आयुक्त(अपील)का कार्यालय,
Office of the Commissioner (Appeal),

केंद्रीय जीएसटी, अपील आयुक्तालय,अहमदाबाद
Central GST, Appeal Commissionerate, Ahmedabad
जीएसटी भवन, राजस्वमार्ग, अम्बावाड़ीअहमदाबाद३८००१५.
CGST Bhavan, Revenue Marg, Ambawadi, Ahmedabad 380015
☎ 07926305065 - टेलेफैक्स07926305136

DIN : **20230664SW000000B6B2**

स्पीड पोस्ट

क फाइल संख्या : File No : GAPPL/COM/STP/3083/2022 /1907 - 11

ख अपील आदेश संख्या Order-In-Appeal No. **AHM-EXCUS-001-APP-49/2023-24**
दिनाँक Date : **30-05-2023** जारी करने की तारीख Date of Issue 01.06.2023

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

ग Arising out of OIO No. **22/CGST/Ahmd-South/JC/NB/2022-23** दिनाँक: **14.09.2022** passed by Joint Commissioner, CGST, Ahmedabad South

ध अपीलकर्ता का नाम एवं पता Name & Address

Appellant

M/s Dharmshil Agencies
Dharmshil House,
Ashirwad Paras Corporate House,
Corporate Road, Prahladnagar,
Ahmedabad - 380015

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 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।

(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 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.

(2) 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 भुगंतान 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 :-

(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 होत 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 शुल्कअधिनियम 1970 यथासंशोधित की अनुसूचि–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 कान्यायालय 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 is invited to the rules covering these and other related matter contended in the Customs, Excise & Service Tax Appellate Tribunal (Procedure) Rules, 1982.

46ण सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण(सिस्टेट),के प्रतिअपीलो 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)-

a. *(Section)* खंड 11D के तहत निर्धारित राशि;
इण लिया गलत सेनवैट क्रेडिट की राशि;
बण 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:

(iv) amount determined under Section 11 D;
(v) amount of erroneous Cenvat Credit taken;
(vi) amount payable under Rule 6 of the Cenvat Credit Rules.

इस आदेश के प्रति अपील प्राधिकरण के समक्ष जहाँ शुल्क अथवा शुल्क या दण्ड विवादित हो तो माँग किए गए शुल्क के 10% भुगतान पर और जहाँ केवल दण्ड विवादित हो तब दण्ड के 10% भुगतान पर की जा सकती है।

In view of above, an appeal against this order shall lie before the Tribunal on payment of 10% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute."

ORDER-IN-APPEAL

The present appeal has been filed by M/s. Dharmshil Agencies, Dharmshil House, Ashirwad Paras Corporate House, Corporate Road, Prahladnagar, Ahmedabad – 380 015 (hereinafter referred to as the "appellant") against Order in Original No. 22/CGST/Ahmd-South/JC/NB/2022-23 dated 14.09.2022 [hereinafter referred to as "*impugned order*"] passed by the Joint Commissioner, CGST, Commissionerate : Ahmedabad South [hereinafter referred to as "*adjudicating authority*"].

2. Briefly stated, the facts of the case are that the appellant were holding Service Tax Registration No. AAEFD5653NST001. The appellant were engaged in providing Business Auxiliary Services and Repair and Maintenance Services. During the course of audit of the financial records of the appellant, it was observed that they had booked an income amounting to Rs. 8,32,05,000/- for the period from October, 2013 to June, 2017 towards Lease Rent Income. It was seen that the appellant had entered into a lease agreement dated 03.10.2009 with M/s. Arvind Ltd. (hereinafter referred to as 'Arvind') for leasing machinery owned by them for a period of eight years, starting from 1st January, 2010. The rent income was fixed at Rs. 18,49,000/- per month. This lease rent income was booked by the appellant as income in their financial records. It appeared that the activity of leasing machinery for a consideration is not covered under the Negative List of Services under Section 66D of the Finance Act, 1994. It further appeared that there is no exemption granted to such activity under any Notification. Therefore, it appeared that the leasing of machinery by the appellant was within the definition of service under Section 65B (44) of the Finance Act, 1994. Accordingly, it appeared that the appellant were liable to pay service tax amounting to Rs. 1,13,47,313/- on this amount.

2.1 The appellant were called for pre-Show Cause Notice consultation on 12.04.2019. However, they did not appear for the same. Therefore, the appellant were issued SCN on 12.04.2019. The appellant challenged the SCN, issued without following Instruction issued from F.No. 1080/09/DLA/M/SC/15 dated 21.12.2015, 1080/DLA/CC Conference/2016 dated 12.01.2016 and Master Circular No. 1053/02/2017-CS dated 10.03.2017, by way of Special Civil

Application No. 8255 of 2019 before the Hon'ble High Court of Gujarat. The Hon'ble High Court vide Order dated 23.07.2021 set aside the SCN and directed to give the appellant reasonable opportunity of making consultation and thereafter issue SCN on being satisfied for issuance of the same. Accordingly, the appellant were granted pre-SCN consultation on 25.08.2021 and thereafter, issued Show Cause Notice bearing No. GADT/Tech/SCN/ST/14/2021-Tech and Legal dated 16.09.2021 wherein it was proposed to :

a) Recover the service tax amounting to Rs. 1,13,47,313/- under the first proviso to Section 73(1) of the Finance Act, 1994 along with interest under Section 75 of the Finance Act, 1994.

b) Impose penalty under Section 78(1) of the Finance Act, 1994.

3. The SCN was adjudicated vide the impugned wherein :

I. The service tax amounting to Rs. 1,13,47,313/- was confirmed under the proviso to Section 73 (1) of the Finance Act, 1994 along with interest under Section 75 of the Finance Act, 1994.

II. Penalty amounting to Rs. 92,90,485/- was imposed under Section 78(1) of the Finance Act, 1994.

4. Being aggrieved with the impugned order passed by the adjudicating authority, the appellant have preferred the present appeal on the following grounds :

i. There appears to be an error in appreciating the ownership of the machinery and the possession and control of the machinery. It is undisputed that they continue to remain owner of the machinery. There is no sale of the machinery.

ii. The person taking the machinery on lease would put it to use and, therefore, the impugned machineries are definitely put to use, which is also not in dispute. They are not concerned with the manner of use by Arvind. The SCN also accepts that they had provided the machinery for use. There is no evidence or allegation that the use is with them or within their control.

iii. The machines leased were in the physical possession of Arvind and were operated by them and the machinery was under the control of Arvind.

The possession, control and use of the machinery was with Arvind, though they could not otherwise part with the machinery.

iv. They are not able to apprehend how the department has found that there is no transfer of right of possession and effective control.

v. The legal ownership continues to be with them but the possession is with the Lessee. In these circumstances, the conclusion sought to be drawn in the SCN is not even remotely supported by the lease agreement. The activities are outside the scope of taxable services and no tax as demanded is payable.

vi. The SCN was issued without jurisdiction and is void. The SCN issued by the Joint Commissioner, Audit is wholly devoid of jurisdiction and contrary to the spirit and intent of the Finance Act, 1994 and the order passed by the Hon'ble Supreme Court.

vii. The Central Excise Officer empowered to issue SCN under Section 73 of the Finance Act, 1994 is only the jurisdictional officer and the Audit Commissionerate Officers, therefore, cannot be considered as 'the' 'Central Excise Officer' empowered to issue SCN. Thus the present SCN is without jurisdiction.

viii. In the case of ITC Ltd. Vs. Commissioner of Central Excise – 2019 (368) ELT 216 (SC), the Hon'ble Supreme Court had in the context of similar definition of the term 'assessment' under the Customs Act, 1962 held that assessment includes self-assessment.

ix. It is well known that where the statute confers the power to perform an act on different officers, especially when they belong to different departments, they cannot exercise their powers in the same case. Where one officer has exercised his powers of assessment, the power to order re-assessment must also be exercised by the same officer or his successor and not by another officer of another department.

x. They rely upon the decision of the Supreme Court in the case of Commissioner of Customs Vs. Sayed Ali – 2011 (265) ELT 17 (SC) which was approved by the Hon'ble Supreme Court in the case of Canon India (P) Ltd Vs. Commissioner of Customs – 2021-VIL-34-SC.

xi. Section 73 of the Finance Act, 1994 is also based on the above principle. Applying the ratio of the above decision in the context of the Finance Act, 1994, "the" Central Excise officer is the officer within whose jurisdiction

the assessee obtains registration, pays taxes, files returns and comply with all other formalities and compliances under the Act.

xii. Thus, apart from providing for a particular officer who can issue SCN, it also contemplates that the adjudication of the SCN shall be done by 'the' same Central Excise Officer who has issued the SCN.

➢ Reliance is placed upon the decision in the case of Consolidated Coffee Ltd. & Anr. Vs. Coffee Board, Bangalore – (1980) 3 SCC 358; Shri Ishar Alloy Steels Ltd. Vs. Jayaswal Neco Ltd.- (2001) 3 SCC 6091; Canon India (P) Ltd Vs. Commissioner of Customs – 2021-VIL-34-SC-CIJ.

xiii. Hence, the SCN issued by the Joint Commissioner, Audit Commissionerate is without jurisdiction and contrary to the provisions of the Finance Act, 1994. Accordingly, the impugned order is liable to be set aside.

vi. The pre-consultation was before Joint Commissioner, Audit. Since the Joint Commissioner, Ahmedabad South is the adjudicating authority and since no pre-consultation was done by his office, the effect is as if no pre-notice consultation was done. This would render the notice void. Reliance is placed upon the Instructions dated 08.07.2016, 13.07.2016 and Master Circular dated 10.03.2017.

vii. The proposal raised in the SCN is without appreciating the relevant clauses of the agreement entered into with Arvind and also overlooking the provisions of the Finance Act as well as the judgments on the said issue. It is a settled legal position that where there has been a transfer of right to use, the same would be treated as an instance of deemed sale attracting levy of sales tax and in such cases, service tax would not be attracted.

viii. By virtue of sub-clause (d) to clause 29A of Article 366 of the Constitution of India, the transfer of right to use any goods for any purpose if deemed to be a sale of those goods by the person making the transfer and such transaction would be liable to Sales Tax/VAT.

ix. Their contention of there being transfer of right to use has not been disputed. Appropriate sales tax has also been discharged by them on the receipt of lease rent. Accordingly the activity was within the scope of Clause (29A) of Article 366 of the Constitution of India and hence, excluded from purview of taxable services under the Finance Act.

x. All the relevant details regarding the transaction were part of their statutory records and hence, were within the knowledge of the authorities who had conducted audit in the past.

xi. Even post 01.07.2012, any transaction involving supply of tangible goods or transfer of goods by way of hiring, leasing or licensing with the right to use such goods shall be deemed as a sale and attract sales tax levy.

xii. Reliance is placed upon Circular No. 198/08/2016-Service Tax dated 17.08.2016 and the judgment in the case of Bharat Sanchar Nigam Limited Vs. UOI – 2006 (2) STR 161 (SC); G.S.Lamba and Sons Vs. State of A.P. – 2015 (324) ELT 316 (A.P); Gimmco Ltd. Vs. Commissioner of C.Ex., & S.T., Nagpur – 2017 (48) STR 476 (Tri.-Mum,); Universal Dredging and Reclamation Corporation Ltd. Vs. Commissioner of CGST and Central Excise – 2020 (78) GSTL 244 (Tri.-Chennai); Order dated 25.04.2016 in the case of Aims Pharma Pvt. Ltd. Vs. C.C.E & S.T., Vadodara-I in ST Appeal No. 111493 of 2016.

xiii. The payment of VAT in accordance with the Gujarat Value Added Tax Act, 2003 has sought to be undermined by suggesting that they had wrongly paid VAT as the case was not of inter state sale. However, it may be appreciated that the authorities under the said regime have not raised any doubt or dispute and, hence, the assertion that they had wrongly paid VAT is without any basis.

xiv. The demand is time barred. There is no allegation or evidence to suggest any contravention, suppression or misstatement on their part with an intention to evade payment of duty. In such circumstances, the benefit of extended period would not be available to the department.

xv. All the transactions have been recorded in their audited books of accounts and balance sheet which are scrutinized by the departmental officers at the time of audit.

xvi. Reliance is placed upon the judgment in the case of Hindalco Industries – 2003 (161) ELT 346, Kirloskar Oil Engines Ltd. Vs. CCE, Nashik – 2004 (178) ELT 998 and Martin and Hariss Laboratories Ltd. Vs. Commissioner – 2005 (185) ELT 421.

xvii. Regarding issue of suppression and invocation of extended period, reliance is placed upon the judgment in the case of Padmini Products – 1989 (43) ELT 195 (SC); Chemphar Drugs and Liniments – 1989 (40)

ELT 276 (SC); Continental Foundation Jt. Venture Vs. CCE, Chandigarh – 2007 (216) ELT 177 (SC).

xviii. When there is no justification in demand of duty, no penalty could be lawfully or justifiable imposed. Reliance is placed upon the judgment in the case of Hindustan Steel Limited – 1978 ELT (J159).

xix. The present case is not a case of any tax not levied or short levied or erroneously refunded and hence the provision pertaining to interest are not applicable. Interest liability would arise only when any duty was liable to be paid as determined under the said Act.

xx. In respect of Revenue Para 1, they had not availed cenvat credit during the period in question and, hence, the observation of the department is factually wrong.

xxi. In respect of Revenue Para 2, they had reported their turnover properly in the returns filed by them. There was no short disclosure of turnover and consequently no short payment of tax. The department had not considered the excise returns and service tax returns filed by the for F.Y. 2016-17 and F.Y. 2017-18.

xxii. In respect of Revenue Para 3, it is submitted that they had filed all their returns regularly and in time. The said fact has not been verified by the department before passing the impugned order.

xxiii. Regarding Revenue Para 4, it is submitted that they agree with the observation of the department and they had made payment through DRC-03 dated 06.05.2022.

xxiv. Regarding Revenue Para 5, it is submitted that they agree with the observation of the department and they had made payment through DRC-03 dated 06.05.2022.

xxv. They had regularly filed their returns and there has been no suppression nor any wilful misstatement. They have also filed their audited Balance Sheet disclosing all the information. Hence, penalty should not be imposed.

xxvi. Interest is payable for non payment or delay in payment of duty. As there is no liability of duty, interest is also not payable.

xxvii. Extended period cannot be invoked as there is no wilful misstatement. This can be vouched on the basis of their filing returns under various tax laws and also audited Balance Sheet with Income Tax department disclosing all information. The SCN is, hence, time barred.

5. Personal Hearing in the case was held on 03.03.2023. Shri Shridev J. Vyas, Advocate, appeared on behalf of appellant for the hearing. He reiterated the submissions made in appeal memorandum. He stated that a part of the demand is beyond the limitation under extended period. He stated that he would make a further written submission. However, the appellant did not submit any further written submission.

6. I have gone through the facts of the case, submissions made in the Appeal Memorandum, the submissions made during the personal hearing and the materials available on records. The issue before me for decision is whether the appellant are liable to pay service tax on the lease rent income received by them by way of leasing of Machinery to M/s. Arvind. The demand pertains to the period from October, 2013 to June, 2017.

7. Before dealing with the merits of the present appeal, I take up the issue regarding jurisdiction of the Joint Commissioner, Audit to issue the impugned SCN. In this regard, it is observed that the appellant had raised this issue before the adjudicating authority and the same was dealt with at Para 41 to 45 of the impugned order by the adjudicating authority. The appellant have in the present appeal not controverted the findings of the adjudicating authority and neither have they come forward with any new grounds on the issue of jurisdiction, which requires a decision by this authority. Therefore, I do not find any reason to deal with the issue of jurisdiction raised by the appellant.

8. The appellant have, in their appeal memorandum as well as in the course of the personal hearing, also raised the ground of limitation. In this regard, it is observed that the impugned SCN was issued on 16.09.2021 demanding service tax for the period from October, 2013 to June, 2017. The appellant were earlier issued SCN on 12.04.2019, which was set aside by the Hon'ble High Court of Gujarat vide Order dated 22.07.2021. However, the Hon'ble High Court had allowed the department to issue fresh SCN after following the process of pre-SCN consultation and the appellant were directed to extend full co-operation and not raise the issue of limitation in respect of the demand, as the action of raising the demand was taken by the department within the prescribed time limit. The ST-3 returns for the period from October, 2013 to

March, 2014 is to be filed by the 25th of April, 2014 in terms of Rule 7(2) of the Service Tax Rules, 1994. The impugned SCN was issued initially on 12.04.2019 and in terms of the Order dated 23.07.2021 of the Hon'ble High Court of Gujarat, the appellant cannot raise the issue of limitation. Considering these facts, I am of the considered view that there is no merit in the contention of the appellant as regards limitation.

9. Coming to the merits of the present appeal, it is alleged in the SCN issued to the appellant, that they have provided taxable service as contemplated under Section 65B (44) of the Finance Act, 1994. The relevant portion of the text of the said section is reproduced below :

> "" 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;"

9.1 It is observed that while Section 65B(44) of the Finance Act, 1994 defines 'service', Section 66D of the Act is in respect of the Negative List of Services and Section 66E is in respect of Declared Services. It is observed that the department has, in the impugned SCN, not specified the nature of the service provided by the appellant and it has been only alleged that the activity carried out by the appellant is a service in terms of Section 65B (44) of the Finance Act, 1994. Having gone through the facts of the case, I find that the activity carried out by the appellant, i.e., leasing of machinery, is covered under Section 66E(f) of the Finance Act, 1994, which is reproduced below :

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

9.2 However, since the SCN does not allege that the activity carried out by the appellant is covered under Section 66E(f) of the Finance Act, 1994, I refrain from deliberating upon the issue in dispute in terms of the said Section and proceed to examine the issue in terms of the provision of law invoked in the impugned SCN.

9.3 As stated hereinabove, the department has merely alleged that the appellant are providing a service as provided under Section 65B(44) of the Finance Act, 1994. The appellant have, on the other hand, contended that their leasing machinery to Arvind involves 'transfer of right to use' and is accordingly, excluded from the purview of service tax in terms of Section 65B(44) (a)(ii). It is observed that clause (29A) of Article 366 of the Constitution of India is in respect of 'tax on the sale or purchase of goods and sub-clause (d) of clause (29A) is in respect of "*a tax on the transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment of other valuable consideration*". It, therefore, is clearly evident that 'transfer of right to use any goods for any purpose' is excluded from the definition of service in terms of Section 65B(44)(a)(ii) of the Finance Act, 1994 by virtue of it being deemed to be a sale within the meaning of clause (29A) of Article 366 of the Constitution of India.

10. At this juncture, I find it pertinent to refer to Circular No. 198/08/2016-Service Tax dated 17.08.2016 issued by the CBIC, the relevant portion of which is reproduced below :

> "2. The matter has been examined. I am directed to draw your attention to the fact 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 Supreme Court in the case of *Bharat Sanchar Nigam Limited* v. *Union of India*, reported in 2006 (2) S.T.R. 161 (S.C.), had laid down 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 therefor 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.
>
> 3.1 This criteria must invariably be followed and applied to cases involving hiring, leasing or licensing of goods. The terms of the contract must be studied carefully vis-a-vis the criteria laid down by the Supreme Court in order to determine whether service tax liability will arise in a given case. It is not possible to either give an exhaustive list of illustrations or judgements on this issue. Cases decided under the Sales Tax/VAT legislations have to be

considered against the background of those particular legislative provisions and terms of contract in that case."

10.1 The issue on hand is required to be examined in terms of the above referred Circular. It is not a matter of dispute that there are goods available for delivery and the same have been delivered and installed at the premises of Arvind. The appellant have entered into a Lease Agreement dated 03.10.2009 and the tenure of the lease is for eight years. On perusal of the said agreement, it is observed that the identity of the goods are as per the First Schedule to the agreement between the appellant and Arvind. In terms of clause 3.2 and 3.4 of the said agreement, the appellant have the right to use the leased machinery and the lessee is required to comply with all laws and regulations relating to possession, operation and use of the said machinery and assumes all risks and liabilities arising from or pertaining to the possession, operation or use of the said machinery. Para 4.2 of the said agreement stipulates that upon the lessee paying the rent and observing all conditions of the agreement, they shall be entitled to hold, possess and enjoy the said machinery during the tenure of the agreement without any interference or disturbances by the lessor i.e. the appellant or any other person. Further, in terms of clause 4.3 of the said agreement, the appellant undertakes not to sell or transfer the leased machinery during the lease period to any party so long as the lessee complies with the obligations mentioned in the agreement. In view of these conditions in the said agreement between the appellant and Arvind, I am of the considered view that the five conditions enumerated by the CBIC in the above referred Circular dated 17.08.2016 stand complied with and, therefore, the transaction of leasing the said machinery by the appellant to Arvind is with transfer of right to use the said machinery.

10.2 In the impugned order, the adjudicating authority has recorded at Para 17 that "*In the present case, the effective control and possession of goods remains with the lessor and the lesee has been merely given right to use the goods i.e. textile machinery and therefore there is no transfer of right to use in this case*". It has also been held that criteria (c) of the judgment of the Hon'ble Supreme Court in the case of BSNL and Board's Circular dated 17.08.2016 has not been fulfilled. Further, the adjudicating authority has at Para 59 of the impugned order recorded his finding that criteria (e) of the BSNL judgment has also bot been satisfied.

10.3 I have perused the agreement between the appellant and Arvind as well as the clauses referred to in the impugned order and find that the above allegation in the SCN is fallacious inasmuch as the clauses of the said agreement only stipulate that the ownership of the leased machinery does not change and remains with the Lessor, i.e., the appellant. Further, the clauses referred to clearly indicate that during the tenure of the lease, the machinery would be in the possession of the lessee, i.e., Arvind. It is pertinent to refer to clause 4.5 of the agreement which stipulates that "*Normally Lessor shall carry out the undertaking repair, maintenance of the said machinery. However, in exceptional cases it shall permit and allow the Lessee to maintain and repair the said machinery for the beneficial enjoyment and continuous use of the said machinery by the lessee*". The language employed in the clauses of the agreement makes it amply clear that while the ownership of the machinery remain with the appellant, the lessee, i.e., Arvind have the right to use of the machinery during the tenure of the lease.

10.4 The CBIC had vide Circular dated 17.08.2016 clarified that the five criteria laid down by the Hon'ble Supreme Court in the BSNL judgment must invariably followed and applied to cases involving hiring, leasing or licensing of goods. These five criteria are reproduced in Para 10 above. In the impugned SCN, criteria (c) has been alleged to have been not fulfilled. In this regard, I find it relevant to refer to clause 3.4 of the agreement between the appellant and Arvind, the relevant portion of which is reproduced below :

> "Lessee agrees to comply with all laws, regulations and orders relating to the possession, operation and use of the "Said Machinery" and assumes all risks or liabilities arising from or pertaining to the possession, operation or use of the "Said Machinery".

10.5 It is observed from clause 3.4 of the agreement between the appellant and Arvind that the said criteria (c) of the BSNL judgment stands complied with inasmuch as all legal consequences including permissions or licenses are to be complied with the lessee i.e. Arvind.

10.6 Further, criteria (e) of the BSNL judgment stipulates that "*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*". In this

regard, I find it pertinent to refer to clause 4.3 of the said agreement between the appellant and Arvind, which is reproduced below :

> "The Lessor undertakes not to sell or transfer the same during the lease period to any party so long as Lessee is complying with the obligations mentioned in this agreement".

10.7 It is evident from the above clause of the said agreement that the appellant cannot sell or transfer the said machinery leased to Arvind during the tenure of the lease period. This clearly indicates that for the duration of the lease period, the right to use the said machinery is with the Lessee i.e. Arvind. Accordingly, criteria (e) of the BSNL judgment stands fulfilled.

10.8 Since the agreement between the appellant and Arvind complies and fulfills the five criteria laid down by the Hon'ble Supreme Court in the BSNL jusgment, it would be erroneous to impute that there is no transfer of right to use the machinery. Once it is established that there is a transfer of right to use the machinery, it is deemed to be sale within the meaning of clause (29A) of Article 366 of the Constitution and accordingly, it stands excluded from the purview of 'service' as defined under Section 65B (44) of the Finance Act, 1994.

11. The appellant have also contended that they are paying Sales Tax/VAT under the Gujarat Value Added Tax Act, 2003. The department has, on the other hand, alleged that the appellant had paid Sales Tax/VAT with a view to evade service tax which is levied and charged at a rate higher than the Sales Tax/VAT. However, it is observed that the department has not adduced any evidence to establish that the appellant had wrongly paid Sales Tax/VAT. Be that as it may be, there is no material on record that the payment of Sales Tax/VAT has been held to be wrongly paid by the jurisdictional Sales Tax/VAT authorities. Consequently, the allegation made by the department on this count is entirely devoid of any merit.

12. The appellant have relied upon various judgments of the Hon'ble Tribunal in support of their contention that service tax is not leviable on the income earned by them from leasing the machinery to Arvind. I find it relevant to refer to the judgment in the case of Express Engineers and Spares Pvt. Ltd. Vs. Commissioner of CGST, Ghaziabad – 2022 (64) GSTL 112 (Tri.-All.) wherein the Hon'ble Tribunal had held that :

"**25.** In the present case, the nature of the transaction between the appellant and the customers, as is clear from the contract, reveals that :

(i) Specific equipments for specific duration for hire were agreed upon between the appellant and the customers;

(ii) The appellant received a fixed monthly amount based on maximum number of hours specified in the work order;

(iii) If the equipment was operated beyond the maximum working hours per month, overtime charges were recovered on *pro rata* basis;

(iv) All Statutory Regulations were required to be complied with by the customers;

(v) If the customer required an operator, it was provided by the appellant with the equipment;

(vi) The customer was responsible for issuing directions to the operator regarding the operation of the equipment;

(vii) The appellant did not have any control over the equipment and the effective control was with the customer. This is because the customer drew plans and issued instructions to the operator for operating the diesel generator sets according to the work requirement;

(viii) There was no minimum and maximum number of hours prescribed for operation of the machine and the duration of use of the equipment was entirely at the discretion of the customer;

(ix) In some cases the responsibility of maintenance of diesel generator sets was on the appellant;

(x) The diesel/fuel and lubricant required to run the diesel generator sets was to be provided by the customers; and

(xi) The equipments could not leave or enter the premises of the customers without a pass issued by the customers.

26. Thus, the transaction between the appellant and the customers would qualify as a transfer of right to use goods with the control and possession over the diesel generator sets passing on to the customers."

12.1 Further, in the case of Century Pulp and Paper Vs. Commissioner of C.Ex., & S.T., Meerut-II -- 2019 (26) GSTL 42 (Tri.-Del.), the Hon'ble Tribunal had held that :

"**4.** We find from the facts on record that the appellant has delivered the effective possession and control of the machinery on the said machinery, which have been delivered to the lessee and admittedly, the said machinery was installed in the premises of the lessee at Sonepat, Haryana. The workers of lessee are entitled to operate such machinery and the lessee is required to take care of the said machinery. Further, we find that pursuant to circular from the [C.B.E. & C.], wherein clearly explaining the scope of the service, it was clarified that transactions, where the supply of tangible goods for use and leviable to VAT/sales tax is a deemed sales of goods and not covered under the scope of the proposed service. We find that the appellant had raised the ground in reply to their show cause notice, wherein they demonstrated that they have been paying VAT on the said transaction of lease rent and they are not liable to pay service tax on the same transaction again. We further find that they have been charged in the invoices raised by the appellant. Further, in the appeal paper book, the appellant have also filed copies of the ST-3 returns and also a certificate from their Auditor stating that VAT have been paid on such transactions.

5. Accordingly, so far as the contention of the Ld. AR is concerned that in the impugned order, it is mentioned that the appellant have failed to lead evidence as regards payment of VAT on the said transaction, we find that the

said finding is vague as the invoice itself shows charging of VAT and appellant had contended in the very 1st reply to the show cause [notice] that they have paid VAT. Accordingly we allow the appeal and set aside the impugned order. The appellant shall be entitled to the consequential benefit."

12.2 In the case of Aims Pharma Pvt. Ltd. Vs. C.C.E & S.T., Vadodara-I in Service Tax Appeal No. 11493 of 2016, the Hon'ble Tribunal, Ahmedabad had in their Final Order No. A/10781/2019 dated 02.05.2019 held that :

"4.3 As per the above terms of the MOU, it is absolutely clear that after giving the cylinders on lease during the entire period of MOU, the effective right of possession, the effective control is with the lessee and not with the appellant. As per the definition of „supply of tangible goods", the supply will fall under the taxable services only when right to possession and effective control is not transferred. Therefore, supply of tangible goods on lease basis with transfer of right to possession and effective control will go out of ambit of taxable services. Moreover this transaction is undisputedly liable to VAT as the appellant are paying the VAT as per the provision of the State Government VAT Act, the board in the DOF letter dated 29/02/2008 (supra), in para 4.4, clarified as below:"

13. In view of the facts discussed hereinabove and in the light of the judgments of the Hon'ble Tribunal as well as Circular dated 17.08.2016, I am of the considered view that leasing of machinery by the appellant to Arvind is outside the ambit of taxable services as it involves 'transfer of right to use' and, consequently, the rent income received by the appellant by leasing the said machinery is not chargeable to service tax. In view thereof, I set aside the impugned order and allow the appeal filed by the appellant.

14. 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.

30 May, 2023

(Akhilesh Kumar)
Commissioner (Appeals)
Date: 30.05.2023

Attested:

(N.Suryanarayanan. Iyer)
Assistant Commissioner (In situ),
CGST Appeals, Ahmedabad.

BY RPAD / SPEED POST

To

M/s. Dharmshil Agencies,
Dharmshil House,
Ashirwad Paras Corporate House,
Corporate Road,

Appellant

Prahladnagar, Ahmedabad – 380 015

The Joint Commissioner,
CGST,
Commissionerate : Ahmedabad South. Respondent

Copy to:

1. The Chief Commissioner, Central GST, Ahmedabad Zone.
2. The Principal Commissioner, CGST, Ahmedabad South.
3. The Assistant Commissioner (HQ System), CGST, Ahmedabad South. (for uploading the OIA)
4. Guard File.
5. P.A. File.