आयुक्त का कार्यालय केंद्रीय वस्तु एवं सेवा कर एवं उत्पाद शुल्क ,अहमदाबाद उत्तर, कस्टम हॉउस(तल प्रथम) नवरंगपुरा- अहमदाबाद ,380009		Office of the Commissioner of Central Goods & Services Tax & Central Excise, Ahmedabad North, Custom House(1st Floor) Navrangpura, Ahmedabad-380009

फ़ोन नंबर./ PHONE No.: 079-2754 4599 फैक्स/ FAX : 079-2754 4463 E-mail:- *oaahmedabad2@gmail.com*

निबन्धित पावती डाक द्वारा / By REGISTERED POST AD

फा .सं/. STC/4-36//O&A/2016-17

आदेश की तारीख़ / Date of Order : 31.01.2020

जारी करने की तारीख़ / Date of Issue : 04.02.2020

द्वारा पारित/Passed by -

डॉ. बलबीर सिंह / Dr. BALBIR SINGH

आयुक्त / COMMISSIONER

मूल आदेश संख्या /

ORDER-IN-ORIGINAL No. AHM-EXCUS-002-COMMR–23/2019-20

जिस व्यक्ति(यों) को यह प्रति भेजी जाती है, उसे व्यक्तिगत प्रयोग के लिए निःशुल्क प्रदान की जाती है।

This copy is granted free of charge for private use of the person(s) to whom it is sent.

2. इस आदेश से असंतुष्ट कोई भी व्यक्ति -इस आदेश की प्राप्ति से तीन माह के भीतर सीमा शुल्क ,उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण ,अहमदाबाद पीठ को इस आदेश के विरुद्ध अपील कर सकता है। अपील सहायक रजिस्ट्रार ,सीमा शुल्क ,उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण ,O-20, मेघाणीनगर ,न्यु मेन्टल हॉस्पीटल कम्पाउन्ड , अहमदाबाद -380016 को संबोधित होनी चाहिए।

Any person deeming himself aggrieved by this Order may appeal against this Order to the Customs, Excise and Service Tax Appellate Tribunal, Ahmedabad Bench within three months from the date of its communication. The appeal must be addressed to the Assistant Registrar, Customs, Excise and Service Tax Appellate Tribunal, O-20, Meghani Nagar, Mental Hospital Compound, Ahmedabad-380 016.

2.1 इस आदेश के विरुद्ध अपील न्यायाधिकरण में अपील करने से पहले मांगे गये शुल्क के 7.5% का भुगतान करना होगा, जहाँ शुल्क यानि की विवादग्रस्त शुल्क या विवादग्रस्त शुल्क एवं दंड या विवादग्रस्त दंड शामिल है ।

An appeal against this order shall lie before the Tribunal on payment of 7.5% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute.

(as per amendment in Section 35F of Central Excise Act,1944 dated 06.08.2014)

3. उक्त अपील प्रारूप सं .इ.ए 3.में दाखिल की जानी चाहिए। उसपर केन्द्रीय उत्पाद शुल्क (अपील) नियमावली 2001 ,के नियम 3 के उप नियम (2)में विनिर्दिष्ट व्यक्तियों द्वारा हस्ताक्षर किए जाएंगे। उक्त अपील को चार प्रतियाँ में दाखिल किया जाए तथा जिस आदेश के विरुद्ध अपील की गई हो ,उसकी भी उतनी ही प्रतियाँ संलग्न की जाएँ)उनमें से कम से कम

एक प्रति प्रमाणित होनी चाहिए(। अपील से संबन्धित सभी दस्तावेज भी चार प्रतियाँ में अग्रेषित किए जाने चाहिए।

The Appeal should be filed in Form No. E.A.3. It shall be signed by the persons specified in sub-rule (2) of Rule 3 of the Central Excise (Appeals) Rules, 2001. It shall be filed in quadruplicate and shall be accompanied by an equal number of copies of the order appealed against (one of which at least shall be certified copy). All supporting documents of the appeal should be forwarded in quadruplicate.

4. अपील जिसमें तथ्यों का विवरण एवं अपील के आधार शामिल हैंचार प्रतियों में दाखिल , उसकी भी उतनी ही ,की जाएगी तथा उसके साथ जिस आदेश के विरुद्ध अपील की गई हो उनमें से कम से क) प्रतियाँ संलगन की जाएंगीम एक प्रमाणित प्रति होगी।(

The Appeal including the statement of facts and the grounds of appeal shall be filed in quadruplicate and shall be accompanied by an equal number of copies of the order appealed against (one of which at least shall be a certified copy.)

5. अपील का प्रपत्र अंग्रेजी अथवा हिन्दी में होगा एवं इसे संक्षिप्त एवं किसी तर्क अथवा विवरण के बिना अपील के कारणों के स्पष्ट शीर्षों के अंतर्गत तैयार करना चाहिए एवं ऐसे कारणों को क्रमानुसार क्रमांकित करना चाहिए।

The form of appeal shall be in English or Hindi and should be set forth concisely and under distinct heads of the grounds of appeals without any argument or narrative and such grounds should be numbered consecutively.

6. अधिनियम की धारा 35बी के उपबन्धों के अंतर्गत निर्धारित फीस जिस स्थान पर पीठ स्थित है, वहां के किसी भी राष्ट्रीयकृत बैंक की शाखा से न्यायाधिकरण की पीठ के सहायक रजिस्ट्रार के नाम पर रेखांकित माँग ड्राफ्ट के जरिए अदा की जाएगी तथा यह माँग ड्राफ्ट अपील के प्रपत्र के साथ संलग्न किया जाएगा।

The prescribed fee under the provisions of Section 35 B of the Act shall be paid through a crossed demand draft, in favour of the Assistant Registrar of the Bench of the Tribunal, of a branch of any Nationalized Bank located at the place where the Bench is situated and the demand draft shall be attached to the form of appeal.

7. न्यायालय शुल्क अधिनियम 1970 ,की अनुसूची ,1-मद 6 के अंतर्गत निर्धारित किए अनुसार संलग्न किए गए आदेश की प्रति पर 1.00रूपया का न्यायालय शुल्क टिकट लगा होना चाहिए।

The copy of this order attached therein should bear a court fee stamp of Re. 1.00 as prescribed under Schedule 1, Item 6 of the Court Fees Act, 1970.

8. अपील पर भी रु 4.00 .का न्यायालय शुल्क टिकट लगा होना चाहिए।

Appeal should also bear a court fee stamp of Rs. 4.00.

विषयः -कारण बताओ सूचनाः

Subject- Proceedings initiated vide Show-Cause-Notice F.No. **DGCEI/AZU/36-47/2016-17** dated **10.10.2016.** issued to M/s. Adi Texfab LLP,Arvind Limited Premises,Naroda Road, Ahmedabad-380025.

BRIEF FACTS OF THE CASE

The facts of the case, in brief, are that M/s. Adi Texfab LLP, Arvind Limited premises, Naroda Road, Ahmedabad [*hereinafter referred as the "said assessee", for* brevity] were registered with Service Tax vide Registration No. AASFA1993NSD001 under the category of "Renting of Immovable property service" as defined under Section 65(105)(zzzz) of the Finance Act, 1994 for the period up to 30.06.2012, and thereafter as a "Declared Service" as specified under Section 66E of the Finance Act, 1994.

2. Directorate General of Central Excise Intelligence [*DGCEI, for brevity*] has conducted an investigation against the said assessee on the basis of an information that they were not discharging their service tax liability by showing lesser receipt in their Service Tax Returns as compared to the actual receipts under the head of "renting" and thereby evaded service tax. Investigation revealed that the said assessee had provided their building along with tangible goods, viz. plant and machinery (looms, winding machines, etc.) on lease to M/s. Arvind Ltd. under three lease deeds dated 12.01.2011, 20.07.2011 and 24.07.2013; that during the period from 01.04.2011 to 30.09.2015, they have received lease charges of Rs. 49,58,24,000/- but did not pay service tax involving Rs. 5,99,94,151/- by considering the same as deemed sale; and that the conditions of lease agreement indicated that the arrangement is merely a license to use the goods in as much as the repair, maintenance and insurance of such leased machineries were to be done by the lessor and the lessor could also sell the machinery to a third person. It was also noticed that the plant and machinery leased out by the said assessee to M/s. Arvind Ltd. were installed in their building situated inside Arvind Mill compound, Santej, Tal: Kalol, Dist. Gandhinagar; that they were paying service tax on the rent received against the building portion only (w.e.f. 2012) and not on the lease charges received towards plant and machineries as such lease charges on plant and machineries were considered as deemed sale.

3. Statement of Shri Jayesh N. Thakkar, Partner of the said assessee was recorded on 23.08.2016 wherein he *inter alia* stated that their income is from the lease charges of its building and textile machineries given to M/s. Arvind Ltd.; that the machineries were installed in their building situated inside Arvind Mill Compound; that they had leased theirbuilding admeasuring 12000 sq. mtr. along with certain machinery vide an agreement dated 12.01.2011at a monthly rent of Rs. 1,22,81,000/- for first 48 months and thereafter Rs. 85,81,000/- which was later reduced vide amendment dated 25.06.2011 to Rs. 80.50 Lakhs for the first 48 months and thereafter Rs. 55 Lakhs per month; that the same was again revised vide 2nd amendment dated 04.05.2012 as Rs. 81 Lakhs per month, with bifurcation of monthly Rs. 62 Lakhs for plant and machineries and Rs. 19 Lakhs for building for 48 months and thereafter Rs. 42.50 Lakhs for plant and machineries and Rs. 13 Lakhs for building; that another agreement dated 20.07.2011 was executed wherein some more machineries were leased out for monthly rent of Rs. 39 Lakhs for first 48 months and thereafter Rs. 28 Lakhs from 49th month onwards; that an amendment was made to this agreement on 19.11.2011 to revise the monthly rent to Rs. 32.63 Lakhs for 48 months and thereafter Rs. 26.63 Lakhs; and that another lease deed dated 24.07.2013 was executed for leasing out one high speed ring frame for a rent of Rs. 2 Lakhs per month. He further informed that since October, 2015 they started doing textile processing job work for M/s. Arvind Ltd. and recovering job charges and hence did not have any rental income for this period; that they considered that the machines are being operated and put to use by M/s. Arvind Ltd. and hence the right to use of the machinery has been transferred to them and therefore, they were paying VAT at the applicable rate considering the same as deemed sale; and that they have collected service tax only on the rent of building which they have deposited to the Government and has not collected service tax from any other clients or on any other services.

4. It, thus, appeared that the said assessee had provided "*Supply of Tangible Goods Service*" to M/s. Arvind Ltd. in as much as they have leased their plant and machinery by entering into a lease deed according to which the insurance and maintenance were to be done by the lessor, expenses were to be incurred by the lessor for realigning and recreating the said machinery were to be reimbursed by the lessee, lessor could transfer the legal rights or sell the machineries to any third party, and the lessee did not have an option to buy the machinery after the lease period. Such services was earlier defined under Section 65(105)(zzzzj) of Finance Act, 1994 for the period upto 30.06.2012 and thereafter with effect from 01.07.2012, as "*Declared Service*" under Section 66E(f) of the said Finance Act, 1994. It also appeared that the

present case was covered in the clarification issued by Board vide Circular No. 198/08/2016-Service Tax dated 17.08.2016. Therefore, a show-cause-notice No. DGCEI/AZU/36-47/2016-17 dated 10.10.2013 was issued to the said assessee by the Additional Director General, DGCEI, Ahmedabad calling upon to show cause to the Commissioner of Service Tax, Ahmedabad as to why:-

(i) The leasing of plant and machinery to M/s.Arvind Ltd. should not be treated as "*Supply of Tangible Goods Service*" as defined under Section 65 (105)(zzzzj) of Finance Act, 1994, as amended, for the period upto 30.06.2012 and w.e.f. 01.7.2012, why the same should not be treated as the "*Declared service*"as per the provisions of Section 66E(f) of the Finance Act, 1994;

(ii) Service Tax of Rs. 5,99,94,152/- [Service Tax Rs. 5,84,04,360/- + EduCess Rs. 10,59,862/- + SHEC Rs. 5,29,931/-], as detailed in Annexure-A to the notice, evaded on the lease rent of plant and machineries during the period from April, 2011 to September, 2015, should not be demanded and recovered from them under the proviso to Section 73(1) of Chapter V of the Finance Act, 1994, read with Section 68 of the Finance Act, 1994;

(iii) Interest should not be demanded and recovered from them under Section 75 of Chapter V of the Finance Act, 1994 on the Service Tax amount at (ii) above;

(iv) Penalty should not be imposed upon them under Section 77 of Chapter V of the Finance Act, 1994for their contravention of different provisions of the Finance Act, 1994 and the Service Tax Rules, 1994; and

(v) Penalty for suppression and mis-declaration of correct taxable value and evasion of Service Tax with deliberate intention to evade Service Tax on the aforesaid taxable services should not be imposed upon them under Section 78 of Chapter V of the Finance Act, 1994.

5. Consequent to the GST regime and the resultant reorganization of the jurisdictions, a corrigendum F.No. STC/4-36/O&A/2016-17 dated 04.04.2018 was issued to the said assessee to make the aforesaid show-cause-notice answerable to the Commissioner of Central GST & Central Excise, Ahmedabad-North Commissionerate.

DEFENCE REPLY

6. The said assessee furnished their defence reply vide letter dated 17.05.2018 *inter alia* stating that assessment under service tax is territorial jurisdiction and there cannot be multiplicity of officers having simultaneous jurisdiction and hence DGCEI is not authorized to issue SCN; that Board's Circular dated 17.08.2016 relied upon in the SCN was issued after the impugned period in the notice; that the legal consequences of clause 2(c) of the said circular was not appreciated while issuing the SCN; that M/s. Arvind Ltd had acquired right to use the machinery under an agreement and accordingly they were using the machinery; that insurance is only a safety measure cover normally obtained to cover some risk and what is required for taking an insurance is an insurable interest which both the lessor and lessee had in this case; and that taking of insurance does not in any way call for any hindrance in right to use for the lessee. The said assessee relied upon the decision of Tribunal in case of *GIMMCO Ltd* cited at *2017 (48) STR-47* wherein the question of taxability of renting of earthmoving equipment under the category of supply of tangible goods for use was examined; that in the said case, the lessor was also providing skilled operator for operation of the equipment and the operator was under the control of the lessor besides, the maintenance and repair was also by the lessor and the lessee could not remove the equipment from the site; that Tribunal had relied upon the decision of Hon'ble Andhra Pradesh High Court in case of *G.S. Lamba* while deciding the case in favour of the assessee; and that the same case of *G.S. Lamba* was also referred in the aforesaid Board's Circular dated 17.08.2016 which was not considered by DGCEI while issuing the SCN but they have picked up a word on repair and maintenance out of context to allege that there is no right to use the machinery by the lessee. They also stated that the machineries leased by them have much longer life and hence the question of their becoming obsolete does not arise; that the circular was issued by the Board to clarify the difference of financial lease and operating

lease which has not been considered by DGCEI; and that the demand is also barred by limitation.

PERSONAL HEARING

7. A personal hearing was offered to the said assessee on 15.11.2019 which was attended on their behalf, by Shri Shridev J. Vyas, Advocate. He referred to the defence reply dated 17.05.2018, besides submitted that the demand is barred by limitation as they had taken conscious take to pay VAT as no service tax was payable. He also submitted a CA certificate dated 17.05.2018 showing proof of VAT payment, and requested to drop the demand. During the hearing, advocate relied upon the following decisions:-

(i) Aims PharmaPvt. Ltd. Vs. CCE & ST, Vadodara-I reported at 2019 (5) TMI 240 – CESTAT, Ahmedabad;

(ii) Century Pulp and Paper Vs., CCE & ST, Meerut-II cited at 2019 (2) TMI 491 – CESTAT, New Delhi;

(iii) Compucom Software Ltd. Vs. CCE & ST, Jaipur-I cited at 2019 (2) TMI 262 – CESTAT, New Delhi; and

(iv) Lindstrom Service India Pvt. Ltd. Vs. Commissioner of C.Ex and ST reported at 2019 (8) TMI 427 – CESTAT Chandigarh.

DISCUSSION AND FINDINGS

8. Having gone through the records of the case and the written and oral submissions made by the said assessee, I find that the only issue which requires determination in this case is whether the activities of leasing plant and machineries by the said assessee to their clients as per their written agreements would be considered as taxable service classifiable as "*Supply of Tangible Goods Service*" as defined under Section 65(105)(zzzzj) during the period upto 30.06.2012, and as a '*Service*' as defined under section 65B read with section 66D for the period with effect from 01.07.2012 and leviable to Service Tax accordingly, or whether such activities would be considered as "*deemed sale*" for the purpose of clause (29A) of Article 366 of the Constitution of India and leviable to Sales Tax? However, before taking up this main issue, I would examine the legal provisions as it existed before and after 01.07.2012, as the statute has undergone major change on this date.

9. Service tax on the '*supply of tangible goods service*" has been levied with effect from 16.05.2008. As per Section 65(105)(zzzzj), taxable service (*supply of tangible goods service*) means any service provided or to be provided 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. The above definition has become defunct with the advent of comprehensive levy of service tax based on negative list introduced with effect from 01.07.2012. Section 65B(44) defines the word "*service*" for the period subsequent to 01.07.2012 and reads as:-

> *"(44) "service" means any activity carried out by a person for another for consideration, and includes a declared service, but shall not include—*
>
> *(a) an activity which constitutes merely,—*
>
> *(i) a transfer of title in goods or immovable property, by way of sale, gift or in any other manner; or*
>
> *(ii) such transfer, delivery or supply of any goods which is deemed to be a sale within the meaning of clause (29A) of article 366 of the Constitution, or*
>
> *(iii) a transaction in money or actionable claim;*
>
> *(b) a provision of service by an employee to the employer in the course of or in relation to his employment;*
>
> *(c) fees taken in any Court or tribunal established under any law for the time being in force."*

10. As per the above definition, service would include declared service as specified under section 66E. According to clause (f) of the said section 66E, declared service include *'transfer of goods by way of hiring, leasing, licensing or in any such manner without transfer of right to use such goods;"*

11. Thus, the provisions relating to leasing of building, plant and machinery, etc. as it existed before and after 01.07.2012 are *parimateria*and it can be reasonably concluded that supply of tangible goods inter-alia with the right to use them for any purpose and which transaction is deemed as a sale will attract only sales tax levy. However, where such supply does not extend to transfer of possession and effective control of overall goods, such a transaction would not become a deemed sale but a service. This is exactly what CBEC had also clarified in their circular No. 334/1/2012-TRU, dated 16.03.2012 issued in connection with the budgetary changes. I find support to draw this conclusion from the Final Order No. A/30115-30116/2018dated 01.02.2018 passed by Hon'ble Tribunal, Hyderabad in Appeal No. ST/20224/2015 in the case of *Power Mak Industries cited at 2018-TIOL-1352-CESTAT-HYD.* Therefore, the moot point to decide in the present cases is whether the said assessee, while leasing their plant and machineryto their clients, had actually transferred the right to use, possession and effective control of such items to their clients, or otherwise? If they had transferred such rights, then the same will be considered deemed sale where sales tax is leviable, and if not, the same will be considered taxable service leviable to service tax.

12. The said assessee has arguedthat leasing of their plant and machinery is deemed to be a sale and sales tax is leviable by the state Government which they have been paying. Here I find that prior to the 46th amendment of the Constitution various transactions including hiring or leasing of goods were held not eligible to sales tax by a series of decisions by the Hon'ble Apex Court. Thereafter, the Parliament based on the recommendation of the Law Commission of India, exercised its constituent power and made the 46th amendment to the Constitution of India by introducing Article 366(29A); that this amendment gave extended meaning to the term "sale" by inserting a new definition of "tax on sale or purchase of goods" in clause (29A) of Article 366 of the Constitution of India, which reads as:

"(29A) "tax on the sale or purchase of goods" includes -

(a) a tax on the transfer, otherwise than in pursuance of a contract, of property in any goods for cash, deferred payment or other valuable consideration;

(b) a tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract;

(c) a tax on the delivery of goods on hire-purchase or any system of payment by instalments;

(d) a tax on the transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;

(e) a tax on the supply of goods by any unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration;

(f) a tax on the supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (whether or not intoxicating), where such supply or service, is for cash, deferred payment or other valuable consideration,

and such transfer, delivery or supply of any goods shall be 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;

13 These clauses serve to bring transactions where one or more of the essential ingredients of a sale as defined in the Sale of Goods Act, 1930 are absent within the ambit of purchase and sales for the purposes of levy of sales tax. Accordingly, in terms of clause (d) above, the transfer of right to use any goods for any purpose, irrespective of period of such usage, is deemed to be a sale and the states were competent to levy and collect tax on such transactions and hence leasing of machinery, compliant to the aforesaid statute, is statutorily liable to Sales Tax. I find no dispute that the said assessee was paying sales tax on the lease charges collected by them from their client during the entire period of dispute.

14. A harmonious reading of the relevant provisions in the law indicates that the intention of the Government is to levy service tax on transactions which are escaping levy of VAT. In other words, those supplies of goods transactions on which VAT is not chargeable, service tax shall be applicable under section 65(105)(zzzzj). I find support to draw this opinion from Ministry's letter DOF No. 334/81/2008-TRU dated 29.02.2008 wherein the budgetary changes proposed by the Government in this regard were communicated as under: -

4.4 SUPPLY OF TANGIBLE GOODS FOR USE:

4.4.1 Transfer of the right to use any goods is leviable to sales tax / VAT as deemed sale of goods [Article 366(29A)(d) of the Constitution of India]. Transfer of right to use involves transfer of both possession and control of the goods to the user of the goods.

4.4.2 Excavators, wheel loaders, dump trucks, crawler carriers, compaction equipment, cranes, etc., offshore construction vessels & barges, geo-technical vessels, tug and barge flotillas, rigs and high value machineries are supplied for use, with no legal right of possession and effective control. Transaction of allowing another person to use the goods, without giving legal right of possession and effective control, not being treated as sale of goods, is treated as service.

4.4.3 Proposal is to levy service tax on such services provided in relation to supply of tangible goods, including machinery, equipment and appliances, for use, with no legal right of possession or effective control. Supply of tangible goods for use and leviable to VAT / sales tax as deemed sale of goods, is not covered under the scope of the proposed service. Whether a transaction involves transfer of possession and control is a question of facts and is to be decided based on the terms of the contract and other material facts. This could be ascertainable from the fact whether or not VAT is payable or paid."

15. Similarly, Part-B of the Budget Speech delivered by the Hon'ble Finance Minister also reads as under which could be considered *contemporaneaexpositio* for interpretation of new levy: -

"155. Finally, I turn to my proposals on service tax.

156. 55 per cent of the GDP is contributed by the services sector, which is a growing sector that must contribute its legitimate share to the exchequer. I propose to bring under the service tax net four services. They are:-

(i) asset management service provided under ULIP, to bring it on par with asset management service provided under mutual funds;

(ii) services provided by stock/commodity exchanges and clearing houses;

(iii) right to use goods, in cases where VAT is not payable; and

(v) customised software, to bring it on par with packaged software and other IT services"

16. In this regard, Hon'ble Supreme Court has observed in the case of *Union of India V/s. Martin Lottery Agencies Limited reported in 2009 (14) S.T.R. 593 (S.C.)* that:-

"28. There cannot be any doubt whatsoever that speech of the Hon'ble Finance Minister in the House of the Parliament may be taken to be a valid tool for interpretation of a statute. It was so held in K.P. Varghese v. Commissioner of Income-tax, Ernakulam&Anr. [(1981) 4 SCC 173 at 184], in the following terms :

"Now it is true that the speeches made by the Members of the Legislature on the floor of the House when a Bill for enacting a statutory provision is being debated are inadmissible for the purpose of interpreting the statutory provision but the speech made by the Mover of the Bill explaining the reason for the introduction of the Bill can certainly be referred to for the purpose of ascertaining the mischief sought to be remedied by the legislation and the object and purpose for which the legislation is

enacted. This is in accord with the recent trend in juristic thought not only in western countries but also in India that interpretation of a statute being an exercise in the ascertainment of meaning, everything which is logically relevant should be admissible."

{See also Commissioner of Wealth Tax, Punjab, J & K, Chandigarh, Patiala v. YuvrajAmrinder Singh and Ors. [(1985) 4 SCC 608]}"

17. Thus, the acid test for taxability under this service could be whether VAT is payable on such goods transaction. If VAT is payable, it is not eligible to service tax under supply of tangible goods service. I find no allegation in the SCN that VAT is not payable on the lease charges collected by the said assessee for the transactions in question.

18. I find that Para 5.3 of the SCN illustratesspecific conditions fromthe lease agreement which apparently form basis for demanding service tax on the lease transactions carried out by the said assessee.It is stated that para 3(iii) of the lease deed dated 12.04.2011 has laid down the condition that the lessee "*will not assign, transfer, sublet or underlet or part with possession of the "said machinery" or any part thereof without the previous consent in writing of the lessor being obtained, which consent shall not be unreasonably withheld by the lessor*". It is interpreted that as per this condition the lessor has kept the control over the machinery with him and that lessee did not have absolute control over the machineries. I do not find anything unusual in this clause due to the fact that the said assessee legally remains the title owner of the equipment, which they have only leased out to the lessee and not sold out. What is important is not the absolute control, but an effective control by the lessee with right to use the leased equipment. I am of the opinion that this clause will not help to construe that the lessor has not transferred effective control of the leased machineries to the lessee. On the other hand, these restrictions cast on the lessee clearly show that the right to use as well as the right of possession and effective control of the equipment actually rest with the lessee; otherwise the lessee cannot be presumed to assign, transfer, sublet or underlet or part with possession of the leased machinery or any part thereof, etc. I find that Hon'ble High Court of Andhra Pradesh in the case of *G.S. Lamba and Sons cited at 2015 (324) ELT 316 (AP)*has held that the essential requirement of a transaction for transfer of the right to use goods, *inter alia*, not the transfer of the property in goods, but it is the right to use property in goods. Further, Hon'ble Tribunal, Hyderabad has also observed in its aforesaid Final Order No. A/30115-30116/2018dated 01.02.2018 in the case of *Power Mak Industries*(supra), that merely because some restrictions are placed on the lessee, it can not be said that there is no right to use by the lessee.

19. It is further stated in the SCN that Para 4(d) of the lease deed dated 12.04.2011 has put the responsibility of repair maintenance on the lessor except under exceptional circumstances. Similarly, it is also mentioned that Para 6 of the lease deed has put the condition that the lessee will pay the costs, charges and expenses incurred by the lessor for realigning and recreating the said machinery, and that these conditions show that the possession and control over the machinery is with the lessor. I am unable to accept that either of these conditions would practically take away the right to use the machinery or the right of possession and its effective control from the lessee. Being the title owner of the equipment, the said assessee is responsible to ensure that the same remains operational and free from damages in the long run. On the other hand, specific conditions for compensation or reimbursement of costs, charges and expenses incurred by the lessor to the lessee towards realigning and recreating the said machinery itself confirm that the rights of use, possession and effective control over the machinery rest with the lessee. The ratio of the decisions in the cases of both *G.S.Lamba and Sons* as well as*Power Mak Industries*(supra)are applicable in this context too.

20. The SCN further states that as per Para 4(e) of the lease deed, responsibility to insure the said machinery lies on the lessor, which indicates that the lessor has maintained ownership of the machineries with him. I am of the view that such an inference does not adhere to the spirit of law. It is nobody's case that clause (29A)(d) of Article 366 of the Constitution of India demands a change in the legal ownership of goods to attract levy of sales tax on deemed sale. As already stated above in the light of *G.S. Lamba and Sons*case (supra), the law does not require change or transfer of the title of property to be taxable under the provisions of deemed

sale, but it is the right to use property in goods. Similarly, Tribunal has observed in the case of *Compucom Software Ltd. Vs CCE & ST, Jaipur-I cited at 2019 (2) TMI 262 Cestat-New Delhi* that the language of Section 65(105)(zzzzj) makes it abundantly clear that for transfer of right to use the goods, ownership is not mandatorily or necessarily required to be, as provided under the Income Tax law. Since the equipment could be insured only in the name of its title owner and not in the name of its lessee, I do not agree that this clause of the lease deed would dilute the rights of the lessee to use, possession and effective control over such machineries. On this point also, I find sustenance of support from the aforesaid decision of Tribunal in the case of *Power Mak Industries*(supra) wherein the lease of DG sets was held to be deemed sale even when the responsibility for insurance, maintenance, repairs and damages charges were borne by the owner.

21. The said Para 5.3 of the SCN also alleges that as per Para 5(b) of the lease deed, the lessor can transfer the legal rights or sell the machineries to a third person. I find that even this clause does not take away the rights of use, possession and effective control of the machineries from the lessee during the lease period, as the lessor being the legal title owner of the property, has liberty to sell his property to any person at his will. What is important for the present dispute is whether such sale has actually been taken place during the lease period and if so, whether such sale has taken away the right to use the property or its possession and effective control from the present lessee. In other words, it is not the ownership of the machineries but the conditions of lease deed between the owner/lessor and the lessee is the one which govern the taxability of the transaction as deemed sale or as taxable service. Even otherwise, the question of transfer of legal rights to a third person arises only when such legal rights are presently vested in the lessee.

22. The last of the allegations in the SCN is that the lessee has not given the option to buy the machinery after the lease period. Although the SCN does not specify the context in which this issue was raised, it is presumed that this clause is invoked in the light of discussions under Para 4.1 of Board's Circular No. 198/08/2016-Service Tax dated 17.08.2016 which reads as: -

> *"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 recognized 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."*

23. A plain reading of this para makes it abundantly clear that the intention is to distinguish the character of two different types of leasing, i.e. financial lease and operating lease. It is not that either of these types will *ipso facto*be considered deemed sale or taxable services. This is evident from further clarification given in the subsequent paras of the same Circular that the two situations have been elaborated only to explain and emphasise the diverse nature of such transactions; that there can be variations and in some cases a combination; and that in all these cases, no *a priori* generalizations or assumptions about service tax liability should be made and the terms of the contract should be examined carefully. Thus it is revealed that the deed of the lessee buying the machinery at the end of lease period is not the deciding factor for determining the transaction as a deemed sale or a taxable service.

24. The SCN does not cite any other clause from the lease deeds to support the transaction of goods as a taxable service. However, I find that the SCN carried detailed reference to CBEC Circular No. 198/8/2016-Service Tax dated 17.08.2016 which was based on Supreme Court's decision in the case of *Bharat Sanchar Nigam Ltd. Vs. UOI reported in 2006(2) STR 161 SC.* The ratio of this case has also been discussed by CBEC vide Para 6.6.1 of the compendium of circulars issued on 20.06.2012 under the title *'Taxation of Services; An Education Guide'.* In

both these documents, CBEC clarified that transfer of right of goods involves transfer of possession and effective control over such goods and reproduced the following tests laid by Supreme Court in the case of *Bharat Sanchar Nigam Ltd.* (supra) to determine whether transaction involves transfer of right to use goods: -

(i) There must be goods available for delivery;

(ii) There must be a consensus *ad idem* as to the identity of the goods;

(iii) The transferee should have legal right to use the goods consequently all legal consequences of such use including any permissions or licenses required therefore should be available to the transferee;

(iv) For the period during which the transferee has such legal right, it has to be the exclusion to the transferor this is the necessary concomitant of the plain language of the statute, viz., a transfer of the right to use and not merely a license to use the goods; and

(v) Having transferred, the owner cannot again transfer the same right to others.

25. I have examined the present case and find it compliant on the above conditions. There is no dispute regarding the availability of goods involved in the lease deed, and there are no allegations on any ambiguity or lack of consensus between the lessor and lessee regarding the conduct of such deed, hence points (i) and (ii) stand fulfilled. It is evident from Para 5(b) of the lease deed that the legal rights of the leased equipment are already vested with the lessee. There is nothing on record which safeguards the lessee from any legal consequences of using the machineries during the lease period when such machineries are in their possession and effective control. The lessor has no obligation to fulfil any compliance except holding the title of ownership as explained above, and any other compliance has to be undertaken by the lessee without any interference by the lessor. There is no covenant in the agreement which binds the lessor to ensure compliance of any requirement of law other than what is mentioned in the lease deed referred above. Thus, the condition given under point (iii) is also fulfilled. As regards point (iv), the issue is whether the lessee has absolute right to use the goods and not merely a license to use the goods. In the present case, the machineries are installed within the absolute possession and control of the lessee and are being used by them for manufacture of goods viz. textile fabrics. Except for the legality associated with the ownership title, the said assessee has no direct control over the machineries during the lease period. Even the expenses if borne by the lessorfor maintenance, realignment and upkeep of the machineries are getting reimbursed by the lessee. As per point (v), the lessor cannot take over the machineries from the lessee during the lease period, nor can they supply the same to any other clients. Thus, the conditions given under point (iv) and (v) are also fulfilled. Board's Circular dated 17.08.2016 supra cautions that whether a transaction amounts to transfer of right or not cannot be determined with reference to a particular word or clause in the agreement. The agreement has to be read as a whole, to determine the nature of the transaction. It is also stated in the circular that in all 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 (supra) as well as other judicial pronouncements. These facts and circumstances further reinforce my view that leasing of machinery by the said assessee to their clients as discussed in the subject SCN, cannot fall under the category of taxable services for levy of service tax.

26. I have also examined various case laws on the subject including those cited by the said assessee during personal hearing. In the case of *Lindstrom Service India Pvt. Ltd. Vs Commissioner of Central Excise & Service Tax cited 2019 (8) TMI 427 – CESTAT Chandigarh*, Tribunal has examined taxability on renting work-wears to the clients by retaining some of the activities of maintaining, washing the equipment, etc. and held that such restrictions cannot be considered as retaining effective control by the owner. Relevant portion from Para 24 of the said order reads as under:-

> *"24. ..... We also find that similar issue come up for consideration before this Tribunal in the case of GIMMCO Ltd. Vs. Commissioner of Central Excise and Service Tax, Nagpur cited at 2017 (48) STR 476 (Tri.Mum). The issue involved in that case was*

regarding the renting of earthmoving equipments to various customers, and based on the clauses in the agreement, there was restriction of use by the lessee as skilled workers to operate the equipment was being provided by the lessor and maintenance and repair of the equipment were also by the lessor. In para 5.1, 5.3, 5.4 and 5.6 of the order it has been held that there is no service involved in this case relaying on yet another decision of Hon'ble High Court of Andhra Pradesh in case of G.S. Lamba. Para 4 which is relevant is reproduced as below;

> *"4. The Petitioners' counsel contends that five eventualities to infer the transfer of the right to use goods are not completely present in the transaction between the Petitioners and Grasim. He would urge that the Tribunal was wrong in relying on Clauses (A), (B) and (D) of the contract in concluding that the Petitioners had transferred the right to use Transit Mixers to Grasim. According to him, these clauses would not lead to any such conclusion and that there was no intention to create exclusive right to use the vehicles by Grasim. The clause for providing dedicated fleet of vehicles with Grasim's logo "Birla Concrete" being painted on them is no indication that the intention was to transfer the right to use Transit Mixers. The RMC is a product with short shelf life and its marketability depends on the quality. So as to assure the product quality to end-user, it was agreed to paint the brand name on the vehicles. The same, however, does not lead to an inference that there is consensus ad idem; and that the Petitioners should keep ready the dedicated fleet of eight vehicles to be used by Grasim. In the absence of transfer of possession and effective control, Section 5-E of the Act is inapplicable. Lastly it is urged that the Tribunal was in error in not recording findings on all the issues raised by the Petitioners. The Counsel relied on various precedents to which a reference would be made at the appropriate place".*

25. From the perusal of these judgments, it is evidently clear that some of the activities of regarding the maintenance and washing of work-wear rented to the clients, by the appellants will not mean that effective control has been retained by the appellant. Further, we have also considered the criteria laid down by the Apex Court in case of BSNL, (supra) regarding transfer of effective control in terms of the provisions of Section 366(29A)(d) of the Indian Constitution.

Further, we also find that Apex Court in case of Rasthyalspat Nigam Limited has explained the similar issue as well;

5.4. The Apex Court in case of Rasthyalspat Nigam Limited has explained the issue in lucid language. "The essence of transfer is passage of control over the economic benefits of property which results in terminating rights and other relations in one entity and creating them in another. While construing the word "transfer" due regard must be had to the thing to be transferred. A transfer of the right to use the goods necessarily involves delivery of possession by the transferor to the transferee. Delivery of possession of a thing must be distinguished from its custody. It is not uncommon to find the transferee of goods in possession while transferor is having custody. When a taxi cab is hired under "rent-a-car" scheme, and a cab is provided, usually driver accompanies the cab; there the driver will have the custody of the car though the hirer will have the possession and effective control of the cab. This may be construed with the case when a taxi car is hired for going from one place to another. There the driver will have both the custody as well as possession; what is provided is service on hire. In the former case, there was effective control of the hirer (transferee) on the cab whereas in the latter case it is lacking. We may have many examples to indicate this differences." If we equate the observations of the Court and activities of the noticee, it would be seen that the 'possession' and 'custody' of the work-wear always lies with the user. Once the work-wear/clothing is delivered/handed over to a particular user, it is up to the user how to put the same to use as per his choice. There remains no 'control' of the noticee over the user so as to restrict or compel a user to user the articles of clothing in a particular manner. This proves that the 'possession' and 'custody' of goods practically remains with the user."

27. I am of the view that the ratio of the aforesaid decision is squarely applicable in the present case so as to decide the merits of the lessee having right to use, possession and effective control of the machineries leased by the said assessee. Further, in the case of *Aims PharmaPvt. Ltd. Vs CCE & ST Vadodara-I reported at 2009 (5) TMI (240) CESTAT Ahmedabad*, Hon'ble Tribunal had examined the taxability on rental charges on gas cylinders and held that since the entire value is liable to Sales Tax as deemed sale, the same would not again leviable to service tax. While considering the case, Tribunal also discussed the case of *GIMMCO Ltd. Vs. Commissioner of Central Excise and Service Tax, Nagpur cited at 2017 (48) STR 476 (Tri.Mum)* as follows: -

> *"... On the similar issue, this Tribunal passed a judgment in the case of Gimmco Ltd. by relying on the Andhra Pradesh High Court judgment in the case of GS Lamba (supra). In Gimmco Ltd. following finding was given:*
>
> *5. We have carefully considered the submissions made by both sides and perused the records.*
>
> *5.1. Section 65(105)(zzzzj) defines the taxable service in respect of supply of tangible goods for use as follows: -*
>
> *"Taxable service" means any service provided or to be provided 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."*
>
> *While the assessee contends that what they have transferred is right to use which is a deemed sale, the Revenue's contention is that the right of possession and effective control remained with the assessee and hence, the transaction has to be treated as service.*
>
> *5.2. Revenue's contention is based on the clauses in the agreement relating to restrictions of use by the lessee, provision of skilled operator by the lessor and maintenance and repairs of the equipment by the lessor. Merely because restrictions are placed on the lessee, it can not be said that there is no right to use by the lessee. Such a view of the revenue does not appear to be tenable when we read carefully the provisions of the agreement. Cl. 13 of the agreement provides for Hirer's Covenants. As per Cl. 13.1, the hirer will use the equipment only for the purpose it is hired and shall not misuse or abuse the equipment. Similarly, in Cl. 13.3, it is provided that the hirer will ensure the safe custody of the equipment by providing necessary security, parking bay, etc., and will be responsible for any loss or damage or destruction. Cl. 13.5 provides that the hirer shall be solely responsible and liable to handle any dispute entered with any third party in relation to the use and operation of the equipment. Further Cl. 14 dealing with title and ownership specifically provides that "equipment is offered by GIMMCO Ltd. only on 'rights to user' basis. Cl. 15 relating to damages provides for compensation to be paid by the hirer to the assessee in case of damage to the equipment during the period of use. These responsibilities cast on the hirer clearly show that the right of possession and effective control of the equipment rest with the hirer; otherwise the hirer cannot be held responsible for misuse/abuse, safe custody/security, liability to settle disputes with third parties in relation to use etc. Further Cl. 4.3 of the agreement provides for charging of VAT at 12.5% on the monthly invoice value which shall be payable by the hirer. These terms and conditions stipulated in the agreement, lead to the conclusion that the transaction envisaged in the agreement is one of "transfer of right to use" which is a deemed sale under Section 2(24) of the Maharashtra Value added Tax, 2002. The Finance Minister's speech and the budget instructions issued by the C.B.E. & C. also clarify that if VAT is payable on the transaction, then service tax levy is not attracted.*
>
> *5.3. A similar issue arose for consideration before the Hon'ble High Court of Andhra Pradesh in the G.S. Lamba case cited supra. The petitioners therein entered into a contract with M/s. Grasim, manufacturer of ready mix concrete (RMC) for providing*

transportation service for shipping RMC by hiring specially designed Transit Mixers. Under the contracts, the transit mixers are never transferred and effective control over running and using these vehicles, as well as disciplinary control over the drivers, always remained with petitioners. It was petitioner's responsibility to obtain route permits, to take the risk or loss of transportation, to decide the shifts for the drivers and vehicles, to maintain and upkeep the vehicles in good condition. The petitioners' contention was that the contract was for transport service and not the transfer of right to use the goods.

5.4. The Hon'ble High Court observed that the essential requirement of a transaction for transfer of the right to use goods are:

(1) it is not the transfer of the property in goods, but it is right to use property in goods;

(2) Article 366(29A)(d) read with the latter part of the Clause (29A) which uses the words, "and such transfer, delivery or supply" would show that the tax is not on the delivery of the goods used, but on the transfer of the right to use goods regardless of when or whether the goods are delivered for use subject to the condition that the goods should be in existence for use;

(3) in the transaction for the transfer of the right to use goods, delivery of goods is not condition precedent, but the delivery may be one of the elements of the transaction;

(4) the effective or general control does not mean always physical control and even if the manner, method, modalities and the time of the use of goods is decided by the lessee or the customer, it would be under the effective or general control over the goods;

(5) the approvals, concessions, licences and permits in relation to goods would also be available to user of the goods, even if such licences or permits are in the name of transferor of the goods; and

(6) during the period of contract exclusive right to use goods along with permits, licences, etc., vests with the lessee.

Applying these principles and examining the terms of the contract, the Hon'ble High Court held that the transaction involved was a transfer of right to use Transit Mixers and not transport service and the petitioners had transferred the 'right to use goods' to Grasim. If we apply the ratio of the above decision to the facts of the present case, the transaction involved herein is "transfer of right to use" which is a deemed sale and not "supply of goods for use" service.

6. In view of the foregoing, we are of the considered view that the assessee's activity of giving various equipments on hire does not fall under the category of "supply of tangible goods for use", hence the same is not liable to service tax w.e.f. 16.05.2008."

28. In the case of *Century Pulp and Paper Vs CCE & ST, Meerut-II cited in 2019 (2) TMI 491 – CESTAT New Delhi*, Tribunal examined service tax liability on leasing of machinery and followed the principle that where the supply of tangible goods for use and leviable to VAT/Sales Tax as a deemed sale of goods are not covered under the scope of service tax. Similarly, in the case of *Compucom Software Ltd. Vs CCE & ST, Jaipur-I cited at 2019 (2) TMI 262 Cestat-New Delhi*, Tribunal stated that the thrust of statute under reference is on the right of transfer to use the goods; that during such handovers, ownership rights may not be transferred to the transferee, as in the case of outright sale of goods, but the important fact is that that possession and effective control of the equipment has been passed on to the lessee; and that since ownership continues to vest with the appellant, depreciation under the Income Tax Act has also been rightly claimed by them. In yet another case of *Blue Dart Aviation Ltd. Vs CST, Chennai*, Tribunal passed order dated 10.07.2018 in Appeal No. ST/186/2011 wherein the ratio of its earlier decision in *Power Mak Industries cited at 2018-TIOL-1352-CESTAT-HYD* referred supra was followed by stating that that the demand of service tax under "Supply of Tangible Goods Service" cannot sustain. I find that the aforesaid decisionsand judgments will put to rest any doubts over the taxability of the lease transactions carried out by the said assessee, as the

lessor had absolute right to use the leased machinery besides vested with its right of possession and effective control during the lease period.

29. I, therefore, find that in the present case of lease transactions, the said assessee had no control over the use of the leased machinery as the right to use, possession and effective control of the same were vested with the lessee party, and thus I hold that the said activity of lease transaction is not in the nature of "service" under the Finance Act in both the period prior to negative list regime and thereafter. Accordingly, I pass the following order: -

ORDER

I drop the demand and vacate the proceedings initiated under Show-Cause-Notice F.No. **DGCEI/AZU/36-47/2016-17** dated **10.10.2016.**

(DR. BALBIR SINGH)
COMMISSIONER
CGST & CEX, AHMEDABAD NORTH

F.NO. STC/4-36/O&A/2016-17

Date: 31.01.2020

BY REGD POST AD/ S.P

To

M/s. Adi Texfab LLP,
Arvind Limited Premises,
Naroda Road,
Ahmedabad-380025.

Copy to: -

1. The Principal Chief Commissioner, CGST &C. Excise Zone, Ahmedabad.
2. The Deputy/Assistant Commissioner of CGST & C. Excise, Div-VII, Ahmedabad-North.
3. The Superintendent of CGST & C.Excise, Range-I, Division-VII, Ahmedabad-North.
4. Guard file.