



::आयुक्त (अपील्स) का कार्यालय, वस्तु एवं सेवा कर और 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

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रजिस्टर्ड डाक ए.डी.द्वारा :-

क	अपील / फाइल संख्या/ Appeal / File No.	मूल आदेश सं / O.I.O. No.	दिनांक/ Date
	V2/96/GDM/2019	04/AC/Anjar-Bhachau/2019-20	20-06-2019

ख अपील आदेश संख्या (Order-In-Appeal No.):

KCH-EXCUS-000-APP-003-2020

आदेश का दिनांक /

Date of Order: 03.01.2020

जारी करने की तारीख /

Date of issue:

07.01.2020

श्रीगोपी 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 एवं सेवाकर, 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 Appellant & Respondent :-

Ratnamani Metals & Tubes Ltd., Survey No. 474, Village: Bhimasar, Anjar-Bhachau Road, Tal.: Anjar,, Dist. Kutch.,

इस आदेश (अपील) से व्यथित कोई व्यक्ति निम्नलिखित तरीके में 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, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, द्वितीय तल, बहुमाली भवन असारवा अहमदाबाद- 380016 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) नियमवली, 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 मांग, ब्याज की मांग 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 क्रमशः 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 सार्वजनिक 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 demanded/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 नियमवली, 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 मांग, ब्याज की मांग 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 क्रमशः 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 सार्वजनिक 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 fee of Rs. 1000/- where the amount of service tax & interest demanded & penalty levied is 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/-.



- (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 प्रतियाँ 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 Form 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 जर्माना विवादित है, या जर्माना, जब केवल जर्माना 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" में 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 अर्जी एवं अपील को लागू नहीं होगा। /

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 पुनरीक्षणयाचिका निम्नलिखित मामलों में, केन्द्रीय उत्पाद शुल्क अधिनियम, 1994 की धारा 35EE के प्रथमपरंतुक के अंतर्गत अवर सचिव, भारत सरकार, पुनरीक्षण आवेदन इकाई, 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, जहां 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 क्रेडिट 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-EE 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 आदेशों 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 न्यायाधिकरण को एक अपील या केन्द्रीय 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-1 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 दाखिल करने से संबंधित व्यापक, विस्तृत और नवीनतम प्रावधानों के लिए, अपीलार्थी विभागीय वेबसाइट www.cbec.gov.in को 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 ::

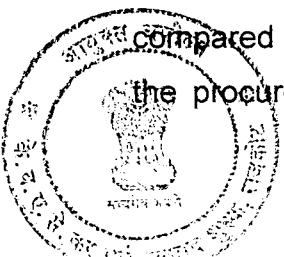
M/s. Ratnamani Metals & Tubes Ltd., Survey No. 474, Villagae: Bhimasar, Anjar – Bhachau Road, Taluka – Anjar, District – Kutch, Pin – 370 240 (*hereinafter referred to as 'the appellant'*) has filed the present appeal against Order-In-Original No. 04/AC/Anjar-Bhachau/2019-20 dated 20.06.2019 (*hereinafter referred to as "the impugned order"*) passed by the Assistant Commissioner, CGST, Division – Anjar-Bhachau, Gandhidham (*hereinafter referred to as "the adjudicating authority"*).

2. Brief facts of the case are that during the course of audit, it was observed that the appellant had recovered certain amounts from its suppliers of inputs under the heads "Quality Claim Received/Late Delivery Charges"; that the appellant recovered the said amount from the supplier for agreeing to bear the damages for failure to deliver the goods as per time schedule or not or poor quality of material, according to the terms of contracts, as Liquidated Damages towards late delivery of material supplied for 'Breach of Contract'. The liquidated damages were recovered by the appellant through debit notes from the suppliers and such amount shown by the appellant in their books of account under the head "Quality Claim Received/Late Delivery Charges" received from the suppliers narrating the same as in the relevant para of 'General Terms & Conditions' of the contracts. The said activity appeared to be a declared service under Section 66 E(e) of the Finance Act, 1994 (*hereinafter referred to as "the Act"*) and liable to service tax. However, the appellant has not paid the service tax. SCN No. VI(a)/8-104/CIR-VII/Gr.33/2018-19 dated 30.01.2019 issued to the appellant which was adjudicated by the adjudicating authority vide impugned order and confirmed the demand of service tax of Rs. 33,02,313/- under proviso to Section 73(1) of the Act along with interest under Section 75 of the Act and imposed equal penalty of Rs. 33,02,313/- under Section 78 of the Act and imposed penalty of Rs. 10,000/- under Section 77 of the Act.

3. Aggrieved, the appellant preferred the present appeal, *inter-alia*, on the grounds as under:

(i) that the appellant procured inputs and raw material from various suppliers through Purchase Orders issued to their suppliers; that as per the Terms and Conditions of the Purchase Order, the supplier is required to ensure, amongst others, "Items/material being supplied conforms to the description and specifications furnished by the appellant.", "The goods being supplied are of good quality and free of defects.", "The goods being supplied are properly packed to avoid transit damages."

(ii) that the Debit Notes have been issued by the appellant only for recovery of excess payment on account of poor quality of the materials sent by the supplier as compared to what specifications were given to supplier; that their primary intention was the procurement of inputs and raw material; that the damages recovered cannot be



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 ASSISTANT COMMISSIONER
 CGST, GANDHIDHAM
 ANJAR-BHACHAU DIVISION

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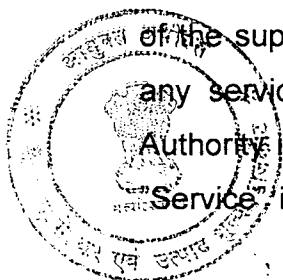
considered as a separate and distinct 'service' from that of the contract's scope and doing so would seem to be a bit too farfetched; that therefore the terms & conditions of the purchase order, it is clear that it was not a 'service' as appearing in Section 65B(44) of the Act as there is a clear distinction between "recovery of excess payment" and "compensation / penalty for damages" as stated in the impugned OIO.

(iii) that in para 3.9 of the impugned order, the adjudicating authority has misinterpreted and misapplied meaning of 'damages' towards 'financial compensation for loss or injury'; that the liquidated damage referred to in Section 74 of Indian Contract Act, 1872 provides that liquidated damage means compensation for loss or injury suffered due to breach of contract; that such amounts are described as penalty or compensation or liquidated damage; that whereas in the appellant case, the amount sought to be recovered through issue of debit note does not represent any penalty of compensation for loss of injury but this amount is recovered on account of sub-standard quality of the product supplied to us.

(iv) that the damages are covered by Section 73 or Section 74 of the Indian Contract Act, 1872; that the damages are payable by the party in breach of the contract to the non-defaulting party subject to the conditions laid down in Section 73 and Section 74; that Section 74 deals with liquidated damages, which broadly means an amount which has been pre-agreed and specified by the parties on the contract and which represents a reasonable pre-estimate of the loss to be suffered by one of the parties in case of breach by the other; that it therefore, follows that damages are payable, as and by way of penalty, procuring the breach of contract by one of the parties; that damages are, therefore, not the same as consideration payable by one party to another for the performance of the contract.

(viii) that Section 66E(e) of the Act does not cover a case where damages are payable upon breach of contract by one party to the non-defaulting party; that Section 66E(e) of the Act requires payment of a consideration, otherwise it would not fall within the definition of the word 'service' appearing in Section 65B(44) of the Act; that there is also a distinction between damages and consideration.

(ix) that the definition of "transaction value" represents the price actually paid or payable for the goods; that even the price is fixed for the goods, the goods are required to be delivered in a good quality and free of defects and if there are any defects or quality issue, the price is reduced depending on that context; that as that result, the supplier received a lesser payment, which is according to the actual transaction value; that therefore as per the provision in the contract, for reduction in the price by application of the clause of the purchase order, is actually in nature of transaction value of the supplied goods for the purpose of Central Excise Duty and not in the nature of any service for levy of Service tax; that therefore, the findings of the adjudicating Authority in terms of para 27 of the impugned order that the transaction is in nature of "Service" is completely erroneous; that the case law of Victory Electricals [2013 TIOL



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1794 Tribunal MAD LB] on which the adjudicating authority relied was also held the same thing that "as per the terms of the contract and on account of delay in delivery of manufactured goods is liable to pay a lesser amount than the generically agreed price as a result of a clause (in the agreement), stipulating variation in the price, on account liability to "liquidated damages", irrespective of whether the clause is titled "penalty" or "liquidated damages", the resultant price would be the "transaction value"; and such value shall be liable to levy of excise duty, at the applicable rate".

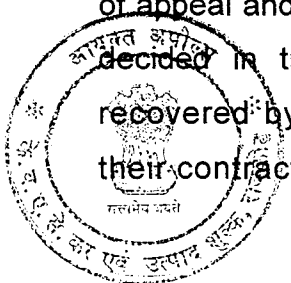
(x) that the such situation has still continued in Goods and Service tax regime under the Section 34 of Central Goods and Service Tax Act, 2017 relating to issuing of Credit and Debit notes; that in GST regime, the credit note is a convenient and legal method by which the value of the goods or services in the original taxable invoice can be amended or revised; that the issuance of the credit note will easily allow the supplier to decrease his taxable value and tax liability.

(xi) that in view of above, Service Tax is not payable on the amount recovered from the supplier of Goods towards substandard quality of goods or goods not conforming to the given specifications and as it has not been for recovery of any compensation for loss or injury or for claiming damages.

(xii) that the audit regularly carried out by the department and this issue was never raised in past therefore, it is now not open to the Department to allege suppression of facts; that since the demand of Service tax is not sustainable, no interest can be levied under Section 75 of the Act and penalty under Section 78 of the Act cannot be imposed; that it is settled law that for such interpretational disputes as this is not a case of Fraud, Collusion, Wilful Mis-statement, Suppression of the facts, Contravention of any of the provisions for intent to evade payment of service tax, the penalty cannot be imposed under Section 78 of the Act; that penalty under Section 77 of the Act cannot be demanded since there has been no contravention of Section 69 of the Act read with Rule 4 of the Service Tax Rules, 1994, since no registration was required in the first place for issuing debit notes for recovery of damages for no such service has been rendered to the appellant.

4. Hearing in the matter was attended to by Shri Ravichandran, Senior General Manager (Commercial) of the appellant, who reiterated the submissions of appeal memo and citation they have annexed already and on limitations. He also submitted that Section 34 of the CGST Act, 2017 will also be applicable and therefore, they requested to allow the appeal.

5. I have carefully gone through the facts of the case, the impugned order, grounds of appeal and written as well oral submissions made by the appellant. The issue to be decided in the present appeal is whether the amount of liquidated damages recovered by the appellant from the vendors/suppliers towards non-fulfillment of their contractual obligation of supply of goods is chargeable to service tax or not.



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6. The facts on records are that the appellant was charging and recovering liquidated damages for delay in supply contract and for poor quality of the materials as per the written agreement between them. The liquidated damages so received, amounts to additional consideration, over and above the principal, were recovered by the appellant by issuing debit notes from the suppliers. Such amount was booked by the appellant in their books of account under the head "Quality Claim Received".

6.1 I find that it is business practice to have some contractual conditions and specifications for future transactions 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, while damages result from failure to perform as per agreed terms. Damages are to dissuade unsatisfactory performance or non-performance of a contract. It is an expression of such dissatisfaction resulting from flawed or delayed performance of contract.

6.2 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.

6.3 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.

6.4 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. The Hon'ble Karnataka High Court in case of Karnataka Power Transmission Corporation Limited reported as 2019 (366) ELT 716 (Kar.) held that "deeming definition of "declared services" to be taxable service – It is within legislative competence of Union of India – There was nothing unconstitutional! and ultra vires about it".

6.5 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

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direct or indirect competition would also fall within the ambit of the above clause.

6.6 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.

6.7 The above exemption is also supported by the CBEC 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.

6.8 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 24/2012-ST, dated 6.06.2012 w.e.f. 1.7.2012) which is reproduced below, for drawing certain inferences 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 realized 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 term "demurrage", a form of liquidated damages, "or by any other name whatever called" and "or in any other manner relatable to the provision of service" concludes that compensation in any manner relatable to the provision of service for breach of contract by whatever name called would merit inclusion in the value for the purpose of Service Tax levy.

6.9 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)

6.10 All the above exclusions are to some extent tolerating an act or a 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.

6.11 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 a written or oral agreement, then such an act is a declared service and liquidated damage paid is the consideration for the said service rendered. Thus, I find

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that the amount recovered by the appellant from the vendors/suppliers towards non-fulfillment of their contractual obligation of supply of goods amounts to liquidated damages and the legislative intention is very clear that any compensation recovered as liquidated damage for breach of contract, barring the above exclusions, is taxable.

6.12 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".

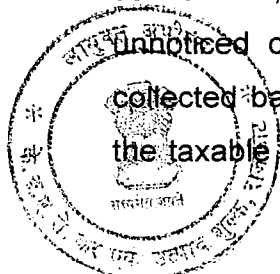
6.13 Further, I find that recently, the *Maharashtra Authority for Advance Ruling in the case of Maharashtra State Power Generation Company Limited, (2018(5) TMI 1332-Authority for Advance Ruling-Maharashtra)* has held that Goods and Services Tax at the rate of 18% would be payable on liquidated damages received by the said company for delayed supply under a 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 a supply of service under para 5(e) of Schedule II of the Central Goods and Services Act, 2017.

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

7. I observe that though the appellant 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 have failed to discharge the appropriate service tax liability on the amounts received towards "Liquidated damages" 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 in returns.

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 those price discount clauses are *in the nature of discount to be extended by suppliers / vendors towards delay on completion of supply or poor quality of material supplied by the suppliers*. 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.

7.2 Moreover, the liquidated damages fall squarely within the ambit of Declared Services. In the instant case, due to audit 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 collected based on audit. Thus, the appellant has willfully suppressed the facts about the taxable services provided, with an intention to evade payment of service tax. Their



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plea of belief that the said amounts of liquidated damages were not chargeable to tax is an afterthought to cover their willful suppression. Therefore, I am of the considered view that the impugned orders are correct, proper and legal.

8. In view of the above, I uphold the impugned order and reject appeal filed by the appellant.

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

8.1 The appeal filed by the appellant stand disposed off in above terms.

(Signature)
अ. पी. शाह
अधीक्षक (अपीलें)

(Signature)
(GOPI NATH) 31/11/2020
Commissioner (Appeals)

By Regd. Post AD.

To,

M/s. Ratnamani Metals & Tubes Ltd.,
Survey No. 474, Villagae: Bhimasar,
Anjar – Bhachau Road, Taluka –
Anjar, District – Kutch, Pin – 370 240

मे. रत्नमणि मेटल्स एवं ट्यूब्स लिमिटेड, सर्वे
नं. ४७४, गाँव: भीमासर, अंजार – भचाउ
रोड, तालुका: अंजार, जिल्ला: कच्छ, पिन –
३७० २४०

प्रति:

(१) प्रधान मुख्य आयुक्त, केन्द्रीय वस्तु व सेवा कर एवं केन्द्रीय उत्पाद शुल्क, अहमदाबाद क्षेत्र, अहमदाबाद को जानकारी हेतु।

(२) आयुक्त, केन्द्रीय वस्तु व सेवा कर, कच्छ आयुक्तलय, गांधीधाम को आवश्यक कार्यवाही हेतु।

(३) सहायक आयुक्त, केन्द्रीय वस्तु व सेवा कर मण्डल, अंजार भचाउ मण्डल, गांधीधाम को आवश्यक कार्यवाही हेतु।

(४) गार्ड फ़ाइल

