आयुक्त (अपील) का कार्यालय,

Office of the Commissioner (Appeal),

केंद्रीय जीएसटी, अपील आयुक्तालय, अहमदाबाद

Central GST, Appeal Commissionerate, Ahmedabad

जीएसटी भवन, राजस्व मार्ग, अम्बावाड़ी अहमदाबाद ३८००१५.

CGST Bhavan, Revenue Marg, Ambawadi, Ahmedabad 380015

. ☎ 07926305065- टेलेफैक्स07926305136

सत्यमेव जयते

DIN :20210364SW0000333FE6

स्पीड पोस्ट

क फाइल संख्या : File No : V2(ST)20/GNR/2020-21

ख अपील आदेश संख्या Order-In-Appeal Nos. **AHM-EXCUS-003-APP-060/2020-21**
दिनाँक Date : **15-02-2021** जारी करने की तारीख Date of Issue 05.03.2021

आयुक्त (अपील) द्वारा पारित
Passed by **Shri Akhilesh Kumar**, Commissioner (Appeals)

ग Arising out of Order-in-Original No. **06/D/GNR/NRM/2020-21** दिनाँक: **28.04.2020,** issued by Assistant Commissioner, Central GST, Division-Gandhinagar, Commissionerate-Gandhinagar

ध अपीलकर्ता का नाम एवं पता Name & Address of the **Appellant** / ~~Respondent~~

M/s Adani Township And Real Estate Company Pvt. Ltd.
Adani House, Nr. Mithakhali Circle,
Navrangpura, Ahmedabad-380009

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

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

भारत सरकार का पुनरीक्षण आवेदन :

Revision application to Government of India :

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1944 की धारा 35–बी/35–इ के अंतर्गतः–

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

(क) उक्तलिखित परिच्छेद 2 (1) क में बताए अनुसार के अलावा की अपील, अपीलो के मामले में सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, अहमदाबाद में 2nd माला, बहुमाली भवन ,असरवा ,गिरधरनागर,अहमदाबाद –380004

(a) To the west regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at 2nd floor,Bahumali Bhawan,Asarwa,Girdhar Nagar, Ahmedabad : 380004. in case of appeals other than as mentioned in para-2(i) (a) above.

The appeal to the Appellate Tribunal shall be filed in quadruplicate in form EA-3 as prescribed under Rule 6 of Central Excise(Appeal) Rules, 2001 and shall be accompanied against (one which at least should be accompanied by a fee of Rs.1,000/-, Rs.5,000/- and Rs.10,000/- where amount of duty / penalty / demand / refund is upto 5 Lac, 5 Lac to 50 Lac and above 50 Lac respectively in the form of crossed bank draft in favour of Asstt. Registar of a branch of any nominate public sector bank of the place where the bench of any nominate public sector bank of the place where the bench of the Tribunal is situated.

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

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

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

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

(5) इन ओर संबंधित मामलों को नियंत्रण करने वाले नियमों की ओर भी ध्यान आकर्षित किया जाता है जो सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्याविधि) नियम, 1982 में निहित है।

Attention in invited to the rules covering these and other related matter contended in the Customs, Excise & Service Tax Appellate Tribunal (Procedure) Rules, 1982.

(6) सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट), के प्रति अपीलो के मामले में कर्तव्य मांग (Demand) एवं दंड (Penalty) का 10% पूर्व जमा करना अनिवार्य है। हालांकि, अधिकतम पूर्व जमा 10 करोड़ रुपए है ।(Section 35 F of the Central Excise Act, 1944, Section 83 & Section 86 of the Finance Act, 1994)

केन्द्रीय उत्पाद शुल्क और सेवा कर के अंतर्गत, शामिल होगा "कर्तव्य की मांग"(Duty Demanded) -

(i) *(Section)* खंड 11D के तहत निर्धारित राशि;
(ii) लिया गलत सेनवैट क्रेडिट की राशि;
(iii) सेनवैट क्रेडिट नियमों के नियम 6 के तहत देय राशि.

⇨ **यह पूर्व जमा 'लंबित अपील' में पहले पूर्व जमा की तुलना में, अपील' दाखिल करने के लिए पूर्व शर्त बना दिया गया है .**

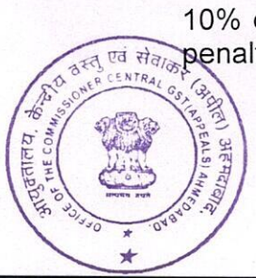
For an appeal to be filed before the CESTAT, 10% of the Duty & Penalty confirmed by the Appellate Commissioner would have to be pre-deposited, provided that the pre-deposit amount shall not exceed Rs.10 Crores. It may be noted that the pre-deposit is a mandatory condition for filing appeal before CESTAT. (Section 35 C (2A) and 35 F of the Central Excise Act, 1944, Section 83 & Section 86 of the Finance Act, 1994)

Under Central Excise and Service Tax, "Duty demanded" shall include:

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

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

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



ORDER-IN-APPEAL

1. This order arises out of an appeal filed by M/s. Adani Township and Real Estate Company Pvt. Ltd, Atreco House, CBD, "Shantigram", Near Vaishnodevi Circle, Ahmedabad-382421, having office at present at Adani House, Near Mithakhali Circle, Navrangpura, Ahmedabad-380009 (hereinafter referred to as '*appellant*') against Order in Original No. 06/D/GNR/NRM/2020-21 dated 28.04.2020 [hereinafter referred to as '*the impugned order*'] passed by the Assistant Commissioner, Central GST, Division-Gandhinagar, Commissionerate-Gandhinagar (hereinafter referred to as '*the adjudicating authority*').

2. Facts of the case, in brief, are that the appellant is engaged in providing services under the category of (i) Construction of residential complex service (ii) Construction of commercial complex service other than residential complex service (iii) Transport of Goods by Road (GTA) (iv) Legal Consultancy Service and (v) Works Contract Service and are holding Service Tax Registration Number AAKCA8681JSD001.

2.1 Audit of the records of the appellant was carried out by the departmental audit officers for the period from F.Y 2014-15 to F.Y 2017-18 (upto June'2017) and a Final Audit Report No. 2102/2018-19-Service Tax was issued on 04.07.2019 for the same. Subsequently, a Show Cause Notice No. 78/2019-20 was issued under F.No. CTA/04-190/Cir-VIII/AP-43/2018-19 dated 08.07.2019 to the said appellant by the Deputy Commissioner, Central Tax Audit, Circle-VIII, Audit Commissionerate, Ahmedabad for demand and recovery of the amounts as reproduced below by invoking extended period of limitation under proviso to Section 73(1) of the Finance Act, 1994:

(i) *Service tax amounting to Rs. 42,37,128/- on account of short payment of service tax on the 'Cancellation Income", being the declared service provided under clause (e) of Section 66E of the Finance Act, 1994.*

(ii) *Wrong availment of Cenvat Credit of Rs. 1,15,731/- on account of Cenvat Credit availed in respect of the invoices, against which the payment was not made to the service provider within 3 months from the date of invoice.*

(iii) *An amount of Rs. 5,493/- towards short payment of Krishi Kalyan Cess.*

(iv) *Wrong availment of Cenvat Credit of Rs. 26,522/-on the invoices issued by M/s. Havmor Restaurant, in contravention of Rule 2(1)(i) and Rule 1(1)(C) of the Cenvat Credit Rules, 2004.*

(v) *Penalty proposed on account of the demands proposed at (i) and (iii) above under Section 78 (1) of the Finance Act, 1994.*

(vi) *Penalty proposed on account of the demands proposed at (ii) and (iv) above under Section 78 (1) of the Finance Act, 1994 read with the provisions of Rule 14(1)(ii) of the Cenvat Credit Rules,2004.*

(vii) *Interest at the appropriate rate on the demands proposed at (i) to (iv) above under Section 75 of the Finance Act, 1994.*

2.2 The show cause notice dated 08.07.2019 has been adjudicated by the adjudicating authority vide the impugned order, which is briefly reproduced below:

(i) *The demand of Service tax amounting to Rs. 42,37,128/- on account of short payment of service tax on the 'Cancellation Income", has been confirmed and ordered to be recovered under Section 73 (1) of the Finance Act, 1994.*

(ii) *Demand of Rs. 1,15,731/- on account of wrong availment of Cenvat Credit [in respect of the invoices, against which the payment was not made to the service provider within 3 months from the date of invoice] has been confirmed under Section 73 (1) of the Finance Act, 1994 read with the provisions of Rule 14 (1) (ii) of the Cenvat Credit Rules, 2004. As the said amount has already been paid by the appellant, the same has been appropriated against the said order.*

(iii) *Demand of Rs. 5,493/- towards short payment of Krishi Kalyan Cess has been confirmed under Section 73 (1) of the Finance Act, 1994. As the said amount has already been paid by the appellant, the same has been appropriated against the said order.*

(iv) *Demand of Rs. 26,522/- on account of wrong availment of Cenvat Credit on the invoices issued by M/s. Havmor Restaurant has been confirmed under Section 73 (1) of the Finance Act, 1994 read with the provisions of Rule 14 (1) (ii) of the Cenvat Credit Rules, 2004.As the said amount has already been paid by the appellant, the same has been appropriated against the said order.*

(v) *Penalties have been imposed of an amount of (a) Rs. 42,37,128/- (b) Rs. 1,15,731/- (c) Rs. 5,493/- & (d) Rs.26,522/- under the provisions of Section 78 (1) of the Finance Act, 1994, in respect of the demands confirmed as mentioned at Sr. (i) to (iv) above.*

(vi) *It has also been ordered to recover the interest under the provisions of Section 75 of the Finance Act, 1994 in respect of the amounts confirmed to be recovered, as mentioned at Sr. (i) to (iv) above.*

3. Being aggrieved with the impugned order, the appellant preferred this appeal on the grounds as reproduced below:

3.1 Demand of Service tax amounting to Rs. 42,37,128/- on account of short payment of service tax on the *'Cancellation Income"*:

(1) The Adjudicating Authority has considered amount of Rs. 4,07,73,952/- as value of taxable services as defined in Section 65B(44) readwith clause (e) of Section 66E of the Act and has confirmed the demand of Service Tax amounting to Rs. 42,37,128/- thereon. Expression "Service" is defined in clause (44) of Section 65B of the Act as any activity carried out by a person for another for consideration and which includes a declared service. Declared service has been defined in Section 66E which interalia includes *"agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act"* by virtue of clause (e). The act of cancellation and retention of the amount consequent to refund of the booking amount did not result into an agreement to the obligation as contemplated in clause (e) of Section 66E of the said act. The agreement under which the unit was booked by the buyer was intended for sale of unit and the fulcrum of the agreement was to convey the unit constructed by the appellant to the buyer whereas the cancellation was merely termination of such agreement. There was no such separate and distinct agreement having its fulcrum and essence to be of cancellation and toleration of an act of the buyer for the amount retained by the appellant. The agreement to which revenue referred to, was entered into for the object of conveying a constructed unit and hence same agreement cannot be later construed as agreement for the purpose of clause (e) as the very object in both the instances are contrary to each other.

(2) It is no dispute that the appellant had not paid tax with respect to the amount retained as cancellation income. They had already paid the due amount of tax on the amount retained, at the time of its taxable event as per Point of Taxation i.e. receipt or due whichever is earlier, under the category of construction service as the amount was actually received in order to provide construction services. Hence, the contention of the adjudicating authority to classify the same under clause (e) of Section 66E is not acceptable.

(3) Further, the amount which was retained by the appellant upon cancellation of booking, had already been taxed under the category of construction service in accordance with the Point of Taxation Rules, 2011 and hence, the same cannot be taxed again under the clause (e) of Section 66E of the Act upon mere cancellation of booking. Taxation of the same again by articulating the same under the category of clause (e) of

Section 66 shall tantamount to duplication of taxation as the said transaction was already subjected to taxation earlier.

(4) As per Sr. No. 4 of the table under Para-2.3.2 of the Education Guide, in case of the *"Advances forfeited for cancellation of an agreement to provide a service"*, it is clarified that *"Since service becomes taxable on an agreement to provide a service such forfeited deposits would represent consideration for the agreement that was entered into for provisions of service."* Accordingly, in the present case, the advance money which was received for provisions of construction service shall be required to be classified as such for construction services under the event of cancellation and when, the amount of cancellation income had already been taxed in past under the relevant category of construction services, the same cannot be taxed again under clause (e) of Section 66E of the Act.

(5) The revenue had rejected the abatement taken by the appellant with respect to the cancellation income and demanded service tax on the value of abatement taken under construction services. This implies that the value of taxable services has been re-determined by the revenue by rejecting the benefit of abatement and as per Rule 4 of the Service Tax (Determination of Value) Rules, 2006, where the Central Excise Officer is not satisfied with the value adopted by the assessee, is not in accordance with the provisions of the Act, he may issue a notice under Rule 4 to the assessee and re-determine the value. In the impugned order, the adjudicating authority has nowhere invoked the provisions of Rule 4 and proposed to reject the value determined by the appellant.

(6) As per the Point of Taxation Rules, 2011, the tax shall be required to be paid at the time of receipt of advance money or provision of service which is earlier and accordingly, the tax was paid on the abated value at the time of receipt of money which was obviously earlier than the year in which the booking was cancelled. Revenue had demanded the tax with reference to the time in which the booking was cancelled and not the time in which money was actually received which is in sheer contradiction of the Point of Taxation Rules, 2011. Hence, the demand of Service Tax is considered to be barred by limitation in as much as the Notice has failed to observe the Point of Taxation Rules, 2011.

3.2 <u>Demand confirmed of (i) Rs. 1,15,731/- (ii) Rs. 5,493/- & (iii) Rs. 26,522/- alleging wrong availment of Cenvat Credit alongwith interest and penalty imposed</u>:

The saving machinery provided in Section 174 of the Central Goods and Services Tax Act, 2017 did not save the provisions of Cenvat Credit Rules, 2004 and

hence, it was not open to the revenue to demand any amount of tax, interest or penalty under the erstwhile rules i.e. Cenvat Credit Rules, 2004. Accordingly, the demand of tax, interest and penalty in as much as it relates to Cenvat Credit, fails to sustain for want of powers, jurisdiction and legality.

3.3 Issuance of Notice invoking extended period of five years in terms of proviso to Section 73 (1) of the Act:

The adjudicating authority has not sufficiently and adequately established suppression on part of the appellant and it is ought to have failed in shifting the onus on to the appellant. In such circumstances, the appellant is not be attributed of grave charges involving suppression. They relied upon various judicial pronouncements, as mentioned below:

(i) *Decision of Hon'ble Supreme Court in case of Pushpam Pharmaceuticals Company Vs. CCE, Bombay 1995 (78) ELT 401 (SC)*

(ii) *CCE Vs. Chemphar Drugs & Liniments-1989 (40) ELT 276 (SC)*

(iii) *Padmini Products Vs. CCE- 1989 (43) ELT 195 (SC)*

(iv) *Continental Foundation Jt. Venture Vs. CCE 2007 (216) ELT 177 (SC)*

3.4 In pursuant to omission of Chapter V to the Finance Act, 1994 by virtue of Section 173 of the CGST Act, 2017, the office of Audit Officer did not have any authority or powers to conduct audit of the records of the appellant and hence the basis of the notice for which impugned order passed was illegal and improper.

3.5 In terms of the Instructions issued by CBIC bearing No. 122/41/2019 dated 05.11.2019, "any specified document that is issued without the electronically generated PIN shall be treated as invalid and shall be deemed to have never been issued". The adjudicating authority had issued the impugned order on 25.04.20120 as it is evident on face of the impugned order whereas the DIN which is quoted over the said order was generated on 12.05.2020 as evident from the copy of the screenshot attached. This implies that the impugned order was issued by the adjudicating authority without generating DIN as on 25.04.2020 and hence, the same shall be considered as illegal order in terms of the said instructions.

4. The appellant was granted opportunity for personal hearing on 16.12.2020 through video conferencing platform. Shri Rahul Patel, Chartered Accountant, appeared for personal hearing as authorised representative of the appellant. He re-iterated the submissions made in Appeal Memorandum.

5. I have carefully gone through the facts of the case available on record, grounds of appeal in the Appeal Memorandum and oral submissions made by the appellant at the time of hearing. I find that the issues to be decided in the case are as under:

(a) *Whether the demand of Service tax amounting to Rs. 42,37,128/- confirmed on account of short payment of service tax on the 'Cancellation Income", as being the declared service provided under clause (e) of Section 66E of the Finance Act, 1994 is legally correct.*

(b) *Whether the provisions of erstwhile Cenvat Credit Rules, 2004 are covered under the saving mechanism provided in Section 174 of the Central Goods and Services Tax Act, 2017, as regards the demands confirmed of (i) Rs. 1,15,731/- (ii) Rs. 5,493/- & (iii) Rs. 26,522/- on account of wrong availment of Cenvat Credit alongwith interest and penalty.*

(c) *Whether the issuance of Notice in the present case, invoking extended period of five years in terms of proviso to Section 73 (1) of the Act is sustainable.*

(d) *In the present case, impugned order has been issued in respect of the demand notice issued on the basis of audit by departmental officers. Whether it is legally correct, when Chapter V to the Finance Act, 1994 has been omitted by virtue of Section 173 of the CGST Act, 2017.*

(e) *Whether the impugned order has been issued by the adjudicating authority, correctly following the directions issued by board for issuance of DIN in respect of all such correspondences.*

6. As regards the issue of demand of Service tax amounting to Rs. 42,37,128/- [as mentioned in above para-5 (a)] confirmed by the adjudicating authority on account of short payment of service tax on the 'Cancellation Income", as being the declared service provided under clause (e) of Section 66E of the Finance Act, 1994, I find that the first point to be decided in the instant case is as to whether the amount of advances forfeited by the appellant would amount to a consideration as envisaged in the service tax law or not and then only the question of taxability arises in the matter.

6.1 Expression "Service" is defined under clause (44) of Section 65B of the Act as any activity carried out by a person for another for consideration and which includes a declared service. Declared Service has been defined in Section 66E which, inter alia, includes "agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act" by virtue of

clause (e) of Section 66E of the Act. Further, the provisions of Section 53 of the Indian Contract Act reads as under:

> *"When a contract contains reciprocal promises and one party to the contract prevents the other from performing his promise, the contract becomes voidable at the option of the party so prevented; and he is entitled to compensation from the other party for any loss which he may sustain in consequence of the non-performance of the contract."*

From the above legal provision, it is amply clear that what is provided therein is the entitlement of a compensation to the party who due to non-performance of the contract by another, may have sustained any loss. The nature of relief envisaged in the said provision is clearly defined as a compensation for the affected party for any loss which he may sustain on account of the act of the other party. Such compensation need not emanate from a civil court proceeding. It can even be agreed upon by the two parties involved even while entering into an agreement. Merely because there is a mutual consent on the amount of compensation receivable in the event of a breach of promise/agreement, the compensation does not take the colour of consideration, as contended by the department. What is to be understood is the fine distinction between the terms "consideration" and "compensation". Consideration is not defined under service tax law but as per provisions of Indian Contract Act, it means a promise made by the promisee in reciprocation. Whereas, the compensation is something which is awarded to the sufferer on account of breach of the contract/promises by the other party. Needless to mention that the consideration involves desire of the promisor whereas compensation involves breach. It is not disputed that definition of the term 'service" as given in Section 65B(44) of the Act envisages "consideration" and not "compensation" flowing from the contract. It is also not the case of the department in the present case that the amount of advances forfeited by the appellant is not in the nature of compensation.

6.2 Further, I find that the department has not disputed the fact that the forfeiture of advance amounts was necessitated out of breach of promise and the amount so forfeited was in lieu of the financial loss the appellant had suffered as a consequence of the act of the buyer. When that being so, such a transaction is clearly in the nature as envisaged in Section 53 of the Indian Contract Act and hence the amount so received would definitely amount to a compensation. Mere receipt of money, which is in the nature of a compensation, can not be treated as consideration for any activity.

6.3 Further, when it is established that the transaction in the case is in fact in the nature of compensation against a breach of promise as envisaged in Section 53 of the Indian Contract Act, the contention that there was an act of tolerating the cancellation of order or refraining from a filing a civil suit for compensation does not stand on merits especially when the compensation intended in terms of Section 53 of the Indian Contract Act has been made good by the appellant themselves by wāy of forfeiture of advances without the intervention of any legal forums. When the appellant himself takes care of situations in the contract which may lead to financial losses to him without taking a legal recourse, it is completely his choice to do so irrespective of the fact whether such an act is consented by the other party or not. It can not be insisted that compensation in such cases necessarily should flow from a legal proceeding. In the instant case, it is the case that the appellant has simply chosen to claim compensation by way of forfeiture of advance amounts deposited by the buyer.

6.4 In view thereof, I am of the considered view that the act of forfeiture of advance amounts by the appellant in the present case is in the nature of a compensation as envisaged under Section 53 of the Indian Contract Act, 1872 against the breach of promise/agreement on the part of the buyer and such a transaction, being compensation against breach of promise/agreement, does not *per se* amount to a consideration and consequently does not *per se* constitute any service or declared service as envisaged under Section 65B (44) and Section 66E(e) of the Act. When there is no consideration, there is no element of service as defined under the Act and consequently there can not be any question of service tax in the matter.

6.5 Further, it is undisputed fact observed in the present case that the agreement under which the unit was booked by the buyer was intended for sale of unit and the focus of the agreement was to convey the unit constructed by the Appellant to the buyer. The appellant also contended that the cancellation of the said agreement was merely termination of such agreement and there was no separate and distinct agreement having its fulcrum and essence to be of cancellation and toleration of an act of the buyer for the amount retained by the Appellant.

6.6 The adjudicating authority has nowhere disputed the fact that the Appellant had not paid tax with respect to the amount retained as cancellation income. The appellant had already paid the due amount of tax on the amount retained, at the time of its taxable event as per the

provisions of the Point of Taxation Rules, 2011 i.e. receipt or due whichever is earlier, under the category of construction services in terms of the agreement existing at the relevant time and hence, same cannot be taxed again under the clause (e) of Section 66E of the Act upon mere cancellation of booking.

6.7 As per Sr. No. 4 of the table under Para-2.3.2 of the Education Guide, in case of the "*Advances forfeited for cancellation of an agreement to provide a service*", it is clarified that "*Since service becomes taxable on an agreement to provide a service such forfeited deposits would represent consideration for the agreement that was entered into for provisions of service.*" Accordingly, in the present case, the advance money which was received for provisions of construction service shall be required to be classified as such for construction services under the event of cancellation. Further, in the present case when the amount of cancellation income had already been taxed in past under the relevant category of construction services, again to tax the same amount under clause (e) of Section 66E of the Act shall tantamount to duplication of taxation.

7. Hon'ble CESTAT, New Delhi in case of Lemon Tree Hotel Versus Commissioner, GST, C.E & Customs, Indore [reported at 2020 (34) G.S.T.L. 220 (Tri. - Del.)] vide Final Order No. A/50820/2019-SM(BR), dated 8-3-2019 held as reproduced below:

> "***5.*** *Having considered the rival contentions, I find that the aforementioned observation of the Commissioner (Appeals) are erroneous and have no legs to stand. Admittedly, the customers pay an amount to the appellant in order to avail the hotel accommodation services, and not for agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act; and chargeable on full value and not on abated value. The amount retained by the appellant is for, as they have kept their services available for the accommodation, and if in any case, the customers could not avail the same, thus, under the terms of the contract, they are entitled to retain the whole amount or part of it. Accordingly, I hold that the retention amount (on cancellation made) by the appellant does not undergo a change after receipt. Accordingly, I hold that no service tax is attracted under the provisions of Section 66E(e) of the Finance Act. Accordingly, this ground is allowed in favour of the appellant."*

8. Further, Hon'ble CESTAT, New Delhi in case of Accounts Officer, Madhya Pradesh Kshetra Vidyut Vitran Company Ltd. Versus Commr. Of CGST, Cus. & C. Ex. Bhopal vide Final Order No. A/50807/2019-SM (BR), dated 27-5-2019 [reported at 2019 (29) G.S.T.L. 734 (Tri. - Del.)] also held as reproduced below:

> "***7.*** *Having considered the rival contentions, I find that the said amount of penalty in question is part of the net amount, after deduction of service tax and other applicable tax from the gross amount. Further, the*

service tax is a destination based tax and the amount is taxable only once. Thus, admittedly, when the amount is already taxed and it is part of the taxed amount, being deducted from the bill, by way of penalty and reflected by the appellant under the head "Miscellaneous Income not pertaining to Revenue". The said amount cannot be again subjected to service tax on this score alone. Further, I find that this amount is not for any service to be rendered under Section 66E(e) of the Finance Act. Accordingly, the appeal is allowed. The service tax and penalty retained by the Commissioner (Appeals) is set aside. The appellant is entitled to consequential benefit in accordance with law. The appeal along with misc. application stands allowed."

9. In view of the above discussion and judicial pronouncements, the findings of the adjudicating authority vide the impugned order as regards the demand of Service tax amounting to Rs. 42,37,128/- on the 'Cancellation Income", treating the same as "*agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act*" and as declared service in terms of clause (e) of Section 66E of the Finance Act, 1994 are not legally sustainable and are liable to be set aside.

10. As regards the contention of the appellant in respect of the legality of demand under Cenvat Credit Rules, 2004 as well as demand in pursuance of audit [the issues as mentioned at above para-5 (b) & para-5 (d)], it would be proper to examine the relevant provisions under sub-section (2) of Section 174 of Central Goods and Services Tax Act, 2017 which are re-produced below:

"(2) The repeal of the said Acts and the amendment of the Finance Act, 1994 (hereafter referred to as "such amendment" or "amended Act", as the case may be) to the extent mentioned in the sub-section (1) or section 173 shall not—

(a) revive anything not in force or existing at the time of such amendment or repeal; or

(b) affect the previous operation of the amended Act or repealed Acts and orders or anything duly done or suffered thereunder; or

(c) affect any right, privilege, obligation, or liability acquired, accrued or incurred under the amended Act or repealed Acts or orders under such repealed or amended Acts:

Provided that any tax exemption granted as an incentive against investment through a notification shall not continue as privilege if the said notification is rescinded on or after the appointed day; or

(d) affect any duty, tax, surcharge, fine, penalty, interest as are due or may become due or any forfeiture or punishment incurred or inflicted in respect of any offence or violation committed against the provisions of the amended Act or repealed Acts; or

(e) affect any investigation, inquiry, verification (including scrutiny and

audit), assessment proceedings, adjudication and any other legal proceedings or recovery of arrears or remedy in respect of any such duty, tax, surcharge, penalty, fine, interest, right, privilege, obligation, liability, forfeiture or punishment, as aforesaid, and any such investigation, inquiry, verification (including scrutiny and audit), assessment proceedings, adjudication and other legal proceedings or recovery of arrears or remedy may be instituted, continued or enforced, and any such tax, surcharge, penalty, fine, interest, forfeiture or punishment may be levied or imposed as if these Acts had not been so amended or repealed;"

In view of the above, it is observed that the saving provisions are clearly provided in terms of Section 174 of the Central Goods and Services Tax Act, 2017 in respect of repealing of Central Excise Act, 1944 as well as amendment of the Finance Act, 1994 [omission of Chapter V to the Finance Act, 1994] vide Section 173 of the said act which will also includes the rules made thereunder. Accordingly, I do not find any merit in the contention of the appellant contesting the legality of demands under the Cenvat Credit Rules, 2004 as well as the issue of demand in pursuance to the audit by departmental officers.

11. As regards the issue of demand invoking the extended period, it is observed that appellant has not disclosed to the revenue that they have wrongly availed Cenvat Credit. This was detected during the course of audit. Thus, they have suppressed the material facts with intention to evade the payment of service tax.

11.1 In the case of Rathi Steel & Power Ltd. [2015 (321) ELT 200 (All.)], the High Court of Judicature at Allahabad held that:

"32. We further find that under Rules, 2004, a burden is cast upon the manufacturer to ensure that Cenvat Credit is correctly claimed by them and proper records are maintained in that regard.

33. The assesse, in response to the show cause notice had stated that there is no provision in Central Excise Law to disclose the details of the credit or to submit the duty paying documents, which in our opinion is false and an attempt to deliberately contravene the provisions of the Act, 1944 and the rules made there under with an intent to evade the duty.

34. In our opinion, the facts of the present case clearly suggest wilful suppression of facts by the assesse as well as contravention of the provisions of the Act and rules framed thereunder with an intent to evade the demand of duty as would be covered by Clauses IV and V of Section 11A (1) of the Act, 1944. Therefore, the invocation of the extended period of limitation in the facts of the present case is fully justified."

11.2 Further, the Hon'ble High Court of Judicature for Andhra Pradesh at Hyderabad in the case of Sree Rayalaseema Hi-Strength Hypo Ltd. Vs. Commissioner of Custom & C. Excise, Tirupati [2012 (278) ELT 167 (A.P)] also held that:

> *"Once the assessee availed credit under Rule 2(K) of the Rules of 2004 without entitlement it amounts to contravention of the rule with the intention of evading payment and the extended period of limitation would be available to the Revenue, notwithstanding the decision not to propose penalty upon the assessee."*

11.3 In view of the above, I am in agreement with the views of the adjudicating authority that the proviso to Section 73 (1) of the Act read with the provisions of Rule 14 (1) (ii) of the Cenvat Credit Rules, 2004 is applicable in the present case for invoking the extended period of limitation for recovery of Cenvat Credit wrongly availed [as mentioned in above para-2.2 at Sr. No. (ii) & (iv)] as well as Krishi Kalyan Cess short paid [as mentioned in above para-2.2 at Sr. No. (iii)] by the appellant.

12. As regards the contention raised by the appellant in respect of the issuance of DIN, I find that the impugned order has been issued by the adjudicating authority and communicated to the appellant under a cover of Document Identification Number (DIN) only and the appellant has nowhere disputed the said fact. It is also observed from the Form of Appeal in 'Form ST-4' filed by the appellant with this office that the impugned order has been communicated to the appellant on 04.06.2020 and accordingly, the impugned order has been issued following the due procedure prescribed for issuance of DIN.

13. On careful consideration of the relevant legal provisions, judicial pronouncements and submission made by the appellant, I pass the Order as below:

(1) The demand of Service tax amounting to Rs. 42,37,128/- confirmed by the adjudicating authority vide the impugned order on account of short payment of service tax on the 'Cancellation Income" [as mentioned in above para-2.2 (i)], fails to survive on merits before law and hence deserves to be set aside. When demand fails, there cannot be any question of interest or penalty. Accordingly, I allow the appeal and set aside the impugned order to the extent of the demand confirmed of Service tax for an amount of Rs. 42,37,128/- alongwith interest

as well as the penalty imposed of Rs. 42,37,128/- under the provisions of Section 78 (1) of the Finance Act, 1944.

(2) The demands confirmed by the adjudicating authority of (i) Rs. 1,15,731/- & (ii) Rs. 26,522/- towards wrong availment of Cenvat Credit as well as of (iii) Rs. 5,493/- towards short payment of Krishi Kalyan Cess alongwith interest under Section 75 of the Finance Act, 1994 and imposition of penalty amounts of (i) Rs. 1,15,731/- (ii) Rs. 26,522/- & (iii) Rs. 5,493/- under Section 78 (1) of the Finance Act, 1994, is upheld.

14. अपीलकर्ता द्वारा दर्ज की गई अपीलो का निपटारा उंपरोक्त तरीके से किया जाता है।
The appeals filed by the appellant stand disposed off in above terms.

15th February, 2021.

(Akhilesh Kumar)
Commissioner (Appeals)

Date: 15th February, 2021.

Attested

(M.P.Sisodiya)
Superintendent (Appeals)
Central Tax, Ahmedabad

By Regd. Post A. D
M/s. Adani Township & Real Estate Company Pvt. Ltd.,
Atreco House, CBD, "Shantigram",
Near Vaishnodevi Circle,
Ahmedabad-382421,
[**Current office**:
Adani House,
Near Mithakhali Circle,
Navrangpura, Ahmedabad-380009]

Copy to :

1. The Pr. Chief Commissioner, CGST and Central Excise, Ahmedabad.
2. The Commissioner, CGST and Central Excise, Commissionerate-Gandhinagar.
3. The Deputy /Asstt. Commissioner, Central GST, Division-Gandhinagar, Commissionerate-Gandhinagar.
4. The Deputy/Asstt. Commissioner (Systems), Central Excise, Ahmedabad-South.
5. Guard file
6. PA File