आयुक्त (अपील) का कार्यालय,

Office of the Commissioner (Appeal),

केंद्रीय जीएसटी, अपील आयुक्तालय, अहमदाबाद

Central GST, Appeal Commissionerate, Ahmedabad

जीएसटी भवन, राजस्व मार्ग, अम्बावाड़ी अहमदाबाद ३८००१५.

CGST Bhavan, Revenue Marg, Ambawadi, Ahmedabad 380015

☎ 07926305065- टेलेफैक्स07926305136

स्पीड पोस्ट

क फाइल संख्या : File No : V2(ST)124/Ahd-South/2019-20/13636 To 13640

ख अपील आदेश संख्या Order-In-Appeal Nos. **AHM-EXCUS-001-APP-091-2019-20**
दिनाँक Date : **17-01-2020** जारी करने की तारीख Date of Issue 23/01/2020

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

ग Arising out of Order-in-Original No. **CGST/DN-VI/17/DEM/SKC/Rasna/2018-19** दिनाँक: **25.03.2019 , i**ssued by Assistant Commissioner, Div-VI, Central Tax, Ahmedabad-South

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

Rasna Processors Pvt ltd
Ahmedabad

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 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/– को 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–बी/35–इ के अंतर्गतः–

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 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 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

This order arises on account of an appeal filed by M/s Rasna Processors Pvt. Ltd., 85, Sunrise Park, Drive-in Road, Ahmedabad - 380054 (in short '*appellant*') against the Order-in-Original No.CGST-VI/17/DEM/SKC/Rasna/2018-19 dated 25.03.2019 (in short '*impugned Order*') issued on 17.06.2019 by the Assistant Commissioner, CGST Division-VI , Ahmedabad South (in short '*the adjudicating authority*').

2. The facts of the case, in brief, are that the appellant is engaged in providing taxable services under the category of "Renting of Immovable Property" and during the scrutiny of records of the appellant by the CERA Audit, it was noticed that in the case of a rent agreement dated 10.04.2013 entered into by the appellant and their client M/s Climate Works Foundation, a Non Profit Organization incorporated in USA, the agreement was entered for a period of thirty six months with a lock-in-period of 30 months and there was a condition that lease could be terminated only after lock-in-period by serving upon Lessor a notice of six months or on payment of applicable rent in lieu of notice or a combination thereof and that the said lease agreement was terminated with effect from May 2015 before the expiry of the lock-in-period of 30 months and the premises rented out to the said Lessee by the above agreement was leased to another Indian company, M/s Shakti Sustainable Energy Foundation from May 2015 onwards. It was the view of the CERA Audit that as the lease/rent agreement with M/s Climate Works Foundation was terminated before the lock-in period of 30 months, the Lessee, M/s Climate Works Foundation, had to pay rent of lock-in period in terms of the Rent Agreement entered with the appellant and the amount of rent so payable would be consideration receivable by the appellant for agreeing to tolerate the act of termination of the agreement before the lock-in period which is a Declared Service as per Section 66(E)(e) of the Finance Act, 1994 (in short '*the Act*') and accordingly service tax was required to be charged on income from May 2015 to October 2015 @Rs.15,60,302/- per month totaling to Rs.93,61,920/- on which service tax payable was Rs.12,85,081/-. On the basis of the above audit objection, a Show Cause Notice (in short '*SCN*') bearing No.V/Div-VI/SCN-47/Rasna/2017-18 dated 12.03.2018 was issued to the appellant. The said SCN was adjudicated vide the impugned orders wherein the adjudicating authority has confirmed the demand along with interest and also imposed a penalty, equivalent to the service tax confirmed, under Section 78 of the Act.

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

(i) In the instant case, one lessee requested the appellant company to cancel the Rent Agreement and sister unit of the lessee took the entire premises on rent at the equivalent Rental Value. Such an activity cannot be considered as an Act to tolerate an Act or situation as pointed out by the Learned Assistant Commissioner. Had the appellant company recovered any additional rent or charged any penal charges for

breach of contract before the expiry of lock in period, then the same would be liable for service tax under the provisions of Section 66E(e) of the Act. However, in the instant case, appellant company has neither collected any additional rent nor charged any penal charges for breach of contract. Thus, cancellation of Rent Agreement before the expiry of lock in period doesn't fall within the ambit of provisions of "Declared Services" under Section 66E(e) of the Act;

(ii) The lock in period provided in the original lease agreement was with the intention to ensure that the appellant was not required to look for other tenants during such period. However when the lessee conveyed that they wanted to vacate the premises within the lock in period but correspondingly its sister unit was willing to take on lease the said premises, the appellant agreed to such arrangement and entered into new lease agreement with the sister unit. In such circumstances, the appellant never raised claim for rent of the remaining months during the lock in period from the old lessee since the premises had been immediately taken on rent by sister unit of such lessee. In fact the agreement with Climate Works Foundation never provided for any automatic recoverable in case premature termination of agreement by the lessee. In fact the agreement contained an arbitration clause and provided for amicable settlement if possible. The appellant did not take any such steps in response to premature cancellation of lease by Climate Works Foundation since the cancellation was effectively only in the nature of shifting of lease to the sister concern of the lessee. Thus, no amount was receivable or received pursuant to the termination of agreement. Demand of service tax on an amount which was never claimed by the appellant from Climate Works Foundation is thus bad and illegal. In any case there is no activity involved in the vacation of premises by the old lessee and simultaneous rental agreement with the sister unit of such lessee. Thus there is no service or declared service provided by the appellant. In any case service tax is leviable on "gross amount charged". There being no consideration charged by the appellant from Climate Works Foundation, the demand of service tax on such notional amount is arbitrary, bad and illegal;

(iii)There was no fraud, collusion, willful mis-statement, suppression or intended evasion. The appellant believed and still maintains that it had fully discharged service tax liability on all rent amounts received during the said year. At best, it is a bonafide dispute of interpretation and in such circumstances invocation of larger period of limitation is bad and illegal; and

(iv)The learned adjudicated authority has imposed service tax on notional amount which according to him is towards "declared service". While the appellant is seriously disputing the very levy of tax, in any case imposition of penalty in the facts and circumstances of the case is arbitrary and illegal.

The appellant has produced copies of rental agreement dated 10.04.2013 with M/s Climate Works Foundation and the revised rental agreement dated 23.04.2015 with M/s Shakti Sustainable Foundation in support of their contention.

4. Personal hearing in the matter was held on 17.12.2019. The appellant was represented by Shri Brij Shah, Chartered Accountant. He reiterated the submissions made in the Appeal Memorandum for consideration.

5. I have carefully gone through the facts of the case, Appeal Memorandum, submissions made at the time of personal hearing and evidences available on records. I find that the appellant during the adjudication proceedings has not submitted any reply to the SCN and not attended the personal hearing granted to them by the adjudicating authority. They seem to be making their submissions first time before the appellate authority. Based on the facts and evidences made available before me, I proceed to decide the appeal on merits.

6. After going through the facts of the case, I find that the department's contention for demand of service tax in the matter solely rests on the two clauses 2.3 and 6.1 of the Rent Agreement dated 10.04.2013 entered between the appellant and their client M/s Climate Works Foundation interpreting which it is alleged that as the Lessee, M/s Climate Works Foundation, terminated the lease agreement before the expiry of lock-in-period of the agreement, they were liable to pay the rent for the remaining period of lock-in-period in terms of above said two clauses of the agreement and this sum receivable by the appellant from the said Lessee is nothing but a consideration for the appellant for the act of tolerating the act of premature cancellation/termination of the agreement by the lessee and the said act of tolerating is a declared service under Section 66(E)(e) of the Act leviable to service tax.

7. On perusal of the Rent Agreement dated 10.04.2013 entered between the appellant and their client Climate Works Foundation, I find that the above said two clauses/paras of the said agreement, based on which the demand in the present case has been made, read as under:

> *2.3 Provided always that at least 6 (six) months before the expiry of Lease Period, LESSOR shall enquire from LESSEE in writing about its intention to extend the Lease by a further period of 36 (thirty-six) months and should duly notify the proposed change in the lease rent. In case LESSEE fails to reply otherwise within a period of 60 (sixty) days from the date of receipt of letter from LESSOR, it would be deemed that the Lease has been extended for another period of 36 (thirty-six) months on the same terms and conditions as contained herein, except rent which shall be changed as per clause 2.2 above. To give effect and to regularize the extended tenure of the lease, LESSEE shall execute a new lease deed and have the same registered, at least 2 (two) months prior to the expiry of the Lease Period as per clause 2.2 above.*

6.1 LESSEE may terminate this Lease Deed anytime after period of 30 (thirty) months of the Lease Period (hereinafter referred to as "Lock-in-Period). It being expressly clarified that this Lease can only be terminated after Lock-in-Period by serving upon LESSOR a notice of 6 (six) months, or on payment of applicable rent in lieu of notice or a combination thereof.

From the above two clauses, it is clear that the lease in the case was agreed upon for a period of 36 months and there was a lock-in-period of 30 months after which only the said lease could be terminated, if so desired by the Lessee. There is no doubt that the condition that the lease can only be terminated after Lock-in-period gives the appellant a right to claim rent for the balance period of the lock-in-period, if the lease deed is terminated before the expiry of the lock-in-period. But it can not be construed that the above said two clauses provide for any mandatory payment or automatic recovery of the said rent in case of early termination of lease, it only entitles the appellant to make a claim for rent, if he desires so. In this context, it needs to be understood what the term "lock-in-period" signifies in case of a lease agreement between two parties. A lock-in-period is usually provided in a lease agreement so as to safeguard the interests of the Lessor legally by way of creating a claim for compensation of any monetary loss or damage that may incur to him in case of an early termination of such an agreement unilaterally by the Lessee. It acts as a inherent tool legally enforceable by the Lessor to make good the losses suffered by him in case of dispute between the two parties during such a period. What is to be noted is that it creates liability on Lessee only when the same is enforced by the Lessor. So the crucial aspect is the act of enforcement of such a tool by the Lessor. It is the prerogative of the Lessor to do it or not. It is only upon enforcement of such a condition by the Lessor that the lessee becomes liable for making payment of a sum as rent for the remaining period of lock-in-period in case of termination of the lease agreement before the expiry of lock-in-period of the agreement. Therefore, a mere provision of lock-in-period in the lease agreement does not per se creates a liability on the Lessee to make payment of rent for the remaining period of lock-in-period. In the instant case, the appellant, who is the lessor in the agreement, has stated that the lock in period provided in the original lease agreement was with the intention to ensure that the appellant was not required to look for other tenants during such period and since the premises had been immediately taken on rent by sister unit of such lessee, the appellant never raised claim for rent of the remaining months during the lock in period from the old lessee. They also stated that though the agreement contained a arbitration clause, they did not take any such steps in response to premature cancellation of lease by the Lessee since the cancellation was effectively only in the nature of shifting of lease to the sister concern of the lessee. Thus, it is a fact on record that the appellant had not enforced the condition for recovery of compensation on the lessee on account of the termination of the lease agreement before the expiry of the lock-in-period. Nor did the department has adduced any material to prove that such a claim has indeed been there on records by the Lessor. In fact, looking to the facts of

the case, the appellant had no reason to be aggrieved with the act of the Lessee as the act of the Lessee had not caused any kind of loss to the them so as to compel for taking a legal action for any compensation. The Lessee themselves ensured that the premises they vacated was immediately again taken on lease by their sister concern causing no loss of any kind to the Lessor by their act, to which the appellant also readily agreed. Thus, the appellant had no ground or reason to claim for the rent of the remaining period of the lock-in-period of the agreement. As no amount was claimed by the appellant from the Lessee for breach of contract/agreement viz. termination of lease agreement before the expiry of lock-in-period, no amount was payable by the Lessee to the appellant for the remaining period of lock-in-period. When no amount was payable by the appellant for the said period, no amount was receivable by the appellant from the Lessee for the said period, for the act of termination of lease agreement, because of the condition of lock in period in the agreement. That being so, the audit's/deparment's view that rent for the remaining period of lock-in-period is receivable by the appellant does not stand on facts and merits.

8. Further, it is to observe that the terms 'Service' and 'Declared Service' have been defined in the Act as per clause (44) and (22) of Section 65B which read as under:

> *(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.*
>
> *(22) "declared service" means any activity carried out by a person for another person for consideration and declared as such under section 66E.*

From the above definitions of the said two terms, it is clear that for an activity to be called 'service', the primary and most important factor is that such an activity has to be carried out by a person for another for consideration. Any act or activity without any consideration does not fall under the ambit of 'service' as defined under the Act. In the instant case, it is a fact clear from records that the appellant was not in receipt of any consideration against the act of termination of rent agreement prior to completion of lock-in-period by the Lessee. In fact, the services of renting provided by the appellant continued without any break even after

termination of the lease agreement by the old Lessee and service tax was paid by them on the consideration received by them from the new Lessee against such renting. It is even admitted by the department that there is no dispute to this fact.

8.1 Now coming to the contention of the department that the appellant had tolerated the act of cancellation of the agreement of the Lessee, it is to observe that the word 'tolerate' means to allow something to happen or exist even while disliking or disagreeing to it. In case of an early termination of a rent agreement, the Lessor normally does not agree with such early termination for fear of loss of an assured income. In the present case, the appellant had no such disagreement and the early termination of the lease agreement was mutually agreed upon between the two parties as there was no loss of any kind to the appellant for the vacated premises being immediately taken on possession by a new Lessee, the sister unit of the Lessee. There was actually nothing for the appellant to tolerate in the matter for there being no reason to dislike or disagree with the said act of the Lessee. Therefore, it is wrong to construe that there was an act of tolerating on the part of appellant to the act of early termination of the lease agreement by the Lessee as alleged by the department. Even if it is assumed that there existed an act of tolerating on the part of the appellant, then also the fact that there was no flow back on consideration of any kind to the appellant from the old Lessee for the said act remains unchanged or unaltered. In the absence of consideration, even the act of tolerating an act or situation does not come under the ambit of either declared service as defined under Section 65B(22) or service as defined under Section 65B(44) of the Act. Thus, the department stand on this count also does not stand on merits.

9. As per provisions of Section 66B and 67 of the Act, service tax is levied on gross amount charged by a service provider. In the present case, as discussed in para 7 above, no amount was charged or claimed by the appellant from the Lessee for their act of termination of lease agreement before the expiry of lock-in-period provided under the agreement. The department had not produced any evidence to prove the contra. In such a situation, it is not legally permitted to adopt a notional value for consideration when there was no consideration in reality which was charged making liable for a payment by the Lessee or receipt by the Lessor. It is a fact undisputed that without a real consideration, in monetary terms or in any other manner, there can not be any levy of service tax for a service provided or to be provided. That being so, the department's act of assuming the value of consideration as amount of monthly rent payable for the remaining period of lock-in-period in the present case merely in terms of the provisions of lock-in-period in the lease agreement does not seem to be legally proper and correct.

10. In view of the above discussions, it is to be held that in the facts and circumstances of the case, there does not seem to exist any activity on the part of the appellant in the act of termination of the rent/lease agreement by the old Lessee of the appellant before the expiry

of lock-in-period provided in the agreement, which can be considered as being falling within the ambit of "service" as defined under the Act so as to call for a levy of service tax. The onus was on the department to prove the taxability in the case in which they failed. Consequently, the demand of service tax by the department in the matter fails to sustain before law and thereby the impugned orders become liable to be set aside.

11. Accordingly, I set aside the impugned order being not legal and proper and allow the appeal of the appellant being found sustainable on merits.

12. 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: 17.01.2020.

Attested:

23/01/2020

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

BY SPEED POST TO:

M/s Rasna Processors Pvt. Ltd.,
85, Sunrise Park,
Drive-in Road,
Ahmedabad – 380054.

Copy to:-

1. The Principal Chief Commissioner, Central Tax , Ahmedabad Zone..
2. The Principal Commissioner, CGST, Ahmedabad South.
3. The Assistant Commissioner, CGST Division-VI, Ahmedabad South.
4. The Asstt. Commissioner, CGST (System), HQ, Ahmedabad South.
   (for uploading the OIA on website)
5. Guard file.
6. P.A. File.