



सत्यमेव जयते

**आयुक्त(अपील)का कार्यालय,
Office of the Commissioner (Appeal),**

केंद्रीय जीएसटी, अपील आयुक्तालय, अहमदाबाद
Central GST, Appeal Commissionerate, Ahmedabad
जीएसटी भवन, राजस्वमार्ग, अम्बावाड़ी अहमदाबाद ३८००१५.
CGST Bhavan, Revenue Marg, Ambawadi, Ahmedabad 380015
☎ 07926305065 - टेलिफैक्स 07926305136



DIN : 20230264SW0000942929

स्पीड पोस्ट

- क फाइल संख्या : File No : GAPPL/COM/STP/2453/2022 **18639-13**
- ख अपील आदेश संख्या Order-In-Appeal No. AHM-EXCUS-001-APP-152/2022-23
दिनांक Date : 06-02-2023 जारी करने की तारीख Date of Issue 21.02.2023
आयुक्त (अपील) द्वारा पारित
Passed by Shri Akhilesh Kumar, Commissioner (Appeals)
- ग Arising out of OIO No. MP/03/AC/Div-IV/22-23 दिनांक: 05.04.2022 passed by Assistant Commissioner, CGST, Division IV, Ahmedabad South
- घ अपीलकर्ता का नाम एवं पता Name & Address

Appellant

M/s Mehul Ashok Kumar Shah
39/8, Samratnagar, Isanpur,
Ahmedabad - 382443

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 :

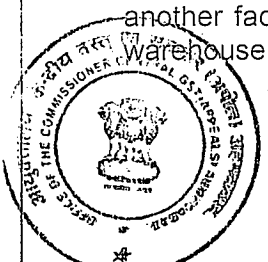
Revision application to Government of India:

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1994 की धारा अतत नीचे बताए गए मामलों के बारे में पूर्वोक्त 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 हानिकार खाने 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 मामलों 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 ड्यूटी क्रेडिट 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 दिनांक से तीन मास के भीतरमूल-आदेश एवं अपील आदेश की दो-दो प्रतियों के साथ उचित आवेदन किया जाना चाहिए। उसके साथ खाता इ.का मुख्य शीर्ष 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 रुपये या उससे कम होतो रुपये 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 सेवा कर अपीलीय न्यायाधिकरण के प्रति अपील:-
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

- (1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1944 की धारा 35-बी/35-इ के अंतर्गत:-

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

- (क) उक्तलिखित परिच्छेद 2 (1) क में बताए अनुसार के अलावा की अपील, अपीलो के मामले में सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण(सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, अहमदाबाद में 2nd माला, बहुमाली भवन, असरवा, गिरधरनागर, अहमदाबाद-380004

- (a) To the west regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at 2nd Floor, Bahumali Bhawan, Asarwa, Girdhar Nagar, Ahmedabad : 380004. in case of appeals other than as mentioned in para-2(i) (a) above.



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

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 notwithstanding the fact that the one appeal to the Appellate 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 शुल्कअधिनियम 1970 यथासंशोधित की अनुसूचि-1 के अंतर्गत निर्धारित किए अनुसार उक्त आवेदन या मूलआदेश यथास्थिति निर्णयन प्राधिकारी के आदेश में से प्रत्येक की एक प्रतिपर रू.6.50 पैसे कान्यायालय 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 is invited to the rules covering these and other related matter contended in the Customs, Excise & Service Tax Appellate Tribunal (Procedure) Rules, 1982.

90 सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण(सिस्टेट),के प्रतिअपीलो के मामले में कर्तव्यमांग(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 सेवाकर के अंतर्गत, शामिल होगा "कर्तव्य की मांग"(Duty Demanded)-

- a. (Section) खंड 11D के तहत निर्धारित राशि;
इण लिया गलत सेनवैट क्रेडिट की राशि;
बण सेनवैट क्रेडिट नियमों के नियम 6 के तहत देय राशि.

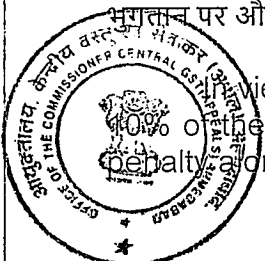
⇒ यह पूर्व जमा 'लंबित अपील' में पहले पूर्व जमा की तुलना में, अपील दाखिल करने के लिए पूर्व शर्त बना दिया गया है.

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 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।



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 one is in dispute."

ORDER-IN-APPEAL

The present appeal has been filed by M/s. Mehul Ashok Kumar Shah, 39/8, Samratnagar, Isanpur, Ahmedabad – 382 443 (hereinafter referred to as the “appellant”) against Order in Original No. MP/03/AC/Div-IV/22-23 dated 05.04.2022 [hereinafter referred to as “*impugned order*”] passed by the Assistant Commissioner, Division – IV, CGST, Commissionerate : Ahmedabad South [hereinafter referred to as “*adjudicating authority*”].

2. Briefly stated, the facts of the case are that the appellant was not registered with the Service Tax department. They were having PAN No. AUQPS1945L. As per the information received from the Income Tax Department, the appellant had earned substantial income from services amounting to Rs.1,46,12,637/- during F.Y. 2014-15 to during F.Y. 2017-18 (up to June, 2017) . However, the appellant did not obtain service tax registration and did not pay service tax on such service income. The appellant was called upon to submit documentary evidence in respect of the income earned by them. They submitted copies of Form 26AS and ITRs for the period under dispute. On verification of the same, it was found that the appellant were engaged in the activity of providing D.G. Sets on hire, and receiving hire charges as consideration, which appeared to be covered under Supply of Tangible Goods service, and hence were taxable. However, the appellant had not paid the applicable service tax amounting to Rs.20,67,268/-.

2.1 Therefore, the appellant was issued Show Cause Notice bearing No. Div.- IV/SCN-199/2020-21 dated 22.12.2020 wherein it was proposed to :

- A. Demand and recover the service tax amounting to Rs.20,67,268/- under the proviso to Section 73 (1) of the Finance Act, 1994 along with interest under Section 75 of the Finance Act, 1994.
- B. Impose penalty under Sections 77(1), 77 (2) and 78 of the Finance Act, 1994.

3. The SCN was adjudicated vide the impugned order wherein :

- a) The demand of service tax amounting to Rs.19,69,711/- was confirmed and the service tax amounting to Rs.97,557/- was dropped.

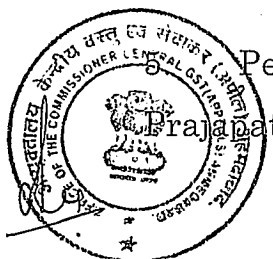


- b) Interest was ordered to be recovered under Section 75 of the Finance Act, 1994.
- c) Penalty amounting to Rs.20,000/- each was imposed under Section 77 (1) and 77 (2) of the Finance Act, 1994.
- d) Penalty amounting to Rs.19,69,711/- was imposed under Section 78 of the Finance Act, 1994.

4. Being aggrieved with the impugned order, the appellant have filed the present appeal on the following grounds :

- i. The adjudicating authority has erred in confirming the demand on the ground that they had not produced any agreement with the buyer despite the fact that such agreements were made with the respective customers and sample copies of such agreements were already submitted by them on 23.02.2022 before the adjudicating authority.
- ii. The adjudicating authority has erred in confirming the demand by considering the hiring of D.G. Sets as without transfer of right to use liable for service tax. It can be verified from the terms of the contracts that they are in relation to transfer of right to use such goods as all risk and reward relating to use of such machine have been transferred to the customers till their utilization.
- iii. The adjudicating authority has erred in considering that the judgments relied upon by them are not applicable to the present case.
- iv. The adjudicating authority has erred in confirming the demand merely based on the ITR and Form 26AS without proper investigation and by invoking extended period despite various courts holding that such approach by the department is not proper and demand can't be confirmed.
- v. The adjudicating authority has erred in confirming the demand in violation of the principles of judicial discipline and passing a non-speaking order. The order has been passed without giving any finding as to why the various judgments relied upon by them were not considered.

Personal Hearing in the case was held on 18.01.2023. Shri Punit Prajapati, Chartered Accountant, appeared on behalf of appellant for the



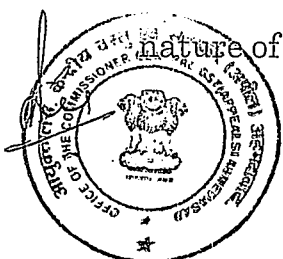
hearing. He reiterated the submissions made in appeal memorandum. He relied upon the judgment of the Allahabad CESTAT in the case of Express Engineers & Spares Pvt. Ltd. Vs. Commissioner, CGST, Ghaziabad – 2022 (64) GSTL 112 (Tri.-All.) during the hearing. He stated the he would submit additional written submission containing reconciliation of income.

6. In the additional written submissions filed on 31.01.2023, the appellant contended, inter alia, that :

- During F.Y. 2014-15 and F.Y. 2015-16, their turnover as per ITR and P&L Account is higher than Form 26AS and the income declared in the ITR and P&L Account is taken as value in the SCN. This amount is the same as the total ledger of 'DG Set Hire Charges'. Thus, there is no need to have any reconciliation for this period.
- During F.Y. 2016-17, the amount reported in Form 26AS is higher as compared to P&L account and ITR as one M/s.Vishal Décor and Events Pvt. Ltd. had deducted TDS of Rs.5,67,100/-, which is not their income. Further, the transaction was booked by the said firm on 27.02.2018 i.e. much after the closure of their books of accounts for F.Y.2016-17. They have not claimed adjustment or refund of the TDS deducted by the said firm. Thus, this entry is not pertaining to the said period and they have not booked it as their income for the said period.
- They submit copies of the ITR, Form 26AS, P&L Account, Ledger Account of DG Hire Charges and Delivery Challans for the period under dispute.

7. I have gone through the facts of the case, submissions made in the Appeal Memorandum, the additional written submissions as well as submissions made at the time of personal hearing and the materials available on records. The issue before me for decision is as whether the providing of D.G. Sets on hire by the appellant amounts to the taxable service as Supply of Tangible Goods and chargeable to service tax or otherwise. The demand pertains to the period F.Y. 2014-15 to F.Y. 2017-18 (upto June).

8. It is observed that in the SCN issued to the appellant, it has been alleged that the income earned by providing D.G. Sets on hire appeared to be in the nature of services defined under Section 65(105)(zzzzj) of the Finance Act, 1994



and, therefore, service tax was proposed to be demanded and recovered from the appellant. The adjudicating authority has in the impugned order referred to the provisions of the erstwhile Section 65(105) (zzzz) as well as Section 66E (f) of the Finance Act, 1994. The adjudicating authority has also relied upon Para 6.6.1 and 6.6.2 of the Education Guide issued by the CBIC and Circular No. 198/08/2016-Service Tax dated 17.08.2016. Thereafter, the adjudicating authority has proceeded to reject the contentions of the appellant on the grounds that no agreement between the appellant and their customer has been produced which establishes that the right to use has been transferred to the customer and that repairs and maintenance of the D.G. Set is to be carried out by the customer. The adjudicating authority has also recorded that the appellant had not submitted any proof of payment of VAT. For these reasons, the adjudicating authority has held that the providing of D.G. Sets on hire by the appellant is taxable as Supply of Tangible Goods.

8.1 The appellant have as part of their appeal memorandum submitted copy of letter dated 23.02.2022 addressed to the Assistant Commissioner, CGST, Division-IV, Ahmedabad South. They had vide the said letter submitted copies of Delivery Challans and Invoices on sample basis, Purchase order of the customer pertaining to these Invoices as wells ITR for F.Y. 2014-15 to F.Y. 2016-17. However, it is observed that the documents have not been taken on record or considered by the adjudicating authority while deciding the case.

9. It is observed that the demand of service tax has been confirmed against the appellant under 'Supply of Tangible Goods'. Therefore, it is pertinent to refer to sub-section (f) of Section 66E of the Finance Act, 1994, which is reproduced below :

66E (f) : "transfer of goods by way of hiring, leasing, licensing or in any such manner without transfer of right to use such goods".

9.1 In the instant case, it is observed that the appellant are supplying D.G. Sets to their customers on hire for which they are receiving consideration. The D.G. Sets given on hire are in the possession of the customer and they are using it for the duration of the period for which it has been given to them on hire. The appellant have submitted a few copies of the Offer Letters issued by them to their customers. These Offer Letters are all similarly worded. One such Offer Letter dated 11.11.2014 is to M/s. Dineshchandra R. Agrawal Infracon Pvt.



Ltd, Ahmedabad. The subject of the said Offer Letter is stated as “ *Offering of DG Set on right to use basis*”. In terms of the said letter, the appellant had offered DG Set on right to use basis for 30 days and the terms of the said Offer Letter indicates that the DG Set would be stationed at the premises of the customer, manpower for operation and other facilities would be of the customer and the cost of diesel and other maintenance cost would also of the customer. It, therefore, is evident that the appellant had, for the duration it was stationed at the premises of the customer, given the right to use the D.G. Set to the customer. Since transfer of right to use is involved, it goes out of the purview of Section 66E (f) of the Finance Act, 1994.

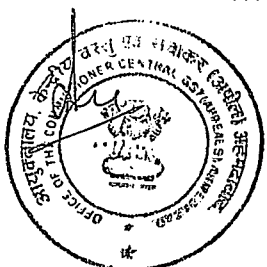
10. The appellant have relied upon the judgment of the Hon'ble Tribunal in the case of and Express Engineers & Spares Pvt. Ltd. – 2022 (64) GTL 112 (Tri.-All.) wherein the Hon'ble Tribunal had held that :

“25. In the present case, the nature of the transaction between the appellant and the customers, as is clear from the contract, reveals that :

- (i) Specific equipments for specific duration for hire were agreed upon between the appellant and the customers;
- (ii) The appellant received a fixed monthly amount based on maximum number of hours specified in the work order;
- (iii) If the equipment was operated beyond the maximum working hours per month, overtime charges were recovered on *pro rata* basis;
- (iv) All Statutory Regulations were required to be complied with by the customers;
- (v) If the customer required an operator, it was provided by the appellant with the equipment;
- (vi) The customer was responsible for issuing directions to the operator regarding the operation of the equipment;
- (vii) The appellant did not have any control over the equipment and the effective control was with the customer. This is because the customer drew plans and issued instructions to the operator for operating the diesel generator sets according to the work requirement;
- (viii) There was no minimum and maximum number of hours prescribed for operation of the machine and the duration of use of the equipment was entirely at the discretion of the customer;
- (ix) In some cases the responsibility of maintenance of diesel generator sets was on the appellant;
- (x) The diesel/fuel and lubricant required to run the diesel generator sets was to be provided by the customers; and
- (xi) The equipments could not leave or enter the premises of the customers without a pass issued by the customers.

26. Thus, the transaction between the appellant and the customers would qualify as a transfer of right to use goods with the control and possession over the diesel generator sets passing on to the customers.

...
...



41. Thus, for all the reasons stated above, it is more than apparent that the supply of diesel generator sets to the customers would not amount to STGU service for the period from 1-4-2011 to 30-6-2012, or a declared service from 1-7-2012 to 2014-15. The orders passed by the Commissioner (Appeals), therefore, cannot be sustained."

10.1 The facts involved in the present appeal are similar to that in the case before the Hon'ble Tribunal. Therefore, following judicial discipline, I am of the considered view that the adjudicating authority has erred in holding that the D.G. Sets given on hire by the appellant is covered by the provisions of Section 66E (f) of the Finance Act, 1994. Accordingly, I set aside the impugned order and allow the appeal filed by the appellant.

11. अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।

The appeal filed by the appellant stands disposed of in above terms.

Akhil Kumar
 (Akhil Kumar) 06 February, 2023..
 Commissioner (Appeals)
 Date: 06.02.2023.

Attested:

N. Suryanarayanan. Iyer
 (N.Suryanarayanan. Iyer)
 Assistant Commissioner (In situ) (Appeals),
 CGST, Ahmedabad.



BY RPAD / SPEED POST

To

M/s. Mehul Ashok Kumar Shah,
 39/8, Samratnagar, Isanpur,
 Ahmedabad – 382 443

Appellant

The Assistant Commissioner,
 CGST, Division- IV,
 Commissionerate : Ahmedabad South.

Respondent

Copy to:

1. The Chief Commissioner, Central GST, Ahmedabad Zone.
2. The Principal Commissioner, CGST, Ahmedabad South.
3. The Assistant Commissioner (HQ System), CGST, Ahmedabad South.
 (for uploading the OIA)
4. Guard File.
5. P.A. File.

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