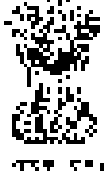




आयकर आयोग, का आदेश, दिनांक २४ सितंबर, २०१३ को जारी किया गया:
TAXI COMMISSIONER, APPTASR DISTRIKENDAL, JAWA



संबंधित दिनांक २४ सितंबर, २०१३ को जारी किया गया

टैक्स मार्केटिंग सेवा - Jember - Jember Ring Road

0.000 000

Tel/Fax No. 0391-3179812-4115210958 (0399) 3623323-33300

संबंधित दिनांक २४ सितंबर, २०१३ को जारी किया गया:

- 1. ... 2. ... 3. ...

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संबंधित दिनांक: 24.09.2013 ... 27.09.2013

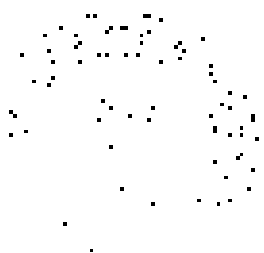
से जारी किया, Jember (Jember), Jember Ring Road

Main body of the document containing detailed text and regulations in Indonesian.



ANNEXURE-A

Sr. No.	Name of the Applicant	Appra. No.	DPO No.
1	Jindal Saw Limited, Jindal Saw Limited Village-Nanakapaya, Jindal, Distt. 162115	VI/11/2014/2015	15/11/2014/2015 16/11/2015
2	Jindal Saw Limited, Jindal Saw Limited Village-Nanakapaya, Jindal, Distt. 162115	VI/11/2014/2015	15/11/2014/2015 16/11/2015
3	Jindal Saw Limited, Jindal Saw Limited Village-Nanakapaya, Jindal, Distt. 162115	VI/11/2014/2015	15/11/2014/2015 16/11/2015
4	Jindal Saw Limited, Jindal Saw Limited Village-Nanakapaya, Jindal, Distt. 162115	VI/11/2014/2015	15/11/2014/2015 16/11/2015
5	Jindal Saw Limited, Jindal Saw Limited Village-Nanakapaya, Jindal, Distt. 162115	VI/11/2014/2015	15/11/2014/2015 16/11/2015
6	Jindal Saw Limited, Jindal Saw Limited Village-Nanakapaya, Jindal, Distt. 162115	VI/11/2014/2015	15/11/2014/2015 16/11/2015
7	Jindal Saw Limited, Jindal Saw Limited Village-Nanakapaya, Jindal, Distt. 162115	VI/11/2014/2015	15/11/2014/2015 16/11/2015

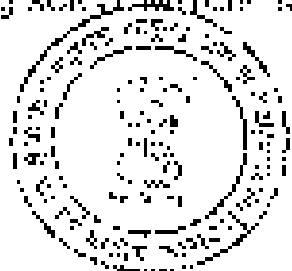


- 3 -
CHIEF JUSTICE APPELLANTS

The appeals listed below have been filed by the following appellants (A) to appellants (F) (hereinafter referred to as the appellants) against the Income-Origins as detailed below (the statute referred to as the impugned orders) passed by the authority shown as detailed below (the authority referred to as the adjudicating authority):

Sr. No.	Appellant Name	Appellant Address	Appellate No.	Appellate Date	Appellate Authority
01	928400 928400	Indel Saw Ltd., AO & DPO Unit Village, Kandolpaya, Taluka Vardola, Pin 390406	Appellate No.1	02/09/2020 02/09/2020	DC, 0284, Dist. Vardola
02	929100 029200	Indel Saw Ltd., AO & DPO Unit Village, Kandolpaya, Taluka Vardola, Pin 390406	Appellate No.2	02/09/2020 02/09/2020	DC, 0284, Dist. Vardola
03	929100 029200	Indel Saw Ltd., AO & DPO Unit, Village Kandolpaya, Taluka Vardola, Pin 390406	Appellate No.3	02/09/2020 02/09/2020	DC, 0284, Dist. Vardola
04	929100 029200	Indel Saw Ltd., AO & DPO Unit, Village Kandolpaya, Taluka Vardola, Pin 390406	Appellate No.4	02/09/2020 02/09/2020	DC, 0284, Dist. Vardola
05	929100 029200	Indel Saw Ltd., AO & DPO Unit, Village Kandolpaya, Taluka Vardola, Pin 390406	Appellate No.5	02/09/2020 02/09/2020	DC, 0284, Dist. Vardola
06	929100 029200	Indel Saw Ltd., AO & DPO Unit, Village Kandolpaya, Taluka Vardola, Pin 390406	Appellate No.6	02/09/2020 02/09/2020	DC, 0284, Dist. Vardola

2. Brief facts of the case are that the appellants (A) to (F) are engaged in manufacturing liquidated (a) gasifiers. In order to do so, a supply of raw materials is required from their vendors as per the written agreement between them and their supplies service providers. A part of the raw material amounts to additional considerations over and above the principal and per cent interest amount of delayed supply of raw materials as per the agreement between the appellants and their vendors. The liquidated damages were received by the appellants from the outstanding payments due to suppliers/service providers and such an amount shown by the appellants in their books of account under the head "Liquidated Damages received from vendors". The said amount appeared to be a revenue service under section 41 of the Finance Act, 1964 (hereinafter referred to as the Act) and liable to service tax. However, the appellants have not paid the service tax. Accordingly, following SMOs have been issued to the appellants:



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Sl. No.	SCN No.	Appellant	Value of goods	Value of interest	Value of penalty	Appellate No.
1	2023-24/0001	Appellant No. 1	100,000	10,000	10,000	1
2	2023-24/0002	Appellant No. 2	200,000	20,000	20,000	2
3	2023-24/0003	Appellant No. 3	300,000	30,000	30,000	3
4	2023-24/0004	Appellant No. 4	400,000	40,000	40,000	4
5	2023-24/0005	Appellant No. 5	500,000	50,000	50,000	5
6	2023-24/0006	Appellant No. 6	600,000	60,000	60,000	6
7	2023-24/0007	Appellant No. 7	700,000	70,000	70,000	7
8	2023-24/0008	Appellant No. 8	800,000	80,000	80,000	8
9	2023-24/0009	Appellant No. 9	900,000	90,000	90,000	9
10	2023-24/0010	Appellant No. 10	1,000,000	1,00,000	1,00,000	10

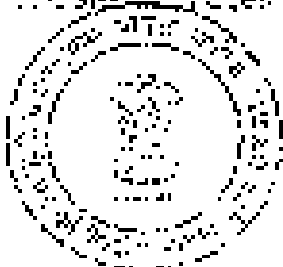
27. The aforesaid SCNs have been adjudicated by the adjudicating authority vide impugned orders and confirmed the demands of service tax under Section 73(i) of the Act along with interest under Section 75 of the Act, in several cases, specially under Section 76 of the Act and imposed penalty of Rs. 10,00,000 each on the Appellant No. 5 & Appellant No. 4 under Section 77 of the Act, penalty of Rs. 10,00,000 each on the Appellant No. 3 & Appellant No. 7 under Section 77 of the Act.

28. Aggrieved, the aforesaid petitioned these appeals, inter-alia, on the grounds as under:

(i) No service tax can be levied when no taxable service is rendered by the appellants and in view of that being no liability to service tax under the Finance Act, 1994, there can be no duty of service tax at all on the appellants.

(ii) The law is well settled that there can be no levy of service tax or goods and the question of levy of service tax or the amount of interest, penalty or interest, imposed by the appellants from suppliers of goods for retained stocks, cannot be related to the appellants' loss, accounts and hence the impugned orders are based and substantiated by law.

(iii) The question of determining the value for transaction value for goods could arise only in respect of finished, movable goods manufactured and sold by the appellants and for which the provisions of Section 4 of the Central Excise Act would apply to ascertain the transaction value and for doing so the question of inclusion or exclusion of incidental charges for delay in shipment of goods for the goods by the appellants does not arise. Certainly, the levy of determining transaction value and inclusion or exclusion of incidental charges does not arise in relation to the goods purchased & received by the appellants for which the duty has been collected on a B-1 regime at the price of supply for which the incidental charges & other charges are levied on the supply and are adjusted



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was not the price paid or payable. The respondents contend that the purchase price of the goods is being enhanced by the levy of liquidated damages on the supplier of those goods. The respondents state that such a levy would increase the appellants' higher input credit as well as their liability to pay the cost of the department if the cost of goods has gone up and if the levy of excise tax been nil and higher amount of credit is admissible to the supplier's ITC, hence the impugned orders are liable to be set aside.

(iv) It is well settled that an audit report is not a statement of fact and is not the only basis to raise any demand and that no working extended period of limitation and the impugned orders are clearly unsustainable. The appellants placed reliance on case of *Bank of India v. State of Madhya Pradesh* (1978) 117 ITR 753 (Trib. (L3)) & *Indian and Eastern Petroleum Society Vs. CIT* reported as 1978 119 ITR 795 (SC).

(v) No taxable service rendered by the appellants to the supplier of goods to the respondents (being the service rendered) and the respondents (being the service provider) and there is no question at all of any liability to service tax being incurred as abstract under the Finance Act, 1994. The assumption of audit that the liquidated damages constituting consideration received by the appellants in addition to the price of goods sold is wrong and totally baseless. The audit was conducted during 27.10.2010 to 30.11.2010 however, the audit records had not been made available nor it was relied upon in the show cause notices. The audit report was neither completed nor final when the impugned ITC was issued on 17.10.2010 and the figures and details of data for the period before and after the period of audit have been taken care of by him. The appellants are entitled as if audit was for the entire period of audit. The audit report was merely a record and hence the appellants cannot be held liable for the audit officer's disclosure of the contents of the invoice and bill, and also in the main bill. In some cases it has been held that the audit report of the impugned orders must be examined, analyzed and audit maintained by the

(vi) The show cause notices are issued by the department without notice without jurisdiction as there is no valid reason for the imposition of tax on the appellants in any manner or otherwise and the Finance Act, 1994 is not a retrospective law. Hence, the impugned orders remain to be conclusive.

(vii) No liability to service tax is levied by the respondents on the liquidated damages and charges. There can be no question of liability & interest under Section 75 and levy of penalty under Section 78 and 79.



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4. Hearing in this matter was attended by Sri. Eshwar Dewan, Deputy General Manager (Fuel, Tax and S&I) (Raj), Bansa Senior Executive of the appellant who presented the submissions of appellants and produced copies of two CAs passed by Commissioner (Appeals), Lucknow on similar issue in their own case and requested to decide this case accordingly.

5. I have carefully gone through the facts of the case, the incalculable costs, amount of expenses incurred as well as submissions made by the appellants. The issue to be decided in the present appeals is whether the amount of liquidated damages recovered by the appellants from the respondents can be set off against their contractual obligation of supply of goods & services chargeable to service tax or not.

6. It is a fact of record that the appellants were engaged in various categorical related activities or maintenance work from their contract. Amount of service charges, including transportation, fuel and power, the principal, and parts and materials of various supply in terms of the agreement entered between the appellants and their vendors. Such amount was shown by the appellants in their books of account under the head "Liquidated Damages received" on 30/06/08.

7. It is a well known practice to have some contractual conditions and restrictions for liquidated damages and one of such situations is when breach of contractual obligation arises. Liquidated damages are such financial compensation made to mitigate the suffering caused due to breach of contract which is agreed by the parties to a contract. Further, performance of the services is a contract, which damages result from failure to perform as per agreed terms. Damages are to discharge unsatisfactory performance or non-performance of a contract. It is an expression of such compensation resulting from the breach of a particular contract.

8. Section 65D clause (4) of the Finance Act, 1991 defines the term "activity" as:-

(a) any kind of the work, service or any activity carried out by a person for another for consideration and includes a declared service

Explanation: - The work, service or any activity carried out by a person for another for consideration includes a declared service, subject to certain exclusions like transfer of the in goods or immovable property, transaction in money or automobile vehicles, etc.

9. The term "activity" has not been defined under the Act, however, the Service Tax (Declaration Guide) issued by C. D. F. & C on 19.8.2011, says as follows:-

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significance of the terms 'supply of services' as defined in clause (a) of section 65B and that includes the services declared under Section 65B of the Finance Act, 1994.

6.3 The clause (g) of Section 65B of the act, as amended by the Finance Act, 2015, reads as:-

(g) Agreement to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act and the amount paid or payable in respect of such obligation.

The above definition lists out the passive activities of transactions leading to agreement to an obligation to refrain from an act or to tolerate an act which are purview of declared services. The Hon'ble Karnataka High Court in case of Kamataka Power Transmission Corporation Limited reported on 29/12/2016 (2016) 117 715 (Kar) and that 'agreeing definition of declared services' to be taxable service. It is a judicial pronouncement competent in law on 12/6-2016 was nothing unconstitutional and ultra vires nature.

6.4 The CBIC under Section 65B of the act, as amended by the Finance Act, 2015, has clarified as:-

6.3.1. 'Agreeing' means agreeing to do or abstain from doing any act or service?

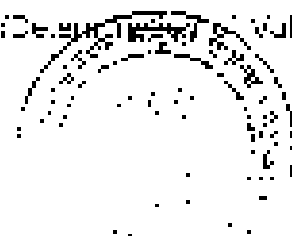
Yes. By virtue of a non-competitively tendered contract, a contractor is contractually bound to complete work within a stipulated time period. Such a contractor, generally, does not do any work without the consent of the person in charge of the contract and will be bound by the declared services.

From the above, non-competitive agreement to do or abstain from doing any act or service is direct or indirect nature. It would be in line with the spirit of the above clause.

6.5 Further, the Entry Serial No. of as notified in the respective State Notification No. 25/2013 ST dated 20/12/2013 as amended by the Notification No. 22/2015-ST, dated 15-4-2016, even the services provided by Government or a local authority by way of rendering any service of a taxable nature in consideration in the form of lease or equivalent charge is payable to the Government or local authority under such terms.

6.6 The above exemption is also supported by the CBIC under Circular No. 18/2016-2016-ST, dated 13-4-2016. This exemption of services provided by the Government by way of rendering an arm's length lease charge is payable to any person other than Government is liable Service Tax.

6.7 The above issue has been addressed in para 10 of section 11 of Rule 8 of Service Tax (Interpretation of Taxable Person) (Amendment) Service Tax (Deemed) Rules, 2016. Value Added Services Rules, 2015 vide Notification No.



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8.

8.12.12.97. states that the value of the service provided shall be the value of the invoice in the context

8.12.13. Cases in which the commission costs will not be included in the value:

(1) subject to the provisions of Section 67 the value of the taxable service provided;

(2) the amount payable to the agent or by any other name whatever solely for the provision of a service beyond the period originally agreed, which may be a consequence of an extension of service;

The value of any interest or charges levied by any other bank or financial institution and for all other financial obligations to the provider of service, including the consideration for any interest related to the provision of service for breach of contract or otherwise, shall not be included in the value for the purpose of Service Tax duty.

8.6. The above conclusion is further strengthened by the following exclusion clauses under Rule 6(2) of the Valuation Rules. The relevant portion is contained below.

6(2). Subject to the conditions specified in sub-rule (1), the value of any taxable service, as the case may be, does not include -

- (a) interest on loans;
- (b) interest on deposits;
- (c) interest on securities;
- (d) interest on bills of exchange;
- (e) interest on deposits;
- (f) Accidental Damages due to unforeseen events not attributable to the service provider;
- (g)

(Emphasis supplied)

8.8. All the above exclusions are to some extent relating an act or a situation by the person receiving the amount. Interest on the purchase of an act of delay in rendering services for supplies made. Accidental damages are for rendering a loss or an injury caused due to the negligence of the service provider or a supplier during the course of making supplies or rendering services.

8.9. It is to be noted that the liability of damages paid by the supplier for delayed supply of the materials and such delay incurred by the buyer on payment of an amount as agreed upon by a written or oral agreement. If the said amount is a separate sum for computer design part is the consideration for the said service rendered. It is to be noted that the amount recovered by the applicants from the respondent's suppliers is not a fulfillment of their contractual obligation or supply of goods or services and, thus, the taxable services and the legislative intention is very clear that the commission received as the stated can also be treated as taxable. It is to be noted that the above exclusions are taxable.

8.10. It is to be noted that under the GST law, as it stands, Carriers are treated as service and GST is applicable under clause (a) of Clause (b)(i) of Section 6(1) of the Act.

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Paragraph 5 of Schedule II to GST Act provides a list of services to be treated as supply of services which inter alia comprises "the obligation to attend from an act or to tolerate an act or situation or to do an act".

6.12 Further, and more recently, the members of the Authority for Advance Ruling in the case of *Mishra Sahasra Seta Power Corporation Limited* (ITA No. 1234-Authority for Advance Ruling dated 14.08.2018) considered the Services Tax at the rate of 18% levied on damages for damages sustained received by the said company for delayed supply of materials. The AAR has considered Equated Damages to be a consideration for assessing the obligation to tolerate an act or situation, which is levied as a tax on services under paragraph 5 of Schedule I of the Central Goods and Services Act, 1987.

6.13 In view of my discussions and findings above, I find that Equated Damages are taxable in terms of the aforesaid provisions of law under clause (b) of Section 63E of the Act.

6.14 I have examined Order in Appeal No. 3/135-27/07/14-KO/2018 and (3/4948-14/07/14-KO/2018) both dated 31.07.2019 passed by the Commissioner (Appeals), Lucknow in and upon by the Appellate Authority. In these cases, it was held that possession of damaged property for material repair cannot be treated as repaired service under Section 65E of the Act. However, I am of the considered opinion that the aforesaid disputes are taxable in terms of the aforesaid provisions of law under clause (b) of Section 63E of the Act as discussed by me in detail above. I am hereby disagree with the stand taken by the Commissioner (Appeals), Lucknow.

6.15 I observe that though the appellants are registered with the Department for payment of Service Tax and submitting returns on regular basis and are duly conversant with the service tax law and procedures, they have failed to discharge the appropriate service tax liability in the amount of Rs. 1,00,00,000/- "in respect of damages" and the tax was never brought to the notice of the Department. They have filed the S.I. 2 returns in concealment of not showing the income from Equated Damages in returns.

6.16 The statute makes great faith on the licensee to assess the service tax liability and pay the same on their own. A specific question was raised as to whether service tax was paid on Equated Damages. In respect of this, they have stated that those paid discount coupons are in the nature of discount to be extended by suppliers / vendors in terms of delay on completion or supply or delay in execution of work. Thus, it is quite evident that there is additional income generated in the course of provision of services; however, this income was not levied and amount



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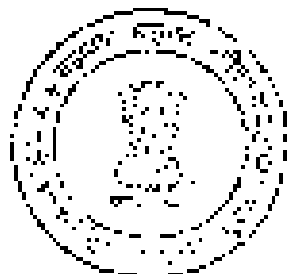
of the said amount which was liability under the tax law which was not taxable.

7. The Appellant has submitted the figures in Schedule A in the audit of declared damages in the instant case. It is also carried out by the Department that part of the payment of service tax has come to light. The non-payment of service tax would have given a reduced working loss in the schedule A. In the instant case, a return which was selected based on audit. Thus, the appellants have willfully suppressed the facts about the taxable amount which is liable in respect of goods payment of service tax. The impact of the fact that the said amount of liquidated damages were not liable to tax is an afterthought to cover their willful suppression. Therefore, part of the tax amount due which has not been paid was correct, proper and legal.

8. The Appellant has submitted and argued that the final audit report was not available to the Income Tax Officer (ITO) dated 17/02/06 and hence the tax liability should be the result of the audit after the period of audit have been taken over by the auditor. The audit report was patently incorrect and the auditor is requested for some confirmation of the audit officers to disprove the correctness of the figures and facts included in the report. But later obtained the same. The final assessment order dated 17/10/2018 has been issued before F.No. 10/2015-16 dated 18/08/2016 issued by the Assistant Commissioner. It is noted that there is no restriction in law to issue SOs before finalization of tax.

9. It is revealed during the audit that the financial records and primary records of the appellants that the appellants showing amount as receipts under the head of liquidated damages and accordingly audit report was issued. Therefore, the appellant have in the argument of the appellants that the audit report was incorrect. The appellant above and the appellants willfully suppressed the facts with an intention to evade payment of service tax. Therefore, part of the tax liability was not paid, it is requested that the same assessment is correctly not be revised by the adjudicating authority in quasi-judicial adjudication proceedings, cross examination and a fair assessment. It is not a part of natural justice but only part of procedural justice. My views are supported by decision of the Hon'ble Tribunal New Delhi in the case of Mrs. Pooja Tyagi (Fy.) Ltd. reported as 2000 (128) FTR 411, wherein the appellant was held liable as under:-

"It is not for the question of cross examination is considered. It has already been held by the Hon'ble Appellate Court and High Courts that in quasi-judicial adjudication proceedings, cross examination is not a necessary part of natural justice. It is not a part of natural justice but only part of procedural justice and the law does not require a notice of cross-examination that if any of the parties



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and/or depending upon as to whether the Commission for Learning is a permanent or judgmental body and as to whether it is a quasi-judicial body.


(Emphasis supplied)

It is clear from above that the Commission for Learning is a permanent body and its jurisdiction is fixed by the appellants.

It is also clear from the above that the Commission for Learning is a permanent body.

It is also clear from the above that the Commission for Learning is a permanent body.


 Commissioner (Appeals)


 JCO (KAT)

By JCO (KAT) (Appeals)

is,

1	Janta Sewa UD III & IV Unit Village Bh. Sanyal, Taluka Mundra Pin-370642	श्री. जयसिंह, जिला मुख्यालय, मुंबई पिन- 400002
2	Janta Sewa UD III Unit Village Bh. Sanyal, Taluka Mundra Pin-370642	श्री. राजेश, जिला मुख्यालय, मुंबई पिन- 400002
3	Janta Sewa UD III & IV Unit Village P. Sanyal, Taluka Mundra Pin-370642	श्री. जयसिंह, जिला मुख्यालय, मुंबई पिन- 400002
4	Janta Sewa UD III & IV Unit Village P. Sanyal, Taluka Mundra Pin-370642	श्री. जयसिंह, जिला मुख्यालय, मुंबई पिन- 400002
5	Janta Sewa UD III Unit, Village Bh. Sanyal, Taluka Mundra Pin-370642	श्री. जयसिंह, जिला मुख्यालय, मुंबई पिन- 400002
6	Janta Sewa UD III & IV Unit, Village P. Sanyal, Taluka Mundra, Pin-370642	श्री. जयसिंह, जिला मुख्यालय, मुंबई पिन- 400002
7	Janta Sewa UD III Unit, Village P. Sanyal, Taluka Mundra, Pin-370642	श्री. जयसिंह, जिला मुख्यालय, मुंबई पिन- 400002
8	Janta Sewa UD III Unit, Village P. Sanyal, Taluka Mundra, Pin-370642	श्री. जयसिंह, जिला मुख्यालय, मुंबई पिन- 400002

is,

1. श्री. जयसिंह, जिला मुख्यालय, मुंबई

2. श्री. राजेश, जिला मुख्यालय, मुंबई

3. श्री. जयसिंह, जिला मुख्यालय, मुंबई

4. श्री. जयसिंह, जिला मुख्यालय, मुंबई

5. श्री. जयसिंह, जिला मुख्यालय, मुंबई

6. श्री. जयसिंह, जिला मुख्यालय, मुंबई

7. श्री. जयसिंह, जिला मुख्यालय, मुंबई

