

सत्यमेव जयते

## आयुक्त(अपील) का कार्यालय,

Office of the Commissioner (Appeal),

केंद्रीय जीएसटी, अपील आयुक्तालय, अहमदाबाद

Central GST, Appeal Commissionerate, Ahmedabad

जीएसटी भवन, राजस्वमार्ग, अम्बावाड़ी अहमदाबाद 380015.

CGST Bhavan, Revenue Marg, Ambawadi, Ahmedabad 380015

☎ 07926305065- टेलीफैक्स 07926305136



DIN : 20211264SW0000723007

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फाइल संख्या : File No : GAPPL/COM/STP/1477/2021

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अपील आदेश संख्या Order-In-Appeal Nos. AHM-EXCUS-003-APP-81/2021-22

दिनांक Date : 28-12-2021 जारी करने की तारीख Date of Issue 31.12.2021

आयुक्त (अपील) द्वारा पारित

Passed by Shri Akhilesh Kumar, Commissioner (Appeals)

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Arising out of Order-in-Original No. DC/D.Khatik/25/ST/Kadi दिनांक: 25.01.2021 issued by Deputy Commissioner, CGST & Central Excise, Division Kalol, Gandhinagar Commissionerate

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

M/s Oswal Industries Limited

(Unit No. 3),

Block No. 258, Kalol Mehsana Highway,

Kalol, Gandhinagar-382721

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

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

भारत सरकार का पुनरीक्षण आवेदन :

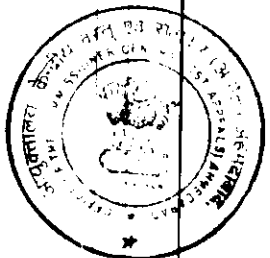
#### Revision application to Government of India:

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1994 की धारा अंतर्गत नीचे बताए गए मामलों के बारे में पूर्वोक्त धारा को उप-धारा के प्रथम परन्तुक के अंतर्गत पुनरीक्षण आवेदन 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, 4<sup>th</sup> 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 में हो माल की प्रक्रिया 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 मामले 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 ड्यूटी क्रेडिट 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 ईए-8 में दो प्रतियों में, प्रेषित आदेश के प्रति आदेश प्रेषित दिनांक 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 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 रुपये या उससे कम होतो रुपये 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.

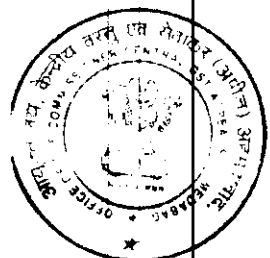
सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवा कर अपीलीय न्यायाधिकरण के प्रति अपील:-  
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(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 2<sup>nd</sup>माला, बहुमाली भवन, असरवा, गिरधरनागर, अहमदाबाद-380004

(a) To the west regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at 2<sup>nd</sup> 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. Registrar 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 आदेश के लिए फीस का भुगतान उपर्युक्त ढंग से किया जाना चाहिए इस तथ्य के होते हुए भी कि लिखा पढ़ी कार्य से बचने के लिए यथास्थिति अपीलीय न्यायाधिकरण को एक अपील या केन्द्रीय सरकार को एक आवेदन किया जाता है।

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

- (59) 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 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 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.

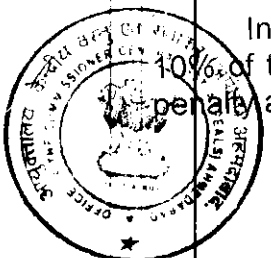
For an appeal to be filed before the CESTAT, 10% of the Duty & Penalty confirmed by the Appellate Commissioner would have to be pre-deposited, provided that the pre-deposit amount shall not exceed Rs.10 Crores. It may be noted that the pre-deposit is a mandatory condition for filing appeal before CESTAT. (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:

- (clx) amount determined under Section 11 D;
- (clxi) amount of erroneous Cenvat Credit taken;
- (clxii) 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. Oswal Industries Ltd, Unit No.3, Block No. 258, Kalol-Mehsana Highway, Kalol, Gandhinagar – 382 721 (hereinafter referred to as the appellant) against Order in Original No. DC/D.KHATIK/25/ST/KADI dated 25-01-2021 [hereinafter referred to as "*impugned order*"] passed by the Deputy Commissioner, CGST & Central Excise, Division : Kalol, Commissionerate : Gandhinagar [hereinafter referred to as "*adjudicating authority*"].

2. Briefly stated, the facts of the case is that the appellant is holding Central Excise Registration No. AAACO3443LXM003 and Service Tax Registration No. AACG5597KST001. During the course of Audit of the records of the appellant for the period January, 2016 to June, 2017 by the departmental officers, it was observed that the appellant had not discharged service tax on Notice Pay recovered from its employees. It appeared to the audit officers that the appellant by recovering Notice Pay was tolerating an act of the employee to leave the job without giving notice for the stipulated period and allowing the employee to leave the job. The said activity appeared to fall under the category of declared services as provided in Section 66E (e) of the Finance Act, 1994. Therefore, the appellant was required to pay the service tax amounting to Rs. 96,127/- for the said period.

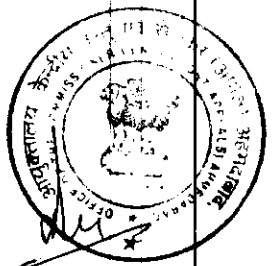
2.1 The appellant was, therefore, issued a SCN bearing No. 52/19-20/CGST Audit dated 03.06.2019 from F.No. VI/1(b)-03/AP-67/C-X/2018-19 wherein it was proposed to demand and recover the service tax amount of Rs.96,127/- under the proviso to Section 73 (1) of the Finance Act, 1994 along with interest under Section 75 of the Finance Act, 1994. Imposition of penalty under Section 78 of the Finance Act, 1994 was also proposed.

3. The said SCN was adjudicated vide the impugned order and the demand for service tax was confirmed along with interest. Penalty was also imposed under Section 78 of the Finance Act, 1994.



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

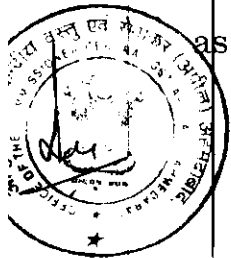
- i. They had in their reply to the SCN clearly submitted that the issue is settled by various courts. However, the adjudicating authority failed to consider their submissions and reiterated the allegations in the SCN to reach the conclusion and arbitrarily proceeded to confirm the service tax demand and penalty.
- ii. The impugned order has been passed without going into the facts of the case and their submission that the services provided by employees to its employer were governed by the exclusion clause contained in Section 65B (44) (b) of the Finance Act, 1994.
- iii. They had submitted that the Commissioner (Appeals), Ahmedabad vide OIA No. AHM-EXCUS-001-APP-0107-17-18 dated 27.10.2017 in the case of QX KPO Services Pvt Ltd., Ahmedabad held that amount recovered from the employee by employer cannot be considered as service and hence, service tax is not required to be recovered from employer. Therefore, the issue is no more res integra and has already been settled.
- iv. They had also contested the case on grounds of limitation. However, the adjudicating authority has just reiterated the facts mentioned in the SCN, thus resulting in passing an order which appears biased and passed only on the basis of the facts mentioned in the SCN.
- v. On a plain reading of the exclusion contained in Section 65B (44) (b) of the Finance Act, 1994 it clearly comes out that the legislative intent was to exclude all aspects relating to a contract of service that exists between an employer and an employee. The issue has also gained clarity from the advance ruling in the case of J.P. Morgan Services India Pvt Ltd – 2016-VIL-01-ARA.
- vi. The Hon'ble Tribunal in the case of HCL Learning Ltd Vs. Commissioner of CGST, Noida – 2019 –TIOL-3543-CESTAT-All. Had held that service tax cannot be recovered on notice pay recovered by the employer from an employee.



- vii. The demand has been raised by invoking the extended period under proviso to Section 73 (1) of the Finance Act, 1994 read with Rule 14 (1) (ii) of the Cenvat Credit Rules, 2004. However, the said provisions can be invoked only in cases involving fraud, collusion, willful misstatement or suppression of facts. The issue involved relates to interpretation of law and, therefore, extended period is not invocable.
- viii. It is also a settled law that suppression cannot be invoked in cases involving interpretation of law. They rely upon the judgment in the case of : Raj Laxmi Steel Industries Vs. Commissioner of Central Excise, Jaipur – 2018 (19) GSTL 63 (Tri.-Del); Commissioner of Central Excise, Bangalore-I Vs. Indus Legal Clothing Ltd – 2010 (262) ELT 376 (Tri.-Bang.); J.K.Sugar Ltd Vs. Commissioner of Central Excise, Meerut-II – 2010 (255) ELT 554 (Tri.-Del.).
- ix. It is a settled law that extended period cannot be invoked where demand has been raised on the basis of entries made by the company in their books of accounts. They rely upon the judgment in the case of : Mohan Goldwater Breweries Limited Vs. Commissioner of Central Excise & Service Tax, Lucknow- 2017 (4) GSTL 170 (Tri.-All.) and Ranbaxy Laboratories Ltd. Vs. Commissioner of Central Excise & Service Tax, Chandigarh-I – 2015 (329) ELT 867 (Tri.-Del).
- x. The imposition of penalty under Section 78 is illogical, illegal and unsustainable in law.
- xi. As the demand itself is not sustainable, the order for confirmation of interest is also not sustainable.

5. Personal Hearing in the case was held on 17.11.2021 through virtual mode. Shri Anil Gidwani, Advocate, and Shri Umakant Behera, Sr. Managr, Accounts & Finance, appeared on behalf of the appellant for the hearing. They reiterated the submissions made in appeal memorandum.

6. I have gone through the facts of the case, submissions made in the Appeal Memorandum, submissions made at the time of personal hearing as well as material available on records. The issue before me for decision is



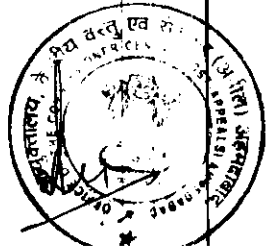
whether by recovering Notice Pay from employees resigning from the company without serving the notice period, the appellant had provided taxable services falling under the category of declared services as provided in Section 66E (e) of the Finance Act, 1994 and is liable to pay service tax. The demand pertains to the period from January, 2016 to June, 2017.

6.1 I find that it has been alleged in the SCN that the appellant had by recovering Notice pay from its employees, tolerated an act of the employee to leave the job without giving notice for the stipulated period and, therefore, is covered by the scope of Section 66E (e) of the Finance Act, 1994 i.e. '*agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act*'. On the other hand, the appellant have contended that the employees resigning are required to serve a prescribed period called notice period. The concept of notice period intends to safeguard the interest of the employers, while they look for new employees for the vacant positions.

7. I find that the issue involved in the present appeal is identical to that decided by me in the case of Cadila Pharmaceuticals Ltd vide OIA No. AHM-EXCUS-002-APP-33/2021-22 dated 11.11.2021, wherein it was held that :

"6.4 Further, I find that the appellant has relied upon the decision of Hon'ble Madras High Court in the matter of GE T&D India Limited (formerly Alstom T&D India Limited) Versus CCE reported in [2020 (1) TMI 1096-Madras High Court]. I have gone through the said judgement and the relevant contents are reproduced here under :

"11. The query raised relates to a *contra* situation, one, where amounts have been received by an employee from the employer by reason of premature termination of contract of employment, and the taxability thereof. The Board has answered in the negative, pointing out that such amounts would not be related to the rendition of service. Equally, so in my view, the employer cannot be said to have rendered any service *per se* much less a taxable service and has merely facilitated the exit of the employee upon imposition of a cost upon him for the sudden exit. **The definition in Clause (e) of Section 66E as extracted above is not attracted to the scenario before me as, in my considered view, the employer has not 'tolerated' any act of the employee but has permitted a sudden exit upon being compensated by the employee in this regard.**



12. Though normally, a contract of employment *qua* an employer and employee has to be read as a whole, there are situations within a contract that constitute rendition of service such as breach of a stipulation of non-compete. Notice pay, in lieu of sudden termination however, does not give rise to the rendition of service either by the employer or the employee."

On going through the above judgment, I find that the Hon'ble High Court has clearly held that the employer by receiving certain amounts in lieu of notice period from outgoing employees, have not 'tolerated' any act of the employee, but has permitted a sudden exit upon being compensated by the employee for the same. Accordingly, such scenario is not covered under the definition of 'declared services' as per clause (e) of the Section 66E of the Finance Act, 1994.

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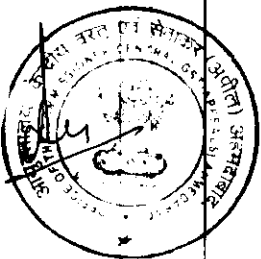
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6.5 In view of the above discussion and following the above mentioned judgements of Hon'ble High Court and also of Hon'ble Tribunal, Chennai, I find that the amount recovered from the employees towards 'notice pay' in the present case cannot be considered as "consideration" for "tolerating an act" leviable to service tax in terms of the provisions of Section 66E (e) of the Finance Act, 1994."

8. I further find that a similar view has been taken by the Commissioner (Appeals), Ahmedabad earlier also in Order-in-Appeal No.AHM-EXCUS-001-APP-0107-17-18 dated 29.09.2017 in the case of QX KPO Services Pvt Ltd., which has been relied by the appellant.

9. The appellant have also relied upon the judgment of the Hon'ble Tribunal in the case of HCL Learning Ltd Vs. Commissioner of CGST, Noida – 2019 –TIOL-3543-CESTAT-All., which is reproduced as under :

"After hearing both the sides duly represented by learned advocate Shri Nishant Mishra appearing on behalf of the appellant and Shri Anupam Kumar Tiwari appearing on behalf of the Revenue, we note that in the present case the employer has been served with a show cause notice demanding service tax from that part of the amount which he recovers out of the salary paid to the employee if the employee breaches the contract of total term of employment. From the record, we note that the term of contract between the appellant and his employee are that employee shall be paid salary and the term of employment is a fixed term and if the employee leaves the job before the term is over then certain amount already paid as salary is recovered by the appellant from his employee. This part of the recovery is treated by Revenue as consideration for charging service tax.





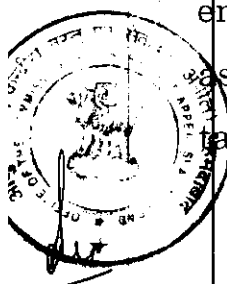
2. We hold that the said recovery is out of the salary already paid and we also note that salary is not covered by the provisions of service tax. Therefore, we set aside the impugned order and allow the appeal."

9.1 I find that the above judgment of the Hon'ble Tribunal is applicable to the facts of the present case.

10. I find that the submissions of the appellant have not at all been considered in the impugned order and neither has any finding been given in respect of the same. The findings in the impugned order is merely a reproduction of the allegations, contained in the SCN. On this very count, the impugned order is liable to be set aside for being a non-speaking order passed without application of mind.

11. I further find that the appellant has relied upon the OIA in the case of QX KPO Services Pvt Ltd and the judgment of the Hon'ble Tribunal in the case of HCL Learning Ltd Vs. Commissioner of CGST, Noida . The appellant had also submitted a copy of the said orders in the course of the personal hearing. However, I find that there is not even a whisper regarding the said OIA in the impugned order. The principles of judicial discipline require that the orders of the higher appellate authorities should be followed unreservedly by the subordinate authorities. This view has been consistently emphasized by the various judicial forums including the apex court in a catena of decisions. The CBEC has also issued an Instruction from F.No.201/01/2014-CX.6 dated 26.06.2014 in this regard directing all adjudicating authorities to follow judicial discipline scrupulously. The impugned order passed by the adjudicating authority is in total disregard of the principles of judicial principles and is bad in law and is liable to set aside on this count also.

12. In view of the facts discussed herein above, I hold that appellant are not liable to pay service tax on the Notice Pay recovered from the employees resigning from the company without serving the notice period as no taxable service is involved in the same. Since the demand of service tax is not sustainable on merits, I am not delving into the aspect of



limitation raised by the appellant. When the demand fails to survive, there does not arise any question of interest or penalty in the matter.

13. Accordingly, the impugned order is set aside for not being legal and proper and the appeal filed by the appellant is allowed.

14. 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.

*(Signature)*  
28<sup>th</sup> December, 2021  
(Akhilesh Kumar)  
Commissioner (Appeals)  
Date: 12.2021.

Attested:

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



**BY RPAD / SPEED POST**

To

M/s. Oswal Industries Ltd,  
Unit No.3, Block No. 258,  
Kalol-Mehsana Highway,  
Kalol, Gandhinagar – 382 721

Appellant

The Deputy Commissioner,  
CGST & Central Excise,  
Division- Kalol,  
Commissionerate : Gandhinagar

Respondent

**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.