सत्यमेव जयते

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
☎ 26305065-079 : टेलेफैक्स 26305136 - 079 :
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DIN-20210964SW000001489A

स्पीड पोस्ट

क फाइल संख्या : File No : GAPPL/COM/STP/1080/2020-Appeal-O/o Commr-CGST-Appl-Ahmedabad/3202 To 3206

ख अपील आदेश संख्या Order-In-Appeal Nos. **AHM-EXCUS-002-APP-17/2021-22**
दिनाँक Date : **17.09.2021** जारी करने की तारीख Date of Issue : **21.09.2021**

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

ग Arising out of Order-in-Original Nos. **13/DC/Demand/20-21/S. Tax dated 10.09.2020**, passed by Assistant/Deputy Commissioner, Central GST & Central Excise, Div-I (NARODA), Ahmedabad-North

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

Appellant-. - M/s Hi Tech Industries, Road No.1, Plot No. 6, GIDC Kathwada, Ahmedabad-382480.

Respondent- Deputy Commissioner, Central GST & Central Excise, Div-I (Naroda), Ahmedabad-North

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

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

भारत सरकार का पुनरीक्षण आवेदन :

Revision application to Government of India :

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

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

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

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

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

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

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

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

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

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

(1) केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001 के नियम 9 के अंतर्गत विनिर्दिष्ट प्रपत्र संख्या इए–8 में दो प्रतियों में, प्रेषित आदेश के प्रति आदेश प्रेषित दिनॉक 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 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,Bahumali Bhawan,Asarwa,Girdhar Nagar, Ahmedabad : 380004. in case of appeals other than as mentioned in para-2(i) (a) above.

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

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

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

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

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

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

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

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

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

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

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

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

Under Central Excise and Service Tax, "Duty demanded" shall include:
(i) amount determined under Section 11 D;
(ii) amount of erroneous Cenvat Credit taken;
(iii) amount payable under Rule 6 of the Cenvat Credit Rules.

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

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

ORDER-IN-APPEAL

The present appeal has been filed by M/s. Hi Tech Industry, Road No.1, Plot No.6, GIDC Kathwada, Ahmedabad- 382430 (hereinafter referred to as the appellant) against Order in Original No. 13/DC/20-21/S.Tax dated 10-09-2020 [hereinafter referred to as "*impugned order*"] passed by the Deputy Commissioner, CGST, Ahmedabad North [hereinafter referred to as "*adjudicating authority*"].

2. The facts of the case, in brief, is that the appellant was having Central Excise Registration No. AABFH8785JXM001 for manufacture of excisable goods Hoist, Winch, EOT Crane, JIB Crane and Spares falling under Chapter 84 and 85 of the CETA, 1985. The appellant had surrendered the registration on 01/12/2015. The appellant was also registered under Service Tax and holding Rregistration No. AABFH8785JST001. The EA 2000 audit of records of the appellant was conducted for the period from November, 2013 to November, 2015. In the course of the Audit, verification of the Balance Sheet for F.Y 2013-14 indicated that the appellant had booked income of Rs.7,18,278/- under Order Cancellation Income. Scrutiny of the ledgers indicated that the appellant had closed the accounts of several buyers by transferring the amount under order cancellation income.

3. It was the department's contention that by recovering Order Cancellation Income, the appellant was tolerating the act of his customers and, therefore, the said activity 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 which was introduced w.e.f. 01.07.2012. The appellant did not agree with observations of the Audit and submitted their reply. The department did not agree with the contention of the appellant and was of the view that the appellant was required to pay service tax on the said amount booked in their books of accounts as Order Cancellation income. The audit observations was contained in Final Audit Report No. 493/17-18 dated 24.11.2017.

4. A notice bearing F.No. VI/1(b)-05/AP-32/Cir V/Aud/17-18 dated 08.12.2017 was issued to the appellant calling upon them to show cause as to why :

i) The service tax of Rs.88,779/- should not be demanded and recovered from them under proviso to Section 73 (1) of the Finance Act, 1994 by invoking the extended period of five years;

ii) Interest should not be demanded and recovered from them under Section 75 of the Finance Act, 1994 and

iii) Penalty under Section 78 of the Finance Act, 1994 should not be imposed upon them.

5. The said SCN was adjudicated by the adjudicating authority vide the impugned order wherein he has :

A) confirmed the demand and ordered recovery of Service Tax Amounting to Rs.88,779/- under the proviso to of Section 73(1) of the Finance Act, 1994;

C) Ordered charging of interest under Section 75 of the Finance Act, 1994;

D) Imposed penalty of Rs.88,779/- under Section 78 of the Finance Act, 1994;

6. Aggrieved with the impugned order, the appellant firm has filed the instant appeal on the following grounds:

i) That the adjudicating authority has erred on fact and law in confirming the demand of service tax on the amount charged as penalty charges which they have reimbursed from the buyer of goods since the same is not towards any taxable service. Goods have not been delivered/supplied and amount has been credited as penalty in relation to delivery/supply of goods and amount given to them by buyers has been credited as penalty. Ultimate object of buyer has not been achieved. Thus no service has been provided in true spirit of the definition of Service in terms of Section 65 B(44).

ii) The amount was in relation to the delivery or supply of goods and not related to any service provided or to be provided.

iii) Penalty amount cannot form part of taxable value for the purpose of leviability of Service Tax under Section 67 of the Act. First of all any

activity must conform to definition of service under Section 65B (44) and thereafter the question of implementation of other rules arise.

iv) In order to charge service tax there must be some activity involved and that activity must be carried out. Work which does not qualify as an activity carried out shall not be termed as service as per Section 65B (44).

v) Forfeited amount means amount of penalty or fine imposed and recovered by them which is the result of dealing in goods or non fulfillment of vested responsibilities of the buyer of the goods. Had the buyer not violated any terms in dealing of goods, the amount would not have been forfeited i.e. charged as penalty.

vi) Amount charged as penalty has been collected out of dealing in goods which is deliver/supply or agreed to be delivered/supplied by the seller. Goods has not been delivered/supplied and hence no service provided in terms of the definition of service as per Section 65B (44).

vii) The Board has vide instruction issued vide F.No. 137/25/2011-ST dated 03.08.2011 has clarified that delayed payment charges received by stock brokers are not includible in taxable value as the same are not the charges for providing taxable service but are in the nature of penal charges.

viii) Section 66E covers certain activities under the definition of Declared Services. In order to qualify any activity under this entry there has to be an agreement which is entered into by both the parties in order to refrain from the act. Any penal charges which are charged due to violation of any other agreement shall not quality under such entry.

ix) Any service whether declared or otherwise has to be accomplished and it shall not include a transaction in money. Only transaction in money is out of the gamut of definition of service.

x) Changeability of Service tax occurs when an activity is performed. In cases of penal charges not activity is performed and hence there is no question of service tax being charged.

xi) They are not liable to pay any penalty/interest as service tax is not required to be paid.

7. Personal Hearing in the case was held on 18.06.2021 through virtual mode. Shri Harshadbhai G. Patel, Advocate, appeared on behalf of the appellant for the hearing. He reiterated the submissions made in appeal memorandum. The appellant

also submitted a written submission dated 18/6/2021 wherein they, inter-alia, relied upon the decisions in the following cases :-

I) M/s. South Eastern Coalfields Vs. Commissioner of Central Excise and Service Tax – Final Order dated 22/12/2020, Tribunal Delhi.

II) M/s. M.P. Poorva Kshetra Vidyut Vitran Co Ltd. Vs. Principal Commissioner, CGST and Central Excise, Bhopal.

III) M/s. K.N. Food Industries Pvt Ltd vVs. Commissioner of CGST and Central Excise, Kanpur reported at 2019-TIOL-3651-CESTAT – ALL.

IV) Commissioner of Service Tax Vs. M/s.Bhayana Builders – 2018TMI 1325.

V) M/s. Bhayana Builders (P) Ltd Vs. Commissioner of Service Tax – 2013 (32) STR 49 (Tri.LB)

8. 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 amount collected and booked by the appellant under Order Cancellation income from their buyers where goods have not been delivered/supplied and amount has been credited as penalty is consideration for tolerating the act of their customers and whether this 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.

8.1 It is observed from the case records that the amount booked under Order Cancellation income was as penalty in relation to the delivery/supply of goods and was given to them by their buyers as penalty. The appellant is a manufacturer of Hoist, Winch, ECT Crane, JIB Crane and spares and apparently manufactured considering the needs of the buyers and if the buyer fails to lift the said goods, the appellant may suffer losses on account of such cancellation. The appellant have claimed to have charged this amount as penalty. Thus, the income earned by the appellant from the act of forfeiture is in the nature of compensation/penalty only.

9. 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 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.

17. In view of the above discussions and the above decisions 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 cannot be any question of interest or penalty.

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

19. 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.

(Akhilesh Kumar) 17th Sept. 2021

Commissioner (Appeals)

Attested:

Date: .09.2021.

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

BY RPAD / SPEED POST

To

M/s Hi Tech Industries,
Road No.1, Plot No.6,
GIDC Kathwada,
Ahmedabad - 382430.

Appellant

The Deputy Commissioner,
CGST & Central Excise,
Division-I (Naroda)
Ahmedabad North.

Respondent

Copy to:

1. The Chief Commissioner, Central GST, Ahmedabad Zone.
2. The Commissioner, CGST, Ahmedabad North.
3. The Assistant Commissioner (HQ System), CGST, Ahmedabad North.

(for uploading the OIA)

4. Guard File.
5. P.A. File.