:: आयुक्त (अपील्स) का कार्यालय,वस्तु एवं सेवा करऔर केन्द्रीय उत्पाद शुल्क::
O/O THE COMMISSIONER (APPEALS), GST & CENTRAL EXCISE

द्वितीय तल,जी एस टी भवन / 2nd Floor, GST Bhavan
रेस कोर्स रिंग रोड / Race Course Ring Road
राजकोट / Rajkot – 360 001
Tele Fax No. 0281 – 2477952/2441142 Email: cexappealsrajkot@gmail.com

सत्यमेव जयते

रजिस्टर्ड डाक ए.डी.द्वारा :-

क	अपील / फाइलसंख्या/ Appeal /File No.	मूल आदेश सं / O.I.O. No.	दिनांक/ Date:
	V2/29/BVR/2019	BHV-EXCUS-000-ADC-14-2018-19	3/20/2019

ख अपीलआदेशसंख्या(Order-In-Appeal No.):

BHV-EXCUS-000-APP-227-2019

आदेश का दिनांक / Date of Order: **25.09.2019** जारी करने की तारीख / Date of issue: **26.09.2019**

श्री गोपी नाथ, आयुक्त (अपील्स), राजकोट द्वारा पारित /
Passed by **Shri Gopi Nath**, Commissioner (Appeals),Rajkot

ग अपर आयुक्त/ संयुक्त आयुक्त/ उपायुक्त/ सहायक आयुक्त, केन्द्रीय उत्पाद शुल्क/ सेवाकर/वस्तु एवंसेवाकर, राजकोट / जामनगर / गांधीधाम द्वारा उपरलिखित जारी मूल आदेश से सृजित: /
Arising out of above mentioned OIO issued by Additional/Joint/Deputy/Assistant Commissioner, Central Excise/ST / GST, Rajkot/Jamnagar/Gandhidham :

घ **अपीलकर्ता &** प्रतिवादी का नाम एवं पता /Name & Address of the **Appellants &** Respondent :-

M/s.Hariyana Ship Demolition Pvt Ltd.Plot no. V4, Ship Breaking Yard,Alang, Bhavnagar-364002,

इस आदेश(अपील) से व्यथित कोइ व्यक्ति निम्नलिखित तरीके मे उपयुक्त प्राधिकारी / प्राधिकरण के समक्ष अपील दायर कर सकता है।/
Any person aggrieved by this Order-in-Appeal may file an appeal to the appropriate authority in the following way.

(A) सीमा शुल्क ,केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपील, केन्द्रीय उत्पाद शुल्क अधिनियम ,1944 की धारा 35B के अंतर्गत एवं वित्त अधिनियम, 1994 की धारा 86 के अंतर्गत निम्नलिखित जगह की जा सकती है ।/

Appeal to Customs, Excise & Service Tax Appellate Tribunal under Section 35B of CEA, 1944 / Under Section 86 of the Finance Act, 1994 an appeal lies to:-

(i) वर्गीकरण मूल्यांकन से सम्बन्धित सभी मामले सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण की विशेष पीठ, वेस्ट ब्लॉक नं 2, आर. के. पुरम, नई दिल्ली, को की जानी चाहिए ।/

The special bench of Customs, Excise & Service Tax Appellate Tribunal of West Block No. 2, R.K. Puram, New Delhi in all matters relating to classification and valuation.

(ii) उपरोक्त परिच्छेद 1(a) में बताए गए अपीलों के अलावा शेष सभी अपीलें सीमा शुल्क, केंद्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, , द्वितीय तल, बहुमाली भवन असावा अहमदाबाद- ३८००१६ को की जानी चाहिए ।/

To the West regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at, 2nd Floor, Bhaumali Bhawan, Asarwa Ahmedabad-380016 in case of appeals other than as mentioned in para- 1(a) above

(iii) अपीलीय न्यायाधिकरण के समक्ष अपील प्रस्तुत करने के लिए केन्द्रीय उत्पाद शुल्क (अपील) नियमावली, 2001, के नियम 6 के अंतर्गत निर्धारित किए गये प्रपत्र EA-3 को चार प्रतियों में दर्ज किया जाना चाहिए । इनमें से कम से कम एक प्रति के साथ, जहां उत्पाद शुल्क की माँग , ब्याज की माँग और लगाया गया जुर्माना, रुपए 5 लाख या उससे कम, 5 लाख रुपए या 50 लाख रुपए तक अथवा 50 लाख रुपए से अधिक है तो क्रमश: 1,000/- रुपये, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपीलीय न्यायाधिकरण की शाखा के सहायक रजिस्टार के नाम से किसी भी सार्वजिनक क्षेत्र के बैंक द्वारा जारी रेखांकित बैंक ड्राफ्ट द्वारा किया जाना चाहिए । संबंधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहां संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है । स्थगन आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रुपए का निर्धारित शुल्क जमा करना होगा ।/

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.5000/-, Rs.10,000/- where amount of duty demand/interest/penalty/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 Asst. Registrar of branch of any nominated public sector bank of the place where the bench of any nominated public sector bank of the place where the bench of the Tribunal is situated. Application made for grant of stay shall be accompanied by a fee of Rs. 500/-.

(B) अपीलीय न्यायाधिकरण के समक्ष अपील, वित्त अधिनियम, 1994 की धारा 86(1) के अंतर्गत सेवाकर नियमवाली, 1994, के नियम 9(1) के तहत निर्धारित प्रपत्र S.T.-5 में चार प्रतियों में की जा सकेगी एवं उसके साथ जिस आदेश के विरुद्ध अपील की गयी हो, उसकी प्रति साथ में संलग्न करें (उनमें से एक प्रति प्रमाणित होनी चाहिए) और इनमें से कम से कम एक प्रति के साथ, जहां सेवाकर की माँग ,ब्याज की माँग और लगाया गया जुर्माना, रुपए 5 लाख या उससे कम, 5 लाख रुपए या 50 लाख रुपए तक अथवा 50 लाख रुपए से अधिक है तो क्रमश: 1,000/- रुपये, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपीलीय न्यायाधिकरण की शाखा के सहायक रजिस्टार के नाम से किसी भी सार्वजिनक क्षेत्र के बैंक द्वारा जारी रेखांकित बैंक ड्राफ्ट द्वारा किया जाना चाहिए । संबंधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहां संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है । स्थगन आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रुपए का निर्धारित शुल्क जमा करना होगा ।/

The appeal under sub section (1) of Section 86 of the Finance Act, 1994, to the Appellate Tribunal Shall be filed in quadruplicate in Form S.T.5 as prescribed under Rule 9(1) of the Service Tax Rules, 1994, and Shall be accompanied by a copy of the order appealed against (one of which shall be certified copy) and should be accompanied by a fees of Rs. 1000/- where the amount of service tax & interest demanded & penalty levied of Rs. 5 Lakhs or less, Rs.5000/- where the amount of service tax & interest demanded & penalty levied is more than five lakhs but not exceeding Rs. Fifty Lakhs, Rs.10,000/- where the amount of service tax & interest demanded & penalty levied is more than fifty Lakhs rupees, in the form of crossed bank draft in favour of the Assistant Registrar of the bench of nominated Public Sector Bank of the place where the bench of Tribunal is situated. / Application made for grant of stay shall be accompanied by a fee of Rs.500/-.

सहायक आयुक्त अपील्स

(i) वित्त अधिनियम, 1994 की धारा 86 की उप-धाराओं (2) एवं (2A) के अंतर्गत दर्ज की गयी अपील, सेवाकर नियमवाली, 1994, के नियम 9(2) एवं 9(2A) के तहत निर्धारित प्रपत्र S.T.-7 में की जा सकेगी एवं उसके साथ आयुक्त, केन्द्रीय उत्पाद शुल्क अथवा आयुक्त (अपील), केन्द्रीय उत्पाद शुल्क द्वारा पारित आदेश की प्रतियां संलग्न करें (उनमें से एक प्रति प्रमाणित होनी चाहिए) और आयुक्त द्वारा सहायक आयुक्त अथवा उपायुक्त, केन्द्रीय उत्पाद शुल्क/ सेवाकर, को अपीलीय न्यायाधिकरण को आवेदन दर्ज करने का निर्देश देने वाले आदेश की प्रति भी साथ में संलग्न करनी होगी। /

The appeal under sub section (2) and (2A) of the section 86 the Finance Act 1994, shall be filed in For ST.7 as prescribed under Rule 9 (2) & 9(2A) of the Service Tax Rules, 1994 and shall be accompanied by a copy of order of Commissioner Central Excise or Commissioner, Central Excise (Appeals) (one of which shall be a certified copy) and copy of the order passed by the Commissioner authorizing the Assistant Commissioner or Deputy Commissioner of Central Excise/ Service Tax to file the appeal before the Appellate Tribunal.

(ii) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय प्राधिकरण (सेस्टेट) के प्रति अपीलों के मामले में केन्द्रीय उत्पाद शुल्क अधिनियम 1944 की धारा 35एफ के अंतर्गत, जो की वित्तीय अधिनियम, 1994 की धारा 83 के अंतर्गत सेवाकर को भी लागू की गई है, इस आदेश के प्रति अपीलीय प्राधिकरण में अपील करते समय उत्पाद शुल्क/सेवा कर मांग के 10 प्रतिशत (10%), जब मांग एवं जुर्माना विवादित है, या जुर्माना, जब केवल जुर्माना विवादित है, का भुगतान किया जाए, बशर्ते कि इस धारा के अंतर्गत जमा कि जाने वाली अपेक्षित देय राशि दस करोड़ रुपए से अधिक न हो।

केन्द्रीय उत्पाद शुल्क एवं सेवाकर के अंतर्गत "मांग किए गए शुल्क" मे निम्न शामिल है

(i) धारा 11 डी के अंतर्गत रकम

(ii) सेनवेट जमा की ली गई गलत राशि

(iii) सेनवेट जमा नियमावली के नियम 6 के अंतर्गत देय रकम

- बशर्ते यह कि इस धारा के प्रावधान वित्तीय (सं. 2) अधिनियम 2014 के आरंभ से पूर्व किसी अपीलीय प्राधिकारी के समक्ष विचाराधीन स्थगन अर्ज़ी एवं अपील को लागू नहीं होगे।/

For an appeal to be filed before the CESTAT, under Section 35F of the Central Excise Act, 1944 which is also made applicable to Service Tax under Section 83 of the Finance Act, 1994, 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, provided the amount of pre-deposit payable would be subject to a ceiling of Rs. 10 Crores,

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

- provided further that the provisions of this Section shall not apply to the stay application and appeals pending before any appellate authority prior to the commencement of the Finance (No.2) Act, 2014.

(C) **भारत सरकार को पुनरीक्षण आवेदन :**
Revision application to Government of India:

इस आदेश की पुनरीक्षण याचिका निम्नलिखित मामलो में, केंद्रीय उत्पाद शुल्क अधिनियम, 1994 की धारा 35EE के प्रथम परंतुक के अंतर्गत अवर सचिव, भारत सरकार, पुनरीक्षण आवेदन ईकाई, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, संसद मार्ग, नई दिल्ली-110001, को किया जाना चाहिए। /

A revision application lies to the Under Secretary, to the Government of India, Revision Application Unit, Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi-110001, under Section 35EE of the CEA 1944 in respect of the following case, governed by first proviso to sub-section (1) of Section-35B ibid:

(i) यदि माल के किसी नुकसान के मामले में, जहा नुकसान किसी माल को किसी कारखाने से भंडार गृह के पारगमन के दौरान या किसी अन्य कारखाने या फिर किसी एक भंडार गृह से दूसरे भंडार गृह पारगमन के दौरान, या किसी भंडार गृह में या भंडारण में माल के प्रसंस्करण के दौरान, किसी कारखाने या किसी भंडार गृह में माल के नुकसान के मामले में।/

In case of any loss of goods, where the loss occurs 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

(ii) भारत के बाहर किसी राष्ट्र या क्षेत्र को निर्यात कर रहे माल के विनिर्माण में प्रयुक्त कच्चे माल पर भरी गई केन्द्रीय उत्पाद शुल्क के छुट (रिबेट) के मामले में, जो भारत के बाहर किसी राष्ट्र या क्षेत्र को निर्यात की गयी है। /

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.

(iii) यदि उत्पाद शुल्क का भुगतान किए बिना भारत के बाहर, नेपाल या भूटान को माल निर्यात किया गया है। /

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

(iv) सुनिश्चित उत्पाद के उत्पादन शुल्क के भुगतान के लिए जो ड्यूटी क्रेडीट इस अधिनियम एवं इसके विभिन्न प्रावधानों के तहत मान्य की गई है और ऐसे आदेश जो आयुक्त (अपील) के द्वारा वित्त अधिनियम (नं. 2), 1998 की धारा 109 के द्वारा नियत की गई तारीख अथवा समायाविधि पर या बाद में पारित किए गए हैं।/

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 such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec. 109 of the Finance (No.2) Act, 1998.

(v) उपरोक्त आवेदन की दो प्रतियां प्रपत्र संख्या EA-8 में, जो की केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001, के नियम 9 के अंतर्गत विनिर्दिष्ट है, इस आदेश के संप्रेषण के 3 माह के अंतर्गत की जानी चाहिए । उपरोक्त आवेदन के साथ मूल आदेश व अपील आदेश की दो प्रतियां संलग्न की जानी चाहिए। साथ ही केन्द्रीय उत्पाद शुल्क अधिनियम, 1944 की धारा 35-EE के तहत निर्धारित शुल्क की अदायगी के साक्ष्य के तौर पर TR-6 की प्रति संलग्न की जानी 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-FE of CEA, 1944, under Major Head of Account.

(vi) पुनरीक्षण आवेदन के साथ निम्नलिखित निर्धारित शुल्क की अदायगी की जानी चाहिए ।
जहाँ संलग्न रकम एक लाख रुपये या उससे कम हो तो रुपये 200/- का भुगतान किया जाए और यदि संलग्न रकम एक लाख रुपये से ज्यादा हो तो रुपये 1000 -/ का भुगतान किया जाए ।

The revision application shall be accompanied by a fee of Rs. 200/- where the amount involved in Rupees One Lac or less and Rs. 1000/- where the amount involved is more than Rupees One Lac.

(D) यदि इस आदेश में कई मूल आदेशो का समावेश है तो प्रत्येक मूल आदेश के लिए शुल्क का भुगतान, उपर्युक्त ढंग से किया जाना चाहिये। इस तथ्य के होते हुए भी की लिखा पढ़ी कार्य से बचने के लिए यथास्थिति अपीलीय नयाधिकरण को एक अपील या केंद्रीय सरकार को एक आवेदन किया जाता है। / In case, if the order covers various numbers 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 lakh fee of Rs. 100/- for each.

(E) यथासंशोधित न्यायालय शुल्क अधिनियम, 1975, के अनुसूची-i के अनुसार मूल आदेश एवं स्थगन आदेश की प्रति पर निर्धारित 6.50 रुपये का न्यायालय शुल्क टिकिट लगा होना चाहिए। /

One copy of application or O.I.O. as the case may be, and the order of the adjudicating authority shall bear a court fee stamp of Rs. 6.50 as prescribed under Schedule-I in terms of the Court Fee Act,1975, as amended.

(F) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्य विधि) नियमावली, 1982 में वर्णित एवं अन्य संबन्धित मामलों को सम्मिलित करने वाले नियमों की ओर भी ध्यान आकर्षित किया जाता है। /

Attention is also invited to the rules covering these and other related matters contained in the Customs, Excise and Service Appellate Tribunal (Procedure) Rules, 1982.

(G) उच्च अपीलीय प्राधिकारी को अपील प्रस्तुत करने से संबंधित व्यापक, विस्तृत और नवीनतम प्रावधानों के लिए, अपीलार्थी विभागीय वेबसाइट www.cbec.gov.in देख सकते हैं। /

For the elaborate, detailed and latest provisions relating to filing of appeal to the higher appellate authority, the appellant may refer to the Departmental website www.cbec.gov.in

:: ORDER IN APPEAL ::

M/s Hariyana Ship Demolition Pvt. Ltd., Plot No. V4, Ship Breaking Yard, Alang, Bhavnagar-364002 (hereinafter referred to as "**appellant**") filed the present appeal against Order-In-Original No. BHV-EXCUS-000-ADC-14-2018-19 dated 20.03.2019 (hereinafter referred to as "impugned order") passed by the Additional Commissioner, Central GST & Central Excise, Bhavnagar (hereinafter referred to as "**the adjudicating authority**").

2. The brief facts of the case are that, during the course of audit of Central Excise & Service Tax records of the appellant for the period from April 2016 to March 2017, it was observed that the appellant had booked a sum of Rs. 3,43,86,200/- and had reflected the same in the profit and loss account as "Other Income", "on late payment" for the Financial Year 2016-17. On detailed scrutiny of the relevant documents, it was revealed that the appellant had sold imported goods viz. Hot Rolled Steel Sheet in Coils valued at Rs. 68,88,46,778/- to M/s Uttam Galva Steels Ltd., Mumbai (hereinafter referred to as "M/s Uttam") on High Sea Sale basis, vide High Sea Sale agreement dated 01.02.2016. Further, it was observed that as per Clause 20 of the said agreement, the appellant has charged/ recovered an amount of Rs. 3,43,86,200/- from M/s Uttam on account of delay in payment as per the relevant clause of the agreement which reads as:

"The buyer will make payment of goods to seller as per mutual understanding. In case of delay in payment by the buyer, the seller will charge overdue interest at the rate of 2% per month".

Thus, the buyer had paid the said amount, agreeing to the condition of the High Sea Sale agreement. The act of the appellant falls under "declared service" as defined under clause (e) of Section 66E of the Finance Act, 1994 and as such is taxable under Section 65B of the Finance Act, 1994 (hereinafter referred to as **"the Act"**). Thus, a Show cause notice for the period from April-2016 to March-2017 was issued to the appellant for recovery of Service Tax amounting to Rs. 51,57,930/- under Section 73(1) of the Finance Act, 1994 alongwith interest and penalties under Section 76,77 and 78 of the Finance Act, 1994. The Adjudicating authority vide OIO No. BHV-EXCUS-000-ADC-14-2018-19 dated 20.03.2019 confirmed the demand of service tax along with interest and imposed penalty under Section 77 & 78 of the Act.

3. Being aggrieved with the impugned order, appellant preferred the present appeal, *inter-alia,* on the various grounds as under:

(i) that since the buyer had not paid the amount of consideration for sale of goods to the appellant, the appellant has charged interest for the deprivation/forbearance/detention of its money, which was 'interest' and the same was different from 'penalty'. Thus, they had recorded M/s Uttam as a 'Sundry Debtor' in their books of accounts and had debited the said amount owed by them. Consequently, it was shown as 'trade receivables' under the head 'current assets' as on 31.03.2016. That charging 'interest' does not come in the purview of Service Tax law.

(ii) that as per clause 20 of the appellant's contract with M/s Uttam, the delayed payment had to be accompanied with overdue interest of 2% per month, which means only interest and does not constitute any activity by them for consideration to M/s Uttam and, therefore, it did not come in the ambit of a 'declared service' at all within the meaning of Section 66E(e) of the Act and therefore will not constitute to 'service' for the purpose of levy of service tax under the definition of 'service' as defined in Section 65B(44) of the Act.

(iii) that they had not agreed to refrain from doing any act or tolerance of any act, therefore, it does not satisfy any ingredient of clause (e) of Section 66E of the Act. Since the levy of service tax was not attracted, the payment of any interest and penalty will not arise.

4. Personal Hearing in the matter was fixed on 05.09.2019. Shri Roshil Nichani, Advocate and Shri H.B.Pandya, authorised representative of the appellant on behalf of the appellant attended the personal hearing and reiterated the submission of appeal memorandum and submitted a copy of Hon'ble Supreme Court's judgement in the case of Associated Cement Company Limited Vs Commercial Tax Officer & Others, Kota for consideration.

5. I have carefully gone through the facts of the case, the impugned order, written as well as oral submissions made by the Appellant. The issue to be decided in the present appeal is whether, the consideration

charged and received by the appellant on account of delay in payment of sale of goods, is chargeable to service tax or not.

6. I find that, it is a business practice to have some agreement and specifications for future transactions and one of such situations is when breach of contractual obligation arises. 'Overdue interest' or 'penal amount' are such monetary compensation meant to mitigate the suffering caused due to breach of contract committed by either of the parties to a contract. In the instant case, as per the agreement, if there is delay in payment by the buyer to the seller of the goods, the seller will charge overdue interest @ 2% per month.

7. Further, performance is the essence of an agreement, while overdue interest or penal amounts are charged for failure to pay the required amount within the stipulated time. The said overdue interest or penal amount are charged to dissuade late payments made by the buyer of the goods. It is an expression of such dissatisfaction resulting from flawed or delayed payments made.

8. Section 65B clause (44) of the Finance Act, 1994 defines the term "service" as-

Section 65B (44) of the Act: *"service" means any activity carried out by a person for another for consideration and includes a declared service.*

From the above, 'service' means any activity carried out by a person for another for consideration. It includes a declared service, subject to certain exclusions like transfer of title in goods or immovable property, transaction in money or actionable claims, etc.

8.1 The term "activity" has not been defined under the Act. However, the Service Tax Education Guide, issued by C.B.E. & C on 19.6.2012, spells out significance of the terms 'Activity', which could be active or passive and that includes the services declared under Section 66E of the Finance Act, 1994.

8.2 The clause (e) of Section 66E of the Act, as inserted by the Finance Act, 2012, reads as-

(e) *Agreement to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act and the above acts constitutes a declared*

service.

The above definition lists out the passive activities of forbearance to act, agreeing to an obligation to refrain from an act or to tolerate an act within the purview of declared service.

Now, I would like to analyse the provisions (supra) as under :

(i) *Obligation to refrain from an act* : - It means any act, which binds a person, for not doing a particular act in the given circumstance.

(ii) *Obligation to tolerate an act or a situation* : It means to accept the occurrences or existence of an act or a particular thing, which is imposed by a condition or circumstances, in a contract, agreement or any other document which is legally enforceable by law.

(iii) *Obligation to do an act* : It means to perform or to do something, necessarily, prescribed in an agreement, contract, or any other document which is required under any law for the time being in force.

8.3 Further, to satisfy the definition of service defined in Section 65B(44) of the Act ibid, the activity should be carried out by a person for another for consideration. It is emphasized that in the instant case, **the service is** 'agreeing to the obligation to refrain from an act', or 'to tolerate an act or a situation', or 'to do an act' and **not** 'to refrain from an act', or 'to tolerate an act or a situation', or 'to do an act'.

8.4 I find that a service has been stated to mean the 'tolerating' of any act among other things. Since a service is any activity for a consideration, such 'tolerating' is a 'service' if it is in exchange of some consideration. According to the definition given by the Act, 'tolerating' an act signifies the foregoing of a benefit by the receiver in exchange for a consideration that compensates the act that is being tolerated. For example, when delivery date has been set and the person making the delivery delays it, but the receiver allows such a delay for a certain amount as delivery charges, it is tolerating an act for a certain consideration i.e. the delay charges. Thus, it is the service of tolerating for which the receiver is extracting a certain amount from the other party. Similarly Airlines, Railways and Roadways Services - all deduct cancellation charges from the passengers. These charges are for tolerating the act of not taking the reserved transport by the passenger. Therefore, these charges are leviable to service tax as the

provision of cancellation charges is already informed to the customer and, therefore, it is an agreement to the obligation to tolerate an act or situation.

8.4 I find that this clause leads to the conclusion that the appellant is in a contractual agreement with the buyer to impose levy of overdue interest or penalty and to accept the amount of these charges in case of the delay in payment beyond the scheduled date. Thus, the appellant has tolerated an act or a situation. The purpose of payment of these overdue interest or penalty is an act of tolerance in the sense that when there is delay in the payment, the appellant is put to certain hardships which he tolerates in return of the payment of extra charges. The above clause also provides that any consideration for tolerating an act is a service and therefore the impugned transaction is also a 'service' under the provisions of the Act.

8.5 Thus, if the parties agree for the extra charges to be paid, the sum fixed is a measure of damages for a breach. In the impugned case, overdue interest or penalty are contractually stipulated for delay in the payment of the goods. In other words, the agreement provides that the buyer may pay 2% extra for the delay. The appellant agrees to tolerate the delay done by the buyer in return for payment of overdue interest or penalty. The appellant could have opted for other measures but instead it chooses to tolerate the delay in return of payment of money. Therefore, I agree with the adjudicating authority that the said act falls under Section66E(e) of the Act.

8.6 Further, the Education Guide on Taxation of Services issued by the Tax Research Unit, CBIC has clarified that,

> *6.7.1 Would non-compete agreements be considered a provision of service?*
>
> *Yes. By virtue of a non-compete agreement one party agrees, for consideration, not to compete with the other in any specified products, services, geographical location or in any other manner. Such action on the part of one person is also an activity for consideration and will be covered by the declared services.*

From the above, 'non-compete agreements' wherein parties agree not to engage into direct or indirect competition would also fall within the ambit of the above clause.

9. Further, the Entry Serial No. 57, as inserted in the mega exemption Notification No. 25/2012-S.T., dated 20-6-2012, as amended by the Notification No. 22/2016-S.T., dated 13-4-2016, exempts services provided by Government or a local authority by way of tolerating non-performance of a contract for which consideration in the form of **fines** or liquidated damage is payable to the Government or local authority under such contract.

10. The above exemption is also supported by the CBIC vide its Circular No. 192/02/2016-S.T., dated 13.4.2016. This exemption of services provided by the Government by way of tolerating an act indicates that such services provided by any person other than Government is liable to Service Tax.

11. Thus, I find that the amount recovered by the appellant from the buyers towards non-fulfillment of their contractual obligation/agreement of causing delay in payment for the goods supplied clearly amounts to compensation for the delay and the legislative intention is very clear that any compensation recovered as interest on delayed payment or by any other name whatever called for breach of the agreement, is taxable. A consideration received by one party from the other as per agreed terms between them is service. Nomenclature has no relevance to interpret a taxing entry. The object of the taxing entry is determination of the levy. The appellant had realized the consideration for delay in payment from their buyers is not at the buyers will and pleasure. Naming of such cost recovery as penal amount or overdue interest does not alter the object of taxation of the receipt made by the appellant. Accordingly, the plea that use of the term "penal amount" or "overdue interest" takes away the aforesaid receipts from the scope of taxation fails to stand. It may further be stated that what is relevant for taxation is the intention of the taxing entry. In view of the above discussion, I do not agree with the appellant that aforesaid receipts are immune from taxation. Therefore, such receipts fall under 'declared service' as defined under clause (e) of Section 66E of the Finance Act, 1994.

12. I find that under the GST law also, such amount recovered are treated as services and GST is applicable in terms of Clause 5(e)of

Schedule-II of the Act.

Paragraph 5 of Schedule II to CGST Act provides a list of activities to be treated as 'supply of services' which inter alia comprises – "***(e) agreeing to the obligation to refrain from an act, or to tolerate an act or situation, or to do an act***".

13. My views as discussed above are supported by a judgement in the case of M/s Bajaj Finance Limited by the Authority for Advance Ruling under GST, Maharashtra as reported in 2018 (19) G.S.T.L. 298 (A.A.R. - GST) wherein it was held that:

".....Thus we find clearly from the above discussions and as per the terms and conditions of the agreement submitted by them that there is clearly an agreement that the applicant, in the case of default of payment of EMI by their customer, the applicant would tolerate such act of default or a situation and the defaulting party i.e. their customer was required to compensate the applicant by way of payment of extra amounts in addition to principal and interest as per the terms and conditions of the Agreement. It is also very clear as to the amount or quantum which is consideration in the form of penal charges being additional interest to be received by the applicant if these are suitable compensation only for tolerating the act of default or situation of default by their customers and are not additional interest as claimed by the applicant. We see from the definition of 'Additional Interest' is given in the referred agreement which clearly indicate that the additional interest is not in the nature of interest but is penal charges.

Thus we find that the consideration if any as received by the applicant would clearly qualify as 'supply' as per Sr. No. 5(e) of Schedule II of the CGST Act which reads as under :-

(5) Supply of Services : The following shall be treated as supply of services :-
(e) Agreeing to the obligation to refrain from an act or to tolerate an act or a situation or to do an act.

In the present case as per details presented before us, we clearly find that there is a clear understanding or agreement between the parties to foresee and tolerate an act or a situation of default on the part of loanees for a monetary consideration which is actually a consideration received by the applicant, though in the agreement they may be giving this

consideration, other names such as 'penal interest', penal charges, penalty, etc. as thought proper by them, but these different nomenclatures in their Agreement would in no way change the actual nature of monetary "consideration" which would clearly be taxable for the supply of services as per Sr. No. 5(e) of Schedule II of the CGST Act, 2018.

We find that the exemption for financial transactions under GST laws is only in respect of the interest/discount earned or paid for loans, deposits or advances. If the transaction, as in the subject case deviates from the above the same fails the test of being a "loan", "deposit" or "advance", or the consideration is not an interest or discount, the exemption is not admissible. In the subject case the amount of penal charges cannot be said to form a part of interest on "loan", "deposit" or "advance". It is recovered/imposed only because the loanee has delayed the payment of EMI (which consists of the principal amount and interest amount). This recovery of penal charges is made in view of toleration of the act of the loanee by the applicant and therefore construes as 'supply' as per Sr. No. 5(e) of Schedule II of the CGST Act and is therefore taxable under the GST Act."

[Emphasis supplied]

14. Further, I find that the case laws submitted by the appellant do not have relevance to the legal facts explained in the above discussions and findings. Therefore, the said case laws does do not hold good in the instant case.

15. In view of my discussions and findings above, I infer that, overdue interest or penal amount recovered by the appellant from their buyers are taxable in terms of the declared services enlisted under clause (e) of Section 66E of the Act. Accordingly, the appeal fails and the service tax levied on the appellant is confirmed.

16. In view of the above discussions, I uphold the impugned Order and dismiss the appeal filed by the appellant.

अंबा अय्यर
Amba Aiyar
अधीक्षक
Superintendent

(Gopi Nath)
Commissioner (Appeals)

By R.P.A.D.
To,
M/s Hariyana Ship Demolition Pvt. Ltd.,
Plot No. V4, Ship Breaking Yard, Alang,
Bhavnagar

Copy to:-

1) The Principal Chief Commissioner, GST & Central Excise, Ahmedabad Zone Ahmedabad, for kind information please.
2) The Commissioner, Central GST & Central Excise, Bhavnagar for information and necessary action.
3) The Additional Commissioner, Central GST & Central Excise, Bhavnagar, for necessary action.
4) Guard File.