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/15-25/OA/2018

आदेश की तारीख़ / Date of Order : 30.06.2020

जारी करने की तारीख़ / Date of Issue : 30.06.2020

द्वारा पारित/Passed by -

डॉ. बलबीर सिंह / Dr. BALBIR SINGH

आयुक्त / COMMISSIONER

मूल आदेश संख्या /

ORDER-IN-ORIGINAL No. AHM-EXCUS-002-COMMR–09-10/2020-21

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 , द्वितीय तल, बाहुमली भवन असरवा, गिरधर नगर पुल के पास, गिरधर नगर, अहमदाबाद, गुजरात 380004 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, 2nd Floor, Bahumali Bhavan Asarwa, Near Girdhar Nagar Bridge, Girdhar Nagar, Ahmedabad, Gujarat 380004.

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. STC/4-19/O&A/16-17** dated 08.03.2017 and **STC/15-25/OA/2018** dated 03.08.2018 issued to M/s. Quippo Energy Pvt. Ltd., Plot No. 427/P, Mahagujarat Industrial Estate, Sarkhej–Bavla Highway, Changodar, Ahmedabad-382213.

BRIEF FACTS OF THE CASE

M/s. Quippo Energy Pvt. Limited, Plot No. 427/P, Mahagujarat Industrial Estate, Sarkhej–Bavla Highway, Changodar, Ahmedabad-382213 (here-in-after referred to as "the noticee") are engaged in providing of service/s under the category of Management, Maintenance or Repair Service, Erection, Commissioning or Installation Service, Manpower Recruitment or Supply Agency's Service and are holding Service Tax Registration No. AAACQ1675QST001 for the same.

2. During the course of Audit, it had been observed that the noticee (Lessor) had leased out 'Power Generating and Heat Recovery Equipments' to various parties (lessee) under various Lease Agreement/s. For the same they charged rent termed as 'Lease Charges' under the head - Standby Charges and Variable Charges, for which lessee parties pay an advance and Bank Guarantee to the assessee (Lessor). The Lease Agreement/s explicitly reflects that both the aforesaid leased equipments are installed by the assessee (Lessor) in the factory premises of the lessee parties. For that the VAT was collected from the lessee on the lease charges and paid by the assessee (Lessor) but no service tax is being discharged thereon. The activity of leasing out of power generating and heat recovery equipments' appeared to be covered under the taxable service of supply of tangible goods' as defined under Section 65 (105) (zzzzj) of the Finance Act, 1994 (w.e.f. 01.07.2012, as "Declared Services" under Section 66E(f) of the Finance Act, 1994) . As the noticee was not paying applicable Service Tax on the lease charges collected by them, show cause notices covering upto the period 31.03.2015 were issued to them by the Service Tax Commissionerate, Ahmedabad.

3. The Noticee has been discharging VAT on the amount received under the Lease agreement since inception which has been also assessed and verified by the VAT authorities via assessment orders.

4. As per the data made available by the noticee vide their letter dated 13.04.2016 and 16.06.2016 and the details submitted them, it is observed that they have continued to follow the same practice of not paying the service tax under the category of Supply of tangible goods during the period April 2015 to March 2016 as detailed below:-

Period (F.Y)	Taxable value	Rate of Service Tax (incl. of Edu.Cess and S.&H. Edu.Cess)	Service Tax payable	Service Tax paid (Rs)	Service Tax Payable/not paid (Rs.)
01.04.2015 to 31.05.2015	29716258	12.36	3672929	0	3672929
01.06.2015 to 31.10.2015	63463109	14	8884836	0	8884835
01.11.2015 to 14.11.2015	2617230	14	366412	0	366412
15.11.2015 to 30.11.2015	9572992	14.5	1388084	0	1388084
01.12.2015 to 31.03.2016	46261073	14.5	6707856	0	6707856
Total	**151630662**		**21020116**	**0**	**21020116**

5. Therefore, Show Cause Notice No.STC/4-19/O&A/16-17 dated 08.03.2017 was issued to M/s. Quippo Energy Pvt. Ltd., Plot No. 427/P, Maha Gujarat Industrial Estate, Sarkhej–Bavla Highway, Changodar, Ahmedabad-382213 wherein they were called upon to show cause to the Principal Commissioner/Commissioner, Service Tax, Ahmedabad, having office at 1st Floor, Central Excise Building, B/h. Panjara Pole, Ambawadi, Ahmedabad-15, as to why:-

(i) the service provided by them should not be considered as "service" and classified under the " Supply of tangible goods service ", in terms of Section 65B of the Finance Act, 1994 and amount collected as lease charges by them amounting to **Rs.15,16,30,662/-** should not be considered as taxable value for the period from April 2015 to March, 2016.

(ii) service tax amounting to **Rs. 2,10,20,116/-** should not be demanded and recovered under proviso to Section 73(1) read with Section 68 of the Finance Act, 1994.

(iii) interest at the prescribed rate should not be charged and recovered in terms of the provisions of Section 75 of the Finance Act, 1994.

(iv) penalty under Section 76 of the Finance Act,1994 for non payment of service tax should not be imposed on them for the failure to make payment of Service in the prescribed time limit.

(v) penalty under Section 77(1)(a) of the Finance Act, 1994 as amended should not be imposed upon them, as they have failed to include the supply of tangible goods service in their Registration under Provision of Section 69 of the Finance Act, 1994 read with Rule 4 of Service Tax Rules, 1994;

(vi) penalty under Section 77(2) of the Finance Act, 1994 as amended should not be imposed upon them, as they have failed to pay appropriate Service Tax and did not filed correct Service Tax Returns under the provisions of Section 70 of the Finance Act, 1994 read with Rule 7 of the Service Tax Rules, 1994;

(vii) penalty under Section 78 of the Finance Act, 1994 as amended should not be imposed on them for suppressing and not disclosing the income from the said taxable service provided by them before the department with an intention to evade payment of service tax.

6. A corrigendum dated 01.08.2017 to the Show Cause Notice was issued subsequently under which the Show Cause Notice was made answerable to the Commissioner of Central GST & Central Excise, Ahmedabad North having office at 1st Floor, Custom House, Nr. All India Radio, Opp: Old High Court, Navrangpura, Ahmedabad 380 009.

7. Further, details of service provided for the period from April 2016 to March 2017 and April 2017 to June 2017 was called for from the noticee by the Superintendent, Range IV, Division-IV, Ahmedabad North vide letter dated 04.09.17. The said details was submitted by the noticee vide their letter dated 09.04.2018. It was observed that they continued to follow the same practice of not paying Service Tax under the category of Supply of Tangible Goods during the said period. Details of service Tax payable by the noticee are as under:-

Period (Financial Year)	Taxable value (Rs.)	Rate of Service Tax (inclusive of Swatch Bharat Cess & Krishi Kalyan Cess)	Service Tax payable (Rs.)
April 2016 to May 2016	2,16,34,920/-	14.50%	31,37,063/-
June 2016 to March 2017	12,18,31,191/-	15%	1,82,74,679/-
April 2017 to June 2017	4,35,66,311/-	15%	65,34,947/-
Total	18,70,32,422/-	--	2,79,46,689/-

8. Therefore, another Show Cause Notice No.STC/15-25/OA/2018 dated 03.08.2018 was issued to M/s. Quippo Energy Pvt. Ltd., Plot No. 427/P, Maha Gujarat Industrial Estate, Sarkhej–Bavla Highway, Changodar, Ahmedabad-382213 wherein they were called upon to show cause to the Commissioner, CGST & Central Excise, Ahmedabad North, having office at 1st Floor, Custom House, Behind All India Radio, Navrangpura, Ahmedabad 380 009, as to why:-

(i) the services provided by them should not be considered as "service" in terms of Section 65B of the Finance Act, 1994 and amount collected as lease charges of **Rs.18,70,32,422/-** should not be considered as taxable value for the period from April 2016 to June, 2017.

(ii) service tax amounting to **Rs. 2,79,46,689/-** (Rupees two crore Seventy Nine Lakh Forty Six Thousand Six Hundred and Eighty Nine) should not be demanded and recovered under proviso to Section 73(1) read with Section 68 of the Finance Act, 1994.

(iii) interest on the aforesaid amount of Rs.279,46,689/- should not be demanded and recovered from them under Section 75 of the Finance Act, 1994 for the delay of payment of Service Tax.

(iv) penalty under Section 76 of the Finance Act,1994 for non payment of service tax should not be imposed on them for the failure to make payment of Service in the prescribed time limit.

(v) penalty under Section 77(1)(a) of the Finance Act, 1994 as amended should not be imposed upon them, as they have failed to include the supply of tangible goods service in their Registration under Provision of Section 69 of the Finance Act, 1994 read with Rule 4 of Service Tax Rules, 1994;

(vi) penalty under Section 77(2) of the Finance Act, 1994 as amended should not be imposed upon them, as they have failed to pay appropriate Service Tax and did not filed correct Service Tax Returns under the provisions of Section 70 of the Finance Act, 1994 read with Rule 7 of the Service Tax Rules, 1994;

9. DEFENCE REPLY

9.1 Vide letters dated 24.04.2017, 24.07.2017 and 23.10.2017 M/s.Quippo Energy Ltd requested for extension of time for filing reply to the show cause notice. They filed replies to the show cause notices vide letter dated 27.12.2019 as reproduced below:-

a) *the service provided by the Noticee as alleged should not be considered as taxable service classifiable under the "supply of tangible goods service", as defined under section 65(105)(zzzzj) of the Finance Act, 1994 and amount shown as lease charges received by them amounting to Rs. 15,16,30,662/- for the period from April, 2015 to March, 2016 and Rs.18,70,32,422/- for the period from April, 2016 to June, 2017 should not be considered as taxable value for providing "supply of tangible goods service";*

b) *the service tax amounting to Rs.2,10,20,116/- and Rs.2,79,46,689/- as alleged in the show cause notices should not be demanded and recovered from the Noticee under proviso to Section 73(1) of the Finance Act, 1994;*

c) *Interest at appropriate rate should not be charged from the Noticee under Section 75 of the Finance Act, 1994 as amended;*

d) *Penalty should not be imposed under Section 76 of the Finance Act, as amended for failure to pay service tax on the value of taxable service received by the Noticee;*

e) *Penalty should not be imposed upon the Noticee under Section 77(1)(a) of the Finance Act, 1994 as amended upon Noticee as alleged that they have failed to include the supply of tangible goods service in their registration under provisions of Section 69 of the Finance Act, 1994 read with Rule 4 of Service Tax Rules, 1994;*

f) *Penalty should not be imposed under Section 77(2) of the Finance Act, 1994 as amended upon the Noticee as alleged that they have failed to pay appropriate service tax and did not file correct service tax returns under the provisions of Section 70 of the Finance Act, 1994 read with Rule 7 of the Service tax Rules, 1994;*

g) *Penalty should not be imposed upon the Noticee under section 78 of the Finance Act, 1994 as amended as alleged for suppressing and not disclosing the income from the said taxable service provided by the Noticees before the department with an intention to evade payment of service tax as mentioned above.*

2.0 ***Brief Facts:***

2.1 *The Noticee is, inter alia, engaged in the business of providing Gas Generating sets (herein after referred to as "gas genset" or "plant") on rental / lease basis. The said Gas Gensets for ease of reference and marketing plan is called as "Power Pack". The Noticee is also engaged in providing services under the category of "Manpower Supply and recruitment agency", "Maintenance & Repair service", "Erection, Commissioning and Installation service" and "Transport of goods by road service" for which they are registered with the service tax authority holding Registration No. AAACQ1675QST001.*

2.2 *The aforementioned Gas Gensets supplied on rent are imported by the Noticee from DEUTZ Asia Pacific, Singapore, Deutz Power Systems, Germany and Clarke energy Ltd., UK. These Gas Gensets are imported after proper physical examination and test using natural gas. These are primarily meant to generate electricity for which natural gas is*

used as a fuel. Fuel is passed to the engine through gas controlling system. Oxygen available in the air is mixed with natural gas and the combustion takes place inside the engine. Combustion forces piston to rotate crank shaft within the engine which helps in turning the armature inside the alternator which thereafter generates electricity. These gensets basically works on lean burn technology.

2.3 *As the Noticee provides these Gas Gensets on rental basis, for ease of transportation and safety purposes, the generating sets imported by the Noticee is installed in a steel container along with the accessories indigenously procured so that the same can be easily moved as and when required. Thus, the imported Gensets duly placed in Steel Container is marketed by the Noticee calling it as "Power Pack". Copies of the photographs of the gas genset / power pack is collectively enclosed and marked as* ***Annexure-1.***

2.4 *The Noticee supplies the Gensets to companies like Italia Ceramics Ltd., Honda Cars India Ltd., etc. which require continuous supply of electricity for the manufacture of their final goods for which they take Gas Gensets on rental basis. All these companies require huge and continuous supply of electricity for use in the manufacturing activity. Some of the companies are also located in remote areas, where continuous supply of electricity is not available for smooth functioning of work and any interruptions in electricity supply can adversely affect their operations and therefore, such customers requires assured supply of electricity. Therefore, the said customers may insist that the Gas Gensets may be set up inside the customer's premises. The Gas Gensets along with heat recovery equipments are purchased by the Noticee at their own cost and leased out to the customers on rent. At the end of the lease period, the Noticee is required to dismantle and take away the equipments. For the said purpose, the Noticee has entered into a Lease Agreement with its customers to give the plant and recovery equipments on lease for which the rent is recovered from the customers. Subsequently, an addendum to lease agreements was carried out between the parties with slight modifications to the main clauses of the main agreement. The illustrative copies of the Lease Agreement dated 12.10.2016 entered with ITALIA Ceramics Ltd. , Lease Agreement dated 21.09.2015 entered with Honda Cars India Ltd along with addendum to the lease agreement are collectively enclosed and marked as* ***Annexure-2.***

2.5 *All the Lease Agreements are similarly worded wherein the Noticee are termed as 'Lessor' and the companies as 'Lessee'. As an illustration, the important recitals of the Lease Agreement entered with one of its customers, i.e., Honda Cars India Ltd are as follows:-*

"Article-1

Definitions

Plant *means the Power Generating equipments of 3 x PP 2000 Power Packs each capable of generating 2000 KWe (within the definition of duration as explained in Annexure D) of continuous electrical power of 11KV, 50Hz, unity power factor and waste heat recovery equipments of 3 X EGB2000 each capable of generating 1400 kgs/hr at 10.54kgs/scm at 90% load from exhaust gas f&a 100 Deg C, which in combination is a Co-Generation unit. Steam output corresponding to 2 x VAM output.*

Article-3

Period of Agreement & extension thereof

3.1 The initial lease period of this agreement will be period of 60 month commencing from 1st April,2015 or such other date as mutually agreed upon in writing and the last date of the agreement will be the last day of 60th month calculated from the 1st day of the first month. Commissioning date of power packs shall be considered as the first day of the initial lease period. Waste heat Recovery Equipments will be commissioned within 5months thereafter.

3.4 It is clearly understood and agreed to between the parties that the Plant will be available for a minimum period of 8000 working hours annually. Plant stoppages attributable to reasons mentioned in clause 4.1(c) and 4.1(d) shall be included while calculating committed minimum 8000 working hours.

Article-4

Service Charges and Payment

*4.1 **(a) StandbyCharges** : During the initial lease period, the lessee shall pay to the lessor, as 'standby charges' for the provision of the plant when the plant is at lessee's site amount as mentioned in the table below:*

Sr No.	*Particulars*	*Charges per month (Rs.)*	*Charges per day (Rs.)*
1.	*For 3x2000 Power Generating Set*	*22,44,000*	*74,800*

Per day rate shall be applied when the billing period involves any incomplete month.

***(b) Variable Charges:** In addition to the 'Standby Charges' as per clause 4.1(a), during the initial lease period, the Lessee shall pay to the lessor as "variable charge" as below:*

@Rs.0.00 (zero paise) per unit of electricity (for the first 52 weeks of the initial lease period)

@Rs.0.10 (ten paise) per unit of electricity (for the balance period of the initial lease period)

***Taxes:** Standby charges and variable charges shall be subject to applicable taxes, present and future, as per the prevailing laws and such taxes shall be charged extra.*

Presently, standby charge and variable charges are subject to VAT under Gujarat VAT Act and the applicable rate is 5%.

*4.4 **Billing:** The Lessor shall raise monthly bills for the standby charges and variable charges. The lessee shall pay in full within 14 days of invoice date. The Lessor shall submit the bill within 3 working days of the bill date and this period of 3 working days shall be part of 14 days period as mentioned hereinabove. In the event of delay in submission by Lessor beyond 3 working days, delayed days will get added upto 14 days mentioned hereinabove. Lessee will acknowledge lessor's bills by signing lessor's copy of the bill with date.*

Delayed payment compensation of Rs. 0.70 per Rs. 1000.00 will be charged per day for delayed period. However, Lessor's right to delayed payment compensation will not prejudice any other rights available under this agreement.

Article-7

Fuel

7.1 Fuel will be an free issue material and will be supplied by the lessee at its own cost and will be brought near the plant at distance and specification indicated by the Lessor.

7.2 Fuel additives will also be free issue material and will be supplied by the lessee at its own cost.

7.3 In order to maintain the highest efficiency level of the Plant, it is necessary that the fuel supplied by the lessee confirms to the specifications as set out in Annexure-B

7.4 The Lessee shall have to submit a copy of its Gas Purchase agreement to the Lessor

Article-8

General

8.3 Without prejudice to what is mentioned in clause 4 of Annexure-A to this Agreement, the Lessee shall be solely responsible for and shall hold the Lessor fully indemnified against any loss or damage arising to or in connection with the Plant for the reason other than commissioning and maintenance of the plant by the Lessor's personnel. However, this will not apply to loss or damage to the plant due to the force majeure causes.

8.5 The Lessee shall have the right to load each power generating plant upto 1330 KWe each. The Lessee shall not load any plant above 1330 KWe each. This is in a non derated phase. In the event, duration applies due to any reason, loading will reduce to that extent.

8.6 By virtue of this agreement, the Lessee shall be considered to have possession of the plant and shall have the right to use the plant for the purpose for which it is leased to him. Lessee shall allow, at all reasonable times, any persons authorized by the Lessor to inspect and examine the condition of the plant and for the said purpose to enter upon the premises where the plant is placed.

8.7 This agreement does not, in any manner, transfer the ownership rights to the plant to the lessee. The lessee shall not sell, assign, transfer, hire, hypothecate, pledge, mortgage, charge, encumber, let or otherwise deal with or with the possession of the plant or any interest thereon or create or allow to be created any lien on the plant.

8.9 Save as explicitly set out in the Agreement, the lessor makes no representations and gives no warranties - statutory, implied or otherwise - as to the plant itself, nor as to the quality and condition of the plant, nor as its suitability for any particular or general purpose. All filters and operations spares are included in the standby charges on the assumption that the generators are supplied clean fuel and that there are not unusually high levels of airborne dust or sand as assessed against industry standard.

8.10 The Lessee shall ensure safety of the plant in a manner similar for its own plant.
''

2.6 *The recital of the Lease Agreement makes it clear that the Gas Genset / Plant is given on lease to their customers for which rent/lease amount is collected on two-fold basis, i.e., standby charge basis and variable basis. Under the standby charge basis, the amount is collected on per week basis or per day basis from the customers which is a fixed amount charged to the customers. In addition to standby charge, the variable charge is collected from the customers wherein the amount is charged at the rate of 0.10 paise on per unit of electricity generated based on the installed electricity meter readings for specific period. On the cumulative amount collected by the Noticee under the lease agreement, appropriate VAT/CST is discharged by the Noticee by classifying the same as transfer of right to use / deemed sale under Gujarat Value Added Tax Act, 2003 / Central Sales Tax Act, 1956. The illustrative copies of the invoices raised by the Noticee representing collection of standby charges and variable charges is enclosed and marked as* ***Annexure-3.***

2.7 *The other recitals of the Lease agreement clarifies that it is the responsibility of the customers to provide fuel and fuel additives to the Noticee as free issue material. Further, it is solely the responsibility of the customers to fully indemnify the Noticee against any loss or damage arising to or in connection with the Plant for the reason other than commissioning and maintenance of the plant by the Noticee's personnel. The Noticee has handed over the possession of the plant and the right to use the plant to the customer for the purpose for which it is leased to the customers / lessee. It is the responsibility of the customers to ensure safety of the plant in a manner similar for its own plant. The term of the Agreement and understanding between the parties makes it clear that neither Noticee nor customers can sell, assign, transfer, hire, hypothecate, pledge, mortgage, charge, encumber, let or otherwise deal with or with the possession of the plant or any interest thereon or create or allow to be created any lien on the plant/gas genset during the period of the Lease Agreement.*

2.8 *Apart from the recitals of the Lease Agreement,* ***Annexure-A*** *to the Agreement further provides the nature of responsibilities casted upon customers and Noticee for the period the gas genset is leased to the customers. The responsibilities to be carried out by the Noticee under the Lease agreement are as follows:-*

- *Ongoing technical support; provision of data sheet, layout, drawings; recommendations during revisions; observations of operating/quality manuals; project management*
- *Deployment of 'Plant' at site*
- *Maintenance of plant including provision of spares, lubricating oil, filters from time to time as per the Noticee's standards*

- *Insurance of the plant*

The responsibilities to be executed by the Customers under the Lease Agreement are as follows:-

To get Statutory approvals like Electrical Pollution, IBR, CCE etc

Gas supply and its provision to Noticee's container flange including metering device.

To provide exhaust pipe and chimney, if required beyond Noticee's battery limit inline with Noticee's specification and back pressure calculations All civil work, site preparation, trenching, drainage, fencing, main gate, lighting at the plant site as specified by the Noticee

Supply and connection to its system all HV/LV cables to evacuate power from plant including provision of main Cu earthing pits, flat/grid as directed by Noticee for connecting the plant.

Disposal/removal of all sludges, used oil, drums, filters and other refuse from the operation of the plant

Provision of jacket water & feed water including chemicals, provision of potable water, provision of chilled water and cooling water for waste heat recovery equipment

Measurement of output from waste heat recovery equipments Crane during unloading and unskilled labour during installation of plant Minor modification at the proposed site with respect to sheeting works and extension of shed in order to accommodate plant and to extract all radiator heat out of shed by suitable means.

2.9 *To set up the above plant, the land is provided by the customer and to operate and maintain it, the required fuel and other utilities, except labour, are provided by the customer without charging any amount to the Noticee. The necessary approvals like Electrical Pollution, CCR from the Central, State and Local authorities for leasing and installation of the plant for generation of electricity are obtained by the Customers. At the end of the contract / agreement period, the leased plant and machineries are detached / removed from the Customer's premises and transported to another place. The quantity of electricity generated in the Customer's premises and captively consumed by the Customer is shown in the excise ER-1 returns submitted by the Customer to their jurisdictional range office every month.*

2.10 *The Gas Genset / Plant along with heat recovery equipments if required by the Lessee / Customer, shall be provided by the Noticee to its customers need to be commissioned at the premise of the Customers. The Customers also require skilled/semi-skilled/unskilled manpower to run and operate the gas genset/plant for generation of electricity. Further, at the time of commencement of agreement and after the completion of tenure of lease agreement, the gas genset/plant needs to be transported from the Noticee's plant to customer's site and vice versa. For the smooth functioning of the said activities, customers are at discretion to avail services of any of the service providers. Since the Noticee have expertise to operate and maintain the Gas Genset / Plant, the customers have assigned the aforesaid categories of work to the Noticee. Commissioning of Gas Genset / Plant, Operation and Maintenance of plant and transportation of plant is done by the Noticee under the separate service agreement named Service Agreement entered with its customers separately. Illustrative copies of the service agreement entered by Noticee with its customers such as Italia Ceramics Ltd, Honda Cars India Ltd etc is collectively enclosed and marked as* ***Annexure-4.***

2.11 *The said service agreements entered between the Noticee and customers pursuant to the lease agreement is a discretion exercised by the customers. There is no mandatory obligation upon the customers or any duty mentioned under the lease agreement to assign the service agreement to the Noticee.*

2.12 *For the commissioning of above leased plant and equipments, the Noticee receive one time consideration for providing the service on which Noticee discharge service tax liability*

under the category of "erection, installation and commissioning service". Noticee also discharge service tax under the category of "manpower recruitment or supply agency service" for the supply of manpower skilled/semi-skilled/unskilled at the premise of the customers for operation and maintenance of the plant and equipment. The activity of transportation of plant carried out from yard to the customer's premise and vice versa is classifiable under "GTA", hence the service recipient is liable to discharge service tax under the reverse charge mechanism. Illustrative copies of invoice raised for commissioning, manpower supply and transportation of plant is collectively enclosed and marked as ***Annexure-5.***

2.13 *The Noticee have been regularly filing the ST-3 Returns before the authorities. Illustrative copies of the ST-3 Returns is enclosed and marked as* ***Annexure-6.***

2.14 *The Noticee believed and is of the view that their activity of providing gas genset/Plant on lease to the customers under the Lease Agreement falls within the purview of "Sale" as defined in Section 2(23) of Gujarat Value Added Tax Act, 2003 and Section 2(g)(iv) of the Central Sales tax Act, 1956. The Noticee has charged VAT as may be applicable to the Customers and the same is shown in the invoices raised by the Noticee. The details of payment of VAT under Gujarat VAT Act, 2003/Central Sales tax Act, 1956 by the Noticee is enclosed and marked as* ***Annexure-7.***

2.15 *The Noticee has been discharging VAT on the amount received under the Lease agreement since inception which has been also assessed and verified by the VAT authorities via assessment orders. Copy of the Assessment order for the period 2014-15 dated 01.03.2019 is enclosed and marked as* ***Annexure-8.***

2.16 *The definition of "Sale" as contained in Section 2(23) of the Gujarat Value Added Tax Act, 2003 and Section 2(g)(iv) of the Central Sales Tax Act, 1956 includes transfer of right to use goods within the meaning of "Sale". The definition of "Sale" as defined in Section 2(23) of Gujarat Value Added Tax Act, 2003 and Section 2(g)(iv) of the Central Sales Tax, 1956 is in line with Article 366(29A) of the Constitution of India. For ease of reference, the relevant portion of definition of "Sale" as defined in Section 2(23) of Gujarat Value Added Tax Act, 2003 and 2(g)(iv) of the Central Sales Tax Act, 1956 is extracted below:*

> *"2(23) "Sale" means a sale of goods made within the State for cash or deferred payment or other valuable consideration and include*
>
> *(d)* ***transfer of the right to use any goods*** *for any purpose (whether or not for a specified period) for cash, deferred payment of other valuable consideration*
>
> (e)
>
> (f)
>
> *2(g)(iv) "Sale" with its grammatical variations and cognate expressions, means any transfer of property in goods by one person to another for cash or deferred payment or for any other valuable consideration and includes:-*
>
> > *(iv)* ***a transfer of right to use any goods*** *for any purpose (whether or not supplied for a specified period) for cash, deferred payment or other valuable consideration;"*

2.17 *However, with effect from 16.5.2008, an amendment was carried out in the Finance Act, 1994 by which a new category of service 'supply of tangible goods service' under Section 65(105) (zzzzj) was included under the realm of Service Tax. For ease of reference, the same is extracted herein below:-*

> *"(zzzzj)"supply of tangible goods services" means any services 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, <u>without transferring right of possession and effective control of such machinery, equipment and appliances</u>. "*

3 *Since in the present case effective control and possession of the Plant is transferred to the Customers by the Noticee, hence no service tax is paid on the said transaction by the Noticee.*

As stated above, Noticee are already discharging VAT liability on the said transaction.

Department vide Para 3 of the Audit report No. 91/2011-12 dated 23.01.2012 took an objection that there is non-payment of service tax on supply of tangible goods services. Copy of the Audit report no. 91/2011-12 dated 23.01.2012 is enclosed and marked as Annexure- 9.

4 *Show cause notice dated 08-03-2017 & 03-08-2018*

On the basis of investigation, Audit report and further information, the present notice dated 02.12.2019, pursuant to the captioned SCNs, is issued upon the Noticee demanding service tax of Rs.2,10,20,116/- and Rs 2,79,46,689/ under the taxable category of "supply of tangible goods for use" for the period April, 2015 to June, 2017 on the ground that the activity carried out by the Noticee, on which the Noticee is already discharging VAT liability, is a taxable service under Section 65(105)(zzzzj) of the Finance Act, 1994.

The captioned SCNs also proposed to charge interest and imposition of penalties under various provisions of Finance Act, 1994.

5 *Case of the Department in the captioned SCNs*

The department has alleged that on perusal of the terms and conditions of the Lease agreement, it is found that the effective control and possession of the machine is with the Noticee and not the customers. It is alleged that there is no transfer of right of possession and effective control of the equipment. Further, it is alleged that the legal rights of possession of the equipments/machines have not been transferred to the customers/lessee. The reasons attributed to such allegations are as follows:-

- *Equipment is leased by the Noticee and even after leasing out it continues to be their property and the ownership lies with them;*
- *Equipment is installed within the premises of the customers/lessee;*
- *The skilled manpower supplied by the Noticee is responsible for complete handling of the equipments and the service agreement gets terminated with the termination of the lease agreement which implies that the equipments are fully controlled by the service provider/Noticee, therefore effective control lies with the Noticee itself.*
- *Clause 8.8 of the Agreement stipulates that the customers/lessee cannot make alterations, additions or improvements to the plant without prior consent of the Noticee. Therefore, legal rights and effective control of the equipments are retained with the Noticee and the same has not been transferred to the customers.*
- *That Article 366(29A)(d) of the Constitution of India only specifies transfer of right to use goods to be treated as deemed sale. The wordings 'right of possession' is kept out of definition, which as per the Department is the situation of payment of service tax and as per the definition of 'taxable service' has to be classified under the category of 'supply of tangible goods' service.*
- *That extended period of limitation is invokable as Noticee have wilfully suppressed the facts with an intention to evade payment of service tax.*

6 *The Noticee in response to the above allegations is hereby furnishing their replies to each and every allegations contained in the aforesaid captioned SCNs, which are without prejudice to each other.*

3.0 ***Our Submissions:***

At the outset, the Noticee dispute and deny all the allegations contained in the show cause notices as they are incorrect and unsustainable on the following grounds, which are without prejudice to one another.

3.1 *Similar issue being already pending before the higher forum i.e. CESTAT. adjudication proceedings should be kept in abeyance till the matter is finally decided in the higher forum*

3.1.1 *That, the Noticee most humbly submits that in cases where similar matters are being dealt with in different forums, the proceedings at the adjudication stage may be transferred to the call book cases, and be disposed in terms of the decision of the appropriate authority of the higher forum, so as to avoid multiplicity of the proceedings, unnecessary expenditure and loss of time at both the assessee and the departments end.*

3.1.2 *That, in the instant case, the Noticee is already in appeal before the Hon'ble CESTAT for service tax demand relating to the same issue, in relation to the a previous period for April 2008 to March 2014. Therefore, until that matter is decided by the Tribunal, it is prayed and most humbly requested that the current adjudication proceedings may be kept in abeyance and may please be decided upon subsequent to and in consideration of the decision of the Hon'ble CESTAT.*

3.2 *The captioned SCNs suffers from inherent lack of jurisdiction as the Noticee is not liable to pay service tax under the category of 'supply of tangible goods'*

3.2.1 That, the Noticee has been issued with the impugned show cause notices proposing to confirm a demand of Service Tax on the supply of Gas Genset to customers on rental basis by the Noticee by classifying the same under the category of "Supply of Tangible Goods Service" in terms of Section 65(105)(zzzzj) read with Section 73(1) of the Finance Act, 1994 which reads as follows:

> *"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"*

3.2.2 That, from the above, it can be inferred that a transaction may be classified under the said newly introduced 'Supply of Tangible Goods service' category when the said transaction fulfils the following conditions:

i) *the said service should have been provided by a person to any other person*

ii) *the said service is in the nature of supply of tangible goods which will include machinery, equipment and appliances*

iii) *the above tangible goods are supplied for use*

iv) *the said supply for use is **without the transfer of right of possession and effective control** of such machinery, equipment and appliances*

*3.2.3 That, the letter issued by the Ministry of Finance vide **D.O.F. No. 334/1/2008- TRU dated 29-2-2008** has further clarified the scope of 'Supply of Tangible Goods'. The relevant extract of the said circular is reproduced herein below:*

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

(Emphasis Supplied)

3.2.4 *That, the aforesaid Circular clearly clarifies that transfer of the right to use any goods is leviable to Sales Tax/VAT as 'deemed sale' of goods and such transfer involves transfer of both possession and control of the goods to the user of the goods. It is further clarified in the said letter that the transaction of allowing another person to use the goods, without giving the legal right of possession and effective control, not being treated as deemed sale of goods, is treated as 'taxable service'. It is also clarified that '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 newly introduced service. Whether a transaction involves transfer of possession and control could be ascertainable from the fact whether or not VAT is payable/paid.*

3.2.5 *That, in view of the above provisions and clarifications, it can be seen that the transactions involving tangible goods can be classified into three categories (apart from the transaction of sale of goods, gift, etc.) as specified below:*

- *Supply of tangible goods service along with the transfer of right of possession and control of the said goods to the transferee - **Liable to VAT/CST as Deemed sales of goods under the category of 'transfer of right to use goods'***
- *Supply of tangible goods service for use without transferring right of possession and effective control of the said goods - **Liable to Service Tax as 'Supply of Tangible Goods service'***
- Supply (providing) of service by using the tangible goods - ***Liable to Service Tax under different head of taxable services.***

3.2.6 *That, the Supply of Tangible Goods service gets covered under the second category and not the first / third category as mentioned above. However, in the instant case, the transaction carried out under the agreement between the Noticee and Customer (lessee) gets covered under the first category and is therefore chargeable to VAT and no service element is involved in the same. The transaction is purely for the transfer of right to use Gas Genset/Plant, where possession and control of the Plant are transferred for the exclusive use of the hirers. The Noticee has been discharging VAT/CST on the entire lease rent turnover of the Noticee from the year 2007-2008 onwards and there is no dispute on the same. Even the assessment has been done by the VAT authorities following which assessment orders are passed accepting the VAT payment made by the Noticee and no objection has been raised thereto.*

3.2.7 *That, it is most humbly submitted that the provisions relating to transfer of right to use the goods is covered under the provisions of Gujarat Vat Act, 2003/Central Sales Tax Act, 1956. Section 2(23)(d) read with Section 3 of the Gujarat Vat Act, 2003 provides that every dealer whose total turnover during the year immediately preceding the appointed day exceeded rupees five lakhs and whose turnover exceeds rupees ten thousand in a year or who is registered under the earlier law or under the Central Act as on the appointed day or whose total turnover and taxable turnover in any year first exceed the thresholds of turnover, or who is registered or liable to be registered as a dealer under this Act or under the Central Act at any time after the appointed day shall be liable to pay tax in accordance with the provisions of this Act. Section 2(23) read with Section 3 of the Gujarat Vat Act, 2003 read as under:*

> *2(23) **"Sale"** means a sale of goods made within the State for cash or deferred payment or other valuable consideration and includes:-*
>
> *(a) transfer, otherwise than in pursuance of a contract, of property in goods for cash, deferred payment or other valuable consideration*

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

(c) delivery of goods on hire purchase or any systems of payment by installments

(d) 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)...

(f)...

'3. Incidence of Tax:-

(1) Subject to the provisions of this Act, every dealer.-

(i) Whose total turnover during the year immediately preceding the appointed day exceeded rupees five lakhs and whose turnover exceeds rupees ten thousand in a year, or

(ii) Who is registered under the earlier law or under the Central Act as on the appointed day, or

(iii) whose total turnover and taxable turnover in any year first exceed the thresholds of turnover, or

(iv) who is registered or liable to be registered as a dealer under this Act or under the Central Act at any time after the appointed dayshall be liable to pay tax in accordance with the provisions of this Act."

3.2.8 *That, from the perusal of Section 2(23) read with Section 3 of the Gujarat Vat Act, 2003 it is amply clear that in cases where the dealer who is registered or liable to be registered under this Act and where the goods are transferred by a person to other for their right to use the goods for a period, the same shall be liable for payment of VAT at the rates specified in the Schedules. In this regard, it is humbly submitted that since the Noticee has leased the Plant to Customers for their use, the same is subject to the provisions of the Gujarat Vat Act, 2003. Similarly, Section 2(g)(iv) of the Central sales tax Act, 1956 provides the definition of sale which is inclusive of transactions getting covered under the category of deemed sales as enumerated under Article 366 (29A) of the Constitution of India.*

3.2.9 *That, it is further submitted that since the Noticee is leasing the Plant/equipment to Customers and only granting the right to use the Plant, the Noticee is not liable to pay service tax on the right to use the goods. The term "transfer of right to use goods" has not been defined in any of the Act, however, this term has been interpreted in various judgments by various Courts including the Hon'ble* ***Supreme Court. The Hon'ble Andhra Pradesh High Court in the case of*** *Rashtriya Ispat Nigam Ltd. Vs. Commercial Tax Officer reported in (1990)77* ***STC 182*** *while considering the scope of Section 5-E of the Andhra Pradesh General Sales Tax Act, 1957 dealt with the term Transfer of right to use goods', and made the following observations:*

"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 contrasted 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 the 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. "

(Emphasis Supplied)

The Noticee therefore places reliance on the judgment as cited in the case of Rashtriya Ispat Nigam Ltd. v. Commercial Tax Officer ***(supra),*** *which has been further confirmed by the Hon'ble Supreme Court in the case of* ***State of Andhra Pradesh Vs. Rashtriya Ispat Nigam Ltd. reported in (2002)126 STC 114.***

3.2.10 That, in support of the above, the Noticee also places reliance on the case of ***G.S. Lamba & Sons, Secunderabad & Others Vs. State of Andhra Pradesh reported in (2011) 52 APSTJ 191*** *wherein the Noticee was providing Transit mixers to M/s Grasim Industries for their use and the control of the Transit mixers vested with M/s Grasim Industries. The issue in dispute in G.S. Lamba* ***(supra)*** *case was whether the activity of giving transit mixers on hire amounted to "Transfer of Right to use Goods" and hence whether Sales Tax can be levied under Section 5-E of the AP VAT Act. The Hon'ble High Court of AP, while deciding the issue held that giving transit mixers on hire amounted to "Transfer of Right to use Goods" and made the following observations:*

> *"45. Reading the recitals and various clauses, indeed there is a transfer of right to use of transit mixers. All the tests as indicated above exist in the contract between the Petitioners and Grasim. The vehicles are maintained by the Petitioners. They appoint the drivers and fix the roster. The licences, permits and insurances are taken in their names by the petitioners, which they themselves renew. The Transit Mixers go to Grasim's batching plants in Miyapur and Nacharam, where they are loaded with RMC and then proceed to the construction sites of customers. The product carried is manufactured by Grasim, which is delivered to the customers and the customers pay the cost of the RMC to Grasim and the petitioners nowhere figure in the process of putting the property in Transit Mixers to economic use. The entire use in the property in goods is to be exclusively utilised for a period of 42 months by Grasim. The existence of goods is identified and the Transit Mixers operate and are used for the business of Grasim. Therefore, conclusively it leads to the only conclusion that the petitioners had transferred the right to use goods to Grasim. For these reasons, we are not able to countenance any of the submissions made by the petitioners' counsel."*
>
> *(Emphasis Supplied)*

3.2.11 With regard to the above, the Noticee also places reliance on the case of ***Bharat Sanchar Nigam Ltd. Vs. Union of India reported in (2006) 145 STC 91 (SC),*** *wherein it was observed that to constitute transfer of right to use goods, the transaction must have the following attributes:*

a) *There must be goods available for delivery;*

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

c) *The transferee should have a legal right to use the goods - consequently all legal consequences of such use including any permissions or licences required therefore should be available to the transferee;*

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

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

3.2.12 That, the Hon'ble High Court of Gauhati in the case of ***HLS Asia Ltd, Vs. State of Assam and Ors. reported as (2003) 132 STC 217 (Gauhati),*** *considered whether the transaction in issue therein was a 'deemed sale', warranting imposition of sales tax. The petitioner before the*

High Court was the owner of high technology equipment used in wire line logging and perforation activities. The operations are done by the use of the high technology equipment deep into the earth through holes drilled into the oil field for identification and mapping of electronic seismic impulses, which are then processed through special software and recorded on magnetic tapes. The Court was therefore required to consider whether the relevant contract involved a lease as defined under the Assam General Sales Tax Act, 1993. The relevant provision of the State legislation brought to sales tax the transfer of the right to use any goods for valuable consideration, without the transfer of the ownership i.e. excluding transfer of ownership. The High Court observed that once it is shown that the right to use any goods is transferred by one person another for exclusive use, it would constitute a lease within the meaning of the provision; that the equipment supplied by the petitioner were required to be used by Oil India Limited (OIL) only and not for any other purposes, this implies that the equipments were for the exclusive use of OIL on payment of charges. The petitioner after having placed the equipment at the work site was not entitled to use it for any other purpose or to withdraw the same at its will and the equipments were to be operated under the supervision of officers of the OIL. The operations were also subject to inspection and supervision by OIL Officers. The terms and conditions clearly show that the element of possession over the equipments by the OIL is present, particularly since the equipment employed at the location of OIL could not be removed or otherwise used without concurrence of OIL, observed the High Court.

3.2.13 That, on a careful analysis of the judicial decisions discussed above, it can be deduced the following conditions are to be satisfied in order to determine that a transaction amounts to a Transfer of right to use goods',

a) *There should be a transfer.*

b) *Such transfer should result in terminating rights in one party and creating them in another.*

c) *The transfer should necessarily involve delivery of possession by the transferor.*

d) *The transfer should be of effective control of goods as distinct from mere custody of goods.*

e) There must be consensus ad idem between the parties.

3.2.14 That, in the instant case the Noticee is the owner of the Gas Genset/Plant. The Noticee has leased the Plant to its Customers for their use for the purpose of manufacture of the final products manufactured by the Customers, and collects rent from the Companies on standby charge and variable charge basis under the Agreements entered into in this connection.

3.2.15 With regard to the fulfilment of the above conditions, it is submitted that perusal of all the terms of the Lease agreements entered into between the Noticee and the customers makes it clear that all the terms in the agreement are stipulated in the context of 'Gas Genset' being given by the Noticee. Thus, the subject matter of the agreement between the parties is 'Plant' which is a tangible good. The Plant is transferred by the Noticee to its customers for their use as per the agreement. It is also submitted that once the Plant is transferred by the Noticee to its customers for their use, the rights as existing with the Noticee terminates when the Plant is transferred and vests with Customers. In this regard, it is submitted that the customers have to provide (i) fuel, (ii) jacket water & feed water, (iii) the Site and, (iv) other facilities and the entire control of the Plant therefore, vests with the customers and not with the Noticee. Further, as per clause 8.3 of the Lease Agreement, the customers will also indemnify the Noticee against any loss or damage arising to or in connection with the Plant for the reason other than commissioning and maintenance of the plant by the Noticee's personnel. Moreover, the Noticee under the terms of the Agreement has agreed not to sell the Plant which becomes the property of the Customers to any party during the term of the Agreement and upto renewal, if any.

3.2.16 *That, it is also pertinent to mention that neither the Customers nor the Noticee intended to receive/provide any service under the Lease Agreement, and the same is clear by the agreement entered into between them. Also, there was consensus ad idem between the*

parties that the Plant shall be transferred by the Noticee only for the use by Customers by transferring control and possession of the Plant and not to provide any kind of service.

3.2.17 *That the Noticee states and submit that they have fully complied with all the tests as laid down in the case of BSNL to hold that there is a transfer of right to use gas genset in the following manner:*

Sl.No.	Tests laid down	Conditions Satisfied by the Noticee
1.	There must be goods available for delivery	The subject matter of the agreement between the parties is the 'Gas Genset/ Plant for generation of electricity on lease' which is goods and is in deliverable State. Hence, the first condition is satisfied.
2.	There must be a consensus ad idem	There is a clear consensus ad idem between the parties as to the nature and subject matter of the transaction shall be Plant for manufacturing of gas. Further neither the lesses nor the Noticee intended to receive/provide any service, and the same is clear from the agreement entered into between them. Also, there was consensus ad idem between the parties that the Plant shall be transferred by the Noticee only for use by the lessees.
3	Transferee must have exclusive right to use the goods	During the subsistence of the agreement the lessee alone has the right to use the Plant and even the Noticee cannot trespass that right of the lessees (Customers). The lessees fix the pattern in which the Plant is to be used and the time when it will function etc. and the entire control of the Plant therefore, vests with the Lessees and not with the Noticee. All the permissions to be obtained from the statutory authorities such as Electrical Pollution, CCR have to be taken by the customers.
4	The owner cannot again transfer the same rights to others	Once the Plant is delivered to Customers for their use, the Noticee cannot simultaneously permit any other person also to use the very same tug during the subsistence of the agreement. The Plant transferred by the Noticee is for the exclusive use of the Customers. It is clear between the parties that Noticee cannot sell or transfer the Plant to any party during the term of the Agreement and renewal, if any. Moreover, sub-leasing of the Plant by the Customer is also not allowed. Therefore, the Noticee has complied with this condition also.
4	The owner cannot again transfer the same rights to others	Once the Plant is delivered to Customers for their use, the Noticee cannot simultaneously permit any other person also to use the very same tug during the subsistence of the agreement. The Plant transferred by the Noticee is for the exclusive use of the Customers. It is clear between the parties that Noticee cannot sell or transfer the Plant to any party during the term of the Agreement and renewal, if any. Moreover, sub-leasing of the Plant by the Customer is also not allowed. Therefore, the Noticee has

3.2.18 *That the Noticee in support of the above, also places reliance on the case of G.S.Lamba & Sons, Secunderabad & Others* ***(supra)*** *wherein it was held that giving transit mixers on hire amounted to "Transfer of Right to use Goods" and not service and hence, no service tax can be imposed at all. In order to arrive at such a conclusion, the Hon'ble High Court considered the following clauses of the agreement:-*

Sl. No.	Clause of the agreement relied upon by the Hon'ble AP High Court in GS Lamba case (supra)	Comparable clauses in the present case
1.	GS Lamba shall maintain and provide a dedicated fleet of 5 vehicles to the lessee.	The Noticee has provided Gas Genset/Plant for generation of electricity to the Customers.
2.	GS Lamba shall make available the vehicles on 24/7 basis i.e., 24 hours and everyday of the week.	The Plant is given to the Customer for their exclusive use for all hours of the day for the period of Agreement.
3.	Drivers to be appointed by GS Lamba to the transferee for operation of the vehicle.	A separate service Agreement is entered by the Noticee with Customers to erect and commission the plant, to provide operation and management of the Plant services to the Customers.

4.	*Customers shall ensure that all statutory clearances in respect of all vehicles like road tax, insurance, pollution compliance etc are obtained*	*In the instant case, the customers ensure that all statutory compliance in respect of the Plant is undertaken by the Noticee themselves. The Noticee may assist companies in obtaining so. All the statutory license are obtained in the customer's name. See Annexure-A attached to lease agreement*

3.2.19 *That, it is therefore submitted that the transactions between the Noticee and various companies is purely a transfer of right to use the goods and no element of service is involved. The clauses of the Agreement also provide that the customers will indemnify the Noticee against the gas genset provided to them under the lease agreement. Further, it is also provided that other activities has to be taken care of by the customers once the right to use the gas genset is transferred by the Noticee.*

3.2.20 *That, it is most humbly submitted that since, the Noticee has provided the Plant and the right to use the Plant to Companies, the question of imposing Service Tax on this transaction does not arise at all. It is submitted that service tax is imposed if there is an element of service involved in the transactions between the parties, where service is rendered by a service provider or the provision of rendering the services by a person is made on behalf of the customers. In the instant case, there is no element of service involved in the transactions between the Noticee and Customers under the Lease Agreement. The Services provided by the Noticee to the Companies has been taken care of by entering into a separate agreement under which the Noticee is already discharging service tax liability for operation and maintenance of the Plant and hence, demand of service tax on the 'Supply of Tangible Goods' agreement as well, is bad-in-law and therefore unsustainable.*

3.2.21 *That, the Board vide Circular No. 334/1 /2008-TRU, dated 29-2-2008 has further clarified that where the transaction attracts levy of VAT/sales tax as deemed sale of goods, the same would not be covered under the scope of Supply of Tangible goods service. It is therefore most humbly submitted that since no Service Tax is leviable in the transactions entered into between the Noticee and the Companies under the Lease Agreement on which already VAT has been discharged by the Noticee and the same has been accepted by the VAT authorities, the impugned show cause notices issued by the Ld. Principal Commissioner / Commissioner of Service Tax, Ahmedabad is not proper and without jurisdiction and is liable to be quashed, along with the entire proceedings initiated thereto.*

3.3 *Both Service Tax and VAT are mutual exclusive in nature and therefore cannot be imposed on consideration received in respect of the same activity or transaction as the same shall lead to double taxation:*

3.3.1 Service Tax cannot be imposed on a transaction which has already been exigible to VAT:

- *That, the Noticee submits that the fact that VAT at the applicable rates has been discharged on the amount received under the Lease Agreement entered between the parties, is not in dispute.*
- *That, the essential criterion is that the tangible goods should be supplied to the transferee for his use, however, the possession and control should remain with the transferor. Therefore, the license to use goods can get covered under this category as can be seen from the case of **BSNL [2006] 145 STC 91** which distinguished Transfer of Right to use goods from license to use goods. The cases similar to that of **Rashtriya Ispat [2002] 126 STC 114** can get covered under this category. Hence, if there is no supply of goods for use, this service is not applicable.*
- *That, from the definition of the Supply of Tangible Goods service, it can be seen that the supply of the tangible goods for use without the transfer of the right of possession*

and control of the tangible goods is subject to service tax under the said taxable category. However, it has not been clearly specified in the said definition as to who should use the tangible goods supplied by the service provider. However, the Department has clarified that the 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.

That, the levy of VAT on a particular transaction is within the legislative competence of the respective State Government under Entry 54 of List II of the Seventh Schedule to the Constitution of India. Such power of the State Legislature to make a law with respect to the levy and imposition of tax on sale or purchase of goods is plenary and in particular Entry 54 is only subject to Entry 92A of Union List and there can be no further curtailment of the State's power to levy tax. Further the powers of the Union and States to levy tax are mutually exclusive and there can be no overlap in the powers of taxation. In this regard the Noticee wishes to place reliance on the case of ***M/s Hoechst Pharmaceuticals Ltd. and Ors Vs. State of Bihar and Ors.*** *reported in* ***(1983) 4 SCC 45.*** *The relevant portion of the judgment is extracted as under:*

"72. It is axiomatic that the power of the State legislature to make a law with respect to the levy and imposition of a tax on sale or purchase of goods relatable to Entry 54 of List II of the Seventh Schedule and to make ancillary provisions in that behalf, is plenary and is not subject to the power of Parliament to make a law under Entry 33 of List III. There is no warrant for protecting the power of Parliament to make a law under Entry 33 of List III into the State's power of taxation under Entry 54 of List II. Otherwise, Entry 54 will have to be read as: 'Taxes on the sale or purchase of goods other than essential commodities etc'. When one entry is made 'subject to' another entry, all that it means is that out of the scope of the former entry, a field of legislation covered by the latter entry has been reserved to be specially dealt with by the appropriate legislature. Entry 54 of List II of the Seventh Schedule is only subject to Entry 92-A of List I and there can be no further curtailment of the State's power of taxation. It is a well-established rule of construction that the entries in the three lists must be read in a broad and liberal sense and must be given the widest scope which their meaning is fairly capable of because they set up a machinery of Government.

75. A scrutiny of Lists I and II of the Seventh Schedule would show that there is no overlapping anywhere in the taxing power and the Constitution gives independent sources of taxation to the Union and the States. Following the scheme of the Government of India Act, 1935, the Constitution has made the taxing power of the Union and of the States mutually exclusive and thus avoided the difficulties which have arisen in some other Federal Constitutions from overlapping powers of taxation."

(Emphasis Supplied)

- *That, the Noticee further relies on the case of* ***Godfrey Philips India Ltd and Anr. Vs. State of UP and Ors reported in (2005) 2 SCC (515)*** *wherein the Hon'ble Supreme Court has categorically laid down that a taxing statute must be construed with clarity and precision so as to maintain mutual exclusivity, and a construction of a taxing entry which may lead to overlapping must be eschewed. The relevant portion of the judgment may be extracted as under:*

"44. The lists contained in Schedule VII to the Government of India Act, 1935, provided for distinct and separate fields of taxation, and it is not without significance that the concurrent legislative list contains no entry relating to taxation but provides only for 'fees' in respect of matters contained in the list but not including fees taken in any court. List I and List II of Schedule VII thus avoid overlapping powers of taxation and proceed on the basis of allocating adequate sources of taxation for the federation and the provinces, with the result that few problems of conflicting or competing taxing power have arisen under the Government of India Act, 1935. This scheme of the

legislative lists as regards taxation has been taken over by the Constitution of India with like beneficial results. "

46. Therefore, taxing entries must be construed with clarity and precision so as to maintain such exclusivity, and a construction of a taxation entry which may lead to overlapping must be eschewed. If the taxing power is within a particular legislative field, it would follow that other fields in the legislative lists must be construed to exclude this field so that there is no possibility of legislative trespass."

(Emphasis Supplied)

- *That, it is a settled law that the taxing power under List I and List II of the Constitution of India must be mutually exclusive and that the power conferred to tax must not overlap. Therefore, if a transaction is such which is within the legislative competence of the State Government, the same cannot also be brought within the legislative competence of the Union Government to tax on such transactions.*

- *That, in the instant case of the Noticee, the power to tax transfer of right to use goods is within the legislative competence of the State Legislature under Entry 54 of List II and not with the Union under List I. Entry 92 C was proposed to be included in List I of the Seventh Schedule by the Constitution (Eighty- Eighth Amendment) Act, 2003 which reads as Taxes on services'. However, such amendment which was to come into effect from a date to be notified, has not been notified in the Official Gazette till date. Entry 97 of List I of the Seventh Schedule to the Constitution of India is a residuary entry which read with Entry 246 confers power on the Union Government to enact laws on any other matter not enumerated in List II or List III including any tax not mentioned in either of these lists. Thus, the power of the Union Government to levy tax under the residuary entry is exercisable only in cases where such transactions are not covered by List II and List III. This is so because the residuary power cannot be so expansively interpreted as to whittle down the power of the State Legislature. Therefore, the power to impose tax by the Union Government under a residuary entry is restricted to the entries covered under List II and List III. Entry 54 of the State List reads as:*

  "54. Taxes on the sale or purchase of goods other than newspapers, subject to the provisions of Entry 92A of List I."

  Further, vide 46th amendment to the Constitution of India, clause 29A was inserted in Article 366 to provide for an inclusive definition to the phrase 'tax on sale or purchase of goods' wherever it occurs in the Constitution. The relevant portion of this sub-Clause is extracted below for ready reference:

  Article 366: In this Constitution, unless the context otherwise requires, "(29A) tax on the sale or purchase of goods includes-

  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;"

  Thus, the 46th amendment to the Constitution of India, empowered the States to levy sales tax/ VAT on transactions in the nature of transfer of right to use goods, which were earlier not exigible to sales tax as it does not constitute a sale as defined under the Sale of Goods Act, 1930.

- *That, in pursuance to the above 46th Amendment, various State Legislatures, including the States of Tamil Nadu, Gujarat, Karnataka and Andhra Pradesh amended their respective VAT Acts so as to include levy of VAT on such transaction in the nature of transfer of right to use goods. Similarly the CST Act which provides for levy of sales tax on inter-state transaction was also amended in the year 2002 to include the transfer of right to use goods within the definition of sale.*

- *That, in view of the above, the Union of India cannot levy Service Tax under Entry 97 on a transaction which is subject to sales tax under Entry 54 of State List (or Entry 92A of Union List as the case may be). Consequently, the Ld. Principal Commissioner / Commissioner of Customs, Central Excise & Service Tax, Vadodara being a creature of the Finance Act, 1994 which imposes Service Tax has no jurisdiction whatsoever to initiate any proceeding against the Noticee to demand service tax. By initiating the proceedings vide in the present matter, the Ld. Principal Commissioner / Commissioner of Service Tax has acted beyond his jurisdiction and the same is liable to be set aside.*

3.3.2 *Service Tax and Sales Tax/VAT are mutually exclusive in the present case:*

- *That the Noticee state and submit that VAT is leviable on the transfer of right to use the Plant given by the Noticee to its Customers on lease basis. In respect thereof, the Noticee has been duly discharging VAT/Sales Tax on such transactions right from the year 2007-2008 i.e., before the Supply of Tangible Goods service even became taxable w.e.f. 16-6-2008. Therefore, if service tax is also levied on the amount charged by the Noticee / on the amount received by them for leasing the Plant on rent, then it would amount to double taxation of the same transaction. Hence, service tax should not be demanded from the Noticee on the said transfer of the right to use Plant for a specific period given on rental basis.*

- *That, in this regard the Noticee wishes to place reliance in the case of* ***Gujarat Ambuja Cements Ltd., Vs. Union of India, reported in 2005 (4)SCC 214*** *wherein the Hon'ble Supreme Court has categorically held that once sales tax is leviable, there cannot be levy of service tax as both the levies are mutual exclusive of each other. The relevant portion of the decision reads as under:*

> *"This mutual exclusivity which has been reflected in Article 246(1) means that taxing entries must be construed so as to maintain exclusivity. Although generally speaking, a liberal interpretation must be given to taxing entries, this would not bring within its purview a tax on subject- matter which a fair reading of the entry does not cover. If in substance, the statute is not referable to a field given to the State, the Court will not by any principle of interpretation allow a statute not covered by it to intrude upon this field. "*
>
> *(Emphasis Supplied)*

The above decision was also relied on by the Hon'ble Supreme Court on the case *of Bharat Sanchar Nigam Limited and another Vs. Union of India reported in 2006 (2) STR 161.*

- *That, the Hon'ble Supreme Court in the case of Godfrey Philips* ***(supra)*** *also has held that VAT and Service Tax are exclusive in nature and the taxing entries must be construed with clarity and precision so as to maintain such exclusivity, and a construction of a taxation entry which may lead to overlapping must be eschewed. If the taxing power is within a particular legislative field, other fields in the legislative lists must be construed to exclude this field so that there is no possibility of legislative trespass.*

- *That, in support of the above contention that the provisions of VAT and Service tax are mutually exclusive and once a transaction is taxed under a particular taxing entry, the same must not be taxed under different taxing entry, the Noticee places further reliance on the following case laws:*

  Imagic Creative Pvt. Ltd v. CCT 2008 (9) STR 337 SC

  Bharat Sanchar Nigam Limited Vs. Union of India (2006) 145 STC 91

  State of U.P. Another v. Union of India & Anr. (2003) 3 SCC 239

- *That, in the light of the foregoing, service tax demanded on the transaction of leasing Plant is bad-in-law and therefore, the aforementioned show cause notices are liable to be dropped on this ground itself.*

3.3.3 *Demanding Service Tax on the turnover on which VAT has already been paid by the Noticee will amount to Double Taxation:*

- *That the Noticee states and submits that as per the provisions of Gujarat VAT Act / CST Act, VAT has been levied and discharged on the entire turnover comprising of revenue received from customers for transfer of tangible goods for use. There is no dispute about the fact that the Noticee have been paying VAT on the present transactions even before the taxable service of Supply of Tangible goods service were made taxable.*

- *That, without prejudice to the above submissions that no service tax is liable to be paid on the above transactions, if service tax is also levied on any portion of the turnover of the Noticee, it will amount to double taxation causing undue hardship to the Noticee. The*

Noticee therefore, submit that no service tax is liable to be imposed on the above transactions on which VAT has already been paid by the Noticee, as the same would amount to double taxation.

3.4 *Initiation of a proceeding ignoring a binding precedent is incorrect and the proceedings are liable to be set aside.*

3.4.1 *That, the Noticee submit that it is a settled law that the transaction of Transfer of Right to Use goods where the possession and control of the goods therein is also transferred, attracts levy of VAT and is not exigible to service tax.*

3.4.2 *That, the Noticee in support of the above places reliance on the case of Bharat Sanchar Nigam Ltd. Vs. Union of India* ***(supra)****, wherein the Hon'ble Supreme Court observed that in order to constitute transfer of right to use the goods, the transaction must have the following attributes:*

a) *There must be goods available for delivery;*

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

c) *The transferee should have a legal right to use the goods - consequently all legal consequences of such use including any permissions or licences required therefore should be available to the transferee;*

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

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

3.4.3 *That, the Noticee states and submit that they have fully complied with all the tests as laid down in the case of BSNL* ***(supra)*** *as shown in the aforesaid Paras. Further, the Noticee also places reliance on the case of G.S. Lamba & Sons, Secunderabad & Others* ***(supra)*** *wherein it was held that giving transit mixers on hire amounted to "Transfer of Right to use Goods" and not service and hence, no service tax can be imposed at all. In order to arrive at such a conclusion, the Hon'ble High Court considered the clauses of the agreement as mentioned in the aforementioned Paras, wherein it is shown that the test which are laid down are very much complied in the present case. Therefore, the ratio laid down in the GS Lamba case* ***(supra)*** *and BSNL case* ***(supra)*** *are squarely applicable to the facts and circumstances of the present case. Such a law laid down by the Hon'ble AP High Court is binding on all the subordinate courts/tribunals, till such time the decision is over-ruled by the Apex Court on the very same point.*

3.4.4 *That, the Noticee further states and submits that any proceeding initiated by a quasi-judicial authority in utter disregard to settled legal position is an exercise in excess of jurisdiction. The Noticee in this regard, also places reliance on the case of* ***East India Commercial Co. Ltd Vs. Collector of Customs AIR 1962 SC 1893*** *wherein the majority judges was of the view that the law declared by the highest court in the State is binding on authorities and Tribunals under its superintendence, and that they cannot ignore it either in initiating a proceeding or deciding on the rights involved in such a proceeding. The relevant Para of the judgment may be extracted as under:*

> *"Under Article 226, it has a plenary power to issue orders or writs for the enforcement of the fundamental rights and for any other purpose to any person or authority, including in appropriate cases any Government, within its territorial jurisdiction. Under Article 227 it has jurisdiction over all courts and tribunals throughout the territories in relation to which it exercises jurisdiction. It would be anomalous to suggest that a tribunal over which the High Court has superintendence can ignore the law declared by that court and start proceedings in direct violation of it. If a tribunal can do so, all the subordinate courts can equally do so, for there is no specific provision, just like in the case of Supreme Court, making the law declared by*

the High Court binding on subordinate courts. It is implicit in the power of supervision conferred on a superior tribunal that all the tribunals subject to its supervision should conform to the law laid down by it. Such obedience would also be conducive to their smooth working; otherwise, there would be confusion in the administration of law and respect for law would irretrievably suffer. We, therefore, hold that the law declared by the highest court in the State is binding on authorities or tribunals under its superintendence and that they cannot ignore it either in initiating a proceeding or deciding on the rights involved in such a proceeding. If that be so, the notice issued by the authority signifying the launching of proceedings contrary to the law laid down by the High Court would be invalid and the proceedings themselves would be without jurisdiction. "

(Emphasis Supplied)

3.4.5 *That, in view of the above, the proceedings initiated by the Department in the present matter is in total violation of the settled law as well as the precedent laid down by the Apex Court and the jurisdictional High Courts and therefore, the proceedings initiated are incorrect and is liable to be set aside.*

3.5 *Without prejudice, even if the service tax liability is confirmed on the Noticee, due to availability of Cenvat credit Central Government unlikely to get any revenue and the whole situation will be Revenue Neutral*

3.5.1 *That, the Department has issued the aforementioned show cause notices demanding service tax on those transactions wherein the Noticee has already discharged their VAT liability. However, without prejudice to the other submissions made, even if the service tax liability is confirmed on the Noticee then also, central government is unlikely to get any revenue due to Cenvat credit benefit which is available to the Noticee as well as the Customers.*

3.5.2 *That, even if it assumed that the service tax is payable on the consideration received under the Lease Agreement, the Noticee submit that their Customers are paying excise duty on the finished goods manufactured by them. The supply of Plant would be eligible as input service for the Customers. The Customers thus would be entitled to Cenvat credit of service tax paid by them to be set off against their manufacture of final good or output service tax liability. Therefore, the entire exercise would be revenue neutral and would not add any penny to the kitty of the central government.*

3.5.3 *That, if the Noticee are being treated as a service provider, then the Noticee also would be eligible to avail Cenvat credit of excise duty paid on inputs and capital goods and service tax paid on input services. The Noticee would be entitled to avail the Cenvat credit of excise duty paid on Plants being capital goods for them. For this reason also the central government would not get any additional amount due to Cenvat credit benefit available both to the Noticee as well as the Companies. Thus, in view thereof, the aforementioned show cause notices are liable to be dropped.*

3.6 Submissions on the specific allegations raised by the Department in the captioned SCNs.

3.6.1 *That, the Department in the show cause notices have alleged that the effective control and possession has not been transferred to the customers on the following grounds:-*

Sl.No.	*Allegation of the Department*	*Submission of the Noticee*
1.	*Equipments are leased by the Noticee and even after leasing out it continue to be their property and the ownership lies with them*	*It is submitted that Noticee are not contesting on the point that the title over the gas genset has been transferred to the customers. The contentions in the aforementioned Paras shows that the effective control and possession is transferred to the customers on execution of the Lease Agreement.*
2.	*Equipments are installed within the premises of the customers/lessee*	*It is submitted that no explanation is provided by the Department as to how this contention shows that service has been undertaken by the Noticee under the Lease Agreement. Moreover, this contention supports the Noticee's submission in line with BSNL case and G S Lamba case that effective control and possession has been transferred to the customers as customers have provided site for commissioning and installation of the gas genset.*

3.	*The skilled manpower supplied by the Noticee are responsible for complete handling of the equipments and the service agreement gets terminated with the termination of the lease agreement which implies that the equipments are fully controlled by the service provider/Noticee, therefore effective control lies with the Noticee itself. Further reliance is also placed on the clause of the Service Agreement that if there is delay in payment of manpower bill, the customers will have to return the plant leased out to them to the Noticee. Therefore, effective control and possession lies with the Noticee.*	*Firstly, it is submitted that the skilled manpower is not supplied under the Lease Agreement which is a subject matter in dispute in the present case. There is a separate service agreement entered between the Noticee and customer under which various services are provided on which service tax has been discharged by the Noticee. The conditions put forth in the service agreement do not by any means alter the nature of the lease agreement which is the subject matter in dispute in the present case. Secondly, had the termination clause in the service agreement not been framed in the said manner, even otherwise if lease agreement would have terminated, Noticee could not provide services on the goods which is not available with the customers. This does not bar the Noticee to provide services to their customers if they customers have taken gas genset from other parties. Thirdly, even if plant is returned due to delay in payment of manpower service, it is settled in the case of* ***Petronet LNG Ltd. reported at 2013-TIOL-1700-CESTAT-DEL*** *wherein it is held that the mere fact that the Manager, Master, personnel and other crew are employed by the owner does not in any manner derogate from the fact that the transaction constitutes transfer of the right to use the tangible goods, including possession and effective control of the tankers (Para 29 of the order).*
4.	*Clause 8.8 of the Agreement stipulates that the customers /lessee cannot make alterations, additions or improvements to the plant without prior consent of the Noticee. Therefore, legal rights and effective control of the equipments are retained with the Noticee and the same has not beentransferrd to the customers.*	*It is submitted that the conclusion drawn by the Department as to legal rights and effective control of the equipments are retained by the Noticee on the ground that customers cannot alter or make addition to the plant is unsustainable. Court has laid down that to see whether legal rights have been transferred or not can be determined by the fact as to who and under whose name all statutory permissions, license for that 'good' have been obtained under the Lease Agreement. It is laid down that it should be in the name of customers/lessee who apply for license before the authorities. The Noticee in the present case, submits that it is the customers who have obtained all the permissions, license from the authorities. Hence, the legal rights and possession has been transferred to the customers.*
5.	*Further, at Para 13 of the show cause notice, it is contended by way of an example, that owner of the car gives possession to the driver for driving. In this case, if the possession and effective control of the car is with the driver, he is not having legal right of possession of the car. Similar is the situation here.*	*It is submitted that the test adopted by the Department to determine the transfer of legal rights is erroneous as also submitted in Para supra. The license, statutory permissions are obtained by the customers as per the terms of the Agreement. Even otherwise, in the case of In* ***Krushna Chandra Behera and Another vs. State of Orissa and Others 1991 (83) STC325 (Orissa),*** *the Hon'ble High Court held as follows: ""13. ...that for all practical purposes, the effective or general control of the vehicle under the agreement rests with the Corporation. Though the owner has to provide a driver and has to carry out the necessarv repairs, we do not think if it can be held that the effective control of the vehicle remains with the owner after the aqreement is executed. Accordinq to us, there is acquisition of possession of thebus, as distinguished from its custody, by the Corporation, and loss of possession so far as the owner is concerned. There is thus transfer of possession of the bus as both the aspects mentioned by Salmond in this regard, which have been noted above, are satisfied and consequently there is transfer of the right to use the same.* *14. In view of the above, we are of the opinion that the present was the case of "sale" within the extended meaning of this word, inasmuch as there was transfer of the right to use the vehicle for valuable consideration".* ***(Emphasis Supplied***

6.	*Article 366(29A)(d) of the Constitution of India only specifies transfer of right to use good to be treated as deemed sale. The wordings 'right of possession' is kept out of definition which as per the Department is the situation of payment of service tax has to be determined as per the definition of taxable service under the category of 'supply of tangible goods' service.*	*The Noticee submits that such contention of the Department is against the legal principle settled by the Apex Court of India and devoid of any legal basis. The judiciary in the case of BSNL, G.S, Lamba have discussed 'right of possession' in terms of Article 366(29A)(d). Hence, the show cause notices deserved to be dropped on the various grounds.*

3.7 ***Without prejudice, the entire quantification is erroneous since the invoices raised during the material period should have been treated as cum-duty value:***

3.7.1 *That, for the sake of argument, even if it is assumed that service tax as alleged is payable by the Noticee, still the manner of calculation of the liability is not correct as the consideration which the Noticee has received is to be considered as inclusive of the service tax payable and the levy of service tax on the gross amount is bad-in-law. Reference in the case can be taken from the levy of excise duty as well, in respect of which it has been held that the amount received should be taken as cum-duty price and the value should be derived therefrom, by excluding the duty alleged to be payable as required under Section 4(4)(d)(ii) of the Central Excise Act, 1944.*

3.7.2 *That, in support of the aforementioned contention, the Noticee places reliance on the Larger Bench decision in the case of* ***Sri Chakra Tyres 1999 (108) ELT 361.*** *The said decision of the Larger Bench has been thereafter affirmed by the Hon'ble Supreme Court as the departmental appeal has been dismissed vide order reported in* ***2002 (142) ELT A279 (SC).*** *The Noticee further relies on the Apex Court judgment in the case of* ***CCE vs. Maruti Udyog Limited 2002 (49) RLT 1 (SC),*** *wherein it has been held that the deduction under Section 4(4)(d)(ii) is allowable, even in situations where no duty was paid at the time of removal. Thus, for the purposes of calculation of service tax payable, the amount paid by the service receiver should be considered as cum tax payment and service tax should be calculated accordingly.*

3.7.3 *That the above view is also supported by* ***Trade Notice No.20/2002 dated 23.5.2002*** *of Delhi-II Commissionerate, which reads as under:*

> *"(a) The liability to pay the service tax remains with the service provider in the current scenario. Failure to realize or even charge the 5% service tax does not negate this statutory liability. In event of any such failure, the amounts released from client in lieu of having rendered the service(s) will be taken to constitute amounts inclusive of service tax. Accordingly, the amount of service tax will be determined and required to be deposited to the credit of the Central Government'.*

The above settled legal position as clarified by the above circular was given legal recognition with Explanation 2 added to Section 67 of the Finance Act, 1994 with effect from 10.09.2004. The Noticee submit that the Explanation is in the nature of clarification and would apply to the demand raised for the past period also.

3.7.4 *That in view of the aforesaid amendments, clarifications, etc. made in the Finance Act, 1994 supported by the judgements as cited above, the aforementioned show cause notices needs to be dropped to the extent.*

3.8 *If the Service Tax demand is confirmed, the amount of tax deposited under VAT will be transferred to the Service Tax account*

3.8.1 *That, the Noticee further submits that even if the service tax demand is confirmed on the Noticee, in the interest of natural justice, the amount of VAT paid by the Noticee in the concerned period should be transferred to the Service Tax account of the Noticee, thus diminishing the service tax liability by the paid amount, if any imposed. In this regard,*

reliance is placed on the decision of Gauhati High Court in the case of ***Quippo Construction Equipment Limited vs. The Union of India & 6 ORS (WP(C)3813/2014),*** *wherein the petitioner (QCEL) was discharging service tax liability on drilling activities provided, until the division bench of the Court held that the said service was liable to VAT and not service tax. Thereafter, the petitioner stopped paying Service Tax and started discharging VAT and filed an SLP before the Supreme Court challenging the said decision. The petitioner was then demanded to pay service tax by the authorities, aggrieved by which this writ petition was filed. The court therefore held the following:*

"If it is held by the Supreme Court that there is no liability for the petitioner to pay tax under the VAT, whatever the amount of tax deposited under the VAT will have to be transferred to the service-tax account. Needless to say, if there is any deficit of service-tax liability the petitioner should make good the same. "

(Emphasis Supplied)

3.8.2 *That, in view of the above, in the instant case as well, if the decision is against the Noticee, the demand for service tax should be adjusted with the amount of service tax already paid and any amount remaining pending, if any shall be payable and hence, the demand is liable to be set aside to that extent.*

3.9 *Imposition of Penalty is not sustainable and is bad-in-law as the same involves bona fide interpretation of law and there was no intent to evade payment of duty*

3.9.1 That, without prejudice, it is most humbly submitted that the imposition of penalty under Section 78, 77 & 76 of the Finance Act,1994 does not arise as from the bare perusal of the provisions of the Act and Rules it can be said that the issues involved in the present case is a question of interpretation of law. In this regard, reliance is placed on the following judgments:

- *Ispat Industries Ltd. v. CCE 2006 (199) ELT 509 (Tri.-Mum)*
- *Secretary, Twon Hall Committee Vs. CCE 2007 (8) S.T.R. 170 (Tri. - Bang.)*
- *CCE Vs. Sikar Ex-serviceman Welfare Coop. Society Ltd. 2006 (4) S.T.R. 213 (Tri.-Del.)*
- *Haldia Petrochemicals Ltd. Vs. CCE 2006 (197) E.L.T. 97 (Tri. - Del.)*
- *Siyaram Silk Mills Ltd. Vs. CCE 2006 (195) E.L.T. 284 (Tri. - Mumbai)*
- *Fibre Foils Ltd. Vs. CCE 2005 (190) E.L.T. 352 (Tri.-Mumbai)*
- *ITEL Industries Pvt. Ltd. Vs. CCE 2004 (163) E.L.T. 219 (Tri. - Bang.)*

3.9.2 *Penalty cannot be imposed under Section 76 of Finance Act, 1994*

- *The Noticee submit that the penalty under Section 76 is not imposable since there is no short payment of service tax. As per the merits of the case, the Noticee is not liable for payment of Service tax.*
- *It is humbly submitted that for imposing penalty, there should be an intention to evade payment of service tax on the part of the assessee. The penal provisions are only a tool to safeguard against contravention of the rules. The Noticee submit that they have always been and are still under the bonafide belief that they are not liable for payment of service tax. Such bonafide belief was based on the ground mentioned here-in-above. There was no intention to evade payment of service tax as mentioned in the ground above. Therefore, no penalty is imposable in the present case.*
- *In support of the above view, reliance is placed on the decision of the Hon'ble Supreme Court in the case of* ***Hindustan Steel Ltd. Vs. The State of Orissa reported in AIR 1970 (SC) 253.*** *The above decision of the Apex Court, was*

followed by the Tribunal in the case of ***Kellner Pharmaceuticals Ltd. Vs. CCE, reported in 1985 (20) ELT 80,*** *and it was held that proceedings under Rule 173Q are quasi-criminal in nature and as there was no intention on the part of the Noticee to evade payment of duty the imposition of penalty cannot be justified. The ratio of these decisions squarely applies in all force to the present case. In the present case, there was neither any mala fide intention nor any intention to evade payment of tax. In view of the foregoing, no penalty is imposable.*

- *The Noticee submit that even if any contravention of provisions the same was solely on account of their bonafide belief and such bonafide belief was based on the reasons stated above. The contraventions, if any, were not with the intention to wilfully evade payment of service tax. Reliance is placed on the judgment of the Hon'ble Supreme Court in the case of* ***Pushpam Pharmaceuticals Company Vs. CCE 1995 (78) ELT 401 (SC)*** *wherein it was held as follows:*

  "4. Section 11A empowers the Department to re-open proceedings if the levy has been short levied or not levied within six months from the relevant date. But the proviso carves out an exception and permits the authority to exercise this power within five years from the relevant date in the circumstances mentioned in the proviso, one of it being suppression of facts. The meaning of the word both in law and even otherwise is well known. In normal understanding it is not different then what is explained in various dictionaries unless of course the context in which it has been used indicates otherwise. A perusal of the proviso indicates that it has been used in company of such strong words as fraud, collusion or wilful default. In fact it is the mildest expression used in the proviso. Yet the surroundings in which it has been used it has to be construed strictly. It does not mean any omission. The act must be deliberate. In taxation, it can have only one meaning that the correct information was not disclosed deliberately to escape from payment of duty. Where facts are known to both the parties the omission by one to do what he might have done and not that he must have done, does not render it suppression. "

  (Emphasis Supplied)

Similar was the view of the Hon'ble Supreme Court in the case in CCE Vs. Chemphar Drugs and Liniments 1989 (40) ELT 276 (SC) ***(supra).***

The rationale of both the above-cited cases is squarely applicable to case of the Noticee. Hence no penalty under section 76 of the Act is sustainable in the present case.

Without prejudice to the above submissions, it is submitted that no case has been made out by the Department that the present demand of service tax is on account of fraud, collusion, willful mis-statement, suppression of facts or contravention of any of the provisions of Act or rules made thereunder with intention to evade the payment of service tax. Hence no interest or penalty under section 76 of the Act can be imposed on this ground itself. The Show Cause Notices are liable to be dropped on this ground also. For the similar reasons no penalty can be imposed under Section 77 also.

3.9.3 *No penalty under Section 77 is applicable*

- *The Noticee further submit that no penalty can be imposed under Section 77 of the Finance Act, 1994 as none of the conditions specified therein have been met.*
- *Section 77 of the Finance Act, it is submitted that, is also not applicable to the facts of the present case as none of the conditions specified in the various clauses of Section 77 are applicable. Section 77 states as under;*

  "SECTION 77. Penalty for contravention of rules and provisions of Act for which no penalty is specified elsewhere. — (1) Any person, —

  (a) who is liable to pay service tax, or required to take registration, fails to take

registration in accordance with the provisions of section 69 or rules made under this Chapter shall be liable to pay a penalty which may extend to five thousand rupees or two hundred rupees for every day during which such failure continues, whichever is higher, starting with the first day after the due date, till the date of actual compliance;

(b) who fails to keep, maintain or retain books of account and other documents as required in accordance with the provisions of this Chapter or the rules made thereunder, shall be liable to a penalty which may extend to five thousand rupees;

(c) who fails to —

(i) furnish information called by an officer in accordance with the provisions of this Chapter or rules made thereunder; or

(ii) (ii) produce documents called for by a Central Excise Officer in accordance with the provisions of this Chapter or rules made thereunder; or

(iii) appear before the Central Excise Officer, when issued with a summon for appearance to give evidence or to produce a document in an inquiry,

shall be liable to a penalty which may extend to five thousand rupees or two hundred rupees for everyday during which such failure continues, whichever is higher, starting with the first day after the due date, till the date of actual compliance;

(d) who is required to pay tax electronically, through internet banking, fails to pay the tax electronically, shall be liable to a penalty which may extend to five thousand rupees;

(e) who issues invoice in accordance with the provisions of the Act or rules made thereunder, with incorrect or incomplete details or fails to account for an invoice in his books of account, shall be liable to a penalty which may extend to five thousand rupees.

(2) Any person, who contravenes any of the provisions of this Chapter or any rules made thereunder for which no penalty is separately provided in this Chapter, shall be liable to a penalty which may extend to five thousand rupees. "

- *The Noticee never failed to keep, maintain or retain the books of accounts and other documents as required under the provisions of the Finance Act, 1994. In fact there is no allegation in the show cause notices to this regard. Therefore, clause (b) is also not applicable.*
- *The Noticee have also not failed to provide any information to the Department or produce documents or appear before the Department on inquiry. In fact there is no allegation in the show cause notices to this effect. Thus clause (c) is also not applicable.*
- *There is no allegation that the Noticee have failed to pay service tax electronically. Thus clause (d) is also not applicable.*
- *There is also no allegation that the Noticee have issued invoices not in accordance with the provisions of the Finance Act, 1994 or the Rules made thereunder. Thus clause (e) is also not applicable. Therefore, the demand raised under Section 77 is bad in law.*
- *Thus, it is clear that none of the conditions of Section 77 are satisfied and therefore the proposal to levy penalty under Section 77 is without basis and does not stand scrutiny.*

3.9.4 *No penalty under Section 78 is applicable*

- *It is further submitted that for imposing penalty under Section 78 of the Act,*

there should be an intention to evade payment of service tax, or there should be suppression or concealment of material facts. The Noticee has provided all the details as and when desired by the Department vide the letters to the Department and the Noticee at no point of time had the intention to evade service tax or suppressed any fact wilfully from the knowledge of the Department.

- *Further, the Noticee was and still, are of the bona-fide belief that the service in question was excluded from the levy of service tax under supply of tangible goods. Thus, what is known to the whole world cannot be considered to have been suppressed. Reliance is placed upon the decision of the Hon'ble Tribunal in* ***Electrical Mfg. Co. P. Ltd. Vs. CCE reported at 1989 (40) ELT 472 [Affirmed by the Hon'ble Supreme Court in 1996 (83) ELT A44]*** *to this effect.*
- *The Noticee* ***inter alia*** *place reliance upon the following decisions to submit the information is available on record and, no suppression can be alleged on the assessee;*

  Suvikram Plastex Pvt. Ltd. Vs. CCE, Bangalore - III 2008 (225) ELT 282 (T)

  (a) *Rallis India Ltd. Vs. CCE, Surat 2006 (201) ELT 429 (T)*

  (b) *Patton Ltd. vs. CCE, Kolkata - V 2006 (206) ELT 496 (T)*

  (c) *CCE, Tirupati Vs. Satguru Engineering & Consultants Pvt. Ltd. 2006 (203) ELT 492 (T)*

  (d) *Indian Hume Pipes Co. Ltd. Vs. CCE, Coimbatore 2004 (163) ELT 273 (T)*

- *It is further submitted that penalty under Section 78 of the Act can be imposed only if the assessee suppresses any information from the Department. However, the Noticee have not suppressed any fact with an intention to evade payment of service tax. Therefore, penalty under Section 78 of the Act cannot be imposed in the present case. Reliance is placed on the judgment of the Hon'ble Supreme Court in the case of* ***Akbar Badruddin Jiwani Vs. Collector of Customs reported at 1990 (047) ELT 0161 SC,*** *wherein the Hon'ble Supreme Court has held as follows:*

57. Before we conclude it is relevant to mention in this connection that even if it is taken for arguments sake that the imported article is marble falling within Entry 62 of Appendix 2, the burden lies on the Customs Department to show that the Appellant has acted dishonestly or contumaciously or with the deliberate or distinct object of breaching the law. ''

(Emphasis Supplied)

- *Also in CCE Vs. Chemphar Drugs and Liniments reported at 1989 (40) ELT 276 (SC),* ***it was held as follows:***

  "8. Aggrieved thereby, the revenue has come up in appeal to this Court. In our opinion, the order of the Tribunal must be sustained. In order to make the demand for duty sustainable beyond a period of six months and upto a period of 5 years in view of the proviso to sub-section 11A of the Act, it has to be established that the duty of excise has not been levied or paid or short-levied or short-paid, or erroneously refunded by reasons of either fraud or collusion or willful misstatement or suppression of facts or contravention of any provision of the Act or Rules made thereunder, with intent to evade payment of duty. Something positive other than mere inaction or failure on the part of the manufacturer or producer or conscious or deliberate withholding of information when the manufacturer knew otherwise, is required before it is saddled with any liability, before the period of six months. Whether in a particular set of facts and circumstances there was any fraud or collusion or willful misstatement or suppression or contravention of any provision of any Act, is a question of fact depending upon the facts and circumstances of a particular case. The Tribunal came to the conclusion that the facts referred to hereinbefore do not warrant any inference of fraud. The assessee declared the goods on the basis of their belief of the interpretation of the provisions of the law

that the exempted goods were not required to be included and these did not include the value of the exempted goods which they manufactured at the relevant time. The Tribunal found that the explanation was plausible, and also noted that the Department had full knowledge of the facts about manufacture of all the goods manufactured by the respondent when the declaration was filed by the respondent.
''

(Emphasis Supplied)

- *It is therefore submitted that there being no suppression, penalty under Section 78 is not applicable as none of the five conditions for imposition of penalty under Section 78 are applicable. There is no fraud; collusion; wilful mis-statement; suppression; or contravention of the provisions of Finance Act, 1994 with an intent to evade payment of duty in the present case. Further the Noticee have clearly stated that there is no suppression in the present case and also that there is no contravention of the provisions of Finance Act, 1994 with an intent to evade payment of duty and crave leave to rely on the submissions made herein above to that effect. It is therefore submitted that the proposal to impose penalty under Section 78 in the show cause notices is without any legal basis and is liable to be set aside.*

3.9.5 **Section 80 of the Finance Act, 1994 is in favour of the Noticee**

It is most humbly submitted that Section 80 of the Act provides that no penalty shall be imposed on the assessee for any failure referred to in sections 76, 77 or 78 of the Act, if the assessee proves that there was reasonable cause for the said failure. Thus, the Act statutorily provides for waiver of penalty. In the present case, there was a bonafide belief on part of the Noticee that the impugned activities were not subject to service tax, based on the detailed grounds given above. Therefore, there was reasonable cause for failure, if any, on part of the Noticee to pay service tax and to file service tax return. Hence, in terms of section 80 of the Act, penalties cannot be imposed under Sections 76, 77 and 78 of the Act. In this regard, reliance is placed on the following judgments:

ETA Engineering Ltd. Vs. CCE, Chennai, 2004 (174) E.L.T 19 (T-LB)

Flyingman Air Courier Pvt. Ltd. Vs. CCE 2004 (170) ELT 417 (T)

S Star Neon Singh Vs. CCE, Chandigarh, 2002 (141) ELT 770 (T)

- *It is also submitted that when no tax liability arises, no question of interest is left for determination. For this reason, the proposal made in the captioned SCNs demanding interest under Section 75 of the Finance Act, 1994 is not sustainable and liable to be set aside.*
- *Therefore, for the aforesaid reason also, the captioned SCNs are not sustainable and is liable to be dropped.*

3.10 Prayer

In view of the aforesaid submissions, it is abundantly clear that the captioned SCNs has been issued without proper examination of the facts and the provisions of the law and hence is clearly unsustainable. The grounds for raising demand of duty and imposing interest & penalty are contrary to and / or is inconsistent with the statements made here-in-before. In the circumstances aforesaid, your goodself is requested to withdraw, cancel and / or rescind the captioned SCNs and drop the proceedings initiated hereunder in the interest of justice and equity. It is also respectfully prayed that the proceedings initiated in the captioned SCNs may kindly be dropped. In any case, the Noticee may be given an opportunity of personal hearing before a final decision is taken in the matter".

10. SUBMISSIONS MADE DURING THE COURSE OF PERSONAL HEARING:

10.1 The personal hearing was fixed on 18.11.2019, 27.12.2019. Ms. Madhu Jain, Advocate and Shri Rupesh Kumar/Company Secretary appeared for personal hearing on 27.12.2019. They reiterated their submissions made in reply. They sought time for further submission and requested for one more hearing. Further hearing was fixed on 21.02.2020 and 05.03.2020. Shri Rupesh Kumar, Company Secretary and Ms Madhu Jain appeared for personal hearing on

05.03.2020. They reiterated the submissions made by them earlier and requested to drop the proceedings in view of the latest/recent decision of the Tribunals and the Hon'ble Supreme Court. They submitted a set of written submission for consideration consisting the following documents:-

1. Copy of the Reply to the Show Cause Notice dated 08.03.2017 and 03.08.2018.
2. Illustrative copies of the Lease Agreement dated 12.10.2016 M/s.Italia Ceramics Ltd., Lease Agreement dated 21.09.2015 of M/s.Honda Cars India Ltd along with addendum to the lease agreement.
3. Copy of the illustrative copies of the invoices raised by the Noticee
4. Illustrative copies of the service agreement entered by Noticee with its customers such as Italia Ceramics Ltd, Honda Cars India Ltd
5. Illustrative copies of invoice raised for commissioning, manpower supply and transportation of plant.
6. Illustrative copies of the ST-3 Returns.
7. Copy of the invoices raised by the Noticee
8. Copy of the Agreement order for the period 2014-15
9. Copy of the Audit report No.91/2011-12 dated 23.01.2012
10. Copy of the Show Cause Notice dated 08.03.2017 & 03.08.2018.

11. DISCUSSION & FINDINGS:

11.1 I have carefully gone through the Show Cause Notices, the defence reply filed by the said noticee, the submissions made during the course of personal hearing and available records. In this case, two show cause notices covering the period from April 2015 to June 2017 have been issued having common issue and periodical in nature. Therefore, I am taking up both the cases together for adjudication. Details of the Show Cause Notices are as under:-

Sr.No.	SCN No. & Date	Period involved	Amount of Service Tax demanded/Rs.
01	STC/4-19/O&A/16-17 dated 08.03.2017	April 2015 to March 2016	2,10,20,116/-
02	STC/15-25/OA/2018 dated 03.08.2018	April 2016 to June 2017	2,79,46,689/-
	Total	...	4,89,66,805/-

12. The issue to be decided in this case is whether, "Power Generating and Heat Recovery Equipments" given on lease would amount to providing taxable service classifiable under the taxable category of "Supply of tangible goods services" as defined under Section 65 (105)(zzzzj) of the Finance Act, 1994 and whether payment of VAT on the said lease charges would be a determinative factor to take it out of the purview of service tax.

12.1 Taxable service of "Supply Of Tangible Goods Services" has been defined under Section 65 (105) (zzzzj) of the Finance Act, 1994 as *"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.*

12.2 On reading of the above definition, it is revealed that a service would become taxable under the said category when the following ingredients are satisfied:

a) The service is provided in relation to supply of tangible goods.

b) The supply is without transferring right of possession and effective control of goods.

13. I proceed to decide whether, the above ingredients are satisfied or otherwise in the case before me.

13.1 I find that the demand in the show cause notices have been based on the fact that since there is no transfer of right of possession and effective control of the equipments, the lease charges collected by the noticee are classifiable under the category of "Supply Of Tangible Goods Service" and therefore taxable. In this regard, the Lease Agreement No. Leas/Com/019/J072 dated 21.09.2015 entered into by the noticee with the lessee party viz. M/s. Honda Cars India Ltd.; Manpower Services Agreement No. Mans/Com/020/J072 dated 21.09.2015 entered into by the noticee with M/s. Honda Cars India Ltd and Mans/Com/020/J087 dated 12.10.2016 entered into with Italia Ceramics Ltd and Notes on Business Activities provided by the service provider have been taken as documentary evidences to arrive to a conclusion that :

i. Equipments were leased by the noticee and even after leasing out it continue to be their property and the ownership lies with them without transferring the effective control of the equipments.

ii. Equipments were installed within the premises of the client

iii. Skilled manpower supplied by the noticee and posted in the premises of the service receiver were solely responsible for complete handling operation-cum-functioning of the equipments and the Manpower Services Agreement is terminated with the termination of Lease Agreement, which implies that the equipments leased are fully controlled by the service provider, in other words, effective control lies with the assessee itself.

14. I find that there is no dispute to the fact that the said noticee is paying VAT/Sales Tax on the "Power Generating and Heat Recovery Equipments" hiring charges and is being assessed by the concerned authorities. However, I have no authority to comment on the applicability or non applicability of VAT either when the Power Generating and Heat Recovery Equipments are given on lease or hire. The definition of taxable service as per section 65 (105)(zzzzj) of the Finance Act, 1994 does not specifically provide that where VAT has been paid, service tax will not be attracted. I further find that the scope of levy of service tax under this service can be better understood by referring to CBEC's letter D.O.F. No. 334/1/2008-TRU dated 29-02-2008. Para 4.4 clarify the scope of services taxable under this category, as follows:

"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 and 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 fact 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."

14.1 Thus, at para 4.4.3 of the said letter it is clearly mentioned that whether a transaction involves transfer of possession and control is a question of fact and is to be decided based on the terms of the contract and other material facts. Mere payment of VAT by the assessee by his own volition does not mean that the liability of Service Tax is ruled out.

15. I have also perused the agreements relied upon in the original show cause notice. I find that the following conditions mentioned in agreements are very crucial and support the allegations made in the show cause notice.

15.1 Lease Agreement No. Leas/Com/019/J072 dated 21.09.2015 entered into by the noticee with the lessee party viz. M/s. Honda Cars India Ltd.

Clause 8.2 "The LESSEE shall have no right, title or interest in the Plant or any part thereof, save and except the exclusive right to access and use the Plant for the purpose herein. The LESSEE shall have no right whatsoever to create any charge or otherwise encumber the Plant in any manner whatsoever and any such action by the LESSEE shall be deemed illegal and unlawful. Further, the LESSEE shall immediately give the LESSOR a notice in the event that the Plant or any part thereof is levied upon with or is about to become liable or is threatened with seizure and LESSEE shall indemnify LESSOR against all loss and damages caused by such action".

Clause 8.3 "The LESSEE shall not sublet the Plant or any part thereof, nor shall the LESSEE assign or transfer any interest in this Agreement without prior written consent of the LESSOR, to any third-party, including without limitation, to any statutory, Government or Tax authorities. The LESSOR may assign this Agreement without notice. Subject to the foregoing, this Agreement insures to the benefit of, and is binding upon the heirs, successors, and assigns of the Parties hereto.

Clause 8.4 "By virtue of this agreement, the LESSEE shall be considered to have possession of the plant and shall have the right to use plant for the purpose for which it is leased to him".

Clause 8.5 "The LESSEE shall allow, at all reasonable times, any persons authorized by the LESSOR to inspect and examine the condition of the plant and for the said purpose to enter upon the premises where the plant is placed. This will apply until the Plant and all other accessories and spares etc. are demobilized and removed from the site"

16. Therefore, it is very clear that in the present case effective control is not parted with by the said noticee. The Power Generating and Heat Recovery Equipments given on hire by the noticee to their clients are for a specific period. Thereafter, if the contract is not renewed the same are brought back by the noticee. All the maintenance work, minor / major breakdowns etc. are being looked after by the said noticee and in some cases the noticee has provided a technician to manage the routine maintenance of the equipments during the day time by deputing him to the clients premises. It is thus evident that the right of control and effective maintenance of the Power Generating and Heat Recovery Equipments always rests in the hand of the noticee. Had it been a case of transfer of effective control, such conditions would not have been agreed upon at the time of entering into the contract. The CBEC's clarification dated 29-02-2008 clearly mentions that transfer of right to use any goods is leviable to sales tax / VAT as deemed sale of goods. Transfer of right to use involves transfer of both possession and control of the goods to the user of the goods. It further clarifies that 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.

17. In the present case in hand, there is no dispute to the fact that the said noticee has not transferred the right of possession. Thus, it satisfies both the essential criteria of the definition of taxable service of "Supply of tangible goods services" under Section 65 (105)(zzzzj) of the Finance Act, 1994. The situation is analogous to the chartering of aircraft.

18. I observe that Circulars issued by the Board are binding on the departmental officers as has been held by the Hon'ble Supreme Court in the case of Ranadey Micronutrients Vs 1996(87)ELT19(SC) and Paper Products Ltd Vs CCE 1996(112)ELT 765(SC).

19. It is noticed that goods in question in the case before me are the "Power Generating and Heat Recovery Equipments " and there cannot be any argument that the same are not tangible goods. The term "Goods" has been defined in section 65(50) of Finance Act, 1994 to mean the same as in section 2(7) of Sale of Goods Act, 1930. "Goods" has been defined under the Sale of Goods Act to mean every kind of movable property other than actionable claims and money. The goods being supplied should be tangible goods i.e. having physical existence and form, in order to attract liability under this category. In the case before me the goods are tangible in nature.

20. This service category envisages use of goods by the recipient of service and the expression "use" would mean the physical exploitation of the said goods by the recipient of service who has become capable of exploitation of the said goods, but without having legal rights of possession and effective control. Therefore, I conclude that service is provided in relation to supply of tangible goods.

21. In view of the above, I find that all the three ingredients of the taxable service of "Supply Of Tangible Goods Services" as defined under Section 65 (105) (zzzzj) of the Finance Act, 1994 are fully satisfied. I also place reliance on the judgment in the case of *Indian National Ship Owner's Association v. Union of India (2009) 14 STR 289 (Bombay)*, wherein, it was held that providing vessels on time charter basis without, parting with the right of possession and giving effective control was covered under Section 65(105)(zzzzj) of the Act.

21.1 Further, Clause 29A of Article 366 of the Constitution of India reads as:

(a) a tax on the transfer; otherwise than in pursuance of a contact, 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) invoked in the execution of a works contract;

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

(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"

In terms of clause (d) above, for a transaction to qualify as deemed sale leviable to state sales tax/VAT, the condition namely, "the transfer of right to use any goods ***for any purpose"***, is required to be fulfilled. ***And if in a transaction the 'right to use* is not transferred then such transaction cannot be classified as 'deemed sale'.*** The Honhle Supreme Court of India in the case of ***BSNL vs. Union of India [2006 (2) STR 161 SC]*** has held that a transaction involves transfer of right to use goods, in case it fulfills the following criteria:

(a) There must be goods available for delivery;

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

(c) Transferee should have legal right to use the goods;

(d) Such right should be to the exclusion of the transferor i.e. it should not be merely license to use the goods, and

(e) During the period of transfer, owner cannot again transfer the same right to others

It is noteworthy that in transfer of right to use goods all the rights except the ownership rights are transferred by the Lessor to the Lessee. This implies that the Lessee will be free to use the subject goods in the manner and way he deems fit. There cannot be any restriction on the lessee so far as use of the leased out goods is in reckon. If this condition is fulfilled then the said transaction will be eligible for being considered as 'deemed sale'.

21.2 It is not the case that the provisions under Article 366(29A) are unfettered so as to prevail over the legislation passed by the Parliament. This aspect has been discussed in detail by the Hon'ble Supreme Court in the case of Baharat Sanchar Nigam vs UOI [2006(2) STR 161] and

the Honhle Court has observed that

> "It has been held in Builders Association of India v. Union of India - (1989) 2 SCC 645 that the clauses in Article 366(29A) do not amount to a separate entry in List II of the 7th Schedule to the Constitution enabling the States to levy tax on sales and purchase independent of Entry 54 thereof [see also Larsen & Toubro Ltd. v. Union of India - (1993) 1 SCC 365, 383]. Article 366(29A) as introduced by the 46th Amendment not being equivalent to a separate entry in List II is subject to the same limitations as Entry 54 of that List. At the time of amending Article 366, Article 286 was also amended by the introduction of Clause (3) which reads as:-
>
> "(3) Any law of a State shall, in so far as it imposes, or authorizes the imposition of-
>
> *(a)* a tax on the sale or purchase of goods declared by Parliament by law to be of special importance in inter-State trade or commerce;
>
> *(b)* a tax on the sale or purchase of goods, being a tax of the nature referred to in sub-clause (b), sub-clause (c) or sub-clause (d) of Clause (29A) of article 366, be subjected to such restrictions and conditions in regard to the system of levy, rates and other incidents of the tax as Parliament may by law specify."
>
> Therefore, the deemed sales included in Entry 54 List II would also be subject to the limitations of Art. 286, Art. 366(29A)."

21.3 Therefore, to decide as to whether a certain transaction in the nature of provision of service and shall be subject to levy under the Finance Act has to be decided by applying judiciously the provisions provided under the Finance Act itself and not by reading the provisions under State law as erroneously concluded by the adjudicating authority that ***"the acid test for taxability under this service could be whether VAT is payable on such goods transaction."***

22 Further, the noticee's contention that they have paid VAT and hence Service Tax cannot be levied is not sustainable in the present case. In the case of Idea Mobile Communication Ltd. Vs. Commissioner of Central Excise & Customs, Cochin before the Hon'ble Supreme Court (Civil Appeal No. 6319 of 2011) in the judgment dated 04.08.2011 has held that ***"It also cannot be disputed that even if sales tax is wrongly remitted*** and paid that would not absolve them from the responsibility of payment of service tax, if otherwise there is a liability to pay the same.*[9]

In view of the above observation of Hon'ble Supreme Court, in the instant case, M/s Quippo Energy Ltd, are required to pay Service Tax, even if they have erroneously paid VAT, as the services of leasing out of the said plants and machinery squarely falls under the category of taxable services leviable to service tax.

23 The Govt, of India, Min. of Finance, Department of Revenue vide their letter F. No. 334/1/2008-TRU dated 29.02.2008 have shown their intention to levy service tax on such transactions under the category of Supply of Tangible Goods for use as given in Section 4.4 of the said letter, which reads as :

> *"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. *

The said service was duly notified/defined vide Notification No. 18/2008-ST dated 10.05.2008 under Section 65(105) (zzzzj) as ***"Supply of Tangible Goods Services"***. The same was further defined under declared services under Section 66E(f) of the Finance Act, 1994 w.e.f 01.07.2012. Thus, it has been clarified that in terms of Article 366(29A)(d), transfer of right to use involves transfer of both possession and control of the goods to the user of the goods and in such a case, the transaction shall be subject to levy of sales tax/VAT.

24.1 In the present case there are legal agreements between the lessor and the lessee for lease of the subject goods. The condition limits the use of machinery by the Lessee in as much as he is not allowed to sublet or underlet the machinery. The Lessee is also neither allowed to transfer the said machinery nor assign the said machinery to someone else except for the written consent from the Lessor. This very clearly proves that the Lessee did not have all the rights over the machinery.

In a similar situation, the Honhle Apex Court in the case of *Bharat Sanchar Nigam Ltd Supra* **has observed that** "Clause 9 clearly interdicts the licensee provided that licensee wilt not assign or transfer his rights in any manner whatsoever under the license to third party. It is impossible to contend that the right to use goods, assuming without conceding that they are goods, which are essential for the rendition of service can never be a transaction or transfer of right to use goods. Nor can the contract between subscribers and licensee viz. service provider be interpreted as involving transfer of right to use goods.

From the above clauses it is clear that the Lessor did not intent to allow the Lessee to use the said machinery in any other manner except for being specifically mentioned in above clause. Thus, the Lessee cannot manufacture fabric or yarn belonging to others on job work basis also as there is specific condition that the machine could be used to manufacture fabric and yarn out of the yarn and fibers ***of the Lessee.*** The Lessee couldn't have used the machinery the way he deemed fit but the manner of use of machinery was confined to the conditions laid down in clause 3(ii) and 3(iii) of the agreements only. Had such restrictions been not imposed on the lessee, which is a pre-condition for a supply to be considered as deemed sale, the lessee would have used the said textiles machineries at their own will and ***for any purpose.*** In the instant case, as the necessary conditions of using the said machinery are not fulfilled.

24.2 In the case of ***Mahyco Monsanto Biotech (India) Pvt Ltd Vs UOI [2016(44) STR 161(Bom),*** the Honble High Court has held that the fact that the agreement between Subway and its franchisee is limited to the precise period of time stipulated in the agreement is vital aspect of the agreement which cannot be brushed aside. At the end of the period of the agreement, or before in case there was any breach of its terms, the rights of the lessee would also end there are set terms provided by the agreement which have to be followed. A breach of these would result in termination of the agreement. Thus, there is no passage of any kind of control or exclusivity to franchisees. In fact, this agreement is a classic example of permissive use. It can be nothing else.

"In our opinion, the most fundamental aspect of permissive use of goods is that at the end of the period for which the use is granted, the goods must be returned to the transferor. Let us consider this in the context of a car hire service, a book library service, Amazon Kindle Unlimited and ITunes Radio. When a car is taken on hire, a fee is paid and the car can be used for a certain period of time. During this time, the person renting the car can only use it. He cannot part with it and certainly cannot destroy it. Once the period of hire comes to an end, the car must be returned to the transferor. Therefore, the effective control over the car remains with the transferor".

24.3 Thus, the fact that the lessee in the present case did not have unqualified right to sub-lease, transfer the leased machinery on its own, without the consent of the Lessor (the noticee) and the lessee didn't have the right to use the machinery the way they liked, indicated that Lessee merely had the license of ***"permissive use"*** of the machinery without having rights to use the

machinery.

25. The moot question to be decided is whether there is a 'transfer' of effective control within the meaning of Article 366(29A)(d). The essence of a Transfer' is the divesting of a right or goods from transferor and the investing of the same in the transferee.

25.1 Clause 4(d) and (e) of both the agreements are identical and the same are reproduced below:

> *(d)* Normally Lessor shall carry out the undertaking repair maintenance of the said Machinery. However, in exceptional cases it shall permit and allow the Lessee to maintain and repair the said Machinery for the beneficial enjoyment and continuous use of the said Machinery by the Lessee"
>
> *(e)* The Lessor shall **insure** the "Said Machinery" throughout the term of the lease.

25.2 From the above clause of the agreement it is amply clear that the Lessee did not even have the rights for maintenance and repairs of the subject machinery. The Lessor was responsible for all the repair and maintenance of the machinery as the Lessor held the rights for maintenance and repairs of the machinery. Moreover, throughout the term of lease, the responsibility to insure the machinery was that of the Lessor not of the lessee.

25.3 In the case of State of Andhra Pradesh Vs Rashtriya Ispat Nigam Ltd. [(2003) 3 SCC 214], the Honhle Court has observed that for the purpose of steel project, RINL allotted different works to contractors. ***They undertook to supply sophisticated machinery to the contractors for the purpose of being used in execution of the*** contracted works and received charges for the same. The High Court after scrutiny and close examination of the clauses contained in the agreement and looking to the agreement as a whole, in order to determine the nature of the transaction, concluded that the transactions between the respondent and contractors did not involve transfer of right to use the machinery in favour of the contractors and in the absence of satisfying the essential requirement of Section 5E of the Act, i.e., transfer of right to use machinery, the hire charges collected by the respondent from the contractors were not exigible to sales tax. The Apex Court observed that "the High Court was right in arriving at such a conclusion. In the impugned order, it is stated, and rightly so in our opinion, that the effective control of the machinery **even while the machinery was in use of the contractor (emphasis supplied)** was that of the respondent company; the contractor was not free to make use of the machinery for the works other than the project work of the respondent or move it out during the period the machinery was in his use; the condition that the contractor would be responsible for the custody of the machinery while it was on the site did not militate against respondent's possession and control of the machinery.

25.4 ***Further, in the case of Carzonrent (India) Pvt Limited vs Commissioner of Service Tax, Delhi-1 [2017(50) STR 172 (tri.-Del)] where similar issue of levy of service tax on leased vehicle (a machinery) was under consideration, the Tribunal has observed that*** ***"We*** **note that relying on the decision of the Hon'ble Punjab & Haryana High Court in the case of Aditya Cement - 2009 (14) S.T.R.** ***P&ff,*** **the Original Authority recorded that as the premium for insurance is paid by the appellant, they have effective control of the insured vehicles. Further, the appellants also paid the maintenance and repair charges of the vehicles. Even, workshop in which the vehicle has to be serviced is decided by the appellant.** ***On*** **careful consideration of the terms of the agreement, which were elaborately** discussed in the impugned order, we note that the clients were never became owners of the cabs. They can use the cabs as long as they are paying rent to the appellant for such usage. The clients do not possess full effective control of the cabs, which are leased to them by the notices. As recorded by the Original Authority, the appellants do not fulfil the attributes as laid down by the Hon'ble Supreme Court to determine and conclude the transaction to be a "deemed sale" (emphasis supplied). As such, we find that the appellants failed to sustain legally their

plea regarding non-applicability of the provisions of Service Tax to the transactions of renting of motor cabs and on such consideration received.

25.5 Therefore, the Hon'ble Courts/Tribunal have consistently held that for a transaction to qualify as a transfer of the right to use goods, 'effective control' must be transferred to the transferee. In the instant case, in the light of conditions prescribed under Lease Agreement, it cannot be concluded that the lessor has transferred effective control over the leased machinery to the lessee.

26. From the above, it is clear that in the present case the 'rights to use the machinery' has not been passed on by the Lessor to the Lessee and accordingly, the transactions were a taxable service falling under the category of "Supply of Tangible Goods Service" defined under Section 65 (105) (zzzzj) of Finance Act, 1994 (upto 30.06.2012) and w.e.f. 01.07.2012, as "Declared Services" under Section 66E(f) of the Finance Act, 1994.

27. I find that the noticee had intentionally classified the said service as non-taxable service and not shown it correctly in the respective ST-3 Returns and accordingly failed to determine and discharge the service tax liability. This act of noticee tantamount to willful misstatement and suppressing the facts with intention to evade service tax payment.

28. Hence from the above it is proved that the noticee had intentionally classified the said service as non-taxable service and not shown it correctly in the respective ST-3 Returns and accordingly failed to determine and discharge the service tax liability. This act of noticee was tantamount to willful misstatement and suppressing the facts with intention to evade service tax payment. The noticee was also liable for penal action as per Section 78 of the Finance Act, 1994 for making willful misstatement and suppression of facts from the department, with an intention to evade service tax payment. They are also liable to pay penalty under Section 76 of the Finance Act, 1994 for failure to pay Service Tax. They also failed to include supply of Tangible Goods Service in their Registration Certificate. Therefore, they had also contravened the provision of Section 69 of Finance Act, 1994 read with Rule 4 of Service Tax Rules, 1994, which made themselves liable for penal action under Section 77 of the Finance Act, 1994. The noticee failed to consider the said receipt of lease charges, as taxable value thereby contravened the provisions of Section 67 of the Finance Act, 1994, which made themselves liable for penal action under Section 78 of the Finance Act, 1994 for suppressing the taxable value.

29. In view of the above discussions, I find that an amount of **Rs.15,16,30,662 /-** received by the said noticee from various customers as Power Generating and Heat Recovery Equipments hiring charges as detailed in Annexure-A to the show cause notice, for the period from April 2015 to March 2016 and an amount of Rs.18,70,32,422/- received for the period from April 2016 to June 2017 is the taxable value under the category of "Supply of tangible goods services" as defined under Section 65 (105) (zzzzj) of the Finance Act, 1994 (w.e.f. 01.07.2012, as "Declared Services" under Section 66E(f) of the Finance Act, 1994) and service tax of **Rs. 2,10,20,116/- and 2,79,46,689/- respectively** on the said taxable value is recoverable from them under proviso to Section 73(1) of the Finance Act, 1994 along with interest under Section 75 ibid.

30. Now, I look into the said noticee's contention that in case service tax is to be levied, it should be levied on cum tax value of the services and not on the entire value.

30.1 I observe that in the case before me it is the assessee's belief that the consideration that they have received is inclusive of service tax payable and that Explanation 2 added to Section 67 of the Finance Act, 1994.

30.2 In this regard, I place reliance on the judgment of M/s Shakti Motors Vs Commissioner of S.Tax reported at 2008(12) STR 710(Tri. Ahmd.) wherein, it has been observed as under:

> *"3. I have considered the arguments advanced by the appellant. I am unable to agree with the advocate that the amount realized has to be treated as cum-tax value in view of the provision of Section 67(2) of Finance Act, 1994, which is reproduced below for ready reference:-*

"Section 67(2). Where the gross amount charged by a service provider, for the service provided or to be provided is inclusive of service tax payable, the value of such taxable service shall be such amount as, with the addition of tax payable, is equal to the gross amount charged".

In terms of the above provision if the invoice does not specifically say that the gross amount charged includes service tax, it cannot be treated as cum-service tax price. Therefore, in the absence of any evidence to show that invoices had indeed been prepared in this manner, cum-tax value benefit cannot be extended."

30.3 Accordingly, I find that claim made by the said noticee in this regard is not correct and hold that benefit of Cum-Tax value is not allowable to the noticee.

30.4 The noticee has also requested to transfer the case into call book as their appeal is pending in CESTAT. I find that the criteria for transferring the present case to call book is not fulfilled as per the prevailing guidelines. Further, no stay order has been produced by the noticee. Therefore, I am not in a position to consider the request of the noticee to transfer the said to call book.

31.1 I find that penalty under Section 76, 77 (1) (a), 77(2) and Section 78 of the Finance Act, 1994 has been proposed in the SCN No.STC/4-19/O&A/16-17 dated 08.03.2017 and in SCN No.STC/15-25/OA/2018 dated 03.08.2018 penalty has been proposed under Section 76, 77(1)(a) and 77(2) of Finance Act, 1994. As regards the issue of imposition of penalty under Section 76 of the Finance Act, 1994, I observe that penalty under Section 76 and 78 of the Finance Act, 1994 are mutually exclusive and once penalty under Section 78 is imposed, no penalty under Section 76 can be imposed in terms of the proviso inserted in Section 78 w.e.f 10.5.2008 in this regard.

31.2 As regards imposition of penalty under Section 77(1) and 77(2) of the Finance Act, 1994, I observe that, as already discussed above, the said noticee was liable to pay service tax under the category of "Supply of tangible goods service", as defined under Section 65(105)(zzzzj) of the Finance Act, 1994, as provider of service, but the said noticee failed to obtain/amend registration as required under section 69 of the Finance Act, 1994 read with Rule 4 of the Service Tax Rules, 1994 and also failed to determine the correct classification, correct consideration of taxable value and pay the Service Tax, Education Cess, SHE Cess within the stipulated time period. The said contraventions on part of the said noticee have made them liable to penalty under Section 77(1) (a) and 77(2) of the Finance Act, 1994.

31.3 I find that the noticee have not produced any reasonable cause for failure to pay service tax except suggesting that it was their bonafide belief that service tax was not payable by them and it was an interpretational issue. This does not merit invoking Section 80 of the Finance Act, 1994 for waiver of penalty. I have already discussed the issue of classification and taxability in the foregoing paras. Therefore, I consider it appropriate to hold the said assessee liable to penalty under Section 76, 77(1) (a) , 77(2) and 78 of the Finance Act, 1994.

32. The noticee has relied upon a number of case laws in their support regarding non-applicability of Service Tax under Supply of Tangible Goods Service, not chargeable interest, applicability of Section 80 of Finance Act, applicability of cum-duty price and stating that penalty under Section 76, 77 and 78 are not imposable . I find that these case laws are not relevant to the present case and hence not maintainable. In view of the above discussion, ratio of the judgments relied upon by the said assessee is not applicable in the case before me. In view of the discussion above, I pass the following orders:-

ORDER

(i) I consider the service provided by the said noticee as "Service" in terms of Section 66B of the Finance Act, 1994 and amount collected as lease charges of Rs.15,16,30,662/- for the period from April 2015 to March 2016 and amount collected as lease charges of Rs.18,70,32,422/- for the period from April 2016 to June 2017 be considered as taxable value.

(ii) I confirm the demand of service tax of Rs.4,89,66,805/- (Rs. 2,10,20,116/- + Rs.2,79,46,689/-) (Four Crore Eighty Nine Lakhs Sixty Six Thousand Eight Hundred Five Only) under Section 73(1) of Finance Act, 1994 read with Section 68 of the Finance Act, 1994 and order that the said amount be recovered from M/s. Quippo Energy Pvt. Ltd., Changodar, Ahmedabad-382 213.

(iii) I order to recover interest on the above confirmed demand of Rs.4,89,66,805/- (Rupees Four Crore Eighty Nine Lakhs Sixty Six Thousand Eight Hundred Five Only) at the prescribed rate from the said assessee under Section 75 of the Finance Act, 1994;

(iv) I impose penalty of Rs. 2,10,20,116/- (Rupees Two Crore Ten Lakh Twenty Thousand One Hundred Sixteen only) under Section 78 of the Finance Act, 1994 on M/s.Quippo Energy Pvt. Ltd, Changodar, Ahmedabad.

(v) I impose penalty of Rs. 27,94,669/- (Rupees Twenty Seven Lakh Ninety Four Thousand Six Hundred Sixty Nine only) under Section 76 of the Finance Act, 1994 on M/s.Quippo Energy Pvt. Ltd, Changodar, Ahmedabad

(vi) I impose penalty of Rs.10,000/- (Ten Thousand Only) under section 77(1) (a) on M/s. Quippo Energy Pvt. Ltd., Changodar, Ahmedabad-382 213.

(vii) I impose penalty of Rs.10,000/- (Ten Thousand Only) under section 77(2) on M/s. Quippo Energy Pvt. Ltd., Changodar, Ahmedabad-382 213.

In view of clause (ii) of the second proviso to Section 78(1), the penalty mentioned at sr. no. (iv) above shall be twenty five percent of the said amount subject to the condition that the amount of such reduced penalty along with service tax and interest is also paid within the thirty days of receipt of this order.

33. Show Cause Notice No. **STC/4-19/O&A/16-17** dated 08.03.2017 and **STC/15-25/OA/2018** dated 03.08.2018 are disposed-off in the above manner.

(Dr.Balbir Singh)
Commissioner
CGST & Central Excise
Ahmedabad North

F.No. STC/15-25/OA/2018

Date: 30.06.2020

By Regd. Post A.D. / SpeedPost A.D/By Hand

To,
M/s. Quippo Energy Pvt. Ltd.,
Plot No. 427/P, Mahagujarat Industrial Estate,
Sarkhej–Bavla Highway,
Changodar, Ahmedabad-382213

Copy to:-

1. The Principal Chief Commissioner, CGST & Central Excise, Ahmedabad Zone, Ahmedabad.
2. The Deputy Commissioner, CGST & Central Excise, Division-IV, Ahmedabad North.
3. The Superintendent, CGST & Central Excise, AR-IV, Division-IV, Ahmedabad North.
4. Guard File.