O/O THE PRINCIPAL COMMISSIONER (APPEALS), GST & CENTRAL EXCISE

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Y25-40/D/2018-19 | [illegible] 05/AC/2018-19 | 09-05-2018

[illegible] (Order-In-Appeal No.):

KCH-EXCUS-000-APP-044-2019

Date of Order: 29.03.2019 | Date of issue: 31.03.2019

[illegible]

Passed by Shri Kumar Santosh, Principal Commissioner (Appeals), Rajkot

[illegible]

[illegible] Name & Address of the Appellant & Respondent :-

M/s Transworld Terminals Pvt. Ltd., Bharat CFS, Zone-4, MPSEZ, Mundra, Gujarat.

[illegible]

[illegible]

[illegible]

:: ORDER IN APPEAL ::

M/s. Transworld Terminals Private Limited, Bharat CFS, Zone-1, MPSEZ, Mundra (hereinafter referred to as 'appellant') filed present appeal against Order-in-Original No. 20/JC/2017-18 dated 30.5.2018 (hereinafter referred to as 'impugned order') passed by the Joint Commissioner, Central GST, Gandhidham (Kutch) (hereinafter referred to as 'the adjudicating authority'):-

2. The brief facts of the case are that Show Cause Notice No. V.ST/STR-Mundra/ST Div/Jt Commr/23/2016-17 dated 15.2.2017 was issued to the appellant demanding reversal of cenvat credit of Rs. 1,62,47,328/- under Rule 6 of Cenvat Credit Rules, 2004 (hereinafter referred to as 'CCR, 2004') in respect of exempted services provided by them during FY 2011-12 to FY 2013-14 and also the appellant has not declared correct value of exempted services in their ST-3 returns for FY 2014-15 which resulted into demand of short reversed cenvat credit of Rs. 9,33,201/- under Section 73(1) of the Finance Act, 1994 (hereinafter referred to as 'the Act') along with interest under Section 75 of the Act and for imposition of penalty under Section 78 of the Act and Rule 15 of CCR, 2004. The lower adjudicating authority vide impugned order confirmed the demand of recovery of cenvat credit aggregating to Rs. 1,71,80,519/- along with interest and imposed penalty of Rs. 1,71,80,519/- under Section 78 of the Act and also imposed penalty of Rs. 1,71,80,519/- under Rule 15 of CCR, 2004.

3. Being aggrieved with the impugned order, appellant preferred the present appeal, inter alia, on the following grounds:

(i) For the period upto 30.6.2012, service tax was required to be levied on taxable service defined under Section 65(105) of the Act; that Section 65(23) of the Act defines 'Cargo Handling Service' and export cargo handling service is/was out of the definition of 'Cargo Handling Service'; that export cargo handling service is not exempted but it is not a service at all as per Section 65(23) of the Act; that the definition does not consider the same to be a service, then it cannot be considered as exempted service; therefore, reversal of credit under Rule 6(3) of CCR, 2004 is not at all required; that the appellant relied on CBEC Circular F. No. B.11/1/2002-TRU dated 1.8.2002, judgment of the Karnataka High Court in the case of Konkan Marine Agencies reported as 2009 (13) S.T.R. 7 (Kar.) and decision of CESTAT, Hyderabad in the case of Rambal Freight Pvt. Ltd. reported as 2017 (47) S.T.R. 61 (Tri.-Hyd.) in support of their contention and submitted that Export Cargo Handling income upto 30.6.2012 was Rs. 28,20,17,105/- and the reversal of cenvat credit @ 5% for FY 2011-12 and @6% for FY 2012-13 comes to Rs. 1,48,42,[illegible]/- which needs to be set aside on this ground alone.

(ii) The appellant is engaged in providing GTA service for transport of empty

cargo containers from port to CFS and vice-versa and charges freight from the customers on which reverse charge is applicable under Service Tax Rules, 1994; that the appellant referred and relied on Rule 2(1)(d) of Service Tax Rules, 1994, Section 68(2) of the Act and Notification No. 35/2004-ST dated 31.12.2004 (upto 30.6.2012) and Notification No. 30/2012-ST dated 20.6.2012 (w.e.f. 1.7.2012) to say that responsibility to pay freight is either on the importer or on the exporter, as the case may be, thus the question of charging of service tax from them does not arise; that the invoices raised by the appellant with respect to transportation charges pertaining to empty containers specifically mention that the service tax liability in respect of freight charges is to be discharged by the consignor or the consignee as the case may be; that freight income does not qualify to be exempted because the service is not exempt from service tax but the recipient is to pay service tax on the freight, hence transportation income cannot be considered as exempt service for the purpose of Rule 6(3) of CCR, 2004 and no reversal of cenvat credit is required to be made; that the appellant relied on decisions in the case of Gurbachan Singh reported as 2017-TIOL-1342-CESTAT-ALL, [illegible] reported as 2016-TIOL-2137-CESTAT-BANG, Angiplast Private Limited reported as 2013-TIOL-785-CESTAT-AHM in support of their contention; that the total freight income for FY 2011-12 to FY 2013-14 comes to Rs. 2,25,34,718/- and the reversal @ 5% (for FY 2011-12) and @ 6% for FY 2012-13 and FY 2013-14 comes to Rs. 12,58,798/-, which needs to be set aside on the above ground.

(iii) For rendering the service of maintenance and repairs, the appellant obtained services of M/s. Komal Enterprises, who charged separately for labour value on which service tax was charged and material component value on which VAT was charged; that the appellant while raising invoices on their customers had followed the same principle and disclosed the material component value including profit margin separately and labour charges separately and VAT and service tax had been charged and collected on the respective amounts by the appellant; that while calculating the value of exempt services, the appellant has considered the sale of material as trading activity and correctly valued exempted service involved by reducing the purchase price from the sale price in view of Explanation-I to Rule 6(3D) of CCR, 2004; that the demand confirmed on account of undervaluation of the material cost for reversal of amount under Rule 6(3) of CCR, 2004 is required to be set aside; that the appellant has collected service tax and VAT separately and has also paid the same to the respective tax collecting authority; that it clearly is not a case of trading but it is a case of composite service and therefore there should not be any requirement of reversal of cenvat credit and order for reversal of Rs. 9,35,781/- needs to be set aside.

(iv) the SCN was issued on 15.3.2017 for the period from April, 2011 to March,

2010; that the SCN was required to be issued within 5 years from the relevant date i.e. date of filing of ST-3 return, even in the case of fraud, collusion, suppression of facts, etc.; that the ST-3 return for the period from April, 2011 to September, 2011 was filed on 17.12.2011 and hence, the last date to issue SCN for the said period expired on 16.12.2016, therefore, SCN issued on 15.3.2017 is invalid and in violation of the law; that the appellant produced copy of ST-3 return for the period from April, 2011 to September, 2011 along with Appeal Memo and submitted that the lower adjudicating authority has provided incorrect findings at Para 25 of the impugned order that ST-3 return was filed on 22.6.2012; thus, reversal of cenvat credit of Rs. 27,60,044/- demanded for the period from April, 2011 to September, 2011 also needs to be set aside on the ground of limitation of time.

(v) The department has issued multiple SCNs for the same period for the purpose of demanding service tax/reversal of cenvat credit under Rule 6 of Cenvat Credit Rules, 2004 (hereinafter referred to as 'CCR, 2004') on freight and cargo handling income earned by the appellant. SCN No. V.ST/STR/Mundra/ST-Div.I/JLComm./29/2016-17 dated 15.3.2017 alleged that the appellant has not reversed amount of cenvat credit attributable to exempted services under Rule 6 of CCR, 2004 for the financial years 2011-12 to 2013-14, considering transportation income is exempted from payment of service tax whereas SCN No. V/15-119/ST/ADC/2015 dated 15.5.2017 demanded service tax on transportation income for the financial years 2011-12 to 2014-15 and the impugned Show Cause Notice No. DGCEI/RRU/35-23/2017-18 dated 31.3.2017 demanded Service Tax of Rs. 18,77,076/- for the period from 1.7.2012 to 31.3.2015. Thus, the department has taken different legal positions where two SCNs have demanded service tax on transportation income considering the same service as taxable service whereas 3rd SCN dated 15.3.2017 issued by the Joint Commissioner has demanded reversal of cenvat credit availed on common input services considering transportation service as exempted service. The department cannot blow hot and cold at the same time and for the same period since it is utter travesty of justice that 3 SCNs are issued to the same assessee for the same period for the same income. The appellant relied on decisions in the case of Standard Niwar Mill reported as 2013 (288) E.L.T. 124 (All.), Sun Pharma Industries Ltd. reported as 2008 (228) ELT 580 (Tri. - Ahmd.), Avery India Ltd. reported as 2011 (268) ELT 61 (Cal.) and Simplex Infrastructure Ltd. reported as 2016 (46) STR 634 (Cal.). Three SCNs have been adjudicated by the same authority for the same period and holding different legal positions in different orders, thereby causing mockery of the adjudication process and therefore the impugned order is unsustainable in law and needs to be set aside on this ground.

(vi) The lower adjudicating authority has given incorrect findings with regard to submissions of the appellant on the ground of limitation, has adjudicated multiple

SCNs and hold different legal positions for the same income of the appellant and ignored submission of the appellant that audit has been already conducted for the concerned period and SCNs still invoked extended period, ignored submissions that when penalty has been imposed under Section 78 of the Act, penalty cannot be imposed under Rule 15 of CCR, 2004 and that export cargo handling is not a service as it is excluded from the scope of cargo handling service under Section 65(23) of the Act and thus the impugned order has been passed without application of mind. The appellant relied on decisions in the case of KCV Appliances Pvt. Ltd. reported as 2019 (10) GSTL 175 (Ker.), Zain Hardtek Pvt. Ltd. reported as 2018 (8) GSTL 376 (Ker.) and Sonia Henry Security Services Pvt. Ltd. reported as 2018 (9) GSTL 209 (Del.) to say that any order passed without application of mind is liable to be quashed.

(vi) Audit of records of the appellant has been conducted every year and all the information has been shown to the department and no observation has been raised by the audit officers for the period from 2008-09 to 2013-14. In such a case, the department cannot allege suppression of facts with intent to evade payment of service tax on the part of the appellant when all the facts and all the details were always available with the department. The appellant relied upon the decisions in the case of Nizam Sugar Factory reported as 2006-TIOL-68-SC-CX, Chandole Travels reported as 2013 (32) STR 453 (Tri. – Del.), Pinky Impression (P) Ltd. reported as 2011 (21) STR 482 (Tri. – Kolkata), Anand Transistor Clock Mfg. Co. reported as 2002 (139) ELT 342 (Tri. – Mumbai) and Diamond Power Infrastructure Limited reported as 2015 (40) STR 825 (Tri. – Ahmd.) to say that there is no suppression of facts by them with intent to evade payment of service tax and therefore the extended period cannot be invoked and penalty under Section 78 of the Act cannot be imposed.

(vii) The impugned order has relied upon decision in the case of South Eastern Coal Fields Ltd. reported as 2016 (41) STR 668 (Tri. – Delhi) wherein it was held that since the consignment note is not issued, the service recipient is not liable to pay service tax under reverse charge. The decision of the CESTAT has been challenged to the Hon'ble Supreme Court by the department and the appeal has been admitted by the Hon'ble Supreme Court reported as 2017-TIOL-260-SC-ST. The appeal has been filed by the department contending that even if there is no consignment note, the service received by South Eastern Coal Fields Ltd. is that of GTA and therefore they are liable to pay service tax under reverse charge. Thus, the matter is under litigation and different interpretations are possible based on facts and factual matrix of each case. In the present case, the service recipients have paid service tax under reverse charge and hence, there is a clear distinct fact which invalidates the case relied upon in the impugned order.

(ix) If service tax is not payable, interest under Section 75 of the Act cannot be recovered and penalty cannot be imposed under Section 78 of the Act. The appellant relied on decisions in the case of Jain Kesar Samaj reported as 2015 (38) STR 906 (Tri. – Mumbai) and Sundaram Textiles Ltd. reported as 2014 (35) STR 30 (Mad.) in this regard.

(x) Penalty under Section 78 of the Act as well as penalty under Rule 15 of CCR, 2004 cannot be imposed. It is bad in law to impose penalty on the same amount for the same reason under two different clauses; that Rule 15 of CCR, 2004 refers to Section 78 of the Act for imposition of penalty. Hence, penalty imposed under Rule 15 of CCR, 2004 is required to be set aside on account of double imposition of penalty for the same alleged amount.

5. Personal hearing in the matter was attended by S/Shri Darshan Ranavat, Chartered Accountant and Umesh Pandya, Manager (Finance) and they reiterated the grounds of appeal and submitted that they have undertaken activity of handling of export cargo and not paid service tax because Section 65(23) defines these activities/cargo handling of export cargo as not service by excluding it; that CBEC Circular No. B-11/1/2002-TRU dated 1.8.2002 Para 2 & Para 3.1 of Annexure-I clarifies as above; that they rely on CESTAT order dated 22.6.2016 in the case of Ramoji Infocity Pvt. Ltd. reported as 2017 (47) STR 61 (Tri.-Hyd.); that they provide GTA service and service tax on GTA is not exempted but payable by the service receiver, the demand is legally not sustainable; that they have submitted sample invoices indicating mention of service tax on GTA by consignor/consignee and not by service provider; that service tax has been paid by them on service portion of repairs & maintenance service provided as they have paid VAT on goods which have been used for repairs & maintenance; that explanation to Rule 5(3) and Rule 5(3A) of CCR, 2004; that demand for the period from April, 2011 to September, 2011 is time barred being beyond 5 years because SCN was issued on 15.3.2017 and service tax return for the period filed on 17.12.2011; that they have been audited every year of dispute and audit reports also attached with appeal memo and hence, suppression of facts can't be alleged as held in the case of Bharat Tel-eventures Limited reported as 2014 (35) STR 85 (Tri. – Mumbai) (Para 5.10); that penalty under Section 78 of the Act is not applicable in this case; that penalty under Rule 15 of CCR, 2004 has also been imposed.

FINDINGS:

6. I have carefully gone through the facts of the case, impugned order, grounds of appeal and the submissions made during personal hearing. I find that the appellant has deposited Rs. 12,85,950/- equivalent to 7.5% of service tax confirmed vide impugned order and thus has complied with the requirement of Section 35F(i) of the

Central Excise Act, 1944, as made applicable to service tax matters vide Section 83 of the Act. Therefore, I proceed to decide the appeal. The issue to be decided in the present case is as to whether confirmation of demand of reversal of cenvat credit on the value of the exempted services under Rule 6(3) of CCR, 2004 is correct or not.

6. I find that the appellant has contended that multiple SCNs have been issued one demanding service tax on transportation income earned by the appellant, another for reversal of cenvat credit under Rule 6(3) of CCR, 2004, considering transportation income and other income as value of exempted services. I also find that SCN dated 16.3.2017 issued by the Assistant Commissioner for the period from 2011-12 to 2014-15 demanding service tax on transportation income whereas the impugned SCN has been issued to the appellant on same date i.e. 16.3.2017 by the Joint Commissioner demanding reversal of cenvat credit availed on common input services considering transportation income, export cargo handling income and income of materials used in providing repairs and maintenance service as exempted services and also the SCN dated 31.3.2017 issued by the DGCEI for the period from 1.7.2012 to 31.3.2015 again demanded service tax on transportation income of the appellant. Hence, I find that the stand of the department is/was not clear whether to consider the income earned by the appellant towards rendering of export cargo handling and towards transportation of empty containers are considered to be exempted services or are liable to service tax and hence, I find that this argument of the appellant is correct.

7. I find that the impugned SCN demanded recovery of cenvat credit not reversed under Rule 6(3) of CCR, 2004 on allegedly exempted services such as cargo handling service, storage and warehousing service, exempted service to the extent of value/cost of the materials supplied while providing repairs and maintenance service and confirmed vide the impugned order. I find that Rule 2(e) of CCR, 2004 defines 'exempted service' as under: -

> (e) "exempted service" means -
>
> (1) taxable service which is exempt from the whole of the service tax leviable thereon; or
>
> (2) service, on which no service tax is leviable under section 66B of the Finance Act; or
>
> (3) taxable service whose part of value is exempted on the condition that no credit of inputs and input services, used for providing such taxable service, shall be taken
>
> but shall not include a service -
>
> (a) which is exported in terms of rule 6A of the Service Tax Rules, 1994; or

(b) By way of transhipment of goods by a vessel from customs station of clearance in India to a place outside India.

(Emphasis supplied)

7.1 Thus, the taxable service which is exempt from service tax or service on which no service tax is leviable under Section 66B of the Act or taxable service whose whole of value is exempted on the condition that no cenvat credit of inputs and input services used for providing such taxable service is taken are considered to be 'exempted service'. The appellant contended that prior to 1.7.2012, income earned against activity of handling of export cargo was not a service as this had been excluded from the definition of 'Cargo Handling Service' under Section 65(23) of the Act. I would like to reproduce definition of 'Cargo Handling Service' as provided under Section 65(23) of the Act which reads as under:

(23) "cargo handling service" means loading, unloading, packing or unpacking of cargo and includes –

(a) cargo handling services provided for freight in special containers or for non-containerised freight, services provided by a container freight station or any other freight terminal, for all modes of transport, and cargo handling service incidental to freight, and

(b) services of packing together with transportation of cargo or goods, with or without one or more of other services like loading, unloading, unpacking,

but does not include handling of excise cargo or passenger baggage or mere transhipment of goods.

(Emphasis supplied)

7.2 It could be seen from the definition of Cargo Handling Service as provided under Section 65(23) of the Act that handling of export cargo is excluded from the definition of Cargo Handling Service which makes it clear that the legislation has kept handling of export cargo out of purview of service tax net and thus, the activity of handling of export cargo is non-taxable service prior to 1.7.2012 and not exempted service. I find that Rule 6(3) of CCR, 2004 will come into play in the case where the service provider takes cenvat credit on common inputs and common input services used for taxable output service and for exempted service also. Since, activity of handling of export cargo has been kept out of service tax net, it cannot be considered as exempted service and therefore in my considered view, no reversal of cenvat credit under Rule 6(3) of CCR, 2004 is required. I also find that w.e.f. 1.7.2012, the classification of the services has been done away with and all the services except those specified in negative list of services are liable to service tax in terms of Section 66B of the Act inserted w.e.f. 1.7.2012 and therefore, service tax is payable on cargo handling services in relation to export cargo also w.e.f. 1.7.2012 and therefore, the same cannot be considered as exempted service w.e.f. 1.7.2012 as well. Hence, no reversal of cenvat credit under Rule 6(3) of CCR, 2001 is required either prior to 1.7.2012 or after. Hence, I set aside demand of reversal of cenvat credit or value of handling of export cargo under Rule 6(3) of CCR, 2001 holding that it has been incorrectly confirmed in the impugned order.

8 I also find that SCN has considered reversal of cenvat credit on value of transportation service provided by the appellant for movement of empty containers from CFS to port and vice versa. The impugned order held that the appellant had not issued consignment notes and therefore, service of transport of empty containers cannot be considered as GTA service whereas, the appellant has contended that they provided GTA service to the extent of transport of empty cargo containers from port to CFS and vice-versa and charged freight from the customers on which reverse charge is applicable under Service Tax Rules, 1994 and that the invoices raised by the appellant with respect to transportation charges pertaining to empty containers specifically mention that the service tax liability in respect of freight charges is to be discharged by the consignor or the consignee, as the case may be. I would like to examine the definition of 'Goods Transport Agency' as provided under Section 65(50b) of the Act and Rule 4B of Service Tax Rules, 1994, which reads as under:

> *(50b) "goods transport agency" means any person who provides service in relation to transport of goods by road and issues consignment note, by whatever name called;*
>
> RULE 4B. Issue of consignment note. — Any goods transport agency which provides service in relation to transport of goods by road in a goods carriage shall issue a consignment note to the recipient of Service:
>
> Provided that where any taxable service in relation to transport of goods by road in a goods carriage is wholly exempted under section 93 of the Act, the goods transport agency shall not be required to issue the consignment note.
>
> *Explanation.* — For the purposes of this rule and the second proviso to rule 4A, "**consignment note" means a document, issued by a goods transport agency against the receipt of goods for the purpose of transport of goods by road in a goods carriage, which is serially numbered, and contains the names of the consignor and consignee, registration number of the goods carriage in which the goods are transported, details of the goods transported, details of the place of origin and destination, person liable for paying service tax whether consignor, consignee or the goods transport agency**
>
> *(Emphasis supplied)*

8.1 I find that any person who provides service in relation to transport of goods by road and issues consignment note, by whatever name called, is Goods Transport Agency and the consignment note is a document issued by Goods Transport Agency

which is serially numbered and contains name of the consignor and consignee, registration number of the goods carriage, details of goods transported, details of place of origin and destination and details of person liable for paying service tax. In the present case, I find that the appellant has transported empty containers and issued invoices as per Explanation to Rule 4B of Service Tax Rules, 1994 containing all these details and therefore, the services of transportation of empty containers is nothing but a GTA service. I further find that Rule 2(1)(d) of Service Tax Rules, 1994 provides that in relation to service provided by GTA, person liable to pay freight is a person liable for payment of service tax which reads as under

> (d) "person liable for paying service tax", -
>
> (i) ... ...
>
> (ii) ... ...
>
> ... ...
>
> ... ...
>
> *(D) in relation to service provided or agreed to be provided by a goods transport agency in respect of transportation of goods by road, where the person liable to pay freight is,—*
>
> *(I) any factory registered under or governed by the Factories Act, 1948 (63 of 1948);*
>
> *(II) any society registered under the Societies Registration Act, 1860 (21 of 1860) or under any other law for the time being in force in any part of India;*
>
> *(III) any co-operative society established by or under any law;*
>
> *(IV) any dealer or excisable goods, who is registered under the Central Excise Act, 1944 (1 of 1944) or the rules made thereunder;*
>
> *(V) any body corporate established by or under any law; or*
>
> *(VI) any partnership firm whether registered or not under any law including association of persons;*
>
> *any person who pays or is liable to pay freight either himself or through his agent for the transportation of such goods by road in a goods carriage:*
>
> *Provided that where such person is located in a non-taxable territory, the provider of such service shall be liable to pay service tax.*
>
> ***(Emphasis supplied)***

6.2 I also find that the appellant has contended that the service receivers have paid service tax on transportation of empty containers under reverse charge mechanism as provided under Rule 2(1)(d) of Service Tax Rules, 1994 and Notification No. 30/2012-ST dated 20.6.2012 and the department has not contested

this not given any documentary evidences against this claim. I also find that liability of payment of service tax in respect of GTA service was on recipient of the service even prior to 1.7.2012 and from 1.7.2012 onwards. Therefore, I hold that GTA service provided by the appellant cannot be considered as exempted service and hence, demand of reversal of cenvat credit under Rule 6(3) of CCR, 2004 on the value of GTA service is not correct, legal & proper. Hence, I set aside demand of Rs. 12,09,790/- for reversal of cenvat credit on value of GTA service under Rule 6(3) of CCR, 2004.

9. I also find that SCN has demanded reversal of cenvat credit on value of materials used in providing repairs and maintenance service. The undisputed facts of the case are that the appellant had taken service of M/s. Kamal Enterprise for providing repairs and maintenance service to their customers. M/s. Kamal Enterprise have charged separately for labour value (on which service tax is charged) and material component value (on which VAT is charged) and similarly the appellant has also charged the value of service and the value of materials separately from their customers and paid service tax on the value of service and paid VAT on the value of materials. I find that it is settled legal position that in case of composite contracts where service is provided along with sale of goods, service tax is leviable on service component. The appellant in the present case has paid service tax on service component of the repairs and maintenance service provided. It is on record that the appellant has consumed the goods in providing the said service on which they paid VAT to the Government of Gujarat. Therefore, I am of the considered view that the value of material cannot be considered as exempted service and no reversal of cenvat credit of Rs. under Rule 6(3) of CCR, 2004 can be demanded on the said income. Hence, I set aside the impugned order confirming reversal of cenvat credit of Rs. 8,31,201/- on value of materials used in providing repairs and maintenance service.

9.1 I find that the Hon'ble CESTAT, Chandigarh in the case of Xerox India Limited reported as 2010 (20) STR 88 (Tri. - Chan.) has held as under: -

> *9. (a) Whether the activity undertaken by M/s. Xerox for various contracts for Maintenance and Repairs do qualify as Maintenance or Repair Service, or not? - It is a fact that appellant is engaged in the activity of Maintenance and Repair of equipments supplied by them under various contracts. M/s. Xerox is required to replace the parts and accessories at the time of repair or maintenance and the Hon'ble Apex Court has examined the contract of M/s. Xerox and held that these contracts i.e. FSMA, SSMA, AMC etc. are Works Contracts and M/s. Xerox is liable to pay VAT/Sales Tax on the material portion of the said contract, as per various State VAT Act. Therefore, as it has been held by the Hon'ble Apex Court these are the Works Contracts and M/s. Xerox is paying VAT on the portion of materials supplied, therefore, in the light of the decision in the case of Wipro GE Medical Systems Limited (supra) M/s. Xerox is liable to*

pay service tax only on Labour Portion. In the said case, the Tribunal observed as under:

> 16. On a very careful consideration of the facts, we find that there is no dispute with regard to the leviability of service tax on the maintenance and repair services. The main point of dispute is with regard to the valuation. However, Section 67 of the Finance Act clearly provides for the abatement of the value of the goods sold in the course of the carrying out of the service. The point is whether the goods are actually sold. According to the department, the contract is only for the maintenance and repair. Therefore, it cannot be said that the spare parts were sold. This view is not correct. The chartered accountant has actually given a certificate with regard to the consumption of materials. It is also not denied that in the course of the maintenance no material was used. In several decisions it has been held that service tax cannot be levied on that portion of the value on which sales tax has been charged. This position has been elaborately dealt with in the decision of the Shilpa Colour Lab case decided by this Bench and cited supra. This view has been affirmed in many decisions. Once, the sales tax has been paid on the materials, then on the same service tax also cannot be charged. In fact, the appellants had relied on the decision of the Hon'ble Karnataka High Court which has been upheld by the Hon'ble Supreme Court. In the Modi Xerox case it has been clearly held that in the Annual Maintenance Contract, the replacement of spares etc. would be considered as sale. Even in the present case, on 70% of the value sales tax has been paid and this has been accepted by the Government of Karnataka. This fact also cannot be ignored. Moreover, Notification No. 12/2003, dated 20-6-2003 clearly provides for exempting the value of the materials sold during the provision of the service. Whenever any service is provided if in the course of the provision of the service certain materials are used they will definitely be considered as sale. This is clearly covered by the Constitutional Article 366(29)(b) cited by the Learned Advocate. We do not agree with the Learned Commissioner that the said Constitutional provision has no application here. The Maintenance and Repair Contract entered by the appellant with their customers has been recognized as 'Works Contract' by the Government of Karnataka and the registration has been obtained for payment of sales tax. When that is the case, it cannot be said that the spare parts received by the clients of the appellant have not been sold to them. We hold that in any Annual Maintenance Contract the spare parts etc. which have been used in the course of the maintenance service are definitely to be considered as sold and when sales tax has been paid on the value of such goods, simultaneously one cannot charge them to the service tax. In view of these clear legal provisions, there is absolutely no justification for levy of service tax beyond 30% of the value of the total contract. We would like to state that the data provided by the appellant shows that the adoption of 30% of the value of the contract towards value of services rendered appears to be reasonable in the light of the payment of sales tax on the 70% value which has also been accepted. Therefore, this valuation cannot be said to be arbitrary. In these circumstances, we do not find any merit in the impugned orders. Since the demand of duty is not sustainable the demand of interest, penalty etc.

also are not justified. Hence, we allow the appeals with consequential relief."

The said order was affirmed by the Hon'ble Apex Court reported as 2012 (28) S.T.R. J44 (S.C.)

10. In view of above, I find that the demand of reversal of cenvat credit under Rule 6(3) of CCR, 2004 on the value of export cargo handling, value of GTA service and value of material used in providing repair & maintenance service is not tenable since consideration received by the Appellant towards these activities cannot be considered as exempted service. Since the demand of reversal of cenvat credit is not tenable, recovery of interest under Section 75 of the Act and imposing penalty under Section 76 of the Act as well as under Rule 15 of CCR, 2004 is also not tenable and legally not sustainable.

11. In view of above, I set aside the impugned order and allow the appeal.

१२. अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।

12. The appeal filed by the appellant is disposed off in above terms.

सत्यापित

(कुमार संतोष)

प्रधान आयुक्त (अपील्स)

By Speed Post

To,

M/s. Transworld Terminals Private Limited, Bharat CFS, Zone-1, MPSEZ, Mundra.	मेसर्स ट्रांसवर्ल्ड टर्मिनल्स प्राइवेट लिमिटेड, भारत सीएफएस, ज़ोन-1, एमपीएसईज़ेड, मुंद्रा

प्रति:

(1) प्रधान मुख्य आयुक्त, केन्द्रीय वस्तु व सेवा कर एवं केन्द्रीय उत्पाद शुल्क, अहमदाबाद क्षेत्र, अहमदाबाद को जानकारी हेतु।

(2) आयुक्त, केन्द्रीय वस्तु व सेवा कर एवं केन्द्रीय उत्पाद शुल्क, गांधीधाम को आवश्यक कार्यवाही हेतु।

(3) सहायक आयुक्त, केन्द्रीय वस्तु व सेवा कर एवं केन्द्रीय उत्पाद शुल्क, मण्डल, मुंद्रा को आवश्यक कार्यवाही हेतु।

(4) गार्ड फ़ाइल