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: 20230864SW0000510835

स्पीड पोस्ट

क फाइल संख्या : File No : GAPPL/COM/STP/3280/2022 /4490 - 94

ख अपील आदेश संख्या Order-In-Appeal No. **AHM-EXCUS-001-APP-76/2023-24**
दिनाँक Date : **31-07-2023** जारी करने की तारीख Date of Issue 16.08.2023

आयुक्त (अपील) द्वारा पारित
Passed by **Shri Shiv Pratap Singh**, Commissioner (Appeals)

ग Arising out of OIO No. 05 to 10/WSO3/CSM/**2022-23** दिनाँक: **29.09.2022** passed by Assistant Commissioner, CGST, Division-III, Ahmedabad South

ध अपीलकर्ता का नाम एवं पता Name & Address

Appellant

M/s Inox Air Products Private Limited,
Plot No.A-1/15, Phase-II, GIDC, Vatva,
Ahmedabad-382445.

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 भुगतान की जाए।

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

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

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

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

(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 सेवाकूर 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.

1ण 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:

(i) amount determined under Section 11 D;
(ii) amount of erroneous Cenvat Credit taken;
(iii) amount payable under Rule 6 of the Cenvat Credit Rules.

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

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

ORDER-IN-APPEAL

The present appeal has been filed by M/s. Inox Air Products Private Limited, Plot No. A-1/15, Phase-II, GIDC, Vatva, Ahmedabad – 382445 (hereinafter referred to as "the appellant") against Order-in-Original No. 05 to 10/WS03/AC/CSM/2022-23 dated 29.09.2022 (hereinafter referred to as "the impugned order") passed by the Assistant Commissioner, Central GST, Division-III, Ahmedabad South (hereinafter referred to as "the adjudicating authority").

2. Briefly stated, the facts of the case are that the appellant are engaged in the manufacture of industrial gases namely, oxygen, nitrogen, argon, helium and others gases, which are classifiable under chapter 28 of the Central Excise Tariff Act, 1985 and have holding Central Excise Registration No. AAAC15569DXM014 and Service Tax Registration No. AAAC15569DST009 for the service categories of GTA, rent-a-cab operator services, repair and maintenance services, Consulting Engineers and Erection, Commissioning or Installation services.

2.1 During the course of the audit of the records of the appellant for the period FY 2006-07 and FY 2007-08, it was found that the appellant had received amount towards leasing out of equipment i.e. pumps, vaporizer, tanks etc. cylinder holding charges which is taxable under section 65(105)(zm) of the Finance Act, 1994 under the category of 'Banking and Financial service'.

2.2 It was noticed that the customers who took delivery of gases in the cylinders supplied by the company, were allowed to retain the cylinders free of charges for a specific number of days and in respect of cylinders retained beyond the said period, an amount under the head of "Cylinder Holding Charges" were received from the customers. The charges received from the customer were in nature of lease charges, which falls under the head of Other Financial services classifiable under the category of "Banking and Other Financial Services".

2.3 Thus, in *view* of aforesaid analysis, it found that service tax of Rs. 1,45,825/- and Rs. 7,52,874/- (including Edu. Cess and S & H. Edu. Cess) was required to be paid along with applicable interest for the period from 2006-07 to 2007- 08.

2.4 Further, from scrutiny of the balance sheet of the appellant, it was observed that the appellant had provided *service* of Maintenance and Repair of Cylinders and received total amount of Rs.3,10,906/- and Rs.89,964/- for the year FY 2006-07 and FY 2007-08

respectively. The said assessee was liable to pay service tax for the year FY 2006-07 to FY 2007-08 to the tune of Rs. 49,174/- (including E. Cess and H.E. Cess) under the category of "Management, Maintenance and Repair". However, during the said period the appellant have paid service tax to the tune of(Rs.14,439/- under the said category. Thus, differential service tax of Rs.34,735/- (including E. Cess and H.E. Cess) is required to be paid along with applicable interest for the period from FY 2006-07 to FY 2007-08.

2.5 Further, it was noticed that in the balance sheet for FY 2006-07, the appellant had shown income of RS.1,20,000/-. On being inquired, it was observed that the appellant provided labourers to its Karjan Unit and the said labourers were in turn utilized by M/s L&T. The Karjan unit issued credit advice for such labourers supply to the appellant and paid service tax of Rs. 14,400/-. Since the actual service was provided by the Ahmedabad Unit, hence the liability of payment of service tax lies with the Ahmedabad Unit, whereas the same has been paid by the Vadodara (Karjan) unit, which was not proper.

2.6 Then after, Letters were issued by the jurisdictional Superintendent, requesting the appellant to furnish the similar information for further period. In reply to the same, vide letter dated 03.02.2010, 24.12.2010 and 10.02.2011 the appellant had provided the required information for further period i.e. upto September-2010, incorporating which the service tax liability of the said appellant was calculated.

2.7 Subsequently, a Show Cause Notice No. STC09/O&A/SCN/IAP/ADC/2011-12 dated 22.07.2011 was issued to the appellant demanding service tax of Rs.34,01,480/- for the period from FY 2006- 07 to FY 2010-11 (upto Sep-10) under proviso to Sub-Section (1) of Section 73 of the Finance Act, 1994. The SCN also proposed recovery of interest under Section 75 of the Finance Act, 1994; and imposition of penalties under Section 76, Section 77 and Section 78 of the Finance Act, 1944.

2.8 For the subsequent period, on the same ground, following five Show Cause Notices had been issued to the appellant, for recovery of the Service Tax, in terms of Section 73 (1A) of the Finance Act, 1944.

Sr. No.	SCN No. and date	Period involved	Total amount of demand for recovery of Service Tax (Rs.)

01	STC-43/O&A/SCN/IAP/ADC/D-III/2012-13 dated 20.03.2013	April-2011 to September-2012	9,80,287/-
02	STC-33/O&A/SCN/IAP/ADC/D-III/2013-14 dated 13.03.2014	October-2012 to September-2013	5,57,156/-
03	STC-26/O&A/SCN/Inox/14-15 dated 17.10.2014	October-2013 to March-2014	2,67,404/-
04	STC-16/O&A/SCN/Inox/ADC/D-V/15-16 dated 30.09.2015	April-2014 to March-2015	5,67,630/-
05	STC-4/O&A/SCN/IAPL/JC/DV/16-17 dated 10.06.2016	April-2015 to March-2016	6,26,717/-

2.9 All the aforesaid Six Show Cause Notice were adjudicated vide the impugned order by the adjudicating authority wherein the total demand of Service Tax amounting to Rs. 64,00,674/- was confirmed under proviso to Sub-Section (1) of Section 73 of the Finance Act, 1994 along with Interest under Section 75 of the Finance Act, 1994. Further (i) Penalty of Rs. 64,00,674/- was imposed on the appellant under Section 78 of the Finance Act, 1994; and (ii) Penalty of Rs. 10,000/- for each SCN was imposed on the appellant under Section 77(1) of the Finance Act, 1994.

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

- The appellant are engaged in the manufacture of industrial gases namely, oxygen, nitrogen, argon, helium and others gases, which are classifiable under chapter 28 of the Central Excise Tariff Act, 1985 and have holding Central Excise Registration No. AAAC15569DXM014 and Service Tax Registration No. AAAC15569DST009 for the service categories of GTA, rent-a-cab operator services, repair and maintenance services, Consulting Engineers and Erection, Commissioning or Installation services.

- Some of the purchaser of the liquid gases do not have the requisite storage facilities to store the liquid gases at a particular temperature. Such purchaser enters into agreements with the appellant under which equipment's i.e. tank, vaporizer, pump, gas analyzer are provided for a specific period and the said equipment's are installed at the premises or project site of the customer for storing and using the gases purchased from the appellant. The appellant receives rent for providing the equipments to various customers.

- The appellant has entered into an agreement with Larsen & Toubro Ltd. for a particular project in Hazira for supply of Liquid Nitrogen and Helium gas (which is supplied in Squad) along with tank, vaporizer, pump and gas analyzer for storing the liquid gas and using the same for their project with other services. The gas and the equipment's are delivered to Larsen & Toubro Ltd. for their use in their project at Hazira, Surat. They submitted copy of Purchase Order issued by Larsen & Toubro Ltd.. Gujarat VAT Act as applicable is paid on the recovery of equipment lease rent amount treating the same as 'transfer of right to use', being deemed sale of goods. The have also submitted copy of Invoice for letting of equipment.

- Further, the appellant also sell gases in cylinders to various customers. There are two classes of buyers/customers, one who buy gases in the supplier's cylinders, with an initial free loan period, and the other in their own cylinders. The customers are free to buy the gases filled in suppliers or own cylinders. The cylinder rent is not charged for customer's cylinder and also not charged for appellant's cylinder when returned within the free loan period. The cylinder rent is charged to the customer to deter it not to hold the cylinders for long time at their end. The said rent amount is received from the customers as a deterrent /penalty for detaining the cylinders beyond the free loan period. The cylinders are returnable and the customers do not have the option to buy the same. On cylinder rent/holding charges, the State VAT is paid as per the provision of Gujarat VAT Act treating the same as 'transfer of right to use, being deemed sale of goods. They have submitted two illustrative copy of purchase order issued by the customers with Invoice for supply of gas and cylinder rent charged to the customer.

- The appellant also submits that gases cleared in appellant's cylinders to various customers are sometimes damaged and the same is repaired and tested again for supply to other customers. The charges are recovered from the customers towards the damages caused to appellant's own cylinder. No service tax is charged /paid as no service is rendered there by the service provider to the service receiver but by the service provider to the service provider as here appellant repairs and tests its own cylinders and not that of the customers. It is self-service and charges recovered from the customer is towards the damages caused to appellant's own cylinders. Service Tax is charged and paid on the amounts recovered towards repairs and testing of customer's cylinder as there is rendered a service by the provider to the receiver. They have submitted copy of Invoices for the above both transactions for reference.

- The appellant also provided labour to its own Karjan unit for executing the units order. The appellant unit and Karjan unit is an independent unit and a separate profit centers. In order to evaluate the contribution of a unit, the units raise internal debit/credit note to account for the involved cost of the goods or services supplied or provided by one unit to another. The Karjan unit has raised invoice on Larsen & Toubro Ltd. charging service tax on the particular transaction and paid the service tax to the exchequer. For the involved revenue amount, the Karjan unit has issued the credit advice to appellant for internal accounting purpose.

- The adjudicating authority failed to appreciate that mere letting of the Equipments and Cylinders by the appellant to the purchasers of the gases on payment of monthly rental charges, is an operating lease. The AS19, issued by the Council of the Institute of Chartered Accountants of India had expressly stated than an operating lease is other than a financial lease.

- The adjudicating authority has failed to substantiate/prove that the providing Equipment and Cylinder, by the appellant to the purchasers of the gases, on loan & returnable basis, on payment of monthly fixed charges, are financial lease services including equipment lease or hire purchase by a body corporate for levy of service tax thereon. The learned adjudicating authority should have held that the above activity is not a financial lease and therefore, not covered by the 'Banking and Other Financial service' as defined in section 65(12)(a)(i) of the Finance Act, 1994.

- The adjudicating authority has gravely erred in ignoring the contents of the circular letter dated 09.07.2001 of the Ministry of Finance, Govt. of India, which clarified the scope of the term "financial leasing services including equipment leasing or hire purchase". As per the clarification, a financial lease has the elements of charging a lease management fee / processing fee / documentation charges and involves charging of Equated Monthly Installment [EMI] which has finance / interest charges components. As per the clarification, the service tax is chargeable on the said elements of lease management fee / processing fee / documentation charges and finance / interest charges only. The Respondent should have held that since the said elements of lease management fee / processing fee / documentation charges and finance / interest charges are absent in the present case, the activity of the case is not a financial lease. The present case is merely letting of the Equipments and Cylinders on payment of monthly rent charges. The appellant does not at all recover any lease management fee /

processing fee / documentation charges and finance / interest charges from the customers who are provided the Equipments and Cylinders.

- On proper appreciation of the provisions of Section 65(12)(a)(i), ibid, and the clarification given in the circular letter dated 09.07.2001 of the Ministry of Finance, Govt. of India, it becomes crystal clear that an "equipment lease" as envisaged in section 65(12)(a)(i), ibid, has to be a "financial lease". The appellant's activity of mere letting the equipments and cylinder on payment of rent charges is outside the purview of the said Section 65(12)(a)(i). The mere activity of letting the equipments and cylinder by the appellant is not a financial lease. The let out equipments and cylinders are returnable at the end of the term and the customers to whom the equipments and cylinders are let do not have the option to buy the same at the end of the terms as is the normal provision in a financial lease. In a financial lease, there are three parties viz. the supplier of the goods, the lessor and the lessee. It is not so in the appellant's case here. Here, the appellant itself provides / supplies the equipments and cylinders which are owned by it and does not procure them from a third party on the basis of the specifications and terms of the lessee. The letting of the equipments and clinders by the appellant are not a financial lease and the same is therefore, clearly outside the purview of the 'Banking and Other Financial Service' as defined in Section 65(12)(a)(i) of the Finance Act, 1994, for the purpose of levy of service tax..

- The adjudicating authority has manifestly erred in understanding that the goods let out for rent, the ownership in the goods remains with the lender and not with the borrower and at the end of the term of the period, the goods lent or let is returned back to the lender by the borrower. There is though transfer of right to use the goods. The adjudicating authority has erroneously held the providing of the equipment and cylinders by the appellant, for payment of monthly charges as leasing of the equipments but the same is NOT at all a financial-lease so as to be covered by the 'Banking & Other Financial Services' as envisaged in the Service Tax Act, 1994. It is a settled law of the land that the revenue has to follow the trade practices and not the otherwise and that the citizen's just claim should not be defeated on hyper technical grounds or with heavy tilt of revenue bias.

- The adjudicating authority, on correct appreciation of the provisions of Section 65(12)(a)(i) of the Finance Act, 1994, should have considered that the services covered thereby are only 'financial leasing services' and the words "including equipment leasing" appearing after the words 'financial leasing services' merely clarify

that the subject matter of the financial lease could be an equipment amongst other goods. The effect of the said words "including equipment leasing" is not to include a separate and independent activity of mere letting out of the equipments otherwise than by way of financial lease. This is also made clear by the Board's circular letter dated 09.07.2001.

- The adjudicating authority should have considered that the words "including equipment leasing" appearing after the words "financial leasing services", in the definition, could not be read in isolation or out of the context in which they appear. They cannot be read so, as to cover within the scope of 'Banking and Other Financial services' a service which has nothing to do with 'financial lease services'. The mere letting out of an equipment, otherwise than by way of a financial lease, has nothing to do with banking and other financial services and cannot therefore be said to be covered by the provisions of Section 65(12)(a)(i) of the Finance Act, 1994. The appellants activity is not at all covered by the said taxable service. Even, as per the judgment of the Hon. CESTAT, WZB, Mumbai, adopting the principle of 'ejusdem generis', a mere body corporate is not covered by the 'banking and other financial services' as decided in their own case law reported at 2007 (8) STR 351 (Tri. Mum.).

- The adjudicating authority has grossly erred in ruling the lease which are covered by the provisions of section 65(12)(a)(i) of the act have essentially got to be financial leasing then only has to include therein the equipment lease or the hire purchase and not just an equipment lease or a hire purchase, in isolation. Item no. iv to the Explanation of section 65(12)(a)(i) of the act has expressly provided - "the lessee is entitled to own, or has the option to own, the asset at the end of the lease period after making the lease payment". In the cases here, there is nothing like that as only pure letting out transactions are involved. The Respondent should have honoured the statutory provisions and the clarifications given in the Board's circular letter dated 09.07.2001 and in not doing so has clearly exceeded his jurisdiction and therefore, on this count alone the impugned OIO deserves to be set aside in toto.

- The adjudicating authority in his order has held that after the introduction of new sections to the Finance Act, 1994 w.e.f. 01.07.2012 all service have been made liable to tax under Section 66B and as per Section 65(B)(44(a)(ii) of the Act, the activity carried out by the appellant regarding leasing of equipment and collecting rent on retaining cylinder are covered under the definition of "service". It is submitted that a deemed sale transaction falling under clause 29A of the Article 366 of the Constitution

is excluded from applicability of service tax in terms of the definition of 'Service' and accordingly , the said transaction would not be liable to service tax under the Act..

- It is submitted that the customers have the sole discretion to use the equipments and cylinders in the way they want. They can even opt not to use the equipments and cylinders. It is submitted that even the payment of lease rent is not dependent upon the usage of the equipments and cylinder. Further, the appellant also has no control whatsoever as to how many number of hours the said equipment and cylinders are to be used on daily or monthly basis by the Customers. Thus, the appellant is not at all concerned with the manner in which the equipments and cylinders are to be used by the Customers. Accordingly, the present transaction is squarely covered within the ambit of deemed sales and hence would not attract Service tax.

- At the outset it is submitted that the adjudicating authority in the impugned order has grossly erred in failing to consider the various orders issued on exactly similar issue for deciding the merits of the case due to non-production of documentary evidence i.e. contract/agreement. It is submitted that the copy of the purchase order entered into with the customers was enclosed in the written submission dated 11.05.2022 which has not taken into consideration while passing the impugned order. The adjudicating authority fails to consider that in the case of Association of Leasing & Financial Service Companies Vs. Union Of India [(2010) 20-STR-417(SC)], Hon'ble Supreme Court held that in equipment leasing/hire-purchase agreements there are two different and distinct transactions, viz., the financing transaction and the equipment leasing/hire-purchase transaction and that the financing transaction, consideration for which was represented by way of interest or other charges like lease management fee, processing fee, documentation charges and administrative fees, which is chargeable to service tax. Financial leasing is a way to purchase an asset with the aid of loan and the lessee uses the asset. It is a contract for leasing of a specific asset between two parties for its use and occupation, lease payments covering full cost of asset together with interest and lessee being entitled to own or having option to own the asset at the end of lease period after completing lease payment. Hire purchase transaction is a method of sales by which goods are let out on hire to the purchaser on payment on an agreed sum of amount on periodical installments. The ownership of the property remains under the control of the creditor who normally passes the right to hirer on the condition of payment of the last agreed sum of money in instalment. Thus, the appellant case is hand will not fall under category of 'Banking and Financial Service'.

- The adjudicating authority in respect to the demand raised under Management, Maintenance and Repair Service had confirmed the demand on the basis that the appellant had not produced any evidence of the payment service tax on the amounts recovered towards repairs and testing provided to the customer cylinders as there is rendered a service by the provider to the receiver. The appellant have submitted the copy of invoice raised on the customer under the said category of service. In support of their aforesaid view, the appellant relied on the following judgment:

  a) 2017 (50) S.T.R. 155 (Tri. - Chennai) - National Oxygen Ltd Vs CCE., Pondicherry
  b) 2017 (49) S.T. R. 437 (Tri. - Delhi) - CCE., Indore Vs Gajra Gears Pvt. Limited

- At the outset the appellant submits that the SCN has been issued on 22.07.2011 and the demand has been raised for the period 2006-07 to 2010-11 (upto Sept 2010) by invoking extended period of limitation. In this regard, the appellant submit that the extended period of limitation can only be invoked where the escapement of tax has been occasioned by fraud, collusion, wilful mis-statement, suppression of facts or contravention of any of the provisions of this Chapter or the Rules made there under coupled with an assessee's intention to evade payment of tax. Both conditions being cumulative. The adjudicating authority has failed to substantiate the cumulative conditions above and has merely passed strictures that the case for larger period of limitation existed since the appellant failed to pay service tax liability as may be due.

- The adjudicating authority in the impugned order held that the appellant has suppressed facts from the department since tax liability was not reported in the return and the same would have remained unnoticed but for the audit. In this regard, the appellant submitted that the service tax laws (under section 70(1) of the Act) mandates a self assessment; the assessees are further obliged to report details of such self-assessment through its half-yearly return in Form ST-3. Form ST-3, does not require a specific or general details of non-taxable revenues earned by the taxpayers. All other revenues earned by the appellant from its services operations were duly reflected in the periodic returns filed for period under contention.

- Given the above, the appellant discharged its legal obligation of furnishing relevant details and the basis of its self-assessments to the department. Service tax laws do not cast a responsibility on the taxpayers to furnish any further details before the department unless expressly required by the latter.

- Further, the concerned revenues were duly accounted in books of accounts and records maintained by the appellant and it is not the case that the matter arise from facts outside the records maintained, which have been duly declared to the service tax authorities. Therefore, the adjudicating authority has erred on facts and in law to conclude/ find the suppression of fact coupled with an intent to evade tax on part of the appellant. Reiteratively, a conclusion that the appellant has suppressed facts from the department is totally baseless and misconceived. In this regard they relied on the following judicial precedents:

  a) Chandilya Chemicals vs CCE – 1990 (114) ELT 695
  b) Pushpam Pharmaceuticals Company vs CCE – 1995 (78) ELT 401
  c) Anand Nishikawa Company Limited vs CCE – (2005) 188 ELT 149

- In addition to other aspects one key independent aspect that the adjudicating authority needs to establish is the existence of 'intent to evade tax payment' as absent same the larger period of limitation cannot be invoked. Conversely put the condition is mandatory and not optional.

- The appellant submits that the following facts buttress its bona fide intent at all times, which the impugned order has conveniently ignored the facts (i) timely filings of returns for all periods in questions with all stipulated disclosure requirements being made good; (ii) Suo moto of voluntary payment of taxes, though with delay wherever applicable; (iii) Owning all the facts and related documentation in the said matter instantly. The appellant submitted that the allegations in the SCN and the findings in the impugned order both seem to rush to the conclusion that a mala fide intent of tax evasion exists, however, both failing to adduce any tangible evidence (formidable and/ or corroborative) to strengthen such allegation/ finding, as the case may be. It is thus submitted that, the conclusion that the appellant had an intention to evade tax payment cannot be arrived at without proof (through concrete or corroborative evidence). In support of their arguments, they relied upon the following case laws:

  a) S K Enterprises vs CCE [(2004) 175 ELT 686]
  b) Bharat Bhai B Gala vs CCE[(2007) 214 ELT 419]
  c) Chamundi Die Cast (P) Ltd. vs CCE, Bangalore [2007 (215) ELT 169 (SC)]

- They further submitted that when the demand itself is not sustainable, the question of imposition of interest does not arise.

- The appellant submitted that any penal consequence is maintainable only if a mala *fide* conduct could be proven on account of the taxpayers and the adjudicating authority has not made out such case in the impugned order rather just made the presumption of mala *fide* intent on behalf of the appellant.

- The adjudicating authority has sought to levy penalty under Section 78 of the Act, on the entire demand. It is settled law that whenever the demand of duty is set aside, consequently the imposition of the penalty has also to be set aside. In this regard, the appellant refers to the following decisions of the Hon'ble Supreme Court and High Court:

  a) CCE vs. H.M.M. Ltd. [1995 (76) ELT. 497 (SC)]
  b) Coolade Beverages Ltd. Vs. CCE, Meerut [2004 (172) E.L.T.451 (All.)]
  c) Guru Instrument Vs. CEGAT [1998(104) E.L.T. (All)]

- Without prejudice to the above, they submitted that no penalty is leviable where question of interpretation is involved. The appellant submitted that it is their reasonable belief that where the transaction involves transfer of rights to use the goods, it amounts to deemed sales on which VAT is leviable as per the provisions of the State Act. Therefore, in the light of aforesaid submissions, no question of failure of payment of tax arises with the intention to evade payment of duty. It is clear that the question as to whether service tax is payable or not, is a question of interpretation of complex legal provisions. It is settled principle in law that no penalty can be levied where there is an interpretational issue/ambiguity in the relevant provisions. In this regard they relied upon the following case laws:

  a) M/s Hindustan Lever vs. CCE, Lucknow [2009-TIOL-1795-CESTAT-DEL].
  b) AEON'S Construction Products Ltd. Vs. Commissioner of C.Ex., Chennai [2005 (180) E.L.T. 209 (Tri. Chennai)]
  c) ETA Engineering Ltd. Vs. Commr. Of C.Ex [2006 (3) S.T.R 429 (Tri. -LB)]

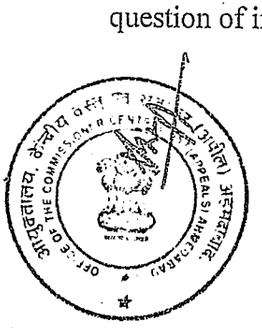
- Further, the appellant submitted that there is no *mens rea* on its part to avoid payment of any tax. The appellant places reliance on the Tribunal decision in the case of Smitha Shetty Vs CCE [2004 (156) ELT 84 (Tri. - Bang)] which was approved by the High

Court in the case of CCE Vs Sunitha Shetty [2004 (174) ELT 313 (Kar.)] wherein, it was held that no penalty should be levied where the breach flows from a *bona fide* belief that the offender is not liable to act in the manner prescribed by the statute. As per the above cited case laws, *mens rea* to evade the tax is important to levy penalty. In the absence of such, and in light of *bona fide* belief that the exemption from payment of Service tax has been rightly availed, penalty should not be levied. In the instant case, the fact that the appellant submitted details as and when required by the Service tax authorities and also regularly filed Service tax and VAT returns disclosing the payment of tax, there is no *mens rea* on the part of the appellant.

- The impugned order seeks to levy penalty under Section 78 of the Act, alleging that the appellant has will-fully suppressed facts. The appellant submitted that the allegations in the Impugned Order are completely baseless and devoid of merits. In this regard, they relied upn the decision of the Hon'ble Supreme Court Tamil Nadu Housing Board vs. CCE [1994 (74) E.L.T. 9 (S.C.)]

- It is settled law, *inter alia,* by the various judgments of the Hon'ble Supreme Court that the burden of establishing intent to evade payment of a tax is on the Revenue and must be established with cogent, positive evidence. It does not emanate from a mere preponderance of probability. In the present case, the Revenue has failed in bringing on record any positive evidence of intent to evade payment of Service tax or suppression of facts by the appellant. Having failed to discharge its burden, the Revenue cannot place the onus of establishing the lack of intent to evade payment of tax or suppression of facts on the appellant. Thus, it is submitted that in any event, there was no intent to suppress any facts or evade payment of duty and hence there can be no imposition of penalty as against the appellant.

- Without prejudice to above, the It is a settled position that something more than a mere failure to pay tax must be shown, i.e. the assessee must be aware that the tax was leviable and must have avoided payment. The word 'evade' in this context means defeating the provision of law for paying duty. In the present facts, as stated above, the factual developments establish that there has been no intention on the appellant's part to avoid any payment of Service Tax. Further, the appellate has paid VAT on the sale of exclusive transfer of rights. Accordingly, it is submitted that there cannot be any question of imposition of penalty.



3.1 The appellant have vide their letter dated 18.04.2023 submitted two compilation of following case laws:

a) Comm. of C.Ex., Indore Vs. Gajra Gears Pvt. Ltd. – 2017 (49) STR 437 (Tri-Del.)
b) Comm. of C.Ex., Vadodara-I Vs. G. E. India, Industries (P) Ltd. – 2008 (12) STR 609 (Tri-Ahmd.)
c) Canon India Pvt. Ltd. Vs. Comm. C.Ex. & ST, LTU, Del – 2019 (20) GSTL 546 (Tir Chan.)
d) Kansai Nerolac Paints Vs. Comm. Customs, Mumbai – 2017 (52) STR 334 (Tri-Mumbai)
e) Comm. of C.Ex., Pune-II Vs. Mohanrao Shinde SSK Ltd. – 2016 (46) STR 742 (Tri-Mumbai)
f) Karnataka Oxygen Ltd. Vs. Stat (Main Bench), Chennai – 2022 (281) ELT 590 (Mad.)
g) Ghatge Patil Industries Ltd. Vs. C.Ex, Pune – 2016 (46) STR 267 (Tri-Mumbai)
h) Linde India Ltd. Vs. C.Ex., Alwar – (2023) 4 Centax 44 (Tri-Del)
i) Paro Food Products Vs. Commr. C.Ex., Hydrabad – 2005 (184) ELT 50 (Tri-Bang.)
j) Commr. of C.Ex. Chandigadh Vs. Arpit Advertising – 2022 (23) STR 460 (Tri-Del)
k) Order-in-Original No. MP/1-8/AC/Div.-III/2022-23 dated 12.04.2022

4. Personal hearing in the case was held on 19.04.2023 through virtual mode. Shri Dhaval K. Shah, Advocate, appeared for personal hearing on behalf of the appellant. He reiterated submissions made in the appeal memorandum as well as those in the two compilations of case laws submitted by him. Due to the change in authority, a further personal hearing in the case was held on 23.06.2023 through virtual mode. Shri Dhaval K. Shah, Advocate, appeared for personal hearing on behalf of the appellant. He reiterated the submissions made earlier in the two compilation handed over in the office on 18.04.2023, those in the appeal memorandum and those made at the time of pervious personal hearing on 19.04.2023. He requested to set aside the OIO based on these submissions.

5. I have carefully gone through the facts of the case, grounds of appeal, submissions made in the Appeal Memorandum; in additional submission; during the course of personal hearing and documents available on record.

6. The issue to be decided in the present appeal are as under:

(i) Whether income earned by the appellant by leasing of equipments liable to service tax under the category of Banking and Other Financial Services.

(ii) Whether income earned by the appellant by rent received from Customers for retaining Cylinders liable to service tax under the category of Banking and Other Financial Services.

(iii) Whether Maintenance and Repair of Cylinders carried out by the appellant liable to service tax under the category of "Management, Maintenance and Repairs service.

(iv) Whether Rs.1,20,000/- received by the appellant through credit advice from its Karjan Unit for providing labourers to its Karjan Unit and the said labourers were in turn utilized by M/s L&T.

6.1 The demand pertains to the period FY 2006-07 to 2010-2011 (upto Sept. 2011) & 2011-2012 to FY 2015-16. 2015-2016

7. With regards to the demand raised for income of leasing of equipments and rent received from the customer for retaining cylinders under the category of Banking and Other Financial Services and as defined under the Section 65 (105) (zm) of the Finance Act, 1994, I find that the demand pertains to the period prior to negative list regime as well as for the period of negative list regime. I find that prior to 01.07.2012, in service tax there was specific service based taxation and the demand for the period up to 30.06.2012 required to be examine in light of 'Banking and Other Financial Services' as defined under Section 65(12) of the Finance Act, 1994 and taxable service as defined under Section 65(105)(zm) of the Finance Act, 1994. Whereas with effect from 01.07.2012, there has been total shift in the service tax levy, from "specific service based taxation" to "negative list based taxation", that means, all the services, except those listed in negative list, shall be liable to service tax. Section 66B of the Finance Act, 1994 provides that there shall be levied a tax to be referred to as service tax on the value of all services, other than those services specified in the negative list, provided or agreed to be provided in the taxable territory by one person.to another and collected in such a manner as may be prescribed. The 'negative list' is provided for in Section 66D of the Finance Act, 1994. Section 65B(44) of the Finance Act, 1994, as inserted w.e.f. 1 July, 2012, defines 'service' to mean any activity carried out by any person for another for consideration and includes a declared service but would not include certain services specified in clauses (a), (b) and (c). Declared services have been enumerated in Section 66E of the Finance Act, 1994.

7.1 For ease of reference, I hereby produce the relevant provisions of Section 65(12) of the Finance Act, 1994; Section 65(105)(zm) of the Finance Act, 1994; Section 65B(44) of the

Finance Act, 1994; and Sub-clause (f) of Section 66E of the Finance Act, 1994, which is relevant for the purposes of the activity involved in this case. Which are as under:

Section 65(12) of the Finance Act, 1994

"(12) "banking and other financial services" means –

(a) the following services provided by a banking company or a financial institution including a non-banking financial company or any other body corporate or commercial concern, namely :-

(i) financial leasing services including equipment leasing and hire-purchase;

Explanation. – For the purposes of this item, "financial leasing" means a lease transaction where –

(i) contract for lease is entered into between two parties for leasing of a specific asset;

(ii) such contract is for use and occupation of the asset by the lessee;

(iii) the lease payment is calculated so as to cover the full cost of the asset together with the interest charges; and

(iv) the lessee is entitled to own, or has the option to own, the asset at the end of the lease period after making the lease payment;

(ii) ommitted

(iii) merchant banking services;

(iv)securities and foreign exchange (forex) broking, and purchase or sale of foreign currency, including money changing;

(v) asset management including portfolio management, all forms of fund management, pension fund management, custodial, depository and trust services;

(vi) advisory and other auxiliary financial services including investment and portfolio research and advice, advice on mergers and acquisitions and advice on corporate restructuring and strategy;

(vii) provision and transfer of information and data processing; and

(viii) banker to an issue services; and

(ix) other financial services, namely, lending, issue of pay order, demand draft, cheque, letter of credit and bill of exchange, transfer of money including telegraphic transfer, mail transfer and electronic transfer, providing bank guarantee, overdraft facility, bill discounting facility, safe deposit locker, safe vaults; operation of bank accounts;

(b) foreign exchange broking and purchase or sale of foreign currency, including money changing provided by a foreign exchange broker or an authorised dealer in

foreign exchange or an authorised money changer, other than those covered under sub-clause (a);

Explanation.- For the purposes of this clause, it is hereby declared that "purchase or sale of foreign currency, including money changing" includes purchase or sale of foreign currency, whether or not the consideration for such purchase or sale, as the case may be, is specified separately;"

Section 65(105)(zm) of the Finance Act, 1994

"(105) "taxable service" means any service provided or to be provided,
(zm) to any person, by a banking company or a financial institution including a nonbanking financial company, or any other body corporate or commercial concern, in relation to banking and other financial services;"

Section 65B(44) of the Finance Act, 1994

"(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."

Section 66E(f) of the Finance Act, 1994

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

7.2 It is observed that the adjudicating authority confirmed the demand on the income received from (i) leasing of equipments and (ii) cylinder holding charges under the taxable service category of "Banking and Other Financial Service" as defined under the Section 65 (105) (zm) of the Finance Act, 1994.

7.3 It is also observed that in this regard, the main contention of the appellant that they have paid VAT as applicable treating the same as 'transfer of right to use', being deemed sale of goods, on the recovery of equipment lease rent amount and the rent amount received from the customers as a deterrent /penalty for detaining the cylinders beyond the free loan period. They also contended that in a financial lease, there are three parties viz. the supplier of the goods, the lessor and the lessee, whereas in the appellant case there is only two parties. The letting of the equipments and cliriders by the appellant are not a financial lease and the same is therefore, clearly outside the purview of the 'Banking and Other Financial Service' as defined in Section 65(12)(a)(i) of the Finance Act, 1994, for the purpose of levy of service tax.

7.4 In this regard, I find that the appellant were received lease rent for use of tank, vaporizer, pump and gas analyzer for storing the liquid gas at the customer site. The appellant were also received cylinder rent charges, in case when the appellant's cylinder not returned within the specified free loan period. I also find that in both the case the appellant paid applicable VAT as per Gujarat VAT Act treating the transactions as deemed sale. In terms of Accounting Standard 19 issued by ICAI, financial lease happens only when lessor transfer ownership rights to lessee after end of lease terms. However, in the present case, there is not any evidence put forth by the adjudicating authority that end of lease terms the ownership rights transferred to leasee. In such a circumstances, the lease in the present case is operative lease and not financial lease and not falls under the definition of Banking and other Financial Services.

7.5 I find that in the present case, there is no ambiguity that right of possession and effective control of such goods was transferred to the service recipient during the period of lease / renting, therefore, it can be said that the equipments were given to the users on lease / rental basis by the appellant and ownership of these equipments were not transferred to the users. Thus, in the instant case, transaction involves the transfer of the right to use any material involving transfer of both possession and control of such goods to the user of goods is transactions of deemed sales which is leviable to VAT.

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

> *"91. To constitute a transaction for the transfer of the right to use the goods the transaction must have the following attributes :*
> *a. There must be goods available for delivery;*
> *b. There must be a consensus ad idem as to the identity of the goods;*
> *c. The transferee should have a legal right to use the goods-consequently all legal consequences of such use including any permissions or licenses required therefor should be available to the transferee;*
> *d. For the period during which the transferee has such legal right, it has to be the exclusion to the transferor this is the necessary concomitant of the plain language of the statute - viz. a "transfer of the right to use" and not merely a licence to use the goods;*
> *e. Having transferred the right to use the goods during the period for which it is to be transferred, the owner cannot again transfer the same rights to others."*

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

7.8 I further find that similar view taken by the Hon'ble CESTAT, Chandigarh, in the case of Canon India Pvt. Ltd., Vs. CCE & ST, LTU, Delhi in his Final Order No. A/62210/2017-CU(DB) dated 13.12.2017 in Appeal No. ST/60413/2013 [2019 (20) GSTL 546 (Tir.-Chan.)], wherein it has held that:

> "Lease – Financial lease vis-à-vis operating lease of imported equipment under Fixed Period Rental Agreement – Taxability under category of Banking and Other Financial

Services – There being no transfer of ownership of equipment to lessee at the end of lease, same to be considered as operating lease and not financial lease, hence not taxable under category of Banking and Other Financial Services – Section 65 (12) and 65(105)(zm) of Finance Act, 1994."

7.9 I further find that similar view also taken by the Hon'ble CESTAT, Delhi, in the case of CCE, Indore Vs. Gajra Gears Pvt. Ltd. in his Final Order No. A/53269/2016-Ex(DB) dated 30.08.2016 in Appeal No. E/1865/2009 [2017 (49) STR 437 (Tir.-Del.)], wherein it has held that:

"Banking and Other Financial Services – Leasing of machines – Lessor being industrial unit – Assessee receiving monthly charges for allowing use of machines for five years while retaining ownership – In terms of Accounting Standard 19 issued by ICAI, financial lease happens only when lessor transfers ownership rights to lessee after end of lease terms – Scope of said standard discussed in detail with reference to lease agreement by first appellate authority to conclude that said leasing not covered under impugned services – There being nothing in Revenue's appeal to controvert these findings, impugned order upheld – Section 65(12) of Finance Act, 1994."

7.10 I also find that, the adjudicating authority observed that as per Section 65B (44)(a)(ii) of the Finance Act, 1994, the activity carried out by the appellant regarding leasing of equipment and collecting rent on retaining cylinder were covered under the definition of "service" as defined under Section 65B (44) of the Finance Act, 1944, for the demand for the period after 01.07.2012. The relevant para of the impugned order is as under:

"38. Thus, as per Section 65B (44)(a)(ii) of the Finance Act, 1994, The activity carried out by the said assessee regarding leasing of equipment and collecting rent on retaining cylinder are covered under the definition of "service"."

7.11 In this regard, I find that the adjudicating authority made gross mistake in this regard, as the provisions made under Section 65B (44)(a)(ii) is for excluding the transaction related to deemed sale transaction falling under clause 29A of the Article 366 of the Constitution and the said provision made the transaction excluded from applicability of service tax in terms of the definition of 'Service' and accordingly , the said transaction would not be liable to service tax under the Act..

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

> *"4.4 SUPPLY OF TANGIBLE GOODS FOR USE:*
>
> *4.4.1 Transfer of the right to use any goods is leviable to sales tax / VAT as deemed sale of goods [Article 366(29A)(d) of the Constitution of India]. Transfer of right to use involves transfer of both possession and control of the goods to the user of the goods.*
>
> *4.4.2 Excavators, wheel loaders, dump trucks, crawler carriers, compaction equipment, cranes, etc., offshore construction vessels & barges, geo-technical vessels, tug and barge flotillas, rigs and high value machineries are supplied for use, with no legal right of possession and effective control. Transaction of allowing another person to use the goods, without giving legal right of possession and effective control, not being treated as sale of goods, is treated as service.*
>
> *4.4.3 Proposal is to levy service tax on such services provided in relation to supply of tangible goods, including machinery, equipment and appliances, for use, with no legal right of possession or effective control. Supply of tangible goods for use and leviable to VAT / sales tax as deemed sale of goods, is not covered under the scope of the proposed service. Whether a transaction involves transfer of possession and control is a question of facts and is to be decided based on the terms of the contract and other material facts. This could be ascertainable from the fact whether or not VAT is payable or paid."*

7.13 In view of the above discussion, I hold that the demand of service tax on income of leasing of equipments and rent received from the customer for retaining cylinders are not taxable under the category of Banking and Other Financial Services under Section 65(105)(zm) of the Finance Act, 1994 read with Section 65(12) of the Finance Act, 1994 prior to 01.07.2012 and also not taxable under Section 65B(44) of the Finance Act, 1994 after 01.07.2012.

8. With regards to the demand for service tax under "Management, Maintenance and Repairs service" for the Maintenance and Repair of Cylinders carried out by the appellant, I find that as defined under the Section 65 (105) (zzg) of the Finance Act, 1994 the taxable service means any service provided or to be provided, to any person, by any person in relation to management, maintenance or repair.

8.1 The appellant in this regard contended that gases cleared in appellant's cylinders to various customers are sometimes damaged and the same is repaired and tested again for supply to other customers. The charges are recovered from the customers towards the damages caused to appellant's own cylinder. No service tax is charged /paid as no service is rendered there by the service provider to the service receiver but by the service provider to the service provider as here appellant repairs and tests its own cylinders and not that of the customers. It is self-service and charges recovered from the customer is towards the damages caused to appellant's own cylinders. Service Tax is charged and paid on the amounts recovered towards repairs and testing of customer's cylinder as there is rendered a service by the provider to the receiver. They have submitted copy of Invoice No. 91306565 dated 31.01.2013 and copy of invoice No. 91138618 dated 28.06.2012 as Exhibit G and Exhibit H along with their appeal memorandum for the above both transactions for reference.

8.2 On verification of the aforesaid both invoices, I find that in both the invoices the appellant charged and collect service tax from the customers. The appellant have failed to produce any other documentary evidence. In the present case, I also find that the appellant provided service of repairing of the damage cylinder to their customers and received the repairing charges from the customer as per their mutually agreed terms and condition 'to return back the cylinder in good condition'. There is no condition stipulated in Service Tax Act that the Maintenance and Repair Services cannot be provided to a person for the goods / equipment / vehicle, etc. which was not belong to the said person. Thus, the appellant provided service to the customer for repairing of the damage cylinder before taking back the same and recovered repairing charges from the customer, which is taxable under Maintenance and Repair Services and service tax is required to be paid by the appellant on the same. I also find that during the period from FY 2006-17 to FY 2010-11 (up to Septmber-2010) the appellant have received total Rs. 17,61,309/- as Cylinder Repair Charges and not paid Service Tax of Rs. 2,01,697/- on the said amount. Thus, I hold that the demand of Service Tax of Rs. 2,01,697/- on the income of Rs. 17,61,309/- under the said category is legally proper and correct.

9. With regards to the demand raised under "Manpower recruitment and supply service", I find that during the relevant time the said service are taxable service as per Section 65(105) (k) of the Finance Act, 1994. The definition of the "manpower recruitment or supply agency" as provided under Section 65(68) of the Finance Act, 1994 and definition of taxable service relevant in the case as per Section 65(105)(k) of the Finance Act, 1994, reads as under:

> "Section 65*(68) "manpower recruitment or supply agency" means any person engaged In providing any service, directly or indirectly, in any manner for recruitment or supply of manpower, temporarily* or *otherwise, to any other person;"*
>
> "Section 65(105) (k) taxable service means service provided *to any person, by a manpower recruitment or supply agency in relation to the recruitment or supply of manpower, temporarily or otherwise, in any manner;"*

9.1 I find that the appellant had provided labourers to its Karjan Unit and the said labourers were in turn utilized by M/s L&T. Thus, there is two transaction happened viz. (i) the appellant provided labourers to its Karjan Unit; (ii) the Karjan Unit provided labourers to M/s. L&T. In my considered view, both the transaction is different as the appellant and their Karjan Unit both are different entity in Service Tax law and both are separately registered with the Service Tax department. In such a situation, in both the case invoice are required to be issued by both the entity and applicable service tax is also required to be paid by both the entity, which was not done in the present case. I also find that the contention of the appellant that their Karjan Unit paid applicable service tax, hence they are not required to pay any service tax is not proper, correct and not legally sustainable. Thus, I hold that the demand of Service Tax of Rs. 14,400/- on the income of Rs. 1,20,000/- under the said category is legally proper and correct.

10. In view of the above discussion, I hold that the impugned order passed by the adjudicating authority confirming demand of service tax, in respect of lease charges / rent charges collected by the appellant is not legal and proper and deserves to be set aside. I uphold the impugned order passed by the adjudicating authority for confirming demand of Rs. Rs. 2,01,697/- under the category of Management, Maintenance and Repair Service and Rs. 14,400/- under the category of Manpower Recruitment and Supply Service along with applicable interest. Needless to say that the penalty under Section 78 of the Finance Act, 1994 is required to be reduced equal to the Service Tax demanded and upheld in this order, with option for reduced penalty as per proviso to Section 78 of the Finance Act, 1994.

11. Accordingly, I order for modification in the impugned order to above extent.

12. अपील कर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है ।

The appeal filed by the appellant stands disposed of in above terms.

(Shiv Pratap Singh)
Commissioner (Appeals)

Attested

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

Date : 31-07-2023

By RPAD / SPEED POST

To,
M/s. Inox Air Products Private Limited,
Plot No. A-1/15, Phase-II,
GIDC, Vatva,
Ahmedabad – 382445

Appellant

The Assistant Commissioner,
CGST, Division-III,
Ahmedabad South

Respondent

Copy to :

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