

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNAL, MUMBAI
REGIONAL BENCH**

Service Tax Appeal No. 88843 of 2018

(Arising out of Order-in-Original No. 66-71/VR/COMMR/2018-19 dated 11.06.2018 passed by the Commissioner of GST & Central Excise, Mumbai East)

M/s. ORIX Auto Infrastructure Services Ltd. Appellant
Plot No.94, Marol Co-operative Industrial Estate,
Andheri Kurla Road, Andheri (E), Mumbai 400 059.

Vs.

Commissioner of CGST, Mumbai East Respondent
9th Floor, Lotus Infocentre, Parel (E),
Mumbai 400 012.

WITH

Service Tax Appeal No. 88844 of 2018

(Arising out of Order-in-Original No. 66-71/VR/COMMR/2018-19 dated 11.06.2018 passed by the Commissioner of GST & Central Excise, Mumbai East)

M/s. ORIX Auto Infrastructure Services Ltd. Appellant
Plot No.94, Marol Co-operative Industrial Estate,
Andheri Kurla Road, Andheri (E), Mumbai 400 059.

Vs.

Commissioner of CGST, Mumbai East Respondent
9th Floor, Lotus Infocentre, Parel (E),
Mumbai 400 012.

WITH

Service Tax Appeal No. 88845 of 2018

(Arising out of Order-in-Original No. 66-71/VR/COMMR/2018-19 dated 11.06.2018 passed by the Commissioner of GST & Central Excise, Mumbai East)

M/s. ORIX Auto Infrastructure Services Ltd. Appellant
Plot No.94, Marol Co-operative Industrial Estate,
Andheri Kurla Road, Andheri (E), Mumbai 400 059.

Vs.

Commissioner of CGST, Mumbai East Respondent
9th Floor, Lotus Infocentre, Parel (E),
Mumbai 400 012.

WITH

Service Tax Appeal No. 88846 of 2018

(Arising out of Order-in-Original No. 66-71/VR/COMMR/2018-19 dated 11.06.2018 passed by the Commissioner of GST & Central Excise, Mumbai East)

M/s. ORIX Auto Infrastructure Services Ltd. Appellant
Plot No.94, Marol Co-operative Industrial Estate,
Andheri Kurla Road, Andheri (E), Mumbai 400 059.

Vs.

Commissioner of CGST, Mumbai East Respondent
9th Floor, Lotus Infocentre, Parel (E),
Mumbai 400 012.

WITH

Service Tax Appeal No. 88848 of 2018

(Arising out of Order-in-Original No. 66-71/VR/COMMR/2018-19 dated 11.06.2018 passed by the Commissioner of GST & Central Excise, Mumbai East)

M/s. ORIX Auto Infrastructure Services Ltd. Appellant
Plot No.94, Marol Co-operative Industrial Estate,
Andheri Kurla Road, Andheri (E), Mumbai 400 059.

Vs.

Commissioner of CGST, Mumbai East Respondent
9th Floor, Lotus Infocentre, Parel (E),
Mumbai 400 012.

WITH

Service Tax Appeal No. 88851 of 2018

(Arising out of Order-in-Original No. 66-71/VR/COMMR/2018-19 dated 11.06.2018 passed by the Commissioner of GST & Central Excise, Mumbai East)

M/s. ORIX Auto Infrastructure Services Ltd. Appellant
Plot No.94, Marol Co-operative Industrial Estate,
Andheri Kurla Road, Andheri (E), Mumbai 400 059.

Vs.

Commissioner of CGST, Mumbai East Respondent
9th Floor, Lotus Infocentre, Parel (E),
Mumbai 400 012.

AND

Service Tax Appeal No. 89088 of 2018**And****ST/Cross/85275 of 2019**

(On behalf of Respondent)

(Arising out of Order-in-Original No. 66-71/VR/COMMR/2018-19 dated 11.06.2018 passed by the Commissioner of GST & Central Excise, Mumbai East)

Commissioner of CGST, Mumbai East

9th Floor, Lotus Infocentre, Parel (E),
Mumbai 400 012.

Appellant

Vs.

M/s. ORIX Auto Infrastructure Services Ltd. Respondent

Plot No.94, Marol Co-operative Industrial Estate,
Andheri Kurla Road, Andheri (E), Mumbai 400 059.

Appearance:

Shri Darvis Shroff, Sr. Advocate, for the Appellant

Shri Shambhoo Nath, Principal Commissioner, Authorised
Representative for the Respondent

CORAM:**HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)****HON'BLE P. DINESHA, MEMBER (JUDICIAL)**

Date of Hearing: 02.03.2022

Date of Decision: 02.03.2022

FINAL ORDER NO. A/85414-85420/2022

PER: SANJIV SRIVASTAVA

These appeals are directed against order in original No 66-71/VR/COMMR/2018-19 dated 11.06.2018 of the Commissioner GST & Central Excise, Mumbai East. By the impugned order, the commissioner has held as follows:

"ORDER

57.1 For Show cause Notice No. 182/COMMR/2011-12 dated 21.10.2011 :

- (i) I confirm the demand of Service Tax amounting to Rs.9,74,46,244/- (Rupees Nine Crore Seventy Four Lakhs Forty Six thousand Two hundred and Forty Four*

only) [inclusive of Service Tax, Education Cess and Higher Education Cess) on M/s. Orix Auto Infrastructure Services Limited, under Section 73(1) and section 73(2) of the Finance Act, 1994. I drop the demand to the extent of Rs.14,61,69,366/- as discussed in para 49 above.

- (ii) I also order the recovery of the interest under Section 75 of the Finance Act 1994 at the applicable rate on the duty amount determined in the Order above;
- (iii) I impose a penalty of Rs.9,74,46,244/- (Rupees Nine Crore Seventy Four Lakhs Forty Six thousand Two hundred and Forty Four only), on M/s. Orix Auto Infrastructure Services Limited under section 78 read with Section 78B of the Finance Act 1994;
- (iv) (iv) I do not impose a penalty on M/s. Orix Auto Infrastructure Services Limited under section 76 read with Section 78B of the Finance Act 1994;

57.2 For SCN No. 433/Commr./2012-13 dated 17.09.2012 :

- (i) I confirm the demand of Service Tax amounting to Rs.3,49,51,204/- (Rupees Three crores Forty Nine lakhs Fifty One thousand Two hundred and Four only) inclusive of Service Tax, Education Cess and Higher Education Cess) on M/s. Orix Auto Infrastructure Services Limited, under Section 73(1) and section 73(2) of the Finance Act, 1994, I drop the demand to the extent of Rs.5,24,26,806/- as discussed in para 49 above.
- (ii) I also order the recovery of the interest under Section 75 of the Finance Act 1994 at the applicable rate on the duty amount determined in the Order above;
- (iii) I impose a penalty of Rs.34,95,120/- (Rupees Thirty Four lakhs Ninety Five thousand One hundred Twenty only), on M/s. Orix Auto Infrastructure Services Limited under section 76 read with Section 78B of the Finance Act 1994:

57.3 For SCN No. 918/Commr./2013-14 dated 18.10.2013:

- (i) *I confirm the demand of Service Tax amounting to Rs.11,23,85,986/- (Rupees Eleven crores Twenty Three lakhs Eighty Five thousand Nine hundred Eighty Six only) (inclusive of Service Tax, Education Cess and Higher Education Cess) on M/s. Orix Auto Infrastructure Services Limited under the provisions of Section 73(1) and section 73(2) of the Finance Act, 1994. I drop the demand to the extent of Is.1,80,87,062/-as discussed in para 49 above.*
- (ii) *I also order the recovery of the interest under Section 75 of the Finance Act, 1994 at applicable rate on the duty amount determined in the Order above;*
- (iii) *I impose a penalty of Rs.1,12,38,599/- (Rupees One Crore Twelve lakhs Thirty Eight thousand Five hundred Ninety Nine only), on M/s. Orix Auto Infrastructure Services Limited under section 76 read with Section 78B of the Finance Act 1994;*

57.4 For SCN No. 1333/Commr./2013-14 dated 16.09.2014:

- (i) *I confirm the demand of Service Tax amounting to Rs.13,66,10,888/- (Rupees Thirteen Crore Sixty Six lakhs Ten thousand Eight hundred Eighty Eight only) (inclusive of Service Tax, Education Cess and Higher Education Cess) on M/s. Orix Auto Infrastructure Services Limited under the provisions of Section 73(1) and section 73(2) of the Finance Act, 1994;*
- (ii) *I also order the recovery of the interest under Section 75 of the Finance Act, 1994 at applicable rate on the duty amount determined in the Order above;* (iii) *I impose a penalty of Rs.1,36,61,089/- (Rupees One Crore Thirty Six lakhs Sixty One thousand Eighty Nine only), on M/s. Orix Auto Infrastructure Services Limited under section 76 read with Section 78B of the Finance Act 1994;*

57.5 For SCN No. ST.V/Div VIII'SCN/ Orix/ 104/15 dated 21.10.2015:

- (i) I confirm the demand of Service Tax amounting to Rs.14,20,63,518/- (Rupees Fourteen Crore Twenty lakhs Sixty Three thousand Five hundred and Eighteen only) (inclusive of Service Tax, Education Cess and Higher Education Cess) on M/s. Orix Auto Infrastructure Services Limited under the provisions of Section 73(1) and section 73(2) of the Finance Act, 1994;
- (ii) I also order the recovery of the interest under Section 75 of the Finance Act, 1994 at applicable rate on the duty amount determined in the Order above;
- (iii) I impose a penalty of Rs.1,42,06,352/- (Rupees One Crore Forty Two lakhs Six thousand Three hundred Fifty Two only), on M/s. Orix Auto Infrastructure Services Limited under section 76 read with Section 78B of the Finance Act 1994:
- (iv) (iv) I impose a penalty of Rs.10,000/- (Rupees Ten thousand only) on M/s. Orix Auto Infrastructure Services Limited, under section 77 of the Chapter V of the Finance Act 1994.

57.6 For SCN No. ME/COMMR/ORIX/10/2018-19 dated 12.04.2018 :

- (i) I confirm the demand of Service Tax amounting to Rs.62,57,77,634/- (Rupees Sixty Two Crore Fifty Seven lakhs Seventy Seven thousand Six hundred Thirty Four only) (inclusive of Service Tax, Education Cess and Higher Education Cess as well as Swatchh Bharat Cess and Krishi Kalyan Cess) on M/s. Orix Auto Infrastructure Services Limited under the provisions of Section 73(1) and section 73(2) of the Finance Act, 1994;
- (ii) I also order the recovery of the interest under Section 75 of the Finance Act, 1994 at applicable rate on the duty amount determined in the Order above;

(iii) I impose a penalty of Rs.6,25,77,763/- (Rupees Six crore Twenty Five lakhs Seventy Seven thousand Seven hundred Sixty Three only), on M/s. Orix Auto Infrastructure Services Limited under section 76 read with Section 78B of the Finance Act 1994;

(iv) I impose a penalty of Rs.10,000/- (Rupees Ten thousand only) on M/s. Orix Auto Infrastructure Services Limited, under section 77 of the Chapter V of the Finance Act 1994.

57.7 The summary of the above order is as under :

Sr No	SCN No & Date and period involved	Amount of demand confirmed	Amount of demand dropped	Interest u/r S 75	Penalty u/r Section 78	Penalty u/r Section 76	Penalty u/r Section 77
1	182/COMMR/2011-12 dated 21.10.2011 for period April 2006 to March 2011	9,74,46,244/-	14,61.69,896/-	Yes	9,74,46,244/-	Nil	10,000/-
2	433/Commr./2012-13 dated 17.09.2012 for period April 2011 to March 2012	3,49,51,204/-	5,24,26,806/-	Yes	No Proposal	34,95,120/-	No Proposal
3	918/Commr./2013-14 dated 18.10.2013 for period April 2012 to March 2013	11,23,85,986/-	1,80,87,062/-	Yes	No Proposal	1,12,38,599/-	No Proposal
4	1333/Commr./2013-14 dated 16.09.2014 for period April 2013 to March 2014	13,66,10,888/-	Nil	Yes	No Proposal	1,36,61,089/-	No Proposal
5	ST.V/Div VIII/SCN/Orix/104/15 dated 21.10.2015 for period April 2014 to March 2015	14,20,63,518/-	Nil	Yes	No Proposal	1,42,06,352/-	10,000/-
6	ME/COMMR/ORIX/10/2018 dated 12.04.2018 for period April 2015 to	62,57,77,634/-	Nil	Yes	No Proposal	6,25,77,763/-	10,000/-

	March 2017						
		114,92,35,474/-	21,6633,234/-	Yes	9,74,46,244/-	10,5178,923/-	30,000/-"
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2.1 As per the intelligence gathered, it was revealed that appellant is engaged in providing taxable services of 'Rent-a-cab service' and not discharging the service tax liability thereon, investigations were undertaken.

2.2 On the scrutiny of the information furnished by the appellants and submissions made by them in the statements recorded revenue alleged:

- Appellant entered into MLA with the various parties, as per the said agreement they provided Motor Cab, Maxi Cab, to their customer all over India, also providing fleet management service in respect of the vehicle provided under lease agreement. The Appellant were receiving the lease rental as prescribed in the respective Supplementary Schedule(s) executed for the proposed vehicle(s).
- The service provided by the Appellant appeared to be correctly classifiable under the head Rent-a-cab scheme operator's service as defined under Section 65(91) of the Act and taxable service under section 65(105)(o) of the said Act.
- They received lease rental charges of Rs.220,21,77,109/- during the period 01.04.2006 to 31.03.2011 which was taxable and the total service tax including Education and Higher Education Cess payable by them was Rs.24,36,15,610/-. Appellant did not pay the service tax for the amount received as lease rental.
- In terms of the provisions of section 68 of Chapter V of the Finance Act, 1994, the responsibility for paying service tax at the rate specified in section 66 ibid was on the Appellant, who had provided the aforesaid taxable service. Section 70 ibid, every person liable to pay service tax shall himself, assess the tax due on the services provided by him and shall furnish to the jurisdictional Superintendent of Central Excise, a return in such form and in such manner and at such frequency, as prescribed. However,

they failed to discharge the service tax liability on the amount received against the said service provided.

- Rule 6 of the Service Tax Rules, 1994 provides that, the service tax has to be paid to the credit of the Central Government by the 5th, of month, immediately following the calendar month in which the payments were received by the service providers, towards the value of taxable services and Rule 7 ibid provides, every assessee has to submit half-yearly return in Form ST-3, along with a copy of the Form GAR-7, for the months covered in the half yearly return, by the 25 of the month following each half year. Appellant thus failed to
- In terms of the provisions of Further, as laid down under Therefore, the Appellant having provided the said specified taxable services from 01.04.2006 to 31.03.2011 and having received the value of the taxable services it was a statutory obligation cast upon the Appellant, being liable to pay service tax, to assess the tax due on the services provided by it and to file the ST-3 returns periodically. However, it deliberately failed to do so and thereby willfully contravened the above provisions with intent to evade payment of due service tax.
- It also appeared that the entire value of the taxable services received by the Appellant, had escaped assessment of Service tax, due to suppression of the above facts and willful contravention of the various provisions of chapter V of the Act and the Rules made there under, with intent to evade payment of service tax therefore, they were liable to assessment under proviso to Section 73(1) of the said Act.

2.3 Alleging the above, a Show Cause-cum-Demand Notice No. 182/COMMR/2011-12 dated 21.10.2011, was issued to the appellant asking them as to why:

- i) Service Tax amounting to Rs.24,36,15,610/- (including Education Cess and H. Ed. Cess) for the taxable value of the services rendered under the category of "Rent-a Cab

Scheme Operator Service for the period 01.04.2006 to 31.03.2011 should not be demanded and recovered from them under proviso to Section 73(1) of the Act read with Section 68 of the said Act and Rule 6 of the ST Rules and Service Tax (Determination of value) Rules 2006.

- ii) Interest at the appropriate rate. on the Service Tax not paid on its due date till the date of payment should not be recovered from them under Section 75 of Chapter V of the Act;
- iii) Penalty should not be imposed upon then under the provisions of Section 76 of the Act for failure to pay Service Tax in accordance with the provisions of Section 68 read with Rule 6 of the ST Rules:
- iv) Penalty should not be imposed upon them under the provisions of the Section 77 of the Chapter V of the Act for failure to furnish prescribed return as required under Section 70 of the Act read with Rule 7 of ST Rules:
- v) Penalty should not be imposed upon them under the provisions of Section 78 of Chapter V of the Act for suppressing the value of all the above taxable services and the taxable nature of the activities undertaken by them with intent to evade payment of service tax.

2.4 From 01.07.2012, levy of service tax based on negative list of services has been introduced, but the basic principles remained the same. The services provided by the appellant were neither covered under the Negative list nor under any exemption notification. As the appellant continued the practice of non-payment of service tax as mentioned above, relevant information was called for from the Appellant from time to time and 5 more periodical show cause notices were also issued to them, covering the subsequent period up to June, 2017.

2.5 The grounds, evidence and legal provisions continued to be the same. The details of all 6 SCNs in the matter issued till date are as under:

Sr No	SCN No and Date	Period involved	Amount involved	Penalty proposed
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				u/r
1	182/COMMR/2011-12 dated 21.10.2011	April 2006 to March 2011	Rs.24,36,15,610/-	Sec 76,77 & 78
2	433/Commr./2012-13 dated 17.09.2012	April 2011 to March 2012	Rs.8,73,78,010/-	Sec 76
3	918/Commr./2013-14 dated 16.09.2014	April 2012 to March 2013	Rs.13,04,73,048/-	Sec 76
4	1333/Commr./2013-14 dated 16.09.2014	April 2013 to March 2014	Rs.13,66,10,888/-	Sec 76
5	ST.V/Div VIII/SCN/Orix/104/ 15 dated 21.10.2015	April 2014 to March 2015	Rs.14,20,63,518/-	Sec 76 and 77
6	ME/COMMR/ORIX/10/2018- 19 dated 12.04.2018	April 2015 to June 2017	Rs.62,57,77,634/-	Sec 76 and 77
		April 2006 to June 2017	Rs.136,59,18,708/-	

2.6 All the six show cause notices have been adjudicated by the Commissioner as per the impugned order referred in para 1, above.

2.7 Aggrieved by the impugned order appellants have filed these appeals.

2.8 Revenue has also filed an appeal against the above order stating that the adjudicating authority has erred in allowing the abatement claimed by the appellants for the period prior to 30.06.2012. Revenue has stated as under:-

"5.3 However, it appears that the Adjudicating authority has erred in inferring that abatement was admissible for the period prior to 01.07.2012. The Adjudicating authority erred in observing that the abatement is admissible on 'Rent-a-Cab services' to the assessee without any condition under Sr. No. 3 of Notification No. 1/2006-ST dated 01.03.2006; that once it was held that the services provided by the Noticee are covered under the category of 'Rent-a-Cab services', the just benefit of

abatement could not be denied to the Noticee; that the impugned Notices did not provide the reasons for denying the benefit of abatement to the Noticee."

2.9 Against the Revenue appeal, the appellants have filed cross objections.

3.1 We have heard Shri Darvis Shroff, Advocate for the appellant and Shri Shamboo Nath, Principal Commissioner, Authorized Representative for the Revenue.

3.2 Arguing for the appellant learned counsel submits that:

B. BRIEF EXPLANTION FOR EACH OF THE POINTS ABOVE:

- The Operating lease transaction of the Appellant involves exploitation of the vehicle purchased specifically for the Lessee as per his instruction for a period covering majority of the vehicle's useful life. Such vehicle is available at the disposal of the Lessee itself during the entire lease period. Therefore, such transactions are within the purview of states for levy of sales lax or VAT and are outside the purview of levy of tax by the Central Government. The activity of leasing of vehicles under the Operating lease agreement is a deemed sale as per Article 366(29A)(d) of the Constitution. The various clauses of the operating lease agreement of the Appellant with Khet-se Agriproduce clearly show that operating lease transactions of the Appellant are not in nature service. (Para 20 - Page 31, Copy of Agreement with Khet-se - Annexure-3, Page 188-209).
- The Appellant are into business of both operating leasing of vehicles as well as Rent-a-cab. The Appellant's operating lease transactions are clearly distinguishable from those of Rent-a-Cab transactions. The Appellant have submitted a detailed clause wise comparison of their operating lease agreements and Rent-a-Cab agreements at Para 21- Page 43. The fundamental difference between the two rests in the manner of identification, deployment and operation of vehicle to be used under the respective contracts. The Motor Vehicles Act, 1988 has clear

demarcating provisions that would attach separately to . the vehicles be used in above two activities. These are by way of their registration, marking of such vehicles etc. The basic objective is to identify the person who is in possession and control of the vehicle plying on the road. There are substantial differences w.r.t. the liability towards loss or damage to the vehicle or to the third parties from the usage of vehicle which is intrinsic to the control and possession of the vehicle.

- It is pertinent to note that in case of rent-a-cab transaction the vehicles are registered in the name of the Appellant whereas in case of operating lease, the registration certificate under the Motor Vehicles Act, 1988 is obtained in name of the Lessee as registered owner and name of the Appellant is shown therein as Lessor/Financer. Annexure-6 and Annexure 7, Page no. 229-232 of the Appeal paper-book.
- The Learned Commissioner has completely misread the various clauses of the operating lease agreement which clearly is unsustainable. The said agreement has to be read as a the Appellant have elaborately dealt with how the Learned Commissioner has erred in his understanding of the various clauses of the operating lease agreement (Annexure-3 Page 188-209).
- The Appellant at Para 22 - Page 50 of grounds of appeal have shown how all the five attributes laid down by Supreme Court in case of Bharat Sanchar Nigam Limited Vs Union of India [2006 3 SCC 1] are fully satisfied in the operating lease transaction. A lease transaction does not necessitate the transfer of ownership. The Learned Commissioner has been influenced by the fact that the Appellant continues to retain the ownership and in the process has mixed up the concept of deemed sale with that of a normal sale transaction. The operating lease transactions of the Appellant fall under sub-clause (d) of Article 366(29A) 1.e. transfer of right to use goods which

does not pre-condition transfer of ownership. Further, in the case of operating lease transactions of the Appellant, the vehicle given on lease is always physically available with the Lessee, . The Lessee is not required to seek approval or to inform the Appellant for use of the vehicle physically available with him before such use. . Further, Lessee is not required to report to the Appellant on daily or periodical basis particulars with respect to the usage of such vehicle. . Further, there are no restrictions placed as to the timing of use of vehicle, method of operating the vehicle and manner of use of such vehicles. Hence, such vehicle is all the time available to the Lessee for use at their discretion or will. Therefore in the case of operating lease there is transfer of control and possession of the vehicle to the Lessee.

- The Appellant wishes to highlight that the issue in present appeal is already decided by Hon'ble Mumbai CESTAT in favour of the Appellant in case of Arval India Private Limited v/s Principal Commissioner of Service Tax - IV(2020-TIOL-1316-CESTAT MUMA 2020-110L-1719-CUS747-41UM In the present case, the Appellant is in transactions, agreements etc are also similar to that in Arval (supra). Therefore, the ratio in the aforesaid orders are squarely applicable to the present case of the Appellant.
- It is submitted that in case of Carzonrent (India) Pvt. Ltd. Versus Commissioner Of Service Tax, the clauses of the Agreement are not set out in the order basis which it was decided that the leasing transactions of the Appellant in Carzonrent case are liable for service tax under the category of rent-a-cab scheme operator service. Accordingly, in the absence of the relevant clauses of the agreement in the above referred order for purpose of comparison the ratio of the said order cannot be of any assistance to the Revenue. In the present case, clauses of the agreement clearly show that all the five attributes of a

transaction to constitute a transfer of right to use goods as set out in BSNL judgement (supra) are fully met in case of the operating lease agreement entered into by the Appellant and therefore the operating lease transactions of the Appellant qualifies to be deemed sale liable for VAT.

- The Appellant has submitted that the extended period of five years cannot be invoked when there exists and it is established that there is bona fide belief by the assessee in adopting the position with respect to operating lease transaction that these are liable to VAT and not liable to Service tax and where the VAT has been duly discharged. Appellant, as well as the Department were in knowledge of the facts even before issuance of the above referred SCNs. In light of several communications exchanged between the Department and the Appellant starting from the year 2007 (Kindly refer Annexure 13 to Annexure 52, Page no. 295-438), no suppression of facts with intent to evade revenue could be alleged the department was completely aware of the transactions of the Appellant even before issue of the first SCN. In such a case, the invocation of extended period of limitation on the ground that the Appellant has suppressed the facts of lease transactions with the intention to evade the payment of service tax is clearly unsustainable. Further, the Appellant has already submitted copy of operating lease agreement, and relevant supporting documents such as invoice etc. to the department. Article 6 of the said agreement contains the details of insurance and maintenance activity of the vehicles undertaken by the Appellant. Therefore, the entire service tax demand including demand on insurance and maintenance is also time barred for the period up to September 2010. Kindly refer Para 27.8 Page 110 of grounds of appeal showing table of demand barred by period of limitation.
- Further, It is important to note that VAT paid by the Appellant on operating lease transactions is significantly

higher (almost 2.5 times) as compared to service tax applicable on such transactions. The same can be verified from table mentioned para 27.2 page 106 of the Appeal paper-book. Therefore, it shall be incorrect to state that there was any mala fide intention on the part of the Appellant to evade payment of tax.

- The Appellant are liable to pay service tax on maintenance and insurance services from the period October 2010 onwards as the period to the same is barred by limitation. For this purpose, the matter needs to be remanded to the lower authority for quantification considering standard deduction of 30% shall be available for works contract services of repair and maintenance in terms of Rule 2A(i) of Service Tax (Determination of value) Rules, 2004. Further, the amount received by the Appellant in relation to insurance and maintenance services may be considered as inclusive of service tax for the purpose of determining the tax liability. And the Appellants be permitted other deductions and exemptions available from value of services of maintenance and insurance.
- Penalty under section 78 is levied where the demand for service tax arises on account of fraud, collusion, wilful misstatement, suppression of facts etc. As iterated in detail in above paras, the Appellant has not suppressed any facts in respect of transaction of the Appellant. Further, the Appellant was under bona fide belief that service tax is not applicable on operating lease of vehicles. Accordingly, in the absence of facts to support wilful miss statement by the Appellant, that penalty under Section 78 shall not be imposed on the Appellant. (Para 33 Page 117)
- The penalty under Section 76 and Section 77 cannot be imposed if there exists a bona fide belief and reasonable cause for the failure to discharge service tax liability. In support of this contention, the Appellant places reliance on decision of the Hon'ble Karnataka High Court in Commissioner of Service Tax v. Motor World (2012 (27)

STR 225) wherein it was held that the penalties under Section 76, 77 and 78 are not automatic and may be imposed only if ingredients of the relevant section are satisfied and in the absence of reasonable cause for failure.

- Section 80 of the Finance Act, 1994 as applicable during the period covered in the impugned order. The said provision was available till 13 May 2015 before it was omitted by the Finance Act, 2015.

Section 80: "Notwithstanding anything contained in the provisions of section 76, or section 77{or first proviso to sub-section (1) of section 78 -- removed by Finance Bill, 2014), no penalty shall be imposable on the assessee for any failure referred to in the said provisions, if the assessee proves that there was reasonable cause for the said failure"

- Issue involved in the present case is squarely covered by the decision in the case of Arval India Pvt Ltd [2020 (41) GSTL 528 (T-Mum)]. This decision was again followed by the tribunal in case of Arval reported at [2021 (47) ELT 382 (T-Mum)]

3.3 Arguing for the revenue learned authorized representative while re-iterating the findings recorded in the impugned order submits that:

- Process of renting a cab under the operating lease is as under :
Selection of car by client → Operating Lease Agreement → Purchase Invoice (mentioning client as a Lessee and Appellant as Lessor) → VAT paid by Lessor → car is registered in the name of Lessee and Lessor, both → delivery of car to Lessee → Car remained under the ownership with Appellant.
- After detailed examination of clauses of Operating Lease Agreement it was held in OIO that the vehicle is registered in the name of Lessee for the purpose

of Motor Vehicle Act only and also in the name of owners, as ownership always lies with the assessee. Appellant to undertake inspection, servicing and technical check up periodically of the vehicle and such cost is included in rental charges. Appellants are also providing certain fleet management services and the cost of fleet management services is included in the monthly rental charges. Appellant is providing insurance during the operating lease period and the cost of insurance are recovered from clients and no service tax is paid on such charges. During the hearings clauses of Lease Agreement Paras 2.5, 2.6, 3.4, 3.5, 3.6, 3.7, 5.1, 5.2, 9.1, 11.7, 16.1 and particularly, Paras 2.5, 2.6, 5.1, 5.2, 9.1, 11.7, 16.1 were relied upon and argued and it was submitted to Hon'ble Bench that criteria laid down in the supreme court in the BSNL Case [2006 (2) STR 161 (SC)], particularly clauses c, d and e of judgment are not satisfied. Therefore, there was no transfer of effective control of Motor Vehicle and transaction not covered under Article 366(29a)(d) of Constitution of India an deemed sale and therefore lease rental charges are leviable to service tax under the Finance Act.

- On similar issue in the case of Rashtriya Ispat Nigam Ltd [1990 77 STC 182 AP], Hon'ble Andhra Pradesh High Court has held that transfer of custody will not be the transfer of right to use.
- Further in the case of Sachin Malhotra [2015 (37) STR 664 (Uttarakhand)], Hon'ble High Court has observed as follows:

"18. *A perusal of Clause 10 would re-enforce us in the view that we are taking that, under the rent-a-cab scheme, the hirer is endowed with the freedom to take the vehicle, wherever he wishes, and he is only obliged to keep the holder of the licence*

informed of his movements from time to time. When a person chooses to hire a car, which is offered on the strength of a permit issued by the Motor Vehicles Department, then the owner of the vehicle, who may or may not be the driver, will offer his service while retaining the control and possession of the vehicle with himself. The customer is merely enabled to make use of the vehicle by travelling in the vehicle. In the case of a passenger, he is expected to pay the metered charges, which is usually collected on the basis of the number of kilometers travelled. These are all matters, which are regulated by the Government. Unlike the said scenario, in the case of a rent-a-cab scheme, as is clear from the very fundamental principle underlying the scheme, it is to give the hirer the freedom to use the vehicle as he pleases, which, undoubtedly, implies that he must have possession and control over the vehicle. This is the fundamental distinction between rent-a-cab and a pure case of hiring. No doubt, the learned counsel for the appellant may be correct in saying that, in the case of rent-a-cab also, there is hiring in the general sense. As we have already noted, the word "hire" is used even in the rent-a-cab scheme. But, what is of fundamental importance and constitutes the distinguishing feature between "rent-a-cab" and "hiring" is that, in the case of "hiring", undoubtedly, the owner of the vehicle retains control and possession; he either drives the vehicle himself or employs somebody else to drive the vehicle; and the customer merely makes use of the vehicle by travelling in the vehicle on the basis of a contract that he will pay the requisite hire charges for the period he uses the vehicle. Unlike the same, in the case of rent-a-cab, as is provided in the Motor Vehicles Act, the person

is enabled to take the vehicle with him wherever he pleases, subject, no doubt, to the terms of the contract between the parties and he uses the vehicle as his own subject to his paying the rent. Though both, rent and hire, may, in a different context, have the same connotation; in the context of rent-a-cab scheme and hiring, we are of the view that they signify two different transactions. What the lawgiver has chosen fit to tax by way of imposition of Service Tax is only transaction relating to business of renting of cabs. It is also pertinent to bear in mind that, in the case of hiring, the hirer may refuse to provide the service to the prospective customer. We cannot accept the argument of the learned counsel for the appellant that the Court must ignore the provisions of Section 75 of the Motor Vehicles Act. We are of the view that, when the lawgiver introduced this new source of taxation, it must be treated as having been aware of the distinct concept of renting a cab for which there is provision in the Central Legislation, namely, Section 75 of the Motor Vehicles Act and also a scheme stood framed as early as in 1989. We are, therefore, of the view that, unless there is control, which is passed to the hirer under the rent-a-cab scheme, there cannot be a taxable transaction under Section 65(105)(o), read with Section 65(91) of the Service Tax Act."

- Board has vide its circular No 198/08/2016-ST dated 17.08.2016 has clarified as follows:

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

In terms of sub-clause (d) of clause (29A) of Article 366 of the Constitution of India, the transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred

payment or other valuable consideration is deemed to be a sale of those goods by the person making the transfer, delivery or supply and a purchase of those goods by the person to whom such transfer, delivery or supply is made. It follows that such transactions will be liable for Sales Tax/Value Added Tax. In terms of section 66E(f) of the Finance Act, 1994, transfer of goods by way of hiring, leasing, licensing or in any such manner without transfer of right to use such goods is a "declared service" and hence liable to service tax. In this regard some representations have been received.

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

- a. There must be goods available for delivery;*
- b. There must be a consensus ad idem as to the identity of the goods;*
- c. The transferee should have a legal right to use the goods - consequently all legal consequences of such use, including any permissions or licenses required therefor should be available to the transferee;*
- d. For the period during which the transferee has such legal right, it has to be to the exclusion to the transferor this is the necessary concomitant of the plain language of the statute - viz. a*

"transfer of the right" to use and not merely a licence to use the goods;

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

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

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

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

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

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

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

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

3.2.6 *G.S Lamba and Sons v. State of Andhra Pradesh reported in 2015 (324) E.L.T. 316 A.P.*

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

- Issue involved in the matter is squarely covered by the decision of tribunal in the case of Carzonrent India Pvt Ltd. [2017 (50) STR 172 (T-Del)]. This decision was subsequently followed in the case of Sun National Transport Co. [2020 (34) GSTL 445 (T-All)].

4.1 We have considered the impugned order along with the submissions made in appeal and during the course of argument.

4.2 The issues that need determination in these appeals can be stated as follows:

- (i) Whether the operating lease entered by the appellant with their client in respect of the motor vehicles provided by

them in terms of MLA, are cases of "deemed sale", as per Article 366 (29A) (d) of the Constitution of India and will be subjected to sales tax/ VAT, or they are covered by the definition of "rent a cab scheme operator" service as defined by Section 65(91) of the Finance Act, 1994 and taxable service under section 65(105)(o) of the said Act.

(ii) Whether the service tax is leviable on the charges collected by the appellant towards Fleet Management Service, as part of the lease rent should be subjected to service tax.

(iii) Whether the demand is hit by the limitation as extended period of limitation cannot be invoked in the present case.

(iv) Whether any penalties under Section 76, 77 or 78 be imposed on the appellant.

4.3 On the issue at "a", the issue needs to be examined vis a vis five criteria as laid down by the Hon'ble Apex Court in the case of BSNL, supra for determining where the transaction undertaken in respect of the "operating lease" can be said to be a transaction of deemed sale as per Article 366 (29A) (d) of the Constitution of India. Board has reiterated the same in their circular referred to by the learned Authorized Representative. For analyzing the same we take up the sample operating leasing agreement along with the supplementary agreement, and reproduce them below:

THIS OPERATING LEASE AGREEMENT made on the abovementioned Agreement Date by and between :

Party No. 1 mentioned above, which is a company incorporated and registered under the Companies Act 1956 and having its Registered Office at the Address mentioned above and hereinafter referred to as "the Lessee" (which expression shall, unless it be repugnant to the context or meaning thereof, mean and include its successors and permitted assigns) of the One Part

AND

Party No. 2 mentioned above, which is a company incorporated under the Companies Act, 1956 and having its registered office

at the Address mentioned above and hereinafter referred to as "the Lessor" (which expression shall, unless it be repugnant to the context or meaning thereof, mean and include its successors and assigns) of the Other Part:

The Lessor and the Lessee are hereinafter collectively referred to as "Parties" and individually as "Party".

WHEREAS:

The Lessee is desirous of taking on lease, from time to time, Vehicle(s) for its employees' use;

The Lessor is willing to provide Vehicle(s) on lease on the terms and conditions hereinafter contained.

NOW THIS AGREEMENT WITNESSETH AND IT IS HEREBY AGREED BY AND BETWEEN THE PARTIES HERETO as follows:

ARTICLE 1 DEFINITIONS

- (1) "Contracted Months" means the number of months or part thereof for which the Vehicle(s) is / are leased to the Lessee, as specified in the Supplementary Schedule(s).*
- (2) "Lease Period" means the period of lease of the Vehicle(s) as specified in Article 3 hereof.*
- (3) "Manufacturer Manual" means and includes the manual(s) issued by the manufacturer of the Vehicle(s)*
- (4) "Payment Schedule" means the schedule as referred in Article 4, which specify the due dates on which lease rentals have to be paid by the "Lessee.*
- (5) "Supplementary Schedule(s)" means the schedule or schedules referred to in Article 15, which specify the details with respect to the Vehicle(s) and other terms and conditions of Lease.*
- (6) "The Vehicle(s)" means the Vehicle(s) and each of the Vehicle(s), specified in the relevant Supplementary Schedule(s) and provided on lease to the Lessee by the Lessor.*

ARTICLE 2 LEASE OF VEHICLE(S)

2.1 At the request of the Lessee (hereinafter referred to as "the Order'), from time to time, the Lessor may acquire and grant on

lease, the Vehicle(s), on the terms and conditions herein contained,

2.2 Each Order shall be considered and evaluated by the Lessor and the acquisition and leasing of the Vehicle(s) shall be at the sole discretion of the Lessor.

2.3 Upon the Lessor accepting an Order, the Parties hereto shall execute a Supplementary Schedule(s) for the proposed Vehicle(s), which shall constitute the demise of the Vehicle(s) to the Lessee, on the terms and conditions contained herein,

2.4 The Lessor shall arrange for the delivery of the Vehicle(s) to the Lessee or its designated nominee at a place designated by the Lessee. On taking such delivery, the lessee or its designated nominee shall check the Vehicle(s) and shall immediately sign the Acceptance Certificate(s) in the format submitted at the time of such delivery and submit the Acceptance Certificate(s) to the Lessor immediately. Unless specified by the Lessee otherwise in the Acceptance Certificate(s), the Lessee agrees that the Vehicle(s) has / have been delivered in good conditions.

2.5 In Mumbai, Pune, Delhi/Gurgaon, Kolkata, Bangalore, Chennai, Hyderabad the Lessor give the delivery of the vehicle(s) and at rest of the places the Lessee, on receipt of intimation from the Lessor, shall be responsible to take timely delivery of the Vehicle(s) from the Dealer and also ensure that relevant documents viz Registration Certificate and Tax Certificate (RCTC) Book, Insurance Papers, Delivery Challan, etc. required for obtaining such delivery are collected by the Lessee or its nominee from the Dealer and keep them inside the Vehicle(s) at all time.

The Lessee shall submit the copy of the RCTC Book and Insurance Papers and the original Delivery Challan to the Lessor within 7 days within which the Lessee / Lessee's nominee would have received from the Dealer. The Vehicle(s) shall be deemed to have been delivered on the day on which intimation is given by the Lessor to the Lessee for taking delivery of the Vehicle(s), except when the dealer is unable to deliver the vehicle(s), in

such a case the vehicle(s) shall be deemed to have been delivered on the actual date of delivery by the dealer.

2.6 The Parties hereby confirm that their intent is that the Vehicle(s) shall at all times remain the property of the Lessor. For the purposes of the Motor Vehicle Act, 1988 (the "Act") and the provisions thereof, the Vehicle(s) Leased / to be leased hereunder shall be registered in the name of the Lessee as Registered Owner, as required under the provisions of the Act, for the benefit of the Lessor and expressly subject to the absolute ownership rights of the Lessor thereon and the Lessee undertakes and hereby authorizes the Lessor to have the said registration transferred in the name of the Lessor or its nominee on the termination and/or expiry of the Lease and/or requiring possession thereof.

2.7 In the event that the Lessee causes cancellation of, or instructs the Lessor to cancel a Purchase Order/Contract with the supplier of the Vehicle(s) or the Lessee shall refuse or be unable for any reason to accept delivery, the Lessor shall be entitled to terminate the Lease of the aforesaid Vehicle(s) and the Lessee shall pay to the Lessor on demand all costs, charges, expenses, damages incurred by the Lessor arising out of such an action of the Lessee, but for any consequential damages,

2.8 Appropriation of payments

(a) Any payments due and payable under or pursuant to this Agreement and made by the Lessee shall be appropriated towards such dues in the following order viz:

- (i) Interest (Late Payment Charges as specified in Article 4.3 on arrears of Lease Rentals that has become due and not paid;*
- (ii) Costs, charges and other expenses;*
- (iii) Lease Rentals.*

(b) Notwithstanding anything contained in Sub Article (a) hereinabove, the Lessor may, at its discretion, appropriate such payments towards the dues, if any, payable by the Lessee in respect of any other assistance(s) availed of by the Lessee from the Lessor in the order specified in the relative Agreement(s).

ARTICLE 3 LEASE PERIOD

3.1 The Lease period shall commence from the date of signing of Acceptance Certificate(s) by the Lessee as mentioned in the Article 2.4 hereinabove. The Acceptance Certificate(s) signed by the Lessee or its designated nominee shall form part and parcel of this agreement and shall be binding upon the parties.

3.2 The Lease Period shall cease with immediate effect and the Lease Agreement shall determine ipso facto upon occurrence of any of the following events:

- (a) Expiry of the Contracted Months.*
- (b) Event of default as specified in Article 12 of this Agreement.*
- (c) Receipt of a prior written notice of 30 days by the Lessor from the Lessee*
- (d) Irreparable damage/loss caused to the Vehicle(s) or theft of the Vehicle(s)*

3.3 On the occurrence of any of the events specified in Article 3.2 (a), (b) and (c) above, the Lessee shall, at its own cost and expense, forthwith deliver or cause to be delivered to the Lessor the following:

- (i) The Vehicle(s) at such time and place in the city/town of delivery of the vehicle's), as may be directed by the Lessor in good order and condition, reasonable wear and tear accepted. In the event the Lessee surrenders the Vehicle(s) with an unreasonable or unacceptable level of wear and tear, the Lessee shall be liable to bear all costs and charges for refurbishing/repairing the Vehicle(s). In the event the Lessee does not deliver the Vehicle(s) as specified above, the Lessor shall be entitled (but not obliged) to repossess the Vehicle(s) at the sole cost and expense of the Lessee, without reference or notice to the Lessee and the Lessee hereby irrevocably authorizes the Lessor or representatives to take physical possession of the Vehicle(s) as aforesaid. It is reiterated that the Lessor may exercise such right to re-possess at its complete discretion and the exercise or refusal to exercise such power will not in any manner*

diminish the Lessee's liabilities and obligations hereunder. Repossessions will be done peacefully with due process of law,

- (ii) Relevant documents with respect to the Vehicle(s), including but not limited to the registration certificate in original and the original Insurance Policy.*
- (iii) Keys (original as well as duplicate) of the Vehicle(s) and accessories of the Vehicle(s) installed by the Lessor,*
- (iv) The Lessor shall issue a receipt to the Lessee or to any person nominated by the Lessee for the delivery of items in sub-clause 3.3 (i), (ii) and (iii) herein above.*

3.4 Upon occurrence of event specified in Article 3.2(b) or in Article 3.2(c) above, as the case may be, the Lessee shall in addition to surrender of vehicle(s) as specified in Clause 3.3 above, pay the Early Termination Amount as mentioned in Note 6 of the Supplementary Schedule(s) to the Lessor immediately upon such cessation of Lease Period and termination of Lease Agreement.

3.5 Upon occurrence of event specified in Article 3.2 (d), the Lessee shall pay the Total Loss Penalty Amount as mentioned in Note 7 of the Supplementary Schedule(s) to the Lessor within seven (7) days of such cessation of Lease Period and termination of Lease Agreement.

3.6 In the event the Lessee fails to comply with the provisions of Article 3.3 or 3.4, or 3.5 above, then the Lessee shall be liable to pay all losses and/or damages that the Lessor may incur as a consequence of non compliance by the Lessee with provisions of Article 3.3 or 3.4. or 3.5 as mentioned above.

3.7 All rights and obligations accrued during the Lease Period shall survive the termination/expiry of the Lease Period

ARTICLE 4 PAYMENT OF LEASE RENTALS

4.1 In consideration of the services provided by the Lessor, the Lessee shall pay to the Lessor lease rental (hereinafter referred to as "Lease Rental"). The Lessee shall pay the Lease Rental monthly in advance, no later than the Third day of each calendar month irrespective of whether the Vehicle(s) has been put to use

or not by the Lessee, as specified in Note 5 of the Supplemental Schedule(s) and Note 6 of the Acceptance Certificate. The Lessee shall pay the first installment of Lease Rent on the date of Acceptance Certificate.

4.2 To discharge its obligation to pay the Lease Rental, the Lessee shall issue from time to time an account payee cheque drawn out in favour of the Lessor, for an amount as specified in the relevant Note 5 of the Supplementary Schedule(s) or in Note 6 of the Acceptance Certificate(s). The Lessee hereby irrevocably authorizes the Lessor to present the account payee cheques for encashment on the due dates thereof and appropriate the payments received there against towards the Lease Rental.

4.3 In the event the Lessee fails to honour any invoice raised by the Lessor in terms of this agreement, the Lessee shall be liable to pay, without prior notification or reminder (a) Late Payment Charges @ 24% p.a. on the amounts due and outstanding, for the period the amount becomes due and payable till such amounts are paid by the Lessee; and (b) any and all costs incurred by the Lessor to recover such amounts. However, the Lessee shall not be liable to pay Late Payment Charges, in cases, where there is a delay by the Lessor in raising the Invoices.

4.4 Any payments made by the Lessor on behalf of the Lessee shall be reimbursed by the Lessee to the Lessor on sufficient proof being available

4.5 The Lessee irrevocably agrees that the lease amount/rentals shall be determined by taking into account any increase in the Purchase Price of the Vehicle(s) in the intervening period between the placement of the order for the Vehicle(s) and its eventual delivery by the Lessor to the Lessee

4.6 The Lessee irrevocably agrees that the lease amount rentals will be increased / decreased by any increment / decrement in taxes whether Sales Tax or Value Added Tax, Service Tax, Lease Tax or Excise Duties and /or insurance premium and also by any increase / decrease in levy and taxes, duties and charges by State / Central Government, as the case may be or any other

related and consequential charges and taxes levied on this transaction now or hereafter.

4.7 The Lessee agrees that the lease amount / rentals will undergo change due to change(s) in the fiscal or monetary policy, which may affect the Lease Rentals. Consequent to such change, the Lessor shall be entitled at any time and from time to time to give notice to the Lessee of its intention to change the Lease Rentals payable by the Lessee and the Lessee shall be bound to pay Lease Rentals as notified, from time to time.

ARTICLE 5 TECHNICAL CONTROL AND INSPECTION

5.1 The Lessee shall present the Vehicle(s) for pollution checks and other statutorily mandated technical / fitness tests, at the dates and places determined by the relevant authorities. Further, the Lessee shall present the Vehicle(s) as and when required by any competent authority for any inspection that may be required by any law, regulation and / or rule. The costs of all such tests/inspections, shall be borne by the Lessor.

5.2 The Lessee shall as and when requested by the Lessor, make available the Vehicle(s) to the Lessor for inspection or technical check up by the Lessor / competent authorities,

ARTICLE 6 USE, MAINTENANCE AND REPAIRS

6.1 The Lessor shall, through its agents/attorneys and at its own cost, keep the Vehicle(s) in good working condition and provide repair and breakdown maintenance of the Vehicle(s)

6.2 The Lessee shall not make any alterations, additions or changes to the Vehicle(s), without the prior permission of the Lessor in writing. In the event the Lessee makes any additions/alterations to the Vehicle(s) without the prior written permission of the Lessor, such an event shall be treated as an Event of Default under this Agreement.

6.3 The Lessee shall use the Vehicle(s) strictly in accordance with instruction as indicated in the Manufacture's Manual of respective Vehicle(s).

6.4 In case of breakdown of Vehicle(s) due to mechanical failure, the Lessor shall provide towing services at its cost at the locations viz. Mumbai, Bangalore, Chennai, Delhi, the Lessee

shall co-ordinate with the dealer of that location for such towing services and the Lessor shall reimburse the expenses incurred by the Lessee in this regard.

The Lessor shall not be responsible for the damages to the Vehicle(s) which, appears reasonably to have been caused willfully and/or is the result of rash and negligent driving or any other negligent/malicious act and the Lessee shall at its own cost and expenses cause the repairs of the Vehicle(s)

ARTICLE 7 REPLACEMENT VEHICLE(S)

The Lessor shall provide a replacement Vehicle(s) (replacement vehicle may be of different make) at its own cost to the Lessee if the Vehicle(s) provided under this agreement is off the road for more than 24 hours in the event of a mechanical breakdown. However, in case of accident of the Vehicle(s), the Lessor shall provide the replacement Vehicle(s) on chargeable basis.

ARTICLE 8 STANDARD MODELS AND SPECIFICATIONS

8.1 The Vehicle(s) are delivered as standard models in accordance with the Lessee's specifications and as stated in the Supplementary Schedule(s).

8.2 The term "standard models" shall be taken to mean the Vehicle(s) as they are delivered to the Lessee. Any addition of extra accessories and adaptations to the Vehicle(s) shall be permitted in consultation with, and after the prior written consent of the Lessor.

ARTICLE 9 INSURANCE

9.1 During the subsistence of this Agreement the Lessee hereby agrees to bear the cost of insuring the vehicle(s) and accordingly shall reimburse the cost towards insurance premium of these vehicles to the Lessor forthwith upon receipt of notice of demand by the Lessee from the Lessor. The Lessor shall comprehensively insure the Vehicle(s), in the joint names of the Lessor and the Lessee with the Lessor's name as the owner and Loss Payee, against all risks, including third party risks. The Lessee shall not do or omit to do or be done or permit or suffer any act which might or could prejudicially vitiate or affect any such insurance,

9.2 *The Lessee assumes all and any liability for loss or damage to the Vehicle(s) or parts thereof, arising out of the negligence or misconduct or by any act or omission of the Lessee, and hereby agrees, confirms and undertakes to indemnify and keep indemnified and saved harmless the Lessor from any losses, claims, damages, expenses and third party claims that the Lessor might be put to/ may suffer/ incur in this regard, not covered by Insurance Policy.*

9.3 *Upon the happening of any event that causes any damage or loss to the Vehicle(s) and/or its accessories whilst thereon, including accident, theft, hit caused by fire explosion, self ignition or lightening, burglary, riot, earthquake, flood, typhoon, hurricane, storm, tempest, inundation, cyclone, hailstorm, frost, malicious act and/or terrorist activity, the Lessee shall as soon as possible notify the Lessor by telephone of such damage or loss relating to the Vehicle(s) and confirm this in writing, within 48 hours from the Lessee becoming aware of such event causing loss and/or damage to the Vehicle(s).*

9.4 *The Lessee shall use and operate the Vehicle(s) with all due diligence. The Lessee undertakes to facilitate the settlement of all cases of damage by providing the relevant information and taking all the steps required if requested to do so. The Lessor retains the right to initiate an investigation in the event of any loss occurrence.*

9.5 *Without prejudice to the generality of the provisions contained above, in the event of accident including injuries / damages of the third party or Vehicle(s) OR theft of the Vehicle(s) or any part and/or accessory thereof, the Lessee shall within 24 hours from becoming aware of such event report the same at its own cost to the nearest police station and shall obtain from such police station a copy of the first information report (FIR) and ensure that the registration, chassis and engine number are specified in the FIR.*

9.6 *Under no circumstances shall the Lessor be held liable towards the Lessee or a third party.*

9.7 The Lessee agrees that any insurance proceeds received under the said insurance shall be applied in making good the damage, provided that in the event of irreparable loss or damage to the Vehicle(s) as a whole, the Lessor shall be entitled to terminate this Agreement in respect of concerned vehicle and to retain any insurance proceeds received by the Lessor in respect thereof. Further, In the event of theft or total / irreparable loss or damage to the Vehicle(s), the Lessee shall forthwith pay the amount mentioned in Article 3.5 to the Lessor

9.8 In the case of the partial accident or the own damaged accident, the lessee shall pay the amount as specified in Note 11 of Supplementary Schedule.

ARTICLE 10 LESSEE'S WARRANTIES

10.1 The Lessee warrants that the execution of this Agreement and the use and operation of the Vehicle(s) by the Lessee will not :

(a) Contravene the provisions of any law, statute, rule and regulation to which the Lessee is subject and/or the Lessee's Memorandum and Articles of Association.

(b) Result in any breach of any agreement or arrangement to which the Lessee is a party.

10.2 The Lessee warrants that it has obtained all consents, licenses, approvals as are necessary for or in connection with the execution, validity and enforceability of this Agreement and for the use and operation of the Vehicle(s) and undertakes to keep them effective and in force at all times during the period of this Agreement and till the Vehicle(s) is delivered back to the Lessor in good order and condition, reasonable wear and tear excepted.

ARTICLE 11 LESSEE'S COVENANTS

During the subsistence of this Agreement and till the Vehicle(s) is / are delivered back to the Lessor in good order and condition in terms hereof, the Lessee shall :

11.1 Not claim any right, title or interest in the Vehicle(s) and/or parts, components thereof other than that of the Lessee or contest the Lessor's sole and exclusive ownership thereof.

11.2 Only claim the right of usage through its employees and / or nominees over the Vehicle(s)

11.3 Use and operate the Vehicle(s) in conformity with the Manufacturer Manual and comply with all statutory and other requirements of law, rules, regulations or directions applicable to use and operation of the Vehicle(s) in that behalf.

11.4 Not transfer, assign or otherwise dispose of or purport to transfer, assign or dispose of the Lessor's rights or obligations or interest hereunder by way of mortgage, charge, otherwise in any manner part with the possession of the Vehicle(s) or any part thereof or whatsoever nature on the Vehicle(s) or any part thereof.

11.5 Indemnify and keep indemnified the Lessor, at all times, against any loss or seizure of the Vehicle(s) under distress, execution or other legal process or destruction or damage to the Vehicle(s) by fire, accident or other cause, from any claim or demand arising out of use/handling the Vehicle(s), or any risk or liability for death or loss of limb of any person whether employee of the Lessee or any third party and hold Lessor harmless, against all losses, damages, claims, penalties, expenses, suits or proceedings of whatsoever nature made, suffered or incurred consequent thereupon,

11.6 Sign, execute and deliver all such documents as may be reasonably requested by the Lessor, in relation to the Vehicle(s), including such forms, affidavits, powers of attorney etc., as may be required to be filed with the transport authorities and other authorities.

The Lessee authorizes the Lessor:

11.7 To sell, alienate, transfer, charge, hypothecate or otherwise encumber the said Vehicle(s) and in this regard, to sign and deliver necessary forms, documents and/or to give notice to the appropriate Regional Transport Authority / Office for effecting transfer of the said Vehicle(s) at the end of the Lease Period or earlier termination of this Agreement.

11.8 To fill in, alter, amend or complete such forms, documents or papers that may be lying with the Lessor duly signed to give full and complete effect thereof

11.9 The Lessee acknowledges, represents, declares, agrees and confirms that:

(a) The Lessor has not at any time made nor does it hereby make any representation or warranty whatsoever with respect to the merchantability, quality, condition, durability, suitability or fitness for the purpose, use, operation or performance of the Vehicle(s).

(b) The Lessor shall in no way be liable or responsible to the Lessee for any liability, claim, loss, damage, or expense of any kind or nature whatsoever arising from the use of the Vehicle(s).

11.10 The Lessee agrees, confirms and undertakes to indemnify and keep indemnified and saved harmless the Lessor from and against all costs, expenses, damages, claims and losses that the Lessor may incur/ suffer on account of any Governmental statutory action which may affect the contents and structure of this Agreement.

ARTICLE 12 EVENTS OF DEFAULT

12.1 An event of default shall occur hereunder if the Lessee:

(a) Fails to pay any two rentals or part thereof or any other payment required to be made hereunder when due and such failure continues for a period of after written notice is sent to the Lessee: or

(b) Fails to perform or observe any other covenant, conditions or agreement to be performed or observed by it hereunder or in any other document furnished to the Lessor in connection herewith and such failure or breach continues unremedied for a period of 14 days after written notice is sent to the Lessee; or

(c) Without the Lessor's consent, sells, transfers, parts with possession or sublets or encumbers or creates any charge and/or lien on or endangers the Vehicle(s) any item thereof; or

- (d) Shall become bankrupt or become insolvent or make an assignment for the benefit of creditors, or consent to the appointment of a trustee or receiver, or either shall be appointed for the Lessee or for a substantial part of its property without its consent or bankruptcy reorganization or insolvency proceedings shall be instituted by or against the Lessee; voluntary or otherwise; or*
- (e) Shall suffer an adverse material change in the financial condition from the date hereof, and as a result thereof, the Lessor deems itself or any of the Vehicle(s) to be insecure; or*
- (f) Makes any additions/alterations to the Vehicle(s) without the prior written permission of the Lessor; or*
- (g) Shall be in default under any other Agreement at any time executed with the Lessor with respect to any other service(s) provided by the Lessor*

ARTICLE 13 DISTRAINT AND MEASURES BY THIRD PARTIES

13.1 If third parties lay claim to or otherwise take action in respect of a Vehicle(s), the Lessee shall take immediate action to safeguard the rightful property of Lessor. If the Lessee loses legal control of any Vehicle(s), the Lessee shall inform the Lessor immediately by facsimile or any other means of written communication within twenty-four hours and if necessary, take appropriate counter measures. The Lessor may take any and all actions it sees fit in the interests of protecting its rights, not excluding action in the name of the Lessee.

13.2 The costs incurred as a result of any action as aforesaid are to be borne by the Lessee and payment shall be made to Lessor upon a written request supported with substantiated proof by the Lessor. The Lessee shall ensure that the Vehicle(s) are only used by persons satisfying the requirements laid down under applicable law and regulations pertaining to such use.

13.3 The Lessee hereby undertakes to abide by existing legislation pertaining to the use of Vehicle(s) when a border is crossed. If, due to non-compliance with the foregoing, the authorities temporarily or permanently take the Vehicle(s) off

the road, all the costs, including fines - incurred in attempts to get the Vehicle(s) on the road again, shall be borne by the Lessee.

ARTICLE 14 MISCELLANEOUS

14.1 Legal Costs, Taxes, Fines

All costs incurred by Lessor in protecting its rights, such as legal and judicial costs in terms hereof and any relevant stamp duty, shall be separately charged to the Lessee, as shall pay any and all taxes currently in force or the levy of any new taxes, of whatever description on the Vehicle(s).

14.2 Notices

Unless otherwise provided herein, all notices or other communications under or in connection with this Agreement shall be given in writing and may be sent by personal delivery or post or courier or facsimile. Any such notice or other communication will be deemed to be effective if sent by personal delivery, when received, if sent by post, on receipt of the same and if sent by courier, on receipt of the same, and if sent by facsimile, when sent (on receipt of a confirmation to the correct facsimile number).

All correspondence shall be addressed, when sent to the Lessee at the address mentioned above and when sent to the Lessor, at the address of ORIX Auto Infrastructure Services Limited mentioned above.

14.3 Waiver

Any express or implied waiver by either Party to this Agreement shall not constitute a waiver of any other default by the other Party or a waiver of any of the Party's rights. All rights and powers of the Lessor under this Agreement will remain in full force, notwithstanding any neglect, forbearance or delay in the enforcement thereof by the Lessor, and the Lessor shall not be deemed to have waived any of their rights or any provisions of this Agreement or any notice given hereunder unless such waiver be provided in writing by the Lessor and any waiver by the Lessor of any breach by the Lessee of this Agreement shall

not be deemed a waiver of any continuing or recurring breach by the Lessee.

ARTICLE 15 LEASE AGREEMENT

15.1 This Agreement contains the terms and conditions that will govern the acquisition of the Vehicle(s) by the Lessor and lease thereof to the Lessee.

15.2 The Parties hereto shall execute Supplementary Schedule(s) and Acceptance Certificate(s) in relation to the specific Vehicle(s) that a Lessee desires to be leased to it and each such Supplementary Schedule(s) and Acceptance Certificate(s) shall constitute a separate agreement amongst the Parties, in respect of the specific Vehicle(s). The Supplementary Schedule(s) and Acceptance Certificate(s) shall form an integral part of this Lease Agreement.

ARTICLE 16 ASSIGNMENT

16.1 The Lessor may charge or delegate to any person any of its rights under this Agreement and any person to whom such rights are charged or delegated shall be entitled to the full benefit of the right(s) of the Lessor under this Agreement. The Lessee shall not assign its rights or obligations under this Agreement without the prior written consent of the Lessor. The Lessor shall ensure that the rights of the Lessee under this Operating Lease Agreement shall be protected.

16.2 Save as aforesaid, this Agreement shall be binding upon and shall insure for the benefit of the Lessor and its successors in title and assigns and the Lessee and its successors in title.

Supplementary Schedule

This Supplementary Schedule is a part of the below mentioned Agreement

Agreement Name	Operating Lease Agreement
Agreement No.	TMB00161
Agreement Date	14 th August 2008
Lessee	Khet-Se Agriproduce India Pvt. Ltd.
Lessor	ORIX Auto Infrastructure Services Limited

(1) Vehicle(s) Description

Make (Manufacturer) : Toyota
Model & Type : Allis GMT
Regn. No. : DL-7. CG4508
Engine Number : 1223146975
Chassis Number : MBJ 532 EE 207604335

(2) Details of Insurance

Name of the Insurer

(3) Location of Vehicle(s) : Delhi

(4) Lease Period : 48 months

(5) Lease Rental : Rs 30,0271- per month
excluding Taxes (including accessories) -

(6) Early Termination Amount

Sr No	Particulars Of Early Termination Charges
(a)	Book Value as on the date of termination
(b)	2% penalty on Book Value amount as aforesaid
(c)	Taxes
(d)	Insurance recovery for balance period
(e)	Extra Kms Charges, if any
(f)	Other outstanding amount including arrears of lease rentals and out of pocket expenses, if any
(g)	SUB TOTAL (a)+(b)+(c)+(d)+(e)+(f)
(h)	Market Price of the vehicle as on date of early termination
(i)	Total (Early Termination Penalty Amount) [(g)-(h)]

(7) Total Loss Penalty Amount

Sr No.	Particulars Of Early Termination Charges
(a)	Book Value as on the date of occurrence of event specified in article 3.2(d)
(b)	2% penalty on Book Value amount as aforesaid
(c)	Taxes
(d)	Extra Kms Charges, if any
(e)	Other outstanding amount including arrears of lease rentals and out of pocket expenses, if any
(f)	SUB TOTAL (a)+(b)+(c)+(d)+(e)

(h)	Insured settled value
(i)	Total (Total Loss Penalty Amount) [(i)-(h)]

(8) Tyre and Battery Limitation

Tyre	Maximum 5 pieces based on Lessor's inspection
Battery	Maximum 1 pieces based on Lessor's inspection

(9) Permissible kms 80,000 km over a period of 48 months, with an average of 20.000 km per annum.

(10) Charges above the permissible Limit: Rs. 6/- per km in excess of 80,000 km for 48 months, No excess km will be charged if the lease is continued for 48 months and the actual km does not exceed 80,000 km during the lease period.

(11) Partial Accident/Own Damage Penalty

Rs NIL / accident

Acceptance Certificate

This Acceptance Certificate is a part of the Agreement (mentioned in Note 1 hereinbelow).

On this date (mentioned in Note 8 hereinbelow.). the undersigned acting for and on behalf of Lessee has inspected and received in good condition Vehicle(s) from Lessor, the following Vehicle(s).

- (1) Agreement Name :Operating Lease Agreement
- Agreement No. : TMB00161
- Agreement Date : 14th August 2008
- Lessee : Khet-Se Agriproduce India Pvt. Ltd.
- Lessor : ORIX Auto Infrastructure Services Limited

(2) Vehicle(s) Description

- Make (Manufacturer) : Toyota
- Model & Type : Allis GMT
- Regn. No. : DL-7. CG4508
- Engine Number : 1223146975
- Chassis Number : MBJ 532 EE 207604335

(3) Details of Insurance

Name of the Insurer

- (4) Commencement Date of Lease : The date on which the Acceptance Certificate is signed by the Lessee or its nominee
- (5) Lease Period : 48 months from Commencement Date of Lease
- (6) First Payment Date for Rentals : The date on which the Acceptance Certificate is signed by the lessee or its nominee Rent Start Date: 01 - December 2008
- (7) Late Payment Charges : 18% p.a

(8) Acceptance Certificate Date:

(9) Early Termination Amount : As per Note 6 of Supplementary Schedule

(10) Total Loss Penalty : As per Note 7 of Supplementary Schedule

4.4 After taking note of the above agreement Commissioner has in the impugned order, analyzed the agreement, and have concluded that the condition at 'd' of the Board Circular by referring to the decision in case BSNL, supra, is not satisfied and hence the transaction in terms of "operating lease cannot be said to be one of deemed sale as per Article 366 (29A) (d) of the Constitution of India. The findings recorded by the Commissioner are reproduced below:

"43. It is the fourth condition set out by the Apex Court in case of M/s. BSNL cited supra that calls for close scrutiny vis-à-vis facts of the instant case. The court envisages a transfer of the right to use the goods and not merely a licence to use the goods. As directed by the Board, the terms of the contract need to be examined to establish whether the criteria set out by the court are fulfilled in the instant case.

43.1 The Article 2.6 of the agreement clearly states that "The Parties hereby confirm that their intent is that the vehicle(s) shall at all times remain the property of the Lessor.". Thus, all the time during the period of agreement, the ownership of the vehicles undisputedly remains with the Noticee.

43.2 As per Article 5.2 of the agreement, "The Lessee shall as and when requested by the Lessor, make available the vehicles, to the Lessor for inspection or technical check up by the Lessor/ competent authorities.". Thus the technical control lies with the Lessor i.e. the Noticee and has not been transferred to the Lessee or the client.

43.3 Article 6.2 of the agreement states that "The Lessee shall not make and alterations, additions or changes to the Vehicle(s), without the prior permission of the Lessor in writing". Further, As per Article 12.1(f). "An event of default shall occur hereunder if the Lessee, Makes any additions/alterations to the Vehicle(s)

without the prior written permission of the Lessor; ". As per Article 3.2 of the agreement, the Lease period shall cease with immediate effect and the Lease Agreement shall determine ipso facto upon occurrence of Event of Default as specified in Article 12 of agreement. It is obvious that the Lessor i.e. the Noticee holds back the control over the vehicles leased out and does not transfer the absolute right to use to the client.

43.4 The supplementary, schedule to the agreement specifies the finer details of the agreement. This schedule also restricts the use of vehicles to certain kilometers. Thus the client is not free to use the vehicles as much as he likes, but beyond the set limit of usage the client is required to pay additional amount over and above the periodical rent.

43.5 Thus it is clear that though the client has the custody and right to use the vehicles, however the effective control over the vehicles has not been transferred by the Noticee to their clients. Hence, the condition (d) set out by the Supreme Court is not being fulfilled in the instant case.

43.6 Further, I find in terms of para 2.6, 3.4, 3.5, 3.6, 3.7, 4.7, 6.2, 11.1, 11.4. 11.7. 16 and other clauses of the agreement, whereas the Lessor continue to possess the right of transfer the vehicle from Lessee to any other person, the Lessee has neither been Transferred right to use nor right of possession and effective control or the property in subject cabs. Therefore, the subject transactions do not comply the criteria 'd' and 'e' above and therefore the subject transaction cannot be claimed to be as 'sales' or 'deemed sales' or being excluded from the scope of being a service in terms of Section 66E(f) or as 65B(44). Further, Article 7 of the agreement clearly establishes that the subject transaction is not a sale, deemed sale, but a service as the Noticee is required to provide a replacement of vehicle for possible continuance of service, which does not happen in case of sale/ deemed sale.

44. In this regard, the Noticee have referred to para 6.6.1 of Education Guide issued by CBEC on taxation of services in their

defense, to emphasize their argument that transaction involving transfer of right to use goods, are kept out of the ambit of service tax, However, I find that the Noticee have ignored the para 6.6.2 of the same Education Guide', wherein same transactions have been listed in a Table to explain the meaning/scope of the term 'transfer or right to use Sr. No. 2 of the said Table is reproduced as under :

Sr No.	Nature of transaction	Whether transaction involves transfer of right to use
2	Supply of equipment like excavators, wheel loaders, dump trucks, cranes, etc for use in a particular project where the person to whom such equipment is supplied is subject to such terms and conditions in the contract relating to the manner of use of such equipment, return of such equipment after specified time, maintenance and upkeep of such equipment	The transaction will not involve transfer of right to use such equipment as in terms of the agreement the possession and effective control over such equipment has not been transferred even though the custody may have been transferred along with permission to use such equipment. The receiver is not free to use such equipment in any manner as he likes and conditions have been imposed on use and control of such equipment.

In the instant case too, the terms of agreement as discussed in forgoing para, indicate that the client,/Lessee is not free to use such equipment in any manner as he likes and conditions have been imposed on use and control of such equipment. Therefore, it is evident that only the custody of vehicles is transferred to the clients by the Noticee along with permission to use these

vehicles and the absolute right to use the vehicles is not transferred

45. The fact that para 3.3 of the agreement clearly states that in case of default the Lessor can terminate the contract and take back the possession and stop usage. It shows that along with ownership, the right to possession and effective control and the right to usage were always with the Lessor and the same were never legally transferred to the Lessee

46. In view of above, as the criteria a set out by the Supreme Court in case of M/s. BSNL, cited supra has not been fulfilled in the instant case. it can be concluded that the transaction does not involve transfer of right to use

47. Further, I find in terms of para 2.6, 3.4, 3.5, 3.6, 3.7, 4.7, 6.2, 11.1, 11.4. 11.7. 16 and other clauses of the agreement, whereas the Lessor continue to possess the right of transfer the vehicle from Lessee to any other person, the Lessee has neither been Transferred right to use nor right of possession and effective control or the property in subject cabs. Therefore, the subject transactions do not comply the criteria d' and 'e' above and therefore the subject transaction cannot be claimed to be as 'sales' or 'deemed sales' or being excluded from the scope of being a service in terms of Section 66E(f) or as 65B(44). Further, Article 7 of the agreement clearly establishes that the subject transaction is not a sale, deemed sale, but a service as the Noticee is required to provide a replacement of vehicle for possible continuance of service, which does not happen in case of sale/ deemed sale.

48. Once it is established that the transaction does not involve transfer of right to use, it cannot be excluded from the scope of service as per Section 65E(f) of the Act. Further, when it is also crystal clear by clause 2.6 of the agreement that the property in subject Cabs always remained with the Noticee. Hence it is out of purview of definition of 'sale' as envisaged in the Clause (29A) of Article 366 of the constitution and thereby also not part of the exclusion clause in the definition of 'service' as per clause (44) of

Section 65B of the Finance Act, 1994. Therefore, the department is correct in considering the subject transaction and the subject activity of renting out of vehicles by the Noticee on operating lease is a 'service' I, therefore, hold that the activity of the Noticee of lending the vehicles to multiple clients under Operating lease is NOT a 'Deemed Sale' and is included the definition of 'service' for the period with effect from 01.07.2012. Since the said activity is a service and not included in the Negative list under Section 66D of the act, the same is chargeable to Service Tax by virtue of provisions of Section 66B of the Act."

4.6 For our analysis we have juxtaposed the relevant clauses above agreement for ease of reference against the five criteria as laid down by the Hon’ble Apex Court in the case of BSNL, supra and also reiterated by the Board in the circular of the Board.

S No	Criteria as laid down by Hon’ble Apex Court	Clause of Agreement
a	<i>There must be goods available for delivery;</i>	Article 2.3, 2.4 and 2.5
b	<i>There must be a consensus ad idem as to the identity of the goods;</i>	Supplementary Schedule gives the details of the vehicle along with the registration number, engine number and chassis number
c	<i>The transferee should have a legal right to use the goods - consequently all legal consequences of such use, including any permissions or licenses required therefor should be available to the transferee;</i>	Article 11.2 & 16.1
d	<i>For the period during which the transferee has such legal right, it has to be to the exclusion to the transferor this is the necessary concomitant of the plain</i>	Article 3.3, 11.2 & 16.1

	<i>language of the statute - viz. a "transfer of the right" to use and not merely a licence to use the goods;</i>	
e	<i>Having transferred the right to use the goods during the period for which it is to be transferred, the owner cannot again transfer the same right to others.</i>	Article 2.3, 3.2(d), 3.3 & 16.1

4.6 Commissioner has concluded in the impugned order by referring to the various clauses in the agreement that there was no transfer of the right to use. However while doing so his emphasis is more on the transfer in the property of the vehicle(s). In our view the "transfer of right to use" cannot be equated to "transfer in the property of vehicles". The intent of the transaction undertaken needs to be determined in terms of the various clauses of the agreement. The intent of the parties, as per the preamble to the agreement is unequivocally stated in following terms:

"The Lessee is desirous of taking on lease, from time to time, Vehicle(s) for its employees' use;
The Lessor is willing to provide Vehicle(s) on lease on the terms and conditions hereinafter contained."

Now the remaining clauses of the agreement need to be examined in terms of the above. Article 2 of the agreement is in respect of identification and delivery of vehicle(s) along with all the documents and permissions. Article 3 defines the lease period and also the conditions wherein the lease agreement can be terminated. Termination of the lease agreement cannot be equated to encumbrance on the right to use of the said vehicles by the lessee. Commissioner has referred to various clauses under this article to hold that this is not absolute transfer of the right to use. Article 4 provides for the Payment of Lease Rental, it provides for the exigencies wherein the lease rental can be modified. Article 5 is in respect of technical control and inspection of the vehicle. It is not in manner restricting the right of usage. Article 6 is for provision of maintenance and repair

services whereas Article 7 provides for the replacement vehicles in case of breakdown/ accident. Article 11 provides for Lessee's Covenants. Commissioner has referred to clause 11.1 and 11.4 to conclude that there is no transfer of right to use. The said clauses are only in respect of title to the vehicle and bar the lessee from claiming title to the vehicle(s), however clause 11.2 provides for the unfettered right to use of the vehicle (s) to the lessee through its employee or nominees. In our view clearly the agreement provides for unfettered right of usage to the lessee and is just not transfer of custody or possession. The reliance placed on Article 11.7, do not advance the argument of the revenue as that clause from plain reading is applicable only after termination of the lease agreement. The reliance placed by the Commissioner on the Education Guide para 6.6.2 is totally uncalled for. The said para is in line with the facts of the decision of Hon'ble Andhra Pradesh High Court in the case of Rashtriya Ispat Nigam, supra. However we do not find any application of the said decision to the facts of case in hand because the conclusion which was arrived in that decision was based on the fact of that case and Hon'ble High court specifically records as follows:

"14. In our view, whether the transaction amounts to transfer of right or not cannot be determined with reference to a particular word or clause in the agreement. The agreement has to be read as a whole, to determine the nature of the transaction. From a close reading of all the clauses in the agreement, it appears to us that the contractor is entitled to make use of the machinery for purposes of execution of the work of the petitioner and there is no transfer of right to use as such in favour of the contractor. We have reached this conclusion because the effective control of the machinery even while the machinery is in the use of the contractor is that of the petitioner-company. The contractor is not free to make use of the same for other works or move it out during the period the machinery is in his use. The condition that he

will be responsible for the custody of the machinery while the machinery is on the site does not militate against the petitioners' possession and control of the machinery. For these reasons, we are of the opinion that the transaction does not involve transfer of the right to use the machinery in favour of the contractor. As the fundamental requirement of section 5-E is absent, the hire charges collected by the petitioner from the contractor are not exigible to sales tax."

In the case of Rashtriya Ispat Nigam, the contractor was obliged to use the machinery only for executing the contract which he had entered into with the petitioner and was not permitted to use the same at any other location. However authorized representative has during the course of arguments not shown a single clause in the agreement which bounded the lessee in this manner. The said decision is clearly distinguishable.

4.7 Learned Authorized representative has referred to the decision of the Hon'ble Uttarakhand High Court to argue that the transaction in the present case is more appropriately taxable under the category of Rent a Cab service. The said decision was distinguished by the tribunal in case of S K Kareemun [2016 (42) S.T.R. 988 (Tri. – Bang)] stating as follows:

"5.7.7 Hon'ble High Court was considering the issue for the period prior to 1-6-2007. As mentioned earlier, the definition was amended to include motor vehicles which can carry more than 12 passengers and which cannot be called as motor cab and maxi cab after 1-6-2007. Further, the definition so introduced incorporated use based exclusion also. This aspect gives the definition of rent-a-cab service a distinct character which is totally different from rent-a-cab scheme contemplated under Motor Vehicles Act. Therefore it would not be correct to apply the decision of the Hon'ble High Court to the present case. Moreover in all these cases it is essential to look at the agreement between the parties and conclusion has to emerge on that basis. We have elaborately discussed the agreement, the relevant portions of the agreement which form the basis for

differentiating our conclusions when we discussed the issues on the basis of the definition and the agreement without considering the decision of the Hon'ble High Court."

4.8 Since as per the terms of the agreement as stated in the above table, we find that the conditions as laid down by the Hon'ble Apex Court in case of BSNL are satisfied, we have no hesitation in holding that the transaction is of deemed sale as per Article 366 (29A) (d) of the Constitution of India. We also find that co-ordinate bench has in case of Arval India Pvt Ltd [2020 (41) G.S.T.L. 528 (Tri. – Mumbai)] concluded in respect of similar operating lease agreement, that the said agreement was that of deemed sale. The said decision also distinguishes the decision of Carzonrent India Pvt Ltd. [2017 (50) STR 172 (T-Del)] stating as follows:

"7. On the other hand, Learned Authorized Representative canvassed the proposition that different aspects of a transaction could be the object of different levies without infringing upon constitutionally demarcated jurisdictions. Learned Authorized Representative placed reliance on the decision of the Hon'ble Supreme Court in Association of Leasing & Financial Services Companies v. Union of India [2010 (20) S.T.R. 417 (S.C.)] and in Idea Mobile Communication Ltd. v. Commissioner of Central Excise & Customs, Cochin [2011 (23) S.T.R. 433 (S.C.)]. We shall advert to these presently. Further reliance is placed on the decision of the Tribunal in Carzonrent (India) Pvt. Ltd. v. Commissioner of Service Tax, Delhi-I [2017 (50) S.T.R. 172 (Tri. - Del.)] on an identical issue of 'lease rentals' not having been offered for tax along with the issue of leviability of tax on 'fleet management charges' on which the assessee before us has discharged tax liability. We take note that, in this decision, the Tribunal attached premium to the detailed consideration of the attributes of sale, as expounded in Bharat Sanchar Nigam Ltd. v. Union of India [2006 (2) S.T.R. 161 (S.C.)], in the order of the original authority thus

'13..... We note that the principle laid down by the Hon'ble Supreme Court in BSNL (supra) will guide while determining the actual nature of transaction between the parties. We are satisfied that the impugned order examined the issue to arrive at the conclusion that the appellant are liable to service tax in respect of the services rendered by them under the category of "rent-a-services".'

and, as it appears to be an approval of the logical weaponry deployed in the order impugned on the facts that were mapped out, we are unable to concede that the facts in the dispute before us are identical in terms of the control retained by the assessee herein over the leased vehicles. In a dispute over competing claims of fitment in either of the two lists in the Seventh Schedule in the Constitution of India, prudence may well dictate that an adjudicating pronouncement be evaluated, even in exercise of appellate jurisdiction, within the statute of such jurisdiction. The taxing statute of the Union and of the several States may, if at all converging, find resolution only in the constitutional Courts in appellate, or writ, jurisdictions. That, however, need not constrain us from examining the scope of the levy itself in the light of a model that finds general commercial acceptance. The approving mark in correctness of findings does not have to be at the cost of propriety in levying the tax."

4.9 The decision of Carzonrent was subsequently followed in the case of Sun National Transport Co. [2020 (34) GSTL 445 (T-All)], without giving much reasoning so once we find ourselves in agreement with the distinction made from the decision in that case by Arval case we do not discuss the said decision again.

4.10 In view of our discussions as above we would answer the question at (i) in para 4.2, in favour of the appellant holding that "operating lease agreement" is squarely a case of deemed sale as per Article 366 (29A) (d) of the Constitution of India.

4.11 The next question that needs to be considered is in respect of leviability of the service tax on the Fleet Management Services Insurance, Maintenance etc. Undisputedly appellant before was

not paying service tax in respect of these services, whereas in case of Arval India Pvt Ltd., bench had specifically noted that Arval was discharging service tax on these services provided by them. Counsel for the appellant has in his submissions admitted to liability to service tax on the said services. Taking note of the submissions made by the appellant in our view the matter needs to be reconsidered by the original authority to determine the demand in respect of the charges recovered by the appellant towards providing of these services which form the part of lease rental. Hence in our view matter to this extent needs to be remanded back to the original authority for re-determination of the demand after taking into account the submissions made by the appellant.

4.12 On the issue of limitation listed by us at (iii) in para 4.2, we are of the view that issue was except for the first show cause notice which is invoking extended period of limitation all other notices are demand notices which have been issued within the normal period of limitation. In respect of the first notice we find that demand for certain period of time is within normal period of limitation. Taking note of the fact that appellants had been discharging the VAT on the transactions undertaken by them in terms of the operating lease agreements, we are of the view that appellant was under genuine and bonafide belief that they are discharging the tax on the transactions undertaken by them. In view of such a bonafide belief, whereby appellants were discharging the VAT on these transactions which was much higher than the tax that could have been demanded treating these transactions to taxable under the category of rent a cab services, we are of view that extended period of limitation cannot be invoked.

4.13 Since we hold that extended period of limitation cannot be invoked, penalty imposed under Section 78 cannot be sustained in view of the decision of the Hon'ble Apex Court in case of Rajasthan Spinning and Weaving Mills. [2009 (238) ELT 3 (SC)] stating as follows:

"19. From the aforesaid discussion it is clear that penalty under Section 11AC, as the word suggests, is punishment for an act of deliberate deception by the assessee with the intent to evade duty by adopting any of the means mentioned in the section.

20. At this stage, we need to examine the recent decision of this Court in *Dharamendra Textile* (supra). In almost every case relating to penalty, the decision is referred to on behalf of the Revenue as if it laid down that in every case of non-payment or short payment of duty the penalty clause would automatically get attracted and the authority had no discretion in the matter. One of us (Aftab Alam, J.) was a party to the decision in *Dharamendra Textile* and we see no reason to understand or read that decision in that manner. In *Dharamendra Textile* the court framed the issues before it, in paragraph 2 of the decision, as follows :

"2. A Division Bench of this Court has referred the controversy involved in these appeals to a larger Bench doubting the correctness of the view expressed in *Dilip N. Shroff v. Joint Commissioner of Income Tax, Mumbai & Anr.* [2007 (8) SCALE 304]. The question which arises for determination in all these appeals is whether Section 11AC of the Central Excise Act, 1944 (in short the 'Act') inserted by Finance Act, 1996 with the intention of imposing mandatory penalty on persons who evaded payment of tax should be read to contain mens rea as an essential ingredient and whether there is a scope for levying penalty below the prescribed minimum. Before the Division Bench, stand of the revenue was that said section should be read as penalty for statutory offence and the authority imposing penalty has no discretion in the matter of imposition of penalty and the adjudicating authority in such cases was duty bound to impose penalty equal to the duties so determined. The assessee on the other hand referred to Section 271(1)(c) of the Income Tax Act, 1961 (in short the IT Act') taking the stand that Section 11AC of the Act is identically worded and in a given case it was open to the assessing officer not to impose any penalty. The

Division Bench made reference to Rule 96ZQ and Rule 96ZO of the Central Excise Rules, 1944 (in short the "Rules") and a decision of this Court in Chairman, SEBI v. Shriram Mutual Fund & Anr. [2006 (5) SCC 361] and was of the view that the basic scheme for imposition of penalty under section 271(1)(c) of IT Act, Section 11AC of the Act and Rule 96ZQ(5) of the Rules is common. According to the Division Bench the correct position in law was laid down in Chairman, SEBI's case (supra) and not in Dilip Shroff's case (supra). Therefore, the matter was referred to a larger Bench."

After referring to a number of decisions on interpretation and construction of statutory provisions, in paragraphs 26 and 27 of the decision, the court observed and held as follows :

"26. In Union Budget of 1996-97, Section 11AC of the Act was introduced. It has made the position clear that there is no scope for any discretion. In para 136 of the Union Budget reference has been made to the provision stating that the levy of penalty is a mandatory penalty. In the Notes on Clauses also the similar indication has been given.

"27. Above being the position, the plea that the Rules 96ZQ and 96ZO have a concept of discretion inbuilt cannot be sustained. Dilip Shroff's case (supra) was not correctly decided but Chairman, SEBI's case (supra) has analysed the legal position in the correct perspectives. The reference is answered.....".

21. From the above, we fail to see how the decision in Dharamendra Textile can be said to hold that Section 11AC would apply to every case of non-payment or short payment of duty regardless of the conditions expressly mentioned in the section for its application.

22. There is another very strong reason for holding that Dharamendra Textile could not have interpreted Section 11AC in the manner as suggested because in that case that was not even the stand of the revenue. In paragraph 5 of the decision the court noted the submission made on behalf of the revenue as follows :

"5. Mr. Chandrashekharan, Additional Solicitor General submitted that in Rules 96ZQ and 96ZO there is no reference to any mens rea as in section 11AC where mens rea is prescribed statutorily. This is clear from the extended period of limitation permissible under Section 11A of the Act. It is in essence submitted that the penalty is for statutory offence. It is pointed out that the proviso to Section 11A deals with the time for initiation of action. Section 11AC is only a mechanism for computation and the quantum of penalty. It is stated that the consequences of fraud etc. relate to the extended period of limitation and the onus is on the revenue to establish that the extended period of limitation is applicable. Once that hurdle is crossed by the revenue, the assessee is exposed to penalty and the quantum of penalty is fixed. It is pointed out that even if in some statutes mens rea is specifically provided for, so is the limit or imposition of penalty, that is the maximum fixed or the quantum has to be between two limits fixed. In the cases at hand, there is no variable and, therefore, no discretion. It is pointed out that prior to insertion of Section 11AC, Rule 173Q was in vogue in which no mens rea was provided for. It only stated "which he knows or has reason to believe". The said clause referred to wilful action. According to learned counsel what was inferentially provided in some respects in Rule 173Q, now stands explicitly provided in Section 11AC. Where the outer limit of penalty is fixed and the statute provides that it should not exceed a particular limit, that itself indicates scope for discretion but that is not the case here."

23. The decision in Dharamendra Textile must, therefore, be understood to mean that though the application of Section 11AC would depend upon the existence or otherwise of the conditions expressly stated in the section, once the section is applicable in a case the concerned authority would have no discretion in quantifying the amount and penalty must be imposed equal to the duty determined under sub-section (2) of Section 11A. That is what Dharamendra Textile decides.

24. *It must, however, be made clear that what is stated above in regard to the decision in Dharamendra Textile is only in so far as Section 11AC is concerned. We make no observations (as a matter of fact there is no occasion for it!) with regard to the several other statutory provisions that came up for consideration in that decision.”*

4.14 In respect of the penalties imposed under Section 76 and 77 and for invocation of the Section 80 of the Finance Act, 1994, we are not inclined to make any pronouncement at this stage and the same needs to be considered by the Commissioner in the remand proceedings while determining the service tax demandable as per our observations in para 4.12 above.

4.15 We summarize our findings in respect of the questions framed by us in para 4.2 in the table below:

S No	Issue/ Question	Findings at para
i	Whether the operating lease entered by the appellant with their client in respect of the motor vehicles provided by them in terms of MLA, are cases of “deemed sale”, as per Article 366 (29A) (d) of the Constitution of India and will be subjected to sales tax/ VAT, or they are covered by the definition of “rent a cab scheme operator” service as defined by Section 65(91) of the Finance Act, 1994 and taxable service under section 65(105)(o) of the said Act.	4.10
ii	Whether the service tax is leviable on the charges collected by the appellant towards Fleet Management Service, as part of the lease rent should be subjected to service tax.	4.11
iii	Whether the demand is hit by the limitation as extended period of limitation cannot be invoked in the present case.	4.12
iv	Whether any penalties under Section 76, 77 or 78 be imposed on the appellant.	4.13 & 4.14

5.1 Thus appeals are partially allowed as indicated in para 4.15 above and the matter is remanded back to the original authority

for re-quantification of demand and interest / penalties as per observations made in para 4.15.

5.2 As we have observed in para 4.10 above that demand under the category of rent-a-cab services cannot be sustained, the appeal filed by Revenue challenging the abatement cannot be sustained and is therefore dismissed. The cross objections filed by the appellant/assessee are disposed of.

5.3 Since matter is substantially old, original authority should decide the matter in remand within a period of three months of receipt of this order after allowing the appellant opportunity to represent and make their submissions.

5.4 Appellant should fully co-operate and provide all the information as called for by the adjudicating authority for redetermination of demand and interest/ penalties.

(Order pronounced in the open court)

(Sanjiv Srivastava)
Member (Technical)

(P. Dinesha)
Member (Judicial)

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