आयुक्त का कार्यालय, (अपीलस)
Office of the Commissioner,
केंद्रीय जीएसटी, अहमदाबाद आयुक्तालय
Central GST, Appeal Commissionerate- Ahmedabad
जीएसटी भवन, राजस्व मार्ग, अम्बावाड़ी अहमदाबाद ३८००१५.
CGST Bhavan, Revenue Marg, Ambawadi, Ahmedabad 380015
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क फाइल संख्या :File No : **V2(ST)23/North/Appeals/2019-20**/1H90H TO 1H908

ख अपील आदेश संख्या :Order-In-Appeal No.: **AHM-EXCUS-002-APP-005-2020-21**

दिनाँक Date :28.04.2020 जारी करने की तारीख Date of Issue: 23/06/2020

श्री अखिलेश कुमार, आयुक्त (अपील) द्वारा पारित

Passed by **Shri Akhilesh Kumar,** Commissioner (Appeals) Ahmedabad

ग _____आयुक्त, केन्द्रीय GST, अहमदाबाद North आयुक्तालय द्वारा जारी मूल आदेश : दिनाँक : से सृजित

Arising out of Order-in-Original:**24/DC/D/AKJ/18-19,** Date: **30/03/2019** Issued by: **Deputy** Commissioner ,CGST, Div: III, Ahmedabad North.

ध अपीलकर्ता एवं प्रतिवादी का नाम एवं पता

Name & Address of the **Appellant** & Respondent

M/s. Inductotherm (India) Pvt. Ltd

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।

I. Any person aggrieved by this Order-In-Appeal issued under the Central Excise Act 1944, 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 पूवोक्त धारा को उप–धारा के प्रथम परन्तुक के अंतर्गत पुनरीक्षण आवेदन अवर सचिव, भारत सरकार, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, संसद मार्ग, नई दिल्ली : 110001 को की जानी चाहिए।

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

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

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

(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।

(b) 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।

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

ध 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।

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

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

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

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

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

सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपीलः–

Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1944 की धारा 35– ण्0बी/35–इ के अंतर्गतः–

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

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 **दूसरा मंजिल, बहूमाली भवन, असारवा, अहमदाबाद, गुजरात** 380016

To the west regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at 2nd floor, Bahumali Bhavan, Asarwa, Ahmedabad-380016 in case of appeals other than as mentioned in para-2(i) (a) above.

(2) केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001 की धारा 6 के अंतर्गत प्रपत्र इ.ए–3 में निर्धारित किए अनुसार अपीलीय न्यायाधिकरणें की गई अपील के विरूद्व अपील किए गए आदेश की चार प्रतियाँ सहित जहाँ उत्पाद शुल्क की मांग, ब्याज की मांग ओर लगाया गया जुर्माना रूपए 5 लाख या उससे कम है वहां रूपए 1000/– फीस भेजनी होगी। जहाँ उत्पाद शुल्क की मांग, ब्याज की मांग ओर लगाया गया जुर्माना रूपए 5 लाख या 50 लाख तक हो तो रूपए 5000/– फीस भेजनी होगी। जहाँ उत्पाद शुल्क की मांग, ब्याज की मांग ओर लगाया गया जुर्माना रूपए 50 लाख या उससे ज्यादा है वहां रूपए 10000/– फीस भेजनी होगी। की फीस सहायक रजिस्टार के नाम से रेखाकिंत बैंक ड्राफ्ट के रूप में संबंध की जाये। यह ड्राफ्ट उस स्थान के किसी नामित सार्वजनिक क्षेत्र के बैंक की शाखा का हो

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

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

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

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

One copy of application or O.I.O. as the case may be, and the order of the adjournment authority shall beer a court fee stamp of Rs.6.50 paisa 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 उत्पाद शुल्क एवं सेवाकर अपीलीय प्राधिकरण (सीस्तेत) के प्रति अपीलों के मामलों में केन्द्रीय उत्पाद शुल्क अधिनियम, १९४४ की धारा ३५फ के अंतर्गत वित्तीय(संख्या-२) अधिनियम २०१४(२०१४ की संख्या २५) दिनांक: ०६.०८.२०१४ जो की वित्तीय अधिनियम, १९९४ की धारा ८३ के अंतर्गत सेवाकर को भी लागू की गई है, द्वारा निश्चित की गई पूर्व-राशि जमा करना अनिवार्य है, बशर्ते कि इस धारा के अंतर्गत जमा की जाने वाली अपेक्षित देय राशि दस करोड़ रूपए से अधिक न हो**

केन्द्रीय उत्पाद शुल्क एवं सेवाकर के अंतर्गत " माँग किए गए शुल्क " में निम्न शामिल है

(i) **धारा 11 डी के अंतर्गत निर्धारित रकम**

(ii) **सेनवैट जमा की ली गई गलत राशि**

(iii) **सेनवैट जमा नियमावली के नियम 6 के अंतर्गत देय रकम**

→ आगे बशर्ते यह कि इस धारा के प्रावधान वित्तीय (सं. 2) अधिनियम, 2014 के आरम्भ से पूर्व किसी अपीलीय प्राधिकारी के समक्ष विचाराधीन स्थगन अर्ज़ी एवं अपील को लागू नहीं होगे।

For an appeal to be filed before the CESTAT, it is mandatory to pre-deposit an amount specified under the Finance (No. 2) Act, 2014 (No. 25 of 2014) dated 06.08.2014, under section 35F of the Central Excise Act, 1944 which is also made applicable to Service Tax under section 83 of the Finance Act, 1994 provided the amount of pre-deposit payable would be subject to ceiling of Rs. Ten Crores,
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.

→Provided further that the provisions of this Section shall not apply to the stay application and appeals pending before any appellate authority prior to the commencement of the Finance (No.2) Act, 2014.

(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।**

(6)(i) 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."

II. Any person aggrieved by an Order-in-Appeal issued under the Central Goods and Services Tax Act, 2017/Integrated Goods and Services Tax Act, 2017/Goods and Services Tax (Compensation to States) Act, 2017, may file an appeal before the appropriate authority.

ORDER-IN-APPEAL

This order arises on account of an appeal filed by M/s Inductotherm (India) Pvt. Ltd., Plot No.SM-6, Road No.11, Sanand-II Industrial Estate, BOL Village, Sanand, Ahmedabad-382170 (in short '*appellant*') against the Order-in-Original No.24/DC/D/AKJ/18-19 dated 30.03.2019 (in short '*impugned Order*') passed by the Deputy Commissioner, Central GST & Central Excise Division-III, Ahmedabad North (in short '*the adjudicating authority*').

2. The facts of the case, in brief, are that the appellant was engaged in the manufacture of tailor made 'Melting furnace, Manual changeover arrangement, Hydraulic Power Supply Unit, Induction Melting furnaces with charge cars and Automotive Pouring Furnace' thereof falling under Chapter 84 and 85 of the Central Excise Tariff Act, 1985. During the course of audit of their financial records by the Department for the period January, 2015 to March, 2017, it was observed that the appellant had forfeited an amount of Rs.1,25,000/- during the year 2015-16 and Rs.1,43,73,994/- for the year 2016-17 and shown the same as income in Profit and Loss account. On verification, it was noticed that the appellant had entered into agreements with M/s Expandable Enterprise P. Ltd. for supply of goods namely Melting furnace, Manual changeover arrangement and Hydraulic Power Supply Unit and with M/s Indsur Global Ltd. for supply of goods namely Induction Melting furnaces with charge cars and Automotive Pouring Furnace. The appellant had received an advance of Rs.1,25,000/- from M/s Expandable Enterprise P. Ltd. and Rs.1,43,73,994/- from M/s Indsur Global Ltd. respectively. One of the conditions in the agreements was that in case of cancellation of an order, engineering efforts and materials will result in loss to the appellant and to compensate this loss, the advance will not be refundable. Both the above customers had cancelled their orders and the said appellant had forfeited the advance amounts received from them by way of debit note dated 17.10.2015 in case of M/s Expandable Enterprise P. Ltd. and debit note dated 15.12.2016 in case of M/s Indsur Global Ltd.

2.1 The audit observed that in the instant case, the appellant and the customers have entered into an agreement whereby the appellant have agreed to supply the requisite goods at the price fixed upon and the customers have agreed to purchase such goods and as token of acceptance of such agreement, the customers have made the advance payment to the appellant as agreed upon and that by cancelling the order placed, the customers prevented the appellant from performing the contract and for that reason the appellant became entitled for receiving compensation from the customers as provided for under Section 53 of the Indian Contract Act, 1972; that however, the appellant had chosen not to seek such compensation by way of filing a civil suit with the appropriate forum and instead have forfeited the advance amount paid by the customers and that in other words, the appellant had refrained from filing a civil suit seeking compensation against forfeiture of the advance received; and that the act of refraining from seeking compensation from the customer by the appellant was covered under the ambit of Section 66E(e) of the Finance Act, 1994 (in short '*the Act*') which declares the

event of 'agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act' as a service and the amount of advances forfeited in the case was the consideration against the said service. Therefore, it was concluded that the appellant was liable to pay service tax on the said income booked on account of forfeiture of advances in respect of cancellation of orders.

2.2 Accordingly, a Show Cause Notice (in short '*SCN*') dated 19.06.2018 was issued to the appellant proposing for recovery of service tax amounting to Rs.21,74,849/- against an income of Rs.1,44,98,994/- shown in their financial records on account of forfeiture of advances in respect of cancellation of orders, along with interest under Section 75 of the Act and imposition of penalty under Section 76 of the Act. The said SCN was adjudicated vide the impugned order wherein the adjudicating authority has confirmed the demand along with interest and has also imposed penalty on the appellant.

3. Aggrieved with the impugned order, the appellant has filed the present appeal mainly on the following grounds:

(a) The expression agreeing to tolerate an act cannot be construed to include situations wherein liquidated damages/penalty is charged by a party for defaults breach committed by other party under the contract. The advance payment forfeiture is merely compensation for making good the loss suffered by a contracting party due to breach of terms of the contract by other party;

(b) Any amount retained or collected from a defaulting party is not a consideration for any "service" because the defaulter has not carried out any activity for the appellant and the amount retained or recovered by the appellant is not a consideration for any "service" rendered by the appellant to the defaulter. As deposit forfeited are not the value of any declared service either, clause (e) of Section 66E of the Act is also not attracted in this situation;

(c) In their case, the defaulters M/s Expandable Enterprise Pvt. Ltd. and M/s Indsur Global Ltd. have failed in paying full price of the goods and such default ultimately resulted in cancellation of the transaction; and recovery by way of forfeiture of advance payment by the appellant was on account of such default of the prospective buyers, which would reduce the financial impact and loss suffered by the appellant for producing tailor made goods to suit the specific requirements of such buyer who failed in paying the agreed price even though the goods were produced in accordance with their requirements. Such recoveries are made for the reason that the person concerned was a defaulter, who had not fulfilled his obligation. Recovery made as a penalty from a defaulting person is not in the nature of a declared service under Section 66E(e) of the Act;

(d) The Revenue's presumption is that the appellant has a right under Section 53 of the Contract Act to file a civil suit for claiming compensation from the above two customers and filing such a civil suit was "an act", from which the appellant has refrained. But the declared service is that "agreeing to the obligation to refrain from an act", and not only refraining from an act. Only when a person is "agreeing to the obligation" for refraining from an act, such a situation is a declared service. In the present case, the appellant has not agreed to the obligation to refrain from any act, and therefore, forfeiture of advance received from the customers when orders are cancelled is not "agreeing to the obligation to refrain from an act";

(e) Section 53 of the Contract Act has nothing to do with the present about levy of service tax. Not filing of a Civil Suit is not "agreeing to the obligation to refrain from an act" and it is not shown by the Revenue in this case, what was the obligation that the appellant has agreed to and what is the evidence to establish that the appellant has refrained from an act like filing a Civil Suit. Section 53 of the Contract Act refers to a right of person, whereas Section 66E(e) of the Act refers to the obligation of a person;

(f) Under the service tax law, it is a settled legal position that mere flow of money cannot be a subject matter of service tax and consideration/money should have nexus with an identified supply of service. It is also equally settled that compensation for damages was not for any provision of service and was instead to make good the loss suffered. The appellant has relied upon the case laws in the cases of (i) Cricket Club of India Vs. Commissioner of Service Tax [2015 (40) STR 973 (Tri.-Mum.)], (ii) Mormugao Port Trust Vs. Commissioner of Customs, Central Excise and Service Tax, Goa [2016 TIOL 2843 (Tri.-Mum)], (iii) Jaipur Jewellery Show Vs. CCE & ST, Jaipur-I [2017 (49) STR 313 (Tri.)] and (iv) CESTAT Mumbai decision in the matter of Reliance Life Insurance Co. Ltd. Vs. Commissioner of Service Tax, Mumbai-I in Tax Appeal No.ST/85584/2015; and

(g) The confirmation of penalty under the provisions of Section 76 of the Act is also an action without the authority of law in as much as there is no justification in demand of service tax leveled against the appellant in this case.

4. Personal hearing in the matter was held on 13.02.2020. Smt. Shilpa P. Dave, Advocate, appeared on behalf of the appellant. She re-iterated submissions made in the Appeal Memorandum and submitted compilation of case laws in their favour and further submitted that the case law of Amit Metaliks covers the case of appellant. She further relied on case law of K.N. Food Industries Pvt. Ltd. also.

5. I have carefully gone through the facts of the case, submissions made in the Appeal Memorandum, and submissions made at the time of personal hearing and evidences available on records. I find that the issue to be decided in this case is whether the advance amount

forfeited by the appellant in case of cancellation of orders in terms of agreement is consideration and hence is liable to for service tax or otherwise.

5.1 It is undisputed fact that the advance amounts given by the two customers were forfeited by the appellant on account of cancellation of orders placed by the said customers for non payment of remaining amount of the goods for which orders were placed. The forfeiture of the advance amounts was effected in terms of the agreement between the appellants and the said customers and the specific clause of the agreement in this regard reproduced by the adjudicating authority in para 14 of the impugned order reads as under :

> *"An induction furnace is capital equipment, it is mostly made against order. So in case of cancellation of an order, engineering efforts and material will result in loss to Inductotherm. To compensate this loss, the advance will not be refundable and in case if expenses incurred towards engineering efforts and material are over advance collected, the balance amount will be payable by the purchaser."*

From the above clause, it is clear that the advance amounts in dispute were forfeited to compensate the financial loss the appellant had suffered towards engineering efforts and material as a result of cancellation of orders. Thus, the income earned by the appellant from the act of forfeiture is in the nature of compensation only.

6. After going through the facts of the case, views of the adjudicating authority and the contentions raised in the appeal memorandum, I find that the first point to be decided in the instant case is as to whether the amount of advances forfeited by the appellant would amount to a consideration as envisaged in the service tax law or not and then only the question of taxability arises in the matter. The department is contending that the said amount is nothing but a consideration for refraining from an act of filing civil suit against the buyer which was available to the appellant in terms of the provisions of Section 53 of the Indian Contract Act. The relevant Section 53 of the Indian Contract Act reads as under:

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

From the above legal provision, it is amply clear that what is provided therein is the entitlement of a compensation to the party who 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 may sustain on account of the act of the other party. Such a compensation need not emanate from a civil court proceedings. It can even be agreed

upon by the two parties involved even while entering into an agreement. Merely because there is a mutual consent on the amount of compensation receivable in the event of a breach of promise/agreement, the compensation does not take the colour of consideration, as contended by the department. What is to be understood is the fine distinction between the terms "consideration" and "compensation". Consideration is not defined under service tax law but as per provisions of Indian Contract Act, it means a promise made by the promisee in reciprocation. Whereas the compensation is something which is awarded to the sufferer on account of breach of the contract/promises by the other party. Needless to mention that the consideration involves desire of the promisor whereas compensation involves breach. It is not disputed that definition of the term 'service" as given in Section 65B(44) of the Act envisages "consideration" and not "compensation". It is also not the case of the department in the present case that the amount of advances forfeited by the appellant is not in the nature of a compensation.

6.1 It is the contention of the appellant that the agreement between them and their buyers became void as the buyers failed to pay the remaining amount of the goods as promised or agreed and it is against the breach of this promise on the part of the buyers that the advance amounts deposited by them were forfeited. The department has not disputed this contention of the appellant. Thus, it is a fact not in dispute that the forfeiture of advance amounts was necessitated out of breach of promise and the amount so forfeited was in lieu of the financial loss the appellant had suffered in consequence of the act of the buyer. When that being so, such a transaction is clearly in the nature as envisaged in Section 53 of the Indian Contract Act and hence the amount so received would definitely amount to a compensation. Mere receipt of money which is in the nature of a compensation can not be treated as consideration for any activity.

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

6.3 In view thereof, I am of the considered view that the act of forfeiture of advance amounts by the appellant in the present case is in the nature of a compensation as envisaged in

Section 53 of the Indian Contract Act, 1872 against the breach of promise/agreement on the part of the buyer and such a transaction, being compensation against breach of promise/agreement, does not *per se* amount to a consideration and does not *per se* constitute any service or declared service as envisaged under Section 65B (44) and Section 66E(e) of the Act. When there is no consideration, there is no element of service as defined under the Act and consequently there can not be any question of service tax in the matter.

6.4 It is observed 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 is held that :

> *25. We also find a considerable force in the contention raised by the learned Advocate that the compensation received by the Appellant from the cultivators and M/s AML, the debt in present and future, which as per Transfer of Property Act in the category of Actionable Claim placing reliance on the decision of Hon'ble Supreme Court in case of* ***Kesoram Industries and Sunrise Association(Supra)***
>
> > *13. A careful reading of the Settlement Agreement in question clearly show that the land owners have agreed to pay a definite sum, that is, an ascertained amount to the Appellant developer to resolve all claims of settlement. The settlement agreements have resulted in creation of a debt in favour of the Appellant. Under the said circumstances a debt is clearly created and the said amount would fall within the scope and ambit of an actionable claim within the meaning of Section 3 of the Transfer of Property Act, 1882 and hence excluded from the definition of ' service' as per Section 65B(44).*
> >
> > *14. It is submitted that the amount in question is an ' actionable claim' which is not liable for any service tax under the provisions of the 1994 Act. The meaning, nature and scope of actionable claim has been dealt with in detail by the Constitution Bench of the Hon'ble Supreme Court of India in case of Sunrise Association vs. Govt. of NCT of Delhi reported in (2006) 5 SCC 603.*
>
> *26. Thus, we held that the entire sum of money would be classified as Actionable Claim which otherwise is beyond the scope of service tax under Section 66B(44) (iii) of the Finance Act. If the transaction of Development Agreement, Settlement Agreement and compensation not fall under 'Service' under the Finance Act there is no application of Section 66 E(e) of the Act ibid.*
>
> *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.

7. In view of the above discussions and the above decision of the Hon'ble Tribunal, it is to be held that the impugned order confirming demand in the matter fails to survive on merits before law and hence deserves to be set aside. When demand fails, there can not be any question of interest or penalty.

8. Accordingly, the impugned order is set aside being not legal and proper and the appeal of the appellant is allowed.

9. अपीलकर्ता द्वारा दर्ज की गई अपीलो का निपटारा उपरोक्त तरीके से किया जाता है।

The appeals filed by the appellant stand disposed off in above terms.

(**Akhilesh Kumar**)
Commissioner (Appeals)

Date: 23.04.2020

Attested

(Anilkumar P.)
Superintendent(Appeals),
CGST, Ahmedabad.

BY SPEED POST TO:

M/s Inductotherm (India) Pvt. Ltd.,
Plot No.SM-6, Road No.11,
Sanand Industrial Estate,
BOL Village, Sanand,
Ahmedabad-382170

Copy to:-

1. The Principal Chief Commissioner, Central GST , Ahmedabad Zone..
2. The Commissioner, CGST, Ahmedabad North.
3. The Deputy Commissioner, Central GST & C.Ex., Division-III, Ahmedabad North.
4. The Assistant Commissioner, CGST (System), HQ, Ahmedabad North.
5. Guard file.
6. P.A. File