केंद्रीय कर आयुक्त (अपील)

O/O THE COMMISSIONER (APPEALS), CENTRAL TAX,

सत्यमेव जयते

वस्तु एवं सेवा कर भवन, सातवीं मंजिल,पोलिटेकनिक के पास, आम्बावाडी, अहमदाबाद-380015

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क फाइल संख्या : File No : **V2(STG)16/AHD-III/2017-18& V2(TOG)02/RA/GNR/2017-18** / 263

ख अपील आदेश संख्या :Order-In-Appeal No.: **AHM-EXCUS-003-APP-0168-169-17-18**

दिनाँक Date :**04.12.2017** जारी करने की तारीख Date of Issue: 17/01/18

श्री उमाशंकर आयुक्त (अपील) द्वारा पारित

Passed by **Shri Uma Shanker** Commissioner (Appeals)Ahmedabad

ग अपर आयुक्त, केन्द्रीय उत्पाद शुल्क, अहमदाबाद-III आयुक्तालय द्वारा जारी मूल आदेश : **AHM-STX-003-ADC-AJS-064-065-16-17** दिनाँक : **30.03.2017**से सृजित

Arising out of Order-in-Original: **AHM-STX-003-ADC-AJS-064-065-16-17,** Date: **30.03.2017** Issued by: Additional Commissioner, Central Excise, Div:Gandhinagar, Ahmedabad-III.

ध **अपीलकर्ता** एवं प्रतिवादी का नाम एवं पता

Name & Address of the **Appellant** & Respondent

M/s. Harishiddh Transport Company

कोई व्यक्ति इस अपील आदेश से असंतोष अनुभव करता है तो वह इस आदेश के प्रति यथास्थिति नीचे बताए गए सक्षम अधिकारी को अपील या पुनरीक्षण आवेदन प्रस्तुत कर सकता है।

Any person aggrieved by this Order-In-Appeal may file an appeal or revision application, as the one may be against such order, to the appropriate authority in the following way :

भारत सरकार का पुनरीक्षण आवेदन :

Revision application to Government of India :

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1994 की धारा अंतर्गत नीचे बताए गए मामलों के बारे में पूर्वोक्त धारा को उप–धारा के प्रथम परन्तुक के अंतर्गत पुनरीक्षण आवेदन अवर सचिव, भारत सरकार, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, संसद मार्ग, नई दिल्ली : 110001 को की जानी चाहिए।

(i) A revision application lies to the Under Secretary, to the Govt. of India, Revision Application Unit Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi - 110 001 under Section 35EE of the CEA 1944 in respect of the following case, governed by first proviso to sub-section (1) of Section-35 ibid :

(ii) यदि माल की हानि के मामले में जब ऐसी हानि कारखाने से किसी भण्डागार या अन्य कारखाने में या किसी भण्डागार से दूसरे भण्डागार में माल ले जाते हुए मार्ग में, या किसी भण्डागार या भण्डार में चाहे वह किसी कारखाने में या किसी भण्डागार में हो माल की प्रकिया के दौरान हुई हो।

(ii) In case of any loss of goods where the loss occur in transit from a factory to a warehouse or to another factory or from one warehouse to another during the course of processing of the goods in a warehouse or in storage whether in a factory or in a warehouse.

(ख) भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित माल पर या माल के विनिर्माण में उपयोग शुल्क कच्चे माल पर उत्पादन शुल्क के रिबेट के मामलें में जो भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित है।

(b) In case of rebate of duty of excise on goods exported to any country or territory outside India of on excisable material used in the manufacture of the goods which are exported to any country or territory outside India.

(ग) यदि शुल्क का भुगतान किए बिना भारत के बाहर (नेपाल या भूटान को) निर्यात किया गया माल हो।

(c) In case of goods exported outside India export to Nepal or Bhutan, without payment of duty.

ध अंतिम उत्पादन की उत्पादन शुल्क के भुगतान के लिए जो डयूटी केडिट मान्य की गई है और ऐसे आदेश जो इस धारा एवं नियम के मुताबिक आयुक्त, अपील के द्वारा पारित वो समय पर या बाद में वित्त अधिनियम (नं.2) 1998 धारा 109 द्वारा नियुक्त किए गए हो।

(d) Credit of any duty allowed to be utilized towards payment of excise duty on final products under the provisions of this Act or the Rules made there under and such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec.109 of the Finance (No.2) Act, 1998.

(1) केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001 के नियम 9 के अंतर्गत विनिर्दिष्ट प्रपत्र संख्या इए–8 में दो प्रतियों में, प्रेषित आदेश के प्रति आदेश प्रेषित दिनाँक से तीन मास के भीतर मूल–आदेश एवं अपील आदेश की दो–दो प्रतियों के साथ उचित आवेदन किया जाना चाहिए। उसके साथ खाता इ. का मुख्यशीर्ष के अंतर्गत धारा 35–इ में निर्धारित फी के भुगतान के सबूत के साथ टीआर–6 चालान की प्रति भी होनी चाहिए।

The above application shall be made in duplicate in Form No. EA-8 as specified under Rule, 9 of Centrai Excise (Appeals) Rules, 2001 within 3 months from the date on which the order sought to be appealed against is communicated and shall be accompanied by two copies each of the OIO and Order-In-Appeal. It should also be accompanied by a copy of TR-6 Challan evidencing payment of prescribed fee as prescribed under Section 35-EE of CEA, 1944, under Major Head of Account.

(2) रिविजन आवेदन के साथ जहाँ संलग्न रकम एक लाख रूपये या उससे कम हो तो रूपये 200/– फीस भुगतान की जाए और जहाँ संलग्न रकम एक लाख से ज्यादा हो तो 1000/– की फीस भुगतान की जाए।

The revision application shall be accompanied by a fee of Rs.200/- where the amount involved is Rupees One Lac or less and Rs.1,000/- where the amount involved is more than Rupees One Lac.

सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपीलः–
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

[redacted]

Under Section 35B/ 35E of CEA, 1944 an appeal lies to :-

उक्तलिखित परिच्छेद 2 (1) क में बताए अनुसार के अलावा की अपील, अपीलो के मामले में सीमा शुल्क केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका,

nominate public sector bank of the place where the bench of any nominate public sector bank of the place where the bench of the Tribunal is situated

(3) यदि इस आदेश में कई मूल आदेशों का समावेश होता है तो प्रत्येक मूल ओदश के लिए फीस का भुगतान उपर्युक्त ढंग से किया जाना चाहिए इस तथ्य के होते हुए भी कि लिखा पढी कार्य से बचने के लिए यथास्थिति अपीलीय न्यायाधिकरण को एक अपील या केन्द्रीय सरकार को एक आवेदन किया जाता हैं।

In case of the order covers a number of order-in-Original, fee for each O.I.O. should be paid in the aforesaid manner not withstanding the fact that the one appeal to the Appellant Tribunal or the one application to the Central Govt. As the case may be, is filled to avoid scriptoria work if excising Rs. 1 lacs fee of Rs.100/- for each.

(4) न्यायालय शुल्क अधिनियम 1970 यथा संशोधित की अनुसूचि–1 के अंतर्गत निर्धारित किए अनुसार उक्त आवेदन या मूल आदेश यथास्थिति निर्णयन प्राधिकारी के आदेश में से प्रत्येक की एक प्रति पर रू.6.50 पैसे का न्यायालय शुल्क टिकट लगा होना चाहिए।

One copy of application or O.I.O. as the case may be, and the order of the adjournment authority shall beer a court fee stamp of Rs.6.50 paisa as prescribed under scheduled-I item of the court fee Act, 1975 as amended.

(5) इन ओर संबंधित मामलों को नियंत्रण करने वाले नियमों की ओर भी ध्यान आकर्षित किया जाता है जो सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्याविधि) नियम, 1982 में निहित है।
Attention in invited to the rules covering these and other related matter contended in the Customs, Excise & Service Tax Appellate Tribunal (Procedure) Rules, 1982.

(6) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय प्राधिकरण (सीस्तेत) के प्रति अपीलों के मामलों में केन्द्रीय उत्पाद शुल्क अधिनियम, १९४४ की धारा ३५फ के अंतर्गत वित्तीय(संख्या-२) अधिनियम २०१४(२०१४ की संख्या २५) दिनांक: ०६.०८.२०१४ जो की वित्तीय अधिनियम, १९९४ की धारा ८३ के अंतर्गत सेवाकर को भी लागू की गई है, द्वारा निश्चित की गई पूर्व-राशि जमा करना अनिवार्य है, बशर्ते कि इस धारा के अंतर्गत जमा की जाने वाली अपेक्षित देय राशि दस करोड़ रूपए से अधिक न हो
केन्द्रीय उत्पाद शुल्क एवं सेवाकर के अंतर्गत " माँग किए गए शुल्क " में निम्न शामिल है

(i) धारा 11 डी के अंतर्गत निर्धारित रकम
(ii) सेनवैट जमा की ली गई गलत राशि
(iii) सेनवैट जमा नियमावली के नियम 6 के अंतर्गत देय रकम

→ आगे बशर्ते यह कि इस धारा के प्रावधान वित्तीय (सं. 2) अधिनियम, 2014 के आरम्भ से पूर्व किसी अपीलीय प्राधिकारी के समक्ष विचाराधीन स्थगन अर्ज़ी एवं अपील को लागू नहीं होगे।

For an appeal to be filed before the CESTAT, it is mandatory to pre-deposit an amount specified under the Finance (No. 2) Act, 2014 (No. 25 of 2014) dated 06.08.2014, under section 35F of the Central Excise Act, 1944 which is also made applicable to Service Tax under section 83 of the Finance Act, 1994 provided the amount of pre-deposit payable would be subject to ceiling of Rs. Ten Crores,
Under Central Excise and Service Tax, "Duty demanded" shall include:

(i) amount determined under Section 11 D;
(ii) amount of erroneous Cenvat Credit taken;
(iii) amount payable under Rule 6 of the Cenvat Credit Rules.

→Provided further that the provisions of this Section shall not apply to the stay application and appeals pending before any appellate authority prior to the commencement of the Finance (No.2) Act, 2014.

(6)(i) इस आदेश के प्रति अपील प्राधिकरण के समक्ष जहाँ शुल्क अथवा शुल्क या दण्ड विवादित हो तो माँग किए गए शुल्क के 10% भुगतान पर और जहाँ केवल दण्ड विवादित हो तब दण्ड के 10% भुगतान पर की जा सकती है।

(6)(i) In view of above, an appeal against this order shall lie before the Tribunal on payment of 10% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute."

ORDER-IN-APPEAL

M/s Harishiddh Transport Company, G/12, Shivam Complex, Opp.Janpath Hotel, Becharaji Road, Mehsana (hereinafter referred to as 'the appellant) has filed an appeal against the Order-in-Original No.AHM-STX-003-ADC-AJS-064-065-16-17 dated 30.03.207 ('the impugned order') passed by the Additional Commissioner, Central Excise, Ahmedabad-III ('the adjudicating authority').

2. Another appeal has been filed by the Assistant Commissioner of CGST Division, Mehsana under Section 84(1) of the Finance Act, 1994 [for short- *the department*] against the said impugned order i.e, AHM-STX-003-ADC-AJS-064-065-16-17 dated 30.03.207 in terms of Review Order No.06/2017-18 dated 06.07.2017 of the Commissioner of CGST, Gandhinagar in respect of M/s Harishiddh Transport Company, the appellant referred to above.

3. The facts in brief are that the appellant is engaged in supply of tankers to M/s Oil and Natural Gas Corporation Limited (for short-ONGC) for their use under a contract/ agreement for inter-location transportation of brine/ crude oil/ effluent/ emulsion/ mud/ operational water etc. of ONGC, Mehsana Asset on the basis of fixed monthly charges. As it appeared that the service provided by the appellant got covered under the "Supply of Tangible Goods" Service, a Show Cause Notice dated 08.10.2015 for the period of 2010-11 to 2013-14 was issued by the jurisdictional Central Excise Officer to the appellant for non-payment of service tax for [i] classifying the service under the service category of "Supply of Tangible Goods"; [ii] demand of service tax amounting to Rs.98,59,803/- with interest; and [iii] imposition of penalty under Section 77 (1)(a), 77(1)(c) ,77(2) and 78 of the Finance Act, 1994 [for short-"the Act"]. Another show cause notice dated 29.02.2016 for the period of 2014-15 was also issued by the Addl. Commissioner, Central Excise to the appellant for non-payment of service tax for Rs.34,34,390/- with interest imposition of penalty under Section 77 (1)(a), 77(1)(c), 77(2) and 76 of the Act. Both the said impugned notices were adjudicated by the adjudicating authority vide the impugned order, by confirming [i] the short paid amounting to Rs.53,68,905/- for the period pertains to October 2013 to March 2015 with interest and imposition of penalty of Rs.5,36,800/-under Sections 76 and Rs.10,000/- each under Section 77(1)(a) and 77(2) of the Act. The adjudicating authority has dropped the demand of short payment to Rs.79,25,288/- for the period of April 2010 to September 2013 and refrained from imposing penalty under Section 78, 77(1)(c) of the Act as time barred .

4. Being aggrieved with the servicer tax confirmed, the appellant has filed the present appeal on the grounds that they were providing vehicles to ONGC and they used the vehicle for transporting goods and paid service tax as a recipient of service under GTA; that the definition of GTA means any person who provides service in relation to transport of goods by road and issued consignment note by whatever named called; that they had issued log book

cum bills and it is to be treated as consignment note; that the said documents contains all the details of vehicle, distance travelled, name of user, place and signature of user; that as the tax liability was correctly paid by ONGC, the same cannot be subjected to tax again in the hands of appellant under a different category; that there are two conditions to be satisfied for classifying the service under supply of tangible goods- first is right of possession of goods should not be transferred and second effective control of goods should not be transferred; that in the instant case although right of possession of oil tankers was not transferred, yet effective control of tankers were transferred to ONGC. It is further contended that non-payment of VAT cannot be a ground for confirming the demand under supply of tangible goods service; that the issue is arising out of interpretation of the provisions of law; that Section 77 and Section 76 are all subject to Section 80 of the Finance Act, 1994. The appellant has cited various case laws in support of their submissions.

5. The department has filed the appeal mentioned at para 2 above on the grounds that the adjudicating authority has erred in holding that the department was aware of the activities of the appellant as a show cause notice dated 21.04.2011 for recovery of service tax had been issued to the assessee, covering the period of 2005-06 to 2009-10; that on perusal of the said show cause notice and subsequent order-in-original/order-in-appeal, it is seen that during the disputed period the appellant was engaged in the activities of "Rent-a-Cab" and GTA service and was operating as a sub-contractor and the actual contractor was entered the contract between ONGC; that in the instant appeal, covering the period of 2010-11 to 2014-15, the appellant has directly entered into contract with ONGC; that the activity of the appellant for the period of 2010-11 to 2014-15 with ONGC is totally different from the facts involved in the previous show cause notice, thus the appellant has suppressed the facts with intention and extended period is invokable to the case covering the period of 2010-11 to 2014-15 and the demand should be confirmed with interest and penalty is imposable under section 78 of the Act.

6. Personal hearing in the matter was held on 30.11.2017. Shri B.V.Joshi, Consultant appeared on behalf of the appellant. He reiterated the submissions advanced in the grounds of appeals and also filed cross objection in the appeal by the department.

7. I have carefully gone through the case records and submission made by the appellant and the department. The issue to be decided in the appellant's appeal is as to whether the service rendered by the appellant is classifiable under the service "Supply of Tangible Goods" as per provisions of Section 65 (105) (zzzzj) of the Finance Act, 1994, or under "Goods Transport Agency" service as defined under Section 65(105)(zzp) of the Finance Act, 1994. As regards the appeal filed by the department, the issue to be decided is as to whether the demand pertains to the period of April 2010 to September 2013 dropped by the adjudicating authority is correct or otherwise.

8. I first take the appeal filed by the appellant. I observe that the issue involved in the matter as to whether the supply of tankers to ONGC for their use under a contract/ agreement

for inter-location transportation on the basis of fixed monthly charges is classifiable under the service category of "supply of tangible goods" or "Goods Transport Agency" has already been decided by me and other appellate authority in various cases, wherein it has been uphold that the tankers supplied by assessees to ONGC are correctly classifiable under the service category of "Supply of Tangible Goods". Since the higher appellate authority has not over ruled the said decisions, I am bound to follow the same in this case also.

9. Section 65 (105) (zzzzj) of the Finance Act, 1994 defines "Supply of Tangible Goods Services", 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."* Section 65(105)(zzp) of the Act, *ibid*, defines taxable service under "Goods Transport Agency, as *"taxable service means" any service provided or to be provided to any person, by a goods transport agency, in relation to transport of goods by road in a goods carriage.* Section 65(50b) of the Finance Act, 1994 defines Goods Transport Agency Service, as *"Goods Transport Agency" means any person who provides service in relation to transport of goods by road and issues consignment note, by whatever name called."*

10. The adjudicating authority has classified the service rendered by the appellant under "Supply of Tangible Goods". I observe that the entry No.(zzzzp) of Section 65 (105) of the Act *ibid* referred above is a new entry inserted vide Finance Act 2008 with effect from 16.05.2008. To fall within the definition of taxable service of "Supply of Tangible Goods" referred above, mainly two conditions are required to be satisfied - (i) there should be a supply of tangible goods for use; (ii) there should not be any transfer of right of possession and effective control of such goods. Once these two conditions are satisfied, the provisions of the said entry will be attracted. To fall within the statute viz. Section 65(50b), which defines the "Good Transport Agency" and taxability on such service under clause of Section 65(105)(zzp) of the Act *ibid*, there should be a service in relation to transport of goods by road coupled with issue of consignment notes.

11. In the instant case, I observe that the appellant used to supply tankers to ONGC for use in inter-location transportation of various goods of ONGC, on the basis of monthly fixed charges under a contract/agreement. As per the contract between the appellant and ONGC, [i] *the tankers supplied are required for transportation of Crude oil/ hot oil/emulsion/ effluent/ operational water/ brine/mud etc. technical water etc. from installation or vice versa and for any other purpose for transportation and may also require to perform outstation duties: [ii] The Contractor (the appellant) shall depute one driver and one conductor on each tanker.*

12. From the terms of the agreement entered into between the appellant and ONGC, it is clear that the service provided by the appellant is essentially supply of tankers along with

its personnel, to operate the same on charter hire basis for use by ONGC and the payment for the services rendered is made on monthly basis to the appellant. In the present case, the appellant has supplied tankers along with drivers and helpers. In the circumstances, it is the appellant, who has possession and effective control over the tankers, by virtue of appellant supplying the drivers and helpers with tankers. The drivers and helpers supplied are the employees of the appellant and not of ONGC. Further, the contract clearly shows that there is no transfer of right of possession by the appellant to M/s. ONGC. The above contract also indicates the fact that the appellant is technically bound by ONGC, in terms of the compatibilities of tankers and the competence of the manpower engaged with such tankers, inasmuch as the appellant should provide specified number of tankers with competent driver and helpers with up to date vehicle documents and required equipments viz., spare wheel and tools etc. In respect of manpower associated with the tankers in question supplied by the appellant, it is presumed that the salaries/wages are to be paid by the appellant, they being the employer. Looking into the circumstances of this case, I observe that the owner of the tanker is the appellant, who supplied the said tanker to ONGC for use in transportation of various goods by ONGC and raised bills on monthly basis for hired tankers, owned by them.

13. Vide Finance Bill, 2008, service provided in relation of "Supply of Tangible Goods", without transferring right of possession and effective control of the said tangible goods are specifically included in the list of taxable service. A brief description was given in para 4.4 of Board's letter D.O.F No.334/1/2008-TRU dated 29.02.2008 which reads as under:

> *"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."*

14. The appellant argued that non-payment of VAT cannot be a ground for confirming the demand under supply of tangible goods service. Payment of VAT on a transaction indicates that the said transaction is treated as sale, i.e. transfer of right to possess. In the instant case, ownership and control of the goods i.e. tankers remained with the appellant and only monthly hire charges were raised. Had there been transfer of possession, i.e. sale, then VAT would have been paid, which is not the case. The activities of transportation of various

goods i.e. assets of ONGC were carried out by ONGC only. Thus, it is clear that the appellant was supplying goods i.e. tankers to ONGC. Thus, it is observed that the service under consideration was covered within the ambit of "Supply of Tangible Goods" service, as elaborated under paras 4.4.1 to 4.4.3 of TRU letter dated 29.02.2008.

15. Further, the essence of the contract made between the appellant and ONGC is for 'supply' of tankers for transportation of goods by ONGC, who themselves are both the consignor and consignee of goods. The appellant has argued that they issued log book cum bills which contains all the details of transportation. The explanation regarding consignment note mentioned under Rule 4B of Service Tax Rules, 2004 is reproduced as follows for ease of reference:

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

16. As per the above referred definition, consignment note should be issued by a goods transport agency against the receipt of goods for the purpose of transport of goods by road in a goods carriage, which is serially numbered; and it should contain the name of the consignor and consignee, details of vehicle registration, goods transported, place of origin and destination and details regarding payment of service tax. Further, it has been made mandatory for every GTA to issue consignment note to the receiver of service under the said rule. Generally, when a person deposits the goods with any transporter for the purpose of transport to a given destination, the transporter issues the lorry receipt or consignment note to the person depositing the goods. The name of the consignee is mentioned on such note. The original copy of the lorry receipt is sent by the person depositing the goods i.e. consignor to the consignee to enable him to collect the goods from the transporter.

17. In the instant case, the appellant has supplied tanker to ONGC and ONGC carried out the activities by using the said tanker as per their requirement of transporting goods owned by them. Therefore, both consignor and consignee is ONGC. Thus, the appellant only supplied tanker and manpower to ONGC in the capacity of a tanker owner and not in the capacity of a "Goods Transport Agency". Further, they did not issue any consignment note for the transportation of such goods. In fact, the appellant was only raising the bills on monthly basis for hire of tankers, owned by them, for supply of tankers to ONGC for their highly specified

usage. Further, the convey notes as mentioned by the appellant cannot be termed as consignment notes as they do not conform to the conditions mentioned in explanation above for being construed as a consignment note, and the same were prepared by ONGC only for their record. Drivers used to merely sign it in token of having received the direction by ONGC. It is noted that there was no reference to convey note in the contract, clearly indicating that it was an internal affair of ONGC, and had nothing to do with the appellant.

18. Further, on going through the various services before the introduction of negative list concept (which has done away with positive list), it would be seen that there is no pattern or mutual exclusivity in the scope of various services. In Customs and Central Excise Tariff the classification of the goods is based on highly scientific pattern. In case of Service Tax, however, various services were brought into the tax net from 1994 onwards on *ad hoc* basis. There is no pattern in the order the services were brought under the tax net. Descriptions of the services are not mutually exclusive. Some of the services are very specific and precise while some are wide in scope. This is the reason that recourse needs to be taken to Section 65A for classifying particular services at a particular point of time. As per Section 65A of the Finance Act, if a service is classifiable under two or more sub-clauses of clause (105) of Section 65, *Classification shall be effected to the sub-clause which provides the most specific description to sub-clauses providing a more general description.* From the above definitions, I find that the activity under consideration is more specifically covered under the category "Supply of tangible goods service".

18.1 In the case of Commissioner of Central Excise, Agra V/s M/s Agra Computers, reported at 2014(34)STR 104 (Del-Tri), it has been held that Section 65A of Finance Act, 1994 provides guidance for determination of classification of taxable services for classification to be determined in terms of sub-clauses of Section *ibid.* Relevant para is as under:

> *"11. Section 65A was incorporated into the Act by the Finance Act, 2002 with effect from 14-5-2003, to provide guidance for determination of classification of taxable services. Clause (1) of this provision provides that classification of taxable services shall be determined according to the terms of the sub-clauses of Section 65(105). Clause (2) provides that if for any reason, a taxable service is, prima facie, classifiable under two or more sub-clauses of Section 65(105), classification shall be effected according to the norms set out in sub-clauses (a) to (c) of Section 65A. Sub-clause (a) provides that the sub-clause of Section 65(105) which provides the most specific description shall be preferred to sub-clauses providing a more general description. Sub-clause (b) states that composite services consisting of a combination of different services which cannot be classified in the manner specified in clause (a), shall be classified as if consisting of a service which gives them their essential character, insofar as this criterion is applicable. Sub-clause (c) is in the nature a residual guidance for classification and is to be resorted to when a service cannot be classified in the manner specified in clauses (a) or (b), and provides that it should be classified under that sub-clause of Section 65(105) which occurs first among the sub-clauses which equally merit consideration."*

18.2 In another case, I find that the Hon'ble Tribunal, Bangalaore in the case of M/s SPL Developers (P) Ltd reported at 2015 (39) STR 455, held that *"The classification of a*

service must always be on analysis of the characteristics of the service, analyzed in terms of the provisions of the Act; considered in the light of the guidance provided in Section 65A of the Act; and identification of which of the clauses of Section 65(105), the service in issue falls into". In the case of M/s Premier Prest Control (P) Ltd, reported at 2015938) STR 870, the Hon'ble Tribunal Delhi has also held that classification of service is to be determined with respect to nature thereof vis-à-vis definitions of various services given in Section 65, read with Section 65A of Finance Act, 1994.

19. With effect from 16.05.2008, Section 65(105)(zzzzj) defines as taxable service, including 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. Looking into the activities of the appellant this i.e 65(105)(zzzzj) is a more specific entry than Section 65 (50b) read with Section 65(105)(zzp) of Finance Act, 1994. .

20. I observe that the Hon'ble Tribunal, Mumbai in the case of M/s Greatship (I) Ltd reported at 2015 (37) STR 544 (Tri-Mumbai) decided a similar issue. In the said judgment, the Hon'ble Tribunal held that the activity of supply of drilling rig along with its personnel to operate the same on charter hire basis without transferring possession and active control comes within the ambit of "supply of tangible goods". The relevant excerpts are reproduced below for ease of reference:

> *"3 Thus, from the terms of the agreement entered into between the appellant and M/s. ONGC, it is clear that the service provided by the appellant is essentially supply of drilling rig along with its personnel to operate the same on charter hire basis and the payment for the services rendered is made on per-day basis. Thus, from the terms of the contract, it is clear that the activity comes within the scope of 'supply of tangible goods for use'. In the present case, the appellant has supplied drilling rigs along with the crew.* ***Thus it is the appellant who has possession and effective control over the drilling rig****. The crew so supplied are the employees of the appellant and not of ONGC.* ***Consideration is paid on per-day basis****. All these elements in the contract clearly show that* ***there is no transfer of right of possession and effective control by the appellant to M/s. ONGC."*** *(emphasis supplied)*

20.1. In the said judgement, the Hon'ble Tribunal also relied on the case of The Shipping Corporation of India and M/s Srinivas Transports in para 5.14, which reads as under:

> ***"5.14*** *A similar issue arose for consideration in the case of The Shipping Corporation of India [2013-TIOL-1652-CESTAT-MUM = 2014 (33) S.T.R. 552 (Tri. Mumbai)], In the said case, the appellant therein provided vessels to ONGC on charter hire basis for transportation of crude oil from Bombay High to the refinery onshore. This tribunal held that the service provided would merit classification under SOTG service. In a recent decision in the case of Srinivasa Transports [2014 (34) S.T.R. 765 (Tri.-Bang.)], a question arose as to whether supply of tractor trailers along with trained drivers to undertake transportation of containers within a container terminal would merit classification under SOTG service or as business support service. This tribunal held that the said service merits classification under SOTG service. These decisions also support the view that charter hire of drilling rigs on time charter basis will fall under SOTG service"*

The ratio of the above mentioned decisions is squarely applicable to the facts of the present case.

21. In view of the foregoing discussions, I hold that the activities carried out by the appellant correctly falls within the ambit of service category of "supply of tangible goods", as all the essential ingredients of the taxable service under the said category as defined under Section 65(105)(zzzzj) of the Finance Act, 1994 are fully satisfied.

22. Further, the appellant has argued that ONGC has paid appropriate service tax under GTA Service; and therefore this amount cannot be taxed again under the service of "supply of tangible goods". From the foregoing discussion, I observe that during the disputed period, the liability of paying service tax was on the appellant and not on the service recipient. Hence, for the disputed period, the amount paid by ONGC is not relevant. In the circumstances, the said argument is not tenable.

23. In view of the above discussion, the appellant is liable for payment of service tax for the disputed period under the category of taxable service of "Supply of Tangible Goods" as specified under Section 65(105)(zzzzj) of the Finance Act, 1994 in respect of services rendered to ONGC.

24. In the appellant's case, as stated in the facts of the case, the impugned notices were issued for the period of [i] April 2010 to March 2014 for Rs.98,59,803/- and [ii] April 2014 to March 2015 for Rs.34,34,390/-. The adjudicating authority has dropped the demand of Rs.79,25,288/- for the period of April 2010 to September 2013 and confirmed the demand of Rs.53,68,905/- for the period of October 2013 to March 2015. The adjudicating authority has dropped the demand pertains to the period of April 2010 to September 2013 on the grounds that since the department had been aware that the appellant had been rendering such services to ONGC from the year 2007 onwards as a show cause notice dated 21.04.2011 pertains to the period of 2005-06 to 2009-10 was issued to them. **The department has filed an appeal, as mentioned in para 2 above**, against the demand dropped by the adjudicating authority. Therefore, before discussing the issue regarding imposition of penalty on the appellant, I take the appeal filed by the department.

25. The department has contended that that the said show cause notice and subsequent order-in-original/order-in-appeal, pertains to the period of 2005-06 to 2009-10, were regarding to the activities of "Rent-a-Cab" service and the appellant was operating as a sub-contractor and the actual contractor was entered the contract between ONGC. Whereas, the instant appeal covering the period of 2010-11 to 2014-15, the appellant has directly entered

into contract with ONGC and the activity of the appellant is totally different from the facts involved in the previous show cause notice.

26. I observe that the issue involved in the show cause notice dated 21.04.2011 *supra* and subsequent order-in-original was decided by the appellate authority vide OIA dated 12.10.2012. On perusal of the said OIA, I observe that the issue involved in the said case is pertaining to [i] non-payment of service tax on "Rent-a-Cab" service for the disputed period; that the appellant was providing vehicles to ONGC and charged on kilometer basis/lump-sum amount basis; [ii] they provided vehicles to the contractors, who have entered into a contract with ONGC and the contractors discharged tax liability; hence no separate tax can be demanded from the appellant; [iii] supply of ambulance service; and [iv] commission from other vehicles owners for hiring their vehicles for catering. This case was further decided by the appellate authority vide OIA dared 20.02.2014, in view of the case again adjudicated by the original adjudicating authority as per direction of CESTAT's order dated 01.05.2013. In short, I observe that the issue involved in the case pertaining to the period of 2005-06 to 2009-10 is substantially different from the instant case pertains to the period of 2009-10 onwards. Therefore, I find merit consideration in the appeal filed by the department. I observe that the adjudicating authority has not properly appreciated the facts of the case involved in the said show cause notice dated 21.04.2011. Since it is clearly established that the service rendered by the appellant is totally different during the disputed periods, extended period invoked by suppressing the facts, as alleged in impugned notice, is correct and sustainable. In the circumstances, the demand of Rs. 79,25,288/- for the period of April 2010 to September 2013 dropped by the adjudicating authority on the ground that the department had been aware of the activities/services rendered by the appellant to ONGC from the year 2007 is not correct and recoverable with interest as alleged in the impugned notice.

27. As regards imposition of penalty for non- payment of service tax as alleged in the impugned notice dated 08.10.2015 and 29.02.2016, I observe that the adjudicating authority has imposed penalty of [i] Rs.5,36,890/- under Section 76 of the Act, against service tax confirmed pertains to the period of October 2013 to March 2015; and [ii] Rs.10,000/- each under Section 77(1)(a) and 77 (2) of the Act for obtaining service tax registration and failure to file ST-3 return under the service category of "supply of tangible goods" service. However, he dropped the penalty under Section 78 as no extended period is invoked and under Section 77 (1) (c) for failure to appear before the Superintendent. The penalties imposable as alleged in the impugned notices are under Section 78 for the period of 2010-11 to 2013-14 and under Section 76 for the period of 2014-15. As the department appeal with regard to confirmation of the demand of extended period is allowed, the penalty under section 78 of the Act as alleged in the impugned notice is imposable for the disputed period. Accordingly, the penalty imposable for the period of 2010-11 to 2013-14 shall be under Section 78 of the Act and equal to the service tax amount involved during the disputed period and the penalty imposable for the period of 2014-15 shall be under Section 76 of the Act and 10% of the service tax amount

involved during the disputed period. No interference required as regards the penalty imposed under Section 77(1)(a) and 77 (2) of the Act.

26. In this backdrop, I reject the appeal filed by the appellant and allow the appeal filed by the department. Both the appeals stand disposed of accordingly.

Date: /12/2017

(उमा शंकर)
आयुक्त (अपील्स)

Attested

(Mohanan V.V)
Superintendent (Appeals-I)
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R.P.A.D

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The Assistant Commissioner,
CGST Division, Mehsana.

Copy to:-
1. The Chief Commissioner, CGST & ST Zone, Ahmedabad.
2. The Commissioner, CGST, Gandhinagar
3. The Addl./Joint Commissioner, (Systems), CGST, Gandhinagar
4. The Dy. / Asstt. Commissioner, CGST, Mehsana Division.
5. Guard file.
6. P.A.