::आयुक्त (अपील्स) का कार्यालय,वस्तु एवं सेवा करऔरकेन्द्रीय 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 – 2477952/2441142Email: 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
	V2/5/EA2/GDM/2019	**04/AC/2019**	**29/03/2019**

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

KCH-EXCUS-000-APP-052-2020

आदेश का दिनांक / Date of Order:	**27.04.2020**	जारी करने की तारीख / Date of issue:	**27.04.2020**

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 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 theAppellant&Respondent :-

M/s Sanghi Industries Ltd. (Respondent), Sanghipuram, Tal: Abdasa, 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 एव 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- ३८००१६को की जानी चाहिए ।/

To the West regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at, 2nd Floor, Bhaumali Bhawan, Asarwa Ahmedabad-380016in 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 रजिस्ट्रार 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 dutydemand/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 रजिस्ट्रार 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/-.

...2...

(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 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 Commissionerauthorizing 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 कोपुनरीक्षण आवेदन :**
Revision application to Government of India:

इस आदेश की पुनरीक्षणयाचिका निम्नलिखित मामलो में, केंद्रीय उत्पाद शुल्क अधिनियम,1994 की धारा 35EE के प्रथमपरंतुक के अंतर्गतअवर 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-11000I, 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 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 समायावधि पर या बाद में पारित किए गए है।/
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 रूपये या उससे कम हो तो रूपये 200/- का भुगतान किया जाए और यदि संलग्न रकम एक लाख रूपये से ज्यादा हो तो रूपये 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 umbers of order- in Original, fee for each O.I.O. should be paid in the aforesaid manner, notwithstanding the fact that the one appeal to the 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 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 ::

The Asst. Commissioner, CGST Division, Bhuj filed appeal No. V2/5/EA2/GDM/2019 on behalf of the Commissioner, Central GST & Central Excise, Gandhidham (hereinafter referred to as "Appellant Department"), in pursuance of Review Order No. 2/OIO/2019-20 dated 28.6.2019 issued under Section 84(1) of the Finance Act,1994 (hereinafter referred to as 'Act') against Order-in-Original No. 4/Asst. Commr./2019 dated 29.3.2019 (*hereinafter referred to as* 'impugned order') passed by the Asst. Commissioner, CGST Division, Bhuj (*hereinafter referred to as* 'adjudicating authority') in the case of M/s Sanghi Industries Ltd (Grinding unit), Kutch (*hereinafter referred to as* 'Respondent').

2. The brief facts of the case are that the Respondent was engaged in manufacture of Cement and was registered with Central Excise. During audit of the records of the Respondent, it was observed that the Respondent had booked income of Rs. 2,11,58,648/- under the head 'Notice Pay', which was recovered from employees in the event of non completion of prescribed notice time before leaving the job. It was also observed by the Audit that the Respondent had booked income of Rs. 91,07,122/- under the head 'Cheque Return Penalty', which was recovered from the buyers when cheques tendered by them are returned. It appeared that the Respondent tolerated the acts of their employees as well as buyers for non payment of dues within specified time as per the mutually agreed upon terms and conditions with the employees/buyers; that such acts of the Respondent falls within the definition of 'declared service' under Section 66E of the Act and the Respondent was liable to pay service tax on the income booked under the accounting heads 'Notice Pay' and 'Cheque Return Penalty' during the period from 1.4.2013 to 30.6.2017

2.1 Show Cause Notice No. VI(a)/8-15/Cir-VII/A4-33/17-18 dated 14.8.2018 was issued to the Respondent, *inter alia,* calling them to show cause as to why service tax of Rs. 41,32,297/- should not be demand and recovered under Section 73(1) of the Act, along with interest, under Section 75 of the Act and proposing imposition of penalty under Section 76,77 and 78 of the Act. The Notice also proposed penalty upon Shri N.B. Gohil, Executive Director of the Respondent under Section 78A(a) of the Act.

2.2 The above Show Cause Notice was adjudicated by the adjudicating authority vide the impugned order who, inter alia, dropped the service tax

demand on the income booked under the heads 'Notice Pay' and 'Cheque Return Penalty'.

3. The impugned order was reviewed by the Appellant Department and appeal has been filed on various grounds, *inter alia*, as below:-

(i) The adjudicating authority passed the impugned order without taking into consideration the relevant statutory provisions for levy of services tax in terms of Section 65E(e) of the Finance Act, 1994 (hereinafter referred to as 'the Act'); that the amount charged by the Respondent, which was received from the employee in lieu of the agreement, amounts to tolerating of an act or a situation and thus the said activities clearly fall within the purview of Section66E (e) of the Act.

(ii) That the Respondent recovered 'Cheque Return Penalty' on account of return of cheques tendered by their buyers as per their agreement with the buyers. The amount of penalty as 'Cheque Return Penalty' charged / collected by the Respondent, the 'promisor', as per the agreement buyers, the 'promisee', tolerated the situation. As per the condition of the agreement the promisee i.e. buyers also agreed to refrain from an act by agreeing to pay charges in terms of agreed terms, if cheques returned back without tendering the same. According to Section 2(d) of the Indian Contract Act, 1872, 'Consideration' is defined as: "When at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or abstain from doing something, such act or abstinence or promise is called consideration for the promise". The amount charged by the Respondent, which was received from the buyers in lieu of the agreement, amounts to tolerating of an act or a situation and thus the said activities clearly fall within the purview of Section 66E (e) of the Finance Act, 1994.

(iii) That in the present case though no 'activity' was carried out, but, for levy of service tax under Section 66E(e) of the Act, service activity is not required. Agreeing to an obligation to refrain from an act or to tolerate an act or a situation has been specifically listed as a 'declared service' under section 66E of the Act and is liable to service tax.

(iv) That Order-in-Appeal No. AHM-EXCUS-001-APP-0107-17-18 dated 29.09.2017 passed by the Commissioner (Appeals), Central Excise and Service Tax, Ahmedabad, as relied upon by the adjudicating authority is accepted by the department on monetary limit grounds and is not accepted on merits.

(v) That the Respondent had been charging / collecting amount as penalty in terms of agreed terms & condition; that act of charging penalty on the said activities is in effect of breach of contract and the amount charged as penalty or fees for the said activities by the Respondent was agreed to the obligation to refrain from act, which is covered under Section 66E(e) of the Act; that the impugned order is not legal and proper and hence, the same needs to be set aside.

4. In hearing, Shri Ambarish Pandey, Advocate appeared on behalf of the Respondent and submitted written submission dated 16.1.2020 along with compilation of statutory provisions and case laws for consideration. No one appeared for hearing on behalf of the Appellant Department.

4.1 In written submission dated 16.01.2020, the Respondent, *inter alia,* contended that they are not performing the alleged 'declared services' under Section 66E (e) of the Act as the amounts received as "Notice Pay" and 'Cheque Return' are in the nature of damages due to default of the employees or the buyers; that expression 'to tolerate an act' included under 'declared services' should be understood to cover instances where the consideration is being charged by one person in order to allow another person to undertake any particular activity. These are cases where it is clear at the very inception that the intention of one party is to undertake an activity and the other party shall allow the same without any hindrance.

4.2 That the word 'obligation' used in Section 66E(e) indicates the need for the existence of the desire in the person for whom the activity is done. In other words, when the service receiver requests the service provider to tolerate an act/situation and the service provider obliges to tolerate provided a consideration is paid, then such a contractual relationship will get covered by Section 66E(e) of the Act. In such situation, the service provider binds himself to act in a particular manner as desired by the service receiver and there is consensus ad idem between the contracting parties to this effect.

4.3 That contrary to above, penalty/ liquidated damages clauses (as in the present case) are invocable only on happening of certain pre-determined event(s), which may or may not arise; that the very intention of such penal clauses is to create a deterrent effect and to ensure that the defaults/ violations are not repeated by the erring party.

4.4. That the notice pay recovered by the Respondent is nothing but in the nature of liquidated damages received from employees for defaults/ breach committed by them of the terms of the Offer Letter/ Service Agreement. It is not that the Respondent had earlier agreed to tolerate such acts of the employee and to charge notice pay from him for such agreeing to tolerate. It is due to breach by the employee that the Respondent recover notice pay. The said amount is nothing but a fair and genuine estimate of the actual cost incurred by the Respondent on account of breach/ default committed by the employee. In support of their contention the Respondent relied upon OIO No.47/AC/ST/Ghaziabad/2015-16 dated 30.03.2016 passed by Additional Commissioner, Ghaziabad in the matter of M/s Glaxo Smithkline Consumer Healthcare Limited.

4.5 That prime factors which validates a transaction as service are activity and consideration, as defined under Section 65B(44) of the Act, which are absent in the facts of present case; that definition of declared service under Section 65B(22) makes it clear that the services listed under Section 66E of the Act needs to be an activity carried out by a person for another person for consideration, and penalty as such does not arise for any activity performed for consideration, hence, the same doesn't qualify as service as well as declared service.

4.6 That consideration is a benefit, which must be bargained for between the parties, and is essential reason for a party entering into a contract whereas in their case 'Notice Pay' and 'Cheque Return amount' are not any gains rather are losses in nature.

4.7 That in terms of Rule 6(2)(vi) of the Valuation Rules, the damages which are not relatable to the provision of service are not includible in the value of taxable service and their contention is also supported by illustration under paragraph 2.3.1 of the 'Education Guide'; that that Section 73 of the Indian Contract Act, 1872 statutorily allows a party to recover damages from the defaulting party in case of default or breach of terms of the contract by such party to the contract; that act of the Respondent is in consonance of the statutory provision and not amounting to provision of any service. Further, the amount recovered from the employees is covered under employee-employer relationship, which is out rightly excluded from the purview of definition of service. In support of their contention they relied upon the decision in the case

of HCL Learning Ltd. vs. Commissioner, CGST, Noida, 2019 (12) TMI 558-CESTAT Allahabad and Order-in-Appeal No. VAD-EXCUS-003-APP-392/2016-17 dated 20.10.2016 passed by Commissioner (Appeals), Vadodara in matter of Gujarat State Fertilizers & Chemicals Ltd.

4.8 That the lower adjudicating rightly dropped penalties as proposed in said SCN, since the issue involves bona fide interpretation of law; that the Respondent regularly submitted periodical returns, it is department's responsibility to scrutinize the returns; that they never suppressed any facts and acted only in good faith; that the Section 80 of the Act is applicable in their case, as there was reasonable cause for the said failure, hence, penalties under Section 76, 77 & 78 are not applicable. The Respondent also cited many case laws in support of their contention to not impose penalty on them.

4.9 In continuation of their written submission, the Respondent also filed additional submission dated 05.02.2020, wherein it is submitted that the extended period of limitation can not be invoked and no penalty can be imposed as the Respondent acted under good faith as issue involved interpretation of law; that no service tax is leviable in their case as also held in case of GET & D India Ltd. -W.P. Nos. 35728 to 35734 of 2016 [2020 (1) TMI 1096- Madras HC]. The Respondent also submitted sample copies of letter of appointment to, and resignation letter of employees.

5. I have carefully gone through the facts of the case, the impugned order, grounds of appeal of the appeal memorandum filed by the Appellant Department and oral as well as written submissions made by the Respondent. The issue to be decided in the present case is whether the Respondent is liable to pay service tax on the incomes booked under the heads 'Notice Pay' and 'Cheque Return Penalty' under Section 66E of the Act and whether the Respondent is liable to penalty under Sections 76,77 and 78 of the Act or otherwise.

6. On going through the records, I find that the Respondent had booked income under the head 'Notice Pay', which was recovered from their employees in the event of non completion of prescribed notice time before leaving the job; that the Respondent had booked income under the head 'Cheque Return Penalty', which was recovered from their buyers, when cheques tendered by them are returned. The impugned Show Cause Notice was issued on the ground that the Respondent tolerated the acts of their employees as well as buyers for non fulfillment of mutually agreed upon terms and conditions and that the such

acts of the Respondent fall within the definition of 'declared service' under Section 66E of the Act and the Respondent was liable to pay service tax. The demand was dropped by the adjudicating authority vide the impugned order, which has been challenged by the Appellant Department by the present appeal.

7. It would be pertinent to examine the legal provisions covering the issue on hand, as under:

7.1 The term "service" is defined under clause (44) of Section 65B of the Finance Act, 1994 as under:

> "(44) 'service' means any activity carried out by a person for another for consideration and includes a declared service."

7.2 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.

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

> "SECTION 66E. Declared services. — The following shall constitute declared services, namely :—
> (a) ... ...
>
> ...
>
> ...
>
> (e) Agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act."

7.4 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 analyze 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.

7.5 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'.

7.6. I find that a service, inter alia, covers 'tolerating' of any act. 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. In backdrop of above legal position and on analyzing the facts of the case, I find that the Respondent recovered 'Cheque Return Penalty' from their buyers on account of return of cheques. The Respondent was in a contractual agreement with the buyer to impose penalty, whenever cheque issued by their buyer is not honoured. These facts are not under dispute. Such penalty is incorporated in the agreement to deter or discourage the buyer from dishonouring cheque and to ensure that buyer remains committed to make payment on due date. However, if cheque is returned, then the Respondent is compensated against financial or administrative inconvenience cause to them. Thus, consideration received by the Respondent was for tolerating the act of their buyers and hence, the said act is covered under 'declared service' in terms of Section 66E(e) of the Act and the Respondent is liable to pay service tax on the amount received by them, as correctly contended by the Appellant

Department.

9. Regarding income booked under the head 'Notice Pay', I find that the Respondent recovered the said amount from their employees who left the job without giving advance notice of agreed time period as per the terms and condition of the agreement between the Respondent and their employees. It is understandable that when an employee leaves the company at short notice, Company's work is hampered until suitable replacement is posted in place of outgoing employee. For tolerating such act of the outgoing employee, the Respondent is compensated in the form of 'Notice Pay' as per terms and condition of the agreement. Thus, consideration received by the Respondent in the form of 'Notice Pay' for tolerating the act of their employees is nothing but 'declared service' in terms of Section 66E(e) of the Act and therefore, the Respondent is liable to pay service tax on the amount received by them, as correctly contended by the Appellant Department.

10. I find that under the CGST Act,2017 also, such amount recovered are treated as services and GST is payable. I find that Schedule II to the CGST Act,2017 provides a list of activities to be treated as 'supply of services' which inter alia comprises - "5(e) agreeing to the obligation to refrain from an act, or to tolerate an act or situation, or to do an act".

10.1 I rely on the order passed by the Authority for Advance Ruling in the case of Bajaj Finance Limited reported in 2018 (19) G.S.T.L. 298 (A.A.R. - GST), wherein it has been 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."

11. In view of my discussions and findings above, I hold that amount recovered by the Respondent from their buyers / employees in the form of 'Cheque Return Penalty' and 'Notice Pay' is taxable in terms of the 'declared services' enlisted under clause (e) of Section 66E of the Act. The adjudicating authority erred in dropping demand of service tax. I, therefore, confirmed service tax demand of Rs. 41,32,297/- under Section 73(1) of the Finance Act, 1994. Since, demand is confirmed, it is natural that service tax is to be payable along with interest at applicable rate under Section 75 ibid.

12. I find that non payment of service tax on incomes booked under the heads 'Cheque Return Penalty' and 'Notice Pay' was revealed during audit of the records of the Respondent by the Department. Had there been no audit of the Respondent's records, the non payment of service tax by the Respondent would have gone unnoticed and hence, ingredients for invoking extended period under Section 73 of the Act existed in the present appeals. In this regard, I rely on the order passed by the Hon'ble CESTAT, Chennai in the case of Six Sigma Soft Solutions (P) Ltd. reported as 2018 (18) G.S.T.L. 448 (Tri. - Chennai), wherein it has been held that,

> "6.5 Ld. Advocate has been at pains to point out that there was no *mala fide* intention on the part of the appellant. He has contended [that] they were under the impression that the said activities would come within the scope of IT services, hence not taxable. For this reason, Ld. Advocate has contended that extended period of time would not be invocable. However, we find that the adjudicating authority has addressed this aspect in para-10 of the impugned order, where it has been brought to the fold that appellant had not at all disclosed the receipt of income in respect of the activities done by them in respect of services provided by them in their ST-3 returns.
>
> 6.6 The facts came to light only when the department conducted scrutiny of the annual reports, possibly during audit. In such circumstances, the department is fully justified in invoking the extended period of limitation of five years."
>
> (Emphasis supplied)

12.1 Since, suppression of facts has been made by the Respondent, penalty under Section 78 of the Act is mandatory. The Hon'ble Apex Court in the case of Rajasthan Spinning & Weaving Mills reported as 2009 (238) E.L.T. 3 (S.C.) has held that once ingredients for invoking extended period of limitation for demand of duty exist, imposition of penalty under Section 11AC is mandatory. The ratio of the said judgment applies to the facts of the present case. I, therefore, impose penalty of Rs. 41,32,297/- under Section 78 of the Act.

13. Since, penalty under Section 78 of the Act is imposed, I refrain from imposing penalty under Section 76 of the Act.

14. I find that the Respondent had not correctly assessed the tax on the income booked under the heads 'Cheque Return Penalty' and 'Notice Pay' and failed to file correct ST-3 returns and thereby violated the provisions contained in Section 77 of the Act. I, therefore, impose penalty of Rs. 10,000/- upon the Respondent under Section 77 of the Act.

15. Regarding penalty proposed upon Shri N.B. Gohil, Executive Director of the Respondent under Section 78A(a) of the Act, I find that Shri Gohil was working as Executive Director of the Respondent and he was supposed to be

aware of the fact that income booked under the heads notice pay were covered within the meaning of declared service in terms of Section 66E of the Act and the Respondent were liable to discharge service tax liability on the same. However, the Respondent failed to disclose the said incomes in the statutory ST-3 returns filed by them as well as failed to make payment of service tax. After considering the facts of the case, I am of the opinion that Shri Gohil was the person responsible to comply with the provisions of the Finance Act, 1994 and omission on his part has rendered himself liable to penalty under Section 78A(a) of the Act. I, therefore, impose penalty of Rs. 1,00,000/- upon Shri N.B. Gohil, Executive Director of the Respondent under Section 78A(a) of the Act.

16. In view of the above discussion, I set aside the impugned Order and allow the appeal filed by the Appellant Department.

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

17. The appeal filed by the Appellant Department is disposed off as above.

27/4/2020

(GOPI NATH)
Commissioner(Appeals)

Attested

(V.T.SHAH)
Superintendent(Appeals)

By R.P.A.D.

To, M/s Sanghi Industries Ltd Sanghipuram, Taluka Abdasa, District Kutch.	सेवा में, मे॰ सांघी इंडस्ट्रीज़ लिमिटेड सांघीपुरम, तालुका अबदासा, जिल्ला कच्छ ।

प्रति:-

1) प्रधान मुख्य आयुक्त, वस्तु एवं सेवा कर एवं केन्द्रीय उत्पाद शुल्क, गुजरात क्षेत्र,अहमदाबाद को जानकारी हेतु।
2) आयुक्त, वस्तु एवं सेवा कर एवं केन्द्रीय उत्पाद शुल्क, गांधीधाम आयुक्तालय, गांधीधाम को आवश्यक कार्यवाही हेतु।
3) सहायक आयुक्त, वस्तु एवं सेवा कर एवं केन्द्रीय उत्पाद शुल्क, भुज मण्डल, गांधीधाम आयुक्तालय, को आवश्यक कार्यवाही हेतु।
4) गार्ड फ़ाइल।