O/O THE COMMISSIONER (APPEALS), CENTRAL GST & CENTRAL EXCISE

Rajkot – 360 001

As per Annexure-A | As per Annexure-A | As per Annexure-A

RCH-EXCUS-000-APP-079-TO-85-2019

Date of Order: 25.09.2019

Date of issue: 27.09.2019

Passed by Shri Gopi Nath, Commissioner (Appeals), Rajkot

As per Annexure-A

11 [illegible]

[illegible]

[illegible]

(i) [illegible]

(ii) [illegible]

(iii) [illegible]

[illegible]

[illegible]

[illegible]

[illegible]

12 [illegible]

[illegible]

13 [illegible]

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14 [illegible]

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15 [illegible]

[illegible]

16 [illegible]

[illegible]

17 [illegible]

[illegible]

18 [illegible]

[illegible]

19 [illegible]

[illegible]

20 [illegible]

[illegible]

ANNEXURE-A

Sr. No.	Name of the Appellant	Appeal No.	OIO No.
1	[illegible]	[illegible]	[illegible]
2	[illegible]	[illegible]	[illegible]
3	[illegible]	[illegible]	[illegible]
4	[illegible]	[illegible]	[illegible]
5	[illegible]	[illegible]	[illegible]
6	[illegible]	[illegible]	[illegible]
7	[illegible]	[illegible]	[illegible]

ORDER-IN-APPEAL

The appeals listed below have been filed by the following appellant no. 1 to appellant no. 7 (hereinafter referred to as 'the appellants') against Orders-in-Original as detailed below (hereinafter referred to as 'the impugned orders') passed by the authority shown as detailed below (hereinafter referred to as 'the adjudicating authority'):

Sr. No.	Appeal File No.	Appellant	Appellant No.	OIO No.	Passed by
01	V2/[illegible]/GDM/2019	Jindal Saw Ltd., AG & DWS Unit, Village [illegible], Taluka Mundra, Pin 370415	Appellant No.1	[illegible] 29/2018-19 dated [illegible].11.2018	DC, CGST, Div. Mundra
02	V2/[illegible]/GDM/2019	Jindal Saw Ltd., [illegible] Unit, Village [illegible], Taluka Mundra, Pin 370415	Appellant No.2	[illegible] 2018-19 dated [illegible].11.2018	DC, CGST, Div. Mundra
03	V2/[illegible]/GDM/2018	Jindal Saw Ltd., [illegible] Cement Unit, Village [illegible], Taluka Mundra, Pin 370415	Appellant No.3	[illegible] dated [illegible]	[illegible] Div. Mundra
04	V2/[illegible]/GDM/2019	Jindal Saw Ltd., [illegible] Unit, Village [illegible], Taluka Mundra, Pin 370415	Appellant No.4	[illegible]	[illegible] Div. Mundra
05	V2/[illegible]/GDM/2019	Jindal Saw Ltd., [illegible] Unit, Village [illegible], Taluka Mundra, Pin 370415	Appellant No.5	[illegible] dated [illegible]	DC, CGST, Div. Mundra
06	V2/[illegible]/GDM/2019	Jindal Saw Ltd., [illegible] Plant, Village [illegible], Taluka Mundra, Pin 370415	Appellant No.6	[illegible] dated [illegible]	DC, CGST, Div. Mundra
07	V2/[illegible]/GDM/2019	Jindal Saw Ltd., [illegible] Village [illegible], Taluka Mundra, Pin 370415	Appellant No.7	[illegible]	DC, CGST, Div. Mundra

2. Brief facts of the case are that the audit observed that the appellants were charging and recovering Liquidated Damages/Penal Interest for delay in supply of materials/services from their vendors as per the written agreement between them and their suppliers/service providers. Amount so recovered amounts to additional consideration over and above the principal and penal interest amount for delayed supply in terms of the agreement entered between the appellants and their vendors. The liquidated damages were recovered by the appellants from the outstanding payment due to supplier/service providers and such amount shown by the appellant in their books of account under the head "Liquidated Damages received from vendors". The said activity appeared to be a 'declared service' under Section 66E(e) of the Finance Act, 1994 (hereinafter referred to as 'the Act') and liable to service tax. However, the appellants have not paid the service tax. Accordingly following SCNs have been issued to the appellants:

Sr. No.	OIO No. & Date	Appellant	Period	Amount Demanded (Rs.)	OIO Passed by
1	[illegible]	[illegible]	[illegible]	[illegible]	Appellant No. 1
2	[illegible]	[illegible]	[illegible]	[illegible]	Appellant No. 2
3	[illegible]	[illegible]	[illegible]	[illegible]	Appellant No. 3
4	[illegible]	[illegible]	[illegible]	[illegible]	Appellant No. 4
5	[illegible]	[illegible]	[illegible]	[illegible]	Appellant No. 5
6	[illegible]	[illegible]	[illegible]	[illegible]	Appellant No. 6
7	[illegible]	[illegible]	[illegible]	[illegible]	Appellant No. 7

2.1 The impugned OIOs have been adjudicated by the adjudicating authority vide impugned orders and confirmed the demands of service tax under Section 73(1) of the Act along with interest under Section 75 of the Act, appropriated amounts already paid under Section 76 of the Act and imposed penalty of Rs. [illegible] each on the Appellant No. 1 & Appellant No. 4 under Section 77 of the Act, penalty of Rs. 10,000/- each on the Appellant No. 3 & Appellant No. 7 under Section 77 of the Act.

3 Aggrieved, the appellants preferred these appeals inter-alia on the grounds as under:

(i) No service tax can be levied on taxable service is provided by the appellant and in view of same being no liability to service tax under the Finance Act, 1994 there can be no levy of service tax and also the penalties.

(ii) The appellant submitted that there can be no levy of service tax on goods and the question of levy of service tax on the amount of interest, damages / penal interest received by the appellants from suppliers of goods for belated supply / non-supply is not liable to the appellants as per rules and hence the impugned orders are bad in law and liable to be set aside.

(iii) The provisions of determining the taxable transaction value for goods could arise only in respect of finished excisable 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 liquidated damages for delay in payment of price for the goods by the buyer would arise. Similarly the issue of determining transaction value for inclusion or exclusion of liquidated damages does not arise in relation to the services rendered / provided by the appellants for which the [illegible] in regard to the period of supply for which the [illegible] paid / payable and levied on the same and adjusted

against the price paid or payable. If the department wants to treat the purchase price of the goods as being enhanced by the levy of liquidated damages on the supplier of those goods, the enhanced value of those goods would entitle the appellants to higher input credit as per law [illegible] and it is not the case of the department that the cost of goods has gone up and higher duty of excise has been paid and higher amount of credit is admissible to the appellants. Hence the impugned orders are liable to be set aside.

(iv) It is well settled that an audit report cannot be considered as the only basis to raise any demand and that too invoking extended period of limitation and the impugned orders are clearly unsustainable. The appellants placed reliance on case of Swastik Pin Works Vs. CCE reported as [illegible] E.L.T. 753 (Tri.-LB) and Indian and Eastern Newspaper Society Vs. CIT reported as 1979 119 ITR 996 (SC).

(v) No taxable service rendered by the appellants to the supplier of goods to the appellants not being the service recipient and the appellants not being the service provider to him. There is no question at all of any liability to service tax being considered as attracted under the Finance Act, 1994. The assumption of audit that the liquidated damages constitute compensation received by the appellants in addition to the price of goods etc. is wrong and totally baseless. The audit was conducted during [illegible] to [illegible] March 2018. However, the audit records had not been made available nor it was relied upon in the show cause notices. The audit report was neither complete nor final when the impugned SCN was issued on [illegible].10.2018 and the figures and data for the period before and after the period of audit have been taken arbitrarily from the appellants and included as if audit was for the entire period. In any case, the audit report was patently incorrect and the appellants had requested the audit officers to disclose the correctness of the figures and basis mentioned in the report but the same have not been disclosed and hence the demands in the impugned orders must be set aside as unsustainable and bad in law.

(vi) The show cause notices are barred by limitation and hence without jurisdiction as there is no wilful misstatement or suppression of facts by the appellants in any manner whatsoever and the show cause notices issued to raise illegal demand invoking extended period of limitation is totally unsustainable and hence the impugned orders required to be set aside.

(vii) No liability to service tax sustained by the appellants on the liquidated damages/penal charges, there can be no question of liability of interest under Section 75 and levy of penalty under Sections 78 and 77.

4. Hearing in the matter was attended to by Shri Baldev Dewan, Deputy General Manager Indirect Tax and Shri Ranjit Rana, Senior Executive of the appellants who reiterated the submissions of appeal memo and produced copies of two OIA passed by Commissioner (Appeals), Lucknow on similar issue in their own case and requested to decide the case accordingly.

5. I have carefully gone through the facts of the case, the impugned orders, grounds of appeal 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 vendors/suppliers for delay/non fulfilment of their contractual obligation of supply of goods/services is chargeable to service tax or not.

6. It is a fact on record that the appellants were charging liquidated damages/penal interest in case of delay in supply of materials/services from their vendors. Amount so recovered amounts to additional consideration, over and above the principal amount, with the amount of delayed 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 from vendors'.

6.1 In commercial, it is common practice to have some contractual conditions and compensations for future uncertainties and one of such situations is when breach of contractual obligation arises. Liquidated damages are such monetary compensation meant to mitigate the suffering caused due to breach of contract committed by either of the parties to a contract. Further, performance is the essence of a contract and the damages result from failure to perform as per agreed terms. Damages are to discount unsatisfactory performance or non performance of a contract. It is an expression of such dissatisfaction resulting from deficient/delay in performance of contract.

7. 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, it is clear that service is 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.

7.1 The term "activity" has not been defined under the Act. However, the Service Tax Education Guide issued by C.B.E. & C. on 20.6.2012, see is [illegible]

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.

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

> (e) Agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act; and the above also 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. The Hon'ble Karnataka High Court in case of Karnataka Power Transmission Corporation Limited reported as 2016 (338) ELT [illegible] (Kar.) held that *'deeming definition of "declared services" to be taxable service ... is within legislative competence of Union of India — there was nothing arbitrary/unreasonable/ultra vires about it'.*

6.4 The Education Guide on Taxation of Service issued by the Tax Research Unit, CBEC has clarified that:

> *5.7.1 Would non-compete agreements be covered under this entry of service?*
>
> *Yes. By virtue of a non-compete agreement one person agrees to the forbearance, not to compete with the other in any specified field or services, geographical location or any other manner. Such forbearance on the part of one person is agreeing to an obligation to refrain from an act and would be covered by the declared service.*

From the above, non compete agreement, wherein parties agree not to engage into direct or indirect competition, would come within the ambit of the above clause.

6.5 Further, the Entry Serial No. 39 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 damages is payable to the Government or local authority under such contract.

6.6 The above exemption is also supported by the CBEC vide its Circular No. 192/02/2016-S.T., dated 13-4-2016. The exemption of services provided by the Government by way of tolerating an act implies that such activity when done by any person other than Government is liable to Service Tax.

6.7 The above issue has been addressed in clause (x) of sub-rule (1) of Rule 6 of Service Tax (Determination of Value) Rules, 2006, inserted by Service Tax (Determination of Value) Second Amendment Rules, 2012 vide Notification No

34/2012-ST, dated 06.03.2012 and/or in 2012 which is reproduced below for drawing a clear inference in this context:

RULE 6. Cases in which the commission, costs, etc., will be included or excluded. —
(1) Subject to the provisions of Section 67, the value of the taxable services shall include —
(x) the amount realised as demurrage or by any other name whatever called for the provision of a service beyond the period originally contracted or in any other manner relatable to the provision of service.

The word 'demurrage' in the form of liquidated damages, or by any other name whatever called, and/or in any other manner relatable to the provision of service, indicates that compensation in any manner relatable to the provision of service for breach of contract or whatever name called would merit inclusion in the value for the purpose of Service Tax levy.

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

6(2). Subject to the provisions contained in sub-rule (1), the value of any taxable service, as the case may be, does not include —
(i) ……………………
(ii) ……………
(iii)
(iv) interest on delayed payment of any consideration for the provision of services or sale of property;
(v) ……………………
(vi) Accidental damages due to unforeseen actions not relatable to the provision of service;
(vii)

(Emphasis supplied)

8.9 All the above exclusions are to some extent tolerating an action or situation by the person receiving the amount. Interest is for tolerating an act of delay in receiving payment for supplies made. Accidental damages are for tolerating 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 service.

8.10 I find that the liquidated damages paid by the supplier for delayed supply of the materials and such delay tolerated by the buyer on payment of an amount as agreed upon by the parties to the agreement, then such an act is a separate service and liquidated damage paid is the consideration for the said service rendered. Thus, I find that the amount recovered by the appellants from the vendors/suppliers towards non-fulfillment of their contractual obligation of supply of goods/services are nothing but liquidated damages and the legislative intention is very clear that any compensation recovered as liquidated damage for breach of contract not falling under above exclusions is taxable.

8.11 I find that under the GST law also, liquidated damages 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"

6.12 Further, I find that recently, the *Maharashtra Authority for Advance Ruling* in the case of *Maharashtra State Power Generation Company Limited* (2018-VIL-123-Authority for Advance Ruling) has held that Goods and Services Tax at the rate of 18% would be payable on liquidated damages received by the said company for delayed supply under the contract. The AAR has considered Liquidated Damages to be a consideration for agreeing to the obligation to tolerate an act or a situation, which is treated as supply of service under para 5(e) of Schedule II of the Central Goods and Services Act, 2017.

6.13 In view of my discussions and findings above, I find that liquidated damages are taxable in terms of the declared services provided under clause (e) of Section 66E of the Act.

6.14 I have examined Order-in-Appeal Nos. (i) 135-ST/APPL/KOL/2018 and (ii) 43-ST/APPL/KOL/2018 both dated 31.07.2019 passed by the Commissioner (Appeals), Lucknow relied upon by the Appellant. The Appellate authority in these cases held that imposition of damage/penalty from defaulter supplier cannot be termed as declared service under Section 66E(e) of the Act. However, I am of the considered opinion that liquidated damages are taxable in terms of the declared services enlisted under clause (e) of Section 66E of the Act as discussed by me in detail above. I respectfully 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 are filing returns on regular basis and are fully conversant with the service tax law and procedures, they never cared to discharge the appropriate service tax liability on the amounts recovered towards "liquidated damages/penalty" and this fact was never brought to the notice of the Department. They have filed the ST-3 returns incorrectly by not showing the income from liquidated damages therein.

7.1 The statute reposes great faith on the assessee to assess the service tax liability and pay the same on their own. A specific question was posed as to whether service tax was paid on liquidated damages recovered; they have stated that these price discount clauses are in the nature of *discount to be extended by suppliers / vendors towards delay on completion of supply or delay in execution of works*. Thus, it is quite evident that there is additional income generated in the course of provision of services; however, the same was not taken into account

while calculating their service tax liability under the mistaken belief that it was not taxable.

7.1 Moreover, the Liquidated Damages fall squarely within the ambit of Declared Services. In the present case, due to audit carried out by the Department, the fact of non-payment of service tax has come to light. The non-payment of service tax would have gone unnoticed causing loss to the exchequer but for verification of records which was selected based on audit. Thus the appellants have wilfully suppressed the facts about the taxable activities provided by them with an intention to evade payment of service tax. Their plea of belief that the said amounts of liquidated damages were not chargeable to tax is an afterthought to cover their such suppression. Therefore, I am of the considered view that the impugned orders are correct, proper and legal.

8. Further, the appellants argued that the final audit report was not available at the time of issuance of SCN dated 17.10.2018 and hence the figures & analysis of the demand before and after the period of audit have been taken. Therefore, the audit report was patently incorrect that the appellants requested for cross examination of the audit officers to disprove the correctness of the figures and basis indicated in the report but not entertained the same. I find that the impugned SCN dated 17.10.2018 has been issued before FAR No. [illegible]/2018-19 dated 19.10.2018 issued by the Assistant Commissioner (Audit), Rajkot. I find that there is no restriction in law to issue SCN before finalization of FAR.

8.1 It is revealed during the audit of the financial records & statutory records of the appellants that the appellants showing amount as receipts under the head of 'Liquidated Damages' and accordingly audit report was issued. Therefore, I do not find force in the argument of the appellant that the audit report was incorrect. As discussed above, the appellants wilfully suppressed the facts with an intention to evade payment of service tax. Therefore, I am of the considered view that the request of cross examination is correctly not entertained by the adjudicating authority. In quasi-judicial adjudication proceedings, cross examination is not a fundamental right. It is not a part of natural justice but only that of procedural justice. My views are supported by decision of the Hon'ble Tribunal, New Delhi in the case of M/s. Poddar Tyres (Pvt.) Ltd. reported as 2000 (126) E.L.T. 737 (Tri.-Del.) wherein it has been held as under:

> "15. ... So far as the question of cross examination is concerned, it has already been held by the Hon'ble Supreme Court and High Courts that in quasi-judicial adjudication proceedings, cross examination is not a fundamental right. It is not a part of natural justice but only that of procedural justice and the Tribunal has held in a series of cases that it may or may not be

persons depending upon facts in whether there is a scheme for [illegible] correct and [illegible] of [illegible]"

(Emphasis supplied)

8. In view of the above, I uphold the impugned orders and reject appeals filed by the appellants.

8.1 [illegible]

8.1 The appeals filed by the appellants stand disposed off in above terms.

(GOPI NATH)
Commissioner (Appeals)

By Regd. Post AD.

To,

1	Jindal Saw Ltd [illegible] Unit, Village Nana Kapaya, Taluka Mundra, Pin:370415	[illegible]
2	Jindal Saw Ltd, [illegible], Village Nana Kapaya, Taluka Mundra, Pin:370415	[illegible]
3	Jindal Saw Ltd [illegible], Village Pragpar, Taluka Mundra, Pin:370415	[illegible]
4	Jindal Saw Ltd [illegible] Unit, Village Pragpar, Taluka Mundra, Pin:370415	[illegible]
5	Jindal Saw Ltd [illegible] Unit, Village Nana Kapaya, Taluka Mundra, Pin:370415	[illegible]
6	Jindal Saw Ltd [illegible], Village Pragpar, Taluka Mundra, Pin:370415	[illegible]
7	Jindal Saw Ltd [illegible], Village Samaghogha, Taluka Mundra, Pin:370415	[illegible]

Copy to:

1) [illegible]
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