::आयुक्त (अपील्स) का कार्यालय,वस्तु एवं सेवा करऔरकेन्द्रीय उत्पाद शुल्क::
O/O THE COMMISSIONER (APPEALS), GST &CENTRAL EXCISE
द्वितीय तल,जी एस टी भवन / 2nd Floor, GST Bhavan
रेस कोर्स रिंग रोड / Race Course Ring Road
राजकोट / Rajkot – 360 001
Tele Fax No. 0281 – 2477952/2441142Email: commrappl3-cexamd@nic.in

सत्यमेव जयते

रजिस्टर्डडाकए.डी.द्वारा

DIN-20211064SX000000F7CD

क	अपील / फाइलसंख्या/ Appeal /File No.	मूल आदेश सं / O.I.O. No.	दिनांक/ Date
	V2/19/RAJ/2021	**01 & 02/DC/JAM-II/2020-21**	**18-12-2020**

अपील आदेश संख्या(Order-In-Appeal No.):

RAJ-EXCUS-000-APP-044-2021

आदेश का दिनांक / Date of Order: **20.10.2021**

जारी करने की तारीख / Date of issue: **21.10. 2021**

श्रीअखिलेश कुमार, आयुक्त (अपील्स), राजकोट द्वारा पारित /

Passed by **Shri Akhilesh Kumar**,Commissioner (Appeals),Rajkot.

ग अपर आयुक्त/ संयुक्त आयुक्त/ उपायुक्त/ सहायक आयुक्त, केन्द्रीय उत्पाद शुल्क/ सेवाकर/वस्तु एवंसेवाकर,राजकोट / जामनगर / गांधीधाम। द्वारा उपरलिखित जारी मूल आदेश से सृजित: /

Arising out of above mentioned OIO issued by Additional/Joint/Deputy/Assistant Commissioner, Central Excise/ST / GST, Rajkot / Jamnagar / Gandhidham :

घ अपीलकर्ता&प्रतिवादी का नाम एवं पता /Name & Address of theAppellant&Respondent :-

M/s. Tata Chemicals Limited (Mithapur-361345), Jamnagar, , Gujarat.

इस आदेश(अपील) से व्यथित कोई व्यक्ति निम्नलिखित तरीके में उपयुक्त प्राधिकारी / प्राधिकरण के समक्ष अपील दायर कर सकता है।/
Any person aggrieved by this Order-in-Appeal may file an appeal to the appropriate authority in the following way.

(A) सीमा शुल्क ,केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपील, केन्द्रीय उत्पाद शुल्क अधिनियम ,1944 की धारा 35B के अंतर्गत एवं वित्त अधिनियम, 1994 की धारा 86 के अंतर्गत निम्नलिखित जगह की जा सकती है ।/

Appeal to Customs, Excise & Service Tax Appellate Tribunal under Section 35B of CEA, 1944 / Under Section 86 of the Finance Act, 1994 an appeal lies to:-

(i) वर्गीकरण मूल्यांकन से सम्बन्धित सभी मामले सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण की विशेष पीठ, वेस्ट ब्लॉक नं 2, आर॰ के॰ पुरम, नई दिल्ली, को की जानी चाहिए ।/

The special bench of Customs, Excise & Service Tax Appellate Tribunal of West Block No. 2, R.K. Puram, New Delhi in all matters relating to classification and valuation.

(ii) उपरोक्त परिच्छेद 1(a) में बताए गए अपीलों के अलावा शेष सभी अपीलें सीमा शुल्क,केंद्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट)की पश्चिम क्षेत्रीय पीठिका,,द्वितीय तल, बहुमाली भवन असावा अहमदाबाद- ३८००१६को की जानी चाहिए ।/

To the West regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at, 2nd Floor, Bhaumali Bhawan, Asarwa Ahmedabad-380016in case of appeals other than as mentioned in para- 1(a) above

(iii) अपीलीय न्यायाधिकरण के समक्ष अपील प्रस्तुत करने के लिए केन्द्रीय उत्पाद शुल्क (अपील)नियमावली, 2001, के नियम 6 के अंतर्गत निर्धारित किए गये प्रपत्र EA-3 को चार प्रतियों में दर्ज किया जाना चाहिए । इनमें से कम से कम एक प्रति के साथ, जहां उत्पाद शुल्क की माँग, ब्याज की माँग और लगाया गया जुर्माना, रुपए 5 लाख या उससे कम,5 लाख रुपए या 50 लाख रुपए तक अथवा 50 लाख रुपए से अधिक है तो क्रमश: 1,000/- रुपये, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपीलीय न्यायाधिकरण की शाखा के सहायक रजिस्ट्रार के नाम से किसी भी सार्वजिनक क्षेत्र के बैंक द्वारा जारी रेखांकित बैंक ड्राफ्ट द्वारा किया जाना चाहिए । संबंधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहां संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है । स्थगन आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रुपए का निर्धारित शुल्क जमा करना होगा ।/

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.5000/-, Rs.10,000/- where amount of dutydemand/interest/penalty/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 Asst. Registrar of branch of any nominated public sector bank of the place where the bench of any nominated public sector bank of the place where the bench of the Tribunal is situated. Application made for grant of stay shall be accompanied by a fee of Rs. 500/-

(B) अपीलीय न्यायाधिकरण के समक्ष अपील, वित्त अधिनियम,1994 की धारा 86(1) के अंतर्गत सेवाकर नियमवाली, 1994, के नियम 9(1) के तहत निर्धारित प्रपत्र S.T.-5 में चार प्रतियों में की जा सकेगी एवं उसके साथ जिस आदेश के विरुद्ध अपील की गयी हो, उसकी प्रति साथ में संलग्न करें (उनमें से एक प्रति प्रमाणित होनी चाहिए) और इनमें से कम से कम एक प्रति के साथ, जहां सेवाकर की माँग ,ब्याज की माँग और लगाया गया जुर्माना,रुपए 5 लाख या उससे कम,5 लाख रुपए या 50 लाख रुपए तक अथवा 50 लाख रुपए से अधिक है तो क्रमश: 1,000/- रुपये, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपीलीय न्यायाधिकरण की शाखा के सहायक रजिस्ट्रार के नाम से किसी भी सार्वजिनक क्षेत्र के बैंक द्वारा जारी रेखांकित बैंक ड्राफ्ट द्वारा किया जाना चाहिए । संबंधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहां संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है । स्थगन आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रुपए का निर्धारित शुल्क जमा करना होगा ।/

The appeal under sub section (1) of Section 86 of the Finance Act, 1994, to the Appellate Tribunal Shall be filed in quadruplicate in Form S.T.5 as prescribed under Rule 9(1) of the Service Tax Rules, 1994, and Shall be accompanied by a copy of the order appealed against (one of which shall be certified copy) and should be accompanied by a fees of Rs. 1000/- where the amount of service tax & interest demanded & penalty levied of Rs. 5 Lakhs or less, Rs.5000/- where the amount of service tax & interest demanded & penalty levied is more than five lakhs but not exceeding Rs. Fifty Lakhs, Rs.10,000/- where the amount of service tax & interest demanded & penalty levied is more than fifty Lakhs rupees, in the form of crossed bank draft in favour of the Assistant Registrar of the bench of nominated Public Sector Bank of the place where the bench of Tribunal is situated. / Application made for grant of stay shall be accompanied by a fee of Rs.500/-.

(i) वित्त अधिनियम,1994 की धारा 86 की उप-धाराओं (2) एवं (2A) के अंतर्गत दर्ज की गयी अपील, सेवाकर नियमावली, 1994, के नियम 9(2) एवं 9(2A) के तहत निर्धारित प्रपत्र S.T.-7 में की जा सकेगी एवं उसके साथ आयुक्त, केन्द्रीय उत्पाद शुल्क अथवा आयुक्त (अपील), केन्द्रीय उत्पाद शुल्क द्वारा पारित आदेश की प्रतियाँ संलग्न करें (उनमें से एक प्रति प्रमाणित होनी चाहिए) और आयुक्त द्वारा सहायक आयुक्त अथवा उपायुक्त, केन्द्रीय उत्पाद शुल्क/ सेवाकर, को अपीलीय न्यायाधिकरण को आवेदन दर्ज करने का निर्देश देने वाले आदेश की प्रति भी साथ में संलग्न करनी होगी। /
The appeal under sub section (2) and (2A) of the section 86 the Finance Act 1994, shall be filed in For ST.7 as prescribed under Rule 9 (2) & 9(2A) of the Service Tax Rules, 1994 and shall be accompanied by a copy of order of Commissioner Central Excise or Commissioner, Central Excise (Appeals) (one of which shall be a certified copy) and copy of the order passed by the Commissionerauthorizing the Assistant Commissioner or Deputy Commissioner of Central Excise/ Service Tax to file the appeal before the Appellate Tribunal.

(ii) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय प्राधिकरण (सस्टेट) के प्रति अपीलों के मामले में केन्द्रीय उत्पाद शुल्क अधिनियम 1944 की धारा 35एफ के अंतर्गत, जो की वित्तीय अधिनियम, 1994 की धारा 83 के अंतर्गत सेवाकर को भी लागू की गई है, इस आदेश के प्रति अपीलीय प्राधिकरण में अपील करते समय उत्पाद शुल्क/सेवा कर मांग के 10 प्रतिशत (10%), जब मांग एवं जुर्माना विवादित है, या जुर्माना, जब केवल जुर्माना विवादित है, का भुगतान किया जाए, बशर्ते कि इस धारा के अंतर्गत जमा कि जाने वाली अपेक्षित देय राशि दस करोड़ रुपए से अधिक न हो।
केन्द्रीय उत्पाद शुल्क एवं सेवाकर के अंतर्गत "मांग किए गए शुल्क" में निम्न शामिल है
(i) धारा 11 डी के अंतर्गत रकम
(ii) सेनवेट जमा की ली गई गलत राशि
(iii) सेनवेट जमा नियमावली के नियम 6 के अंतर्गत देय रकम
- बशर्ते यह कि इस धारा के प्रावधान वित्तीय (सं॰ 2) अधिनियम 2014 के आरंभ से पूर्व किसी अपीलीय प्राधिकारी के समक्ष विचाराधीन स्थगन अर्जी एवं अपील को लागू नहीं होंगे।/
For an appeal to be filed before the CESTAT, under Section 35F of the Central Excise Act, 1944 which is also made applicable to Service Tax under Section 83 of the Finance Act, 1994, 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, provided the amount of pre-deposit payable would be subject to a ceiling of Rs. 10 Crores,
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
- provided further that the provisions of this Section shall not apply to the stay application and appeals pending before any appellate authority prior to the commencement of the Finance (No.2) Act, 2014.

(C) भारत सरकार कोपुनरीक्षण आवेदन :
Revision application to Government of India:
इस आदेश की पुनरीक्षणयाचिका निम्नलिखित मामलो में, केंद्रीय उत्पाद शुल्क अधिनियम,1994 की धारा 35EE के प्रथमपरंतुक के अंतर्गतअवर सचिव, भारत सरकार, पुनरीक्षण आवेदन ईकाई, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, संसद मार्ग, नई दिल्ली-110001, को किया जाना चाहिए। /
A revision application lies to the Under Secretary, to the Government of India, Revision Application Unit, Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi-110001, under Section 35EE of the CEA 1944 in respect of the following case, governed by first proviso to sub-section (1) of Section-35B ibid:

(i) यदि माल के किसी नुकसान के मामले में, जहां नुकसान किसी माल को किसी कारखाने से भंडार गृह के पारगमन के दौरान या किसी अन्य कारखाने या फिर किसी एक भंडार गृह से दूसरे भंडार गृह पारगमन के दौरान, या किसी भंडार गृह में या भंडारण में माल के प्रसंस्करण के दौरान, किसी कारखाने या किसी भंडार गृह में माल के नुकसान के मामले में।/
In case of any loss of goods, where the loss occurs 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

(ii) भारत के बाहर किसी राष्ट्र या क्षेत्र को निर्यात कर रहे माल के विनिर्माण में प्रयुक्त कच्चे माल पर भरी गई केन्द्रीय उत्पाद शुल्क के छूट (रिबेट) के मामले में, जो भारत के बाहर किसी राष्ट्र या क्षेत्र को निर्यात की गयी है। /
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.

(iii) यदि उत्पाद शुल्क का भुगतान किए बिना भारत के बाहर, नेपाल या भूटान को माल निर्यात किया गया है। /
In case of goods exported outside India export to Nepal or Bhutan, without payment of duty.

(iv) सुनिश्चित उत्पाद के उत्पादन शुल्क के भुगतान के लिए जो ड्यूटी क्रेडीट इस अधिनियम एवं इसके विभिन्न प्रावधानों के तहत मान्य की गई है और ऐसे आदेश जो आयुक्त (अपील) के द्वारा वित्त अधिनियम (नं॰ 2),1998 की धारा 109 के द्वारा नियत की गई तारीख अथवा समयावधि पर या बाद में पारित किए गए है।/
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 such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec. 109 of the Finance (No.2) Act, 1998.

(v) उपरोक्त आवेदन की दो प्रतियां प्रपत्र संख्या EA-8 में, जो की केन्द्रीय उत्पादन शुल्क (अपील)नियमावली,2001, के नियम 9 के अंतर्गत विनिर्दिष्ट है, इस आदेश के संप्रेषण के 3 माह के अंतर्गत की जानी चाहिए। उपरोक्त आवेदन के साथ मूल आदेश व अपील आदेश की दो प्रतियां संलग्न की जानी चाहिए। साथ ही केन्द्रीय उत्पाद शुल्क अधिनियम, 1944 की धारा 35-EE के तहत निर्धारित शुल्क की अदायगी के साक्ष्य के तौर पर TR-6 की प्रति संलग्न की जानी 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.

(vi) पुनरीक्षण आवेदन के साथ निम्नलिखित निर्धारित शुल्क की अदायगी की जानी चाहिए।
जहाँ संलग्न रकम एक लाख रूपये या उससे कम हो तो रूपये 200/- का भुगतान किया जाए और यदि संलग्न रकम एक लाख रूपये से ज्यादा हो तो रूपये 1000 -/ का भुगतान किया जाए।
The revision application shall be accompanied by a fee of Rs. 200/- where the amount involved in Rupees One Lac or less and Rs. 1000/- where the amount involved is more than Rupees One Lac.

(D) यदि इस आदेश में कई मूल आदेशों का समावेश है तो प्रत्येक मूल आदेश के लिए शुल्क का भुगतान, उपर्युक्त ढंग से किया जाना चाहिये। इस तथ्य के होते हुए भी की लिखा पढ़ी कार्य से बचने के लिए यथास्थिति अपीलीय नयाधिकरण को एक अपील या केंद्रीय सरकार को एक आवेदन किया जाता है। / In case, if the order covers various umbers of order- in Original, fee for each O.I.O. should be paid in the aforesaid manner, notwithstanding 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 lakh fee of Rs. 100/- for each.

(E) यथासंशोधित न्यायालय शुल्क अधिनियम, 1975, के अनुसूची-I के अनुसार मूल आदेश एवं स्थगन आदेश की प्रति पर निर्धारित 6.50 रुपये का न्यायालय शुल्क टिकिट लगा होना चाहिए। /
One copy of application or O.I.O. as the case may be, and the order of the adjudicating authority shall bear a court fee stamp of Rs.6.50 as prescribed under Schedule-I in terms of the Court Fee Act,1975, as amended.

(F) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्य विधि) नियमावली, 1982 में वर्णित एवं अन्य संबन्धित मामलों को सम्मिलित करने वाले नियमों की ओर भी ध्यान आकर्षित किया जाता है। /
Attention is also invited to the rules covering these and other related matters contained in the Customs, Excise and Service Appellate Tribunal (Procedure) Rules, 1982.

(G) उच्च अपीलीय प्राधिकारी को अपील दाखिल करने से संबंधित व्यापक, विस्तृत और नवीनतम प्रावधानों के लिए, अपीलार्थी विभागीय वेबसाइट www.cbec.gov.in को देख सकते हैं। /
For the elaborate, detailed and latest provisions relating to filing of appeal to the higher appellate authority, the appellant may refer to the Departmental website www.cbec.gov.in.

:: ORDER-IN-APPEAL ::

M/s. Tata Chemicals Ltd., At: Mithapur, Okha Mandal, Dist: Dwarka (hereinafter referred to as **"the appellant"**) has filed the present appeal alongwith stay application against the Order-in-Original No. **01 & 02/DC/JAM-II/2020-21** dated **18-12-2020** (hereinafter referred to as **'the impugned order'**) passed by the Deputy Commissioner, CGST & Central Excise, Division Jamnagar-II (hereinafter referred to as **'the lower adjudicating authority'**).

2. Briefly stated, facts of the case are that the appellant are holders of Service Tax Registration No. AAACT4059MST005. On the basis of intelligence, the appellant were a Wagon Owner under the "Wagon Investment Scheme" of India Railways and were not discharging duty liability correctly, an inquiry was conducted. It was observed that as per the said scheme, the investor in the scheme procured and provided wagons to the Railways, who in turn, offered such wagon owners concession / rebate on railway freight. The Customers investing in Railway wagons were assured of supplying a guaranteed no. of rakes every month based on the no. of rakes procured and the turn round of the type of wagons with 10% concession on freight. It appeared that the appellant were liable to pay service tax on the consideration received by them from the Railways in form of concession / rebate under the category of "Supply of Tangible Goods Services", as defined under erstwhile Section 65(105)(zzzzj) of the Finance Act, 1994 (hereinafter referred to as "the Act"). The relevant details / information / copy of relevant documents were obtained from the appellant and it was observed that the appellant had received consideration to the tune of Rs.3,37,67,699/- and Rs. 2,87,93,676/- during period from October 2014 to March 2016 and from April, 2016 to June 2017 respectively, on which they had not paid service tax.

3. The above observation culminated into issuance of two show cause notices dated 04-09-2017 and 18-09-2018 demanding service tax amount of Rs.43,62,182/- and Rs. 42,97,216/- respectively, which was adjudicated by the lower adjudicating authority vide the impugned order. The adjudicating authority confirmed demand under Section 73 (2) of the Act, alongwith interest under Section 75 of the Act, and also imposed penalty under Section 76 and Section 77 of the Act.

4. Being aggrieved by the impugned order, the appellant had preferred the present appeal, inter-alia, mainly on the following facts and grounds:

(i) For their business requirement, they had entered into an agreement on 03.04.2008 with Railways under the "Wagon Investment Scheme", as per which they have agreed to move one number of BCN rake so procured by them. In pursuant of the investment

made by them, they were entitled to a guaranteed supply of 4 rakes per month and a freight rebate of 10%.

(ii) The said impugned order does not lay down or specify as to how the ingredients or the applicability of charging section/ definition of "supply of tangible goods service" is met or attracted as essential constituents i.e. "legal right of possession" and "effective control" has not been attributed to rest with them and without which the transaction can not be said to be attracted to the service under the said category.

(iii) That supply of tangible goods would be chargeable to service tax provided there is no transfer of the "Right to Possession" and "Effective Control" of such goods from the service provider to the recipient of service. There does not appear any discussion or allegation in the SCN / impugned order as to how the appellant could have exercised either the "Right of Possession" or "Effective Control" of such tangible goods i.e. railway wagons, which is the first and foremost condition for taxability. The scope of the valuation rules in so far section 67 of the Act and the rules framed thereunder, will occupy or elaborate the field only once the entry or the charge is established with certainty, else such aspect of valuation is otiose and will not come to aid to make the entry otherwise not charged and one being charged to tax.

(iv) It is settled provision in interpretation of taxing statute that one has to look merely as what is clearly said. There is no room for any intendment. There is neither equity nor presumption as to a tax. Nothing to be read in, nothing to be implied and one has to look fairy at the language used. In this regard, they relied upon following case laws:

- Janapada Sabha Chhindwara Vs. Central Province Syndicate Ltd. [AIR 1971 SC 57]
- Atlas Cycle Industries Vs. State of Harayana [AIR 1972 SC 121]

(v) That as per agreement with the Indian Railways dated 03.04.2008,

(a) The assets become a part or merged in the general pool of wagons of the Indian Railways.(cl. 3.1)

(b) The assets become a part of the rolling stock of the Indian Railways(cl.2.3).

(c) They do not repair or maintain the assets, it is done by the Indian Railways.(cl.7)

(d) The Indian Railways have full liberty or even modify the assets as per its requirement.(cl.9)

(e) In the event of any accident, they have only the limited right to claim the depreciated value of the assets(cl 10.2).

(f) There is no payment by way of lease rentals by the Railways.(cl.3.3.1.1)

(g) The only benefit for the investment was rebate in freight and guaranteed supply of wagons i.e. 4 rakes per month (Cl.3.3.1.1). The rebate in freight is only a return of the investment.

Therefore, once the investment is made and agreement is entered into, the noticee is not in a position to exercise any type of control over the assets.

(vi) That as regards the requirement of right of "possession" over the assets, it is to submit that

(a) During the default period of agreement i.e. 15 years, which both the parties have entered into to perform, the noticee do not have any right to claim possession of the assets. And after completion of the agreed period of 15 years the assets shall get so to say automatically transferred to the Indian Railways (Cl. 40). There is no mention of any agreed value or scope of any natural agreement as to such value as per the agreement upon such transfer. It is not in dispute that at the end of 15 years the gross value/ depreciated value of the assets would be almost nil, and given the proposal of Cl. 10.2 of the agreement, at the most, the investor/ noticee may lay its hands on depreciated value as per Income Tax Rules minus scrap value i.e. at the most scrap value of the assets. Therefore, the transfer to Railways I without any right of possession as envisaged in the statue.

(b) The option or right of possession even by a pre-mature termination is not forthcoming. Since it is only in the exceptional/ rare/ unlikely situation of a termination of the agreement as per (cl..11.0) i.e. on account of liquidation/ merger with other company or due to alteration/ deletion of the investment scheme (not in the hands of the noticee), the noticee company, in such form or manner as it may exist can seek / opt for sale of the assets at a mutually agreed price. Such a possibility in the currency of the noticee existing as such is not possible and therefore to say that it is the right of the noticee as such is wrong in the context. There is no year wise agreed buy out price in agreement and given the purport of valuation as in Cl 10.2, it is only the scrap value that such successor in interest of the noticee company may in the remote lay its hands upon. Therefore, even by an early termination of the agreement in such rare event, the noticee cannot exercise any right of re-possession/ possession whatsoever, as required by the charging provision of the section. There is no

iota of any rebuttal to the aforesaid factual and legal relationship of the parties by the impugned order. And on the other hand, the charge to tax, invoking the extended period of limitation has been confirmed solely based on the letter of the TRU dated 29.02.2008. Therefore, the impugned order grossly fails to establish the charge, the test of deemed sale or payment of VAT is not germane in the context, since the charge to service tax under service tax laws have to read in and applied by the extant service tax laws and not any other law.

(vii) They submitted that first and foremost, the transaction has to be a "service" to be attracted by the charging provisions of Section 66B. The transaction is not covered under the ambit of "Declared Services" (Section 66E) since there is no transfer of goods by way of hiring, leasing, licensing or in any such manner without transfer of right to use such goods, as the right to use the goods i.e. wagons is never with them, as explained supra. The lower authority did not consider the position in law per section 65B (44) of the Act in defining "Service" – means any activity carried out by a person for another for consideration and includes a declared service but shall not include (1) an activity which constitutes merely a transfer of title in goods or immovable property, by way of sale, gift or in any other manner; or (2) 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; that the investment made by them in pursuant to the public scheme of Indian Railways and promote Public-Private partnership and there is not element of any separate service provided or to be provided by the parties and neither there is any supply of tangible goods by retaining right of possession and control. Even assuming though not admitting, particularly in context of the aspects as contended in the SCN itself, citing the clarification of TRU dated 29.02.2008, that a transaction if it involves both possession and control of the goods to the user of the goods, will be a "deemed sale", then given the exclusion of "deemed sale" in the definition itself, the transaction cannot be treated as service and not liable to service tax.

(viii) The lower authority had grossly erred in confirming penalty u/s. 76 and 77 vide the impugned order. No mens-rea have been attributed against them. On the other hand, they have made available true and complete details of transactions. They were under bonafide belief that such transaction don't attract levy of service tax in light of the submissions made in para(s) supra, confirming penalty was totally unwarranted. Assuming but not admitting, that such transaction is covered under the net of service tax, considering the issue on its merits and their point of view, there could not be any occasion to depart from Section 80 of the Act. In this regard, they relied upon the judgment in the case of Fruition Informatics [2012 (282) ELT 30 (Kar)] and M/s. ETA Engineering Ltd. [2004(174)ELT 19].

(ix) An identical situation in case of MSPL Ltd. [2012 (25) STR 90 (Tri. – Bang.)], Hon'ble Tribunal after considering and discussing the issue, has granted unconditional stay in the matter. Similarly, ratio of decision in case of Bhima SSK Ltd. [2013-TIOL-775-CESTAT-MUM] was applicable in the present case.

(x) In identical matter for the SCN for earlier period for the period from Jan, 2009 to March, 2012 and for April, 2012 to March, 2013 and April 2013 to September 2014, the Commissioner (Appeals), Cen. Ex. & Cus. Rajkot vide OIA no. RAJ-EXCUS-000-APP-202-14-15 dt. 26.09.2014, OIA No. RAJ-EXCUS-000-APP-003-15-16 Dt. 16.04.2015 and OIA No. RJT-EXCUS-000-APP-145-16-17 dated 19.01.2017 has allowed their appeals.

5. Personal Hearing in the matter was held on 30-09-2021. Shri Harshit Thaker, Sr. Manager (Accounts) attended the hearing. He reiterated the grounds of the appeal.

6. I have carefully gone through the facts of the case, the impugned order and submissions made by the appellant in the Grounds of Appeal as well as during the course of personal hearing. The issue to be decided in the present appeal is whether the appellant is liable to pay service tax on the freight rebate received by them from the Indian Railways in terms of Wagon Investment Scheme (hereinafter referred to as "scheme") treating it as consideration towards provision of services or otherwise.

7.1 I find that the Lower Authority has confirmed the demand of Service tax on "Supply of Tangible Goods service". The definition of taxable service for "Supply of Tangible Goods" given at under erstwhile Section 65(105)(zzzzj) of the Act is as under :

> *"any service provided or to be provided,-*
> *(zzzzj) to any person, by any other person in relation to supply of tangible goods including machinery, equipment and appliances for use, without transferring right of possession and effective control of such machinery, equipment and appliances."*

7.2. On going through the documents available on records, I observe that the entire issue revolves around an investment scheme of Indian Railway and Agreement entered into between the Appellant and Govt of India through Indian Railways where return on an investment made by the appellant is guaranteed in a predefined manner. The key highlights of the Agreement are as under:-

> *"2.5 The Railway Administration shall give freight rebate @10% on the normal tariff rates to the Investor as may be notified by the Central Government from time to time.*
>
> *3.1 Wagons procured under the scheme will merge and operate in*

general pool of wagons of Indian Railways.

3.3.1.1 Freight rebate of 10% shall be granted for 15 years and guaranteed supply of wagons at the rate of 4 rakes per month.

4.0 Ownership of Wagons: Ownership of BCN wagons procured under Wagon Investment Scheme (WIS) shall get transferred to Indian Railways after 15 years from the date on which full rake has been handed over to IR.

5.0 The Railway Administration will provide above guaranteed clearance per month for a period of 15 years from the commencement date on the basis of supply and availability of wagons for service/ commercial use....

7.0 Free time and demurrage rules applicable to railway owned wagons from time to time will be applicable to wagons procured under WIS.

No maintenance charges will be levied for maintenance undertaken by Indian Railways as per standard norms.

9.0 The Indian Railways will be at liberty to make the necessary modification/ changes on the wagons which they would carry out on their own wagons of similar design.

10.2 In the event of such wagons getting condemned as a result of accident, Indian Railways will pay the depreciated value as per Income tax Rules minus scrap value of the wagon at the time of condemnation

11.0 In the event of termination of the agreement by the Investor on account of liquidation / merger with other company or due to any alteration / deletion in the scheme, the ownership of wagons would remain with Investor. However, the investor shall have option to sell the wagons to Indian Railways at a mutually agreed price.".

7.3. It is observed from the above terms & conditions that the appellant once enters in the scheme; the wagons get absorbed in general pool of wagons of Indian Railways. Thus, although the ownership of wagons remains with the appellant, they don't have the possession of these wagons. Moreover, the appellant does not have any effective control over these wagons. Further, no maintenance charges would be levied for maintenance undertaken by Railways as per standard norms and Railways would be at liberty to make the necessary modifications / changes on the wagons. It can be seen that this agreement does not refer any "supply of Wagons" by the Appellant but an investment to procure wagons. Therefore, I find force in the argument of the appellant that the transaction would be covered under the service tax net only if two basic criteria viz. (i) Possession of goods and (ii) Effective Control are satisfied. In the instant case, on perusal of aforesaid clauses of the agreement, I find that the neither the possession of wagons nor effective control over these wagons rests with the appellant. Thus, in view of above, the transaction does not pass the basic test of "Supply of Tangible Goods" for levy of Service Tax. I, therefore, conclude and hold that the agreement made by the appellant with the Indian Railways is an investment deal and such an act of investment and return thereon under the said agreement does not fall under the definition of service category of "supply of tangible goods" and do not attract

service tax

8. I also observe that my predecessors vide Orders-in-Appeal Nos. (i) RJT-EXCUS-000-APP-202-14-15 dated 26.09.2014, (ii) RJT-EXCUS-000-APP-003-15-16 dated 16.04.2015 and (iii) RJT-EXCUS-000-APP-145-16-17 dated 19.01.2017 in the proceedings of earlier period in appellant's own case, has also took a similar view. In the said order, after discussing the relevant definition and case laws referred by the Appellant i.e. MSPL Ltd. Vs. CCE, Belgaum [2012 (25) STR 90 (Tri. – Bang.)], Bhima SSK Ltd. [2013-TIOL-775-CESTAT-MUM], and M/s. Blue Dart Aviation Ltd. [2012 (05) LCX 0156], it was observed as under: -

> *"14. Regarding the period from 01.07.2012, as held above that during the transaction between the appellant and Indian Railways, the possession and effective control over the wagons remained with Railways. It is also undisputed that the appellant had invested in the scheme for the reason to get guaranteed supply of racks and rebate in freight. As per the said agreement, it is obvious that the appellant had not entered into the investment scheme with any motive to earn income by way of giving wagons on hiring. It is also clear from the clause 4 & clause 11 of the agreement that once the wagons were given by the appellant to Indian Railways under Wagon Investment Scheme, the same were not going to be returned to them under any circumstances. This means that the Government had launched such type of the Public-Private partnership scheme with sole intention to expand their capital and in turn, they were granted benefits in the form of guaranteed rakes and discount in freight. Under these circumstances, I am of the view that the supply of guaranteed rakes and discount in freight is nothing but return on their investment, and cannot be termed as service. In this regard, I find force in the arguments put forth by the appellant that it ought to have been considered that section 65B (44) of the Act in defining service means any activity carried out by a person for another for consideration and includes a declared service but shall not include (1) a transfer of title in goods or immovable property, by way of sale, gift or in any other manner, or (2) 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. The investment made by them is pursuant to the public scheme of Indian railways and promote Public-Private partnership and there is no element of separate "service" provided or to be provided by the parties and neither there is any supply of tangible goods by retaining right of possession and control. The consideration received by the appellant cannot be termed as consideration received towards service provided by them as the transaction does not pass the test of supply of taxable service to the Railways by the appellant.*
>
> *In view of above discussion, I find that the appellant were not liable to pay service tax even during the period from 01.07.2012 to 31.03.2013."*

9. The Appellant has contended that the adjudicating authority erred in not following the judicial discipline, as relied upon Order-in-Appeals dated 26-09-2014, 16-04-2015 and 19-01-2017 passed by the then Commissioner (Appeals), Rajkot in their own case were not

considered by the adjudicating authority on the grounds that said orders were accepted by the Department on monetary limits and not on merits.

9.1 It is pertinent to mention that when the Department accepted the Orders-in-Appeal on monetary limit, fact remains that said orders have not been reversed by higher appellate authority and consequently binding on the adjudicating authority. The judicial discipline required the adjudicating authority to have followed the said orders in letter and spirit. When any order is accepted on monetary limit, the Department may agitate the issue in appropriate case in other appeal proceedings, but it is not open for the adjudicating authority to pass order on merit disregarding binding judicial precedent. The adjudicating authority may distinguish relied upon decision, if there is change in facts or change in legal position. However, there is no change in legal provisions brought out in the SCN or in impugned order. Hence, I find merit in contention of the appellant.

9.2 My views are supported by the Order passed by the Hon'ble CESTAT, New Delhi in the case of RGL Converters reported as 2015 (315) E.L.T. 309 (Tri. - Del.), wherein it has been held that,

> *"10. It is axiomatic that judgments of this Tribunal have precedential authority and are binding on all quasi-judicial authorities (Primary or Appellate), administering the provisions of the Act, 1944. If an adjudicating authority is unaware of this basic principle, the authority must be inferred to be inadequately equipped to deliver the quasi-judicial functions entrusted to his case. If the authority is aware of the hierarchical judicial discipline (of precedents) but chooses to transgress the discipline, the conduct amounts to judicial misconduct, liable in appropriate cases for disciplinary action.*
>
> *11. It is a trite principle that a final order of this Tribunal, enunciating a ratio decidendi, is an operative judgment per se; not contingent on ratification by any higher forum, for its vitality or precedential authority. The fact that Revenue's appeal against the judgment of this Tribunal was rejected only on the ground of bar of limitation and not in affirmation of the conclusions recorded on merits, does not derogate from the principle that a judgment of this Tribunal is per se of binding precedential vitality qua adjudicating authorities lower in the hierarchy, such as a primary adjudicating authority or a Commissioner (Appeals). This is too well settled to justify elaborate analyses and exposition, of this protean principle.*
>
> *12. Nevertheless, the primary and the lower appellate authorities in this case, despite adverting to the judgment of this Tribunal and without concluding that the judgment had suffered either a temporal or plenary eclipse (on account of suspension or reversal of its ratio by any higher judicial authority), have chosen to ignore judicial discipline and have recorded conclusions diametrically contrary to the judgment of this Tribunal. This is either illustrative of gross incompetence or clear irresponsible conduct and a serious transgression of quasi-judicial norms by the primary and the lower appellate authorities, in this case. Such perverse orders further clog the appellate docket of this Tribunal, already burdened with a huge pendency, apart from accentuating the faith deficit of the citizen/assessee, in departmental adjudication."*

9.3 I also rely on the decision rendered by the Hon'ble Gujarat High Court in the case of Claris Lifesciences Ltd. reported as 2013 (298) E.L.T. 45 (Guj.), wherein it has been held that,

> *"8. The adjudicating officer acts as a quasi judicial authority. He is bound by the law of precedent and binding effect of the order passed by the higher authority or Tribunal of superior jurisdiction. If his order is thought to be erroneous by the Department, the Department can as well prefer appeal in terms of the statutory provisions contained in the Central Excise Act, 1944.*
>
> *9. Counsel for the petitioners brought to our notice the decision of the Apex Court in the case of Union of India v. Kamlakshi Finance Corporation Ltd. reported in 1991 (55) E.L.T. 433 (S.C.) in which while approving the criticism of the High Court of the Revenue Authorities not following the binding precedent, the Apex Court observed that :-*
>
> *"6...It cannot be too vehemently emphasized that it is of utmost importance that, in disposing of the quasi-judicial issues before them, revenue officers are bound by the decisions of the appellate authorities. The order of the Appellate Collector is binding on the Assistant Collectors working within his jurisdiction and the order of the Tribunal is binding upon the Assistant Collectors and the Appellate Collectors who function under the jurisdiction of the Tribunal. The principles of judicial discipline require that the orders of the higher appellate authorities should be followed unreservedly by the subordinate authorities. The more fact that the order of the appellate authority is not "acceptable" to the department - in itself an objectionable phrase - and is the subject-matter of an appeal can furnish no ground for not following it unless its operation has been suspended by a competent Court. If this healthy rule is not followed, the result will only be undue harassment to assessees and chaos in administration of tax laws.*
>
> *7. The impression or anxiety of the Assistant Collector that, if he accepted the assessee's contention, the department would lose revenue and would also have no remedy to have the matter rectified is also incorrect. Section 35D confers adequate powers on the department in this regard. Under sub-section (1), where the Central Board of Excise and Customs (Direct Taxes) comes across any order passed by the Collector of Central Excise with the legality or propriety of which it is not satisfied, it can direct the Collector to apply to the Appellate Tribunal for the determination of such points arising out of the decision or order as may be specified by the Board in its order. Under sub-section (2) the Collector of Central Excise, when he comes across any order passed by an authority subordinate to him, if not satisfied with its legality or propriety, may direct such authority to apply to the Collector (Appeals) for the determination of such points arising out of the decision or order as may be specified by the Collector of Central Excise in his order and there is a further right of appeal to the department. The position now, therefore, is that, if any order passed by an Assistant Collector or Collector is adverse to the interests of the Revenue, the immediately higher administrative authority has the power to have the matter satisfactorily resolved by taking up the issue to the Appellate Collector or the Appellate Tribunal as the case may be. In the light of these amended provisions, there can be no justification for any Assistant Collector or Collector refusing to follow the order of the Appellate Collector or the Appellate Tribunal, as the case may be, even where he may have some reservations on its correctness. He has to follow the order of the higher appellate authority. This may instantly cause some prejudice to the Revenue but the remedy is also in the hands of the same officer. He has only to bring the matter to the notice of the Board or the Collector so as to enable appropriate proceedings being taken under S. 35E(1) or (2) to keep the interests of the department alive. If the officer's view is the correct one, it will no doubt be finally*

upheld and the Revenue will get the duty, though after some delay which such procedure would entail."

9.4 I also rely on the decision rendered by the Hon'ble Madras High Court in the case of Industrial Mineral Company (IMC) reported as 2018 (18) G.S.T.L. 396 (Mad.), wherein it has been held that,

"8. This Court is of the view that when the order passed by the Tribunal has not been stayed or set aside by the Hon'ble Supreme Court, it is the bounden duty of the Adjudicating Authority to follow the law laid down by the Tribunal. Since a binding decision has not been followed by the Adjudicating Authority in this case, this Court can interfere straightaway without relegating the assessee to file an appeal."

10. In view of above, the service tax confirmed by the impugned order is not legally sustainable and is liable to be set aside. As the entire demand of service tax is not legally tenable, the question of demanding interest under erstwhile Section 75 of the Act and imposition of penalties under erstwhile Section 76 and 77 of the Act does not arise and accordingly, the same are also required to be set aside.

11. In view of the above, I allow the appeal filed by the appellant and set aside the impugned order passed by the lower adjudicating authority.

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

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

Attested

Superintendent
Central GST (Appeals)
Rajkot

(अखिलेश कुमार)
आयुक्त (अपील्स)

20 October, 2021

By R.P.A.D.

To,

1	M/s. Tata Chemicals Ltd., At: Mithapur, Okha Mandal, Dist: Dwarka PIN CODE – 361 345.	मेसर्स टाटा केमिकल्स ली एट : मीठापुर ओखा मण्डल जिल्ला:- देवभूमि द्वारका पिन – ३६१३४५

Copy submitted to:-

1) The Chief Commissioner, CGST & Central Excise, Ahmedabad.
2) The Principal Commissioner, CGST & Central Excise, Rajkot.
3) The Deputy Commissioner, CGST & Central Excise Division, Jamnagar-II.
4) The Superintendent, CGST & C.Ex., Range-Dwarka.
5) Guard File