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)6/EA-2/Ahd-South/2019-20/14089 TO 14093

ख अपील आदेश संख्या Order-In-Appeal Nos. **AHM-EXCUS-001-APP-097A-2019-20**
दिनाँक Date : **24-01-2020** जारी करने की तारीख Date of Issue 02/03/2020

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

ग Arising out of Order-in-Original No. **AC/21/Div-II/2018-19** दिनाँक: **06.03.2019** , issued by Assistant Commissioner, Div-II, Central Tax, Ahmedabad-South

ध अपीलकर्ता का नाम एवं पता Name & Address of the Appellant / Respondent
Shubham Extrusion Technik 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/– 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–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 out of an appeal filed by the Assistant Commissioner, Central GST, Division-II, Ahmedabad South Commissionerate (in short '*appellant*') in terms of Review Order No.02/2019-20 dated 07.06.2019 passed under Section 84(1) of the Finance Act, 1994 (in short '*the Act*') by the Reviewing Authority against Order-in-Original No.AC/21/Div-II/2018-19 dated 06.03.2019 (in short '*impugned order*') passed by the Assistant Commissioner, Central GST, Division-II, Ahmedabad South Commissionerate (in short '*the adjudicating authority*') in the case of M/s Shubham Extrusion Technik Pvt. Ltd., Plot No.62/7-8, Phase-I, GIDC, Vatva, Ahmedabad (in short '*respondent*').

2. The facts of the case, in brief, are that the respondent was engaged in the manufacture of Machinery falling under Chapter 84 of the Central Excise Tariff Act, 1985. During the course of audit of their financial records, it was observed that they had booked certain income under the head of "Order Cancellation Income" and "Write-off Income". On enquiry about the said income, the respondent informed that in their line of business, they take a certain amount of advance from their customers against order confirmation as their product is tailor-made and expensive and lot of expense has to be made towards purchase of raw materials required for manufacture of such finished goods and that in the event of cancellation of order by the customers, they forfeit the advance received from the customers due to incurring financial burden since the raw materials already procured would be lying in stock as inventory till the time another similar order is procured and that above income had been booked on account of forfeiture of advances in respect of cancellation of orders.

2.1 The audit observed that in the instant case, the respondent and the customers have entered into an agreement whereby the respondent have agreed to supply the requisite goods at the price fixed upon and the customer has agreed to purchase such goods and as token of acceptance of such agreement, the customers have made the advance payment to the respondent as agreed upon and that by cancelling the order placed, the customers prevented the respondent from performing the contract and for that reason the respondent became entitled for receiving compensation from the customers as provided for under Section 53 of the Indian Contract Act, 1972; that however, the respondent 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 respondent 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 respondent 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 respondent 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 24.04.2018 was issued to the respondent proposing for recovery of service tax amounting to Rs.7,80,105/- against an income of Rs.52,00,698/- shown in their financial records on account of forfeiture of advances in respect of cancellation of orders. The said SCN was adjudicated vide the impugned order wherein the adjudicating authority has dropped the demand by observing that he found no iota of evidence on record that the respondent and buyers have entered into any arrangement by which the respondent had agreed not to resort to Section 53 of the Indian Contract Act, 1872 and the buyer had foregone the advance money and that the provisions of Section 53 of the Indian Contract Act, 1872 are not applicable to the instant case and that merely based on the accounting treatment in books of accounts, service tax cannot be demanded on the advance amount and that the retaining of advance money received against sale of machineries cannot be said as agreeing to obligation to tolerate an act or refrainment as contemplated in clause (e) of Section 66E of the Act and accordingly it does not constitute either Service or Declared Service and hence there is no leviability of Service Tax on the advance amount received.

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

(i) The adjudicating authority has erred in coming to the conclusion that there was no agreement between the respondent and the buyer to any obligation to tolerate an act. The adjudicating authority has completely missed out the essence of the terms 'agreement', 'contract', 'promise', etc. which has led to the erroneous conclusion;

(ii) In the instant case, the respondent had proposed to sell his goods to the customer and the customer on acceptance of the proposal had paid the advance amount towards purchase of such goods. Thus, an act of proposal and acceptance of proposal is evident in the transaction and as such the proposal has been converted to a 'promise' in terms of Section 2(b) of the Indian Contract Act, 1872. It goes without saying that price of the goods had been fixed which formed the consideration towards sale of goods by the respondent. Thus, the entire transaction is an 'agreement' in terms of the provisions of Section 2(e) of the Indian Contract Act, 1872;

(iii)The provisions of Section 9 of the Indian Contract Act, 1872 clearly indicate that an agreement can be written or otherwise. In the instant case, it is a fact that there is no written agreement. But the fact that a proposal of sale has been made towards certain consideration is accepted by the purchaser by their act of giving the advance amount towards acceptance of such proposal. Thus, the fact that an agreement has been entered into by the respondent and his buyer can not be turned down simply on the ground that there is no written agreement. The adjudicating authority has lost sight of the fact that in absence of an agreement,

the need to deposit advance money with the respondent against the proposed sale would never have arisen;

(iv) Further, contracts need not be written in as much as the law provides all 'agreements' are 'contracts' – Section 10 of the Indian Contract Act, 1872;

(v) In the instant case, the agreement/contract between the respondent and the buyer is in two parts and is in the nature of reciprocal promises. On one side the buyer has agreed to buy the goods for the agreed upon consideration and on the other side the seller i.e., the respondent has agreed to accept the cancellation of order on the condition of forfeiture of the advance money paid. The will to cancel the order on forfeiture of the advance money is an inherent clause to the acceptance of purchase of goods. This is all the more evident from the fact that the buyer of the goods has not made any claim towards the advance money deposited with the respondent at the time of entering into the agreement of purchase. Had there been no mutual consent regarding forfeiture of the advance money in the event of cancellation of order, the buyer would certainly have claimed the advance money from the respondent. However, no such claim has been advanced by the buyer and as such it is implied that the buyer has accepted the proposal of the respondent that the advance would be forfeited in the event of cancellation of order. Thus, the second part of the proposal to the effect of forfeiture of advance in case of cancellation of order also stands accepted by the buyer and as such assumes the nature 'promise' in terms of Section 2(b) of the Indian Contract Act. The consideration with regard to such promise is the quantum of advance money paid to the respondent and therefore, the element of 'promise' and 'consideration' is present in the second part of the proposal which makes it an agreement in terms of Section 2(e) of the Indian Contract Act. In other words, there was a mutual consent at the end of both the parties that the amount of advance would be forfeited in the event of cancellation of order and no further action would lie at the end of any of the parties;

(vi) The agreement between the two parties consisted of twofold reciprocal promises : (a) Agreement to sell the goods on receipt of agreed upon consideration by the respondent and acceptance thereof by the buyer; and (b) Agreement to cancel the order on payment of the agreed upon consideration which is equal to the advance money deposited by the purchaser. This clearly indicates that consideration towards sale-purchase is the agreed upon price and the consideration towards the act of tolerating the cancellation of order by the buyer is the amount equivalent to the advance deposit made;

(vii) In the instant case, the respondent has tolerated the act of cancellation of the order by the buyer and refrained from an act of filing civil suit against the buyer which was available to them in terms of the provisions of Section 53 of the Indian Contract Act, 1872 on receipt of the consideration of Rs.52,00,698/-. Such activities of 'tolerating an act and/ or refraining from an act' are covered under the ambit of 'declared service' in terms of the provisions of Section 66E(e) of the Act and therefore, the demand of service tax has rightly been raised in the show cause notice;

(viii) The adjudicating authority's finding to the effect that the forfeiture of advance money does not result into agreeing to obligation to tolerate an act or refrainment is factually incorrect as the event of cancellation of the order by the buyer was the inherent part of the agreement between the two parties and the consent by the respondent to such an event of cancellation of order is clearly

visible on the count that the respondent has forfeited the advance amount and not taken recourse to the other legal options available to them in terms of the Indian Contract Act. Thus, it is very much clear that the respondent has agreed to the obligation to tolerate an act of cancellation of order by the buyer and refrain from taking legal action on forfeiture of the advance amount at the time of entering into the agreement;

(ix) The adjudicating authority has erred in interpreting the Guidance Note 6.7 to the effect that the declared services are to be restricted merely to the activities mentioned in the guidance note as the activity mentioned under the Guidance Note is only illustrative and not exhaustive and Section 66E(e) of the Act does not restrict the scope of 'declared service' merely to non-compete agreements;

(x) The adjudicating authority has also erred in finding that '*there is no consideration as there is no activity*' as the act of tolerating or the act of refraining is an activity in pure linguistic terms and in the instant case, the respondent have tolerated the act of cancellation of an order and also refrained from taking legal course of action against such cancellation is certainly an activity undertaken by them and the agreed upon consideration for cancellation of order was the quantum of amount deposited as advance i.e., forfeiture of advance. Thus, both the elements of 'activity' and 'consideration towards the activity' are very much present in the instant case;

(xi) The finding of the adjudicating authority that the buyers have not allowed the respondent to appropriate or forfeit the advance money for any purpose other than sale of machinery and accordingly receipt of advance money per se does not result into consideration for any activity other than sale of machinery is highly erroneous and contradictory as the amount forfeited was not towards sale/purchase of machinery but was purely towards cancellation of such sale/purchase order and is a consideration towards breach of contract and not towards sale of goods; and

(xii) The case laws relied by the adjudicating authority are misplaced as the facts in the present case are totally different from the facts in those cases.

4. Personal hearing in the matter was held on 08.01.2020. Shri C.A. Rahul Patel, Chartered Accountant, appeared on behalf of the respondent and submitted copy of defense reply dated 27.01.2019 submitted before the adjudicating authority along with copies of ledger and requested to consider their submissions. No one appeared from the appellant's side.

5. I have carefully gone through the facts of the case, submissions made in the appeal memorandum, and submissions made by the respondent at the time of personal hearing and evidences available on records. It is the contention of the department that the event of cancellation of the order by the buyer was the inherent part of the agreement between the two parties and the respondent has tolerated the act of cancellation of the order by the buyer and refrained from an act of filing civil suit against the buyer which was available to them in terms of the provisions of Section 53 of the Indian Contract Act, 1872 against an agreed upon consideration which is equal to the advance money

deposited by the buyer and hence the amount of advances forfeited by the respondent against cancellation of orders by their buyers is taxable in terms of Section 66E(e) of the Act and leviable to service tax accordingly.

6. After going through the facts of the case, views of the adjudicating authority and the contentions raised by the department in the appeal, I find that the first point to be decided in the instant case is as to whether the amount of advances forfeited by the respondent 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. As stated in the previous para, the department is contending that the said amount is nothing but a consideration for the act of tolerating the act of cancellation of the order by the buyer and for refraining from an act of filing civil suit against the buyer which was available to the respondent 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 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 respondent is not in the nature of a compensation.

6.1 It is the contention of the respondent that the agreement between the respondent and the buyer became void as the buyer failed to take delivery of the goods as promised or agreed and it is against the breach of this promise on the part of the buyer that the advance amounts deposited by them were forfeited. The department has not disputed this contention of the respondent. 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 respondent 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 respondent themselves by way of forfeiture of advances without the intervention of any legal forums. When the respondent himself takes care of situations 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 definitely should flow from a legal proceeding. In the instant case, it is the case that the respondent 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 respondent 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. Further, as the case of the department fails on the above count on merits, I do not find it worth to consider the other contentions of the department in the matter for being becoming irrelevant for the same reason.

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 thelearned 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 contentions raised by the department on the merit of the issue are not sustainable in law on facts and merits and hence deserves to be rejected.

8. Accordingly, I do not find any reason to interfere with the decision taken by the adjudicating authority and therefore, I upheld the impugned order and reject the appeal filed by the appellant being devoid of merits.

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: 24.01.2020.

Attested:

28/02/2020

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

BY SPEED POST

To

M/s Shubham Extrusion Technik Pvt. Ltd.,
Plot No.62/7-8, Phase-I,
GIDC, Vatva,
Ahmedabad

Copy to:-

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2. The Principal Commissioner, CGST, Ahmedabad South (RRA Section).
3. The Assistant Commissioner, CGST, Division-II, Ahmedabad South.
4. The Asstt. Commissioner (System), CGST , Ahmedabad South.
   (for uploading OIA on website)
5. Guard file
6. P.A. file.