आयुक्त(अपील)का कार्यालय,

Office of the Commissioner (Appeal),

केंद्रीय जीएसटी, अपील आयुक्तालय,अहमदाबाद

Central GST, Appeal Commissionerate, Ahmedabad

जीएसटी भवन, राजस्वमार्ग, अम्बावाड़ीअहमदाबाद३८००१५.

CGST Bhavan, Revenue Marg, Ambawadi, Ahmedabad 380015

07926305065- टेलेफैक्स07926305136

DIN : **20211164SW0000015956**

स्पीड पोस्ट

क फाइल संख्या : File No : GAPPL/COM/STP/1281/2020 /H695 To H699

ख अपील आदेश संख्या Order-In-Appeal Nos.**AHM-EXCUS-003-APP-60/2021-22**
दिनाँक Date : **22-11-2021** जारी करने की तारीख Date of Issue 30.11.2021

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

ग Arising out of Order-in-Original No. **26/D/GNR/KP/2020-21** दिनाँक: **19.10.2020** issued by Assistant Commissioner, CGST& Central Excise, Division Gandhinagar, Gandhinagar Commissionerate

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

M/s Gujarat State Electricity Corporation Ltd
Thermal Power Station, Gandhinagar

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 हानिकार खाने 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 मे 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 भीतरमूल–आदेश एवं अपील आदेश की दो–दो प्रतियों के साथ उचित आवेदन किया जाना चाहिए।उसके साथ खाता इ.का मुख्य शीर्ष 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 होतो रूपये 200/–फीस भुगतान की जाए और जहाँ संलग्नरकम 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 सेवा कर अपीलीय न्यायाधिकरण के प्रति अपील:–
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

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

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,BahumaliBhawan,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 होत 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 शुल्कअधिनियम 1970 यथासंशोधित की अनुसूचि–1 के अंतर्गत निर्धारित किए अनुसार उक्त आवेदन या मूलआदेश यथास्थिति निर्णयन प्राधिकारी के आदेश में से प्रत्येक की एक प्रतिपर रू.6.50 पैसे कान्यायालय 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.

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

केन्द्रीय उत्पाद शुल्क और सेवाकर 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:
(xcvii) amount determined under Section 11 D;
(xcviii) amount of erroneous Cenvat Credit taken;
(xcix) amount payable under Rule 6 of the Cenvat Credit Rules.

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

The present appeal has been filed by M/s. Gujarat State Electricity Corporation Limited, GSECL TPS Gandhinagar Thermal Power Station, Gandhinagar (hereinafter referred to as the appellant) against Order in Original No. 26/D/GNR/KP/2020-21 dated 19.10.2020 [hereinafter referred to as "*impugned order*"] passed by the Assistant Commissioner, CGST, Division : Gandhinagar, Commissionerate : Gandhinagar [hereinafter referred to as "*adjudicating authority*"].

2. Briefly stated, the facts of the case is that the appellant were holding Service Tax Registration No. AAACG6864FST002 and engaged in providing services of Renting of Immovable Property, Legal Consultancy (RCM), Works Contract (RCM), Rent-a-Cab (RCM), Security Service (RCM), Manpower Recruitment (RCM) and GTA (RCM) under Chapter V of the Finance Act, 1994. During the course of the audit of the records of the appellant by the departmental audit officers, it was observed that they had booked expense under the head of 'Renting of Motor Vehicle' and were discharging service tax liability on such service under the Reverse Charge Mechanism (RCM). It was observed that the appellant had paid service tax by taking abatement @ 60% of the taxable value as per Sr.No.7(a) of Notification No. 30/2012 dated 20.6.2012. It appeared that in terms of Section 68 (2) of the Finance Act, 1994 read with the provisions of Rule 2 (d)(F) of the Service Tax Rules, 1994 and Notification No. 30/2012-ST dated 20.6.2012, the service recipient was liable to pay 100% of the Service Tax in respect of such service. Thus, it appeared that the appellant was liable to pay Service Tax amounting to Rs.1,41,174/-.

2.1 It was further observed that the appellant had shown income under Tender Income during the F.Y. 2016-17 but had not paid service tax on such income. The said income was in lieu of the tender allotment process to the applicant/bidder. It appeared that the tender fees was recovered by the appellant 'to do an act' for allotment process of tender and they appeared to have provided a service which falls within the ambit of

Section 66(E)(e) of the Finance Act, 1994. The appellant, was accordingly, liable to pay service tax amounting to Rs.1,30,087/- on such Tender Fees received by them.

2.2 Further, on reconciliation of ST-3 returns and the Income Ledger of the appellant in respect of Renting of Immovable Property, it was observed that the appellant had short paid service tax amounting to Rs.5,524/-.

2.3 On scrutiny of the financial statements of the appellant, it was observed that they had in March, 2017 shown an income of Rs.16,82,676/- with the narration " The amt. of S.D. Retention & Stale cheque over last three year consider as company Rev.". The appellant had informed vide letter dated 05.12.2019 that the security deposit was towards terms and condition of contract for the purpose of ensuring completion of works/supply. These were refundable in nature and refunded to respective parties/vendors on receipt of NOC from user section/department involved in the execution of works/supply. The amount was booked as income due to non performance of situation as per contract. This appeared to be a consideration for the service defined under Section 66E (e) of the Finance Act, 1994 and accordingly, the appellant was liable to pay Service Tax amounting to Rs.2,52,401/-.

3. The appellant was issued a Show Cause Notice No. 291/19-20 dated 08.06.2020 from F.No. VI/1(b)/443/IA/C-VIII/AP-53/18-19 seeking to :

- Demand and recover the Service Tax totally amounting to Rs.5,29,186/- (Rs.1,41,174/- + Rs.1,30,087/- + Rs.5,524/- + Rs.2,52,401/-) under Section 73 of the Finance Act, 1994 by invoking the extended period of limitation;
- Recover interest under Section 75 of the Finance Act, 1994 ;
- Impose penalty under Section 78 of the Finance Act, 1994.

4. The said SCN was adjudicated vide the impugned order wherein :

- The demand for Service Tax amounting to Rs.3,88,012/- (Rs.1,30,087/- + Rs.2,52,401/- + Rs.5,524/-) was confirmed under Section 73 of the Finance Act, 1994 .
- Demand for Service Tax amounting to Rs.1,41,174/- was dropped.
- Interest was ordered under Section 75 of the Finance Act, 1994;
- Penalty amounting to Rs.3,88,012/- was imposed under Section 78 of the Finance Act, 1994;

5. Being aggrieved with the impugned order, the appellant has filed the instant appeal on the following grounds:

i) The impugned order is ex-facie bad in law in as much as the same is passed contrary to the facts of the case. On this single ground, the impugned order deserves to be quashed and set aside.

ii) The Tender Fees collected and write off of security deposit is not at all a service and by no stretch of imagination they can be considered as covered under the definition of Declared Services.

iii) The Tender Forms are sold to the prospective bidders and a tender fee is collected. No service has been provided by selling tender form. They fail to understand how sale of tender form can be considered as agreeing to refrain from an act of a situation or to do an act.

iv) They have not entered into any specific contract to tolerate an act or situation. Mere passing of journal entry in the books of accounts for write off of security deposits barred by law of limitation does not imply that any service has been provided or any consideration has been received.

v) The issue involved is that of substantial interpretation of the statutory provisions. Every non-payment or non-levy of tax does'nt attract extended period and penalty.

vi) They were always under the bonafide belief that the tender fees and write off of security deposits does not amount to consideration flowing as no service was received and therefore they are not liable to pay service tax. Under the circumstances, it cannot be

said that there was any malafied intent of evading payment of service tax by reasons of fraud, misstatement, suppression etc.

5.1 The appellant have also filed written submission on 17/11/2021 wherein they, interalia, stated that :

- Tender fees is collected to increase the quality of bids received and ensures that the contractors with the requisite expertise are given the opportunity and submit the bids needed. Thus by inviting tenders and collecting tender fees, no sort of service is provided by them.
- By collecting tender fees they are inviting quotations from suppliers/contractors to do an act. They themselves are not doing any act or providing any service.
- Section 67 clearly indicates that the gross amount charged by the service provider has to be for the service provided. Therefore, the amount charged has to be necessarily a consideration for the service provided which is taxable under the Act.
- Any amount which has no nexus with the taxable service and is not a consideration for the service provided does not become part of the value which is taxable under Section 67.
- It follows from the decisions of the Hon'ble Supreme Court in Bhayana Builders and Intercontinental Consultants and the decision of the Hon'ble Tribunal in Bhayana Builders that consideration must flow from the service recipient to the service provider and should accrue to the benefit of the service provider and that the amount charges has necessarily to be a consideration for the taxable service provided under the Finance Act.
- The activities that are contemplated under Section 66E(e) are when one party agrees to refrain from an act, or to tolerate an act or a situation, or to do an act, are activities where the agreement specifically refers to such an activity and there is a flow of consideration for this activity.

- They rely upon the decisions of the Hon'ble Tribunal in the case of 1) South Eastern Coalfields Ltd Vs. Commissioner of C.Ex. & Service Tax and 2) M.P. Poorva Kshetra Vidyut Vitran Co Ltd. Vs. Principal Commissioner of Service Tax.
- The security deposit is a amount deposited by the contractor/supplier to ensure performance. It is not in the nature of consideration and is refundable. The Law of Limitation Act, 1963 provides that after expiry of three years, claim for recovery of an amount has not legal right.
- Thus the security deposit which became due but not claimed after three years became time barred. These amounts were written off in the books of accounts by passing journal entry. This amount is accumulated over the years and is not the income of the current year. It is not consideration towards any service provided. It is not the case where the security deposit is forfeited for any reason. Any amount credited to the Profit and Loss account cannot be considered as consideration towards service provided and brought under the tax net.
- Even if the security deposit is considered as penalty income, service tax would not be applicable as any amount charged which has no nexus with the taxable service and is not a consideration for the service provided does not become part of the value which is taxable.
- They had rented out immovable property for both residential and commercial purposes and rent recovered were accounted for separately under different accounting heads. Rent from immovable property used for residential purpose is exempt from service tax being covered under the negative list. However, erroneously rental income of Rs.36,828/- was booked under rent for commercial purpose instead of residential purpose.

6. Personal Hearing in the case was held on 17.11.2021 through virtual mode. Ms. Neeta Vs. Ladha, CA, appeared on behalf of the appellant for the hearing. She reiterated the submissions made in appeal memorandum.

7. I have gone through the facts of the case, submissions made in the Appeal Memorandum, and submissions made at the time of personal hearing and material available on records. I find that the issues for decision before me are :-

A) Whether the Tender Fees received by the appellant can be considered a consideration for provision of taxable service of 'agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act' and chargeable to service tax under Section 66E(e) of the Finance Act, 1994 ?

B) Whether the Security Deposit recovered by the appellant allegedly towards penalties due to non-performance as per contract is a consideration for provision of taxable service of 'agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act' and chargeable to service tax under Section 66E(e) of the Finance Act, 1994 ?

C) Whether the appellant had short paid service tax on Renting of Immovable Property Service?

7.1 As regards the first issue, I find that it has been alleged in the SCN issued to the appellant that the Tender Fees received by them was a consideration 'to do an act' - for allotment process of tender', which appeared to fall under Section 66E (e) of the Finance Act, 1994 as a declared service. I find that tender fees are collected when bids are invited and tenders are floated. The fees collected are a part of the process of tender and generally towards the tender documents. There is no service involved in the process wherein only the documents are supplied to the interested parties on payment of the tender fees. This can in no way be termed to be either agreeing to do an act or refrain from an act. Therefore, I am of the considered view that the Tender Fees collected by the appellant is not a consideration and neither is the appellant providing any taxable service by supplying tender documents on payment of fees. Consequently, I find that the demand in respect of the Tender Fees collected by the appellant is not legally sustainable.

8. The second issue is that of charging of service tax on Security Deposit recovered by the appellant allegedly towards penalties due to non-performance as per contract, under Section 66E(e) of the Finance Act, 1994. The appellant have contended that the security deposits given by their contractors/suppliers which were over three years old and not claimed became barred by the Law of Limitation and hence, by journal entry was passed and the amounts booked as income. They have submitted copy of the journal voucher along with detailed calculation of the amounts transferred. I find merit in the contention of the appellant that mere transfer of amounts from liability to Income by passing journal entry would not make the amounts liable to payment of service tax. There has to be a nexus between the amounts received and the service provided. I find that the department has not adduced any evidence to support the allegation that the forfeited Security Deposit was a consideration towards a taxable service provided by the appellant.

9. I find from the case records that the appellant had vide their letter No. GSECL/GTPS/Acctts/Service Tax Audit dated 05.12.2019 informed that the security deposit retention was penalty in nature due to non performance as per contract. The department, therefore, was of the view that such retention of deposits as penalty for non performance of contract was a consideration for service in terms of Section 66E (e) of the Finance Act, 1994. The issue, therefore, to be decided is whether recovery of penalty from suppliers/contractors falls under the category of declared services viz. "*Agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act*" as provided in Section 66E (e) of the Finance Act, 1994.

9.1 I find that a similar issue has been decided by me earlier vide OIA No. AHM-EXCUS-002-APP-17/2021-22 dated 17/09/2021 in the case of M/s.Hi Tech Industry. The relevant part of this OIA is reproduced as under :-

"I find that the first point to be decided in the instant case is as to whether the amount booked under Order Cancellation Income 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. The department is contending that the said amount is nothing but a consideration for tolerating the act of not performing the contractual obligation by the buyers of the appellant. At this juncture it is relevant to refer to Section 53 of the Indian Contract Act which 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 was prevented from performing the contract for any loss which he may sustain as a consequence of the non-performance of the contract. 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. Merely because there is a mutual agreement on the amount of compensation 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 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 by the other party. The definition of the term 'service" as given in Section 65B(44) of the Act envisages "consideration" and not "compensation". I find that the amount forfeited/penalty by the buyers of the appellant is in the nature of a compensation and not consideration as contended by the department.

10. It is a fact accepted by the department too that the amount forfeited/penalty is for tolerating the act of not performing the contractual obligation. Therefore, 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 cannot be treated as consideration for any activity. Further, when it is established that the transaction in the case is in the nature of compensation against a breach of contract as envisaged in Section 53 of the Indian Contract Act, the contention that there was an act of tolerating the act of not performing the contractual obligation by the service provider is not sustainable.

11. I am, therefore, of the considered view that the amount booked as Order Cancellation income which is infact forfeiture of amounts/penalty paid by the buyers of the appellant in the present case is in the nature of a compensation as envisaged in Section 53 of the Indian Contract Act, 1872 for non performance of the contractual obligations. Such a transaction, being compensation against breach of contractual obligations, does not per se amount to a consideration and 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 cannot be any question of service tax in the matter.

12. I find that the Kolkata Regional Bench of Hon'ble Tribunal in their decision dated 25.10.2019 in Service Tax Appeal No.ST/76339 of 2018 (DB) in the case of M/s Amit Metaliks Ltd., Durgapur Vs. The Commissioner of Central Goods and Services Tax, Bolpur, has dealt with a similar kind of situation as in the present case and it was held that :

> *27. As far as the compensation received from M/s Amit Mines is concerned, the Show Cause Notice mentions the leviablity of Service tax on the amount received towards the compensation for non supply of the agreed quantity of manganese ore under Section 66 E(e) of Finance Act which is even otherwise is purely the transaction sale of the iron ore to the Appellant by M/s Amit Mines. Thus, the compensation amount is towards default on the sale of the goods. The sale could not be effected and, therefore, Appellant received the liquidated damage by way of raising the debit note which was honoured by M/s AML. Thus, this amount of compensation/ liquidated damage cannot be treated as service under Section 66 E(e) of the Act. The demand is thus not sustainable on this aspect also.*

13. The appellant have also relied upon a few decisions in support of their stand. I find that the decision dated 22.12.2020 of the Hon'ble Tribunal in the case of M/s.South Eastern Coalfields Vs. Commissioner of Central Excise and Service Tax, Raipur is applicable to the present case. In said the case the issue was the collection of an amount towards compensation/penalty from the buyers of coal on the short lifted/un-lifted quantity of Coal; collected amount towards compensation/penalty from the contracts engaged for breach of terms and conditions; and collected amount in the name of damages from the suppliers for breach of the terms and conditions of the contract. The department contended that this amount was taxable as a declared service under Section 66E (e) of the Finance Act, 1994. The Hon'ble Tribunal held that :-

> *" 43. It is, therefore, not possible to sustain the view taken by the Principal Commissioner that penalty amount, forfeiture of earnest money deposit and liquidated damages have been received by the appellant towards*

consideration for tolerating an act leviable to service tax under section 66(E) (e) of the Finance Act."

14. The appellant have also relied upon the decision in the case of M.P. Poorva Kshetra Vidyut Vitran Co. Ltd. Vs. Principal Commr., CGST & C. EX., Bhopal reported at 2021 (46) G.S.T.L. 409 (Tri. - Del.). In the said case the appellant was collecting an amount towards liquidated damages from the contractors and suppliers when they failed to ensure compliance of the terms of the contract within the time stipulated and the appellant was also recovering amount from consumers for theft and un-authorized use of electricity. According to the Department, this amount was not included in Section 66D(k) of the negative list and so a show cause notice was issued to the appellant mentioning therein that the penalty amount and the amount collected towards theft of electricity by the appellant was towards consideration for tolerating an act and covered as a "declared service" under Section 66E(e) of the Finance Act w.e.f. July 1, 2012. It was held by the Hon'ble Tribunal that :

"Thus, for all those reasons stated above, it is not possible to sustain the order passed by the Principal Commissioner confirming the demand of service tax on the amount collected towards liquidated damages and theft of electricity. The order dated December 31, 2018 is accordingly set aside and the appeal is allowed".

15. In the case of M/s.K.N. Food Industries Pvt Ltd, Vs. Commissioner of CGST and Central Excise, reported at 2020 (38) G.S.T.L. 60 (Tri. - All.) the Hon'ble Tribunal had held that :

"In the present case apart from manufacturing and receiving the cost of the same, the appellants were also receiving the compensation charges under the head ex-gratia job charges. The same are not covered by any of the Acts as described under Section 66E(e) of the Finance Act, 1994. The said sub-clause proceeds to state various active and passive actions or reactions which are declared to be a service namely; to refrain from an act, or to tolerate an act or a situation, or to do an act. As such for invocation of the said clause, there has to be first a concurrence to assume an obligation to refrain from an act or tolerate an act etc. which are clearly absent in the present case. In the instant case, if the delivery of project gets delayed, or any other terms of the contract gests breached, which were expected to cause some damage or loss to the appellant, the contract itself provides for compensation to make good the possible damages owning to delay, or breach, as the case may be, by way of payment of liquidated damages by the contractor to the appellant. As such, the contracts provide for an eventuality which was uncertain and also corresponding consequence or remedy if that eventuality occurs. As such the present ex-gratia charges made by M/s. Parle to the appellant were towards making good the damages, losses or injuries arising from "unintended" events and does not emanate from any obligation on the part of any of the parties to tolerate an act or a situation and cannot be considered to be the payments for any services.

***5.** In view of the foregoing, we find no reasons to uphold the impugned orders. Inasmuch as the appeal stands allowed on merits, the plea of limitation is not being adverted to."*

16. In the light of the above decisions of the Hon'ble Tribunal, I find that the contention of the department is not sustainable. Having found no merit in the contention of department for raising demand in the matter, I am not going into the merits of appellant's other contentions in the matter."

9.2 I find that the facts involved in the present appeal are similar to that in the above case. I further find that there is no change in the legal provisions nor has there been any judicial ruling contrary to the aforesaid orders. That being so, I do not find any reason to take a different view in the matter. Hence, following my above decision on similar facts as well as the judicial pronouncements cited in the OIA supra, it is held in the present case also that the retention of security deposit by the appellant is not a consideration and neither has any service in terms of Section 66E (e) of the Finance Act, 1994 been provided by the appellant. Consequently no service tax is payable by the appellant on the penalty recovered by them from their contractors/suppliers. The demand confirmed in the impugned order, is therefore, not legally sustainable.

10. As regards the issue of short payment of service tax on income from renting of immovable property, I find that 'Renting of Immovable Property" is a Declared Service under Section 66E(a) of the Finance Act, 1994 and accordingly, chargeable to service tax. The Negative List of Services is as per Section 66D of the Finance Act, 1994 and sub-section (m) of the said Section 66D reads as *"services by way of renting of residential dwelling for use as residence*". It has been contended by the appellant that they are renting immovable property for both commercial as well as residential purpose. However, erroneously they had booked an income of Rs.36,828/- under rent for commercial purpose instead of rent for residential purpose. I find that the appellant have not put forth any evidence to substantiate their contention either before the adjudicating authority or in their appeal memorandum. Therefore, I am not inclined to accept their contention and accordingly, I hold that the adjudicating authority has rightly confirmed the demand for service tax along with interest and penalty.

11. In view of the above discussions, I set aside the demand in respect of the Tender Fees charges collected by the appellant from their contractors/suppliers. I also set aside the demand in respect of the Security Deposits retained by the appellant and booked as income. As the demand does not survive, the question of interest and penalty does not arise. I uphold the confirmation of demand for service tax amounting to Rs.5,524/- along with interest and penalty in respect of the income from renting of immovable property.

12. अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।

The appeal filed by the appellant stands disposed off in above terms.

22nd November 2021.

(Akhilesh Kumar)
Commissioner (Appeals)

Attested:

(N.Suryanarayanan. Iyer)
Superintendent(Appeals),
CGST, Ahmedabad.

Date: .11.2021.

BY RPAD / SPEED POST

To

M/s. Gujarat State Electricity Corporation Limited, Appellant
GSECL TPS Gandhinagar Thermal Power Station,
Gandhinagar

The Assistant Commissioner, Respondent
CGST & Central Excise,
Division : Gandhinagar,
Commissionerate : Gandhinagar

Copy to:

1. The Chief Commissioner, Central GST, Ahmedabad Zone.
2. The Commissioner, CGST, Gandhinagar.
3. The Assistant Commissioner (HQ System), CGST, Gandhinagar. (for uploading the OIA)
4. Guard File.
5. P.A. File.