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

द्वितीय तल, जी एस टी भवन / 2nd Floor, GST Bhavan,
रेस कोर्स रिंग रोड, / Race Course Ring Road,
राजकोट / Rajkot – 360 001
Tele Fax No. 0281 – 2477952/2441142Email: **commrappl3-cexamd@nic.in**

सत्यमेव जयते

रजिस्टर्ड डाक ए.डी. द्वारा :-

DIN – 20210564SX000000E9E1

क	अपील / फाइलसंख्या/ Appeal /File No.	मूलआदेशसं / OIO No.	दिनांक/ Date
	V2/29/GDM/2020	**1/Asst. Comm/2020**	**8.5.2020**

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

KCH-EXCUS-000-APP-161-2021

आदेश का दिनांक / Date of Order: **25.05.2021** जारी करने की तारीख / Date of issue: **27.05.2021**

श्री अखिलेश कुमार, आयुक्त (अपील), राजकोट द्वारा पारित/
Passed by **Shri Akhilesh Kumar**, Commissioner (Appeals), Rajkot

ग अपर आयुक्त/ संयुक्त आयुक्त/ उपायुक्त/ सहायक आयुक्त, केन्द्रीय उत्पाद शुल्क/ सेवाकर/वस्तु एवंसेवाकर, राजकोट / जामनगर / गांधीधाम। द्वारा उपयुक्तलिखित 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 :-

M/s. Gujarat State Electricity Corporation, Kutch Thermal Power Station, Pandhro, SKV Nagar, District Kutch.

इस आदेश(अपील) से व्यथित कोई व्यक्ति निम्नलिखित तरीके से 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 निम्नलिखि+त 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 रजिस्टार के नाम से किसी भी सार्वजिनक क्षेत्र के बैंक द्वारा जारी रेखांकित बैंक ड्राफ्ट द्वारा किया जाना चाहिए। संबंधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहां संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है। स्थगन आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रुपए का निर्धारित शुल्क जमा करना होगा।/

The appeal to the Appellate Tribunal shall be filed in quadruplicate in form EA-3 / as prescribed under Rule 6 of Central Excise (Appeal) Rules, 2001 and shall be accompanied against one which at least should be accompanied by a fee of Rs. 1,000/- Rs.5000/-, Rs.10,000/- where amount of dutydemand/intefest/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,1994की धारा 86(1) के अंतर्गत सेवाकर नियमवाली, 1994, के नियम 9(1) के तहत निर्धारित प्रपत्र S.T.-5में चार प्रतियों में की जा सकेगी एवं उसके साथ जिस आदेश के विरुद्ध अपील की गयी हो, उसकी प्रति साथ में संलग्न करें (उनमें से एक प्रति प्रमाणित होनी चाहिए) और इनमें से कम से कम एक प्रति के साथ, जहां सेवाकर की माँग , ब्याज की माँग और लगाया गया जुर्माना, रुपए 5 लाख या उससे कम,5 लाख रुपए या 50 लाख रुपए तक अथवा 50 लाख रुपए से अधिक है तो क्रमश: 1,000/- रुपये, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपीलीय न्यायाधिकरण की शाखा के सहायक रजिस्टार के नाम से किसी भी सार्वजिनक क्षेत्र के बैंक द्वारा जारी रेखांकित बैंक ड्राफ्ट द्वारा किया जाना चाहिए। संबंधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहां संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है। स्थगन आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रुपए का निर्धारित शुल्क जमा करना होगा।/

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

(i) वित्त अधिनियम,1994की 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 Commissioner authorizing the Assistant Commissioner or Deputy Commissioner of Central Excise/ Service Tax to file the appeal before the Appellate Tribunal.

(ii) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय प्राधिकरण (सेस्टेट) के प्रति अपीलों के मामले में केन्द्रीय उत्पाद शुल्क अधिनियम 1944 की धारा 35एफ के अंतर्गत, जो की वित्तीय अधिनियम, 1994 की धारा 83 के अंतर्गत सेवाकर को भी लागू की गई है, इस आदेश के प्रति अपीलीय प्राधिकरण में अपील करते समय उत्पाद शुल्क/सेवा कर मांग के 10 प्रतिशत (10%), जब मांग एवं जुर्माना विवादित है, या जुर्माना, जब केवल जुर्माना विवादित है, का भुगतान किया जाए, बशर्ते कि इस धारा के अंतर्गत जमा कि जाने वाली अपेक्षित देय राशि दस करोड़ रुपए से अधिक न हो।
केन्द्रीय उत्पाद शुल्क एवं सेवाकर के अंतर्गत "मांग किए गए शुल्क" 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 अर्ज़ी एवं अपील को लागू नहीं होंगे।/
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-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 क्रेडीट इस अधिनियम एवं इसके विभिन्न प्रावधानों के तहत मान्य की गई है और ऐसे आदेश जो आयुक्त (अपील) के द्वारा वित्त अधिनियम (नं॰ 2),1998 की धारा 109 के द्वारा नियत की गई तारीख अथवा समायाविधि पर या बाद में पारित किए गए 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।
जैहाँ 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 एकै अपील या केंद्रीय सरकार को एक आवेदन किया जाता है। / In case,if the order covers variousnumbers of order- in Original, fee for each O.I.O. should be paid in the aforesaid manner, not withstanding the fact that the one appeal to the Appellant Tribunal or the one application to the Central Govt. As the case may be, is filled to avoid scriptoria work if excising Rs. 1 lakh fee of Rs. 100/- for each.

(E) यथासंशोधित न्यायालय शुल्क अधिनियम, 1975, के अनुसूची-I के अनुसार मूल आदेश एवं स्थगन आदेश की प्रति पर निर्धारित 6.50 रुपये का न्यायालय शुल्क टिकिट लगा होना चाहिए। /
One copy of application or O.I.O. as the case may be, and the order of the adjudicating authority shall bear a court fee stamp of Rs.6.50 as prescribed under Schedule-I in terms of the Court Fee Act,1975, as amended.

(F) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्य विधि) नियमावली, 1982 में वर्णित एवं अन्य संबन्धित मामलों को सम्मिलित करने वाले नियमों की ओर भी ध्यान आकर्षित किया जाता है। /
Attention is also invited to the rules covering these and other related matters contained in the Customs, Excise and Service Appellate Tribunal (Procedure) Rules, 1982.

(G) उच्च अपीलीय प्राधिकारी को अपील 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 Gujarat State Electricity Corporation, District: Kutch (*hereinafter referred to as* 'Appellant') has filed Appeal No. V2/29/GDM/2020 against Order-in-Original No. 1/Asst. Commr./2020 dated 8.5.2020 (*hereinafter referred to as* 'impugned order') passed by the Assistant Commissioner, CGST Division, Bhuj (*hereinafter referred to as* 'adjudicating authority').

2. The facts of the case, in brief, which are relevant for the purpose of the present proceedings, are that the Appellant was engaged in generation of electricity and was registered with Service Tax department. Investigation carried out by the Officers of Directorate General of Goods and Service Tax Intelligence (DGGSTI) revealed that whenever there was delay in supply of materials/services by their suppliers/contractors, certain amount was deducted by the appellant from the payment toward 'penalties' as per terms and conditions of agreement/contract. It was further observed that the Appellant had booked such 'penalties' under the head 'Other income' in their annual financial records. It was found by the officers of DGGSTI that the Appellant had recovered Rs. 1,81,29,660/- during the period from October, 2013 to June, 2017. It appeared to the investigating officers that said penalty was collected by the Appellant for tolerating the act of their suppliers/contractors in terms of agreement/contract and such penalty was consideration for providing 'Declared Service' under Section 66(e) of the Finance Act, 1994 (hereinafter referred to as 'Act') and the Appellant was liable to pay service tax on such penalty amount.

2.1 Show Cause Notice No. DGGI/SZU/36-22/2019-20 dated 16.4.2019 was issued to the Appellant, *inter alia,* calling them to show cause as to why service tax amount of Rs. 24,25,197/- should not be demanded and recovered under proviso to Section 73(1) of the Act, along with interest, under Section 75 of the Act and proposing imposition of penalty under Sections 76, 77 and 78 of the Act.

2.2 The above Show Cause Notice was adjudicated by the adjudicating authority vide the impugned order who, inter alia, confirmed demand of service tax of Rs. 24,25,197/- under proviso to Section 73(1) of the Act, along with interest, under Section 75 of the Act and imposed penalty of Rs. 24,25,197/- under Section 78 and Rs. 5,000/- under Section 77 of the Act.

3. Being aggrieved, the Appellant has filed the present appeal contending, *inter alia*, as below:-

(i) That the impugned order is bad in law in as much as the same is passed contrary to the facts of the case.

(ii) That the penalty collected from the suppliers/ contractors by them is not covered under the definition of Declared Services. That to get covered under declared service defined under section 66E(e), it has to be a standalone transaction. However, penalties are recovered by them from suppliers/ contractors as per the terms of the performance contract and are purely financial in nature. No separate contract as well as no varied service has been provided by the seller with respect to such charges. Since there is no service, applicability of service tax is out of purview.

(iii) The appellant has not entered in to any specific contract to tolerate an act or situation. They had entered in to agreements only for performance. The clause related to penalty/ liquidated damages had been incorporated only for the purpose of ensuring the performance of the contract. This cannot be considered as an agreement for non-performance of the transaction.

(iv) The company is not allowing to reduce the cost of material/ service, in the invoice of the supplier/ contractor and the supplier/ contractor is charging full rate / contracted rate i.e. basic value plus excise duty plus VAT / CST etc. Hence, the transaction value for the company is only agreed / contracted value and not the reduced value.

(v) Further, deduction of penalty is not a separate transaction but it's a kind of original transaction since excise/ service tax has been paid in toto on original transaction then levying tax once again would amount to double taxation.

(vi) That for invoking extended period of limitation & imposition of penalty & is submitted that the issue involved is that of substantial interpretation of the statutory provisions Every non-payment/non-levy of tax doesn't attract extended period & penalty - There must be some positive action which betrays a negative intention of wilful default - For operation of extended period of limitation intention to deliberately default is a mandatory prerequisite and inadvertent non-payment doesn't attract extended period of limitation.

4. Personal hearing was conducted in virtual mode through video conferencing on 11.2.2021. Ms. Neeta Ladha, C.A. appeared on behalf of the Appellant. He reiterated the submission made in Appeal Memorandum. He further stated that the parties in question were not allowed to deduct the VAT/ Central Excise duty and hence, applicable tax was already paid on amount in question. She stated that she would submit written submission as well as case laws in support of her contentions based on which the case may be decided.

4.1 In written submission dated 12.2.2021, the Appellant, *inter alia*, contended that,

(i) They paid Central Excise duty / VAT on the penalty amount recovered. This penalty has been emerged from the transaction pertaining to supply on which Excise/ VAT had already been charged by the supplier. They are not allowing to reduce the cost of material/ service, in the invoice of the supplier/ contractor and the supplier/ contractor is charging full rate / contracted rate i.e. basic value plus excise duty plus VAT / CST etc. Hence, it is clear that the transaction value for the company is only agreed / contracted value and not the reduced value. Hence, service tax is not applicable where service tax is applicable.

(ii) That there is no specific agreement to tolerate an act or situation. They had not entered into any agreement with the contractor agreeing to an obligation to tolerate the delay in the performance of the contract on the part of the contractor. They had entered in to agreements only for the performance of the said agreements. Merely inclusion of penalty clause in the agreement cannot be considered as an agreement to tolerate the delay. The purpose of agreeing to payment of penalty/ liquidated damages is to ensure performance. It cannot be said to be a consideration for tolerating non-performance Payment of damages or the forfeiture of deposit does not restitute the person to whom loss or damage is caused. Penalty/ Liquidated damages are in nature of a measure of damages to which parties agree, rather than a remedy. By charging damages or forfeiture, one party does not accept or permit the deviation of the other party. It is an expression of displeasure. Liquidated damages/ penalty cannot be said to be the desired income or result of the contract. By no stretch of imagination can these penal charges, deducted by the appellant from the contractor's bill on account of poor quality of work, delay in supply/ execution of work be termed as consideration. Liquidated damages are recovered for compensating the loss suffered by

the recipient. Hence, charging service tax on liquidated damages/ penalty once again would amount to double taxation and relied upon following case laws:

(a) South Eastern Coalfields Ltd. - 2020-TIOL-1711-CESTAT-DEL
(b) MP Poorva Kshetra Vidyut Vitran Company Ltd - 2021-TIOL-105-CESTAT-DEL.

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

6. On going through the records, I find that the Appellant had booked income under the head 'Other Income', which was recovered from their suppliers/contractors whenever there was delay in supply of materials/services as per terms and conditions of agreement/contract. The adjudicating authority held that said penalty was collected by the Appellant for tolerating the act of their suppliers/contractors in terms of agreement/contract and such penalty was consideration for providing 'Declared Service' under Section 66(e) of the Act and the Appellant was liable to pay service tax on such penalty amount.

7. It would be pertinent to examine the legal provisions covering the issue on hand, which are detailed below.

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 I find that 'Declared Service' has been defined under Section 66E of the Act. The clause (e) thereof, which is relevant in the present case, reads as under:

> "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."

7.3 Further, to satisfy the definition of service defined in Section 65B(44) of the Act ibid, the activity should be carried out by a person for another for a consideration. Though the term 'consideration' has not been specifically defined under the Act but Explanation (a) to Section 67 of the Act provides that "consideration" includes any amount that is payable for the taxable services provided or to be provided.

8. On examining the present case in backdrop of the above legal provisions, I find that the first point to be decided in the instant case is as to whether the amount deducted by the Appellant from the payment made to the suppliers for delay in supply of materials/ services would amount to a consideration as envisaged in the service tax law or not and then only the question of taxability arises in the matter. The adjudicating authority has observed that the said amount is nothing but a consideration for tolerating an act of delay in supply of materials/ services by their contractors. It is undisputed that there was an agreement between the appellant and their contractors, as per which, the contractors were liable to penalty in the event of delay in supply of materials / services. Thus, both parties had agreed for compensation in the event of breach of contract in terms of Section 53 of the Indian Contract Act. The relevant Section 53 of the Indian Contract Act reads as under:

> "When a contract contains reciprocal promises and one party to the contract prevents the other from performing his promise, the contract becomes voidable at the option of the party so prevented; and he is entitled to compensation from the other party for any loss which he may sustain in consequence of the non-performance of the contract."

(Emphasis supplied)

8.1 From the above legal provision, it is amply clear that what is provided therein is the entitlement of a compensation to the party who was prevented from performing the contract for any loss which he may sustain as a consequence of the non-performance of the contract. Merely because there is a mutual consent on the amount of compensation receivable in the event of a breach of promise/agreement, the compensation does not take the color of consideration as held by the adjudicating authority. What is to be understood is the fine distinction between the terms "consideration" and "compensation". As per the Indian Contract Act, 1872 consideration means a promise made by the promisee in reciprocation. Whereas the compensation is something which is awarded to the sufferer on account of breach of the contract/promises by the

other party. Needless to mention that the consideration involves desire of the promisor whereas compensation involves breach. It is not disputed that definition of the term 'service" as given in Section 65B(44) of the Act envisages "consideration" and not "compensation". It is not the case of the Department in the present case that the amount agreed to pay to the appellant is not in the nature of a compensation. When that being so, such a transaction is clearly in the nature as envisaged in Section 53 of the Indian Contract Act, 1872 and hence the amount so retained by the Appellant would definitely amount to a compensation. Mere receipt of money which is in the nature of a compensation cannot be treated as consideration for any activity.

8.2 An agreement has to be read as a whole so as to gather the intention of the parties. The intention of the appellant and their contractors was for supply of materials / service. The consideration contemplated under the agreements would have been for supply of such materials/ services. The intention of the parties certainly would not for flouting the terms of the agreement so that the penal clauses get attracted. The penal clauses are in the nature of providing a safeguard to the commercial interest of the appellant and it cannot, by any stretch of imagination, be said that recovering any sum by invoking the penalty clauses is the reason behind the execution of the contract for an agreed consideration. It cannot be the intention of the appellant to impose any penalty upon the other party nor would it be the intention of the other party to get penalized.

8.3 In view thereof, I am of the considered view that the amount deducted by the Appellant, in the form of penalty, from the payment made to their suppliers for breach of contract was in the nature of a compensation as envisaged in Section 53 of the Indian Contract Act, 1872 and such penalty does not *per se* amount to a consideration and consequently such transaction does not *per se* constitute any service or 'Declared Service' as envisaged under Section 65B(44) and Section 66E(e) of the Act, respectively. When there is no consideration, there is no element of service as defined under the Act and consequently there cannot be any question of levying service tax in the matter.

9. I rely on the Order passed by the Hon'ble CESTAT, New Delhi in the case of South Eastern Coalfields Ltd Vs CCE, Raipur reported as 2020-TIOL-1711-CESTAT-DEL, wherein it has been held that,

"24. What follows from the aforesaid decisions of the Supreme Court in Bhayana Builders and Intercontinental Consultants, and the decision of the Larger Bench of the Tribunal in Bhayana Builders is that "consideration" must flow from the service recipient to the service provider and should accrue to the benefit of the service provider and that the amount charged has necessarily to be a consideration for the taxable service provided under the Finance Act. Any amount charged which has no nexus with the taxable service and is not a consideration for the service provided does not become part of the value which is taxable. It should also be remembered that there is marked distinction between "conditions to a contract" and "considerations for the contract". A service recipient may be required to fulfil certain conditions contained in the contract but that would not necessarily mean that this value would form part of the value of taxable services that are provided.

25. It is in the light of what has been stated above that the provisions of section 66E(e) have to be analyzed. Section 65B(44) defines service to mean any activity carried out by a person for another for consideration and includes a declared service. One of the declared services contemplated under section 66E is a service contemplated under clause (e) which service is agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act. There has, therefore, to be a flow of consideration from one person to another when one person agrees to the obligation to refrain from an act, or to tolerate an act, or a situation, or to do an act. In other words, the agreement should not only specify the activity to be carried out by a person for another person but should specify the:

(i) consideration for agreeing to the obligation to refrain from an act; or
(ii) consideration for agreeing to tolerate an act or a situation; or
(iii) consideration to do an act.

26. Thus, a service conceived in an agreement where one person, for a consideration, agrees to an obligation to refrain from an act, would be a 'declared service' under section 66E(e) read with section 65B (44) and would be taxable under section 68 at the rate specified in section 66B. Likewise, there can be services conceived in agreements in relation to the other two activities referred to in section 66E(e).

27. It is trite that an agreement has to be read as a whole so as to gather the intention of the parties. The intention of the appellant and the parties was for supply of coal; for supply of goods; and for availing various types of services. The consideration contemplated under the agreements was for such supply of coal, materials or for availing various types of services. The intention of the parties certainly was not for flouting the terms of the agreement so that the penal clauses get attracted. The penal clauses are in the nature of providing a safeguard to the commercial interest of the appellant and it cannot, by any stretch of imagination, be said that recovering any sum by invoking the penalty clauses is the reason behind the execution of the contract for an agreed consideration. It is not the intention of the appellant to impose any penalty upon the other party nor is it the intention of the other party to get penalized.

28. It also needs to be noted that section 65B(44) defines "service" to mean any activity carried out by a person for another for consideration. Explanation (a) to section 67 provides that "consideration" includes any amount that is payable for the taxable services provided or to be provided. The recovery of liquidated damages/penalty from other party cannot be said to be towards any

service per se, since neither the appellant is carrying on any activity to receive compensation nor can there be any intention of the other party to breach or violate the contract and suffer a loss. The purpose of imposing compensation or penalty is to ensure that the defaulting act is not undertaken or repeated and the same cannot be said to be towards toleration of the defaulting party. The expectation of the appellant is that the other party complies with the terms of the contract and a penalty is imposed only if there is non-compliance.

29. The situation would have been different if the party purchasing coal had an option to purchase coal from 'A' or from 'B' and if in such a situation 'A' and 'B' enter into an agreement that 'A' would not supply coal to the appellant provided 'B' paid some amount to it, then in such a case, it can be said that the activity may result in a deemed service contemplated under section 66E (e).

30. The activities, therefore, that are contemplated under section 66E (e), when one party agrees to refrain from an act, or to tolerate an act or a situation, or to do an act, are activities where the agreement specifically refers to such an activity and there is a flow of consideration for this activity.

31. In this connection, it will be useful to refer to a decision of the Supreme Court in *Food Corporation of India vs. Surana Commercial Co. and others (2003) 8 SCC 636*. The Supreme Court pointed out that if a party promises to abstain from doing something, it can be regarded as a consideration, but such abstinence has to be specifically mentioned in the agreement. … …"

32. In the present case, the agreements do not specify what precise obligation has been cast upon the appellant to refrain from an act or tolerate an act or a situation. It is no doubt true that the contracts may provide for penal clauses for breach of the terms of the contract but, as noted above, there is a marked distinction between 'conditions to a contract' and 'considerations for a contract'.

… …
… …

35. Reference can also be made to a decision of the Tribunal in Lemon Tree Hotel. The issue that arose for consideration was whether forfeiture of the amount received by a hotel from a customer on cancellation of the booking would be leviable to service tax under section 66E(e). The Tribunal held that the retention of the amount on cancellation would not attract service tax under section 66E (e) …"

… …
… …

43. It is, therefore, not possible to sustain the view taken by the Principal Commissioner that penalty amount, forfeiture of earnest money deposit and liquidated damages have been received by the appellant towards "consideration" for "tolerating an act" leviable to service tax under section 66E(e) of the Finance Act.

44. The impugned order dated December 18, 2018 passed by the Commissioner, therefore, cannot be sustained and is set aside. The appeal is, accordingly, allowed."

9.1 I also rely on the Order passed by the Hon'ble CESTAT, New Delhi in the case of MP Poorva Kshetra Vidyut Vitran Company Ltd reported as 2021-TIOL-105-CESTAT-DEL.

10. In view of the above, I hold that the Appellant is not liable to pay service tax on the income booked under the head 'Other Income'. I, therefore, set aside the confirmation of demand of Rs. 24,25,197/-. Since, the demand is set aside, recovery of interest and imposition of penalty of Rs. 24,25,197/- under Section 78 and penalty of Rs. 5,000/- under Section 77 are also required to be set aside and I order accordingly.

11. I set aside the impugned order and allow the appeal.

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

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

25 May, 2021.

(Akhilesh Kumar)
Commissioner (Appeals)

Attested

(V.T.SHAH)
Superintendent (Appeals)

By R.P.A.D.

To, M/s Gujarat State Electricity Corporation, Kutch Thermal Power Station, Pandhro, SKV Nagar, District Kutch.	सेवा में, मे॰ गुजरात स्टेट इलेक्ट्रिसिटी कार्पोरेशन कच्छ थर्मल पावर स्टेशन, पान्ध्रों, एसकेवी नगर, जिल्ला कच्छ ।

प्रतिलिपि:-

1) 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।