



स्टैंड डाक ए.डी. द्वारा

DIN-20221264SX0000111D82

अपील / फाइल संख्या/
Appeal / File No.

V2/12/BVR/2022

मूल आदेश सं /

O.I.O. No.

**BHV-EXCUS-000-JC-LD-
009-2021-22**

दिनांक/Date

09-02-2022

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

BHV-EXCUS-000-APP-096-2022

आदेश का दिनांक /

Date of Order:

11.11.2022

जारी करने की तारीख /

Date of issue:

02.12.2022

श्री शिव प्रताप सिंह, आयुक्त (अपील्स), राजकोट द्वारा पारित /

Passed by Shri Shiv Pratap Singh, Commissioner (Appeals), Rajkot.

अपर आयुक्त/ संयुक्त आयुक्त/ उपायुक्त/ सहायक आयुक्त, केन्द्रीय उत्पाद शुल्क/ सेवाकर/ वस्तु एवं सेवाकर, 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:

अपीलकर्ता & प्रतिवादी का नाम एवं पता / Name & Address of the Appellant & Respondent :-

M/s. Manish Kishanchand Rajai,, Navdurga Building, Opp. Ajay Guest House, Sutarwad Bhavnagar, Gujrat-364001

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.

सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रांतीय अपील, केन्द्रीय उत्पाद शुल्क अधिनियम, 1944 का 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: -

वर्गीकरण मूल्यांकन से सम्बन्धित सभी मामलों सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण की विशेष पीठ, वेस्ट ब्लॉक नं 2, आर० के० 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.

उपरोक्त परिच्छेद 1(a) में बताए गए अपीलों के अलावा शेष सभी अपीलों सीमा शुल्क केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेड) की पश्चिम क्षेत्रीय पीठिका, द्वितीय तल, बहुमाली भवन असारवा अहमदाबाद- 360016 को की जानी चाहिए /

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

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 मांग, ब्याज की मांग और लगाया गया जुर्माना, रूपये 5 लाख या उससे कम, 5 लाख रूपये या 50 लाख रूपये तक अथवा 50 लाख रूपये से अधिक है तो क्रमशः 1,000/- रूपये, 5,000/- रूपये अथवा 10,000/- रूपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपीलीय न्यायाधिकरण की शाखा के सहायक रजिस्टार के नाम से किसी भी सार्वजनिक 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/- रूपये 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 duty/demand/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/-

अपीलीय न्यायाधिकरण के समक्ष अपील, वित्त अधिनियम, 1994 की धारा 86(1) के अंतर्गत सेवाकर नियमावली, 1994, के नियम 9(1) के तहत निर्धारित प्रपत्र S.T.-5 में चार प्रतियों में की जा सकती है 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 मांग, ब्याज की मांग और लगाया गया जुर्माना, रूपये 5 लाख या उससे कम, 5 लाख रूपये या 50 लाख रूपये तक अथवा 50 लाख रूपये से अधिक है तो क्रमशः 1,000/- रूपये, 5,000/- रूपये अथवा 10,000/- रूपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपीलीय न्यायाधिकरण की शाखा के सहायक रजिस्टार के नाम से किसी भी सार्वजनिक 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/- रूपये 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 shall be accompanied by a fee of Rs. 1,000/- where the amount of service tax & interest demanded & penalty levied is more than fifty Lakhs or less, Rs.5000/- 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 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 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 आयुक्त, 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 Form ST.7 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 Commissioner authorizing 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 (सेस्टेट) के प्रति अपीलों के मामले में केन्द्रीय उत्पाद शुल्क अधिनियम 1994 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, उ केवल जुर्माना विवादित है, का भुगतान किया जाए, बशर्त 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

- बशर्त यह कि इस धारा के प्रावधान वित्तीय (सं 2) अधिनियम 2014 के आरंभ से पूर्व किसी अपीलीय प्राधिकारी के समान विचारार्थीन स्थान अर्जा एवं अपील को लागू नहीं होगा। /

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 be made before the Tribunal on payment of 10% of the duty demanded where duty or duty and penalty are in dispute, penalty, where penalty alone is in dispute, provided the amount of pre-deposit payable would be subject to 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 appeal pending before any appellate authority prior to the commencement of the Finance (No.2) Act, 2014.

(C) भारत सरकार को पुनरीक्षण आवेदन :

Revision application to Government of India:

इस आदेश की पुनरीक्षणयाचिका निम्नलिखित मामलों में, केन्द्रीय उत्पाद शुल्क अधिनियम 1994 की धारा 35EE के प्रथमपरंतुक के अंतर्गत अपील, 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 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 ज्युटी क्रेडीट इस अधिनियम एवं इसके विभिन्न प्रावधानों के तहत मान्य की गई है अथवा ऐसे आदेश जो आयुक्त (अपील) के द्वारा वित्त अधिनियम (नं. 2), 1998 की धारा 109 के द्वारा नियत की गई तारीख अथवा समायाविधि पर बाद में पारित किए गए हैं। /

Credit of any duty allowed to be utilized towards payment of excise duty on final products under the provision 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 प्रतियाँ प्रपत्र संख्या EA-8 में, जो की केन्द्रीय उत्पादन शुल्क (अपील)नियमावली, 2001, के नियम 9 के अंतर्गत विनिर्माणित है, इस आदेश के संप्रेषण के 3 माह के अंतर्गत की जानी चाहिए। उपरोक्त आवेदन के साथ मूल आदेश व अपील आदेश की दो प्रतियाँ 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 0 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 दंग से किया जाना चाहिये। इस तथ्य के होते हुए भी की लिखी पट्टी कार्य से बचने के लिए यथास्थिति अपीलीय न्यायाधिकरण को एक अपील या केन्द्रीय सरकार को एक आवेदन कि जाते हैं। / In case, if the order covers various numbers 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 Rs. 100/- for each.

(E) यथासंशोधित न्यायालय शुल्क अधिनियम, 1975, के अनुसूची-1 के अनुसार मूल आदेश एवं स्थगन आदेश की प्रति पर निर्धारित 6.50 रूपये न्यायालय शुल्क टिकट 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 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 संबंधित मामलों को सम्मिलित करने वाले नियमों को और 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। /

Appellants may refer to the Departmental website www.cbec.gov.in.



:: अपील आदेश / ORDER-IN-APPEAL ::

M/s. Manish Kishanchand Rajal, Bhavnagar (hereinafter referred to as "Appellant") has filed the present Appeal against Order-in-Original No. BHV-EXCUS-000-JC-LD-009-2021-22 dated 09.02.2022 (hereinafter referred to as 'impugned order') passed by the Joint Commissioner, Central GST, Bhavnagar (hereinafter referred to as 'adjudicating authority').

2. The facts of the case, in brief, are that the Income Tax Department provided data/ details of various persons, who declared in their Income Tax Returns for financial year 2014-15, 2015-16 & 2016-17 to have earned income by providing services classified under various service sectors. The Income Tax Department also provided data of Form 26AS showing details of total amount paid/ credited under Section 194C, 194H, 194I & 194J of the Income Tax Act, 1961 in respect of various persons which depicted that such persons had earned income from providing services. The said data also contained the details of the Appellant who had not obtained Service Tax Registration under the Finance Act, 1994 (hereinafter referred to as 'the Act'). The jurisdictional Superintendent issued letter dated 15.07.2020 and email calling for the information/ documents for the financial year 2014-15, 2015-16, 2016-17 & 2017-18 (upto June-2017). The said letter dated 15.07.2020 was received back from the Postal Authorities undelivered with remarks "Not Known/ Left/ Incomplete Address etc." Since no reply/ response was given by them, the Service Tax was determined on the basis of data/ details provided by the Income Tax department available on records.

3. The above investigation culminated into Show Cause Notice dated 03.09.2020 proposing to demand Service Tax of Rs. 1,06,76,628/- including all cess under Section 73(1) of the erstwhile Finance Act, 1994 (hereinafter referred to as 'the Act') by invoking extended period alongwith interest under Section 75 of the Act from the Appellant. It was also proposed to impose penalty under Section 77(1)(a), 77(2), 77 (1)(c) and Section 78 of the Act.


4. The adjudicating authority vide the impugned order confirmed Service Tax demand of Rs. 1,06,76,628/- under Section 73(1) by invoking extended period of 5 years along with interest under Section 75 of the Act. The adjudicating authority imposed penalties of Rs. 10,000/- each under Section 77(1)(a), 77(2) and Section 77 (1)(c) of the Act. The penalty of Rs. 1,06,76,628/- was also imposed upon the Appellant under Section 78 of the Act.

5. Being aggrieved, the Appellant has preferred the present appeal on various grounds as stated below:

The Show Cause Notice issued by invoking the extended period of time is

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Central GST (Appeals)
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time barred, not in consonance with expression of law and thus not enforceable under the law.

(ii) The adjudicating authority has not appreciated that the appellant has provided services of transportation of goods by road and same is covered under the Negative List of services under Section 66D of the Act and hence the appellant is not liable to Service Tax as service provided are covered under the negative List of services.

(iii) The adjudicating authority erred in taxing the services of transport of goods by road under the head "Transfer of goods by way of hiring, leasing, licensing or in any such manner without transfer of right to use such goods". The adjudicating authority has not appreciated that means of providing transportation of goods is also exempt under mega exemption Notification No. 25/2012-ST.

(iv) The adjudicating authority has in similar case of Kishanchand Bhulchand Rajai, father of the Appellant engaged in providing similar services of transport of goods road has dropped the proceedings vide OIO No. BHV-EXCUS-000-JC-LD-004-2021-22 dated 26.11.2021 and he ought to have dropped the proceedings against the Appellant being identical case.

(v) The adjudicating authority has not appreciated that individual truck owners are outside purview of service tax as held by various decided case laws.

(vi) The adjudicating authority has not appreciated that there is no suppression of facts, fraud etc. with intend to evade payment of tax by the Appellant and hence the adjudicating authority erred in law in levying penalty under Section 78 and 77 of the Act.

6. Personal hearing in the matter was held on 18.10.2022. Shri Jayesh N. Mehta, Shri Manish Kishanchand Rajai & Shri Dinesh Rajai appeared for personal hearing and submitted a paper book containing written submissions with legal provisions relied and copies of previous orders wherein the proceedings were dropped. In one such order in case of present appellant's father passed by the same authority also the proceedings were dropped under identical facts and circumstances. They submitted that they were transporting goods by road as individual truck owners without issuing any consignment note and the service provided by them was exempt under Section 66D(P) of the Finance Act, 1994. They also submitted that the lower Adjudicating Authority has erroneously considered that they were renting trucks for transport of goods. They requested to drop the present proceedings as the issue is already settled and accepted by the Department as per the orders previously issued. They have nothing more to add.

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7. The paper book containing written submission produced during the personal hearing is akin to the statement of facts and ground of appeals submitted by the in the Appeal memorandum. In the paper book, they have submitted the copies of RC books of trucks, audited annual accounts for financial year 2014-15 to 2016-17, Form 26AS for the financial year 2014-15 to 2016-17, audited annual accounts for financial year 2014-15 to 2016-17 of Kishanchand Rajai, copies of Order-In-Originals issued by other Adjudicating Authority dropping the proceedings in similar matters, copies of provisions of Income Tax Act as well as Finance Act. They have also submitted Tax Audit Report for the year 2014-15 and copies of freight bills.

8. I have carefully gone through the case records, impugned order, appeal memorandum and written submission filed during the course of personal hearing by the Appellant. The issue to be decided in the case on hand is that whether the Appellant is liable to pay service tax on activity carried out by them or not.

9. I find that the Adjudicating Authority found that the activity of the Appellant is covered under Section 65B(44) of the Act as well as under clause (f) of Section 66(E) of the Act and held that the Appellant was liable to pay service tax on transfer of goods by way of hiring, leasing, licensing or in any such manner without transfer of right to use such goods. I find that the subject issue was clarified by the Board vide Circular No. 198/08/2016-Service Tax dated 17.08.2016 which is re-produced below for reference:

Subject: Service tax liability in case of hiring of goods without the transfer of the right to use goods.

In terms of sub-clause (d) of clause (29 A) of Article 366 of the Constitution of India, the transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration is deemed to be a sale of those goods by the person making the transfer, delivery or supply and a purchase of those goods by the person to whom such transfer, delivery or supply is made. It follows that such transactions will be liable for Sales Tax/Value Added Tax. In terms of section 66E(f) of the Finance Act, 1994, transfer of goods by way of hiring, leasing, licensing or in any such manner without transfer of right to use such goods is a "declared service" and hence liable to service tax. In this regard some representations have been received.

2. The matter has been examined. I am directed to draw your attention to the fact that in any given case involving hiring, leasing or licensing of goods, it is essential to determine whether, in terms of the contract, there is a transfer of the right to use the goods. Further, the Supreme Court in the case of Bharat Sanchar Nigam Limited vs Union of India, reported in 2006(2) STR 161 SC, had laid down the following criteria to determine whether a transaction involves transfer of the right to use goods, namely,-

- a. There must be goods available for delivery;*
- b. There must be a consensus ad idem as to the identity of the goods;*
- c. The transferee should have a legal right to use the goods – consequently all legal consequences of such use, including any permissions or licenses required therefor should be available to the transferee;*

For the period during which the transferee has such legal right, it has to be to the exclusion to the transferor this is the necessary concomitant of the plain language of

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the statute – viz. a “transfer of the right” to use and not merely a licence to use the goods;

e. Having transferred the right to use the goods during the period for which it is to be transferred, the owner cannot again transfer the same right to others.

3.1 This criteria must invariably be followed and applied to cases involving hiring, leasing or licensing of goods. The terms of the contract must be studied carefully vis-a-vis the criteria laid down by the Supreme Court in order to determine whether service tax liability will arise in a given case. It is not possible to either give an exhaustive list of illustrations or judgements on this issue. Cases decided under the Sales Tax /VAT legislations have to be considered against the background of those particular legislative provisions and terms of contract in that case.

3.2 The following case law may also be referred to. These should not be applied mechanically but their applicability to the facts of a given case, the terms of the contract in the given case and the criteria laid down by the Supreme Court should be examined carefully.

3.2.1. Commissioner VAT vs International Travel House Ltd – Delhi High Court judgement dated 8-9-2009 in ST Appeal 10/2009.

3.2.2 Rashtriya Ispat Nigam Limited vs Commercial Tax Officer reported in 1990(77) STC 182 and State of Andhra Pradesh vs Rashtriya Ispat Nigam Limited reported in 2002 (126) STC 114

3.2.3. State Bank of India vs State of Andhra Pradesh reported in 1988 (70) STC 215 A.P

3.2.4 Ahuja Goods Agency vs State of Uttar Pradesh reported in 1997 (106) STC 540

3.2.5 Lakshmi AV Inc vs Assistant Commercial Tax Officer reported in 2001(124) STC 426 Karnataka

3.2.6 G. S. Lamba and Sons vs State of Andhra Pradesh reported in 2015(324) ELT 316

AP

4.1 There will also be cases involving either a financial lease or an operating lease. The former generally involves a transfer of the asset and also the risks and rewards incident to the ownership of that asset. This transfer of the risks and rewards is also recognised in accounting standards. It is generally for a long term period which covers the major portion of the life of the asset and at the end of the lease period, usually the lessee has an option to purchase the asset. The lessee bears the cost of repairs and maintenance and risk of obsolescence also rests with him. In contrast, an operating lease does not involve the transfer of the risks and rewards associated with that asset to the lessee. It is for a short term period and at the end of the lease period the lessee does not have an option to purchase the asset. The cost of repairs, maintenance and obsolescence rests with the lessor.

4.2. Similarly in the aircraft industry there are “dry leases” and “wet leases”. Generally speaking, “wet leases” may involve short term provision of an aircraft along with crew, maintenance and insurance while the lessee bears other operating expenses. In contrast, a “dry lease” is for a relatively longer term and involves the provision of an aircraft only without crew.

4.3 The above two situations have been elaborated only to explain and emphasize the diverse nature of such transactions. There can be variations and in some cases, a combination.

5. In all these cases, no a priori generalisations or assumptions about service tax liability should be made and the terms of the contract should be examined carefully, against the backdrop of the criteria laid down by the Supreme Court in the Bharat Sanchar Nigam Limited case as well as other judicial pronouncements.

9.1 I find that lower Adjudicating Authority has not discussed or elaborated reasoning for arriving of the conclusion that the activity carried out by the Appellant falls under the scope of Section 66E(f) of the Act as directed in the circular. On perusal of the impugned order, I find that the lower Adjudicating Authority has not tested the ingredients narrated by the Board in above

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mentioned Circular to prove the taxability of the services carried out by the Appellant. The para 4.1 of the above mentioned Circular also speaks about the type of lease and it should be recognized in the books of account, and the lessee bears the cost of repairs and maintenance and risk of obsolescence also rests with him.

9.2 On the contrary, on perusal of the records, I find that as per the Tax Audit Report Part-B of form No. 3CD submitted by the Appellant, their nature of business or profession is Transporter. It is also mentioned in the books of account that the Appellant has borne the expenses viz. diesel expenses, Naka & Toll Tax expenses, loading and unloading expenses, spare parts expenses, Driver cleaner salary expenses, Road Transport Tax (RTO Tax), Truck insurance expenses etc. Further, I find from the documents submitted by the appellant that during the relevant period, the Appellant had never made any agreement / contract with the recipient of the services to use the goods without transfer of its right. Instead, they had supplied the said trucks for transportation of goods to their customers in which the position and control always lies with the Appellant and they had never supplied their trucks on hiring/ leasing/ licensing to their customers. Further, on verification of ledgers and freight memo submitted by the Appellant, it appears that they charged the freight per trip from their customers.

9.3 In view of the above, it is clear that the Appellant is engaged in transport of goods by road and had provided the services to various companies and hence, the conclusion drawn by the Adjudicating Authority that the services provided by the Appellant is transfer of goods by way of hiring, leasing, licensing or in any such manner without transfer of right to use such goods under clause (f) of Section 66(E) of the Act (i.e. declared services) is devoid of any basis.

10. It is the contention of the Appellant that their services are covered under negative list as defined under clause 66D (p) (i). The same is re-produced below for sake of reference:

"66D (p) services by way of transportation of goods—

(i) by road except the services of—

(A) a goods transportation agency; or

(B) a courier agency;"

Now coming to the taxability under Goods Transport Agency services, the same is defined under clause 26 of Section 65B of the Act as under:

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“(26) “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;”

10.1 On verification of documents viz. books of accounts, profit & loss accounts and copies of bills issued by the Appellant, it is amply clear that the services provided by them is transport of goods other than a Goods Transportation Agency as they have not issued consignment notes. The Appellant has submitted copies of Freight Memo issued by one Komal Roadlines wherein the name of the Appellant, his truck number and destination as ‘from area’ to ‘to area’ has been mentioned. Further, the name of consignee is also mentioned in the freight memos issued by Komal Roadlines. Therefore, it is amply clear that the Appellant is an individual truck owner/ operator and not a Goods Transport Agency and hence covered under Section 66D(p)(i)(A).

11. In view of discussions and finding, I set aside the impugned order and allow the appeal filed by the Appellant.

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

12. The appeal filed by Appellant is disposed off as above.

शिव प्रताप सिंह

**Superintendent
Central GST (Appeals)
Rajkot**

By R.P.A.D.

**(शिव प्रताप सिंह)/(Shiv Pratap Singh),
आयुक्त (अपील)/Commissioner (Appeals)**

To, M/s Manish Kishanchand Rajai, F/7, Trade Centre, First Floor, Kalanala, Bhavnagar-364001	सेवा में, मे. मनीष किशनचंद राजाई, f/7, ट्रेड सेंटर, प्रथम मंझील, कालानाला, भावनगर- ३६४००१।
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प्रतिलिपि :-

- 1) मुख्य आयुक्त, वस्तु एवं सेवा कर एवं केन्द्रीय उत्पाद शुल्क, गुजरात क्षेत्र, अहमदाबाद को जानकारी हेतु।
- 2) आयुक्त, वस्तु एवं सेवा कर एवं केन्द्रीय उत्पाद शुल्क, भावनगर आयुक्तालय, भावनगर को आवश्यक कार्यवाही हेतु।
- 3) अपर/सयुक्त आयुक्त, वस्तु एवं सेवा कर एवं केन्द्रीय उत्पाद शुल्क, भावनगर को आवश्यक कार्यवाही हेतु।
- 4) सहायक आयुक्त, वस्तु एवं सेवा कर एवं केन्द्रीय उत्पाद शुल्क, भावनगर-1 मण्डल को आवश्यक कार्यवाही हेतु।
- 5) गार्ड फाइल।

