from various terms and agreements". I do not agree with the above contention of adjudicating authority. I have perused the contract No.4600005277 made between the appellant and M/s CIL for "hiring of heavy lifting equipment on callout basis". As per the compensation schedule of the contract, service tax @12.36% will be inclusive for the case of rental on crane machine and 3.09% on transport service which will be directly payable to Government account by M/s CIL. As per Schedule rate of the vehicle, I find that lifting equipment (crane) will be charged per hours and transporting vehicles will be per km. I find that as per Board's circular dated 17.08.2016 supra, the following criteria to determine whether a transaction involves transfer of the right to use goods, namely, -

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 therefore should be available to the transferee;*
d. *For the period during which the transferee has such legal right, it has to be to 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 right to others.*

11. In the instant case, the appellant supplies goods (trucks) to M/s CIL as per terms and conditions of agreement/contract for using the goods at the specified places of M/s CIL. As per terms and conditions of the contract and service order issued thereof, M/s CIL have all right to use the goods at their discretion and they reserve right to reject any member of the appellant's employees, prior to that member commenting any part of service. The entire work is executed by M/s CIL and not by the appellant. The appellant cannot transfer the goods (trucks) to any other persons during the tenure of contract/agreement. The deployment of drivers and helpers and maintenance of vehicles are part of agreement of hiring the vehicles. In such incidental situation, it cannot be said that the appellant is having all right to use tankers and the possession and effective control are with them during the hired period.

12. I find that similar view has been taken by the Hon'ble High Court of Gauhati in the case of M/s Brahmaputra Valley Construction & Suppliers V/s ONGC Ltd [2018 (14) G.S.T.L. 355 (Gau.)]. In the said decision, the Hon'ble Court has held that:

22. A perusal of the above terms shows that (a) the contract is for hiring of the cranes for carrying out the operations of the ONGC; (b) the scope of work is mentioned to specify the operation in connection with which the cranes are hired; (c) the work is not to be executed by

the contractor but by the ONGC itself; (d) the contractor is to provide cranes on hire in connection with the said work. It appears to have been wrongly assumed that the contractor is to execute the work mentioned in the heading of Scope of work. It is clear from the recital that the scope of work is mentioned as the work for which the cranes were hired; (e) Clause 2.1 shows that the cranes are at the disposal of the ONGC and per day hire charges are paid for all days, except maintenance days; ***(f) services of staff and maintenance are incidental to the hiring of the cranes.*** *Liability to the third party is on account of the fact that in spite of hiring of the cranes by the ONGC, the employees operating the cranes are provided by the assessee. In Mersey Docks and Harbour Board v. Coggins & Griffiths (Liverpool) Ltd. and McFarlane, [1946] 2 All E.R. 345 and in Bhoomidas v. Port of Singapore Authority, [1978 1 All ER 956, it has been held that even if a ship is hired, responsibility for damage to a third party is not of the hirer but of the owner as it is the owner who controlled the manner and working of the employees; (g)* ***it is the ONGC alone which is entitled to exclusively use the cranes and not the assessee.***

23. *On totality of above factors, we, conclude that the transaction clearly involved transaction of right to use."*

Therefore, by following the ratio of the above judgment of Hon'ble High Court of Gauhati and looking into the contract/agreement/service order, mode of payment and other clause narrated in the agreement/contract in the instant case, it is apparent that the appellant have no control over the goods and the personnel deployed by them for the operation being carried out by M/s CIL.

12. In view of above discussion, I find that the activity carried out by the appellant does not covered within the definition of Section 66 E(f) of the Finance Act as the appellant have no control , possession of goods (trucks) and no right to use the tankers as per their specification. M/s CIL, the recipient of the goods (trucks), have all the control, possession and right to use the goods (trucks). Since the control, possession and right to use the goods lies with M/s CIL, service tax demanded as per definition of Section 66 E of Finance Act is not correct and not sustainable. In this regard, I rely decision of the Hon'ble Tribunal, Delhi in the case of Commissioner of Service Tax, Delhi V/s ITD ITD CHEM JOINT VENTURE [2019 (24) GSTL 568-Tri Del]. Para 5 of the said decisions reads as under:

"5. We have considered the facts and heard both sides. It is seen that in similar circumstances, CESTAT in the case of Petronet LNG Ltd. (supra) held as under :

"The transactions in issue amount to transfer of the right to use tangible goods, with possession and effective control of such goods, in favour of the assessee by owners of the tankers. These transactions fall within the ambit of the exclusionary clause of Section 65(105)(zzzzj) of the Act and are therefore immune to the liability to service tax."

Further, I find that the Hon'ble Tribunal, Allahabad has pronounced a judgment on similar issue in the case of M/s GPL Polyfils [2019 (27) GSTL 395], wherein it has been held that the

right of possession, effective control and supervision lies with recipient of Machine supplied by appellant and accordingly, said supply not covered under supply of tangible goods. The Hon'ble Court further held that mere non-payment of VAT would not make supply taxable, there being no such stipulation in definition of services ibid- while payment of VAT may be conclusive of deemed sale, its non- payment does not necessarily lead to contrary conclusion. Relevant para is reproduced below:

> *4. As regards the supply of Bailing Press Machine to a third party person, we note that the Lower Authorities have referred to the various clauses of the agreement establishing that the right of possession shall rest with the user who would be having overall supervision and effective control of the machines. In terms of the definition of "Supply of Tangible Goods", the activity would not be considered as taxable services if the right of possession and effective control of the machine is transferred to the recipient of the machines. The payment or nonpayment of VAT is not one of the requisite condition of the definition of Supply of Tangible Goods. It is settled law that no condition Service Tax Appeal No.70840 of 2018-CU[DB] 5 or requirement, which is not a part of the definition can be introduced by the adjudicator. No doubt the payment of VAT would establish the transaction to be a deemed sale and thus not covered by the definition but nonpayment by itself does not lead to the contrary, especially when it stands established from the agreement entered between the parties that the supply was alongwith possession and effective control of the machines. As such, we find no reasons to confirm the service tax demand of Rs.74,469/- confirmed for the period 2010-11. Accordingly the same is set aside alongwith setting aside of penalty."*

13. Recently, the Hon'ble Tribunal, Delhi in case of Commissioner of ST V/s S.K. & Company [2019 (28) GSTL) 56] has decided the issue similar to the instant case, wherein, they held that:

> *"5. We find that the adjudicating authority has reached to the conclusion that the respondent-assessee have not been engaged in the activity of Site Formation and Clearances, Excavation and Earth moving service as alleged in the impugned show cause notice, rather they have been only supplying earth moving machines like excavators etc. on rental basis and the physical control and possession of these machines have always remained with the clients who have actually hired such machines. We find that the department in their appeal has not adduced any evidence to controvert the finding of the learned adjudicating authority. We also find that the learned Commissioner has also examined the activity of respondent-assessee whether same can be classified as supply of tangible goods and has held that since the possession of the machines and effective control of same have remained with the persons who have hired these machines and thus,same can also not be classified as supply of tangible goods. We find that in all the three show cause notices, the demand has been made under the category of Site Formation and Clearances, Excavation and Earth moving and Demolition services and after detailed examination of agreements and invoices etc., the learned adjudicating authority has held that the amount received by the respondent assessee are not for the services of site formation, as stated in preceding para, the department has not adduced any evidence to substantiate their claims in this regard. Thus, we are in full agreement with the finding of the adjudicating authority with regard to the determination of classification of activity undertaken by the respondent-assessee which has been determined by him on the basis of detailed examination of agreement, invoices and other documents."*

14. In view of above discussion and by following the decisions the Hon'ble High Court of Gauhati, Hon'ble Tribunal Delhi and Allahabad, supra, I find that the activity in dispute in the instant case is not falling within the ambit Section 66E (f) of Finance Act as "transfer of

goods by way of hiring, leasing, licensing or in any such manner without transfer of right to use such goods".

15. Further, in the instant case, the appellant has contended that the service tax has been paid by M/s CIL under the category of 'Goods Transport Agency Service' under reverse charge mechanism. The appellant has further argued that they issued log sheets which contain all the details of transportation. As per Section 65 (50b) of the Finance Act, 'Transport Agency Service *means any person who provides service in relation to transport of goods by road and issues consignment note, by whatever name called."* Further, Section 65 B (26) of the Finance Act also interprets 'Goods Transport Agency' as the same meaning. In this case, the appellant has submitted copy of 'log sheet' maintained by them during the course of trucks operated M/s CIL, which is one of the conditions of service order. On perusal of the said log sheet, I find that they mentioned, Vehicle No. and other details viz., date and time, milage covered, place visited, purpose of visit and signature of user and driver. The explanation regarding consignment note mentioned under Rule 4B of Service Tax Rules, 2004 is as under:

> *'Explanation - For the purposes of this rule and the second proviso to rule 4A, "consignment note" means a document, issued by a goods transport agency against the receipt of goods for the purpose of transport of goods by road in a goods carriage, which is serially numbered, and contains the name of the consignor and consignee, registration number of the goods carriage in which the goods are transported, details of the goods transported, details of the place of origin and destination, person liable for paying service tax whether consignor, consignee or the goods transport agency.'*

In the instant case, as observed above, the appellant has supplied various types of trucks to M/s CIL and M/s CIL carried out the activity by using the said trucks as transportation service. However, the appellant maintained documents i.e log sheet for transporting materials, by mentioning all required details therein, as per agreement/contract. In the circumstances, I am of the opinion that the convey note i.e log sheet maintained by the appellant can be termed as consignment note as per explanation under Rule 4 B of Service Tax Rules.

16. Further, on going through the various services before the introduction of negative list concept (which has done away with positive list), it would be seen that there is no pattern or mutual exclusivity in the scope of various services. In Customs and Central Excise Tariff the classification of the goods is based on highly scientific pattern. In case of Service Tax, however, various services were brought into the tax net from 1994 onwards on *ad hoc* basis. There is no pattern in the order the services were brought under the tax net. Descriptions of the services are not mutually exclusive. Some of the services are very specific and precise while some are wide in scope. This is the reason that recourse needs to be taken to Section 65A of Finance Act for classifying particular services at a particular point of time. As per Section 65A of the Finance Act, if a service is classifiable under two or more sub-clauses of clause (105) of Section 65, *Classification shall be effected to the sub-clause which provides the most specific description to sub-clauses providing a more general description.*

17. Further, I find that the mode of payment made to the appellant by the M/s CIL for the activity in question is as per distance travelled. In other words, the payment is based on actual kilo meter travelled by the vehicle. This indicates that the payment discharged by them to the appellant is not based per trucks hired or used per hour. In this context also, it is evident that the appellant is not providing 'supply of tangible goods' but Goods transport Agency service'.

18. From the above discussion, I find that the activity under consideration is more specifically covered under the category "Goods Transport Agency Service", as the activity does not fall within ambit of definition of Section 66E(f) of Finance Act.

19. In this backdrop, I set aside the impugned order and allow the appeal filed by the appellant. The appeal stands disposed of accordingly.

(Gopi Nath)
Commissioner (Appeals)
Date : .10.2019

Attested

(Mohanan V.V)
Superintendent (Appeals)
Central GST, Ahmedabad

R.P.A.D

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2. The Principal. Commissioner, CGST, Ahmedabad South
3. The Addl./Joint Commissioner, (Systems), CGST, Ahmedabad South
4. The Dy. / Asstt. Commissioner, CGST, Divison-1, Ahmedabad South.
5. Guard file.
6. P.A.