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

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रजिस्टर्ड डाक ए.डी. द्वारा

DIN:20210264SW0000302092

क फाइल संख्या : File No : GAPPL/COM/STP/282/2020

ख अपील आदेश संख्या Order-In-Appeal Nos. **AHM-EXCUS-001-APP- 75/2020-21**

दिनाँक Date : **15-02-2021** जारी करने की तारीख Date of Issue

श्री अखिलेश कुमार आयुक्त (अपील) द्वारा पारित

Passed by Shri. Akhilesh Kumar, Commissioner (Appeals)

ग Arising out of Order-in-Original No **MP/08/AC/Div-IV/20-21 dated 14.05.2020** issued by Assistant Commissioner, Div-IV, Central Tax, Ahmedabad-South.

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

M/s Remica Plastic Machinery Manufacturers, 2/AB, Sardar Patel Industrial Estate, Nr. Gujarat Petrol Pump, Narol, Ahmedabad-382405.

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 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 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.

(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।

(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.

(26) 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)

(27)

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:

(xxxiv) amount determined under Section 11 D;
(xxxv) amount of erroneous Cenvat Credit taken;
(xxxvi) 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।

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 appellate tribunal whenever it is constituted within three months from the president or the state president enter office.

ORDER-IN-APPEAL

This order arises on account of an appeal filed by M/s Remica Plastic Machinery Manufacturers, 2/AB, Sardar Patel Industrial Estate, Nr. Gujarat Petrol Pump, Narol, Ahmedabad-382405 (hereinafter referred as '*the appellant*') against the Order-in-Original No.MP/08/AC/Div-IV/20-21 dated 14.05.2020 (hereinafter referred as '*the impugned order*') passed by the Assistant Commissioner, Central GST, Division-IV, Commissionerate: Ahmedabad-South(hereinafter referred as '*the adjudicating authority*').

2. The facts of the case, in brief, are that the appellant was engaged in the manufacture of Plastic Extrusion Plants falling under Chapter 84 of the Central Excise Tariff Act, 1985 and also holding Service Tax registration as a recipient of service under the category of Transport of goods by Road and Legal Services. During the course of audit of their financial records by the Department, it was observed that there was an Indirect Income of Advance Forfeited from Debtors (total 5 nos.) to the tune of Rs. 14,81,000/- shown in the balance sheet for the F.Y 2016-17. On verification, it was noticed that as per the terms and condition of clause 5 (cancellation of order) of Order dated 14.10.2011 for confirmation for Remica Model RPM-90/1980 Extrusion Coating with PP with BOPP Lamination with manual registration control with accessories entered between the appellant and the respective buyer namely M/s. JBS Rasayan Pvt. Ltd., Kolkatta, it has been agreed upon that:

> *"Subsequently once the order placed will not be cancelled for any reason whatsoever the case of the order being cancelled or failure from your side to lift the machine after fifteen days of our intimation the entire amount of the advance will be forfeited."*

Similarly, for the other orders also, the terms and conditions with the respective debtors were the same.

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 (hereinafter referred as '*SCN*') dated 29.11.2018 was issued to the appellant proposing for recovery of service tax amounting to Rs. 2,61,137/- against an income of Rs.14,81,000/- shown in their financial records on account of forfeiture of advances in respect of cancellation of orders, under the provisions of Section 73 (1) of the Finance Act, 1994 by invoking the extended period of limitation along with interest under Section 75 of the Act and imposition of penalty under Section 78 of the Act. Further, vide the said SCN, demand for Service Tax amounting to Rs. 16,404/-was also proposed from the appellant towards the liability of Service Tax under RCM (reverse charge mechanism) in respect of the expenses incurred under legal head to the tune of Rs. 1,13,300/- by the appellant. In respect of the said demand also, penalty under Section 78 of the Act was proposed alongwith recovery of interest on the said short payment of Service Tax under Section 75 of the Act.

2.3 The SCN dated 29.11.2018 was adjudicated vide the impugned order, briefly reproduced as below:

(i) Confirmed the demand and ordered for recovery of Service Tax of Rs. 2,61,137/- in respect of the income on account of forfeiture of

advances against cancellation of the orders under proviso to Section 73 (1) of the Finance Act, 1994.

(ii) Interest at the applicable rate ordered to be recovered in respect of confirmed demand of Service Tax of Rs. 2,61,137/- under Section 75 of the Finance Act, 1994.

(iii) Confirmed the demand of Service Tax of Rs. 16,404/- in respect of the expenses incurred under legal head by the appellant, under proviso to Section 73 (1) of the Finance Act, 1994 and it has also been ordered to appropriate Rs. 16,404/- already paid by the appellant; the interest amount of Rs. 4827/- also confirmed under Section 75 of the Finance Act, 1994 and ordered to be appropriated.

(iv) Imposed penalty of Rs. 2,77,541/- upon the appellant under Section 78 of the Finance Act, 1994.

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

(i) The amount received in advance in sale transaction was pre manufacturing cost to meet with pre manufacturing expenses such as engineering, designing, drawing and part of raw material cost. As such, the amount was in nature of pre-manufacturing cost and forms a part of assessable value under Section 4 of Central Excise Act, 1944 and hence, the same cannot be construed as consideration for service of agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act.

(ii) The amount received as advance from the customers was to be used for manufacture of excisable goods and partly covers the cost of inputs, which were to be used in the manufacture of final products. It is well settled that charges or consideration are divided in pre manufacturing activity and post manufacturing activity. The charges relating to engineering, designing, drawing, pre-fabrication are considered as pre manufacturing cost and form part of assessable value under Section 4 of the Central Excise Act, 1944. In this connection reliance is placed on the decision of Hon'ble Tribunal in the case of Indo Berolina

Industries Pvt. Ltd. Vs. CCE, Mumbai-IV cited at 2015 (330) ELT-739 (Tri. Mumbai) wherein Hon'ble Tribunal has held that expenditure relating to pre fabrication, engineering and design stage would form part of the assessable value of the machinery and equipment. In the present case also, the amount received as advance was pre manufacturing cost and form part of the assessable value of the machine to be manufactured, the same cannot be construed as consideration for refraining from filing the civil suit. In as much as the amount received as advance was towards the pre manufacturing cost and therefore, appellant did not suffer any loss for which any civil suit can be lodged. As such they have not received the amount as advance for not filing civil suit in the event of cancellation of order or not buying the machines by the buyer.

(iii) The advance payment was received before 01.07.2012 when Section 66E (e) was not in statute, therefore, Service Tax could not be demanded. In fact, advance amounts were received during the period from year 2007 to 2011 and as per condition of the sale order, amount was forfeited after six months of the advance amount received. Such forfeited amounts were lying in account for long time and the accounting entry under Kasar-Vatav expenses was made in the year 2017. As such accounting treatment of showing the forfeited amount in ledger cannot be taken as date of forfeit. Further, on perusal of Rule 3 of Point of Taxation Rules, it clearly establishes that service tax is payable when advance payment is received and as Section 66E (e) was not in statute before 01-07-2012 when advance payment was received, service tax liability cannot be saddled. In this connection, reliance is placed on the decision of Hon'ble Tribunal in the case of M/s. Amit Metaliks Limited Vs. Commissioner of CGST, Bolpur in Service Tax Appeal No. 76639 of 2018, the Hon'ble Tribunal in para 19 of their decision held that:

"19. The declared service under Section 66E(e) was first introduced from 01.07.2012 while the agreements are prior to the said date. The rules cannot go beyond Act since the charge under Finance Act was not available on the date of agreements in

question. The Rule 5 of the Point of Taxation Rule has thus no application in this case to create a change in an indirect way."

(iv) Further, the Hon'ble Tribunal in the case of M/s. Amit Metaliks Limited Vs. Commissioner of CGST, Bolpur in Service Tax Appeal No. 76639 of 2018, the Hon'ble Tribunal in para 27 of their decision also held that "the advance amount forfeited cannot be treated as service under Section 66E(e) of Finance Act, 1994" which would be squarely applicable in the present case.

(v) Reliance is also placed on the decision of Hon'ble Tribunal in case of LEMON TREE HOTEL Versus COMMISSIONER, GST, C.E. & CUSTOMS, INDORE [reported at 2020 (34) G.S.T.L. 220 (Tri. - Del.)] underwhich Hon'ble Tribunal held as reproduced below:

*"**5.** Having considered the rival contentions, I find that the aforementioned observation of the Commissioner (Appeals) are erroneous and have no legs to stand. Admittedly, the customers pay an amount to the appellant in order to avail the hotel accommodation services, and not for agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act; and chargeable on full value and not on abated value. The amount retained by the appellant is for, as they have kept their services available for the accommodation, and if in any case, the customers could not avail the same, thus, under the terms of the contract, they are entitled to retain the whole amount or part of it. Accordingly, I hold that the retention amount (on cancellation made) by the appellant does not undergo a change after receipt. Accordingly, I hold that no service tax is attracted under the provisions of Section 66E(e) of the Finance Act. Accordingly, this ground is allowed in favour of the appellant."*

(vi) As regards the imposition of penalty it is submitted that when details of advance payment were available on record, suppression could not be held against the appellant. Further, reliance is placed on the decision of Hon'ble Tribunal in the case of Stratagem Media Pvt. Ltd. Vs. CCE, Mumbai-IV cited at 2016 (46) STR-420 (Tri. Mumbai). They also contended that the penalty under Section 78 of the Finance Act, 1994 could not be imposed in respect of deemed service and legal service in light of the Revenue neutrality. They placed reliance on the decision of Hon'ble Tribunal in the case of Matrix Telecom Pvt. Ltd. Vs. CCE, Vadodara-II cited at 2013 (32) STR-423 (Tri. Ahmd.) wherein it is held that:

"10. I find that the plea of Revenue neutrality is strong plea as well as in this case, as credit available to the appellant on Service Tax paid under reverse charge mechanism can be utilized for

discharge of excise duty and hence there can be no reasons avoid Service Tax liability. It is noted that various decisions are in favour of the assesse. The judgements of this Bench in the case of Dineshchandra R. Agarwal Infracon Pvt. Ltd. (supra) and Sagar Enterprises (supra) are directly on the point and are in favour of the assesse."

In light of the above, penalty ought not to have been imposed on the appellant.

4. Personal hearing in the matter was held on 24.12.2020. Shri P. G. Mehta, Advocate, appeared on behalf of the appellant. He re-iterated submissions made in the Appeal Memorandum.

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 by the buyer as per the conditions mentioned in the confirmation of orders issued by the appellant can be treated as consideration and accordingly would be liable to service tax as being the declared service provided under clause (e) of Section 66E of the Finance Act, 1994.

5.1. It is observed from the case records that the appellant had shown indirect income in the Ledger of "Kasar Vatav Exp" to the tune of Rs. 14,81,000/- for the F.Y. 2016-17. This was on account of forfeiture of advance amount pertaining to five (5) contracts of supply of goods manufactured by the appellant, and it was as per terms and conditions of contract entered into by the parties concerned. The department intends to treat this forfeited amount as a consideration for not executing the contract and in turn tax it under Section 66 E (e) of the Finance Act, 1994 as "Declared Service" under clause agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act.

5.2 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 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 compensation need not emanate from a civil court proceeding. 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.

5.3 In the present case, it is undisputed 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 cannot be treated as consideration for any activity.

5.4 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 cannot 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.

5.5 In view of the above, 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 cannot be any question of service tax in the matter.

6. 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."

6.1 Further, I find that CESTAT, Regional Bench, Allahabad in case of K.N. Food Industries Pvt. Ltd. Versus Commissioner of CGST & C.Ex., Kanpur [reported at 2020 (38) G.S.T.L. 60 (Tri. - All.)] vide Final Order No. ST/A/71917/2019-CU(DB), dated 26-11-2019 also 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."*

7. In view of the above discussions and the judicial pronouncements of the Hon'ble Tribunal, it is to be held that the impugned order as regards to confirming demand of Service Tax of Rs. 2,61,137/- in respect of the income on account of forfeiture of advances against cancellation of the orders does not sustain on merits before law and hence the impugned order deserves to be set aside to that extent. When demand fails, there cannot be any question of interest or penalty.

8. It is also observed that the appellant has paid Service Tax of Rs. 16,404/- leviable under reverse charge mechanism on the expenses incurred by them under legal head alongwith interest of Rs. 4827/-, as pointed out by audit, and the same have also been appropriated by the adjudicating authority vide the impugned order. Further, the appellant has not raised any contention in the present appeal in respect of the said payments of Service Tax and interest leviable thereon.

8.1 However, it is observed that as regards the penalty imposed under Section 78 of the Finance Act, 1994 for short payment of Service Tax of Rs. 16,404/- leviable on the expenses incurred under legal head, the appellant has contended that the same would not be imposable on the

grounds of Revenue neutrality. They also placed reliance on the decision of Hon'ble Tribunal in the case of Matrix Telecom Pvt. Ltd. Vs. CCE, Vadodara-II cited at 2013 (32) STR-423 (Tri. Ahmd.). I find that at para-9 of the said judgment, Hon'ble Tribunal in the said case noted as reproduced below:

> *"**9.** I have considered the submissions made by both the sides and perused the records. The issue involved in this case is only as to the penalty imposed by the lower court and upheld by the First Appellate Authority. The appellant herein had discharged the Service Tax liability along with interest on receipt of the show cause notice and before adjudication. It is also undisputed that the Service Tax liability has arisen on the ground of appellant being the recipient of services of Management and Business Consultancy Services from an overseas Consultancy Service and these services are received by the appellant for the advises given on marketing. Understandably, Service Tax paid on such services rendered would be available to the appellant themselves as Cenvat credit which can be utilized for discharge of any excise duty on the final goods manufactured and cleared by the appellant. On the factual matrix as noted hereinabove, I find that the issue is to be decided in favour of the appellant, as regards penalty imposed, **I find strong force in the contentions raised by ld. Counsel, that during the period Service Tax liability under reverse charge mechanism was being disputed at various forums and attained finality, after the judgment of the Hon'ble High Court of Bombay in the case of Indian National Ship Owners Association** [2008-TIOL-633-HC-MUM-ST = 2009 (13) S.T.R. 235 (Bom.)]."*

In the present case, it is observed that the short payment of Service Tax of Rs. 16,404/- leviable on the expenses incurred under legal head has been pointed out by audit pertains to the F.Y 2016-17 and F.Y 2017-18 (upto June'2017). Accordingly, it is observed that during the relevant time, the Service Tax liability on the said issue was very clear. Accordingly, I find that facts of the present case are different than the case of Matrix Telecom Pvt. Ltd. cited by the appellant and hence the same would not be squarely applicable.

8.2 In view of the above, I do not find any force in the contention of the appellant so as to interfere in the impugned order to the extent of penalty imposed by the adjudicating authority in respect of short payment of Service Tax of Rs. 16,404/- in respect of the expenses incurred by the appellant under legal head.

9. Accordingly, the impugned order is set aside to the extent of demand of Service tax of Rs. 2,61,137/- alongwith interest and penalty [as mentioned in above para-7] and the appeal of the appellant is allowed to that extent. However, the impugned order to the extent of penalty

imposed in respect of short payment of Service Tax of Rs. 16,404/- [as mentioned in above para-8.2] is upheld and the appeal of the appellant is rejected to that extent.

10. 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.

15th February 2021

(Akhilesh Kumar)
Commissioner (Appeals)

Date:15th February, 2021

Attested

(M.P.Sisodiya)
Superintendent(Appeals),
CGST, Ahmedabad.

BY SPEED POST TO:

M/s Remica Plastic Machinery Manufacturers,
2/AB, Sardar Patel Industrial Estate,
Nr. Gujarat Petrol Pump,
Narol, Ahmedabad-382405

Copy to:-

1. The Principal Chief Commissioner, Central GST, Ahmedabad Zone.
2. The Principal Commissioner, CGST, Ahmedabad-South.
3. The Assistant Commissioner, Central GST, Division-IV, Ahmedabad-South.
4. The Assistant Commissioner, CGST (System), HQ, Ahmedabad-South.
5. Guard file.
6. P.A. File