आयुक्त का कार्यालय
Office of the Commissioner
केंद्रीय जीएसटी, अपील अहमदाबाद आयुक्तालय
Central GST, Appeals Ahmedabad Commissionerate
जीएसटी भवन, राजस्व मार्ग, अम्बावाड़ी, अहमदाबाद-380015
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सत्यमेव जयते

आज़ादी का अमृत महोत्सव

**By SPEED POST**
DIN:- 20230264SW000088058D

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| (क) | फ़ाइल संख्या / File No. | GAPPL/COM/STP/1849/2022-APPEAL 1840-2K |
| (ख) | अपील आदेश संख्या और दिनांक / Order-In-Appeal No. and Date | AHM-EXCUS-003-APP-116/2022-23 and 15.02.2023 |
| (ग) | पारित किया गया / Passed By | श्री अखिलेश कुमार, आयुक्त (अपील) Shri Akhilesh Kumar, Commissioner (Appeals) |
| (घ) | जारी करने की दिनांक / Date of issue | 16.02.2023 |
| (ङ) | Arising out of Order-In-Original No. KLL DIV/EX/Paras Mani Tripathi/109/2021-22 dated 12.04.2022 passed by the Deputy Commissioner, CGST, Division-Kalol, Gandhinagar Commissionerate | |
| (च) | अपीलकर्ता का नाम और पता / Name and Address of the Appellant | M/s Goras Dairy Products Pvt Ltd., No. 89/1, Opp. New Arvind Mill, Khartraj, Gandhinagar – 382721 |

कोई व्यक्ति इस अपील-आदेश से असंतोश अनुभव करता है तो वह इस आदेश के प्रति यथास्थिति नीचे बताए गए सक्षम अधिकारी को अपील अथवा पुनरीक्षण आवेदन प्रस्तुत कर सकता है, जैसा कि ऐसे आदेश के विरुद्ध हो 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 :-

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 : -

(क) 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।

In case of any loss of goods where the loss occur in transit from a factory to a warehouse or to another factory or from one warehouse to another during the course

of processing of the goods in a warehouse or in storage whether in a factory or in a warehouse.

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

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

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

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

(घ) 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।

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.

(2) 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.

(3) 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 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 :-

(2) उक्तलिखित परिच्छेद 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।

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

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 notwithstanding 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 संषोधित की अनुसूची -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 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) एके प्रति अपीलो 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)।

(1) खंड (Section) 11D के तहत निर्धारित राशि;
(2) लिया गलत सेनवैट क्रेडिट की राशिय;
(3) सेनवैट क्रेडिट नियमों के नियम 6 के तहत देय राशि।

यह पूर्व जमा ' लंबित अपील' में पहले पूर्व जमा की तुलना मेंए 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.

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

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."

## अपीलिय आदेश / ORDER-IN-APPEAL

This Order arises out of an appeal filed by M/s. Goras Dairy Products Pvt. Ltd, 89/1, Opp. New Arvind Mills, Khatraj, Dist.Gandhinagar, Pin-382761 [hereinafter referred to as the appellant] against OIO No. KLL DIV/EX/PARAS MANI TRIPATHI/109/2021-22 dated 12.04.2022 [hereinafter referred to as the impugned order] passed by Deputy Commissioner, Central GST, Division : Kalol, Commissionerate : Gandhinagar [hereinafter referred to as the adjudicating authority].

2. Briefly stated, the facts of the case are that the appellant were registered under Central Excise Registration No./ECC No. AADCG7295FEM001. They were engaged in manufacture of Nitrated Water falling under Chapter 22011010 of the Central Excise Tariff Act, 1985 (CETA, 1985), as Job-workers of M/s Nourishco Beverages Ltd for manufacturing 'TATA WATER PLUS' in bottles and pouches. The product is covered under MRP based valuation under Section 4A of the Central Excise Act, 1944 (CEA,1944). During the course of Audit of the records of the appellant by the officers of Central Tax Audit Commissionerate, Ahmedabad, it was observed that during the period F.Y.2014-15 to F.Y.2016-17, the appellant had received taxable income in the name of 'Minimum Commitment Charges' amounting to Rs.1,42,20,982/- and had not taken service tax registration or paid service tax on the said taxable income. They had recorded the said income in their profit & loss account as well as in the ledger.

2.1 Audit also observed that during the period F.Y.2014-15 to F.Y.2016-17, the appellant had entered into an agreement dated 22.01.2014 with M/s Nourishco Beverages Ltd. to manufacture, process and package the products 'TATA-WATER PLUS –Zinc and Copper variants in 200 ml pouch, 500 ml pet bottle and 1000 ml pet bottle for sale to M/s Nourishco Beverages Ltd. The said agreement contained a clause vide which it was stipulated that M/s Nourishco Beverages Ltd. were committed to lift certain quantity of their product every month, failing which the appellant would receive a fixed amount of consideration as 'Minimum Commitment Charges'. This amount was received as toleration charges by the job worker (appellant) for the act of non-lifting of assured quantity by the principal manufacturer (M/s Nourishco Beverages Ltd.). Audit construed that the act of toleration for a consideration, by the appellant falls under the category of 'Declared

Service' in terms of clause (e) of Section 66E of the Finance Act,1994, as amended (FA,1994) and the amount of 'Minimum Commitment Charges' received by the appellant was nothing but 'Reimbursement of balance fixed cost' and falls under the category of taxable service and therefore liable to Service Tax. The Service Tax liability of the appellant was calculated as below :

| Period | Minimum Commitment Charges earned (in Rs.) | Service Tax payable (in Rs.) |
|---|---|---|
| F.Y.2014-15 | 1,36,135/- | 16,826/- |
| F.Y.2015-16 | 41,69,576/- | 6,04,588/- |
| F.Y.2016-17 | 99,15,271/- | 14,87,291/- |
| Total | 1,42,20,982/- | 21,08,705/- |

3. The appellants were issued Show Cause Notice vide F.No.VI/1(b)-08/AP_68/C-X/17-18 dated 13.07.2018 (in short SCN) wherein it was proposed :

- The services rendered by the appellant to M/s Nourishco Beverages Ltd. by the act of M/s Nourishco Beverages Ltd. for not lifting the assured quantity to be considered as an act 'tolerating for consideration' be classified under 'Declared Service' as defined under clause (e) of Section 66 E of the FA,1994.
- to demand and recover service tax amounting to Rs. 21,08,705/-, for the period F.Y.2014-15 to F.Y.2016-17 under Section 73 (1) of the Finance Act, 1994 alongwith interest under Section 75 of the Finance Act, 1994.
- imposition of penalties were proposed under Section 76, 77 (1)(a), 77 (2) and 78 of the Finance Act, 1994.

4. The SCN was decided vide the impugned order, wherein the proposals made vide the SCN were confirmed.

5. Being aggrieved by the impugned order, the appellant have filed the present appeal on following grounds:

(i) The SCN was issued after the implementation of GST Act, 2017 and therefore demands raised under the Finance Act,1994 becomes invalid after 01.07.2017.

(ii) The activity undertaken by the appellant is not liable to service tax hence extended period of limitation cannot be invoked. In support they relied on the following decisions :

- Decision of the Hon'ble Supreme Court in the case of Jaiprakash Industries Ltd. Vs CCE – (2002) 146 ELT 481.
- Decision of the Hon'ble Supreme Court in the case of Continental Foundation Joint Venture Vs CCE (2007) 216 ELT 177.
- Decision of the Hon'ble Supreme Court in the case of Pushpam Pharmaceuticals Co. Vs CCE, Bombay – (1995) 78 ELT 401.
- Decision of the Hon'ble Supreme Court in the case of CCE Vs Chemphar Drugs & Liniments Ltd. (2002) TIOL 266.
- Decision of the Hon'ble Supreme Court in the case of CCE Vs Ballarpur Industries (2007) 8 SCC 89.

(iii) The amount received by the appellant as Minimum Commitment Charges were actually paid to facilitate them to meet their fixed cost. They also contended that various judicial authorities have ruled that, the said amount received would not form part of the taxable services. In support of their contention they relied on the following judgements :

- Decision of the Hon'ble Tribunal, Delhi in the case of CCE Vs Ram Decorative & Industries – (2000) 124 ELT 659.
- Decision of the Hon'ble Tribunal in the case of Honda Cars Vs CCE (2021) 48 GSTL 247.
- Decision of the Hon'ble Tribunal in the case of M.P.Poorva Kshetra Vidyut Vitran Vs Pricipal Commissioner reported (2021) 46 GSTL 409.

(iv) Relying on the decision of the Hon'ble Tribunal in the case of CST Vs Amalgations reported (2019) 24 GSTL 462 they contented that the commitment charges are in the nature of interest on unutilized portion of credit facilities and cannot be subject to service tax.

(v) No Service is rendered by the appellant and the amount received as minimum commitment charges are in a form of compensation and not consideration, hence when the activity do not qualify as service, question of payment of service tax does not arise.

(vi) The activity of the appellant do not stand covered under the definition of services as defined under Section 65B(44) of the FA,1994 and in support they relied on the decision of the Hon'ble Delhi High Court in the case of Delhi Chit Fund Association Vs Union of India reported (2013) 30 STR 347.

Further, this decision has attained finality as the Hon'ble Supreme Court has dismissed the appeal filed by the department against the same, reported in 2014 TIOL 23. They also relied on the decision of the Hon'ble Sikkim High Court in the case of Future Gaming and Hotel Services (Private ) Limited Vs Union of India reported (2015) TS 564.

(vii) They relied on Section 2(d) and Section 73 of the Indian Contract Act, 1872 to differentiate between the definitions of 'Consideration' and 'Compensation' in support of their contention that both cannot be equated.

(viii) They further relied on the decision of the Hon'ble Tribunal in the case of Tata Oil India Pvt.Ltd Vs CCE reported 2013 (29) STR 334 wherein it was rules that 'Compensation' received cannot be treated as 'Consideration'.

(ix) As there was no suppression on part of the appellant therefore Penalty under Section 78 of the Finance Act, 1994 cannot be imposed.

(x) As the issue involved in the case pertains to interpretation of statutory provisions hence as a settled principle of law, no penalty can be levied. In this conext they relied on the following decisions :

*Mundra Port and SEZ Vs CCE reported (2009) 18 STT 314.*
*Haryana Roadways Engg. Vs CCE (2001) 131 ELT 662.*
*Century Cement Vs CCE (2002) 150 ELT 1065.*
*Bhilwara Spinners Ltd. Vs Commr. of cen.Excise, Jaipur, 2001 (129) ELT 458 (Tri. Delhi).*

*(xi)* Relying on the decision of the *Hon'ble Supreme Court of India in the case of CCE Vs Balkrishna Industries – (2006) 201 ELT 325,* they contended that since duty itself is not payable there is no question of penalty.

6. Personal hearing in the case was held in virtual mode on 10.01.2023. Ms Vamini J., Advocate, appeared on behalf of the appellant. She reiterated the submissions made in their appeal memorandum and relied upon various case laws submitted as part of the submission.

7. I have gone through the facts of the case, submissions made in the Appeal Memorandum, oral submissions made during the personal hearing and materials available on records. The issue before me for decision is whether Service Tax is leviable and payable in respect of an amount received by the appellant as

'Minimum Commitment Charges'. The demand pertains to the period F.Y.2014-15 to F.Y.2016-17.

8. I find that the appellants were registered with Central Excise as 'Job-Workers' for M/s Nourishco Beverages Ltd (principal manufacturer) and were engaged in manufacture of Nitrated Water under the brand name 'TATA WATER PLUS' in bottles and pouches falling under Chapter 22011010 of the Central Excise Tariff Act, 1985 (CETA, 1985). They were not registered under Service Tax law. As per the agreement dated 30.01.2014 between the appellant and the principal manufacturer, all raw materials and packing material were to be supplied by the principal manufacturer, the manufacturing line was to be exclusively used for the products pertaining to the principal manufacturer who also had exclusive rights to reject any lot/batch of products after inspection. The appellants did not have any rights to dispose of the products, assets or materials of the principal manufacturer without their written consent. Further, as per 'Annexure-G' of the agreement, the principal manufacturer was in obligation to fulfill a 'Minimum Volume Commitment' of lifting a specific quantity of the manufactured product and in the event of failure, they would pay an amount to the appellant which is in the nature of penalty/compensation for non-lifting of the assured quantity.

8.1 It is also observed that the amount of penalty/compensation received by the appellant during the period F.Y.2014-15 to F.Y.2016-17 was reflected as 'Minimum Commitment Charges' in their books of accounts. The audit as well as the adjudicating authority have considered this amount of Rs.1,42,20,982/- as 'Consideration for Service' in terms of Section 65B(44) of the Finance Act, 1994 being payment received for 'Tolerating the act of non-lifting the assured quantity' considering them to be a declared service under the ambit of Section 66E(e) of the FA, 1994. Consequently, the said amount was considered as Taxable income for computation of the Service Tax amounting to Rs. 21,08,705/-.

8.1 It is observed from the case records that the appellant is a job-worker carrying out job-work for the principal manufacturer, and the product is covered under MRP based valuation. Section 66E(e) of the Finance Act, 1994 reads as :

*SECTION 66 E. Declared services. — The following shall constitute declared services, namely:—*

*(a) renting of immovable property*

*(d) development, design, programming, customization, adaptation, upgradation, enhancement, implementation of information technology software;*
*(e) agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act;*

Considering the provisions Section 66 E (e) of the Finance Act,1994 in light of the facts and circumstances of the case, I find that in terms of the agreement between the appellant and the principal manufacturer, the appellant is not obligated to refrain from any activity. They have fulfilled their work as job-workers. However, it is due to the failure of the principal manufacturer, certain volume of the product was not lifted. Hence, considering the act of the appellant as 'Tolerating the act of non-lifting the assured quantity' under 'Declared Service' is legally incorrect.

8.2 The Hon'ble CESTAT, Allahabad has in an identical case of M/s K. N. Food Industries Pvt. Ltd. Vs The Commissioner of CGST & Central Excise, Kanpur in Service Tax Appeal No.70737 of 2019 reported as 2020 (38) G.S.T.L. 60 (Tri. - All.), decided that :

...

**2.** *M/s. Parle is making payment of job charges to the appellant on per kilo basis of confectionary as agreed upon between the two. However in case the quantum of goods got manufactured by M/s. Parle is less than standard mutually agreed upon quantum, the appellants are entitled ex-gratia job charges to cover up the loss or deficiencies in normal job charges to be received by the appellant. The quantum of ex-gratia to be given to the appellant is computed based upon various factors like 'Per Day Maximum Output' based on production capacity, 'Packing Capacity' of per month and 'Output Ratio' arrived at operating time of the plant to manufacture the confectionaries etc. As such, bills are raised by the appellant and paid by M/s. Parle.*

**3.** Entertaining a view that such receipt of *ex-gratia* job charges by the appellant amounts to providing services, Revenue raised a show cause notice dated 11-4-2016 raising demand of Service Tax for the period July, 2012 to March, 2015...

4.....

*The Lower Authorities have invoked the provision of the Section 66E(e) of the Act which relates to the definition of the declared services. The same is to the effect that "(e) agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act". Provisions of Section 65B(44) of the Act refers to the process amounting to manufacture or production of goods on which the duty is leviable under Section 3 of the Central Excise Act, 1944 as on service. However no Service Tax is leviable on such services, as the same is covered under the negative list. Further, agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act is a declared service on which the Service Tax is leviable under Section 66B of the Act.*

*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 the 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.*

The facts and circumstances of the present appeal is identical with the case discussed and decided by the Hon'ble CESTAT.

9. Further, the legal provisions under Section 65B (44) of the Finance Act, 1994 reads as :

*SECTION [65B. Interpretations.—*

*In this Chapter, unless the context otherwise requires,—*
*(1) "Actionable claim" shall have the meaning assigned to it in section 3 of the Transfer of Property Act, 1882 (4 of 1882);*
*...*
*(44) "service" means any activity carried out by a person for another for consideration, and includes a declared service, but shall not include—*
*(a) an activity which constitutes merely,—*
*(i) a transfer of title in goods or immovable property, by way of sale, gift or in any other manner; or*
*(ii) such transfer, delivery or supply of any goods which is deemed to be a sale within the meaning of clause (29A) of article 366 of the Constitution; or*
*(iii) a transaction in money or actionable claim;*
*(b) a provision of service by an employee to the employer in the course of or in relation to his employment;*
*(c) fees taken in any Court or tribunal established under any law for the time being in force*

Considering the above legal provision, I find force in the argument of the appellant that the *Hon'ble Delhi High Court in the case of Delhi Chit Fund Association Vs UOI (2013) 30 STR 347* has held that the definition of service under Section 65 B (44) implies four elements namely : (i) person providing service (ii) person receiving service (iii) actual rendering of service and (iv) consideration for service. Considering the above interpretation of the Hon'ble High Court with the facts and circumstances of the present case, I find that none of the ingredients are being fulfilled in considering the activity of the appellant as 'Service' under the above section. Hence, the activity of the appellant do not fall under the ambit of 'Service' and the findings of the adjudicating authority is not legal and proper.

10. It is also observed that, the amount of Rs.1,42,20,982/- received by the appellant during the period F.Y. 2014-15 to F.Y.2016-17 was in the nature of compensation for the act of 'breach of contract' by the principal manufacturer. The Hon'ble CESTAT Principal Bench, New Delhi in the case of Rajcomp Info Service Ltd. Vs Commissioner of Cen.Ex, Jaipur reported as 2022 (65) G.S.T.L. 103 (Tri. - Del.) ruled that "*Liquidated damages recovered on account of breach or non-performance of contract not to be considered as consideration for tolerating an act and hence, not leviable to Service Tax under Section 66E(e) of Finance Act, 1994 as declared services.*" Respectfully following the above decision of the Hon'ble CESTAT, the amount received by the appellant cannot be considered as 'Consideration' and therefore the same is not liable for Service Tax.

10.1 I find it relevant to refer to CBIC Circular No. 178/10/2022-GST dated 03.08.2022 issued from F. No. 190354/176/2022-TRU. Relevant portions of the said circular is reproduced as under :

...

*In some of these cases, tax authorities have initiated investigation and in some advance ruling authorities have upheld taxability.*

*4. In Service Tax law, 'Service' was defined as any activity carried out by a person for another for consideration. As discussed in service tax education guide, the concept 'activity for a consideration' involves an element of contractual relationship wherein the person doing an activity does so at the desire of the person for whom the activity is done in exchange for a consideration. An activity done without such a relationship i.e., without the express or implied contractual reciprocity of a consideration would not be an 'activity for consideration'. The element of contractual relationship, where one supplies goods or services at the desire or another, is an essential element of supply.*

*5. The description of the declared service in question, namely, agreeing to the obligation to refrain from an act or to tolerate an act or a situation, or to do an act in para 5 (e) of Schedule II of CGST Act is strikingly similar to the definition of contract in the Contract Act, 1872. The Contract Act defines 'Contract' as a set of promises, forming consideration for each other. 'Promise' has been defined as willingness of the 'promisor' to do or to abstain from doing anything. 'Consideration' has been defined in the Contract Act as what the 'promisee' does or abstains from doing for the promises made to him.*

*6. This goes to show that the service of agreeing to the obligation to refrain from an act or to tolerate an act or a situation, or to do an act is nothing but a contractual agreement. A contract to do something or to abstain from doing something cannot be said to have taken place unless there are two parties, one of which expressly or impliedly agrees to do or abstain from doing something and the other agrees to pay consideration to the first party for doing or abstaining from such an act. There must be a necessary and sufficient nexus between the supply (i.e. agreement to do or to abstain from doing something) and the consideration.*

*6.1 A perusal of the entry at serial 5(e) of Schedule II would reveal that it comprises the aforementioned three different sets of activities viz. (a) the obligation to refrain from an act, (b) obligation to tolerate an act or a situation and (c) obligation to do an act. All the three activities must be under an "agreement" or a "contract" (whether express or implied) to fall within the ambit of the said entry. In other words, one of the parties to such agreement/contract (the first party) must be under a contractual obligation to either (a) refrain from an act, or (b) to tolerate an act or a situation or (c) to do an act. Further some "consideration" must flow in return from the other party to this contract/agreement (the second party) to the first party for such (a) refraining or (b) tolerating or (c) doing. Such contractual arrangement must be an independent arrangement in its own right. Such arrangement or agreement can take the form of an independent stand- alone contract or may form part of another contract. Thus, a person (the first person) can be said to be making a supply by way of refraining from doing something or tolerating some act or situation to another person (the second person) if the first person was under an obligation to do so and then performed accordingly.*

...

11. In view of the above Circular issued by the Board and going by the judicial pronouncements referred above and considering the fact (as per clause 4.2 of the agreement) that the appellant were not allowed to sell or dispose any product without the approval of the principal manufacturer, I am of the considered view that the amount of Rs.1,42,20,982/- received by the appellant as 'Minimum Commitment Charges' from their principal manufacturer – M/s Nourishco Beverages Limited cannot be considered as a 'Declared Service' under Section 66E(e) of the Finance Act,1994. Therefore, the impugned order confirming the demand of Service Tax amounting to Rs.21,08,705/- alongwith interest and penalties is not legal and proper.

12. In view of the above, the demand for service tax, confirmed vide the impugned order along with interest and penalty are set aside and the appeal filed by the appellant is allowed .

13. अपीलकर्ताद्वारादर्जकीगईअपीलकानिपटाराउपरोक्तरीकेसेकियाजाताहै।

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

15th February, 2023.

(Akhilesh Kumar)
**Commissioner (Appeals)**
Dated: 15th February, 2023

Attested

सोमनाथ चौधरी/SOMNATH CHAUDHARY
अधीक्षक/SUPERINTENDENT
केन्द्रीय नस्तु एवं सेवाकर (अपील), अहमदाबाद.
CENTRAL GST(APPEALS), AHMEDABAD.

To,

By RPAD/SPEED POST

M/s Goras Dairy Products Pvt.Ltd,

89/1, Opp. New Arvind Mills,

Khatraj, Dist.Gandhinagar,

Pin-382761

Copy to:

1. The Chief Commissioner, Central GST, Ahmedabad Zone.
2. The Commissioner, CGST, Gandhinagar.
3. The Deputy/Assistant Commissioner, CGST & Central Excise, Division : Kalol, Commissionerate : Gandhinagar
4. The Dy/Assistant Commissioner (Systems), CGST Appeals , Ahmedabad. (for uploading the OIA)
5. Guard File.
6. P.A. File.